LOCAL GOVERNMENT LAW BULLETIN

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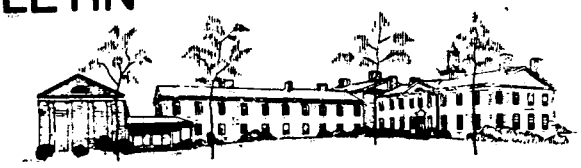

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1975 LEGISLATION

by

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This Local Government Law Bulletin discusses four acts of particular interest to city attorneys passed by the 1975 General Assembly. Each of these acts is summarized in the Institute's legislative summary, which will be published shortly, but the format of that publication did not permit a detailed look at these new statutes. The four acts discussed are:

Ch. 361 (S 449): Notice of Claims Against Cities
Ch. 723 (S 461): Waiver of City Tort Immunity
Ch. 576 (H 453): Proration of Taxes Upon Annexation
Ch. 67 (H 107): Service of Papers in Ch. 160A Condemnations

Ch. 361 -- Notice of Claims

In its last few sessions, the General Assembly has enacted local acts for a large number of cities establishing notice procedures that must be followed by persons holding tort or contract claims against the city. Typically such a local act (often part of the city's charter) requires that notice of the claim be presented to the city council, or some other official, within 90 days after the claim arises, and that thereafter suit be brought within one year after the claim arises. If notice is not given or the action not brought within the limits set, the claim is lost. The notice provision operates

much like a statute of limitations, although there is one procedural distinction. The statute of limitations is an affirmative defense, but in a proper case the plaintiff must allege and prove that notice was given. Foster v. Charlotte, 206 N.C. 528 (1934).

Because of the notice requirement's similarity to a shortened statute of limitations, some reasonable concern has arisen about its fairness under existing circumstances. Notice requirements typically are found in city charters, not in G.S. Chapters 1 or 160A, and might easily be overlooked by some attorneys. Therefore, Senate Bill 449 was introduced to extend the notice requirement to all cities and to place it in Chapter 1, where it could be found by all attorneys. Somewhat amended, S 449 was enacted as Ch. 361 of the 1975 Session Laws. All cities should become familiar with this new statute, including those that have had local notice requirements, because the new uniform requirements differ somewhat from most local provisions.

Ch. 361 enacts a new G.S. 1-55.1. Under its provisions a person with a claim against a city in either contract or tort must give written notice of the claim to the city council or its designee within six months after the claim is due or the cause of action arises. In addition, the claimant must bring suit within two years after the claim is due or the cause arises, although he must wait at least 30 days after presenting notice before bringing suit. (Presumably this waiting period is to afford the city some time to investigate the claim and perhaps settle it.) Chapter 361 is effective October 1, 1975, but does not apply to "claims becoming due or causes of action arising" before that date.

All existing local acts on this subject are repealed. The act directs that, on its effective date,

> all parts of local acts, including city charters, that require notice to a city or town of any claim against it arising in contract or in tort and that prohibit suit against the city or town if notice is not given or that limit the period during which an action may be brought on such a claim after notice has been given are repealed.

The notice of claim provisions of some city charters also include a limitation--typically two years--on certain actions related to real property: inverse condemnation, ejectment, removing a cloud upon title. The repealer clause of Ch. 361 does not extend to such provisions, and they remain in force. Also, since Ch. 361 does not apply to claims coming due or causes arising before October 1, it may be that existing local acts continue in effect vis-a-vis such claims; however, the act does not make that clear.

The disabilities set out in G.S. 1-17 are explicitly applied to the notice requirement. If a complainant suffers from one of the listed disabilities--minority, insanity, imprisonment--at the time the claim becomes due or the cause of action arises, the six-month and two-year periods do not begin to run until the disability is removed. A related provision permits a city to request the appointment of a guardian ad litem to represent a person with a potential claim but known to be suffering from a disability under G.S. 1-17. This provision is essentially a modification of Rule 17(c)(1) of the North Carolina Rules of Civil Procedure, which permits appointment of a guardian ad litem for a potential plaintiff under a disability only upon application of a relative or friend of the plaintiff or upon the court's own motion.

Three further items deserve mention. First, the statute requires that notice be given to the council or its designee. Several cities have won cases on the ground that notice to a manager or other appointed official is not substantial compliance with a requirement of notice to the council [Miller v. City of Charlotte, 25 N.C. App. 584 (1975), and cases cited therein], but a city might wish to facilitate notice by permitting it to be given to the manager or attorney. Such an action should be taken by ordinance.

Second, the statute simply requires that notice of the claim be given, without being specific about the content of the notice. Since the apparent purpose of the notice requirement is to provide the city with enough knowledge of the claim to be able to investigate it, the notice ought to specify who the claimant is, what occurred, when, and how much the claim is thought to be. Anything less might present the possibility that the notice is insufficient. (A city might wish to better assure that notice is sufficient by developing forms for claimants to use.)

Third, the statute makes no explicit modification to G.S. 1-53. That section requires that a person with a contract claim against a county or city present it to the chairman of the board of county commissioners or the mayor within two years after it arises. As introduced, S 499 explicitly modified G.S. 1-53, but that provision was deleted on the Senate floor, on the stated ground that it was unnecessary. Unfortunately that conclusion is not crystal clear. Compliance with new G.S. 1-55.1 would constitute compliance with G.S. 1-53, but the reverse is not necessarily so. The new section in effect amends the older, removing cities from its compass. But the new section contains no repealer clause--general or specific--and so such an amendment will have to be read into the statute.

Ch. 723 -- Waiver of Immunity

Ch. 723 (S 461) rewrites G.S. 160A-485 to permit cities to waive their immunity from tort liability by purchasing liability insurance. All that is required to effect such a waiver is to simply purchase such insurance. The new statute permits a city to waive its immunity selectively, by deciding what torts to cover or what officials, employees, or agents to cover. The waiver extends only to the amount of insurance purchased, and only to claims that arise during the period the waiver is in effect.

Cities have had authority to waive their immunity to negligence actions involving motor vehicles, by purchase of insurance, since 1951. As originally enacted and codified (as G.S. 160-191.1 to 160-191.5), that authorization stated specifically that if a city purchased automobile liability insurance but wished to retain its immunity for governmental functions, it would have to take "affirmative action" in the form of an ordinance or resolution. (In Galligan v. Town of Chapel Hill, 276 N.C. 172 (1970), the Supreme Court held that such affirmative action remains in effect until modified or repealed.) When the motor vehicle liability waiver statute was recodified in G.S. Chapter 160A, as G.S. 160A-485 (now replaced by the act under discussion), the requirement of affirmative action was dropped and replaced by the statement that all that was necessary to waive immunity was to purchase insurance. The latter provision was essentially continued in this new statute.

Liability insurance policies generally do not distinguish between proprietary and governmental functions. Therefore, if a city should purchase liability insurance, or renew an existing policy, after June 23, 1975, the effective date of new G.S. 160A-485, it will in almost all cases thereby waive its tort immunity as to governmental functions. If a city wishes to retain its immunity but still insure against proprietary liabilities, it would seem necessary for the governing board, at a minimum, to adopt a resolution or ordinance stating that it does not intend, by purchasing insurance, to waive its immunity as to governmental functions. The city may also wish to attach an endorsement to the policy specifying that it extends only to proprietary functions.

Ch. 576 -- Annexation: Proration of Taxes

G.S. Chapter 160A, Article 4A, sets out five annexation procedures: Part 1 (vote of people required); 160A-31 (100% petition); Part 2 (involuntary, below 5,000); Part 3 (involuntary, 5,000 and above); and Part 4 (satellite). Each procedure has provided that annexed property is subject to city taxes beginning with the first fiscal year following annexation. For that reason, annexations frequently have been made effective June 30. The fiscal year begins the next day, and there is essentially no time gap between the city's responsibility for services and the annexed property's liability for taxes. Some cities have made a practice of annexing in the middle of the fiscal year to ease the transition to inclusion in the city by providing services for several weeks or months before tax liability attaches. In other cases, however, annexations have become effective in mid-fiscal year against the annexing city's wishes. If an involuntary annexation is appealed to the courts, it becomes effective when final judgment is entered. Thus, though a city's annexation ordinance may state that it becomes effective June 30, because of appeals to Superior Court and perhaps beyond the ordinance may not actually take effect until several months later. As a result residents of the annexed area may receive services for several months before taxes can be levied against their property.

Ch. 576 (H 453) intends to close the time gap in all statutory annexations between responsibility for services and liability for taxes. Upon annexation, the city is to determine the tax liability of each parcel of annexed property had it been in the city at the beginning of the fiscal year, then multiply that value by a fraction based on the number of days remaining in the fiscal year. The result is the property's actual tax liability for that fiscal year. The new statute (which makes an identical amendment to each of the five statutory annexation procedures) describes the fraction as follows:

> The numerator shall be the number 365 minus the total number of days after the preceding July 1 and immediately prior to the effective date of the annexation, and the denominator shall be the number 365.

It should be noted that one begins to count days with July 2 and counts through the day before the annexation takes effect.

An example, based on an annexation effective February 1, should make the fraction and its use clearer. For a February 1 annexation, the number of days since July 1 is 214, and therefore the fraction's numerator is 365

minus 214, or 151, and the fraction itself is 151/365. If the tax liability on a particular piece of property would have been $400 on July 1, applying the fraction would show an actual liability on February 1 of $165.48.

The statute sets out a few special provisions concerning collection of such prorated taxes. They are due on the date of annexation, while interest begins to accrue on the 120th day after annexation. Interest is two per cent from the 120th through the 149th day after annexation. Thereafter, additional interest accrues at the rate of 3/4 of one per cent for each 30 days, or part thereof, until the tax is paid. (This interest schedule generally conforms to that set out for normally levied property taxes in G.S. 105-360.) Returning to the example of a February 1 annexation, taxes would be due on that day, and interest will begin to accrue on June 1, 120 days later.

The statute does not specify how these prorated taxes are to fit into the cycle for lien sales and foreclosures. Under G.S. 105-355 the lien for taxes attaches at the time listing is required, regardless of the time that tax liability attaches. Thus it would seem that upon annexation, annexed property becomes subject to a tax lien effective the January 1 immediately before the fiscal year in which annexation takes place. A city tax collector is required by G.S. 105-369 to report to the governing board on the second Monday of each February the amount of unpaid taxes in the current fiscal year that are liens on real property. The governing board must then set a date for sale of the liens, on the second Monday of one of the next four months. Presumably unpaid prorated taxes should be included in such a lien report and sale, even though they may have been due only a few days or weeks. If an annexation takes place late in the fiscal year, they might not even yet be due.

The proration statute creates several other unnecessary problems for an annexation taking place at the beginning of a fiscal year. As noted above, the traditional effective date for annexations has been June 30. However, plugging June 30 into the fraction results in

$$\frac{365-363}{365} = \frac{2}{365}$$

That is, property annexed on June 30 is liable for two days' worth of the taxes levied the preceding July 1. Collecting such a small amount would cost more than would be brought in, but simply ignoring the taxes would constitute an improper release of taxes, contrary to G.S. 105-380.

A July 1 annexation date would be much worse, however. Look again at the fraction; it establishes the tax liability of property for the fiscal year in which the property is annexed. Plugging July 1 into the fraction, read literally, results in:

$$\frac{365-364}{365} = \frac{1}{365}$$

If an annexation is effective July 1, the property annexed is subject to only one day's worth of taxes for its entire first year in the city.

Only with July 2 annexations can a full year's taxes be charged against annexed property. In such an annexation there are no days "after the preceding July 1 and immediately prior to" the annexation. Therefore the fraction would read:

$$\frac{365-0}{365} = \frac{365}{365} = 1$$

Thus to maximize taxes, an annexation should be made effective July 2.

Unfortunately, two problems remain with the July 2 date. First is a problem it shares with any date near the beginning of the fiscal year. As noted above, taxes on annexed property in the year of annexation are due on the effective date of annexation and interest begins to accrue 120 days later. This is as true for an annexation effective at the beginning of the fiscal year as for one effective in the middle of the fiscal year. Thus with a July 2 annexation, taxes on the annexed property are due July 2 and interest begins October 30, even though the same taxes on property already in the city are not due until September 1 and interest does not begin to run until January 1. Any attempt to waive the two months interest on taxes on annexed property, to bring those taxes into conformity with taxes on other property in the city, would again constitute an improper release of taxes.

The second problem arises from passage of a separate act, Ch. 513 (S 255). This act requires the State Department of Administration, when it makes its annual estimates of municipal population for purposes of distributing Powell Bill funds, to take into account annexations "accomplished through July 1st of the calendar year" in which the Powell Bill distribution will be made. A July 2 annexation would miss by one day. Using June 30 would, of course, avoid this problem but, as noted, would raise others.

Obviously Ch. 576 needs amendment. It seems to have been drafted with only the mid-fiscal year annexation in mind. If, however, it is not amended by the 1976 General Assembly, cities might wish to consider making 1976 annexations effective September 3. The single advantage of that date is that interest on pro-rated taxes due that day would begin to accrue on January 1, thus bringing the tax collection cycle for taxes on annexed property into approximately the same schedule as taxes on other property in the city. (It is impossible to bring the interest schedule for taxes due under the proration statute into exact conformity with that for regular taxes. The former is constructed in terms of days--120 days, each 30 days thereafter--while the latter is constructed in terms of months--January 1, each month thereafter.)

Ch. 67 -- Condemnation Service

The G.S. Chapter 160A condemnation procedure, set out in Article 11, requires the service of several notices and resolutions. These are (1) the preliminary condemnation resolution (160A-247); (2) the final condemnation resolution (160A-253); (3) notice of rejection of the other party's appraiser (160A-248); (4) notice of change in time or place of the first meeting of the board of appraisers (160A-249); and (5) notice of appeal to the General

Court of Justice (160A-255). G.S. 160A-245 has provided that all notices required to be served under the Article are to be served in conformity with Rule 4 of the Rules of Civil Procedure, but there has been some question about how papers denominated resolutions are to be served, particularly the preliminary condemnation resolution, which must be served on all persons with an interest in the property being condemned. Ch. 67 (H 107) attempts to clarify the manner of service of resolutions (and notices) under Article 11. Unfortunately, it is not certain that clarification has resulted.

Ch. 67 adds a new paragraph to G.S. 160A-245 providing that "all notices and resolutions required to be served" by the Article 11 procedure may be presented to the sheriff for service; the sheriff is to serve the paper "as and when requested" by the city council, and is to receive his usual fees. Any notice or resolution required to be served is to be issued by the council in the form of a summons, and the selection communicated to the sheriff by letter from the council. This addition to the statute serves well for most preliminary condemnation resolutions, but raises at least three problems in other situations.

First, Article 11 has provided that the final condemnation resolution and any notice of appeal are to be "served . . . by registered mail." Does the new provision of G.S. 160A-245, permitting service by the sheriff, operate to amend these two existing provisions requiring service by registered mail. In most cases, of course, service by mail is satisfactory and even preferable. But if there is concern about whether the person being served will accept the letter, personal, face-to-face service may be necessary. Ch. 67 probably operates to amend the existing requirement of registered mail service, and personal service would therefore be available for the final condemnation resolution and notice of appeal, but that is not certain.

Second, the new section speaks of presenting the notice or resolution to be served to the sheriff of the county in which the city is located. If the city is located in more than one county, the paper is to be presented to the sheriff of the county in which the majority of the property is located. But no provision is made for the situation in which the city is in one county and the property in another. It would appear that the drafters of this provision forgot about a city's power to condemn property outside of its own borders. A notice or resolution can, of course, be delivered to the sheriff of another county for service in that county and it will probably be served, but the mandate of this statute does not run to that situation.

Third, the new section runs, on its face, to all notices and resolutions required to be served under the article. Yet the section seems to assume that only the city will have occasion to serve a notice or resolution. Any notice or resolution that is to be served pursuant to the new section is to be issued by the city council in the form of a summons and the sheriff notified by letter from the city council. But both the condemnee, if he wishes to appeal or to object to the city's appraiser, and the board of appraisers, if they wish to change the time or place of their meeting, will have occasion to serve notice of their action on the parties to the condemnation. The statute simply does not address their situation.

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EARLIER LOCAL GOVERNMENT LAW BULLETINS

1. County ordinance file, regulation and resolution index (March 1975).

2. Massage parlor regulation (model ordinance) (March 1975).

Copies of these bulletins may be ordered from the Institute of Government, Box 990, Chapel Hill, N.C. 27514

IMPORTANT ADDENDUM

Through an oversight, the effective dates of Chapters 576 and 67 were omitted in the discussion of those two acts. The effective dates are:

Ch. 576	January 1, 1976
Ch. 67	October 1, 1975