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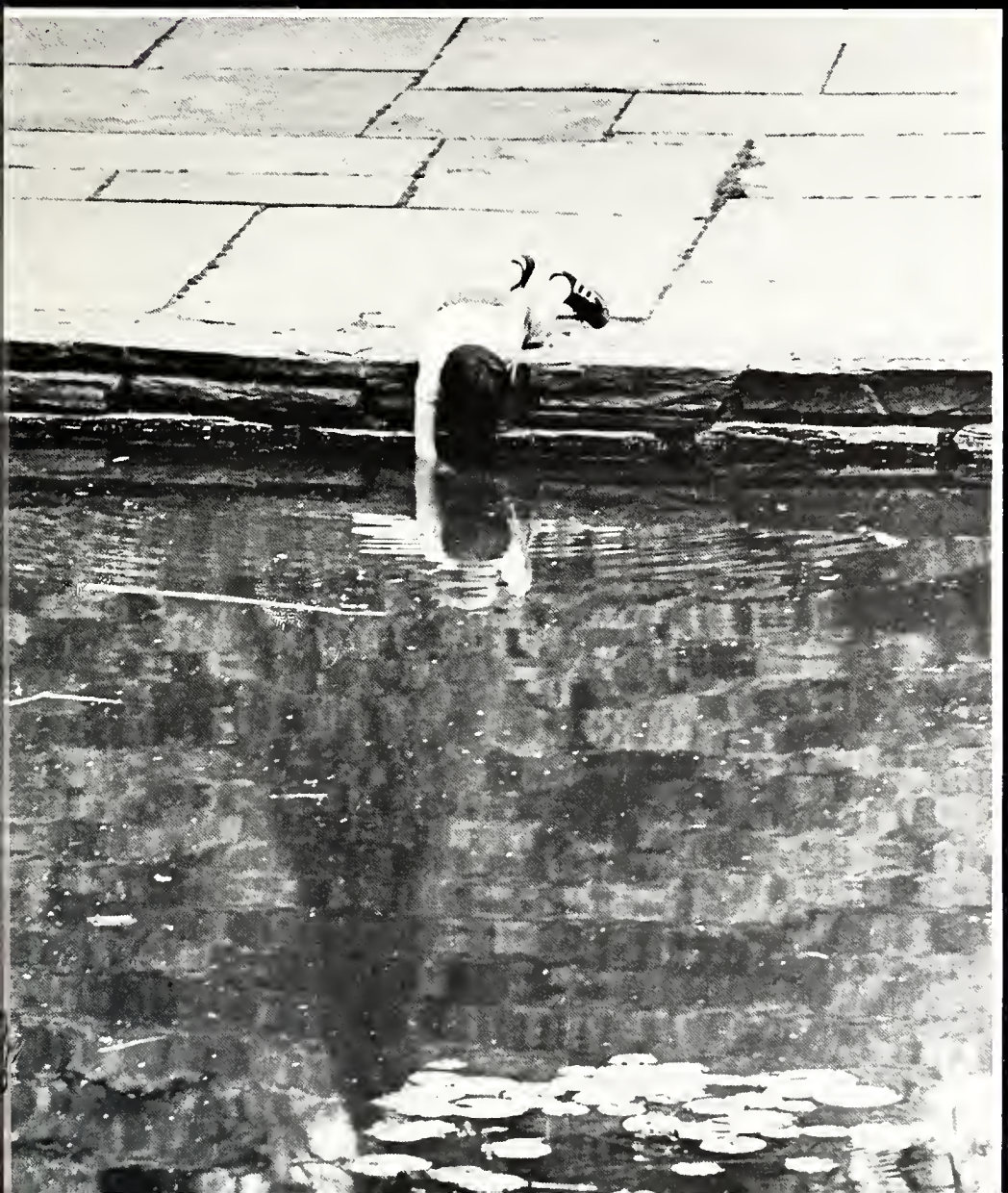

This month

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Contents

This month's cover: In the spring, small boys and fish ponds (this one at the Duke University gardens) are bound to get together. All photos by Carson Graves.

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The Legislative Research Commission and Its Environmental Studies

by Milton S. Heath, Jr.

INTRODUCTION

The Legislative Research Commission is a sometime thing that operates only in legislative off-years (for short, we will refer to it in this article as the LRC). By statute, the LRC is reborn biennially after the final adjournment of a regular legislative session. It functions from that time until the convening of the next regular session, when it goes out of existence again. (The original sponsors of the law creating the LRC reasoned that the General Assembly might not care to have a legislative "Kitchen Cabinet." This was ensured by the simple expedient of providing for the LRC to cut-out on the eve of each regular session.)

The LRC is led by co-chairmen, the Speaker of the House (currently Representative Philip Godwin) and the President Pro Tempore of the Senate (currently Senator Gordon Allen). Each co-chairman appoints five members from his house, who together constitute the LRC for the ensuing interim between legislative sessions. This year Speaker Godwin appointed to the LRC Rep. Julian D. Fenner, Rep. Ernest W. Messer, Rep. William R. Roberson, Jr., Rep. Carl J. Stewart, Jr., and Rep. Willis P. Whichard. Senator Allen this year appointed as his designees to the LRC Sen. Lamar Gudger, Sen. F. O'Neil Jones, Sen. Charles H. Larkin, Jr., Sen. William W. Staton, and Sen. Thomas E. Strickland.

The mission of the LRC is to study subjects that need in-depth analysis and review as a prerequisite to good legislation. It shares this role with such ad hoc study commissions as may be created by each General Assembly to examine subjects specifically assigned to them. Most of the LRC's projects are assigned to it by resolution. Either house of the General Assembly by resolution may initiate an LRC study.

The LRC is staffed by the Legislative Services Office, now ably directed by veteran legislative expert Clyde Ball. With the help of his chief deputy, William Potter, Ball sees to it that the LRC receives the services it needs to carry out its mission. With Ball's advice and guidance, the LRC is relying heavily this year, as it has in the past, on Institute of Government staff members to conduct most of the research that provides the background for LRC legislative recommendations. Institute staff members also assist the LRC's committees by helping them to prepare for their hearings, to write their reports, and to draft the bills that carry their recommendations.

In recent years the LRC has been the source of a great deal of important, complex legislation. A persuasive case can be made that the kind of legislation that has become the trademark of the LRC would rarely if ever be initiated and developed in the heat and frenzy of a regular legislative session.

The LRC is uniquely a legislative creation, in more ways than one. In neither leadership nor basic membership is it tied to the executive branch. Its work is selected exclusively by the General Assembly itself or by its leaders, the Speaker and the President Protempore.

In recent years the LRC has come to specialize in several areas of public concern, notably environmental legislation. LRC studies, for example, originated North Carolina's new comprehensive Pesticide Law of 1971 and the package of legislation enacted in 1971 concerning regional and local water supplies. This year the LRC is back at its environmental post again (along with significant studies in several other fields, including public health, emergency medical care, alcoholic beverage control, motor vehicle legislation, and mental health). Pursuant to SR 961,

the 1971 Assembly assigned to the LRC a very large order in the environmental field—consideration of legislation concerning seven specific subjects, each in itself a substantial study. (The LRC has also voluntarily taken on other environmental responsibilities, including a study of a proposed salt-water fishing program.)

A PRELIMINARY REVIEW OF LEGISLATIVE RESEARCH COMMISSION ENVIRONMENTAL STUDIES FOR 1971

Senate Resolution 961

Senate Resolution 961 assigned seven specific environmental law studies to the LRC for report and recommendations to the 1973 General Assembly. The LRC was also authorized to consider such other environmental protection or natural resource management subjects not assigned to any study commission as it may deem appropriate. A Committee on Environmental Studies was designated by the LRC at its first meeting to make the studies indicated by SR 961.

The LRC was expressly authorized by SR 961 "where desirable and feasible in its judgment, to include non-legislator members on the study subcommittee" designated to perform these environmental studies. The co-chairmen of the LRC have also made it clear that they consider it appropriate and desirable to include on the various study subcommittees members of the 1971 General Assembly who are not serving on the Research Commission. As the conclusion to this article indicates, both legislators who are not LRC members and nonlegislators have been appointed to the various subcommittees this year.

As to each of the studies contemplated by SR 961, the LRC was directed to "examine and evaluate previous relevant experience in North Carolina, legislation and proposals in other jurisdictions, and the experience of other jurisdictions in applying such legislation."

The next section of this article briefly summarizes the seven subjects specifically designated for study by SR 961.

Summary of Subjects Specifically Designated for LRC Study by SR 961

1. *Regulation of Septic Tank Wastes.* This subject was assigned to the LRC after a bill relating to the control of septic tank wastes died in Senate committee during the 1971 session (section 5 of S 432, one of Governor Scott's environmental program bills; the provisions relating to septic tank wastes were deleted from the bill by the Senate C & D Committee).

The 1971 proposal concerning septic tank wastes originated from the State Board of Health. It would have set an ordinary minimum lot size of 40,000 square feet for new septic tank locations, subject to exceptions in appropriate cases. (Similar limitations have already been applied by State Board of Health regulations to septic tanks within the watersheds of public water supplies.) Questions were raised by many people about the effect of the proposed limitations on the use of septic tanks, and the Senate C & D Committee decided that the subject would require more extensive study than would have been possible during the legislative session.

2. *Abatement of Oil Pollution and Oil Spills.* A comprehensive bill providing for abatement of oil pollution, including measures for cleanup of oil spills, also died in Senate committee during the 1971 session (section 1 of S 420, another of Governor Scott's environmental program bills; section 1 was deleted from the bill by the Senate C & D Committee after brief hearings).

The 1971 oil pollution control proposal was a comprehensive measure. Among other things, it would have:

—Established absolute liability for unauthorized oil discharges onto waters or lands, except those caused by *force majeure* or governmental negligence.

—Fixed responsibility for cleanup of any oil spill on person causing spill. The State may clean up spill and charge back cost.

—Required permit from BWAR for pipelines, refineries, and other oil terminal facilities, and permit for proposed oil discharges.

—Authorized BWAR to adopt regulations to implement above provisions.

—Prescribed heavy civil and criminal penalties for violations.

At the 1971 Senate committee hearings, questions were raised about several aspects of this bill. It was asserted that some of its aspects overlapped existing federal laws and that similar legislation in Florida was being tested in court. (A three-judge federal district court has since held some aspects of the Florida law unconstitutional because they would intrude upon exclusive federal maritime jurisdiction. The Supreme Court has accepted an appeal.) The relationship between federal and state laws and programs on oil pollution will obviously be an important aspect of this study.

Questions were also raised concerning the severity of the fines set forth in the bill, which could run as high as $50,000.

3. *Regulation of Animal and Poultry Wastes.* Identical bills were introduced in the 1971 Senate and House "to control pollution from animal and poultry production units." Their sponsors were Senator Gordon Allen (S 771) and Representative Norwood Bryan (H 1229). The bills implemented a recommendation of Governor Scott's environmental message, requiring:

(1) the Department of Water and Air Resources to prepare a survey of the animal wastes problem by January 1, 1972, and (2) every owner of an "animal or poultry production unit" to file with the Department by April 1, 1972 a plan concerning control of waste discharges into or near streams, reduction of odors, and suppression of insects, vermin, and pests associated with the unit. (An "animal or poultry production unit" was defined as an area designed or used, in whole or in part, for the confined feeding or holding of animals or poultry.)

The bill omitted provisions that had been suggested in earlier drafts for mandatory animal waste permits, but it did retain a general rule-making power authorizing the Board of Water and Air Resources to adopt regulations governing animal waste disposal, odor problems, and pest control. Thus, the bill as finally introduced combined an inventory and planning procedure with general rule-making powers concerning pollution from animal wastes.

On June 22, H 1229 received an unfavorable report from the House Committee on Water and Air Resources (Rep. Bryan's committee). No further action was taken on this bill or its Senate companion by the 1971 General Assembly. SR 961 directed LRC study of "regulation of management of animal and poultry wastes."

Some work is already under way on proposals for animal waste control. LRC staff assistants and other North Carolinians attended a Council of State Governments/USDA-sponsored conference in September on state legislation dealing with this subject. Members of several interested departments of the North Carolina State University School of Agriculture and Life Sciences have been meeting as a committee for several months to begin developing proposals on this subject. (A similar process was most helpful to the LRC in 1970 in developing proposals for the new North Carolina Pesticide Law.)

4. *Abatement of Nutrient Pollution.* A bill introduced in 1971 would have empowered the Board of Water and Air Resources to adopt regulations limiting phosphate, nitrate, and other plant nutrient content of detergents used in North Carolina, looking toward ultimate elimination of all nutrient content. After hearings before the House Committee on Water and Air Resources at which the wisdom of this measure was sharply questioned by expert testimony, the bill was reported unfavorably (H 118, introduced by Rep. Bryan).

The LRC environmental study resolution directs a study of "prevention and abatement of pollution of the State's waters by nutrient waste, particularly compounds of phosphorus and nitrogen." While the wording of this resolution and that of the bill that failed in 1971 are not identical, the objectives appear to be substantially similar.

Since the end of the 1971 session, some further developments have occurred on this front. The United States Surgeon General has publicly expressed reservations about the wisdom of banning phosphate detergents, because of the hazards of available substitutes. After some initial disagreement, he was joined by the head of the Environmental Protection Agency. The North Carolina Board of Water and Air Resources has initiated a survey of nutrient pollution problems in North Carolina on which at least preliminary reports are anticipated within a few months. By deferring its study on nutrients until late this spring, the LRC has been able to see some clarification of federal views and to give the Office of Water and Air Resources an opportunity to mature its recommendations.

5. *Control of Sedimentation and Siltation.* SR 961 directs the LRC to study "prevention and abatement of pollution of the State's waters by sedimentation and siltation, particularly that occurring from runoff of surface waters and from erosion." Efforts and programs to control sedimentation are hardly new—witness the long-time work of the Soil Conservation Service. It is a novel approach, however, to treat sedimentation control as an aspect of a water pollution control program, for water pollution control historically has operated through control of "point sources," such as industrial waste discharge or municipal sewage outlets. The machinery of water pollution control agencies is geared largely to coping with point sources of pollution. But to control sedimentation and siltation, not only point sources must be controlled but also diffused sources of sediment and silt. Thus, the addition of sedimentation control to a water pollution control program may involve not merely a difference in degree but also a difference in kind.

The original draft of Governor Scott's 1971 environmental message contained a recommendation for adopting legislation to authorize the Board of Water and Air Resources to regulate pollution caused by sedimentation or siltation. A bill had been drafted by the Governor's environmental task force to implement this recommendation. Governor Scott questioned the workability of the proposal as drawn, and decided not to refer to sedimentation control in his message. He indicated informally his willingness to support a proposal along these lines later in the session if one could be prepared in time, but none was forthcoming. Thus, the matter was carried over for LRC review.

Local bills authorizing Winston-Salem/Forsyth County and Raleigh/Wake County to adopt sedimentation control ordinances were enacted in 1971.

6. *Recovery of Water Supply Damages.* Rep. Nash of Rowan introduced a bill in 1971 to authorize agencies that provide water supply services to recover damages in the courts from persons who pollute the water supply (H 781). When this bill failed to pass, it was listed in the items to be considered by the LRC under SR 961.

H 781 arose out of the 1970 "fishkills" on the Yadkin River. One effect reported from these pollution incidents was damage to water supply equipment in such downstream cities as Salisbury. The bill therefore sought to establish a procedure looking toward recovery of such damages—if possible out of court, but if necessary by lawsuit. A proposed measure of damages was set forth in the bill. The procedure outlined in H 781 is modeled after an existing statutory procedure that directs the Board of Water and Air Resources to administratively assess and enforce fish and wildlife damages resulting from fishkills. Rep. Nash suggested to the BWAR that water supply damages merely be added to this existing procedure, but representatives of the BWAR doubted that they could undertake this responsibility with present manpower. For this reason, H 781 was drafted in terms of a judicial rather than administrative procedure.

When H 781 was considered in committee in 1971, it generated some opposition. It was reported to the floor by the House Committee on Water and Air Resources by a closely divided vote, with an understanding that it would be re-referred to a Judiciary Committee. The bill was re-referred to Judiciary No. 2, which later reported it unfavorably.

7. *Reporting of Industrial Wastes and Other Toxic Wastes to Public Waste Disposal Systems.* Rep. Odell Payne of Guilford County introduced a bill in 1971 to require that persons who discharge into municipal or county sewage treatment systems industrial wastes or other wastes containing toxic substances should provide regular detailed reports to the city or county concerning the nature, content, and volume of their wastes. The "teeth" in this bill consisted of drastic civil penalties for failure to comply with the reporting requirements, plus requirements that the polluters must keep their waste loads within prescribed tolerances (on the order of 5–10 per cent) during each reporting year. This bill generated much discussion and controversy within the House Water and Air Resources Committee to which it was referred. The Committee and expert witnesses who appeared before the Committee had considerable sympathy for the purposes of H 409, but disagreed on details. After many committee meetings on the subject, the bill was reported favorably in substitute form but failed to pass second reading in the House, and was later listed among the items for LRC study by SR 961.

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CONCLUSION

The LRC is now well into its assigned environmental studies under SR 961. It has designated a committee to supervise these studies, and the committee has designated four subcommittees to address themselves specifically to the subjects of animal waste control, oil pollution control, sedimentation control, and septic tank waste control. Other subjects covered by SR 961 will be handled directly by the full committee. The full Environmental Studies Committee includes representation from the General Assembly at large as well as the LRC itself. (See box.)

In designating its subcommittee membership, the Environmental Studies Committee chose to follow a pattern of appointing supplemental public membership that the LRC Committee on Pesticides pioneered with great success in 1971. Each subcommittee of the

(Continued on page 13)

THE EQUAL EMPLOYMENT OPPORTUNITY ACT: WHAT IT MEANS FOR LOCAL GOVERNMENTS

by Donald B. Hayman

ON MARCH 24, 1972, President Nixon signed H.R. 1746, the Equal Employment Opportunity Act of 1972. This bill, which was effective on that date, extends the Civil Rights Act of 1964 to all state and local governmental employees. The 1964 act prohibits discrimination because of race, color, religion, sex, or national origin and establishes a federal agency, the Equal Employment Opportunity Commission, to investigate charges of discrimination.

The newspapers of the area carried the headlines of the debate in the Senate for many weeks, but little or no notice has been given to the act's legal ramifications for state and local governments.

The courts have held for many years that racial discrimination in state and local government is unconstitutional. In recent years the Civil Rights Acts of 1866 and 1871 have been cited by the Supreme Court as prohibiting racial discrimination. Federal grant programs have for some time required certification that discrimination is not being practiced. Chapter 823, enacted in 1971 by the North Carolina General Assembly, provided that "all State departments and agencies and all local political subdivisions of North Carolina shall give equal opportunity for employment, without regard to race, religion, color, creed, national origin or sex to all persons otherwise qualified."

In the past a person who believed he had been discriminated against and desired relief had to bring a civil suit in federal court. This procedure was both expensive and slow. The new legislation makes the federal government responsible for investigating alleged discrimination and for bringing legal action in the public sector as it has been responsible for doing in the private sector since 1964.

A state or local employee or applicant who believes that he has been discriminated against may contact the Equal Employment Opportunity Commission, which is authorized to investigate alleged unlawful employment practice. If the Commission finds that discrimination has occurred, it is authorized to use informal methods of conference, conciliation, and persuasion to seek an agreement that discriminatory practices will cease.

If the EEOC cannot achieve a successful conciliation of the discriminatory practices, it will refer the matter to the Attorney General of the United States. The Attorney General has 180 days following the alleged unlawful employment practice to file civil action against the governmental unit. He may bring an action for appropriate temporary or preliminary relief pending the final disposition of the charge. If the Commission has dismissed the charge or 180 days have elapsed without the Attorney General's filing a complaint, the person alleging discrimination may bring a civil action within the appropriate district court. The court may appoint an attorney and authorize the commencement of action without the payment of fees, cost, or security. In 1974, two years after the amendments' enactment, the functions of the Attorney General under this section will be transferred to the Equal Employment Opportunity Commission.

If the court finds that a city, county, or state has engaged in an unlawful employment practice, it may order the employee reinstated with or without back pay. Back pay is limited to that which accrues from a date not more than two years before the charge was filed with the Commission. Under the 1964 Civil Rights Act, court costs and attorneys' fees may be levied against the discriminating employer.

THE PASSAGE OF THIS ACT increases the possibility that legal action charging discrimination in employment and promotional practices within all departments will be brought against a city. In August 1971 an action was filed against the City of Charlotte, and in November a similar action was filed against the City of Fayetteville. The cases were brought by the North State Law Enforcement Officers Association, an unincorporated organization of black officers, and black officers in the two cities.

The black officers in both cities asked for injunctions (1) prohibiting the city from using criteria for employment and promotional tests that were not properly validated, (2) requiring promotions on the basis of seniority unless valid nondiscriminatory employment criteria for promotion are developed, (3) requiring that only blacks be appointed until the racial composition of the department reflects the

same racial proportion as in the community, and (4) specifying that future lieutenant and captain vacancies shall be filled only with qualified black applicants until the racial composition of police officers above the rank of patrolman reflects the same racial proportion as the average racial proportion of black officers within the police department.

Alleged discrimination in the employment and promotion of black officers in the Durham Police Department has been charged in a complaint recently filed with the Law Enforcement Assistance Administration in Washington.

The 1972 Equal Employment Opportunity Act makes all state and local governments subject to the regulations and investigatory authority of the Equal Employment Opportunity Commission. These regulations, which appear in the *Code of Federal Regulations*, Title 29, Chapter XIV, provide that the use of any test that adversely affects hiring or promotion of minority groups constitutes discrimination unless (1) the test has been differentially validated, and (2) no alternative hiring or promotion procedures are available. In the *Griggs v. Duke Power* case decided by the United State Supreme Court on March 8, 1971, the Court apparently approved the Equal Employment Opportunity Commission's Guidelines on Employment Testing Procedures and added that tests should be specifically related to job performance. The Supreme Court adopted the following important principles concerning employment selection: (1) employment selection devices, although neutral on their face, are unlawful if they operate to freeze the status quo or to perpetuate the effects of past discrimination; (2) it need not be proved that the defendants intended to discriminate; (3) the burden is on the defendants to show that any given requirement for employment is specifically related to job performance; and (4) statistics alone may establish a prima facie case of discrimination.

On March 9, 1971, in *Carter v. Gallagher*, a federal district court ordered the Minneapolis Fire Department, which had no blacks among 535 firemen, to (1) initiate an affirmative recruitment program, including both maximum feasible use of communication media most likely to reach minority groups and pre-test tutoring sessions, to attract minority-group members to employment as fire fighters; (2) stop requiring high school graduation or certificate of equivalency as a requirement for employment, although employees might be required to obtain high school equivalency certification within two years; (3) validate all tests used in the future in accordance with the EEOC testing guidelines; and (4) give absolute preference to 20 minority-group members.

In decisions in the same case on September 9, 1971, and January 7, 1972, the Eighth Circuit Court of Appeals reversed the absolute preference to 20 minority-group members, but did approve hiring one minority employee for every two white firemen until a minimum of 20 minority firemen were employed.

THE COURT'S REASONING may help suggest the thinking of federal judges and the precedents that are being established. With reference to the requirement of high school completion, the court found that a lower percentage of minority-group members than whites graduate from high school and that there is:

> no evidence which establishes that a high school education is in any respect a necessary indication that the applicant has such ability to learn [fire-fighting practices and procedures]. An education requirement for promotions within the department may have some justification, but at the entry level position of fire fighter there is no necessary basis for that position.

With reference to the civil service examination, the court found that a disproportionate number of minority-group members fail the examination and that there is no evidence that the examination was related to job performance. It further noted:

> It is now generally recognized that minority group persons will often score lower than white persons on an examination which utilizes a formal English vocabulary . . . . An employment test which is thus "culturally biased" against any group will tend to eliminate persons of that group without necessarily establishing that they are not likely to succeed in the employment sought.

The Court of Appeals stated that federal courts may mandate that one out of every three persons hired by a department be a qualified minority-group member until at least 20 such persons have been hired. It found that the use of mathematical ratios as a starting point in shaping remedy for racial discrimination is not unconstitutional and is within equitable remedial discretion of district courts. It added, "Given past discriminatory hiring policies, it is not unreasonable to assume that minority-group persons will be reluctant to apply for employment absent some positive assurance that if qualified they will be hired on more than a token basis."

In further support of the ratio the Court of Appeals stated:

> . . . it is speculative to assume that qualifying tests rank qualified applicants with precision, statistical validity, and predictive significance, and therefore, a hiring remedy based upon alternating ratio will by no means necessarily result in hiring less qualified minority-group persons in preference to more qualified white persons.
>
> . . . Such a procedure does not constitute a "quota" system because as soon as the trial court's order is fully implemented all hirings will be on a racially nondiscriminatory basis.

On February 10, 1972, in *NAACP v. Allen*, the United States District Court of the Middle District of Alabama enjoined the Alabama State Highway Patrol to hire and permanently employ one black trooper for each white trooper hired until approximately 25 per cent of the force is black. The court directed that no training courses for training new troopers

(Continued on page 13)

MEMO

TO: Judges, Solicitors, Public Defenders, and Police Attorneys

FROM: William Crumpler and L. Poindexter Watts

Several cases decided this term by the Supreme Court of the United States and several recent decisions by the Supreme Court of North Carolina contain points that deserve highlighting. These points are briefly set forth below for your reference.

Search and Seizure

A pitfall awaits an unwary solicitor when he introduces a search warrant and affidavit into evidence for the court's consideration at voir dire unless he causes the record to show affirmatively that the warrant and affidavit were neither exhibited nor read to the jury. In State v. Spillars, 280 N.C. 341 (1972), the record on appeal apparently only indicated that a search warrant and accompanying affidavit were admitted into evidence. The court adopted the rule that "when documentary evidence is regularly admitted, it is presumed that its contents are made known to the jury." 280 N.C. at 352. Pursuant to this rule, it was presumed that the jury learned of matters in the search warrant that were incompetent as evidence and prejudicial to the accused, and hence the defendant won a new trial.

Since the state Supreme Court apparently is not disposed to remand cases for further development of issues such as this one, the purpose for introducing a search warrant into evidence at voir dire should be clearly enunciated for the record. No particular form is necessary as long as the record shows that the contents were not made known to the jury.

On another point, Spillars contains language that seems to indicate that the Supreme Court may accept the idea of going outside the written affidavit in order to determine whether sufficient facts were before a magistrate to support the finding of probable cause. 280 N.C. at 349. State v. Milton, 7 N.C. App. 425 (1970), first advanced this idea, but the Court of Appeals retreated from it in State v. Flowers, 12 N.C. App. 487 (1971).

Robbery - Double Jeopardy

Defendant was charged initially with armed robbery of employee A. At trial the evidence tended to show that while A was present in the store at the time of the robbery, employees B and C had actual control of the store's money and handed it over to the robbers. The trial judge therefore granted a nonsuit for variance, and the State then obtained a new bill of indictment charging defendant with robbery of employees B and C. HELD: the second prosecution was barred under the double-jeopardy clause in that the same evidence would support a conviction in either case; although the money was taken from the immediate presence of B and C, all employees present in the store were confronted by and endangered by the robbers, and each had responsibility for the custody and care of the employer's money. That A was farther from the store's money than B or C made no difference; the phrase "from the person" of A in the first indictment included a taking from his presence. Hence the nonsuit in the first case served as a final disposition to the robbery when viewed as a single transaction. State v. Ballard, 280 N.C. 479 (1972). Compare Duncan v. Tennessee, 10 CrL 3078 (Feb. 23, 1972) (dissenting opinion to dismissal on ground that certiorari was improvidently granted; defendant was tried on charge of robbery with pistol and case dismissed when proof showed robbery with rifle--with state later indicting for "new" crime of robbery with rifle).

It might be noted that the double-jeopardy clause will not ordinarily bar reprosecution if, prior to verdict, a mistrial is declared with the consent of the accused. (Without consent, there must be a "manifest necessity" for the mistrial.) See, e.g., United States v. Jorn, 400 U.S. 470 (1971). The defendant in Ballard was the moving party for nonsuit, so he may be deemed to have consented to the nonsuit. However, the judgment of nonsuit had the force and effect of a not-guilty verdict and therefore could not be regarded as a mistrial granted prior to verdict. Since it is not clear whether the North Carolina Supreme Court would allow a motion for nonsuit for variance to be treated as a motion for mistrial, it is imperative that the materiality of the variance be viewed in the light of double jeopardy and collateral estoppel. In Ballard, the gravamen of the offense was the endangering of life by the use of arms, and it was immaterial which of the employees present actually handed over the money.

Restriction on Use of Prior Convictions - United States Supreme Court

In Burgett v. Texas, 389 U.S. 109 (1967), the Supreme Court disallowed the use of prior convictions for the purpose of proving guilt or enhancing punishment (under a recidivist statute) when the prior convictions had been obtained in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). This term they affirmed the remanding of a case for resentencing because the trial judge in imposing sentence had considered two previous convictions obtained in violation of Gideon.

United States v. Tucker, 10 CrL 3053 (Jan. 11, 1972). Moreover, the Court very recently prohibited the use of convictions constitutionally invalid under Gideon to impeach credibility. Loper v. Beto, 10 CrL 3122 (March 22, 1972). The upshot of these decisions is to preclude any use whatsoever at trial of prior convictions that violated the right to counsel at trial as established in Gideon. But cf. State v. Gainey, infra.

Impeaching by Reference to Prior Misconduct

The state Supreme Court in State v. Gainey, 280 N.C. 366 (1972), distinguished State v. Williams, 279 N.C. 663 (1971), which eliminated cross-examination of defendants with respect to previous indictments or arrests (as contrasted with prior convictions). It said:

> [T]he decision in Williams did not change the rule that for purposes of impeachment a witness may be asked whether he has committed specific criminal acts or been guilty of specified reprehensible conduct. . . . Had the solicitor's question been whether defendant had engaged in an affray on Thursday night instead of 'What were you arrested for'? it would have been permissible. [280 N.C. at 373 (citations omitted) (emphasis in original).]

Of course, under North Carolina law the answer by the defendant would be binding on the state and not rebuttable by extrinsic evidence, although the solicitor may "sift the witness." See State v. Gaiten, 277 N.C. 236 (1970). Compare State v. Bailey, 278 N.C. 80 (1971), (rule binding a party to answer of witness on cross-examination as to collateral matter not applicable when questions tend to show bias, interest, or prejudice of witness). The court further noted in Gainey that the solicitor may question the defendant as to parole violations for the purpose of impeachment.

Plea Bargaining - United States Supreme Court

The United States Supreme Court in Santobello v. New York, 10 CrL 3016 (Dec. 20, 1971), made it clear that a breach by one prosecutor of a plea-bargaining agreement made by another prosecutor cannot be excused on the ground that it was inadvertent. "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing' or has done." 10 CrL at 3017. The circumstances of this case, in addition to other plea-bargaining cases, leave no doubt that the Supreme Court favors negotiated agreements that facilitate the administration of criminal justice but will hold the state through all of its representatives to a very high degree of compliance with the terms of any agreement.

Confessions: Preponderance of Evidence Proves Voluntariness - United States Supreme Court

The notion that the voluntariness of a confession must be established beyond a reasonable doubt before it can be admitted into evidence has been dispelled by the United States Supreme Court. In Lego v. Twomey, 10 CrL 3057 (Jan. 12, 1972), it held that the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary, but it left the states free, pursuant to their own law, to adopt a higher standard.

Dying Declarations

"We conclude that when request is made for such instruction, the judge must instruct the jury to receive a dying declaration with caution. . . . Absent such specific request, it is not prejudicial error for the trial judge to fail to give a cautionary instruction as to dying declarations." State v. Winecoff, 280 N.C. 420, 423 (1972) (citations omitted).

Statements of Codefendants During Course of Crime

In State v. Crump, 280 N.C. 491 (1972), the state Supreme Court reiterated the rule, often overlooked, that a witness need not remember exactly who of several criminal actors made an incriminating statement, so long as the statement was made in furtherance of a common design while the actors were jointly engaged on an illegal mission. There need be no charge of conspiracy, nor must the court make a specific finding of a conspiracy.

Bruton Rule

Nelson v. O'Neil, 402 U.S. 622 (1971), and several North Carolina cases were cited in State v. Jones, 280 N.C. 322 (1972), to support a decision that Bruton v. United States, 391 U.S. 123 (1968), was not applicable where a codefendant took the stand and testified after his confession, which implicated the other codefendants, had been admitted into evidence; the right of confrontation was afforded by his taking the stand.

However, if the testifying codefendant's confession is not self-incriminating but does incriminate the others, it is inadmissible at their joint trial. In all events, a confession of one codefendant should be received in evidence over the objection of the others only when the trial judge instructs the jury to consider the confession solely against the declarant. But note this qualifying remark of the court:

> Even so, in each case the prejudicial impact of testimony of out-of-court declarations of a codefendant, even when the right to confrontation is afforded, must be evaluated in the light of the competent admitted evidence against the nondeclarant defendant referred to in such declarations. We do not foreclose the possibility that the gap between the impact of evidence which is not admitted against but incriminates the nondeclarant and of competent evidence of minimal probative value admitted against him in a given case may be so great as to constitute a denial of due process. [280 N.C. at 339.]

The court further distinctly indicated the confession as introduced into evidence can mention that others were involved in the crime as long as no codefendant is mentioned by name. "The sine qua non for application of Bruton is that the party claiming incrimination without confrontation at least be incriminated." 280 N.C. at 340.

The rules concerning confessions of codefendants can get complicated, and Jones is an instructive case.

Felony-Murder

The felony-murder provision of G.S. 14-17 is not limited to felonies inherently dangerous to human life; it includes felonies "if the commission or attempted commission thereof creates any substantial foreseeable human risk and actually results in the loss of life," State v. Thompson, 280 N.C. 202, 211 (1972). The reason for the killing is immaterial, and it is no defense that the slaying was accidental or unintentional. Causation is established for application of the rule if the acts culminating in death are part of a continuous transaction. A separate judgment imposing punishment for the distinct felony the commission of which caused death cannot be entered if defendant is found guilty of felony-murder for the felony-murder includes as a lesser offense the separate felony in that proof of the latter is indispensable to proof of the former. (It is appropriate, of course, to try the defendants on the included felony counts, as the jury might acquit on the murder charge and convict as to the other felonies.) State v. Thompson, supra.

This recent case, involving a homicide in the course of a daytime breaking-and-entering and larceny, can probably be considered the leading case in North Carolina on the felony-murder rule. Some aspects of it are new to North Carolina jurisprudence.

In another felony-murder case, State v. Frazier, 280 N.C. 181 (1972), the state Court stated that the indictment is sufficient if in accordance with G.S. 15-144, and there is no requirement for an allegation that the murder was committed in the perpetration of a felony. This case also involved a question whether the state had lived up to a plea-bargaining arrangement; the issue was resolved in favor of the state.

Continuances, Photograph Identification, Miranda, Robbery

State v. Stepney, 280 N.C. 306 (1972), discussed a variety of points. As to continuances, the Court said, "Continuances should not be granted unless the reasons therefor are fully established. Hence, a motion for continuances should be supported by an affidavit showing sufficient grounds." 280 N.C. at 312.

As to photograph identification of suspects, the Court repeated that the defendant has no right to a lawyer at that proceeding. However, if a general objection is made to an in-court identification, the judge should conduct a voir dire, find facts, and then determine the admissibility of the in-court identification testimony. Failure to conduct the voir dire will be harmless error if the pretrial viewing of photographs was free of impermissible suggestiveness and the evidence demonstrates that the in-court identification originated with observation of defendant at the time of the crime and not with the photographs.

Here the defendant only objected once to several references by the witness that identified defendant; hence, in this case the initial objection lost its effectiveness since similar testimony came in subsequently without objection. "When there is no objection to the admission of evidence, the question of its competency is foreclosed on appeal." 280 N.C. at 316.

As to Miranda, the Court held defendant's confession was properly admitted; the defendant confessed spontaneously and not in response to any question by the police, and thus Miranda was not applicable. 280 N.C. at 316-17 (semble).

Finally, the Court not surprisingly rejected defendant's contention that assault with a deadly weapon inflicting serious injury was a lesser included offense of armed robbery; the infliction of serious injury is not an essential ingredient of armed robbery. State v. Richardson, 279 N.C. 621 (1971), was cited as the controlling case on the question of lesser included offenses. 280 N.C. 317-18.

Waiver of Right to Counsel

Justice Lake's opinion, concurring in the result in State v. Bass, 280 N.C. 435, 454 (1972), is interesting reading in regard to the recent problem of State v. Lynch, 279 N.C. 1 (1971), concerning the waiver of right to counsel by indigents at a critical stage of the prosecution. Bass involved waiver of counsel at a lineup by an indigent charged with a capital offense. Justice Lake did not feel a violation of the statute making the right to counsel unwaivable at lineups in a capital case necessarily rendered testimony about the lineup inadmissible. Moreover, he asserted that the statutory provision forbidding the waiver of counsel by an indigent charged with a capital offense was unconstitutional.

Given the apparent inclination of the other members of the North Carolina Court, as exemplified in this decision, the opinion may be somewhat academic. But it is worth reading in that light, and furthermore it may serve as a long-shot argument for solicitors who still have cases left that turn on the Lynch question.

Equal Employment Opportunity Act *(Continued from page 6)*

be held until approximately 25 per cent of the trooper candidates are black. The Alabama Patrol was also permanently enjoined from failing to hire supporting personnel in the ratio of one black for each white until approximately 25 per cent of supportive personnel are black.

In summary, state and local governments are today subject to the Equal Employment Opportunity Commission. Black officers in two North Carolina cities have alleged discrimination in recruitment and promotion. The Supreme Court has looked closely at employment tests and selection devices and outlawed those that in fact perpetuate discrimination. Statistics alone have been used to establish discrimination, and the burden is on the employer to show that any given requirement for employment is specifically related to job performance. Where the percentage of blacks employed varies from the percentage of blacks in the total population, several federal courts have mandated that a certain percentage of blacks be hired until a specified number or percentage is employed.

LRC *(Continued from page 4)*

current Environmental Studies Committee has three legislative members and three public members. In each case the public membership includes one conservationist, one representative of the business or industry most concerned with the subject, and one professional specialist. The resulting composition of the 1972 subcommittees reflects a cross-section of concerned citizens—leading environmentalists (including one student environmental leader), civic group leaders, expert specialists, and business leaders—all willing to donate their time in the interests of developing better environmental legislation.

All of the subcommittees and the full committee have now held their first round of public hearings. Further hearings will continue throughout the spring. When the hearings are over, legislative recommendations and a proposed LRC report will be developed. If present indications are any sign, another substantial package of LRC proposals for strengthening environmental protection and management will be in hand before the end of the year and ready for the 1973 General Assembly's early consideration.

LADIES' DAY AT THE INSTITUTE

CABLE TELEVISION

Aspects of Franchising

by Elmer R. Oettinger
and Mike Harris

IN THE PAST TEN YEARS cable television has grown from a few scattered cable companies serving outlying communities where television reception was difficult to some 4,500 cable systems with 10 million subscribers in the United States. As a direct consequence of this phenomenal growth, the Federal Communications Commission has changed its perspective from (a) considering CATV merely as a supplement to broadcast television, to (b) concerning itself with CATV controversies through the use of ancillary jurisdiction, to (c) an assertion of plenary jurisdiction and considerable regulation.

This changed awareness of the nature and potential of CATV (community antenna television as it is sometimes called) for programming and service as well as transmission has brought a strong exercise of FCC rule-making power in an apparent effort to establish ground rules for the entire nation.

It is important that governing board members of any community contemplating franchising cable television be aware of changed concepts in technology, services, and regulation. New FCC regulations became effective on March 31, 1972. Those regulations recognized three separate services performed by cable television: (1) transmission of programming originated by broadcast television; (2) origination of programming as a broadcaster, available only to subscribers; and (3) transmission of programming produced by third persons or groups, thereby providing common-carrier services. The latter two services have won acceptance on the basis of evidence of the feasibility and desirability of a larger number of channels and programs.

Accordingly, it is essential that any franchising agreement be approached with an appreciation of CATV technological changes and strong regulatory controls exerted by FCC. To note only one of the new regulations—the expressed intention of the FCC to review all existing franchising no later than 1977 to insure compliance with its rules—is to illustrate their importance.

IN NORTH CAROLINA, municipalities have express authority to franchise cable television (G.S. 160A–319). Although counties do not have express authority to grant CATV franchises, they are not prohibited by statute from doing so. In fact, in other jurisdictions it appears that both counties and municipalities have authority to grant such franchises.

The following information, compiled from questionnaires returned by North Carolina communities to the Institute of Government, indicates the experience of North Carolina cities and towns that have granted franchises and established CATV systems. It further suggests specific areas of concern for any governmental unit contemplating cable television.

1. *Length of Franchise*: In North Carolina, the length of franchise ranges from five to thirty-five years.

The FCC recommends a maximum of fifteen years. Among arguments against granting long-term franchises are (a) changing technology, and (b) regulations that can result in binding future governing bodies with outmoded plans and regulations.

2. *Service Requirements*: About 60 to 70 per cent of North Carolina municipalities require complete CATV service to all subscribers. To avoid charges of discrimination, such a requirement seems generally desirable. However, exceptions may be necessary in remote or inaccessible areas.

3. *Charges*: Average charges in North Carolina appear to be $10 for installation, $5 monthly charge, and $2 for add-on connection.

4. *Control of Rates*: A large majority of North Carolina towns and cities require rate increase proposals to be submitted to the municipal governing board in advance for approval, which appears to be an advantageous way to protect the public.

5. *Tax Rate*: Towns and cities vary in their approach. Some charge flat fees, others use percentages, and still others combine the two. Percentages run from 1 to 5 per cent of the gross. Some knowledgeable observers believe the tax rate should cover administrative and review costs only. Their approach is different from that of many municipal boards, which—especially in earlier years—have regarded CATV more as a source of revenue than as a public service. The new FCC regulations specify that any rate over 3 per cent of the gross must be justified by a showing of good cause before the FCC. The suggested franchise fee range is 3 to 5 per cent, although the franchising authority must justify to the FCC any fee above 3 per cent.

6. *Construction Standards*: Most present North Carolina franchises require compliance with the national electric safety code and local standards. It appears desirable that FCC standards also be included in franchises.

7. *Liability Insurance:* Although some communities appear to have no or small insurance coverage requirements, the average coverage for towns in the population and area range of Chapel Hill is $100,000/$200,000 for property damage and $100,000/$300,000 for personal injury. Cities ranging in size between Winston-Salem and Charlotte require as much as $300,000 / $500,000 / $300,000 for coverage.

8. *Pole Provisions*: Most North Carolina municipalities require CATV franchises to negotiate with power or telephone companies for use of their poles. Some permit installation for new poles solely for CATV.

Laying cable underground rather than installing new poles in a new area seems desirable.

9. *Channel Requirements*: North Carolina CATV franchises range from three to twelve in the number of channels required. Considering CATV's potential for service, those figures are low. In the light of recent FCC requirements, they appear unacceptable in certain more populous areas. The FCC has listed 100 major television markets and their designated communities throughout the nation. It has specified that new cable television operators in the top 100 markets must provide a minimum of 20 channels (actual or potential). It is said that one cable could successfully carry even more channels. The 100 major television markets listed by the FCC in which CATV access channels are required include the following communities or areas in North Carolina: (42) Charlotte; (46) Greenville-Spartanburg-Anderson, S. C. - Asheville, N. C.; (47) Greensboro-High Point-Winston-Salem, N.C.; (73) Raleigh-Durham, N.C.; (84) Greenville-Washington-New Bern, N.C. In view of the fact that the FCC considers these 100 markets to include all areas that fall within a thirty-five mile radius of the television station's licensed to serve these communities, a number of other undesignated municipal and county governments that happen to fall within this radius are covered by the new FCC rule. To illustrate, Chapel Hill apparently would be included in the Raleigh-Durham area; Concord, in the Charlotte area; Kinston, in the Greenville-Washington-New Bern area; and Lexington, in the Greensboro-High Point-Winston-Salem area.

10. *Access Channels*: The FCC is interested not only in seeing that larger numbers of channels are provided on CATV but also in assuring that "free access" channels are provided for public use and a wide range of programming. The new regulations require new cable operators in the top 100 television market areas to provide a free TV channel for five years for use by local government and another free channel for educational television. The new cable systems in this market also must make available a channel for access by the public.

The FCC report states: "The government access channel is designed to give maximum latitude for use by local governments. The suggestions for use range across a broad spectrum and it is premature to establish precise requirements. As with the educational channel, use of the government channel will be free from the time subscriber service is inaugurated until five years after the completion of the cable system's basic trunk line, at which time we will consider whether to expand or curtail such free use or to continue the development." Among other uses the FCC sees for a government cable television channel are these: (a) special communications systems to reach particular ethnic groups or neighborhoods in a community; (b) municipal surveillance of public areas for protection against crime, detection of fires, control of air pollution, and control of traffic; (c) utilization of employment services and manpower; (d) educational and training programs for municipal employees; and (e) a two-way communication capability to permit

(Continued on page 21)

PROGRAMMING AND CONTROLLING CAPITAL IMPROVEMENTS

by

J. L. Mercer

Are your municipal physical facilities growing older and becoming more inadequate day by day for the needs of your community? Do you find that your city's needs for new and remodeled capital projects are outstripping your ability to keep track of them and to pay for them? Do you feel that you are not always sure exactly where you stand progress-wise on all of your capital projects? Answers to these and similar questions relating to a citywide capital improvements program have been found in Raleigh, North Carolina, through the use of modern program management techniques borrowed from private industry.

Recognition of the Need for Capital Program Plans and Controls

In December 1969 a group of outside management consultants, hired by the Raleigh city council to study the city's organization, recognized the need for program management, plans, and controls in the city's ever-growing capital improvements area. Among other changes in the organizational structure, the consultants recommended that the city create the position of assistant city manager for programming and budgeting. The responsibilities of this new assistant manager would be management of the capital improvements program, development and control of the city's budgeting systems, and development of citywide systems and procedures. Management of the capital improvements program would include overall program management, development of a program planning and control system, and development of a capital budgeting system. This new assistant city manager for programming and budgeting would work within a "management team" concept being developed for Raleigh. The team would consist of the city manager, the assistant city manager for operations, the assistant city manager for programming and budgeting, and the assistant to the city manager for intergovernmental relations. Each assistant city manager would be given the required functional authority to carry out his assigned duties, and the intergovernmental coordinator would serve primarily in a staff capacity to the city manager. The various city department heads would still report administratively to the city manager, but they would also report functionally to the two assistant city managers in their assigned areas of responsibility.

When filling the position of assistant city manager for programming and budgeting, the city manager looked primarily to private industry. Among the requirements for the position was a background in program management, budgeting, and systems and procedures.

Beginning the Capital Improvements Programming

In addition to initiation and development of citywide procedures systems and annual and five-year operating budgeting systems, the new assistant city manager for programming and budgeting was to begin immediately to set up a capital improvements program planning and control system and a five-year capital improvements budgeting system. Already in existence was a Capital Improvements Committee, consisting of the city department heads involved in the various capital programs and headed by the assistant city manager for operations. This committee met monthly and discussed the progress of the various projects in work at any one time. A progress report giving a brief status of the various projects was published monthly by the assistant city manager for operations. This was all to be turned over to the new assistant city manager for programming and budgeting.

Establishing a Chart Room or Control Room

The assistant city manager for programming and budgeting took over a fourth floor room of the Raleigh Municipal Building as his "chart room" or "control room" for the capital improvements pro-

gram. This room was to serve as its focal point or nerve center. In this room the latest progress and status of the various projects in the program would be kept and displayed visually for review by department heads responsible for various facets of the program, other city administrators, and the city council.

Since the new control room had formerly been an office complex, the assistant city manager for programming and budgeting had a wall removed in order to make one rectangular-shaped room approximately twelve by thirty feet. Several four- by eight-feet sheets of one-fourth-inch-thick Plexiglas were mounted on two walls over one-inch-grid graph paper. Two-inch aluminum and cork strips bordered the Plexiglas and allowed regular charts to be hung over the Plexiglas as necessary, to give multipurpose to the walls. A drafting table, file cabinet, and chart file were secured for the control room. Later, three standard two-and-one-half feet by six feet, formica topped, cafeteria style tables were purchased for the room, along with fifteen cushion chairs. Framed beaverboards were mounted on the remaining long wall, and the fourth wall, which was brick and housed a window, was left as it was.

The control room was now ready for the planning and development schedules for the city's multitudinous capital improvements program. But which project should be begun first? And should the projects be grouped together, or separated into logical subprograms?

Development of a Program Structure

The City Planning Department had always handled preparation of the capital improvements program previously and had published a listing of program projects in 1968. In addition, the planning department was currently developing a suggested capital program for submission to the Research Triangle Regional Planning Commission. The project listings in this suggested program, together with the projects outlined in the capital improvements committee progress report and other internal and external memoranda and correspondence, provided a basis for starting to build a program structure.

The first step was to lay out the projects on a large chart without regard to priority or program structure. In this "brainstormed" listing, the project name was listed first, followed by other project information such as the overall program in which the project was housed, the estimated start and completion dates of the various projects, the current status of each project, the source of funds, and any other pertinent information available. Once this had been accomplished, the large listing was cut into individual strips by project, and each project strip was pinned to the beaverboard in the chart room. Push pins, which are pins similar to thumb tacks but with large plastic heads, were used to facilitate rearranging and removal of projects as required. A preliminary attempt was made by the assistant city manager for programming and budgeting to group projects into various tentative program categories or structures. The initial categories were as follows:

Streets
Public utilities
Public works
Parks and recreation
Fire prevention and suppression
Miscellaneous.

Once the preliminary program structures had been established, the next step was to involve the cognizant department heads. This was done in separate sessions for each initial program category. In most cases, several "think" sessions were required in order to sort projects into logical subprograms, establish tentative project priorities, and fill in missing project information. In most instances the responsible department heads were encouraged to involve their division heads and various supervisory personnel. The planning director and other members of the management team were also involved in these sessions. This phase took several months to review, rereview, add or delete projects, and polish the entire program.

Once the responsible department heads and the administration had agreed on various program structures, the recommended programs were reviewed with the city council. This phase was accomplished in several stages as each program category was made ready for review. The council made a few specific changes, primarily in project priorities, and gave general program approval.

After the State Highway Program was approved by the city council, a meeting was set and the program priorities were reviewed with and made known to the North Carolina State Highway Commission. The Parks and Recreation projects were also reviewed with, and approval was received from, the City Council Parks and Recreation Advisory Commission, prior to the review with the city council. The council approvals in each category were given with the understanding that each project would be considered for final approval on its own merits at the time of project activation.

Parks and Recreation Program
Public Utilities Program
  Water Program
  Sewer Program
Fire Prevention and Suppression Program
State Highway Program
  TOPICS Program (Traffic Operating Program to Increase Capacity and Safety)

The author is assistant city manager for programming and budgeting in Raleigh. His article is reprinted from the International City Management Association's publication MIS *(Management Information Service), Volume 4, No. LS–2 (February 1972).*

City Street and Sidewalk Program
Miscellaneous Projects. (Included in this category were such items as Public Works Landfill Development, New City Garage Construction, Southside Urban Renewal Project [this is handled by a separate authority but the city per se has some improvement responsibilities], Historic Sites Preservation, etc.)

In all, about 575 individual projects were identified and categorized; priorities were assigned, and general approval was received from the city council. The planning period was approximately ten years. The total program value, considering all of the matching funds from other governmental units, was around $150 million.

Preparing the Program Plan

With the projects ranked in priority sequence, the next step was to prepare program plans and schedules to meet the established objectives. As a first step, the assistant city manager for programming and budgeting issued a citywide standard procedure establishing specific scheduling steps in the overall capital improvements program.

As was specified in this standard procedure, various schedules were developed for each active project in the program. Widely accepted program planning, control, and scheduling techniques, such as Gantt and Milestone Charting, Program Evaluation and Review Technique (PERT), and Critical Path Method (CPM) were utilized. Much of the initial detailed scheduling was performed by the assistant city manager for programming and budgeting.

Early in the program, various cognizant department and division heads were initially trained and directed in the preparation of departmental schedules and later were guided in the preparation of total project schedules. The most popular of the techniques among department heads was the Gantt Chart, because of its ease of usage and its understandability. Most of the original detailed schedules were prepared on preprinted scheduling forms. Copies of each schedule were distributed to responsible internal and external organizations including outside utility companies. Copies of each schedule were also posted on the beaverboards in the chart room. Actual progress against each schedule was kept by the assistant city manager for programming and budgeting, with considerable input being provided by cognizant department heads for each project.

Using these detailed schedules as a base, the assistant city manager for programming and budgeting began the preparation of "major event" schedules (also called "key events") for each project. As a starting point, a project control form was developed and utilized for each project. On this form the project and the program in which it was categorized were identified. In addition, the project was described and the latest status of the project was listed. Preparation of the schedule was accomplished by selecting the major events from the detailed Gantt or Milestone Charts previously prepared by department heads (or, in some cases, by the assistant city manager for programming and budgeting). Only the major or key events were entered on the status control log schedule sheets. Such events involved project approval by the city council, selection of architect, completion of plans, awarding of contracts, beginning and end of construction, date project became operational, etc. Two-digit project event designators were assigned to each of these major events in ascending sequence, beginning with 00. A brief description of each event, such as "Approve Bids," was also entered. In addition, the function responsible for each event taking place was identified along with the schedule for its occurrence. Later, actual progress against each schedule would be tracked by the assistant city manager for programming and budgeting. The status control logs were separated into the program structure categories identified earlier and were placed in ring binders with index tabs.

Once the status control logs had been prepared for each of the projects identified in the overall capital improvements program, the next step was to post the major event schedules on the Plexiglas boards in the chart room. In anticipation of this, a date strip had been affixed to the top of the Plexiglas, and the boards had been divided into sections according to the program structure categories previously identified.

In scheduling the individual projects in each program structure category, emphasis was placed on scheduling active projects first. This was a logical step in that active projects generally carried the high priorities in each category.

Each project was assigned a project identifier which served as the beginning building block for the project major-event schedule. Such identifiers as the following were used in each program category:

SH 3	State Highway Program, Priority Project Three
US 10	Public Utilities Program, Sewer Program, Priority Project Ten
P 7	Parks and Recreation Program, Priority Project Seven
M 2	Miscellaneous Public Works Program, Priority Project Two

The respective project identifier was placed on Mylar pressure-sensitive standard PERT symbols using Prestype. These symbols were attached to the Plexiglas in ascending priority sequence, with the highest priority project in each program structure at the bottom.

After individual project identifiers had been placed for each program structure category, the next step was to begin actual project scheduling. A supply of Mylar standard planning and control symbols and pressure-sensitive tape was purchased and used extensively throughout the scheduling process. These standard symbols and tapes are available from most en-

gineering supply houses stocking Chartpak, Rotex, or similar graphic aid supplies.

Statusing the Chart Room

In order to set the stage for initial and continuing program planning, control, and statusing of the capital improvements program, a standard procedure was issued specifying responsibility for management of capital projects. The public works director volunteered to prepare this procedure subject to final approval by the assistant city manager for programming and budgeting and the city manager.

After major events had been scheduled on the Plexiglas boards in the chart room, the next step was to status the schedules. During the scheduling process it was necessary to do a bit of "historic scheduling" in order to establish a total picture of the time span for the project. This would be of help later in estimating time requirements for activities in future projects. This historic scheduling provided some "actual" status for some of the active projects and led to the establishment of a base line, or beginning point, for future statusing.

Status information was obtained from many sources, such as external and internal correspondence, departmental project status reports, meeting minutes, newspaper articles, personal contacts with departmental personnel, and on-site observations. The most important sources of status information, however, were the biweekly capital improvements program reviews. A standard procedure was issued establishing the review committee and outlining the attributes of the program review procedure.

Among the major attributes of this procedure were the implementation of the periodic capital improvements program reviews and the quarterly comprehensive progress report issued on all active capital projects. The advantage of the exception-type program review agenda is that cognizant program individuals are never certain as to which project will be discussed until they receive their agenda. This causes involved individuals to keep close surveillance on all of their projects, thus improving scheduling and quality. The quarterly comprehensive report keeps the city manager and the council up-to-date on all active projects.

All program review sessions in Raleigh are held in the chart room. At the beginning of each review session the assistant city manager for programming and budgeting, who serves as chairman of the capital improvements program, reviews the exceptions in each department head's program. Identification of projects which are behind schedule is clearly effective in making individual department heads fully aware of their responsibilities, especially when no valid reason can be shown for the delay.

Attendance at all program review sessions is mandatory for department heads involved in the capital improvements program. Formal minutes of these sessions are not published, but the status reported at the meetings is noted and later posted to the status control logs and subsequently to the schedules in the chart room. A verticle felt string is hung over the Plexiglas boards to indicate the "as of," or present date, on the chart room schedules. Every event behind this line datewise must have a status, i.e., either completed or incomplete; either green or red. Events ahead of this line datewise may have a status of "complete ahead of schedule," which is shown as green. Events ahead of the line may also be shown as yellow, indicating that it is already known that the event will not be completed on schedule. Colored flags are also used to indicate impact of an event which has not been completed by its final date.

The chart room, then, serves as an overall program status center for the city manager and the city council. In addition to the statused individual program schedules, summaries by subprogram and for the overall capital improvements program are obtained. Further, various statistics are gathered and plotted in order to determine the overall program trends. These trends help to determine program problem areas such as under- or overuse of resources, constant problem areas needing attention, etc. Detailed schedules for the more complicated projects are also maintained on the beaverboards, and their status is kept current.

Although the program reviews are biweekly, status in the chart room is posted daily from memoranda, personal observation, data furnished from key personnel, etc. The more current the status information is in the chart room, the more effective the room and the system can be. In Raleigh a full-time administrative assistant has been employed to keep the chart room statused, to perform scheduling, etc. The assistant reports to the assistant city manager for programming and budgeting. This administrative assistant position has been filled by engineering students on a cooperative education program from North Carolina State University located in Raleigh. Industrial engineering students are particularly suitable for this position because of their familiarity with various scheduling techniques.

The DoMore Award

Not all is negative about the control process; exceptional positive effort is also recognized. A semiserious award, called for want of a better name the Bottomly Q. DoMore Award, has been inaugurated, and several awards have already been made. This award, in the form of a framed certificate is given to department heads or other project directors for completing a project ahead of a published schedule.

The DoMore Award is usually presented by the assistant city manager for programming and budgeting in a ceremony at a monthly staff breakfast, or at one of the biweekly staff meetings. Despite the semiserious approach, the DoMore Award has acted as a very positive incentive to department heads to

get their projects completed ahead of schedule and within budget.

Design Reviews

Another integral part of the program control system is the capital improvements design reviews procedure. This standard procedure, which appears as Appendix D of this report, was established for the purpose of working the "bugs" out of projects before they are submitted to the city manager and city council for approval.

The permanent design review committee consists of the various department heads involved in all phases of the capital program and is chaired by the assistant city manager for programming and budgeting. Temporary members are assigned depending upon the type of project being reviewed.

The design review meets at the request of a department head who is ready to submit a capital project to the city manager and council for approval. The design review, a closed work session, is usually held in the chart room. Its objective is to remove potential project problems or anomalies prior to review of the project by the approving authority. The result of these design reviews has been stronger presentations of recommended project designs being made by the initiating agency to the approving authority.

Advantages of the System

What has been the result of implementing the program planning and control system in Raleigh? Have any tangible results been obtained? What might a city administration expect of adapting the Raleigh system to its own capital improvements scheduling?

During the first six months after the system became operational the following positive results were noted:

1. Five major projects were completed ahead of schedule, within budget, and with requisite quality, which had been almost unheard of before.
2. The 1971 annual paving program was completed on schedule and substantially ahead of the 1970 paving program (which had not been subjected to the new program planning and control system).
3. Thirty days were cut from the time required to construct a standard fire station, and a larger station was constructed at less cost and with requisite quality.
4. Response from outside contractors and outside telephone and utility companies to the city's needs on individual projects improved. This came about primarily through better project planning and better communications as a result of published schedules provided at preconstruction conferences.
5. More general status information than ever before was available relative to the capital improvements program, and this information was disseminated throughout the organization and, in some cases, to the general public.
6. Improved response was received from all program participants. More efficient methods were being applied on all projects, and the kind of attention that would ensure success was being given to the program.
7. More management decision information relative to the capital program was available to the city manager and the city council than ever before. Another status technique that proved very successful here was the Council-Adviso-Gram (see figure 8). This bulletin is forwarded to the council and to other internal program participants by the assistant city manager for programming and budgeting whenever a program accomplishment of noteworthy significance is attained. This helped provide the necessary policy making and executive attention to the program to ensure success.
8. Because of the comprehensive identification and scheduling of the overall capital program, better fiscal control was established; this paved the way for implementation of a five-year capital improvements budgeting system.

CATV *(Continued from page 16)*

city governments to run surveys of CATV subscribers who could answer the surveys by electronic signals to the station.

11. *Public Proceedings Required for Franchising*: Municipal franchising authorities are required by the FCC to hold public proceedings offering due process of law to consider the legal, character, financial, technical, and other qualifications of applicants to install and run CATV systems. At least two meetings are required, including the initial public hearing, for the governing board to complete allocation of a CATV franchise. North Carolina law (G.S. 160A–76) requires that the granting, renewing, extending, or amending of CATV franchise be passed at two regular meetings by ordinances.

It is essential that any local governing board contemplating CATV be aware of the FCC regulations and experience within the state before taking final action. This memorandum offers guidelines that can be useful to local governing boards responsible for decisions on cable television, but technical questions still require a close examination of new FCC regulations as they pertain to each governing unit.