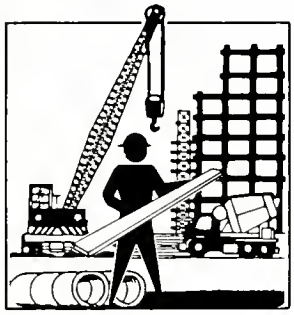
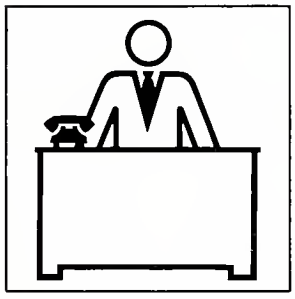
Popular Government

Published by the Institute of Government, The University of North Carolina at Chapel Hill

Fall 1985

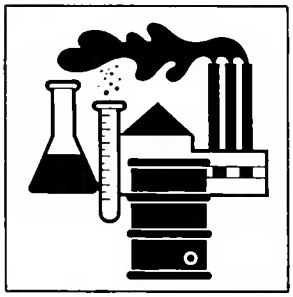


Industrial Development Bonds



Understanding the Mayor's Office in Council-Manager Cities

North Carolina's New Legal Drinking Age



Local Governments' Regulation of Hazardous Wastes

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Popular Government

Vol. 51/No. 2
Fall 1985

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Popular Government (ISSN 0032-4515) is published four times a year (summer, fall, winter, spring) by the Institute of Government, Knapp Building 059A, The University of North Carolina at Chapel Hill, Chapel Hill, N.C. 27514. Subscription: per year $8.00. Second-class postage paid at Chapel Hill, N.C.

INDUSTRIAL DEVELOPMENT BONDS— Still Alive and Relatively Well in North Carolina

Despite recent changes in federal tax laws that affect the availability of industrial development bonds, North Carolina is in a good position to make effective use of IDBs for economic and community development.

J. Allen Adams and R. William Ide, III

Many state and local governments make enormous efforts to attract industry to their areas. One important tool in these recruitment campaigns has been these governments' ability to use industrial development bonds ("IDBs") to help provide the facilities needed by industry. Not long ago North Carolina's chief industrial recruiter observed that without IDBs "we'd be out of business."[1] Congress, however, recently revised the tax code to restrict the use of this financing technique. With some exceptions, these changes should not significantly hamper and indeed may enhance the use of IDBs in North Carolina. But time may be running out on IDBs because new tax proposals would eliminate them.

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1. "Tax-free Bonds on Tight Rein," News and Observer (Raleigh, N.C.), January 15, 1985, at 1D.

Background of IDBs

Industrial development bonds are a separate category of financing because, under federal tax laws, the income on bonds issued by state or local government agencies is exempt from federal income tax. Though state and local government borrowing for industrial purposes has been restricted, and though such borrowing may yet lose the tax exemption altogether, federal law still accords a significant tax break to industrial development financing that meets specific requirements.

The standard industrial revenue bond project works something like this: A public agency (in North Carolina, a County Industrial Facilities and Pollution Control Financing Authority) issues bonds and uses the proceeds to construct an industrial facility; the facility is then leased or sold to a private company, the lease or sale payment schedule being set at a level sufficient to retire the agency's bonds. Because the interest on the authority's bonds is tax-exempt, the company's financing costs are lower than would be possible with conventional loans, the interest on which is not tax-exempt.[2] This is the standard

2. It should be noted, however, that traditional buyers of bonds are turning to alternative investment opportunities because of the reduced tax rates

industrial development bond project, but the federal tax laws define industrial development bonds to include more than this standard example. Under the federal laws, an industrial development bond is any borrowing by a state or local government the proceeds of which—all or a major portion—are used by a private person, firm, or corporation in its business. Thus the downtown loan pools that a number of North Carolina cities have established are industrial development bonds, because the proceeds of the loan to the city are lent to private persons, firms, or corporations, even though the loans have nothing to do with county industrial financing authorities.

IDBs were first used by Mississippi in the 1930s to help raise capital for factories. Over the years they have been used to finance such things as health care facilities, convention centers, hotels and motels, multi-family rental housing, office buildings, and other projects developed by the private enterprise system. North Carolina began to use IDBs relatively late—in 1976. It also has tighter restrictions on IDBs than most other states, allowing their use only when companies are building or expanding industrial plants or installing pollution control equipment. Further, under North Carolina law only facilities that pay higher than average wages may be financed with IDBs.

Though IDB-financed projects create jobs and serve other public purposes, the bonds themselves have continually been under attack by the United States Treasury Department because interest on the bonds is exempt from federal taxation.[3] The Treasury considers IDBs an inefficient tax subsidy because of the transaction costs of the bond issue and because IDBs allow local governments, rather than the federal government, to decide where federal tax subsidies will be given. In 1968 Congress acceded to the Treasury's pleas and imposed restrictions on IDBs.[4] Nevertheless more and more of these bonds were issued.[5] In 1982 Congress passed additional restrictions, but the amount of IDBs issued continued to rise. In 1983 IDB issuances, as measured by the United States Treasury, totaled $50 billion.[6]

As larger companies reach their IDB limits, smaller regional companies—of which there are many in North Carolina—may be more likely to use IDBs.

Recent tax law changes

Last year Congress further restricted the use of IDBs as part of the Deficit Reduction Act of 1984 (the Act).[7] Local governments and their attorneys, banks, corporations, investment bankers, investors, or others who have a role in IDB financing must consider a number of new questions before they can advise their clients about the availability of IDBs. This article provides a background for the issues that now need to be addressed in an IDB financing in North Carolina.

Specific beneficiary IDB limits (single issue and aggregate). The Internal Revenue Code (the Code) creates two types of IDBs. First, there are those that finance specific projects ("exempt facilities") for which no dollar limit on IDB financing has been set. These projects include residential rental property for low to moderate income persons, mass transit facilities, convention facilities, and pollution control facilities. The second category,"small issue" bonds, are the type generally used by private companies. These issues are limited to either $1 million or $10 million (when the bond amount—added to related capital expenditures in the three years before and after the date of the issue—does not exceed $10 million).[8]

Many large companies[9] have used small-issue IDBs to raise capital for numerous projects across the country, amassing a large IDB indebtedness. Henceforth the Act restricts such use of IDBs; it provides that no single beneficiary of the IDB privilege may have more than a total of $40 million in outstanding industrial development and pollution control bonds in the entire United States. If a single beneficiary should have more than $40 million

for individuals and corporations, the past poor performance of the municipal bond market, the availability of better investment opportunities, and some defaults in the municipal market. State and local banks also have taken a diminished role as buyers. Eleanor D. Craig, "Impact of Federal Policies on Municipal Bond Financing," *National Tax Journal* 34, no. 3 (September 1981), 389, 392-93.

3. The Treasury's attack began in 1954 with the Treasury proposal to tax housing authority bonds and IDBs other than those issued to finance manufacturing plants. George E. Lent, "The Origin and Survival of Tax-Exempt Securities," *National Tax Journal* 12 (1959), 301.

4. Congress limited IDBs by purpose or size. Pub. L. No. 90-364.

5. House Ways and Means Committee Report on H. R. 4170 (90th Cong., 1st Sess., 1968-70, p. 1683.

6. *Treasury Report on Private Purpose Tax-Exempt Bond Activity During Calendar Year 1983*, p. 1.

7. Pub. Law No. 98-369.

8. In addition, the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, provided that no small-issue IDBs could be issued after December 31, 1986. The Act extended the sunset provision for IDBs for manufacturing facilities through 1988.

9. For example, Days Inns of America, Safeway Stores, and Walmart Stores.

in IDBs, the whole bond issue that caused the overage would lose its tax-exempt status.

The complication comes in the fact that *all* outstanding IDBs, not just small-issue IDBs, are counted when the $40 million limit is computed. Consequently, if a beneficiary has $35 million in 1983 multi-family rental housing bonds outstanding and a $6 million small issue is proposed, the latter issue would take the beneficiary over the $40 million limit and interest on the bonds for that project would become taxable. This change will mostly affect larger companies, which Congress apparently believes can raise sufficient capital in private capital markets. As the larger national companies reach their limits, smaller regional companies—of which there are many in North Carolina—may be more likely to use IDBs.

Statewide limits on aggregate amount of private-activity bonds. The Act also sets for each state a volume limit of $200 million or $150 per capita (whichever formula produces the greater amount) for all "private activity bonds" issued within any one year. This provision is designed to curtail the volume of IDBs.[10] Private-activity bonds include small-issue IDBs as well as some bonds for exempt facilities and student loan bonds. Beginning in 1987, the per capita limit will be reduced to $100.

The Act allocates 50 per cent of the per capita limit to the state and 50 per cent to other issuers; the allocations to other issuers are made on the basis of their populations.[11] The state legislature (or the governor, on an interim basis) may provide a different allocation formula.[12] North Carolina has not yet chosen to set a different allocation formula.

This per capita limit should not affect the issuance of bonds in North Carolina. Historically North Carolina has issued significantly less in IDBs than the $150 limit would permit. For example, while the $150 limit would allow $900 million in IDBs to be issued within the state, in 1984 only $799 million was issued. Even that figure is misleading, because $324 million of the total was for one unusually large issue.[13] Until 1984 the largest annual

The new legislation does not affect many of the attractive features of tax-exempt financing for multi-family rental housing under Section 103 of the Internal Revenue Code.

aggregate amount of IDBs issued in North Carolina was nearly $400 million of bonds, issued in 1981. Indeed, the per capita limit may benefit North Carolina, because other states—having reached their limit—may not be able to offer additional IDBs as an inducement to industry.

Restrictions on acquisition of land and existing facilities. To meet congressional concern that bond proceeds be spent in ways that stimulate the economy and create new jobs, the Act restricts the use of bond proceeds for the purposes of acquiring land and existing facilities. It limits to less than 25 per cent the amount of bond proceeds that may be used to acquire land.[14] If the IDB is for an industrial park, the figure is increased to 50 per cent, a provision intended to permit a window for the acquisition of land in connection with a project while insuring that something productive is done with the land once acquired.

IDB proceeds may not be used to acquire land used for farming, though there are limited exceptions for first-time farmers, for farmers with small land parcels, and for some farm equipment. These provisions may have a major effect in North Carolina. This state recently established a "North Carolina Agricultural Facilities Finance Agency," which is authorized to issue IDBs for agricultural purposes.[15] The Act's provisions, limiting the amount of tax-exempt financing available for purchases of land, will severely restrict the agency's ability to use IDBs for many type of projects.

Arbitrage restrictions. The Act reduces the opportunities for arbitrage profits—that is, profits made by investing bond proceeds in securities that provide a yield higher than the interest rate of the bonds. Previously, bond proceeds could be invested at unrestricted yields for a

10. *Op. cit. supra* note 5, p. 1693. "To prevent further unrestrained growth in private activity bonds, the committee believes that meaningful limitations should be imposed on the volume of private activity tax-exempt bonds."

11. I.R.C. § 103(n)(2) and (3). An issuer may elect under Section 103(n)(10) to treat any "unused" authorization as a "carry-forward" to one or more "carry-forward projects." The projects must be specifically identified, and bonds subsequently issued for those projects will not count against the later-year limit. The unused authorization may be carried forward for only three years—except for certain air or water pollution control projects, which may use a six-year carry-forward.

12. *Id.* § 103(n)(6)(A) and (B).

13. The bonds were issued to finance Carolina Power & Light's pollution control equipment.

14. Nonagricultural land acquired by a public agency in connection with an airport, mass transit, or port development project is excepted if it is acquired for noise abatement, wetland preservation, future use, or other public purpose. I.R.C. § 103(b)(16)(C).

15. See N.C. GEN. STAT. § 122B-1-29. The agency's first members were appointed in December 1984.

"temporary period" of up to three years pending construction or acquisition of the project financed with the funds. Further, a reserve fund of not more than 15 per cent of bond proceeds could be invested at an unrestricted yield.[16]

The new legislation requires that arbitrage profits that result from "acquired nonpurpose obligations" be rebated to the United States Treasury. These "acquired nonpurpose obligations" include Treasury bills and bonds purchased for a construction fund, a reserve fund, or a short-term investment.[17] But if the gross proceeds of a bond issue are spent within six months after issuance, the rebate need not be made.[18] Consequently, issuers/beneficiaries may continue to obtain unrestricted yield for a short time. Costs of obtaining credit-enhancement devices like letters of credit, lines of credit, bond insurance, or surety bonds are not included in calculating arbitrage limits. IDBs for residential rental projects are exempt from the new arbitrage limitations and are still governed by the Code and regulations as they existed before 1984.[19]

Depreciation limitations. Congress had already eliminated accelerated cost-recovery deductions ("ACRs") for many projects financed by tax-exempt IDBs.[20] With the 1984 legislation, it moved toward totally eliminating ACR for property financed with proceeds of tax-exempt bonds; only multi-family residential rental projects may still use ACRs.[21] Other projects must use straight-line depreciation.

Use of federal guarantees. There are many federal programs that guarantee debt obligations, and some of them had been used in conjunction with tax-exempt bonds. But Congress concluded that the use of the federal guarantees "results in a double subsidy,"[22] and these federally guaranteed tax-exempt bonds were proving more attractive than United States Treasury securities, which are taxable. Consequently, the Act denies tax-exempt status to interest income from IDBs that are federally guaranteed.[23]

Prohibited facilities. While the question of what facilities qualify for small-issue IDB financing is generally left to state law, Congress has declared interest income on IDBs that finance specific kinds of facilities to be taxable.[24] To the list of projects that, in effect, may not be financed with IDBs, the Act adds airplanes, "skyboxes" or other private luxury boxes (usually associated with stadium construction), health clubs, facilities primarily used for gambling, and stores whose principal business is the sale of alcoholic beverages for off-premises consumption. These tighter restrictions should not affect IDBs in North Carolina because the Department of Commerce, which must approve all IDB projects in this state, has previously disqualified all such projects.

The tighter restrictions on certain projects should not affect IDBs in North Carolina because the Department of Commerce, which must approve all IDB projects in this state, has already disqualified such projects.

Residential rental property. The new legislation does not affect many of the attractive features of tax-exempt financing for multi-family rental housing under Section 103 of the Code. For example, (a) residential rental projects are excluded from the state per capita limits;[25] (b) although the Act denies tax-exempt status to obligations guaranteed by the federal government, residential rental projects are excepted unless the proceeds are invested in federally insured deposits or accounts;[26] (c) residential rental property remains exempt from the provisions that require straight-line depreciation;[27] (d) residential rental property is excepted from the arbitrage limitations of the new Act;[28] and (e) property is treated as residential property under the Act even if part of the building in which the property is located is used for other than residential rental purposes.[29] The restrictions on the use of bond proceeds for acquiring land or existing

16. Treas. Reg. 1.103-14(d).

17. "(H DEFINITIONS. For purposes of this paragraph—"(i) NON PURPOSE OBLIGATIONS. The term 'nonpurpose obligation' means any security [within the meaning of subparagraph (A) or (B) of section 165(g)(2)] or any obligation not described in subsection (a) which—(I) is acquired with the gross proceeds of an issue, and (II) is not acquired in order to carry out the governmental purpose of the issue.'" I.R.C. § 103(6)(H).

18. I.R.C. § 103(c)(6)(F)(iii).

19. *Id.* § 103(c)(6)(B).

20. *Id.* § 168(f)(12)(C).

21. Pub. L. No. 98-369, § 628(B)(I)(C).

22. *Op. cit. supra* note 5, p. 1685.

23. Pub. L. No. 98-369, § 622, which amended I.R.C. § 103(h).

24. I.R.C. § 103(b)(6)(O).

25. *Id.* 103(n)(7)(B).

26. *Id.* 103(h)(3)(C).

27. *Id.* 168(f)(12)(C).

28. *Id.* 103(c)(6)(B).

29. Pub. L. No. 98-369, § 628(e), which amended I.R.C. 103(b)(4)(A).

facilities, outlined above, also apply to multi-family residential rental project bonds.

Refunding. Entities that use bond financing occasionally find it necessary to discharge debt in order to remove it from their balance sheets. Further, fluctuations in interest rates sometimes make it attractive to substitute new debt at lower rates for old debt at higher rates. "Refunding" can accomplish these purposes.

North Carolina permits IDBs to be refunded, although the North Carolina Constitution (Art. 9, Sec. 9) specifically prohibits the refunding of projects already financed by a source other than IDBs with tax-exempt bonds. The Act continues to allow refundings, with some limitations. The definition of private-activity bonds in the provisions as to state per capita limits excludes refunding bonds, but only to the extent that the amount of the refunding bonds does not exceed the amount of the refunded obligation.[30] Individual users that are over the $40 million limit may refund existing bonds with the proceeds of a new bond issue under certain circumstances. Although costs of issuing the refunding bonds may not be financed from the proceeds of that issue, the original bonds need not be refunded until 180 days after the refunding bonds are issued. Arbitrage earnings during the period may be used to recover substantial portions of these costs.

30. I.R.C. § 103(n)(7)(D).

The battle over IDBs continues. The recent Reagan administration proposal on tax reform shows a strong sentiment to cut back tax-exempt financing. It eliminates all but the most traditional forms of tax-exempt finance. Among other things, it would (a) bar the tax exemption for new bond issues if more than 1 per cent of the proceeds was used by any nongovernmental entity, and (b) impose new restrictions on arbitrage and refundings even on the government-use bonds still considered tax-exempt.

Issuers need to monitor developments concerning these proposed changes. In the meantime, however, because of its traditionally limited use of IDBs, North Carolina is in a relatively strong position, vis-à-vis the many states that may have exceeded the new limits on IDBs, to continue using IDBs. While issues must be carefully structured to account for the recent changes in the tax law, IDBs can still be an important tool for economic and community development in North Carolina.

Understanding the Mayor's Office in Council-Manager Cities

James H. Svara

In November of odd-numbered years, cities throughout North Carolina hold elections to choose their mayor. Nearly a third of them—virtually all cities with over 5,000 population—use the council-manager form of government. The office of mayor in those cities—that is, council-manager cities—is probably the most misunderstood leadership position in government. Some of us may think of a mayor in North Carolina as being comparable with mayors of cities in certain other states, who occupy a true executive office (most visibly, the big-city mayors of the North). Others of us may dismiss the mayor as a figurehead. North Carolina's nonexecutive mayors are commonly perceived either to be doing less than they actually are or to have more power to act than state law and the municipal charter give them. Mayors in council-manager cities are not mere ribbon-cutters and gavel-pounders, nor are they the driving force in city government. What they are—somewhere between the two stereotypes—is an important leader who can strongly influence how well city government performs.

It is difficult for voters to know how to assess candidates for mayor. Those who seek and hold the office may also need to know more about the position and the realistic potential inherent in it. Mayoral candidates, borrowing a page from the campaign book of the executive mayor, often present themselves as the leader who will take charge of city government and propose bold solutions to the city's problems. Once elected, however, they will have difficulty in following through. Although he or she has the title of mayor and some of the popular expectations for leadership associated with the title, the North Carolina mayor has no powers on which to base true executive leadership and must depend on other officials, elected and appointed, for most of what he accomplishes. He lacks both the ability to initiate policies on his own and the legal authority to implement those policies.

Let's look at the office of council-manager mayor in order to help voters know what qualities to look for in a candidate and to suggest to officeholders and candidates how they can best fill that post.

The nature of the office

The council-manager mayor is analagous to a company's chairman of the board, important but not crucial to the organization's operation. The government may operate adequately with minimal leadership from the mayor, since the plural executive organization provided by the council spreads out the responsibility for policy initiation. In addition, the manager has considerable informal influence, based on expertise and staff support, over the generation of proposals, and he has formal authority to direct implementation. Still, the "chairman" mayor can have an impact on governmental performance through contributions to the governing process that, though different from those of the "executive" mayor, are still important.

The elements of leadership can be organized in two categories. One category is a coordinative function in which the mayor is more or less active at pulling together the parts of the system to improve their interaction. The parts are the council, manager/staff, and public; the mayor has a special and close relationship with each. By virtue of his favored position, the mayor can tap

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into various communication networks among elected officials, governmental staff, and community leaders. Although they can and do interact with each other independently, the mayor—if he has done his homework—can transmit messages better than anyone else in the government because of his broad knowledge. He therefore has a unique potential to expand the level of understanding and improve the coordination among the participants in city government.

The second element is guidance in the initiation of policy, which may be done as part of the coordinating function or separately. The mayor not only channels communication but may also influence and shape the messages being transmitted. He can also use more dramatic techniques to raise issues and put forth proposals, but these must be used cautiously because he runs the risk of alienating the council, whose support he needs to be effective.

Variety of roles

It is a testament to the diffuseness of the mayor's job that there is such variation in how the job is perceived, once one goes beyond formal responsibilities.[1] In a series of interviews with and about the mayors of North Carolina's five largest cities (Charlotte, Winston-Salem, Greensboro, Raleigh, Durham) the mayors, council members, and community leaders were asked to describe the mayor's responsibilities and roles in their city. The responses revealed ten roles, which can be grouped into four dimensions of leadership—i.e., major areas in which a mayor may contribute to the functioning of city government. Whether he engages in the roles and how well he handles them are questions that provide the basis for distinguishing among types of mayoral leadership, which are addressed in the next section. The dimensions and roles of leadership are listed in Table 1.

Table 1. Dimensions and Roles of Mayoral Leadership in Council-Manager Cities

—Roles are identified by letters A-J.
—Dimensions are indicated by numbers I-IV.

I. Ceremony and Presiding: the typically perceived type of leadership
   - A. Ceremonial tasks
   - B. Spokesman for council
   - C. Presiding officer

II. Communication and Facilitation
   - D. Educator: informational and educational tasks vis-a-vis the council, manager, and/or public.
   - E. Liaison with manager: promotes informal exchange between the council and the manager and staff.
   - F. Team leader: coalescing the council, building consensus, and enhancing group performance

III. Organization and Guidance
   - G. Goal-setter: setting goals and objectives for council and manager; identifying problems; establishing tone for the council.
   - H. Organizer: stabilizing relationships; guiding the council to recognition of its roles and responsibilities; defining and adjusting the relationship with the manager.
   - I. Policy advocate: developing programs; lining up support for or opposition to proposals.

IV. Promotion
   - J. Promoter: promoting and defending the city; seeking investment; handling external relationships; securing agreement among parties to a project.

Ceremony and presiding. The *ceremonial* function is the dimension of leadership that observers of city government typically see. The mayor is in heavy demand for appearances at many and various meetings, dinners, and other special occasions. He also serves as *spokesman for the council,* enunciating positions taken, informing the public about coming business, and fielding questions about the city's policies and intentions. In these two activities, the mayor builds an extensive contact with the public and the media, which can be a valuable resource. In addition, the mayor *presides* at meetings. In so doing, he sets the tone for meetings and may exert mild influence over outcomes by guiding the debate, by drawing more from some witnesses and limiting the contributions of others, and by determining the timing of resolution of issues. Councils often face difficult choices and, like

1. David M. Lawrence and Warren J. Wicker, eds., *Municipal Government in North Carolina* (Chapel Hill: Institute of Government, 1982), pp. 51-52.

Table 2. Performance Levels in Various Leadership Functions by Types of Mayors in Council-Manager Cities

Type	Ceremony and presiding	Communication and facilitation	Organization and guidance	Promotion
Caretaker	Low	Low	Low	Low
Symobolic leader	High	Low	Low	Low
Coordinator	High	High	Low	Low
Activist/ Reformer	High	Low	High	Variable Low
Promoter	High	Low	Low	High
Director	High	High	High	High

small groups generally, depend to some extent on the resolve of the leader either to decide or to delay.

Communication and facilitation. Beyond simply transmitting council views to the public, the mayor may also serve as an *educator.* In his relations with the council, the public, the media, and/or the manager and staff, the mayor identifies issues or problems for consideration, promotes awareness of important concerns, and seeks to expand citywide understanding by providing information. In this activity, he is not primarily promoting an idea, as in the activities discussed below, but informing and educating. For example, the mayor who systematically speaks to the press and groups about the increasing imbalance between needs and revenues helps to prepare the public for a tax increase at budget time.

As *liaison* person with the manager, he links the two major components of the system—the legislative body and administrative apparatus—and can facilitate communication and understanding between elected and appointed officials. The mayor increases the manager's awareness of council preferences and can predict how the council will react to administrative proposals. Although the manager must maintain positive relations with each member of the council, the mayor-manager interaction is an efficient way to exchange information. For the mayor to hold up his end of the relationship, he must be sensitive to the concerns of all council members, accurately convey their sentiments, and share with them what he learns from the manager.

Finally, as *team-builder* the mayor works to coalesce the council and build consensus. In this regard, he promotes cohesion without trying to guide the council in any particular direction. Council members do not automatically work well together, and the larger the council the less harmony there is likely to be. The goal here is not agreement or likemindedness, but rather to approach city business as a common enterprise. The mayor as team leader seeks to promote full expression, help the council work through differences expeditiously, and encourage it to face issues and resolve them decisively.

Organization and policy guidance. In the roles considered so far, the mayor has stressed communication and coordination, whereas the group of roles to be discussed here involves influencing the direction of city government affairs and the content of policy. As *goal-setter,* the mayor establishes goals and objectives for council and manager, identifies problems, and sets the tone for the council. Some mayors keep track of a set of key objectives so that the council and the manager orient themselves to accomplishing these priority items.

The mayor may also be active as an *organizer* and stabilizer of the key relations within city government. He guides the council to recognition of its roles and responsibilities. He helps to define the pattern of interaction between council and manager, monitors it, and makes adjustments. The sharing and separation of responsibilities between the council and manager in this form of government is a complex relationship.[2] The mayor is uniquely situated to control it and better able than any other official to correct it, if change is needed. For example, the mayor may advise the manager to bring more matters to the council or fewer; he may intervene with a council member who is intruding into operational matters; or he may seek to alleviate tension between the council and staff before a serious rift develops. The mayor often handles these efforts in organization and stabilization privately. Indeed, his ability to make such adjustments out of the spotlight is one of his greatest advantages.

2. James H. Svara, "Dichotomy and Duality: Reconceptualizing the Relationship Between Policy and Administration in Council-Manager Cities," *Public Administration Review,* 45 (January/February 1985), 221-32.

Finally, the mayor may be a *policy advocate.* As an active guide in policy-making, he develops programs and lines up support or organizes opposition to proposals. In these activities, the mayor most closely resembles the executive mayor's public persona as the city's problem-solver. The chairman mayor has a potential for policy leadership that is not sufficiently recognized.[3] Still, the mayor should be aware that advocating policies must be balanced with the other roles, not pursued to the exclusion of others. He must proceed subtly and more indirectly than the executive mayor, who can launch a new proposal with a press conference and has extensive resources for building coalitions. Still, the chairman mayor can influence the perspectives and decisions of the council and the manager. Especially if he is a mayor elected directly by the voters rather than a member of the council who has been elected to the mayorship by his council colleagues (as some mayors are), the mayor has a vague mandate to lead, but he must take care not to alienate the council and isolate himself by moving too far away from it as an assertive advocate of new policies.

Promotion. Conceptually distinct from the functions already discussed is the mayor's role in promoting and defending the city. He may be involved in external relations and help secure agreement among parties to a project. For some mayors, the *promoter* role is a simple extension of ceremonial tasks. Others are active initiators of contacts and help develop possibilities for the city. As official representative, the mayor has extensive dealings with officials in other governments and may serve as a key participant in formulating agreements with state or federal officials, developers, and others who seek joint ventures with city government. The mayor may also take the lead in projecting a favorable image of the city and seek to "sell" others on investment in it.

Types of leadership

The kind of mayoral leadership an incumbent provides depends on which roles he performs and how well. The combinations of activities pursued by individual mayors is varied, but certain general types are clear.[4] Mayors develop a leadership type for themselves by the way they combine the four dimensions of leadership. (See Table 2.)

The mayor could invest so little in the office and define its scope so narrowly that he is simply a *caretaker*—a uniformly underdeveloped type of leadership. For most mayors, the presiding and ceremonial tasks are inescapable because they are legally required or inherent parts of the job. Mayors who perform no other roles may be called *symbolic heads* of their government. Such narrowly defined leadership wil not meet the needs of the modern governmental system. Although he serves as presiding officer, ceremonial head, and spokesman, such a mayor makes no effort to unify the council members, keep them informed, communicate with the public, intervene between the council and manager, and so forth. As a consequence, the council is likely to be divided, confused, and disorganized, and the manager's influence will expand.

If he does undertake the unifying, informing, communicating and intervening tasks, the mayor becomes a *coordinator.* Pursuing these activities effectively is essential to a smoothly functioning council-manager government with strong elected leadership. Council members do not always work together well; nor do the council, manager, and public necessarily interact smoothly. The coordinator is a team leader; he keeps the manager and council in touch and interacts with the public and outside agencies in order to improve communication. He helps to achieve high levels of shared information. But since he is weak in policy guidance, he contributes little to policy formulation (at least, no more than any other member of the council.) The coordinator is not a "complete" type of leader, since the organizing and guidance roles are not part of his repertoire.

There are two other incomplete types of leader. One of them has two variations—the activist and the reformer. This type emphasizes policy guidance and advocacy but neglects coordinative activities, especially team-building. The *activist* wants to get things accomplished quickly and succeeds by force of his personality and the presence of a working majority on the council. Although influential, the activist is viewed by some members of the council (perhaps even his own supporters) as abrasive and exclusionary in his leadership. The tenure of this type of mayor is marked by successful policy initiatives along with friction and disgruntlement among the council members. The *reformer* launches noble campaigns that have little prospect of success because he has limited support on the council. The reformer is more concerned with enunciating ideas about what the city should do than working with the council and maintaining coordination. As a result, he is likely to be ineffective as a policy leader

3. Nelson Wikstrom, "The Mayor As a Policy Leader in the Council-Manager Form of Government: A View from the Field," *Public Administration Review* 39 (May/June 1979), 270-76.

4. A review of the literature and typology of roles in mayor-council and council-manager cities is presented in James H. Svara and James W. Bohmbach, "The Mayoralty and Leadership in Council-Manager Government," *Popular Government* 42 (Winter 1976), 1-6.

because he is isolated from the rest of the council.

Another incomplete form of leadership found occasionally is the mayor who specializes in promotion. The *promoter* role may be combined with any of the other types and is becoming increasingly important for all mayors. The mayor who is excessively involved in promotion, however, may devote so much time to traveling and selling the city that he gives little attention to other aspects of the job. This type of leader may be more successful at negotiating agreement among developers, financial institutions, and government agencies for a major project than he is at welding a majority within the council. The specialized promoter leaves a vacuum of responsibility for tasks involving coordination, organization, and policy guidance, and others must try to fill it.

The *director* is a complete type of mayor who not only contributes to smooth functioning but also provides a general sense of direction. A primary responsibility of the council is to determine the city government's mission and its broad goals. The director contributes significantly to consideration of broad questions of purpose. One mayor suggested that "my toughest job was keeping the council's attention on the horizon rather than on the potholes."

This type of mayor stands out as a leader in the eyes of the council, the press, and the public, but he must use that recognition as a source of leverage rather than control. He can enhance the influence of elected officials by unifying the council, filling the policy vacuum that can exist on the council, and guiding policy toward goals that meet the community's needs. Furthermore, he is actively involved in monitoring and adjusting relationships within city government to maintain balance, cooperation, and high standards. No one else can attack the causes of friction between the council and manager (which may be produced by failings of either party) or promote the constructive interaction that is needed for effective performance. This mayor does not usurp the manager's prerogatives or diminish his leadership. In fact, in the organizer role, the mayor seeks to enhance the manager's ability to function as the chief executive officer. In sum, although the director does not become the driving force as the executive mayor can be, he is the guiding force in city government.

Conclusion

The council-manager form of government needs certain contributions from the mayor in order to function smoothly. At a minimum, the mayor should accept the coordinator type of leadership in order to facilitate exchange of information among public, council, and staff and to help the council operate more effectively. This attention to the internal dynamics of city government and relationships with the public is crucial for complete leadership. If a mayor is to shape both the process and the direction of city government, he cannot ignore the coordinative dimension; he can achieve victories over the short run but may become an isolated reformer. The mayor who defines the job as simply symbolic leadership is ignoring many important roles that are needed for effective city government.

Voters will have difficulty assessing whether a candidate has the qualities and intentions needed to be a good mayor for their city. In meetings with candidates, it is important to find out how they conceive the office and how they would relate to other officials. Priorities and ideas about policy are important, because they are likely to be manifested in the intricate details of interaction handled by the mayor. It is also important to know how the prospective mayor will work with others to accomplish his policy goals. The media should try to find out how the candidates perform as leaders in small groups. The performance of incumbents can be assessed against the checklist of roles outlined in Table 1. The standards for assessing performance must be grounded in the conditions of that community and in what kind of mayor the city needs. Given the ambiguous nature of the mayor's office, these efforts by citizens to learn about candidates take on a special importance. In the process, voters not only assess the candidates but also help shape expectations for the office itself.

For candidates and incumbents, it is time to abandon the notion that the mayor's office is "what one chooses to make of it." This oft-heard statement is misleading in two important respects. First, the activities of a good mayor are not matters of choice. The increasing demands on city governments mean that these governments need strong leadership from the mayor, at least as a coordinator and preferably as a director. If the mayor does not undertake these activities, a serious vacuum exists in council-manager government. Therefore, a good mayor *must* perform certain roles.

Second, the statement fosters the misconception that mayors who seek to define the responsibilities of their post broadly are on an "ego trip." They could, it would seem, just as well "choose" to be the first among equals on the council rather than make a big deal of being the mayor. That position is not consistent with this study's analysis of leadership in the large North Carolina cities. The nature of the office in council-manager government requires that the mayor be prepared to accept certain responsibilities reflected in the ten roles. He does so not because of inflated self-esteem but because the position calls for assumption of responsibility. Indeed, the mayor who provides

complete leadership has accepted restraints on his freedom and the obligation to be an invisible leader within the council as well as a public advocate. The same logic applies to similar positions, such as the chairman or chairwoman of the county board of commissioners or the school board. Whoever occupies such offices should be expected to assert leadership across a wide range of roles and should not be faulted for doing so.

In conclusion, the council-manager mayor can contribute substantially to the performance of his government and the betterment of his community. The position is not a pale imitation of the executive mayor's office in mayor-council city but rather a unique leadership position that requires distinctive qualities. Council-manager cities ask the mayor not to run the show but to bring out the best in council and staff and to foster a common sense of purpose. dP

Don Hayman Retires

Donald Bales Hayman, Professor of Public Law and Government and Assistant Director of the Institute of Government, will retire on December 31, 1985.

The bare benchmarks in Hayman's career are simple. Born May 9, 1919, in the Kansas wheat country. Graduated from high school in Formosa, Kansas, and from the University of Kansas, with high honors at both. M.A. and Ph.D. degrees from The University of North Carolina at Chapel Hill. Three years in the Office of Personnel, U.S. Department of Labor. A member of the Institute of Government faculty since April 1, 1948.

But these facts only begin to describe Don Hayman's career. If a single term were to be used, it would be "devoted." Don's work at the Institute of Government has been characterized by his devotion to the merit principle in public personnel administration, to the improvement of public administration, to the mission of the Institute of Government and The University of North Carolina, and to the state and its citizens.

Don Hayman is a man who has found his being in his devotion to the larger public good. His satisfactions come in service to others. He cannot refuse a request for help. His limits have been not those of the spirit but of the flesh. He will not do less; he can not do more.

The evidence for this evaluation is abundant in the record of Don's work and in the recognition given to that work. In his first years with the Institute, Don prepared a guidebook on the law enforcement officers' retirement system, reported on city and county personnel practices for the Charlotte-Mecklenburg merger study, established new selection procedures for the State Highway Patrol, and helped to draft a modern personnel system for state government that was enacted by the 1949 General Assembly.

Over the following years Don has regularly advised state agencies and Committees of the General Assembly on personnel matters. He has also worked with more than 200 cities and counties in drafting personnel ordinances and in preparing position classification and pay plans. By letter and by telephone he has responded to more than 50,000 personnel inquiries from state and local officials on topics ranging from recruitment to retirement.

In the early 1950s, at the request of the State Treasurer, Don made a study of the financial soundness of all retirement systems in the state and the feasibility of bringing state and local employees under Social Security. Today's retirement arrangements for state and local govern-

(continued on inside back cover)

Book Review

A Citizen's Handbook on Groundwater Protection, by Wendy Gordon. New York: Natural Resources Defense Council, Inc., 1984. 208 pages. $10.00. Paperback.

During the glory days of environmental concern and legislation in this country—the late 1960s and early 1970s—no subject received less attention than groundwater protection. Times have changed. We have come to appreciate that removing pollutants from the air and surface water and depositing them on the land may improve air and surface water quality at the risk of contaminating ground water; we have come to recognize the First Law of Environmental Degradation—Everything Must Go Somewhere; and we have seen several instances in which groundwater used for public water supply has become contaminated with hazardous pollutants. In consequence, government agencies, conservation organizations, and individual citizens have become concerned about the critical need to protect groundwater from pollution.

A Citizen's Handbook on Groundwater Protection provides a needed basic-level source book on groundwater. Its major divisions include a discussion of what groundwater is, how it flows, and how it becomes contaminated; a discussion of citizen action to protect groundwater; and a review and summary of federal and state laws that may be used to protect groundwater from pollution. Appendices contain the addresses of state agencies responsible for groundwater and citations to state statutes dealing with groundwater. There is a glossary of groundwater terms and a bibliography.

The book is written for the general reader and assumes no particular knowledge of either the scientific or legal aspects of the subject. Its weaknesses stem for the most part from the author's decision not to go too deeply into detail or to discuss complexities. In discussing what groundwater is and how it flows, the book does well in covering in summary fashion such topics as recharge areas (areas where rain and surface water permeate the land's surface to replenish groundwater), discharge areas (rivers and lakes), and the flow of groundwater down the hydraulic gradient (ground water moves slowly, without turbulence, from a point where the water level is higher to one where the level is lower). All with ample illustrations. Pollutants in groundwater are described as being in the shape of a plume, similar to a plume of smoke, moving with the general direction of groundwater flow. But the book omits any discussion of lighter-than-water contaminants, which may remain very near the water table and not flow in a plume, and heavier-than-water contaminants, which may travel downward to the first confining bed of rock or soil and then flow in the opposite direction of the general groundwater flow. The omission of any discussion of these two characteristics of some pollutants may lead the reader to believe that monitoring for groundwater pollution is a less complex task than it actually is.

As part of the discussion of the federal statutes that may be used to protect groundwater—such as the Safe Drinking Water Act, the Resource Conservation and Recovery Act, and the Clean Water Act—the author includes a bare-bones discussion of the citizen-suit provisions, which allow any person to sue EPA to require the performance of a nondiscretionary duty, or sue a private party who is violating a statute, regulation, or permit. Citizen suits are a valuable enforcement tool and have been used extensively by the Natural Resources Defense Council and other conservation organizations. The discussions would have been livelier and more interesting if they had contained some examples of cases in which suits had been brought against EPA to force it to promulgate a standard or regulation or against private parties to halt a violation of a permit or standard.

The discussions of the federal statutes, while comprehensive and a useful reference source, contain no citations to the relevant United States Code sections. This may be a lawyer's lament, and I sympathize with the author's desire to reduce the clutter of footnotes, but the book would have been much more useful if the citations had been included. One more lawyer's quibble: In discussing various legal remedies at pages 68-79, the author briefly mentions such matters as exhaustion of administrative remedies, ripeness, standing to sue, and jurisdiction and then says that the advice of a lawyer "may" be needed on these matters. I would have insisted on a lawyer's advice or not mentioned those technical legal issues.

A shortcoming caused by the book's publication date is that it contains no discussion of the effect of the 1984 amendments to the Resource Conservation and Recovery Act on groundwater. The amendments require EPA to regulate generators of at least 100 kilograms of hazardous wastes per month (the previous threshold was 1,000 kilograms per month), require the control of leaking underground storage tanks, establish specifications for the construction of new tanks, and greatly restrict the disposal of hazardous wastes in landfills.

(continued on page 18)

North Carolina's New Legal Drinking Age

Ben F. Loeb, Jr.

The modern history of alcoholic beverage control in the United States dates from ratification of Eighteenth Amendment to the federal Constitution, which prohibited the manufacture, sale, or transportation of intoxicating liquors within the United States. Congress and the states were empowered to enforce this amendment by appropriate legislation. North Carolina responded to the Eighteenth Amendment with the Turlington Act of 1923, which prohibited the purchase or possession of all types of alcoholic beverages by all age groups.[1] The Turlington Act remained virtually unchanged until the Eighteenth Amendment was repealed by the Twenty-first in 1933.

After repeal of national prohibition, the General Assembly authorized the sale of beer (first with an alcoholic content of not more than 3.2 per cent and then not more than 5 per cent) to persons at least 18 years of age, and it authorized the sale of unfortified wine (up to 14 per cent alcohol) to those at least 18 years of age.[2] It also established a local-option ABC (alcoholic beverage control) store system where persons who were at least 21 could purchase hard liquor and fortified wine (over 14 per cent alcohol).[3]

The age limits established in the 1930s remained 18 and 21 for beer and spirituous liquors, respectively, until the 1980s, when rising public concern over fatalities caused by drinking drivers resulted in enactment of the Safe Roads Act of 1983.[4] That act, which was largely a rewrite of the Driving Under the Influence Law, also raised the drinking age for malt beverages and unfortified wine from 18 to 19.[5] The minimum drinking age in North Carolina might have remained at 19 indefinitely except for federal legislation passed in 1984. Pub.L. No. 98-363 (the Federal Drinking Age/Highway Fund Law) provided that any state that had not adopted a minimum drinking age of 21 by October 1, 1986, would lose 5 per cent of its federal highway funds in fiscal year 1987 and an additional 10 per cent in fiscal year 1988. For North Carolina, that would mean a loss of over $9 million in the first year and approximately $20 million in the second. Some states might lose a great deal more. New York and Texas, for example, could each lose almost $100 million in that two-year period.[6] (See Table 1.)

The 1985 General Assembly acted swiftly, though reluctantly, in response to this federal legislation. Chapter 141 (H 101) amended G.S. 18B-300 and G.S. 18B-302 to make it unlawful to sell or give malt beverages or unfortified wine to anyone younger than 21 years of age or for a person younger than 21 to purchase or possess these beverages. However, a violation by a 19- or 20-year-old was made an "infraction" rather than a misdemeanor, punishable by a fine of not more than $25. Chapter 141 defines an *infraction* as an unlawful act that is not a crime. The procedure for charging and trying an infraction will be the same as for a misdemeanor, but conviction will have no

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The author is an Institute of Government faculty member who has written extensively on both North Carolina motor vehicle law and North Carolina liquor law.

1. N.C. Sess. Laws 1923, Ch. 1.

2. N.C. Sess. Laws 1933, Ch. 216; N.C. Sess. Laws 1939, Ch. 158.

3. N.C. Session Laws 1937, Ch. 49.

4. N.C. Sess. Laws 1983, Ch. 435.

5. N.C. Gen. Stat. §§ 18B-300, -302.

6. Cong. Rec., S8222, June 26, 1984.

consequences other than a fine. A person so convicted will not even be assessed court costs.

The new drinking age law becomes effective September 1, 1986—one month before the mandatory federal deadline. However, Chapter 141 also provides that if Congress repeals the applicable provisions of Pub. L. 98-363 or if that law is found to be unconstitutional, the operative sections of Chapter 141 will expire and the drinking age for malt beverages and unfortified wine will revert to 19. It is interesting to note that many states had already adopted a minimum drinking age of 21 for all alcoholic beverages (beer, wine, hard liquor) before Congress enacted Pub. L. 98-363. The map on the next page shows the drinking age by state in April of 1985.[7]

Alcohol and the young driver

Motor vehicle accidents are the leading cause of serious injury and death among American youth. In 1980 nearly 19,000 persons between ages 15 and 24 died in automobile crashes. The problem is that many inexperienced drivers are also inexperienced drinkers—a potentially lethal combination. A study made by the University of Michigan Transportation Research Institute (UMTRI) in 1982 demonstrates the benefits that may be achieved through a higher national drinking age. It analyzed data from Michigan, Maine, New York, and Pennsylvania. In Michigan and Maine the drinking age had been lowered and then raised again, while in New York and Pennsylvania it remained unchanged.[8]

Table 1. Potential Costs to States That Do Not Accept Age 21 As the Minimum Drinking Age

	First Year 5% Loss	Second Year 10% Loss
Alabama	$11,816,000	$23,632,000
Colorado	9,178,000	18,306,000
Connecticut	7,589,000	15,178,000
District of Columbia	2,486,000	4,972,000
Florida	24,253,000	48,506,000
Georgia	17,187,000	34,374,000
Hawaii	5,839,000	11,678,000
Idaho	4,387,000	8,774,000
Iowa	6,103,000	12,206,000
Kansas	5,527,000	11,054,000
Louisiana	14,398,000	28,796,000
Maine	2,939,000	5,878,000
Massachusetts	9,881,000	19,762,000
Minnesota	10,558,000	21,116,000
Mississippi	5,424,000	10,848,000
Montana	5,584,000	11,168,000
New Hampshire	2,646,000	5,292,000
New York	30,101,000	60,202,000
North Carolina	9,970,000	19,940,000
Ohio	17,862,000	35,724,000
South Carolina	7,616,000	15,232,000
South Dakota	4,156,000	8,312,000
Texas	33,247,000	66,494,000
Vermont	2,650,000	5,300,000
Virginia	15,560,000	31,120,000
West Virginia	6,178,000	12,356,000
Wisconsin	7,250,000	14,500,000
Wyoming	4,531,000	9,062,000

Source: CONG. REC., S 8222, June 6, 1984

Michigan. Michigan lowered its legal drinking age from 21 to 18 in the early 1970s and then returned it to 21 in 1978. After the drinking age was raised, alcohol-related accidents involving personal injury decreased by 20 per cent for the 18 through 20 age group. In addition, a 17 per cent drop occurred in accidents that resulted in only property damage.[9]

Maine. In October 1977 Maine raised the minimum drinking age from 18 to 20. During the next 12 months the number of alcohol-related property damage accidents that involved 18- and 19-year-old drivers decreased by approximately 20 per cent. However, there was no significant change in alcohol-related personal injury rates among this age group.[10]

7. "A New Prohibition," *Newsweek On Campus* (April 1985), 7.

8. "Effects of the Minimum Drinking Age on Automobile Crashes Involving Young Drivers," *The UMTRI Research Review* 13, nos. 1, 2 (University of Michigan Transportation Research Institute, Ann Arbor, Mich. July-August/ September-October 1982), 3-12.

9. *Id.* at 6-7.

10. *Id.* at 8.

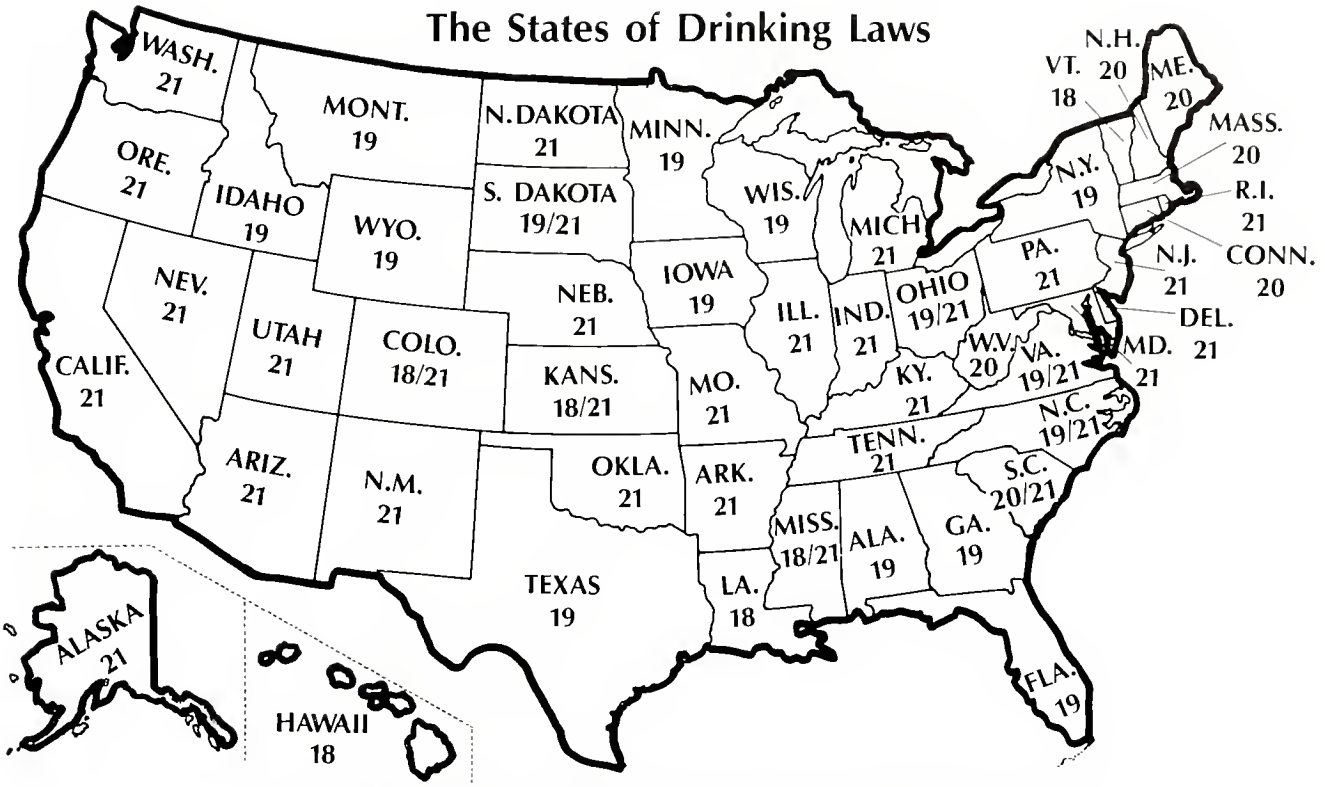

Figure 1. The States' Minimum Legal Drinking Age

New York. During the 12 months after Maine raised its drinking age, New York experienced no significant change in rates of motor vehicle accidents involving the 18-20 age group. Nor did New York see any decreases in alcohol-related property damage or personal injuries among this age group in the year after Michigan raised its drinking age. These findings indicate that the declines in accidents in Michigan and Maine probably resulted from raising the drinking age rather than from some other factor.[11]

Pennsylvania. UMTRI also compared data on motor vehicle accidents in Pennsylvania during the 1970s with its figures for Michigan and Maine. While Pennsylvania had fewer crashes involving daytime property damage than in previous years, UMTRI judged the available data to be inconclusive.[12]

The Insurance Institute for Highway Safety has also studied the effect of the drinking age on highway accidents and fatalities. In the early 1970s more than half of the states lowered their drinking age, but by 1981 fourteen of them had reinstated a higher minimum age. The result was a sharp decline in nighttime fatal crashes among the affected age group. The Insurance Institute study concluded, perhaps somewhat optimistically, that "[a]ny single state that raises its drinking age can expect the involvement in nighttime fatal crashes of the age group to which the change in the law applies to drop by about 28 per cent."[13]

Constitutional issues

The constitutionality of the federal "Drinking Age/Highway Funds Law" has already been challenged in Ohio and South Dakota, and more court tests are likely. In Ohio the plaintiffs took a voluntary dismissal, apparently to await the outcome of the South Dakota case,[14] in which the plaintiff

11. *Id.* at 9.

12. *Id.*

13. *Status Report* 16, no. 14 (Insurance Institute for Highway Safety, September 23, 1981), 9.

14. Ohio Retail Permit Holders v. Elizabeth

attacked the constitutionality of the federal law on the grounds that it violated both the Tenth and Twenty-first amendments to the Constitution. The United States District Court for the District of South Dakota upheld the constitutionality of the federal law and dismissed South Dakota's complaint.[15]

The first section of the Twenty-first Amendment merely repeals the Eighteenth (prohibition) Amendment. However, the second section provides:

> The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquor, in violation of the laws thereof, is hereby prohibited.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states, respectively, or to the people." Obviously, some legislative authority was reserved to the states by Section 2 of the Twenty-first Amendment. The exact scope of the power that the states may exercise in regard to liquor control has been the subject of numerous Supreme Court decisions.

Among the first of these cases was *Mahoney v. Joseph Triner Corporation.*[16] In that case the plaintiff corporation was manufacturing liquor in Illinois; some of it was sold in Minnesota. In 1935 the Minnesota legislature prohibited the importation of any brand of liquor containing more than 25 per cent alcohol unless the brand was registered with the United States Patent Office (apparently an attempt to protect Minnesota liquor manufacturers). At the time this statute was enacted, the Triner Corporation was selling many brands of liquors not registered with the Patent Office. The corporation sued in federal district court to enjoin the Minnesota Liquor Control Commissioner from interfering with its business, alleging that the statute in question violated the equal protection clause of the Fourteenth Amendment. The trial court ruled for the corporation, and the defendant commissioner appealed.

The Supreme Court found that the state statute clearly discriminated in favor of liquor processed within Minnesota, but it held that under the Twenty-first Amendment discrimination against imported liquor was permissible even though it was not an incident of reasonable regulation of the liquor traffic. In upholding the constitutionality of the Minnesota statute, the Court stated: "A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth."[17]

Another allegedly discriminatory state statute was tested in *Indianapolis Brewing Company v. Liquor Control Commission.*[18] In 1937 the Michigan Liquor Control Act was amended to prohibit Michigan beer dealers from selling beer manufactured in a state that by statute discriminated against beer manufactured in Michigan. Indiana was one of several such states, and an Indiana brewing company brought action in federal district court to enjoin enforcement of the Michigan law. The brewer contended that the Michigan statute violated several provisions of the Constitution, including the commerce clause, the due process clause, and the equal protection clause. In finding the statute constitutional, the Supreme Court said,

> Since the Twenty-first Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause; and . . . discrimination between domestic and imported intoxicating liquors . . . is not prohibited by the equal protection clause. The further claim that the law violates the due process clause is also unfounded. *The substantive power of the state to prevent the sale of intoxicating liquor is undoubted* [emphasis added].[19]

In 1970 the California Department of Alcoholic Beverage Control promulgated regulations that in effect prohibited the sale of liquor in licensed establishments that allowed lewd dancing or entertainment. A three-judge district court concluded that these regulations unconstitutionally abridged freedom of expression guaranteed by the First and Fourteenth amendments to the Constitution. In reversing the district court, the United States Supreme Court noted that the state regulations did not censor a dramatic performance in a theater but dealt with only the licensing of bars and nightclubs that sell liquor by the drink. While the Court did not go so far as to hold that the Twenty-first Amendment superseded all other provisions of the Constitution in the area of liquor regulation, it did view the state's authority in this area as somewhat broader than the district court had done. In finding for the state, the Court said, "Given the added presumption in favor of the validity of the state regulation in this area that the Twenty-first Amendment requires, we cannot hold that the regulations on their face violate the Federal Constitution."[20]

H. Dole, U.S. District Court, Southern District of Ohio (Eastern Division), Civil Action Number C2-84-1541 (1984).

15. South Dakota v. Elizabeth H. Dole, U.S. District Court, District of South Dakota (Western Division), Civil Action Number 84-5137 (1984).

16. 304 U.S. 401 (1938).

17. *Id.* at 404.

18. 305 U.S. 391 (1938).

19. *Id.* at 394.

20. California v. LaRue, 409 U.S. 109 (1972).

The Court reached a similar decision in *New York State Liquor Authority v. Dennis Bellanca.*[21] In that case the owners of several nightclubs and bars sued in a New York court, alleging that a state statute prohibiting nude dancing in establishments licensed to sell liquor for on-premises consumption violated the First Amendment in that it prohibited topless dancing on all licensed premises. The New York courts agreed, reasoning that topless dancing was a form of protected expression under the First Amendment. The U.S. Supreme Court, in reversing the New York court, stated: "This court has long recognized that a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries . . . . It is equally well established that a State has broad power under the Twenty-first Amendment to regulate the times, places, and circumstances under which liquor may be sold."[22] Apparently the Court concluded that a state's broad power to regulate the sale of liquor outweighed any First Amendment protection accorded nude dancing.

Thus the U.S. Supreme Court has invoked the Twenty-first Amendment to successively sanction state regulation of liquor imports, sale of imported liquor, sale of all liquor, and the conditions of sales, notwithstanding apparent conflicts with other provisions of the U.S. Constitution. However, in another line of cases the federal courts have determined that a state's authority under the Twenty-first Amendment is not absolute.

In *Craig v. Boren,*[23] for example, the Supreme Court considered an Oklahoma law that prohibited the sale of 3.2 per cent beer to males under age 21 and females under age 18. The action was brought by a male between ages 18 and 21 and a licensed female beer vendor. A three-judge district court sustained the constitutionality of the Oklahoma statute. On appeal the U.S. Supreme Court observed that the central issue of the case was whether this gender-based difference constituted a denial to 18-year-old males of equal protection under the Fourteenth Amendment. Statistics presented by the state indicated that males in the 18-20 age group were arrested much more frequently for driving under the influence and drunkenness than females of the same age. Despite these data, the Supreme Court found that the statute invidiously discriminated against young males. The state contended that this type of discrimination was permitted by the Twenty-first Amendment; but the U.S. Supreme Court, in rejecting this argument, stated:

> In sum, the principles embodied in the Equal Protection Clause are not to be rendered inapplicable by statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups. We thus hold that the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case . . . . We conclude that the gender-based differential . . . constitutes a denial of equal protection of the laws to males aged 18-20 . . . .[24]

It would appear in light of these cases that a federal drinking-age law might well run afoul of either the Twenty-first Amendment (an infringement on state power) or the Fourteenth Amendment (because of an impermissible classification). However, what may save the Federal Drinking Age/Highway Fund Law is that it does not really mandate a minimum drinking age. Rather, it gives the states an incentive to set a higher minimum. The general welfare clause (also known as the congressional spending-power clause) apparently permits the federal government to do some things indirectly that it may not do directly.[25]

In *Oklahoma v. United States Civil Service Commission,*[26] for example, the federal government threatened to withhold highway funds because a member of the state highway commission had engaged in political activity in violation of the federal Hatch Act, which forbids partisan campaigning by state employees in areas financed by federal funds. The state brought suit, alleging that the Hatch Act, as applied in this case, violated the Tenth Amendment to the federal Constitution. In upholding the law's constitutionality, the Court said: "The Tenth Amendment does not forbid the exercise of this power in the way that Congress has proceeded in this case . . . . [T]he Tenth Amendment has been consistently construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end."[27]

More recently the U.S. Court of Appeals (D.C. Circuit) upheld the constitutionality of a provision of the Social Security Act that required states, as a condition of receiving federal Medicaid funds, to maintain certain levels of state payments to the "supplemental security income program." The court found that the challenged provision represented an appropriate exercise of the congressional spending power, and thus did not violate the Tenth Amendment. Most significantly, the court stated:

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21. 452 U.S. 714 (1981).
22. *Id.* at 715.
23. 429 U.S. 190 (1976).
24. *Id.* at 208-10.
25. U.S. Const. art. 1, § 8.
26. 330 U.S. 127 (1946).
27. *Id.* at 143.

> The conditions that Congress may set in dispensing federal funds are not restricted to those areas over which Congress has direct regulating authority . . . . [W]e have been unable to uncover any instance in which a court has invalidated a funding condition.[28]

The motor vehicle accident fatality rate in North Carolina, which closely parallels the national experience, has been decreasing steadily since the mid-1930s. In 1934 there were 26.46 fatalities per 100 million vehicle miles driven in this state. That figure had dropped to 13.80 in 1944, then to 6.77 in 1954, to 4.40 in 1974, and to 3.01 in 1984. This represents a decrease of almost 90 per cent over five decades.[29] Raising the drinking age for malt beverages and unfortified wine to 21 is unlikely to have a sudden or dramatic effect on the already low North Carolina per-mile highway death rate. However, this federally inspired legislation, along with other recent highway safety measures (i.e., tough DWI laws, mandatory seat belt laws), should contribute to a continued slow but steady decline in the highway death toll.

28. State of Oklahoma v. Schweiker, 655 F.2d 401, 406 (1981).

29. *North Carolina Traffic Accident Facts* (Raleigh: North Carolina Department of Transportation, 1984).

Book Review

(continued from page 12)

The book contains an especially helpful chapter on how citizens can organize themselves for action to protect groundwater and how to deal with government agencies responsible for controlling groundwater contamination. I like the positive tone of the advice on how to apply pressure to government agencies: to be for various protective measures rather than against every proposal. The critical analysis of the federal drinking water standards under the Safe Drinking Water Act is also instructive. No one should be misled into believing that his drinking water is not harmful to his health just because it has been found to be free from the listed contaminants or below the levels of the standards. As the author points out, standards have been promulgated for only a limited number of chemicals found in groundwater, and there are no standards for most of the synthetic organics, many of which are suspected carcinogens.

The description of the process by which a generator, transporter, or disposer of hazardous wastes obtains a permit under the Resource Conservation and Recovery Act is an excellent job of making a complicated procedure understandable. Although the 1984 RCRA amendments have changed the process somewhat, the *Handbook's* discussion will still be helpful.

Although the book is intended to be a practical guide for citizen action to protect groundwater and not a critical study of groundwater pollution problems and the legal and institutional arrangements for dealing with them, the reader cannot feel optimistic about our chances of protecting our groundwater. No federal statute deals comprehensively with groundwater pollution: EPA has found it impossible to develop an effective strategy to protect groundwater; many of the necessary protective actions must be in the form of state or local land-use rules that protect recharge areas and wells; and local governments have generally been reluctant to use land-use regulation to protect surface water quality, much less groundwater quality. And once contaminated, groundwater is often impossible to decontaminate. Even when remedial measures can be taken, they are very expensive.

If progress is to be made in controlling groundwater pollution, informed citizen action will be essential. The *Handbook* provides interested citizens a useful survey of the problem, a review of the laws that can be used to address the problem, and a guide to bringing influence and opinion to bear in the most effective manner.—*William A. Campbell*

MEMO:

How Far May North Carolina Local Governments Go in Regulating Hazardous Waste?

From: Glenn Dunn

I. Is there enabling legislation authorizing local governments to adopt ordinances regulating hazardous waste?

A. A city or town in this state has no inherent police power. It may exercise only such powers as are expressly conferred on it by the General Assembly or are necessarily implied from those expressly so conferred. *Conover v. Jolly,* 277 N.C. 439, 177 S.E.2d 879 (1970). This principle applies as well to counties.

B. There is clearly adequate enabling legislation, both general and specific, for both cities and counties to adopt ordinances regulating hazardous waste.

1. **General enabling legislation.** Cities are authorized to define, prohibit, regulate or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and they may define and abate nuisances. G.S. 160A-174. Counties have precisely the same general authority. G.S. 153A-121. There can be little doubt that regulation of hazardous wastes and the facilities that treat, store, or dispose of such wastes would fall within this general grant of ordinance-making power.

2. **Specific enabling legislation.** In addition to the above general ordinance-making power, cities and counties have been granted more specific power to adopt ordinances pertaining to hazardous waste management. Each of the specific grants of authority discussed below in (a) through (e) provides an adequate basis for ordinances regulating some aspect of hazardous waste management. In combination, these statutes constitute further statement of the General Assembly's clear intent that local governments be authorized to establish a thorough regulatory scheme regarding such activities.

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This article was orginally published in a slightly different form by the North Carolina Bar Foundation as part of a set of continuing legal education materials on *The Regulation of Hazardous Waste in North Carolina,* Jan. 18, 1985. It is reprinted here by permission of the North Carolina Bar Foundation.

(a) Cities and counties may adopt ordinances pertaining to the disposal of solid wastes within their jurisdictions, including the requirement that solid waste be placed in specified places or receptacles for collection and disposal. G.S. 160A-192 and G.S. 153A-132.1. Counties have more explicit authority to regulate storage, collection, transportation, use, disposal, and other disposition of solid wastes. G.S. 153A-136. This provision requires that an ordinance be consistent with and supplementary to regulations of the Department of Human Resources (DHR). Hazardous waste is by statutory definition a subcategory of solid waste. G.S. 130A-290(18).

(b) Cities and counties may adopt ordinances pertaining to the restriction, regulation, prohibition, possession, storage, use, or conveyance of any explosive, corrosive, or inflammable substances or any instrumentalities of mass death or destruction in their jurisdictions. G.S. 160A-183, G S. 153A-128. Most, if not all, hazardous waste would fall within the subject matter described by the statutes.

(c) Cities and counties may adopt ordinances for abatement of public health nuisances that are dangerous or prejudicial to the public health or public safety. G.S. 160A-193 and G.S. 153A-140.

(d) The authority of municipalities is further supplemented by authority to adopt ordinances for the regulation or prohibition of the emission or disposal of substances or effluents that tend to pollute or contaminate land, water, or air—rendering or tending to render it injurious or an interference with property. G.S. 160A-185. This grant of authority expressly limits ordinances to being consistent with and supplementary to state and federal laws and regulations. *Stanly v. Department of Conservation*, 284 N.C. 15, 199 S.E.2d 641 (1973).

(e) Cities and counties clearly may adopt zoning ordinances to regulate buildings and other structures, including those that generate, treat, store, or dispose of hazardous waste. G.S. 160A-381 and G.S. 153A-340. Regulations under such ordinances may deal with, among other things, the location and use of buildings for trade and industry, density of population, and physical characteristics of structures. Special-use permits with special conditions and safeguards are authorized. This zoning authority certainly is broad enough to allow regulation of the location of waste management facilities and of many site and structural design features of such facilities.

C. Conclusion. Existing enabling legislation establishes broad and clear authority for cities and counties to regulate practically any aspect of hazardous waste management. In fact, the general delegation alone would almost certainly be adequate, especially when viewed in conjunction with the legislature's express intent that grants of power are to be broadly construed (G.S. 160A-4) and that the specific grants are not to be deemed exclusive or a limiting factor on general authority to adopt ordinances (G.S. 160A-177). Therefore, lack of authority or—more accurately—limitations on such authority are not due to inadequate enabling legislation but rather to the possibility that such ordinances are inconsistent with or otherwise pre-empted by other federal or state laws.

II. What are the limitations on the power of local governments to regulate hazardous waste?

A. The legislature has set out in G.S. 160A-174(b) the requirement that an ordinance be consistent with the Constitution and laws of North Carolina and has defined those circumstances that make an ordinance inconsistent:

(1) The ordinance infringes a liberty guaranteed to the people by the state or federal Constitution;
(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or Federal law;
(3) The ordinance makes lawful an act, omission, or condition that is expressly made unlawful by State or Federal law;
(4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or Federal law;
(5) The ordinance purports to regulate a field for which a State or Federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;
(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or Federal law.

The fact that a State or Federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.

All but two of those factors may be eliminated rather summarily for purposes of this discussion. A hazardous waste ordinance, if reasonable, should not run afoul of constitutional liberties; nor are we concerned, in this context, that it makes lawful an act made unlawful by state or federal law. Nowhere does state or federal law *expressly* provide that hazardous waste management is a subject forbidden to regulation by local ordinance, and the type of ordinance under discussion is not one that defines elements of an offense. Therefore (1), (3), (4) and (6) are not relevant here, and the remainder of this discussion focuses on (2) and (5).

B. Are ordinances regulating hazardous waste prohibited by G.S. 160A-174(b)(2) as making unlawful an act, omission, or condition that is *expressly* [author's emphasis] made lawful by state or federal law?

1. The Resource Conservation and Recovery Act (RCRA) is the federal law regulating hazardous waste. Nowhere does it expressly make any hazardous waste activities legal, and in fact it states that it does not prohibit a state or its political subdivisions from imposing requirements more stringent than those under RCRA. 42 U.S.C. § 6929. Thus any provisions that expressly make any hazardous waste activities legal within the meaning of G.S. 160A-174(b)(2) must be found in state law.

2. A careful analysis of state statutes finds that all provisions on the subject merely establish and authorize a state regulatory scheme and a permit program to implement the regulatory standards without expressly making any of the regulated activities lawful. The fact that an act or condition may ultimately be permitted does not satisfy the criterion of G.S. 160A-174(b)(2) that the act or condition be made "expressly lawful" by a state statute, when the term "expressly" is given its plain meaning as required by rules of statutory construction. *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 232 S.E.2d 484 (1976). This interpretation was supported, at least for cities, when the North Carolina Court of Appeals held that a municipal ordinance that established a more stringent standard of care for vicious or menacing dogs than a state statute on the same subject was not inconsistent within the meaning of G.S. 160A-174(b). The court reasoned that when the statute was designed to provide minimum protection in all areas of the state, stricter regulations are justified in areas of more concentrated population. *Pharo v. Pearson*, 28 N.C. App. 171 (1975).

3. There are three noteworthy cases in which a local ordinance was found inconsistent with state law. In each case, the ordinance in question established a license requirement and the license was denied to an activity that had already been licensed

under a state statute. Also, in each case the court's decision turned either on the explicit language of the statute or the ordinance. In one case, an express provision in the statute itself made the activity legal. *State v. Williams*, 283 N.C. 550, 196 S.E.2d 156 (1973). In the second case, the local ordinance expressly prohibited the activity rather than merely establishing regulations more stringent than those established by the statute. *Tastee Freez, Inc. v. Raleigh*, 256 N.C. 208, 123 S.E.2d 632 (1962). In the third case, the state statute clearly expressed legislative intent that the statute was to pre-empt or establish an exclusive procedure for approving local ordinances on the same subject. *Greene v. City of Winston-Salem*, 287 N.C. 66, 213 S.E.2d 231 (1975).

Thus each of these cases can be distinguished from the situation in which a local government adopts an ordinance that only establishes more stringent standards for management of hazardous waste.

C. Are ordinances regulating hazardous waste prohibited as purporting to regulate a field for which a state or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation?

1. This is the codification of the legal concept of "occupation of the field" as a basis for finding a local ordinance invalid as inconsistent with state law. This definition clearly codifies three familiar principles already well established by case law that must be satisfied before a statute will be found to occupy the field.

First, there must be legislative intent to occupy the field. The mere fact that a state law and the regulatory program created pursuant to it constitute a thorough regulatory scheme is not enough to foreclose a local ordinance. Second, the legislative intent must be clear. It is insufficient that the requisite intent was implied. Third, the intent must be to provide a regulatory scheme that is not just thorough and comprehensive but also complete and to the exclusion of local regulation.

The total effect of these three standards is that there must be little doubt from the plain wording of a statute that the legislature intended to proscribe local authority to regulate the subject. Analysis of all the statutory provisions concerning hazardous waste regulation fails to reveal language that even comes close to such a clear statement of legislative intent to occupy the field.

2. The statutory provision that most nearly expresses such legislative intent is G.S. 130A-296, which provides that "[i]t is the intent of the General Assembly to prescribe a *uniform* system for the management of hazardous waste and *to place limitations* upon the exercise by all units of local government of the power to regulate the management of hazardous... [author's emphasis]." Surely the term "uniform" at most only implies, and therefore falls far short of expressing, the clear legislative intent to establish a complete regulatory scheme to the exclusion of local ordinances. Even more surely, the phrase "to place limitations" is not a clear statement of intent to proscribe local ordinances generally regulating hazardous waste management activities.

3. Where a local ordinance specifically regulates hazardous waste facilities and landfills, it is even clearer that the legislature did not intend to pre-empt local ordinances generally. G.S. 130A-293(a) states the General Assembly's intent:

> Notwithstanding any authority granted to counties, municipalities, or other local authorities to adopt local ordinances, including those regulating land use, any local ordinance which prohibits or has the effect of prohibiting the establishment or operation of a hazardous waste facility or a hazardous waste landfill facility which [has been approved pursuant to the review authority established in this same statute] shall be invalid only to the extent necessary to effectuate the purposes of this article.

This provision can only be interpreted to negate any claim of general pre-emption when read in conjunction with the procedure referred to for approval of a facility. In fact, the provision actually affirms the legislature's intent that local ordinances concerning hazardous waste facilities or landfills not be generally pre-empted. The procedure for approving a facility or landfill is actually a procedure for reviewing local ordinances allegedly prohibiting such a facility or landfill. The procedure clearly provides that an ordinance is subject to review only if it is claimed to prohibit a facility or landfill, and not if it merely establishes additional regulations with which the facility or landfill can comply.

Furthermore, the facility or landfill can be built or operated in spite of the ordinance—that is, the ordinance can be pre-empted—only if certain findings are made. Of these findings, the one pertinent to this discussion is:

> (4) That the construction and operation of the facility will not pose an unreasonable health or environmental risk to the surrounding locality and that the facility developer or operator has taken or has consented to take any reasonable measures to avoid or manage foreseeable risks *and to comply to the maximum extent feasible with applicable ordinance(s)* [author's emphasis]. G.S. 130A-293(c)(4).

The very existence of this review procedure and more particularly the requirement that a facility not be approved unless found to comply as much as possible with applicable ordinance(s) evidences clear legislative intent that ordinances not be pre-empted. At the very least, this statutory provision is fatal to any argument that there is clear legislative intent to pre-empt.

III. Conclusion

There is adequate enabling legislation for local hazardous waste ordinances. However, two of the more specific of those statutes require that a local ordinance be consistent with and supplementary to state regulations on the same subject. G.S. 160A-185 for cities and G.S. 153A-136 for counties. This limiting language could well be interpreted to mean that a local ordinance may not establish specific standards different from those set by state regulations. In other words, the local regulations should supplement or "fill in the cracks" in the state regulatory scheme. But this limitation can probably be avoided by relying on the more general grant of police authority for the ordinance. G.S. 160A-174 for cities and G.S. 153A-121 for counties.

Local ordinances that establish reasonable regulations for hazardous waste management activities are not likely to be pre-empted as inconsistent with state laws within the meaning of G.S. 160A-174(b). However, an ordinance expressly prohibiting an activity or condition may well be pre-empted under that statute.

The same principle applies to regulating land uses involving hazardous waste by zoning ordinances, particularly because issues of compatibility with other development and other considerations on which zoning is based are only very generally addressed by state hazardous waste regulations. It follows that a special-use permit with accompanying conditions may be adopted under zoning authority.

Finally, it is clear that the validity of a local ordinance affecting a hazardous waste facility or landfill is not affected under G.S. 160A-174(b) even if it is prohibitive, but rather is to be determined by the Waste Management Board through the procedure established for that purpose. Also, if such an ordinance is found to be unreasonably prohibitive, it is to be invalidated only to the extent necessary to remove the prohibition. All reasonable provisions of the ordinance are to remain in effect.

Congress v. the Courts: *Extracurricular Student Religious Groups*

Benjamin B. Sendor

May a public school permit students to form extracurricular clubs to engage in religious activity on school grounds? In an article in *Popular Government* two years ago, I concluded that the establishment clause of the First Amendment probably prohibits such clubs.[1] That opinion rested on the clear trend among courts on the question[2] and on a statement by the U.S. Supreme Court in its decision in *Widmar v. Vincent*.[3]

However, two developments since that article appeared have reopened the question: (1) the Supreme Court's decision in February 1985 to review *Bender v. Williamsport Area School District*,[4] and (2) the passage of the Equal Access Act in 1984.[5] This article will discuss the significance of these developments for public school officials.[6]

Bender involves the efforts of high school students in Williamsport, Pennsylvania, to form an extracurricular religious group. School policy set aside a 30-minute student activity period on Tuesdays and Thursdays between the morning homeroom period and the first class for any activity that would contribute "to the intellectual, physical or social development of the students that is otherwise considered legal and constitutionally proper." Student clubs that met under this policy covered a wide spectrum of groups, curriculum-related and otherwise, including the Spanish club, the student newspaper, a literary magazine, student government, the Key Club (a service group), Future Homemakers of America, and office aides (students who helped in filing, answered telephones, and ran errands).

Lisa Bender and other students requested permission to form a religious group, to be called "Petros," to meet during the activity period. The stated purpose of Petros was "to promote spiritual growth and positive attitudes in the lives of its members." Meetings were to include "Scripture reading, discussion, prayer and other activities which may be of interest to the group." Petros was allowed to conduct one organizational meeting, at-

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The author is an Institute of Government faculty member who has written several articles on religion in the schools. This article is based on one that appeared in the Spring 1985 issue of *School Law Bulletin*, published by the Institute of Government.

1. Benjamin B. Sendor, "The Law and Religion in the Public Schools: A Guide for the Perplexed," *Popular Government* 49 no. 2 (Fall 1983), 34.

2. *See* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist. 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); Brandon v. Board of Educ. of Guilderland, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (Cal. Ct. App.), *cert. denied*, 434 U.S. 877 (1977); Trietley v. Board of Educ. of the City of Buffalo, 65 App. Div. 2d 1, 409 N.Y.S. 2d 912 (N.Y. App. Div. 1978); *contra*, Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965).

3. 454 U.S. 263 (1981).

4. 536 F. Supp. 697 (M.D. Pa. 1983), *rev'd*, 741 F.2d 538 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3585 (U.S. Feb. 18, 1985) (No. 84-773).

5. Pub. L. No. 98-377. A copy of the Equal Access Act appears as an appendix to this article.

6. Note that this question does not involve the undisputed right of students to engage in private, voluntary, nondisruptive religious activity—either alone or in groups—during free times in the school day, such as during lunch. *See* Wallace v. Jaffree, 53 U.S.L.W. (U.S. June 4, 1985) (No. 83-812) The issue here is whether the establishment clause permits students—or whether the free speech clause of the First Amendment guarantees the right of students—to create more formal groups to meet in places and at times set aside by schools for extracurricular student activities.

tended by approximately 45 students. The first meeting included Bible-reading and prayer. However, the local school board then prohibited further meetings, fearing that the meetings would violate the establishment clause.

The students sued the board in federal district court, seeking an injunction that would allow them to meet. The court ruled for them, relying on the Supreme Court's 1981 decision in *Widmar v. Vincent*. In *Widmar* the Court held that the First Amendment right to freedom of speech required a public university in Missouri to allow students to form extracurricular student religious clubs on campus. The Court explained that the university's neutral, open-door extracurricular policy created an open forum for student groups. Therefore the First Amendment's free speech clause barred the university from prohibiting any group on the basis of the group's views unless such prohibition was necessary to serve a compelling state interest. When the university argued that a prohibition against religious clubs was necessary to protect the state's compelling interest in complying with the establishment clause, the Court disagreed. It held that allowing such groups to meet would not violate the establishment clause for four reasons: (1) granting access to student religious groups would serve a secular interest of maintaining the campus as an open marketplace of ideas; (2) any benefits to religion would be merely "incidental" rather than primary effects of the clubs because college students were mature enough to realize that "an open forum in a public university does not confer any imprimatur of State approval on religious sects or practices";[7] (3) passive permission to meet would not risk entangling the university with religion; and (4) college students often live on campus, with little opportunity to find suitable places for worship off campus. Significantly, the Court noted that college students are more mature than younger students and, therefore, they should be able to appreciate that an open-door extracurricular policy is neutral toward religion.[8]

In *Bender* the district court applied *Widmar* directly to the high school setting. The court ruled that the school board had abridged the students' freedom of speech. Regarding the establishment clause, the court decided that allowing Petros to meet would serve the secular purpose of maintaining a neutral extracurricular policy, that high school students are mature enough not to mistake the school's permission for Petros to meet for endorsement of the group's religious views or practices, and that the required teacher supervision would be minimal.

7. 454 U.S. at 274.
8. *Id.* at 294 n. 14.

On appeal, the U.S. Court of Appeals for the Third Circuit reversed the district court's ruling. It agreed with the district court that the students had a valid free speech interest in forming Petros. But it then held that barring Petros from meeting was necessary in order to protect the school board's compelling interest in complying with the establishment clause, an interest sufficient to override the students' free speech rights. The court stressed

The courts: The schools' compelling interest in complying with the establishment clause overrides the students' equal access rights.

two factors as decisive in analyzing Petros under the establishment clause. First, disagreeing with the district court, the appeals court maintained that high school students are not mature enough to appreciate the neutral spirit of the school board's permission for Petros to meet—particularly given the structured, controlled nature of high school education within the context of compulsory school attendance. Second, it found that supervision by teachers so as to keep order during club meetings would risk excessive entanglement of school authorities in religious matters. These factors led the court to strike the balance between the establishment clause and the free speech clause in favor of the establishment clause. That decision puts the Third Circuit in line with the Second, Fifth, and Eleventh Circuits and with appellate courts in New York and California.[9]

Despite the clear trend among courts to prohibit extracurricular religious clubs as an establishment clause violation, Congress passed the Equal Access Act (EAA) on July 25, 1984, the day after the *Bender* decision (EAA became effective on August 11, 1984). Passage of EAA pits Congress against the courts over the legality of such clubs, a conflict that the Supreme Court may resolve when it reviews *Bender* in coming months.

9. *See* cases cited in note 2, supra. *See also* Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (per curiam). The controversy in *Nartowicz* arose in a much different setting from the neutral, open-door activity period in *Bender*. In *Nartowicz*, the court examined a school board's permission for student religious club meetings in the context of substantial school support of other religious activities

The Equal Access Act (Pub. L. No. 98-377)

SHORT TITLE

SEC. 801. This title may be cited as "The Equal Access Act."

DENIAL OF EQUAL ACCESS PROHIBITED

SEC. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal finance assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

SEC. 803. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

SEC. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

CONSTRUCTION

SEC. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

EAA provides that if a public high school[10] that receives federal aid allows one or more "noncurriculum related" extracurricular student groups to meet on school grounds, it must grant a fair opportunity ("equal access") to all such student groups without discriminatory prohibition of any such group "on the basis of the religious, political, philosophical, or other content" of views expressed during group meetings. The basic thrust of EAA is to codify *Widmar* for public high school: once a high school allows some groups to meet for purposes not related to curriculum, it may not deny permission to other such student groups to meet.

It is important to grasp the broad scope of EAA. Although it was introduced to give access to student religious groups, as finally enacted the bill grants access to all types of extracurricular groups, including political and philosophical groups as well as religious groups. Thus it applies to Young Republicans and Young Gays as well as Young Christians. EAA applies to mainstream and controversial fringe groups alike. A school that allows a Methodist student prayer group or a student Democrats group to meet may not bar a student Hare Krishna chanting group, a student socialist group, or a Ku Klux Klan group from meeting on the basis of group members' views.[11]

Note that EAA applies only to schools that already permit noncurriculum-related groups to meet during noninstructional time. That is, a school that does not allow any such groups to meet is exempt from EAA. Only schools that allow some such groups to meet must open their doors to other such groups. The bill defines a noncurriculum-related group as one with activities "not directly related to the school curriculum." This skeletal definition places the burden of distinguishing between curriculum- and noncurriculum-related groups on school boards. The task is difficult. While some types of groups plainly are related to the curriculum (e.g., language clubs, athletic teams, and a literary magazine), others seem to be noncurricular, though they are not easily categorized (e.g., service club and chess club).

Boards that wish to exempt their high schools from EAA may either ban all "noncurriculum-related" groups or define "curriculum-related" broadly enough to encompass all existing nonreligious, nonpolitical, and nonphilosophical groups.[12] But they should realize that the definition of "curriculum-related" is not infinitely elastic. A board that makes unreasonable distinctions among groups would violate students' free speech and EAA rights and invite a civil rights lawsuit brought by students under 42 U.S.C. § 1983 to enforce their rights. For example, a board that classifies all political clubs except a student socialist club as curriculum-related would violate the free speech and EAA rights of the student socialists.

The act defines noninstructional time as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." This definition on its face includes periods before the first class and after the last class; it seems to exclude other periods during the school day, such as lunch and study hall.[13] Accordingly, EAA probably requires equal access only if some noncurriculum-related groups meet before or after the instructional day.

If EAA applies to a school, the school must satisfy a number of conditions to comply with the act's mandate: (1) a permitted group must be initiated by students and have voluntary attendance policies; (2) a school may not sponsor any such groups, although it may pay incidental costs of providing space, lighting, and heat;[14] (3) school employees may not participate in meetings, although an

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10. EAA expressly applies to "secondary schools" and defines that term to mean "a public school which provides secondary education as determined by state law." North Carolina law does not specifically define the term "secondary school," although it probably includes only grades nine through twelve. See N.C. GEN. STAT. §§ 115C-74, -75; Op. N.C. Att'y Gen. (Apr. 1, 1985).

11. Particular characteristics of some groups, such as discriminatory membership policies, might justify a school's refusal to allow meetings under EAA. This question will be discussed below.

12. Some boards might wish to exempt their high schools from EAA simply because they oppose noncurriculum-related extracurricular groups; other boards might choose to do so because, pending the Supreme Court's decision in *Bender*, they believe that the establishment clause prohibits extracurricular religious clubs. Such boards might prohibit all noncurriculum-related groups in order to steer a narrow course of compliance with both the establishment clause and EAA. Finally, some boards, while receptive to permitting meetings of mainstream noncurriculum-related groups, might nevertheless seek exemption from EAA in order to keep controversial or fringe noncurriculum-related groups out of school.

13. If EAA does not apply to periods during the instructional day, such as lunch and study hall, a school could permit some noncurriculum-related clubs to meet and prohibit others from meeting without violating EAA. Thus a school could permit the chess club to meet during the lunch period and still bar a religious club from meeting at that time. Note, however, that such distinctions are still subject to a future decision by the Supreme Court in *Bender* concerning the constitutional free speech rights of students in religious clubs that would be excluded by such a policy.

14. EAA does not fully describe what types of school support constitute prohibited "sponsorship" other than "promoting, leading, or participating in a meeting" [§ 803 (2)], but such sponsorship might include financial subsidies, extra credit for students who participate in clubs, and even announcements of club activities by school employees. It is not clear whether allowing notices of club activities to be posted on bulletin boards or published in the school newspaper would constitute sponsorship, though a ban of such forms of notice seems unrealistic. *See* Tatel, Mineberg, & Middlebrooks, "An Introduction to the Equal Access Act," *Education Law Reporter* 21 (Jan. 10, 1985), 7, 10-11.

employee may be assigned solely to maintain discipline;[15] (4) meetings may not interfere with educational activities; and (5) outsiders may not direct or regularly attend meetings.[16]

Despite its broad scope and strict conditions, EAA allows school officials to retain authority over several important facets of extracurricular student activity. It does not affect school control over curriculum-related groups. Also, the act does not require schools to allow student meetings that are otherwise unlawful, such as disruptive or violent gatherings. School officials still have authority to keep order and protect the welfare of students and employees. But they may not ban a meeting out of concern for possible disruptive conduct without specific, reliable evidence that disruption is likely to occur; a group may not be prohibited from meeting simply because its members express controversial or unpopular views.[17] Furthermore, officials probably may ban groups with discriminatory or secret membership policies.[18] Finally EAA does *not* affect school officials' control over access of outside, community groups to school facilities.[19]

EAA conflicts with the decision in *Bender.* Petros, the group banned in that case, would seem to fall under EAA's protective umbrella for noncurriculum-related groups. The only court that has yet addressed the constitutionality of EAA in regard to religious groups hinted that it might be unconstitutional, finding that a religious club that students sought to establish under EAA would unduly promote religion.[20] Decisions concerning extracurricular religious groups by the Second, Fifth, and Eleventh Circuits and by state appellate courts in New York and California also appear to conflict with EAA. Note that the conflict pertains only to religious groups; therefore all school boards should heed the congressional directive concerning equal access for nonreligious groups. Still, given the conflict over religious groups, boards must decide whether to obey Congress or the courts in regard to those groups. Boards in jurisdictions governed by courts that have prohibited extracurricular religious clubs should follow those courts' rulings and bar such clubs. Boards elsewhere[21] should seek their attorneys' advice about whether Congress or the courts have correctly interpreted the First Amendment's establishment and free speech clauses. For a definitive answer, we must all await the Supreme Court's review of *Bender.* ☙

15. Although Section 802(c)(3) of EAA prohibits participation of employees only in religious groups, Sections 802(c)(2) and 803(2) prohibits employee participation in all categories of noncurriculum-related groups, except to maintain discipline. Some commentators have questioned whether Congress intended to prohibit employee participation in nonreligious groups, despite the plain language of Section 803(2). *See* Tatel et al., *supra* note 14, at 11; *Equal Access: Interpretation and Implementation Guidelines* (Arlington, Va.: American Association of School Administrators, 1984), p. 7. In North Carolina the Orange County Board of Education has adopted a policy that copes with this harsh language by drawing yet a further distinction between noncurriculum-related groups initiated by students and those initiated by the school. The policy prohibits employee participation and school sponsorship only in noncurriculum-related groups initiated by students.

16. Although EAA forbids control or regular attendance by outsiders, it does not state whether and to what extent a group covered by the act may be affiliated with outside organizations. It is conceivable that some forms of affiliation might result in control of a student group by outsiders, in violation of EAA.

17. *See generally* Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969)

18. Regarding discriminatory groups, *see* Knights of Ku Klux Klan Realm of Louisiana v. East Baton Rouge Parish School Bd., 578 F.2d 1122 (5th Cir. 1978); Cason v. City of Jacksonville, 497 F.2d 949 (5th Cir. 1979); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973). The courts in these cases held, in pertinent part, that the discriminatory membership policies of particular adult political groups did not justify school boards' decisions to deny these groups access to public school facilities for meetings. However, the courts in Ringers and Cason distinguished between off-campus membership and attendance of an on-campus meeting. The courts suggested that a school board could deny access to a group that admits members of the public to an on-campus meeting on a discriminatory basis. *See* Ringers, 473 F.2d at 1018; Cason, 497 F.2d at 954. In the case of an extracurricular student group, both membership and attendance of meetings occur on campus and, therefore, a board probably could ban student groups that discriminate with respect to either membership or attendance. With respect to secret societies, *see* Passel v. Fort Worth Indep. School Dist., 453 S.W.2d 888 (Tex. Cir. App. 1970); Robinson v. Sacramento City Unified School Dist., 53 Cal. Rptr. 781 (Cal. App. 1966).

19. Student Coalition for Peace v. Lower Merion School District, No. 84-1017 (E.D. Pa. Jan. 31, 1985). *See* Janine M. Murphy, "Access to Public School Facilities and Students," 16 *School Law Bulletin* no. 16 (Winter 1985), 9.

20. Mergens v. Board of Educ. of Westside Community Schools, CV85-0-426 (D. Neb. May 23, 1985). Although the district court judge expressly declined to address the constitutionality of EAA directly, he denied the students' motion for a preliminary injunction to enforce their EAA rights to establish a religious club.

21. The Fourth Circuit, which has jurisdiction over North Carolina, has not addressed the constitutionality of extracurricular religious clubs, and the school boards of this state are not bound by the decisions of the appellate courts that have done so.

Don Hayman

(continued from page 11)

ments developed largely from the information provided by Don's study.

His personnel activities have expanded into work with Employment Security Commission personnel and to courses in personnel administration at the Institute of Government and in the UNC Political Science Department.

Soon after Don joined the Institute he became its authority on council-manager and other forms of local government organization. At that time the form was used in five counties and 30 cities in North Carolina. As he retires, it is found in 85 counties and 135 cities in this state. Don advised with citizens and officials in almost all of the counties and cities that adopted council-manager government during his tenure at the Institute.

Don has been instrumental in establishing the administrative training programs that have become a central part of the Institute's offerings. He has been a chief contributor in developing the Institute's Municipal Administration course, first offered in 1953, and the County Administration course, established 10 years later. In 1962 he helped to establish the annual seminar for city and county managers.

In 1966, with Don's strong backing and support, a Master's in Public Administration program was established at UNC-CH. He has regularly taught in the program, served on its committees, and handled its internship placements. Much of the credit for the MBA program's success must go to Don Hayman.

Since the State Government Internship program was established in the early 1960s, Don has been closely associated with it. Under this program more than 600 college students have been placed with state agencies for a summer. Many of them have developed a career interest in public administration.

Few people have been as effective as Don in promoting organizational interests of those concerned with public administration. In 1958 he was the chief mover in establishing the North Carolina Chapter of the Public Personnel Association (now the International Personnel Management Association). He was also instrumental in organizing the North Carolina Chapter (now the Research Triangle Chapter) of the American Society for Public Administration and served as its first president.

While teaching and consulting have taken the major portion of Don's time, he has also been productive in research and writing. A list of his publications—including books, monographs, articles, and special studies and reports—would number over 200 items.

Don's work has been widely recognized. He was the first person elected to honorary membership in the North Carolina Chapter of the International Personnel Management Association. He is an honorary member of the North Carolina City and County Management Association, and in 1978 he became the first North Carolinian to be made an honorary member of the International City Management Association.

In 1982 he was given the Warner W. Stockberger Award for outstanding contributions to the public personnel profession by the International Personnel Management Association. And two years later the International City Management Association again recognized Don by presenting him with its Stephen B. Sweeney Award, given to an academic leader for "a significant contribution to the formal education of students pursuing careers in local government management."

This is only a part of Don's record, but it suggests the scope and the importance of his work.

To a degree seldom found in other teachers, Donald Hayman is dedicated to the public interest and is devoted to those who make their careers in the public service. His work lives in him—and through his teaching and counseling of students and public officials, it will continue to live in others.

A famous American philosopher once advised against looking back for fear of discovering that something might be gaining on you. Don Hayman, as he retires, can look back with pride in his work and in the accomplishments of those who have been influenced by his teaching and his wise counsel. And if he sees something gaining on him, he can relax. It will be only a host of public officials following his tracks and his teaching as they strive to make public service in North Carolina ever better.—*Jake Wicker*

POPULAR GOVERNMENT
(ISSN 0032-4515)
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