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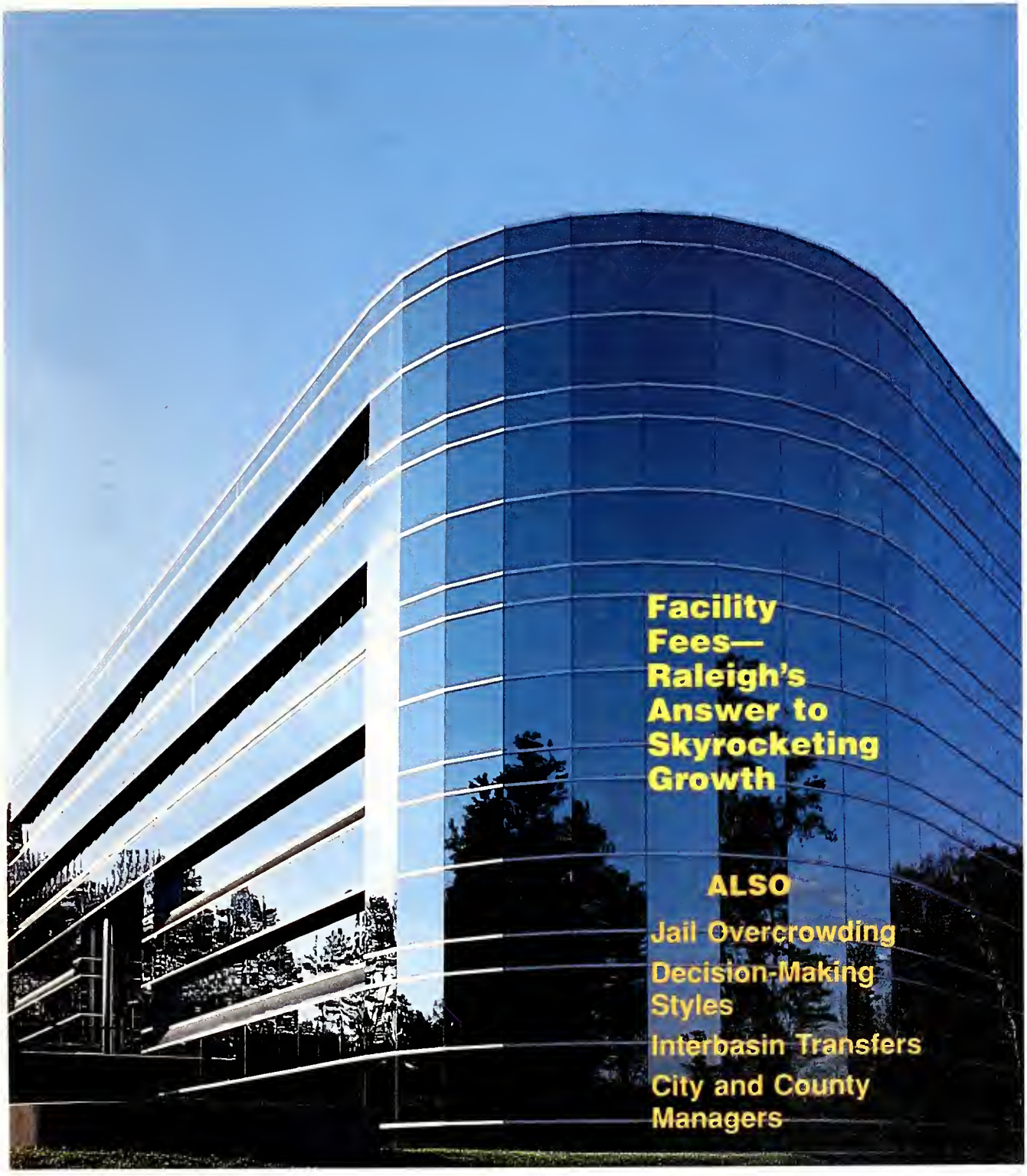

Facility Fees—Raleigh's Answer to Skyrocketing Growth

ALSO

Jail Overcrowding

Decision-Making Styles

Interbasin Transfers

City and County Managers

On the Cover

The Carolina Corporate Center is one of Raleigh's new office parks. This building is the first of four planned for the complex. Photograph by Bob Donnan.

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Popular Government

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CONTENTS

Fall 1989 Vol. 55, No. 2

Jim Sink/ARTECH

p. 2

Courtesy North Carolina Power

p. 34

Feature Articles

Book Review

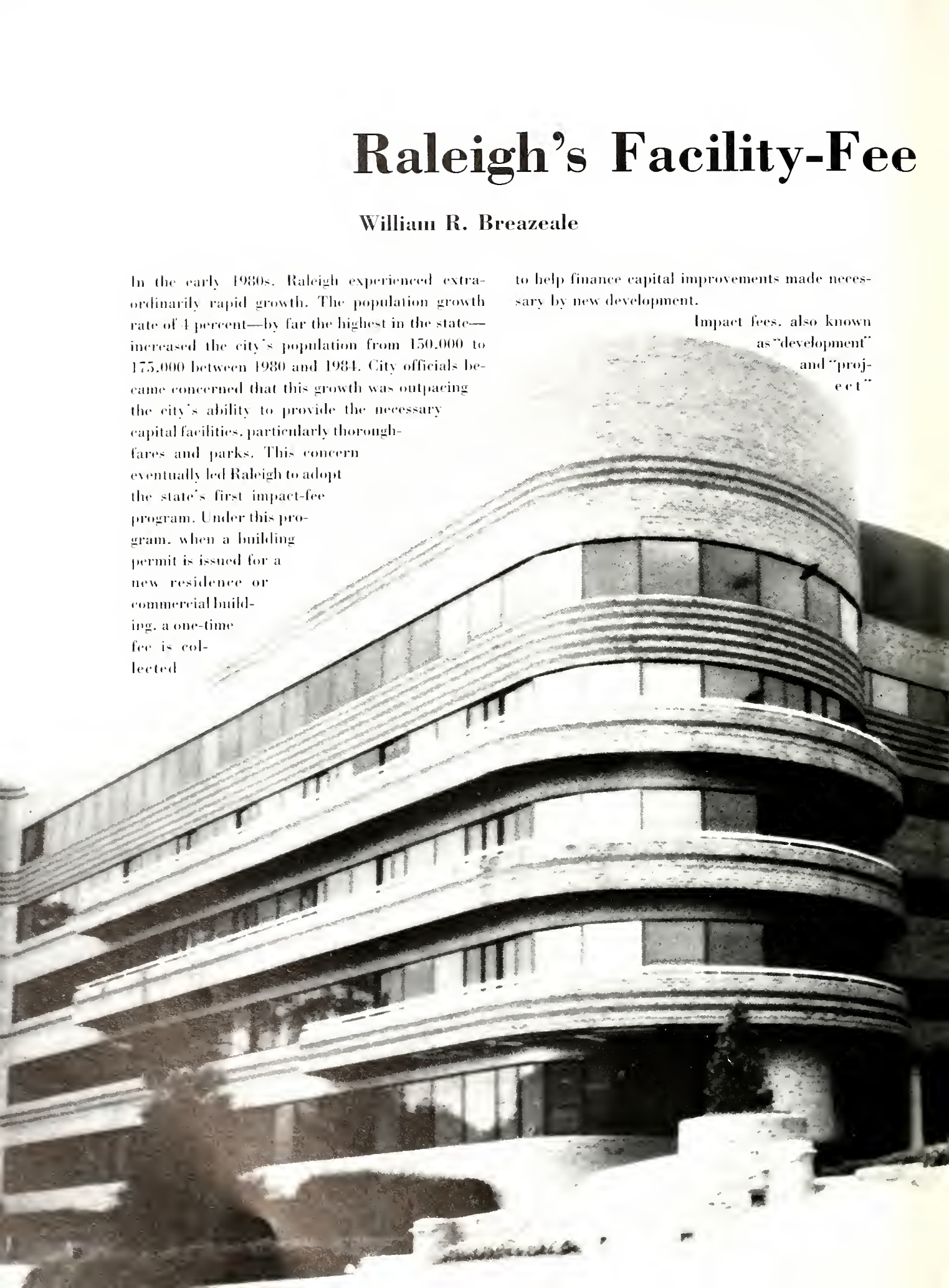
Around the State

Raleigh's Facility-Fee

William R. Breazeale

In the early 1980s, Raleigh experienced extraordinarily rapid growth. The population growth rate of 4 percent—by far the highest in the state—increased the city's population from 150,000 to 175,000 between 1980 and 1984. City officials became concerned that this growth was outpacing the city's ability to provide the necessary capital facilities, particularly thoroughfares and parks. This concern eventually led Raleigh to adopt the state's first impact-fee program. Under this program, when a building permit is issued for a new residence or commercial building, a one-time fee is collected to help finance capital improvements made necessary by new development.

Impact fees, also known as "development" and "project"

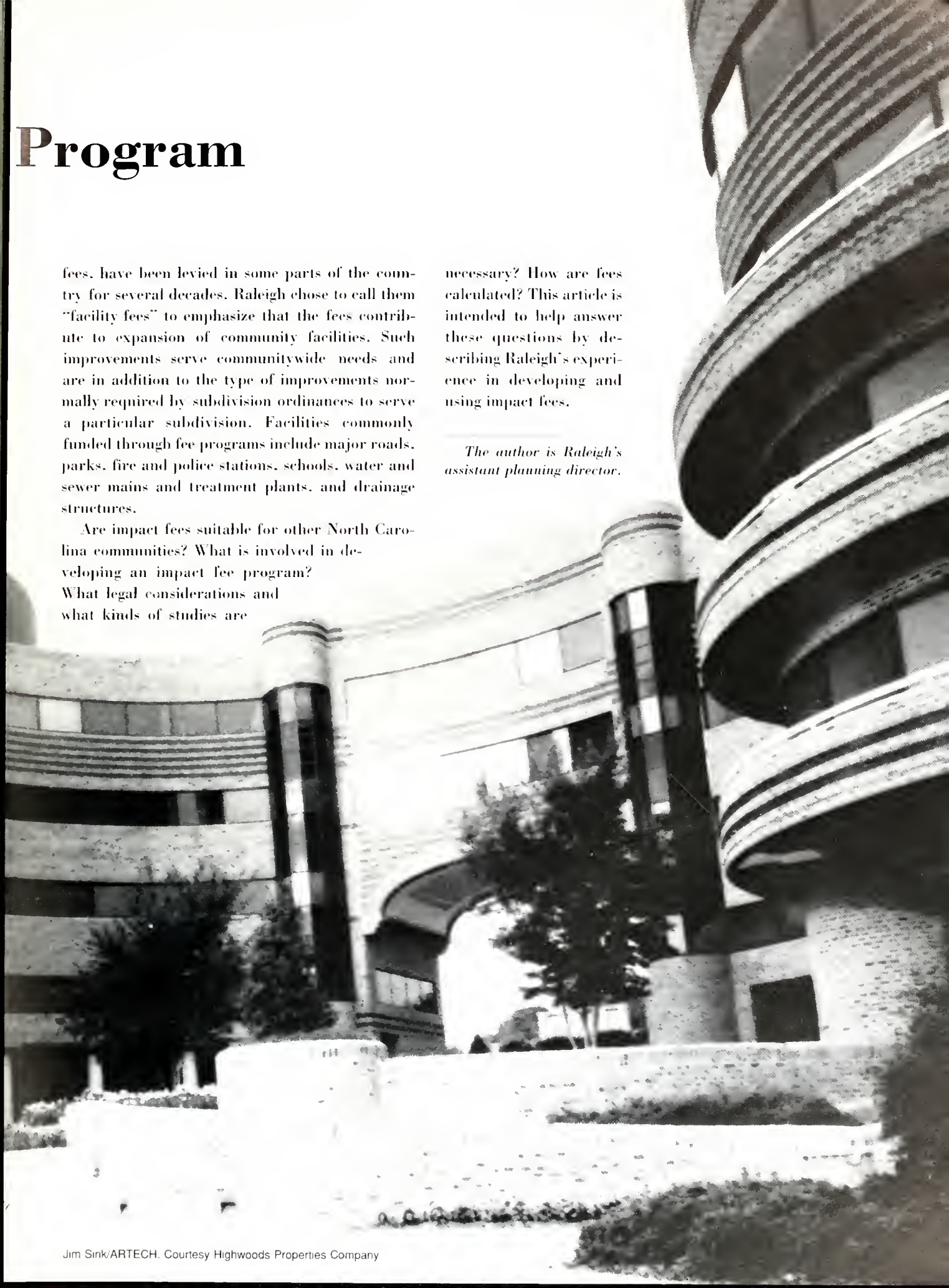


Program

fees, have been levied in some parts of the country for several decades. Raleigh chose to call them "facility fees" to emphasize that the fees contribute to expansion of community facilities. Such improvements serve communitywide needs and are in addition to the type of improvements normally required by subdivision ordinances to serve a particular subdivision. Facilities commonly funded through fee programs include major roads, parks, fire and police stations, schools, water and sewer mains and treatment plants, and drainage structures.

Are impact fees suitable for other North Carolina communities? What is involved in developing an impact fee program? What legal considerations and what kinds of studies are necessary? How are fees calculated? This article is intended to help answer these questions by describing Raleigh's experience in developing and using impact fees.

The author is Raleigh's assistant planning director.



Jim Sink/ARTECH. Courtesy Highwoods Properties Company

Bob Donnan

The state is widening Creedmoor road from two to five lanes to handle increased traffic.

Why Use Impact Fees?

Traditionally, the additional facilities needed to serve a growing population are financed from the community's general tax base. That means that current residents as well as newcomers pay the cost of providing facilities needed by new residents. In turn, the new residents help to pay for facilities needed by people who move in later. An impact-fee program shifts some of the burden away from current residents by placing part of the costs directly on the new residents and businesses that create the need for new facilities.

In North Carolina an impact-fee program also has the advantage that it permits a city to collect revenues from development located outside the city's boundaries but within its extraterritorial jurisdiction, which would not be subject to taxes levied by the city. This revenue source is important when a large share of growth occurs outside the city's boundaries. In Raleigh, for example, such growth accounted for about 20 percent of the value of construction covered by 1988 building permits.

An impact-fee program also can give a city more control over the timing and location of capital facilities associated with new development. Usually such facilities are built incrementally as new subdivisions are constructed. An impact-fee program provides a revenue source that can finance the orderly planning and construction of those facilities without regard to where or when individual subdivisions are constructed. For example, impact fees could be used at critical points outside a subdivision in order to improve traffic flow in a way that benefits residents of the subdivision as well as others.

Furthermore, an impact-fee program can bring an increased measure of uniformity, consistency, and comprehensiveness to the treatment of different kinds of development. Often different requirements for providing public improvements apply to different types of development, depending on the type of approval required. Requirements also vary for developments that require special-use permits, site-plan approvals, or conditional-use zoning. In North Carolina most jurisdictions rely on the subdivision authority to obtain site-specific public improvements. But a property may be developed without being subdivided, so that improvements are not required.

With an impact-fee program, requirements for public improvements can be made to depend on the actual impact of a development rather than on the type of approval procedure. Also, requirements are imposed more consistently because all new development in a given category is subject to the same, predetermined fee and because that fee has been calculated according to the effect of the development on the need for a public service. Furthermore, an impact fee can be linked more accurately to a development's impact than could requirements imposed at the subdivision stage because normally the fee is collected when actual use of a site is about to begin and when the particular use of the land is known.

Raleigh's Experience

Raleigh began to investigate the possibility of using impact fees in 1984. In early 1985 the city council endorsed the concept and approved a reso-

Bob Donnan

Lynn Road Extension, a city project in north Raleigh, will provide an additional access route.

lution to seek enabling legislation from the state. Because in North Carolina there is no clear authority to charge such fees as part of a local land-development regulation, adopting a fee program required special legislation from the state to amend the city's charter.

Once enabling legislation was approved in 1985, staff members prepared background information and developed policy alternatives with guidance from the Department of City and Regional Planning at The University of North Carolina at Chapel Hill. All city departments that deal with development regulations and fee collection, monitoring, and disbursement helped develop the program. Through such interdepartmental cooperation, almost all potential problems of interpretation and enforcement were anticipated and resolved before the program was implemented.

About nine months were spent preparing a draft report to the city council.[1] Work on an inventory of facilities and a fee schedule consumed about half of this time. The other half was devoted to a comprehensive revision of the development regulations. A community must integrate a fee into existing ordinances, such as subdivision standards, because they may already regulate the service for which the fee is to be charged.

This preparation was followed by several months of public review of the staff recommendations. The recommended fee schedules for thoroughfares and for parks and open space received little comment: apparently the general public considered the level of fees and the distribution of charges among different land uses reasonable. The amendments to the development regulations sparked great interest in the development community, however, and much time was spent on revisions. New local ordinances finally were adopted in August, 1987.

During these early years, several major concerns had to be addressed. The building community's concerns focused on the amount of the fees to be charged and on how the fees would be used. Therefore drafters of the enabling legislation inserted a provision limiting the amount of fees that could be used for any fee-eligible project to no more than 50 percent of the project's cost. This limitation helped to convince the development community that fees would not be set at extraordinarily high levels. The types of facilities for which fees could be used also were limited. Whereas the original draft of the enabling legislation called for fees to be used for many types of facilities, such as parking decks and fire stations, the revised legislation limited the use to thoroughfares, open-space and greenway acquisition, park-facilities construction, and drainage structures.

The city also clarified the private sector's responsibility for construction of public improvements by addressing three other issues. The first issue pertained to the universal and consistent application of requirements. A fundamental principle of a fee program is that all users in new developments should contribute proportionately to funding large public improvements that benefit not only the development site but the community as well. A corollary to this approach is that all developments of any consequence, whether single-family houses or regional shopping centers, should be responsible for the site-specific public improvements, such as residential streets and minor utility lines, that are not covered by the fee. In Raleigh these site-specific improvements have been required only when land is subdivided. But about 20 percent of all new construction in Raleigh takes place on land that was not subdivided under the city's jurisdiction. The city and developers agreed that for all construction greater than a given size or intensity and for certain changes in use, minimum subdivision-type improvements would be required, regardless of whether the developer sought to subdivide the land.

The second issue dealt with the conditions under which extra road construction or land conveyance would be required in conjunction with development. The city specified minimum street improve-

ments and open-space requirements for different sizes and types of developments and set out exactly when extra improvements would be required.

In addition, the city expanded its system for reimbursing developers.[2] When a developer chooses or is required to make an improvement that meets future as well as present needs (called an oversized improvement), the city reimburses the developer for the portion beyond what the development's impact requires. For example, a developer might build a wider road than the traffic from his or her development will require, in anticipation of future development and increased traffic. This kind of preparation avoids the costly work of replacing or expanding improvements when greater capacity becomes necessary. In such cases, the city will reimburse the developer for the extra capacity. Raleigh's reimbursement system now covers all situations involving these extra improvements.[3]

The third issue—how exactions and reimbursements would be applied to developments that were under way at the time of fee adoption—also received substantial attention. The city decided to adopt an effective date several months beyond the council's actual approval date to allow developers adequate time to pursue one of two alternatives: to apply for building permits for ongoing developments before the effective date (thus avoiding the new fee) or to apply for permits after the effective date and participate in the extra reimbursement benefits available under the program.

Legal Considerations

Current judicial scrutiny of fee programs has focused on the rational nexus test. This principle was cited recently in major state and federal court decisions dealing with the justifications for local development exactions. The principle has two components: the attribution test and the benefit test. The attribution test deals with the amount of the fee, which must be proportional to the costs attributable to new development. The benefit test requires that fees be expended in a manner that benefits the owners of the property for which the fee is paid.

Raleigh's enabling legislation was drafted to meet these tests. First, the legislation requires Raleigh to meet the attribution test by preparing detailed plans and studies that (1) describe the characteristics of new development that make expansion necessary (for example, data projecting increased traffic due to new construction—called traffic-generation rates) and (2) provide a basis for calculating the proportionate costs attributable to new development. The benefit test also is addressed in several sections of the legislation. The particular services for which fees would be collected must be defined clearly by the community. Once collected, these fees may not be combined with other revenues to finance services not specifically authorized. The money must be placed in separate trust funds reserved for the specified capital projects. And the fees must be spent within a given time period: six years for local projects and ten for projects pursued with other governmental units. These periods match the general time frames for improvements under Raleigh's Capital Improvement Program and the state's Transportation Improvement Program.

A further aspect of the rational nexus principle deals with benefit zones, which define areas that receive benefit from a new facility or group of facilities. Disbursement of fees is restricted to the benefit zone within which the fees were collected, guaranteeing that the fees will benefit the new developments generating the fees. Benefit zones also provide a method of closely matching the cost of a service or facility with the fee charged. If costs such as land acquisition vary throughout the community, the related fees can vary by benefit zone to reflect these differing costs.

The number and configuration of zones will vary with the type of service. Also, the nature of the service being provided will dictate a benefit zone's size and boundaries. For certain functions, such as fire stations and sewer collection lines, service areas may be easily definable. But a city should not create relatively small zones and thereby restrict expenditures such that, for instance, only one planned facility in each can qualify for funds within the legislated time frames. Zones should encompass enough projected development that a reasonable level of fees can be collected and expended on priority projects within time limitations.

Before fixing zone boundaries there should be a thorough examination of the scope of services that each facility will provide. For instance, even though neighborhood parks traditionally have been re-

garded as solely benefiting residents who live within walking distance, such parks often serve groups from an entire district or city—such as recreation leagues, arts and crafts organizations, and civic groups, which may use a park's meeting rooms and athletic fields.

Raleigh created four zones for parks and open space (see map on page 9) and three zones for thoroughfares. The zones are pie shaped so that older areas, which may generate only moderate fees, are combined with faster-growing suburban sections. Thus sufficient funds can be collected to finance a variety of projects that will benefit fee-paying residents scattered throughout the zone. To ensure that the benefit accrues to new residents and businesses, the local ordinance requires the city council to review at least every two years the specific locations of fee collections and the expenditures within each benefit zone.

Calculating Fees

The following four steps provide a framework for calculating fees:

1) Select standards for the facility's level of service.
2) Calculate the cost of serving new residences and businesses, based on the adopted service levels, and determine whether benefit zones will be used.
3) Adjust this cost, if necessary, by a factor that represents the share of costs for which existing residents and businesses should be responsible. This adjustment is needed so that new residents and businesses are not asked to pay for upgraded or expanded facilities for existing residents and businesses.
4) Determine a final fee schedule for each benefit zone.

In many cities service-level standards are incorporated into approved plans for providing services. If such standards do not exist, national studies can be used as the basis for establishing local standards. Higher standards justify higher fees, of course, but by adopting higher standards, a community may obligate itself to upgrade existing facilities to meet those higher, more costly standards.[4] Examples of some standards are, for schools, the amount of land or building square footage per pupil; for water, gallons per person, per day; for parks, acres of open space per population; and for roads, the average number of vehicles per day, per lane mile.

Once standards are determined, the cost of land acquisition and facility construction must be calculated. These figures will be translated into the appropriate cost per unit for clients served, based on the service level chosen. At this stage the jurisdiction should have determined at least tentative benefit-zone boundaries. All costs must be calculated for each benefit zone, so that different costs in different parts of the jurisdiction can be reflected in varying fees.

The open-space and park calculations are relatively straightforward. The following formula shows the sequence of calculations to estimate the cost of acquisition of open space and park land attributable to one single-family house in a given benefit zone:

Service level standard	=	11.4 acres of open space per 1,000 people
Average number of individuals per single-family house	=	2.9 individuals per house
Service level translated into amount of land needed per housing unit [(11.4 ÷ 1,000) x 2.9]	=	.033 acres per house
Average cost of one acre of land	=	$16,973
Cost of land per housing unit (.033 x $16,973)	=	$560

In a similar manner the costs associated with all the planned improvements for a park—buildings, lighting, athletic fields, parking, etc.—are calculated and summed to give a total cost attributed to a new single-family residence.

There are several methods that can be used to calculate thoroughfare construction costs. Raleigh relied on future trip-generation figures from the computer model used to develop the Raleigh Metropolitan Thoroughfare Plan.[5] The city calculated the total cost of thoroughfares attributable to new development over a given period (ten years) and

divided it by the total trips generated by the same development in each benefit zone. The cost per trip that could be assigned to new development ranged from $75 to $115 per trip. Thus, at an average trip-generation rate of ten trips per single-family house, a charge of $750 to $1,150 could be applied, depending on the benefit zone.

Before setting a potential maximum fee, the calculations must incorporate a "double-payment" credit to make the fee more equitable. In debates on the fairness of impact fees, often it is charged that new residents will pay twice for a facility: once as a part of a fee and again as part of future taxes and utility charges. To a certain extent, this argument is valid. By adopting an impact fee for a particular service, the community allocates responsibility between the existing residents and businesses and the new users who will enjoy the facilities in the future. If a fee is to be levied against new construction to offset all or a portion of its responsibility for new facilities, then the existing businesses and residences also must shoulder an equivalent responsibility. This responsibility can be factored into the fee formula as a double-payment credit, so that the fee is reduced by the value assigned to the existing population's responsibility. The credit includes three items:

1) The amount of the jurisdiction's outstanding bond indebtedness for facilities to serve the existing population;
2) The cost of refurbishing an existing facility to make it equivalent to the new facility to be financed by new residents (this is calculated as an amount of depreciation that has occurred in existing facilities); and
3) The cost of eliminating deficiencies in existing facilities, to make them equivalent to the new facilities (establishing this figure may require a time-consuming inventory of existing facilities and thus should be one of the first tasks undertaken by the community).

Once the potential maximum fee is calculated, how should the jurisdiction decide what level to set the fee at? Even after deducting the double-payment credit, most jurisdictions may find that if the service-level standards are realistic and the consequent deficiencies are small or nonexistent, the potential fee is higher than the community wants to charge. The imposition of a large fee in addition to other costly public improvement requirements may not be appropriate, especially if the community is competing for new development.

In Raleigh both the thoroughfare and the parks and open-space fee levels were set at less than one third of what theoretically could have been charged to new development (Table 1 gives examples of these fees). In Raleigh,

fees are considered an important, but not critical, element in capital improvement funding. If the city continues to grow as it has recently, Raleigh should collect about $9.5 million in thoroughfare fees and about $5 million in parks and open-space fees in the next five years. These projections represent about 17 percent of the revenues to finance the city's five-year capital improvement program for these facilities. The balance will come from bond-sale proceeds, state aid for city streets (Powell Bill funds), sales tax revenues, and the property tax.

Table 1
Raleigh Facility Fees Assessed with Building Permits

	Thoroughfare	Parks and Open Space[a]	Total
Single-family house	$ 292	$ 375	$ 667
Apartment unit	178	272	450
Office building of less than 100,000 square feet	.517/sq. ft.	n/a	.517/sq. ft.
Retail building of less than 50,000 square feet	.954/sq. ft.	n/a	.954/sq. ft.

[a]Varies by zone; fee listed is for highest charge.

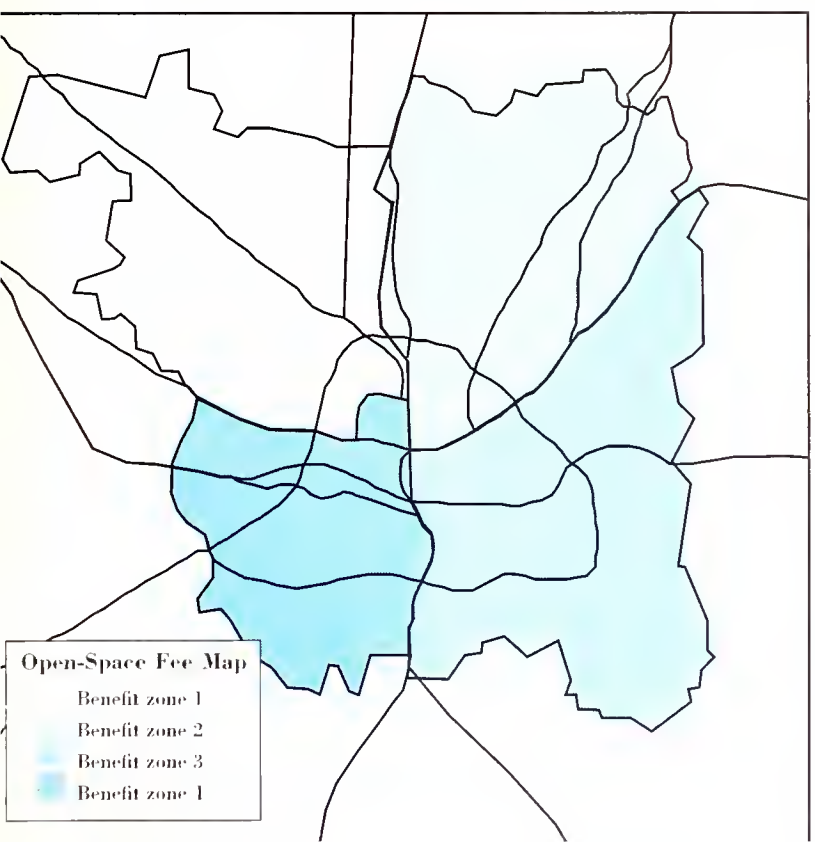
Conclusion

Communities that are investigating impact fees as a funding source should consider the following caveats:

1) Fee revenues are dependent on the rate of city growth. During years of slow growth, revenues will lag. Impact fees cannot be used to construct improvements in advance of development. However, fees can help retire bond indebtedness acquired to purchase land or construct facilities ahead of the actual need.
2) To the extent that fees are a substitute for taxes, the community sacrifices the flexibility inherent in the allocation of tax funds; fees can be spent only for the purpose for which they were collected, only within certain time limitations, and only for facilities that will sufficiently benefit the developments from which the fees were derived.[6]
3) A fee program can be time-consuming to develop. A jurisdiction must inventory existing facilities and deficiencies and perform a vigorous study establishing the level at which fees can be assessed. To undertake such a study, a community must be properly staffed and have adequate systems in place for collecting, monitoring, budgeting, and disbursing fees by benefit zone.

A primary concern of any community considering impact fees is the influence they might have on development decisions: to what extent will the additional charges placed on developments put the jurisdiction at a competitive disadvantage in relation to nearby communities? From Raleigh's experience so far, it seems that the level of fees charged is not discouraging development. Building-permit activity in 1988 did not drop dramatically, and there was no indication that fees were causing activity to shift to nearby communities.

Probably the most important factor in Raleigh's case was the decision to involve the development and building community at the start. Almost all ma-



West Chase Two, at far left, was completed in July, 1988. Photograph by Bob Donnan.

jor issues were resolved early at the time the enabling legislation was drafted. The building community clearly understood that the city did not intend to rely heavily on fee charges: fees were approached as a supplement to, not a substitute for, more traditional methods of financing. Furthermore, the building community's active participation and positive recommendations facilitated adoption of the program. Builders and developers generally perceived the fees as a reasonable tradeoff for revised public improvement requirements, which included more predictable standards and an expanded reimbursement system. ❖

Notes

1. A compendium of staff reports is available from the Raleigh Planning Department, including the consultants' report: Michael A. Stegman and Thomas P. Snyder, "Establishing Facility Fees in Raleigh: Issues and Alternatives" (July 1986). Publications describing issues and calculation methods include:

James B. Duncan, Norman R. Standerfer, and Bruce W. McClendon, *Drafting Impact Fee Ordinances Part 2: Technical Planning and Administrative Guidelines*, Planning Advisory Service Memo, November 1986 (Chicago: American Planning Association, 1986).

James C. Nicholas, *The Calculation of Proportionate-Share Impact Fees*, Planning Advisory Service Report no. 408 (Chicago: American Planning Association, 1988).

Maureen G. Valente and Clayton Carlisle, *Developer Financing: Impact Fees and Negotiated Exactions*, Management Information Service, vol. 20, no. 1, April 1988, (Washington, D.C.: International City Management Association, 1988).

For a general discussion, see Thomas P. Snyder and Michael A. Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure* (Washington, D.C.: Urban Land Institute, 1986).

2. During discussions with the development community, it became apparent that developers much preferred monetary reimbursement to credits for oversized improvements and land dedications that could be issued against possible future fee obligations. Credits can be difficult to allocate among competing parties that may have responsibility for actual payment of fees. For instance, in the case of a shopping center that has a credit available for one half of the fee due, how should the city determine who should receive this credit? Should the first contractor requesting a permit get the credit? Or should the credit somehow be proportionately distributed among all contractors on the site? How can a contractor prepare a cost estimate not knowing the amount of credit that he or she can actually claim? Another problem with credits is that they can distort the cash flow of the system because developers may substitute them for projected fees at unpredictable times. Credits also allow private developers, in effect, to establish priorities for the use of fees. Because the jurisdiction may not control the timing of credits, future fee collections for strategic road improvements can be diverted by credits for less-important oversized improvements on the developer's site.

3. Also, when an impact fee covers an oversized improvement or land conveyance, reimbursement is available for the oversized portion. Thus the property owner does not pay twice—once through actual construction and once through a fee. Raleigh modified its system to favor construction of certain projects by giving accelerated reimbursement payments for projects that the city considers priorities. This system is based on preadopted values for reimbursable items. For instance, extra pavement for thoroughfares is reimbursable at $11.86 per square yard, and extra grading at $2.75 per cubic yard. Fees are used as a funding source for reimbursement: 20 percent of all parks and open-space fees and 25 percent of all thoroughfare fees are reserved for reimbursing developers. Repayment is guaranteed up to $5,000 to ensure coverage of small contracts. The remainder also is guaranteed, but no time period is set for reimbursement. Instead, reimbursement is based on the annual amount of fees collected.

4. The standards selected will greatly influence subsequent calculations. How a standard is expressed determines who is charged and the method of the charge. Road fees provide an illustration of how this happens. Such fees are derived from average trip-generation rates for different types of land uses. If the standard is expressed as peak-hour volume, the developers of certain land uses that generate heavy peak-hour demands, such as offices, will be charged relatively higher fees. In contrast, if a fee schedule is constructed using average daily volume, the schedule will reflect relatively lower charges for offices, which do not generate as high a rate of trips in a twenty-four-hour period as other uses.

5. If there are no future trip-generation figures available for a jurisdiction, another method that can be used calculates the actual amount of new road length needed to serve each land-use category. The fee is determined by multiplying the cost of road construction per foot by the length of roadway that is needed for the particular use.

6. Impact taxes, used in other states, are a variation on the impact-fee approach. Orange County has been exploring the possibility of adopting a countywide tax. Such an approach may not require the same level of intensive background studies involved in an impact-fee program and may allow more discretion in setting the charges and allocating the revenue collected. Like a fee, the tax is imposed when new development is initiated (not necessarily as a condition of permit issuance), and the existing apparatus for tax collection can be used. A principal drawback of the tax is that, unlike the fee, it cannot be assessed for development outside the municipal boundary. It also requires additional enabling legislation.

Characteristics, Contributions, and Values of City and County Managers in North Carolina

James H. Svara

City and county managers, as appointed officials who are leaders in their communities, occupy a unique position. The nature of the job and the manager's exact role have long been subjects of disagreement among observers of local government. Managers commonly are considered professionals, but some people may view them as "hired hands," either because they lack professional qualities or because they are not free to exercise them.[1] Insofar as managers possess expertise, exercise independence while acknowledging control, move across communities to find new opportunities for practice, and have commitment to standards of conduct developed by the profession, they manifest the traits of professionals.

The manager's formal position is clearly established in state statute.[2] The manager ensures that the policies of the governing board are executed and directs and supervises the administration of all offices under the control of the governing board. The manager may recommend to the governing board any measures that he or she considers expedient. The manager has the power to prepare and submit the annual budget and capital program to the governing board and has authority over personnel actions, with approval of the commission in the case of counties.[3]

Counties present different circumstances to the manager because of the close county ties to state government, the presence of other elected officials who direct some departments, and the operation of semi-autonomous boards and commissions that play a part in policy making, budgeting, and selecting the director in other major departments. Given these structural differences, whether a county manager can be considered comparable to a city manager is an open question. Furthermore, the very small jurisdiction—city or county—may be characterized by such close, first-person relationships that a manager cannot fill the role in the ways prescribed by law or found in larger jurisdictions with more formalized role definitions.

With these general factors in mind, we shall examine the background and characteristics of

The author is a professor of political science and public administration at North Carolina State University and a member of the NASPAA/ICMA Task Force on Local Government Management Education. When this study was conducted, he was an associate professor of political science and director of the Masters of Public Affairs Program at The University of North Carolina at Greensboro.

Table 1
Distribution of Local Government Managers by Age and Education

	Cities	Counties	United States[a]
Age			
Under 30	9%	5%	8%
30–39	39	15	12
40–49	25	27	26
50–59	19	16	20
60 and over	8	7	5
Education			
High school/technical school	14%	0%	2%
Some college	12	9	10
College degree/graduate courses	32	48	30
Graduate degree	11	43	58
M.P.A.[b]	35	30	—[c]

[a]*The Municipal Year Book 1985*, tab. 1/2 and 1/7. The national figures include managers from cities, counties (6 percent of total respondents), and recognized councils of government (4 percent of respondents). Age breaks in the national data were coded 30 and under, 31–40, 41–50, 51–60, and over 60.

[b]Percentage of managers with a graduate degree who hold an M.P.A. degree.

[c]Not available.

Table 2
Tenure of Local Government Managers in North Carolina

	Current Position		All Positions	
	Cities	Counties	Cities	Counties
Less than 1 year	8%	17%	5%	5%
1–2 years	29	21	15	12
3–5 years	32	38	14	34
6–9 years	15	17	22	19
10–14 years	5	1	24	9
More than 14 years	11	3	20	21

managers, their involvement in various aspects of the governmental process, their attitudes toward the governing board, and the values that shape their role in order to gauge the professionalism of managers in North Carolina. The connection between characteristics such as age and educational level and managers' behavior and attitudes also will be explored. Throughout the discussion, comparisons of city and county managers and of managers who serve in jurisdictions of different sizes will be offered.

The source of data used in this analysis is a survey of local government managers conducted in 1987. The questionnaire was administered by mail to 216 city and 94 county managers in North Carolina. Jurisdictions with a vacancy in the position or an acting manager were omitted from the study. A follow-up request was sent to managers who did not respond to the initial inquiry. Responses were received from 131 cities and 58 counties, for a response rate of 61 percent and 62 percent, respectively.

Characteristics of Managers

The distribution of local government managers in North Carolina with respect to age is quite similar to the distribution of managers nationally, as indicated in Table 1. City managers are slightly more likely to be drawn from the under-thirty and over-fifty categories than are county managers. Sixty percent of the youngest managers are employed in the smallest cities (with a population less than 2,500) and counties (with a population less than 25,000).

The educational level of managers in the state falls somewhat below the national average, as indicated in Table 1. The cities are more likely to have managers with less than a college degree than are counties or local governments in the rest of the country, and both cities and counties fall below the national percentage in managers with a graduate degree. Only about a third of the managers who responded to the survey have the Master of Public Affairs or Administration (M.P.A.) degree, despite the growing acceptance of this professional public-management degree as the standard formal preparation for the manager's position. As is true nationally, the educational attainment of managers is lower among those in higher age groups. Among managers in North Carolina under forty years of age, 59 percent have a graduate degree (49 percent have the M.P.A.), compared with approximately 30 percent of those over forty. The comparable figure nationally, however, for the under-forty group is more than 70 percent with a graduate degree.

The smaller the jurisdiction, the more likely it is that the manager does not have a college degree. In four categories of jurisdictions ranging in size from smallest to largest, 28, 23, 15, and 6 percent of the managers, respectively, have not completed college. On the other end of the educational spectrum, only 37 percent of the managers in the smallest jurisdictions have a graduate degree. The distribution of graduate-degree recipients is fairly even in the other

three categories, with 44 to 46 percent of the managers holding an advanced degree.

The length of time that managers have spent in their current position suggests that counties have higher rates of turnover than cities. As indicated in Table 2, proportionately more than twice as many county managers are in their first year, and less than a third as many have been in their current position fourteen years or more. Two thirds of city managers have served six years or more in all manager positions, compared to half of the county managers. This difference probably reflects the fact that the manager plan has been better established in cities for a longer time than in counties. Younger managers have served less time in their current positions than older managers, as one would expect. Smaller jurisdictions tend to have managers with less experience than larger ones. Sixty percent of the smallest cities and counties have managers with total experience of five years or less, approximately 30 percent of the small- to moderate-sized jurisdictions do, and only 21 percent of the largest jurisdictions have managers with this amount of experience.

Tenure patterns in North Carolina closely match those found nationally. The average length of time spent in the current job is 5.6 years for city managers, 4.2 years for county managers, and 5.1 years for all managers in North Carolina, compared with 5.4 years for all managers nationwide.[1] Once again, we see that county managers do not have the length of tenure found in cities in this state or nationally. The range of experience among North Carolina managers is identical to the rest of the country. Among managers in the state and nation, 49 percent have served in only one government as a manager. Three fifths of these one-jurisdiction managers in North Carolina have less than five years of experience as a manager; 16 percent have a managerial career of ten years or more in one place.

Involvement in the Governmental Process

The manager makes extensive contributions to all dimensions of the governmental process. One may divide activities in this process into four dimensions. *Mission* refers to determination of the purpose, goals, and constitutional structure of local government, and *policy* involves adopting the projects and programs to achieve the mission. *Administration* refers to service delivery and implementation, and *management* is the coordination and control of the resources of government. Managers are highly involved in these dimensions when they exercise initiative to raise problems and recommend actions and when they handle matters entirely on their own. The average involvement reported by managers is moderately high to very high for all the specific decisions listed in Table 3. The involvement level of managers is higher than that of members of governing boards in all activities, with the exception of (1) changing governmental institutions and adding or removing programs (mission) and (2) budget review and approval (pol-

Table 3
Involvement by Managers in Specific Decisions in Cities and Counties

	Actual		Preferred	
	Cities	Counties	Cities	Counties
Mission				
Analyzing future needs	3.8	3.9	3.9	3.9
Strategies for development	3.7	3.7	3.9	3.9
Changing institutions	3.1	3.2	3.2	3.5
Initiating and canceling	3.5	3.5	3.6	3.6
Purpose and scope	3.7	3.6	3.7	3.8
Average	3.6	3.6	3.7	3.7
Policy				
Annual program goals	3.8	3.8	3.8	4.0
Planning and zoning	3.5	3.4	3.5	3.5
Formulating budget	4.3	4.3	4.3	4.4
Reviewing budget	3.7	3.6	3.7	3.5
Average	3.8	3.8	3.8	3.9
Administration				
Service decisions	4.0	3.9	4.2	4.1
Citizen complaints	4.1	4.0	4.1	4.1
Project decisions	3.7	3.8	3.8	3.9
Evaluating programs	3.8	3.7	3.7	4.0
Average	3.9	3.8	4.0	4.0
Management				
Hiring department heads	4.2	3.9	4.5	4.4
Hiring other staff	4.1	4.0	4.3	4.2
Contracts and purchasing	4.0	4.1	4.2	4.2
Change management	3.9	3.9	4.0	4.1
Average	4.1	4.0	4.2	4.2

Note: Involvement was measured on a five-point scale: 1=very low—not involved; 2=low—minimum review or reaction; 3=moderate—advising or reviewing; 4=high—leading, guiding, or pressuring; 5=very high—handle entirely.

Table 4
Actual Involvement by Managers in Major Dimensions of Governmental Process, by Size of Jurisdiction

	Mission	Policy	Administration	Management
Cities				
Under 2,500	3.5	3.6	3.7	3.8
2,500–7,500	3.7	3.9	3.9	4.1
7,501–39,999	3.7	4.0	4.1	4.3
40,000 and over	3.7	3.9	3.9	4.4
Counties				
Under 25,000	3.6	3.9	3.9	4.1
25,000–50,000	3.7	3.7	3.9	4.1
50,001–99,999	3.4	3.7	3.7	3.8
100,000 and over	3.6	3.8	3.9	3.9

Note: Involvement was measured on a five-point scale: 1=very low—not involved; 2=low—minimum review or reaction; 3=moderate—advising or reviewing; 4=high—leading, guiding, or pressuring; 5=very high—handle entirely.

icy).[5] Extensive involvement by managers is found in both cities and counties. The involvement of county managers and city managers is virtually the same for all but one activity. In appointing department heads, city managers display greater latitude than county managers, which reflects the difference in their formal authority in this area. Still, city and county managers appear to approach and carry out the job in a similarly active way.

Further, managers are generally satisfied with their level of contribution. In most cases the actual and preferred ratings they assign to themselves are virtually identical (plus or minus .1 on the rating scale). The city managers would like more control over appointing department heads and somewhat more involvement in shaping strategies for development, service decisions, hiring other staff, and contracting. County managers are more dissatisfied, preferring more involvement in changing institutions, in evaluating programs, and especially in appointing department heads. They would like a somewhat larger role in six activities—determining strategies, determining purpose and scope of government, developing annual program goals, making service decisions, hiring other staff, and changing management practices—as well as in the management dimension generally. Managers are active, and they are comfortable in their role. They provide guidance and assistance for the governing board in all matters that come before the local government. The manager offers leadership to all aspects of local government, not simply administrative leadership.

The size of the jurisdiction has a greater effect on city managers than county managers, as indicated in Table 4. In every dimension of activities, the managers in the smallest cities are somewhat less involved. This does not mean that they do less but rather that they defer somewhat more to the council, which also tends to be more active in all areas than the councils in larger cities. Furthermore, managers in the two largest city categories display more independence in handling management decisions than those in the smaller cities. There is no consistent tendency for managers of any size category of counties to be more or less involved, although managers in smaller counties have greater involvement in management than those in the larger counties.

That most managers are active participants in all kinds of local government activities does not mean that *all* are. Average ratings understate the involvement of some and overstate that of others. Figure 1 presents the distribution of managers by level of involvement for each dimension of the governmental process. Those managers who take the initiative on all or almost all of the activities in a dimension may be considered activists: they are highly or very highly involved.[6] More than half of the city managers and 38 percent of the county managers can be called activists in the mission dimension. In policy, 73 percent and 60 percent of the city and county managers, respectively, are highly or very highly involved. In administration and management, the proportion of activists is similar for cities and counties—approximately three fourths in administration, and four fifths in management. However, the managers who exercise substantial independence in decision making in administration and management (those with a rating of 4.3 or higher) are found more often in cities than in counties. Thus active leadership increases as one moves from mission to management and is slightly better established in cities than in counties. County managers are more likely to incorporate greater consultation with the governing board into their leadership than are city managers.

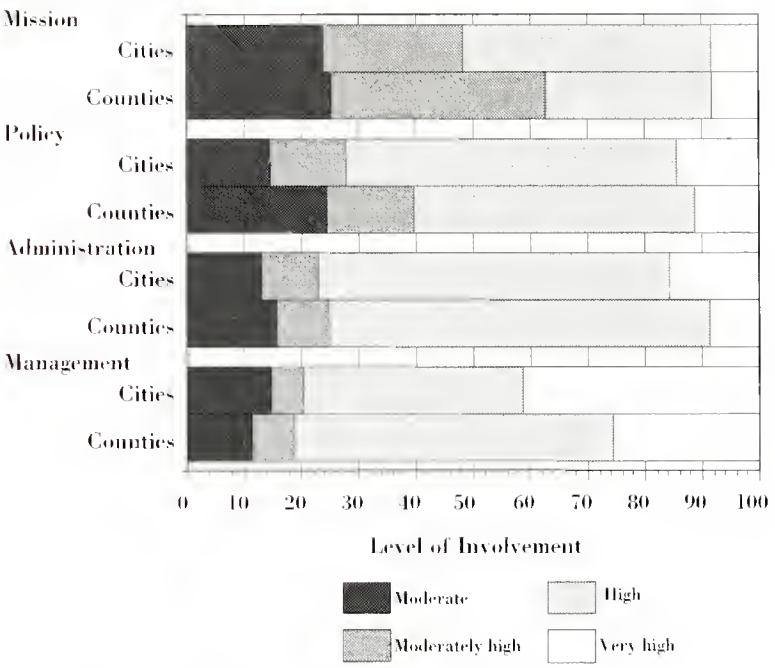
An activist stance is more likely to be demonstrated by managers who are younger and by those who have received more formal education. In mis-

sion, policy, and administration, those under forty are more than twice as likely as those over sixty to display active initiation. The difference is present but less marked in management. With regard to education, managers with the M.P.A. degree (who also tend to be younger) are the most likely to be activists in mission and policy. Whereas 47 and 70 percent of all managers are activists in these two dimensions, among those with an M.P.A. degree 62 percent are highly or very highly involved in mission and 80 percent rate this high in policy. In contrast, among those with less than a college degree only 24 percent are activists in mission and 51 percent are activists in policy. In the administration and management dimensions, all those with college or graduate degrees are more inclined to play a larger role than those with less education.

When the intercorrelation of characteristics is taken into account—for example, the tendency of younger managers to be more educated—the most powerful factor associated with managerial involvement in mission and policy is the age of the manager.[7] Younger managers—generally, those younger than fifty—are likely to be more highly involved even when educational level, experience, and type of jurisdiction are considered. Size of the jurisdiction is also important in that the relationship between age and involvement is significant only in the very small and moderately small jurisdictions. No clear pattern emerges to explain variations in the level of involvement in administration. In management activities the level of education is the most important factor associated with greater involvement in management decisions in the smaller jurisdictions. As formal preparation for the position increases, managers may be more inclined to assert their prerogatives to handle management decisions with greater independence.

These relationships do not hold up in the moderately large and very large jurisdictions. Neither age nor education of the manager is significantly related to the manager's involvement in any of the dimensions. Those who occupy the manager's position in the larger jurisdictions display substantial consistency in their level of activity regardless of age or education. Either upward mobility screens out the managers who prefer to maintain a lower profile or such managers do not seek the position in larger places.

Figure 1
Distribution of City and County Managers by Actual Level of Involvement (Percentage of Total)



Unless the activism of managers erodes over time, there is evidence from these findings that managers will increasingly take an explicit leadership role as generational change occurs in management ranks and as advanced education in public management becomes more widespread.

One might object that some managers take on more responsibility for initiating and handling decisions in mission and policy than is desirable. A level of activity that is "too high" might have the effect of depressing the council's contribution. Such an outlook would reflect a zero-sum view of council-manager relations in which greater activity by one produces less by the other. The correlation between the manager's level of involvement and that of the governing board, however, is consistent with the view that the council is responsible for formulating mission, the manager is responsible for management, and both sets of officials share responsibility for policy and administration.[8]

There is a weak positive relationship between the manager's and the council's rating in mission. The council's involvement in determining the direction and purpose of the city is slightly enhanced by the manager's activity level. The relationship is a posi-

Table 5
Value Commitments of City and County Managers

	Percentage Agreeing	
	Cities	Counties
Policy and Administrative Initiatives		
A manager should advocate major changes in policies.	81.1	79.0
A manager should assume leadership in shaping municipal policies.	79.9	87.7
A manager should advocate new services in order to promote equity and fairness for low-income groups and minorities.	88.2	89.5
A manager should actively promote equity and fairness in the distribution of existing city services.	100.0	100.0
Political Involvement		
A manager should facilitate the expression of citizen opinions even if they are counter to council views.	77.1	66.7
A manager should maintain a neutral stand on any issues on which the community is divided.	16.6	18.2
A manager should advocate policies to which important parts of the community may be hostile.	58.6	28.3
Relations with the Council		
A manager should consult with the council before drafting the budget.	61.7	75.4
A manager should act as an administrator and leave policy matters to the council.	51.6	54.4
A manager should make it clear to the council when they are intruding in administrative matters.	83.0	87.7
A manager should insist on having a free hand in directing the internal operations of city government.	90.0	84.2

tive-sum interaction because more involvement by the manager makes the council more involved, and vice versa. In policy and administration there is a moderate and weak inverse relationship, respectively. Extensive involvement by the manager reduces the council's involvement somewhat. In management there is a strong inverse relationship. When managers are active, governing boards are largely excluded.

Managers do not shape the council's role in mission, except perhaps to induce greater activity. Active managers do not diminish and, if anything, may strengthen the role of the council in determining the purpose and direction of government. They do modestly alter the council's activity in policy and administration. It appears that active managers help to keep the governing board from taking on as great a load of specific policy and implementing decisions. Active managers lighten the load of middle-range policy making and reduce governing board involvement in administration. The manager's involvement level greatly affects the extent to which the governing board is active in management. Managers who display a great deal of initiative strongly reinforce the exclusion of elected officials from operational matters. The alternative interpretation is that when governing boards stay out of management decisions, the manager is more likely to exercise his or her prerogatives.

Further evidence that managers do not see the relationship as zero-sum is found in their preferences regarding the governing board's activity level. Insofar as they prefer change in the governing board's involvement, they generally prefer the governing board to be doing more rather than less than it is currently.[9] Managers in cities and counties would prefer that the governing boards take a substantially larger part in determining the purpose and scope of government, analyzing future needs, and developing strategies for the future. Governing board members, in the opinion of managers, should contribute more to developing annual program goals and objectives and to evaluating programs. Managers would like the governing board to be much less involved in investigating citizen complaints and in hiring decisions. Strong managers, therefore, are not an alternative to strong councils. Rather, they can complement each other.

Managers' Values

The values of the local government managers reflect a commitment to active leadership, despite the variation in actual leadership they provide. As indicated in Table 5, they generally agree that managers should (1) advocate major changes in policy when they are needed, (2) assume leadership in shaping policies, and (3) advocate new services in order to promote equity and fairness. All the managers agreed that the manager should actively promote equity and fairness in the distribution of existing city services.

Managers accept an obligation to promote openness and to take stands on controversial matters. A

commitment to citizen participation is reflected in the widespread belief that the manager should facilitate the expression of citizen opinions even if they are counter to council views. Three fourths of the city managers and two thirds of the county managers took this position. There are limits, however, particularly in counties and smaller jurisdictions. Almost half of city and county managers feel that the manager should remain neutral if the community is sharply divided on an issue: a majority of managers in small jurisdictions feel this way. Whereas three fifths of city managers agree that they should advocate policies in the face of opposition, only 28 percent of the county managers do so. Among managers in the largest cities and counties, however, 61 percent agree that such advocacy is necessary.

In their dealings with the councils, managers generally favor consultation with the council before formulating the budget, especially in counties. Managers of the largest jurisdictions are the most supportive of consultation. Despite their extensive policy activity, over half of all managers would prefer to act as an administrator and leave policy matters to the councils, presumably reflecting some ambivalence about their "new" roles. This view is particularly widespread among managers in small jurisdictions. Managers do believe that they should assert their prerogatives in administration and management: over 80 percent think that the manager should make it clear when the council is intruding in administrative matters and should insist on a free hand in directing internal operations.

The value system of most managers generally supports an activist role.[10] The managers who are most likely to have such commitments are more educated, although differences based on educational level are confined to a few areas. Those with graduate degrees are least accepting of the idea of taking a neutral stance if the community is divided or of confining their activities to administration and leaving policy matters to the governing board—the so-called dichotomy model of council-manager roles. M.P.A. recipients in particular are most accepting of consultation with the governing board on the budget, although highly insistent of protecting their prerogatives as managers. Age is a factor that cuts both ways. Young managers are more restrained in advocating major change or assuming leadership but most supportive of citizen participation. The oldest managers are most cautious in contentious situations, least likely to advocate new services to promote equity, but most likely to assume leadership. They also are least likely to consult with the governing board on the budget. They almost universally accept a dichotomy model that would limit their role to administration (86 percent did so).

Summary and Implications

Local government managers in North Carolina are professionals in the sense that they have special preparation for their work, they draw upon experience that often is based on being a manager in more than one jurisdiction, and they have value commitments that indicate a willingness to take on obligations that are part of serving their communities. Although they accept the control of elected officials, they are not mere hired hands. Managers clearly perceive themselves as leaders who make contributions to all dimensions of the governmental process.

There are limitations to these generalizations and shortcomings in the data that should be noted. First, although a majority of managers lack advanced degrees as an educational base for their work, the survey did not cover other kinds of training, such as the widely attended Institute of Government course in municipal and county administration and other continuing education that managers complete. Still, the managers in the state do not quite match the level of educational attainment found in the rest of the country. Second, half of the managers have served as manager in only one community. But the survey did not capture experience in other jurisdictions in positions lower than the manager's job, and many young managers will move to other jurisdictions during their career. Still, the generalization that managers are broadly experienced must be tempered by the fact that managers are as likely as not to be drawing from experience as managers in only one jurisdiction.

Third, and perhaps the most important shortcoming of the analysis, is that it focuses on managers as individuals and neglects the community of managers in the state and nation of which they

are a part. The "teaching," information, support, and ethical standards that come from the North Carolina City and County Management Association and the International City Management Association promote greater professionalism by providing knowledge to managers, fostering common standards, and offering a network of experienced practitioners from which individuals can derive assistance. The practices and performance of an M.P.A.–trained manager with experience in several jurisdictions may not be as different as one would suspect from that of a manager with limited formal education and experience in only one community, if both have been active members of the manager associations.

The findings support the conclusion that city and county managers in this state can be viewed as comparable. The latter have shorter tenure, they are somewhat restricted in personnel matters, and they are somewhat more dissatisfied with the level of their involvement than are the city managers. The level of involvement by county managers is fairly uniform across counties of different sizes, whereas city managers in the smallest communities are somewhat more limited in their involvement. The county managers are a bit more cautious, particularly when the population is divided on an issue, and are more likely to consult with the commission. Still, the two groups of managers have similar backgrounds, display virtually identical involvement ratings (except in hiring department heads), and divide in a similar way over most value commitments. City and county managers are not identical, but they are alike in most respects. A unique feature of this state is that professional management is as widespread in counties as it is in cities.

Managers have different perspectives shaped in part by variations in circumstances, age, and education. Managers in small jurisdictions face distinct challenges, particularly in small cities. They share more activities with elected officials, who themselves are involved at a higher level in more areas, and they are somewhat more cautious about asserting visible leadership. The younger managers and those with graduate education are more inclined to define their position as one of active, broad-ranging leadership. They recognize a direct responsibility to address community problems and to involve citizens in the work of government. They have a strong sense of their prerogatives as managers yet accept the need for close interaction and consultation with elected officials. Older managers and those with less formal education are more inclined to define their role as separate from the council, and they place more emphasis on their administrative activity. Older managers are ready to assume leadership, but they are less likely to see themselves as the agent of change or the link with the community for their government.

Presumably, managers as a group are moving toward more activism and greater acceptance of their position as an intermediary in a wide range of interactions within the governmental process and the life of the community. They will increasingly act as brokers and facilitators of action and serve as organizational managers. This shift results not only from change in the characteristics of individual managers but also from a shifting consensus in the state and national manager associations. At the same time, managers will continue to come from a variety of backgrounds and have divergent perspectives about issues within the profession. They do not come out of the same mold, and they are not of one mind in defining their roles. Local government managers will bring a healthy diversity to discussions in the associations about their performance and about the issues and dilemmas they confront in their work. ❖

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Notes

1. Richard J. Stillman II, "The City Manager: Professional Helping Hand, or Political Hired Hand?" *Pub-*

lic Administration Review 37 (November/December 1977): 659–70.

2. See Donald B. Hayman, "The Council-Manager Form of Government," in *Municipal Government in North Carolina*, ed. David M. Lawrence and Warren J. Wicker (Chapel Hill, N.C.: Institute of Government, 1982), 39–40.

3. This restriction applies unless by resolution the commission permits the manager to make appointments without approval. See Donald B. Hayman, "The County Manager," in *County Government in North Carolina*, ed. A. Fleming Bell, II (Chapel Hill, N.C.: Institute of Government, 1989), 21.

4. Mary A. Schellinger, "Local Government Managers: Profile of the Professionals in a Maturing Profession," *The Municipal Year Book 1985* (Washington, D.C.: International City Management Association, 1985), tab. 1/8.

5. For a complete discussion of the managers' assessment of the governing board's involvement, see James H. Svara, "Council-Manager Relations and the Performance of Governing Boards," *Popular Government* 54 (Summer 1988): 27–32.

6. In this discussion and in Figure 1, the breakdown of managers is based on their rating on the four or five items used to construct each dimension. If the average rating is 4.3 or higher (that is, two or three of the items receive a rating of 4 and at least two receive a 5), the manager is placed in the very high involvement category. The high involvement category (3.75–4.25) results when at least three of four or at least four of five items have a rating of 4. A moderately high rating (3.3–3.7) includes two ratings of 3, with the other activities rated higher. Finally, a moderate rating of 3.25 or less is given when at least three items were rated 3 or lower and none was rated 5.

7. These generalizations are based on a regression analysis of involvement level; measures of association between involvement, age, and education, controlling for jurisdiction size; and a comparison of average levels of involvement for managers in each age and education category in jurisdictions of different sizes.

8. The gamma measure of correlation between the manager's actual involvement and the governing board's actual involvement in each dimension is as follows: mission, +.13; policy, -.30; administration, -.16; and management, -.62. Statistical significance is less than .01 (measured by chi square) for all but the administration dimension.

9. See Svara, "Council-Manager Relations."

10. It appears that council members are largely in agreement with the manager on the policy role. Among the council members surveyed in North Carolina and other states, there is general agreement that the manager should take the initiative in policy recommendations, advocate major changes when they are needed, support equity in policies and service delivery, and foster citizen participation.

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North Carolina's Jails: the Governor's

Prison overcrowding. Lawsuits. Federal intervention. All these have directed attention to the problems in North Carolina's state prison system. In recent years the tremendous increase in inmate population has focused attention on prisons and the substandard conditions brought about by overcrowding. But prison problems have overshadowed another crisis—that of the state's local jails, whose population has increased much faster than that of the prisons. Today's jails are frequently overcrowded and are struggling to meet licensing requirements and constitutional standards. From January, 1976, to July, 1988, the statewide average daily jail population nearly tripled, increasing from 2,032 to 5,899 prisoners (see "Trends in Local Jail Population, 1976–1988" on page 24–25). Although jail capacity has been sufficient to handle the average population, some jails frequently have exceeded their capacities during peak periods. And capacity has not grown as fast as the jail population. From 1981 to 1988, capacity increased from 5,567 to 7,154, or 4.1 percent annually, while average population increased from 3,403 to 5,838, or 10.2 percent annually.

To address this crisis, the Governor's Crime Commission, a planning agency representing local and state criminal justice officials, conducted a comprehensive study of the North Carolina jail system. The objectives of the study, which began in 1987, were to analyze laws, policies, and practices affecting jails and to present proposals to improve the jail system in North Carolina.[1] When the study began, a description of the statewide jail population—who is in jail, for what offense, and for how long—was not available from any source. Therefore the commission's Criminal Justice Statistical Center, with technical advice from the Institute of Government, collected and analyzed extensive data on local jails.[2]

The authors are on the staff of the Governor's Crime Commission. Ms. Lanning and Ms. Pearce are criminal justice planners, and Mr. Jones is director of the Criminal Justice Statistical Center.

The Commission's Recommendations

On the basis of its study of jail data and suggestions contributed by a variety of knowledgeable individuals, the commission issued a series of recommendations aimed at alleviating jail overcrowding and related problems. The commission's recommendations concern two categories of prisoners: pretrial detainees (defendants awaiting court disposition of criminal charges, who constitute the majority of the statewide jail population); and sentenced prisoners. Selected recommendations are summarized here, followed by commentary.

Pretrial Detainees

Police chiefs and sheriffs should develop written policies to encourage law enforcement officers to issue citations instead of arresting defendants charged with misdemeanors. The senior resident superior court judge of each judicial district, in consultation with the chief district court judge, should issue guidelines for magistrates regarding the use of criminal summons in lieu of arrest warrants for low-risk misdemeanor defendants.

There were 404,444 arrests made in North Carolina in 1987; about 60 percent of these (241,000) resulted in admissions to jail.[3] Current law allows law enforcement officers to issue a citation rather

Recommendations from Crime Commission

Kristine Lanning, David E. Jones, and Sandy Pearce

than arrest a person charged with a misdemeanor. It also allows magistrates and other judicial officials to issue a criminal summons rather than an arrest warrant for a person charged with any crime.[4] The defendant charged by citation or summons is neither arrested nor admitted to jail. Rather, he or she is ordered to appear in court on a specific day to face charges and may be arrested if he or she fails to appear.

Most arrests (about 87 percent in 1987) involve nonassaultive offenses, and most of the latter are misdemeanors. This suggests that the use of citations and summonses could be increased without risk to public safety. Greater use of these procedures could reduce jail admissions as well as save the time of law enforcement officers.

*

Superior and district court judges should develop pretrial release policies that include guidelines regarding who should be released pretrial and under what conditions. More attention should be given to the use of conditions other than secured appearance bond, such as unsecured bond and supervision of the defendant while on pretrial release. Senior resident superior court judges, in consultation with chief district court judges, should review pretrial release guidelines annually and amend them according to local problems and needs. The Administrative Office of the Courts should provide magistrates with twenty-four–hour access to criminal history information for making pretrial release decisions.

The purposes of pretrial release—also called bail—are to release arrested defendants pending court disposition and to provide reasonable assurance that they will return to court when required without posing unacceptable risk to the public while they are free. Four conditions of pretrial release are legally authorized: secured appearance bond; unsecured appearance bond; supervision by some person or agency; and the defendant's written promise to appear.[5]

State law allows local flexibility in pretrial release policy. The senior resident superior court judge in each judicial district, in consultation with the chief district court judge, must issue recommended policies for pretrial release in the district. Many of the current local policies are limited to specifying secured bond amounts for certain offenses. They often do not address the issues of who should be released and the use of conditions other than secured bond. In addition, magistrates and other judicial officials often have little information on which to base their determination of conditions of pretrial release. Giving magistrates twenty-four–hour access to defendants' criminal history records would improve their ability to assess risks for pretrial release.

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Legislation should be enacted to authorize defendants to secure appearance bonds (and thus obtain pretrial release) by depositing 15 percent of the bond amount in cash, with 90 percent of the deposit to be refunded if the defendant appears in court as ordered and 10 percent retained by the court for administrative costs.

Fractional deposit bond would give the defendant an additional incentive to appear in court: a refund of most of the deposit.[6] Also, fractional deposit bond could improve the opportunity for pretrial release in two ways. First, some defendants who could not afford to pay a nonreturnable 15

percent of the bond to a bondsman might be able to spare a 15 percent deposit that would be refunded upon their appearance. Second, the improved deterrent to failure to appear (through potential loss of the refund) might allow judicial officials to set lower bonds.[7] Information from the Pretrial Services Resource Center in Washington, D.C., indicates that twenty-three states, the District of Columbia, and the federal courts now allow release under certain circumstances by depositing a fraction of the bond amount.

*

Supervision of defendants as a condition of pretrial release should be encouraged, with an emphasis on those who are not released from jail within twenty-four to forty-eight hours after arrest. Counties should fund programs that (1) screen jailed defendants for supervised pretrial release, (2) recommend supervised pretrial release to magistrates and judges in appropriate cases, (3) inform defendants about their obligation to appear in court, and (4) supervise defendants to ensure their appearance in court where such supervision is required by a judicial official.

In examining forms of pretrial release that, although authorized by current law, are infrequently used, the commission found much potential in the use of supervised release. Because this form of release can involve an extra cost (for staff to screen defendants, report to the court, and supervise defendants), the commission recommended that it be concentrated on defendants who have spent at least twenty-four to forty-eight hours in jail without release. Such defendants often remain in jail until their cases are tried and contribute very heavily to the pretrial jail population.[8] Therefore releasing some of them could significantly reduce the population.

The commission examined supervised pretrial release agencies in Wake, Buncombe, and Mecklenburg counties. Each agency delivers services in a different manner, but all increase opportunity for pretrial release, especially for those defendants who are unable to post a secured bond. The agency interviews defendants and assesses their risk of nonappearance in court. If a defendant meets certain criteria, the agency recommends to the court that he or she be released under the agency's supervision. While the defendant's case is pending, the agency maintains contact with the defendant to ensure his or her appearance. It also informs the defendant of the obligation to appear in court and the consequences of failing to appear.

*

The disposition of cases involving jailed defendants should be expedited to reduce the jail population. Prosecutors, in consultation with local law enforcement officers, should develop and implement early screening policies to identify those cases in which charges are likely to be reduced or dismissed. County governments experiencing jail overcrowding should consider hiring a person as a local court liaison. This person would be responsible for expediting assignment of counsel to indigent clients in pretrial detention; identifying jail cases for expedited action by district attorneys, clerks, and judges; and advising district attorneys of defendants who have spent unusually long times in pretrial detention.

As explained in "Trends in Local Jail Population, 1976–1988," the greatest cause of the growth of the jail population has been the increased length of time spent in jail by pretrial defendants. Information provided to the commission by the Administrative Office of the Courts indicates that the disposition time in criminal cases has increased in recent years.[9] This increase may be one reason why the length of stay in jail has increased. District attorneys, who in North Carolina are responsible for scheduling criminal cases for court action,[10] play a key role in determining the pace of disposition. The District Attorneys' Conference, an association of the state's elected district attorneys, supports a policy of giving priority in scheduling to cases involving jailed defendants.[11] In addition, at least one district attorney is already systematically screening such cases, and the county has hired a jail coordinator to expedite their processing.[12] Although county governments have no authority over district attorneys or other court officials, they have a strong incentive to reduce jail overcrowding because they pay for jails. Therefore counties should take the leadership role in managing jail population through the services of local court liaisons.

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Assignment of counsel should be expedited for indigent defendants who have not received pretrial release. The Administrative Office of the Courts should expand its program of indigency screening, using specialized court staff to investigate whether defendants are indigent and thus entitled to court-appointed defense counsel. The sheriff, as jail administrator, should notify the clerk of superior court or the public defender's office[13] when a defendant in custody asserts that he is indigent and desires counsel or is without counsel for more than forty-eight hours after arrest. Efforts should be made to determine whether the defendant is indigent and to assign counsel before the first appearance in district court, so that bond reduction can be considered at that appearance.

Judges having jurisdiction may review jailed defendants' pretrial release conditions and change them at any time. However, the commission found that this review sometimes is delayed by the process of appointing defense counsel because judges often prefer to have counsel present when considering pretrial release. Indigent defendants probably spend more time in pretrial detention than do defendants who can afford private attorneys. One reason is that their low income makes it difficult for them to post bond. Another reason is that they ordinarily do not have appointed counsel at their first court hearing, which may make it more difficult to get timely court review of their conditions of pretrial release.[14]

One way to expedite appointment of counsel, when appropriate, would be to expand the indigency-screening program. Delays in appointing counsel are less severe in the eight (of thirty-four) judicial districts in which the Administrative Office of the Courts provides indigency-screening services. Indigency screeners go into jails each weekday and interview pretrial defendants. They explain eligibility for indigent services and the defendants' obligation to reimburse the state for the cost if they are able.[15] Most important, screeners verify information obtained from defendants. Screeners appear in court, providing judges with information relevant to eligibility for appointed counsel. They also notify lawyers promptly that they have been appointed.

*

Judges should enforce conditions of pretrial release more stringently. Forfeiture should be ordered whenever a defendant does not appear for court as scheduled, with a "discount" (partial remission of the forfeiture) allowed for the defendant's prompt return to court. District attorneys should prosecute some defendants for the offense of willful failure to appear.

The defendant and the bondsman, if any, legally are liable for forfeiture of the bond if the defendant fails to appear without a lawful excuse. However, courts rarely enforce this liability by issuing a forfeiture judgment. This is true in North Carolina as well as in other jurisdictions.[16] In a recent study of Durham, 87 percent of bonded defendants who failed to appear were not ordered by judgment to forfeit any portion of their bonds.[17] Also, although willful failure to appear is a crime,[18] it rarely is prosecuted. Ordering forfeiture of at least a percentage of bonds and prosecuting at least some defendants for willful failure to appear would remind defendants and bondsmen of the consequences of failing to abide by court orders. These proposals also would balance the possible increased risks of failure to appear associated with greater opportunity for pretrial release.

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Counties experiencing jail population management problems should initiate a Jail Overcrowding Project.

Help is available for counties that want to address jail overcrowding problems. So far, eleven counties have received funds for Jail Overcrowding Projects through the Governor's Crime Commission, which administers criminal justice grants. These projects use a systematic approach to develop and implement local jail-population management plans. (See "Local Jail-Population Management" on page 26 for a description of these projects.)

Sentenced Jail Prisoners

Judges, in collaboration with sheriffs, should develop a policy of sentencing driving-while-impaired (DWI) offenders to serve jail terms during the week when feasible, rather than on weekends. Using work

release and defendants' vacation periods would avoid jeopardizing the offenders' employment.

Although the pretrial jail population is considered the major contributor to jail overcrowding, the most substantial increase in admissions has come in the area of convicted DWI offenders. More than 18,000 drunk drivers were sentenced to jail in 1986, constituting 32 percent of all sentenced admissions that year. For some levels of DWI offenses, minimum jail sentences of seven or fourteen days are required.[19] These often are imposed in the form of weekends in jail. Sheriffs have told the commission that DWI weekend sentences tend to increase the jail population at the very time that jails have peak loads of other prisoners.

Recognizing the desirability of sentencing drunk drivers in such a way that they can remain employed, the commission promoted the use of work release to help ease the jails' weekend crowding. Offenders could serve their time on weekdays but be released to go to their regular jobs, returning to their cells at night.[20]

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Sheriffs and county commissioners should collaborate to determine confinement-level needs and to develop comprehensive confinement plans for counties, taking into consideration the need for maximum, medium and minimum custody. The plans may call for renovation, new construction, or contracted jail space in another county in order to provide appropriate confinement for all sentenced inmates, male and female. In addition, sheriffs should develop formal custody guidelines for appropriate housing placement of sentenced offenders.

Most of North Carolina's local jails were built as maximum-security units with the primary purpose of holding pretrial detainees. Before 1979, these units also housed misdemeanants with sentences of up to 30 days. But with the passage of the Local Confinement Act in 1977,[21] counties became responsible for holding misdemeanants sentenced to terms of 30 to 180 days, which has increased jail overcrowding. The usual response to overcrowding has

Trends in the Local Jail Population, 1976–1988

The number of prisoners in North Carolina's local jails has been increasing steadily since 1976, although it shows some signs of accelerating in the late 1980s. Figure 1 shows a moving twelve-month average[1] of the end-of-month, total statewide jail population, based on data provided by the North Carolina Department of Human Resources (DHR). This average increased almost threefold from 2,032 in January, 1976, to 5,899 in July, 1988.The DHR data divide the jail population into two categories—sentenced and pretrial prisoners. Sentenced prisoners are those serving a criminal sentence in jail. The pretrial category consists primarily of criminal defendants awaiting disposition of their charges, usually because they are unable to post a secured bond set as a condition of their pretrial release. This category also includes smaller numbers of other nonsentenced prisoners: those jailed for civil contempt (chiefly failure to make support payments), those held for violation of probation conditions or failure to comply with court orders, those awaiting transportation to state prison, and those held for other jurisdictions (such as federal court). The sentenced and pretrial categories do not include the small number of inebriates (held for their own protection up to twenty-four hours) and respondents in involuntary commitment proceedings because of mental illness.

As Figure 1 shows, most jail prisoners—75 percent in July, 1988—are in the pretrial category. Most of the growth in the average jail population from January, 1976, to July, 1988—2,750 of 3,867, or 71.1 percent—was due to the increase in pretrial prisoners. Their average number grew from 1,677 to 4,427 during the period, increasing by 13.0 percent per year. The sentenced population, although

it contributed much less to the total than did the pretrial category, grew more rapidly during this period—from an average of about 356 in January, 1976, to 1,472 in July, 1988, an increase of 24.9 percent per year.

If the jail population increases, it must be because of growth in admissions, average length of stay, or both. In North Carolina, both are involved. In Figure 2 we see that average monthly admissions (number admitted) to jail has increased steadily, from about 14,727 in January, 1976, to about 24,160 in July, 1988, or about 5.1 percent per year. Most of that growth has been in the pretrial category because most admissions (91.1 percent in July, 1988) are in that category. But sentenced admissions, although a small part of the total, have increased rapidly. From June, 1981, to July, 1988, the average number of sentenced admissions increased from 901 to 2,150, or about 19.3 percent per year.

Not only have more prisoners been admitted each month since 1976, but the amount of time they stay in jail has lengthened. The increase in the average length of stay has contributed somewhat more to the increased jail population than has increased admissions. (Average length of stay is estimated by dividing average population by average admissions.) As Figure 3 shows, the average stay has increased from about 4.19 days in January, 1976, to about 7.42 days in July, 1988. This is an increase of 6.1 percent per year during the period—faster than the accompanying increase in average admissions. All of this growth has occurred in the pretrial category. The average length of stay of sentenced prisoners actually declined from 1981 to 1988, from about 30 days to about 20 days.

To summarize, North Carolina's statewide jail population has grown rapidly from 1976 to 1988. The increase has been driven by three factors: (1) increased time spent in jail by pretrial prisoners; (2) increased admissions of pretrial prisoners; and (3) increased admissions of sentenced prisoners.—*Stevens H. Clarke and David E. Jones*

Note

1. The moving average is calculated by averaging the twelve-month periods beginning with January, 1975; then beginning with February, 1975; then beginning with March, 1975; and so on. The date used for each average is the midpoint of the period it covers.

Figure 1
Statewide Jail Population, Moving Average

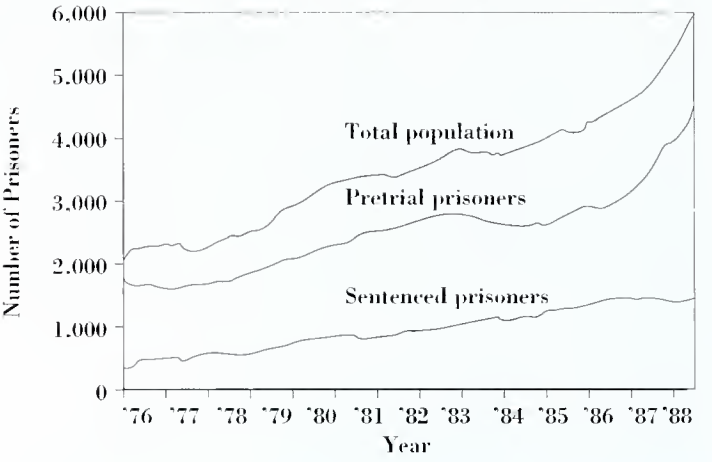


Figure 2
Statewide Monthly Jail Admissions, Moving Average

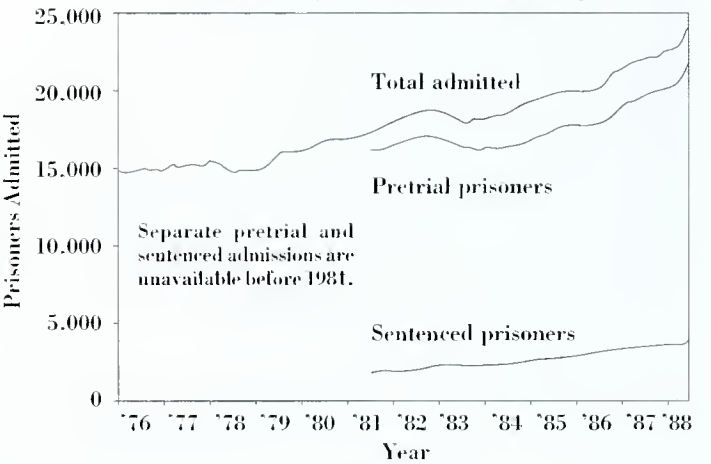
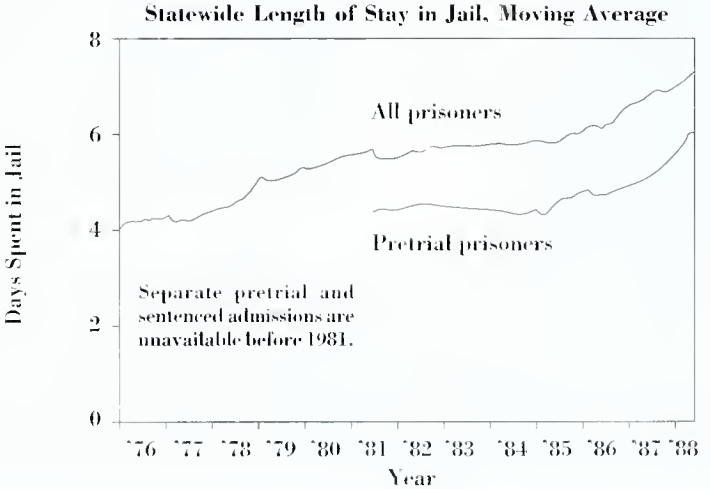


Figure 3
Statewide Length of Stay in Jail, Moving Average



Local Jail-Population Management: A New Approach to Overcrowding

Jail space is a scarce resource that must be managed continuously to ensure its availability. Responsibility for jail overcrowding is assigned to no one agency and must be assumed jointly by all agencies using the jail. To solve the problem, an interagency planning effort is necessary, and there must be collective problem solving with effective leadership.

Eleven North Carolina counties have initiated structured Jail Overcrowding Projects with the goal of producing and implementing a local plan to reduce jail overcrowding by (1) using alternatives to pretrial detention and (2) coordinating management of inmates with other agencies such as the courts and the Department of Correction. The steps involved in such a project include the following:

1) Form a local jail advisory group made up of representatives from each criminal justice agency, each branch of government, and each executive office that can affect admission to jail, alternatives to jail, length of stay, and the allocation of public funds for incarceration and alternatives to incarceration.
2) Hold monthly meetings of the jail advisory group for an eighteen- to twenty-four–month period.
3) Designate a project facilitator who will be responsible for structuring and carrying out activities to produce a written jail-population management plan.
4) Designate a research analyst who will be responsible for designing and executing a data collection and analysis plan and for presenting the results to the group.
5) Charge the jail advisory group, with assistance from the facilitator and research analyst, to
   a) Produce a system description—an accurate and detailed flow chart of the local criminal justice system—as a common reference point.
   b) Develop a plan of action for completing the project—who is responsible for what and when.
   c) Develop testable assumptions about the causes of jail crowding in the jurisdiction.
   d) Review and analyze data to answer the questions raised by the group's assumptions. Data should describe who is in jail, for what, and for how long.
   e) Examine operational problems and solutions.
   f) Draw up a jail-population management plan: identify targets for action; formulate program and policy recommendations; assign priorities for implementation; and map strategies and schedules.
   g) Present the plan to the board of county commissioners and to the community.
   h) Support and monitor implementation of the plan. The jail advisory group should continue to meet to ensure implementation of the plan.

For information on the Jail Overcrowding Projects initiated by eleven counties and on the availability of grant funds, contact Sandy Pearce, Governor's Crime Commission, (919) 733-5013.

been to build more cells. But the cost of building space for a single jail inmate in a maximum-security unit is high—more than $125,000 in 1986.[22] Therefore the commission recommended that various levels of custody be considered.

Although the commission concluded that minimum-custody units have many advantages over the standard maximum-custody jails, it learned that none of the minimum-custody jail units in operation at the time of study had formal classification guidelines. Internal classification of inmates based on court status, seriousness of offense, and history of

criminal behavior is an important tool for appropriately housing and supervising inmates. Thus formal guidelines are essential because they not only ensure uniformity in decision making but also reduce exposure to liability.[23]

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Each jail administrator should assess current operations and develop a plan to provide basic programs and services to inmates as required by current case law, including access to medical care, legal resources, and physical exercise. Regional jails, community resources, and volunteers should all be considered as means to provide inmate programs and services. In addition, sheriffs should form local advisory committees to develop plans to provide point-of-entry programming for high-risk, high-need offenders. Substance abuse treatment, mental health care, G.E.D. opportunities, and job-seeking skills should be addressed in the plans to be presented to county commissioners.

The Institute of Government informed the commission of a growing trend in lawsuits involving the rights of jail inmates. Inmate demands in these cases typically fall into three categories: (1) limitations on inmate rules imposed by jail officials, (2) improvements in the overall living conditions in jails and the alleviation of overcrowding, and (3) provisions for particular inmate rights, such as medical care, access to the courts, and physical exercise. An active approach is needed to reduce the number of new lawsuits.

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Legislation should be enacted to allow county governments a simpler method of financing the construction of jail facilities.

Data collected by the Department of Human Resources indicated that many North Carolina jails are old, outdated, and overcrowded. After considering information from the Local Government Commission about funding mechanisms for jail construction, commission members agreed that obtaining voter approval for referendums required by general obligation bonds was too difficult. They favored legislative initiatives to expand revenue-raising methods for the counties.[24]

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A statewide resource for jail consultation should be developed within the Department of Human Resources. The consultation should include:

1) *conducting a study of infrastructure needs;*
2) *developing a plan for uniform inmate data collection and periodic analysis;*
3) *collecting and disseminating information on the planning and construction of jails;*
4) *collecting and disseminating information on the operation of jails, including programming and management; and*
5) *collecting and disseminating information on funding sources for construction and innovative programming.*

The Association of County Commissioners and the N.C. Sheriffs Association should establish an ongoing jail planning and management committee. The role of the committee should include:

1) *representing needs of jails to organizations and governmental bodies;*
2) *disseminating jail information; and*
3) *advocating for current and future jail issues and needs.*

Planning the construction and operation of a jail is a complex task, with which North Carolina local government officials need more assistance. For this reason, the commission recommended a statewide jail information system that will provide more data useful for local planning efforts. The Department of Human Resources is required by current laws to provide technical assistance to local jails and to inspect jails and enforce state minimum standards. Thus the recommended consulting program could be built on the present efforts of the department.

The commission further recommended that county commissioners and sheriffs join forces as a committee because they share responsibility for jail construction and operation.❖

Notes

1. The full details of the study are available in Governor's Crime Commission, *North Carolina Jails in Crisis: A Report to the Governor* (Raleigh, N.C., 1988).

2. To provide a reliable sample of the 254,000 jail admissions in 1986, information was collected from twelve jails representing fourteen counties. Jails were chosen to represent large, medium, and small counties from the mountains, piedmont, and coastal regions of the state.

The sample included Anson, Buncombe, Catawba, Craven, Granville, Harnett, New Hanover, Mecklenburg, Rockingham, Wake, and Yancey counties and the Albemarle District (which included Camden, Pasquotank, and Perquimans counties).

3. North Carolina Department of Justice, State Bureau of Investigation, *Crime in North Carolina: 1987 Uniform Crime Report* (Raleigh, N.C., 1988).

4. N.C. Gen. Stat. §§ 15A-302 and -303.

5. Every person arrested for a crime has a statutory right to be brought before a magistrate or other judicial official without unnecessary delay to have the legality of the arrest reviewed and, unless charged with a capital offense, to have conditions of pretrial release set. An appearance bond is a promise to pay a stated amount of money (the bond amount) if the defendant fails to appear. A secured bond may be secured by a cash deposit, a mortgage of property, or a surety (bond-man). The surety may be a nonprofessional bond-man or a licensed professional bondsman who typically receives up to 15 percent of the bond amount as a nonreturnable fee for his or her service. Secured bond, by law, must be used as a last resort—only if the other conditions will not reasonably assure the defendant's appearance in court or will endanger individuals or evidence. All released defendants are required to return to court for scheduled court appearances. Their reappearance may be enforced by forfeiture of the bond and by prosecution for willful failure to appear, which is a crime [N.C. Gen. Stat. §§ 15A-511 and 15A-531 through -541].

6. The bonded defendant is encouraged to return by the potential forfeit of the entire bond amount if he or she fails to appear.

7. Legislation to authorize fractional deposit bond (S.B. 513) was introduced in the 1989 General Assembly session but was withdrawn. It was strongly opposed by professional bail bondsmen.

8. Also, defendants who do not spend at least twenty-four hours in jail contribute very little to the pretrial jail population. See Stevens H. Clarke, *Reducing the Pretrial Jail Population and the Risks of Pretrial Release: A Study of Catawba County, North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1988), 5–7, 13–16.

9. For example, the median disposition time in district court nontraffic criminal cases rose from twenty-one days in fiscal year 1978–79 to twenty-nine days in fiscal year 1986–87, an increase of 38.1 percent. See the annual reports of the Administrative Office of the Courts for fiscal years 1978–79 through 1986–87.

10. N.C. Gen. Stat. § 7A-61.

11. See N.C. Conference of District Attorneys, *Calendaring Criminal Cases in North Carolina's Superior Courts* (Raleigh, N.C., 1981), 26–27.

12. Information provided to the commission by Ed Grannis, district attorney, Twelfth Judicial District.

13. See N.C. Gen. Stat. § 7A-453.

14. An indigent defendant is entitled to an attorney's services as soon as feasible after being taken into custody or being served with any initiating process [N.C. Gen. Stat. § 7A-451(b)]. Indigency may be determined or reconsidered by the clerk of superior court or a judge at any stage of a case [N.C. Gen. Stat. § 7A-450(c)]. In most districts an assistant clerk of court prepares an affidavit of indigency for the defendant's first court appearance, after which the judge rules upon the request and makes the assignment if appropriate. Although clerks are authorized to determine indigency and assign counsel [N.C. Gen. Stat. § 7A-452(c)], this power is rarely exercised.

15. N.C. Gen. Stat. § 7A-455.

16. Studies in North Carolina and elsewhere indicate that such bond forfeitures are rarely enforced by the courts. One reason why courts often exercise their discretion to reduce or remit bond forfeitures is that most defendants who fail to appear eventually return to court. See Stevens H. Clarke, *Pretrial Release Policy from North Carolina's Perspective* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1988), 33–39; and *Reducing the Pretrial Jail Population*, 10–11.

17. Stevens H. Clarke, *Pretrial Release in Durham, North Carolina* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1987), 25–32.

18. N.C. Gen. Stat. § 15A-513.

19. N.C. Gen. Stat. § 20-179.

20. Judges in a few North Carolina districts have entered general orders that authorize the local sheriff to reschedule an inmate's weekend sentence if the jail is full. This measure may avert a crisis but, at the same time, merely postpones solving the basic problem.

21. The relevant portions of this act are codified in N.C. Gen. Stat. § 15A-1352.

22. Ruby Riles, deputy commissioner of public affairs, New York City Department of Corrections, telephone conversation, October 1989.

23. Some North Carolina jails do provide for the special needs of these "high-need" inmates. New Hanover County Jail's medical care program does address substance abuse and mental illness. Area mental health staff make weekly visits to the Pitt County jail. And sentenced inmates in Randolph and Buncombe counties have access to a G.E.D. program through the local community college system.

24. In 1985 and 1987 the Local Government Commission supported legislative initiatives to expand methods of raising revenue for counties. The League of Municipalities and the Association of Counties joined in support, but neither bill was passed. The 1985 proposal would have allowed counties and cities to issue up to one sixteenth of their borrowing power without going to the voters. The 1987 bill would have permitted local governments to issue "special obligation" bonds, which are bonds secured by funds other than the revenues generated by the bond project but not subject to voter approval.

Decision Making in Personnel Departments

Stephen K. Straus

Managers and employees rate personnel departments that include them when making decisions more effective than departments that do not. This finding was a key conclusion of a survey of 1,244 officials and employees in twenty-four North Carolina municipalities.[1] Other research on decision making supports this conclusion.[2] When managers include others in decision making, they can produce better proposals and recommendations, and the decisions they make are more likely to be implemented effectively than when they do not.[3] Nevertheless, many managers of personnel departments have been reluctant to be inclusive in their decision making.[4] The survey of North Carolina municipalities found that almost three fourths of the respondents felt excluded from decisions made by their personnel departments.

Why do personnel managers not include others more often? Perhaps it is because they do not fully understand how to do so and what can be gained. For those interested in the significant potential of an inclusive approach, this article describes what it is, its advantages, and its possible disadvantages. Furthermore, the article draws from the survey of North Carolina municipalities to suggest when, how, and with whom public personnel departments can use the inclusive approach most effectively.

The author is an Institute of Government faculty member who specializes in personnel management.

Defining Terms

Personnel managers are called on to develop proposals and recommendations for many issues that affect employees at all levels of the organization. When developing a recommendation, the personnel staff can choose either an *inclusive* or an *exclusive* approach to decision making. An inclusive approach involves soliciting opinions about the recommendation from those who may be affected by the decision. For example, when establishing a new performance appraisal system, the personnel department may ask managers, supervisors, and employees to develop the criteria for evaluating individual jobs and some of the procedures for implementing the system. The survey respondents identified additional examples of activities for which their personnel managers had used the inclusive approach. Some of those were implementing the Fair Labor Standards Act, developing new training programs, setting up new testing procedures for hiring and promotions, establishing a new position classification plan for the entire municipality, and developing and implementing regulations regarding sexual harassment.

When using an exclusive approach, personnel staff members develop ideas without input from outside the department and submit their proposals only to the city manager or board for approval. For instance, to comply with new laws, personnel department staff members may recommend changes in personnel policies without seeking the opinions of others about the impact of those changes on the organization.

Advantages and Disadvantages

In deciding whether to adopt an inclusive approach, a personnel manager must understand the potential advantages and disadvantages, given the specific opportunities, needs, and constraints of the personnel department and the organization.[5]

In many instances, using an inclusive approach will benefit the personnel department as well as the entire organization. For example, the department can develop the most effective selection and recruitment programs if it works with the individual departments hiring employees to determine the requirements of various positions and the

procedures for filling them. The personnel department usually knows how to design and implement effective recruitment and selection processes. The hiring department often has greater insight into the nature of a position to be filled, the past performance of employees in that position, and the future needs of the department. By pooling their information and ideas, the personnel and hiring departments can consider a broader range of alternatives and can evaluate proposed solutions more effectively.

Personnel departments also can implement procedures and programs more effectively if they use an inclusive decision-making approach, because they depend heavily on other departments to implement their recommendations successfully.[6] For example, they cannot observe every interview to ensure that managers and supervisors in other departments interview legally and ask only job-related, nondiscriminatory questions. But if they involve the managers and supervisors in developing interviewing procedures, the interviewers will tend to implement the recommendations more effectively. This is because people in other departments are more likely to accept and commit to decisions if they have had the opportunity to be involved in making those decisions and have been able both to influence the decision and to understand the personnel department's objections to their opinions.[7]

In spite of these advantages, personnel managers will find that using an inclusive decision-making approach may be costly or problematic. First, including others in decisions can be time-consuming and expensive, at least in the short run. Conferring with others takes time and defers work on other tasks. Furthermore, inclusive decision making requires specialized skills, such as group problem-solving and conflict-management skills, because differences of opinion tend to surface and must be resolved.[8] Personnel department staff members thus may need additional training, a further investment of time and resources.

Second, a personnel manager must get management's support for committing departmental resources to such a process. Doing so may be difficult, depending on the politics of the organization.[9] For example, department heads and managers may constrain the personnel department's involvement with others in the organization because they perceive that the department's purpose is only to carry out routine, technical procedures that do not require input from others. Also, some managers perceive their personnel department as ineffective and therefore want to limit its impact on the rest of the organization.[10]

Given departmental and organizational needs and constraints, personnel managers may find some very good reasons for excluding others when making a decision. However, research has shown that personnel managers and staff members tend to emphasize unfounded problems as a pretext for excluding others. For example, one study found that personnel managers seldom use inclusive decision making and that although the personnel managers cited organizational constraints as the reason, the real reason was their own fear of change.[11]

Survey Results

The study of North Carolina municipalities also found that personnel managers seldom use the inclusive decision-making approach. The following sections examine the types of approaches used and opinions about the effectiveness of those practices.

Type of activity

Personnel departments fulfill two main types of functions in an organization—*compliance* and *development*.[12] When carrying out compliance functions, they are dealing with legal and procedural issues, such as establishing and enforcing procedures for grievances and discipline or developing and monitoring rules and regulations to conform with state and federal laws. Through development functions, personnel departments provide resources and support to the organization. These functions include, for example, sharing information between departments and procuring, training, and rewarding personnel.

At first glance, most personnel managers might assume that decisions involving compliance functions are more effectively made within the department and that involving others in making those decisions would only promote dissatisfaction with the law or with the personnel department's role in enforcing the law.[13] In our survey, however, employees rated the effectiveness of their depart-

ments higher when the inclusive approach was used for compliance decisions as well as development decisions.

Survey respondents evaluated eleven compliance and thirteen development activities performed by their personnel departments (see Table 1). In a separate section of the survey, the respondents also described their involvement with the personnel department in its decision making. Analysis of these responses showed that respondents rated their departments more effective for both types of activities when their personnel departments used an inclusive decision-making approach. As Table 2 indicates, on a scale of 1 to 5 with 1 representing "very ineffective" and 5 representing "very effective," respondents rated the inclusive approach (3.6) substantially more effective than the exclusive approach (2.9) for both compliance and development activities.[14]

An illustration of the benefits of inclusive decision making on a compliance activity is the development of a smoking policy by Chapel Hill's personnel department. A group of employees consisting of both smokers and nonsmokers volunteered to help the personnel department analyze the problem of smoking in the workplace. On the basis of the results of an employee survey, the committee and personnel department staff members drafted a policy on smoking that accounted for differences in the working conditions of departments; they also encouraged the town to offer training to help employees stop smoking. Though smoking policies can generate conflict among employees, this policy was well received. The town manager approved the proposal, and it drew support throughout the organization because the views of all employees were incorporated into the final decision.

Style of inclusive approach

While the respondents in our survey clearly preferred being included in their personnel departments' decisions, the study findings also demonstrated that the way they were included—that is, the type of inclusive approach used—significantly affected their ratings. A personnel manager interested in implementing an inclusive approach can choose between two styles: the *consultative* and the *participative*.[15]

Table 1
Compliance and Development Activities

Compliance Activities
Maintain personnel records
Answer applicant questions
Advise manager on personnel procedures
Advise department heads on personnel procedures
Set up, administer, and update personnel policies
Keep department heads up-to-date on personnel policies
Talk to employees about personnel policies
Administer grievance procedures
Ensure compliance with legal requirements
Administer the affirmative action program
Administer the employee benefits program
Development Activities
Provide promotional opportunities
Reclassify positions with changed responsibilities
Carry out public relations activities
Visit other departments to become aware of working conditions
Act as intermediary between employees and management
Carry out training programs
Meet with departments to review the effectiveness of personnel policies for their departments
Administer the performance appraisal system
Ensure the fair treatment of all employees
Provide orientation training to new employees
Ensure that pay is competitive
Recruit and select employees
Provide employee communications such as newsletters

Table 2
Average Ratings of Personnel Department Effectiveness by Decision Approach and Personnel Activity

	Compliance Activities	Development Activities	All Activities
Inclusive Approach			
Participative (9.6%)[a]	4.0	3.6	3.8
Consultative (19.1%)	3.7	3.1	3.4
All (28.7%)	3.8	3.3	3.6
Exclusive Approach (71.3%)	3.2	2.6	2.9

Note: Ratings are on a scale of 1 to 5.

[a]Percentages indicate respondents' perceptions of their personnel departments' decision-making style.

When using a consultative style, personnel department staff members describe the problem to other members of the organization and ask for their

Table 3
Percentage of Respondents
Preferring Various Types of Decision Approaches

	City Managers and Department Heads	Supervisors	Nonsupervisory Employees
Inclusive Approach			
Participative	79.0%	55.9%	53.8%
Consultative	18.0	29.1	27.5
Total	97.0	85.0	81.3
Exclusive Approach	3.0	14.9	19.7

Table 4
Ratings of Personnel Department Effectiveness
by Position Level and Decision Approach

	City Managers and Department Heads	Supervisors	Nonsupervisory Employees
Inclusive Approach			
Participative	3.7	3.9	3.9
Consultative	3.2	3.5	3.5
All	3.4	3.6	3.6
Exclusive Approach	2.3	3.0	3.0

Note: Ratings are on a scale of 1 to 5.

ideas and suggestions before developing a proposal. Responses may be solicited at meetings, or a proposal may be circulated for written comments. But although the personnel department staff members may be influenced by these opinions, in the end they make the final decisions about the proposal.

The participative style, in contrast, always involves a meeting. Members of the personnel department and the organization meet as a group to generate and evaluate alternative solutions in order to reach agreement on what action to take. When using the participative style, personnel staff members do not have the final say on the decision; rather, they are willing to accept and implement any solutions that have the support of the entire group.

The survey results reported in Table 2 show that 28.7 percent of respondents reported being included in the decisions of their personnel departments. Of these, 19.1 percent indicated that their departments used a consultative style, and 9.6 percent reported that their departments used a participative style. However, the departments using a participative style were rated somewhat more effective than those using a consultative style (3.8 compared with 3.4). (Table 2 also shows that the participative style was rated most effective for both compliance and development activities.)

Employment level of participant

When deciding to use an inclusive decision-making approach, each personnel manager must decide what members of the organization to include. Some managers argue that lower-level members such as nonsupervisory employees and even first-line supervisors should not be involved, contending that employees at this level are not interested in deciding personnel issues or do not want to be included because management will override their suggestions anyway.[16]

The findings of our study contradict this argument. As shown in Table 3, respondents at all levels of the organization preferred to be included in decisions made by their personnel departments and preferred the participative to the consultative style. Moreover, when respondents were included in a participative style of decision making, they rated their personnel department more effective (see Table 4).

But how can personnel managers effectively implement an inclusive approach with all levels of employees in a sizeable organization? Goldsboro's personnel department demonstrated how this could be done when it developed a performance appraisal system through participative decision making in 1988. To establish new performance standards, the department first divided all members of the organization into their respective occupational groups, presented the objectives of the new system, and asked each occupational group to elect representatives to a planning committee.[17] Then the planning committee for each occupational group, in conjunction with personnel department staff members, developed standards by which the group's members would be evaluated. Thus all organizational members participated in the decision either indirectly, by choosing representatives for their committee, or directly, by serving on the committee and deciding on the new standards.

Conclusion

The study's results show that the inclusive approach is not used extensively in North Carolina municipalities but that the respondents perceive it to be the most effective approach. The results also demonstrate that the inclusive approach can be used effectively with all types of personnel issues and with all levels of employees.

The study did not explore why the inclusive approach is not used more often, but other research has suggested that personnel managers are discouraged from using this approach because of limited resources, management resistance, and their own resistance to change. These factors are not to be minimized. At the same time, they also are not insurmountable. Certain municipal personnel departments, including those of Asheville, Wilson, and Charlotte, have dealt with similar constraints in implementing an inclusive approach. Given the experiences of these personnel departments and the results of the study, personnel managers may wish to consider using the inclusive approach more often. ❖

Notes

1. The author conducted the study in 1986 to evaluate the effectiveness of public personnel departments as part of his doctoral work at Duke University. At the time of the study these municipalities represented twenty-four of the thirty members of the North Carolina Organization of Municipal Personnel Officials (NCOMPO), an affiliate of the North Carolina League of Municipalities. The other six municipalities declined to participate in the survey. The twenty-four municipalities range in population from 7,000 to more than 100,000 citizens and represent all geographical regions of the state. The response rate of employees, supervisors, and managers in the study was 77.5 percent. The response rates across municipalities ranged from a low of 58 percent to a high of 92 percent.

2. For a summary of this research in the public sector, see Debra W. Stewart and G. David Garson, *Organizational Behavior and Public Management* (New York: Marcell Dekker, Inc., 1983) 136–78.

3. Nicholas Lovrich, "The Dangers of Participative Management: A Test of Unexamined Assumptions concerning Employee Involvement," *Review of Public Personnel Administration* 5 (1985): 9–25.

4. Victor Vroom and Arthur G. Jagos, "Decision-Making as a Social Process: A Normative and Descriptive Model of Leader Behavior," *Decision Sciences* 5 (December 1974): 148–66.

5. For a more in-depth examination of these advantages and disadvantages, see Vroom and Jagos, "Decision-Making as a Social Process."

6. Anne S. Tsui, "A Tri-Partite Approach to Research in Personnel-Human Resource Department Effectiveness," *Industrial Relations Journal* 23 (Spring 1981): 184–97.

7. Terence R. Mitchell, "Motivation and Participation: An Integration," *Academy of Management Journal* 16 (1973): 160–79.

8. Jay M. Shafritz, *Position Classification: A Behavioral Analysis for the Public Service* (New York: Praeger, 1973), 309.

9. Stewart and Garson, *Organizational Behavior*, 169.

10. John Nalbandian, "From Compliance to Consultation: The Changing Role of the Personnel Administrator," *Review of Public Personnel Administration* 7 (Spring 1981): 38.

11. Lovrich, "Dangers of Participative Management," 22.

12. Nalbandian, "From Compliance to Consultation," 10.

13. John Nalbandian and Donald E. Klinger, "Integrating Context and Decision Strategy: A Contingency Theory Approach to Public Personnel Administration," *Administration and Society* 12 (August 1980): 178–202.

14. The probability that the difference in these average ratings is due to chance is less than .01. This is also true for all other average ratings reported in this article.

15. These terms and their definitions are drawn from Vroom and Jagos, "Decision-Making as a Social Process." However, the authors also distinguish between consultative and participative decisions made with individuals and with groups. Our survey did not examine those distinctions.

16. Lovrich, "Dangers of Participative Management," 9–10.

17. Examples of occupational groups include laborers, technicians, professionals, clerical staff, and department heads.

Interbasin Transfers and Other Involved in Diverting Water

Interbasin and transwatershed movements of water have a long and familiar history in the United States and elsewhere from ancient times to the present. . . . [I]n North Carolina alone, in connection with public water supply and waste disposal activities there are fourteen known cases of interbasin transfers totalling about 40 million gallons per day and eighty known cases of transwatershed diversions totalling about 300 million gallons per day. Alongside the practice

The subject of interbasin transfers, or diversions,[2] has long been a lightning rod for disputes among water users in North Carolina and elsewhere. It was a major bone of contention in a series of legislative encounters in the state dating from the 1950s into the 1980s, and it continues to be a focus of controversy, both within and without the General Assembly. In my work at the Institute of Government scarcely a month goes by without an inquiry on the subject. This article attempts to synthesize the law of interbasin transfers and to address some related questions. It proceeds from definition to current North Carolina issues, by way of background comments on state and federal law.

Definition

When I first encountered the term *interbasin transfer* in the 1950s, there seemed to be no confusion about its meaning. In North Carolina every publication of the State Stream Sanitation Commission had a map of the state on the front, subdivided into the seventeen or so major river basins—like the Roanoke, the Yadkin, the French Broad, the Little Tennessee, and so forth.[1] Everybody knew that they were river basins and that "interbasin transfer" referred to a transfer of water from one basin to another.

But before long, engineers with an eye for detail were pointing out that the term *river basin* had a perfectly appropriate, smaller-scale use that included smaller sub-basins, watersheds, and catchment areas, and bureaucracies like the Department of Interior were using the term in a larger-scale sense, like the "Southeast River Basins." In addition, lawyers were pointing out that water transfers not involving interbasin or transwatershed transfers could have substantial impact. For instance, a water transfer could be just as harmful to a riparian landowner (one who owns land adjoining a stream or lake) if it merely moved water around his or her land.

Thus there is no simple or clear definition of the term. Occasionally a statute will provide a definition that may help for some purposes, but most of these definitions are neither comprehensive nor models of clarity.[3]

What is a "diversion?" It may be an interbasin transfer from one major river basin to another, or a transwatershed movement from one tributary watershed to another, or simply a movement of water around the property of one riparian landowner (see figures 1 through 3). In any of these cases, a transfer or movement can damage an affected landowner as long as it significantly reduces the streamflow. And in any of these three situations an injured downstream riparian landowner may (or may not) prevail in a civil suit to enforce the basic premise of the riparian rights doctrine of water law that "a riparian proprietor is entitled to the natural flow of the stream running along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of water by other like proprietors."[4]

North Carolina courts have considered a wide variety of water movements to be diversions. At least as early as 1877 the North Carolina Supreme

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Diversions: Legal Issues

Milton S. Heath, Jr.

and the history of diversion, however, there seems to be an inborn human resistance to diversion on the part of the inhabitants of the region that will lose the water—to the taking of "our water" for somebody else's needs. Considering this natural animus against outside intrusions on an area's water resources, it is hardly surprising that legal systems concerning water rights embody some constraints against diversion generally and against interbasin transfers particularly.[2]

Court affirmed an award of damages to a downstream mill owner against a canal company, its officers, and its contractors, for cutting a canal into a stream at the head of a swamp, "thus diverting a considerable part of the water, which was accustomed to flow by plaintiffs' mill."[7] However, the uncertainties inherent in such litigation are illustrated in a decision four years later, in which the state supreme court reversed an award that would have continued an injunction against a contemplated diversion of a creek for a projected gold-washing operation, sought by competing gold-washing operations.[8] The court reflected the traditional judicial reluctance to grant advance injunctive relief before actual damage had accrued, but the court's order left the defendants without a clear victory: "[W]e now simply decide that there is error in continuing the injunction, but without prejudice to the plaintiffs' right to move for it hereafter when the case presented will admit."[9]

References to diversions also appear in decisions involving disputes over damages from changes in surface drainage. Early North Carolina damage suits over such effects (usually incidental to development of land) often recited the formula that changes in surface drainage patterns may "accelerate" water flows but may not "divert" those flows to the damage of neighboring landowners. This language appeared in decisions that followed an early, so-called civil law rule that gave higher land an implied easement to drain surface waters over lower land, a concept that was discarded in 1978 by *Pendergrast v. Aiken* and replaced with a reasonable-use rule.[10] It is unclear from subsequent decisions whether anything viable remains of the antidiversion language of the early surface drainage cases.

Common Law Concepts

Observers familiar with water rights know that riparian landowners commonly assume that they alone are entitled to use the waters of a stream and to use them mainly for their own riparian lands. These observers also know that nonriparians seek judicial relief from the impact of this concept and that their efforts have left some marks on the law.[11] Without getting lost in detailed, state-by-state variations, it seems fair to say that some restrictions on out-of-basin transfers are generally accepted. Few would claim that an entire stream legally can be diverted to the detriment of downstream riparian landowners, because this would violate the essence of riparian rights law, contravene the public trust, or amount to a public nuisance. But beyond this, state law is not so clear. The following is a sample of significant questions to which definitive answers may or may not be available, with variations from state-to-state:

Q: Is a diversion or interbasin transfer flatly illegal, no matter what the circumstances?

A: The answer in North Carolina, both at common law and by statute, is almost certainly no.[12] But this is not true in all states.

Q: Is it illegal (1) only if it materially injures a riparian owner or (2) if it materially injures a riparian owner *and* amounts to an unreasonable water use?

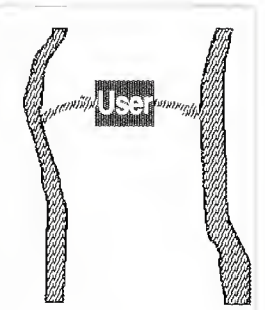


Figure 1

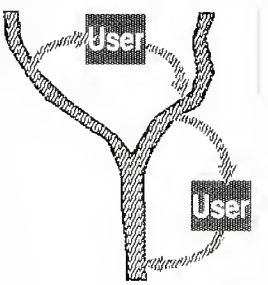


Figure 2

Figure 3

A: In most jurisdictions the common law answer to both parts is probably yes—with somewhat less certainty for the second part.[13]

Q: How does the state define *riparian* and other lands that are entitled to exercise riparian rights?

A: North Carolina cases do not give a complete answer but do establish that (1) riparian rights are an incident of the ownership of riparian land and cannot be conveyed separately from that land and (2) riparian land must actually be in contact with the stream and cannot qualify as riparian if separated from the stream, for example, by a railroad track.[14]

Q: If a diversion or interbasin transfer is illegal according to state law, what legal remedies are available to injured parties—only damages, or also injunctive relief?

A: Damages are available, but the availability of injunctive relief is uncertain. If the defendant is a public water supply agency, injunctive relief may not be available at all.[15]

In varying degrees these uncertainties plague the law of riparian rights in a number of eastern states and frustrate water resources program administrators and water users. Some commentators, such as William C. Moser, have recommended legislative solutions to resolve some of the uncertainties,[16] but this may not be politically feasible. Short of a legislative solution, the best that lawyers can do for their clients is to identify the settled issues and predict as best they can how the courts are likely to resolve the unsettled issues.

North Carolina Legislation

Interbasin transfer and diversion issues have been warmly debated for more than three decades in North Carolina's legislative halls. In 1955, when a major drought gripped the Southeast, the General Assembly rejected a far-reaching proposal (Senate Bill 153) to replace North Carolina's traditional reliance on the riparian rights doctrine with a prior appropriation statute modeled after western states' water law. Had this bill been enacted, the state's common law restrictions on movement of water from riparian land would have been largely discarded. The bill failed to pass, but a compromise measure was enacted creating the Board of Water Commissioners, a policy study group that was an early predecessor of the Environmental Management Commission.[17] Among its limited substantive powers, the board had authority to approve emergency diversions of water for local public water supplies in a declared water emergency[18] and authority to grant a certificate to a water and sewer authority created under General Statutes Chapter 162A to condemn water rights or associated lands in connection with "plans for impounding or diverting" waters under G.S. 162A-7.[19] G.S. 162A-7 also made the board the arbiter to balance the interests of the affected river basins, and it detailed standards to guide the board.[20] The balancing mechanism in G.S. 162A-7 touches a sensitive issue that has been replayed in later years: how to accommodate the sometimes conflicting interests of riparian owners and regionalized water and sewer systems.

In 1959 the legislature began to attach antidiversion riders to water resources management legislation. Two statutes designed to tap federal funding for small watershed projects and reservoir projects were enacted with riders that were primarily savings clauses disavowing any intent to authorize diversion of water.[21]

Another set of antidiversion amendments was attached to a 1961 bill, Chapter 1001, that was enacted at the request of local governments in the Research Triangle area to empower counties and cities to finance and operate water and sewer systems jointly under mutually agreeable terms. One of these amendments required jurisdictions proceeding under Chapter 1001 to obtain the approval of the Board of Water Resources before condemning water rights or diverting water from one stream to another.[22] Another amendment prohibited the diversion of water from any "major river basin" except where "now permitted by law" and except in the case of a river whose main stem below the diversion was "located entirely within North Carolina."[23] (If one examines a North Carolina river basin map, it will be apparent that this antidiversion amendment exempts the Neuse, the Cape Fear, and the Tar—which are the principal basins of the Research Triangle area—but applies to such interstate basins as the Yadkin, the Catawba, the Broad, and the rivers flowing west into Tennessee. Thus the exemption gave the act's sponsors in the Triangle area something for their pains but potentially restricted regional utility systems elsewhere.)

In 1967 and 1973, antidiversion riders were attached to two major water laws, the Capacity Use Areas Law of 1967 and the Stored Water Act of 1971.[24] A provision that reinforced the rights of local public water supply agencies to withdraw water from storage was included in G.S. 143-215.49, a section of the Stored Water Act. Another 1967 statute, the Dam Safety Law, spoke to riparian interests by requiring dams to meet "minimum stream flow requirements" designed to protect downstream water quality.[25]

Beginning in 1971, bills introduced to expand diversion authority failed to receive sufficient support for passage, attesting to the lobbying strength of their opponents. In 1971 and 1973 two bills that sought to extend the authority of the State Board of Water and Air Resources to approve diversions by *individual* cities and counties both died in committee.[26]

More recently, a 1987 attempt to repeal the requirement of G.S. 162A-7 that water and sewer authorities obtain the approval of the Environmental Management Commission before condemning water rights or associated lands also failed. After strenuous efforts to develop an acceptable compromise, the bill's sponsors abandoned their efforts to eliminate this form of state review over water supply acquisitions.[27]

In 1979 a legislative study commission was created at the request of House Speaker Carl Stewart, Jr., to study alternative water management options, including "a state water authority to furnish water throughout the state."[28] Early in the commission's investigation there were indications of strong political resistance to a state water authority because it might serve as a vehicle for interbasin transfer. In its final report, the commission did not see fit to mention the water authority and was content to say, "This Commission does not recommend interbasin transfers of water as a means of solving the water management problems of North Carolina."[29]

In summary, the legislation enacted since 1955 has added a significant legislative component to the law on diversion and interbasin transfer. Notably, two statutes from this era need to be consulted in answering almost any current question on the subject: the Water and Sewer Authorities Law (G.S. 162A-7) and the 1961 legislative compromise on joint local water and sewer ventures (now codified in G.S. 153A-283 through -287). A checklist of their most commonly applied provisions includes the following:

1) G.S. 162A-7, which contains the requirement for a water and sewer authority to obtain a certificate from the Environmental Management Commission before condemning waters, water rights, or lands with water rights attached.
2) G.S. 153A-278, which contains the 1961 enabling authority for two or more local governments to undertake joint water and sewer projects.
3) G.S. 153A-285, which contains the requirement for local governments with joint water or sewer projects to obtain the approval of the Environmental Management Commission before condemning water rights or diverting water from one river to another. This approval is to be granted by a certificate issued pursuant to G.S. 162A-7.[30]
4) G.S. 153A-287, which contains the prohibition against diversions from any major river basin whose main stem downstream is not located entirely in North Carolina (the concession accepted by the sponsors of the 1961 act). This section also exempts diversions "now permitted by law" from its scope.

If these statutes reflect a common policy thread, it is that the General Assembly has elected to augment the common law of diversion in circumstances likely to involve significant regional interests—that is, in cases involving substantial diversions by joint local projects, especially if interstate rivers are affected.

In particular cases it may be necessary to examine other statutes in the group reviewed earlier in this section. For example, the Dam Safety Law and the 1971 Stored Water Act may need to be consulted on questions involving dams.

Federal Law

Because federal law is the "supreme law of the land" according to Article VI of the United States Constitution, it is important to identify the federal elements of diversion or interbasin transfer law. First, the United States Supreme Court has made it

clear that, in an original action between two states seeking to resolve an interstate water dispute, the Court will not be bound by the interbasin transfer constraints of either state's law but will seek to "equitably apportion" the disputed waters in its discretion.[31] Second, the Court also has made it clear that interbasin transfer constraints established by state law need not bind a federal agency in carrying out its statutory mission.[32] Third, the federal Water Resources Planning Act provides that it is not to be construed to authorize any entity it creates (such as a river basin commission) to plan the transfer of waters from one river basin commission's area to another commission's area.[33] And fourth, it now seems likely that interstate compact law will consistently be held to be "federal law" in the constitutional sense.[34] Thus the compact mechanism may offer an avenue for working out interstate water disputes and problems free of some state law constraints, unless the compact itself provides otherwise.

In summary, if federal law sometimes defers to antidiversion concepts (as in the Water Resources Planning Act), it is more likely to assert the independence of federal law from state-based limitations. In any event, federal law does not appear to add further antidiversion limitations to those found in state law. To the contrary, federal law may afford opportunities to escape state antidiversion limitations.

Common Issues

This section presents a list of frequent questions followed by brief answers. To avoid local references that might breach a confidence, I will use the terms *in-state basin* and *multistate basin* instead of the names of specific rivers. In-state basin refers to a river whose main stem remains in North Carolina below the point of diversion (such as the Cape Fear, the Neuse, the Tar-Pamlico, and a number of small rivers that originate in or near coastal counties and empty into North Carolina coastal waters or sounds). Multistate basin refers to a river that crosses into another state somewhere below the point of diversion.

Question 1: Piedmont city A, located on the main stem of a multistate basin, plans to run a water line that will divert water from the main stem of an in-state basin. Would this violate any prohibition against interbasin transfers?

Answer: It would not violate the statutory prohibition in G.S. 153A-287, because in-state diversions are exempted from this section. More information would be needed to evaluate the common law implications of this diversion—such as data concerning streamflows, the quantity of the diversion, and its relationship to other withdrawals.

Question 2: What if the water line in Question 1 crossed county boundaries; could the county from which the water was withdrawn obtain an injunction against the diversion because water would be moved across county lines?

Answer: The answer to this question ordinarily would be no. No state law prohibits cross-county diversions. G.S. 130A-294(a)(4) prohibits the Department of Human Resources from issuing a permit for a *landfill* without the prior approval of the county where the landfill is to be located, but there is no similar statewide law concerning water supply intakes. There is a series of local acts, however, that prohibits local governments from acquiring *real property* in neighboring counties without the approval of that county.[35] Thus if city A acquired land for its water line or water supply intake in a county covered by one of these local acts, without the approval of that county, it is possible that an injunction could be obtained by the county—assuming that it had standing to sue and that no other complicating factors barred the grant of an injunction.

Question 3: City B, located on one tributary of an in-state basin, proposes to run a sewer line that will divert its treated municipal sewage to discharge into another tributary of the same in-state basin. (Assume that city B obtains its water supply from the tributary on which it is located.) Would this violate any prohibition against interbasin transfers?

Answer: It would not violate the statutory prohibition in G.S. 153A-287 for the reason stated in the answer to Question 1. In addition, the better view is that a tributary of an in-state basin is not a "major river basin" within the meaning of G.S. 153A-287. This is an acceptable, literal reading of these words.

and it is historically valid—that is, it is consistent with the prevailing interpretation of these words during the period when G.S. 153A-287 was first enacted. More information would be needed to evaluate the common law implications of this diversion, along the lines noted in the answer to Question 1.

Question 4: City C, located in the drainage area of one multistate basin, is considering requests from developers to extend several small sewer lines to subdivisions located in the drainage area of another multistate basin. The city's sewage is treated in a joint city-county plant that discharges treated sewage into the main stream of city C's own river basin. Would city C violate any prohibition against interbasin transfers by extending any or all of these sewer lines?

Answer: This is a complex question. On first impression, extending these sewer lines would violate the statutory prohibition in G.S. 153A-287 because this would divert water from a multistate basin. City C might be able to establish, however, that these diversions would be exempted from G.S. 153A-287 because they are "now permitted by law."

In the first place, city C could argue that the now-permitted-by-law clause exempts any diversions that would have been legal at common law. The minor sewer extensions involved here might well be permitted at common law because they are unlikely to result in the "material injury" that is required for an actionable violation of common law riparian rights.[36]

In the second place, if city C applies for and receives Environmental Management Commission (EMC) approval under G.S. 153A-285 (requiring EMC certification of diversions by a city and county acting jointly or by joint agencies), this might be viewed as satisfying the now-permitted-by-law test of G.S. 153A-287. Whether this argument would be successful turns mainly on the meaning of the word *now*. That is, does *now* mean before G.S. 153A-287 was enacted (that is, before 1961), simultaneously (that is, G.S. 153A-285 and -287 were enacted at the same time in Chapter 1001 of the 1961 Session Laws), or at the time the statute is applied? If *now* has the second or third meaning, the G.S. 153A-285 procedure should satisfy the G.S. 153A-287 test.[37]

A local government like city C that is contemplating a series of minor sewer- or water-line extensions involving diversions may find it worthwhile to make studies that will identify the point or range where the cumulative impact of such diversions might become legally significant. This would supply both an early warning system and a sound technical foundation for decisions.

Question 5: Is it necessary for a joint city-county utility, a water and sewer authority, or an individual city to obtain EMC approval for a water line that will divert water from the drainage area of one stream to the drainage area of another?

Answer: The lawyer's answer to this three-part question is yes, maybe, and no. The joint utility is required to obtain approval by G.S. 153A-285, as noted in the answer to Question 4; and the water and sewer authority, by G.S. 162A-7(a) if the authority needs to use eminent domain powers in order to acquire water, water rights, or lands having water rights attached.[38] There is no statutory requirement for an individual city to obtain such EMC approval.

What I have said so far speaks to the letter of the law. In actual practice, the EMC has required approval in only two cases: for Orange Water and Sewer Authority's Cane Creek reservoir and for a joint application by the cities of Cary and Apex for a water supply allocation from Jordan Reservoir. It remains to be seen how actively the requirement will be applied in the future.[39]

There is a distinction that should be noted between the requirement for EMC approval in G.S. 153A-285 and the prohibition against diversions in G.S. 153A-287. The prohibition applies only to diversions from major multistate river basins, while the requirement for EMC approval applies to diversions from any "stream or river to another." Thus, for example, a joint utility or water and sewer authority that proposes to run a water line from one tributary of an in-state basin to another might escape the G.S. 153A-287 prohibition but be subject to the G.S. 153A-285 approval.

Question 6: City D, located in the drainage area of one multistate river basin, wants to obtain a water supply from an electric power company's reservoir located on the main stem of another multistate basin. What legal restrictions or requirements would apply to this proposed water supply?

Answer: The prohibition against diversion in G.S. 153A-287 would apply to this proposal, unless city D could bring itself under the now-permitted-by-law exemption. The city could argue for such an exemption along the lines indicated in the answer to Question 4.

Most water power reservoirs are operated under license from the Federal Energy Regulatory Commission (formerly, the Federal Power Commission). In 1965 the commission approved a standard license condition concerning joint use of licensed reservoirs for inclusion in future licenses. This condition would permit "reasonable use" of licensed reservoirs for water supply purposes as approved by the commission, if arrangements were made to compensate the power company for loss of power revenues.[10] If city D obtained approval of the withdrawal, this approval might put the city in a position to argue that it would be exempted from the G.S. 153A-287 prohibition against diversions—either under the terms of G.S. 153A-287 or because federal law would govern the situation.

Question 7: A developer seeks city zoning ap-

Tim Frates

The Gaston Pipeline Controversy

The city of Virginia Beach, Virginia, proposes to increase its available water supply by building a pipeline that will tap the Virginia side of Lake Gaston, a power lake on the Roanoke River. The project would involve an eighty-five–mile pipeline from Lake Gaston to Virginia Beach: twenty-six river crossings, traversing several large drainage basins: an initial pumping rate of 10 million gallons per day; and an ultimate pumping rate of 60 million gallons per day.[1] Downstream from Gaston Dam the Roanoke River flows exclusively through North Carolina and eventually empties into Albemarle Sound. Downstream riparian owners are watching the proposed project with great interest. Despite strong public and political resistance, Virginia Beach has moved ahead through preliminary project phases, including an application to the United States Army Corps of Engineers for Section 10 and Section 404 permits covering the project.[2] What body of law governs the diversion and other water-law issues associated with this project?

First, we can eliminate the legal concepts that will not affect these issues unless something changes: (1) The project will not be tested by the Supreme Court's "equitable apportionment" rule governing interstate water controversies. North Carolina chose not to bring suit against Virginia over the Gaston pipeline, and only by such a suit would the equitable apportionment rule come into play. (2) Interstate compact rules and decisions will not be applied, because the two states have not elected to enter an interstate compact and are not likely to do so unless the political winds shift. (3) The water rights law of North Carolina probably will not directly affect these issues, because both the withdrawal and the use of the water will occur in Virginia. Early on, North Carolina's attorneys recommended that the state use the Capacity Use Areas Law for greater leverage, but it did not do so.

Second, Virginia's common law of water rights—quite similar to North Carolina's—is a potential tool for determining the issues in this case.[3] In Virginia, substantial or material injury probably is required in order to sustain an action for an unlawful diversion or transfer. Whether such injury has occurred will not be clear until the project has been completed and in place for some time. Virginia apparently has no statutes comparable to G.S. 162A-7 or G.S. 153A-285 through -287.

Third, three related lawsuits have been brought concerning the pipeline project:

1) *State of North Carolina v. Hudson*, in which North Carolina challenged the Corps of Engineers permits that have been sought for the

proval for a housing and office building project with drainage features that will move small amounts of surface water from the drainage area of one tributary stream to the drainage area of another tributary stream. (Both streams are tributary to the same major river.) Can the town zoning administrator properly disapprove the permit because state law prohibits such diversions?

Answer: Probably not. The diversion would not violate the statutory prohibition in G.S. 153A-287, whether this is an in-state basin or a multistate basin, because water would not be moved out of the major river basin. Even if there was a diversion out of the major basin, under the assumed facts it probably would be so minor as to fall under the now-permitted-by-law exemption. Furthermore, there is nothing in the assumed facts that seems to support a zoning-permit rejection based on the common law surface-drainage cases. Damage claims based on changes in surface drainage are now decided under the reasonable-use rule of *Pendergrast v. Aiken*: in deciding such claims the trial court should balance the gravity of the harm that might be caused against the benefits of the proj-

project, mainly on the grounds that the corps rejected North Carolina's request that the corps complete a formal environmental impact statement for the project.[4]

2) *City of Virginia Beach v. Roanoke River Association*, which involves a reverse twist on the first case. Virginia Beach went "forum shopping" (looking for a more favorable court) by filing a suit in the Eastern District of Virginia, seeking a declaratory judgment that the corps permits *do* comply with all federal laws (including the National Environmental Policy Act) and are valid.[5]

3) *City of Virginia Beach v. Champion International and Weyerhauser Company*, in which Southside Virginia interests mounted a clever tactical challenge to North Carolina's opposition to the project. The suit seeks a declaratory judgment that the two defendant companies (which own or propose plants near the mouth of the Roanoke River that will withdraw large amounts of water from the river) have no riparian rights that would be damaged by the Gaston diversion, because the diversion is only a "minute fraction" of the river's flow.[6]

The first two cases have been combined into one suit before Judge Earl Britt, chief judge of the Eastern District of North Carolina. A preliminary decision by Judge Britt in July, 1987, retained jurisdiction of the case but remanded it to the Corps of Engineers for further consideration.[7] Under this preliminary decision, North Carolina's request for an immediate, court-ordered environmental impact statement was rejected. But the court directed the corps to report back (1) its assessment of the effects of the project on striped bass (to assist the court in deciding whether an environmental impact statement was required) and (2) the extent of the city's water needs. In the course of his opinion, Judge Britt agreed that the corps properly declined to consider riparian rights and diversion and interbasin transfer issues in its permit proceedings and added that these matters should not be addressed by him, but in a civil suit or in legislative halls.[8]

Notes

1. The factual assumptions summarized here are drawn from State of North Carolina v. Hudson [665 F. Supp. 428 (E.D.N.C. 1987)] and briefs of the parties to this action.

2. Section 10 of the Rivers and Harbors Appropriation Act of 1899 [33 U.S.C. § 403] and Section 404 of the Clean Water Act of 1977 [33 U.S.C. § 1344].

3. The leading Virginia cases are Virginia Hot Springs v. Hoover, 143 Va. 460, 130 S.E. 408 (1925); and Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508 (1921). The substance of this paragraph is based on a conversation with William Walker, director of the Virginia Water Resources Center, 10 August 1989.

4. 665 F. Supp. 428 (E.D.N.C. 1987).

5. 776 F.2d 484 (4th Cir. 1985).

6. Civil Action No. 84-10-N (E.D. Va.).

7. State of N.C. v. Colonel Ronald Hudson, 665 F. Supp. 428 (E.D.N.C. 1987).

8. *Id.* at 447–48.

ect to the developer.[11] If any elements of the old formula (changes in surface drainage may "accelerate" but may not "divert" water flows) have survived *Pendergrast*, they still would not appear to justify a zoning rejection on the facts of this case.

Question 8: EMC is vested with statutory authority to allocate water to local governments from water supply storage in federal reservoir projects, such as the Falls of the Neuse Reservoir and Jordan Reservoir.[12] If EMC undertakes to allocate water from a federal reservoir located within a major in-state basin to local governments located within that basin or within a neighboring in-state basin, what legal requirements or restrictions apply?

Answer: If any combination of cities and counties acting jointly or through a joint agency applies for allocations, EMC should require that the applicant obtain an EMC certificate under the procedure set forth G.S. 162A-7. If a water and sewer authority applies for an allocation, and if the authority needs to use eminent domain powers to acquire water, water rights, or land with water rights attached, the authority also should obtain an EMC certificate.[13] No proceeding is indicated if the applicant is an individual city or county. Finally, the allocation of water by EMC would not violate the G.S. 153A-287 prohibition against diversions. The proposed diversions here are covered by the exemption for any diversion from an in-state basin whose main stream below the point of diversion is located entirely in North Carolina.

Conclusion

The law of interbasin transfer and diversion is a field laced with controversy. I have sought in this article to delineate the strictly legal elements and to apply them to common problems. The product of this effort is more an assortment of miscellaneous rules than a model of coherent legal concepts. Interbasin transfer and diversion rules do not always resolve problems or even fit individual cases well. They are not self-enforcing and may lack a convenient forum or agency for enforcement. But they must be considered in addressing recurring problem situations. I hope that this article will simplify the task of lawyers and other professionals operating in this field, especially those who are encountering its mysteries for the first time.

Notes

1. For earlier discussions of the issues treated in this article, see:

Milton S. Heath, Jr., "Issues Concerning Major River Basin Diversions in the Southeast" (unpublished paper presented at the Annual Conference of the American Society of Civil Engineers, Water Section, Norfolk, Virginia, 1 June 1988).

William C. Moser, "Accommodating Interwatershed Transfer under the Riparian Doctrine," in William Walker et al., *Legal and Administrative Systems for Water Allocation and Management: Options for Change* (Blacksburg, Va: Virginia Water Resources Research Center, 1984), hereinafter cited as "Interwatershed Transfer."

Milton S. Heath, Jr., "Some Current Legal Issues in North Carolina Concerning Diversion of Water for Public Water Supplies and Related Matters," in William E. Cox, *Legal and Administrative Systems for Water Allocation and Management* (Blacksburg, Va.: Virginia Water Resources Research Center, 1978), hereinafter cited as "Diversion of Water for Public Water Supplies."

Milton S. Heath, Jr., and William R. Walker, "Interbasin Transfer as an Alternate Source of Water Supply in the Southeastern States: Legal Aspects," in James R. Wallace and Bernd Kahn, *Water Conservation and Alternative Water Supplies* (Atlanta, Ga.: Georgia Institute of Technology, 1978), hereinafter cited as "Interbasin Transfer."

2. Heath and Walker, "Interbasin Transfer," 161.

3. The terms *interbasin transfer* and *diversion* sometimes are used interchangeably, although interbasin transfer probably is used more commonly today. Strictly speaking, *interbasin transfer* is better reserved to describe movements of water from one major river basin to another (such as from the Neuse to the Cape Fear River Basin), and *diversion* is better used to encompass the broader category of all surface water movements. For further discussion, see the section on definitions.

4. The State Stream Sanitation Committee was North Carolina's principal water-quality agency from 1951 to 1967. Its most substantial publications were a series of reports on public hearings concerning river basin classifications, such as the *Public Hearing Regarding Proposed Classification of the Waters of the Watauga River Basin* (Raleigh, N.C., 1962).

5. For example, the General Statutes give the following definition of *watershed*, which technically applies only to the water and air pollution control statute [Article 21, Part 1 of Chapter 143]: "a natural area of drainage, including all tributaries contributing to the supply of at least one major waterway within the State, the speci-

fic limits of each watershed to be designated by the Environmental Management Commission" [N.C. Gen. Stat. § 143-213(21)] (hereinafter the General Statutes will be cited as G.S.). This definition raises as many questions as it answers. Could it be used as a definition of tributary watersheds of a major drainage basin? Could it be used as a definition of a major drainage basin itself? What actual application, if any, does it have (especially given that the term *watershed* is not used in Article 21, Part 1)?

6. Smith v. Town of Morganton, 187 N.C. 801, 802–3 (1921).

7. Williamson v. Lock's Creek Canal Co., 78 N.C. 156, 158 (1877).

8. Walton v. Mills, 86 N.C. 277 (1881).

9. *Id.* at 285.

10. Pendergrast v. Aiken, 293 N.C. 201, 236 S.E.2d 787 (1977).

11. Moser, "Interwatershed Transfer," traces the interplay of these riparian and nonriparian claims in southeastern law.

12. Heath, "Diversion of Water for Public Water Supplies."

13. Heath, "Diversion of Water for Public Water Supplies."

14. Moser, "Interwatershed Transfer." I am aware of no North Carolina decisions that clearly resolve two issues often debated in the literature and in the decisions of other states: whether riparian land extends to *any* land held in single ownership that is contiguous to a stream, even if the land was added onto the noncontiguous side of a riparian tract, and whether land outside the watershed of a stream can qualify as riparian even if it is part of a tract held in single riparian ownership.

15. Heath, "Diversion of Water for Public Water Supplies."

16. Moser, "Interwatershed Transfer."

17. 1955 N.C. Sess. Laws ch. 857.

18. G.S. 143-355(b) and (c).

19. A 1957 engineering report, which outlined the "Seven Cities Plan," illustrates what was contemplated by Chapter 162A [Piatt and Davis, William Olsen and Associates, and Hazen and Sawyer, "Report on Seven Cities Water Project, Yadkin River: Report to Seven Cities Water Committee" (1957)]. This plan, prepared by three major engineering firms, proposed a water supply project on the Yadkin River to serve the seven neighboring cities of Greensboro, Winston-Salem, High Point, Kernersville, Burlington, Lexington, and Thomasville. The Seven Cities Plan was debated at length in the region but never adopted. If this plan had been realized, it would have drawn on a relatively large water source, the Yadkin River near Winston-Salem, to meet the needs of two Yadkin river basin cities (Winston-Salem and Lexington) and five Cape Fear or Cape Fear–Yadkin cities (High Point, Kernersville, Burlington, Thomasville, and Greensboro).

20. G.S. 162A-7(c), which provides that:

> (c) The Board shall issue certificates only to projects which it finds to be consistent with the maximum beneficial use of the water resources in the State and shall give paramount consideration to the statewide effect of the proposed project rather than its purely local or regional effect. In making this determination, the Board shall specifically consider:
>
> (1) The necessity of the proposed project;
>
> (2) Whether the proposed project will promote and increase the storage and conservation of water;
>
> (3) The extent of the probable detriment to be caused by the proposed project to the present beneficial use of water in the affected watershed and resulting damages to present beneficial users;
>
> (4) The extent of the probable detriment to be caused by the proposed project to the potential beneficial use of water on the affected watershed;
>
> (5) The feasibility of alternative sources of supply to the petitioning authority and the comparative cost thereof;
>
> (6) The extent of the probable detriment to be caused by the use of alternative sources of supply to present and potential beneficial use of water on the watershed or watersheds affected by such alternative sources of supply;
>
> (7) All other factors as will, in the Board's opinion, produce the maximum beneficial use of water for all in all areas of the State affected by the proposed project or alternatives thereto.

21. Chapter 308 empowered counties and cities to issue bonds representing joint local commitments to finance the local cost share of United States Army Corps of Engineers reservoir projects. Worded as a statewide bill, it was designed especially to facilitate a flood-control project on the Yadkin River near Wilkesboro, by encouraging local funding of potential water supply features that would help justify the project.

Chapter 781, popularly known as the small watershed law, authorized counties or watershed-improvement districts to make commitments to maintain and pay the local cost share of small flood-protection, drainage, and water-conservation projects aided by United States Soil Conservation Service capital funds under Public Law 566 of 1954.

22. G.S. 153A-285.

23. G.S. 153A-287.

24. The Capacity Use Areas Law gave the Board of Water and Air Resources (now the Environmental Management Commission) limited powers to regulate the use of water in areas where the commission finds that water shortages exist or are impending—in effect, a water-management tool for critical areas to be designated by the commission [G.S. 143-215.13]. Although the major tar-

get of this act was groundwater problems, the act applies technically to rivers as well.

The Stored Water Act established a right for those who construct impoundments on rivers to store water for withdrawal, either directly (from the impoundments) or downstream (from streamflows augmented by the storage) [G.S. 143-215.44]. The right of withdrawal cannot be used to justify water "being diverted without authority from the basin from which it was withdrawn" [G.S. 143-215.47].

25. G.S. 143-215.28(a) and 143-215.25(1).

26. A legislative study commission on regional water supplies recommended extending authority to approve transbasin diversions for water supply purposes to cover individual cities and counties [*Legislative Research Commission. Report to the 1971 General Assembly on Local and Regional Water Supplies* (1970)].

27. G.S. 162A-6(16). As enacted, the act gave water and sewer authorities the same power as cities and counties to acquire subject to a purchase money security interest.

28. 1979 N.C. Sess. Laws ch. 1019.

29. *Legislative Study Commission on Alternatives for Water Management. Report to the 1980 General Assembly* (1980), 8, 12.

30. It should be noted that G.S. 153A-285 requires approval not only for water rights condemnations but also for diversions from "one stream or river to another." This makes G.S. 153A-285 broader than G.S. 162A-7, which contains only the condemnation provision. (One can only speculate whether the reference to diversions "from one stream or river to another" is broader than the reference in G.S. 153A-287 to diversions from "any *major* river basin.")

31. *See, e.g.*, Connecticut v. Massachusetts, 282 U.S. 660 (1931), which involved a dispute between Massachusetts and Connecticut over a proposed diversion of Connecticut River waters to Boston.

32. First Iowa Hydro-Electric Coop. v. Federal Power Comm'n, 328 U.S. 152 (1946), involved a proceeding before the Federal Power Commission concerning a license for a power dam that would have involved an interbasin transfer, apparently contrary to Iowa law but not contrary to the Federal Power Act.

33. 42 U.S.C. § 1962-1(d).

34. Cuyler v. Adams, 449 U.S. 433 (1981); Washington Metro. Area Transit Auth. v. One Parcel of Land, 706 F.2d 1312 (4th Cir. 1983).

35. For a list of the original series of local acts requiring such approvals, see Milton S. Heath, Jr., "Natural Resources and the Environment," in *North Carolina Legislation 1981*, ed. Ann L. Sawyer (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1981), 188–89.

36. Harris v. Norfolk and Western Ry. Co., 153 N.C. 442, 445, 69 S.E. 623, 624 (1910). And see Heath, "Diversion of Water for Public Water Supplies," 169–70.

37. Even without the word *now* in G.S. 153A-287, similar questions would arise concerning the meaning of the words *permitted by law*.

38. The current interpretation of the North Carolina Division of Water Resources is that G.S. 153A-285 requires EMC approval of a water and sewer authority's line whether or not eminent domain powers are used, because the authority is a "joint agency" within the meaning of the statute [conversation with John N. Morris, director, Division of Water Resources, 17 August 1989]. This is a plausible, literal interpretation. Another acceptable interpretation, however, would require that G.S. 153A-285 be read contextually with G.S. 162A-7, that G.S. 162A-7 be considered the statute governing EMC approvals of water and sewer authority diversions, and that G.S. 162A-7 not be read as implicitly amended by G.S. 153A-285.

39. There is at least one additional application for EMC approval anticipated, which involves the Piedmont Triad Regional Water Authority's projected Randleman Reservoir [conversation with John N. Morris, director, Division of Water Resources, 17 August 1989].

40. U.S. Federal Power Commission, Joint Use of Water Power Project Works or Parts Thereof for Certain Water Supply Purposes, Docket No. R-249, order terminating proceeding (April 7, 1965), 33 F.P.C. 711 (1965).

41. 293 N.C. 201, 216, 236 S.E.2d 787, 796–97 (1977).

42. Specifically, under G.S. 143-354(a)(11) EMC may "assign or transfer to any local government having a need for water supply storage in federal projects any interest held by the state in such storage, upon assumption of repayment obligations therefor, or compensation to the state, by such local government."

43. See note 38 for the argument that a water and sewer authority must obtain EMC approval for the allocation because it should be considered a "joint agency" within the meaning of G.S. 153A-285.

BOOK REVIEW

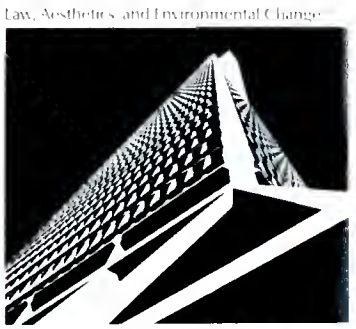
A Review of *Icons and Aliens: Law, Aesthetics, and Environmental Change*

Richard D. Ducker

In one cartoon as two Indian braves overlook the United States Cavalry's construction of a fort on the plain below, one brave remarks to the other, "Another monstrosity!" In another cartoon, one of the three little pigs defiantly declares to the big, bad wolf skulking outside the door, "Tough luck! You can no longer huff and puff and blow my house down. It's been designated a landmark!" In yet another, one matronly lady remarks to her visiting friend on the train, "I feel I should warn you. They've taken down most of Boston and they're putting up something else."

The subject of these cartoons, all found in John Costonis's *Icons and Aliens*, is environmental change—how people react to it and how they expect government to promote or prevent it. We know that features of what architects call the "built environment" are often rich in symbolic significance and may evoke strong psychological and emotional reactions. The author calls those physical features invested with values that confirm our sense of order or identity "icons." In contrast, "aliens" are physical features that threaten these icons and our investment in the values they represent. Sometimes aliens are capable of destroying or extinguishing icons, as when plans for a new office building call for the demolition of a historic downtown theater. Aliens also may contaminate the environment, as when billboards clutter scenic vistas.

Courtesy University of Illinois Press



These metaphors create certain ironies. Some of the attributes we associate with an icon (for example, the associations of New York's Upper East Side with financial prosperity and celebrity) do not translate well into physical forms, the focus of aesthetic regulation. Furthermore, preserving the physical character of a neighborhood (the icon) may destroy its social character ("gentrification" is one form of this phenomenon). Perhaps the most disturbing irony is that when built by earlier generations, features we now view as icons may then have been seen as aliens.

John Costonis's frame of reference, evidenced by his liberal reference to development battles in Manhattan, derives from his residency as dean of the New York University Law School. His book *Space Adrift: Landmark Preservation and the Marketplace*, published in 1974 by the University of Illinois Press, develops the intellectual, policy, and legal rationale for the concept of transferring development rights, a planning tool increasingly used in larger cities to help justify development restrictions placed on historic landmarks. His background and interest in historic preservation is evident in *Icons and Aliens*. Historic preservation controversies provide the grist for a number of the examples in his new book, but his purpose is not merely descriptive. His thesis is that the law's approach to regulation for aesthetic purposes (what he calls "legal aesthetics") is misguided and not up to the task of justifying governmental action. Although Costonis is not necessarily ready to turn to the private sector to settle disputes between icons and aliens, he does emphasize the importance of what he calls the "process values" by which a community selects its icons, resolves conflicts, and protects the interests of those who would sponsor potential ali-

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BOOK REVIEW

ons. He makes lucid arguments for respecting due process and equal protection, for resisting the temptation to burden regulated property owners unduly, and for protecting the potential (but as yet legally unrecognized) First Amendment rights of architects and artisans for freedom of expression.

But he levels his greatest criticism at lawmakers and courts for allowing aesthetic regulation to proceed with an uncritical eye, for acknowledging concepts of visual beauty (what he calls "museum aesthetics") as the legitimate basis for legal aesthetics, and for tolerating the use of inappropriate standards by administrative agencies. Beauty is an inadequate basis for regulation for a variety of reasons, he claims. The associational relationships we have with buildings and public areas are more important than the visual, particularly to the layperson. If legal aesthetics is based on mimicry and is reactive in nature, as he claims it is, it does not adequately tolerate the need for creativity and autonomy in a community. Tastes change as time goes by; no single style can serve as beauty's model. Museum aesthetics tends to focus on isolated objects rather than on their context, an approach that is inadequate for environmental evaluation. For example, Costonis would scorn the labeling of billboards as ugly. It is the environmental context in which they are placed and the "associational dissonance" that may result that matters.

Although this critique is careful and complete, these arguments have been made before by others. By now it is clear that the reasons *why* we should support aesthetic regulation and historic preservation must be better related to the social, psychological, and, yes, even the economic significance of protecting buildings, neighborhoods, and public areas. Furthermore, those who would encourage government to use its protective power must provide guidance as to *how* this should be done by detailing more clearly the characteristics that make certain areas worthy of protection and the characteristics of incongruous development that would threaten their status.

It is on the question of how government can make principled decisions that Costonis founders. In place of standards based on community appearance, Costonis would substitute what he calls "stability standards," standards that recognize the strong psychological and emotional responses that environmental change evokes. But he does not appear ready to acknowledge the parochial, irresponsible side of neighborhood and community protection efforts with their possible antisocial, exclusionary, and anticompetititve implications. Neither does he provide concrete examples of stability standards or how they should be applied. He appears more concerned with outcomes than with standards for decision making. The author apparently approves of the maxim attributable to the German chancellor Metternich: "A law is like a sausage: it is better not to ask how it was made."

In any case *Icons and Aliens* provides a lively overview of the uneasy relationship between aesthetics and the law. Costonis's analysis spans the disciplines in fresh, ironic, and often amusing ways. Anyone concerned with historic preservation, neighborhood conservation, and environmental change will enjoy it and learn from it. ❖

John Costonis, *Icons and Aliens: Law, Aesthetics, and Environmental Change* (Urbana and Chicago: University of Illinois Press, 1989).

AROUND THE STATE

Update on Employment at Will and the Local Government Employer

Stephen Allred

In the Spring 1989 issue of *Popular Government*, the article "Employment at Will and the Local Government Employer" (see pages 13–17 of that issue) explained the development of the public policy exception to the employment at will rule and noted the decision of the North Carolina Court of Appeals in *Coman v. Thomas Manufacturing Company*.[1] In that case, the court refused to extend the public policy exception to cover an employee, Mark Coman, who allegedly was fired for refusing to drive his truck longer than the time allowed under United States Department of Transportation regulations.

On July 26, 1989, the North Carolina Supreme Court reversed the court of appeals decision in the *Coman* case. The supreme court first held that Coman could bring a claim for wrongful discharge in violation of public policy. Second, the court looked to the ruling in *Sides v. Duke University*[2] (also discussed in the article) to explain the scope of this type of claim. The supreme court quoted *Sides*, saying: "[W]hile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy. . . ."[3]

Coman alleged violations of the federal Department of Transportation regulations, which in turn had been adopted by the North Carolina Department of Motor Vehicles in the North Carolina Administrative Code as its own regulations. The North Carolina Supreme Court concluded that state public policy, as established in the Administrative Code, barred the acts complained of by Coman. Further, the court found that public policy protected the safety of individuals and property on or near the public highways [N.C. Gen. Stat. § 20-384] and that "actions committed against the safety of the traveling public are contrary to this established public policy."[4] Thus, as the court of appeals had done in *Sides*, the court grounded its recognition of a public policy in the state's published statutes and regulations.

In recognizing the public policy exception, the court held that under North Carolina law, an employee at will could not be discharged in bad faith. Recalling an 1874 opinion in which the court held that a master could not discharge his servant in bad faith,[5] the court noted that "bad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships."[6]

The lone dissent, filed by Justice Louis B. Meyer, warned that in recognizing the public policy exception to the employment at will doctrine, the court was inviting an onslaught of spurious lawsuits by disgruntled former employees.[7] The majority, however, deemphasized that possibility, noting that "our courts have abundant authority to protect employers from frivolous claims, particularly by the imposition of sanctions against attorneys and parties pursuant to Rule 11 of the Rules of Civil Procedure."[8]

Certainly the recognition of the public policy exception by the North Carolina Supreme Court is a significant and far-reaching action. Indeed, it probably ranks as the most important employment-law decision rendered by the court in this decade. Whether the long-term effect of the *Coman* decision will be to increase substantially the number of wrongful discharge actions brought in the North Carolina courts remains to be seen. ❖

The author is an Institute of Government faculty member who specializes in personnel law.

Notes

1. 91 N.C. App. 327, 371 S.E.2d 731 (1988), *rev'd*, 325 N.C. 172, 381 S.E.2d 445 (1989), hereinafter cited as *Coman*.

2. 74 N.C. App. 331, 328 S.E.2d 818, *rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985).

3. *Coman*, 325 N.C. at 175 (citing Sides v. Duke University, 74 N.C. App. at 342, 328 S.E.2d at 826).

4. *Coman*, 325 N.C. at 176.

5. Haskins v. Royster, 70 N.C. 601 (1874).

6. *Coman*, 325 N.C. at 177.

7. *Coman*, 325 N.C. at 183 (Meyers, J. dissenting).

8. *Coman*, 325 N.C. at 178.

AROUND THE STATE

1988 Awards for Financial Reporting

S. Grady Fullerton

Eight additional governmental units in North Carolina have been awarded the coveted Certificate of Achievement for Excellence in Financial Reporting,[1] bringing the total number of North Carolina holders to thirty-five (see Table 1). Each fiscal year the Government Finance Officers Association (GFOA) of the United States and Canada awards the certificate to local government units for outstanding annual financial reports. This award is the highest form of recognition a local government unit can receive for financial reporting.

GFOA began the program in 1945 to encourage units to prepare and publish easily readable and understandable comprehensive annual financial reports covering all of their entities, funds, and financial transactions during the year. Reports submitted to the program are judged on this basis and are reviewed thoroughly by three independent evaluators, who are carefully selected for their extensive training and experience in governmental accounting.

North Carolina units have shown increasing interest in GFOA's program, as indicated by the increasing number of units receiving the award between 1983 and 1988:

1988	35 units
1987	27 units
1986	22 units
1985	23 units
1984	16 units
1983	17 units

A similar award, administered by the Association of School Business Officers International and limited to school administrative units, is the Certificate of Excellence in Financial Reporting.[2] Begun in 1974, this program also is starting to attract the attention of North Carolina units. For fiscal year 1986–87, only two units were awarded the certificate: five received the award for fiscal year 1987–88 (see Table 2). ❖

Table 1
North Carolina Government Units Receiving the Certificate of Achievement for Excellence in Financial Reporting, Fiscal Year 1987–88

Municipalities	Counties	School Administrative Units
Asheville	Buncombe County	Asheville City School System
Cary	Cabarrus County	Charlotte-Mecklenburg School System
Chapel Hill	Catawba County	Hickory City School System*
Charlotte	Davidson County	
Durham	Durham County	Councils of Governments
Greensboro	Forsyth County	Neuse River Council of Governments*
Hendersonville*	Guilford County	
High Point	Iredell County*	
Kill Devil Hills*	Mecklenburg County	
Lumberton	Moore County*	
Morganton*	New Hanover County	
Newton	Orange County	
Raleigh	Person County*	
Salisbury	Wake County	
Sanford		
Wilmington		
Wilson		

*Indicates a unit receiving the certificate for the first time.

Table 2
North Carolina School Administrative Units Receiving the Certificate of Excellence in Financial Reporting, Fiscal Year 1987–88

Asheville City School System
Catawba County School System*
Charlotte-Mecklenburg School System
Hickory City School System*
Yancey County School System*

*Indicates a unit receiving the certificate for the first time.

1. This program was described in more detail in S. Grady Fullerton, "How a Local Government Can Upgrade Its Financial Reporting," *Popular Government* 53 (Fall 1987): 27–31.

2. This program was described in more detail in S. Grady Fullerton, "How a School Administrative Unit Can Upgrade Its Financial Reporting," *School Law Bulletin* 20 (Winter 1989): 14–18.

The author is an Institute of Government faculty member who specializes in governmental accounting and financial reporting.

Off the Press

North Carolina Legislation 1989

Edited by Joseph S. Ferrell

This comprehensive summary of the General Assembly's enactments during the 1989 legislative session is written by Institute faculty members who are experts in the respective fields affected by the new statutes. It contains chapters on the following topics: the legislative institution; alcoholic beverage control; cities; constitutional proposals; counties; courts and civil procedure; criminal law and procedure; elections; health; juvenile law; land records; local government finance; local taxes and tax collection; marine fisheries, wildlife, and boating regulation; mental health; motor vehicles; natural resources and the environment; planning, development, and land-use regulation; public education; public personnel; sentencing and state corrections; sheriffs and jails; social services and related laws; state government; state taxes; transportation; utilities and energy; and waste management. [90.01] ISBN 1-56011-161-5

County Salaries in North Carolina 1990

Compiled by Carol S. Burgess

This publication presents the results of the Institute's annual survey of county salaries and personnel practices in North Carolina. Ninety-six counties participated in the survey. The report includes salary and wage profiles by position, for all major county positions as well as other posts in which county officials have expressed interest. It also contains information about fringe benefits offered for the 1989–90 fiscal year, estimated county population projections, and assessed property valuations. [90.02] ISBN 1-56011-163-1

North Carolina's Community Penalties Program: An Evaluation of Its Impact on Felony Sentencing in 1987–1988

Laura F. Donnelly and Stevens H. Clarke

The authors evaluated twelve North Carolina community penalties programs that investigate and prepare sentence plans for nonviolent criminal defendants who otherwise would be likely to receive substantial prison sentences. The evaluation looked at how effective the programs are in reaching "prison-bound" defendants and in obtaining community sentences such as restitution, community service, and probation instead of prison terms. This booklet reports the results of that study. [90.03] ISBN 1-56011-160-7

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