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On the cover The proliferation of the North Carolina beaver, once extinct in this region, has been making news across the state. Photograph by Melissa McGaw, courtesy N.C. Wildlife Resources Commission.

What Constitutes an Impartial Jury?

Thomas H. Thornburg

In the last two years communities across the nation have been terrorized by riots, or the threat of riots, in the aftermath of controversial jury trials. Each of these incidents has involved significant social criticism of the legal system, including disapproval of how members of racial minority groups are represented on juries.

The author is an Institute of Government faculty member whose specialties include courts, juries, and criminal law and procedure. *He is indebted to the research and writing of Kim Grantham, a third-year student at Duke University Law School, on two topics: (1) Sixth Amendment fair cross-section requirements in selecting citizens for jury service and (2) the history of jury selection in North Carolina. She addressed these topics in an unpublished memorandum, "North Carolina Jury Selection Procedures and the Fair Cross-Section Requirement" (July 28, 1993). Grantham was a law clerk at the Institute of Government during the summer of 1993.*

Clearly, the most destructive of these episodes was the rioting that grew out of the 1992 state court acquittal of white police officers involved in the beating of Rodney King, a black man, in Los Angeles, California. More than fifty peopled died in that violence, and damage estimates exceeded one billion dollars. Much of the criticism following the officers' trial was based on the belief that a jury with no black members could not have fairly considered the case of white policemen accused of assaulting a black man. And more fundamental to how our courts operate was the contention that a jury that included no blacks *could not have been chosen by a fair method.*[1]

In what ways does our judicial system combat discrimination in the selection of citizens to be jurors? How is it possible that in cases where race is a central tension our judicial system permits juries to be created without minority members? Do the principles of our judicial system sup-

port the notion that juries should be composed of "representatives" of various groups in the community in proportion to the group's presence in the community?

This article will attempt to answer these recurrent questions in terms of the federal and state law applicable in North Carolina. First, it will explain arguments on each side of the theoretical battle concerning fair jury representation and describe briefly some prominent cases involving fairness based on race. These issues later will be explored by discussing, first, how citizens are selected to be called for jury service, and second, by describing what happens when prospective jurors arrive at the courthouse in anticipation of serving as jurors in civil or criminal trials.

A Theoretical Battle about Fair Juries

Inherent in the criticisms leveled in the aftermath of the 1992 King verdict is the belief that a jury that would be fair either to a black victim or a black defendant must have some black members. The same could be said for victims and defendants of other racial and ethnic backgrounds. Some critics of the present system say that having some or a few members of a particular racial or ethnic group is not enough to overcome the prejudices of white jurors; these critics assert that the racial composition of the jury should mirror that of the community in which a crime occurred and a subsequent trial takes place.[2] In short, they argue for proportionately representative juries.

But proponents of proportionately representative juries have their own critics. Many legal scholars criticize the position as one that promotes (1) stereotypes about races, (2) the belief that members of different racial groups cannot understand or fairly judge one another, and (3) continued separation along racial lines in our society. These critics claim that proportional representation promotes the value of racial loyalty over impartiality and the rule of law in the legal system. Such critics favor approaches to jury selection that stress the idea that justice in a democratic society ought to be color-blind.[3] In many ways, the theoretical battle in this context is very much like the conflict concerning affirmative action in hiring and school admission procedures: those who favor special steps to recognize and advance people based on minority personal characteristics versus those who think all advancement decisions should be blind to characteristics like race and sex.

While the theoretical battle continues, we face very real problems in our communities. Issues of race representation on juries have arisen in numerous recent cases receiving national publicity:

- the late summer 1993 California state court trial of three black men accused of assaulting and attempting to murder white truck driver Reginald Denny during the hours of social turmoil immediately following the 1992 acquittal of the police officers in the King case (the defendants were acquitted by a jury made up of four blacks, four Hispanics, three whites, and one Asian American);
- the summer 1993 trial of white ex-police officers Walter Budzyn and Larry Nevers who were involved in the death of Malice Greene, a black man, in Detroit, Michigan (each was convicted; twenty-one of the twenty-four jurors on the two juries were black);
- the spring 1993 retrial of Miami, Florida, police officer William Lozano, who is Hispanic, charged with manslaughter in the death of a black motorcyclist (the presiding judge changed the venue,[4] or place for trial, for Lozano's case six times; various interest groups criticized each move because of the racial composition of the community from which the jury in the new venue would be drawn; ultimately, Lozano was acquitted by a six-person jury composed of one black, two Hispanics, and three whites);
- the spring 1993 trial of black congressman Harold Ford, of Memphis, Tennessee, on federal charges of taking political payoffs. (The congressman and others were critical of the presiding federal judge's decision to move venue outside of Memphis—Congressman Ford's home district and a predominantly black community—into a nearby rural and mostly white district. The case received national attention when the U.S. Justice Department requested that the judge return the case to Memphis. The judge refused, and the congressman was acquitted by a jury of one black and eleven whites.)[5]

All of these cases involve questions about fairness to victims or defendants, based on race. They also raise specific questions about how our court system deals with racial issues, not just in the most controversial cases but in its everyday business. A close look at how individuals are selected as potential jurors will be instructive.

Selecting Citizens for Jury Service

North Carolina statutes require that lists of citizens eligible for jury service be created in each county at least every two years, and the statutes permit that task to be done every year at the request of a county's resident superior court judge. A three-member county jury

commission compiles the list. Each member of the commission is appointed by a different county official.[6] Each appointee, who must be a county resident and a registered voter, serves a two-year term. The county jury commission creates a list of prospective jurors by drawing names from two lists of county citizens compiled by other government agencies: a list of county residents who are licensed drivers, from the state's Department of Transportation, Division of Motor Vehicles; and a list of registered voters from the county board of elections. A commission also may draw on any other reliable source of names it wishes, the goal being to include as many eligible citizens as possible. North Carolina counties rarely go beyond the two basic source rolls described above, however.

More than one source list has been used here since 1967, in an effort to maximize the number of qualified citizens who may be included as potential jurors. Some states use only voter registration lists to generate lists of jurors—critics say, and evidence supports, that use of such a single source limits participation by members of racial minorities as jurors.[7] A 1980 study of six North Carolina counties showed that inclusion of the driver's license source list, along with the registered voter list, increased the number of blacks among prospective jurors, and brought the lists closer to representing the proportion of blacks in the counties' population.[8]

Since the late 1940s North Carolina has progressed to use of source lists that are more representative of the proportion of women and minorities in the state's general population. From the 1800s through 1947, county tax return lists were used to generate names of prospective jurors in North Carolina. This source list underrepresented the poor, blacks, and women.[9] In 1947 the General Assembly provided that jury commissioners also should consider a list of county residents who did not appear on tax lists but who otherwise met juror qualifications.[10] In 1967 the General Assembly added voter registration records as a source for juror names.[11] In 1981 the taxpayer list was removed as a source list for jurors, and the driver's license list was added, along with the authority for jury commissions to consider other source lists deemed reliable.[12]

The roster of prospective jurors created by the commission is called the master jury list. The jury commission must select persons randomly from the source lists to be placed on the master jury list.[13] So that a person may be considered only once for inclusion on the final list, the jury commission removes duplicate listings of names that happen to appear on both source lists before starting the selection process. That process must be random: every name in the source lists must have the same opportunity to be selected for the master list. The randomness of the process helps prevent opportunities for discrimination or favoritism in the selection process, including that which may have occurred historically on the grounds of race or sex.[14] In other words, the way in which persons are chosen for eligibility *is supposed to be blind to the race, sex, and other characteristics of prospective jurors.*

This system of selecting citizens for prospective jury service by a random process is based on notions of fairness growing out of judicial interpretations of the Sixth Amendment to the United States Constitution. The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed" (note that this rule applies to criminal trials but not to civil trials). Article I, Section 24, of the North Carolina Constitution is interpreted by some as a similar requirement.[15]

The *Taylor* Rule

Historically, juries in the United States have been mostly white and middle-class.[16] Racial minorities, women, and poor whites have been under-represented. Over time, criminal defendants have challenged the rules governments use for choosing citizens for prospective jury service in criminal trials. In 1975 the United States Supreme Court decided the case of *Taylor v. Louisiana.*[17] Taylor, a criminal defendant, argued that a Louisiana law that automatically exempted women from jury service unless they requested that they be considered for it was unconstitutional, because the law resulted in a relatively small number of women serving on juries. While women composed 53 percent of the population eligible for jury service in the judicial district where Taylor was tried, the list of jurors from which Taylor's jury was selected comprised only 10 percent women. The Supreme Court agreed with Taylor, saying that a criminal defendant has a right to be tried by a jury drawn from a source "fairly representative of the community" in which the trial is held.[18] And it said that Louisiana's automatic exemption statute for women prevented Taylor's jury from being adequately representative.

Taylor remains a primary source of law on the issue of discrimination in choosing citizens as prospective jurors, and today lawyers describe the *Taylor* rule as a criminal defendant's right to be tried by a jury drawn from a fair cross-section of the community. The *Taylor* rule applies not only to the presence of women on juries but

also to the presence of racial minorities on juries. This principle has been an important tool in eliminating explicit intentional discrimination contained in laws and policies that either prevent minorities and women from being considered at all for jury service, or that raise barriers to their being considered.

Significantly, the Supreme Court said in *Taylor* that the fair cross-section requirement does not mean that juries "must mirror the community and reflect the various distinctive groups in the population."[19] Instead, the requirement is that distinctive community groups must not be systematically or intentionally excluded in the process of selecting citizens to be prospective jurors.

Thus the Court stopped short of requiring any specific group representation in juries. In place of that, it is adequate that prospective jurors be chosen by a process that disregards characteristics like race and sex. A jury pool should reflect the presence of various community interests and perspectives, but it need not be representative. As a result, it is not unconstitutional to hold a trial in which no juror is a member of a minority racial group—even if the case involves significant racial issues—as long as such groups are represented in the source pool from which names of prospective jurors were drawn, the selection of jurors was appropriately random, and restrictions on the use of peremptory challenges, described below, were complied with. Moreover, there is no constitutional violation if this random selection process yields jury after jury composed entirely of white men—or of black men.[20] Such results can reinforce perceptions that how we select juries is unfair, as well as foster distrust of the decisions made by such juries.

Problems of Random Selection

A weakness of random selection as a tool to combat discrimination is that the approach will include only citizens—minority or otherwise—whose names appear on the lists used to draw jurors: typically driver's license lists and voter registration lists. Studies have indicated that members of racial minorities do not register to vote—or, to a lesser extent, get driver's licenses—in proportions similar to whites.[21] Consequently, compared to their proportion of the community, these minority groups are under-represented in the lists from which juror names are drawn.[22] Representation might be improved by use of other source lists, such as phone number listings and rosters of utility subscribers. But, as a rule, courts have not required use of additional lists. And courts typically will not require efforts to assure near or exact proportional representation of a community's member groups in a jury source list; courts tend to view such efforts as extraordinarily expensive and time-consuming. In fact, the United States Supreme Court has said that providing representative juries for each criminal defendant is a "practical impossibility."[23]

The random selection process itself does little to combat under-representation. Under-representation of a particular group on a jury is deemed unconstitutional only if it is proven to be "unfair and unreasonable" and an inevitable result of systematic discrimination against the group in question in the selection process used.[24] Consequently, when reviewed by the North Carolina Supreme Court and federal courts under this standard, none of the following disparities between the presence of eligible black citizens in the jury pool and their presence in the county population was so gross as to be considered unfair:

- Jury pool was 10 percent black, while county's eligible black adult population was 20 percent[25]
- Jury pool was 17.3 percent black, while county's eligible black adult population was 23.5 percent[26]
- Jury pool was 26.3 percent nonwhite, while the county's eligible nonwhite population was 35.9 percent[27]
- Jury pool was 17.1 percent black, while county's black population was 31.1 percent[28]

Naturally, such outcomes do little to assuage critics who argue that proportional representation of minority groups is necessary for fair trials.

A criticism of this selection process is that it pays no attention to personal characteristics. While some people view blindness to characteristics like race and sex as a strength, others see the feature as a weakness because it prevents a factor like race from being *favorably* considered in creating juries. The method does not permit the affirmative inclusion in jury service of members of racial or other groups that may be under-represented on the source lists. As a result, under-representation is not affected by the process of selecting a pool of prospective jurors.

After creating the master jury list, the jury commission faces the difficult task of removing names of persons who are disqualified under law from serving as jurors. Characteristics that disqualify someone from jury service in this state include physical or mental incompetence, inability to "hear and understand the English language," and conviction of a felony without having one's citizenship restored.[29] Generally, jury commissions apply the following rule: If there is some doubt about whether someone is disqualified, include that person on the list. Later in the judicial process, other actors—judges and

attorneys—will have the opportunity to remove jurors who are legally disqualified.

Selecting Jurors for Service in a Trial

After the jury commission finishes its work, the clerk of superior court in the county randomly selects names from the list as necessary for jury service during the two-year period in which the list is valid. Those prospective jurors selected are summoned to the courthouse. All qualified citizens summoned are expected to serve as jurors. Citizens qualified to be jurors can avoid jury service only through excusal by a judge for reasons of compelling personal hardship, or because service would be contrary to the public health, safety, or welfare.[30]

Upon arriving at the courthouse, prospective jurors generally are directed to a jury room, where they are checked in and oriented to their duties as jurors. Then prospective jurors wait until they are called to a particular courtroom for questioning as to the possibility of serving as a juror in a trial to be held in that courtroom.

Prospective jurors are asked to sit in the jury box to be questioned about serving as a juror. The presiding judge and attorneys for the parties ask each prospective juror questions. Generally the questions are designed to learn how prospective jurors might decide the case before the court, based on their background, experience, and ideas. At this stage, there are typically only two ways that a juror who is qualified under statute and without hardship may be excused from jury service: "for cause"[31] or by "peremptory challenge." Challenges for cause generally are used when the judge believes, or has been convinced by a party, that a juror cannot be impartial in the case. For example, knowledge of a case's facts or friendship with involved parties or attorneys that would prevent a juror from being fair to both sides may be grounds for removing a juror for cause.

Peremptory Challenges

Under state law, parties and their lawyers get a particular number of peremptory challenges in every jury trial.[32] Peremptory challenges are used to prevent particular prospective jurors from being seated on a jury for a trial, usually because a party fears that the juror will not be favorable to his or her position. Until 1986 opposing parties had no right to contest the use of peremptory challenges, and trial judges had no control over their use. Historically, *peremptory* meant that the lawyer could strike a prospective juror without offering any reason for that challenge—it was a free strike. The lawyer did not have to offer any justification to an opposing party or to the judge. Consequently, courts implicitly allowed lawyers to strike jurors for reasons that might be unconstitutional in other circumstances. For example, a prosecutor could use peremptory challenges to prevent the seating of black jurors in the criminal trial of a black defendant.

In 1986 an important judicial tool for limiting discrimination emerged with the United States Supreme Court's groundbreaking ruling in *Batson v. Kentucky*.[33] The *Batson* tool is derived from the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and, in some North Carolina cases, from a "functionally equivalent" equal protection provision in Article I, Section 19, of the North Carolina Constitution.[34] The application of *Batson* in North Carolina also has relied on Article I, Section 6, of the North Carolina Constitution, which provides: "No person shall be excluded from jury service on account of sex, race, color, religion, or national origin." Many states have no constitutional provision like Article I, Section 6.

In *Batson* the Supreme Court ruled that the Equal Protection Clause prohibits prosecutors in criminal cases from using peremptory challenges for racially discriminatory reasons. The Supreme Court extended that principle to the use of peremptory challenges by criminal defendants and their attorneys in *Georgia v. McCollum*,[35] and to all parties in civil trials in *Edmonson v. Leesville Concrete Company*.[36] One of the most striking developments of this line of cases was that the Court stated that a *Batson* claim concerns a *juror's* Fourteenth Amendment equal protection rights as well as the equal protection rights of the parties to the litigation, and it provided that parties may assert their own rights or the rights of dismissed jurors.[37]

After *Batson* and its companion cases, this means that parties and their attorneys, in civil or criminal cases, cannot prevent a juror from sitting on a jury because the juror is black, Native American, Asian, or a member of another racial or ethnic minority. If a court finds that a party misuses a peremptory challenge on the basis of discrimination, the court may require that the removed juror be reseated on the jury or that jury selection be started over with jurors who were not aware of the

discrimination. Also, because the right at stake belongs to a juror, the race of the claimant is not important—so, for example, a white criminal defendant may assert that a prosecutor has discriminated against a black juror by using a peremptory challenge.[38]

In North Carolina *Batson* has been interpreted to protect blacks and Native Americans.[39] Mexican Americans and Hispanics from other Latin American countries also are likely to qualify for protection.[40]

One of the questions raised by the *Batson* decision is: How expansive an impact does, or can, the ruling have? The United States Supreme Court based its decision on the constitutional principle that all people should be treated equally—courts apply this principle to questions of how numerous groups in our society, not just racial minorities, are treated. Someday *Batson* could be applied to prohibit discrimination on the basis of many group identities, including religion, sex, or disability status.[41] In *State v. Fullwood*,[42] the North Carolina Supreme Court held that *Batson* protections apply "only to the specific problem of discrimination based on race." Apparently, the North Carolina Supreme Court would not extend *Batson*, as it is presently interpreted, to prohibit discrimination on the basis of sex in the use of peremptory challenges. However, in November 1993 the United States Supreme Court heard arguments in a case about whether *Batson* should prohibit the use of peremptory challenges against women and men because of their sex.[43] The Court likely will rule on this issue in 1994.

There are limits to how effective *Batson* can be in combating discrimination. For instance, *Batson*'s application has become extremely complex and technical, requiring several stages of claims and proof before a final ruling can be made.[44] Failure to satisfy all of the required technical steps can mean that a substantive claim of discrimination fails. Also, parties who allegedly discriminate have a fairly simple threshold showing to make to defeat a claim of *Batson* discrimination. Such a party need only show a "race-neutral" reason for the peremptory challenge. That is, the party must reveal a reason unrelated to race for using the peremptory challenge. A trial judge may accept virtually any race-neutral reason as long as the judge finds that the party was sincere in offering the reason.[45] As an illustration of how easy a standard this can be, the North Carolina Court of Appeals upheld the following explanation of a contested peremptory challenge by a prosecutor: a veteran police detective assisting in jury selection "stated that he did not feel comfortable" with the removed black prospective juror.[46] Of course, this standard is flexible enough to permit an individual trial judge to have an extremely high standard about what constitutes a permissible race-neutral explanation as well.

For commentators who argue for proportional representation of societal groups on juries, the *Batson* tool is unsatisfactory because its primary motivation is to protect individual jurors who may have been discriminated against in how a peremptory challenge was used. It does nothing to promote a group or community notion of jury composition.

Common Questions

How is it possible that in cases where race is a central tension our judicial system permits juries to be created without minority members?

As explained above, it is possible for a jury that does not contain a single black juror to be chosen in a case involving black defendants or black victims, even if the case involves significant racial issues. This is possible for at least two reasons.

1. The tool for combating discrimination in how people are selected for jury service is characteristic-blind; because persons are chosen at random, without regard to any characteristic, it is always possible that no black juror may be seated. Minorities tend to be under-represented in the process of selecting citizens for jury service, and the law does not prohibit this.

2. Jurors are subject to removal from cases by peremptory challenge or for cause. Parties in a case still may use peremptory challenges to remove jurors they do not think will favor their side, or those they simply dislike—*Batson* prohibits parties from using challenges on the basis of race—but it is not a perfect weapon against discrimination. Impermissible racial reasons for removing jurors may be disguised and not provable by a *Batson* challenge. *Batson* prohibits intentional discrimination; it does not say that black jurors must sit on a particular jury. If it is clear that jurors cannot be impartial, the presiding judge is likely to remove them regardless of their racial identity.

Do the principles of our judicial system support the idea that juries should be composed of "representatives" of various groups in the community in proportion to the group's presence in the community?

Almost resoundingly, the answer is *no*. The Sixth Amendment's requirement of an "impartial jury" may be interpreted by many Americans to mean a jury that represents many different components of society—racial, ethnic, religious, and socioeconomic diversity, among others. But that is not how courts have defined a constitutionally permissible impartial jury. Instead, they have defined as impartial and acceptable a process for selecting prospective jurors that is characteristic-blind. In order to avoid discrimination, the system should avoid consideration of any factor like race, sex, or age. That means that both positive and negative consideration of such factors should be avoided in the selection process.

Our system has two basic ways of combating discrimination: (1) assuring a characteristic-blind process for choosing citizens for jury service, and (2) prohibiting intentional racial discrimination in lawyers' use of peremptory challenges when lawyers select jurors for a particular trial. The law tolerates under-representation of racial and minority groups in the jury process, as long as courts perceive the selection system as a fair effort to include as many people, backgrounds, and perspectives as possible.

What Is the Future?

Almost certainly, as the population of North Carolina and the rest of the nation grows more racially and ethnically diverse, there will be legal and political pressures to add greater representation of these groups in legal and political institutions. Additionally, women almost certainly will make claims for greater representation. It may well be the case that the years ahead will bring changes in the law concerning the Sixth and Fourteenth Amendments. And it is possible that North Carolina's special constitutional provision concerning protections for minorities will get greater attention from litigants and courts.

There likely will be greater pressure on the courts to adopt more proportional representation notions concerning juries, in order to satisfy a changing sense of what fairness means in the United States. And the courts are likely to respond to the public's changing sense of fairness. The United States Supreme Court, in both the *Taylor* and *Batson* decisions, stated that it is important that citizens see fairness and democracy in their government and that the Court defend that appearance of fairness so that public confidence in the system remains strong.[47] Shifting values may result in application of "affirmative action"–type principles to juries.

But the best lessons for improving things in the short run probably come from recent cases involving racial tension. Prosecutors and court officials were attentive to issues of race in the 1993 federal trial of the officers involved in beating Mr. King. That jury of twelve was composed of nine whites, two blacks, and one Hispanic, while the state court jury had included no members of racial minorities. Press reports concerning the trial of Los Angeles truck driver Reginald Denny's black assailants stressed that the greatest possible care was being taken by the attorneys on both sides in that case to assure that a fair jury was selected and—presumably—that blacks would be a part of the jury.

These instances indicate that, ultimately, eliminating discrimination in selecting who sits on juries almost certainly will rely upon commitment to principles of fairness, equality, and antidiscrimination among lawyers, judges, and parties involved in court cases, and not just upon the rules established for these actors to abide by. ❖

Notes

1. Andrew Kull, "Racial Justice: Trial by Cross-section," *New Republic*, November 30, 1992, 17.

2. Rogers Worthington, "Should Justice Peek?: Police Trials Raise Questions about Juries' Makeup," *Chicago Tribune*, August 29, 1993, 1.

3. See, e.g., Elizabeth McCaughey, "Like Justice, Jury Selection Should Be Colorblind," *Wall Street Journal*, March 3, 1993, A15. She writes that the "inevitable outcome of such racial and ethnic particularism" is a system in which "racial loyalties override any commitment to impartial fact-finding and a uniform application of the laws." Critics also point to a slippery slope in the proportional representation approach—that is, what are the limits concerning which groups must be represented? How do we decide what those limits are? For example, how could a Norwegian or an Aleut defendant in North Carolina be afforded a jury of peers in such a system? The jury of peers idea should not be taken to such an extreme, Ms. McCaughey would likely say. See also Kull, "Racial Justice," 17.

4. Venue in North Carolina is governed by N.C. Gen. Stat. (G.S.) 15A-143, Art. 3, and G.S. 15A-957.

5. McCaughey, "Like Justice," A15.

6. One member is appointed by the board of county commissioners, one by the senior resident superior court judge serving the county, and one by the county's clerk of superior court. See James C. Drennan and Miriam S. Saxon, *A Manual for North Carolina Jury Commissioners*, 3d ed. (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1993), for a more thorough discussion of the jury commission's role. See also G.S. Ch. 9.

7. See Cynthia Williams, Note, "Jury Source Representativeness and the Use of Voter Registration Lists," *New York University Law Review* 65 (June 1990): 590.

8. G. Thomas Munsterman and Janice T. Munsterman, "The Search for Jury Representativeness," *Justice System Journal* 11 (1986, no. 1): 69, citing Henry C. Campen, Jr., *Presentation on Alternative Jury Selection Method* (Raleigh, N.C.: North Carolina Administrative Office of the Courts, April 1981).

9. *See, e.g.*, the North Carolina Supreme Court's discussion of groups represented on the Union County tax ledger in State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

10. 1947 N.C. Sess. Laws ch. 1007, §. 1.

11. 1967 N.C. Sess. Laws ch. 218, §. 1.

12. 1981 N.C. Sess. Laws ch. 720, §. 1.

13. G.S. 9-2.

14. Munsterman and Munsterman, "The Search for Jury Representativeness," 59–78.

15. *See, e.g.*, the dissent by Justice Exum in State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980).

16. See Note, "Developments in the Law—Race and the Criminal Process," *Harvard Law Review* 101 (May 1988): 1472, 1558, citing *National Jury Project, Jurywork: Systematic Techniques*, § 5.01, at 5-2 (2d ed. 1987). It also cited a survey conducted from 1971–74 showing that nonwhites were underrepresented in more than 77 percent of 166 surveyed federal judicial districts with a nonwhite population of 4 percent or more. In more than a third of the districts, nonwhites were under-represented by at least 20 percent in the jury pool, and in an eighth of the districts they were under-represented by more than 50 percent.

17. Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). The Court further confirmed this approach in Duren v. Missouri, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

18. *Taylor*, 419 U.S. at 538.

19. *Taylor*, 419 U.S. at 538.

20. The fact that in our society generally there are more whites than blacks means that all-black juries, and certainly all-black male juries, are less likely to occur than all-white juries. Of course, in predominantly black communities the chances that an all-black jury could be impaneled are greater.

21. See Munsterman and Munsterman, "The Search for Jury Representativeness," 59–78. See also Williams, "Jury Source Representativeness," 590. Munsterman and Munsterman, at p. 69, cite a study of six North Carolina counties that showed blacks to be under-represented on the driver's license rolls, as compared to their proportional representation in the population of the surveyed counties. Driver's license under-representation tends to be less extreme than under-representation in voter registration (see note 16).

22. Note, "Developments in the Law—Race and the Criminal Process," *Harvard Law Review* 101 (May 1988): 1472, 1562.

23. Lockhart v. McCree, 476 U.S. 162, 174, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

24. State v. Price, 301 N.C. 437, 272 S.E.2d 103 (1980).

25. State v. Cornell, 281 N.C. 20, 187 S.E.2d 768 (1972).

26. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981).

27. State v. Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

28. *Price*, 301 N.C. 437, 272 S.E.2d 103.

29. G.S. 9-3.

30. G.S. 9-6. On such grounds, a judge could excuse a pregnant woman who is expecting to give birth any day, a person who has a medical condition that does not permit him or her to remain seated for long periods of time, or—though less likely—a sole business proprietor who makes a compelling case that prolonged jury service would destroy his or her livelihood.

31. Challenges for cause in civil cases are governed by G.S. 9-15. In criminal cases, G.S. 15A-1212 governs.

32. G.S. 9-19 provides each party with eight peremptory challenges in civil trial jury selection. G.S. 15A-1214 and -1217 provide for peremptory challenges in criminal trial jury selection. In capital murder trials (a trial in which a defendant may be sentenced to death is called a "capital" trial), the defendant and the prosecutor each get fourteen challenges; in noncapital criminal trials, the defendant and the prosecutor each get six challenges. Additionally, in all criminal trials, each side gets one challenge for each alternate juror that will be seated.

33. 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). For a thorough discussion of *Batson*, see Thomas H. Thornburg, *Batson v. Kentucky's Impact on Peremptory Challenges in North Carolina Courts*, Special Series No. 7 (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, August 1992).

34. See White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983), for a discussion of the similarity between the federal and state equal protection clauses.

35. Georgia v. McCollum, 505 U.S. ___, 112 S. Ct. 2348, 60 U.S.L.W. 4523 (1992).

36. Edmonson v. Leesville Concrete Company, 500 U.S. ___, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

37. *See* Powers v. Ohio, 499 U.S. ___, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) and *Edmonson*, 500 U.S. ____.

38. This was the exact claim in *Powers*, where the Supreme Court upheld the white defendant's position.

39. For a case indicating that Native Americans qualify for *Batson* protections, see State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990).

40. *See* Castenada v. Partida, 430 U.S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977).

41. See Thornburg, *Batson v. Kentucky's Impact on Peremptory Challenges*, 6–10, for a more detailed discussion of *Batson*'s possible application to other kinds of personal characteristics.

42. State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988).

43. The case is *J. E. B. v. T. B.* Its lower court citation is 606 So. 2d 156 (Ala. Ct. of Civ. Apps., 1992).

44. See Thornburg, *Batson v. Kentucky's Impact on Peremptory Challenges*, for details of *Batson*'s application in North Carolina's courts. *Batson* requires a showing of *prima facie* evidence by the party claiming discrimination; rebuttal by the party accused of discriminating (offering a reason for a peremptory challenge); surrebuttal by the claimant (an opportunity to show that the provided reason was inadequate or pretext for discrimination); and, finally, a ruling by a presiding judge.

45. See Thornburg, *Batson v. Kentucky's Impact on Peremptory Challenges*, 27, for a discussion of acceptable and unacceptable reasons for justifying peremptory challenges contested on *Batson* grounds.

46. State v. McNeil, 99 N.C. App. 235, 393 S.E.2d 123 (1990).

47. *Taylor*, 419 U.S. at 530–31. *Batson*, 476 U.S. at 87–88.

Can the Fate of the Lottery Be Left to the Voters?

John L. Sanders

In the last half dozen years the North Carolina General Assembly repeatedly has turned its attention to the establishment of a statewide lottery. Since 1987 the legislature has considered a total of eleven bills for that purpose—all specifying that the lottery would come into being only if the ballot proposition "FOR approval of an act establishing a North Carolina State Lottery" gained the approval of a majority of voters in a statewide referendum.[1]

Although the Senate has passed lottery bills three times—in 1989, 1991, and 1993[2]—none has yet gained passage in the House of Representatives. The latest of them, known in legislative language as S 11, is pending in the House Committee on Constitutional Amendments and Referenda and is likely to come before the House in the summer of 1994. If approved then, S 11, as it now stands, would put the lottery issue on the ballot for decision by the voters later in 1994.

The merits of a statewide lottery have been—and will continue to be—much debated, and this article is not an entry in that debate. It focuses instead on one feature of S 11 (and of earlier bills for the same purpose)—the statewide referendum—that has no direct bearing on the merits of the lottery but is critically important to the manner in which the "lottery or no lottery" issue ultimately is to be decided.

There are many potential reasons for leaving the final say on a statewide lottery to the voters. Basic to them all is the fact that the proposal would turn what is now a crime punishable under the law of the state into a pastime sponsored by the state itself, chiefly for the state's financial benefit. Some legislators may reason that if the state is to convert a criminal act into a benign form of socialized amusement, it should do so only on direct command of the people. Other less portentous justifications may be conjectured. Whatever the reasons, it is the testimony of legislators and legislative observers alike that no lottery bill is likely to be enacted without a voter referendum feature, though it is indisputably within the legislature's own power to enact one if it sees fit. The fact that all eleven of the lottery bills that were introduced in 1987, 1989, 1991, and 1993 conditioned their effectiveness on voter approval in a statewide referendum confirms the perception that a lottery is politically feasible only if the voters bear the ultimate responsibility for its initiation.

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Politically necessary, perhaps—but is it constitutional?

The issue that this article addresses then is not one of politics but of constitutional law: Is conditioning the statewide effectiveness of a legislative act (such as S 11, establishing a lottery) on voter approval in a statewide referendum an unconstitutional delegation by the General Assembly of its legislative power?

The answer is not clear.

The People Have Delegated Their Legislative Power

In our form of government the people hold all the power until they choose to delegate some parts of it to their government through the constitution. The people of North Carolina in 1776 delegated to the General Assembly all of the people's legislative power, except for express and implied reservations of such power found in the constitution. They did so with these words in the original state constitution, words unchanged until 1868:

> SECTION 1ST. That the Legislative Authority shall be vested in two distinct Branches, both dependant on the People—to wit a Senate and a house of Commons.

In 1868 the people reconfirmed that delegation of all legislative power when they adopted a revised constitution, with the following provision, in effect from 1868 to 1971:

> SECTION 1. The Legislative authority shall be vested in two distinct branches, both dependent on the people to wit; a Senate and House of Representatives.

And the people again confirmed the delegation with the adoption of the Constitution of 1971 and its present language, found in Article II, Section 1:

> SECTION 1. *Legislative power.* The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

Under the general delegation of legislative authority made to it by Article II, Section 1, the General Assembly has all legislative power not denied to it by the Constitution of North Carolina or of the United States, either by prohibition (for example, "No poll or capitation tax shall be levied by the General Assembly. . . .")[3] or by affirmative provision that precludes legislative choice (for example, "In each county a Sheriff shall be elected by the qualified voters thereof . . . and shall hold his office for a period of four years. . . .").[4]

The Constitution of North Carolina never has provided for the initiative or referendum, procedures involving the voters directly in routine state lawmaking.

Referenda Where the People Have Reserved Their Power

The constitution makes several specific reservations of ultimate legislative power to the people. In these instances, the people have not delegated their legislative power to the General Assembly, and a vote of the people is necessary to effect a change. The specific reservations in the current constitution are, in substance, as follows:

- *Calling a constitutional convention.* A convention of the people (for example, to consider amendments to the constitution) can be called only by an act of the General Assembly adopted by a two-thirds vote of the whole membership of the Senate and House of Representatives and approved by a majority of the qualified voters who vote on the proposition in a statewide referendum.[5]
- *Revising or amending the constitution—one method.* A revision or amendment of the Constitution of North Carolina initiated by a convention of the people requires that the proposed revision or amendment be adopted by the convention and approved by a majority of the qualified voters who vote on the proposition in a statewide referendum.[6]
- *Revising or amending the constitution—second method.* A revision or amendment of the Constitution of North Carolina initiated by the General Assembly requires that the proposed revision or amendment be adopted by a three-fifths vote of all the members of the Senate and House of Representatives and approved by a majority of the qualified voters who vote on the proposition in a statewide referendum.[7]
- *Approving state debt.* The General Assembly may not contract debts secured by a pledge of the faith and credit of the state, except under narrow circumstances defined in the constitution, without the approval of a majority of the qualified voters of the state who vote on the proposal.[8]
- *Lending the state's credit.* The General Assembly may not give or lend the credit of the state to any person or to any corporation not controlled by the state without the approval of a majority of the qualified voters of the state who vote on the proposal.[9]
- *Paying Reconstruction debts.* The state may not pay any part of designated 1868–70 Reconstruction debts and bonds unless the proposal "is approved by a majority of all the qualified voters at a referendum held for that sole purpose."[10] (Note that the

proposal must "beat the registration"—that is, be approved by a majority of the state's registered voters.)

- *Local government borrowing.* Borrowing by local governments is subject to limitations that require the approval of the qualified voters of the affected unit.[11]
- *Taxing property.* The General Assembly may not authorize any unit of local government to levy any property tax except for a purpose authorized by general law uniformly applicable throughout the state, unless the tax is approved by a majority of the qualified voters of the unit who vote thereon.[12]

These are the only instances in which the constitution *requires* voter approval of actions of the General Assembly or of local governing bodies acting under delegated legislative authority. None applies to the lottery issue.

Referenda in Other Circumstances

The General Assembly has the authority to enact a statute of statewide applicability providing for a statewide lottery, such as S 11; it need not involve the voters in the process. But may the General Assembly constitutionally condition the effectiveness of its legislative action on a statewide popular vote of approval, as is proposed in S 11? Would that action be an unconstitutional delegation of the legislative power?

How the General Assembly May Delegate Its Legislative Power

General Rule—No Delegation

The general rule is that the General Assembly's legislative power cannot be delegated. Said the North Carolina Supreme Court in *Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority et al.*:

> It is a settled principle of fundamental law, inherent in our constitutional separation of government into three departments and the assignment of the lawmaking function exclusively to the legislative department, that . . . the Legislature may not abdicate its power to make laws or delegate its supreme legislative power to any other department or body.[13]

A literal reading of Article II, Section 1, would prohibit every delegation to another governmental entity of any legislative power that the General Assembly could itself finally exercise, imposing impossible burdens on the General Assembly. Therefore the supreme court has found several exceptions to or qualifications of the apparent breadth of the prohibition on delegation quoted above.

Exceptions

Exception for administrative rules. The most extensive line of cases creating what amounts to an exception to the rule against delegability arises when the General Assembly assigns to an administrative agency the power to adopt implementing rules consistent with a legislative act. If the legislative act includes standards sufficient to guide the agency in its delegated, quasi-legislative rule making, the delegation will be upheld on the theory that the General Assembly has made the basic policy and has granted the administrative agency the power merely to furnish the implementing details or to find the facts that bring the statute into operation.[14]

That line of cases is not helpful here, except to give occasion to observe that S 11, in proposing to delegate to the voters of the state the power to approve or reject the proposed lottery bill in referendum, furnishes no guidance to the voters as to the basis on which they are to make their decision; the voters' judgment is left as unguided as is that of the General Assembly.

Exception for flexibility for local governments. Another exception to the nondelegability rule arises where the challenged legislation assigns discretionary authority to a local governmental unit to accept or reject the applicability of the legislation *in that unit.* In recognition of the traditional, virtually unlimited power of the General Assembly to establish, regulate, and abolish counties, cities, and other units of local government, the state supreme court is disposed to uphold against a nondelegability challenge a legislative act (1) that empowers a local governing body to allow or disallow the act to take effect in that unit[15] or (2) that specifies that a legislatively authorized tax or policy takes effect in a particular unit only upon voter approval in a referendum in that unit.[16]

The state supreme court sometimes speaks in very broad terms regarding referenda under this local government flexibility exception, declaring, for example, that

> It is not open to question now that the Legislature may provide that a statute shall not take effect or be in force until approved by the people at an election to be held for the purpose of ascertaining their will in respect thereto.[17]

That case and others containing such language, however, dealt with *local* referenda in which (1) the effectiveness of a state legislative act intended to apply only in a particular unit of local government (a local act) is conditioned on its acceptance in a voter referendum in that unit[18] or (2) the local applicability of a statewide act is

made to depend on the approval of the voters of that unit in referendum.[19]

An exception for a delegation back to the people? No case has been found in which the North Carolina Supreme Court has decided squarely the issue of whether the *statewide* effectiveness of an act of the General Assembly may be conditioned on a *statewide* vote of approval.

That leads to the question of what may be discerned from the history of Article II, Section 1, of the constitution as to whether it allows the General Assembly to leave the ultimate decision on the effectiveness of the pending lottery legislation to the voters of the whole state.

History of North Carolinians' Legislative Power

What can be determined or reasonably surmised about the intent of the framers of Article II, Section 1, of the North Carolina Constitution—and its predecessor texts—as to the scope and finality of the people's delegation of legislative authority to the General Assembly?

The Framers' Intent

When the Constitution of 1776 was drafted and promulgated by the Fifth Provincial Congress of North Carolina, elected and sitting as a constitutional convention and as such invested with the full power of the people of the state, it was not referred to the voters for ratification. There was no local precedent for such a referral. (Only one of the new American states referred its Revolutionary-era constitution to popular referendum; the others were adopted finally by conventions, as in North Carolina.) Nor was any provision then made for future amendment of our state constitution, with or without popular participation. The only changes of a constitutional nature made between 1776 and 1835 were made when the Constitutional Convention of 1788 fixed the state capital in Wake County[20] and the Constitutional Convention of 1789 extended to the Town of Fayetteville the privilege of electing a borough member of the House of Commons of the General Assembly;[21] there was no referendum of approval in either instance. Since not even constitutional amendments were thought to require voter approval, it reasonably may be inferred that those who wrote and promulgated the Constitution of 1776 had no reason to contemplate voter participation, whether mandatory or at the General Assembly's discretion, in the enactment of any statute that the General Assembly was competent to adopt.

The principal framers of the Constitution of 1776 were familiar with the works of the English philosopher John Locke, who wrote in 1690 in the chapter entitled "Of the Extent of the Legislative Power" in his major work *Of Civil Government, Book II*:

> Fourthly, the legislative cannot transfer the power of making laws to any other hands, for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, 'We will submit, and be governed by laws made by such men, and in such forms,' nobody else can say other men shall make such laws for them; nor can they be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.

Referenda since 1835

Not until 1835 was there a statewide vote or referendum in North Carolina on any issue. The General Assembly of 1834–35 called for a statewide referendum to be held in 1835 on whether a convention of the people should be convened to consider amendments to the state constitution. The voters approved the convention and elected delegates to it. The amendments adopted by that convention were submitted to the voters for ratification, as was required by the terms of the act providing for the convention.[22]

The amendments of 1835 added to the constitution a procedure for an amendment to the constitution to be initiated by the General Assembly. Under it, the General Assembly enacted the proposed amendment by special majorities at two successive legislative sessions (an election of members having intervened), and then it was submitted to the voters of the state who were qualified to vote for members of the House of Commons.[23] That procedure was used only once prior to 1868: an amendment eliminating the 50-acre freehold ownership qualification for voting for a member of the state Senate was approved in a statewide referendum in 1857.[24]

The electorate gained further experience with statewide referenda when on February 28, 1861, they voted on (and rejected) a proposal to call a convention of the people to consider secession from the Union.[25]

The convention of the people that met in 1861–62 was called by action of the General Assembly, as the constitution authorized, without seeking voter approval.[26]

The Convention of 1865–66 was called under authority of the president of the United States, without voter approval.[27] That convention submitted to the voters of the state two proposals: one to repeal the 1861 ordinance

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 1993

S 4

SENATE BILL 11
Judiciary 1 Committee Substitute Adopted 5/25/93
Finance Committee Substitute Adopted 6/3/93
Fourth Edition Engrossed 6/9/93

Short Title: 1993 Lottery - With Referendum. (Public)

January 28, 1993
A BILL TO BE ENTITLED
AN ACT TO PROVIDE FOR A BINDING REFERENDUM ON THE ESTABLISHMENT OF A NORTH CAROLINA STATE LOTTERY.

The General Assembly of North Carolina enacts:

Section 1. The General Statutes are amended by adding a new Chapter to read:

"Chapter 143C.
"North Carolina State Lottery.
"ARTICLE 1.
"General Provisions and Definitions.

"§143C-101. Citation.
This Chapter shall be known and may be cited as the North Carolina State Lottery Act.

"§143C-102. Purpose and intent.
The General Assembly declares that the purpose and intent of this Chapter is to provide additional monies to benefit the public purposes described in this Chapter without the imposition of additional or increased taxes through the implementation of a State-operated lottery. The lottery shall be initiated at the earliest practical time and it shall be operated to maximize new revenue to the State. That new revenue shall be raised in a manner consistent with the dignity of the State and the general welfare of the people, and in a manner consistent with effective business practices."

* *

Sec. 11. The question of whether North Carolina should have a State lottery shall be submitted to the qualified voters of the State at a referendum on the question held on November 2, 1993. The referendum shall be held in accordance with Chapter 163 of the General Statutes. The form of the ballot for the referendum is:

"[ ] FOR a State lottery.
[ ] AGAINST a State lottery."

Sec. 12. If a State lottery is approved by the qualified voters of this State in the referendum held under Section 11 of this act, the costs to the State Board of Elections and the county boards of election for conducting the referendum are considered expenses of the lottery; the State Lottery Commission shall reimburse the State Board of Elections and the county boards of election for these costs from the Lottery Fund.

If a State lottery is not approved by the qualified voters of this State in the referendum held under Section 11 of this act, the State Board of Elections and the county boards of election may seek reimbursement from the General Assembly for their costs incurred in conducting the referendum.

Sec. 13. Sections 11, 12, and 13 of this act are effective upon ratification. If a State lottery is approved by the qualified voters of this State in the referendum held under Section 11 of this act, then Sections 1 through 10 of this act become effective January 1, 1994. If a State lottery is not approved, Sections 1 through 10 do not become effective.

of secession and one to abolish slavery in the state; both were approved by the voters in a referendum held on November 9, 1865.[28] While neither of these propositions took the form of an explicit amendment to the constitution, both had that character, and their substance later was incorporated into the 1868 constitution.[29]

The Convention of 1865–66 also wrote and submitted to the voters of the state a revised constitution, which was rejected in a referendum held on August 2, 1866.[30]

The Convention of 1868 was called to revise the constitution in several respects required by the congressional Reconstruction Acts; this was a condition of readmission to representation in the United States Congress. That convention was called by federal authority but with voter approval given in referendum.

The delegates to the Convention of 1868 were aware that there were then only seven instances in which the voters of the whole state of North Carolina had voted on issues in referenda: twice in 1835 (whether to call the convention and whether to approve the amendments it proposed), once in 1857 (the suffrage amendment), once in 1861 (the secession convention call), once in 1865 (repealing secession and abolishing slavery), once in 1866 (the proposed constitution), and once in 1867 (whether to call the Covention of 1868). Three times the issue had been whether to call a convention of the people; four times the issue had been constitutional amendments or the equivalent. In no instance prior to 1868 had there been a statewide referendum on whether to approve an ordinary statute that it was within the competence of the General Assembly to enact.

Thus it may be reasonably inferred that when the delegates to the Convention of 1868 approved—and the voters of the state ratified in referendum—Article II, Section 1, of the Constitu-

tion of 1868 (which is substantively the same as the current section of the same number), they did not do so with the expectation that ordinary legislation would or could be referred to the voters for approval in statewide referendum as a condition of its effectiveness. In the light of the practice of a century, it was understood that if the General Assembly chose to act on a matter within its competence, the act of the legislators always was final and unconditional.

The Constitution of 1868 included a procedure (copied from the 1835 amendments) for calling a convention of the people by a two-thirds vote of all the members of each house of the General Assembly. That procedure did not require that the convention call receive voter approval, nor did it require that the work product of the convention (such as constitutional amendments) be submitted to the voters for ratification or rejection. Thus, under the Constitution of 1868, a convention of the people could have been called, and amendments to the constitution adopted and put into effect by that convention, all without consultation of the voters, as had been done during the Civil War.

Since adoption of the Constitution of 1868, statewide votes on constitutional changes have occurred at forty-one elections; a total of 133 amendment proposals have been voted on in those referenda.[31]

Only one convention of the people has been held since 1868. A proposed convention was rejected by the voters in 1871. The Convention of 1875 was called by the General Assembly without voter approval, but the amendments that convention adopted were submitted to and ratified by the voters of the state in 1876.[32]

On several occasions (all since 1900), the voters of the state have voted on the issuance of state bonds for various purposes where required by the constitution to do so.

Three instances of referenda to approve or disapprove General Assembly actions. In three instances the General Assembly has conditioned the effectiveness of *statewide* acts on *statewide* referenda, as S 11 now proposes to do.

In 1881 it submitted to the voters of the state for their approval or disapproval legislation prohibiting statewide the manufacture and sale of alcoholic beverages; the voters overwhelmingly rejected prohibition.[33]

In 1908 the General Assembly again adopted legislation prohibiting statewide the manufacture and sale of intoxicating liquors, subject to a statewide referendum in May 1908. The voters approved the 1908 legislation and inaugurated statewide prohibition a decade before the nation did so.[34]

The General Assembly of 1973 enacted a statute authorizing the calling of a voter referendum on whether to authorize sales of liquor by the drink in each of those counties and cities with local ABC systems that chose to vote on whether to have such sales. The act called a statewide voter referendum on whether that mixed-drink legislation should take effect statewide.[35] In that November 6, 1973, referendum, the legislation was rejected by more than two to one. (The legislation that finally authorized *local* referenda on mixed-drink sales did not call for a statewide referendum of approval with respect to the legislation.)[36]

None of those three acts (of 1881, 1908, and 1973) calling for statewide referenda was considered by the state Supreme Court. The issue of whether the referenda amounted to an unconstitutional delegation of legislative power was not faced.

Other than those two prohibition votes and one liquor-by-the-drink vote, no instance has been found in which the General Assembly has enacted legislation and made the *statewide* effectiveness of that act conditional on *statewide* voter approval. In several instances, statewide legislation has been enacted in which the *applicability* of that legislation *in a particular local unit*, such as a city or county, was made conditional on a voter referendum in that jurisdiction, but the statewide effectiveness of the legislation itself was not at issue.[37]

The effect of the current constitution. The 1868 version of Article II, Section 1, of the constitution remained unaltered until the Constitution of 1971 set its present reading. The Constitution of 1971 was drafted by the North Carolina State Constitution Study Commission. The General Assembly of 1969 (after minor modifications) enacted that proposed constitution, and the voters ratified it in 1970.[38]

The State Constitution Study Commission was aware of legislative practice and judicial interpretations concerning voter participation in the legislative process. (The commission was chaired by a retired chief justice of the state supreme court, and its membership included several current or former judges and members of the General Assembly.) While some provisions of the proposed Constitution of 1971 did make substantive changes in the constitution as it then read (for example, future conventions of the people must submit their proposed constitutional changes to the voters for approval), the rewriting of Article II, Section 1, delegating the legislative power to the General Assembly, reflected no change in its meaning. The commission did not undertake to enlarge or reduce the broad, general powers of the General Assembly. In its report, the commission said: "While Article II, dealing with the General Assembly, has been

reorganized, the text found in the proposed constitution contains almost no substantive change."[39]

So the Constitution of 1971 effected no change in the existing power of the General Assembly to enact legislation or to condition the effectiveness of a statewide legislative act on statewide voter approval. If the General Assembly did not have power to make such a delegation prior to 1971, it did not gain it by virtue of the Constitution of 1971; if it had such power prior to 1971, it did not lose it by virtue of the Constitution of 1971.[40]

Conclusion

May the General Assembly constitutionally condition the effectiveness of a statewide act, such as the pending lottery bill (S 11), on a statewide popular vote of approval? Only the courts, deciding a lawsuit brought for the purpose, can provide the answer. And on that answer may hang the fate of the lottery.

The governing constitutional provision is Article II, Section 1, of the Constitution of North Carolina, which reads:

> SECTION 1. *Legislative power.* The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

The history of that provision since 1776 does not reveal conclusively whether it is unconstitutional for the General Assembly to delegate to the voters of the state the final approval power with respect to a statewide legislative act.

The general rule as often enunciated by the North Carolina Supreme Court is that the legislative power cannot be delegated by the General Assembly. While in numerous cases the state supreme court has found it constitutional for the General Assembly to enact a statute whose effectiveness *within a particular governmental unit* is made dependent on a vote of approval by the governing body or the voters of that unit, that court has not dealt with the issue of whether such a delegation to the voters of the *entire state* would be constitutional. Whether the General Assembly can, in effect, return to the voters of the state a part of the legislative power the people have vested in the General Assembly by Article II, Section 1, is not answered by the court decisions treating *local* referenda. A logical distinction can be drawn between the two types of delegation, based on the broad power of the General Assembly to deal legislatively with local governments, including the power to condition the local implementation of a statute on an approving local voter referendum.

While the voters of the state often have voted (as the constitution requires) on constitutional amendments and on the issuance of debt beyond the limited capacity of the General Assembly to issue, there have been only three instances in which the voters of the whole state have been asked to approve or disapprove in statewide referenda the statewide effectiveness of legislation that the General Assembly could have enacted without voter involvement. All three acts involved alcoholic beverages: statewide prohibition in 1881 and 1908 and liquor by the drink in 1973. In none of those instances was the legislative action delegating to the voters the final word on the validity of the legislation reviewed by the state supreme court.

The rarity of such statewide referenda not required by the constitution reflects the willingness of the General Assembly to act finally upon and accept full responsibility for matters within the scope of its authority. Unlike many states, North Carolina is not required by its constitution or by political custom to refer many issues to the people for final decision; only constitutional changes, calls for conventions of the people, and certain assumptions of financial obligations beyond limits fixed in the constitution must (and regularly do) go to the state's voters for action. All other matters are within the General Assembly's final authority and, with very rare exceptions, it has exercised that authority.

The general rule laid down by the North Carolina Supreme Court that the legislative power may not be delegated by the General Assembly, and the absence of any decision in which the supreme court has established an exception to that rule so as to allow the General Assembly to delegate the final decision on the statewide effectiveness of legislation to the voters in a statewide referendum, support the conclusion that such a delegation, if challenged in the state courts, probably would be found to be unconstitutional.

The weight of national authority is strongly against the constitutionality of this type of delegation of power.[41]

Implications for the General Assembly

What are the implications for the General Assembly as it contemplates further action in 1994 on S 11, the pending lottery bill?

If S 11 is enacted in its present form, including the binding referendum, citizens who objected to the lottery on its merits or to the procedure by which it was adopted could bring a lawsuit, seeking an injunction against the inclusion of the issue on the state ballot. And if no lawsuit occurred before the referendum, one might follow it should the voters approve the lottery proposal. In

either event, the state court would be faced with three alternatives:

Uphold the referendum as a proper delegation of legislative authority. The state court could decide that the referendum involved no improper delegation of legislative power, that the General Assembly may condition its acts on voter approval. The vote in the referendum would determine whether the lottery would be established.

Uphold the lottery even though the referendum involves an improper delegation of legislative authority. The state court could find that the General Assembly exceeded its power in delegating to the voters the ultimate decision—holding that the referendum feature was invalid—*but nevertheless hold* that the remainder of the act was valid and complete without the referendum section. The lottery would be established—on the authority of the General Assembly already exercised by the enactment of the law—whether or not the referendum had already been held and regardless of its outcome.

Strike down the lottery. The state court could hold that the referendum, involving an improper delegation, was so integral to the legislature's intent in adopting the legislation that the entire act failed to meet the test of constitutionality. So, there could be no lottery established under authority of that act, whatever the outcome of the referendum. ❖

Notes

1. Bills were introduced in 1987 (S 127 and H 173), 1989 (S 4, H 15, and H 96), 1991 (S 2, H 15, and H 21), and 1993 (S 11, H 38, and H 178).

2. In 1989 the Senate passed S 4; in 1991, S 2; and in 1993 the current S 11.

3. N.C. Const. of 1971, art. V, § 1 (amended 1973).

4. N.C. Const. of 1971, art. VII, § 2.

5. N.C. Const. of 1971, art. XIII, § 1.

6. N.C. Const. of 1971, art. XIII, § 3.

7. N.C. Const. of 1971, art. XIII, § 4.

8. N.C. Const. of 1971, art. V, § 3(1) (amended effective 1973).

9. N.C. Const. of 1971, art. V, § 3(2) (amended effective 1973).

10. N.C. Const. of 1971, art. V, § 3(4) (amended effective 1973).

11. N.C. Const. of 1971, art. V, § 4 (amended effective 1973).

12. N.C. Const. of 1971, art. V, § 2(5) (amended effective 1973).

13. Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority et al., 237 N.C. 52, 60, 74 S.E.2d 310, 316 (1953).

14. *Carolina-Virginia Coastal Highway*, 237 N.C. at 60–63, 74 S.E.2d at 316–18.

15. Manly et al. v. City of Raleigh, 57 N.C. 370 (1859).

16. Cain et al. v. Commissioners, 86 N.C. 8 (1882); Cottrell et al. v. Town of Lenoir, 173 N.C. 138, 143, 91 S.E. 827, 829 (1917); Taylor v. Carolina Racing Association, Inc., et al., 241 N.C. 80, 95, 84 S.E.2d 390, 401 (1954).

17. *Cottrell et al.*, 173 N.C. 138 at 143, 91 S.E. 827 at 829.

18. As was true in *Cottrell*, above, note 16.

19. State v. Mathis, 149 N.C. 546, 63 S.E. 99 (1908).

20. Journal of the Convention of North Carolina, 1788, in *State Records of North Carolina* 22 (August 2, 1788): 33.

21. Journal of the Convention of North Carolina, 1789, in *State Records of North Carolina* 22 (November 22, 1789): 52–53.

22. 1834–35 N.C. Pub. L. chs. 1, 2.

23. Constitutional Amendments of 1835, art. IV, § 1, subsec. 2.

24. 1854–55 N.C. Pub. L. ch. 7; 1856–57 N.C. Pub. L. chs. 12, 13.

25. 1860–61 N.C. Pub. L. ch. 17.

26. 1861 N.C. Pub. L. (1st Ex. Sess.) ch. 9.

27. 13 U.S. Statutes at Large 760 (1865).

28. *Ordinances of the Convention*, 1865–66, chs. 1, 2.

29. N.C. Const. of 1868, art. I, § 4; art. XIV, § 6.

30. *Ordinances and Resolutions Passed by the North Carolina State Convention, Second Session, 1866*, ch. 1.

31. John L. Sanders, "Our Constitutions: A Historical Perspective," in *The Constitution of North Carolina, Its History and Content* (Raleigh, N.C.: North Carolina Secretary of State, 1989?), 56.

32. Johnstone Jones and John Reilly, eds., *Amendments to the Constitution of North Carolina, proposed by the Constitutional Convention of 1875*, chs. 1–30 and pp. 67–69.

33. 1881 N.C. Pub. L. ch. 319.

34. 1907 N.C. Pub. L. (Ex. Sess. 1908) ch. 71.

35. 1973 N.C. Sess. Laws ch. 316, § 1.

36. 1977 N.C. Sess. Laws (1978 sess.) ch. 1138.

37. *See, e.g.*, the A.B.C. Law of 1937, 1937 N.C. Pub. L., ch. 49, § 25; N.C. Gen. Stat. § 18B-600; Local Option Sales and Use Tax Act, 1969 N.C. Sess. Laws ch. 1228, § 1 [invalidated on other grounds, Hajoca Corp. v. Clayton et al., 277 N.C. 560, 178 S.E.2d 481 (1971)].

38. The 1969 N.C. Sess. Laws ch. 1258 submitted the proposed constitution to the qualified voters of the state, who ratified it on November 3, 1970. By the terms of the act submitting it to the voters, it took effect on July 1, 1971; hence its designation as the "Constitution of 1971."

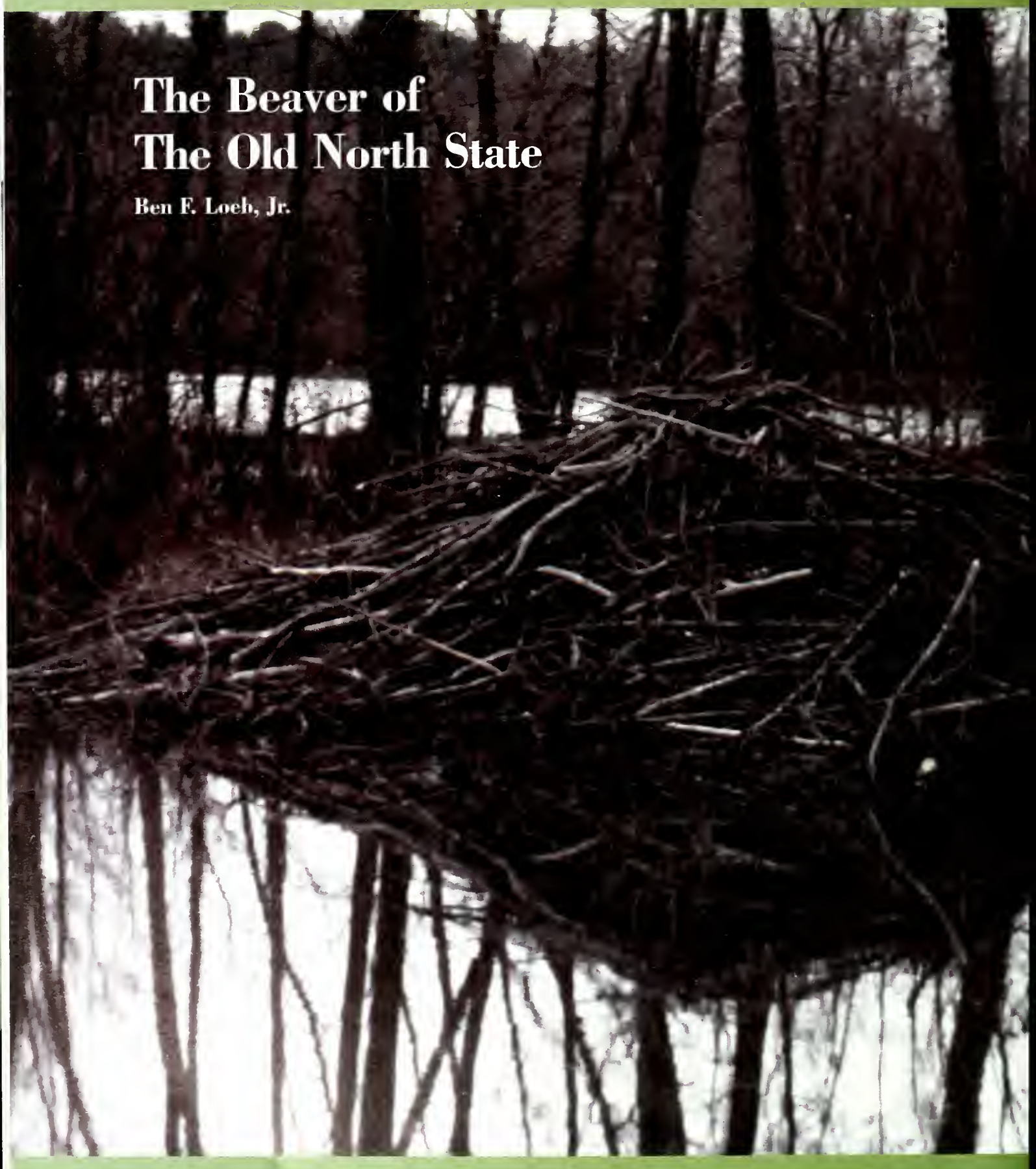
39. *Report of the North Carolina State Constitution Study Commission* (Raleigh, N.C.: N.C. State Constitution Study Commission, 1968), 30.

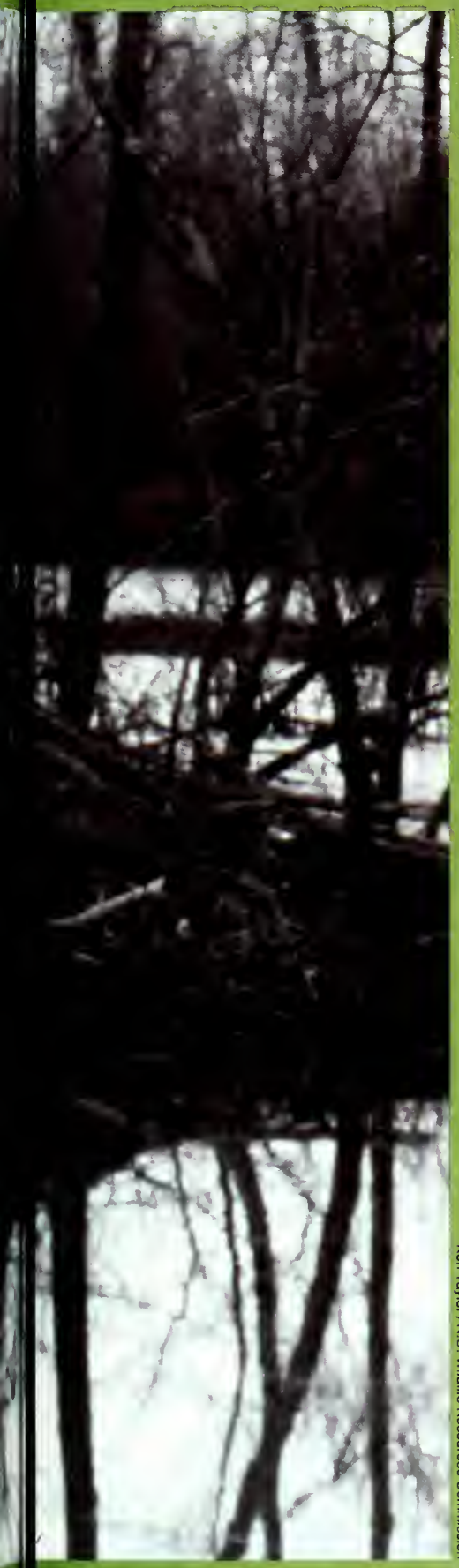
40. It has been suggested that Article I, Section 9, of the constitution (which provides that "[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held") supports the power of the General Assembly to refer to the voters the final decision on ordinary legislation. That provision originally referred to the election of members of the General Assembly, and it continues to refer only to elections of public officers, not to consultations of the voters on issues through referenda.

41. People *ex rel.* Thompson v. Barnett, 344 Ill. 62, 176 N.E. 108, 76 A.L.R. 1044 (1931); G. R. B., Annotation, *Referendum of general legislative act to people in absence of constitutional requirement in that regard*, 76 A.L.R. 1053; 16 AM. JUR. 2d *Constitutional Law* § 346 (1979); 16 C.J.S. *Constitutional Law* § 167 (1984).

The Beaver of The Old North State

Ben F. Loeb, Jr.





Ken Taylor / N.C. Wildlife Resources Commission

The North Carolina beaver, an obscure little creature once extinct in this area, is making big news across the state—leaving a trail of flooded timber and farmland, traffic-stopping dams, and irate property owners.

Durham. In Durham, where the beaver population is estimated to be between 500 and 1,000, impounded water behind beaver dams entered sewer mains and threatened to push the system past treatment plant capacity. To date efforts to control beavers have been remarkably unsuccessful. The city has spent several thousand dollars to clear blockages at sewer easements and to install "beaver baffles," which make holes in the dams, in an attempt to control flooding and reduce water levels behind dams. Apparently nothing has worked.[1]

Granville County. Beavers in southern Granville County built a dam that was literally a traffic stopper—the lake behind it blocked a busy rural road for several months. The dam, all 1,500 feet of it, also flooded valuable timber and farmland. A farmer whose land is ringed with ponds caused by beaver dams has lost $45,000 worth of timber. At one time approximately seventy-five acres of his land were under several feet of water.[2]

Johnston County. Beaver activity in Johnston County has put more than 10,000 acres of county land under water. The beavers dam up streams, and the floods that follow drown crops, engulf roads, and leave acres of lifeless trees. In addition, road crews in the county spend a third of their time clearing pipes of debris stuffed into them by the beavers. Timber growers in the area are dynamiting beaver dams, but the beaver proliferation continues.[3]

Wake County. Beavers number in the thousands in and around

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N.C. Wildlife Resources Commission

A beaver lodge (far left) provides an insulated home of sticks and mud, which can reach up to 10 feet high and 20 feet in diameter.

Falls Lake. Their activities are destroying bottom land hardwood such as oak, ash, and black walnut. Some beavers in the Falls Lake area were trapped, but the level of beaver activity continued unabated.[4]

The North Carolina Beaver: A Short History

Beavers once were very common in North Carolina as well as in many other parts of this country. Before extensive trapping reduced their numbers, as many as 60 million may have lived in North America. But beaver pelts at one time were quite valuable, and extensive trapping for fur wiped out most of the beaver population east of the Mississippi River before the turn of the twentieth century. The last native North Carolina beaver reportedly was trapped in 1897 in Stokes County, and for about forty years this state had no beaver population whatsoever. There is only one species of beaver in North America, but there are numerous subspecies. The subspecies originally native to North Carolina was *Castor canadensis carolinensis*.[5]

In an effort to reintroduce the beaver into this state, in 1939 the State Department of Conservation and Development transplanted twenty-nine Wisconsin-stock beavers from Pennsylvania to the Sandhills Wildlife Management Area in Richmond County. As the Sandhills beaver community grew and prospered, small numbers were relocated throughout North Carolina. Then during the 1950s a few Alabama beavers were placed in the Umstead State Park near Raleigh, and that colony also has done well. In addition to these imported beavers, beavers from adjacent states also have entered North Carolina by way of several of the major rivers that cross state borders.[6]

A Profile

The beaver is the largest member of the rodent family in North America, with adults reaching an average length of two and one-half to three feet and weighing between thirty-five and fifty pounds. In North Carolina baby beavers (kits) are born during March and April, with litters ranging from one to six kits. A family group, usually known as a *colony*, typically consists of a pair of adults, two to three kits, and two to three yearlings (one-year-old kits). At about age two or three, beavers leave the home pond to establish their own colonies. (Reportedly some adult beavers return to the homeplace on occasion.) Beavers feed and work primarily at night and can have a life-span of up to two decades. They are vegetarians and eat a variety of grasses, plants, shrubs, and trees. The bulk of their diet consists of gums, dogwoods, pines, oaks, maples, willows, birches, and poplars. Beavers are monogamous, mate for life, and produce a single litter each year.[7]

The Beaver Habitat

Beavers probably do more to establish and maintain their own habitat than any other species save *homo sapiens*. That may be the reason they are of such interest. The beaver's home, called a *lodge*, consists of a pile of sticks and mud built on the bank (or in the water) at the site of a pond, lake, or stream. The size of a beaver lodge usually increases yearly as material is added to the outside walls to help insulate the colony from the winter cold. These lodges eventually can be more than ten feet high and twenty feet in diameter. Beaver dams (which usually are downstream from the lodge) are constructed to maintain a sufficient water depth to ensure access to both food and construction materials, as well as an escape route if necessary. An active beaver pond may last for decades and grow from less than an acre to many acres as the size of the dam is increased.[8]

Benefits from Beavers

Beaver colonies can have a very positive impact on the environment. Their dams conserve soil and water by slowing water movement through watersheds, especially during heavy rains, thereby reducing soil erosion. During periods of drought beaver ponds help to stabilize and maintain the water table. At such times, as during the summer of 1993, the ponds also may be an important source of water for irrigating crops and watering livestock. Habitat changes wrought by beavers can benefit many species of birds, mammals, and fish. Their ponds increase the diversity of food available for wildlife, and some become primarily duck ponds. (Landowners with beaver ponds sometimes enhance huntable populations of ducks by erecting nest boxes and planting waterfowl food plants to attract migratory ducks in the fall.) Additionally, beaver ponds often provide better fishing opportunities than do nearby streams. More species of fish live in the ponds than in the streams, and they reach larger sizes because of the increased food supply.[9]

Because the beaver habitat is largely in the water, beavers have no natural enemies. In addition, beaver pelts are worth so little now that "taking beaver" is no longer attractive to commercial trappers. The result has been an exploding beaver population, along with howls of anguish from flooded landowners.

Governmental Response: The Empire Strikes Back

For decades hunting, trapping, or otherwise taking beaver in North Carolina was quite limited. As fur-bearing animals they could be taken by trapping but only during very short seasons as authorized by North Carolina Wildlife Resources Commission rules. And, under the provisions of Chapter 113, Section 294, of the North Carolina General Statutes (hereinafter G.S.), the unlawful taking, possession, sale, or purchase of a beaver was punishable by a $200 fine and imprisonment for up to ninety days. But by 1990 the beaver population was expanding rapidly, and so was public discontent. As the General Assembly is wont to do on hearing from dissatisfied constituents, it enacted new legislation. G.S. 113-291.9, which was effective October 1, 1991, created an open season for taking beaver with firearms during any open season for taking wild animals (virtually year round). The taking of beaver with connibear traps, which kill the beaver under water, also was expressly authorized.

G.S. 113-291.9 originally applied to only eleven counties (mostly in the east): Bladen, Brunswick, Columbus, Craven, Johnston, Jones, Lenoir, Pamlico, Randolph, Sampson, and Wayne. Public discontent continued to grow over the next two years, and in 1993 the General Assembly, in one of its first enactments of the session, made G.S. 113-291.9 a statewide act. (Only the mountain counties of Buncombe, Madison, McDowell, and Yancey were exempted from its provisions.) A new G.S. 113-291.9 also was added, authorizing landowners whose property has been damaged or destroyed by beavers to take beaver on their property by any lawful method (for example, by trapping or shooting) without obtaining a depredation permit from the Wildlife Resources Commission. Depredation permits, as defined by G.S. 113-274, authorize the destruction, removal, or transplanting of undesirable, harmful, predatory, or surplus wildlife. Typically a depredation permit is issued to a farmer whose crops are being destroyed by deer or other wild animals.

A Summary of Beaver Legislation

As amended in 1991 and 1993, the law as to the taking of beaver may be summarized as follows:

1. Beavers, as fur-bearing animals, may be trapped during the trapping seasons set forth in rules of the Wildlife Resources Commission.[10] (G.S. 113-291.6 prohibits trapping on the land of another without the written permission of the owner of the land or his or her agent.)
2. There is an open season for taking beaver with firearms virtually year round, provided permission has been obtained from the owner or lessee of the land on which the beaver is taken.
3. Landowners whose property has been damaged or destroyed by beavers may take beaver on their own property by any lawful method (shooting, trapping) without obtaining a depredation permit from the Wildlife Resources Commission.
4. Trap number 330 of the connibear type, which generally is prohibited by the provisions of G.S. 113-291.6, is authorized for taking beaver during trapping seasons as established by the Wildlife Resources Commission.

The North Carolina Beaver Board

In addition to the legislation described above, the 1991 General Assembly created the Beaver Damage Control Advisory Board with a mandate to develop a pilot program to control beaver damage on private and public lands.[11] The board has nine members, including the director of the Wildlife Resources Commission (or the director's designee), who serves as chairman. The other board members are the commissioner of agriculture, the director of the Division of Forest Resources, the director of the Soil and Water Conservation Division, the director of the State Cooperative Extension Service, the secretary of transportation, the state director for Animal Damage Control of the U.S. Department of Agriculture, the president of the North Carolina Farm Bureau Federation, and a representative of the North Carolina Forestry Association (or the designee of each of these officials).

In developing the program, the board was directed to provide relief to landowners, if possible, through beaver control and management rather than eradication. As established originally, the pilot program was limited to the counties of Bladen, Brunswick, Columbus, and Sampson. Fifty thousand dollars was appropriated to implement the pilot program in the four pilot counties, and an additional $50,000 was appropriated to be used statewide to control beaver damage. The pilot program originally was scheduled to end by December 1, 1993. However, the 1993 General Assembly extended that date by a year and added Pender and Robeson counties to the pilot program. Additional funding in the amount of $146,000 was provided for the 1993–94 fiscal year.[11]

The board met regularly during 1993 to plan and implement the pilot program. By the middle of August,

Deborah Conger / N.C. Wildlife Resources Commission

Swampland and lifeless trees are common consequences of beaver activity.

N.C. Wildlife Resources Commission

A beaver dam has beneficial aspects as well—it conserves soil and water by slowing water movement through watersheds.

approximately 1,000 beavers had been trapped and killed at 192 sites, resulting in about 2,500 acres being reclaimed. (In other words, that land is now above water.) Numerous educational meetings were conducted to inform the landowners both of the benefits of beaver activity and of how to remove these animals when needed. More than 10 percent of the landowners who had requested assistance decided not to participate in the pilot program after learning that removal of the beavers would not result in any future benefits—perhaps because most of the damage already had been done—while keeping them would be ecologically beneficial. Also, due to the summer drought, some landowners in the pilot counties began using beaver ponds for irrigation. It remains to be seen whether beaver control activities will indeed solve the problem. In areas where there are large beaver populations, they tend to reoccupy the habitat from which they are removed.[12]

Leave It to Beaver?

According to an article in the December 1992 issue of *Wildlife in North Carolina*, the beaver is a "keystone species"—that is, a "stone that holds the entire structure in place." Removing a keystone species can cause profound changes in the ecology of an area. Keystone species vary with location. In the Aleutian Islands, for example, sea otters at one time were the keystone species, but as they were eliminated by excess trapping, a complicated set of events led near-shore fish populations to shrink and eventually disappear. Another keystone species, the gopher tortoise, is found in Florida and certain other southern states. This large turtle digs thirty-foot burrows, which are also used by forty other species, including numerous mammals and amphibians. Currently the gopher tortoise population is declining, thereby threatening the other species that depend on its burrows.

According to the *Wildlife in North Carolina* article:

> [The beaver's] controversial labors can change a fast-moving stream into a pond, attracting fish, muskrats, herons, and a variety of species that prefer deeper, slower-moving water. But the beavers must constantly work to maintain the pond. If they leave or are removed, the pond will silt up and diverse life will disappear."[13]

Ecological concerns notwithstanding, most property owners, whether urban or rural, will act to protect their property. The Wildlife Resources Commission is reluctant to issue permits for the live trapping and relocation of beavers, because past experience has shown that beavers are no respecters of property lines and will move considerable distances in search of new habitat. This creates a continuing dilemma for those who have responsibility for controlling beaver damage.

Conclusion

Hardly anyone wishes to eradicate North Carolina's most famous keystone species. But the experience of those managing the beaver pilot program described above indicates that only a small percentage of landowners will tolerate large numbers of beaver in the event of widespread flooding or other damage. So far, no alternative to eradication has proved successful. ❖

Notes

1. Gregory Childress, "City Eyes Beaver Kill to Ease Floods," *Herald Sun* (Durham), April 27, 1993, C1.
2. Dudley Price, "Battle Brews over Beaver-Blocked Blacktop," *News & Observer* (Raleigh), June 8, 1993, 3A.
3. Carol Blaney, "Beavers Swamp Johnston," *News & Observer* (Raleigh), March 2, 1993, 2B.
4. Valerie R. Gregg, "Beavers Make Comeback with a Vengeance in N.C.," *News & Observer* (Raleigh), July 27, 1992, 1A.
5. N.C. Wildlife Resources Commission, "Beaver," in *North Carolina Wild* (Raleigh, N.C.: Wildlife Resources Commission, Division of Conservation Education, August 1992).
6. North Carolina State University, *Beavers in North Carolina: Ecology, Utilization and Management* (Raleigh, N.C.: Cooperative Extension Service, NCSU, Publication No. AG-434, April 1991), 1 (hereinafter *Beavers in North Carolina*).
7. *Beavers in North Carolina*, 3–5.
8. *Beavers in North Carolina*, 5–7.
9. *Beavers in North Carolina*, 7–9.
10. N. C. Admin. Code tit. 15A, ch. 10b § 0300.
11. 1991 Sess. Laws ch. 1044, § 69.
12. 1993 Sess. Laws ch. 561, § 111.
13. *Beaver Management Assistance Pilot Program (BMAPP) Update*, Report to Beaver Damage Control Advisory Board, dated August 20, 1993.
14. Lawrence S. Earley, "Keystone Species," *Wildlife in North Carolina* (December 1992): 2–3.

Animal Protection Society of Orange County

"How Are We Doing?" Evaluating the Performance of The Chief Administrator

Margaret S. Carlson

Picture a governing board meeting at a hectic time of year. Perhaps it is budget season and difficult funding decisions loom. Or the members are still recovering from stinging criticism over a hot community issue. Suddenly someone says, "Hey, didn't we say last year that we were going to evaluate the manager around this time?" Other members groan inwardly as they envision yet another series of meetings and potential conflict with other board members. One member says, "Everything seems to be going OK. Let's just go ahead and decide on a salary increase now. Is an evaluation really that important?"

Yes.

Evaluating the performance of the chief administrative officer—whether the title is manager or health director or school superintendent or social services director—is critically important.

In recent years, jurisdictions increasingly have recognized the importance of a useful performance evaluation system to the overall effectiveness of their organizations. They have taken steps to improve their methods of evaluating line workers, supervisors, and department heads. But one very important individual is frequently overlooked at performance evaluation time: the person who reports to the governing board. Governing boards have a responsibility to get on with that job. This article is designed to show how to evaluate a chief administrative officer who reports to a governing board, for simplicity called here the "manager."

Ironically, the reasons that a manager may not receive a regular performance evaluation are the very reasons that an evaluation can be helpful:

- this individual is in a unique position in the organization;
- he or she serves at the pleasure of the board; and
- he or she may frequently receive conflicting messages about priorities and direction from board members.

It is vital for managers to get regular, accurate feedback about whether they are meeting the expectations of the board, but it is unlikely that the organization will have a useful process in place for administrators to get that information in the absence of a well-conceived performance evaluation system.

Conducting an effective evaluation is hard work, but it doesn't have to be a bad experience for the board or the manager. With planning and a commitment to open lines of communication, chances are good that the experience will result in a new level of cooperation and understanding between manager and board and, ultimately, a more effective working relationship.

Common Pitfalls

Both the board and the manager may approach an evaluation with reluctance. Board members will be required to talk openly and honestly about the positive and negative aspects of a person's performance—a difficult task for many people. The manager must be able to receive this feedback in a nondefensive manner, even when it appears that the board is articulating specific performance expectations for the first time, or that the board is focused on the manager's conduct in the most recent crisis, rather than his or her overall performance. Here are some common problems that boards and managers encounter when they plan for and conduct a performance evaluation.

- The board evaluates the manager only when there

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are serious performance problems, or when all or some of the board members already have decided that they want to fire the manager.

- The board realizes it is time to determine the manager's salary for the upcoming year, and it schedules a performance evaluation for the next meeting, without discussing the format or process of the evaluation.
- The discussion during the evaluation is unfocused, with board members disagreeing about *what* the manager was expected to accomplish as well as *whether* the manager met expectations.
- The board excludes the manager from the evaluation discussion.
- The board evaluates only the manager's interactions with and behavior toward *the board*, even though members recognize that this may represent a relatively small portion of the manager's responsibilities.
- The board borrows an evaluation form from another jurisdiction or from a consultant without assuring that the form matches the needs of its own board and manager.

Most of these pitfalls can be avoided by planning and conducting a systematic process for evaluating the manager's performance. A thorough evaluation process, like the one suggested below, contains several essential components (see Figure 1).

A Suggested Evaluation Process

Planning the Evaluation

1. Agree on the purpose(s) of the evaluation. Typically, boards identify one or more of the following when describing the purpose of an evaluation:

- to give the manager feedback on his or her performance and to identify areas where improvement may be needed;
- to clarify and strengthen the relationship between the manager and the board; and
- to make a decision about the manager's salary for the upcoming year.

These goals are not incompatible, and it is possible to accomplish all of these tasks at once. However, it is essential that board members and the manager discuss and reach agreement on the purpose of the evaluation before deciding what the rest of the process will be. For example, a board member who thinks the main reason for doing an evaluation is to make a decision about compensation may think a brief consultation among board members—minus the manager—is sufficient to ensure that no members have any major concerns about the manager's performance. This member also may ask for input from a personnel specialist who can provide information about managers' salaries in comparable jurisdictions. By contrast, a board member whose main interest is improving communication between the board and the manager may suggest a process that includes a conversation between the board and manager, with the manager present throughout the evaluation.

A board might question whether the manager should be involved in planning the evaluation process, as the evaluation may be seen as the board's responsibility, with the manager as the recipient of the evaluation. Yet most boards want to conduct an evaluation that is helpful to the manager and provides guidance for his or her future actions. Because it can be difficult for the board to fully anticipate what the manager would—or would not—find useful in an evaluation, it is wise to consult with the manager early in the planning process. For instance, the board may feel that the manager would be uncomfortable hearing board members talk about his or her performance firsthand and so design a process that "protects" the manager from hearing any negative feedback. Although the board's motives may be good, such a design may not meet the manager's needs if the manager actually wanted to be part of the discussion, negative comments and all. Spending some time talking about the purpose of an evaluation at the beginning of the process will reduce the possibility of misunderstandings and conflicting priorities later on.

Figure 1
Steps in Planning and Conducting an Evaluation Process

Planning the Evaluation

1. Agree on the purpose(s) of the evaluation.
2. Agree on what the board expects of the manager.
3. Agree on the frequency and timing of the evaluation.
4. Agree on who will be involved.
5. Agree on an evaluation form to be used.

Conducting the Evaluation

1. Have individual board members complete the evaluation form prior to the evaluation session.
2. Have the manager do a self-assessment.
3. Agree on a setting for the evaluation discussion.
4. Have the manager present during the evaluation.
5. Consider using a facilitator.
6. Allow sufficient time.
7. Include a portion where the board evaluates its own performance.
8. Decide on the next steps and critique the process.

2. Agree on what the board expects of the manager. A job is essentially *a set of expectations*. It is possible to assess whether or not an individual holding that job has met expectations. Unfortunately, boards often find themselves in the position of preparing to evaluate the manager without first having defined those expectations and without having given the manager clear guidance about what he or she has to do to fulfill them. An evaluation can be useful only if an earlier discussion has taken place in which the board and manager have outlined expectations for the manager's performance. A board and manager may discuss expectations in conjunction with setting organizational goals for the upcoming year, perhaps as part of an annual retreat.

After setting goals, the board may specify objectives for the manager that define his or her role in meeting these goals. These objectives, then, are the board's expectations concerning the manager. For example, a city council may set a goal of working with agencies and community groups to reduce drug-related crimes in the city. The council may list one or more objectives for the manager related to this goal: for example, identifying groups and agencies that already are working to reduce drug-related crime, forming a partnership that includes members of all relevant groups, or explaining new programs to the local media. If the manager needs clarification of the objectives or has some concerns about his or her ability to meet the board's expectations, those issues are best discussed at the time these objectives are set, rather than a year later when the board wants to know why its expectations have not been met.

In addition to identifying *what* the board wants the manager to achieve, a board typically has an interest in *how* the manager achieves these objectives; it expects the manager to have certain knowledge and exhibit certain skills while performing his or her duties. Expectations about the manager's knowledge and skills also should be articulated by the board. For example, the board may expect the manager to have oral and written presentation skills that enable him or her to present ideas clearly and concisely to diverse groups. It also may expect the manager to be able to allocate resources in a way that ensures equitable service delivery to citizens and to be able to delegate work effectively and evaluate the performance of his or her staff.

A board's expectations for the manager often represent a mix of general areas of knowledge and skills every manager should possess, as well as specific expectations based on the board's composition, the organization's history, or special features of the city or region. Therefore it may be helpful for the board to use an existing list of managerial expectations as input for its discussion, then customize these expectations to fit the needs of the jurisdiction. Many professional organizations—for example, the International City/County Management Association (ICMA) for city and county managers—can supply such a list; or the board and manager may contact other communities in their area. Remember that a list of expectations for the manager that comes from a source outside the board is intended to *begin* a discussion of the board's expectations for the manager, not to *replace* this discussion. The only way for the board to give clear, consistent guidance to the manager is to spend some time talking about what it wants the manager to accomplish and about the knowledge and skills he or she should exhibit in the process.

3. Agree on the frequency and timing of the evaluation. The board and manager should agree on how often evaluations should be conducted (perhaps once a year, for example) and adhere to that schedule. The timing of the evaluation also should be considered. For example, the board may wish to have the evaluation cycle and budget cycle coincide and make decisions about the manager's compensation at such a time. Or, it may choose to conduct the evaluation before the budget process gets under way if it feels that it would not be able to give its full attention to the evaluation during the months leading up to the adoption of the budget. The board should avoid scheduling the evaluation just before or after an election. If the evaluation is held too soon after an election, new members may not have the time they need to gather information about and form a judgment of the manager's performance. Likewise, it is not a good idea to schedule an evaluation just before an election if a change in the composition of the board is expected.

4. Agree on who will be involved. All members of the board and the manager should participate in the evaluation (more about the manager's presence at the evaluation, below). The full board's participation is necessary, because all members have relevant information about the manager's performance. In addition, during the planning process the board and manager should consider whether there are other parties who have an important perspective on the manager's performance. A common problem is for the board to focus entirely on the manager's interactions with the board, even though the manager spends only a fraction of his or her time in direct contact with the board.

Although both the board and manager may feel that the perceptions of staff, citizens, and others are important, they may be concerned about how these perceptions will be collected and shared. It is not a good idea for board members to go directly to staff and poll

employees on their views of the managers' strengths and weaknesses, for example. Such actions would put board members in an inappropriate administrative role and may put staff members—including the manager—in an uncomfortable position. Instead, the manager might hold "upward review sessions" with his or her staff, in order to receive feedback from subordinates, and report general themes that came out of these sessions as part of his or her self-assessment.

The goal is not to make the manager feel under attack; rather, it is to acknowledge that many people may have relevant information about the manager's performance and that the board should not be expected to know everything about the manager's work. If the board and manager choose not to incorporate other sources of information in the evaluation, the board may want to consider omitting performance criteria that it feels unable to judge (such as the coaching and mentoring of subordinates).

5. Agree on an evaluation form to be used. Frequently this is the first step that boards consider when planning an evaluation, and they find it to be a difficult task. However, if the board already has discussed and agreed on what it expects of the manager (see Step 2), agreeing on an evaluation form becomes much easier. It is simply a matter of translating expectations into performance criteria, making sure that the criteria are clear and measurable. For example, three expectations in the area of "knowledge and skills necessary for local government management" may look like Figure 2.

Following each criterion on the evaluation form is a scale ranging from "does not meet expectations" to "exceeds expectations," with an option of marking "unable to rate." Although a board may choose to assign numbers to this scale (for example, 1 through 5, with 1 corresponding to "does not meet expectations" and 5 corresponding to "exceeds expectations"), a numerical rating system is less useful in an evaluation of the manager than it is in an organizationwide evaluation of all employees, where standardized comparisons may have some value. In fact, a potential problem with using a numerical rating system is that it is easy to focus on the number as the end in itself, rather than simply a shorthand way to express the evaluation. Thus a board may discuss at length whether a manager's performance on a given dimension is a 3 or a 4, and perhaps conclude that it is a 3.5, without fully exploring what those numbers represent.

Samples of evaluation forms may be obtained from ICMA and other professional organizations. Again, it is essential for each board and manager to tailor a form to meet their needs.

Figure 2
Portion of Sample Evaluation Form

Presentation Skills—The ability to understand an audience and present an idea clearly and concisely, in an engaging way, to a group whose interests, education, culture, ethnicity, age, etc., represent a broad spectrum of community interests and needs.

1	2	3	4	5	
Does Not Meet Expectations		Meets Expectations		Exceeds Expectations	Unable to Rate

Citizen Service—The ability to determine citizen needs, provide equitable service, allocate resources, deliver services or products, and evaluate results.

1	2	3	4	5	
Does Not Meet Expectations		Meets Expectations		Exceeds Expectations	Unable to Rate

Delegating—The ability to assign work, clarify expectations, and define how individual performance will be measured.

1	2	3	4	5	
Does Not Meet Expectations		Meets Expectations		Exceeds Expectations	Unable to Rate

Conducting the Evaluation

1. Have individual board members complete the evaluation form prior to the evaluation session. Setting aside some time for individual reflection is important preparation for the evaluation session. It reinforces the message that this is an important task, worthy of the board members' attention. Making individual assessments before beginning a group discussion also increases the likelihood that each member will form his or her own opinion without being influenced by the judgments or experiences of other members.

This is not meant to imply that board members cannot change their minds as a result of group discussion; on the contrary, members frequently change their views of a manager's performance as they hear the perspectives of other members and learn information that was not available to them when making their individual assessments.

2. Have the manager do a self-assessment. Inviting the manager to assess his or her own performance can add a helpful—and unique—perspective to the evaluation process. In most cases, the manager can simply complete the same evaluation form being used by the board. For the manager, the comparison of the self-assessment

with the assessments of others provides an opportunity for insight into his or her own overestimation or underestimation of performance level as compared to the expectations of the board. For the board, hearing how the manager rates his or her own performance (and more importantly, how he or she arrived at that rating) can help members gain some insight into whether the board and manager are communicating effectively. For example, board members may rate the manager as not meeting expectations in a given area because a land-use study was not completed. Upon discussion with the manager, however, the board learns that the study has been completed but has not yet been presented to the board. This distinction is important, because it suggests different areas for improvement. If the manager did not complete the study, the discussion may have focused on the importance of meeting deadlines. Instead, the group may develop strategies for improving communication so that board members receive information in a timely manner.

3. Agree on a setting for the evaluation discussion. The evaluation should be conducted in a setting that is private and comfortable, free from interruptions, and considered neutral by all parties. These are the same characteristics a board may look for in a retreat setting when it meets to develop a long-range plan, discuss roles and responsibilities of new board members, and the like. The idea is to set aside a time and place to address a single topic, away from the pressure of a loaded agenda.

Boards frequently ask whether the manager's evaluation is defined as an open meeting. Since the board is considering the performance of the manager—a public employee—during an evaluation, such a meeting may be held in executive session. According to the open-meetings statute, a public body may hold an executive session to "consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of a public officer or employee."[1]

4. Have the manager present during the evaluation. The above example, where the board learns important information from the manager during the evaluation, illustrates the benefit of having the manager in the room and playing an active role in the evaluation. A manager present during the discussion can respond to questions from the board, ask questions, and provide relevant information that otherwise may not be available to the board.

Frequently, a board's first impulse is to exclude the manager from the evaluation session. Some members may be reluctant to share negative feedback in the manager's presence. Other members may fear that the evaluation will turn into an analysis of the manager's handling of a single incident, with the manager defending his or her actions. Still others may want to shield the manager from what they perceive to be unduly harsh criticism from a few board members. These are valid concerns. However, many of the problems anticipated by the board stem from a lack of planning rather than from the manager's presence at the evaluation; consequently, many of these issues can be addressed in earlier phases in the planning process. For example, a good evaluation form will help ensure that the discussion focuses on job-related behaviors rather than personal traits and will look at the previous year's performance rather than that of the previous week.

Some boards choose to exclude the manager from the evaluation session and select one member to summarize the board's discussion for the manager after the evaluation has been completed. Appointing a "designated spokesperson" to communicate the board's evaluation to the manager is often frustrating for both parties. It is difficult for one person to summarize a complex discussion in an accurate and balanced way, and the spokesperson may end up overemphasizing some points and underemphasizing or eliminating others. For a manager who is seeking feedback and guidance, this one-way communication usually does not give a full picture of the board's perceptions; consequently, the manager may make future decisions that are not consistent with the board's expectations.

Even with a careful planning process, board members still may have concerns about sharing negative feedback with the manager. As described in the next section, a skilled facilitator frequently can diminish these concerns by helping the group discuss these issues in a constructive way.

After the board has concluded its discussion of the manager's performance, it may wish to excuse the manager while it makes a decision about the manager's compensation. The manager presumably will receive any feedback and guidance from the board before the salary discussion, so his or her presence is not necessary at this point. However, the board should keep in mind that the actual setting of the manager's salary is not covered under the personnel exception to the open-meetings law, and as such this determination should take place in an open session.[2]

5. Consider using a facilitator. A performance evaluation is a complex task, particularly when an entire group is participating in the evaluation. Members may have different views of the manager's past performance, or

different expectations for the future. Board members also may be reluctant to share negative feedback, or they may be concerned that their feedback will be misinterpreted. For all these reasons, it is often helpful to use a facilitator when conducting the evaluation. A facilitator can help the group by monitoring the group's process, while leaving all members free to focus on the task of the evaluation. Facilitators often suggest that groups use a set of ground rules to help them accomplish their work more effectively.[3]

The board might look to local business, civic, and academic leaders for recommendations for qualified facilitators; or it might contact the Institute of Government or the state's Association of County Commissioners, League of Municipalities, School Board Association, or similar organizations for help in this area.

6. Allow sufficient time. A useful technique for the actual evaluation is a "round-robin" format. Each member in turn expresses his or her judgment of the manager's performance on a given criterion, and the entire group then discusses any differences among individuals' ratings, with the goal of reaching group consensus on the manager's performance in this area before progressing to the next performance criterion. Even with a small board that is in general agreement about the manager's performance, this is a time-consuming process. Therefore setting aside a full day for the evaluation session is a good idea. Although this may seem like a lot of time to devote to one issue, the consequences of failing to reach agreement on what the board expects of the manager can ultimately require far more time and energy. The group may wish to divide the evaluation session into two half-days, if that is more manageable (both in terms of scheduling and energy levels).

7. Include a portion where the board evaluates its own performance. In theory, it is possible for a board to specify expectations for the manager and then evaluate the degree to which a manager has met these expectations. In practice, however, meeting expectations is usually a two-way street, and it is helpful for a board to examine its own functioning and how it contributes to—or hinders—the manager's effectiveness. For example, a board may have set a number of high-priority objectives for the manager to meet, after which individual board members brought new "high-priority" projects to the manager throughout the year. In this case, the board would be partly responsible for the manager's failure to meet the expectations initially set by the board.

8. Decide on the next steps and critique the process. The actual evaluation of the manager's (and the board's) performance may seem like the last step in the evaluation process, but there are still a number of decisions to be made before the next evaluation cycle can begin. The board may wish to have a separate session to make a decision about the manager's compensation. This is also a logical time to talk about expectations and goals for the coming year, and the board may wish to set a date in the near future when it will set expectations and performance measures in preparation for the next evaluation.

An important final step: Before the evaluation is concluded, all members should assess the evaluation process itself. This self-critique helps the group look at its own process and learn from its experiences working together. By reflecting on the task just completed, the group frequently identifies components of the process that worked well and aspects that could have been more effective. For example, it may decide that it did not clearly define the manager's role in reaching board goals before the evaluation and resolve to address this by a specified date.

Conclusion

As the steps described here illustrate, the evaluation of a chief administrative officer is a process, not an event. Careful planning and a commitment to communication between the board and the manager throughout the year will greatly facilitate the actual evaluation and increase the likelihood that it will be a valuable experience for all involved.

One last word: Don't let the fear that your board has not laid the proper groundwork prevent you from getting on with the job. You will probably see some things that you would like to change after the first evaluation (and the second, and the third . . .). That's what the self-critique is for. The important thing is to begin the process. Making the evaluation a regular part of the board's work is the best way to ensure its success. ❖

Notes

1. N.C. Gen.Stat. § 143-318.11. For more on open meetings and procedures for going into an executive session, see David Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers*, 3d ed. (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1986).

2. See Lawrence, *Open Meetings and Local Governments in North Carolina*, 20.

3. A detailed discussion of ground rules and the role of the facilitator can be found in Roger M. Schwarz, "Groundrules for Effective Groups," *Popular Government* 54 (Spring 1989): 25–30, and Kurt Jenne, "Governing Board Retreats," *Popular Government* 53 (Winter 1988): 20–26.

A Guide to Improving a Local Government's Bond Rating

Charles K. Coe

When units of local government borrow money by selling bonds, they must pay the money back with interest, of course. Like homeowners with mortgages, governmental units want the lowest interest rate possible, because that reduces the cost of borrowing the money. Unlike most homeowners, however, governmental units may be able to take steps to lower the interest rate they must pay. This article outlines those steps.

Before a local unit sells its bonds—that is, before it borrows the money—it must get them rated. A high rating indicates that the local unit is a good credit risk—it is very likely to meet its interest and principal payment obligations under the bonds—and a low rating means the opposite. Investors are willing to purchase highly rated bonds at lower interest.

The difference in interest costs can be sizable. For example, an improvement of one full rating amounts to savings of about $50,000 on a bond of $1 million.[1] In addition to representing significant savings, a good credit rating reflects positively on a local unit's managerial and fiscal competence.

How to get a better bond rating? Larger cities and counties, which go to the bond market frequently, generally are familiar with the bond rating process and with ways to improve a rating. This article is aimed at the infrequent bond issuer: smaller local units, which may have far less experience.

The Bond Rating Agencies

Three nationally recognized rating agencies—Moody's Investors Service, Inc. (Moody's), Standard & Poor's Corporation (S & P), and Fitch Investors Service, Inc. (Fitch)—rate bonds. Bonds rated by these national firms are much easier to sell on national bond markets.

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Fitch does not rate bonds frequently for North Carolina local governments.

North Carolina local jurisdictions also are rated by the North Carolina Municipal Council, Inc. (NCMC). The NCMC was founded in 1932 by a group of securities dealers to assist the many jurisdictions that had defaulted on their bonds after the stock market crash of 1929. The NCMC's membership comes from brokership firms, banks with municipal securities departments that buy North Carolina municipal debt, law firms that serve as bond counsel for North Carolina bond issuers, regulatory authorities, the North Carolina Local Government Commission (LGC), and the State Banking Commission.

Bond rating fees. Fees charged by the national rating agencies are based on the amount of the bonds to be sold: from $1,000 to $3,000 for bonds under $3 million to as much as $25,000 for bonds in excess of $100 million (see Table 1). The NCMC does not charge local units for its rating services; members pay for the council's services through membership fees and assessments based on bond sales.

Bond rating categories. The national agencies use rating categories that are similar to one another's but just different enough to be confusing. Fitch and S & P, for instance, each label their highest-rated bonds "AAA," while Moody's uses "Aaa." And the two agencies have slightly different schemes for distinguishing between better and worse bonds within a rating category (see Table 2). The NCMC's rating system is totally different, a numerical scheme from 0 to 100. By State Banking Commission rules, banks cannot hold for investment purposes any municipal bond with an NCMC score of less than 75 or a rating from the national bond rating firms of less than Baa or BBB.

The highest possible bond rating from the three nationally recognized rating agencies is AAA (or Aaa). North Carolina has more AAA-rated cities and counties than any other state. According to rating analysts with Moody's, the principal reason for North Carolina's strong

performance compared to other states is the close oversight of local jurisdictions performed by the LGC.[2] The LGC approves all bond sales; acts as financial advisor for bond sales; and monitors budgeting, cash management, and auditing practices. Moody's analysts suggest still more reasons for the state's performance:

- The excellent training programs offered by the Institute of Government at The University of North Carolina at Chapel Hill
- The high amounts of fund balance that local units keep
- The state's relatively high property-tax rate limit and relatively low homestead exemption for elderly and low-income homeowners
- The high property-tax collection rates of local jurisdictions[3]

The high percentage of cities and counties in North Carolina with the council-manager form of government is doubtless another contributing factor.

S & P and Moody's typically give local units very similar ratings (see Table 3), while the NCMC gives considerably more local units a rating equivalent to the BBB or Baa rating group than these agencies do. It puts 37 percent of local units at this level, compared to 17 percent and 14 percent for S & P and Moody's, respectively.

Steps to a Better Bond Rating

Local units can wait passively for a credit rating assignment, or they can actively take steps to improve chances of getting a better bond rating. Sometimes they will get a push, as when the LGC feels that conditions have improved sufficiently in a community. In that case, the LGC will recommend that the unit seek a better rating.[4]

Improving in Key Areas

Bond rating agencies base their evaluations on a number of economic, debt, financial, and governmental factors.

Economic factors. Much in the economic area is beyond a community's control. Local governments can take steps to make available to prospective developers the needed land, water, sewer, and other public services. They also can work closely with the chamber of commerce to attract new investment and to retain existing businesses. Regardless of actions taken, however, some communities are constrained by a stagnant or declining economy due to their poor location, inadequate labor supply, or other shortcomings.

Debt factors. Likewise, if a community has an undesirably high amount of debt outstanding, reducing the amount may be problematic. Effective options are to refinance the amount of debt if interest rates fall or reduce it if funds become available to repay existing debt. An immediately available tool is the adoption of a capital improvement program (CIP)—a formally adopted program that forecasts facility, infrastructure, and equipment needs; projects the costs of meeting those needs; and names sources of financing. Rating agencies, of course, will look to see that the CIP is more than just wishful thinking. They assess the likelihood of funding of future projects. To give assurance of such funding, some local

Table 1
Rating Fees and Schedules for General Obligation Bonds

Issue Size	Fee
Under $3 million	$ 1,000–$ 3,000
$3 million to under $5 million	$ 2,000–$ 4,000
$5 million to under $20 million	$ 3,000–$ 6,000
$20 million to under $50 million	$ 4,000–$ 8,000
$50 million to under $100 million	$ 6,000–$12,000
$100 million and over	$10,000–$25,000

Table 2
Rating Categories

Fitch Investors Service, Inc.

AAA	Highest-quality bonds
AA	Very-high-quality bonds
A	High-quality bonds
B	Satisfactory-quality bonds

Moody's Investors Service, Inc.

Aaa	Best-quality bonds
Aa	High-quality bonds
A	Upper-medium-quality bonds
B	Medium-quality bonds

Standard and Poor's Corporation

AAA	Highest-quality bonds
AA	Very-strong-quality bonds
A	Strong-quality bonds
BBB	Adequate-quality bonds

North Carolina Municipal Council

The minimum score for a bank-eligible investment is 75. A perfect score is 100, and the highest rating currently held by any unit is 93.

Note: Bonds in the Aa, A, and Baa groups that possess the strongest investment attributes, according to Moody's, are designated by the symbols Aa1, A1, and Baa1. For Fitch and S&P, plus (+) or minus (–) signs are used to indicate upper or lower positions within an assigned rating.

Table 3
Ratings of N.C. County Governments by Three Rating Agencies

S & P			Moody's			NCMC[a]		
Rating	No. of local units N=76	% of local units	Rating	No. of local units N=81	% of local units	Rating	No. of local units N=91	% of local units
BBB	3		Baa	4		75–78[b]	33	37%
BBB+	10		Baa1	7				
	13	17%		11	14%			
A–	1							
A	34		A	38		79–84[c]	41	45
A+	16		A1	20				
	51	67		58	71			
AA–	1							
AA	6		Aa	6		85–89	13	14
AA+	2		Aa1	3				
	9	12		9	11			
AAA	3	4	Aaa	3	4	90–100	4	4

Sources: S&P's *Municipal Bond Book*, February 1993; *Moody's Municipal Bonds*, March 1993; and *North Carolina Municipal Council's Ratings of N. C. Counties*, March 31, 1993.

a. These ranges were constructed by staff of the North Carolina Municipal Council (NCMC). The NCMC ranked nine counties below its minimum investment grade of 75.

b. Fourteen counties of this group (15%) did not receive ratings from other rating agencies.

c. Three counties of this group (3%) did not receive ratings from other rating agencies.

units dedicate portions of taxes to annual capital funding. Sometimes the dedication of funding is done in conjunction with a multiyear forecast of operating revenues and expenditures of a specified planning period, usually five or six years.[5] Local units also can set in place, and adequately fund, capital reserve funds in the budget.

Financial factors. Local units can strengthen their financial management in several ways. The governing board can adopt a policy to build up the amount of unreserved fund balance in the general fund and reserves in other funds; it can ensure that the unit gets a clean audit opinion; it can make improvements to the accounting system including automation; it can correct deficiencies that might be raised by the independent auditor in a management letter; and it can apply for and receive formal recognition from the Government Finance Officers Association (GFOA) for the annual budget and the financial report.[6]

Governmental factors. Finally, in the governmental area, the local unit can institute and follow good tax collection practices, including taking the appropriate legal steps to collect delinquent property taxes. And it can try to hire and retain professional staff members by offering attractive compensation packages.

Dealing Effectively with Bond Rating Agencies

Once a local unit has addressed the economic, debt, financial, and governmental factors, there are four steps it can take in dealing with the bond rating agencies to cement a better bond rating.

Step 1: establishing a strong working relationship with the rating agencies. The local unit should develop a strong working relationship and communication with rating agencies.[7] Doug Carter, former finance director of Charlotte, says that the local jurisdiction should have a "back and forth" relationship.[8] The national rating agencies assign specific analysts to cover North Carolina and other states. Generally, these analysts and their managers do not turn over rapidly, so local units have the chance to form continuing relationships with rating personnel. Larry Fisher and Gary McConkey (the finance director of Asheville and the former finance director of Cary, respectively), whose cities achieved ratings upgrades, found that attending an S & P ratings seminar helped them establish face-to-face relationships with ratings officials and better understand the ratings process.[9] McConkey recommends that local units keep ratings agencies abreast of improvements and new developments in the jurisdiction by sending to rating analysts newspaper accounts and other reports as appropriate—similarly, the rating agencies should also be told of adverse factors. The key to a strong working relationship is open and full communication between the local unit and ratings analysts.

Step 2: applying for a bond rating. The LGC recommends that local units contact the rating agencies for a rating sixty days before the bond will be issued.[10] The local unit must decide whether it wants to apply to one rating agency or two. The LGC recommends that units issuing more than $2 million obtain two bond ratings, but what of bond issues of less than $2 million? The LGC recommends only one bond rating, but might two be more cost effective? Research shows that municipalities that purchase a second credit rating reduce their borrowing cost (net of transaction costs) by 5.2 basis points—that is, the difference between, say 5 percent interest and 5.052 percent.[11] A twenty-year $1 million bond sold at an interest rate of 5 percent would cost $6,980 less over the life of the issue than a bond sold at 5.052 percent. The current cost of a rating for bond issues under $3 million is $1,000 to $3,000. Therefore, although the LGC requires only one bond rating, issuers of bonds less than

$2 million should consider getting two ratings. Of course, in any given situation, a second rating might be worse than the first, adversely affecting the interest rate.

Step 3: the on-site rating visit. Two North Carolina finance directors who were able to obtain rating upgrades for their units' bonds—Blair Bennett of Cabarrus County and Larry Fisher of Asheville—recommend trying to get rating analysts to visit the community for a firsthand view.[12] The rating agency may request to visit a community if significant changes have occurred in underlying credit factors, but most on-site visits are initiated by the local jurisdiction. The rating agency may decline the invitation, of course.

Local jurisdictions should give rating analysts a balanced view of the community, disclosing the community's shortcomings as well as its strong points. Often the tour combines walking, riding, and an aerial overview. The local unit should give a firsthand look at previous bond-financed projects, those under construction, and likely future needs. During the visit analysts typically meet with a forum of elected, business, and community leaders at some point in the tour.

Step 4: the New York visit. *(If the rating agency visits the community, a New York visit is not necessary.)* In the absence of an on-site rating visit, the LGC recommends that a local jurisdiction visit the bond rating agency if it is seeking a better rating or if a possibility of being downgraded exists.[13] The LGC recommends that local units visit New York City about twenty-five days before the bonds' sale date.[14] The rating representation team should be very well prepared and provide a highly professional presentation, because the rating agency uses the quality of the presentation as one gauge of the local unit's management capacity.

Closely following a few guidelines can help ensure a high-quality presentation.

- *Pick the team wisely.* Put people on the team who are intimately familiar with the community, its plans, and its finances. The team should be small; rating agencies look askance when whole governing boards with little technical knowledge descend on them.
- *Discuss the agenda in advance.* The analysts are particularly interested in information that cannot be obtained in the written materials already provided.[15] Check with the analyst to determine that the material to be presented is complete and relevant.
- *Prepare a rating booklet.* Use a well-crafted booklet as the basis for the team's presentation. For a unit preparing a booklet for the first time, the LGC can

Questions Most Commonly Asked in a Bond Rating Review Meeting

- Are there any economic development activities taking place in other surrounding counties that will have an impact on the economy?
- Is the population growing? If yes, what type of population growth is it? Does the population growth have a positive or negative impact on the local unit's economy? How has the local unit planned to service this growth in terms of zoning, growth regulations, and infrastructure improvements?
- What is the local unit doing to diversify its work force? Describe the economic development program.
- What is the unit doing that is managerially innovative which will make it more efficient in the future?
- How has the unit's population changed over the last ten years? Is it getting older or younger? Is there an established trend?
- What type of turnover has the local unit had among key management personnel?
- What type of planning programs has the local unit engaged in over the past several years? Have the results been positive?
- Explain the local unit's characteristics: location, transportation network, infrastructure, natural assets, and liabilities.
- What is the quality of the labor force; i.e., the match between the skills and education levels of the labor force and employment base?
- What are the local unit's cash management and investment practices?

Source: Blair Bennett, finance director of Cabarrus County, North Carolina.

Obtaining a Better Bond Rating: The Asheville Story

1984 Denial

The city applied to Moody's to improve its bond rating from A1 to Aa. Moody's reported that Asheville had a strong financial operation, a low level of debt, and the economy had performed well in the 1982-83 recession. The rating upgrade was denied, however, for the following reasons:

- the population of the city was not growing in comparison to the rest of Buncombe County and the rest of North Carolina;
- the city had aging housing stock; and
- the city had experienced only moderate growth in its tax base and in employment.

1984

1985

Improvements after 1984 Denial

The city increased the amount of its fund balance. Furthermore, the completion of I-26 and I-40 in the late 1970s began to bear the fruits of economic development; $59 million in economic development and redevelopment projects were completed or under way in the downtown area. Finally, the city adopted a Capital Improvement Program (CIP). The city council dedicated 8 cents of the property tax and 60 percent of the one-half cent sales tax for capital improvements. Thus with this dedicated funding and with other revenue sources, the city ensured that all projects over $7,500 in value would be funded for the six-year period of the CIP.

1986

1986 Denial

Again the city applied to Moody's and also to S & P for a rating upgrade. Both rating agencies denied the upgrade request. Although impressed with the adoption of the CIP and with recent economic development, including $50 million in projects downtown, the rating agencies cited the following problems:

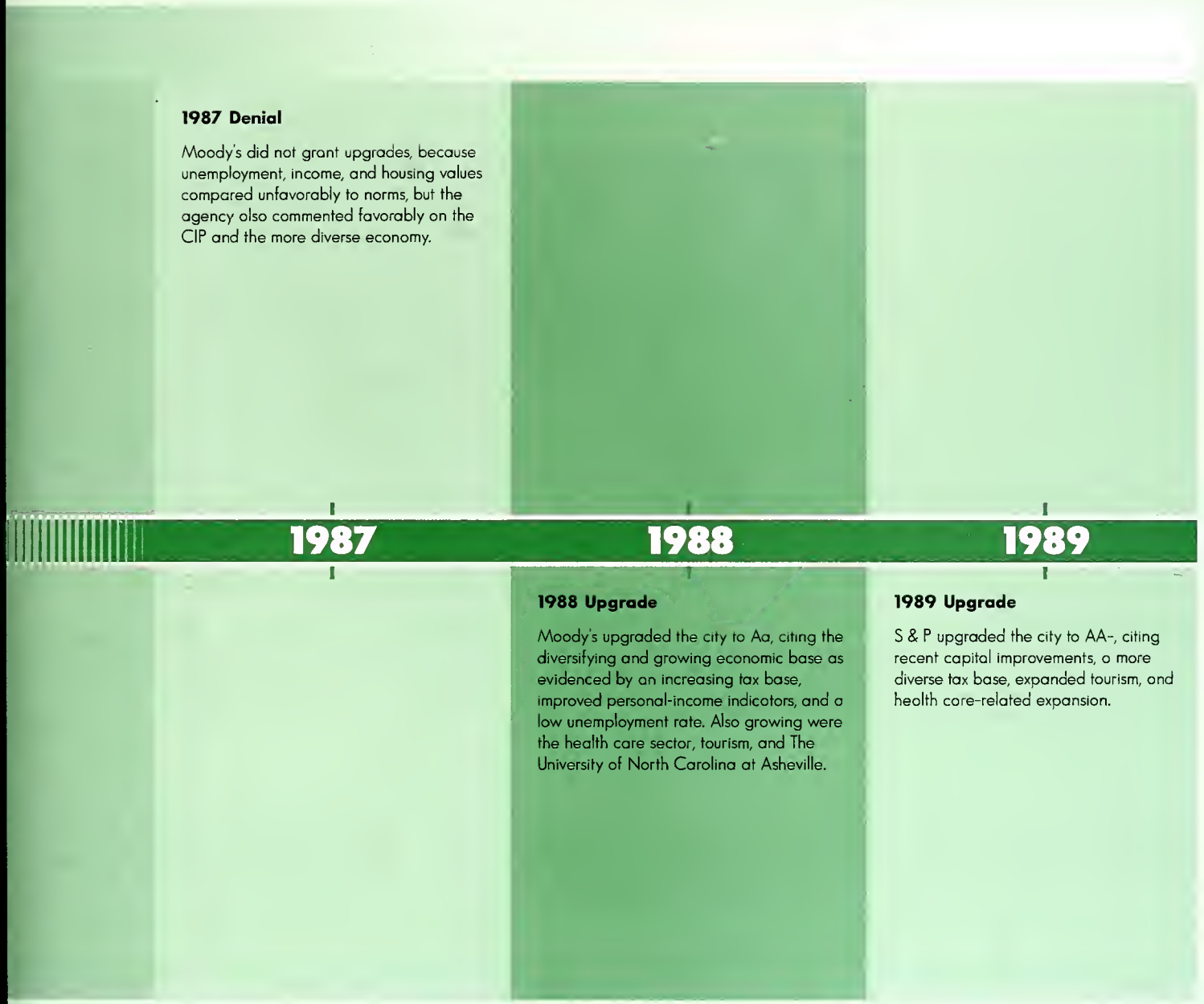
- The need for capital renovations
- A too-high unemployment rate
- An economy too dependent on tourism
- Several recent changes in the city manager position

Improvements after 1986 Denial

In 1986 the city voters approved $17 million in general obligation bonds for streets and sidewalks and $3 million as part of the $17 million construction of a cultural arts center. Unemployment decreased; the tax base increased by 9 percent due to expansion and redevelopment; and two parking facilities were constructed at a total cost of $6.4 million.

recommend well-done booklets that can be used as guides, and the International City/County Management Association has a guide.[16] Supplementing the written material with overheads, slides, or a videotape is a useful strategy.

- *Watch the time.* The rating agencies do not set a time limit for the presentation, but one expert says that the meeting should not last more than ninety minutes.[17] Meetings that drone on lose the attention of the analysts and reflect unfavorably on the rating presentation team. S & P recommends that the team initially make a ten- to fifteen-minute presentation featuring key points and then answer analysts' questions.[18]
- *Anticipate questions.* Blair Bennett has informally surveyed other finance directors to determine questions commonly asked by rating analysts (see sidebar, page 33).
- *Be careful of comparisons.* In making its rating presentation, a local unit may be tempted to compare its fiscal and economic performance to other units with better ratings. Although the intent is to show that the unit is comparable or superior to the comparison units, there may be an unintended effect: the rating analyst may take umbrage at the implication that the agency had rated the unit too low before.[19]
- *Be accurate and straightforward.* The "pitch" is less



important than the content of the answer.[20] If unsure of an answer, say so and provide the proper responsive information later. Finally, after the presentation, make sure that the analysts receive any further information they need to make their determination.

In summary, the local unit should prepare well for the New York visit. This is a golden opportunity to showcase the professionalism of the community and to highlight the positive policy directions being taken. On the other hand, without adequate preparation and forethought, the meeting may reflect unfavorably on the community's ability to manage its affairs and plan for the future.

Getting a Better Bond Rating: A Case Study

Analysts at both Moody's and at S & P cite the city of Asheville as having been especially adept at obtaining better bond ratings over the years. (See "Obtaining a Better Bond Rating: The Asheville Story.") Asheville received a rating upgrade from Moody's from A1 to Aa and from S & P from A + to AA– over a six-year period. To improve their bond rating, Asheville officials took a lot of steps along the way; of significance was the economic development that occurred due to the completion of the I-26 and I-40 interstate highways.

Conclusion

A local jurisdiction should take action where possible to improve its bond ratings. Rating agencies will tell a community about areas for improvement. Local officials can improve their chances of getting a better rating by adopting a CIP, by hiring professional managers, by obtaining GFOA recognition for the budget and financial report, by maintaining healthy unreserved fund balances, and by encouraging economic development and diversification. ❖

Notes

1. Telephone interview with Everett Chalk, deputy director of the Local Government Commission, October 20, 1992.

2. David Alter, Julie Berman, and Patricia McGuigan, "Administrative Factors in Rating Local Debt: Case Studies of Three States in the Southeast Region," *Moody's Municipal Issues* (October/November 1992): 7.

3. Alter, Berman, and McGuigan, "Administrative Factors," 7–8.

4. Chalk interview, 1992.

5. A survey of North Carolina cities and counties indicates that about a third of cities with populations greater than 5,000 and a fifth of all counties prepare multiyear forecasts of revenues and expenditures. See A. John Vogt and Charles K. Coe, "A Close Look at North Carolina City and County Budget Practices," *Popular Government* 59 (Summer 1993): 16–28.

6. *See* Government Finance Officers Association, *Distinguished Budget Presentation Awards Program* (Chicago: GFOA, undated brochure), for a description of the program.

7. Anthony Crowell and Stephen Sokol, "Playing in the Gray: Quality of Life and the Municipal Bond Ratings Game," *Public Management* 75 (May 1993): 3.

8. Telephone interview with Douglas Carter, principal, Alex. Brown & Sons, Inc., November 24, 1992.

9. Telephone interviews with Gary McConkey, town manager of Knightdale, March 10, 1992, and Larry Fisher, finance director of Asheville, October 1, 1992.

10. Chalk interview, 1992.

11. L. Paul Hsueh and David S. Kidwell, "Bond Ratings: Are Two Better than One?" *Financial Management* 17, no. 1 (Spring 1988): 30.

12. Fisher interview; telephone interview with Blair Bennett, finance director of Cabarrus County, October 3, 1992.

13. Chalk interview, 1992.

14. Telephone interview with Chalk, May 5, 1993.

15. *An Issuer's Guide to the Rating Process* (New York: Moody's Investors Service, 1993), 13.

16. International City Management Association, *GO Bonds: Rating Agency Presentation by the City of Fort Worth Texas* (Washington, D.C.: ICMA, 1987). The organization has since changed its name to International City/County Management Association.

17. Telephone interview with Tom McLaughlin, vice-president, Governmental Financial Group, October 2, 1992.

18. Standard & Poor's Corporation, *S & P's Municipal Finance Criteria* (New York: S & P, 1989), 7.

19. Bennett interview.

20. Carter interview.

At the Institute

Heath Receives Public Health Award

Institute of Government faculty member Milton S. Heath, Jr., who specializes in environmental health and protection and natural resources management, has received the 1993 Distinguished Service Award from the North Carolina Public Health Association, given annually to an individual who is not a public health professional.

The association cited Heath for his long dedication to public health service. He teaches environmental and natural resource law to soil scientists, engineers, soil and water conservationists, and graduate students. Heath has trained environmental health specialists in county health departments for the N.C. Environmental Health State of Practice Committee for more than ten years. Since 1968 he has been instrumental in the drafting of environmental and natural resource legislation to be considered by the General Assembly. He also has served on many public health boards such as the Water Resources Research Institute of Board of Directors and the Governor's Blue Ribbon Committee on Environmental Indicators.

Heath is the first Institute faculty member to receive this award in twenty-six years. —*Melanie Stepp*

Vogt Named to National Budgeting Task Force

The Government Finance Officers Association recently named Institute faculty member A. John Vogt, a local government finance and budgeting specialist, to its National Task Force on State and Local Government Budgeting.

The task force recommends ways to develop new approaches to budgeting and determines whether guidelines for state and local government budgeting would be appropriate and the form they should take.

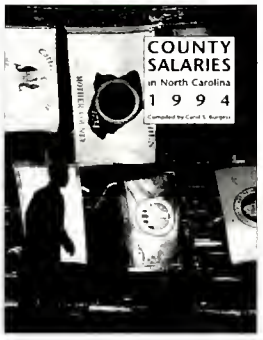
It includes representatives of the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, the National Association of Counties, and the American Society for Public Administration.

Vogt and a member of the faculty of Harvard University's Kennedy School of Government are the sole university representatives on the task force, which includes state and local government finance directors and officers of private accounting, finance, and municipal bond firms.

—*Editors*

Off the Press

County Salaries in North Carolina 1994



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