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The University of North Carolina at Chapel Hill



Trends in Local Governments

■ Privatization

■ Performance
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POPULAR GOVERNMENT

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POPULAR GOVERNMENT

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This issue of *Popular Government* includes articles on three related topics: privatization, economic development, and performance measurement. In each area, local governments are reconsidering the scope of their activities and the way in which they carry out and evaluate the services that they will continue to provide. Privatization initiatives have generated public debate about the extent to which the private sector can or should carry out functions previously undertaken by government, and competition with the private sector has changed the way in which local governments account for and deliver services. Economic development raises the question of how much the government can insert itself into the private marketplace. Performance measurement represents efforts to assess what the government does in terms of results rather than effort. *Popular Government* presents all three topics with its usual focus on North Carolina. David Ammons, the Institute's newest faculty member, will add his insights on these topics in the next issue.

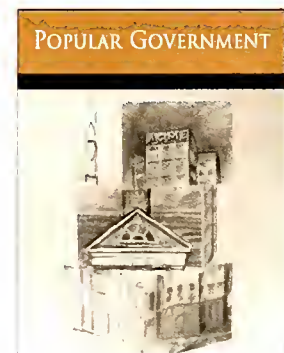
—Frayda S. Bluestein

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On the cover The changing relationship between local government and private enterprise may puzzle North Carolinians. Across the state and the nation, businesses are taking on many responsibilities once thought to be exclusively public, and public employees are competing with the private sector for the privilege of delivering municipal and county services. Drawings and model by Michael Brady. Photo by Troy Sprinkles.



Privatization: Considerations for North Carolina Local Governments

Frayda S. Bluestein and Kyle Gray



Priate prisons, privately funded highway lanes, charter schools, private nonprofit hospitals, contracts for garbage collection and water and wastewater operations, public-private joint ventures for new construction, competition with the private sector—these and other arrangements involving the private sector have gained attention as governments at all levels strive to accommodate demands for services and respond to pressure to curb government spending. Recent trends in management, including reinventing,

reengineering, downsizing, and rightsizing, have been embraced by public managers, who often introduce privatization as one component of organizational change. In addition, privatization has been the focus of a broader debate about the appropriate size of government and the respective roles of the public and private sectors in responding to economic and social problems.

This article provides an overview of privatization and describes privatization initiatives by North Caro-

Solid waste collection is among the governmental functions most commonly contracted out to private enterprise.



Karen Tam

lina governments. It also discusses three components of service delivery—arranging, producing, and financing—and illustrates how they are affected by various approaches to privatization. Finally, the article lists factors that local government officials should take into account when considering privatization of government services or functions. Another article discusses legal issues in privatization (see page 28).

This article *does not* answer the question of whether privatization is good or bad. Privatization has the potential to save money, and competition with the private sector, sometimes a component of privatization, can increase government efficiency. But privatization also has risks. Government has a unique role in protecting the public health, safety, and welfare. It must ensure that privatization does not place those interests beyond the control of the public, as represented by elected officials. Public officials should use a comprehensive and systematic analysis to determine, case by case, the costs and the other short- and long-term effects of privatization.

Definition and Background

In this article, “privatization” means the introduction of private-sector involvement in some or all components of a service or an activity previously performed by government employees. The most common form of privatization is contracting with the private sector (“contracting out” or “outsourcing”) instead of using government employees. As explained later, this is really

partial privatization because the government retains ultimate responsibility for the service even when private contractors do the work. Total privatization occurs when the government ceases its involvement entirely—for example, by selling a utility to a private operator or by terminating its garbage collection service and leaving the activity to private haulers who contract directly with customers. Other arrangements, including franchising, volunteerism, and public-private partnerships, all introduce private-sector involvement and thus are within the foregoing definition, even though the government still has a role. Similarly, vouchers, subsidies, and user fees are changes that decrease the extent of government involvement in financing, with effects discussed more fully later.

Privatization is certainly not a new concept for government. At a basic level, both public and private entities face the determination of whether it is more cost-effective to make or to buy a product.¹ Over the past several decades, a promise to increase efficiency in and reduce the size of government has been a popular political platform, spurred by the postwar expansion in the level of government spending. State and local government officials have also looked to privatization in the face of fiscal pressures intensified by the federal government’s delegation of more

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responsibility to the local level. A 1986 study reported that local governments contracted for \$100 billion in services annually from the private sector.² A more recent study showed significant increases in the number and the types of services contracted out between 1987 and 1995, especially janitorial services, solid waste collection, and street maintenance and repair.³

Indianapolis, Phoenix, and Charlotte have been leaders in privatization.⁴ Phoenix officials report better service quality in thirteen departments and cost savings of more than \$27 million as results of the city's privatization program, which began in 1979.⁵ However, not all experiences have been as positive. After comparing the operating costs of state-run and privately run prisons, the Tennessee Department of Correction found that the department itself ran the state's most cost-effective facility, at a yearly savings of \$100,000.⁶ As illustrated by these different outcomes, privatization does not always yield cost savings or improved service quality.

In North Carolina, local governments commonly contract for certain services, including solid waste collection, construction,⁷ repair and maintenance work, janitorial services, printing, and some health and human services, such as day care, foster care, and home health. State and local governments have also considered selling entire operations or physical assets to private entities to reduce the tax burden on their citizens.

The 1995 General Assembly authorized a committee to study state government reorganization and privatization. The committee's privatization subcommittee has addressed several proposals, including privatization of public school transportation, sale of assets (focusing on the North Carolina railroad and state ports), and lease (instead of purchase) of property and equipment.⁸ The committee will make its final recommendations to the 1997 General Assembly.

The University of North Carolina, in response to a legislative directive to investigate privatization opportunities, received a report from a consulting firm recommending several functions for privatization and suggesting a multistep process for implementing a privatization plan.⁹ Each campus in the university system is currently reviewing services for possible privatization.

Among North Carolina local governments, Charlotte has undertaken the most significant privatization program (see "Privatization and Competition in Charlotte," page 12 in this issue). In fiscal year 1995, Char-

lotte awarded \$204 million in service and construction contracts to the private sector, up from \$151 million awarded in the previous year.¹⁰ The city has also developed a citywide program for competing with the private sector, overseen by a citizens' committee. Mecklenburg County has established a comprehensive privatization program that includes an analysis of service delivery, a system for determining costs and competing with the private sector, and a procedure for developing contracts.¹¹ Raleigh and Wake County have also devoted significant attention to privatization, aided by citizens' task forces charged with identifying opportunities for privatization. Even though most North Carolina local governments have no formal privatization program, the question of whether they can reduce costs through alternative arrangements is always on the table.

Components of Service Delivery

To say that government provides a particular function or service is to gloss over the various ways in which government acts and the different roles that government may play. Scholars define and analyze the various components of government involvement in different ways.¹² The following discussion, which borrows concepts from several works, describes three distinct components—arranging, producing, and financing—and illustrates how they change under various arrangements for service delivery. This framework allows public officials to evaluate alternatives by asking how the service will be produced, how it will be financed, and what entity will be responsible for arranging these and other aspects of the service.

"Arranging" refers to the responsibility for determining whether to provide the service or the function, and if so, for selecting the means to accomplish that. In many cases, especially for traditional or statutorily mandated services, the governmental entity, usually through its governing body, structures service delivery. That is, government decides what level of service to provide, how to deliver it, who will be entitled to receive it, and who will finance it. In many privatized arrangements, including the most common one, contracting with the private sector, government retains responsibility for arranging. When government completely privatizes—that is, when it ceases all involvement in a function (sometimes called "load shedding")—*whether* and *how* to provide the function are left to the private sector.

"Producing" is a separate consideration because government can arrange a service or a function without using government employees to produce it. As noted earlier, when government contracts with the private sector, it still arranges, placing only the responsibility for production in private hands. Vouchers, tax credits, and subsidies allow citizens to choose among various public or private producers. Public-private partnerships may involve shared responsibility for production, or private production and public financing. Cost savings from private-sector production are often attributed to several factors: economies of scale; efficiencies due to competition, the profit motive, specialization, and expertise; and ease of acquiring equipment and hiring personnel, due to the lack of constraint by laws governing the public sector. On the other hand, private production, especially when accomplished by contracting, raises a number of concerns, including the possibilities of corruption in the contract award process, cost escalation over time, a decrease in employee benefits, a decrease in quality of service due to the profit motive, and loss of control and responsiveness to citizens' concerns.¹⁵ When production is privatized, government as the arranger of the service must still define levels of service and expectations for quality through contractual relationships, anticipate the effects of changes in service needs or defaults by contractors, and monitor the contract, incurring continuing administrative costs that are sometimes difficult to estimate.

"Financing" involves a distinct set of policy issues and is not necessarily linked to production. For example, a change from government to private production through contracting often involves no change in financing. An arrangement that is funded by taxes redistributes wealth, providing benefits without regard to one's ability to pay for them and requiring payment without regard to one's direct benefit or use.¹⁴ In contrast, an arrangement that involves a decrease in government financing can have regressive effects. For example, if user fees finance a service or if a subsidy replaces total government funding for a service, people who have limited resources may no longer have access to the service. If government retains some involvement in arranging services, these policy decisions are a governmental role. However, when government has no involvement, these decisions are made entirely within the private-sector marketplace.

When considering alternatives, local governments should try to select the best roles for the public and private sectors in each category for every activity or

function. This means that local governments should consider more than just the cost of production. They should consider whether government should control or participate in establishing the level of service, the extent of its availability, and the method of financing. When private production is more cost-effective, local governments can preserve the levels of service and the availability of services by contracting for production and retaining responsibility for arranging. When only partial government funding is necessary, a subsidy or a public-private partnership is an appropriate arrangement. If a service is widely available in the marketplace and those who benefit can afford to pay for it and should be required to do so, government can stop arranging it. The following sections discuss specific factors that local governments should consider in arriving at optimal arrangements for service delivery.

Factors in Privatization Decisions

Cost

The most common reason for privatizing is to save money. In a 1992 survey of more than 1,400 cities and counties by the International City/County Management Association (ICMA), 90.3 percent of the respondents indicated that fiscal pressures had prompted their privatization efforts.¹⁵ Despite the emphasis on savings in privatization decisions, most governments lack an accepted methodology for comparing the costs of government and private providers. For example, in a survey of 120 cities and counties concerning contracting practices, more than 50 percent responded that they did not use a set procedure to compare the cost of government production and private contractors.¹⁶ Several useful methodologies for comparing costs do exist,¹⁷ but capturing and comparing government and private production costs is uncharted territory for many units of government.

Cost of Government Production

To analyze the potential cost saving from privatization, a governmental unit must first compare the costs of government production and private production. As an initial step, the unit must identify and describe with specificity the service being considered, and determine the unit's current cost of producing it. This process is useful even if privatization ultimately does not occur because it introduces a level of cost

Competing with the Private Sector

How does a public entity compete with the private sector? Typically, when a local government is involved in bidding, it is *receiving* bids from outside providers of goods or services. Some units, however, are *preparing* bids as a way of comparing the costs of public and private production of services. The concept of competing with the private sector was popularized in the book *Reinventing Government*.¹ The authors, David Osborne and Ted Gaebler, emphasized that inefficiencies have developed in the public sector because it has viewed itself as a monopoly. Experience has shown that the process of bidding against the private sector has generated innovation and improvement in public-sector delivery of service.

With the exception of two categories of contracts, local governments in North Carolina are free to bid against the private sector without complying with any statutory procedures. When local governments contract for construction or repair work and for the purchase of apparatus, supplies, materials, or equipment, Sections 143-129 and -131 of the North Carolina General Statutes (hereinafter G.S.) *require* them to receive bids if the expenditure exceeds \$5,000. In the context of privatization decisions, one way to think about these statutory requirements is that they *mandate* that the private sector provide certain goods and

services except for projects within the scope of G.S. 143-135, a limited exception to the bidding laws that allows certain work to be done with a unit's own forces. (This limitation is discussed in more detail in "Privatization: Legal Issues for North Carolina Local Governments," page 28.) For most other types of services, which do not require competitive bidding, local governments have broad discretion to develop procedures for obtaining competition and determining the best method of delivering services.

Phoenix is recognized as a leader in using competition. According to the city's manager, the approach is part of an overall strategy to improve efficiency in government, which he describes as "competitization" rather than privatization.

Competitization means that the city competes with private firms to win the right to deliver certain services at the most economical cost to citizens. If the city department can perform the job at the lowest cost while maintaining desired services levels, the city is awarded the contract. . . . The bidding of city services is one element of a strategy to improve Phoenix's operational practices and management by introducing competition into government operations. The goal is to use competition to obtain for the public the best-quality services for the lowest sustainable price.²

accountability that many governmental units have not achieved before. Governments engaged in measuring their performance and "benchmarking" (developing targets) may have tackled many of the service definition and accounting problems necessary to compare public and private costs. (See "Measuring the Performance of Local Governments," page 41 in this issue.) As noted in "Competing with the Private Sector" (above), if the local unit evaluates its cost by allowing its own department to submit a bid, both accountability and cost-saving innovation may result. (See "The Charlotte Model for Competition: A Case Study," page 19 in this issue. It describes a successful bid submitted by the Charlotte-Mecklenburg Utility Department for operation and maintenance of two of the department's eight treatment plants.)

A major problem in analyzing costs for privatization decisions is cost allocation. Governmental accounting generally does not require full allocation of direct and indirect costs.³ Although many local governments prepare indirect cost plans for grants and

federal reimbursements, they do not make budget decisions based on cost accounting for particular services. In addition, private-sector cost accounting, to which governments may look as a model for their own cost analysis, includes capital asset depreciation, which financial accounting for general government services typically does not capture.¹⁹ These differences make accurate comparison between government and private costs difficult.

The governmental unit must also decide whether to include in its cost accounting only the costs that it will avoid by discontinuing its role as the producer of a given service, or whether to allocate the full costs, direct and indirect, including those that will not necessarily be eliminated by contracting out production (such as a portion of the manager's time spent on the service being considered). The choice of costing methodology may depend on the purpose of the evaluation. If the unit is bidding against the private sector, anything less than a full allocation of costs might result in an unfair comparison. On the other hand, if the

Charlotte has adopted a similar policy regarding competition with the private sector (see "Privatization and Competition in Charlotte," page 12 in this issue.)

An important consideration in competing with the private sector is that the unit does not have to submit a bid based on how it has previously provided the service. To the contrary, government has used competition as a tool for innovation and improvement in how it carries out certain functions. "The Charlotte Model for Competition: A Case Study," page 19 in this issue, describes the process that the Charlotte-Mecklenburg Utility Department used to prepare a bid for operation of two treatment plants. It illustrates in detail the changes made by a team of employees to generate efficiency and cost savings.

A key component in the innovation brought about by competition is that management gives the employees who are currently responsible for carrying out the function an opportunity to suggest changes. Describing the team approach used in Phoenix, the manager notes:

It is important to eliminate the bureaucratic layers that keep the line employee from doing his or her job more effectively. . . . All departments can benefit from a mechanism that allows all workers, their unions, and management to cooperate, break down

walls, and innovate. Employee morale can improve when line workers realize that their ideas count and contribute to the success of their organization and their job. These benefits . . . are every bit as important as the cost savings achieved.³

Viewed this way, competing against the private sector has the potential to develop efficiencies in all government services, not just those being considered for privatization.

Competition is one tool that local governments can use to determine the most cost-effective way to deliver services. As noted in the main article, factors in addition to cost should be evaluated to determine the best arrangement.

Notes

1. David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Reading, Mass.: Addison Wesley Publishing Co., 1992).
2. Frank Fairbanks and Ed Zuercher, "What's Wrong with the Phoenix Model?" *Public Management* 76, no. 12 (Dec. 1994): 19, 20.
3. Fairbanks and Zuercher, "Phoenix Model," 22.

resources will be redirected to other government activities, perhaps only the savings that will truly be realized should be counted.²⁰

Cost of Private Production

In contrast to government's own cost, the cost of private production is relatively easy to determine. It primarily consists of the amount of the bid or the proposal from a private-sector provider. However, government incurs additional costs under private production and must add them to the bid to arrive at an accurate cost of privatization. Government costs for private production include the expense of administering, monitoring, and enforcing the contract with the private entity; compensation for employees who are terminated; the cost of creating and approving the contract; and, for some services, the cost of reinitiating them or acquiring substitutes if the contractor defaults. Unfortunately, many of the government costs associated with private production are not known at the time of contracting

and can only be estimated. If it is too difficult to estimate the cost of monitoring (for example, when satisfactory performance is hard to quantify), or if the cost of retaining the ability to reinitiate the service is very high, privatization may be inappropriate.

Proponents of privatization have suggested that the cost of contracting should be reduced by the amount of new taxes that the private contractor will pay as a result of receiving the contract.²¹ Presumably this would include only the taxes arising from the work undertaken under the contract and only those that would be returned to the contracting unit—for example, property taxes on a new or expanded local facility to service the contract. In addition, funds received from liquidating equipment may be counted as a one-time cost saving from privatization.²² Statutorily mandated procedures for disposing of public property must be complied with when privatization involves liquidation of equipment.²³

As noted in "Privatization and Competition in Charlotte" (see page 12 in this issue), inherent differences between public and private production make it

difficult for a government to create an entirely "level playing field." It is important to recognize, however, that the government is not *legally* required to do so. Although a local government may not act arbitrarily or discriminate against contractors on the basis of race or political point of view,²⁴ the question of how best to deliver services is within the broad legislative discretion of the governing board. Thus issues of fairness in the cost comparison methodology are of practical and political but not legal significance. Indeed, even if the cost comparison indicates that private production would cost less, the governing body may conclude that other factors make in-house production more desirable.

Competition in the Marketplace

Closely linked to cost as a factor in privatization decisions is the issue of whether there is sufficient competition within the private marketplace. One of the main tenets of privatization is that competition to obtain and retain a contract, whether between public and private providers or among private providers, will improve the quality and lower the cost of the service provided. This philosophy is reflected in the "Yellow Pages test" employed by some units, including Charlotte. As a general rule, all services provided by Charlotte that have Yellow Pages listings are candidates for privatization. For this approach to succeed, however, the local economy must be large enough to sustain a number of private service providers. Where the private marketplace lacks sufficient competition or expertise, private providers may engage in monopolistic behavior, raising prices and reducing quality over time.²⁵

Lack of competition is particularly risky once a local government eliminates its own capacity to provide the service. One commentator describes this concern as follows:

While in principle the government can replace unsatisfactory suppliers and contract with more efficient and effective ones or produce the service itself, this option will often be absent, because no other responsive and responsible contractors are available. When a municipality sells its own fire trucks, buses, or sanitation equipment in favor of contracting out, it greatly reduces the possibility that it can act as a potential competitor to private firms if their performance proved [*sic*] unsatisfactory. Sunk contracting costs and the need for service continuity may mean the government unit may have little choice but to

utilize a particular supplier on a long-term basis. Therefore, the problem of service monopolies cannot simply be avoided by relying on the private sector, since the private sector itself may not be marked by competition among suppliers.²⁶

The government will incur costs to reenter the marketplace or provide temporary service if the contractor defaults or enters bankruptcy, especially if continuity is important to protect public health or safety. These potential costs should be considered as part of the privatization decision.

To guard against this type of dependency, governmental units of sufficient size can consider parceling out service contracts to several private service providers. Using a number of private contractors for the same service at different times or in different parts of the jurisdiction lets the government compare their quality and provides an emergency backup if one of the contractors defaults. Competition can also be created in limited markets. For example, governmental units can jointly contract with private providers for commonly used services, allowing the providers to take advantage of economies of scale and, as a result, to lower fees to each participating unit.²⁷ Another approach for units of sufficient size (100,000 people or more) is to create internal competition by designating separate districts in the city for service by contractors and by public employees, or by establishing multiple districts with public-private competition for each. By creating separate service districts, the city can encourage direct competition between private and public service providers as they vie for future contracts.²⁸

Some functions lack competition in the private sector because they have traditionally been carried out only by the government.²⁹ Government functions that have few or no counterparts in the private sector may not benefit from the economies of scale and the efficiency of production that are often cited as advantages of privatization. Indeed, government takes responsibility for some functions precisely because they do not generate enough profit to interest the private sector. The lack of a readily available independent private marketplace for functions traditionally performed only by government may signal that the functions involve matters of important public health, safety, and welfare requiring significant and continuing government involvement. Nonetheless, whether for economic or philosophical reasons, an increasing number of these functions are being considered for privatization. Once the market for them is opened to private competition, the number of private competi-

tors may increase over time, and the benefits of privatization may be realized.

Some traditionally governmental functions, particularly health and human services, have been privatized through transfer to nonprofit organizations specially organized for that purpose. According to at least one analysis, privatization in this context does not result in the benefits traditionally predicted by its proponents.³⁰ Instead, the nonprofit organizations have taken on many of the characteristics of their governmental predecessors. Officials considering privatization should not make the same assumptions about functions for which there is an independent private market as they make about more traditionally governmental functions that lack a competitive private market.

Performance Requirements and Service Quality

Privatization often requires governmental units to identify and describe levels of service quality. This is necessary to ensure that cost comparisons are accurate and that the privatized arrangement will not result in a decreased level of service. Service quality should be described in terms of performance requirements and should be incorporated into contracts that can be monitored and enforced by the contracting unit.

Most government agencies have not traditionally operated under clearly articulated performance measures. Recently, however, governments at all levels have increasingly begun to engage in performance measurement, and some have defined quality levels as part of their continuing strategies to improve government efficiency and accountability. (See "Measuring the Performance of Local Governments," page 41 in this issue.) Although they may not necessarily do this work as part of a privatization program, it may be useful for that purpose.

Once a contract is awarded, the private provider's obligations are limited to the terms specified in the contract, so the contract must be comprehensive and specific about what is required. Thereafter, adjustments in the level of service or other modifications must be negotiated with the contractor. For example, one city's contract for solid waste collection did not specify that trash around the container must be collected, even though the city typically provided this level of service. Once the contract was in place, citizens complained (to the city, not to the contractor), but the time to define the contractor's responsibility was past.

The city could pay more to adjust the contract, incur expenses to respond with its own forces, or ask the citizens to accept a lower level of service. In contrast, when government forces are doing the work, the unit has more flexibility to adjust service delivery. The lack of flexibility during the term of the contract and the need to articulate performance requirements are significant but easily overlooked factors in privatization decisions.

Local governments can include citizens as well as public- and private-sector participants when developing performance requirements.³¹ These groups can help the governing body determine the level of service to be used to compare costs and thereafter to monitor performance, ensuring that public and private forces deliver the promised quality.

Effect on Public Employees

Another major consideration in whether to privatize is the likely effect on public employees. In some states the presence and the power of public employee unions have featured significantly in debates about privatization. Although North Carolina local governments are prohibited from contracting with unions,³² units generally feel a responsibility to their employees when privatization eliminates jobs. As noted earlier, some governments allow their own departments to prepare bids, in effect offering government employees the opportunity to make the best case for retaining their positions.

When positions are eliminated, units may try to reduce staff through attrition or transfer within the organization. In some cases the privatization agreement may require that the private company offer positions to former employees at equivalent salary levels or for a minimum time.³³ Such a requirement may reduce the private company's flexibility in hiring and compensation and thus reduce the government's potential savings, but the government may be willing to accept that cost in consideration of its employees. Finally, some units have considered giving the employees working in soon-to-be-privatized activities an opportunity to form a private company to compete for the work.

Ultimately a government's approach to job loss from privatization may be a function of the underlying motivation for the change. If the unit is pursuing privatization to reduce the size of government or to eliminate government competition with the private sector, a decrease in the number of public employees

may be a desired result. Nonetheless, providing reasonable opportunities for individual employees who are displaced by privatization is a major factor for most governing boards deciding whether to privatize. The article about Charlotte's competition program (see page 12) demonstrates several strategies for addressing employee issues.

Equity and Protection of the Public Interest

Much of the privatization debate extends beyond considerations of cost and performance. For many engaged in that debate, an underlying concern about privatization stems from their fundamental views on the role of government in society. Although some people feel that government has grown too big and too often performs functions better left to the private sector, others fear that the private sector will not adequately protect the public interest when it takes over functions previously provided by the government. Even the most ardent privatization proponents recognize that government has some role to play. The difference in approaches stems from the individual's view of what constitutes essential government activity.³⁴

Related to the debate about the appropriate role of government is the effect of privatization on citizens' access to services. When faced with a proposal to privatize a traditional government service, citizens have in many cases voiced concern that private service providers will restrict public access to that service. Despite some cynicism about government, citizens recognize that they have at least some opportunity to appeal to and perhaps to influence their elected officials, an opportunity that is cut off if a service is left entirely to the private sector. Of course, when government contracts with the private sector, the unit still has a role in arranging the service, such as establishing performance levels and financing, and in monitoring it. But laws designed to facilitate public access, such as open meetings and public records laws, generally do not apply to private entities, even when they are under contract with government and being paid with tax dollars. (See "Privatization: Legal Issues for North Carolina Governments," page 25, for further discussion about the question of when public laws apply to private entities.) Indeed, proponents of privatization sometimes cite as one of its advantages the fact that the public bidding and personnel laws—identified as causes of increased cost and inflexibility of government production—will not apply. As noted earlier, when considering privatization, governments must determine whether particular services

require continued government involvement, in either arranging or producing, to protect the public interest.

Governments have responded to public concerns by involving citizens in privatization decisions through panels and commissions.³⁵ This allows governmental units to receive public input into how contracts with private providers are established and monitored and thus to build public confidence in the outcomes of privatization.

Conclusion

Privatization has the potential to improve significantly the way in which government operates, through cost savings, increased accountability, and increased efficiency. At the same time, the political and philosophical debate about privatization raises questions about the proper role of government. The article on legal issues (see page 28) notes that as private entities assume an increasing role in functions previously provided by government, courts have struggled to draw clear lines of distinction between public and private action. Citizens and elected officials must also find ways to strike the proper balance between cost-effectiveness and the public interest. Decision makers can benefit from careful consideration of the various factors involved in privatization and can learn from the experiences of other governmental units in making their own decisions on privatization.

Notes

1. Jonas Prager, "Contracting Out Government Services: Lessons from the Private Sector," *Public Administration Review* 54, no. 2 (March/April 1994): 177.
2. Lawrence L. Martin, "A Proposed Methodology for Comparing the Costs of Government Versus Contract Service Delivery," *The ICMA Municipal Yearbook* (Washington, D.C.: International City/County Management Association, 1992), 12-15 [citing David Seader, "Privatization and America's Cities," *Public Management* 68 (Dec. 1986): 7].
3. *Privatization 1995: Ninth Annual Report on Privatization* (Los Angeles: Reason Foundation, 1995), 2.
4. *See From Privatization to Innovation: A Study of 16 U.S. Cities* (Chicago: The Civic Federation, February 1996) (describing city programs in outsourcing, competitive contracting, restructuring, and employee innovation).
5. Jim Flanagan and Susan Perkins, "Public/Private Competition in the City of Phoenix, Arizona," *Government Finance Review* 11, no. 3 (June 1995): 7.
6. Jacqueline Bueno, "As Privatization Sweeps the South, Past Efforts Offer Some Lessons," *Wall Street Journal* (Oct. 4, 1995), S.1.
7. As discussed more fully in another article in this

issue. "Privatization: Legal Issues for North Carolina Local Governments" (see page 28), state law requires local governments to receive competitive bids from the private sector for construction or repair work estimated to cost more than \$5,000. See N.C. Gen. Stat. (hereinafter G.S.) §§143-128, -129, -131.

8. Legislative Research Commission, State Government Reorganization and Privatization Committee, *Report to the 1995 General Assembly*, 1996 Regular Session, May 1, 1996, 15-18.

9. MGT of America prepared three reports: *Overview of Privatization in Public Higher Education and Other Government Operations*, *Base-Line Report*, and *List of Events for Conducting a Comprehensive Privatization Review of a University*. They are available from the Institute of Government library.

10. *Competition/Privatization Highlights*, Annual Report, July 1994-June 1995 (available from the city of Charlotte).

11. See John McGillicuddy, "Mecklenburg County's Privatization Efforts Work: Guidelines Help Determine Appropriate Privatization," *CountyLines* (Raleigh, N.C.: North Carolina Association of County Commissioners) 22, no. 14 (July 1996): 6-7.

12. See Harry P. Hatry, Kenneth P. Voytek, and Allen E. Holmes, *Building Innovation into Program Reviews: Analysis of Service Delivery Alternatives* (Washington, D.C.: The Urban Institute, 1989), 9-10; Werner Z. Hirsch, *Privatizing Government Services: An Economic Analysis of Contracting Out by Local Governments* (Los Angeles: Institute for Industrial Relations, 1991), 22-32 (describing components in terms of ownership of assets, production, management, financing, allocation, and regulation); Lydia Manchester, "Alternative Service Delivery Approaches and City Service Planning," in *Public Sector Privatization: Alternative Approaches to Service Delivery*, Lawrence K. Finley, ed. (New York: Quorum, 1989), 13-23 (distinguishing between arranging and delivering services); Randy L. Ross, *Government and the Private Sector: Who Should Do What?* (New York: Crane Russak & Co., 1988), 5-21 (presenting an analytic framework dividing functions into funding, production, utilization, and control).

13. Ruth Hoogland DeHoog, *Contracting Out for Human Services: Economic, Political, and Organizational Perspectives* (New York: State University of New York Press, 1984), 6.

14. This is referred to as the "decoupling of funders and users" in the framework proposed by Ross, *Government and the Private Sector*, 11.

15. Evalina R. Moulder, "Privatization: Involving Citizens and Local Government Employees," *Baseline Data Report* 26, no. 1 (Washington, D.C.: International City/County Management Association, 1994): 2.

16. Martin, "A Proposed Methodology," 12 [citing Mercer/Slavin, *Findings of a National Survey of Local Government Service Contracting Practices* (Atlanta: Mercer/Slavin, 1987), 2, 13-14].

17. See Lawrence Martin, "How to Compare Costs Between In-House and Contracted Services," *Privatization Center How To Guide #4* (Los Angeles: Reason Foundation, March 1993); and Pete Rose, "Costing Government Services: Benchmarks for Making the Privatization Decision,"

Government Finance Review 10, no. 3 (June 1994): 7-11. Charlotte has developed a *Competition Handbook* (available from the city) for use in competing with potential private-sector providers. It sets forth a methodology for preparing a "bid" that represents the city's cost for a particular service.

18. See Government Finance Officers Association, *Governmental Accounting, Auditing, and Financial Reporting* (Chicago: GFOA, 1994), chaps. 2, 3.

19. Proprietary funds, including enterprise funds, seek to account for the total cost of the enterprise (including capital asset depreciation), whereas governmental funds seek to account for the spendable financial resources moving in and out of the fund. *Governmental Accounting, Auditing, and Financial Reporting*, 12-14.

20. The methodologies cited in note 17 adopt the latter approach.

21. E. S. Savas, "It's Time to Privatize," *Fordham Urban Law Journal* 19 (1992): 781, 792.

22. Although it can be argued that these funds should not be counted because they represent the residual value of equipment purchased with public funds, privatization eliminates the need to continue using the equipment to the end of its useful life.

23. See G.S. Chap. 160A, Art. 12.

24. See Board of County Commissioners, *Wabaunsee County v. Umbehr*, 64 U.S.L.W. 4682 (1996); and *O'Hare Truck Service v. Northlake*, 64 U.S.L.W. 4694 (1996) (barring government discrimination against independent contractors based on their political speech or affiliation).

25. David N. Ammons and Debra J. Hill, "The Viability of Public-Private Competition as a Long-Term Service Delivery Strategy," *Public Productivity & Management Review* 19, no. 1 (Sept. 1995): 12-24.

26. DeHoog, *Contracting Out for Human Services*, 23.

27. Prager, "Contracting Out Government Services," 180.

28. Ammons and Hill, "The Viability of Public-Private Competition," 16.

29. Lawrence Martin makes a similar distinction between "ancillary services," such as printing, custodial services, security, water, billing, and maintenance, and "core services," such as police, fire protection, and land use planning. See "Selecting Services for Public-Private Competition," *ICMA Management Information Service Report* 28, no. 3 (March 1996): 2-3.


30. Steven Rathgeb Smith and Deborah A. Stone, "The Unexpected Consequences of Privatization," in Michael K. Brown, ed., *Remaking the Welfare State* (Philadelphia: Temple University Press, 1988), 232-52.

31. See Hatry, Voytek, and Holmes, *Building Innovation*, chap. 3; and Moulder, "Privatization."

32. See G.S. 95-98.

33. "Employee Issues in Privatization," *ICMA Management Information Service Report* 27, no. 10 (Nov. 1995): 8-9.

34. As illustrated by the North Carolina Supreme Court decision in *Maready v. City of Winston-Salem*, discussed in "Economic Development after *Maready*" (see page 55 in this issue), the legal parameters of proper governmental activity change over time in recognition of changing political, economic, and social conditions.

35. See Moulder, "Privatization." 

Privatization and Competition in Charlotte

Pamela A. Syfert and David Cooke



On June 10, 1996, the Charlotte City Council unanimously approved an agreement with CM-ConOp for operation and maintenance of a city-owned water treatment plant and wastewater treatment plant. Under the five-year agreement, the city will pay CM-ConOp \$7.5 million, and water and sewer customers will save \$4.2 million. CM-ConOp's proposal beat those of seven international firms experienced in water and wastewater contract operations.

What is CM-ConOp? CM-ConOp stands for Charlotte-Mecklenburg Contract Operations, a team composed of and representing the employees of the City of Charlotte and the Charlotte-Mecklenburg Utility Department. Simply put, city employees faced with competition found better and more efficient ways to operate water and wastewater treatment plants. To date, this is the city's best illustration of the benefits derived when traditional municipal services—that is, those delivered by enterprises owned and wholly operated by city workers—are subjected to head-to-head competition with the private sector.

Charlotte has found that competition works. The purpose of this article is to share our experiences introducing competition into local government. We are asked frequently about our efforts: How did you get started? How did employees respond? Did you have to change your processes? Did you save any money? How did you monitor the private sector? This article attempts to address many of these questions.

Pamela A. Syfert is the city manager of Charlotte. David Cooke was the coordinator of the city's privatization and competition efforts at the time he wrote this article. He is now deputy county manager of Wake County.

“Privatization” as Defined in Charlotte

The term “privatization” means many things to many people. In Charlotte it means principally (1) contracting or inviting competition for services and (2) asset management.

Contracting or Inviting Competition for Services

Charlotte's goal is to provide “the best service at the lowest cost.” To this end, since February 1994, the city has investigated more than fifty possibilities for contracting with the private sector or inviting competition to provide city services. The initiatives have involved all the services that are also available in the marketplace. These areas include residential garbage collection for one-fourth of the city, landscape and grounds maintenance, fueling of the city fleet, printing and copying, administration of the false alarm ordinance, special transportation services, street widening and resurfacing, replacement of traffic signal bulbs, tree trimming and removal, building maintenance, and others.

The city has achieved savings in most areas, whether the city or private firms have won the competition to provide the service. Examples include estimated annual savings of \$70,000 in garbage collection and \$95,000 in print shop and copier services and, as already mentioned, an estimated five-year savings of \$4.2 million in operation and maintenance of water and wastewater treatment plants. More important, competition has changed the day-to-day functions of the city's workforce. Employ-

ees now constantly look for ways to reduce costs and improve services. These benefits cannot always be documented, but they are real and are the best measures of the success of competition.

Asset Management

“Asset management” means identifying and analyzing all physical assets (land and buildings) and evaluating alternative arrangements for ownership and management. Our goal is to maximize use of and return on existing and future assets.

During fiscal year 1995, Charlotte sold approximately \$10 million in property. An additional \$20 million in property is on the market, including the city’s

old convention center. The city has also considered selling a wastewater treatment plant and getting out of the cemetery business. Today a debate about the future of the Charlotte Coliseum is under way.

Evolution of the Privatization Policy

Like most other cities and most counties across the United States, Charlotte for some time has called on the private sector for many services, including collection of garbage from apartment complexes, janitorial services, and engineering design. However, during the early 1990s, fervor for privatization and more efficient or smaller government spread across the nation. Indianapolis, under Mayor Stephen Goldsmith, was

Charlotte’s Policy on and Goals for Competitive Bidding

Policy Statement

The City Council will evaluate whether an individual City service should be considered a “public” or “private” service. If the Council determines that a service is a public service (involving a City-wide standard of service, determined and administered by the City and paid for by a tax or governmental levy), the following policy shall apply:

In evaluating the most efficient and effective way to provide public services, the City shall use a competitive process in which private service providers are encouraged to compete with City departments for the opportunity to provide such services, and in which the option of delivering services through public employees and departments must be justified through the competitive bidding process. The City shall encourage the provision of public services through contracts with private service providers, wherever this offers the lowest cost, most effective method of service delivery consistent with service level standards and other adopted City policies.

Goals for Services Contracting

1. The City Council wishes to provide the highest quality services at the lowest cost, whether provided by City forces or by private contracts.
2. Current contracts for services will be reviewed to

ensure that existing private service providers are being held accountable and are providing effective and efficient services as specified by individual contracts. This review may result in placing a service out for competitive bidding again, with the City also submitting a bid for doing the work.

3. The City Council will systematically assess current City services to determine the appropriate level of service to be provided, whether by City forces or by private contract.
4. The City Council will assess the relationship of a service being considered for competition with other Council priorities and policies. Council will use this assessment to determine whether the services will be subject to competitive bid and in what amount, to determine any special provisions which may need to be included in specifications to address other Council priorities and policies.
5. Efforts should be made to minimize the impact on current City employees affected by competition. Each competition recommendation should include an assessment of the effect on employees and recommendations for handling any negative impact.
6. The City Council will make an assessment of how to best provide a “level playing field” for the City and all potential private service providers. This assessment will include defining the public values of City services and how those values will be addressed in the bid process and specifications.

among the most heralded examples. The city pursued privatization in nontraditional areas, including wastewater treatment and airport operation, and it required public employees to compete with the private sector in most areas. What was happening in Indianapolis was on the way to Charlotte.

In 1992 Charlotte's mayor, Richard Vinroot, appointed a Mayor's Privatization Task Force, made up of citizens, to "evaluate services and facilities provided and managed by the City of Charlotte and to determine whether they could be delivered more effectively and efficiently by the private sector." After a year's study, the task force reported to the city council, recommending that the council foster competition between the public and private sectors in providing municipal services. "Competition is the primary force that keeps private businesses efficient and focused on customer needs," the task force wrote. "The city should have to compete and perform in the same manner as demanded for private business to continue performing services."²

In November 1993 the city council approved a policy statement and goals for contracting for services (see page 13), which can be summed up as follows: the city will seek the best service at the lowest cost, either through city forces or the private sector, and a competitive procurement process will determine who the service provider will be. The city council also established a Citizens' Privatization/Competition Advisory Committee to monitor progress toward the goals.

Implementation of the Policy

Following the approval of a privatization policy and the establishment of a citizens' advisory committee to monitor progress, the organization wrestled with how to prepare a workforce of 4,500 to compete, especially when competition might mean the loss of jobs. The city has used three strategies over the past three years: communication efforts, organizational changes, and changes in systems and policies.

Communicating a Future with Competition

From city employees' perspective, the whole world was changing. One day they worked for the city, fairly secure in their jobs as long as they worked hard. The

next day their jobs were contingent on competing successfully with the private sector. We took several approaches to communicating that competition was here to stay in our organization, that city workers could compete successfully, and that competition could make us better.

"A Picture of Our Future"

In August 1994 the city manager initiated a process to answer the question, "What might the city's services and workforce look like four years from now?" As part of that process, a group of employees and managers developed a "picture." They based it on an examination of local, state, and national trends and the expectations of political leaders, citizens, and city employees.

The following statements are taken from Charlotte's *Picture of Our Future*:³

- Government will be addressing community problems through partnership arrangements and by brokering services, placing less emphasis on new government programs as solutions to problems.
- Government will be competitive in cost and quality with the private sector for services provided by city employees.
- All city services that are available in the private sector will be put up for competitive bid.
- There will be fewer employees providing direct services to citizens, except for public safety.
- Competition will change the way in which the city approaches human resource issues: recruiting, pay and benefits, training, scheduling, promoting, etc.

In November 1994 the city manager and the deputy city manager began meeting with city employees to discuss the future. Workers were discomfited by the messages communicated but agreed that the messages were an honest representation of the expectations of Charlotte's citizens and elected officials. The *Picture of Our Future* became the focal point for explaining the coming changes in how we would conduct our business. (The discussions revealed that employees appreciated knowing where the organization was going, even if the news was not entirely positive for them. Everyone appreciates honesty.)

"Privatization/Competition Update"

The city also began to publish a monthly *Privatization/Competition Update* and to distribute it to all city employees, city council members, and mem-

bers of the citizens' advisory committee. The update chronicles competition efforts throughout the city government.

Organizing Differently

Citywide Reorganization

In September 1993, before the city council established the privatization policy, the city's twenty-six departments were reorganized into nine "key businesses" and four "support businesses." The goals of the reorganization were to focus on essential service areas, to run each department more like a private business, and to make the departments more accountable. Key businesses were required to develop business plans, and decisions about human resources, budget, finance, and purchasing formerly made by central administrative staff were delegated to the key business executives (formerly department heads). The change was significant and, in hindsight, critical to competing successfully with the private sector. Key businesses have now had three years' experience in business planning and operating more autonomously (for example, making decisions about buying technology, redesigning jobs, and reclassifying employees).

Competition Plans

Each key business—even Police and Fire—has a five-year competition plan that includes the following elements:

- A list of the services provided by the key business that are also available in the private sector
- A schedule for subjecting the services to competitive bidding
- Strategies for making the key business more competitive

A summary of the competition plan for the Charlotte-Mecklenburg Utility Department appears as Figure 1.

Support Staff

During fiscal year 1995, we reallocated positions to provide support and assistance to key businesses in competition, to track the progress of competition and privatization citywide, and to work with the citizens' advisory committee. Support staff help key businesses

prepare requests for proposals (RFPs), determine the cost of services, prepare bids and proposals, and learn how to become more competitive.

Steering Committees

We established two steering committees to oversee the privatization and competition effort: one on contracting and inviting competition for services, the other on asset management. Each committee includes key business executives and an assistant city manager.

Citizens' Advisory Committee

The Citizens' Privatization/Competition Advisory Committee created by the city council in 1993 has played an important role in providing detailed guidelines on contracting and inviting competition for services, and asset management. The city council's guidelines prescribed a broad role for the committee, and, as a result, its members have been involved in the competition process from beginning to end. They have helped prepare RFPs, reviewed the city's costing methodologies, evaluated proposals and bids, and made recommendations to the city council.

Making Changes in Systems and Policies

We understood early that if the city was to compete successfully, changes would be necessary. Indeed, changes have occurred at the work unit level, the key business level, and the city level. Each competition initiative seems to alter somewhat our way of doing business. Two citywide changes are described in the following sections.

Activity-Based Costing and Management

To control our costs, we are implementing activity-based costing and management on an organization-wide scale. Activity-based costing requires each of the key businesses to identify all "activities," or services, and to identify all resources (staff, tools, office space, supervisors, etc.) necessary to deliver the services. Our goal is to put all cost information (including all overhead) at the activity or service level. We expect this to change how we prepare and administer our budget and track financial information.

Workforce Preparedness

Although city employees never had an explicit guarantee of employment until retirement, they certainly had an implied guarantee (we refer to it as the "informal contract"). That has changed. Our efforts to prepare employees and to communicate a different message have several components:

- Adopting a new policy, which does not imply lifelong employment. The new *Human Resources Philosophy* states:

The City of Charlotte is committed to providing quality services at market competitive costs through service delivery by City employees or when costs would be lower, through privatization. The City is also committed to the skills development of its employees, both to enhance their services to citizens, or when necessary due to organizational changes or privatization to prepare them for opportunities within or outside of the City organization.²

- Continuing our pay and benefits programs, which are based on the city's remaining competitive in recruiting and retaining employees, and becoming competitive with private organizations in terms of overall costs. The programs are also intended to emphasize performance.
- Evaluating incentive programs similar to the private-sector practice of profit sharing.
- Offering new training programs. City employees may enroll in a course called Competition 101. In the training, employees are assigned to groups, each of which forms a business to compete against the city. We ask the groups to identify what they would do differently (in running their new business) than the city does today. Then we explore how the city might implement those changes itself. If we want to compete successfully, we need that kind of approach.

We also ask each employee to think about what he or she can do differently. Two-way responsibility is stressed: the organization's responsibility is to ensure that the environment (resources, work rules, etc.) exists for successful competition, and the employee's responsibility is to use the resources to compete. Both the organization and the employee win with this arrangement. Each participant in Competition 101 receives a book titled *The Employee Handbook of the New Work Habits for a Radically Changing World*. It describes, in easy-to-read form, what an individual can do to be successful.

Lessons Learned

Although we are still learning, we have already learned much. The lessons include the following:

Know the Competition

We know our competitors much better than we did before. In the past our efforts to establish standards focused on comparing Charlotte with other cities. We wanted to compare our service levels, staffing, and costs with Raleigh; Winston-Salem; Greensboro; Richmond, Virginia; and so on. In the heat of competition, however, these comparisons are irrelevant. We now compare ourselves with our private competitors: in sanitation, with BFI or Waste Management; in wastewater treatment, with JMM or Wheelabrator; in fleet management, with Ryder or Penske.

Competition also leads to sharing. We have found many private firms willing to assist us with information, which we use to improve our posture before formal competitive bidding.

Know the Costs

We recognize the cost of services better than we did before. One lesson is that bids differ from budgets, as the authors of "The Charlotte Model for Competition: A Case Study" explain (see page 19). Unlike budgets, which are all-inclusive, bids must respond directly to the requirements of an RFP. They should not be inflated to account for events or conditions outside the RFP. Key businesses are not required to include the total cost of a service in a bid, but they do have to identify that cost, which includes their own overhead and citywide overhead for costs such as finance, human resources, training, the city manager, and the city attorney.

Attention to costs has created many positive changes in our organization. Some examples include a key business closing an operations yard to reduce costs in residential garbage collection; several key businesses turning in vehicles that were barely used, to reduce the costs of fleet ownership; and several key businesses reducing the amount of office space that they used because it was now being charged to them per square foot.

Analyzing costs has affected internal services. Key businesses now question the amount and the nature

Figure 1
Charlotte-Mecklenburg Utilities Department Five-Year Competition Plan

Services Available in Private Sector	Employees at Risk If CMUD Loses Bid	Contract Amount (\$)	Savings Realized (\$)
Scheduled for Competitive Bidding in FY 1995			
Odor control	1.0	125,000	225,000
Maintenance of grounds	3.0	99,590	39,353
Janitorial services	3.0	66,708	34,318
Total	7.0	291,298	298,671
Scheduled for Competitive Bidding in FY 1996			
Irwin Creek Wastewater Treatment Plant	25.0	2,700,000	796,858
Use of wastewater byproducts as fertilizer	0.0	680,000	164,300
Residuals Compost Management Facility	6.0	1,300,000	186,000
Vest Water Treatment Plant	14.0	1,200,000	193,993
Location of water lines	3.0	160,000	0
Testing of soils and materials	5.0	192,750	1,000
Maintenance of right-of-way	5.0	100,100	19,040
Maintenance of lift stations	9.0	665,000	0
Maintenance of instrumentation*	2.0	111,600	N/A
Total	69.0	7,109,450	1,361,191
Scheduled for Competitive Bidding in FY 1997			
Labs	12.0	775,000	
Hydraulic and mechanical sewer cleaning	20.0	733,000	
Service renewals	5.0	450,000	
Trunk line monitoring/basin	0.0	250,000	
Permanent flow monitoring	0.5	65,000	No data available yet
Meter reading (1/4 route sets)	6.0	198,000	
Herbicide/TV sewer lines (cleaning)	3.0	140,000	
TVing sewer lines (cleaning)	3.0	121,000	
Total	49.5	2,732,000	
Scheduled for Competitive Bidding in FY 1998			
Maintenance of hydrants	8.0	478,000	
Maintenance of meters (1/4 system)	2.0	63,000	
Total	10.0	541,000	
Scheduled for Competitive Bidding in FY 1999			
Preventive and corrective maintenance	19.0	1,260,000	
Water main repairs	5.0	128,000	
Meter reading (1/4 route sets)	6.0	198,000	
Total	30.0	1,586,000	
Grand Total	165.5	12,259,748	1,659,862

Notes: All costs are annualized. Services are listed in the year in which the RFP will be issued. Contract amounts are actual for FYs 1995 and 1996, estimated for FYs 1997, 1998, and 1999. Savings are estimated.

*Maintenance of instrumentation at one plant is scheduled to be contracted out as a benchmarking effort.

of the costs allocated to them from internal support services (purchasing, finance, human resources, information technology, fleet management, etc.). As a result, charge-back systems are becoming more closely linked to consumption (of the service) and to market

prices. Support services are also getting smaller. Figure 2 illustrates the changes in staffing in Charlotte. The ratio of overhead employees (those providing support to key businesses) to total employees has declined since fiscal year 1993.

Pay Attention to Morale

Privatization and competition require that the organization change. As noted earlier, we have entered into a new "contract" with employees, and that has affected morale. Some employees long for the organization of yesterday. Some are energized by the opportunities that change brings. Although we take morale seriously, we are not retreating to the old ways.

We try to focus on what we can control and on the environment that we as managers create for our workforce. Is the environment open enough for risk taking and a free exchange of ideas? Do key businesses have the staff, the tools, and the technology to be efficient? Do they have the time and the resources for training? In short, are we supporting employees as they compete? Our aim is to answer all these questions affirmatively.

Involve Employees

Who knows most about how services are provided? Who knows best what we should be doing differently to be more competitive? That is right—our very own employees. The people who are providing the services day in and day out (and whose jobs are at stake) are the ones who should be involved in the competition process.

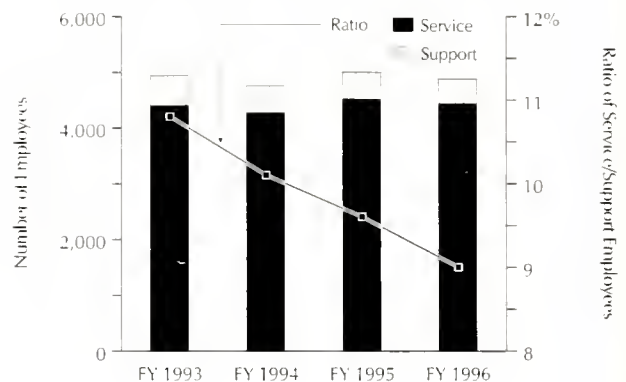
Understand the Unpredictability of Bidding

"Benchmarking"—that is, developing targets for performance—is an important means of assessing an organization's strengths, but an organization should exercise caution in using benchmarking to make decisions about service delivery. We have learned that "you never really know until you bid." For example, we learned what firms were charging to install radios and electrical equipment in police cars in other cities and in counties. On that basis we calculated our costs and determined that we would be the low-cost provider of that service. We then bid for it. When the bids were opened, we were not the winners. The winning firm had offered Charlotte prices that were one-fifth of those that they were charging other customers.

Acknowledge That a "Level Playing Field" Is Not Always Possible

The city has major cost advantages over private firms. It pays no taxes (income, property, sales, or gas) and does not need to make a profit. On the other

Figure 2
Changes in the Charlotte Workforce, 1993–96



hand, when the city bids, its bids must reflect its costs. The city does not have the latitude to underprice a bid—in marketing jargon, to "lowball" or "buy the bid" or propose a "loss leader"—as private firms do for a variety of sound business reasons.

In several instances after a bid has been awarded, losing firms or city staff have asserted that the winner bought the bid. Our response has been that as long as a contractor adheres to the performance criteria of the contract, the winners are the taxpayers, who receive "the best service at the lowest cost."

Recognize That Competition Works

This article began with the conclusion that competition works. That is our greatest lesson learned. We are accomplishing things today that we could not have accomplished without competition. Over the last five to six years, we have rightsized, downsized, reengineered, and improved. These efforts resulted in reduced staff and reduced costs. Competition has taken us to a new level. Charlotte has shown that given the time and the resources, local governments can compete successfully with the private sector.

Notes

1. City of Charlotte, Mayor's Privatization Task Force, *Privatization Task Force—Final Report* (Charlotte, N.C.: June 30, 1993), 2.
2. Mayor's Privatization Task Force report, 13.
3. Staff of the City of Charlotte, *A Picture of Our Future* (Charlotte, N.C.: Nov. 1994), 1.
4. City of Charlotte, Human Resources Department, *Human Resources Philosophy* (Charlotte, N.C.: April 1994), 1.

The Charlotte Model for Competition: A Case Study

Barry M. Gullet and Douglas O. Bean



The Charlotte-Mecklenburg Utility Department (CMUD) is a municipal agency that provides water and wastewater services to approximately 500,000 residents of Charlotte and Mecklenburg County in the southern Piedmont region of North Carolina. In 1995, spurred by inquiries from the private sector, unsolicited proposals to purchase system components, and political interest, the department decided to allow private firms to compete with city staff for operation and maintenance of two of the department's eight treatment plants, one a water treatment facility, the other a wastewater treatment facility. Bidders could submit separate bids for the water plant and/or the wastewater plant or a combined bid for both. In 1996 the department received eight bids, seven from private firms and one from the department's own bid team, referred to as Charlotte-Mecklenburg Contract Operations, or CM-ConOp. One of the bids was for the water plant only. The other seven, including CM-ConOp's, were combined bids. CM-ConOp submitted the lowest cost proposal, which will result in savings of \$4.2 million over the five-year term of the contract.

Organization for Competition

City staff and elected officials strongly desired that the competition processes take place on a "level playing field." Consequently they put up an imaginary wall between a team that would assemble the bidding documents and evaluate the bids (the "evaluation

team") and a team preparing the staff's bid (the "bid team"). Each team had separate consultants as resources. The evaluation team was composed of city staff and citizens' advisory committee members to ensure the integrity of the process and the ultimate recommendations.

Competition as Reality

All the discussion and the preliminary work that led to competition for operation of the plants were of interest to everyone concerned. A combination of three events, however, drove home the reality that CMUD might not always operate the facilities.

First, after CMUD issued the request for qualifications, it invited potential bidders to tour the plants. Two members of the bid team participated in these tours to hear questions and concerns and generally to observe the competitors. It was sobering for them to see more than thirty people at the plants, to know that those people represented the largest and most reputable contract operations firms in the world, and to realize that the firms' representatives were there to try to take over the plants.

The next and most inspiring experience was visits that the bid team made to observe firsthand the

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private operation of treatment plants. The Charlotte City Council had often cited Indianapolis as a model city for competition. The plants privately operated for Indianapolis by the White River Environmental Partnership were therefore of great interest to the bid team. So were the facts surrounding the Indianapolis staff's unsuccessful bid to continue to operate those facilities. The bid team also spent several days at plants in the Montreal, Canada, area. It witnessed firsthand the excellent appearance and operation of all these plants with minimum staffing, and it heard from the managers and the operators about their operating strategy. This visit made the bid team realize that to win the competition, it needed to make major changes in the CMUD operation. Just as important, the bid team came away satisfied that CM-ConOp could operate in the same manner as the successful private firms.

The third event was the issuance of the request for proposals (RFP). Until that time, everything had been speculation and general preparation. Issuance of the RFP laid out the rules and the requirements for the first time and firmly defined the schedule for the remainder of the selection process.

A New Perspective

A major challenge for the bid team was to prepare a proposal based on a completely new perspective. From the research that the team had completed, it knew that traditional public methods of operating treatment plants were not likely to win the competition. Further, the bid team quickly realized that it had to base the proposal wholly on the RFP, excluding work taking place at both plants outside the scope of the bids.

Everyone on the bid team was experienced at preparing a budget. No one was experienced at preparing a bid. Budgets had to be all-inclusive and capable of absorbing any changed conditions or events over the two-year budget cycle used by the City of Charlotte. Finishing a budget cycle significantly under budget was acceptable. In fact, it was encouraged. A bid, on the other hand, could not be inflated. The RFP specifically defined the bidders' responsibility for changed or unexpected conditions. To be successful, the bid team had to set standards by and model private, not public, methods. This task was difficult because of the limited availability of reliable information from private plants.

City and CMUD policies ran counter to some changes that the bid team felt it had to make in order to win. The team had to learn to think in new ways and gather backing from managers for separating CM-ConOp from some policies. This actually turned out to be easier than expected because departments such as Human Resources were anxious to support CM-ConOp's bidding efforts.

The bid team also had to learn to apply more precision to plant operations. Traditionally, using more chemicals than were actually required, or running equipment continuously or at the operator's convenience, had been acceptable. To obtain the most efficient operations, staff had to have better control over such processes. Precision was also critical to estimating the consumption of chemicals and power.

Bid Development

With the guidance of a consultant (HDR Engineering, Inc.), the bid team used a methodical approach to developing the bid and the operating strategy for each plant. It focused on four major areas to improve operations and reduce costs: energy and utilities, treatment processes, controls and automation, and personnel. Within each area, it developed a menu of options. The options ranged in some cases from status quo operation to extremely radical and potentially controversial ideas. The team calculated and documented the potential savings and benefits of each option. Many options involved capital expenditures or investments. The team also determined these costs. Because the bids were to cover five years, the capital or implementation costs were amortized over this period at the same interest rate paid by the city on recent bond sales. The bid team also considered the risk associated with each option. During the development of the proposal, the team decided that it would implement several options carrying a moderate risk of not producing the projected levels of savings, but it would take no credit for savings in the bid. For example, the team projected one strategy to produce \$10,000 in savings. However, the certainty of the projection was low, so the bid did not take the \$10,000 into account. This is an important point, for a program to share savings beyond the bid level with the plant staff was a major incentive in the CM-ConOp proposal.

The bid also proposed strategies involving staffing and personnel costs, including reduction of the total

staffing for the two plants from twenty-nine to sixteen positions. In the months leading up to the deadline for submitting the bid, both plants operated with employee counts approaching the levels in the proposal. The department allowed this to take place in preparation for the reductions anticipated if CM-ConOp or a private firm was the successful bidder.

Although the staffing reductions have attracted a large amount of attention from proposal evaluators and others, the most significant personnel strategies are related to incentives, salaries, and training.

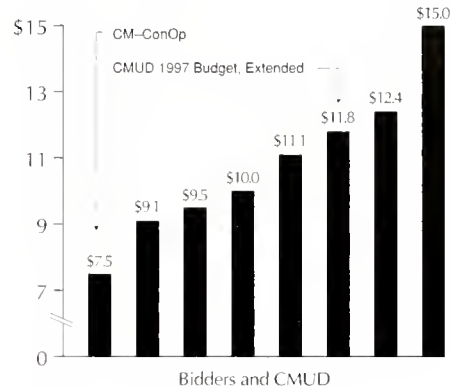
Incentives

The CM-ConOp proposals included an incentive system that was unprecedented in Charlotte city government. Indeed, it was unlike any in local government elsewhere, to the knowledge of CMUD personnel. On the basis of private operating practices that it had observed, the bid team firmly believed that strong incentives were necessary to maintain operators' interest in the success of the plants. As proposed, the incentive plan would return one-half of any operational savings beyond the bid amount to the plant staff (savings being the bid amount minus the actual costs). The remaining one-half would be retained by the plant, to be accumulated as an operating buffer or used for minor purchases or improvements. Goals for operating costs would be set and evaluated monthly. Payouts to the employees would be made quarterly, but half of the amount due would be held back for payment annually. Cost overruns would be deducted from accumulated savings. Also, for monthly savings to accrue to employees, two performance goals had to be met: the plant had to be in full regulatory compliance, and there could be no lost-time accidents.

Salaries and Benefits

In the earliest days of discussions about competition in Charlotte, employees expected that to compete with the private sector, a bid from a city team would have to reduce salaries and benefits. As a key bidding strategy, CM-ConOp actually proposed salary increases ranging up to 20 percent for some employees. Benefits remained unchanged. The reason for the salary increases was to attract and retain the most highly skilled and best-qualified operators possible. An interesting result of the competition process

Figure 1
Net Present Values of Bids and CMUD Projected Operating Costs for Five Years, for Both Plants
(in millions of dollars)



Notes: "Net present value" is a calculation that adjusts downward net expenditures or revenues projected for future years because of the risks associated with cash flows. The chart shows for each bidder the totals of the bid amount for the first year of the contract plus the net present values for the four other years.

The rounded figures used in the chart show a difference of \$4.3 million between CM-ConOp's bid and CMUD's projected operating costs. The actual difference was \$4.2 million, as reported in the text.

is that CMUD will now have different compensation plans for operators depending on the plant at which they work.

Training

Training was also a key bidding strategy for CM-ConOp. Substantially more funds were included in the bid amount than had ever been invested in training of operators. This was critical to developing excellent operators and sustaining high plant performance at minimum cost. CM-ConOp's goal was to raise each operator to the level of a trainer in one or more particular aspects of plant operation so that an internal network of experts would be available as a resource for all the CMUD plants. Additionally, CM-ConOp proposed cross-training of operators to allow better use of time and to build greater understanding of overall operations and goals.

Selection

The bids were evaluated on the "net present value" of the bid amount for each of five years. (Net present value is a calculation that adjusts downward net expenditures or revenues projected for future years be-

cause of the risks associated with cash flows.) The bids submitted by CM-ConOp were the lowest in every case. The five-year totals of CM-ConOp and the six other firms submitting combined bids are shown in Figure 1. For comparison, the fiscal year 1997 operating budgets for the two plants before the competition have been added together and extended for five years, and their net present values have been calculated and totaled.

The evaluation team concluded that the CM-ConOp proposal should be accepted, and it presented its recommendation to the CMUD Advisory Committee and to Charlotte's Citizens' Privatization/Competition Advisory Committee. After hearing the details of the proposal and understanding the level of evaluation completed, both groups unanimously approved the recommendation. The final recommendation to the Charlotte City Council on June 10, 1996, was that the CM-ConOp proposals be accepted and that the council approve a resolution establishing a memorandum of understanding with CM-ConOp.

Unexpected Results

The competition process dramatically changed the perspective of the bid team members. Evidence of this has surfaced in other, often unanticipated areas

of the CMUD operation. For example, during a recent selection of consultants based on their qualifications, one finalist showcased a treatment plant project that proposed a significant staff increase relative to the added capacity and equipment. On the basis of this action, along with the consultant's lack of concern about operating costs, the selection panel eliminated the consultant. On the same project, the project team (which included several members of the bid team) requested that the first step in designing an expansion of the facility be to develop an optimal operating plan for the facility. The suggestion was that the plant be designed around operations, departing from the typical CMUD practice of operating around the design. Neither episode would likely have occurred without the competition experience.

Conclusion

The Charlotte model for competition has shown that competition is good. It has also demonstrated that local government can compete with the private sector in both technical and cost areas, and win. For this to happen, local government employees must adopt the methods of the private sector and receive support from their policy makers. The effort is extremely intense, but the rewards are worth the work. ☐

Charter Schools: An Experiment in Privatizing Education

Laurie L. Mesibov



Ask the members of the North Carolina General Assembly if the state needs to improve its public schools, and all 170 will say yes. Ask them how to improve schools, and they may give 170 different answers. The search for ways to improve student learning has made school reform the subject of lively debate and experimentation in North Carolina—and in the other forty-nine states—for years.

In 1996 North Carolina joined a growing list of states that allow charter schools as one element of school reform.¹ Charter schools are a recent development. Minnesota passed the first statute in 1991.² Now more than twenty-five states have some form of charter school statute,³ and more than 230 charter schools were operating during the 1995–96 school year.⁴

A charter school is a public school funded with public moneys and under public control, but it is a special kind of public school—a “deregulated” one. The chief distinguishing characteristic of a charter school is that it is governed by the board of directors of a private, nonprofit corporation, not the local board of education. The board of directors has significant autonomy in operating the school. In turn, it is accountable for student performance and for complying with the law and the school’s charter.

The term “charter” refers to a written contract between a charter applicant and a local board of education.⁵ The charter sets out how the school will be run and how student achievement will be measured. As long as a school complies with its charter, it will not be bound by most of the state statutes and regulations

that apply to other public schools. However, if it does not comply, the charter can be revoked and the school closed—the ultimate accountability.

A variety of reasons may explain the growth of charter schools. Some charter school enthusiasts believe that deregulation is good in and of itself or that competing for students will improve all schools. Others support charter schools because they increase parental choice within the public school system.⁶ To some, charter schools represent a step toward public support of private education, perhaps making it more likely that vouchers or tuition tax credits will be approved in the future. Conversely, others see charter schools as a roadblock to public support for truly private education. Many supporters believe that the people in each community have the best insights and ideas for improving schools. Charter schools are consistent with this belief and with principles of local control, flexibility, and accountability,⁷ simply stretching those principles to a new level.

The most basic reason for charter schools is that a large number of students are not thriving or even surviving in traditional public schools. Charter schools, because of their size, instructional techniques, mission, or philosophy, offer educational opportunities not otherwise available in public schools.

The charter school movement is an experiment. Its guiding hypothesis is that freedom from government

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regulation will improve student performance. This hypothesis needs to be tested. Citizens, especially decision makers, need to know not only what happens to students but why. If student performance improves, it is important to sort out whether deregulation, innovative practices, a greater sense of community, school or class size, parental choice, parental involvement, a certain curricular focus, teacher self-selection, a contract that requires results, or some other factor or combination of factors was responsible. This challenging task is made even more difficult by the fact that one charter school will be very different from another. That is the whole idea, though.

Other questions that deserve attention are whether charter schools actually serve as a catalyst or a model for change in traditional public schools; whether charter schools attract students to public schools from private schools or home schools; and whether other public schools are hurt by the loss of funds or personnel. Appropriate evaluations are vital because no later than January 1, 1999, the State Board of Education (State Board) must make recommendations about modifying, expanding, or ending the state's charter schools approach.⁹

Although charter school statutes across the country share many basic principles, they differ in the emphasis that they place on the various principles, and in the details. The rest of this article summarizes North Carolina's new statute. The summary does not describe every detail of the statute, and the statute itself leaves many issues unresolved—for example, exactly how a charter school will be accountable to a local board of education. The State Board will address many of these issues.

The General Assembly's Goals for Charter Schools

The General Assembly was clear about its goals for charter schools. It is allowing charter schools in order to (1) improve student learning; (2) increase learning opportunities for all students, with a special emphasis on students who are academically gifted or at risk of academic failure; (3) encourage the use of different and innovative teaching methods; (4) create new professional opportunities for teachers, including opportunities to be responsible for the learning program at the school site; (5) provide parents and students with expanded choices in types of public educational opportunities; and (6) hold schools accountable for stu-

dent achievement and provide schools with a method to change from rule-based to performance-based accountability systems.⁹

Establishment of Charter Schools

Many people across North Carolina already have a vision of the kind of charter school that they would like to create. But it is a long way from a vision to actually enrolling students. Bringing an idea to life takes hard work.

Any individual, group, or nonprofit corporation may begin the formal process of establishing a charter school by applying. An application must describe (1) a program that implements one or more of the six purposes listed earlier; (2) student achievement goals and the method that will be used to demonstrate that students have attained the skills and the knowledge specified for those goals; (3) the school's governance structure, including a process to ensure parental involvement; (4) admission policies and procedures; (5) a proposed budget and evidence that the plan for the school is economically sound; (6) requirements and procedures for program and financial audits; (7) the school's plan for complying with statutory requirements¹⁰ relating to health and safety, liability, employees, instructional program, accountability, admission, and transportation; (8) types and amounts of insurance coverage, including bonding insurance for the school's principal officers; (9) the term of the contract (five years being the maximum); (10) qualifications for school employees; (11) procedures by which students could be excluded from the charter school and returned to a regular public school; (12) the number of students to be served;¹¹ (13) school facilities and provision of administrative services; and (14) the school's relationship to the local board of education—whether it will operate independently of that board or be subject to some supervision and control of its administrative operations.¹²

If the applicant wants to convert an existing public school into a charter school, the application must include a statement signed by a majority of the school's teachers and instructional support personnel indicating that they favor conversion. It must also present evidence that a significant number of parents of currently enrolled students favor conversion.

Securing approval of a charter is a two-step process: obtaining preliminary approval and obtaining final approval. Any of three chartering entities may give

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give preliminary approval or appeal if it finds that the chartering entity acted arbitrarily or capriciously, did not appropriately consider the application, or did not act in a timely manner.¹³

The State Board must give final approval to an application if it finds that the application meets all statutory and State Board requirements and would achieve one or more of the statutory purposes.¹⁴ However, the State Board may authorize no more than 100 charter schools statewide and no more than 5 per year in any local school administrative unit.¹⁵ If too many applications meet the standard for final approval, the State Board must give priority to applications "that are most likely to further State education policies and to strengthen the educational program offered in the local school administrative units in which they are located."¹⁶

Operation of Charter Schools

Although it is accountable to the local board of education, a charter school is operated by a private nonprofit corporation. The corporation's board of directors decides issues related to the operation of the school, including budgeting, curriculum, and operating procedures.

A basic principle of charter schools is exemption from statutes and rules applicable to schools operated

charter schools board of directors, which hires and fires them.

Again, while allowing great freedom for charter schools, the General Assembly has imposed one important restriction. At least 75 percent of the teachers in kindergarten through grade five must hold teacher certificates; this drops to 50 percent of teachers in grades six through twelve.

A local board of education may not require any employee to become a charter school employee. However, if a teacher employed by a local board requests a leave of absence to teach in a charter school, the board must grant the request for as many years as the teacher requests.¹⁸

Admission

One concern often heard about charter schools is that they will siphon off the brightest or the least troublesome students, leaving regular public schools with lower-achieving, more difficult children. The North Carolina statute includes provisions addressing this concern. Any child qualified for admission to a North Carolina public school is qualified for admission to a charter school (however, no child may be required to attend a charter school). Charter schools may not limit enrollment to students in a specific geographic area, as other public schools traditionally do.¹⁹

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Securing approval of a charter is a two-step process: obtaining preliminary approval and obtaining final approval. Any of three chartering entities may give

preliminary approval: (1) the local board of education of the school administrative unit in which the charter school will be located; (2) the board of trustees of a constituent institution of The University of North Carolina (UNC) as long as that institution is involved in planning, operating, or evaluating the school; or (3) the State Board. Only the State Board may give final approval to a charter.

The criterion for a successful application at the first stage has three parts: (1) whether the application contains all the required information; (2) whether the applicant has the ability and would be likely to operate the school in an educationally and economically sound manner; and (3) whether granting the application would improve student learning and achieve one of the other purposes for creating a charter school. Every application that meets this three-part test must be given preliminary approval.

If any chartering entity turns down an application, the applicant may modify the application and reapply. If a school board or a UNC institution does not approve an application, the applicant may appeal the decision to the State Board. The State Board must give preliminary approval on appeal if it finds that the chartering entity acted arbitrarily or capriciously, did not appropriately consider the application, or did not act in a timely manner.¹³

The State Board must give final approval to an application if it finds that the application meets all statutory and State Board requirements and would achieve one or more of the statutory purposes.¹⁴ However, the State Board may authorize no more than 100 charter schools statewide and no more than 5 per year in any local school administrative unit.¹⁵ If too many applications meet the standard for final approval, the State Board must give priority to applications "that are most likely to further State education policies and to strengthen the educational program offered in the local school administrative units in which they are located."¹⁶

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A basic principle of charter schools is exemption from statutes and rules applicable to schools operated

by local school boards. This exemption is not total, however. Charter schools must meet the same health and safety requirements as local school boards. Further, like other public schools, they must offer the instructional program a minimum of 180 days per year, and the program must be designed to at least meet the student performance standards adopted by the State Board and any other standards in the charter. The schools must conduct student assessments required by the State Board and comply with State Board charter school policies on education of children with special needs. Charter schools must also comply with state statutes relating to student discipline.¹⁷ They may not charge tuition. Finally, they must be nonsectarian in all operations and may not be affiliated with a nonpublic sectarian school or a religious institution.

Employees

Although charter schools are public schools, employees of charter schools are not employees of the local school board. Instead, they are employees of the charter school's board of directors, which hires and fires them.

Again, while allowing great freedom for charter schools, the General Assembly has imposed one important restriction. At least 75 percent of the teachers in kindergarten through grade five must hold teacher certificates; this drops to 50 percent of teachers in grades six through twelve.

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Characteristics of Strong Charter School Statutes

Charter school statutes create a process and a context for implementation that either strengthen or limit the potential impact of charter schools. Early assessments of charter school laws indicate that strong statutes are more likely than weak ones to produce a successful system of charter schools.¹ In a report for the Education Commission of the States, Louann A. Bierlein suggests seven criteria that define strong charter school legislation:²

1. The possibility of a non-local board sponsor or the option of an appeal procedure
2. Permission for any individual or group to attempt to organize a charter proposal
3. Automatic exemption from state and local regulations rather than case-by-case exemption
4. Fiscal autonomy—every school has complete control over money allocated as a result of per-pupil funding
5. Complete legal autonomy or charter determination of the level of legal autonomy
6. No (or very high) limits on the number of charter schools that can be formed
7. The acceptance of some percentage of non-certified employees as teachers in charter schools

Notes

1. "Charter Schools," *Clearinghouse Issue Brief* (Denver, Colo.: Education Commission of the States) (Jan. 1996): 1.

2. Louann A. Bierlein, "Existing Charter School Laws: Analysis of 'Stronger' Components," cited in "Charter Schools," 1-2.

Qualified students who apply must be enrolled as long as space is available. If applicants exceed the capacity of a program, a class, a grade level, or a building, students will be accepted by lot.

Other requirements are designed to promote diversity in the student body. A charter school may not discriminate against any student on the basis of ethnicity, national origin, gender, or disability. Except as otherwise provided by law or the school's mission as defined in its charter,²⁰ a school may not limit admission on the basis of intellectual ability, measures of achievement or aptitude, disability, race, creed, gender, national origin, religion, or ancestry. Within a year after a charter

school opens, its population must reasonably reflect the racial and ethnic composition of the general population residing in the school administrative unit or the special population that the school serves.²¹ In addition, a charter school is subject to any court-ordered desegregation plan in effect for the local school unit.

Funding

State and local current expense funds for public schools follow students to charter schools. That is, funds that normally would go to local school administrative units go instead to charter schools. The State Board will make two allocations of state funds to charter schools: (1) an amount equal to the local unit's average per-pupil allocation for average daily membership, except for children with special needs;²² and (2) an additional amount for each student who is a child with special needs. At the local level, a school administrative unit must transfer to a charter school an amount equal to the current expense appropriation per pupil to the local school unit, for every child who resides in the unit and attends a charter school.

The State Board may authorize a charter school before it has space, equipment, facilities, and personnel if the applicant indicates that the authorization is necessary for it to raise money. The State Board may not, however, allocate any funds to the school until it has space.²³

Charter schools may seek federal and private funds.

Nonrenewal or Termination of a Charter

The State Board, or another chartering entity with the State Board's approval, may terminate or decline to renew a contract for the following reasons: (1) failure to meet the requirements for student performance in the contract; (2) failure to meet generally accepted standards of fiscal management; (3) violations of law; (4) a material violation of any condition, standard, or procedure in the contract; (5) a request from two-thirds of the faculty and instructional support personnel at the school that the contract be terminated or not be renewed; or (6) "other good cause identified."

Conclusion

North Carolinians know what they want: better educational opportunities for students and improved student performance. Members of the General As-

sembly and thousands of other people across the state are exploring new ways to reach those intertwined goals. Allowing charter schools—public schools created and operated outside the existing education establishment—is consistent with the assumption that there are many routes to improve education and that no one model will work for every school or every student. Charter school supporters believe that these schools will help students who attend them and also lead to change in traditional public schools.

Notes

1. Chapter 731 of the 1996 North Carolina Session Laws adds Part 6A, Charter Schools, to Chapter 115C, Article 16, of the North Carolina General Statutes (hereinafter G.S.), Sections 115C-238.29A through -239.29J.

2. Louann A. Bierlein, *Charter Schools: Initial Findings* (Denver, Colo.: Education Commission of the States, March 1996), 1.

3. Joe Nathan, "Possibilities, Problems, and Progress: Early Lessons from the Charter Movement," *Phi Delta Kappan* 78 (Sept. 1996): 19. Nathan adapted this article from a recent book of his, *Charter Schools* (San Francisco: Jossey-Bass, 1996).

4. "Charter Schools," *Clearinghouse Issue Brief* (Denver, Colo.: Education Commission of the States) (Jan. 1996): 1.

5. In North Carolina the State Board may sign the contract of an approved school on behalf of the local board if the local board does not sign it. G.S. 115C-238.29E(c). The contract presumably will contain terms required by the State Board in addition to terms accepted in the application or negotiated between the State Board and the applicant.

6. Several North Carolina school systems currently offer limited parental choice through magnet schools.

7. E.g., the new School-Based Management and Accountability Program, commonly known as the ABCs program, G.S. 115C-105.20 through -105.32.

8. The State Board makes these recommendations to the Joint Legislative Education Oversight Committee. G.S. 115C-238.29I(c).

9. G.S. 115C-238.29B(b)(14). Rule-based accountability focuses on compliance with rules and regulations, performance-based accountability on student achievement.

10. These requirements are set out in G.S. 115C-238.29F.

11. Charter schools must enroll at least sixty-five students and employ at least three teachers unless the applicant is able to show a compelling reason for not meeting this minimum. G.S. 115C-238B(b)(12).

12. Employees of totally independent charter schools are not eligible for participation in the state retirement or major medical plans. Applications for these schools must specify which employee benefits will be offered and how they will be funded. G.S. 115C-238.29B(b)(14).

13. G.S. 115C-238.29C(a) requires a chartering entity to act before February 1 on requests for preliminary approval received by November 1 of the preceding year.

14. G.S. 115C-238.29D(a). The condition for final

approval—that an application meet "one or more of the purposes set out in G.S. 115C-239.29A"—differs from the condition for preliminary approval [G.S. 115C-238.29C(b)]—that "granting the application would improve student learning and would achieve one of the other purposes set out in G.S. 115C-238.29A."

15. In 1995-96 North Carolina had approximately 2,000 public schools. The smallest administrative unit, Tyrrell County, had 2 schools; the largest, Charlotte-Mecklenburg, 126 schools. *North Carolina Education Directory 1995-96* (Raleigh, N.C.: North Carolina Department of Public Instruction, 1995), 154, 193, 248.

16. G.S. 115C-238.29D(b).

17. An exception to this requirement allows a school to define in its charter the circumstances under which it may exclude a student and return her or him to another public school. G.S. 115C-238.29B(11).

18. A tenured teacher may return to a school in the administrative unit at the end of his or her employment at the charter school if an appropriate position is available. If not, the teacher will have priority for all positions for which he or she is qualified. G.S. 115C-238.29F(e)(3).

19. If a regular public school converts to a charter school, students who reside within that school's former attendance area must be given preference for admission. G.S. 115C-239.39F(g)(3). In all other situations, admission may not be determined by the attendance area in which a student resides or even by the school administrative unit in which the student resides. G.S. 115C-238.29F(g)(3) and (4). Charter schools must provide transportation for students residing in the school unit where the school is located and are encouraged to provide it for others. G.S. 115C-238.29F(h). Local boards are encouraged to contract with charter schools to provide student transportation. G.S. 115C-238.29J(a).

20. G.S. 115C-238.29A offers the only guidance about acceptable missions for charter schools that might result in a student population that differs from the general population. It says that one goal of charter schools is to expand learning experiences for students who are academically gifted or at risk of academic failure. Questions remain about the acceptability of other missions that might result in a student population with a racial or ethnic composition different from that of the general population.

21. G.S. 115C-238.29F(g) does not explain how these two requirements—acceptance by lot if student applications exceed capacity and a student body that is representative of the larger community—fit together.

22. G.S. 115C-109 defines "students with special needs" as students with specified handicaps, other health-impaired students, and pregnant students in need of special education. Shortly after the General Assembly enacted the charter school statute, it amended G.S. 115C-109 by removing academically gifted students from the definition of children with special needs. Traditional public schools will receive a funding allotment for students who are "academically or intellectually gifted," as described in new G.S. 115C-150.5. 1996 Sess. Laws ch. 18 (2nd Ex. Sess.), §§ 18.24(b), (f), (g).

23. Charter schools may not use state funds to purchase land or buildings; they may use other funds, or lease space. G.S. 115C-238.29H(a) and -238.29F(e). ■

Privatization: Legal Issues for North Carolina Local Governments

Frayda S. Bluestein



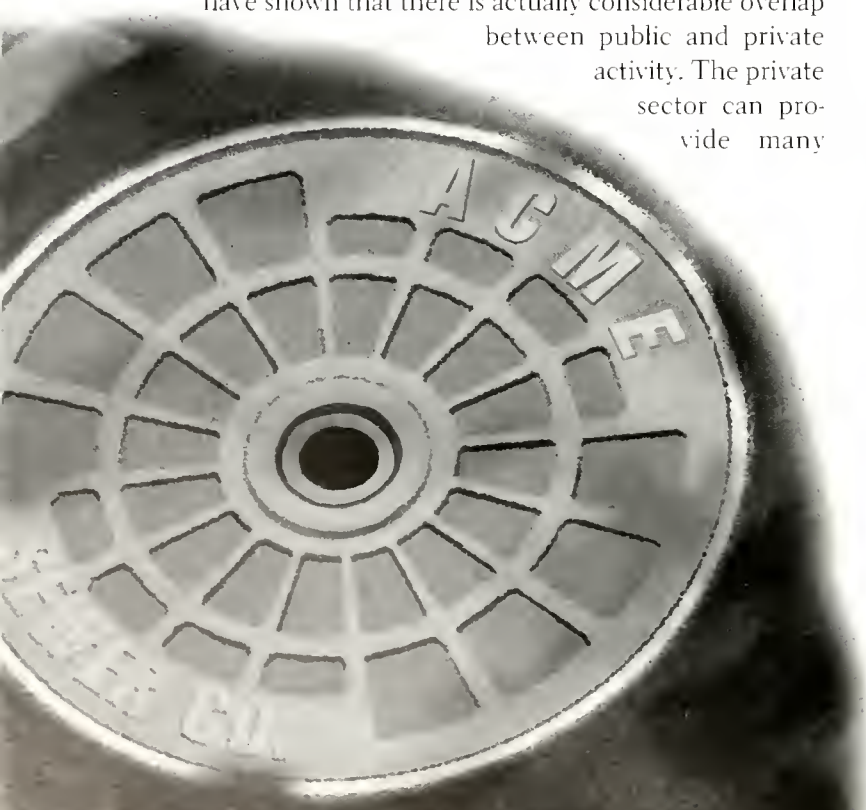
What are the essential differences between public and private activity? Does the law create a bright line separating activity that is reserved exclusively to the public sector from activity in which private actors may participate? Are there some traditionally governmental powers that are subject to procedural protections whether they are exercised by public or private actors? Recent trends in privatization have shown that there is actually considerable overlap between public and private activity. The private sector can provide many

of the services previously offered by the government, and in some cases the government can be more involved in the private marketplace than previously recognized. (See "Economic Development after *Maready*," page 55 in this issue.)

This article discusses legal issues involved in privatization of local government functions or activities. These issues can be categorized in terms of three questions: (1) What are the legal limitations on the types of local government functions that may be privatized? (2) What legal requirements apply to the process of privatization, particularly to contracting with private entities ("contracting out")? (3) What laws apply when private entities carry out public functions? Although each of these questions involves distinct legal issues, a common theme emerges. Legal issues regarding privatization reflect but do not necessarily resolve current political and philosophical questions about the respective roles of the public and private sectors, their essential differences, and the appropriate allocation of responsibility between them.

What Types of Functions May Be Privatized?

When a local government conducts a particular function, the main issue of legal authority is whether state law authorizes it to perform that function. This is of particular importance for North Carolina local governments, which operate under limited powers del-



egated by the state.¹ When a government with authority to engage in a particular function involves the private sector in delivering that function, the government must also have legal authority for the particular privatized arrangement.

In many cases, identifying legal authority for privatization is not a difficult hurdle, particularly if the arrangement involves contracting with the private sector to perform services that are generally available in the private marketplace. However, governments have begun to consider privatizing functions that have traditionally been performed only by government, and statutes and cases offer relatively little guidance on what types of powers or functions a private entity can legally exercise or conduct. In some cases, state statutes may delegate exclusive authority for an activity to a governmental entity or official. In addition, some governmental functions may involve the exercise of powers not generally available to a private actor.

The North Carolina General Statutes (hereinafter G.S.) provide broad authority for cities and counties to contract with private entities. Identical statutes in Chapters 153A (governing counties) and 160A (governing cities) allow local governments to "contract with and appropriate money to any person, association, or corporation in order to carry out any public purpose that the [local government] is authorized by law to engage in."² State statutes also provide authority for contracting out specific functions, such as health or social services,³ solid waste collection and disposal,⁴ and operation of public enterprises.⁵ Cities have specific authority to grant utility franchises,⁶ and counties have franchising authority for solid waste collection or disposal,⁷ ambulance services,⁸ and cable television.⁹ A county may lease a public enterprise as lessor or lessee.¹⁰ A city's decision to sell, lease, or discontinue a city-owned enterprise must be approved by a majority vote of its citizens.¹¹ Cities also have specific authority to abandon or transfer cemeteries.¹²

Despite broad statutory authority to contract with private entities, a local government's contracting authority may be limited if a more specific statute imposes requirements that may be met only by a governmental entity or official. Although no cases address this question, a recent advisory opinion of the North Carolina attorney general's office addressed it in response to the question of whether a county could privatize the operation of its jail by contracting with a private company.¹³ Even though G.S. 153A-449 (the statute that authorizes counties to contract with pri-

ivate entities) appears to provide authority for this arrangement, the attorney general's opinion places greater weight on more specific statutes that give sheriffs responsibility for the operation of jails and expressly prohibit sheriffs from delegating their official responsibilities.¹⁴ The opinion concludes that even though the county has no legal obligation to operate a jail, neither the sheriff nor the county has the authority to delegate responsibility for operating the jail to a private entity.¹⁵

It is difficult to identify for each area of public activity the functions that involve an exercise of official duties that cannot be privatized. At least one guiding rule, based on the advisory opinion just summarized, is that a specific statutory provision that assigns responsibility to a particular governmental board or employee takes priority over the general authority to contract with the private sector and could reasonably be interpreted as limiting the authority to privatize a particular governmental function.

Even this rule of statutory interpretation requires some elaboration. Although the sheriff does have responsibility for operating a jail, it seems beyond question that he or she has the legal authority to hire a private company to clean the jail or provide food services for the jail. An Ohio court facing a similar question concluded that the sheriff's authority to contract with the private sector for operation of a jail is limited to ministerial duties or consultant services.¹⁶

A reasonable prediction is that courts will uphold the privatization of services or functions that are commonly available in the private sector because little about these services invokes the particular role or discretion of the governmental entity. Privatization of these services is also most likely to result in cost savings.¹⁷ For example, printing, cleaning, and maintenance services are commonly needed and available in the private sector, and a company specializing in these areas may well be able to provide them at less cost than a government agency.

On the other hand, some functions, because of their nature rather than because of a specific statutory limitation, may be viewed as essentially governmental and thus not delegable to the private sector. Several North Carolina Supreme Court decisions have established that a local governing board cannot contract away its essential governmental discretion. As stated

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by the court, a local government cannot deprive itself or future boards "of discretion which public policy demands should be left unimpaired."¹⁸ Examples of discretionary powers that according to North Carolina court cases cannot be contracted away include legislation,¹⁹ annexation,²⁰ taxation,²¹ and zoning.²²

Finally, the private exercise of certain extraordinary powers, such as condemnation, arrest, taxation, and legislation, raises an additional set of concerns that go beyond issues of governmental authority to privatize. As noted earlier, these powers have in common the exercise of essential governmental discretion. They also involve the exercise of coercion, which is held in check by constitutional protections applicable to government action, such as the requirement that the powers be exercised for a public purpose and that due process be provided.²³ Do these characteristics—coercive powers or exercise of significant government discretion—mark the essential difference between the public and private realms?²⁴ Does the democratic process provide the ultimate check on the exercise of governmental authority, rendering private exercise of such authority inappropriate? These questions are subject to debate. The law does not help clarify the issue because courts and legislatures have extended traditionally governmental powers to private entities.²⁵ It seems unlikely that North Carolina local boards or officials could delegate these powers without specific statutory authority. When state law extends coercive authority to private entities—for example, when it gives private railroads and utilities authority to condemn property—the authorization includes procedural protections and limitations on the purpose for which the power may be used.²⁶ Even if there is no absolute distinction in law or philosophy between the role of government and that of the private sector, the protections against abuse of discretion and improper exercise of coercive authority should be preserved whether the action is taken by a public or a private actor.²⁷

What Legal Requirements Apply to the Privatization Process?

Assuming that a local government has authority to privatize, arrangements for doing so vary. By far the most common form of privatization is a contract with a private entity to perform a function or to produce a service previously performed by a local government. Examples of services commonly performed under con-

tracts include solid waste collection, maintenance, and janitorial and food services. Several important legal considerations arise in the contracting process and are discussed in the following sections. Although some of these legal issues arise for any kind of contract, local governments, under the rubric of privatization, are contracting for more services and including a wider scope of activity in contracts, making development, evaluation, and enforcement of the contracts new and more challenging tasks.

Competition

An important procedural question in contracting with the private sector is whether the contract requires competitive bidding under state statutes. For two categories of contracts—contracts for construction or repair and contracts for the purchase of apparatus, supplies, materials, or equipment—local governments are required to obtain competition if the expenditure exceeds \$5,000.²⁸ State statutes also contain requirements for selecting architects, engineers, and land surveyors, although local governments can exempt themselves from the prescribed procedure.²⁹ For other types of services necessary to conduct the business of local government, units are not required to receive bids and are free to contract with the private sector at their discretion, using any procedures they deem appropriate, including individual negotiation. Local governments often obtain competition for service contracts in order to promote fairness and encourage competitive prices. They may have local policies requiring competition even though state law does not require them to do so.

Privatization has resulted in a different kind of competitive bidding, in which government employees compete against the private sector. (See "Competing with the Private Sector," page 6 in this issue.) Some units have developed a system under which the local government bids against the private sector as a way of determining the most cost-effective way to deliver a service. There are no statutory requirements governing the preparation or the submission of bids by government entities themselves.³⁰ However, there is one possible limitation on local governments' ability to bid against the private sector for construction or repair work.

As noted earlier, local governments are required to comply with competitive bidding statutes for construction or repair work estimated to cost more than

\$5,000. Formal bids are required for work estimated to cost \$100,000 or more, informal bids for work estimated to cost between \$5,000 and \$100,000. Under G.S. 143-135, which is often referred to as the "force account statute," local governments are not required to comply with otherwise applicable competitive bidding statutes when they use their own forces to do construction or repair work.³¹ However, this exception is limited to projects that do not exceed \$125,000 (including labor and materials) or projects whose labor component does not exceed \$50,000.³² For projects that exceed these thresholds, local governments must comply with the competitive bidding requirements. This statute generally has been interpreted as placing a limit on the amount of construction or repair work that may be undertaken with the unit's own employees.

It could be argued that government employees might be used for projects exceeding the limits in G.S. 143-135 as long as the unit itself complies with the competitive bidding requirements. This interpretation, however, does not fit well with the language of the statutes. The competitive bidding requirements, primarily those in G.S. 143-128 and -129, clearly contemplate bids being received from and work being performed by private contractors. Particular requirements such as separate-prime bidding,³³ submission of performance and payment bonds guaranteeing work, and execution of a contract simply do not make sense when applied to an in-house bid. Thus, for construction or repair work, a government's ability to compete with the private sector is probably limited to projects that do not exceed the thresholds established in the force account statute.

Public-Private Projects

One method of privatization is to use private capital or facilities for infrastructure or other projects. A question that frequently arises is whether projects that involve both public and private resources are subject to the competitive bidding statutes. As noted earlier, formal bidding is required for construction or repair work estimated to cost \$100,000 or more of public money. Thus if a private entity plans to build a new facility, and a local government has agreed to contribute more than \$100,000 to the project, the project must be competitively bid. This is true even if the private entity owns the property and plans to take responsibility for designing and overseeing the project.

It is unclear, however, whether the local government must conduct the bidding or whether the private contractor might carry out the statutory procedures. Nothing on the face of the statute indicates that compliance by a private entity is contemplated.³⁴

Not all private projects that are supported by public funds require bidding. If a governmental entity makes a grant of funds to a private entity to use for a generally described public purpose, as opposed to a specific project, the private entity can spend that money without complying with competitive bidding laws. Thus, for example, a private entity organized for the purpose of promoting tourism in a city can spend money that it receives from the city to purchase equipment or improve property without bidding. However, the more involvement the public unit has in a particular project—for example, if the unit designs the project or will own the asset when it is completed—the less able it is to argue that the project is not subject to bidding. Another possible public-private arrangement is for a local government to contract with a private entity to construct a facility and pay the cost over time through lease payments. Again, under this arrangement the project is likely to be viewed as requiring competitive bidding if the lease payments are considered to be a long-term purchase agreement rather than an arms-length rental agreement for a fixed period.

At least one case suggests that local governments cannot avoid the bidding requirements by contracting with a private entity to build a facility and then convey the completed asset back to the local government. (This is sometimes referred to as a "turn-key" arrangement.) The plaintiff in *Styers v. City of Gastonia*³⁵ asserted that he built a water system outside the city limits based on an agreement that the city would buy it from him if the city annexed the area in which the system was located. The North Carolina Supreme Court held that the contract was unenforceable because among other reasons it did not comply with the formal bidding statute. A different outcome would have opened the door for public agencies to avoid competitive bidding requirements simply by executing a turn-key contract under which a private entity would take responsibility for the entire project for a fixed fee.

Similarly a local government contract that purports to give a private entity responsibility for purchasing equipment to be owned and used by the local government could be viewed as a violation of competitive bidding requirements. For example, a city might hire a private company to take over management of its

information systems, including analyzing equipment needs and purchasing necessary equipment on behalf of the city. The *Styers* case and the rationale of the attorney general's opinion discussed earlier suggest that a local government cannot avoid the specific statutory competitive bidding requirements (which include a requirement that contracts in the formal range be awarded by the governing body) by hiring a private entity to do its purchasing. Whether a local government can allow a private entity to contract on its behalf in areas that are not subject to mandatory procedures, such as for services or for construction or equipment costing less than \$5,000, remains unclear.

As the foregoing discussion illustrates, there are many possible arrangements for public-private collaboration. However, the competitive bidding requirements may limit the flexibility of local governments to participate in these arrangements, even though they might be advantageous to both the public and the private partner. Indeed, it is ironic that proponents of privatization often cite as a major advantage the fact that the private sector can do business more efficiently because it does not have to comply with the bidding statutes, even though a primary purpose of competitive bidding is to save taxpayer dollars. Of course, the bidding statutes exist not just to save money but also to ensure a fair, competitive process for awarding public contracts. Nonetheless, it may be worth considering whether the existing bidding laws could be changed to afford more flexibility without significantly diminishing the fairness of the process. In the absence of further illumination by the courts or changes in the general law, however, units may want to obtain local legislation to clarify the procedures for particular public-private projects.

Disposing of Property

As part of a contract to privatize, a local government may want to dispose of property that the government previously used to provide the service. For example, if a unit decides to contract with a private provider for garbage collection, it may wish to include in the contract a requirement or an option for the private provider to purchase the trucks and other equipment for which the unit will no longer have any use. As noted earlier, bidding procedures do not apply to the contract for garbage collection services. However, mandatory procedures do apply to the sale of public property.

The procedures governing disposal of surplus property for local governments are contained in Article 12 of Chapter 160A.³⁶ The unit must use one of three competitive methods set forth in that article for the sale of personal property valued at \$10,000 or more and for the sale of any real property. If the property to be disposed of is personal property valued at less than \$10,000, the unit may use the private sale procedure in G.S. 160A-267, which essentially requires governing board action and notice but no competition. When a contract for services includes the sale of property for which competition is required, the unit must either sell the property separately from the service contract, or subject the entire service contract, including the property to be conveyed to the successful bidder, to a competitive process that satisfies the statute.

As a practical note, units may want to consider retaining enough equipment to provide some level of service in the event of default or temporary interruption of service by the private contractor. One way to accomplish this protection is to include a right of repurchase in the contract. It is unclear, however, whether an automatic repurchase provision violates the competitive bidding laws that apply to purchase of equipment by local governments.

Another option is to lease the equipment to the private contractor. Although leasing avoids the procedural complications of selling and buying property, it diminishes the savings and the other advantages that the unit realizes when it divests itself of ownership. In addition, a lease for longer than ten years must be treated as a sale and is subject to the statutory procedures governing sale of property.³⁷

Liability

Generally, units are not liable for the negligent acts of independent contractors and can protect themselves from occasional liability through insurance and indemnification provisions in contracts.³⁸ However, some important liability concerns fall outside these general rules.

First, the freedom from liability for negligence of independent contractors exists only when the contractors do the work according to their own methods and judgment and are not subject to instruction by the employer except regarding the results of the work.³⁹ As often stated, independent contractors must be responsible for determining the "manner and method" of the work.

If a local government is privatizing a function that involves significant public interest or requires a high degree of responsiveness to citizens' concerns—for example, a function involving public health or safety—the unit may find it necessary to provide detailed requirements in the contract with the private provider. These may include specified performance requirements and perhaps regular oversight by the unit or a citizens' committee. In these circumstances the independence of the contractor may be diminished to the point that the contractor would be considered an agent of the unit. Avoiding liability may be less important than ensuring satisfactory performance of a service, but the potential for liability in these situations should not be overlooked.

In some cases the unit retains liability even when a true independent contractor relationship exists. If a unit has responsibility under federal or state grants or regulations, the unit retains that responsibility even if it contracts with another entity to carry out some or all of the functions involved.⁴⁰ For example, if a unit has been issued a permit for the discharge from its wastewater treatment plant and hires a private contractor to operate the plant, fines for violations of the permit's conditions will be imposed on the unit, not the contractor. The contract may require the operator to indemnify the unit for such fines, but primary liability rests with the unit.

In addition, the courts have recognized some governmental duties that cannot be delegated, that is, duties for which the governmental entity retains liability even if an independent contractor is negligent. Examples include maintenance of streets and sidewalks,⁴¹ provision of medical care to inmates,⁴² condemnation,⁴³ and inherently dangerous activities.⁴⁴ Of course, the unit can also be held directly liable for negligence in selecting an independent contractor who causes injury or damage.

Finally, a different kind of liability, not strictly legal, should be considered in privatization decisions. Citizens are likely to view their elected representatives as having some continuing responsibility for privatized functions even after governmental forces no longer directly provide them. If citizens are dissatisfied with the service provided under a contract with a private provider, they will likely call on the unit to enforce or terminate the contract. Furthermore, if service by a private provider is interrupted, they will expect the governmental unit to provide interim or substitute service. Mechanisms for responding to

these demands, as well as the cost of doing so, should be factored into the privatization process.

What Laws Apply When Private Entities Perform Public Functions?

One aspect of privatization that may affect the overall public interest stems from the difference in the legal treatment of public and private entities. Laws governing competitive bidding, personnel, open meetings, and public records have been developed to ensure that public entities spend tax dollars wisely, fairly, and through procedures that are open to public inspection. These laws generally do not apply to private entities, even when they act under contracts with a public entity and are paid with tax dollars. Indeed, it is sometimes argued that the private sector can realize savings because it does not have to comply with the cumbersome legal requirements imposed on public entities.

In some cases, however, courts have held that laws designed to protect public interests in government activities *do* apply to private actors. Courts have expressed concern that governments might avoid their responsibilities to the public by simply creating private alter egos or delegating governmental authority to private entities. On the other hand, courts have consistently held that a private entity does not become subject to the laws that govern public entities simply by contracting with a public entity. These cases demonstrate that the corporate structure of the entity—public, private, nonprofit, or for profit—does not dictate how a court will analyze the applicable law, especially when matters of public interest, including civil rights, are at issue. What remains unclear are the factual conditions that will cause a court to apply the public law to the private entity. When these laws do not apply, local governments making contracting decisions must weigh the cost savings against the decrease in public accountability.

North Carolina Cases Defining "Public Agencies"

North Carolina cases illustrate several judicial approaches to determining whether rules governing public agencies apply to private entities. These approaches also exist in the federal jurisprudence, discussed later. One line of reasoning focuses on the extent to which the government has substantial,

continuing involvement in the operation of the entity—for example, through fiscal oversight or authority to appoint members of the governing board. Another approach looks at whether the purpose for which the entity was chartered is primarily a governmental function. A third theory focuses on the extent of government involvement in the creation of the entity.

A case involving a nonprofit hospital established the rule that when a public agency has sufficient involvement in the organization and the operation of a private entity, laws applicable to public agencies apply to the private entity. In *News and Observer Publishing Co. v. Wake County Hospital System*,⁴⁵ the North Carolina Supreme Court held that the public records law applied to a private nonprofit hospital that operated with significant ties to Wake County. In reaching this result, the court relied on the fact that the county had created the hospital corporation, appointed the members of its governing board, and retained significant fiscal oversight and ownership interests in the hospital property.

In an earlier case involving a private nonprofit hospital, the court had reached a similar result, focusing instead on the governmental character of the function. In *Coats v. Sampson County*,⁴⁶ the court held that the rules determining where public officials may be sued applied to a claim against a private nonprofit hospital, finding that the “establishment, construction, maintenance, and operation of hospital facilities are public and governmental functions.”⁴⁷ Because the hospital was exercising a public function under authority delegated by the county, the court considered it a public agency for purposes of determining where to file suit.

In *Guthrie v. Ports Authority*,⁴⁸ the court had little difficulty concluding that the North Carolina Ports Authority was an agency of the state and that the state’s Industrial Commission therefore had exclusive authority over the claims at issue. The court relied on the *News and Observer* case, identifying as significant involvement by the state that the governor appointed members of the governing board and filled vacancies, and that ultimate funding control rested with the state. The court also noted that the North Carolina Ports Authority had statutory authority to act on behalf of the state and was named in the statute as an “instrumentality of the state.”⁴⁹ The court reached this result even though the ports authority operated independently and autonomously and its function was considered proprietary in character. The court concluded that these factors did not erase

the ports authority’s “substantial ties” with the state.

In *Winfas, Inc. v. Region P Human Development Agency*,⁵⁰ the court focused on the method of creation in holding that a human development agency created by the county commissioners was a public body as defined in the state’s open meetings law.⁵¹ The defendant argued that it was not a public body because after its creation, it had changed its status to become a nonprofit corporation under North Carolina state statutes. The court ruled that a change in corporate status or name was not sufficient because it did not change the basic character or purpose of the operation. The court’s willingness to ignore the legal status of the entity was explained by the following quote: “To hold otherwise would eviscerate the public policy of [the open meetings law] by allowing public bodies to hold secret meetings due to a superficial change in their legal form.”⁵²

The court’s concern about public authorities circumventing their obligations merely by changes in corporate form or structure may well underlie many of its decisions in this area.⁵³ Public entities cannot avoid legal requirements designed to protect citizens’ access to courts, meetings, or documents by reconstituting themselves as private entities. This access may be denied, however, when governments contract with private entities to carry out specific tasks.

In contrast to the cases just discussed, the North Carolina Court of Appeals has held that an independent contractor does not become a public agency merely by doing work for a public entity. In *Durham Herald v. North Carolina Low Level Radioactive Waste Management Authority*,⁵⁴ the plaintiff sought access to documents held by consultants hired by the state. The trial court held that the contractors were not agencies of the state or its subdivisions, the category of entities covered by the public records law.⁵⁵ The court of appeals affirmed, holding that the records produced by the consultants acting under contracts with the authority were not subject to disclosure under the public records law, and under a more specific law governing the authority,⁵⁶ until “they [were] received by the Authority in the proper exercise of its discretion.”⁵⁷ Thus the fact that an independent contractor is paid with tax dollars is clearly not sufficient by itself to invoke the application of laws governing public entities. This is especially true when the government is not involved in the organization or the operation of the private contractor and when the function is not one that the court characterizes as public or governmental in nature.

The cases just discussed mark points at opposite ends of a spectrum, ranging from a traditional independent contractor relationship to contracts in which there is significant government involvement in either operation or creation, or in which the activities are characterized as governmental functions. As governments increase their reliance on the private sector, both public and private entities should consider whether the new arrangements will be viewed as public or private for purposes of laws governing public entities. For some arrangements the foregoing cases will not provide sufficient guidance. A number of cases dealing with federal civil rights claims provide additional reference points. They also illustrate the difficulty that the courts have had in delineating essential differences between public and private actors.

Federal Civil Rights Cases Defining "State Action"

The United States Supreme Court and the lower federal courts have had many opportunities to decide when a private actor may be sued under federal laws that provide remedies for violations of constitutional rights committed by state actors or those acting under "color of state law."⁵⁵ As in the cases discussed earlier, federal courts have been asked whether particular circumstances justify applying to a private entity, laws designed to protect the public from government action.

Over more than thirty years, the United States Supreme Court has developed several standards for determining when a private actor may be sued for civil rights violations. Unfortunately the Court has not articulated clear guidelines for when to use each standard. Indeed, it has admitted that its "cases deciding when private action might be deemed that of the state have not been a model of consistency."⁵⁶ These tests, as recently enumerated by Justice Sandra Day O'Connor, include the following inquiries: whether there is a sufficiently close connection between the state and the challenged action; whether the state, by encouraging the challenged conduct, should be considered responsible for it; and whether the alleged infringement of federal rights is "fairly attributable" to the state.⁶⁰ The standards have also been described as the "symbiotic relationship" situation, in which the state has "insinuated itself into a position of interdependence" with a private company;⁶¹ the "joint action" situation, in which the private party is a "willful par-

ticipant in joint activity with the State or its agents;"⁶² and the "traditional public function" situation, in which the private entity is exercising powers traditionally reserved *exclusively* to the state.⁶³ In some cases, several of these standards are used, whereas in others, only the standard deemed most relevant is emphasized.⁶⁴ As a result, several of the key cases in this area are difficult to reconcile, and it is hard to identify a clear or consistent rationale governing private responsibility for civil rights of citizens.

Government Involvement with a Private Entity

In a 1961 case, rules governing public entities were applied to a restaurant operator who leased space in a publicly owned parking garage.⁶⁵ The United States Supreme Court allowed an equal protection claim against the restaurant operator, who had refused to serve a customer because of his race. The Court concluded that the numerous connections between the public owner and the private tenant, especially the city's benefit from the leasing arrangement, prevented the city from divorcing itself from the discriminatory conduct of its business partner.⁶⁶ This case established what has since been called the "symbiotic relationship" standard, although few cases have actually employed it.

On the other hand, the Court has held that a private school under contract with a public school system to provide special education is not subject to the rules governing public employers. In *Rendell-Baker v. Kohn*,⁶⁷ several employees claimed that they were discharged for criticizing the school's operations and argued that this violated their First Amendment and due process rights. The Court ruled that the school was a private entity and that the employees' claim could not be heard. A dissenting opinion pointed out that the "State [had] delegated to the New Perspectives School its statutory duty to educate children with special needs . . ." and that "[t]he school receive[d] almost all of its funds from the state, and [was] heavily regulated."⁶⁸ In contrast, the majority focused on the fact that the state did not exercise any influence over the school's personnel decisions, so they were not "fairly attributable" to the state.⁶⁹ The Court concluded:

The school . . . is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the govern-

ment by reason of their significant or even total engagement in performing public contracts.⁷¹

The Court also rejected the plaintiffs' assertion that the school served a "public function," noting that this factor was significant only when the function had traditionally been the exclusive prerogative of the state.⁷¹ The fact that state law mandated education of these particular students made it a public function but not necessarily one reserved exclusively to the public. Finally, the court found that there was no "symbiotic relationship" of mutual benefit, as there had been in *Burton*. Rather, the relationship was a typical fiscal one between a public entity and a contractor performing services.⁷²

In contrast, the Court in a later case held that a private contractor providing medical services in a state prison was liable as a state actor. In *West v. Atkins*,⁷³ which arose in North Carolina, a prisoner sued for violation of his Eighth Amendment right to be free from cruel and unusual punishment, based on injuries allegedly caused by a physician under contract with the state to provide medical treatment to prisoners. The lower court had ruled in favor of the physician, relying on an earlier Supreme Court decision holding that a public defender was not a state actor because he exercised independent professional judgment.⁷⁴ In *West* the Court rejected this reading of the earlier case, holding that a private party exercising professional judgment could be considered a state actor if the state had delegated to her or him its responsibility to provide adequate medical care. The Court noted:

Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights.⁷⁵

In a footnote the Court commented that a different result would allow the state to contract out all services, leaving citizens with no means for vindication of constitutional rights.⁷⁶

These cases are difficult to reconcile. Perhaps one significant difference is that the *Rendell-Baker* case involved a claim by an employee of the private actor, rather than a direct recipient of the mandated service or a member of the general public. The courts seem more likely to find that there is state action when the claim involves a public function, rather than personnel decisions or other inner workings of the private entity.

A recent federal court of appeals case emphasizes

the extent to which government involvement in the activities at issue affects the determination of whether state action is involved. In *Catanzano v. Dowling*,⁷⁷ a federal court of appeals held that determinations made by certified home health agencies about reimbursements and methods of delivery for Medicaid patients constituted state action. Thus any changes in benefits would require notice, opportunity for hearing, and continuation of benefits pending resolution of disputes. At first blush, this case appears directly contrary to an earlier United States Supreme Court decision holding that decisions by private nursing homes to transfer or discharge Medicaid recipients did not amount to state action.⁷⁸ The court of appeals distinguished *Catanzano* from the earlier case by noting that home health agencies were not merely regulated but "deeply integrated" into the state's regulatory scheme for providing home health care. The court noted the detailed state regulations under which the private agencies made their determinations, and emphasized the extent to which the state had delegated its responsibility to the agencies to act in accordance with those regulations. Whereas in the earlier case, the Supreme Court had found no exercise of coercive power by the state, the appeals court in *Catanzano* concluded that the state exerted sufficient influence that the home health agencies could not be considered "'independent actors doing business with the state,' but are 'entities that have assumed the responsibility for [the state's] mandated health care duties.'"⁷⁹

Method of Creation of the Private Entity

The cases discussed so far have focused on the government's involvement with the private entity. A separate line of cases emphasizes the extent to which the private entity itself, by virtue of the way in which it was created, should be viewed as a state actor. A recent example of this approach can be found in *Lebron v. National Railroad Passenger Corporation*.⁵⁰ Lebron alleged that Amtrak violated his First Amendment free speech rights by refusing to allow him to post a political advertisement in Penn Station. The United States Supreme Court ruled that Amtrak was a state actor, even though it had a private corporate structure. The Court focused on the nature of the entity—specifically, that it had been established by the government; that the government retained some control, particularly through its authority to appoint members of the governing body; and that the corporation was established to carry out a public purpose.

In a dissent Justice O'Connor disagreed with the majority about the nature of the question before the Court. In her view the plaintiff had argued that Amtrak was a *private* actor whose actions should be attributable to the government, so for procedural reasons the plaintiff was limited to that argument. Posing the question that way, Justice O'Connor reached a different result, relying not on the method of creation and government involvement in the entity itself but on the government's role in the particular action about which the plaintiff complained. The test as articulated in the dissent is whether "the challenged action results from the exercise of private choice and not from state influence or coercion."⁵¹ In the Amtrak case, Justice O'Connor would have found that the government had no involvement in the decision in question and that it should not be imputed to the state.

Justice O'Connor's test, which is similar to that used in *Rendell-Baker*, is difficult to square with other cases in which the government is held responsible for private actors to whom it has delegated significant responsibility. Clearly the extent of government involvement is a significant factor, but whether the inquiry should be directed at government involvement in creation, regulation, or operation of the entity, or government involvement in the particular decision at issue, remains unclear.

Involvement of a Traditional Government Function

Finally, a set of cases addressing whether the activity involves a traditional government function illustrates how the courts are struggling with the issue of which functions are uniquely governmental and which are not. As most recently articulated by the United States Supreme Court, the "government function" approach holds that a private entity may be considered a state actor when performing a function that is "traditionally the exclusive prerogative of the state."⁵² In a recent case arising in North Carolina, the Fourth Circuit Court of Appeals noted that "functions that are uniquely sovereign in character qualify as traditional exclusive state functions" and that although there are many functions traditionally performed by governments, few are exclusively so.⁵³

In *United Auto Workers v. Gaston Festivals*,⁵⁴ the United Auto Workers (UAW) sued Gaston Festivals, Inc. (GFI), a private nonprofit corporation that organized and promoted the annual Fish Camp Jam in Gastonia, North Carolina, for refusing to allow UAW

to have a booth to promote its Buy America campaign. The Fourth Circuit Court of Appeals held that UAW could not assert a First Amendment claim because GFI acted in a completely private capacity. UAW argued that the city had conferred on GFI its sovereign power, relying on the "delegation of exclusive government function" standard.⁵⁵ The court noted the limited circumstances in which the courts had held an activity to be within the exclusive realm of the public sector, listing from cases decided to that date the following examples: administration of elections, operation of a company town, exercise of eminent domain, peremptory challenges in jury selection, and operation of a municipal park.⁵⁶ The court's listing of functions held *not* to be exclusively governmental included provision of electricity and other utilities, operation of a nursing home, coordination and governance of college and amateur athletics, education of maladjusted children, and care of foster children.⁵⁷

In the *UAW* case, the court characterized the function involved as "community entertainment" and ruled that it was not an exclusively governmental function. The court emphasized that the fact that a private entity performed a function that served the public did not make it a state actor. Furthermore, the facts that the city issued a permit, the event took place on public property, and the city made a \$10,000 annual contribution to the event were not sufficient to support a finding of state action.⁵⁸

Another factor in determining whether a function has traditionally been reserved exclusively to the public sector is whether there has historically been private-sector involvement and whether the function is one that governments have been legally obligated to provide. Several cases involving claims against volunteer fire departments illustrate the difficulty of this approach.

In analyzing whether a local government that contracts with a volunteer fire department has delegated a function exclusively reserved to the government, courts have delved into the historical patterns and statutory provisions governing fire protection in the specific jurisdiction in question. Courts have looked, for example, at whether state law requires the entity to provide the function and whether there are private-sector fire fighting alternatives.⁵⁹ Courts in different jurisdictions have reached different conclusions.⁶⁰ In several cases decided in the Fourth Circuit, the court of appeals determined that whether fire protection was an exclusive government function in Maryland

was a question of fact to be decided by a jury.⁴¹ In a separate concurring opinion in one of these cases, the judge expressed concern that this view could lead to "irreconcilable results within the state of Maryland on the basic legal question [of] whether Maryland volunteer fire fighting companies fall under the public function theory of state action."⁴²

These federal cases struggle to reconcile the general rule that private independent contractors are not subject to laws and standards governing public agencies merely by virtue of their contractual relationship with a public entity, with the concern that the government could easily avoid rules designed to protect the public by placing responsibility for a public function in private hands. The courts' concern reflects an assumption that there is an arena of activity that is uniquely governmental and is directed at matters of sufficient public interest to warrant application of certain protections and rules to the activity, no matter who conducts it. Given the current disagreement in society about the proper role and size of government, it is not surprising that the courts have had difficulty establishing definitive tests for what activities are fundamentally governmental. Despite the lack of clarity in the cases, local governments should consider the extent to which decisions to place responsibility for functions in private hands may reduce or eliminate the applicability of laws that are designed to protect the public interest.

Conclusion

Local government motivation to privatize may stem from a desire to improve efficiency or from a desire to decrease the size of government. Legal limitations on privatization and legal standards for determining when public laws apply to private entities have the potential to define the arena of essential governmental responsibility. However, the current law does not provide such guidance. Instead, government officials must exercise caution in creating new arrangements, in effect, defining and protecting the realm of public interest that they feel they were elected to represent.

Notes

1. See A. Fleming Bell, II, "Dillon's Rule Is Dead; Long Live Dillon's Rule!" *Local Government Law Bulletin*, no. 66 (March 1995).

2. N.C. Gen. Stat. [hereinafter G.S.] §§ 153A-449, 160A-20.1.

3. G.S. 153A-259 (counties).

4. G.S. 153A-292 and -299.1 (counties); 160A-324 (cities, solid waste collection).

5. G.S. 153A-275 (counties); 160A-312 (cities). G.S. 153A-274 (counties) and 160A-311 (cities) set forth the list of functions that are considered public enterprises under the statute.

6. G.S. 160A-319. Authority extends to all public enterprises listed in G.S. 160A-311 and to telephone systems.

7. G.S. 153A-136(a)(3).

8. G.S. 153A-250(a)(1).

9. G.S. 153-157.

10. G.S. 153A-275.

11. G.S. 160A-321. The vote requirement does not apply to airports, off-street parking systems and facilities, or solid waste collection and disposal systems. Statutory provisions in Article 12 of Chapter 160A set forth procedures that cities and counties must follow before disposing of other real and personal property.

12. G.S. 160A-342 and -345. On abandonment or transfer, cemeteries may be operated only by a religious organization or an entity licensed by the State Burial Association Commissioner.

13. Advisory Opinion to Honorable John H. Baker, Jr., Wake County Sheriff, and Honorable Worth L. Hill, Durham County Sheriff, from John R. McArthur, Chief Counsel, Office of the Attorney General, John R. Corne, Special Deputy Attorney General, Human Resources/Medical Facilities Section, and John J. Aldridge III, Assistant Attorney General, Law Enforcement Liaison Section, dated June 23, 1995 (hereinafter Advisory Opinion).

14. See G.S. 162-22, which states that the sheriff "shall have the care and custody of the jail . . ."; and G.S. 162-24, which provides that the "sheriff may not delegate to another person the final responsibility for discharging his official duties . . ."

15. Advisory Opinion, 2.

16. See *Ohio Patrolmen's Benevolent Ass'n v. Repke*, 1995 Ohio App. LEXIS 5576 (Dec. 29, 1995).

17. When there is demand for a particular service outside the government, the unit may realize cost savings through privatization because of economies of scale available to a private-sector provider. See page 5 of "Privatization: Considerations for North Carolina Local Governments," in this issue.

18. *Plant Food Co. v. City of Charlotte*, 214 N.C. 515, 199 S.E. 712 (1938). See generally David M. Lawrence, "Contracts That Bind the Discretion of Governing Boards," *Popular Government* 56, no. 1 (Summer 1990): 35.

19. *Plant Food Co.*, 214 N.C. at 515, 199 S.E. at 712.

20. *Thrash v. City of Asheville*, 95 N.C. App. 457, 355 S.E.2d 657 (1989).

21. *Tilghman v. West of New Bern Volunteer Fire Department*, 32 N.C. App. 767, 233 S.E.2d 595 (1977).

22. *Lewis v. City of Washington*, 63 N.C. App. 552, 305 S.E.2d 752 (1983).

23. Ronald C. Moe, "Exploring the Limits of Privatization," *Public Administration Review* 47 (Nov./Dec. 1987): 456-57.

24. As one court has defined it, "[a] public function is

one which is exercised by virtue of certain attributes of sovereignty delegated to a city for the health and protection of its inhabitants or the general public." *McLeod v. Duluth*, 218 N.W. 892, 893 (1928), cited in *Plant Food Co. v. City of Charlotte*, 214 N.C. 518, 519-20, 199 S.E. 712, 713 (1938).

25. See David M. Lawrence, "Private Exercise of Governmental Power," *Indiana Law Journal* 61 (1985-86): 647-95.

26. See G.S. 40A-3 and -19.

27. See Lawrence, "Private Exercise," proposing a due process approach to reviewing private delegations.

28. G.S. 143-129 and -131.

29. G.S. Chap. 143, Art. 3D.

30. In contrast, some states have developed procedures for privatization and competition with the private sector that include cost accounting principles and are enforceable by private-sector competitors. See *Academy Bus Tours Corp. v. New Jersey Transit Corp.*, 622 A.2d 1335 (N.J. Super. Ct. App. Div. 1993).

31. Although the licensing requirements for contractors do not apply to work done with a unit's own forces (see G.S. 57-1), the statutory requirements for using a registered architect or engineer still apply. See G.S. 133-1.1.

32. G.S. 143-135. Some local governments may have local acts establishing higher thresholds.

33. On public projects costing \$500,000 or more, G.S. 143-128 requires public agencies to receive bids separately in four categories: plumbing, electrical, mechanical (heating, ventilation, and air conditioning), and general work.

34. Although the court has extended public law requirements to private entities [see *News and Observer Publishing Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981), *cert. denied*, 459 U.S. 803 (1982)], it based its ruling on a finding that a private entity was quasi-public, not a purely private entity receiving public funds.

35. *Styers v. City of Gastonia*, 252 N.C. 572, 114 S.E.2d 348 (1960).

36. These provisions also apply to counties (G.S.153A-176), local school units [G.S. 115C-518(a)], and community colleges (G.S. 115D-15).

37. G.S. 160A-272.

38. *But see* G.S. 22B-1, limiting the enforceability of indemnity agreements in construction contracts.

39. Charles E. Daye and Mark W. Morris, *North Carolina Law of Torts*, sec. 23.20, p. 386, citing *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 15, 29 S.E.2d 137, 139-40 (1944).

40. See *Pet, Inc. v. The University of North Carolina*, 72 N.C. App. 128, 131, 323 S.E. 2d 745, 747 (1984).

41. *Cole v. City of Durham*, 176 N.C. 289, 97 S.E. 33 (1918).

42. *Medley v. North Carolina Dept. of Correction*, 330 N.C. 837, 412 S.E.2d 654 (1992).

43. *Insurance Co. v. Blythe Bros. Co.*, 260 N.C. 69, 79, 131 S.E.2d 900, 907 (1963).

44. *Deitz v. Jackson*, 57 N.C. App. 275, 291 S.E.2d 282 (1982); *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991).

45. *News and Observer Publishing Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981), *discr. rev.*

denied, 305 N.C. 302, 291 S.E.2d 151, *cert. denied*, 459 U.S. 803 (1982). Compare *Weston v. Carolina Medicorp, Inc.*, 120 N.C. App. 370, 402 S.E.2d 653 (1991) (finding insufficient county involvement to warrant a conclusion that the private nonprofit hospital engaged in "state action").

46. *Coats v. Sampson County*, 264 N.C. 332, 141 S.E.2d 490 (1965).

47. *Coats*, 264 N.C. at 334, 141 S.E.2d at 492.

48. *Guthrie v. Ports Authority*, 56 N.C. App. 68, 286 S.E.2d 823 (1982), *aff'd*, 307 N.C. 522, 299 S.E.2d 618 (1983).

49. *Guthrie*, 56 N.C. App. at 73-74, 286 S.E.2d at 827.

50. *Winfas, Inc. v. Region P Human Development Agency*, 64 N.C. App. 724, 308 S.E.2d 99 (1983).

51. See G.S. 143-318.10. The focus on method of creation is probably explained by the fact that it is one of the criteria in the open meetings law that determine whether an entity is subject to the law's requirements.

52. *Winfas*, 64 N.C. App. at 726, 308 S.E.2d at 100.

53. See *News and Observer Publishing Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 12, 284 S.E.2d 542, 549 (1981), noting that the county's relationship with the nonprofit organization was not a "radical change" from its relationship with the hospital authority, the public entity that immediately preceded the creation of the private nonprofit entity.

54. *Durham Herald v. North Carolina Low Level Radioactive Waste Management Auth.*, 110 N.C. App. 607, 430 S.E.2d 441, *cert. denied*, 334 N.C. 619, 435 S.E.2d 334 (1993).

55. G.S. 132-1; *Durham Herald*, 110 N.C. App. at 611, 430 S.E.2d at 444.

56. G.S. 104C-6(a)(18).

57. *Durham Herald*, 110 N.C. App. at 613, 430 S.E.2d at 445.

58. The United States Supreme Court has held that the Section 1983 "under color of state law" requirement is the same as the "state action" requirement in the Fourteenth Amendment. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) [citing *United States v. Price*, 383 U.S. 787, 794, n.7 (1966)].

59. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. ___, 115 S. Ct. 961, 130 L. Ed. 2d 902, 909 (1995) [quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting)]. See Ronald J. Krotoszynski, Jr., "Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations," *Michigan Law Review* 94 (1995): 302.

60. *Lebron*, 513 U.S. at ___, 115 S. Ct. at 979, 130 L. Ed. 2d at 928 (O'Connor, J., dissenting) (citations omitted).

61. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

62. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 152 (1970).

63. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). These characterizations of the court's standards appear in *Gallagher v. "Neil Young Freedom Concert"*, 49 F.3d 1442 (10th Cir. 1995) [citing *Martin A. Schwartz and John E. Kirklín, Section 1983 Litigation: Claims, Defenses, and Fees*, vol. 1, secs. 5.10 through 5.15 (New York: Wiley & Sons, 1986)].

64. See Krotoszynski, "Back to the Briarpatch," 337, suggesting an approach in which all the tests are considered: "When a particular defendant does not satisfy any one of the three state action tests, a reviewing court should step

back and consider whether the defendant satisfies a sufficient portion of each of the three tests to support a state action finding, even if no single test is satisfied completely."

65. *Burton*, 365 U.S. at 715.

66. *Burton*, 365 U.S. at 861 ("It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly privately owned buildings.").

67. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982).

68. *Rendell-Baker*, 457 U.S. at 844 (Marshall, J., dissenting).

69. *Rendell-Baker*, 457 U.S. at 839-40 [quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 ("The ultimate issue in determining whether a person is subject to suit under section 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'")].

70. *Rendell-Baker*, 457 U.S. at 841.

71. *Rendell-Baker*, 457 U.S. at 841 [citing *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)].

72. *Rendell-Baker*, 457 U.S. at 843.

73. *West v. Atkins*, 487 U.S. 42 (1988).

74. See *Polk County v. Dodson*, 454 U.S. 312 (1981).

75. *West*, 487 U.S. at 56.

76. *West*, 487 U.S. at 56, n.14.

77. *Catanzano v. Dowling*, 60 F.3d 113 (2nd Cir. 1995).

78. *Blum v. Yaretsky*, 457 U.S. 991 (1982).

79. *Catanzano*, 60 F.3d at 120 [quoting *J.K. v. Dillenberg*, 836 F. Supp. 694, 697-98 (D. Ariz. 1993)].

80. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. ___, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995).

81. *Lebron*, 513 U.S. at ___, 115 S. Ct. at 980, 130 L. Ed. 2d at 930.

82. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

83. *United Auto Workers v. Gaston Festivals*, 43 F.3d 902, 907 (4th Cir. 1995).

84. *United Auto Workers*, 43 F.3d at 907.

85. *United Auto Workers*, 43 F.3d at 906.

86. *United Auto Workers*, 43 F.3d at 907 (citations omitted).

87. *United Auto Workers*, 43 F.3d at 907 (citations omitted).

88. *United Auto Workers*, 43 F.3d at 905.

89. See *Yeager v. City of McGregor*, 980 F.2d 337 (5th Cir.), cert. denied, 510 U.S. 821, 114 S. Ct. 79, 126 L. Ed. 2d 47 (1993).

90. See *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1144 (3rd Cir. 1995), summarizing cases going both ways.

91. See *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 1994 U.S. App. LEXIS 12492 (May 31, 1994); *Haavistola v. Community Fire Co. of Rising Sun*, 6 F.3d 211 (4th Cir. 1993).

92. *Goldstein*, 1994 U.S. App. at LEXIS 12492 at *6 (Wilkinson, J., concurring). ☐

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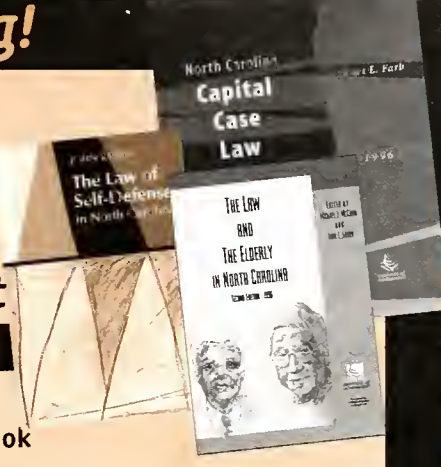
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Measuring the Performance of Local Governments

Paula K. Few and A. John Vogt



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Paula K. Few is the coordinator of the North Carolina Local Government Performance Measurement Project. A. John Vogt is an Institute of Government faculty member who specializes in governmental budgeting.

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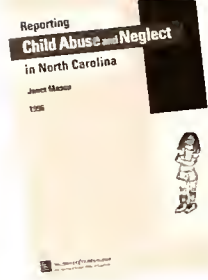
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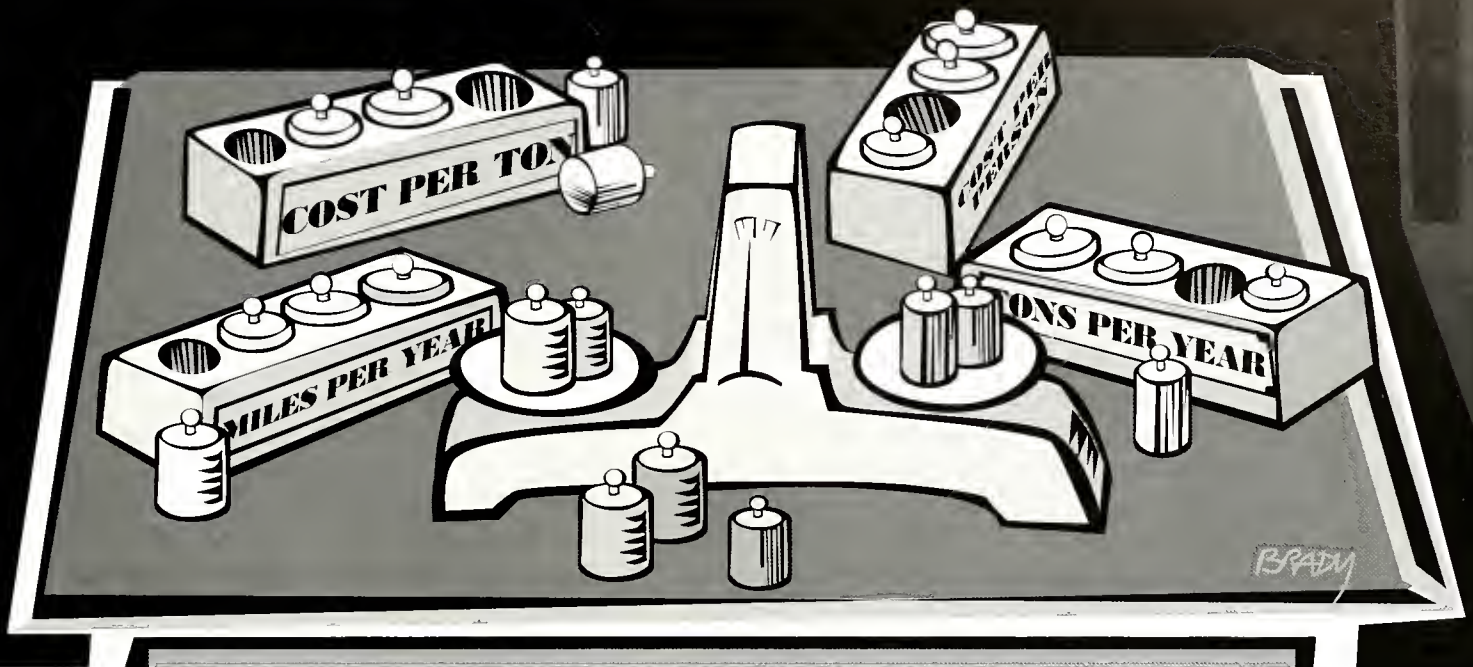
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74. See *Polk County v. Dodson*, 454 U.S. 312 (1981).
75. *West*, 487 U.S. at 56.
76. *West*, 487 U.S. at 56, n.14.
77. *Catanzano v. Dowling*, 60 F.3d 113 (2nd Cir. 1995).
78. *Blum v. Yaretsky*, 457 U.S. 991 (1982).
79. *Catanzano*, 60 F.3d at 120 [quoting *J.K. v. Dillenberg*, 836 F. Supp. 694, 697-98 (D. Ariz. 1993)].
80. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. ___, 115 S. Ct. 961, 130 L. Ed. 2d 902 (1995).
81. *Lebron*, 513 U.S. at ___, 115 S. Ct. at 980, 130 L. Ed. 2d at 930.
82. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).
83. *United Auto Workers v. Gaston Festivals*, 43 F.3d 902, 907 (4th Cir. 1995).
84. *United Auto Workers*, 43 F.3d at 907.
85. *United Auto Workers*, 43 F.3d at 906.
86. *United Auto Workers*, 43 F.3d at 907 (citations omitted).
87. *United Auto Workers*, 43 F.3d at 907 (citations omitted).
88. *United Auto Workers*, 43 F.3d at 905.
89. See *Yeager v. City of McGregor*, 980 F.2d 337 (5th Cir.), cert. denied, 510 U.S. 821, 114 S. Ct. 79, 126 L. Ed. 2d 47 (1993).
90. See *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1144 (3rd Cir. 1995), summarizing cases going both ways.
91. See *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 1994 U.S. App. LEXIS 12492 (May 31, 1994); *Haavistola v. Community Fire Co. of Rising Sun*, 6 F.3d 211 (4th Cir. 1993).
92. *Goldstein*, 1994 U.S. App. at LEXIS 12492 at *6 (Wilkinson, J., concurring).

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Michael Brady

Measuring the Performance of Local Governments

Paula K. Few and A. John Vogt



North Carolina cities and counties are continually looking for ways to improve services, become more efficient, and save tax dollars. As part of this effort, local officials are asking hard questions: Are local government services meeting the needs or resolving the problems for which they were created? Are services achieving the goals that elected officials have established for them? Do local officials know the true cost of providing each service? Are local governments doing a better job today than they did five years ago?

The North Carolina Local Government Performance Measurement Project arose to help provide answers to these questions. This article describes the project's purposes, background, origins, participants, organization, services studied, performance measures,

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methodology, and implementation. Further, it presents preliminary results obtained in one part of the project, a study of residential solid waste collection. These results include profiles of the participating units (large cities), their services, their performance levels, and their costs. The article concludes with observations about next steps for the project and for performance measurement generally in North Carolina.

Purposes of the Project

The North Carolina Local Government Performance Measurement Project is a joint undertaking of the North Carolina Local Government Budget Association (a group of budget professionals employed in local governments around the state), the Institute of Government, and the cities and the counties participating in the project. Its primary purpose is to develop a model that North Carolina's cities and counties can use to support their ongoing efforts to measure and assess their performance and costs. A second purpose is to test and refine the model by applying it to a select group of city and county services.

The project involves several steps: preparing unit and service profiles for the cities and the counties in the study, identifying and agreeing on the performance measures that the units use for the services studied, developing a cost accounting method for the services, and explaining the differences in costs and services among participating units.

The ultimate goal is to produce methods and data that local governments across the state can use for assessing the quality and the cost of services, making comparisons among similarly situated cities or counties, considering alternative levels of service, and evaluating proposals to provide services from private companies. The project will also help local governments identify innovative or improved methods of service delivery and develop "benchmarks" (targets) for performance of the services studied.

Background to the Project

The project can be better understood with some knowledge of national events and initiatives. One backdrop for the project is the elimination of jobs in the private sector (downsizing) as a means of improving productivity, and corresponding initiatives to im-

prove public services and make them more efficient. Citizens, as customers of government services, expect them to be provided responsively and efficiently and to represent good value for tax dollars. Many citizens have personally experienced downsizing and reengineering in the private sector. Nearly all citizens have read or heard about these initiatives. They expect government to be as effective and productive as private-sector organizations.¹

Another backdrop is increased interest in government's contracting with the private sector for services, and in other approaches to privatization, as alternatives to government's delivering public services. These approaches can produce savings as a result of the competition among potential providers. The high-profile success of Phoenix and the experiences of some North Carolina local governments with privatization and competition have encouraged a growing number of public entities in the state to invite private firms and their own workforce to bid on providing services.²

A third context for the project is the 1994 recommendation of the highly influential Governmental Accounting Standards Board (GASB) that local governments include measures of service effort and accomplishment (performance) in their external financial reporting.³ This recommendation, and the years of research and work leading up to it, have had a great influence in furthering performance measurement in the public sector. Partly in response to GASB research initiatives, the Government Finance Officers Association of the U.S. and Canada (GFOA) passed two resolutions calling on public entities to develop and use performance measures in their budgeting systems.⁴ Other national associations have encouraged public entities to employ performance measurement to improve planning, decision making, and management. For example, in 1992 the American Society for Public Administration approved a *Resolution Encouraging the Use of Performance Measurement and Reporting by Government Organizations*.⁵

A fourth backdrop for the project is the Government Performance and Results Act, which Congress enacted in 1993. It requires all federal agencies to develop five-year strategic plans and one-year performance plans. The plans must cover each program or activity set forth in an agency's budget and include performance indicators as well as objective, quantifiable, and measurable goals.⁶

An increasingly rich literature on performance measurement has emerged in recent years. Three books are of particular note. In 1992 the Urban Insti-

tute and the International City/County Management Association (ICMA) jointly published the book *How Effective Are Your Community Services? Procedures for Measuring Their Quality*, which identifies and analyzes outcome- or effectiveness-oriented measures for a wide variety of city and county services.⁷ Subsequently David Osborne and Ted Gaebler wrote *Reinventing Government* (1992),⁸ which motivated many state and local government officials to develop, strengthen, and use performance measurement for public decision making and management. More recently *Municipal Benchmarks: Assessing Local Performance and Establishing Community Standards* (1996), by David Ammons, has made a substantial contribution to the literature on performance measurement.⁹

Finally, several national performance measurement and benchmarking projects are under way. An ICMA project involves thirty-eight large cities and counties, including Charlotte, North Carolina.¹⁰ Another project, sponsored by the Innovations Group, encompasses a larger number and a broader range of local governments.¹¹ Like the North Carolina project, these two national projects are attempting to identify comparable performance measures for services delivered by participating units. They face significant challenges in ensuring reliable and comparable results for several reasons: the relatively large number of local governments involved in these projects, the number of services being studied, and the considerable variability among the units in service levels, systems, and conditions. Staff of the North Carolina project hope that by focusing on a select group of services provided by a small number of local units in one state, and by working closely with the officials in those units, they will produce results that participating cities and counties can use with confidence.

Origin and Initiation of the Project

The impetus for the North Carolina project came from two groups, city and county managers and budget officials. In 1994 the North Carolina League of Municipalities convened a meeting of managers from several of the state's large and medium-size cities. Although this meeting focused on privatization and competition with private providers of public services, one subject was the use of performance measures and benchmarks to compare performance by a city's own workforces with proposed or actual performance by private contractors. Subsequently the Winston-Salem budget

director proposed to the North Carolina Local Government Budget Association that interested members of the association undertake a performance measurement project. In early 1995, representatives from several large cities and counties, and staff from the Institute of Government, the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and North Carolina State University met and assigned to a smaller working group the task of preparing a proposal for such a project.

When the proposal was complete, the North Carolina Local Government Budget Association and the Institute of Government agreed to cosponsor the project and provide logistical and financial support. In fall 1995 the Institute of Government hired a project coordinator, whose first step was to secure commitments from seven large cities to participate in and help finance the initial phase of the project.¹² Subsequently seven large counties agreed to do the same as the project's second phase. A third phase concentrating on medium-size and small cities and counties that are using or wish to use performance measurement is just beginning. These units are also helping to finance Phase III.

A work plan prepared in fall 1995 sets forth the project's objectives, based on the proposal approved by the Institute of Government and the North Carolina Local Government Budget Association, and outlines a schedule for implementation. The project has a steering committee composed of the budget directors of the seven cities and seven counties participating in the initial phases of the project, and representatives from the Institute of Government, the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and North Carolina State University. The budget directors of Winston-Salem and Forsyth County cochair this committee, whose function is to set policy and make all major decisions concerning project implementation.

Project Participants and Organization

Phase I of the project began in September 1995 and will be completed in early 1997. The participating cities are Asheville, Cary, Durham, Greensboro, Raleigh, Wilmington, and Winston-Salem. Phase II began in January 1996 and will be completed by summer 1997. The participating counties are Buncombe, Catawba, Durham, Forsyth, Guilford, Mecklenburg, and Wake.

Phase III, scheduled to begin in January 1997, will emphasize adaptation of the unit and service profile, performance measurement, and cost accounting methods from Phases I and II to smaller jurisdictions, whose staff generally have less experience with performance measurement than the staff of large cities and counties. It may also involve the development of training to help staff in such units create and use performance measurement and cost accounting systems. If the large cities and counties express an interest, Phase III may apply the project's models to additional services in those units.

Services Studied in Phases I and II

In fall 1995 the city representatives on the project steering committee selected the city services to be studied in Phase I:

- *Police*
 - Patrol
 - Investigations
 - Emergency communications
- *Solid waste collection*
 - Residential refuse collection
 - Recyclable materials collection
 - Residential trash and yard waste collection
- *Street maintenance*
 - Street surface maintenance, repair, and resurfacing
 - Right-of-way maintenance
 - Street cleaning

(Subsequently the committee decided to provide only service profile data for right-of-way maintenance and street cleaning, having discovered that the differences in organizational arrangements for these two functions made cost data difficult to compile.)

In December 1995 the committee's county representatives selected the county services to be studied in Phase II:

- *Jails*
 - Jail operations
 - Pretrial release programs
- *Emergency medical services (ambulance)*
- *Child protective services*
 - Discovery and investigation of abuse and neglect
 - Foster care
 - Adoption services
- *Inspections*
 - Building
 - Environmental

Glossary of Performance Measurement Terms

These definitions of terms used by the North Carolina Local Government Performance Measurement Project closely follow conventional definitions and common usage.

Performance measurement. The process of assessing the results produced or achieved by public services. For a particular service, performance measurement might start with the formulation of a mission statement and measurable objectives that reflect or address the need for the service. The process also involves identifying measures to assess the extent to which the objectives are met and measuring the costs or the efforts expended to provide the service.

Performance measure. Statistics or quantifiable indicators that can be used to assess different dimensions of service. The term is seldom defined in the literature.¹ However, some questions posed by performance measurement point toward the foregoing definition: Are citizens getting their money's worth for the tax and other public dollars that they pay to finance local government? Are local government services meeting the needs or resolving the problems for which they were created? How effective and efficient are services? Some performance measures assess the resources expended or the workload involved in providing a service. Some measure the level, the amount, or the quantity of service provided to clients, citizens, or the community. Others evaluate the extent to which a service meets need or demand, resolves problems that the service was created to resolve, or achieves objectives that officials established for the service. Still others relate the resources or efforts expended on a service to the amount of service provided or the extent to which the service meets needs, demands, or objectives. These last types are commonly called "efficiency and effectiveness measures."

Benchmark. A target or a goal for performance of a service, against which actual performance is compared. Benchmarks can be based on any of numerous factors: clients' or citizens' needs or expectations; performance achieved in a past period or year; performance of the same service by other governmental entities or by private firms; generally accepted standards, where they exist, for effective or efficient provision of a service; and others. Although the North

Carolina project is gathering data that individual local governments can use to develop benchmarks, the project itself does not extend to the identification or the development of benchmarks for the services studied.

Cost. The consumption of human, material, and other resources to provide a service. Cost occurs when these resources are actually used, regardless of when they were acquired.²

Expenditure. A decrease in financial resources. It occurs when the financial resources are depleted to acquire the other kinds of resources needed to provide a public service.³ Governments budget and account for expenditures rather than costs. Expenditures and costs for any given item may occur at the same time or at different times. To measure performance, one should know the dollar value of the human and material resources consumed to produce the service.

Cost accounting. The process of measuring and reporting on costs. The cost accounting model used in the North Carolina project measures full costs, including direct operating and maintenance expenses; indirect overhead, administrative, and support expenses; and charges for the use of capital equipment and facilities.

Notes

1. For instance, the Government Finance Officers Association of the U.S. and Canada (GFOA) issued two very useful reports on performance measurement in 1994: Patricia Tigue and James Greene, Jr., "Performance Measurement: The Link to Effective Government," *Research Bulletin* (Chicago: April 1994); and Dennis Strachota and Patricia Tigue, *Research Report: The Use of Performance Measures in City and County Budgets* (Chicago: Aug. 1994). Both stress the importance of performance measurement and discuss different types of measures. *Research Report* includes a lengthy catalog of performance measures found in budget documents submitted for the GFOA's Distinguished Budget Presentation Awards Program. However, neither publication provides a single, concise definition of performance measure, nor do most of the other publications cited in this and the main article.

2. The term "cost" in the main article refers to the "using up of assets." Under generally accepted accounting principles, such an event is strictly speaking an expense rather than a cost. Thus "cost" in the main article means "expense." The term "cost" is used because it is commonly associated with the term "cost accounting," which accounts for the use or the consumption of resources rather than their acquisition. See GFOA, *Governmental Accounting, Auditing, and Financial Reporting* (Chicago: GFOA, 1994), 322.

3. GFOA, *Governmental Accounting, Auditing, and Financial Reporting*, 329.

The steering committee has used several criteria in selecting city and county services for inclusion in the project. The services have to (1) be important to the mission of city or county government, (2) affect large numbers of citizens or have many clients, and (3) in a few cases, be a candidate for contracting out or privatization. An effort has been made to keep the number of selected services small because the project's primary goal is to develop and test methods that North Carolina's cities and counties can use for their own performance measurement and cost accounting. Only a small number of services needed to be selected and studied for this purpose. The project's second important objective is to produce valid and reliable data. To achieve this as well, it has been advisable to include just a few services in Phases I and II.

Project Performance Measures

The North Carolina project is using three broad categories of performance measures: (1) measures of service need and quantity, (2) measures of efficiency, and (3) measures of effectiveness.

Measures of Service Need and Quantity

Measures of service need and quantity (output) are a starting point for analyzing service performance. Measures of the need for a service address the fundamental question of why services exist. They are generally the principal ingredient that officials use to set objectives and formulate outcome-oriented measures to determine whether they achieve their objectives. Measures of the quantity of a service speak to magnitude. In the project, measures of service need and quantity are presented as comparisons—say, units of need or output per 1,000 customers or citizens. For some services, measures of need are different from measures of quantity. For example, in street maintenance, the measure of service need is lane miles of streets maintained by the city, whereas the measure of quantity is tons of repaving material applied to maintain streets. For other services, one indicator measures both service need and service quantity. For residential solid waste collection, the measure of service quantity, tons of waste collected, is also the most practical measure of need.

Commonly Used Performance Measures

A basic step in the identification and the selection of performance measures for the services studied in the North Carolina Local Government Performance Measurement Project was the formulation of a typology. The literature and actual practice suggest a number of ways to classify performance measures.¹ The project's typology has the following components: measures of resource or effort, workload or activity, service quantity or output, service need or demand, outcome, efficiency, and effectiveness. Although resource or effort and workload or activity measures are not in themselves good gauges of program performance, they are included in the discussion because they are used as building blocks for measures that do evaluate results or performance. The project's definitions and illustrations for these different types of measures are as follows:

Resource measures. Expenditures, costs, and personnel counts are the most common indicators of resources used or effort expended in providing a service. These indicators are used in formulating ratios, such as cost per ton, which make meaningful comparisons possible. Cost is the principal resource measure used for this project.

Activity measures. These refer to steps or activities that form the process of delivering a service. An activity or workload measure might count the number of times a particular step is performed. To provide comparative measures of performance, these data should be used in ratios rather than on their own.

Output measures. These measure the end product of service delivery. They count the number of times that the service or the product is delivered or the amount of service that is provided. For a public health immunization program, the number of persons immunized or the number of immunizations given might be a measure of service quantity or output. This type of measure does not consider the quality of service provided or the resources used. It therefore must be supplemented with some indicators that do assess these areas.

Need or demand indicators. These refer to conditions or problems underlying the need for a service. Logically they have a relationship to the amount of service provided. For public health immunization, the incidence of the disease for which an immunization is given might serve as an indicator of the need for the

program. Indicators of demand or need are often used to formulate objectives and outcome-oriented measures for a service and to evaluate efficiency and effectiveness.

Outcome measures. Typically, officials have explicit objectives for services that they institute, and they want to measure the extent to which they achieve the objectives. Many outcome measures refer to an underlying need or demand for a service, or to a problem giving rise to the service. For example, an objective for public health immunization might be "To reduce the incidence of childhood communicable diseases by 5 percent." After an immunization program is under way for a time, one can presumably link the program's performance with a decrease in the disease rates.

Efficiency measures. These are usually a ratio between the resources expended to provide a service and the level (quantity) of service provided, assuming a certain level of quality. (How much did it cost to provide the service?) Efficiency measures may also compare resources expended with improvements or changes in service quality, while holding quantity constant. (How much more did it cost to improve quality?) For a recycling program, cost per ton of recyclable materials collected could be an efficiency measure.

Effectiveness measures. These can assess any of the following: (1) the quality level at which a service is provided; (2) the extent to which the service meets the demand for the service or resolves the problem giving rise to the service; (3) the extent to which the service meets the objectives (also an outcome measure); or (4) resources expended on the service in relation to need met or demand fulfilled.

Notes

1. For example, see Patricia Tighe and James Greene, Jr., "Performance Measurement: The Link to Effective Government," *Research Bulletin* (Chicago: April 1994), 3-4; Mark Glover, *A Practical Guide for Measuring Program Efficiency and Effectiveness in Local Government* (Tampa, Fla.: Innovations Group, n.d.), chap. 6; and David N. Ammons, *Municipal Benchmarks: Assessing Local Performance and Establishing Community Standards* (Thousand Oaks, Calif.: Sage Publications, 1996), 2. Tighe and Greene distinguish among input, output, outcome, and efficiency measures. Glover identifies input, output, efficiency, productivity, and effectiveness or outcome measures. Ammons differentiates among three types of advanced performance measures: efficiency, effectiveness, and productivity.

Measures of Efficiency

Cost per unit of service, product, or output is the project's principal measure of efficiency. An example of an efficiency measure for recycling is the cost per ton of recycling material collected. Full-time equivalent (FTE) positions per unit or per 1,000 units of service is a second and generally less reliable measure of efficiency. The North Carolina project uses it only sparingly and with caveats attached. The FTE position count includes both positions occupied by full-time personnel and positions held by employees on a temporary or part-time basis, adjusted for the portion of the full work year or day that they are on the job. It does not include city and departmental administrative and other staff whose work indirectly supports a service. The number of FTE positions is inappropriate as a measure of resources expended for services that a city contracts out to the private sector unless the number of FTE positions used by the contractor is also available and counted.

Measures of Effectiveness

Several different types of effectiveness measures are used for the services studied in the project. Some relate to the quality of service provided or to clients' or citizens' perceptions of the quality. An example of an effectiveness measure for police patrol services is response time for the most serious types of crime. To citizens this measure is of great importance. It is of less significance to police departments using community policing, which emphasizes crime prevention activities and police presence in neighborhoods. An effectiveness measure for emergency communications is the average time that it takes actually to dispatch officers to the scene of a crime, counting from the time at which a call is received. Other effectiveness measures used in the project address the extent to which a service meets the need or resolves the problem that it addresses. A measure used in solid waste recycling provides an illustration: tons of waste recycled in a particular year as a percentage of tons of waste deposited in landfills in that year or a prior base year. There are limitations, however, on the ability to measure effectiveness in terms of need met or demand fulfilled. For example, it is difficult to demonstrate a direct relationship between increases in police effort and decreases in crime rates.

Implementation of the Project

The North Carolina project has five stages: (1) compilation of a unit profile for each participating city and county, (2) preparation of a detailed profile for each service being studied, (3) selection of performance measures for each service (and collection of performance data), (4) development of a method for determining the cost of services, and (5) preparation of an explanation of the differences between and among units in costs and services.

Compilation of City and County Profiles

Project staff have compiled demographic, topographic, economic, and other relevant information about each participating city and county to help explain differences in service approaches, levels, and costs. An example shows the effect of topography. Greensboro uses automated vehicles to collect refuse. The terrain there is relatively flat. When Asheville tested the vehicles, the automated arms could not replace the refuse cans without many of them rolling away down the hills. Consequently Asheville continues to have workers lift cans from the curb to empty the contents into the refuse collection trucks. Such a system results in higher personnel costs. In this case, topography helps explain the different service delivery approaches in the two cities.

Preparation of Service Profiles

Project staff, officials working in each of the service areas studied, and budget officials developed an instrument to collect data about how each unit provides a service. A separate instrument has been developed for each of the nine services studied in the project.

The contributions of officials working in the service areas have been crucial in ensuring that the right questions are asked. For example, in street repaving, street maintenance personnel from the participating cities recommended using cost per ton of repaving materials "put into place" as the measure of efficiency. Project staff had initially suggested cost per linear foot of streets repaved. Because cost per ton controls for depth of overlay used, it is a superior measure.

Using the service profile instruments, city and county officials have gathered data on each service, which they have then verified. The resulting profiles

depict the ways in which each unit provides a service, and they report data about the quantity and the quality of the service as well as the resources used to provide it.

Selection of Performance Measures

Catalogs and helpful analyses of various types of performance measures for specific services appear in published sources. To select performance measures specifically for this project, project staff first reviewed the literature, as well as budget documents from participating units and other local governments known for excellence in performance measurement. They also identified and gave consideration to measures already being used by participating governments. Further, they surveyed officials in the participating cities and counties. An important consideration was a commitment to select, to the extent possible, measures for which data were readily available in each unit. On the basis of this work, staff produced preliminary recommendations, from which the steering committee selected measures of quantity, need, efficiency, and effectiveness.

Development of a Cost Accounting Model

The steering committee's initial discussions about cost accounting issues included whether to capture only direct costs for a service or to attempt full costing. The latter consists of (1) direct costs for labor, operating, and maintenance expenses; (2) indirect costs, which include allocations for items like utilities and telephones, and overhead costs for departmental and central staff functions, such as purchasing and data processing; (3) charges (depreciation) for the use of equipment; and (4) charges (depreciation) for the use of facilities. The committee opted for full costing but with separate calculation of direct costs, indirect costs, usage charges for capital equipment, and usage charges for capital facilities.

Using these general categories as a framework, staff at the Institute of Government, including the faculty member specializing in governmental accounting, drafted a detailed cost accounting model consisting of approximately sixty-five specific line items. The model is based on the charts of accounts used in the cities' accounting systems. Further, it allows for the use of existing indirect cost allocation plans in five of the

cities in Phase I and all the counties in Phase II.¹³

Significantly the cost model uses acquisition or construction costs, often referred to as "historical costs," as the basis for usage charges for equipment and facilities. The alternative was replacement costs. Although that would have had certain advantages, the difficulty of arriving at reliable numbers for such costs dictated the choice of historical costs. Moreover, the use of historical costs is recommended in generally accepted accounting principles.¹⁴ Estimates of useful life were developed by project staff based on current standards and were applied to historical acquisition or construction costs to come up with annual usage charges for equipment and facilities needed for the services studied.

Budget and finance personnel in the participating cities suggested revisions of the model, which was then tested on residential solid waste collection. The model did well in the test, although some adjustments were necessary to ensure that the costs reported would be as comparable as possible. The model was later tested on one of the county services, foster care, and some changes were made for application to the county services in Phase II.

Preparation of an Explanation of Differences

From the beginning, participants realized that cities and counties providing high levels of service or facing unusual conditions in providing a service (such as the challenges of hilly terrain for collecting solid waste in Asheville) might incur higher costs for the service than other cities and counties. For example, as a matter of governing board policy, some cities provide behind-the-house collection of residential solid waste, whereas others collect at the curb. This difference in service level will result in different costs. Likewise, a city using less expensive materials for street maintenance than another city may have lower street maintenance costs for each ton of materials used (although use of lower-quality materials may result in more frequent repairs in the long run).

The project's performance and cost data will note and explain such differences. Indeed, presentation of such explanatory information is one of the project's most important components. It will illuminate conditions and practices in a particular city or county that may, when combined with the measurement data, lead to more efficient and effective service delivery.

Project Results

Final results for Phase I of the project will be published in early 1997 by the Institute of Government. Results for Phase II will be available in summer 1997. Meanwhile, preliminary results obtained for solid waste collection from residences are presented to illustrate the types of results that the project will produce. The unit profiles and the service descriptions are summarized as Table 1, the results on performance measures as Table 2, and the cost numbers compiled for residential solid waste collection as Table 3. Cities are not identified by name in the tables. The data presented are materially accurate as of this writing, but they may change slightly before being finalized.

Unit Profiles and Service Descriptions of Solid Waste Collection from Residences

Table 1 shows important data on whether solid waste is collected from the back yard or at the curb. Three of the seven cities offer backyard collection. Another component of service level is frequency—whether solid waste is collected once or twice a week. (Only one city collects twice a week.) One city relies heavily on contractors to collect 45 percent of its total waste tonnage, whereas another city uses one-person automated equipment on many of its routes.

Table I reflects two general approaches to residential solid waste collection. One is characterized by relatively high levels of service, as evidenced by more frequent collection and/or pickup in the back yard. Three cities are in this group. The other mode employs weekly collection and/or curbside service. Four cities have adopted this approach. One city in this group is further distinguished by substantial service contracting, another by reliance on automated equipment rather than collection staff.

Table I shows other differences, such as whether the residential solid waste collection function is budgeted and accounted for in the unit's general fund or in an enterprise fund, and whether the city has flat, gently rolling, or hilly terrain. These elements affect the service, although they seem to have less effect on cost and performance than service location, frequency, and method do. The differences in service level and approach for residential solid waste collection provide a framework for presenting and explaining differences in city performance and cost data for this service.

Performance Measures of Solid Waste Collection from Residences

Measures of Quantity or Need

For residential solid waste collection, the measure of service quantity used is the number of tons of solid waste collected annually from residences per 1,000 collection points and per 1,000 population. It is arguable whether the number of tons collected is also a measure of need, for it counts only actual amounts collected, which is at best a proxy measure of need. [See "Commonly Used Performance Measures," page 46, and the earlier discussion of measures of service need and quantity (output) in the section Project Performance Measures.]

Efficiency Measures

Four efficiency measures were selected: annual cost per ton collected, annual cost per collection point, annual cost per collection, and annual number of tons of waste collected per FTE position providing residential solid waste collection service.

As noted earlier, the steering committee thought it essential to keep the number of measures small and to confine data collection to that already occurring in cities. These criteria, however, create certain problems. The efficiency measures selected, for example, are imperfect indicators. Cost per ton, cost per collection point, and cost per collection do not account for differences in topography, size of geographic area covered, street layout, or similar variables. Likewise, measurement of the number of tons of solid waste collected annually per FTE position is clearly affected by whether a city collects waste from residences with its own workforce or by contract with private waste collectors. Consequently, tons of waste collected per FTE for the two cities contracting out a significant portion of this service refer only to tonnage collected by city workforces.

Table 2 demonstrates that there are indeed differences in performance among the participating cities, often explained by variations in their approach to service delivery and the conditions under which they provide service. The service profiles and the efficiency ratios also reveal a strong positive correlation between service levels and costs.

When making comparisons among cities based on efficiency, it is important to remember that how efficiently a service is provided does not speak to how

Table 1
City Profiles and Service Descriptions for Residential Solid Waste Collection

	City A	City B	City C	City D	City E	City F	City G
City Profile							
Property tax rate FY 94-95	0.681	0.57	0.54	0.67	0.58	0.58	0.5725
Year of last revaluation	1993	1994	1992	1988	1991	1993	1992
Land area of city (sq. mi.)	79.31	42.00	38.40	97.70	32.00	100.01	99.50
Topography/region	Flat/gently rolling	Hilly	Flat/gently rolling	Flat/gently rolling	Flat	Gently rolling	Flat/gently rolling
Service Description							
Tons collected FY 94-95	40,000	23,181	16,644	48,156	20,300	40,714	54,790
Residential customers	47,000	24,000	20,437	54,000	19,310	54,135	62,703 (single fam. only)
Collection location							
Curbside	X	X		X	X		
Back yard		X*	X			X	X
Collection frequency							
Once a week	X	X	X	X	X	X	X
Twice a week					X*		X
FTE positions	66.0	34.0	45.5	27.2	11.5	114.1	157.8
Size of crews	3-person	3-person 2-person	4-person 3-person	2-person 1-person	3-person 2-person	3-person	4-person
Amount of service							
contracted out (%)	0	0	0	0	45.0	11.6	2.6
Type of fund used for service							
General fund		X	X			X	X
Enterprise fund	X			X	X		
Solid waste fee, if any	NA	NA	\$11.50/mo.	\$5.55/qtr.	Volume based	NA	\$1.30/mo.

*Available for a fee

good a service is or how satisfied customers are. Measures of efficiency are useful, however, in providing some answers to previously unanswerable questions about the trade-offs between cost and level of service.

Effectiveness Measures

The effectiveness measures selected are number of complaints or valid complaints per 1,000 collection points and survey results quantifying citizens' satisfaction with collection service. Although the literature considers these to be good measures of effectiveness, and the steering committee believes that they are the best available, the lack of standardization introduces major problems into the data. There is no consistency in how cities collect data on complaints, if reliable records are kept at all. Most keep logs of complaints. But what one city may log as a "complaint," another may log as a "contact." The problems in defining and collecting data on valid complaints are even more

daunting. Only one of the cities participating in the project verifies the validity of complaints. This requires significant staff effort and time. A recommendation likely to emerge from the study is that North Carolina cities validate complaints about residential solid waste collection.

In the area of surveys of customers' satisfaction, although some of the cities do use such surveys, there are wide variations in how the surveys are developed and administered. Again, to measure citizens' satisfaction on a consistent basis, cities must work to develop and employ common survey instruments.

It should be noted that the steering committee did find it easier to develop measures of effectiveness for several of the other services.¹⁵

Table 2 shows the considerable variation among the seven project cities in cost per ton of solid waste collected from residences. Although project staff cannot state with certainty what accounts for these differences, the data point to some possible explanatory factors.

Table 2
Performance Measures for Residential Solid Waste Collection

	City A	City B	City C	City D	City E	City F	City G
Service Quantity or Need Measures							
Tons collected per 1,000 population	272.00	348.26	270.90	254.83	333.41	248.09	227.45
Tons collected per 1,000 collection points	851.06	965.88	814.41	891.78	1,051.27	752.08	873.80
Efficiency Measures							
Cost per ton collected (\$)	116.29	103.33	126.97	62.19	78.83	126.24	119.04
Cost per collection point (\$)	98.97	99.80	103.53	55.46	82.87	94.94	104.01
Cost per collection (\$)	98.97	99.80	103.53	55.46	80.16	94.94	52.01
Tons collected per FTE	606.06	681.79	365.96	1,770.44	1,034.78	356.83	347.21
Effectiveness Measures							
The project steering committee selected the effectiveness measures listed below for residential solid waste collection. The cities participating in the first phase of the project did not collect data on complaints in a consistent manner or conduct surveys of customers' satisfaction regularly or consistently. Therefore they cannot be compared on these measures. However, the committee wants to publicize the measures as a way of encouraging local units to begin collecting the information.							
Complaints per 1,000 collection points							
Valid complaints per 1,000 collection points							
Sample survey of customers' satisfaction with residential solid waste collection service							

Notes: For Cities A, C, and G, the figures reflect residential solid waste plus one or more other categories of waste, such as curbside trash. For the two cities that have substantial contracted service, tons collected per FTE reflect only tons collected by city workers.

First and not surprisingly, everything else being equal, higher levels of service will cost more than lower levels. The cities collecting once or twice a week from the back yard have higher costs per ton than those collecting once a week at curbside.

Second, crew size appears to affect costs. The city operating one-person trucks has considerably lower total costs and lower costs for salaries and benefits per ton than the other six cities do. However, this city has higher equipment costs than the others. The city relying significantly on contracted services also has low per-ton costs. Is this due to contracting? Do the contractors used by this city offer lower pay and benefits to their employees than the other cities pay their solid waste collection workforces? If so, how should other cities assess this fact in weighing the advantages of contracting? Do location and topography partly explain this difference, given that the city relying on contracted services has flat terrain, which may lower the collection costs? These and similar questions re-

main to be answered as cities use the information from the project to explore methods of providing essential services.

Differences in cost might also be explained by economies of scale enjoyed by large cities, or by variations in types or ages of equipment. Between two cities, for example, the one with the older fleet will likely have the higher maintenance costs. Capital equipment charges, however, will be higher where there is newer equipment. Educating the public on waste reduction may reduce the number of tons collected relative to the number of customers or the size of the population, as may a fee schedule for collection that is based on volume. Different methods of allocating indirect costs may also affect results.¹⁶ In some cases, costs may be affected by the distance that collection vehicles travel to reach a landfill or a transfer station, by the average size of residential lots, by the average number of people in a household, and by various other factors. This discussion underscores the great

Table 3
 Cost Summary for Residential Solid Waste Collection
 (\$)

	City A	City B	City C	City D	City E	City F	City G
Salaries/benefits	2,806,048	1,140,087	1,228,523	894,130	383,218	3,451,461	4,370,936
Operating expenses	614,145	401,837	361,141	957,525	966,998	1,046,679	694,897
Indirect costs	669,146	525,150	283,183	350,569	185,316	221,056	1,066,629
Capital costs	562,346	328,130	240,510	792,795	64,700	420,623	389,575
Total	4,651,685	2,395,204	2,113,357	2,995,019	1,600,232	5,139,819	6,522,037

Note: Landfill disposal costs have been excluded.

importance of considering differences in service levels, methods, and conditions in reporting cost and performance differences among cities.

Use of the Results

How can cities use the project's results for residential waste collection? Given different methods of service delivery and different conditions, can cities make valid comparisons among themselves? The answer is yes: cities can make useful comparisons of cost per ton, cost per collection point for solid waste collection, and other measures if they take care in gathering service and cost data. Cities providing similar levels of service and facing similar service conditions can examine and compare their collection methods to improve service delivery systems. Even when service levels and conditions vary among cities, officials are much better able to see and judge the effect of these differences on costs. This, in turn, can lead to changes in service level or approach. Such information and comparisons provide officials with a better basis for asking questions that can lead to innovations and savings in service delivery and more effective methods of providing services. They are useful as well in making decisions about the allocation of resources and the direction of programs.

Cities can also use the information resulting from the project for making comparisons over time for their own services. For example, officials in a city might use the performance measures and the cost models to determine whether the city is collecting solid waste more efficiently this year than it did five years ago, or to ascertain how much the city is saving by contracting for the service or by collecting solid waste once a week instead of twice a week. Rigorous performance measurement and cost accounting allow officials to address and answer such questions more readily.

Summary and Conclusion

As of this writing (October 1996), Phase I, involving the large cities, is being concluded, and an outline for a performance measurement workbook based on Phase I results has been developed. The outline calls for discussion of the models for performance measurement and cost accounting developed in Phase I and for presentation of the unit and service profiles, performance measures, costs, and narrative information explaining differences among the cities for each of the services studied. Appendixes will include copies of all the instruments developed to collect data. The steering committee will develop the final format and content of this workbook, to be published in early 1997. Much of this information will also be placed on the Internet on NCINFO, a comprehensive site for North Carolina state and local government resources, at the following Web address: <http://ncinfo.iog.unc.edu>.

Phase II, evaluating county services, is progressing well. Service and cost data are being collected, and the county steering committee is selecting the measures that will be used. A workbook will also be published for Phase II results.

As noted earlier, Phase III will be undertaken during 1997. A steering committee composed of representatives from the participating units will set the objectives and devise the work plan.

What will the long-term benefits of this project be? Besides the publications just described, project staff expect several results:

- agreement among the participating cities and counties as well as other North Carolina local governments on a core set of measures to assess service performance;
- a common approach to determining the cost of local government services;
- a better understanding of how the variables that

Elements of Good Performance Measures

Number. Many performance measurement systems falter because they attempt too much.¹ When a system is tracking a host of measures, the effort to collect and maintain data is unlikely to be sustained. In addition, policy makers may become bogged down in detail and lose sight of key aspects of performance. The North Carolina Local Government Performance Measurement Project generally uses only one or two measures of need or quantity for each service, and most of these are also incorporated into the ratios for efficiency and effectiveness measures. The project has identified no more than three efficiency measures for each service and has in most cases limited effectiveness measures to that number. In almost every case, no more than eight of the most crucial measures for each service are used.

Validity. Obviously, attention must be paid to choosing performance measures that are “valid,” that is, that measure what they purport to measure. To this end, project personnel have chosen measures that most cities and counties are already using successfully. Also, they have asked both budget officials and staff involved in service delivery to help in selecting the measures.

Relevance. A very important criterion for a measure is that it be “relevant.” This criterion dictates that the measures selected pertain to essential aspects of service performance. Service quality presents the most significant challenge in this area. The quality of most services can be assessed along many dimensions. Because the project uses so few measures of quality per service, the challenge is to address the crucial dimensions. Project staff have consulted extensively with officials from the participating units to ensure the selection of relevant measures.

Reasonable cost of data collection. Although many measures are potentially useful to a unit, the cost of the effort required to collect data must remain “reasonable”; that is, the benefits realized from collect-

ing data must at least equal the costs incurred. Project staff are trying to ensure this by limiting the number of measures per service and by focusing on measures for which most of the participating units are already collecting data. Staff do recommend, however, some measures for which few, if any, of the participating units currently collect data—for example, measures based on surveys of clients’ or citizens’ satisfaction with services. When this occurs, staff are providing examples of such surveys.

Accuracy. The data collected for the selected measures must also be “materially accurate.” This requires that the collection process have integrity. Project staff are recommending steps that a city or a county can take to ensure this integrity.

Reliability. Data must be “reliable” as well, that is, consistent from period to period and comparable from unit to unit. The project’s emphasis on careful service description, rigorous definition of measures, and careful data collection has helped ensure reliability of data.

Notes

1. Public officials in North Carolina have identified and successfully use a select number of financial indicators to gauge financial performance by cities and counties in the state. Two of the most important ones are available general fund balance and the current year’s property tax collection percentage. Both of these indicators are watched closely by local managers and elected officials, state regulatory officials, and the bond rating agencies. For counties, data for these indicators are reported annually in the North Carolina Association of County Commissioners and the Department of the State Treasurer’s *Fiscal Summary of North Carolina Counties* (Raleigh, N.C.: NCACC). This publication presents a two-page summary of fiscal data for each county, including fund balance and tax collection information. The aim of the North Carolina Local Government Performance Measurement Project is eventually to produce such summarized information on the performance of key local government services.

make each city and county unique affect the performance, the delivery, and the cost of services;

- a better basis for individual cities and counties to identify and select benchmarks against which to measure their own service performance and cost.

As local governments in North Carolina head to-

ward the twenty-first century, they must develop new tools to keep pace with change. Experience so far with the North Carolina Local Government Performance Measurement Project has led many people involved in the project to conclude that systematic performance measurement will be one of those essential tools.

Notes

1. For example, in recent years, business groups and certain citizens' groups in Charlotte have quite actively encouraged that city to operate as efficiently and leanly as possible. See O. Wendell White, Pam Syfert, and David Cooke, "Rightsizing in Charlotte, North Carolina," *Government Finance Review* 10, no. 6 (Dec. 1994): 7-9.

2. David Osborne and Ted Gaebler describe Phoenix's experiences with privatization and competition in their landmark book *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (Reading, Mass.: Addison-Wesley Publishing Co., 1992), chap. 3. A recent overview and analysis of competition is provided by Lawrence L. Martin in "Selecting Services for Public-Private Competition," *ICMA Management Information Service Report* 28, no. 3 (March 1996).

3. Governmental Accounting Standards Board, *Concept Statement No. 2 on Service Efforts and Accomplishment Reporting* (Norwalk, Conn.: GASB, April 1994). This statement declares, "SEA [service effort and accomplishment] information is necessary for assessing accountability and in making informed decisions; therefore, to be more complete, GPEFR [general purpose external financial reporting] for governmental entities needs to include SEA information" ["Summary," p. 1]. "Service effort and accomplishment information" is another name for performance reporting.

4. Government Finance Officers Association, *Recommended Practices for State and Local Governments* (Chicago: GFOA, 1995). The first resolution, approved in 1993, states, "[P]erformance objectives and measurement are critical components and key tools for use in budget planning and decision making and program management by all levels of government" (pp. 44-45). The second resolution, passed in 1994, stresses, "Meaningful performance measurements provide for governmental accountability by assisting government officials and citizenry in identifying financial and program results and evaluating past resource decisions" (pp. 45-47).

5. *Resolution Encouraging the Use of Performance Measurement and Reporting by Government Organizations*, adopted by the American Society for Public Administration, April 14, 1992.

6. An overview of this federal act, a discussion of its implications for federal performance measurement, and an analysis of performance measurement in general appear in Robert S. Kravchuk and Ronald W. Schack, "Designing Effective Performance Measurement Systems under the Governmental Performance and Results Act of 1993," *Public Administration Review* 56 (July/Aug. 1996): 348-58.

7. Harry P. Hatry, Louis H. Blair, Donald M. Fisk, John M. Greiner, John R. Hall, Jr., and Philip S. Schaenman, *How Effective Are Your Community Services? Procedures for Measuring Their Quality* (Washington, D.C.: Urban Institute and International City/County Management Association, 1992).

8. Osborne and Gaebler, *Reinventing Government*, chaps. 4 and 5.

9. David N. Ammons, *Municipal Benchmarks: Assessing Local Performance and Establishing Community Standards* (Thousand Oaks, Calif.: Sage Publications, 1996). Ammons recently joined the Institute of Government faculty and is serving as an adviser to the North Carolina Local Government Performance Measurement Project.

10. The ICMA project on performance measurement was initiated in 1995. See Terrell Blodgett and Gerald Newfarmer, "Performance Measurement: (Arguably) The Hottest Topic in Government Today," *Public Management* 78, no. 1 (Jan. 1996): 6. The ICMA has been very active in promoting and encouraging research on performance measurement. See David N. Ammons, ed., *Accountability for Performance: Measurement and Monitoring in Local Government* (Washington, D.C.: ICMA, 1995). Among other things the book describes how to involve employees in performance measurement.

11. Results from this project and guidelines for performance measurement are presented in Mark Glover, *A Practical Guide for Measuring Program Efficiency and Effectiveness in Local Government* (Tampa, Fla.: Innovations Group, n.d.).

12. Paula K. Few serves as project coordinator.

13. Cost allocation plans distribute the indirect and overhead costs of operations among benefiting departments or programs according to how much each department or program uses the corresponding services.

14. For example, the Governmental Accounting Standards Board's *Codification* (Norwalk, Conn.: GASB, 1995), sec. 1400.111, provides that general fixed assets should be recorded at their historical costs. See GFOA, *Governmental Accounting, Auditing, and Financial Reporting* (Chicago: GFOA, 1994), 105.

15. An example of a good effectiveness measure being used for recycling service is the percentage of eligible collection points participating in curbside recycling annually. This indicates how much of the solid waste stream is being diverted from landfills through recycling.

16. Some cities use a single step-down allocation, whereas others use a double step-down method that distributes the costs of central services a second time to line services, thus producing higher numbers. ☐

Economic Development after *Maready*

David M. Lawrence



In 1992 and 1993, Winston-Salem and Forsyth County were seeking to attract to their area a large office facility being planned by the Pepsi-Cola company. Eventually, negotiations focused on an office building that had recently been vacated by its owners and donated to Wake Forest University. Unfortunately for the negotiations, Wake Forest University had already found tenants for the space, and they were in possession under leases with the university. To persuade them to vacate, the city and the county agreed to pay for renovating alternative office space in another building owned by the university and moving the tenants there, at a total public cost of \$1 million. This offer worked, and Pepsi-Cola agreed to move to Winston-Salem, to the university's office building.

The Pepsi-Cola transaction was one of twenty-four industrial or commercial incentive packages to which the city and the county agreed between 1990 and 1995. The total cost for the twenty-four projects was \$9.1 million for the city and \$4.2 million for the county. From this public investment, the two governments calculated that they had attracted almost \$240 million of private business investment and more than 5,500 new jobs.

The incentive packages developed and offered by Winston-Salem and Forsyth County were typical of many being developed and offered by other local governments in North Carolina and by the state itself. Indeed, they were typical of incentive packages being offered by local and state governments across the country. What was not typical was that Winston-Salem's and Forsyth County's incentive practices led a citizen to sue the two governments, alleging that the practices and the statute under which they were

undertaken violated the public purpose limitation of the North Carolina state constitution. The case of *Maready v. City of Winston-Salem*¹ captured the attention of the state's local governments and economic developers from the time it was brought, in spring 1995, until it was decided in favor of the two local governments, in March 1996.

This article explains the public purpose doctrine and the basis of William Maready's use of it in the case that Maready brought against Winston-Salem and Forsyth County. It also reports the court's decision and rationale. Finally, it discusses the meaning of the decision for future economic development incentives in North Carolina.

The Public Purpose Doctrine

The public purpose doctrine is recognized in Article V, Section 2(1), of the state constitution, which declares that "the power of taxation shall be exercised . . . for public purposes only . . ." The constitutional language, however, understates the breadth of the doctrine, which is actually a limitation on governmental *expenditure*: if an expenditure does not serve a public purpose, it may not be made, regardless of the source of the revenues supporting it.² Thus the doctrine is a constitutional limitation on what government may do. To argue, as Maready was doing, that economic development incentive programs did not

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serve a public purpose was therefore to argue that government could not offer them. If the courts agreed with Maready, not even the General Assembly could overcome such a judicial decision. North Carolina would be out of the incentive business.

Maready's Use of the Public Purpose Doctrine

Maready based his position on North Carolina Supreme Court decisions in 1965 and 1973 holding that industrial revenue bonds did not serve a public purpose under the state constitution.⁵ In its simplest form, an industrial revenue bond is issued by a state agency or a local government to finance an industrial facility for lease to a private company. The company's lease payments are the sole security for the bonds. Because the interest on industrial revenue bonds is exempt from federal income taxation, the effect is to allow the company to finance an industrial facility more cheaply than if the company itself borrowed the necessary funds directly from a bank. In the 1965 and 1973 decisions, the court held that the benefits that industrial revenue bond financing accorded to the private companies outweighed any benefits to the public from new jobs or an increased tax base. Although the state's voters subsequently overruled the decisions by approving a constitutional amendment permitting counties to establish county authorities that might issue industrial revenue bonds,⁶ the amendment was quite narrow. There was no assurance that the general principles that underlay the two decisions had been overridden by the amendment.

Nevertheless, during the 1950s and the early 1990s, the General Assembly granted cities and counties broad statutory authority to offer economic development incentives. The basic authorization is found in Section 155-7.1 of the North Carolina General Statutes (hereinafter G.S.). Subsection (b) permits a number of specific practices to assist businesses, including developing industrial parks, assembling other potential industrial sites, constructing and leasing or selling shell buildings, helping extend public and private utility lines to industrial or commercial facilities, and preparing sites for business properties or facilities. Subsection (d2) permits a local government to convey real property to a private company and accept as compensation the increased property and sales tax revenues that will accrue to the government over the ensuing ten years as a result of improvements constructed on

the property by the private company. Finally, subsection (a), which has been in the statute since 1925, grants broad authority to "make appropriations for the purposes of aiding and encouraging the location of manufacturing enterprises." Many local governments have relied on subsection (a) as support for incentive packages that are not specifically listed in subsection (b), including the renovation and moving-expense package that Winston-Salem and Forsyth County put forth in the Pepsi-Cola transaction. In *Maready* the plaintiff argued that G.S. 155-7.1 was unconstitutional in its entirety.

The *Maready* Decision

The parties in the *Maready* case held an abbreviated trial before a judge in early August 1995. The court, relying on the industrial revenue bond cases, concluded the trial by ruling in favor of the plaintiff: the statute was unconstitutional in its entirety, and the two local governments were enjoined from any further economic development activities based on it. Both sides had understood from the beginning that there would be an appeal, regardless of the trial court decision. They joined in a petition to bypass the state court of appeals and appeal the decision straight to the State Supreme Court. The supreme court granted their motions in November and heard the case on February 16, 1996. Three weeks later, on March 5, the supreme court reversed the trial court on a 5-2 vote, holding that G.S. 155-7.1 was in fact constitutional: economic development incentives did serve a public purpose.

The majority opinion recognized that the decisions in the two industrial revenue bond cases were central to the decision in *Maready* and offered at least four arguments to distinguish the former from latter. First, the court noted that when the General Assembly had enacted the legislation overturned in the first industrial revenue bond case, it had concurrently adopted a resolution declaring that such bonds represented bad public policy. In deciding what is or is not a public purpose, the courts customarily give great weight to the General Assembly's opinions. The resolution suggested what the legislature's real opinion of industrial revenue bonds was. Thus, although the earlier court had held the bond legislation unconstitutional, its doing so appeared to be in accord with legislative opinion. In contrast, when G.S. 155-7.1 was amended in the 1950s and the 1990s, there was no evidence of

any dominant legislative opinion in opposition to the policy incorporated in the amendments.

Second, the court noted that the voters had adopted a constitutional amendment permitting some industrial revenue bond financing. It argued that the amendment "diminished the significance" of the two cases.⁵

Third, the court noted that Article V, Section 2(7), of the state constitution now specifically permitted the state and its local governments to appropriate money to private persons and entities as long as the money would be used to serve a public purpose. To the court, this amendment, which became effective after the second of the two industrial revenue bond cases, caused "the constitutional problem" at the heart of the two decisions to "no longer exist."⁶

Fourth, and most fundamentally, the court admitted simply to having a different perception of the effect of and the need for economic development incentives than did the court that decided the two industrial revenue bond cases. The earlier court had judged that the predominant benefit from incentive programs was private, going to the company whose facilities were being financed. The current court made a different judgment: that the predominant benefit from incentive programs was public, going to citizens, who enjoyed greater employment opportunities as a result, and to governments, which built stronger revenue bases. There was no fundamental difference in the activities being judged. Rather, the passage of a quarter-century had changed the perception of those doing the judging. As the court said in *Maready*, "[T]he passage of time and accompanying societal changes now suggest a positive response" to the question of constitutionality.⁷

The Meaning of the Decision for Economic Development Incentives

What does the court's decision mean for the future of economic development incentives in North Carolina? Are there any remaining limits on what local governments (and the state) may offer companies?

First, with respect to the kind of incentive at issue in *Maready*, which was essentially cash or cash equivalents, the court's opinion appears to leave any limits on what governments may offer, to the governments and the agencies offering the incentives rather than to the courts. The opinion indicates that if a particular incentive is more for the private benefit of the

company involved than for the general public, the rule of the industrial revenue bond cases will cause that incentive to be unconstitutional. The court's recognition of that consequence, however, is not an invitation to citizens to sue and challenge specific incentive packages. The opinion notes that G.S. 158-7.1 requires a public hearing before expenditures are made pursuant to the statute. These "strict procedural requirements," it states, ". . . provide safeguards that should suffice to prevent abuse."⁸ That is, if a local government has held a public hearing and given the public a chance to comment on a proposed incentive package, and if the government thereafter decides to go forward, the incentive is presumed to offer a public, rather than a private, benefit.

Second, the opinion suggests that the current legislative authority for this sort of incentive is as broad as the constitution permits. As noted earlier, subsection (a) of G.S. 158-7.1 is a long-standing and very broad authorization for economic development activities. The age of the subsection and its vague breadth led local governments during the 1980s to seek the amendatory legislation that became subsections (b) and (d2), which offer much more specific authority. When the General Assembly added the new subsections, however, it also inserted a statement that the listing of specific authorizations in subsection (b) was not to be read as a limitation on what might be authorized by subsection (a). The State Supreme Court appears to have taken the General Assembly at its word. Several of the incentives offered by Winston-Salem and Forsyth County depend on a broad reading of subsection (a) for their statutory authorization, and the court upheld all the incentives offered by the two governments. Some of these "innovative activities"⁹ included subsidies of a company's office rental costs, "spousal relocation assistance" (the court's term, probably meaning assistance in relocating the spouses of a company's employees), and the incentive package offered to Pepsi-Cola, described at the beginning of this article.¹⁰

Third, although Winston-Salem and Forsyth County financed all their incentives from current revenues, the *Maready* decision certainly supports the constitutionality of *borrowing* for these purposes as well. The North Carolina courts have never distinguished between public purposes for expenditures from current revenues and public purposes for expenditures from borrowed funds. The statutory authority to borrow, however, may not be as broad as the constitutional authority. Both the general obligation bond

statute¹¹ and the revenue bond statute¹² specifically list only providing industrial parks, acquiring land suitable for industrial buildings, and providing shell buildings as authorized purposes. G.S. 160A-20, the authority for installment financing agreements, is not so limited; it is available for any capital project that a city or a county is authorized to undertake. As a practical matter, however, an installment financing agreement may sometimes not be a suitable means of financing an incentive package because the only security for such a borrowing is the property being financed. If a local government is financing the acquisition of land, which it will in turn convey to a private company, it is unlikely that the company will be willing to accept the property subject to the local government's deed of trust. But unless the local government receives full value for the property at the time of conveyance, the loan will remain outstanding, and the need for the security will continue.¹³

Fourth, certain kinds of incentives common in other states have been unavailable in North Carolina. Consequently they were not at issue in *Maready* and therefore remain unavailable in North Carolina. Most prominent among these other kinds of incentives are property tax abatements negotiated with companies, and government guarantees of repayment of loans made to the companies by private lenders. There is no statutory authority in North Carolina for negotiated property tax abatements, and the provisions of the state constitution relating to property tax exemptions and classifications make it exceedingly difficult to craft any such authority.¹⁴ The state constitution also explicitly bars the state and its local governments from guaranteeing loans to private parties unless the voters approve.¹⁵ There is not even any statutory authority to call a referendum for that purpose.

Finally, the effect of the decision on the power of state or local government to use eminent domain for economic development is uncertain. Because there is no current statutory authority for governments to use eminent domain for economic development, such as to assemble land for an industrial park or, more starkly, to acquire a site desired by a company for its manufacturing facility, eminent domain was not at issue in *Maready*. The court has always equated the *public purpose* limitation on expenditure with the *public use* limitation on eminent domain:¹⁶ if a government may spend public funds on a project, it may condemn a person's land for the project. If the General Assembly authorizes the use of eminent domain for economic development and if the court maintains

the historical equation, the court will likely uphold that use. In some states, however, the courts do not automatically equate public purpose and public use. Because condemning one person's land to convey it to another often seems somehow different from spending public money on a project, it remains possible that the North Carolina courts will reject an automatic extension of *Maready* to eminent domain. That issue must await further legislative and judicial actions.

Notes

1. *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996).

2. In a number of cases, the North Carolina Supreme Court has applied the public purpose doctrine to expenditures that were funded by sources other than taxation. *E.g.*, *City of Greensboro v. Smith ex rel. City of Greensboro*, 241 N.C. 363, 85 S.E.2d 292 (1955); and *Dennis v. City of Raleigh*, 253 N.C. 400, 116 S.E.2d 293 (1960).

3. *Mitchell v. North Carolina Industrial Dev. Fin. Auth.*, 273 N.C. 137, 159 S.E.2d 745 (1968); and *Stanley v. Department of Conservation and Dev.*, 284 N.C. 15, 199 S.E.2d 641 (1973).

4. N.C. Const., Art. V, § 9 (1973).

5. *Maready*, 342 N.C. at 720, 467 S.E.2d at 623.

6. *Maready*, 342 N.C. at 720, 467 S.E.2d at 623.

7. *Maready*, 342 N.C. at 720, 467 S.E.2d at 623.

8. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625. Actually the public hearing requirement applies only to activities undertaken pursuant to subsection (b). Given the importance that the court accorded to the hearing, however, local governments proceeding pursuant to subsection (a) are well advised to comply with the public hearing requirement as well.

9. *Maready*, 342 N.C. at 724, 467 S.E.2d at 625.

10. The full listing of incentives granted by Winston-Salem and Forsyth County is found in the dissenting opinion, *Maready*, 342 N.C. at 736-37, 467 S.E.2d at 632-33.

11. N.C. Gen. Stat. § 159-45(b)(24) (hereinafter the General Statutes are referred to as G.S.).

12. G.S. 159-81(3)m.

13. It is also possible that some instances of general obligation borrowing to finance incentives might be held to be a gift of the government's credit, in violation of Article V, Section 4(3), of the state constitution. In *Foster v. Medical Care Comm'n*, 253 N.C. 110, 195 S.E.2d 517 (1973), the court quoted with approval from a Florida decision, in which the Florida court characterized a gift of credit as the imposition of financial liability on a government entity for the benefit of a private enterprise. *Foster*, 253 N.C. at 121, 195 S.E.2d at 525. If a local government were to issue general obligation bonds—for example, to purchase an industrial site—and then were to give the site to a private business, the result might well be characterized as a gift of the government's credit to the business. Even if such a gift

of credit serves a public purpose, the constitution additionally requires voter approval of the transaction. Most general obligation debt, of course, requires voter approval in any event, but the ban on gifts of credit might bar use of nonvoted, two-thirds bonds for some incentives.

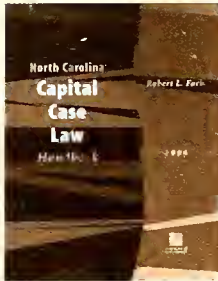
14. N.C. Const., Art. V, §§ 2(2) and (3).

15. N.C. Const., Art. V, § 3(2), for the state, and § 4(3), for local governments.

16. For example, in *Mitchell v. North Carolina Industrial*

Dev. Fin. Auth., 273 N.C. 137, 159 S.E.2d 745 (1968), one reason the court gave for finding industrial revenue bonds unconstitutional was that “[w]ere we to hold that [the] Authority serves a public purpose when it acquires a site, constructs a manufacturing plant, and leases it to a private enterprise, we would thereby authorize the legislature to give [the] Authority the power to condemn private property as a site for any project which it undertook.” *Mitchell*, 273 N.C. at 158, 159 S.E.2d at 760. ☐

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Book Review

Rational Rejection

Community, Culture, and Economic Development: The Social Roots of Local Action, by Meredith Ramsay. State University of New York Press, 1996. 125 pages. \$16.95 paperback, \$49.95 hardback.

Anita R. Brown-Graham

Other authors in the field of economic development prefer to address the future—What's next? Meredith Ramsay focuses on the past—What happened? and Why? In her well-written and thoughtful treatise *Community, Culture, and Economic Development: The Social Roots of Local Action*, she illustrates how local history, informal governing arrangements, traditional social structures, and cultural values can lead a community to reject economic development efforts.

Her study focuses on the development policies of two communities in Somerset County, Maryland: Princess Anne and Crisfield. Somerset County is the poorest in the state, with an average annual income in 1986 of less than \$8,000. Although Ramsay strongly rejects the emphasis often placed on the urban-rural dichotomy, it is safe to say that with populations of 1,666 and 2,888 respectively, both Princess Anne and Crisfield are rural communities.

Princess Anne is the commercial center for the county's agricultural industry. An elite group of conservative white landowners has ruled it almost continuously for three hundred years. The social order is hierarchical, and social relations are characterized by pronounced political, economic, and racial inequalities. Over the years the regime has been threatened by the American Revolution, the Civil War, the civil rights movement, and temporary de-

clines in agricultural production. Notwithstanding these challenges, the regime succeeded in perpetuating its rule and making good on the official county motto *Semper eadem*, "Ever the same." This privileged group ruled for centuries without accountability and brooked no opposition.

But the 1980s brought change to Princess Anne. In 1986 the inexorable decline of agriculture and the immigration into the county of Harvey Hastings, a real estate broker with grandiose plans for commercial real estate development, provided the catalyst for constructing a new economic base. Of course, the beneficiaries were still to be the old family landowners—the only ones with the means to benefit from Hastings's plans. Initially there seemed to be widespread support for such development. However, support waned as the economic development plans came to be viewed as nothing more than an attempt by the governing group to shift the community to a new economic base without surrendering political dominance.

Ironically it was opposition to the landowners' economic development efforts that produced the first real and somewhat lasting challenge to the monopoly of power by Princess Anne's elite regime. Ramsay explains that as long as agriculture provided the economic base for the ruling group, the poor blacks and the migrant workers bearing an inordinate share of the costs of production had neither the internal community allies nor the ability themselves to challenge the entrenched power structure. But when the landholding elites began experimenting with commercial and industrial development, they imposed significant social costs, including quite offensive odors from newly recruited industries, on a group of well-educated middle-class

whites who operated outside the existing hierarchy. This allowed traditionally disenfranchised groups, particularly blacks desiring development strategies that would lead to economic and political restructuring, to forge a political coalition with the group of outsider white voters and defeat the incumbent town commissioners who had supported the landowners' development strategies.

Crisfield, by contrast, is marked by the waterways that border the Chesapeake Bay. Its economy and way of life based on a fragile seafood industry, Crisfield was founded by dissidents fleeing the plantation hierarchy. Isolationism is a prominent feature of its residents' worldview, and Crisfield lies untouched by the social order that has prevailed farther inland.

This city's response to the economic decline of the 1980s was conservative by necessity because of the nearly total dearth of resources. But it was also conservative out of respect for the city's poor majority. The mayor, a poor man himself, was described to Ramsay as "a fine and decent human being, a humble man who loves his city. He opposes zoning and building codes because to restrict mobile homes or condemn somebody's dilapidated houses might hurt somebody. It might leave somebody homeless."

Ramsay connects Crisfield's resistance to development and outsiders to grim lessons from the past. In 1910 the formerly isolated Crisfield had become the second-most-populated city in Maryland, with over twelve thousand people (four times the present count). Immigrants, who came by way of a new railroad that was run through Crisfield after the Civil War, catapulted the city into an oystering boom. The boom completely transmogrified Crisfield's social and natural environment. Lawlessness became the norm. The once-quiet city was now known for its casinos, saloons, bawdy houses, and un-

fettered violence. Dredging vessels descended from Baltimore, Cape Cod, and New Jersey by the hundreds to exploit the bay's providence, destroying the oyster beds as they came.

The reign of terror finally came to an end with the collapse of the oyster industry in the 1920s. The bay's ecological system has never recovered from the plundering of the boom era, however, and apparently neither have the people of Crisfield. Both the powerful seafood packers and the "watermen" (Ramsay's preferred term for poor whites) vehemently opposed every important plan for economic development. Whereas the packers feared the competition from outsiders, the watermen feared that capitalistic market forces reminiscent of the oystering boom years would absorb and transform all other values, leaving the indigenous population once again embattled, belittled, cheated, displaced, and disinherited.

From her study of Princess Anne and Crisfield, Ramsay draws several conclusions. Elite and privileged classes develop ties of mutual obligation with the poor and the powerless by facilitating access to capital and to economic and social opportunity. The vulnerability of the poor, which is rooted in these ties, means that organized expression of discontent is highly unlikely. Moreover, top-down economic development appeals primarily to educated groups rich in resources and skillful at exploiting growth opportunities. For the poor to embrace uncontrolled economic development would mean jeopardizing their subsistence arrangements, renouncing their dependence on powerful patrons, and betraying deeply internalized community values on which their social status and personal security depend. So they reject major economic change, through either silent sabotage or alliances with those less vulnerable to retaliation from the

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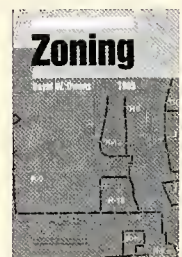
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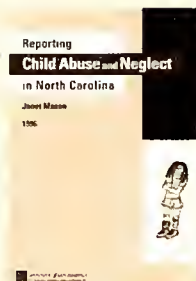
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privileged class. Major economic change, either growth or decline, should therefore be viewed as throwing communities out of balance politically as well as economically.

I had trouble accepting Ramsay's implicit conclusion that tension between the privileged and the poor is an inevitable result of economic development activity. I could easily agree, however, with her basic premise that the average citizen's reaction to proposed development is likely to be based on an informal assessment of the probable sociocultural impacts and the effects on his or her values, preferences, and political and economic interests. That being the case, I accept that sometimes protection of class privilege is the motivating factor behind the adoption of specific plans for economic development. In such times, even an elite containing well-intentioned individuals is unlikely to consider the full range of options for growth or to view local issues primarily in terms of an overarching community interest. Not surprisingly, as Ramsay found in her study, the economic development options adopted under such circumstances will lead to tension with the less privileged.

I was stimulated by Ramsay's challenge to the assumptions that most people make about the benefits of development and their willingness to ignore the sometimes harsh effects on established power relations, cultural values, and fragile subsistence arrangements. After all, the selling point for local governments' participation in entrepreneurial activity is that economic development fosters the economic welfare of the whole community. But Ramsay's study indicates that economic development stances and individual actions are frequently prompted by other values that supersede both communal and individual maximization of profit. As she points out, market calculations of the impacts of a

development project that fail to take account of nonmarket values are susceptible to the errors of overestimating the project's benefits and underestimating its real costs. With reluctance and some trepidation, I am now persuaded, at least until I read another book on local economic development, that "[e]conomic development acts like a giant asphalt paving machine that tears up the old road in the process of building the new." I used to think of development only as the process of building new roads.

I must confess, lest I lose credibility with people who have read it, that although the book is short, it is based on Ramsay's research as a doctoral student, so it is rather academic. The second chapter sets forth an intimidating theoretical framework for the study, citing a host of theories and theorists. My suggestion for those who might share my distaste for chapters in which nearly every paragraph mentions a different theorist: skip chapter 2. The introduction contains all the theory that readers need to understand and enjoy the rest of the book.

Despite its academic tendency, Ramsay's book deserves a wide audience, and I strongly recommend it to anyone involved in local economic development activity. Ramsay is a very good storyteller, and her recital of historical events is both informative and entertaining. Although the findings are obviously limited to the two communities studied, there are universal lessons to be learned from the experiences and the responses of the citizens of Princess Anne and Crisfield. In countering the conventional wisdom that economic development policy is influenced the most by market forces, Ramsay effectively demonstrates the rationality of two severely distressed communities rejecting outside investment as a way of increasing land values and creating jobs and opportunities.

At the Institute

Stephens, Ammons Join Institute Faculty

Two new faculty members, John B. Stephens and David N. Ammons, recently joined the Institute.

Stephens arrived in March to develop a public dispute resolution program with financial support from the Love Foundation. The Institute's program assists state and local government officials through consulting, conflict assessment, training, and limited direct mediation and facilitation services. Stephens is also developing case studies, publications, and a clearinghouse of information on public dispute resolution. The Love Foundation grant includes support for another clinical faculty member, at the UNC-CH Law School, to develop a curriculum and to collaborate with Stephens on law-related issues.

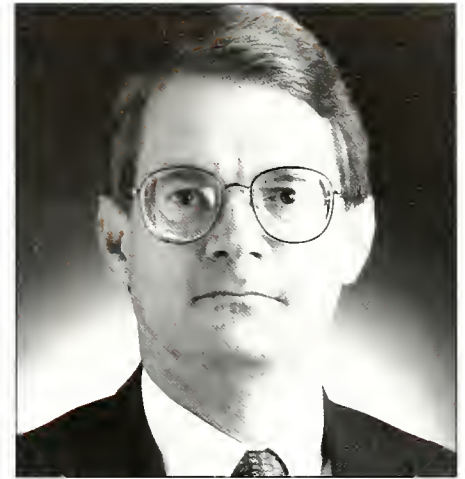
"Conflict is normal," Stephens says. "The challenge for me is to help officials enhance their current skills while maintaining my impartiality on political issues. I will work with each party individually as if I'm talking to a roomful of everyone involved."

Stephens is an adjunct faculty adviser for Antioch University's M.A. in Conflict Resolution program and is completing his Ph.D. in conflict resolution at the Institute for Conflict Analysis and Resolution at George Mason University, Fairfax, Virginia. Before joining the Institute, he served as research director of the Ohio Commission on Dispute Resolution and Conflict Management. His responsibilities included developing and evaluating pilot projects in mediation and group problem solving for state and local governments, schools, and community dispute settlement programs.

The focus of his work will be teaching officials more efficient ways to



John B. Stephens



David N. Ammons

handle public issues—skills in negotiating, collaborating, and problem solving. He has been working with dispute resolution centers across North Carolina to solve disputes ranging from land use to public school reform.

"The Institute, over the last six years, has trained government officials as facilitators," Stephens remarks. "I will work with them to apply their capabilities in more complex disputes."

Ammons, who joined the Institute in August as an associate professor, received his Ph.D. from the University of Oklahoma, concentrating in public administration, state and local government, and research methodology. His specialty is improvement of productivity in local government, with a current focus on performance measurement, "benchmarking" (developing targets), and privatization.

Ammons came to the Institute from the Carl Vinson Institute of Government at the University of Georgia, where he was a senior associate. One of his projects there was working with a statewide commission to design benchmarks for gauging the condition of that state's communities. He served as the University of Georgia's representative on a joint project of the

Southern Growth Policies Board and the Southern Consortium of University Public Service Organizations to develop a training curriculum in public-sector accountability. His career also includes service on the administrative staffs of four municipalities in Tennessee, Texas, and Arizona.

"I have had the great opportunity over the years to work with local governments in several different parts of the country," Ammons comments. "And now I am delighted to be here. Many local governments in North Carolina have reputations for innovative thinking on issues of governance and management—reputations that are well deserved. That makes this a great place for someone with my interests. It's going to be a stimulating and enjoyable environment in which to work."

Ammons is already involved in the North Carolina Local Government Performance Measurement Project (see "Measuring the Performance of Local Governments," page 41 in this issue), soon to enter its third phase, which will involve medium-size cities and counties. He is also teaching local government and management courses on topics related to productivity improvement. —Jennifer Hobbs

McMahon Retires

Richard R. "Dick" McMahon, lecturer in public management and government, retired in September 1996, but he is using much of his extra time to teach Institute courses. "I've been very busy," McMahon said between classes. "I'm teaching again tomorrow." He will continue teaching on a contractual basis in the Municipal and County Administration course, the Purchasing course, and the Law Enforcement Executive Program, among others.

McMahon began working as the Institute's first psychologist in June 1963. "I worked a lot at that time in the criminal justice area," he recalled, "with probation officers, corrections officials, and police administrators. Most often I counseled employees one-on-one and set up basic training."

In later years, McMahon shifted his focus to helping organizations manage themselves better through organizational psychology. This resulted in his spending more time with managers than he had before. "I realized that the organizational culture needed to change so that management was interested in how a probation officer interacted with contacts, instead of how many contacts were made," McMahon explained. Institute management faculty now consistently focus on training managers to improve organizations.

Mike Smith, director of the Institute, said, "I am convinced that Dick's approach to work was exactly what founder Albert Coates had in mind for the Institute: always finding a way to

help, always 'in the bloodstream' with public officials, always practical, and always recognizing that people have a greater ability to help themselves than they usually realize. In addition to all of the officials and institutions that Dick has helped, he has helped his colleagues over the years by setting an excellent example. I am delighted that Dick will continue working with the Institute even in his retirement."

McMahon said that retirement will give him the opportunity to do the things he wants to do, both at the Institute and elsewhere. —*Jennifer Hobbs*



Richard R. McMahon

Institute Mourns Death of Longtime Staff Member

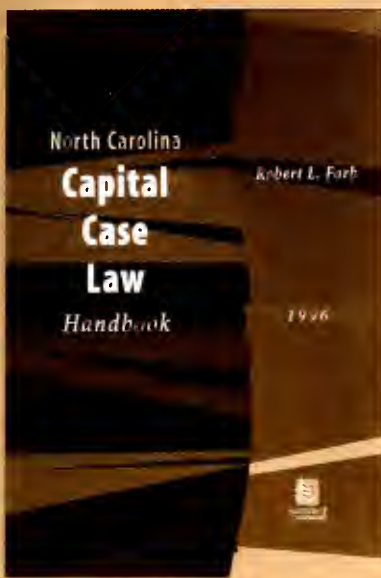
Phillip Monroe Andrews, Jr., an Institute employee for twenty-four years, died September 7 following a lengthy battle with AIDS. A native of Carrboro, he attended The University of North Carolina at Chapel Hill and King's College in Charlotte. He was a dedicated employee, a gifted musician, and a valued colleague.

In late August, a colleague wrote a poignant letter thanking Phil for the example that he provided both in and out of the office and describing him as "one of the most positively influential people I have ever known." In his role as manager of the Institute's Production and Distribution Section, he worked effectively with his staff: to ensure quality

printing and distribution of program announcements, classroom materials, special bulletins, and publication flyers; to ship Institute publications in a timely and cost-conscious manner; and to provide reliable mail, transportation, telecommunication, office supply, and client database services. Phil cared about the reputation of the Institute of Government and recognized that many state and local government employees might form their first impressions of this university while attending Institute programs.

The Institute will remember Phil for his thoughtfulness, generosity, patience, keen sense of duty, and courage in the face of adversity. —*Kay Spivey*

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—James Madison
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