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INSTITUTE of GOVERNMENT
The University of North Carolina at Chapel Hill

Citizen Comment at Government Board Meetings

- Welfare Reform
- Conservation Tax Credits
- End-of-Life Medical Decisions
- Evaluating the Manager

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Since 1931 the Institute has conducted schools and short courses for city, county, and state officials. Through monographs, guidebooks, bulletins, and periodicals, the research findings of the Institute are made available to public officials throughout the state.

Each day that the General Assembly is in session, the Institute's *Daily Bulletin* reports on the Assembly's activities for members of the legislature and other state and local officials who need to follow the course of legislation.

Over the years the Institute has served as the research agency for numerous study commissions of the state and local governments.

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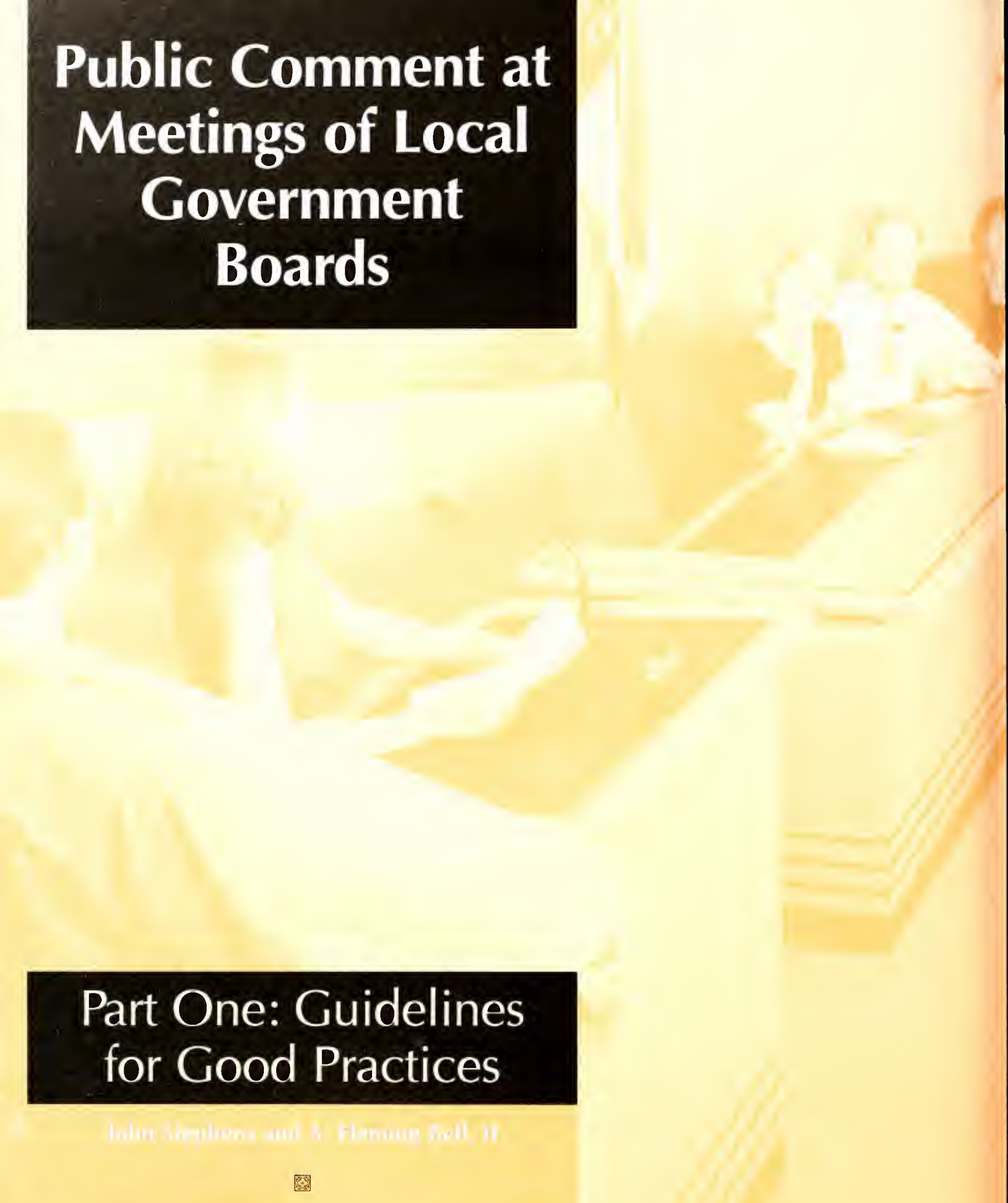
On the cover Two citizens express their opinions on a controversial proposal that a hypothetical town council is discussing. Public officials should understand good practices and legal requirements for hearing from their community. Photo by Will Owens.

Public Comment at Meetings of Local Government Boards

Part One: Guidelines for Good Practices

John Stephens and A. Fleming Bell, II



Photograph by Will Owens

An interested citizen regularly attends board meetings and offers many comments and criticisms. What is the best way to allow him to speak and yet keep the meetings moving?

An angry group of citizens hold up banners and chant slogans during a council meeting. Can the board restrict the demonstration? How can it be kept under control without infringing on the citizens' constitutional rights?

At a public meeting, a citizen charges a government employee with malfeasance. How can the charge best be handled?

Being in the public eye as a governmental official—county commissioner, town councilor, school board member, or citizen member of a health, planning, or similar government board—brings with it the joys and the tribulations of dealing with citizens and citizen groups in public meetings. It may seem that citizens come to a meeting only when they want to demand action on a problem. Board members want to be responsive to citizens' concerns, but, as responsible stewards, they must constantly keep in mind the general public good. In addition, they must conduct the board's business in ways prescribed by law. Nevertheless, governmental officials need feedback from the community and therefore should welcome citizens' comments and complaints.

This two-part article addresses public comment at regular meetings[1] of local government bodies in North Carolina. Public officials need to understand what the law requires government boards to do and forbids them to do as they listen to citizens. Public officials also need to understand the principles of good communication and effective management of meetings. Part One of this article addresses how boards can foster positive exchanges with citizens. It reports on an Institute of Government survey of how North Carolina governmental units provide information about the government, including details on how citizens may speak at board meetings, and it applies general guidelines on citizens' comments to three particularly difficult situations that can arise when citizens address local government boards. Part Two, which will appear in the next issue of *Popular Government*, will discuss the law on public forums and free speech. It also will report on the ways in which municipal and county boards and boards of education typically receive citizens' comments.

Local government bodies, both elected and appointed, are always on the hot seat for several reasons beyond their control. First, they are more accessible than state and federal officials. Even if local policies and practices are guided by rules set in Raleigh or Washington, citizens who dislike those policies and

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practices may take out their resentment on local officials. Second, most citizens perceive that local government has a more direct impact on their day-to-day concerns than either the state or the federal government. Most decisions affecting schools, law enforcement, solid waste disposal, roads, recreation, land use, and human services are made at the local level, and they directly touch the lives of people. While state and federal bodies gain attention for large—even global—issues, they usually act at some distance from the daily concerns of citizens, with little immediate effect on the nitty-gritty matters like garbage collection, youth violence, or traffic congestion. Third, citizens tend to come to board meetings only when they are riled up about something—only when something has gone wrong in their lives that they think can be helped by a particular action by their local board.

Today citizens are increasingly disenchanted with governmental performance,[2] but it appears that Americans have greater confidence in their local officials to "deal with problems facing their communities" than they do in state or federal government.[3] Moreover, confidence in local government appears to be holding steady, while confidence in the problem-solving capabilities of some religious organizations, nonprofit groups, and local media has declined markedly in recent years.[4]

Unfortunately, citizens' confidence even in local government is low. Only 24 percent of respondents in a national poll said they had "a great deal" or "quite a lot" of confidence in local government's ability to deal with problems facing their community, but 44 percent had a high confidence in their local schools to handle problems. Churches and voluntary organizations also received higher "confidence scores" than local government.

The only general public-opinion figures for North Carolina local government are more than fifteen years old. In 1980, 58 percent of citizens rated the performance of their mayor as excellent or satisfactory; 12 percent said it needed improvement; and 25 percent said the performance of their city council or board of county commissioners needed improvement. In a Southern Focus poll covering several southeastern states that was conducted in spring 1995, nearly 40 percent believed that local government was doing an "excellent" or "good" job. Another 40 percent rated local government performance as "fair," and 14 percent said it was "poor."

Thus citizens who come to a meeting of a local public board may be skeptical about stating their concerns and sharing their ideas. Many North Carolina public officials lament that they hear only from the citizens dissatisfied with local government, and citizens at public meetings may doubt that they will be understood or have any impact on the problem they face. It seems critically important for boards to know both how the law says they must behave toward citizens at board meetings and how they can make participation by citizens as constructive as possible.

Public officials should recall that public comment is only one indication of how citizens perceive the fairness and the receptivity of their government. A recent study by the Institute of Government[5] identified such factors as "fairness," "citizen influence," and "a problem-solving approach" as criteria by which citizens measure the quality of their government. The study showed a significant gap between what citizens expected in terms of their ability to influence board decisions and what they actually received in terms of response.

Whatever the size of the community, local boards need to find ways of ascertaining the concerns of people who do not come to public meetings. Why do they not come? Are the board's regular business meetings scheduled at such a time that family and job obligations prevent people from attending hearings and board meetings? There will always be a few vocal people who easily express themselves at government board meetings. Perhaps a balance needs to be achieved between these ready speakers and other citizens by especially encouraging participation by the citizens who do not usually state their views. Given the negative feelings many citizens have about public officials and the workings of governmental agencies, a special effort to secure citizens' comments may have a long-term benefit for the community.[6] Improved citizen participation at board meetings may yield important information for board members and help educate the entire community.

Encouraging Constructive Public Comment

Making Information Available

Keeping the citizens informed about the local government is an important step in maintaining a cooperative relationship with the public. Last year the Institute of Government surveyed local governments about how they communicate with their citizens. Dozens of public information officers and clerks from school districts, counties, and municipalities shared their informational brochures and policy statements.

The following paragraphs describe some of the ways in which North Carolina local governments provide information for their constituents.

Davidson County's board of education has an easy-to-read brochure welcoming citizens, describing board meetings, explaining how to express concerns, and presenting brief biographies of the five-member board. The brochures of both the Davidson County school board and the Guilford County commissioners include a useful diagram of the seating arrangement and the names of the board and the staff.

The Clinton city schools include a one-page summary of information for citizens in their systemwide activity calendar. A section titled "Do you have a question?" encourages parents to seek information and to share their concerns with teachers and principals on most matters. A chart lists twenty-five common topics—bus transportation, student health program, students' special needs, and so on—and indicates two contact people for each subject by position or name. The Clinton schools' grievance policy clearly describes, first, how to seek direct negotiation of difficulties and then how to bring a grievance to the board.

Rocky Mount has a very complete directory of city boards, commissions, and committees, most of which are open for citizen comment and membership. It briefly explains the responsibilities and the membership of each public body—from mayor and council to the inspection services advisory committee—and then lists the names, addresses, and telephone numbers of all members, their length of service, and the dates on which their terms expire. It also states when a board member is ineligible for reappointment.

Newton's brochure reports the meeting schedules of the board of aldermen and ten other boards and commissions, and gives departmental telephone numbers. The brochure also gives information on tax rates and municipal utilities.

Guilford County's brochure notes that while members of some boards must have specific skills or training, the board of county commissioners "desire to reflect a broad participation in appointments [to boards and commissions], including male and female citizens, persons from all geographic areas of the County, and persons representing diverse racial and age groups."

The Chapel Hill–Carrboro school board's informational brochure notes its desire to enable people with various disabilities to participate in board meetings.

Possibly reflecting its rapid growth, Cary offers a brochure that focuses on the process for commenting on rezonings, development plans, and changes to the unified development ordinance. The town council's agendas for all regular meetings contain a "public speak-out" item that allows comments on any topic, whether or not it is on the agenda. The time limit for speakers is five minutes each.

Some local government boards briefly summarize their last meeting before they formally approve the minutes of that meeting. The Stokes County board of education provides a one-page summary of board action and other events at the meetings even if there was no formal board action on a topic. Its general brochure includes photographs and short biographies of the five board members and the superintendent, and notes that there is a regular public-comment period at each meeting. Summaries of meetings, quickly prepared and easily distributed, can help citizens stay informed.

Some government units produce brochures that explain their budgets. Guilford County's summary of appropriations and revenues for its $360 million budget includes tax rates by jurisdiction—county, city or town, and fire district. The county also produces a monthly calendar of meetings of all local governing boards, municipal as well as county.

Using telecommunications technology, High Point displays the schedule for its council meetings on a cable television bulletin board and places the council's agendas on its Internet home page. The home page includes information on the city's budget, revenues, and expenditures. A printed brochure welcomes High Point citizens and visitors to the city council meeting, encourages participation, and describes how to address the board. The brochure states the time limits for speakers, notes the need for speakers to give their name and address, and asks them to be courteous and succinct. It also describes the difference between ordinances, resolutions, and motions; states the conditions for going into closed session; and explains the quasi-judicial actions the council takes on property matters.[7]

What Is "Constructive"?

Most public boards strive for balance on citizens' participation at regular business meetings. Since the meetings concern "the public's business," gaining citizens' remarks and responses to questions is an essential part of keeping government open to the public. On the other hand, the meetings must be controlled so that the board can conduct its business in an orderly fashion and make timely decisions in order to meet legal, budgetary, and programmatic needs.

Within the legal requirements and prohibitions (to

be discussed in Part Two), there are several ways public bodies can handle citizens' comments during meetings. What *does* contribute to encouraging input that will be productive in the eyes of citizens and public officials? This section presents five general guidelines for creating a productive atmosphere at meetings and then specific steps to be taken before, during, and after the meeting. A later section of this article deals with ways of handling the difficult situations that may arise during the citizens' comment period of a board meeting.

First, determining what are "constructive" comments from the public is not a strictly objective exercise. Many citizens approach this question by asking, "Do I agree with it? Did I get what I want? Did the board act the way that I think is best?" Focusing on a specific result is understandable if one assumes that "constructive" = "what is positive for me." But this approach can overshadow other important ways for judging productive exchanges between citizens and public bodies.

Public boards want to conduct well-structured, efficient meetings in which speakers use calm, civil language. But some citizens or citizen groups may believe that dramatic, emotionally charged speech will emphasize the depth of their concerns and help persuade the board to adopt their point of view. Sometimes such language is not a deliberate choice: strong emotions can grow out of perceived threats to a person's health or safety and from feelings of unfair treatment. Since citizens offer their views at board meetings with the aim of persuading those in power to act in a particular way, some people may think that a confrontational style will be most effective: after all, "the squeaky wheel gets the grease." Furthermore, much of today's television entertainment and news coverage highlights how confronting, shouting, and even bullying make people take one seriously and help one get one's way. If "constructive" is judged only in a win-lose, support-or-oppose context, someone is likely to feel pressured, overlooked, or defeated.

There are other ways to judge what is constructive in receiving citizens' remarks. It takes both citizens *and* board members to encourage constructive participation and to create a productive forum. *How* things happen in a meeting can be as important as what things happen. Some components of constructive citizen-board interaction are whether

- all relevant information is shared between citizens and public officials;
- citizens believe their views are understood by public officials, and vice versa;
- the nature of a problem is clarified, even though there may be different perspectives on the causes and the consequences of the situation;
- options for responding to citizens' concerns are created or explained (including legal, financial, or other constraints on potential solutions);
- in the end, citizens and public officials all believe that they have received respect.

Obviously, not all of these characteristics can be easily accomplished through a two-minute citizen presentation and a brief response from the board. These standards for creating constructive public comment go beyond a single presentation or meeting and should be built into a larger design of improving government services to citizens and businesses and involving citizens in public issues.

Although the following practical steps focus on how to *receive* public comment and promote a positive atmosphere, it is important to remember the interactive nature of public comment and board action in building citizens' confidence in government.

Fostering a Productive Exchange

What *can* be done in a regular business meeting to support constructive interchanges? Some small, simple steps can help citizens feel welcome and respected while increasing the likelihood that their remarks will be viewed as constructive by public officials. These steps can be modified to fit the level of formality of a meeting or the general style of the jurisdiction. In some smaller municipalities and more rural counties, where the citizens may well be neighbors or acquaintances, a personal style may be more appropriate than the formal ideas that follow.

One important component for constructive exchanges is information. Public bodies need to make information available to citizens and convey information on a continuing basis in ways that are easily understood. Knowing how to give and receive information effectively is important for public officials who want to create a productive exchange with citizens. The following tips for providing information focus on organization and communication skills:

At the Beginning of the Meeting and Earlier

Have copies of the agenda and other important materials available for people in the audience. This step helps reduce the inevitable gap between the information available to the board members and the

staff about the subjects being discussed, and the information available to citizens.

Provide an information sheet about the conduct of regular business meetings. A simple brochure can help welcome people and give them guidelines for appropriate and timely public comment. The information sheet also should list other ways for citizens to make their views and concerns known. It should explain what people can do when there is insufficient time in the meeting for everyone to comment or when they want to add to their oral presentations (by using the comment sheet and similar vehicles that are provided at the meeting; see the later section on having a comment sheet available).

Prepare a question-and-answer sheet. Citizens are learning about the workings of local government as they observe and make comments. As part of the information brochure or as a separate document, answers to Frequently Asked Questions (FAQs) should be readily available. The FAQ sheet should address

- board meeting days and times;
- the point in the agenda at which general public comment is welcome;
- other ways of contacting staff or elected officials (for example, office hours, telephone numbers, and addresses for written comments);
- the budget process (including at what point comment from citizens will help determine spending priorities);
- the responsibilities and the meeting dates of other public bodies whose work is related to the board that is holding the meeting (for example, for town and city councils, their planning board or transportation board; for boards of county commissioners, the health board or the social services board. Information on school boards, economic development committees, public safety boards, mental health advisory commissions, and area agencies on aging also could be included as a way to inform citizens about services and about opportunities to participate in government);
- whom to contact on common concerns about land use, animal control, and areas of neighborhood conflict like noise, animals, and parking;
- what can and cannot be handled in a public meeting (that is, the limits for public discussion of personnel and legal issues).

Have a comment sheet available. Many people fear speaking in public.[5] A comment sheet circulated throughout the audience allows citizens to share their views without having to speak in front of a large group. The sheet can be useful for citizens who simply have questions for a board or the board's staff. It can also be used to solicit the citizens' views on specific topics.

The Institute of Government survey suggests that no North Carolina jurisdiction offers a general comment sheet. Example 1 shows a possible format. Many local governments have sign-up sheets that ask citizens

Example 1: Citizen Comment Sheet

Purpose: To allow citizens to share their views, complaints, or questions in written form. A citizens' comment sheet can be especially important when a group must designate a single spokesperson to address the board but individual citizens may have concerns that need attention.

City of Carolinaboro
Citizen Comment Sheet

Your question, comment, or criticism:

Do you have a solution to propose?

Do you want someone to contact you to address the problem?
___ Yes ___ No

If so, how should we contact you?
Name: _____
Address: _____
Telephone: _____
Best time to reach you: _____

Are there other government services you find confusing or think could be improved? Please describe.

What has worked well in your contact with government agencies (for example, police, development, and health department)?

to identify their concern and to indicate whether others have the same concern. Some jurisdictions have produced flyers describing a grievance procedure. For example, school boards provide a brochure that explains how problems between a parent and a teacher or a principal may be resolved. A comment sheet helps citizens who come to a board meeting as members of a group that can have only one or two spokespersons address the board. They can add relevant information or points that they feel are very important but were not sufficiently covered by their spokesperson(s). The sheet also can be useful for a citizen who merely wants to ask a question of the board or the staff. Since having to reply to these comments might become burdensome for the staff, perhaps a pilot period should be used to test the utility of the comment sheets.

The board should periodically assess whether its policies and practices on citizen participation are working well. Usually such an assessment happens only when a problem arises. A specific controversy may cause the board to evaluate its general procedures, but the controversy may unduly focus attention on one particularly troublesome meeting. Even when things are going well, regularly reviewing how citizens' input is dealt with can reveal new opportunities for more effective meetings.

During the Meeting

The following steps will help the board encourage public participation while moving meetings along smoothly. See pages 10–13 for ways of handling three difficult situations.

Identify which topics are of interest to which members of the audience. Many jurisdictions have either an advance-notice requirement for placing a citizen's concern on the board's agenda or a sign-up sheet for general comments. Still, if the audience is relatively small, it can be useful to ask citizens individually which agenda items are of interest to them, or to call for a show of hands on each item. The presiding official should confirm whether the interested people wish to speak or prefer to observe before deciding whether they want to comment. Quickly determining which topics are of interest to the audience will help the board structure the meeting and apportion time for public comment. At the beginning of the meeting, the audience should be told whether public comment will be taken during the board's discussion of a particular agenda item or at some other point in the meeting.

Announce the limits on public comment. If the agenda provides a specific time for public comment, the chair or another board member should open the period by describing what issues can and cannot be handled during this part of the meeting (for example, that personnel matters may not be discussed in public). Even if written material is available on how citizens should address the board, an oral summary of those rules by the presiding person will help set the tone. Citizens should be reminded of the available agendas, fact sheets about local government, and comment sheets for providing supplementary input to the board. Drawing attention to the comment sheet can be especially useful for gathering comments from a large group of citizens.

Estimate when topics of interest will be considered. If the board takes comments on agenda items one by one, it should estimate when the topic of interest to a particular group will be considered. Such an estimate will allow citizens to relax or leave the room, if necessary, without fearing that they will miss the discussion of their item.

Provide background information. For each topic, and especially for a subject clearly of interest to several people in the audience, the issues involved, the relevant information, and past actions regarding the matter should be summarized. Although such a review may be repetitive for board members, it can help citizens understand the context of the matter before the board. Citizens often say, "I never heard of this before. Why do you have to decide so quickly?" Summarizing how an issue or a problem came to the board's attention, what steps have been taken to investigate the situation, and what legal, budgetary, or practical requirements guide the board's judgment on the options may correct misinformation and provide a better basis for citizens to speak to the choices that the board can control.

This process can help improve the way information about the working of the board and important public issues is shared with concerned citizens. While public notice in a newspaper may be all that the law requires, placing information in libraries, community centers, grocery stores, or other locations frequented by citizens may be more effective. Radio announcements or call-in shows also may be useful.

Listen actively. So, after all this preparation and preliminary information, the first citizen begins to talk. The board members can sit back and relax, right? Yes and no. *How* they listen may be as important as what a citizen hears them say before or after his or her comment. Listening effectively can be difficult when board members want to review material or talk quietly with one another about the next item on the agenda.

Even quiet paper-shuffling could suggest that a board member is not listening or not taking the speaker's views seriously.

There are three facets to active listening:

1. Maintaining eye contact. This practice shows the listener's interest by focusing on the speaker. Staring is inappropriate, but catching the speaker's eye as she or he speaks communicates a great deal to that person.

2. Being aware of body posture. Although crossing one's arms may be comfortable or a natural reaction in a cold room, this gesture can imply disagreement with the speaker's views. Similarly, leaning back can imply a distant or judgmental stance toward what the citizen is saying. Such a posture may be more comfortable, but sitting squarely or leaning forward slightly will silently say, "I'm listening."

Nodding one's head is another nonverbal way of encouraging a speaker to continue. That gesture shows interest, but it can be misinterpreted. Although it is intended to mean "I am listening," some people might interpret the gesture as "I am agreeing with you [the speaker]."

3. Providing verbal feedback. In a busy meeting, the presiding person may prefer just to thank a speaker for her or his comment, ask whether other board members have a question or a comment for the speaker, and move on to the next speaker. If not every board member has understood the speaker's remarks . . . well, too bad: there are other things to do tonight. Unfortunately, such haste may undercut the effort to provide a constructive atmosphere for citizens' comments. Even if time is short, summarizing the speaker's comments and assuring the citizen that the board understands his or her position are important components of active listening, especially when board members may disagree with the speaker's views. The board chair could make the summary for each speaker, or this task could be rotated among the board members from meeting to meeting.

An effective summary includes the emotional dimension of a citizen's concern. (See Example 2.) Is the person frustrated, confused, angry, or upset? Acknowledging a speaker's emotions or values, in addition to the substance of what the person says, shows understanding of her or his complete message. The chair can summarize the speaker's emotions, even when he or she strongly disagrees with the substance of the remarks, by making it clear that the opinion expressed is the speaker's—for example, "So you feel that . . ." "You believe . . ." "Your view is that . . ." "How you see it is . . ."

It is sometimes difficult to judge which feelings a person is conveying in his or her statement. People show different levels of emotion and expressiveness depending on the situation, their personal traits, or their cultural background.[9] They can be angry and yet speak in a quiet, inexpressive voice—or they can shout and gesture. On the other hand, someone speaking loudly may simply be excited or unaware that his or her voice is raised. The summaries should try to acknowledge the speaker's emotions, but board members should be prepared to correct their impressions of a citizen's feelings or underlying concerns.[10]

Example 2: Summaries of a Speaker's Content and Emotion

MS. JORDAN, A CITIZEN:

"Thank you, Madam Chairman. I'm Dorinda Jordan. I live at 4522 Cool Spruce Avenue in the Tall Trees neighborhood. I'm really concerned about people speeding on my street. There are a lot of children in the neighborhood, and I think it's dangerous. All the time I see people racing up my street and barely missing my children and my neighbors' children on their bikes and skateboards. I think that having a police car along the road would slow people down. It wouldn't have to be there all the time, just during times when kids are out. This would make a big difference to me and my neighbors. I hope we can have greater police visibility to slow down those speeders and make our neighborhood safer. Thank you."

Three Possible Summaries

Summary 1: "Ms. Jordan, you want us to stop speeders in your area, but that means we have to decrease patrols in other parts of the city."

This is a poor summary because it is too brief and implies that satisfying the speaker's concern will hurt others.

Summary 2: "Ms. Jordan, your main concern is to increase police patrols in your neighborhood, the Tall Trees subdivision, and to slow down traffic passing through. Is this correct?"

This summary is better, but it does not capture the emotions behind Ms. Jordan's concern.

Summary 3: "Ms. Jordan, you're fearful that your child and other children could get hurt by drivers exceeding the speed limit in your neighborhood, the Tall Trees subdivision. So you are requesting increased police patrols to slow down the traffic. Is this correct?"

This summary is best because it reflects both the content and the emotion of Ms. Jordan's statement and is checked for accuracy.

Example 3: An Interim Summary of a Speaker's Concerns on Several Apparently Unrelated Topics

"Mr. Sampson, excuse me. I want to be sure I understand what you have said so far. You are concerned about trash collection, loose animals, loud noise from your neighbors, and spending on the new county jail. It seems that you are frustrated that this board and county employees have not done more to address problems you see in these areas. Is this right? Thanks. Please continue."

Be careful in saying what will be done about a concern or a complaint. A citizen who hears that the matter will be "investigated" can interpret that phrase as meaning that "the problem will be fixed." Occasionally it may be better to say not only what *will* be done but also what *will not* be done until more information is gathered, other people are contacted, or a particular deadline for the board passes. Of course, nothing should be promised that cannot be done with reasonable certainty.

It is equally important to be clear about *when* things will happen. "We'll get back to you" can mean different things. A citizen may expect a call in one or two days, while the board member may intend that a letter be sent or that the staff be allowed time to investigate the situation and provide a full response in a week or more.

When possible, the citizen should be directed to a neighborhood council, an advisory group, or a planning or budget process that is appropriate to the kind of comment or issue she or he raised. A comment sheet will allow citizens to get their views on paper and also to know whom to contact.

Thank each speaker for his or her views. This obvious courtesy is easy to forget when there are many speakers or when a speaker's comments are critical of the board. Showing appreciation for a citizen's views, especially when one or more board members may disagree with them, helps build credibility in the citizen's eyes.

After the Meeting

When the meeting is over, the board should clarify what follow-up steps are needed in responding to citizens' comments and who will respond. Even if it is the manager or a department head who replies to the concern, the board should be clear about when the response will be made and whether it wants a copy of any written reply. Follow-up steps could include contacting the citizen after she or he receives a written response or has talked with the appropriate official. Following up not only ensures that commitments are honored but also helps determine whether the citizen considers the response to be effective.

Handling Difficult Situations

The preceding guidelines will be useful at all times, but what about really tough situations like the following?

Situation 1: A speaker talks on multiple topics and continues past the formal or informal time limit.

Occasionally a speaker goes on and on and thereby causes a problem for the board, which has a whole agenda to get through. In such a situation, simply showing that the board has heard and understands the citizen's comments can sometimes help keep the comments focused and bring them to a close. The chair can always cut off a speaker, especially when a time limit has been announced, but doing so can upset the speaker. Other approaches should be tried before the chair uses that option, as follows:

1. Summarizing. (See Example 3.) If the speaker is talking about several topics, the chair can volunteer to summarize the points made so far. In general, a speaker should not be interrupted, but breaking in to summarize a rambling presentation is one way to show that the speaker is being heard. Sometimes it can also prompt the speaker to return to his or her most important point.

2. Clarifying what the speaker seeks. This task may be difficult, since the person's comments may range from complaints about situations beyond the board's jurisdiction to general criticism about government rules, spending, or responsiveness.

3. Acknowledging the person's goals and feelings. Even when the board disagrees with the speaker's opinion or argument or is unable to address the citizen's concern, recognizing the person's frustration, anger, or anxiety may help provide relief for someone with many apparently disconnected concerns.

4. Clarifying how a citizen can have her or his concern addressed. (See Example 4.) Individuals and groups often believe that it is entirely up to the board or its staff to solve the problems they bring before the board. But as the board clarifies what a speaker wants, it can suggest perhaps several ways of addressing the problem. Pointing out several options helps people

understand that their concerns have been heard and that they do indeed have influence.

5. "Reality-checking." When a speaker asks for a particular action, the board can help that person understand that it may not be able to grant the request by reminding him or her that there may well be serious objections from other citizens if it does so.

6. Reminding the speaker. The board should again state its time limits for public comment and (when appropriate) which matters can and cannot be discussed publicly. The speaker should be asked to understand the board's need to address other agenda topics or give other citizens a chance to speak.

7. Offering the speaker a way to be more involved. Perhaps the board can connect the speaker with a group—among the community's many formal and informal committees, task forces, neighborhood associations, and other organizations—that addresses at least one of the person's complaints.

But some speakers may still continue past the time limit, or repeat points, or bring up new topics. At that point, telling them they must stop is appropriate. Still, treating such people firmly but courteously shows respect for them and helps build confidence throughout the community in its local government boards.

Situation 2: A large group of people attend, express strong views and feelings, and demand action.

The presence of a large group of angry citizens can be stressful for board members. This kind of gathering can be anticipated when the issue is important, when the number of pre-meeting telephone calls increases, or when group leaders say they are organizing their supporters to attend the meeting and press their concerns. How should an agitated group like this be handled?

It is important to allow extra time at the meeting for this kind of situation. By reconsidering which business is essential and which agenda items it can handle quickly or defer, the board can sometimes revise the agenda to accommodate the group(s) of citizens who wish to share their views on an important issue.

One option is to allow a single speaker to address the full board, followed by small-group discussions with one or two board members in each group. When a single speaker presents the group's concerns before the full board and audience, everyone can hear the same general concerns and information. Often agitated citizens' groups gain some degree of satisfaction simply by venting their feelings in an official setting. The board can help to accommodate this desire by suggesting that the group have a few high-energy, articulate people speak on the group's behalf.

Example 4: A Way to Help a Citizen Consider More than One Solution
(drawing on the information in Example 2)

"Ms. Jordan, your concern is that people are driving too fast through your neighborhood and endangering children. Let me suggest some other possible ways to address your concern. One way could be to have police cruisers in the area at particular times, as you suggest. Another is for more visible crossing guards at either end of the street, since going and coming from school places the greatest number of children on the street. A third option would be to involve the Neighborhood Blockwatch group and ask parents and other adults to be on the sidewalk to watch the children at certain times of the day. A fourth option is to check with your neighbors to see whether theré may be play space for the youngsters off the street. Another possibility is to have the transportation department check on traffic flow and see whether the timing of traffic signals around your neighborhood contributes to people driving too fast down your street. What do you think about these other possible solutions? Do you have other suggestions?"

The small-group approach has several advantages. Assigning a team of one or two board members to meet with each of several sets of citizens allows the board to hear from more people. This technique also promotes an informal give-and-take between board members and citizens that can be very productive. The conversation in these small groups should begin with the board member(s) listening and making sure that the group members all have a chance to express their views. The board member(s) should summarize the concerns and clarify those that are most important. Then they all can discuss whether the board needs other information in order to act, and they also can explore potential solutions. Finally, the full board should reconvene, with board members reporting on the concerns and the possible solutions discussed in the small groups. It is also appropriate at this time to raise whatever concerns board members have about the citizens' demands and how they relate to the legal, financial, or other constraints the board faces.

Depending on the specific situation (for example, what the nature of the issue is, who is affected, and whether the situation involves great risk), it may be necessary to agree on some short-term steps and schedule another meeting devoted solely to the problem. This meeting might take the form of a public

Example 5: Two Ways to Handle a Personal Attack

Scenario 1: Defend oneself and question the citizen.

MS. WILKES [A CITIZEN]:

You, Mr. Anson, you promised not to raise taxes. And then I read that you voted for an increase in the property tax rate. How do you explain such a lie?

MR. ANSON [A BOARD MEMBER]:

You may think we can raise or lower taxes at will. It's more complicated than that. We are in danger of losing accreditation for our schools. And we are squeezed because of the changes in the funding formula made in Raleigh. Now I don't like raising taxes, but in order to keep the school open, I thought a temporary one-cent increase was the best that could be expected.

CITIZEN WILKES:

But you *promised* not to increase taxes! What other promises are you going to break?

BOARD MEMBER ANSON:

That's unfair. Do you have a better idea? Of course not. You're just here to gripe and get attention. Your time is up.

Scenario 2: Pause, summarize, and encourage the citizen to consider other factors.

CITIZEN WILKES:

You, Mr. Anson, you promised not to raise taxes. And then I read that you voted for an increase in the property tax rate. How do you explain such a lie?

BOARD MEMBER ANSON:

Ms. Wilkes, I see that you are very upset with what you view as my changing my position on tax increases. I would be upset too if a politician promised one thing and did another, *if* there was no change in the circumstances of the pledge. Do you know why I and the majority of this board voted in favor of a temporary increase in the property tax?

CITIZEN WILKES:

No, and you bet I'm mad about your lie. You promised not to increase taxes! Do you deny this? What other promises are you going to break?

BOARD MEMBER ANSON:

Ms. Wilkes, you see my action as a flip-flop, right? And because of that change, you wonder if I'm going to change other positions. Is that right?

CITIZEN WILKES:

You're darn tootin', you slimeball.

MR. GARDNER [A BOARD MEMBER]:

Ms. Wilkes, expressing your views is fully accepted here, but insults are not.

BOARD MEMBER ANSON:

Ms. Wilkes, to be clear: you believe that I broke a promise about taxes, and you question whether I'll stick to other commitments. Let me say that while I'm willing to take the heat, I do not appreciate vulgar language. I'm trying to do my best in difficult circumstances. So I'm not asking you to change your views, but I'd like to see whether you are willing to hear more from me and other board members about the choices we faced between keeping the property tax at the same rate and having the schools possibly lose their accreditation because of their financial needs. I just want to be sure you understand the choices we faced, though you may still disagree with my vote.

hearing; it might lead to the formation of an advisory group; or it might result in some other approach.

Situation 3: A speaker verbally attacks or insults one or more board members.

Probably the most difficult situation a board member can face is a personal attack in a public setting. Sometimes the line between defending a policy or a decision and defending oneself is very thin. Personal attacks must be dealt with, but as constructively as possible. The presiding officer, while acknowledging the person's underlying concern, should tell the offending speaker that she or he has crossed the line of acceptable speech. Still, the board needs to remember that unless the person is using obscene language or "fighting words," the speaker's remarks attacking one or more board members, while uncomfortable to the board, are probably constitutionally protected free speech. (The legal limits on protected free speech will be examined in Part Two of this article.)

Five strategies can be helpful in this situation:

1. Taking a deep breath. This old piece of advice still makes good sense. Harsh personal criticism causes stress. Stress automatically causes the body to bring up its defenses. Muscles tighten, palms become sweaty, and breathing rate increases. These physiological changes are natural, understandable, and useful in preparing for fight or flight. But unless the speaker threatens physical harm and the board member actually wants to flee, the body's reaction may cause the board member's verbal response to be unnecessarily defensive. Taking the time to breathe deeply helps counteract the fight-or-flight syndrome and focuses attention on analyzing what the person is saying rather than on immediately defending oneself.

2. Summarizing. (See Example 5.) One way to disarm an upset person is to summarize his or her strong, critical views. The target board member will not agree with the speaker, but summarizing the remarks so as to reflect the depth and the strength of the speaker's feelings will help the board member control his or her own emotions. If possible, another board member should make the summary, for two reasons. First, the board member being criticized or attacked gains more time to prepare a response. Second, summarizing helps determine whether the attack arose from a perceived malfeasance on the part of the entire board or on the part of only one board member.

3. Asking for clarification. Agitated people often speak in generalizations: "You're all crooks!" "You don't listen to people!" Asking for specific examples may produce a more fruitful exchange than trying to reply to general statements.

4. Expressing one's own feelings. (See Example 5.) No one likes being attacked and put on the defensive, and the target board member should say so in a direct, controlled fashion. The reply may help the board refocus on how best to conduct the public's business.

5. Examining the speaker's main concerns. Setting aside the unpleasantness of the speaker's remarks, the board may want to explain its decision-making process if that process is relevant to the angry citizen's concerns. Finally, it may wish to consider whether to open the matter at issue for further discussion at this or a later meeting.

Summary

People on public boards—elected representatives in powerful city, county, and school positions and citizens who serve on less visible committees—face citizens' comments and criticism in many public meetings. Encouraging citizens to share their views in a constructive way helps rebuild trust in public institutions. Limited resources and state and federal rules may constrain what North Carolina local governments can do to respond to criticism and requests from their citizens. Part Two of this article will address the specifically legal concerns about free speech and acceptable ways to limit public comment. While much is being made about state and national efforts to regain civility in public affairs,[11] local government board members are on the front lines of improving civic engagement in their communities. Helping citizens—including harsh critics—feel welcomed and valued is an important way to create and maintain trust in public service and preserve its legitimacy.

Notes

1. This article concerns comment during the portions of public meetings that are not designated as public hearings. By "public meetings" we mean official gatherings of North

Carolina local government boards. Under the open meetings law, most official actions of such boards must take place in meetings that are open to the public; that is, anyone may attend and observe. But public meetings typically have a predetermined agenda that may or may not provide for comments from non-board members.

2. Many studies and analyses have probed citizens' alienation from government. Among them are Richard C. Harwood, *Citizens and Politics: A View from Main Street America* (Dayton, Ohio: The Kettering Foundation, 1991); David Mathews, "Putting the Public Back into Politics," *National Civic Review* 80, no. 4 (Fall 1991): 343–51; and William R. Potapchuk, "New Approaches to Citizen Participation: Building Consent," *National Civic Review* 80, no. 2 (Spring 1991): 155–65.

3. A 1996 study reported levels of confidence in government as follows: local government, 24 percent; state government, 19 percent; federal government, 16 percent. Frank Benest, "Serving Customers or Engaging Citizens: What Is the Future of Local Government?" *Public Management* 78, no. 2 (Feb. 1996): A-9.

4. Between 1990 and 1994, confidence in religious institutions fell from 57 percent to 40 percent; in voluntary groups, from 54 percent to 37 percent; and in local media, from 34 percent to 24 percent. Benest, "Serving Customers."

5. Margaret S. Carlson and Roger M. Schwarz, "What Do Citizens Really Want? Developing a Public-Sector Model of Service Quality," *Popular Government* 60 (Summer 1996): 26–33.

6. A practical resource that covers many aspects of public participation is James L. Creighton, *Involving Citizens in Community Decision-Making: A Guidebook* (Washington, D.C.: Program for Community Problem Solving, 1992).

7. We thank all of the local and state government officials who replied to our survey. Their materials have been added to the Institute of Government library.

8. David Wallenchinsky, Irving Wallace, and Amy Wallace, *The People's Almanac Presents The Book of Lists* (New York: William Morrow and Company, 1977), 469. Forty-one percent cited speaking before a group as their greatest fear; 32 percent said heights; 22 percent said financial problems; and 19 percent said death.

9. Thomas Kochman, *Black and White Styles in Conflict* (Chicago: University of Chicago Press, 1981). Kochman notes culturally different levels of comfort with emotion-filled speech, breaking in on speakers, and so on.

10. Although designed for training young people to be mediators, a useful checklist for listening effectively is "Are You an Effective Communicator?" in *Peer Mediation Conflict Resolution in Schools (Program Guide)*, by Fred Schrumpf, Donna Crawford, and H. Chu Usadel (Champaign, Ill.: Research Press, 1991), 55.

11. *See* Kevin Merida and Barbara Vobejda, "In Search of a Civil Society," *Washington Post National Weekly Edition* (Dec. 23, 1996–Jan. 5, 1997), 6.

Michael Brady

Welfare Reform: What Will It Mean for North Carolina?

John L. Saxon

In August of 1996, Congress enacted the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, the most drastic overhaul of America's approach to welfare since 1935. What will this federal welfare reform law mean to state and local governments, taxpayers, and poor families and children in North Carolina?

Proponents of welfare reform insist that the new law will "end welfare as we know it," ending a devastating cycle of welfare dependency. Critics, on the other hand, fear that the new welfare legislation will rip a gaping hole in America's "safety net" for the poor; that it will push millions of children deeper into poverty; that there simply are not enough jobs to provide work for families who receive welfare; and that, freed from federal requirements, state and local governments will engage in a "race to the bottom" by cutting assistance for needy families.

This article summarizes the 1996 federal welfare reform legislation, discusses some of the choices and the

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Aid to Families with Dependent Children: Facts and Figures

- In 1993 approximately five million families—including one of every seven children in the United States—received AFDC; over half of the children who received AFDC had been born out of wedlock.[1]
- In 1993 the total cost of the AFDC program in the United States (excluding child care and job training) was $25.2 billion. Federal spending for AFDC ($13.8 billion) accounted for less than 1 percent of the federal budget.[2]
- In North Carolina, an average of 116,000 needy families (including 210,000 dependent children) received AFDC in 1995.[3]
- In 1995 the maximum AFDC payment for a parent and two children in North Carolina was $272 per month (approximately 25 percent of the poverty level for a family of three).[4]
- In 1995, spending for North Carolina's AFDC program was $415 million.[5] Federal funds paid about 62 percent of the cost of North Carolina's AFDC program ($257.3 million); the state about 16 percent ($66.2 million); and the counties about 22 percent (approximately $90.2 million).

1. U.S. House of Representatives, *Overview of Entitlement Programs* (hereinafter referred to as *1994 Green Book*) (Washington, D.C.: U.S. Government Printing Office, 1994), 324–25, 390, 399, 401.
2. *1994 Green Book*, 324–25.
3. N.C. Division of Social Services, *Annual Statistical Report* (Raleigh, N.C.: N.C. Division of Social Services, 1995).
4. *Annual Statistical Report*.
5. *Annual Statistical Report*.

challenges the new law presents to state and local governments, and examines the potential impact of welfare reform on North Carolina and North Carolinians.[3]

A Brief History of Welfare Reform

America's debate regarding welfare reform is not new. Indeed, "every president since Harry Truman . . . declared welfare reform a priority at some point in his administration."[4] Nonetheless, the basic structure and philosophy of the Aid to Families with Dependent Children (AFDC) program—the principal welfare program for single mothers and children—remained largely unchanged from 1935 until 1996.

The most recent round of the welfare reform debate started during the 1992 presidential campaign, when then Governor Bill Clinton promised that, if elected, he would "end welfare as we know it." But welfare reform remained on the back burner during the first two years of the Clinton administration as Congress debated, and ultimately rejected, the administration's proposal to reform the nation's health care and health insurance systems.

The issue resurfaced in the 1994 election. Republican candidates for the House of Representatives included welfare reform as one of the ten planks in their Contract with America. The new Republican majority in the House passed a welfare reform bill, the Personal Responsibility Act (H.R. 4), on March 24, 1995. The Senate passed a somewhat less radical version the following fall. A compromise proposal was included in the budget-reconciliation act but was vetoed by President Clinton on December 7, 1995. On January 9, 1996, the president vetoed a freestanding welfare reform bill, arguing that the bill did not protect the eligibility of poor families for Medicaid and did not do enough to provide child care for families who were seeking to move from welfare to work.

As the 1996 presidential election approached, the House of Representatives passed H.R. 3734, a welfare reform proposal that (1) was somewhat more moderate than the one vetoed by the president and (2) deleted provisions that made Medicaid a block grant program. On July 31, 1996, President Clinton announced that he would accept the House-Senate conference agreement on H.R. 3734. Later that day, the House of Representatives adopted the conference agreement by a vote of 328 to 101. The next day the Senate passed the compromise legislation by a vote of 78 to 21. Three weeks later the president signed the compromise as Public Law Number 104-193 (P.L. 104-193), the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

The federal welfare reform law, 250 pages long, is extremely complex and detailed. It makes hundreds of fundamental changes with respect to AFDC, Supple-

mental Security Income (SSI), the Food Stamp program, child support enforcement, day-care and nutrition programs for children, and the eligibility of immigrants and legal aliens for public assistance and social services.

This article focuses primarily on Title I of P.L. 104-193, which replaces AFDC with a new program, Temporary Assistance for Needy Families (TANF).

Aid to Families with Dependent Children (AFDC)

For more than sixty years, AFDC was the primary government program that provided cash assistance (or welfare) to poor parents (usually single mothers) of children who had been deprived of the care and the support of a parent (usually the child's father) as a result of the parent's death, absence from the home, disability, or unemployment.

Congress enacted the AFDC program as part of the Social Security Act of 1935. Under this law, the federal government agreed to pay at least half the cost of the AFDC programs established by states. To receive federal funding, however, states had to comply with a number of detailed federal requirements in administering their AFDC programs. Needy families that met the AFDC eligibility requirements were legally entitled to receive AFDC benefits and could continue receiving those benefits as long as they met the requirements.

In most states, the AFDC program was administered by a state social services agency, and the nonfederal share of AFDC costs was paid from state tax revenues. North Carolina, however, required counties to administer the AFDC program, to pay the nonfederal share of local administrative costs, and to pay half of the nonfederal share of AFDC benefits that were paid to county residents.

Temporary Assistance for Needy Families (TANF)

Title I of P.L. 104-193 repealed the federal AFDC law and replaced it with a new block grant program known as Temporary Assistance for Needy Families (TANF).

Like AFDC, TANF is a public assistance program for needy families with children. Also like AFDC, it is financed jointly by the federal government and the states, is administered by state or local social services agencies, and is subject to certain federally imposed requirements and restrictions. But TANF constitutes a radical departure from the philosophy and the policies that governed the AFDC program for more than sixty years. Unlike previous attempts to reform welfare, P.L. 104-193 will, in fact, "end AFDC as we know it." Among other things, it

- caps federal funding for TANF;
- increases the states' authority to establish their own rules concerning the TANF program;
- eliminates the legal entitlement of needy families to assistance;
- limits how long eligible families may receive assistance;
- requires most parents who receive TANF to work; and
- seeks to end welfare dependency by requiring work, promoting marriage, and discouraging out-of-wedlock births.

To receive federal funding under the TANF Block Grant, a state must submit a state plan for TANF to the United States Department of Health and Human Services (HHS) by July 1, 1997. HHS approval of the state TANF plan is *not* required, and HHS has no authority (1) to disapprove a state's plan as long as the plan is complete and provides the information required by federal law, (2) to impose additional requirements (beyond those specified in the federal law) on states as a condition of receiving federal TANF funding, or (3) to withhold federal funds or take other actions against a state that does not comply with the provisions of its TANF plan.

In its plan each state must describe how it intends to

- provide assistance in all political subdivisions of the state to needy families who have (or are expecting) a child;
- provide parents with job preparation, work, and supportive services that will enable them to become self-sufficient and move from welfare to work;
- require parents and caretakers who receive assistance to engage in work activities;
- restrict the use and the disclosure of information about individuals and families who receive assistance;
- reduce the incidence of out-of-wedlock pregnancies (with special emphasis on pregnancies among teenagers).

P.L. 104-193 gives states the option of terminating their AFDC programs and implementing the TANF

program before July 1, 1997. Like many other states, North Carolina has chosen to implement TANF before that deadline.[3]

On October 16, 1996, Governor Jim Hunt and the state Department of Human Resources took the first step toward implementing welfare reform by submitting a TANF plan (based on the state's Work First AFDC waiver) to HHS. Still, the transition from AFDC to TANF will not be quick, simple, easy, or painless.

As North Carolina moves toward welfare reform, four of the most critical choices and challenges confronting the state and local governments will be

- deciding how the state (and counties) will pay for assistance to needy families under the TANF Block Grant;
- determining how much of a safety net the state will provide for needy families with children;
- deciding how the state will transform welfare from a way of life to a time-limited program that provides temporary assistance to needy families, and what will happen to families and children when they reach the end of the time limit; and
- determining how the state will move poor parents from welfare to work and what will happen to children if their parents cannot work, cannot find a job, or cannot arrange adequate child care or transportation.

Paying for Assistance

P.L. 104-193 dramatically alters the way in which the federal government and states pay for assistance to needy families with children. Federal funding for AFDC benefits, AFDC child care, and administration of state AFDC programs was not capped. Instead, the federal government agreed to pay a specific percentage of the cost of each state's AFDC program; it appropriated as much money as was necessary to pay the federal share; and it required states to provide state or local funds to match the federal AFDC funding that they received.[4] Given the entitlement nature of the AFDC program, the actual cost to each level of government depended on (1) the number of eligible families who applied for AFDC, (2) the AFDC benefit level established by the state, and (3) the cost of administering the program. Funding for AFDC was therefore open ended at all levels of government.

In contrast, P.L. 104-193 eliminates open-ended federal funding for AFDC and caps the amount of federal funding that will be provided to states for assistance to needy families with children. It consolidates federal funding for the four components of AFDC (cash benefits, emergency assistance, administration, and job training) into a single "funding stream"—the TANF Block Grant. The new law also repeals the state-match requirements of the AFDC statute and increases the states' fiscal flexibility by (1) no longer requiring that states provide assistance to all families who are eligible for assistance and (2) giving states more authority with respect to the eligibility of needy families for assistance, the amount of assistance provided to eligible families, and the length of time they may receive assistance.

Federal welfare reform therefore both limits the federal government's fiscal responsibility for providing assistance to needy families with children and shifts greater responsibility, or at least potentially greater responsibility, to the states.

Federal Funding for States under the TANF Grant

Under P.L. 104-193, Congress will appropriate approximately $16.4 billion per year through federal fiscal year (FFY) 2002 for TANF Block Grants to states. The amount of each state's TANF Block Grant will be based on the amount of federal AFDC funding the state received before the welfare reform law was passed. North Carolina's TANF Block Grant will be about $302 million per year.

Whereas AFDC funding varied with the increasing or decreasing costs of the state's AFDC program, the state's TANF Block Grant will, with a few minor exceptions, be set at a fixed amount for the next five years. States like North Carolina that experience significant increases in population growth or in which per capita spending for poor families is significantly less than the national average may qualify for a 2.5 percent increase in TANF funding.[5] A state also may receive a bonus of up to 5 percent of the state's TANF Block Grant if it qualifies, on the basis of having achieved the goals set by P.L. 104-193, as a "high performance" state. If a state experiences increased welfare costs as the result of an economic downturn, it *may* be eligible to receive additional federal TANF funding from a contingency fund, or it may borrow money from the federal government to cover increased welfare costs.

Repealing AFDC and capping federal funding under the new TANF Block Grant system will result in federal "savings" (that is, reductions in projected fed-

eral spending compared with expenditures under the former AFDC program) of about $1.2 billion over six years (FFY 1997 through FFY 2002), or about 2 percent of the $54.5 billion in federal spending cuts under P.L. 104-193.[6]

But the impact of reduced federal funding under the TANF program should not be underestimated. The Congressional Budget Office estimates that, unless states substantially increase state and local spending for TANF or make significant cuts in assistance to needy families, federal TANF funding will be far less than the amount the states will need to meet the work requirements of the new law.[7] Another study estimates that (1) if the TANF program had been implemented in 1988, North Carolina would have received $46 million (or 17 percent) *less* than it received in federal AFDC funding for the period 1988 through 1995; and (2) this reduction in federal funding would have forced the state either to spend an additional $71 million in state and local funds to maintain assistance payments for eligible families or to make significant reductions in benefit levels or the number of families who received assistance.[8]

State and Local Spending under TANF

Proposals to repeal the AFDC state-match requirement, to eliminate the legal entitlement to assistance, and to increase the states' authority to restrict eligibility for assistance led some opponents of welfare reform to fear that states would respond to it by making substantial cuts in state spending for needy families with children. To avoid such a "race to the bottom," P.L. 104-193 includes a "maintenance of effort" requirement.

Although states are no longer required to match federal funding for assistance to needy families, beginning in FFY 1998, the amount of a state's TANF Block Grant will be reduced if the amount of state and local spending for cash assistance, child care, education and job training, or other assistance for needy families with children is less than 80 percent of state and local spending for AFDC cash benefits, emergency assistance, administration, child care, and job training in FFY 1994.[9] To receive its full TANF Block Grant allocation, North Carolina will have to spend at least $154 million per year for state-funded or locally funded assistance to needy families with children. If the state fails to meet this maintenance-of-effort requirement during a fiscal year, its TANF Block Grant for the following fiscal year will be reduced on a dollar-for-dollar basis.

The maintenance-of-effort requirement undoubtedly will somewhat mitigate the impact of reductions in state and local spending for needy families with children. Nevertheless, the Congressional Budget Office estimates that if each state spends only what it is required to spend under the TANF maintenance-of-effort requirement, state and local spending for assistance to needy families with children during the period FFY 1997 through FFY 2002 will be $32 billion (or 33 percent) *less than* the amount that states would have spent for needy families under the AFDC program.[10]

Reductions in state and local spending for needy families therefore *may* be greater than reductions in federal welfare spending. It is also possible, however, that the cap on federal TANF funding, combined with the TANF work requirements, will force state and local governments to maintain or *increase* their spending in order to offset reduced federal spending for needy families or to pay the increased costs that may be incurred in moving families from welfare to work.

Weaving a New Safety Net

P.L. 104-193 substantially increases the authority—and perhaps more important, the *responsibility*—of states to decide how much of a safety net they will provide for poor families and children.

Under the AFDC law, the federal government made most of the policy decisions about the eligibility of needy families for assistance, the types of assistance that could be provided to eligible families, how long they could receive assistance, and how the states were required to administer their AFDC programs. P.L. 104-193 significantly limits the federal government's role in these decisions and gives each state broad discretion to determine the circumstances under which needy families will be eligible for assistance under its TANF program, how much assistance families will receive, what types of assistance they will receive, and how long they may receive it.

State Options under Federal Welfare Reform

P.L. 104-193 increases the states' authority to design and administer their own assistance programs for needy families in three ways. First, it repeals many of the federal requirements that states had to comply with in order to receive federal funding for AFDC. Second, it gives states a number of explicit options in administering the TANF program. Third, it allows

states to establish eligibility requirements for TANF that are more restrictive than the limitations mandated by federal law.

Expenditure and transfer of federal TANF funds. Unless otherwise prohibited by federal law, North Carolina may spend its federal TANF Block Grant for any purpose that was authorized under the AFDC law (including cash benefits, emergency assistance, child care, and job training or employment programs for needy families with children). In addition, the state may spend TANF funds in any manner that is reasonably calculated to accomplish the purposes of the TANF statute (providing in-kind assistance or cash assistance to needy families so that children may be cared for in their homes or in the homes of relatives; ending welfare dependency by promoting job preparation, work, and marriage; reducing the incidence of out-of-wedlock pregnancies; and encouraging the formation of two-parent families).[11]

The state also may use up to 30 percent of its TANF Block Grant to provide child care and social services for needy families under the state's Child Care and Development Block Grant and Social Services Block Grant. If the state does not need to spend (or chooses not to spend) the entire amount of its annual TANF Block Grant for assistance to needy families, it may carry over the unused TANF funds in a "rainy day" account and use them to provide financial assistance, child care, job training, employment services, or other TANF services to needy families in later years.

Administration. P.L. 104-193 requires states, in administering the TANF program, to treat all persons who apply for or receive TANF assistance in a "fair and equitable" manner but repeals virtually all of the federal requirements governing the way the states administered their AFDC programs.

P.L. 104-193 provides that a state TANF program must serve all political subdivisions of the state, but it does not require that the program be administered in a *uniform* manner in every county or that the same level of assistance or services be provided to eligible needy families across the state. North Carolina therefore could provide more assistance to a needy family in Charlotte than to a similar family in Warren County, or allocate a disproportionate share of TANF funding for employment and training programs in urban areas, or distribute TANF funding to counties through mini-block-grants and allow each county to decide how it will assist its needy families.

Legal entitlement to assistance. Under the AFDC program, families that met the federal and state eligibility requirements for AFDC were *entitled* to receive an AFDC check, and state social services agencies had to provide AFDC benefits to *every* eligible family, no matter how many families were eligible for AFDC or how much it cost to provide assistance to all of them.

P.L. 104-193 repeals the federal law requiring states to guarantee assistance to all eligible needy families. North Carolina may *choose* to create a legal entitlement to TANF assistance as a matter of state law, but it is no longer required to do so. If the state does not create an entitlement, it may cap the amount of money it will spend for its TANF program. Then, if available federal, state, and local funding for TANF is insufficient to provide the full amount of assistance to every eligible family, the state may place eligible families on a waiting list or terminate, reduce, or suspend assistance.

Eligibility of needy families. Under P.L. 104-193, each state must establish objective criteria for determining the eligibility of families for TANF assistance. In general, however, the state is free to establish its own standards for determining whether a family is eligible under the state's TANF program. For example, the state may provide TANF assistance to working families and to two-parent as well as single-parent families. Or it may choose to deny assistance to all teenaged parents or to all children who are born out of wedlock.

Assistance for needy families. As noted earlier, states have broad discretion in determining both the type and the amount of assistance that will be provided to needy families under the TANF program. In addition to—or instead of—cash assistance payments to needy families, a state may use TANF funds to provide energy assistance; to establish an electronic-benefits-transfer (EBT) system for assistance payments; to provide in-kind assistance and services or vouchers that recipients can use to obtain housing, food, or other goods and services; to provide child care assistance for the children of parents who are working or looking for work (regardless of whether the parent receives cash assistance); to provide employment placement, job training, or subsidized employment for parents; to fund "individual development accounts"; to provide emergency or diversionary assistance that will help families avoid the need for regular cash assistance; or to fund parenting and pregnancy-prevention programs for teenagers.

Time limits on assistance. P.L. 104-193 prohibits states from providing federally funded assistance to an

eligible family for longer than sixty months. North Carolina, however, may exempt up to 20 percent of the state's TANF families from this time limit. It also may impose a more restrictive time limit on the receipt of TANF assistance than the one established by P.L. 104-193.

Work requirements. P.L. 104-193 establishes a number of work requirements for families who receive federally funded assistance. Still, states have some flexibility in meeting these work requirements, which are discussed later in this article.

Legal immigrants. P.L. 104-193 allows each state to deny or limit TANF assistance to noncitizens who were residing legally within the United States on or before August 22, 1996. Legal immigrants who enter the United States after that date are (with some exceptions) ineligible to receive TANF assistance until they have lived in this country for five years.

"Interstate immigrants." Some states fear that if they provide higher public assistance benefits than other states, they will become "welfare magnets" that attract poor families from states with less generous assistance programs. P.L. 104-193 responds by allowing each state to limit assistance for families who have lived in the state for less than twelve months. If a family moves to North Carolina from another state and has lived here for less than a year, the state may determine the family's eligibility for TANF and the amount of assistance on the basis of the TANF rules established by the state where the family formerly lived.

"Family cap" restrictions. Formerly the amount of a family's AFDC benefits was based in part on the number of dependent children who lived in the home of the parent or the adult caretaker. Thus, given the same family income, a single parent with two children received a larger AFDC check than a single parent with one child.

Although there was almost no empirical evidence that AFDC encouraged single parents to have more children in order to receive additional assistance,[12] earlier versions of federal welfare reform legislation imposed a "family cap" that would have prohibited states from providing assistance for children who were born or conceived while their mothers were receiving AFDC. The final version of the new law deleted the family cap, but P.L. 104-193 allows a state to impose such a restriction with respect to TANF.

North Carolina's initial TANF plan incorporates the family cap that was contained in the state's AFDC Work First waiver (explained later in this article). Under this provision, a family will not (with some exceptions) receive additional cash assistance for a child born ten or more months after the family began receiving assistance.[13] Children affected by the TANF family cap remain potentially eligible for other assistance, including food stamps, Medicaid, and in-kind assistance or vouchers under the state's Social Services Block Grant.

School attendance. P.L. 104-193 allows North Carolina to require children and parents who receive TANF assistance to attend school if they have not completed high school, and to sanction the family (by terminating or reducing the family's assistance) if they do not do so.

Unwed teenaged parents. The welfare reform law allows states to deny assistance to unmarried teenaged parents and their children.

Drug screening and treatment for substance abuse. P.L. 104-193 permits states to require families who apply for or receive TANF to submit to random drug testing as a condition of eligibility.

"Personal responsibility contract." The new law also permits states to require recipients of TANF to sign a "personal responsibility contract" that establishes additional conditions concerning the family's eligibility for assistance, and North Carolina has done so.

Federally Mandated Restrictions Concerning Eligibility for TANF

Although P.L. 104-193 increases the states' authority to design and implement their own TANF programs, it does not completely eliminate federal requirements and restrictions. North Carolina therefore must comply with the provisions contained in the federal TANF statute as a condition of receiving federal funding, just as it had to do under the AFDC law. If the state does not comply with federally imposed restrictions, HHS may withhold a portion of its TANF Block Grant.

Besides observing the federally mandated sixty-month time limit on TANF assistance and the TANF work requirements (which are discussed later in this article), states must comply with the following requirements and restrictions imposed by P.L. 104-193.

School attendance by teenaged parents. States may not provide federally funded TANF assistance to an individual who is under age eighteen, is unmarried, has a minor child who is at least twelve weeks old, and has not received a high school diploma or GED certificate unless that person is attending high school,

studying for a high school diploma or GED certificate, or participating in an alternative state-approved educational or training program.

Residence of teenaged parents. States may not provide TANF assistance to an unmarried, minor parent (usually the teenaged mother) who is not living with her parent, legal guardian, or other adult relative unless (1) her parents, guardian, and other appropriate relatives are deceased or their whereabouts are unknown; (2) her parents, guardian, and other appropriate relatives will not allow her to live in their home; (3) she or her child has been subjected to serious physical or emotional harm, sexual abuse, or exploitation in the home of her parents, guardian, or other relative or would suffer imminent or serious harm if she and the child lived in the home; or (4) the state or local social services agency determines that it is in the best interest of her or her child to waive the requirement that she live with her parents, guardian, or adult relative.

Assistance for legal immigrants. P.L. 104-193 makes noncitizens who *legally* enter the United States after August 22, 1996, ineligible to receive federally funded TANF assistance (and other federally funded means-tested public assistance) until they have lived in this country for five years.

Persons convicted of drug-related felonies. The new welfare reform law makes persons convicted after August 22, 1996, of a felony involving possession, use, or distribution of a controlled substance ineligible for TANF assistance.

Fugitive felons and parole violators. P.L. 104-193 prohibits states from using TANF funds to provide assistance to a person who is fleeing to avoid prosecution or confinement in connection with a federal or state felony charge or conviction or with violation of a condition of probation or parole.

Persons who fraudulently receive multiple benefits. The new law makes a person convicted of fraudulently misrepresenting his or her residence to obtain TANF, Medicaid, food stamps, or Supplemental Security Income benefits from two or more states ineligible to receive cash assistance under a state TANF program for ten years.

Welfare Reform and North Carolina's Work First Waiver

Before P.L. 104-193 was passed, a number of states, including North Carolina, requested and received waivers from HHS in order to implement state welfare reform experiments that otherwise would not have been possible under the federal AFDC laws and regulations.

North Carolina's Work First waiver, approved in February 1996, allowed the state to increase the limit on the value of automobiles and other assets owned by a family for purposes of establishing eligibility for AFDC; to require all AFDC recipients to sign a personal responsibility contract; to impose a cap on benefits for AFDC recipients who have additional children after they begin to receive public assistance; to require teenaged parents who receive AFDC to live with their parents and attend school; to provide additional assistance to two-parent families; to impose a twenty-four-month time limit on the receipt of AFDC benefits by certain families; and to provide diversionary assistance to families who are at risk of needing welfare assistance.

P.L. 104-193 allows any state that received an AFDC waiver before August 22, 1996, to administer its TANF program under the provisions of its waiver, rather than the provisions of the new law, to the extent that the waiver is inconsistent with the requirements or the restrictions of the TANF statute.

Because P.L. 104-193 authorizes states to impose without federal approval many of the requirements and the restrictions that were contained in their AFDC waivers, the new legislation largely eliminates the need for states to obtain waivers. Still, continuing the provisions of a waiver may be the only way that some states can avoid, or at least delay, having to comply with *some* of the federal requirements and restrictions imposed by the new law.

North Carolina's initial TANF plan provides that the state has chosen to continue its Work First waiver. But it does not specifically indicate any areas in which the state asserts that the waiver is inconsistent with the provisions of the federal TANF statute.

Welfare Reform and Medicaid

Earlier versions of federal welfare reform legislation would have transformed Medicaid into a block grant program, but P.L. 104-193 does not contain this proposal. Although the new law does not radically reform the Medicaid program and will not significantly reduce federal, state, or local spending for Medicaid (America's most expensive public assistance program), it does make a number of changes that may affect the eligibility of needy families and children to receive medical care.

Before P.L. 104-193 was passed, the eligibility of poor families with dependent children for Medicaid was linked to their eligibility for AFDC. All children and adult caretakers who received AFDC benefits were *automatically* eligible for Medicaid. The new law breaks this linkage between Medicaid and eligibility for TANF. Families who receive cash or noncash assistance under a TANF program will *not* be eligible for Medicaid solely because they are eligible for TANF.

Nonetheless, most needy families with children who were eligible for Medicaid under the former AFDC and Medicaid laws will still be eligible for Medicaid under welfare reform. The new law requires North Carolina to provide Medicaid benefits to *all* children under age thirteen who live in a family whose income is below the federal poverty guideline. Also, P.L. 104-193 now requires each state to provide Medicaid to most needy families and children who would have been entitled to Medicaid under the state's 1996 AFDC standards. It also preserves the guarantee of four to twelve months of transitional Medicaid benefits for families who lose their AFDC-linked eligibility to Medicaid as a result of increased earnings from employment, loss of the AFDC earned-income deduction, or receipt of child support collections.

Child Care for Needy Families

Before P.L. 104-193 was passed, North Carolina received federal funding for child care through four distinct funding streams—the AFDC child care program, transitional child care for former AFDC recipients, the at-risk AFDC child care program, and the Child Care and Development Block Grant (CCDBG). Effective October 1, 1996, P.L. 104-193 replaced these four programs with a *new* CCDBG. Although states will receive federal funding for child care under the new CCDBG in the form of a single block grant, the CCDBG consists of three distinct components—or "pots"—of federal funding, with different allocation formulas and rules regarding a state's eligibility to receive funding from each of the pots.

Each state must use at least 70 percent of the nondiscretionary CCDBG funds it receives to provide child care assistance to families who (1) receive assistance under the state's TANF program, (2) are attempting to move from welfare to work, or (3) are at risk of becoming dependent on TANF. Still, families who receive TANF or are attempting to move off welfare are no longer legally *entitled* to receive child care assistance.

States may use federal CCDBG funds to provide child care assistance to families whose income is less than 85 percent of the state's median income for families of the same size. Although federal law does not limit the amount of time a family may receive assistance under the new CCDBG, a state may establish its own reasonable standards for this purpose.

Between FFY 1997 and FFY 2002, the federal government will provide almost $20 billion in funding for child care services through CCDBG. It is unclear, however, whether federal and state funding for child care under P.L. 104-193 will be sufficient to provide child care to low-income working families as well as families that are moving from welfare to work. The Congressional Budget Office estimates that states will have to use a significant amount of their CCDBG funding to provide child care for TANF recipients who must work in order to receive TANF assistance. It also estimates that, by FFY 2002, funding for child care under CCDBG will be $1.8 billion per year *less* than the amount states will need both to meet the TANF work requirements and to maintain child care assistance for other working families.[14]

How Long May Families Receive Assistance?

The belief that welfare should be time-limited assistance that helps families become self-sufficient, rather than a never-ending way of life that breeds welfare dependency from one generation to the next, is fundamental to welfare reform under P.L. 104-193.[15]

Time limits, as such, were unknown under the AFDC law. Although a family's AFDC assistance could be terminated for a number of reasons (including failure to seek or accept suitable employment or to participate in a job-training program), if the family continued to meet all of the federal and state AFDC eligibility requirements, it was legally entitled to receive AFDC benefits until the youngest child turned eighteen years of age.

Studies on the length of time that families received AFDC indicate that 56 percent of families who began receiving AFDC benefits at any given time received cash assistance for less than one year before they left welfare, that the average length of time on welfare for all families who entered the AFDC system at any particular time was slightly more than two years, and that only 7 percent of all families remained on AFDC

continuously for more than eight years.[16] But researchers also have found that at least one-third of all families who left AFDC later reapplied for and received AFDC benefits and that about 60 percent of all families who were receiving AFDC at any given time had received these benefits (continuously or intermittently) for more than five years.[17]

P.L. 104-193 prohibits states from using federal TANF funds to provide financial or nonfinancial assistance to a family that includes a parent or a caretaker who has received federally funded TANF assistance for sixty months (continuously or intermittently) while that person was an adult.

Under the Clinton administration's welfare reform proposals, time limits on AFDC were linked to a parent's obligation to work: families who received AFDC for two years would have been ineligible for continued assistance unless the parent or the adult caretaker was employed or working in a community service job. In contrast, the sixty-month time limit in P.L. 104-193 is not tied to a welfare recipient's involvement in an educational or job-training program, her participation in a workfare or community service program, her ability to find employment, or her willingness to work. The sixty-month time limit on assistance under P.L. 104-193 is a cumulative, nationwide, lifetime limit, not merely a restriction on receiving assistance for more than sixty *consecutive* months. In addition, the time limit applies to any type of federally funded TANF assistance to an adult caretaker or parent.[18] This is important for two reasons. First, the clock of the federal time limit runs, whether or not a family receives a welfare check during a given month, if the family receives an emergency or diversionary grant, an energy-assistance voucher or third-party payment, child care, job training, or other assistance that is paid for in whole or in part by federal TANF funds. Second, once a family reaches the sixty-month limit, it is ineligible for nonfinancial, as well as financial, assistance that is paid for with federal TANF funds.

Under P.L. 104-193, states may, but are not required to, exempt families from the federal limit if terminating assistance would create an undue hardship, but the total number of families exempted from the federal time limit during a fiscal year may not exceed 20 percent of the state's average monthly TANF caseload.[19] North Carolina therefore will have to decide (1) whether it will exempt some families from the time limit, (2) what criteria it will use to exempt families from the federal time limit, (3) who will determine whether a particular family meets the criteria for receiving continued assistance, (4) how long exempt families may continue to receive assistance, and (5) whether the state will use state or local funds to assist families who are no longer eligible for TANF assistance because of the five-year time limit.

But more important, North Carolina also will have to decide whether to impose a time limit on assistance for needy families that is more restrictive than the federal limit. North Carolina's Work First waiver imposes a twenty-four-month limit on cash assistance for families who are actively participating in Work First employment activities. Once a family is subject to the Work First time limit and has received assistance for twenty-four months (consecutively or intermittently), it is ineligible to receive assistance for the ensuing three years.

The state may retain this twenty-four-month time limit for families who are actively participating in employment activities, or make it apply to all families who receive TANF assistance, or impose a one-, three-, or five-year time limit.

The Impact of Time Limits

What will be the impact of time limits under welfare reform? Will time limits encourage families to leave welfare and become self-sufficient? Or will they, as some fear, result in increased poverty, hunger, and homelessness? The answer is not clear.

It will be several years before the state (and needy families) feel the full impact of time limits under the new federal and state laws. Under AFDC, which had no time limits, at least three-quarters of AFDC families at any given time either had received or were expected to receive AFDC for at least sixty months, consecutively or intermittently.[20] It has therefore been estimated that on a nationwide basis, between 1.42 million and 1.96 million families per year could lose assistance during the first five years that the sixty-month TANF time limit is in effect.[21] And while time limits undoubtedly may force some parents to find work sooner than they would have done otherwise, the limited employability of many long-term welfare recipients may make the transition from welfare to work extremely difficult.[22]

Moving Families from Welfare to Work

One primary objective of welfare reform is to "move families from welfare to work," thereby enabling families to support themselves financially

rather than rely on government assistance. The view that able-bodied welfare recipients should work to support themselves and their children rather than rely on public assistance is not new. Long before P.L. 104-193 was passed, states could require AFDC recipients to participate in job search, job training, workfare, and other employment-related programs as a condition of receiving assistance. But the new law significantly increases the work requirements for parents who receive assistance under the TANF program.

Work Requirements

P.L. 104-193 repeals the AFDC job-training program and consolidates federal funding for employment programs for welfare recipients into the TANF Block Grant. It also requires states to satisfy three new requirements in moving families from welfare to work. First, states must require each parent and adult caretaker who receives TANF assistance to engage in work either as soon as the state determines that he or she is ready to do so or after that person has received assistance for twenty-four months (whether or not consecutive), whichever is earlier. States are free to decide how they will determine whether a parent or a caretaker is ready to work, what type of activities constitute work, how many hours per week the parent or the caretaker will be required to work, and what penalties (for example, reduction or termination of assistance to the individual or to the entire family) will be imposed if the TANF recipient fails to comply with a state's work requirements.

Under North Carolina's Work First waiver, single parents must participate in work or work-related activities for thirty hours per week. The waiver exempts TANF recipients from this requirement if they are under age eighteen, are age sixty-five or older, are disabled or incapacitated, are unable to participate in work or work-related activities because they have no child care or transportation, are caring for a disabled dependent, or have a child under age one. If a parent fails to comply with the work requirements without good cause, the amount of the family's assistance is reduced for three to twelve months. The state may not sanction a parent for not complying with the work requirements if she has a child under age six and has been unable to obtain reasonable, affordable, and adequate day care for the child.

Second, P.L. 104-193 provides that, beginning August 22, 1997, states must require parents and adult caretakers who have received assistance for *two months* to participate in community-service employment—that is, an unpaid workfare job with a public or private employer—unless they are working or are exempt from the federally mandated work requirements. States may opt out of this community-service work requirement.

Table 1
Required Work-Participation Rates under P.L. 104-193

Fiscal Year	Work-Participation Rate (All Families) (%)	Work Requirement (All Families) (hrs./wk.)	Work-Participation Rate (Two-Parent Families) (%)	Work Requirement (Two-Parent Families) (hrs./wk.)
1997	25	20	75	35
1998	30	20	75	35
1999	35	25	90	35
2000	40	30	90	35
2001	45	30	90	35
2002	50	30	90	35

Third, to receive their full TANF Block Grant allocations, states must meet two federally mandated "work participation rates" for families who receive TANF assistance (see Table 1). If a state fails to meet either of the mandated work-participation rates without reasonable cause, the secretary of health and human services may withhold 5 percent of the state's TANF Block Grant for the following fiscal year.

The work-participation rates under P.L. 104-193 apply to families who are receiving assistance under the state's TANF Block Grant rather than to the number of families who previously received assistance and are now working. Still, the state's work-participation rate may be reduced significantly if, through an effective work program or an improving state economy, the state can reduce the number of families who receive assistance.

To be included in the state's work-participation rate, an adult parent or caretaker or a minor head of household must be engaged for at least twenty hours each week (or thirty-five hours per week for two-parent families) in "work activities." Only the work activities specified in P.L. 104-193—or designated in an AFDC waiver granted to the state before August 22, 1996—may be considered in calculating the state's federally mandated work-participation rates. P.L. 104-193 defines "work activities" as unsubsidized employment; subsidized public- or private-sector employment; on-the-job training; work experience (if not enough private-sector

employment is available); community service; vocational training (for a maximum of twelve months); caring for the children of parents who are participating in community service; and job-search or job-readiness programs for not more than four consecutive weeks or more than six weeks altogether. For teenaged parents who have no high school diploma or GED, work activities also include attending high school, participating in a GED program, or pursuing other job-related education.

The Impact of Work Requirements

P.L. 104-193 therefore places strict requirements on states in moving families from welfare to work. Unfortunately, however, federal funding for work programs under the new law may fall far short of the amount needed to meet the federal work requirements. The Congressional Budget Office estimates that the cost (excluding child care) of meeting the work requirements will reach $5.6 billion per year by FFY 2002—almost four times the amount spent on the AFDC job-training program in FFY 1994—and that federal funding under the TANF Block Grant over the next six years will be $12 billion *less* than the amount that states will need in order to meet the work requirements.[23] As a result of this funding shortfall, the Congressional Budget Office projects that many states will not meet the work requirements and therefore will risk losing even more federal funding through penalty reductions of their TANF Block Grants.

But more important, the success of welfare reform—moving families from welfare dependency to self-sufficiency through employment—will depend on the validity of two fundamental assumptions of the federal legislation: that jobs will be available for anyone who is willing, able, or required to work; and that employment can enable welfare families to become self-sufficient and pull themselves out of poverty.

The question is whether—given the limited job skills of many welfare recipients, high unemployment rates in many rural and urban areas, and structural changes in the American labor market—these assumptions will prove to be true.

It appears that under welfare reform, up to two million single parents will be required to seek employment, competing with another seven million workers who are unemployed even when there is "full employment."[24] To provide jobs to all able-bodied welfare recipients within a one- or two-year period, employers will have to double or triple their hiring of new unskilled workers.[25] Nonetheless, over the long term, the economy probably will be able to provide low-skill, low-wage jobs for the vast majority of former welfare recipients without a significant increase in unemployment.[26]

In the short run, however, given the decline in the demand for less-skilled workers and the limited education and work experience of most welfare recipients, moving large numbers of families from welfare to work will be difficult at best. Moreover, many of those who are able to find and keep a job may find it hard to earn enough to support their families and lift themselves out of poverty without continued assistance.[27]

The Future

It is far too soon to say what welfare reform will mean for North Carolina. Although enactment of P.L. 104-193 may mark the "end of welfare as we know it," the important question is what we will create to take the place of the welfare system after it has been dismantled.

Changes in government funding for assistance to needy families, the devolution of authority from the federal government to the states with respect to welfare policy, the transformation of welfare from a legal entitlement to limited temporary assistance, and the movement of families from welfare to work present a number of important choices and challenges to North Carolina state and local governments. The way in which we make these choices, meet these challenges, and respond to these new responsibilities will determine the ultimate success or failure of welfare reform.

Notes

1. A more detailed summary and discussion of the 1996 federal welfare reform law appears in John L. Saxon, "Welfare Reform: What Will It Mean for North Carolina?" *Social Services Law Bulletin*, no. 24 (Feb. 1997).

2. Thomas Corbett, "Child Poverty and Welfare Reform: Progress or Paralysis," *Focus* 15 (Spring 1993): 1.

3. By implementing TANF before the deadline of July 1, 1997, North Carolina received approximately $8 million more in federal funding than it would have received if it had continued to provide assistance to needy families under the AFDC law.

4. The federal share and the state match for AFDC varied from state to state. In North Carolina, the federal government paid 50 percent of the cost of administering the state's AFDC program and about 64 percent of the cost of AFDC benefit payments to eligible families.

5. The total amount of supplemental TANF funding for

states for FFY 1998 through FFY 2001 may not exceed $800 million. North Carolina is expected to be one of twenty states that will qualify for a supplemental TANF grant.

6. David A. Super et al., *The New Welfare Law* (Washington, D.C.: Center on Budget and Policy Priorities, 1996), 6–7. Nearly all of the savings under P.L. 104-193 come from changes to the Food Stamp and Supplemental Security Income programs and from restricting the eligibility of legal immigrants for public assistance.

7. Super et al., *The New Welfare Law*, 6–7.

8. Dan Gerlach, "What Does Federal Welfare Reform Mean for North Carolinians?" *BTC Reports* 2 (Aug. 1996): 10 (published by the North Carolina Budget and Tax Center in Raleigh).

9. If a state meets the law's work-participation requirements for TANF recipients, its maintenance-of-effort requirement is reduced to 75 (rather than 80) percent of the state's historic nonfederal spending for AFDC.

10. Super et al., *The New Welfare Law*, 8.

11. Up to 15 percent of North Carolina's TANF Block Grant (or about $45.3 million per year) may be used to offset part of the cost incurred by the state and counties in administering the state's TANF program.

12. Gregory Acts, *The Impact of AFDC on Young Women's Childbearing Decisions* (Washington, D.C.: The Urban Institute, 1993).

13. The family-cap provision included in proposed state welfare reform legislation (H.R. 5) that was considered by the General Assembly in 1995 would have affected more than one thousand North Carolina families each month. The General Assembly's Fiscal Research Division estimated that such a restriction would reduce state and local spending for AFDC by about $1 million to $1.5 million each year. But a study of New Jersey's family-cap provision by Rutgers University found that the restriction did not reduce the birthrate of mothers who were receiving AFDC. Michael C. Laracy, *If It Seems Too Good to Be True, It Probably Is* (Washington, D.C.: Center for Law and Social Policy, 1995).

14. Super et al., *The New Welfare Law*.

15. LaDonna Pavetti, "Who Is Affected by Time Limits?" *Welfare Reform Issue Brief No. 7* (Washington, D.C.: The Urban Institute, May 1995).

16. LaDonna Pavetti, "The Dynamics of Welfare and Work," cited in *Overview of Entitlement Programs* (hereinafter referred to as *1994 Green Book*), by U.S. House of Representatives (Washington, D.C.: U.S. Government Printing Office, 1994), 441–42.

17. Pavetti, "The Dynamics," cited in *1994 Green Book*, 441–42. One study suggests that African-Americans, single (never wed) parents, and parents with no recent work experience are more likely to remain on AFDC for long periods than white AFDC recipients, parents who apply for AFDC following a divorce, and parents who have worked within two years of applying for AFDC. David T. Ellwood, "Targeting Would-Be Long-Term Recipients of AFDC," cited in *1994 Green Book*, 443–44. Although more than 60 percent of all daughters whose mothers received AFDC do not receive AFDC themselves, there is evidence that children who grew up in families that received AFDC are more likely to receive welfare when they become adults than children who grew up in poor families that did not receive welfare. Greg J. Duncan et al., "Welfare Dependence within and across Generations," *Science* 239 (Jan. 29, 1988); and Martha S. Hill and Michael Ponza, "Does Welfare Dependency Beget Dependency?" cited in *1994 Green Book*, 447–49.

18. The federally imposed time limit does not apply to assistance a person received while he or she was a minor child who was not the head of a household or married to the head of the household.

19. States that imposed time limits under their pre-welfare-reform AFDC waivers generally exempted more than 20 percent of their AFDC caseloads from time limits on the basis of disability, child care, or other factors. Steve Savner et al., *When the Clock Doesn't Run: Exemptions and Extensions Granted under Time-Limited AFDC Waivers* (Washington, D.C.: Center for Law and Social Policy, 1995).

20. Pavetti, "Who Is Affected?"

21. Pavetti, "Who Is Affected?"

22. Pavetti, "Who Is Affected?" Historically, half of all AFDC recipients who have been on the welfare rolls for more than five years have little or no recent work experience, and more than 60 percent have less than a high school education.

23. Super et al., *The New Welfare Law*. P.L. 104-193 also caps federal funding for child care for children whose parents receive TANF and are working or participating in employment-related programs. But the work requirements of P.L. 104-193 will increase the need for child care for TANF recipients. As a result, the Congressional Budget Office projects that, beginning in FFY 1999, states will not receive sufficient federal funding to provide child care to the children of TANF recipients who are working, without reducing child care funding for working families who do not receive public assistance.

24. A recent study of the entry-level, low-skill job market in Illinois found that, despite significant decreases in the state's overall unemployment rate, the unemployment rate of workers who needed entry-level jobs was almost twice as high as the unemployment rate for other workers. Virginia L. Carlson and Nikolas C. Theodore, *Are There Enough Jobs? Welfare Reform and Labor Market Reality* (DeKalb, Ill.: Northern Illinois University, 1995). In both rural southern Illinois and the urban areas of Chicago and East St. Louis, there were six to nine unemployed unskilled workers for every available entry-level job.

25. Gary Burtless, "Employment Prospects of Welfare Recipients," in *The Work Alternative: Welfare Reform and the Realities of the Job Market*, ed. Demetra Smith Nightingale and Robert H. Haveman (Washington, D.C.: Urban Institute Press, 1994), 88.

26. Burtless, "Employment Prospects," 88.

27. Researchers estimate that only 41.5 percent of welfare mothers would be able to earn more than the federal poverty level for a family of three. Sheldon Danziger and Jeffrey Lehman, "How Will Welfare Recipients Fare in the Labor Market?" *Challenge* 39, no. 2 (March/April 1996).

A tract of land on scenic Grandfather Mountain (above, viewed from the Beacon Heights Overlook on the Blue Ridge Parkway) is among the many properties donated under the state's conservation tax-credit program.

North Carolina's Conservation Tax-Credit Program

Bonny A. Moellenbrock

In 1983, as North Carolina faced a critical need to protect its fragile coastline and provide public access to the beaches, the General Assembly adopted a new system of incentives to help preserve the state's coastal areas and other threatened places. It approved a plan under which credits could be given against the state income tax for gifts of property or property interest for the purpose of conserving the state's land and habitats. Fourteen years later, how well has the tax-credit program worked? Is it doing what it was intended to do? What are its benefits? At what cost? This article addresses all of these questions and makes recommendations for increasing the program's effectiveness.

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Federal and State Tax Policy

Federal and state laws on charitable deductions from the income tax are the point of departure for this discussion. The federal revenue code allows both individuals and corporations to claim deductions from their income tax for "charitable contributions," a term that includes donations of property and property interests for conservation purposes.[1] Depending on the value of the gift, an individual may deduct up to 30 percent of his or her adjusted gross income for that

tax year for such a contribution. If the value of the gift exceeds 30 percent of the donor's income, the contributor may carry over any excess value and apply it over the next five years to his or her tax liability. Corporations may claim the same charitable deductions, except that the maximum annual deduction is only 10 percent of net corporate income, and they too may carry over excess value, to be applied to their tax liability for the five succeeding years.

Since base taxable income for individuals in North Carolina is the federal taxable income from which charitable contributions have already been deducted, a state tax deduction for charitable contributions, including donations for conservation purposes, is necessarily a part of the state tax code.[2] Like the federal law, North Carolina law allows individuals whose donation is valued at more than 30 percent of their adjusted gross income to carry the excess value forward for the next five years. Corporations may claim up to 5 percent of their net income as deductions from the North Carolina income tax; but unlike the federal government, the state does not allow corporations to carry over unused value.

The Historic Preservation and Conservation Agreements Act of 1979 provides another incentive for gifts for conservation purposes. It enables state and local governments to accept "conservation" and "preservation easements" (see "Some Useful Explanations," page 30) and allows the giver to claim a reduced value when the property is being assessed for tax purposes.[3] Accordingly a donor of a conservation easement may request a reappraisal of her or his property on the basis of the donation and expect a reduction in local property tax.[4] Corporations also may expect a reduction in the tax levied against property that is subject to conservation restrictions.[5]

The availability of these tax deductions provides *some* incentive for donors of conservation land, but not much. This article shows that the conservation tax-credit program is providing another valuable approach in soliciting such gifts. (See "Tax Deductions Compared with Tax Credits," page 31).

A Brief History of the Program

In the late 1970s and early 1980s, North Carolina was implementing its Coastal Area Management Act (CAMA)[6] to protect coastal resources and minimize loss of life and property in hazardous coastal areas. When minimum oceanfront setback regulations were enacted in 1979, many oceanfront lots became no longer suitable for building. At the same time, as private development increased along the ocean strand, the state was seeking ways of maintaining access to public beaches. The legislation that resulted "established a permanent program for acquiring, improving, and maintaining beach accessways."[7] In purchasing land, this program gave priority to lots rendered undevelopable by the setback provisions over those that were unaffected by the regulations.

The legislative study committee investigating these land-use issues then recommended that a tax credit be given to encourage the owners of undevelopable oceanfront property to donate it to the state. Such a tax credit would help the state acquire beach access at a reduced cost while somewhat compensating the landowners for the devaluation of their property as a result of the setback requirement. Therefore House Bill 230 was introduced in the 1983 General Assembly to create the tax-credit program. To gain statewide political support and avoid a charge that the proposed law did not provide equal protection of the law, the bill's supporters extended the coverage of the tax-credit proposal beyond the coastal areas to include other types of conservation efforts. The legislation passed in July 1983 and was made retroactive to January 1983.[8]

Some Useful Explanations

Types of Property Donations

The rights, or interest, associated with property ownership may be considered a "bundle of sticks." For example, the right to farm, the right to mine, and the right to develop are all individual "sticks" in a bundle of rights. These sticks are divisible; that is, individual rights can be donated.

When a landowner donates a parcel of land outright (the entire bundle of rights), the gift is called a donation of **fee simple** interest. The donation of some of the rights, such as mining rights or development rights, is called a **conservation** or **preservation easement**. A conservation easement typically restricts the owner's ability to develop the property or destroy vegetation or natural features but allows him or her to continue to live on, sell, and rent the land. The easement is binding on future purchasers. A donation of a **remainder interest** allows the donor to own and continue to live on the property until she or he dies, at which time the property becomes the property of a nonprofit organization or a government agency. When a landowner sells the fee simple interest to a nonprofit organization or a government agency at a price below market value, the transaction is called a **bargain sale**.

The Value of Various Types of Property Donations

The value of a **fee simple** interest is the fair market value of the property.

The value of a **conservation easement** is the difference between the fair market value without restrictions and the fair market value with restrictions.

The value of a **remainder interest** is the value of the property donated. Although the donor maintains ownership of the property until death, the value of the donation is considered a charitable donation when it is made. IRS actuarial tables are used to determine the allowable income tax deduction for such donations.

The value of a **bargain sale** is the difference between the fair market value and the actual sale price.

Sources: Land Trust Alliance, *Conservation Options: A Landowner's Guide* (Washington, D.C.: Land Trust Alliance, 1993); Samuel N. Stokes et al., *Saving America's Countryside: A Guide to Rural Conservation* (Baltimore: Johns Hopkins University Press, 1989).

Operation of the Program

As a result of that law, North Carolina offers its residents a state income tax credit of 25 percent of the fair market value of real property interest donated to the state, a local government, or a qualified charitable conservation organization for acceptable conservation purposes.[9] The maximum allowable credit per individual or corporation per year was originally $5,000 but was raised in 1989 to $25,000.[10] The credit claimed in any given year may not exceed the donor's income tax liability for that year. If the allowable credit is greater than what the donor owes in income tax in that year, the excess credit may be carried forward for the next five years. The remaining value of a donation valued above the credit cap may be deducted from taxable income.[11]

Administration and Publicity

The General Assembly allocated no funds to administer the program. Instead, the program was "adopted" by William Flournoy in the North Carolina Department of Environment, Health, and Natural Resources (DEHNR). Flournoy, now environmental analysis program manager in DEHNR, developed the application process and continues to manage the program. He keeps approved applications and supporting documents in annual files but not applications denied. The Department of Revenue keeps no record of the tax credits claimed, although a new computer system may soon allow this information to be compiled.

Flournoy publicized the program in the state's conservation community through personal communication and presentations at conferences and meetings. In addition, the Division of Coastal Management sent explanations of the program to all owners of potentially undevelopable oceanfront parcels. Since 1989, DEHNR has distributed ten thousand copies of its brochure on the program to conservation conferences, Department of Revenue–sponsored seminars, private conservation organizations, and individuals. Also, the North Carolina income tax instruction booklet tells those who are interested in the credit program to contact the Department of Revenue.

The Approval Process

To apply for certification that tax credit should be given for their contribution, property donors must fill out a relatively simple form and attach a copy of the

Tax Deductions Compared with Tax Credits

Since tax deductions only reduce taxable income, the value of a charitable contribution in reducing tax liability is approximately 30 cents for every dollar donated. In contrast, tax credits for conservation purposes are applied to the amount of tax owed on a dollar-for-dollar basis, thereby reducing tax liability considerably more than a tax deduction would. For example:

With No Tax Deduction or Credit		With a $5,000 Tax Deduction		With a $5,000 Tax Credit	
Taxable income	$50,000	Taxable income	$50,000	Taxable income	$50,000
30% income tax	× 0.30	Less tax deduction	− 5,000	30% income tax	× 0.30
Income tax owed	$15,000	Adj. taxable income	$45,000	Income tax owed	$15,000
		30% income tax	× 0.30	Less tax credit	− 5,000
		Income tax owed	$13,500	Income tax owed	$10,000
		Tax savings	$ 1,500	Tax savings	$ 5,000

recorded deed of transfer. If the donation is not to a state agency, the charter of the local government or the nonprofit recipient also must be attached. Flournoy reviews the application materials and forwards copies to the Environmental Section of the Attorney General's Office for its review of the title and the recipient's qualifications. He also sends copies to the appropriate division of DEHNR for its review of whether the proffered gift meets the state's qualifications for a contribution for conservation purposes and whether it benefits the public. For example, the Division of Coastal Management reviews credit applications for parcels involving coastal lands and estuarine sanctuaries, and the Parks and Recreation Division reviews applications for parcels for which public access, species habitat, and general open-space conservation uses are claimed. If necessary, either a representative of the relevant division or Flournoy conducts an on-site evaluation to confirm the qualifications of the donation.

After DEHNR approves the contribution, the recipient agency, government, or organization must confirm its receipt of the donated property. DEHNR sends the applicant a letter certifying that the gift was approved for tax credit. The applicant must include this certification letter with its state income tax return in order to receive the credit. The complete approval process may take from one week to four months.

Note that DEHNR does not determine the value of the tax credit; it merely confirms that the gift is indeed a qualifying donation of real property interest for approved conservation purposes. The donor must state the value of the property given on his or her income tax form and therefore should have the property appraised to confirm the valuation submitted for purposes of obtaining a tax credit. The IRS requires an appraisal for donations of property valued at over $5,000 and for all conservation easements.

Evaluation of the Program

The study. The study reported in this article was based on a review of program files over the thirteen years from the beginning of 1983 through the end of 1995. It examined information from the application, the supporting documents, and the credit-certification letter for each application. Flournoy, the program's administrator, and David Owens of the Institute of Government, who drafted the legislation, provided historical background. Also, representatives of North Carolina conservation organizations (and several organizations in other states with tax-credit programs) gave their impressions of the program: How useful is the tax credit in their negotiations? How aware of the program are their donors? What do they think the program's strengths and weaknesses are, and how can it be improved?[12]

In evaluating the program, two stages were compared: the first six years of the program, when there

Table 1
Donation Summary

Donation Characteristics	1983–88 $5,000 Credit Cap No.	%	1989–95 $25,000 Credit Cap No.	%
No. of donations	37		95	
Annual average	6.17		13.6	
No. of donors	169		215	
Total acreage	2,383+		23,714+	
Average acreage	66*		252*	
Donation Source				
Individuals	32	86	66	69
Corporations	5	14	24	25
Indiv. and corp.	0	0	5	5
Recipient				
State agency	13	35	13	14
Local government	14	38	26	27
Nonprofit organization	10	27	56	59
Primary Conservation Use				
Beach access	2	5	0	0
Fish & wildlife conservation	10	27	28	29
Public access	13	35	24	25
Other conservation	12	32	43	45
Property Interest Donated				
Fee simple interest	32	86	67	71
Conservation easement	3	8	20	21
Bargain sale	2	5	7	7
Remainder interest	0	0	1	1
Location of Land Donated				
Coastal county	18	49	22	23
Coastal Plain county	4	11	22	23
Piedmont county	13	35	31	33
Blue Ridge county	2	5	18	19
Value and Cost of Credits				
Estimated total value	$5,642,350‡		$34,751,667‡	
Estimated average value	$182,011*		$404,089*	
Maximum claimable tax credits	$574,151		$2,877,402	

+Each stage had one donation for which the acreage was not stated.

*For the average calculations, n = number of donations for which either the acreage or the value was declared.

‡The first stage included six donations and the second stage nine donations for which the value was not estimated.

was a credit cap of $5,000, and the seven years just after the cap was raised to its present level of $25,000. (See Table 1 for a summary of the data on donations for each stage.)

Number and size of donations. The total number of applicants is unknown because records were kept only for successful applicants. The average number of certified donations per year, however, increased by 120 percent during the second stage of the program, and the average acreage of the donations increased by approximately 282 percent. The higher credit limit and the publicity on the program provided by the brochure undoubtedly contributed to these increases.

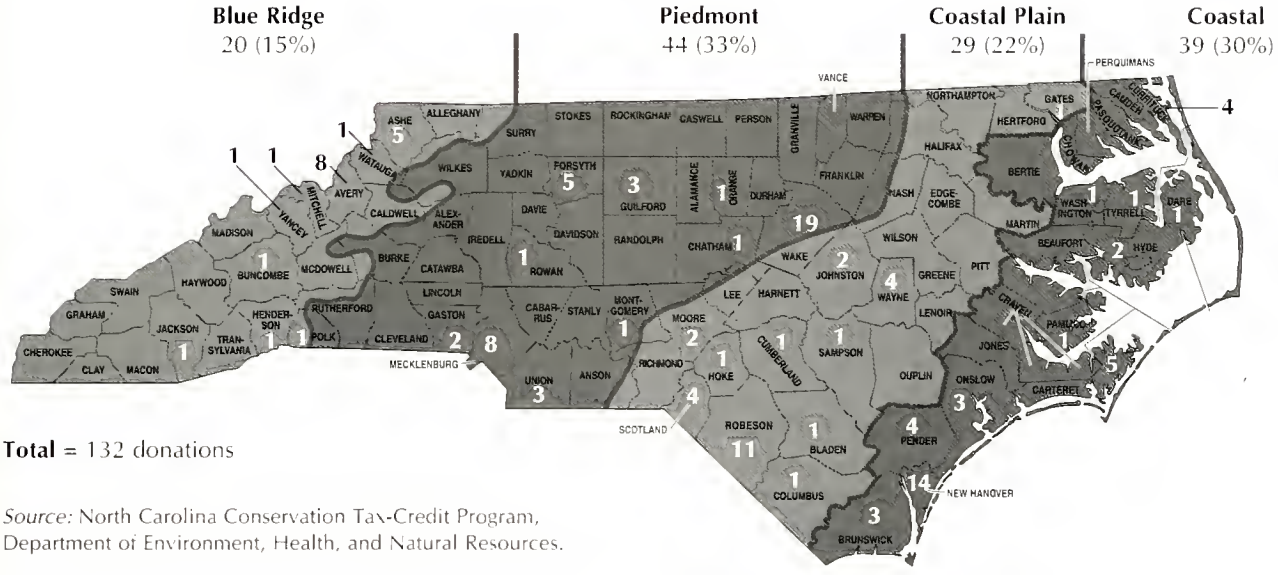
Types of donors. Both individuals and corporations made donations, though in both stages most contributions were made by individuals. Many donated parcels were owned by more than one person, typically a married couple or a group of heirs, and some were owned jointly by a corporation and individuals.

The higher cap on allowable tax credit that was adopted in 1989 could have been expected to increase the number of corporate donors, which might have larger tracts of land or more valuable property and significant taxable income. The number of corporate donors as a percentage of the total did indeed increase after the cap was raised, and the average estimated values of the donations by corporations were significantly higher than the average estimated values of the property donated by individuals. In each stage, however, the average size of corporate donations was less than the average size of individual donations. That is, on average, individuals gave larger tracts, but corporations gave more valuable tracts.

Recipients. In the second stage, the percentage of donations made to nonprofit organizations rose dramatically (from 29 percent to 67 percent), while donations to state agencies declined. Improved publicity and greater numbers of nonprofit land-conservation organizations may help to explain this phenomenon.

The increase in the number of donations to nonprofit conservation groups rather than to the state results in significant hidden savings for the state. Obviously the state saves money when it need not make a "fee simple" purchase (see "Some Useful Explanations," page 30) to preserve land for public purposes. But it gains even more when it does not acquire the responsibility and the costs of managing the conservation land acquired by nonprofit organizations. Also, no state employees need be used in negotiating with landowners to secure donations when nonprofit groups are providing this service. In many cases, nonprofit organizations play a significant role in negotiations for land that ul-

Map 1
Number of Donations, by Region and County Location, 1983–95



Total = 132 donations

Source: North Carolina Conservation Tax-Credit Program, Department of Environment, Health, and Natural Resources.

timately is given to the state. Clearly the tax-credit program has provided these groups with a useful tool that reduces the state's conservation-related responsibility and cost.

Types of donations. The increase in gifts of conservation easements and "bargain-sale" donations (see "Some Useful Explanations") during the second stage reflects an increased awareness of these alternative tools within the community. It also indicates that nonprofit groups were increasing both in number and in their understanding of how to use a sophisticated tool like easements to achieve their goal: 80 percent of the easement donations were to nonprofit groups.

Types of conservation use. The sources used in this study did not specify for each donation the public benefit that made the donation eligible for a tax credit, and many of the donations provided more than one public benefit. For the purposes of this study, when possible, donations were categorized according to their primary conservation use. If the primary use was not clear or if the donation provided for a combination of uses, the gift was considered to fall into the "other" category.

Considering that the program was first conceived in the effort to secure access to public beaches and compensate owners of beachfront land rendered undevelopable by the setback regulations, it is interesting that only two donations actually provided beach access. The limit on the tax credit that can be received is probably a factor in this failure: the credit may simply not provide enough compensation relative to the value of a beachfront lot. Or a longtime owner of a beachfront lot who is not a developer may not have enough income or a large enough tax obligation to make a credit useful; in such a case the owner may prefer to speculate, hoping for changes in regulations. Although the credits did not succeed in encouraging donations of beach access, 30 percent of the donations were in coastal counties. Clearly the program has contributed significantly to the protection of coastal resources.

Location of donations. The study classified donations on the basis of their location. "Coastal" counties have ocean or sound frontage. "Coastal Plain" counties lie in the eastern part of the state but have no coastal frontage. "Piedmont" counties lie in the center of the state, and the "Blue Ridge" counties lie in the western mountains. (See Map 1 for the locations and the number of donations through 1995.)

The property donations were fairly well distributed throughout the state, though only 15 percent were in the mountains. This may reflect both the lack of publicity for the program in the west and the economic condition of the region. The program does not provide much incentive for people who are land-rich but cash-poor, a common situation in many of the Appalachian counties. This fact may help to explain why the highest percentage of donations came from the Piedmont. Economic conditions are better there, and

land is under great pressure for development around the metropolitan areas.

Estimated value of donations. Because the Department of Revenue does not track conservation tax credits and their value and because tax returns are not open for research, the valuation actually claimed for donated property was not available. However, donors could voluntarily estimate the value of their donation on the certification form. Some donors provided an appraised value, some their own estimate, and others no valuation at all. The valuations on the donated conservation easements were often unclear. Some estimates were obviously for the easement only, while others apparently were for the full value of the property. Therefore the value of the donations can be considered an estimate only.

The estimated value of the donations increased 122 percent in the second stage, from an average of $182,011 per year while the credit cap was $5,000 to an average of $404,089 per year after the $25,000 cap went into effect. The latter figure includes a contribution valued at $11,976,000 made to the Pine Island Audubon Society. This donation greatly increased the average for the second stage. If this gift is not counted, the average value for the second stage was $267,949, representing a more realistic 47 percent rise in the average value per year of donations in the second stage.

Estimated cost to the state. Again, lack of Department of Revenue records prevents an exact analysis of numbers of certified credits claimed and their value. Still, the maximum value of the tax credits that were available may be estimated by (1) assuming maximum credit values for donations of land for which the donor did not indicate a value, (2) assuming that the value of each easement donated was equal to the full value of the property, and (3) assuming that all of the tax credits granted were used.[13]

On this basis, the estimated maximum "cost" of the program, in terms of tax revenue lost to the state, was $574,151 during the first stage and $2,877,402 during the second stage, for a total of $3,451,553. The lost $574,151 is only 10 percent of the estimated value of the donated property interest in stage 1, and the lost $2,877,402 is only 8 percent of the estimated value in stage 2. The total loss of $3,451,553 is only 8.5 percent of the overall estimated value of the donated property. The higher limit on tax credits did increase the cost of the program, but when lost revenue stayed at 8.5 percent of the estimated value while the average valuation of donated land increased by 47 percent over the seven years of stage 2, the higher credit limit can still be considered a bargain. That is particularly true in view of the fact that the state is not responsible for managing most of the land and did not need to expend employee time in acquiring most of the properties.

In the first stage, the value of 58 percent of the donations for which a value had been estimated was so large that when the 25 percent allowable deduction was applied to it, the $5,000 cap on tax credit was exceeded. In the second stage, the tax credit—calculated on the 25 percent basis—exceeded the $25,000 cap for 31 percent of such properties. Clearly the lower credit cap did not completely discourage larger donations, but the higher cap appears to have increased the average value of the donations.

Nonprofit organizations' experiences and impressions. To varying degrees, all of the nonprofit representatives consulted in this study considered the program to be a useful tool. Several said that, in at least some cases, the tax credit was a very important factor in securing a donation of interest in property. One person who works in four states noted that there were more donations to his organization in North Carolina than in the other states; he considers the tax-credit program—plus a superior North Carolina acquisitions officer—an important reason for this difference. Other representatives said that the credit was a useful incentive if not the critical factor in influencing potential donors; it often helped reduce the amount of time spent negotiating the transaction. One of them observed that the program is an important tool but less so in his Appalachian region, where income in general is not high enough to make tax credits an incentive.

Some of the nonprofit representatives said that the costs of the donation transaction sometimes were an obstacle, particularly for relatively small donations. To obtain the federal income tax deduction, potential donors must pay for the appraisal of both donated property interests worth more than $5,000 and any conservation easements given. This cost might run to $300 or more for a limited, simple appraisal. For larger or more complex properties, especially those with timber value, the cost could be up to $5,000. Other costs—legal fees, charges for title searches, recording fees, and surveying charges (if necessary)—might add up to $500. These costs may be paid by the donor or the nonprofit recipient, or they may be shared. Some nonprofit groups may have a lawyer on staff or a volunteer or a board member who will provide these services without charge. Perhaps this problem could be addressed by allowing the costs associated with a donation of property interest to be taken as a charitable-

contribution deduction from federal taxable income. Such a rule would be consistent with federal income tax deduction guidelines.

Weaknesses and strengths of the program. Despite the efforts of DEHNR and the Department of Revenue, the conservation tax-credit program is not well known. All of the nonprofit respondents said that most donors were not aware of it, not even those who were motivated by the financial benefits of tax deductions, and neither were their financial or legal advisers. One representative said that many of the nonprofit conservation groups he encountered did not understand the program and its procedures.

The tax-credit program is less effective at the extremes: the credit cap limits the incentive for extremely large donations and property with very high value, while income tax incentives in general are not useful for land-rich, cash-poor individuals. In addition, the credit is unlikely to persuade a landowner whose only interest is to maximize income from his or her property. It is more useful when the potential donor has at least some interest in conservation but needs encouragement.

Most nonprofit representatives believed that North Carolina is fortunate in its conservation tax-credit program. One commented on the straightforwardness of the statute and the application process compared with the federal provisions on deductions for contributions. North Carolina's statute is easy to understand, and the application process is simple. Those attributes help in implementing the program.

The program is most useful in areas where the economy is stable or growing and there is great real estate development pressure. In such regions, the credits provide a strong incentive. The credits also are useful for people who are interested in developing their land, because the credits help reduce the taxes associated with the income from the development and thereby make conserving a portion of the land a feasible option. Furthermore, the credits are an important incentive for bargain sales of property because they allow the state or local government and nonprofit organizations to be more competitive with the private sector.

Improvement of Water Quality

During its summer 1996 special session, the General Assembly adopted two new environmental programs with implications for the tax-credit program. Grants made to state and local government and nonprofit conservation groups by the Clean Water Management Trust Fund[14] will allow the recipients to acquire riparian buffers and conservation easements, restore degraded lands, repair failing waste-treatment systems and septic tanks, eliminate illegal drainage connections, provide for stormwater control, and plan for reductions in pollution of surface water. The conservation tax credits will help stretch the grant funds by providing additional incentives for land donors. Before, if donated land did not have significant conservation value other than the improvement of water quality, the gift would have fallen under the "other" category of conservation use. The new legislation directs the trust fund's board of trustees to develop specific guidelines for tax-credit certification on the basis of improved water quality.

The Wetlands Restoration Program[15] was established as a "nonregulatory statewide wetlands restoration program for the acquisition, maintenance, restoration, enhancement, and creation of wetland and riparian resources that contribute to the protection and improvement of water quality, flood prevention, fisheries, wildlife habitat, and recreational opportunities." The availability of tax credits for conservation donations will help this program acquire such land.

The General Assembly appropriated significant funds for these two programs. But despite the likely increase in applications for tax credits that will result from them, it provided no additional funds for administering the tax-credit program, nor did it charge the staffs of these new programs with helping to administer the program.

Summary and Recommendations

The North Carolina conservation tax-credit program is clearly a valuable tool for securing donations of interest in real property for conservation. Over the first thirteen years of the program, North Carolinians received significant land-conservation benefits at a fraction of the property's cost. Nonprofit conservation organizations that encourage and accept property donations have found the credits to be a useful negotiating tool. The involvement of nonprofit groups in acquiring and managing conservation land helps reduce the cost to the state of achieving this public benefit. The tax credits provide the strongest incentive in areas where the value of land is relatively high because of increasing development. Furthermore, the credits will be an important tool in the state's efforts to

improve water quality. But the program does have weaknesses, and these must be addressed. The following recommendations should be considered:

• **Increase educational efforts for targeted groups.** Too few people know that conservation tax credits are available, and that is the program's major weakness. However, a widespread campaign targeted at the general public is not likely to be useful or cost-effective because most people do not own land with conservation value. One nonprofit representative aptly stated that the critical need is to tell a landowner who is considering selling her or his property about the conservation options and benefits before she or he contacts a developer. Therefore attorneys, estate planners, accountants, and real estate agents all must be informed about the program, as well as local government officials and boards, nonprofit conservation organizations, large land-holding corporations, and developers.[16] Printed materials and workshops are needed to explain the program to all of these relevant individuals and organizations.

Intergovernmental cooperation should be pursued as well. In 1996, presentations on the program were given at state foresters' meetings, and the Department of Revenue printed an article about the program in its quarterly newsletter. Personnel of the new Clean Water Management Trust Fund and the Wetlands Restoration Program should be made very familiar with the program in order to achieve the goals of these two water-quality programs. Local agencies also can be helpful. For example, extension agents (who have direct communication with landowners) can tell farmers who are considering selling their land about the tax credits.

• **Consider raising or removing the $25,000 cap on the tax credit.** Such a step would significantly increase the incentive provided by the credits and help the state reach conservation and environmental goals in a nonregulatory manner. Since nonprofit organizations would probably continue to do most of the negotiating, much of the work would remain in the private sector. The money thus saved in staff time and long-term land-management costs should be considered when the issue of tax revenue lost to the state arises.

With the limited information available, it is difficult to predict the cost of the program in terms of lost revenue if the cap should be raised. Had there been no credit limit from 1983 through 1995, the maximum total cost would have increased by approximately $8 million—from an average revenue loss amounting to 5 percent of the total estimated value of the land donated in the 1983–95 period to a loss amounting to 25 percent of the total value. Since only some of the donors would be able to claim all of the tax credits to which they would be entitled, the true cost of the program in lost revenue if the cap should be raised would likely be less than 25 percent of the value of the land—still a good deal for the state.

• **Maintain a comprehensive database of donations.** To track the effectiveness of the program on a continuing basis and to predict more accurately the impact of changes in the program, detailed records need to be maintained in a comprehensive database. Also, concrete data on the exact conservation use and the true value of the donation should be consistently obtained. There should also be a follow-up with donors to confirm and keep track of the use of certified credits and their level of satisfaction with the program. In addition, DEHNR should work with the Department of Revenue to determine whether its new information-management system can provide complete figures on the dollar amounts of the conservation tax credits claimed.

• **Provide adequate administrative funding and staffing.** To implement these recommendations and maximize the program's benefits, a committed staff will be necessary. If the annual rate of donation is constant, the record-keeping tasks could be accomplished each year by a summer intern. But if the program grows as expected in response to the water-quality improvement initiatives, a permanent dedicated staff will be needed to manage the program and compile this information. The task of educating those who need to be aware of the credits will also require personnel committed to the program.

Conclusion

Since 1983 the North Carolina conservation tax-credit program has provided an efficient and cost-effective way to encourage the private donation of conservation land for the public good, and it will continue to play an important role in both general conservation of land and efforts to improve water quality. To maximize its benefit, however, the program needs increased educational efforts, a data-management system, and administrative funding and staffing. To increase the program's impact, the General Assembly should raise or remove the present cap on the amount of tax credit that will be allowed for donations of land for conservation purposes.[17]

Notes

1. 26 U.S.C.S. § 170 (1995). For a landowner to receive a federal tax deduction for such a contribution, the property must be donated to a state or local government or a nonprofit conservation organization exclusively for conservation purposes. The law defines "conservation purpose" as "(i) the preservation of land areas for outdoor recreation by, or for the education of, the general public, (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem, (iii) the preservation of open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant public benefit, or (iv) the preservation of an historically important area or a certified historic structure." The land must be permanently protected, and surface mining is prohibited.

Slightly different rules apply to the deduction of donations of short- and long-term capital gain property. 26 U.S.C.S. § 170 (1995).

Property donations also may reduce estate taxes. In general, up to $600,000 of a decedent's assets are exempt from federal estate tax. Assets greater than this amount are subject to taxes that can be as high as 55 percent of the estate value. A gift of conservation land during one's lifetime can reduce the taxable value of the estate, while the value of a property donation specified in a will may be taken as a charitable deduction from the value of the estate. 26 U.S.C.S. § 2055 (1995).

Furthermore, while North Carolina's inheritance tax rate varies according to the kinship of the heir and the value of the inherited interest, a property interest that is transferred for charitable or public purposes to the state, a local government, or an in-state charitable organization (as well as certain out-of-state charitable organizations) is not subject to state inheritance tax. In addition, transfers of property to charitable organizations (and spouses) are not subject to gift taxes. N.C. Gen. Stat. §§ 105-2 through -9 (hereinafter the General Statutes will be cited as G.S.).

2. N.C. Tax Reports § 15-255 (1995).

3. G.S. 105-275(29).

4. G.S. 121-40.

5. G.S. 105-130.9.

6. G.S. Chap. 113A, Art. 7.

7. G.S. 113A-134.1 through -134.3 (Supp. 1981); 1981 N.C. Sess. Laws ch. 925. *See also* David Owens, "Land Acquisition and Coastal Resource Management: A Pragmatic Perspective," *William and Mary Law Review* 24, no. 4 (1983): 652.

8. G.S. 105-151.12 (individuals), -130.34 (corporations).

9. Acceptable conservation purposes in North Carolina are for (i) public beach access, (ii) access to public waters or trails, (iii) fish and wildlife conservation, and (iv) other similar land-conservation purposes. G.S. 105-151.12 (individuals), -130.34 (corporations). Donations that are required by local regulations or ordinances are not eligible for the tax credit.

10. G.S. 105-151.12 (individuals), -130.34 (corporations). In 1991 the legislation was amended to address changes in the format for the federal tax return. Individual recipients of conservation tax credits now must add the value of the donated property, up to a maximum value of $100,000 (25 percent of which yields $25,000, the maximum allowable tax credit), to their taxable income for both state and federal reporting purposes. This adjustment prevents donors from getting both a state income tax deduction and a credit for their donation.

11. G.S. 105-151.12(c) (individuals), -134.6(c) (corporations).

12. Conservation organization representatives interviewed were as follows: Fred Annand, North Carolina Chapter of the Nature Conservancy; Beth Booker, Southern Appalachians Highlands Conservancy; James Coman, National Committee for the New River; Kate Dixon, Triangle Land Conservancy; Brian Dobyns, Piedmont Planning Associates; Camilla Herlevich, North Carolina Coastal Land Conservancy; Paul Hurt, Southeastern Regional Office of the Nature Conservancy; Dickson McLean, Lumber River Conservancy; Charles Roe, Conservation Trust for North Carolina; and Nick Williams, Maryland Environmental Trust.

13. The formula used to calculate the maximum claimable tax credit is as follows:

A. When the estimated value of the property is known:
   Step 1: 25% of estimated value ÷ number of donors = maximum tax credit per donor
   (Note: This figure may not exceed $5,000 for property donated when that cap was in existence or $25,000 after the cap was raised. If the calculated amount exceeds the cap, this value is equal to the amount of the applicable cap.)
   Step 2: Maximum tax credit per donor × number of donors = maximum claimable tax credits

B. When the estimated value of the property is unknown:
   Step 1: Applicable credit cap = maximum tax credit per donor
   Step 2: Maximum tax credit per donor × number of donors = maximum claimable tax credits

14. G.S. 113-145.1 through -145.8; 1996 N.C. Sess. Laws ch. 18.

15. G.S. 143-214.8 through -214.13; 1996 N.C. Sess. Laws ch. 18.

16. Even developers might find the program useful, especially with landowners who are reluctant to sell land because they are interested in conservation. A savvy developer could explain the tax-credit program to such a landowner, encourage him or her to grant conservation easements on the critical parcels of land, and then persuade him or her to develop the remaining land.

17. The 1997 General Assembly is actively considering several of the revisions to the tax-credit program suggested by this article. *See, e.g.*, H 260, which would increase the allowable conservation donation tax credit to $250,000, and establish a conservation easements program within DEHNR.

Advance Directives for Medical Decision Making in North Carolina: Rights, Duties, and Questions
Part Two

Nancy M. P. King and Arlene M. Davis

All people have a powerful interest in retaining control over decisions about their own health care and medical treatment. Some of the important and difficult health care decisions they face concern their preferences for the treatment they want—or don't want—when they cannot speak for themselves. This is Part Two of an article[1] intended to provide basic information that individuals, families, health care providers, and policy makers in North Carolina can use to improve popular and professional understanding and implementation of advance directives for medical decision making.

Part One discussed the constitutional and common law recognizing people's right to make decisions about their own health care and the North Carolina statutory scheme for advance directives and end-of-life decision making. Part Two deals with a fairly recent addition to prospective planning, requests for do-not-resuscitate (DNR) orders outside the hospital, and the North Carolina Supreme Court's decision in *First Healthcare Corporation v. Rettinger*. That case, which deals with payment for nursing home care, is the state's first high court decision relating to end-of-life decisions. Both parts of the article address the questions, issues, and problems that can arise for the many parties involved in medical decision making. The focus is on the breadth of the right to make both current and prospective medical treatment choices, which includes both requesting and refusing treatment. But Part Two also addresses problems that arise from the most common use of advance directives—refusing treatment at the end of life.

Part One introduced (hypothetically) Julia Hawthorne, a patient who received aggressive treatment and ventilatory support. This eighty-year-old widow first was hospitalized after a mild stroke. During that hospital stay, after talking with her longtime physician, Dr. Martin, she asked for and received a DNR order. Unable to return home when discharged, Mrs. Hawthorne was transferred to a nursing facility. A few months later she returned to the hospital with severe

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pneumonia. Many treatment decisions were necessary, but the respiratory failure caused by the pneumonia had compromised Mrs. Hawthorne's capacity to make health care and treatment decisions for herself.

Several factors contributed to the decision to place Mrs. Hawthorne on a ventilator. Hospital policy did not allow the staff to honor the DNR order from her previous hospitalization because it had expired. Like many people, Mrs. Hawthorne had no formal advance directive to guide the decision making, nor had Dr. Martin documented her wishes. The hospital turned to Dan and Rita, Mrs. Hawthorne's two children, to make treatment decisions for her. Unfortunately they disagreed: Dan consented to aggressive treatment with ventilatory support, while Rita viewed this as contrary to what their mother would want.

Mrs. Hawthorne's situation is not unusual. Yet, although the various stakeholders may seem at odds, both resolution of the problem and advocacy for Mrs. Hawthorne and people like her are possible—not only when the decision must be made at the end of life but whenever people cannot voice their own treatment choices.

So What Happened to Mrs. Hawthorne?

Dan and Rita went to talk to the chairperson of the hospital's ethics committee (who, surprised to learn that once Mrs. Hawthorne's DNR expired no one on staff had considered it evidence of her wishes, immediately began planning a series of staff education programs on end-of-life decision making). After much discussion, Dan and Rita decided to request both a DNR order and withdrawal of their mother's ventilatory support. The orders were written.

North Carolina law and the hospital's policies on DNR orders and withdrawal of treatment recognize adult children as legitimate substitute decision makers for a patient who is unable to make his or her own decisions regarding treatment and does not have an advance directive.[2] Dan and Rita's authority included withholding and withdrawing treatment for their mother; this broad authority is accompanied in the statutes and in hospital policies by such safeguards as confirmation of the patient's condition by a second physician and the availability of ethics committee consultation.[3]

These decisions for Mrs. Hawthorne were especially difficult for Dan. His original decision to continue treatment was based on his religious views, but the ethics committee chairperson, his sister, the hospital chaplain, and the pastor of his church helped him reconcile his beliefs with his mother's wishes. The staff helped by making clear to him that the decisions to withhold CPR (cardiopulmonary resuscitation) and to stop the ventilator would not affect any other medical treatments. They also explained "comfort care" (also called "palliative care") to him. Emphasizing what would be done for his mother, rather than what would not be done, the staff discussed with Dan the oral and skin care, positioning, pain management, and emotional support (communicated through the words and touch of her caregivers) that would be part of her daily care.[4]

As sometimes happens, however, nature did not follow anyone's expectations. The ventilator was withdrawn, but Mrs. Hawthorne breathed on her own. She was still confused and only intermittently conscious; plans were made to transfer her back to the nursing home because she no longer needed hospital care. Her attending physician obligingly wrote a second DNR order, intended to be effective only during the transfer and to expire when she arrived at the nursing facility. Dr. Martin assured Rita and Dan that he would call the physician at the nursing home about a new DNR order to cover their mother's admission. One thing was different, however: Mrs. Hawthorne now had a nasogastric tube that delivered medication for her pneumonia. Asked about its removal just before Mrs. Hawthorne's discharge, the attending physician said only, "Don't worry. They'll take care of that at the nursing home."

When she was discharged, the nursing staff called Emergency Medical Services (EMS) to take Mrs. Hawthorne back to the nursing facility. In reviewing the patient's orders and medical history, the EMS personnel were happy to find the DNR order for transport—the time period when they would be the only medical personnel with her. Overhearing their conversation, Rita asked, "Why did you need *another* DNR order when we already have one?" An EMS technician replied, "We can't honor the hospital's DNR order. Without our own DNR order, we are obligated to give your mother CPR if she arrests during the trip."

Out-of-Hospital DNR Orders

It may seem strange that the only way to avoid CPR, unlike other medical treatment, is by getting a doctor to write an order not to do it (a DNR order)—

and maybe more than one order. After all, if someone does not want surgery, or does not want to take a recommended medicine, he or she can (with a few exceptions) avoid these treatments. Why do we need DNR orders anyway—isn't an advance directive (if we think of it) or a protest by our family enough?

Let's look back at Mrs. Hawthorne's two hospitalizations: During her first hospitalization, after her stroke, she stated her desire to forgo CPR and received a DNR order communicating her informed decision—no cardiac resuscitation if her heart or breathing stopped—to the hospital's nonphysician staff. That order, intended to apply in the future at a time when Mrs. Hawthorne would not be able to speak for herself, was based on her request to her attending physician. When she returned to the hospital, after pneumonia and respiratory failure made her unable to make any treatment decisions, the attending physician and the hospital turned to her adult children to decide about her treatment. On their request, based on what they believed would be their mother's wishes if she could tell them, another DNR order was written.

Without these orders, the nonphysician staff would be obligated to resuscitate her, and they would be privileged to act without her consent. Even if Mrs. Hawthorne had an advance directive, the nonphysician staff would still need an order not to resuscitate. An advance directive is not an order. It is evidence of an individual's wishes and a communication from that person to the physicians who are offering treatment. Physicians have the expertise and judgment to act on patients' advance directives; nonphysicians need a physician's orders if they are to deviate from the presumption that patients want emergency treatment like CPR.[5]

CPR is different from most medical treatment because patients are incapacitated at the time it appears necessary, but are presumed to want it; therefore physicians' orders are needed so that patients can refuse it. But DNR orders halt only CPR. Any other treatment may still be given—even one that may otherwise be part of resuscitation efforts. (For example, the ventilatory support often used in resuscitation could be offered to a DNR patient if there was no other way to make that patient comfortable in the face of severe respiratory distress.) In the hospital setting, many patients may request a DNR order, including both terminally ill patients of any age (adults or minors of sufficient maturity) and otherwise "healthy" patients whose beliefs and convictions lead them to reject CPR.

But things change when patients leave the hospital—even when their condition and wishes do not change. Until 1991 North Carolinians who wanted to preserve their DNR status when they left the hospital, or to secure a DNR order outside the hospital, could not do so. Here is why: In the hospital, nonphysician health care providers who are hospital employees may refrain from instituting CPR by following the order of any physician with hospital privileges. Outside the hospital, however, it is almost always EMS personnel who are called on to honor DNR orders. Their authority is necessarily limited, with some exceptions, to the standing orders and protocols developed and approved by their own physician medical directors. In most circumstances, EMS personnel are not permitted to carry out medical orders given to them by other physicians.

In the past the limited discretion of EMS personnel and their statutory mandate "to prevent loss of life"[6] caused problems once patients started leaving the hospital for other settings. As a result, some care providers counseled certain patients to avoid calling EMS. Suppose a patient with a DNR order in the hospital went home, where her condition worsened. Her concerned family wanted to call EMS for assistance but not for CPR. Avoiding CPR was nearly impossible: Unless a physician was on site to give a DNR order (an unlikely possibility) and the EMS personnel called to that site received telephone permission from their own medical director to accept that order, they had to initiate CPR—even over the objections of family members or friends who explained the patient's contrary wishes or past DNR status, or presented her living will.[7]

Nobody was happy about this situation. If individuals were to be given a choice about CPR outside hospitals, a way had to be found to provide EMS with a valid DNR order. In 1990 the North Carolina Medical Society convened a task force that developed an out-of-hospital DNR order that EMS could honor. Not just any DNR order by any physician—nor any advance directive or request from a family member—will do. EMS personnel are trained to accept only one special, notarized yellow form, which physicians obtain from the medical society. This form combines an out-of-hospital DNR order with evidence of its statutory basis;[8] it enables EMS personnel to withhold unwanted resuscitations, yet it also includes safeguards so that only unwanted resuscitations are withheld.

Currently, out-of-hospital DNR orders may be written only for individuals who meet the narrow and

explicit statutory criteria found in the Natural Death Act as originally written.[9] Terminally and incurably ill adults or their authorized representatives may request an out-of-hospital DNR order for use at home or in nursing facilities that rely on EMS for emergency treatment. Although that order serves many North Carolinians well, it leaves out other citizens who wish to refuse CPR on the basis of more recent statutory changes or their common law right to refuse treatment.

Mrs. Hawthorne obtained an out-of-hospital DNR order under this system because the attending physician was willing to diagnose her as meeting the "terminally and incurably ill" statutory criterion on which it relies. Another physician might have thought differently and found her ineligible for a transport DNR order—while eligible for a hospital order. Many attempts are made by patients, family members, and health care providers to modify the yellow forms to conform to the needs of other people who wish to refuse CPR but fall outside the yellow form's narrow categories—for example, frail but functional elderly adults. However, an altered yellow form is invalid, and EMS cannot honor it.[10]

The North Carolina Medical Society has convened another task force, this time to update the out-of-hospital DNR order first offered in 1991.[11] Although the update is not yet complete, the task force hopes to change the yellow form to create a simpler DNR order, with a separate documentation sheet indicating broader bases for the order. At the very least, conforming the statutory basis of the DNR order to include recent amendments to the "natural death" statutes and the new health-care-agent statute[12] would better serve North Carolinians in all settings. A simple, portable order for the individual to keep handy, with separate documentation of the evidence supporting it, would protect people from unwanted CPR and assure health care providers and other interested parties that their refusals are genuine and well informed. North Carolinians should have the same right to refuse CPR whether they are hospitalized or not.

More Decisions for Mrs. Hawthorne

Mrs. Hawthorne's EMS transfer was uneventful. As he had promised her children he would do, and before he left on an extended vacation, Dr. Martin called the nursing facility to talk to a physician. Dr. Bladen, the physician on call for admissions, was not there; unlike hospitals, nursing homes generally do not have medical staff present at all times. Dr. Martin left a message requesting a DNR order for Mrs. Hawthorne on the basis of his conversation with her during her first hospitalization. Noting the message and the fact that the existing DNR order had expired when the EMS transport ended, the admitting nurse called Dr. Bladen to tell him that Mrs. Hawthorne had arrived and that her children had already requested both the DNR order and removal of the nasogastric tube. Dr. Bladen added this matter to the long list of things he needed to address on his rounds that day.

During rounds, it became clear that Mrs. Hawthorne was not doing well. Dr. Bladen noted that she was semiconscious and agitated and appeared uncomfortable. It was unlikely that she could eat, even with assistance. Although Rita, with Dan's quiet acquiescence, insisted that it was time to remove the nasogastric tube, to their surprise Dr. Bladen would write neither the order to remove the tube nor a new DNR order. He told them, "I can't write those orders. It's against this facility's policy to write a DNR order for patients like your mother. And if she can't eat, she needs the tube for feeding now, not for medication. We can't let her starve."

Explaining that Dr. Martin and the attending physician at the hospital were both willing to write such orders for their mother in her current condition, Dan and Rita asked the nursing home administrator to assign another physician who would write the DNR order and remove the tube. The administrator replied, "I can talk to our medical director about your mother, but I can tell you that no doctor can make your mother a DNR patient or order the removal of her feeding tube now. She's not terminally ill or in a persistent vegetative state. It is our policy not to withdraw treatment except in accordance with one of the North Carolina statutes, and your mother's circumstances do not meet any of the statutory requirements. Our lawyer tells me that we even have a new court decision to support that policy. We're sorry, but we have to follow the law for your mother's protection."

After coming to their hard-won agreement about what their mother would want, Rita and Dan could hardly believe their ears. To them, nothing had changed: Their mother was uncomfortable, unhappy, and certainly not living in a state she would have chosen. Physicians outside the nursing home endorsed a DNR order on her behalf, but she had no current order and therefore would receive CPR if her heart or breathing stopped. Her feeding tube was now providing "artificial nutrition and hydration," which the

hospital physicians, the children thought, would have withdrawn just as they did the ventilator. How could Dr. Bladen proceed with this treatment, knowing their mother's history and the unified objections of her children? How could the nursing home administrator say that, unlike the hospital, the nursing home would not help them do what their mother would want?

Fortunately, as a result of their experience with the hospital, Dan and Rita had learned a little about how to work the system. When they asked to see the nursing home's policy, they discovered that it was no more than a reprinting of the conditions listed in the Natural Death Act. According to the policy, only "terminally and incurably ill" adults and those in a persistent vegetative state (or their representatives) could refuse "extraordinary" treatment like CPR and artificial nutrition and hydration.[13]

Next, Dan and Rita talked to the nursing home's lawyer at his law office. (Few health care facilities are able to employ "in-house" counsel; many lawyers for health care facilities thus have less experience within the facility than they would like.) The lawyer praised the clarity of the nursing home policy's statutory formulation and cautioned that doctors who order cessation of treatment outside those narrow statutory categories rely on the "less safe" common law right to decline treatment: "Our doctors have more legal protection because of our policy. That makes them more confident and their decisions more certain, without compromising patient care. After all, our position is supported by the North Carolina Supreme Court."

With this new and confusing information, Dan and Rita returned to the nursing facility hoping to find a sympathetic and thoughtful advocate, as they did when they consulted the ethics committee at the hospital. They asked whether the nursing facility had an ethics committee, ethics consultant, ombudsman, or patient advocate, but there was none. The administrator explained, "Since the passage of the Patient Self-Determination Act, we ask folks if they have advance directives, and if they do, we place them in their charts. We haven't had time to worry about these other things. Besides, we have a very good lawyer and medical director, and everyone here cares about the residents."

Dan and Rita returned to Dr. Bladen. Thinking of her own advance directive and the planning she did with her own physician, Rita pressed Dr. Bladen to justify the difference that now existed in treatment choices available to her mother merely because she was in the nursing home instead of the hospital. Dr. Bladen reluctantly agreed that the hospital physicians could and would write the orders he would not write for their mother, but he hastened to add that he liked the confines of the facility's policies: "I'm very concerned about my legal responsibilities, as doctors should be. These policies protect everybody."

Mrs. Hawthorne's children now wondered whether a transfer to another facility would solve the problem. Would other nursing homes honor their mother's wishes? They had no chance to find out, however, because there were no open beds in the community. They asked next about taking her home. Here the nursing staff, in an effort to discourage them, pointed out the difficulties of caring for Mrs. Hawthorne at home, although the admitting nurse did tell them that they could contact a home health agency or a hospice organization.

Feeling that they had few options, they again consulted the hospital's ethics committee chairperson for advice and guidance. She told them that most nursing homes are in a difficult position: "They have fewer physicians and registered nurses available than hospitals do and have to rely more on staff with less training, so they have a tendency to look for more certainty in their policies. Besides, they have to worry about absent families, and even sometimes about families that may not have the resident's best interests at heart. Nursing home residents stay there longer than they stay with us, and nursing home staff aren't necessarily better at dealing with death than anybody else. What we really need in this state is to do a better job of educating providers and facilities about advance care planning and to provide support for advance care planning services. But you'll just have to patiently and persistently pursue your case with the nursing home. Maybe our in-house counsel can give you some legal ammunition."

When Dan and Rita talked with the hospital lawyer, she was eager to discuss *First Healthcare Corporation v. Rettinger*,[14] a case that had just been decided in the North Carolina Supreme Court. The attorney noted that there were several similarities between the facts of *Rettinger* and Julia Hawthorne's circumstances: "In 1990 Mr. Rettinger, who had Parkinson's disease, entered a nursing home (Hillhaven), and the 'Declaration Of A Desire For A Natural Death' that he had executed in 1983 became part of his Hillhaven record. In February 1991, Mr. Rettinger was transferred to the hospital for treatment of pneumonia, and a nasogastric tube was inserted to administer medications. In March, when Mr. Rettinger returned to

Hillhaven with the tube in place, his wife asked that it be removed.[15]

"Mr. Rettinger's attending physician told Mrs. Rettinger that Hillhaven's policy did not allow the tube to be removed if that act would be likely to cause the patient 'to starve or dehydrate to death.'[16] That same month Mrs. Rettinger tried unsuccessfully to find another facility for her husband. When she asked to take him home, she was told she could not.[17]

"On June 20, 1991, Hillhaven told Mrs. Rettinger's attorney that the tube could be removed only under certain statutory conditions—a diagnosis of terminal and incurable illness or persistent vegetative state confirmed by a second physician—or by court order. On June 26 Mrs. Rettinger stopped paying Hillhaven for medical care and services and sought a court order the next day. She won her court order on September 12, with no appeal by Hillhaven. On October 5, the physician's order was written and the tube removed. Mr. Rettinger died on October 22.[18]

"The case that went to the North Carolina Supreme Court was a collection action brought by Hillhaven because Mrs. Rettinger refused to pay for her husband's care from June 1991 until his death in October of that year. Her attorneys argued that she should not have to pay for services expressly rejected by her and by her husband's advance directive. Hillhaven's attorneys argued, and the supreme court agreed, that nursing home personnel could not comply with these requests without a diagnosis and order signed by two physicians, which were not in place until after Mrs. Rettinger obtained her court order."[19]

Dan and Rita were now perplexed. "This sounds like a bad way to handle treatment decisions," Dan said, fuming. "The Rettingers suffered through many months of very slow procedure—and got a court order to remove the tube—but still had to pay for everything!" Rita asked, "Does this case mean that a nursing home can fashion a limited policy to implement advance directives and that people who fall outside that policy are stuck with it?"

"Well, I can see why you'd think that," the lawyer admitted. "An awful lot of health care lawyers have apparently come to that conclusion.[20] It's wrong, though. *Rettinger* does *not* say that patients who want to step outside the narrow confines of the statutory criteria may not do so. The decision never addressed that question directly. And it is possible to argue both ways. On the one hand, a narrow policy like the one you describe might be viewed as reasonable as long as prospective residents are given prior notice of it. On the other hand, in my view the stronger argument holds that nursing home residents have the right, according to constitutional and common law and even according to the 'general purpose' clauses in our statutes, to have their advance directives honored, even when they go beyond the terms of the model forms, as long as there is reason to believe that the directives represent the residents' wishes. When Mrs. Rettinger obtained the court order in the first place, the judge made just that determination because Mr. Rettinger's condition did not fit what were then the statutory criteria.

"However, the focus of the supreme court's decision was not the substance of Hillhaven's policy but Mrs. Rettinger's contractual duty to pay for services during the time Hillhaven complied with its policy. In this case the nursing home was worried about getting two physicians' signatures and a valid order for its nonphysician personnel—*not* about the grounds for removing Mr. Rettinger's tube. I wish that hospitals and nursing homes, and their lawyers, would start paying more attention to determining what patients want and honoring their wishes. Communication broke down in *Rettinger*, and the decision is being used to justify poor communication and unresponsive policy. The best thing I can tell you is to keep the lines of communication open for your mother's sake."

After several days of patient, persistent discussion with Dr. Bladen and the nursing home administrator, a compromise was reached with the assistance of the facility's medical director: Dan and Rita found another physician with privileges at the nursing home who was willing to write a DNR order and remove the nasogastric tube, and the nursing home authorities permitted him to do so. Julia Hawthorne died peacefully several days later.

The Lessons Learned

This process of negotiation made Dan and Rita understand that it is appropriate for institutions to take great care in ensuring that those who would speak for a patient are acting out of good knowledge and in good faith. They had to think through their reasoning very carefully in order to convince Dr. Bladen and the nursing home staff. They also had to recognize that, since their mother left no written advance directive, this process of thorough discussion and negotiation protected her rights and interests. They simply wished it had not been so hard.

The thoughtful persistence of Dan and Rita in advocating for their mother and questioning the wisdom of others was a lesson to providers as well. Dr. Bladen learned to distinguish his personal preferences about patients' treatment from his professional responsibility to respond to requests from patients and their families—and to clarify the difference with his patients. He also learned that institutional policy is no substitute for informed planning of treatment with patients.

These distinctions are no small matter, given Dr. Bladen's powerful role in presenting and describing the options available to his patients. The treatment option that is medically, morally, and legally acceptable but personally objectionable to the physician must be identified as such.[21] Whether the patient wants to receive or refuse treatment, the physician who does not wish to comply must try to transfer the patient to a physician who will.[22] Both proceeding without consent and abandoning the patient are choices that are neither moral nor legal. Like Dr. Bladen, many practitioners would understandably prefer to avoid difficult or controversial decisions by deferring to a policy. But they owe more to their patients, including full and frank discussions about the range of recommendations and options available through advance care planning.

Dr. Bladen decided that from now on he will help transfer a patient to the care of another physician when he, in good conscience, cannot comply with the patient's wishes. Wondering how to place advance care planning higher on his list of objectives for good patient care, he called the North Carolina Medical Society for information and contacts about treatment decisions at the end of life. He even scheduled an appointment with the facility's medical director to talk about the need for a more responsive policy.

In the best of all worlds, Dan and Rita would have contacted Dr. Martin when he returned from vacation. After caring for Mrs. Hawthorne for forty years, he failed her in her final days. Evidence of his prior conversation with her and his knowledge of her preferences could have helped persuade the nursing home authorities that her children's wishes reflected her own. Moreover, he might well have had a duty to

Statutory Advance Directive Forms

The "Declaration," below, is North Carolina's "living will" type of directive, and the "Health Care Power of Attorney" is the state's form for appointing a surrogate decision maker. The latter includes suggested language (in boldface type) that is not in the statutory form but could be added by persons who can name a health care agent and wish to refuse treatment in a broader range of circumstances than those currently listed in the statute. Someone who is not able to name an agent could amend a Declaration or attach an addendum to it using similar language, in order to make clear the desire to refuse treatment under similarly broad circumstances.

Declaration Of A Desire For A Natural Death

I, _____, being of sound mind, desire that, as specified below, my life not be prolonged by extraordinary means or by artificial nutrition or hydration if my condition is determined to be terminal and incurable or if I am diagnosed as being in a persistent vegetative state. I am aware and understand that this writing authorizes a physician to withhold or discontinue extraordinary means or artificial nutrition or hydration, in accordance with my specifications set forth below:

(Initial any of the following, as desired):

__ If my condition is determined to be terminal and incurable, I authorize the following:

  __ My physician may withhold or discontinue extraordinary means only.

  __ In addition to withholding or discontinuing extraordinary means if such means are necessary, my physician may withhold or discontinue either artificial nutrition or hydration, or both.

__ If my physician determines that I am in a persistent vegetative state, I authorize the following:

  __ My physician may withhold or discontinue extraordinary means only.

  __ In addition to withholding or discontinuing extraordinary means if such means are necessary, my physician may withhold or discontinue either artificial nutrition or hydration, or both.

This the _____ day of _____

Signature _____

I hereby state that the declarant, _____, being of sound mind signed the above declaration in my presence and that I am not related to the declarant by blood or marriage and that I do not know or have a reasonable expectation that I would be entitled to any portion of the estate of the declarant under any existing will or codicil of the declarant or as an heir under the Intestate Succession Act if the declarant died on this date without a will. I also state that I am not the declarant's attending physician or an employee of the declarant's attending physician, or an employee of a health facility in which the declarant is a patient or an employee of a nursing home or any group-care home where the declarant resides. I further state that I do not now have any claim against the declarant.

Witness _____

Witness _____

The clerk or the assistant clerk, or a notary public may, upon proper proof, certify the declaration as follows:

'Certificate'

I, _____, Clerk (Assistant Clerk) of Superior Court or Notary Public (circle one as appropriate) for _____ County hereby certify that _____, the declarant, appeared before me and swore to me and to the witnesses in my presence that this instrument is his Declaration Of A Desire For A Natural Death, and that he had willingly and voluntarily made and executed it as his free act and deed for the purposes expressed in it.

I further certify that _____ and _____, witnesses, appeared before me and swore that they witnessed _____, declarant, sign the attached declaration, believing him to be of sound mind; and also swore that at the time they witnessed the declaration (i) they were not related within the third degree to the declarant or to the declarant's spouse, and (ii) they did not know nor have a reasonable expectation that they would be entitled to any portion of the estate of the declarant upon the declarant's death under any will of the declarant or codicil thereto then existing or under the Intestate Succession Act as it provides at that time, and (iii) they were not a physician attending the declarant or an employee of an attending physician, or an employee of a health facility in which the declarant was a patient or an employee of a nursing home or any group-care home in which the declarant resided, and (iv) they did not have a claim against the declarant. I further certify that I am satisfied as to the genuineness and due execution of the declaration.

This the _____ day of _____

_____

Clerk (Assistant Clerk) of Superior Court or Notary Public (circle one as appropriate) for the County of _____

Health Care Power of Attorney

Use of this form in the creation of a health care power of attorney is lawful and is authorized pursuant to North Carolina law. However, use of this form is an optional and nonexclusive method for creating a health care power of attorney and North Carolina law does not bar the use of any other or different form of power of attorney for health care that meets the statutory requirements.

1. Designation of health care agent.

I, _____, being of sound mind, hereby appoint

Name: _____
Home Address: _____
Home Telephone Number _____
Work Telephone Number _____

as my health care attorney-in-fact (herein referred to as my "health care agent") to act for me and in my name (in any way I could act in person) to make health care decisions for me as authorized in this document.

If the person named as my health care agent is not reasonably available or is unable or unwilling to act as my agent, then I appoint the following persons (each to act alone and successively, in the order named), to serve in that capacity: (Optional)

A. Name: _____
Home Address: _____
Home Telephone Number _____
Work Telephone Number _____

B. Name: _____
Home Address: _____
Home Telephone Number _____
Work Telephone Number _____

Each successor health care agent designated shall be vested with the same power and duties as if originally named as my health care agent.

2. Effectiveness of appointment.

(Notice: This health care power of attorney may be revoked by you at any time in any manner by which you are able to communicate your intent to revoke to your health care agent and your attending physician.)

Absent revocation, the authority granted in this document shall become effective when and if the physician or physicians designated below determine that I lack sufficient understanding or capacity to make or communicate decisions relating to my health care and will continue in effect during my incapacity, until my death. This determination shall be made by the following physician or physicians (You may include here a designation of your choice, including your attending physician, or any other physician. You may also name two or more physicians, if desired, both of whom must make this determination before the authority granted to the health care agent becomes effective.): _____

_____

_____

3. General statement of authority granted.

Except as indicated in section 4 below, I hereby grant to my health care agent named above full power and authority to make health care decisions on my behalf, including, but not limited to, the following:

A. To request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records, and to consent to the disclosure of this information;
B. To employ or discharge my health care providers;
C. To consent to and authorize my admission to and discharge from a hospital, nursing or convalescent home, or other institution;
D. To give consent for, to withdraw consent for, or to withhold consent for, X ray, anesthesia, medication, surgery, and all other diagnostic and treatment procedures ordered by or under the authorization of a licensed physician, dentist, or podiatrist. This authorization specifically includes the power to consent to measures for relief of pain.

Continued on next page

E. To authorize the withholding or withdrawal of life-sustaining procedures when and if my physician determines that I am terminally ill, permanently in a coma, suffer severe dementia, or am in a persistent vegetative state. ["To authorize the withholding of or withdrawal of life-sustaining procedures when my physical or cognitive state is compromised to the point where I cannot interact with my surroundings or enjoy my family or friends."] Life-sustaining procedures are those forms of medical care that only serve to artificially prolong the dying process and may include mechanical ventilation, dialysis, antibiotics, artificial nutrition and hydration, and other forms of medical treatment which sustain, restore or supplant vital bodily functions. Life-sustaining procedures do not include care necessary to provide comfort or alleviate pain.

I DESIRE THAT MY LIFE NOT BE PROLONGED BY LIFE-SUSTAINING PROCEDURES IF I AM TERMINALLY ILL, PERMANENTLY IN A COMA, SUFFER SEVERE DEMENTIA, OR AM IN A PERSISTENT VEGETATIVE STATE.

F. To exercise any right I may have to make a disposition of any part or all of my body for medical purposes, to donate my organs, to authorize an autopsy, and to direct the disposition of my remains.

G. To take any lawful actions that may be necessary to carry out these decisions, including the granting of releases of liability to medical providers.

4. Special provisions and limitations.

(Notice: The above grant of power is intended to be as broad as possible so that your health care agent will have authority to make any decisions you could make to obtain or terminate any type of health care. If you wish to limit the scope of your health care agent's powers, you may do so in this section.)

In exercising the authority to make health care decisions on my behalf, the authority of my health care agent is subject to the following special provisions and limitations (Here you may include any specific limitations you deem appropriate such as: your own definition of when life-sustaining treatment should be withheld or discontinued, or instructions to refuse any specific types of treatment that are inconsistent with your religious beliefs, or unacceptable to you for any other reason.):

["I wish my agent to exercise the authority to withhold or withdraw life support in any situation in which, based on his knowledge of me and previous conversations with me, he believes I would make that decision. I intend this to be a broad delegation of power. The delegation may be exercised as a result of chronic, degenerative or other conditions and is not limited to terminal illness, coma, severe dementia or persistent vegetative state."]

5. Guardianship provision.

If it becomes necessary for a court to appoint a guardian of my person, I nominate my health care agent acting under this document to be the guardian of my person, to serve without bond or security.

6. Reliance of third parties on health care agent.

A. No person who relies in good faith upon the authority of or any representations by my health care agent shall be liable to me, my estate, my heirs, successors, assigns, or personal representatives, for actions or omissions by my health care agent.

B. The powers conferred on my health care agent by this document may be exercised by my health care agent alone, and my health care agent's signature or act under the authority granted in this document may be accepted by persons as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf. All acts performed in good faith by my health care agent pursuant to this power of attorney are done with my consent and shall have the same validity and effect as if I were present and exercised the powers myself, and shall inure to the benefit of and bind me, my estate, my heirs, successors, assigns, and personal representatives. The authority of my health care agent pursuant to this power of attorney shall be superior to and binding upon my family, relatives, friends, and others.

7. Miscellaneous provisions.

A. I revoke any prior health care power of attorney.

B. My health care agent shall be entitled to sign, execute, deliver, and acknowledge any contract or other document that may be necessary, desirable, convenient, or proper in order to exercise and carry out any of the powers described in this document and to incur reasonable costs on my behalf incident to the exercise of these powers; provided, however, that except as shall be necessary in order to exercise the powers described in this document relating to my health care, my health care agent shall not have any authority over my property or financial affairs.

C. My health care agent and my health care agent's estate, heirs, successors, and assigns are hereby released and forever discharged by me, my estate, my heirs, successors, and assigns and personal representatives from all liability and from all claims or demands of all kinds arising out of the acts or omissions of my health care agent pursuant to this document, except for willful misconduct or gross negligence.

D. No act or omission of my health care agent, or of any other person, institution, or facility acting in good faith in reliance on the authority of my health care agent pursuant to this health care power of attorney shall be considered suicide, nor the cause of my death for any civil or criminal purposes, nor shall it be considered unprofessional conduct or as lack of professional competence. Any person, institution, or facility against whom criminal or civil liability is asserted because of conduct authorized by this health care power of attorney may interpose this document as a defense.

8. Signature of principal.

By signing here, I indicate that I am mentally alert and competent, fully informed as to the contents of this document, and understand the full import of this grant of powers to my health care agent.

_____ _____

Signature of principal Date

9. Signatures of witnesses.

I hereby state that the Principal _____, being of sound mind, signed the foregoing health care power of attorney in my presence, and that I am not related to the principal by blood or marriage, and I would not be entitled to any portion of the estate of the principal under any existing will or codicil of the principal or as an heir under the Intestate Succession Act, if the principal died on this date without a will. I also state that I am not the principal's attending physician, nor an employee of the principal's attending physician, nor an employee of the health facility in which the principal is a patient, nor an employee of a nursing home or any group care home where the principal resides. I further state that I do not have any claim against the principal.

Witness:_____ Date: _____
Witness:_____ Date: _____

STATE OF NORTH CAROLINA
COUNTY OF _____

CERTIFICATE

I, _____ a Notary Public for _____ County, North Carolina, hereby certify that _____ appeared before me and swore to me and to the witnesses in my presence that this instrument is a health care power of attorney, and that he/she willingly and voluntarily made and executed it as his/her free act and deed for the purposes expressed in it.

I further certify that _____ and _____, witnesses, appeared before me and swore that they witnessed _____ sign the attached health care power of attorney, believing him/her to be of sound mind; and also swore that at the time they witnessed the signing (i) they were not related within the third degree to him/her or his/her spouse, and (ii) they did not know nor have a reasonable expectation that they would be entitled to any portion of his/her estate upon his/her death under any will or codicil thereto then existing or under the Intestate Succession Act as it provided at that time, and (iii) they were not a physician attending him/her, nor an employee of an attending physician, nor an employee of a health facility in which he/she was a patient, nor an employee of a nursing home or any group-care home in which he/she resided, and (iv) they did not have a claim against him/her. I further certify that I am satisfied as to the genuineness and due execution of the instrument.

This the _____ day of _____, 19 ___

_____
Notary Public

My Commission Expires:

_____

(A copy of this form should be given to your health care agent and any alternate named in this power of attorney, and to your physician and family members.)

initiate more than one conversation with Mrs. Hawthorne on this subject, and perhaps to try to encourage her to write a more explicit advance directive.

The nursing home's administrator and its lawyer learned that the policy of demanding statutory advance directive forms before any withdrawal of treatment is poor practice, poor ethics, and bad law. Even after the *Rettinger* decision, such limitations may protect the institution from one set of risks while exposing it to others, including the risk of overtreatment, accusations of self-interested maximization of income, and even charges of battery.[23]

It may not always be possible to rely on the word of family members. Indeed, the nursing home administrator remained convinced that many family members are self-serving in their own way, but he has now acknowledged an obligation to investigate and weigh the evidence in each instance, instead of relying on a rigid rule. Impressed with the assistance Mrs. Hawthorne's children received from the hospital, the administrator contacted the chairperson of the hospital's ethics committee to ask for joint continuing education on end-of-life decision making and help in setting up an ethics committee for his facility. He also asked the facility's medical director to review the existing policy. And realizing that the next case is just around the corner, the administrator contacted his own professional organization, the North Carolina Health Care Facilities Association, for further information and advice.

Minimizing Risks and Maximizing Rights

Advance directives of all types provide important information and guidance for those who will honor the wishes of the individuals who write them. Health care providers are often misinformed about patients' rights[24] and may be tempted to disregard an advance directive that does not look like what is in the statutes, or one that looks "right" but lacks some of the legal formalities required by the statutes. If an advance directive is to be thrown out because it is not "perfect," then almost any evidence about the choices, wishes, and values of the person who wrote the directive also will have to be discarded

as lacking "proof." However, a patient's family, physicians, and other caregivers must—and routinely do—rely on this kind of evidence (such as Mrs. Hawthorne's expired DNR order) to make good decisions on the patient's behalf, and health care institutions and their attorneys routinely—and rightly—recognize the legal and moral validity of this evidence.

When health care decisions must be made for a patient by someone else, we must look at what this patient said he or she wanted. If we do not know specifically, we have to figure out what this person would have wanted. And if we do not have enough information to determine that, we must ask what would be in this patient's best interests. Advance directives—of all kinds—provide the best kinds of evidence. In many cases they tell us precisely what the patient wanted; in other cases they may help us figure out what the patient would have wanted. (To see what the North Carolina statutory advance directives look like, see page 44.)

Persons who are highly concerned about their health care choices—for example, those who have strong preferences, those whose health problems have caused them to plan ahead, or those who have seen family or friends experience difficulty in exercising their decision-making rights—should know two things. First, they have the right to express choices and preferences that are not included in the statutory model forms. Second, they should supplement their written forms with extensive discussion of the values and issues underlying their choices.

People who have such concerns should focus on several kinds of information that will help others understand their wishes and make decisions based on them: (1) the goals of treatment—that is, what treatments need to be able to accomplish in order for them to be "worth it" for the person; (2) desired and unwanted states of health and functioning—that is, the state of health and activity and the kind of life the person hopes for, is willing to live with, or views as not worth it; and (3) the person's values, life activities, and experiences of importance.[25] Health care providers and others faced with implementing advance directives should encourage advance care planning, promote the use of advance directives, and recognize the broad range of evidence that can provide legally and morally legitimate guidance for health care decision making.

Nonetheless, it is true that advance directive statutes in most states, including North Carolina, state that the physician "may," not "must," rely on a statutory form. The reason is that these laws were written to provide physicians with a shield against the accusation "You let my loved one die!" But families are becoming increasingly likely to make a different accusation—"You prolonged my loved one's suffering!"[26] So that neither accusation has to be made, patients and physicians need to communicate about these decisions, and institutional and state policies need to encourage the habit of such communication.

To some extent, this planning and discussion also must be communicated outside the patient-physician relationship. If an advance directive is to be honored, people must know that it exists and what it says and be willing to help implement it—not just the physician, but also family, close friends, and other providers.

At present, few North Carolinians can realistically expect that their legitimate wishes not to be given unwanted treatment will be honored. Their wishes, even those expressed in advance directives, are often ignored because their choices and circumstances do not fit narrowly drawn statutory categories and are therefore mistakenly thought by administrators and lawyers to be invalid. In addition, many health care providers and institutions treat aggressively out of misplaced and exaggerated fears of legal liability.

North Carolinians want to know that their legitimate choices about health care will be honored by physicians and health care institutions. Constitutional and common law legitimizes those choices; state law makes it possible to honor them. But policy and practice must change throughout the state to make it likely. The many personal and social costs of high-technology treatments at the end of life have become as great a concern in North Carolina as they are everywhere. One way to address that problem is to minimize the delivery of unwanted treatment and focus on advance care planning.

There is a Julia Hawthorne in nearly every family, with important rights and interests in making health care decisions, especially at the end of life. It is vital that all state governmental entities with any role in interpreting or applying the law of health care decision making do so correctly, recognizing its breadth and purpose so that, when the time comes, the health care decisions of all the Julia Hawthornes—and of everyone else as well—can be appropriately honored.

Notes

1. Part One appeared in *Popular Government* 62 (Spring 1997): 2–11.

2. N.C. Gen. Stat. § 90-322 (hereinafter the General Statutes will be cited as G.S.). See also Part One of this article.

3. See the discussions of this statute and common medical practice in Part One.

4. "Comfort care" is often mentioned in literature regarding the end of life, but it is rarely examined. For an exception, *see* C. Glenn Pickard, Jr., "Beyond the No-Code Order," *North Carolina Medical Journal* 54, no. 8 (Aug. 1993): 383–85.

5. *See* N.C. Admin. Code tit. 32H (Emergency Medical Services Advanced Life Support). Of course, the fact that a patient has an advance directive does not necessarily mean that a DNR order is required. The DNR order implements the advance directive that refuses such treatment and thus reflects—and must match—the patient's wishes. Patients who have written advance directives but retain decisional capacity may want DNR orders—or they may not want such an order until the advance directive is in effect.

6. G.S. 143-507.

7. The apocryphal anecdote has it that a hospice patient's family panicked at 3:00 A.M. and called 911. Then they immediately called the hospice nurse and asked, "What can we do now that we've made this awful mistake?" The hospice nurse beat EMS personnel to the house and physically barred the door, denying them entry. Shortly thereafter, work was begun on the out-of-hospital DNR order discussed later. *See* Debbie A. Travers and Greg Mears, "Physicians' Experience with Prehospital Do-Not-Resuscitate Orders in North Carolina," *Prehospital and Disaster Medicine* 11 (April–June 1996): 91–100.

8. An informal opinion from the North Carolina Attorney General's Office concluded that the out-of-hospital DNR order, if properly executed, should allow EMS personnel to withhold CPR without incurring liability. *See* David M. Parker's letter to Julian D. Bobbitt, Jr., Dec. 14, 1990.

9. G.S. 90-321 and -322 (1977).

10. David M. Parker's letter to Julian D. Bobbitt, Jr., Dec. 14, 1990. For a description and discussion, *see* Travers and Mears, "Physicians' Experience."

11. Call the North Carolina Medical Society for more information [(919) 833-3836 or (800) 722-1350].

12. G.S. 90-321 and -322; 32A-15 through -26. See also Part One of this article.

13. G.S. 90-321 and -322. It should be noted that the policy neglected the additional choices available under the Health Care Powers of Attorney Act, G.S. 32A-15 through -26.

14. First Healthcare Corp. v. Rettinger, 342 N.C. 886, 467 S.E.2d 243 (1996), *rev'g* 118 N.C. App. 600 (1995), 456 S.E.2d 347 (1996), *rev'g* No. 230A95-Forsyth (N.C. Jan. 19, 1994).

15. Mrs. Rettinger amended Hillhaven's form, on which she had requested no resuscitation, to ask that no nasogastric tube be used; the form was returned to her as invalid. *Rettinger*, 118 N.C. App. at 601, 456 S.E.2d at 347–48.

16. *Rettinger*, 118 N.C. App. at 601, 456 S.E.2d at 347–48.

17. Mrs. Rettinger said that she was told she could not take her husband home. *Rettinger*, 118 N.C. App. at 601, 456 S.E.2d at 347–48.

18. *Rettinger*, 118 N.C. App. at 602, 456 S.E.2d at 348–49.

19. *Rettinger*, 118 N.C. App. at 602, 456 S.E.2d at 348–49. Under nursing home regulations, each resident must be seen by his or her physician only once every thirty days. Perhaps that was why Mr. Rettinger's feeding tube was not removed until nearly a month after the court order was issued. Both the judicial and the administrative delays in this case were regrettable.

20. Christine Nero, "First Health Care v. Rettinger: The Impact of a Living Will on Payment Obligations in the Long-Term Care Setting," *Prognosis* (May 1996): 14–16; Frederick A. Burke, "Dying by the Rules: Legal Decisions at the End of Life," *North Carolina Medical Journal* 57, no. 6 (Nov.-Dec. 1996): 386–89.

21. Nancy M. P. King, *Making Sense of Advance Directives*, rev. ed. (Washington, D.C.: Georgetown University Press, 1996); 42 U.S.C. §§ 1395 *et seq.* (1990). Dr. Bladen's comments about removal of nasogastric tubes and starvation are a good example. Many people still mistakenly regard withholding or withdrawing artificial nutrition and hydration as the equivalent of committing the patient to dying of hunger or thirst. But in reality, appropriate comfort care can ensure a minimum of discomfort from the cessation of these treatments (*see* Pickard, "Beyond the No-Code Order"), and death is attributable to the underlying condition that renders normal eating and drinking impossible for the patient.

22. Although no North Carolina statute specifically mandates this practice, it follows from state statutes forbidding treatment without consent and abandonment of a patient. It also is addressed by the Patient Self-Determination Act. See Part One of this article, note 9 and accompanying text.

23. The law provides that continuing unwanted treatment is a battery, as is any unwanted physical contact. The requirement of informed consent to medical treatment is related to the law prohibiting battery. *See* King, *Making Sense*, especially the discussion in chapter 2.

24. See the discussion in Part One of the constitutional, common, and statutory law recognizing the patient's broad right to make his or her own health care decisions.

25. Several excellent model advance directives, in particular a new one available through the American Association of Retired Persons (AARP), emphasize the goals of treatment. A document called a "values history" also can help clarify what the writer of the directive believes important. *See* King, *Making Sense*, especially chapters 1 and 5.

26. King, *Making Sense*, especially chapters 1 and 5. See also the discussion of the legal grounding for this accusation in Part One.

Board-Manager Performance Evaluations: Questions and Answers

Margaret S. Carlson

In recent years, both public- and private-sector organizations increasingly have recognized the importance of a useful performance evaluation system to their overall effectiveness. They have taken steps to improve their methods of evaluating front-line workers, teams, supervisors, and department heads. By comparison, the evaluation of the chief administrator who reports to a governing board is often sketchy and sporadic, and the process may be driven by one or more board members who are unhappy with the manager's performance. This article addresses some of the most common questions asked by governing boards and chief administrative officers who seek to develop an effective performance evaluation process. It is not designed to outline an entire evaluation process, since that information is available elsewhere.[1] Instead, the questions that follow highlight some of the "stumbling blocks" that boards and chief administrators often encounter in evaluations, and the answers suggest ways to avoid or overcome these problems in future evaluation cycles.

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For simplicity's sake, the chief administrative officer who reports to a governing board is called the "manager" throughout the article; the principles also apply to all who occupy the managerial position—for example, health directors and social services directors as well as city and county managers. The phrase "board-manager performance evaluation" is intended to reflect the interactive nature of the process; although the board is legally responsible for evaluating the manager, the evaluation process should lead the board to evaluate its own performance and identify ways in which it helps or hinders the manager's effectiveness.

Is it necessary to evaluate the manager's performance if everything seems to be going well between the board and the manager?

A common misconception about the chief administrative officer's evaluation by the governing board is that an evaluation is necessary only to resolve major performance problems and therefore regular evaluations are not needed if there are no obvious problems to correct. After all, when there are so many pressing issues that require a board's time and attention, why devote energy to something that is going well? This view, while understandable, is probably the chief reason that board-manager evaluations have a negative reputation. If the board has waited until the relationship with the manager has seriously deteriorated, it probably will not have gathered the specific information needed to evaluate the manager's overall performance objectively.

Rather than waiting for a crisis to spur a performance evaluation, the board should conduct regular reviews with the manager. By developing an evaluation process when things are operating smoothly, the board and the manager can continue to strengthen their relationship and help avoid future problems. A good evaluation comprises three basic stages: (1) reflection on past performance, (2) identification of goals and direction for the coming year, and (3) development of action plans for implementing those goals and for improving overall performance.[2] When the board waits until there are serious problems before conducting an evaluation, there is often too much emphasis on the first stage (looking backward) and not enough time spent on the second and third stages (planning for the future). It is considerably easier to have a productive dialogue and a balanced evaluation if the parties are not focused on a recent, high-profile event.

Finally, it is interesting to note that the statement

"everything seems to be going well" in the foregoing question is in itself an evaluation of the manager's performance. Evaluation is inevitable; people are constantly evaluating things around them, whether the focus of their attention is a basketball game, a restaurant meal, or a potential candidate for a job opening. Others writing on this topic have observed that the question is not *whether* to do an evaluation but how *formal* the evaluation should be.[5]

All right then, does the board have to conduct a formal evaluation of the manager?

In a perfect working relationship, a formal performance evaluation (that is, a scheduled time set aside annually or biennially for the board and the manager to talk about past performance and future goals) would be unnecessary: the parties would have an ongoing conversation about what is going well and what needs improvement, and a formal evaluation would be redundant. In the vast majority of organizations, however, the reality is that people do not receive (or give) feedback quite so freely. They may assume that "no news is good news" and think that everyone understands his or her role and responsibilities. Or they may avoid raising an issue because they fear the other person's reaction to the feedback. Because people often fall short of the ideal when it comes to communicating about performance, it is a good idea to designate a specific, regular time and place for an evaluation. Of course, this time is not a substitute for monitoring performance on a continuing basis.

Another reason that a governing board and the manager should conduct formal evaluations arises from the unique nature of their relationship. In the absence of a group conversation about performance, the chief administrator essentially is being asked to aggregate the informal comments of individual board members into a group assessment of his or her performance. It is unfair and risky to expect the manager to infer group priorities from conversations with individuals. The only way a manager can be confident that an evaluation reflects the sentiment of the whole board is to have all board members and the manager participate in a joint discussion.

A formal evaluation need not include a complex written form with a numerical rating system. The two elements mentioned earlier are critical. First, there should be a discussion among all board members, and between the board and manager, about what is going well and what needs improvement. Second, this discussion should happen regularly—at least once a year. Beyond these two elements, other features of the evaluation (for example, the use of a form and the link between the evaluation and the salary decision) are at the discretion of the board and the manager.

The board members don't always agree on what they expect of the manager. Isn't it unfair to subject the manager to conflicting messages in an evaluation?

In an ideal board-manager relationship, the governing board speaks to the manager with one voice: any differences among board members are resolved through discussion and vote, and the result is presented to the manager as the wishes of the majority of the board. In reality, however, differences in board members' perspectives may not be resolved so easily. Consequently the manager may receive mixed messages about the board's priorities. For example, some members of a city council may believe that the manager should have an external focus and spend much of his time speaking to neighborhood associations, citizens' action committees, or regional groups in order to represent the city's interests effectively. Other council members may think that the manager should focus most of his attention on the internal operation of the organization, believing that his top priority should be to ensure that all city employees work as efficiently and effectively as possible.

The important thing to remember about a performance evaluation is that the evaluation does not create these mixed messages, although it may provide a setting in which these conflicts are brought to the surface and openly discussed for the first time. Most managers are keenly aware of board members' competing expectations for their performance; indeed, since they are the recipients of these differing views, they are probably more attuned to the views than anyone else. An effective performance evaluation establishes an atmosphere in which these different expectations of the manager may be identified and resolved. Recall that a board-manager performance evaluation should include a portion in which the board examines its own functioning and the way in which it contributes to—or hinders—the manager's effectiveness.

Is there a good generic form that we can use?

It is difficult to recommend a good general evaluation form. Almost by definition, any form that is broad enough to apply to a variety of settings or jurisdictions will not be specific enough to give the kind of customized feedback needed to help a board and the manager

assess their particular situation. If the board and the manager are in the process of developing an evaluation system and wish to look at some samples to help create their own form, they may look to several sources. The International City/County Management Association (ICMA) has several examples of forms supplied by managers. The Institute of Government also has some samples. Human services boards, school boards, and other boards and officials may wish to contact their own professional associations to see forms that have been tailored to their particular position.

The performance dimensions included in these evaluation instruments may provide useful information for a board and the manager as they prepare to discuss expectations for the manager's performance. However, it is essential that the board and the manager develop the form *before* the first evaluation cycle in which it will be used. Typically, boards decide that they want to look at examples of evaluation forms immediately before the manager's evaluation. While reviewing these forms, board members often see performance categories that they wish to include in that year's evaluation. The problem is that the board may evaluate the manager against criteria that were added at the end rather than the beginning of the evaluation cycle. For example, a board may decide that it wants to assess "initiative and risk taking" as one performance dimension. If this comes at the end of a year in which the board continually emphasized the value of conservatism and the need to avoid unnecessary risks (financial or otherwise), it may not be reasonable to assume that the manager understood risk taking to be an expectation of the board. The most effective evaluation forms are created by the board and the manager to reflect the needs and the goals of that particular jurisdiction and to represent a list of expectations for the manager's performance that was set at the beginning of the evaluation cycle.[4]

Do we need to use a form at all?

Not necessarily. There is nothing magical about a form; in fact, many problems in performance evaluation come about because the board focuses too much on finding a form and not enough on clarifying expectations for the manager well before the evaluation. A form is merely a tool; it cannot substitute for the board's discussion of and agreement on expectations for the manager.

If the board decides to use a form, it should think carefully about the measures that will be used to assess the manager's performance. Some boards use three basic levels of performance standards: "below expectations," "meets expectations," and "exceeds expectations." They apply the standards to each of the criteria being measured. Other boards prefer to use a numerical rating scale—for example, a 1 to 5 scale ranging from "unsatisfactory" (1) to "excellent" (5). Regardless of the measures used, it is extremely important for the raters to agree on how the ratings will be defined and how they will be applied. Numerical scales are particularly susceptible to being applied inconsistently by multiple raters. For example, one member may rate the manager 3 when the manager has met a goal, because the member interprets a 3 as meaning "meets expectations." Another board member may agree that the manager met the goal but interpret the numbers as analogous to the letter grades A through F. Consequently he may rate the manager 4 or 5 because he views a rating of 3 as a C. The resulting confusion and misunderstanding—both among board members and between the board and the manager—have completely derailed more than one evaluation process.

Boards sometimes see numerical rating scales as a way to introduce a level of objectivity into the evaluation process, but these scales are simply a type of shorthand to summarize large amounts of information and are no more objective than written comments. Both boards and managers usually find that the most valuable information shared in a performance evaluation is qualitative, not quantitative.[5] The goal is to establish effective communication between the board and the manager; overly cumbersome forms and scales can be a hindrance rather than an aid toward this end.

Should the board consider information from others in its own evaluation?

Opinions vary on this issue. One authority on board-manager relations states unequivocally that the appraisal of executives should reflect a single source of evaluative data—the board.[6] The rationale for this view is that the board, and the board alone, should specify what the chief administrative officer is responsible for accomplishing. An evaluation then consists simply of assessing whether these specified ends were met. Since the board sets the performance criteria in the first place, it is also responsible for assessing the manager's performance against these (and only these) criteria.

For many boards, however, the evaluation process is not so straightforward. The task of setting measurable results can be complex, and boards typically go through a learning process that occurs over several evaluation cycles. A social services board, for example, may see the social services director's duties in working with a regional council as an important component of her work, but it may discover that none of its members know much about the director's accomplishments in this area. What are their options in this situation? At a minimum, the director should provide a self-assessment of her performance, including the work with the regional council. This will add an extremely valuable perspective to the evaluation process, since the director will be able to share relevant information about her activities that the board would not have access to otherwise.

Clearly the chief administrative officer is one important source of information, but the board may decide that it needs other perspectives as well. Continuing with the foregoing example, members of the social services board might wish to talk with members of the regional council to get another view of the social services director's work with this group. When seeking information from others for purposes of making the evaluation, there is one guiding principle: board members should take care to collect information in such a way that it may be shared with the subject of the evaluation. In other words, the board should not guarantee to outside parties that their comments will not be revealed to the individual being evaluated.

But if you talk to others about the manager's performance, isn't it important to promise confidentiality to those individuals? I thought that was the best way to get honest feedback.

While the board's motives may be good (for example, it may want to talk to those who are in a position to know about the manager's performance and also make sure that these individuals will not experience retaliation from the manager for any negative information they may share), a promise of confidentiality often backfires and creates problems for everyone.

Picture the following scenario, based on a real example. A board of county commissioners decides that it needs to hear from others in order to evaluate the county manager. Board members interview county employees individually and ask each one for his or her view of the manager's performance in various areas. The employees are assured that these conversations are completely confidential and that the manager will never know who said what. Representatives from other organizations who have contact with the county manager also are interviewed and guaranteed confidentiality.

When the board explains to the manager the ratings he has received, it runs into problems with the ratings that are partially (or largely) based on feedback from others. In many instances these ratings have been based on one or more specific examples of the manager's performance that the board has learned about from employees and others. Because it has promised confidentiality to these people, the board does not want to be too specific in explaining the ratings for fear that the manager will know who provided the information—and that the confidentiality agreement will thereby be violated.

As a result, the board is frequently vague and speaks in generalities about the need for the manager to improve his performance or make changes in his managerial style. Board members explain that they cannot be very specific for the reasons just listed. "That's all right," the manager says. "I can go back to my employees and ask them for more information about how I can improve my performance." "Oh, no, you can't do that," the board replies. "If you do, the employees will think you're on a 'witch hunt' and just trying to find out who said what so you can retaliate." In handling information from employees in this way, the board has created a situation that actually prevents the manager from getting the feedback he needs to improve his performance.

This does not necessarily mean that the board must attach an interviewee's name to each piece of information it provides the manager during the evaluation (for example, the board need not say, "Jane Doe said X, and Joe Smith said Y"). It does mean that board members should begin the interview with an individual by explaining that any information that person gives will be shared with the manager. For example: "The board's goal is to give specific feedback that will help the manager improve his performance. Since this may include particular examples to illustrate a point, it is possible that he may guess the source of the information from the example, even if we do not mention the source by name, so we ask you not to say anything to us that you are not willing to have shared with the manager." This will help the board avoid basing the evaluation (consciously or unconsciously) on information that is not available to the manager.

Why is it important to have the manager present during the evaluation? We always meet without her and have the chair summarize the main points for her later.

For many boards, the idea of having the chief administrator present during the evaluation is a radical departure from their usual approach. Board members may doubt their ability to talk openly and honestly about both the positive and the negative aspects of the manager's performance in her or his presence, and they may doubt the manager's ability to receive this feedback in a nondefensive manner. If board members disagree about the manager's performance, those who support the manager may wish to "protect" her or him and act as a buffer between the manager and the others.

To understand why a manager's presence at the evaluation is important, it is necessary to examine two issues: (1) the purpose of the evaluation and (2) the way people process information. Typically, boards wish to use an evaluation to give the manager feedback on her or his performance and to identify areas in which improvement may be needed. They also want to clarify and strengthen the relationship between the manager and themselves. It is difficult to accomplish either of these goals unless the manager is present during the board's discussion, because human beings are imperfect information processors: we organize information through a series of "shortcuts" that can lead us to different interpretations of the same event.

Assessments of an individual's performance are based on a series of interactions over time, some more memorable than others. When we observe behavior, we don't record the event objectively, the way a video recorder might. Instead, we *infer* additional meaning—motives, values, and so on—from the person's actions, and we store all this information for future use. Often we don't realize that much of our "data" about a person is not actual fact but the meaning we have added through the inferences we have made. We also are more likely to remember events that are consistent with our image of a person than those that are not. So, for example, a board member who did not receive a piece of information that was distributed by the manager to other board members may infer that the manager is not neutral (that is, that the manager favors some board members over others). She then may look for other examples that support her inference and ignore data that do not support it.

Making inferences about others' behavior is inevitable. It creates problems only when we make an inference about someone, do not recognize it as an inference, do not test it with that person, and then act as if it were a fact. A manager needs to play an active role in the evaluation—responding to questions from the board, asking questions, and providing information—because of the importance of *testing inferences* during the evaluation process. An inference about an individual can be tested only with that individual; it cannot be tested by seeing whether other people share the same inference.[7]

Let's play out in two scenarios the example of the board member who believes that the manager is not neutral. In the first scenario, the manager is present. The board member says that the manager "plays favorites." The manager probably asks specifically why the board member has made this statement. She cites the piece of information that was distributed to other board members but not to her. At this point, the discussion can explore several directions, all potentially useful: Are there problems with the distribution system? Were assumptions made about who was interested in a given topic? And so on. The manager is likely to come away from that discussion with a clear idea of the problem and the steps he should take to correct it.

Now imagine a scenario without the manager present. The board member says that the manager "plays favorites." Other members agree or disagree, but when she explains why she has made that charge, they can only speculate about what was in the manager's mind, since he is not there to tell them. Probably the summary of the evaluation that the manager receives will mention the need for him to "remain neutral" and "avoid playing favorites among board members." Chances are slim that the manager will know what precipitated these comments and even slimmer that he will clearly understand what to do to correct the problem. Ultimately he will have to go back to the board for clarification, and the process will take more time and energy than if he had participated from the beginning.

Can we set aside time for the evaluation at the end of a regular board meeting?

The board and the manager can set a time and a place for the evaluation discussion that are agreeable to all, but they should not be surprised if the discussion takes considerably longer than anticipated. Board

members frequently say, "We don't want to do it the way it happened last year. We started the evaluation at 9:30 P.M. after the regular board meeting, and everyone was so tired at midnight that we just wrapped it up, even though we still had a number of issues to discuss." It is probably more realistic to set aside a half-day, particularly if the board and the manager are trying a new evaluation process. As with anything new, the evaluation may seem a bit awkward at first, but the process will become more streamlined after a couple of cycles.

Whether a public official is a board member or a chief administrator, he or she has much to gain from good board-manager performance evaluations. The board and the manager who view this process as an opportunity for a two-way conversation about expectations, goals, and priorities will be able to identify new ways of working together to accomplish their mission. Board members who approach the manager's evaluation thinking, "This isn't about us, this is about you," may overlook valuable information that could help them serve their constituents more effectively. And the manager who prefers to avoid any formal discussion of his or her performance may miss the chance to improve.

Will redesigning the board-manager evaluation process require significant time and energy? Possibly. Is it worth it? Definitely. An effective board-manager performance evaluation process could be considered a legacy for future boards. It is an investment in effective governance.

Notes

1. For a more detailed treatment of a recommended evaluation process, *see* Margaret S. Carlson, "How Are We Doing? Evaluating the Performance of the Chief Administrator," *Popular Government* 59 (Winter 1994): 24–29.

2. *See* Lyle J. Sumek, "Performance Evaluation: Evaluate or Not? That Is *Not* the Question," *Public Management* 70, no. 2 (Feb. 1988): 2–9.

3. Sumek, "Performance Evaluation," 2.

4. Carlson, "How Are We Doing?" 27.

5. Linda Hopper, "Laying the Groundwork for Evaluation," *Public Management* 70, no. 2 (Feb. 1988): 10–12.

6. John Carver, *Boards That Make a Difference* (San Francisco: Jossey-Bass Publishers, 1990), 124.

7. For more information on identifying and testing inferences, *see* Rick Ross, "The Ladder of Inference," in *The Fifth Discipline Fieldbook*, ed. Peter Senge et al. (New York: Doubleday, 1994), 242–46.

At the Institute

IOG Hires Simpson as First Development Director

Ann Simpson, the Institute's first director of development, has spent a good amount of time listening.

"I like to get to know people," she said. "I listen to how people view an organization and what the organization is doing that really appeals to them."

Simpson, who began working at the Institute on April 1, previously worked as major-gifts manager for The University of North Carolina Center for Public Television (UNC-TV), where she developed and carried out a statewide annual-giving program focused on increasing contributions of $1,000 or more from individuals, foundations, and small businesses.

"We worked to help people understand what public television does, whom it reaches, and why it's important," Simpson said. "UNC-TV's support is broad based," she added. "In fund-raising for the Institute, the need is to identify people who are touched less directly but still benefit from its work. There's a whole world of people whose lives are made better by the Institute's work with government, but the Institute has not traditionally reached out to them. It will take some creativity to reach them."

Simpson described the Institute's mission as a challenging one in a dynamic environment. "North Carolina is growing faster than it ever has before," she said. "Policies are getting much more sophisticated, and there is a greater focus on public-private partnership, an area in which the Institute could be quite helpful."

Simpson is confident that the Institute will maintain its politically neutral stand with more private donations, even large ones. "Most of the time, when people decide to give at high levels, they believe in the work an organization is doing and understand how it works. They are not asking for change. They are giving so that the organization can do a better job. The Institute cannot be partisan in its work for better government, and folks understand that."

Before she took her UNC-TV position, Simpson worked in various communication and development roles for Wetlands America Trust/Ducks Unlimited, Inc., the North Carolina Environmental Defense Fund, and the Nature Conservancy.

"Each of these organizations built a good reputation for working cooperatively with various groups. I have seen how well this balanced approach works, from the local level all the way to the national level, and I understand how important local action is to success.

"The work the Institute does on behalf of North Carolina government is extraordinary," Simpson added. "I would really like to see it expand."

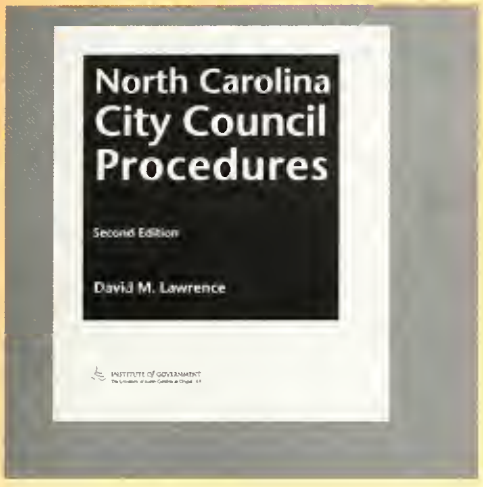
Ann Simpson

Two years ago, the Institute engaged Ross, Johnston & Kirsting, Inc., of Durham to study its fund-raising potential. The firm concluded that the Institute's reputation as an outstanding provider of government services in North Carolina created a solid foundation for expanding its financial resources.

"I believe that Ann is the ideal person to help the Institute begin raising private funds to support its activities," said Michael R. Smith, the Institute's director. "She has excellent experience, and she has a demonstrated commitment to our mission—improving North Carolina government."

Simpson and her husband, Bland Simpson, both grew up in eastern North Carolina. Recently they coauthored *Into the Sound Country*, an illustrated history of the region, to be published by The University of North Carolina Press this fall. —*Jennifer Hobbs*

Off the Press



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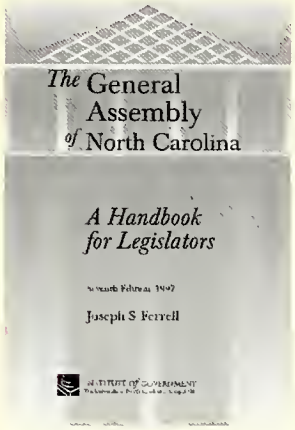

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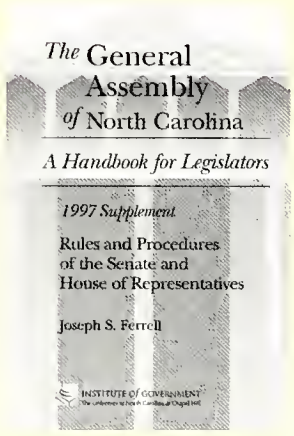

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to preserve the form and spirit of
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