

To: Managers, Clerks, Administrators and Attorneys

From: Kimberly S. Hibbard, General Counsel

Date: August 4, 2011

Re: Information regarding recently enacted legislation

The attached memoranda provide additional detail and analysis on legislative enactments from the 2011 long session of the General Assembly. Please see that they are distributed as appropriate among your staff and officials. Memos attached address the following:

- Annexation
- Billboards
- Capital Projects Reporting
- Environmental Issues
- E-Verify
- Firearms
- Land Use
- Public Records
- Rental Property Inspections

Should you have any questions or concerns, please contact a member of the League's staff at 919-715-4000.

KSH/rbr



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To: Managers/ Administrators/Clerks/ Attorneys/Planners
From: Kimberly S. Hibbard, General Counsel
Date: August 4, 2011
Re: Substantial Changes to the Annexation Laws

The 2011 General Assembly made sweeping changes to the statutes governing the municipal annexation process. The changes are contained in a series of acts, each of which is discussed in its appropriate subject matter categories below:

HB 845 - Annexation Reform Act of 2011 (SL 2011-396)
HB 56 - Local Annexations Subject to 60% Petition (SL 2011-177)
SB 27 - Local Annexations Subject to 60% Petition (SL 2011-173)
HB 168 - Farms Exempt from City Annexation & ETJ (SL 2011-363)
HB 171 - Municipal Self-Annexations (SL 2011-57)

Collectively, the legislation implements a property owner "veto petition" process that can terminate a city-initiated annexation; subjects certain previously completed annexations to the veto process; requires "no cost" extension of water and sewer lines all the way to the home/structure in city-initiated and some types of voluntary annexations; allows, and in some cases compels, the annexation of distressed areas with less than a 100% petition; and exempts "bona fide farms" from being annexed without consent.

Be aware that the legislation is unclear in some respects and will require significant legal analysis and interpretation. It also raises a number of questions that will perhaps only be answered by the courts. For example, the requirement to use public funds to make infrastructure improvements to private property may raise constitutional concerns.

CHANGES TO THE CITY-INITIATED ANNEXATION PROCESS

HB 845 - Annexation Reform Act of 2011 (SL 2011-396) makes several fundamental changes to city-initiated annexation statutes, as well as numerous procedural changes summarized below.

I. Water and Sewer Extensions

When municipalities initiate an annexation, they no longer have the discretion to set the terms of financial participation by annexed property owners in the extension of water and sewer infrastructure. Instead the act implements a new "opt-in" process and cost limitations for those services. Municipal financial responsibility for water and sewer extensions is dramatically increased as a result.

Opting in. The city's obligation to provide water and sewer extensions is triggered if the owners of a majority of the properties in the annexation area request the extensions. In addition to the major infrastructure, individual water and sewer lines must be provided all the way to the structures on the requesting properties. Once the opt-in threshold has been met, the municipality must provide the extensions at no cost (other than user fees) to all properties that request it by the deadline, and at a reduced cost on a sliding scale to those requesting it at a later time. In order for lines to be installed to structures on the individual properties, the property owners must provide installment easements. Following installation of the lines, the property owner takes ownership of them and becomes responsible for their maintenance and repair.

Who requests. The property owners that are eligible to sign up for water and sewer extensions at no cost are those who own the property as of the date of the combined notice of the public informational meeting and public hearing.

Procedure. The municipality must begin the water and sewer sign-up process within five business days of the resolution of intent by notifying property owners, in writing, of the opportunity to have water and sewer lines and connections installed at no cost. The property owners are allowed 65 days from the passage of the resolution of intent to respond yes or no to this opportunity. A majority of the property owners of a single parcel of real property must respond favorably before the parcel can be counted as a "yes." Any owners of parcels that already receive the municipality's water or sewer, whether provided by the municipality or by a third party under contract with the municipality, are deemed to respond favorably.

Successful opt-in. If after 65 days, the property owners of a majority of the parcels respond favorably, those that responded favorably receive the right to have lines and connections installed at no cost, a right that runs with the land. The municipality must notify, within five days, those property owners who failed to respond, or who responded negatively, that water and sewer will be extended to the area and offer a second, 30-day opportunity for that property owner to sign up. Those property owners responding favorably to this second opportunity also receive water and sewer extensions at no cost.

If the opt-in threshold is met, property owners who fail to respond favorably during the sign-up period may request service in the future and the municipality may charge them for a percentage of the average cost of installation (based on the cost of residential installations from curb to residence, including connection and tap fees, in the area described in the annexation ordinance). The proportion that may be charged to latecomers is on a sliding scale for five years, after which the city may charge any properties requesting service according to the city's policy.

If owners do not opt in. If the owners of a majority of the parcels do not request extension of water and sewer services, the municipality may proceed with the annexation and is not required to provide water and sewer services to any property owners in the annexation area. [If it nonetheless decides to provide the services, the act sets out a sliding scale of the amount that a requesting property owner can be charged for the connection during the first five years after the effective date; after that the city can charge according to its policy.]

No fees to non-customers. The city may not require the payment of capacity charges, availability fees, or any other similar charge from property owners in the annexed area who do not choose to become customers of the water or sewer system.

Time for completion of infrastructure. Any required water and sewer infrastructure must be in place within 3.5 years of the effective date of the annexation ordinance. If the municipality is unable to provide the services within that timeframe due to permitting delays through no fault of its own, the municipality may petition the Local Government Commission for a reasonable time extension.

Applicability. The requirement to extend water and sewer applies to municipalities that already provide water or sewer service to customers within their existing boundaries. If the municipality does not provide water or sewer, but its existing residents are served by a public water or sewer system (or by a combination of a public water or sewer system and one or more nonprofit entities providing service by contract with the public system), the city could be exempt from financial responsibility for the extension of service to the annexed area. The exemption applies only if the annexed area is served by the public water or sewer system and the municipality has no responsibility through an agreement with the public water or sewer system to pay for the extension of lines to annexation area. "Public water or sewer system" in this context means a water or sewer authority, a metropolitan water or sewerage district, a county water or sewer district, a sanitary district, a county-owned water or sewer system; a municipally-owned water or sewer system; a water or sewer utility created by an act of the General Assembly; or a joint agency providing a water or sewer system by interlocal agreement.

II. Veto (Denial) Petition

The act institutes a veto petition process by which the owners of 60 percent of the parcels in the annexation area can terminate the annexation.

Procedure. Within five days following the adoption of the annexation ordinance, the municipality sends the county tax assessor a list of owners of real property within the annexation area. The assessor in turn forwards a list of parcels to the county board of elections, and the board of elections prepares petition forms for each of the properties with each owner listed individually, a signature line for each owner, and a statement that the person signing is petitioning to deny the annexation. The board of elections then mails a petition to the address of record for those property owners within five business days of receipt from the assessor.

Who signs. If there is a change in ownership of real property after the date of the resolution of consideration until 30 days after the date of the adoption of the annexation ordinance, the new owner of the real property is to be considered the eligible owner of the property. A majority of the property owners of a single parcel of real property must sign the petition before the board of elections may count that parcel as having submitted a petition to deny annexation.

Submitting Petitions. The signed petition may be submitted to the board of elections in person or by mail. If the signature on the petition form is not the same as the preprinted name on the form, then the signed petition must be notarized and accompanied by a copy of the legal authority for the signature of the person signing a petition. The board of elections also must accept signatures signed on a petition form prepared by the board of elections, but collected by another person. The act does not specify whether this form can include the signatures of the owners of more than one property, but it does require the petition form to be returned to the board of elections in a sealed container.

Results. The denial petition signature process closes 130 days after the adoption of the annexation ordinance and the board of elections must certify the results within 10 business days. The determination of the results must be observed by three property owners from the area proposed for annexation, chosen by lot by the board of elections from among those who request to serve in this role, and three persons designated by the municipality. The act does not specify the criteria that should be used to determine if a petition is valid. The municipality is required to reimburse the board of elections for its costs related to the denial petition process.

Effect of successful petition. If the property owners of at least 60 percent of the parcels submit denial petitions, then the annexation terminates and the municipality may not

adopt a resolution of consideration for the area described in the annexation ordinance for at least 36 months.

Applicability. The veto petition process does not apply to any owner of real property located within any part of the annexation area that is completely surrounded by the municipality's primary corporate limits (a "doughnut hole").

III. Farm Property

HB 168 - *Farms Exempt from City Annexation & ETJ* (SL 2011-363) makes a significant additional amendment to the city-initiated annexation statutes. It provides that property that is being used for "bona fide farm purposes" on the date of the "resolution of intent to consider annexation" may not be annexed without the written consent of the owner or owners. [It is not clear whether the General Assembly meant the resolution of consideration or the resolution of intent.] The change applies to annexations of property used for bona fide farm purposes that were initiated on or after June 27, 2011 or are pending on that date.

Previously the annexation statutes implemented a "delayed annexation" process for agricultural property subject to present use value taxation that allowed those lands to be included in an annexation area for setting boundaries and for land use authority, but not for taxation or other purposes until the property lost its use value status. Those provisions were removed from the statutes by HB 845.

The new protections for farms are much broader. Land used for a qualifying bona fide farm purpose may not be included in the annexation area for any purpose unless the owner consents. Because the definition of bona fide farm is very broad, we anticipate a great deal of uncertainty in application and more difficulty in avoiding the creation of doughnut holes. (Please see the League's memo on *Land Use* for further discussion on the definition of bona fide farms.)

IV. General Procedural Changes in City-Initiated Annexations

- The city-initiated annexation statutes are now one-size-fits-all. There is no longer a distinction based on population of the municipality.
- The annexation process must begin with a resolution of consideration, followed by a resolution of intent at least one year later. There is no longer an option to begin with the resolution of intent and delay the effective date.

- Density and contiguity standards generally did not change, although doughnut holes can now be annexed without the need to meet the density standards.
- Annexation ordinances must become effective on the first or second June 30th following adoption.
- The act codifies, in part, case law prohibiting “shoestring” annexations by clarifying that contiguity cannot be established by a connecting corridor that consists solely of the length of a street or street right-of-way.
- The act prohibits the splitting of parcels. If any portion of a parcel of property is proposed for annexation, the entire parcel as recorded in the deed transferring the title is to be included.
- There are several changes to notification procedure. Mail notice to property owners and publication are now required after passage of the resolution of consideration. As to notices following the resolution of intent, the combined notice of the public informational meeting and public hearing must contain several additional information items and must be mailed within five business days of the resolution of intent in addition to publication.
- There are changes to the timeline and contents of the public meetings. The public hearing may not take place until 30 days after the water and sewer sign-up period is complete. The public information meeting must now include an explanation of the provision of major municipal services; how to request water or sewer service to individual lots; the average cost of a residential connection to the water and sewer system; and an explanation of the opportunity for installation of a residential connection.

V. Appeals and Remedies

Services. The city must report to the Local Government Commission regarding its delivery of services. If the LGC determines that the municipality failed to deliver any required police, fire, solid waste, and street maintenance services within 30 days of the effective date, the residents of the annexation area are not included in its population of the municipality for state, federal, or county funding distributions based on population until all of the services are provided. During the period from 30 days until 15 months after the effective date, property owners may also seek a writ of mandamus if services are not being provided. The city must also report to the LGC as to whether it has completed installation of water and sewer lines. Reports are required within six months of the effective date of the annexation, and again within 3.5 years or upon completion of

the installation, whichever is sooner. If the LGC finds that the city has failed to deliver the water and sewer services within 3.5 years, the municipality must halt any other annexation in progress and must restart a stopped annexation from the beginning once water and sewer services are provided.

Appeals. The filing period for lawsuits challenging an annexation is moved to 60 days after the close of the veto petition signature period. The court must set the effective date for an annexation as the first June 30 at least six months after the final judgment or following the date upon which a municipality takes any required action to conform to the court's remand instructions.

Attorneys' Fees. The court now may award attorney's fees to a property owner if a final court order is issued against the municipality.

VI. Effective Date and Applicability

The changes in HB 845 are effective July 1, 2011 and apply to city-initiated annexations for which no ordinance has been adopted as of that date. For city-initiated annexations begun prior to July 1, 2011, but which had not reached the point of adopting the ordinance by that date, the city can reinstate the annexation, but it must comply with the new provisions. The act does not apply to any city with a charter provision requiring a owner consent or a referendum in city-initiated annexations.

VII. Voting Rights Counties

Cities located within one of the forty Voting Rights counties need to include within their plans and timelines the additional step of obtaining preclearance from the U.S. Department of Justice. If using the new city-initiated method, we believe preclearance will be needed for both the veto petition process and for the annexation itself. The petition process is so closely analogous to a referendum that municipalities should submit it for preclearance before the veto petition process begins. A letter from the Attorney General's office to one of our member cities supports that stance. Existing statutes place the responsibility for preclearance submissions on the municipal attorney.

CERTAIN COMPLETED ANNEXATIONS SUBJECT TO VETO PETITION

Although the annexation reform provisions in HB 845 do not apply to annexations for which an ordinance was adopted before July 1, 2011, two additional acts apply the veto petition process retroactively to specified annexations in nine municipalities. Under *HB 56 - Local Annexations Subject to 60% Petition (SL 2011-177)* and *SB 27 - Local Annexations Subject to 60% Petition (SL 2011-173)*, the affected cities and towns are Asheville, Fayetteville, Goldsboro, Kinston, Lexington, Marvin, Rocky Mount, Southport, and Wilmington. All of the annexations in question had ordinances in place, many had

already been upheld by the appellate courts, and one had been effective for almost three years (with millions of dollars in public expenditures toward the water and sewer infrastructure). Nonetheless, the two acts require these particular annexations to reopen the process and go through a veto petition procedure similar to that in HB 845. If the property owners of at least 60% of the parcels in the annexation area sign a petition to deny the annexation, the annexation is terminated (or, in the case of the one that had become effective, it is repealed) and the municipality may not adopt a resolution of consideration for the area for at least 36 months. These acts raise a number of questions and set a disturbing precedent.

They were effective June 18, 2001 and require the county board of elections to mail petitions to property owners within 30 days thereafter. Affected cities in Voting Rights counties have been made aware of preclearance needs (see Voting Rights in Sec. VII above), adding a logistical issue to the other concerns with the legislation.

CHANGES TO THE VOLUNTARY ANNEXATION PROCESS

HB 845 - Annexation Reform Act of 2011 (SL 2011-396) also amends the statutes on voluntary annexation. The act provides for two new types of voluntary contiguous annexations that allow annexation with less than a 100% petition. For one of these types, the city retains discretion on whether to annex but for the other the municipality is required to annex under specified circumstances.

I. Distressed Areas.

Applicability. The new types of voluntary annexation are applicable only to certain high poverty areas. These are defined as areas in which at least 51% of the households have incomes that are 200% or less than the most recently published U.S. Census Bureau poverty thresholds. For both of the new types of voluntary annexation, the petitioners are required to submit reasonable evidence to demonstrate that the area meets the poverty thresholds. The evidence presented may include Census Bureau data, signed affidavits by at least one adult resident of the household attesting to the household size and income level, or any other documentation verifying the incomes for a majority of the households within the petitioning area. Petitioners may elect to submit the names, addresses, and social security numbers of persons in the area to the city clerk for confidential submission to the Department of Revenue. This information is not a public record. The Department uses the list to provide the city with a summary report of income for households in the petitioning area that can serve as evidence that the poverty thresholds are met.

Discretionary annexation. A municipality may annex a distressed area when an adult resident in at least two-thirds of the households in the area has signed a petition. If an

ordinance is adopted in response to such a petition, the effective date must be within 24 months of adoption.

Mandatory annexation. The city is required to annex a distressed area if the owners of at least 75% of the parcels have signed the petition. To qualify, the area must be at least one-eighth contiguous to the city's boundaries and it can be no larger than 10 percent of the city's existing land area. Upon determining that a petition meets the requirements for a mandatory annexation, the municipality has 60 days to determine whether the estimated annual debt service payment that would be required to extend water and sewer to all properties in the annexed area is less than five percent of the annual revenues of the city's water and sewer system. If so, the city must adopt an annexation ordinance within 30 days and set an effective date within 24 months of the adoption. If not, the city may decline to annex the area, provided the LGC certifies its cost estimates.

If the city declines, it must make ongoing good faith efforts during the three years following the certification to secure Community Development Block Grants or other grant funding for extending water and sewer service to all parcels in the areas covered by the petition. If sufficient funding is secured so that the estimated capital cost for extension, less the funds secured, would result in an annual debt service cost of less than five percent of the annual water and sewer systems revenue for the most recent fiscal year, the governing body has 30 days to adopt an annexation ordinance for the area with an effective date no later than 24 months after the adoption of the ordinance.

In any event, a city is not required to approve more than one annexation petition submitted under this provision within a 36-month period.

Services. For both of these new types of voluntary annexation, services must be provided to the area after the effective date of the annexation "in the same manner and according to the same schedules" as apply to city-initiated annexations. This appears to mean that the water and sewer opt-in process and the "no cost" provisions would apply.

II. Other Changes to the Voluntary Process

Ordinance effective date. In voluntary contiguous annexations other than those for distressed areas, the city may make the annexation ordinance effective immediately or on the first or second June 30 following the ordinance's passage.

No shoestrings. The act applies the concept of prohibitions on "shoestrings" to voluntary annexation. It specifies that a connecting corridor consisting solely of a street or street right-of-way cannot be used to establish contiguity. It further clarifies the definition of contiguity by allowing the property to be considered contiguous if it is separated from the municipal boundary by the width of a street or street right-of-way.

State-maintained streets. *HB 171 - Municipal Self-Annexations (SL 2011-57)* makes changes to both the contiguous and the satellite voluntary annexation statutes intended to restrict the annexation of state-maintained streets on the city's own volition. It specifies that a city has no authority to adopt a resolution or to petition itself for voluntary annexation of property it does not own or have a legal interest in. It then states that, for purposes of the prohibition, a city has no legal interest in a state-maintained street unless it owns the underlying fee rather than an easement. The act also amends the satellite annexation statute to provide that a satellite petition is not valid if it is unsigned; signed by the city for the annexation of property the city does not own or have a legal interest in; or it is for the annexation of property for which a signature is not required and the property owner objects to the annexation. The act was effective April 28, 2011.

III. Effective Date

Aside from the provisions on state-maintained streets mentioned above, the changes to the voluntary process were effective July 1, 2011 and apply to petitions for annexation presented on or after that date.

CHANGES APPLICABLE TO ALL TYPES OF STATUTORY ANNEXATION

Recordation of agreements. HB 845 requires any written agreement regarding annexation between a municipality and a person having a freehold interest in real property to be recorded in the register of deeds office in the county where the property is located in order for the agreement to be enforceable.

State fund priority. HB 845 requires that Community Development Block Grant, Wastewater Reserve, and Drinking Water Reserve funding guidelines give priority to projects located in areas annexed by a municipality in order to provide water or sewer services to low-income residents. Low-income residents are those with a family income that is 80% or less of median family income. (This is applicable regardless of the type of annexation process but may be of more interest for the high poverty petitioned areas.)

RECOMMENDED ACTIONS

The legislation significantly alters the authority of municipalities to annex, and it is important to review your municipality's practices to ensure that they reflect these changes.

Assess the status of annexations in progress. It is important to first determine whether the municipality has any city-initiated annexations currently underway and where they are in the process. Based upon the effective date of the changes (see Sec. VI above),

some annexations may need to be reinitiated. For a small number of cities, even a completed annexation must be retroactively run through the veto petition process. (See “Certain Completed Annexations Subject to Veto Petition” above.)

Review local policies. In light of these changes, we strongly recommend that you begin to review any policies or procedures you have established regarding annexation and consider any necessary or appropriate changes. Cities may wish, for example, to consider whether or not to continue extending water and sewer lines outside of their corporate limits in the future.

Emphasize public information/build understanding. In city-initiated annexations, the municipality must as a practical matter prepare to convince a sizable portion of the property owners of the value of becoming a part of the municipality. It is now more important than ever to be able to articulate the advantages of annexation to citizens in a proposed annexation area, to existing city residents, and to legislative decision-makers.

Resources. In many cities and towns, the professionals in the planning department and management staff can advise on needed changes to policies and procedures. Throughout the process of review and consideration of changes, we urge you to consult with your city or town attorney. Remember that this area of the law is often litigated, and may be more so in the future, so you should act prudently with the benefit of legal advice. The League and the School of Government can provide general information and guidance regarding the annexation statutes and possible interpretations. Two recent School of Government postings discuss the annexation changes:

<http://sogweb.sog.unc.edu/blogs/localgovt/?p=4494>

<http://sogweb.sog.unc.edu/blogs/localgovt/?p=5000>.

MEMORANDUM

To: Managers, Administrators, Clerks, Attorneys, and Planners

From: Paul A. Meyer, Chief Legislative Counsel

Date: August 4, 2011

Re: Changes to Billboard Regulation

During the 2011 session, the General Assembly passed legislation impacting the regulation of outdoor advertising. *SB 183 - Selective Vegetation Removal/State Highways (S.L. 2011-397)* affects the ability of billboard owners to obtain vegetation removal permits from the NC Department of Transportation and amends other portions of state law on outdoor advertising. This memorandum provides details of the changes below.

Background

The legal framework for Outdoor Advertising regulation is a complicated balance of state statutes, administrative rules, local ordinances and case law. The Outdoor Advertising Act (G.S. Chapter 136, Article 11) establishes the basic framework for billboard controls in North Carolina. In a nutshell, the NCDOT issues permits for the erection of new billboards and removal of vegetation within 660 feet of the edge of the right of way of interstate or primary highways in the state, subject to the zoning and tree cutting controls of local governments. G.S. 136-129(4) limits billboard locations to areas zoned industrial and commercial, in conformity with rules and regulations promulgated by NCDOT. While local governments control zoning decisions in local communities, there is a long-standing legal battle between the billboard industry and local governments as to which portion of law controls their industry—local ordinances, or NCDOT rules. Furthermore, existing administrative code provisions enable local governments to impact vegetation removal around billboards through local tree preservation ordinances.

The North Carolina Administrative Code Section .0600 titled "Selective Vegetation Removal Policy" states in part:

.0601 Permit to Remove Vegetation

(f) If the application for vegetation cutting is for a site located within the corporate limits of a City or Town, local officials will be given the

opportunity to review the application if the City or Town has previously advised the Division Engineer of their desire to review such applications.

.0603 Issuance or Denial Of Permit

(b) The application will be denied by the Division Engineer if:

(10) The application is contrary to ordinances or rules and regulations enacted by the local government, within whose jurisdiction the work has been requested to be performed.

For almost a decade, the NC Outdoor Advertising Association has pursued legislative changes that would have allowed billboard operators to expand the number and type of billboards in the state, and expand the tree cutting zones around existing billboards in order to enhance their advertising potential--by limiting or eliminating state and local regulations, or by bolstering state rules to preempt local ordinances. This year was no exception. SB 183 in its original form would have allowed the conversion of nonconforming billboards to digital format by right (state preemption of local ordinances), increased existing cut zones to 400 feet on all state highways (overriding state rules calling for a 250 foot cut zone), trumped all local tree preservation ordinances, and provided for clear cutting within the vegetation removal zones (overriding NCDOT rules which provide for "picture framing" of billboards, but not clear cutting). The enacted version is somewhat scaled back but still makes some significant changes.

Application to Municipalities

After a long struggle to improve the bill from the perspective of local communities, the legislation as enacted impacts cities in the following ways:

1. **Local tree cutting ordinances and authority.** Local tree cutting ordinances remain in effect, as preemptive language was removed late in the legislative session. [Efforts to insert language bolstering the strength and controlling authority of local ordinances were quashed in the Conference Committee report.]
2. **Enforcement Actions.** Cities may no longer deny the issuance of electrical permits for billboards, if NCDOT has issued a permit (that has not been revoked) for the billboard.
3. **Digital Billboards.** Local ordinances controlling sign characteristics remain in effect, as preemptive language allowing conversion to digital format by right was removed.
4. **Vegetation Removal Cut Zones.** Cut zone control over city-system streets remains under the purview of municipalities. The existing 250 foot

cut zone on primary and interstate highways (in NCDOT rules) changes as follows:

- a. Within cities/ETJ:
 - highways other than interstates and fully controlled access roads remain at 250 feet
 - interstate highways and fully controlled access roads expand to 340 feet
- b. Outside cities/ETJ:
 - cut zone expands to 380 feet

5. **Vegetation Removal and Replanting Requirements.** Billboard owners obtained the ability to remove trees and vegetation of any age, including clear cutting vegetation in Section 4 of the bill [G.S. §136-133.1(e)]. However, they are now required to submit a beautification and replanting plan for the billboard site to NCDOT, and plant and maintain the compensatory plantings upon approval of the plan by NCDOT. NCDOT is charged with the development of replanting rules which would apply statewide, working with municipalities to determine what types of billboard vegetation removal would trigger replanting, what types of planting would be appropriate, and under what scheme. While this portion of the bill is effective September 1, 2011, NCDOT is required to adopt temporary rules to implement the new law while permanent rules are being developed. Additionally, municipalities may request that they be given 30 days to review and provide comments on vegetation removal applications submitted to NCDOT that are for sites located inside their city limits.
6. **Miscellaneous.** The new law is chock full of additional restrictions on illegal tree cutting, the ability of the NCDOT to deny permits, details regarding previously existing trees, and appeal rights of permit applicants. While all of these will impact vegetation removal efforts, they do not directly affect municipal functions or regulatory authority.

In summary, new elements were added to state statute regarding billboard regulation--some of which aided local communities and some of which damaged local control over outdoor advertising. The impending rulemaking by NCDOT concerning replanting is an important next step in maintaining local control over aesthetics in local communities.



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MEMORANDUM

To: Managers, Administrators, Clerks, Attorneys, Planners and Finance Officers

From: Karl Knapp, Director of Research and Policy Analysis

Date: August 4, 2011

Re: Reporting of Proposed Debt Issuances to the General Assembly - New Requirement
HB 595 - Reorganization/Legislative Oversight Committee (SL 2011-291)

The 2011 North Carolina General Assembly added a new step to the process that must be followed in order to get certain debt issuances approved by the Local Government Commission (LGC). The General Assembly created a new Joint Legislative Committee on Local Government, which will “review and monitor local government capital projects that are required to go before the Local Government Commission and require debt to be issued over \$1 million dollars, with the exception of schools, jails, courthouses, and administrative buildings.” The legislation does not give the new committee the authority to prevent the LGC from approving a local debt issuance. It does require that all projects fitting the criteria above must be reported to the Joint Legislative Committee Chairs, Committee Assistant, and the Fiscal Research Division at least 45 days before presentation of the project before the LGC. **Failure to meet this new reporting requirement could affect the legality of a bond issuance.**

The LGC considers the 45 day time frame to be measured from the date of the first meeting of the Commission at which the debt is to be considered. The duty to report falls on local governments, not the LGC. The legislation took effect on June 24, 2011, so the first debt issuances affected will be those considered at the September 13, 2011 meeting of the LGC. Notifications for those issuances must have been received by the Joint Legislative Committee on or before July 29, 2011.

The \$1 million reporting threshold appears to apply to the amount of debt, rather than the size of the project itself. For example, if a city plans to issue \$2 million in debt for three separate road improvement projects, none of which will cost more than \$1 million, it appears that this proposed debt issuance should be reported to the Committee.

The term "administrative buildings" is not defined in the act, but it would be prudent not to apply the exception too broadly. For example, a new fire station that also will house the fire department's administrative staff probably should be considered a fire station, not an administrative building. Similarly, it does not appear appropriate to consider a new police station to be a jail simply because it includes holding cells.

The Joint Legislative Committee has not yet been appointed, so no guidance has been issued as to what information the Committee wishes to see about a project. We recommend that until guidance is issued, the notification should provide a description of the project to be undertaken and the amount and type of debt financing for which approval from the LGC will be sought.

Because the names of the Committee chairs are not yet known, proposed debt issuances meeting the criteria should be reported to the N. C. General Assembly by sending a notification letter to each of the following addresses:

Joint Legislative Committee on Local Government
Committee Chairs and Committee Assistant
N. C. General Assembly
16 W. Jones Street
Raleigh, North Carolina 27601

Director, Fiscal Research Division
N. C. General Assembly
Suite 619
Legislative Office Building
300 N. Salisbury Street
Raleigh, North Carolina 27603

The LGC requests that a copy of your notification letter be sent to:

Vance Holloman, Secretary
Local Government Commission
N. C. Department of State Treasurer
325 N. Salisbury Street
Raleigh, North Carolina 27603-1385

MEMORANDUM

To: Managers, Administrators, Clerks, Attorneys and Utility Directors

From: W. Daniel Amburn, Legislative Specialist

Date: August 4, 2011

Re: Recent Legislation on Environmental Issues

The General Assembly considered numerous items of environmental significance within the confines of the "Long Session" of the 2011-2012 biennium. Addressing such legislation in categorical fashion, this memorandum summarizes the statutory changes and their potential impact on municipalities.

Regulatory Reform

With an override of the Governor's veto, *SB 781-Regulatory Reform Act of 2011* became law as SL 2011-398. The act is both lengthy and complex, including provisions that no state environmental rule can be adopted if it is stricter than its federal counterpart, with certain exceptions. [Similar provisions, known as the "Hardison Amendments" after their principal sponsor, had been adopted by the General Assembly in the 1970s and repealed in 1991.]

The act's other restrictions on rulemaking and state agencies include:

- 1) Agencies may not seek to implement or enforce guidance, policies or interpretations that would meet the definition of a rule, unless adopted through rulemaking.
- 2) Agencies can only adopt rules that are expressly authorized by federal or state law and that are necessary to serve the public interest.
- 3) Every proposed rule must have a fiscal note approved by the rulemaking body prior to notice of the rulemaking and fiscal notes are subject to public notice and comment.
- 4) Agencies must review their rules annually and flag duplicative, burdensome, and inconsistent rules – these must be repealed.
- 5) Agencies must examine at least two alternatives to every rule and explain why they were discarded when noticing the proposed rule.

- 6) Administrative law judges will serve as the final decision-makers in settling disputes with agencies, with appeals directly to superior court.

This law applies to all permanent rules that are adopted on or after October 1, 2011, regardless of when the rulemaking process began. Note that regulatory reform provisions adopted earlier in the session in SB 22 and as part of the budget bill were repealed by this act.

Water Issues

Local Regulation of Private Wells. *SB 676–Clarify Water & Well Rights/Private Property (SL 2011-255)* prohibits county health departments from delaying or refusing to issue permits for the construction, repair or operation of private drinking water wells that are otherwise in compliance with statutory requirements and administrative rules. The act specifies that a construction or repair permit for a private well cannot be denied on the basis of a local government policy that discourages or prohibits the drilling of new wells. Note that the original bill would also have removed municipal authority to mandate connection to public water systems; however, that language was removed and no statutory changes were made to the mandatory connection authority in G.S. 160A-317. The legislation raises some questions of interpretation that are as yet unanswered. A review of local policies regarding private wells, cross-connection control, and related matters is recommended, in consultation with your municipal attorney. This law became effective on June 23, 2011.

Water Supply Development. *HB 609–Promote Water Supply Development/Efficiency (SL 2011-374)* is a combination of provisions originally proposed in HB 609, HB 586 and HB 787. The first edition of HB 787 contained numerical per capita residential usage water efficiency goals, which had potentially severe financial implications for water systems. The numerical goals were removed from the legislation; however, local water supply plans must now include a plan for the long-term reduction of per capita demand for potable water. In order to be eligible for state water infrastructure funds from the Drinking Water State Revolving Fund, the Drinking Water Reserve or any other grant or loan funds allocated by the General Assembly, water systems must now have a consumer education program that emphasizes the importance of water conservation and includes information on measures that residential customers may implement to reduce water consumption. The incorporation of a plan for the long term reduction in demand for potable water will also be required for bond approval for water systems. The water efficiency portion of the act becomes effective October 1, 2011. The act also contains provisions that seek to expand the state's role in assisting local governments with developing new reservoirs and other water supply resources. These other provisions became law on June 27, 2011.

Interbasin Transfer. *HB 643-Exempt CCPCUA from IBT Requirements (SL 2011-298)* provides that no interbasin certification will be required for a transfer of water from one river basin to another to supplement groundwater supplies for the fifteen counties in the Central Coastal Plain Capacity Use Area. It also directs the Environmental Review Commission to make recommendations on how the state can better coordinate policies on interbasin transfer, capacity use areas, and other water supply laws. This law became effective on June 24, 2011.

Reclaimed Water/Reuse Water. Effective April 20, 2011, *HB 268-Reclaimed Water Rules/Storm Debris Cleanup (SL 2011-48)* included use of reclaimed water for irrigation at nurseries among the activities that are "deemed permitted" and made more flexible the requirements regarding storage and irrigation of reclaimed water as part of a conjunctive use system. Section 12 of *HB 119-Amend Environmental Laws 2011 (SL 2011-394)* directs the Environmental Management Commission to adopt rules establishing standards for gray water systems and facilitating their permitting.

Cisterns and Rain Barrels. Under Section 12 of *HB 119-Amend Environmental Laws 2011 (SL 2011-394)*, municipalities are authorized to regulate cistern and rain barrel installation and maintenance for the purpose of protecting the public health and safety and for the purpose of preventing them from becoming a public nuisance. However, no ordinance may prohibit or have the effect of prohibiting the installation or maintenance of such systems to collect water for irrigation purposes. The provision was effective July 1, 2011.

Public Water Supply Wells. DENR may now grant a variance from the minimum horizontal separation distances for public water supply wells if: (1) the well supplies water to a non-community water system or supplies water to a business or institution, such as a school, that has become a non-community water system through an increase in the number of people served by that well; (2) it is impracticable (feasibility and cost) for the public water supply system to comply with the minimum horizontal separation; (3) there is no reasonable alternative source of drinking water available to the system; (4) the granting of the variance will not result in an unreasonable risk to public health. These variances will require that the non-community public water supply well is at least 25 feet from a building, mobile home, or other permanent structure that is not used to house animals. Additional requirements are separations of at least 50 feet from surface waters and at least 100 feet from animal houses, feedlots or cultivated areas where chemicals are applied. Section 16.1 of *HB 119-Amend Environmental Laws 2011 (SL 2011-394)*, effective July 1, 2011.

Water Quality

Mitigation Credits. *SB 425-Ecosystem Enhancement Program Changes (SL 2011-343)* requires most local governments to purchase mitigation credits from private mitigation

banks instead of accessing the Ecosystem Enhancement Program's in-lieu fee program. It does so by changing the definition of "government entity" with respect to the EEP, effectively excluding local governments from using the program in mitigation activities when a private option is available. The federal government, the state, and any state agency can continue to access the EEP as a first option. Cities and towns with mitigation banking instruments in place before July 1, 2011 will still be able to use them as a primary resource. This law became effective on June 27, 2011. DENR has updated its implementation document, available online at:

http://portal.ncdenr.org/c/document_library/get_file?uuid=bd80ad4e-2a18-414f-aa79-01b71c001e7a&groupid=60329

Jordan Lake. The Jordan Lake rules were modified in Section 14 of *HB 119-Amend Environmental Laws 2011 (SL 2011-394)*. Wastewater treatment plants now receive a two year extension for compliance with nitrogen limits--to 2018--as long as the discharger has received an authorization for construction, installation, or alteration of the treatment works for compliance by December 31, 2016.

Riparian Buffers. Riparian buffer rules in the Neuse River Basin and the Tar-Pamlico River Basin were modified to address development of single-family homes on selected "existing lots" in Section 17 of *HB 119-Amend Environmental Laws 2011 (SL 2011-394)*. Defined as lots of two acres or less in size and having been platted prior to August 1, 2000, existing lots where construction of a single-family residence is precluded by the buffer rules may encroach upon the buffer if all of the following conditions are met: (1) the residence is set back the maximum feasible distance from the normal high-water level or normal water level, whichever is applicable; (2) the residence is set back a minimum of 30 feet landward of the normal high-water or normal water level, whichever is applicable; (3) stormwater generated by new impervious surface within the buffer is treated and diffuse flow of stormwater is maintained through the buffer; and (4) if the residence will be served by an on-site wastewater system, no part of the septic tank or drainfield may encroach into the riparian buffer. DENR is to study the application and implementation of the Neuse and Tar-Pamlico Buffer Rules in depth and report its findings to the Environmental Management Commission by February 1, 2012.

Coastal

Terminal Groins. *SB 110-Permit Terminal Groins (SL 2011-387)* authorizes the Coastal Resources Commission to permit the construction of up to four terminal groin structures along the coast of North Carolina. To be permitted, the CRC must find that structures or infrastructure are imminently threatened by erosion and nonstructural approaches are impractical; the groin will be accompanied by a concurrent beach fill project; construction and maintenance of the terminal groin will not have significant adverse impacts to private property or public recreational beaches; there is an adequate

inlet management plan; and the project complies with the CRC's guidelines except to the extent modified by the act. No state funds may be spent for terminal groin related activities unless specifically appropriated by the General Assembly, nor may special obligation bonds, nonvoted general obligation bonds, or installment purchase contracts be used to finance the groins. This law became effective June 28, 2011.

Solid Waste

Storm Debris. Storm debris issues were addressed in *HB 268-Reclaimed Water Rules/Storm Debris Cleanup (SL 2011-48)*. The act allowed the disposal, temporary storage and burning of debris associated with the severe weather that occurred on April 16, 2011. These storm-related activities were allowed through June 1, 2011.

Mercury Recycling in Public Buildings. Language clarifying the definition of "state funds" was included in Section 5 of *HB 119-Amend Environmental Laws 2011 (SL 2011-394)*. Beginning July 1, 2011, municipalities using state funds for the construction or operation of public buildings must establish a program for the collection and recycling of all spent fluorescent bulbs and thermostats containing mercury that are generated in its public buildings. Use of state funds, for purposes of this requirement, is now defined as receiving grant funding from the state for the construction or operation of a public building.

Compost Facilities. Under Section 7 of *HB 119-Amend Environmental Laws 2011 (SL 2011-394)*, Type I Solid Waste Compost Facilities are exempted from water quality permitting requirements, unless required by federal law. The provision was effective July 1, 2011. The Division of Water Quality has received an informal opinion from the state Attorney General's Office reflecting their interpretation that "stormwater discharge from a composting facility during the compost manufacturing process could be considered process wastewater and should be permitted under an NPDES wastewater permit." Both municipalities and trade groups have indicated fundamental disagreement with this opinion. Further action on this issue is likely.

Remediation of Contaminated Sites

Industrial Remediation. *HB 45-Accelerate Cleanup of Industrial Properties (SL 2011 - 186)* significantly changes the process for remediation of contaminated industrial sites by authorizing responsible parties to present a site-specific cleanup plan based on the risk posed to health or the environment. Sites that qualify for such remediation are those that have been primarily used for manufacturing or other industrial activities for the production of a commercial product and for which contaminants have not migrated off the property. The act does not apply to properties subject to programs regarding leaking underground storage tanks, dry-cleaning solvents, or pre-1983 landfills. Those utilizing the program will pay a fee based on the size of the site to be remediated. In

order to participate in the program, individuals must submit an investigation report and remediation plan with site-specific remediation standards for DENR's approval. In developing standards, the current and probable future use of groundwater is to be identified and protected. Additional requirements include notice to local governments having taxing or land use jurisdiction over the proposed site and notice to all surrounding landowners. DENR will both conduct the program and track the sites receiving the site-specific remediation. This law became effective on June 20, 2011.

MEMORANDUM

To: Managers, Administrators, Clerks and Attorneys

From: John M. Phelps, II, Senior Assistant General Counsel
Hartwell Wright, Human Resources Consultant

Date: August 4, 2011

Re: E-Verify Requirement for Local Governments

During the 2011 session, the General Assembly enacted legislation requiring certain employers, including local governments, to verify their new employees' authorization to work in the United States, using the E-Verify system.

New requirement effective October 1. *HB 36 – Employers and Local Gov't Must Use E-Verify (SL 2011-263)* enacted new G.S. 160A-169.1 entitled "Municipality verification of employee work authorization." The legislation requires municipalities to use E-Verify and is effective October 1, 2011. A corresponding provision in the act places the same requirements upon counties and is codified at G.S. 153A-99.1.

New 160A-169.1(a) states that "each municipality shall register and participate in E-Verify to verify the work authorization of new employees hired to work in the United States." The new section defines E-Verify and states that its provisions are to be enforced without regard to race, religion, gender, ethnicity, or national origin. The requirement applies only to new employees of the municipality and not to existing employees.

Unlike earlier versions of the bill, HB 36 as enacted does not require a contractor to register and participate in E-Verify in order to work with local governments. Contractors may be obligated to participate in the system if they are covered as private employers under the provisions discussed below, but there is no requirement that a local government verify its contractors' participation.

What is E-Verify? E-Verify is an Internet-based system that is operated by the Department of Homeland Security in partnership with the Social Security Administration. There is no charge to employers to use the system. It allows an employer to determine the eligibility of an employee to work in the United States using

information reported on the employee's Form I-9 "Employment Eligibility Verification." E-Verify does not replace the requirement to complete and retain the Form I-9. E-Verify may not be used before an employee is hired and it may not be used to verify current employees unless the employer has been awarded a federal contract on or after September 8, 2009 that contains the Federal Acquisition Regulation E-Verify clause.

Participation in E-Verify. In order to enroll in E-Verify, an employer should visit the enrollment website at <https://e-verify.uscis.gov/enroll/>. Before successfully enrolling in the system, an employer must agree to the terms of a Memorandum of Understanding (MOU) that is electronically signed by the employer and the Department of Homeland Security. The MOU sets out features of the system and the E-Verify program and enumerates specific responsibilities of the Department of Homeland Security, the Social Security Administration and the employer.

Provisions for Private Employers. HB 36 also enacted a new G.S. Chapter 64, Article 2 entitled "Verification of Work Authorization." This article requires private employers, after hiring an employee, to verify the work authorization of the employee through E-Verify. It provides that any person with a good faith belief that an employer is violating its requirements may file a complaint with the Commissioner of Labor. Details regarding investigation of the complaint, actions to be taken and consequences of violations are set out. This article does not apply to state agencies, counties, municipalities, or other governmental bodies. It is effective on October 1, 2012 for employers with 500 or more employees; on January 1, 2013 for employers with 100 or more but fewer than 500 employees; and on July 1, 2013 for employers with 25 or more but fewer than 100 employees.

Additional resources. The website of the E-Verify system, www.uscis.gov/E-Verify, contains a great deal of helpful information. Items accessible through it include a User Manual for Employers, a Quick Reference Guide for E-Verify Enrollment, a copy of the MOU, a Question and Answer section and many other materials. Additionally, the UNC School of Government has published Immigration Law Bulletin No. 3/July 2011 entitled *What Does the 2011 E-Verify Legislation Mean for Local Governments and Employers?* This bulletin was written by Sejal Zota and may be accessed at <http://sogpubs.unc.edu/electronicversions/pdfs/ilb03.pdf>.

MEMORANDUM

To: Managers, Administrators, Clerks and Attorneys

From: John M. Phelps, II, Senior Assistant General Counsel

Date: August 4, 2011

Re: 2011 Firearms Legislation

The 2011 General Assembly considered a number of bills that concern the rights of individuals to own, possess, or carry firearms. One of those bills, *HB 650 - Amend Various Gun Laws/Castle Doctrine (SL 2011-268)*, contains several provisions of interest to local governments. Those provisions are the focus of this memo. Other items of general interest found in the bill are also summarized below. A short summary of a city's authority to regulate firearms as it will exist after the effective date of HB 650 is also included at the end of the memo. The effective date for the act is December 1, 2011.

I. Limitation on local government authority to post prohibitions on carrying of concealed weapons

Current law. The intent of the General Assembly to prescribe a uniform system for regulating the carrying of concealed handguns is specified in G.S. 14-415.23 [statewide uniformity of concealed handgun regulation]. To insure that uniformity, it further provides that local governments are prohibited from enacting ordinances and other rules concerning regulation of carrying concealed handguns. It has, however, authorized units of local government to adopt ordinances to permit the posting of a prohibition against carrying concealed handguns, in accordance with G.S. 14-415.11(c) (discussed below) on local government buildings, their appurtenant premises, and parks.

"Parks" deleted from posting authority. Under G.S. 14-415.23 as amended by HB 650, a unit of local government may adopt an ordinance to permit the posting of a prohibition against carrying a concealed handgun, in accordance with G.S. 14-415.11(c), on local government buildings and their appurtenant premises. This language deletes "parks" from the list of places where the posting may occur.

"Recreational facilities" now included in posting authority. The amended statute then provides that a unit of local government may adopt an ordinance to prohibit, by

posting, the carrying of a concealed handgun on municipal and county recreational facilities that are specifically identified by the unit of local government. The statute defines the term "recreational facilities" to include only the following: a playground, an athletic field, a swimming pool, and an athletic facility. Consequently, a local government may not post a prohibition for park property in general, but can post in areas of parks that include a playground, swimming pool, or athletic fields or facilities.

Exception for storage of handgun. The amendments to G.S. 14-415.23 also provide that when a local government adopts a prohibition ordinance with regard to recreational facilities, the concealed handgun permittee may, nonetheless, secure the handgun in a locked vehicle within the trunk, glove box, or other enclosed compartment within or on the vehicle.

II. Additional exceptions authorizing persons to carry concealed weapons

Current law. G.S. 14-269 [carrying concealed weapons] sets forth the general prohibition that it is unlawful for any person willfully and intentionally to carry concealed about his or her person any pistol or gun except in specified circumstances, such as when on the person's own premises or when the person has obtained a permit to carry a concealed handgun. Additionally, it provides a listing of groups of persons to whom the prohibition does not apply. Prior to the enactment of HB 650, the listing contained five groups.

New exceptions. As rewritten, there are now three additional groups of persons to whom the prohibition on carrying concealed handguns does not apply. Those groups are:

- Any person who is a district attorney, an assistant district attorney, or an investigator employed by the office of a district attorney [district attorney personnel] who has a concealed handgun permit; provided that such person shall not carry a concealed weapon at any time while in a courtroom or while consuming alcohol or an unlawful controlled substance.
- Any person who is a qualified retired law enforcement officer as defined in G.S. 14-415.10 [definitions applicable to concealed handgun statutes], is a holder of a concealed handgun permit, and is certified by the North Carolina Criminal Justice Education and Training Standards Commission.
- Detention personnel or correctional officers employed by the state or a unit of local government who park a vehicle in a space that is authorized for their use in the course of their duties may transport a firearm to the parking space and store

that firearm in the vehicle parked in the parking space, provided that the firearm is secured.

III. Modifications to scope of concealed handgun permits

Current Law. Under G.S. 14-415.11, any person who has a permit to do so may carry a concealed handgun unless otherwise specifically prohibited by law. Subsection (c) of the statute lists (with one new exception discussed below) areas where a person, despite having a permit, may not carry a concealed handgun. Included on that list are places where a notice has been posted indicating that carrying a concealed handgun there is prohibited. It is through this statute that the authority of a local government to post concealed handgun prohibitions (as authorized in G.S. 14-415.23) is implemented.

Additional locations where concealed handguns may be carried. HB 650 adds several subsections to G.S. 14-415.11 clarifying several locations where concealed handguns may be carried. A person who has a concealed handgun permit may carry the concealed handgun on the grounds or waters of a park within the State Parks System. The legislation also allows a person to carry any firearm openly, or to carry a concealed handgun with a permit at any state-owned rest area, at any state-owned rest stop along the highways, and at any state-owned hunting and fishing reservation.

Expanded permit scope for District Attorneys. An amendment was made to the G.S. 14-415.11(c) list of areas where concealed handgun permittees may not carry concealed handguns, providing that the subsection does not apply to those individuals described in G.S. 14-415.27. G.S. 14-415.27, also enacted as a part of HB 650, authorizes any district attorney personnel who have a concealed handgun permit to carry a concealed handgun in the areas listed in G.S. 14-415.11(c) unless otherwise prohibited by federal law. This means that in areas where a local government posts a prohibition on carrying concealed weapons, the prohibition will not apply to district attorney personnel.

IV. Other significant provisions of HB 650

Among the other provisions of HB 650, several new sections have been enacted that concern a person's use of defensive force. New G.S. 14-51.2 provides that the lawful occupant of a home, motor vehicle, or workplace may use deadly force against an intruder under circumstances described therein and provides that a person using such force is generally immune from civil or criminal liability. The person using the force does not have a duty to retreat from the intruder.

The bill also amends G.S. 14-409 [machine guns and other like weapons] to allow a person to possess or own such weapons under state law if the person possess or owns

the weapon in compliance with federal law. A similar amendment was made to G.S. 14-288.8 [weapons of mass destruction].

V. Summary of city authority to regulate firearms

Concealed firearms. Upon the effective date of HB 650, local governments may adopt ordinances to permit the posting of a prohibition against carrying concealed handguns on local government buildings, their appurtenant premises and on recreational facilities. After these postings, individuals may not carry a concealed weapon upon the properties named unless one or more of the exceptions described above apply.

Non-concealed firearms. G.S. 14-409.40 provides that the regulation of firearms is an issue of general, statewide concern and that the entire field of regulation of firearms is preempted from regulation by local governments except as provided in that section. Subsection (f) of that section states that nothing in the section prohibits municipalities from application of their authority under (among several statutes listed) G.S.160A-189 [firearms], G.S. 14-269 [carrying concealed weapons discussed above], 14-415.11 [scope of concealed handgun permits discussed above], and G.S. 14-415.23 [posting authority discussed above]. G.S. 160A-189 authorizes a city by ordinance to regulate, restrict, or prohibit the discharge of firearms at any time or place within the city except when used in defense of person or property or pursuant to the lawful directions of law enforcement officers. It further provides that a city may, by ordinance, regulate the display of firearms on the streets, sidewalks, alleys, or other public property. Under this authority, cities may still, for example, prohibit the discharge of firearms within the city limits and may prohibit a person from possessing or carrying a non-concealed firearm on streets and other public property.

MEMORANDUM

To: Managers, Administrators, Clerks, Attorneys, and Planners

From: Paul A. Meyer, Chief Legislative Counsel

Date: August 4, 2011

Re: Significant Land Use Changes

The 2011 General Assembly passed a number of bills affecting local land use laws and authority: (1) use of development moratoria; (2) award of attorneys' fees for acting outside of authority; (3) zoning statute of limitations; and (4) removal of municipal land use authority over land used for bona fide farm purposes in the extraterritorial jurisdiction. This memorandum attempts to explain how these changes impact cities and towns.

Development Moratoria

HB 332 - Clarify Development Moratoria Authority (S.L. 2011-286). As a resolution to a long-standing debate with the NC Homebuilders' Association concerning the alleged abuse of authority by local governments in imposing moratoria on development approvals, this new law eliminates local authority to enact a moratorium in order to develop and adopt new or amended plans as to residential uses. In its original form, the bill totally eliminated the use of temporary moratoria under G.S. 160A-381(e) for the purpose of "developing and adopting new or amended plans or ordinances," which is the primary reason cities would enact a temporary moratorium. Cities frequently need a "time out" in order to formulate and adopt new or amended plans and ordinances when faced with an unforeseen development type, or development of a scale not previously envisioned. By carving out "residential uses," cities can continue to enact development moratoria as to commercial or industrial uses and to address infrastructure issues. The act was effective June 24, 2011.

Attorneys' Fees

HB 687 - Atty Fees/City or County Action Outside of Auth. (S.L. 2011-299). Representative of the perceptions regarding municipal authority that were articulated throughout the 2011 Long Session of the General Assembly, this legislation penalizes a municipality

that "acts outside the scope of its legal authority" by allowing judges to award reasonable attorneys' fees to a plaintiff who successfully challenges the municipality's action. Furthermore, the new law removes the court's discretion by requiring the judge to award attorneys' fees (apparently whatever the attorney wants to charge, with no limitation of reasonableness) to successful plaintiffs if the action of the city is also determined to be an "abuse of its discretion." The introduction and support of the bill presumed that municipal officials were, in many cases, strident and activist regulators.

The new law introduces the concept of "abuse of discretion" in a new context. The term "abuse of discretion" will likely be defined only when the first Court of Appeals decision is rendered. How does "acting outside the scope of its legal authority" compare to "abuse of its discretion?" In order to abuse one's discretion, is it not assumed that some legal authority existed from which the municipal official obtained discretion to act? If that is the case, then how could actions be an "abuse of discretion" if a judge determines the same action was done "outside of legal authority?"

While this new law most certainly affects all aspects of city administration, we expect it to be especially problematic in the administration of land use/zoning decisions. In the land use context, increased rigidity in administration could be the result. It will no doubt have a chilling effect on the ability of local officials to interpret local ordinances or state law, or exercise discretion to the benefit of an individual, if that interpretation could generate litigation from a third party alleging the city acted outside of its legal authority. Certain industries (night clubs, sexually oriented businesses) will most certainly look to the new law as a way to subsidize their lawsuits against local government regulatory actions. The act is effective October 1, 2011, and applies to claims for relief that are brought or defended on or after that date.

Statute of Limitations

HB 806 - Zoning Statute of Limitations/Ag District Change (S.L. 2011-384). This new law changes the statutes of limitations and repose in zoning-related challenges, and alters the standing of parties in such actions. The bill was introduced at the behest of the NC Homebuilders' Association and greatly aids developers and homebuilders alike.

Previously there was a two-month statute of limitations for all types of zoning challenges. Under the new law, G.S. 1-54.1 has been amended to specify that the two-month limitation only applies to actions contesting the validity of any ordinance adopting or amending a zoning map or approving a special use, conditional use, or conditional zoning district rezoning request. The time runs from the adoption of the ordinance or amendment.

Furthermore, both the county (G.S. 153A-348) and city (G.S. 160A-364.1) statutes of limitation have been changed to make it significantly easier for development interests to

challenge the validity of zoning or unified development ordinances, by allowing up to one year to bring an action challenging the ordinance, measured from the date upon which the party first has standing to challenge the ordinance, not the date upon which the ordinance was adopted. This has the potential to leave ordinances open to challenge for an indefinite period of time, since a party might not obtain standing until the person purchases property subject to the ordinance sometime in the future. [Such parties may not assert a procedural deficiency in the adoption of the ordinance as the basis for challenging its validity, unless raised within three years of the adoption of the ordinance.]

Additionally, parties challenging zoning enforcement actions or appeals of enforcement actions are permitted to raise the invalidity of the ordinance as a defense, and are not barred by the statutes of limitation or repose from doing so. [These parties may not assert a procedural deficiency in the adoption of the ordinance as the basis for challenging its invalidity, unless raised within three years of the adoption of the ordinance.]

This act became effective July 1, 2011 but does not apply to litigation pending on that date.

Farms Exempt from ETJ

HB 168 - Farms Exempt from City Annexation and ETJ (S.L. 2011-363). In response to a push by agricultural interests, asserting that they should not be subject to government controls, this new law significantly restricts the ability of city governments to plan for and create balanced, compatible growth patterns in and around municipalities. The bill does two significant things: (1) eliminates future involuntary annexations of property used for bona fide farm purposes by requiring written consent to be annexed [please see the League's *Annexation* memo for more discussion on this]; and (2) removes municipal land use authority over properties used for bona fide farm purposes in the ETJ.

"Bona fide farm purposes" are very broadly defined in G.S. 153-340(b)(2):

Except as provided in G.S. 106-743.4 for farms that are subject to a conservation agreement under G.S. 106-743.2, bona fide farm purposes include the production and activities relating or incidental to the production of crops, fruits, vegetables, ornamental and flowering plants, dairy, livestock, poultry, and all other forms of agriculture as defined in G.S. 106-581.1. For purposes of this subdivision, the production of a nonfarm product that the Department of Agriculture and Consumer Services recognizes as a 'Goodness Grows in North Carolina' product that is produced on a farm subject to a conservation agreement under G.S. 106-743.2 is a bona fide farm purpose.

In other words, virtually any agriculturally-related practice intended for or incidental to production can qualify property as a bona fide farm purpose. Bona fide farm purpose encompasses all use value farms, and likely includes agri-tourism activities, among others. The potential for abuse and fraud in this area is significant, given the broad definition. Already, cases exist in which land owners who use their land in ways incompatible to their neighbors are claiming they are not subject to zoning based on a bona fide farm use.

Because it will be difficult for a city to determine which properties are being used for a bona fide farm purpose, the new law requires owners of these properties to submit one of the following to the city: (a) farm sales tax exemption certificate issued by the Department of Revenue; (b) copy of the property tax listing showing that the property is eligible for participation in the present use value program pursuant to G.S. 105-277.3; (c) copy of the farm owner's or operator's Schedule F from the most recent federal income tax return; (d) forest management plan; or (e) Farm Identification Number issued by the U.S. Department of Agriculture Farm Service Agency.

While bona fide farm property that is located in the geographic area of a municipal ETJ is probably not removed from the boundaries of the ETJ, it is no longer subject to city regulations that otherwise would apply in the ETJ, including zoning, subdivision control, building codes and enforcement, community development, sedimentation and erosion control, floodway control, open space, and historic property regulation. These properties likely will become subject to whatever land use regulations the county has and is authorized to enforce. [Note, however, that counties are already prohibited from applying zoning codes to bona fide farm properties under G.S. 153A-340(b), except for certain large swine farms.] Should the property cease to be used for bona fide farm purposes, the property immediately becomes subject to the exercise of the municipal ETJ.

The new law defines "property" to mean a single tract of property or an identifiable portion of a single tract. Thus, there may be circumstances in which a portion of a tract in the ETJ that is used for bona fide farm purposes would not be subject to city regulation, while the portion used for other purposes would be.

Bona fide farm properties that are currently within city limits (rather than in the ETJ) will remain a part of the city and subject to its regulations. Previously annexed use value farms will continue to receive deferred application of the municipal property tax and continue to be subject to municipal land use controls.

The act became effective on June 27, 2011.

MEMORANDUM

To: Managers, Administrators, Clerks and Attorneys

From: Kimberly S. Hibbard, General Counsel

Date: August 4, 2011

Re: 2011 Amendments to the Public Records Act

Legislation enacted in the 2011 session makes two changes to the public records law that may be of interest to municipalities. Please be aware of these changes and adjust your procedures accordingly.

911 Transcripts

SB 98 (Session Law 2011-321) - 911 Call Transcripts carves out a limited exception that is intended to help protect the identity of complaining witnesses on 911 calls. G.S. 132-1.4(c)(4) generally makes the contents of 911 and other emergency telephone calls a public record, with an exception for certain information (such as name, address and telephone number) that could reveal the identity of the caller, victim or witness.

Law enforcement agencies expressed concern that a caller's voice could allow him or her to be identified, and callers would therefore fear retaliation and be deterred from making emergency calls. An amendment to the statute expands the exception to include contents that reveal the "natural voice," and allows the law enforcement agency to release either a written transcript of the call or a reproduction with the voice altered. The original recording is to be provided under process for evidence in any court proceedings.

This legislation was effective when it became law on June 27, 2011.

Action needed: We recommend that you review this change with your law enforcement agency and determine if policy changes are needed to address the use of voice-altered recordings or transcripts.

Email Lists

SB 182 (Session Law 2011-54) - Statewide Email Subscription Lists converts a local act into legislation that is applicable to local governments statewide. New G.S. 132-1.13 creates a partial exception to the public records law with regard to email subscriber lists maintained by a local government. In recent years, such lists have become a common method for municipalities to distribute a wide range of information by email to those who subscribe, including city council meeting and agenda notices, updates on recreational programs, announcements regarding city services, newsletters, emergency declarations and more. Municipalities found themselves in the awkward position of being required to share the email addresses gathered for the lists under the public records law, then bearing the brunt of citizen anger when subscriber in-boxes started to fill with advertisements, surveys and other unsolicited bulk email. Some cities saw a mass exodus from their subscriber lists as a result.

The General Assembly appears to have struck a balance between the desire to promote openness and the potential deleterious effects of spam. G.S. 132-1.13 specifies that an electronic list of subscribers maintained by a local government is open for public inspection. The local government may choose to make the list available for inspection in either printed or electronic format, or both. However, the unit of government is not required to provide a copy of the list. Since many businesses and organizations request copies of such lists electronically for ease in creating their own bulk email lists, the change should cut down considerably on use of the lists for advertising and other spam purposes.

The act also restricts the local government's use of the subscriber email list. It may only be used for the purpose for which the person subscribed, to notify subscribers of a public health or safety emergency, or to notify subscribers of similar lists in the event the original list is to be deleted.

The legislation was effective when it became law on April 28, 2011. Please visit the School of Government's blog at <http://sogweb.sog.unc.edu/blogs/localgovt/?p=4957> for more discussion.

Action needed: Since a municipality may provide a copy, but is not required to do so, your city may wish to adopt a policy spelling out whether--or under what circumstances--a copy will be provided, to guide staff in responding to any requests. We also recommend that you review the language of the information provided to potential electronic subscribers to alert them to the policy.

MEMORANDUM

To: Managers, Administrators, Clerks and Attorneys

From: Paul A. Meyer, Chief Legislative Counsel

Date: August 4, 2011

Re: Changes in Residential Inspection Programs

The General Assembly has passed legislation altering the laws concerning residential rental unit inspections. This memorandum attempts to explain its impact on municipalities.

Background

A number of municipalities have initiated residential rental inspections programs to combat unsanitary and unsafe living conditions and protect tenants and neighbors. Each city program has been formed to meet local regulatory goals, with differences in target, design, and function. Some are universal inspection programs, where all units are inspected prior to being occupied by a tenant. Some inspection programs are purely complaint driven. In addition, some cities have developed and are operating landlord registration programs, which are usually tied to inspection programs. These registration programs focus on improving tenant conduct by holding landlords partially accountable for tenant nuisance activities, criminal activities, noise violations, etc.

In response to local efforts to improve rental housing conditions and tenant conduct via what they perceived as "overly invasive inspections programs, landlord registration programs, and their related fees," the NC Apartment Association and NC Realtors' Association pursued legislation to preempt local autonomy, in order to clamp down on municipal regulatory programs. *SB 683 - Residential Inspections (S.L. 2011-281)* was the result.

Application to Municipalities

A. Inspections Programs

The new law attempts to preempt city residential real estate inspections by amending G.S. 160A-424. The old statute broadly authorizes city inspectors to make periodic

inspections for “unsafe, unsanitary, or otherwise hazardous and unlawful conditions in structures.” The new law limits periodic inspection programs to situations in which there is “reasonable cause” to believe unsafe, unsanitary, or otherwise hazardous or unlawful conditions may exist in a structure. “Reasonable cause” includes the following situations: (a) the landlord or owner has more than two violations of housing ordinances or codes within a 12-month period (once triggered, this appears to allow periodic inspections of all properties owned by the given landlord or owner); (b) there is a complaint of substandard conditions, or a request for inspection; (c) the inspections department has actual knowledge of unsafe condition; or (d) violations of local ordinances are visible from the structure’s exterior.

Additionally, new authority to conduct periodic inspection programs, separate and apart from “reasonable cause” inspection programs, is provided in the new G.S. 160A-424(b). Cities may now conduct periodic inspection programs as part of a “targeted effort within a geographic area that has been designated by the city council,” as long as the city does not discriminate in its selection of areas or housing types to be targeted, and provides notice and opportunities for public input in developing the periodic inspections area. There is no definition for what is meant by “discrimination,” but presumably it refers to equal protection issues in delineating an area subject to periodic inspections.

B. Landlord Registration Programs; Landlord Permitting; Landlord Fees

The second part of the new law places restrictions on landlord registration programs and limits when fees can be assessed to landlords for violations of local ordinances.

A small number of cities operate universal landlord registration programs, which previously required landlords to register their residential rental units with the city in order to hold the property out for rent. Cities with such programs in place and which charge registration fees for all residential rental properties as of June 1, 2011 were grandfathered into the new law, under a limited fee schedule. Future universal landlord registration programs are now prohibited, but limited residential rental registration programs appear to be allowed in the future, under certain criteria.

Cities may charge “residential rental property registration” fees on properties with more than two violations in a 12-month period, or properties identified in the top 10% of properties with “crime or disorder problems as set forth in a local ordinance.” (This certainly suggests that G.S. 160A-424(c) allows residential rental property registration programs, although not expressly). Furthermore, cities may require property owners or managers controlling any property with more than three violations in a 12-month

period, or property identified in the top 10% of properties with “crime or disorder problems as set forth in a local ordinance” to obtain permission or a permit from the city to lease the property. While not completely clear, it appears that the total of residential registration fees, combining universal registration program fees (if any) and violation-oriented registration fees (if any), may not exceed the cost of operating the residential rental registration program.

With regard to limitations on fees under the new law, a question has arisen as to whether cities may apply privilege license taxes to support landlord registration programs and rental inspection programs. G.S. 160A-424(c) in pertinent part says: “In no event may a city do any of the following: (iii) except as provided in subsection (d) of this section, levy a special fee or tax on residential rental property that is not also levied against other commercial and residential properties.” Subsection (d) authorizes fees to be assessed against properties with two or more violations within the previous two months. To this author, privilege license taxes assessed to owners of both commercial and residential rental properties would be acceptable under this provision, but not if the privilege license tax was applied only to owners of residential rental properties.

Additional Commentary

While the aim of the bill appears to be directed at periodic inspection programs of local governments, there is a question whether G.S. 160A-424 (and its county counterpart G.S. 153A-364) cover all residential inspection programs statewide. Certainly, inspection programs operated by housing authorities or other entities beyond city or county inspection departments remain unaffected. Additionally, local city or county residential rental inspection program ordinances organized under different enabling authority might also be unaffected. For example, cities may wish to explore with their attorneys whether rental inspection programs established pursuant to G.S. Chapter 160A, Article 19, Part 6 (Minimum Housing Standards), rather than under the statutes amended by the act in Part 5 (Building Inspections), remain viable. The details of local programs vary, so please contact your municipal attorney should you have questions regarding the legal authority and structure of your local rental inspections program.