ARTICLE 4

The Police Power

by A. Fleming Bell, II

THE TERM *POLICE POWER* was used by United States Chief Justice John Marshall as early as 1827[1] to describe the sovereign powers retained by the states when they delegated some of their authority to the federal government under the U.S. Constitution. This retained, or residual, authority of each state government consists of its power to regulate the conduct and affairs of those who are in some way governed by the state. As explained by Marshall's successor, Chief Justice Taney,

> But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a State passes a quarantine law, or a law to punish offences, or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same powers; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion. [citation omitted] It is by virtue of this power that it legislates; and its authority to make regulations of commerce is as absolute as its power to pass health laws, except in so far as it has been restricted by the constitution of the United States.[2]

To call a state's retained authority its "police power" may be somewhat confusing at first glance. As Chief Justice Taney points out, we are not speaking here simply about the power of the police officer on the corner, although that person is certainly involved in enforcing the laws of the state. Rather, the police power comprises all of the various aspects of sovereignty, including subjects as diverse as raising and spending money, and specifying rules for voting, for the receipt of government benefits, and for the use of public and private property.

1. Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 443 (1827). In several other cases decided prior to *Brown*, the Supreme Court also speaks of the "police" authority of the states.

2. License Cases, 46 U.S. (5 How.) 504, 583 (1846).

ISBN 978-1-56011-501-4. This article was last updated in 2006.

While this sovereign power is comprehensive, it does have its limits, found in higher laws. State statutes and administrative regulations must respect the rights guaranteed to the people by the state and federal constitutions, such as the rights enumerated in Article I of North Carolina's constitution, those found in the Bill of Rights (Amendments 1 to 10 of the U.S. Constitution), and the rights to equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the federal constitution. Legislative enactments and administrative rules must also be consistent with the state constitution (see, for example, the restrictions on local legislation in N.C. CONST., art. II, § 24), with statutes adopted by Congress pursuant to its enumerated powers (see, for example, the federal Voting Rights Act of 1965, as amended, 42 U.S. Code § 1971, § 1973 *et seq.*), and with federal administrative rules that govern the carrying out of the requirements of federal statutes.

The police power of a state is typically exercised by both the state and its various political subdivisions. The way in which the power is shared varies from state to state, depending on each jurisdiction's particular constitutional and statutory provisions.

Defining the General Police Power of Cities and Counties in North Carolina

Local governments in North Carolina are creatures of the state legislature. That is, the North Carolina constitution grants the General Assembly broad authority to establish local governments essentially whenever and however it sees fit. The state constitution states that "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by [the] Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable" (N.C. CONST., art. VII, § 1). Thus, if the General Assembly wants to create a city, county, or other local governmental unit, it is free to do so. If it wishes to abolish a local government, or to merge it with another, or to impose particular obligations on it, it has almost unlimited power to do as it chooses.[3] In sum, North Carolina is not a "home rule" state, as that term is commonly understood. Its local governments exist by legislative benevolence, not by constitutional mandate.[4]

Under North Carolina's system, the extent of the power of local governing boards to adopt rules to govern the city's or county's affairs or the life of the community depends on what the General Assembly authorizes. As creatures of the state legislature, local governments may act only if they have legislative permission to do so.

Cities, counties, and local health agencies are the main types of local entities that the General Assembly has authorized to exercise a portion of the state's police power at the local level.[5] The elected governing boards of cities and counties are given broad, general delegations of authority to enact a wide variety of ordinances, or local laws, pertaining to the community's health, safety, or general welfare and the abatement of nuisances [see G.S. 153A-121(a) and 160A-174(a), respectively]. Boards of health are given narrower powers. As part of their responsibility for local health matters, these appointed bodies are authorized by the General Statutes to enact public health regulations [see G.S. 130A-39(a) to (f) and G.S. 153A-121(d)]. The regulatory powers of boards of health are discussed further in Article 41.

Determining exactly what types of ordinances and other regulations the General Assembly has authorized local governments to adopt is not always easy, however. In particular, what is included in the legislative grants of power to cities and counties that enable them to pass ordinances relating to the public health, safety, and welfare and for the

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3. As noted in the introduction to this article, the only limitations on this power are those imposed by higher law, such as the state constitution, the federal constitution, and federal statutes and administrative rules. We will consider some of these limitations briefly later in the article, as part of our discussion of the limitations imposed on the local police power by the doctrine of preemption.

4. In constitutional "home rule" states, the existence and/or powers of at least some of the state's units of local government are spelled out in the state constitution. To change such provisions, a constitutional amendment, rather than simply a legislative act, is required.

5. Some other types of local governments, such as water and sewer authorities, sanitary districts, school administrative units, and airport authorities have also been granted limited powers to adopt ordinances or rules regulating the subjects with which they deal or conduct on property that they control. This article covers primarily the general police power of cities and counties that applies more broadly in the community.

abatement of nuisances, and to local boards of health to adopt regulations that are necessary to protect and promote the public health? And what part of the regulatory authority that would otherwise exist at the local level has been withheld by the state, through a doctrine known as preemption?

Answering these basic questions about the extent of the local police power requires a rule of statutory interpretation. The nature of this rule has been the subject of much discussion and some uncertainty in North Carolina in recent decades.[6]

The first rule for interpreting the statutory powers of North Carolina's local governments was announced by the North Carolina Supreme Court over 100 years ago. Commonly called "Dillon's Rule," it sets out three principles that the courts will use in construing the powers that the creator, the legislature, has bestowed on its creatures, local governments. Under the rule, a local government has only the following powers: (1) those granted to it by the legislature in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted, and (3) those essential (that is, not simply convenient, but indispensable) to accomplishment of the unit's declared objects and purposes.[7]

Dillon's Rule was regularly applied in North Carolina in cases involving the police power and other matters until the 1970s, with sometimes unpredictable results. Many of the disputes in interpreting the rule centered on its "implied powers" provision. Not surprisingly, reasonable people could differ widely in determining what powers could be "necessarily or fairly implied" from a specific legislative grant of authority. In general, however, it is fair to say that the courts were more willing to imply the power to act when the local governmental activity in question was routine and historically unremarkable. They were more likely to require very specific enabling authority for new, unusual, or controversial activities.[8]

In 1971 and 1973 the General Assembly rewrote the main bodies of law pertaining to cities and counties respectively.[9] Both Chapter 153A and 160A of the General Statutes contain more generous standards than Dillon's Rule for interpreting legislative grants of power to local governments. In Section 4 of both chapters, we find similar language:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall be construed to include any powers that are reasonably expedient to the exercise of the power. (G.S. 153A-4)

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6. School of Government faculty members have been active participants in this exploration. *Cf.* Frayda S. Bluestein, "Do North Carolina Local Governments Need Home Rule?" *North Carolina Law Review*, vol. 84, no. 6 (2006): 1,983–2,030; Frayda S. Bluestein, "Do North Carolina Local Governments Need Home Rule?," *Popular Government*, vol. 72, no.1 (Fall 2006): 15–24; David W. Owens, "Local Government Authority to Implement Smart Growth Programs: Dillon's Rule, Legislative Reform, and the Current State of Affairs in North Carolina," *Wake Forest Law Review*, 35 (3): 671–705; and A. Fleming Bell, II, "Dillon's Rule is Dead; Long Live Dillon's Rule!" *Local Government Law Bulletin* 66 (March 15, 1995).

7. *See*, *e.g.*, Bowers v. City of High Point, 339 N.C. 413, 417, 451 S.E.2d 284, 287-88 (1994), *citing* Moody v. Transylvania County, 271 N.C. 384, 386, 156 S.E.2d 716, 717 (1967); Smith v. City of Newbern [new, New Bern], 70 N.C. 14 (1874).

8. *Cf., e.g.*, Smith v. City of Newbern [now, New Bern], 70 N.C. 14 (1874) (supreme court implies the power for the City of New Bern to construct a public market from a specific grant of authority for "appointing market places and regulating the same," Acts of 1779, ch. 25, § 13) with State v. Gulledge, 208 N.C. 204, 179 S.E. 883 (1935) [supreme court is unwilling to imply the power for the City of Charlotte to require taxicab operators to obtain liability insurance from either its charter or the general law: "We do not think that the authority 'to regulate the use of automobiles . . . or any other motor vehicle,' conferred by the charter, or the authority 'to license and regulate all vehicles operated for hire' or the 'power to make … regulations for the better government,' conferred by the general law, can justly be construed as intended by the Legislature to authorize the adoption of an ordinance of the kind here involved which establishes a public policy hitherto unknown in the general legislation of the state." 208 N.C. at 208, 179 S.E. at 885 (citations to charter and to general law omitted).] One can explain the different results by noting that cities have had markets since classical Greek and Roman times, while requiring liability insurance for the then "newfangled" automobiles was unusual—"a public policy hitherto unknown," State v. Gulledge, *id.*—in the first few decades of the twentieth century.

9. 1971 N.C. Sess. Laws ch. 698; 1973 N.C. Sess. Laws ch. 822.

> It is the policy of the General Assembly that the cities of this State should have adequate authority to exercise the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect: Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State. (G.S. 160A-4)

These statutes state a rule of construction that appears to be quite different from Dillon's Rule. They provide that Chapters 153A and 160A and local acts pertaining to cities and counties are to be broadly construed. Further, they require that grants of powers to cities and counties be construed to include other powers that are "reasonably expedient" to exercise those grants. This language should probably be viewed as significantly more expansive than the Dillon's Rule requirement that additional powers must be "necessarily or fairly implied" from the express grant of power. This interpretation seems especially likely if the statutes are construed in light of their stated purpose of providing adequate authority for cities and counties to exercise the powers conferred on them, including the power to adopt and enforce local ordinances.[10]

Interpretation is only required, however, if a statute is ambiguous. If a court finds that a statute clearly states a specific grant of power to a local government, or conversely, if it cannot find a relevant grant at all, it will honor that grant of authority or that lack of authority. Construing a broad, general grant of power, on the other hand, may require a court to resort to a rule of interpretation such as that found in G.S. 153A-4 and 160A-4.[11]

Some recent cases help to illustrate these principles. In a 1994 decision, the North Carolina Supreme Court upheld a schedule of permit fees charged by the City of Charlotte for administration of some of the municipal planning and zoning enabling laws.[12] Similarly, the North Carolina Court Appeals in a 2005 case held that the City of Laurinburg had sufficient enabling authority to operate a fiber optic system as a public enterprise.[13] In both cases, the courts used the rule of interpretation found in G.S. 160A-4 to construe in an expansive manner broadly written enabling statutes that did not precisely answer the question posed (the city planning and zoning enabling act in the Charlotte case, and the public enterprise statutes in the Laurinburg case).

In contrast, the supreme court in 1994 ruled that the City of High Point was without statutory authority to provide a particular type of retirement benefit for law enforcement officers. In reaching its decision, the court relied on the very precise and limited wording of the statute that it said applied.[14] A 1999 supreme court case from the City of Durham produced a similar result.[15] A system of fees imposed by the city as part of its storm management program was challenged, and the supreme court found that the fees went beyond what was allowed in what it found to be a very specific statutory authorization.

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10. It is somewhat unclear whether this "reasonably expedient" rule for implying powers applies only to grants of power to cities and counties under Chapters 153A and 160A and local acts (for cities, only city charters are mentioned), or whether it also includes grants of power under other statutes.

11. *See* Durham Land Owners Association v. County of Durham, 177 N.C.App. __, 630 S.E.2d 200, 203-04 (2006), *stay denied,* 360 N.C. 532, 633 S.E.2d 469 (2006), *disc. review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006), 2006 WL 1735193 (N.C.), discussed later in this section, for more discussion on these points.

12. Homebuilders Ass'n of Charlotte v. City of Charlotte 336 N.C. 37, 43-44, 442 S.E.2d 45, 49-50 (1994), *rev'g* 109 N.C. App. 327, 427 S.E.2d 160 (1993); *see also* River Birch Assoc. v. City of Raleigh, 326 N.C. 100, 107-09, 388 S.E.2d 538, 542-43 (1990).

13. BellSouth Telecommunications, Inc. v. City of Laurinburg, 168 N.C. App. 75, 83-87, 606 S.E.2d 721, 726-28 (2005), *disc. review denied*, 359 N.C. 629, 615 S.E.2d 660 (2005).

14. Bowers v. City of High Point, 339 N.C. 413, 417, 451 S.E.2d 284, 287-88 (1994), *rev'g* 110 N.C. App. 862, 431 S.E.2d 219 (1993). It is also possible to argue that the *Bowers* case, which was decided only a few months after the *Homebuilders* decision was rendered but contains no reference to *Homebuilders,* is simply an inconsistent opinion. See A. Fleming Bell, II, "Dillon's Rule is Dead; Long Live Dillon's Rule!," *Local Government Law Bulletin* 66, *op cit.*

15. Smith Chapel Baptist Church v. City of Durham, 350 N.C. 805, 811-12, 517 S.E.2d 874, 878-879 (1999), *superseding* 348

Most recently, the court of appeals examined fees that Durham County imposed on persons and companies constructing new residences.[16] The fees were to be used for school capital construction, in order to help offset the impact of this growth on the capacity of the county's schools. The plaintiffs in the case contended that Durham County could not impose the fees, because they were not authorized to do so by the General Assembly.

The court of appeals cited the earlier Charlotte, High Point, and City of Durham decisions in explaining its approach to statutory interpretation in the Durham County case. While acknowledging the importance of G.S. 153A-4 and G.S. 160A-4 as interpretative rules, it explained that they only come into play if there is some ambiguity in the statute being considered. If the meaning of the statute in question is clear, then G.S. 153A-4 or G.S. 160A-4 will not be used in the court's interpretive process.

Using these guidelines, the court of appeals examined the statutes cited by Durham County as authorizing its fees. The court found that the statutes relied on were either closely connected to specific county activities such as charging fees for permits, so that no interpretation was needed, or else authorized a general category of county actions, such as enactment of police power or zoning ordinances. In the latter cases, the court applied G.S. 153A-4, but it was unwilling to construe the statutory authorizations so broadly as to include the fees. Noting that counties are creatures of the legislature and have only those powers granted to them by the General Assembly, the court struck down Durham County's attempt to impose school impact fees.

The Implications of These Rules of Interpretation for the Police Power

As noted earlier, under North Carolina law three types of local government entities—cities, counties, and local boards of health—have been delegated substantial ordinance- or rule-making power by the General Assembly. G.S. 153A-121(a) specifies that "[a] county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances." Similarly, G.S. 160A-174(a) provides that "[a] city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."

Article 6 of G.S. Chapter 153A and Article 8 of Chapter 160A are both entitled "Delegation and Exercise of the General Police Power." In addition to the broad delegations set out above, both articles also include a number of statutes authorizing particular kinds of ordinances, despite the fact that G.S. 153A-124 and 160A-177 make it clear that the enumeration in the police power statutes or other portions of Chapters 153A 121 and 160A of specific regulatory powers is not exclusive, nor is it a limit on the general authority to adopt ordinances conferred on cities by G.S. 160A-174 and on counties by G.S. 153A-121. Some of these provisions are no doubt survivors from the days when the Dillon's Rule requirement for specific statutory authorization was at its height (see, for example, G.S. 153A-134, authorizing the regulation and licensing of businesses and trades, which dates from 1868; G.S. 160A-182, "Abuse of animals," and G.S. 160A-186, allowing the regulation of domestic animals, the first versions of which were enacted in 1917; G.S. 160A-188, "Bird Sanctuaries," which dates from 1951; and G.S.153A-136, "Regulation of Solid Wastes," which originated in 1955.)

In many of those cases in which a city or county is authorized to carry out a particular activity by more than one statute, the local government may use any of them as its authorization.[17] For example, cities and counties may make use of either their specific (G.S. 153A-133 and 160A-184) or general [G.S. 153A-121(a) and 160A-174(a)] authority to regulate noise.

N.C. 632, 502 S.E.2d 364 (1998). Other cases decided after enactment of G.S. 153A-4 and G.S. 160A-4 that find a lack of statutory authority for local government actions include Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 554, 276 S.E.2d 443, 445 (1981), *appeal after remand*, 61 N.C. App. 682, 301 S.E.2d 530, *disc. rev. denied*, 308 N.C. 675, 304 S.E. 2d 757 (1983); and Greene v. City of Winston-Salem, 287 N.C. 66, 72, 213 S.E.2d 231, 235 (1975).

16. Durham Land Owners Association v. County of Durham, 177 N.C.App. __, 630 S.E.2d 200 (2006), *stay denied,* 360 S.E.2d 532 (2006), *disc. review denied*, 360 N.C. 532, 633 S.E.2d 678 (2006).

17. This approach is explicitly sanctioned for general laws and local acts in G.S. 153A-3 and 160A-4.

On the other hand, in some cases other articles of Chapters 153A and 160A provide such detailed or different requirements for particular kinds of ordinances that it is clear that those procedures must be followed when cities and counties take the actions covered by those more specific statutes. See, for example, Article 18 of Chapter G.S. 153A and Article 19 of G.S. Chapter 160A, which deal with planning and development regulation, both of which impose detailed notice and hearing requirements on the adoption and amendment of development regulations.

Similarly, while in theory local officials can control the disposal of junked or abandoned motor vehicles through either the general police power of G.S. 153A-121(a) and G.S. 160A-174(a); a business-regulation ordinance authorized by G.S. 153A-134 or G.S. 160A-194; or a zoning ordinance, adopted in accordance with the procedures set out in G.S. Chapter 153A, Article 18 or Chapter 160A, Article 19, there are also procedures specified for such ordinances in G.S. 153A-132, 153A-132.2, G.S. 160A-303, and 160A-303.1, as appropriate. Since the legislature has provided specific rules in these statutes for junked or abandoned vehicle disposal, it is common practice for most officials to "play it safe" and follow the guidelines.

Another example of such a specific grant of authority is found in G.S. 153A-46 and 160A-76(a), which impose precise, virtually identical requirements that cities and counties are to follow whenever they adopt franchise ordinances. These statutes provide that no ordinance making a grant, renewal, extension, or amendment of any franchise may be finally adopted until it has been passed at two regular meetings of the governing board. Also, no franchise grant, renewal, extension, or amendment is to be made except by ordinance.

A franchise is a peculiar grant of authority, generally made to a private individual or entity, which is somewhat like a license and somewhat like a contract. It can be of significant economic value. Concern over giving a valuable public right to a private party is probably why the General Assembly imposes these precise rules requiring a franchise to be passed at two regular meetings of the board before it can be awarded, renewed, extended, or amended.

In conclusion, local officials should be cautious about applying too broad a rule of statutory construction as they use the general police power granted by G.S. 153A-121(a) and 160A-174(a) as their source of authority for ordinances that promote the public health, safety, or general welfare. While these statutes provide sufficient statutory authorization in many cases, the High Point, Durham, and Durham County cases show that this is not always the case. If the general police power statutes are insufficient, a local government must be able to point to some other statute that authorizes its proposed action.

Extra care is also needed if a source of statutory authority exists, but a court might be expected to conclude that the statute has a "clear meaning" that does not need interpreting under G.S. 153A-4 or G.S. 160A-4. Similarly, if the General Assembly has provided a local government with a detailed procedure for taking a particular action, those specific directions should generally be followed. While the rules of interpretation found in the statutes are very useful, in general they should primarily be applied if there is both a grant of statutory authority and some ambiguity in that grant.

Preemption of Local Ordinances

In addition to insuring that they have adequate enabling authority to enact police power ordinances, cities and counties must also make certain that the regulations they wish to impose are consistent with higher law imposed by the state and federal governments. An ordinance that is not consistent is said to be "preempted" by the higher law, and is not valid. The North Carolina Supreme Court reiterated the purpose of preemption rules in a 2002 case involving a county ordinance. " '[M]unicipal by-laws and ordinances must be in harmony with the general laws of the State, and whenever they come in conflict with the general laws, the by-laws and ordinances must give way.' "[18]

The preemption rules to which both cities and counties are subject are summarized in G.S. 160A-174(b):[19]

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18. Craig v. County of Chatham, 356 N.C. 40, 44, 565 S.E.2d 172, 175 (2002), quoting State v. Williams, 283 N.C. 550, 552, 196 S.E.2d 756, 757 (1973) [quoting Town of Washington v. Hammond, 76 N.C. 33, 36 (1877)]. According to the Chatham County court, "[t]he law of preemption is grounded in the need to avoid dual regulation." *Id*., citing State v. Williams, op cit., 283 N.C. at 554, 196 S.E.2d at 759. The same rule applies to both cities and countries. Note that the Chatham County court cites two municipal cases in support of its decision involving a county ordinance.

19. While the preemption rules are found in the city statutes, they apply equally to cities and counties. State v. Tenore, 280 N.C. 238, 185 S.E.2d 644 (1972). They are largely based on city and county case law.

(b) A city ordinance shall be consistent with the Constitution and laws of North Carolina and of the United States. An ordinance is not consistent with State or federal law when:
(1) The ordinance infringes a liberty guaranteed to the people by the State or federal Constitution;
(2) The ordinance makes unlawful an act, omission or condition which is expressly made lawful by State or federal law;
(3) The ordinance makes lawful an act, omission, or condition which is expressly made unlawful by State or federal law;
(4) The ordinance purports to regulate a subject that cities are expressly forbidden to regulate by State or federal law;
(5) The ordinance purports to regulate a field for which a State or federal statute clearly shows a legislative intent to provide a complete and integrated regulatory scheme to the exclusion of local regulation;
(6) The elements of an offense defined by a city ordinance are identical to the elements of an offense defined by State or federal law.

The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.

Some examples will show how these limitations operate. First, it is not difficult to imagine how an ordinance, if not carefully drafted, might infringe a personal liberty guaranteed by the federal or state constitution. Suppose, for example, that a city council wished to enact an ordinance prohibiting all gatherings and speeches at all times in the city's public parks. Public assembly and free speech are rights protected by both the first amendment to the U.S. Constitution, as applied to the states through the Fourteenth Amendment, and Sections 12, "Right of Assembly and Petition," and 14, "Freedom of Speech and Press," of Article I of the North Carolina State Constitution. An ordinance containing such a blanket prohibition could not stand against these constitutional guarantees.

What about an ordinance making "unlawful an act, omission or condition which is expressly made lawful by State or federal law"? The North Carolina Supreme Court considered this issue in a 1962 case in which an ice cream distributor challenged a Raleigh ordinance prohibiting the peddling of ice cream along the city's streets and sidewalks. The supreme court noted that the ice cream vendor had been issued a state license authorizing it to engage in the business of peddling (a state privilege license), and that the Raleigh ordinance "purport[ed] to prohibit a person, firm or corporation from exercising the privilege granted by the State license," since it imposed "an absolute prohibition on the peddling of ice cream in any manner along the streets or sidewalks of Raleigh." The court declared the ordinance provision invalid, reasoning that "the City of Raleigh cannot, by ordinance, prohibit conduct that is legalized and sanctioned by the General Assembly."[20]

An ordinance making lawful behavior that is made unlawful by state law presents the opposite situation. For example, state law prohibits gambling except in very limited circumstances (G.S. 14-292). Because of this restriction, a county could not enact a valid ordinance establishing a system for licensing pari-mutuel betting at horse tracks.

North Carolina's alcoholic beverage control laws provide a good example of a subject that cities and counties are, for the most part, expressly forbidden to regulate by local ordinance. The "sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina" are governed exclusively by Chapter 18B of the General Statutes, and local ordinances establishing different rules are prohibited, except as expressly provided in that chapter.[21]

For example, G.S. 18B-300(c) specifically authorizes local ordinances that regulate or prohibit the possession or consumption of malt beverages or unfortified wine or the possession of open containers on public streets in a city or a county by persons who are not occupants of motor vehicles, as well as on the city's or county's property. Cities and counties may also "regulate or prohibit the possession of malt beverages and unfortified wine on public streets, alleys,

20. Eastern Carolina Tastee-Freez, Inc. v. City of Raleigh, 256 N.C. 208, 211-12, 123 S.E.2d 632, 634-35 (1962).

21. G.S. 18B-100 provides in part: "[Chapter 18B] is intended to establish a uniform system of control over the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages in North Carolina, and to provide procedures to insure the proper administration of the ABC laws under a uniform system throughout the State. . . . Except as provided in this Chapter, local ordinances establishing different rules on the manufacture, sale, purchase, transportation, possession, consumption, or other use of alcoholic beverages, or requiring additional permits or fees, are prohibited."

or parking lots which are temporarily closed to regular traffic for special events." The same statute contains a reminder that possession or consumption of alcoholic beverages is unlawful except as authorized by the ABC law. As another example of state control, the rules for local ABC elections are specified by state law (G.S. Chapter 18B, Article 6).

Even when a state statute does not state explicitly that state law governs a subject to the exclusion of local regulation, the state regulatory scheme may be so complete and comprehensive that the legislative intent to so "occupy the field" is clear. As the North Carolina Supreme Court has explained with respect to counties, "[t]he enactment and operation of a general, statewide law does not necessarily prevent a county from regulating in the same field. However, preemption issues arise when it is shown that the legislature intended to implement statewide regulation in the area, to the exclusion of local regulation."[22]

The case just mentioned involved a police power ordinance, zoning ordinance amendments, and board of health regulations intended to regulate large-scale hog farming operations in Chatham County. The provisions were challenged by farmers and others, who asserted that comprehensive state-level swine farm laws and regulations preempted the local rules. The supreme court agreed, concluding that "North Carolina's swine farm regulations [and the applicable state statutes] are so comprehensive in scope that the General Assembly must have intended that they comprise a 'complete and integrated regulatory scheme' on a statewide basis, thus leaving no room for further local regulations"[23] such as the police power ordinance. The court also struck down the board of health regulations and the zoning amendments, although for somewhat different reasons.

The legislature's desire to achieve complete consistency between state law and local ordinances suggests the next restriction—that a local ordinance cannot prohibit exactly the same conduct that is prohibited by state law. For example, state criminal statutes precisely define several offenses involving the unlawful killing of human beings, including first and second degree murder and voluntary and involuntary manslaughter. State statutes also specify particular penalties for those convicted of each type of offense. Because human killing is made unlawful by state law, a city or county cannot adopt a valid ordinance outlawing such activity.

As explained by the supreme court, "'[a] general grant of power, such as a mere authority to make by-laws, or to make by-laws for the good government of the place, and the like, should not be held to confer authority upon the [municipal] corporation to make an ordinance punishing an act; for example, an assault and battery, which is made punishable as a criminal offense by the laws of the State.' *1 Dill. on Mun. Corp., s 302. The power conferred upon the municipal body is presumed to be in subordination to a public law regulating the same matter for the entire state, unless a clear intent to the contrary is manifest.* "[24] [emphasis added]

At the same time, both G.S. 160A-174(b) and supreme court precedent recognize that the mere fact that a state law makes something unlawful does not *necessarily preclude* enactment of a local ordinance requiring a *higher standard* "of conduct or condition." In *State v. Tenore*, a case involving a local ordinance regulating obscenity, the court noted that the last sentence of G.S. 160A-174(b) "reaffirms our conclusion in [an earlier case] that, notwithstanding the existence of a general state-wide law relating to obscene displays and publications, a city may enact an ordinance prohibiting and punishing conduct not forbidden by such state-wide law."[25] (The court struck down the ordinance in question in *Tenore*, however, holding that it forbade the *same conduct* that was forbidden by state law.[26])

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22. *See* N.C.G.S. § 160A-174(b)(5) (2001); Craig v. County of Chatham, op cit., 356 N.C. at 44, 565 S.E.2d at 175.

23. *Id*., 356 N.C. at 50, 565 S.E.2d at 179. One of the ordinances struck down by the supreme court was a zoning provision that the court of appeals had earlier upheld because, unlike the county's other ordinances, it was specifically authorized by state law. The supreme court found that the zoning ordinance was fatally flawed because it incorporated the swine ordinance that the court had found invalid.

24. State v. Langston, 88 N.C. 692 (1883), quoted in State v. Tenore, 280 N.C. 238, 245,185 S.E.2d 644, 649 (1972).

25. State v. Tenore, *op cit*., 280 N.C. at 247, 185 S.E.2d at 650.

26. *Id*., 280 N.C. at 248-49, 185 S.E.2d at 650-51. The "higher standard of conduct" argument also failed in the more recent case of Craig v. County of Chatham, 143 N.C.App. 30, 41, 545 N.C. App. 455, 461-62 (2001), *aff'd in part and rev'd in part on other grounds*, *op cit*., 356 N.C. at 54, 565 S.E.2d at 181-82, discussed earlier in this section of the article.

Adoption of Local Ordinances

County and city governing boards must follow special procedures in adopting and maintaining most police power ordinances, in keeping with the idea that ordinances are important rules regulating citizens' conduct.[27] These procedures are described in detail in Article 3. In general, some sort of super-majority vote is required to adopt a police power ordinance when it is first brought before the governing board. (See also the discussion of franchise ordinances in "The Implications of These Rules of Interpretation for the Police Power," earlier in this article.)

Enforcement of Local Ordinances

The penalties that may be imposed for violations of city and county ordinances are set out in the General Statutes (G.S. 14-4, 153A-123, and 160A-175). In general, a person who violates a municipal or county ordinance is either responsible for a noncriminal infraction penalty of up to $50, if the ordinance is one regulating the operation or parking of vehicles, or is guilty of a Class 3 misdemeanor, with a $50 fine. [The misdemeanor provision in G.S. 14-4(a) also applies to violations of ordinances of metropolitan sewerage district created under G.S. Chapter 162A, Article 5.] In the case of nonvehicle offenses, a city or county may specifically provide in the ordinance for other, different penalties as provided in G.S. 153A-123 (counties) or G.S. 160A-175 (municipalities). For example, it may raise the maximum fine to as much as $500 and provide for a civil penalty for violations of the ordinance (no specific dollar limitation is stated for civil penalties). The city or county may also specify that each day's violation is a separate offense or provide for the possibility of equitable relief in superior court (e.g., injunctions) for failure to obey the ordinance. In the case of "[a]n ordinance that makes unlawful a condition existing upon or use made of real property," the statutes authorize a court to issue an order of abatement to require the condition to be corrected as well as an injunction, so long as the proposed remedy is provided for by the ordinance. If the local government goes to court to seek an injunction and/or an order of abatement and relief is granted by the court, the violator may be held in contempt of court if the order is not obeyed.

A local government may pursue as many or as few of these remedies as it chooses and in whatever order it chooses, as long as the remedy being pursued is provided for in the ordinance. Any appropriate city or county official, as set out in the ordinance, may charge someone with a violation of a local ordinance.

There are different legal rules for criminal misdemeanors and for civil penalties, which may sometimes cause local officials to prefer one of these remedies to the other. Of course, as noted just above, both remedies may be used to remedy the same violation. They can either be pursued at the same time or sequentially.

Proving that a criminal misdemeanor has been committed requires local officials to secure the assistance of the district attorney's office to prosecute the crime, and the violation must be proved "beyond a reasonable doubt." As noted above, the maximum fine that can be levied is $500 per separate day's offense, depending on the language in the ordinance and the judge's sentencing decision. Even though the fine for a local ordinance violation is somewhat limited, the person who is convicted of the violation nevertheless has a criminal record. Some local officials therefore like to use criminal sanctions, reasoning that the threat of a criminal record may help deter ordinance violations.

The city or county attorney or an official they train may bring a civil penalty action before a magistrate for violation of an ordinance—the district attorney's office does not need to be involved. The action is one "in the nature of debt": if the person charged is convicted, he or she owes a debt to the city or county. There is no established maximum dollar amount for civil penalties, although the maximum amount that can be charged must be stated in the ordinance and an unreasonably large penalty might not be allowed by the courts. In addition, the standard of proof in civil penalty cases, like that in the civil law generally, is "by a preponderance of evidence," which is a lower burden of proof for the local government than "beyond a reasonable doubt." All of these factors (who may bring the action, the lack of a set dollar maximum on the penalty, and the evidentiary standard) may lead some local officials to prefer civil actions to criminal prosecutions.

27. City and county budgets and city annexations are also adopted by ordinance. However, the term *ordinance* has a different meaning in those contexts. Here, we are speaking only about ordinances that involve the exercise of the police power.

If the town or county has a code of ordinances, it may have a "remedies" section in the code that cross-references the various ordinances and specifies which remedies may be applied for violations of each ordinance. It is also a good practice for the code or the individual ordinances to spell out the circumstances under which warnings may be issued prior to an enforcement action being brought.

The "clear proceeds" of any money collected for an ordinance violation, whether in the form of a fine, an infraction penalty, or another type of civil penalty, go in most cases to the school systems of the county in which the local government is located, pursuant to Article IX, Section 7 of the North Carolina constitution. A recent court of appeals case explains what such a fine or penalty includes.

> [North Carolina's supreme court] has defined a penalty to be a sum collected under a "penal law[ ]," or a "law[ ] that impose[s] a monetary payment for [its] violation [where] [t]he payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party.". . .
>
> Our courts do not employ an "unduly restrictive" test to differentiate between fines and penalties: . . . The crux of the distinction lies in the *nature* of the *offense* committed, and not in the *method* employed by the municipality to collect fines for commission of the offense.
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> Thus, an assessment is a penalty or a fine if it is "imposed to deter future violations and to extract retribution from the violator" for his illegal behavior. [28]

In keeping with this distinction, North Carolina local governments may only retain the "net proceeds" of civil penalties that they impose and collect for ordinance violations in one case—if the ordinance clearly does not allow for the same behavior to be punished criminally, either as a misdemeanor under G.S. 14-4 or under some other statute. If a civil penalty is only one of the options that are available under the ordinance, the "clear proceeds" of the amounts collected go to the county's schools, even if a civil penalty is the only option being pursued in a particular situation.[29]

The rules for "clear proceeds" are spelled out in G.S. 115C-437 and 115C-452. In sum, a local government is allowed to deduct up to ten percent of the amount that it collects for an ordinance violation for its "actual costs of collection." The rest of the money it receives must be remitted to the county finance officer, who in turn determines and remits the appropriate amounts to the finance officer of each school administrative unit in the county.[30]

Finally, an ordinance of a municipality or county may only be enforced if it has been filed and indexed in the jurisdiction's ordinance book [G.S. 153A-50; 160A-79(d)]. It is presumed that filing and indexing has occurred, however, unless the defendant raises the issue. For more details, see also G.S. 160A-78 and 160A-79 (cities) and G.S. 153A-48 and 153A-49 (counties). Cities with a population of 5,000 or more are also required to have a code of ordinances, updated at least annually (G.S. 160A-77). The statutes also provide rules for the filing and cross-referencing of various types of technical ordinances [G.S. 153A-47; G.S. 160A-76(b), 160A-77]. The keeping of ordinance books and codes of ordinances is discussed in detail in Article 7.

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28. Shavitz v. City of High Point, __ N.C.App. __, 630 S.E.2d 4, 11-12 (2006), quoting Mussallam v. Mussallam, 321 N.C. 504, 509, 364 S.E.2d 364, 366-67, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 915 (1988); Cauble v. Asheville, 301 N.C. 340, 344, 271 S.E.2d 258, 260 (1980) ("Cauble II") (citations omitted), *aff'g in part and rev'g in part*, 45 N.C.App. 152, 263 S.E.2d 8 (1980) ("Cauble I"); and N.C. School Bds. Ass'n v. Moore, 359 N.C. 474, 496, 614 S.E.2d 504, 517 (2005).

29. See Cauble II, 301 N.C. 340, 344-45, 271 S.E.2d 258, 260-61(1980).

30. ". . . *The clear proceeds of all penalties and forfeitures and of all fines collected for any breach of the penal laws of the State*, as referred to in Article IX, Sec. 7 of the Constitution, *shall include the full amount* of all penalties, forfeitures or fines collected under authority conferred by the State, *diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected*. . . ." G.S. 115C-437 (emphasis added).