

A PRACTICAL GUIDE TO AVOIDING THE DEFENSE OF SOVEREIGN IMMUNITY IN CLAIMS AGAINST MUNICIPALITIES

by Carlos E. Mahoney
Glenn, Mills & Fisher, P.A.
P.O. Drawer 3865
Durham, NC 27702
919-683-2135

I. INTRODUCTION

Sovereign or governmental immunity is based on the feudal English theory that “the king could no wrong.” The doctrine protects government (state, city, county, school boards, etc.) from all liability for any tort which is committed by an employee while performing a governmental function. *Vest v. Easley*, 145 N.C. App. 70, 549 S.E.2d 568 (2001). The doctrine was originally not part of North Carolina’s common law. *Steelman v. City of New Bern*, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971). However, it was expressly recognized in 1885 by our Supreme Court in the case of *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695 (1885). Since its recognition, the doctrine of sovereign immunity has been codified and acknowledged by the General Assembly as the public policy of this State. *See e.g.*, N.C. Gen. Stat. §160A-485 (2005) (cities and towns).

Sovereign immunity can be harsh in its application. The defense is absolute, unqualified, and can only be waived in accordance with statute. *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993), *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 436 (1992)(Holding that the municipality did not waive its immunity by instituting a risk management plan under which it paid all or part of some tort claims against municipal employees), *Clayton v. Branson*, 170 N.C. App. 438, 451, 613 S.E.2d 259, 268-69, *review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005) (Holding that the execution of settlement contracts between a municipality and tort claimants did not waive the defense of governmental immunity). In those cases in which immunity exists and has not been waived, the courts are required to dismiss all claims against the municipality irrespective of the equities or fairness of the situation. *See, Blackwelder* at 324-25, 420 S.E.2d at 436 (Further holding that the municipality was not equitably estopped to raise the defense of governmental immunity because it had paid plaintiff’s property damage claim and engaged in settlement negotiations before a lawsuit was filed).

Due to the harshness of the doctrine, it is important for the practicing lawyer to be able to recognize those circumstances in which sovereign immunity either does not apply or has been waived. It is also important for the practitioner to be able to pursue alternative avenues of relief in order to avoid the immunity defense. This manuscript will provide a checklist to help you evaluate whether your client’s claim will be subject to the defense of sovereign immunity, *infra* at pp. 2-5. The manuscript will also provide a comprehensive review of the law concerning

governmental versus proprietary functions, *infra* at pp. 5-13.

II. A CHECKLIST FOR AVOIDING THE SOVEREIGN IMMUNITY DEFENSE.

Whenever you review or accept a case against a governmental entity, you need to determine whether the claim will be barred by sovereign immunity. If immunity will likely apply, then you need to consider alternative avenues of redress. The following checklist will help you analyze whether your client will be able to avoid governmental immunity, and/or its effects, if a lawsuit must be filed.

1. Was your client injured as a result of a governmental or a proprietary function?
If your client was injured or damaged while the municipality was performing a governmental function, then immunity will apply. However, if the municipality was engaged in a proprietary function or an activity subject to a common law exception, then immunity will not exist. *Infra* at pp. 5-13.
2. Has the government waived its immunity from suit?
A municipality has no power or authority to waive its immunity, except as allowed by statute. *Stephenson v. City of Raleigh*, 232 N.C. 42, 59 S.E.2d 195 (1950)(Holding that the municipality did not waive its immunity by purchasing liability insurance when the legislature had not passed a statute allowing a waiver of immunity). Presently, the following entities are authorized by statute to waive their immunity:
 - a. Cities and towns - N.C. Gen. Stat. §160A-485 (2005): By the purchase of liability insurance, participation in a local governmental risk pool under G.S. §58-23-1, *et seq.*, or the use of a funded reserve coupled with the adoption of a resolution designating the “funded reserve to be the same as the purchase of insurance under this section.” A sample resolution partially waiving the defense of governmental immunity (3 pages), and a resolution establishing a funded reserve (2 pages), is attached as an appendix to this paper
 - b. Counties - N.C. Gen. Stat. §153A-435: By the purchase of liability insurance, participation in a local governmental risk pool under G.S. §58-23-1, *et seq.*, or the use of a funded reserve coupled with the adoption of a resolution designating the “funded reserve to be the same as the purchase of insurance under this section.” A sample local governmental risk pool policy (11 pages) is attached as an appendix to this paper.
 - c. Local boards of education - N.C. Gen. Stat. §115C-42: By the purchase of liability insurance. *Mullis v. Sechrest*, 126 N.C. App. 91, 484 S.E.2d 423 (1997), *reversed on other grounds*, 347 N.C. 548, 495 S.E.2d 712 (1998) (Noting that local boards of education are not eligible by statute to

participate in local governmental risk pools).

- d. Mental health authorities - N.C. Gen. Stat. §122C-152: By the purchase of liability insurance.
- e. Community colleges - N.C. Gen. Stat. §115D-24: By the purchase of liability insurance.
- f. Sheriff, clerk of superior court, register of deeds, surveyor, coroner, county treasurer - N.C. Gen. Stat. §58-76-5: By a public official bond, provided that the surety is joined as a named defendant in the action. A sample sheriff's bond (1 page) is attached as an appendix to this paper.

NOTE: You must allege in your lawsuit that the municipality has waived its governmental immunity. Otherwise, your client has failed to state a claim against the governmental entity. *Gunter v. Anders*, 115 N.C. App. 331, 444 S.E.2d 685 (1994), *review denied*, 339 N.C. 611, 454 S.E.2d 250 (1995), *Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000)

- 3. Does the insurance policy have a self-insured retention (SIR) endorsement?
Many municipalities purchase liability policies which are subject to a self-insured retention (SIR) which will typically preserve the defense of governmental immunity, i.e. \$1,000,000 liability coverage subject to a \$100,000 SIR. However, unlike a fixed deductible, all defense costs (including attorney's fees) are applied toward the SIR so that the liability insurer's obligation to indemnify is accelerated as defense costs are incurred. For example, a municipality will have no immunity if it expends \$100,000 in defense costs on a policy with a \$100,000 SIR. *See, Kephart by Tutwiler v. Pendergraph*, 131 N.C. App. 559, 507 S.E.2d 915 (1998), *Cunningham v. Riley*, 169 N.C. App. 600, 611 S.E.2d 423 (2005). As a result, partial summary judgment on the issue of governmental immunity is rarely appropriate when a liability policy is subject to an SIR. *Kephart* at 568-70, 507 S.E.2d at 921-22, *also see, Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 464 S.E.2d 299 (1995). A sample declarations page and SIR endorsement (2 pages) are attached as an appendix to this paper.
- 4. If the claim against the municipality is barred by sovereign immunity, can you sue the tortfeasor in his or her individual capacity?
The general rule (known as "public official immunity") is that a public official sued in his personal or individual capacity has immunity from claims for mere negligence in the performance of his duties. However, a public official is not shielded from personal liability if his actions were corrupt or malicious, or if he acted outside of and beyond the scope of his duties. *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952). Police officers, fire chiefs, school principals are examples of public officials. *See, Willis v. Town of Beaufort*, 143 N.C. App. 106,

544 S.E.2d 600, *review denied*, 354 N.C. 371, 555 S.E.2d 280 (2001), *Gunter* at 67-68, 441 S.E.2d at 171.

In contrast, a public employee can be sued in his or her individual capacity for all torts, including mere negligence. Public employees include school teachers and crossing guards. *Daniel v. City of Morganton*, 125 N.C. App. 47, 479 S.E.2d 263 (1997), *Isenhour v. Hutto*, 350 N.C. 601, 517 S.E.2d 121 (1999).

NOTE: You must indicate in the caption whether the governmental employee or agent has been sued in his or her official capacity or individual capacity. You also should also plead allegations regarding the individual's capacity and indicate in the prayer for relief whether the plaintiff seeks to recover damages from employee individually or as an agent of the governmental entity. *Mullis v. Sechrest*, 347 N.C. 548, 495 S.E.2d 721 (1998). Otherwise, the courts will construe the lawsuit to be against the individual defendant in his or her official capacity, which is merely another way of pleading an action against the government. *Reid* at 172, 527 S.E.2d at 90.

5. If the claim is fully or partially barred by sovereign immunity, does your client have uninsured or underinsured motorist coverage?

Claims for uninsured or underinsured motorist coverage can be pursued if your client's motor vehicle claim against the government is either fully or partially barred by governmental immunity. *Williams v. Holsclaw*, 128 N.C. App. 205, 495 S.E.2d 166, *affirmed*, 349 N.C. 225, 504 S.E.2d 784 (1998), *North Carolina Farm Bureau Mut. Ins. Co. v. Knudsen*, 109 N.C. App. 114, 426 S.E.2d 88, *review denied*, 334 N.C. 165, 432 S.E.2d 365 (1993).

6. Has the municipality denied your client's claim and asserted sovereign immunity in violation of your client's due process and equal protection rights?

A lawsuit could be maintained against a municipality for the violation of your client's rights to substantive due process¹ and/or equal protection as a result of the denial of his or her claim for damages and the subsequent assertion of sovereign immunity. *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000), *appeal dismissed as improvidently allowed*, 355 N.C. 205, 558 S.E.2d 174 (2002), *Ripellino v. North Carolina School Boards Ass'n, Inc.*, ___ N.C. App. ___, 627 S.E.2d 225 (2006), *notice of appeal based upon dissent filed on April 6, 2006*. In

¹ The Court of Appeals recently held that a plaintiff does not have a constitutionally protected property right or entitlement to pursue a lawsuit against or to recover from a municipality which has not waived its governmental immunity. Under these circumstances, a plaintiff cannot pursue a claim against the municipality for the violation of his or her procedural due process rights. *Clayton v. Branson*, 170 N.C. App. 438, 452-54, 613 S.E.2d 259, 270-71, *review denied*, 360 N.C. 174, 625 S.E.2d 785 (2005).

order to evaluate this type of claim, you will need to obtain records of all municipal settlements through a public records request under N.C. Gen. Stat. §132-1.3. You will also need to obtain the municipality's official policy for settling or denying claims which are subject to governmental immunity. A sample policy (2 pages) is attached as an appendix to this paper.

In light of the Court of Appeals' decision in *Clayton v. Branson*, it is doubtful that a successful claim will exist in the absence of irrational behavior by the government or its use of inherently suspect criteria, such as race, gender, religion, ethnicity, or disability status. *Clayton* at 455-60, 613 S.E.2d at 271-74.

III. GOVERNMENTAL VERSUS PROPRIETARY FUNCTIONS

As noted *supra* at p. 2, in evaluating whether a case may be subject to sovereign immunity, you must first determine whether your client was injured or damaged by the government's performance of a governmental function or a proprietary one. Generally, the government has immunity for acts committed in its governmental capacity, but when it engages in proprietary activity, it becomes subject to liability in tort just like a private corporation. *Town of Grimesland v. City of Washington*, 234 N.C. 117, 123, 66 S.E.2d 794, 798 (1951); *Evans v. Housing Authority of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004). This issue must be analyzed in light of the activity that the municipal employee or agent was performing at the time of the incident giving rise to the claim. *Beach v. Town of Tarboro*, 225 N.C. 26, 33 S.E.2d 64 (1945), *Childs v. Johnson*, 155 N.C. App. 381, 573 S.E.2d 662 (2002).

Any governmental action "which is discretionary, political, legislative or public in nature and performed for the public good in behalf of the State, rather than for itself, comes within the class of governmental functions. When, however the activity is commercial or chiefly for the private advantage of the compact community, it is private or proprietary." *Millar v. Town of Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942). "Charging a substantial fee to the extent that a profit is made is strong evidence that the activity is proprietary." *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). Nevertheless, actual profit is not the test, and a municipality will not lose its immunity solely because it engaged in an activity which made a profit. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 522, 186 S.E.2d 897, 903-04 (1972) (*quoting*, *McCombs v. City of Asheboro*, 6 N.C. App. 234, 170 S.E.2d 169 (1969)).

Our Supreme Court has distinguished the two classes of activity in the following manner:

When a municipality is acting 'in behalf of the State' in promoting or protecting the health, safety, security, or general welfare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it [the governmental activity] must be for a public purpose or a public use.

So then, generally speaking the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security, or general welfare of the residents of the municipality.

Britt v. City of Wilmington, 236 N.C. 446, 450-51, 763 S.E.2d 289, 293 (1952).

A. FACTORS TO CONSIDER IN EVALUATING WHETHER A TORT WAS COMMITTED IN THE PERFORMANCE OF A GOVERNMENTAL FUNCTION OR A PROPRIETARY ONE

Some activities are clearly governmental (i.e. law enforcement work) or proprietary in nature (i.e. operation of a municipal airport for profit). There are also many activities which cannot be easily classified. While “[t]he case law defining governmental and proprietary powers as relating to municipal corporations is consistent and clearly stated in this and other jurisdictions [the] application of these flexible propositions of law to given factual situations has resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary.” *Koontz* at 528, 186 S.E.2d at 907 (1972). Typically, the resolution of this issue will depend on a case by case analysis of the facts.

In examining the facts of a particular case, our appellate courts have considered whether the governmental activity is:

1. Traditionally provided by municipal government, *Britt* at 451, 73 S.E.2d at 293, *McIver v. Smith*, 134 N.C. App. 583, 586, 518 S.E.2d 522, 525 (1999), *review dismissed as improvidently granted*, 351 N.C. 344, 525 S.E.2d 173 (2000), *Pierson v. Cumberland County Civic Center Comm’n*, 141 N.C. App. 628, 632, 540 S.E.2d 810, 813 (2000);
2. Performed also by private business, *Britt* at 451, 73 S.E.2d at 293, *Hickman by Womble v. Fuqua*, 108 N.C. App. 80, 83, 422 S.E.2d 449, 451 (1992), *review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993);
3. A public enterprise under G.S. 160A-311, *et seq.* in which the municipality sets rates for services and competes with private business, *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567, *review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991);
4. Dependent upon the continued payment of service charges, *Id.*;

5. Profitable to the municipality, *Moffitt v. Asheville*, 103 N.C. 237, 9 S.E. 695, 698 (1885);
6. Accompanied by a fee or charge which generates either incidental income, *Rich v. City of Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972), or substantial revenue to offset operational costs, *Glenn v. City of Raleigh*, 246 N.C. 469, 98 S.E.2d 913 (1957), *Koontz, supra* at p. 5;
7. Directed in part toward individuals who reside outside the territorial limits of the municipality; *Smith v. City of Winston-Salem*, 247 N.C. 349, 100 S.E.2d 835 (1957), *Koontz, supra* at p. 5;
8. Directed toward a compact segment of the community, *Carter v. City of Greensboro*, 249 N.C. 328, 106 S.E.2d 564 (1959);
9. Specifically authorized by statute,² *Evans v. Housing Auth. of the City of Raleigh*, 359 N.C. 50, 602 S.E.2d 668 (2004), *Hickman by Womble, supra* at p. 6; or,
10. Subject to an exception to the traditional rule, *infra* at p. 12-13.

B. EXAMPLES OF GOVERNMENTAL FUNCTIONS

The North Carolina courts have determined the following activities to be governmental in nature and subject to sovereign immunity:

1. Police powers

- Performing law enforcement duties, *McIlhenney v. City of Wilmington*, 127 N.C. 146, 37 S.E. 187 (1900), *Croom v. Town of Burgaw*, 259 N.C. 60, 129 S.E.2d 586 (1963), *Jones v. Kearns*, 120 N.C. App. 301, 462 S.E.2d 245, *review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995);
- Using a police car for the purpose of repairing a police radio, *Lewis v. Hunter*, 212 N.C. 504, 193 S.E. 814 (1937);
- Installing, maintaining, and timing the traffic signals at an intersection, *Hamilton v. Town of Hamlet*, 238 N.C. 741, 78 S.E.2d 770 (1953), *Rappe v. Carr*, 4 N.C. App. 497, 167 S.E.2d 48 (1969);

² However, the determination as to whether an activity is a governmental or proprietary function must be made by the judiciary, not the legislature, and a legislative declaration that an activity is governmental will not be binding upon the courts. *Rhodes v. City of Asheville*, 230 N.C. 759, 53 S.E.2d 313 (1949).

- Contributing 10% of funds to a railroad crossing improvement project which was primarily funded by a federal grant and fully completed by non-municipal employees, *Wilkerson v. Norfolk Southern Railway Co.*, 151 N.C. App. 332, 566 S.E.2d 104 (2002).
- Collecting taxes, including coins from on-street parking meters, *Wall v. City of Raleigh*, 121 N.C. App. 351, 465 S.E.2d 51 (1996)
- Collecting parking fines and late fees imposed for parking violations, *Id.*
- Erecting and maintaining a jail, *State ex rel. Hayes v. Billings*, 240 N.C. 78, 81 S.E.2d 150 (1954).

2. Fire protection

- Organizing, maintaining, and operating a fire department, *Peterson v. City of Wilmington*, 130 N.C. 76, 40 S.E. 853 (1902), *Harrington v. Town of Greenville*, 159 N.C. 632, 75 S.E. 849 (1912); *Willis v. Town of Beaufort*, *supra* at p. 3-4;
- Responding to a fire call, *Taylor v. Ashburn*, 112 N.C. App. 604, 436 S.E.2d 276 (1993), *review denied*, 336 N.C. 77, 445 S.E.2d 46 (1994);
- Extinguishing a fire, *Klassette v. Liggett Drug Co.*, 227 N.C. 353, 42 S.E.2d 411 (1947);
- Maintaining a fire hydrant for use by the fire department, *Howland v. City of Asheville*, 174 N.C. 749, 94 S.E. 524 (1917);
- Erecting and maintaining telephone and telegraph poles and lines for a police and fire alarm system, *Cathey v. City of Charlotte*, 197 N.C. 309, 148 S.E. 426 (1929).

3. Public health and welfare

- Using a fire hydrant to clean the streets, *Parks-Belk Co. v. City of Concord*, 194 N.C. 134, 138 S.E. 599 (1927);
- Maintaining a free public sewer system which causes personal injury or death,³

³ However, if the sewer system causes damage to property, a lawsuit is permissible against the municipality under the theories that the government's actions created a nuisance and constituted a taking of property, *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913), *McCombs*, but not under a theory of negligence, *Roach v. City of Lenoir*, 44 N.C. App. 608, 261 S.E.2d 299 (1980).

Metz v. City of Asheville, 150 N.C. 748, 64 S.E. 881 (1909), or constructing and operating a sewage system which causes injury while charging a fee to cover the costs of operating, managing, and repairing the system, *McCombs v. City of Asheboro*, *supra* at p. 5;

- Constructing and maintaining a public storm drain which causes injury or death, *Stone v. City of Fayetteville*, 3 N.C. App. 261, 164 S.E.2d 542 (1968);
- Unclogging private storm water drains, *Biggers v. John Hancock Mut. Life Ins. Co.*, 127 N.C. App. 199, 487 S.E.2d 829, *review denied*, 347 N.C. 395, 494 S.E.2d 405 (1997);
- Maintaining a street lighting system, *Beach v. Town of Tarboro*, *supra* at p. 5;
- Transmitting electricity for street lighting purposes only, *Steelman v. City of New Bern*, 279 N.C. 589, 184 S.E.2d 239 (1971);
- Failing to enforce a health ordinance, *Hull v. Town of Roxboro*, 142 N.C. 453, 55 S.E.351 (1906), or temporarily suspending an ordinance prohibiting the use of firecrackers within the city limits, *Hill v. Alderman of City of Charlotte*, 72 N.C. 55 (1875);
- Operating a chemical fogging machine on a street or highway for the purpose of destroying insects in the interest of public health, *Clark v. Scheld*, 253 N.C. 732, 117 S.E.2d 838 (1961), *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967);
- Operating a municipal ambulance service while charging a fee to defray the costs, *McIver v. Smith*, *supra* at p. 6;
- Performing social service duties, *Hare v. Butler*, *supra* at p. 5;
- Constructing and operating a housing authority for low or moderate income tenants under G.S. §157-1, *et seq.*, *Evans v. Housing Authority of the City of Raleigh*, *supra* at p. 7.

4. Sanitation

- Using a city truck to gather and remove garbage for a charge which covered the municipality's actual expenses, *James v. City of Charlotte*, 183 N.C. 630, 112 S.E. 423 (1922);
- Collecting, removing, and disposing of garbage within city limits, including the operation of a landfill for the purpose of disposing garbage collected within the city limits, *Koontz v. City of Winston-Salem*, 280 N.C. 513, 520-21, 186 S.E.2d

897, 903 (1972), *Reid v. Town of Madison*, 137 N.C. App. 168, 527 S.E.2d 87 (2000);

- Driving a city truck for the purpose of collecting and removing prunings from shrubbery and trees, *Stephenson v. City of Raleigh*, 232 N.C. 42, 59 S.E.2d 195 (1950);
- Maintaining and using an incinerator to burn trash and garbage within city limits, *Scales v. City of Winston-Salem*, 189 N.C. 469, 127 S.E. 543 (1925).

5. Education

- Operating a public library, *Seibold v. Kinston-Lenoir County Public Library*, 264 N.C. 360, 141 S.E.2d 519 (1965);
- Transporting by bus students to and from school, *Benton v. Board of Educ. of Cumberland County*, 201 N.C. 653, 161 S.E. 96 (1931), *Herring v. Winston-Salem/Forsyth County Board of Educ.*, 137 N.C. App. 680, 529 S.E.2d 458, *review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000);
- Operating a voluntary after-school enrichment program, *Schmidt v. Breeden*, 134 N.C. App. 248, 517 S.E.2d 171 (1999).

6. Parks and recreation

- Maintaining a park and playground, even if incidental income (less than 1% of operating costs) was generated from the operation of a kiddie-train at the park, *Rich v. City of Goldsboro*, *supra* at p. 7;
- Sponsoring a free tennis clinic as part of a municipality's parks and recreations program, *Hickman by Womble v. Fuqua*, *supra* at p. 6.

C. EXAMPLES OF PROPRIETARY FUNCTIONS

The North Carolina courts have determined the following activities to be proprietary or private in nature and therefore not subject to sovereign immunity:

1. Revenue-generating activity

- Grading streets, cleansing sewers, and maintaining a wharf from which the municipality derived a profit, *Moffitt v. City of Asheville*, 103 N.C. 237, 9 S.E. 695, 697 (1889);

- Operating a housing project for a limited class of tenants which generated substantial financial returns for the municipality under a contract with the federal government, *Carter v. City of Greensboro*, *supra* at p. 7;
- Operating a lawnmower in a public park which contained an amusement area that generated net revenue for the municipality, *Glenn v. City of Raleigh*, *supra* at p. 7;
- Accumulating methane gas at a city landfill which generated revenue and offset costs by 9.39% as a result of allowing garbage from outside the city limits to be collected and deposited at the landfill by private collectors licensed by the county, *Koontz v. City of Winston-Salem*, *supra* at pp. 9-10.

2. Public enterprise

- Operating and maintaining a municipal sewer system which charges fees to customers as a “public enterprise” under G.S. §160A-311, *et seq.*, *Pulliam v. City of Greensboro*, *supra* at p. 6, *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 562 S.E.2d 75, *review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002);
- Operating a commercial electric light plant, *Terrell v. Washington*, 158 N.C. 281, 73 S.E. 888 (1912);
- Supplying electricity for purchase by a private company, *Rice v. City of Lumberton*, 235 N.C. 227, 69 S.E.2d 543 (1952), or by individual consumers, *Dale v. City of Morganton*, 270 N.C. 567, 155 S.E.2d 136 (1967);
- Operating a commercial waterworks plant, *Woodie v. Town of North Wilkesboro*, 159 N.C. 353, 74 S.E. 924 (1912), and a municipal water works system for the sale of water for private consumption, *Foust v. City of Durham*, 239 N.C. 306, 79 S.E.2d 519 (1954), *Faw v. Town of Wilkesboro*, 253 N.C. 406, 117 S.E.2d 14 (1960) *Mosseller v. City of Asheville*, 267 N.C. 104, 147 S.E.2d 558 (1966).

3. Non-traditional activity

- Owning and maintaining a municipal golf course, *Lowe v. City of Gastonia*, 211 N.C. 564, 191 S.E. 7 (1937);
- Constructing, operating, and maintaining a municipal airport, *Rhodes v. City of Asheville*, 230 N.C. 134, 52 S.E.2d 371, *rehearing denied*, 230 N.C. 759, 53 S.E.2d 313 (1949), *Piedmont Aviation, Inc. v. Raleigh-Durham Airport*, 288 N.C. 98, 215 S.E.2d 552 (1975);
- Constructing, maintaining, and operating a public hospital, *Sides v. Cabarrus Memorial Hospital, Inc.*, 287 N.C. 14, 213 S.E.2d 297 (1975);

- Operating a municipal arena or civic center for holding exhibitions and athletic events which generate revenue, *Aaser v. City of Charlotte*, 265 N.C. 494, 497, 144 S.E.2d 610, 613 (1965), *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971);
- Leasing a municipal arena to the promoter of an athletic event while operating refreshment stands in the corridors of the building for the sale of items to the patrons of the event, *Id.*, *Pierson v. Cumberland County Civic Center Comm'n*, 141 N.C. App. 628, 540 S.E.2d 810 (2000);
- Constructing and operating an ABC store, *Waters v. Biesecker*, 60 N.C. App. 253, 289 S.E.2d 746, *affirmed*, 309 N.C. 165, 305 S.E.2d 539 (1983).

4. Private activity

- Driving a municipal vehicle for the personal use of a public official or employee, *Childs v. Johnson*, 155 N.C. App. 381, 573 S.E.2d 662 (2002).

D. EXCEPTIONS TO THE TRADITIONAL RULE

In addition, there are several exceptions to the traditional rule that municipalities have immunity for torts committed in the performance of a governmental function. These exceptions include the following:

1. Municipal streets and sidewalks

- Constructing and maintaining in a reasonably safe condition the streets and sidewalk of a municipality, *Millar v. Town of Wilson*, 222 N.C. 340, 23 S.E.2d 42 (1942)(Observing that this exception is “illogical”), *Hunt v. City of High Point*, 226 N.C. 74, 36 S.E.2d 694 (1946), *Eakes v. City of Durham*, 125 N.C. App. 551, 481 S.E.2d 403 (1997);
- Constructing and maintaining all bridges, dangerous pits, embankments, dangerous walls, and other perilous places and things very near and adjoining the municipal streets by proper railings, barriers, lighting, or other reasonably necessary signals for the protection of the public, *Hunt* at 77-78, 36 S.E.2d at 696-97, *Willis v. City of New Bern*, 191 N.C. 507, 132 S.E. 286 (1926);

2. Nuisance and Taking of Property

- Establishing and maintaining a nuisance which causes appreciable damage to the property of a private owner, *Guilford Realty and Ins. Co. v. Blythe Brothers Co.*, 260 N.C. 69, 78, 131 S.E.2d 900, 907 (1963)(Observing that this exception is based on the theory that the nuisance constitutes a taking or appropriation of property), *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913);

- Operating a sewer disposal system which causes property damage to a private owner, whether by polluted land, water, or air, *Wagner v. Town of Conover*, 200 N.C. 82, 156 S.E. 167 (1930);
- Negligently maintaining a storm drainage system which causes property damage to a private owner, *Kizer v. City of Raleigh*, 121 N.C. App. 526, 466 S.E.2d 336 (1996);
- Failing to exercise due care in the upkeep of drains and culverts built by a third party, but adopted, controlled, or managed by the municipality as part of its drainage system, thereby causing property damage, *Milner Hotels, Inc. v. City of Raleigh*, 268 N.C. 535, 151 S.E.2d 35 (1966), *modified on rehearing*, 271 N.C. 224, 155 S.E.2d 543 (1967), *Hooper v. City of Wilmington*, 42 N.C. App. 548, 257 S.E.2d 142, *review denied*, 298 N.C. 568, 261 S.E.2d 122 (1979), *Howell v. City of Lumberton*, 144 N.C. App. 695, 548 S.E.2d 835 (2001);
- Damaging private property while attempting to abate a nuisance, *Rhyne v. Town of Mount Holly*, 251 N.C. 521, 112 S.E.2d 40 (1960).

IV. CONCLUSION

The doctrine of sovereign immunity can be a confusing and complicated area of law. It can also be an unfair and inequitable doctrine. However, the legislature is unlikely to abolish the doctrine of governmental immunity and it will continue to exist during the foreseeable future. Therefore, before representing a client with a claim against the government you need to understand the intricacies of the law. By successfully avoiding the immunity defense, you can help your clients obtain just compensation when they are injured or damaged by the government.

RESOLUTION TO ADOPT A POLICY TO
WAIVE GOVERNMENTAL IMMUNITY IN
LIMITED CIRCUMSTANCES

WHEREAS, while governmental immunity serves a beneficial purpose in allowing the City and its citizens to conserve public funds which might otherwise be expended in lengthy negotiations and costly lawsuits against the City, the City also recognizes that there are claims in which it is equitable and in the public interest of the City to resolve the claims by waiving immunity as to certain categories of damages; and

WHEREAS, the North Carolina General Assembly recently amended G.S. 160A-485 by granting municipalities explicit authority to waive governmental immunity through the adoption by a city council of a resolution that deems the creation of a funded reserve to be the same as the purchase of liability insurance to pay for such claims; and

WHEREAS, adoption of such a resolution by a city council under this statute waives a city's governmental immunity only to the extent specified in the council resolution and in no event greater than funds available in the funded reserve for the payment of such claims; and

WHEREAS, on December 20, 2004, the City Council adopted such a resolution and established a funded reserve in the amount of \$500,000; now, therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DURHAM:

The City of Durham hereby adopts the following policy on the waiver of governmental immunity for claims and judgments (hereafter collectively referred to as "claims") in the range of \$.01 to \$500,000.00. The cumulative recovery limit under this policy for all claims arising from any one accident or occurrence, whether from one or multiple persons, shall not exceed \$500,000.00.

1. The City will waive its sovereign/governmental immunity and waive immunity for public officials and officers acting in their official capacity only (hereafter collectively referred to as "governmental immunity") only to the extent and in the limited circumstances described herein. This policy is not intended to alter or expand the City's liability, limit available defenses other than governmental immunity, waive governmental immunity from any and all types of claims or damages other than as explicitly included in the waivers contained in this policy, or affect any principle of law other than waiver of governmental immunity. This policy shall be strictly construed against finding a waiver of governmental immunity and any ambiguity in the interpretation or application of this policy shall be resolved in favor of a finding that no such waiver has occurred. Except as specifically provided in this policy, the City will assert governmental immunity as a complete bar and defense in all claims and under all circumstances in accordance with applicable law.

2. In claims involving personal injury and/or property damage, and subject to Sections 5 and 6, the City will waive governmental immunity for the following categories of damages, where the City determines or a court of competent jurisdiction renders a final decision: that the injury and damages were proximately caused by the negligence of the City or its officials, officers, agents or employees while acting within the scope of their authority and the course of their employment, and that no defenses other than governmental immunity apply to the claims.

- a. property damage, but only if proximately caused by the negligent operation of a motor vehicle, machinery or equipment by officers, agents or employees of the City;
- b. medical expenses, including dental and veterinary expenses;
- c. chiropractic expenses or physical therapy expenses for no more than three consecutive months during any calendar year;
- d. lost wages for time authorized out of work by physicians licensed to practice medicine in North Carolina; and
- e. out of pocket expenses, but only if proximately caused by the negligent operation of a motor vehicle, machinery or equipment by officers, agents or employees of the City, and excluding attorney's fees and excluding all other litigation-related expenses.

3. In claims involving wrongful death under G.S. 28A-18-1 et seq., and subject to Sections 5 and 6, the City will waive governmental immunity for the following categories of damages, where the City determines or a court of competent jurisdiction renders a final decision: that the wrongful death and damages were proximately caused by the negligence of the City or its officials, officers, agents or employees while acting within the scope of their authority and the course of their employment, and that no defenses other than governmental immunity apply to the claims.

- a. expenses for care, treatment and hospitalization of the decedent incident to the injury resulting in death;
- b. reasonable funeral expenses of the decedent; and
- c. the present monetary value of the decedent to the persons entitled to receive the damages recovered which shall include and is limited to compensation for the loss of the reasonably expected
 - (1) net income of the decedent; and
 - (2) services, protection, care and assistance of the decedent, whether voluntary or obligatory, to such persons.

4. For purposes of application of this policy, a decision of a court of competent jurisdiction shall not be considered as "final" until the conclusion of any appeals of such decision to the appellate courts.

5. The City expressly retains governmental immunity for claims or damages for: (a) pain and suffering, emotional distress, mental anguish, bereavement from the death of a loved

one, loss of consortium, consequential damages, and any and all other elements or categories of damages not specifically included in Sections 2 or 3 above, as applicable; (b) any portion of damages in excess of \$500,000.00 arising from any one accident or occurrence (unless and except to the extent the City has waived its immunity pursuant to G.S. 160A-485(a) independently from this policy through the purchase of liability insurance); (c) any claim that could be addressed, or for which the City may be held liable, under any worker's compensation, unemployment compensation, or similar law or insurance; and (d) any claim that is in the nature of an insurance subrogation claim.

6. In the absence of a final decision by a court of competent jurisdiction, a condition of waiver of governmental immunity is that the claimant or plaintiff executes a release of all claims against the City and its officials, officers, employees and agents. A further condition of waiver of governmental immunity is that, pursuant to G.S. 160A-485, funds remain available in the City's funded reserve for the payment of claims.

7. This policy is effective upon adoption, and applies to all claims pending on that date as well as claims that arise thereafter. The City reserves the right to modify or terminate this policy at any time, and to have any such modification or termination apply to any claim not paid or for which there has not yet been a final decision of a court of competent jurisdiction.

8. This policy is not severable. If a court of competent jurisdiction determines that any provision of this policy or the application of such provision to any person or in any circumstance is invalid or unlawful, then this policy and the waiver of governmental immunity contained in this policy shall be deemed immediately repealed in its entirety as to all claims without further action by the City Council of the City of Durham, and governmental immunity shall apply to all claims and in all circumstances whatsoever to the fullest extent permitted by law.

9. All resolutions which conflict or are inconsistent with this resolution are modified to the extent of any such conflict or inconsistency so as to conform to the provisions and standards of this resolution.

This the 20th day of December, 2004.

**APPROVED BY
CITY COUNCIL**

DEC 20 2004

D. Ann Gray
CITY CLERK

RESOLUTION TO ESTABLISH A FUNDED RESERVE
TO PAY CLAIMS WHERE GOVERNMENTAL
IMMUNITY HAS BEEN WAIVED

WHEREAS, the North Carolina General Assembly recently amended G.S. 160A-485 by granting municipalities explicit authority to waive governmental immunity through the adoption by a city council of a resolution that deems the creation of a funded reserve to be the same as the purchase of liability insurance to pay for such claims; and

WHEREAS, adoption of such a resolution by a city council under this statute waives a city's governmental immunity only to the extent specified in the council resolution and in no event greater than funds available in the designated funded reserve established for the payment of such claims; and

WHEREAS, the City Council has on this date adopted a resolution to waive governmental immunity in limited circumstances (the "Immunity Resolution"); and

WHEREAS, pursuant to G.S. 160A-485, a corresponding funded reserve should be established for the payment of such claims; now, therefore,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DURHAM:

The City of Durham hereby establishes a funded reserve (the "fund") to pay claims in which immunity has been waived in accordance with the Immunity Resolution, subject to the following provisions:

1. The initial appropriation to the fund shall be \$500,000.
2. Payments made for claims in which immunity is waived in accordance with the Immunity Resolution shall be paid only from the fund, and only to the extent of the funds available in the fund.
3. All such payments shall be subject to the terms of the Immunity Resolution. By way of illustration and not limitation, payments from this fund shall be limited to the specific categories of damages authorized by City Council in the Immunity Resolution, and shall not include other damages or expenses associated with the claims, such as attorney's fees, claims administration or legal defense costs.
4. The only claims payable from this fund shall be claims covered by the Immunity Resolution, for which immunity has been waived by the City pursuant to the Immunity Resolution. No other claims shall be paid from this fund such as, by way of illustration and not limitation, claims for workers' compensation benefits or other claims in which immunity is not available as a legal defense.

5. The balance in this fund shall be carried over at the end of each fiscal year and remain in the fund. This shall be available in addition to any other funds that City Council may appropriate in any fiscal year for the fund. The City Council shall be under no obligation to appropriate additional funds for the fund.

6. The funded reserve is created upon adoption of this resolution. The City reserves the right to modify or terminate this funded reserve at any time, and to have any such modification or termination apply to any claim not paid or for which there has not yet been a final decision of a court of competent jurisdiction.

7. This resolution shall be construed in a manner consistent with the Immunity Resolution. All resolutions which conflict or are inconsistent with this resolution are modified to the extent of any such conflict or inconsistency so as to conform to the provisions and standards of this resolution.

This the 20th day of December, 2004.

**APPROVED BY
CITY COUNCIL**

DEC 20 2004
John Gray
CITY CLERK



NORTH CAROLINA COUNTIES LIABILITY AND PROPERTY INSURANCE POOL FUND

**SECTION V
PROFESSIONAL LIABILITY: LAW ENFORCEMENT AND PUBLIC OFFICIALS
CONTRACT DECLARATIONS**

Participant:

Certificate Number:

Contract Period: From 07/01/2001 to 07/01/2002

Effective Time: 12:01 a.m., Eastern Standard Time

SCHEDULE OF COVERAGES AND LIMITS

COVERAGE	LIMIT
Law Enforcement Liability, Each Occurrence	\$ 2,000,000
Public Officials Liability, Each Wrongful Act	\$ 2,000,000
Sexual Abuse Extension: Each Occurrence and Contract Period Aggregate	\$ 2,000,000

DEDUCTIBLE

Law Enforcement, Each Occurrence	\$
Public Officials, Each Wrongful Act	\$
Sexual Abuse Extension: Each Occurrence	\$

PROFESSIONAL LIABILITY COVERAGE DOCUMENT

THIS IS AN OCCURRENCE CONTRACT.

The Fund agrees with the Participant in consideration of the payment of the contribution and in reliance upon the statements in the application and subject to the limits of liability, exclusions, conditions, and other terms of this Contract as follows:

A. Coverage Agreements.

1. Law Enforcement Employees Coverage.

The Fund will pay on behalf of the Participant or Covered Person, or both, all sums which the Participant or a Covered Person shall become legally obligated to pay as money damages because of an Occurrence which results in:

- a. Personal Injury; or
- b. Bodily Injury; or
- c. Property Damage; or
- d. Personal Injury, Bodily Injury, or Property Damage which results in emergency first aid treatment

and arising out of the performance of a Covered Person's duties to provide law enforcement or other Fund approved law enforcement activities, or both, as declared in the application.

2. Public Officials Coverage

The Fund will pay on behalf of the Participant or a Covered Person, or both, all sums which the Participant or Covered Person shall become legally obligated to pay as money damages because of any civil claim or claims brought against the Participant or a Covered Person arising out of any Wrongful Act of any Covered Person acting in his capacity as a Covered Person(s) of the Participant and caused by the Covered Person while acting in his regular course of duty.

3. Sexual Abuse Extension Agreement

We will pay damages for Personal Injury and/or Bodily Injury as a result of an Occurrence arising from sexual abuse, sexual molestation, sexual exploitation or sexual injury, which alleges that the Participant was negligent in hiring, training, and supervision practices.

For the purposes of this Sexual Abuse Extension Agreement only, the following definitions apply:

Personal Injury means bodily injury, mental injury, mental anguish, shock, sickness, disease, disability, sexual dysfunction, unlawful detention, false imprisonment, public humiliation, invasion of right of privacy, or assault and battery.

Sexual abuse means physical, mental or moral harassment or assault of a sexual nature against any person.

Coverage shall not apply:

1. on behalf of any person who personally takes part in inflicting sexual abuse, sexual molestation, sexual exploitation, or sexual injury upon another person; or
2. on behalf of any person who remains passive upon gaining knowledge of any alleged sexual abuse, sexual molestation, sexual exploitation, or sexual injury committed by an employee of

the insured.

The most we will pay for damages is limited to:

\$2,000,000 Per person sexually abused, sexually molested, sexually exploited, or sexually injured, regardless of the number of incidents involving that person. For purposes of this limit, any Wrongful Act which results from a claim under this extension is also included in this \$2,000,000 per person limit..

\$2,000,000 Aggregate per policy period.

Multiple incidents of sexual abuse, sexual molestation, sexual exploitation, or sexual injury to one person, whether consisting of one or any combination among these, shall be deemed to be one Occurrence and shall be subject to the coverage and limits in effect at the time of the first incident even if some of such incidents take place after the Contract Period.

B. Defense Costs; Charges & Expenses.

With respect to such coverage as is afforded by this Section V Professional Liability of this Contract, the Fund shall, in addition to the Limits of Liability:

1. have the right and duty to defend any action or suit seeking money damages brought against the Participant or a Covered Person alleging an Occurrence or Wrongful Act, even if such action or suit is groundless, false, or fraudulent; but, the Participant shall not admit liability for or settle any claim or incur any cost or expense without the written consent of the Fund, and the Fund shall have the right to make such investigation and conduct negotiations and enter into such settlement of any claim or suit as the Fund deems expedient.

If the Participant or a Covered Person unreasonably refuses any settlement recommended by the Fund, the Participant or the Covered Person shall thereafter at its or his own expense negotiate or defend such claim or suit independently of the Fund, and the Fund's liability shall not exceed the amount for which the claim could have been settled plus the costs and expenses incurred with the Fund's consent up to the date of such refusal; however, the Fund does not have the duty of defending an allegation of a criminal act in a criminal court.

2. pay all reasonable expenses, other than salaries of any Covered Person incurred by the Participant at the Fund's request.

C. Territory.

In Section V Professional Liability of this Contract, coverage shall apply anywhere in the world with respect to Bodily Injury, Property Damage, Personal Injury or Advertising Injury arising out of the activities of any Covered Person permanently domiciled in the United States of America though temporarily outside the United States of America, its territories and possessions, or Canada, provided the original suit for damages because of any such injury or damage is brought within the United States of America, its territories or possessions, or Canada.

D. Fund's Limit of Liability

As applicable under Section V Professional Liability, the total liability of the North Carolina Counties Liability and Property Insurance Pool Fund for any one Occurrence/Wrongful Act involving one Participant will be \$2,000,000; except where other liability and/or coverage sublimits apply; then the Fund's liability will also be limited to the applicable sub-limit.

The Fund's liability for any one Occurrence/Wrongful Act involving one Participant will be limited to \$2,000,000 regardless of the number of Covered Persons, number of claimants or claims made, or the number of covered vehicles involved whether or not covered in one or more than one capacity

under this Contract or the contract of other Fund Participants.

In no event shall coverage under any liability section of this Contract combine with any other section to increase the per Occurrence/Wrongful Act limit of liability of \$2,000,000 as set out above.

E. Deductible.

Any amount payable under this Section V Professional Liability of this Contract shall be reduced by the deductible amount stated in the Declarations Page of this Section V Professional Liability. This deductible shall apply to each Wrongful Act/Occurrence and shall be borne by the Participant. Defense costs are included within the deductible.

All claims against the Participant arising out of a series of continuous, repeated, or interrelated Wrongful Acts or Occurrences shall be considered as one Wrongful Act/Occurrence and subject to one deductible.

F. Exclusions Applicable to "Law Enforcement Employees" Coverage (Section V, A, 1).

This coverage does not apply to any claim as follows:

1. any claims, demand or cause of action brought by the Participant or a Covered Person against another Participant or a Covered Person, (including Fair Labor Standards Act allegations). This exclusion does not apply to claims arising out of allegations falling under the equal protection clause of the 14th Amendment to the U.S. Constitution.
2. any claim based upon any violation of the Employee Retirement Income Security Act of 1974 (Public Law 93-406), more commonly referred to as the Pension Reform Act of 1974, or any amendments thereto or similar provisions of any federal, state or local law or common law;
3. any claim for any obligation for which the Participant or any carrier as its insurer may be held liable under any workers compensation, unemployment compensation, disability benefits law, or under any similar law, or to any injury or money damages sustained by any paid full or part-time employee of the Participant directly or indirectly related to his employment by the Participant;
4. any claim for damages arising out of fraudulent, dishonest, or criminal behavior, including the willful violation of a penal statute or ordinance committed by or with the knowledge or consent of the Participant, and claims or injury arising out of the willful, intentional or malicious conduct of any Covered Person;
5. any claim for liability assumed by the Participant under any contract or agreement, except as assumed under Mutual Aid Agreements entered into pursuant to North Carolina law;
6. any claim for Bodily Injury or Property Damage arising out of the ownership, operation, use, loading, or unloading of any land motor vehicle designed for use principally on public highways, including any machinery or apparatus attached thereto, or any aircraft or watercraft;
7. any claim for Property Damage to:
 - a. property owned or occupied by or rented to any Covered Person or the Participant;
 - b. property used by a Covered Person or the Participant; or
 - c. property in the care, custody, or control of "Covered Persons" or the Participant or as to which the Covered Person or the Participant is for any purpose exercising physical control. This exclusion does not apply to property in custody or to property seized pursuant to judicial order or otherwise under the lawful control of a law enforcement employee;

8. any claim for the acts of any Covered Person while engaged in any form of health care or ambulance services, except for first aid as specifically defined and limited herein;
9. any claim based on or arising out of any alleged failure to provide police protection sufficient and/or adequate to prevent the happening of any Occurrence resulting in injury, Property Damage, property loss, or any consequential loss therefrom.

G. Exclusions Applicable to Public Officials Coverage (Section V, A, 2).

This coverage does not apply to any claim as follows:

1. seeking the return of any profit, advantage, gain, or remuneration to which the Participant or a Covered Person was not legally entitled; however, the Participant shall be defended under the terms of this Contract unless a judgment or final adjudication established such lack of legal entitlement;
2. brought about or contributed to by the fraudulent, dishonest, or criminal behavior of any Covered Person, however, notwithstanding the foregoing, the Participant and a Covered Person shall be protected under the terms of the Contract as to any claims upon which suit is brought against them by reason of any alleged dishonesty on their part unless a judgment or other final adjudication thereof adverse to them shall establish that acts of active and deliberate dishonesty committed by them with actual dishonest purpose and intent were material to the cause of action so adjudicated;
3. seeking relief, or redress, in any form other than money damages;
4. for Bodily Injury;
5. for loss, damage to or destruction of any tangible property, or the loss of use thereof by reason of the foregoing;
6. for Personal Injury ;
7. arising from a publication or utterance in the course of or related to advertising, broadcasting, or telecasting activities conducted by or on behalf of the Participant or Covered Person.
8. arising from inverse condemnation and/or adverse possession;
9. arising from strikes, riots, or civil commotions;
10. arising from the willful violation of any statute, ordinance, or regulation committed by or with the knowledge or consent of any Covered Person;
11. arising from:
 - a. the contamination of any environment by pollutants that are introduced at any time, anywhere, in any way; or
 - b. any Bodily Injury, Personal Injury, Property Damage, costs, or other loss or damage arising out of such contamination, including but not limited to, cleaning up, remedying, or detoxifying such contamination; or
 - c. payment of sums related to the investigation or defense of any loss, injury or damage or payment of any cost, fine or penalty or payment of any expense involving a claim or suit related to a or b above.

As used in this exclusion, the following terms will have the following meanings:

"Contamination" means any unclean or unsafe or damaging or injurious or unhealthful condition arising out of the presence of Pollutants, whether permanent or transient in any Environment.

"Environment" includes any person, any manmade object or feature, animals, crops and vegetation, land, bodies of water, underground water or water table supplies, air, and any other feature of the earth or its atmosphere, whether or not altered, developed, or cultivated, including, but not limited to any of the above, owned, controlled, or occupied by the insured.

"Pollutants" means smoke, vapors, soot, fumes, acids, sound, alkalis, chemicals, liquids, solids, gases, thermal pollutants, and all other irritants or contaminants.

12. arising from any "Covered Person's" activities in a fiduciary capacity as respects employee benefit plans;
13. arising from activities of an attorney-at-law, medical personnel, architect, engineer, or accountant, in the scope of his professional duties. The Participant and a Covered Person shall be protected however under the terms of this Contract as to any claim made against them as a public official or Employee of the Participant;
14. arising out of breach of contract except as assumed under Mutual Aid Agreements entered into pursuant to North Carolina law;
15. arising out of the operation or activities of any school or school district, hospital or health clinic, housing authority or transit authority, airports, gas and utility companies; however, this exclusion does not apply to the operation of a health clinic owned by a health department which has paid a premium to the Fund to be included as a Participant for coverage under this Contract.
16. any claims, demand or cause of action brought by the Participant or a Covered Person against another Participant or a Covered Person, including Fair Labor Standards Act allegations. This exclusion does not apply to claims arising out of allegations falling under the equal protection clause of the 14th Amendment to the U.S. Constitution.

H. Nuclear Exclusion.

This coverage does not apply:

1. To Bodily Injury or Property Damage including medical payments resulting from the Hazardous Properties of Nuclear Material, if
 - a. the Nuclear Material
 - (1) is at any Nuclear Facility owned by or operated by or on behalf of the Participant; or
 - (2) has been discharged or dispersed therefrom; or
 - b. the Nuclear Material is contained in Spent Fuel or Waste at any time possessed, handled, used, processed, stored, transported, or disposed of by or on behalf of the Participant; or
 - c. the Bodily Injury or Property Damage arises out of the furnishing by the Participant of services, materials, parts, or equipment in connection with the planning, construction, maintenance, operation, or use of any Nuclear Facility, but if such Facility is located within the United States of America, its territories or possessions, or Canada, this exclusion (c) applies only to Property Damage to such Nuclear Facility and any property there at.
2. As used in this exclusion:

"Hazardous Properties" includes radioactive, toxic, or explosive properties;

"Nuclear Material" means Source Material, Special Nuclear Material, or By-product Material;

"Source Material", "Special Nuclear Material", and "By-product Material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof;

"Spent Fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a Nuclear Reactor;

"Waste" means any waste material (1) containing By-product Material and (2) resulting from the operation by any person or organization of any Nuclear Facility included within the definition of Nuclear Facility under paragraph a or b below;

"Nuclear Facility" means:

- a. any Nuclear Reactor; or
- b. any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing Spent Fuel, or (3) handling, processing or packaging Waste; or
- c. any equipment or device used for the processing, fabricating, or alloying of Special Nuclear Material if at any time the total amount of such material in the custody of the Participant at the premises, where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235; or
- d. any structure, basin, excavation, premises, or place prepared or used for the storage or disposal of Waste, and includes the site on which any of the foregoing is located, all operations conducted on such site, and all premises used for such operations;

"Nuclear Reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material;

"Property Damage" includes all forms of radioactive contamination of property.

I. General Conditions.

1. Participant's Duties in the Event of Occurrence, Wrongful Act, Claim or Suit

- a. Upon the Participant becoming aware of any Wrongful Act/Occurrence which could reasonably be expected to be the basis of a claim or suit covered hereby, written notice shall be given by or on behalf of the Participant to the Fund or any of its authorized agents as soon as practicable, together with the fullest information obtainable.
- b. If claim is made or suit is brought against the Participant or a Covered Person, the Participant shall immediately forward to the Fund every demand, notice, summons, or other process received by the Participant or its representative.
- c. The Participant or a Covered Person shall cooperate with the Fund and, upon the Fund's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Participant because of injury or damage with respect to which coverage is afforded under this Contract; and the Participant or a Covered Person shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The Participant or a Covered Person shall not, except at its or his own cost, voluntarily make any payment,

assume any obligation, or incur any expense other than for first aid to others at the time of accident without the Fund's consent.

2. Action Against the Fund.

No action shall lie against the Fund unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Contract, or until the amount of the Participant's obligation to pay shall have been finally determined either by judgment against the Participant after actual trial or by written agreement of the Participant, the claimant, and the Fund.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Contract to the extent of the coverage afforded by this Contract. No person or organization shall have any right under this Contract to join the Fund as a party in any action against the Participant or a Covered Person to determine the Participant's or a Covered Person's liability, nor shall the Fund be impleaded by the Participant or a Covered Person or its or his legal representative. Bankruptcy or insolvency of the Participant or a Covered Person shall not relieve the Fund of any of its obligations hereunder.

3. Other Coverage.

Such coverage as is provided under this Contract shall be excess over any other valid or collectible coverage.

4. Cancellation.

This Section V Professional Liability shall be canceled as provided in the General Provisions Section of this Contract.

5. Subrogation.

In addition to the subrogation provisions of the General Provisions Section of this Contract, the following shall apply in this Section V Professional Liability.

The Fund will have no rights of subrogation against any person or entity, which is a Covered Person under this Section V Professional Liability of this Contract; or against any other person or entity, which the Participant has waived its right of subrogation against in writing before the time of loss.

J. Definitions.

1. "Advertising Injury" means an injury arising out of an offense committed during the Contract Period occurring in the course of the Named Participant's advertising activities if such injury arises out of libel, slander, defamation, violation of right of privacy, piracy, unfair competition, or infringement of copyright, title, or slogan.
2. "Bodily Injury" means bodily injury, sickness or disease sustained by a person including death as a result of an injury, sickness or disease at any time.
3. "Covered Persons" means
 - a. The Participant;
 - b. a person who is a lawfully elected or appointed official of the Participant while acting under the jurisdiction of the Participant or within the scope of his authority or apparent authority, express or implied, but only with respect to his liability while acting within the scope of his authority;

- c. any employees of the Participant while acting within the scope of their duties;
- d. a member of a commission, board, or other unit operating by and under the jurisdiction of the Participant and within apportionment of the total operating budget, and included on the application, provided that the coverage afforded shall not extend to any of the following boards, commissioners, or units unless specifically endorsed hereon: schools, airports, transit authorities, hospitals and health clinics, municipally owned gas or electric companies, housing authorities or fire stations; however, coverage does apply to the board of a health clinic owned by a health department which has paid a premium to the Fund to be included as a Participant for coverage under the contract.
- e. any person who performs a service on a volunteer basis for the Participant and under its direction and control;
- f. any person while providing services to the Participant under any mutual aid or similar agreement, or while acting as an agent for the Participant;
- g. the law enforcement department of the Participant named in the Declarations Page of this Section V (Professional Liability) of this Contract; and
- h. each individual law enforcement officer or other employee of such department as are officially employed in the law enforcement duties or control, but only in furtherance of the official pursuits of the law enforcement department or other Fund approved activities.

The coverage afforded by this Contract shall not extend to any of the following boards, commissioners, or units unless specifically endorsed hereon: schools, airports, transit authorities, hospitals and health clinics, municipally owned gas or electric companies, housing authorities or fire stations; however, coverage does apply to the board of a health clinic owned by a health department which has paid a premium to the Fund to be included as a Participant for coverage under this Contract;

- 4. "Damages" whenever used in this Contract means compensatory damages only and does not include fines or penalties.
- 5. "Employment Practice Violation (s) means any actual or alleged:
 - a. Wrongful dismissal, discharge or termination (either actual or constructive) of employment, including breach of an implied contract;
 - b. Harassment (including sexual harassment whether hostile work environment, "quid pro quo", or otherwise);
 - c. Discrimination of any type;
 - d. "Retaliation";
 - e. Employment related misrepresentation(s) either to an employee, volunteer or applicant of the Participant;
 - f. Wrongful failure to employ or promote;
 - g. Negligent evaluation or wrongful deprivation of career opportunity;
 - h. Wrongful demotion;
 - i. Defamatory or negative statements regarding an employee reference;
- 6. "Law Enforcement Employees" means persons described as Class A, Class B, and Class C, as

follows:

"Class A" means those armed employees who deal directly with the public and exercise general powers of arrest. This category includes but is not limited to the following:

- a. county sheriff and chief deputy exercising powers of arrest;
- b. an officer exercising powers of arrest; and
- c. all personnel with regular street or road duties, or both, detectives and investigators.

"Class B" means those employees, armed or unarmed, who do not deal directly with the public or only exercise limited power of arrest under the direct supervision of a certified officer; or those employees who do not exercise power of arrest and whose duties are only administrative in nature. This category includes but is not limited to the following:

- a. jailers and matrons;
- b. auxiliary or reserve officers while on duty (under the direct supervision of a certified officer) exercising arrest powers;
- c. court security;
- d. civil process officers;
- e. auxiliary or reserve officers while on duty not exercising powers of arrest;
- f. coroner; and
- g. school crossing guards, humane officers, and crime prevention officers.

"Class C" means those employees whose ordinary duties are only indirectly related to the enforcement of criminal laws. This category includes but is not limited to the following:

- a. clerical staff, fingerprinting staff, license examination staff;
- b. stenographic personnel, food service staff, photographic staff; and
- c. dispatcher staff, and staff with record keeping duties.

7. "Occurrence" means an accident, neither intended nor expected, or a happening or event or a continuous or repeated exposure to conditions which results in Personal Injury, Bodily Injury, Advertising Injury or Property Damage during the Contract Period. All personal injuries to one or more persons and/or Property Damage arising out of an accident or a happening or event or continuous or repeated exposure to conditions shall be deemed an Occurrence.
8. "Participant" means the covered political subdivisions named in the Declarations Page.
9. "Personal Injury" means injury other than Bodily Injury arising out of one or more of the following offenses:
 - a. False arrest, false imprisonment, wrongful eviction, wrongful entry, detention, malicious prosecution, invasion of rights of privacy, libel, slander, or defamation of character, publication of disparaging materials, and assault and battery;
 - b. Mental injury, mental anguish, humiliation, erroneous service of civil papers, violation of civil rights, disparagement of property and discrimination;
 - c. Advertising injury;
10. "Property Damage" except in the Nuclear Exclusion means damage or destruction to loss of property, excluding, however, damage to property owned by the Participant. Property Damage also means loss of use of property that is not physically injured.
11. "Retaliation" means a wrongful act of the Participant in response to any of the following activities:
 - a. A political affiliation;
 - b. The actual or attempted exercise by an employee of the Participant of any right that such employee has under law;

- c. The disclosure by an employee or volunteer to a superior or any outside authority of any act by the Participant which violates any rules or regulations that govern the Participant.
12. "Wrongful Act" means any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty including misfeasance, malfeasance, nonfeasance and "Employment Practices Violation(s)" by a Covered Person while acting within the scope of his professional duties or Fund approved activities.

VIP# 5212947

Bond No. 08261616

OFFICIAL BOND

MARSH
An MMC Company

AMOUNT \$ 25,000.00

JAN 16 2003

KNOW ALL MEN BY THESE PRESENTS:

That Lane Carter, as Principal (hereinafter called Principal), and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland, having its principal office in the City of Baltimore, Maryland, as Surety, (hereinafter called Surety), are held and firmly bound unto the State of North Carolina through Moore County

RECEIVED

in the penalty of Twenty-Five Thousand and No/100 Dollars (\$25,000.00), to the payment whereof, well and truly to be made and done, the Principal binds himself, his heirs, executors and administrators, and the Surety binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated this 23rd day of December, A.D. 2002, Zurich North America Surety & Financial Enterprises

THE CONDITIONS OF THE AFOREGOING OBLIGATION ARE SUCH, That, WHEREAS, the Principal was elected or appointed Sheriff

NOW, THEREFORE, if the Principal shall, during the term, beginning on the 2nd day of December, 2002, and ending the 4th day of December, 2006, well and faithfully perform all and singular the duties incumbent upon him by reason of his election or appointment as aforesaid, and honestly account for all moneys coming into his hands according to law, except as hereinafter limited, then this obligation shall be null and void; otherwise of full force and virtue.

This Bond is executed by the Surety upon the following express conditions which shall be conditions precedent to the rights of recovery hereunder;

FIRST: That regardless of the number of years this bond shall continue or be continued in force, or be renewed, and of the number of annual premiums that shall be payable or paid, the Surety shall not be liable hereunder for more in the aggregate than the above named penalty.

SECOND: That the Surety may, if it shall so elect, cancel this Bond by giving thirty (30) days notice in writing to P.O. Box 905, Carthage, NC 28327 and this Bond shall be deemed canceled at the expiration of said thirty (30) days; the Surety remaining liable, however, subject to all the terms, conditions and provisions of this Bond, for any act or acts covered by this Bond which may have been committed by the Principal up to the date of such cancellation; and the Surety shall upon surrender of this Bond and its release from all liability hereunder, refund the premium paid, less a prorata part thereof for the time this Bond shall have been in force.

THIRD: That the Surety shall not be liable hereunder for the loss of any public moneys or funds occurring through or resulting from the failure of, or default in payment by, any banks or depositories in which any public moneys or funds have been deposited, or may be deposited, by or placed to the credit, or under the control of the Principal, whether or not such banks or depositories were or may be selected or designated by the Principal or by other persons; or by reason of the allowance to, or acceptance by the Principal of any interest on said public moneys or funds, any law, decision, ordinance or statute to the contrary notwithstanding.

FOURTH: That the Surety shall not be liable for any loss or losses, resulting from the failure of the Principal to collect any taxes, licenses, levies, assessments, etc., with the collection of which he may be chargeable by reason of his election or appointment as aforesaid.

WITNESS:

Lane Carter
Principal
(SEAL)

As to Principal

Fidelity and Deposit Company of Maryland

Attest:

By Vickie L. Petrea, Attorney-in-Fact

**PUBLIC ENTITY EXCESS
LIABILITY POLICY DECLARATIONS**

Renewal of:	(ReWrite) of PXL 801068
Policy No.:	544-000003-2
Named Insured and Mailing Address:	City of Durham, NC, etal 101 City Hall Durham, NC 27701
Policy Period:	From 3/15/1999 to 1/20/2000 at 12:01 am Standard Time at your mailing address shown above

In return for the payment of the premium, and subject to all the terms of this policy, we agree with you to provide the insurance as stated in this policy.

Only a Coverage Form marked below with an "X" is part of this policy on its effective date:

Excess General Liability
 Excess Automobile *1

Defense Costs/Claims Expenses are included in the Limit:

Limit of Insurance:	Each Accident or Occurrence Limit	<u>\$ 5,000,000</u>
	Policy Aggregate Limit	<u>\$25,000,000</u>
Self-Insured Limit Retention		<u>\$ 350,000</u>
Advanced Premium		
<input checked="" type="checkbox"/> Flat	<input type="checkbox"/> Adjustable (see Premium Adjustment Endorsement)	<u>\$204,480.</u>

Endorsements attached to this Policy: FM 206.12; CA 0001; CG-0001; CG 2160; CG 2135; IL 0017; IL 0021; IL 0269; FM 117.0.15; FM 117.0.16; FM 117.0.17; FM 117.0.22; FM 117.0.25; FM 117.0.26; FM 117.0.27; FM 117.0.28; FM 117.0.29; FM 2.0.775; FM-GEN-001; FM-GEN-002.

Countersigned: John B. Coeybaud

By Sandra M. Ramsey
Authorized Representative



SELF-INSURED RETENTION ENDORSEMENT (Expenses Included in SIR)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

COMMERCIAL AUTOMOBILE COVERAGE PART.

1. In consideration of the premium charged and as a condition to the issuance and continuation of the Policy, it is agreed that the NAMED INSURED shall retain, as a self-insured retention, per occurrence and as respects combined insured damages and insured allocated costs and expenses of investigation, defense, negotiation and settlement applicable to such damages, the sum of THREE HUNDRED FIFTY THOUSAND (\$350,000.) DOLLARS. The company's limit of liability, as stated elsewhere in the Policy, shall apply solely in excess of the NAMED INSURED'S self-insured retention. Allocated costs and expenses of investigation, defense, negotiation and settlement shall not include any costs or expenses of any

A. claims management or service company of any INSURED, or

B. wages or salaries of any employee of any INSURED, or

C. operating expenses of any INSURED.

In the event that any combined insured damages and insured allocated costs and expenses, as aforementioned, exceed, per occurrence, the NAMED INSURED'S self-insured retention and involve the liability of the company, then, solely as respects each such occurrence, the company will pay, in addition to its otherwise applicable limit of liability, all supplementary payments, as defined in the Supplementary Payments Conditions of the Policy, except that the company shall not, at any time, be obligated to pay any costs or expenses of any

A. claims management or service company of any INSURED, or

B. wages or salaries of any employee of any INSURED, or

C. operating expenses of any INSURED.

3. The limit of the company's liability for all damages under all BODILY INJURY and PROPERTY DAMAGE liability coverages provided in this Policy, including damages for care and loss of services, shall not be greater than the sum of FIVE MILLION (\$5,000,000) per Occurrence and the sum of TWENTY FIVE MILLION (\$25,000,000.) in the Aggregate. Workers' Compensation is STATUTORY.

4. In the event of any occurrence which, in the opinion of any INSURED, is likely to give rise to liability under this Policy, no costs or expenses, other than for immediate first aid to others, shall be incurred by any INSURED, except at his or her own cost, peril and expense, without the written consent of the company. The NAMED INSURED shall be obligated to

A. provide an adequate defense and investigation of any action for or notice of any actual, potential or alleged damages, and

B. accept any reasonable offer or settlement within the NAMED INSURED'S self-insured retention,

and, in the event of any NAMED INSURED'S failure to comply with any part of this paragraph, the company shall not be liable for any damages or costs or expenses resulting from any such occurrence.

The company may, at its sole option, pay, as damages, costs and expenses, any part or all of the NAMED INSURED'S self-insured retention in order to effect settlement of any and all actions against any INSURED and, upon notice of any such action by the NAMED INSURED of the company having done so, the NAMED INSURED shall, within ten (10) calendar days of such notice, fully reimburse the company.

**PLAINTIFF'S
EXHIBIT**

4

RESOLUTION PROVIDING FOR THE DISPOSITION OF CLAIMS AND
AUTHORIZING THE CITY MANAGER TO DENY, COMPROMISE, OR SETTLE
CLAIMS AGAINST THE CITY, ITS OFFICERS, AND EMPLOYEES, WITHIN
CERTAIN SPECIFIED LIMITS

WHEREAS, from time to time claims are made against the City for alleged damage to property, injury to person, or deprivation of some right, and

WHEREAS, the City may have procured liability insurance to protect itself, and its officers, and employees, in certain areas of the City's municipal functions, and has also developed a risk retention program with respect to many areas of the City's municipal functions, and

WHEREAS, it is in the public interest to provide for the prompt investigation and disposition, settlement, or compromise of such claims without the delay occasioned by bringing such matters in every instance before the City Council, now, therefore

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF DURHAM:

SECTION 1. The City Manager shall designate one or more subordinate employees, or one or more properly licensed, independent professional adjusters, to receive and investigate claims made against the City of Durham, its officers, or employees. The City Manager or his designee shall determine whether any such claim arises from an accident, occurrence, or omission which is covered by existing liability insurance, and shall notify the insurance carrier in accordance with the notice requirements of the policy. If the claim is uninsured, or if the insurance policy requires the City to administer the claim, then the City Manager or his designee shall promptly investigate and process such claim in accordance with the provisions of this Resolution.

SECTION 2. The City Manager or his designee shall receive and investigate every judicial or administrative process served upon the City or upon a City officer or employee. The City Manager or his designee shall determine whether liability insurance coverage is available, or whether the claim or action is one appropriate for processing under the risk retention program. Where liability insurance coverage is available, or the claim or action is appropriate for processing under the retained risk program, the judicial or administrative process shall be forwarded promptly by the City Manager or his designee to the appropriate insurance carrier, or processed as a retained risk claim or action. A copy of every judicial or administrative process shall be forwarded to the City Attorney's office upon receipt by the City Manager or his designee. The City Attorney shall undertake or otherwise provide for the City's defense, and the City Manager or his designee shall promptly inform the City Attorney with regard to applicable insurance.

SECTION 3. The City Manager is authorized to compromise or settle any claim made against the City, or any officer or employee of the City whenever the City Manager determines:

R.p.0425

- a. that the amount of the proposed settlement or compromise is twenty-five thousand dollars (\$25,000.00) or less;
- b. that there is a legal basis for the claim asserted;
- c. that the claim of the complaining party is meritorious;
- d. that, with respect to claims against City officers or employees, the compromise or settlement of the claim by the City on behalf of the officer or employee is consistent with the policy and uniform standards of the City in such matters.

SECTION 4. The City Manager may deny any claim for good reason.

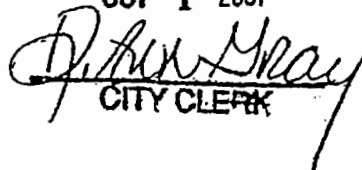
SECTION 5. The City Manager shall consult with the City Attorney as to procedures for the denial, settlement, or compromise of claims pursuant to the resolution.

SECTION 6. The City Manager shall maintain, or cause to be maintained, a record of every claim which is settled or compromised pursuant to this resolution. Such records shall be in sufficient detail to disclose the nature of the settlement, the amount and terms of the settlement, and the parties thereto. The records so maintained shall be available for public inspection in the manner provided by law. The City Manager shall make a report to the City Council on a quarterly basis concerning claims which the City Manager has settled or compromised pursuant to the resolution during the preceding ninety (90) day period.

SECTION 7. This resolution shall be effective upon passage and supersedes Resolution No. 7231 and Resolution No. 7977 and any other prior resolution of a similar nature.

APPROVED BY
CITY COUNCIL

OCT 1 2001


CITY CLERK