



n o r t h c a r o l i n a



2004 LEGAL ASPECTS

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BUSINESS CORPORATION ACT

Effective July 1, 1990, the North Carolina Business Corporation Act was adopted. The new law is based on the Model Business Corporation Act developed by the American Law Institute. This progressive new act is designed to bring North Carolina law into uniformity with the laws of other states and the standards of the current financial world.

ORGANIZATION AND POWERS

TYPES OF BUSINESS

A corporation may be organized for any lawful business or combination of business purposes.

POWERS

The corporation law gives corporations broad powers. These powers need not be recited in the articles of incorporation; they are conferred on the corporation when it is organized.

EASE OF ORGANIZATION

A corporation may be organized quickly and easily. The statute clearly sets forth the brief statements that must appear in the articles of incorporation. Generally, the corporation comes into existence as a corporation the moment its articles of incorporation are filed with the secretary of state in Raleigh. However, the effective date of any document may be delayed up to 90 days after filing,

MINIMUM CAPITAL

North Carolina does not set a minimum capital to be paid before a corporation may begin to do business.

CORPORATE NAME

The corporate name must include the words "corporation," "incorporated," "limited," "company" or an abbreviation of such words, and must be distinguishable upon the records of the secretary of state from the name of any other corporation transacting business in North Carolina.

A firm planning to incorporate may reserve with the secretary of state the exclusive right to a corporate name for 120 days. In some instances, the name may be reserved for up to 10 years, if the name was acquired through an acquisition. § 55D-23 reserved name states for a "nonrenewable 120 days."

DIRECTORS

Directors need not be shareholders or North Carolina residents. If there are nine or more directors the board of directors may serve staggered terms.

A corporation may indemnify its directors and officers against liability and litigation expenses arising out of their status as such except with regard to activities known or believed by them to be clearly in conflict with the best interests of the corporation.

The statute also gives directors and officers absolute rights to be indemnified for expenses in connection with various types of suits, whether civil or criminal, if they are wholly successful in their defense or if their conduct meets certain standards, and authorizes the corporation to purchase liability insurance for directors and officers. Moreover, corporations are permitted to amend their charters to limit or eliminate the monetary liability of directors for certain breaches of fiduciary duties.

Directors may meet anywhere they wish; no meeting is required to be held in North Carolina. Notice may be waived for any meeting. Directors may also take action by unanimous written consent without meeting.

SHARE AND SHAREHOLDERS

ISSUES OF SHARES

North Carolina corporations have statutory authority to issue any type of shares currently marketed, including non-voting shares. Once the amount of authorized capital has been specified, any shares may then be issued at the discretion of the directors. Preferred and special classes of shares may be issued in series, and the directors may be authorized to fix the terms of each series. Shares may be issued for cash, property or services performed or to be performed by the corporation.

PURCHASE OF STOCK IN PUBLIC CORPORATIONS

Purchasers of substantial blocks of stock in certain publicly held corporations may face restrictions on the voting rights of their shares unless they comply with certain conditions or receive the approval of the other shareholders.

STOCK OPTIONS

A corporation may option its stock to its own employees and to employees of its subsidiaries.

STOCK TRANSFERS

Stock transfers are governed by the Uniform Commercial Code (Article 8).

PREEMPTIVE RIGHTS AND CUMULATIVE VOTING

Generally, neither preemptive rights nor cumulative voting in the election of directors exist unless they are affirmatively granted in the articles of incorporation.

DIVIDENDS

Dividends may be paid unless the payment would render the corporation unable to pay its debts as they become due, or unless the payment would cause the corporation's total assets to be less than total liabilities plus the amount needed to satisfy preferential dissolution rights.

MEETINGS OF SHAREHOLDERS

Like directors, shareholders may meet anywhere they wish. Notice may be waived, and action taken by unanimous consent without a meeting.

AMENDING ARTICLES OF INCORPORATION

The holders of a majority of a corporation's shares (or such greater percentage as is specified in the charter) may vote to amend the charter. In certain limited circumstances, shareholders dissenting to an amendment have an appraisal right. Directors may also amend.

MERGER, SALE OF ASSETS, AND APPRAISAL RIGHTS

MERGER

North Carolina corporations may merge with other corporations, foreign or domestic, with the approval of a majority of the shareholders. A wholly owned subsidiary may be merged into its parent corporation by the board of directors; no shareholder vote of the parent corporation is required.

SALE OF ASSETS

A North Carolina corporation may sell or exchange all or substantially all of its assets in the normal course of business. If the sale is other than in the regular course of business, generally the approval of a majority of shareholders will be required.

APPRAISAL RIGHTS

Shareholders generally have appraisal rights in the event of a merger or a sale of assets other than in the regular course of business, and in the event of certain amendments to the articles of incorporation, and possibly in the event of dissolution.

FOREIGN CORPORATIONS

A foreign corporation (one organized under the law of another state) may be authorized to do business in North Carolina.

CERTIFICATE OF AUTHORITY

All foreign corporations must obtain a certificate of authority before doing business in North Carolina unless exempt from this requirement. No certificate of authority is needed if the foreign corporation acts solely to:

- a. sue or defend a suit in North Carolina;
- b. hold directors or shareholders meetings here;
- c. maintain bank accounts or borrow money here;
- d. maintain offices for transfer agents or registrars;
- e. solicit certain orders that become binding, contracts only if accepted in another state;
- f. make or invest in secured or unsecured loans in North Carolina, including the servicing of mortgages and deeds of trust and the foreclosing of property;
- g. take security or collect debts due or enforce any rights in property securing the debts;
- h. transact business in interstate commerce;
- i. conduct an isolated transaction, completed in six months and not part of a series or number of repeated transactions;
- j. merely own real or personal property; or
- k. make sales through independent contractors.

A foreign corporation may engage in any or all of the indicated activities without a certificate of authority to do business in North Carolina. However, this exemption does not protect such corporations from being sued in North Carolina with respect to these or other transactions. In addition, if an entity is not

qualified in North Carolina, it cannot be classified as a "foreign" corporation.

A foreign corporation authorized to do business in North Carolina enjoys the same rights and privileges as domestic corporations. The statute requires a foreign corporation to maintain a registered office and a registered agent. It also states the procedure by which a corporation may withdraw from the state or have its certificate of authority revoked. A foreign corporation doing business in North Carolina may not sue in North Carolina courts until it has obtained the necessary certificate of authority. This does not prevent the corporation that has not obtained a certificate from defending a suit, nor does it impair the validity of any contract or other act of the corporation.

NAME

Foreign corporations that contemplate doing business in the state at some future time may register their names with the secretary of state for a year at a time, thereby preventing other corporations from using the reserved names

PROVISIONS FOR CORPORATIONS

FILING FEES

Whenever a corporation files certain documents with the secretary of state, it must pay filing fees. The fee for filing articles of incorporation is \$125. The fee for filing an application for a certificate of authority for a foreign corporation is \$250.

REPORTS AND PAYMENTS OF FEES AND TAXES

All corporations doing business in North Carolina must file certain reports with the secretary of revenue. Failure to file required reports or to pay fees and taxes may result in suspension of the articles of incorporation or the certificate of authority by the secretary of state.

<http://www.secretary.state.nc.us/Corporations>

Securities Law (“Blue Sky Law”)

SECURITIES LAW (“BLUE SKY LAW”)

North Carolina, like other states and the federal government, has statutes designed to prevent fraud in the sale of securities. The North Carolina Securities Act is modeled after the Uniform Securities Act of 1956. It requires registration of securities that are not federally-covered securities or are not exempt or sold in exempt transactions, and imposes liability for securities transactions involving material misstatements or omissions of fact. A “covered” security is one that Federal Securities Law defines as not subject to state registration or exemption laws. The “antifraud” provisions are applicable to registered, exempt and covered securities.

EXEMPT SECURITIES

Securities that are exempt from registration include securities representing an interest in and issued by banks, federally chartered savings and loan associations or state savings and loan associations authorized to do business in North Carolina, and regulated public utilities and insurance companies authorized to do business in North Carolina. Other exempted securities include those listed on certain stock exchanges; commercial paper maturing in nine months that arises out of current transactions or the proceeds of which are to be used for current transactions; capital stock issued by a professional corporation organized pursuant to Chapter 55B of the North Carolina General Statutes; certain annuity contracts and similar securities if regulated by the North Carolina insurance commissioner; and any interest in an employees’ stock option, savings, pension, profit-sharing or similar plan.

EXEMPT TRANSACTIONS

A number of securities transactions are exempt from registration even if the securities themselves are not exempt. These include any offer or sale by the issuer to a corporation with a net worth of more than \$1 million or certain financial institutions, investment companies or securities dealers. Also exempt are private placements offered to no more than 25 people during any 12 month period. Additional limitations are imposed on this exemption for offers made under certain federal exemptions or involving limited partnership securities. The North Carolina secretary of state also has declared rules exempting under certain conditions private placements that are exempt under Rule 505 under Regulation D of the U.S.

Securities and Exchange Commission and securities issued by certain nonprofit organizations.

Preorganization certificates or subscriptions are exempt, provided:

- a. no commission or other remuneration is paid for soliciting subscribers;
- b. no public advertising or soliciting is used;
- c. the number of subscribers is not more than 10 and the number of offerees is not more than 25;
- d. no payment is made by any subscriber. Before subscriptions can be collected, however, the securities must be registered or some other exemption must be available.

In addition, offerings may be made to existing security holders if no commission or remuneration (other than a standby commission) is paid for soliciting or if notice specifying the terms of the offer is given to the secretary of state and the Secretary does not disallow the exemption. Also exempted are offers (but not sales) of a security for which registration statements have been filed under both the federal Securities Act of 1933 and the North Carolina Securities Act. Consummation of such transactions must be withheld until the registration statements have become effective.

Finally, the following transactions are excluded from the definitions of “offer” and “sale”: stock splits and certain stock and other security dividends; transactions incident to certain mergers, consolidations, reclassifications and sales of corporate assets in exchange for securities of another corporation, transactions incident to certain judicially approved reorganizations involving securities and bonafide loan and pledge transactions.

Certain exempt nonissuer transactions by persons who already hold outstanding securities include the following: any isolated nonissuer transactions, whether effected directly or through a securities dealer; any nonissuer distribution (other than by a controlling person) if certain information relating to the issuer is publicly available or the security meets certain financial tests; and any transaction by a nonissuer effected by or through a registered dealer if it is made pursuant to an unsolicited order or offer to buy.

Securities Law (“Blue Sky Law”)

REGISTRATION

If no exemptions are available, and the securities are not “covered” they must be registered before being offered or sold in North Carolina. Registration by notification is the simplest method of registration. It is available principally to business organizations that have existed for at least five years and meet specific operations and earnings requirements. Holders of outstanding securities (other than certain oil, gas and mining securities) may also register by notification securities to be sold in a nonissuer distribution if there has been a registration of the same class of securities in the state within the past five years.

Registration by coordination is available for any security for which a registration statement has been filed under the federal Securities Act of 1933 in connection with the same offering. This method of registration allows the registrant to coordinate the effective date of the registration with the federal offering and offerings in other states. Federal registration materials may be used.

Registration by qualification is available for any offering and requires more extensive disclosure and information than is necessary for registration by notification.

Generally, each method of registration requires sponsorship by a North Carolina registered dealer, an application fee for registering the dealer, \$200.00 for a firm and \$55.00 for an agent.

DEALER REGISTRATION

The North Carolina Securities Act also provides for registration and regulation of dealers and salesmen. The provisions are similar to those of the Uniform Securities Act, with the additional requirement that dealers be registered with the U.S. Securities and Exchange Commission.

TENDER OFFER DISCLOSURES

In 1977 the Tender Offer Disclosure Act became effective. It seeks to give management and the shareholders of a target company adequate information and time to evaluate and respond to a tender offer.

INVESTMENT ADVISER REGISTRATION

The North Carolina Investment Adviser Act provides for registration and regulation of investment adviser firms and investment adviser representatives. The provisions are similar to the requirements of the Uniform Securities Act and to the federal Investment Advisers Act of 1940.

GENERAL PARTNERSHIPS

The Uniform Partnership Act was adopted in 1941. North Carolina has revised the Uniform Partnership Act to permit a domestic or foreign general partnership to register as a limited liability partnership. The partners in a domestic limited liability partnership ordinarily have no individual liability for the debts or obligations incurred by the partnership while it was registered as a limited liability partnership. The liability of the partners of a registered foreign limited liability partnership is determined under the laws of the partnership's state of organization. North Carolina has also revised the Uniform Partnership Act to permit a domestic general partnership to (1) convert to a domestic limited liability company or to a domestic limited partnership and (2) to merge with one or more domestic or foreign business or non profit corporations, domestic or foreign limited liability companies, domestic or foreign limited partnerships or domestic or foreign general partnerships (including limited liability partnerships).

LIMITED PARTNERSHIPS

The Revised Uniform Limited Partnership Act (RULPA) was adopted Oct. 1, 1986. The North Carolina law is a modified form of the model act that updates prior law to more accurately reflect actual practice and parallel the structure of corporate law.

DOMESTIC LIMITED PARTNERSHIPS

Under RULPA, only the certificate of limited partnership as specifically defined by the 1986 act may be filed. All other information, including the identity of the limited partners, is to be maintained in the internal records of the limited partnership. This includes the partnership agreement and any other supporting documents. The records of the limited partnership may be maintained at the registered office or at a separate location in this state.

RULPA also requires that the certificate of limited partnership be filed in the secretary of state's office. In addition, all filings must be on the forms prescribed by the secretary of state.

Under the revised act, a limited partnership is not legally formed until the certificate of limited partnership is filed in the secretary of state's office. While RULPA recognizes the existence of limited partnerships formed prior to Oct. 1, 1986, through a technical amendment adopted in 1987, these limited partnerships are also required to file an original

certificate of limited partnership in the secretary of state's office in order to designate a registered office and registered agency.

FOREIGN LIMITED PARTNERSHIPS

The North Carolina statute requires that foreign limited partnerships transacting business in this state file an application for a certificate of authority in the secretary of state's office. The application must designate a registered office and agent in this state. In addition, the name to be used in North Carolina must be specified. If the application conforms to law, a certificate of authority is issued by the secretary of state.

LIMITED PARTNERSHIP NAMES

Under RULPA, a limited partnership name must include the words *limited partnership* without abbreviation. The name must also be distinguishable upon the records of the Secretary of State from the names of the other domestic and foreign corporations, nonprofit corporations, limited partnerships, and limited liability companies authorized to transact business in North Carolina. This requirement also applies to the name that a foreign limited partnership uses in this state.

LIMITED PARTNERS

Under RULPA, the names, addresses and contributions of limited partners are no longer a matter of public record and may not be included in the certificate of limited partnership filed by a domestic limited partnership.

Instead, this information is to be maintained in the internal records of the limited partnership. Foreign limited partnerships may elect to maintain the names and addresses of their partners in the office of the secretary of state or may designate a separate location for such information in their applications for certificates of authority.

The revised act also provides that a limited partner is not liable for the obligations of the limited partnership by reason of being a limited partner and does not become liable for such obligations by participating in the management or control of the partnership's business. Additionally, under RULPA, limited partners may contribute to the partnership in the form of services and not just cash and property.

TAX CONSIDERATIONS

Departing from the model act, the North Carolina law defines “partnership interest” as including income, gains, losses, deductions, credits and distribution rights, rather than simply profits and losses. This change brings the North Carolina act into conformity with the current Internal Revenue Code.

North Carolina has amended its version of RULPA to permit a domestic limited partnership to convert to a domestic limited liability company and to permit a domestic or foreign limited liability company, a foreign limited partnership and a domestic or foreign general partnership (including a domestic or foreign limited liability partnership) to convert to a domestic limited partnership. North Carolina has also amended its version of RULPA to permit a domestic limited partnership to merge with one or more domestic or foreign business or non profit corporations, domestic or foreign limited liability companies, domestic or foreign limited partnerships or domestic or foreign general partnerships (including limited liability partnerships).

ASSUMED NAME STATUTE

If a general partnership operates under a name other than the names of its partners, a certificate of assumed name must be recorded in the register of deeds office in each county in which business is transacted. The same is true of a limited partnership operating under a name other than that filed in the secretary of state’s office.

DEPARTMENT OF LABOR

Much of North Carolina's labor legislation is administered by the Department of Labor. The full texts of the overtime, minimum wage, wage payment, youth employment, and occupational safety and health laws, as well as the various safety codes used in the department's more specialized safety inspection services, may be obtained by writing to:

*North Carolina Department of Labor
4 W. Edenton Street,
Raleigh, North Carolina 27601*

WAGES

The minimum hourly wage in North Carolina is \$5.15, however, certain full-time students may be paid 90 percent of the minimum wage. Time and one-half must be paid after 40 hours of work in any workweek.

Youth employment certificates are required for most workers aged 14 through 17. Hazardous work is not permitted. No youth under the age of 18 regularly enrolled in school may work between 11 p.m. and 5 a.m. when there is school the next day unless written permission is obtained from the school principal and the parent or guardian. Work rules for 14- and 15-year-olds are established and enforced by the commissioner of labor.

Wages are due on the regular payday. Employees must be notified of pay policies, rates and paydays. Deductions from paychecks, other than those required by law, may be made only with an employee's prior written authorization.

If the amount of wages is in dispute, acceptance of partial payment by an employee does not constitute a release of the balance of the claim. Any release of claim required by an employer as a condition of partial payment is void.

The minimum wage and overtime provisions generally apply to all North Carolina businesses that are not subject to the Federal Fair Labor Standards Act, but some employees and establishments are exempt.

The Wage and Hour Office of the Department of Labor investigates complaints and collects back wages if they are due to an employee. The state may bring civil or criminal actions against an employer

for violations of the law. An employee may also sue the employer for back wages.

OCCUPATIONAL SAFETY AND HEALTH ACT

The Occupational Safety and Health Act of North Carolina provides safety and health protection for workers. Patterned after the federal Occupational Safety and Health Act of 1970, the purpose of this statute is "to assure so far as possible every working man and woman in the state of North Carolina safe and healthful working conditions and to preserve our human resources."

The North Carolina Department of Labor has primary responsibility for administering the act. The department issues job safety and health standards, inspects work places and promotes safe and healthful working conditions. The act spells out the rights and obligations of both employers and employees, and establishes penalties and procedures for independent review of administrative actions.

The Occupational Safety and Health Act of North Carolina covers every employer who has one or more employees. However, the act does not affect work places covered by the Federal Mine Safety and Health Act or those covered by certain other federal safety and health laws.

State and local government employees are covered by the state OSHA law, as are employees in agriculture.

Safety officers from the Department of Labor conduct periodic job-site inspections. The law requires that a representative of the employer and an employee authorized by the other employees be given an opportunity to accompany the safety officer to assist in the inspection. Workers have the right to notify the Department of Labor and to request an inspection if they believe that unsafe and unhealthful conditions exist at their work site. In addition, employees have the right to bring unsafe conditions to the attention of the safety officer making the inspection. When the Department of Labor finds health and safety violations, a citation of violation and a proposed monetary penalty is issued to the employer.

Citations must be prominently displayed at or near the place of violation.

PENALTIES FOR VIOLATION

The law provides for mandatory penalties of up to \$7,000 for each serious violation and for optional penalties of up to \$7,000 for each nonserious violation. A “serious violation” is defined as one likely to result in serious physical harm to employees.

Penalties of up to \$7,000 are required for each day during which an employer fails to correct a violation within the time period set in the citation. Also, any employer who willfully or repeatedly violates the act is to be assessed civil penalties of not more than \$70,000 for each violation.

Criminal penalties also are provided for in the act. Any willful violation resulting in the death of an employee, upon conviction, is a misdemeanor punishable by a fine of not more than \$10,000 or by imprisonment for not more than six months, or by both. Conviction of an employer after a first conviction doubles the maximum penalty.

The act further provides that employees may not be discharged or discriminated against in any way for filing safety and health complaints or otherwise exercising their rights under the law.

A State Occupational Safety and Health Advisory Council of 11 members is appointed by the commissioner of labor to advise and consult with the commissioner on administration of the act and adoption of safety and health standards.

In addition, a three-member Safety and Health Review Board is appointed by the governor and is independent of the Department of Labor. An employer, or his employee or representative, may appear before this board should disagreement arise concerning any penalty. The review board hears citation appeals and issues decisions in these cases. Internal appeals processes within the OSH Division are also available to employers.

CONSULTATION

The Department of Labor employs a staff of OSHA consultants to encourage voluntary compliance and to assist business and industry in meeting health and safety standards. The department operates on the belief that employee health and safety are best served when individual establishments develop their own health and safety programs.

FEDERAL-STATE COOPERATION

North Carolina’s OSHA law and administrative program were developed under a section of the federal Occupational Safety and Health Act of 1970, that permits the states to take over administration of OSHA standards after they have demonstrated that their state administration is “equally as effective” as direct federal administration. North Carolina was the fourth state to qualify for complete state administration of OSHA and received final federal approval of its state program in 1996.

MINE SAFETY AND HEALTH ACT

The Mine and Quarry Division of the Department of Labor enforces the Mine Safety and Health Act of North Carolina and conducts a program of inspection, education and training technical assistance, and consultations to implement the act. The Mine Safety and Health Act of North Carolina requires the commissioner of labor to issue safety and health standards for mines, including quarries and sand and gravel operations. The commissioner may modify the application of any standard upon petition by the mine operator, a representative of miners or miner if it is determined that an alternative method of protecting the miners will guarantee the same level of safety and health afforded the miners by the standard or will enhance the level of safety and health provided by the standard. The commissioner must give the petitioner an opportunity for a public hearing prior to making the decision.

The Mine and Quarry Division makes routine mine inspections and investigates accidents. Miners may request inspections, and their representatives may accompany the inspector.

If an accident occurs, the mine operator must notify the commissioner or the director of the division, who may take any action deemed appropriate to protect the life of any person. If inspection indicates imminent danger, the commissioner may order evacuation of the mine or stop the use of dangerous equipment. The law requires each mine operator to file with the commissioner his name the name and location of each mine and the identity of the official in charge of safety and health at the mine. It provides for procedures for holding hearings on order of the commissioner and for judicial review. It authorizes the commissioner to require mine operators to investigate and maintain records and to report on mine accidents.

Labor Legislation

The following violations are misdemeanors, subject to Class Z fines and imprisonment: willful violation of a standard or order that causes a death or serious physical harm; knowingly making false statements in applications other documents required by the act; and offering or selling equipment as being in compliance with the act with knowledge that it does not comply.

The law prohibits the discrimination or retaliatory action against an employee because the employee in good faith files a claim or complaint, initiates an inquiry, investigation, inspection, proceeding or other action, or testifies or provides information to any person with respect to the statutes.

The act also empowers the commissioner to enter into agreements with the federal agency enforcing safety and health standards in mines to enforce and promote safety and health.

UNIFORM BOILER AND PRESSURE VESSEL ACT

The Boiler and Pressure Vessel Division of the Department of Labor periodically inspects all boilers and pressure vessels subject to the Uniform Boiler and Pressure Vessel Act. Operating a boiler or pressure vessel subject to the law without an inspection certificate is a misdemeanor punishable by a \$1,000 fine.

Boilers and pressure vessels owned by the federal government, located in private residences, and others beneath certain size and power limits are exempt from the act. The Board of Boiler and Pressure Vessels Rules advises the commissioner of labor on the formulation of rules and regulations governing the construction, installation, inspection, re-pair, alteration, use, and operation of boilers and pressure vessels in the state. The board also certifies inspectors. Misrepresenting oneself as an authorized inspector is a Class 2 misdemeanor punishable by a \$ 1,000 fine.

MEDIATION AND ARBITRATION OF LABOR DISPUTES

The Department of Labor maintains a mediation and arbitration service to expedite the voluntary, amicable and speedy settlement of labor-management disagreements. To this end, the commissioner of labor maintains a list of qualified arbitrators. Procedures are provided to ensure prompt adjudication of the arbitration process. The department provides assistance to employers in

identifying mediators to help in labor disputes. Their decisions generally are nonbinding.

The North Carolina Supreme Court treats the remedy provided by the arbitration statutes as only supplementary to any other remedy the employer or employee may have under general law.

The Supreme Court also has held that where a labor organization has promised an employee that it will diligently prosecute his grievance, the employee may sue the union if he loses the right to enforce his claim through the union's neglect to file suit in time.

BLACKLISTING OF EMPLOYEES

It is a crime in North Carolina for any person or corporation, by word or writing of any kind, to prevent or attempt to prevent any discharged employee or any employee who leaves voluntarily from obtaining employment with any other person or corporation. An employer is not prohibited from disclosing, upon a written request by an employer to whom a discharged employee has applied, a truthful statement of the reason for the employee's discharge. The penalty for blacklisting of employees is a fine not to exceed \$500 and the person black-listed has a right of action in the civil courts for punitive damages.

UNIONS AND LABOR DISPUTES

RIGHT-TO-WORK LAW

North Carolina is one of many states with a "right-to-work" law. The General Assembly has declared it to be the public policy of the state that "the right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association."

Closed shop and union shop agreements are illegal and void. An employer may not require an employee to join a union, nor may he require him to refrain from joining a union. An employer may not require an employee to pay dues or fees to any labor organization as a condition of employment or continuation of employment.

MISCELLANEOUS REGULATIONS

It is unlawful in North Carolina for employers to require any applicant for employment to pay the cost of a medical examination or the cost of furnishing any records required by the employer as a condition of hiring. This is a misdemeanor carrying, a possible fine of \$ 100.

It is a crime for any person to give, offer or promise to any agent or employee "any gift or gratuity whatever with intent to influence his action in relation to his principal's, employer's or master's business." The employee who accepts any such gift and carries out the illegal design also is guilty of a misdemeanor.

APPRENTICESHIP

The Apprenticeship Act, as well as the National Apprenticeship Act of 1937 (Fitzgerald Act), is administered in North Carolina by the Department of Labor's Apprenticeship and Training Bureau. The bureau promotes a broad range of high school and adult apprenticeship programs designed to train workers to meet the demands of industry for highly skilled workers. The division sets standards, approves apprenticeship programs that meet criteria, keeps records and issues completion certificates to citizens who complete apprenticeship training. An Apprenticeship Council advises the commissioner of labor in formulating policies on apprenticeship and other on-the-job training, programs.

RIGHT TO KNOW

The Department of Labor administers the Hazardous Chemicals Right to Know Act. This Act requires all employers who use or store hazardous chemicals in amounts of at least 55 gallons or 500 pounds to provide annual lists of these materials to local fire chiefs. These lists also must be provided to citizens when a request is made in writing. Provisions are included in the law to protect trade secrets.

Violations of the Right to Know Act will subject the violator to a civil penalty of up to \$ 1,000 per day for each violation. An employer shall not discharge or in any manner discriminate against an employee for assisting in an inspection of the employer's facility or testifying in a proceeding under the act.

RETALIATORY EMPLOYMENT DISCRIMINATION

The Retaliatory Employment Discrimination Act protects employees who in good faith file or threaten to file workers' compensation claims, or exercise their rights under the state's Occupational Safety and Health Act, the Mine Safety and Health Act, or the Wage and Hour Act. Additionally, employees are also protected against retaliation by an employer if the retaliation involves genetic testing, counseling, or information including sickle cell trait, or for retaliation involving National Guard membership, or juvenile order obligations, or for opposition to any practice made unlawful by these statutes.

Investigators from this division impartially examine all written complaints filed with the department under the act. If a complaint does not have merit, a right-to-sue letter is issued to the complainant who may then choose to pursue the claim through civil proceedings. If the complaint is found to be valid, the division attempts conciliation through informal means prior to issuing a right-to-sue letter or taking the complaint to court.

Relief available under this act includes:

- a. reinstatement of the employee;
- b. reinstatement of full fringe benefits and seniority;
- c. compensation for lost wages, benefits, and other economic losses caused by the illegal retaliatory action or discrimination

Attorneys' fees may also be awarded to those injured by the civil action. The court may also triple the damages if the violation is found to be willful, may issue an injunction to enjoin continued violations of this Act.

CONTROLLED SUBSTANCE EXAMINATION REGULATION

The Controlled Substance Examination Regulation Act protects individuals from inadequate controlled substance examinations both before employment and on the job.

This act sets out minimum procedural requirements to be followed by employers who choose to utilize controlled substance examinations. These procedural requirements include:

- a. collection of samples under reasonable and sanitary conditions;
- b. use of approved laboratories for all testing of samples;
- c. confirmation of all samples that give a positive result during screening:

- d. establishing procedures for adequate chain of custody.

Violations of this act will result in a \$250 penalty per affected examinee, up to a maximum of \$1,000 per investigation by the division.

ELEVATORS AND AMUSEMENT DEVICES

The Elevator and Amusement Device Bureau inspects the proper installation and safe operation of all elevators, escalators, personnel hoists, dumbwaiters, moving walks, moonlifts, amusement rides, inclined stairway chair lifts and lifting devices for people with disabilities. The bureau issues certificates of operation for devices and equipment found upon inspection to be in compliance with the law and the rules adopted by the Department of Labor.

The following may result in civil penalties: operation of a device or equipment without a certificate of operation; operation not in accordance with the law or rules and regulations; failure to properly notify the division of an accident involving death, personal injury or property damage; or operation of an unsafe device or equipment. Civil penalties may run as high as \$500 for each day a device is in violation. The penalty for a criminal violations may amount to a Class 2 misdemeanor and may result in penalties including a fine as high as \$5,000. Misrepresenting oneself as an authorized inspector is a Class 2 misdemeanor punishable.

Operators of amusement devices are required to maintain liability insurance on their devices.

PRIVATE PERSONNEL AND JOB LISTING SERVICES

Private personnel services (formerly known as employment agencies) and job listing services operating in North Carolina are licensed and regulated by the Private Personnel Service Office of the Department of Labor. All services charging a fee to applicants must be licensed.

Employer-fee-paid personnel consulting services and temporary help services are not required to be licensed, but they must certify annually to the department that they operate on a 100 percent employer fee paid basis, they require no applicant placement contract and they have no recourse against an applicant for a fee under any circumstances. In addition, a temporary help service must notify the department that it does not operate as a private

personnel service or an employer fee-paid personnel consulting service.

The division investigates all consumer complaints against licensed services.

Each licensee is required to deposit with the department a bond payable to the state of North Carolina in the amount of \$25,000 upon condition that the service will pay to applicants all referrals due if the service terminates its business.

All license applicants are required to file with the department a schedule of fees charged and a copy of the contract that an applicant for employment will be required to execute. The Private Personnel Services Act sets the requirements for the contracts with employment applicants.

The commissioner of labor may levy fines up to \$250 against personnel services or job listing services for violating the Private Personnel Services Act or regulation of the Job Listing Services Act. For repeated willful violations, the commissioner may suspend or revoke the license.

Operation of a private personnel service or job listing service without first obtaining the appropriate license is a Class 1 misdemeanor. The violator is also subject to a civil penalty of between \$50 and \$100 for each day the service operates without a license, with the total penalty not to exceed \$2,000.

DEPARTMENT OF COMMERCE INDUSTRIAL COMMISSION

WORKERS' COMPENSATION

On January 1, 1975, workers' compensation became compulsory for defined employers and employees in North Carolina.

If an employer has fewer than three employees (casual employees, farm laborers, and domestic employees are not counted for this purpose), he does not come under the statute and does not lose the normal defenses in a suit for personal injury, unless one or more of his employees is engaged in activities that involve the use or presence of radiation.

However, the employer of fewer than three persons may insure if he chooses; if he does so, he can take advantage of the Workers' Compensation Act by this agreement.

Labor Legislation

The Workers' Compensation Act is administered by the North Carolina Industrial Commission.

SELF-INSURANCE

The employer covered by statute normally procures standard workers' compensation insurance, but he is not required to do so. The employer may qualify as a self-insurer with approval of the Department of Insurance by providing proof of ability to comply with the statute and, if required, depositing security. If the employer does not qualify as a self-insurer and does not obtain insurance, he is liable for the normal compensation that may be enforced by attachment or receivership

Self-insurers are required to pay tax at the rate of 2.5 percent or the equivalent of premiums charged against the same or most similar industry or workers' compensation insurance.

Premium rates for insurance must be approved by the commissioner of insurance.

WHEN COMPENSATION IS PAYABLE

No compensation is owed unless:

- a: the employee receives "injury by accident", "specific traumatic incident" or suffers from one of several specified occupational diseases;
- b: the "injury" arises: (1) out of the employment and (2) within the course of the employment; and
- c: the injury did not result from the claimant's intoxication, use of unprescribed drugs or the claimant's willful intention to kill or injure himself or another.

In addition, the claiming employee must comply with certain procedural standards; for example, by giving notice of the claim to the employer as soon as practicable and within 30 days after the accident. Compensation may be reduced if the employee violates approved safety regulations.

EMPLOYEES' BENEFITS

Except for scheduled injuries, for which a specified amount is payable, the maximum amount is payable. The maximum weekly benefit payable under the North Carolina law is 66.6 percent of weekly wages lost but not more than the amount established annually to be effective October 1st as provided by the Act. The maximum compensation rate is 110 percent of the state's average weekly wage, which is computed each July 1. The change in the

compensation rate is effective on the following, January 1.

The minimum rate per week during the disability period is \$30. Cases involving paralysis, loss of mental capacity, loss of more than one limb or eye, or permanent total disability are paid for life. The employer is liable to provide medical treatment so long as treatment will lessen an employee's disability. The employer is also liable for supplying artificial limbs. If the employee dies of his injuries, the employer is liable for up to \$2,000 expenses.

Death benefits may be paid for life if mental or physical disability prevents the surviving spouse from supporting herself or himself as of the date of death. Compensation for death is paid to dependent children for 400 weeks or until they reach the age of 18 years, whichever occurs last.

CONTRACTORS AND SUBCONTRACTORS

A principal or intermediate subcontractor is, under some circumstances, liable for compensation of a subcontractor's employees. However, the principal contractor may require the subcontractor to furnish a certificate of insurance approved by the Industrial Commission. If this certificate is required, the principal contractor is not liable for compensation to the subcontractor's employees.

EMPLOYERS' CLAIMS AGAINST THOSE CAUSING INJURY

The employer is liable for benefits under the statute even if the injury is caused by a third party's negligence. In such cases, however, any settlement from or judgment against the negligent third party is used to reimburse the employer after certain costs of collection are deducted.

EMPLOYMENT SECURITY COMMISSION

The Employment Security Commission administers North Carolina's employment security program. Although the commission is a state agency, federal funding totally supports its operation. North Carolina ranks among the top states in the nation in the fiscal soundness of its unemployment insurance program.

The commission consists of a chairman (a full-time executive) and six commissioners, all appointed by the governor. The chairman exercises the commission's authority.

Labor Legislation

In addition to administering unemployment insurance, the commission is a labor exchange, matching jobs with people, and people with jobs, including workers in expanding fields of technology and highly skilled occupations.

The commission has three divisions:

UNEMPLOYMENT INSURANCE DIVISION

The Unemployment Insurance Division deals directly with employers and employees. The Employment Security Law of North Carolina applies to any private employer that in the current or preceding calendar year has either one or more employees for 20 or more weeks or a payroll of \$1,500 or more in any calendar quarter. Agricultural and domestic employers are covered if they meet the requirements of G.S. 96-8(5)(n) and 96-8(5)(o), respectively.

Nonprofit tax-exempt organizations under Section 501(c)(3) of the Internal Revenue Code are also covered if they have four or more employees for as many as 20 weeks in a calendar year. All government workers and employees of educational institutions are covered.

The law also applies to any employer who is taxed under the Federal Unemployment Tax Act. Subject to the commission's approval, employers, may voluntarily elect to be covered under the law.

EMPLOYMENT SERVICE DIVISION

The Employment Security Division (ESC) has 90 local offices throughout the state. These offices are staffed by local managers, placement interviewers, veterans' employment representatives, counselors and labor-market analysts.

Local ESC offices refer applicants throughout the state and nationwide through a job bank network for available openings. It matches workers according to job specifications.

Information on types of workers available by occupation, sex, education, etc., is furnished locally. Wage data drawn from current job orders and surveys of representative firms are also available.

Local ESC personnel consult with firms to offer complete staffing services-- including taking applications, screenings and referrals.

ESC renders many other related services. For instance, it provides services for migrant farm workers and their employers.

LABOR MARKET INFORMATION DIVISION

Statistical and technical information from this division's Bureau of Employment Security Research is important to employers. The bureau coordinates and administers the agency's state and federal reporting programs, conducts research regarding unemployment insurance and employment services, and promotes greater economic stability and growth. It develops and disseminates information on employment, unemployment, wage rates, fringe benefits, industry and occupational projections, and labor market conditions on a statewide and area basis. This information is widely used by existing industries and is particularly important to firms that are considering North Carolina locations.

Labor market newsletters showing local employment and unemployment trends are prepared periodically.

COST TO EMPLOYER

The unemployment insurance tax rate and the taxable wage base are provided by the Act.

An employer's experience rating is based on the relationship between the three year taxable payroll and the experience rating account balance.

BENEFITS

Weekly benefit payments are based on earnings preceding the worker's new claim. The maximum weekly benefit amount should be computed at 66-2/3 percent of the average weekly insured wage. The duration of payments varies from 13 to 26 weeks, depending on the claimant's work pattern.

To be eligible for benefits, one must be unemployed, able and available to work, and actively seeking work on his own initiative. Availability is determined on a week-to-week basis, and each claimant must keep the local employment office advised of his availability and efforts to find work.

During a claimant's base period, his employer is notified of any claims pending and instructed to inform the commission of any cause for which the claimant left work that the employer believes might make the claimant ineligible for benefits. A worker may be disqualified for the duration of his unemployment if it is determined that he is

unemployed because of misconduct in connection with his job, or refusal to accept or apply for suitable work. Disqualification is also possible under certain other limited statutory conditions, such as refusing to participate in a training program when so directed by the commission. A worker may be partially disqualified (four to 13 weeks) for substantial fault connected with his work or for leaving work in anticipation of a layoff due to no available work (not less than four weeks).

After a permanent disqualification, the worker can requalify by returning to covered employment for at least five weeks and being paid at least 10 times the weekly benefit amount. Moreover, a requalification requires that the separation from the last work occur because of a nondisqualifying reason. Benefits are not payable in North Carolina to any claimant whose unemployment results from a labor dispute. Participation in a strike is not required for disqualification.

A determination is issued by a claims adjudicator when there is a question of eligibility or qualification for benefits. Any aggrieved party disagreeing with the results of that determination may appeal to the appeals referee, who will conduct an evidentiary hearing and issue a decision containing findings of fact and conclusions of law. Appeals from the referee's decision go to the commission. The Commission will then review the evidence and affirm, modify or reverse the referee, or may render an entirely new commission decision or remand the matter for additional evidence. Decisions by the commission and the appeals referees must, by statute, be based upon the evidence elicited at the hearings conducted by the appeals referee. Appeals from the commission go to the Superior Court where the evidence considered is again limited to that obtained before the referee.

FAIR EMPLOYMENT PRACTICES

The Equal Employment Practices Act provides that it is the public policy of the State of North Carolina "to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination . . . on account of race, religion, color, national origin, age, sex or handicap . . ." The Human Relations Commission has the authority to receive charges of discrimination from the Equal Employment Opportunity Commission and to investigate and conciliate charges of discrimination. This Act applies to employers that regularly employ 15 or more employees.

HIV/AIDS

The North Carolina Communicable Disease Act prohibits an employer from requiring, performing, or using AIDS virus testing to determine suitability for continued employment or determining suitability for continued employment based on whether the employee has the AIDS virus or HIV infection. The Act does not prohibit testing job applicants for the AIDS virus, refusing to hire a job applicant because of a confirmed positive test for AIDS virus infection, including AIDS virus testing in annual medical examinations routinely required of all employees or taking appropriate action, including termination, against an employee with the AIDS virus or HIV infection if he is unable to perform his normally assigned job duties or poses a significant risk to his co-workers' or the public's health. Persons aggrieved by an act or discriminatory practice prohibited by this law are entitled to institute a civil action in superior court. The court may order rehiring or reinstatement of the employee and may award back pay and attorneys' fees to the prevailing party in the action.

PERSONS WITH DISABILITIES PROTECTION ACT

This Act prohibits discrimination because of a disabling condition. This law prohibits, with certain exceptions, an employer's: (1) refusal to hire or discharge of a qualified disabled person because of a disabling condition; (2) requirement that an applicant identify himself as a disabled person prior to a conditional offer of employment; and (3) retaliation for opposition to a practice made unlawful by this statute or for participating in a proceeding brought pursuant to this statute. The Act defines a "qualified disabled person" as a disabled person who can satisfactorily perform the job duties with or without reasonable accommodation and whose disabling condition does not create an unreasonable risk of harm to himself, other employees, or the public. A "disabled person" is defined as a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. The Act defines "reasonable accommodation" as making reasonable physical changes in the workplace or making reasonable changes in the job duties that would enable the employee to satisfactorily perform them.

SICKLE CELL AND GENETIC DISCRIMINATION

These laws prohibit employment discrimination because of sickle cell trait and prohibit denial of and discharge from employment on the basis of genetic information concerning the employee or a member of the employee's family or because the employee requested genetic counseling or testing services.

USE OF LAWFUL PRODUCTS

This law prohibits employment discrimination because of the lawful use of lawful products off work premises during non-working hours, and covers employers that employ three or more employees (including state agencies and political subdivisions). An employee or prospective employee who is discriminated against in violation of this section may bring a civil action and may obtain the following remedies: (1) recovery of wages or benefits lost as a result of the violation; (2) reinstatement without loss of position, seniority, or benefits; or (3) an order directing the employer to offer employment to the prospective employee. The court also may award costs and attorneys' fees to the prevailing party in an action brought pursuant to this section.

NATIONAL GUARD SERVICE AND MILITARY SERVICE

These laws prohibit employment discrimination based on National Guard or military service and provide certain reinstatement rights for employees who participate in National Guard Service. Penalties for violation of this law include compensation of the employee for any lost wages or benefits.

JURY DUTY

It is unlawful for an employer to discriminate against an employee on the basis of jury service. An employer who violates this section may be liable to the employee in a civil action for damages and reinstatement.

EMPLOYMENT REFERENCE IMMUNITY

This law provides immunity to employers who provide information about a current or former employee's job history or performance to a prospective employer upon the prospective employer

or employee's request. Immunity does not apply if the information was false and the employer knew or reasonably should have known it was false.

PARENTAL LEAVE

Employers must grant employees who are parents or guardians of a school-aged child up to four hours unpaid leave per year for the child's school activities. This law also prohibits employers from retaliation against employees for exercising these rights. An employee who has been discriminated against in violation of this section may bring a civil action and obtain lost wages, benefits, and reinstatement without loss of position, seniority, wages or benefits.

JUVENILE ORDER LEAVE

This law prohibits employers from taking adverse employment action against an employee who is absent from work because of required attendance at a juvenile order hearing or because of compliance with a court order regarding a juvenile, such as attendance at parental responsibility courses or providing juvenile transportation.

THREAT TO OBTAIN POLITICAL CONTRIBUTION OR SUPPORT

This statute covers state employees or office appointees (excluding elective office or advisory positions), and prohibits certain individuals from coercing other individuals to support a particular political candidate or committee by threatening a change in employment status or preferential personnel treatment. A violation of this statute is a Class 2 misdemeanor.

WHISTLEBLOWER PROTECTION FROM RETALIATION

This law prohibits employment discrimination against state employees because they report to their supervisor, department head or other appropriate authority that a state agency or employee is or has been engaging in violation of state or federal law, fraud, misappropriation of state resources, actions which pose substantial and specific danger to the public health and safety, gross mismanagement, or gross abuse of authority.

INTEREST, USURY & CREDITORS' REMEDIES

The legal rate of interest in North Carolina is 8 percent, but the parties may contract in writing for a different rate of interest. The maximum allowable contract rates vary according to the amount lent. For loans of \$25,000 or less, the maximum allowable rate is the greater of either 16 percent or the rate for six-month U.S. Treasury bills plus 6 percent. For loans of more than \$25,000 or first mortgage home loans of more than \$10,000, the parties may contract in writing for any rate of interest. Banks may charge the interest in advance only if the effective rate collected does not exceed the maximum allowable rate if such interest had not been collected in advance.

Permissible fees and charges imposed in connection with a loan of \$300,000 or less are also regulated by North Carolina law.

The penalty for lenders other than finance companies taking, receiving or charging an unlawful rate of interest is forfeiture of the entire interest, but the original debt is not affected. If an unlawful rate of interest has already been paid by the debtor, he may recover twice the amount of interest paid in an action in the nature of a debt. The penalty for finance companies charging more than the allowable rate of interest is to void the contract. The company has no right to collect any principal or charges with respect to the loan.

North Carolina also has a Consumer Finance Act that allows higher charges by finance companies on loans of \$10,000 or less.

Credit sales of personal property on an installment basis are governed by the North Carolina Retail Installment Sales Act, which prescribes maximum finance charges. Remedies for excessive finance charges, which vary depending upon the extent to which an improper finance charge exceeds the allowable maximum, include the forfeiture of finance charges, a penalty of twice the finance charge paid or the voiding of the entire contract.

CRIMINAL SANCTIONS AFFECTING SECURITY TRANSACTIONS

The laws of North Carolina contain ample criminal provisions to protect the creditor who has been defrauded. Some laws pertain to the crimes of fraudulently disposing of secured property, secreting,

property to hinder the enforcement of a lien, obtaining property by false pretenses and forgery.

CREDITORS' REMEDIES

Corporations doing business in North Carolina may sue and be sued. They can avail themselves of, and are subject to, the statutory provisions relating to judgments, execution sales attachments, garnishments and proceedings supplemental to execution. No property of a corporation is exempt from claims of creditors. North Carolina does accord to an individual a personal property exemption of up to \$6,500 and a \$10,000 homestead exemption.

JUDGMENT AND EXECUTION

A judgment in North Carolina does not become a lien on any property of the judgment debtor by its mere rendition. However, when the judgment is docketed, it becomes a lien on any real property of the judgment debtor in the county where it is docketed. A judgment obtained and docketed in one county may be docketed in any other county of the state. The lien of a docketed judgment is valid for 10 years after the judgment is rendered.

A judgment, even though docketed, does not become a lien on personal property of the judgment debtor. For a judgment creditor to acquire a lien on the debtor's personal property, execution of the judgment must be issued and a levy made on the personal property by the sheriff. A lien attaches to the personal property the instant the levy is made.

Practically all types of tangible property belonging to the judgment debtor may be levied on by the sheriff. Growing crops are not subject to levy until they have matured.

ATTACHMENT AND GARNISHMENT

In an action to recover a money judgment, an attachment of the defendant's property located in North Carolina may be obtained before judgment if the defendant is:

- a. a nonresident;
- b. a foreign corporation;
- c. a domestic corporation whose president, vice president, secretary or treasurer cannot be found in the state,
- d. a resident of the state who, with intent to defraud his creditors or to avoid service of summons, either has left or is about to leave

the state or keeps himself concealed in the state; or

- e. a person or domestic corporation that, with intent to defraud his or its creditors, either has removed or is about to remove property from this state or has assigned, disposed of or secreted property.

As part of an attachment, a judgment creditor may, by the use of garnishment proceedings, have money owed his debtor by a third person held until judgment. Similarly, property of the judgment debtor held by a third person maybe reached by the garnishment process.

PROCEEDING SUPPLEMENTAL TO EXECUTION

When a judgment creditor has been unable to find sufficient property of his debtor to satisfy his judgment, he may take advantage of statutory provisions that require the debtor to appear and answer inquiries designed to uncover property he may have or may have transferred to others in fraud of his creditors. A supplemental proceeding also is used to reach property of the judgment debtor held by a third person or money owed to the judgment debtor by a third person.

METHODS OF HANDLING INSOLVENT DEBTORS' ESTATES

Various methods are available in the settlement of insolvent debtors' estates. Creditors may agree among themselves and with the debtor to enter into a composition agreement. By a composition, the creditors may agree to take in full settlement a certain percentage or portion of their claims, or agree to give the debtor an extension of time, or both.

A debtor may, of his own accord, assign all but his exempt property to an assignee for the benefit of his creditors. Such assignment will be valid if the statutory provisions are strictly adhered to, but making the assignment does not release the debtor from his obligation to pay his creditors their full claims. Thus, if the assignee's distribution of the proceeds of the assigned property to the creditors has not produced full payment, the debtor is still liable for the balance in the absence of an agreement to release him.

A debtor may take advantage of the Federal Bankruptcy Code and file a voluntary petition in bankruptcy. His creditors may be able to put the debtor into involuntary bankruptcy. Insolvent

corporations also may be placed into state court receiverships.

A Chapter 7 bankruptcy proceeding results in a liquidation of the debtor's assets and distribution to his creditors, but it is possible, in an appropriate case, to have a corporation reorganized in bankruptcy pursuant to Chapter 11 of the Bankruptcy Code so that it may continue in business rather than be liquidated.

Planning and Development

PLANNING AND DEVELOPMENT

North Carolina cities and counties have long enjoyed broad authority delegated to them by the state legislature to make plans for and exercise control over the quality of city and county development. While these statutes are generally permissive and not mandatory in their application, a growing number of local governments have taken advantage of this legislation in recent years. Most cities and more than half of the state's 100 counties have planning programs covering their geographical area of jurisdiction.

State law is highly flexible with respect to how a local government may organize its planning program, nearly always permitting a citizen planning advisory organization to be established that is tailored to the particular circumstances or problems of a given program or area. Citizen planning boards or commissions may be setup to work at the city, city-county, county, or regional level. The subject matter of most local planning programs tends to focus on physical development problems, land use and development, public facilities and services.

Technical services for these boards are usually provided by professional planners in large cities and in a growing number of counties. Some larger cities conduct planning programs jointly with the counties where they are located. The smaller cities and towns tend to rely on private consultants for technical expertise. Many also rely on the Division of Community Assistance, North Carolina Department of Commerce, which maintains regional offices throughout the state. Technical planning assistance provided by public and private consultants is sometimes funded through some combination of state and local funds. In addition, more specialized types of local planning assistance are made available by individual state agencies in connection with their own programs. The departments of Transportation, Human Resources and Cultural Resources are examples. Technical planning assistance is sometimes extended to the smaller towns and counties by the regional planning agencies of which they are members.

Except in the coastal area, there is no legal requirement that cities or counties prepare plans for future growth. All 20 coastal counties and municipalities therein have comprehensive land use plans as mandated by the state.

Firms interested in doing business in the state often find that studies prepared in connection with these

plans are a useful source of information about local conditions. These documents often include information about the local population and economic base, land development patterns, land availability and suitability for various types of development, soil surveys, housing surveys, and existing and planned transportation and utility networks.

ZONING

North Carolina cities and towns have authority to adopt zoning ordinances that specify both the use that may be made of a particular piece of property and the intensity of its development. Density regulation is accomplished through in minimum lot area, building height and bulk controls, setbacks from street and lot lines, etc. Off-street parking and the size and location of signs are usually regulated by zoning ordinances. All cities and towns may extend their zoning authority for one mile beyond the corporate limits. Cities with a population of 10,000 to 25,000 may extend their jurisdiction up to two miles, and those with population over 25,000 may regulate development for up to three miles beyond the city limits. A city's, limits of extraterritorial jurisdiction are the same for zoning, subdivision regulations, a minimum housing standard ordinance, enforcement of the state building code, regulations aimed at protecting historic buildings and districts, acquiring open space, and establishing community appearance commissions.

County zoning jurisdiction begins where that of the city ends, and a county zoning ordinance may extend either throughout the remainder of the county (outside the jurisdiction of cities) or merely to smaller areas that need such regulation. At the request of a city, the county may also zone areas inside the city's jurisdiction. In adopting zoning regulations, the city or county governing board must consider the-character of each zoning district and its special suitability for particular types of use restrictions. In addition to being "reasonable" in their application to particular properties, the zoning regulations must also be uniform within each district.

SUBDIVISION REGULATIONS

All cities and counties have legislative authority to adopt ordinances regulating the subdivision of land, thereby requiring a minimum standard of design and layout in the process of converting raw land into developed building lots. Almost all cities with more than 10,000 in population, most smaller towns and many counties have adopted such regulations. A county may enforce subdivision regulations

Planning and Development

throughout the jurisdiction, or it may regulate subdivisions in smaller districts if it also adopts zoning regulations for the smaller area.

BUILDING CODES

Unlike most states, North Carolina has a uniform, statewide building code. The state building code applies to all structures except farm buildings. Responsibility for enforcing building regulations is divided among the cities and counties, the state Department of Insurance, and other agencies.

MINIMUM HOUSING STANDARDS

Cities and counties are authorized to adopt ordinances specifying minimum standards of maintenance for the continued occupancy of dwellings. These ordinances generally prescribe minimum standards for foundation, toilets, running water, ventilation, screening against insects, room sizes and other similar items.

HOUSING AND COMMUNITY DEVELOPMENT

All North Carolina municipalities and counties are authorized to undertake housing and community development programs. These programs are usually carried out by a local housing authority, redevelopment commission or community development department, but they may also be carried out by the governing board itself. The state's fair housing laws generally mirror federal standards.

OTHER DEVICES FOR CONTROLLING URBAN DEVELOPMENT

CAPITAL IMPROVEMENT PROGRAMS

North Carolina cities and counties have the authority to apply modern financial planning and budgeting to publicly financed capital improvements. The number of localities and counties that are exercising their authority is growing rapidly.

ANNEXATION

Municipalities may annex adjacent territory by city ordinance without an election, provided the area meets certain criteria of "urban" development and the city guarantees provision of city services, facilities and utilities. This allows orderly expansion of city services without the costs and disruptive effects of frequent annexation elections. In addition, annexation of noncontiguous territory meeting certain standards

is possible when requested by the owners of all of the property in the "satellite" area.

CIVIC DESIGN AND HISTORIC PRESERVATION

Cities and counties have the power to protect the visual environment of cities and rural areas. The administrative agency for such measures is a Community Appearance Commission, consisting of experts and laymen who provide leadership and guidance in matters of civic design and community architecture, landscaping, cleanup campaigns, etc. The commissions are advisory, and only rarely is any legal control of new building design or aesthetics permitted. Historic districts, buildings and landmarks may be controlled to a greater degree to protect their historic qualities.

PROVISION OF URBAN SERVICES BY COUNTIES

While responsibility for major urban services is divided among North Carolina cities, counties and the state, counties have the authority to provide services to developing or developed areas outside cities. Many counties provide utility services (water and sewer), garbage and refuse disposal, fire protection, and planning and economic development programs. As mentioned earlier, all counties have authority to impose zoning and subdivision controls.

Note: Local acts of the General Assembly may modify the above general statements for one or more cities, towns or counties.

Transactions and Trademarks

TRANSACTIONS AND TRADEMARKS

The Trademark Registration Act permits registration of a trademark or service mark with the secretary of state's office. Registration is evidence of the rights conferred by actual use of the mark in the sale of goods or services. Neither trademarks nor service marks can be reserved.

Protection of trademarks is regulated by both, the federal and state governments. For administrative purposes, the state act adopts about 60 enumerated types of goods and services for which a claim of use can be made. Unlike federal legislation, the state act does not expressly provide that registration will be considered public notice of ownership.

Registration is for a term of 10 years. Marks may also be assigned. After five years into the registration or renewal of a mark, the registrant must submit current proof of use of the mark in order to continue the term of registration. The fees for filing are as follows: registration filing fee is \$75; renewal fee is \$35; assignment fee is \$25; and change of name of registrant fee (if a corporation) is \$10. A mark may not be registered if it is confusingly similar to another mark, falsely suggests a relationship to any government or institution, or if it is descriptive, deceptive, disparaging or scandalous. The attorney general's office has determined that a search for availability should include corporate name files as well as trademark files.

SECURED TRANSACTIONS

REAL PROPERTY

In granting a mortgage or deed of trust on real property, the debtor passes legal title to the mortgagee or to a trustee for the benefit of his creditor. A significant difference between a mortgage and a deed of trust, as they are used in North Carolina to secure a debt, is the number of parties to the transaction. In the mortgage transaction there are only two parties -- the mortgager and the mortgagee. To a deed of trust, there are three parties: the grantor, the trustee and the creditor. Deeds of trust are highly favored over mortgages in this state for securing indebtedness with title to real property.

RECORDATION

To be valid against subsequent purchasers and lien creditors, all mortgages and deeds of trust must be recorded in the office of the register of deeds in the county or counties where the real property is situated, and a mortgage or deed of trust is good against subsequent purchasers and lien creditors of the mortgager or grantor only from the date of recordation. The statutory provisions for recordation are strictly construed in favor of subsequent purchasers and creditors, and no kind of notice of an existing unrecorded mortgage or deed of trust will suffice to give any priority to the mortgagee or trustee over subsequent purchasers or creditors.

Moreover a mortgage or deed of trust that attempts to cover any after-acquired real property of the debtor is valid between the debtor and his creditor, but until registration, it is not valid against subsequent purchasers and lien contractors.

The only exceptions to the strict recordation requirements involve parol trusts and equitable mortgages (those arising by operation of law), but even in such cases bonafide purchasers for value without notice are protected when the trust or mortgage is not recorded.

TRANSACTIONS OTHER THAN EXPRESS MORTGAGES AND DEEDS OF TRUST

The general rule (with respect to rights of purchasers and creditors) is that if the defeasance annulment clause is omitted from a deed (thus making it appear to be an absolute conveyance rather than a mortgage) by ignorance, fraud, undue influence or mistake, and if the grantor establishes that fact in the trial and further establishes that the intent was that the deed was to be for security, the courts may declare a conveyance to be mortgage. This "equitable mortgage" may be valid against all persons, except bona fide purchasers for value without actual notice, without being recorded, for it cannot be validly recorded as a deed because it is not so intended, nor as a mortgage because it does not show. Such a deed will have the effect of an equitable mortgage between the creditor and the debtor on the above showing. Against lien creditors and purchasers of the grantor, it is invalid for lack of proper recordation. As to subsequent purchasers from the creditor relying on it as a duly recorded deed, it passes title.

The statutes of North Carolina contain ample provisions for laborers' liens, material men's liens and mechanics' liens against real property for the

Transactions and Trademarks

benefit of people performing labor or supplying materials in building, repairing or improving such property. Liens thus created ordinarily are superior to any other subsequent encumbrance upon the property; however, all such liens must be filed in the office of the clerk of superior court in the county or counties where the land is situated no later than 120 days after the last furnishing of labor or materials.

FORECLOSURE OF MORTGAGES AND DEEDS OF TRUST

Mortgages and deeds of trust generally contain powers of sale conferred upon the mortgagee or trustee by the terms of the instrument. Upon default by the debtor, the power of sale may be exercised after notice to the debtor and other specified persons and a hearing before the clerk of court in the county where the land is situated. If, at the hearing, the clerk finds:

- a. a valid debt;
- b. default;
- c. right to foreclose under the instrument; and
- d. proper notice has been given to those entitled to it,

the sale can proceed. The losing party may appeal to the proper court upon posting a bond. After the hearing, the mortgagee must give notice of the sale at least 20 days before the sale by posting, first class mail and publication. Anyone interested in receiving notice of default and sale under a power of sale of a particular deed of trust or mortgage may file a request for notice with the register of deeds of the county where the property is situated. Mortgages that contain no power of sale may be foreclosed by judicial proceedings. However, since the statutory procedures for judicial sales are more complex than those for sales under powers of sale, judicial sale proceedings are rarely used.

Upon foreclosure of a deed of trust, the creditor may bid in and obtain good title. The trustee may not bid in at the sale and take good title against the claims of the debtor. When a trustee in a deed of trust bids in and purchases the property at foreclosure, he takes at best a voidable title. The courts treat a trustee in a deed of trust as an agent of both the grantor and the creditor and closely scrutinize dealings between the parties to ensure fairness and prevent fraud and overreaching.

REDEMPTION

A mortgager or grantor of a deed of trust, or any other person, firm or corporation with an equitable

interest in the property, may apply to a judge of the superior court, before a sale under foreclosure is confirmed, to enjoin the sale on grounds that the high bid is inadequate. Of course, any sale under foreclosure may be set aside upon proof of fraud.

Generally, there are two classes of rights of redemption that are vested in a mortgager or grantor of a deed of trust. The debtor always retains an equitable interest in the property. However, the right to redeem the property on the date that the debt matures is termed a "legal right of redemption," while the right to redeem after default is called an "equitable right of redemption." Thus, at any time before final sale of the property after a mortgage or deed of trust is foreclosed, the mortgager or grantor may exercise his equitable right of redemption and may sue to enjoin any sale on the grounds that his equity in the property will be diminished or destroyed.

DEFICIENCY JUDGMENTS

Deficiency judgments may be obtained within one year after a foreclosure sale that brings less than the debt secured. There can be no deficiency judgment on a purchase-money transaction in which the debt runs directly to the seller. The seller's only recourse is recovery of the property.

STATUTE OF LIMITATIONS

Actions to foreclose mortgages or deeds of trust must be begun within 10 years after forfeiture, or after the power of sale becomes absolute, or within 10 years after the last payment on the indebtedness. Similarly, the statute of limitations on sealed instruments is 10 years against the principal. As to sureties on sealed notes or other evidences of debt, the statute is three years. The statute of limitations for obtaining a deficiency judgment is one year.

STATUTE OF FRAUDS

To be legally binding, contracts conveying any interest in real estate, except leases for less than three years, must be in writing. North Carolina's interpretation of this requirement has been rigorous. A trust may be created without a formal writing.

PERSONAL PROPERTY

Secured transactions involving personal property (goods, documents, instruments general intangibles, chattel paper, accounts or contract rights) or fixtures are covered by Article 9 of the Uniform Commercial

Transactions and Trademarks

Code. The code is now operative in almost all jurisdictions of the United States, so that the law of this and other states is substantially uniform.

PAWNS AND PAWNBROKERS

The Pawnbrokers Moderization Act of 1989 governs pawn transactions and the licensing of pawnbrokers. With certain limitations, cities and counties may impose additional rules. Any person or firm engaged in the pawnbrokers business must file a bond in the amount of \$5,000 upon being licensed.

NC Department of the Secretary of State

Marcia Russell, Trademarks Supervisor
2 South Salisbury Street,
Raleigh, NC 27601-2903
(919) 807-2162 or Fax (919) 807-2215
E-mail: trademrk@sosnc.com
Web site: <http://www.secretary.state.nc.us/trademrk>

Environmental Regulations

ENVIRONMENTAL REGULATIONS

North Carolina is committed to provide leadership, education and advocacy for the responsible stewardship and sustainable development of North Carolina's environment and natural resources. In stewardship the state will preserve, conserve, restore, and manage natural resources and promote their responsible use now and in the future. And in sustainable development the state will provide leadership and endorse a healthy environment in a prosperous economy for present and future generations of North Carolinians.

North Carolina uses an Administrative Code (regulations) to administer and interpret environmental laws. Most NC environmental requirements are in the NC Administrative Code Title 15A. State environmental regulations and programs are compatible with federal programs. North Carolina has been delegated permit and program authority by the EPA for most major environmental programs.

North Carolina has a State Environmental Policy Act of 1971 (SEPA). This requires state agencies to review and report on the environmental effects of all activities that 1) involve a state action. 2) involve an expenditure of public money or private use of public land, and 3) have a potential significant environmental effect. If these three conditions are met, an environmental review document must be prepared before permits can be obtained.

The different Divisions of the Department of Environment and Natural Resources (DENR) issue most of the North Carolina environmental permits. Each DENR agency is very helpful in providing information and application forms for the permits they issue. To help industry and the public with environmental permit information and agency contacts, DENR also has several assistance agencies, such as: the **Environmental Permit Information Center (EPIC)** at (888) 368-2640, the **Office of Small Business Ombudsman (OSBO)** at (800) 829-4841, and the **Division of Pollution Prevention and Environmental Assistance (DPPEA)** at (800) 763-0136. DENR also maintains an on-line permitting assistance service, at http://www.envhelp.org/html/find_permits.asp

For industrial and business facilities, the **Department of Commerce, Business/Industry Development Division** can coordinate required environmental permits from the different environmental agencies.

**North Carolina Department of Commerce
Business/Industry Development Division**
301 N. Wilmington Street,
Raleigh, NC 27626-0571
(919) 733-3333 or Fax (919) 733-9265
E-mail: info@nccommerce.com
Web site: <http://www.investnc.com>

The types of permits that may be required of an industry are determined by the location of the project, the resources that will be extracted, the disposal of any residuals, and/or the method of residuals disposal. A general summary of the most commonly applicable environmental permit requirements follows.

AIR POLLUTION SOURCE OR ABATEMENT FACILITIES

N.C. Gen Stat. § 143-215.108 requires a permit be obtained before:

- 1) Establishing or operating any air contaminant source;
- 2) Building, erecting, using or operating any equipment which may result in the emission of air contaminants or which is likely to cause air pollution;
- 3) Altering or changing the construction or method of operation of any equipment or process from which air contaminants are or may be emitted;
- 4) Entering into an irrevocable contract for the construction and installation of any air-cleaning device, or allow or cause such device to be constructed, installed or operated.

WITHDRAWAL OF SURFACE OR GROUND WATERS

One or more permits from a state agency may be required prior to withdrawing or utilizing surface waters or groundwater, depending on the daily volume of the withdrawal, location of the waters, environmental impact of the withdrawal, etc. Local authorities, usually, will have zoning or health requirements that require a local permit or authorization. If the State designates, an area as a 'Capacity Use Area', strict planning and allowed development of available water supplies are required. All local communities of the State are required to maintain a 20-year water supply plan, which is to be updated every 5 years. Under N.C.G.S. § 130A-317, all persons and units of local government constructing or altering a public water system shall

Environmental Regulations

give prior notice and submit plans, specifications and other information to the State for determination of compliance with applicable State statutes and rules.

WELL CONSTRUCTION

The State of North Carolina has rules governing the location, construction, repair, and abandonment of wells and the installation and repair of pumps and pumping equipment. Any public water supply well to be used as a community or non-transient, noncommunity water system must be investigated and authorized by the State. As required under N.C.G.S §§ 87-83 through 87-96, a state permit is required prior to the location or construction of any of the following kinds of wells:

- 1) any water-well or well system with a design capacity of 100.00 gallons per day or greater;
- 2) any well added to an existing system where the total design capacity of such existing well system and added well will equal or exceed 100,000 gpd;
- 3) any monitoring well, constructed to assess the impact of an activity not permitted by the state, when installed on property other than that on which the unpermitted activity took place;
- 4) any recovery well;
- 5) any well intended for the recovery of minerals or ores;
- 6) any oil or gas exploration or recovery well;
- 7) any well for recharge or injection purposes;
- 8) any well with a design deviation from the standards specified under the rules.

WASTEWATER TREATMENT FACILITIES DISCHARGING TO SURFACE WATERS

A permit to construct or operate a wastewater treatment facility is required prior to any of the following:

- 1) Making any outlets into the waters of the State.
- 2) Constructing or operating any sewer system, treatment works, or disposal system within the State.
- 3) Altering, extending, or changing the construction or method of operation of any sewer system, treatment works, or disposal system within the State.
- 4) Increasing the quantity of waste discharged through any outlet or processed in any treatment works or disposal system to any extent that would result in any violation of the

effluent standards or limitations established for any point source or that would adversely affect the condition of the receiving waters to the extent of violating any applicable standard.

- 5) Changing the nature of the waste discharged through any disposal system in any way that would exceed the effluent standards or limitations established for any point source or that would adversely affect the condition of the receiving waters in relation to any applicable standards.
- 6) Causing or permitting any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of this Article.
- 7) Causing or permitting any wastes for which pretreatment is required by pretreatment standards to be discharged, directly or indirectly, from a pretreatment facility to any disposal system or to alter, extend or change the construction or method of operation or increase the quantity or change the nature of the waste discharged from or processed in that facility.
- 8) Entering into a contract for the construction and installation of any outlet, sewer system, treatment works, and pretreatment facility or disposal system or for the alteration or extension of any such facility.
- 9) Disposing of sludge resulting from the operation of a treatment works, including the removal of in-place sewage sludge from one location and its deposit at another location, consistent with the requirement of the Resource Conservation and Recovery Act and regulations promulgated pursuant thereto.
- 10) Causing or permitting any pollutant to enter into a defined managed area of the State's waters for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals.
- 11) Causing or permitting discharges regulated under N.C.G.S. § 143-214.7 that result in water Pollution.
- 12) Constructing or operating an animal waste management system, as defined in N.C.G.S. § 143-2 15. 10B, without obtaining a permit.

Environmental Regulations

Facilities that discharge wastewater into a surface water body require a permit under the National Pollutants Discharge Elimination System (NPDES). This kind of permit requires an additional Authorization to Construct from the state, to confirm the proposed facilities will meet the NPDES limits, before construction of the facilities can begin.

WASTEWATER FACILITIES NOT DISCHARGING TO THE SURFACE WATERS

A permit to construct or operate a wastewater treatment facility, not discharging to the surface waters, is required prior to any of the following:

- 1) Constructing or operating any sewer system, treatment works, or disposal system within the State.
- 2) Altering, extending, or changing the construction or method of operation of any sewer system, treatment works, or disposal system within the State.
- 3) Increasing the quantity of waste discharged through any outlet or processed in any treatment works or disposal system to any extent that would result in any violation of the effluent standards or limitations established for any point source or that would adversely affect the condition of the receiving waters to the extent of violating any applicable standard.
- 4) Changing the nature of the waste discharged through any disposal system in any way that would exceed the effluent standards or limitations established for any point source or that would adversely affect the condition of the receiving waters in relation to any applicable standards.
- 5) Causing or permitting any waste, directly or indirectly, to, be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of this Article.
- 6) Causing or permitting any wastes for which pretreatment is required by pretreatment standards to be discharged, directly or indirectly, from a pretreatment facility to any disposal system or to alter, extend or change the construction or method of, operation or increase the quantity or change the nature of

the waste discharged from or processed in that facility.

- 7) Entering into a contract for the construction and installation of any outlet, sewer system, treatment works, and pretreatment facility or disposal system or for the alteration or extension of any such facility.
- 8) Disposing of sludge resulting from the operation of a treatment works, including the removal of in-place sewage sludge from one location and its deposit at another location, consistent with the requirement of the Resource Conservation and Recovery Act and regulations promulgated pursuant thereto.
- 9) Causing or permitting any pollutant to enter into a defined managed area of the State's waters for the maintenance or production of harvestable freshwater, estuarine, or marine plants or animals.
- 10) Causing, or permitting discharges regulated under G.S. 143-214.7 that result in water pollution.
- 11) Constructing or operating an animal waste management system, as defined in N.C.G.S. § 143-215. 1 0B, without obtaining a permit.

DEVELOPMENT IN AREAS OF ENVIRONMENTAL CONCERN

Under the authority of the Coastal Area Management Act (CAMA), any development in an "Area of Environmental Concern" (AEC) shall first obtain a permit from the Division of Coastal Management (in addition to any other required State or local permit). "Areas of Environmental Concern" (AEC) are located in a 20 county area bordering the Atlantic Ocean or any of the sounds of the State. Specific "Areas of Environmental Concern" (AEC) include:

- 1) Coastal wetlands;
- 2) Estuarine waters;
- 3) Renewable resource areas;
- 4) Fragile or historic areas-;
- 5) Waterways and lands under or flowed by tidal waters or navigable waters;
- 6) Natural-hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property;
- 7) Areas that are or may be impacted by key facilities;
- 8) Outstanding Resource Waters; and
- 9) Primary Nursery Areas.

Under N.C.G.S. § 113A-118, a State permit is required for any project defined as a "Major Development". Under an expedited procedure,

Environmental Regulations

provided for by N.C.G.S. § 113A-121, a permit for any project defined as a “Minor Development” can be obtained from the appropriate city or county, with an approved implementation and enforcement program. If a local approved program is not available, the minor development permit shall be obtained from the State. Any utility facility for the development, generation or transmission of energy is subject to the Coastal Resources Commission permits for such facilities.

DREDGE AND FILL IN ESTUARINE WATERS AND TIDELANDS, ETC.

Under N.C.G.S. § 113-229, a state dredge and fill permit is required before beginning any excavation or filling of estuarine waters, tidelands, marshlands, or state-owned lakes. The granting of this state permit, from the Department of Environment and Natural Resources, shall not relieve any person from the necessity of obtaining any required permit from the US Army Corps of Engineers for work in navigable waters or wetlands. The Secretary of the Department of Environment and Natural Resources is empowered to issue special emergency dredge or fill permits upon application. Emergency permits can only be issued when life or structural property is in imminent danger as a result of rapid recent erosion or sudden failure of a man-made structure.

MINING ACTIVITIES

In accordance with N.C.G.S. § 74-46, *et seq.*, prior to engaging in a mining activity of more than one acre, a state permit that covers the affected land must be acquired. A mining permit does not preclude the need for other possible permits that apply to activities or location of the mine, such as stormwater permits, Section 404/401 certification for impacted wetlands, a CAMA permit if the mine is in the coastal area, or any permit or authorization required by local governments.

DAM CONSTRUCTION, REPAIR, ALTERATION, OR REMOVAL

N.C.G.S. § 143-215.23 through .37 covers the requirements for a state permit prior to the construction, repair, alteration or removal of a dam. Generally a permit is required from the state if a dam is to be more than 15 feet high and hold more than a 10 acre-feet of volume. However, if the State determines a dam to be a high-hazard dam a permit is required regardless of size. High-hazard is defined as any dam that could cause loss of life if a failure occurred.

As listed in the general statutes referenced above, the following kinds of dams do not require a state environmental permit. But, they may require permits or approvals from other state agencies or local government:

- 1) Dams constructed by the United States Army Corps of Engineers, the Tennessee Valley Authority, or another agency of the United States government, when the agency designed or approved plans for the dam and supervised its construction.
- 2) Dams constructed with financial assistance from the United States Soil Conservation Service, when that agency designed or approved plans for the dam and supervised its construction.
- 3) Dams licensed by the Federal Energy Regulatory Commission, or for which a license application is pending with the Federal Energy Regulatory Commission.
- 4) Dams for use in connection with electric generating facilities under the jurisdiction of the North Carolina Utilities Commission, except that a dam operated by a small power producer, as defined in N.C.G.S. § 62-3(27a), shall be subject to the provisions of this part even though the dam is constructed pursuant to a certificate of public convenience and necessity issued by the North Carolina Utilities Commission.
- 5) Dams under a single private ownership that provides protection only to land or other property under the same ownership and that does not pose a threat to human life or property below the dam.
- 6) A dam that is less than 15 feet in height or that has an impoundment capacity of less than 10 acre-feet, unless the Department determines that failure of the dam could result in loss of human life or significant damage to property below the dam.

The exemption from State permitting authority, for a dam described above, does not apply after the supervising federal agency relinquishes authority for the operation and maintenance of the dam to a local entity.

LAND DISTURBING ACTIVITY

The Sedimentation Pollution Control Act of 1973 (N.C.G.S. §§ 113A-50 through 113A-66), in general, requires the submittal and approval of a sedimentation/erosion control plan prior to any land disturbing activity of one acre or more.

Environmental Regulations

This requirement for plan submittal does not apply to the following land-disturbing activities:

- 1) Activities, including the breeding and grazing of livestock, undertaken on agricultural land for the production of plants and animals useful to man, including, but not limited to:
 - a. Forages and sod crops, grains and feed crops, tobacco, cotton, and peanuts.
 - b. Dairy animals and dairy products.
 - c. Poultry and poultry products.
 - d. Livestock, including beef cattle, sheep, swine, horses, ponies, mules, and goats.
 - e. Bees and apiary products.
 - f. Fur producing animals.
- 2) Activities undertaken on forestland for the production and harvesting of timber and timber products and conducted in accordance with best management practices set out in Forest Practice Guidelines Related to Water Quality, as adopted by the Department.
- 3) Activities for which a permit is required under the Mining Act of 1971, Article 7 of Chapter 74 of the General Statutes.
- 4) An emergency activity essential to protect human life. (However, once the emergency situation is ended, the regulatory requirements must be followed.)

FILLING WATERS OR WETLANDS

As required under the Code of Federal Regulations (CFR) part 404, the U.S. Army Corps of Engineers must issue a permit, prior to initiating any activity in North Carolina that may result in filling navigable waters or wetlands. In North Carolina, the main Corps of Engineers office is located in Wilmington, with the three regulatory field offices located in Asheville, Washington, and Raleigh. The Corps of Engineers, or an agent approved by the Corps, will delineate the boundaries of wetlands. As part of the Federal permitting process, North Carolina must provide a certification of approval under CFR part 401. The State's 401 Certification/Wetlands Unit, in the Division of Water Quality, is the implementing state agency, and may require additional information from an applicant.

BROWNFIELDS

Property that is abandoned, idled or underused because of actual or possible environmental contamination and that is or may be subject to remediation under specified state or federal remediation programs is known as "brownfields

property". See N.C.G.S. § 130A-310.31(b)(3). Brownfields property often remains undeveloped, because the cost of remediation to normal standards is prohibitive. As a result, the Brownfields Property Reuse Act permits a developer to enter into an agreement, known as the "brownfields agreement" with the North Carolina Department of Environment and Natural Resources under which the developer agrees to undertake limited remediation and to develop the property for a use that is safe to the public. In exchange, the developer is absolved from liability for failing to undertake more extensive remediation efforts. See generally, N.C.G.S. § 130A-310.30 *et seq.*

As an added incentive to brownfields redevelopment, the owner of a brownfields property is entitled to exclude a portion of the appraised value of qualifying improvements made to the property for the first five years after their completion. To qualify for the partial exclusion, (1) the property must be subject to a brownfields agreement, and (2) the improvements to the property must be made after July 1, 2000 and after the date of the brownfields agreement. N.C.G.S. § 105-277.13(a).

In the first taxable year after the qualifying improvements are completed, 90% of the appraised value of the improvements are excluded from tax. The percentage of the appraised value excluded from tax declines to 75% in the second year after completion of the improvements, 50% in the third year, 30% in the fourth year and 10% in the fifth year. In the sixth year and thereafter, the improvements are fully taxable. N.C.G.S. § 105-277.13(c). In addition, the improvements are to be appraised annually during the five-year exclusion period. N.C.G.S. § 105-277.13(a).

SOLID AND HAZARDOUS WASTE MANAGEMENT

General Statutes 130A_290 through 130A_309 covers solid and hazardous waste management requirements. Waste reduction, recovery and reuse requirements are specifically covered in GS 130A_309. Permits are required for the creation of nonhazardous solid waste landfills, treatment and processing facilities, composting facilities, transfer facilities, and incineration facilities. Permits are required for hazardous waste treatment, storage or disposal facilities, the post closure of hazardous facilities, hazardous waste research development and demonstration facilities, and emergency situations (emergency permits can be issued in a matter of hours). Hazardous waste generators and hazardous waste transporters are required to obtain

identification numbers prior to operation. Solid and hazardous wastes are prohibited from disposal into the waters of the state.

RADIATION PROTECTION

The North Carolina Radiation Protection Commission is required by the North Carolina Radiation Protection Act to make rules and implement programs for the receipt and use of radioactive material, accelerators, x-ray machines, machines with radioactive elements, tanning equipment, and the management of low-level radioactive waste. The authority for this is found in General Statute 104E. However, the rules for radiation registrations and licenses are found in Administrative Code 15A NCAC 11. Licenses are required for radiation accelerators, and radioactive materials. Registrations are required for tanning equipment/facilities, x-ray machines and any equipment that has radioactive elements (for example, many kinds of factory machines have measurement gauges with radioactive elements).

ARCHAEOLOGICAL AND HISTORIC SITES

In accordance with general statute 121.12 and Executive Order No. 16, State agencies are required to take historic properties or archaeological sites into account before completing a state action, such as permit applications and licenses applications. The Department of Cultural Resources, Division of Archives & History must be given the chance to review a project to determine its effect on the historic or archaeological site. Any federal action that will affect a historic site is required, under the National Historic Preservation Act (and the regulations under 36 CFR 800), to take the historic site into account. Several state agencies with delegated federal programs are required to follow this procedure. There are federal and state tax credits (as much as 20 %) for the rehabilitation of historic sites (such as old factories, mills, etc.).

Environmental Permits

ALL ACTIVITIES

Does the activity involve all three of the following?

- 1) An action by a state agency
- 2) Expenditure of public money or private use of public land
- 3) Potential for significant environmental effect

Requires an environmental document under the **NC State Environmental Policy Act (SEPA)**
contact the permitting agency

AIR QUALITY ACTIVITIES

Are there air emissions or air cleaning devices?

New source, complex sources, toxic emissions, modifications, control equipment, expansions, etc.

Air Quality Permit
Div. of Air Quality

WATER QUALITY ACTIVITIES

Is wastewater being collected?

Sewer lines, pump stations, etc.

Sewer Collection Permit
Div. of Water Quality

Is there a discharge of wastewater?

To surface water
(Includes treatment systems)

NPDES Permit and Authorization to Construct
Div. of Water Quality

To land surface
(includes treatment system)

Non-Discharge Permit
Div. of Water Quality

To subsurface
(Includes treatment system)

Local Health Department
Div. Environmental Health

Is there any effect on streamflow?

Withdrawals from surface waters,

Streamflow Modification Notification
Div. of Water Resources

stream alteration by dams or weirs,

Dam Safety Permit
Div. of Land Resources

Are water resources affected?

Water use in a capacity use area

Water Use Permit
Div. of Water Resources

In one of 20 coastal counties, or in water basin classified as Outstanding, Resource Waters or High Quality Waters

CAMA Permit
Division of Coastal Management

Construction/use of well for injection

Stormwater Certification
Div. of Water Quality
Special requirements on an NPDES permit may apply
Div. of Water Quality

Construction of well for Supply, monitoring, recovery of minerals or contaminants, exploration, etc.

Injection Well Permit
Div. of Water Quality

Well Construction Permit
Div. of Water Quality

Environmental Permits

Are water resources affected? (cont'd)	Dredging, filing, land clearing, Federal 404 permits, road and pipe crossings of waters and wetlands	401 Certification <i>Div. of Water Quality</i>
	Transfer/disposal of water from use in one river basin into another river basin	Interbasin Transfer Certificate <i>Div. of Water Resources</i>
	Any withdrawal of one million gallons per day or more	Registration of Water Withdrawals <i>Div. of Water Resources</i>
	Pier of structure in state-owned lakes	State Lakes Construction Permit <i>Div. of Parks and Recreation</i>
	Cable, pipeline, bridge over or under navigable waters	State Easement <i>State Property Office</i>
Injecting substances into the subsurface?	Injecting to subsurface through wells	Injection Well Construction/Use Permit <i>Div. of Water Quality</i>
Is development planned within an surface water supply watershed?	Any non-point sources of pollution	Minimum Statewide Managing Requirements of local water shed protection ordinances for water supply watershed management and protection <i>Div. of Water Resources</i>
	Hazardous materials used and stored within the watershed	Permit for Exploration Recovery or Salvage <i>Div. of Archives and History</i>
Is a waterfront cleanup being planned?	Removal of old pilings, wrecked boats, etc. from inland or coastal water bodies	
Is a bridge or other structures easement/being built over navigable waters?	Structures over navigable waters, oil or gas exploration and minerals leases	Bridge or Other Structures
		Lease (over navigable waters) <i>State Property Office</i>
Is a cable or a pipeline crossing navigable waters?	Cable and pipeline corridors in or on lands below navigable waters	Cable or Pipeline Easements (lands below navigable waters) <i>State Property Office</i>
Raising fish, shellfish, or crustaceans for commercial purposes?	Saltwater fish, shellfish, or crustaceans	Aquaculture Permits <i>Div. of Marine Fisheries</i>
	Freshwater fish and crustaceans	Aquaculture Permits <i>Dept. of Agriculture</i>

Environmental Permits

COASTAL AREA ACTIVITIES
Is the activity in the 20 coastal area counties?

Development in designated Area of Environmental Concern (AEC)	Coastal Area Management Act Major Development Permit <i>Div. of Coastal Management</i>
Excavation or filling of marshland, estuarine waters, tidelands	State Dredge and Fill Permit <i>Div. of Coastal Management</i>
When development in an area of Environmental Concern (AEC) is minor	Coastal Area Management Act Minor Development Permit (local) <i>Div. of Coastal Management</i>

LAND AREA ACTIVITIES
Is land disturbed or impoundment involved?

Construction disturbance of one or more acres	Sedimentation Control Plan Approval (State or Local) <i>Div. of Land Resources</i>
Dam 15 feet high and 10 acre feet impoundment volume	Dam Safety Approval to Construct, Alter, Repair or Remove <i>Div. of Land Resources</i>
Impounding 100 acres or more	Mosquito Control Impoundment Permit <i>Div. of Environmental Health</i>
Wetlands impact	404 Permit <i>US Army Corps of Engineers</i> 401 Certification <i>Div. of Water Quality</i>

Will there be mining or exploration activities?

One or more acres of affected land	Mining Permit <i>Div. of Land Resources</i>
Mineral prospects	Geophysical Exploration Permit <i>Div. of Land Resources</i>
Oil or gas drilling	Permit to Drill <i>Div. of Land Resources</i>
Uranium exploration	Uranium Exploration Permit <i>Div. of Land Resources</i>
Excavation of material for more than one off-site construction site	Mining Permit <i>Div. of Land Resources</i>

Is land clearing and burning involved?

Open burning of man-made debris prohibited and burning of land-clearing debris only allowed under certain conditions and in certain locations. Contact Div. of Air Quality for more information	Open Burning Permit <i>Div. of Forest Resources and Div. of Air Quality</i>
Fires in or within 500 feet of woodlands	Open Burning Permit <i>Div. of Forest Resources and Div. of Air Quality</i>

Environmental Permits

Is there an Underground Storage Tank (UST)?

A new system being installed or a leak detection device being installed or permanent closure or change in service
Underground Storage Tank Notification (UST)
Div. Waste Management

Commercial underground storage of petroleum products
Underground Storage Tank Registration and fee
Div. Waste Management

HAZARDOUS MATERIAL ACTIVITIES

Is there a concern about radiation protection?

X-ray machines or any radiation equipment including equipment with radioactive instruments
Registration of Radiation Machines
Div. of Radiation Protection

Commercial tanning business
Tanning Facilities and Equipment Registration
Div. of Radiation Protection

Particle accelerator
Accelerator License
Div. of Radiation Protection

Radioactive material
Radioactive Material License
Div. of Radiation Protection

Is there any removal of asbestos material?

Renovations, demolitions, or planned maintenance
Asbestos Containing Material Removal Permit
Div. of Epidemiology

National Emissions Standards for Hazardous Air Pollutants Notification (NESHAP)
Div. of Epidemiology

Is there treatment, storage, or disposal of hazardous waste?

Management of hazardous waste at facilities
Hazardous Waste, Management Permit
Div. of Waste Management

Emergency disposal when endangerment of public health or the environment
Hazardous Waste, Management Permit
Div. of Waste Management

CULTURAL RESOURCE ACTIVITY

Are cultural resources affected?

Explore, recover or salvage a shipwreck
Permit for Exploration/Recovery or Salvage
Div. of Archives and History

Archaeological investigations on state lands
Archaeological Resources Protection Air Permit

Business License Information

NORTH CAROLINA DEPARTMENT OF COMMERCE

Business ServiCenter - Small businesses are vital to the growth and development of the state. North Carolina is dedicated to supporting of entrepreneurs and start-up businesses. Through a range of state agencies and partners, we offer a wide variety of educational services and technical assistance to help your business grow:

- Licensing, permitting, taxes & insurance
- Financing
- Business plan development
- Evaluating business feasibility
- Strategic needs assessment
- Site location
- Market analysis
- Industry and labor information
- Venture capital needs
- Technology transfer

START-UP INFORMATION - The Business ServiCenter license consultants make it easier for businesses to meet the license requirements of the State of North Carolina.

There are numerous steps a prospective business owner must take before starting a new business. Identifying all the licenses, permits, regulations, and/or other approvals required for the planned business activity is a crucial step to the success of any business.

The State of North Carolina has no single business license that will ensure compliance with the numerous state licenses, permits and regulatory requirements. Additionally, the proposed business may be subject to local and/or federal requirements. Simply knowing which agencies to contact can be a very confusing task for the new entrepreneur.

The ServiCenter does not keep records of existing businesses or issue state business licenses, but assists perspective business owners in identifying and meeting these requirements.

Free Services Provided by the ServiCenter:

- One-on-one client consultations
- Customized licensing information including employer forms and business structure information
- Referrals to local, state, federal agencies and occupational licensing boards
- Identify other business resources

North Carolina Department of Commerce
Business ServiCenter
4344 Mail Service Center
Raleigh, North Carolina 27699-4344
Telephone: 919 715-2864
Toll-free: 1 800-228-8443 (in NC)
Fax: 919 715-2855
<http://www.nccommerce.com/servicenter/>

NORTH CAROLINA DEPARTMENT OF THE SECRETARY OF STATE

No matter how large or small your business may be, the N.C. Department of the Secretary of State is a valuable source of information and technical assistance for companies relocating or making capital investments in North Carolina. The N.C. Department of the Secretary of State works with business and industry in the following areas:

INCORPORATION - The Corporations Division administers North Carolina laws governing the legal formation and regulation of corporations, limited liability companies and limited partnerships. When you are ready to incorporate your foreign or domestic business in North Carolina, you can get the forms and information you will need to complete the process.

**Call the Corporations Division
at (919) 807-2225
or visit the Web site at:**

<http://www.secretary.state.nc.us/corporations>

TRADEMARKS AND AUTHENTICATIONS -The Trademark Registration Section administers all North Carolina trademark and service mark laws. Trademark and service mark protection will help protect the various symbols your business uses to distinguish itself in the marketplace. The Authentication Section assists businesses in authenticating documents intended for legal use in another nation under the terms of the Hague Convention of 1961. If your company conducts business outside the territorial boundaries of the United States, the Authentication Section can provide you with prompt, accurate apostilles and authentications.

**Call the Trademark Registration Section
at (919) 807-2162 and the
Authentication Section at (919) 807-2140
You can also visit their Web site at:
(Trademark)**

<http://www.secretary.state.nc.us/trademrk>
<http://www.secretary.state.nc.us/authen>

Business License Information

UNIFORM COMMERCIAL CODE - The Uniform Commercial Code Section (UCC) files and maintains notices of liens on secured personal property to third parties. UCC filings are a matter of public record and can help businesses make lending and borrowing decisions of their own.

**Call the Uniform Commercial Code Section at
(919) 807-2219 or visit the Web site at:
<http://www.secretary.state.nc.us/ucc/>**

SECURITIES - The Securities Division administers all North Carolina laws governing the sales of financial securities inside the state's borders. The division investigates all complaints filed against securities brokers and dealers, commodities brokers and investment advisers, as well as complaints against specific investment vehicles offered for sale here.

**Call the Securities Division
at (919) 733-3924 or
(800) 688-4507 or visit its Web site at:
<http://www.secretary.state.nc.us/sec/>**

Business License Information

BUSINESS LICENSE INFORMATION FAQ (FREQUENTLY ASKED QUESTIONS)

1. How do I get a business license?

North Carolina has no such thing as "a business license" that covers every business activity. North Carolina has over 700 business license requirements for certain types of businesses. There are also businesses for which there are no state license requirements. Call the Business ServiCenter License Consultants to determine your state license requirements, 919 715-2864 or 1 800 228-8443 toll-free within NC.

2. How do I get a tax number?

There are several types of tax numbers. If a business is planning to have sales, a [Sales & Use Tax number \(AS/RP1 form\)](#) is required. Businesses having employees are required to obtain a [Federal Employer Identification number \(SS-4 form\)](#) along with a N.C. withholding tax number. The Business ServiCenter can provide application forms to businesses for these numbers.

3. How do I register my business name?

The type of business structure determines where a business name (assumed name) should be registered. A [Certificate of Assumed Name](#) for sole proprietorships and partnerships must be filed with the [Register of Deeds](#) in the county or counties where businesses plan to operate. Corporations or Limited Liability Companies must register their business names with the [N.C. Secretary of State, Corporations Division](#).

4. What do I need to do to incorporate my business? Do I need an attorney?

You can Incorporate or form a LLC by filing Articles of Incorporation (Corporation) or Articles of Organization (LLC) with the [N.C. Secretary of State, Corporations Division](#). There are additional steps involved in completing the corporation or LLC. The booklet, "A Guide to Incorporating Your Business" is available to assist you with the paperwork. An attorney is not required, though it may be helpful to have the services of an attorney since there are a number of legal issues involved in establishing new businesses, new corporations and new LLC's. The only time you would be required to use an attorney would be if you wanted to hire someone to incorporate your business for you. When someone

else incorporates your business for you, he or she is considered to be practicing law and it is against the law for anyone other than a licensed attorney to practice law in North Carolina.

5. How do I check to see if a name I want to use as my corporate name is available?

Name availability can be determined by contacting the N.C. Secretary of State, Corporations Division at 919 807-2225. The Corporations Division can also be reached by fax at 919 807-2039. On-line searches can be completed on the [Corporations Division](#) Web page.

6. How do I apply for a Federal ID Number?

A federal employer identification number (Form SS-4), can be applied for by mail or at their Web site. You may contact them toll-free at 1 800 829-1040 or www.irs.gov.

7. Where can I go for a business loan?

Contacting the bank where you are an account holder is a good place to start. Loan information can be obtained from the [Small Business Administration](#) by calling toll-free 1 800 827-5722. In addition, the [North Carolina Self-Help Credit Union](#) offers loan programs for qualified businesses and can be reached toll-free at 1 800 476-7428.

8. If I have a state license, why do I need a city license?

The state license you have is good statewide in North Carolina; however, you may need additional city licenses because you are doing business within city limits. State and city governments are separate entities and may have different licensing requirements. Separate county government requirements may also apply to your business.

9. Who can help me with my business plan?

North Carolina has 58 [Small Business Centers](#) located within Community Colleges across the State. These Centers provide a variety of services to small businesses, including assistance with the development of business plans. For more information, contact your local community college or the [SBTDC](#) in your area. In addition, the [SBA](#) is an excellent resource for assisting with business plans for new and existing businesses, and can be reached toll-free at 1 800 827-5722.

10. Does Business ServiCenter maintain a listing of businesses licensed by the State?

No. The Business ServiCenter does not issue licenses, keep records or register licensed businesses. Municipalities and/or counties maintain tax records for businesses operating within their limits, and municipalities can provide information confirming whether a business has been issued a local privilege license. The "North Carolina Business Directory" published by American Business Directories may be a useful resource and should be available at your local library.

11. Is there a fee for the Business License Consultant services?

No. The Business ServiCenter was created as a result of the business community's need for a central source of information regarding business licenses. All services are provided without cost.

Forms of Doing Business

One of the first issues faced by a foreign investor is choosing the most appropriate structure for its United States operation. The foreign investor can organize a new entity or establish a branch in the United States. It is generally advisable to organize a new entity in the United States rather than operate a branch of the foreign business, because a branch does not provide the foreign investor with “limited liability” and has negative tax implications.

In organizing a new North Carolina operation, there are several types of entities that can be chosen by a foreign investor. The most common include subchapter C corporations and limited liability companies (“LLC”). Each form of business entity has its advantages and disadvantages which are discussed below.

CORPORATIONS

Formation of corporations in the United States is governed by state law and not federal law. In North Carolina, the procedure for organizing a corporation is relatively simple. First, a document entitled the “Articles of Incorporation” is filed with the Secretary of State of the State of North Carolina. The Articles of Incorporation state the name of the corporation, the type of shares of stock, the authorized number of shares of stock and the name and address of the registered agent of the corporation for service of process.

Various other documents must be executed in order to complete the establishment of a North Carolina corporation. These other documents include “bylaws,” which regulate the internal management of the corporation and organizational resolutions which, among other things, elect the directors of the corporation, appoint the officers, select the fiscal year, authorize the issuance of shares and establish bank accounts in the United States.

There is no legally required minimum capital contribution for the establishment of a corporation in North Carolina. However, the capital paid in must be reasonable in order to obtain “limited liability” (discussed below) of the shareholders. The determination of reasonableness depends on the nature and scope of the corporation’s intended business operations, and the foreign investor should review this issue with its North Carolina legal counsel. The capital contribution to the corporation can take many forms including cash, promissory notes, services performed and contracts for services to be performed.

A North Carolina corporation has three levels of control. These include (i) the shareholders; (ii) the directors; and (iii) the officers. The shareholders own the corporation and exercise indirect control by electing the Board of Directors and by voting on certain fundamental matters of corporate policy. The Board of Directors establishes the general policies of the corporation and approves certain actions of the corporation. In addition, the Board of Directors appoints officers. The officers are responsible for implementing the policies of the Board of Directors and overseeing the day to day operations of the corporation. A corporation usually has as its officers a President, a Secretary and a Treasurer (and may have one or more Vice Presidents and an Assistant Secretary). The same person can function in the capacity of a shareholder, a director and an officer, and the same person can hold more than one position as an officer. However, it is common for there to be at least two separate individuals who act as officers in order to execute certain contracts and perform other functions.

The main advantage of the corporate form is the limited liability of the shareholders, which can be achieved if the North Carolina corporation is adequately capitalized and is operated as a separate and distinct legal entity from the shareholders. If properly formed and operated, the shareholders are generally shielded from liability for the debts and obligations of the corporation, and their potential loss is limited to their investment. In addition, the members of the board of directors, which set policy and business strategy for the corporation, are also exempt from personal liability for their good faith business decisions. Usually, the North Carolina corporation is set up as a wholly owned subsidiary of the foreign parent company but can be directly owned by the private owners of the foreign company.

The foreign investor should consider the tax aspects relating to the formation and operation of its North Carolina corporation. The North Carolina corporation will be subject to federal and state income taxes. The maximum federal corporate income tax in 2001 is 35 percent. The North Carolina corporate income tax rate for 2001 is a flat rate of 6.9 percent.

The main disadvantage of the corporate form of doing business in the U.S. - particularly as compared to an LLC, discussed below, is the “double taxation” of income. Any taxable net income of the corporation will be taxed at the federal and state corporate income tax rates. In addition, when the after-tax profits of the corporation are distributed to its shareholders, the shareholders are also taxed at the

Forms of Doing Business

federal and state levels on these distributions. The tax imposed on distributions will depend on the location of the shareholder. If the shareholder is a foreign entity or an individual residing out-side the U.S., the distributions will generally be subject to a federal withholding tax imposed at a flat 30 percent rate. This 30 percent rate is frequently reduced to 5-15 percent if the U.S. has a tax treaty with the foreign investor's home Country. For example, distributions paid by a North Carolina corporation engaged in an active trade or business, and which is wholly-owned by an investor from the following countries would be taxed in the U.S. at the following reduced rates:

Withholding rate on distributions

<u>Country</u>	<u>under Treaty</u>
Canada	5%
France	5%
Germany	5%
Italy	5%
Japan	10%
Switzerland	5%
The Netherlands	5%
United Kingdom	5%

Each Treaty should, however, be analyzed for specific application to each investment and situation. North Carolina does not impose a separate withholding tax on distributions by North Carolina corporations to foreign shareholders.

In addition, the foreign shareholder may be entitled to a credit in the shareholder's home country for some or all of the tax imposed on such distributions, and this aspect should be considered with the foreign investor's tax advisor in its home country. In some countries no further tax is imposed on intercorporate distributions.

Although a U.S. corporation owned by foreign investors has the disadvantage of "double taxation," it has the advantage that the foreign shareholder generally avoids any requirement to file U.S. income tax returns. This is a significant advantage of the corporate form of doing business in the U.S.. However, if the U.S. corporation is owned by an individual foreign investor, the value of such U.S. corporate stock will be subjected to U.S. estate tax upon the investor's death unless a treaty exemption applies (e.g., Germany).

LIMITED LIABILITY COMPANIES

An LLC is a hybrid of a corporation and a partnership. It is conceptually similar to the GmbH in Germany and Switzerland, the SARL in France, the Limitada in Italy, the SprL in Belgium, and the S. de R.L. in Mexico. If structured correctly, the LLC provides its owners (called "members") with the limited liability enjoyed by the shareholders of a corporation and a single level of federal and state taxation in the United States. The profits, losses and deductions are passed directly through the LLC to the members because the LLC is considered a partnership for tax purposes (although some states, but not North Carolina, tax all LLCs as corporations). Thus, only the members pay tax on the taxable income of the LLC and "double taxation" is avoided. This may offer significant savings on U.S. taxes in comparison to operating through a corporation; the amount of savings depends on the plans for distributing profits, the U.S. tax rate on distributions to a particular foreign investor, and other considerations.

The disadvantage of an LLC from a U.S. tax perspective is that the foreign member of an LLC must pay tax on its income from the LLC and must file U.S. tax returns. This exposes the foreign investor to, among other things, audits by the U.S. Internal Revenue Service. In addition, a United States "branch profits" tax may be imposed if the investor is a foreign corporation. Finally, if the foreign investor is an individual the value of the investor's interest in the LLC will be subject to U.S. estate tax upon the investor's death.

There are ways to structure the investment such that the foreign investor's main operating company is not exposed to U.S. taxation through an LLC. Much of this structuring involves tax issues in the foreign investor's home country. For instance, the foreign investor could establish a wholly-owned subsidiary in its home Country and this foreign subsidiary could be the member of the North Carolina LLC. Thus, the foreign subsidiary would act as a holding company through which the investment in the United States would be made; this foreign subsidiary would then have the U.S. tax obligations described above. This structure would insulate the assets of the main operating company from the taxing jurisdiction of the United States.

In deciding between doing business in the U.S. through an LLC or a corporation, the tax laws of the foreign investor's home country should also be

Forms of Doing Business

considered so the structure with the maximum overall benefit can be established.

An LLC is formed by filing “articles of organization.” The articles of organization need not disclose the identity of the members, who can instead be identified in a separate private document. Instead of adopting bylaws as in a corporation, an “operating agreement” is adopted by the members of a LLC to govern the relationship between the members. The operating agreement provides much more flexibility than the bylaws in a corporation. The operating agreement allocates the income, gain, losses, deductions and credits among the members. In addition, the operating agreement governs the distribution of cash and other property among the members.

LLCs can be member-managed or manager-managed. The distinction between the two is analogous to the distinction between a general partnership and a limited partnership (described below). In a member-managed LLC, all of the members can influence the day-to-day operation of the LLC, subject to the terms of the operating agreement. In a manager-managed LLC, the members have an economic interest in the LLC, but generally do not control the management of the LLC. The management is instead controlled by managers, who may or may not be members, who are appointed by the members pursuant to the operating agreement. The duties of a manager of an LLC generally mirror the duties of a director in a corporation.

The use of the LLC form is particularly useful because the operating agreement can expressly delineate the division of profits and losses, the allocation of risks and the management responsibilities of each member.

OTHER ENTITIES

Other forms of business entities available to a foreign investor include, for example, general partnerships and limited partnerships. Foreign investors generally do not choose any of these entities because of their various drawbacks. A general partnership is an association of two or more persons to carry on a business for profit. A written partnership agreement is not legally required but is highly recommended. In fact, a general partnership can be created unintentionally by the parties. The main drawback to a general partnership is that each partner’s potential liability is unlimited. The partners of a general partnership are jointly and severally liable for all debts and obligations of the partnership. However, a

general partnership may register as a limited liability partnership by filing an application with the North Carolina Secretary of State. The partners of a registered limited liability partnership ordinarily do not have liability for the debts or obligations incurred by the partnership while it is a registered limited liability partnership.

A limited partnership has two classes of partners. The general partner(s) generally manages the day-to-day operations of the partnership and has unlimited liability for all debts and obligations of the limited partnership. In contrast, the limited partners are similar to shareholders in a corporation in that they have limited liability and their losses are limited to the value of their investment in the limited partnership, regardless of whether they participate in the management or control of the partnership’s business. A limited partnership is formed by filing a Certificate of Limited Partnership, and while a partnership agreement is not required it is recommended.

HYBRID ENTITIES

A hybrid entity is a business entity that is treated as a corporation in one jurisdiction and as a partnership in another. Such arrangements can produce interesting and sometimes beneficial tax results. For example, an entity owned by a foreign investor and classified in the U.S. as a corporation can insulate the investor from U.S. estate taxation. but provide the investor with the benefits of flow-through treatment in the foreign jurisdiction.

Hybrid arrangements are, however, complex and must be carefully reviewed and coordinated with foreign tax counsel.

VISA AND IMMIGRATION ISSUES

Foreign companies should consider early in the planning process their need for visas for transferees to the U.S. U.S. immigration laws are very complex and can cause problems and delays for those who fail to plan ahead. U.S. immigration laws distinguish between two types of persons: nonimmigrants (persons coming to the United States for a limited period of time for business or pleasure) and immigrants (persons intending to remain in the United States permanently or indefinitely). These categories cannot be discussed in detail at this time, but a few points should be mentioned. Lawful permanent residence (the “green card”) is available under certain circumstances. The green card has not been commonly used for the initial transfer of individuals to the U.S. Instead, the initial transfer has usually been made by using one of the nonimmigrant business visas. However, under the Immigration Act of 1990, it is possible for certain transferees to come into the U.S. on an immigrant visa, rather than a nonimmigrant visa, if planning and implementation of the transfer can begin several months (or years) before the actual date of transfer.

There are five useful nonimmigrant business visas the B-1, L-1, E, H-1B and O-1 visas. The B-1 “business visitor” visa enables a businessman to visit the United States for a short period of time (normally six months or less). One or more extensions of stay, in increments of six months or less, are possible in appropriate cases. However, USCIS has recently increased scrutiny of requested stays in B-1 status for longer than 30 days. During the B-1 nonimmigrant stay in the U.S., he may attend business meetings, solicit sales (under certain restrictions) for the foreign company, and negotiate contracts. He may not be employed in the U.S. although he may be reimbursed for legitimate business expenses.

L-1 “intracompany transferee” visas are available for managers, executives, and individuals with specialized knowledge of the company’s business or products who have worked abroad with a properly related company for at least one year within the preceding three years. Regulations limit the validity of the initial L-1 visa to one year for those being transferred to newly formed United States businesses (businesses which have been doing business for less than one year). All other L-1 visas maybe issued for an initial period of three years. The Immigration Act of 1990 has broadened the definition of “manager” and extended the period of authorized L-1 stay for managers and executives (now classified as L-1As) to seven years. Those transferred in the specialized

knowledge capacity (L-1Bs) may remain in the U.S. for up to five years. USCIS has recently increased scrutiny of the use of this category.

E visas are provided for by a treaty or other agreement between the U.S. and many foreign countries and authorize the employment by United States companies of executives, managers or other individuals who hold essential skills. An E-1 visa application requires proof that substantial trade between the United States and the treaty country is being carried out by the United States company. An E-2 visa application requires a showing that a substantial investment has been made by an overseas company or by foreign nationals. E-2 visas may be issued to the actual investor(s) or to employees of the investor company. If an employee, the applicant must be of the same nationality as the foreign owner(s) of the United States company by which he will be employed. E visas are generally issued in increments of up to five years for managers and executives; three years for essential skills employees. However, they can be reissued indefinitely so long as the investment or trade and nationality requirements for eligibility continue to be met.

H-1B visas are available to individuals coming to the U.S. to be employed in specialty occupations. Such occupations are those which require the services of a professional, usually with a university degree, such as scientists, engineers, computer systems analysts, marketing specialists, etc. The prospective employer of an H-1B nonimmigrant must obtain approval of a Labor Condition Application (LCA) from the U.S. Department of Labor before the H-1B petition may be filed. In the LCA, the employer must attest, among other things, that it will pay the H-1B nonimmigrant at least the prevailing wage for the job or the actual wage paid to other workers similarly employed, whichever is greater. H-1B visas may be issued for an initial three year period, and may be extended for an additional three years.

The O-1 visa, established by the Immigration Act of 1990, is available to aliens of exceptional ability, including such ability in business. To obtain O-1 classification, it must be established that the individual has achieved national or international acclaim. An O-1 petition may be approved for an initial period of three years, and extensions may be granted in one year increments.

Accompanying family members in the L-1, H-1 B, E and O-1 categories may obtain nonimmigrant visas which are generally valid for the same period of time as the visa of the principal beneficiary. However,

family members may not engage in employment in the United States while in dependent nonimmigrant visa status.

The visa application process is complex, time consuming, and paper intensive. Advance planning and the assistance of a qualified U.S. immigration attorney are essential.

PRODUCT LIABILITY

There has been much publicity worldwide about U.S. product liability laws. The U.S. generally follows the doctrine of “strict liability.” This means that if an individual is injured by a defective product, someone along the chain of distribution is liable to the individual regardless of the degree of care used in the testing, marketing, sale or maintenance of the product. Although not always the case, liability most often rests with the manufacturer.

Strict liability is a fact of life in the United States, and there is no way to eliminate this risk. There are, however, many ways to minimize the risk of product liability. Obviously, both domestic and foreign companies would not continue selling in the United States if they were not able to manage this risk. The most effective way is to build well-designed, quality products with appropriate safety devices and warning labels. Also, promotional materials and instruction manuals on operation, use and safety should be carefully drafted. Importantly, most entities doing business in the U.S. should obtain product liability insurance. A good product liability insurance policy should protect the entity against claims for the defective manufacture of products and will generally cover the cost of defending legal claims brought against the entity. However, product liability insurance should be viewed as a complement, not an alternative, to the other ways of minimizing the risk of product liability. Finally, a periodic safety audit of a company’s practices and procedures is a good method of keeping current on the duties imposed by law and a good investment against future liability.

TERMS AND CONDITIONS

A North Carolina business will also need terms of sale and delivery which comply with U.S. law. Literal English translations of foreign terms are not sufficient and are usually not enforceable in the U.S. because the legal principles involved are very different. Most states in the U.S. have adopted the Uniform Commercial Code, a uniform set of statutes governing the sale of goods that is slightly modified from state to state. The rules codified in these state

statutes must be followed precisely when selling in the United States.

Terms and conditions of sale form the basic terms of each sale transaction. They need not be overly complex and they can be prepared quickly if necessary. Terms and conditions usually address such important issues as limitation of warranties and exclusion of certain damages. The terms and conditions do not alleviate the need to carefully draft the terms specific to a particular sale, including the product being sold, any special operating or performance standards, payment terms and delivery dates. Appropriate sales documentation procedures are also important to maximize the likelihood that the entity’s terms and conditions apply to the transaction. Your North Carolina lawyer can advise you on these issues.

Depending on the business needs of the North Carolina entity it may also be advisable to use terms and conditions of purchase. These are particularly useful for frequent purchases of sophisticated products or materials used in the entity’s operations or production.

CORPORATE PREMISES

The North Carolina business will, of course, need premises from which to operate. Office space for lease and land on which to build are abundant and affordable throughout North Carolina. The North Carolina Department of Commerce, local Chambers of Commerce, and local real estate brokers will work with a foreign operation to find the location best suited for its particular needs. Attorneys generally assist the entity in negotiating its lease and acquiring its land.

FINANCING SOURCES

There are several potential sources of funds for foreign investors in North Carolina including banks, leasing companies and factoring, companies. In addition, the issuance of industrial revenue bonds is a viable source of financing for certain manufacturing businesses.

Banks are available to provide short, medium and long term financing. Short term financing can be arranged through loans or the use of a “line of credit.” Pursuant to a line of credit, the customer is permitted to draw down sums of money from time to time up to a specified maximum. Medium and long term financing usually take the form of loans with interest rates that “float” according to some market

indicator. The most common market indicators used by banks are the “prime lending rate” and the “London Interbank Offering Rate.”

LEASING COMPANIES generally finance personal property and equipment. A leasing company will purchase equipment for the investor and then lease it to the investor for a specified periodic payment. The leasing company retains actual title to the equipment and can depreciate the equipment on its financial statements. The lessee is generally allowed to treat the rental payments as a current expense on its financial statements, thus reducing net taxable income. In addition, many times the lease agreement will provide for a purchase option at the end of the term. The foreign investor should consult with a United States tax advisor to determine whether a lease or a purchase of equipment would be most beneficial.

FACTORING COMPANIES provide funds by purchasing accounts receivable at a discount. The customer is notified that his account has been assigned and then remits payments directly to the factoring company. The factoring company sometimes (but not often) assumes the risk of non-payment and performs bookkeeping and collection functions. The advantage to the seller is the access to immediate cash, although at a discounted value.

INDUSTRIAL REVENUE BONDS are a form of long term, low interest financing used to finance the establishment or expansion of manufacturing facilities in the state of North Carolina. The low interest rate is available because the interest earned by the bondholder is exempt from federal income taxes. Generally, industrial revenue bonds may be issued in amounts up to \$10,000,000.

Industrial revenue bonds may be issued in any of North Carolina's 100 counties. The focus of the industrial revenue bond program is the creation of jobs in the manufacturing sector which will raise the average manufacturing wage level in the community and reduce unemployment. In order to qualify for industrial revenue bond financing, the business must show that (i) the project is a manufacturing facility, (ii) the project will create or preserve new jobs (approximately one job per \$150,000 of financing) and (iii) the business will pay an average wage which is higher than (x) the average wage currently earned by manufacturing workers in the county where the plant is to be located, or (y) (if less) 110% of the North Carolina statewide average wage for manufacturing workers. The wage requirement may

be waived in areas of especially severe unemployment.

The industrial revenue bond financing program begins with the entity's application to the county Industrial Development and Pollution Control Financing Authority (the “Authority”) for “inducement.” The inducement represents a letter of intent by the Authority to issue industrial revenue bonds for the benefit of the company. Only costs incurred by the company *after* the “inducement” may be paid out of bond proceeds. Thus, *the company should not enter into bidding contracts for the purchase of land or otherwise prior to being induced or prior to speaking further with legal counsel in North Carolina.* So long as the company has been induced, it may incur costs relating to the project prior to issuance of the bonds and thereafter be reimbursed for these costs out of bond proceeds, so long' as the bonds are issued within one year after the project is placed in service. This enables the company to proceed with the development of the project even though the bonds have not yet been issued.

Once the inducement is obtained, the company must prepare and submit an application for project approval to the North Carolina Department of Commerce. This application will include, among other things, information on the company, the facility, the environmental impact of the project, the products to be manufactured, employment and wage figures and projections for the viability of the project. In addition to the approval of the application by the North Carolina Department of Commerce, the bonds must be approved by the North Carolina Local Government Commission and by the county commissioners in the county where the project is to be located, and an allocation of funds must be approved by the North Carolina Allocation Committee. It will generally require a minimum of 3-5 months from the time of inducement before the bonds can be issued.

INCENTIVES FOR QUALITY JOBS AND BUSINESS EXPANSION

The William S. Lee Quality Jobs and Business Expansion Act was enacted in 1996 and subsequently amended by the North Carolina General Assembly to recruit new companies into North Carolina, or encourage existing companies to add jobs, production capacity or invest in product related research. The potential tax savings offered by the Act should be of interest to new expanding companies and their investors. The Act contains the following categories

of tax credits which are offered by the State of North Carolina:

1. Investment in Machinery and Equipment Tax Credit;
2. Job Creation Tax Credit;
3. Worker Training Tax Credit;
4. Research and Development Tax Credit;
5. Investment in Central Administrative Office Property Tax Credit;
6. Investment in Air Courier Hubs Tax Credit; and
7. Investment in Large or Major Recycling Facilities Tax Credit.

Contact your attorney or the North Carolina Department of Commerce for more information on the requirements for qualifying for these credits and details on the potential tax savings offered under each credit.

EMPLOYMENT ISSUES

The United States laws regarding the employment of workers are less restrictive than in most foreign countries. North Carolina, in particular, promotes an efficient and effective workforce. North Carolina has an ample supply of hard working, well trained workers for use in both the manufacturing and service sectors. North Carolina has a comprehensive system of universities, community colleges and trade schools which prepare North Carolina workers for a wide spectrum of job opportunities. This intricate educational system prepares all levels of workers from senior level management down to assembly line workers.

In addition, North Carolina is a “right to work” state which means that the right of a person to work for a particular company cannot be denied solely because of the employee’s membership or non-membership in any labor union, organization or association. This is beneficial to employers because it discourages the formation of labor unions and helps to keep labor costs down.

Legal issues should be considered when hiring and terminating employees in the United States. North Carolina follows the “employment at will” doctrine. This means that, without an agreement as to the term or length of employment, an employee can be terminated by the employer, with or without cause, at any time, except for certain illegal reasons. However, employers often require their executive employees to sign a written employment agreement, which generally includes provisions such as salary, benefits, length of employment, notice period for termination,

covenants not to compete, and covenants not to use or disclose confidential and proprietary information of the employer. Employment agreements with non-executive employees are rare.

A covenant not to compete is an agreement by an employee not to compete with his or her employer in certain ways for a period of time after the employment relationship ends. These types of covenants are strictly construed by the courts, but are generally enforceable in North Carolina if they are in writing, supported by consideration, reasonable as to the duration of the restriction and the territory, and do not violate a public policy of the State. If the covenant not to compete is signed by the employee prior to beginning employment, the hiring of the employee generally is adequate consideration for the covenant not to compete. If the covenant not to compete is executed after the employment relationship has begun, the employer must provide new consideration such as specific additional salary or benefits or other compensation. The terms of the covenant not to compete should be carefully drafted, with the assistance of legal counsel, to address the requirements for enforceability pursuant to North Carolina law.

North Carolina also has a trade secret protection act which prohibits employees from using or disclosing confidential information of the employer which is confidential or proprietary. However, many employers require their employees to sign a written confidentiality agreement. It is preferable to have this type of agreement signed at the time the employee begins employment, and it can be incorporated into an employee handbook (discussed below).

Employers also need to be aware of various employment discrimination laws that protect employees (and prospective employees) from discrimination based on such factors as age, race, gender, religion, national origin, and physical or mental handicaps. These laws include the Civil Rights Act of 1964, the North Carolina Equal Employment Practices Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. With an understanding of these laws, the foreign owned entity in North Carolina should not have particular difficulty adjusting its policies and procedures to operate in accordance with the applicable laws.

Other employment issues that arise include the payment of wages, the granting of employee benefits and the adoption of an employee handbook. The amount of the wages to be paid to an employee are

established by the employer, generally based on market and industry practices (although state and federal laws set a minimum wage that is consistently applied to all industries).

In addition, the employer must withhold a certain percentage of the employee's income to pay certain federal and state taxes and make periodic filings to government agencies regarding the wages of each employee. An accountant or tax advisor in the state of North Carolina can easily guide the foreign entity through the various requirements.

In North Carolina, employers are not generally required to grant employees any specific benefits. In practice, however, North Carolina employers generally offer certain benefit packages as an incentive for employees to work for them. These benefits generally include one or more of the following: medical insurance, dental insurance, disability insurance, and profit sharing and retirement plans. The details of the benefits can be discussed with the employer's legal and financial advisors to determine the most appropriate benefits to offer employees.

Finally, many North Carolina employers adopt an employee handbook to govern the behavior of their employees and to describe the benefits being offered by the employer. An employee handbook is not a complicated document to prepare, but is a useful tool for an employer since it establishes consistent work related standards which the employer and employee will follow. If carefully drafted, it will cover important aspects of employment and will inform employees what standards of performance and codes of conduct are acceptable in the workplace.

GOVERNMENTAL REGULATION

Governmental regulation in the United States is generally lesser than that of other industrialized countries. Nonetheless, there are several federal agencies and federal statutes that directly and indirectly regulate the conduct of business in the United States. The foreign investor must be aware of the regulations that may apply to its particular business.

OTHER LEGAL ISSUES

There are many other legal issues beyond the scope of this presentation which may be of interest to a particular entity as it plans strategy for investing and doing business in North Carolina. These include, for instance, patent and trademark laws, U.S. trade laws,

as well as the legal aspects of other investment structures such as licensing. These issues can be addressed by a legal advisor in North Carolina.

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