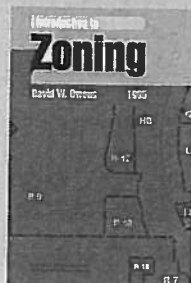
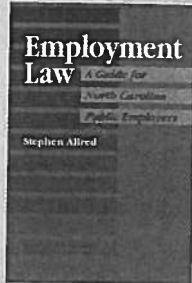


**Selected Local Government
Reference Materials**
published by the
Institute of Government



**Employment Law: A Guide for
North Carolina Public Employers**

Second edition, 1995

Stephen Allred

419 pages; ISBN 1-56011-249-2

This clearly written resource offers guidance to public employers and employees in North Carolina on the law governing the employment relationship. Primarily intended as an explanation of the law and not as a policy guide, this book nonetheless contains occasional suggestions for policy considerations in various chapters, and sample personnel policies are included as appendices. This edition also includes expanded sections on the Americans with Disabilities Act, the Family and Medical Leave Act, and the North Carolina Workers' Compensation Act.

Introduction to Zoning

1995

David W. Owens

120 pages; ISBN 1-56011-275-1

This book introduces zoning law for citizen board members and the interested public. Each chapter deals with a distinct aspect of zoning, such as where a city can apply its ordinance, the process that must be followed in rezoning property, or how an ordinance is enforced. Although intended as a solid introduction for citizens new to these issues, this book will also be a helpful refresher for those who have been at the zoning business for some time.

For ordering information, telephone
(919) 966-4119.

**Questions I Am Frequently Asked:
May We Fill a Vacancy Before It Occurs
(and May a Board Member Participate in
Filling His or Her Own Vacancy)?**

David M. Lawrence

Sometimes local government officials or members of local government boards resign with the understanding that the resignation will take effect at some future date. The question then often arises: May the official or board with power to fill the vacancy do so before the vacancy actually occurs? And, if the vacancy is within the membership of the appointing board itself, may the board member who is resigning participate in filling her or his own vacancy? Although this set of questions is not directly answered by statute in North Carolina and has not been litigated in this state, the answer to both questions appears to be yes. The chain of reasoning is as follows:

First, a member of a local government board clearly may resign effective some date in the future.¹ Once the resignation is accepted, it may not be withdrawn, but it takes effect upon its own terms.

Second, the case law nationally is clear that when an appointing board or official knows of a vacancy that will occur at a specific future date, the board or official may appoint someone to fill the vacancy before that future date. Numerous cases support this rule; two will illustrate it. In *Board of Education v.*

Nevels,² the school board, acting in December 1975, reappointed the superintendent for a term to begin the succeeding July. A new board took office in January 1977 and sought to have the reappointment invalidated. The Kentucky court upheld the reappointment, writing that "[i]t has long been the rule in Kentucky that there can be a valid appointment to an office in advance of the time the vacancy actually occurs. Prospective appointments to office are generally deemed to be valid."³ In *State ex rel. Oklahoma Tax Commission v. Mourer*,⁴ the state tax commission made its appointment to a county board of equalization on December 13, for a term beginning the upcoming January 1. The enabling statute also called for appointments to the board of equalization by the board of county commissioners but prohibited the tax commission and the county commissioners from appointing persons residing in the same commissioners' district. On January 2 the county commissioners purported to make their appointment to the board of equalization but appointed a person who resided in the same commissioners' district as the tax commission appointee. When the tax commission sued to uphold their appointment, the Oklahoma court ruled in favor of the earlier appointment: a board may make an appointment before a vacancy actually

The author is an Institute of Government faculty member whose specialties include public records and local government law.

occurs. Therefore, the tax commission appointment was valid, and, having been first, the tax commission appointment had precedence.⁵ I have found no cases disagreeing with this basic rule, and therefore I expect the North Carolina courts would adopt it as well, should they face the question. The rule, after all, does make sense: it allows an appointing official or board, knowing of an impending vacancy, to make sure there is no interruption in the performance of the duties associated with the office or position in question.

There is one important exception to this general rule, one that would probably be accepted in North Carolina along with the rule. When the vacancy will not become effective until after the conclusion of the terms of some or all of the members of the appointing body, the vacancy may not be filled by the current members of the appointing body. For example, in *State ex rel. Norman v. Viebranz*,⁶ a school board appointed one of its members (Marcial) to a regional vocational education board as the school board's *ex officio* representative on that regional board. Marcial was then defeated for reelection, which also cost him his seat on the regional board. In anticipation of Marcial's leaving the regional board, the remaining members of the school board appointed another school board member, Norman, to the seat on the regional board. Shortly thereafter, the new members of the school board qualified for office, and they appointed Viebranz to the same seat on the regional board. In a suit between Norman and Viebranz, the Ohio Supreme Court held that it was the new school board, rather than the retiring board, that was empowered to make the appointment.⁷

Third, until the effective date of the resignation, a resigning board member remains a full member of his or her board, as entitled (or required) to participate in board matters as any other

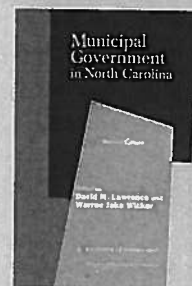
member.⁸ When a board is filling a vacancy in its own membership, as county commissioners and city councils are authorized to, and therefore the person resigning is resigning as a member of that board, he or she still remains a member of the appointing board until the resignation becomes effective. The North Carolina statutes impose a duty on the members of city councils and boards of county commissioners to vote on all matters that come before the board, unless excused as permitted by statute.⁹ The statutes limit the reasons that justify such an excuse, and those reasons are inapplicable to filling one's own vacancy.¹⁰ Therefore, if the board acts to fill the vacancy in its own membership before the vacancy in fact occurs, the resigning member not only may, but must, vote on the issue.

In conclusion, then, when it becomes settled that a vacancy in an office will occur at some date in the future, the official or board with authority to fill the vacancy may do so before the vacancy in fact occurs; the only exception to this rule occurs when the vacancy will not become effective until after the end of the term of the appointing official or of the terms of some or all of the members of the appointing board. In addition, if the board is filling such a future vacancy among its own membership, the member whose resignation is causing the vacancy may participate in filling it.

Notes

1. See *In re Peoples*, 296 N.C. 109, 250 S.E.2d 890 (1978), in which a district court judge had resigned with a future effective date and the court clearly assumed such a resignation was possible and proper.
2. *Board of Educ. v. Nevels*, 551 S.W.2d 15 (Ky. Ct. App. 1977).
3. *Nevels*, 551 S.W.2d at 18.
4. *State ex. rel. Oklahoma Tax Comm'n*, 596 P.2d 882 (Ok. 1979).
5. Another relatively recent case accepting this general rule is *Morrison v. Michael*, 159 Cal. Rptr. 568 (Cal. Ct. App. 1979), in which the court upheld a propos-

Selected Local Government Reference Materials published by the Institute of Government



Municipal Government in North Carolina

Second edition, 1996
 Edited by David M. Lawrence and Warren Jake Wicker
 770 pages; ISBN 1-56011-248-4 (Paperback); ISBN 1-56011-280-8 (Hardback)

This comprehensive introduction to North Carolina city government describes how cities are established and organized; what their powers, functions, and financial resources are; and how they operate in North Carolina.

Open Meetings and Local Governments in North Carolina: Some Questions and Answers

Fourth edition, 1994
 David M. Lawrence
 55 pages; ISBN 1-56011-231-X

In 1994 the North Carolina General Assembly enacted a significant set of amendments to the open-meetings law. This edition reflects those most recent amendments, which modified the definition of public body and completely revised the section of the law allowing closed sessions. Discussing the statute through a series of questions and answers, this book is a must-have for members of local governing boards, local government administrators, reporters, and others who deal on a recurring basis with the state's open-meetings statute.

For ordering information, telephone (919) 966-4119.

pective judicial appointment by the state's governor.

6. 483 N.E.2d 1176 (Ohio 1985).

7. Other cases that support this exception to the general rule include *Mullinax v. Garrison*, 373 S.E.2d 471 (S.C. 1988) (A county's legislative delegation was authorized to appoint members of state board of education and current members sought to fill vacancy that would occur succeeding January 1, even though their own terms expired November 13. The court holds that they could not make the appointment, because their own terms ended before the vacancy was to occur.); *Hansen v. Town of Highland*, 147 N.E.2d 221 (Ind. 1958) (An

outgoing city council appointed the initial members of a new board, a few weeks before a new city council took office. The court states the general rule and the exception but decides the exception does not apply because the enabling statute required the outgoing council to establish the board before the new council took office.).

8. See *In re Peoples*, note 1 above, in which the court wrote that "[w]hen a resignation specifies the time at which it will take effect, the resignation is not complete until that date arrives. Thus, Respondent [who had resigned on January 10, to take effect on February 1] remained a District Court Judge until 1 February 1978, *exercis-*

ing all the powers of that office" (emphasis added) 296 N.C. at 145, 250 S.E.2d at 911.

9. N.C. Gen. Stat. § 153A-44, for counties; N.C. Gen. Stat. § 160A-75, for cities. School boards also fill their own vacancies, but there is no comparable statutory requirement that school board members vote on all matters coming before the board; therefore, a school board could probably provide by rule for when board members may be excused.

10. The two statutes permit a board member to be excused from voting only if the matter involves the board member's personal financial interests or the board member's official conduct. ■

Book Review

An Introduction to Imaging Systems

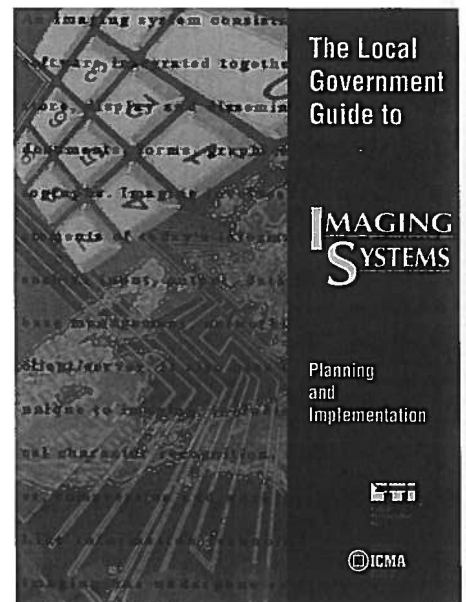
The Local Government Guide to Imaging Systems: Planning and Implementation, by Todd Newcombe. International City/County Management Association [telephone (202) 289-4262; fax (202) 962-3500], 1995. 112 pages. \$35 for local governments and nonprofit organizations, \$70 for all others.

William A. Campbell

The imaging systems discussed in this book are systems in which paper documents are scanned to optical disks and retrieved by computer technology. Imaging systems have many advantages over traditional methods of processing and storing records. First, they save space. In place of file cabinets and record books, optical disks are stored in "jukeboxes" that retrieve the optical platters in much the same way that the machine with colored lights at your favorite café is able to retrieve and play "Heartbreak Hotel," only faster. A single optical disk can hold 40,000 to 100,000 pages of 8½ by 11-inch documents, and a jukebox can

store and retrieve as many as 200 disks. Second, using a computer network several different government agencies or officials can obtain simultaneous access to the same record. Third, access to the record can be obtained from a remote location by anyone with a PC and a modem. Several years ago in Charlotte, in what at that time was a gee-whiz demonstration, I watched as records from Middlesex County, Massachusetts, were brought up on a computer screen and then faxed to Charlotte. Among the North Carolina local governments in which imaging systems are already in use are the offices of registers of deeds in Cumberland, Harnett, and Orange counties.

This book is a good introduction to imaging systems, with chapters on both the management and technical aspects of such systems. I found the technical discussions more interesting and easier to follow than the management parts, largely, I think, because Newcombe is a disciple of the "reengineering government" movement. I find the meaning of such statements as "organize around the outcome not the tasks" and "integrate information processing with information production" hard to grasp,



but I acknowledge that to those in the movement they may be as understandable as "pass the salt." Newcombe makes the important point in his management chapter, though, that much thought must go into planning for change. That is, a government department that intends to implement an imaging system must spend as much time and effort on planning for the changes in work assignments and work flow that imaging will bring as it does on selecting the imaging equipment and soft-