(5)

ATTACHMENT 2
§ 103

§ 103. The Nature of Public Purpose: Private Purpose

One basic attitude at work in the public purpose limitation is that some activities are reserved for the private sector of our economy and it is inappropriate for government to engage in those activities. This attitude reflects a fundamental bias in favor of the private sector and the market economy. It is a bias not explicitly found in our constitution, yet one that is very real in public purpose jurisprudence. Thus, for example, the court has held that it is not a public purpose for a city to construct and operate a hotel.[9] This activity is reserved for the private sector.

Thus far, simple enough. The difficulty comes in recognizing or determining the activities reserved for the private sector or appropriate to the public sector. Many activities are performed by both; indeed, it is difficult to think of a governmental activity—particularly a local governmental activity—that has not been privately performed at some time during the last 200 years. Moreover, the long-term tendency has been for the role of government to grow, for government to assume activities that previously were the primary preserve of the private sector. Unfortunately the cases, especially their rhetoric, do not provide much guidance in determining which activities are public and which must remain private. What emerges from them is a sense of respect for traditional governmental activities, coupled with a cautious attitude toward innovations, toward expansions of government's role. If an activity has traditionally been engaged in by government, then it is almost certain to be held to serve a public purpose. The courts had no difficulty holding that police or fire protection, street construction, or public health programs serve public purposes. Furthermore, if an activity is new but is perceived as an outgrowth of more traditional functions, then it too will likely be held to serve a public purpose. Our court upheld government provision of housing by emphasizing the slum-clearance aspect of public housing and then drawing on the traditional public concern for safe and sanitary housing for its citizens. So too airports

9. Nash v. Tarboro, 227 N.C. 283 (1947).

Lawrence, Local Government Finance in North Carolina, 2nd Ed.

were perceived as a continuation of government's traditional concern to facilitate transportation and commerce through the construction of roads, canals, and port facilities and were held to serve a public purpose. But when an activity is entirely new and cannot draw on such a tradition, a public purpose attack is more likely to succeed. Tarboro's attempt, some forty years ago, to construct and operate a hotel was such an innovation, and the attack did succeed: the hotel served no public purpose, and using public moneys for it was unconstitutional.

Appendix A lists the activities that the North Carolina Supreme Court has held to serve public purposes. Activities that do not appear on the list are not necessarily ones that do not serve a public purpose; more likely this issue simply has not been litigated in regard to them.

§ 104. The Nature of Public Purpose: Who Benefits?

In discussing the public purpose limitation, the courts frequently distinguish between public and nonpublic purposes in language much like this:

> It is clear, however, that for a use to be public its benefits must be in common and not for particular persons, interests, or estates; the ultimate net gain or advantage must be the public's as contradistinguished from that of an individual or private entity.[10]

That language is of little help in determining whether a particular activity is best provided by the public or private sector; rather, it calls attention to a second context of the public purpose limitation. In this second context, the limitation is concerned that the *public* be the beneficiary of public programs and expenditures. The activity might be one that is the appropriate business of government, one not limited to the private sector, yet a particular application might not serve a public purpose because the public benefit is minimal. This section explores three situations in which the nature of the beneficiary has raised public purpose questions—if the public

10. Mitchell v. Financing Authority, 273 N.C. 137, 144 (1968).

benefit is too narrow, if the location of the expenditure is outside the unit, or if the public benefit is too broad.

A. The Benefit Is Too Narrow

Some expenditures fail the public purpose test because the benefit they confer on particular persons or agencies significantly outweighs any benefit to the public at large. In such a case the court balances the public benefit against the private benefit, invalidating the expenditure if the private benefit is predominant. Illustrating this principle are the several attempts by governments to build facilities for private entities—either industrial corporations or hospitals.[11] In each case, a public agency sought to issue bonds to build a facility for lease to the private agency. The ultimate effect would be that the private agency obtained a new facility at less cost than would have been possible through private borrowing. In each case, the court found this benefit to the private agency paramount, significantly outweighing any public benefit and causing the entire program to fail the public purpose test. These specific cases have since been reversed by constitutional amendment,[12] but they continue to stand as reflections of the basic point that the benefits of a particular expenditure or activity may be so narrowly placed that the expenditure or activity serves no public purpose. Although this aspect of the public purpose limitation is well-established, it is most difficult to predict the judicial treatment of any particular expenditure. The balancing process that underlies these cases is essentially without clear standards, dependent on the values of the particular judges making the decision, and values can differ significantly.

It should be noted that the problem in the cases referred to in the paragraph above was that the benefit to a *very few* persons or entities far outweighed the benefit to the general public. That is, the problem was in the very limited number of beneficiaries rather than in the fact of direct, primary benefit

11. *Id.* at 137; Foster v. Medical Care Comm'n, 283 N.C. 110 (1973); Stanley v. Dep't of Conservation and Development, 284 N.C. 15 (1973).

12. N.C. CONST. art. V, §§ 8 and 9 (1976).

to individuals. Many governmental programs provide such a direct, primary benefit to individuals—social service programs, housing programs, education programs, to take obvious examples. The court has several times upheld, against public purpose challenges, programs of this latter sort. It upheld higher education loans to persons of low or moderate income in *Educational Assistance Authority v. Bank*[13] and housing loans to such persons in *Martin v. Housing Corporation*[14] and *In re Housing Bonds.*[15] In each case the court emphasized two points. First, the benefit to the individuals would be accompanied by broader public benefits—an educated citizenry in the education loan case and the abatement or avoidance of slums in the housing loan cases. Second, the private sector had been unable to provide the kinds of loans in question; if the loans were to be made, only the public sector could do it.

B. Location of the Expenditure

For a county or city, the primary public that is to benefit from public expenditure is the citizens of the county or city. This fact has sometimes led to the argument that facilities constructed with a county's or city's funds must be located within the unit or that services provided with a county's or city's funds must be provided within the unit. The courts have usually rejected such arguments. It is the benefit to the unit's citizens that is important rather than the location of the facility or program. Thus the court has upheld city support of an armory that was to be located outside the city; city support of a city-county library, even when some city funds were spent outside the city; and one county's payment of three-fourths of the cost of a bridge connecting it with a neighboring county, even though most of the bridge was in the neighboring county.[16] In each case the actual benefit to the citizens of the city or county justified the extraterritorial expenditure.

13. 276 N.C. 576 (1970).

14. 277 N.C. 29 (1970).

15. 307 N.C. 52 (1981).

16. Morgan v. Spindale, 254 N.C. 304 (1961)—armory; Jamison v. Charlotte, 239 N.C. 682 (1954)—library; Martin County v. Wachovia Bank and Trust Co., 178 N.C. 26 (1919)—bridge.