## Coates' Canons Blog: Competing, Making a Profit

**By David Lawrence**

**Article: https://canons.sog.unc.edu/competing-making-a-profit/**

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UPDATE August 2013: For additional limitations regarding the provision of cable and broadband services by municipalities, click **here**.

I have recently received several phone calls asking me about the statute that prohibits local governments from making a profit on operations or about the one that prohibits them from competing with the private sector. There actually are no such statutes of general application, although there are a few specific statutes with that effect and a couple of cases that are relevant.

There is no comprehensive statutory or constitutional bar to a local government making a profit on its operations and using that profit to support unrelated activities. Historically, for example, cities with electric or natural gas distribution systems made significant profits and used those profits to subsidize general fund operations. In recent years, though, the General Assembly has imposed a no-profit rule on stormwater and solid waste enterprises. The statutes are:

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| Stormwater utility | 153A-277 and 160A-314 |
| Solid waste collection | 153A-292 and 160A-317 |
| Solid waste disposal | 153A-292 and 160A-314.1 |

In addition, when the revenues in question arise from what are called “regulatory fees” – fees imposed on someone as part of a regulatory process – the North Carolina supreme court has held that while the fees may cover the costs of the regulatory program, they may not earn a profit beyond that. Homebuilders Assn. of Charlotte v. City of Charlotte, 336 N.C. 37 (1994). But apart from the listed statutes, and the rule set out in the Homebuilders case, it is economics, not law, that keeps a city or county from making a profit on its various operations.

As to competing with the private sector, there is a state government statute with that effect. **G.S. 66-58,** which is widely but informally known as the Umstead Act, generally prohibits any agency that is part of State government from engaging “directly or indirectly in the sale of goods, wares or merchandise in competition with the citizens of the State.” The act is subject, though, to dozens of exceptions, the very first of which provides that it does not apply to counties and municipalities. There is no comparable statute that does apply to local governments.

The General Assembly has *regulated* competitive activities of local governments engaged in two enterprises. Competition between electric cities, electric co-ops, and investor-owned electric utilities is regulated by G.S. 160A-331 through 160A-338. And a local government that begins to compete with private solid waste collectors must comply with procedures and protections imposed by G.S. 160A-327. These are the only such regulations that I am aware of, however.

It might also be recalled that the state supreme court has indicated that entering into competition with the private sector can violate the public purpose limitation of the state constitution. In Nash v. Tarboro, 227 N.C. 283 (1947), the court held that it was not a public purpose for a town to own and operate a hotel, which the court noted was “essentially a private business, conducted for private gain.” While the case has no relevance to activities that are authorized by statute and that clearly serve public purposes, it might stand in the way of a local government that sought to get legislative authority for and then begin a new activity that was already being provided by the private sector.

David Lawrence is retired from the faculty of the School of Government. For questions about the subject of this blog post, please refer to our **list of faculty expertise** to identify the appropriate faculty member to contact.

## Links

- canons.sog.unc.edu/?p=4967
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_66/GS_66-58.html
- www.sog.unc.edu/node/1553