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## Coates' Canons Blog: Does the Board Have to Approve This?

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A frequently asked question if there ever was one. It would be nice if the statutes that govern local government activities were consistent and clear about what specific decisions or activities require governing board approval. No such luck. But there are a few key pieces of information that can help answer the question. This blog post discusses two situations that clearly require governing board action: 1) when a statute specifically requires it; and 2) when the action is legislative in character. In most other situations, actions may be undertaken by the board, or may be delegated to some other person or board within the unit. Of course, there is frequently value in obtaining governing board approval for some things even when it's not required.

### What the Statute Says

The legislature defines local government authority through specific "enabling" statutes, which describe not only the powers these units may exercise, but also, with varying degrees of detail, the specific procedures they must follow when doing so. Parallel statutes for **cities** and **counties** provide that powers of the city or county are to be exercised by the governing board. However, "a power, right, duty, function, privilege, or immunity that is conferred or imposed by law without direction or restriction as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the [governing board]." So the governing board is free to delegate responsibility for any function or activity to others as it sees fit, unless a statute specifies how it must be done. As a practical matter, in most cases the delegation of authority is through the organizational structure the board creates, including job descriptions, budgetary decisions, and other specific actions allocating responsibility for administrative functions within the unit.

Take contracting, for example: Which contracts must be approved by the governing board? Cities and counties have broad authority to contract as part of the basic delegation of powers under **G.S. 160A-11** and **153A-11**. More specific provisions dealing with particular types of contracts are sprinkled among numerous statutes and may also be addressed in city charters and other **local acts** of the General Assembly. Some statutes specifically require action by the governing board, and others don't. The **formal bidding statute** requires the "governing board" to award construction contracts in the formal bid range (\$500,000 or more), but specifically authorizes delegation of authority to award purchase contracts in the formal bid range (\$90,000 or more). The **informal bidding statute** doesn't specifically require governing board action for any type of contract, so the board is free to delegate this responsibility for these contracts. Similarly, most of the procedures for disposing of property, set forth in **Article 12 of Chapter 160A** (applicable to cities, counties, and schools), require board action, but **G.S. 160-266(c)** specifically authorizes the board to delegate authority to dispose of personal property worth less than \$30,000.

In contrast, most types of service contracts are not governed by any specific statutory provisions so there are no specific requirements for board approval of these contracts. So a contract for solid waste services costing \$650,000 may be approved by the manager or the solid waste director, but a construction contract costing \$650,000 must be approved by the governing board. Why? Because the statute says so.

When it comes to personnel matters, authority is affected by the structure in the unit. The statutes governing authority under the city-manager and county-manager forms of government dictate much of the division of responsibility, assigning specific responsibility for personnel administration to the manager, and taking it away from the governing board. Of course, the board may choose whether or not to adopt this form of government, but once it has chosen, the statutes dictate the division of responsibility. In a non-manager form of government, the board is free to retain or delegate authority for personnel actions. Under both structures, legislative actions affecting personnel must be taken by the board. Which leads to the next important factor.

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## Legislative Actions

There is a common law (judge-made) limitation on the governing board's authority to delegate: Cases have held that the board cannot delegate its legislative authority. See, e.g., *Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155 (1969)). In addition, the statutes make clear than any ordinance, or action having the effect of an ordinance, must be approved by the governing board. **G.S. 160A-75; 153A-45.**

It may not always be clear when a particular action is considered legislative (as opposed to administrative or quasi-judicial). For example, how would you characterize the action to approve a "policy" governing requests for public records? Calling something a regulation or policy doesn't always mean that it's not a legislative act. This is a topic for another blog post. It's important to recognize, though, that much of the authority delegated to local governments involves regulation of private activity through local laws. Any action that will be enforced as a local law, with civil or criminal penalties will always require board approval.

## Board Approval When Not Required

Think again about the public records policy. It is probably not, in my view, a legislative matter. But it's a good example of something that may be more effective if the board approves it anyway. A policy or other matter may gain greater adherence and attention through the process of board approval so that is an important factor to consider, even when board approval is not required. Indeed, it's often the case that the board wishes to weigh on a matter, and of course, the board can establish local policies and practices about what may and must be brought before it for review or approval.

## Answering the Question

Consideration of the factors just discussed should help determine what the governing board must approve. To recap: If it's legislative, take it to the board. If it's not, look for specific statutory provisions that govern the action. If the statute says that "the city," "the county," "a local government," or "the unit of government" may or shall take the action, then the governing board itself may do it, or the board may delegate the authority to another person or board. If the statute specifies the "governing board," "the city council," "the board of county commissioners," "the manager," the sheriff," "the board of adjustment," or any other specifically named official or board, then that official or board must take the action.

One final point: It would be comforting to imagine that the legislature carefully considers, when enacting enabling legislation, whether to limit the governing board's authority to delegate authority for authorized activities. In some cases, the choice of wording is probably intentional. The example in contracting area illustrates, however, that there are certainly cases where the specific language chosen creates illogical results. As I noted in **an article about North Carolina's non-home rule status**, the legislature has delegated broad, home-rule like authority to local governments in North Carolina. But a consequence of the form of that delegation (multiple, individual enabling statutes), is that the detail in some of the statutes inhibits local flexibility in administration.

## Links

- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-12](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-12)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-12](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-12)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-11](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-11)
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- [canons.sog.unc.edu/?p=2163](http://canons.sog.unc.edu/?p=2163)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-129](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-129)
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- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-45](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-45)



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- [www.sog.unc.edu/publications/articles/do-north-carolina-local-governments-need-home-rule](http://www.sog.unc.edu/publications/articles/do-north-carolina-local-governments-need-home-rule)