Coates' Canons Blog: Locally-Collected Penalties & Fines: What Monies Belong to the Public Schools?

By Kara Millonzi

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Which of the following revenues belong to a county's local school administrative unit(s)?

1. A city imposes a $50 civil penalty on a citizen for violating the city's noise ordinance. (The ordinance specifies that each violation is subject to a civil penalty of up to $50. The ordinance also is criminally enforceable under**G.S. 14-4** . That means that violation of the ordinance constitutes a Class 3 misdemeanor under state law.)

2. A county imposes a statutory penalty of 10 percent of the amount of tax due by a property owner for the previous five years (for a total of $1500) when it discovers that the property was not properly listed with the county.

3. Pursuant to local act authority, a town installs red-light cameras at various intersections and adopts an ordinance which imposes a $50 penalty on any car owner whose vehicle is caught on camera running a red light. (Running red lights also is illegal under state law.)

4. A county imposes a $500 penalty on a citizen for violating its local air pollution control ordinance. The local program is authorized and designed to enforce state environmental laws.

5. Citizens turn in several abandoned bicycles to a village's police department. The police department follows the procedures of**G.S. Ch. 15, Art. 2** to sell the abandoned bicycles at auction which generates $1200 in revenue.

The answer is that the "clear proceeds" of**all** the amounts listed above must be distributed to the county's local school administrative unit(s). The first four hypothetical situations are examples of the four categories of penalties and fines collected by local governments that belong to the public schools pursuant to**N.C. Const. Art. IX, Sect. 7** and**G.S. 115C-437.** (As discussed below, the net proceeds in the fifth hypothetical belong to the local school administrative unit(s) in the county by statutory mandate.)

This post summarizes the constitutional mandate and sets forth a framework for determining what locally-collected penalties and fines belong to the public schools. The next post will explore the nuances in calculating "clear proceeds" and detail how the proceeds are distributed to the local school administrative unit(s). Finally, a future post will address the issue of forfeitures.

Constitutionally-Mandated Payments to Public Schools

N.C. Const. Art. IX, Sect. 7 provides, in relevant part, that:

> the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

The North Carolina Supreme Court has defined a penalty as a sum collected under a "penal law[]" or a "law[] that impose[s] a monetary payment for [its] violation [where] the payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party." Mussallam v. Mussallam, 321 N.C. 504, 364 S.E.2d 364 (1988). A fine is a sentence imposed by a court for a criminal law violation. North Carolina courts have not focused on the technical distinction between penalties and fines or the label given to a particular assessment, though. Instead, for purposes of**Art. IX, Sect. 7**, "an assessment is a penalty or a fine if it is 'imposed to deter future violations and to extract retribution from the violator' for his illegal behavior." Shavitz v. City of High Point, 177 N.C.App. 465, 630 S.E.2d 4 (2006). (internal citation omitted).

Locally-Collected Fines and Penalties Subject to Art IX, Sect. 7

The constitutional provision only applies to penalties and fines (and forfeitures) that are imposed for breaches of the state's penal laws. North Carolina courts, however, have held that certain locally-collected penalties and fines are subject to**Art. IX, Sect. 7** because they actually are assessed for either (1) a violation of the state's penal law or (2) a violation of a state statute or state regulatory scheme where the penalty or fine is intended to punish the violator. The locally-collected penalties and fines that are subject to**Art. IX, Sect. 7** fall into the following four sub-categories:

(1) Locally-Collected Penalty or Fine Assessed for a Violation of the State's Penal Law

a. Penalty or Fine Imposed for Violation of Local Ordinance that is Criminally Enforceable under G.S. 14-4

All ordinances adopted by municipalities and counties are criminally enforceable under**G.S. 14-4**, unless the unit's governing board specifically states in the ordinance that the provisions of**G.S. 14-4** do not apply. (**G.S. 14-4** makes violation of a local ordinance a Class 3 misdemeanor.) The North Carolina Supreme Court has held that if a local ordinance is criminally enforceable under**G.S. 14-4**, then the clear proceeds of any civil penalty or fine assessed for a violation of the local ordinance must be remitted to the local school administrative unit(s) in the county in which the penalty or fine was assessed. *See* Cauble v. City of Asheville, 301 N.C. 340, 271 S.E.2d 258 (1980). And the clear proceeds of the penalty or fine must be distributed to the public schools even if there is not an actual criminal prosecution of the violator. In essence, by enacting**G.S. 14-4**, the General Assembly has made violation of a local ordinance a breach of the penal law of the state—thereby implicating**Art. IX, Sect. 7**.

A local government may opt-out of criminal enforcement of a local ordinance if it so states in the ordinance.*See***G.S. 160A-175** (municipalities);**G.S. 153A-123** (counties). If a county or municipality opts-out of criminal enforcement of a particular ordinance, then any penalty or fine collected for violation of the ordinance may be retained by the local unit (unless, of course, one of the other categories below applies).

To illustrate, suppose a municipality adopts an ordinance proscribing overtime parking and imposing a $25 fee on any vehicle owner who violates the ordinance. The city employs a parking enforcement officer who places citations on each motor vehicle indicating overtime parking. An individual who receives a citation is directed to pay the fee to the city within a certain timeframe. If the ordinance is otherwise silent with respect to enforcement, then the provisions of**G.S. 14-4** automatically apply and violation of the ordinance is a Class 3 misdemeanor. Because of this, the clear proceeds of any civil penalty collected by the municipality for violation of the ordinance must be distributed to the local school administrative unit(s) in the county in which the municipality is located. (This is true even if the unit never pursues the criminal remedy against the violator.) If, however, the ordinance specifies that the unit opts-out of criminal enforcement under**G.S. 14-4**, then the unit may keep all of the penalty proceeds. (This example does not fall into any of the other categories discussed below.)

b. Penalty that is Imposed for Violation of a Local Ordinance for Conduct that also Violates State Penal Law

If a local government imposes a penalty for the violation of a local ordinance that also constitutes a violation of a coordinate state penal statute, then the clear proceeds of the penalty must be distributed to the local school administrative unit(s) in the county in which the penalty is assessed.

This sub-category arises from*Shavitz v. City of High Point,* 177 N.C.App. 465, 630 S.E.2d 4 (2006). The City of High Point adopted an ordinance to civilly enforce the state law provision that makes it illegal to run a traffic light by means of a traffic control photographic system (red-light cameras). The enabling legislation specified that if a municipality adopted a red-light camera ordinance which imposed a civil penalty for running a red light, violation of that ordinance would not be considered an infraction under the state penal law. Despite this effort to de-criminalize the violation when enforced through the red-light camera program, the North Carolina Court of Appeals held that the legislation that authorizes municipal red light camera programs "merely creates an alternative mechanism for enforcement" of the state penal law. According to the court, when the city imposed a civil penalty for violating its red-light camera ordinance it was actually enforcing a penal law of the state. Therefore, the clear proceeds of the civil penalty belonged to the public schools pursuant to**Art. IX, Sect. 7**.

Note that beyond penalties imposed for violation of red-light camera ordinances, very few (if any) penalties likely will fall within this category. That is because it is rare for a local ordinance to proscribe behavior or activities that also are prohibited under the state penal law. In fact, municipalities generally are prohibited from defining elements of an offense that are identical to the elements of an offense defined by State or federal law.*See***G.S. 160A-174**.

(2) Locally-Collected Penalty or Fine Imposed for Violation of a State Statute where the Penalty is Intended to Punish the Violator

a. Penalty Imposed under State Law that is Intended to Punish Violator

If a local government collects a penalty (or fine) that is imposed under state law**and** the penalty is intended to punish the violator, then the clear proceeds of the penalty must be distributed to the local school administrative unit(s) in the county in which the penalty was assessed.*See* North Carolina School Bds Ass'n v. Moore, 359 N.C. 474, 614 S.E.2d 504 (2005).

To break it down—(1) the penalty must be imposed by a state statute (as opposed to a local ordinance); and (2) the purpose of the penalty must be to punish the violator and deter future violations.

Art. IX, Sect. 7 does not apply, however, if the penalty is not intended to punish, but instead is intended to compensate the government or a private party for a loss. The line between "punishment" and "compensation" is not always clear. My colleague, Shea Denning, highlighted some potentially distinguishing factors in a**2005 Local Government Law Bulletin** . The first factor is the label used by the General Assembly to characterize the assessment. For example, denoting an assessment as a "penalty" (as opposed to a "fee," "charge" or "interest payment") is some indication that the legislature intended to punish a violator. A second factor is whether the "penalty" is imposed in addition to other fees and charges, such interest charges. In that case, arguably the fees, charges, or interest payments are intended to compensate whereas the penalty is intended to punish. The amount of the penalty also may prove significant—the higher the penalty, particularly relative to the violation, the more likely that it is being imposed as retribution or to deter future violations. Finally, the situations in which the penalty is to be imposed may give insight into the Legislature's intent. If, for example, the penalty is not imposed in situations in which the violation was "innocent" or not due to any fault of the violator it suggests that the penalty is intended as a punishment.

So what locally-collected assessments satisfy these criteria? The short answer is that we do not know for sure. Based on the court's analysis in*Moore*, however, there are several locally-collected penalties that are imposed by state statue and that likely are intended to "punish" a violator. They include (but may not be limited to) the following:

(i) penalty imposed for the late-listing or failure to list property for*ad valorem* property taxation (G.S. 105-312);

(ii.) penalty imposed for the submission of a worthless check for payment of*ad valorem* property taxes (G.S. 105-357);

(iii.) penalty imposed for operating a business without an appropriate privilege license (G.S. 153A-152; G.S. 160A-211; G.S. 105-109; G.S. 105-236);

(iv.) penalty imposed for failure to file or failure to pay occupancy taxes (G.S. 153A-155; G.S. 160A-215; G.S. 105-236);

(v.) penalty imposed for failure to file or failure to pay prepared food or meal taxes (G.S. 153A-154.1; G.S. 160A-214.1; G.S. 105-236); and

(vi.) penalty imposed for failure to file or failure to pay motor vehicle and heavy equipment rental gross receipts taxes (G.S. 153A-156; G.S. 153A-156.1; G.S. 160A-215.1; G.S. 160A-215.2; G.S. 105-236).

Thus, a unit likely must distribute the clear proceeds of the above-listed penalties to the local school administrative unit(s) in the county in which the penalties are assessed. (As always, local officials should consult with their attorneys before making final determinations about which revenues are subject to**Art. IX, Sect. 7**.)

b. Penalty that is Intended to Punish and that is Imposed for Violation of a Local Ordinance that is Adopted to Enforce State-Mandated Requirements

If a local government imposes a penalty for the violation of a local ordinance that was adopted to enforce a state-mandated regulation and the penalty is intended to punish the violator, then the clear proceeds of the penalty must be distributed to the local school administrative unit(s) in the county in which the penalty is assessed.

This sub-category comes from*Donoho v. City of Asheville*, 153 N.C.App. 110, 569 S.E.2d 19 (2002). In*Donoho*, two counties and a city formed a local air pollution control agency pursuant to state law authority which allowed local enforcement of state-mandated air quality standards under certain circumstances. The authority enacted local ordinances to enforce the air quality standards, and it prescribed civil penalties for violations of the local ordinances. (Apparently all parties agreed that the penalties were punitive in nature.) The court of appeals held that the clear proceeds of these penalties belonged to the public schools. According to the court, the local agency acted as an agent of the state in enforcing the air quality standards. And, similar to the red-light camera ordinances, the local program merely provided an alternative enforcement mechanism of the state regulatory scheme.

Thus, if the state adopts a regulatory scheme and allows a local government to enforce that scheme, the clear proceeds of any penalties assessed for violations of the local ordinances that are punitive in nature must be distributed to the public schools.

Statutorily-Mandated Payments to Public Schools

In addition to the penalties and fines that must be distributed to the public schools by operation of**Art. IX, Sect. 7** and **G.S. 115C-437**, the General Assembly also may direct local governments to distribute certain revenues to local school administrative units that are not covered by the constitutional provision.

For example,**G.S. Ch. 15, Art. 2** prescribes procedures for disposing of personal property that is seized by, confiscated by, or*comes into the possession of in any way*, a local police department or a local sheriff department.**G.S. 15-15** directs that the net proceeds (after deducting certain costs and expenses) be distributed to the local school administrative unit(s) in the county in which the sale is made. This statutory mandate goes beyond what would be required under**Art. IX, Sect. 7**.

For information on calculating and distributing clear proceeds click **here**.

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-4.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_15/Article_2.html
- www.ncga.state.nc.us/Legislation/constitution/article9.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_115C/GS_115C-437.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-175.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-123.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-174.html

- sogpubs.unc.edu/electronicversions/pdfs/lglb108.pdf
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_15/GS_15-15.html
- canons.sog.unc.edu/?p=6041