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Mark A. Davis, General Counsel
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Re: Local Bills Requiring Photo Voter Identification

Dear Mark:

You have advised this Office that a number of county boards of commissioners have recently passed resolutions requesting the General Assembly to enact local bills requiring photo identification of voters prior to voting. House Bill 351, "An Act to Restore Confidence in Government by Requiring that Voters Provide Photo Identification Before Voting," was adopted by the 2011 Session of the General Assembly, but vetoed by the Governor. A belief has been expressed that some members of the General Assembly are advocating a strategy through which photo voter identification requirements may be imposed on a statewide basis by the enactment of multiple local bills covering all counties. You have requested our opinion as to whether such bills, if enacted, would be in violation of the United States or North Carolina Constitution.

Article XIV, Section 3 of the North Carolina Constitution requires general laws, rather than special or local acts, to be adopted when dealing with laws "uniformly applicable in every . . . unit of local government." In its entirety, it states:

> Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, *no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and any amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State.* General laws may be enacted for classes defined by population or other

> criteria. General laws uniformly applicable throughout the state shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the state. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act.

N.C. CONST., art. IV, § 3. (Emphasis supplied.)

Professor John Orth, in his treatise entitled "The North Carolina State Constitution" discusses the history of Article XIV, Section 3, and explains that in its definition of "general laws," the section provides not so much a definition but an explication of what a general law is not. He opines that the best definition of a "general law" may be the one given by Sir William Blackstone in 1765: "A general or public act is an universal rule, that regards the whole community. . . . Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns." Orth, p. 166 (quoting Blackstone, Commentaries 1:85-86).

The North Carolina Supreme Court has been called on to determine whether a bill is a local or general law. The court has defined "local law" to mean:

> [P]rimarily at least, a law that in fact, if not in form, is confined within territorial limits other than that of the whole state, . . . , or is directed to a specific locality or spot, as distinguished from a law which operates generally throughout the state.

McIntyre v. Clarkson, 254 N.C. 510, 517-18, 119 S.E.2d 888, 893 (1961)(quoting 50 Am. Jur. *Statutes* § 8, pp. 24 (1944), now appearing as rewritten in 73 Am. Jur. 2d *Statutes* § 7, p. 273 (1974))."[Language that no longer appears in 73 Am. Jur. 2d Statutes § 5, at p. 230 has been deleted.]

The courts have not considered the General Assembly's designation of a bill as general or local to be determinative. *Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 650, 360 S.E.2d 756, 762, n. 1 (1987). Rather, the Supreme Court has developed tests for determining whether a given piece of legislation is a local act or a general law. In *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 183-84, 581 S.E.2d 415, 425-26 (2003), Justice Edmunds summarized the history of the Supreme Court's approach to determining whether a law was local or general.

"A statute is either 'general' or 'local'; there is no middle ground." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965). We have observed that "no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general." *McIntyre v. Clarkson*, 254 N.C. 510, 517, 119 S.E.2d 888, 893 (1961). Consequently, since the enactment of Article II, Section 24 (originally Article II, Section 29, *see Smith v. County of Mecklenburg*, 280 N.C. 497, 506, 187 S.E.2d 67, 73 (1972)), we have set out alternative methods for determining whether a law is general or local. *See City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 435-36, 450 S.E.2d 735, 738-39 (1994). In earlier decisions, we held that if the legislation impacted a majority of the counties, the law was general. *See State v. Dixon*, 215 N.C. 161, 165, 1 S.E.2d 521, 523 (1939). Later, we established what has become known as the "reasonable classification" test. *See McIntyre v. Clarkson*, 254 N.C. at 518-19, 119 S.E.2d at 894-95. This test considers how the law in question classifies the persons or places to which it applies. Pursuant to this test, the "classification must be reasonable and . . . must be based on a reasonable and tangible distinction and operate the same on all parts of the state under the same conditions and circumstances." *Id.* at 519, 119 S.E.2d at 894. A law is deemed local where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where the classification does not rest on circumstances distinguishing the places included from those excluded.

Id. at 518, 119 S.E.2d at 894. On the other hand,

the constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. A law is general if "any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories."
Adams v. N.C. Dep't. of Natural & Econ. Res., 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978) (quoting Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev. 340, 391 (1967)).

In *Town of Emerald Isle v. State*, 320 N.C. 640, 360 S.E.2d 756 (1987), we departed from the reasonable classification test enunciated in *Adams* where the act in question applied only to a site-specific portion of land on a

> particular beach. Instead, we applied a test that examined "the extent to which the act in question affects the general public interests and concerns," *id.* at 651, 360 S.E.2d at 763, because the reasonable classification test was "ill-suited to the question presented in [that] case, since by definition a particular public pedestrian beach access facility must rest in but one location," *id.* at 650, 360 S.E.2d at 762.

Justice Edmunds went on to explain in the *Blue Cross* case that the reasonable classification analysis should be used because the legislation at issue was not site-specific. "Under a reasonable classification analysis, 'the distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application.' *Adams v. N.C. Dep't. of Natural & Econ. Res.*, 295 N.C. at 690, 249 S.E.2d at 407. Legislative classification of conditions, persons, places, or things is reasonable when it is 'based on a [a] rational difference of situation or condition.' *High Point Surplus Co. v. Pleasants*, 264 N.C. at 656, 142 S.E.2d at 702. 357 N.C. 185, 581 S.E.2d 426."

In *Blue Cross* the court noted that there was no evidence in the record to indicate that employment practices in Orange County differed significantly from the employment practices in other counties in North Carolina. "Upholding the particularized laws in this case could lead to a balkanization of the state's employment discrimination laws, creating a patchwork of standards varying from county to county. The end result would be the 'conglomeration of innumerable discordant communities' that Article II, Section 24 was enacted to avoid." *Id* at 189, 142 S.E.2d at 429.

A few years after *Blue Cross* was decided, Chief Judge Martin explained for the Court of Appeals how to distinguish a general law from a local, private or special law.

> The General Assembly may be "directed or authorized by th[e] Constitution to enact general laws," and those "[g]eneral laws may be enacted for classes defined by population *or other criteria*." N.C. Const. art. XIV, § 3 (emphasis added).
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> . . . .
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> The "reasonable classification" method of analysis, first applied in *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961), "considers how the law in question classifies the persons or places to which it applies." *Williams*, 357 N.C. at 183, 581 S.E.2d at 425. Under this analysis, "[a] law is general if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." *McIntyre*, 254 N.C. at 519, 119 S.E.2d at 894 (internal quotation marks omitted). "Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and

> operate the same on all parts of the state under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious." *Id.* at 519, 119 S.E.2d at 894-95. "The Legislature has *wide discretion* in making classifications." *Id.* at 519, 119 S.E.2d at 894.(emphasis added). Accordingly, "[t]he test is whether the classification is reasonable and whether it embraces all of the class to which it relates. Classifications . . . must be natural and intrinsic and based on substantial differences." *Id.* at 519, 119 S.E.2d at 894-95; *see also City of New Bern*, 338 N.C. at 435-36, 450 S.e.2d at 738-39("[Under this test, a law is general if] any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories.")(internal quotation marks omitted)(quoting *Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978)).

City of Asheville v. State of North Carolina, 192 N.C. App. 1, 23-25, 665 S.E.2d 103, 121-122 (2008), *disc. rev. denied and appeal dismissed by* 363 N.C. 123, 672 S.E.2d (2009).

We are aware of only one North Carolina case addressing whether an election law was a permissible local act. In *Ratcliff v. County of Buncombe*, 663 F. Supp. 1003, 1009 (W.D.N.C. 1987), Judge Sentelle held that "[i]t is clear that the subject of dual office holding in North Carolina can only be validly treated by general laws uniformly applicable throughout the State." In reaching this conclusion, he cited the constitutional provision dealing with disqualification from "office" and statutes describing the duties of the office of county manager. He concluded that "it is incumbent upon the state legislature to deal with the subject of dual office holding of county commissioners and county manager only through general laws." *Id.* at 1010. A local act addressing a dual office holding provision applicable to only Buncombe County was therefore held invalid as a matter of state constitutional law.

We also note, however, that Section 3 of Article VI of the Constitution explicitly states that "[t]he General Assembly shall enact *general* laws governing the registration of voters." (Emphasis supplied.) The requirement that the General Assembly must enact general laws on registration supports the proposition that any laws related to the act of voting must be general laws.

Based upon these precedents and principles, it appears likely our courts would conclude that voter identification requirements, if otherwise constitutional, must be enacted through general laws applicable statewide to all voters in a class. Legislation which enacts such requirements through multiple local acts would therefore be deemed impermissible under the Constitution.

You have also indicated that proponents of these local bills believe the Governor will

be unable to exercise her veto authority to prevent a photo voter identification requirement, as she did in regard to House Bill 351. Our opinion is requested as to whether, as a matter of constitutional law, the Governor's veto authority can be circumvented through the enactment of multiple local bills.

The North Carolina Constitution provides that local bills applying in less than fifteen counties are not subject to veto by the Governor. ART. II, § 22(6). The exemption from veto provided for local bills does not apply:

> [I]f the bill, at the time it is signed by the presiding officers:
>
> (a) Would extend the application of a law signed by the presiding officers during that two year term of the General Assembly so that the law would apply in more than half the counties in the State, or
> (b) Would enact a law identical in effect to another law or laws signed by the presiding officers during that two year term of the General Assembly that the result of those laws taken together would be a law applying in more than half the counties in the State.

N.C. CONST. ART. II, § 22(6).

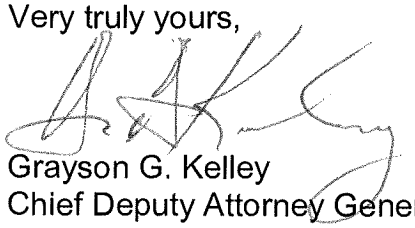
The suggestion that photo voter identification legislation enacted through multiple local bills would be exempt from the Governor's veto powers therefore appears to be in direct conflict with Article II, §22(6)(a) and (b) if the bills applied in more than half the counties.

We are not aware whether local bills are being considered which would result in the enactment of voter identification requirements applicable only in certain counties. We note, however, that Article I, Section 19 of the North Carolina Constitution and Amendment XIV of the United States Constitution have equal protection provisions that we believe call into question any voter identification requirement not made applicable to all voters in the State. "It is well settled in this State that 'the right to vote on equal terms is a fundamental right.'" *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002). "When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter. . . . The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise." *Bush v. Gore*, 531 U.S. 98, 104, 121 S.Ct. 525, 529 (2000). It is therefore our view that significant equal protection concerns would arise if voter identification requirements were established for some voters and not others based merely on their county of residence.

To summarize, cases decided by our appellate courts have consistently concluded that the North Carolina Constitution mandates the enactment of general laws, rather than special or local acts, when the General Assembly addresses matters uniformly applicable throughout the state. The enactment of local acts applying photo voter identification requirements in only certain counties would raise serious equal protection issues under both the United States Constitution and North Carolina Constitution. Furthermore, Article II, § 22(6) of the North Carolina Constitution clearly states that the exemption from veto authority for local bills applying in less than fifteen counties does not apply when a bill has the effect of extending the application of a bill previously enacted during a two-year term of the General Assembly to more than half the counties in the state, or to a bill which is identical to another law or laws and the result of those laws taken together would be a law applying in more than half the counties in the state. It is therefore our opinion that the enactment of local bills requiring photo voter identification in certain counties would likely be held unconstitutional by the courts.

Please contact me if you require further legal assistance.

Very truly yours,



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