

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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SENATE DRS35407-LYx-300A* (4/7)

Short Title: Public-Private Partnerships for Schools. (Local)

Sponsors: Senator Malone.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO ALLOW CAPITAL LEASE FINANCING FOR PUBLIC SCHOOLS.

The General Assembly of North Carolina enacts:

SECTION 1. Article 37 of Chapter 115C is amended by adding a new section to read:

"§ 115C-531. Capital leases of school buildings and school facilities.

(a) Definitions. – The following definitions apply in this section:

(1) Capital lease. – A capital lease as defined by generally accepted accounting principles, regardless of how the parties describe the agreement.

(2) Private developer. – The entity with which the school board enters into a capital lease or build-to-suit lease under the provisions of this section.

(b) Authorization. – Local boards of education may enter into capital leases of real or personal property for use as school buildings or school facilities. The capital lease may relate to an existing building or a new school building to be constructed. The term of any capital lease, including any renewal periods, shall not exceed 40 years from the expected date that the local board of education will take occupancy of the property that is the subject of a capital lease. Subdivisions (c) and (d) of G.S. 115C-521 do not apply to a capital lease entered into under this section.

(c) Construction, Repairs, and Renovation. – The provisions of G.S. 115C-530(b) apply to a capital lease under this section. A capital lease entered into under this section may provide that the private developer is responsible for providing, or contracting for, construction, repair, or renovation work. Construction, repair, or renovation work undertaken or contracted by a private developer is not subject to the requirements of Article 8 of Chapter 143 of the General Statutes. Construction, repair, or renovation work undertaken or contracted by the private developer involving the estimated

1 expenditure of three hundred thousand dollars (\$300,000) or more is subject to the
2 provisions of G.S. 115C-532.

3 (d) **Nonsubstitution Clause.** – No capital lease may contain a nonsubstitution
4 clause that restricts the right of a local board to continue to provide a service or activity
5 or to replace or provide a substitute for any property financed or purchased by the
6 capital lease.

7 (e) **No Deficiency Judgment; No Pledge of Taxing Power.** – No deficiency
8 judgment may be rendered against any local board of education or any unit of local
9 government, as defined in G.S. 160A-20(h), in any action for breach of a contractual
10 obligation authorized by this section, and the taxing power of a unit is not and may not
11 be pledged directly or indirectly to secure any moneys due under a contract authorized
12 by this section. A capital lease shall state that it does not constitute a pledge of the
13 taxing power or full faith and credit of the local board of education or board of county
14 commissioners.

15 (f) **Budgetary Accounting.** – A capital lease entered into under this section shall
16 be considered a continuing contract for capital outlay and is subject to
17 G.S. 115C-441(c1); provided, however, notwithstanding any provision of
18 G.S. 115C-441(c1) or G.S. 115C-426, in each fiscal year the appropriation of funds by
19 the county for the payment of amounts due under the capital lease shall be at the
20 discretion of the board of county commissioners.

21 (g) **Local Government Commission Approval.** – Capital leases entered into under
22 this section are subject to approval by the Local Government Commission under Article
23 8 of Chapter 159 of the General Statutes if they meet the standards set out in
24 G.S. 159-148(a)(1), 159-148(a)(2), and 159-148(a)(3). For purposes of determining
25 whether the standards set out in G.S. 159-148(a)(3) have been met, only the
26 five-hundred-thousand-dollar (\$500,000) threshold applies.

27 **"§ 115C-532. Additional provisions applicable to build-to-suit capital leases.**

28 (a) **Definitions.** – The definitions of G.S. 115C-531 apply in this section. In
29 addition, for the purposes of this section, the following definitions apply:

30 (1) **Build-to-suit capital lease.** – A capital lease that provides for the
31 construction of new facilities or the renovation of existing facilities by
32 the private developer, the cost of which is estimated to be greater than
33 three hundred thousand dollars (\$300,000).

34 (2) **First-tier subcontractor.** – A subcontractor who contracts directly with
35 the private developer for all construction, repair, or renovation work
36 under this section.

37 (b) **Contract Provisions.** – A build-to-suit capital lease may include contractual
38 provisions by the private developer regarding the provision of products, services, and
39 guaranties related to a facility that is the subject of a capital lease. A local board of
40 education may also enter into a separate agreement or series of related agreements
41 regarding the provision of products, services, and guaranties related to a facility that is
42 the subject of a capital lease; provided all agreements are approved by the board of
43 county commissioners in connection with the approval of the build-to-suit capital lease.

1 (c) Approval by Local Board of Education. – Before entering into a build-to-suit
2 capital lease pursuant to this section, the local board of education shall adopt one or
3 more resolutions that satisfy the conditions of this subsection. Before adopting the
4 resolutions required by this subsection, the local board of education shall publish a
5 notice of its intent to enter into a build-to-suit capital lease at least 10 days in advance of
6 the date of the meeting at which the action is contemplated and in a newspaper having
7 general circulation within the geographic area served by the local board of education.
8 The notice shall include, at a minimum, the date, time, and place of the meeting, a
9 description in brief and general terms of the subject of the lease, the name of the other
10 party to the lease, and an indication of the board's intent to take action to authorize the
11 lease at the indicated meeting. The resolutions shall provide the following:

12 (1) That entering into the build-to-suit capital lease for one or more
13 specified buildings or facilities is in the board's best interests under all
14 the circumstances. In making this evaluation, the local board of
15 education may consider the time, cost, and quality of design,
16 engineering, and construction, including the time required to begin and
17 the time required to complete a particular activity; occupancy costs,
18 including lease payments, life-cycle maintenance, repair, and energy
19 costs; and any other factors the board deems relevant.

20 (2) That the private developer is qualified to provide, either alone or in
21 conjunction with other identified and associated persons, the products
22 and services called for under the proposed capital lease and any related
23 agreements. The local board of education shall make this
24 determination taking into account any factors the local board deems
25 relevant, including the knowledge, skill, and reputation of the provider
26 and its associated persons, the goals and plans of providers for
27 utilization of minority business enterprises, and the costs to be incurred
28 by the local board of education.

29 (d) Additional Requirements Regarding Design Services. – Required design and
30 engineering services shall be performed by a licensed architect or engineer, who may be
31 an employee or other affiliate of the private developer. Specifications for any new
32 school building shall be consistent with the requirements of G.S. 143-128(a). All
33 applicable requirements for the review or approval of design and specifications for
34 school buildings by the Department of Public Instruction and the Department of
35 Insurance apply to school buildings constructed, repaired, or renovated under a capital
36 lease authorized under this section. The provisions of G.S. 143-64.31 do not apply to
37 design services for projects under a build-to-suit capital lease pursuant to this section.

38 (e) Additional Requirements Regarding Construction Services. –

39 (1) A private developer shall prequalify and solicit bids from first-tier
40 subcontractors for all construction work under this section. The
41 prequalification criteria shall be determined by the local board of
42 education and the private developer to address quality, performance,
43 the time specified in the bids for performance of the contract, the cost
44 of construction oversight, time for completion, capacity to perform,

1 and other factors deemed appropriate by the private developer and the
2 local board of education.

3 (2) A private developer and first-tier subcontractors shall comply with
4 G.S. 143-128.2. The local board of education shall require the private
5 developer to submit its plan for compliance with G.S. 143-128.2 for
6 approval by the local board of education prior to the private developer
7 soliciting bids under this subsection.

8 (3) A private developer shall open bids and shall award each contract to
9 the lowest responsible, responsive, and prequalified bidder, taking into
10 consideration quality, performance, the time specified in the bids for
11 performance of the contract, the cost of construction oversight, time
12 for completion, compliance with G.S. 143-128.2, and any other factors
13 deemed appropriate by the private developer and the local board of
14 education and advertised as part of the bid solicitation. A private
15 developer shall enter into the construction contracts directly with the
16 successful bidder. After the award of a contract or contracts, the
17 private developer and any contractor may continue to negotiate and
18 reach agreement on modifications to all aspects of the contract,
19 including the time for performance, the scope of the work, and the
20 price to be paid.

21 (4) The local board of education, in its discretion, may require the private
22 developer to provide a performance and payment bond for construction
23 work in accordance with the provisions of Article 3 of Chapter 44A of
24 the General Statutes and may require a bond or other appropriate
25 guarantee to cover any other guarantees, products, or services to be
26 provided by the private developer.

27 (f) Predevelopment Agreements with Private Developer Authorized. – Local
28 boards of education may enter into predevelopment agreements with a private developer
29 in advance of entering into a build-to-suit capital lease. Predevelopment agreements
30 with private developers shall be approved by the board of county commissioners.
31 Predevelopment agreements may include provisions for each of the following:

32 (1) Site selection, land acquisition, and site preparation, including such
33 services as wetlands delineation, archaeological review, and State and
34 local government land-use permitting.

35 (2) Building programming and design, including both architectural and
36 engineering services pursuant to subsection (d) of this section.

37 (g) Real Estate Transfer Authorized. – Notwithstanding any contrary provisions
38 of law, a city, county, or local board of education may, pursuant to the procedures in
39 G.S. 160A-267, sell, lease, or otherwise transfer real or personal property to any private
40 developer for construction, repair, or renovation of a school facility under a build-to-suit
41 capital lease entered into pursuant to this section. The conveying unit may subject the
42 property to any covenants, conditions, or restrictions as the unit deems to be necessary
43 to carry out the purposes of this section. The disposition of property pursuant to this
44 subsection is not subject to the requirements of G.S. 115C-518. No transfer by a local

1 board of education under this subsection shall occur unless it is approved by the board
2 of county commissioners.

3 (h) Additional Permitted Lease Terms. – In recognition of the potential economic
4 and technical utility of build-to-suit capital leases, which include in their scope
5 combinations of design, construction, operation, management, and maintenance
6 responsibilities over prolonged periods of time, and the potential desirability of a single
7 point of responsibility for these matters in connection with build-to-suit capital leases,
8 any build-to-suit capital lease may include provisions imposing responsibility on the
9 private developer or any identified affiliated entity for any of the following matters:

- 10 (1) Site selection, land acquisition, and site preparation, including
11 wetlands delineation, archaeological review, and State and local
12 government land-use permitting.
- 13 (2) Facility programming, planning, and design, including both
14 architectural and engineering services.
- 15 (3) Qualification and prequalification of contractors and subcontractors.
- 16 (4) Construction and construction management.
- 17 (5) Financing.
- 18 (6) Facility maintenance and repairs.
- 19 (7) Energy usage guarantees.
- 20 (8) Transfer of ownership of the leased property to a local government
21 entity at the end of the lease term.
- 22 (9) Any other guaranties, products, and services as the local board of
23 education may determine."

24 **SECTION 3.** G.S. 143-129(e) is amended by adding a new subdivision to
25 read:

26 "(e) Exceptions. – The requirements of this Article do not apply to:

27 ...

- 28 (12) Build-to-suit capital leases with a private developer under
29 G.S. 115C-532."

30 **SECTION 4.** This act applies only to local school administrative units
31 approved by the State Board of Education for participation in the pilot program to
32 evaluate the utility of capital leases in assisting local school administrative units with
33 capital facility needs. The State Board of Education shall select up to eight local school
34 administrative units for participation in the pilot program and shall give priority to large
35 local school administrative units with pressing capital facility needs. The State Board of
36 Education shall make a report on the pilot program to the 2007 and 2008 Regular
37 Sessions of the 2007 General Assembly. There is appropriated from the General Fund
38 to the State Board of Education the sum of one hundred thousand dollars (\$100,000) for
39 the 2006-2007 fiscal year to implement the pilot program.

40 **SECTION 5.** This act becomes effective July 1, 2006.