

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2005

H

D

HOUSE DRH30530-LYx-300\* (4/7)

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

Sponsors: Representatives Yongue, Carney, Eddins, and Lucas (Primary Sponsors).

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.