

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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SENATE BILL 2009*

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

Sponsors: Senators Malone; and Stevens.

Referred to: Finance.

May 26, 2006

1 A BILL TO BE ENTITLED
2 AN ACT TO ALLOW CAPITAL LEASE FINANCING FOR PUBLIC SCHOOLS.
3 The General Assembly of North Carolina enacts:

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

6 "**§ 115C-531. Capital leases of school buildings and school facilities.**

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

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

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

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

21 (c) Construction, Repairs, and Renovation. – The provisions of G.S. 115C-530(b)
22 apply to a capital lease under this section. A capital lease entered into under this section
23 may provide that the private developer is responsible for providing, or contracting for,
24 construction, repair, or renovation work. Construction, repair, or renovation work
25 undertaken or contracted by a private developer is not subject to the requirements of
26 Article 8 of Chapter 143 of the General Statutes. Construction, repair, or renovation
27 work undertaken or contracted by the private developer involving the estimated
28 expenditure of three hundred thousand dollars (\$300,000) or more is subject to the
29 provisions of G.S. 115C-532.

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

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

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

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

25 **"§ 115C-532. Additional provisions applicable to build-to-suit capital leases.**

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

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

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

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

42 (c) Approval by Local Board of Education. – Before entering into a build-to-suit
43 capital lease pursuant to this section, the local board of education shall adopt one or
44 more resolutions that satisfy the conditions of this subsection. Before adopting the

1 resolutions required by this subsection, the local board of education shall publish a
2 notice of its intent to enter into a build-to-suit capital lease at least 10 days in advance of
3 the date of the meeting at which the action is contemplated and in a newspaper having
4 general circulation within the geographic area served by the local board of education.
5 The notice shall include, at a minimum, the date, time, and place of the meeting, a
6 description in brief and general terms of the subject of the lease, the name of the other
7 party to the lease, and an indication of the board's intent to take action to authorize the
8 lease at the indicated meeting. The resolutions shall provide the following:

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

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

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

35 (e) Additional Requirements Regarding Construction Services. –

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

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

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

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

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

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

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

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

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

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

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

23 read:

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

25 ...

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

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

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