

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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SENATE BILL 2009*
Finance Committee Substitute Adopted 6/29/06

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

Sponsors:

Referred to:

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. – A capital lease may not 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 (h) No Agreements on Student Assignment. – A capital lease may not contain
26 any provision with respect to the assignment of specific students or students from a
27 specific area to any specific school.

28 (i) Lien Laws Not Affected. – The provisions of Article 2 of Chapter 44A of the
29 General Statutes apply to any real property, improvement to the real property, and rights
30 that flow with the real property that is subject to a capital lease under this section. Real
31 property that is subject to a capital lease under this section is subject to liens and
32 foreclosure actions in the same manner and to the same extent as if the property were
33 owned in fee simple by a private entity.

34 **"§ 115C-532. Additional provisions applicable to build-to-suit capital leases.**

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

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

41 (2) Prime contractor. – A contractor who contracts directly with the
42 private developer or the private developer's construction manager at
43 risk, if any, for construction, repair, or renovation work under this
44 section.

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

8 **(c) Approval by Local Board of Education.** – Before entering into a build-to-suit
9 capital lease pursuant to this section, the local board of education shall adopt a
10 resolution as provided in this subsection. Before adopting the resolution required by this
11 subsection, the local board of education shall publish a notice of its intent to enter into a
12 build-to-suit capital lease at least 10 days in advance of the date of the meeting at which
13 the action is contemplated and in a newspaper having general circulation within the
14 geographic area served by the local board of education. The notice shall include, at a
15 minimum, the date, time, and place of the meeting, a description in brief and general
16 terms of the subject of the lease, the name of the other party to the lease, and an
17 indication of the board's intent to take action to authorize the lease at the indicated
18 meeting. The resolution shall provide the following:

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

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

36 **(d) Additional Requirements Regarding Design Services.** – Required design and
37 engineering services shall be performed by an engineer, to the extent permitted under
38 G.S. 83A-13(b), or a licensed architect. Specifications for any new school building shall
39 be consistent with the requirements of G.S. 143-128(a). All applicable requirements for
40 the review or approval of design and specifications for school buildings by the
41 Department of Public Instruction and the Department of Insurance apply to school
42 buildings constructed, repaired, or renovated under a capital lease authorized under this
43 section.

1 (e) Additional Requirements Regarding Construction Services. – A private
2 developer is required to seek competition and minority business participation in
3 connection with all construction work under this section in accordance with the
4 following provisions:

5 (1) A private developer shall either (i) solicit bids from prime contractors
6 for all construction work under this section or (ii) select a construction
7 manager at risk through a qualification based process in which case the
8 selected construction manager at risk shall solicit bids from all of its
9 prime contractors for all construction work under this section.

10 (2) The private developer or its construction manager at risk may
11 prequalify contractors. The prequalification criteria, if any, shall be
12 determined by the local board of education and the private developer
13 to address quality, performance, the time specified in the bids for
14 performance of the contract, the cost of construction oversight, time
15 for completion, capacity to perform, and other factors deemed
16 appropriate by the private developer and the local board of education.

17 (3) A private developer and its construction manager at risk, if any, shall
18 comply with the requirements applicable to a public entity pursuant to
19 G.S. 143-128.2, and prime contractors shall comply with the
20 provisions of G.S. 143-128.2 applicable to contractors, except the
21 private developer and its construction manager shall adopt the local
22 board of education's minority participation goal. The local board of
23 education shall require the private developer to submit its plan for
24 compliance with G.S. 143-128.2 for approval by the local board of
25 education prior to the private developer soliciting bids under this
26 subsection.

27 (4) A private developer or its construction manager at risk shall publicly
28 advertise at least 30 days in advance of the bid date in a newspaper
29 having general circulation within the geographic areas served by the
30 local board of education, shall open bids publicly, and shall award
31 each contract to the lowest responsible, responsive, and prequalified
32 bidder, taking into consideration quality, performance, the time
33 specified in the bids for performance of the contract, the cost of
34 construction oversight, time for completion, compliance with
35 G.S. 143-128.2, and any other factors deemed appropriate by the
36 private developer and the local board of education and included in the
37 bid solicitation. A private developer or its construction manager at risk
38 shall enter into the construction contracts directly with the successful
39 bidder. After the award of a contract or contracts, the private developer
40 or its construction manager at risk and any contractor may negotiate
41 and reach agreement with the successful bidder on modifications to all
42 aspects of the contract, including the time for performance, the scope
43 of the work, and the price to be paid.

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

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

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

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

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

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

34 (1) Site selection, land acquisition, and site preparation, including
35 wetlands delineation, archaeological review, and State and local
36 government land-use permitting.

37 (2) Facility programming, planning, and design, including both
38 architectural and engineering services.

39 (3) Qualification and prequalification of contractors and subcontractors.

40 (4) Construction and construction management.

41 (5) Financing.

42 (6) Facility maintenance and repairs.

43 (7) Energy usage guarantees.

1 (8) Transfer of ownership of the leased property to a local government
2 entity at the end of the lease term.

3 (9) Any other guaranties, products, and services as the local board of
4 education may determine.

5 (i) Letter of Credit. – A private developer shall provide an irrevocable letter of
6 credit for the benefit of laborers and materialmen in an amount not less than five percent
7 (5%) of the total cost of the improvements which are the subject of the build-to-suit
8 capital lease and shall maintain the letter of credit throughout the construction of the
9 project and for the succeeding six-month period."

10 **SECTION 2.** G.S. 143-129(e) is amended by adding a new subdivision to
11 read:

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

13 ...

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

16 **SECTION 3.** This act is effective when it becomes law and is repealed
17 effective July 1, 2011.