EXHIBIT A

No. COA14-1255 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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CITY OF ASHEVILLE, a municipal corporation, Plaintiff,	)	
v.	)	From Wake County No. 13 CVS 6691
STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	

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AMICUS CURIAE'S BRIEF

City of Wilson

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ISSUE PRESENTED

WHETHER THE STATE HAS THE AUTHORITY WITHOUT LIMITATION TO ENACT LAWS THAT DEPRIVE MUNICIPALITIES OF PRIVATE PROPERTY USED FOR PROPRIETARY PURPOSES?

ARGUMENT

With regard to the issue of the proper relationship between the State and its municipalities, vis-à-vis the authority of the former to direct the affairs of the latter, this brief takes the position that the State does not have unbridled authority to micromanage the affairs of local governments—or as put by the Appellant, "authority to . . . enact laws affecting every aspect of the life and existence of municipalities in this State." (R p. 49) Despite Appellant's apparent contention to the contrary, municipalities are not relegated to second-class citizens by the North Carolina Constitution.

The State is correct in asserting that it has the authority, as specified in Article VII of the North Carolina Constitution, to "provide for the organization and government and the fixing of boundaries of . . . governmental subdivisions, and except as otherwise prohibited by [the] Constitution, may give such powers and duties to . . . governmental subdivisions as it may deem advisable." N.C. Const. art. VII. It has much of the same authority with respect to private corporations as provided in Article VIII of the Constitution. N.C. Const. art. VIII. There is no question that municipalities would not exist absent the Constitutional provisions and enabling legislation from the General Assembly. The State seems to take the view, however, that its authority with respect to political subdivisions is boundless, subject to their passing whims or vagaries. To the contrary, the General

Assembly's authority over its subdivisions is limited by the following language: "except as otherwise prohibited by this Constitution." N.C. Const. art. VII.

This restriction is commonly understood to consist mainly of the limitations against certain local, private, or special acts or resolutions as specified in Section 24 of Article II. N.C. Const. art. II, §24. However, the limitation does not say "as otherwise prohibited by Article II of this Constitution," but rather more broadly states "as otherwise prohibited by this Constitution." N.C. Const. art. VII. This takes on special significance when the dual nature of municipalities is properly understood. As stated by the North Carolina Supreme Court in *Williamson v. City of High Point*, 213 N.C. 96, 195 S.E. 2d 90, 96 (1938):

> [t]he dual capacity or twofold character possessed by municipal corporations is governmental, public, or political, and proprietary, private, or quasi private. In its governmental capacity a city or town acts as an agency of the state for the better government of those who reside within the corporate limits, and in its private or quasi private capacity it exercises powers and privileges for its own benefit.

The Court in *Williamson* goes on to state that "it is well settled that local conveniences and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that quasi private capacity in which they act for the benefit of their citizens exclusively. *Id* (quoting *Asbury v. Town of Albemarle*, 162 N.C. 247, 253, 78 S.E.146, 150 (1913). This bifurcation has a number of legal consequences. One such consequence of

the distinction is that local governments are only entitled to sovereign immunity for those undertakings that are governmental in nature. When a unit of local government acts in its private or proprietary capacity, it, like a private corporation, is not entitled to assert sovereign immunity as a tort defense. More importantly for purposes of this analysis, however, when acting in their propriety capacity, units of local government are entitled to the same constitutional rights as private corporations. In basic terms the concept is thus—when acting like the State, a municipality is treated like the State, when acting like a private corporation, the municipality is treated like a private corporation. The North Carolina Supreme Court makes this point with such force and clarity in *Asbury v. Town of Albemarle*, 162 N.C. 247, 78 S.E. 146, 149 (1913), that the whole quote is worth reproducing here in its entirety:

> Municipal corporations possess a double character; the one governmental, legislative, or public; the other, in a sense, proprietary or private. In its governmental or public character the corporation is made by the state one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad*

> *hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it are omnipotent.
>
> In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power; but, as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations.

This fundamental concept was expressed with equal cogency by the United States Supreme Court over a century before in *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 694, 4 L. Ed. 629 (1819), where the learned Justice Story stated:

> [i]t may also be admitted, that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendent, that it may at its will take away the private property of the corporation, or change the uses of its private funds, acquired under the public faith.

This concept, like the concept of the right of private corporations to hold property without interference from the State, is, again in the words of Justice Story, grounded upon "principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals." *Terrett v. Taylor*, 13 U.S. 43, 52, 3 L. Ed. 650 (1815). When the North Carolina Constitution

states in Article I, Section 35 that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty," it is precisely the inviolate principles such as those above posited by Justice Story pertaining to property rights to which it refers. N.C. Const. art. I, §35.

Consistent with this understanding of the Constitutional limitations upon legislative interference with local management of local affairs, the appropriate framework to analyze the present issue is as if a private corporation were substituted for the City of Asheville. The trial court was correct to propose, somewhat rhetorically, that we "[c]onsider the impact of the enactment of a statute requiring SAS to transfer its entire proprietary corporate business and its control to a competitor, another proprietary corporate business without SAS' consent for an alleged public purpose in favor of cutting costs and consolidation of business resources." (R p. 164) The fact of the matter is that the analysis should be exactly the same. To create an even more apt analogy, consider the impact of the enactment of a statute requiring Aqua N.C., a private North Carolina water supplier serving approximately 270,000 customers, to transfer, without its consent, its entire proprietary water system and control over to a competitor for an alleged public purpose of improving its management of those resources. The justifiable uproar would be deafening and our Courts would be swift to find such interference to be beyond the legislature's constitutional authority. Nevertheless, a misplaced and ill

begotten impression that the State has the "authority to . . . enact laws affecting every aspect of the life and existence of municipalities in this State" leads the Appellant to propose precisely such a thing with respect to the Appellee, despite the fact that the Appellee is entitled to the exact same constitutional rights and protections with regard to its ownership of its water system as is Aqua N.C. (R p. 49). When disabused of the notion that the General Assembly has unfettered authority with respect to its municipalities—in much the same way that parents do not have unfettered authority over every aspect of the existence of their children—and when the scope of analysis is properly brought to bear on the issue without those distortions in mind, the proper conclusion becomes readily apparent. No in-depth analysis of North Carolina constitutional jurisprudence is necessary to quickly arrive at the logical conclusion that the State cannot seize Aqua N.C.'s water system infrastructure due to concerns about the manner in which it is being managed. Substituting the City of Asheville in place of Aqua N.C. cannot be considered to affect the slightest change to that conclusion. Given that private property held by private corporations and private property used by municipalities for proprietary purposes are entitled to the same treatment, the analysis is the same—that is, the Constitution only allows limited State interference pursuant to a well-defined public purpose and with just compensation. *See Dare County Bd. of Educ. v. Sakaria*, 118 N.C. App. 609, 614, 456 S.E.2d 842, 845-46 (1995), *aff'd*,

342 N.C. 648, 466 S.E.2d 717 (1996) (stating that "[b]ecause the exercise of the power of eminent domain is in derogation of property rights, all laws conferring this power must be strictly construed"). Under such Constitutional restrictions a limited interference—such as constructing a bridge over a stream—would likely be tolerated, but a carte blanche seizure of the entire system, which is already being put to public service, cannot be sustained.

The implications of following the position advocated by the State cannot be overstated. If the State has the ability to run roughshod over the private property rights of municipalities and other units of local government, a far different picture of public infrastructure in North Carolina would emerge. With the prospect of the State disagreeing with any type of infrastructure investment or management choices and accordingly seizing or transferring those assets to another entity, municipalities would be foolish to make any type of substantial investment in such services. In fact, they would probably owe a duty to their citizens to not make any further investment in their systems, whether adding a line or pipe, clearing a stream, building a dam or a water or wastewater treatment facility, replacing poles, installing substations, or any other manner of public utility investment. This holds especially true in the context of overbuilding infrastructure, like the City of Wilson has done with respect to Buckhorn Reservoir, to create a long term water supply as well as a buffer or reserve in the event of emergency. If by virtue of the present

case it is established that the Constitution permits the State to seize and reallocate municipally-owned proprietary enterprise, excess capacity—such as potentially exists with Buckhorn Reservoir—could present particularly attractive "low hanging fruit".

It is also important to recognize that the property investment at issue is in response to the local needs of the citizens of the local government and the source of funds for such investment is local as well. When a unit of local government enacts local ordinances or provides police service or any other activity in its governmental capacity, it is naturally acting as an extension of the State (although even in those cases in response to local needs and concerns); however, when a unit of local government is acting in its private capacity, it is operating not as an extension of the State, but as an extension of the citizens of the unit, or as stated by the Court in *Asbury*, "for the private advantage of the compact community." 162 N.C. at 253, 78 S.E. at 149. This is true not only in a theoretical or academic sense, but in a more absolute sense in that when acting in such a capacity, a unit of local government is being funded and acting pursuant to the local needs of the compact community—much like the private corporation acts pursuant to and responds to the needs of its shareholders. This concept is not a radical or far-flung idea endeavoring to enlarge municipal autonomy, but rather harkens back to the fundamental principles established by the North Carolina Constitution, and is

commensurate with even more firmly entrenched property rights jurisprudence dating back to the birth of our federal government.

Amicus curiae City of Wilson offers the example of its Buckhorn Reservoir expansion to illustrate the potentially harmful effects that a decision in favor of the State in this case could have. As previously stated, Wilson spent over $50,000,000 to expand Buckhorn Reservoir to guarantee a sound supply of water for its citizens and customers for many years to come. The reservoir is Wilson's primary water supply source. The original Buckhorn Dam was built in 1974, 800 feet upstream from the current dam. The reservoir at that time only had the ability to contain 960 million gallons of water, but the capacity had reduced to 800 million gallons before being replaced. During the period of time from 1987 until 2004, Wilson, at its sole cost and expense, acquired lands and permits, and engineered, designed, and constructed a new dam for the purpose of expanding its water supply. The new dam raised the water level in the reservoir by 12 feet and increased its capacity from 800 million gallons to almost 7 billion gallons when fully filled, covering an area of 2,303 acres. The expansion project was undertaken in recognition of immediate and long-term needs of Wilson's citizens and water customers for an adequate and sound public water supply.

In 2007-2008, eastern North Carolina experienced a severe drought—the worst on record for the area; in fact, many counties, including Wilson County,

were declared disaster areas due to the unprecedented drought. *See* Patrick Driscoll, Larry Copland, *Southeast drought hits crisis point*, USA TODAY, Oct. 21, 2007, *available at* http://usatoday30.usatoday.com/weather/news/2007-10-19-drought_N.htm (last accessed April 24, 2015)*; Drought-related disaster declared in 59 counties*, WRAL.COM, Nov. 10, 2008, *available at* http://www.wral.com/news/local/story/3931506/ (last accessed April 24, 2015).

With the exception of the City of Wilson—which thanks to its recent water supply expansion had a reliable water supply—many surrounding communities faced significant water supply shortages. By virtue of its substantial investment and considerable foresight, Wilson was able to provide emergency water supply to those communities via voluntary water supply interconnection agreements. *See* Mike Baker, *Relentless N. Carolina drought could be devastating in '08*, USA TODAY, Dec. 26, 2007, *available at* http://usatoday30.usatoday.com/weather/drought/2007-12-26-nc-drought_N.htm (last accessed April 24, 2015). Wilson charged a reasonable fee for the emergency water supply, as a private corporation in its situation would do. It owed a duty to its citizens to charge for that service, just as a private corporation would owe a duty to its shareholders.

If the State's legislative efforts to transfer control of Asheville's water system go unchecked, there is nothing that would prevent the State from enacting

similar legislation to seize other local government-provided water resources and redistribute them within the region. Such a scenario would result in a windfall to the receiving communities at the expense of the forward thinking communities. Such a concern is magnified in those situations, such as with Wilson, where considerable effort and cost has been expended to "future-proof" the community. Wilson believes that its voluntary interconnection agreements with surrounding communities diminishes the likelihood of State interference, however other municipalities may not be given the opportunity. Like the ants in a popular tale from Aesop's Fables who have stored up food for winter, Wilson and other industrious municipalities are well guarded against the hardships of drought by virtue of their advanced planning. However, unlike in the tale, Wilson and other similarly situated municipalities would be unable to tell the "grasshopper" to go dance when it came for their water. Such a state of affairs, as described by the United States Court of Appeals for the District of Columbia Circuit, "favors the grasshopper and thus encourages his feckless ways." *Process Gas Consumers Grp. v. FERC*, 158 F.3d 591, 593 (D.C. Cir. 1998). As illustrated by the fable, insecurity with regard to property rights breeds idleness and penalizes industry and innovation. As John Adams said in his treatise on the United States Constitution, "[t]he moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it,

anarchy and tyranny commence." THE WORKS OF JOHN ADAMS, vol. 6 at 9 (CHARLES FRANCIS ADAMS, ED., BOSTON, CHARLES LITTLE AND JAMES BROWN, 1851). Those principles do not evaporate just because that property is held by a municipal corporation; to the contrary, such disparate treatment cannot "be contended."

CONCLUSION

Because the General Assembly's attempt to legislate control of private property held by the City of Asheville intrudes upon the City of Asheville's property rights and exceeds the authority of the General Assembly, in violation of the North Carolina Constitution and in conflict with fundamental principles of law, *Amicus Curiae* City of Wilson respectfully asks the Court to uphold the trial court's decision and decline to give legal effect to the Water Act.

This the 24th day of April, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for the Appellee certifies that the foregoing brief, prepared utilizing a proportional font, is less than 3,750 words (excluding cover, indexes, table of authorities, certificates of service, this certificate of compliance, and appendices) as reported by word-processing software.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this day he has served the foregoing *AMICUS CURIAE* BRIEF by THE CITY OF WILSON on all parties to this action by depositing a copy of the same in the exclusive care and custody of the United States Postal Service, first class mail, postage prepaid addressed to:

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