NO. COA14-1255 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

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CITY OF ASHEVILLE, a municipal corporation,	)	
Plaintiff-Appellee,	)	
v.	)	
STATE OF NORTH CAROLINA,	)	From Wake County
Defendant-Appellant,	)	
and	)	
THE METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY,	)	
Defendant.	)	

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NORTH CAROLINA LEAGUE OF MUNICIPALITIES' *AMICUS CURIAE* BRIEF

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INTRODUCTORY STATEMENTS

Amicus League of Municipalities ("League") adopts and incorporates by reference the Introductory Statements in plaintiff-appellee's brief. The League's 24 April 2015 motion for leave to participate as *amicus curiae* was granted 28 April 2015.

INTEREST OF AMICUS CURIAE

Amicus League is a voluntary federation of approximately 540 municipalities, collectively representing nearly 100% of the municipal population and providing a unified, nonpartisan voice on municipal issues at the state and federal levels. The League's members have a compelling interest in issues affecting their role in providing infrastructure and services necessary to sustain populations in growing urban areas.

This case raises important constitutional issues regarding the limitations on legislative power. An extraordinary legislative decision, unsupported by a cognizable rational basis, targeted a single municipality for the unilateral and uncompensated transfer of its water system to another entity. Such enactments, if allowed to stand, ignore the substantial investments made by municipal citizens and threaten the continued viability of their public enterprises.

ARGUMENT

I. GIVEN THE FUNDAMENTAL CONSTITUTIONAL PROVISIONS SERVING AS A RESTRAINT ON LEGISLATIVE POWER, THE TRIAL COURT PROPERLY HELD THAT THE WATER ACT WAS VOID AND UNENFORCEABLE.

It is well-established that a municipal corporation has a dual nature, performing *proprietary* as well as governmental functions, as it is a both a body *corporate* and a body politic. *McQuillin Muni. Corp.* § 2.07.10 at 145 (rev. 3d ed. 1999). *See, e.g.*, G.S. 160A-11 ("Corporate powers," referring *inter alia* to "rights in property") & G.S. 160A-12 ("Exercise of Corporate Power").

In an action presenting a challenge to the critical importance of the *proprietary* aspect of municipal ownership and operation of public enterprises, the Supreme Court, upon reviewing "fundamental" principles pertaining to due process that "should be carefully and jealously guarded," stated:

> Under our government, municipalities have the right to own and operate water, sewerage and electric light systems.... ***Municipal corporations have the same rights as individuals and private corporations, to battle for justice and equality of opportunity as they view it, in their sphere of uplift and endeavor, and equal rights should be given to all under the law.***

Power Co. v. Elizabeth City, 188 N.C. 278, 297-98, 124 S.E. 611, 620 (1924) (emphasis added);[1] *see Madison Cablevision v. City of Morganton,* 325 N.C. 634, 648-

[1] *Cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2768 (2014) (Regarding the "familiar legal fiction" of treating corporations as persons: "But it is important to

649, 386 S.E.2d 200, 208-09 (1989) (citing *Elizabeth City*; Court notes range of public enterprises and statewide import of decision).[2]

A. The City of Asheville is entitled to the protection of N.C. Const. Art. I § 19, with respect to its water system, which it owns and operates in its proprietary capacity.

As set forth over a century ago by the Supreme Court in the seminal case of *Asbury v. Albemarle*, "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.***"

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keep in mind that the ***purpose*** of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the ***people*** (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these ***people***.... Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being.") (emphasis added). *Compare* G.S. 160A-11 (***inhabitants*** of each city are vested with all of the property and rights in property belonging to the corporation and exercise municipal powers and functions). Chapter 160A is entitled "Municipal Corporations." The term "Municipal Corporations" has origins pre-dating the Republic, as "towns and cities ... had long been organized as corporations at common law and under the King's charter, see 1 W. Blackstone, Commentaries on the Laws of England 455-473 (1765); 1 S. Kyd, A Treatise on the Law of Corporations 1-32, 63 (1793) (reprinted 2006)." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 388 (2010) (Scalia, J., concurring).

[2] The State attempts to assert that the Court of Appeals' opinion in *Bellsouth* was a Dillon's Rule case, when a close reading reveals that it was anything but. *Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 82-83, 606 S.E.2d 721, 726, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 660 (2005) (holding that "the narrow Dillon's Rule of statutory construction used when interpreting municipal powers has been replaced by [G.S.] 160A-4's [broad construction] mandate").

Asbury, 162 N.C. 247, 252-53, 78 S.E. 146, 149 (1913) (emphasis added).[3] The rule set forth in *Asbury* reflected the predominant rule nationally. As the Maine Supreme Court observed shortly thereafter:

> The Federal courts have universally held that the power of a city to construct water works is not a political or governmental power, but a private and ***corporate*** one, granted and exercised not to enable it to control its people but to authorize it to furnish, to itself and to its inhabitants, water for their private advantage. By what we regard the better reasoning and consequently the greater weight of authority ***a large majority of the State courts follow the rule*** laid down in the federal jurisdiction, namely, ***that a municipal corporation engaged in the business of supplying water to its inhabitants is engaged in an undertaking of a private nature.***

Woodward v. Livermore Falls Water Dist., 100 A. 317, 319 (Me. 1917) (citations omitted; emphasis added).

Nearly a half century later, the Supreme Court reaffirmed the constitutional dimension of the governmental-proprietary distinction in *Candler v. City of Asheville*, 247 N.C. 398, 406-07, 101 S.E.2d 470, 475-76 (1958). Here, the trial court correctly cited *Asbury* and *Candler,* as the legal and policy distinctions for proprie-

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[3] *See High Point v. Duke Power Co*, 34 F. Supp. 339, 344 (M.D.N.C. 1940), *aff'd*, 120 F.2d 866, 869-70 (4th Cir. 1941) ("The exercise of its powers for the private advantage of the City is subject to the same rules that govern individuals and private corporations. *Holmes v. Fayetteville*, 197 N.C. 740, 150 S.E. 624 [(1929), *appeal dismissed*, 281 U.S. 700 (1930)]; *Asbury v. Albemarle*.") Note too that the Umstead Act, which is designed to prohibit State government from competing with the private sector, acknowledges that local governments, in providing services to their citizens, can and do engage in business enterprises just as other corporations do. *See* G.S. 66-58 ("Sale of merchandise or services by governmental units") & G.S. 66-58(b)(1) (exempting municipalities and counties from prohibitions).

tary functions recognized therein remain for good reason. When any corporation is created, the corporation has certain rights. When municipalities are performing proprietary functions, municipalities need to be treated the same as other corporations for purposes of the Law of the Land clause: it is vitally important in the provision of water service, which requires tremendous investment by municipal inhabitants and is directly related to public health, safety, and welfare.

When acting in a proprietary capacity, municipalities face considerable exposure, as governmental immunity does not apply to proprietary functions. *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010); *Evans v. Housing Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004). Whereas damages against the State are capped, G.S.143-291 *et seq.*, under G.S. 160A-485 municipalities face unlimited liability in actions pertaining to their proprietary functions (such as the selling of water for private consumption). Further, like corporations, municipalities can be subject to allegations of anticompetitive conduct when conducting proprietary operations. *See Madison Cablevision, supra.*[4]

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[4] The governmental-proprietary distinction is also embedded elsewhere in the law. For example, it impacts whether a litigant is entitled to post-judgment interest against a local government, *Shavitz v. City of High Point*, 177 N.C. App. 465, 485-86, 630 S.E.2d 4, 18, *disc. review denied*, 361 N.C. 430, 648 S.E.2d 845 (2007); the application of the doctrine of *nullum tempus occurrit regi, Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992); and the doctrine of estoppel-by-deed, *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E.2d 402 (1953).

N.C. Const. art. VII ("General Assembly to provide for local government") includes the qualifying language "except as otherwise prohibited by this Constitution." *Id.* § 1. Contrary to the State's sweeping assertions, the power of the legislature, while it may be plenary as to local governments with regard to their delegated *governmental* powers, is not absolute: the qualifying language of Article VII explicitly recognizes that the legislature is not omnipotent. *See, e.g.*, N.C. Const. art. II, § 24; art. XIV, § 3 & art. I § 19. Indisputably, the constitutionality of the Water Act is a judicial, not a legislative, question. N.C. Const. art I, § 6. *See Moore v. Knightdale Bd. of Elections,* 331 N.C. 1, 4, 413 S.E.2d 541, 542-43 (1992).[5]

B. Given the long-standing statutory framework authorizing many forms of regionalism by general law, and the Water Act's failure to actually further this stated objective, the trial court correctly held that the Act is contrary to Article I, § 19.

The people of this State have historically relied on municipalities to construct and operate water infrastructure and services. More than 360 municipalities

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[5] Although this brief focuses on the Law of the Land clause, *amicus* League submits that the trial court correctly found the Water Act to be an invalid local act, as Asheville amply demonstrated in the proceedings below that the Act: (1) creates an unreasonable classification and constitutes a local act under Art. II, § 24 and (2) violates prohibitions set forth in that section. As to the substantive issues set forth in Art. II, § 24(1), the General Assembly may only exercise its powers by the enactment of laws generally applicable to all municipalities. *Lamb v. Bd. of Educ.*, 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952). By holding the Act unconstitutional, the trial court properly recognized the dangers inherent in interference via locally-targeted legislation in the ownership and operation of long-established municipal water supply systems. *Cf. Williams v. BCBS*, 357 N.C. 170, 185-86, 581 S.E.2d 415, 426-27 (2003); *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997) ("[T]he classification of watersheds is a complex subject. It is not something the General Assembly can micro-manage.")

own water systems, collectively serving an estimated population of more than 5.1 million.[6] While Asheville is the only system directly affected by the Water Act (2013 N.C. Sess. Laws, chs. 50 & 388), this case gives all municipalities with public enterprises great pause. If the Act were to be upheld, signaling that it is constitutionally permissible for the legislature to single out individual municipal utilities for the unilateral and uncompensated transfer of their assets, it is hard to imagine a more chilling effect on future decisions to finance and extend such systems.

Water infrastructure is enormously expensive, and local citizens' investment is significant.[7] Asheville's system, for all its idiosyncratic history, is not unique in its vulnerability to being targeted. Bill drafters could craft provisions to take aim at any other municipal system that incurs disfavor, meting out similar treatment under the guise of "regionalism." With the potential for being unceremoniously divested of their assets, citizens are unlikely to support future investment in public enterprise systems; concomitantly, municipal officials are unlikely to take the political and financial risks inherent in making such expenditures. Municipalities

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[6] Data analyzed by the UNC Environmental Finance Center (EFC), April 2015; Data Source: U.S. EPA's Safe Drinking Water Information System database; data on all community water systems active as of October 2013. All other providers of community water systems combined statewide serve less than half the population served by municipal systems.

[7] See J. Hughes & S. Royster, *Overview of Local Government Water and Wastewater Debt in North Carolina* (UNC EFC: Feb. 2014). http://www.efc.sog.unc.edu/sites/www.efc.sog.unc.edu/files/BorrowingForTheBigStuff_2013.pdf.

cannot adequately plan for the future of the community in the face of such uncertainty. This is precisely why the Constitution contains checks on legislative power.[8]

Even if it does not encourage the passage of other legislation to transfer municipal system assets, there would nonetheless be tremendous statewide impact if the Water Act were to be upheld. Mandating the transfer of Asheville's system assets causes it to be in violation of the transfer provisions and other critical covenants of the Indenture governing Water Bonds. The effect on the local government bond market alone is reason for great trepidation, as borrowing costs for all would be substantially higher.[9] These anticipated impacts are made more acute by

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[8] As Chief Justice Marshall wrote in *Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, 694-95 (1819) ("It may be admitted, that corporations ... such as ... cities ... 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***.... From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation. This Court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it.") (emphasis added).

[9] Memorandum to Members of the N.C. Local Government Commission from T. Vance Holloman, Secretary, May 2, 2013, Doc. Ex. 391. ("In addition to our concerns about the revenue bonds of the Asheville water system, we are concerned that such actions taken or being considered by the General Assembly may ***negatively affect the bond market's demand for North Carolina local government debt.*** We have expressed these concerns to the General Assembly concerning a proposed bill to transfer the airport of the City of Charlotte to a new, regional authority. These actions with regard to Asheville and Charlotte seem to be contrary to Chapter 159-93. That statute is a pledge to the holders of revenue bonds by the General Assembly not to take any action to interfere with the ability of an issuer of revenue bonds to repay that debt. ***We***

forecasts that North Carolina's drinking water infrastructure capital needs will top $10 billion over the next two decades. *See* Hughes & Royster, fn. 7.

Amicus League does not dispute that regionalism, as set forth in the preamble to the Water Act, is an appropriate policy objective in theory. However, where, as here, the means employed by the enactment do not reasonably further its stated objective, the Act must fail under Article I, §19. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004) (relationship of the classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational). Here, it was arbitrary and irrational to mandate the transfer of the assets of a single existing system in the name of "regionalism," when there are already numerous existing and proven methods of achieving that purpose available under general law, and when the method chosen does not in fact promote the ostensible purpose.

When the Water Act was ratified, there were already in place numerous alternative mechanisms, developed over decades by the General Assembly, for the regionalization of water and sewer services under laws of general applicability. These include G.S. Chapter 162A, Article 1 ("North Carolina Water and Sewer Authorities Act"); Article 2 ("Regional Water Supply Planning Act"); Article 3 ("Re-

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feel the debt markets will take notice of the actions of the General Assembly, as well as any resulting litigation, events of default, and forced refunding of debt at an economic loss. North Carolina revenue bonds have been in high demand in the past due in part to the General Assembly honoring its pledge not to interfere with the repayment of bonds. Noteworthy events such as Asheville and Charlotte may hurt the demand for these bonds and result in higher financing costs in the future.") (emphasis added).

gional Sewage Disposal Planning Act"); and Article 4 ("Metropolitan Water Districts Act. The public enterprise statutes have long authorized both municipalities and counties to engage in regional activity by extending water and sewer services outside their borders. G.S. 153A-27; G.S. 160A-312. Furthermore, the General Assembly has authorized units of local government to enter into interlocal agreements to jointly undertake any of their powers or functions, including public enterprises. Chapter 160A, Article 20, Part 1 ("Interlocal Cooperation"). *See Caswell County v. Town of Yanceyville*, 170 N.C. App. 124, 131, 611 S.E.2d 451, 456 (2005) (Article 20 constitutes "a broad grant of authority to local governmental units for interlocal cooperation").

Cumulatively, these statutes demonstrate a legislative recognition that regionalism can be accomplished in a variety of ways: it need not mean the creation of a separate regional entity. In many cases regionalism takes the form of extension of an existing system to serve the larger community, contractual arrangements for the sale of water or treatment services, interconnections of systems, and joint agencies via interlocal agreement.[10] There is widespread use of these alternative

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[10] *See* UNC Environmental Finance Center's *Water System Partnerships, Interconnections, and Interlocal Agreements Project* home page at http://www.efc.sog.unc.edu/project/water-system-partnerships-interconnections-and-interlocal-agreements for materials recognizing the many arrangements by local governments that can be characterized as regionalization: J. Hughes & G. Barnes, *Crafting Inter-Local Water Agreements* at 2 (UNC EFC: 6/24/09) ("[B]y far the most common tool for creating water partnerships in North Carolina is through interlocal agreements."); S.

statutory mechanisms in the major urban centers of the State. *See* Affidavit of T. Randolph Perkins, Doc. Ex. 482 for examples. *See also* R. Whisnant & S. Eskaf, *An Overview of NC Water Service Providers* (UNC EFC: 11/13/13) (types of utility models and regional activities).

It is axiomatic that true effective regionalism depends upon the cooperation of the governed entities. Each of the alternative mechanisms described above involves a level of participation, partnership, and consent of the units of government involved. Further, it is clear that the General Assembly has in its laws of general applicability taken the approach of providing incentives for, rather than mandating, regionalization. *E.g.*, G.S. 159G-23(10) (water grants); G.S. 130A-317(c)(3) (construction of water systems); G.S. 130A-317(d) (local approval programs); G.S. 143-215.22L(n)(7) (resale of water); G.S. 143-355.7 (State assistance with water supply alternatives).

By stark contrast, the Water Act arbitrarily demands *compulsory* regionalization of a single system—a closed class—without a basis, rational or otherwise, for distinguishing it from all other publicly-owned water systems. As Judge Manning stated below, "Asheville, alone among all local governments in North Carolina, **has no choice in the matter**." (R. 158)

Eskaf, *Tips on Regionalization: Crafting Interlocal Water Agreements and Water System Interconnections* (UNC EFC: 11/13/13) (interconnections and interlocal agreements as regionalization).

The Act's bald statement of its purpose is insufficient to save it, as the mechanism employed by the Act does not further the purported objective of regionalism. Asheville's system already serves 124,000 customers across a multi-county area, almost 40% of whom are outside the city limits. The system serves customers in Buncombe and Henderson Counties, and by interlocal agreement supplies water to other municipal systems in the area. It is already prohibited from charging differential rates to customers outside its limits. As the trial court properly concluded, the transfer of assets would result in no change in the existing uses or purposes currently served by the Asheville system.[11] (R. 158) For all intents and purposes, the Asheville system is already functioning as a regional system. Transferring such a system to another entity by fiat appears, if anything, antithetical to the promotion of regionalization. Moreover, the Act inexplicably leaves intact multiple separate water systems in the area that would not be divested of their assets and consolidated into the MWSD, including Biltmore Forest, Black Mountain,

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[11] For the reasons stated by the plaintiff-appellee, the trial court properly found that the Act constituted an impermissible taking. *State Highway Comm'n v. Greensboro City Bd. of Educ.*, 265 N.C. 35, 49, 143 S.E.2d 95, 97-98 (1965). Its alternative ruling was also correct regarding just compensation. Decisions of other jurisdictions are in accord. *See generally* 2-5 *Nichols on Eminent Domain* § 5.06(8)(b). *Cf. Hobby Lobby*, 134 S.Ct. at 2768 (**"When rights, whether constitutional or statutory, are extended to corporations,** the purpose is to protect the rights of these ***people***.... Protecting corporations from government seizure of their property ***without just compensation protects all those who have a stake*** in the corporations' financial well-being.") (emphasis added.)

Montreat, and Woodfin Water and Sewer District. These circumstances illustrate the arbitrary nature of the Water Act.

A mere pretext of regionalism cannot sustain the enactment. *See City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 338 N.C. 430, 437-39, 450 S.E.2d 735,739-41 (1994) (demonstrating that where there is law of general applicability, a dispute among jurisdictions in insufficient to provide a rational basis for differential treatment from all other jurisdictions statewide; also rejecting the art. VII, § 1 argument that legislature had acted within its plenary authority).

The trial court correctly held that there was no basis, rational or otherwise, for the Act to single out Asheville for the transfer of its assets. Despite the State's contentions referencing federal law, whereas the federal constitution provides a floor of basic rights, the State Constitution is designed to give greater rights, such as by the Law of the Land Clause and other limitations on the legislative power. *McNeill v. Harnett Cnty.*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990); N.C. Const. art. I, § 6. Given the important constitutional provisions that serve as a restraint on the General Assembly's legislative power, the trial court correctly invalidated the Water Act.

CONCLUSION

Amicus League respectfully requests that this honorable Court affirm the superior court's order in all respects.

Respectfully submitted, this 1st day of May, 2015.

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CERTIFICATE OF COMPLIANCE

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

This the 1st day of May, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing NORTH CAROLINA LEAGUE OF MUNICIPALITIES' AMICUS BRIEF was served this date upon counsel for the parties by depositing a copy thereof in the United States mail, first-class postage prepaid, addressed as follows:

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