No. COA 14-1255 TENTH DISTRICT

****

IN THE NORTH CAROLINA COURT OF APPEALS

****

CITY OF ASHEVILLE, a municipal corporation,	)	
Plaintiff,	)	
vs.	)	From Wake County
THE STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA,	)	
Defendants.	)	

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REPLY BRIEF OF THE STATE OF NORTH CAROLINA

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REPLY BRIEF OF THE STATE OF NORTH CAROLINA

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PRELIMINARY STATEMENT

Pursuant to Rule 28(h) of the North Carolina Rules of Appellate Procedure, the State of North Carolina hereby respectfully submits this Reply Brief in further support of its appeal and its prayer that this Honorable Court reverse the trial court's 9 June 2014 decision, order and judgment (the "9 June Order") [R. 157-65]

granting summary judgment to the City of Asheville (the "City"), denying the State's Motion for Summary Judgment and holding, *inter alia*, that North Carolina Session Law 2013-50 (the "Act") [R. 28-34], as amended by North Carolina Session Law 2014-388 [R. 367], is unconstitutional, null and void.

THE STATE'S REPLY TO THE CITY'S BRIEF

The State set forth in its initial Brief why it believes that this Court should reverse the trial court's 9 June Order, including, *inter alia*, why the Act is not a local law, why the Act does not "relate to" health, sanitation and the abatement of nuisances or non-navigable streams, why the Act does not violate the City's equal protection rights, why the Act does not effect a taking of private property and why the implementation of the Act does not entitle the City to "just compensation." Because the State has fully demonstrated in its initial Brief the correctness of its position on, *inter alia*, these issues, it will not repeat its arguments on these matters in this Reply Brief, but will instead focus on two other matters raised by the City in its Brief. First and foremost, the State will focus on a threshold issue as presented in the City's Brief that goes to the heart of whether the City may maintain this lawsuit against the State – namely, whether the City has sustained or, following the implementation of the Act, will sustain any injury in fact sufficient to give the City standing to sue the State in this case and whether, as an agency of the State, the City may challenge the constitutionality of a statute of the State. Second, the State

will briefly address the City's continued reliance upon incompetent, irrelevant and inadmissible evidence allegedly attesting to the intentions of individual members of the General Assembly concerning the Act as of the time the General Assembly enacted it.

I.

THE CITY LACKS STANDING TO SUE THE STATE.

The City bases its claim of standing in this case on its assertions that: (i) Article 2, Section 160A-11 of the General Statutes "vests in the inhabitants of Asheville ... all rights and interests in the assets of the [Asheville] Water System ..." (City's Brief at page 12); (ii) the Water System is the City's "private property" (*e.g.*, City's Brief at page 13); (iii) the Act "expropriates" the Water System and "takes" it from the City (*e.g.,* City's Brief at page 44); and (iv) for purposes of this dispute, the City is no different from any private citizen or private corporation whose private property the State Government is attempting to forcibly take. (*E.g.*, City's Brief at pages 13-14)

And indeed, this is exactly how the trial court analyzed the transfer provision of the Act. In articulating the basis for its decision, the trial court stated:

> The Water Act's transfer of the entire Water System, reduced to essentials, amounts to a taking of all the assets and debts of a proprietary municipal business from Asheville and places the assets and debts in the ownership of another entity. Consider 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. 164]

Seen in this light, the City's claim of a legally cognizable injury in fact caused by the Act and, thus, its claim of standing are based on the notion that, if implemented, the Act will injure the City by forcibly taking its private property and giving it to someone else. As the trial court did in its 9 June Order [R. 164], the City argues that the transfer provision of the Act is governed – and prohibited – by the Supreme Court's decisions in *Asbury v. City of Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), and *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958). (City's Brief at pages 13, 37-38)

But *Asbury* and *Candler* dealt with an altogether different issue – the issue what constitutes a proprietary function of a municipality. Neither case dealt with the situation where a statute enacted by the General Assembly transfers ownership and control of a publicly owned water system from one political subdivision of the State to another political subdivision of the State – as opposed to its transfer to a private person or corporation – to be used for the same public purpose and for the benefit of the same group of citizens.

This is a critical distinction and highlights why the Act does not "injure" the City in such a way as to confer upon it standing to sue the State in this case. If the Act is implemented, the assets and liabilities of a publicly owned water system[1] will be transferred from Asheville, one political subdivision of the State, to the Metropolitan Water and Sewerage District of Buncombe County, North Carolina (sometimes hereinafter referred to as the "MWSDBC"), another political subdivision of the State. The water system will continue to be publicly owned. As explained in the State's initial Brief and in the Act itself, the residents of the City will be politically represented on the MWSDBC, which will be politically accountable to them and to the General Assembly for its operation of the combined water and sewerage system. Moreover, as explained in the State's initial Brief and in the Act itself (and as the City seems to acknowledge), following the transfer of the water system to the MWSDBC, the residents of Asheville will continue to be served in the same way by the same water system as they have been previously and as they are now. Hence, the residents of Asheville will not be required by reason of the transfer provision of the Act to construct or pay for a replacement or new water (or sewerage) system. And the recipient of the water system – the

[1] The City acknowledges that the water system has been paid for by many people other than just the residents of Asheville. In this regard, the City's Brief notes that "[t]he Water System has been built and maintained ... using a combination of taxes, service fees, connection charges, bonded debt, various federal and state grants, contributions from Buncombe County and conveyance by dedication or deed from property owners and developers. (City's Brief at page 3)

MWSDBC – will be a governmental entity that has been in existence and operation for decades[2] and which has a bond rating that is as high as the City's.[3]

The only "loss" that will be occasioned by the transfer provision of the Act will be the City's (not its residents') loss of exclusive control over a large administrative bureaucracy. The people of Asheville will lose nothing.

Under these circumstances, the City cannot show that the Act will cause it an injury or loss of the type sufficient to confer standing on it to sue the State in this case. *Asbury* and *Candler*, on which the trial court relied for its decision, are inapplicable and do not support the City's underlying argument that it has been or will be injured by the Act.

In addition to the fact that the City cannot demonstrate that it has suffered or will suffer a legally cognizable injury in fact attributable to the Act, the City's

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[2] The Metropolitan Sewerage District of Buncombe County, North Carolina, is a public body organized under the provisions of the North Carolina Metropolitan Sewerage Districts Act, Article 5, Chapter 162A of the North Carolina General Statutes. It was established in 1962 by the North Carolina State Stream Sanitation Committee for the purpose of constructing and operating facilities for the treatment and disposal of sewage generated by the political subdivisions comprising the MSD. *See* http://www.msdbc.org/aboutus.php.

[3] As of March 26, 2013, the capital markets assigned a credit rating of "AA+; Outlook Stable" to the Metropolitan Sewerage District of Buncombe County, North Carolina's bonds. *See* http://www.marketwatch.com/story/fitch-rates-metro-sewerage-dist-of-buncombe-cty-nc; and http://www.businesswire.com/news/home/20130326006390/en/Fitch-Rates-Metro-Sewerage-Dist-Buncombe. At the same time, Moody's assigned an Aa2 credit rating to the MSDBC's $30.105 million Sewer System Revenue Refunding Bonds, Series 2013. *See* http://www.municipalbonds.com/bonds/issue/120532JG2.

Brief fails to show how its case can survive the application of the legal principle that an agency of the State may not sue the State challenging the constitutionality of a State statute. In attempting to deal with this principle, the City tries to distinguish *Appeal of Martin*, 286 N.C. 66, 73-74, 209 S.E.2d 766, 772 (1974) (City's Brief at page 12), but the City's attempt to do so rests upon an incomplete reading of the Supreme Court's discussion in that case of the issue whether a municipality created by the General Assembly has standing to sue the State challenging the constitutionality of a statute enacted by the General Assembly. The City claims that *Martin* holds merely that a party who has availed itself of the benefits of a statute may not thereafter challenge the constitutionality of the same statute. (City's Brief at page 12) But a careful reading of *Martin* demonstrates that the City is ignoring what the Supreme Court actually said about standing.

Martin was a tax case in which Mecklenburg County had used and relied upon N.C. Gen. Stat. §105-281 (1969 Cum. Supp.) as the legal basis justifying its attempt to collect a tax from the taxpayer. Specifically, the County had relied upon the taxing power conferred upon it by the General Assembly through its enactment of N.C. Gen. Stat. §105-281 as the underlying basis for its attempt to levy the tax in question upon the taxpayer. But in addition to this taxing power, N.C. Gen. Stat. §105-281 also contained a nontaxable classification exemption provision. When various administrative tribunals and the Mecklenburg County Superior Court ruled

that the nontaxable classification exemption provision contained in N.C. Gen. Stat. §105-281 exempted the taxpayer from tax liability, the County challenged the exemption portion of the statute, claiming that it was unconstitutional. *See* 1974 N.C. LEXIS 1179 at *1-*11 and 286 N.C. at 75, 209 S.E.2d at 772.

On these facts, the Supreme Court held that:

> As a general rule, one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. 16 *Am. Jur. 2d,* Constitutional Law, §135 (1964); *see Utilities Comm. v. Electric Membership Corp.*, 276 N.C. 108, 171 S.E.2d 406 (1970); *City of Durham v. Bates*, 273 N.C. 336, 160 S.E.2d 60 (1968); *Ramsey v. Veterans Commission*, 261 N.C. 645, 135 S.E.2d 659 (1964); *Convent v. Winston-Salem*, 243 N.C. 316, 90 S.E.2d 879 (1956).

Martin, 286 N.C. at 74, 209 S.E.2d at 772.

On this basis, the court ruled against the County.

But prior to this discussion and holding, the court engaged in an extensive discussion of a different and more fundamental issue – whether a political subdivision of the State has standing to challenge the constitutionality of a State statute, which is precisely the issue in the instant case. On this question, the court noted that "[t]he counties of North Carolina were created by the General Assembly as governmental agencies of the State" (citations omitted), and stated that:

> The question whether a State subdivision has standing to contest the constitutionality of a State statute has produced conflicting decisions in other jurisdictions.

> (Citations omitted) But the prevailing view is that a subdivision of the State does not have standing to raise such a constitutional question. (Citation omitted) Likewise, the majority of jurisdictions which have considered whether a city or county may challenge a tax statute on constitutional grounds answer in the negative. (Citations omitted) Although these decisions do not articulate a well defined rule of law, much of their reasoning i[s] persuasive.

Martin, 286 N.C. at 73-74, 209 S.E.2d at 772. *See also Wood v. City of Fayetteville*, 43 N.C. App. 410, 418-19, 259 S.E.2d 581, 586 (1979) (same).

The City's attempt at page 12 of its Brief to give *Martin* the back of its hand ignores the *Martin* court's clear statement, as quoted above, that, in its view, the majority – and better – position on this fundamental standing question is that a municipality may not sue the State challenging the constitutionality of a State statute. Whatever the *Martin* court may have also said in its final holding about how Mecklenburg County had engaged in conduct giving rise to an estoppel does not change this fact. Furthermore, the City's attempt to distinguish *Martin* as, essentially, mothing more than an estoppel case ignores the Supreme Court's favorable citation of and reliance upon *Martin* five years later in *Wood.*

Because the City has not suffered an injury in fact as a result of the Act and because a municipality may not challenge the constitutionality of a State statute, the City lacks standing to sue the State in this case and, consequently, this Court

should reverse the trial court's 9 June Order, grant the State's Motion for Summary Judgment and dismiss the City's case in its entirety.

II.

THE CITY RELIES UPON INCOMPETENT AND INADMISSIBLE "EVIDENCE" TO SUPPORT ITS POSITION IN THIS APPEAL.

In its Brief, which was authored by, *inter alia*, an attorney who was a member of the General Assembly at the time the Act was considered, debated and enacted, the City makes a series of assertions about what was allegedly in the mind of this or that legislator at the time the Act was being considered and voted on. The City's Brief then cites as factual authority for these statements a document, also prepared by the same former legislator, which likewise purports to provide the reader with an alleged "inside" view of what various legislators allegedly had or "must have had" in their minds at the time the Act was being formulated and voted upon.

Thus, for example, at page 8 of its Brief, the City states as fact that "[d]uring the course of the legislative deliberations on the bill that eventually became the Water Act, *concerns arose* that if Greenville no longer needed or held an [interbasin transfer certificate], Section 1.(a)(2) [of the Act] might not be able to save [Greenville's] water system from forced merger into the Contentnea [Metropolitan Sewerage District], as Greenville's population continued to grow"

(citing the reader to another document authored by the City's legislator-legal counsel and entitled "Legislative Appendix" – R. 171; Rule 9(d) Documentary Exhibits at pages 228-236). (Emphasis supplied)

Likewise on page 10 of its Brief, the City states that "Section 5.5 [of the Act] ... was proposed as an amendment ... by Senator Apodaca ... *in response to concerns voiced by other senators* that the Water Act might unintentionally apply to other localities in the future" (again citing as alleged factual authority the City's "Legislative Appendix"). (Emphasis supplied)

And at page 22 of its Brief, the City twice refers this Court to the "floor debate" and the City's "Legislative Appendix" concerning the Act in an effort to demonstrate what one or more members of the General Assembly allegedly meant or intended as regards the Act.

It is well recognized by the courts of this State that such "evidence" is incompetent and inadmissible when offered to prove what one or more legislators intended or might have intended or meant as regards a particular statute. In *State of North Carolina ex rel. North Carolina Milk Commission v. National Food Stores, Incorporated*, 270 N.C. 323, 332-33, 154 S.E.2d 548, 555-56 (1967), the Supreme Court made this clear, stating that:

> While the cardinal principle of statutory construction is that the words of the statute must be given the meaning which will carry out the intent of the Legislature, that intent must be found from the language of the act, its

> legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied. Testimony, even by members of the Legislature which adopted the statute, as to its purpose and the construction intended to be given by the Legislature to its terms, is not competent evidence upon which the court can make its determination as to the meaning of the statutory provision.

Accord: Electric Supply Co. of Durham, Inc. v. Swain Electrical Co., Inc., 328 N.C. 651, 657, 403 S.E.2d 291, 295 (1991) ("[W]e have declared affidavits of members of the legislature who adopted the statutes in question not to be competent evidence of the purpose and intended construction of the legislation."); *Manning v. Atlantic and Yadkin Railway Co.*, 188 N.C. 648, 659, 125 S.E. 555, 562 (1924) (where the Supreme Court cited with approval *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897), for the proposition that debates in Congress may not be resorted to for the purpose of proving the intentions of congressmen concerning a particular statute because it is impossible to determine with certainty what construction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of the individual members. Those who do not speak may not agree with those who do, the result being that the only proper way to construe a legislative act is to construe the language used in the act.).

In response to similar efforts by the City to put such evidence before the trial court, the State formally objected and asked the trial court to disregard all such

"evidence." *See* Transcript of 23 May 2014 Hearing at page 21 and R. 170, 171 [at paragraph 6(b)]. The trial court ruled that such evidence was irrelevant and inadmissible. *Id.* The State asks this Court to rule likewise and to ignore the City's citations to alleged evidence of floor debates concerning the Act and alleged "inside information" by a former legislator as to what one or another member of the General Assembly allegedly said or allegedly intended regarding the Act – including the City's "Legislative Appendix."

CONCLUSION

For each of the foregoing reasons, and for the additional reasons set forth in the State's initial Brief, the State of North Carolina respectfully prays that this Court vacate the trial court's 9 June 2014 Order awarding summary judgment to the City and denying the State's 27 February 2014 Motion for Summary Judgment; that this Court enter an Order awarding summary judgment to the State as prayed for by the State in its 27 February 2014 Motion for Summary Judgment; and that this Court grant the State such other and further relief as it may deem just and proper.

Respectfully submitted this 11th day of May 2015.

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CERTIFICATE OF COMPLIANCE
WITH RULE 28(j)(2)(A)2. OF THE NORTH CAROLINA
RULES OF APPELLATE PROCEDURE

This is to certify that the State's Reply Brief in this matter is proportionally typed in 14-point Times New Roman font and that said Brief, including its footnotes and case citations, but excluding its covers, index, table of authorities, certificate of compliance with Rule 28(j)(2)(A)2., certificate of filing and service and appendices, contains no more than 3,750 words, based upon the word count reported by the undersigned counsel's word processing software (which reports that this Brief contains 3,148 words).

This 11th day of May 2015.

/S/ I. Faison Hicks
I. Faison Hicks

CERTIFICATE OF FILING AND SERVICE

This is to certify that, on the 11th day of May 2015, the undersigned caused the original of the State's Reply Brief in this appeal to be filed electronically with the Office of the Clerk of Court of the North Carolina Court of Appeals, pursuant to the North Carolina Rules of Appellate Procedure.

This is to further certify that, on the 11th day of May 2015, the undersigned caused a copy of the State's Reply Brief in this appeal to be served upon counsel for the Plaintiff-Appellee in this matter, Daniel G. Clodfelter, Esquire, Parker Poe Adams & Bernstein LLP, Three Wells Fargo Center, 401 South Tryon Street, Suite 3000, Charlotte, North Carolina 28202, as well as T. Randolph Perkins, Esquire, and Jonathan M. Watkins, Esquire, Moore & Van Allen PLLC, 100 North Tryon Street, 47th Floor, Charlotte, North Carolina 28202, by First-Class United States Mail.

This is to further certify that, on the 11th day of May 2015, the undersigned caused a copy of the State's Reply Brief in this appeal to be served upon counsel for the Metropolitan Sewerage District of Buncombe County, North Carolina, William Clarke, Esquire, Roberts & Stevens, P.A., Post Office Box 7647, Asheville, North Carolina 28802, and Stephen W. Petersen, Esquire, Smith Moore Leatherwood, LLP, 434 Fayetteville Street, Suite 2800, Raleigh, North Carolina 27601.

This is to further certify that, on the 11th day of May 2015, the undersigned caused a copy of the State's Reply Brief in this appeal to be served upon counsel for the North Carolina League of Municipalities, *amicus curiae*, Kimberly S. Hibbard, Esquire, and Gregory F. Schwitzgebel III, Esquire, Office of the General Counsel, North Carolina League of Municipalities, 215 North Dawson Street, Raleigh, North Carolina 27602-3069, and upon counsel for the City of Wilson, *amicus curiae*, James P. Cauley, III, Esquire, and Gabriel Du Sablon, Esquire, Cauley Pridgen, P.A., Post Office Drawer 2367, Wilson, North Carolina 27894.

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