No. COA 14-1255 TENTH JUDICIAL DISTRICT

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IN THE NORTH CAROLINA COURT OF APPEALS

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

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# BRIEF OF THE STATE OF NORTH CAROLINA

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## ISSUES PRESENTED

I.

WHETHER THE TRIAL COURT ERRED BY FAILING TO DISMISS THE CITY'S CASE ON THE GROUND THAT THE CITY LACKS CAPACITY AND STANDING TO SUE THE STATE?

II.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT IS A LOCAL LAW?

III.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT "RELATES TO" HEALTH, SANITATION AND THE ABATEMENT OF NUISANCES AND/OR NON-NAVIGABLE STREAMS?

IV.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT VIOLATES THE CITY'S EQUAL PROTECTION RIGHTS?

V.

WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT EFFECTS AN UNLAWFUL TAKING OF THE CITY'S PRIVATE PROPERTY AND THAT, IF THE ACT WERE IMPLEMENTED, THE CITY WOULD BE ENTITLED TO "JUST COMPENSATION?"

## PROCEDURAL HISTORY

The City of Asheville (the "City") filed this action on 14 May 2013 alleging that North Carolina Session Laws 2013-50 (sometimes referred to hereinafter as the "Act"), violates the North Carolina and United States constitutions. (R. 2, 13-21) On the same day, the Honorable Donald W. Stephens entered a Temporary Restraining Order enjoining the State from implementing or enforcing the Act (the "TRO"). (R. 38)

The case was thereafter assigned to the Honorable Howard E. Manning, Jr., Superior Court Judge. By agreement, the parties extended the TRO pending a

hearing on the City's Motion for a Preliminary Injunction and the State filed a Motion to Dismiss the City's Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. (R. 42, 43, 54, 48)

Following a 6 September 2013 hearing, Judge Manning entered a Consent Order establishing a discovery schedule, permitting the City to file an amended complaint, continuing the TRO and establishing a schedule for the filing of summary judgment motions. (R. 108)

On 2 October 2013, the City filed its Amended Complaint. On 29 October 2013, the Metropolitan Sewerage District of Buncombe County, North Carolina (sometimes referred to hereinafter as the "MSDBC") filed its Answer to the City's Amended Complaint. On 7 November 2013, the State filed its Motion to Dismiss and Answer to the City's Amended Complaint. On 27 February 2014, the City filed its Motion for Partial Summary Judgment. On the same day, the State filed its Motion for Summary Judgment. (R. 59, 113, 120, 143, 148)

Judge Manning held a hearing on the parties' motions for summary judgment on 23 May 2014. (R. 160) Following that hearing, he entered a "Memorandum of Decision and Order Re: Summary Judgment" on 9 June 2014 (the "9 June Order"). (R. 157) On 8 July 2014, the State filed its Notice of Appeal of the 9 June Order. (R. 168)

## GROUNDS FOR APPELLATE REVIEW

This is an appeal as of right from a final judgment of a Superior Court pursuant to N.C. Gen. Stat. §7A-27(b)(1).

## STATEMENT OF THE FACTS

### Introduction and Background

By this action, the City sought a declaration that Session Laws 2013-50, entitled "An Act to Promote the Provision of Regional Water and Sewer Services by Transferring Ownership and Operation of Certain Public Water and Sewer Systems to a Metropolitan Water and Sewerage District," is unconstitutional under the North Carolina and United States constitutions. (R. 59, 71-79) In the alternative, the City sought a declaration that, if implemented, the Act would effect a taking of the City's private property for which it would be entitled to compensation. (R. 79-80)

### The City's Claims Which Are the Subject of This Appeal

The trial court granted summary judgment in favor of the City on its First, Second, Third and Sixth (alternative) Claims for Relief.[1] (R. 157-65)

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[1] Because it ruled for the City of its other claims, the trial court declined to rule on the City's Fourth and Fifth Claims, seeking a declaration that the Act violates Article I, §10 of the United States Constitution and Article I, §19 of the North Carolina Constitution because it allegedly impairs the obligation of contracts. (R. 164-65)

The City's First Claim sought a declaration that the Act is unconstitutional under Article II, §24(1)(a) and Article II, §24(1)(e) of the North Carolina Constitution on the grounds that the Act is a local law relating to: (i) health, sanitation and the abatement of nuisances; and (ii) non-navigable streams. (R. 71-72)

The City's Second Claim sought a declaration that the Act is unconstitutional under Article I, §19 of the North Carolina Constitution on the ground that it violates the City's equal protection rights. (R. 72-75)

The City's Third Claim sought a declaration that the Act is unconstitutional under Article I, §§19 and 35 of the North Carolina Constitution on the ground that the asset transfer provisions of Section 1(a) of the Act work an unlawful taking of what the City characterizes as its private property. (R. 75-76)

By its Sixth (alternative) Claim, the City sought a declaration that, if the Act is implemented, Article I, §§19 and 35 of the North Carolina Constitution mandate that the City be compensated for the assets of the Asheville Water System. (R. 79-80)

## The Act

The Act recognizes that "regional water and sewer systems provide reliable, cost-effective, high-quality water and sewer services to a wide range of residential and institutional customers." It further recognizes that "regional solutions" to

problems relating to large public water and sewer systems are valuable to the effort to ensure that the citizens and businesses of this State have access to the highest quality services. (Rule 9(d) Documentary Exhibits ["DE"], 221-27)

In furtherance of these aims, the Act creates a new political entity, known as a metropolitan water and sewerage district ("MWSD").

Section 1(a) of the Act provides that:

> All assets, real and personal, tangible and intangible, and all outstanding debts of any public water system meeting all of the following criteria are by operation of law transferred to the metropolitan sewerage district operating in the county where the public water system is located, to be operated as a Metropolitan Water and Sewerage District:
>
> (1) The public water system is owned and operated by a municipality located in a county where a metropolitan sewerage district is operating.
>
> (2) The public water system has not been issued a certificate for an interbasin transfer.[2]
>
> (3) The public water system serves a population greater than 120,000 people, according to data submitted pursuant to G.S. 143-355(l).

But the heart of the Act is found in its provisions dealing with the *governance* of the newly created water and sewer district, found in Section 2. Following the transfer of the assets and obligations of the municipal water system

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[2] The interbasin transfer provision of the Act (Section 1(a)(2)) was repealed by Session Laws 2013-388.

to the metropolitan sewerage district, the metropolitan sewerage district becomes a metropolitan water and sewer district. The Act provides that this MWSD shall be governed by a district board that shall be representative not only of the citizens of the municipality that formerly operated the water system at issue, but also of the citizens living in the other municipalities located in the water system's service area, as well as the county residents living within the water system's service area. N.C. Gen. Stat. §162A-85.3, as revised by the Act.

The Act gives the members of this MWSD district board, broadly selected from the water system's entire service area, control over the tax rates to be charged for water and sewer services and the rates and charges for services within the newly established MWSD. N.C. Gen. Stat. §§162A-85.9 and 85.13, as revised by the Act. The Act also strictly forbids any price discrimination against customers who reside outside the territorial boundaries of the MWSD but who receive services from the MWSD. *Id.*

If the Act were allowed to become effective, it would transfer all of the assets and liabilities, including all debts and other obligations, of the Asheville Water System to the metropolitan sewerage district that currently serves Asheville and Buncombe counties (the Metropolitan Sewerage District of Buncombe County – the MSDBC). By virtue of the Act, the MSDBC, a metropolitan sewerage district, would become a metropolitan water *and* sewerage district which would

operate both the Asheville Water System *and* the sewerage system now operated by the MSDBC.

At the time the Act became law in May 2013 and at this time, the transfer provisions of the Act would apply only to the Asheville Water System; however, Greenville operates a municipal water and sewerage system that currently provides services to its residents and 75% of the residents of Pitt County. This system currently serves almost 28,000 water customers and nearly 22,000 sewerage customers. *See* http://www.efc.unc.edu/projects/FinanLdrGuidebook/GUC%20Case%20Study.pdf, "Greenville Utilities Commission, Pitt County, NC, Interruptible Service Agreements Case Study," UNC Environmental Finance Center, and http://www.guc.com/index_a.html.

According to the Census Bureau, Pitt County's 2012 estimated population was 172,554, an increase of 4,406 people, or well over 2.5%, as compared to 2010. Greenville's 2012 estimated population was 87,242, an increase of 2,688 people, or over 3%, as compared to 2010. *See* https://www.census.gov, https://www.census.gov/popfinder/?fl=37:37147, www.census.gov/popest/data/index.html, http://factfinder2.census.gov/bkmk/table/1.0/en/PEP/2012/PEPANNRES/0400000US37.05000 and

http://factfinder2.census.gov/bkmk/table/1.0/en/PEP/2012/PEPANNRES/0400000US37.16200.

If Greenville's and Pitt County's populations continue to grow at this rate, it is reasonably foreseeable that Section 1(a) of the Act will also apply to the Greenville water system in the near future.

The Asheville Water System

The City operates a water treatment and distribution system for the treatment and supply of water and for the operation of sanitary disposal systems for individuals and entities within its corporate limits and for individuals and entities outside its corporate limits. *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 4, 665 S.E.2d 103, 109 (2008), *rev. denied*, 363 N.C. 123, 672 S.E.2d 685 (2009) ["*City of Asheville*"]. The system serves the City of Asheville, approximately 60% of Buncombe County and a small part of Henderson County. Thus, the Asheville Water System serves the region surrounding the City.

The Metropolitan Sewerage District of Buncombe County

The MSDBC is a public body organized under the provisions of the North Carolina Metropolitan Sewerage Districts Act, Article 5, Chapter 162A of the General Statutes. It was established in 1962 by the North Carolina State Stream Sanitation Committee to construct and operate facilities for the treatment and

disposal of sewage generated by the political subdivisions comprising the MSDBC. *See* http://www.msdbc.org/aboutus.php.

The MSDBC is a non-profit, publicly-owned utility. *Id.* It is comprised of the following 16 political subdivisions located in Buncombe County:

City of Asheville
Town of Montreat
Beaverdam Water & Sewer District
Enka-Candler Water & Sewer District
Town of Biltmore Forest
Fairview Sanitary Sewer District
Town of Black Mountain
Skyland Sanitary Sewer District
Busbee Sanitary Sewer District
Swannanoa Water & Sewer District
Caney Valley Sanitary Sewer District
Woodfin Sanitary Water & Sewer District
Crescent Hill Sanitary Sewer District
Town of Weaverville
Venable Sanitary District
Town of Woodfin

*Id.*

The MSDBC's governing board consists of twelve members, three of whom are from Buncombe County, three of whom are from Asheville, one of whom is from the Woodfin Sanitary Water & Sewer District and one of whom is from each of the Towns of Biltmore Forest, Black Mountain, Montreat, Weaverville and Woodfin. *Id.*

The MSDBC operates and maintains a 40-million gallon per day wastewater treatment plant to treat raw sewage and industrial wastewater collected in a network of collector sewers. *Id.* It also operates and maintains approximately 60 miles of interceptor sewers that connect such sewers to the treatment plant. *Id.*

The MSDBC covers approximately 180 square miles and serves over 50,000 billed customers and an estimated population of 125,000 people. http://www.msdbc.org/documents/SPAR2013.pdf. The MSDBC's collection system includes 991 miles of public sanitary sewer lines, 32 public pump stations and approximately 28,000 manhole access points. *Id.*

In 2013, the MSDBC's Wastewater Reclamation Facility treated approximately 8 billion gallons of wastewater. *Id.* It serves over 50,000 residential and commercial customers and over 22 significant industries. *Id.* In 2013, it treated an average daily flow of 21.9 million gallons. *Id.*

Previous Legislative Attempts to Restrain the City in its Operation of the Water System and Previous Litigation Between the City and its County Water Customers Over the City's Operation of the Water System

The City sells water not only to its own citizens, but also to Buncombe County (and Henderson County) residents. There has been an ongoing dispute between these county water customers and the City for the past 80 years concerning the City's operation of the water system, including complaints that the

City charges substantially higher prices for water to county customers than to City customers, despite the fact that county taxpayers had helped finance significant parts of the water system, and complaints that the City was taking monies from its operation of the water system and spending them on projects that benefitted the City's citizens only (rather than reinvesting those monies in the water system).

These complaints have prompted the General Assembly on three occasions to enact reform legislation designed to restrain the City from engaging in these and other practices. *See generally City of Asheville*, 192 N.C. App. at 4-5, 665 S.E.2d at 109. These legislative enactments took the form of three session laws (collectively, "the Sullivan Acts"): (i) House Bill 931, Chapter 399 of the 1933 Public-Local Laws ("Sullivan I"); (ii) Session Laws 2005-140 ("Sullivan II"); and (iii) Session Laws 2005-139 ("Sullivan III"). *Id.*

Sullivan I, entitled "An Act to Regulate Charges Made by the City of Asheville for Water Consumed in Buncombe County Water Districts," sought to prevent the City from charging higher rates for water to county customers than to City customers where the water mains leading to the county customers had been paid for and were maintained with county tax monies and was thus a legislative attempt to deal with City-county price discrimination.

Sullivan II, entitled "An Act Regarding Water Rates in Buncombe County," represented another attempt by the General Assembly to deal with the City-county price discrimination problem in Asheville.

Finally, Sullivan III, entitled "An Act Regarding the Operation of Public Enterprises by the City of Asheville" and enacted on the same day as Sullivan II, modified N.C. Gen. Stat. §§160A-312, 160A-31(a) and 160A-58.1(c). That portion of Sullivan III which modified N.C. Gen. Stat. §160A-312 represented yet another legislative attempt to deal with the City-county price discrimination problem. It also attempted to deal with the complaint that Asheville was taking money from the operation of the water system and spending it on things other than the water system.

The City's response to the Sullivan Acts was to challenge each one and to claim that they were unconstitutional. *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958); *City of Asheville*. In those cases, the Supreme Court and this Court upheld the constitutionality of all the Sullivan Acts.

## ARGUMENT

THE TRIAL COURT ERRED BY FAILING TO DISMISS THE CITY'S CASE ON THE GROUND THAT THE CITY LACKS CAPACITY AND STANDING TO SUE THE STATE.

### A.

### Standard of Review

Standing is a question going to the court's subject matter jurisdiction. *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164-65, 552 S.E.2d 220, 225 (2001). A claim that the court lacks subject matter jurisdiction may be raised for the first time at any point in a lawsuit, even on appeal. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979).

The standard of review applicable to a motion to dismiss for lack of subject matter jurisdiction is *de novo* review. *County Club of Johnston County, Inc. v. United States Fidelity & Guaranty Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002).

### B.

### The City Lacks Capacity and Standing to Sue the State.

As a municipal corporation, Asheville is a political subdivision of the State and can only exercise those municipal powers that have been granted to it by the

General Assembly. *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287-88 (1994). For over 100 years, North Carolina followed the common law rule known as the "Dillon Rule," which provides that:

> A municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable.

*Bellsouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75, 81, *rev. denied*, 359 N.C. 629, 2005 N.C. LEXIS 982 (2005).

Dillon's Rule was broadened by the General Assembly's enactment of N.C. Gen. Stat. §160A-4, which states that the provisions of Chapter 160A, pertaining to cities and towns, shall be broadly construed to include any additional and supplementary powers that are reasonably necessary and expedient to carry them into effect. *Id.* at 81-82.

But nowhere in Chapter 160A is there any grant of authority to a municipality to sue the State and the State is unaware of any statute that authorizes a municipality to file a civil action against the State challenging the constitutionality of a statute enacted by the General Assembly. *See* discussion of this issue in *Appeal of Martin*, 286 N.C. 66, 73-74, 209 S.E.2d 766, 772 (1974).

Accordingly, this Court should vacate the trial court's 9 June Order and dismiss the City's Amended Complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

C.

In Addition, a Municipality Is Not a "Person" For Purposes of Article I, §19's Equal Protection Guarantee.

Article I, §19 of the North Carolina Constitution provides, in relevant part, that "No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion or national origin." This provision from the Constitution's "Declaration of Rights" is a declaration of the rights of the *people* of this State. It is not a declaration of the rights of the government – whether State or local.

Hence, the City lacks standing to sue the State for an alleged violation of the State Constitution's equal protection guarantee and the City's Second Claim should be dismissed.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT IS A LOCAL LAW.

A.

Standard of Review

(i)

Summary Judgment

The trial court granted summary judgment to the City on its First Claim. On Appeal from an order granting summary judgment, the appellate court reviews the matter *de novo*. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

The evidence presented by the parties in support of and in opposition to summary judgment must be viewed in the light most favorable to the party against whom summary judgment was granted. *Fox v. Sara Lee Corp.*, __ N.C. App. __, 764 S.E.2d 624, 627 (2014).

Summary judgment is appropriate only where the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact *and* that a party is entitled to judgment as a matter of law. *Id.*

(ii)

The Legal Principles Applicable to the City's
Claims that the Act is Unconstitutional

The City has the burden of establishing the Act's unconstitutionality. *State of North Carolina v. Mello*, 200 N.C. App. 561, 564, 684 S.E.2d 477, 479 (2009), *aff'd*, 364 N.C. 421, 700 S.E.2d 224 (2010). In addition, it is universally recognized that:

> [T]he statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld *on any reasonable ground* [citation omitted]. When examining the constitutional propriety of legislation, '[w]e ... resolve all doubts in favor of their constitutionality' [citation omitted].

*Id.* (Emphasis supplied)

Furthermore, it is well recognized by the courts of this State and the federal courts that a court will find a challenged statute constitutional if there is *any* reading of the statute's purpose or intent that would render it constitutional. *See, e.g., Heller v. Doe*, 509 U.S. 312, 320, 125 L. Ed. 2d 257, 270 (1993) ("[T]he burden is on the one attacking the legislative arrangement to negative *every conceivable basis* which might support it." [citations omitted]) (emphasis supplied); *In Re R.L.C.*, 361 N.C. 287, 295, 643 S.E.2d 920, 924 (2007) ("[I]t is not necessary for courts to determine the actual goal or purpose of the government

action at issue; instead, any conceivable legitimate purpose is sufficient to sustain the constitutionality of the statute" [citation omitted]).

(iii)

The Principles Defining General and Local Laws

Article II, §24 of the North Carolina Constitution identifies fourteen "[p]rohibited subjects" about which the General Assembly "shall not enact any local, private, or special act or resolution." Two of those prohibited subjects are local laws "relating to:" (i) health, sanitation and the abatement of nuisances; and (ii) non-navigable streams. N.C. Const., Art. II, §§24(1)(a) and 24(1)(e). The City alleged that the Act is a local law relating to these two subjects and the trial court entered summary judgment in favor of the City on this claim.

The Supreme Court has held that the purpose of this Constitutional provision was to free the General Assembly from the enormous amount of petty detail which had previously been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by general laws to local authorities and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State. *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 188, 581 S.E.2d 415, 428 (2003).

The Supreme Court has held that a law is general where it:

> is broad enough to reach ... all places affected by the conditions to be remedied, so that the statute operates uniformly throughout the state under like circumstances, and its classification is reasonable and based upon a rational difference of situation or condition, ..., even though it does not actually apply to all parts of the state, or indeed, even though there are only a few places, or one place, on which the statute operates.

*McIntyre v. Clarkson*, 254 N.C. 510, 518, 119 S.E.2d 888, 894 (1961).

In practice, however, the distinction between local and general laws cannot be made based on geographic scope alone. "Conceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification." *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965). Ultimately, the question whether legislation is local or general depends on the facts of each individual case. *See City of Asheville* at 24, 665 S.E.2d at 121 ("Because 'no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general, ....'" [citations omitted]).

The analysis of the issue whether a law is local or general depends, at least in part, on "the purpose for which the legislation was designed." *Id.* "The best indicia of ... legislative purpose are 'the language of the statute, the spirit of the

act, and what the act seeks to accomplish.'" *State of North Carolina, ex rel. Comm'r of Ins. v. North Carolina Rate Bureau,* 300 N.C. 381, 399, 255 S.E.2d 557, 561 (1980). "[A] court may [also] consider 'circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied.'" *Id.*

In addition, the court may take into account what purpose(s) *could* have been in the collective mind of the General Assembly in enacting the law. *See City of Asheville* at 38, 665 S.E.2d at 129 ("According to this interpretation, the creation of such a fund restricting the use of revenue to the limited purposes of growing and maintaining the water system *could* 'provide for ... healthful conditions in the [community] by means of ... an adequate water supply,' ..., and *could* likely prevent Asheville's water distribution system from becoming 'declared to be unfit [or] obsolete.'"). (Emphasis supplied)

The Supreme Court has set out various tests for determining whether an act is general or local. *Williams*, 357 N.C. at 183, 581 S.E.2d at 425. One test is the "reasonable classification" method of analysis, which "considers how the law in question classifies the persons or places to which it applies." *Id.* Under this analysis, "[a] law is general if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." *McIntyre v. Clarkson,* 254 N.C. at 519, 119 S.E.2d at 894. The classification must be reasonable and germane to the law. It

must be based on a reasonable and tangible distinction and operate the same on all parts of the state under the same conditions and circumstances. The classification must not be discriminatory, arbitrary or capricious. The Legislature has wide discretion in making classifications. *Id.*.

Another recognized test is the general public interest test, which focuses on the extent to which the act affects the *general* public interests and concerns. *City of New Bern,* 338 N.C. 430, 436, 450 S.E.2d 735, 739 (quoting *Town of Emerald Isle v. State of North Carolina,* 320 N.C. 640, 651, 360 S.E.2d 756, 762-63 (1987)).

In *Emerald Isle,* the Court addressed whether an act that established a public pedestrian beach access facility at Bogue Point was a local act. The act applied only to a site-specific portion of land on a particular public pedestrian beach access facility which, by definition, was in a single location. *Id.* at 650, 360 S.E.2d at 762. The Court held that the purpose of the act in *Emerald Isle* was to establish pedestrian beach access facilities for general public use in the vicinity of Bogue Inlet, and thus held that the act was not local, reasoning that, "[b]y directing the establishment of public pedestrian beach access facilities including parking areas, pedestrian walkways and restroom facilities, the legislature ... sought to promote the general public welfare by preserving the beach area for general public pedestrian use." *Id.* at 651-52, 360 S.E.2d at 763.

B.

The Act is Not a Local Law

The Act is not a local law for at least two reasons. First, by its express terms, the Act applies to all localities which fit the criteria set out in Section 1(a), subparts (1) and (3). As noted above, although the Act applies at this time only to Asheville and the MSDBC, if Greenville's and Pitt County's populations continue to grow at the current rate, it is reasonably foreseeable that Section 1(a) of the Act will also apply to the Greenville water system in the near future.

Second, the language of the Act (specifically Section 2) and the history of the relationship between the City and its county water customers over the past 80 years, as well as the General Assembly's repeated attempts to find a solution to the problems of price discrimination and misuse by the City of water system-generated revenues, strongly suggests that, in enacting the Act, the General Assembly was attempting to bring about an organic reform to the underlying *governance* problems that have plagued the region and have led to the many disputes and complaints of county water consumers over the past 80 years. The Act attempts to solve these problems by transferring control of the water system from the City to a newly created political entity whose governing board would be composed of members representing the City, other municipalities located within the water system's service area and county water customers. The General Assembly

presumably concluded that, by reforming the governance of the water system (and the sewerage system), it would solve the problems that have plagued the region for so long and, in doing so, advance an important general public good. Because the Act's underlying purpose is to reform and improve the governance of an entire region's water services system, the Act seeks to promote the general public welfare and, as such, is a general law.

## THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT "RELATES TO" HEALTH, SANITATION AND THE ABATEMENT OF NUISANCES AND NON-NAVIGABLE STREAMS.

### A.

### Standard of Review

As this Court observed in *City of Asheville*:

> [T]he [Constitution's] use of the nonspecific phrase '[r]elating to' suggests that even the mere mention of a subject which connotes any relationship to health or sanitation -- no matter how tenuous -- might constitute an act *relating to* health and sanitation and, thus, be violative of this constitutional provision. Nevertheless, a thorough review of earlier cases that examine whether specific legislative enactments *relate to* health or sanitation reveals that, in order for a court to determine that a legislative enactment *relates to* health or sanitation, the court must conclude that an act either plainly 'state[s] that *its purpose is to regulate* sanitary matters, or to regulate health[, or must conclude that the purpose of the act is to regulate health or sanitary matters after a] ... careful perusal of the entire act, . . . [wherein] *the entire act must be considered.*' (Emphasis supplied)

192 N.C. App. at 34, 665 S.E.2d at 126 (citation omitted).

Thus, simply because a law "concerns" one of the prohibited subjects listed in Article II, Section 24 of the State Constitution does not mean that it "relates to" that subject. In *City of Asheville*, this Court considered two laws affecting Asheville's water system for the purpose of determining whether those laws were local and, if so, whether they related to health, sanitation and the abatement of nuisances. The first of those laws – Sullivan II – had three provisions. Section 1 barred the City from charging higher water rates to users in the county than to City residents. Section 2 confirmed the City's authority to discontinue water service for nonpayment, as already authorized under N.C. Gen. Stat. §160A-314(b). Section 3 required that Buncombe County "maintain the waterlines owned by [Buncombe County] ... in proper repair in order that there may not be a waste of water by leakage." Session Laws 2005-140.

On these facts, this Court held that the law "*principally contemplates* preventing the economic impact of wastefulness ... rather than *prioritizing* the system's health and sanitary conditions." *City of Asheville* at 36-37, 665 S.E.2d at 128. (Emphasis supplied)

B.

The Act Does Not "Relate to" Health and Sanitation and/or Non-Navigable Streams.

The focus of the Act is on improved governance of water and sewer resources on a regional scale. The vast majority of the Act is drawn verbatim from the existing statutes creating and governing metropolitan water districts and metropolitan sewer districts. Indeed, some of those laws are incorporated by cross-reference. N.C. Gen. Stat. §162A-85.5. In its arguments below, the City concluded from this, and alleged as fact, that "there will be no change in the use of the assets" of the City's water supply when the Act is implemented. (R. 74) "The change in ownership will not result in or require any higher quality of water than that currently being provided" and the Act "does not extend protection of the public health or safety beyond that currently existing." (R. 74).

The purpose and effect of the Act, at least according to the City, thus have nothing to do with the quality or quantity of water delivered. Put another way, the purpose and effect of the Act are completely *disconnected from* health or sanitation. On these facts, the City cannot sustain the contention that the Act "relates to" health, sanitation and the abatement of nuisance in any sense, much less that it "relates to" "health, sanitation and the abatement of nuisance" as those terms were described by this Court in *City of Asheville.*

Furthermore, the heart of the Act is §2, by which the General Assembly seeks to bring about governance reform on a regional scale to, *inter alia*, a municipal water system that has been plagued for generations by discord, distrust, litigation and unsuccessful efforts at legislative fixes. This is what the Act "relates to," not sanitation and the abatement of nuisances.

Likewise, the Act does not "relate to" non-navigable streams. The City alleges that "[t]he watershed area owned by ... Asheville as part of the Asheville Water System contains several non-navigable streams, including [listing of streams by name]." (R. 63) The City further asserts that the Act "purports to transfer to another entity ... a number of non-navigable streams that are integral components of the water supply network." (R. 72)

But these streams can hardly be considered the "principal contemplat[ion]" of the Act or its "priorit[y]." The Act never even mentions these or any other streams – navigable or non-navigable. It only addresses "assets, real and personal, tangible and intangible." Session Laws 2013-50, §§1a, 1b and 1c. To the extent that the streams are included within these broad, generic categories, they are addressed by the Legislature along with a broad spectrum of other types of property that may make up the water system. There is no suggestion that these streams are the only assets of the water system or that they are even the principal assets. They are not, by any means, the focus or heart of the Act. The impact of

the Act on streams – navigable or non-navigable – is thus merely incidental to the Act and the Act is therefore not barred by Article II, §24(1(e) of the State Constitution.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT VIOLATES THE CITY'S EQUAL PROTECTION RIGHTS.

A.

Standard of Review

For claimed equal protection violations, the courts of this State apply well-known standards. "If the statute ... affects the exercise of a fundamental right or classifies a person based upon a suspect characteristic, we apply strict scrutiny. On the other hand, if the statute impacts neither a fundamental right nor a suspect class, we employ the rational basis test." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004).

The City does not allege that any "fundamental right" or "suspect" classification is at issue here, and so the rational basis test – "the lowest tier of [judicial] review" – applies. *Id.* Under this test, the Court must ask:

> whether distinctions which are drawn by a challenged statute ... bear *some* rational relationship to a *conceivable* legitimate governmental interest. Rational basis review is satisfied so long as there is a *plausible* policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental

> decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

*Id.* at 180-81, 594 S.E.2d at 15-16. (Emphasis supplied)

The Legislature need not state its justifications. The law is valid so long as *some* justification on the facts *may* exist. Accordingly, enumerated legislative findings and, indeed, any indicia of the Legislature's rationale, are irrelevant. A court must find only "a connection between the statute and a *conceivable* government interest." *Id.* (Emphasis supplied) The Legislature is not required to convince the court of the correctness of its judgments. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed. 2d 659, 669 (1981). Instead, the challenger must show that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." *Vance v. Bradley*, 440 U.S. 93, 111, 59 L. Ed. 2d 171, 184 (1979). To succeed, the City must establish complete legislative irrationality. If the issue is "at least debatable," the City "cannot prevail." *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54, 82 L. Ed. 2d 1234, 1243 (1938).

B.

The Act Does Not Violate the City's Equal Protection Rights.

The City has strayed from the applicable legal standard from the outset. It first attempted to shift the burden to the General Assembly, alleging that the Act's "minimal legislative findings" do not differentiate the Asheville Water System from other similarly situated municipal or county water systems. (R. 73) But the burden is not on the General Assembly to state its grounds. It is on the City to demonstrate that no grounds could have existed.

Next, the City posited several hypothetical problems with the Legislature's classification. But when reviewing the City's allegations, the Court must consider that equal protection does not require mathematical precision and need not foreclose all inequality. *Liebes v. Guilford County Dep't of Pub. Health*, 213 N.C. App. 426, 435, 724 S.E.2d 70, 77 (2011). It is enough that the Legislature is attacking the perceived problem with some rationality.

Here, the General Assembly "recognize[d] the value of regional solutions for public water and sewer for large public water systems" because "regional water and sewer systems provide reliable, cost-effective, high-quality water and sewer services to a wide range of residential and institutional customers." Session Laws 2013-50. To further this goal, it authorized a new legal entity called a metropolitan

water and sewerage district. *Id.* The General Assembly granted MWSDs all of the powers of both metropolitan water districts ("MWD") and metropolitan sewerage districts ("MSD") save one: the power to levy taxes. N.C. Gen. Stat. §162A-85.5. Nevertheless, MWDs and MSDs have different powers. Compare N.C. Gen. Stat. §162-36 with N.C. Gen. Stat. §162-69. For example, an MSD may adopt and enforce its own ordinances and may require property within the district to connect to the system. N.C. Gen. Stat. §§162-69 (13a), (13b). These are not insubstantial legislative authorizations and the General Assembly believed that these authorizations were necessary or prudent for the operation of an MWSD.

The City questioned why the General Assembly required certain areas with MSDs and not areas with only MWDs to form MWSDs. (R. 73) The General Assembly could rationally have concluded that it would be an easier transition for an MSD, with its pre-existing ordinance and connection authority, to form an MWSD and continue that authority. The same logic could explain why an MWSD is appropriate where an MSD already exists, but not where sewer service is provided in the absence of an MSD. (R. 73)

The City also complained that only large municipal water systems are formed into MWSDs and not smaller ones. (R. 73; *see* Session Laws 2013-50, §1(a)(3)) The General Assembly could have determined that focusing on larger entities would create MWSDs with larger footprints while involving fewer legal

entities. This would achieve the regionalization goal without the logistical difficulties of combining many independent systems.

The City also objected that the end users of the combined regional system allegedly will not realize any difference in its service. In this apparent substantive due process challenge, the City asserted that the law lacks "any rational basis" because "there is no discernible legitimate objective relating to protection of the public health, morals, order, safety or general welfare." (R. 74)[3]

But as even the City recognized, the Act is not outcome driven. It fosters a change in the scope of governance. Therefore, the City's attack sweeps far too broadly, as it would doom any attempt by the Legislature to re-organize government so as to promote efficiency and better service to citizens where the law itself does not prescribe specific outcomes regarding health, safety and so forth. The General Assembly cannot be so hamstrung in its ability to manage the affairs of governance.

Next, the City posited a host of reasons why the Act's methods are allegedly "unreasonable." (R. 74-75) Presumably, this aspect of the City's Second Claim also rests on substantive due process grounds. Substantive due process generally ensures that a law is rationally related to a conceivable legislative objective. It also

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[3] This allegation contradicts the City's own argument that the Act is a local law "relating to" health, sanitation and the abatement of nuisances.

provides a very limited check on the rationality of the law in more general terms. But this review is extraordinarily narrow and highly deferential to the Legislature.

Under this standard, the City's Amended Complaint fails to state any claim cognizable in law. For example, the City's Amended Complaint argued that the new MWSD "has never operated a public water supply and delivery system." (R. 74) But this could be said about any new governmental entity, even a City. If this argument were to prevail, no new governmental entity could ever be assigned tasks by the General Assembly because that entity would never have performed them previously.

The City also complained that the MWSD is unfunded, or possibly inadequately funded. (R. 74-75) But the existing MSD maintains funds. As that MSD is converted into an MWSD, the MWSD will receive all of the assets of the public water system it is to manage. Those assets may include funds, and will include revenue-generating assets. If any issues regarding funding exist, they will be temporary only, as the MWSD will, in short order, be receiving the revenue that formerly fully funded the water system.

Finally, the City contended that the Act is constitutionally improper because it "conflict[s] with General Statutes of long standing" regarding municipal water systems. (R. 74-75) The City's suggestion that the Constitution bars the General Assembly from amending "General Statutes of long standing" is baseless.

THE TRIAL COURT ERRED IN CONCLUDING THAT THE ACT EFFECTS AN UNLAWFUL TAKING OF THE CITY'S PRIVATE PROPERTY AND THAT, IF THE ACT WERE IMPLEMENTED, THE CITY WOULD BE ENTITLED TO "JUST COMPENSATION."

The trial court ruled that, if implemented, the asset and obligation transfer provisions of §1 of the Act would effect a "taking" or condemnation by the State of Asheville's "private property" (citing *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)); that the Act would use the City's Water System for exactly the same purpose as it is currently being used by the City; and that, consequently, the Act violates Article I, §§19 and 35 of the State Constitution and is an invalid exercise of the State's power of imminent domain. (R. 162-64)

Alternatively, the trial court held that, if the Act were held to be a valid exercise of the State's condemnation power, then the State would be required to compensate the City for the water system. (R. 164)

Each of these rulings was erroneous.

A.

Standard of Review

The standard of review applicable to this issue is that standard stated above regarding rulings by trial courts granting motions for summary judgment (*de novo* review).

B.

The Trial Court Erred in Concluding That the Act Effects a "Taking" of the City's Private Property, That the Act Would Do the Same Thing With the Water System as is Presently Being Done by the City With That System and That, Consequently, the Act is an Invalid Exercise of the State's Power of Imminent Domain.

The transfer of assets and liabilities contemplated by §1 of the Act, as applied to the Asheville Water System, presents a fact pattern that, insofar as the State is aware, the courts of this State have not dealt with previously. Although *Asbury* and *Candler*, on which the trial court relied below, dealt with the issue what constitutes a proprietary function of a municipality, neither case dealt with a situation in which a law enacted by the General Assembly transferred control and ownership of a municipal water system from one political subdivision of the State to another political subdivision of the State.

If implemented, the Act would not effect a "taking" or condemnation of the City's Water System. That water system is, in reality, held by the City in trust for the citizens of the City and is operated by the City as a water system for the use of those citizens. In recognition of the fact that a regional water and sewer system would be in the interests of all the citizens in the Asheville-Buncombe County-Henderson County region, and in recognition of the fact that the public in that region would be better served regarding water and sewer services if the governance of the water and sewer systems was meaningfully reformed, the General Assembly

adopted the Act in order to transfer operating control – by transferring ownership – of the Asheville Water System to the MSDBC. The Asheville Water System will not be repurposed as a result of the implementation of the Act and it will continue to serve the citizens of Asheville with water as before, only more efficiently. In other words, the citizens of Asheville will not lose or lose the use of the existing water system.

Furthermore, the City will not have to use tax dollars to acquire or construct another water system, since the existing water system will not be destroyed by the Act's transfer of assets section. Rather, the existing water system will continue to serve the citizens of Asheville in the future, just as it does now. This fact distinguishes this case from *State Highway Comm. v. Greensboro Bd. of Educ.*, 265 N.C. 35, 143 S.E.2d 87 (1965), also relied upon by the trial court in its decision below.

Accordingly, the Act does not effect a taking of the water system.

If this Court were to conclude that this transfer does constitute a taking, which the State disputes, any such taking would not constitute an invalid exercise of the State's imminent domain power, as found by the trial court. Contrary to the trial court's finding, the transferred water system assets and obligations would not be used for the same purpose as before, because, if implemented, the Act would

effect important, systemic improvements to the way the water system is governed, controlled and, thus, operated.

## CONCLUSION

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

Respectfully submitted this 20th day of February 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 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 8,750 words, based upon the word count reported by the undersigned counsel's word processing software (which reports that this Brief contains 7,694 words).

This 20th day of February 2015.

*/S/ I. Faison Hicks*
I. Faison Hicks

CERTIFICATE OF FILING AND SERVICE

This is to certify that, on the 20th day of February 2015, the undersigned caused the original of the State's 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 20th day of February 2015, the undersigned caused a copy of the State's 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 20th day of February 2015, the undersigned caused a copy of the State's 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 20th day of February 2015, the undersigned transmitted a courtesy copy of the State's Brief in this matter to counsel for the City of Asheville and the Metropolitan Sewerage District of Buncombe County, North Carolina at the following email addresses: danclodfelter@parkerpoe.com; BClarke@roberts-stevens.com; Steve.Petersen@smithmoorelaw.com; and randyperkins@mvalaw.com.

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