No. COA 14-1255 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, Defendant-Appellant, and THE METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendant.	)	From Wake County No. 13 CVS 6691

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PLAINTIFF-APPELLEE'S BRIEF

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INTRODUCTION AND STATEMENT OF THE CASE

House Bill 488 was presented to the Governor on 3 May 2013 and became law (N.C. Sess. Laws 2013-50), without his signature on 13 May 2013 (as later amended by N.C. Sess. Laws 2013-388, the "Water Act" or the "Act") (R pp 60, 86-93, 95-107). The Water Act would involuntary take the Asheville water system and "transfer" it—alone among all other municipal water systems in the state—to a newly created Metropolitan Water and Sewerage District, a special purpose unit of government operating only in portions of Buncombe and Henderson Counties, ostensibly "in an effort to ensure that the citizens and businesses of North Carolina are provided the highest quality services." N.C. Sess. Laws 2013-50, Preamble (R p 8). The Water Act has no provision for compensation to Asheville. For all the reasons articulated in the trial court's order granting Asheville's motion for partial summary judgment, the Water Act is unconstitutional as applied to Asheville.

First, by singling out Asheville for its operation, the Act violates Article II, Section 24 of the North Carolina Constitution's prohibitions on local acts relating to health and sanitation, *see infra* Parts II.A, B, and local acts relating to non-navigable streams, *see infra* Parts II.A, C.

Second, because Asheville owns and operates the water system in its proprietary capacity and the Water Act deprives Asheville of its property other than for a constitutionally permitted public purpose (and without just

compensation), the Water Act offends the takings element of Article I, Section 19 of the North Carolina Constitution. *See infra* Part III.A.

Third, because the Water Act uses wholly irrational means to implement its stated objective, the Water Act offends the due process and equal protection elements of Article I, Section 19 under even rational basis review. *See infra* Part III.B.

The Wake County Superior Court correctly struck down the Water Act as unconstitutional, and this Court should affirm that ruling.[1]

STATEMENT OF FACTS

A. The Asheville Water System

For over a century Asheville has owned, operated, managed, and maintained a system for the operation of sanitary disposal systems and for the supply, treatment, and distribution of water for drinking, cooking, and cleaning (the "Water System"). (R pp 62, 127, 150, 159). This Water System supplies water to a diverse customer base of approximately 124,000, including Asheville's own residents and businesses, users located in unincorporated areas of Buncombe

[1] The trial court did not reach two additional claims because they were rendered moot by the court's ruling. Those claims allege that the Water Act would (i) impair Asheville's contractual obligations with its bondholders in violation of Article I, Section 19 and (ii) violate the statutory covenant in favor of Asheville and its bondholders given under N.C. Gen. Stat. § 159-93. (R pp 69, 76-79, 143, 161). If this Court were to reverse, those claims would remain for consideration below.

County, indirectly by wholesale to users in other municipalities in Buncombe County, and, more recently, to some users in Henderson County. (R pp 62, 127, 150, 159; Doc. Ex. 2, 400-01, 636, 647). The Water System has been built and maintained over the past century 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. (R pp 63-64, 150, 159; Doc. Ex. 216-20, 623). Like many other municipal water systems across North Carolina, Asheville owns, operates, and maintains the Water System as a public enterprise under Article 16 of Chapter 160A of the North Carolina General Statutes. (Doc. Ex. 2, 636).

The real property of the Water System includes a protected watershed area consisting of over 17,000 acres of mountainous forestlands in Buncombe County, all of it owned by Asheville. (R pp 62-63, 150-51, 159). The watershed contains a number of non-navigable streams that feed the two reservoirs supplying raw water for Asheville. (R pp 63, 151, 159; Doc. Ex. 576-77, 624, 636, 655).

Other components of the Water System include three water treatment plants; twenty-nine treated water storage reservoirs; 1,660 miles of distribution lines for treated water; and approximately forty pump stations. (R p 159; Doc. Ex. 2, 636-37).

Like any other private or public enterprise, the Water System also possesses a number of intangible interests and assets that are essential to its operations, including approximately 147 trained and certified employees; numerous licenses and permits required by state and federal law; wholesale water supply contracts with other municipal entities; operating contracts for the supply of goods and services; well-developed operating procedures and policies; a strong and experienced management structure; and insurance coverage provided by policies held in the name of the City. (R pp 62, 68-69, 127, 132, 160; Doc. Ex. 3, 396-403, 563-65, 634-37). These intangible interests and assets are specific to the City of Asheville, as operator of the Water System; they cannot be transferred or assigned without the consent of third parties, if they can be transferred at all. (R pp 62, 127, 160).

B. The Water Act

The provisions of the Water Act are complex and were the product of a series of successive legislative actions, revisions, and amendments. They require careful parsing to appreciate the manner in which they give rise to Asheville's claims in this case.

1. Section 2 of the Water Act

Section 2 of the Water Act adds to the General Statutes new Article 5A of Chapter 162A, which authorizes the creation of a new special purpose government,

the "metropolitan water and sewerage district," (the "MWSD") (R pp 87-92). When the Water Act was enacted, the General Statutes already contained numerous provisions authorizing the voluntary creation and operation of regional public water supply and distribution systems, regional public sanitary sewer systems, and combined water and sewer systems, including:

1. Article 1, Chapters 162A-1 through 19, permitting the creation of county water and sewer authorities. County water and sewer authorities created under Article 1 may offer water service only, sewer service only, or both water and sewer service. N.C. Gen. Stat. § 162A-1-19.

2. Article 4, Chapters 162A-31 through 59, authorizing the creation of "metropolitan water districts." N.C. Gen Stat. § 162A-31-50, (s*ee also* Doc. Ex. 637).

3. Article 5, Chapters 162A-64 through 82, authorizing "metropolitan sewerage districts," of which nominal defendant Metropolitan Sewerage District of Buncombe County (the "Buncombe MSD") is one of only three currently existing in the State. N.C. Gen. Stat. § 162A-64-82, (s*ee also* Doc. Ex. 637).

4. Article 6, Chapters 162A-86 through 94, permitting county boards of commissioners to create county water and sewer districts. County water and sewer authorities created under Article 6 may offer water service only, sewer service only, or both water and sewer service. N.C. Gen. Stat. § 162A-86-94.

5. Article 20, Chapters 160A-460, *et seq.*, authorizing cities and counties to form voluntary joint agencies to carry out any undertaking that could be carried out singly and separately—including the provision of water service, sewer service, or both.[2] N.C. Gen. Stat. § 160A-460, *et seq*.

[2] Asheville currently participates in just such an interlocal agreement with Henderson County, under which customers in Henderson County receive water at

6. Article 16, Chapter 160A-312(a) and (d), authorizing municipalities to operate water and sewer systems as "public enterprises" and to provide service both inside and outside their city limits. N.C. Gen. Stat. § 160A-312(a), (d).

7. Finally, Article 2, Chapter 130A-47, *et seq*., authorizing the Commission for Public Health to create sanitary districts as bodies corporate and politic with the power to construct and operate public sewerage systems, public water supply and distribution systems, or both. N.C. Gen. Stat § 130A-47, *et seq*.

New Article 5A adds to these previously existing organizational models; it is modeled on existing Article 4, covering metropolitan water districts, and Article 5, covering metropolitan sewerage districts. *Compare* (R pp 87-92) *with* N.C. Gen. Stat. § 162A-31-59 *and* N.C. Gen. Stat. § 162A-64-82.

Subject to the exception that is at the heart of this case, the creation of an MWSD under Section 2 of the Water Act is a wholly voluntary undertaking by the local governments that choose to constitute the MWSD:

> *Except as provided by operation of law*, the governing bodies of two or more political subdivisions may establish a metropolitan water and sewerage district if all of the political subdivisions adopt [a specific form of resolution].

N.C. Sess. Laws 2013-50, § 2 (art. 5A, § 162A-85.2) (R p 88) (emphasis added). The exception arises from the opening qualifying phrase in Section 2, and that exception is the subject of Section 1.(a) of the Act.

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the same rate and on the same terms as customers in Asheville. (Doc. Ex. 402, 459-78, 636).

2. Section 1.(a) of the Water Act

Under Section 1.(a), any public water system that meets certain criteria is subject to involuntary transfer "by operation of law" to a newly formed MWSD to be constituted and operated in the manner provided under Section 2. (R p 86). The owner of such a water system must surrender all of the assets that comprise its water system to the MWSD. As originally enacted on 13 May 2013, Section 1.(a) of the Water Act provided that all assets and debts of any public water system meeting the following three criteria *shall be transferred* to an MWSD:

> (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.[3]
>
> (3) The public water system serves a population greater than 120,000 people, according to the data submitted pursuant to G.S. 143-355(l).

N.C. Sess. Laws 2013-50, § 1.(a) (R p 86).

With respect to the first criterion, only three metropolitan sewerage districts (each an "MSD") exist in the State, the Contentnea MSD in Pitt County, the Bay River MSD in Pamlico County, and the nominal defendant in this case, the Buncombe MSD. (Doc. Ex. 637). Of those three MSDs, only the Buncombe MSD

[3] Interbasin transfer certificates are issued by the Environmental Management Commission under the provisions of N.C. Gen. Stat. § 143-215.22L. Asheville has not been issued such a certificate. (*See* Doc. Ex. 657).

is located in a county where there is also located a public water system serving more than 120,000 people (Doc. Ex. 484, 635). The water system operating in Pamlico County serves a customer base that is less than 15,000 and has been shrinking. (Doc. Ex. 484, 635). In Pitt County there is a water system owned by the City of Greenville that currently serves some 96,000 people. (*See* Doc. Ex. 484-85, 635, 638). Thus, only the Asheville Water System satisfies both the first and the third criteria of Section 1.(a).

Because Greenville's water system serves a population that is growing, however, Greenville could one day satisfy Section 1.(a)(3). (*See* Doc. Ex. 484-85). But Greenville, unlike Asheville, failed to satisfy Section 1.(a)(2) (as originally enacted), because it possessed (and possesses) an interbasin transfer certificate (an "IBTC") issued by the State. (*See* Doc. Ex. 485, 500-18, 635).

3. Section 1.(g) of the Water Act

During 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 IBTC, Section 1.(a)(2) might not be able to save its water system from forced merger into the Contentnea MSD, as Greenville's population continued to grow. (*See* Doc. Ex. 234-36). In response to that concern, on 23 August 2013 (after this suit was commenced), Senate Bill 341 ("SB 341") was amended via North Carolina Session Laws 2013-388, an enactment that modified Section 1 of the

Water Act in two respects: (i) Section 4 of North Carolina Session Laws 2013-388 repealed Section 1.(a)(2) of the Water Act; and (ii) Section 5 of the session law amended the Water Act by adding a new Section 1.(g) to the Water Act. *See* N.C. Sess. Laws 2013-388, §§ 4, 5. (R pp 95-107).

The new subsection (g) excludes from Section 1.(a)'s "operation of law" provisions public water systems owned by municipalities that also operate a sewer system and provide "other utility services" to customers:

> SECTION 1.(g) For purposes of this section, a public water system shall not include any system that is operated simultaneously with a sewer system by the same public body, in conjunction with the provision of other utility services for its customers.

N.C. Sess. Laws 2013-388, § 5 (R p 107). Interestingly enough, Greenville, in addition to owning and, through the Greenville Utilities Commission, operating its water supply and distribution system and a sanitary sewer system, also provides to its customers "other utility services," namely electricity and natural gas service. (*See* Doc. Ex. 485, 625-26, 635, 639). The substitution of new Section 1.(g) for former Section 1.(a)(2) meant that Greenville's water system would not meet the criteria of Section 1, only now for a different reason.

4. Section 5.5 of the Water Act

As described above, the combined language of Sections 2, 1.(a), and 1.(g) of the Water Act go a long way towards ensuring that no public water system in the

state other than Asheville's would be involuntarily transferred into an MWSD. *See* N.C. Sess. Laws 2013-50 §§ 1.(a), 2 (R p 86-92); N.C. Sess. Laws 2013-388 §5 (R p 107). Those sections do not, however, rule out involuntary transfer in the event that a new MSD is created in a county in which there is a public water system that—but for the lack of an MSD—would meet the criteria for involuntary transfer. *Id*.

Section 5.5 of the Water Act addresses that possibility. It does so by amending Article 5 of Chapter 162A—the article setting out the existing statutory provisions governing the creation of *metropolitan sewerage districts*, such as the Buncombe MSD. (Doc. Ex. 271). Section 5.5 provides that no new metropolitan sewerage district can be created in North Carolina *without the express consent of every local government lying wholly or partly within the proposed boundaries of the district*. (Doc. Ex. 271).

Section 5.5 was not included in the originally filed version of the bill that became the Water Act. It was proposed as an amendment to the bill by Senator Apodaca, who represents Henderson County and parts of Buncombe County, in response to concerns voiced by other Senators that the Water Act might unintentionally apply to other localities in the future.[4] (Doc. Ex. 271, 282).

[4] The full legislative history regarding Section 5.5's inclusion in the Water Act is discussed at pages 228-36, 271, and 273-96 of the Documentary Exhibit.

5. A second look at Section 2

It is useful to revisit one peculiarity of Section 2 that is pertinent to the determination whether the Water Act is "local" or "general." The ostensibly generally applicable criteria for MWSD board composition in new Section 162A-85.3 happen to mirror exactly the particularities of the jurisdictions that compose the current Buncombe MSD. (*See* Doc. Ex. 368-80, 401, 458, 485-86). Localities that do not share those particularities—such as serving a county with a population of more than 200,000 people; having a special elected sewer and water district wholly contained within MWSD boundaries; and containing a municipality of at least 75,000—would be unable, under Section 2, to appoint a reasonably complete board. *See* N.C. Sess. Laws 2013-50, § 2 (§ 162A-85.3(2), (3), (4), (5), (6)); (R p 88). In fact, hypothetical MWSDs other than Asheville could be forced to be governed by boards with only two members, both appointed under subsection (1) by the county board of commissioners where the MWSD would operate—and none appointed by any of the municipalities in that county that might have coalesced to help form the MWSD.

ARGUMENT

I. ASHEVILLE UNQUESTIONABLY HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF THE WATER ACT.

Beyond question Asheville has standing to challenge the constitutionality of the Water Act. This suit concerns the right of ownership and control of the

Asheville Water System. Article 2, Section 160A-11 vests in the inhabitants of Asheville, acting as a municipal corporation, all rights and interests in the assets of the Water System and full control over the acquisition, ownership, and disposition of those assets. N.C. Gen. Stat. §160A-11. The North Carolina Uniform Declaratory Judgment Act expressly states that a "person" entitled to maintain suit under that Act includes "[a] municipal corporation or other corporation of any character whatsoever." N.C. Gen. Stat. § 1-265.

The Supreme Court has consistently recognized that municipalities have standing to seek a declaration (under that Act) concerning the constitutionality of an act of the General Assembly affecting municipal rights, powers, duties, and properties. *See, e.g.*, *City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 328 N.C. 557, 559-60 (1991) (holding that the plaintiff properly had standing to bring a claim for declaratory judgment to challenge constitutionality of statute); *Emerald Isle v. State,* 320 N.C. 640, 646 (1987) (same); *see also Town of Spruce Pine v. Avery Cnty.*, 346 N.C. 787, 790 (1997). The ruling in *In re Appeal of Martin*, 286 N.C. 66 (1974), which is cited by the State (State Br. 15), is not to the contrary. That decision held only that a party who had availed itself of the benefits of a statute could not thereafter challenge the constitutionality of that same enactment. *See In re Appeal of Martin*, 286 N.C. at 75.

Without citing any authority, the State also contends that Asheville is not a "person" entitled to claim the protections of Article I, Section 19 of the North Carolina Constitution. (*See* State Br. 16). But that contention is flatly contrary to established law. It is well-settled that Asheville owns and operates its Water System in its proprietary capacity distinct and apart from its function as a unit of government. *See, e.g.*, *Fussell v. N.C. Farm Bureau Mut. Ins. Co.,* 364 N.C. 222, 225 (2010) (holding a municipal corporation selling water for private consumption is acting in a proprietary capacity); *Mosseller v. City of Asheville,* 267 N.C. 104, 107 (1966) (same).

The significance of this fact is best expressed by the words of the North Carolina Supreme Court: "[A]s to [a municipality's] private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." *Asbury v. Albemarle*, 162 N.C. 247, 253 (1913); *accord Candler v. City of Asheville*, 247 N.C. 398, 406 (1958); *see generally Trs. Dartmouth Coll. v. Woodward*, 17 U.S. 518, 694 (1819) (Marshall, C.J.) ("[I]t will hardly be contended, that even in respect to [ ] corporations [such as towns, cities and counties], 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."). With respect to its rights as the

owner of the Water System, Asheville cannot be distinguished from any other person, such as a private corporation, owning exactly the same property.

Thus, there is no question that Asheville, operating in its proprietary capacity, is entitled to invoke all the rights afforded under our Constitution—including those under Article I, Section 19.

II. THE WATER ACT IS UNCONSTITUTIONAL UNDER ARTICLE II, SECTION 24 BECAUSE IT IS A LOCAL ACT RELATING TO HEALTH AND SANITATION AND TO NON-NAVIGABLE STREAMS.

Article II, Section 24 ("Section 24") of our Constitution forbids the General Assembly from "enact[ing] any local, private, or special act or resolution" of several types, including those "(a) relating to health, sanitation, and abatement of nuisances," and those "(e) relating to non-navigable streams." N.C. Const. art. II, § 24, cls. (1)(a), (1)(e). Moreover, "[a]ny local, private, or special act or resolution enacted in violation of the provisions of [Section 24] shall be void." N.C. Const. art. II, § 24, cl. (3); *see also id.* art. XIV, § 3.

This constitutional prohibition was meant "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*, 357 N.C. 170, 188 (2003). As the Supreme Court has explained, in adopting this provision "[t]he people were motivated by the desire that the General

Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities." *Idol v. Street*, 233 N.C. 730, 732-33 (1951).

Of special note here, this constitutional restriction also protects against the use of the legislative process to advance parochial ends with respect to matters that instead should be dealt with by laws of general application:

> Public Laws . . . are permanent in character, are for the equal benefit of all, and [are] of universal application. Not so with private statutes. These are not of common concern, and do not receive the watchful and cautious scrutiny of the Legislature . . . . They are often procured by agents and for a purpose . . . .

State ex rel. Taylor v. Carolina Racing Ass'n, 241 N.C. 80, 96 (1954).

Notwithstanding the State's characterization of the applicable standard (*see* State Br. 18), it is well settled that courts of our state are obligated to strike down laws that offend the North Carolina Constitution—including Section 24. *See, e.g.*, *Williams*, 357 N.C. at 183 (noting this duty and striking down a local act as unconstitutional under Section 24); *City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 338 N.C. 430, 436 (1994) (same); *McIntyre v. Clarkson*, 254 N.C. 510, 526 (1961) (same); *Bayard v. Singleton*, 1 N.C. 5, 7 (1792) (striking down legislation as unconstitutional, famously the first holding of its kind in the country).

Here, by singling out Asheville to forcibly take and transfer its Water System into a newly formed MWSD, the Act violates Section 24's prohibitions on local acts relating to health and sanitation and local acts relating to non-navigable streams. Indeed, as is evident from Judge Manning's ruling below, (R p 162), the question of constitutionality is not a close one.

A. The Water Act Is a Local Act.

Although Section 2 of the Water Act superficially appears to be a law of statewide applicability, certain cases involving the creation of MWSDs (such as the case here) are governed not by the permissive language of Section 2 but by the provisions of Section 1. Because Section 1 of the Act establishes an MWSD for Asheville alone "by operation of law," it functions in the nature of a proviso to, exception to, or amendment of Section 2's otherwise general application. As such, it is to be construed as if it were a discrete enactment. *See Robbins v. City of Charlotte*, 241 N.C. 197, 199 (1954) (stating that a proviso to a statute "should be held to include no case not clearly within its plain terms"); *see generally* 82 C.J.S. *Statutes* §§ 502-507 (2009).

Here, the conjunction of Sections 1 and 2 in the same act brings into play the provisions of Article XIV, Section 3 of our Constitution, which require that "general laws" be uniformly applicable to all units of government "without classification or exception" and, further, that every amendment to or repeal of a

"general law" must likewise be by "general law" and not by "local, special or private" law. *Id*. To the same effect is Section 24(2), which forbids the enactment of an otherwise prohibited "local, private or special" law by means of the partial repeal of an otherwise "general law." *Id*. art. II, § 24(2).

As discussed next, the various provisions of the Water Act combine in such a way that the Act is manifestly "local" and not "general." The State's two perfunctory arguments to the contrary are not only unpersuasive, they actually support the conclusion that the Water Act is a local enactment. *See infra* Part II.A.3.

1. The "reasonable classification" test applies here.

Whether the Water Act is "local" or "general" is analyzed under the "reasonable classification" test, which "considers how the law in question classifies the persons or places to which it applies." *City of Asheville v. State*, 192 N.C. App. 1, 25 (2008), *disc. review denied*, 363 N.C. 123 (2009). While this method of analysis affords the General Assembly a certain degree of discretion in making classifications, that discretion is not unbridled.

For a classification-based law to be general, the classification "must be natural and intrinsic and based on substantial differences." *Id*. (quoting *McIntyre*, 254 N.C. at 519). It must also "embrace[] all of the class to which it relates." *Id*. Thus, "when the persons or things subject to the law are not reasonably different

from those excluded, the statute is local or special." *Id*. at 24 (quoting *McIntyre*, 254 N.C. at 518); *see also Floyd v. Lumberton City Bd. of Educ.*, 71 N.C. App. 670, 673 (1984) (same).

Moreover, the classification may not be "arbitrary," but instead "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." *McIntyre*, 254 N.C. at 519. Indeed, to be considered "general" rather than "special" or "local," legislation that distinguishes among localities must do so based upon "***manifest peculiarities clearly distinguishing those of one class from each of the other classes***" that are so compelling that they "***imperatively demand***[] legislation for each class separately." *Id.* at 518 (emphasis added).

The State's explication of the applicable analysis is inaccurate in two fundamental ways. *First*, the State relies on the standards applied in *Heller v. Doe*, 509 U.S. 312 (1993), and *In re R.L.C.*, 361 N.C. 287 (2007) (citing *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). (State Br. 18). The State fails to disclose, however, that those cases applied "rational basis" review to substantive due process and equal protection challenges under the Fourteenth Amendment to the United States Constitution, and instead pretends that the mode of constitutional scrutiny in those cases applies here to the issue of whether the Water Act is "local"

or "general." Yet, the State cites no authority suggesting that the Section 24 mode of analysis is the same as Fourteenth Amendment "rational basis" analysis—nor could it.

Undeterred, the State attempts to import the "conceivable basis" principles of Fourteenth Amendment rational basis review by relying on the following, entirely inapposite, passage from Judge Martin's discussion in *City of Asheville*:

> 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."

(State Br. 21 (quoting *City of Asheville*, 192 N.C. App. at 38) (emphasis and alterations in State Br.)).

But this language appears in the context of the Court's consideration of whether the legislation at issue in the case would affect health and sanitation, *City of Asheville*, 192 N.C. App. at 38, *not* in the context of determining whether the legislation was "general" or "local"—much less in the context of dreaming up some other conceivable legislative reasoning. Indeed, the Court had already determined that Sullivan III (N.C. Sess. Laws 2005-139), was "local" and not "general" by considering the "language of the statute, the spirit of the act, and what the act seeks to accomplish." *Id*. at 32. And it did so *without* having considered

what the General Assembly *could have been contemplating* in enacting Sullivan III. *Id*. at 32, 38. Thus, the Court was not, as the State suggests, speculating about what might have been in the "collective mind of the General Assembly in enacting the law." (State Br. 21). For good reason: such speculation certainly is not the charge of the courts in determining whether legislation is "local" or "general" under Article II, Section 24.

Second, perhaps realizing that the Water Act is plainly "local" under the applicable reasonable classification test, the State now resorts to *Emerald Isle,* a case that analyzed whether a unique, site-specific law was a prohibited local enactment under Section 24. (State Br. 22). The *Emerald Isle* mode of analysis is inapplicable here for the same reasons the Court found it inapplicable in *City of Asheville*. Unlike in *Emerald Isle*, 320 N.C. at 650, the legislation here is not site-specific. *Cf. City of Asheville*, 192 N.C. App. at 26. The Water Act's "legislated change could be effected as easily in" Asheville "as in any other county in the state." *Williams*, 357 N.C. at 184. "Consequently," as in *City of Asheville*, "the general public interest method of analysis identified in *Emerald Isle* is inapplicable to this case." *City of Asheville*, 192 N.C. App. at 26; *see also Williams*, 357 N.C. at 184-85 (holding "the *Emerald Isle* analysis [to be] inapplicable" where the "legislation is not site-specific"); *City of New Bern*, 338 N.C. at 436 ("In the case before us, the acts shift the responsibility for enforcing the building code from the

City to the county. Such a legislated change could be effected as easily in New Bern as in any other city in the state. These acts therefore are not site-specific, and thus the *Emerald Isle* general public interest method of analysis is unsuited to this case.").

2. Because the Water Act singles out Asheville despite the absence of any "manifest peculiarities," it is a local law.

As already explained, although not mentioning Asheville by name, the Water Act nonetheless is carefully constructed and drafted to apply only to Asheville. *See supra* Statement of Facts, Parts B.1-B.5; *cf. City of Asheville*, 192 N.C. App. at 37 (concluding that, despite the omission of any specific reference to Asheville's water system, "we agree with Asheville that the limitations of Sullivan III apply solely to Asheville's management of, and responsibility for, the operation of the water distribution system"); *see also In re Incorporation of Indian Hills*, 280 N.C. 659, 665 (1972) (explaining that, when charged with determining constitutionality under Section 24, "court[s] will look beyond the form of the act and ascertain whether the statute in is fact generally and usually applicable throughout the State"); *State v. Harris*, 183 N.C. 633, 637 (1922) (finding the act revealed "a palpable attempt to evade the constitutional restriction" when one or

more counties were "not designated expressly by name" but were "so described as to be clearly indicated").[5]

It is clear that the nominally "general" criteria of Section 1 were reverse-engineered to single out Asheville—a point the State does not contest. The State attempts to justify the targeting of Asheville by pointing to the Asheville Water System's history. Indeed, the legislative history of the Water Act confirms that the history of Asheville's Water System was precisely what motivated the legislation in the first place. (Doc. Ex. 228-36). Neither the legislative findings in the Water Act itself nor the Act's floor debate identified any logical basis for treating Asheville differently from all other municipalities in the State. (*See* Doc. Ex. 221-366). Indeed, the comments during legislative debate did not discuss any *current* peculiarities of the Asheville Water System, but only the system's prior *history*. (Doc. Ex. 254-70, 273-96).

This fact is outcome-determinative on the issue of whether the Act is local. In *City of Asheville* this Court unequivocally held that history alone is not "one of 'manifest peculiarities clearly distinguishing' Asheville and Buncombe County from other [local water and sewer systems] across the State." 192 N.C. App. at 31-

[5] That the supposedly general membership criteria of Section 2 so perfectly fit the situation in Buncombe County but so awkwardly match other situations in North Carolina—if they match them at all—is further evidence that the Act is not truly meant to be general. *See supra* Statement of Facts, Part B.6.

32 (quoting *McIntyre*, 254 N.C. at 518). The Court concluded, therefore, that the legislation "embrace[d] less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purposes for which the legislation was designed." *Id*. at 32. On that basis, the court held the disputed legislation to be "local." *Id*.

Section 1 of the Water Act is a local act for the same reasons that the legislation at issue in *City of Asheville* was held by this Court to be a local act. Because the legislative intent here was to single out the Asheville Water System due to its history—and not due to any manifest peculiarities of the nature of the Water System itself that imperatively demand disparate treatment—the Water Act is a local law under Section 24. *Id.*; *accord Elec. Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 657 (1991).

Even if the supposed "general" criteria of the Water Act were not designed to target Asheville, the Water Act would still be "local" because the Water System is not a unique class of one under the "reasonable classification" mode of analysis. Asheville is one of a number of municipalities that supply water not only to individuals and businesses within its borders, but also to surrounding regions including other municipalities and unincorporated areas. (*See* Doc. Ex. 487, 635, 642-48). It is also one of many municipalities that operate a public water system in an area where sewer services are separately provided by a non-municipal or

regional entity. (*See* Doc. Ex. 488, 635, 641-44). Asheville is far from the only municipality serving a population over 120,000 and possessing such characteristics. (*See* Doc. Ex. 485-87, 489-90, 641-42).

For example, water service in Wake County, which has a population over 900,000, is not provided by a single regional source but rather by multiple separate providers. (*See* Doc. Ex. 644, 646). Cabarrus County is a rapidly growing county of more than 175,000 people in which, as in Buncombe County, sewer service is provided by a countywide water and sewer authority but water service is provided by the cities of Concord and Kannapolis. (*See* Doc. Ex. 486-87, 641-43). And, of course, as previously noted, the City of Greenville is a large municipal water supplier in Pitt County, a county where the Contentnea MSD is now providing regional sewer service. *See supra* Statement of Facts, Part B.2. Put simply, there are many large-scale water systems situated in all relevant respects similarly to Asheville but which are spared expropriation and transfer to a regional entity.[6] Thus, because "the persons or things subject to the law are not reasonably different from those excluded, the statute is local or special." *City of Asheville*, 192 N.C. App. at 24 (quoting *McIntyre*, 254 N.C. at 518).

[6] The goal of "regionalization" of water and sewer service in Buncombe and Henderson Counties is hard to square with the fact that the Water Act allows several other municipal water systems operating in Buncombe County to continue to operate independently, even though the different jurisdictions owning such separate systems will be granted representation on the board of the New MWSD. *See infra* Part III.B.

With respect to Section 1.(g) in particular, even with the benefit of ample time to craft a *post hoc* rationalization, the State can provide absolutely no reason why the water system owned by a municipality that provides other utility services in addition to water and sewer services should not be subject to regionalization under the Water Act. Instead, the State simply pretends that Section 1.(g) of the Water Act does not exist. (*See* State Br. 17-24).

The arbitrary criteria to which the General Assembly was forced to resort in Sections 1.(a) and 1.(g) of the Water Act in order to single out Asheville boldly underscores that there is no principled basis on which to target the Asheville Water System alone for involuntary "regionalization."

3. The State's arguments demonstrate that the Water Act is a local law.

Both of the State's perfunctory arguments underscore that the Water Act is a local law. Perhaps because it realizes that the truth is fatal to its case, the State misleadingly represents to the Court that "if Greenville's and Pitt county's populations continue to grow at the current rate, it is reasonabl[y] foreseeable that Section 1(a) of the Act will also apply to the Greenville Water System in the near future." (State Br. 23). That is not true; Greenville is saved from the involuntary transfer provision because its utilities commission provides "other utility services" in addition to water and sewer services. *See supra* Statement of Facts, Part B.3. In fact, it was precisely the concern that Greenville's growing population could result

in that city's being unintentionally ensnared by the involuntary transfer provision in Section 1 of the Water Act that caused the General Assembly to create an exception for water systems with an IBTC. *See* N.C. Sess. Laws 2013-50 § 1.(a)(2) (R p 86). Once that device for ensuring Greensville's exclusion from Section 1 was deemed unsatisfactory, the General Assembly crafted a second mechanism for guaranteeing Greensville's exclusion from involuntary transfer: Section 1.(g). *See supra* Part B.3. Thus, the truth is just the opposite of the State's representation on this point. The Water Act creates a closed class for involuntary transfer, now and for all time.

The importance of this point is plain: where a statute utilizes seemingly general criteria to determine the class of municipalities subject to its operation—especially where the class has but a single member—in order for the statute truly to be "general," the number and identity of the class member(s) must be open-ended, capable of changing as time goes by and facts evolve. *Cf. State v. Wayne Cnty. Clerk*, 648 N.W.2d 202, 204 (Mich. 2002) (holding, under an analogous constitutional provision, that a law affecting a criteria-based closed class is incapable of being "general"); *Wayne Cnty. Bd. of Comm'rs v. Wayne Cnty. Airport Auth.*, 658 N.W.2d 804, 834-35 (Mich. Ct. App. 2002) (holding that to be "general," legislation "*must* have an *open end* through which cities *are automatically brought* within its operations when they attain the required

population" (emphasis added)). Otherwise, the legislature's classification is not really a classification by *type* of municipality; instead it creates a closed class that covers targeted municipalities—or, as here, a single municipal water system.

Second, the State—without citation of any kind—argues that the Water Act was likely designed to serve the "general public good" by addressing "the many disputes and complaints of county water customers of the past eighty years." (State Br. 23). But as discussed above, precisely because the Water Act is the General Assembly's attempt to insert itself into a long-running, opaque, and peculiarly local dispute, the Water Act is a local act. *See supra* Part II.A.1.

To the extent the State attempts to invoke *Emerald Isle* in support of this argument, that case is entirely inapplicable here for the reasons discussed above. *Id*. And the analysis under the reasonable classification test certainly is not concerned with whether a local act promotes "the general public good," (State Br. 24); *see City of Asheville*, 192 N.C. App. at 24-25. To the contrary, Section 24 expressly proscribes local laws of the enumerated types, "no matter how praiseworthy or wise such local, private, or special act or resolution may be," *Idol*, 233 N.C. at 732-33.

B. <u>The Water Act Relates to Health and Sanitation.</u>

The State rests its argument that the Water Act does not "relate to" health and sanitation on this Court's decision in *City of Asheville*. The State's reliance on

that decision falls flat for two primary reasons. *First*, the purpose of the Water Act is far different from the purpose of the two so-called "Sullivan Acts" at issue in *City of Asheville*. *See infra* Part II.B.1. *Second*, the State's argument mischaracterizes the extent to which legislation must "relate to" health and sanitation to run afoul of Section 24(a). *See infra* Part II.B.2.

1. The Water Act is materially different than the Sullivan Acts.

The two local enactments at issue in *City of Asheville*, colloquially referred to as "Sullivan II" and "Sullivan III," mandated that rate differentials between city and non-city residents be eliminated, that water service could be terminated for customers who fail to pay, and that revenues from the operation of the Water System be retained in the enterprise fund and not diverted to other municipal purposes. 192 N.C. App. at 5-7. Unlike the Water Act, neither Sullivan II nor Sullivan III expressly stated that their purpose was to regulate sanitary matters or health. *Id.* at 36-37. After comprehensively analyzing the two acts, this Court held that Sullivan II "relate[d] *only* to matters which are *purely* economic in nature." *Id.* (emphasis added); *see also id*. at 38-39. With regard to Sullivan III the Court found no direct link to health and sanitation, especially in light of the fact that Sullivan III shared the same legislative findings and presumably therefore the same legislative intent of Sullivan II. *Id*. at 38-39.

The Water Act, of course, lacks all of the economic markers that led the Court in *City of Asheville* to conclude that those acts did not "relate to" health and sanitation. The State does not offer any argument as to why the Water Act is "purely economic" in nature; instead, it argues that "[t]he focus of the Act is on the effective governance of water and sewer resources on a regional scale." (State Br. 20). But the Act itself plainly states that regionalization is simply a means to accomplish the specifically recited purpose: "to ensure that citizens and businesses of North Carolina are provided the highest quality [water and sewer] services." N.C. Sess. Laws 2013-50, Preamble (R p 86). Repeating the same theme, the Act further states that it enables the creation of regional water and sewer organizations 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." *Id*.

Substituting bravado for facts, law, and logic, the State ignores this stated purpose and argues that "the purpose and effect of the Act are completely *disconnected from* health or sanitation." (State Br. 26). This position seems to be premised entirely on Asheville's view, expressed in the context of its Third Claim (the "takings" claim), that the Water Act will not change the "use" of the Water System's assets or actually improve the quality of water service. (*Id*.) But whether the Act will actually succeed in its stated purpose is beside the point entirely.

What matters under the decided cases is the goal, aim, or objective of the Act, irrespective of whether that goal is eventually achieved. *See City of Asheville*, 192 N.C. App. at 37 (ruling based on "what the act seeks to accomplish" and what it "sought to . . . remed[y]," as evidenced by the act's stated objective and spirit).

The connection of the Water Act to health and sanitation is also underscored by the provisions creating the new Metropolitan Water and Sewer District. The provisions authorizing and empowering MWSDs are essential parts of the Water Act; without them the Act does not function and fails entirely of any purpose. Unless some new entity is created and empowered to function, there could be no operation for Section 1 and nothing into which the Water System could be merged.

The Water Act explains that the purpose of this new type of entity is "***to provide for the preservation and promotion of the public health and welfare.***" N.C. Sess. Laws 2013-50 § 2 (R p 87-92) (emphasis added). To that end, the Act delegates to MWSDs all the powers necessary to create, own, operate, and regulate sanitary sewer systems and water supply systems. MWSDs may, for example, ***adopt and enforce their own ordinances regarding water and sewer use***—ordinances whose purpose, no doubt, is to promote the public health. *See id*. (R p 92) (implementing statutory authority to be codified at N.C. Gen. Stat. § 162A-85.25 for MWSDs to adopt and enforce ordinances); *see also Pulliam v. Greensboro*, 103 N.C. App. 748, 754 (1991) (explaining that water is "vital to

clean living"); *Drysdale v. Prudden*, 195 N.C. 722, 733 (1928) (explaining that "pure water is nature's natural beverage—life and health giving").

With respect to the New MWSD in particular, if the Water Act were to take effect the New MWSD would be tasked with administering, revising as necessary, and enforcing, among other things, the Buncombe MSD's Sewer Use Ordinance, (Doc. Ex. 34-147), whose express "purpose [is] to protect, preserve, and promote the public health and environment of the district," *id*. (*Cf.* State Br. 7-8).

The conclusion that the Water Act "relates to" health and sanitation, inescapable as a matter of logic, is also amply supported by settled precedent. Indeed, the very argument the State advances here—namely, that the Water Act is a perfectly proper exercise of the General Assembly's power to organize and reorganize local government under Article VII, Section 1 of the Constitution—was expressly rejected by the North Carolina Supreme Court in *City of New Bern*, 338 N.C. at 438. In that case, the Court ruled that legislation "shift[ing] the responsibility for enforcing the building code from the City to the county" was inescapably related to health and sanitation. *Id*. at 442 (striking down the legislation as unconstitutionally void "local acts that . . . affect health and sanitation").

City of New Bern is but one in a long line of cases that consistently hold that matters involving the creation, governance, financing, or operational control of

agencies, departments, divisions, districts, and units of local government that administer and manage health and sanitation systems are matters that "relate to" health and sanitation under Section 24. *See, e.g.*, *Lamb v. Bd. of Educ.*, 235 N.C. 377, 379 (1952) (holding that a statute prescribing "provisions with respect to sewer and water service for local school children in Randolph County" relates to health and sanitation); *Idol,* 233 N.C. at 733 (holding that legislation conferring on the City of Winston-Salem and Forsyth County the power to administer certain health regulations on a consolidated, countywide basis held "clear[ly] beyond peradventure" to be related to health and sanitation); *Sams v. Bd. of Cnty. Comm'rs*, 217 N.C. 284, 285 (1940) (holding that legislation creating a county board of health and naming its members for Madison County is related to health and sanitation); *Drysdale*, 195 N.C. at 726 (holding legislation authorizing the creation of a new sanitary district in Henderson County "related to" health and sanitation). Thus, even under the State's view that the Water Act is about the "governance" of the Asheville Water System, ample and well-settled precedent makes plain that the Act nevertheless relates to health and sanitation under Section 24.

2. The State wrenches dicta from City of Asheville out of context to attempt to manufacture an impossibly narrow construction of "relating to."

The State mischaracterizes *dicta* in *City of Asheville* to argue that under that case's holding, legislation must "principally contemplate" and "prioritize" health and sanitation in order to "relate to" health and sanitation. (State Br. 25-26). *City of Asheville* holds no such thing. As discussed above, that case holds that the two Sullivan Acts had no direct link to health and sanitation and were related exclusively to purely economic matters. *City of Asheville*, 192 N.C. App. at 36-37. The language distorted by the State is used in the context of describing one portion of Sullivan II—in particular, Section 3 of Sullivan II—and in support of the Court's holding that Sullivan II related "only to . . . purely economic" matters. *Id.* at 36. In that limited context, the Court explained that Section 3 of Sullivan II "principally contemplates preventing the economic impact of wastefulness on the water distribution system, rather than prioritizing the system's health or sanitary conditions." *Id*. at 36-37.

The State would have this Court believe that the converse proposition must necessarily be true—namely, that in order for legislation to relate to health and sanitation, it must "principally contemplate," "prioritiz[e]," and "relate only" health and sanitation. But the State does not attempt to explain its logic, nor could it, and it cites no precedent in support of its contention.

There is good reason why the standard urged by the State is not the law: if it were, and if legislation were required to "principally contemplate" and "prioritize" health and sanitation to the exclusion of anything else, the General Assembly could routinely circumvent all of Section 24'sprohibitions by the simple expedient of combining multiple pieces of legislation into massive omnibus bills. A local act relating to the provision of water and sewer services could, for example, be buried in the General Assembly's biennial budget act. An omnibus bill of that sort could hardly be said, as a whole, to "principally contemplate" and "prioritize" health and sanitation, and Section 24 would be rendered ineffectual. Constitutional principles are not simply puzzles to be solved by clever draftsmanship.

C. The Water Act Relates to Non-Navigable Streams.

The State argues that the Water Act does not "relate to" non-navigable streams because "[t]he Act never even mentions these or any other streams" and that the Act does not take "only" the 17,000 acre drainage basin with uncounted miles of non-navigable streams, but also "other types of property that may make up the water system." (State Br. 27). That is a strange argument indeed.

Consider a hypothetical constitutional proscription on legislation "relating to" fire trucks and a statute that purports to involuntarily transfer ownership of all tangible assets located at 100 Court Plaza, Asheville, NC 28801. This hypothetical act makes no mention of any type of automobile, let alone fire trucks. It does not

discriminate at all with regard to type of asset taken; it takes any type of tangible asset at the location. Does it "relate to" fire trucks? An appreciation of the factual context makes clear that yes, it certainly does: 100 Court Plaza is the home of the Asheville central fire station. It holds several fire trucks, all of which are an integral and necessary part of the fire station's operation. The statute would take those trucks—along with a wide range of other assets, such as fire equipment, a foosball table, a television, chairs, tables, and maybe even a Dalmatian. But there is no denying that the statute nevertheless "relates to" fire trucks as that term has been construed by the case law.

Analogously, an appreciation of factual context makes clear that the Water Act does relate to non-navigable streams. As with the fire station example, the taking of many other valuable assets does not preclude the Water Act from relating to non-navigable streams—streams that are essential components of the Water System. Indeed, the two reservoirs that provide more than eighty percent of Asheville's water are fed exclusively by non-navigable streams that, in the aggregate, channel all water collected from the protected watershed. (R pp 63, 151, 159; Doc. Ex. 2, 576-77, 624, 636, 655). Without this complex system of small streams and the watershed they drain the remainder of the system is useless. (R pp 63, 151, 159; Doc. Ex. 576-77, 624, 636, 655). Without the non-navigable streams, Asheville has no Water System.

Whatever the precise contours of "relate to" in the context of Section 24(1)(e), it cannot be the case that taking these streams from their rightful owner, without any compensation, fails to "relate to" non-navigable streams within the ambit of the Constitution.

III. THE WATER ACT OFFENDS MULTIPLE ASPECTS OF ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION.

Although this Court need not reach the issue because the Water Act's unconstitutionality under Section 24 is outcome determinative, the Water Act also violates multiple aspects of Article I, Section 19 of the North Carolina Constitution. As the trial Court correctly ruled, the Water Act violates both the takings element, *see infra* Part III.A, and the due process and equal protection elements of that Section, *see infra* Part III.B.

A. The Water Act Is an Unconstitutional Taking in Violation of the Takings Element of the Law of the Land Clause.

Article 1, Section 19 provides as follows:

> No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. 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.

Id. It is well settled that the first sentence in Section 19, known as the "Law of the Land" clause embodies the same protections against the taking of property except

for a public purpose—and then only upon payment of just compensation—that is embodied in the Fifth Amendment to the United States Constitution. *See, e.g.*, *Long v. City of Charlotte*, 306 N.C. 187, 196 (1982); *DeBruhl v. State Hwy. & Public Works Comm'n,* 247 N.C. 671, 675-76 (1958).

As discussed in Part I above, "as to [a municipality's] private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." *Asbury*, 162 N.C. at 253. Our courts have long held that the supply of water for private consumption is a proprietary function of a municipal corporation. *See, e.g.*, *Fussell*, 364 N.C. at 225; *Mosseller*, 267 N.C. at 107. For that reason, and because the State has clearly granted municipalities the powers to own property in their corporate names, N.C. Gen. Stat. § 160A-11, and to "acquire, . . . [and] own any or all of the public enterprises as defined in this Article [16]," N.C. Gen. Stat. 160A-312(a), there can be no doubt that Asheville's ownership of its Water System is protected under the "Law of the Land" clause.

The State's free-form argument—unsupported by any published authority — that a State-directed conveyance of property from one public owner to another public owner is not a transfer subject to constitutional safeguards is entirely misguided. (State Br. 35-37). Because Asheville owns the Water System in its proprietary capacity, it must to that extent "be regarded *quoad hoc* as a private

corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it are omnipotent." *Asbury,* 162 N.C. at 253. Asheville's proprietary property cannot be taken and given to another unless it is taken both (i) for a public purpose and (ii) upon payment of just compensation—no matter the identity of the transferee. *See, e.g.*, *State Hwy. Comm'n v. Greensboro Bd. of Educ.*, 265 N.C. 35, 49 (1965); *Bd. of Transp. v. Charlotte Park & Recreation Comm'n*, 38 N.C. App. 708, 711-12 (1978).

Here, the State has not taken Asheville's Water System for its own sovereign use; it has simply transferred ownership of the system from one owner, Asheville, to another owner, the newly formed MWSD, *who will use the assets for precisely the purpose to which they are presently committed.* As the Supreme Court made plain in *Kelo v. City of New London*, 545 U.S. 469 (2005), this is not a constitutionally permissible public purpose:

> [I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.

Id. at 477; *see also Calder v. Bull*, 3 U.S. 386, 388 (1798) (ruling that "a law that takes property from A and gives it to B" is contrary to power entrusted with the legislature); *see also* 29A C.J.S. *Eminent Domain* §54 (2009). Our courts have repeatedly endorsed this principle. *See, e.g.*, *State Hwy. Comm'n v. Thornton*, 271

N.C. 227 (1967); *Town of Apex v. Whitehurst*, 213 N.C. App. 579, 584 (N.C. App. Ct. 2011).

The State does not argue that the Water System would be put to a different use if the Act were allowed to take effect; it merely contends that it would be better managed by a regional owner and operator. While it is clear that there would be a change in who *manages* the Water System, none of this constitutes a change in *use* or *purpose*. The Water System's purpose will remain and its assets will continue to be used precisely as before: to supply, treat, and distribute water for drinking, cooking, cleaning, and the operation of sanitary disposal systems for residents in Buncombe and Henderson Counties. Importantly, the State's better-managed rationale has been squarely rejected by our Supreme Court:

> [I]t might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation.

Briggs v. Raleigh, 195 N.C. 223, 229-30 (1928).

For all these reasons, the State is constitutionally prohibited from taking the Asheville Water System and transferring it to the New MWSD. If, however, the Court were to rule that the State is constitutionally permitted to take the Water System and transfer ownership to the New MWSD, in that event the State would

be constitutionally obligated to pay Asheville just compensation. *State Hwy. Comm'n*, 265 N.C. at 49.

B. The Water Act Violates the Due Process and Equal Protection of Law Elements of the Law of the Land Clause.

Article I, Section 19 also incorporates the due process and equal protection clauses of the United States Constitution's Fourteenth Amendment. *See, e.g.*, N.C. Const., art. I, § 19 ("No person shall be denied the equal protection of the laws . . ."); *McNeill v. Harnett Cnty.*, 327 N.C. 552, 563-64 (1990) (explaining that Article I, Section 19 is synonymous with the Fourteenth Amendment's due process clause); *In re Sterilization of Moore,* 289 N.C. 95, 98 (1976) (same); *City of Asheville,* 192 N.C. App. at 44 (same).

The Water Act is 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." *See* N.C. Sess. Laws 2013-50, Title (R p 86). The Act's preamble declares the General Assembly's aspiration to "ensure that the citizens and businesses of North Carolina are provided with the highest quality services" and further declares that this aspiration can be realized through "regional water and sewer systems [that] provide reliable, cost-effective, high-quality water and sewer services . . . ." These are the stated objectives of the Act, and Asheville does not contend that they are illegitimate.

The State, by focusing on the general and unenlightening proposition that an enactment does not run afoul of due process or equal protection when it treats some persons or entities differently provided the principle of distinction rests on some conceivable legitimate government interest, misses the point of Asheville's claim. It is not the propriety of the Water Act's objectives that is problematic; instead, the constitutional defect lies in the irrational and arbitrary means used by the Water Act ostensibly to accomplish its stated objectives. Asheville's claim focuses on that separate prong of the Law of the Land clause's imperative—that even legislation pursuing a legitimate governmental objective must rationally promote that objective, without arbitrary or capricious discrimination. *Cf. City of Asheville,* 192 N.C. App. at 44 (explaining that the second prong of the inquiry is: "are the means chosen to implement [the legitimate] objective reasonable?").

Though the "rational basis" test employed in due process and equal protection analysis is less exacting than the "local act versus general law" analysis required under Section 24, the former is not the toothless rubber stamp the State portrays it to be. As the Supreme Court explained in *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180-81 (2004), for rational basis review to be satisfied, there must not only be a plausible policy reason for a discrimination or differentiation, but also "the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the

relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Accord Heritage Village Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 447-48 (1979), *aff'd.*. 299 N.C. 399 (1980). And as the United States Supreme Court has explained, "even the standard of rationality as we so often have defined it *must* find some footing in *the realities of the subject addressed by the legislation." Heller*, 509 U.S. at 321 (emphasis added).

Here, there is no rational relationship between the Water Act's stated goals and the Act's singular targeting of Asheville for the Act's operation. The State hypothesizes that the General Assembly could have concluded that it would be easier to consolidate municipal water systems with an existing MSD, with its pre-existing ordinance and connection authority, into a new MWSD and continue that existing authority, and that this explains why an MWSD is appropriate in those cases where an MSD already exists. (*See* State Br. 31). Of course this leaves open to question why the Act was meticulously structured to *exclude* regional areas served by the Contentnea Metropolitan Sewerage District or the Bay River Metropolitan Sewerage District. Nor, for that matter, if ease of transition and consolidation were the rational basis for the Act's operation, is there any explanation for not extending the Act's provisions to municipally operated *sanitary*

sewer systems operating in areas where an existing Metropolitan *Water* District is already in place, with its existing ordinances, structure, and operations.

The State presses on to say that focusing on larger systems—those serving populations greater than 120,000—would enable the creation of MWSDs with larger footprints while involving the consolidation of fewer discrete legal entities. (*See* State Br. 31-32.) Yet that rationale could not explain why Greenville, which the State contends will in the near future have a population greater than the Water Act's threshold, is and will forever be excluded from operation of the Water Act's mandatory regionalization provisions. Nor would it explain why the Act so clearly and obviously excludes systems with even larger footprints and even fewer discrete legal entities than exist in Buncombe County—for example, the systems serving Durham and Mecklenburg counties. (Doc. Ex. 488-89).

Further, the State cannot explain why the General Assembly's purportedly well-reasoned and rational goals should apply "by operation of law" to Asheville alone, but should be merely voluntary and permissive everywhere else in the State. Recall that by virtue of Section 5.5 of the Water Act, no new MSDs can be created in the State without the consent of every jurisdiction affected by that creation and that by virtue of Section 1.(a) of the Act, no involuntary consolidation of any public water systems can occur except in a county where there is an MSD. The State's failure to address this distinction is a glaring omission; Section 5.5 cements

that the Water Act's singular purpose was to force the expropriation of Asheville's Water System "by operation of law" and for no compensation. The State simply cannot articulate why the means chosen—permissive and voluntary regionalization everywhere except Asheville—could be rationally related to the objective of ensuring high-quality services to the citizens and businesses of North Carolina.

Confining the analysis to the geographic boundaries of the existing Buncombe MSD—and thereby excluding all other water systems from consolidation into the New MWSD—rather than aiming to form a truly regional system further reveals that the relationship between the Water Act's goals and its means is so attenuated as to render its operation arbitrary and irrational. Biltmore Forest, for example, has no independent supply of raw water and no facilities to treat raw water. (Doc. Ex. 401, 413-420, 442, 489). If the Act's objective is to regionalize water service in order to ensure the highest quality water and sewer service, the exclusion of the Biltmore Forest water system, which will remain a superfluous intermediary retailer of the New MWSD's water, makes little sense. The same could be said of the water systems operated by other municipalities in Buncombe and Henderson Counties—the water systems of Weaverville, Black Mountain, and Montreat and the water system operated by the Woodfin Water and Sewer District—all of which are excluded. (Doc. Ex. 400-402, 438-475). Yet, by virtue of Section 2 of the Water Act, all of those jurisdictions, along with the

Counties of Buncombe and Henderson, will have representation on the board of the New MWSD even though none will be contributing any of their water system assets to that new entity. This too reveals just how disconnected the Water Act's classification system is from its stated objective.

For its lack of any rational relationship between means and ends, the Water Act violates the due process and equal protection elements of Article I, Section 19 of the North Carolina Constitution.

CONCLUSION

For all of the preceding reasons, the City of Asheville respectfully requests that this Court affirm the Superior Court's ruling striking down the Water Act as unconstitutional.

Respectfully submitted, this 24th day of April, 2015.

Electronically submitted
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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellee certifies that the foregoing brief, which is prepared using proportional font, is less than 11,250 words* (excluding cover, indexes, table of authorities, certificate of service, and this certificate of compliance) as reported by the word-processing software.

s/Daniel G. Clodfelter
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* Pursuant to this Court's 10 March 2015 order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PLAINTIFF-APPELLEE'S BRIEF was served this date upon counsel for the Defendant-Appellant State of North Carolina and Defendant Metropolitan Sewerage District of Buncombe County, North Carolina by depositing a copy thereof in the United States mail, first-class postage prepaid, addressed to:

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This the 24th day of April, 2015.

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