No. COA14-1255 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County

****

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING

****

INDEX

ATTACHMENTS

TABLE OF CASES AND AUTHORITIES

Constitutional Provisions

Statutes

Session Laws

Regulations

Court Rules

Municipal Codes

No. COA14-1255 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA, Defendants.	)	From Wake County

****

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, the City of Asheville respectfully petitions this Court to rehear this appeal. As shown below, the Court's October 6 Opinion misapprehends and overlooks points of law and fact on the City's first, second, third, and sixth claims for relief. See City of Asheville v. State, No. COA14-1255, slip op. at 11-18, 20-24 (N.C. Ct. App. Oct.

6, 2015) [Attachment A to this Petition]. The City requests that the Court substantively reconsider these claims.

In addition, the Opinion includes language that might misapprehend the status of the City's fourth and fifth claims. Id. at 6 n.2, 26. The City requests that the Court amend its Opinion to clarify that Claims 4 and 5 remain pending on any remand.

This petition is supported by certificates from Gary L. Beaver, Andrew H. Erteschik, K. Edward Greene, Ryke Longest, Larry S. McDevitt, and William F. Wolcott, III.

BACKGROUND

In 2013, the General Assembly enacted a statute that stripped the City of its municipal water system. The statute directed a transfer of the ownership and operation of the water system to a newly created Metropolitan Sewer and Water District. See Act of May 14, 2013, ch. 50, §§ 1(a)-1(f), 2013 N.C. Sess. Laws 118, 118-19, amended by Act of Aug. 23, 2013, ch. 388, §§ 4-5, 2013 N.C. Sess. Laws 1605, 1618; Attachment A at 3-4.

In response, the City filed this lawsuit. The complaint states six claims for relief, numbered as follows:

(1) The 2013 statute is a local law related to health, sanitation, and non-navigable streams, violating article II, section 24 of the North Carolina Constitution.

(2) The statute violates the City's rights under the "law of the land" clause of article I, section 19 of the North Carolina Constitution.

(3) The statute confiscates the City's property, in violation of article I, sections 19 and 35 of the North Carolina Constitution.

(4) The statute impairs the obligation of the City's contracts, in violation of Article I, Section 10 of the United States Constitution and article I, section 19 of the North Carolina Constitution.

(5) The statute impairs the obligation of the City's contracts, in violation of N.C. Gen. Stat. § 159-93 (2013).

(6) In the alternative, if the 2013 statute is implemented, the City is entitled to just compensation under article I, sections 19 and 35 of the North Carolina Constitution.

(R pp 13-21)

The State moved to dismiss the complaint, arguing that the City lacked standing. (R pp 121-23) The State also moved for summary judgment on the merits. (R p 143) The City, too, moved for summary judgment in its favor. (R p 148)

The trial court denied the State's motions, but granted the City's motion for summary judgment. (R p 165) The court ruled in the City's favor on Claims 1, 2, 3, and 6 and enjoined the transfer of the water system. (R p 165) The court expressly declined to reach Claims 4 and 5. (R pp 164-66)

On appeal, this Court reversed the trial court on the merits of Claims 1, 2, 3, and 6. See Attachment A at 24.

On Claim 1, this Court declined to decide whether the 2013 statute is a local act. Instead, the Court held that the statute is not related to health, sanitation, or non-navigable streams. The Court reasoned that it is not the statute's purpose to regulate these subjects. Id. at 11-16. For that reason, the Court held that the 2013 statute does not violate article II, section 24 of the North Carolina Constitution.

On Claim 2, this Court held that the statute does not violate the "law of the land" clause of article I, section 19 of the North Carolina Constitution. The Court reasoned that the City cannot bring an equal protection claim against the State. Id. at 19. The Court also held that the State had a rational basis for involuntarily transferring the City's water system to a new entity. Id. at 19-20.

On Claims 3 and 6, the Court decided that the 2013 statute did not cause a taking of property for which the City would be entitled to just compensation. Id. at 23-24.

Claims 4 and 5 are the City's impairment-of-contract claims. The Court noted that the trial court had not yet ruled on those claims. Id. at 6 n.2, 25-26. Accordingly, the Court did "not reach any conclusion regarding Asheville's fourth and fifth claims for relief." Id. at 25.

This outcome on Claims 4 and 5 tracks the parties' briefing in this Court. The State's opening brief made no arguments about what would happen with Claims 4 and 5 in the event of a reversal. See State Br. 4 n.1. The City, for its part, wrote that "if this Court were to reverse, [Claims 4 and 5] would remain for consideration below." See City Br. 2 n.1. The State's reply brief took no issue with this statement.

Even so, the Opinion contains phrases that might cause confusion about the status of Claims 4 and 5. In footnote 2, the Court wrote that because the City did not brief the impairment-of-contract argument as an alternative basis for affirmance, "it is not preserved." See Attachment A at 6 n.2. Likewise, at the end of the Opinion, the Court wrote that "any argument by Asheville based on [the fourth and fifth] claims for relief are waived." Id. at 26. These statements could be misunderstood as limiting the City's ability to pursue Claims 4 and 5 on remand.

This Court's mandate issued on 26 October 2015. This petition is being filed within fifteen days of that date. See N.C. R. App. P. 31(a). The City has also

filed a petition for supersedeas and a motion for temporary stay in connection with this petition for rehearing.

REASONS WHY REHEARING SHOULD BE GRANTED

I. THE COURT'S REASONING ON THE MERITS MISAPPREHENDS AND CONFLICTS WITH CONTROLLING DECISIONS OF THE NORTH CAROLINA SUPREME COURT.

The October 6 Opinion misapprehends several decisions of the North Carolina Supreme Court on important constitutional issues. The decision will have a major impact on local governments across North Carolina. These reasons warrant rehearing.

A. The Opinion Misapprehends Controlling Supreme Court Decisions on Article II, Section 24(1)(a) of the North Carolina Constitution.

1. The Opinion Misapprehends City of New Bern v. New Bern-Craven County Board of Education.

The most recent Supreme Court decision to address whether a local act relates to health or sanitation is City of New Bern v. New Bern-Craven County Board of Education, 338 N.C. 430, 450 S.E.2d 735 (1994). This Court's Opinion misapprehends New Bern and its application to the 2013 statute at issue here.

New Bern confirms an important principle from earlier Supreme Court decisions: when a local act shifts responsibility for the administration and enforcement of laws that affect the public health and sanitation, the statute violates

article II, section 24 of the North Carolina Constitution. Id. at 441, 450 S.E.2d at 741-42.

New Bern involved a local act that transferred, from the City of New Bern to Craven County, the administration and enforcement of a building code. Id. at 434, 450 S.E.2d at 738. The Supreme Court held that an act that transfers this authority "relates to" health and sanitation if the laws or regulations administered by the local entity "affect any of the prohibited subjects of health, sanitation, or the abatement of nuisances." Id. at 439, 450 S.E.2d at 740 (emphasis added). Applying this standard, the Court recognized that a building code's purpose is to protect health and sanitation. Id. at 440, 450 S.E.2d at 741. Accordingly, the Court held that shifting responsibility for administering and enforcing a building code "affected," and therefore "related to," health and sanitation. Id. at 442, 450 S.E.2d at 742.

The transfer provision in the 2013 statute, like the statute at issue in New Bern, shifts the authority to administer and enforce laws that protect the public health. The Court's Opinion overlooked this key point.

The transfer provision creates a new metropolitan water and sewer district and orders the City to turn over its water system—along with all related administration and enforcement—to that district. See Act of May 14, 2013, ch. 50, §§ 1(a)-1(f), 2013 N.C. Sess. Laws at 118-19. The statute grants the new district

the power to "exercis[e] . . . essential government functions to provide for the preservation and promotion of the public health and welfare." Id. sec. 2, § 162A-85.5(a), 2013 N.C. Sess. Laws at 121.

To that end, the law specifically includes a provision entitled "Adoption and enforcement of ordinances." It states that a metropolitan water and sewer district "shall have the same power as a city under G.S. 160A-175 to assess civil fines and penalties for violations of its ordinances and may secure injunctions to further ensure compliance with its ordinances." Id. sec. 2, § 162A-85.25(a), 2013 N.C. Sess. Laws at 121.

As a result of these provisions, the new water and sewer district will take over the administration and enforcement of a City of Asheville program, operated under authority granted by state water-quality regulators, for the evaluation and approval of construction, alteration, and extension of the water system. (Doc. Ex. 396-97) Under this program, the City administers a permitting process for altering or extending the water system—a permitting process that the City can enforce through civil penalties and lawsuits. See Asheville, N.C., Mun. Code ch. 21, art. III, §§ 4-6 (Supp. 2008). The program ensures that any changes to the water system comply with the requirements of the North Carolina Drinking Water Act, the purpose of which is "to regulate water systems within the State which supply drinking water that may affect the public health." N.C. Gen. Stat. § 130A-312

(2013) (emphasis added); see Doc. Ex. 397. The transfer provision in the 2013 law shifts responsibility for administering this health-related compliance program.

The statute makes this shift, moreover, for the specific purpose of offering Asheville citizens "reliable, cost-effective, high-quality water and sewer services." Act of May 14, 2013, ch. 50, first recital, 2013 N.C. Sess. Laws at 118. As the North Carolina Supreme Court has held, that purpose directly relates to the public health. See, e.g., Drysdale v. Prudden, 195 N.C. 722, 732-33, 143 S.E. 530, 534-35 (1928); see also infra pp. 12-14 (discussing Drysdale).

The October 6 Opinion misapprehends the holding of New Bern and its controlling impact on this case. The Opinion distinguishes New Bern on the basis that the 2013 statute "does not empower anyone to enforce health regulations." See Attachment A at 16. That reasoning is mistaken. As shown above, the transfer provision in the statute specifically shifts enforcement powers related to water systems. By doing so, the statute decides who will enforce a statute that affects (i.e., "relates to") the public health. New Bern, 338 N.C. at 442, 450 S.E.2d at 742.

The Opinion also misapprehends the "relates to" standard in New Bern and other decisions. Instead of applying New Bern and its express reasoning that a statute relates to health and sanitation if it "affects" those matters, this Court relied on a 2008 decision of its own, which stated that a law relates to health and

sanitation if it "regulate[s]" those matters. Attachment A at 12-13 (citing City of Asheville v. State, 192 N.C. App. 1, 33, 665 S.E.2d 103, 126 (2008)). That aspect of the 2008 decision should not control here, because New Bern and other Supreme Court decisions contradict it. See New Bern, 338 N.C. at 439, 450 S.E.2d at 740 (concluding that statutes violated article II, section 24 because they "affect health and sanitation"); Lamb v. Bd. of Educ., 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952) (invalidating a statute related to health and sanitation because it affected water and sewer services); Drysdale, 195 N.C. at 730-32, 143 S.E. at 534-35 (holding that a local law that creates a water and sewer system is impermissible because the purpose of such a system is to protect the public health).

Accepted principles on the interpretation of our State Constitution confirm that the New Bern analysis of article II, section 24(1)(a) governs this case. "The principles governing constitutional interpretation are generally the same as those 'which control in ascertaining the meaning of all written instruments.'" Coley v. State, 360 N.C. 493, 497-98, 631 S.E.2d 121, 125 (2006) (quoting Stephenson v. Bartlett, 355 N.C. 354, 370, 562 S.E.2d 377, 389 (2002)). In particular, "[i]n determining the will or intent of the people as expressed in the Constitution, all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument." Id. at 498, 631 S.E.2d at

121 (quoting State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989)).

Further, the Supreme Court has held that courts must not interpret constitutional provisions in a way that undermines their purposes. The Court applied this principle to article II, section 24 in Board of Health v. Board of Commissioners, 220 N.C. 140, 16 S.E.2d 677 (1941). The Court held that article II, section 24 "is remedial in its nature," so it should not be applied so narrowly as to "defeat its purpose." Id. at 143, 16 S.E.2d at 679. The Court went on to explain that the prohibition on health-related local laws in article II, section 24 reflects the following purpose: "[T]he alleviation of suffering and disease, the eradication or reduction of communicable disease in its humanitarian, social, and economic aspect, is a state-wide problem which ought not to be interfered with by local dilatory laws which are so frequently the outcome of local indifferency, or factional and political disagreements." Id.

New Bern interpreted article II, section 24 consistently with this purpose and consistently with the above rules of interpretation. Applying those principles, the Supreme Court held that laws "relating to health" are those "affecting health"—a natural interpretation of the phrase "relating to"—not just those "regulating health." See New Bern, 338 N.C. at 442, 450 S.E.2d at 742. The latter reading,

after all, would construe "relating to" so narrowly as to frustrate the purpose of article II, section 24.

Construing the constitutional phrase "relating to health" as "regulating health" would also contradict distinctions that the framers made within the language of article II, section 24. At the same time that the section prohibits local laws "[r]elating to health," it prohibits laws "[r]egulating labor, trade, mining or manufacturing." N.C. Const. art. II, § 24(1)(a), (j) (emphasis added). This "difference of phraseology . . . evinces a corresponding difference in the sense." State v. Crawford, 13 N.C. (2 Dev.) 425, 427 (1830). To interpret these two different phrases to mean the same thing would also violate the presumption that "no part of a statute is mere surplusage, but each provision adds something which would not otherwise be included in its terms." Domestic Elec. Serv., Inc. v. City of Rocky Mount, 285 N.C. 135, 143, 203 S.E.2d 838, 843 (1974).

For all of these reasons, rehearing is warranted to address the Opinion's misapprehension of New Bern and related decisions.

2. The Opinion Misapprehends and Conflicts with Drysdale v. Prudden.

This Court's reasoning that the 2013 statute does not relate to health and sanitation also misapprehends and conflicts with Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928). See Attachment A at 14-15.

In Drysdale, our Supreme Court wrote at length on how a water system is essential to the public health:

- Such a system, according to the Supreme Court, "involves the very life and health of a community."
- A water system "promot[es] the public health and welfare."
- The Court observed that "pure water is nature's natural beverage—life and health giving."
- Indeed, "[p]ure water is the very life of a people."

195 N.C. at 732-33, 143 S.E. at 534-35.

This Court distinguished Drysdale by stating that the Drysdale Court "never makes any determination regarding which of the 14 'prohibited subjects' was implicated" by the statute at issue. Attachment A at 14. That statement is incorrect. As shown above, Drysdale contains a detailed discussion of one of those subjects—health and sanitation—and its relationship to water service. That relationship, in fact, was the very reason why the Drysdale Court invalidated a statute that created a new water and sewer district. As the Supreme Court emphasized, the statute in Drysdale was enacted "for the purpose of preserving and promoting the public health and welfare." Drysdale, 195 N.C. at 732, 143 S.E. at 535 (emphasis added).

Later Supreme Court decisions, moreover, recognize that Drysdale involved a statute related to health and sanitation. For example, in Sams v. Board of Commissioners, 217 N.C. 284, 7 S.E.2d 540 (1940), the Supreme Court held that a provision that created a county board of health was an invalid local act under article II, section 24(1)(a). For this holding, the Court relied on Drysdale: "To the same effect is the ruling in [Drysdale], where a special act creating a sanitary district for the construction and maintenance of a water and sewer system in Henderson County was held to violate this Constitutional provision." Id. at 285, 7 S.E.2d at 541; see also Gaskill v. Costlow, 270 N.C. 686, 688, 155 S.E.2d 148, 149 (1967) (citing Drysdale as an example of a case invalidating local acts "[r]elating to health and sanitation");[1] Lamb, 235 N.C. at 379, 70 S.E.2d at 203 (same).[2]

---

[1] Gaskill is yet another decision holding that a law that targets water or sewer services in a single locality violates article II, section 24(1). There, the Supreme Court recognized that article II, section 24 barred a statute that directed a municipality to extend its water and sewer system under certain circumstances. Gaskill, 270 N.C. at 687-88, 155 S.E.2d at 148-50.

[2] The Opinion also inaccurately distinguishes Lamb. This Court's Opinion states that in Lamb, the statute required a municipal body to continue operating a water and sewer system. Attachment A at 16. The transfer provision here does the same thing. Section 1(e) of the 2013 statute requires that the City transfer all permits for the water system to the new district "to ensure that no current or paid customer loses service due to the regionalization of water and sewer services required by this act." Act of May 14, 2013, ch. 50, § 1(e), 2013 N.C. Sess. Laws at 119 (emphasis added). After the transfer of these permits and the entire water system, customers would indeed lose service if the new district were not required to provide it. In this way, the 2013 statute requires a municipal body to operate a water and sewer system.

In sum, when the October 6 Opinion distinguished Drysdale, it misapprehended the holding of that decision and others.

B. The Takings Analysis in the Opinion Misapprehends and Overlooks Asbury v. Town of Albemarle.

The October 6 Opinion also conflicts with Asbury v. Town of Albemarle, 162 N.C. 247, 78 S.E. 146 (1913). Specifically, the Opinion misapprehends the controlling effect of Asbury on the City's claims that the transfer provision takes the City's water system without just compensation.

In Asbury, our Supreme Court held that when a municipality acts in a proprietary capacity, the General Assembly "is under the same constitutional restraints that are placed upon it in respect of private corporations." Id. at 253, 78 S.E. at 149. The Court reasoned that proprietary powers "are for the private advantage of the compact community." Id. Thus, in a case involving proprietary functions, courts must treat a municipality as a "private corporation." Id.

As the Asbury Court recognized, these principles bar the General Assembly from taking a municipality's proprietary property. Id. at 254, 78 S.E. at 149. Although the General Assembly may "shape . . . municipal organizations," it cannot control property that a municipality "has acquired, or the rights in the nature of property which have been conferred upon it." Id. at 254, 78 S.E. at 150 (quoting People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 104 (1871)); cf. N.C.

Const. art. VII, § 1 (granting the General Assembly the power to "provide for the organization" of a local government, and to give "powers and duties," but not authorizing the taking of a municipality's proprietary property without just compensation).

Asbury controls the takings analysis in this case, but is absent from the Opinion's discussion of that issue. As this Court itself has recognized, when the City operates its water system, it acts in a proprietary capacity. City of Asheville, 192 N.C. App. at 49, 665 S.E.2d at 136; accord Asbury, 162 N.C. at 254-55, 78 S.E. at 150. Under Asbury, then, the General Assembly cannot enact a law that takes the City's property—the water system in which the community has invested—without just compensation. Asbury, 162 N.C. at 253-54, 78 S.E. at 149.

The October 6 Opinion misapprehends how Asbury governs this case. This misapprehension has at least two features.

First, the Opinion gives Asbury an inaccurately narrow scope. In particular, the Opinion reads Asbury as precluding the General Assembly only from (a) requiring a municipality to operate a water system and (b) controlling a municipality's discretion in operating the system. See Attachment A at 17.

Asbury, however, does not limit its holding to these two scenarios alone. Rather, it holds that the General Assembly cannot take away any of a municipality's property when the municipality acts in a proprietary capacity. The

Supreme Court specifically rejected the notion that "the legislative power is so transcendent that it may, at its will, take away the private property of" a city. Asbury, 162 N.C. at 254, 78 S.E. at 149 (quoting Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 694 (1819)).

Second, instead of applying Asbury to the City's takings claims, the Court cited an older decision, Brockenbrough, for the proposition that the State may involuntarily transfer a city's water system to another political subdivision. See Attachment A at 21 (citing Brockenbrough v. Bd. of Water Comm'rs, 134 N.C. 1, 19, 46 S.E. 28, 33 (1903)).

Brockenbrough did not authorize such a taking. Rather, it stated that a city did not violate the state constitution by voluntarily transferring its water system, with express legislative approval, to a water board. See Brockenbrough, 134 N.C. at 20, 46 S.E. at 34. In any event, the Supreme Court decided Brockenbrough a decade before Asbury—the seminal decision that recognizes the property rights of municipalities that act in a proprietary capacity. As Asbury shows, those constitutional property rights limit the legislature's general powers to shape municipal governments. In the absence of rehearing, this Court's Opinion will

create serious confusion on the analysis of takings when the General Assembly attempts to shift the ownership of a municipality's property.[3]

Asbury calls for the Court to hold that the General Assembly may not take property from a municipality that is acting in a proprietary capacity. Under that principle, this Court should affirm the trial court's conclusion that the transfer is a taking for which the City is entitled to just compensation. See Dep't of Transp. v. Rowe, 353 N.C. 671, 676, 549 S.E.2d 203, 208 (2001) ("Just compensation is clearly a fundamental right under both the United States and North Carolina Constitution.").

II. THE COURT'S CONCLUSION THAT THE 2013 STATUTE RELATES TO HIGH-QUALITY WATER SERVICE CONFIRMS THAT THE STATUTE RELATES TO HEALTH AND SANITATION.

The Opinion held that the 2013 statute prioritized "the quality of the service provided to the customers of public water and sewer systems," but nonetheless did not relate to health and sanitation. Attachment A at 12. As explained above, that reasoning overlooks the Drysdale Court's express recognition that water quality affects the public health.

---

[3] The Opinion also relies on decisions from the United States Supreme Court, and from other states, to conclude that the taking of the City's water system requires no compensation. Attachment A at 21-23. Those cases do not address the City's rights under the North Carolina Constitution, so they cannot take precedence over Asbury. See State v. Jones, 305 N.C. 520, 525, 290 S.E.2d 675, 678 (1982) (noting that cases interpreting the United States Constitution may influence, but do not control, the interpretation of the North Carolina Constitution).

Indeed, modern statutes and regulations that govern water service confirm that health and the quality of water service are inseparable. For example:

- The express purpose of the North Carolina Drinking Water Act is "to regulate water systems within the State which supply drinking water that may affect the public health." N.C. Gen. Stat. § 130A-312 (2013). A provider of water service, such as the newly created water and sewer district in Buncombe County, must comply with regulations under the Drinking Water Act. (Doc. Ex. 3, 396)
- Likewise, the federal Safe Drinking Water Act authorizes the enforcement of "national primary drinking water regulations" on public water systems in each state. 42 U.S.C. § 300g (2012). Under these regulations, public water systems must give their customers annual reports on the source and quality of their tap water. These reports are specifically required to identify any risks to human health. See 40 C.F.R. §§ 141.151-141.155 (2015).

These statutes and regulations underscore the holding in Drysdale: the quality of water service is a matter of public health. It "relate[s] to" health and sanitation as a matter of law. N.C. Const. art. II, § 24(1)(a).

This Court's reasoning to the contrary conflicts with the above statutes and regulations. It will create uncertainty for municipal officials, regulators, and the

General Assembly, fueling tomorrow's appeals. Rehearing will allow the Court to resolve this uncertainty.[4]

III. THE OPINION COULD INADVERTENTLY (AND ERRONEOUSLY) AFFECT CLAIMS 4 AND 5.

The October 6 Opinion correctly states that the Court did "not reach any conclusion regarding Asheville's fourth and fifth claims for relief." Attachment A at 25. However, as noted above, the Opinion contains phrases that might cause confusion on the status of Claims 4 and 5. See id. at 6 n.2, 25-26, quoted supra p. 5. The City respectfully requests that the Court rehear the case and amend the opinion to confirm that Claims 4 and 5 remain open on remand.

A. The Circumstances Justify an Amendment to the Opinion's Language on Claims 4 and 5.

A Court can grant rehearing to correct an inadvertence in an opinion or to clarify an opinion. See, e.g., State ex rel. N.C. Utils. Comm'n v. S. Ry. Co., 268 N.C. 204, 205, 150 S.E.2d 337, 337-38 (1966); Templeton v. Kelley, 217 N.C. 164, 165, 7 S.E.2d 380, 381 (1940).

---

[4] Because the Court held that the 2013 statute did not relate to health or sanitation, the Court did not decide whether the 2013 statute is a local act under article II, section 24 (or whether it violates the prohibition on local amendments to general laws in article XIV, section 3). Attachment A at 10. If the Court grants rehearing and decides that the statute does relate to public health and sanitation, the local nature of the law will become a live issue. For the reasons stated on pages 16-27 of the City's appellee brief, the trial court was right to conclude that the 2013 statute is a local act.

For example, in Raleigh Farmers Market, the Supreme Court's original opinion suggested that the way the parties had litigated the case "amounted to a waiver of a jury trial." State Highway Comm'n v. Raleigh Farmers Mkt., Inc., 264 N.C. 139, 139-40, 141 S.E.2d 10, 11 (1965). On rehearing, the Supreme Court published a clarification, noting that the waiver language in the opinion "was not intended to limit, nor has either party's right to jury trial been impaired by what was said." Id.

A similar clarification is needed here. This Court's October 6 Opinion states that "any argument by Asheville based on [Claims 4 and 5 is] waived." Attachment A at 25-26. This language most logically means that the Court did not consider these claims on appeal. However, the language could be misconstrued as limiting the City's ability to pursue Claims 4 and 5 further.

To avoid any misunderstanding on remand, the City requests that the Court amend the Opinion to avoid waiver language and note only that Claims 4 and 5 were not before this Court. The conclusion of this petition proposes language to that effect. See infra pp. 30-31.

These minor changes would avoid any implication that the City could waive entire claims that the trial court had not yet decided. As shown below, that implication would be contrary to the law.

B. Applying Waiver to Undecided Alternative Grounds for Affirmance Would Misapprehend the Law.

The Opinion passages in question most likely mean that because the City did not brief Claims 4 and 5 as alternative grounds for affirmance, the City was not entitled to an affirmance on those grounds. See Attachment A at 6 n.2, 25-26.

If, however, these passages were meant to say that the non-briefing of Claims 4 and 5 somehow forfeited those entire claims, that statement would misapprehend the law. The Appellate Rules allow, but do not require, an appellee to brief alternative grounds for affirmance. When an appellee does not brief alternative grounds, neither the rules nor any other source of law provides that the appellee waives the ability to have the trial court decide unadjudicated claims.

1. The "May" Language in Appellate Rules 28(c) and 10(c) Shows That Briefing of Alternative Grounds Is Allowed, but Not Required.

The language of the Appellate Rules confirms that an appellee may brief alternative grounds for affirmance, but is not compelled to do so.

Rule 28(c) states that "an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment." N.C. R. App. P. 28(c) (emphasis added).

Likewise, Rule 10(c) provides that "an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment." N.C. R. App. P. 10(c) (emphasis added).

"Ordinarily when the word 'may' is used in a statute, it will be construed as permissive and not mandatory." State v. O'Connor, 222 N.C. App. 235, 240, 730 S.E.2d 248, 252 (2012) (quoting In re Hardy, 294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978)); see also State v. Baker, 208 N.C. App. 376, 380, 702 S.E.2d 825, 828 (2010). By contrast, texts that use "must" or "shall" are typically mandatory. See Baker, 208 N.C. App. at 380, 702 S.E.2d at 828.

Applying these principles, this Court has stated that the Appellate Rules "permit" an appellee to raise alternative grounds for affirmance. Bd. of Dirs. of Queens Towers Homeowners' Ass'n, Inc. v. Rosenstadt, 214 N.C. App. 162, 168, 714 S.E.2d 765, 769 (2011). Likewise, the Court has written that the rules "allow" an appellee to do so. F. Indus. v. Cox, 45 N.C. App. 595, 603, 263 S.E.2d 791, 796 (1980). Because the briefing of alternative grounds is allowed, but not required, the absence of that briefing causes no waiver.

This consequence of the word "may" parallels the North Carolina rule on permissive counterclaims. Rule 13 of the North Carolina Rules of Civil Procedure

provides that a defendant "may" file a permissive counterclaim. N.C. Gen. Stat. § 1A-1, Rule 13(b) (2013). Because of this "may" language, this Court has rejected arguments that a failure to pursue a permissive counterclaim waives that claim in later proceedings. See Hailey v. Allgood Constr. Co., 95 N.C. App. 630, 633, 383 S.E.2d 220, 222 (1989).

The same principle applies here. Although an appellee may raise alternative grounds for affirming a judgment, its omission of those grounds does not rob the appellee of claims related to those grounds. No North Carolina rule or decision has ever held otherwise.

To the contrary, this Court has written that when an appellee has alternative grounds for affirmance but does not brief them, what the appellee loses is "consideration [of those grounds] on appeal." Tate Terrace Realty Inv'rs, Inc. v. Currituck Cty., 127 N.C. App. 212, 224, 488 S.E.2d 845, 852 (1997) (emphasis added). Here, the City has already suffered that consequence. This Court reversed the trial court's judgment, and it did so without considering alternative paths to an affirmance. See Attachment A at 24-26. The law provides no other consequence.

2. The Two Situations in Which Appellees Have Faced Waiver Do Not Apply Here.

Appellees in North Carolina have occasionally faced waiver, but they have done so only in two scenarios that do not apply here.

The first scenario involves the old doctrine of "cross-assignments of error." That doctrine does not apply here, because the North Carolina Supreme Court abolished it in 2009. The Supreme Court struck from Appellate Rule 10 the requirement that appellees list alternative bases for affirmance in a record on appeal, on pain of waiver. See State v. Ray, 364 N.C. 272, 280 n.2, 697 S.E.2d 319, 323-24 n.2 (2010).

The successor concept in the rules—the cross-issue—lacks any waiver consequences. Rule 10(c) now expressly states: "An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues . . . ." N.C.R. App. P. 10(c). Moreover, even when the old Rule 10 did have waiver consequences, those consequences affected only the scope of appellate review, not the scope of a post-appeal remand. See, e.g., Moose v. Versailles Condo. Ass'n, 171 N.C. App. 377, 381 n.1, 614 S.E.2d 418, 421 n.1 (2005); Tate Terrace Realty Inv'rs, 127 N.C. App. at 224, 488 S.E.2d at 852. No version of Rule 10 has ever affected the scope of a remand.

The second waiver scenario arises when an appellee fails to take a required cross-appeal. That scenario, too, does not apply here.

A cross-appeal does not seek to affirm a trial court's decree on alternative grounds; instead, it attacks that decree. See Harllee v. Harllee, 151 N.C. App. 40, 51, 565 S.E.2d 678, 684-85 (2002). In a cross-appeal, an appellee "purport[s] to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered." Id.

This is not a cross-appeal case, because the City has never attacked the trial court's decree. On the contrary, in the trial court, the City obtained the judgment it sought: a declaration that the 2013 statute was invalid and an injunction against implementation of that statute.

3. Extinguishing Claims That a Trial Court Never Reached Would Be Unsound.

There are compelling reasons why courts have not applied waiver in a case like this one.

If this Court began to compel appellees to brief all of their claims—including claims that a trial court never reached, as here—that change in the law would have adverse consequences for the Court and litigants. It would make appellate briefs longer and more complex. It would require parties and this Court to spend extensive time on issues that might well prove academic, increasing the Court's already heavy workload.

In some cases, moreover, the alternative theories that would be forcibly injected into appeals would be constitutional claims. Forcing the Court to grapple with those claims would violate the principle that courts should avoid constitutional questions when it is not necessary to decide them. See Herndon v. Herndon, 777 S.E.2d 141, 146 (N.C. Ct. App. 2015), appeal pending, No. 363A15 (N.C. filed Nov. 2, 2015).

In sum, compelling the Court and parties to address alternative theories, on pain of waiver, would disserve a core purpose of the Appellate Rules: to expedite appellate review. See Anthony v. City of Shelby, 152 N.C. App. 144, 146, 567 S.E.2d 222, 225 (2002).

C. Even If the Court Wished to Announce a New Waiver Rule, It Would Be Unjust to Apply That Rule in This Case.

Finally, even if the Court wished to create a new rule that imposed waiver consequences on remand, it would be unjust to apply that new rule here. It would be unjust for at least three reasons:

- First, as shown above, existing rules and case law gave the City no warning that the non-briefing of alternative grounds could affect entire claims on remand.
- Second, the State has never argued for waiver here. See State Br. 4 n.1; supra p. 5.

- Third, eliminating Claims 4 and 5 would deprive the public of a decision on important issues in a major case.

To avoid such an injustice, the City requests that the Court apply Appellate Rule 2, if needed, to suspend the effect of any new interpretation of Rules 10(c) and 28(c). Rule 2 provides that this Court may "suspend or vary the requirements or provisions" of any appellate rule "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2; see also State v. Johnston, 173 N.C. App. 334, 338-39, 618 S.E.2d 807, 809-10 (2005) (discussing Rule 2 and its purpose).

Eliminating the City's impairment-of-contract claims in this Court, without a remand, would be a manifest injustice. The State never argued that the City was committing a waiver of any kind. Nor did the State dispute the City's express statement that if the Court reversed the judgment, Claims 4 and 5 would remain pending in the trial court. See City Br. 2 n.1.

Further, holding that a new waiver theory applied here would violate one of the purposes of the Appellate Rules: to ensure that parties have notice of the basis on which the Court might rule. See S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC, 189 N.C. App. 601, 617, 659 S.E.2d 442, 453 (2008); Hammonds v. Lumbee River Elec. Membership Corp., 178 N.C. App. 1, 13-15, 631 S.E.2d 1, 9-10 (2006).

Here, no rule or case law informed the City that it needed to brief claims that the trial court had not reached, or else forfeit those claims.

Suspending the effect of a new interpretation of Rule 10(c) would also expedite decision on a critical matter of public interest—whether a forced transfer of the City's water system would impair the City's bond obligations, in violation of the United States and North Carolina Constitutions.

The City uses revenue from the water system to satisfy bond obligations. Transferring the water system could force the City into default. (R pp 69-71) A bond default could prove disastrous for the City's credit ratings, jeopardizing the City's ability to issue bonds for capital expenditures in the future. (R pp 69-71)

Issues of this magnitude deserve to be resolved on their merits. Municipalities throughout the state, along with their creditors, will be anxious to know whether the State can produce a bond default with impunity.

In sum, the public interest calls for at least one court to decide Claims 4 and 5 on their merits. Such a decision should not be prevented by a novel interpretation of the Appellate Rules.

ATTACHMENTS

The City has attached the following items to this petition:

A. City of Asheville v. State, No. COA14-1255, slip op. (N.C. Ct. App. Oct. 6, 2015), certified copy.

B. Certificate of Gary L. Beaver

C. Certificate of Andrew H. Erteschik

D. Certificate of K. Edward Greene

E. Certificate of Ryke Longest

F. Certificate of Larry S. McDevitt

G. Certificate of William F. Wolcott, III

CONCLUSION

The City respectfully requests that the Court rehear this appeal and reconsider the merits of the City's constitutional claims.

The City also respectfully requests that this Court rehear this appeal and amend the Court's Opinion to clarify that the City has not waived Claims 4 and 5 on remand. Specifically, the City requests the following amendments:

- Replacement of the phrase in footnote 2, "therefore, it is not preserved," with the following phrase: "therefore, we reach no conclusion on that claim."

- Replacement of the first full sentence on page 26 of the slip opinion, "Therefore, any argument by Asheville based on these claims for relief are waived," with the following sentence: "Therefore, these claims are not before us."

Respectfully submitted this 9th day of November, 2015.

ELLIS & WINTERS LLP

/s/ Electronically submitted
Matthew W. Sawchak
N.C. State Bar No. 17059
matt.sawchak@elliswinters.com
P.O. Box 33550
Raleigh, North Carolina 27636
(919) 865-7000

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

CAMPBELL SHATLEY, PLLC

Robert F. Orr
N.C. State Bar No. 6798
bob@csedlaw.com
674 Merrimon Avenue, Suite 210
Asheville, NC 28804
(828) 398-2775

CITY OF ASHEVILLE
CITY ATTORNEY'S OFFICE

Robin T. Currin
N.C. State Bar No. 17624
rcurrin@ashevillenc.gov
P.O. Box 7148
Asheville, NC 28802
(828) 259-5610

Counsel for the City of Asheville

VERIFICATION

I, Robin T. Currin, being first duly sworn, verify that the statements in the attached petition are true to the best of my knowledge, information, and belief.

Robin T. Currin

Sworn and subscribed to me this 6 day of November, 2015.

Notary Public

My Commission Expires: 8/7/18

(AFFIX NOTARIAL SEAL)

JOHN ALEXANDER CARMICHAEL
Notary Public
Buncombe County
My Commission Expires
08/07/2018
NORTH CAROLINA

CERTIFICATE OF SERVICE

I certify that today, I caused the attached document to be served on all counsel by e-mail and U.S. mail, addressed to:

I. Faison Hicks, Esq.
North Carolina Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
fhicks@ncdoj.gov

William Clarke, Esq.
Roberts & Stevens, P.A.
P.O. Box 7647
Asheville, NC 28802
bclarke@roberts-stevens.com

Stephen W. Petersen, Esq.
Smith Moore Leatherwood, LLP
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
steve.petersen@smithmoorelaw.com

This 9th day of November, 2015.

/s/ Electronically submitted
Matthew W. Sawchak

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA14-1255

Filed: 6 October 2015

Wake County, No. 13-CVS-6691

CITY OF ASHEVILLE, a municipal corporation, Plaintiff,

v.

STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, NORTH CAROLINA, Defendants.

Appeal by Defendants from "Memorandum of Decision and Order Re: Summary Judgment" entered 9 June 2014 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 June 2015.

Parker, Poe, Adams & Bernstein LLP, by Daniel G. Clodfelter, City Attorney for the City of Asheville, by Robin T. Currin and Robert W. Oast, Jr., Long, Parker, Warren, Anderson & Payne, P.A., by Robert B. Long, Jr., and Moore & Van Allen PLLC, by T. Randolph Perkins, for the Plaintiff-Appellee.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General I. Faison Hicks, for the Defendant-Appellant.

Cauley Pridgen, P.A., by James P. Cauley, III, and Gabriel Du Sablon, for Amicus Curiae, the City of Wilson.

Kimberly S. Hibbard and Gregory F. Schwitzgebel, III, for Amicus Curiae, the North Carolina League of Municipalities.

DILLON, Judge.

The City of Asheville ("Asheville") commenced this action against the State of North Carolina, challenging the constitutionality of certain legislation enacted by our

General Assembly in 2013. A provision in this legislation requires Asheville to cede ownership and control of its public water system to another political subdivision. The trial court entered an order enjoining this involuntary transfer, concluding that the legislation violated the North Carolina Constitution.

We affirm the trial court's conclusion that Asheville has standing to challenge the authority of the General Assembly in this matter. We reverse the court's conclusions regarding the legislation's constitutionality and its injunction and remand the matter for further proceedings consistent with this opinion.

I. Background

The General Assembly has empowered municipalities to own and operate public water systems and public sewer systems and to serve customers both inside and outside of their corporate limits. N.C. Gen. Stat. § 160A-312.

Asheville is a municipality which owns and operates a public water system (the "Asheville Water System"). Asheville, however, does not operate a public sewer system. Rather, the public sewer system is owned and operated by a metropolitan sewerage district (an "MSD").[1] Like a municipality, an MSD is a type of political subdivision authorized by the General Assembly. N.C. Gen. Stat. § 162-64, *et seq.*

The relationship between Asheville and its water customers living outside of its corporate limits has historically been quite litigious, with many disputes resolved

[1] This MSD, known as the Metropolitan Sewerage District of Buncombe County, is the nominal defendant in this action.

through legislation from our General Assembly. *See Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958); *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

In 2013, our General Assembly enacted legislation (the "Water/Sewer Act") which withdraws from Asheville the authority to own and operate the Asheville Water System and transfers the System to the Buncombe County MSD as follows:

The Water/Sewer Act creates a new type of political subdivision known as a *metropolitan water and sewerage district* (an "MWSD"), empowered to run both a public water system and a public sewer system within a defined jurisdiction. An MWSD may be formed either *voluntarily* or *by operation of law*. An MWSD is formed *voluntarily* when two or more political subdivisions (*e.g.*, cities and MSD's) consent to form an MWSD to consolidate the governance of the public water and sewer systems in their region. N.C. Gen. Stat. § 162A-85.2.

A provision in the Water/Sewer Act (the "Transfer Provision") – the provision which is at the heart of this litigation – allows for the formation of an MWSD by operation of law. This provision states that the public *water* system belonging to a municipality or other political subdivision which meets certain criteria and which happens to operate in the same county that an MSD operates a public *sewer* system *must be transferred* to that MSD, upon which the MSD converts to an MWSD. *See* 2013 N.C. Sess. Laws 50, §§ 1(a)-(f), as amended by 2013 N.C. Sess. Laws 388, § 4.

Though the Transfer Provision does not *expressly* reference Asheville by name, the *only* public water system which currently meets all of the Transfer Provision's criteria for a forced transfer to an MSD is the Asheville Water System.

Asheville commenced this action, challenging the legality of the Transfer Provision on several grounds. The State moved to dismiss, contending that Asheville lacked standing to challenge the General Assembly's authority to enact the legislation. Also, both parties filed cross motions for summary judgment.

Following a hearing, the trial court entered an order recognizing Asheville's standing. The trial court enjoined the application of the Transfer Provision, concluding that it violated our state constitution on *three* grounds.

The State timely appealed.

II. Standard of Review

As this case involves the interpretation of a state statute and our state Constitution, our review is *de novo*. *See In re Vogler*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012).

III. Asheville's Standing

The trial court concluded that Asheville has standing to challenge the authority of the General Assembly to enact the Transfer Provision. We agree.

Our Supreme Court has expressly held that "municipalities [have] standing to test the constitutionality of acts of the General Assembly." *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 790, 488 S.E.2d 144, 146 (1997) (citing *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 328 N.C. 557, 402 S.E.2d 623 (1991) and *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987)).

In challenging Asheville's standing, the State cites *In re Appeal of Martin*, 286 N.C. 66, 209 S.E.2d 766 (1974), in which our Supreme Court held that a certain county lacked standing to challenge the constitutionality of a provision contained in a particular statute. However, the Court explained in *Town of Spruce Pine, supra,* that its holding in *Martin* was *not* that political subdivisions lack the authority to challenge the constitutionality of a statute *generally,* but rather that a political subdivision which *accepts the benefits* of part of a statute lacks standing to challenge another part of that same statute. *Town of Spruce Pine,* 346 N.C. at 790, 488 S.E.2d at 146 (distinguishing *Martin*). Here, Asheville has standing because it has not accepted any benefit from the 2013 Water/Sewer Act.

IV. Constitutionality of the Water/Sewer Act

The trial court held that the Transfer Provision was invalid under our North Carolina Constitution based on three separate grounds:

(1) the Transfer Provision is a "local law" relating to "health," "sanitation" and "non-navigable streams," in violation of *Article II, Section 24*;

(2) the Transfer Provision violates Asheville's rights under the "law of the land" clause found in *Article I, Section 19*; and
(3) the Transfer Provision constitutes an unlawful taking of Asheville's property without just compensation in violation of *Article I, Sections 19* and *35*.

We disagree and hold that the Transfer Provision does not violate these constitutional provisions.[2]

A. The General Assembly has plenary power regarding the political subdivisions in our State, except as restricted by the state and federal constitutions.

The plenary police power of the State is "vested in and derived from the people," *N.C. Const. Article I, § 2*; and "an act of the people *through their representatives in the legislature* is valid unless prohibited by [the State] Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989) (emphasis added). *See also Hart v. State*, ___ N.C. ___, ___, 774 S.E.2d 281, 287 (2015) (stating that the North Carolina Constitution "is not a grant of power, but [rather] *a limit* on the otherwise plenary police power of the State"); *Painter v. Wake County Bd. of Educ.*, 288 N.C. 165, 177, 217 S.E.2d 650, 658 (1975) (stating that "[a]n act of our General Assembly is legal when [the North Carolina] Constitution contains no prohibition against it").

[2] The trial court refused to rule on a fourth basis in support of the injunction, namely, that the Transfer Provision unlawfully impairs Asheville's contractual obligations with its bondholders who provided financing for its public water system, in violation of *Article I, Section 10* of the United States Constitution; *Article I, Section 19* of the North Carolina Constitution; and N.C. Gen. Stat. § 159-93. However, Asheville has not presented any argument regarding this fourth ground as "an alternative basis in law for supporting the [injunction]," N.C. R. App. P. 10(c), and, therefore, it is not preserved.

The General Assembly's power includes the authority to organize and regulate the powers of our State's municipalities and other political subdivisions. *See N.C. Const. art. VII, §1* (recognizing that the General Assembly has the power to regulate our towns and cities "except as [] prohibited by [our state] Constitution"). Our Supreme Court has repeatedly recognized this power. For example, in two cases in which Asheville was a party, the Court stated that the powers of a municipality "may be changed, modified, diminished, or enlarged [by the General Assembly, only] subject to the constitutional limitations," *Candler v. City of Asheville*, 247 N.C. 398, 407, 101 S.E.2d 470, 477 (1958), and that the authority accorded a municipality "may be withdrawn entirely at the will or pleasure of the [General Assembly]," *Rhodes v. Asheville*, 230 N.C. 134, 140, 52 S.E.2d 371, 376 (1949). *See also In re Ordinance*, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978) ("Municipalities have no inherent powers; they have only such powers as are delegated to them by [our General Assembly]"); *Highlands v. Hickory*, 202 N.C. 167, 168, 162 S.E. 471, 471 (1932) ("[Municipalities] . . . are the creatures of the legislative will, and are subject to its control").

Here, the General Assembly has sought to exercise its power over political subdivisions by enacting the Transfer Provision, which (1) creates a new political subdivision in Buncombe County (an MWSD), (2) withdraws from Asheville authority to own and operate a public water system, and (3) transfers Asheville's water system to the MWSD, all without Asheville's consent and without compensation to Asheville.

Early last century, our Supreme Court recognized our General Assembly's power to withdraw from the City of Charlotte its authority to operate its public water system and to transfer this system to a new political subdivision:

> It is clear that the Legislature may, in aid of municipal government or for the purpose of discharging any municipal functions, or for any proper purpose, create municipal boards and confer upon them such powers and duties as in its judgment may seem best. . . . The Legislature has frequently exercised the power conferred by the Constitution by establishing boards of health in towns and cities, school boards and such others as may be deemed wise as additional government agencies. *We do not understand that this power is questioned, or that the title to the [public water system] purchased by [Charlotte] did not pass to and vest in the board of water commissioners established by the act [of the Legislature].*

Brockenbrough v. Board of Water Comm'rs., 134 N.C. 1, 17, 46 S.E. 28, 33 (1903). The Court recognized that the waterworks of a municipality are, in fact, "held in trust for the use of the city." *Id.* at 23, 46 S.E. at 35. Additionally:

> There is no prohibition . . . against the creation by the Legislature of every conceivable description of corporate authority and to endow them with all the faculties and attributes of other pre-existing corporate authority. Thus, for example, there is nothing in the Constitution of this State to prevent the Legislature from placing the police department of [a municipality] or its fire department or its waterworks under the control of an authority which may be constituted for such purpose.

Brockenbrough, 134 N.C. at 18, 46 S.E. at 33. The Court noted that even the city of Charlotte, the plaintiff in *Brockenbrough*, "conced[ed] the power of the Legislature to

establish [a separate] board of water commissioners and to transfer to the said board the [waterworks] property of the city." *Id.* at 18, 46 S.E. at 33.

Accordingly, *unless prohibited by some provision in the state or federal constitutions*, our General Assembly has the power to create a new political subdivision, to withdraw from Asheville authority to own and operate a public water system, and to transfer Asheville's water system to the new political subdivision.

B. The three constitutional restrictions on the General Assembly's power cited by the trial court do not apply to the enactment of the Transfer Provision.

Asheville argues that the trial court correctly concluded that the Transfer Provision violates our state constitution. In our *de novo* review of the trial court's conclusions, we are guided by the following:

Our courts have the power to declare an act of the General Assembly unconstitutional. *See Hart*, ___ N.C. at ___, 774 S.E.2d at 284; *Bayard v. Singleton*, 1 N.C. 5 (1787).

We must not declare legislation to be unconstitutional unless "the violation is *plain and clear*," *Hart*, ___ N.C. at ___, 774 S.E.2d at 284 (emphasis added). We are to "indulge every presumption in favor of [an act's] constitutionality" and that "all reasonable doubt will be resolved in favor of its validity." *Painter*, 288 N.C. at 177, 217 S.E. at 658.

We are not to be concerned with the "wisdom and expediency" of the legislation, but whether the General Assembly has the "power" to enact it. *In re Denial*, 307 N.C.

52, 57, 296 S.E.2d 281, 284 (1982). As our Court has recognized in an opinion authored by Judge (now Chief Justice) Mark Martin, "courts have no authority to inquire into the *motives* of the [General Assembly] in the incorporation of [a] political subdivision[.]" *Bethania Town v. City of Winston-Salem*, 126 N.C. App. 783, 786, 486 S.E.2d 729, 732 (1997) (emphasis added).

And, finally, the burden in this case rests with Asheville to show beyond a reasonable doubt that the Transfer Provision violates some constitutional provision.

We now address the three constitutional grounds relied upon by the trial court in striking down the Transfer Provision.

1. Article II, Section 24 – Prohibition against certain types of local laws.

Asheville argues, and the trial court concluded, that the Transfer Provision violates *Article II, Section 24(1)(a)* and *(e)* of our state constitution, which prevents the General Assembly from enacting certain types of local laws. We disagree.

Taking effect in 1917, *Article II, Section 24* restricts the otherwise plenary power of our General Assembly to enact so-called "local" laws, by declaring void any "local" law concerning any of 14 "prohibited subjects" enumerated in that provision. *N.C. Const. art. II, § 24(1)(a)-(n).* Therefore, a law violates this constitutional provision *only* if it is deemed "local" *and* if it falls within the ambit of one of the 14 "prohibited subjects."

In the present case, the trial court held that the Transfer Provision is a local law and that it falls within the ambit of two "prohibited subjects": Laws "relating to health [or] sanitation" and laws "relating to non-navigable streams[.]" *N.C. Const. art. II, § 24(1)(a), (e).*

Our Supreme Court has stated that a law is either "general" or "local," but there is "no exact rule or formula" which can be universally applied to make the distinction. *Williams v. Blue Cross*, 357 N.C. 170, 183, 581 S.E.2d 415, 425 (2003). However, in the present case, we need not reach whether the Transfer Provision constitutes a "local law." Rather, we hold that it is not *plain and clear* and *beyond reasonable doubt* that the Transfer Provision falls within the ambit of either prohibited subject identified by the trial court.

Seven years ago, our Court grappled with this issue in a case involving these same parties and a constitutional challenge of three statutes regulating the Asheville Water System. *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 665 S.E.2d 103 (2008).

In the 2008 case, Asheville argued that every law which concerns a water or sewer system "*necessarily* relate[s] to health and sanitation" within the ambit of *Article II, Section 24(1)(a). City of Asheville*, 192 N.C. App. at 32, 665 S.E.2d at 126. Writing for this Court, our former Chief Judge John Martin rejected Asheville's argument, holding that "the mere implication of water or a water system in a

legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution." *Id.* at 37, 665 S.E.2d at 129.

Rather, we concluded that our Supreme Court precedent instructs that a local law is not deemed to be one "relating to health [or] sanitation" unless (1) the law plainly "state[s] that *its purpose is to regulate* [this prohibited subject]," or (2) the reviewing court is able to determine "that the purpose of the act is to regulate [this prohibited subject after] careful perusal of the entire act". *Id.* at 33, 665 S.E.2d at 126 (quoting *Reed v. Howerton*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924)). We noted that the best indications of the General Assembly's purpose are "the language of the statute, the spirit of the act, and what the act seeks to accomplish." *City of Asheville*, 192 N.C. App. at 37, 665 S.E.2d at 129 (*quoting State ex rel. Comm'r of Ins. v. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980)).

Following *Reed* and our 2008 case, we first look to see if the Water/Sewer Act expressly states that its purpose is to regulate health or sanitation, and conclude that it does not. Rather, the Act's *stated* purpose is to address concerns regarding the quality of the service provided to the customers of public water and sewer systems:

> Whereas, regional water and sewer systems provide reliable, cost-effective, *high-quality* water and sewer *services* to a wide range of residential and institutional customers; and
>
> Whereas, in an effort to ensure that the citizens and businesses of North Carolina are provided with the *highest quality services*, the State recognizes the value of regional

> solutions for public water and sewer for large public systems; Now, therefore,
>
> The General Assembly of North Carolina enacts . . . .

2013 N.C. Sess. Laws 50 (emphasis added).

We next peruse the entire Water/Sewer Act to determine whether it is plain and clear that the Act's purpose is to regulate health or sanitation. We find that there are no provisions in the Act which "contemplate[] . . . prioritizing the [Asheville Water System's] health or sanitary condition[.]" *See City of Asheville*, 192 N.C. App. at 36-37, 665 S.E.2d at 128. In fact, a provision in the Act allows for the "denial or discontinuance of [water and sewer] service" by an MWSD based on a customer's non-payment, *see* N.C. Gen. Stat. § 162A-85.13(c), which, as in the 2008 case, belies Asheville's argument that the purpose of the Act relates to health and sanitation. *See City of Asheville*, 192 N.C. App. at 35, 665 S.E.2d at 127. Rather, the provisions in the Water/Sewer Act appear to prioritize concerns regarding the governance over water and sewer systems and the quality of the services rendered. *See* N.C. Gen. Stat. § 162A-85.1, *et seq.*

Following this same analysis, we hold that the Water/Sewer Act does not fall within the ambit of the phrase "relating to non-navigable streams." The mere implication in legislation of a public water system which happens to derive water from a non-navigable stream "does not necessitate a conclusion that [the legislation] relates to [non-navigable streams] in violation of the Constitution." *City of Asheville*,

192 N.C. App. at 37, 665 S.E.2d at 129. There is nothing in the Water/Sewer Act which suggests that its purpose is to address some concern regarding a non-navigable stream.

Asheville cites five cases from our Supreme Court to argue that the Transfer Provision *is* a law "relating to health [or] sanitation," which we now address:

The most compelling of these case is *Drysdale v. Prudden,* 195 N.C. 722, 143 S.E. 530 (1928). *Drysdale* appears to stand for the proposition that an act which establishes a sanitary district (to provide public water/sewer service) is a local law *and* relates to health and sanitation. However, on closer look, the *Drysdale* Court only bases its ruling on the fact that the act is a local law – the Court never makes any determination regarding which of the 14 "prohibited subjects" was implicated by the act; and, therefore we assume that this issue was not put before the Court.

We read *Drysdale* in conjunction with *Reed, supra.* Like *Drysdale, Reed* is a 1920's case in which our Supreme Court addresses the constitutionality of a statute creating sanitary districts. *Reed,* 188 N.C. at 42, 123 S.E. at 479-80. However, unlike *Drysdale,* the Court in *Reed* held that the act in question, which (ironically) created sewer districts in Buncombe County, was constitutional. *Id.* at 45, 123 S.E. at 481-82. Specifically, the Court addressed the issue of whether the act was one "relating to health [or] sanitation," holding that *it was not,* because the language in the act did not suggest this to be the act's purpose, but rather the act merely sought to create

political subdivisions through which sanitary sewer service could be provided. *Id.* at 44, 123 S.E. at 481. The Court then addressed *separately* the issue of whether the act was local, though curiously holding that the act was not local because it applied to the entire county. *Id.* at 45, 123 S.E. at 481-82.

In any event, both cases provide insight on the issue as to whether a law is "local" or "general," and, admittedly, the Court's conclusion in *Drysdale* on this issue is more consistent with recent holdings from that Court, while the conclusion on the issue reached in *Reed* – that a law is "general" if it applies throughout one entire county – appears to be somewhat of an outlier. However, *Reed* is more instructive than *Drysdale* in determining whether an act "relat[es] to health [or] sanitation." *Id.* at 44, 123 S.E. at 481. The Court in *Reed* takes this issue head-on, while in *Drysdale* the Court never addresses the issue. Accordingly, as our Court did in 2008, we follow *Reed* on the issue as to whether a law relates to health or sanitation.

The other cases cited by Asheville do not mandate that we reach a contrary result in the present case. Three of these cases are distinguishable because they deal with legislation that empowers a political subdivision with authority *to enforce health regulations* in a county. *See City of New Bern v. Bd. of Educ.*, 338 N.C. 430, 437-38, 450 S.E.2d 735, 739-40 (1994) (authorizing Craven County to perform building inspections); *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951) (creating a city-county board of health in Forsyth County); *Sams v. Bd. of County Comm'rs*, 217

N.C. 284, 285, 7 S.E.2d 540, 541 (1940) (creating a county board of health in Madison County). In the present case, however, the Transfer Provision does not empower anyone to enforce health regulations, nor does it impose any health regulations on the Asheville Water System. Rather, similar to the act at issue in *Reed*, it merely creates the political subdivision through which public water and sewer systems may be provided in Buncombe County. *Reed*, 188 N.C. at 44, 123 S.E. at 481.

The fifth case cited by Asheville, *Lamb v. Bd. of Educ.*, is also not controlling. 235 N.C. 377, 70 S.E.2d 201 (1952). In *Lamb*, our Supreme Court declared unconstitutional an act which imposed a duty on the Randolph County Board of Education to provide "a sewerage system and an adequate water supply" for its schools. *Id.* at 379, 70 S.E.2d at 203. The Court held that this legislation *did* relate to health and sanitation because it was clear that "its sole purpose" was to make sure that school children in Randolph County had access to "healthful conditions" while at school. *Id.* The Water/Sewer Act, however, does not require any political subdivision to continue operating a water or sewer system.

2. Article I, Section 19 – "Law of the Land" Clause/Equal Protection

Asheville argues, and the trial court concluded, that the Transfer Provision violated the "law of the land" clause contained in *Article I, Section 19* because there is no "rational basis" in treating Asheville differently from other municipalities

operating public water systems and because there is no "rational basis" in transferring Asheville's water system to another political subdivision. We disagree.

The trial court cites *Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), as authority for its holding. In *Asbury*, our Supreme Court stated that our General Assembly "is under the same constitutional restraints that are placed upon it in respect of private corporations" when exercising power regarding a municipality's exercise of a proprietary function. *Id.* at 253, 78 S.E. at 149. However, we do not read *Asbury* as restricting the General Assembly's authority to *withdraw* authority from a political subdivision to engage in a proprietary function, a power recognized in *Article VII, Section 1* and in a number of other Supreme Court decisions. Rather, *Asbury* addresses the limitations to the General Assembly's power to *manage* certain aspects of a municipality's water system, standing for the propositions that (1) the General Assembly has the authority *to empower* a municipality to operate a public water system (or other proprietary endeavor); (2) the General Assembly, however, cannot *compel* a municipality to operate a water system (or other proprietary endeavor); and (3) where a municipality which has been empowered *and* has decided to operate a public water system, the General Assembly may regulate but cannot otherwise "control the exercise of [] discretion by the municipality" in operating the system. *Id.* at 255, 78 S.E. at 150.

Our holding here is not at odds with *Asbury*. The Transfer Provision does not *compel* Asheville to operate a water system nor does it seek to interfere with Asheville's *discretion* in running a water system. Rather, the General Assembly is exercising its power to *withdraw* from Asheville its authority to own and operate a public water system. *See Candler*, 247 N.C. at 407, 101 S.E.2d at 477 (recognizing the General Assembly's power to "diminish" the powers of a municipality).

Asheville contends, and the trial court agreed, that the General Assembly had no "rational" basis for *singling out* Asheville in the Transfer Provision. Assuming that the Transfer Provision has this effect, we believe that the fact that the General Assembly irrationally singles out one municipality in legislation merely means that the legislation is a "local" law; it does not render the legislation unconstitutional, *per se*. *See City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 435-36, 450 S.E.2d 735, 738-39 (holding that a law is local if there is no "rational basis reasonably related to the objective of the legislation" for singling out the class to whom the law applies); *McIntyre v. Clarkson*, 254 N.C. 510, 519, 119 S.E.2d 888, 894 (1961) (establishing the "reasonable classification" method to determine whether a law is general or local). As previously noted, the General Assembly can enact a local law concerning municipalities so long as the law does not fall within one of the 14 prohibited subjects enumerated in *Article II, Section 24* of our state constitution. *See City of Asheville*, 192 N.C. App. at 32, 665 S.E.2d at 126 (sustaining statutes

regulating the Asheville Water System though concluding that the singling out of Asheville was not based on any rational basis).

We are persuaded by decisions from the United States Supreme Court holding that municipalities do not have Fourteenth Amendment rights concerning acts of the legislature, *Ysursa v. Pocatello Educ. Assoc.*, 555 U.S. 353, 363 (2009) (holding that unlike a private corporation, a municipality "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator [the legislature]"), a rule which applies even when legislation affects a municipality's exercise of a proprietary function, such as operating a water system. *See Trenton v. New Jersey*, 262 U.S. 182, 190-91, 67 L. Ed. 937, 942 (1923) (holding that the distinction between a municipality acting "as an agent for the State for governmental purposes and as an organization to care for the local needs in a private or proprietary capacity . . . furnishes no ground to invoke [the Fourteenth Amendment of the United States]"); *see also Williams v. Baltimore*, 289 U.S. 36, 40, 77 L. Ed. 1015, 1020-21 (1933); *Rogers v. Brockette*, 588 F.2d 1057, 1067-68 (1979) (citing additional United States Supreme Court authority).

Finally, the trial court concludes that the Transfer Provision violates the "law of the land" clause because there is no rational basis between the purpose of the Act (to ensure that citizens and businesses are provided with the highest quality of services) and requiring the involuntary transfer of the Asheville Water System to an

MWSD. The trial court lists reasons why it believes that the Transfer Provision will not accomplish a legitimate purpose. However, the State suggests a number of rational bases for the Transfer Provision. For instance, the Transfer Provision was included to provide better governance of the Asheville Water System, a system which has had a contentious history with customers residing outside Asheville's city limits: The Transfer Provision allows the Asheville Water System to be governed by a political subdivision whose representatives are selected from all areas served by the System, as opposed to being governed by Asheville's city council, which is chosen only by those living within Asheville's city limits. It is not our role to second-guess "the wisdom [or] expediency" of the Transfer Provision, as long as there is some rational basis in that provision to accomplish some valid public purpose. *See In re Denial*, 307 N.C at 57, 296 S.E.2d at 284.

Accordingly, we reverse the conclusion of the trial court that the Transfer Provision violates the "law of the land" clause in our state constitution.

3. Article I, Sections 19 and 35 – Taking of Asheville's Property

Asheville argues, and the trial court held, that the Transfer Provision exceeded the State's authority to take property, or, in the alternative, to take property without paying just compensation in violation of *Article I, Sections 19* and *35* of our state constitution. We disagree.

Article I, Section 19 of our state constitution states that no person shall be "deprived of . . . property, but by the law of the land," and *Article I, Section 35* states that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

The trial court concluded that the Transfer Provision violates the above cited sections in two respects: First, the Transfer Provision was "not a valid exercise of the sovereign power of the [General Assembly] to take or condemn property for a public use" because the transfer of Asheville's water system to the MSD would not result in any "change in the existing uses or purposes currently served by the [system]"; and second, even if the General Assembly had the power to "condemn" Asheville's water system, it deprived Asheville of its constitutional right to receive "just compensation."

On the first issue, we note that our Supreme Court has recognized the authority of our General Assembly to divest a city of its authority to operate a public water system and transfer the authority and assets thereof to a different political subdivision. *See Brockenbrough*, 134 N.C. at 19, 46 S.E. at 33 (recognizing that the waterworks of a municipality are, in fact, held "in trust for the use of the city").

Our United States Supreme Court has held that there is no constitutional prohibition against a State withdrawing from a municipality the authority to own and operate a public water system and transferring the municipality's system to

another political subdivision "without compensation" to the municipality or "without the consent" of the municipality's citizens:

> The diversion of waters from the sources of supply for the use of the inhabitants of the State is a proper and legitimate function of the State. This function . . . may be performed directly [by the State]; or it may be delegated to bodies politic created for that purpose, or to the municipalities of the State. . . .
>
> . . . . The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies. . . . All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

Trenton v. New Jersey, 262 U.S. at 186, 67 L. Ed. at 940. *See also Hunter v. Pittsburgh*, 207 U.S. 161, 178-79, 52 L. Ed. 151, 159-60 (1907). The *Trenton* Court specifically addressed that its holding applied even to State action concerning a municipality acting in a proprietary capacity. *Trenton*, 262 U.S. at 191, 67 L.E. at 943.

Our holding today is consistent with holdings from around the United States. As the treatise *McQuillan on Municipal Corporations* recognizes, "it is generally held that transferring property and authority by act of the legislature from [a city] to another where the property is still devoted to its original purpose, does not invade the vested rights of the city." *McQuillan*, sec. 4.133, Vol. 2. Indeed, the Minnesota Supreme Court has stated:

> "[a]s to property held in a proprietary or private capacity, in trust for the benefit of township inhabitants for certain designated purposes, the legislature may provide for the transfer thereof from the officers of such municipality to different trustees, with or without consent of the municipality and without compensation to it.

Bridgie v. Koochiching, 35 N.W.2d 537, 540 (1948). Likewise, the Pennsylvania Supreme Court has stated:

> The Commonwealth has absolute control over such agencies and may add to or subtract from the duties to be performed by them, or may abolish them and take property with which the duties were performed without compensating the agency thereof.

Chester County v. Commonwealth, 17 A.2d 212, 216 (1941). *See also Orleans Parish v. New Orleans*, 56 So.2d 280, 284; *Hickey v. Burke*, 69 N.E.2d 33 (1946) (Ohio court recognizing power to "relieve [a] municipality of [certain] duties and withdraw the power. If property has been acquired, it may shift the title and control to other agencies[.] . . . without compensation").

None of the cases cited by Asheville in its argument address the situation where the General Assembly acts to take the property of a municipality used to carry on a proprietary function and transfers it to another political subdivision to carry out the same function. For instance, *State Hwy. Comm'n v. Greensboro Bd. of Educ.*, 265 N.C. 35, 143 S.E.2d 87 (1965) and *Bd. of Transp. v. Charlotte Park & Rec. Comm'n*, 38 N.C. App. 708, 248 S.E.2d 909 (1978) merely stand for the proposition that where one governmental agency charged with building roads condemns the property of

another agency who owns property for purposes unrelated to building roads, the condemning agency must pay just compensation.

Accordingly, we hold that the Transfer Provision does not constitute an unlawful taking without just compensation.

V. Conclusion

In conclusion:

We affirm the portion of the trial court's order denying the State's motion to dismiss, rejecting the State's argument that Asheville lacked standing or capacity to challenge the validity of the Transfer Provision.

We reverse the trial court's grant of summary judgment for Asheville on its first claim for relief, which declared that the Transfer Provision constitutes a local act relating to health, sanitation or non-navigable streams in violation of *Article II, Sections 24(1)(a)* and *(e)* of our state constitution. Specifically, we hold that, assuming it is a local act, it does not "relate to" health, sanitation, or non-navigable streams within the meaning of our state constitution. We also reverse the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its second claim for relief, which declared that the Transfer Provision violates the "law of the land" clause in *Article I, Section 19* of our state constitution. We also reverse

the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its third claim for relief, which declared that the Transfer Provision violates *Article I, Sections 19* and *35* of our state constitution, as an invalid exercise of power to take or condemn property. We also reverse the trial court's grant of summary judgment on Asheville's sixth claim for relief, which, in the alternative to the injunction, awarded Asheville money damages for the taking of the Asheville Water System. We also reverse the trial court's denial of the State's motion for summary judgment on these claims, and direct the court on remand to enter summary judgment in favor of the State on these claims.

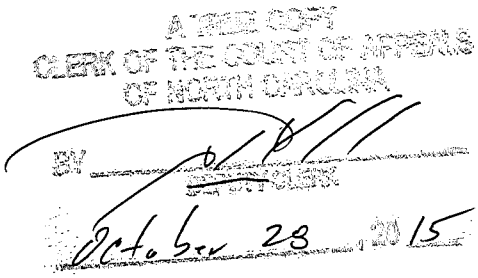
We reverse the trial court's order enjoining the enforcement of the Transfer Provision.

We do not reach any conclusion regarding Asheville's fourth and fifth claims for relief, in which Asheville contends that the enforcement of the Transfer Provision would impermissibly impair obligations of contract in violation of our state and federal constitutions and in violation of N.C. Gen. Stat. § 159-93. The trial court made no rulings on these claims, and Asheville did not take advantage of Rule 10(c) of our Rules of Appellate Procedure, which allows an appellee to propose issues which

form "an alternate basis in law for supporting the order[.]" Therefore, any argument by Asheville based on these claims for relief are waived.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Judges CALABRIA and ELMORE concur.



No. COA14-1255 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

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

****

CERTIFICATE OF GARY L. BEAVER
IN SUPPORT OF PETITION FOR REHEARING

****

I, Gary L. Beaver, certify that:

1. I am submitting this certificate under Rule 31(a) of the North Carolina Rules of Appellate Procedure in support of the Plaintiff's petition for rehearing in this case.

Attachment B

2. I am a partner in the law firm of Nexsen Pruet, PLLC, in which I primarily practice commercial litigation. I am also a member in good standing of the North Carolina Bar. I was first admitted in 1982 following graduation from Duke University School of Law that year. I am the current chairman of the North Carolina Bar Association's Appellate Rules Committee. I have served on that committee for over 10 years. I have no interest in the subject of this case, and I have not been counsel for any party to the case.

3. I have carefully examined the decision of the Court of Appeals in this case, and I have considered the authorities cited in that decision. Based on my examination of the decision of the Court of Appeals, it appears to be erroneous in that it implies that the City of Asheville has waived its fourth and fifth claims of relief -- claims which were not in issue before the Court of Appeals and not ruled upon by the trial court.

4. On the last page of its opinion, the Court of Appeals noted that the trial court had "made no rulings on" Asheville's fourth and fifth claims of relief and that therefore, the Court of Appeals did "not reach any conclusion regarding" those claims. Nevertheless, the Court of Appeals stated that Asheville waived these claims because it "did not take advantage of Rule

10(c) of our Rules of Appellate Procedure, which allows an appellee to propose issues which form 'an alternate basis in law for supporting the order[.]'" The Court of Appeals has misconstrued the permissive language of Rule 10(c) that an appellee "may list" such issues, treating that rule as if it stated that an appellee "must list and brief" such issues or waive them forever. Actually, Rule 28(c) of the North Carolina Rules of Appellate Procedure rather than Rule 10(c) governs briefing requirements and it provides that an appellee "may present" such issues. Like Rule 10(c), Rule 28(c) permits but does not require such presentation as it does not include language such as "must present" regarding such issues. I am not aware of any North Carolina rule or decision that holds that not briefing an alternative ground for affirmance waives a claim on remand. Such a first-time holding would be particularly unfair and inappropriate where the alternative ground was not addressed at all by the trial court in the decision appealed.

5. In 2009, the North Carolina Supreme Court rid the appellate system of the old assignments of error requirement that required an appellant to identify every ground for appeal or waive it. To now add a drastic consequence for appellees to require them to identify and brief every alternative ground for

supporting the decision that the appellants are appealing, including those that were not even addressed by the trial court, seems to be contrary to the evolution of the appellate rules.

6. The Court's reliance on Rule 10(c) as the basis for this new waiver consequence appears to be particularly incorrect because Rule 28(c) allows an appellee to brief an alternative ground for affirmance whether or not that ground is listed by the appellee under Rule 10(c) as an alternative ground for affirmance among the proposed issues on appeal.

7. Prior to the decision of the Court of Appeals in this case, no North Carolina rule or decision had established the waiver consequence suggested by the Court's decision in this case. If the Court wishes to create such a waiver consequence, then it ought to provide to all appellate parties, including Asheville, adequate notice of that consequence so that they may act to avoid it. Here, Asheville had no notice of the new waiver consequence prior to its creation by the Court of Appeals and, therefore, did not receive fair and adequate due process.

8. The normal path for a change to the appellate rules is adoption by the North Carolina Supreme Court. Judicially creating the new waiver consequence would, at a minimum, stand

in tension with the North Carolina Supreme Court's authority to establish the rules governing appellate procedure in this state.

9. There are other strong policy reasons why creating this new waiver consequence may not serve the interests of economically serving justice. Appellees would be forced to needlessly brief many more issues than they currently brief to the Court.

a. Creating a waiver consequence for not doing what Rule 10(c) simply allows will inevitably result in longer, more complex briefs and a much greater expenditure of time, effort, and money by parties and of time and effort by the Court to consider issues that, now, are often left unaddressed. I, for one, would feel compelled to address in an appellee brief every possible ground for support of every claim made by my client even if the trial court decided and the appellant briefed but one issue concerning one claim in a case where my client had made a dozen claims.

b. The additional issues, briefing, and time expenditures are likely to further burden an already heavily burdened Court of Appeals and, consequently, lead to delays in adjudicating appeals at the current pace.

10. Prior to this case, the only consequence to an appellee for not asserting potential alternative grounds for affirmance was to reduce the number of grounds upon which the appellate court might provide affirm. Until now, if a reversal occurred, that harm was suffered and nothing more. The appellee was not punished by being barred on remand from proceeding on claims and issues that neither the trial court nor the appellate court had ever addressed. If such a consequence is to be mandated, it ought to be under the North Carolina Supreme Court's appellate rule-making authority with ample notice to all appellate parties.

For these reasons, I respectfully suggest that it would be appropriate for the Court to rehear this case.

This 5th day of November, 2015.

Gary L. Beaver

Gary L. Beaver

No. COA14-1255 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County

****

RULE 31 CERTIFICATE OF ANDREW H. ERTESCHIK

****

I, Andrew H. Erteschik, state as follows:

1. I am a partner with the law firm of Poyner Spruill LLP. I have been a member of the North Carolina Bar since 2006.

2. My law practice focuses on appeals. My involvement in the appellate bar includes serving on the NCBA Appellate Rules Committee, the Section Council of the NCBA Appellate Practice Section, and the ABA Judicial Division Amicus Committee. I have served as an adjunct professor of appellate advocacy at

the UNC School of Law. I began my career as a law clerk to Justice (now Chief Justice) Mark D. Martin of the Supreme Court of North Carolina.

3. I have no personal or pecuniary interest in the subject of this action. I do not represent any party to this action.

4. I have carefully examined this appeal and the authorities cited in the Court's 6 October 2015 decision. As set forth below and in the City of Asheville's petition for rehearing, I believe the Court erred when it described the consequences of Asheville's decision not to raise alternative grounds for affirming the trial court.

5. Page 25 of the Court's opinion correctly states that the Court did "not reach any conclusion regarding Asheville's fourth and fifth claims for relief." However, the end of that paragraph, as well as footnote 2 on page 6 of the opinion, states that because Asheville did not raise these issues as alternative grounds for affirming the trial court, its fourth and fifth claims were "waived."

6. The Court's use of the word "waived" could be misconstrued to imply that these claims are waived on remand—that is, that they should be *dismissed* on remand. That is not the law in North Carolina. No North Carolina rule or decision holds that if alternative grounds for affirming the trial court are not raised in the appellate courts, they are waived on remand.

7. On the contrary, Rules 10(c) and 28(c) of the North Carolina Rules of Appellate Procedure are permissive. *See* N.C. R. App. P. 10(c) (providing that an

appellee "may list" such issues in the record on appeal); *see also* N.C. R. App. P. 28(c) (providing that an appellee "may present" such issues in briefing). The permissive nature of Rules 10(c) and 28(c) protects parties who win in the court below: if they choose not to raise alternate grounds for affirming the trial court, they are not deprived of their day in court on claims that the trial court never reached.

8. Here, however, the Court's decision could be misconstrued as implying that when Asheville chose not to raise its fourth and fifth claims as alternative arguments on appeal, it forfeited those claims in the trial court even though no court ever adjudicated those claims. I do not believe this is what the Court intended.

9. The Court's decision also has implications beyond this appeal. If left unaddressed, the Court's decision could usher in a *Viar*-esque era where appellees must load up their briefs with layers of alternative arguments or risk having various claims dismissed on remand. Motivating this kind of behavior would be counterproductive. It would create new and unnecessary risks for appellate litigants while simultaneously increasing our appellate courts' workload for no reason. I do not believe this is what the Court intended.

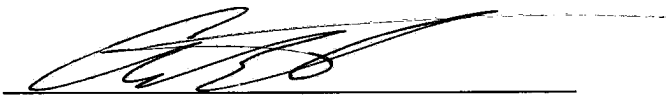
10. Asheville's proposal of replacing the last phrase in footnote 2 and the first full sentence on page 26 of the Court's opinion fully corrects the issue in

efficient fashion. This simple revision would not only avoid any misunderstandings on remand in this particular case, but would also protect against unintended consequences in future cases.

11. For these reasons, I respectfully urge the Court to rehear this appeal and amend its 6 October 2015 opinion as set forth in Asheville's petition for rehearing.

Respectfully submitted the 10th day of November, 2015.

POYNER SPRUILL LLP

By: 

Andrew H. Erteschik
N.C. State Bar No. 35269
aerteschik@poynerspruill.com
P.O. Box 1801
Raleigh, NC 27602-1801
Telephone: 919.783.2895
Facsimile: 919.783.1075

No. COA14-1255 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

CITY OF ASHEVILLE, a Municipal Corporation,	)	
Plaintiff,	)	
v.	)	From Wake County
STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY,	)	
Defendants.	)	

****

CERTIFICATION OF K. EDWARD GREENE IN SUPPORT OF PLAINTIFF-APPELLEE'S PETITION FOR REHEARING

****

TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS:

K. Edward Greene respectfully submits the following certification in support of rehearing under N.C.R. App. P. 31(a):

1. I am an attorney with Wyrick, Robbins, Yates & Ponton LLP, located in Raleigh, North Carolina. I have been a member of the North Carolina Bar since the fall of 1969. I served on this Honorable Court between 1986 and 2002. My current practice includes a focus on North Carolina State Court appellate matters

Attachment D

and I practice regularly before both this Court and the Supreme Court of North Carolina.

2. I have no interest in this subject matter of this action and have not been counsel for any party to this action.

3. I have carefully examined this appeal, including the authorities cited in this Court's opinion filed on 6 October 2015 and the Plaintiff-Appellee's Petition for Rehearing. I respectfully consider this Court's opinion in error, in particular as it relates to this Court's suggestion the City of Asheville either failed to preserve or waived any arguments it may have now and in the future on its Fourth and Fifth Claims for relief.

4. First, in Footnote 2 of this Court's opinion, this Court states: "However, Asheville has not presented any argument regarding this fourth ground as 'an alternative basis in law for supporting the [injunction],' N.C. R. App. P. 10(c), and, therefore, it is not preserved." (Slip op p 6). This statement is in error because, as this Court noted, the trial court declined to rule on this fourth ground. Thus, there is no ruling from the Court on this ground and, therefore, there was no ruling to be "preserved" on appeal. N.C.R. App. P. 10(a) makes this clear by requiring for an issue to be "preserved" for appeal: "It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." N.C.R. App. P 10(a). In the absence of a ruling by the trial court on the

Fourth Claim for relief, there was no issue for the City of Asheville to propose in the alternative or for this Court to review. Nor was there reason for the City of Asheville to obtain a further ruling from the trial court because the City was not "the complaining party."

5. Second, in its Conclusion, this Court's opinion states:

> We do not reach any conclusion regarding Asheville's fourth and fifth claims for relief, in which Asheville contends that the enforcement of the Transfer Provision would impermissibly impair obligations of contract in violation of our state and federal constitutions and in violation of N.C. Gen. Stat. § 159-93. The trial court made no rulings on these claims, and Asheville did not take advantage of Rule 10(c) of our Rules of Appellate Procedure, which allows an appellee to propose issues which form "an alternate basis in law for supporting the order[.]" *Therefore, any argument by Asheville based on these claims for relief are waived.*

(Slip op pp 25-26) (emphasis added).

6. As an initial matter, an Appellee is never required to present proposed issues in the Record on Appeal. Rule 10(c) is clearly permissive in nature, providing:

> Without taking an appeal, an appellee *may* list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which the appeal has been taken.

N.C.R. App. P. 10(c) (emphasis added). Indeed, an appellee's list of proposed issues has no preclusive effect on the issues before the Court: "An appellee's list of

proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief." Id. Thus, the decision not to list issues in the alternative under N.C.R. App. P. 10(c) by an Appellee cannot be deemed a "waiver" of those issues.

7. This is surely true where a trial court has made no ruling on those issues. Rule 10(c) can only be interpreted to apply where the trial court has made a ruling which constitutes an act or omission giving rise to an alternative basis for affirmance.

8. The consequences of requiring an appellee to preserve for appeal every issue upon which the trial court did not rule and which remain pending below are troubling. First, it places this Court in the position of sitting as a Court of first impression on those issues and not as a Court of review. Second, it would greatly increase the complexity of appellate litigation under North Carolina law as every appellee would be effectively required to brief, as alternative bases for affirmance, every ground which remained pending in the trial court below.

9. The facts (1) the trial court limited its decision to only those grounds it believed necessary to the decision below; and (2) the City of Asheville defended on appeal only those grounds upon which the trial court actually ruled, do not constitute a waiver of the grounds which were not decided. This Court should, in

summary, instead conclude the Fourth and Fifth Claims for Relief made by the City of Asheville are merely not before this Court in this appeal.

10. I respectfully submit this Honorable Court should take rehearing of this matter to correct the errors identified herein.

Respectfully submitted, this the 5th day of November 2015.

WYRICK ROBBINS YATES & PONTON LLP

By: _____

K. Edward Greene
N.C. Bar No. 1749
Post Office Drawer 17803
Raleigh, NC 27619
Telephone: (919) 781-4000
Facsimile: (919) 781-4865
Email: egreene@wyrick.com

No. COA 14-1255 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff-Appellee, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants-Appellants.	)	From Wake County No. 13 CVS 6691

****

CERTIFICATE OF RYKE LONGEST
IN SUPPORT OF PETITION FOR REHEARING

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, I, James Patrick Longest, Jr. "Ryke", submit and present this Certificate in Support of the Petition for Rehearing of Plaintiff-Appellee, the City of Asheville, in the above-captioned case (the "Petition").

In support of the Petition, I certify unto the Court as follows:

1. I have been a member of the North Carolina State Bar since 1991 and my Bar Number is 18297.

Attachment E

2. I worked for 14 years with the N.C. Department of Justice in its Environmental Division. I have worked for the past eight years as Director of Environmental Law and Policy Clinic at Duke University School of Law and serve as a Clinical Professor of Law. My law practice and my law teaching have primarily focused on environmental law, administrative law and water resources law.

3. I have no interest in the subject of this action.

4. I have not been counsel for any party to this action.

5. I have carefully examined the appeal in this case, including the Record and Briefs of the parties, the Court of Appeals' October 6, 2015 Opinion, the authorities cited in the Opinion, and the Petition for Rehearing. Based on that examination, I consider the Petition to be well-founded, and I would urge the Court to grant the Petition and to rehear this case, based on the points set forth in the City's Petition. Specifically, and respectfully, I consider the following bases of the Opinion to be in error:

a. The Court's holding that N.C. Session Laws 2013-50 (and later amended by N.C. Session Laws 2013-388) (hereinafter the "Water Act") does not violate Article II, Section 24(1)(a) of the North Carolina Constitution.

b. The Court's holding that the City did not have the right to challenge the Water Act's violation of the Law of the Land Clause.

c. The Court's holding that the Water Act was not a taking of the City's property and that the City is not entitled to a just compensation.

d. The Court's holding that the City may have waived its Fourth and Fifth Claims based on the City's failure to present arguments on these claims to the Court of Appeals pursuant to N.C.R. App. P. 10(c).

RESPECTFULLY SUBMITTED this the 9th day of November, 2015.

James Patrick Longest, Jr. "Ryke"
N.C. Bar # 18297
Duke University School of Law
Box 90360
Durham, NC 27708
919-613-7207

No. COA 14-1255 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff-Appellee, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants-Appellants.	)	From Wake County No. 13 CVS 6691

****

CERTIFICATE OF LARRY McDEVITT
IN SUPPORT OF PETITION FOR REHEARING

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, I, Larry S. McDevitt, submit this Certificate in Support of a Petition for Rehearing (the "Petition"), in this case, filed by the Petitioner, the City of Asheville.

In support of said Petition, I certify unto the Court as follows:

1. I have been a member of the North Carolina State Bar since 1968, and my Bar Number is 5032.

Attachment F

2. I am past State Bar Chair of IOLTA, Past President of the North Carolina Bar Association, for 11 years North Carolina's sole State Delegate to the American Bar Association, and past President of the 28th Judicial District Bar. The focus of my law practice is civil litigation.

3. I am the Senior Principal in The Van Winkle Law Firm and its past President. While my main office is in Asheville, I am also the Managing Principal of its Charlotte office.

4. I have no interest in the subject of this action.

5. I have not been counsel for any party to this action.

6. I have carefully examined the appeal in this case, the Court of Appeals' October 6, 2015 Decision, and the authorities cited in the Decision. Based on that examination, I consider the Petition to be well-founded, and I would urge the Court to grant the Petition and to rehear this case based on the points set forth below immediately following each holding in question, as well as other points. Specifically, and respectfully, I consider the Decision to be in error as follows:

a. The Court's holding that N.C. Session Laws 2013-50 (and later amended by N.C. Session Laws 2013-388)(hereinafter the "Water Act") does not relate to health or sanitation and does not violate Article II, Section 24(a)(1) of the North Carolina Constitution.

i. Among other reasons, the Decision overlooked specific language in the Water Act creating the Metropolitan Water and Sewer District (hereinafter "MWSD") providing that such district is a public entity "...exercising public and essential governmental functions to provide for the preservation and promotion of the public health and welfare..." and has all the powers of a metropolitan water district and a metropolitan sewer district, except to levy taxes. N.C.G.S. 162A-85.5 This specifically brings the Water Act within the prohibition of said Section 24(a)(1) of the North Carolina Constitution and should render it unconstitutional.

ii. Further, the Decision overlooked N.C.G.S. 162A-85.25 providing that such district "...shall have the same power as a City under G.S. 160A-175 to assess civil fines and penalties for violations of its ordinances..." thus giving it the power of enforcement of law related to health and sanitation. Under the cases cited in the Decision, it is clear that by transferring the assets of the Asheville Water System to the MWSD for the "... promotion of the public health..." and by granting the MWSD the power to enforce the laws relating to health and sanitation, the Water Act is related to health and sanitation within the meaning of Article II, Section 24

of the North Carolina Constitution. Thus, the Water Act should be declared void and unconstitutional.

iii. Also, the Decision incorrectly concluded that Drysdale v. Prudden, 195 N.C. 722, (1928), was not applicable, when in fact, it is directly on point. In Drysdale a special sanitary and maintenance district was attempted to be created within Henderson County by local legislation. It was given the powers—among many others--to enter into agreements with the owners of existing water supplies and sewage systems and to keep the same in proper working order. The Supreme Court held that the creation of said District violated a prior provision of the State Constitution (Article II, Section 29) which is similar in all relevant respects to said Section 24 of the North Carolina Constitution above. One of the purposes of the prohibited act in Drysdale was, as in the case before this Court, the promotion of public health through a local act. The Court in Drysdale found that the act was unconstitutional for that and other reasons. This Court should do the same with the appeal before it and rehear this appeal to that end.

b. The Court's holding that Article I, Section 19 of the North Carolina Constitution does not apply to restrict the General Assembly's authority

to transfer the City's water system to another public body by legislative act.

This conclusion is contrary to the holding of Asbury v. Albemarle, 162 N.C. 247, 253 (1913) wherein the North Carolina Supreme Court held: "In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power, but as to its private or propriety functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." All North Carolina case law holds the furnishing of water to be a propriety function of government. Mosseller v. City of Asheville, 267 N.C. 107 (1966), Fussell v. NC Farm Bureau Mut. Ins. Co., 364 N.C. 222, (2010); Thus, said Section 19 is clearly applicable here and should invalidate the Water Act.

c. The Court's holding that there was a rational basis between the purpose of the Water Act for better governance, or similar reasons, of the water system of the City of Asheville owned and operated by it in a propriety capacity.

Again, Asbury v. Albemarle, supra, held that the foregoing was not a proper subject for legislation. That precedent should be applied here to render the Water Act void.

d. The Court's holding that Asheville is not entitled to just compensation for the taking of its property held in a proprietary capacity.

As before, this is clearly contrary to the holding of the North Carolina Supreme Court in Asbury v. Albemarle, supra, in which the Supreme Court of North Carolina recognized the limitations upon the legislature with respect to legislation regarding properties so held. There can be no dispute that, under the Water Act, the property of the City of Asheville was held in a proprietary capacity and was taken and transferred to the MWSD without any compensation. This is illegal under Asbury and should be declared so.

RESPECTFULLY SUBMITTED this the 9th day of November, 2015.

Larry S. McDevitt
State Bar Number 5032
P.O. Box 7376
Asheville, NC 28802
828-258-2991

No. COA 14-1255 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff-Appellee, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants-Appellants.	)	From Wake County No. 13 CVS 6691

****

CERTIFICATE OF WILLIAM F. WOLCOTT, III IN SUPPORT OF PETITION FOR REHEARING

****

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

NOW COMES William F. Wolcott, III, pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, and presents this Certificate in Support of the Petition for Rehearing of Plaintiff-Appellee, the City of Asheville, in the above-captioned case (the "Petition").

In support of the Petition, I certify unto the Court as follows:

1. I have been a member of the North Carolina State Bar since 1972, and my Bar Number is 4807. I am currently active in the practice of law with a focus on commercial real property law.

Attachment G

2. I am past President of the 28th Judicial District Bar.

3. I have no interest in the subject of this action.

4. I have not been counsel for any party to this action.

5. I have carefully examined the appeal in this case, including the Record and Briefs of the parties, the Court of Appeals' October 6, 2015 Opinion, the authorities cited in the Opinion, and the Petition for Rehearing. Based on that examination, I consider the Petition to be well-founded, and I would urge the Court to grant the Petition and to rehear this case, based on the points set forth in the City's Petition. Specifically, and respectfully, I consider the following bases of the Opinion to be in error:

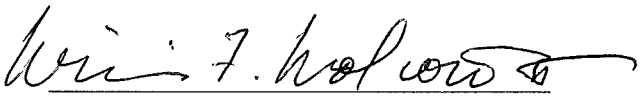
a. The Court's holding that N.C. Session Laws 2013-50 (and later amended by N.C. Session Laws 2013-388) (hereinafter the "Water Act") does not relate to health and sanitation and does not violate Article II, Section 24(1)(a) of the North Carolina Constitution.

b. The Court's holding that the Water Act was not a taking of the City's property and that the City is not entitled to a just compensation.

c. The Court's holding that the City may have waived its Fourth and Fifth Claims (which alleged the unlawful and unconstitutional impairment of its contractual obligations) based on the City's failure to present

arguments on these claims to the Court of Appeals pursuant to N.C.R. App. P. 10(c).

RESPECTFULLY SUBMITTED this the 9th day of November, 2015.



William F. Wolcott, III
N.C. State Bar No. 4807
P.O. Box 2020
Asheville, NC 28802
(828) 348-6014