No. 391PA15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CITY OF ASHEVILLE, a municipal corporation	)	
v	)	From Wake County
	)	No. 13CVS6691
STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY	)	No. COA14-1255

****

MOTION FOR TEMPORARY STAY
(Filed 24 November 2015)
(Allowed 25 November 2015)
and
PETITION FOR WRIT OF SUPERSEDEAS
(Filed 24 November 2015)
(Allowed 28 January 2016)
and
NOTICE OF APPEAL
(Constitutional Question)
(Filed 24 November 2015)
(Retained 28 January 2016)
and
PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31
(Filed 24 November 2015)
(Allowed 28 January 2016)
and
MOTION TO DISMISS APPEAL
(Filed 7 December 2015)
(Denied 28 January 2016)

****

No. 391PA15

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County No. COA14-1255

****

UNOPPOSED PETITION FOR WRIT OF SUPERSEDEAS AND UNOPPOSED MOTION FOR A TEMPORARY STAY

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No. 391PA15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County No. COA14-1255

****

UNOPPOSED PETITION FOR WRIT OF SUPERSEDEAS AND UNOPPOSED MOTION FOR A TEMPORARY STAY

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 23(b) of the North Carolina Rules of Appellate Procedure, the City of Asheville respectfully petitions this Court to issue a writ of supersedeas and a temporary stay of the enforcement of the decision of the Court of Appeals in City of Asheville v. State, No. COA14-1255, slip op. (N.C. Ct. App. Oct. 6, 2015) [copy attached].

The City has filed a timely notice of appeal from the decision of the Court of Appeals, as well as a petition for discretionary review. As shown below, the stay requested here is needed to preserve the status quo while this Court considers this notice and petition. See N.C. R. App. P. 23(b).

Defendants the State and the Metropolitan Sewerage District of Buncombe County do not oppose this petition and motion.

BACKGROUND

In 2013, the General Assembly enacted a statute that would take away the City's water system. The water system would be given to the sewer authority that serves much of Buncombe County. 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; slip op. at 3-4. The sewer authority would become a "metropolitan water and sewer district"—a new type of local-government entity. See slip op. at 3.

The City filed this lawsuit to challenge the legality of the 2013 Act. (R pp 59-83) The City alleged that the Act violates article II, section 24 of the North Carolina Constitution, which prohibits local laws relating to health, sanitation, and non-navigable streams. (R pp 71-72) The City also alleged that the Act violates

article I, section 19 of the Constitution, because the statute takes the City's property without just compensation. (R pp 75-76, 79-80)

The trial court granted summary judgment in favor of the City and enjoined the transfer of the water system. (R p 165)

On 6 October 2015, the Court of Appeals reversed the trial court in a published decision. Slip op. at 24.

On 9 November 2015, the City timely petitioned the Court of Appeals for rehearing. The Court of Appeals denied the petition the next day.

REASONS WHY A WRIT OF SUPERSEDEAS SHOULD ISSUE

The City has filed a timely notice of appeal and petition for discretionary review. Those papers present significant constitutional issues for this Court's consideration. The circumstances justify a stay to preserve the status quo so this Court can review this case under stable conditions.

The trial court enjoined the involuntary transfer of a massive water system. The decision of the Court of Appeals reversed that injunction. Slip op. at 25. Thus, in the absence of a stay, the 2013 Act would require the City to begin the costly and complex transfer of its water system to a newly formed metropolitan water and sewerage district.

The need to stay the effect of the 2013 Act becomes clear when one focuses on the cost and complexity of the transfer ordered by the statute:

- The Asheville water system serves over 124,000 customers, including residential, commercial, industrial, and institutional users. (Doc. Ex. 2, 400)
- The system contains thousands of miles of water lines and dozens of pump stations and related facilities. (Doc. Ex. 2)
- Operating the water system requires almost 150 employees. (Doc. Ex. 3) These employees have rights and benefits with the City, including health insurance, pensions, and statutory employment protections. These people cannot simply be transferred to a new employer without their consent. (Doc. Ex. 3)
- The City has multiple federal and state certifications that—in the interest of safety—require that trained and authorized personnel operate the system. (Doc. Ex. 396-98) These certifications apply only to the City of Asheville and its employees. Like the City's employees, these certifications cannot simply be transferred to a new water system. (Doc. Ex. 3, 398-99)

- Implementing the 2013 Act would require a complicated transfer of financial, accounting, and information-technology systems, as well as new training of personnel. (Doc. Ex. 4)

As these points show, any transfer of the City's water system would require the utmost care and planning. Indeed, as the City's Director of Water Resources has testified, any transition of this type would take at least a full year. (Doc. Ex. 4) No one would benefit from undertaking this costly and complex transfer before this appeal concludes.

Even starting the transfer prematurely, in fact, would cause irreparable harm. Because the City uses revenue from the water system to satisfy the City's bond obligations, transferring the water system could force the City into default. (R pp 69-71) A default could damage the City's credit ratings, undermining the City's ability to issue municipal bonds in the future. (R pp 69-71)

Finally, it bears repeating that the State and the Metropolitan Sewerage District of Buncombe County do not oppose the City's request for a supersedeas and a temporary stay. This non-opposition makes sense, because a stay of the decree will not harm anyone. The City's water system will continue to provide reliable, safe water while a stay is in place.

For all of these reasons, the balance of harms favors maintaining the status quo while this Court considers the City's notice of appeal and petition for discretionary review.

MOTION FOR TEMPORARY STAY

Pursuant to Appellate Rule 23(e), the City respectfully moves that this Court temporarily stay the enforcement of the decision of the Court of Appeals until this Court decides the City's petition for supersedeas.

As noted above, the State and the Metropolitan Sewerage District of Buncombe County do not oppose this motion for temporary stay.

A temporary stay is justified for the reasons stated above in support of the City's petition for supersedeas. Transferring the City's water system would be an exceedingly complex and time-consuming undertaking. Beginning that transfer now would pose irreparable harm to the City. It would also put this Court in the position of reviewing an unstable case.

A temporary stay would preserve the status quo while this Court considers the City's notice of appeal and petition for discretionary review, as well as the City's petition for supersedeas.

ATTACHMENT

Attached to this petition and motion is a certified copy of the 6 October 2015 decision of the Court of Appeals. The record on appeal in this case contains the remaining factual items cited in this petition and motion.

CONCLUSION

The City respectfully requests that this Court issue a writ of supersedeas to the Court of Appeals, staying enforcement of that court's decision until this Court addresses the City's notice of appeal and petition for discretionary review and, if the Court allows review, until the Court decides the City's appeal.

The City also requests that the Court issue a temporary stay of the enforcement of the decision of the Court of Appeals until this Court decides the City's petition for supersedeas.

This 24th day of November, 2015.

ELLIS & WINTERS LLP

/s/ Electronically submitted
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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.

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Counsel for the City of Asheville

VERIFICATION

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

Robin T. Currin

Sworn and subscribed to me this 10th day of November, 2015.

Notary Public

My Commission Expires: 2-2-2016

(AFFIX NOTARIAL SEAL)

THOMAS EUGENE DOWNING
Notary Public, North Carolina
Haywood County
My Commission Expires
February 02, 2016

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:

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This 24th day of November, 2015.

/s/ Electronically submitted
Matthew W. Sawchak

Supreme Court of North Carolina

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From N.C. Court of Appeals
(14-1255)
From Wake
(13CVS6691)

25 November 2015

Mr. Matthew W. Sawchak
Attorney at Law
ELLIS & WINTERS LLP
P.O. Box 33550
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RE: City of Asheville v State of North Carolina, et al. - 391P15-1

Dear Mr. Sawchak:

The following order has been entered on the motion filed on the 24th of November 2015 by Plaintiff for Temporary Stay:

"Motion Allowed by order of the Court in conference, this the 25th of November 2015."

s/ Ervin, J.
For the Court

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
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Mr. Robert W. Oast, Jr., City Attorney, For City Of Asheville - (By Email)
Mr. Daniel G. Clodfelter, Attorney at Law, For City Of Asheville - (By Email)
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Hon. Robert F. Orr, Attorney at Law, For City Of Asheville - (By Email)
Mr. Matthew W. Sawchak, Attorney at Law, For City Of Asheville - (By Email)

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No. 391PA15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County No. COA14-1255

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NOTICE OF APPEAL BASED ON CONSTITUTIONAL QUESTIONS AND ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW

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SUPREME COURT OF NORTH CAROLINA

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CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County No. COA14-1255

****

NOTICE OF APPEAL BASED ON CONSTITUTIONAL QUESTIONS AND ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to N.C. Gen. Stat. § 7A-30(1) (2013) and Rule 14(b)(2) of the North Carolina Rules of Appellate Procedure, the City of Asheville appeals to this Court from the judgment of the Court of Appeals in City of Asheville v. State, No. COA14-1255, slip op. (N.C. Ct. App. Oct. 6, 2015) [copy attached]. As shown below, this appeal involves substantial questions under the North Carolina

Constitution. The City timely raised these constitutional issues in the Court of Appeals and in the trial court. See id. at 5-6, 10, 20; R pp 148-56.

In the alternative, pursuant to N.C. Gen. Stat. § 7A-31(c), the City petitions the Court to certify the judgment for discretionary review. The subject matter of this appeal has significant public interest, the case involves legal principles of major significance to North Carolina jurisprudence, and the decision of the Court of Appeals conflicts with decisions of this Court.

INTRODUCTION

This case involves a 2013 statute that compels the City to transfer its entire water system—a system worth hundreds of millions of dollars—to a new political subdivision. That statute threatens the City's taxpayers with the seizure of assets in which they have invested for over a century.

The City's water system protects the health of over 100,000 people. The terms of the 2013 statute, moreover, apply to the City's water system alone. Thus, the statute is a local law relating to health and sanitation. Such a law violates article II, section 24(1)(a) of the North Carolina Constitution.

The 2013 statute also violates article I, section 19 of the North Carolina Constitution, because it takes proprietary assets without compensation.

The trial court recognized these constitutional violations and enjoined the State from taking away the City's water system. However, the Court of Appeals (Dillon, J., joined by Calabria and Elmore, JJ.) reversed the trial court's judgment.

In that decision, the Court of Appeals interpreted article II, section 24 unsoundly. That provision bars local statutes "[r]elating to health [or] sanitation." N.C. Const. art. II, § 24(1)(a). The Court of Appeals held, however, that a statute violates article II, section 24 only if it "prioritize[s]" or "regulates" health or sanitation in literal terms. Slip op. at 13. That reasoning departs from the constitutional text, as well as this Court's teachings on constitutional interpretation.

The appellate court's reasoning also conflicts with this Court's decisions that enforce article II, section 24. In those decisions, this Court has recognized repeatedly that water and sewer services inherently affect health and sanitation. It has also held that laws that change the governance of health-related local services violate article II, section 24. Finally, the Court has held that violations of article II, section 24 stem from the practical effects of a statute, not just from the statute's literal terms. The decision here violates all of these principles.

The decision also eviscerates our Constitution's ban on takings without just compensation—a ban that this Court has found inherent in article I, section 19. The Court of Appeals held that as long as municipal taxpayers' property goes to another political subdivision, no compensable taking occurs. That holding clashes

with this Court's decisions. When, as here, a municipality operates an enterprise in a proprietary capacity, this Court has held that the State cannot take that enterprise without compensation.

In addition, this case overlaps with another pending constitutional appeal. In Town of Boone v. State, No. 93A15-2, a direct appeal to this Court, the Court will soon decide similar questions on the scope of article II, section 24. Reviewing the Asheville water case at the same time would allow the Court to consider how its teachings in Boone will apply in another important factual context—the ownership and management of proprietary assets. Review would also ensure that this case is decided under the standards announced in Boone, promoting consistency in the law. The high stakes and important constitutional issues in this case justify retaining the case for a decision with Boone.

The issues in this appeal also have intense public interest. Those issues go to the heart of local investments in infrastructure. If the decision of the Court of Appeals stands, local utilities can be seized without compensation. That prospect is making municipalities and their taxpayers uncertain about their protections under the North Carolina Constitution. In the absence of this Court's review, municipal residents throughout the state, as well as bond purchasers, will ascribe more risk to utility investments.

In sum, this appeal raises substantial questions under the North Carolina Constitution—questions that have not already been conclusively decided. The appeal therefore falls within this Court's statutory jurisdiction. See State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968). In the alternative, the City respectfully requests that the Court grant discretionary review to resolve the critical constitutional issues that this case presents.

BACKGROUND

A. Asheville's Water System

The City of Asheville owns and operates a water system that provides clean, reliable water to 124,000 customers. (R pp 159; Doc. Ex. 400) The system includes a 17,000-acre watershed, three water treatment plants, forty pumping stations, 1660 miles of distribution lines, and other facilities. (R pp 63, 151, 159; Doc. Ex. 2) The City's taxpayers have invested in this water system over a 100-year period. (Doc. Ex. 591, 597-600)

B. The Statute at Issue

In 2013, the General Assembly enacted a statute that would take away the City's water system. That Act would transfer the water system to the sewer authority that serves much of Buncombe County. See Act of May 14, 2013, ch. 50, §§ 1(a)-1(f), 2013 N.C. Sess. Laws 118, 118-19 [the Act], amended by Act of

Aug. 23, 2013, ch. 388, §§ 4-5, 2013 N.C. Sess. Laws 1605, 1618. The sewer authority would become a metropolitan water and sewer district—a new type of government entity. See slip op. at 3.

The new district would serve the same water customers that the City has served up to now. See Act § 1(e), 2013 N.C. Sess. Laws at 119. Board members for the new district would come from an area beyond Asheville. Some board members, in fact, would represent areas that are not even served by the water system. See id. sec. 2, § 162A-85.3(a), 2013 N.C. Sess. Laws at 120-21. Under the Act, then, City taxpayers would not only lose ownership of their water system, but would lose control over the governance of that system as well.

As the Court of Appeals recognized, the Act is written so that only Asheville meets the statutory criteria for this taking. Slip op. at 4.

C. Trial Court Proceedings

The City filed this lawsuit to challenge the legality of the Act, primarily under the North Carolina Constitution. (R pp 59-83) The City alleged that the Act violates article II, section 24, which prohibits local laws "relating to" health, sanitation, and non-navigable streams. N.C. Const. art. II, § 24(1)(a), (e); R pp 71-72. The City also alleged that the Act violates article I, section 19, because the Act takes the City's property without just compensation. (R pp 75-76, 79-80)

The trial court granted summary judgment in favor of the City. (R p 165) It held that the Act relates to health and sanitation because it concerns "the treatment and supply of water for drinking, cooking and cleaning purposes, and for the operation of sanitary disposal systems." (R p 162) The court further held that the Act relates to non-navigable streams. (R p 162)

The trial court also held that the Act is not a valid taking of property. (R 163-64) In the alternative, the court held that if the taking were valid, the City would be entitled to just compensation. (R p 164)[1]

D. The Decision of the Court of Appeals

The Court of Appeals reversed the trial court in a published decision. See slip op. at 24-25.

The court held that a statute falls within article II, section 24(1)(a) of the North Carolina Constitution only if the statutory text shows a purpose "to regulate"

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[1] In its complaint, the City also alleged that the Act violates the equal-protection and due-process guarantees in article I, section 19. (R pp 72-75) Further, the City alleged that the statute impairs the obligation of contracts, violating Article I, Section 10 of the U.S. Constitution, article I, section 19 of the North Carolina Constitution, and N.C. Gen. Stat. § 159-93. (R pp 76-79)

The trial court ruled that the Act violated article I, section 19 because there was no rational basis for singling out Asheville for a taking or for transferring the City's water system to an entity that had never operated one before. (R p 163) Because the court enjoined the enforcement of the Act on the grounds stated above, it did not reach the City's impairment-of-contract claims. (R p 165)

health or sanitation or "prioritize[s]" those subjects. Id. at 12-13 (quoting City of Asheville v. State, 192 N.C. App. 1, 33, 37, 665 S.E.2d 103, 126, 128 (2008)).

Applying these tests, the court simply perused the text of the Act and concluded that the text does not "prioritize" health or sanitation. Id. at 13. The court did not address the Act's practical effects. Using similar reasoning, the court held that the Act did not relate to non-navigable streams. Id. at 14. For these reasons, the court held that the Act does not violate article II, section 24.[2]

The court went on to reject the City's takings claims. It held that a city has no constitutional protection at all against uncompensated takings, as long as the city's property is given to another municipality for the same function. Id. at 21-24. To justify this new rule on involuntary takings, the court relied on a 1903 case that upheld a voluntary transfer of a water system. Id. at 21 (citing Brockenbrough v. Bd. of Water Comm'rs, 134 N.C. 1, 19, 46 S.E. 28, 33 (1903)).[3]

In the end, the Court of Appeals reversed the trial court's judgment and the resulting injunction. Id. at 24-25.

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[2] Because the court decided that the Act did not regulate any subject prohibited by article II, section 24, it did not decide whether the Act was a local law. Slip op. at 11.

[3] The court also reversed the judgment under the "law of the land" clause. Slip op. at 19-20. It went on to state that it "d[id] not reach any conclusion" on the City's impairment-of-contract claims. Id. at 25.

The City filed a timely petition for rehearing. The Court of Appeals denied the petition the next day, 10 November 2015. The City is filing this notice and petition within fifteen days of that denial. See N.C. R. App. P. 14(a). The City is also filing a petition for supersedeas and a motion for temporary stay in connection with this notice and petition.

REASONS WHY THIS APPEAL PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION

I. THE COURT OF APPEALS NARROWED ARTICLE II, SECTION 24, USING REASONING THAT CONFLICTS WITH THE CONSTITUTIONAL TEXT AND WITH THIS COURT'S TEACHINGS.

For three reasons, the decision of the Court of Appeals presents a substantial constitutional question. First, the decision defeats the purpose of article II, section 24. Second, it conflicts with this Court's teachings on constitutional interpretation. Finally, it conflicts with this Court's decisions that enforce article II, section 24.

A. The Decision Defeats the Purpose of Article II, Section 24.

The decision of the Court of Appeals ignores the remedial purpose of article II, section 24. Worse still, the decision makes that constitutional provision less effective.

The people of North Carolina adopted article II, section 24 in 1917.[4] They did so "to strengthen local self-government by providing for the delegation of local matters by general laws" alone. Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 188, 581 S.E.2d 415, 428 (2003) (quoting High Point Surplus Co. v. Pleasants, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965)). For example, article II, section 24(1)(a) prohibits local laws relating to health and sanitation because those subjects "are so related to the welfare of the whole state as to demand uniform and coordinated action under general laws." Bd. of Health v. Bd. of Comm'rs, 220 N.C. 140, 143, 16 S.E.2d 677, 679 (1941).

In addition, the framers of article II, section 24 intended to prevent a patchwork of varying local laws on certain subjects. See Williams, 357 N.C. at 185-86, 581 S.E.2d at 427. Article II, section 24 is drafted in "emphatic and express terms" to prevent this goal "from degenerating into a mere pious hope." Idol v. Street, 233 N.C. 730, 732, 65 S.E.2d 313, 315 (1951).

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[4] The ban on local acts originally appeared as article II, section 29. Revisions to the state constitution in 1971 moved the provision to article II, section 24. See Smith v. Mecklenburg Cty., 280 N.C. 497, 506, 187 S.E.2d 67, 73 (1972). Pre-1971 decisions on the former article II, section 29 "apply equally to present Article II, Section 24." Id. For simplicity, this notice refers to the provision as article II, section 24 throughout.

As this Court has also recognized, section 24 is remedial in nature. Board of Health, 220 N.C. at 143, 16 S.E.2d at 679. Its application "should not be denied on an unsubstantial distinction which would defeat its purpose." Id.

Here, the decision of the Court of Appeals defeats the purpose of article II, section 24. Under the court's reasoning, that constitutional provision applies only if a statute recites a goal to prioritize health and sanitation or to regulate those subjects. Slip op. at 12-13.

According to the decision, moreover, courts are to divine these priorities and purposes from the text of a statute alone. See id. at 12-14. The Court of Appeals did not consider the practical effects of the Act. Instead, it simply "peruse[d]" the statutory text for "provisions in the Act which 'contemplate[ ] . . . prioritizing the [Asheville Water System's] health or sanitary condition[.]'" Id. at 13 (quoting Asheville, 192 N.C. App. at 37, 665 S.E.2d at 128 (emphasis added here; alterations in 2015 decision)). Because the court did not find the words "health" or "sanitation" in the statutory text, it found no constitutional violation.

This literalism by the Court of Appeals invites artful drafters to evade article II, section 24. It allows them to avoid a violation as long as they avoid mentioning a purpose to regulate or prioritize a prohibited subject. If omitting magic words is all that article II, section 24 requires, the remedial purpose of that provision will indeed become a "mere pious hope." Idol, 233 N.C. at 732, 65 S.E.2d at 315.

B. To Equate "Relating to" with "Regulating" Clashes with This Court's Teachings on Constitutional Interpretation.

The decision of the Court of Appeals also clashes with the rules of constitutional interpretation announced by this Court. It does so by ignoring the distinction between two different constitutional phrases: "relating to" and "regulating." N.C. Const. art. II, § 24(1)(a), (j); see slip op. at 12-13.

As this Court has instructed, "[t]he best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected." State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944)).

The decision of the Court of Appeals violates this principle. It holds that a law "is not deemed to be one 'relating to health or sanitation' unless . . . 'its purpose is to regulate'" one of those subjects. Slip op. at 12 (emphasis changed) (quoting N.C. Const. art. II, § 24(1)(a) and Asheville, 192 N.C. App. at 33, 665 S.E.2d at 126). The court went on to conclude that the Act does not violate this heightened "regulation" standard. See id. at 12-13.

In this reasoning, the court ignored a key textual distinction in article II, section 24. That section prohibits local laws "[r]elating to" several subjects, including health and sanitation. N.C. Const. art. II, § 24(1)(a); see id. § 24(1)(d)-(g). Section 24 also uses the word "[r]egulating," but only in reference to a

different group of subjects. Id. § 24(1)(j). This "difference of phraseology in the same [provision] . . . evinces a corresponding difference in the sense." State v. Crawford, 13 N.C. (2 Dev.) 425, 427 (1830). If the framers had intended for the differing phrases in article II, section 24 to mean the same thing, "they would have used the same words." Id.

To treat "relating to" and "regulating" as synonymous also violates the plain meanings of these two phrases. For example, in Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), the U.S. Supreme Court held that a law "relates to" a subject "if it has a connection with or reference to" that subject. Id. at 96-97. "Regulate," in contrast, means "to govern or direct according to rule; . . . to bring under the control of law or constituted authority." Williams, 357 N.C. at 189, 581 S.E.2d at 429 (quoting State v. Gulledge, 208 N.C. 204, 208, 179 S.E. 883, 886 (1935)). Because the definition of "regulate" is more demanding than the definition of "relate to," the laws that regulate a subject are only a subset of the laws that relate to that subject.

Thus, by applying a "regulation" standard in this case, the Court of Appeals artificially narrowed article II, section 24. That narrowing violated this Court's teachings on constitutional interpretation.

C. The Decision Below Conflicts with This Court's Decisions That Enforce Article II, Section 24.

Finally, the Court of Appeals applied article II, section 24 in a way that clashes with decisions of this Court.

The court admitted that the Act seeks to ensure "high-quality water and sewer services." Slip op. at 12 (emphasis changed) (quoting Act, first recital, 2013 N.C. Sess. Laws at 118). The court also stated that the Act addresses the governance of the Asheville water system. Id. at 13. Despite these health- and sanitation-related purposes of the Act, the court still concluded that the Act was not related to health and sanitation.

That reasoning conflicts with three lines of this Court's decisions on the meaning of "relating to" in article II, section 24:

(1) cases holding that water and sewer services are inherently related to public health and sanitation,

(2) cases holding that the governance of health-related services affects health and sanitation, and

(3) cases holding that the practical effect of a statute controls whether the statute violates article II, section 24.

1. Under this Court's decisions, water and sewer services are inherently related to health and sanitation.

The decision below conflicts with this Court's recognition that water and sewer services are inherently related to health and sanitation.

This Court first invalidated a local law on water service in Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928). In doing so, the Court stressed that water service "involves the very life and health of a community" and "promot[es] the public health and welfare." Id. at 732-33, 143 S.E. at 534-35.

Here, the Court of Appeals explicitly departed from Drysdale. The panel reasoned that Drysdale never decided whether the statute in question was related to health. Slip op. at 14.[5] That reasoning clashes with this Court's later decisions that hold—based on Drysdale—that a water system is inherently health-related. See, e.g., Gaskill v. Costlow, 270 N.C. 686, 688, 155 S.E.2d 148, 149 (1967); Lamb v. Bd. of Educ., 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952).

The statutes and regulations that govern the City's water system confirm that the quality of water service directly affects the public health. For example:

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[5] The Court of Appeals instead relied on Reed v. Howerton Engineering Co., 188 N.C. 39, 123 S.E. 479 (1924). See slip op. at 14-15. Drysdale, however, limits Reed. The Drysdale Court concluded that Reed held only that a particular statute was not local. See Drysdale, 195 N.C. at 728, 143 S.E. at 533; see also Joseph S. Ferrell, Local Legislation in the North Carolina General Assembly, 45 N.C. L. Rev. 340, 367-68 (1967) (discussing how Drysdale limits Reed).

- The North Carolina Drinking Water Act "regulate[s] water systems within the State which supply drinking water that may affect the public health." N.C. Gen. Stat. § 130A-312 (2013). The City must comply with and administer regulations under this statute. (Doc. Ex. 3, 396)
- The City administers a permitting process for any construction, alteration, and extension of its water system. (Doc. Ex. 396-97) This process ensures that any changes to the water system comply with the North Carolina Drinking Water Act. Doc. Ex. 397; see Asheville, N.C., Mun. Code ch. 21, art. III, §§ 4-6 (Supp. 2008).
- Finally, under federal regulations, the City, like any supplier of public drinking water, must give its customers annual reports on the source and quality of their tap water. These reports must identify any risks to human health. See 40 C.F.R. §§ 141.151 to .155 (2015).

Thus, this Court's decisions, as well as other sources of law, show that the quality of water service inherently affects the public health.

The contrary decision of the Court of Appeals clashes with this Court's teachings. See slip op. at 11-16. For example, the court reasoned that the statute here does not "prioritize" health or sanitation because it allows the new district to cut off service to nonpaying customers. Id. at 13. The above decisions, however,

are based on the overall health-promoting function of water service. See, e.g., Drysdale, 195 N.C. at 732-33, 143 S.E. at 534-35. That common-sense proposition does not require water service to be free of charge.

The appellate court's reasoning here will cause confusion on which laws related to water and sewer service violate article II, section 24. That confusion will fuel tomorrow's appeals.

2. Local laws on the governance of health-related services violate article II, section 24.

This Court has also recognized that a second group of statutes—laws on the governance of health-related services—relate to health and sanitation:

- In City of New Bern v. New Bern-Craven County Board of Education, 338 N.C. 430, 450 S.E.2d 735 (1994), this Court held that a law that shifted authority for building inspections was related to health and sanitation. The Court recognized that administration and enforcement of the building code "unquestionably affects health and sanitation." Id. at 442, 450 S.E.2d at 742.
- In Idol v. Street, likewise, this Court struck down a law because it consolidated the health departments in Forsyth County. 233 N.C. at 733, 65 S.E.2d at 315.

- In Board of Health v. Board of Commissioners, the Court invalidated a law requiring that a county health officer be confirmed by the county commissioners. 220 N.C. 140, 143-44, 16 S.E.2d 677, 679 (1941).
- Finally, in Sams v. Commissioners of Madison County, this Court invalidated a local law that created a county board of health and named its members. 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940).

Here, in contrast, the Court of Appeals reasoned that because the Act addresses "governance over water and sewer systems," it does not relate to health. Slip op. at 13. The above decisions require the opposite conclusion. In all of those cases, the statutes at issue involved the governance of health-related agencies. That effect on governance was exactly what led the Court to hold that the statutes related to health and sanitation. Those cases are a second line of decisions from this Court that conflict with the decision below.

3. This Court looks to a statute's practical effect, not just its literal purpose, to decide its relationship to a prohibited subject.

The Court of Appeals also overlooked a third teaching from this Court: when courts apply article II, section 24, they must focus on whether a statute has a practical effect on prohibited subject matter.

For instance, in New Bern, the only stated purpose of the statute was to change who controlled building-code inspections in a county. See 338 N.C. at 433-34, 450 S.E.2d at 737-38. This Court, however, focused on the practical effect of the statute: shifting the administration and enforcement of rules that affect health and sanitation. See id. at 439-40, 450 S.E.2d at 740-41. Even though the statute did not literally mention health or sanitation, the Court held that the statute affected those subjects. Id. at 442, 450 S.E.2d at 742.

In Williams, the Court focused even more explicitly on the practical effect of a statute. The Court rejected an argument that a statute did not regulate labor or trade because its only stated purpose was to prevent discrimination. 357 N.C. at 189, 581 S.E.2d at 429. In a unanimous opinion by Justice Edmunds, the Court stressed that preventing discrimination "has the practical effect of regulating trade." Id. at 190, 581 S.E.2d at 429 (emphasis added). Because of that practical effect, the Court invalidated the statute under article II, section 24. Id. at 191, 581 S.E.2d at 430.

It bears noting, moreover, that Williams involved a subject-matter test—"regulating"—that is narrower than the test that governs here. N.C. Const. art. II, § 24(1)(j); see supra pp. 12-13. Because the Asheville case involves a broader subject-matter test—"relating to"—the Williams Court's "practical effect" standard applies here with even greater force. N.C. Const. art. II, § 24(1)(a).

Here, as noted above, the Court of Appeals ignored the practical effects of the Act. See slip op. at 12-13. The Act shifts control over water service in Asheville and the surrounding area—a service that is inherently related to health and sanitation. Act §§ 1(a)-1(f), 2013 N.C. Sess. Laws at 118-19; see, e.g., Lamb, 235 N.C. at 379, 70 S.E.2d at 149. Likewise, the Act shifts the administration of water-quality statutes and regulations—measures that "unquestionably affect[ ] health and sanitation." New Bern, 338 N.C. at 442, 450 S.E.2d at 742; see supra pp. 15-16.

Instead of analyzing these practical effects, the Court of Appeals focused only on the stated purpose of the Act. See slip op. at 12-13. That reasoning flouts Williams, in which this Court wrote that article II, section 24 "is not dependent on the purpose for which the local law was passed." 357 N.C. at 190, 581 S.E.2d at 429.[6]

D. Reviewing This Case Will Allow the Court to Reinforce and Develop the "Relating to" Standard Under Article II, Section 24.

As shown above, the decision here conflicts with three lines of this Court's precedents on the "relating to" standard in article II, section 24(1). The fact that the Court of Appeals misunderstood all of these cases shows a need for this Court

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[6] That reasoning also overlooks the health-related purposes of the Act, including "provid[ing] reliable, . . . high-quality water and sewer services." Act, first recital, 2013 N.C. Sess. Laws at 118.

to reinforce—and perhaps add to—its teachings on the "relating to" standard. The scope of that language is a substantial constitutional issue that has not been conclusively resolved. See Colson, 274 N.C. at 305, 163 S.E.2d at 383.

In addition, this case is an important complement to another pending constitutional appeal. In Town of Boone v. State, No. 93A15-2, a direct appeal to this Court, the parties are likewise debating the meaning of "relating to" and "regulating" under article II, section 24. The original briefs and oral arguments in Boone were filled with discussion of those issues. Now that the jurisdictional issues in Boone are resolved, see Order at 2-3, Town of Boone v. State, No. 93A15 (N.C. Nov. 6, 2015), the renewed appeal will focus even more on the subject-matter tests under article II, section 24.

As the Court explores those constitutional standards, it will benefit from considering how the standards apply in a range of factual contexts. The present case involves a different factual context from Boone, and an equally important one: the ownership and management of proprietary assets.

The high stakes of this case, likewise, justify review in tandem with Boone. This case will determine who owns and controls a water system worth hundreds of millions of dollars—a system that serves over 120,000 North Carolinians. These high stakes confirm that the constitutional issues in this case are substantial indeed.

II. THE COURT OF APPEALS ELIMINATED THE NORTH CAROLINA CONSTITUTION'S BAN ON TAKING MUNICIPAL PROPERTY WITHOUT COMPENSATION.

This case also raises substantial constitutional issues on takings of property without just compensation.

This Court has recognized that article I, section 19 of the North Carolina Constitution bars uncompensated takings of property. Finch v. City of Durham, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989). The right to be free from uncompensated takings extends to municipalities that carry out proprietary functions on behalf of their taxpayers. Asbury v. Town of Albemarle, 162 N.C. 247, 253, 78 S.E. 146, 149 (1913).

Here, the Court of Appeals purported to repeal this constitutional right. The court held that the General Assembly can, with impunity, "divest a city of its authority to operate a public water system and transfer the authority and assets thereof to a different political subdivision." Slip op. at 21.

This carte blanche reasoning would apparently avoid all the usual requirements of takings doctrine. It would not require that the taking meet the legal tests for a public purpose. Nor would it require compensation for the property that is taken. See id. at 20-25.

As shown below, this radical new rule conflicts with Asbury and other decisions of this Court. It presents a substantial constitutional issue that only this Court can resolve. See Colson, 274 N.C. at 305, 163 S.E.2d at 383.

A. The Decision Below Conflicts with This Court's Teachings.

In Asbury v. Town of Albemarle, this Court held that when a municipality carries out proprietary functions, the General Assembly faces "the same constitutional restraints that are placed upon it in respect of private corporations." 162 N.C. at 253, 78 S.E. at 149. In a proprietary setting, a municipality has the same rights and duties that a private corporation has. Id.[7]

These principles bar the General Assembly from taking away a municipality's proprietary assets. Id. at 254, 78 S.E. at 149. Asbury held that the General Assembly may "shape . . . municipal organizations," but 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

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[7] Since Asbury, this Court has continued to recognize the distinction between governmental and proprietary functions. See Candler v. City of Asheville, 247 N.C. 398, 406, 101 S.E.2d 470, 476 (1958) (quoting Asbury); Holmes v. City of Fayetteville, 197 N.C. 740, 747, 150 S.E. 624, 627 (1929) ("[T]he exercise of powers for private advantage of the City is subject to the same rules that govern individuals and private corporations.").

Likewise, the Court has recognized that in proprietary settings, a municipality has no sovereign immunity from tort liability. See, e.g., Estate of Williams ex rel. Overton v. Pasquotank Cty. Parks & Recreation Dep't, 366 N.C. 195, 199-200, 732 S.E.2d 137, 141 (2012).

rel. Le Roy v. Hurlbut, 24 Mich. 44, 104 (1871)). Thus, the legislature cannot take assets from a city's taxpayers and donate those assets to another municipality, "giv[ing] something for nothing." Id. at 252, 78 S.E. at 149.

The assets protected by this rule include Asheville's water system. When a municipality operates a water system, it carries out a proprietary function on behalf of its taxpayers. See, e.g., Fussell v. N.C. Farm Bureau Mut. Ins. Co., 364 N.C. 222, 225; 695 S.E.2d 437, 440 (2010); Mosseller v. City of Asheville, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966). Under Asbury, then, the General Assembly cannot take 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.

Indeed, the protection of municipal property is so firmly rooted in North Carolina law that this Court has required just compensation even when a local entity was not acting in a proprietary capacity. In State Highway Commission v. Greensboro City Board of Education, the Court ordered the State to compensate a school board for taking its land. See 265 N.C. 35, 49, 143 S.E.2d 87, 98 (1965). The Court stressed that "our organic law provides that just compensation shall be paid for property so appropriated." Id. at 46, 143 S.E.2d at 95.

For all of these reasons, Asbury and other decisions bar the uncompensated taking of the City's water system.

The Court of Appeals, however, did not discuss Asbury in its takings analysis. See slip op. at 20-24. Instead, the court cited a pre-Asbury decision for the proposition that the State may involuntarily transfer a city's water system. Id. 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 an involuntary taking. Instead, it stated that a city did not violate the state constitution by voluntarily transferring its water system to a board that would operate the system "for and in the name of" the city. Brockenbrough, 134 N.C. at 3, 46 S.E. at 28; see id. at 20, 46 S.E. at 34. Even if Brockenbrough applied here, moreover, it would still be limited by Asbury—the seminal decision, ten years later, that recognized the property rights of municipalities that act in a proprietary capacity.

B. The Court of Appeals Relied on Out-of-State Authority to Abrogate Asbury.

Instead of applying Asbury, the Court of Appeals relied on out-of-state cases that interpret other constitutions. Slip op. at 21-23. That reasoning misapprehended the law in two important respects.

First, the out-of-state cases the court cited do not address the City's rights under the North Carolina Constitution. Thus, they cannot take precedence over Asbury. See State v. Jones, 305 N.C. 520, 525, 290 S.E.2d 675, 678 (1982).

Second, the court overlooked more recent out-of-state authorities that reinforce the Asbury rule. For example, the Supreme Court of Delaware, adopting the majority rule, has held that "property which is held in a proprietary capacity cannot be taken by the State unless just compensation is paid." New Castle Cty. Sch. Dist. v. State, 424 A.2d 15, 17 (Del. 1980). Other courts across the country agree. See, e.g., People ex rel. Dep't of Pub. Works v. City of L.A., 33 Cal. Rptr. 797, 800 (Ct. App. 1963); Town of Winchester v. Cox, 26 A.2d 592, 594-95 (Conn. 1942); Town of Peru v. State, 315 N.Y.S.2d 775, 776 (App. Div. 1970).

In sum, article I, section 19 protects municipalities that operate in a proprietary capacity, as well as municipal taxpayers, against takings without just compensation. The contrary opinion of the Court of Appeals will cause serious confusion in our state's jurisprudence.

C. The New Rule Announced by the Court of Appeals Has Not Yet Been Conclusively Addressed.

The century-old decision in Asbury is this Court's last direct word on takings of a municipality's proprietary assets. Takings of similar assets appear likely to recur. By reviewing this case and rejecting the reasoning below, the Court can reaffirm its important teachings in this area.

PETITION FOR DISCRETIONARY REVIEW

For reasons similar to those explained above, this case meets all of the criteria for discretionary review under N.C. Gen. Stat. § 7A-31(c).

REASONS WHY CERTIFICATION SHOULD ISSUE

I. THIS CASE, AND THE BROADER ISSUES IT RAISES, HAVE SIGNIFICANT PUBLIC INTEREST.

This case will decide the fate of a water system operated by a major North Carolina city—a water system with hundreds of millions of dollars in assets. (R pp 79, 164) It involves the possible transfer of thousands of acres of land, water rights, and infrastructure in which City taxpayers have invested for over a century. (R pp 63, 151, 159; Doc. Ex. 2, 591, 597-600) This case also threatens those taxpayers' ability to govern their water system. See Act sec. 2, § 162A-85.3, 2013 N.C. Sess. Laws at 120-21. For all of these reasons, the citizens of Asheville are keenly interested in this appeal.

This appeal is also of great interest to municipalities and taxpayers throughout the state. This case will decide whether article II, section 24 and article I, section 19 are viable limits on takings of local governments' proprietary assets. Those assets are found throughout the state. For example, more than 360 municipalities own water systems that serve over 5.1 million North Carolinians. Brief for the North Carolina League of Municipalities as Amicus Curiae

Supporting the City at 6-7, City of Asheville v. State, No. COA14-1255 (N.C. Ct. App. May 1, 2015).

In the wake of the decision here, municipalities are questioning the security of these infrastructure investments, as well as the wisdom of any further investments. Id. at 7-9. "With the potential for being unceremoniously divested of their assets, citizens are unlikely to support future investment in public enterprise systems; concomitantly, municipal officials are unlikely to take the political and financial risks inherent in making such expenditures." Id. at 7.

Municipalities and investors are also concerned about the potential impact of this decision on municipal bonds. Cities like Asheville service their bond debt through revenue from their proprietary enterprises, such as the water system here. (See R pp 69-71) The Act threatens the stability of these revenues, increasing risks for bondholders and creating higher borrowing costs for North Carolina's local governments. League Amicus Br. 8; Doc. Ex. 391-93. Higher borrowing costs mean reduced infrastructure investment or higher taxes.

Finally, this case has received significant statewide media attention.[8] This media attention is no surprise, given the high stakes of this case and the intense public interest in it.

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[8] See, e.g., Appeals court declines to hear ruling in Asheville water, Associated Press (Nov. 11, 2015), http://www.wral.com/appeals-court-declines-to-hear-ruling-in-asheville-water/15102470/; Stephen Kindland, Panel Discusses

II. THIS APPEAL INVOLVES LEGAL PRINCIPLES OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THIS STATE.

As the above notice of appeal shows, this case involves several important issues of law. For example:

- The case involves an interpretation of article II, section 24 that allows artful drafting to defeat the purpose of this provision.
- It involves an interpretation of article II, section 24 that equates "relating to" with "regulating," even though those distinct phrases are juxtaposed within the same constitutional section.
- It involves the dubious conclusion that a statute that shifts the governance of a single water system is not a local law relating to health and sanitation.
- It involves the meaning of the subject-matter tests in article II, section 24—an issue that is also before this Court in Boone.
- Finally, it involves a ruling that destroys the takings protections for municipalities and their taxpayers under article I, section 19.

"Who Owns WNC's Water?", Hendersonville Times-News (Oct. 22, 2015), http://www.blueridgenow.com/article/20151022/NEWS/151029924; Mark Binker, Appeals court: Asheville Water System Transfer Constitutional, WRAL.com (Oct. 6, 2015), http://www.wral.com/appeals-court-asheville-water-system-transfer-constitutional/14951463/; Mark Barrett, Asheville Can Keep Water System, Judge Says, Asheville Citizen-Times (June 9, 2014), http://www.citizen-times.com/story/news/local/2014/06/09/asheville-can-keep-water-system-judge-says/10252961/.

In sum, this appeal will have a major impact on the legal relationship between municipalities and other parts of our state government. An appeal with that impact is critically important to the jurisprudence of this state.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS.

In addition, the decision of the Court of Appeals conflicts with multiple decisions of this Court. As shown above, it conflicts with at least the following holdings:

- A court may not interpret article II, section 24 in a way that defeats its remedial purpose. See Board of Health, 220 N.C. at 143, 16 S.E.2d at 679.
- A court should not interpret differing phrases in the same provision as if they meant the same thing. See Crawford, 13 N.C. (2 Dev.) at 427.
- Water and sewer services are inherently related to health and sanitation. See, e.g., Lamb, 235 N.C. at 379, 70 S.E.2d at 203.
- Laws that shift the governance of health-related services are related to health and sanitation. See, e.g., New Bern, 338 N.C. at 442, 450 S.E.2d at 742.

- Courts look to the practical effects of a law, not just its stated purpose, to decide whether the law relates to health and sanitation. See, e.g., id. at 439-40, 450 S.E.2d at 740-41.
- The State may not take the proprietary assets of a municipality without a public purpose and just compensation. See Asbury, 162 N.C. at 254, 78 S.E. at 149.

IV. IF RULE 15(h) APPLIES HERE, THIS CASE SATISFIES IT.

Finally, this case warrants review in its current procedural posture. See N.C. R. App. P. 15(h).

The trial court did not reach two of the City's claims—the City's claims for impairment of contract obligations. (R p 165) The Court of Appeals, likewise, "d[id] not reach any conclusion regarding" those claims. Slip op. at 25. As a result, Appellate Rule 15(h) arguably applies here.[9]

If Rule 15(h) does apply, this case satisfies its requirements. A failure to certify this appeal "would cause a delay in final adjudication which would

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[9] This conclusion is uncertain, because the Court of Appeals used varying language on the status of the unreached claims. First, the court wrote that it reached no conclusion on those claims. Slip op. at 25. Then, however, the court wrote that "any argument . . . based on these claims for relief are [sic] waived." Id. at 26. In its petition for rehearing, the City sought clarification of this inconsistent language. The court, however, denied the petition without addressing this issue.

probably result in substantial harm" to the City of Asheville and other municipalities. N.C. R. App. P. 15(h).

First, reviewing this case now will prevent a delay in its final resolution. If the Court reviews this case and applies the precedents discussed above, the Court will most likely reverse the Court of Appeals. If so, the trial court's summary judgment and permanent injunction will go back into effect, and this dispute will be resolved. In contrast, if the Court declines review, the parties will continue to battle in the trial court over the impairment-of-contract claims and other issues. For these reasons, reviewing this case now is far more likely to resolve the case than the opposite ruling would be.

Second, delaying the resolution of this case would cause substantial harm. As shown above, delay would continue the uncertainty for the parties here, as well as the many North Carolina municipalities that are gravely concerned about the outcome of this case. That uncertainty is even casting doubt on the security of North Carolina municipal bonds. (Doc. Ex. 391-93)

For these reasons, declining review would delay the final adjudication of this case, harming Asheville, other municipalities, and bond investors.

ISSUES TO BE BRIEFED

If the Court grants discretionary review, the City's appeal will present the following issues:

1. Did the Court of Appeals err by reversing the trial court's judgment and permanent injunction in favor of the City?
2. Did the Court of Appeals err in its description of the status of the City's claims on remand?

CONCLUSION

The City respectfully requests that the Court exercise jurisdiction over this constitutional appeal. In the alternative, the City requests that the Court grant discretionary review.

Respectfully submitted, this the 24th day of November, 2015.

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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.

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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:

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This the 24th day of November, 2015.

/s/ Electronically submitted
Matthew W. Sawchak

NO. 391P15-1 TENTH DISTRICT

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SUPREME COURT OF NORTH CAROLINA

****

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

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THE STATE OF NORTH CAROLINA'S MOTION TO DISMISS THE CITY OF ASHEVILLE'S PURPORTED APPEAL BASED UPON ALLEGED CONSTITUTIONAL QUESTIONS

and

THE STATE'S RESPONSE IN OPPOSITION TO THE CITY'S PETITION FOR DISCRETIONARY REVIEW

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SUPREME COURT OF NORTH CAROLINA

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Plaintiff-Petitioner,	)	
vs.	)	From Wake County
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Defendants-Respondents.	)	

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THE STATE OF NORTH CAROLINA'S MOTION TO DISMISS THE CITY OF ASHEVILLE'S PURPORTED APPEAL BASED UPON ALLEGED CONSTITUTIONAL QUESTIONS

and

THE STATE'S RESPONSE IN OPPOSITION TO THE CITY'S PETITION FOR DISCRETIONARY REVIEW

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES the State of North Carolina, by and through Roy Cooper, the Attorney General of the State of North Carolina, and the undersigned Special Deputy Attorney General of the State of North Carolina, and respectfully moves this Honorable Court to dismiss the purported appeal of the City of Asheville (hereinafter referred to as the "City") from the unanimous decision of the North Carolina Court of Appeals in *City of Asheville v. State of North Carolina*, No. COA14-1255, slip op. (N.C. Ct. of App. decided Oct. 6, 2015) (hereinafter referred to as the "Court of Appeals' Decision Below"), which purports to be based upon substantial constitutional questions.

The State further respectfully moves this Honorable Court to deny the City's alternative Petition for Discretionary Review of the Court of Appeals' Decision Below (hereinafter referred to as the City's "PDR").

The State respectfully urges the Court to dismiss the City's purported appeal on the ground that the City has not presented this Court with any substantial constitutional questions sufficient to support an appeal under N.C. Gen. Stat. §7A-30(1). With the exception of three issues which the City failed to raise in its brief and arguments to the Court of Appeals, that court examined *all* of the issues now raised by the City comprehensively and in detail and addressed each such issue with careful consideration of all the controlling precedents. As to the three issues which the City neglected to raise and brief or even argue in the proceedings before

the Court of Appeals, the City failed to allow that court to pass upon the merits of those issues, such that it has no right to a second appeal concerning these issues under N.C. Gen. Stat. §7A-30(1) (or under N.C. Gen. Stat. §7A-31(c)). *E.g., State of North Carolina v. Mitchell,* 276 N.C. 404, 410, 172 S.E.2d 527, 530-31 (1970) (The Supreme Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at *each* level of appellate review by an appropriate assignment of error and by argument in his brief.)

Under these circumstances, there is no reason or need for this Court to consider this matter further.

The State also respectfully urges the Court to deny the City's PDR on the ground that the case does not meet any of the criteria set out in N.C. Gen. Stat. §7A-31(c).

PROCEDURAL HISTORY

The City filed this lawsuit on 14 May 2013 alleging that North Carolina Session Laws 2013-50 (hereinafter referred to as the "Act"), violates the North Carolina and the United States constitutions. (R. 2, 13-21) On the same day, the

Honorable Donald W. Stephens entered a Temporary Restraining Order enjoining the State from implementing or enforcing the Act (the "TRO"). (R. 38)

The case was thereafter assigned to the Honorable Howard E. Manning, Jr., Superior Court Judge. By agreement, the parties extended the TRO pending a hearing on the City's Motion for a Preliminary Injunction and the State filed a Motion to Dismiss the City's Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. (R. 42, 43, 54, 48)

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

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

The trial court held a hearing on the parties' motions for summary judgment on 23 May 2014. (R. 160) Following that hearing, the trial court entered a

"Memorandum of Decision and Order Re: Summary Judgment" on 9 June 2014 (hereinafter referred to as the "9 June Order"). (R. 157) In its 9 June Order, the trial court held that the Act was unconstitutional on the grounds that: (i) the Act's transfer provision is a "local law" relating to health, sanitation and non-navigable streams in violation of Article II, Section 24 of the North Carolina Constitution; (ii) the Act's transfer provision violates the City's rights under the Law of the Land clause found in Article I, Section 19 of the North Carolina Constitution; and (iii) the Act's transfer provision constitutes an unlawful taking of the City's property without just compensation in violation of Article I, Sections 19 and 35 of the North Carolina Constitution. (R. 157, 162-64) In its 9 June Order, the trial court expressly declined to rule on or otherwise adjudicate the City's additional claims that the Act's transfer provision unlawfully impairs the City's contractual obligations with its bondholders who provided financing for the 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. (R. 157, 164-65)

On 8 July 2014, the State timely filed its Notice of Appeal of the 9 June Order. (R. 168)

Although the trial court's decision declining to rule on the City's three claims filed pursuant to 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 constituted an adverse ruling as to the City, it did not appeal from that ruling by the trial court.

On 20 February 2015, the State filed its initial brief with the Court of Appeals in support of its request that that court reverse the trial court's 9 June Order and vacate its injunction.

On 24 April 2015, the City filed its responsive brief with the Court of Appeals. In that brief, the City made a series of arguments in support of the trial court's 9 June Order; however, the City elected not to argue as an alternative basis on which the trial court's judgment and injunction might be upheld that the Act unlawfully impaired the City's contractual obligations to its bondholders in violation of either Article I, Section 10 of the United States Constitution, Article I, Section 19 of the North Carolina Constitution or N.C. Gen. Stat. §159-93. Court of Appeals' Decision at 6 n. 2, 25-26.

The State filed its reply brief in further support of its appeal on 11 May 2015.

After the State and the City had briefed the case to the Court of Appeals, that court heard oral arguments on 3 June 2015. Court of Appeals' Decision Below at 1. On 6 October 2015, the Court of Appeals issued a decision authored by the Honorable R. Christopher Dillon, in which the Honorable Ann Marie Calabria and

the Honorable Rick Elmore concurred, reversing the trial court's judgment. In its decision, the Court of Appeals did not reach or decide the question whether the Act was a local law, Court of Appeals' Decision Below at 11, but held that, even if the Act were a local law, it does not violate Article II, Section 24, Article I, Section 19 or Article I, Section 35 of the North Carolina Constitution. Court of Appeals' Decision at 1, 5-6. In addition, the Court of Appeals held that, by failing to present any argument regarding Article I, Section 10 of the United States Constitution, Article I, Section 19 of the North Carolina Constitution or N.C. Gen. Stat. §159-93 as one or more alternative bases for supporting the decision of the trial court, the City had waived these three issues and had failed to preserve them for appeal. Court of Appeals Decision at 6 n. 2, 25-26.

THE RELEVANT FACTS

Introduction and Background

By its lawsuit against the State, the City sought a declaration that Session Laws 2013-50, entitled "An Act to Promote the Provision of Regional Water and Sewer Services by Transferring Ownership and Operation of Certain Public Water and Sewer Systems to a Metropolitan Water and Sewerage District," is unconstitutional under the North Carolina and United States constitutions. (R. 59, 71-79) In the alternative, the City sought a declaration that, if implemented, the

Act would effect a taking of the City's private property for which it would be entitled to compensation. (R. 79-80)

The Water System at Issue

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

As the City acknowledged in its Brief to the Court of Appeals, the water system has been paid for by many people other than just the City's residents. In this regard, the City's Brief notes that "[t]he Water System has been built and maintained ... using a combination of taxes, service fees, connection charges, bonded debt, various federal and state grants, contributions from Buncombe County and conveyance by dedication or deed from property owners and developers. (City's Brief at page 3) In addition, the water system has been financed through tax-exempt bond financing, a form of financing that is relatively inexpensive precisely because it is subsidized by all taxpayers, wherever they may

be located. Furthermore, although the City's revenue bonds for the water system provide that the State is not legally liable to pay off the bond indebtedness in the event of a default by the City, as a practical matter, the credit rating of the State would be so adversely affected by any such default that it seems likely that the State and its taxpayers would ultimately conclude that they had no choice but to pay off any such default indebtedness. Thus, in reality, the water system at issue in this case has been paid for by and is the "property" of the people of this State.

The Metropolitan Sewerage District of Buncombe County

Like a municipal corporation, the MSDBC is a political subdivision of the State authorized by the General Assembly and organized pursuant to N.C. Gen. Stat. §§162-64, *et seq*. It was established in 1962 by the North Carolina State Stream Sanitation Committee to construct and operate facilities for the treatment and disposal of sewage generated by the political subdivisions comprising the MSDBC. *See* http://www.msdbc.org/aboutus.php.

The MSDBC treats and disposes of sewerage generated by the following 16 political subdivisions located in Buncombe County:

City of Asheville
Town of Montreat
Beaverdam Water & Sewer District
Enka-Candler Water & Sewer District
Town of Biltmore Forest
Fairview Sanitary Sewer District
Town of Black Mountain

Skyland Sanitary Sewer District
Busbee Sanitary Sewer District
Swannanoa Water & Sewer District
Caney Valley Sanitary Sewer District
Woodfin Sanitary Water & Sewer District
Crescent Hill Sanitary Sewer District
Town of Weaverville
Venable Sanitary District
Town of Woodfin

Id.

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

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

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

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

The Act

The Act recognizes that "regional water and sewer systems provide reliable, cost-effective, high-quality water and sewer services to a wide range of residential and institutional customers." It further recognizes that "regional solutions" to problems relating to large public water and sewer systems are valuable to the effort to ensure that the citizens and businesses of this State have access to the highest quality services. (Rule 9(d) Documentary Exhibits ["DE"], 221-27)

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

Section 1(a) of the Act, referred to by the Court of Appeals as the Act's "transfer provision," provides that:

> All assets, real and personal, tangible and intangible, and all outstanding debts of any public water system meeting all of the following criteria are by operation of law transferred to the metropolitan sewerage district operating in the county where the public water system is located, to be operated as a Metropolitan Water and Sewerage District:

(1) The public water system is owned and operated by a municipality located in a county where a metropolitan sewerage district is operating.

(2) The public water system has not been issued a certificate for an interbasin transfer.[1]

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

Significantly, once the Act is implemented, the assets *and* liabilities of the publicly owned water system heretofore operated by the City will be transferred from the City, a political subdivision of the State, to what will then become the Metropolitan Water and Sewerage District of Buncombe County (hereinafter sometimes referred to as the "MWSDBC"), another political subdivision of the State. The water system will continue to be publicly owned and operated. As explained in the Act, the residents of the City will be politically represented on the MWSDBC, which will be politically accountable to them and to the General Assembly for its operation of the combined water and sewerage system. Moreover, as also explained in the Act, following the transfer of the water system and its debts to the MWSDBC, the City's residents will continue to be served in exactly the same way as they have been previously and as they are now by exactly

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

the same water system. Hence, the City's residents will not be required by reason of the transfer provision of the Act to construct or pay for a replacement or new water (or sewerage) system. And, as explained below, the recipient of the water system – the MWSDBC – will be a governmental entity that has been in existence and operation for over a half century and which has a bond rating that is as high as the City's.

What *will* change following the transfer of the water system to the MWSDBC will be the *governance* of that system. Indeed, the heart of the Act is not its transfer provision, but rather its provisions dealing with the newly created metropolitan water and sewerage district and the governance of this district, found in Section 2 of the Act. Following the transfer of the assets, liabilities and other obligations of the water system to the MSDBC, that metropolitan sewerage district will become a metropolitan water and sewerage district. The Act provides that this MWSD shall be governed by a district board that shall be representative not only of the residents of the municipality that formerly operated the water system, but also of the residents living in the other municipalities located in the water system's service area, as well as the county residents living within the water system's service area. N.C. Gen. Stat. §162A-85.3, as revised by the Act.

The Act gives the members of this MWSD district board, who will be broadly selected from the water system's entire service area, control over the tax

rates to be charged for water and sewer services and the rates and charges for services within the newly established MWSD. N.C. Gen. Stat. §§162A-85.9 and 85.13, as revised by the Act. The Act also strictly forbids price discrimination against customers who reside outside the territorial boundaries of the MWSD but who receive services from the MWSD. *Id.*

The Alleged Risks Posed to the Water System's Bondholders by the Act

In its Notice of Appeal and PDR, the City states, without citation to any fact, that the Act is causing uncertainty and increased financial risks for municipalities, taxpayers and capital markets. The best way to ascertain the actual level of uncertainty and risk that the Act poses to taxpayers, investors and the capital markets is to review how the capital markets have actually reacted to the Act. On the date the Act was enacted, the 2005 Series Asheville, North Carolina Water System Revenue Bonds carried a credit rating of Aa2 from Moody's and AA from Standard & Poor's. (R. 11 [Complaint, ¶ 24])

An online search of Moody's and Standard & Poor's rating services since 14 May 2013 reveals no downgrade in either of these credit ratings. *See* https://www.moodys.com/page/search.aspx?rd=&ed=&tb=1&sb=&sd=0&po=0&ps=10&std=&end=&rk=0&lang=en&cy=global&ibo=&spk=&kw=Asheville%2c+North+Carolina+Water+System+Revenue+Bonds%2c+Series+2005 and

ftp://ftp.ashevillenc.gov/Water/Asheville-Moffitt-HB-925-Info-Request/01-Financial%20Stability/SPReport-2007WaterSystemBonds.pdf.[2]

The MSDBC's own bond credit rating is equal to the City's. On 26 March 2013, the capital markets assigned a credit rating of "AA+; Outlook Stable" to the MSDBC's outstanding bonds. *See* http://www.marketwatch.com/story/fitch-rates-metro-sewerage-dist-of-buncombe-cty-nc; and http://www.businesswire.com/news/home/20130326006390/en/Fitch-Rates-Metro-Sewerage-Dist-Buncombe. On 28 March 2013, Moody's assigned an Aa2 credit

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[2] Rule 201 of the North Carolina Rules of Evidence, entitled "Judicial notice of adjudicative facts," provides, in relevant part, that:

> (b) *Kinds of facts.* -- A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> (c) *When discretionary.* -- A court may take judicial notice, whether requested or not.
> (d) *When mandatory.* -- A court shall take judicial notice if requested by a party and supplied with the necessary information.

See also, e.g., Smith v. Beaufort County Hospital Association, 141 N.C. App. 203, 211, 540 S.E.2d 775, 780 (2000), *rev. denied,* 353 N.C. 381, 547 S.E.2d 435, *aff'd per curiam*, 354 N.C. 212, 552 S.E.2d 139 (2001) (trial court properly took judicial notice of the number of times plaintiff law firm had participated in litigation in North Carolina by relying on information supplied by the North Carolina Bar Association, inasmuch as that information is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned); 1-2 *Brandis and Broun on North Carolina Evidence,* Judicial Notice in General, §24 (2013).

rating to the MSD's $30.105 million Sewer System Revenue Refunding Bonds, Series 2013. *See* http://www.municipalbonds.com/bonds/issue/120532JG2.

Perhaps even more telling, at no time since the inception of this litigation has the Trustee for the City's water system revenue bonds, whose function it is to protect the interests of the bondholders, ever expressed to the court *any* concern about *any* alleged risks posed to the bondholders by the Act and he has *never* attempted to intervene in this litigation, play any role in this litigation or even take a side in this litigation.[3]

[3] Beyond all this, if the City actually believed that the Act posed a threat to a municipality's ability to finance public enterprises through the sale of tax-exempt revenue bonds, one would expect that it would have actively appealed and vigorously argued concerning the trial court's refusal to rule on the issue whether the Act's transfer provision unlawfully impaired its contractual obligations to its bondholders 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. As noted elsewhere in this Motion and Response, however, the City filed no such appeal and did not even argue these issues to the Court of Appeals as an alternative basis for upholding the trial court's injunction. Court of Appeals' Decision Below at 6 n. 2, 25-26. The City's failure to appeal this aspect of the trial court's 9 June Order and its complete silence regarding these matters in the proceedings before the Court of Appeals speaks volumes about the degree to which it really believes that the Act poses a threat to bondholders and tax-exempt bond financing of public enterprises.

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

As noted above, the City sells water not only to its own residents, but also to the residents of Buncombe County and some of the residents of Henderson County. There has been an ongoing dispute between these county water customers and the City for the past 80 years concerning the City's operation and use of the water system, including complaints that the City charges substantially higher prices for water to county customers than to City customers, despite the fact that county taxpayers helped finance significant parts of the water system, and complaints that the City was taking monies from its operation of the water system and spending them on projects that benefitted the City's residents only (rather than reinvesting those monies in the water system).

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

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

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

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

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

and the North Carolina Court of Appeals upheld the constitutionality of all the Sullivan Acts.

MOTION TO DISMISS APPEAL

The City's arguments in support of its attempted appeal purportedly based on the existence of substantial constitutional questions overlap substantially with its arguments in support of its PDR. Consequently, the State will discuss these purported substantial constitutional questions in detail in responding to the City's PDR.

As a general matter, however, the State notes at this point that the City has failed to demonstrate that this case presents any substantial question arising under either the United States Constitution or the North Carolina Constitution.[4] An appellant seeking review by this Court as a matter of right on the ground that a substantial constitutional question is involved must allege and show the involvement of such a question or suffer dismissal. *State of North Carolina v. Colson*, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968), *cert. denied*, 393 U.S.

[4] Indeed, as pointed out above, the City failed to raise its only federal constitutional issue in its appeal to the Court of Appeals below. That constitutional issue was whether the transfer provision of the Act unlawfully impairs the City's contractual obligations with its bondholders in violation of Article I, Section 10 of the United States Constitution (as well as Article I, Section 19 of the North Carolina Constitution and N.C. Gen. Stat. §159-93). By failing to raise this issue before the Court of Appeals, the City failed to give that court an opportunity to pass on this issue, thereby waiving the issue and failing to preserve it for appellate review. Court of Appeals' Decision Below at 6 n. 2, 25-26.

1087, 89 S. Ct. 876, 21 L. Ed. 2d 780 (1969). The question must be real and substantial, rather than superficial and frivolous. *Id.* It must be a constitutional question which has not already been the subject of conclusive judicial determination. *Id.* Mere mouthing of constitutional phrases like 'due process of law' and 'equal protection of the law' will not avoid dismissal. *Id. See also Bundy v. Ayscue*, 276 N.C. 81, 84, 171 S.E.2d 1, 3 (1969); *Thompson v. Thompson*, 288 N.C. 120, 121, 215 S.E.2d 606, 607 (1975).

In addition, an appellant seeking review by this Court as a matter or right under N.C. Gen. Stat. §7A-30 on the ground that a substantial constitutional question is involved must show that he preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief. *State of North Carolina v. Mitchell,* 276 N.C. 404, 410, 172 S.E.2d 527, 530-31 (1970) (where this Court stated that: "This Court will not pass upon the merits of a litigant's contention that his constitutional right has been violated by a ruling or order of a lower court, unless, at the time the alleged violation of such right occurred or was threatened by a proposed procedure, ruling or offer of evidence, or at the earliest opportunity thereafter, the litigant made an appropriate objection, exception or motion and thereafter preserved the constitutional question at each level of appellate review by an appropriate assignment of error and by argument in his brief.").

When this Court reviews a case pursuant to N.C. Gen. Stat. §7A-30, its review "is restricted to rulings of the Court of Appeals" and "only the decision of [the Court of Appeals] is before us for review." *State of North Carolina v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 356 (1968).

The City failed to brief or even argue to the Court of Appeals the questions whether the Act unlawfully impairs the City's contractual obligations with its bondholders in violation of Article I, Section 10 of the United States Constitution, Article I, Section 19 of the North Carolina Constitution and/or N.C. Gen. Stat. §159-93.[5] Court of Appeals' Decision Below at 6 n. 2, 25-26. By failing to do so, the City did not give the Court of Appeals an opportunity to consider and pass upon these questions. Under these circumstances, to the extent that the City's purported Notice of Appeal seeks a second appeal as to these questions, it should be dismissed.

Beyond these three questions, which the City failed to preserve for appeal and waived, the Court of Appeals' Decision Below fully addressed the questions now raised by the City in its purported appeal and PDR. Those questions were correctly determined by the Court of Appeals consistent with controlling precedents. As a result, no substantial constitutional question remains for this

[5] The City also failed to take an appeal of that aspect of the trial court's 9 June Order which declined to adjudicate these three claims made by the City.

Court to resolve. Accordingly, this Court should dismiss the City's purported appeal under N.C. Gen. Stat. §7A-30(1).

RESPONSE IN OPPOSITION TO THE CITY'S ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW OF CONSTITUTIONAL ISSUES PURSUANT TO N.C. GEN. STAT. §7A-31 AND APPELLATE RULE 15

REASONS WHY CERTIFICATION SHOULD NOT ISSUE

This Court should not grant the City's PDR because the City cannot meet the requirements of N.C. Gen. Stat. §7A-31 for discretionary review. Given the well-reasoned decision of the Court of Appeals on the issues that the City now raises through its purported appeal and PDR, and given that the Court of Appeals relied in its decision on directly applicable controlling legal precedents, the issues now presented to this Court by the City have been properly addressed and the correct result reached. There is no conflict between the Court of Appeals' Decision Below and any of this Court's prior precedents. Certification of a matter on the grounds of significant public interest is appropriate only when there are unresolved legal issues worthy of this Court's attention. None of the issues raised by the City has significant public interest and the case does not involve legal principles of major significance to the jurisprudence of the State. *See* N.C. Gen. Stat. §7A-31(c). Furthermore, as demonstrated below, not one of the arguments made by the City in support of its purported appeal and its PDR has merit.

Accordingly, and for the reasons set forth more fully below, this Court should dismiss the City's purported appeal and deny its PDR.

EACH OF THE ARGUMENTS MADE BY THE CITY IN SUPPORT OF ITS PURPORTED APPEAL AND ITS PDR IS WITHOUT MERIT AND NONE JUSTIFIES A SECOND APPEAL BY THE CITY.

I.

The Analysis Employed by the Court of Appeals Concerning the Issue Whether a Statute Violates Article II, Section 24(1)(a) of the North Carolina Constitution on the Ground That it "Relates to" Health, Sanitation and Non-Navigable Streams Was Entirely Consistent With This Court's Prior Decisions.

In its purported appeal and its PDR, the City claims that the Court of Appeals applied an overly literal and simplistic mode of analysis to the Act, thereby defeating the purpose of Article II, Section 24 of the State Constitution. In fact, nothing could be less true. The Court of Appeals did not, as the City claims, merely grope for "unsubstantial distinctions" (City's Appeal and PDR at page 11) or reach its decision after quickly concluding that the Act's text did not include the exact words "health," "sanitation" or "non-navigable streams." (City's Appeal and PDR at page 11)

In reaching its decision, the Court of Appeals went much deeper than this and asked itself what the General Assembly sought to accomplish through the Act. It did this by studying the text of the Act as a whole and concluded – correctly –

that the Act not only does not specifically mention the words "health," "sanitation" or "non-navigable streams," but that the heart (and bulk) of the Act deals with something altogether different from health, sanitation and/or non-navigable streams – *i.e.*, issues going directly to the *quality* of services rendered and the *governance* of the water system at issue here. *E.g.*, Court of Appeals' Decision Below at 13.

As demonstrated below, this analysis is entirely consistent with this Court's teachings on how to evaluate a statute to determine whether it "relates to" health, sanitation and/or non-navigable streams. It would be equally applicable in a municipality's challenge to a statute's mandate that a publicly owned and operated forest, park and recreational facility (or any other public facility that has nothing to do with health, sanitation and non-navigable streams) be transferred from a municipality to a regional authority which is also a subdivision of the State.

Given that the Court of Appeals carefully studied the text of the Act to inform it of the General Assembly's purpose in adopting the Act and given that the Court of Appeals' mode of analysis is entirely consistent with this Court's decisions on Article II, Section 24 of the North Carolina Constitution, nothing in its mode of analysis defeats the purpose of Article II, Section 24, detracts from the remedial nature of Article II, Section 24 or invites artful drafters to evade Article II, Section 24 by simply omitting "magic words" from a statute. (City's Appeal

and PDR at page 11) Hence, the City's contentions concerning the Court of Appeals' mode of analysis are without merit and do not support its purported appeal or its PDR.

The City also claims in its purported appeal and its PDR that the Court of Appeals' Decision Below "clashes with the rules of constitutional interpretation announced by this Court" by "ignoring the distinction between two different constitutional terms: 'relating to' and 'regulating.'" (City's Appeal and PDR at page 12) The City claims that the word "regulating" gives rise to a more heightened standard than the term "relating to." According to the City, by applying a "regulation" standard in this case, the Court of Appeals artificially narrowed Article II, Section 24 in violation of this Court's teachings. (City's Appeal and PDR at pages 12-13)

This claim is likewise untrue. In fact, the standard applied by the Court of Appeals in its decision below came *directly* from the decisions of *this* Court. At page 12 of its decision below, the Court of Appeals cited and quoted with approval from a 2008 decision of the Court of Appeals authored by Chief Judge Martin and concurred in by Judges Steelman and Stephens in *City of Asheville v. State of North Carolina*, 192 N.C. App. 1, 665 S.E.2d 103 (2008), *app. dismissed and rev. denied*, 363 N.C. 123, 672 S.E.2d 685 (2009), stating 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 a] careful perusal of the entire act.'" Chief Judge Martin added 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.'" 192 N.C. App. at 33, 37, 665 S.E.2d 126, 129. (Emphasis in original) Court of Appeals Decision Below at 12.

But Chief Judge Martin did not just make up the term "regulating," as applied to a reviewing court's analysis of the question whether a statute "relates to" health, sanitation or some other forbidden subject. He drew this term directly from this Court's decision in *Reed v. Howerton,* 188 N.C. 39, 44, 123 S.E.2d 479, 481 (1924) ("The act does not state that its purpose is to *regulate* sanitary matters, or to *regulate* health or abate nuisances. A careful perusal of the entire act, and the entire act must be considered, clearly shows that the main purpose of the act and, in fact, the only purpose of the act, is to provide districts in Buncombe County wherein sanitary sewers or sanitary measures may be provided in rural districts."). (Emphasis supplied) And Chief Judge Martin likewise did not just make up the words "the best indications of the General Assembly's purpose" in enacting a statute. He drew these words directly from another decision of this Court, *State of*

North Carolina ex rel. Commissioner of Ins. v. Rate Bureau, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (1980).

Hence, the Court of Appeals' use of the term "regulating" in its decision below was entirely faithful to this Court's prior precedents and cannot justify the City's purported appeal or its PDR.

Next, the City claims that the Court of Appeals' Decision Below conflicts with this Court's decisions regarding Article II, Section 24 of the State Constitution. (City's Appeal and PDR at page 14)[6] As demonstrated below, this, too, is untrue.

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[6] In making this claim, the City asserts that "[t]he [C]ourt [of Appeals] admitted that the Act seeks to ensure '*high-quality water* and sewer services.'" (Emphasis in original) This is a misstatement of what the Court of Appeals actually said, as well as what the court meant. The Court of Appeals noted that "the Act's stated purpose is to address concerns regarding the *quality of the service provided*" – in this case, "to the customers of public water and sewer systems." Court of Appeals' Decision Below at 12. (Emphasis supplied) The court offered as support for this conclusion the following words of the Act: "*high quality* water and sewer *services* to a wide range of residential and institutional customers" and "*highest quality services*." Court of Appeals' Decision Below at 12. (Emphasis in original) The court also stated its conclusion, based on its perusal of the Act as a whole, that "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*." Court of Appeals' Decision Below at 13. (Emphasis supplied) Thus, the Court of Appeals clearly seems to have thought that the goals of the Act were the quality of services provided to customers and the governance of the system, two purposes which have nothing to do with whether the *res* at issue in the case is a water system or some other public facility, such as a public park, that has nothing at all to do with water.

First, the City cites *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928), as being in conflict with the Court of Appeals' Decision Below. (City's Appeal and PDR at page 15) The City argues that the Court in *Drysdale* stated that water service "involves the very life and health of a community" and "promot[es] the public health and welfare." 195 N.C. at 732-33, 143 S.E. at 534-35. (City's Appeal and PDR at page 15)

But, as the Court of Appeals correctly observed, the Court in *Drysdale* never made a determination that the statute at issue in that case was one "relating to" health, sanitation or non-navigable streams. *Drysdale* is thus distinguishable from this case and does not conflict with the Court of Appeals' Decision Below. The Court of Appeals acted properly in relying on *Reed v. Howerton*, 188 N.C. 39, 123 S.E. 479 (1924), instead of *Drysdale* on the issue how to determine whether a statute "relates to" health or sanitation. Unlike *Drysdale*, the *Reed* Court actually grappled with and decided the issue whether a statute creating sewer districts in Buncombe County was one "relating to" health or sanitation, holding that it was not because the language of the statute did not suggest that this was the statute's purpose, but rather that the statute merely sought to create political subdivisions through which sanitary sewer service could be provided. 188 N.C. at 42, 44, 45, 123 S.E. at 479-80, 481, 482.

The City next cites *Gaskill v. Costlow*, 270 N.C. 686, 688, 155 S.E. 148, 149 (1967), for the proposition that "a water system is inherently health-related." (City's Appeal and PDR at page 15) This assertion is untrue at multiple levels. First and foremost, nowhere in the *Gaskill* decision did the Court even state, much less hold, that "a water system is inherently health-related." Indeed, *Gaskill* did not even deal with a water system, but rather with "sewerage facilities," 270 N.C. at 687, 155 S.E. at 149 ("[r]elating exclusively to sewerage facilities ..."), which are not at issue in the City's challenge to the transfer provision of the Act. In fact, the *Gaskill* Court did not even state that a sewerage facility is inherently health-related.

Second, the *Gaskill* Court's discussion of whether a local law dealing with a town's sewerage facilities "related to" health, sanitation and the abatement of nuisances did not constitute the Court's "holding" in that case. The *Gaskill* Court's entire discussion of this issue was *dictim*. Its actual holding *reversed* the Court of Appeals' decision that the local act at issue in that case was unconstitutional because it related to health, sanitation and the abatement of nuisances. And the Court's holding reversing the Court of Appeals' decision was based solely on the fact that the plaintiffs in that case had failed to file their constitutional challenge to the local act in issue in a timely manner. 270 N.C. at 688-90, 155 S.E.2d at 150-51.

Moreover, the facts of *Gaskill* are significantly different from those of this case, which further distinguishes *Gaskill* from this case. As the Court noted in *Gaskill*, the statute challenged in that case "relat[ed] *exclusively* to sewerage facilities in the Town of Beaufort ...." (Emphasis supplied) By contrast, the Act is lengthy. Only a small part of it even deals with the transfer of the water system to an MWSD. Most of its provisions deal with issues going to the quality of services delivered to customers, as well as the governance of the newly created water and sewerage district.

In addition, the City's reference to *Gaskill* fails to disclose the fact that the Court there spoke approvingly of the "sole purpose" test to determine whether a statute "relates to" health, sanitation or non-navigable streams (among other prohibited subjects), 270 N.C. at 688, 155 S.E.2d at 149-50, not to its "practical effect(s)."

As the Court of Appeals' Decision Below demonstrates, prescribing provisions with respect to water services for the residents of Buncombe County was not the sole purpose of the Act. Indeed, as the Court of Appeals' Decision Below demonstrates, that was not the purpose of the Act at all. Accordingly, the *Gaskill* decision does not support the City's purported appeal or its PDR.

The City also cites *Lamb v. Board of Education*, 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952), for the proposition that a water system is inherently

health-related. (City's Appeal and PDR at page 15) As the Court of Appeals noted in its decision below, however, *Lamb* is not controlling here. The Court in *Lamb* declared unconstitutional a statute which imposed a duty on the Randolph County Board of Education to provide a sewerage system and an adequate water supply for its schools. 235 N.C. at 379, 70 S.E.2d at 203. The *Lamb* Court held that this statute "related to" health and sanitation, but it did so because "its sole purpose" was to ensure that school children in Randolph County had access to healthful conditions while at school. *Id.* As the Court of Appeals noted in its decision below, the Act does not require any political subdivision of the State to continue operating a water or sewerage system.

Next, the City claims that the Court of Appeals' Decision Below conflicts with this Court's decisions allegedly holding that laws dealing with the governance of health-related services "relate to" health and sanitation. (City's Appeal and PDR at page 17) In support of this assertion, the City cites *City of New Bern v. New Bern-Craven County Board of Education*, 338 N.C. 430, 442, 450 S.E.2d 735, 742 (1994), *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951), *Board of Health of Nash County v. Board of Commissioners of Nash County*, 220 N.C. 140, 143-44, 16 S.E.2d 677, 679 (1941), and *Sams v. Board of County Commissioners*, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940). But each of these cases is distinguishable from this case. As the Court of Appeals observed below, *New*

Bern, *Idol* and *Sams* are distinguishable from this case because they deal with legislation that empowers a political subdivision with authority to *enforce health regulations* in a county. Court of Appeals' Decision Below at 15. The same is true of *Board of Health of Nash County v. Board of Commissioners of Nash,* 220 N.C. 140, 143-44, 16 S.E.2d 677, 679 (1941).

By contrast, in this case, the Act's transfer provision does not empower anyone to enforce health regulations and it does not impose any health regulations on the water system. Rather, as the Court of Appeals correctly observed, this case is more like *Reed*, in that the Act here 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. Court of Appeals' Decision Below at 16.

The City next argues that the Court of Appeals' Decision Below "focused only on the stated purpose of the Act" (City's Appeal and PDR at page 20) and that it overlooked this Court's teaching that, when courts apply Article II, Section 24 of the North Carolina Constitution to a statute, they must focus on whether the statute has a "practical effect" on health, sanitation or non-navigable streams. (City's Appeal and PDR at page 18) In support of its "practical effect" argument, the City relies on *New Bern* and *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415 (2003).

This argument is likewise without merit. First, as demonstrated above and as is apparent from the Court of Appeals' Decision Below, the court did not just focus on the "stated purpose" of the Act. Rather, it painstakingly reviewed the text of the Act as a whole and concluded from its text that its purposes related to the quality of services provided to customers and the governance of the system.

Second, both *New Bern* and *Williams* are distinguishable from and inapplicable to this case. As the Court of Appeals observed below, *New Bern* is distinguishable from this case because, unlike the Act here, the statute in *New Bern* dealt with legislation that empowered a political subdivision with authority to *enforce health regulations* in a county. Court of Appeals' Decision Below at 15. In addition, unlike the Act at issue in this case, the statute in *New Bern* singled out the specific building inspection power determined by this Court to relate to health and sanitation and further micro-managed the relationship between the city and the county on this topic. *New Bern,* 338 N.C. at 430, 450 S.E.2d at 735. Even more fundamentally, however, *New Bern* is distinguishable from this case because the statute at issue in *New Bern*, unlike the Act here, was not a water-related statute.

Williams is likewise fundamentally distinguishable from this case. The statute at issue in *Williams* also did not deal with water-related issues. In fact, although *Williams* was an Article II, Section 24 case, it dealt with the issue whether a statute regulated trade and labor, not with whether it relates to health,

sanitation and/or non-navigable streams. 357 N.C. at 177, 581 S.E.2d at 421-22. Under these circumstances, the Court of Appeals was correct in looking to *Reed*, a case that actually dealt with a water-related statute and which actually made a holding about whether the statute related to health or sanitation, for guidance on how to determine whether the Act at issue in this case relates to health, sanitation and/or non-navigable streams.

II.

This Court's Precedents Applying Article II, Section 24 Only Prohibit Legislation That Directly Legislates on a Prohibited Subject; An Incidental Effect Is Not Sufficient to Establish a Constitutional Violation.

In further response to the City's argument that the Court of Appeals should have considered the "practical effects" of the Act, the State notes that, in challenges brought pursuant to Article II, Section 24 of the North Carolina Constitution, this State's appellate courts have focused their analysis on whether the challenged legislation *directly* legislates on a prohibited topic. Legislative intent is determined based on the language of the challenged act. This Court has used the phrases "sole purpose," "main or only purpose," "directed solely against," and "aimed at" in analyzing such legislation. And this Court has held that an incidental effect on one of the prohibited subjects is *not* sufficient to find a constitutional violation.

As noted above, in *Reed v. Howerton*, this Court rejected an Article II, Section 24 (formerly Section 29) challenge to "An act to create sanitary districts in Buncombe County, and describing their purposes and powers." 188 N.C. at 39, 123 S.E. at 479. The Court did not focus on the word "sanitary," but instead looked at the entire act:

> While the act may use the words "sanitary district," yet when taken as a whole it is not a local, private or special act relating to health, sanitation and the abatement of nuisance. The act does not state that its *purpose* is to regulate sanitary matters, or to regulate health or abate nuisances. A careful perusal of the entire act, and the entire act must be considered, clearly shows that the *main purpose* of the act and, in fact, the *only purpose* of the act, is to provide districts in Buncombe County wherein sanitary sewers or sanitary measures may be provided in rural districts.

188 N.C. at 44, 123 S.E. at 481. (Emphasis supplied) The main, or only purpose, of the act was to allow sanitary districts. The act did not otherwise attempt to regulate sanitary matters, health or the abatement of nuisances.

In *Cheape v. Town of Chapel Hill,* 320 N.C. 549, 359 S.E.2d 792 (1987), this Court likewise looked at the main purpose of the challenged legislative act in determining that the act did not regulate trade in violation of Article II, Section 24(1)(j). That act allowed Chapel Hill to engage in economic development by entering into joint ventures with private companies. This Court held that the act did not violate Article II, Section 24(1)(j). Unlike private parties, who possessed

the capacity to engage in development projects, cities were merely "creature[s] of the General Assembly" and had only those powers expressly or impliedly conferred upon them. *Id.* at 564, 359 S.E.2d at 801. All the Act did was to "empower the Town of Chapel Hill to engage in 'economic development projects.'" *Id.* at 559-60, 359 S.E.2d at 798. It gave the Town the power to act, but it did not relate to or attempt to regulate any potential project itself. *Id.* The *Cheape* decision is in accord with the principle enunciated in this Court's decision forty-seven years earlier in *Fletcher v. Collins,* 218 N.C. 1, 9 S.E.2d 606 (1940), that the constitutional prohibition contained in Article II, Section 24 is against direct action on the part of General Assembly, not the establishment of machinery to accomplish these ends. *Id.* at 5, 9 S.E.2d at 609.

Similarly, in *In re Durham Annexation Ordinance Numbered 5991 for Area A*, 69 N.C. App. 77, 316 S.E.2d 649, *app. dismissed and rev. denied,* 312 N.C. 493, 322 S.E.2d 553 (1984), the Court of Appeals considered whether N.C. Gen. Stat. §160A-56, exempting certain counties from the annexation statutes, constituted a local act in violation of Article II, Section 24(1)(h), prohibiting local laws erecting new townships, changing township lines or establishing or changing the lines of school districts. *Id.* at 82, 316 S.E.2d at 653. The Court of Appeals held that it did not. The annexation statutes themselves did not erect new townships or change township lines. "They merely *authoriz[ed]* various townships to change their lines

by various procedures .... The annexation statutes set out in G.S. 160A, *et seq.* [were] clearly consistent with the authority granted to the General Assembly by our Constitution in Article VII, Section 1." 69 N.C. App. at 82-83, 316 S.E.2d at 653. (Emphasis supplied) Thus, this legislation, like the legislation in *Cheape v. Town of Chapel Hill*, was focused on giving broad powers, not merely or solely on regulating a prohibited topic.

By contrast, in *Lamb,* this Court held that a local act was related to health and sanitation because its *sole purpose* was to prescribe provisions with respect to sanitary conditions through sewer and water service for local school children in Randolph County. The act therefore violated the prohibition contained in Article II, Section 24 on local acts relating to health, sanitation and the abatement of nuisances. 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952).

The Court of Appeals was thus being faithful to this Court's precedents on Article II, Section 24 when it focused its analysis on the Act's main or primary purpose, not its incidental effect(s).

III.

The Court of Appeals' Holding That the Act's Transfer Provision Does Not Effect a "Taking" of the City's Private Property Was Correct and Is Not Inconsistent With Any of This Court's Prior Precedents.

At the tail end of its purported Notice of Appeal and PDR, the City asserts that the transfer provision of the Act effects a "taking" of its private property and that, in finding against the City on this issue, the Court of Appeals "purported to repeal" the constitutional "right to be free from uncompensated takings" of private property. (City's Appeal and PDR at page 22) In making this argument, the City relies on *Asbury v. Town of Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), and *State Highway Commission v. Greensboro City Board of Education,* 265 N.C. 35, 143 S.E.2d 87 (1965). As demonstrated below and in the Court of Appeals' Decision Below: (i) the Act's transfer provision does not effect a taking of the City's private property at all, much less one for which the payment of compensation would be appropriate; (ii) nothing in *Asbury, Greensboro City Board of Education* or any other decision of this Court conflicts in any way with the Court of Appeals' Decision Below on this alleged "takings" issue; (iii) the Court of Appeals correctly relied upon *Brockenbrough v. Board of Water Commissioners of Charlotte*, 134 N.C. 1, 46 S.E. 28 (1903), in reaching its decision; and (iv) the Court of Appeals acted correctly in looking to the common law decided elsewhere,

in addition to *Brockenbrough* (among other things), on the issue whether the transfer of the water system in this case constitutes a compensable "taking" of private property.

(i)

The Act's Transfer Provision Does Not Effect a "Taking" of the City's Private Property, Whether Compensable or Otherwise.

The water system is not the private property of the government of the City of Asheville. That water system is held by the City *in trust* for, among other persons, the residents of the City, and it is operated by the City as a water system for the use of, among others, those residents. In recognition of the fact that a regional water and sewer system would better serve the interests of all the people who live in the Asheville-Buncombe County-Henderson County region, and in recognition of the fact that the people who live in that region would be better served if the governance of the water and sewer systems was meaningfully reformed, the General Assembly adopted the Act in order to transfer operating control – by transferring ownership – of the water system to the MSDBC. Importantly, the water system will not be moved or destroyed and it will not be repurposed as a result of the implementation of the Act. Instead, it will continue to serve the residents of the City, among others, with water just as before, only more efficiently and fairly. In other words, the residents of the City will not lose or lose the use of

the existing water system. Furthermore, the City and its residents will not have to use tax dollars to acquire or construct another water system, since the existing water system will not be destroyed or repurposed by the Act's transfer provision. Rather, the existing water system will continue to serve the residents of Asheville, among others, in the future, just as it does now. Manifestly, this is not a "taking" of the water system from those who own it.[7]

(ii)

Nothing in Any Decision of This Court Conflicts With the Court of Appeals' Decision Below on the Alleged "Takings" Issue Raised by the City.

The City claims that the alleged "takings" issue in this case is controlled by *Asbury v. City of Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), and that the Court of Appeals' holding that the transfer provision of the Act does not give rise to a taking of the water system conflicts with *Asbury*. (City's Appeal and PDR at pages 22-25) These assertions are untrue.

[7] Another way to illustrate why the transfer contemplated by the Act is not a "taking" is to consider what a fair compensation would be if the transfer *were* viewed as a "taking." Given that: (i) the City's residents will continue to have full and uninterrupted access to the water system and will continue to use it just as they always have; (ii) the water system will not be destroyed or moved; and (iii) the residents of the City will not have to spend money building a new or replacement water system, *any* compensation paid to the City or its residents on account of the water system's transfer to the MSDBC would, by definition, constitute a double recovery.

Asbury dealt with the issue what constitutes a proprietary function of a municipality. It did not deal with a situation in which a law enacted by the General Assembly transfers ownership and control of a municipal water system (or some other municipal facility) from one political subdivision of the State to another political subdivision of the State so that it will be used by the transferee political subdivision in the same way and for the benefit of the same people as before. Hence, on this takings issue, *Asbury* is not controlling or even relevant.[8]

The City also cites *State Highway Commission v. Greensboro Board of Education*, 265 N.C. 35, 143 S.E.2d 87 (1965), for the proposition that the transfer provision of the Act effects a taking of its private property and that the Court of Appeals' holding to the contrary conflicts with this Court's decisions. This claim, too, is untrue. Indeed, the *Greensboro Board of Education* decision illustrates clearly why the transfer of the water system at issue in this case is *not* a taking.

In *Greensboro Board of Education*, the State Department of Transportation condemned land belonging to the Greensboro public school system which was then being used for a public school. The purpose of the condemnation was to enable the State to construct a road. But, unlike the transfer provision at issue in this case, the building of this road by the State necessarily *repurposed* the school system's land

[8] The same is true of *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958), which the City also cites. (City's Appeal and PDR at page 23 n. 7)

and thus required that the school system spend money to replace the school. 265 N.C. at 40, 143 S.E.2d at 91; *see also* "Prior History."

This is exactly the opposite of the instant case. If the Court in *Greensboro Board of Education* had not treated the State's condemnation as a taking, the school system would have lost one of its existing schools and could have replaced that school only by spending its own money to build a new school, all without compensation by the State.

By contrast, in the instant case, the Act's transfer provision will not require the City to build a new water system, because that system is not being destroyed, moved or repurposed by the Act. It will continue to be used by the same members of the public for the same purpose as before. Thus, *Greensboro Board of Education* is distinguishable from this case and is not in conflict with the Court of Appeals' Decision Below.

(iii)

The Court of Appeals Correctly Relied Upon *Brockenbrough v. Board of Water Commissioners of Charlotte* in Reaching its Decision.

The City criticizes the Court of Appeals for its citation to and reliance on *Brockenbrough v. Board of Water Commissioners of Charlotte*, 134 N.C. 1, 46 S.E. 28 (1903), because, according to the City, the statute at issue in *Brockenbrough* did not mandate an *involuntary* transfer of Charlotte's water

system to another political subdivision of the State, as does the Act in the instant case. Instead, the City argues that the statute at issue in *Brockenbrough* effected a *voluntary* transfer of Charlotte's water system to this other political subdivision for and in the name of Charlotte. Based on this assertion, the City claims that *Brockenbrough* is inapplicable to this case. (City's Appeal and PDR at page 25)

This, too, is untrue. As the *Brockenbrough* decision makes clear, the legislative act at issue there created a board of water commissioners and empowered it "to take ... the land, real estate, ... and property of every kind now owned by [the] board of aldermen [of the City of Charlotte] ... for the purpose of operating and maintaining a system of waterworks for the said city ...." 134 N.C. at 3-4, 46 S.E. at 28. In other words, the *Brockenbrough* legislation *mandated* that the City of Charlotte transfer its water works property to another political subdivision of the State. The Court's decision makes clear that the City of Charlotte did turn its waterworks property over to this other political subdivision and that it did so without protest or dispute, *id.* at 4, 46 S.E. at 29; however, that fact does not render the transfer mandated by the statute voluntary. It just means that the city complied with the statute and chose not to challenge it in court. Thus, the Court of Appeals was correct in relying upon *Brockenbrough*, a decision that is applicable to this case.

(iv)

The Court of Appeals Acted Correctly in Looking to Persuasive Decisions From Other Jurisdictions, in Addition to *Brockenbrough* and Other Precedents, on the Issue Whether the Transfer of the Water System Mandated by the Act Constitutes a Compensable Taking of Private Property.

The City claims that the Court of Appeals relied on federal and other out-of-state authorities to "abrogate" *Asbury*. (City's Appeal and PDR at page 25) This claim is untrue. First and foremost, as demonstrated above, the Court of Appeals' Decision Below does not even conflict with *Asbury*, much less abrogate it or create a "new rule." Second, the Court of Appeals can hardly be faulted for considering the persuasive decisions of the United States Supreme Court and other states – in addition to *Brockenbrough* – on the takings issue raised by the City, or in noting that there is persuasive precedent from other jurisdictions concluding that the type of transfer at issue in this case is not a taking at all.[9]

[9] The out-of-state precedents cited by the Court of Appeals are not the only cases that the court could have cited on this point. *See also, e.g., State of Florida v. Tampa Sports Authority*, 188 So.2d 795 (Fla. 1996), where the Florida Supreme Court upheld the Florida legislature's uncompensated conveyance of a city-owned stadium to a newly-created administrative agency, noting that, both before and after the transfer, the stadium was "held for the use and benefit of the public." *Id.* at 798. The court held that, under such circumstances, the legislature had "full authority to transfer [the stadium] from one creature of the legislature to another without formal deed or compensation." *Id. Cf. Campbell v. First Baptist Church*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) (holding that "[m]unicipal corporations are creatures of the legislature and all of their powers are determined

IV.

The Fact That This Court Will Soon Hear the Appeal of the State in *Town of Boone v. State of North Carolina* Does Not Support the City's Purported Appeal or its Petition for Discretionary Review.

The City argues in its purported appeal and its PDR that this Court should grant it a second appeal in this matter because this Court will soon decide an appeal in *Town of Boone v. State of North Carolina,* No. 93A15 (N.C. Nov. 6, 2015). (City's Appeal and PDR at 20) Unlike this case, the appeal in *Town of Boone* is a direct appeal to this Court by the State pursuant to N.C. Gen. Stat. §7A-27(a1), in that it arises from an order of a three-judge panel enjoining as unconstitutional a statute of the General Assembly.[10]

The *Boone* case is so different from this case that its pendency before this Court has no logical bearing on whether this Court should decide to hear the City's

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by the legislature). Given that the United States Government is a federal form of government and that, as such, the states of the Union are not merely "creatures of Congressional will," but rather have characteristics of sovereignty, it is not surprising that cases involving the taking of a municipality-proprietor's property by the federal government are treated differently and usually result in a finding that the taking is compensable. *See, e.g., United States v. 50 Acres of Land*, 469 U.S. 24 (1984); *United States v. Carmack*, 329 U.S. 230 (1946); *Town of Bedford v. United States*, 23 F.2d 453, 456-57 (1st Cir. 1927).

[10] In other words, by contrast to the situation here, the appeal to this Court in the *Boone* case will be the parties' first and only appeal of the trial court's decision declaring an act of the General Assembly unconstitutional. In the instant case, of course, the City seeks a second appeal of this matter.

purported appeal or grant its PDR. First and foremost, the statute at issue in *Boone* is not a water-related statute, inasmuch as it does not purport to relate to or regulate any public water system.

Second, the statute at issue in *Boone* deals with – and limits – a municipality's power to extend its territorial reach through extraterritorial jurisdiction.[11] Like annexation, extraterritorial jurisdiction allows a municipality to bring territory within its control. In the context of annexation, the Court of Appeals has declined to analyze cases dealing with the subject of municipal annexation under Article II, Section 24's prohibition against local laws relating to health, sanitation or non-navigable streams, ruling instead that municipalities lack standing to challenge an act of the General Assembly which places restrictions of their annexation powers. *E.g., Wood v. City of Fayetteville,* 43 N.C. App. 410, 412, 415, 259 S.E.2d 581, 582, 584, *rev. denied,* 299 N.C. 125, 261 S.E.2d 926 (1980).[12] Hence, it is not even clear that this Court will reach the issue whether the statute at issue in *Boone* violates Article II, Section 24 of the State Constitution.

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[11] The statute at issue in *Boone* is entitled "An Act Providing that the Town of Boone Shall Not Exercise the Powers of Extraterritorial Jurisdiction." It removes Boone's Chapter 160A, Article 19 powers of extraterritorial jurisdiction, including the power to establish the territory.

[12] In the context of annexation, the Court of Appeals has also held that Article II, Section 24 is not a restriction on the General Assembly's Article VII, Section 1 authority to grant annexation power, which delegates to municipalities the General

Thus, the entire context of *Boone* is fundamentally different from this case. Under these circumstances, its pendency before this Court does not support the City's purported appeal or its PDR.

V.

The City's Assertions That the Act's Transfer Provisions Threaten Local Investment in Infrastructure, Cause Uncertainty Among Municipalities and Taxpayers and Increase Investment Risks for Municipal Residents and Bond Purchasers Are Unsupported and Untrue and Do Not Justify a Second Appeal in This Case.

Little need be said of the City's unsupported claim that the Act's transfer provisions threaten local investment in infrastructure, cause uncertainty among municipalities and taxpayers and increase investment risks for municipal residents and bond purchasers (City's Appeal and PDR at pages 4, 27-28), except that at no time during the two-plus year course of this litigation has the Trustee for the bondholders who have purchased the City's Water System Revenue Bonds ever communicated to the court *any* concern about *any* such risk or uncertainty and at no time has that Trustee *ever* attempted to intervene in the case in order to protect against *any* such alleged risks or uncertainties. The same is true of the North Carolina State Treasurer. The transfer of the water system (including its

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Assembly's authority to extend municipal powers within those extended corporate boundaries. *E.g., Campbell v. City of Greensboro,* 70 N.C. App. 252, 254-55, 319 S.E. 323, 325, *app. dismissed and rev. denied,* 312 N.C. 429, 322 S.E.2d 553 (1984).

obligations and debts) from one local government owner-operator to another will not have *any* effect on the revenues generated by the water system, which alone secure the bond indebtedness. In addition, as noted above, the Metropolitan Sewerage District of Buncombe County has a credit rating that is just as high as the City's and over a half century of operational experience.

VI.

Appellate Rule 15(h) Does Not Support the City's Request For a Second Appeal In This Case.

The City asserts that Rule 15(h) of the North Carolina Rules of Appellate Procedure[13] supports its request for a second appeal in this case. This, too, is not true.

As noted above, the City sought a declaration from the trial court that, among other things, the Act unlawfully impairs its contractual obligations to its bondholders 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-

[13] Rule 15(h), entitled "Discretionary review of interlocutory orders," provides that:

> An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

93. (R. 60-61, 76-79, 81) Based on these three claims, the City sought to enjoin the enforcement of the Act. (R. 80-82)

In its 9 June Order, the trial court declined to rule on or otherwise adjudicate these three claims. (R. 157, 164-65) The trial court's refusal to rule on these claims constituted an adverse ruling as to the City. In the interests of avoiding piecemeal appeals, the City could and should have appealed from this adverse ruling by the trial court if it wished to obtain an adjudication of these claims and issues.[14] Certainly, the City should have appealed from this aspect of the trial court's 9 June Order after the State had filed its own Notice of Appeal herein; however, the City elected not to do so and did not even brief or argue these three issues to the Court of Appeals as an alternative basis for upholding the trial court's injunction.

In its decision below, the Court of Appeals was quite clear in stating that, by its inaction, the City had "waived" "any argument ... based on these claims," Court of Appeals' Decision Below at 25-26, and that the City had failed to "preserve[]" these claims and issues. *Id.* at 6 n. 2.

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[14] Inasmuch as the City moved the trial court for summary judgment on these three claims, the City could (and should) have appealed the trial court's 9 June Order, sought a ruling by the Court of Appeals that the trial court erred in not granting the City's motion for summary judgment as to these claims and asked the Court of Appeals itself to rule on its summary judgment motion as to these three claims.

Under these circumstances, the City is not entitled to a second appeal under Appellate Rule 15(h), N.C. Gen. Stat. §7A-30(1) or N.C. Gen. Stat. §7A-31(c).

And given that the City elected not to appeal from the adverse ruling of the trial court declining to adjudicate these three claims by the City, it is now barred from seeking to relitigate these three claims in the trial court upon remand of this case. Any other result would permit – indeed, encourage – a litigant to engage in piecemeal appeals.

Accordingly, the City's argument that granting it a second appeal in this case at this time will "prevent delay in its final resolution" and avoid "substantial harm" to the City is specious. The City's purported appeal should be dismissed and its PDR should be denied.

CONCLUSION

Except for the three claims and issues that the City waived and failed to properly preserve for review, the Court of Appeals' Decision Below fully addressed all of the questions now raised by the City in its purported appeal and PDR and the constitutional questions now presented to this Court by the City were correctly determined by the Court of Appeals consistent with controlling precedents. As a result, no substantial constitutional question remains for this Court to resolve.

In addition, the Court of Appeals' Decision Below properly addressed all of the issues now presented by the City and reached the correct result. The Court of Appeals' Decision Below is consistent with this Court's prior precedents. Certification of a matter on the grounds of significant public interest is appropriate only when there are unresolved legal issues worthy of this Court's attention. None of the issues raised by the City has significant public interest and the case does not involve legal principles of major significance to the jurisprudence of the State.

Furthermore, not one of the arguments made by the City in support of its purported appeal and its PDR has merit.

Accordingly, this Court should dismiss the City's purported appeal and deny its PDR.

Respectfully submitted and electronically filed this 7th day of December 2015.

Signature of counsel appears on the following page.

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CERTIFICATE OF FILING AND SERVICE

This is to certify that, on the 7th day of December 2015, the undersigned caused the original of the State of North Carolina's Motion to Dismiss the City of Asheville's Purported Appeal Based Upon Alleged Substantial Constitutional Questions and the State's Response in Opposition to the City's Petition for Discretionary Review to be filed electronically with the Office of the Clerk of Court of the North Carolina Supreme Court, pursuant to the North Carolina Rules of Appellate Procedure and the Rules of the North Carolina Supreme Court.

This is to further certify that, on the 7th day of December 2015, the undersigned caused a copy of the State of North Carolina's Motion to Dismiss the City of Asheville's Purported Appeal Based Upon Alleged Substantial Constitutional Questions and the State's Response in Opposition to the City's Petition for Discretionary Review to be served by First-Class United States Mail, postage prepaid, on:

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/S/ I. Faison Hicks
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No. 391P15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County No. COA14-1255

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RESPONSE TO MOTION TO DISMISS CONSTITUTIONAL APPEAL

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No. 391P15 TENTH DISTRICT

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CITY OF ASHEVILLE, a Municipal Corporation, Plaintiff, v. STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, Defendants.	)	From Wake County No. COA14-1255

****

RESPONSE TO MOTION TO DISMISS CONSTITUTIONAL APPEAL

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

In accordance with Rule 37(a) of the North Carolina Rules of Appellate Procedure, the City of Asheville responds to the State's motion to dismiss the City's constitutional appeal under N.C. Gen. Stat. § 7A-30(1) (2013). The City respectfully requests that the Court deny the motion.

INTRODUCTION

The City's notice of appeal frames two constitutional issues that warrant review by this Court:

(1) What standard decides whether a local statute relates to health or sanitation and thus violates article II, section 24(1)(a) of the North Carolina Constitution?

(2) Does the State violate article I, section 19 of the North Carolina Constitution when it takes a municipal enterprise without compensation?

The State's motion to dismiss does not show that these questions are insubstantial. Instead, the motion simply debates the answers to these questions. The State's lengthy arguments on the merits underscore the City's point—that the issues here have not yet been conclusively decided. See State v. Colson, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968).

In fact, the motion to dismiss increases the confusion that the Court of Appeals has already created here. The motion proposes new standards that go beyond the erroneous reasoning in the decision below.

For example, the State proposes multiple tests to decide whether a local law relates to health or sanitation:

- The State proposes a "sole purpose" test that even the Court of Appeals did not adopt.
- It also relies on a question-begging distinction—a distinction between "direct" and "incidental" effects on health or sanitation.
- Finally, the State defends the "regulation" test that the Court of Appeals applied here—a test that strays from this Court's modern decisions.

As these shifting proposals show, the State and other parties need this Court's guidance on the "relating to" standard under article II, section 24.

Equally troubling are the State's proposals to narrow the takings guarantee under the North Carolina Constitution. The State argues that municipal utilities—systems paid for by municipal taxpayers—are statewide property that the State can move around as it pleases. That argument flouts this Court's teachings on municipal taxpayers' property rights in proprietary assets.

More fundamentally, the State's motion misunderstands this Court's jurisdiction under section 7A-30(1). A constitutional appeal to this Court is not a mere "second appeal," as the State repeatedly argues. Instead, an appeal like this one is a tocsin to the Court, calling on the Court to interpret and enforce the North Carolina Constitution. Here, the disturbing reasoning of the Court of Appeals, as

well as the State's attempt to stretch that reasoning even further, confirms that this case satisfies section 7A-30(1).

In an effort to create a diversion, the State repeatedly discusses claims that are not a basis of the City's notice of appeal—the City's impairment-of-contract claims. Those claims are distinct from the constitutional issues described above, so the status of those claims has no bearing here.

Finally, the State fails when it tries to downplay the significance of this case. This appeal will decide who will own and manage a water system that serves over 100,000 North Carolinians. The municipal property in question is worth hundreds of millions of dollars.

The only thing weightier than the practical impact of this case, moreover, is the case's impact on North Carolina constitutional law. The decision below eviscerates key constitutional doctrines that protect municipalities and their taxpayers. The multiple pending motions for leave to participate as amici curiae describe the problems that the decision below, if left unreviewed, will cause.

For all of these reasons, the City urges the Court to deny the State's motion to dismiss (or allow the City's alternative petition for discretionary review) and address the constitutional issues that the City has presented.

REASONS WHY THE MOTION TO DISMISS SHOULD BE DENIED

I. THE STATE'S ARGUMENTS HIGHLIGHT THE NEED FOR THIS COURT'S GUIDANCE ON THE SUBJECT-MATTER TEST UNDER ARTICLE II, SECTION 24(1)(a).

The decision of the Court of Appeals narrows the subject-matter test under article II, section 24(1)(a) from "relating to" to "regulating." Notice of Appeal at 12-13. That narrowing of article II, section 24 distorts the constitutional text and clashes with this Court's decisions. See id. at 12-20.

In its motion to dismiss,[1] the State not only defends the reasoning of the Court of Appeals, but proposes a variety of new—and even narrower—subject-matter tests. As shown below, none of those proposals squares with this Court's decisions. In any event, the fact that the State's own motion applies multiple subject-matter tests shows the need for this Court to clarify the standards that govern article II, section 24.

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[1] The motion to dismiss rests on arguments that appear throughout the State's combined filing. See Motion at 19. Thus, this response addresses the State's arguments against constitutional review, regardless of where those arguments appear in the filing.

Because this response focuses on the Court's jurisdiction under section 7A-30(1), it does not comprehensively rebut the State's arguments on the merits. By focusing the response in this way, the City does not mean to imply any agreement with the State's arguments.

A. The State's "Sole Purpose" Test Is Unsound.

The Court of Appeals held that a statute relates to health or sanitation if its text shows a purpose to regulate or prioritize health or sanitation. City of Asheville v. State, No. COA14-1255, slip op. at 12-13 (N.C. Ct. App. Oct. 6, 2015). As the City has shown, that test deviates from the language of article II, section 24(1)(a). Worse still, the test gives drafters a roadmap for avoiding the constitution. See Notice of Appeal at 11-13.

The State's motion proposes a standard even narrower than the one applied below. The motion argues that a statute violates article II, section 24 only if its sole purpose is to address one of the prohibited subjects. Motion at 34.

That proposed test would weaken article II, section 24 even more than the Court of Appeals did. It would invite drafters to insert multiple purposes into a single statute so that the statute has no sole purpose. Under the State's proposed test, even a statute that literally addressed health would pass muster, as long as the statute showed other purposes as well.

The State appears to base its sole-purpose test on Lamb v. Board of Education, 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952). See Motion at 30-31.[2]

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[2] The State also bases its proposed test on cases that do not even involve the "relating to" standard. See Motion at 35-37. For example, the State cites Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987), which addressed whether a local act "regulate[d] labor, trade, mining or manufacturing." Id. at 558, 359 S.E.2d at 797 (emphasis added) (quoting N.C. Const. art. II, sec. 24(1)(j)).

Lamb, however, does not establish a sole-purpose test. The Court held that the statute in that case "relates to health and sanitation, since its sole purpose is to prescribe provisions with respect to sewer and water service." Lamb, 235 N.C. at 379, 70 S.E.2d at 203. Observing that a statute had a sole purpose is not the same thing as requiring that sole purpose in future cases.

This Court's most recent decision under article II, section 24(1)(a) confirms that there is no sole-purpose test. See City of New Bern v. New Bern-Craven Cty. Bd. of Educ., 338 N.C. 430, 450 S.E.2d 735 (1994). In New Bern, the Court did not focus on the purpose of the challenged statute at all, much less demand a sole purpose. See id. at 438-42, 450 S.E.2d at 740-42. Instead, the Court focused on the effect of the statute: changing the local entity responsible for administering and enforcing health-related regulations. See id. at 439-40, 450 S.E.2d at 740-41.

As these points show, the State proposes a standard that clashes with this Court's interpretation of the phrase "relating to" in article II, section 24(1)(a). That misunderstanding of the Court's decisions shows a need for the Court's guidance.

The State also cites In re City Annexation Ordinance, 69 N.C. App. 77, 316 S.E.2d 649 (1984), in which the Court of Appeals asked whether a local act was one "[e]recting new townships, or changing township lines, or establishing or changing the lines of school districts." Id. at 82, 316 S.E.2d at 653 (discussing N.C. Const. art. II, sec. 24(1)(h)).

B. The State's "Directly Legislates" Test Likewise Fails.

The State proposes another test that varies from the decision below. It argues that a statute relates to health or sanitation only if it "directly legislates" on health or sanitation, rather than having an "incidental effect" on those subjects. Motion at 34. That argument is so mistaken that it, too, illustrates the need for instruction from this Court.

First, the terms "direct" and "incidental" are question-begging. These terms are labels for conclusions, not analytical tools that would help courts reach conclusions.

Second, a "directness" standard is unfaithful to the constitutional language: "relating to." This Court's decisions show the breadth of that phrase. Applying the "relating to" test, this Court has held that a number of statutes with relatively indirect effects on health nonetheless relate to health. See, e.g., New Bern, 338 N.C. at 439, 450 S.E.2d at 740 (invalidating statute that shifted building-code inspections from a city to a county); Lamb, 235 N.C. at 379, 70 S.E.2d at 203 (invalidating statute that required a referendum before a school board could connect water and sewer service to a school); Bd. of Health v. Bd. of Comm'rs, 220 N.C. 140, 143-44, 16 S.E.2d 677, 679 (1941) (invalidating statute that required that county commissioners confirm a county health officer).

Indeed, as the State admits, an entire line of cases holds that laws on the governance of health-related services relate to health and sanitation. See Motion at 31-32. None of the statutes in those cases prescribed any health standards. Instead, like the statute here, they specified who would administer and enforce health standards. See, e.g., New Bern, 338 N.C. at 439, 450 S.E.2d at 740; Idol v. Street, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951); Sams v. Bd. of Comm'rs, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940); Notice of Appeal at 17-18.

Thus, the State is arguing for a standard that clashes with a principle that the State itself acknowledges. See Motion at 32. This confusion underscores the need for the Court to clarify the case law under article II, section 24.

C. The "Regulating" Test Relies on Authority That This Court Abandoned Nearly a Century Ago.

The State also advocates for the "regulating" test that the Court of Appeals applied here. Id. at 26, 35; see slip op. at 12-13. The State argues that this test has a basis in one of this Court's decisions: Reed v. Howerton Engineering Co., 188 N.C. 39, 123 S.E.2d 479 (1924).

As the City has already noted, however, this Court has abandoned Reed's discussion of the "relating to" standard. In Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928), this Court limited Reed to the conclusion that the statute at issue in Reed was not local. See id. at 727-28, 143 S.E. at 533. As an influential

article explains, the Drysdale Court treated Reed's statements on the "relating to" test as dicta. Joseph S. Ferrell, Local Legislation in the North Carolina General Assembly, 45 N.C. L. Rev. 340, 367-68 (1967).

Since Drysdale, then, Reed's interpretation of article II, section 24(1)(a) has not been good law in this Court. None of this Court's major opinions on the "relating to" standard rely on Reed. See, e.g., New Bern, 338 N.C. at 438-42, 450 S.E.2d at 740-42; Lamb, 235 N.C. at 379, 70 S.E.2d at 203; Idol, 233 N.C. at 733, 65 S.E.2d at 315; Board of Health, 220 N.C. at 142-44, 16 S.E.2d at 678-79; Sams, 217 N.C. at 285, 7 S.E.2d at 541.

Thus, the State and the Court of Appeals are relying here on a 1924 decision that this Court has not treated as authoritative since 1928. This revival of outdated authority confirms the need for this Court to reconcile and update the law under article II, section 24.

II. THE STATE'S PROPOSAL TO NARROW TAKINGS LAW LIKEWISE SHOWS THE NEED FOR REVIEW.

The decision below removes municipal assets from the takings guarantee under the North Carolina Constitution. See Notice of Appeal at 22-26. The State defends that decision by arguing that municipalities are not property owners at all, so they have no constitutional protection against takings. Motion at 8-9, 39-40 &

n.7. That attempted defense just shows the need for this Court to clarify this important area of state constitutional law.

A. The State's Arguments Against Property Rights Highlight the Need for Review by This Court.

In its motion, the State makes two extreme arguments about property rights:

- It argues that the State, not municipal taxpayers, owns municipal utilities. Id. at 8-9.
- It also argues that a taking is not a taking at all if the seized property is put to the same use as before. Id. at 39-40 & n.7.

If these are the State's views on property rights, correction from this Court is urgently needed.

According to the State's motion, the City's water system is not the City's property at all, because the bonds used to finance the water system are exempt from taxes. Id. at 8-9. Under that logic, the federal government owns almost every home in America because it forgoes taxes through the mortgage interest deduction. Unsurprisingly, the State identifies no authority that adopts any logic of the kind.

The State also argues that municipal utilities are State property because the State could voluntarily bail out the City if it defaulted on its bond debt. Id. at 9. That argument is equally fallacious. Under that reasoning, a mother who tells

herself that she would rather pay off her son's business loans than let the business fail is, for that reason alone, the owner of the son's business.

In addition to having absurd consequences, the State's reasoning clashes with the public-enterprise statutes. Those statutes give municipalities the authority to own water systems. N.C. Gen. Stat. § 160A-312(a); see id. § 160A-311(2).

The State goes on to argue that city taxpayers who are defeased of their water system suffer no taking at all as long as the water continues to flow. Motion at 39-40 & n.7. That argument—that property rights include only a specified use of property, not control over property—clashes with this Court's teachings. For example, in Vance S. Harrington & Co. v. Renner, the Court emphasized property owners' right to control their property, not just to use it in a specified way. The Court wrote that "[e]very person owning property has the right to make any lawful use of it he sees fit." 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952) (emphasis added).

Attacks on property rights are especially troubling when they come from the State. The argument that the State may expropriate assets at will is one that might be expected from the government of Cuba, but not from the government of North Carolina. The State's argument calls on this Court to repair the takings guarantee under our state constitution, as well as the property rights that the guarantee protects.

B. The State's Rejection of Asbury Presents a Substantial Constitutional Issue.

The State's motion also seeks to minimize Asbury v. Town of Albemarle, 162 N.C. 247, 78 S.E. 146 (1913). The motion argues that Asbury does not apply because that case is not an exact factual replica of this one. See Motion at 41.

The principles of the decision, however, apply squarely here. In Asbury, the Court rejected the idea that "the legislative power is so transcendent that it may, at its will, take away the private property" of a municipality. 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)).

Here, the Court of Appeals created the same transcendent power that the Asbury Court rejected. The appeals court held that the General Assembly can, with impunity, "divest a city of its authority to operate a public water system and transfer the authority and assets thereof to a different political subdivision." Slip op. at 21.

That reasoning violates more than the principle stated above. It also violates the principle that where a municipality's "private or proprietary functions" are concerned, "the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." Asbury, 162 N.C. at 253-54, 78 S.E. at 149. The removal of those restraints raises a substantial constitutional issue for this Court's review.

Trying to overcome the principles in Asbury, the State argues that a 1903 decision allows the State to transfer water systems without consent and without compensation. Motion at 42-43 (discussing Brockenbrough v. Bd. of Water Comm'rs, 134 N.C. 1, 46 S.E. 28 (1903)). The State argues that Brockenbrough involved an involuntary transfer of a water system, just as this case does. Id. at 43.

The State is mistaken. Brockenbrough involved a voluntary transfer of a water system—a transfer "at the instance and with the approval and pursuant to a resolution of the board of aldermen." 134 N.C. at 6, 46 S.E. at 29. In addition, the issue in Brockenbrough was not the validity of this transfer, but the transferee's authority to issue bonds. See id. at 9-10, 46 S.E. at 31.

Finally, the State defends the Court of Appeals for relying on out-of-state cases to support its interpretation of our state constitution. Motion at 44 & n.9. Decisions from other states, however, mirror this Court's reasoning in Asbury. See Notice of Appeal at 26 (discussing these decisions).

In sum, the Court of Appeals disregarded Asbury based on decisions that interpret other constitutions, as well as an older and off-point North Carolina decision. See slip op. at 21-24. These missteps by the Court of Appeals, as well as the age of this Court's decisions on the issue, show the need for the Court to reaffirm our state constitutional guarantee against uncompensated takings.

III. THE MOTION TO DISMISS MISUNDERSTANDS THIS COURT'S ROLE IN SHAPING CONSTITUTIONAL LAW.

The State's motion also commits a more fundamental error: slighting this Court's role in shaping constitutional law. The motion does so by arguing, no fewer than ten times, that the City is merely seeking a "second appeal" here.

The error of that argument becomes clear when one considers the history of this Court's jurisdiction over constitutional appeals. When the North Carolina Court of Appeals was created, a commission made recommendations that culminated in the enactment of section 7A-30(1). See State of N.C. Courts Comm'n, Report of the Courts Commission to the North Carolina General Assembly 2-3 (1967). In its recommendations, the commission stressed this Court's role in shaping constitutional law:

> The Supreme Court must remain the court entrusted with the final decision on all truly important questions of law. . . . A strictly limited category of "important" cases—capital cases and cases involving constitutional interpretations, for example—should have access to the Supreme Court by statute.

Id. at 4; see also id. at 4-5. The commission specifically excluded constitutional cases from the class of lawsuits in which "double appeals, as of right, are to be avoided." Id. at 4; accord id. at 13.

As this history shows, a constitutional appeal like this one is far from a mere double appeal. Instead, such an appeal lies at the center of this Court's

constitutional and statutory responsibilities. See N.C. Const. art. IV, § 12(1); N.C. Gen. Stat. § 7A-30(1).

The State also errs by minimizing the precedential value of this Court's decisions. For example, the State downplays New Bern and Asbury by arguing that those cases do not involve the precise fact pattern here. See Motion at 30-33, 41. Those decisions, however, interpret the same constitutional provisions that are at issue here, and they announce useful principles on the meaning of those provisions. See Notice of Appeal at 17-20, 22-26. The State has no basis for slighting those principles.

Similar errors defeat the State's effort to distinguish this case from Town of Boone v. State, No. 93A15-2. See Motion at 45-47. In Boone, the Court will soon be called on to interpret article II, section 24, including the same subsection at issue here. See, e.g., State-Defendant-Appellant's Brief at 2, 46-62, Town of Boone v. State, No. 93A15 (N.C. Apr. 23, 2015). The factual differences between this case and Boone are not an obstacle to reviewing this case. To the contrary, analyzing the meaning of article II, section 24(1)(a) in two different settings would help the Court interpret the provision soundly. See Notice of Appeal at 21.

In sum, the State's narrow view of this Court's role under section 7A-30(1), as well as its narrow view of the Court's precedents, defeats the State's motion to dismiss.

IV. THIS APPEAL DOES NOT DEPEND ON THE CITY'S IMPAIRMENT-OF-CONTRACT CLAIMS.

The State devotes a significant part of its motion to an issue that the City's notice of appeal does not present. The motion refers to the City's impairment-of-contract claims no fewer than seven times. The State argues that the City may not pursue these claims on appeal. See Motion at 2-3, 5-6, 7, 16 n.3, 19 n.4, 21 & n.5, 48-50.

Although the City disputes the State's argument, the dispute does not matter in this setting. The City's notice of appeal is not based on the impairment-of-contract claims. See Notice of Appeal at 9-26. The State's discussion of those claims is no more than a distraction from the constitutional questions at issue here.

V. THE HIGH STAKES OF THIS CASE REINFORCE THIS COURT'S STATUTORY JURISDICTION.

Contrary to the State's efforts to downplay the importance of this appeal, see Motion at 47-48, the stakes of this case are immense.

This appeal will decide who will own and manage a water system worth hundreds of millions of dollars. (See R pp 79, 164) It will also decide whether the taxpayers of the City of Asheville will continue to govern their water system, or whether a new regional board, in which Asheville has only a minority stake, will take control. See Act of May 14, 2013, ch. 50, sec. 2, § 162A-85.3(a), 2013 N.C. Sess. Laws 118, 120-21.

Further, the impact of this appeal will reach far beyond Asheville. The appeal asks whether article II, section 24(1)(a) of the North Carolina Constitution remains a meaningful limit on locally oriented legislation. Likewise, this appeal will decide whether article I, section 19 protects municipal taxpayers against takings of proprietary assets.

The practical and doctrinal significance of this appeal becomes clear when one considers the pending motions for leave to appear in this case as amici curiae. All of these prospective amici have expressed grave concerns about the effects of the decision below:

> The decision below—which could be read to effectively moot Article II, Section 24—will have a dramatic impact on the ability of municipal corporations to invest in the equipment, technology, and analysis that is necessary for the proper maintenance and operation of water services.

Brunswick Reg'l Water & Sewer H2GO Amicus Mot. at 2-3.

> [T]he Court of Appeals' decision seriously misconstrues this Court's previous holding in Asbury, leading the Court of Appeals to establish a dangerous precedent that would upend settled expectations regarding municipal ownership and property interests in proprietary undertakings.

City of Wilson Amicus Mot. at 3-4.

> Among the most crucial of . . . municipal services is the provision of clean, abundant, and affordable water, and movant League's members have a highly significant stake in maintaining authority and control over the public water infrastructure they have developed on behalf of their citizens.

N.C. League of Municipalities Amicus Mot. at 2-3.

> By rejecting constitutional challenges to the seizure of a local government's water system, the Court of Appeals has set a disturbing precedent that will likely discourage local investment in water infrastructure.

Int'l Mun. Lawyers Ass'n Amicus Mot. at 2.[3]

As these organizations will attest, the effects of the decision below confirm the need for this Court to exercise its statutory jurisdiction over this appeal.

CONCLUSION

The City respectfully requests that the Court deny the State's motion to dismiss.

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[3] In response to concerns about how the decision below undermines local infrastructure investments, the State argues that the Act at issue has not yet rattled the municipal-bond market. Motion at 47-48. That argument, however, overlooks the point that the courts have stayed the implementation of the Act.

In any event, the State's argument is cold comfort to municipalities and taxpayers who are concerned about the ownership of their own proprietary assets, as distinguished from the value of bonds secured by those assets.

Respectfully submitted, this 18th day of December, 2015.

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N.C. R. App. P. 33(b) Certification:
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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:

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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.

North Carolina Court of Appeals

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No. 14-1255

CITY OF ASHEVILLE,
a municipal corporation,
Plaintiff,

V

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

From Wake
(13CVS6691)

ORDER

The following order was entered:

The petition filed in this cause on the 9th of November 2015 and designated 'Plaintiff-Appellee's Petition for Rehearing' is denied.

By order of the Court this the 10th of November 2015.

The above order is therefore certified to the Clerk of the Superior Court, Wake County.

WITNESS my hand and the seal of the North Carolina Court of Appeals, this the 10th day of November 2015.

Daniel M. Horne Jr.
Clerk, North Carolina Court of Appeals

Copy to:
Mr. Gary R. Govert, Assistant Solicitor General, For State of North Carolina
Mr. I. Faison Hicks, Special Deputy Attorney General
Mr. Robert W. Oast, Jr., City Attorney, For City Of Asheville
Mr. Daniel G. Clodfelter, Attorney at Law, For City Of Asheville
Mr. T. Randolph Perkins, Attorney at Law, For City Of Asheville
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Mr. Stephen W. Petersen, Attorney at Law
Mr. Gabriel Du Sablon
Mr. James P. Cauley, III, Attorney at Law
Ms. Kimberly S. Hibbard, General Counsel
Mr. Gregory F. Schwitzgebel, III, Senior Assistant General Counsel
Hon. Robert F. Orr, Attorney at Law, For City Of Asheville
Mr. Matthew W. Sawchak, Attorney at Law, For City Of Asheville
Hon. Jennifer Knox, Clerk of Superior Court

Supreme Court of North Carolina

CITY OF ASHEVILLE, a municipal corporation

v

STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY

From N.C. Court of Appeals
(14-1255)
From Wake
(13CVS6691)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Plaintiff on the 24th of November 2015 in this matter pursuant to G.S. 7A-30 (substantial constitutional question), the following order was entered and is hereby certified to the North Carolina Court of Appeals: the notice of appeal is

"Retained by order of the Court in conference, this the 28th of January 2016."

s/ Ervin, J.
For the Court

Upon consideration of the petition filed by Plaintiff on the 24th of November 2015 for Writ of Supersedeas of the judgment of the Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 28th of January 2016."

s/ Ervin, J.
For the Court

Upon consideration of the petition filed on the 24th of November 2015 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 28th of January 2016."

s/ Ervin, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15 (g)(2).

WITNESS my hand and official seal of the Supreme Court of North Carolina, this the 29th of January 2016.

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
Mr. I. Faison Hicks, Special Deputy Attorney General - (By Email)
Mr. Robert W. Oast, Jr., City Attorney, For City Of Asheville - (By Email)
Mr. Daniel G. Clodfelter, Attorney at Law, For City Of Asheville - (By Email)
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Supreme Court of North Carolina

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From N.C. Court of Appeals
(14-1255)
From Wake
(13CVS6691)

29 January 2016

Mr. I. Faison Hicks
Special Deputy Attorney General
N.C. DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602

RE: City of Asheville v State of North Carolina, et al. - 391PA15-1

Dear Mr. Hicks:

The following order has been entered on the motion to dismiss the appeal filed on the 7th of December 2015 by State of NC:

"Motion Denied by order of the Court in conference, this the 28th of January 2016."

s/ Ervin, J.
For the Court

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina

M. C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Copy to:
North Carolina Court of Appeals
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