

SUPREME COURT OF NORTH CAROLINA

CITY OF ASHEVILLE, a Municipal)
Corporation,)

Plaintiff-Petitioner,)

v.)

From Wake County

COA14-1255

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

Defendants-Respondents.

**MOTION OF BRUNSWICK REGIONAL
WATER & SEWER H2GO FOR LEAVE TO
FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF
PLAINTIFF-PETITIONER**

Brunswick Regional Water & Sewer H2GO ("H2GO") hereby requests leave pursuant to Rule 28(i), North Carolina Rules of Appellate Procedure, to file an amicus brief in support of Plaintiff-Petitioner should this Court allow Plaintiff-Petitioner's appeal pursuant to the Notice of Appeal Based on Constitutional Questions and Alternative Petition for Discretionary Review filed in this Court on 24 November 2015.

INTEREST OF AMICUS

H2GO is a sanitary district, organized and existing pursuant to Chapter 130A of the North Carolina General Statutes, which provides water distribution, sewage collection, and wastewater treatment to approximately 9,500 residential and commercial customers in northeast Brunswick County. H2GO's boundaries include all of the Town of Belville, a majority of the Town of Leland, a section of the Town of Navassa, and much of the unincorporated area outside of these communities. H2GO is governed by a board of publicly elected commissioners.

H2GO provides water and sewer utility services for the purposes of preserving and promoting health and sanitation. H2GO has a substantial interest in ensuring that there is a plainly defined, proper standard for determining who may make local decisions related to health and sanitation.

The Court of Appeals decision in this case departed from precedents of this Court and otherwise erred in its reasoning regarding the application of article II, section 24 of the North Carolina Constitution ("Article II, Section 24").¹ 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

¹ The language of Article II, Section 24 was adopted by the people of North Carolina in 1917, although it appeared in article II, section 29 until certain revisions to the state constitution in 1971 led to the language being moved to its current location. See Smith v. Mecklenburg Cty., 280 N.C. 497, 506, 187 S.E.2d 67, 73 (1972).

equipment, technology, and analysis that is necessary for the proper maintenance and operation of water services. Accordingly, this Court should hear Plaintiff-Petitioner's appeal.

H2GO is experienced in the provision, maintenance, and growth of water services. It has been in operation since the 1970s, predating much of the development in its service area, and remains viable. It services an area that is about as removed from that serviced by the Plaintiff-Petitioner as North Carolina geography will allow. It continues to explore and invest in growth and new technologies, including a state-of-the-art reverse osmosis plant that it has been studying since 2011, and which is currently in the pilot-testing phase. As such, H2GO is well equipped to brief this Court on the impact that the Court of Appeals decision could have on the governance, viability, and growth of water systems in North Carolina. H2GO therefore requests that this Court grant it leave to file an amicus brief in support of Plaintiff-Petitioner.

ISSUES TO BE ADDRESSED AND H2GO'S POSITION

Article II, Section 24 prohibits the General Assembly from enacting any local, private, or special act or resolution "[r]elating to health [or] sanitation." As this Court has explained, Article II, Section 24:

should not be so construed as to minimize the provision it has made It is remedial in its nature, and its application should not be denied on an unsubstantial distinction which would defeat its purpose. It especially

mentions general “laws relating to health” as being within its protective purview, recognizing that the alleviation of suffering and disease, the eradication or reduction of communicable disease in its humanitarian, social, and economic aspect, is a state-wide problem which ought not to be interfered with by local dilatory laws which are so frequently the outcome of local indifference, or factional and political disagreements.

Bd. of Health v. Bd. of Comm'rs, 220 N.C. 140, 143, 16 S.E.2d 677, 679 (1941).

Further, the purpose of Article II, Section 24 is to:

free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by general laws to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.

Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 188, 581 S.E.2d 415, 428 (2003).

The decision below, however, depends entirely on unsubstantial distinctions that weaken local self-government and otherwise defeat the purpose of Article II, Section 24. Consider that:

- As, presumably, we all accept that quality water is vital to health, the decision below attempts to distinguish quality water from quality water service. Slip op. at 13. The Court of Appeals reasons that the latter may be interpreted not to relate to health or sanitation. This

distinction is illogical. Simply put, one would never be heard to state: "My water company provides me a great service, but the water sure is unhealthy."

- The decision below relies on the standard of whether the legislation at issue "regulates" health or sanitation. Slip op. at 12–13. However, the Constitutional prohibition on local acts related to health or sanitation uses a "relate to" standard, not a "regulate" standard. And not by accident. Just nine lines later—in reference to labor, trade, mining or manufacturing—Article II, Section 24 uses a "regulate" standard. N.C. Const. art. II, § 24(1)(j). "Relate to" and "regulate" are not synonyms, and they are both used within Article II, Section 24. It cannot be correct to construe them to mean the same thing.
- Even if the standard to be applied to the local acts prohibited by Article II, Section 24(1)(a) (the provision prohibiting acts "[r]elating to health [or] sanitation") was "regulate," the conclusion below—that legislation taking an operation away from a municipal corporation does not constitute "regulating" that operation—not only weakens local self-government, but does not make sense. It is akin to reasoning that a child who, dissatisfied with a game, takes the ball and goes home, does not regulate the game.

- The decision below relies on the legislation at issue not "prioritizing" health. Slip op. at 13. The Court of Appeals reasons that because the legislation allows the water of a non-paying customer to be shut off (i.e. takes away a resource vital to life, or hurts health), it cannot prioritize health. By this dangerous logic, a law requiring Wake County to poison its citizens' water supply would not run afoul of the prohibition against local laws relating to health because, by mandating harm, it would plainly not prioritize health.

Those who govern cities, like the Plaintiff-Petitioner, and other municipal corporations, like this amicus, are confronted with numerous risks—political and economic—when they choose to invest in services, such as the provision of water, related to the health and sanitation of their communities. One of those risks should not be that the General Assembly will "take the ball and go home" should the legislature disagree with the locally elected officials. This risk is barred by the plain language of Article II, Section 24.

In an effort to build a simple test based on a piecemeal application of precedent, the Court of Appeals overlooked the remedial nature of Article II, Section 24. As such, the decision below renders Article II, Section 24, at best, unduly uncertain and confusing, and, at worst, wholly meaningless.

Should this amicus file a brief in this matter, it will address whether the trial court correctly held that the legislation at issue violates the North Carolina Constitution, and the real-world implications for those actively investing in water infrastructure should the decision below stand.

WHEREFORE, H2GO respectfully prays that this Court hear Plaintiff-Petitioner's appeal and grant H2GO leave to file an amicus brief.

Respectfully submitted this the 4th day of December, 2015.

s/ Edward J. Coyne III

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on December 4, 2015, the foregoing
MOTION OF BRUNSWICK REGIONAL WATER & SEWER H2GO FOR
LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-
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