NO. 391P15-1 TENTH DISTRICT

****

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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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.

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[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

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[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]

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[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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