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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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.

[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]

[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:
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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