No. 391PA15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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AMICUS CURIAE CITY OF WILSON'S NEW BRIEF

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AMICUS CURIAE CITY OF WILSON'S NEW BRIEF

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ISSUE PRESENTED

DID THE COURT ERR BY HOLDING THAT THE STATE CAN, WITHOUT RESTRICTION, DEPRIVE MUNICIPALITIES OF PRIVATE PROPERTY USED FOR PROPRIETARY PURPOSES?

ARGUMENT

In the decision being appealed from, the North Carolina Court of Appeals appears to have adopted the flawed view advanced by Defendant State of North Carolina that the State has unbridled authority to direct and regulate the affairs of local governments without limitation—even to the extent that such regulation deprives local government and their citizens of property without just compensation. In so doing, the Court of Appeals establishes new and unfounded precedent that has dire implications for units of local government in that it threatens to substantially disrupt settled expectations regarding property ownership and jeopardize existing proprietary undertakings by such units.

It is important to note at the outset that the State is correct in asserting that it has the authority, as specified in Article VII of the North Carolina Constitution, to "provide for the organization and government and the fixing of boundaries of . . . governmental subdivisions, and except as otherwise prohibited by [the] Constitution, may give such powers and duties to . . . governmental subdivisions as it may deem advisable." N.C. CONST. art. VII. It has much of the same authority with respect to private corporations as provided in Article VIII of the Constitution. N.C. CONST. art. VIII. There is no question that municipalities—like private corporations—would not exist absent these Constitutional provisions and enabling legislation from the General Assembly. The State seems to take the view,

however, that its authority with respect to political subdivisions is boundless, subject to the State's passing whims or vagaries. To the contrary, the General Assembly's authority over its subdivisions is limited by the following language: "except as otherwise prohibited by this Constitution." N.C. CONST. art. VII.

This restriction is commonly understood to consist mainly of the limitations against certain local, private, or special acts or resolutions as specified in Section 24 of Article II. N.C. CONST. art. VII. However, the limitation does not say "as otherwise prohibited by Article II of this Constitution," but rather more broadly states "as otherwise prohibited by this Constitution." N.C. CONST. art. VII. This takes on special significance when the dual nature of municipalities is properly understood. As this Court stated in Williamson v. City of High Point, 213 N.C. 96, 106, 195 S.E. 2d 90, 96 (1938) (quoting Holmes v. Fayetteville, 197 N.C. 740, 744, 150 S.E. 624, 626 (1929)):

> [t]he dual capacity or twofold character possessed by municipal corporations is governmental, public, or political, and proprietary, private, or quasi private. In its governmental capacity a city or town acts as an agency of the state for the better government of those who reside within the corporate limits, and in its private or quasi private capacity it exercises powers and privileges for its own benefit.

This Court in Williamson goes on to state that "it is well settled that local conveniences and public utilities, like water and lights, are not provided by municipal corporations in their political or governmental capacity, but in that quasi

private capacity in which they act for the benefit of their citizens exclusively." Id (quoting Asbury v. Town of Albemarle, 162 N.C. 247, 253, 78 S.E. 146, 150 (1913)). This bifurcation has a number of legal consequences. One such consequence of the distinction is that local governments are only entitled to sovereign immunity for those undertakings that are governmental in nature.[1] More importantly for purposes of this analysis, however, when acting in their propriety capacity, units of local government are entitled to the same constitutional rights as private corporations. In basic terms the concept is thus—when acting like the State, a municipality is treated like the State, when acting like a private corporation, the municipality is treated like a private corporation. This Court made this point with such force and clarity over 100 years ago in Asbury v. Town of Albemarle, 162 N.C. 247, 78 S.E. 146 (1913), that the quote is worth reproducing here in its entirety:

> Municipal corporations possess a double character; the one governmental, legislative, or public; the other, in a sense, proprietary or private. In its governmental or public character the corporation is made by the state one of its instruments, or the local depositary of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself. But in its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations

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[1] When a unit of local government acts in its private or proprietary capacity, it, like a private corporation, is not entitled to assert sovereign immunity as a tort defense. See e.g., Scales v. Winston-Salem, 189 N.C. 469, 129 S.E. 543 (1925).

> connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it are omnipotent.
>
> In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power; but, as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations.

Asbury, 162 N.C. at 253. This fundamental concept was expressed with equal cogency by the United States Supreme Court nearly a century before in Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 694, 4 L. Ed. 629, 673 (1819), where the learned Justice Story stated:

> [i]t may also be admitted, that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended, that even in respect to such corporations, the legislative power is so transcendent, that it may at its will take away the private property of the corporation, or change the uses of its private funds, acquired under the public faith.

This concept, like the concept of the right of private corporations to hold property without interference from the State, is—again in the words of Justice Story—grounded upon "principles of natural justice, upon the fundamental laws of every

free government, upon the spirit and the letter of the constitution of the United States, and upon the decisions of most respectable judicial tribunals." Terrett v. Taylor, 13 U.S. 43, 52, 3 L. Ed. 650, 653 (1815). When the North Carolina Constitution states in Article I, Section 35 that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty," it is precisely the inviolate principles such as those above posited by Justice Story pertaining to property rights to which it refers. N.C. CONST. art. I, § 35.

The Court of Appeals attempts to distinguish this Court's holding in Asbury in order to reach the conclusion that the State was within its right to seize control of Asheville's proprietary water system. The Court of Appeals' reasoning, however, is flawed and cannot be sustained. The Court of Appeals states that "we do not read Asbury as restricting the General Assembly's authority to *withdraw* authority from a political subdivision to engage in a proprietary function…[r]ather, Asbury addresses the limitations to the General Assembly's power to *manage* certain aspects of a municipalities water system…" City of Asheville v. State, 777 S.E.2d 92, 99 (N.C. Ct. App. 2015) (emphasis in original). This distinction between withdrawing authority versus managing proprietary functions is untenable. The Court in Asbury was explicit that they were "consider[ing] the power of the Legislature to *deprive* a municipal corporation of the right through its governing body to exercise its discretion in the purchase of a waterworks or

sewerage plant." Asbury, 162 N.C. at 252. The Asbury Court, then, squarely considered and rejected the asserted right of the General Assembly to *withdraw* authority to engage in a proprietary function when it affects property rights.

The Court of Appeal also incorrectly asserts that Article VII, Section 1 of the North Carolina Constitution (discussed infra pp. 2-3) and "a number of other" [unidentified] "Supreme Court decisions" empower the General Assembly to withdraw municipal authority to engage in proprietary functions. City of Asheville v. State, 777 S.E.2d 92, 99 (N.C. Ct. App. 2015). While Article VII, Section 1 does indeed give the Legislature the ability to determine what powers to confer upon units of local government, there is absolutely no mention of authority to take those powers away. The ability to breathe life into a community does not equate to authority to snuff it out with impunity. There is no disagreement that the General Assembly's authority over local government is wide ranging; however with respect to the private property of a municipality put to use in a proprietary function, this Court has found it to be limited.

The Court of Appeals also cites to Candler v. Asheville, 247 N.C. 398, 101 S.E.2d 470 (1958) for the proposition that the General Assembly has the power to "diminish" the powers of a municipality. City of Asheville v. State, 777 S.E.2d 92, 100 (N.C. Ct. App. 2015). This assertion, however, is taken entirely out of context. In fact, the irony of the reference is that the quoted paragraph from

Candler leads off with the Court reiterating the distinction between governmental and proprietary functions, and declaring that the particular power at issue in that case (rate-making) was clearly a governmental function.[2] Consistent with the Court's prior holding in Asbury, therefore, the Candler Court asserted that the legislature could direct the manner in which the City sets rates. Moreover, Candler explicitly cites to Asbury and a long lineage of North Carolina Supreme Court precedent establishing the fact that "in its proprietary capacity, [a municipality] acts exclusively in a private or quasi-private capacity for its own benefit." Candler, 247 N.C. at 406. The Candler Court also takes care to cite this Court's prior holding in Asbury that "as to [a municipality's] private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." Candler, 247 N.C. at 406. Candler, therefore, provides no support for the Court of Appeals' assertion, and is in fact inapposite.

The Court of Appeals reasoning also misses the mark in assuming that the legal issue is whether the State has the right to *withdraw* municipal authority. Nothing in the challenged legislation prohibits or withdraws Asheville's authority

[2] In fact, in order to establish that rate-making is a governmental function, the Candler Court first observes that "*[i]n owning and operating a utility plant a city acts not in a governmental but in a proprietary capacity*, (but) when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the state, as regulator." Candler v. City of Asheville, 248 N.C. 398 (1958) (emphasis added).

to own or operate a public water system.[3] In fact, Asheville could, if it was so inclined, start over from scratch in constructing and operating a water system. The Court of Appeals' attempt to structure the argument as one of withdrawing authority simply avoids the crux of the issue—which is that the General Assembly has impermissibly interfered with the private property rights of the municipality.[4]

The Court of Appeals' reliance on Trenton v. New Jersey, and other U.S. Supreme Court jurisprudence pertaining to the 14th Amendment is also misguided. See City of Asheville v. State, 777 S.E.2d 92, 100 (N.C. Ct. App. 2015). First, the U.S. Supreme Court has been careful to reign in efforts—such as those exhibited by the Court of Appeals in this case—from reading Trenton v. New Jersey and Hunter v. Pittsburgh too broadly. For example, in Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125 (1960) the U.S Supreme Court cautioned that "[t]o exalt this power [of the State over its political subdivisions] into an absolute is to misconceive the reach and rule of this Court's decisions in the leading case of Hunter v. Pittsburgh, 207 U.S. 161, and related cases…" Id. at 342, 81 S.Ct. at 127. In fact, the Gomillion Court recognizes that "[t]he Hunter opinion itself intimates that a state legislature may not be omnipotent even as to the disposition

[3] The legislation only purports to transfer all "assets" and "debts" of an affected municipality's sewer system. (R p 30)

[4] See also Asbury v. Town of Albemarle, 162 N.C. 247 (1913) (quoting People v. Hurlburt, 24 Mich. 44, 9 Am. Rep. 103 (1871)) ("Conceding to the state the authority to shape the municipal organizations at its will, it would not follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it.").

of some types of property owned by municipal corporations." Id at 344, 81 S.Ct. at 128. The Court in Gomillion concludes that "the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences." Id at 344, 81 S.Ct. at 129.

Second and more importantly, the pronouncements in Trenton v. New Jersey cannot be substituted for this Court's well-established precedent in Asbury and Candler. Trenton and its progeny specifically discuss—and the rules of law derived therefrom pertain solely to—the limits of the f*ederal constitution* vis-à-vis the authority of a state to deprive a local government of its property. See generally Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534 (1923); Ysursa v. Pocatello Educ. Assoc., 555 U.S. 353, 129 S.Ct. 1093 (2009). The question of s*tate constitutional* limitations on a state's deprivation of local government property is an entirely separate legal issue. In fact, the Trenton case specifically admits of the distinction between governmental and proprietary functions, and additionally recognizes that, although the State is "unrestrained by any provision of the Constitution of the United States" with regard to its control of the governmental functions of its municipalities, it must nevertheless "conform[] its action to the *state* constitution". See Trenton, at 186-187, 262 S.Ct. at 536 (emphasis added). The Court of Appeals should not, therefore, have been "persuaded by" that line of cases, as neither party to the present action has raised any federal constitutional

claim. See City of Asheville v. State, 777 S.E.2d 92, 100 (N.C. Ct. App. 2015). The Court of Appeals *should* have been persuaded instead by existing North Carolina Supreme Court precedent interpreting the very *State c*onstitutional limitations at issue in this case. This Court in Asbury stated in no uncertain terms that as to the "private or proprietary functions [of a municipality], the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." Asbury v. Town of Albemarle, 162 N.C. 247, 253 78 S.E. 146, 149 (1913). The Court of Appeals had no reasoned basis upon which to deviate from this established and binding precedent.

Consistent with this understanding of the state constitutional limitations upon legislative interference with local management of local affairs, the appropriate framework to analyze the present issue is as if a private corporation was substituted for the City of Asheville. Consider the impact of the enactment of a statute requiring Aqua N.C.—a private North Carolina water supplier serving approximately 270,000 customers—to transfer, without its consent, its entire proprietary water system and control over to a competitor for the purpose of improving the management of those resources. Such interference would clearly be beyond the legislature's constitutional authority. Nevertheless, a misplaced and ill-begotten impression that the State has the "authority to . . . enact laws affecting every aspect of the life and existence of municipalities in this State" leads the State

to propose precisely such a thing with respect to the City of Asheville, despite the fact that the City is entitled to the same constitutional rights and protections with regard to its ownership of its water system as is Aqua N.C. (R p. 49). Given that private property held by private corporations and private property used by municipalities for proprietary purposes are entitled to the same treatment, the analysis is the same—that is, the North Carolina Constitution only allows limited State interference pursuant to a well-defined public purpose and with just compensation. See Dare County Bd. of Educ. v. Sakaria, 118 N.C. App. 609, 614, 456 S.E.2d 842, 845-46 (1995) (stating that "[b]ecause the exercise of the power of eminent domain is in derogation of property rights, all laws conferring this power must be strictly construed"). Under such constitutional restrictions a carte blanche seizure of the entire system, which is already being put to public service, cannot be sustained.

The implications of the precedent established by the Court of Appeals cannot be overstated. If the State has the ability to run roughshod over the private property rights of citizens of municipalities and other units of local government, a far different picture of public infrastructure in North Carolina would emerge. With the prospect of the State disagreeing with any type of infrastructure investment or management choices and accordingly seizing or transferring those assets to another entity, municipalities would be foolish to make any type of substantial investment

in such services. In fact, they would probably owe a duty to their citizens to *not* make any further investment in their systems, whether adding a line or pipe, clearing a stream, building a dam, constructing a water or wastewater treatment facility, replacing poles, installing substations, or any other manner of public utility investment. This holds particularly true in the context of overbuilding infrastructure, like *amicus curiae* City of Wilson has done with respect to its Buckhorn Reservoir, where it created a long term water supply that also serves as a buffer or reserve in the event of a drought or other emergency. If the Court of Appeals' precedent in this case—establishing that the Constitution permits the State to seize and reallocate municipally-owned proprietary enterprise—is left to stand, excess capacity—such as potentially exists with Buckhorn Reservoir—could present particularly attractive "low hanging fruit".

It is also important to recognize that the property investment at issue is in response to the local needs of the citizens of the local government and the source of funds for such investment is local as well. When a unit of local government enacts local ordinances or provides police service or any other activity in its governmental capacity, it is naturally acting as an extension of the State (although even in those cases in response to local needs and concerns); however, when a unit of local government is acting in its private capacity, it is operating not as an extension of the State, but as an extension of the citizens of the unit, or as stated by

the Court in Asbury, “for the private advantage of the compact community.” Asbury, 162 N.C. at 253, 78 S.E. at 149. When acting in such a capacity, a unit of local government is being funded and acting pursuant to the local needs of the compact community—much like the private corporation acts pursuant to and responds to the needs of its shareholders. This concept is a fundamental principle established by the North Carolina Constitution, and is commensurate with even more firmly entrenched property rights jurisprudence dating back to the birth of the federal government.

Amicus curiae City of Wilson offers the example of its Buckhorn Reservoir expansion to illustrate the potentially harmful effects of the Court of Appeals’ decision. Wilson spent over $50,000,000 to expand Buckhorn Reservoir to guarantee a sound supply of water for its citizens and customers well into the future. The Reservoir is Wilson’s primary water supply source. The original Buckhorn dam was built in 1974. During the period of time from 1987 until 2004, Wilson, at its sole cost and expense, acquired lands and permits, and engineered, designed, and constructed a new dam for the purpose of expanding its water supply. The new dam raised the water level in the Reservoir by 12 feet and increased its capacity from 800 million gallons to almost 7 billion gallons when fully filled, covering an area of 2,303 acres. The expansion project was undertaken

in recognition of immediate and long-term needs of Wilson's citizens and water customers for an adequate and sound public water supply.

In 2007-2008, eastern North Carolina experienced a severe drought—the worst on record for the area; in fact, many counties, including Wilson County, were declared disaster areas due to the unprecedented drought. See Patrick Driscoll, Larry Copland, *Southeast drought hits crisis point,* USA TODAY, Oct. 21, 2007, *available at* http://usatoday30.usatoday.com/weather/news/2007-10-19-drought_N.htm (last accessed March 7, 2016); *Drought-related disaster declared in 59 counties,* WRAL.COM, NOV. 10, 2008, *available at* http://www.wral.com/news/local/story/3931506/ (last accessed March 7, 2016).

With the exception of the City of Wilson—which thanks to its substantial recent investment had a reliable water supply—many surrounding communities faced significant water supply shortages. By virtue of its substantial investment and considerable foresight, Wilson was able to provide emergency water supply to those communities via voluntary water supply interconnection agreements. See Mike Baker, *Relentless N. Carolina drought could be devastating in '08,* USA TODAY, Dec. 26, 2007, *available at* http://usatoday30.usatoday.com/weather/drought/2007-12-26-nc-drought_N.htm (last accessed March 7, 2016).

If the precedent established by this case is allowed to stand, there is nothing that would prevent the State from enacting similar legislation to seize other local government-provided water resources and redistribute them within the region. Such a scenario would result in a windfall to the receiving communities at the expense of the forward thinking communities. Like the ants in a popular tale from Aesop's Fables who have stored up food for winter, Wilson and other industrious municipalities are well guarded against the hardships of drought by virtue of their advanced planning. AESOP, THE ANT AND THE GRASSHOPPER (circa 550 B.C.). However, unlike in the tale, Wilson and other similarly situated municipalities would be unable to tell the "grasshopper" to go dance when it came for their water. Such a state of affairs, as described by the United States Court of Appeals for the District of Columbia Circuit, "favors the grasshopper and thus encourages his feckless ways." Process Gas Consumers Grp. v. FERC, 158 F.3d 591, 593 (D.C. Cir. 1998). As illustrated by the fable, insecurity with regard to property rights breeds idleness and penalizes industry and innovation. As John Adams said in his treatise on the United States Constitution, "[t]he moment the idea is admitted into society, that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence." THE WORKS OF JOHN ADAMS, vol. 6 at 9 (CHARLES FRANCIS ADAMS, ED., BOSTON, CHARLES LITTLE AND JAMES BROWN, 1851). Those principles do not evaporate just

because that property is held by a municipal corporation; to the contrary, such disparate treatment cannot "be contended." Asbury, 162 N.C. at 254, 78 S.E. at 149.

In recognition of the importance of these longstanding and inviolate principles, the North Carolina Supreme Court in Asbury established as the law of this State that "as to [a municipality's] private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." Id at 253, 78 S.E. at 149.

A recurrence to this fundamental principal is of the utmost importance for the future of local government infrastructure and the health, safety and security of their citizens.

CONCLUSION

Because the General Assembly's attempt to legislate control of private property held by the City of Asheville intrudes upon the City of Asheville's property rights and exceeds the authority of the General Assembly, in violation of the North Carolina Constitution and in conflict with fundamental principles of law, *Amicus* c*uriae* City of Wilson respectfully asks the Court to reverse the decision of the Court of Appeals and reinstate the trial court's judgment.

This the 7th day of March, 2016.

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Rule 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

The undersigned attorney hereby certifies that on this day he has served the foregoing AMICUS CURIAE CITY OF WILSON'S NEW BRIEF on all parties to this action by depositing a copy of the same in the exclusive care and custody of the United States Postal Service, first class mail, postage prepaid addressed to:

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