No. 391PA15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

**********

| | | |
|---|---|---|
| CITY OF ASHEVILLE,<br>a Municipal Corporation,<br><br>Plaintiff,<br><br>v.<br><br>STATE OF NORTH CAROLINA<br>and the METROPOLITAN<br>SEWERAGE DISTRICT OF<br>BUNCOMBE COUNTY,<br><br>Defendants. | ) | From Wake County |

**********

BRIEF OF AMICUS CURIAE
INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

**********

INDEX

TABLE OF CASES AND AUTHORITIES ..... ii

ISSUE PRESENTED ..... 1

INTRODUCTION ..... 2

INTEREST OF AMICUS CURIAE ..... 2

ARGUMENT ..... 3

THE STATE MAY NOT TAKE PROPERTY HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY WITHOUT PAYING JUST COMPENSATION ..... 3

A. The Court of Appeals' reliance on an overly broad application of Supreme Court precedent is erroneous. ..... 4

B. Under *Asbury*, the State is prohibited from taking municipal property held in a proprietary capacity without just compensation. ..... 13

C. Under *Asbury*, the State is prohibited from taking the City's water system without paying just compensation. ..... 15

D. Allowing the State to take the City's property without compensation will irreparably harm the City and establish dangerous precedent. ..... 17

E. The Court of Appeals inappropriately disregards *Asbury* in favor of inapplicable and non-binding precedent from other states. ..... 20

CONCLUSION ..... 23

CERTIFICATE OF SERVICE ..... 25

TABLE OF CASES AND AUTHORITIES

**Federal Cases**

*Bd. of Comm'rs v. Lucas*, 93 U.S. 108 (1876) ..... 15

*Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226 (1897) ..... 5

*Essex Pub. Rd. Bd. v. Skinkle*, 140 U.S. 334 (1891) ..... 14

*Gomillion v. Lightfoot*, 364 U.S. 339 (1960) ..... 5, 10, 11, 12

*Hunter v. Pittsburgh*, 207 U.S. 161 (1907) ..... 3, 6, 7, 8

*New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891) ..... 15

*Trenton v. New Jersey*, 262 U.S. 182 (1923) ..... 3, 9

*Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) ..... 15

*United States v. 50 Acres of Land*, 469 U.S. 24 (1984) ..... 6

*Worcester v. Worcester C.S.R. Co.*, 196 U.S. 539 (1905) ..... 15

**State Cases**

*Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913) ..... 4, 13, 14, 15, 16

*Bridgie v. Koochiching County*, 35 N.W.2d 537 (Minn. 1948) ..... 20

*Brockenbrough v. Bd. of Water Comm'rs*, 134 N.C. 1, 46 S.E. 28 (1903) ..... 4, 20

*Cambridge v. Comm'r of Pub. Welfare*, 257 N.E.2d 782 (Mass. 1970) ..... 6, 14, 15

*Chester Cty. Inst. Dist. v. Commonwealth*, 17 A.2d 212 (Pa. 1941) ..... 21, 22

*City of Asheville v. State*, __ N.C. App. __, 777 S.E.2d 92 (2015) ..... 11

*City of Asheville v. State*, 192 N.C. App. 1, 665 S.E.2d 103 (2008) ..... 14

*DOT v. M.M. Fowler, Inc.*, 361 N.C. 1,
637 S.E.2d 885 (2006) ..... 13, 14

*Fussell v. N.C. Farm Bureau Mut. Ins. Co.*,
364 N.C. 222, 695 S.E.2d 437 (2010) ..... 16

*Hickey v. Burke*, 69 N.E.2d 33 (Ohio Ct. App. 1946) ..... 22

*New Castle Cty. Sch. Dist. v. State*,
424 A.2d 15 (Del. 1980) ..... 22

*People ex rel. Dep't of Pub. Works v. Los Angeles*, 33 Cal.
Rptr. 797 (Ct. App. 1963) ..... 22

*Proprietors of Mt. Hope Cemetery v. Boston*,
33 N.E. 695 (Mass. 1893) ..... 16, 22

*State v. Core Banks Club Props., Inc.*,
275 N.C. 328, 167 S.E.2d 385 (1969) ..... 13

*State v. Jackson*, 348 N.C. 644, 503 S.E.2d 101 (1998) ..... 4, 5

**State Statutes**

N.C. Gen. Stat. § 162A-85 ..... 16, 18

N.C. Gen. Stat. § 162A-85.3(a) ..... 18

N.C. Gen. Stat. § 160A-311(2) (2015) ..... 15, 18

N.C. Gen. Stat. § 160A-312(a) (2015) ..... 15, 18

**Constitutional Provisions**

U.S. Const. amend. V ..... 5

N.C. Const. art. I, § 19 ..... passim

**Session Laws**

Act of May 14, 2013, ch. 50,
2013 N.C. Session Laws 118-19 ..... passim

**Other**

Calvin R. Massey, *Takings and Progressive Rate
Taxation*, 20 Harv. J.L. & Pub. Pol'y 85, 104 (1996) ..... 10

Josh Bender, *Municipal Constitutional Rights: A New Approach*, 31 Yale L. & Pol'y Rev. 389, 393 (2013) ..... 12

Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829, 861 (1989) ..... 19

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 281 (Harvard University Press 1985) ..... 20

1A-2 Nichols on Eminent Domain § 2.27 (2015) ..... 14, 22

2-5 Nichols on Eminent Domain § 5.06 (2015) ..... 6

No. 391PA15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

**********

| | | |
|---|---|---|
| CITY OF ASHEVILLE, a Municipal Corporation, | ) | |
| Plaintiff, | ) | |
| v. | ) | From Wake County |
| STATE OF NORTH CAROLINA and the METROPOLITAN SEWERAGE DISTRICT OF BUNCOMBE COUNTY, | ) | |
| Defendants. | ) | |

**********

# BRIEF OF AMICUS CURIAE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

**********

## ISSUE PRESENTED

WHETHER THE STATE MAY TAKE PROPERTY HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY WITHOUT PAYING JUST COMPENSATION.

## INTRODUCTION

*Amicus Curiae* International Municipal Lawyers Association (IMLA) adopts the Statement of the Case, Statement of Appellate Jurisdiction, and Statement of the Facts in Plaintiff-Appellant's New Brief. IMLA's Motion for Leave to File Amicus Curiae Brief filed 1 December 2015 was granted 28 January 2016.

## INTEREST OF AMICUS CURIAE

IMLA is a nonprofit, nonpartisan professional organization comprised of local government entities including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Established in 1935 and consisting of more than 2,500 members, the IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts.

Since 1935, the IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. The IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective

viewpoint of local governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and state appellate courts.

The IMLA and its members have a compelling interest in this case. The IMLA believes that enforcement of the statute at issue, Act of May 14, 2013, ch. 50, 2013 N.C. Sess. Laws 118 ("the Act"), would affect an unlawful taking without compensation and that the Court of Appeals' rejection of the constitutional challenges to the seizure of the City of Asheville's water system overlooks local governments' property rights in proprietary assets, such as municipal water and sewer systems.

## ARGUMENT

### THE STATE MAY NOT TAKE PROPERTY HELD BY A MUNICIPALITY IN A PROPRIETARY CAPACITY WITHOUT PAYING JUST COMPENSATION.

A municipality is protected by the Fifth Amendment to the United States Constitution and article I, section 19, of the North Carolina Constitution, from an uncompensated taking of property held in a proprietary capacity. Neither *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), nor *Trenton v. New Jersey*, 262 U.S. 182 (1923), cases upon which the Court of

Appeals erroneously relies, provides that a state can take property held by a municipality in a proprietary capacity without compensation and transfer that property to another governmental entity. This case is directly controlled by *Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), which provides that the State cannot take property held by a municipality in a proprietary capacity without compensation and transfer that property to another governmental entity. The Court of Appeals' reliance upon *Brockenbrough v. Bd. of Water Comm'rs*, 134 N.C. 1, 19, 46 S.E. 28, 33 (1903) is misplaced where *Brockenbrough* was decided ten years before *Asbury* and concerned voluntary, not involuntary, transfers of assets from one public subdivision to another. This Court in *Asbury* stressed property rights in proprietary assets and the Court of Appeals' decision below ignores how these property rights protect the infrastructure investments of municipal taxpayers.

### A. The Court of Appeals' reliance on an overly broad application of Supreme Court precedent is erroneous.

"Questions concerning the proper construction and application of the North Carolina Constitution can be answered with finality only by this Court." *State v. Jackson*, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998)

(citations omitted). In construing the North Carolina Constitution, this Court is not bound by the decisions of federal courts, including the United States Supreme Court. *Id.* at 648, 503 S.E.2d at 104 (citation omitted). Nonetheless, the Court of Appeals relied on *Hunter* and *Trenton* to support its conclusion that a North Carolina municipality acting in a propriety capacity has no protection for uncompensated takings by the State. This reliance was misplaced.

The United States Supreme Court "has never acknowledged that the States have the power to do as they will with municipal corporations regardless of consequences." *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960). "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution." *Id.* at 344-45.

The United States Constitution protects the rights of property owners through the "Takings Clause," which provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. This property protection is applicable to the states via the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897). Although the Fifth Amendment refers only to compensation for

"private property," the Takings Clause encompasses the property of state and local governments when it is condemned by the United States. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). Moreover, "[p]roperty acquired by municipal corporations for the private benefit of their inhabitants is protected by the U.S. Constitution. This means that the property can be taken by eminent domain, *with payment for the property* taken made to the municipal corporation." 2-5 Nichols on Eminent Domain § 5.06 (2015) (emphasis added); *see Cambridge v. Comm'r of Pub. Welfare*, 257 N.E.2d 782, 782 (Mass. 1970).

Whether a state may take property held by a municipality in its proprietary capacity without paying just compensation has never arisen directly for adjudication in the Supreme Court. The *Hunter* Court signaled, however, that Fifth Amendment rights would, or at least could, apply to a municipality against a state in regard to property held in a proprietary capacity. *Hunter*, 207 U.S. at 180.

*Hunter* involved a claim by citizens of Allegheny, Pennsylvania, that the General Assembly of that State could not direct a consolidation of their city and Pittsburgh over the objection of a majority of the Allegheny voters. It was alleged that while Allegheny already had made numerous civic

improvements, Pittsburgh was only then planning to undertake such improvements, and that the annexation would therefore greatly increase the tax burden on Allegheny residents. *Id.* at 176-77. In denying the Allegheny citizens' claim, the Court held (1) that there is no implied contract between a city and its residents that their taxes will be spent solely for the benefit of that city, and (2) that a citizen of one municipality is not deprived of property without due process of law by being subjected to increased taxes as a result of the consolidation of his city with another. *Id.* at 177-79.

The Court's analysis concerned a municipality's exercise of governmental powers. The Court explained that "[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them." *Id.* at 178.

> Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, *constitutes a contract* with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole

> or a part of it with another municipality, repeal the charter and destroy the corporation.

*Id.* at 178-79 (emphasis added).

The Court cautioned, however, "in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes." *Id.* at 179. The *Hunter* Court specifically noted that Allegheny did not argue at trial that it held the property at issue in a private and proprietary capacity. *Id.* at 180. Therefore the issue of whether plaintiffs were deprived of their property without due process of law because of the increased taxation which would result from the annexation was "entirely different" from the issue of taking of privately-held municipal lands. *Id.* at 180.

Implicit in the Court's decision is that had Allegheny been able to accurately allege that the property deprived was held by the city in its private and proprietary capacity, the Court might have entertained Allegheny's claim that it had been deprived of property without due process of law.

Like *Hunter*, *Trenton v. New Jersey* also did not involve a taking of a

municipality's property held in a proprietary capacity. Rather, in *Trenton*, the Supreme Court concluded that the state can levy a tax without violating the Takings Clause, as the power to tax has long been held not to violate that clause. *Trenton*, 262 U.S. 182. *Trenton* involved the city of Trenton's to its parent state's imposition of a fee for diverting water. The State created the Trenton Waterworks as a body politic and political subdivision of the State and gave it power to draw water and provide water to residents within the city at rates the company concluded to be appropriate. *Id.* at 184. Subsequently, as the city's population overwhelmed the existing water supply, the State authorized this body politic to draw water from the Delaware River without limitation. A few years later, the State authorized the city to acquire Trenton Waterworks; which it did. As time passed, the State recognized a need to conserve its resources and sought to do so by imposing a tax on the city's excess draw from the River beyond 100 gallons of water per day per person based on the 1905 Census. *Id.* at 183-84. The city's use exceeded this limit and the State billed it for a little over $14,310. The city resisted paying and the State sued; the city defended the suit on the basis of impairment of contract, taking without compensation, and a violation of due process. *Id.* at 183.

Ultimately, the Supreme Court dismissed the case as it concluded, based on *Hunter*, that the tax levied by the State did not violate the Takings Clause. *Id.* at 188, 192.

Neither the facts nor the Court's conclusions in *Hunter* or *Trenton* provides support to the State of North Carolina in this case and are poor support for the Court of Appeals' analysis. These cases support the state's right to tax property without violating the Takings Clause. That principle rests not on the distinction between governmental and proprietary rights, nor on the relationship between the State and its municipalities, but upon sovereignty principles. To be sure, taxation if excessive may violate the Takings Clause. Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 Harv. J.L. & Pub. Pol'y 85, 104 (1996). But North Carolina did not choose to tax Asheville's property; instead, it chose to seize it. Neither *Hunter* nor *Trenton* provides support for the State's uncompensated appropriation of private property.

The Supreme Court in *Gomillion v. Lightfoot* reiterates what the *Hunter* opinion itself intimates—that a state legislature is not omnipotent with regard to the property of municipal corporations. *Gomillion*, 364 U.S. at 344. In *Gomillion*, the Court addressed a claim that the Alabama

legislature's enactment of a statute redefining the boundaries of the City of Tuskegee was a device designed to disenfranchise black citizens of their voting rights guaranteed by the Fifteenth Amendment. The Court "freely recognize[d] the breadth and importance . . . of the State's political power[,]" to control its subdivisions, but warned that "[t]o exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions" in *Hunter*, *Trenton*, and related cases. *Id.* at 342-43. The *Gomillion* Court thus clarified, "a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases." *Id.* at 344.

The Court of Appeals relied on *Hunter* and *Trenton* for the proposition that "municipalities do not have Fourteenth Amendment rights concerning acts of the legislature, . . . even when the legislation affects a municipality's exercise of a proprietary function." *City of Asheville v. State*, __ N.C. App. __, 777 S.E.2d 92, 100 (2015). The Court's broad reading of *Hunter* and *Trenton* "misconceive[s] the reach and rule of this

Court's decisions" in *Hunter* and *Trenton* and leads to the overly broad conclusion that "the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations[.]" *Gomillion*, 364 U.S. at 342-43, 344; *see also* Josh Bender, *Municipal Constitutional Rights: A New Approach*, 31 Yale L. & Pol'y Rev. 389, 393 (2013) (describing the negative consequences of reading *Hunter* too broadly). Instead, as directed by *Gomillion*, the correct reading of *Hunter* and *Trenton* is that the State's authority to appropriate property held by a municipality in its governmental capacity and to tax municipal property held in a proprietary capacity is unrestrained by the particular prohibitions of the Constitution considered in those cases. *Gomillion*, 364 U.S. at 344. As neither *Hunter* nor *Trenton* concerned a taking of a municipality's proprietary property without compensation, they are of no persuasive value in adjudging whether North Carolina can seize the City's proprietary water system without compensation other than as cautionary reminders that the Supreme Court of the United States has specifically reserved the issue as not falling squarely within the State's sovereign power.

**B. Under *Asbury*, the State is prohibited from taking municipal property held in a proprietary capacity without just compensation.**

"North Carolina's Constitution protects the rights of property owners through the 'Law of the Land Clause,' which provides that '[n]o person shall be . . . deprived of his . . . property, but by the law of the land.'" *DOT v. M.M. Fowler, Inc.*, 361 N.C. 1, 4, 637 S.E.2d 885, 889 (2006) (quoting N.C. Const. art. I, § 19). The prohibition against taking private property for public use unless just compensation is paid "'is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina[.]'" *M.M. Fowler*, 361 N.C. at 4-5, 637 S.E.2d at 889 (quoting John V. Orth, *The North Carolina State Constitution* 58 (Univ. of N.C. Press 1995)). "The right to take property for public use . . . is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned." *State v. Core Banks Club Props., Inc.*, 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969).

Municipal corporations have a dual character: governmental and proprietary. *Asbury*, 162 N.C. at 253, 78 S.E. at 149. In their governmental characters, as mere agencies or instrumentalities of the state, municipalities

conduct general elections, construct and maintain public highways and bridges, suppress disorder and crime, and perform similar acts conducive to the safety and prosperity of citizens of the state at large. 1A-2 Nichols on Eminent Domain § 2.27 (2015). In their private, proprietary capacities, however, municipal corporations take on the capacities of a private corporation, may claim its rights and immunities, and are subject to its liabilities. *Id.* It is in this capacity that they construct works for supplying water and light to the dwellings of their inhabitants, and establish markets, cemeteries, and libraries for their use. *Id.* *See City of Asheville v. State*, 192 N.C. App. 1, 49, 665 S.E.2d 103, 136 (2008) ("When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity[.]").

In matters purely governmental in character, the municipality is under the absolute control of the legislative power. *Asbury*, 162 N.C. at 253, 78 S.E. at 149. Thus, the legislature may exercise absolute control over property acquired in a municipality's governmental capacity and may, without paying compensation therefor, transfer the property to some other agency of the government. *Id.*; *Essex Public Road Board v. Skinkle*, 140 U.S.

334 (1891); *Cambridge*, 257 N.E.2d at 785.

On the other hand, property held by a municipality in its private or proprietary capacity is not subject to the same legislative control as property held in a governmental capacity. *Asbury*, 162 N.C. at 253, 78 S.E. at 149; *Cambridge*, 257 N.E.2d at 785. When a municipality performs "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, 78 S.E. at 149. Thus, property acquired in a municipality's proprietary capacity for the private benefit of its inhabitants is protected by the constitution, and can be taken only for a public purpose and upon payment of just compensation. *Id.* at 254, 78 S.E. at 149. *See Cambridge*, 257 N.E.2d at 785; *Worcester v. Worcester C. S. R. Co.*, 196 U.S. 539 (1905); *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79 (1891); *Board of Comm'rs v. Lucas*, 93 U.S. 108 (1876); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

**C. Under *Asbury*, the State is prohibited from taking the City's water system without paying just compensation.**

In this case, the City has the legal authority to own and operate its water system. *See* N.C. Gen. Stat. § 160A-311(2) (2015), -312(a); R p 159;

Doc. Ex. 400 (granting municipalities the right to own and operate a water and sewer system). Moreover, it is well settled that as the operator of a system of waterworks for private consumption and use, the City is acting in its proprietary capacity. *See Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010). The legislature is therefore under the same constitutional restraints in asserting control over the City in this instance that it would be with respect to a private corporation, and is prohibited from taking the City's assets relating to its water system without compensation. *Asbury*, 162 N.C. at 253, 78 S.E. at 149. *See e.g.*, *Proprietors of Mount Hope Cemetery v. Boston*, 33 N.E. 695, 699-700 (Mass. 1893) (holding that a cemetery owned by the city in its proprietary capacity was protected by the United States and Massachusetts Constitutions and could not be taken by the state without payment of just compensation). As this Court, quoting with approval from the *Trustees of Dartmouth College*, stated:

> "It may be admitted that corporations . . . such as . . . cities, 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."

*Asbury* at 253, 78 S.E. at 149-50 (citation omitted) (alterations in original).

The Act at issue in this case attempts to do what the Supreme Court in *Asbury* expressly proscribed: it takes away the private property of Asheville or changes the uses of its private funds acquired under the public faith. *See* Act sec. 1, 2013 N.C. Sess. Laws at 118-19; *see also* Plaintiff-Appellant's New Brief pp. 10-12 (describing the mechanisms of this taking). Moreover, although the Act confiscates Asheville's proprietary assets, it provides no compensation for this taking. *See* Act sec. 1, § 162A-85.4, 2013 N.C. Sess. Laws at 118-19.

**D. Allowing the State to take the City's property without compensation will irreparably harm the City and establish dangerous precedent.**

The Act would inflict irreparable harm upon the City through the seizure of millions of dollars' worth of assets and the removal of the City's ability to locally govern its own water infrastructure. Moreover, allowing the Act to be enforced would signal that a legislature has unfettered power to tinker with or destroy a municipal corporation for any reason, including political enrichment or coercion.

First and foremost, the Act would divest the City of hundreds of millions of dollars in proprietary assets. (R pp 79, 164; Plaintiff-Appellant's

New Brief pp. 7-8) These seized assets would include massive facilities that have taken the City over a century to build. (R pp 63-64, 150, 159; Doc. Ex. 216-20, 623; Plaintiff-Appellant's New Brief p. 7) The seized assets could also include thousands of acres of watershed land, reservoirs, and other real property. (R pp 62-63, 150-51, 159; Doc. Ex. 2, 636-37; Plaintiff-Appellant's New Brief p. 7)

Second, the Act deprives the City and its taxpayers of the governance over their water system – a system in which the City and its taxpayers have invested for more than a century. *See* Act sec. 2, § 162A-85.3(a), 2013 N.C. Sess. Laws at 120-21 (board members for the new district would come from an area beyond Asheville and only 25% of the board would come from the City ); Act sec. 2, § 162A-85.4, 2013 N.C. Sess. Laws at 121 (provisions that could reduce the City's representation in the new district even further).

Third, the Act evidences the General Assembly's ability to micromanage local governments and its excessive power in making local laws – laws that that should be made by local governments. N.C. Gen. Stat. § 160A-311(2), -312(a). Allowing the Act to be enforced would signal to this General Assembly, and to legislators around the country, that it is permissible to arbitrarily and unilaterally order the transfer of a

municipality's assets without compensation. Such a holding would chill future decisions by municipal management to invest in local infrastructure or engage in programs to improve local systems. It would discourage economic risk-taking and stunt municipal development and growth. When extrapolated to voter-approved bond issues for capital improvements subsequently seized by the State, the decision mocks the democratic process that a referendum supports. Voters should know that what they vote to invest in will not be unceremoniously appropriated by special interests in the General Assembly.

Municipal governments by their very nature must engage in complex and highly regulated financings where interest rates can mean the difference of millions of dollars in cost to those governments. Without diverting into this complex area, suffice to say that a city's balance sheet necessarily changes when its assets and its sources of revenue are taken from it. Investors in the city's bonds need to have an expectation of stability in anticipation of the city's ability to pay its indebtedness. If the Court upholds legislation that strips a city of its assets and its attendant revenue sources, without compensation, one can easily imagine the disruption that will flow from that decision.

Finally, the Act's failure to provide for compensation allows for potential abuses in the political process. If the State can take private property without compensation, two types of abuses can occur. First, groups of citizens who gain control of the legislative process could use uncompensated takings as a means to enrich themselves at the expense of less politically powerful groups. Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. Pa. L. Rev. 829, 861 (1989). Second, those in political power could use uncompensated takings as a means to punish or coerce specific citizens, thereby depriving them of their liberty. *Id.* *See also* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 281 (Harvard University Press 1985) (asserting that the Takings Clause is designed to control rent seeking and political faction). By requiring the State to indemnify the City for seizing millions of dollars of assets, the compensation requirement cautions those in control of the government to use the power of eminent domain wisely.

### E. The Court of Appeals inappropriately disregards *Asbury* in favor of inapplicable and non-binding precedent from other states.

The Court of Appeals' decision disregards this Court's opinion in

*Asbury*, the seminal case on involuntary transfers of proprietary assets, which holds that the North Carolina Constitution limits a state legislature's power to divest a municipal corporation of its proprietary property. *Asbury*, 162 N.C. at 253, 78 S.E. at 149-50. The Court instead relies on *Brockenbrough*, 134 N.C. at 19, 46 S.E. at 33 to support its conclusion that a state legislature may order the involuntary transfer of a city's proprietary assets to another entity. This reliance misapplies this Court's holding in *Brockenbrough* as the transfer of property in that case was voluntary, while the transfer in the instant case was involuntary. Moreover, *Brockenbrough* was decided ten years before *Asbury* and thus, its application is limited by *Asbury*. Disregarding *Asbury* eviscerates the takings protections of the North Carolina Constitution and invalidates established precedent forbidding the State from transferring municipal property to other private entities without just compensation.

The Court of Appeals' reliance on out-of-state cases is likewise unfounded, as the cases are neither mandatory nor persuasive. *See e.g.*, *Bridgie v. Koochiching*, 35 N.W.2d 537 (Minn. 1948) (holding a rational basis justified a law ordering that when the assessed valuation of a town drops below $40,000, the county board may dissolve the municipality); *Chester*

*Cty. Inst. Dist. v. Commonwealth*, 17 A.2d 212 (Pa. 1941) (upholding an uncompensated taking of property when the property was to be used for *governmental* purposes because "the Commonwealth has absolute control over such agencies and may add to or subtract from the duties to be performed by them, or may abolish them and take the property with which the duties were performed without compensating the agency therefor"); *Hickey v. Burke*, 69 N.E.2d 33 (Ohio Ct. App. 1946) (stating that in "matters of state-wide concern [as opposed to a localized, proprietary matter] the state is supreme over its municipalities and may in the exercise of its sovereignty impose duties and responsibilities upon them as arms or agencies of the state").

Moreover, the Court overlooked out-of-state cases supporting *Asbury* and applying the majority rule that "property acquired by municipal corporations for the private benefit of their inhabitants is protected by the constitution, and can be taken only by eminent domain, and *upon payment of its value*." 1A-2 Nichols on Eminent Domain § 2.27 (emphasis in original). *See New Castle Cty. Sch. Dist. v. State*, 424 A.2d 15 (Del. 1980) (invalidating a statute authorizing the state to take property from a local board of education to build a public park – an unequivocally public

purpose – on the basis that property held in a proprietary capacity cannot be taken without just compensation); *People ex rel. Dep't of Public Works v. City of Los Angeles*, 33 Cal. Rptr. 797, 800 (Cal. Ct. App. 1963) (holding the city was entitled to compensation after the state condemned a park that the city owned and operated in its proprietary capacity); *Proprietors of Mt. Hope Cemetery*, 33 N.E. at 698 ("[T]he conclusion to which we have come is that the cemetery falls within the class of property which the city owns in its private or proprietary character, as a private corporation might own it, and that its ownership is protected under the Constitutions of Massachusetts and of the United States so that the Legislature has no power to require its transfer without compensation.").

## CONCLUSION

For these reasons, *Amicus Curiae*, the International Municipal Lawyers Association, respectfully urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted this the 7th day of March, 2016.

ALLEGRA COLLINS LAW

/s/ Electronically Submitted
Allegra Collins
N.C. Bar No. 35448
225 Hillsborough St.
Raleigh, NC 27603
(919) 880-9809
allegracollins@hotmail.com

/s/ Electronically Submitted
Alexandra Davis
N.C. Bar No. 49150
c/o Allegra Collins
225 Hillsborough St.
Raleigh, North Carolina 27603
(919) 610-9406
alexandra.davis8815@gmail.com

Attorneys for *Amicus Curiae* International Municipal Lawyers Association

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Brief of Amicus Curiae International Municipal Lawyers Association has been filed with the Court's electronic filing system and has been served upon all parties to the appeal by electronic mail, addressed to counsel of record as follows:

Matthew W. Sawchak
Ellis & Winters, LLP
P.O. Box 33550
Raleigh, NC 27636
matt.sawchak@elliswinters.com

Robert F. Orr
Campbell Shatley, PLLC
674 Merrimon Avenue, Suite 210
Asheville, NC 28804
bob@csedlaw.com

Robert B. Long, Jr.
Long, Parker, Warren, Anderson & Payne, P.A.
14 South Pack Square, Suite 600
Asheville, NC 28802
fran@longparker.com

Robin T. Currin
City of Asheville City Attorney's Office
P.O. Box 7148
Asheville, NC 28802
rcurrin@ashevillenc.gov

I. Faison Hicks, Esq.
North Carolina Department of Justice

P.O. Box 629
Raleigh, NC 27602-0629
fhicks@ncdoj.gov

William Clarke, Esq.
Roberts & Stevens, P.A.
P.O. Box 7647
Asheville, NC 28802
bclarke@roberts-stevens.com

Stephen W. Petersen, Esq.
Smith Moore Leatherwood, LLP
434 Fayetteville Street, Suite 2800
Raleigh, NC 27601
steve.petersen@smithmoorelaw.com

This the 7th day of March, 2016.

/s/ Electronically Submitted
Allegra Collins