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
NORTH CAROLINA LEAGUE OF MUNICIPALITIES'
NEW BRIEF

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INTRODUCTORY STATEMENTS

Amicus North Carolina League of Municipalities (hereinafter "League") adopts and incorporates by reference the Introductory Statements set forth prior to the Argument section of plaintiff-appellant City of Asheville's brief. N.C. R. App. P. 28(f). This honorable Court granted the League's motion for leave to participate as *amicus curiae* on January 28, 2016. N.C. R. App. P. 28(i).

INTEREST OF *AMICUS CURIAE*

Amicus League, founded over a century ago in 1908, is a voluntary nonpartisan federation of approximately 540 cities, towns, and villages, collectively representing nearly 100% of the municipal population. *Amicus* League provides a unified, nonpartisan voice for municipal issues, representing and advocating the common interests of its member municipalities, before all branches of state and federal government. The mission of *amicus* League is to enhance the quality of life by promoting excellence in municipal government. *Amicus* League carries out this mission by: providing member services that strengthen and support the effectiveness of municipal government; engaging members, staff, and stakeholders in representing municipal issues and interests; devel-

oping municipal leaders who can address the needs and interests of their citizens; and engaging in advocacy on municipal issues at the state and federal level.

The members of *amicus* League have a compelling interest in legal issues affecting the powers, responsibilities, and duties of local governments. Indeed, the North Carolina Legislature has declared that, "It is the policy of the General Assembly that the cities of this State should have adequate authority to execute the powers, duties, privileges, and immunities conferred upon them by law." G.S. 160A-4. This certainly encompasses issues affecting the municipal role as key providers of infrastructure and public services that are essential to the health, safety, and welfare of the citizenry and necessary to sustain growing urban and urbanizing areas. *Amicus* League's Core Municipal Principles and advocacy goals have long emphasized the need to protect local elected officials' decision-making authority over municipal public enterprise systems in order to promote orderly growth and economic development, as well as the need to support measures that maximize the ability of local governments to provide and manage high-quality utility services to meet the needs of the community and protect the public health, safety,

and welfare. Ready access to clean, abundant, and affordable water is crucial not only to the health and safety of the citizenry, but also to the long-term growth and economic interests of the state. To that end, *amicus* League has opposed proposals that seek to weaken or remove local control over public utility assets, measures which ultimately provide substantial disincentives for local investment in infrastructure.

Amicus League's members have a significant stake in maintaining authority over the public water infrastructure constituting a substantial investment on behalf of the citizens in their respective communities. In this case, an extraordinary legislative decision, unsupported by a cognizable rational basis, targeted a *single* municipality for the unilateral and uncompensated transfer of its water system to an entirely *new* type of entity known as the "metropolitan water and sewerage district" ("MWSD"). Such enactments, if allowed to stand, ignore the considerable investments made by municipal citizens and threaten the continued viability of their public enterprises even as substantial population growth is projected over the next two decades. This case raises important constitutional issues regarding the limitations on legislative power. Given the integral role of municipalities as primary providers of

water to the citizens of North Carolina, and the magnitude of the constitutional questions presented, the League respectfully submits that this case is of the utmost significance.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY REVERSING THE TRIAL COURT'S HOLDING THAT THE WATER ACT WAS VOID AND UNENFORCEABLE ON A NUMBER OF GROUNDS. GIVEN THE FUNDAMENTAL CONSTITUTIONAL PROVISIONS WHICH SERVE AS A RESTRAINT ON THE LEGISLATIVE POWER, THE TRIAL COURT CORRECTLY INVALIDATED THE WATER ACT, AND ITS DECISION SHOULD BE REINSTATED.

Applicable constitutional restrictions restrain the otherwise plenary Article VII, § 1 power of the General Assembly over municipalities. It is respectfully submitted that the General Assembly, having authorized municipalities by general law[1] to engage in public enterprises,[2] may not by unconstitutional local act micro-manage the manner in which such enterprises are to be owned, governed, and operated by local elected officials. In *Town of Spruce Pine v. Avery County*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997), this Court observed, "[T]he classification of watersheds is a complex subject. It is ***not*** something the General Assembly can micro-manage." (Emphasis added.) Just as in the

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[1] N.C. Const. art. II, § 24(4); N.C. Const. art. XIV, § 3 (defining "General laws").
[2] G.S. Chapter 160A, Article 16.

Town of Spruce Pine case, a complex subject intrinsically connected to *public health* is directly at issue here— a municipal government's continued operation of an extensive water distribution system developed over the course of century. The trial court correctly held that the Water Act[3] was unconstitutional on a number of grounds, and the Court of Appeals erred in reversing that decision.

Article VII, § 1 ("General Assembly to provide for local government") includes the qualifying language at the end of the first sentence "except as otherwise prohibited by this Constitution." Contrary to the State's sweeping assertions, the power of the General Assembly, while it may be plenary in some respects as to local governments with regard to their delegated *governmental* powers, is not absolute, especially in regard to their *proprietary* powers as recognized by *Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), a century ago. While *amicus* League recognizes that acts of the General Assembly are generally presumed to be constitutional, the qualifying language of Article VII, § 1 explicitly recognizes that the legislature is not omnipotent. *See, e.g.*, N.C. Const. art. II, § 24 & art. XIV, § 3. 1 *McQuillin Muni. Corp.* § 1.21

[3] 2013 N.C. Sess. Laws 50, §§ 1(a)-(f), as amended by 2013 N.C. Sess. Laws 388, § 4-5 (hereinafter "Water Act"). The Court of Appeals, throughout its opinion, referred to the enactment as the "Transfer Provision." *Slip op.* at 3.

at 21 (3d ed. rev. 1999). Unquestionably, the constitutionality of the Water Act under provisions of the North Carolina Constitution is a judicial, and not a legislative, question. N.C. Const. art. I, § 6. *See Moore v. Knightdale Bd. of Elections,* 331 N.C. 1, 4, 413 S.E.2d 541, 542-43 (1992).

A. The Court of Appeals erred by holding that the Water Act was not a local act relating to health or sanitation in violation of Article II, Section 24(1)(a) of the North Carolina Constitution.

The Court of Appeals erred in "revers[ing] the trial court's grant of summary judgment for Asheville on its first claim for relief, which declared that the Transfer Provision constitutes a local act relating to health, sanitation or non-navigable streams in violation of Article II, Sections 24(1)(a) and (e) of our state constitution." *Slip op.* at 24. *Amicus* League submits that the trial court correctly held that the Water Act was an invalid local act, as the City of Asheville amply demonstrated in the proceedings below that the Water Act: (1) creates an unreasonable classification and constitutes a local act under N.C. Const. art. II, § 24 ("Limitations on local, private, and special legislation"), and (2) violates prohibitions set forth in that section, namely N.C. Const. art. II, § 24(1)(a) ("Relating to health, sanitation, and the abatement of nui-

sances") & N.C. Const. art. II, § 24(1)(e) ("Relating to non-navigable streams"). *See* N.C. Const. art. II, § 24(3) ("Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.")

As to the substantive issues set forth in Article II, sec. 24(1), the General Assembly may only exercise its powers by the enactment of laws generally applicable to all municipalities. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 188, 581 S.E.2d 415, 428 (2003) ("'It was the purpose of [Article II, Section 24] to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by *general laws* to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.' *High Point Surplus Co. v. Pleasants*, 264 N.C. [650] at 656, 142 S.E.2d [697] at 702 [(1965)].") (Emphasis in original.)

Erroneously relying upon *Reed v. Howerton*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924), the Court of Appeals took an unduly restrictive in-

terpretation of N.C. Const. art. II, § 24(1)(a) ("Relating to health, sanitation, and the abatement of nuisances") by requiring a "purpose ... to regulate health or sanitation" or to "prioritize" those subjects. *Slip. op.* at 13; *see also slip op.* at 12 ("precedent instructs 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] careful perusal of the entire act'.") (Emphasis in original; quoting *Reed v. Howerton.*)

Lamb v. Bd. of Educ., 235 N.C. 377, 70 S.E.2d 201 (1952) and *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928) are the most controlling precedents on the N.C. Const. art. II, § 24(1)(a) ("Relating to health, sanitation, and the abatement of nuisances") issue. *Lamb* (1952) was decided after *Reed v. Howerton*, 188 N.C. 39, 123 S.E. 479 (1924) and does not cite *Reed*, but does cite *Drysdale*. *Drysdale* (1928) invalidated a local enactment dealing with the provision of water and was published just four years after *Reed*. In *Drysdale*, this Court determined that a local law was not examined in *Reed*. *Drysdale,* 195 N.C. at 727-28, 143 S.E. at 533. *See Reed,* 188 N.C. at 44, 123 S.E. at

481 ("Nor do we think the law is subject to the objection that it is local or special. A law which applies generally to a particular class of cases is not a local or special law.")

Further, the Court of Appeals errs, *slip op.* at 14, by stating that *Drysdale v. Prudden* was not decided under the health or sanitation provision, as a subsequent Supreme Court holding explicitly described the case as follows: "To the same effect is the ruling in *Sanitary District v. Prudden,* 195 N.C. 722, 143 S.E. 530 [*Drysdale*], where a special act creating a sanitary district for the construction and maintenance of a water and sewer system in Henderson County *was held to violate* this constitutional provision." *Sams v. Board of Commissioners of Madison County,* 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940) (emphasis added). *Reed* is at best an outlier case to the facts presented here, and the Court of Appeals erred by making it a focal point of its analysis in the decision.

Lamb v. Bd. of Educ., 235 N.C. 377, 70 S.E.2d 201 (1952), is particularly instructive. The enactment in *Lamb,* nowhere mentioning the

terms "health" or "sanitation" in its text[4], sought to control the means of approving the *financing* of water infrastructure: at issue in *Lamb* was an enactment requiring voter approval, via special election, if more than $2,000.00 was to be expended for the extension of a water or sewer system to serve a public school. Upon observing the local act prohibition of Article II, § 24 and the practical effect of the enactment, this Court opined, "The statute in question is a local or special act. It relates only to Randolph County, and in Randolph County affects only a single agency, the County Board of Education. It *relates to health and sanitation*, since its sole purpose is to prescribe provisions with respect to sewer and water service for local school children in Randolph County. It purports to limit the power of the County Board of Education to provide for sanitation and healthful conditions in the schools by means of a sewerage system and an adequate water supply." *Id.* at 379, 70 S.E.2d at 203 (emphasis added; citations omitted).

Reed, the case relied upon by the Court of Appeals, *slip op.* at 14-16, is not mentioned by the Supreme Court in *Lamb*. Instead, this Court in *Lamb* cites *Drysdale* and a line of other cases with the defini-

[4] Following *Reed v. Howerton*, 188 N.C. 39, 123 S.E. 479 (1924), the Court of Appeals initially examined whether the Water Act "expressly state[d] that its purpose [was] to regulate health or sanitation." *Slip op.* at 12.

tive statement, "The decisions of this Court sustain the ruling of the trial judge." *Lamb*, 235 N.C. at 379, 70 S.E.2d at 203 (citing *Sanitary District v. Prudden,* 195 N.C. 722, 143 S.E. 530 (1928) [*Drysdale*]; *Sams v. Board of Commissioners of Madison County,* 217 N.C. 284, 7 S.E.2d 540 (1940); *Board of Health of Nash County v. Board of Commissioners,* 220 N.C. 140, 16 S.E.2d 677 (1941); *Idol v. Street,* 233 N.C. 730, 65 S.E.2d 313 (1951)). Notably, in addition to *Drysdale v. Prudden,* two other cases brought forward by plaintiff-City, *Sams, supra,* and *Idol, supra,* are cited by that very passage in *Lamb*. *Slip op.* at 15. The cases are subsequently cited together in *Gaskill v. Costlow,* 270 N.C. 686, 688, 155 S.E.2d 148, 149 (1967).

The trial court correctly determined that the Water Act was enacted in violation of N.C. Const. art. II, § 24(1)(a) and was void pursuant to N.C. Const. art. II, § 24(3). [R. 162] The provision of water is inextricably embedded within the public health. "Maintaining safe drinking water and environmentally sound sewer services is one of the most important responsibilities of a local government." J. Hughes, "The Painful Art of Setting Water and Sewer Rates" *Popular Government,* Spring/Summer 2005 at 14 (characterizing the provision of water as a

"fundamental public health service"); *see also id.* at 5 ("ultimately the water and sewer business is primarily about public health"). "Setting water and sewer rates is one of the most important environmental and public health responsibilities of a local government or a utility." J. Hughes *et al, Multi-Level Financial Analysis of Residential Water and Wastewater Rates and Rate-Setting Practices In North Carolina*, Water Resources Research Institute, (Report No. 389) November 2006.

Further, federal laws (and corresponding state regulations) including the Safe Drinking Water Act of 1974, 42 U.S.C. 300f *et seq.* (P.L. 93-523, amending the Public Health Service Act), as well as the Clean Water Act of 1977, 33 U.S.C. 1251 *et seq.* (P.L. 95-217, amending the Federal Water Pollution Control Act), constitute well-established policy setting forth "protective programs in the Water Sector to protect human health and the environment." Department of Homeland Security & Environmental Protection Agency, *Water Critical Infrastructure and Key Resources Sector-Specific Plan as input to the National Infrastructure Protection Plan*, May 2007, p.1. *See also* Department of Homeland Security & Environmental Protection Agency, *Water-Sector Specific Plan: An Annex to the National Infrastructure Protection Plan* 2010. Such

regulations are part of a complicated policy scheme ultimately implemented at the local level by municipal officials.

Indeed, the fact that the constitutional provision at issue, N.C. Const. art. II, § 24(1)(a), uses the term "***relating*** to health, sanitation" is highly significant in that it is a substantially broader term than "***regulating*** labor, trade..." in N.C. Const. art. II, § 24(1)(j) (emphasis added). The two terms appear within the *same* constitutional provision and are not intended to be synonymous. *See Williams* 357 N.C. at 189, 581 S.E.2d at 429 (interpreting N.C. Const. art. II, § 24(1)(j)). The Court of Appeals misapprehended *Reed* and its "regulate" standard, *slip op.* at 12-13: additionally, as examined *infra* at 8-9 of this brief, there is no determinative indication that *Reed* involved the interpretation of a local act.

Nor is a dispute among jurisdictions sufficient to save an otherwise invalid local act. In *City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 338 N.C. 430, 437-38, 450 S.E.2d 735, 739-40 (1994), the City of New Bern filed a declaratory judgment action seeking to have three enactments of the General Assembly declared unconstitutional. The city and the county disagreed as to which entity should perform

building inspections of school buildings, community college buildings, and a medical center. Prior to the enactments, the city performed these inspections pursuant to G.S. 160A-411. The local acts shifted the responsibility for enforcing the State Building Code from the city to the county. Given the law of general applicability, G.S. 160A-411, this Court rejected defendant's argument "that New Bern required special legislative attention because the city and the county were unable to agree on which entity should perform the inspections of the buildings covered by the three acts. This inability to agree, they contend, provides a rational basis for the legislature's objective in enacting these acts, that of designating Craven County to perform the inspections." *Id.* at 437, 450 S.E.2d at 739. This Court held, "based on this statute, as well as on the facts of this case, we perceive no rational basis that justifies the separation of New Bern from all other cities in North Carolina for special legislative attention regarding the designation of an appropriate inspection department. The acts thus create an unreasonable classification. They therefore are local acts." *Id.* at 438, 450 S.E.2d at 740. The lack of a rational basis for the classification of Asheville's water system is further explored in section B.2 of this brief, *infra*. Whereas the panel

here found it unnecessary to reach whether the Water Act constituted a local law, *slip op. at* 11, it is clear under *City of New Bern* that a local law is in fact at issue. *Id.* at 438, 450 S.E.2d at 740.

Further, this Court explicitly *rejected* the county's argument that the legislature had acted within its plenary authority under N.C. Const. art. VII, § 1. *City of New Bern,* 338 N.C. at 438, 450 S.E.2d at 740. This Court emphasized that relying upon local governments' mere inability to agree[5] over the provision of services was not sufficient to justify special legislative attention. *Id.* at 437, 450 S.E.2d at 739. Finding the conclusion "inescapable," this Court held that the local acts affected health and sanitation[6]: the local acts were accordingly prohibited by

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[5] *See also Board of Health of Nash County v. Board of Commissioners,* 220 N.C. 140, 143, 16 S.E.2d 677, 679 (1941) (Article II, Section 24 "should not be so construed as to minimize the provision it has made looking to this result. It is remedial in its nature, and its application should not be denied on an unsubstantial distinction which would defeat its purpose. It especially mentions general 'laws relating to health' as being within its protective purview, recognizing that the alleviation of suffering and disease, the eradication or reduction of communicable disease in its humanitarian, social, and economic aspect, is a State-wide problem which ought not to be interfered with by local dilatory laws which are so frequently the outcome of local indifferency, or ***factional and political disagreements.***") (Emphasis added.); *Madison Cablevision, Inc. v. City of Morganton,* 325 N.C. 634, 647, 386 S.E.2d 200, 207 (1989) (noting that territorial disputes over service provision are not uncommon challenges facing municipalities operating public enterprise programs).

[6] This Court in *City of New Bern* placed significant focus on the plumbing aspects of the State Building Code, as "some of the aims informing the plumbing regulations are the provision of 'adequate, safe and potable water' and 'adequate sanitary facilities' in premises intended for human occupancy. [II N.C. State Bldg. Code] §§ 301.1 & 301.3." *City of New Bern,* 338 N.C. at 440, 450 S.E.2d at 741.

N.C. Const. art. II, § 24 and were void pursuant to subsection (3) of that section. As *City of New Bern* amply demonstrates, where there is law of general applicability, here G.S. 160A-311(2) and G.S. 160A-312(a), a dispute among jurisdictions is insufficient to provide a rational basis for differential treatment from all other jurisdictions statewide. The analysis set forth above in *City of New Bern* was thoroughly reexamined and reaffirmed by this Court nearly a decade later in *Williams*, 357 N.C. at 189-90, 581 S.E.2d at 429. By holding the Water Act unconstitutional, the trial court properly recognized the dangers inherent in interference via local legislation in the ownership, governance, and operation of long-established municipal water supply systems. *See Town of Spruce Pine v. Avery County*, 346 N.C. 787, 792, 488 S.E.2d 144, 147 (1997) ("[T]he classification of watersheds is a complex subject. It is ***not*** something the General Assembly can micro-manage.") (Emphasis added.)[7]

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[7] This quoted material from *Town of Spruce Pine* was an essential part of this Court's decision upholding the 1989 statewide Water Supply Watershed Protection Act, G.S. 143-214.5, and upholding the delegation of the Act's administration to the N.C. Environmental Management Commission. It is well established that the "'ordinary restrictions with respect to the delegation of power [by the General Assembly] to an agency of the State, which exercises no function of government, do ***not*** apply to cities, towns, or counties.'" *Plemmer v. Matthewson*, 281 N.C. 722, 726, 190 S.E.2d 204, 207 (1972) (emphasis added; citation omitted). *See A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 219, 258 S.E.2d 444, 452 (1979) ("Delegation to municipal corporations of the States' police power to legislate concerning local problems such as zoning is permissible by long standing exception to the general rule of

B. The Court of Appeals erred by holding that the Water Act did not constitute an unlawful taking without just compensation.

The Court of Appeals erred by "revers[ing] the trial court's grant of summary judgment for Asheville on its third claim for relief, which declared that the Transfer Provision violates Article I, Sections 19 and 35 of our state constitution, as an invalid exercise of power to take or condemn property." *Slip op.* at 25. The Court also erred by "revers[ing] the trial court's grant of summary judgment on Asheville's sixth claim

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non-delegation of legislative power"); *see also Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889) ("It is a cardinal principle of our system of government, that local affairs shall be managed by the local authorities, and general affairs by the central authority; and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to entrench upon that rule."). There is certainly a separation of powers art. I, § 6, component here as well, as enacted local bills are explicitly excluded from the Governor's veto authority. N.C. Const. art. II, § 22(6) (exemption from Governor's veto).

This exception to the doctrine of non-delegation in the context of local governments is also legislatively recognized by the "broad construction" statute regarding statutory interpretation. G.S. 160A-4 (municipalities); G.S. 153A-4 (counties). *See Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte,* 336 N.C. 37, 442 S.E.2d 45 (1994); *Bellsouth Telecommunications, Inc. v. City of Laurinburg*, 168 N.C. App. 75, 82-83, 606 S.E.2d 721, 726, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 660 (2005) (public enterprise statutes). Further, it is well established that it is presumed that local elected officials act in good faith. *Painter v. Wake County Board of Education* 288 N.C. 165, 178, 217 S.E.2d 650, 658 (1975) ("Absent evidence to the contrary, it will always be presumed: '. . . " '[T]hat public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. . . . Every reasonable intendment will be made in support of the presumption.' " '[T]he burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence.'") (Citations omitted.) The elected officials constituting the city council must take an oath of office. N.C. Const. art. VI, § 7; G.S. 160A-61 & G.S. 160A-68(b); G.S. 11-8.

for relief, which, in the alternative to the injunction, awarded Asheville money damages for the taking of the Asheville Water System." *Id.* In so holding, the Court of Appeals misapprehended well-established law.

It is axiomatic that a municipal corporation has a dual nature–performing *proprietary* as well as governmental functions–as a municipal corporation is both a body *corporate*, as well as a body politic. 1 *McQuillin Muni. Corp.* § 2.07.10 at 145 (3d ed. rev. 1999). *Asbury v. Albemarle*, 162 N.C. 247, 253, 78 S.E. 146, 149 (1913). *See* G.S. 160A, Article 2 ("General Corporate Powers"); *see e.g.*, G.S. 160A-11 ("Corporate Powers"; referring *inter alia* to "rights in property") & G.S. 160A-12 ("Exercise of Corporate Power"; providing that "[A]ll powers, functions, rights, privileges, and immunities of the corporation shall be exercised by the city council....").

In a plaintiff's action nearly a century ago presenting a direct challenge to the critical importance of the *proprietary* aspect of defendant-municipal corporation's ownership and operation of public enterprises, this honorable Court, upon reviewing "fundamental" principles pertaining to due process that "should be carefully and jealously guarded," stated:

> ***Under our government, municipalities have the right to own and operate water, sewerage and electric light systems.... Municipal corporations have the <u>same rights</u> as individuals and private corporations, to battle for justice and equality of opportunity as they view it, in their sphere of uplift and endeavor, and equal rights should be given to all under the law.***

Elizabeth City Water & Power Co. v. Elizabeth City, 188 N.C. 278, 297-98, 124 S.E. 611, 620 (1924) (emphasis added).[8] It is noteworthy that

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[8] *Cf. Burwell v. Hobby Lobby Stores, Inc.*, ___ U.S. ___, 134 S.Ct. 2751, 2768 (Nos. 13-354 & 356, 2014) (Regarding the "familiar legal fiction" of treating corporations as persons, Justice Alito, in writing for the majority, emphasizes, "But it is important to keep in mind that the ***purpose*** of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the ***people*** (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these ***people***. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being.") (Emphasis added.)

Compare G.S. 160A-11 ("The ***inhabitants*** of each city heretofore or hereafter incorporated ... shall be and remain a municipal corporation by the name specified in the city charter. Under that name ***they*** shall be ***vested*** with all of the property and rights in property belonging to the corporation; shall have perpetual succession; may sue and be sued; may contract and be contracted with; may acquire and hold any property, real and personal, devised, sold, or in any manner conveyed, dedicated to, or otherwise acquired by them, and from time to time may hold, invest, sell, or dispose of the same; may have a common seal and alter and renew the same at will; and shall have and may exercise in conformity with the city charter and the general laws of this State all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever.") (Emphasis added.) Chapter 160A is entitled "Municipal Corporations." The term "Municipal Corporations" has origins pre-dating the Republic, as "towns and cities ... had long been organized as corporations at common law and under the King's charter, see 1 W. Blackstone, *Commentaries on the Laws of England* 455-473 (1765); 1 S. Kyd, *A Treatise on the*

nearly seven decades later, in *Madison Cablevision v. City of Morganton,* 325 N.C. 634, 648-649, 386 S.E.2d 200, 208-09 (1989), this Court, recognizing the range of public enterprises, G.S. Chapter 160A, Article 16, Part 1; G.S. 160A-311[9], and the statewide import of the decision before the Court, stated, "Municipally owned and operated enterprises have been permitted to engage in head-to-head competition with privately-owned companies. [In] *Power Co. v. Elizabeth* City, 188 N.C. 278, 124 S.E. 611 (1924) . . . [this Court held that] a private company could not restrain a city from establishing a water system on the ground that establishment of a municipal system 'would create an unfair competition' even though the private company claimed the competition would destroy its business." *Id.* at 649, 386 S.E.2d at 208-09.[10] Here, the Court of Appeals opinion failed to recognize critical aspects of the proprietary operations of municipal corporations.

Law of Corporations 1-32, 63 (1793) (reprinted 2006)." *Citizens United v. Federal Election Commission*, 558 U.S. 310, 388 (2010) (Scalia, J., concurring).

[9] *See also* G.S. Chapter 153A, Article 15, Part 1 (counties); G.S. 153A-274.

[10] The State, in its brief before the Court of Appeals [br. 15], attempts to assert that the Court of Appeals' opinion in *Bellsouth* was a Dillon's Rule case, when a close reading reveals that it was anything but. *Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 82-83, 606 S.E.2d 721, 726, *disc. review denied*, 359 N.C. 629, 615 S.E.2d 660 (2005) (applying G.S. 160A-4 to the public enterprise statutes; holding that "the narrow Dillon's Rule of statutory construction used when interpreting municipal powers has been replaced by [G.S.] 160A-4's [broad construction] mandate).

1. The Court of Appeals erred by reversing the trial court's holding that plaintiff-appellant City of Asheville, acting in a proprietary capacity, was entitled to the same protections of Article I, § 19 as a private individual or corporation engaged in a similar business enterprise.

Plaintiff-appellant City of Asheville is entitled to the protection of the Law of the Land, N.C. Const. art. I § 19, with respect to its extensive water system, which it owns and operates in its proprietary capacity. As set forth over a century ago by this Court in the seminal case of *Asbury v. Albemarle* (issued a decade before *Elizabeth City*, *supra* at 19 of this brief), "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. 247, 252-53, 78 S.E. 146, 149 (1913) (emphasis added). *Accord High Point v. Duke Power Co.*, 34 F. Supp. 339, 344 (M.D.N.C. 1940), *aff'd*, 120 F.2d 866, 869-70 (4th Cir. 1941) ("The exercise of its powers for the private advantage of the City is subject to the same rules that govern individuals and private corporations. *Holmes v.*

Fayetteville, 197 N.C. 740, 150 S.E. 624 [(1929), *appeal dismissed*, 281 U.S. 700 (1930)]; *Asbury v. Albemarle* [*supra*].").[11]

It is most noteworthy that the rule set forth in *Asbury* reflected the predominant rule nationally. As the Maine Supreme Court observed:

> The Federal courts have universally held that the power of a city to construct water works is not a political or governmental power, but a private and ***corporate*** one, granted and exercised not to enable it to control its people but to authorize it to furnish, to itself and to its inhabitants, water for their private advantage. By what we regard the better reasoning and consequently the greater weight of authority ***a large majority of the State courts follow the rule*** laid down in the federal jurisdiction, namely, ***that a municipal corporation engaged in the business of supplying water to its inhabitants is engaged in an undertaking of a private nature.***

Woodward v. Livermore Falls Water Dist., 116 Me. 86, 90-91, 100 A. 317, 319 (1917) (citations omitted; emphasis added).[12] The *Trenton v.*

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[11] In addition to the seminal language set forth by this Court in *Asbury*, it is worth noting that the Umstead Act, which is designed to prohibit state government from competing with the private sector, specifically recognizes and acknowledges that local governments, in seeking to provide services to their citizens, can and do engage in business enterprises just as other corporations do. *See* G.S. 66-58 ("Sale of merchandise or services by governmental units"; setting forth general prohibition) & 66-58(b)(1) (exempting municipalities and counties from prohibitions).

[12] A century prior to the *Asbury v. Albemarle* decision, Chief Justice Marshall wrote the following in *Dartmouth College v. Woodward*, 4 Wheat. (17 U.S.) 518, 694-95 (1819) ("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 transcendant, that it may at its will take away the private property of the***

New Jersey, 262 U.S. 182 (1923) case cited by the Court of Appeals is fully distinguishable as a U.S. Constitution fourteenth amendment case involving a state's diversion of waters. *Slip op.* 19 & 22. The decision has no bearing upon the question presented here of whether the enactment constituted an unlawful taking without just compensation under the North Carolina Constitution. *See State v. Jones*, 305 N.C. 520, 525, 290 S.E.2d 675, 678 (1982) (setting forth the principle that federal fourteenth amendment decision "did not control this Court's interpretation of the 'law of the land' clause in our State Constitution"); *Horton v. Gulledge*, 277 N.C. 353, 359, 177 S.E.2d 885, 889 (1970). Similarly, *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), also cited by the Court of Appeals with *Trenton*, *slip op.* at 22, is fully distinguishable as a case pertaining to municipal boundaries, and emphasizes that the state legislature must conform its action to the state constitution. *Id.* at 179.

Nearly a half-century after *Asbury*, this Court reaffirmed the constitutional dimension of the governmental-proprietary distinction in

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corporation, or change the uses of its private funds acquired under the public faith.... From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction, and abrogation. This Court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it.") (Emphasis added.)

Candler v. City of Asheville, 247 N.C. 398, 406-07, 101 S.E.2d 470, 475-76 (1958). Bringing this concept forward to the present day, here the trial court correctly cited *Asbury* (1913) and *Candler* (1958), as the legal and policy distinctions for proprietary functions recognized therein endure for good reason. [R. 164] When any corporation is created, the corporation has certain rights.[13] When municipalities are performing proprietary functions, municipalities need to be treated the same as other corporations for purposes of the Law of the Land clause: this principle is vitally important in the provision of water service, which requires tremendous investment in infrastructure by the inhabitants of municipalities and is directly related to the public health, safety, and welfare.

Needless to say, when acting in a proprietary capacity, municipalities face considerable exposure. For liability purposes, governmental immunity does not apply to proprietary functions. *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010) ("We have long held that a municipal corporation selling water for private consumption is acting in a proprietary capacity and can be held li-

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[13] *See* fn. 8 and related text, *supra*.

able for negligence just like a privately owned water company.") (Citations omitted.) "The State's sovereign immunity applies to both its governmental and proprietary functions, while the more limited governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Evans v. Housing Auth. of City of Raleigh*, 359 N.C. 50, 53, 602 S.E.2d 668, 670 (2004); *see Williams v. Pasquotank County*, 366 N.C. 195, 199-200, 732 S.E.2d 137, 141 (2012). Whereas damages against the state are capped at a maximum limit under the State Tort Claims Act, G.S. 143-291 *et seq.*, under G.S. 160A-485 municipalities face unlimited liability in actions pertaining to their proprietary functions (such as the selling of water for private consumption). Further, like corporations, municipalities can be subject to allegations of anticompetitive conduct when conducting proprietary operations. *See Madison Cablevision, supra.*[14]

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[14] The governmental-proprietary distinction is also embedded elsewhere in the law. For example, it impacts the question of whether a litigant is entitled to post-judgment interest against a local government. *Shavitz v. City of High Point*, 177 N.C. App. 465, 485-86, 630 S.E.2d 4, 18, *disc. review denied*, 361 N.C. 430, 648 S.E.2d 845 (2007) (citing *Rowan II* in applying governmental-proprietary distinction). The governmental-proprietary distinction also impacts the application of the doctrine of *nullum tempus occurrit regi*. *Rowan County Bd. of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992) (*Rowan II*) ("If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute at issue expressly includes the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless

2. The trial court correctly held that, "The Water Act, by operation of law, transfers the assets and debts of the Asheville Water System without consent and over the objection of Asheville, the water system's owner. The transfer of the entire Water System required by the Water Act results in no change in the existing uses or purposes currently served by the Asheville Water Systems."

Building upon its finding that Asheville owned and operated its water system in a proprietary capacity, the trial court correctly determined that, "The Water Act's transfer of the entire Water System, reduced to essentials, amounts to a taking of all the assets and debts of a proprietary municipal business from Asheville and places the assets and debts in the ownership of another entity." [R. 164] Finding *inter alia* that the usage of the assets would not change during the course of the transfer to a new, undeveloped entity, the trial court properly found throughout its order that the Water Act lacked a rational basis.

At the outset, the Court of Appeals misapprehended, and erred by relying upon, *Brockenbrough v. Board of Water Comm'rs of Charlotte*, 134 N.C. 1, 46 S.E. 28 (1903). *Slip op.* at 8-9, 21. *Brockenbrough* involved the city's *voluntary* transfer of a water system, as the city had created a separate board of water commissioners in 1899 via charter

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the statute at issue expressly excludes the State.") The governmental-proprietary distinction also appears to apply to the doctrine of estoppel-by-deed. *Washington v. McLawhorn*, 237 N.C. 449, 75 S.E.2d 402 (1953).

amendment (wherein the board of aldermen appointed the commissioners and the mayor served as *ex-officio* chairman). *Id.* at 3, 46 S.E. at 28 ("said board was empowered for and in the name of the board of aldermen of the city of Charlotte" to operate the system). (It is this distinguishing feature that also renders inapposite the Court of Appeals' citation to *McQuillin on Municipal Corporations* § 4.133, Vol. 2. *Slip op.* at 22.) By relying upon an opinion issued a decade before *Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), the Court of Appeals errs in inferring that *Brockenbrough* involved the "transfer [of] the authority and assets thereof to a different political subdivision." *Slip op.* at 21. In reality, at issue in *Brockenbrough* was whether the board of water commissioners, acting for the city of Charlotte, under ch. 271, Private Laws 1899, as amended by ch. 196 of Private Laws of 1903, was authorized to issue $ 200,000.00 in special revenue bonds. *Id.* at 6-7, 46 S.E. at 29. In stark juxtaposition, the Water Act here involves a ***compulsory*** transfer of an extensive water system against the City of Asheville's will to an entirely new, undeveloped entity. Importantly, *Brockenbrough* is neither mentioned nor cited in *Asbury*.

By way of background as to the scope of the trial court's holding, the people of this state have historically relied on municipalities to construct and operate water infrastructure and services. More than 360 municipalities own water systems, collectively serving an estimated population of more than 5.1 million citizens through more than 1.9 million service connections.[15]

While Asheville is the only system directly affected by the Water Act, this case gives municipalities that own and operate water or the wide range of other public enterprise systems great pause. If the Water Act were to be upheld–signaling that it is constitutionally permissible for the legislature to single out individual municipal utilities for the unilateral and uncompensated transfer of their assets–it is hard to imagine a more chilling effect on future decisions to finance, develop, and extend such systems in local communities throughout the state. *Madison Cablevision*, 325 N.C. at 648, 386 S.E.2d at 208.

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[15] Data analyzed by the UNC Environmental Finance Center (EFC), April 2015. Data Source: U.S. Environmental Protection Agency's Safe Drinking Water Information System (SDWIS-FED) database; data on all community water systems active as of October 2013. All other providers of community water systems combined statewide (including county systems, water and sewer authorities, sanitary districts, metropolitan water districts, federal systems, state systems, nonprofit corporations, small private systems, and private for-profit systems) serve less than *half* the population served by municipal systems.

Water infrastructure is enormously expensive, and accordingly local investment is significant.[16] It is well not to lose sight of the fact that these systems have been established through the investments and indebtedness of municipal citizens.

Asheville's system, for all its idiosyncratic history, is not unique in its vulnerability to being targeted. Resourceful bill drafters could easily craft provisions to take aim at any other municipal system that incurs disfavor, meting out similar treatment for compulsory transfer citing merely "regionalization" as justification. With the potential for being unceremoniously divested of their assets, why would citizens support future investment in their public enterprise systems? Municipal officials would not likely be willing to take the political and financial risks inherent in making such expenditures, if they are building on shifting sands. Such decisions would also be impacted by the reaction of the bond market, resulting in higher borrowing costs throughout the state.[17] Municipalities cannot adequately plan for the future for the in-

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[16] *See* J. Hughes & S. Royster, *Overview of Local Government Water and Wastewater Debt in North Carolina* (UNC Environmental Finance Center: Feb. 2014). http://www.efc.sog.unc.edu/sites/www.efc.sog.unc.edu/files/BorrowingForTheBigStuff_2013.pdf

[17] "Local governments rely on debt financing for a variety of capital needs, however water and wastewater are clearly dominant debt drivers. According to the

habitants of their jurisdictions and the greater community in the face of such uncertainty: this is precisely why the North Carolina Constitution contains checks on legislative power.

There would be tremendous statewide impacts if the Water Act were allowed to become effective. Singling out the Asheville system for the transfer of its assets causes it, among other things, to be in violation of the transfer provisions and other critical covenants of the Indenture governing Water Bonds. The deleterious effect on the local government bond market alone is reason for great trepidation statewide.[18]

State Treasurer . . . . as of June 30, 2012, $8 billion of [total outstanding debt] was for water and wastewater debt. This number has been steadily increasing over time.... Over time, many utilities that relied on general obligation debt have begun to turn increasingly to revenue-backed debt (e.g. revenue bonds) in which the security behind the debt consist of the utilities' legal authority to generate (and if needed raise) user fees and rates." J. Hughes & S. Royster, *Overview of Local Government Water and Wastewater Debt in North Carolina* at 2 (UNC Environmental Finance Center: Feb. 2014).

[18] Memorandum to Members of the N.C. Local Government Commission from T. Vance Holloman, Secretary, May 2, 2013. ("In addition to our concerns about the revenue bonds of the Asheville water system, we are concerned that such actions taken or being considered by the General Assembly may ***negatively affect the bond market's demand for North Carolina local government debt.*** We have expressed these concerns to the General Assembly concerning a proposed bill to transfer the airport of the City of Charlotte to a new, regional authority. These actions with regard to Asheville and Charlotte seem to be contrary to [G.S.] Chapter 159-93. That statute is a pledge to the holders of revenue bonds by the General Assembly not to take any action to interfere with the ability of an issuer of revenue bonds to repay that debt. ***We feel the debt markets will take notice of the actions of the General Assembly, as well as any resulting litigation, events of default, and forced refunding of debt at an economic loss.*** North Carolina revenue bonds have been in high demand in the past due in part to the General Assembly honoring its pledge not to interfere with the repay-

These anticipated impacts are made more acute by forecasts that the state's population will grow by as much as twenty percent over the next twenty years,[19] greatly increasing demand for urban services, foremost among them water. It is estimated that North Carolina's drinking water infrastructure capital needs will top $10 billion over the next two decades. *See* Hughes & Royster, fn. 16 at 1, *supra*. These are exceptionally high stakes from the municipal perspective.

Amicus League does not dispute that regionalization, as set forth in the preamble to the Water Act, is an appropriate policy objective in theory. However, where, as here, the means employed by the enactment do not reasonably further its stated objective, the Act must fail under Article I, § 19. *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004) (the relationship of the classification to its goal must not be so attenuated as to render the distinction arbitrary or irrational). Here, it was arbitrary and irrational to mandate the compulsory transfer of the assets of a single existing system in the name of "regionaliza-

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ment of bonds. Noteworthy events such as Asheville and Charlotte may hurt the demand for these bonds and result in higher financing costs in the future.") (Emphasis added.) *See Madison Cablevision*, 325 N.C. at 648, 386 S.E.2d at 208 (emphasizing endangerment of bonds).

[19] State Data Center, NCOSBM, *Population Overview, 2010-2035*, https://ncosbm.s3.amazonaws.com/s3fs-public/demog/countytotals_populationoverview.html (last visited March 6, 2016).

tion,"–a mere pretext– when there are already numerous existing and proven methods of achieving that purpose available under general law, and when the facts show that the method chosen does not in fact promote the ostensible purpose.

Reflecting decades of legislative policy deliberation, ample authority exists under general law for municipalities to engage in regional arrangements for the provision of water and sewer services. The public enterprise statutes have long authorized both municipalities and counties to engage in regional activity by extending water and sewer services outside their borders. G.S. 160A-312; G.S. 153A-275. County water and sewer districts may also provide services outside their boundaries, G.S. 162A-87.3, as may sanitary districts, G.S. 130A-55(2).

In addition, at the time of the enactment of the Water Act, there were already in place numerous alternative statutory mechanisms for the regionalization of water and sewer services under laws of general applicability. As early as 1955, the General Assembly began enacting statutes to facilitate regional approaches to water and sewer service, beginning with Article 1 of G.S. Chapter 162A ("North Carolina Water and Sewer Authorities Act"). 1955 N.C. Sess. Laws, ch. 1195; G.S. 162A-1.

Following years of deliberative study leading up to the 1971 session, the General Assembly then significantly expanded its statutory scheme. To further encourage the development of regional water supplies and regional sewage disposal, Article 2 ("Regional Water Supply Planning Act of 1971") and Article 3 ("Regional Sewage Disposal Planning Act of 1971") were added to Chapter 162A. 1971 N.C. Sess. Laws, ch. 870 & 892; G.S. 162A-20; G.S. 162A-26. Chapter 892 was adopted in response to a Legislative Research Commission study on the "need for legislation 'concerning local and regional water supplies (including sources of water, and organization and administration of water systems).'" G.S. 162A-21. In the Regional Water Supply Planning Act, the General Assembly expressed a policy preference for regional water solutions to meet future public water supply needs. G.S. 162A-21(3). In that same session, the General Assembly provided other alternatives for regional systems, including Metropolitan Water Districts. Chapter 162A, Article 4 ("Metropolitan Water Districts Act"); G.S. 162A-31.

Furthermore, the General Assembly has authorized units of local government to enter into interlocal agreements to jointly undertake any of their powers or functions, including public enterprises. Chapter

160A, Article 20, Part 1 ("Interlocal Cooperation"); G.S. 160A-460(1); G.S. 160A-461; G.S. 160A-311 (defining "public enterprise"). *See Caswell County v. Town of Yanceyville*, 170 N.C. App. 124, 131, 611 S.E.2d 451, 456 (2005) (holding that Article 20 constitutes "a broad grant of authority to local governmental units for interlocal cooperation"). *See also* G.S. 160A-462 (establishment of joint agencies) & G.S. 153A-278 ("Joint Provision of Enterprisory Services").

Taken together, these statutes demonstrate a legislative recognition that regionalization can be accomplished in a variety of ways. It need not mean the creation of a separate regional authority or district. In many cases, regionalization takes the form of extension of an existing system to serve the larger community, contractual arrangements between entities for the sale of water or treatment services, interconnections of systems, or joint agencies via interlocal agreement.[20] There is

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[20] A considerable substantive body of knowledge has developed through the years, as the UNC Environmental Project has a portion of its website entirely dedicated to *Water System Partnerships, Interconnections, and Interlocal Agreements.* "This project, part of the NC Water System Capacity Development Support project funded by the Public Water Supply Section of NC Department of Environment and Natural Resources, provides resources and assistance to water systems, local governments and regulators who are involved in water system partnerships (often called regionalization)." *See* project home page at http://www.efc.sog.unc.edu/project/water-system-partnerships-interconnections-and-interlocal-agreements for materials recognizing the many arrangements by local governments that can be characterized as regionalization; J. Hughes & G. Barnes,

widespread use of those alternative statutory mechanisms in the major urban centers of the state. *See* examples in Affidavit of T. Randolph Perkins, Doc. Ex. 482. *See also* R. Whisnant & S. Eskaf, *An Overview of NC Water Service Providers,* (UNC EFC: 11/13/13).

It is axiomatic that true effective regionalization depends upon the consent and cooperation of the governed entities. Each of the alternative mechanisms—joint agencies, water and sewer authorities, metropolitan water districts, interlocal agreements—involves a level of participation, partnership, and consent of the governmental units involved. It is abundantly clear that the General Assembly has in its laws of general applicability taken the approach of providing incentives, rather than mandating, regionalization. *See e.g.*, G.S. 159G-23(10) (point system for loan or grant from state Drinking Water Reserve gives priority to actions supporting regionalization); G.S. 130A-317(c)(3) (no construction or alteration of public water system unless Department of Environmental Quality has determined that system is capable of interconnection at an appropriate time with expanding municipal, county, or regional sys-

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Crafting Inter-Local Water Agreements at 2 (UNC EFC: 6/24/09) ("[B]y far the most common tool for creating water partnerships in North Carolina is through interlocal agreements."); S. Eskaf, *Tips on Regionalization: Crafting Interlocal Water Agreements and Water System Interconnections* (UNC EFC: 9/20/13) (interconnections and interlocal agreements as regionalization).

tem); G.S. 130A-317(d) (to establish own approval programs for water distribution systems, local unit must show system is capable of interconnection); G.S. 143-215.22L(n)(7) (in interbasin transfer, prohibition on resale of water lifted for interlocal agreements or regional water supply arrangements). *See also* G.S. 143-355.7 ("Water supply development; State-local cooperation"; providing for the state to assist local governments at their request in identifying preferred water supply alternatives for long-term needs).

By stark contrast, the Water Act arbitrarily demands *compulsory* regionalization of a single system—a closed class—without a basis, rational or otherwise, for distinguishing it from others across the state. There is simply no rational explanation for the disparate treatment of Asheville's system as compared to all other publicly owned water systems. *City of New Bern*, 338 N.C. at 438, 450 S.E.2d at 740; *Williams*, 357 N.C. at 187-88, 581 S.E.2d at 428 (citing cases).

The Water Act's bald statement of its purpose is insufficient to save it, as the mechanism employed by the Act does not further the purported objective of regionalization. Asheville's system already serves 124,000 customers across a multi-county area, almost forty per-

cent of whom are outside the city limits. The system serves customers in Buncombe and Henderson Counties, and by interlocal agreement supplies water to other municipal systems in the area. It is already prohibited from charging differential rates to customers outside its limits. For all intents and purposes, the Asheville system is already functioning like a regional system. As the trial court properly concluded, the transfer of assets would result in no change in the existing uses or purposes currently served by the Asheville system. [R. 164] Transferring such a system to another entity by legislative fiat appears, if anything, antithetical to the promotion of regionalization. Moreover, the Water Act inexplicably leaves intact multiple separate water systems in the area that would not be divested of their assets and consolidated into the new entity (the MWSD), including Black Mountain, Montreat, Biltmore Forest, and Woodfin Water and Sewer District. These circumstances amply illustrate the arbitrary nature of the Water Act.

The mere pretext of regionalization cannot sustain the enactment. See *City of New Bern*, 338 N.C. at 437-38, 450 S.E.2d at 740 (demonstrating that where there is law of general applicability, a dispute among jurisdictions is insufficient to provide a rational basis for differ-

ential treatment from all other jurisdictions statewide; also *rejecting* the N.C. Const. art. VII, § 1 argument that the General Assembly had acted within its plenary authority). "No pretexts, whatever, can be an apology for unconstitutional enactments." *People ex rel. Merchs.' Sav. Loan & Trust Co. v. Auditor of Pub. Accounts,* 30 Ill. 434, 440 (1863). For these reasons, the trial court correctly determined that there was no basis, rational or otherwise, for the Water Act to arbitrarily and capriciously single out the City of Asheville for the transfer of its assets, wherein "[t]he transfer of the entire Water System required by the Water Act results in no change in the existing uses or purposes currently served by the Asheville Water Systems." [R. 163-64]

3. The trial court correctly held that "[t]he Water Act is not a valid exercise of the sovereign power of the legislative branch of government (or the State of North Carolina) to take or condemn property for a public use where here, the property (the Water System) is being used for the same purposes as are intended to be done by the transfer of the Water System to the MWSD." The trial court also correctly decided the Sixth (Alternative) Claim for Relief in determining that the City of Asheville would otherwise be entitled to compensation for the taking of its assets under the Law of the Land Clause should the Water Act be upheld as a valid exercise of the sovereign.

The trial court correctly held that the Water Act was void and unenforceable under N.C. Const. art. I, §§ 19 & 35,[21] constituting an

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[21] In addition to citing the Law of the Land Clause, the trial court also cited N.C. Const. art. I, § 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."). *Amicus* League submits that this is aptly reflective of the magnitude of the case, which had been assigned as exceptional pursuant to Local Rule 2.1 Wake County. Regarding this enduring section of the Constitution, it has been observed, "Based on a section of the Pennsylvania Declaration of Rights [*cf.* Pa. Const. of 1776], this section has been included in all three state constitutions. It is a salutary reminder that commentaries of all sorts, whether in judicial opinions or in academic treatises, no matter how helpful in explicating particular texts, are no substitute for the originals. All generations are solemnly enjoined to return *ad fontes* (to the sources) and rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation. *In interpreting the constitution, the admonition may offer a clue in difficult cases.* In a leading Virginia case from 1794 the respected Judge Spencer Roane, mindful of the cognate provision in the Virginia Declaration of Rights, defined 'fundamental principles' as 'those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.' (*Kamper v. Hawkins* [3 Va. 20, 40 (1788)])." John V. Orth & Paul M. Newby, *The North Carolina State Constitution* 91 (Oxford University Press, 2d ed. 2013).

Cf. Hobby Lobby, ___ U.S. ___, 134 S.Ct. at 2768 ("When rights, whether constitutional or statutory, are extended to corporations, the purpose is to ***protect the rights of these people.... Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being.***") (Emphasis added.) As has been noted by the Local Government Commission, *supra* fn. 18, if the Water Act (which is contrary to G.S. 159-93), is upheld, the statewide repercussions on the bond market's demand for North Carolina local government debt would be severe, including higher borrowing costs for all. *See Madison Cablevision*, 325 N.C. at 648, 386 S.E.2d at 208 (emphasizing endangerment of bonds). This stands in stark juxtaposition to the situation prior to the enactment of the local act. "In North Carolina, the Local Government Commission within the Department of State Treasurer's State and Local Government Division must approve all water and wastewater debt. This oversight has resulted in widespread recognition that North Carolina's local government debt capacity and **reliability** are among the best in the country." J. Hughes & S. Royster, *Overview of Local Government Water and Wastewater Debt in*

impermissible taking, as the Water Act's compulsory transfer of the entire Water System to the MWSD resulted in no change in the existing uses or purposes currently served by Asheville's operation of the system in a proprietary capacity. [R. 164] *See Asbury*, *supra* at 21 of this brief.

The trial court also correctly decided the Sixth (Alternative) Claim for Relief in determining that the City of Asheville would otherwise be entitled to compensation for the taking of its assets under the Law of the Land Clause should the Water Act be upheld as a valid exercise of the sovereign. [R. 164] In deciding this claim, the trial court correctly cited *State Highway Comm'n v. Greensboro City Bd. of Educ.*, 265 N.C. 35, 49, 143 S.E.2d 87 (1965).[22] Decisions of numerous other jurisdictions are in accord. *See generally*, 2-5 *Nichols on Eminent Domain* § 5.06(8)(b) ("The general rule is that compensation must be paid for the acquisition of all works from which a municipal corporation can derive a revenue, or which enure to the advantage of its inhabitants rather than

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North Carolina at 4 (UNC Environmental Finance Center: Feb. 2014) (emphasis added).

[22] *Id.* at 46, 143 S.E.2d at 95-96 ("There is nothing in our Constitution inhibiting the Legislature from granting express and explicit power and authority to the State Highway Commission to condemn for 'controlled access facilities' property owned by the City Board of Education and devoted to public use, except that our **organic law** provides that just compensation shall be paid for property so appropriated. *Burlington City Board of Education v. Allen* [243 N.C. 520, 91 S.E.2d 180 (1956)].") (emphasis added).

to that of the public at large. This also includes all funds specifically devoted to enterprises of this class."); 2 *McQuillin Muni. Corp.* § 4.132 at 269 (3d ed. rev. 1996) ("In regard to property of a municipal corporation that is distinctly private in character, it is generally not subject to appropriation or complete control by the state, except by the exercise of eminent domain with payment of full compensation."); 1-13 *Antieau on Local Government Law*, Second Edition § 13.02[2],[3].[23]

Despite the State's contentions and Court of Appeals' citations referencing federal law, whereas the federal constitution provides a floor of basic rights, the North Carolina State Constitution is designed

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[23] Two decades before this Court's decision in *Asbury, supra,* in *Mt. Hope Cemetery v. Boston*, 158 Mass. 509, 511-12, 33 N.E. 695 (1893) it was observed, "By a quite general concurrence of opinion . . . this legislative power of control is not universal, and does not extend to property acquired by a city or town for special purposes not deemed strictly and exclusively public and political, but in respect to which a city or town is deemed rather to have a right of private ownership, of which it cannot be deprived against its will, save by the right of eminent domain, with payment of compensation.... But the general doctrine that cities and towns may have a private ownership of property, which cannot be wholly controlled by the state government, though the uses of it may be in part for the benefit of the community as a community, and not merely as individuals, is now well established in most of the jurisdictions where the question has arisen." *See also Shirk v. City of Lancaster*, 313 Pa. 158, 164, 169 A. 557, 560 (Pa. 1933) ("[R]evenues derived in [a municipality's] private capacity, as a return from its water or other utility works, are trust funds and cannot be controlled or taken directly for state purposes.... The revenues of a municipality from the property thus owned in its private and proprietary character are for the beneficiaries."). *Shirk* was cited with approval by this Court in *Piedmont Aviation v. Raleigh-Durham Airport Authority*, 288 N.C. 98, 103, 215 S.E.2d 552, 555 (1975). *See generally*, A. M. Swarthout, Annotation, *"Eminent domain: power of one governmental unit or agency to take property of another such unit or agency,"* 91 L. Ed. 221, 248 (1946).

to give greater rights, such as by the Law of the Land Clause and other limitations on the legislative power. N.C. Const. art. I, § 6. *See McNeill v. Harnett Cnty*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990) ("Decisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution are binding on this Court; however, such decisions, although persuasive, do not control an interpretation by this Court of the law of the land clause in our state Constitution. We must therefore make an independent determination of the constitutional rights of the plaintiffs under the law of the land provision of our state Constitution.") (Citation omitted.); *State v. Jones, supra; Horton, supra.*

Given the important constitutional provisions that serve as a restraint on the General Assembly's legislative power, the trial court correctly invalidated the Water Act on a number of grounds. Presented with a complex public enterprise case with momentous consequence, the trial court's order treated the critically important issues presented in a sound matter, just as the North Carolina Supreme Court has in *Asbury, Elizabeth City, Madison Cablevision* and their progeny.

CONCLUSION

Amicus League respectfully requests that this honorable Court reverse the decision of the Court of Appeals and reinstate the decision of the trial court.

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

North Carolina League of Municipalities

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing *AMICUS CURIAE* NORTH CAROLINA LEAGUE OF MUNICIPALITIES' NEW BRIEF has been duly served on this date upon counsel for the parties by mailing a copy thereof via United States mail, first-class postage prepaid, addressed to the following:

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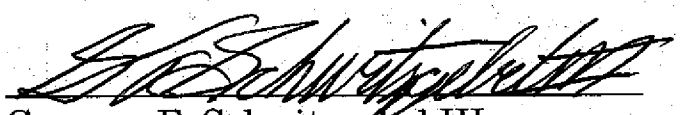
This is the 7th day of March, 2016.



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