No. 391PA15 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

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

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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PLAINTIFF-APPELLANT'S REPLY BRIEF

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In its opening brief, the City made four points that show the key errors in the decision of the Court of Appeals. The State's brief does not overcome these points.

First, the Act at issue relates to health and sanitation. It takes the Asheville water system—a major health-related enterprise—and hands it over to an entity that has never operated a water system. Likewise, the Act changes who will administer and enforce a series of

health-related statutes and regulations. Under this Court's decisions, these practical effects of the Act show its relationship to health and sanitation.

The State offers no effective rebuttal to these conclusions. It does not deny that the Act has practical effects on health and sanitation, but it tries to avoid those practical effects by speculating on what the Act "could" be intended to accomplish. In response to this Court's decisions that enforce article II, section 24, the State offers only immaterial distinctions. Finally, the State says almost nothing to defend how the Court of Appeals narrowed the test in section 24(1)(a) from "relating to" to "regulating" and "prioritizing."

Second, the Act is a local law. The State does not deny that the tortured criteria in the Act apply to Asheville alone. Those criteria are unrelated to the Act's stated goal: regionalizing water and sewer services throughout North Carolina. The State responds by imagining a different purpose for the Act—to resolve an alleged dispute between Asheville and its neighbors. This Court has rejected this "dispute resolution" argument before.

Third, the Act is a taking of the City's proprietary assets. To try

to avoid this conclusion, the State offers two novel legal theories: (1) the City does not actually own its water system, and (2) a taking is not a taking as long as the City's residents can still buy water. Those arguments contradict the law on takings.

Fourth, the City's contract-impairment claims remain alive in the event of a remand. The Court of Appeals erred by suggesting that the City, as an appellee, could somehow waive those claims. The State's half-hearted defense of this waiver theory falls short.

In sum, the State has not explained away the errors in the decision below.

ARGUMENT

I. THE ACT RELATES TO HEALTH AND SANITATION.

In its opening brief, the City showed that the Act[1] relates to health and sanitation under this Court's standards. See N.C. Const. art. II, § 24(1)(a). The State's efforts to avoid this conclusion fail.

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[1] Act of May 14, 2013, ch. 50, 2013 N.C. Sess. Laws 118, amended by Act of Aug. 23, 2013, ch. 388, secs. 4-5, 2013 N.C. Sess. Laws 1605, 1618. For the Court's convenience, each of the City's briefs includes these session laws in an appendix.

A. This Court's Decisions Show That the Act Relates to Health and Sanitation.

This Court's decisions under article II, section 24 establish three key principles:

(1) The practical effect of an enactment, not its alleged purpose, defines the act's subject matter. City Br. 45-47.

(2) Water and sewer services are closely related to health and sanitation. Id. at 36-43.

(3) Laws that change the governance of health-related services relate to health and sanitation. Id. at 43-44.

The State's brief does not deny these principles directly. Instead, it tries to defeat these principles by distinguishing this Court's precedents. Those attempted distinctions, however, do not undermine this Court's teachings under article II, section 24.

1. The practical effect of the Act relates to health and sanitation.

According to the Court's most recent decisions under article II, section 24, it is the practical effect of a law that defines the law's subject matter. See Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170,

189, 581 S.E.2d 415, 429 (2003); City of New Bern v. New Bern-Craven Cty. Bd. of Educ., 338 N.C. 430, 442, 450 S.E.2d 735, 742 (1994).

Here, the State does not deny the practical effect of the Act: handing the ownership and operation of a major water system to an entity that has never run any water system. See State Br. 8-9, 12. Likewise, the State does not deny that this practical effect relates to health and sanitation. See id. at 71.

Instead, the State tries to change the subject. It argues that the practical effect of the Act is trumped by the State's view of the Act's purpose. See id. at 69-71. The State tries to parry this Court's decisions by arguing that the Act might have purposes that are unrelated to health and sanitation. Id. at 52-54, 55-56, 60, 68.

This Court has rejected similar efforts to shift the focus from the practical effect of a statute to the statute's alleged purpose.

In Williams, the Court held directly that if a law's practical effect concerns one of the subjects listed in article II, section 24, the law is invalid. 357 N.C. at 189, 581 S.E.2d at 429. In Williams, as here, the defendants tried to defend an enactment by arguing that it served proper purposes. Id. This Court, however, held that the practical

effects of the law took precedence over its "intent." Id.

In New Bern, likewise, the Court showed that a law's practical effect, not the law's alleged purpose, is the key under article II, section 24. The defendant in New Bern advanced the same non-health-related purpose that the State alleges here: the resolution of a dispute between local governments. 338 N.C. at 437, 450 S.E.2d at 739. This Court, however, did not focus on that alleged purpose when it decided that the acts at issue related to health and sanitation. Instead, the Court analyzed the practical effect of the acts: shifting the authority to administer health-related regulations. Id. at 442, 450 S.E.2d at 742.

The Act here has the same practical effect as in New Bern. It puts a newly created entity, instead of the City, in charge of complying with the many statutes and regulations that govern the quality of the City's water. City Br. 41-42 (detailing these statutes and regulations). The State does not deny that the Act shifts these responsibilities. Nor does the State deny a more central point: the Act entrusts the City's water supply to an entity that has never operated any water system.

Trying to minimize these practical effects on health and sanitation, the State asserts that if the new district takes over the

City's water system, "[t]he City's residents will continue to be served in exactly the same way as they have been previously." State Br. 12. This statement, however, is mere wishful thinking. If the Act went into effect, the purity of the City's water would depend on decisions made by the new district—decisions that the City would not control. See City Br. 13-14.

Recent events highlight the practical effects of measures that shift control over public water supplies. The State of Michigan recently experimented with taking control of a water system away from a city. The new operator changed the city's water source, causing a public-health disaster. See Claire Groden, Emergency Manager System Comes Under Fire After Flint Water Disaster, Fortune (Mar. 23, 2016), http://fortune.com/2016/03/23/flint-emergency-managers/. Although the State of Michigan did not make this change for health-related purposes, children in Flint will be experiencing its health-related effects for the rest of their lives.

In sum, the Act here has the practical effect of shifting control over a major water system. This change—regardless of the purposes that the State now invents for it—relates to health and sanitation.

2. The close relationship between the operation of a water system and health and sanitation shows that the Act relates to health and sanitation.

The State has also failed to overcome a second lesson of this Court's decisions: the operation of a water system is closely related to health and sanitation.

In its opening brief, the City highlighted Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530 (1928), and Lamb v. Board of Education, 235 N.C. 377, 70 S.E.2d 201 (1952), as two cases that show the close relationship between water systems and health and sanitation. City Br. 36-37. The State's efforts to undermine these cases fail.

The State first argues that in Drysdale, this Court never decided that the law at issue was related to health and sanitation. State Br. 38-39. This Court, however, has not accepted the State's interpretation of Drysdale. Instead, the Court has cited Drysdale for its holding that the law in that case related to health and sanitation. See Gaskill v. Costlow, 270 N.C. 686, 688, 155 S.E.2d 148, 149 (1967); Lamb, 235 N.C. at 379, 70 S.E.2d at 203; Sams v. Bd. of Comm'rs, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940).

The State's arguments about Lamb fare no better. The State

argues that Lamb never decided that water and sewer services are related to health and sanitation. State Br. 55. This is incorrect. The statute in Lamb barred a county board of education from constructing water and sewer lines without a voter referendum. Lamb, 235 N.C. at 379, 70 S.E.2d at 203. The Court held that the statute was related to health and sanitation because it "prescribe[d] provisions with respect to sewer and water service." Id. (emphasis added). By applying this broad standard, the Court showed that water and sewer service relates to health and sanitation.

In addition to misunderstanding this Court's decisions, the State misunderstands the fundamental relationship between water service and the public health. As this Court has recognized, water service "involves the very life and health of a community" and "promot[es] the public health and welfare." Drysdale, 195 N.C. at 732-33, 143 S.E. at 535.

The Act itself recognizes the importance of water quality when it states a goal to provide "high-quality water and sewer services." Act, first recital, 2013 N.C. Sess. Laws at 118 (emphasis added). Trying to sever the connection between the Act and the public health, the Court of

Appeals implied that the services named in the Act might involve something other than water quality. City of Asheville v. State (decision below), 777 S.E.2d 92, 98 (N.C. Ct. App. 2015), appeal retained and disc. rev. allowed, 781 S.E.2d 476 (N.C. 2016). In State ex rel. Utilities Commission v. Public Staff, however, this Court illustrated how the quality of water service is closely related to health and sanitation. 317 N.C. 26, 37, 41, 343 S.E.2d 898, 905, 907 (1986), cited in City Br. 38, 40.

The State tries to avoid Utilities Commission by arguing that the decision did not draw a connection between water service and health. State Br. 62. The State is mistaken. In Utilities Commission, the Court first described the health-related problems with the water system at issue: bacterial contamination, noncompliance with state health regulations, and more. 317 N.C. at 31, 343 S.E.2d at 902. The Court described these problems as a "failure to provide adequate water service." Id. at 41, 343 S.E.2d at 907 (emphasis added). As Utilities Commission shows, the intermediate court's and the State's attempts to distinguish water service from health and sanitation fail.

Finally, the State misunderstands the City's argument on the close relationship between water service and health and sanitation.

The City is not arguing that "any law" that affects a water system "necessarily" affects health and sanitation. State Br. 47, 52. Instead, the City's point is that this Act affects health and sanitation. The Act entrusts the operation of a major water system—an important public-health resource—to an entity that has never operated a water system. Recent events show how this kind of on-the-job training can harm the public health.

As this Court has recognized, the purity of public water supplies affects "the very life and health of a community." Drysdale, 195 N.C. at 732-33, 143 S.E. at 535. The State's efforts to deny this relationship fail.

3. The Act relates to health and sanitation because it shifts the governance of health-related resources.

As this Court has repeatedly recognized, laws that shift the governance of health-related services relate to health and sanitation. City Br. 43-44 (citing New Bern, Idol, Board of Health, and Sams). The State admits, fifteen times, that the Act affects the governance of the City's water system. State Br. 13-14, 27, 29-31, 44, 53, 57, 68-69, 73. Under this Court's decisions, these admissions lead directly to the

conclusion that the Act relates to health and sanitation.

The State tries to distinguish the governance cases by arguing that they addressed only a narrower topic: the selection of officers to administer health-related laws. Id. at 64. That argument fails.

First, the State's argument raises a distinction without a difference. Organizations can act only through individuals. Thus, it makes no difference whether the Act changes which organization controls health-related functions or which officer controls those functions. In either case, the practical effect is the same: someone new will be carrying out the health-related functions.

Second, the State's "officer selection" argument misreads this Court's decisions.

In New Bern, for example, the laws at issue did not specify any health officers. Instead, like the Act here, the laws in New Bern changed which local entity would administer and enforce health-related regulations. 338 N.C. at 433-34, 450 S.E.2d at 737-38. Because those regulations were designed to protect the public health, the Court held that legislation that shifts the authority to enforce them relates to health. Id. at 439-40, 450 S.E.2d at 740-41.

Likewise, the law in Idol v. Street, 233 N.C. 730, 65 S.E.2d 313 (1951), affected more than officer selection. That law combined the health departments of a city and a county. Id. at 733, 65 S.E.2d at 315.

Third, the State's distinctions cannot diminish the governance effects of the Act here. The Act takes control of the Asheville water system away from the City. City Br. 13-14. It also changes who will administer and enforce a series of health-related statutes and regulations. Id. at 41-42. These admitted changes to the governance of the City's water system resemble the changes that led the New Bern Court to find a relationship to health and sanitation. See New Bern, 338 N.C. at 439-40, 450 S.E.2d at 740-41.

* * *

In sum, this Court's decisions show, in multiple ways, that this Act relates to health and sanitation. The Act's practical effect is to "shift the responsibility" for Asheville's water service—a service that "involves the very life and health of a community." Id. at 436, 450 S.E.2d at 739; Drysdale, 195 N.C. at 733, 143 S.E. at 535; see Williams, 357 N.C. at 189, 581 S.E.2d at 429.

The State's attempts to avoid these principles violate one further

lesson from this Court: Article II, section 24 is "remedial in its nature, and its application should not be denied on an unsubstantial distinction which would defeat its purpose." Bd. of Health v. Bd. of Comm'rs, 220 N.C. 140, 143, 16 S.E.2d 677, 679 (1941).

B. The State's Efforts to Change the Constitutional Text from "Relating to" to "Regulating" Fail.

As the City has shown, the Court of Appeals distorted the text of article II, section 24 in this case. The court did so when it narrowed the subject-matter test in section 24(1)(a) from "relating to" to "regulating" and "prioritizing." See City Br. 30-36. The State offers no meaningful defense for this error in constitutional interpretation.

First, the State offers no defense at all for the "prioritization" test that the Court of Appeals applied here. See Decision below, 777 S.E.2d at 98. As the State does not deny, a "prioritization" standard is far narrower than the "relating to" standard that the people adopted in section 24. City Br. 33-34. The State, through its silence, has conceded this error by the Court of Appeals.

Likewise, the State offers no textual defense of the court's use of a "regulation" standard. "Regulating" is a much narrower standard than

"relating to." Id. at 31-33 & n.6. This point, too, stands unrebutted.

By replacing "relating to" with "regulating," the Court of Appeals ignored the textual distinctions among the subsections in article II, section 24(1). Id. at 30-33. Compare N.C. Const. art. II, § 24(1)(a), with id. § 24(1)(j). If the framers intended the different tests in section 24 to mean the same thing, "they would have used the same words." State v. Crawford, 13 N.C. (2 Dev.) 425, 427 (1830).

This Court has applied this "different words, different meaning" principle to article II, section 24. In Fletcher v. Collins, 218 N.C. 1, 9 S.E.2d 606 (1940), the Court addressed subsection 24(1)(h), which bans local laws "establishing" school-district boundaries. The Court refused to equate "establishing" with "relating to." It explained that the "precise meaning" of the words used in section 24 is important. Id. at 5, 9 S.E.2d at 609. This attention to textual distinctions shows the error in the "regulating" test that the Court of Appeals applied here. See Decision below, 777 S.E.2d at 97-98.

The State tries to defend the "regulating" test by citing Reed v. Howerton Engineering Co., 188 N.C. 39, 123 S.E.2d 479 (1924). The State's argument, however, ignores this Court's later treatment of Reed.

Drysdale v. Prudden "all but overrule[s]" the discussion of the "relating to" standard in Reed. Joseph S. Ferrell, Local Legislation in the North Carolina General Assembly, 45 N.C. L. Rev. 340, 401 (1967); see id. at 401 nn.288-89. In Drysdale, this Court limited Reed to a decision on whether the law at issue was local. See Drysdale, 195 N.C. at 727-28, 143 S.E. at 533. The Court treated Reed's discussion of "regulation" as a dictum. Ferrell, supra, at 368.

Since Reed, no decision by this Court has enforced a "regulation" standard under article II, section 24(1)(a). City Br. 35. The State implies that Town of Kenilworth v. Hyder, 197 N.C. 85, 147 S.E. 736 (1929), is such a case, but that is not true. Kenilworth did not apply a "regulation" standard. It cited Reed only because the two cases involved related statutes. See id. at 86, 147 S.E. at 736.

The Court had good reasons for turning away from the "regulation" language in Reed. As shown above, that language overlooks textual distinctions within article II, section 24(1). In addition, a regulation test would clash with this Court's later decisions that apply article II, section 24(1)(a). Since Drysdale, this Court has enforced section 24(1)(a) against laws that have related to health and

sanitation, but have not literally regulated those subjects. See, e.g., Lamb, 235 N.C. at 379, 70 S.E.2d at 203 (invalidating statute that required a referendum before a school board could spend money on water and sewer extensions); Board of Health, 220 N.C. at 143-44, 16 S.E.2d at 679 (invalidating statute that required that county commissioners confirm a county health officer).

In sum, the Court of Appeals erred by ignoring the distinction between "relating to health [or] sanitation" and laws that regulate or prioritize those topics. N.C. Const. art. II, § 24(1)(a). The State has not dispelled this textual error by the Court of Appeals.

C. The State's Arguments About Statutory Purposes Fail.

The State's main gambit in this Court is to argue that the General Assembly adopted the Act for purposes that might seem unrelated to health and sanitation. No fewer than ten times, the State offers its speculation on purposes that the legislature "could have" or "may have" had in mind. State Br. 27-30, 44-45, 53. These after-the-fact rationalizations fail for multiple reasons.

First, the State's arguments about statutory purposes flout Williams. In Williams, the Court's most recent decision in this area, the

Court held that the validity of a law under article II, section 24 depends on the law's "practical effect," not its alleged "intent." 357 N.C. at 189, 581 S.E.2d at 429; see supra pp. 4-6.

Second, the State's purpose arguments would rob article II, section 24(1)(a) of any meaning. The State argues that a local law does not relate to health and sanitation "if there is any reading of the statute's purpose or intent that would render it constitutional." State Br. 5. That proposed test is the same as the "rational basis" test in due-process and equal-protection cases. Indeed, as the authority for this proposed test, the State cites due-process and equal-protection cases alone. See id. (citing Heller v. Doe, 509 U.S. 312, 320 (1993); In re R.L.C., 361 N.C. 287, 295, 643 S.E.2d 920, 924 (2007)).

Irrational laws are already invalid under article I, section 19 of the North Carolina Constitution. See, e.g., Rhyne v. K-Mart Corp., 358 N.C. 160, 180-81, 594 S.E.2d 1, 15 (2004). Narrowing the subject-matter inquiry under article II, section 24 to a rational-basis test would deprive article II, section 24 of any incremental effect. This Court and the U.S. Supreme Court have rejected interpretations of that kind. See, e.g., Dist. of Columbia v. Heller, 554 U.S. 570, 628 n.27 (2008) (rejecting

such a result under the federal constitution); Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (holding that separate statutory provisions should be not be construed in a way that makes any provision useless or redundant).

The State cites no decision in which this Court has narrowed the subject-matter test under article II, section 24 to a rational-basis test. As shown above, there are good reasons why the Court has avoided such a result. Indeed, if the State could avoid article II, section 24 by inventing wholesome-sounding statutory purposes, the constitutional ban on certain local laws would become "a mere pious hope." Idol, 233 N.C. at 732, 65 S.E.2d at 315. For these reasons, the Williams Court was wise to focus on practical effects, not alleged legislative purposes. See Williams, 357 N.C. at 189, 581 S.E.2d at 429; supra pp. 4-6.

Third, the State's "purpose" arguments rely on conjecture alone. The Act itself states its purpose: "to ensure that the citizens and businesses of North Carolina are provided with the highest quality [water and sewer] services." Act, second recital, 2013 N.C. Sess. Laws at 118. Even the Court of Appeals recognized this as the Act's purpose. See Decision below, 777 S.E.2d at 98.

The State, however, argues that "the General Assembly's actual, though unstated, purpose in passing the Act could have been" to resolve an alleged dispute over the governance of Asheville's water system. State Br. 26-27 (emphasis added). No fewer than ten times, the State speculates that this purpose is what the legislature "could have" or "may have" had in mind. Id. at 27-30, 44-45, 53. Notably lacking from these arguments, however, are any citations to evidence in the record.

This Court has recently rejected a similar gambit by the State. In North Carolina Association of Educators, Inc. v. State, No. 228A15, 2016 WL 1551209 (N.C. Apr. 15, 2016), the State tried to justify another recent enactment by speculating that the statute was intended to address a particular problem. Id. at *11. The State, however, did not cite any evidence of such a problem. The Court therefore rejected the State's speculation and declared the law invalid. Id. This case calls for the same result.

Finally, the State doubles down on its purpose arguments by arguing that article II, section 24 requires that health and sanitation be the Act's "sole purpose." State Br. 56. This argument is even more erroneous than the State's other purpose arguments.

A sole-purpose test would eviscerate article II, section 24. It would invite drafters to insert multiple purposes into a single statute so that the statute has no sole purpose. Under the State's proposed test, even a statute that explicitly addressed health would pass muster, as long as the statute showed other purposes as well.

The State appears to base its sole-purpose test on Lamb. See id. That case, however, does not establish a sole-purpose test. In Lamb, the Court held that the statute at issue "relates to health and sanitation, since its sole purpose is to prescribe provisions with respect to sewer and water service." 235 N.C. at 379, 70 S.E.2d at 203. Observing that a particular statute had a sole purpose is not the same thing as requiring that sole purpose in future cases.

For all these reasons, the State's arguments about alleged purposes of the Act overlook the statutory text and this Court's teachings. The Act violates article II, section 24 because its practical effect—shifting responsibility for the operation of a major water system—relates to health and sanitation.

II. THE ACT IS A LOCAL ACT.

In its opening brief, the City established the second element of a violation of article II, section 24: the local nature of the Act. City Br. 47-56. The State responds by arguing that the Act is a general law. When it does so, however, it misapplies this Court's decisions on when enactments are local for purposes of article II, section 24.

A. Under the "Reasonable Classification" Test, the Act is Local.

When the General Assembly adopted the Act, it drafted criteria to guarantee that Asheville, but no other community, would be divested of its water system. Id. at 48-52. The State does not deny that the criteria in the Act apply to Asheville alone. See State Br. 26.

Where, as here, an act uses criteria that distinguish among communities, the act is local unless its criteria are reasonably related to the act's purpose. See Adams v. N.C. Dep't of Nat. & Econ. Res., 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978); McIntyre v. Clarkson, 254 N.C. 510, 518, 119 S.E.2d 888, 894 (1961).

Here, the goal of the Act is to "to ensure that the citizens and businesses of North Carolina are provided with the highest quality [water and sewer] services" by implementing "regional solutions for

public water and sewer for large public systems." Act, second recital, 2013 N.C. Sess. Laws at 118 (emphasis added). As the City has shown, singling out one water system for a forced transfer lacks any rational relationship to the legislature's statewide goal. City Br. 52-56. The State does not dispute this point. See State Br. 26-31. Under the "reasonable classification" test, then, the Act is local. See Adams, 295 N.C. at 691, 249 S.E.2d at 407; City Br. 52-56.

When the State argues that the Act is general, it simply ignores the statewide purpose of the Act. It argues that the Act's "actual, though unstated, purpose" is to resolve alleged disputes between Asheville and its neighboring communities. State Br. 27; accord id. at 17-18. It goes on to argue that the Act serves this unstated purpose of dispute resolution. Id. at 27-28.

This Court has rejected similar "dispute resolution" arguments. In New Bern, the Court held that the mere presence of a dispute between a city and a county offered "no rational basis that justifies the separation of New Bern from all other cities in North Carolina for special legislative attention." 338 N.C. at 438, 450 S.E.2d at 740 (finding a law local for this reason); see also City of Asheville v. State,

192 N.C. App. 1, 29, 31-32, 665 S.E.2d 103, 124, 125-26 (2008) (rejecting similar "dispute resolution" arguments and holding that earlier enactments about the Asheville water system were local). Thus, even if the Act had the unstated purpose that the State alleges, that purpose would not justify singling out Asheville.

In sum, the Act here is local. The State's "unstated purpose" arguments cannot avoid this conclusion.

B. The Test For Site-Specific Enactments Does Not Apply Here.

The State also argues that the Act is a general law under the specialized test that this Court applied in Town of Emerald Isle v. State, 320 N.C. 640, 360 S.E.2d 756 (1987). That test, however, does not apply here.

The specialized test in Emerald Isle was designed for a type of enactment that this case does not involve: overtly site-specific legislation. In that case, a statute directed a state agency to acquire "all lands inletward of the dune adjacent to the terminus of Inlet Drive and the adjacent portion of Bogue Court" in Emerald Isle. Id. at 643, 360 S.E.2d at 758 (quoting Act of June 16, 1983, ch. 539, § 1, 1983 N.C. Sess. Laws 458, 458). As this passage shows, the enactment in Emerald

Isle was openly site-specific.

Because this unusual feature of Emerald Isle would have automatically made the enactment local, the Court crafted a unique test to apply to the site-specific enactment. See id. at 650-51, 360 S.E.2d at 762-63. The Court asked whether creating public beach access at Bogue Inlet served the "general public welfare of the State." Id. at 651, 360 S.E.2d at 763.

Since Emerald Isle, this Court has never again applied the specialized test that it created for that case. In this Court's most recent cases under article II, section 24, the Court held that the Emerald Isle test did not apply because the statutes at issue were not "site-specific." Williams, 357 N.C. at 184, 581 S.E.2d at 426; New Bern, 338 N.C. at 436, 450 S.E.2d at 739.

The same is true here. The Act is not site-specific like the enactment in Emerald Isle. Instead, the Act states ostensibly neutral criteria. See Act sec. 1(a), 2013 N.C. Sess. Laws at 118; City Br. 10-12, 49-52. Those criteria are cleverly tailored to fit Asheville alone, but they bear no resemblance to the literal street addresses in the Emerald Isle statute. Because this is not a case of overtly site-specific

legislation, the "reasonable classification" test governs here. See Williams, 357 N.C. at 184-85, 581 S.E.2d at 426; New Bern, 338 N.C. at 436, 450 S.E.2d at 739.

Even if the Emerald Isle test did apply here, moreover, the Act would still be local under that test. Invoking that test, the State argues that the forced transfer of Asheville's water system will serve all North Carolinians by enhancing tourism in the Asheville area. State Br. 28-31. This "tourism promotion" argument fails for several reasons.

First, the argument has no factual basis. Nothing in the Act, or in the record on appeal, suggests that the forced transfer of Asheville's water system has anything to do with promoting tourism. Instead, the State's arguments about tourism are pure invention.

Second, the State's "tourism promotion" argument would produce absurd results. Under the State's logic, even the most targeted enactment would be general if it involved an area that enjoys tourist traffic. In those parts of North Carolina, article II, section 24 would be repealed. This result would violate the Court's warning that "the application of [article II, section 24] should not be denied on an unsubstantial distinction which would defeat its purpose." Board of

Health, 220 N.C. at 143, 16 S.E.2d at 679.

Finally, the State's arguments under the Emerald Isle test are circular. The State tries to defend the Act by arguing that it "focuse[s] its attention on the place where [an alleged] problem exists." State Br. 30. This statement will be true of any local statute, as long as the State can invent a problem to fill out the argument. Likewise, the State will always be able to argue that the "history" of the place targeted by a local act "demand[s] special legislative attention." Id. at 30-31. If these types of question-begging arguments had any force, there would be no such thing as a local act. That outcome would eviscerate article II, section 24.

For these reasons, the State's arguments under the Emerald Isle test fail. The Act here is local.

III. THE COURT OF APPEALS ERRED BY HOLDING THAT MUNICIPAL PROPRIETARY ENTERPRISES HAVE NO PROTECTION FROM UNCOMPENSATED TAKINGS.

Article I, section 19 of the North Carolina Constitution bars the State from taking property without paying just compensation. Long v. City of Charlotte, 306 N.C. 187, 195-96, 293 S.E.2d 101, 107-08 (1982). Here, the Court of Appeals purported to repeal this protection for an

entire category of property: proprietary enterprises owned by local governments. Decision below, 777 S.E.2d at 101-02.

The State attempts to defend that categorical rule by arguing that the State, not any municipality, is the actual owner of proprietary assets. See State Br. 21, 73. It also argues that a taking is not a taking at all if municipal residents can buy services from the transferee of seized property. See id. at 73-74. Those arguments violate this Court's lessons on proprietary property and takings.

A. The City Owns Its Water System.

The State argues that the City does not actually own its water system. According to the State, the City only holds the water system "in trust" for the entire state. Id. at 21. This argument fails for several reasons.

First, this Court's decisions reject the State's argument. The Court has specifically held that when a municipality owns and operates a water system, it does so in its proprietary, or private, capacity. E.g., Mosseller v. City of Asheville, 267 N.C. 104, 107, 147 S.E.2d 558, 561 (1966). When a municipality holds assets in this capacity, it does not hold them for the benefit of the state. It holds them "for the private

advantage of the compact community which is incorporated as a distinct legal personality or corporate individual." Asbury v. Town of Albemarle, 162 N.C. 247, 253, 78 S.E. 146, 149 (1913).

Second, the State's argument overlooks the record in this case, as well as the law that underlies that record. In the trial court, the City presented an affidavit that stated directly that the City owns and operates its water system under North Carolina's public-enterprise statutes. (Doc. Ex. 2, ¶ 6) Those statutes give municipalities the authority to own and operate water systems. N.C. Gen. Stat. § 160A-312(a); see id. § 160A-311(2). The State has not cited any evidence or any law that contradicts these points.[2]

Third, the Act itself admits that the City owns its water system. As its initial criterion for a forced transfer, the Act requires that a water system be "owned and operated by a municipality." Act sec. 1(a)(1), 2013 N.C. Sess. Laws at 118 (emphasis added). Thus, if the State were correct that the City does not own its water system, the Act

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[2] The State also argues that Buncombe County owns part of the Asheville water system. State Br. 7. The record shows, however, that in 2012, the county transferred its water-system assets, if any, back to the City. (Doc. Ex. 216-20)

would not apply to Asheville. In sum, the State's denial that the City owns its water system is not only unsupported, but self-defeating.

B. The State May Not Take a Proprietary Asset Without Just Compensation.

Asbury holds that proprietary assets have the same protections as private property, including the constitutional ban on uncompensated takings. Asbury, 162 N.C. at 253-54, 78 S.E. at 149-50; see City Br. 58-59. In an effort to defeat this principle, the State makes three arguments. As shown below, those arguments all fail.

1. Asbury governs the takings analysis here.

The State argues that Asbury does not apply because that case is not an exact factual replica of this one. See State Br. 74. The principles of the decision, however, apply squarely here. In Asbury, the Court rejected the idea that "the legislative power is so transcendent that it may, at its will, take away the private property" of a municipality. Asbury, 162 N.C. at 254, 78 S.E. at 149 (quoting Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 694 (1819)).

Here, the Court of Appeals created the same transcendent power that the Asbury Court rejected. The court held that the General

Assembly can, with impunity, "divest a city of its authority to operate a public water system and transfer the authority and assets thereof to a different political subdivision." Decision below, 777 S.E.2d at 101.

That reasoning violates the principle that when a local government owns proprietary assets, "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. Just as the General Assembly could not take away Red Hat's building and give it to Lenovo, the General Assembly cannot take the City's water system and transfer it to another entity.

2. Brockenbrough does not apply here.

Instead of following Asbury, the Court of Appeals relied on Brockenbrough v. Board of Water Commissioners, 134 N.C. 1, 46 S.E. 28 (1903). The State tries to defend that analysis by the Court of Appeals. State Br. 76-77. Brockenbrough, however, does not apply to this case.

Here, the General Assembly took the Asheville water system despite the strong opposition of city residents. A public referendum reported more than five-to-one opposition to a transfer of Asheville's

water system. (Doc. Ex. 649)

Brockenbrough, in contrast, involved a voluntary transfer of a water system. The Charlotte board of aldermen asked the General Assembly to create a new board of water commissioners and to transfer the city's water system to the new board. Brockenbrough, 134 N.C. at 6, 46 S.E. at 29.

The State tries to deny this feature of Brockenbrough, but it has no basis for the denial. The argument that the city in Brockenbrough "merely . . . complied with the law" overlooks the text of the decision. State Br. 77. The Brockenbrough Court stated directly that the General Assembly enacted the statute in question "at the instance and with the approval and pursuant to a resolution of the board of aldermen." 134 N.C. at 6, 46 S.E. at 29.

Finally, even if Brockenbrough applied here, it would still be limited by Asbury—the seminal decision, ten years later, that recognized the property rights of municipalities that act in a proprietary capacity.

3. A transfer of ownership and control of a water system is a compensable taking.

Finally, the State argues that the Act causes no taking at all, because the new owner of the water system will continue to sell water to city residents. State Br. 73.

This argument attempts a drastic narrowing of our citizens' protection against uncompensated takings. As this Court has held, property ownership includes much more than the opportunity to receive services. Instead, property "includes 'every aspect of right and interest capable of being enjoyed.'" Beroth Oil Co. v. N.C. Dep't of Transp., 367 N.C. 333, 341, 757 S.E.2d 466, 473 (2014) (quoting Long, 306 N.C. at 201, 293 S.E.2d at 110).

Here, the Act has at least three effects that this Court and the U.S. Supreme Court have recognized as a taking:

- The Act takes away the City's title to the water system. Act sec. 1(a)-(c), 2013 N.C. Sess. Laws at 118-19; see, e.g., United States v. Pewee Coal Co., 341 U.S. 114, 115-16 (1951).
- The Act seizes the assets that make up the water system. Act sec. 1(a)-(c), 2013 N.C. Sess. Laws at 118-19; see, e.g., Horne v. Dep't of Agric., 135 S. Ct. 2419, 2428 (2015).

- The Act strips the City of control over the water system. Act sec. 1(d)-(e), 2013 N.C. Sess. Laws at 118-19; id. sec. 2, §§ 162A-85.3(a) & -85.4, 2013 N.C. Sess. Laws at 120-21; see, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982); Vance S. Harrington & Co. v. Renner, 236 N.C. 321, 324, 72 S.E.2d 838, 840 (1952).

The State argues that the opportunity to buy water in the future would offset this taking, but it offers no support for that argument. See State Br. 73. To the contrary, the U.S. Supreme Court has held that when the government seizes an enterprise, a taking occurs, even if the new owner continues business operations. Pewee Coal, 341 U.S. at 115.

The State's argument would have sweeping and unacceptable consequences. It would allow the government to seize all kinds of water systems, as long as the new owners kept selling water from those systems. See City of Wilson Amicus Br. 11-12. Indeed, the State's argument would allow the government to seize the Mecca Restaurant for public purposes, as long as the transferee allowed the Dombalis family to buy lunch from the restaurant in the future. No amount of creative argument can justify results like these.

For all these reasons, the Court of Appeals erred by reversing the trial court's judgment on the City's takings claims.

IV. AS THE APPELLEE IN THE COURT OF APPEALS, THE CITY COULD NOT AND DID NOT WAIVE ANY CLAIMS.

Finally, if the Court of Appeals meant to suggest that the City waived its impairment-of-contract claims on appeal, the court erred further. See Decision below, 777 S.E.2d at 95 n.2, 102-03.

The court implied that the City was required to present its unadjudicated claims as alternative grounds for affirmance. Id. Under Rules 10(c) and 28(c), however, pursuing alternative grounds for affirmance is strictly optional. Rule 10(c) states that an appellee "may list" alternative issues in a record on appeal. N.C. R. App. P. 10(c). Rule 28(c), likewise, states that an appellee's brief "may present" alternative grounds. Id. r. 28(c). Here, the Court of Appeals seems to have overlooked the difference between "may" and "must." See City Br. 66-71.

Although the State never made any waiver arguments in the Court of Appeals, it now tries to defend the court's waiver-related reasoning. State Br. 78-79. The State's arguments, however, confirm

that the reasoning has no basis. For example, the State acknowledges that the Appellate Rules only "permit a litigant" to pursue alternative grounds for affirmance. Id. at 78 (emphasis added).

The State tries to turn this permission into a requirement, but it cites no authority that supports such a result. The State's argument cites no case law at all. See id. at 78-79. Instead, it cites two rules that have no bearing here.

The first cited rule, Rule 28(b)(6), states the duties of an appellant, not those of an appellee. Rule 28(b) and its subparts define what an "appellant's brief shall contain." N.C. R. App. P. 28(b). In the Court of Appeals, however, the City was the appellee. Rule 28(c), not Rule 28(b), defined the City's briefing duties. Rule 28(c) states only that "an appellee may present" alternative grounds for affirmance. Id. r. 28(c) (emphasis added).

The second cited rule, Rule 16, offers even less support for the State's waiver argument. That rule states only that this Court's review focuses on the decision of the Court of Appeals. Id. r. 16(a). The City has shown the errors in that decision—including the errors in the court's waiver-related statements.

CONCLUSION

The City respectfully requests that the Court reverse the decision of the Court of Appeals and reinstate the trial court's judgment. The City also requests that the Court reverse any decision by the Court of Appeals that the City has abandoned its contract-impairment claims.

Respectfully submitted, this 27th day of April, 2016.

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This the 27th day of April, 2016.

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CONTENTS OF APPENDIX AND ADDENDUM

(c) Striking the word "county" appearing in line 7 immediately after the word "other" and before the word "and" and inserting in lieu thereof the words "judicial district".

Sec. 6. This act shall become effective October 1, 1983.

In the General Assembly read three times and ratified, this the 16th day of June, 1983.

H. B. 886 CHAPTER 539

AN ACT TO PROVIDE FOR REASONABLE BEACH ACCESS WITHIN THE TOWN OF EMERALD ISLE.

The General Assembly of North Carolina enacts:

Section 1. The Department of Natural Resources and Community Development, in cooperation with the Town of Emerald Isle, is hereby directed to acquire real property by purchase or condemnation, make improvement for and maintain facilities for the provision of public pedestrian beach access in the vicinity of Bogue Inlet. The town shall not be required to expend local funds to acquire real property, but shall be responsible for maintaining the facility. Public beach access facilities in the vicinity of Bogue Inlet shall include parking areas, pedestrian walkways, and rest room facilities, and may include any other public beach access support facilities. Insofar as is feasible, said facility shall include all lands inletward of the dune adjacent to the terminus of Inlet Drive and the adjacent portion of Bogue Court, as well as such adjacent properties necessary to provide adequate parking and support facilities. Notwithstanding any other law or authority to the contrary, beach access facilities in the vicinity of Bogue Inlet after the installation of said public pedestrian beach access facility shall not include facilities for vehicular access to the beach, including but not limited to the use of the Inlet Drive right-of-way for vehicular access; provided that such prohibition shall not apply until the pedestrian beach access facility is opened; after the installation of said public pedestrian beach access facility, motor vehicles are hereby prohibited from being operated on the ocean beaches and dunes adjacent to and within Blocks 51, 52, 53 and 54 of Emerald Isle; provided that this vehicular access prohibition shall not apply to reasonable access by public service, police, fire, rescue or other emergency vehicles.

Sec. 2. Nothing in this act shall be construed to otherwise limit or constrain the authority of the Town of Emerald Isle to regulate and manage the use of vehicles on ocean beach areas.

Sec. 3. This act is effective upon ratification.

In the General Assembly read three times and ratified, this the 16th day of June, 1983.

(c1) For a volunteer medical or health care provider who provides services at a free clinic to receive the protection from liability provided in this section, the free clinic shall provide the following notice to the patient, or person authorized to give consent for treatment, for the patient's retention prior to the delivery of health care services:

"NOTICE

Under North Carolina law, a volunteer medical or health care provider shall not be liable for damages for injuries or death alleged to have occurred by reason of an act or omission in the medical or health care provider's voluntary provision of health care services unless it is established that the injuries or death were caused by gross negligence, wanton conduct, or intentional wrongdoing on the part of the volunteer medical or health care provider."

(d) A nonprofit community health referral service that refers low-income patients to ~~physicians~~ medical or health care providers for free services is not liable for the acts or omissions of the ~~physician~~ medical or health care providers in rendering service to that patient if the nonprofit community health referral service maintains liability insurance covering the acts and omissions of the nonprofit health referral service and any liability pursuant to subsection (a) of this section.

(e) As used in this section, a "nonprofit community health referral service" is a nonprofit, 501(c)(3) tax-exempt organization organized to provide for no charge the referral of low-income, uninsured patients to volunteer health care providers who provide health care services without charge to patients."

SECTION 2. G.S. 90-21.102(2) reads as rewritten:

"(2) Free clinic. — A nonprofit, 501(c)(3) tax-exempt organization organized for the purpose of providing health care services without charge or for a minimum fee to cover administrative ~~costs~~ costs.~~and that maintains liability insurance covering the acts and omissions of the free clinic and any liability pursuant to G.S. 90-21.16(a).~~"

SECTION 3. This act becomes effective October 1, 2013, and applies to claims that arise on or after that date.

In the General Assembly read three times and ratified this the 6th day of May, 2013.

Became law upon approval of the Governor at 4:42 p.m. on the 13th day of May, 2013.

Session Law 2013-50 **H.B. 488**

AN ACT TO PROMOTE THE PROVISION OF REGIONAL WATER AND SEWER SERVICES BY TRANSFERRING OWNERSHIP AND OPERATION OF CERTAIN PUBLIC WATER AND SEWER SYSTEMS TO A METROPOLITAN WATER AND SEWERAGE DISTRICT.

Whereas, regional water and sewer systems provide reliable, cost-effective, high-quality water and sewer services to a wide range of residential and institutional customers; and

Whereas, in an effort to ensure that the citizens and businesses of North Carolina are provided with the highest quality services, the State recognizes the value of regional solutions for public water and sewer for large public systems; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1.(a) All assets, real and personal, tangible and intangible, and all outstanding debts of any public water system meeting all of the following criteria are by operation of law transferred to the metropolitan sewerage district operating in the county where the public water system is located, to be operated as a Metropolitan Water and Sewerage District:

(1) The public water system is owned and operated by a municipality located in a county where a metropolitan sewerage district is operating.

(2) The public water system has not been issued a certificate for an interbasin transfer.

(3) The public water system serves a population greater than 120,000 people, according to data submitted pursuant to G.S. 143-355(l).

SECTION 1.(b) All assets, real and personal, tangible and intangible, and all outstanding debts of any public sewer system operated by a subdivision of the State and body politic that is interconnected with the metropolitan sewerage district receiving assets pursuant to Section 1(a) of this act are by operation of law transferred to that metropolitan sewerage district to be operated as a Metropolitan Water and Sewerage District.

SECTION 1.(c) All assets, real and personal, tangible and intangible, and all outstanding debts of any public sewer system operated by the metropolitan sewerage district receiving assets pursuant to Sections 1(a) and 1(b) of this act, are by operation of law transferred to, and be operated as, a Metropolitan Water and Sewerage District, as established pursuant to this act.

SECTION 1.(d) Until appointments are made to the Metropolitan Water and Sewerage District established pursuant to this act, the district board of the metropolitan sewerage district in the county in which the public water system, the assets of which are transferred pursuant to Section 1(a) of this act, is located shall function as the district board of the Metropolitan Water and Sewerage District. All members of the metropolitan sewerage district shall continue to serve on the district board of the Metropolitan Water and Sewerage District until the governing body with appointing authority appoints or replaces that individual on the district board of the Metropolitan Water and Sewerage District.

SECTION 1.(e) All necessary permits for operation shall also be transferred to the Metropolitan Water and Sewerage District established pursuant to this act to ensure that no current and paid customer loses services due to the regionalization of water and sewer services required by this act. The new Metropolitan Water and Sewerage District shall immediately begin assessing all permits and the process for transferring the permit or applying for any needed permits. All State agencies shall assist the new Metropolitan Water and Sewerage District in obtaining any needed permits in that entity's name.

SECTION 1.(f) For purposes of this section, the transfer of all outstanding debts by operation of law shall make the Metropolitan Water and Sewer District liable for all debts attached to and related to the assets transferred under this section, and the Metropolitan Water and Sewer District shall indemnify and hold harmless the grantor entity for any outstanding debts transferred under this section.

SECTION 2. Chapter 162A of the General Statutes is amended by adding a new Article to read:

"Article 5A.

"Metropolitan Water and Sewerage Districts.

"**§ 162A-85.1. Definitions.**

(a) Definitions. – As used in this Article, the following definitions shall apply:

(1) Board of commissioners. – The duly elected board of commissioners of the county or counties in which a metropolitan water and sewerage district shall be created under the provisions of this Article.

(2) City council or Council. – The duly elected city council of any municipality.

(3) Cost. – As defined in G.S. 162A-65.

(4) District. – A metropolitan water and sewerage district created under the provisions of this Article.

(5) District board. – A water and sewerage district board established under the provisions of this Article.

(6) General obligation bonds. – As defined in G.S. 162A-65.

(7) Governing body. – As defined in G.S. 162A-32.

(8) Person. – As defined in G.S. 162A-65.

(9) Political subdivision. – As defined in G.S. 162A-65.

(10) Revenue bonds. – Any bonds the principal of and the interest on which are payable solely from revenues of a water and sewerage system or systems.

(11) Revenues. – All moneys received by a district from, in connection with, or as a result of its ownership or operation of a water and sewerage system, including moneys received from the United States of America, or any agency thereof, pursuant to an agreement with the district board pertaining to the water and sewerage system, if deemed advisable by the district board.

(12) Sewage. – As defined in G.S. 162A-65.

(13) Sewage disposal system. – As defined in G.S. 162A-65.

(14) Sewerage system. – As defined in G.S. 162A-65.

(15) Sewers. – As defined in G.S. 162A-65.

(16) Water distribution system. – As defined in G.S. 162A-32.

(17) Water system. – As defined in G.S. 162A-32.

(18) Water treatment or purification plant. – As defined in G.S. 162A-32.

(b) Description of Boundaries. – Whenever this Article requires the boundaries of an area be described, it shall be sufficient if the boundaries are described in a manner which conveys an understanding of the location of the land and may be by any of the following:

(1) By reference to a clearly identified map recorded in the appropriate register of deeds office.

(2) By metes and bounds.

(3) By general description referring to natural boundaries, boundaries of political subdivisions, or boundaries of particular tracts or parcels of land.

(4) Any combination of the foregoing.

"**§ 162A-85.2. Creation.**

(a) Except as provided by operation of law, the governing bodies of two or more political subdivisions may establish a metropolitan water and sewerage district if all of the political subdivisions adopt a resolution setting forth all of the following:

(1) The names of the appointees to the district board.

(2) The date on which the district board shall be established.

(3) The boundaries of the district board.

(b) Prior to the adoption of a resolution under subsection (a) of this section, the governing body shall hold at least two public hearings on the matter, held at least 30 days apart, after publication of the notices of public hearing in a newspaper of general circulation, published at least 10 days before each public hearing.

"**§ 162A-85.3. District board.**

(a) Appointment. – The district board shall consist of members appointed as follows:

(1) Two individuals by the governing body of each county served, wholly or in part, by the district.

(2) One individual by the governing body of each municipality served by the district located in any county served by the district with a population greater than 200,000.

(3) Two individuals by the governing body of any municipality served by the district with a population greater than 75,000, in addition to any appointments under subdivision (2) of this subsection.

(4) One individual by the governing body of any county served by the district with a population greater than 200,000, in addition to any appointments under subdivision (1) of this subsection.

(5) One individual by the governing body of a county in which a watershed serving the district board is located in a municipality not served by the district, upon recommendation of that municipality. The municipality shall provide to the governing body of the county a list of three names within 30 days of written request by the county, from which the county must select an appointee if the names are provided within 30 days of written request.

(6) One individual by the governing body of any elected water and sewer district wholly contained within the boundaries of the district.

(b) Terms; Reappointment. – Terms shall be for three years. A member shall serve until a successor has been duly appointed and qualified.

(c) Vacancies; Removal. – If a vacancy shall occur on a district board, the governing body which appointed the vacating member shall appoint a new member who shall serve for the remainder of the unexpired term. Any member of a district board may be removed by the governing board that appointed that member.

(d) Oath of Office. – Each member of the district board, before entering upon the duties, shall take and subscribe an oath or affirmation to support the Constitution and laws of the United States and of this State and to discharge faithfully the duties of the office. A record of each such oath shall be filed with the clerk or clerks of the governing boards appointing the members.

(e) Chair; Officers. – The district board shall elect one of its members as chairman and another as vice-chairman. The district board shall appoint a secretary and a treasurer who may, but need not, be members of the district board. The offices of secretary and treasurer may be combined. The district board may also appoint an assistant secretary and an assistant treasurer or, if the office is combined, an assistant secretary-treasurer who may, but need not, be members of the district board. The terms of office of the chairman, vice-chairman, secretary, treasurer, assistant secretary, and assistant treasurer shall be as provided in the bylaws of the district board.

(f) Meetings; Quorum. – The district board shall meet regularly at such places and dates as are determined by the district board. All meetings shall comply with Article 33C of Chapter 143 of the General Statutes. A majority of the members of the district board shall constitute a quorum, and the affirmative vote of a majority of the members of the district board present at any meeting thereof shall be necessary for any action taken by the district board. No vacancy in the membership of the district board shall impair the right of a quorum to exercise all the rights and perform all the duties of the district board. Each member, including the chairman, shall be entitled to vote on any question.

(g) Compensation. – The members of the district board may receive compensation in an amount to be determined by the district board but not to exceed that compensation paid to members of Occupational Licensing Boards as provided in G.S. 93B-5(a) for each meeting of the district board attended and for attendance at each regularly scheduled committee meeting of the district board. The members of the district board may also be reimbursed the amount of actual expenses incurred by that member in the performance of that member's duties.

"**§ 162A-85.4. Expansion of district board after creation.**

(a) After creation pursuant to G.S. 162A-85.2, the district board may expand to include other political subdivisions if the district board and the political subdivision adopt identical resolutions indicating the political subdivision will become a participant in the district board.

(b) Prior to adopting the resolution under subsection (a) of this section, the district board and the political subdivision shall hold at least two public hearings on the matter, held at least 30 days apart, after publication of the notices of public hearing in a newspaper of general circulation, published at least 10 days before each public hearing.

(c) Upon adoption of the identical resolutions, the political subdivision shall appoint a district member in accordance with G.S. 162A-85.3(a), if that political subdivision is entitled to an appointment under that section.

"**§ 162A-85.5. Powers generally.**

(a) Each district shall be deemed to be a public body and body politic and corporate exercising public and essential governmental functions to provide for the preservation and promotion of the public health and welfare, and each district is hereby authorized and empowered to do all of the following:

(1) To exercise any power of a Metropolitan Water District under G.S. 162A-36, except subdivision (9) of that section.

(2) To exercise any power of a Metropolitan Sewer District under G.S. 162A-69, except subdivision (9) of that section.

(3) To do all acts and things necessary or convenient to carry out the powers granted by this Article.

(b) Each district shall keep its accounts on the basis of a fiscal year commencing on the first day of July and ending on the 30th day of June of the following year.

"**§ 162A-85.7. Bonds and notes authorized.**

A metropolitan water and sewerage district shall have power from time to time to issue bonds and notes under the Local Government Finance Act.

"**§ 162A-85.13. Rates and charges for services.**

(a) The district board may fix, and may revise from time to time, rents, rates, fees, and other charges for the use of and for the services furnished or to be furnished by any water system or sewerage system. Such rents, rates, fees, and charges may not apply differing treatment within and outside the corporate limits of any city or county within the jurisdiction of the district board. Such rents, rates, fees, and charges shall not be subject to supervision or regulation by any bureau, board, commission, or other agency of the State or of any political subdivision.

(b) Any such rents, rates, fees, and charges pledged to the payment of revenue bonds of the district shall be fixed and revised so that the revenues of the water system or sewerage system, together with any other available funds, shall be sufficient at all times to pay the cost of maintaining, repairing, and operating the water system or sewerage system, the revenues of which are pledged to the payment of such revenue bonds, including reserves for such purposes, and to pay the interest on and the principal of such revenue bonds as the same shall become due and payable and to provide reserves therefor. If any such rents, rates, fees, and charges are pledged to the payment of any general obligation bonds issued under this Article, such rents, rates, fees, and charges shall be fixed and revised so as to comply with the requirements of such pledge.

(c) The district board may provide methods for collection of such rents, rates, fees, and charges and measures for enforcement of collection thereof, including penalties and the denial or discontinuance of service.

"**§ 162A-85.17. Rights-of-way and easements.**

A right-of-way or easement in, along, or across any State highway system, road, or street, and along or across any city or town street within a district is hereby granted to a district in case such right-of-way is found by the district board to be necessary or convenient for carrying out any of the work of the district. Any work done in, along, or across any State highway system, road, street, or property shall be done in accordance with the rules and regulations and any reasonable requirements of the Department of Transportation, and any work done in, along, or across any municipal street or property shall be done in accordance with any reasonable requirements of the municipal governing body.

"**§ 162A-85.19. Authority of governing bodies of political subdivisions.**

(a) The governing body of any political subdivision is hereby authorized and empowered to do any of the following:

(1) Subject to the approval of the Local Government Commission regarding the disposition of any outstanding debt related to the water system or sewer system, or both, to transfer jurisdiction over and to lease, lend, sell, grant, or convey to a district, upon such terms and conditions as the governing body of such political subdivision may agree upon with the district board, the whole or any part of any existing water system or systems or sewerage system or systems or such real or personal property as may be necessary or useful in connection with the acquisition, construction, reconstruction, improvement, extension, enlargement, equipment, repair, maintenance, or

operation of any water system or sewerage system by the district, including public roads and other property already devoted to public use.

(2) To make and enter into contracts or agreements with a district, upon such terms and conditions and for such periods as such governing body and the district board may determine for any of the following:

a. For the collection, treatment, or disposal of sewage.

b. For the supply of raw or treated water on a regular retail or wholesale basis.

c. For the supply of raw or treated water on a standby wholesale basis.

d. For the construction of jointly financed facilities whose title shall be vested in the district.

e. For the collecting by such political subdivision or by the district of rents, rates, fees, or charges for the services and facilities provided to or for such political subdivision or its inhabitants by any water system or sewerage system and for the enforcement of collection of such rents, rates, fees, and charges.

f. For the imposition of penalties, including the shutting off of the supply of water furnished by any water system owned or operated by such political subdivision, in the event that the owner, tenant, or occupant of any premises utilizing such water shall fail to pay any such rents, rates, fees, or charges.

(3) To fix and revise from time to time, rents, rates, fees, and other charges for the services furnished or to be furnished by a water system or sewerage system under any contract between the district and such political subdivision and to pledge all or any part of the proceeds of such rents, rates, fees, and charges to the payment of any obligation of such political subdivision to the district under such contract.

(4) To pay any obligation of such political subdivision to the district under such contract from any available funds of the political subdivision and to levy and collect a tax ad valorem for the making of any such payment.

(5) In its discretion or if required by law, to submit to its qualified electors under the election laws applicable to such political subdivision any contract or agreement which such governing body is authorized to make and enter into with the district under the provisions of this Article.

(b) Any such election upon a contract or agreement called under subsection (a) of this section may, at the discretion of the governing body, be called and held under the election laws applicable to the issuance of bonds by such political subdivision.

"**§ 162A-85.21. Submission of preliminary plans to planning groups; cooperation with planning agencies.**

(a) Prior to the time final plans are made for the extension of any water system or sewerage system, the district board shall present preliminary plans for such improvement to the county or municipal governing board for their consideration if such facility is to be located within the jurisdiction of any such county or municipality. The district board shall make every effort to cooperate with the county or municipality in the location and construction of any new proposed facility authorized under this Article.

(b) Any district board created under the authority of this Article is hereby directed, wherever possible, to coordinate its plans for the construction of any new water system or sewerage system improvements with the overall plans for the development of the planning area if such district is located wholly or in part within a county or municipal planning area.

(c) This section shall not apply to renovations, repairs, or regular maintenance of water systems or sewer systems.

"§ 162A-85.25. Adoption and enforcement of ordinances.

(a) A district shall have the same power as a city under G.S. 160A-175 to assess civil fines and penalties for violation of its ordinances and may secure injunctions to further ensure compliance with its ordinances as provided by this section.

(b) An ordinance may provide that its violation shall subject the offender to a civil penalty of not more than one thousand dollars ($1,000) to be recovered by the district in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time after he has been cited for violation of the ordinance. Any person assessed a civil penalty by the district shall be notified of the assessment by registered or certified mail, and the notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the district within 30 days after receipt of notice, or such longer period, not to exceed 180 days, as the district may specify, the district may institute a civil action in the General Court of Justice of the county in which the violation occurred or, in the discretion of the district, in the General Court of Justice of the county in which the person assessed has his or its principal place of business, to recover the amount of the assessment. The validity of the district's action may be appealed directly to General Court of Justice in the county in which the violation occurred or may be raised at any time in the action to recover the assessment. Neither failure to contest the district's action directly nor failure to raise the issue of validity in the action to recover an assessment precludes the other.

(c) An ordinance may provide that it may be enforced by an appropriate equitable remedy issuing from court of competent jurisdiction. In such case, the General Court of Justice shall have jurisdiction to issue such orders as may be appropriate, and it shall not be a defense to the application of the district for equitable relief that there is an adequate remedy at law.

(d) Subject to the express terms of an ordinance, a district ordinance may be enforced by any one, all, or a combination of the remedies authorized and prescribed by this section.

(e) An ordinance may provide, when appropriate, that each day's continuing violation shall be a separate and distinct offense.

"§ 162A-85.29. No privatization.

The district board may not in any way privatize the provision of water or sewer to the customers of the district unless related to administrative matters only."

SECTION 3. G.S. 159-44(4) reads as rewritten:

"(4) "Unit," "unit of local government," or "local government" means counties; cities, towns, and incorporated villages; consolidated city-counties, as defined by G.S. 160B-2(1); sanitary districts; mosquito control districts; hospital districts; merged school administrative units described in G.S. 115C-513; metropolitan sewerage districts; metropolitan water districts; metropolitan water and sewerage districts; county water and sewer districts; regional public transportation authorities; and special airport districts."

SECTION 4. G.S. 159-48(e) reads as rewritten:

"(e) Each sanitary district, mosquito control district, hospital district, merged school administrative unit described in G.S. 115C-513; metropolitan sewerage district, metropolitan water district, metropolitan water and sewerage district, county water and sewer district, regional public transportation authority and special airport district is authorized to borrow money and issue its bonds under this Article in evidence thereof for the purpose of paying any capital costs of any one or more of the purposes for which it is authorized, by general laws uniformly applicable throughout the State, to raise or appropriate money, except for current expenses."

SECTION 5. G.S. 159-81(1) reads as rewritten:

"(1) "Municipality" means a county, city, town, incorporated village, sanitary district, metropolitan sewerage district, metropolitan water district, metropolitan water and sewerage district, county water and sewer district, water and sewer authority, hospital authority, hospital district, parking authority, special airport district, special district created under Article 43 of

Chapter 105 of the General Statutes, regional public transportation authority, regional transportation authority, regional natural gas district, regional sports authority, airport authority, joint agency created pursuant to Part 1 of Article 20 of Chapter 160A of the General Statutes, a joint agency authorized by agreement between two cities to operate an airport pursuant to G.S. 63-56, and the North Carolina Turnpike Authority described in Article 6H of Chapter 136 of the General Statutes and transferred to the Department of Transportation pursuant to G.S. 136-89.182(b), but not any other forms of State or local government."

SECTION 5.5. Article 5 of Chapter 162A of the General Statutes is amended by adding a new section to read:

"**§ 162A-66.5. Approval of all political subdivisions required.**

Prior to the adoption of a resolution under G.S. 162A-66 on or after April 1, 2013, the Environmental Management Commission shall receive a resolution supporting the establishment of a district board from (i) the board of commissioners of the county or counties lying wholly or partly within the boundaries of the proposed district and (ii) from the governing board of each political subdivision in the county or counties lying wholly or partly within the boundaries of the proposed district. If the Environmental Management Commission does not receive a resolution from each of those political subdivisions, the Environmental Management Commission may not adopt the resolution to create the district board."

SECTION 6. This act becomes effective May 15, 2013, and the Metropolitan Water and Sewerage District in Section 1 of this act shall be created by operation of law.

In the General Assembly read three times and ratified this the 2nd day of May, 2013.

Became law on the date it was ratified.

Session Law 2013-51 **H.B. 484**

AN ACT TO ESTABLISH A PERMITTING PROGRAM FOR THE SITING AND OPERATION OF WIND ENERGY FACILITIES.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 143 of the General Statutes is amended by adding a new Article to read:

"Article 21C.

"Permitting of Wind Energy Facilities.

"**§ 143-215.115. Definitions.**

In addition to the definitions set forth in G.S. 143-212, the following definitions apply to this Article:

(1) "Major military installation" means Fort Bragg, Pope Army Airfield, Marine Corps Base Camp Lejeune, New River Marine Corps Air Station, Cherry Point Marine Corps Air Station, Military Ocean Terminal at Sunny Point, the United States Coast Guard Air Station at Elizabeth City, Naval Support Activity Northwest, Air Route Surveillance Radar (ARSR-4) at Fort Fisher, and Seymour Johnson Air Force Base, in its own right and as the responsible entity for the Dare County Bombing Range, and any facility located within the State that is subject to the installations' oversight and control.

(2) "Wind energy facility" means the turbines, accessory buildings, transmission facilities, and any other equipment necessary for the operation of the facility that cumulatively, with any other wind energy facility whose turbines are located within one-half mile of one another, have a rated capacity of one megawatt or more of energy.

"(g) For purposes of enforcing this Chapter and Article 34 of Chapter 66 of the General Statutes, the following provisions are applicable:

(1) ~~the law~~ Law enforcement agents of the Department of the Secretary of State have statewide jurisdiction and have all of the powers and authority of law enforcement officers. The agents have the authority to assist local law enforcement agencies in their investigations and to initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations.

(2) Any party to a transaction requiring a notarial certificate for verification and any attorney licensed in this State who is involved in such a transaction in any capacity, whether or not the attorney is representing one of the parties to the transaction, may execute an affidavit and file it with the Secretary of State, setting forth the actions which the affiant alleges constitute violations. Upon receipt of the affidavit, law enforcement agents of the Department shall initiate and carry out, on their own or in coordination with local law enforcement agencies, investigations of violations."

SECTION 6. Sections 1 and 3 of this act become effective September 1, 2013. Section 2 of this act becomes effective July 1, 2014. Section 5 of this act is effective when it becomes law and applies to notarial acts and omissions occurring on or after that date. The remainder of this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 26th day of July, 2013.

Became law upon approval of the Governor at 10:46 a.m. on the 23rd day of August, 2013.

Session Law 2013-388 **S.B. 341**

AN ACT TO ESTABLISH AN EXPEDITED PROCESS FOR THE MODIFICATION OF INTERBASIN TRANSFER CERTIFICATES AND FOR THE ISSUANCE OF INTERBASIN TRANSFER CERTIFICATES IN THE CENTRAL COASTAL PLAIN CAPACITY USE AREA AND THE COASTAL AREA COUNTIES AND TO AMEND S.L. 2013-50, AN ACT TO PROMOTE THE PROVISION OF REGIONAL WATER AND SEWER SERVICES BY TRANSFERRING OWNERSHIP AND OPERATION OF CERTAIN PUBLIC WATER AND SEWER SYSTEMS TO A METROPOLITAN WATER AND SEWERAGE DISTRICT.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-215.22G reads as rewritten:

"**§ 143-215.22G. Definitions.**

In addition to the definitions set forth in G.S. 143-212 and G.S. 143-213, the following definitions apply to this Part.

(1) "River basin" means any of the following river basins designated on the map entitled "Major River Basins and Sub-basins in North Carolina" and filed in the Office of the Secretary of State on 16 April 1991. The term "river basin" includes any portion of the river basin that extends into another state. Any area outside North Carolina that is not included in one of the river basins listed in this subdivision comprises a separate river basin.

a.	1-1	Broad River.
b.	2-1	Haw River.
c.	2-2	Deep River.
d.	2-3	Cape Fear River.
e.	2-4	South River.
f.	2-5	Northeast Cape Fear River.

g.	2-6	New River.
h.	3-1	Catawba River.
i.	3-2	South Fork Catawba River.
j.	4-1	Chowan River.
k.	4-2	Meherrin River.
l.	5-1	Nolichucky River.
m.	5-2	French Broad River.
n.	5-3	Pigeon River.
o.	6-1	Hiwassee River.
p.	7-1	Little Tennessee River.
q.	7-2	Tuskasegee (Tuckasegee) River.
r.	8-1	Savannah River.
s.	9-1	Lumber River.
t.	9-2	Big Shoe Heel Creek.
u.	9-3	Waccamaw River.
v.	9-4	Shallotte River.
w.	10-1	Neuse River.
x.	10-2	Contentnea Creek.
y.	10-3	Trent River.
z.	11-1	New River.
aa.	12-1	Albemarle Sound.
bb.	13-1	Ocoee River.
cc.	14-1	Roanoke River.
dd.	15-1	Tar River.
ee.	15-2	Fishing Creek.
ff.	15-3	Pamlico River and Sound.
gg.	16-1	Watauga River.
hh.	17-1	White Oak River.
ii.	18-1	Yadkin (Yadkin-Pee Dee) River.
jj.	18-2	South Yadkin River.
kk.	18-3	Uwharrie River.
ll.	18-4	Rocky River.

(2) "Surface water" means any of the waters of the State located on the land surface that are not derived by pumping from groundwater.

(3) "Transfer" means the withdrawal, diversion, or pumping of surface water from one river basin and discharge of all or any part of the water in a river basin different from the origin. However, notwithstanding the basin definitions in G.S. 143-215.22G(1), the following are not transfers under this Part:

a. The discharge of water upstream from the point where it is withdrawn.

b. The discharge of water downstream from the point where it is withdrawn.

(4) "Public water system" means any unit of local government or large community water system subject to the requirements of G.S. 143-355(l).

(5) "Mainstem" means that portion of a river having the same name as a river basin defined in subdivision (1) of this section. "Mainstem" does not include named or unnamed tributaries."

SECTION 2. G.S. 143-215.22L reads as rewritten:

"**§ 143-215.22L. Regulation of surface water transfers.**

(a) Certificate Required. – No person, without first obtaining a certificate from the Commission, may:

(1) Initiate a transfer of 2,000,000 gallons of water or more per ~~day~~ day, calculated as a daily average of a calendar month and not to exceed 3,000,000 gallons per day in any one day, from one river basin to another.

(2) Increase the amount of an existing transfer of water from one river basin to another by twenty-five percent (25%) or more above the average daily amount transferred during the year ending 1 July 1993 if the total transfer including the increase is 2,000,000 gallons or more per day.

(3) Increase an existing transfer of water from one river basin to another above the amount approved by the Commission in a certificate issued under G.S. 162A-7 prior to 1 July 1993.

(b) Exception. – Notwithstanding the provisions of subsection (a) of this section, a certificate shall not be required to transfer water from one river basin to another up to the full capacity of a facility to transfer water from one basin to another if the facility was in existence or under construction on 1 July 1993.

(c) Notice of Intent to File a Petition. – An applicant shall prepare a notice of intent to file a petition that includes a nontechnical description of the applicant's request and an identification of the proposed water source. Within 90 days after the applicant files a notice of intent to file a petition, the applicant shall hold at least one public meeting in the source river basin upstream from the proposed point of withdrawal, at least one public meeting in the source river basin downstream from the proposed point of withdrawal, and at least one public meeting in the receiving river basin to provide information to interested parties and the public regarding the nature and extent of the proposed transfer and to receive comment on the scope of the environmental documents. Written notice of the public meetings shall be provided at least 30 days before the public meetings. At the time the applicant gives notice of the public meetings, the applicant shall request comment on the alternatives and issues that should be addressed in the environmental documents required by this section. The applicant shall accept written comment on the scope of the environmental documents for a minimum of 30 days following the last public meeting. Notice of the public meetings and opportunity to comment on the scope of the environmental documents shall be provided as follows:

(1) By publishing notice in the North Carolina Register.

(2) By publishing notice in a newspaper of general circulation in:

a. Each county in this State located in whole or in part of the area of the source river basin upstream from the proposed point of withdrawal.

b. Each city or county located in a state located in whole or in part of the surface drainage basin area of the source river basin that also falls within, in whole or in part, the area denoted by one of the following eight-digit cataloging units as organized by the United States Geological Survey:

03050105 (Broad River: NC and SC);
03050106 (Broad River: SC);
03050107 (Broad River: SC);
03050108 (Broad River: SC);
05050001 (New River: NC and VA);
05050002 (New River: VA and WV);
03050101 (Catawba River: NC and SC);
03050103 (Catawba River: NC and SC);
03050104 (Catawba River: SC);
03010203 (Chowan River: NC and VA);
03010204 (Chowan River: NC and VA);
06010105 (French Broad River: NC and TN);
06010106 (French Broad River: NC and TN);
06010107 (French Broad River: TN);
06010108 (French Broad River: NC and TN);

06020001 (Hiwassee River: AL, GA, TN);
06020002 (Hiwassee River: GA, NC, TN);
06010201 (Little Tennessee River: TN);
06010202 (Little Tennessee River: TN, GA, and NC);
06010204 (Little Tennessee River: NC and TN);
03060101 (Savannah River: NC and SC);
03060102 (Savannah River: GA, NC, and SC);
03060103 (Savannah River: GA and SC);
03060104 (Savannah River: GA);
03060105 (Savannah River: GA);
03040203 (Lumber River: NC and SC);
03040204 (Lumber River: NC and SC);
03040206 (Lumber River: NC and SC);
03040207 (Lumber River: NC and SC);
03010205 (Albemarle Sound: NC and VA);
06020003 (Ocoee River: GA, NC, and TN);
03010101 (Roanoke River: VA);
03010102 (Roanoke River: NC and VA);
03010103 (Roanoke River: NC and VA);
03010104 (Roanoke River: NC and VA);
03010105 (Roanoke River: VA);
03010106 (Roanoke River: NC and VA);
06010102 (Watauga River: TN and VA);
06010103 (Watauga River: NC and TN);
03040101 (Yadkin River: VA and NC);
03040104 (Yadkin River: NC and SC);
03040105 (Yadkin River: NC and SC);
03040201 (Yadkin River: NC and SC);
03040202 (Yadkin River: NC and SC).

c. Each county in this State located in whole or in part of the area of the source river basin downstream from the proposed point of withdrawal.

d. Any area in the State in a river basin for which the source river basin has been identified as a future source of water in a local water supply plan prepared pursuant to G.S. 143-355(l).

e. Each county in the State located in whole or in part of the receiving river basin.

(3) By giving notice by first-class mail or electronic mail to each of the following:

a. The board of commissioners of each county in this State or the governing body of any county or city that is politically independent of a county in any state that is located entirely or partially within the source river basin of the proposed transfer and that also falls within, in whole or in part, the area denoted by one of the eight-digit cataloging units listed in sub-subdivision b. of subdivision (2) of this subsection.

b. The board of commissioners of each county in this State or the governing body of any county or city that is politically independent of a county in any state that is located entirely or partially within the receiving river basin of the proposed transfer and that also falls within, in whole or in part, the area denoted by one of the eight-digit cataloging units listed in sub-subdivision b. of subdivision (2) of this subsection.

c. The governing body of any public water ~~supply~~—system that withdraws water upstream or downstream from the withdrawal point of the proposed transfer.

d. If any portion of the source or receiving river basins is located in another state, all state water management or use agencies, environmental protection agencies, and the office of the governor in that state upstream or downstream from the withdrawal point of the proposed transfer.

e. All persons who have registered a water withdrawal or transfer from the proposed source river basin under this Part or under similar law in an another state.

f. All persons who hold a certificate for a transfer of water from the proposed source river basin under this Part or under similar law in an another state.

g. All persons who hold a National Pollutant Discharge Elimination System (NPDES) wastewater discharge permit for a discharge of 100,000 gallons per day or more upstream or downstream from the proposed point of withdrawal.

h. To any other person who submits to the applicant a written request to receive all notices relating to the petition.

(d) Environmental Documents. – The definitions set out in G.S. 113A-9 apply to this section. The Department shall conduct a study of the environmental impacts of any proposed transfer of water for which a certificate is required under this section. The study shall meet all of the requirements set forth in G.S. 113A-4 and rules adopted pursuant to G.S. 113A-4. An environmental assessment shall be prepared for any petition for a certificate under this section. The determination of whether an environmental impact statement shall also be required shall be made in accordance with the provisions of Article 1 of Chapter 113A of the General Statutes; except that an environmental impact statement shall be prepared for every proposed transfer of water from one major river basin to another for which a certificate is required under this section. The applicant who petitions the Commission for a certificate under this section shall pay the cost of special studies necessary to comply with Article 1 of Chapter 113A of the General Statutes. An environmental impact statement prepared pursuant to this subsection shall include all of the following:

(1) A comprehensive analysis of the impacts that would occur in the source river basin and the receiving river basin if the petition for a certificate is granted.

(2) An evaluation of alternatives to the proposed interbasin transfer, including water supply sources that do not require an interbasin transfer and use of water conservation measures.

(3) A description of measures to mitigate any adverse impacts that may arise from the proposed interbasin transfer.

(e) Public Hearing on the Draft Environmental Document. – The Commission shall hold a public hearing on the draft environmental document for a proposed interbasin transfer after giving at least 30 days' written notice of the hearing in the Environmental Bulletin and as provided in subdivisions (2) and (3) of subsection (c) of this section. The notice shall indicate where a copy of the environmental document can be reviewed and the procedure to be followed by anyone wishing to submit written comments and questions on the environmental document. The Commission shall prepare a record of all comments and written responses to questions posed in writing. The record shall include complete copies of scientific or technical comments related to the potential impact of the interbasin transfer. The Commission shall accept written comment on the draft environmental document for a minimum of 30 days following the last public hearing. The applicant who petitions the Commission for a certificate under this section shall pay the costs associated with the notice and public hearing on the draft environmental document.

(f) Determination of Adequacy of Environmental Document. – The Commission shall not act on any petition for an interbasin transfer until the Commission has determined that the environmental document is complete and adequate. A decision on the adequacy of the environmental document is subject to review in a contested case on the decision of the Commission to issue or deny a certificate under this section.

(g) Petition. – An applicant for a certificate shall petition the Commission for the certificate. The petition shall be in writing and shall include all of the following:

(1) A general description of the facilities to be used to transfer the water, ~~including the location and capacity of water intakes, pumps, pipelines, and other facilities.~~including current and projected areas to be served by the transfer, current and projected capacities of intakes, and other relevant facilities.

(2) A description of all the proposed consumptive and nonconsumptive uses of the water to be transferred.

(3) A description of the water quality of the source river and receiving river, including information on aquatic habitat for rare, threatened, and endangered species; in-stream flow data for segments of the source and receiving rivers that may be affected by the transfer; and any waters that are impaired pursuant to section 303(d) of the federal Clean Water Act (33 U.S.C. § 1313(d)).

(4) A description of the water conservation measures used by the applicant at the time of the petition and any additional water conservation measures that the applicant will implement if the certificate is granted.

(5) A description of all sources of water within the receiving river basin, including surface water impoundments, groundwater wells, reinjection storage, and purchase of water from another source within the river basin, that is a practicable alternative to the proposed transfer that would meet the applicant's water supply needs. The description of water sources shall include sources available at the time of the petition for a certificate and any planned or potential water sources.

(6) A description of water transfers and withdrawals registered under G.S. 143-215.22H or included in a local water supply plan prepared pursuant to G.S. 143-355(l) from the source river basin, including transfers and withdrawals at the time of the petition for a certificate and any planned or reasonably foreseeable transfers or withdrawals by a public water system with service area located within the source river basin.

(7) A demonstration that the proposed transfer, if added to all other transfers and withdrawals required to be registered under G.S. 143-215.22H or included in any local water supply plan prepared by a public water system with service area located within the source basin pursuant to G.S. 143-355(l) from the source river basin at the time of the petition for a certificate, would not reduce the amount of water available for use in the source river basin to a degree that would impair existing uses, pursuant to the antidegradation policy set out in 40 Code of Federal Regulation § 131.12 (Antidegradation Policy) (1 July 2006 Edition) and the statewide antidegradation policy adopted pursuant thereto, or existing and planned consumptive and nonconsumptive uses of the water in the source river basin. If the proposed transfer would impact a reservoir within the source river basin, the demonstration must include a finding that the transfer would not result in a water level in the reservoir that is inadequate to support existing uses of the reservoir, including recreational uses.

(8) The applicant's future water supply needs and the present and reasonably foreseeable future water supply needs for public water systems with service

area located within the source river basin. The analysis of future water supply needs shall include agricultural, recreational, and industrial uses, and electric power generation. Local water supply plans prepared pursuant to G.S. 143-355(l) for water systems with service area located within the source river basin shall be used to evaluate the projected future water needs in the source river basin that will be met by public water systems.

(9) The applicant's water supply plan prepared pursuant to G.S. 143-355(l). If the applicant's water supply plan is more than two years old at the time of the petition, then the applicant shall include with the petition an updated water supply plan.

(10) Any other information deemed necessary by the Commission for review of the proposed water transfer.

(h) Settlement Discussions. – Upon the request of the applicant, any interested party, or the Department, or upon its own motion, the Commission may appoint a mediation officer. The mediation officer may be a member of the Commission, an employee of the Department, or a neutral third party but shall not be a hearing officer under subsections (e) or (j) of this section. The mediation officer shall make a reasonable effort to initiate settlement discussions between the applicant and all other interested parties. Evidence of statements made and conduct that occurs in a settlement discussion conducted under this subsection, whether attributable to a party, a mediation officer, or other person shall not be subject to discovery and shall be inadmissible in any subsequent proceeding on the petition for a certificate. The Commission may adopt rules to govern the conduct of the mediation process.

(i) Draft Determination. – Within 90 days after the Commission determines that the environmental document prepared in accordance with subsection (d) of this section is adequate or the applicant submits its petition for a certificate, whichever occurs later, the Commission shall issue a draft determination on whether to grant the certificate. The draft determination shall be based on the criteria set out in this section and shall include the conditions and limitations, findings of fact, and conclusions of law that would be required in a final determination. Notice of the draft determination shall be given as provided in subsection (c) of this section.

(j) Public Hearing on the Draft Determination. – Within 60 days of the issuance of the draft determination as provided in subsection (i) of this section, the Commission shall hold public hearings on the draft determination. At least one hearing shall be held in the affected area of the source river basin, and at least one hearing shall be held in the affected area of the receiving river basin. In determining whether more than one public hearing should be held within either the source or receiving river basins, the Commission shall consider the differing or conflicting interests that may exist within the river basins, including the interests of both upstream and downstream parties potentially affected by the proposed transfer. The public hearings shall be conducted by one or more hearing officers appointed by the Chair of the Commission. The hearing officers may be members of the Commission or employees of the Department. The Commission shall give at least 30 days' written notice of the public hearing as provided in subsection (c) of this section. The Commission shall accept written comment on the draft determination for a minimum of 30 days following the last public hearing. The Commission shall prepare a record of all comments and written responses to questions posed in writing. The record shall include complete copies of scientific or technical comments related to the potential impact of the interbasin transfer. The applicant who petitions the Commission for a certificate under this section shall pay the costs associated with the notice and public hearing on the draft determination.

(k) Final Determination: Factors to be Considered. – In determining whether a certificate may be issued for the transfer, the Commission shall specifically consider each of the following items and state in writing its findings of fact and conclusions of law with regard to each item:

(1) The necessity and reasonableness of the amount of surface water proposed to be transferred and its proposed uses.

(2) The present and reasonably foreseeable future detrimental effects on the source river basin, including present and future effects on public, industrial, economic, recreational, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, electric power generation, navigation, and recreation. Local water supply plans for public water systems with service area located within the source river basin prepared pursuant to G.S. 143-355(l) shall be used to evaluate the projected future water needs in the source river basin that will be met by public water systems. Information on projected future water needs for public water systems with service area located within the source river basin that is more recent than the local water supply plans may be used if the Commission finds the information to be reliable. The determination shall include a specific finding as to measures that are necessary or advisable to mitigate or avoid detrimental impacts on the source river basin.

(3) The cumulative effect on the source major river basin of any water transfer or consumptive water use that, at the time the Commission considers the petition for a certificate is occurring, is authorized under this section, or is projected in any local water supply plan for public water systems with service area located within the source river basin that has been submitted to the Department in accordance with G.S. 143-355(l).

(4) The present and reasonably foreseeable future beneficial and detrimental effects on the receiving river basin, including present and future effects on public, industrial, economic, recreational, and agricultural water supply needs, wastewater assimilation, water quality, fish and wildlife habitat, electric power generation, navigation, and recreation. Local water supply plans prepared pursuant to G.S. 143-355(l) that affect the receiving river basin shall be used to evaluate the projected future water needs in the receiving river basin that will be met by public water systems. Information on projected future water needs that is more recent than the local water supply plans may be used if the Commission finds the information to be reliable. The determination shall include a specific finding as to measures that are necessary or advisable to mitigate or avoid detrimental impacts on the receiving river basin.

(5) The availability of reasonable alternatives to the proposed transfer, including the potential capacity of alternative sources of water, the potential of each alternative to reduce the amount of or avoid the proposed transfer, probable costs, and environmental impacts. In considering alternatives, the Commission is not limited to consideration of alternatives that have been proposed, studied, or considered by the applicant. The determination shall include a specific finding as to why the applicant's need for water cannot be satisfied by alternatives within the receiving basin, including unused capacity under a transfer for which a certificate is in effect or that is otherwise authorized by law at the time the applicant submits the petition. The determination shall consider the extent to which access to potential sources of surface water or groundwater within the receiving river basin is no longer available due to depletion, contamination, or the declaration of a capacity use area under Part 2 of Article 21 of Chapter 143 of the General Statutes. The determination shall consider the feasibility of the applicant's purchase of water from other water suppliers within the receiving basin and of the transfer of water from another sub-basin within the receiving major river basin. Except in circumstances of technical or economic infeasibility or

adverse environmental impact, the Commission's determination as to reasonable alternatives shall give preference to alternatives that would involve a transfer from one sub-basin to another within the major receiving river basin over alternatives that would involve a transfer from one major river basin to another major river basin.

(6) If applicable to the proposed project, the applicant's present and proposed use of impoundment storage capacity to store water during high-flow periods for use during low-flow periods and the applicant's right of withdrawal under G.S. 143-215.44 through G.S. 143-215.50.

(7) If the water to be withdrawn or transferred is stored in a multipurpose reservoir constructed by the United States Army Corps of Engineers, the purposes and water storage allocations established for the reservoir at the time the reservoir was authorized by the Congress of the United States.

(8) Whether the service area of the applicant is located in both the source river basin and the receiving river basin.

(9) Any other facts and circumstances that are reasonably necessary to carry out the purposes of this Part.

(l) Final Determination: Information to be Considered. – In determining whether a certificate may be issued for the transfer, the Commission shall consider all of the following sources of information:

(1) The petition.

(2) The environmental document prepared pursuant to subsection (d) of this section.

(3) All oral and written comment and all accompanying materials or evidence submitted pursuant to subsections (e) and (j) of this section.

(4) Information developed by or available to the Department on the water quality of the source river basin and the receiving river basin, including waters that are identified as impaired pursuant to section 303(d) of the federal Clean Water Act (33 U.S.C. § 1313(d)), that are subject to a total maximum daily load (TMDL) limit under subsections (d) and (e) of section 303 of the federal Clean Water Act, or that would have their assimilative capacity impaired if the certificate is issued.

(5) Any other information that the Commission determines to be relevant and useful.

(m) Final Determination: Burden and Standard of Proof; Specific Findings. – The Commission shall grant a certificate for a water transfer if the Commission finds that the applicant has established by a preponderance of the evidence all of the following:

(1) The benefits of the proposed transfer outweigh the detriments of the proposed transfer. In making this determination, the Commission shall be guided by the approved environmental document and the policy set out in subsection (t) of this section.

(2) The detriments have been or will be mitigated to the maximum degree practicable.

(3) The amount of the transfer does not exceed the amount of the projected shortfall under the applicant's water supply plan after first taking into account all other sources of water that are available to the applicant.

(4) There are no reasonable alternatives to the proposed transfer.

(n) Final Determination: Certificate Conditions and Limitations. – The Commission may grant the certificate in whole or in part, or deny the certificate. The Commission may impose any conditions or limitations on a certificate that the Commission finds necessary to achieve the purposes of this Part including a limit on the period for which the certificate is valid. The conditions and limitations shall include any mitigation measures proposed by the

applicant to minimize any detrimental effects within the source and receiving river basins. In addition, the certificate shall require all of the following conditions and limitations:

(1) A water conservation plan that specifies the water conservation measures that will be implemented by the applicant in the receiving river basin to ensure the efficient use of the transferred water. Except in circumstances of technical or economic infeasibility or adverse environmental impact, the water conservation plan shall provide for the mandatory implementation of water conservation measures by the applicant that equal or exceed the most stringent water conservation plan implemented by a ~~community water system, as defined in G.S. 143-355(l),~~ public water system that withdraws water from the source river basin.

(2) A drought management plan that specifies how the transfer shall be managed to protect the source river basin during drought conditions or other emergencies that occur within the source river basin. Except in circumstances of technical or economic infeasibility or adverse environmental impact, this drought management plan shall include mandatory reductions in the permitted amount of the transfer based on the severity and duration of a drought occurring within the source river basin and shall provide for the mandatory implementation of a drought management plan by the applicant that equals or exceeds the most stringent water conservation plan implemented by a ~~community water system, as defined in G.S. 143-355(l),~~public water system that withdraws water from the source river basin.

(3) The maximum amount of water that may be ~~transferred on a daily basis,~~transferred, calculated as a daily average of a calendar month, and methods or devices required to be installed and operated that measure the amount of water that is transferred.

(4) A provision that the Commission may amend a certificate to reduce the maximum amount of water authorized to be transferred whenever it appears that an alternative source of water is available to the certificate holder from within the receiving river basin, including, but not limited to, the purchase of water from another water supplier within the receiving basin or to the transfer of water from another sub-basin within the receiving major river basin.

(5) A provision that the Commission shall amend the certificate to reduce the maximum amount of water authorized to be transferred if the Commission finds that the applicant's current projected water needs are significantly less than the applicant's projected water needs at the time the certificate was granted.

(6) A requirement that the certificate holder report the quantity of water transferred during each calendar quarter. The report required by this subdivision shall be submitted to the Commission no later than 30 days after the end of the quarter.

(7) Except as provided in this subdivision, a provision that the applicant will not resell the water that would be transferred pursuant to the certificate to another public water ~~supply~~ system. This limitation shall not apply in the case of a proposed resale or transfer among public water ~~supply~~ systems within the receiving river basin as part of an interlocal agreement or other regional water supply arrangement, provided that each participant in the interlocal agreement or regional water supply arrangement is a co-applicant for the certificate and will be subject to all the terms, conditions, and limitations made applicable to any lead or primary applicant.

(o) Administrative and Judicial Review. – Administrative and judicial review of a final decision on a petition for a certificate under this section shall be governed by Chapter 150B of the General Statutes.

(p) Certain Preexisting Transfers. – In cases where an applicant requests approval to increase a transfer that existed on 1 July 1993, the Commission may approve or disapprove only the amount of the increase. If the Commission approves the increase, the certificate shall be issued for the amount of the preexisting transfer plus any increase approved by the Commission. A certificate for a transfer approved by the Commission under G.S. 162A-7 shall remain in effect as approved by the Commission and shall have the same effect as a certificate issued under this Part. A certificate for the increase of a preexisting transfer shall contain all of the conditions and limitations required by subsection (m) of this section.

(q) Emergency Transfers. – In the case of water supply problems caused by drought, a pollution incident, temporary failure of a water plant, or any other temporary condition in which the public health, safety, or welfare requires a transfer of water, the Secretary of Environment and Natural Resources may grant approval for a temporary transfer. Prior to approving a temporary transfer, the Secretary shall consult with those parties listed in subdivision (3) of subsection (c) of this section that are likely to be affected by the proposed transfer. However, the Secretary shall not be required to satisfy the public notice requirements of this section or make written findings of fact and conclusions of law in approving a temporary transfer under this subsection. If the Secretary approves a temporary transfer under this subsection, the Secretary shall specify conditions to protect other water users. A temporary transfer shall not exceed six months in duration, but the approval may be renewed for a period of six months by the Secretary based on demonstrated need as set forth in this subsection.

(r) Relationship to Federal Law. – The substantive restrictions, conditions, and limitations upon surface water transfers authorized in this section may be imposed pursuant to any federal law that permits the State to certify, restrict, or condition any new or continuing transfers or related activities licensed, relicensed, or otherwise authorized by the federal government. This section shall govern the transfer of water from one river basin to another unless preempted by federal law.

(s) Planning Requirements. – When any transfer for which a certificate was issued under this section equals or exceeds eighty percent (80%) of the maximum amount authorized in the certificate, the applicant shall submit to the Department a detailed plan that specifies how the applicant intends to address future foreseeable water needs. If the applicant is required to have a local water supply plan, then this plan shall be an amendment to the local water supply plan required by G.S.143-355(l). When the transfer equals or exceeds ninety percent (90%) of the maximum amount authorized in the certificate, the applicant shall begin implementation of the plan submitted to the Department.

(t) Statement of Policy. – It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina. It is the public policy of this State that the reasonably foreseeable future water needs of a public water system with its service area located primarily in the receiving river basin are subordinate to the reasonably foreseeable future water needs of a public water system with its service area located primarily in the source river basin. Further, it is the public policy of the State that the cumulative impact of transfers from a source river basin shall not result in a violation of the antidegradation policy set out in 40 Code of Federal Regulations § 131.12 (1 July 2006 Edition) and the statewide antidegradation policy adopted pursuant thereto.

~~(u) Renewal of Certificate. – A petition to extend or renew a certificate shall be treated as a new petition.~~

(v) Modification of Certificate. – A certificate may be modified as provided in this subsection.

(1) The Commission or the Department may make any of the following modifications to a certificate after providing electronic notice to persons who have identified themselves in writing as interested parties:

a. Correction of typographical errors.
b. Clarification of existing conditions or language.
c. Updates, requested by the certificate holder, to a conservation plan, drought management plan, or compliance and monitoring plan.
d. Modifications requested by the certificate holder to reflect altered requirements due to the amendment of this section.

(2) A person who holds a certificate for an interbasin transfer of water may request that the Commission modify the certificate. The request shall be considered and a determination made according to the following procedures:

a. The certificate must have been issued pursuant to G.S. 162A-7, 143-215.22I, or 143-215.22L and the certificate holder must be in substantial compliance with the certificate.
b. The certificate holder shall file a notice of intent to file a request for modification that includes a nontechnical description of the certificate holder's request and identification of the proposed water source.
c. The certificate holder shall prepare an environmental document pursuant to subsection (d) of this section, except that an environmental impact statement shall not be required for the modification of a certificate unless it would otherwise be required by Article 1 of Chapter 113A of the General Statutes.
d. Upon determining that the documentation submitted by the certificate holder is adequate to satisfy the requirements of this subsection, the Department shall publish a notice of the request for modification in the North Carolina Register and shall hold a public hearing at a location convenient to both the source and receiving river basins. The Department shall provide written notice of the request for the modification and the public hearing in the Environmental Bulletin, a newspaper of general circulation in the source river basin, a newspaper of general circulation in the receiving river basin, and as provided in subdivision (3) of subsection (c) of this section. The certificate holder who petitions the Commission for a modification under this subdivision shall pay the costs associated with the notice and public hearing.
e. The Department shall accept comments on the requested modification for a minimum of 30 days following the public hearing.
f. The Commission or the Department may require the certificate holder to provide any additional information or documentation it deems reasonably necessary in order to make a final determination.
g. The Commission shall make a final determination whether to grant the requested modification based on the factors set out in subsection (k) of this section, information provided by the certificate holder, and any other information the Commission deems relevant. The Commission shall state in writing its findings of fact and conclusions of law with regard to each factor.
h. The Commission shall grant the requested modification if it finds that the certificate holder has established by a preponderance of the evidence that the requested modification satisfies the requirements of subsection (m) of this section. The Commission may grant the requested modification in whole or in part, or deny the request, and may impose such limitations and conditions on the modified certificate as it deems necessary and relevant to the modification.

i. The Commission shall not grant a request for modification if the modification would result in the transfer of water to an additional major river basin.

j. The Commission shall not grant a request for modification if the modification would be inconsistent with the December 3, 2010 Settlement Agreement entered into between the State of North Carolina, the State of South Carolina, Duke Energy Carolinas, and the Catawba River Water Supply Project.

(w) Requirements for Coastal Counties. – A petition for a certificate to transfer surface water to supplement ground water supplies in the 15 counties designated as the Central Capacity Use Area under 15A NCAC 2E .0501, or to transfer surface water withdrawn from the mainstem of a river to provide service to one of the coastal area counties designated pursuant to G.S. 113A-103, shall be considered and a determination made according to the following procedures:

(1) The applicant shall file a notice of intent that includes a nontechnical description of the applicant's request and identification of the proposed water source.

(2) The applicant shall prepare an environmental document pursuant to subsection (d) of this section, except that an environmental impact statement shall not be required unless it would otherwise be required by Article 1 of Chapter 113A of the General Statutes.

(3) Upon determining that the documentation submitted by the applicant is adequate to satisfy the requirements of this subsection, the Department shall publish a notice of the petition in the North Carolina Register and shall hold a public hearing at a location convenient to both the source and receiving river basins. The Department shall provide written notice of the petition and the public hearing in the Environmental Bulletin, a newspaper of general circulation in the source river basin, a newspaper of general circulation in the receiving river basin, and as provided in subdivision (3) of subsection (c) of this section. The applicant who petitions the Commission for a certificate under this subdivision shall pay the costs associated with the notice and public hearing.

(4) The Department shall accept comments on the petition for a minimum of 30 days following the public hearing.

(5) The Commission or the Department may require the applicant to provide any additional information or documentation it deems reasonably necessary in order to make a final determination.

(6) The Commission shall make a final determination whether to grant the certificate based on the factors set out in subsection (k) of this section, information provided by the applicant, and any other information the Commission deems relevant. The Commission shall state in writing its findings of fact and conclusions of law with regard to each factor.

(7) The Commission shall grant the certificate if it finds that the applicant has established by a preponderance of the evidence that the petition satisfies the requirements of subsection (m) of this section. The Commission may grant the certificate in whole or in part, or deny the request, and may impose such limitations and conditions on the certificate as it deems necessary and relevant."

SECTION 3.(a) Section 1 of S.L. 2011-298 reads as rewritten:

"**SECTION 1.** Notwithstanding G.S. 143-215.22I and G.S. 143-215.22L, a certificate issued pursuant to G.S. 143-215.22L is not required for a transfer of water from one river basin to another river basin to supplement groundwater supplies in the 15 counties designated as the Central Coastal Plain Capacity Use Area under 15A NCAC 2E .0501."

SECTION 3.(b) Section 4 of S.L. 2011-298 reads as rewritten:

"**SECTION 4.(a)** This act is effective when it becomes law and applies to any transfer of water from one river basin to another river basin to supplement groundwater supplies in the 15 counties designated as the Central Coastal Plain Capacity Use Area under 15A NCAC 2E .0501 initiated on or after August 31, 2007.

"**SECTION 4.(b)** Section 1 of this act shall expire if the cumulative volume of water ~~transfers~~ transfers, by public water supply systems sharing a single intake, from one river basin to another river basin to supplement groundwater supplies in the 15 counties designated as the Central Coastal Plain Capacity Use Area under 15A NCAC 2E .0501 initiated on or after August 31, 2007, by any person that does not hold a certificate for an interbasin transfer on or before the effective date of this act, exceeds 8,000,000 gallons per day.

"**SECTION 4.(c)** Any transfer of water from one river basin to another river basin to supplement groundwater supplies in the 15 counties designated as the Central Coastal Plain Capacity Use Area under 15A NCAC 2E .0501 initiated while Section 1 of this act is effective shall not require certification pursuant to G.S. 143-215.22L upon expiration of Section 1 of this act."

SECTION 3.(c) Section 7 of S.L. 2007-518, as amended by Section 4 of S.L. 2010-155 and Section 2 of S.L. 2011-298, reads as rewritten:

"~~**SECTION 7.(a)** Except as provided in subsections (b), (c) and (d) of this section, this~~ **SECTION 7.** This act becomes effective when it becomes law and applies to any petition for a certificate for a transfer of surface water from one river basin to another river basin first made on or after that date.

~~"**SECTION 7.(c)** For purposes of this subsection, "isolated river basin" means each of the following river basins set out in G.S. 143-215.22G(1):~~

~~g.~~	~~2-6~~	~~New River.~~
~~v.~~	~~9-4~~	~~Shallotte River.~~
~~aa.~~	~~12-1~~	~~Albemarle Sound.~~
~~hh.~~	~~17-1~~	~~White Oak River.~~

~~For a petition for a certificate for transfer of surface water from a river basin to an isolated river basin, this act becomes effective 1 July 2020. Prior to 1 July 2020, a petition for a certificate for transfer of surface water from a river basin to an isolated river basin shall be considered and acted upon by the Environmental Management Commission pursuant to the procedures and standards set out in G.S. 143-215.22I on 1 July 2007.~~

~~"**SECTION 7.(d)** Notwithstanding subsection (c) of this section, an applicant for a certificate for transfer of surface water from a river basin to an isolated river basin may request that the applicant be subject to the certification process that would apply if the transfer was not into an isolated river basin.~~"

SECTION 4. Section 1(a)(2) of S.L. 2013-50 is repealed.

SECTION 5. S.L. 2013-50 is amended by adding a new section to read:

"**SECTION 1.(g)** For purposes of this section, a public water system shall not include any system that is operated simultaneously with a sewer system by the same public body, in conjunction with the provision of other utility services for its customers."

SECTION 6. If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

SECTION 7. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 22nd day of July, 2013.

Became law upon approval of the Governor at 10:46 a.m. on the 23rd day of August, 2013.

Selected North Carolina General Statutes

§ 160A-311. Public enterprise defined.

As used in this Article, the term "public enterprise" includes:

(1) Electric power generation, transmission, and distribution systems.

(2) Water supply and distribution systems.

(3) Wastewater collection, treatment, and disposal systems of all types, including septic tank systems or other on-site collection or disposal facilities or systems.

(4) Gas production, storage, transmission, and distribution systems, where systems shall also include the purchase or lease of natural gas fields and natural gas reserves, the purchase of natural gas supplies, and the surveying, drilling and any other activities related to the exploration for natural gas, whether within the State or without.

(5) Public transportation systems.

(6) Solid waste collection and disposal systems and facilities.

(7) Cable television systems.

(8) Off-street parking facilities and systems.

(9) Airports.

(10) Stormwater management programs designed to protect water quality by controlling the level of pollutants in, and the quantity and flow of, stormwater and structural and natural stormwater and drainage systems of all types.

§ 160A-312. Authority to operate public enterprises.

(a) A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

(b) A city shall have full authority to protect and regulate any public enterprise system belonging to or operated by it by adequate and reasonable rules. The rules shall be adopted by ordinance, shall apply to the public enterprise system both within and outside the corporate limits of the city, and may be enforced with the remedies available under any provision of law.

(c) A city may operate that part of a gas system involving the purchase and/or lease of natural gas fields, natural gas reserves and natural gas supplies and the surveying, drilling or any other activities related to the exploration for natural gas, in a partnership or joint venture arrangement with natural gas utilities and private enterprise.

Selected Provisions of the North Carolina Rules of Appellate Procedure

N.C. R. App. P. 10(c) Preservation of Issues at Trial; Proposed Issues on Appeal

. . .

(c) *Appellee's Proposed Issues on Appeal as to an Alternative Basis in Law.* Without taking an appeal, an appellee may list proposed issues on appeal in the record on appeal based on any action or omission of the trial court that was properly preserved for appellate review and that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. An appellee's list of proposed issues on appeal shall not preclude an appellee from presenting arguments on other issues in its brief.

Portions of the record or transcript of proceedings necessary to an understanding of such proposed issues on appeal as to an alternative basis in law may be included in the record on appeal by agreement of the parties under Rule 11(a), may be included by the appellee in a proposed alternative record on appeal under Rule 11(b), or may be designated for inclusion in the verbatim transcript of proceedings, if one is filed under Rule 9(c)(2).

N.C. R. App. P. 16(a)
Scope of Review of Decisions of Court of Appeals

(a) *How Determined.* Review by the Supreme Court after a determination by the Court of Appeals, whether by appeal of right or by discretionary review, is to determine whether there is error of law in the decision of the Court of Appeals. Except when the appeal is based solely upon the existence of a dissent in the Court of Appeals, review in the Supreme Court is limited to consideration of the issues stated in the notice of appeal filed pursuant to Rule 14(b)(2) or the petition for discretionary review and the response thereto filed pursuant to Rule 15(c) and (d), unless further limited by the Supreme Court, and properly presented in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court.

N.C. R. App. P. 28(b)-(c)
Briefs: Function and Content

. . .

(b) Content of Appellant's Brief. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the record on appeal shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(*c*) *Content of Appellee's Brief; Presentation of Additional Issues.* An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It need contain no statement of the issues presented, of the procedural history of the case, of the grounds for appellate review, of the facts, or of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the

appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

2016 WL 1551209
Only the Westlaw citation is currently available.
Supreme Court of North Carolina.

NORTH CAROLINA ASSOCIATION OF EDUCATORS, INC., Richard J. Nixon, Rhonda Holmes, Brian Link, Annette Beatty, Stephanie Wallace, and John Deville
v.
The STATE of North Carolina.

No. 228A15.
|
April 15, 2016.

Opinion

***1** Appeal pursuant to N.C.G.S. § 7A–30(2) from the decision of a divided panel of the Court of Appeals, —— N.C.App. ——, 776 S.E.2d 1 (2015), affirming orders entered on 6 June 2014 by Judge Robert H. Hobgood in Superior Court, Wake County. On 20 August 2015, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court on 15 February 2016.

Attorneys and Law Firms

Patterson Harkavy LLP, by Burton Craige and Narendra K. Ghosh; and National Education Association, by Philip Hostak, pro hac vice, for plaintiff-appellees.

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Gray Layton Kersh Solomon Furr & Smith, PA, by Michael L. Carpenter, for North Carolina Retired Governmental Employees' Association, amicus curiae.

McGuinness Law Firm, by J. Michael McGuinness, for Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for State Employees Association of North Carolina, Inc., amicus curiae.

EDMUNDS, Justice.

The North Carolina Constitution provides that "[t]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15. Until 2013, North Carolina public school teachers were employed under a system usually described generically as the "Career Status Law," through which teachers could earn career status after successfully completing a probationary period and receiving a favorable vote from their school board. N.C.G.S. § 115C–325 (2012). That process changed with passage of the Current Operations and Capital Improvements Appropriations Act of 2013, ch. 360, 2013 N.C. Sess. Laws 995 ("the Act"). Details of the Act are described below, but most pertinent to the case at bar, the Act retroactively revoked the career status of teachers who had already earned that designation by repealing the Career Status Law ("Career Status Repeal"), *id.*, sec. 9.6(a), at 1091, and created a new system of employment for public school teachers, *id.*, secs. 9.6(b) to 9 .7(y), at 1091–1116 (hereinafter sections 9.6 and 9.7).

Plaintiffs allege that sections 9.6 and 9.7 of the Act violate Article I, Section 10 of the United States Constitution (forbidding passage of any "Law impairing the Obligation of Contracts")

and Article I, Section 19 of the North Carolina Constitution (the Law of the Land Clause), as it applied to teachers who have previously earned career status. We conclude that repeal of the Career Status Law unlawfully infringes upon the contract rights of those teachers who had already achieved career status. As a result, we hold that sections 9.6 and 9.7 are unconstitutional, though only to the extent that the Act retroactively applies to teachers who had attained career status as of 26 July 2013.

*2 We begin our analysis with an overview of the evolution of state statutes that have controlled career status of public school teachers. For over four decades, North Carolina public schools have operated under what was commonly called the Career Status Law, a statutory framework setting out a system for the employment, retention, and dismissal of public school teachers. However, little in this framework has remained static over the years.

Beginning in 1971, the General Assembly created a procedure through which teachers who were employed for at least three consecutive years as probationers would become "career teachers" if the school board voted to reemploy the teacher for the upcoming school year. *See* Act of July 16, 1971, ch. 883, 1971 N.C. Sess. Laws 1396 (codified at N.C.G.S. § 115–142 (1971)). In addition, any teacher who had been employed in the same public school system for four consecutive years or been employed by the State as a teacher for five consecutive years would automatically became a career teacher. N.C.G.S. § 115–142(c). These career teachers were no longer subject to an annual appointment process, *id.* § 115–142(d), and could only be dismissed for one of twelve grounds specified in the statute, *id.* § 115–142(e)(1). If a teacher was to be dismissed, the act provided for notice and, if requested by the teacher, a review of the recommendation of dismissal by a panel of the Professional Review Committee prior to termination. *Id.* § 115–142(h). A local school board could choose not to renew its contract with a probationary teacher for any reason that was not "arbitrary, capricious, discriminatory or for personal or political reasons." *Id.* § 115–142(m)(2).

The system originally set up in 1971 has been subject to continual tinkering and revision by the General Assembly. In 1973, the General Assembly added a thirteenth statutory ground for dismissal of a teacher, *id.* § 115–142(e)(1)m (1975), and gave disappointed teachers the option of requesting either a review of a superintendent's dismissal recommendation by a panel of the Professional Review Committee or a hearing before the school board, *id.* § 115–142(h)(3) (1975). *See* Act of May 23, 1973, ch. 782, secs. 12, 20, 1973 N.C. Sess. Laws 1136, 1138, 1139 (codified at N.C.G.S. § 115–142 (1975)). In 1979, a fourteenth statutory ground for dismissal or demotion was added. *See* Act of June 8, 1979, ch. 864, sec. 2, 1979 N.C. Sess. Laws 1185, 1188 (codified at N.C.G.S. § 115–142(e)(1)n (1979)).

The next significant change came in the 1983 legislative session. The General Assembly amended the 1979 law to provide that, after a teacher had taught for three, four, or five consecutive years in a school system with more than 70,000 students, the local school board had authority to grant the teacher career status, reappoint the teacher to another probationary one-year contract, or decline to reappoint the teacher. *See* Act of May 26, 1983, ch. 394, 1983 N .C. Sess. Laws 301 (codified at N.C.G.S. § 115C–325(c)(1) (1985)). At the end of the probationary teacher's sixth year, the school board's choices were limited to appointment to career teacher status or nonrenewal of the appointment. N.C.G.S. § 115C–325(c)(1). However, the General Assembly did not extend

this program, so after 1 July 1985 the process through which teachers received career status reverted to the 1981 system. *See* Ch. 394, sec. 6, 1983 N.C. Sess. Laws at 302. In 1992, a new statutory ground for dismissal was added, along with an amendment allowing a teacher who was being considered for dismissal to request a hearing either before the local school board or before a panel of the Professional Review Committee (instead of the previously provided investigation of the superintendent's recommendation by the Professional Review Committee). *See* Act of July 14, 1992, ch. 942, 1991 N.C. Sess. Laws (Reg.Sess.1992) 730 (codified at N.C.G.S. § 115C–325(e)–(j) (1992)). Under either option, the hearing procedure was set out in subsection 115C–325(j). N.C.G.S. § 115C–325(e)(2), (h)(3), (i)(2) (1992).

*3 In 1997, the General Assembly enacted a comprehensive set of statutes that included measures aimed at improving student academic achievement, enhancing teacher skills and knowledge, and implementing a system to review more rigorous teacher preparation, professional development, and certification standards. *See* The Excellent Schools Act, ch. 221, 1997 N.C. Sess. Laws 427. The new law enacted, amended, or repealed many provisions related to education and included significant changes to section 115C–325. For example, the act increased from three to four the number of years of consecutive service a teacher had to complete before becoming eligible for career status. *See* N.C.G.S. § 115C–325(c)(1) (1997). This act also expanded the definition of "demote" to include some circumstances under which a career teacher was suspended without pay and excluded circumstances where bonus payments were reduced or eliminated. *Id.* § 115C–325(a)(4) (1997). The Professional Review Committee system was eliminated and replaced with case managers who were certified mediators specially trained by the State Board of Education. *Id.* § 115C–325(h)–(h1) (1997). Career employees being recommended for dismissal or demotion had the option of choosing between a hearing in front of a case manager, governed by subsection 115C–325(j), or a hearing in front of the school board, conducted pursuant to subsection 115C–325(j2). *Id.* § 115C–325(h)(3) (1997). In 2009, the legislature amended the statute to add procedural protections for probationary teachers. *See* Act of July 13, 2009, ch. 326, 2009 N.C. Sess. Laws 528 (codified at N.C.G.S. § 115C–325(m)(3)–(4) (2009)).

In 2011, the legislature eliminated case managers and replaced them with hearing officers before whom career status teachers could request a hearing prior to dismissal or demotion. *See* Act of June 17, 2011, ch. 348, sec. 1, 2011 N.C. Sess. Laws 1464, 1464 (codified at N.C.G.S. § 115C–325(a)(4c), (h)(3), (h1) (2011)). The act also provided a definition for "inadequate performance," one of the original statutory grounds for dismissal or demotion of a career employee. N.C.G.S. § 115C–325(e)(3) (2011).

The employment system in place at the time of the passage of the Act was codified under N.C.G.S. § 115C–325 (2012) and established two classes of public school teachers. Probationary teachers were defined in N.C.G.S. § 115C–325(a)(5), while career teachers were defined in N.C.G.S. § 115C–325(a)(1c). Probationary teachers were employed through annual contracts with the local board of education. *Id.* § 115C–325(m)(2). These contracts were subject to nonrenewal for any reason that was not "arbitrary, capricious, discriminatory or for personal or political reasons." *Id.* The school board would vote on whether to grant career status to a probationary teacher who had been employed by that school

system for four consecutive years. *Id.* § 115C–325(c)(1). Probationary teachers eligible for such a vote had the right to notice and a hearing before the board's vote if the superintendent did not intend to recommend the teacher for career status. *Id.* § 115C–325(m)(3)–(4). Upon a vote to grant career status, probationary teachers would enter into a career contract with their employing local board of education.

***4** Career status teachers could only be dismissed, demoted, or relegated to part-time status based on one or more of fifteen specified statutory grounds. *Id.* § 115C–325(e)(1). Prior to making a recommendation for dismissal, demotion, or relegation to part-time status of a career status teacher, the superintendent was required to give written notice of the grounds on which he or she believed the action to be justified. *Id.* § 115C–325(e)(2). Upon receipt of such written notice, a career teacher had a right to request a hearing before a hearing officer to contest the superintendent's recommendation, at which the career teacher was entitled "to be present and to be heard, to be represented by counsel and to present through witnesses any competent testimony relevant to the issue of whether grounds for dismissal or demotion exist." *Id.* § 115C–325(j)(3). The decision of the hearing officer could be further appealed to the full school board. *Id.* § 115C–325(j1)(1). The board could approve dismissal or demotion of a career teacher after undertaking a whole record review to determine whether the hearing officer's findings of fact were supported by substantial evidence. *Id.* § 115C–325(j2)(7).

This summary demonstrates that the General Assembly's treatment of career teacher status has changed significantly over the last forty years. Now the Career Status Law, N.C.G.S. § 115C–325 (2012), is no more. The changes under review here occurred in 2013, when the General Assembly passed the Act. Ch. 360, 2013 N.C. Sess. Laws at 995. The Act revokes career status for all teachers as of 1 July 2018. *Id.*, sec. 9.6(i), at 1103. Under the new system, teacher contracts are not open-ended, as was previously the case for career teachers, but instead extend "for a term of one, two, or four school years." N.C.G.S. § 115C–325.3(a) (2015). A decision not to renew a teacher's contract can be based on any reason not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." *Id* . § 115C–325.3(e) (2015). The superintendent must give the teacher written notice of a decision to recommend nonrenewal. *Id.* § 115C–325.3(d) (2015). Within ten days of receiving such notice, the teacher can petition the local school board for a hearing, but the school board has discretion whether to grant the request. *Id.* § 115C–325.3(e). Dismissal, demotion, or a change to part-time status during the term of the contract remains based on the fifteen statutory grounds and procedure set forth previously in the Career Status Law. *Id.* § 115C–325.4(a) (2015). Any teacher who had not achieved career status "prior to the 2013–2014 school year" is no longer eligible to receive career status in the future and will instead be employed primarily by one-year contracts, "except for qualifying teachers offered a four-year contract as provided in subsection (g) of this section, until the 2018–2019 school year." Ch. 360, sec. 9.6(f), 2013 N.C. Sess. Laws at 1103.[1]

[1] Subsections 9.6(g) and (h), which never went into effect, would have required superintendents to review the performance and evaluations of all teachers employed in their schools for at least three consecutive years and recommend one-quarter of those teachers to receive a four-year contract beginning

> in the 2014–15 school year. Ch. 360, sec. 9.6(f), 2013 N.C. Sess. Laws at 1103. The selected teachers would receive a five-hundred dollar annual pay raise for each year of the four-year contract in exchange for the relinquishing of career status. *Id.*, sec. 9.6(g)-(h), at 1103.

*5 On 17 December 2013, the North Carolina Association of Educators, Inc. (NCAE), five tenured public school teachers, and one probationary public school teacher filed a complaint in Superior Court, Wake County, challenging the constitutionality of the repeal of the Career Status Law under both the North Carolina and United States Constitutions. In their first claim for relief, plaintiffs alleged that the repeal constituted a "taking of property without just compensation in violation of Article I, Section 19 of the North Carolina Constitution." Plaintiffs further contended the repeal was an "impairment of contracts in violation of Article I, Section 10 of the United States Constitution." Plaintiffs requested a declaration that sections 9.6 and 9.7 of the Act are unconstitutional under both constitutions as applied retroactively to revoke career status from teachers who had previously earned that designation, and also as applied prospectively to probationary teachers who were employed by the public schools before the repeal and had been on a track leading to eligibility for career status. Plaintiffs also sought "a permanent injunction against the implementation and enforcement" of both sections as to all tenured and probationary teachers who were employed by public schools as of 26 July 2013.

On 17 January 2014, the State filed its answer denying all of plaintiffs' allegations. The State also filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, arguing that plaintiffs failed to state a legal claim upon which relief may be granted. On 10 March 2014, plaintiffs filed a motion for summary judgment, along with supporting affidavits, and the State responded with affidavits opposing plaintiffs' motion. After a 12 May 2014 hearing, the trial court on 6 June 2014 entered an order granting in part plaintiffs' motion as to the retroactive revocation of career status from teachers who already held that status. As to the claims brought on behalf of teachers who had not yet earned career status, the trial court denied in part plaintiffs' motion for summary judgment and granted summary judgment in favor of the State. The trial court declared unconstitutional sections 9.6 and 9.7 of the Act as they apply to career status teachers as of 26 July 2013. The court further enjoined the State from implementing and enforcing those provisions as to teachers holding career status on 26 July 2013, and also denied the State's oral motion to stay the trial court's permanent injunction. Plaintiffs and defendant filed separate notices of appeal.

The Court of Appeals unanimously affirmed the trial court's decision to grant summary judgment in favor of the State as to plaintiffs' claims on behalf of probationary teachers. *NCAE*, — N.C.App. ——, ——, 776 S.E.2d 1, 23–24 (2015) (majority); *id.* at ——, 776 S.E.2d at 24 (Dillon, J., concurring in part and dissenting in part). That decision was not appealed to this Court and we do not address it further. However, the Court of Appeals was divided as to career status teachers. The majority rejected the State's argument that the trial court erred as a matter of law when it granted summary judgment in favor of plaintiffs on the issue of whether retroactive application of the Career Status Repeal violated the Contract Clause of the United States Constitution. *Id.* at ——, 776 S.E.2d at 9 (majority). The majority acknowledged that in

Bailey v. State, 348 N.C. 130, 500 S.E.2d 54 (1998), this Court set out a three-part test for analyzing an alleged violation of the United States Constitution's Contract Clause. *NCAE,* —— N.C.App. at ——, 776 S.E.2d at 9–10. Under that test, the reviewing court considers "(1) whether a contractual obligation is present, (2) whether the state's actions impaired that contract, and (3) whether the impairment was reasonable and necessary to serve an important public purpose." *Bailey,* 348 N .C. at 141, 500 S.E.2d at 60 (citing *U.S. Tr. Co. of New York v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)). Applying the *Bailey* test and analyzing cases from this Court and the United States Supreme Court, the majority found that, as to the existence of a contractual right, the Career Status Law was a "statutory promise" and that, upon satisfying its requirements and achieving career status, plaintiffs "earned a vested right to career status protections." *NCAE,* —— N.C.App. at ——, 776 S .E.2d at 12. In considering next whether those statutory contractual rights were substantially impaired by the State's actions, the majority concluded that eliminating career contracts in favor of contracts for one, two, or four years substantially impaired the rights promised to plaintiffs. *Id.* at ——, 776 S.E.2d at 13. The majority also held that a school board's discretionary ability to deny renewal of a contract for a term of years without a hearing was a substantial change from the previous law's requirement of a hearing prior to imposition of termination, demotion, or other discipline. *Id.* at ——, 776 S.E.2d at 13. Accordingly, the court had "no trouble concluding that the trial court was correct in its determination that the Career Status Repeal substantially impairs Plaintiffs' vested contractual rights." *Id.* at ——, 776 S.E.2d at 13.

*6 Finally, the Court of Appeals was unpersuaded by the State's argument that the General Assembly repealed the Career Status Law in order to improve the public school systems by providing a method under which schools more easily could rid themselves of ineffective teachers. *Id.* at ——, 776 S.E.2d at 14. The court found the contention that these measures would improve the school system to be baseless and unsupported by the affidavits submitted by both parties. *Id.* at ——, 776 S.E.2d at 14. Even assuming the State's purpose was an important one, the majority was unconvinced that repealing the Career Status Law "was a reasonable and necessary means to advance that purpose." *Id.* at ——, 776 S.E.2d at 15. The majority found that no evidence suggested that the approach embodied in the Act served the purpose of removing incompetent teachers, particularly when less drastic alternatives exist for the reform of public education. *Id.* at ——, 776 S.E.2d at 15–16. The majority concluded that the trial court correctly found the repeal of the Career Status Law violated the United States Constitution's Contract Clause as to teachers who had already earned career status at the time of repeal. *Id.* at ——, 776 S.E.2d at 16. Based on this Contract Clause violation, the Court of Appeals further held that plaintiffs' contract right was a property interest that was being unjustly taken away by the repeal without compensation to plaintiffs, in violation of the Law of the Land Clause of the North Carolina Constitution. *Id.* at ——, 776 S.E .2d at 16–18.

The dissenting judge argued that the repeal is unconstitutional to the extent that it allows career status teachers to be stripped of a protected property interest without a hearing. *Id.* at ——, 776 S.E.2d at 25 (Dillon, J., concurring in part and dissenting in part). Nevertheless, the dissenting judge would not hold that the Career Status Law created any contractual rights, *id* . at ——, 776 S.E.2d at 28, and except for the

portion giving local boards the discretion whether to hold a hearing before depriving a career teacher of his or her property interest in continued employment, would find the repeal of that law constitutional on its face, *id.* at ——, 776 S.E.2d at 29. The State appealed to this Court on the basis of the dissenting opinion and we granted the State's petition for discretionary review as to additional related issues.

This Court presumes that statutes passed by the General Assembly are constitutional, *State v. Packingham,* 368 N.C. 380, 382–83, 777 S.E.2d 738, 742 (2015) (citing *Wayne Cty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs,* 328 N.C. 24, 29, 399 S.E.2d 311, 314–15 (1991)), and duly passed acts will not be struck unless found unconstitutional beyond a reasonable doubt, *Morris v. Holshouser,* 220 N.C. 293, 295, 17 S.E.2d 115, 117 (1941). Even so, we review de novo any challenges to a statute's constitutionality. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.,* 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citations omitted).

*7 Plaintiffs first allege that the Career Status Repeal violated Article I, Section 10 of the Constitution of the United States by impairing the contract rights of teachers who had earned career status before the repeal. The Contract Clause, "one of the few express limitations on state power" in the Constitution, *U.S. Tr. Co.,* 431 U.S. at 14, 97 S.Ct. at 1514, 52 L.Ed.2d at 104, provides that "[n]o State shall ... pass any ... Law impairing the Obligation of Contracts," U.S. Const. art. I, § 10. As the Court of Appeals correctly recognized, this Court uses the three-factor test set out in *Bailey* to determine whether a Contract Clause violation exists. *Bailey,* 348 N.C. at 141, 500 S.E.2d at 60 (citing *U.S. Tr. Co.,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92).

Accordingly, we first consider whether any contractual obligation arose from the statute making up the now-repealed Career Status Law. The United States Supreme Court has recognized a presumption that a state statute "is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Bd. of Educ.,* 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57, 62 (1937). This presumption is rooted in the longstanding principle that the primary function of a legislature is to make policy rather than contracts. *Indiana ex rel. Anderson v. Brand,* 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685, 690 (1938). A party asserting that a legislature created a statutory contractual right bears the burden of overcoming that presumption, *Dodge,* 302 U.S. at 79, 58 S.Ct. at 100, 82 L.Ed. at 62, by demonstrating that the legislature manifested a clear intention to be contractually bound, *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.,* 470 U.S. 451, 466, 105 S.Ct. 1441, 1451, 84 L.Ed.2d 432, 446 (1985). Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals. *See Kornegay v. City of Goldsboro,* 180 N.C. 441, 451, 105 S.E. 187, 192 (1920). We are deeply reluctant to "limit drastically the essential powers of a legislative body" by finding a contract created by statute without compelling supporting evidence. *Nat'l R.R.,* 470 U.S. at 466, 105 S.Ct. at 1451, 84 L.Ed.2d at 446; *see also Mial v. Ellington,* 134 N.C. 131, 153, 46 S.E. 961, 968 (1903) ("[M]any things done by the State may seem to hold out promises to individuals which, after all, cannot be treated as contracts without hampering the legislative power of the State in a manner that would soon leave it without the means of performing its

essential functions.").

This requirement for explicit indications of legislative intent is shown in two United States Supreme Court cases in which the use or omission of the word "contract" in the statute was deemed critical. In *Phelps v. Board of Education,* 300 U.S. 319, 57 S.Ct. 483, 81 L.Ed. 674 (1937), that Court considered a New Jersey employment system where, after completing three years of service, teachers were hired for an ongoing open-ended period during which they could not be dismissed or subjected to a reduction in salary without notice and a hearing. *Id.* at 320–21, 57 S.Ct. at 484, 81 L.Ed. at 676. The Supreme Court found that this system did not set up a contract but instead "established a legislative status for teachers," *id.* at 322, 57 S.Ct. at 484, 81 L.Ed. at 676, and was a "regulation of the conduct of the board" that created no binding obligation, *id.* at 323, 57 S.Ct. at 485, 81 L.Ed. at 677. However, the Court shortly thereafter distinguished *Phelps* in *Brand,* 303 U.S. 95, 58 S.Ct. 443, 82 L.Ed. 685, when it held that Indiana's "Teachers' Tenure Act" created a statutory contractual right between the teachers and a local school district. In *Brand,* the Court looked specifically to the language of Indiana's Act, noting that the word "contract" was peppered throughout nearly every section of the statute. *Id.* at 105, 58 S.Ct. at 448, 82 L.Ed. at 693 ("The title of the Act is couched in terms of contract. It speaks of the making and cancelling of indefinite contracts. In the body the word 'contract' appears ten times in § 1, eleven times in § 2, and four times in § 4....").

***8** These cases indicate that courts must consider the language used by the legislature to determine whether a statute "provides for the execution of a written contract on behalf of the state." *Dodge,* 302 U.S. at 78, 58 S.Ct. at 100, 82 L.Ed. at 61. North Carolina's Career Status Law does not present the type of unmistakable legislative intent found by the United States Supreme Court in the statute at issue in *Brand.* Nowhere in the portion of section 115C–325 establishing the promotion of a teacher to career status does the word "contract" appear. *Compare* N.C.G.S. § 115C–325(c)(1) (2012), *with Brand,* 303 U.S. at 101 n. 14, 58 S.Ct. at 446 n. 14, 82 L.Ed. at 691 n. 14 (discussing the Indiana statute's frequent use of that term). The word "contract," as used in the remainder of our Career Status Law refers only to individual contracts with the local school boards and relationships between teachers and the local school system, with no mention of the State.

Turning next to cases from this Court, we considered an alleged Contract Clause violation in the context of retirement benefits in *Bailey,* 348 N.C. 130, 500 S.E.2d 54, and in the context of disability retirement payments in *Faulkenbury v. Teachers' & State Employees' Retirement System of North Carolina,* 345 N.C. 683, 483 S.E.2d 422 (1997). In both cases, this Court held that vested contractual rights were created by the statutes at issue because, at the moment the plaintiffs fulfilled the conditions set out in the two benefits programs, the plaintiffs earned those benefits. Though the benefits would be received at a later time, the plaintiffs' right to receive them accrued immediately, became vested, and a contract was formed between the plaintiffs and the State. *Bailey,* 348 N.C. at 138, 500 S.E.2d at 58 ("After employment for the set number of years, an employee is deemed to have 'vested' in the retirement system."); *Faulkenbury,* 345 N.C. at 692, 483 S.E.2d at 428 (stating that the plaintiffs fulfilled their condition of working for five years and "[a]t that time, the plaintiffs' rights to benefits in case they were disabled became vested"). In other words, neither the retirement benefits in *Bailey* nor the disability payments in *Faulkenbury* were based upon future actions by

the plaintiffs. Instead, those benefits had been presently earned and became vested as the plaintiffs performed, even though payment of those benefits was deferred until a later time.

In contrast, a teacher has no vested career status rights at the end of the probationary period. Instead, after successfully meeting all the requirements, a teacher could enter a career contract with the school board. Thus, we see that the Career Status Act is a regulation of conduct through which local school boards can exercise their discretion to enter into contracts with teachers for whom they approve career status. The Career Status Law contemplates the creation of individual contracts between school boards and teachers but does not itself establish any benefit provided to teachers by the State nor create any relationship between them. As a result, plaintiffs have not overcome the strong presumption against finding a vested right created by the Career Status Law.

***9** In addition, the oft-amended course of the Career Status Law over the decades is evidence that the State did not intend to create a contract with teachers by the terms of the statute. Each new version of the statute did not immediately create a vested contract between the State and public school teachers. The amendments instead altered details of career status while leaving the overall career status system intact, thereby allowing the possibility of future modifications and amendments as needs arose. Accordingly, we conclude the Career Status Law did not itself create any vested contractual rights.

However, our analysis does not end here. "[L]aws which subsist at the time and place of the making of a contract ... enter into and form a part of it, as if they were expressly referred to or incorporated in its terms." *Home Bldg. & Loan Ass'n v. Blaisdell,* 290 U.S. 398, 429–30, 54 S.Ct. 231, 237, 78 L.Ed. 413, 424 (1934) (quoting *Von Hoffman v. City of Quincy,* 71 U.S. (4 Wall.) 535, 550, 18 L.Ed. 403, 408 (1866)). Before receiving career status, plaintiffs entered individual contracts with the local school boards. Implied as a part of each of these contracts was the Career Status Law. As the State concedes in its brief, the "applicable statutory terms must be read into the contracts" and the contracts "[i]ncorporat[ed] the statutory body of 'school law' applicable to Plaintiffs as teachers." The statutory system that was in the background of the contract between the teacher and the board set out the mechanism through which the teachers could obtain career status. A teacher's career status rights under the Career Status Law become vested only upon completing several consecutive years as a probationary teacher and then receiving approval from the school board. Thus, vesting stems not from the Career Status Law, but from the teacher's entry into an individual contract with the local school system. At the time the parties made the contract, the right to career status vested. At that point, the General Assembly no longer could take away that vested right retroactively in a way that would substantially impair it.

The record demonstrates the importance of those protections to the parties and the teachers' reliance upon those benefits in deciding to take employment as a public school teacher. For instance, in his affidavit, Bruce W. Boyles, Cleveland County Superintendent of Schools, stated that "[t]eachers rely upon their career status rights in making employment decisions"; "[w]hen interviewing and hiring teachers, teachers frequently ask about career status rights"; and such protections have value to prospective teachers which "makes up for not having better monetary compensation." The affidavits of plaintiffs Annette Beatty, John deVille, Rhonda Holmes, Richard J. Nixon, and Stephanie Wallace establish that they were

promised career status protections in exchange for meeting the requirements of the law, relied on this promise in exchange for accepting their teacher positions and continuing their employment with their school districts, and consider the benefits and protections of career status to offset the low wages of public school teachers. Thus, we conclude that, although the Career Status Law itself created no vested contractual rights, the contracts between the local school boards and teachers with approved career status included the Career Status Law as an implied term upon which teachers relied.

***10** We next move to the second part of a Contract Clause analysis in which we consider whether the vested rights found above were substantially impaired by the Career Status Repeal. *U.S. Tr. Co.*, 431 U.S. at 17, 97 S.Ct. at 1515, 52 L.Ed.2d at 106. "Total destruction of contractual expectations is not necessary for a finding of substantial impairment." *Energy Reserves Grp. v. Kan. Power & Light Co.*, 459 U.S. 400, 411, 103 S.Ct. 697, 704, 74 L.Ed.2d 569, 580 (1983) (citing *U.S. Tr. Co.*, 431 U.S. at 26–27, 97 S.Ct. at 1519–20, 52 L.Ed.2d at 112). However, a showing that the change in the law results in an outcome different from that "reasonably expected from the contract" may be sufficient to show a substantial deprivation. *Id.* at 411, 103 S.Ct. at 704, 74 L.Ed.2d at 580. Plaintiffs contend that the repeal of the Career Status Law and its protections substantially impairs the contractual rights for which they bargained.

The benefits enjoyed by career teachers have been described above, most of which boil down to enhanced job security. The Career Status Law establishing those benefits was replaced by a new system that eliminates career status entirely, allowing local school boards and teachers to enter into contracts in durations of only one, two, or four years. N.C.G.S. § 115C–325.3(a) (2015). Nonrenewal of these shortened contracts can be based on any reason not "arbitrary, capricious, discriminatory, for personal or political reasons, or on any basis prohibited by State or federal law." *Id.* § 115C–325.3(e) (2015). If the superintendent recommends that a teacher not be renewed, the teacher can petition for a hearing but the school board has unrestricted discretion whether to grant or deny that request. *Id.*

We hold that these changes are a substantial impairment of the bargained-for benefit promised to the teachers who have already achieved career status. Retroactively revoking this status from those whose career status rights had already vested deprives career teachers of the promise of continuing employment, as well as the right to a hearing in circumstances in which their now-shortened contracts may not be renewed. Plaintiffs' affidavits indicate they relied both on the promise of continued employment as a form of added compensation to supplement their lower salaries and on the benefits of career status when deciding to continue teaching in the public school systems. Elimination of these benefits substantially deprives current career status teachers of the value of their vested contractual rights.

Under the third prong of the *Bailey* test, a substantial impairment of contractual rights can still be upheld if the impairment was a reasonable and necessary means of serving a legitimate public purpose. *U.S. Tr. Co.*, 431 U.S. at 25, 97 S.Ct. at 1519, 52 L.Ed.2d at 112. The Contract Clause is not meant to bind the hands of the State absolutely. The Clause's "prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.' " *Energy Reserves Grp.*, 459 U.S. at 410, 103 S.Ct. at 704, 74 L.Ed.2d at 580 (quoting *Blaisdell*, 290 U.S. at 434, 54 S.Ct. at 239, 78 L.Ed. at 426).

Courts weigh a state's interest in exercising its police power against the impairment of individual contractual rights when determining whether the impairment is sufficiently justified. This portion of the inquiry involves a two-step process, first identifying the actual harm the state seeks to cure, then considering whether the remedial measure adopted by the state is both a reasonable and necessary means of addressing that purpose. *See id.* at 412, 103 S.Ct. at 705, 74 L.Ed.2d at 581.

***11** Accordingly, we consider the interest the State argues is furthered by repealing the Career Status Law. The burden is upon the State when it seeks to justify an otherwise unconstitutional impairment of contract. *U.S. Tr. Co.*, 431 U.S. at 31, 97 S.Ct. at 1522, 52 L.Ed.2d at 115. Relying on Article I, Section 15 of our constitution, which establishes the duty of the State to guard and maintain the people's right to the privilege of education, the State claims that improving public education is an essential constitutional responsibility. *Hoke Cty. Bd. of Educ. v. State*, 358 N.C. 605, 614–15, 599 S.E.2d 365, 376 (2004) ("[T]he State and State Board of Education had constitutional obligations to provide the state's school children with an opportunity for a sound basic education, and that the state's school children had a fundamental right to such an opportunity." (citing *Leandro v. State*, 346 N.C. 336, 351, 488 S.E.2d 249, 257 (1997))). The State argues that "the goal of the Career Status Repeal was to address 'adequate' but marginal teachers with career status" as part of a series of reforms intended to improve the deficiencies in the State's public school system.

We fully agree that maintaining the quality of the public school system is an important purpose. Nevertheless, while alleviating difficulties in dismissing ineffective teachers might be a legitimate end justifying changes to the Career Status Law, no evidence indicates that such a problem existed. Instead, the record is replete with affidavits from teachers and administrators who relate that the Career Status Law did not impede their ability to dismiss teachers who failed to meet the academic standards necessary properly to educate students in public schools. Instead, these affiants indicate that the Career Status Law was an important incentive in recruiting and retaining high-quality teachers. Inadequate teachers could be and were dismissed under the Career Status Law on the statutory grounds laid out in N.C.G.S. § 115C–325(e)(1) (2012), including dismissal for "[i]nadequate performance," defined in the Career Status Law as "(i) the failure to perform at a proficient level on any standard of the evaluation instrument or (ii) otherwise performing in a manner that is below standard," *id.* § 115C–325(e)(3) (2012). Accordingly, we fail to see a legitimate public purpose for which it was necessary substantially to impair the vested contractual rights of career status teachers.

Moreover, even if we conclude that a legitimate public purpose did exist justifying such an impairment, the method adopted for alleviating that harm must be necessary and reasonable. *U.S. Tr. Co.*, 431 U.S. at 25, 97 S.Ct. at 1519, 52 L.Ed.2d at 112. While we acknowledge that the retroactive repeal was motivated by the General Assembly's valid concern for flexibility in dismissing low-performing teachers, we do not see how repealing career status from those for whom that right had already vested was necessary and reasonable. "[A] State is not free to impose a drastic impairment [of contract] when an evident and more moderate course would serve its purposes equally well." *Id.* at 31, 97 S.Ct. at 1522, 52 L.Ed.2d at 115. In the record, plaintiffs suggest several alternatives to retroactive repeal of the Career Status Law that would allow school boards more flexibility in

dismissing low-quality teachers. The legislature could add additional grounds for dismissal as it did in 1973, *see* Ch. 782, sec. 12, 1973 N.C. Sess. Laws at 1138, in 1979, *see* Ch. 864, sec. 2, 1979 N.C. Sess. Laws at 1188, and in 1992, *see* Ch. 942, sec. 1, 1991 N.C. Sess. Laws (Reg.Sess.1992) at 730. Or the General Assembly could have refined the definition of "inadequate performance" as it did in 2011. *See* Ch. 348, sec. 1, 2011 N.C. Sess. Laws at 1464. Given the possibility of such less sweeping alternatives for improving teacher quality, "the State has failed to demonstrate" why the retroactive repeal was necessary and reasonable. *U.S. Tr. Co.*, 431 U.S. at 31, 97 S.Ct. at 1522, 52 L.Ed.2d at 115.

***12** Because we hold the repeal is unconstitutional in its retroactive application based on the Contract Clause of the United States Constitution, we need not address plaintiffs' alternative claim based on Article I, Section 19 of the North Carolina Constitution. Accordingly, we conclude that the retroactive repeal of career status from those teachers who had earned that designation prior to the Career Status Repeal is unconstitutional. The vested contractual rights of those teachers were substantially impaired without adequate justification, in violation of the Contract Clause of the United States Constitution.

MODIFIED AND AFFIRMED.

All Citations

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