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Concurrent Session:

That's a Nice Airport and Water/Sewer System You Have... Would Be a Pity If Something Happened to It

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Charlotte, North Carolina

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CITY OF ASHEVILLE V. STATE OF NORTH CAROLINA



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A

ASHEVILLE WATER SYSTEM HISTORY AND LITIGATION BACKGROUND

ASHEVILLE WATER SYSTEM LITIGATION HISTORY

- Over a period of many years beginning around the turn of the 20th century Asheville assembles approximately 20,000 acres of watershed centering on the North Fork of the Swannanoa River and Bee Tree Creek in Buncombe County. The city constructs two impoundments within the watershed at a distance of approximately fifteen miles from the city along with water treatment facilities at the reservoirs and transmission mains to bring the treated water to the city. Both Bee Tree Creek and the Swannanoa North Fork are non-navigable streams.

- Between 1923 and 1927 pursuant to acts of the General Assembly six special purpose districts are created in Buncombe County to provide water and sewer service to customers in those districts. The districts are created as municipal corporations and are empowered to issue, and do in fact issue, bonds to finance the construction of mains and other distribution facilities within their territories. Initially, water is purchased by the districts in bulk from the Asheville water system, and the districts are billed through master meters. Maintenance of the distribution systems of the special districts is overseen by the trustees of the districts, who are also the same as the board of commissioners for Buncombe County, and all financing costs are borne by the districts and the county.

- In 1928 the master meter arrangement is ended and Asheville begins to supply water directly to customers within the special districts and bill those customers directly. At that time the rates charged by Asheville to customers within the special districts are approximately double the rates charged to customers residing inside the city limits. In 1929 pursuant to an enactment of the General Assembly the boundaries of Asheville's corporate limits are expanded to include a portion of some of the special districts, and Asheville assumes a pro rata portion of the then-existing indebtedness of those districts.

- In the 1920's the N.C. Supreme Court renders two conflicting decisions, both opinions authored by the same justice, on the constitutionality under Article II, §24 of the North Carolina Constitution of enactments creating special purpose districts for purposes of providing water and/or sewer service. *Reed v. Howerton Engineering,* 188 N.C. 39, 123 S.E. 479 (1924)(finding local act creating special districts in Buncombe County to be constitutional); *Drysdale v. Prudden,* 195 N.C. 722, 143 S.E. 190 (1928)(finding local act creating special sanitary district in Henderson County to be unconstitutional).

- Following Asheville's "land boom" in the 1920's and the subsequent Great Depression, all local governments in Buncombe County and all of the special districts are forced into bankruptcy. Buncombe County takes over the affairs of the special districts, and in 1936 new debt is issued to refinance all defaulted bonds of the city and the special districts.

- The General Assembly enacts 1933 N.C.Session Law ch. 399, popularly known as "Sullivan I," which prohibits Asheville from charging rates for service to customers connected to water mains that were constructed using proceeds from bonds issued by the special purpose districts in Buncombe County different from the rates charged to customers inside the Asheville city limits.

- Asheville complies with Sullivan I until 1955, at which time it adopts new water rates imposing higher charges for customers outside its city limits than for those inside the city. A group of Buncombe County residents challenge Asheville's new rate structure. Although the trial court holds that Sullivan I is unconstitutional, that decision is reversed and the N.C. Supreme Court rejects all constitutional challenges to Sullivan I made by Asheville. Notably, Asheville does not claim that Sullivan I was an unconstitutional "local" or "special" act under the N.C. Constitution's provision that was the predecessor to and was substantially identical to current Article II §24. Asheville contends only that Sullivan I violates the Fourteenth Amendment to the U.S. Constitution and the "law of the land" clause in Article I §17 of the North Carolina Constitution, which is uniformly interpreted to be the "due process" and "equal protection" provision of the state constitution.

Candler v. City of Asheville, 247 N.C. 398, 101 S.E.2d 470 (1958) ("Asheville I").

- In 1960 Asheville annexes further portions of the territory of the original special districts and assumes an additional pro rata share of the outstanding bond debt issued in the 1930's. This debt, along with other local government debt that was refinanced after the 1930's bankruptcies, is finally paid in full in 1976.

- In 1980 and in consequence of the final repayment of all Depression-era debt, Asheville signals its intention to file a new suit challenging the constitutionality of Sullivan I. As a result of negotiations between the City and Buncombe County, however, a lawsuit is avoided and instead the city and county enter into an interlocal agreement combining all Asheville water system assets and operations and all Buncombe County and special district assets and operations under Asheville's management. This arrangement is referred to as the "Asheville/Buncombe Water Authority," although no new legal entity is created, and the term "authority" is a misnomer. The interlocal agreement also addresses a number of other topics in addition to the parties' water systems. In one provision in the interlocal agreement Asheville covenants that it will not seek to challenge the constitutionality of Sullivan I while the agreement remains in effect. Under the agreement the rates to be established for water service are to be, and in fact were, the same for both Asheville customers and customers residing in other areas of Buncombe County.

- Between 1981 and the final termination of the interlocal agreement Buncombe County makes substantial capital contributions to the expansion, repair, and maintenance of the combined water system. However, neither when the interlocal agreement is created, during the time it was in effect, nor when it is finally terminated do the parties ever reach any agreement on precisely which water lines and facilities had been or were being contributed by and were therefore owned by Asheville and which had been or were being contributed by Buncombe County and were therefore owned by Buncombe County, either itself or as successor to the special districts.

- In 2005 Asheville allows the interlocal agreement to expire in accord with its stated terms, and the prospect of new litigation over Sullivan I thereby returns. In anticipation of and literally on the eve of the expiration of the interlocal agreement, however, the General Assembly enacts 2005 N.C. Session Law ch. 140, "Sullivan II," and 2005 Session Law ch. 139, "Sullivan III." Taken together these two enactments, (a) generalize the provisions of Sullivan I to prohibit different rates for any customers located anywhere in Buncombe County outside the Asheville city limits, (b) require that Asheville segregate all water system revenues and expenses in a separate fund and prohibit most transfers from the separate fund to other funds established by the city for other public purposes, and (c) remove the city's existing immunity from liability for damages to customers located outside its city limits arising from the provision of or failure to provide water service to such customers.

- Asheville immediately files suit challenging all three Sullivan Acts on several grounds under provisions of the North Carolina Constitution. The trial court, "while holding its nose," upholds all three enactments against all constitutional challenges by Asheville. **Unpublished trial court decision is provided in these materials.** On appeal the N.C. Court of Appeals sustains the trial court's rulings, among other things concluding: (a) that Asheville cannot not challenge Sullivan I's constitutionality, even though the grounds advanced in Asheville's new 2005 suit are different from those presented in *Candler v. City of Asheville*; (b) that *Candler* does not bar constitutional challenges to Sullivan II and III; (c) that Sullivan II and III are "local" acts within the meaning of N.C. Constitution Article II §24; (d) but that Sullivan II and III do not relate to health and sanitation under clause (1)(a)nor do they regulate trade or commerce under clause (1)(j)but that they instead pertain only to economic and financial matters involving the supply of water in Buncombe County. The N.C. Supreme Court declines to review the Court of Appeals decision, either by appeal of right or by petition for discretionary review.

City of Asheville v. State of North Carolina, 192 N.C.App. 1, 665 S.E.2d 103 (2008) ("Asheville II").

- In response to continuing friction among Asheville, Buncombe County, and adjoining Henderson County concerning extension of water service to locations in Buncombe and Henderson Counties in 2013 General Assembly enacts 2013 N.C. Session Law ch. 50 (popularly called "the Water Act," and not known as "Sullivan IV"). The legislation is proposed by powerful legislators representing portions of Buncombe County and Henderson County. **Detailed legislative history is provided in these materials.**

- Immediately upon passage of the Water Act Asheville challenges the law on several grounds: (1) that it is an unconstitutional local act relating to health and sanitation within the meaning of Article II, §24(1)(a); (2) that it is an unconstitutional local act relating to non-navigable streams within the meaning of Article II, § 24(1)(c); (3) that it is an unconstitutional taking of Asheville's proprietary assets for an impermissible purpose; (4) that it is an unconstitutional taking of Asheville's proprietary assets without any provision for payment of just compensation; (5) that it deprives Asheville of its property without due process of law in violation of Article I §19 of the North Carolina Constitution; and (6) that it impairs Asheville's contractual obligations under bond indentures relating to the financing of the water system in violation of N.C.Gen.Stat. §159-93.

- This time the same Superior Court judge who heard Asheville's earlier challenge to Sullivan II and III rules in favor of Asheville on its constitutional claims under Article II §24, its due process claim under Article I §19, and on its two claims relating to the taking of its property for an improper purpose and without provision for just compensation. The trial court reserves ruling on the claim arising under N.C.Gen.Stat. §159-93 alleging an illegal impairment of Asheville's obligations to the holders of its bonds relating to the water system. **Unpublished trial court decision is provided in these materials.**

- In 2015 the Court of Appeals reverses the trial court, finding that the Water Act is a "local" enactment but that it does not "relate to health and sanitation" but is instead grounded in the General Assembly's plenary power to organize and re-organize local governments. The Court relies in part on *Reed v. Howerton Engineering, Inc. supra.* Asheville's other constitutional claims are likewise rejected, and the Court of Appeals rules that Asheville had not preserved its statutory impairment of contract claim for appeal and that the claim was thus deemed abandoned.

City of Asheville v. State of North Carolina, 243 N.C.App. 249, **777 S.E.2d 92 (2015).**

- On appeal and discretionary review the N.C. Supreme Court reverses the Court of Appeals with respect to the claim that the Water Act is an unconstitutional local act relating to health and sanitation. In the course of doing so, Supreme Court rejects the

Court of Appeals' reliance on *Reed v. Howerton Engineering* and notes that the better authority on the point is *Drysdale v. Prudden, supra. The* Court declines to rule on any other claims presented, finding it unnecessary to do so, but it does rule that Asheville could not be deemed to have abandoned its statutory impairment of contract claim.

City of Asheville v. State of North Carolina, 369 N.C. 80, 794 S.E.2d 759 (2016) **("Asheville III")**

FINIS ????

This Was Our Valley[1]: Taking Asheville's Watershed



Nan and Will Burnett's Lodge, c. 1925

by Anne Chesky Smith

On a mild mid-March day in 1903, North Fork Watershed's first warden, Will Burnett, turned a newly-placed cast iron valve, opening the pipe that would send the first trickle of drinking water into the mountain town of Asheville, North Carolina, nearly 20 miles away. This water—some of the purest in the United States—would later flood the school, church, graveyard, and homesteads built by Burnett's family and friends over the last century and a half.

Will Burnett and his brother, Bart, two of eight children born to Confederate soldier Marcus Lafayette "Fate" Burnett and Sarah Jane Allison, became the first wardens to patrol the newly formed Asheville Watershed in 1903, when the city condemned and purchased a portion of the land (a little under 5,000 acres) that makes up the present day, approximately 22,000-acre property. Over the next four decades, the Burnett brothers were allowed to live near their homeplace, but under the charge that they would

> *Notices were nailed to the trees containing a new word to the mountaineers, 'No Trespassing.' The trails were closed. The saddened community, bewildered, wandered away. Thousands begged for permission to pass through the forests again, but were refused."*

Will and Bart's father, Fate, however, found an ingenious way to legally claim his birthright just as his boys had as wardens. Fate Burnett loved to hunt—especially bear. Some time after the watershed land was posted no hunting, fishing, or trespassing, Fate approached Asheville's mayor to discuss a concern. He told the mayor about a number of deep pools within the watershed property that black bears would wallow in. Appalled at the thought of bears mudding the city's water, the mayor gave Fate the exclusive right to chase all the bears out of the watershed by whatever means necessary.

Fate was the grandson of Frederick Thomas Burnett Sr. and his wife, who was known only as "Granny Else." In 1800, Frederick Sr., Else, and their children stopped under the shadow of the great Black and Craggy mountain ranges and declared they would go no further west than the uninhabited forests on the North Fork of the Swannanoa River. Though the land was rocky, the game was abundant and the family soon built the first log cabin in the valley very near the spot where over 100 years later City of Asheville workers would bulldoze and shape the land into a 1309-foot earthen dam.

Many other families migrated to the North Fork Valley over the next century—Pattons, Tysons, Powers, Presleys, Bartlets, Lydas, Morrises, Hendersons, Cordells, Allisons, Hambys, Walkers, McAfees, Stepps, Connallys, and (perhaps most famously) North Carolina's Civil War Governor Zebulon B. Vance—but the Burnetts remained a central force in the development of the North Fork Valley from an unexplored wilderness to a community that at its beginning had a population competing with the City of Asheville. Will and Bart's great Uncle Else, named for Granny Else, organized and gave the sermons at the first church in the valley in 1823. Will and Bart's cousin, William Henry "Champ" Burnett taught at the one-room schoolhouse that stood at the confluence of Sugar Fork and North Fork. Champ also served as the church song leader as well as the Justice of the Peace, magistrate, and constable for the North Fork Valley.

With such strong ties to the community, the Burnett family did not give up their land without a fight. On August 7, 1911, W.H. Burnett sent a handwritten letter to Mr. S. Montgomery of the City of Asheville stating,

> *"I learn from your notice in Asheville Citizen that you have cut timber, built houses, put up notices, and otherwise trespassed on five acres of land on Mitchell's peak, including the summit and Dr. Mitchell's grave. The above belongs to my wife, Mrs. Elsie E. Burnett. You have no wright [sic] title or permission to this property and [I] hereby notify you to remove the things from said lands, which I hope you may do without further … trouble."*

of … its turbulent trout streams and eternal hills…. The many jars of cream, butter and eggs in stone jars sunken in the huge poplar log … it being the only refrigeration to us at the period with the temperature around 40 the year round. We holed up potatoes and turnips, cabbage and carrots in mother earth. The Honorable Zeb Vance and Col. J.K. Conley [sic] were about our only sources of cash income, 80 cents per day from sun up to sun down."

A great many men lived principally by gathering wild ginseng and other herbs sold to Hines and Wilson at Cooper Station, now Swannanoa. Of course some of us had hogs that lived on chestnut and acorns and other mountain resources…. It surely grieves me to look up old North Fork at the works of man, it's all gashed up by modern civilization…. Such is life. There is nothing we can do about it."

And, it seems, he was right. The original North Fork Church and Schoolhouse are now under water and most other structures were simply abandoned when the land was condemned. Today, all that is left are the remnants of stone fireplaces and foundations dotting the landscape—many toppled over by time, weather, and fallen trees. Even the still-standing chimneys from the more elaborate two-story homes are missing their mantles, looted from the properties years before and used in new construction in the nearby town of Black Mountain. Though the original Burnetts have passed on, their descendants still feel the effects of the loss of their family's land. Many crave the right to visit the valley of their ancestors.



The Asheville Watershed as viewed from the nearby Grovestone Quarry.

ratified in May 2013. North Carolina Governor, Pat McCrory, however, allowed the bill to become law without his signature because of the "number of complicated inter-governmental issues" that it had the potential to raise. As expected, soon after the bill became law, the City of Asheville filed a suit against the State of North Carolina to resolve the issues McCrory spoke of, and the law is now under a temporary restraining order. The final hearing for the case is set to be held in the spring of 2014.

Whichever way the case goes, the war over ownership of the land is unlikely to end. The battle between the Burnetts and the City of Asheville was not the first fight over rights to the property – the land had been in use for centuries as a Native American hunting ground prior to 1800 – and it is unlikely that the final ruling in the 2014 court case will be the last. The shift to a publicly-owned resource in the early 1900s preserved not only a source of water, but also an entire Appalachian ecosystem. The Burnetts and other valley families sacrificed a great deal so that Asheville could provide some of the nation's cleanest water to tens of thousands of people in Buncombe County. But now, with the potential transfer of ownership, residents are concerned that development, timbering, and even fracking could occur within the boundaries of the city's watershed, which is currently closed to the public and under a conservation easement. It is very possible that the fight for the future of the property is just beginning.[2]

UPDATES:

June 9, 2014 – Wake County Superior Court Judge Howard Manning Jr. found the 2013 law transferring Asheville's water system to the Metropolitan Sewerage District to be unconstitutional. Judge Manning said that the law was an "unlawful taking" of the city's assets. He also referred to the lack of compensation that would have been granted to the city if the law came into effect. The Republican sponsors of the law feel sure Manning's decision will be overturned.

October 2015 – "The state filed a notice of appeal in July and a three-judge panel of the Court of Appeals decided unanimously in the state's favor. The court's opinion written by Judge Chris Dillon, stated that even if the statute was a local law, it did not directly deal with matters of health or sanitation. The court also found the state did not have to compensate the city for taking over the water system."

March 7, 2016 – "The city appealed to the state Supreme Court, which in January agreed to hear the case. The court has also issued a stay on the Court of Appeals decision. If the North Carolina Supreme Court rules against the city, it could mean the end of a three-year legal battle, with roots going back decades, and the takeover of the municipal water system by a regional authority. The court could also uphold an earlier lower court decision that the Court of Appeals overruled, which found the takeover unconstitutional. That could send the matter back to a lower court for further review."

December 22, 2016 – "Asheville will maintain control of Western North Carolina's biggest water system following a state Supreme Court ruling handed down Wednesday. In the 5-2 ruling the court sided with the city against the state General Assembly and its 2013 law to strip Asheville of the water system. The decision overturned a Court of Appeals ruling favoring the legislature."

1 The title of this piece comes from the wonderful book *This Was My Valley* by Fred Burnett.

2 This article was first published in *Now & Then: The Appalachian Magazine*.

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B

The "Sullivan Acts"

- 1933 Public-Local Laws, ch. 399 ("Sullivan I")

- 2005 Session Laws ch. 140 ("Sullivan II")

- 2005 Session Laws ch. 139 ("Sullivan III")

STATE OF NORTH CAROLINA

PUBLIC-LOCAL LAWS

ENACTED BY THE

GENERAL ASSEMBLY

AT ITS

SESSION OF 1933

BEGUN AND HELD IN THE CITY OF RALEIGH

ON

WEDNESDAY, THE FOURTH DAY OF JANUARY, A. D. 1933

PUBLISHED BY AUTHORITY

RALEIGH, N. C.
1933

Turnkey fees.

SEC. 12. That the turnkey fees allowed the jailer of Bladen County shall be twenty-five cents one way, in lieu of the fees now allowed by law.

Salary of County Attorney.

SEC. 13. That the County Attorney of Bladen County shall receive a salary of six hundred dollars per annum, payable monthly, in full compensation for all services performed by him as such County Attorney.

Taxes necessary to pay salaries and fees ordered levied.

SEC. 14. The salaries, fees, commissions and compensation of the several officers and employees of Bladen County, as hereinbefore named, shall be as fixed in this Act, and the Board of Commissioners and any and all other county officials charged with duty in the premises are hereby authorized, empowered and directed to levy the necessary taxes making provision for and paying the salaries and compensation as fixed in this Act.

Conflicting laws repealed.

SEC. 15. All prior laws and clauses of laws in conflict with this Act, whether passed at this or previous sessions of the General Assembly, are, to the extent of such conflict, hereby repealed.

Effective May 1, 1933.

SEC. 16. This Act shall be in full force and effect on May first, nineteen hundred thirty-three.

Ratified this the 28th day of April, A.D. 1933.

H. B. 931

CHAPTER 399

AN ACT TO REGULATE CHARGES MADE BY THE CITY OF ASHEVILLE FOR WATER CONSUMED IN BUNCOMBE COUNTY WATER DISTRICTS.

The General Assembly of North Carolina do enact:

Charges for water by Asheville to users in Buncombe County regulated.

SECTION 1. That from and after the passage of this act it shall be unlawful for the City of Asheville, or any of the governing authorities, agents, or employees thereof, to charge, exact, or collect from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of laying such main, a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said city.

Discontinuance of supply for failure to pay rent.

SEC. 2. That the City of Asheville is hereby specifically authorized and empowered, through its officers, agents and employees, to cause any user of water who shall fail to pay promptly his water rent for any month to be cut off, and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages.

Cutting out users outside City in emergencies.

SEC. 3. That it is the purpose and intent of this act to declare that persons residing outside of the corporate limits of the City

of Asheville shall be entitled to the use of Asheville surplus water only, and the governing body of the City of Asheville is authorized and empowered to discontinue the supply of water to any districts, or persons, out of the corporate limits of the City of Asheville at any time that there may be a drought or other emergency, or at any time the governing body of the City of Asheville may deem that the city has use for all of its water supply.

Water wastage prohibited.

SEC. 4. That it shall be the duty of the County Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville, in Buncombe County, to maintain the water lines in proper repair in order that there may not be a waste of water by leakage.

Conflicting laws repealed.

SEC. 5. That all laws and clauses of laws in conflict with this act are hereby repealed.

SEC. 6. That this act shall be in force from and after its ratification.

Ratified this the 28th day of April, A.D. 1933.

H. B. 1250

CHAPTER 400

AN ACT TO REGULATE THE BUILDING OF DAMS ACROSS CREEKS, BAYS, AND RIVER ESTUARIES. (APPLICABLE ONLY TO CARTERET COUNTY.)

The General Assembly of North Carolina do enact:

Damming water courses allowed in Carteret County.

SECTION 1. That it shall be lawful for any person or persons owning the lands on both sides of any creek, bay, river or branch of such river or creek, subject to the approval and permission of the War Department of the United States Government, to construct and maintain across said creek, bay, river or branch thereof, a dam, breakwater, or fill, such construction and maintenance to be performed upon such terms and conditions as may be prescribed by the said War Department.

SEC. 2. *Provided*, that this act shall apply only to Carteret County.

Conflicting laws repealed.

SEC. 3. That all laws and clauses of laws in conflict with this act are hereby repealed.

SEC. 4. That this act shall be in force and effect from and after its ratification.

Ratified this the 28th day of April, A.D. 1933.

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

SESSION LAW 2005-140
HOUSE BILL 1065

AN ACT REGARDING WATER RATES IN BUNCOMBE COUNTY.

Whereas, the North Carolina General Assembly previously adopted Chapter 399 of the 1933 Public-Local Laws (known as the "Sullivan Act") to address the particular circumstances of the supplying of water to certain residents of Buncombe County by the City of Asheville and the charges therefor; and

Whereas, from the adoption of the Sullivan Act until the present, the City of Asheville, directly or through the Asheville/Buncombe Water Authority, has continued to supply water to certain consumers of water in Buncombe County outside the corporate limits of the City of Asheville in those areas of the County where water has been supplied by the City of Asheville, all at a rate no higher than that charged by the City of Asheville to similarly situated water consumers residing within the corporate limits of said city; and

Whereas, from and after 1981, the City of Asheville and the County of Buncombe have discharged various of their obligations relating to the provision of water to certain citizens of Buncombe County residing inside and outside the corporate limits of the City of Asheville and the maintenance and upkeep of their respective water facilities pursuant to an Agreement between the City of Asheville and the County of Buncombe establishing the Asheville/Buncombe Water Authority dated 29 October 1981 and certain supplements and amendments thereto (hereinafter "Water Agreement"); and

Whereas, practically all, if not all, of the cost of the waterlines serving Buncombe County (outside of the corporate limits of the City of Asheville) has been paid by the County of Buncombe, the various water and sewer districts of the County of Buncombe, by the Asheville/Buncombe Water Authority pursuant to its duties to Buncombe County, and by private developers and landowners, desiring water service in such areas and not paid by the City of Asheville; and

Whereas, during the term of the Water Agreement, the County of Buncombe has paid directly to the City of Asheville in excess of $37,000,000 pursuant to that Agreement; and

Whereas, at the time of the adoption of the Water Agreement, certain public recreational facilities were transferred to the County of Buncombe by the City of Asheville, and during the term of the Water Agreement, the costs related to those facilities have been borne by the County of Buncombe; and

Whereas, during the term of the Water Agreement, the County of Buncombe has expended $9,025,715 on capital expenditures for the public recreational facilities referenced above; and

Whereas, the City of Asheville has given notice to terminate the Water Agreement as of 30 June 2005; and

Whereas, the City of Asheville is entitled to a fair return on its capital investment; and

Whereas, upon the termination of the Water Agreement as noticed by the City of Asheville for 30 June 2005, the ownership of the public recreational facilities shall revert to the City of Asheville; and

Whereas, upon the termination of the Water Agreement as noticed by the City of Asheville for 30 June 2005, the ownership of all water system facilities conveyed to the City of Asheville pursuant to the Water Agreement shall revert to the County of Buncombe and its water districts; and

Whereas, the citizens of Buncombe County outside the corporate limits of the City of Asheville now, or in the future to be, supplied water from lines connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto, are entitled to obtain water at a fair rate from the water system for which they have paid, through taxes, through payments for water, and through direct payments by the County of Buncombe and its water and sewer districts; and

Whereas, the population of Buncombe County is projected to grow by more than thirty-eight percent over the next twenty-five years, and more than two-thirds of that growth is projected to occur outside the current city limits of the City of Asheville; and

Whereas, the Asheville/Buncombe Water Authority has developed substantial excess capacity in anticipation of the growth of population in Buncombe County and of supplying water to the additional population from facilities the cost of which has been, and in the future will be, paid out of water system revenues; and

Whereas, the excess capacity in the water system maintained by the Asheville/Buncombe Water Authority is such that the system has a current capacity in excess of 41 million gallons per day and a current average usage of 22 million gallons per day; and

Whereas, the Mills River water treatment plant of the Asheville/Buncombe Water Authority was constructed at a location and in a manner that substantial additional capacity can be added to the water system now served by the Asheville/Buncombe Water Authority in the future without the construction of an additional water treatment plant; and

Whereas, the complicated pattern of dealings between the City of Asheville and the County of Buncombe regarding the provision of water to water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto has now given rise to the issue of the rate that the City of Asheville may charge the water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto to whom it provides water even though the Sullivan Act remains in full force and effect; and

Whereas, it is the exclusive right of the State to regulate the provision of and rates charged for public utilities to the citizens of the State; Now, therefore,

The General Assembly of North Carolina enacts:

SECTION 1. From and after the effective date of this act, it shall be unlawful for the City of Asheville, or any of the governing authorities, agents, or employees thereof, to charge, exact, or collect from any water consumer in Buncombe County currently or hereafter connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto a rate for water consumed higher than the rate charged for the same classification of water consumer residing or located within the corporate limits of the City of Asheville. Classification of water consumer as referred to herein means the type of facility to which the water is provided (e.g., single-family residence, multiple-family residence, retail, commercial, industrial) without regard to geographic location within Buncombe County.

SECTION 2. The City of Asheville may, through its officers, agents, and employees, cause any user of water who shall fail to pay promptly his water rent for any month to be cut off and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages, all consistent with G.S. 160A-314(b).

SECTION 3. It shall be the duty of the Board of Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville in Buncombe County to maintain the waterlines owned by the County of Buncombe and such water districts in proper repair in order that there may not be a waste of water by leakage.

SECTION 4. To the extent that the Sullivan Act (Chapter 399 of the Public-Local Laws of 1933) does not conflict with this act, it continues to apply.

SECTION 5. This act is effective when it becomes law.

In the General Assembly read three times and ratified this the 29th day of June, 2005.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ James B. Black
Speaker of the House of Representatives

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

SESSION LAW 2005-139
HOUSE BILL 1064

AN ACT REGARDING THE OPERATION OF PUBLIC ENTERPRISES BY THE CITY OF ASHEVILLE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 160A-312 reads as rewritten:

"**§ 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.~~ citizens and other areas and their citizens located outside the corporate limits of the city. 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.~~limitations.

(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, and shall comply with all of the following:

(1) The rules shall apply equally to the public enterprise system both within and outside the corporate limits of the ~~city,~~city.

(2) The rules may not apply differing treatment within and outside the corporate limits of the city.

(3) The rules shall make access to public enterprise services available to the city and its citizens and other areas and their citizens located outside the corporate limits of the city equally.

(4) The rules may prioritize the continuation of the provision of services based on availability of excess capacity to provide the service.

(5) The rules ~~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.

(d) A city shall account for a public enterprise in a separate fund and may not transfer any money from that fund to another except for a capital project fund established for the construction or replacement of assets for that public enterprise.

Obligations of the public enterprise may be paid out of the separate fund. Obligations shall not include any other fund or line item in the city's budget."

SECTION 2. G.S. 160A-31(a) reads as rewritten:

"(a) The governing board of any municipality may annex by ordinance any area contiguous to its boundaries upon presentation to the governing board of a petition signed by the owners of all the real property located within such area. The petition shall be signed by each owner of real property in the area and shall contain the address of each such ~~owner.~~ owner and a statement that the owner's petition for annexation is not based upon any representation by the municipality that a public enterprise service available outside the corporate limits of that municipality would be withheld from the owner's property without the petition for annexation."

SECTION 3. G.S. 160A-58.1(c) reads as rewritten:

"(c) The petition shall contain the names, addresses, and signatures of all owners of real property within the proposed satellite corporate limits (except owners not required to sign by subsection (a)), shall describe the area proposed for annexation by metes and bounds, and shall have attached thereto a map showing the area proposed for annexation with relation to the primary corporate limits of the annexing city. The petition shall also contain a statement from the owner that the owner's petition for annexation is not based upon any representation by the municipality that a public enterprise service available outside the corporate limits of that municipality would be withheld from the owner's property without the petition for annexation. When there is any substantial question as to whether the area may be closer to another city than to the annexing city, the map shall also show the area proposed for annexation with relation to the primary corporate limits of the other city. The city council may prescribe the form of the petition."

SECTION 4. This act applies only to the City of Asheville. Section 1 of this act shall not apply to the operation of public transportation systems or off-street parking facilities and systems as public enterprises.

SECTION 5. This act becomes effective June 30, 2005. Section 1 of this act applies to the fiscal year 2005-2006 and thereafter. Any assets, liabilities, or equity of a public enterprise operated or held by the city during the fiscal year 2004-2005 shall be transferred to a separate fund in accordance with G.S. 160A-312, as amended by Section 1 of this act, when this act becomes law. Sections 2 and 3 apply to petitions for annexation received by the municipality on or after June 30, 2005.

In the General Assembly read three times and ratified this the 29th day of June, 2005.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ James B. Black
Speaker of the House of Representatives

C

MEMORANDUM OF DECISION AND ORDER RE: SUMARY JUDGMENT

Wake County Superior Court No. 05-CVS-10743 (Feb. 2, 2007) (Manning, J.) ("Sullivan II and III")

NORTH CAROLINA:

WAKE COUNTY:

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 10743

CITY OF ASHEVILLE, a municipal corporation,
Plaintiff,

vs.

STATE OF NORTH CAROLINA;

and

COUNTY OF BUNCOMBE, et al.
Defendants.

FILED
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WAKE COUNTY, C.S.C.
BY

MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT

THIS MATTER is before the Court upon cross motions for summary judgment pursuant to Rule 56, North Carolina Rules of Civil Procedure. The motions were heard at the January 16, 2007, civil session of the Wake County Superior Court. Counsel for all the parties were present and presented oral arguments. Each party submitted a lengthy memorandum in support of its position together with affidavits, deposition transcripts and authorities, the total combined height of which exceeding more than a foot and one-half. The arguments of counsel, with two short breaks, commenced at approximately 10:50 a.m. and concluded at 2:30 p.m. At the conclusion of the hearing, the Court took the matter under advisement in order to review more than 100 pages of memoranda submitted, plus more that five inches of case law and authorities in addition to the supporting discovery, affidavits and depositions.

The Court, in its spare time and without the assistance of any research assistant or law clerk, has now had the opportunity to thoroughly review the arguments, record and supporting authorities for all sides in this dispute. The matter is now ripe for disposition. Because the dispute

between the City of Asheville and Buncombe County over the sale, pricing, management and distribution of the municipal water system reaches back in time more than seventy (70) years, a review of the factual background is necessary to an understanding of the case.

FACTUAL BACKGROUND

This case relates to the provision of water to citizens of Asheville and Buncombe County by the public water utility operated by the City of Asheville. Two of the challenged statutes, Sullivan I and Sullivan II, local acts of the General Assembly, regulate the rates that may be charged by that public utility. The third challenged statute, Sullivan III, also a local act, addresses other issues related to that public utility, primarily the expenditure of revenues from the utility and related accounting issues.

Sullivan I, which was enacted in 1933, provided in pertinent part that: (1) Asheville may not "charge . . . from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the [water] main of any water district which has paid or issued bonds for the payment of the expense of laying such main, a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said city;" (2) Asheville is empowered to discontinue the water service of any user who fails to promptly pay his or her water bill; (3) persons living outside of Asheville's corporate limits should be entitled to the use of Asheville's surplus water only; and (4) Buncombe County and/or the trustees of water districts operating outside of Asheville's corporate limits shall be required to maintain water lines in proper repair. 1933 N.C. Sess. Laws 399.

Sullivan II, which was enacted in 2005, provides that: (1) Asheville may not "charge . . . from any water consumer in Buncombe County currently or hereafter connected to the water lines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto, a rate for water consumed higher than the rate charged for the same classification of water consumer residing or located within the corporate limits of the City of Asheville;" (2) Asheville has the authority to cut off the water service of a consumer who fails to timely pay his or her water bill; (3) the Buncombe County Board of Commissioners and/or the trustees of the various water

districts functioning outside of Asheville's corporate limits are required to maintain those water lines owned by Buncombe County and/or said water districts and to keep them in proper repair. Sullivan II further provides that Sullivan I continues to apply (to the extent it does not conflict with Sullivan II). 2005 N.C. Sess. Law 140.

Sullivan III, enacted at the same time as Sullivan II, essentially (1) requires Asheville to account for its water utility in a separate fund and prohibits it from transferring any money from that fund to another fund except for capital project funds established for the building or replacement of assets for the utility, and states that obligations of the public enterprise may be paid out of the separate fund; and (2) removes Asheville's immunity from liability for damages to those living outside city limits for failure to provide water service. 2005 N.C. Sess. Law 139.

The subject of the Sullivan acts is the Asheville water supply system, a public utility. The primary water source from which this public utility supplies water is owned by the City of Asheville. The distribution system, including the water lines, is owned in part by the City of Asheville and in part by Buncombe County and the water district Defendants. The record of ownership of the distribution facilities is sparse, with the County and the water districts having paid for and contributed distribution facilities since the 1920's. Other than one limited annexation in 1960 involving portions of water districts, the City did not acquire existing lines in areas annexed by the City pursuant to the provisions of N.C.G.S. 162A-93(c).

Much of the history relevant to this lawsuit can be found in the North Carolina Supreme Court's opinion in *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d. 470(1958). As set out more fully in *Candler*, with the increase in development in Asheville and Buncombe County, between 1923 and 1927, pursuant to acts of the General Assembly, six water and sewer districts were formed in Buncombe County. These districts had certain geographical boundaries outside the City of Asheville and were authorized to acquire rights of way for water and sewer lines, to construct the lines, and hold elections authorizing the issuance of bonds paying therefor. The districts did issue the bonds and build water lines for the distribution of the water, which lines were

connected to the water system initially established by the City of Asheville. *Candler, supra* at 400.

In 1933, the General Assembly enacted Sullivan I, which provides in pertinent part:

> SECTION 1. That from and after the passage of this act it shall be unlawful for the City of Asheville or any other governing authorities, agents, or employees, thereof, to charge, exact, or collect from any resident of Buncombe County, whose property is now connected or may hereafter by connected with the main of any water district which has paid or issued bonds for the payment of the expense of laying such main a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said city.
>
> SEC. 2. That the City of Asheville is hereby specifically authorized and empowered, through its officers, agents and employees, to cause any user of water who shall fail to pay promptly his water rent for any month to be cut off and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages.
>
> SEC. 3. That it is the purpose and intent of this act to declare that person residing outside of the corporate limits of the City of Asheville shall be entitled to the use of Asheville surplus water only, and the governing body of the City of Asheville is authorized and empowered to discontinue the supply of water to any districts, or persons, out of the corporate limits of the City of Asheville at any time that there may be a drought or other emergency or at any time the governing body of the City of Asheville may deem that the City has use for all of its water supply.
>
> SEC. 4. That it shall be the duty of the County Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville in Buncombe County to maintain the water lines in proper repair in order that there may not be a waste of water by leakage.

The County Commissioners of Buncombe County, who also serve as Trustees of the various water districts, levied taxes to pay the principal and interest on the bonds issued by the water districts within the districts, and to pay for the

408, 101 S.E.2d at 477. The court acknowledged that a statute of general applicability existing at that time -- G.S. § 160-256 -- expressly provided for cities to fix different rates for consumers outside the city's corporate limits than those charged to consumers within the corporate limits. *Id.* at 408-09, 101 S.E.2d at 477-78. The Supreme Court nevertheless held that it was lawful for Sullivan I to establish rates for a different class of consumers living outside of Asheville's city limits whose property was connected (or might later be connected) with the main of an existing water district which had paid or issued bonds for the payment of expenses relating to the construction of the water system. The Court then stated:

> The Legislature by adopting the above Act did not establish the rates to be charged to consumers in the water . . . districts involved, *although it had the right to do so*; but it did direct the City of Asheville not to charge rates to the persons, firms, and corporations in these districts in excess of the rate or rates fixed from time to time by . . . Asheville to be paid by persons, firms, and corporations within the corporate limits of the City. The governing body of . . . Asheville is free to raise or lower its present rates if in its judgment the rates are too high or too low.

Id. at 409, 101 S.E.2d at 478 (emphasis added).

The Supreme Court further held that "since a municipality has no legal right . . . to sell water to consumers residing outside its corporate limits without legislative authority, the Legislature has the power to fix the terms upon which such sales shall be made . . ." Id. at 410, 101 S.E.2d at 479.

The Supreme Court observed that it had consistently held that the North Carolina Constitution did not forbid the General Assembly from "conferring upon municipal corporations additional powers, *or restricting the powers theretofore vested in them.*" *Candler*, 247 N.C. at 409, 101 S.E.2d at 478. (emphasis added) The Court explained that the rationale underlying these types of enactments:

> is that the needs of the different communities are so diverse that no legislature could foresee the emergencies that would arise in

maintenance of the water and sewer lines by general levy as provided by Sullivan I. *Candler, supra* at 401.

From the adoption of Sullivan I through August 1955, the City of Asheville complied with the terms of Sullivan I and charged consumers of water outside the City of Asheville (including those outside the areas regulated by Sullivan I) the same rates as similarly situated consumers inside the City of Asheville. In August 1955, the Asheville City Council adopted an ordinance effective 1 September 1955 establishing substantially higher rates for those consumers outside the City of Asheville. That gave rise to a lawsuit filed by these defendants' predecessors in interest challenging the ordinance as contrary to the provisions of Sullivan I. The City, as its defense, challenged the constitutionality of Sullivan I.

The trial court in *Candler* held that Sullivan I was unconstitutional as a violation of then Section 17 of Article I of the Constitution of North Carolina and of the 14th Amendment to the United States Constitution. *Candler, supra* at 404. The Supreme Court reversed, holding that Sullivan I was constitutional.

In its *Candler* analysis, the Court discussed the Legislature's authority to establish rates for public utilities, stating:

> The fixing of rates is a legislative act . . . Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The Court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive.

Id. at 407-08, 101 S.E.2d at 477 (quoting *St. Joseph's Stockyard Company v. United States*, 298 U.S. 38, 80 L.Ed. 1033 (1936))

The Supreme Court further noted that the Legislature had statutorily authorized municipalities owning water systems to provide water to recipients outside city limits. *Id.* at

> different localities or the necessity for additional powers dependent on changing conditions, and could not provide for them by general legislation, and the present case is an apt illustration of the wisdom of this course.

Id. at 410, 101 S.E.2d at 478 (citing *Kornegay v. Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920)).

The Legislature's basis for enacting Sullivan I involved a recognition that customers outside Asheville were paying a significant portion of the costs incurred in constructing, operating, repairing, and maintaining Asheville's water system and that Asheville itself had not contributed to the construction, repair and maintenance of the system. *Id.* at 410-11, 101 S.E.2d at 479.

The Supreme Court determined that Asheville was not required to sell water to customers outside its city limits but that if it chose to do so, it was bound to comply with the terms of Sullivan I. *Id.* at 411-12, 101 S.E.2d at 479-80. The Court in *Candler* concluded that "*[i]n our opinion . . . the Legislature had the power to enact [Sullivan I], and that [Sullivan I] is constitutional and valid and is binding on the City of Asheville . . .*" *Id.* at 411, 101 S.E.2d at 479.

From the time of *Candler* until the present, the City of Asheville has continued to charge uniform rates to consumers of water from the public utility water system, within and without the corporate limits of Asheville.

From *Candler* until 1981, the City directly supplied water to consumers at uniform rates in compliance with Sullivan I, and the County fulfilled its maintenance obligations under Sullivan I by making payments to the City for maintenance of the lines. In 1981, the City, the County, and the water districts negotiated the "Water Agreement." (See Affidavit of Jon Creighton, paragraph 5) Among other things, that agreement created the Asheville/Buncombe Water Authority through which water was then provided to the citizens of Asheville and to all citizens of Buncombe County serviced by the joint water facility, all at uniform rates. The Water Agreement was amended for various reasons on multiple occasions, but remained in force and effect through 30 June 2005 when it ended due to termination by

the City of Asheville. In June 2005, shortly before the termination of the Water Agreement, the General Assembly enacted Sullivan II and Sullivan III, while keeping Sullivan I in effect as well.

In *Candler*, the Supreme Court held that the Legislature had the authority to establish rates for municipally owned utilities. In considering all of the facts and circumstances of the case at that time in passing on the constitutionality of Sullivan I, the Court considered that the City of Asheville had contributed nothing to the construction of the systems in the water districts and that the City only served to pump water into the system, read the meters, and bill the customers. *Candler, supra* at 411. The Court also considered that slightly over 28% of the meters through which the City of Asheville furnished water were outside its corporate limits and that slightly over 27% of its total income for the water system was from consumers outside the City. *Candler, supra* at 411.

Those same factual underpinnings continue to exist today, except that even a greater percentage of the consumers from the public utility water system reside outside the City of Asheville.

Since *Candler* was handed down by the Supreme Court, lines have been added to the water system by developers and other private entities, by the City, by the County, and the Asheville/Buncombe Water Authority. Lines of the water system outside the City have been maintained by the City at either County expense or by the Asheville/Buncombe Water Authority.

From 1973 through 1998, the County paid to the City in excess of $26,000,000.00 (more than $24,000,000.00 of which was from County funds exclusive of grants) for capital improvements to the water system, for maintenance of the water system, and for other expenses of the water system. County records prior to 1973 are insufficient to provide detailed information about County contributions to the water system from 1957 through 1972, although the County did make the payments to the City in fulfillment of the County's maintenance obligations under Sullivan I.

From 1983 through 2005 the County paid an additional $39,846,693.00 directly to the City pursuant to the Water Agreement.

In addition, during the term of the Water Agreement, Buncombe County spent $9,025,715.00 for capital improvements to recreational facilities the title of which was returned to the City of Asheville upon termination of the Water Agreement.

From 1957 through fiscal year 2005, the City of Asheville did not put any funds into the water system. In fact, in addition to the net operating revenue for that period of time of almost $114,000,000.00 (income less expenses), there were a number of payments made from the "water fund" as part of the "operating expenses." The City did so primarily through three budget items:

Administrative-reimburse general and other funds	Department wide expenditures	Tax and franchise benefits-paid to general fund
$52,473,739	$39,324,144	$12,372,231

In 1999 the Mills River water treatment facility was added to the Asheville/Buncombe Water System. The Mills River facility was a water treatment plant developed under the aegis of the Asheville/Buncombe Water Authority for an approximate cost of $31,000,000.00. It added in excess of 5 million gallons per day of capacity to the water system, increasing the total capacity of the system by 15-20%. The site, just outside Buncombe County in Henderson County, was chosen by the water authority in part for its location only a few hundred feet from the French Broad River, which leaves it relatively easy to add even substantially greater capacity to the water system in the future. The Mills River facility was financed with revenue bonds, which bonds are required to be retired exclusively with payments from water system revenue and not the general fund of the City of Asheville.

At present, over 43% of the meters through which Asheville furnishes water are **outside its corporate limits, and the City derives over 42% of its revenues** from the sale of water to consumers outside its corporate limits.

The history of the Asheville-Buncombe Water system for the last fifty years is, in principal, the same as set out in

Candler. Financially, if anything has changed, it is that the County has contributed to the system to an even greater extent, while the City has continued to be a net taker of funds from the public utility water system. The City has continued to take funds from the public utility water system while, as is clear from the record, the system has fallen farther and farther into disrepair. With the City of Asheville's lawful, unilateral termination of the Water Agreements which were to expire on June 30, 2005, the General Assembly, on 29 June 2005, enacted Sullivan II and Sullivan III.

As strange as it might seem to an outsider, both Sullivan II and Sullivan III were heard in Senate committee, reported to the Senate floor, passed second and third readings, were sent back to the House for concurrence, were concurred with by the House and **were ratified all in a single day, that day being the day before the expiration of the Water Agreements** between Asheville and Buncombe County. It goes without saying that this legislation was passed "faster than a speeding Teflon coated bullet" and that no one from the City of Asheville saw it coming on Jones Street in Raleigh.

Reduced to essentials, it is fair to say that in this matter, Buncombe County had the political inside track in the General Assembly and as such, there was no robust, fair fight before the railroad train carrying Sullivan II and III from Jones Street to the City of Asheville left the station at warp speed.

The question then becomes - even if the enactment of Sullivan II and III seems so unfair to the City of Asheville, can the General Assembly do such a thing so fast and does the General Assembly have the power enact such legislation so as to intercede on the side of one party in an ongoing dispute between a city government and a county government?

In the event a Court entered an Order or Judgment determining the rights of one party to a dispute over the other, without notice, hearing or other due process of law, its Order or Judgment would be vacated by the Appellate Courts on grounds too numerous to mention here.

Nevertheless, this Court, while holding its nose, has reached the conclusion that in the legislative theater of

conflict, the legislature has the power and authority to act in the manner in which it did with respect to Sullivan II and Sullivan III and will grant the defendants' motions for summary judgment.

DECISION

I. THE CITY OF ASHEVILLE HAS STANDING TO BRING THIS ACTION UNDER THE SPECIFIC CIRCUMSTANCES OF THIS CASE.

The defendants have contended that the City of Asheville has no standing to challenge the limitations placed on it by Sullivan I, II and III. The Court recognizes the general rule that any municipality is a creature created by the legislature, and as an agency of the state, cannot question the limitations placed by the legislature on the powers granted to it. *Wood v. City of Fayetteville*, 43 N.C.App. 410, 419 259 S.E.2d. 581, 586 (1979).

Despite the general rule, under the facts of this particular case and the specific nature of the legislation at issue, the Court concludes as a matter of law that the City of Asheville has standing to bring this action on two separate grounds: The first is that a municipality that has been "sliced and diced" as the City of Asheville has in this instance, is entitled to challenge that specific legislation in the Superior Courts of North Carolina.

The second is independent of the first. The Court concludes, as a practical matter of judicial economy and litigation expense, dismissing the lawsuit on the basis of standing would only result, in the Court's opinion, in an undue delay in reaching the underlying issues relating to the legislation at issue here. As Asheville did in *Candler v. City of Asheville, supra*, Asheville need only defy the law and enact a rate change that would violate Sullivan II to invite another lawsuit that would replicate the *Candler* case. Given the hard work and expense that the parties have been put to so far in this litigation, the Court concludes that the City of Asheville, **since it has not accepted any of the so called "benefits" of the legislation**, is entitled to challenge this legislation. In making this determination, the Court is well aware of the decision in *In re: Appeal of Martin*, 236 N.C. 66, 73-74 209 S.E.2d. 766, 772 (1971)

II. SULLIVAN I, SULLIVAN II, AND SULLIVAN III ARE

CONSTITUTIONAL IN THAT (A) THEY ARE A VALID EXERCISE OF LEGISLATIVE AUTHORITY, (B) THEY ARE NOT LOCAL ACTS IN VIOLATION OF ARTICLE II, SECTION 24 OF THE NORTH CAROLINA CONSTITUTION AND (C) SULLIVAN I, II AND III DO NOT VIOLATE ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION. *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958).

The Court concludes as a matter of law that the three acts in question are constitutional. Here's why. Article VII, Section 1 of the North Carolina Constitution states in pertinent part as follows:

> The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities, and towns, and other governmental subdivisions and, except as otherwise provided by this Constitution, may give such powers and duties to counties, cities, and towns, and other governmental subdivisions as it may deem advisable.

N.C. CONST. art. VII, § 1.

The Court concludes that *Candler* makes clear that none of the Sullivan Acts at issue in this litigation are prohibited by Article II, Section 24 of the Constitution.

The Court further concludes as a matter of law that the Sullivan Acts do not relate to health and sanitation and do not regulate trade.

In *Candler, supra*, the Supreme Court expressly stated the following with regard to Sullivan I: "*[N]or does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate.*" *Candler*, 247 N.C. at 410, 101 S.E.2d at 479. (emphasis added) Sullivan I and II are essentially identical in terms of the requirements imposed on Asheville's ability to set rates applicable to non-city consumers regarding the sale of water. Asheville can determine how much it will charge for a gallon of water to a customer, but the rates charged across the board, as well as what Asheville must do with respect to its customers and the funds collected are a governmental function subject to legislative control.

Accordingly, the Court concludes as a matter of law that the provisions and limitations imposed on the City of Asheville

in Sullivan I, Sullivan II and Sullivan III are within the power of the Legislature to enact. *Candler v. City of Asheville*, supra.

Additionally, the Court concludes as a matter of law that Sullivan I, II and III do not violate the "law of the land" clause set out in Article I, Section 19 of the Constitution. Unless a legislative enactment makes classifications based on factors such as race, gender, or illegitimacy or infringes on a fundamental right, courts simply apply a rational basis test in determining whether the enactment is constitutional. Under this standard of review, "the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid." *Department of Transportation v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). In this regard, the Court concludes that Asheville cannot meet its burden under this standard in that there is plainly a rational basis for the enactment of this legislation although it is one-sided and in favor of one municipal government over another. Having so determined, the Court grants summary judgment in favor of the State of North Carolina and the Buncombe County defendants.

The Court also rejects the arguments by the City of Asheville that: (1) the Sullivan Acts are unconstitutional under the rule announced in *Asbury v. Town of Albemarle, 162 N.C. 247 (1913)*; and (2) that Sullivan III unconstitutionally creates special privileges for an ineligible class of persons in violation of the exclusive emoluments prohibition contained in Article I, Section 32 of the North Carolina Constitution. In this regard, the City of Asheville is reading much too much gloom and doom into the provisions of Sullivan III with respect to lack of statutory immunity on the record before this Court.

Reduced to essentials, after considering all of the City of Asheville's arguments and challenges to the Sullivan Acts, the Court concludes as matter of law that the Sullivan Acts are constitutional in all respects and are a legitimate exercise of legislative power over the City of Asheville, a municipal government which operates for the administrative convenience of the State of North Carolina. Having so determined, summary judgment is appropriate.

DISCUSSION

The Court, after reviewing the North Carolina Constitution and case law submitted, has been convinced, once again, that when it comes to exercising control over municipalities, school boards, counties and other governmental entities created by the Legislative Branch for its convenience, the Legislative Branch has the authority, subject to the specific provisions limiting that authority in the North Carolina Constitution, to enact the specific type of legislation as evidenced by Sullivan I, II and III.

While the passage of legislation, such as the Sullivan Acts, that intercedes in and resolves a dispute in favor of one governmental entity against another, goes against the very fiber of the concept of due process that is required in disputes brought in the judicial branch of government, such legislative conduct is permitted and sanctioned, as long as it does not exceed the limits set in stone in the North Carolina Constitution.

It follows, therefore, that the City of Asheville, having no success in the judicial branch of government in this fight, must now seek relief and redress from the source of its pain - the General Assembly of North Carolina. For as this Court views the situation, only the General Assembly can restore to the City of Asheville what it has taken away with respect to the City of Asheville's rights to its water system. Such is the nature of politics.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT

1. **The City of Asheville's motion for summary judgment is denied.**
2. **The State of North Carolina's motion for summary judgment is granted.**
3. **The County of Buncombe's (all defendants) motion for summary judgment is granted.**
4. **This action is dismissed.**
5. **The Court, in its discretion, has determined that each party shall bear its own costs.**

This the 2d day of February, 2007.

Howard E. Manning, Jr.
Superior Court Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the Foregoing **MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT** in the above titled action upon all other parties to this cause by facsimile transmission as permitted by Rule 5, North Carolina Rules of Civil Procedure:

Mark A. Davis
Special Deputy Attorney General at 919/716-6763
State of North Carolina
Raleigh, N.C.
Defendant: State of North Carolina

Daniel G. Clodfelter at 704/331-1159
T. Randolph Perkins
Mark A. Nebrig
Robert W. Oast, Jr. c/o
Moore & Van Allen
Charlotte, N.C.
Plaintiff: City of Asheville

Robert B. Long, Jr. at 828/253-1073
W. Scott Jones
Long, Parker, Warren & Jones
Defendants: Buncombe County, et al.

This the 2d day of February, 2007.

Howard E. Manning, Jr.
Superior Court Judge

D

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 "Water Act")

- North Carolina Session Law 2013-50 (HB 488)

- Legislative History of Session Law 2013-50

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2013

SESSION LAW 2013-50
HOUSE BILL 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.

s/ Daniel J. Forest
President of the Senate

s/ Paul Stam
Speaker Pro Tempore of the House of Representatives

This bill having been presented to the Governor for signature on the 3rd day of May, 2013 and the Governor having failed to approve it within the time prescribed by law, the same is hereby declared to have become a law. This 14th day of May, 2013.

s/ Karen Jenkins
Enrolling Clerk

LEGISLATIVE APPENDIX

The Legislative History of S.L. 2013-50 Confirms That It Is a Local Act

S.L. 2013-50 began life as House Bill 488,[1] filed in the House on March 28, 2013 (hereafter, "HB 488").[2] Its primary sponsors were Representatives Moffitt and Ramsey, both of Buncombe County, and Representative McGrady of adjoining Henderson County.

The Original Bill. As HB 488 progressed through committee in the House and arrived on the House floor for debate, it did not include the provision that later became Section 5.5. (The effect of Section 5.5 is discussed in the text of the Memorandum at Part III.A.3.) Nor did it include all three of the criteria contained in Section 1.(a) of S.L. 2013-50 as eventually enacted. Section 1.(a) of the second edition of the bill[3] instead read as follows:

> All assets, real and personal, tangible and intangible, and all outstanding debts of any public water supply system operated by a subdivision of the State and body politic that serves a population greater than one hundred twenty thousand (120,000) people, according to data submitted pursuant to G.S. 143-355(1) for the year 2011, that is not operated as either a joint or regional public water system, shall be transferred to the metropolitan sewerage district in the county in which the public water system is located, to be operated as a Metropolitan Water and Sewerage District.

The only criteria for mandatory transfer of a public water supply system to a new MWSD were: (a) that there be a service population of greater than 120,000, (b) that the water system not already be operating as either a joint or regional water system, and (c) that there be a metropolitan sewerage district operating in the county where the water system was located. The language of the bill did not foreclose the possibility that new metropolitan sewerage districts

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[1] HB 488, as originally filed, is provided in the Appendix at Tab C-1.

[2] A summary of the complete legislative history is provided in the Appendix at Tab C-2 and may also be examined in more detail at the General Assembly's website, www.ncleg.net.

[3] The second edition of the bill appears in the Appendix at Tab C-3.

could be created in the future, potentially triggering the future application of Section 1's uniform mandatory transfer provisions to other water systems in the State that then served or thereafter came to serve more than 120,000 people. In other words, the class of public water systems to which Section 1 could apply was an "open" class, susceptible to the inclusion of additional members in the future beyond those covered by that section at the time of enactment.

The Stam Amendment Saves Cary's Water System. HB 488 was debated on second reading in the House on April 11, 2013. During the floor consideration of the bill, Representative Paul Stam offered an amendment to the bill that would rewrite Section 1.(a) of the bill and add a third triggering condition for the involuntary transfer of a municipal water system: that the municipality whose water system was to be involuntarily transferred not be the holder of an interbasin transfer certificate.[4] The amendment was adopted, and the bill thereafter passed its final required reading on April 15, 2013. Several facts are noteworthy about Representative Stam's amendment: (1) that Representative Stam's district includes a portion of the Town of Apex, which purchases its water at wholesale from the Town of Cary in Wake County; (2) that the Town of Cary has a population in excess of 120,000 persons; and (3) that the Town of Cary *does* hold an interbasin transfer certificate permitting it to draw water from the Cape Fear River basin and discharge it into the Neuse River basin. (*See* Perkins Aff. ¶ 13 and Ex. E; *see also* Recordings of House Debates (comprising a true and complete recording of the House debates on the second and third readings of HB 488.)[5] The effect of Representative

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[4] Representative Stam's amendment is provided in the Appendix at Tab C-4.

[5] The Certified Recordings of the House Debates are provided in the Appendix at Tab C-5. Asheville is mindful of the decision in *Styers v. Phillips,* 277 N.C. 460, 471-73 (1971) that the statements of an individual legislator, most especially *post hoc* affidavits or individual statements not made in the course of official proceedings, are not competent evidence to determine legislative intent. Other precedent in North Carolina, however, suggests that in appropriate
(continued on next page)

Stam's amendment was to exclude the water system of the Town of Cary from the potential application of Section 1, in the event a metropolitan sewerage district ever came to be created in Wake County.

The Apodaca Amendment Includes the "Clincher." When HB 488 reached the Senate, its principal floor manager was Senator Tom Apodaca, who represents portions of Buncombe and Henderson Counties. In the Senate concerns about the potential operation of Section 1 of the bill in areas of the State outside Buncombe and Henderson counties persisted. Although the amendment offered by Representative Stam and adopted by the House appeared to foreclose that possibility, at least for water systems holding interbasin transfer certificates, for the avoidance of all doubt about the matter a further amendment was proposed by Senator Apodaca and adopted overwhelmingly by the Senate.[6] That amendment became Section 5.5 of the Act: it ensured that no future metropolitan *sewerage* districts would be created anywhere in the State except with the consent of *all* local governments participating in its creation and contributing assets to the new entity.[7] As provided by Section 1.(a)(1) of the bill, without an

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circumstances statements made in the course of official deliberations may be considered as some evidence of the actions taken and the matters considered by the legislature. *E.g., Waste Industries USA, Inc. v. State,* 725 S.E.2d 875, 884 (N.C. Ct. App. 2012) (considering the circumstances under which legislative statements made during the course of official proceedings may properly be considered, though concluding that the particular statement at hand was not admissible); *cf. Dusenberry v. Dusenberry,* 314 N.C. 608, 613-14 (1985) (Meyer, J. dissenting, discussing statements made during the course of floor debate in the Senate). Asheville offers the record of the floor debates here for the following limited purposes: (1) to confirm the actions taken by the General Assembly, (2) to identify the sponsors of bills and amendments, and (3) to show what subjects were considered during the course of the official proceedings.

[6] The Apodaca amendment is provided in the Appendix at Tab C-6.

[7] The Senate adopted a second amendment to HB 488, offered by Senator Brunstetter, which removed the authority for MWSDs to impose and collect *ad valorem* taxes. That amendment is of some interest in connection with Asheville's Fourth and Fifth Claim and will be discussed further in Part VI.C of the Memorandum, and is provided in the Appendix at Tab C-7.

existing metropolitan sewerage district in place in a county, the involuntary transfer provisions of Sections 1 and 6 of the Act would not and could not operate with respect to any publicly owned and operated water systems in that county. With the adoption of the Apodaca amendment, Section 1 of HB 488 effectively became a "closed" class.

The Senate floor debate on HB 488 was dominated by the two Senators representing Buncombe County, Senators Apodaca and Nesbitt, who took opposing positions on the bill. Other Senators spoke in the debate for two purposes only: (1) to complain generally about the forcible taking of Asheville Water System pursuant to the bill, or (2) to seek and receive assurances that Section 1 of the bill would not apply to any municipal water systems outside Buncombe County.[8]

The "State of Play" on May 13, 2013. HB 488 as enacted was duly ratified and presented to the Governor, who allowed it to become law without his signature, and it thereby became S.L. 2013-50 on May 13, 2013.[9] As matters stood on that date, the effect of the Apodaca amendment was to close the door on the possibility that the uniform mandatory transfer provisions of Section 1 of the Act might apply to any water systems in the future except for (1) those water systems located in counties where there were *existing* metropolitan sewerage districts, or (2) those water systems whose owners voluntarily consented to the formation of a new metropolitan sewerage district with which their water systems could be consolidated. As for

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[8] *See* Certified Recordings of Senate Debates (comprising a true and complete recording of the full floor debate on the second reading of HB 488 in the Senate). The Certified Recordings of the Senate Debates are provided in the Appendix at Tab C-8. For ease of reference, the debates can be located on disc marked "CD 2" of the Senate floor debate on HB 488 of April 25, 2013, beginning at the 5:45 mark; the disc containing the April 29, 2013 Senate floor debate, beginning at the 5:48 mark; and the disc marked "CD 2" of the Senate floor debate on the Pate amendment to HB 94 of July 2, 2013, beginning at the 21:40 mark.

[9] *See supra* n.2.

the mentioned water systems in group (1), the water system owned by the City of Greenville was excluded from Section 1 because Greenville held an interbasin transfer certificate for its system.[10]

HB 94 Threatens to Repeal Greenville's Exemption. The pertinent legislative history of S.L. 2013-50 does not end on May 13, 2013. On May 14, 2013, Asheville commenced this action seeking a declaratory judgment and injunctive relief, complaining, among other grounds, that Section 1 of S.L. 2013-50 was an impermissible local enactment dealing with health and sanitation in contravention of the prohibition against such legislation contained in Article II, Section 24(1)(a) of the Constitution. Thereafter, in what was most certainly a reaction to this suit and in an attempt to render Section 1 of the Act at least marginally more a "general" law, a new provision suddenly appeared, without explanation, in an unrelated piece of legislation then pending in the House of Representatives, House Bill 94, an omnibus piece of legislation dealing with several topics and whose title was "Amend Environmental Laws-2013." As introduced in the House of Representatives on February 12, 2013, and as ultimately voted on by that body, HB 94 had no provisions relevant in any manner to the present litigation.[11] The

[10] Greenville's interbasin transfer certificate authorizes the transfer of water from the Tar River basin to the Contentnea Creek basin and to the Neuse River basin. The certificate was issued in 2010 in order to permit Greenville to provide water at wholesale to the Towns of Farmville and Winterville and to Greene County. The provisions of S.L. 2011-298 and the proposed amendments to that session law contained in SB 341 exempted from the interbasin transfer certificate requirements water transfers initiated on or after August 31, 2007, of the type covered by Greenville's certificate. Although Greenville still held the certificate issued to it in 2010, the combined effect of these provisions was to render the certificate superfluous. Greenville's 2010 interbasin transfer certificate is provided in the Appendix at Tab C-9.

[11] The version of HB 94 adopted by the House is provided in the Appendix at Tab C-10.

original version of HB 94 contained only seven sections and passed second and third readings in the House of Representatives on May 14, 2013, the same day this suit was commenced.[12]

When HB 94 appeared for consideration by the Senate Committee on Environment and Natural Resources on June 26, 2013, a completely new edition of the bill was offered to the committee.[13] It had morphed into a true omnibus with some 35 sections, several of which themselves had multiple subsections containing various substantive provisions. One such new provision was Section 34 which announced, quite simply, that "Section 1.(a)(2) of S.L. 2013-50 is repealed." That section of S.L. 2013-50, it will be remembered, was the one of the triggering conditions for the operation of the involuntary transfer of a municipal water system to an MWSD established in Section 1 of S.L. 2013-50 – the condition being that the municipal system to be transferred not be the holder of an interbasin transfer certificate. The effect of the proposed new provision in HB 94 would have been to undo the work of Representative Stam's original amendment to HB 94 and thereby create the possibility of a future involuntary transfer of the municipal water system of the City of Greenville to the Contentnea Metropolitan Sewerage District, the metropolitan sewerage district now operating in Pitt County, where Greenville is located.

Senator Pate's Amendment Rescues Greenville's Water System. The new edition of HB 94 reached the floor of the Senate on July 2, 2013, where multiple amendments were offered and considered. One such amendment was offered by Senator Louis Pate, who represents a portion of Pitt County. Senator Pate's amendment deleted the recently created Section 34 from HB 94, and the amendment was adopted by the Senate with no dissenting

[12] The summary legislative history of HB 94 is provided in the Appendix at Tab C-11 and may also be viewed at the General Assembly's website, www.ncleg.net.

[13] This edition of the bill is provided in the Appendix at Tab C-12.

votes.[14] In the floor debate on the proposed amendment Senator Pate explained that it was intended to preserve the original situation under S.L. 2013-50 in which the City of Greenville's water supply system would not be subject to the involuntary operation of Section 1 of that enactment.[15] HB 94 ultimately failed to be enacted, resulting in Section 1.(a)(2) remaining unchanged from S.L. as enacted, at least until the events described in the next paragraph.

Another Attempt Is Made to Include Greenville in Section 1. The saga of S.L. 2013-50's potential application to the City of Greenville's water system did not end with the death of HB 94. Independently of S.L. 2013-50 and HB 94, SB 341, a bill that would make substantial revisions to the General Statutes governing interbasin transfers was moving through the 2013 legislative process. The legislative history of SB 341 is lengthy and complex, but only one portion of that history touches upon the matters at issue in this case.[16] When the bill arrived in the House for consideration, it contained a series of provisions that would amend S.L. 2011-

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[14] Senator Pate's amendment is provided in the Appendix at Tab C-13.

[15] See Certified Recording of the Senate Debates, at Appendix, Tab C-8 (Sen. Pat: "Session Law 2013-50 which passed recently transfers Ashville's water system to a Metropolitan Sewage District. When this law passed, it included a provision limiting its application to public water systems that had not been issued an inter-basin transfer certificate. House Bill 94 however eliminates this provision from the law thereby making the transfer provisions applicable to Greenville's water system. That's Greenville which is 330 miles away from Ashville. This creates a threat that Greenville's water system will be transferred to the Contentnea sewage district, a small Metropolitan Sewage District located in Pitt County. The Contentnea sewage district has a limited staff and a transfer of the Greenville water system to such a small entity is neither practical or a reasonable action. The Greenville water system is a tremendous asset to the Greenville Utility Service Area and having a transfer of the assets and liabilities occur by operation of law without any compensation to the City of Greenville would not be beneficial to Greenville or its citizens nor any other person served by Greenville utilities. Sen. Don Davis of Green County who also represents Pitt County with me is absent today, but he called me today to let me know that he supports this Amendment as I hope all members will. * * * Sen. Apodaca: ". . . I still support this Amendment."

[16] A summary of complete legislative history of SB 341 is provided in the Appendix at Tab C-14.

298, an act of the 2011 session of the General Assembly. The cumulative effect of S.L. 2011-298 and of the proposed amendments set out in proposed SB 341 would have been that Greenville would no longer have been required to hold or rely upon the interbasin transfer certificate it had first obtained in 2010. In addition, Section 4 of the bill again proposed to repeal Section 1.(a)(2) of S.L. 2013-50. The effect of these various provisions in SB 341 was once again to put Greenville at risk that Section 1.(a) of S.L. 2013-50 might in the future require an involuntary transfer of Greenville's water system to the Contentnea Metropolitan Sewerage District.

Greenville's Water System Is Saved Again. When SB 341 arrived on the floor of the House, an amendment was offered by Representative Brown, who represents a portion of Pitt County, and the amendment was adopted by the House.[17] SB 341 with the Brown amendment passed the House and later received Senate concurrence. Although the repeal of Section 1.(a)(2) of S.L. 2013-50 remained in SB 341 as it was ultimately passed by the General Assembly, Representative Brown's amendment added the new provision that became Section 1.(g) of S.L. 2013-50. As explained in the Memorandum text in Part III.A.2, that new Section 1.(g) effectively restored Greenville's exemption from the involuntary transfer of its water system to the Contentnea Metropolitan Sewerage District. Moreover, the replacement of former Section 1.(a)(2) with new Section 1.(g) served to put Greenville's exemption from the Water Act on a more permanent footing and one that is largely under Greenville's own control. Greenville's exemption now rests on its ownership of a water and sewer system combined with other utility operations (gas and electricity) and not on the fact that it holds an unnecessary and superfluous interbasin transfer certificate.

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[17] Representative Brown's amendment is provided in the Appendix at Tab C-15.

There could be no clearer evidence than this legislative history relative to HB 94 and SB 341, all of it post-dating the original enactment of S.L. 2013-50 on May 2, 2013, that the General Assembly took the most exquisite pains to ensure that Section 1 of S.L. 2013-50 would have no application to any municipal water system other than Asheville's.

E

MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT

Wake County Superior Court No. 13-CVS-6691 (June 8, 2014) (Manning, J.)("Water Act")

STATE OF NORTH CAROLINA

WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13-CVS-6691

CITY OF ASHEVILLE,
a municipal corporation,
Plaintiff,

v.

STATE OF NORTH CAROLINA and
the METROPOLITAN SEWERAGE
DISTRICT OF BUNCOMBE COUNTY.
Defendants.

MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT

THIS MATTER is before the Court upon the State of North Carolina's ("the State") motion to dismiss the complaint, and upon cross motions for summary judgment pursuant to Rule 56, North Carolina Rules of Civil Procedure. Additionally, plaintiff, City of Asheville ("Asheville") has filed a motion for sanctions against the State arising out of discovery matters. These motions were heard at a special session of the Wake County Superior Court on Friday, May 23, 2014. Before proceeding further it is necessary to provide the following:

Factual Background and Procedural History of the Case

The Genesis of this lawsuit.

The Water Act of 2013 – Session Law 2013-60 and as amended by Session Law 2013-88. ("The Water Act") On May 13, 2013 Session Law 2013-60 became the law in the manner provided in Article II, Section 22(7) of the Constitution of North Carolina, having been adopted by both houses of the North Carolina General Assembly, duly ratified, not vetoed and left unsigned by the Governor. The Water Act or ("Act") was later modified on August 23, 2013, after the institution of this civil action, by Session Law 2013-388. For purposes of this Memorandum of Decision and Order (MDO) the Act, as amended by the foregoing, will be referred to as the Act, or The Water Act. Sections 1 and 6 of the Initial Act purported to immediately and involuntarily transfer all the assets and debts of the Asheville Water System to defendant Metropolitan Sewerage District of Buncombe County ("MSD"), without Asheville's consent, then to be operated as a "metropolitan water and sewerage district" ("MWSD") over Asheville's strenuous objection, and contrary to the wishes of its citizens as expressed by referendum held in November, 2012, which overwhelmingly opposed any sale or lease of the system. Section 1

does not make any provision for the transfer of the Water System's intangible assets— invaluable components without which the System simply cannot function. Water Scott 6/9/14

Section 2 of the Act creates a new form of political subdivision—the so-called MWSD. That section permits any two or more local governments to form an MWSD by agreement among them; it allows those governments to choose to contribute their existing water supply, treatment, and distribution systems and their existing sewerage collection and treatment systems to such an MWSD.

Asheville, alone among all local governments in North Carolina, **has no choice in the matter.** Instead, the New MWSD to operate in Buncombe and Henderson Counties is created by fiat of the Water Act, and the assets and debts of the Asheville Water System are involuntarily taken from Asheville and transferred to the New MWSD by operation of law. Sections 1 and 6 ("by operation of law") of the Act contain mandatory transfer provisions which currently apply only to the Asheville Water System. Included in the debts to be transferred, are Water Bonds issued by Asheville. From time to time as required for expansion and upgrades to the Water System, Asheville has issued revenue bonds (the "Water Bonds") under a General Trust Indenture dated December 1, 2005 (the "Indenture") with The Bank of New York (the "Trustee").

The Water Bonds were all issued pursuant to Article 5 of Chapter 159 of the General Statutes and are secured by the net revenues of the Water System. The Water Bonds are not issued by a separate entity; rather, the City of Asheville is the sole issuer and obligor on such bonds. Currently, the aggregate principal amount of Water Bonds outstanding is approximately $55,570,000, and the bonds carry a current credit rating of Aa2 from Moody's and AA from Standard & Poor's. These ratings reflect both the rating agencies' and the general public's strong confidence in the long-standing integrity of Asheville's operation and management of the Water System.

While Section 1.(f) of the Act purports to cause the transfer to the New MWSD of all existing debts of the Water System and the assumption by the New MWSD of such debts "by operation of law," no provision is made anywhere in the Act for obtaining the consent of the Trustee or the bondholders to such transfer. The State has simply declared that the Trustee and the bondholders must look to a newly created, unrated "successor" to Asheville for repayment of the Water Bonds and performance of the Indenture obligations.

The effective date of the act was May15, 2013.

What exactly does the Act purport to transfer and take away from the City of Asheville? Answer: The entire Asheville Water System -- lock, stock, barrels, pipes, woodlands and mountain streams as well as transferring the existing debt ($65,570,000) in Water Bonds

to the "new" MWSD as described above.

The Asheville Water System. For over a century Asheville has owned, operated, managed, and maintained a system for the supply, treatment, and distribution of water for drinking, cooking, and cleaning purposes, and for the operation of sanitary disposal systems. This Water System supplies water to a diverse customer base, including Asheville's own residents, residents living in unincorporated areas of Buncombe County, indirectly by wholesale to residents of other municipalities in Buncombe County, and more recently, to some residents of Henderson County. The Water System has been built and maintained over the past century using a combination of taxes, service fees, connection charges, bonded debt, various federal and state grants, contributions from Buncombe County, and donations from property owners and developers. Asheville owns, operates, and maintains its water system as a public enterprise under N.C. Gen. Stat. § 160A-311 through § 160A-326. By resolution of the Board of Commissioners of Buncombe County (the "County") and by deed, dated May 15, 2012, the County voluntarily conveyed to Asheville all of the County's ownership interest in various water distribution lines and related facilities that had been previously owned by the County. The Water System is no different in its governance and operation from other municipal water systems across North Carolina.

The Water System includes a protected watershed area consisting of over 17,000 acres of mountainous forestlands in Buncombe County, all of it owned by Asheville. It is one of the largest municipally owned watersheds in the United States. The watershed contains a number of non-navigable streams, including Left Fork Bee Tree Creek, Wolfe Branch, Bell Branch, Right Fork Bee Tree Creek, Sugar Fork, Shute Branch, Long Branch, Saltrock Branch, North Fork Swannanoa River, Glassmine Branch, Stony Fork, Dry Branch, Little Fork, Big Branch, Morgan Branch, as well as other smaller, unnamed streams. None of the streams feeding either of the two reservoirs in Asheville's Water System, Bee Tree Reservoir and North Fork Reservoirs is navigable by even the smallest of watercraft, such as a canoe or kayak.

Within the watershed area are two impoundments, each of which supports a water treatment plant and which together are capable of treating and supplying a total of 36 million gallons of water per day. Asheville owns a third water treatment plant located at the confluence of the French Broad and Mills Rivers in Henderson County with a daily treatment capacity of 7 million gallons of water. The system also includes an additional twenty-nine treated water storage reservoirs, some 1,660 miles of distribution lines for treated water, and more than forty pump stations. The system currently serves approximately 124,000 customers, some 48,000 of whom are located outside Asheville's city limits.

The Water System is also composed of intangible assets that are essential to its proper functioning but that are not, and cannot be, transferred to the New MWSD by the Water Act. The system has approximately 147 trained and certified employees; numerous licenses and permits required by state and federal law; wholesale water supply contracts with other municipal entities; operating contracts for the supply of goods and services; and revenue accounts of more than $2,218,000.00 held for the benefit of outstanding public bonds. In addition to the experienced and skilled workforce, other essential components of the system include well-developed operating procedures and policies, a strong and experienced management structure, and insurance coverage provided by policies held in the name of the City. If allowed to go into effect, Asheville contends that the Water Act would break the links between the physical assets of the system, which would be transferred to the New MWSD, and these intangible assets, which would remain with Asheville, thereby destroying the unity and integrity of the Asheville Water System.

The Lawsuit by Asheville to stop the Act from going into effect— Procedural history up to and including the May 23, 2014 hearing.

This lawsuit was filed before May 15, 2013. The Honorable Donald W. Stephens entered a Temporary Restraining Order ("TRO") blocking the Act going into effect. The case was then assigned to this Court pursuant to Local Rule 2.1 Wake County. The parties, by agreement, extended the TRO pending a hearing on Asheville's Motion for a Preliminary Injunction. In the interim, the State of North Carolina did not file an answer but instead, filed a motion to dismiss pursuant to Rule 12, North Carolina Rules of Civil Procedure.

In September, 2013, the Court held a hearing on Asheville's motion for preliminary injunction and the State's motion to dismiss the complaint. The TRO entered by the Honorable Donald W. Stephens in May, 2013, restraining the implementation of the legislation at issue remained in effect by consent of the parties and Order of this Court. Prior to the September, 2013 hearing the parties submitted memoranda of law, exhibits, affidavits and authorities, all of which the Court reviewed prior to the hearing.

Following that hearing the Court, in consultation with the parties, reached an accord that the parties would engage in discovery, be permitted to file an amended complaint and pleadings, and continue the original TRO in effect in order to have this matter come before the Court upon cross motions for summary judgment based upon undisputed material facts. This procedure made good sense because this case, no matter what the outcome, will be appealed to the appellate division and a decision on summary judgment declaring the rights of the parties under the law would be, in essence, a final judgment on most, if not all issues.

On September 30, 2013, Asheville filed its Verified Amended Complaint.
On October 31, 2013, the MSD filed its Answer.
On November 6, 2013, the State of North Carolina filed a Motion to Dismiss and Answer in response to the Verified Amended Complaint.
On February 27, 2014, Asheville filed its Motion For Partial Summary Judgment and a Motion for Discovery Sanctions against the State of North Carolina.
On February 27, 2014, the State of North Carolina filed its Motion for Summary Judgment.
On March 14, 2014, the State of North Carolina filed its Response to Asheville's Motion for Partial Summary Judgment.
On April 14, 2014, the State of North Carolina filed a Reply in further support of its Motion for Summary Judgment.
In addition, both parties have submitted memorandum of law and various replies to the motions for summary judgment.
The parties requested that the Court hold a hearing on the motions for summary judgment and the State's motion to dismiss on May, 23, 2014.
The Court, in preparation for the May 23, 2014 summary judgment hearing, spent over 12 hours reviewing the memoranda of law, exhibits, affidavits and the legislative Act at issue and other materials submitted by the State and Asheville, the total combination of which exceeded approximately one foot in height notwithstanding the case law submitted by "flash drive."
On May 23, 2014, counsel for all parties were present and counsel for the State and Asheville presented oral arguments. The Court, at the conclusion of the hearing, requested that counsel for the State and Asheville submit by Friday, May 30, a maximum two-page submission setting for the relief requested by each party (except nominal defendant MSD) and from Asheville, copies of cited decisions in the N. C. Reports preceding Volume 265. These were timely served.
The Court has now had the time and opportunity, uninterrupted by other court business, to thoroughly review the arguments, record and supporting authorities for all sides in this dispute about the Asheville Water System. From a review of the memoranda of both the State and Asheville and statements of counsel at the May 23, 2014 hearing as well as the record, there is no genuine issue as to any material facts in this matter that would prevent this Court from ruling on the issues presented as a matter of law pursuant to Rule 56, North Carolina Rules of Civil Procedure. This matter is now ripe for disposition.

Decision:

The Court has reached a decision on all of Asheville's Claims For Relief except for the two claims relating to the Water Bonds. The Court's decision on each claim follows:

First Claim for Relief:

The Water Act violates Article II, Section 24(1)(a) of the Constitution of North Carolina which provides as follows: that "[t]he General Assembly shall not enact any local, private, or special act or resolution: (a) [r]elating to health, sanitation and the abatement of nuisances." Article II, Section 24(2) of the Constitution of North Carolina provides as follows: "[n]or shall the General Assembly enact such local, private, or special act by the partial repeal of a general law, but the General Assembly may at any time repeal local, private or special laws enacted by it." Article II, Section 24(3) of the Constitution of North Carolina provides as follows: "[a]ny local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void." Article II, Section 24(1)(e) of the Constitution of North Carolina provides that "[t]hat the General Assembly shall not enact any local, private, or special act or resolution: (e) [r]elating to non-navigable streams."

Decision on First Claim For Relief. The Court based, upon the undisputed material facts of record, concludes as a matter of law that:

1. The Water Act is a local act which was specifically drafted and amended to apply only to Asheville and the Asheville Water System
2. The Water Act is a local act relating to the treatment and supply of water for drinking, cooking and cleaning purposes, and for the operation of sanitary disposal systems which is applicable only to Asheville and the Asheville Water System and therefore is a local act which relates to health and sanitation in violation of Article II, Section 24(1)(a) of the North Carolina Constitution.
3. The Water Act is a local act relating to non-navigable streams and is applicable only to Asheville and the Asheville Water System in violation of Article II, Section 24(1)(e) of the North Carolina Constitution.
4. The Water Act, a local act, was enacted in violation of the provisions of Article II, Section 24(1)(a) and Section 24(1)(3) and pursuant to Article II, Section 24(3) of the North Carolina Constitution is void, of no force and effect.

Second Claim For Relief:

The Water Act violates Article I, Section 19 of the Constitution of North Carolina in that the Act takes, without Asheville's consent, the Water System and transfers the Water System to another entity without any rational basis for doing so.

Decision on Second Claim For Relief. The Court based, upon the undisputed material facts of record, concludes as a matter of law that:

1. Asheville, in its ownership and operation of the Water System, pursuant to Article 14A of

Chapter 160A of the N.C. General Statutes, acts in a proprietary capacity and function. Acting in a proprietary capacity with respect to the Water System, Asheville is entitled to the protections of Article I, Section 19 of the North Carolina Constitution as a private individual or corporation engaged in a similar business enterprise. *Ashbury v. Albemarle, 162 N.C. 247(1913); Candler v. City of Asheville, 247 N.C. 398(1958).*

2. The Water Act, by operation of law, transfers the assets and debts of the Asheville Water System without consent and over the objection of Asheville, the Water System's owner. The transfer of the entire Water System required by the Water Act results in no change in the existing uses or purposes currently served by the Asheville Water Systems.
3. Section 1 of the Act lacks a rational basis for selecting the Asheville Water System and subjecting the Water System to treatment different from that provided under the Act for all other publicly owned water systems in North Carolina and fails to make a reasonable classification as required by law.
4. The Water Act lacks a rational basis, including, but not limited to the fact that (a) the use of the assets of the Water System will not change under the transfer; (b) the transfer to the new "owner" the MSWD, will not result in any higher quality of water that is now provided by the Asheville Water System; (c) the Water Act does not expand or improve protection of health and sanitation beyond that now being provided by the Asheville Water System; (d) the new "owner" of the Asheville Water System is an entity that has never owned or operated a public water supply and delivery system; (e); The Water Act removes ownership of a proprietary function of local government which operates similar to a public corporate entity by simply taking the Water System away from the City of Asheville by force of law and without a rational basis.
5. The Water Act is contrary to the law of the land in violation of Article I, Section 19 of the North Carolina Constitution as the means utilized to achieve what the legislation sought to obtain bears no relation, rational basis or otherwise, to the Act's stated purpose.

The Third Claim for Relief:

The Water Act violates Article I, Sections 19 and 35 of the Constitution of North Carolina in that the Water Act transfers the Water System, a proprietary function of the City of Asheville, to the MWSD, resulting an unlawful taking of the Asheville Water System, which system is to be used for the same purposes as the Asheville Water System is presently being used.

Decision on Third Claim For Relief. The Court based, upon the undisputed material facts of record, concludes as a matter of law that:

1. Asheville in its ownership and operation of the Water System, pursuant to Article 14A of Chapter 160A of the N.C. General Statutes, acts in a proprietary capacity and function. Acting in a proprietary capacity with respect to the Water System, Asheville is entitled to the protections of Article I, Sections 19 and 35 of the North Carolina Constitution as a private individual or corporation engaged in a similar business enterprise. *Ashbury v. Albemarle, 162 N.C. 247(1913); Candler v. City of Asheville, 247 N.C. 398(1958).*
2. The Water Act, by operation of law, transfers the assets and debts of the Asheville Water System without consent and over the objection of Asheville, the Water System's owner. The transfer of the entire Water System required by the Water Act results in no change in the existing uses or purposes currently served by the Asheville Water Systems. The Water Act's transfer of the entire Water System, reduced to essentials, amounts to a taking of all the assets and debts of a proprietary municipal business from Asheville and places the assets and debts in the ownership of another entity. Consider the impact of the enactment of a statute requiring SAS to transfer its entire proprietary corporate business and its control to a competitor, another proprietary corporate business without SAS' consent for an alleged public purpose in favor of cutting costs and consolidation of business resources.
3. The Water Act is not a valid exercise of the sovereign power of the legislative branch of government (or the State of North Carolina) to take or condemn property for a public use where here, the property (the Water System) is being used for the same purposes as are intended to be done by the transfer of the Water System to the MWSD.
4. The Water Act violates Article I, Sections 19 and 35 of the North Carolina Constitution.

The Sixth (Alternative) For Relief.

The Water Act violates Article I, Sections 19 and 35 of the Constitution of North Carolina by transferring the Water System to MWSD without just compensation.

Decision on Sixth (Alternative) Claim For Relief. The Court based, upon the undisputed material facts of record, concludes as a matter of law that in the event that it may be determined that the Water Act is a valid exercise of the sovereign power of the State of North Carolina to take the Asheville Water System in the manner set forth in the Act then Asheville, as the owner of the Asheville Water System, is entitled to be paid just compensation for the Asheville Water System which current audited financial statements asses as its Net Asset Value to be greater than One hundred million dollars ($100,000,000). (Verified Amended Complaint, p.75.) *State Highway Comm'n v. Greensboro Bd of Educ., 265 N.C. 35, 49 (1965).*

The Fourth and Fifth Claims for Relief attack the constitutionality of the Water Act on the

basis that the Act, if implemented would violate Article I, Section 10 of the United States Constitution prohibiting states from passing any law which would impair the obligation of contracts and Article I, Section 19 of the North Carolina Constitution which prohibits the State from impairing the obligation of contracts. *Broadfoot v. City of Fayetteville, 124 N.C. 472 (1899).* Because of the decisions of the Court above, the Court declines to address these two claims.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT:

1. That the Water Act is in violation of Article II, Section 24(1)(a) and Article II, Section 24(1)(e) and pursuant to Article II, Section 24(3) of the North Carolina Constitution is void and unenforceable.
2. The Water Act is contrary to the law of the land in violation of Article I, Section 19 of the North Carolina Constitution as the means utilized to achieve what the legislation sought to obtain bears no relation, rational basis or otherwise, to the Act's stated purpose and is void and unenforceable.
3. The Water Act is not a valid exercise of the sovereign power of the legislative branch of government (or the State of North Carolina) to take or condemn property for a public use where here, the property (the Water System) is being used for the same purposes as are intended to be done by the transfer of the Water System to the MWSD. The Water Act violates Article I, Sections 19 and 35 of the North Carolina Constitution and is void and unenforceable.
4. The City of Asheville's Motion For Partial Summary Judgment as to the First, Second, Third and its Alternate Sixth Claims for Relief is granted.
5. That the State of North Carolina's Motion to Dismiss the complaint is denied.
6. That the State of North Carolina's Motion for Summary Judgment as to all Claims for Relief is denied.
7. That the City of Asheville's Motion for Discovery Sanctions is denied.
8. That the State of North Carolina is permanently enjoined from implementing or attempting to implement The Water Act.

This the 9th day of June, 2014.

Howard E. Manning, Jr.
Superior Court Judge

F

North Carolina Constitutional Provisions Relating to "General" Versus "Local, Private, and Special" Laws

- Article VII, Section 1
- Article XIV, Section 3
- Article II, Section 24
- Article V, Sections 4, 8, 9, 11, 12, 13 and 14

NORTH CAROLINA CONSTITUTION
ARTICLE VII

Section 1. General Assembly to provide for local government.

The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions, and, except as otherwise prohibited by this Constitution, may give such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

The General Assembly shall not incorporate as a city or town, nor shall it authorize to be incorporated as a city or town, any territory lying within one mile of the corporate limits of any other city or town having a population of 5,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within three miles of the corporate limits of any other city or town having a population of 10,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within four miles of the corporate limits of any other city or town having a population of 25,000 or more according to the most recent decennial census of population taken by order of Congress, or lying within five miles of the corporate limits of any other city or town having a population of 50,000 or more according to the most recent decennial census of population taken by order of Congress. Notwithstanding the foregoing limitations, the General Assembly may incorporate a city or town by an act adopted by vote of three-fifths of all the members of each house.

NORTH CAROLINA CONSTITUTION
ARTICLE XIV

Sec. 3. General laws defined.

Whenever the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State. General laws may be enacted for classes defined by population or other criteria. General laws uniformly applicable throughout the State shall be made applicable without classification or exception in every unit of local government of like kind, such as every county, or every city and town, but need not be made applicable in every unit of local government in the State. General laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be. The General Assembly may at any time repeal any special, local, or private act.

NORTH CAROLINA CONSTITUTION
ARTICLE II

Sec. 24. Limitations on local, private, and special legislation.

(1) Prohibited subjects. The General Assembly shall not enact any local, private, or special act or resolution:

(a) Relating to health, sanitation, and the abatement of nuisances;
(b) Changing the names of cities, towns, and townships;
(c) Authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys;
(d) Relating to ferries or bridges;
(e) Relating to non-navigable streams;
(f) Relating to cemeteries;
(g) Relating to the pay of jurors;
(h) Erecting new townships, or changing township lines, or establishing or changing the lines of school districts;
(i) Remitting fines, penalties, and forfeitures, or refunding moneys legally paid into the public treasury;
(j) Regulating labor, trade, mining, or manufacturing;
(k) Extending the time for the levy or collection of taxes or otherwise relieving any collector of taxes from the due performance of his official duties or his sureties from liability;
(*l*) Giving effect to informal wills and deeds;
(m) Granting a divorce or securing alimony in any individual case;
(n) Altering the name of any person, or legitimating any person not born in lawful wedlock, or restoring to the rights of citizenship any person convicted of a felony.

(2) Repeals. Nor shall the General Assembly enact any such local, private, or special act by the partial repeal of a general law; but the General Assembly may at any time repeal local, private, or special laws enacted by it.

(3) Prohibited acts void. Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

(4) General laws. The General Assembly may enact general laws regulating the matters set out in this Section.

NORTH CAROLINA CONSTITUTION
ARTICLE V

Sec. 4. Limitations upon the increase of local government debt.

(1) Regulation of borrowing and debt. The General Assembly shall enact general laws relating to the borrowing of money secured by a pledge of the faith and credit and the contracting of other debts by counties, cities and towns, special districts, and other units, authorities, and agencies of local government.

Sec. 8. Health care facilities.

Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State, counties, cities or towns, and other State and local governmental entities to issue revenue bonds to finance or refinance for any such governmental entity or any nonprofit private corporation, regardless of any church or religious relationship, the cost of acquiring, constructing, and financing health care facility projects to be operated to serve and benefit the public; provided, no cost incurred earlier than two years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from the revenues, gross or net, of any such projects and any other health care facilities of any such governmental entity or nonprofit private corporation pledged therefor; shall not be secured by a pledge of the full faith and credit, or deemed to create an indebtedness requiring voter approval of any governmental entity; and may be secured by an agreement which may provide for the conveyance of title of, with or without consideration, any such project or facilities to the governmental entity or nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto for nonprofit private corporations.

Sec. 9. Capital projects for industry.

Nothwithstanding any other provision of this Constitution, the General Assembly may enact general laws to authorize counties to create authorities to issue revenue bonds to finance, but not to refinance, the cost of capital projects consisting of industrial, manufacturing and pollution control facilities for industry and pollution control facilities for public utilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property for any such capital project.

Sec. 11. Capital projects for agriculture.

Notwithstanding any other provision of the Constitution the General Assembly may enact general laws to authorize the creation of an agency to issue revenue bonds to finance the cost of capital projects consisting of agricultural facilities, and to refund such bonds.

In no event shall such revenue bonds be secured by or payable from any public moneys whatsoever, but such revenue bonds shall be secured by and payable only from revenues or property derived from private parties. All such capital projects and all transactions therefor shall be subject to taxation to the extent such projects and transactions would be subject to taxation if no public body were involved therewith; provided, however, that the General Assembly may provide that the interest on such revenue bonds shall be exempt from income taxes within the State.

The power of eminent domain shall not be exercised to provide any property for any such capital project.

Sec. 12. Higher education facilities.

Notwithstanding any other provisions of this Constitution, the General Assembly may enact general laws to authorize the State or any State entity to issue revenue bonds to finance and refinance the cost of acquiring, constructing, and financing higher education facilities to be operated to serve and benefit the public for any nonprofit private corporation, regardless of any church or religious relationship provided no cost incurred earlier than five years prior to the effective date of this section shall be refinanced. Such bonds shall be payable from any revenues or assets of any such nonprofit private corporation pledged therefor, shall not be secured by a pledge of the full faith and credit of the State or such State entity or deemed to create an indebtedness requiring voter approval of the State or such entity, and, where the title to such facilities is vested in the State or any State entity, may be secured by an agreement which may provide for the conveyance of title to, with or without consideration, such facilities to the nonprofit private corporation. The power of eminent domain shall not be used pursuant hereto.

Sec. 13. Seaport and airport facilities.

(1) Notwithstanding any other provision of this Constitution, the General Assembly may enact general laws to grant to the State, counties, municipalities, and other State and local governmental entities all powers useful in connection with the development of new and existing seaports and airports, and to authorize such public bodies:

(a) to acquire, construct, own, own jointly with public and private parties, lease as lessee, mortgage, sell, lease as lessor, or otherwise dispose of lands and facilities and improvements, including undivided interest therein;

(b) to finance and refinance for public and private parties seaport and airport facilities and improvements which relate to, develop or further waterborne or airborne commerce and cargo and passenger traffic, including commercial, industrial, manufacturing, processing, mining, transportation, distribution, storage, marine, aviation and environmental facilities and improvements; and

(c) to secure any such financing or refinancing by all or any portion of their revenues, income or assets or other available monies associated with any of their seaport or airport facilities and with the facilities and improvements to be financed or refinanced, and by foreclosable liens on all or any part of their properties associated with any of their seaport or airport facilities and with the facilities and improvements to be financed or refinanced, but in no event to create a debt secured by a pledge of the faith and credit of the State or any other public body in the State.

Sec. 14. Project development financing.

Notwithstanding Section 4 of this Article, the General Assembly may enact general laws authorizing any county, city, or town to define territorial areas in the county, city, or town and borrow money to be used to finance public improvements associated with private development projects within the territorial areas, as provided in this section. The General Assembly shall set forth by statute the method for determining the size of the territorial area and the issuing unit. This method is conclusive. When a territorial area is defined pursuant to this section, the county shall determine the current assessed value of taxable real and personal property in the territorial area. Thereafter, property in the territorial area continues to be subject to taxation to the same extent and in like manner as property not in the territorial area, but the net proceeds of taxes levied on the excess, if any, of the assessed value of taxable real and personal property in the territorial area at the time the taxes are levied over the assessed value of taxable real and personal property in the territorial area at the time the territorial area was defined may be set aside. The instruments of indebtedness authorized by this section shall be secured by these set-aside proceeds. The General Assembly may authorize a county, city, or town issuing these instruments of indebtedness to pledge, as additional security, revenues available to the issuing unit from sources other than the issuing unit's exercise of its taxing power. As long as no revenues are pledged other than the set-aside proceeds authorized by this section and the revenues authorized in the preceding sentence, these instruments of indebtedness may be issued without approval by referendum. The county, city, or town may not pledge as security for these instruments of indebtedness any property tax revenues other than the set-aside proceeds authorized in this section, or in any other manner pledge its full faith and credit as security for these instruments of indebtedness unless a vote of the people is held as required by and in compliance with the requirements of Section 4 of this Article.

Notwithstanding the provisions of Section 2 of this Article, the General Assembly may enact general laws authorizing a county, city, or town that has defined a territorial area pursuant to this section to assess property within the territorial area at a minimum value if agreed to by the owner of the property, which agreed minimum value shall be binding on the current owner and any future owners as long as the defined territorial area is in effect. (2003-403, s.1.)

G

SELECTED CASE LAW EXCERPTS

- Why Must Laws Be "General"?

- What is a "General Law"?

- Determination Whether a Law is "General" or "Special" Is Not the Same as "Rational Basis" Equal Protection Analysis

- Is a Transfer of a Public Enterprise From One Municipal Owner to Another Municipal Owner an Unconstitutional "Taking"?

WHY MUST LAWS BE "GENERAL"?

"The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December 1776. During the ensuring 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special acts or resolutions relating to many of the most common subjects of legislation.

....

In thus amending their organic law, the people were motivated by a desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void [....]."

Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 185-86, 581 S.E.2d 415, 426-27 (2003)(quoting ***Idol v. Street,*** 233 N.C. 730, 732-33, 65 S.E.2d 313, 314-15 (1951)(first alteration in original)(quoting N.C. Constitution of 1868, art. II, §29 (1917)(now art. II, §24(3)))).

WHAT IS A "GENERAL LAW"?

"Within the meaning of constitutional prohibitions against local laws, a law is local where, by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where the classification does not rest on circumstances distinguishing the places included from those excluded. In other words, a local law discriminates between different localities without any real, proper, or reasonable basis or necessity – a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless or detrimental to the others."

McIntyre v. Clarkson, 254 N.C. 510, 518, 119 S.E.2d 888, 894 (1961).

"[T]he test is whether the classification is reasonable and whether it embraces all of the class to which it relates. Classifications ... must be natural and intrinsic and based on substantial differences.

Id. at 519, 894-95.

"In barest outline, a statutory classification is held to be 'reasonable' if it satisfies the following five tests: (1) the classification must be based upon substantial distinctions which make one class really different from another; (3) the classification adopted must be germane to the purpose of the law; (3) the classification must not be based upon existing circumstances only; (4) to whatever class a law may apply, it must apply equally to each member thereof; and (5) if the classification meets these requirements, the number of members in a class is wholly immaterial."

City of Asheville v. State of North Carolina, 396 N.C. 80, 91, 794 S.E.2d 759, 768-69 (2016) (quoting Ferrell, *Local Legislation in the North Carolina General Assembly,* 45 N.C.L. Rev. 340, 391-92 (1967)).

DETERMINATION WHETHER A LAW IS "GENERAL" OR "SPECIAL" IS NOT THE SAME AS "RATIONAL BASIS" EQUAL PROTECTION ANALYSIS

"[T]he State hypothesizes that the General Assembly's decision to treat the City differently than all other North Carolina municipalities might hinge upon the "unique facts" and history of the "Asheville-Buncombe-Henderson region," which the State claims to consist of a "prolonged history of conflict between" the City and residents of Buncombe and Henderson Counties who are dependent on the City's water system that has been "characterized by charges of discrimination and the misuse of public monies and other resources" and has "engendered a toxically high level of public district and cynicism concerning local government in that region which itself makes sound democratic governance there difficult to achieve." More specifically, the State asserts, as a purely hypothetical matter, that the General Assembly "could have" singled out the City's water system for involuntary transfer due to "fundamental and serious governance problems" that affect extraterritorial customers located in portions of Buncombe County outside the City's municipal limits and in Henderson County.

...

[W]e note that this aspect of the State's defense of the legislation seems rooted in the rational basis test employed in the due process and equal protection context. However, nothing in our Article II, Section 24 jurisprudence suggests that we should focus on a hypothetical, rather than the actual, justification for the challenged legislation in determining whether it should be deemed general or local in nature. Furthermore, a decision to approve the use of the hypothetical purpose approach suggested by the State would deprive Article II, Section 24 of the North Carolina Constitution of any meaningful effect by rendering it indistinguishable from the substantive due process provisions of Article I, Section 19 of the North Carolina Constitution."

City of Asheville v. State of North Carolina, 396 N.C. 80, 95-96, 794 S.E.2d 759, 771-72 (2016) internal citations omitted)

IS AN INVOLUNTARY TRANSFER OF A PUBLIC ENTERPRISE SYSTEM FROM ONE MUNICIPAL OWNER TO ANOTHER MUNICIPAL OWNER AN UNCONSTITUTIONAL "TAKING"?

"In matters purely governmental in character, it is conceded that the municipality is under the absolute control of the legislative power, but as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations."

Asbury v. City of Albemarle, 162 N.C. 247, 253, 78 S.E. 146, 149 (1913).

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

Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 694-95 (1819) (Marshall, C.J.),

"It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to define, has been approved by many of the state courts, and it has been held that, as to the latter class of property, the legislature is not omnipotent. If the distinction is recognized, it suggests the questions whether the property of a municipal corporation owned in its private and proprietary capacity may be taken from it against its will and without compensation. Mr. Dillon says truly that the question has never arisen directly for adjudication in this Court. But it and the distinction upon which it is based have several times been noticed. Counsel for plaintiffs in error assert that the City of Alleghany was the owner of property held in its private and proprietary capacity, and insist that the effect of the proceedings under

this act was to take its property without compensation and vest it in another corporation, and that thereby the city was deprived of its property without due process of law, in violation of the Fourteenth Amendment. *But no such question is presented by the record, and there is but a vague suggestion of the facts upon which it might have been founded.*"

Hunter v. City of Pittsburgh, 207 U.S. 161, 179-80, 28 S.Ct. 40, 49, 52 L.Ed. 151, 159-60 (1907). (internal citations omitted; emphasis added)

"[I]t might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation."

Briggs v. City of Raleigh, 195 N.C. 223, 229-30, 141 S.E. 597 (1928).

H

SOME SUGGESTED FUTHER READINGS

Long, "State Constitutional Prohibitions on Special Laws," 60 *Cleveland State Law Review* 719 (2012)

Ireland, "The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States," *The American Journal of Legal History*, Vol. 46, No. 3 (July 2004)

Ferrell, "Local Legislation in the North Carolina General Assembly," *45 North Carolina Law Review* 340 (1967)

Wiseman, "Rethinking Municipal Corporate Rights," 61 *Boston College Law Review* 591 (2020)