

**City of Asheville v. State of North Carolina:
Finding a Limit for Legislative Reach Into Local Affairs?**

Seth Morris

I. Introduction

On October 6, 2015 the North Carolina Court of Appeals issued its ruling in the case of *City of Asheville v. State*.¹ In ruling for the state, the court affirmed the district court’s ruling that the City of Asheville had standing while rejecting the lower court’s conclusions about the act’s constitutionality.² The city’s challenge rested on three arguments:

- (1) that the act violates state constitutional limitations of the legislature’s power to enact local legislation concerning “health and sanitation” or the “regulation of non-navigable streams³;
- (2) that the act violates the state constitution by irrationally singling-out a single municipality⁴, and;
- (3) that the state constitution prohibits the legislature from taking property from a municipality without compensation and transferring that property to another political subdivision.⁵

The court, applying a broad interpretation of the state’s power over municipalities and other political subdivisions, rejected all three of the city’s claims.⁶ The city plans to appeal the court’s decision.⁷

¹ 777 S.E.2d 92 (N.C. Ct. App. 2015)

² *Id.* at 94.

³ Brief of Plaintiff-Appellee at 14, *City of Asheville v. State*, 777 S.E.2d 92 (N.C. Ct. App. 2015) (No. COA 14-1255).

⁴ *Id.* at 40.

⁵ *Id.* at 36.

⁶ *City of Asheville v. State*, 777 S.E.2d 92, 102 (N.C. Ct. App. 2015)

⁷ Mark Barrett, *Updated: Court Upholds Asheville Water System Transfer*, ASHEVILLE CITIZEN-TIMES (Oct. 6, 2015, 9:58 PM), <http://www.citizen-times.com/story/news/2015/10/06/court-upholds-asheville-water-system-transfer-msd/73437648/?from=global&sessionKey=&autologin=>.

II. Background

In 2013, the North Carolina General Assembly passed House Bill 488, the North Carolina Water/Sewer Act.⁸ Citing concerns over cost-effectiveness and quality of service, the Act established that, for counties with both a municipal water system that meets certain service criteria and a metropolitan sewerage district (MSD), the water system and sewerage district must be merged into a new political entity known as a Metropolitan Water and Sewerage District (MWSD).⁹ Because of the bill's strict limits upon which systems would qualify for merger, its only effect was to force the merger of the City of Asheville's municipal water system with the Metropolitan Sewerage District of Buncombe County.¹⁰ This merger would have the effect of transferring the all of the water system property owned by the city to the newly established Metropolitan Water and Sewerage District of Buncombe County.

The Water/Sewer Act is the result of years of political tension, previous legislative involvement, and litigation surrounding the Asheville Water System.¹¹ This ongoing dispute stems from the fact that the City of Asheville owns and controls the water system and sells water to surrounding communities and customers.¹² The city established a rate system that charged non-residents a higher rate than those living within the city limits.¹³ The legislature asserted itself into the issue by passing several bills that regulated how the water system charged its customers beginning in the mid-2000s.¹⁴ Tensions continued and culminated with the passing of

⁸ N.C.G.S. § 162A-85.2.

⁹ *Id.*

¹⁰ *City of Asheville v. State*, 777 S.E.2d 92, 94 (N.C. Ct. App. 2015).

¹¹ *Timeline: Water – A Fighting Word in Asheville*, ASHEVILLE CITIZEN-TIMES (Oct. 6, 2015, 10:24 AM), <http://www.citizen-times.com/story/news/local/2014/05/17/water-fighting-word-asheville/9238173/>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

the Water/Sewer Act, wresting control of the system away from the city and transferring its ownership to the newly created metropolitan water and sewerage district.¹⁵

As soon as the Act became law, the city filed a complaint and motion for a temporary restraining order in Wake County Superior Court.¹⁶ The court granted the temporary restraining order and trial preparations began.¹⁷ In June of 2014, the Superior Court issued a ruling rejecting the State’s motion for summary judgment and granting the city relief on the three aforementioned constitutional claims.¹⁸ The state appealed and a three-judge panel of the Court of Appeals heard oral arguments in June of 2015.¹⁹ In a decision filed on October, 6, 2015, the panel unanimously rejected all three of the city’s claims.²⁰

III. First Claim: Article II, § 24 Prohibits Local Laws Relating to “Health”, “Sanitation”, and “Non-Navigable Streams”

Asheville’s first claim is that the Water/Sewer Act is in violation of Article II, § 24 of the state constitution, which prohibits local laws “related to” fourteen different subjects, including “health,” “sanitation,” and “non-navigable streams.”²¹ Asheville contends that law is clearly related to health and sanitation because it “delegates all the powers necessary to create, own, operate, and regulate sanitary sewer systems and public water systems . . . whose purpose no doubt is to promote the public health.”²² Furthermore, the city contends that the act clearly relates to non-navigable streams because, “[w]ithout the non-navigable streams [that feed the system’s reservoirs], Asheville has no Water System.”²³

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Brief of Plaintiff-Appellee at 14, *City of Asheville v. State*, 777 S.E.2d 92 (N.C. Ct. App. 2015) (No. COA 14-1255).

²² *Id.* at 30.

²³ *Id.* at 35.

The Superior Court ruled that the Water/Sewer Act violates Article II, § 24 of the state constitution by attempting to regulate “health,” “sanitation”, and “non-navigable streams” through a local law.²⁴ In support of this proposition, the lower court ruled that, as a matter of law, the Water/Sewer Act is a local law, “specifically drafted and amended to apply on to Asheville and the Asheville Water System,” and that the law related to “sanitation,” “health, and “non-navigable streams.”²⁵

In overturning the Superior Court’s ruling, the Court of Appeals agreed with the city’s claim that the Water/Sewer Act is local law, but reasoned that a local law “is not deemed to be one ‘relating to health [or] sanitation’ unless (1) the law plainly ‘state[s] that *its purpose is to regulate* [this prohibited subject],’ or (2) the reviewing court is able to determine ‘that the purpose of the act is to regulate [this prohibited subject after] careful perusal of the entire act.’”²⁶ In order to determine the purpose of the Water/Sewer Act, the court turned first to the language of the legislation itself. The Act purports to address concerns regarding “quality [of] services” and “cost effective[ness]” of the municipal water system.²⁷ Secondly, the court determined, by “perusal of the entire act”, that it “prioritizes[s] concerns regarding the governance over water and sewer systems and the quality of the services rendered.”²⁸ The court distinguished the present case from previous cases voiding the establishment of local sanitation districts on the grounds that the Water/Sewer Act does not “enforce” or “impose” health regulations on the

²⁴ City of Asheville v. State, 777 S.E.2d 92, 94 (N.C. Ct. App. 2015).

²⁵ *Id.* at 95.

²⁶ City of Asheville v. State, 777 S.E.2d 92, 97-98 (N.C. Ct. App. 2015) (quoting City of Asheville v. State, 665 S.E.2d 103, 126 (N.C. Ct. App. 2008)).

²⁷ City of Asheville v. State, 777 S.E.2d 92, 94 (N.C. Ct. App. 2015).

²⁸ *Id.*

water system.²⁹ Furthermore, the court determined that there is “nothing in the Water/Sewer Act which suggests that its purpose is to address some concern regarding a non-navigable stream.”³⁰

IV. Second Claim: Article I § 19 Prohibits the State from Singling-Out a Municipality Without a “Rational Basis” in Violation of the “Law of the Land.”

The city’s second claim—that the Water/Sewer Act is unconstitutional because it irrationally singles out the city in violation of the law of the land—relies upon the due process clause established in Article I, § 19 of the state constitution.³¹ Asheville argued that this clause, which mirrors 14th Amendment of the U.S. Constitution, requires that, even when the State is pursuing a legitimate government interest, it must do so “rationally”, without “arbitrary or capricious discrimination.”³² The city conceded that the State has a “legitimate government interest” in ensuring that North Carolina’s water systems provide “reliable, cost-effective, high-quality water and sewer services.”³³ However, the city contends, that, in pursuit of this legitimate interest, the state irrationally and “meticulously structured [the Act] to exclude” other, similarly-situated municipal water system and metropolitan sewerage districts, and conversely, municipals sewerage systems operating within metropolitan water districts.³⁴ Furthermore, the city argued, the Act delineation between Asheville’s water system and other water systems within the Metropolitan Sewerage District of Buncombe County, is further proof of its “arbitrary and irrational” nature.³⁵

In ruling for the city, the Superior Court found the state lacked a “rational basis” for transferring the municipal water system “without Asheville’s consent” when such a transfer

²⁹ *Id.* at 99.

³⁰ *Id.* at 98.

³¹ Brief of Plaintiff-Appellee at 41, *City of Asheville v. State*, 777 S.E.2d 92 (N.C. Ct. App. 2015) (No. COA 14-1255).

³² *Id.* at 41.

³³ *Id.* at 42.

³⁴ *Id.* at 42.

³⁵ *Id.* at 44.

would result in “no change in the existing use and purposes” of the water system.³⁶ Thusly, the state violated the “law of the land” by enacting a transfer that “bears no relation . . . to the Act’s stated purpose.”³⁷

The Court of Appeals disagreed that the Water/Sewer Act irrationally singled-out the City of Asheville and concluded that the Act achieved a “legitimate government interest” by expanding the governance of the system to include representatives from across the system’s service area. The court found that when the “General Assembly irrationally singles out one municipality in legislation [it] merely means that the legislation is a local law”³⁸ and, that local laws are not in violation of the “law of the land,” “even when legislation affects a municipality’s exercise of a proprietary function, such as operating a water system.”³⁹ Furthermore, the court found that the transfer provision achieves “some valid public purpose” by transitioning the governance of the water system to “a political subdivision whose representatives are selected from all areas served by the system, as opposed to being governed by Asheville’s city council, which is chosen only by those living within Asheville’s city limits.”⁴⁰

V. Third Claim: The Transfer Provision of the Water/Sewer Act Is an Unconstitutional Taking Under Article 1, § 19 and § 35.

The City of Asheville’s final claim was that the transfer of the Asheville Water System to the newly created metropolitan water and sewerage district without compensation is an unconstitutional “taking.”⁴¹ Article 1, § 19 of the state constitution establishes due process protections against the state taking of property.⁴² Article 1, § 35 asserts that “a frequent

³⁶ City of Asheville v. State, No. 13CVS006691, 2014 WL 7053974, at *5 (N.C. June 9, 2014)

³⁷ *Id.* at *6.

³⁸ City of Asheville v. State, 777 S.E.2d 92, 100 (N.C. Ct. App. 2015).

³⁹ *Id.* at 101.

⁴⁰ *Id.* at 100-01.

⁴¹ Brief of Plaintiff-Appellee at 36, City of Asheville v. State, 777 S.E.2d 92 (N.C. Ct. App. 2015) (No. COA 14-1255).

⁴² N.C. CONST. art. 1, § 19.

recurrence to fundamental principles” is vital to the protection of liberty.⁴³ Asheville contended that (1) the water system is a proprietary function that must be afforded the same protections from taking as private businesses, and that (2) such a taking of its proprietary water system is not a “valid use of [the] sovereign power” to take property for “public use” because such a transfer would not materially change the public good stemming from the use of the property.⁴⁴ Pleading in the alternative, Asheville argued that, even if the transfer of the water system is constitutional, that the city must be justly compensated for the taken property.⁴⁵

The Superior Court agreed with the city on both counts. The court found that (1) Asheville water system is a proprietary function, and (2) that the city is entitled to the same protections as business engaged in “similar business enterprise.”⁴⁶ Thusly, the court reasoned, the taking is not a “valid exercise” of the state’s authority, because the system is used for the same purposes under its current ownership as it would be under the control of a metropolitan water and sewerage district.⁴⁷ Furthermore, the court held that even if the taking were constitutional, Asheville is entitled to just compensation for the taking of its system which is worth in excess of \$100 million.⁴⁸

The Court of Appeals, relying on precedent that established expansive interpretation of state power over municipalities, reversed the lower court. North Carolina courts have previously recognized the authority of the legislature to transfer a municipal water system to another political entity.⁴⁹ The court dismissed the notion that, because the city was acting in a

⁴³ N.C. CONST. art. 1, § 35.

⁴⁴ Brief of Plaintiff-Appellee at 37, *City of Asheville v. State*, 777 S.E.2d 92 (N.C. Ct. App. 2015) (No. COA 14-1255).

⁴⁵ *Id.* at 41.

⁴⁶ *City of Asheville v. State*, No. 13CVS006691, 2014 WL 7053974, at *5 (N.C. June 9, 2014).

⁴⁷ *Id.* at *6.

⁴⁸ *Id.*

⁴⁹ *City of Asheville v. State*, 777 S.E.2d 92, 96 (N.C. Ct. App. 2015).

“proprietary capacity”, it deserved the same protections afforded to similar private entities.⁵⁰ The court found no distinction between state authority over proprietary functions and any other municipal functions.⁵¹ Furthermore, the court, relying on precedent established by the United States Supreme Court, found no duty to compensate the city for the taking.⁵² The court reasoned that the diversion of waterways for the purpose of providing water to its citizens is a function of the state that it may delegate to municipalities or whatever else political entity it chooses.⁵³ As such, the court found that, the state may take a municipal water system without “compensation” or the “consent of [the municipality’s] citizens.”⁵⁴

VI. Conclusion

The decision in *City of Asheville v. State* further confirms that the legislature in North Carolina has the broad authority to create and rescind municipal powers with little fear of judicial intervention. As the court interprets it, Article II, § 24 provides protection to municipalities only in the clearest and most egregious cases of legislative overreach. Municipalities bear a heavy burden in proving that this overreach occurred. Furthermore, North Carolina continues to recognize little municipal right to due process.

Moving forward, municipalities can no longer rely on the courts to protect them from the legislative whims that attempt to govern their local affairs. It is clear that where the legislature want to intervene—whether in regard to water systems, airports, fiber-optic networks, or otherwise—the legislature can intervene. In light of *Asheville*, municipalities should be wary of bringing suit against the, seemingly all-powerful legislature. As legal remedies are further diminished, local leaders will have to look increasingly toward political solutions. Forging

⁵⁰ *Id.* at 100.

⁵¹ *Id.*

⁵² *Id.* at 101.

⁵³ *Id.* at 96.

⁵⁴ *Id.* at 101.

relationships with local legislative delegations and directing (or credibly threatening to direct) change at the ballot box are the most powerful tools that municipal elected officials and residents can utilize to keep the legislature out of their local affairs.