

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 2013-50 and as amended by Session Law 2013-88.

("The Water Act") On May 13, 2013 Session Law 2013-50 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 ~~its~~ intangible assets—
invaluable components without which the System simply cannot function.

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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 \$65,570,000, 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 May 15, 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 assess 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