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## Coates' Canons Blog: Legislative Transfer of Asheville Water System Is Constitutional

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[**Update:** The North Carolina Supreme Court reversed this decision in *Asheville v. State*. Read about the Supreme Court decision in a blog post [here](#).]

In 2013 the North Carolina General Assembly enacted a law (S.L. 2013-50) that requires the city of Asheville to transfer its water system to an existing metropolitan sewerage district (MSD) operating in Buncombe County. Once the water system is transferred, the law transforms the MSD into a new entity, a municipal water and sewer district (MWSD), which has authority to operate both the water and sewer systems. The law doesn't mention Asheville or the Buncombe County MSD by name, but they are the only local governments that meet the descriptive criteria in the law. The city of Asheville challenged the constitutionality of the law and the trial court ruled in the city's favor. The North Carolina Court of Appeals has reversed that ruling in *City of Asheville v. State*, finding the law to be a valid exercise of the legislature's authority over local governments.

This case continues a long history of legal challenges to local legislation involving the Asheville's water system. An earlier case described the "long and tumultuous history" involving Asheville's water distribution system. *State v. Asheville*, 192 N.C. 1, 29 (2008). That court considered the legislative finding that "Asheville and Buncombe County have experienced a 'complicated pattern of dealings' with respect to the development and maintenance of its water distribution system," to be sufficient justification for the differential treatment Asheville has received under several local acts targeting its authority over the system. *Id.* at 31. See also *Candler v. City of Asheville*, 247 N.C. 398 (1958). The city challenged the 2013 act, as it did in the previous cases, arguing that it violated several constitutional provisions, including the prohibition on local acts relating to health and sanitation. The city also argued that it was entitled to compensation under both the federal and state constitution for the mandated transfer of the water system, which the city operates in a proprietary capacity.

Relying on precedent dating back to 1903, the court of appeals held that the city is not entitled compensation, and upheld the entire law as a valid exercise of the General Assembly's almost unlimited authority to define the powers of local governments. The lesson is, as I sometimes describe it: What the legislature giveth, the legislature can taketh away. Indeed, the opinion reads like a primer on North Carolina local government law and the power of the legislature.

### *Issues on Appeal*

The city claimed that the "transfer provision" in the law violates the city's rights under three sections of the North Carolina Constitution: 1) Article 1, Sec. 19 (the "law of the land" clause, generally interpreted to encompass due process and equal protection rights); Article 1, Secs. 19 and 35 (prohibiting the taking of property without just compensation); and Article II, Sec. 24 (prohibiting local laws relating to certain subjects, including health and sanitation and non-navigable streams). The city also alleged that the law unlawfully impairs the city's contracts with bondholders in violation of the state and federal constitutions, but the court ruled that the city did not preserve that claim on appeal and did not address it.

The state was joined by the Buncombe County Metropolitan Sewerage District (which the court recognized as the nominal defendant) in arguing that the city did not have standing to bring the suit. The court affirmed that local governments have standing to challenge the constitutionality of acts of the General Assembly. It noted, however, that a local government that accepts the benefits of a part of a statute lacks standing to challenge another part of that statute. See *In re Appeal of*

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*Martin*, 286 N.C. 66 (1974).

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Since the city did not accept any benefits of the act, it had standing to challenge it in this case.

### *A Primer on the Power of the Legislature*

The court of appeals affirmed the transfer provision and rejected each of the city's constitutional arguments. In doing so, it articulated the basic relationship between the legislature and the city, which I summarize here (with citations omitted).

- The state constitution doesn't grant the legislature its police power; that power is inherent and is limited only by the constitution.
- Local governments have no inherent powers; they have only such powers as are delegated to them by the legislature. They are "creatures of the legislative will and subject to its control."
- The General Assembly has the power to organize and regulate local governments (also known as subdivisions of the state). This means that any authority the legislature gives to local governments can be changed, modified, diminished, or enlarged *at will*, subject only to constitutional limitations.
- The court will declare an act of the General Assembly unconstitutional only if the violation is *plain and clear*. It is not the court's role to consider the motives, or the "wisdom and expediency" of the legislation.
- The burden is on the local government to show beyond a reasonable doubt that a challenged act violates the constitution.
- A local act doesn't have to be rational under the constitution as long as it doesn't fall within one of the constitution's prohibited categories for local acts.
- Local governments do not have constitutional rights under the Fourteenth Amendment to the U.S. Constitution, even when they are acting in a proprietary capacity.

### *Legislature Has Authority to Transfer a Utility*

The city's challenge relied heavily on *Asbury v. Albemarle*, 162 N.C. 247 (1913). This case involved a law requiring a municipality that proposed to construct its own public water system to first acquire by purchase or condemnation any system of like character already constructed by a private or quasi-public corporation. The *Asbury* court held that the legislation was void because it attempted to "control the exercise of discretion by [a municipality] in the management of its purely private and property rights." The court of appeals distinguished *Asbury*, noting that the legislation did not compel Asheville to operate a water system nor did it interfere with the city's discretion in operating it. Instead, according to the court, the legislature simply withdrew the city's authority to operate a water system, an action plainly within the legislature's power.

### *No Compensation is Due to the City*

The city also argued that it is entitled to compensation when the legislature takes away an asset that the city holds in its proprietary capacity. The court of appeals noted that both the North Carolina Supreme Court and the United States Supreme Court have upheld a state's transfer of a utility from one political subdivision to another without compensation, and without the consent of the citizens or the affected units. See *Trenton v. New Jersey*, 262 U.S. 182 (1923); *Brockenbrough v. Board of Water Comm'rs.*, 134 N.C. 1 (1903). Such a transfer can be viewed as a function of a legislature's plenary authority to organize and structure local governments. While cases have held that compensation is required when a public agency condemns another agency's property to use for a different purpose, no compensation is required, even if the local government holds the property in a proprietary capacity, when the property will be used for the same purpose.

### Local Acts Relating to Sanitation and Health

A significant portion of the court of appeals' opinion is taken up with the analysis of whether the legislation violates the

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prohibition in Article II, Sec. 24 of the North Carolina Constitution against local acts relating to health and sanitation. The courts apply a two-part test when analyzing challenges under this provision of the constitution. First, is it a local act or a general law? Second, if it is a local act, does it fall within one of the forbidden categories under Article II, Sec. 24? The court avoided wading into the complicated case law regarding what constitutes a local act. The act in question was written as general law but would still be subject to one of several tests that the North Carolina courts have developed to determine whether its effect is entirely local. The court concluded that it was not “plain and clear” or “beyond a reasonable doubt” that the law related to health and sanitation or non-navigable streams, so it did not need to analyze whether it was a local act or a general law.

To determine whether a local act falls within one of the prohibited categories, a court focuses on whether the purpose of the law relates to a prohibited subject – in this case, health and sanitation, or non-navigable streams. The court relies on explicit legislative statements of intent or purpose, if any, or deduces the apparent purposes from the law itself. In this case, the court concluded that the purpose and concern that motivated the legislature related to the governance and quality of service. The law did not, in court’s view, prioritize health or sanitary conditions or address any concern regarding a non-navigable stream.

The court also distinguished this case from others involving laws that empowered political subdivisions to enforce *health regulations*. These cases involved laws that created new entities to enforce *health regulations*, including laws relating to building inspections and health boards. As stated by the court, “the Transfer Provision does not employ anyone to enforce health regulations, nor does it impose any health regulations on the Asheville Water System...it merely creates the political subdivision through which public water and sewer systems may be provided in Buncombe County.” *Slip op at 16*. The city argued that the transfer provision should be deemed invalid under the ruling in *Drysdon v. Prudden, 195 N.C. 722 (1928)*, in which the North Carolina Supreme Court invalidated a local act establishing a sanitary district to provide public water and sewer service. The court held that the *Drysdon* opinion “never makes any determination regarding which of the 14 ‘prohibited subjects’ was implicated by the act,” and, therefore we assume that this issue was not put before the court.” *Slip op. at 14*.

Our courts have struggled to develop a coherent framework for analyzing cases involving the “health and sanitation” provision of the constitution. One possible reading of the caselaw is that a local act that addresses the structure of a political subdivision does not violate the constitution, even if the effect of the act is to empower a new or existing entity to create or enforce laws or regulations that relate to health and sanitation. Similarly, a local act related to fees or other financial aspects of an entity that engages in health and sanitation can be seen as affecting only the operations of the entity, and not related to health and sanitation. Under such a framework, only a local act with a purpose that directly relates to standards and regulations affecting health and sanitation would fall within the prohibited category. The court of appeals’ opinion in the latest Asheville water case can be read to support this approach. It is a bit unclear, however, whether the holding is based on legislature’s focus on the structure and governance of the water system, or whether the case holds that the law is constitutional because water and sewer utility operations simply do not relate to health and sanitation.

#### It’s All About Restructuring, But What About the Details?

The court of appeals certainly focused on the transfer provision as a restructuring and change of governance, placing it squarely within the legislature’s inherent authority over local governments. As already noted, however, issues regarding the effect on contractual commitments, including bond agreements, were not addressed in the opinion. In another case that is often mentioned along with the Asheville case, the legislature attempted to transfer the Charlotte airport from the city to a separate authority. While the city initially challenged the structural changes, the legal issue that has forestalled the transfer revolves around the issue of FAA approval of the change. So even though the legislature has authority to rearrange the structures and players, the realities of operating an enterprise may present a separate set of practical and legal limitations on legislatively-initiated transfers.

## Links

- [appellate.nccourts.org/opinions/?c=1&pdf=35087](https://appellate.nccourts.org/opinions/?c=1&pdf=35087)



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