
Coates' Canons Blog: Local Acts Relating to Health and Sanitation: Supreme Court Weighs in On Asheville and Boone Cases

By Frayda Bluestein

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Article VII, sec. 1 of the North Carolina Constitution gives the General Assembly almost unlimited power to create local governments, and to define, expand, and limit their authority. Does this power allow the legislature, by local act, to require the city of Asheville to transfer its water system to a newly formed water and sewer authority? The North Carolina Supreme Court has said it does not. Does it permit the legislature, by local act, to eliminate the town of Boone's authority to exercise regulatory powers outside the town limits? The North Carolina Supreme Court has said it does. Both opinions involve interpretations of Article II, sec. 24(1)(a) of the North Carolina constitution, which prohibits local acts relating to health, sanitation, and the abatement of nuisances.

Summary of *Asheville v. State of North Carolina*.

Asheville challenged a local act that required the city to transfer its water system to a regional water and sewer district. (Please see this blog post to learn more about the facts and the Court of Appeals decision in this case.) In a nutshell, the Court of Appeals concluded that the main purpose of the act was to change the *governance* of the system, and that such a change did not relate to health and sanitation within the meaning of the constitutional limitation on local acts. The court's opinion also confirmed that the legislature may make this type of change and rejected the city's arguments that it should be compensated for the taking of the system.

In an opinion authored by Justice Ervin, the Supreme Court reversed, holding that the legislation mandating the transfer was an unconstitutional local act relating to health and sanitation. (The court did not address or express an opinion regarding the other constitutional issues.) As I chronicled in my earlier blog post, North Carolina's appellate courts have struggled to establish a consistent standard for determining when a local act violates the health and sanitation provision. In the Asheville case, the Supreme Court introduced a new test:

[T]he ultimate issue that we must decide in this case is whether, in light of its *stated purpose and practical effect*, the legislation has a material, but not exclusive or predominant, connection to issues involving health, sanitation, and the abatement of nuisances.

Slip op. 36-7 (emphasis added). Applying this standard, and listing the numerous health-related regulations that govern water and sewer operations, the Supreme Court held that a change in governance does in fact have a material practical effect on public health and sanitation. Therefore, the local act violated the constitution.

Justice Newby dissented, setting out an analysis that did not carry the day in the Asheville case, but was adopted as the majority opinion in the *Town of Boone* case, decided the same day. The dissent posits that the basic constitutional structure as delineated in Article VII, sec. 1, gives the legislature plenary authority to structure and organize local governments as political subdivisions of the state. This power includes the authority to modify the boundaries and structure of these entities. The dissent concludes that "the plain meaning of the constitutional provision that delegates to the legislature the 'organization and government and the fixing of boundaries' embraces the creation, expansion, retraction, and dissolution of all forms of local government..." *Slip op. at 48*. Noting that the city's water district was created by a local act, the dissent opines: "If it is unlawful to modify [the city's water district] then it was unlawful to establish it by local act." *Slip op. at 43*. Justice Newby expands upon this framework in the *Boone* case.

Summary of *Town of Boone v. State of North Carolina*.

In 2014, the General Assembly by local act withdrew the Town of Boone's power to exercise regulatory authority in areas

outside its corporate limits, returning that authority exclusively to Watauga County. The Town challenged the local act under Article II, sec. 24(a)(1) – the health and sanitation provision in the state constitution. A three-judge panel held that the local act was unconstitutional, and the case was appealed directly to Supreme Court under G.S. 7A-27(a1) (providing for appeals directly to the Supreme Court from any order that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law).

Writing for the majority, this time, Justice Newby again focused on the constitutional provision that defines legislative powers regarding local governments (Article VII, sec. 1):

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.

Citing to the Report of the 1968 Constitutional Study Commission, the opinion notes that this provision is not a delegation of authority, but is instead “‘a general description’ and ‘merely a recognition’ of ‘the General Assembly’s power to provide for the organization and powers of local government.’” *Slip op. at 9*. The opinion’s key holding comes with the parsing of the two parts of this provision:

The second clause of Article VII, Section 1 concerns the authority of the General Assembly to confer specific “powers and duties” on local governmental units. Unlike the first clause in Article VII, Section 1, the second clause includes an express limitation; namely, it prohibits any legislative delegation of “powers and duties” to local governmental units that is “otherwise prohibited by this Constitution.” *Only under the second clause, then, is the General Assembly’s authority over local governments expressly subject to limitations imposed by other constitutional provisions, including the constraints on local acts in Article II, Section 24 first adopted in 1917.*

Slip op. at 12 (emphasis added). Applying this interpretation to the situation in *Boone*, the opinion framed the issue as follows:

The pivotal question before this Court is whether the Boone Act...is an exercise of the General Assembly’s plenary authority to ‘provide for the organization and government and fixing boundaries’ of local government under the first clause of Article VII, Section 1. If so, our analysis ends, and there is no need to address the application of the second clause...and any restrictions imposed by Article II, Section 24.

Slip op. at 15-16. The opinion concludes that “[t]his local jurisdictional reorganization is precisely the type of ‘organization and government and fixing of boundaries’ contemplated by the first clause...”. Therefore it is well within the legislative authority and is not subject to analysis under Article II, sec. 24. Simply stated, the opinion holds that because the local act involved a change in the boundaries within which the Town could exercise its jurisdiction, the limitation on local acts relating to health and sanitation simply does not apply.

Justice Ervin concurred in the conclusion that the local act is constitutional, but for different reasons. The concurring opinion rejected the majority opinion’s interpretation of the relationship between Article VII, sec. 1 and Article II, sec. 24. In addition, the concurrence notes that the effect of the local act cannot be considered merely a “fixing of boundaries”:

The only reason that a municipality is required to define the area in which it is entitled to exercise extraterritorial jurisdiction is to specify the location or locations within which the municipality can take a limited number of actions that could not otherwise be taken there.

Slip op. at 42-43 (listing numerous statutes authorizing regulatory powers in extraterritorial jurisdictions). The concurrence points out that the initial creation and subsequent extensions of municipal boundaries determine who votes in elections, pays taxes, and receives services. The opinion also notes however, that the boundary in *this case* relates directly to the exercise of regulatory powers and thus is subject to the state constitution’s prohibitions against local acts relating to health and sanitation. *Slip op. at 44-5*. Justice Ervin, applied the new standard enunciated in *Asheville*, and concluded that considering the “purpose and practical effect” of the local act it did not have a material connection to health and sanitation, and was for that reason constitutionally valid.

In a dissenting opinion, Justice Beasley, joined with Justice Ervin in rejecting the majority opinion's standard for determining when Article II, sec. 24 applies, but disagreed about whether the Boone local act violated the constitution. Citing to prior cases, Justice Beasley noted that the Court has previously held that "a [local] law altering who is charged with enforcing health and sanitation laws" violates the constitutional prohibition. *Slip op. at 74* (citations omitted). Also, applying the "purpose and practical effect" standard from the *Asheville* case, the dissent comes to the opposite conclusion from the concurrence, finding that the practical effect of shifting responsibility for enforcement of the regulations – including the building code, fire code, and plumbing code – would have a material connection to health and sanitation and thus violates the constitution.

Reconciling the Opinions: Comments and Questions

The case law regarding local acts has long been marked by a lack of consistency. After years of conflicting decisions and multiple standards, we now have two brand new standards but perhaps not a sense of clarity about how they will be applied.

Here are the two new standards in brief:

The *Asheville* Standard: Considering its stated purpose and practical effect, does the legislation have a material connection to issues involving health, sanitation, and the abatement of nuisances?

The *Boone* Standard: Does the local act only relate to "organization and government and fixing boundaries"? If so, then the limitations under Article II, sec. 24 do not apply and the local act is constitutional.

The majority and dissenting opinions in these cases reveal a tension between these two approaches. So how might courts apply these standards in future case? One approach would be as follows:

Step 1: Apply the *Boone* standard to determine whether the local act is subject to the prohibitions under Article II, sec. 24.

- a) If the court finds that the act relates only to the first part of Article VII, sec. 1 (organization and government and fixing boundaries), then no further review is necessary and the local act is constitutional. End of analysis.
- b) If instead the act relates to the second part of that section (the giving of powers and duties), and is not limited to those matters viewed as falling only under the first part, then the Article II, sec. 24 limitations apply. Go to step 2.

Step 2: Apply the *Asheville* "purpose and practical effect" standard to determine whether the act violates the constitution.

The matter is far from clear, however. The *Boone* case presents a good example of how hard it is to separate – legally and conceptually – the drawing of boundaries and the delegation or withdrawal of authority. In many cases these things go hand in hand. In addition, *Asheville* presents an example of a law that makes no changes in the regulatory activity except with respect to the governing body that is carrying it out. Although the *Asheville* majority found that a mere change in governance had a material connection to health and sanitation, the dissent makes a strong argument that a change in governance is squarely within the legislature's plenary authority over the structure and organization of local governments. Furthermore, while both opinions cite to cases in supporting or distinguishing the results under the new standards, it's not clear what remaining value these prior cases have in light of the new standards.

This issue has been challenging the courts for a long time now. For a look back at the origins of the local act limitations, check out the law review article written by our (retired) colleague Joe Ferrell in 1967 (cited multiple times in these two opinions): *Local Legislation in the North Carolina General Assembly*. While it's clear that the initial motivation for limiting local acts was to reduce the volume of bills for the legislature to manage during the sixty-day long sessions of that era, Ferrell's summary of cases demonstrates that a diversity of approaches and justifications has been part of this area of law from the beginning, not only regarding the prohibited subject matter, but even as to what constitutes a local act.

For more information about local acts, see my blog post: [What's a Local Act?](#)



Links

- appellate.nccourts.org/opinions/?c=1&pdf=35087
- canons.sog.unc.edu/legislative-transfer-of-asheville-water-system-is-constitutional/
- appellate.nccourts.org/opinions/?c=1&pdf=35085
- scholarship.law.unc.edu/cgi/viewcontent.cgi?article=2278&context=nclr
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