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Constitutional Law; Water System; Transfer Provision

City of Asheville v. State of North Carolina, ___ N.C. App. ___ (No. COA14-1255, Wake– 10/6/15), 777 S.E.2d 92 (No. COA14-1255, 10/6/15), *reh'g denied*, ___ N.C. App. ___ (No. COA14-1255, 11/10/15), *writ of supersedeas allowed*, ___ N.C. ___ (No. 391PA15, 1/28/16), *notice of appeal retained and petition for disc. review allowed*, ___ N.C. ___ (No. 391PA15, 1/28/16)

- ***Holding***– Court of Appeals holds that unless prohibited by some provision in the state or federal constitutions, the General Assembly has the power to create a new political subdivision, to withdraw from Asheville authority to own and operate a public water system, and to transfer Asheville's water system to the new political subdivision. Court of Appeals reverses trial court's order enjoining the enforcement of the Transfer Provision (2013 N.C. Sess. Laws 50, §§ 1(a)-(f), as amended by 2013 N.C. Sess. Laws 388, § 4).

- ***Key Excerpt***– "We affirm the portion of the trial court's order denying the State's motion to dismiss, rejecting the State's argument that Asheville lacked standing or capacity to challenge the validity of the Transfer Provision.

We reverse the trial court's grant of summary judgment for Asheville on its first claim for relief, which declared that the Transfer Provision constitutes a local act relating to health, sanitation or non-navigable streams in violation of *Article II, Sections 24(1)(a)* and *(e)* of our state constitution. Specifically, we hold that, assuming it is a local act, it does not 'relate to' health, sanitation, or non-navigable streams within the meaning of our state constitution. We also reverse the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its second claim for relief, which declared that the Transfer Provision violates the 'law of the land' clause in *Article I,*

Section 19 of our state constitution. We also reverse the trial court's denial of the State's motion for summary judgment on this claim, and direct the court on remand to enter summary judgment in favor of the State on this claim.

We reverse the trial court's grant of summary judgment for Asheville on its third claim for relief, which declared that the Transfer Provision violates *Article I, Sections 19* and *35* of our state constitution, as an invalid exercise of power to take or condemn property. We also reverse the trial court's grant of summary judgment on Asheville's sixth claim for relief, which, in the alternative to the injunction, awarded Asheville money damages for the taking of the Asheville Water System. We also reverse the trial court's denial of the State's motion for summary judgment on these claims, and direct the court on remand to enter summary judgment in favor of the State on these claims.

We reverse the trial court's order enjoining the enforcement of the Transfer Provision.

We do not reach any conclusion regarding Asheville's fourth and fifth claims for relief, in which Asheville contends that the enforcement of the Transfer Provision would impermissibly impair obligations of contract in violation of our state and federal constitutions and in violation of [G.S.] 159-93. The trial court made no rulings on these claims, and Asheville did not take advantage of Rule 10(c) of our Rules of Appellate Procedure, which allows an appellee to propose issues which form 'an alternate basis in law for supporting the order[.]' Therefore, any argument by Asheville based on these claims for relief are waived."

- ***Synopsis***− Appeal by defendants from June 2014 order. Affirmed in part; reversed and remanded in part. Opinion by Judge Dillon, with Judge Calabria and Judge Elmore concurring. On January 28, 2016, the North Carolina Supreme Court: (1) allowed plaintiff-City's petition for writ of supersedeas; (2) retained plaintiff-City's notice of appeal (substantial constitutional question), and; (3) allowed plaintiff-City's petition for discretionary review.

Nota Bene (N.B.)
Other Recent Decision of Note

Procedure; Board of Adjustment; Permits; Attorney's Fees

Izydore v. City of Durham, ___ N.C. App. ___ (No. COA14-1378, Durham− 10/6/15) (***unpublished***), *disc. review denied*, ___ N.C. ___ (No. 404P13-2, 1/28/16)

- ***Holding***− Trial court correctly denied petitioner's amended petition for attorneys' fees under G.S. 6-21.7.

- ***Key Excerpt***− This case is before the Court of Appeals for a second time. The facts of the initial case are found at pages 25 of the *Digest of Municipal Law 2013-14.* (*See* Izydore v. City of Durham, ___ N.C. App. ___, 746 S.E.2d 324 (No. COA12-1284, Durham− 8/6/13), *disc. review denied*, 367 N.C. 261, 749 S.E.2d 851 (No. 404P13, 11/7/13). There, the issue was whether the trial court had erred in declining to award attorneys' fees to a property owner who had initially challenged the issuance of building permits in 2009. The property owner had sought attorneys' fees under G.S. 6-19.1, which authorizes trial courts − under certain specified circumstances − to award such fees to parties prevailing in civil actions against *state* agencies. The Court of Appeals affirmed the trial court's order denying petitioner's claim for attorneys' fees because: (1) respondent (the City; the City-County Planning Department; and the City-County Board of Adjustment) consisted of local units of government *rather than* state agencies; and (2) G.S. 6-19.1 applies "only in those civil actions involving ac-

tual agencies of the State." Izydore I, ___ N.C. App. at ___, 746 S.E.2d at 327. The North Carolina Supreme Court denied review of the case.

Approximately three months later, petitioner sought attorneys' fees under a different statute, G.S. 6-21.7 (a 2011 statute pertaining to actions outside of statutory authority). The trial court also rejected petitioner's claim here. In affirming, the Court of Appeals determined that the case presented here was governed by the doctrine set forth in Lea Co. v. N.C. Bd. of Transp., 323 N.C. 697, 699-700, 374 S.E.2d 866, 868 (1989) and D & W, Inc. v. City of Charlotte, 268 N.C. 720, 722-23, 152 S.E.2d 199, 202 (1966). "In Izydore I, we affirmed the order of the trial court denying Petitioner's petition for attorneys' fees, which was the sole remaining issue in the case. We did not remand for any further proceedings in the trial court or otherwise expressly contemplate the need for any further action by that court. Therefore, once our mandate issued, the case was over. Were we to adopt Petitioner's argument by holding that he was permitted to file a new petition for attorneys' fees after the case had been fully adjudicated, we would be giving him the proverbial 'second bite at the apple' − a result that finds no support in our jurisprudence. Indeed, our rejection of Petitioner's argument on this issue is consistent with the public policy of achieving finality to litigation. In sum, '[a]ll things must end – even litigation.' So too the present lawsuit." (Citations omitted.)

- ***Synopsis***− Appeal by petitioner from July 2014 order. Affirmed. Opinion by Judge Davis, with Judge Bryant and Judge Inman concurring. On January 28, 2016, the North Carolina Supreme Court denied petitioner's petition for discretionary review.