Dec. 2016/Jan. 2017 **Volume XXXVI, Nos. 6-7**

Local Acts; Public Enterprises; Water System; Involuntary Transfer

City of Asheville v. State, ___ N.C. ___ (No. 391PA15, 12/21/16)

- ***Holding***– Legislation that effectively required the City of Asheville to involuntarily transfer the assets that it uses to operate a public water system to a newly created metropolitan water and sewerage district constituted an unconstitutional local act violating art. II, § 24(1)(a) ("[r]elating to health[and] sanitation") of the North Carolina Constitution.

- ***Key Excerpt***– Justice Ervin wrote the majority opinion. The majority stated that the first issue to be resolved in the case was whether the Act was a local act prohibited by Article II, section 24 of the North Carolina Constitution or was a general law, which the General Assembly had the power to enact. Utilizing the reasonable classification test, the Court determined that the legislation was local in nature. "The total absence of any justification for singling out the City's water system from other large municipally owned systems and the steps taken during the drafting process to ensure that the involuntary transfer provisions of the legislation did not apply to any municipality except the City demonstrate that the involuntary transfer provisions were never intended to apply to any municipal water system except that owned by the City. As a result, given the absence of any reasonable relationship between the stated justification underlying the legislation and the classification adopted by the General Assembly for the purpose of achieving its stated goal, the legislation is, without doubt, a local rather than a general law." (Citations omitted.)

Having determined that the Act was a local law, the majority turned to a consideration of whether the legislation "[r]elat[es] to health[and] sanitation." N.C. Const. art. II, § 24(1)(a). The majority initially stated, "[W]hile the stated purpose of the legislation is undoubtedly relevant to the determination of whether a local law violates Article II, Section 24(a), our recent precedent clearly indicates that the practical effect of the legislation is pertinent to, and perhaps determinative of, the required constitutional inquiry…. As a result, the approach adopted by the Court of Ap-

peals for determining whether the legislation constituted an impermissible local law relating to health and sanitation departs from that required by our precedents, properly understood. Admittedly, this Court has not, to date, clearly indicated when a local act does and does not 'relate' to a prohibited subject for purposes of Article II, Section 24. Although 'related' can be defined as '[c]onnected in some way; having a relationship to or with something else,' *Related, Black's Law Dictionary* (10th ed. 2014), we cannot conclude that the existence of a tangential or incidental connection between the challenged legislation and health and sanitation is sufficient to trigger the prohibition worked by Article II, Section 24(1)(a) of the North Carolina Constitution. On the other hand, we recognize that, as a purely textual matter, 'relating to' is not equivalent to 'regulating.' *Compare* N.C. Const. art. II, § 24(1)(a) ('[r]elating to health, sanitation, and the abatement of nuisances'), *with id.* art. II, § 24(1)(j) ('[r]egulating labor, trade, mining, or manufacturing'). As a result, in light of the relevant constitutional language and the import of our prior decisions interpreting and applying the prohibition set out in Article II, Section 24 of the North Carolina Constitution, the 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." (Citations omitted.)

The majority held that the legislation was a prohibited local act relating to health and sanitation in violation of art. II, § 24(1)(a). In so holding, the majority determined that the legislation had material health and sanitation effects. "An analysis of the practical effect of the legislation reinforces the strength of the connection between the issues addressed in the legislation and public health and sanitation. As an initial matter, we note that the City, in the course of operating its water system, is required to ensure compliance with the North Carolina Drinking Water Act, [G.S.] 130A-311 to -329 (2015), which appears in a chapter of the General Statutes entitled 'Public Health' (Chapter 130A) and which is intended 'to regulate water systems within the State which supply drinking water that may affect the public health,' *id.* § 130A-312. In view of the fact that the City's water system is a 'public water system' for purposes of the North Carolina Drinking Water Act, *see id.* § 130A-313(10), the City must show compliance with the North Carolina Drinking Water Act and related regulations in order to obtain approval from the North Carolina Department of Environmental Quality for the construction, alteration, and additions to water system facilities, *see id.* § 130A-317 (c), (d); Asheville, N.C., Code of Ordinances, ch. 21 (2016). In addition, the City is required to ensure that its water treatment operators are certified pursuant to [G.S.] 90A-20 to 90A-32 in order to 'protect the public health and to conserve and protect the water resources of the State.' [G.S.] 90A-20 (2015). Finally, the City is required to provide annual reports concerning the source and quality of the water that it provides to its customers, including the existence of any identified risks to human health stemming from consumption of the water provided by its system. *See* 40 C.F.R. §§ 141.151–.155 (2016). . . . The fact that the legislation changes the governance of the City's water system does not operate to remove it from the prohibition worked by Article II, Section 24(1)(a) of the North Carolina Constitution. As we have clearly held, a local act that shifts responsibility for enforcing health and safety regulations from one entity to another clearly relates to health and sanitation." (Citations omitted.)

In addressing the dissenting opinion, the majority stated, "Although North Carolina is not a home rule jurisdiction, and although our constitution, consistent with the language of this provision [art. VII, § 1], gives the General Assembly exceedingly broad authority over the 'powers and duties' delegated to local governments, *id.*, that

authority is subject to limitations imposed by other constitutional provisions. Aside from the fact that the legislation does not actually prohibit the City from operating a water system, the General Assembly's authority over the 'powers and duties' delegated to local governments is expressly subject to the limitations set out in Article II, Section 24, which 'is the fundamental law of the State and may not be ignored.'" (Citation omitted.) In a footnote, the majority added, "The legislation cannot be properly understood as nothing more than an exercise of the General Assembly's plenary authority to create new units of local government. Instead of simply creating a new unit of local government, the General Assembly took a number of actions in the legislation, including creating the Metropolitan Water and Sewerage District through a repurposing of the Metropolitan Sewerage District and effectively eliminating the City's ability to operate its existing water system."

- ***Dissent***− Judge Newby dissented, joined by Chief Justice Martin. "The General Assembly is the only body politic with the oversight and authority to create and organize local political subdivisions in its discretion. It alone has the ability to resolve local governance disputes such as those undergirding the litigious past of the water system at issue. . . . The plenary power of the General [Assembly] allows it, not the courts, to craft a resolution of this matter. As acknowledged in the first clause of Article VII, Section 1, the General Assembly has plenary authority to establish new subdivisions of local government. The General Assembly alone can consider the local competing interests and craft a solution. Such legislative action is not conditioned upon first providing a majority of this Court with satisfactory justification. The majority's holding that a new political subdivision addressing regional problems with the water system violates Article II, Section 24 simply because the legislation involves a water system erases the General Assembly's historic authority to establish convenient local governmental units acknowledged by the first clause of Article VII, Section 1. The General Assembly's creating a new local governmental subdivision does not offend the state constitution. This Court should not weigh the wisdom or expediency of a legislative act." (Citation omitted.)

- ***Synopsis***− On discretionary review pursuant to G.S. 7A-31 and on appeal of right of a substantial constitutional question pursuant to G.S. 7A-30(1) from a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 777 S.E.2d 92 (2015), affirming in part and reversing and remanding in part a summary judgment order entered in June 2014, as clarified by means of a consent order entered in July 2014 in Superior Court, Wake County. Reversed. Majority decision by Judge Ervin. Judge Newby dissenting, joined by Chief Justice Martin.

  ***Note*:** The League participated as *amicus curiae* in this case.

Local Acts; Extraterritorial Jurisdiction

Town of Boone v. State, ___ N.C. ___ (No. 93A15-2, 12/21/16)

- ***Holding***− By withdrawing the Town of Boone's extraterritorial jurisdiction, the General Assembly restored the local jurisdictional boundaries as originally fixed, returning the governance of territory located outside of the municipal limits to Watauga County. The limitations imposed by Article II, Section 24 of the state constitution do not apply to an action by the legislature establishing or modifying the jurisdictional boundaries of local governmental units. Because the legislative act withdrawing the Town's extraterritorial jurisdiction fell squarely within this plenary power, the act was constitutional.

- ***Key Excerpt***− At issue was the Boone Act, which effectively reorganized the specified local governmental jurisdictions within Watauga County by confining the Town of Boone's jurisdictional reach to its corporate limits and restoring govern-

ance of the extraterritorial area to the County. Act of June 26, 2014, ch. 33, sec. 1, 2013 N.C. Sess. Laws (Reg. Sess. 2014) 139, 140 (the Boone Act) ("Notwithstanding any other provision of law, the Town of Boone shall not exercise any powers of extraterritorial jurisdiction as provided in Article 19 of Chapter 160A of the General Statutes.").

Justice Newby wrote the majority opinion. The pivotal question at issue was whether the Boone Act, which withdrew the Town's extraterritorial jurisdiction, constituted an exercise of the General Assembly's plenary authority to "provide for the organization and government and fixing of boundaries" of local government under the first clause of N.C. Const. Article VII, Section 1. "The text of the first clause of Article VII, Section 1, '[t]he General Assembly shall provide for the organization and government and the fixing of boundaries' of local governmental entities, mandates the statutory creation, structuring, restructuring, and defining of local governmental subdivisions and their jurisdictional boundaries. We look to the plain meaning of the phrase to ascertain its intent. Each word informs a proper understanding of the whole. 'Organization' means something 'put together into an orderly, functional, [and] structured whole.' *Organize*, *The American Heritage Dictionary* 926 (new coll. ed. 1979). 'Government' is defined as '[t]he act or process of governing; especially, the administration of public policy in a political unit; political jurisdiction.' *Government*, *id.* at 570. The 'fixing of boundaries' means establishing borders or limits. *See Fix* and *Boundary*, *id.* at 497, 156. Thus, the plain meaning of the phrase 'organization and government and fixing of boundaries' includes the designation and realignment of the political jurisdictions of local governmental units. The General Assembly alone has the oversight responsibility and authority to define, limit, and expand the otherwise competing jurisdictions of local political subdivisions. Setting the jurisdictional boundaries of political subdivisions is left to legislative discretion. Since the needs of each community differ, this Court has repeatedly acknowledged the practical reality that the General Assembly may exercise that discretion by local act." (Citations omitted.)

Given the applicability of the first clause of Article VII, Section I regarding the General Assembly's plenary power, the Court stated that there was no need to address the application of the second clause of Article VII, Section I and any restrictions imposed by Article II, Section 24. "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." Here, the Boone Act constituted an exercise of the General Assembly's plenary authority to "provide for the organization and government and fixing of boundaries" of local government under the first clause of Article VII, Section 1, and the analysis ended at that point. "Extraterritorial jurisdiction is inextricably tied to a municipality's authority to enforce its zoning and development ordinances within certain geographic boundaries. By retracting the Town's jurisdictional reach to its corporate limits, the Boone Act restores the local government boundaries within Watauga County as originally fixed. This local jurisdictional reorganization is precisely the type of 'organization and government and fixing of boundaries' contemplated by the first clause of Article VII, Section 1 and historically approved by this Court. The Boone Act withdraws from the Town its extraterritorial jurisdiction and its governing

authority to enforce certain ordinances within the one-mile perimeter and returns governance of that territory to the County and its residents. The General Assembly is the only body politic uniquely qualified to oversee local government and set the jurisdictional lines that divide the Town and the County. Because the state constitution authorizes the General Assembly to reduce the Town's jurisdictional reach, the removal of extraterritorial jurisdiction falls squarely within the legislature's general power as described in the first clause of Article VII, Section 1."

- ***Concurrence in the Result***- Justice Ervin concurred in the result, joined by Justice Hudson. "While I believe that the Town has standing to challenge the constitutionality of the Boone Act as violative of Article II, Section 24, and that the Town's claim is not barred by sovereign immunity considerations, I am unable, in light of the presumption of constitutionality and the breadth of the issues addressed in the Boone Act, to conclude that the challenged legislation constitutes local legislation relating to one of the prohibited subjects listed in Article II, Section 24. Although I agree with the result that the Court deems appropriate, I am unable to agree that the Boone Act implicates the General Assembly's powers over the organization, government, and boundaries of local governments and that the limitations on the enactment of local legislation set out in Article II, Section 24 have no bearing on the proper resolution of this case. As a result, I concur in the result reached by the Court without concurring in its opinion."

- ***Dissent***– Justice Beasley dissented, disagreeing with the majority's holding that the Boone Act did not violate Article II, section 24. "The majority concludes that of the two clauses in paragraph one of Article VII, Section 1, it is only under the second clause that 'the General Assembly's authority over local governments [is] expressly subject[ed] to limitations imposed by other constitutional provisions, including the constraints on local acts in Article II, Section 24.' Assuming that the qualification contained within Article VII, Section 1 only applies to the second clause, I disagree with the majority's conclusion that the Boone Act falls exclusively within the first clause. As stated in the concurring opinion, the provisions in Article VII, Section 1 relate to both municipal boundaries (clause 1) and municipal powers (clause 2). As the concurring opinion correctly states, 'extraterritorial jurisdiction relates to regulatory power or authority rather than the establishment of municipal boundaries' and therefore, the Boone Act is more properly interpreted as relating to the municipal powers in the second clause. As such, the Boone Act is subject to Article VII, Section 1's limiting language, including the limitations imposed by Article II, Section 24. The concurring opinion also correctly states that determining the constitutionality of the Boone Act requires an analysis of Article II, Section 24's prohibitions; the analysis does not stop at Article VII, Section 1, as argued by the majority. Additionally, while I agree with most of the discussion set forth in the concurring opinion regarding Article II, Section 24 and the test to be applied under it, I disagree with the application of that test proffered in the concurring opinion to the facts of this case. Specifically, in regards to whether the Boone Act violates the constitutional limitations imposed by the Local Act Prohibition, I believe that this Court's decisions in City of New Bern v. New Bern–Craven County Board of Education, 338 N.C. 430, 450 S.E.2d 735 (1994), and Williams [v. Blue Cross Blue Shield of N.C.], 357 N.C. 170, 581 S.E.2d 415 [(2003)], guide our analysis."

  . . . .

  "[W]hile I agree with the general discussion in the concurring opinion, I disagree with the result that the Boone Act does not violate the Local Act Prohibition. After analyzing individually each of the subjects in the Local Act Prohibition that the Town alleged the Boone Act violated, the concurring opinion concluded that the Boone Act does not materially connect to either 'health, sani-

tation, and the abatement of nuisances,' N.C. Const. art. II, § 24(1)(a), 'non-navigable streams,' *id*. art. II § 24(1)(e), or 'labor, trade, mining, or manufacturing,' *id*. art. II § 24(1)(j). However, this Court should not analyze each of the enumerated subjects in isolation. In determining if the Boone Act violates the Local Act Prohibition, this Court should view the entire Local Act Prohibition. Thus, if this Court views all of the statutes within Article 19 of Chapter 160A that relate to 'health, sanitation, and the abatement of nuisances,' 'non-navigable streams,' and 'labor, trade, mining, or manufacturing' as a whole, then the Boone Act clearly has a material connection to the prohibited subjects enumerated in the Local Act Prohibition."

- ***Synopsis***− Appeal pursuant to G.S. 7A-27(a1) from July 2015 order entered by a three-judge panel of the Superior Court, Wake County, appointed by the Chief Justice under G.S 1-267.1. Reversed. Majority opinion by Justice Newby. Justice Ervin concurring in the result, joined by Justice Hudson. Justice Beasley dissenting.

Public Enterprises;
Water and Sewer Impact Fees

Quality Built Homes, Inc. v. Town of Carthage, ___ N.C. App. ___ (No. COA15-115-2, Moore− 12/30/16) (***unpublished***)

- ***Holding***− On remand from the N.C. Supreme Court, ____ N.C. ___, 789 S.E.2d 454 (2016), N.C. Court of Appeals holds that claims for refunds of impact fees are subject to 10-year statute of limitations and that Town's estoppel defense is inapplicable. Matter remanded to trial court as to whether to award attorney's fees under G.S. 6-21.7.

- ***Key Excerpt***− The Court agreed with plaintiffs' contention that their claims for refunds of the impact fees are subject to the ten-year statute of limitations pursuant to G.S. 1-56. *See* G.S. 1-56 ("An action for relief not otherwise limited by this subchapter may not be commenced more than 10 years after the cause of action has accrued.") "'North Carolina courts have held that ultra vires claims for charging fees without statutory authority have a ten-year statute of limitations.' Tommy Davis Constr. Inc. v. Cape Fear Public Utility Auth., No. 7:13-CV-2-H., 2014 WL 3345043, at *3 (E.D.N.C. July 8, 2014) (unpublished) (citing Amward Homes, Inc. v. Town of Cary, 206 N.C. App. 38, 59, 698 S.E.2d 404, 419–20 (2010), *aff'd by an equally divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011), and Durham Land Owners Ass'n v. Cnty. of Durham, 177 N.C. App. 629, 640–41, 630 S.E.2d 200, 208 (2006)), *aff'd* 807 F.3d 62 (4th Cir. 2015). In affirming the federal district court's decision in Tommy Davis Construction, the Fourth Circuit relied on this Court's recent opinion in Point South Point Properties, LLC v. Cape Fear Public Utility Authority, ___ N.C. App. ___, 778 S.E.2d 284 (2015), regarding which statute of limitations applies to state law claims like those brought in the instant case…."

The Court held that the trial court erred in granting summary judgment based on the doctrine of estoppel by acceptance of benefits. "[I]n the instant case, the General Assembly clearly contemplated that even if a party received a 'benefit,' *i.e.*, 'development or a development permit,' in exchange for paying an illegal fee, the party should still receive a recovery of that fee. *See* [G.S.] 160A-363(e) ('If the city is found to have *illegally exacted* a . . . fee . . . *for development or a development permit* not specifically authorized by law, the city shall return the . . . fee . . . plus interest . . . .' (emphasis added)). In other words, because plaintiffs would be legally entitled to receive development approval but for the requirement of the illegal impact fee, the doctrine of estoppel by acceptance of benefits does not apply. To hold otherwise would render section 160A-363(e) meaningless, because no party could ever seek a refund under that statute had they original-

ly received a 'benefit' in exchange for first paying the illegal fee. Lastly, '[e]quity will not interfere where a statute applies and dictates requirements for relief.' Lankford v. Wright, 347 N.C. 115, 122, 489 S.E.2d 604, 608 (1997) (Mitchell, C.J., dissenting) (quoting 27A Am. Jur. 2d *Equity* § 246 (1994))."

The Court then turned to a consideration of "whether plaintiffs are entitled to attorneys' fees and costs pursuant to [G.S.] 6-21.7, in light of the fact that the Supreme Court has held that 'the impact fee ordinances on their face exceed the powers delegated to [defendant] by the General Assembly . . . .' Quality Built Homes, ___ N.C. at ___, 789 S.E.2d at 459 (citation omitted)." *See* G.S. 6-21.7 ("In any action in which a city or county is a party, upon a finding by the court that the city or county acted outside the scope of its legal authority, the court *may* award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action, provided that if the court also finds that the city's or county's action was an abuse of its discretion, the court *shall* award attorneys' fees and costs.") (Emphasis added.)

The Court stated, "Plaintiffs contend that defendants' use of the illegal impact fees for other purposes was an abuse of discretion, making an attorneys' fee award in their favor mandatory. However, in the instant case, because the trial court erred as a matter of law by granting summary judgment in favor of defendant, it necessarily did not reach the issue of whether to grant attorneys' fees to plaintiffs, the losing parties at the trial court level. Therefore, given that the Supreme Court has already determined that defendant 'acted outside the scope of its legal authority' in imposing illegal impact fees, we remand to the trial court to determine whether that 'act . . . constituted an abuse of discretion before the [trial] court is required to award attorney's fees.' Etheridge [v. Cnty. of Currituck], 235 N.C. App. [469] at 479, 762 S.E.2d [289] at 297 [(2014)]. If the trial court so finds, it shall then award reasonable attorneys' fees and costs to plaintiffs and, if it does not so find, the court shall determine whether, in its discretion, an award of attorneys' fees and costs is appropriate in this case."

- ***Synopsis***− On remand from Supreme Court's order in Quality Built Homes, Inc. v. Town of Carthage, ____ N.C. ___, 789 S.E.2d 454 (2016), reversing and remanding the unanimous decision of the Court of Appeals in Quality Built Homes, Inc. v. Town of Carthage, ___ N.C. App. ___, 776 S.E.2d 897 (No. COA15-115, 2015) (***unpublished***), for consideration of unresolved issues. Opinion by Judge Bryant, with Judge Stephens and Judge Dietz concurring. On February 3, 2017, the Town filed a petition for discretionary review in this matter.

NOMINATIONS FOR THE ERNEST H. BALL AWARD FOR EXCELLENCE IN MUNICIPAL LAW

The Award for Excellence in Municipal Law was established in 1991 by the Past Presidents Group of the North Carolina Association of Municipal Attorneys. Originally known as the Distinguished Service Award, in 1994 it was renamed in honor of Ernest H. Ball, former General Counsel of the North Carolina League of Municipalities.

The Award for Excellence in Municipal Law is intended to recognize persons who have made valuable contributions to the field of municipal law, whether through a single accomplishment or through an entire career. (A nominee does not have to be an attorney, and the Award is not necessarily intended to be presented annually, as the Association reserves the right not to make a presentation in any given year.)

Past recipients of the Award include: Philip P. Green, Jr., David M. Lawrence, Jesse L. Warren, Claude V. Jones, Henry W. Underhill, Jr., Warren Jake Wicker, the Honorable Louis B. Meyer, Roddey M. Ligon, Jr., William I. Thornton, Jr., William A. Campbell, Judith W. Wegner, Gerry F. Cohen,

DeWitt F. “Mac” McCarley, Henry D. Blinder, and Frayda S. Bluestein.

Nominations and brief supporting material should be submitted to Kim Hibbard, NCLM General Counsel, by Thursday, March 16, 2017.

A committee of past presidents will meet during the Winter Conference scheduled for March 23 - 24, 2017, after which a recommendation may be submitted to the Association’s Board of Directors. If the Board chooses to make an award for 2017, it will be presented during the Annual Banquet at the Summer Conference in Wrightsville Beach, August 3 - August 5, 2017. For more information, please contact Kim Hibbard at (919) 715-3936 or khibbard@nclm.org.