

**METROPOLITAN SEWERAGE/WATER  
SYSTEM COMMITTEE**

**NORTH CAROLINA GENERAL ASSEMBLY**



**SUPPORTING DOCUMENTATION FOR  
REPORT TO THE  
2012 SESSION  
of the  
2011 GENERAL ASSEMBLY  
OF NORTH CAROLINA**

Email from City of Asheville Attorney, Bob Oast to House Committee on Finance, March 23, 2011.

*Candler v. City of Asheville*, 247 N.C. 398, 101 S.E. 2d 470 (1958).

Regional Water Supply and Water Service Agreement.

Asheville City Council Minutes May 25, 2004.

*Asheville v. State*, No. 05 CVS 10743 (Super. Ct. Wake Co Feb. 2, 2007)(memorandum of decision and order re: summary judgment).

Letter from Mayor Worley, dated June 24, 2005 to Chairman Ramsey, Buncombe County Commissioners.

Asheville City Council Minutes, Monday, June 12, 2006.

*City of Asheville v. State*, 192 N.C. App 1, 665 S.E.2d 103 (2008), *appeal dismissed, disc. rev. denied*, 672 S.E.2d 685 (2009).

Letter, City of Asheville with attachment, May 16, 2006.

Letter, Buncombe County Board of Commissioners, June 22, 2006.

City of Asheville, Staff Report, Legislative Agenda for 2007.

City Council minutes April 25, 2006.

Report From Water Agreement Task Force, Asheville Chamber of Commerce, April 28, 2005.

*Asheville-Citizen Times*, March 25, 2005, Editorial, Page 9.

**From:** Bob Oast [mailto:boast@ashevillenc.gov]

**Sent:** Wednesday, March 23, 2011 09:07 PM

**To:** Rep. Julia Howard; Rep. Dale Folwell (Speaker Pro Tempore); Rep. Mitchell Setzer; Rep. Edgar Starnes

**Cc:** Rep. Susan Fisher; Rep. Tim Moffitt; Rep. Patsy Keever

**Subject:** House Bill 236/Repeal Biltmore Lake Annexation

Dear Representatives Howard, Folwell, Setzer, and Starnes:

I am writing to you as members and chairs of the House Committee on Finance. I regret that I cannot attend your meeting tomorrow. Because I cannot attend the Committee meeting in person, I am writing to express the City of Asheville's opposition to HB 236.

The ordinance annexing the Biltmore Lake area was adopted in August of 2007, with an effective date of December 31, 2007. The property owners in the area petitioned for judicial review. After a nine day trial in Buncombe County Superior Court in January of 2010, the annexation was upheld. The petitioners have appealed, and that appeal is currently pending in the North Carolina Court of Appeals.

The Biltmore Lake area is over 350 acres in size, and has an estimated resident population of over 700. The Superior Court held that the City followed the statutory procedure for annexation, that the area was developed for urban purposes within the meaning of the law and that it qualified for annexation, and that the municipal services that the City committed to provide to the area substantially complied with the law.

The City followed the law in this annexation. The petitioners are getting their day in court, also according to the law, to try to prove otherwise. To interrupt this process and legislatively repeal the annexation would deprive the City of the expectation that, if it followed the law, the annexation would be upheld. At last night's City Council meeting, Council directed me to ensure that the the Finance Committee members are aware that the the City opposes House Bill 236, and to urge you to vote against it.

The ability to annex urbanized areas is important to all North Carolina cities for all of the reasons that you have heard and read about. However, it is especially important to Asheville. Because of legal and financial limitations related to water service, Asheville does not engage in voluntary annexations to the same extent that other cities are able to. Annexation is crucial to Asheville's ability to grow, and crucial to its regional importance in Western North Carolina.

The City of Asheville wants to assist the General Assembly in any way we can to develop legislation that provides for meaningful annexation reform in this 2011 legislative session, and we support the work of the NC League of Municipalities in this effort. However, we believe that repeal of a legally proper annexation over the objections of the City is not the way to achieve this goal.

If you have any questions or need any further information, please do not hesitate to contact our Mayor and members of our City Council, City Manager Gary Jackson, or me. Thank you for your service to North Carolina.

Respectfully,

Robert W. Oast, Jr.  
City Attorney  
Asheville, NC  
828/252-4385

## CANDLER v. ASHEVILLE.

COKE CANDLER, HARRY P. MITCHELL AND JOHN C. VANCE, MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS OF BUNCOMBE COUNTY AND EX OFFICIO TRUSTEES OF SOUTH BUNCOMBE WATER AND WATERSHED DISTRICT, OF SWANNANOA SANITARY SEWER DISTRICT, OF BEAVERDAM WATER AND SEWER DISTRICT, OF CANEY VALLEY SANITARY SEWER DISTRICT, OF HAZEL WARD WATER AND WATERSHED DISTRICT, OF VENABLE SANITARY DISTRICT, IN BEHALF OF ALL WATER CONSUMERS OF BUNCOMBE COUNTY WHOSE PROPERTY IS CONNECTED TO ANY OF THE WATER MAINS OF ANY OF SAID DISTRICTS; P. MORTON KEARY, TOM COLE, FRANK LOWE, MRS. NELL BUSCH, HOYT SPIVEY AND W. E. CREASMAN, WATER CONSUMERS IN THE ABOVE-NAMED DISTRICTS WHOSE PROPERTIES ARE CONNECTED TO WATER MAINS OF SAID DISTRICTS, IN THEIR OWN BEHALF AND IN BEHALF OF ALL RESIDENTS OF BUNCOMBE COUNTY WHOSE PROPERTIES ARE CONNECTED TO ANY OF THE WATER MAINS OF THE AFOREMENTIONED DISTRICTS v. CITY OF ASHEVILLE, A MUNICIPAL CORPORATION.

(Filed 10 January, 1958)

1. Municipal Corporations § 1—

A municipal corporation has a dual capacity: one, governmental or political, the other proprietary or *quasi-private*.

2. Municipal Corporations § 6—

While public utilities, such as water and lights, are necessary municipal expenses, nevertheless a municipality in furnishing water and lights to private consumers acts in a proprietary capacity.

3. Municipal Corporations § 5—

A municipal corporation is under the absolute control of the Legislature in regard to purely governmental matters, but as to proprietary municipal functions the Legislature is under the same constitutional restraints that are placed upon it in regard to private corporations.

4. Constitutional Law § 11: Utilities Commission § 2—

The State, in the exercise of a governmental function pursuant to the police power, has authority to regulate and establish rates to be charged by intrastate utilities, which power it may exercise directly or by delegation to administrative agencies under prescribed rules and standards. The General Assembly has not given the Utilities Commission authority to establish rates for municipally owned utilities.

5. Municipal Corporations § 8b—

The General Assembly has prescribed adequate standards for the fixing of rates by municipalities owning their own water works system and has authorized such municipalities to furnish water to private consumers outside their corporate limits and to charge for such services a different rate from that charged consumers within their limits. G.S. 160-255, G.S. 160-256.

6. Municipal Corporations § 5: Statutes § 2—

There is no contract between the State and the public that a municipal charter shall not at all times be subject to amendment by the Gen-

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eral Assembly, and Section 4, Article VIII, of the State Constitution does not forbid the Legislature from doing so by special act.

7. Municipal Corporations § 8b—

Since a municipality has no legal right either in its governmental or proprietary capacity to sell water to consumers residing outside its corporate limits without legislative authority, the Legislature has the power to fix the terms upon which such sales shall be made; provided, such terms permit the establishment of a rate or rates which will be fair and just to the consumer and will produce a proper return to the municipality.

8. Same: Statute prescribing that residents of sanitary districts should not be charged for water at higher rate by municipality held constitutional.

Residents within sanitary districts adjacent to a municipality constructed and maintained with funds derived from a tax levied therein their respective water and sewer systems. The municipality sold water to such districts at bulk sale rates by metering same through master meters. Later, the municipality sold water directly to the individual consumers in the districts and billed such consumers at a higher rate than that charged residents of the city. *Held*: A statute thereafter enacted (Chapter 399, Public-Local Laws of 1933) prohibiting the municipality from charging residents in such districts at a higher rate, but not prescribing the rates to be charged by the municipality or commanding it to furnish water to consumers outside its limits, renders void an ordinance subsequently enacted in conflict therewith, since the statute is valid and does not violate Section 17, Article I, of the State Constitution or the Fourteenth Amendment to the Federal Constitution, the rates fixed by the city for its residents being presumed just and reasonable and the city having no expense in regard to the construction, maintenance or repair of the systems within the respective districts.

9. Municipal Corporations § 8b—

In prohibiting a municipality from charging residents in sanitary districts outside the municipality rates for water service in excess of rates charged residents of the municipality, the General Assembly may prescribe that it should be unlawful for the city to charge non-residents within the sanitary districts a higher rate, notwithstanding that ordinarily the violation of a rate regulation merely subjects the violator to a penalty.

10. Estoppel § 10—

A municipality cannot be estopped from enforcing a valid ordinance or from contesting the validity of an act it deems unconstitutional.

APPEAL by plaintiffs from *Campbell, J.*, May Term 1957 of BUNCOMBE.

This is an action to restrain the City of Asheville from putting into effect an ordinance which provides a higher rate for consumers of water living outside the City than that charged to consumers residing in the City.

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The facts essential to an understanding of the questions involved on this appeal are stated below.

1. Between 1923 and 1927, pursuant to various Acts of the Legislature, there were formed in Buncombe County six water and sewer districts. These districts were duly incorporated by the Legislature as municipal corporations for the purpose of furnishing to the residents of the respective districts water and sewer service. By the provisions of the various Acts of the Legislature, the districts were given geographical boundaries and were authorized to acquire rights of way for water and sewer lines, to construct such lines, and to hold elections authorizing the issuance of bonds in payment therefor.

2. The six districts issued bonds as follows: South Buncombe Water and Watershed District—\$400,000.00 5½% Water and Sewer Bonds, dated 1 May 1927. Swannanoa Sanitary Water District—\$1,723,000.00 5½% Water and Sewer Bonds, dated 1 July 1927, and \$150,000.00 6% Water and Sewer Bonds, dated 15 May 1929. Beaverdam Water and Sewer District—\$500,000.00 5% Water and Sewer Bonds, dated 1 September 1927. Caney Valley Sanitary Sewer District—\$66,000.00 6% Water and Sewer Bonds, dated 1 May 1927. Hazel Ward Water and Watershed District—\$48,000.00 6% Water and Watershed Bonds, dated 1 November 1926. Venable Sanitary District—\$45,000.00 6% Water Bonds, dated 1 January 1928.

3. Each respective district was created and organized and the Board of Commissioners of Buncombe County made trustees thereof, pursuant to the following Acts of the General Assembly: (a) South Buncombe Water and Watershed District—Chapter 501 of the 1925 Public-Local Laws of North Carolina, and Chapter 246 of the 1927 Public-Local Laws of North Carolina. (b) Swannanoa Sanitary Water District—Chapter 249 of the 1927 Public-Local Laws of North Carolina, and Chapter 139 of the 1931 Public-Local Laws of North Carolina. (c) Beaverdam Water and Sewer District—Chapter 135 of the 1927 Private Laws of North Carolina. (d) Caney Valley Sanitary Sewer District—Chapter 341 of the 1923 Public-Local Laws of North Carolina, and Chapter 243 of the 1927 Public-Local Laws of North Carolina. (e) Hazel Ward Water and Watershed District—Chapter 501 of the 1925 Public-Local Laws of North Carolina, and Chapter 235 of the 1927 Public-Local Laws of North Carolina. (f) Venable Sanitary District—Chapter 237 of the 1927 Public-Local Laws of North Carolina.

Each plaintiff listed below is a citizen of Buncombe County and resides in the district hereinafter indicated and is a consumer of water, whose property is connected to one of the water

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mains of the district in which he resides, to wit: P. Morton Keary, South Buncombe Water and Watershed District; Tom Cole, Swannanoa Sanitary Water District; Frank Lowe, Beaverdam Water and Sewer District; Mrs. Nell Busch, Caney Valley Sanitary Sewer District; Hoyt Spivey, Hazel Ward Water and Watershed District; and W. E. Creasman, Venable Sanitary District.

4. The Board of Commissioners of Buncombe County as ex officio trustees of such municipal corporations or districts enumerated herein, are charged with the management, operation and control of each of such corporations, and have the power, as such trustees, to do all things necessary for the successful operation of water and sewer systems, including purchasing of land, rights of way, laying of pipes, and such other things as may be necessary for the successful operation of sewer and water systems in said districts, including the maintenance thereof. The Board of Commissioners, as such, and not as trustees, is authorized and directed by the Special Acts to levy annually a special tax in the respective districts for the maintenance of the water and sewer systems located therein, and to levy annually in each district a tax sufficient to pay the principal and interest due on the bonds issued by such district.

5. That for the year 1954-1955, the following were the debt service levies for said districts: South Buncombe Water and Watershed District—\$8,189.00—15.40¢ per \$100 valuation. Swannanoa Sanitary Water District—\$45,280.00—20.70¢ per \$100 valuation. Beaverdam Water and Sewer District—\$2,268.00—13.10¢ per \$100 valuation. Caney Valley Sanitary Sewer District—\$1,850.00—29.00¢ per \$100 valuation. Hazel Ward Water and Watershed District—\$2,300.00—12.30¢ per \$100 valuation. Venable Sanitary District—\$1,300.00—16.00¢ per \$100 valuation. That for prior years said County Commissioners have levied varying amounts for said debt service but generally comparable to the figures above stated.

6. That for the year 1954-1955, the levy for maintenance and upkeep of said lines and systems for each of the districts was as follows: South Buncombe Water and Watershed District—\$12,500.00—18.60¢ per \$100 valuation. Swannanoa Sanitary Water District—\$44,500.00—19.50¢ per \$100 valuation. Beaverdam Water and Sewer District—\$3,800.00—19.90¢ per \$100 valuation. Caney Valley Sanitary Sewer District—\$1,400.00—16.00¢ per \$100 valuation. Hazel Ward Water and Watershed District—\$2,100.00—9.70¢ per \$100 valuation. Venable Sanitary District—\$2,200.00—15¢ per \$100 valuation.

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7. Pursuant to the provisions of Chapter 205 of the 1929 Private Laws of North Carolina, the corporate limits of the City of Asheville were enlarged and extended so as to include within the extended corporate limits of the City portions of the territory embraced within the boundaries of the Beaverdam Water and Sewer District, the South Buncombe Water and Watershed District, and the Swannanoa Sanitary Water District. The City of Asheville, as required by Section 8 of the above Act, assumed the payment of a portion of the bonded indebtedness of said districts in proportion to the percentage the assessed valuation of the territory annexed to the City of Asheville bore to the assessed valuation of the entire territory of said districts. As of 1 July 1936, the date of the refunding of the bonded indebtedness of said districts, the City of Asheville had assumed the following percentages and amounts of the bonded indebtedness incurred by said districts: The percentage of the indebtedness in the Beaverdam Water Sewer District was 86.043, and the amount was \$430,215.00; the percentage in the South Buncombe Water and Watershed District was 39.6765, and the amount was \$158,706.00; the percentage in the Swannanoa Sanitary Water District was 27.7688, and the amount was \$538,839.00. As of 1 July 1949, the City of Asheville assumed the proportionate percentage and amount of the outstanding indebtedness of the Caney Valley Sanitary Sewer District, which had been included within the territorial limits of the City of Asheville, as follows: 25.68253, and the amount of \$12,841.27. As of 1 July 1955, the outstanding indebtedness of the four districts referred to in this paragraph was \$1,742,000.00, of which the City of Asheville had assumed \$713,304.89.

8. That since the assumption by the City of Asheville of the indebtedness hereinabove set out, the City of Asheville has levied annually an ad valorem tax on all the taxable property in the City of Asheville of a sufficient rate to pay the principal and interest of that part of said indebtedness of said districts so assumed, as required by Section 8 of Chapter 205 of the 1929 Private Laws of North Carolina.

9. It is stipulated by the parties to this action that, for the fiscal year ending 30 June 1956, 5,983 water meters were in operation in the said water districts outside the City of Asheville; that the individual consumers residing in the districts purchased and installed these meters at an average initial cost of \$40.00 per meter; that the City of Asheville served on the above date, in and outside its corporate limits, a total of 20,977 water meters; that the revenue during the year indicated from the meters located outside the City was \$285,483.00, and all

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revenue from the sale of water through all the above meters was \$1,056,703.00, and the total cost of billing and meter reading was \$85,365.00.

10. It is also stipulated that the City of Asheville has, over a long period of years, beginning over fifty years ago, invested in a waterworks system a sum in excess of ten million dollars, which system consists of watersheds comprising approximately thirty square miles in area, located on the North Fork of the Swannanoa River and on Bee Tree Creek in Buncombe County, at a distance of approximately fifteen miles from the City of Asheville, impounding dams, chlorinating plants, pumping installations, transmission lines from said watersheds to the City of Asheville, reservoirs and a network of distribution lines operated and maintained by large maintenance crews and personnel employed by the City of Asheville, which waterworks system was originally for the primary purpose of providing the citizens of Asheville with an adequate supply of wholesome water for domestic and industrial purposes and for fire protection. It is further stipulated that, including the water bonds issued by the City of Asheville on 1 December 1951, in the sum of \$2,750,000.00, the combined unpaid indebtedness of the City for the waterworks system as of 30 June 1955 was \$6,404,593.44.

11. Prior to the year 1928, the City of Asheville sold water in bulk under its ordinances to certain of said water districts, by means of metering the same through one or more master meters located in one or more districts, and such districts paid the City therefor at rates provided for bulk sales of water, and the districts sold the water at retail prices to the individual consumers and did its own billing and collecting. In 1928, this method was abandoned and the City of Asheville thereafter sold water directly to the individual consumers in the districts and billed the individual consumers on the basis of rates then in effect under its ordinances.

12. On 29 February 1928, the City of Asheville adopted an ordinance which reduced the rates to customers outside its corporate limits but still charged a rate to outside customers double that charged customers inside its corporate limits. Effective as of 25 August 1930, the City of Asheville increased its water rates to both its inside and outside customers, still leaving the cost to outside customers double that charged to customers living within its corporate limits.

13. That the General Assembly of North Carolina, at its 1933 session, enacted Chapter 399 of the 1933 Public-Local Laws, reading as follows: "Section 1. That from and after the passage of this Act, it shall be unlawful for the City of Asheville, or any

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of the governing authorities, agents, or employees thereof, to charge, exact, or collect from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of laying such main, a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said City.

"Section 2. That the City of Asheville is hereby specifically authorized and empowered, through its officers, agents and employees, to cause any user of water who shall fail to pay promptly his water rent for any month to be cut off, and his right to further use of water from the city system to be discontinued until payment of any water rent in arrearages.

"Section 3. That it is the purpose and intent of this Act to declare that persons residing outside the corporate limits of the City of Asheville shall be entitled to the use of Asheville surplus water only, and the governing body of the City of Asheville is authorized and empowered to discontinue the supply of water to any districts, or persons, out of the corporate limits of the City of Asheville at any time that there may be a drought or other emergency, or at any time the governing body of the City of Asheville may deem that the city has use for all of its water supply.

"Section 4. That it shall be the duty of the County Commissioners of Buncombe County and/or trustees of the different water districts operating outside of the corporate limits of the City of Asheville, in Buncombe County, to maintain the water lines in proper repair, in order that there may not be a waste of water by leakage."

14. That after the passage of the above Act, the City of Asheville billed consumers of water in the various districts at the same rate as that charged consumers of water living inside the City of Asheville, until 1 September 1955. That on 11 August 1955, the City Council of the City of Asheville enacted Ordinance No. 383, to be effective as of 1 September 1955, establishing rates for outside consumers substantially higher than those charged its consumers within its City limits.

Upon the foregoing finding of facts by the court below, it was concluded as a matter of law that (a) Chapter 399 of the 1933 Public-Local Laws of North Carolina is unconstitutional and void and is contrary to the Constitution of the State of North Carolina and the Constitution of the United States of America, and particularly is in violation of Section 17 of Article I of the Constitution of North Carolina and the Fourteenth

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Amendment to the Constitution of the United States of America, and other applicable provisions of said Constitutions; (b) that the defendant, City of Asheville, is not estopped to assert the invalidity of Chapter 399 of the 1933 Public-Local Laws of North Carolina; and (c) that Ordinance No. 383 enacted by the City Council of the City of Asheville, on 11 August 1955, and every section thereof, is in all respects lawful and valid.

Judgment was entered accordingly, the temporary restraining order theretofore entered was dissolved, the action was dismissed and the plaintiffs directed to pay the costs of the action to be taxed by the Clerk.

Plaintiffs appeal, assigning error.

*Ward & Bennett, Roy A. Taylor, William M. Styles, for plaintiff appellants.*

*Robert W. Wells, Charles N. Malone, Frank M. Parker, for defendant appellee.*

DENNY, J. The numerous exceptions and assignments of error preserved and brought forward on this appeal, in our opinion, present only three questions which require our consideration and determination. (1) Did the trial court err in holding that Chapter 399 of the 1933 Public-Local Laws of North Carolina is unconstitutional and contrary to Section 17, Article I, of the Constitution of North Carolina, and the Fourteenth Amendment to the Constitution of the United States? (2) Did the trial court err in holding that the defendant City of Asheville is not estopped to assert the invalidity or unconstitutionality of the above Act? (3) Did the trial court err in holding that Ordinance No. 383, enacted by the City Council of the City of Asheville, on 11 August 1955, is lawful and valid and in full force and effect?

The correctness of the ruling of the court below on the first question posed, turns on whether or not the General Assembly has the power to prohibit a municipality from selling water to consumers residing outside its corporate limits at a higher rate than the rate fixed for consumers of water who reside within its corporate limits, where such outside consumers reside in a water or water and sewer district in which the taxpayers of the district have constructed the water or water and sewer facilities and are maintaining them out of ad valorem taxes levied on the real and personal property in the district.

A municipal corporation in this State has a dual capacity. One is governmental or political, and the other is proprietary or quasi-private. *Asbury v. Albemarle*, 162 N.C. 247, 78 S.E. 146;

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*Holmes v. Fayetteville*, 197 N.C. 740, 150 S.E. 624; *Millar v. Wilson*, 222 N.C. 340, 23 S.E. 2d 42; *Nash v. Tarboro*, 227 N.C. 283, 42 S.E. 2d 209; *Rhodes v. Asheville*, 230 N.C. 134, 52 S.E. 2d 371.

A municipality acting in its governmental capacity is an agency of the State for the better government of those residing within its corporate limits, and while public utilities, like water and lights, are now held to be a necessary municipal expense, *Fawcett v. Mt. Airy*, 134 N.C. 125, 45 S.E. 1029, even so, they are not provided by a municipality in its political or governmental capacity, except insofar as they may furnish water for extinguishing fires and for other municipal purposes, *Harrington v. Greenville*, 159 N.C. 632, 75 S.E. 849; *Howland v. Asheville*, 174 N.C. 749, 94 S.E. 524; *Klassette v. Drug Co.*, 227 N.C. 353, 42 S.E. 2d 411; and provide electric energy for lighting streets, *Baker v. Lumberton*, 239 N.C. 401, 79 S.E. 2d 886; or for the operation of traffic light signals, *Hamilton v. Hamlet*, 238 N.C. 741, 78 S.E. 2d 770, or other municipal purposes, but, in its proprietary capacity it acts exclusively in a private or quasi-private capacity for its own benefit.

"In matters purely governmental in character it is conceded that the municipality is under the absolute control of the legislative power, but as to its private or proprietary functions, the Legislature is under the same constitutional restraints that are placed upon it in respect of private corporations." *Asbury v. Albemarle*, *supra*. No one challenges the power of the State to fix rates for private utilities or for utilities operated in a proprietary capacity by a municipality.

In this State, the power to regulate and to establish the rates to be charged by intrastate railroads, motor vehicle carriers of passengers and freight, power companies, etc., has been delegated to the North Carolina Utilities Commission. However, the right to establish rates for municipally owned electric light plants, water, or water and sewer systems, has never been given to the Utilities Commission.

In *Utilities Commission v. State*, 239 N.C. 333, 80 S.E. 2d 133, this Court, speaking through *Barnhill, J.*, later *C.J.*, said: "This right to grant franchises to public service corporations and to fix or approve the rates to be charged by them for the services rendered the public rests in the Legislature. The General Assembly may act directly or it may delegate its authority to an administrative agency or commission of its own creation. However, no Act undertaking to delegate the rate-making function of the Legislature is valid unless the General Assembly prescribes rules and standards to guide the legislative agency in

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exercising the delegated authority. *Motsinger v. Perryman*, 218 N.C. 15, 9 S.E. 2d 511; *S. v. Harris*, 216 N.C. 746, 6 S.E. 2d 854; *Hospital v. Joint Committee*, 234 N.C. 673 (concurring opinion at p. 684), 68 S.E. 2d 862; *Coastal Highway v. Turnpike Authority*, 237 N.C. 52, 74 S.E. 2d 310."

In 43 Am. Jur., Public Utilities and Services, section 83, page 624, *et seq.*, it is said: "In accordance with its right to regulate and control public utilities, a state may, under its police power and within constitutional limitations, regulate and prescribe reasonable rates at which charges may be made by public utilities for their services to the public. The function of rate making is purely legislative in character, whether it is exercised directly by the legislature itself by the enacting of a law fixing rates or by the granting of a charter wherein the rates are regulated, or is exercised by some subordinate administrative or municipal body to whom the power of fixing rates has been delegated; in any of such cases, the completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power."

In the last cited authority, section 94, page 636, we find this statement: "The well recognized general rule is that when a governmental body has the power to regulate the rates for charges for services by public utilities to consumers, that power includes the power to fix any maximum rate which is fair and just to the consumer if it will also produce a proper return to the public utility."

It is clear that the power to establish rates is a governmental function and not a proprietary one. It is likewise clearly established in this jurisdiction that municipalities "are creatures of the legislature, public in their nature, subject to its control, and have only such powers as it may confer. These powers may be changed, modified, diminished, or enlarged, and, subject to the constitutional limitations, conferred at the legislative will. There is no contract between the State and the public that a municipal charter shall not at all times be subject to the direction and control of the body by which it is granted." *Holmes v. Fayetteville*, *supra*.

In the case of *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 80 L.Ed. 1033, in speaking for the Court, *Chief Justice Hughes* said: "The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or

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through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The Court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. \* \* \* When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within the sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are especially applicable to such an agency are met, as in according a fair hearing, and acting upon evidence and not arbitrarily."

Likewise, in *City of Seymour v. Texas Electric Service Co.*, 66 F. 2d 814 (C.C.A. 5), (*certiorari* denied 290 U.S. 685, 78 L.Ed. 590), it is said: "\* \* \* In owning and operating a utility plant a city acts not in a governmental but in a proprietary capacity, (but) when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the State, as regulator. It exerts not the contractual power of the city, but the sovereign power of the state." See also *Shirk v. Lancaster*, 313 Pa. 158, 169 A 557, 90 A.L.R. 688.

The Legislature has authorized a municipal corporation that owns a waterworks system to furnish water to any person, firm, or corporation outside its corporate limits, where the service is available. G.S. 160-255. Likewise, the Legislature has seen fit to adopt G.S. 160-256, which in pertinent part provides: "The governing body, or such board or body which has the management and control of the waterworks system in charge, may fix such uniform rents or rates for water or water service as will provide for the payment of the annual interest on existing bonded debt for such waterworks system, for the payment of the annual installment necessary to be raised for the amortization of the debt, and the necessary allowance for repairs, maintenance, and operation, and when the city shall own and maintain both waterworks and sewerage systems, including sewerage disposal plants, if any, the governing body shall have the right to operate such system as a combined and consolidated system, and when so operated to include in the rates adopted for the waterworks a sufficient amount to provide for the payment of the annual interest on the existing bonded debt for such sewerage system or systems, for the payment of the annual installment necessary to be raised for the amortization of such debt, and the necessary allowance for repairs, maintenance and operation. \* \* \* Provided, however, that for service supplied outside the corporate limits of the city, the governing body, board or

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body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits \* \* \*

Unquestionably, the above statute contains ample standards to guide a municipality in exercising the delegation of authority to fix fair and just water rates. Moreover, Chapter 399 of the 1933 Public-Local Laws of North Carolina merely established separate classifications as between services supplied outside the corporate limits of the City of Asheville, "where the service is available," to persons, firms, and corporations not located within a water or water and sewer district, and to persons, firms, and corporations outside the corporate limits of the City of Asheville, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of constructing such water or water and sewer system.

The Legislature by adopting the above Act did not establish the rates to be charged to consumers in the water or water and sewer districts involved, although it had the right to do so; but it did direct the City of Asheville not to charge rates to the persons, firms, and corporations in these districts in excess of the rate or rates fixed from time to time by the governing body of the City of Asheville to be paid by persons, firms, and corporations within the corporate limits of the City. The governing body of the City of Asheville is free to raise or lower its present rates if in its judgment the rates are too high or too low.

This Court has heretofore held that Section 4, Article VIII, of our Constitution does not forbid the Legislature from passing special acts, amending charter of cities, towns, and incorporated villages, or conferring upon municipal corporations additional powers, or restricting the powers theretofore vested in them. *Kornegay v. Goldsboro*, 180 N.C. 441, 105 S.E. 187; *Holton v. Mocksville*, 189 N.C. 144, 126 S.E. 326; *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377; *Deese v. Lumberton*, 211 N.C. 31, 188 S.E. 857.

In *Kornegay v. Goldsboro*, *supra*, it is said: "The defendant is a public corporation and section 1 of Article VIII 'would seem clearly to have reference to private or business corporations, and does not refer to public or quasi-public corporations acting as governmental agencies.'" *Mills v. Commissioners*, 175 N.C. 215, 95 S.E. 481.

The Court, in this same case, in discussing the validity of the special act under consideration, said: "\* \* \* Is it not clear that the true intent of the last section (section 4 of Article VIII) is to impose the duty of passing general laws relating to cities

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and towns, leaving it to the discretion of the legislature to enact special acts as the needs of the municipalities may require?" The Court then continues: "The reason for making this distinction is that the needs of the different communities are so diverse that no legislature could foresee the emergencies that would arise in different localities or the necessity for additional powers dependent on changing conditions, and could not provide for them by general legislation, and the present case is an apt illustration of the wisdom of this course."

In the case of *Holton v. Mocksville, supra*, Conner J., speaking for the Court, said: "Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending charters of cities, town and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. We find nothing in section 4, Article VIII of the Constitution rendering this act unconstitutional, nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate. *Kornegay v. Goldsboro*, 180 N.C. 441."

In our opinion, since a municipality has no legal right either in its governmental or proprietary capacity to sell water to consumers residing outside its corporate limits without legislative authority, the Legislature has the power to fix the terms upon which such sales shall be made; provided, such terms permit the establishment of a rate or rates which will be fair and just to the consumer and will produce a proper return to the municipality.

In the instant case, it will be presumed that the City Council of the City of Asheville acted in good faith in establishing water rates for its own consumers residing within its corporate limits and that it based the rates on the provisions contained in G.S. 160-256. There is nothing on this record which tends to show that the rate or rates to be charged the consumers in these water or water and sewer districts are unjust and confiscatory.

It is clear, under the facts disclosed on this record, that every purchaser of water in these water or water and sewer districts, from the City of Asheville, at the rates fixed for consumers of water within the city limits of Asheville, are paying as much of the debt service and interest, as well as the cost of operating, repairing, and maintaining the water and sewer systems of the City of Asheville, as any resident of the City who purchases a like amount of water. Moreover, in addition thereto, the persons, firms, and corporations in these water or water and sewer dis-

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districts are being taxed to pay the debt service, including interest on bonds issued to construct the water or water and sewer system in these respective districts, as well as taxing themselves for the repair and maintenance of such water or water and sewer system. Asheville contributed nothing to the construction of these systems, neither does it contribute anything to the cost of repairing and maintaining them. Asheville renders no service except to pump the water into the water systems, read the meters, which it did not furnish and does not service, and to bill the consumers.

It further appears from the record that a little over twenty-eight per cent of the meters through which the City of Asheville furnishes water are outside its corporate limits and the City derives a little over twenty-seven per cent of its total income from its water system from these outside consumers.

In our opinion, in light of all the facts and circumstances revealed on this record, the Legislature had the power to enact Chapter 399 of the Public-Local Laws of 1933, and that such Act is constitutional and valid and is binding on the City of Asheville insofar as it pertains to the right to sell water to persons, firms, and corporations who obtain water through mains constructed and maintained at the expense of the taxpayers in these water or water and sewer districts. We further hold that such Act does not violate Section 17, Article I, of the Constitution of North Carolina, or the Fourteenth Amendment to the Constitution of the United States.

The City of Asheville, however, still has the right to establish a different rate for service outside its corporate limits to persons, firms, and corporations not located or residing in a district that has constructed and maintained at its own expense its water or water and sewer system. *Construction Co. v. Raleigh*, 230 N.C. 365, 53 S.E. 2d 165; *Fulghum v. Selma*, 238 N.C. 100, 76 S.E. 2d 368. In *Construction Co. v. Raleigh*, *supra*, we held that in the absence of any constitutional or statutory restriction the rates and fees that may be charged to residents outside the corporate limits of a city or town are matters to be determined by its governing body in its sound discretion. It is optional with the City of Asheville as to whether or not it will continue to furnish these districts with water, but if it does do so, it must do so on the prescribed terms. Furthermore, the City is not authorized to contract for the sale of water to outside consumers except with respect to its surplus water.

The appellee contends the statute is unconstitutional because it provides that it shall be unlawful for the City to sell its water to outside consumers above the rate established for consumers in-

## CANDLER v. ASHEVILLE.

side the corporate limits of the City. This contention is without merit. While ordinarily the violation of a regulation established by a rate-making body subjects the violator to a penalty, in many instances such violation is declared to be a misdemeanor. G.S. 60-6; G.S. 62-121.72 (3); G.S. 62-128.

We do not consider the case of *Missouri P. R. Co. v. Tucker*, 230 U.S. 340, 57 L.Ed. 1507, and similar cases cited by the appellee, as controlling on the facts in the present case. In those cases, the complaining party or parties had no voice in the establishment of the rates; nor were they given the right to be heard. Here, the complaining party was left free to fix the rate which the General Assembly directed should be the maximum rate to be charged where certain factors or conditions exist. Moreover, the complaining parties in the cases cited by the appellee were compelled by law to operate under the rate or rates promulgated. Such is not the case here. As we have heretofore pointed out, the City of Asheville is under no duty to sell water to consumers residing outside its corporate limits. *Fulghum v. Selma*, *supra*. However, under the facts revealed by the record, it would seem that the City, in view of its control of the sources of water in the area, does have a moral duty to furnish water to these districts.

On the second question posed, we hold that a municipality cannot be estopped from enforcing its legal ordinances or from contesting the validity of an act it deems unconstitutional. *Raleigh v. Fisher*, 232 N.C. 629, 61 S.E. 2d 897 and cited cases.

In light of the conclusions we have reached, we hold that Ordinance No. 383, enacted by the City Council of the City of Asheville, on 11 August 1955, is invalid insofar as it established a different rate or rates for persons, firms, and corporations within these water or water and sewer districts and the rate or rates established for persons, firms, and corporations within the City limits of Asheville. The Ordinance is valid insofar as it applies to persons, firms, and corporations outside the City of Asheville, but not within a district that has established and maintains, at its own expense, the water or water and sewer system.

The judgment of the court below is  
Reversed.

1995.

STATE OF NORTH CAROLINA  
COUNTY OF HENDERSON

FIRST AMENDED AND RESTATED  
REGIONAL WATER SUPPLY AND  
WATER SERVICE AGREEMENT

**THIS REGIONAL WATER SUPPLY AND WATER SERVICE AGREEMENT** made and entered into this the 11<sup>th</sup> day of November, 1995, by and between **COUNTY OF HENDERSON**, a body politic and corporate (herein "Henderson County"); **THE CANE CREEK WATER AND SEWER DISTRICT**, a municipal body created pursuant to Chapter 162A-86 et seq. of the North Carolina General Statutes (herein "the District"); **THE ASHEVILLE/BUNCOMBE WATER AUTHORITY**, a joint agency created pursuant to Chapter 160A-460 et seq. of the North Carolina General Statutes (herein "Authority"); **CITY OF ASHEVILLE**, a municipal corporation (herein "Asheville"); and the **COUNTY OF BUNCOMBE**, a body politic and corporate (herein "Buncombe County"), hereinafter collectively called the "Parties."

**WHEREAS**, in order to best conserve, protect and utilize the natural resources of Western North Carolina, the Authority, Buncombe County, Henderson County, the Metropolitan Sewerage District (herein "MSD"), Asheville and the City of Hendersonville, North Carolina, adopted a "RESOLUTION OF INTENT TO STUDY THE CREATION OF A REGIONAL WATER AND SEWER AUTHORITY"; and

**WHEREAS**, the Authority as a joint agency may not own real property and title to real property acquired by the Authority has been vested in Asheville; and

**WHEREAS**, as part of its plan to obtain a reliable, long-term water source, the Authority and Asheville acquired approximately 137 acres of real property along the French Broad River in Buncombe County, North Carolina for a new water treatment plant, said property being more particularly described in Deed Book 1358, at Page 613, of the Buncombe County, N C. Register's Office (herein "the Brevard Road Site"); and

**WHEREAS**, the State of North Carolina Department of Environment, Health and Natural Resources has recommended that the Authority consider water intake sites further upstream from the Brevard Road Site in Henderson County; and

**WHEREAS**, the Authority on behalf of the City of Asheville plans to purchase real property in Henderson County for the placement of water intakes and water treatment facilities; and

**WHEREAS**, Henderson County seeks a reliable long term means of properly and adequately disposing of its wastewater and sewage; and

**WHEREAS**, Henderson County has entered into negotiations with MSD to have MSD accept Henderson County's wastewater and sewage; and

WHEREAS, the Authority, Asheville and Henderson County entered into a Regional Water Agreement, dated June 28, 1994, setting forth the general terms for the provision of potable water to the citizens of Henderson and Buncombe Counties; and

WHEREAS, in order to supplement the Regional Water Agreement all the Parties, except Asheville, agreed to and signed a "Regional Water Supply and Water Services Agreement" (the "Regional Agreement"); which has been submitted to Asheville for consideration; and

WHEREAS, Asheville requested that amendments be made to the Regional Agreement in order that said Agreement be consistent with the requirements of Asheville in relation to other obligations of Asheville, including Asheville's obligation for undertaking the revenue bond financing associated with the construction of the facilities provided for in said Agreement; and

WHEREAS, the Parties desire to amend, restate and replace the Regional Agreement in its entirety by the terms of this First Amended and Restated Regional Water Supply and Water Service Agreement; and

WHEREAS, the Authority, Asheville and Buncombe County acknowledge that the Supplemental Water Agreement, dated August 1987 (herein "Supplemental Water Agreement") will be amended, if required, to provide consistency with and continuity to the terms set forth herein;

NOW THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree to the following terms and conditions:

#### **SECTION I: ENABLING AUTHORITY AND PURPOSE**

1.0 By this Agreement, the parties intend to establish a joint undertaking for providing water for consumptive and/or industrial uses to citizens of Henderson and Buncombe Counties. The District through its Board of Trustees does by this Agreement contract pursuant to N.C.G.S. 153A-275 with Henderson County to provide and operate a water distribution system for the benefit of District residents. Henderson County by this Agreement does contract with the Authority and Asheville to make potable water available to Henderson County and to install and own the Regional Water Lines as hereinafter defined until such time as those lines are purchased by Henderson County and/or the District pursuant to the terms hereinafter set forth. The enabling authority for this Agreement is set forth in Chapter 160A, Article 20 of the North Carolina General Statutes.

#### **SECTION II: DEFINITIONS**

The terms set forth in this Section and referenced throughout the Agreement shall have the meaning as set out below. All other terms used in the Agreement not defined below or elsewhere in the Agreement shall have their customary dictionary definition.

2.0 "Regional Water Lines": water transmission or water distribution lines and associated improvements installed by the Authority at the request of Henderson County pursuant to the terms of this Agreement to provide water for customers within the Cane Creek Water and Sewer District as set forth below in subsection 2.1.

2.1 "Service District": the area in which the Authority is required pursuant to the terms of this Agreement to install a water distribution system. As of the date hereof, said area is delineated as the Cane Creek Water and Sewer District as defined in "Resolution to Create the Cane Creek Water and Sewer District" attached hereto and incorporated herein as Exhibit A. However, such District may be by resolution amended, expanded or restated to incorporate all or a portion of Henderson County, as further provided in subsection 4.2 below.

2.2 "Transmission Lines": water lines ten (10) inches or larger in diameter size.

2.3 "Distribution Lines": water lines less than ten (10) inches in diameter size.

2.4 "Committee": the Policies and Priorities Committee of the Asheville/Buncombe Water Authority as expanded to include a member from Henderson County, as further provided in Section V below.

2.5 "Projected Regional Water Line Costs": the amount of capital costs projected to be incurred for the design, purchase, installation, construction, financing, and replacement (if any) of a Regional Water Line or Lines and any associated improvements agreed upon by the Authority Director and the Henderson County Utilities Director prior to any work or materials being contracted for and/or installed in connection with a Regional Water Line or Lines, as further provided in Section VII below.

2.6 "Actual Regional Water Line Costs": all capital costs associated with the installation of a Regional Water Line or Lines and associated improvements incurred by the Authority and/or Asheville prior to the transfer of ownership of the applicable improvement pursuant to the terms of this Agreement from the Authority and/or Asheville to Henderson County.

2.7 "Net Revenue": the gross proceeds received from a Regional Water Line less the total costs to produce, treat, and deliver potable water to customers served by the Regional Water Line, less the total costs to maintain and repair the Regional Water Line and less the total costs to bill and collect from customers served by the Regional Water Line. Payments to Asheville and Buncombe County pursuant to Article IV, Paragraph 16 of the Supplemental Water Agreement shall not be subtracted from the proceeds generated by the Regional Water Lines in determining "Net Revenue". However, costs of support services provided by Asheville as reflected in Article VIII(b) of that Agreement which are attributable to the Regional Water Lines shall be included in figuring "Net Revenue".

**SECTION III: WATER INTAKES AND TREATMENT PLANT; OTHER REAL PROPERTY**

3.0 Pursuant to Chapter 153A-15 of the North Carolina General Statutes, Henderson County by and through its Board of Commissioners has consented and reaffirms the acquisition by Asheville (or the Authority on behalf of Asheville) of real property located in Henderson County for the placement of water intakes, water storage, a treatment plant and other water treatment facilities, said property (herein "the Water Plant Site") being described as follows:

A. all of that real property described in Deed Book 471, at Page 47, of the Henderson County, N.C. Register's Office, containing 261.53 acres, more or less; and

B. all of that real property described in Deed Book 482, at Page 451, of the Henderson County, N.C. Register's Office, containing 29.80 acres, more or less; and

C. all of that real property described in Deed Book 522, at Page 313, of the Henderson County, N.C. Register's Office, containing 7.28 acres, more or less; and

D. all of that real property described in Deed Book 482, at Page 453, of the Henderson County, N.C. Register's Office, containing 26.09 acres, more or less.

3.1 The Water Plant Site and improvements thereto along with water transmission lines or distribution lines, pump stations and other related equipment or facilities located in Henderson County serving only customers outside Henderson County shall be operated by the Authority and shall be considered part of "the water system of the City of Asheville" as that term is set forth in the Supplemental Water Agreement and amendments thereto.

3.2 Except as provided in subsections 3.3 and 3.4 below, Henderson County by and through its Board of Commissioners and pursuant to Chapter 153A-15 of the North Carolina General Statutes consents to the acquisition by Asheville (or the Authority on behalf of Asheville) through purchase, condemnation or any other lawful means of such other real property in Henderson County, including easements and rights-of-way, for the installation of valves, transmission lines, pump stations and other equipment and facilities used to process and distribute water to customers of the Authority and/or Henderson County. The signatures herein of its Board of Commissioners shall be conclusive proof of Henderson County's consent under Chapter 153A-15. Notwithstanding the above, Henderson County shall provide Asheville, upon request, any additional proof of consent that may be required to effectuate any purchase, condemnation or other acquisition of real property in Henderson County for the purposes of constructing a water treatment plant and/or installing transmission and distribution equipment and facilities. Henderson County acknowledges that this consent is provided as evidence of the County's commitment to the Authority, which consent is being relied upon by the Authority in its expenditures of time and money needed to install the improvements contemplated by this Agreement.

3.3 The Authority shall provide Henderson County notice of any purchase, condemnation or other lawful means of acquisition of property located in Henderson County by the Authority thirty (30) days before such acquisition is effectuated by title transfer or by judgment order being docketed. Said notice shall include the location of property to be obtained and the purpose behind the acquisition. If a reasonable alternative site is provided by Henderson County that satisfies the purposes outlined by the Authority in the above notice, the Authority is restricted to the acquisition of same. Whether an alternative site is "reasonable" shall include, but not be limited to, such factors as the Authority's purpose, its relation to the proximity of the proposed location, the size of the alternative tract, the impediments to title, if any, time necessary for acquisition and the relative costs of acquisition. Notwithstanding the above, the Authority shall have the sole discretion in locating the main transmission lines in Henderson County servicing only customers outside Henderson County.

3.4 In the event this Agreement is terminated as set forth in Section XIV or subsection 4.3 below or voided per subsection 4.4, then thereafter the provisions of N.C.G.S. 153A-15 shall apply, preventing the Authority from acquiring real property in Henderson County without Henderson County's consent. Any property acquired or contract rights for acquisition obtained by the Authority or Asheville before such termination shall remain vested in the Authority or Asheville and such title and rights shall not thereafter be voided without the approval of the Authority and Asheville, their successors and assigns.

3.5 Henderson County shall initiate condemnation or take other actions as reasonably requested by the Authority or Asheville in order to acquire all real property, or partial interests thereof, in Henderson County needed for the purposes of carrying out this Agreement and any amendments thereto. If requested, Asheville and/or the Authority shall reimburse Henderson County for Henderson County's acquisition costs upon delivery of title to Asheville for the properties obtained by Henderson County.

3.6 Henderson County shall participate with the Authority and/or Asheville as reasonably requested by the Authority in all permitting processes and Federal and State regulatory procedures necessary to have the Water Plant Site and related improvements thereto approved for water intake, treatment and storage. The parties shall each take all reasonable measures to protect and improve each associated watershed for the Mills River and French Broad Rivers in accordance with its classification, including, but not limited to, enforcement of all applicable watershed regulations.

3.7 The Authority and Asheville shall seek the immediate declassification of the watershed draining to the Brevard Road Site from the State of North Carolina Department of Environment, Health, and Natural Resources (herein "DEHNR") upon approval by DEHNR of the water intakes on the Mills River and/or French Broad River. Notwithstanding the intent of the Authority to declassify the Brevard Road Site upon the conditions expressed herein, no cause of action or duty to any member of the public is created for the failure of the Authority to achieve declassification.

#### **SECTION IV: WATER SERVICE - AREA, STRUCTURE and DURATION**

4.0 Pursuant to the terms and conditions hereinafter set forth, the Authority shall supply water taken from the Mills River and processed at water treatment facilities in Henderson County owned by the Authority or Asheville (hereinafter "Henderson County Water Treatment Facilities") to Henderson County without regard to quantity and in accordance with all applicable federal and state laws and regulations. The Authority and Asheville agree that in no event shall the quantity of Mills River water provided to Henderson County citizens from a new water treatment plant at the Water Plant Site be reduced or eliminated in order to provide water to customers of the Authority located outside Henderson County. Provided, however, the policies of the Authority and/or Henderson County shall take precedence over this prohibition, until Henderson County provides a written demand to the Authority that this provision be enforced regardless of such policies. This Agreement shall not be construed as creating an entitlement to water for any citizen or user within Henderson County nor shall Henderson County, the Authority or Asheville be liable to any person for damages for failure to furnish water. Allocations for water for any citizen of Henderson County shall be conducted on a case-by-case basis per policies and procedures established by Henderson County.

4.1 If for whatever reason, whether due to man-made reasons (i.e. chemical contamination, etc.) or Acts of God (i.e. drought, etc.), the water from Henderson County Water Treatment Facilities is inadequate to serve the residents of Henderson County, the Authority shall make available to Henderson County customers in accordance with Authority rules and fee schedules waters from the Bee Tree and/or North Fork Reservoirs in Buncombe County. The Authority may charge different rates for customers located outside Buncombe County than those in Buncombe County in providing potable water originating from treatment facilities sited in Buncombe County.

4.2 Pursuant to the terms and conditions hereinafter listed, the Authority shall install water lines (defined above in subsection 2.0 as "Regional Water Lines") at the direction of Henderson County to serve customers within the Cane Creek Water and Sewer District as such area is defined in the "RESOLUTION TO CREATE THE CANE CREEK WATER AND SEWER DISTRICT OF HENDERSON COUNTY" attached hereto and incorporated herein as Exhibit A or as amended, extended or restated. The Regional Water Lines installed by the Authority and any real property acquired thereto shall be titled in Asheville and shall remain so titled until such time as said lines and real property interests are conveyed to Henderson County in accordance with the terms hereinafter set forth. The service area for Authority extensions of water lines denoted in this subsection may be amended to include all or a portion of the Mud Creek Water and Sewer District or other areas in Henderson County upon consent of the Trustees for the Mud Creek Water and Sewer District and Henderson County.

4.3 Subject to the terms of subsection 16.2 and except as stated in subsection 4.4 and the provision for termination in Section XIV, this Agreement for water supply and installation of Regional Water Lines shall continue for a period of forty (40) years from the date hereof at which time it may be extended by the mutual consent of all the parties hereto or their successors or assigns for multiple periods not exceeding forty (40) years each.

4.4 This Regional Water Supply and Water Service Agreement is contingent on: (i) the sale of the Water Plant Site to Asheville (or the Authority on behalf of Asheville); (ii) the approval by the State of North Carolina of a water intake on the Mills River with a quantity being at least 10 million gallons a day and/or an intake in the French Broad River; (iii) State of North Carolina approval of the plans for treatment and separate storage of waters from the Mills River and/or French Broad River; and (iv) receipt of funds by Asheville and/or the Authority for the construction of a 5 million gallons per day water treatment plant at the Water Plant Site (hereinafter the "Water Treatment Plant") upon such terms and conditions as are satisfactory to Asheville and the Authority. If any of the conditions in this paragraph 4.4 do not occur before June 30, 1997, then this Agreement shall be null and void with no further privileges, responsibilities or liabilities between the parties.

**SECTION V: WATER SERVICE - ADMINISTRATION, RULES AND POLICIES RE: USAGE.**

5.0 Henderson County and/or the District shall adopt rules and regulations for the District covering subjects addressed by the Authority's existing policies (herein "the Henderson County Policies"), including, without limitation, the extension, connection and usage of the Regional Water Lines envisioned by this Agreement. The Henderson County Policies shall substantially conform to the Authority's policies and the Authority's policies shall control unless specifically contradicted by the Henderson County Policies. The Henderson County Policies shall include, without limitation:

A. Procedures for water allocation, connection and/or water extension requests. As stated in 5.1 below, the Authority's existing Policies and Priorities Committee (herein "Committee") shall be the body to initially decide water allocations and/or extensions within the District with a right of appeal to the Henderson County Board of Commissioners.

B. Water Service Agreement Forms, including provisions for billing, collection, and enforcement such as disconnection for failure to pay. For each new connection to the Regional Water Lines in the District, a water service agreement (herein "Water Service Agreement") shall be signed by the customer, the Director for the Authority, and the Henderson County Utilities Director.

C. Metering requirements.

D. Water Use restrictions.

E. Hazard and Protective Devices.

F. Interruption of Water Service.

G. Enabling language for usage fees (imposed by the Authority or Henderson County), connection charges, impact fees or other kind of charges.

I. Enabling language for the acquisition of easements on or off-site to a party requesting a water line extension.

5.1 One (1) board member of the Authority appointed by Henderson County shall become a member to the existing Authority Policies and Priorities Committee. Applications from parties within the Service District for allocation, connection or extension requests shall be submitted first to the Henderson County Utilities Director who shall then review the request(s). The Henderson County Utilities Director shall then forward the particular application to the Authority Director with a written recommendation. The Authority Director shall present the application with his comments to the Committee along with the Henderson County Utilities Director's recommendation. Based on the policies adopted by Henderson County and the recommendation and comments from the Henderson County Utilities Director and Authority Director, the Committee shall approve or deny the request from the customer within the District. Subject to subsection 5.5. below, a party may appeal an adverse decision by the Committee to the Henderson County Board of Commissioners within fifteen (15) days after receipt of the decision. The appeals process shall conform to the appeals process set forth in the Authority's Water Policies. The Committee shall interpret the Henderson County Policies consistent with the Authority's policies.

5.2 Henderson County shall enact schedules of fees, charges and penalties for services furnished by the Authority and Henderson County pursuant to this Agreement as they relate to reimbursement for capital costs associated with the Regional Water Lines. Such schedules shall include, but not be limited to, connection charges and impact fees, acceptable to the Authority and shall be duly adopted by both Henderson County and the Authority before the first Henderson County customer is served through a Regional Water Line.

5.3 Except as provided in subsection 4.1, the Authority shall enact water usage rates for customers in Henderson County that are equal to or less than rates applied to its customers in Buncombe County. As long as the above requirement is met, the Authority may enact and modify such rates at any time without the consent of Henderson County or the District.

5.4 Henderson County does hereby contract with the Authority to provide billing and collection services for all water rates, fees, and charges from Henderson County customers water from the Water Plant Site or other Asheville-owned treatment facilities. The Authority shall have the right and power to take all necessary and reasonable action to enforce the terms of any Water Service Agreement of any customer and the rules and regulations adopted by Henderson County and the usage rates imposed by the Authority. Subject to subsection 5.5 below, all appeals of matters concerning the enforcement and interpretation of Henderson County Policies shall follow the same or similar process outlined in the Authority's Water Policies (with the "Director" therein being the Authority's Director).

5.5 Notwithstanding the right of a party to appeal to Henderson County from an adverse ruling by the Committee, Henderson County shall not waive any fee or charge requirement pertaining to an

applicant for water line connection or extension or approve the Authority's assumption of any extension costs for an applicant's project without the prior written consent of the Authority.

5.6 Asheville and the Authority shall establish an account separate from the Revenue Fund (as that term is defined in the General Trust Indenture dated as of February 1, 1996, hereinafter the "Indenture", between Asheville and a financial institution as a trustee) and the Water Fund (as that term is defined in the Supplemental Water Agreement) for the revenues collected from Henderson County customers served by the Regional Water Lines and shall keep its records reasonably accessible to appropriate Henderson County employees during normal business hours. Establishment of such separate account does not alter the rights under the Indenture with respect to such revenues so long as the respective Regional Water Lines are owned by Asheville. The Authority shall provide to Henderson County a quarterly statement of the accounts payable and accounts receivable concerning the customers connected to the Regional Water Lines. The Authority shall in the separate water account set up a subcategory for revenues attributable to each Regional Water Line (e.g. using street addresses rather than alphabetical listing).

5.7 Water service at all facilities owned by Henderson County shall be metered, and subject to the monthly billing charge. However, direct activities operated as general governmental services, except schools, by Henderson County shall receive reasonable amounts of water free of charge. By way of example and not by way of limitation, direct activities operated by Henderson County as general governmental services shall include the County courthouse and the County library. Henderson County agrees to amend its rules to terminate this provision at any time the Authority eliminates this same allowance for governmental facilities in Asheville and Buncombe County. Notwithstanding the above, all Regional Water Line extension requests and allocations for governmental or quasi governmental entities shall follow the same procedures outlined in subsection 5.1 above.

#### **SECTION VI: REGIONAL WATER LINES - LOCATION, SIZE, MATERIALS AND CONSTRUCTION**

6.0 Regional Water Lines shall be installed by the Authority with the location, size and materials of the lines to be determined by Henderson County in compliance with Section 6.8 below. The Utilities Director for Henderson County is authorized in accordance with the terms below to establish the appropriate location, size, and materials for each Regional Water Line. The allocation of costs for the Regional Water Line or Lines is set forth in Section VII below.

6.1 The procedure for the Authority's installation of any Regional Water Line or other improvements servicing customers residing within the Service District shall be as follows:

A. The Henderson County Utilities Director shall request in writing to the Authority's Director the installation of a Regional Water Line or Lines or other improvement (the "Project") and shall include: (i) a survey showing the location of the proposed improvement; (ii) specifications sheet denoting materials, size, length and other

specifications in accordance with Section 6.8 below; and (iii) projected revenues from the Project.

B. Within thirty (30) days or such reasonable time as can be agreed upon by the parties after receipt of the above request, the Authority Director and the Henderson County Utilities Director shall agree on the Projected Regional Water Line Costs and Projected Regional Water Line Revenues for the Project as set forth in Section VII below and the projected timetable of construction. Financing of the Project shall be as set forth in Section VIII below.

C. Any amendments to Projected Regional Water Line Costs resulting from anticipated change orders to bids approved under subsection 6.2 below shall be in writing and signed by the Henderson County Utilities Director and the Authority Director.

6.2 The Authority shall have the responsibility to advertise for contractors for the Project and solicit bids from suppliers of the equipment or facilities for the Project. After reviewing the various bids, the Authority shall select the contractors and/or suppliers. Advertisement and selection of contractors and suppliers shall be done in accordance with the bidding and letting requirements for public contracts in N.C.G.S. 143-128 et seq., if applicable. The contractors for the Project shall not be employees of Henderson County, the District, the Authority, Asheville or Buncombe County.

6.3 The Authority shall be responsible for overseeing the construction of the Project and shall endeavor to have contractors for the Project comply with the plans and specifications for the Project. Henderson County by and through its representatives from the Henderson County Utilities Department shall have access to the site of the Project to monitor construction progress in relation to the projected timetable and compliance with plans and specifications.

6.4 Enforcement of any contracts entered into for the Project shall rest in the Authority, until such time as the ownership of the applicable improvement is transferred to Henderson County. The Henderson County Utilities Director may, at any time, complain in writing to the Authority Director regarding a Project, setting forth in detail the particular objections. The Authority Director shall respond to the Henderson County Utilities Director within seven (7) days after receipt of the complaint, setting forth the plans, if any, for rectifying any perceived problems. If the Henderson County Utilities Director is not satisfied with the response or if a response is not received within the allotted seven (7) days, Henderson County may request arbitration as provided for in Section XIII below. The Authority and Henderson County may agree to stop work on the Project during the time of arbitration. The arbitrator(s) shall allocate to the losing party the increased costs, if any, for the Project resulting from any delay from arbitration. The Authority Director shall indicate to the Henderson County Utilities Director changes, if any, in the timetable for construction resulting from the arbitration delay.

6.5 Any warranties of materials or labor enuring to the Authority and/or Asheville that have not lapsed at the time the Project improvement is purchased by Henderson County shall be transferred to Henderson County. Any contract for construction services on a Project shall expressly set forth that warranties of construction may be assigned to Henderson County. Except for these warranties, the Authority and Asheville do not give any warranties or representations, expressed or implied, related to the Project to anyone, including, without limitation, any warranty of workmanship or that the lines have been constructed in accordance with the plans and specifications for the Project.

6.6 The Authority shall have the right to determine where and when it will construct distribution or transmission lines, pump stations and other related equipment or facilities within Henderson County to serve only customers outside Henderson County. Provided, however, Henderson County may, except for the main transmission lines running to Buncombe County to serve only non-Henderson County customers, require that the Authority choose an alternate route proposed by Henderson County, if reasonable grounds for not proceeding with the Authority's original route are shown. Henderson County bears the burden of proof regarding the standard of reasonableness (which standard is set forth with more particularity in subsection 3.3 above).

6.7 At any time, Henderson County shall have the right to construct, subject to subsection 6.8 below, its own distribution or transmission lines at Henderson County's sole expense to be served by the Henderson County Water Treatment Facilities. Net revenue generated by any such lines shall be paid to Henderson County.

6.8 The water distribution system installed in Henderson County shall be constructed in accordance with the then current Asheville Buncombe Water Authority Water System Extension Design Guidelines and Specifications or such design guidelines and specifications as are then being used by the Authority so as to be as technologically advanced as the system in place in Buncombe County. For example, facilities constructed in Henderson County shall conform to requirements for use in the SCADA network being operated in Buncombe County.

6.9 Asheville, Buncombe County and/or the Authority shall obtain the prior written consent of Henderson County before they jointly or severally enter into any agreement to in any manner, directly or indirectly, build or construct or cause to be built or constructed, in whole or in part, any water treatment plant in Henderson County, other than at the Water Plant Site.

## **SECTION VII: REGIONAL WATER LINES - COSTS AND REVENUES**

7.0 The Actual Regional Water Line Costs of a Project shall consist of the Authority's total costs associated with the purchase, installation, and/or replacement of the Project, including, without limitation, expenses associated with:

- A. Acquisition of rights-of-way and real property.

B. Acquisition of equipment (including such equipment as needed to conform to the Authority's water system in Buncombe County).

C. Engineering, except for services rendered by the Henderson County engineer (who currently is William Lapsley and Associates) where fees shall be paid directly by Henderson County.

D. Appraisal work.

E. Legal services.

F. Financing, including, without limitation, principal and accrued interest on the debt service attributable to the Project and the cost of money associated with the construction of the Project.

G. Replacement costs of the line, if any.

H. Any other capital costs associated with the Project that are agreed upon in writing by the Authority Director and the Henderson County Utilities Director.

7.1 The Regional Water Line Revenue of a Project shall consist of the net revenue derived from the use of the particular Regional Water Line(s) by customers within the Service District including, without limitation, usage fees, impact fees, and/or connection or tap-on fees as set forth in the schedules duly adopted by Henderson County and the Authority.

7.2 Subject to subsection 7.4 below, the Authority shall install a Regional Water Line or Lines and any associated improvement in Henderson County at Henderson County's request and at the Authority's sole cost and expense when the Projected Regional Water Line Revenue noted in 7.1 above will result in the total reimbursement to the Authority of the projected Regional Water Line Costs outlined in subsection 7.0 above in nine (9) years or less from the date the Project is substantially completed (herein "the Pay Back Period"). Notwithstanding the above, Henderson County may at any time contribute funds to the Project, reducing the amount of Regional Water Line Revenues needed for reimbursement to the Authority as provided herein.

7.3 Subject to subsection 7.4 below, the Authority shall install a Regional Water Line or Lines and any associated improvement in Henderson County at Henderson County's request and at the shared expense of Henderson County and the Authority when the Projected Regional Water Line Revenues for said line(s) will not result in total reimbursement to the Authority of the Projected Regional Water Line Costs within nine (9) years from substantial completion of the Project. Henderson County shall pay to the Authority before substantial completion of the Project the portion of the Actual Projected Regional Water Line Costs, which will not be reimbursed from reasonably projected revenues from the water line within the Pay Back Period.

7.4 Notwithstanding the above, before the Authority is required to install a Regional Water Line or Lines and any associated improvement, Henderson County must provide reasonable proof to the Authority that the Authority will be completely reimbursed for the Project from Regional Water Line Revenues during the Pay Back Period.

7.5 Notwithstanding the above, the Authority must be reimbursed in full for its Actual Regional Water Line Costs for a particular Project within the Pay Back Period. If at the end of the Pay Back Period, the Regional Water Line Revenues have not matched the Actual Regional Water Line Costs, less accounted for depreciation by that time, Henderson County agrees to promptly pay the difference and purchase the applicable Project from the Authority and/or Asheville. Upon reimbursement of the Authority and/or Asheville in full of the Actual Regional Water Line costs by Regional Water Line user fees, or by a payment from Henderson County pursuant to this paragraph, the Authority and/or Asheville shall transfer their interest in the Project to Henderson County.

#### **SECTION VIII: REGIONAL WATER LINES - OWNERSHIP AND PURCHASE**

8.0 All Regional Water Lines installed at the Authority's and/or Asheville's total or partial expense shall be titled in and remain the property of Asheville until:

- a. The Authority and/or the City of Asheville has been completely reimbursed for its Actual Regional Water Line Costs less accounted for depreciation and the applicable line(s) is released as collateral for any indebtedness of Asheville and/or the Authority that it is pledged to secure and documents necessary to convey Asheville's ownership interest in the real and personal property involving the applicable lines have been prepared, executed and delivered to Henderson County; or
- b. A Regional Water Authority is formed which acquires the water system assets from the Authority, Asheville and Henderson County.

Notwithstanding the above, the Regional Water Lines may be part of the water system of the City of Asheville as that term is defined in the Indenture, but shall not be part of the water system for documentation describing it as property held in perpetuity by Asheville for the benefit of its citizens.

8.1 For any Regional Water Line and/or real property the Authority and/or Asheville conveys to Henderson County pursuant to this Agreement, the Authority and/or Asheville shall transfer all its rights to that line or real property in its AS-IS condition WITHOUT WARRANTY OF MERCHANTABILITY or any other warranties, including title, expressed or implied.

8.2 The Authority shall be entitled to retain the revenue received from the use of the Regional Water Lines for so long as such lines remain the property of Asheville. When such lines become the

property of Henderson County, the net revenue from such lines shall be paid to Henderson County.

8.3 Henderson County shall have the option to lease any and all Regional Water Lines that do not impact customers of the Authority located outside of Henderson County from the Authority and/or Asheville for the price of one dollar (\$1.00). However, the revenue from the lines so leased shall continue to be paid to the Authority as provided in subsection 8.2 above.

**SECTION IX: FINANCING OF WATER PLANT SITE, REGIONAL WATER LINES, ACCOUNTING AND AUDITOR REVIEW**

9.0 It is acknowledged by the parties herein that the improvements contemplated by this Agreement may be funded from several sources, including proceeds from general obligation bonds and/or revenue bonds. The particular source of funds for those improvements shall be within the discretion of the Authority and Asheville. However, Asheville and the Authority agree to credit the net revenues from the Regional Water Lines to the recoupment of capital expenses making up the Regional Water Line Costs.

9.1 If necessary, Asheville shall select a Bond Counsel to advise them on the issuance and administration of the bonds attributable to the Water Plant and Regional Water Lines. The Bond Counsel shall provide all the parties noted in this subsection with copies of any documentation or information requested or sent to any party concerning the financing of the improvements contemplated herein. Notwithstanding the above, if a Regional Water Line is funded by a mechanism of financing, including but not limited to general obligation bonds, revenue bonds, or the provisions of North Carolina General Statutes 160A-20 *et. seq.*, in no event shall the period of amortization for such financing exceed the Pay Back Period.

9.2 A separate account shall be established by Asheville for the proceeds from any bonds issued by Asheville used to finance the projects contemplated by this Agreement. Henderson County through its County Manager shall be entitled to receive all information about said account within a reasonable period of time after requesting same.

9.3 Henderson County, Asheville, and Buncombe County, as part of their annual, independent audit, shall direct their respective auditors to review the provisions of this Agreement and determine whether said provisions have been met by the respective parties. A report of the auditors' findings shall be mailed to the Authority, Henderson County, Asheville and Buncombe County for review.

9.4 The Authority shall adhere to the North Carolina Local Budget and Fiscal Control Act in matters pertaining to the financing of the improvements noted in this Agreement.

9.5 Nothing in this Agreement shall be construed as being a pledge of the taxing powers of Henderson County, Asheville, Buncombe County and/or the District.

9.6 Nothing in the financing documents shall be construed as a pledge of the taxing power of Henderson County.

#### **SECTION X: MAINTENANCE AND REPLACEMENT**

10.0 The Authority shall be responsible for any maintenance or repair of any Regional Water Line during Asheville's ownership of said line. The Authority in conjunction with the City of Asheville Water Resource Department shall have discretion to decide the scope and timing of any maintenance or repairs. Neither the Authority or Asheville shall be liable to any person, the District or Henderson County for the interruption of water service to any customer within the District, except as otherwise stated herein.

10.1 Any replacement of a Regional Water Line shall be done in accordance with the process set forth in Section VI above and the figuring of costs and revenues in Section VII above, with the exception that unreimbursed capital costs from the old line shall be included in the Regional Water Line Costs for the replacement (unless replacement is due to Acts of God as noted in subsection 12.4 below).

#### **SECTION XI: WATER PLANT SITE FACILITIES**

11.0 Asheville shall be responsible for the financing and the Authority shall be responsible for the construction of the facilities at the Water Plant Site for intake, treatment and storage. The Authority shall provide Henderson County with copies of the draft plans and specifications for said facilities at least thirty (30) days prior to Authority approval of said plans and specifications. Henderson County may within that thirty (30) day period make comments to the Authority regarding the adequacy of said plans and specifications. After the thirty (30) day comment period has elapsed, the Authority may adopt, in the Authority's sole discretion, said plans and specifications as drafted or incorporate all or any part of Henderson County's suggestions into any revisions. Any contracts for the construction of the facilities for the Water Plant Site may be entered into without Henderson County's consent and Henderson County shall not be considered a third party beneficiary.

#### **SECTION XII: LIABILITIES**

12.0 The Authority, Asheville or Buncombe County shall not be liable for any losses, injuries or damages related in any way to the Water Plant Site or the Regional Water Lines or the maintenance or operation thereof except for their own affirmative acts of negligence and then only to the extent of their applicable insurance coverages or for the Authority, the extent set forth in Section I.C.6. of its Water Policies.

12.1 Henderson County or the District shall not be liable for any losses, injuries or damages related in any way to the Water Plant Site or the Regional Water Lines or the maintenance or operation thereof except for their own affirmative acts of negligence and then only to the extent of their applicable insurance coverages.

12.2 To the extent permitted by law, each party (herein "the Responsible Party") agrees to defend, indemnify and hold harmless all the other said parties to this Agreement and their elected or appointed officials, agents and employees (herein "the Nonculpable Parties") from and against any and all claims, damages, judgments, costs and expenses (including, but not limited to, reasonable attorney's fees) of any kind and nature suffered by or asserted against the Nonculpable Parties as a direct or indirect result of any intentional or negligent act or omission caused solely by the Responsible Party or its agents or employees.

12.3 The Authority during Asheville's ownership of the Regional Water Lines shall be solely responsible for damage to the Regional Water Lines caused by Acts of God (i.e. drought, floods, lightning, etc.) to the extent of repair and/or replacement costs. Upon transfer of said lines to Henderson County, Henderson County shall then be solely responsible for repair and/or replacement costs.

12.4 If, for whatever reason, not due to the fault or negligence of either Henderson County or the Authority, liability for the release or discharge of environmental pollutants is triggered from the installation, use or repair of the Regional Water Lines, then Henderson County and the Authority agree to share equally in the costs (including reasonable attorney's fees) of defending against or cleaning up the contamination to the extent required by law.

### SECTION XIII: ARBITRATION

13.0 Subject to subsection 13.1 below, any controversy which arises between the parties hereto regarding the interpretation of or rights, duties or liabilities under Sections VI, VII, and/or VIII of this Agreement shall be settled by binding arbitration. Any other issues disputed by the parties may be litigated as provided by the North Carolina Rules of Civil Procedure. Any arbitration shall be before a disinterested arbitrator, if one can be agreed upon within thirty (30) days from the date of the first written request for arbitration by one of the parties. The parties shall use their best efforts to choose an arbitrator who is a North Carolina resident and who will be familiar with the subject matter of the Arbitration by reason of training and/or experience. If one disinterested arbitrator cannot be chosen, then the dispute shall be heard by three (3) arbitrators: one named by the Authority, one named by Henderson County, and one named by the two thus chosen. The Authority and Henderson County shall appoint their respective arbitrators within forty (40) days from the date of the first written request for arbitration by one of the parties. The arbitrator or arbitrators shall determine the controversy in accordance with the laws of the State of North Carolina as applied to the facts found by him or them. The decision shall be rendered within ninety (90) days of the first written request for arbitration and the decision shall be final. The parties shall bear their respective costs for arbitration. Provided, however, the parties shall share equally the cost of a third arbitrator, if any. In the event of a conflict between the rules of the American Arbitration Association and North Carolina law, the laws of the State of North Carolina shall govern.

13.1 The provisions of arbitration above are inapplicable to the construction of the facilities at the Water Plant Site and the transmission lines or distribution lines, pump stations and other related

equipment or facilities in Henderson County servicing only customers outside Henderson County, those improvements being part of the water system of the City of Asheville as stated in subsection 3.1 above.

#### **SECTION XIV: TERMINATION**

14.0 Except for subsections 4.3 and 4.4 above and subject to subsection 16.2 below, this Agreement may not be terminated unless mutually agreed upon in writing by all the parties. Upon termination, the rights and liabilities of the parties to each other shall cease to exist and title to all real or personal property shall remain in the governmental entity then owning said property.

#### **SECTION XV: AMENDMENTS, INTEGRATION, CONFLICTS WITH PRIOR AGREEMENT, AND ADDITION OF PARTIES**

15.0 This Agreement may be amended at any time by mutual agreement of Asheville, Buncombe County, the Authority and Henderson County, said amendment shall be in writing and must be signed by the duly authorized representatives of the City of Asheville, Buncombe County, Henderson County and the Authority to be effective.

15.1 No oral statements or prior written material (except as set forth in subsection 15.2 below) not specifically incorporated herein shall be of any force and effect, and no changes in or additions to this Agreement shall be recognized unless incorporated herein by amendment as provided above.

15.2 This Agreement is intended to supplement the Agreement dated June 28, 1994 and any conflict between the two shall be resolved in reliance on the terms expressed herein.

15.3 Other political subdivisions or units of local government may be added to this Agreement by the mutual consent of all the parties hereto.

#### **SECTION XVI: CONSISTENCY WITH THE SUPPLEMENTAL WATER AGREEMENT AND ITS DURATION**

16.0 Article XII of the Supplemental Water Agreement states that the City of Asheville shall retain title to all of the assets of the entire water system of the City and that all revenues from said system be deposited in the City's Water Fund. It is contemplated by this Agreement as provided by Section VIII above that Henderson County may, at its discretion, acquire some or all of the Regional Water Lines installed by the Authority for the benefit of Henderson County customers. To avoid confusion with any bond covenants which use the term "water system of the City" and to provide consistency with the Supplemental Water Agreement, the Authority, Asheville and Buncombe County agree to amend said agreement to exclude the Regional Water Lines from the definition of "water system of the City", after Bond Counsel for the City gives an opinion, if requested by the City, that said amendment will not violate any existing bond covenants.

16.1 The Authority, Asheville and Buncombe County shall amend Article II of the Supplemental Water Agreement to provide for ten (10) members through December 31, 1997, at which time the Authority shall consist of nine (9) members. Two (2) members of the Authority shall be appointed by the Board of Commissioners of Henderson County, one (1) of whom may be a member of that Board. In addition, the Chairman of the Henderson County Board of Commissioners shall be allowed to attend all meetings of the Authority including closed sessions as a non-voting member.

16.2 Notwithstanding any provisions in this Agreement to the contrary or Article XVI of the Supplemental Water Agreement, this Agreement shall not terminate until such time as the indebtedness created to finance the acquisition and/or construction of the new water source facility has been paid in full or provision for payment of same shall have been made and mutually agreed upon between Asheville, the Authority and Buncombe County.

16.3 If the Supplemental Water Agreement is terminated before the forty years referenced in subsection 4.3 above, then Asheville shall assume all the Authority's rights and powers as well as duties and obligations under the terms of this Agreement including, without limitation, providing for a water supply and Regional Water Lines for at least the remainder of the forty year term set forth in subsection 4.3 above.

#### **SECTION XVII: CONSISTENCY WITH MASTER PLAN, BYLAWS AND POLICIES**

17.0 Article IV, Paragraph 18. of the Supplemental Water Agreement states that the Authority "shall be responsible for developing a Master Plan which shall be followed for capital improvements." Article IV, Paragraph 19. of the Supplemental Water Agreement provides that "all policies shall remain in full force and effect and be applicable to the consolidated water system except where modified by the Authority as provided" in or where otherwise inconsistent with the Supplemental Water Agreement. To the extent that the improvements and terms of operation contemplated by this Agreement are not included in the Master Plan or are inconsistent with the policies of the Authority, the Authority, Asheville, and Buncombe County agree to amend the Master Plan and/or policies to provide consistency with this Agreement.

#### **SECTION XVIII: SEVERABILITY**

18.0 If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, then only that portion of the Agreement that is invalid or unenforceable shall be void, and the remainder of this Agreement shall remain in full force and effect and the intent of this Agreement shall be enforced to the greatest extent permitted by law.

#### **SECTION XIX: HIRING; PERSONNEL**

19.0 In all hiring or employment made possible by or resulting from this Agreement, there shall not be any discrimination against any employee or applicant for employment because of race, color, religion, sex, age, disability or national origin.

19.1 In an effort to promote regionalism in the workforce, the Authority and Asheville agree to make a good faith effort to make available at least twenty-five (25%) of the positions to be filled at the Water Treatment Plant to qualified persons who are residents of Henderson County. This effort shall not alter any job specifications or personnel criteria as established solely by the Authority and Asheville for the Water Plant. In addition, no cause of action or duty to any member of the public shall be created by this personnel goal. The persons operating the Water Plant shall be at all time employees of the City of Asheville, subject to Asheville's personnel policies the same as all other City employees.

#### **SECTION XX: CONFLICT OF LAWS; ASSIGNABILITY; INTERPRETATION**

20.0 This Agreement shall be construed and interpreted under the laws of the State of North Carolina.

20.1 Except as otherwise stated herein, the benefits and burdens of each party under this Agreement may not be assigned without the prior written consent of all parties to this Agreement.

20.2 The parties acknowledge that no one particular party shall be deemed the drafter of this Agreement in the event of a breach of contract dispute and consequently, the provisions herein shall not be construed more strictly against any party.

#### **SECTION XXI: REGIONAL WATER AND/OR SEWER AUTHORITY**

21.0 It is the intention of the parties to this Agreement to establish herein the basis for the formation of a Regional Water and/or Sewer Authority, which would, at a minimum, include as members Henderson and Buncombe Counties, the Authority and Asheville. Pursuant to that intent, the parties herein shall in good faith work towards the creation of a regional authority and the promotion of said authority to other units of local government in the western part of North Carolina. At the time that the Regional Authority is created, all assets and improvements accumulated pursuant to this Agreement shall be transferred to such Regional Authority upon such terms and conditions as are then mutually acceptable.

#### **SECTION XXII: CONVEYANCE OF BREVARD ROAD SITE**

22.0 Asheville shall convey the Brevard Road Site to Henderson County to permit Henderson County to negotiate with MSD for sewer services. Henderson County shall either 1) convey the Brevard Road Site to MSD in fee simple upon condition subsequent that a wastewater treatment plant be constructed on the Brevard Road Site within ten (10) years of the date of such conveyance, or else title shall revert automatically to Asheville; or 2) convey said property to a regional water and sewer authority of which Henderson County, the Authority, and Asheville are a part. In the event that Henderson County shall not perform numbers 1) or 2) above within ten years from the date of conveyance of the Brevard Road Site to Henderson County, Henderson County shall convey the Brevard Road Site back to Asheville in fee simple absolute.

IN WITNESS WHEREOF, the undersigned officers have executed this Agreement under proper authority given at a duly called meeting of its respective Boards, this the day and year first above written.

Attest: (COUNTY SEAL)

Kathy Hughes  
Clerk

BUNCOMBE COUNTY

By: Gene Rainey  
Gene Rainey, Chairman

Attest: (CITY SEAL)

Magdalen Boulson  
Clerk

CITY OF ASHEVILLE

By: Russ Martin  
Russ Martin, Mayor

Attest: (AUTHORITY SEAL)

James P. Feltus  
Secretary

ASHEVILLE - BUNCOMBE  
WATER AUTHORITY

By: Ernest E. Ferguson  
Ernest Ferguson, Chairman

Attest: (COUNTY SEAL)

Elizabeth W. Corn  
Clerk

HENDERSON COUNTY

By: Renee Kumor  
Renee Kumor, Chairman

Attest:

Elizabeth W. Corn  
Clerk

CANE CREEK WATER & SEWER DISTRICT

By: Renee Kumor  
Renee Kumor, Chairman

Regular Meeting

Present: Mayor Charles R. Worley, Presiding; Vice-Mayor R. Carl Mumpower; Councilwoman Terry M. Bellamy; Councilman Jan B. Davis; Councilman Joseph C. Dunn; Councilwoman Diana Hollis Jones; Councilman Brownie W. Newman; City Manager James L. Westbrook Jr.; City Attorney Robert W. Oast Jr.; and City Clerk Magdalen Burleson

Absent: None

**PLEDGE OF ALLEGIANCE**

Veteran from the U.S. Marine Corp Danny Roberts led City Council in the Pledge of Allegiance.

**INVOCATION**

Councilman Davis gave the invocation.

**I. PROCLAMATIONS:**

**A. RECOGNITION OF CITY OF ASHEVILLE RESERVISTS**

On behalf of City Council, Mayor Worley recognized Darrell McCurry and Brian Freelan, employees with the Asheville Police Department who have recently returned from military service in the 211<sup>th</sup> Military Police Company.

**B. PROCLAMATION PROCLAIMING THE WEEK OF JUNE 5-12, 2004, AS "NATIONAL NEIGHBORWORKS WEEK"**

Councilman Davis read the proclamation proclaiming June 5-12, 2004, as "National NeighborWorks Week" in the City of Asheville. He presented the proclamation to Mr. William Sewell, Interim Executive Director of Neighborhood Housing Services, who briefed City Council on some activities taking place during the week.

**II. CONSENT AGENDA:**

At the request of Mayor Worley, Councilwoman Bellamy moved to continue Consent Agenda E until the Consent Agenda on June 8, 2004. This motion was seconded by Councilman Davis and carried unanimously.

Councilwoman Bellamy asked that Consent Agenda Item H be removed from the Consent Agenda due to a conflict of interest.

**A. APPROVAL OF THE MINUTES OF THE REGULAR MEETING HELD ON MAY 11, 2004, AND THE WORKSESSION HELD ON MAY 18, 2004**

Councilman Davis asked that the May 18, 2004, minutes be amended to delete his presence at the meeting.

**B. RESOLUTION NO. 04-113 - RESOLUTION ADOPTING A JOINT RESOLUTION WITH BUNCOMBE COUNTY TO CREATE A CITY-COUNTY TASK FORCE TO DEVELOP A 10-YEAR PLAN TO END HOMELESSNESS AND STEERING COMMITTEE MEMBERS**

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Summary: The consideration of a resolution to create a City-County Task Force to develop a Ten-Year Plan to End Homelessness and appointment of suggested Steering Committee members.

On March 23, City Council approved the formation of a joint City-County Steering Committee to develop a Ten-Year Plan to End Homelessness. The Downtown Social Issues Task Force stated at that time that they would come back to Council with a suggested list of appointees. Staff and Task Force members have worked to develop a list of suggested appointees that will represent the agencies critical to the writing and implementation of the Plan.

The Task Force will be presenting their recommendation and list of appointees to the Buncombe County Commissioners at their June 1, 2004, meeting. It is hoped that the Steering Committee will start meeting early in June.

**Advantages:**

- Key agencies from the County, the City and the private sector will be represented on the Steering Committee to oversee the preparation of the Ten Year Plan to End Homelessness. Investment of these agencies is critical to the implementation and success of the resulting plan.

**Disadvantages:**

- None noted

City staff recommends the adoption a resolution to create a City-County Task Force to develop a Ten-Year Plan to End Homelessness and appointment of suggested Steering Committee members.

**RESOLUTION BOOK NO. 28 – PAGE 258**

- C. **MOTION SETTING A PUBLIC HEARING ON JUNE 8, 2004, TO CONSIDER ADOPTION OF THE FISCAL YEAR 2004-05 ANNUAL OPERATING BUDGET**
- D. **RESOLUTION NO. 04-114 – RESOLUTION AMENDING THE 2004 SCHEDULED CITY COUNCIL MEETINGS TO INCLUDE A COMMUNITY MEETING ON JUNE 29, 2004, AT THE NORTH ASHEVILLE COMMUNITY CENTER**

**RESOLUTION BOOK NO. 28 – PAGE 259**

- E. **APPROVE FORM OF ORDINANCE NO. 3116 – ORDINANCE AMENDING THE CONDITIONAL USE PERMIT OF APPELDOORN CONDOMINIUMS LOCATED AT 200 BROOKLYN ROAD**

This matter was continued until the Consent Agenda on June 8, 2004.

- F. **RESOLUTION NO. 04-115 - RESOLUTION APPOINTING A MEMBER TO THE CIVIL SERVICE BOARD**

Summary: The term of Sophie Dixon, as a member of the Civil Service Board, expired on May 21, 2004.

It is the consensus of City Council to reappoint Ms. Dixon, as a member of the Civil Service Board, to serve an additional two-year term. Her term will expire May 21, 2006, or until her successor has been appointed.

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**RESOLUTION BOOK NO. 28 – PAGE 260**

- G. **RESOLUTION NO. 04-116 - RESOLUTION AUTHORIZING THE CITY MANAGER TO APPLY TO THE N.C. DEPT. OF TRANSPORTATION FOR GRANTS FOR (1) NEW HAW CREEK ROAD SIDEWALK IMPROVEMENTS – PHASE II; AND FRENCH BROAD GREENWAY TRAIL IN THE RIVERSIDE INDUSTRIAL DISTRICT**

Mr. Dan Baechtold, MPO Coordinator, said that this is the consideration of a (1) resolution authorizing the City Manager to apply for grants from the N.C. Dept. of Transportation (NCDOT), through the Transportation Enhancement Program, for New Haw Creek Road Sidewalk Improvements - Phase II, and for the French Broad Greenway Trail along Riverside Drive; and (2) resolution for City sponsorship of grant applications from Pack Square Conservancy and Mountain Housing Opportunities.

Every two years, the NCDOT puts out a call for applications for transportation enhancement funds. These are federal funds for projects in specific categories such as pedestrian and bicycle improvements, streetscape improvements, beautification, and water quality improvements. If a project is awarded through the state selection process, costs are reimbursed at a rate of eighty percent (80%). The local match is twenty percent (20%).

Any public or private agency may apply for these funds, but each application must have a local government agency as the sponsor. In past years, the City of Asheville has received enhancements funds for projects such as the Urban Trail and the Weaver Boulevard Greenway. In 2002, the City received a grant for sidewalk improvements on New Haw Creek Road. Also in 2002, the City sponsored applications from the Pack Square Conservancy and Mountain Housing Opportunities. All three of these

Match by Mountain Housing Opportunities (and other sources): \$ 57,780  
Enhancement Funds Requested: \$ 231,120  
Total Project Cost: \$ 288,900

Project Description: This project proposes a continuation of streetscape improvements along the Clingman Avenue and Haywood Road Corridor. This project includes the design and construction of a single-lane, traffic circle at the intersection of Haywood Road and Roberts Street, which will include sidewalks and pedestrian crossings. A second component of this project includes the design and layout of a greenway on the southern side of the West Asheville RiverLink Bridge over to Haywood Road. The greenway will include barriers separating pedestrians from vehicular traffic movement. Along with the greenway, the pedestrian area will feature benches, a sun shelter and safe crosswalks. The West Asheville RiverLink Bridge, one of three crossings over the French Broad River serving west Asheville has been traditionally the favorable route for pedestrian and bicycle transit commuters to and from downtown. These changes will

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enhance the existing corridor and reinforce its identity as Asheville's gateway to the riverfront and West Asheville. The proposal will create a safer intersection solution at Haywood Road and Roberts Street and provide over 1,000 feet of on-road greenway into west Asheville.

#### CONSIDERATIONS:

- If awarded, these grants will bring in federal funds to complete transportation projects in the City of Asheville.
- A local cash match of 20% is required on all of the projects. The City of Asheville would only be responsible for the cash match on two of the projects.
- This is a competitive process across the State of North Carolina. If the money is not awarded to local projects, it will be spent on enhancements in other Counties.
- Staff time will be required to manage and implement the projects.
- City of Asheville will assume maintenance responsibilities for the improvements that are installed. In the case of Pack Square improvements, however, the Conservancy is taking steps to provide for long-term maintenance.

City staff recommends City Council (1) approve a resolution authorizing the City Manager to apply to the State of North Carolina for grant applications for New Haw Creek Road Sidewalk Improvements – Phase II, and for the French Broad Greenway Trail; and (2) approve a resolution designating the City of Asheville as the local government sponsor for grant applications for Pack Square Streetscape Improvements – Phase II and III, and Clingman Avenue Streetscape and Greenway – Phase II.

#### **RESOLUTION BOOK NO. 28 – PAGE 261**

#### **H. RESOLUTION DESIGNATING THE CITY OF ASHEVILLE AS THE LOCAL GOVERNMENT SPONSOR FOR GRANT APPLICATIONS FROM PACK SQUARE CONSERVANCY INC. AND MOUNTAIN HOUSING OPPORTUNITIES TO THE N.C. DEPT. OF TRANSPORTATION THROUGH THE TRANSPORTATION ENHANCEMENTS PROGRAM**

This item was pulled from the Consent Agenda due to a conflict of interest.

Mayor Worley said that members of Council have been previously furnished with a copy of the resolutions and ordinances on the Consent Agenda and they would not be read.

Councilwoman Jones moved for the adoption of the Consent Agenda. This motion was seconded by Councilman Dunn and carried unanimously.

#### **ITEM PULLED FROM THE CONSENT AGENDA FOR INDIVIDUAL VOTE**

#### **RESOLUTION NO. 04-117 - RESOLUTION DESIGNATING THE CITY OF ASHEVILLE AS THE LOCAL GOVERNMENT SPONSOR FOR GRANT APPLICATIONS FROM PACK SQUARE CONSERVANCY INC. AND MOUNTAIN HOUSING OPPORTUNITIES TO THE N.C. DEPT. OF TRANSPORTATION THROUGH THE TRANSPORTATION ENHANCEMENTS PROGRAM**

For summary see Consent Agenda Item G above.

Councilman Dunn moved to excuse Councilwoman Bellamy from participating in this matter due to a conflict of interest.

This motion was seconded by Councilwoman Jones and carried unanimously.

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Councilwoman Jones moved to adopt Resolution No. 04-117. This motion was seconded by Councilman Dunn and carried unanimously.

**RESOLUTION BOOK NO. 28 – PAGE 262**

**III. PUBLIC HEARINGS:**

- A. PUBLIC HEARING TO CONSIDER THE ISSUANCE OF A CONDITIONAL USE PERMIT FOR PROPERTY LOCATED OFF WHITE PINE DRIVE FOR THE CONSTRUCTION OF A 60 UNIT APARTMENT COMPLEX (KENILWORTH FOREST VILLAGE APARTMENTS) IN AN RS-4 RESIDENTIAL SINGLE-FAMILY MEDIUM DENSITY DISTRICT AND RM-8 RESIDENTIAL MULTI-FAMILY MEDIUM DENSITY DISTRICT**

Mayor Worley said that a letter has been received from Mr. Robert M. Grasso, on behalf of the developer Virginia May, requesting a continuance of the hearing until July 27, 2004.

Councilman Dunn moved to continue the public hearing until July 27, 2004. This motion was seconded by Councilwoman Bellamy and carried unanimously.

- B. PUBLIC HEARING TO CONSIDER CLOSING A PORTION OF AN UNOPENED SECTION OF APPALACHIAN WAY**

**RESOLUTION NO. 04-118 - RESOLUTION CLOSING A PORTION OF AN UNOPENED SECTION OF APPALACHIAN WAY**

Mayor Worley opened the public hearing at 5:18 p.m.

Assistant Public Works Director David Cole said that this is the consideration of a resolution to close a portion of an unopened section of Appalachian Way. This public hearing was advertised on April 30, May 7, 14 and 21, 2004.

N. C. Gen. Stat. sec. 160-299 grants cities the authority to permanently close streets and alleys without regard to whether they have actually been opened.

Pursuant to this statute, City of Asheville staff has initiated a request to close a portion of an unopened section of Appalachian Way. The closing of this portion of right-of-way will facilitate the realignment and connection of a greenway to a proposed extension of Oakcrest Place.

Closure of this section of right-of-way will have no impact on the ingress and egress for any of the abutting properties. There are three lots that abut this section of right-of-way. They are identified by PIN Nos. 9628.14-34-2261; 9628.14-34-5074; and 9628.14-34-2396.

City staff recommends that City Council adopt the resolution to close a portion of an unopened section of Appalachian Way.

Mayor Worley closed the public hearing at 5:22 p.m.

Mayor Worley said that members of Council have previously received a copy of the resolution and it would not be read.

Vice-Mayor Mumpower moved for the adoption of Resolution No. 04-118. This motion was seconded by Councilwoman Bellamy and carried unanimously.

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**RESOLUTION BOOK NO. 28 – PAGE 263**

- C. PUBLIC HEARING TO CONSIDER THE CONDITIONAL USE ZONING OF PROPERTY IDENTIFIED AS**

**BILTMORE POINTE LOCATED AT 100 FAIRVIEW ROAD FROM COMMERCIAL INDUSTRIAL DISTRICT TO RM-16 RESIDENTIAL MULTI-FAMILY HIGH DENSITY DISTRICT/CONDITIONAL USE; AND THE ISSUANCE OF A CONDITIONAL USE PERMIT TO CONSTRUCT 136 NEW TOWNHOME UNITS**

**ORDINANCE NO. 3119 - ORDINANCE REZONING PROPERTY ON 100 FAIRVIEW ROAD FROM COMMERCIAL INDUSTRIAL DISTRICT TO RM-16 RESIDENTIAL MULTI-FAMILY HIGH DENSITY DISTRICT/CONDITIONAL USE**

**ORDINANCE NO. 3120 - ORDINANCE GRANTING A CONDITIONAL USE PERMIT FOR PROPERTY IDENTIFIED AS BILTMORE POINTE LOCATED AT 100 FAIRVIEW ROAD TO CONSTRUCT 136 NEW TOWNHOME UNITS**

Oaths were administered to anyone who anticipated speaking on this matter.

City Attorney Oast reviewed with Council the conditional use district zoning process by stating that this is a two-part process. It requires rezoning, which is a legislative act, and the issuance of a conditional use permit, which is a quasi-judicial site-specific act. Even though the public hearing on those two items will be combined, all the testimony needs to be sworn and two votes will need to be taken. The first vote will be to grant the rezoning to the conditional use district category and the second vote will be to issue the conditional use permit. If Council runs into a situation that it votes to rezone, Council doesn't have to issue the conditional use permit on the same night.

After hearing no questions about the procedure, Mayor Worley opened the public hearing at 5:24 p.m.

All Council members disclosed that they have visited the site and/or have talked to the developer, prior to having any knowledge that the matter would come before Council as a conditional use permit. City Council said that they would consider this issue with an open mind on all the matters before them without pre-judgment and that they will make their decision based solely on what is before Council at the hearing.

City Attorney Oast said that as documentary evidence is submitted, he would be noting the entry of that evidence into the record.

Mr. Joe Heard, Director of Development Services with the Planning & Development Department, submitted into the record City Exhibit 1 (Affidavit of Publication), City Exhibit 2 (Certification of Mailing of Notice to Property Owners); and City Exhibit 3 (Staff Report).

Mr. Heard said that this is the consideration of a request to rezone property located identified as Biltmore Pointe located at 100 Fairview Road from Commercial Industrial District to RM-16 Residential Multi-Family High Density District/Conditional Use, and a request to issue a conditional use permit to construct 136 new townhome units.

The Asheville City Development Plan 2025 (ACDP 2025), through its "Land Use and Transportation" goals and strategies, clearly supports and encourages efforts to provide affordable housing particularly in areas where public transit and alternative modes of transportation are available. In addition, both the ACDP 2025 and the City's Sustainable

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Economic Development Strategic Plan describe the connection and need for affordable housing to support economic development.

The applicant, Bruce Goforth, has requested a rezoning of 13.04 acres of Commercial Industrial District property to RM-16 (Residential multi-family, high density) to allow for the new construction of 136 individual affordable townhome units (City Exhibit 3 – Aerial Map). The Conditional Use component of this project will be a site master plan showing the location of the proposed townhome units, amenities, open space, landscape buffers, drives, and new road access. The project site is located within City limits near the northwest corner of Fairview Road and Stoner Road, directly adjacent to the Slosman property from which the 13 acres under consideration is being subdivided. The subject property is surrounded on three sides by industrial or commercial warehousing/storage land uses. The fourth side borders a mix of commercial storage, single family residential, and vacant CI zoned property.

The site is a moderately sloping wooded site with frontage on two city maintained roads. Principal access will be located off of Fairview Road (City Exhibit 3 – Utilities & Grading Plan). A secondary access is required off of Stoner Road per the City of Asheville Ordinance and State Fire Code requirements, to be established before more than 30 units are built and occupied. This access will be gated and used only during emergency situations. In addition, a new loop road built to City of Asheville standards

will be constructed to provide access to the individual townhome units. The rezoning component of this project is not being sought for higher density purposes. The CI zoning district currently allows the same density permitted in RM-16 (16 units per acre).

Rather, this designation is being sought for its compatibility with the proposed use and reduced front setbacks more typical of residential developments. CI normally requires a 35' front setback meant to separate the more industrial uses from road traffic, while the RM-16 district has only 15' setbacks. Residential developments in CI are typically multi-family apartment developments with outdoor parking lots that do not require additional setbacks from new road frontage. In order to provide a less monolithic residential development of townhomes (with garages) that provide opportunity for ownership, the developer would prefer to rezone to RM-16.

The purpose of the CI zoning district is to provide areas for a wide range of commercial and industrial uses including but not limited to, light manufacturing, wholesale, and warehousing with outdoor storage, office, and residential. This district is to be established in areas where environmental conditions and urban infrastructure are adequate to support these uses.

The purpose of the RM-16 zoning district is primarily to encourage a full range of high density multi-family housing types to be located near employment centers, shopping facilities, roads and other urban infrastructure capable of handling the demand generated by high density residential development.

At their April 19, 2004, meeting, the City of Asheville Technical Review Committee (TRC) reviewed the Conditional Use Rezoning request and made a positive recommendation that the project be forwarded to the Planning and Zoning Commission, stipulating the following project conditions summarized as follows:

1. Sidewalk (or fee in lieu of) and street trees be provided along road frontage for Fairview and Stoner Roads. (Staff is not recommending a fee in lieu of.) If not feasible along the subject property, the Stoner Road sidewalk can be located across the street.
2. Show sewer easements and ensure that no required tree falls within the easement.
3. Revise required landscapes buffers per section 7-11-2(d) of the Unified Development Ordinance (UDO)
4. Obtain encroachment permits from Norfolk Southern (if necessary).

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5. Show location and species of required street trees.
6. Delineate open space requirements.
7. Show and label building setbacks. Setbacks are to be measured from perimeter parcel lines and rights-of-way for existing and proposed roads. RM-16 requires a 15' front setback where some proposed footprints encroach.
8. Provide a revised site plan showing the following missing information:
  - Label and dimension all rights-of-way.
  - Label proposed road.
  - Show location of required fire hydrants.
  - Show location of required street lights.
  - Provide information describing the number of bedrooms per unit.
  - Provide plant schedule.
9. Provide a second entrance required per the City Ordinance and State Fire Code.
10. Provide accessible sidewalk connection to all common areas.
11. Show pedestrian protection on proposed retaining walls.
12. Turning radii must be less than 20'.
13. Traffic impact analysis is required.
14. A covered bench should be provided at the entrance of the neighborhood by the completion of Phase II.
15. A recorded subdivision will be required before grading or final approval.

City Council must take formal action as set forth in section 7-9-9(c)(4) of the UDO, and must find that all seven standards for approval of conditional uses are met based on the evidence and testimony received at the public hearing or otherwise

appearing in the record of this case (UDO 7-16-2(c)). Staff's review indicates that all seven standards are met as proposed in the site plan.

- 1) That the proposed use or development of the land will not materially endanger the public health or safety.  
***The proposed project has been reviewed by City staff and appears to meet all public health and safety related requirements. The project must meet the technical standards set forth in the UDO, the Standards and Specifications Manual, the North Carolina Building Code and other applicable laws and standards that protect the public health and safety.***
- 2) That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant.  
***The project area is moderately sloped and will require clearing and grading. Given the typical Asheville terrain, the amount of grading is not unusual for a project of this type or size. Care will need to be taken to provide open space and roads that do not exceed a certain maximum percent slope. Minor retaining walls (under 8') are shown and may need to be extended to meet other project requirements.***

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- 3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property.  
***There is a significant amount of literature that describes how "affordable" housing does not negatively impact adjacent property values. Developments of this size in the City do require a homeowner's association that manages the common open space and typically has minimum site standards that control the deterioration that can contribute to a decrease in property values. These will be individually owned units that, historically, inspire care and upkeep. In addition, the higher density development could serve as a buffer/transition area to the existing single family residences that could be impacted by the more intense uses permitted in the CI zoning district.***
- 4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located.  
***The surrounding properties are primarily light manufacturing and warehousing/storage uses with significant work traffic. The proposed development will be residential but through its density and activity, will not be out of character/harmony or scale with these uses. Along the majority of the eastern side of the property are small, modest single-family homes on small lots (some lots are vacant) located on the opposite side of the right-of-way for Stoner Road. These homes are similar in size and are expected to be harmonious with the proposed development. The only area of concern is a smaller portion of the eastern boundary where there are two moderately sized single-family homes on comparatively larger lots. These homes are larger and less typical of the development in the area and are separated from the proposed development by a vacant lot and a 30' Type C buffer required where adjacent to the subject property. It is expected that these lots will not be significantly impacted by the proposed development.***
- 5) That the proposed use or development of the land will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City.  
***The Asheville City Development Plan 2025 (ACDP 2025), through its "Land Use and Transportation" goals and strategies, clearly supports and encourages efforts to provide affordable housing particularly in areas where public transit and alternative modes of transportation are available. In addition, both the ACDP 2025 and the City's Sustainable Economic Development Strategic Plan describe the connection and need for affordable housing to support economic development.***
- 3) That the proposed use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar facilities.  
***This proposed development is within close proximity to transportation facilities with the Route 12 bus line running regularly down Fairview Road. In addition, there are some infrastructure improvement plans in place for new sidewalk, road resurfacing, and stormwater control that will improve access along this corridor along with improvements that will be part of the proposed development (additional sidewalk, bus shelter, etc.). The project area is also located in clear and close proximity to other major road facilities and interstate connections, service centers, and easily accessed employment centers. Technical review has not revealed any problems for future utility service to the development.***
- 7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.

**The proposed project will include the construction of a new road to provide clear and safe access to the individual units. In addition, a second entrance will be**

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**provided to help facilitate traffic movement and to accommodate alternative access in the event of an emergency. Lastly, preliminary review by the City's traffic engineer does not reveal any significant concern over traffic loads generated by a development of this size but is requiring a traffic impact analysis for verification.**

Pros:

1. Clearly supports City goals to provide affordable housing in appropriately located areas.
2. Provides opportunity for infill residential development.
3. Proposed land use will provide a lesser impact than some potential land uses under current zoning designation.

Cons:

1. High density residential development that will contribute to the traffic load of Fairview Road and Stoner Road.
2. Located adjacent to commercial industrial zoning whose current land uses could change to a heavier impact over time.
3. Will require moderate to large amounts of clearing and grading to accommodate proposed density and road layout.
4. Removes opportunity for Commercial Industrial development in a generally Commercial Industrial area.

For the reasons outlined in this report, staff concurs with the Planning & Zoning Commission's recommendation to approve of the zoning change from CI to RM-16/Conditional Use and to approve the associated conditional use permit, as proposed by the applicant, subject to all TRC conditions being met.

Mr. Bob Grasso, land planner for the project, felt this is a great opportunity for affordable housing and it's a great urban infill project. When the project was laid out, they tried to create a sense of neighborhood. They have provided a basketball court, volleyball court and playground equipment to serve the residents in the development. There will be 2-bedrooms with a third bedroom option. Each unit will have a single-car garage and parking in front. They have provided the emergency access on the backside of the development. Questions arose at the TRC meeting if they could provide a second street access onto Stoner Road. He explained that (1) the residents on Stoner Road said that they did not want to see any traffic from the development onto Stoner Road; (2) he didn't think that Norfolk Southern would grant them any kind of right-of-way on top of their right-of-way; and (3) the intersection where Stoner Road comes out onto Fairview Road is a blind intersection. Therefore, he felt it was a good compromise to have the emergency access. He explained that the sidewalks along Stoner Road on the opposite side of the development would be very difficult from a grade standpoint, pointing out that they are trying to preserve as many of the mature trees along Stoner Road and also along Fairview Road as possible. He felt the scale of the project fits in well with the adjoining properties and he urged Council to support the conditional use rezoning and permit.

Mr. Doug Hill, partner of Biltmore Pointe, LLC, spoke in support of the development, however, asked that City Council amend a couple of the conditions, which will affect the cost of the affordability of the units. Regarding sidewalks along the road frontage for Fairview and Stoner Roads, he explained that along Stoner Road it is steeply elevated and there are mature trees and dense foliage. He felt the natural way it is might be a better fit for the neighborhood. He also pointed out that no other side streets in that neighborhood have sidewalks. Regarding sidewalks on the Fairview Road side, there is a concrete drainage ditch that runs the length of

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their property that will have to be removed and something done to have the water rerouted. The cost of the sidewalks and trees alone would add \$1,000 to each unit. He explained that after all the units are sold, there will be approximately \$16 Million to the City's tax base. He hoped the City would cover the sidewalk costs with the additional tax revenue brought in by their development. The other condition they asked to be relieved of was the requirement to provide a Traffic Impact Analysis (TIA). The City's Traffic Engineer said he didn't think the development would cause any significant traffic loads but was still requiring a TIA. A TIA will cost approximately \$6-7,000. He felt that if there was no impact, the requirement for a TIA should be waived. He said the units will sell for approximately \$120-125,000 per unit. He said it is their goal to keep the unit costs under \$120,000. He also mentioned the secondary access road issue required by the Fire Department. He explained by putting in the emergency access road they have lost two units. He said that is another cost which will be added to the development fees, ultimately increasing the cost of the units by approximately \$500 per unit.

Planning & Development Director Scott Shuford explained that it is a requirement of the State Fire Code that a secondary

access road be built. When Councilman Newman asked if there could be two accesses onto Fairview Road, Mr. Heard said that there is a requirement that the accesses be a certain distance apart, thus eliminating the idea of two accesses on Fairview Road.

When Councilman Newman asked how the gate would work on the secondary road access, Mr. Shuford said that Fire Department will be able to access the road through a special arrangement that they have with a type of lock-box that is placed there. This is something that the Fire Department accesses all the time and it is a very routine type of situation for them.

Councilman Newman asked what other type of infrastructure improvements are planned for the area. City Engineer Cathy Ball said that a sidewalk will be built within the next 6 months, regardless of this development, from the church on Fairview Road down toward Sweeten Creek Road across the street from this development. Regarding sidewalks on Fairview and Stoner Roads, they feel like the impact of this project is significant enough to warrant the sidewalks being constructed and not allowing a fee in lieu of, particular with it being an affordable housing project. Regarding the condition that a sidewalk can be being constructed across the street from the development on Stoner Road, the Engineering Department staff surveyed Stoner Road and determined that there isn't enough of an easement for that to happen. Therefore, that is not an option.

Councilman Davis felt that the topography on the Stoner Road side of the project lends itself to not having sidewalks. He did think, however, that sidewalks on the Fairview Road side was appropriate.

City Engineer Ball explained the charges per linear feet for sidewalks in the Fees & Charges Manual. She also pointed out that the Fees & Charges Manual says that if it's an affordable housing project, and if Council decides to allow the fee in lieu of construction for the Stoner Road sidewalks, then after the last unit is sold and they can show that they are all affordable housing were sold under the affordable housing threshold, then the developer can get back 50% of the amount they paid in.

Councilwoman Bellamy asked what affordable housing rebates could be sought for this development. Mr. Shuford said that we have an arrangement with the Water Authority where they would get half their tap fees back, half of their building permit fees and half of their sewer tap fees back from MSD. In a project this size, it would be approximately \$1,000-\$1,500 per unit. He did note that the affordable housing rebates would be whatever affordable housing threshold is in place when they get their Certificate of Occupancy.

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Regarding a comment from Mr. Hill about street trees, Mr. Shuford said we have an alternative compliance provision in our landscaping ordinance and if they are preserving the natural vegetation, that may very well substitute for the street trees.

Upon inquiry of Councilwoman Bellamy, Mr. Anthony Butzek, City Traffic Engineer, said that he does have a particular concern about concentrating traffic from this many units through one single entryway, which is the original reason why they requested a second access point. After hearing concerns of the residents on Stoner Road about that access point, we agreed with the Fire Department that an emergency access road would be adequate and requested that be conveyed to the City in either the form of a right-of-way or an access easement. The TIA is intended to determine what, if any, improvements are needed to be made to that primary access point. We did try to be reasonable in only requiring the study be done to show that that access point would work adequately. He said that they anticipate 1,000 trips per day to be generated by this development. He said that a TIA would cost approximately \$3-4,000, depending on the consultant they select to do the study.

Mayor Worley asked what would happen if when the TIA analysis comes in and it indicates a need for some traffic measures. Mr. Butzek responded that if Council approves the conditional use permit, staff would ask for an additional condition of approval that gives staff the authority to make any corrections generated by the review of the traffic study for this project. If the developer objected to those, then he would have the ability to come back to Council and ask for a waiver.

Mr. Butzek explained that without having the study, they cannot project what traffic problems might ensue from the development. Since Fairview Road is such a busy street, there will be a significant number of vehicles turning in and out of this development, particularly in the morning peak hours. There will be a lot of cars exiting the development through one single point onto a very busy street. The traffic analysis might show that they need to provide a turn lane exiting the site, maybe a turn lane entering the site or maybe the need for a signal. The cost for a turn lane would be approximately \$50,000. The City would like to know that ahead of time so the City is not burdened with that responsibility at a later date.

When Councilman Dunn asked why a TIA was not done prior to this meeting, Mr. Butzek responded that staff would have preferred that the study be done before now, but it was his understanding that the developer wanted to move forward quickly, and to require the TIA before going to Council would have delayed their process significantly.

Councilman Dunn suggested the developer pay for the TIA, and if the analysis calls for a turn lane at approximately

\$50,000, then Council use Trust Fund dollars to pay for it.

Councilwoman Bellamy agreed with Councilman Dunn, however, she recommended that a condition of approval be that the initial sales price have a cap of whatever the affordable housing rebate threshold will be, in order to make it eligible for Housing Trust Fund dollars. She said that the threshold is now \$120,000, but anticipates that being raised to \$130,000 in the very near future.

Upon inquiry of Mayor Worley, Mr. Hill said they have done their cost study based on \$120,000 for a 2-bedroom unit. The \$120,000 per unit already takes into account the affordable housing rebates. It does not include the cost for sidewalks outside the development, which will increase the per unit cost by over \$1,000 per unit.

Councilman Newman asked Mr. Hill if he would be confident they could meet the affordable housing threshold. Mr. Hill replied that costs rise over time and this will be a 3-4 year project. He didn't want to get about 2 years down the road and find it's not feasible to build any

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more units because they are locked into a threshold. However, he said the \$130,000 threshold is fine now and in the foreseeable future.

Ms. Smith, resident of Stoner Road, said that her community club has come to Council in the past to ask for sidewalks on their road. She stressed that they do want sidewalks. She said that most of the trees on the developer's side of Stoner Road are dead and always seem to be falling onto the road. The traffic on Stoner Road is getting to where the residents are thinking about asking the City for speed humps.

Mr. Alan Ditmore felt the traffic assumptions were incorrect in that the unit density reduces traffic by allowing people to walk or bus, instead of driving. He felt the more you build, the less traffic there will be.

After hearing no rebuttal, Mayor Worley closed the public hearing at 6:24 p.m.

Councilwoman Bellamy said that in the past, City Council has approved development that had issues related to Norfolk Southern and they did give the developer permission to use access for their right-of-way. Mr. Butzek also noted that this is not a rail crossing, but just putting a street near a rail line.

Upon inquiry of Councilman Davis, Ms. Ball said staff cost estimates differ from the developer's estimates. They did some sidewalk costs for Stoner and Fairview Roads and their estimate of the maximum cost was \$60,000, which is about \$300 per unit for the sidewalks. The TIA requested is only a limited one just for the driveway (City Exhibit 4), which would be about \$4,000 or \$24 per unit. The estimated fee in lieu of for Stoner Road would be approximately \$24,000.

Upon inquiry of Councilwoman Jones, Mr. Shuford recalled some of the items being discussed regarding building permit fees for affordable housing.

Vice-Mayor Mumpower felt the developer would not want Council to do anything that would step outside our standards. Therefore, he asked if City Council has the ability to waive the sidewalk requirement on Stoner Road in terms of the building a sidewalk or the fee in lieu of. Ms. Ball said that for Level 3 projects staff makes a recommendation to Council. Council has the option of accepting or rejecting staff's recommendation. City Attorney Oast also responded in that some cases Council has authorized forms of alternative compliance with sidewalks, i.e., through the use of sidewalks that may not necessarily be on a road, but are more in the nature of greenways.

When Vice-Mayor Mumpower asked if Council has the ability to waive the TIA requirement, Ms. Ball replied that Council also has the option of not requiring that analysis.

Mayor Worley explained why he would support waiving the sidewalk requirement on Stoner Road. He felt the entrance and the pedestrian activity generated by this development will clearly be on Fairview Road and there will be sidewalks inside the development. He would be willing to waive the sidewalk requirement on Stoner Road only. Councilman Dunn agreed with Mayor Worley.

Councilman Newman supported waiving the sidewalk requirement on Stoner Road. He suggested maintaining the sidewalk requirement (or a fee in lieu of) on Fairview Road and require the TIA with the understanding that if the TIA does indicate there are some additional improvements that need to be made on Fairview Road that the public handle those costs. Also, if certain

requirements are waived, he felt Council needs to make sure that the homes will be affordable. He recommended an affordable housing threshold of \$130,000 per unit.

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City Attorney Oast said that until Council knows what the cost of the improvements are on Fairview Road, if any are recommended by the TIA, Council should stay away from a commitment to pay for them. He suggested City Council consider funding such improvements as recommended at the time they have such recommendations.

Councilwoman Jones supported the recommendations by Councilman Newman. However, she think that Council needs to have a more intentional conversation about the Housing Trust Fund than just saying that is for affordable housing. To date Council has been very clear, up until the last exception on Appeldoorn Condominiums, that the Fund would be for money being paid back at a certain percentage rate. She is fine with going outside those bounds, but would like to have that conversation.

Mr. Shuford said that we are not pursuing sidewalks in the Joint Planning Area, but when new streets are created we are asking that grading occur to allow sidewalks to be put in more effectively. He offered that as a compromise if no sidewalks will be required on Stoner Road and/or Fairview Road.

Vice-Mayor Mumpower thanked the developer for bringing affordable homes to Asheville, but he was concerned that Council may be taking steps that we don't normally take. He thinks we are stepping further than we should and ultimately are not going to realize that great of savings to this project. He felt that we have standards for a reason and even though he does not agree with all of them, we do have them and should try to apply them as consistently as we can.

Councilman Davis supported the TIA being performed and liked the suggestion about grading for sidewalks on Fairview Road or a fee in lieu of. However, regarding sidewalks on Stoner Road, he felt we would be losing valuable trees for sidewalks that will never be used.

Vice-Mayor Mumpower moved to adopt Ordinance No. 3119 to approve the conditional use rezoning for property located at 100 Fairview Road from Commercial Industrial District to RM-16 Residential Multi-Family High Density District/Conditional Use. This motion was seconded by Councilwoman Bellamy and carried unanimously.

**ORDINANCE BOOK NO. 21 – PAGE 163**

Councilman Newman moved to adopt Ordinance No. 3120 to issue a conditional use permit for property located at 100 Fairview Road to construct 136 new townhome units, subject to (1) waving the sidewalk requirements on Stoner Road; (2) maintain the sidewalk requirement (or a fee in lieu of) on Fairview Road; (3) require a Traffic Impact Analysis, with the understanding that City Council will consider funding such improvements at the time they have such recommendations; (4) the initial sales price of the units may not exceed the affordable housing threshold established by the City; and (5) all other TRC conditions being met as outlined above. This motion was seconded by Councilman Davis and carried on a 6-1 vote, with Vice-Mayor Mumpower voting "no".

**ORDINANCE BOOK NO. 21 – PAGE 165**

At 7:00 p.m., Mayor Worley announced a short break.

**D. PUBLIC HEARING TO CONSIDER A CONDITIONAL USE PERMIT FOR PROPERTY LOCATED AT 50 OREGON AVENUE FOR A PROPOSED TELECOMMUNICATION FACILITY/FLAGPOLE**

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**ORDINANCE NO. 3121 - ORDINANCE GRANTING A CONDITIONAL USE PERMIT FOR PROPERTY LOCATED AT 50 OREGON AVENUE FOR A PROPOSED TELECOMMUNICATION FACILITY/FLAGPOLE**

City Clerk Bursleson administered the oath to anyone who anticipated speaking on this matter.

City Attorney Oast reviewed with Council the conditional use district zoning process. This process is the issuance of a conditional use permit, which is a quasi-judicial site-specific act. At this public hearing, all the testimony needs to be sworn.

After hearing no questions about the procedure, Mayor Worley opened the public hearing at 7:28 p.m.

All Council members disclosed that they have visited the site and would consider this issue with an open mind on all the matters before them without pre-judgment and that they will make their decision based solely on what is before Council at the hearing.

City Attorney Oast said that as documentary evidence is submitted, he would be noting the entry of that evidence into the record.

Mr. Joe Heard, Director of Development Services with the Planning & Development Department, submitted into the record City Exhibit 1 (Affidavit of Publication), City Exhibit 2 (Certification of Mailing of Notice to Property Owners); City Exhibit 3 (Staff Report); and City Exhibit 4 (other information required by the ordinance).

Mr. Heard said that this is the consideration of the issuance of a conditional use permit for property located at 50 Oregon Avenue for a proposed telecommunication facility/flagpole.

The Asheville City Development Plan 2025 thoroughly describes the need to accommodate and encourage new technology as a critical factor in sustainable economic development both through the further stimulation of investment and technology and through the improved quality of life desired by residents and tourists. In addition, the proposed installation supports the notable Smart Growth Goal of 'adaptive reuse/infill' through the seamless co-operation with an existing site.

The applicant (Triton, PCS) is requesting a Conditional Use Permit for a 0.86 acre parcel to allow for the installation of a concealed monopole telecommunication tower on Institutional zoned property (City Exhibit 3 – Aerial Map). The City owned property being considered for this installation is located at 50 Oregon Avenue (corner of Oregon and Louisiana Avenues) and currently houses City Fire Station #3. The telecommunication tower will be located within a lease area of approximately 810 s.f. and will be housed within a 100' tall concealed monopole capable of accommodating up to 3 separate users (City Exhibit 3 – Tower Elevation). In addition to the monopole, a small (214 s.f.) building addition will be built to house the necessary ground equipment. This addition will be designed to blend into the existing fire station's architecture through material and form (City Exhibit 3 – Landscaping Plan and Details). Two separate areas will also be dedicated to accommodate future user's ground equipment; one of which will be concealed within a second building addition, the other is to be screened by a free standing brick wall and proposed vegetation. In addition to the site plan changes designed to accommodate the tower and equipment, other minor site improvements are planned as part of this development project. Specifically, a sidewalk, 4 additional parking spaces, a utility easement, storage space for firehouse use, a new generator, and a newly paved maneuvering area for vehicles and maintenance crews.

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The original application called for the installation of a 100' tall stealth flagpole that would fly an American flag and be up lighted for visual effect (City Exhibit 3 – Site Plan). The recent discussion at the Technical Review Committee (TRC) meeting resulted in the recommended condition that in lieu of the flagpole design, a concealed monopole design be considered by City Council due to the maintenance concerns over the long term care and attention being afforded to the flag, as well as the presence of existing flags on the site, a bank on the adjacent property, and across Louisiana Avenue on the Army Reserve site (City Exhibit 3 – Tower Elevation).

The subject property is a corner lot located within the City Limits just one block south of Patton Ave. Although the lot is located on the corner, the lease area for the monopole is located to the rear of the site, behind the fire station adjacent to the ABC store. At ground level, the pole is well buffered from adjacent properties by existing vegetation.

Separate from this development review is a parallel review for a lease/contract agreement between the City and Triton PCS.

As part of the special requirements applied to Conditional Uses in the Institutional zoning districts per Sec. 7-16-2(c)(3), the project must meet a number of conditions for 'telecommunication towers' including those technical conditions addressed in the TRC report. In addition to the technical conditions, the following, non-technical standards must also be met:

- f. Applicants shall first be encouraged to consider properties owned by the City or Buncombe County before considering private properties.  
**The site located at 50 Oregon Avenue is City of Asheville owned property.**
- i. No telecommunication facility shall interfere with usual and customary radio and television reception.  
**Triton PCS has stated in their application and notification letters that no interference is expected.**
- t.7. Generators may not be used as a primary electrical power source.  
**Generators will not be used as a primary electrical power source.**

t.13. The City Council may require any other conditions deemed necessary or desirable to ameliorate the impact of the tower on the adjacent properties and uses.

**Additional conditions to be proposed as deemed necessary by Council.**

u. An annual wireless telecommunication facility permit shall be required for each wireless telecommunication facility located in the city.

**In order to annually renew this permit the applicant must certify the information described in Sec. 7-16-2(c)(3)(u)1-6.**

v. Conditional use permits for telecommunication towers shall be valid for an initial period of five years.

**In order to review the permit for an additional five year period, the applicant must submit a renewal request within 60 days prior to the expiration of the initial permit period. A review shall be conducted to determine whether and under what conditions the conditional use may be extended for successive five year periods. Additional details of this renewal process are described in Sec. 7-16-2(c)(3)(v).**

w. A conditional use approval for a telecommunication tower shall become null and void if the facility is not constructed and placed in service with one year of the date of approval.

**Approval will become null and void after a period of one year; however, the conditional use approval may be extended for a period of 6 months if substantial**

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**construction has commenced before the end of the initial year. If construction has not begun before the end of the initial year, re-application for a new conditional use permit would be required.**

At their May 3, 2004, informal meeting, the TRC reviewed the Conditional Use Permit request and made a positive recommendation that the project be forwarded to City Council stipulating the conditions outlined in the TRC staff report with the additional recommendation that City Council consider the concealed monopole design in place of the stealth flagpole design.

City Council must take formal action as set forth in section 7-9-9(c)(4) of the Unified Development Ordinance (UDO), and must find that all seven standards for approval of conditional uses are met based on the evidence and testimony received at the public hearing or otherwise appearing in the record of this case (UDO 7-16-2(c)). Staff's review indicates that all seven standards are met as proposed in the site plan.

- 1) That the proposed use or development of the land will not materially endanger the public health or safety.  
***The proposed project has been reviewed by City staff and appears to meet all public health and safety related requirements. The project must meet the technical standards set forth in the UDO, the Standards and Specifications Manual, the North Carolina Building Code and other applicable laws and standards that protect the public health and safety***
- 2) That the proposed use or development of the land is reasonably compatible with significant natural and topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant.  
***The proposed tower and accessory building additions, as a technical condition, must be designed to blend with the surrounding environment and is expected to have a nominal impact on the site area. In addition, the installation is extremely limited in its footprint and will require an extremely small amount of site disturbance with little to no grading or ground disturbing activity.***
- 3) That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property.  
***The proposed telecommunication tower is designed to blend with the surrounding environment, is well screened at ground level, and is most visible from the adjacent commercial corridor where the impact of a concealed tower will be nominal. In addition, no reception interference is expected which could potentially affect other quality of life issues for adjacent or nearby residents.***
- 4) That the proposed use or development of the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located.  
***As mentioned earlier, the lease/installation area for the tower is extremely small (810 s.f.) and, by definition, is designed to be in harmony with the scale, bulk, coverage, density and character of the area or neighborhood. The height of the pole is somewhat atypical but is located in proximity with other poles and objects of significant height including; flagpoles, power poles, light poles, signage, church steeples, and transmission lines. In***

**addition, part of the justification for the concealed monopole, in place of the flagpole, was to minimize attention being drawn to the pole by the flying of a flag and possible uplighting.**

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- 5) That the proposed use or development of the land will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City.  
**The Asheville City Development Plan 2025 thoroughly describes the need to accommodate and encourage new technology as a critical factor in sustainable economic development both through the further stimulation of investment and technology and through the improved quality of life desired by residents and tourists. In addition, the proposed installation supports the notable Smart Growth Goal of 'adaptive reuse/infill' through the seamless co-operation with an existing site.**
- 6) That the proposed use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar facilities.  
**The proposed development is located near transportation facilities and other utilities appear adequate. The initial technical review by other technical agencies and utility providers has not revealed any problems for serving the use.**
- 7) That the proposed use will not cause undue traffic congestion or create a traffic hazard.  
**The proposed installation is not expected to cause any increase in traffic to the site other than the occasional maintenance visit.**

Pros:

1. Generates revenue for the City that is long term and increases annually.
2. Provides public benefit through better cell phone coverage.
3. Tower designed for co-location and use of three antennae, which eliminates the need for additional towers in the future.
4. Using stealth technology, the tower will not be obtrusive.
5. Installation can operate simultaneously and independently of other existing land use and does not occupy developable space.
6. As part of the license agreement, Fire station #3 will receive other site improvements.

Cons:

1. Encumbers the property for 5 years with the ability to renew for subsequent 5 year periods, potentially impacting the redevelopment of the property.
2. Monopole will be 100' tall and visible above tree line and from a significant distance.

Staff concurs with the Technical Review Committee recommendation of approval with the conditions outlined in the TRC report with the additional condition that a 'concealed monopole' design be used in lieu of the originally proposed 'stealth flagpole'.

Mr. Heard updated City Council on a letter dated April 20, 2004 (Attachment in City Exhibit 4). He said they (1) changed their proposal to a concealed monopole design; (2) received their letter of determination from the FAA in that the pole could present no hazard; (3) received their environmental determinations from the EPA; (4) received the Emissions Safety Report stating that the site will be in full compliance with FCC standards; and (5) a balloon test was not conducted pursuant to the TRC.

A resident on Louisiana Avenue asked if there are any possible or known health risks associated with the tower, will the licensor remedy any interference if it should arise, and where are the other towers located at in the west Asheville area.

Mr. Chad Groseclose, Property Management Specialist with Triton Systems, responded to the questions raised by a resident on Louisiana Avenue. Throughout his presentation, Mr. Groseclose used the following to support his responses to each conditional use standard:

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Applicant Exhibit 1 (photo of tower); Applicant Exhibit 2 (analysis of the impact of communication towers on sale prices in residential neighborhoods by Charleston Appraisal Service Inc.); Applicant Exhibit 3 (map showing other towers in the west Asheville area); and Applicant Exhibit 4 (letter dated May 19, 2004, regarding the stability of a proposed flagpole/communications tower from Paul J. Ford and Company Structural Engineers).

Upon inquiry of Councilman Newman of the terms of the lease, Field Services Coordinator Ed Vess said that the developer

will initially be doing improvements to the fire station that should cost them around \$60-70,000, including the new generator, the new storage area, sidewalks, paved parking, etc. Then there will be a lease fee that they will begin paying. First year - \$18,000; second year - \$22,500; third year \$25,960; the fourth year \$27,000; and the fifth year \$28,000. After that, the rate will increase 4% per year from then on.

After rebuttal, Mayor Worley closed the public hearing at 8:05 p.m.

Vice-Mayor Mumpower moved for the adoption of Ordinance No. 3121, granting a conditional use permit for property located at 50 Oregon Avenue for a proposed telecommunication facility/flagpole, subject to the Technical Review Committee conditions being met and that a "concealed monopole" design be used in lieu of the originally proposed "stealth flagpole." This motion was seconded by Councilwoman Bellamy and carried unanimously.

**ORDINANCE BOOK NO. 21 – PAGE**

**E. PUBLIC HEARING TO CONSIDER REZONING ONE LOT AT 555 BREVARD ROAD FROM RM-8 RESIDENTIAL MULTI-FAMILY MEDIUM DENSITY DISTRICT TO COMMERCIAL BUSINESS II DISTRICT**

**ORDINANCE NO. 3122- ORDINANCE TO REZONE ONE LOT AT 555 BREVARD ROAD FROM RM-8 RESIDENTIAL MULTI-FAMILY MEDIUM DENSITY DISTRICT TO COMMERCIAL BUSINESS II DISTRICT**

Mayor Worley opened the public hearing at 8:06 p.m.

Mr. Joe Heard, Director of Development Services with the Planning & Development Department, said that this is the consideration of an ordinance to rezone one lot at 555 Brevard Road from RM-8 Residential Multi-Family Medium Density District to Commercial Business District. This public hearing was advertised on May 14 and 21, 2004.

Mr. Heard said that the Asheville City Development Plan 2025 discusses land use and transportation goals and strategies for infill development that include pursuing, "compatible infill development in order to actively promote appropriate development and redevelopment within the City and its ETJ" along with assuring that the City of Asheville, "continues to serve as the regional commercial center for western North Carolina by providing opportunities for the location of large commercial uses within the City." The proposed rezoning and redevelopment of the Brevard Road corridor support these land use goals.

Two properties located on the northwest corner of Brevard Road and Pole Creasman Road were recently (12-16-03) rezoned from RS-4/RM-8 to Community Business II District.

The applicant (Progress Energy) has requested a rezoning from RM-8 (Residential Multi-family, Medium Density) to CB-II (Community Business II) to allow for further commercial development of the Brevard Road corridor. The subject property currently supports a CP&L Substation with numerous lines running across the property, but is otherwise undeveloped. The property is bordered by commercial retail and low density residential (mobile home sites) to the

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north, low density residential (zoned RM-8) to the east across Brevard Rd., vacant commercially zoned property to the south, and vacant residentially zoned property to the west. There are some additional CB-II zoned properties to the north and south along Brevard Rd. The majority of CB-II properties on the Brevard Road corridor are non-conforming.

Understanding the recent and anticipated changes to the Brevard Road corridor, the Asheville City Council recently directed the staff of Planning and Development to conduct a zoning study for the corridor to determine whether there was need to consider rezoning areas along Brevard Road to better reflect the goals and guidelines of the City's development plan(s) and Smart Growth goals. As a result of the preliminary study, the subject parcel was noted as property better suited for commercial and/or mixed use development.

The purpose of the RM-8 district is to provide medium density multi-family housing types along with single family detached and attached residences. This district is also intended to provide a transitional area between medium density single family dwellings and other higher density residential uses and/or uses of a heavier impact.

The Community Business II district is established to provide business and service uses to medium/high density residential areas, serving several residential neighborhoods.

With the recent commercial rezoning to the properties on the corner of Brevard Road and Pole Creasman Road, the

remaining RM-8 zoned property no longer serves as an effective transition area between low density residential and higher impact uses. In addition, it is recognized that the subdivision of the larger RM-8 parcel and proximity of the power substation remaining on site has decreased the opportunity for a quality multi-family development. Lastly, there is precedent for rapid turnover of non-conforming properties in areas where new conforming development and increased traffic spurs new demand. With the current road widening underway, increasing residential density, and the potential for new conforming CB-II commercial uses, it is believed that there is significant potential for quality commercial development along this corridor.

Pros:

1. Allows for opportunities of quality, conforming commercial and/or mixed use development.
2. Could spur the redevelopment of non-conforming, vacant, or underutilized properties.
3. Allows for infill development that supports City adopted plans and goals.
4. Rezoning will better support the commercial character of Brevard Rd.

Cons:

1. Reduces potential for residential multi-family development along a major corridor.
2. Rezoning has the potential to stall the turnover of existing non-conforming, vacant, or underutilized properties currently commercially zoned through the opportunity for new construction.

As a result of recent and anticipated changes to the Brevard Rd. corridor and for the reasons stated above, Planning and Development concurs with Planning and Zoning's recommendation to approve this rezoning request from RM-8 to CB-II.

Mr. Lou Bisette, attorney representing Progress Energy, urged City Council to support the rezoning in that the pretty is better suited to commercial use.

Councilwoman Jones felt this was an appropriate rezoning, however, she continues to be concerned about the multi-family residential districts being "whittled away" and at some point Council needs to figure out how we are going to replace what we are rezoning.

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Mayor Worley closed the public hearing at 8:13 p.m.

Mayor Worley said that members of Council have previously received a copy of the ordinance and it would not be read.

Councilman Dunn moved for the adoption of Ordinance No. 3122. This motion was seconded by Councilwoman Bellamy and carried unanimously.

#### **ORDINANCE BOOK NO. 21 - PAGE**

#### **F. PUBLIC HEARING TO CONSIDER REZONING 142 N. BEAR CREEK ROAD FROM INSTITUTIONAL DISTRICT TO RM-8 RESIDENTIAL MULTI-FAMILY MEDIUM DENSITY DISTRICT**

#### **ORDINANCE NO. 3123 - ORDINANCE TO REZONE 142 N. BEAR CREEK ROAD FROM INSTITUTIONAL DISTRICT TO RM-8 RESIDENTIAL MULTI-FAMILY MEDIUM DENSITY DISTRICT**

Mayor Worley opened the public hearing at 8:14 p.m.

Urban Designer Alan Glines said that this is the consideration of an ordinance to rezone 142 N. Bear Creek Road from Institutional District to RM-8 Residential Multi-Family Medium Density District. This public hearing was advertised on May 14 and 21, 2004.

Mr. Glines said that the property is located within the City limits in the western area of the City. The property appears to have been zoned Institutional based on its proximity to Institutional uses and to create compatibility with the underlying higher density manufactured housing units that are located on this parcel and the surrounding parcels.

The 2025 Asheville City Development Plan does not show any major changes expected in this area of west Asheville. The plan does recognize the need to strengthen residential neighborhoods and to provide a mixture of housing types in a wide range of prices to serve the needs of the community.

Surrounding properties to the north, west and south are zoned Institutional and have residential uses on them. To the

east, across Bear Creek Road from this parcel the area is zoned RM-8 and include single family uses.

The Buncombe County parcel data does not entirely agree with a survey that has been prepared for this lot. The discrepancies are of a dimensional nature and location of the right-of-way for Bear Creek Road. Staff has spoken with Buncombe County who agreed with the survey information provided for the property. County staff will update the GIS map layer for this parcel. For the consideration of this rezoning, we will consider the survey information as most accurate for our review.

The parcel under review contains two single family homes and a single manufactured home. The rezoning would allow uses permitted in the RM-8 district and would allow some relief for the subdivision requirements for the property since the lot area is reduced and street frontage requirement is also reduced.

The Institutional District reserves land for the development of major educational, medical and offices uses and multifamily residential uses while minimizing conflicts with adjacent land uses.

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RM-8 Residential Multi-Family Medium Density District establishes areas to provide a full range of medium density multifamily and single family housing types and limited non-residential development normally required to provide basic services in a community.

PROS: RM-8 Zoning is consistent with the properties located across the street. The zoning change will more closely align with the current use of the property.

CONS: The rezoning will remove the possibility of future institutional uses from this property.

The Planning and Zoning Commission, at its May 5, 2004, meeting, voted 7-0 to recommend approval. City staff recommends approval of this rezoning request as well.

Upon inquiry of Vice-Mayor Mumpower, City Attorney Oast said that due to the size of the parcel it might look like spot zoning, however, he thinks that Mr. Glines has done a good job explaining the foundation of his recommendation and if you look at the aerial photograph it is actually zoning it to a use that is more compatible with what it is already being used for.

Mayor Worley closed the public hearing at 8:20 p.m.

Mayor Worley said that members of Council have previously received a copy of the ordinance and it would not be read.

Councilwoman Bellamy moved for the adoption of Ordinance No. 3123. This motion was seconded by Councilman Dunn and carried unanimously.

#### **ORDINANCE BOOK NO. 21 - PAGE**

#### **IV. UNFINISHED BUSINESS:**

##### **A. RESOLUTION NO. 04-119 - RESOLUTION APPROVING CITY COUNCIL'S STRATEGIC OPERATING PLAN**

Mayor Worley said that this is the consideration of a resolution approving City Council's Strategic Operating Plan. He said this Plan is the outgrowth of Council's retreat process, visioning process and goal-setting process.

Mayor Worley said that members of Council have previously received a copy of the resolution and it would not be read.

Councilwoman Bellamy moved to adopt Resolution No. 04-119. This motion was seconded by Councilwoman Jones.

Councilman Newman said that the planning process that we went through as a Council to create this strategic plan was really valuable. He knows Council all has a lot of different ideas that are not reflected in this document but it was really useful to work together to identify some of the areas that there are large areas of agreement on. He came out of the process realizing there are some really critical community needs that have been talked about for a long time but we haven't have the collective voice to tackle them. He was excited that some of those challenges have been identified and are committing ourselves to work together.

Councilman Dunn said there is no perfect plan. He said that sometimes his vision conflicts with other Council members but it's healthy. He felt this document is very important. His support on this document means he will listen to what the other visions

are as long as others will

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listen to his vision. The statement that Council will all speak in one voice probably won't happen because we are all individuals. He was pleased, however, that Council has finally decided to tackle some of the big issues.

Vice-Mayor Mumpower felt this was a well-intended effort initiated by our Mayor and City Manager. He finds himself in an awkward position in that there are parts of this document that he agrees with a lot and there are parts that he disagrees with a lot. At its core, he has a concern that this document represents a distraction from our main mission, which is city services. He feels the document represents an expansion of our city government at a level that exceeds his personal comfort zone. He feels we are growing our government faster in some respects than we are of people and he has discomfort with that. The strongest point to take him away from signing this document, however, is that he believes we have fundamental things that we need to focus on (core city services) and that we are stepping in so many other directions that we tend to neglect some of those fundamental services. He pointed to sidewalks. We have a \$100 Million budget and are only earmarking (for several years) \$50,000 a year for new sidewalk construction and \$150,000 for sidewalk repair. He said that is a very nominal portion of our budget for a fundamental infrastructure issue. There are other monies that go to sidewalks, like fee in lieu of, but those are inconsistent monies. We have had recent discussion about a hard drug interdiction program that the majority of Council spoke against. That to him is fundamental. Public safety is fundamental. We can talk about other exciting initiatives that can have a good and special impact on Asheville, but before we go to the exotic, we should stay with the basic and he believes this document takes us too far away from that. With regret, he will have to vote against the strategic plan.

Councilwoman Jones encouraged all citizens to go to the City's website and read the document. She believed that this document is very grounded in housing, economic development, infrastructure and planning. We are a growing community and it is part of what we are elected to do is to anticipate the growth so that we are able to deliver those critical services well into the future for our children. She felt this document will take us in a good direction in next 20 years.

Mayor Worley felt the process to arrive at this document was a good process, a very collaborative process and had a lot of give and take from Council. He felt this is a good vision for Asheville. He doesn't think it takes away from our core services and he doesn't think it expands government, but he does think it's a recognition of what we are and the direction we are going in as a City. The document reflects what makes Asheville the 8<sup>th</sup> best place in the country to live. Also, it's clear that this is a high level vision supported by strategic goals. He felt that each of us, while we may buy in the overall vision, all have different ideas about how we institute it. He does believe that this document moves us in a good direction.

The motion made by Councilwoman Bellamy and seconded by Councilwoman Jones carried on a 6-1 vote with Vice-Mayor Mumpower voting "no."

#### **RESOLUTION BOOK NO. 28 – PAGE 265**

#### **V. NEW BUSINESS:**

##### **A. RESOLUTION NO. 04-120 - RESOLUTION AUTHORIZING THE CITY MANAGER TO RENEW THE CONTRACT WITH BALL-JANIK, LLP, FOR THE PROVISION OF FEDERAL REPRESENTATION SERVICES**

Economic Development Director Mac Williams said that this is the consideration of a resolution authorizing the City Manager to renew the contract with Ball-Janik, LLP, for the provision of federal representation services.

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The City of Asheville entered into the initial contract with Ball-Janik in April 2003 for a 12-month period. In doing so, it was suggested at that time to consider the approach of engaging federal representation for at least three years but using annual contracts. The initial contract called for monthly payments of \$5,000 "inclusive" of out-of-pocket expenses. The renewal contract is the same except that Ball-Janik is now asking for out-of-pocket expenses to be "exclusive" of the \$5,000 monthly fee. Ball-Janik is proposing that out-of-pocket expenses would not exceed \$5,000 annually.

The current Fiscal Year 2004-05 City budget proposal includes adequate funding for this proposed contract.

Support statement:

- Representation services enhance positioning of and advocacy for City agenda items by our own elected representatives as well as other Members of Congress and their staffs who also have influence over decisions affecting City agenda items.

Challenge statement:

- Representative Taylor, in particular, as a member of the House Appropriations Committee, is uniquely positioned to respond to City funding requests without the need for City funding of professional representation services.

Staff recommends approval of the resolution authorizing the City Manager to renew the contract with Ball-Janik, LLP, for the provision of federal representation services.

When Councilman Dunn asked if there have been any monies obtained for the City that we can directly attribute to our consultant's involvement, Mr. Williams said that there have been two specific funding earmarks for projects. One for \$300,000 for a new transit bus and the other is \$2,000,000 for traffic signal upgrades. He said that monies obtained for the City that can be indirectly attributed to Ball-Janik's involvement include: (1) they lobbied for inclusion of language in the reauthorization of the federal transportation bill known as TEA-21 which extends flexibility to Asheville and the Asheville Transit System to use federal transit funds for operational assistance. Without this legislative fix, the Asheville Transit System would lose approximately \$800,000 in federal funding that it now receives for operational assistance. This effort has been ongoing as Congress continues to debate the reauthorization of TEA-21. (2) they supported two additional earmarks that made their way into Omnibus spending bill – a \$1 million earmark to NC DOT for the WNC Passenger Rail Initiative which will be distributed to transit systems throughout the state for buses and bus facilities.

Mr. Williams said that the lobbyists also promote the City's priorities to the Congressional delegation staff, subcommittee, committee staff and the delegation members on a regular, sustained and on-going basis. Given the time pressures placed on the members of the Congressional delegation, considerable behind-the-scenes work takes place at the staff level and our lobbyists work hard to maintain and build strong relationships with delegation and committee staff. In doing so, they are able to gain access to these staff at critical points in the legislative process and to remind them of the City's funding priorities.

Mayor Worley said that members of Council have been previously furnished with a copy of the resolution and it would not be read.

Councilwoman Jones moved for the adoption of Resolution No.04-120. This motion was seconded by Councilman Dunn.

Vice-Mayor Mumpower felt this is an ex-officio level of government that we are creating artificially and he disagrees with it in principle. He thinks that it's the congressman's job and it's our job to work with our congressman in that regard. He believes that these connections can be

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developed independently. He felt it was hard to track the work and he doesn't think it's fair to say that they have created all these revenues for us, but he's sure they had an impact. He thinks that tracking what they do for us in a concrete way is extremely difficult. He also thinks it makes us an active participant in a system that is notorious for pork barrel politics and that's stepping out of the system that we have in place and that's wrong.

Councilman Dunn said that he voted against the contract last year. However, he will reevaluate them every year and if they can continue to produce, he will support them. He pointed out that Congressman Taylor does care for our community and will work for Asheville's need.

Councilman Davis agreed with Vice-Mayor Mumpower, however, he would support the contract for another year but look for more activity in the coming year.

Vice-Mayor Mumpower said that he has talked to Congressman Taylor's office and they have assured him that if we bring things to them, they will actively pursue them. He couldn't understand why Asheville doesn't do their own work and why we need the buffer of a lobbyist. Mr. Williams said that we can do our work for those individuals, but they only just one vote on the committees that they sit on. City Manager Westbrook also responded that Council decided about 1.5 years ago that we were not effective in Washington and we needed more professional assistance. He said it takes someone in Washington to pursue our items at this level.

Councilwoman Bellamy felt that our \$60,000 investment has been returned and after reviewing our 2005 federal agenda requests, she felt having a lobbyist to assist the City was something she would support.

Ms. Hazel Fobes said that what Council could be using for the infrastructure of our water system is far more important than paying a lobbyist.

Councilwoman Jones said that delivery on basic infrastructure improvements was \$2.3 Million. Part of what we are elected to do is to be smart, be strategic for Asheville, and to do what we need to do ethically to bring home our citizens what they need to be safer and to have better city services.

Mayor Worley spoke in support of the lobbyist. He was pleased that we have a congressman that works well with Asheville, however, he has a limited staff and we can't rely on his staff to do all the research. He felt this is a team effort.

The Secretary of the Libertarian Party of Buncombe County would rather see Asheville not hire a lobbyist.

Mr. Mike Lewis originally felt that hiring a lobbyist was not a good thing, however, after seeing what the lobbyist has helped the City obtain funds for, he now feels it is a good thing to continue and hoped Council will re-evaluates it again next year.

The motion made by Councilwoman Jones and seconded by Councilman Dunn carried on a 6-1 vote, with Vice-Mayor Mumpower voting "no."

**RESOLUTION BOOK NO. 28 – PAGE 266**

**B. RESOLUTION NO. 04-121 - RESOLUTION APPOINTING MEMBERS TO URTV INC. BOARD OF DIRECTORS**

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Vice-Mayor Mumpower said that this is the consideration of appointing members to URTV Inc., the non-profit selected by Asheville and Buncombe County to manage the community's public access television station.

On December 16, 2003, City Council adopted Resolution No. 03-208 that the City and County would appoint two members each to the URTV Inc. Board of Directors.

At City Council's worksession on May 18, 2004, City Council instructed the City Clerk to arrange interviews for DeWayne Barton, Sandra Bradbury, Kofi Caldwell, Katina Turner and Mark Wilson. Ms. Bradbury was out of town and unable to attend the interview process.

Council was impressed with all candidates interviews and instructed the City Clerk to send the applications to Buncombe County and the URTV Inc. Board for their consideration.

DeWayne Barton received 2 votes, Sandra Bradbury received 7 votes, Kofi Caldwell received 0 votes, Katina Turner received 0 votes and Mark Wilson received 4 votes. Councilman Dunn noted that he was unable to attend the interviews and would only therefore vote for the person he knew and would recommend. Therefore, Sandra Bradbury and Mark Wilson will be the City representatives on the URTV Inc. Board of Directors to each serve a two year term respectively, terms to expire June 30, 2006, or until their successors have been appointed.

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**C. RESOLUTION NO. 04-122 - RESOLUTION TO AMEND OR TERMINATE THE RESTATED AND AMENDED SUPPLEMENTAL WATER AGREEMENT**

Mayor Worley said that one of the things that came out of Council's goal setting process was a desire to regain control of the water. We talked about it in terms of what it means when we annex and the ability to have the potential to charge differential rates. There are also other financial and non-water issues involved. As a part of the resolution, we include in it a provision that directs the giving of one year's notice of termination of the Water Agreement and that will give us a one-year timeframe within which to conduct negotiations. Hopefully we will be able to conduct negotiations and arrive at some results satisfactory to both Asheville and Buncombe County, but it gives us some options down the road if those negotiations prove to be unsuccessful.

Mr. Brian Peterson, member of the Regional Water Authority but only speaking as a citizen of Asheville, applauded the Mayor and Council for taking this step. He has felt this is something that should have already happened. Even though some of comments he's heard has been about annexation or differential rates, but it's much more than that. Looking at where we are now, having been on the Regional Water Authority over a year, it's not that it's not properly managed, it's that it cannot be properly managed. He feels that the staff, governmental bodies and the Regional Water Authority do a good job, but the structure is dysfunctional. He thinks that making a significant change is the only thing we can do to be able to get out of that mess. Anytime we try to make some small improvements, this political dysfunction keeps coming up so that we can't really fix the system. He feels the fundamental problem is lack of accountability. If the people running the system don't do a good job, they are held

accountable by the customers and voters. As it is now, no one is accountable. In looking at some of the negotiations with Hendersonville, it's hard for the members of Authority to think of themselves as Authority members – everybody thinks of themselves as looking out for their individual governmental body. He didn't think the Regional Water Authority works and thinks this is a good step. He hoped the City will get back into control and be held accountable.

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Mr. Mike Lewis felt that this is a core issue in this community. If you can't supply the basics, and water is very basic, then you are not governing. He urged City Council to regain control and do something about our extremely high water bills.

Ms. Hazel Fobes, Chair of Citizens for Safe Drinking Water and Air, provided City Council with her comments. She attended the May 13 and 18 Regional Water Authority meetings to hear public comments on the budget. She was pleased that the entire group seemed to have a cooperative exchange about the water system. They were very interested in the amount of money that the Water Authority needs, the lack of sources and the fact that Asheville and Buncombe County were taking off the top \$2 Million. She thought they were going to do something about getting all or part of that money back. Now there is this resolution which she feels was hastily drawn up. It seems that the City of Asheville wants to take over the Water Authority, but Council wants to take it over in a way that is not pleasant. She knows it is Asheville's water system, but if you take it over, then we don't have any Regional Water Authority. She wants an independent Water Authority. She urged Council not to pass this resolution immediately. The Water Authority now has a civil engineer who has the authority to practice water and systems and land planning in North Carolina, South Carolina and Florida. She asked Council to have an independent regional water system, but the resolution doesn't even talk about regionalism.

Councilman Dunn said that regionalism isn't about who owns the system, but about the water. The important thing is for everyone in this community to have water. The Regional Water Authority has not worked and he is pleased that this Council is going to do something about the Water Agreement. The citizens of Asheville elected City Council to do something and it's now time for the City of Asheville to regain control of our water system and give a break to the water users. He has been on the Regional Water Authority for approximately three months and agrees it is a broken system, which is not accountable to anyone. The City of Asheville taxpayers are paying the bonds on these water improvements – not Henderson County and not the City of Hendersonville, and the City Council needs to be accountable to our taxpayers. He feels that City Council is fair and will take into consideration what the County needs are. He felt the people in Henderson County should be able to have water, but it doesn't mean they should be making decisions for the City of Asheville taxpayers.

Councilman Newman said that families and businesses in Asheville pay twice the property taxes as all the other residents and businesses in Buncombe County and they pay some of the highest residential water rates in North Carolina. The Water Authority is currently proposing to increase water rates by 50% over the next five years and we still need to invest a lot more into the infrastructure. Someone needs to look out for the taxpayers of Asheville. He hoped we can negotiate successfully with the County and our neighbors but we need to start getting some kind of change in place.

Vice-Mayor Mumpower said we are only announcing the beginning of the process of looking at change. We are not locking ourselves into anything and we are not violating any agreements. We are announcing to other bodies that we think we have a broken system of management and we need to look at ways to fix that. We hear a lot about regional authorities and it is a good concept, but when you look across the state, that is not the model that exists in North Carolina. Most cities own their resources and they own them for a reason. Our not owning our resources is one of the reasons we have such a difficult time with annexation. It is a fairness issue to the City and we can talk about regionalism as a good concept but when you get down to reality, that is not what everyone else is doing. We are trying to fix a broken system and do it in a fair, even-handed manner. Nothing will change quickly or thoughtlessly.

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Councilwoman Bellamy said the primary purpose of the 1996 Water Agreement was to provide for the operation of a unified water distribution system that was regional in scope, and to provide a means for the orderly extension of water service to unincorporated areas of Buncombe County and beyond, and to provide for the cost-effective repair and maintenance of the existing water distribution system. She doesn't feel like those purposes are being addressed today. She thinks it is regional in name only. When we did try to extend water lines into Henderson County, there was a lot of disagreement on how that should have been done. Conflict continues to arise when we think about decisions that need to be made with regard to the water system. She feels that putting this issue on the table for Council to review in detail over the next year will give the people the opportunity to give input on what they want to see as well as our elected officials. If we are going to look at being cost-effective, we need to look at every aspect of that happening, not just what it would look like from a regional approach. She supports looking at this for a year to decide if we want to continue with our current relationship under the 1996 Water Agreement.

Councilwoman Jones said that it is her observation is that the Regional Water Authority has very good people on it that care about the region and the entities that they represent, but that regional body has not been able to do what it needed to do for the region. A recent example is that Asheville wanted to work with the City of Hendersonville (the only other water distributor in our region) on a plan to scout out what would happen in an emergency. We couldn't even get an emergency plan for our people. That is not looking after the region. To assume that Asheville is moving towards controlling its taxpayers assets equals to a disregard of the water needs of our region is not the case.

Mayor Worley said the water system is a 3/4 of a billion dollar asset and that is a pretty significant asset for us not to be managing ourselves. We do a disservice to our citizens in the water rates. Our citizens pay higher water rates than just about any other city in North Carolina. And, all of those cities have differential rates involved, which serves as a tool for many aspects. It is a tool we don't have. This is also a process that will take considerable amount of time and we don't know what's going to come out of the negotiations. He anticipates a lot of give and take, a lot of discussion and a lot of ideas. He doesn't think the steps we are taking tonight or anything that will come out of the negotiations over the coming year in any way diminishes our regional commitment. Every member of this Council recognizes that in this day and age we have to be regional in nature. What benefits our neighbors benefits us and vice versa. We only succeed by working together. The provision of water is certainly a regional commitment and a regional asset, but we get a portion of our water from another county and it's only fair that we share that water with other counties and other jurisdictions that need it. We have done that in the past and we will continue to do that in the future. The way we are regional in nature may change, but he doesn't see any change whatsoever in the regional commitment. We will continue to have that commitment, will continue to work with our neighbors, and will continue to honor every regional agreement that we are a party to.

Following up on Councilman Dunn's comment, Mayor Worley said that it's easy to say the \$1 Million Asheville gets out of the water revenues should be given back, but the water system is our asset. If we gave up that \$1 Million to replace it, we would have to raise our property tax rates by 2-cents on the dollar. We have to have that \$1 Million to balance our budget. So, the question is do we get that as a return on the investment of our asset where all the water customers pay that bill (which a substantial number of whom do not live in the City of Asheville) or do we shift that burden to strictly City residents. That is how giving back the \$1 Million affects Asheville.

Vice-Mayor Mumpower moved for the adoption of Resolution No. 04-122. This motion was seconded by Councilwoman Bellamy and carried unanimously.

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**VI. OTHER BUSINESS:**

Vice-Mayor Mumpower announced the following vacancies for June, 2004. He asked interested people to contact the City Clerk for an application form.

Vice-Mayor Mumpower reminded Council of the various ceremonies which will be taking place on Memorial Day. He especially invited the public to the Memorial Day Ceremony on May 31 at 2:00 p.m., in the City/County Plaza area.

Councilwoman Bellamy formally recognized the Asheville High Girl's Basketball Team, Asheville High Girl's Soccer Team and T.C. Roberson's Soccer Team on their successful seasons. She also congratulated the Asheville High School Seniors and was astounded to see the amount of community service these young people commit to.

All of City Council congratulated Councilman Newman and his wife Beth on their daughter, Tess Newman.

The following claims were received by the City of Asheville during the period of May 7-13, 2004: Natalie Baker (Police), Katherine McCoy (Fire), Lisena Moss (Sanitation), Linda Buckner (Fire), Jimmy Cole (Water) and Bellsouth (Water). These claims have been referred to Asheville Claims Corporation for investigation.

**VII. INFORMAL DISCUSSION AND PUBLIC COMMENT:**

Mr. Mike Fryar asked City Council to approve an arbitrator to meet with him, his attorney Mr. Reidinger, the City Manager, and the City Attorney to discuss a fair solution of his concerns regarding annexation of his property on Smoky Park Highway. Mayor Worley responded that City Council has listened to Mr. Fryar for the past year and has carefully considered every aspect. City Council has not sided with the views of Mr. Fryar. He put Mr. Fryar on notice that Council is not going to continue having the same presentation on the same subject every time we meet.

**VIII. ADJOURNMENT:**

Mayor Worley adjourned the meeting at 9:45 p.m.

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CITY CLERK

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MAYOR

NORTH CAROLINA:

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

WAKE COUNTY:

05 CVS 10743

CITY OF ASHEVILLE, a municipal  
corporation,  
Plaintiff,

vs.

STATE OF NORTH CAROLINA;

and

COUNTY OF HUNCOMBE, et al.  
Defendants.

FILED  
ENTERED -2 PM 1:40  
WAKE COUNTY CLERK  
BY \_\_\_\_\_

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MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT

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THIS MATTER is before the Court upon cross motions for summary judgment pursuant to Rule 56, North Carolina Rules of Civil Procedure. The motions were heard at the January 16, 2007, civil session of the Wake County Superior Court. Counsel for all the parties were present and presented oral arguments. Each party submitted a lengthy memorandum in support of its position together with affidavits, deposition transcripts and authorities, the total combined height of which exceeding more than a foot and one-half. The arguments of counsel, with two short breaks, commenced at approximately 10:50 a.m. and concluded at 2:30 p.m. At the conclusion of the hearing, the Court took the matter under advisement in order to review more than 100 pages of memoranda submitted, plus more that five inches of case law and authorities in addition to the supporting discovery, affidavits and depositions.

The Court, in its spare time and without the assistance of any research assistant or law clerk, has now had the opportunity to thoroughly review the arguments, record and supporting authorities for all sides in this dispute. The matter is now ripe for disposition. Because the dispute

between the City of Asheville and Buncombe County over the sale, pricing, management and distribution of the municipal water system reaches back in time more than seventy (70) years, a review of the factual background is necessary to an understanding of the case.

FACTUAL BACKGROUND

This case relates to the provision of water to citizens of Asheville and Buncombe County by the public water utility operated by the City of Asheville. Two of the challenged statutes, Sullivan I and Sullivan II, local acts of the General Assembly, regulate the rates that may be charged by that public utility. The third challenged statute, Sullivan III, also a local act, addresses other issues related to that public utility, primarily the expenditure of revenues from the utility and related accounting issues.

Sullivan I, which was enacted in 1933, provided in pertinent part that: (1) Asheville may not "charge . . . from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the [water] main of any water district which has paid or issued bonds for the payment of the expense of laying such main, a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said city;" (2) Asheville is empowered to discontinue the water service of any user who fails to promptly pay his or her water bill; (3) persons living outside of Asheville's corporate limits should be entitled to the use of Asheville's surplus water only; and (4) Buncombe County and/or the trustees of water districts operating outside of Asheville's corporate limits shall be required to maintain water lines in proper repair. 1933 N.C. Sess. Laws 399.

Sullivan II, which was enacted in 2005, provides that: (1) Asheville may not "charge . . . from any water consumer in Buncombe County currently or hereafter connected to the water lines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto, a rate for water consumed higher than the rate charged for the same classification of water consumer residing or located within the corporate limits of the City of Asheville;" (2) Asheville has the authority to cut off the water service of a consumer who fails to timely pay his or her water bill; (3) the Buncombe County Board of Commissioners and/or the trustees of the various water

districts functioning outside of Asheville's corporate limits are required to maintain those water lines owned by Buncombe County and/or said water districts and to keep them in proper repair. Sullivan II further provides that Sullivan I continues to apply (to the extent it does not conflict with Sullivan II). 2005 N.C. Sess. Law 140.

Sullivan III, enacted at the same time as Sullivan II, essentially (1) requires Asheville to account for its water utility in a separate fund and prohibits it from transferring any money from that fund to another fund except for capital project funds established for the building or replacement of assets for the utility, and states that obligations of the public enterprise may be paid out of the separate fund; and (2) removes Asheville's immunity from liability for damages to those living outside city limits for failure to provide water service. 2005 N.C. Sess. Law 139.

The subject of the Sullivan acts is the Asheville water supply system, a public utility. The primary water source from which this public utility supplies water is owned by the City of Asheville. The distribution system, including the water lines, is owned in part by the City of Asheville and in part by Buncombe County and the water district Defendants. The record of ownership of the distribution facilities is sparse, with the County and the water districts having paid for and contributed distribution facilities since the 1920's. Other than one limited annexation in 1960 involving portions of water districts, the City did not acquire existing lines in areas annexed by the City pursuant to the provisions of N.C.G.S. 162A-93(c).

Much of the history relevant to this lawsuit can be found in the North Carolina Supreme Court's opinion in *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d. 470(1958). As set out more fully in *Candler*, with the increase in development in Asheville and Buncombe County, between 1923 and 1927, pursuant to acts of the General Assembly, six water and sewer districts were formed in Buncombe County. These districts had certain geographical boundaries outside the City of Asheville and were authorized to acquire rights of way for water and sewer lines, to construct the lines, and hold elections authorizing the issuance of bonds paying therefor. The districts did issue the bonds and build water lines for the distribution of the water, which lines were

connected to the water system initially established by the City of Asheville. Candler, supra at 400.

In 1933, the General Assembly enacted Sullivan I, which provides in pertinent part:

SECTION 1. That from and after the passage of this act it shall be unlawful for the City of Asheville or any other governing authorities, agents, or employees, thereof, to charge, exact, or collect from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of laying such main a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said city.

SEC. 2. That the City of Asheville is hereby specifically authorized and empowered, through its officers, agents and employees, to cause any user of water who shall fail to pay promptly his water rent for any month to be cut off and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages.

SEC. 3. That it is the purpose and intent of this act to declare that person residing outside of the corporate limits of the City of Asheville shall be entitled to the use of Asheville surplus water only, and the governing body of the City of Asheville is authorized and empowered to discontinue the supply of water to any districts, or persons, out of the corporate limits of the City of Asheville at any time that there may be a drought or other emergency or at any time the governing body of the City of Asheville may deem that the City has use for all of its water supply.

SEC. 4. That it shall be the duty of the County Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville in Buncombe County to maintain the water lines in proper repair in order that there may not be a waste of water by leakage.

The County Commissioners of Buncombe County, who also serve as Trustees of the various water districts, levied taxes to pay the principal and interest on the bonds issued by the water districts within the districts, and to pay for the

408, 101 S.E.2d at 477. The court acknowledged that a statute of general applicability existing at that time -- G.S. § 160-256 -- expressly provided for cities to fix different rates for consumers outside the city's corporate limits than those charged to consumers within the corporate limits. *Id.* at 408-09, 101 S.E.2d at 477-78. The Supreme Court nevertheless held that it was lawful for Sullivan I to establish rates for a different class of consumers living outside of Asheville's city limits whose property was connected (or might later be connected) with the main of an existing water district which had paid or issued bonds for the payment of expenses relating to the construction of the water system. The Court then stated:

The Legislature by adopting the above Act did not establish the rates to be charged to consumers in the water . . . districts involved, although it had the right to do so; but it did direct the City of Asheville not to charge rates to the persons, firms, and corporations in these districts in excess of the rate or rates fixed from time to time by . . . Asheville to be paid by persons, firms, and corporations within the corporate limits of the City. The governing body of . . . Asheville is free to raise or lower its present rates if in its judgment the rates are too high or too low.

*Id.* at 409, 101 S.E.2d at 478 (emphasis added).

The Supreme Court further held that "since a municipality has no legal right . . . to sell water to consumers residing outside its corporate limits without legislative authority, the Legislature has the power to fix the terms upon which such sales shall be made . . ." *Id.* at 410, 101 S.E.2d at 479.

The Supreme Court observed that it had consistently held that the North Carolina Constitution did not forbid the General Assembly from "conferring upon municipal corporations additional powers, or restricting the powers theretofore vested in them." *Candler*, 247 N.C. at 409, 101 S.E.2d at 478. (emphasis added) The Court explained that the rationale underlying these types of enactments:

is that the needs of the different communities are so diverse that no legislature could foresee the emergencies that would arise in

maintenance of the water and sewer lines by general levy as provided by Sullivan I. Candler, *supra* at 401.

From the adoption of Sullivan I through August 1955, the City of Asheville complied with the terms of Sullivan I and charged consumers of water outside the City of Asheville (including those outside the areas regulated by Sullivan I) the same rates as similarly situated consumers inside the City of Asheville. In August 1955, the Asheville City Council adopted an ordinance effective 1 September 1955 establishing substantially higher rates for those consumers outside the City of Asheville. That gave rise to a lawsuit filed by these defendants' predecessors in interest challenging the ordinance as contrary to the provisions of Sullivan I. The City, as its defense, challenged the constitutionality of Sullivan I.

The trial court in Candler held that Sullivan I was unconstitutional as a violation of then Section 17 of Article I of the Constitution of North Carolina and of the 14th Amendment to the United States Constitution. Candler, *supra* at 404. The Supreme Court reversed, holding that Sullivan I was constitutional.

In its Candler analysis, the Court discussed the Legislature's authority to establish rates for public utilities, stating:

The fixing of rates is a legislative act . . . . Exercising its rate-making authority, the legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The Court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents. When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive.

*Id.* at 407-08, 101 S.E.2d at 477 (quoting *St. Joseph's Stockyard Company v. United States*, 298 U.S. 38, 80 L.Ed. 1033 (1936))

The Supreme Court further noted that the Legislature had statutorily authorized municipalities owning water systems to provide water to recipients outside city limits. *Id.* at

different localities or the necessity for additional powers dependent on changing conditions, and could not provide for them by general legislation, and the present case is an apt illustration of the wisdom of this course.

*Id.* at 410, 101 S.E.2d at 478 (citing *Kornegay v. Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920)).

The Legislature's basis for enacting *Sullivan I* involved a recognition that customers outside Asheville were paying a significant portion of the costs incurred in constructing, operating, repairing, and maintaining Asheville's water system and that Asheville itself had not contributed to the construction, repair and maintenance of the system. *Id.* at 410-11, 101 S.E.2d at 479.

The Supreme Court determined that Asheville was not required to sell water to customers outside its city limits but that if it chose to do so, it was bound to comply with the terms of *Sullivan I*. *Id.* at 411-12, 101 S.E.2d at 479-80. The Court in *Candler* concluded that "[i]n our opinion . . . the Legislature had the power to enact [*Sullivan I*], and that [*Sullivan I*] is constitutional and valid and is binding on the City of Asheville . . ." *Id.* at 411, 101 S.E.2d at 479.

From the time of *Candler* until the present, the City of Asheville has continued to charge uniform rates to consumers of water from the public utility water system, within and without the corporate limits of Asheville.

From *Candler* until 1981, the City directly supplied water to consumers at uniform rates in compliance with *Sullivan I*, and the County fulfilled its maintenance obligations under *Sullivan I* by making payments to the City for maintenance of the lines. In 1981, the City, the County, and the water districts negotiated the "Water Agreement." (See Affidavit of Jon Creighton, paragraph 5) Among other things, that agreement created the Asheville/Buncombe Water Authority through which water was then provided to the citizens of Asheville and to all citizens of Buncombe County serviced by the joint water facility, all at uniform rates. The Water Agreement was amended for various reasons on multiple occasions, but remained in force and effect through 30 June 2005 when it ended due to termination by

the City of Asheville. In June 2005, shortly before the termination of the Water Agreement, the General Assembly enacted Sullivan II and Sullivan III, while keeping Sullivan I in effect as well.

In *Candler*, the Supreme Court held that the Legislature had the authority to establish rates for municipally owned utilities. In considering all of the facts and circumstances of the case at that time in passing on the constitutionality of Sullivan I, the Court considered that the City of Asheville had contributed nothing to the construction of the systems in the water districts and that the City only served to pump water into the system, read the meters, and bill the customers. *Candler, supra* at 411. The Court also considered that slightly over 28% of the meters through which the City of Asheville furnished water were outside its corporate limits and that slightly over 27% of its total income for the water system was from consumers outside the City. *Candler, supra* at 411.

Those same factual underpinnings continue to exist today, except that even a greater percentage of the consumers from the public utility water system reside outside the City of Asheville.

Since *Candler* was handed down by the Supreme Court, lines have been added to the water system by developers and other private entities, by the City, by the County, and the Asheville/Buncombe Water Authority. Lines of the water system outside the City have been maintained by the City at either County expense or by the Asheville/Buncombe Water Authority.

From 1973 through 1998, the County paid to the City in excess of \$26,000,000.00 (more than \$24,000,000.00 of which was from County funds exclusive of grants) for capital improvements to the water system, for maintenance of the water system, and for other expenses of the water system. County records prior to 1973 are insufficient to provide detailed information about County contributions to the water system from 1957 through 1972, although the County did make the payments to the City in fulfillment of the County's maintenance obligations under Sullivan I.

From 1983 through 2005 the County paid an additional \$39,846,693.00 directly to the City pursuant to the Water Agreement.

In addition, during the term of the Water Agreement, Buncombe County spent \$9,025,715.00 for capital improvements to recreational facilities the title of which was returned to the City of Asheville upon termination of the Water Agreement.

From 1957 through fiscal year 2005, the City of Asheville did not put any funds into the water system. In fact, in addition to the net operating revenue for that period of time of almost \$114,000,000.00 (income less expenses), there were a number of payments made from the "water fund" as part of the "operating expenses." The City did so primarily through three budget items:

Administrative-reimburse general and other funds	Department wide expenditures	Tax and franchise benefits-paid to general fund
\$52,473,739	\$39,324,144	\$12,372,231

In 1999 the Mills River water treatment facility was added to the Asheville/Buncombe Water System. The Mills River facility was a water treatment plant developed under the aegis of the Asheville/Buncombe Water Authority for an approximate cost of \$31,000,000.00. It added in excess of 5 million gallons per day of capacity to the water system, increasing the total capacity of the system by 15-20%. The site, just outside Buncombe County in Henderson County, was chosen by the water authority in part for its location only a few hundred feet from the French Broad River, which leaves it relatively easy to add even substantially greater capacity to the water system in the future. The Mills River facility was financed with revenue bonds, which bonds are required to be retired exclusively with payments from water system revenue and not the general fund of the City of Asheville.

At present, over 43% of the meters through which Asheville furnishes water are outside its corporate limits, and the City derives over 42% of its revenues from the sale of water to consumers outside its corporate limits.

The history of the Asheville-Buncombe Water system for the last fifty years is, in principal, the same as set out in

Candler. Financially, if anything has changed, it is that the County has contributed to the system to an even greater extent, while the City has continued to be a net taker of funds from the public utility water system. The City has continued to take funds from the public utility water system while, as is clear from the record, the system has fallen farther and farther into disrepair. With the City of Asheville's lawful, unilateral termination of the Water Agreements which were to expire on June 30, 2005, the General Assembly, on 29 June 2005, enacted Sullivan II and Sullivan III.

As strange as it might seem to an outsider, both Sullivan II and Sullivan III were heard in Senate committee, reported to the Senate floor, passed second and third readings, were sent back to the House for concurrence, were concurred with by the House and were ratified all in a single day, that day being the day before the expiration of the Water Agreements between Asheville and Buncombe County. It goes without saying that this legislation was passed "faster than a speeding Teflon coated bullet" and that no one from the City of Asheville saw it coming on Jones Street in Raleigh.

Reduced to essentials, it is fair to say that in this matter, Buncombe County had the political inside track in the General Assembly and as such, there was no robust, fair fight before the railroad train carrying Sullivan II and III from Jones Street to the City of Asheville left the station at warp speed.

The question then becomes - even if the enactment of Sullivan II and III seems so unfair to the City of Asheville, can the General Assembly do such a thing so fast and does the General Assembly have the power enact such legislation so as to intercede on the side of one party in an ongoing dispute between a city government and a county government?

In the event a Court entered an Order or Judgment determining the rights of one party to a dispute over the other, without notice, hearing or other due process of law, its Order or Judgment would be vacated by the Appellate Courts on grounds too numerous to mention here.

Nevertheless, this Court, while holding its nose, has reached the conclusion that in the legislative theater of

conflict, the legislature has the power and authority to act in the manner in which it did with respect to Sullivan II and Sullivan III and will grant the defendants' motions for summary judgment.

**DECISION**

**I. THE CITY OF ASHEVILLE HAS STANDING TO BRING THIS ACTION UNDER THE SPECIFIC CIRCUMSTANCES OF THIS CASE.**

The defendants have contended that the City of Asheville has no standing to challenge the limitations placed on it by Sullivan I, II and III. The Court recognizes the general rule that any municipality is a creature created by the legislature, and as an agency of the state, cannot question the limitations placed by the legislature on the powers granted to it. *Wood v. City of Fayetteville*, 43 N.C.App. 410, 419 259 S.E.2d. 581, 586 (1979).

Despite the general rule, under the facts of this particular case and the specific nature of the legislation at issue, the Court concludes as a matter of law that the City of Asheville has standing to bring this action on two separate grounds: The first is that a municipality that has been "sliced and diced" as the City of Asheville has in this instance, is entitled to challenge that specific legislation in the Superior Courts of North Carolina.

The second is independent of the first. The Court concludes, as a practical matter of judicial economy and litigation expense, dismissing the lawsuit on the basis of standing would only result, in the Court's opinion, in an undue delay in reaching the underlying issues relating to the legislation at issue here. As Asheville did in *Candler v. City of Asheville, supra*, Asheville need only defy the law and enact a rate change that would violate Sullivan II to invite another lawsuit that would replicate the *Candler* case. Given the hard work and expense that the parties have been put to so far in this litigation, the Court concludes that the City of Asheville, since it has not accepted any of the so called "benefits" of the legislation, is entitled to challenge this legislation. In making this determination, the Court is well aware of the decision in *In re: Appeal of Martin*, 236 N.C. 66, 73-74 209 S.E.2d. 766, 772 (1971)

**II. SULLIVAN I, SULLIVAN II, AND SULLIVAN III ARE**

CONSTITUTIONAL IN THAT (A) THEY ARE A VALID EXERCISE OF LEGISLATIVE AUTHORITY, (B) THEY ARE NOT LOCAL ACTS IN VIOLATION OF ARTICLE II, SECTION 24 OF THE NORTH CAROLINA CONSTITUTION AND (C) SULLIVAN I, II AND III DO NOT VIOLATE ARTICLE I, SECTION 19 OF THE NORTH CAROLINA CONSTITUTION. *Candler v. City of Asheville*, 247 N.C. 398, 101 S.E.2d 470 (1958).

The Court concludes as a matter of law that the three acts in question are constitutional. Here's why.

Article VII, Section 1 of the North Carolina Constitution states in pertinent part as follows:

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 provided by this Constitution, may give such powers and duties to counties, cities, and towns, and other governmental subdivisions as it may deem advisable.

N.C. CONST. art. VII, § 1.

The Court concludes that *Candler* makes clear that none of the Sullivan Acts at issue in this litigation are prohibited by Article II, Section 24 of the Constitution.

The Court further concludes as a matter of law that the Sullivan Acts do not relate to health and sanitation and do not regulate trade.

In *Candler, supra*, the Supreme Court expressly stated the following with regard to Sullivan I: "[N]or does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate." *Candler*, 247 N.C. at 410, 101 S.E.2d at 479. (emphasis added) Sullivan I and II are essentially identical in terms of the requirements imposed on Asheville's ability to set rates applicable to non-city consumers regarding the sale of water. Asheville can determine how much it will charge for a gallon of water to a customer, but the rates charged across the board, as well as what Asheville must do with respect to its customers and the funds collected are a governmental function subject to legislative control.

Accordingly, the Court concludes as a matter of law that the provisions and limitations imposed on the City of Asheville

in Sullivan I, Sullivan II and Sullivan III are within the power of the Legislature to enact. *Candler v. City of Asheville, supra.*

Additionally, the Court concludes as a matter of law that Sullivan I, II and III do not violate the "law of the land" clause set out in Article I, Section 19 of the Constitution. Unless a legislative enactment makes classifications based on factors such as race, gender, or illegitimacy or infringes on a fundamental right, courts simply apply a rational basis test in determining whether the enactment is constitutional. Under this standard of review, "the party challenging the regulation must show that it bears no rational relationship to any legitimate government interest. If the party cannot so prove, the regulation is valid." *Department of Transportation v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001). In this regard, the Court concludes that Asheville cannot meet its burden under this standard in that there is plainly a rational basis for the enactment of this legislation although it is one-sided and in favor of one municipal government over another. Having so determined, the Court grants summary judgment in favor of the State of North Carolina and the Buncombe County defendants.

The Court also rejects the arguments by the City of Asheville that: (1) the Sullivan Acts are unconstitutional under the rule announced in *Asbury v. Town of Albemarle*, 162 N.C. 247 (1913); and (2) that Sullivan III unconstitutionally creates special privileges for an ineligible class of persons in violation of the exclusive emoluments prohibition contained in Article I, Section 32 of the North Carolina Constitution. In this regard, the City of Asheville is reading much too much gloom and doom into the provisions of Sullivan III with respect to lack of statutory immunity on the record before this Court.

Reduced to essentials, after considering all of the City of Asheville's arguments and challenges to the Sullivan Acts, the Court concludes as matter of law that the Sullivan Acts are constitutional in all respects and are a legitimate exercise of legislative power over the City of Asheville, a municipal government which operates for the administrative convenience of the State of North Carolina. Having so determined, summary judgment is appropriate.

**DISCUSSION**

The Court, after reviewing the North Carolina Constitution and case law submitted, has been convinced, once again, that when it comes to exercising control over municipalities, school boards, counties and other governmental entities created by the Legislative Branch for its convenience, the Legislative Branch has the authority, subject to the specific provisions limiting that authority in the North Carolina Constitution, to enact the specific type of legislation as evidenced by Sullivan I, II and III.

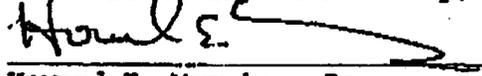
While the passage of legislation, such as the Sullivan Acts, that intercedes in and resolves a dispute in favor of one governmental entity against another, goes against the very fiber of the concept of due process that is required in disputes brought in the judicial branch of government, such legislative conduct is permitted and sanctioned, as long as it does not exceed the limits set in stone in the North Carolina Constitution.

It follows, therefore, that the City of Asheville, having no success in the judicial branch of government in this fight, must now seek relief and redress from the source of its pain - the General Assembly of North Carolina. For as this Court views the situation, only the General Assembly can restore to the City of Asheville what it has taken away with respect to the City of Asheville's rights to its water system. Such is the nature of politics.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED THAT**

1. The City of Asheville's motion for summary judgment is denied.
2. The State of North Carolina's motion for summary judgment is granted.
3. The County of Buncombe's (all defendants) motion for summary judgment is granted.
4. This action is dismissed.
5. The Court, in its discretion, has determined that each party shall bear its own costs.

This the 28 day of February, 2007.

  
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 Howard E. Manning, Jr.  
 Superior Court Judge

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has this day served the foregoing **MEMORANDUM OF DECISION AND ORDER RE: SUMMARY JUDGMENT** in the above titled action upon all other parties to this cause by facsimile transmission as permitted by Rule 5, North Carolina Rules of Civil Procedure:

Mark A. Davis  
Special Deputy Attorney General at 919/716-6763  
State of North Carolina  
Raleigh, N.C.  
Defendant: State of North Carolina

Daniel G. Clodfelter at 704/331-1159  
T. Randolph Perkins  
Mark A. Nebrig  
Robert W. Oast, Jr. c/o  
Moore & Van Allen  
Charlotte, N.C.  
Plaintiff: City of Asheville

Robert B. Long, Jr. at 828/253-1073  
W. Scott Jones  
Long, Parker, Warren & Jones  
Defendants: Buncombe County, et al.

This the 2d day of February, 2007.

  
Howard E. Manning, Jr.  
Superior Court Judge

June 24, 2005

Mr. Nathan Ramsey  
Buncombe County Commissioners  
60 Court Plaza  
Asheville, NC 28801

RE: Water Agreement Negotiations

Dear Chairman Ramsey:

Thank you for your letter of June 23, 2005.

You are correct that we are running out of time to resolve issues regarding the water agreement; unfortunately, the County's letter does not get us any closer to a resolution.

In praiseworthy efforts to find some common ground, individual Council members and Commissioners have – publicly and privately – put forth proposals for the elected bodies to consider. These proposals all have some merit and all show a genuine willingness to elevate the interests of the citizens that we all serve over our political differences. Where there's a will, there must be a way, and I hope we can find it.

The last proposal made by the City Council was transmitted to the County Commissioners on May 17. That proposal offered serious compromises by the City on virtually every issue identified as being of importance to the County, including: limits on differential rates, limits on annexing as a condition of service, the ability for the County to participate meaningfully in the rate setting and line extension policies, and limits on interfund transfers. We are still waiting on a serious response to this proposal. Instead, as to those important issues, the County's position is, and always has been "all or nothing," and the County has never indicated a willingness to compromise. Regrettably, your June 23 letter continues this non-responsive approach.

The City terminated the Water Agreement in accordance with its terms, as agreed to by the City and the County in 1981, and again in 1996. The City Council's resolution authorizing notice of termination also held out the hope and expectation that the Agreement would be re-negotiated. However, rather than engage in any sincere effort to re-negotiate the agreement, the Commissioners first deferred those efforts until after the November election, and then worked with our legislative delegation – and behind our backs – on the drafting and introduction of Sullivan Acts II and III. Whatever strength your "all or nothing" position has depends entirely on those bills becoming law

and withstanding certain legal challenge. We are prepared to work against the adoption of those bills, and to challenge them if they become law.

Even if Sullivan Acts II and III become law, all that you will have gained is a water system that treats every user unfairly – unfairly burdening your City constituents who already pay some of the highest rates in the State, while unfairly benefiting your County constituents, who will not have to pay their fair share. Additionally, Sullivan Acts II and III virtually assure that sound land use planning will have a harder time in Buncombe County, jeopardizing the asset that is most precious to all of us, our scenic beauty and environment.

You are again correct that the legal battles necessary to resolve the issues if we cannot agree will be long and costly. When the dust settles, and when City of Asheville has established its legal right to operate its water system like every other city in North Carolina – and despite what has been said, Asheville and Buncombe County are not that different from the rest of the State – you will have to explain publicly why you passed up the opportunity to reach an agreement that was fair for everyone.

We look forward to our joint meeting on June 28 and an opportunity to make meaningful progress, and we hope that the Commissioners feel the same.

Sincerely,

*Charles R. Worley*

Charles R. Worley  
Mayor

*Dr. Carl Mumpower*

Dr. Carl Mumpower  
Vice Mayor

*Jan Davis*

Jan Davis  
Councilman

*Holly Jones*

Holly Jones  
Councilwoman

CRW:lm

*Terry Bellamy*

Terry Bellamy  
Councilwoman

*Dr. Joe Dunn*

Dr. Joe Dunn  
Councilman

*Brownie Newman*

Brownie Newman  
Councilman

Special Meeting

Present: Mayor Terry M. Bellamy, Presiding; Vice-Mayor Diana Hollis Jones; Councilwoman Robin L. Cape; Councilman Jan B. Davis; Councilman Bryan E. Freeborn; Councilman R. Carl Mumpower; Councilman Brownie W. Newman; City Manager Gary W. Jackson; City Attorney Robert W. Oast Jr.; and City Clerk Magdalen Burleson

Present: Buncombe County Chairman Nathan Ramsey, Presiding; Vice-Chair Bill Stanley; Commissioner David Gantt; County Manager Wanda Greene; County Attorney Joe Connolly; and County Clerk Kathy Hughes (Absent: Commissioner Carol Peterson and Commissioner David Young).

Present: Senator Tom Apodaca; Senator Martin L. Nesbitt, Jr.; Representative D. Bruce Goforth; Representative Susan C. Fisher; and Representative Wilma M. Sherrill

Mayor Bellamy called the meeting to order at 9:00 a.m. in the Laurel Forum at UNC-Asheville. Councilman Freeborn then moved to adjourn the meeting to Conference Room 110 in order to go into closed session to consult with an attorney employed by the City about matters with respect to which the attorney-client privilege between the City and its attorney must be preserved, including litigation involving the following parties: City of Asheville; and State of North Carolina. The statutory authorization is contained in G.S. 143-318.11(a)(3). This motion was seconded by Vice-Mayor Jones and carried unanimously.

At 9:50 a.m. Councilman Davis moved to come out of closed session and reconvene the meeting in the Laurel Forum. This motion was seconded by Councilwoman Cape and carried unanimously.

At 10:00 a.m. Mayor Bellamy and Chairman Ramsey called their respective boards to order to discuss water-related issues.

Mayor Bellamy outlined some issues that are important in impacting our area. Looking at the issue of water, the City is looking at a governance structure that will be a municipal-run system. The City has done a great deal to improve our system and we want to outline a couple things: (1) Asheville is the first city to have an active asset management program and it's structured to approach is to optimize the life-cycle costs of asset ownership necessary for providing reliable and dependable service to our customers; (2) we have environmental management standards for the ISO 14001 Certification; (3) we have computerized our maintenance system; (4) we have a capital improvement program in which we have over \$6 Million that we are investing back into the system; and (5) we had an excellent peer review by QualServe. She felt it was important for individuals to know what we have done in the past 6-12 months regarding our system.

Regarding rate differentials, Mayor Bellamy said that when you look at differentials across the State of North Carolina, the average differential is 85% (they use that to offset costs). City Council is willing to give up our rate differential ability (which is about 85%) and for that 85%, it would cost us over \$6 Million. Today we would like to see a tax equity payment of \$6 Million for us to give up the rate differential ability. We are willing to talk about how we can get there.

Mayor Bellamy said another issue that has been important to the City is the Joint Planning Area (JPA). The City of Asheville is open to look at new approaches and alternatives to the JPA, especially since we are now we are looking at extending some of our services that we currently provide into the County.

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Mayor Bellamy said the last issue is the Civic Center. The last proposal that we submitted to the County talked about support for our Civic Center. We are looking to get support for our Civic Center from Buncombe County and our legislative delegation. We do, however, want to express our reservations using sales tax for this support.

Commissioner Gantt said that throughout the whole discussions they have had four guiding principles. The County has presented the City with 9 separate offers, all that have been unanimous decisions, and they have all been rejected by the City. Eight offers were rejected and one offer accepted by then Councilman Joe Dunn. The most guiding principles for us is an independent Water Authority. Every time a city runs a water department they have to pay betterment costs to the N.C. Dept. of Transportation. The number we have is \$4 Million. That is \$4 Million right off the top. The repairs needs are around \$350 Million that need to be put into the system. If we had an independent authority, we could put the money towards fixing the system since everyone wants to fix the system and make sure it doesn't get run down again. We always thought the MSD type model would be best. The money they receive is put right back into repairs and they have a capital plan to put \$260 Million in over the next 20 years. The County is so insistent on an independent board because we have seen how well MSD works and the results to the

rate payers.

Commissioner Gantt said that another guiding principle for the County is no differential rates. The Sullivan Act has been law since the 1930's. We don't feel that for a necessary service that people should pay differential rates. There is no utility, except for a government run utility, that pays differential rates for services. Based on the history of our County, who paid for the system to begin with, there should be no differential rates.

Commissioner Gantt said their third guiding principle is that there be no forced annexation to receive water services. Water is a basic necessity and everyone should be entitled to it.

Commissioner Gantt said that finally, we want everyone to be treated equal. Someone is going to have to pay for this big mess we're in and we want everyone to be treated fairly. We will have to work together to do this. The offers we have made in the past have included taking over the Civic Center. Some of the offer packages were up to \$50 Million and the County Manager has a copy of the eight specific proposals we have given and the one we accepted from then Councilman Joe Dunn. We have talked dozens of times because we want to work this out. As far as the specific proposal, basically if \$6 Million is desired to be paid up front, that money would be paid by people that will probably never have water service and never got a benefit from it. We already have 3 other water systems within the City and we represent those people too. To say that we're going to give a whole lot of money from their coffers didn't seem right to us. We want everyone to be treated equally and fair and we are very interested in an independent board because that is the way we see the opportunity to fix up what we have. We are, however, interested in continuing talking.

Senator Nesbitt said that their position is well-known in that they put it into legislation. He said we do have a unique history in that in the 1930's our founding fathers made a deal. When everyone went broke they put all the water systems together. Prior to that time the City charged differential rates. When they pooled their reasons, they decided not to do that. The County residents gave up their water systems (he believed there were five) and gave them to the City. When the County residents gave up their ability to have their own water system based on that commitment, it seems unfair that 70 years later to say we are now going to increase your rates. That is where we were coming from. It's all about how you treat people. We did what we thought was best for the community. Asheville is not the only city in the state where this occurs. The City of Charlotte in Mecklenburg County have gone through a number of voluntary agreements to take over other people's water system for the agreement that they would phase out differential rates

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and they did it over a 10-year period. At the end of that time, Charlotte will not be charging differential rates.

Representative Goforth was concerned about the negative attitude from Council toward the legislators. He felt it was the City's poor planning when they terminated the water agreement, knowing there would be an upfront loss of \$2.5 Million. In addition, we are now in a lawsuit costing everyone money. He urged the City and the County to go back to the table and work out something fair for everyone.

Mayor Bellamy said that this meeting is a point to move forward. The City does have a shortfall in our budget, but we were not anticipating Sullivan Acts II and III taking away \$1.1 Million. We have recently paid for and received completed a study that said the City needs to put \$59 Million back into our system, not \$300 Million inaccurately quoted. She hoped that as we move forward that accurate information is given. She requested a copy of the 9 proposals the County offered.

Senator Apodaca felt we need to look at the way the whole process started when the City gave notice of the termination of the water agreement and the way the legislators were kept out of it. He hoped everyone could put that behind them and move forward.

Representative Sherrill agreed that the biggest disappointment is the negative attitude the legislators have received from Councilman Mumpower, which is a bad reflection on all of City Council. She was totally against using water for forced annexation. She hoped we can move forward. We would all like to see something happen with the Civic Center and they have been begging for years for the figures and plans on what the City as a whole wants to do with the Civic Center.

Representative Fisher felt that we have the potential to get along and supported moving forward.

Councilman Mumpower passed out information on his position on the water issues. He said that he intends to continue insulting the actions of our legislative body against the citizens of Asheville. Our state legislators got involved in a local matter. Had they not trumped the process we would be at a much different place today in treating people in a fair and responsible manner. He said a few cities in North Carolina own and don't manage their own assets. Regarding the City of Charlotte, Charlotte

is taking over the County of Mecklenburg. There is one in Chapel Hill which is a University owned system. Aside from those two, every other city in North Carolina of any size, including Hendersonville, Weaverville and Canton, own and manage their assets and it works. He stressed that Asheville is being treated differently and that is not fair. He said that he has never made a public personal attack on anyone. When our legislators passed Sullivan Acts II and III, they created a permanent division between the City and the County. He didn't create that, the legislators did and all he has done is to shine a light on it.

Commissioner Gantt said that 44% of the water ratepayers live outside the City limits. He agreed that this issue is not City vs. County, but is a matter of politics and control over the water facilities. He hoped we can get beyond the control issue.

Regarding differential rates, Councilman Newman said that is a core issue because we need some kind of rate structure to fix the system. Everyone is interested in treating the customers fairly, although we may have different opinions about what that fairness is. He shared Asheville's prospective on the rate structure. He said that when the various systems were combined, the basic understanding at that time was that on the lines that had been built and were being paid for by the bonds for the old water districts, the agreement was that the City could never charge differential rates on those lines (because there had been specific bond issue for

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those specific lines). But Asheville's prospective is that there was never necessarily an agreement that on any future lines – 100 years in the future – that they couldn't start charging differential rates. Not that everyone will agree with that, but that is the other prospective. When the Regional Water Authority was created there was an administrative agreement between the different local governments not to charge differential rates. We feel the City's offer today is a big concession on our part. He said that City Council is willing to not challenge that legal question if we can work out an overall agreement that is fair. (At this time – 10:37 p.m. Councilman Freeborn left the meeting).

Mayor Bellamy said that other municipalities in Buncombe County charge differential rates. So, if you want no differential rates in Buncombe County then it should be across the board for every municipality in Buncombe County.

Senator Nesbitt felt that every place where they have a differential, the people know it. What we have here is 70 years of history where people built lines and joined the system with no differential rates and now the City wants to charge differential rates.

Councilman Mumpower explained that was why City Council's position is for incremental increases.

Councilwoman Cape said that we have an unusual situation in Asheville in that 50% of our daytime visitors don't live in the City and rely on City services, which are paid for by the Asheville taxpayers. We have to figure out a way to be fair and water is one of those pieces.

Vice-Mayor Gantt said that the County did a study of dollars into the County from City residents and County residents and dollars out. He thinks because of the services, it's a basic wash-out because the County does welfare, schools, general health and well-being and more money goes back to the City residents when they pay taxes. He lives outside the City limits, but has his office in the City and School District and receives services. And, actually there is a net increase return on the dollar spent by City taxpayers to the County. Maybe we should jointly study that issue. Mayor Bellamy felt it would be good to furnish the City the County's study so we can look at not only the City and County dollars, but where the State dollars go, because when we look at our infrastructure, that is where we are missing support.

Representative Goforth said that since the City took over the Golf Course we have differential rates. The City owns the property and County is paying the note on it for \$2.5 Million. Mayor Bellamy responded that was the bonds are for McCormick Field. She said that the County was leasing the property from the City of Asheville and the County paid for the upfit. Any building that someone leases, the owner keeps the upfit when the tenant moves out.

Ms. Greene responded to Commissioner Gantt when he asked what the amount is that the County pays for debt service on bonds that the City has ownership of.

Vice-Chair Stanley wondered what the numbers are between City/County residents who go through the Department of Social Services and the Health Department.

Mayor Bellamy noted that we are all partners and despite of what it looks like, there are several ventures the City and County are collaborating successfully.

Senator Nesbitt felt that the City and Council can get over the differential rates hurdle after we solve some of these other

problems. He suggested as a starting point that the City and County sit down and determine what is an equity. A lot of the things went away with the water agreement. The legislators don't have any role in that and it's not for us to decide what the

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equities are. Once that is determined and we can help in some way, we will be willing to do that. The legislator's prospective is that we may be able to help with the Civic Center, golf course, McCormick Field, Nature Center, et al. He suggested putting all of those things together to be dealt with since they are County-wide services to where everyone can look at it. Maybe in that process we can find a way to help you with some of that and that will relieve the \$6 Million problem. If you can solve some of it in another way, it is the same thing as giving you money. We need to help you find some money for the Civic Center or the County has to help you. He said they need a good plan on what to do about the Civic Center. We never had one, but he's not sure Council has reached consensus much less the community. If we are going to do something, we need to do what is right for this community for the next 30-40 years. He would like an expert from the outside to come in and tell us what this region needs. We are ready, willing and able to help in some way and we will try to help you out in that area.

Councilman Davis, Chair of the Civic Center Task Force, explained in detail the exhaustive process used to gather information from the community, culminating in a final report. He noted that they did not look at it from a regional approach. He explained the following two options that were presented to City Council by the Task Force: (1) Build a new arena, build Performing Arts Center and Media Center inside the existing arena, make Thomas Wolfe a flat floor facility; and (2) Renovate the arena, build a new performing arts center on the lot next to City Hall (Parkside) and make Thomas Wolfe a flat floor facility. A third option was to refurbish what we have. He then explained the rough cost estimates. In addition, the City has just had a study completed by Dr. Ha from Western Carolina University, which said that the Civic Center is currently operating at a deficit of about \$400,000 a year, but generates ten times more in visitor spending dollars than it costs to operate the Center (\$19 Million in money generated vs. \$1.9 Million in operating expenditures). In addition to the economic impact of the Civic Center, it also generates over \$4 Million a year in federal, state and local taxes.

Senator Nesbitt felt that the City has done a great job in studying the Civic Center, but to some extent the City has been laboring under what the City could do. What he is proposing is what the state legislators, the County Commissioners, and private sector can do to help. But, before they commit, they want to look at it from that prospective because we are the hub of this region.

Representative Goforth felt that we can lower the rates if we do what is best for the people. If you can get \$5-6 Million from someone who will lease the water system, that makes sense to him.

Senator Apodaca feels that the City and County should concentrate on the water issue by separating out all the other facilities. Then find out where the true costs come and figure out a way to pay for those services but not on the back of water users.

Councilman Newman said that we have to address some of these tax equity issues and if we don't have any rate differentials, it's hard to see how it's fair to Asheville residents.

Vice-Mayor Jones voted to give notice to terminate the water agreement because she didn't feel like the water pipes were getting fixed (3 different governmental bodies were needed to approve the budget) and Asheville City rate-payers pay the highest water rates in the state. She said those two things were why she wanted to renegotiate the water agreement. She said that the City has made a capital improvement commitment of \$6 Million this year to fix those pipes. She feels that the City-run system gives accountability to the voter. She said that the City is offering no rate differentials for a tax equity arrangement. This is a big movement since June of 2005. She felt the City has moved forward and hoped the County would move forward too.

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Upon inquiry of Commissioner Gantt, Water Resources Director David Hanks felt that the City should be investing \$6-8 Million every year for maintenance. Mr. Hanks said that if we have the resources and the ability, we probably have approximately \$200-300 Million of real live needs out there as far as system-wide replacements, which is not uncommon of a water system our size. It's not feasible to do the projects at one time. Our CIP over the next seven years will go for maintenance.

Upon inquiry of Representative Sherrill, Mr. Hanks said that the annual raters pay about \$20 Million per year, plus an additional \$2 Million from development.

Upon inquiry of Representative Goforth, Mayor Bellamy said that we want to keep the water system because it is a City

asset and that is one source that Asheville residents have direct accountability for. Over the last year, we have shown Asheville residents that we can be good stewards of our resources.

Chairman Ramsey said that City Council was extremely unwise not to take the offer of the County to take all the recreation facilities (including the Civic Center) so they could be paid for by the taxpayers throughout the County. Then we could come up with a plan on the Civic Center and go to the local delegation and others to come up with additional funding streams. The only thing they asked for in exchange was a true independent authority and that recreation facilities be governed jointly with the City and the County. The assets would still be owned by the City of Asheville.

Putting aside the non-betterment costs issue, Mayor Bellamy asked why the City shouldn't be allowed to run their own water system.

Chairman Ramsey felt that the City has every right to run their own water system, but when the City gave notice to terminate the water agreement, they faced certain consequences. (At 11:30 p.m., Senator Apodaca left the meeting.)

Vice-Chair Stanley said that we have a new Mayor and a new City Manager. He felt that the City and County Managers and the Mayor and Chairman they should be given an opportunity to work this out and bring to the respective bodies a proposed plan.

Senator Nesbitt said that the City is the one holding the problems. You have a water system you need to repair and civic center, et al. we need to do something with. Those are things as the County Commissioners and legislators have an interest in and we need to turn our attention to these problems. He said that in some reasonable way, under some reasonable plan, the legislators are willing to come to the table and help. In addition to the City and County being able to work it out, there will be help from your legislative delegation to do that. He thinks the City and County need to get together on the Civic Center issue and figure out what needs to be fixed and quantify it for the legislative delegation. We will then be ready to try to help, if that's possible. He said that this session is almost over and the City and Council will have some time to work on it before the next session, which starts in January of 2007

Commissioner Gantt suggested the City and County Managers get the income and expenses (including betterments) and the repair needs for the water system. Then the bodies can talk about the best way to manage it. He said he didn't care that much about how it's managed, but just that it gets fixed for the next 30-40 years.

Councilman Newman said that if we want to try to work this out locally, then we need to stay ahead of the judicial process. We may a little more time on the Civic Center, but some of the core water utility issues, we do need to try to work out as quick as we can. He felt that the City and County Managers need some direction on what each of the bodies can live with. The City

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has come in and said we are committed to fixing the system. We are also willing to have no rate differentials going forward (with a tax equity payment of \$6 Million/year) and will drop our legal challenge around that issue. He asked if any of the proposals that the County made in the past are still alive and what is on the table for negotiations.

Representative Sherrill said that if there is some agreement between the City and County, there may be something small we can find to do in the legislature before we adjourn this year. (At 11:39 p.m., Representatives Goforth and Sherrill left the meeting.)

Vice-Chair Stanley said that he didn't have a problem with the City running the water system, but just wanted to make sure where the money was going.

In response to Councilman Newman's question if any County proposals were still on the table, Commissioner Gantt said that unlike the negotiations, the County has made a conscious effort to not answer unless all five Commissioners agree. He said they would be willing to keep talking but all five Commissioners would need to agree on any proposals.

Chairman Ramsey said that he would not support a \$6 Million tax equity payment unless they can come up with money which they don't have. He would support the water system being a City-run system but that all water revenue must stay in the system with no differential rates. He personally would be willing to compromise on some issues, but not others. Certainly he did not want to necessarily compromise on the one point that within 1/2 mile of the City limits future developments of a certain size would have to agree to be voluntarily annexed before they receive water service. We were on the record at the time accepting that. He is still willing to go in that direction and still willing to go the direction of the independent authority.

Councilman Mumpower said that all the County proposals ask Asheville to perform differently than Canton, Hendersonville, Waynesville, Weaverville, and all the other cities that own their assets in our area. He is not personally willing to support any agreement that says the City of Asheville has to behave differently than everybody else does.

Councilman Davis said that the City does have the tool to annex, if the area meets certain criteria, however, if the City and the County work together, we can have a place where people would want to build new development in the City.

Mayor Bellamy said the next step will be for the two Managers to circulate some dates for the next open meeting with all three bodies, at which meeting the report can be reviewed and we can see what needs to be done next and how we are going to get there.

Senator Nesbitt said that someone has to quantify the amount of the City's recreation facilities (that were transferred back after termination of the water agreement) and have that taken out of the equation before the legislators will know what they can do. We wouldn't just be helping the City with the Civic Center but around the corner we will be helping the City with the water system. If we take the burden off the City on the other facilities it will leave you with money to fix the water system.

Senator Nesbitt suggested the City and County Managers work together on coming up with a consensus group of things that could be put in an authority and how much money that will save the City if you do that. With all due respect, he thinks he would want an independent assessment on what we need to do regionally with the Civic Center.

Upon inquiry of Councilman Mumpower about the cost of the study, Senator Nesbitt said that the County would pay for it. And, it would need to be a new person not used before.

-8-

At 11:51 a.m., Mayor Bellamy and Chairman Ramsey adjourned their respective meetings.

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CITY CLERK

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MAYOR

CITY OF ASHEVILLE, a municipal corporation, Plaintiff, v. STATE OF NORTH CAROLINA, and COUNTY OF BUNCOMBE, et al., Defendants

NO. COA07-516

Filed: 19 August 2008

**1. Appeal and Error—Supreme Court decision—dispositive**

Although plaintiff City of Asheville argues that Candler v. City of Asheville, 247 N.C. 398, incorrectly decided the issues at the time and is not dispositive of any issue in the present case, the Court of Appeals has no authority to overrule decisions of the Supreme Court.

**2. Appeal and Error—prior opinion—not overruled**

In an action involving rates for customers of the Asheville water distribution system who live outside the Asheville city limits, the Court of Appeals held that Candler v. City of Asheville, 247 N.C. 398 was not overruled by language in Piedmont Aviation, Inc. v. Raleigh-Durham Airport Authority, 288 N.C. 98.

**3. Collateral Estoppel and Res Judicata—res judicata—constitutionality claim—not raised in prior case**

In an action involving a series of session laws concerning City of Asheville water rates (Sullivan I, II, and III), the City was precluded by res judicata from challenging Sullivan I under any provision of the North Carolina Constitution because it litigated the constitutionality of Sullivan I in Candler v. City of Asheville, 247 N.C. 398 (1958). Even though it now contends that Candler decided different constitutional questions, the current claims could have been raised in Candler.

**4. Collateral Estoppel and Res Judicata—collateral estoppel—series of session laws on same subject—constitutional challenge to one—subsequent challenge to others on different provisions**

In an action involving a series of session laws concerning City of Asheville water rates (Sullivan I, II, and III), the City was not precluded by collateral estoppel from challenging the constitutionality of Sullivan II and III under a particular provision of the North Carolina Constitution by its failure in an earlier case to argue that Sullivan I violated that provision.

**5. Cities and Towns; Constitutional Law—North Carolina Constitution—water system—local acts not involving health and sanitation**

Session laws concerning the City of Asheville water system and its relationship with surrounding areas (Sullivan II and III) were local acts and were not prohibited by Article II, Section 24, Clause 1 of the North Carolina Constitution as involving health and sanitation. The plain language of Sullivan II indicates that it relates only to economic matters; the mere implication of water or a water system in a legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution. Sullivan III's legislative purpose is not inconsistent with Sullivan II to a certainty, and any reasonable doubt must be resolved in favor of presumed constitutionality.

**6. Cities and Towns; Constitutional Law—North Carolina Constitution—water system—local acts not involving trade**

Session laws concerning the City of Asheville water system and its relationship with surrounding areas (Sullivan II and III) were local acts and but were not prohibited by Article II, Section 24, Clause 1 of the North Carolina Constitution as involving trade. Asheville, acting in its proprietary capacity to operate the water distribution system, is not a citizen of the State engaging in trade for the purpose of Article II, Section 24 of the North Carolina Constitution.

**7. Cities and Towns—water system—surrounding area—session laws limiting proprietary decisions**

Session laws involving the operation of the City of Asheville water system (Sullivan II and III) did not impermissibly intrude on the decision-making authority of Asheville under the North Carolina Constitution with respect to its purely proprietary and private activities. While these session laws preclude certain decisions regarding Asheville citizens and customers outside the city limits, judges are not legislators.

**8. Appeal and Error—brief—argument abandoned**

Asheville abandoned on appeal its contention that session laws concerning its water system violated the law of the land clause in the North Carolina Constitution by not presenting and discussing that argument in its brief. As the challenging party, Asheville had the burden of establishing the unconstitutionality of the statute.

**9. Cities and Towns; Constitutional Law—North Carolina Constitution—session law—local water system—not an exclusive emolument**

Modifications to N.C.G.S. § 160A-312(a) under a session law (Sullivan III) do not violate the prohibition on exclusive emoluments in the North Carolina Constitution. Those modifications do not confer a exclusive benefit on water consumers located outside Asheville's corporate limits which is not already shared by water consumers located within Asheville's corporate limits.

Appeal by plaintiff from order entered 2 February 2007 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 4 February 2008.

*Robert W. Oast, Jr., City Attorney for the City of Asheville, and Moore & Van Allen, PLLC, by Daniel G. Clodfelter, Mark A. Nebrig, T. Randolph Perkins, and Jeffrey M. Young, for plaintiff-appellant.*

*Roy Cooper, Attorney General, by Mark A. Davis, Special Deputy Attorney General, and W. Dale Talbert, Special Deputy Attorney General, for defendant-appellee State of North Carolina.*

*Long, Parker, Warren & Jones, P.A., by W. Scott Jones, and Robert B. Long, Jr., for defendants-appellees Buncombe defendants.*

*Andrew L. Romanet, Jr., General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel, for North Carolina League of Municipalities, amicus curiae.*

MARTIN, Chief Judge.

Plaintiff City of Asheville ("Asheville") appeals from the trial court's 2 February 2007 order denying its motion for summary judgment, granting cross-motions for summary judgment by the State of North Carolina and the County of Buncombe with several affiliated officials and individuals (with the State of North Carolina, collectively "defendants"), and dismissing the action.

According to the parties' Amended Complaint and Answers, Asheville operates and at least partially owns a water treatment and distribution system for the treatment and supply of water for drinking, cooking, and cleaning purposes, and for the operation of sanitary disposal systems for individuals and entities within its corporate limits and for some individuals and entities outside of its corporate limits. According to the September 2005 certified Water System Management Plan from Asheville's Water Resources Department, Asheville operates this water distribution system as a public enterprise. The system "serves all of the City of Asheville, approximately 60% of Buncombe County and less than 1% of Henderson County. The major water supply is the City's watershed, which is comprised of 20,000 acres of mountainous forestland in eastern Buncombe County." "The water distribution system . . . is comprised of over 1,200 miles of transmission and service lines, 24 pump stations, 21 storage reservoirs, and associated equipment.

[Asheville's] watershed, treatment plants, transmission and service lines, pumping stations and reservoir storage systems combine to make th[e] system one of the largest in North Carolina."

This case arises out of Asheville's desire to "determine the rates it would charge to supply water to customers located outside the Asheville city limits" unencumbered by any "restrictions . . . [or] requirements imposed on Asheville resulting from the passage and enforcement" of three session laws (collectively "the Sullivan Acts") enacted by the North Carolina General Assembly: (1) House Bill 931, Chapter 399 of the 1933 Public-Local Laws (hereinafter "Sullivan I"); (2) House Bill 1065, Session Law 2005-140 (hereinafter "Sullivan II"); and (3) House Bill 1064, Session Law 2005-139 (hereinafter "Sullivan III").

Sullivan I, captioned "An Act to Regulate Charges Made by the City of Asheville for Water Consumed in Buncombe County Water Districts," provides:

SECTION 1. That from and after the passage of this act it shall be unlawful for the City of Asheville or any of the governing authorities, agents, or employees, thereof, to charge, exact, or collect from any resident of Buncombe County, whose property is now connected or may hereafter be connected with the main of any water district which has paid or issued bonds for the payment of the expense of laying such main, a rate for water consumed higher than that charged by the City of Asheville to persons residing within the corporate limits of said city.

SEC. 2. That the City of Asheville is hereby specifically authorized and empowered, through its officers, agents and employees, to cause any user of water who shall fail to pay promptly his water rent for any month to be cut off, and his right to further use of water

from the city system to be discontinued until payment of any water rent arrearages.

SEC. 3. That it is the purpose and intent of this act to declare that persons residing outside of the corporate limits of the City of Asheville shall be entitled to the use of Asheville surplus water only, and the governing body of the City of Asheville is authorized and empowered to discontinue the supply of water to any districts, or persons, out of the corporate limits of the City of Asheville at any time that there may be a drought or other emergency, or at any time the governing body of the City of Asheville may deem that the city has use for all of its water supply.

SEC. 4. That it shall be the duty of the County Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville, in Buncombe County, to maintain the water lines in proper repair in order that there may not be a waste of water by leakage.

Sullivan Act, ch. 399, 1933 N.C. Public-Local Laws 376.

Sullivan II, captioned "An Act Regarding Water Rates in Buncombe County," provides:

SECTION 1. From and after the effective date of this act, it shall be unlawful for the City of Asheville, or any of the governing authorities, agents, or employees thereof, to charge, exact, or collect from any water consumer in Buncombe County currently or hereafter connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto a rate for water consumed higher than the rate charged for the same classification of water consumer residing or located within the corporate limits of the City of Asheville. Classification of water consumer as referred to herein means the type of facility to which the water is provided (e.g., single-family residence, multiple-family residence, retail, commercial,

industrial) without regard to geographic location within Buncombe County.

SECTION 2. The City of Asheville may, through its officers, agents, and employees, cause any user of water who shall fail to pay promptly his water rent for any month to be cut off and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages, all consistent with G.S. 160A-314(b).

SECTION 3. It shall be the duty of the Board of Commissioners of Buncombe County and/or the trustees of the different water districts operating outside of the corporate limits of the City of Asheville in Buncombe County to maintain the waterlines owned by the County of Buncombe and such water districts in proper repair in order that there may not be a waste of water by leakage.

SECTION 4. To the extent that the Sullivan Act (Chapter 399 of the Public-Local Laws of 1933) does not conflict with this act, it continues to apply.

Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246-47.

Finally, Sullivan III, captioned "An Act Regarding the Operation of Public Enterprises by the City of Asheville" and enacted on the same day as Sullivan II, modified N.C.G.S. §§ 160A-312, 160A-31(a), and 160A-58.1(c). The only section of Sullivan III at issue in the present case modifies N.C.G.S. § 160A-312 to provide, in relevant part:

- (a) A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to furnish services to the city and its citizens and other areas and their citizens located outside the corporate limits of the city. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve,

maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations.

(b) A city shall have full authority to protect and regulate any public enterprise system belonging to or operated by it by adequate and reasonable rules. The rules shall be adopted by ordinance, and shall comply with all of the following:

- (1) The rules shall apply equally to the public enterprise system both within and outside the corporate limits of the city.
- (2) The rules may not apply differing treatment within and outside the corporate limits of the city.
- (3) The rules shall make access to public enterprise services available to the city and its citizens and other areas and their citizens located outside the corporate limits of the city equally.
- (4) The rules may prioritize the continuation of the provision of services based on availability of excess capacity to provide the service.
- (5) The rules may be enforced with the remedies available under any provision of law.

...

(d) A city shall account for a public enterprise in a separate fund and may not transfer any money from that fund to another except for a capital project fund established for the construction or replacement of assets for that public enterprise. Obligations of the public enterprise may be paid out of the separate fund. Obligations shall not

include any other fund or line item in the city's budget.

Sullivan III, ch. 139, 2005 N.C. Sess. Laws 243-44.

Our discussion of the issues involved in this case would not be complete without some historical background. The history of this case began over eighty years ago. Asheville's City Manager Gary W. Jackson, Asheville's Director of the Water Resources Department David Hanks, Buncombe County's representative in the State Senate Martin L. Nesbitt, Jr., Buncombe County's Finance Director Donna Clark, certified public accountant G. Edward Towson, II, and Buncombe County's Assistant County Manager and Director of Planning Jon Creighton provided testimony by sworn affidavits regarding the history of the development, ownership, construction, maintenance, and operating costs of the water distribution system and the Asheville/Buncombe Water Authority.

As set out more fully in *Candler v. City of Asheville*, 247 N.C. 398, 400-04, 101 S.E.2d 470, 471-75 (1958), which chronicled the first thirty-five years of the history of this case, with the increase in development in Asheville and Buncombe County, between 1923 and 1927, pursuant to acts of the General Assembly, six water and sewer districts were formed in Buncombe County. See *id.* at 400, 101 S.E.2d at 471. As the trial court stated, "[t]hese districts had certain geographical boundaries outside the City of Asheville and were authorized to acquire rights of way for water and sewer lines, to construct the lines, and hold elections authorizing the issuance of bonds paying therefor." Citing *Candler*, the court further stated that "[t]he districts did issue

the bonds and build water lines for the distribution of the water, which lines were connected to the water system initially established by the City of Asheville." The record also establishes that each of the six districts was a body politic, governed and administered by its own trustees who determined policy.

Following Asheville's "land boom" and the Depression at the end of the 1920's, all local governments in Buncombe County and all of the water and sewer districts were bankrupted. The Buncombe County Commissioners, who also served as trustees of the various water districts, levied taxes to pay the principal and interest on the bonds issued by the water districts within the districts, and to pay for the maintenance of the water and sewer lines as provided by Sullivan I. See *id.* at 401, 101 S.E.2d at 472. According to the record, "[i]n 1936, the local governments in [Buncombe] County took actions required to refinance all defaulted bonds, both of the local governments and the districts." "County Commissioners, in their role as trustees, determine[d] the tax rate to be levied within each district to provide funds for the maintenance of the water and sewer lines and to amortize the debt."

According to the affidavits of Asheville's City Manager Jackson and Buncombe County's Assistant County Manager and Director of Planning Creighton, in 1960, Asheville annexed portions of the territory of the original water districts and thereby assumed \$396,000.00 in bonded indebtedness as a pro-rata share of the existing principal balance from the water districts for areas annexed into Asheville that year. According to Jackson, "[w]hen

Asheville and Buncombe County defaulted on their bonded indebtedness during the Great Depression, the water district indebtedness was part of the consolidated indebtedness that was refinanced through refunding bonds . . . . Th[is] debt was finally paid off in 1976." (Citations omitted.)

Jackson stated in his affidavit that, "[i]n 1980, following the final payment and satisfaction of all the water district debt and the refunding debt from the Great Depression, the Asheville City Council passed a resolution authorizing the filing of a declaratory judgment action challenging the validity of Sullivan I." According to Jackson, as well as Buncombe County's State Senator Nesbitt, in November 1980, an interlocal agreement was reached between Asheville and Buncombe County with an effective date of 29 October 1981 "relating to water service in Buncombe County," establishing the Asheville/Buncombe Water Authority, and relating to additional "matters of local governmental concern . . . including parks and recreation and law enforcement." According to Jackson's affidavit, this interlocal agreement and its subsequent amendments (hereinafter "the Water Agreement") "contained a specific provision whereby Asheville specifically agreed not to challenge Sullivan I's constitutionality while the [Water Agreement was] in force." Jackson stated that, as a result of the provisions of the Water Agreement, the City ultimately did not file the declaratory judgment action.

The affidavits of Jackson and Nesbitt also show that, in compliance with the provisions of Sullivan I, the 1981 Water

Agreement also "required Asheville to charge the same water rates for the same classes of customers within and outside of the City limits," even though Asheville began charging the same water rates following the Court's decision in *Candler* in 1958, and continued to do so until it terminated the Water Agreement in accordance with its express terms effective 30 June 2005.

According to Creighton, from 1957 through 1981, Buncombe County "carried out its obligations under [Sullivan I] to maintain [the] waterlines owned by the County primarily by making payments to the City of Asheville for maintenance of the lines" and, from 1981 through 2005, to the Asheville/Buncombe Water Authority pursuant to the Water Agreement. As reflected in the affidavit of Buncombe County's Finance Director Clark and supporting exhibits, from July 1973 through June 1998, Buncombe County "contributed \$26,435,201.00 towards the construction, upkeep and other costs of the Asheville Buncombe Water System. Of that amount, \$1,932,834.00 were grant funds." Per Clark and Creighton, for the fiscal years from 1982 through 2005, when Buncombe County held title to various public recreational facilities pursuant to the Water Agreement until its termination by Asheville in 2005, Buncombe County's capital expenditures on those facilities was \$9,025,715.00. As Nesbitt stated, during the period from October 1981 through June 2005, "the water system had in fact been allowed to fall farther into disrepair while [Asheville] and, to a lesser extent, Buncombe County were taking money from the water system."

As indicated in Jackson's affidavit, "[i]n accord with the provisions of [the Water Agreement] and effective upon its termination, . . . certain water lines and facilities conveyed to Asheville reverted to [Buncombe] County." According to Nesbitt's affidavit and the 30 September 2005 Agreement Between the City of Asheville and Buncombe County for Water System Maintenance and Repair entered into after the enactment of Sullivan II and III, the parties do not dispute that the South Buncombe pump station and storage tank are owned by Buncombe County and, pursuant to the 1981 Water Agreement, the ownership of all water system facilities conveyed to Asheville "were to be re-conveyed to the County of Buncombe and its water districts following termination of the Water Agreement." However, the parties are not otherwise in agreement about the current ownership of the water system facilities that make up the water distribution system.

On 11 October 2005, Asheville filed its Amended Complaint for Declaratory Judgment against the State of North Carolina challenging the constitutionality of the Sullivan Acts. On 13 March 2006, the State of North Carolina filed its Answer to Amended Complaint seeking dismissal of Asheville's complaint and a declaration that the Sullivan Acts are constitutional. On 18 July 2006, the County of Buncombe with several affiliated officials and individuals (collectively "Buncombe defendants") filed a Motion to Intervene and an Answer to Asheville's complaint seeking a dismissal of the action and, in the alternative, a declaration of

the constitutionality of the Sullivan Acts. In September 2006, the trial court granted Buncombe defendants' Motion to Intervene.

On 12 July 2006, Asheville filed its Motion for Summary Judgment. On 2 January and 5 January 2007, respectively, the State of North Carolina and Buncombe defendants filed their own Motions for Summary Judgment. After a hearing on 16 January 2007, the trial court entered its Memorandum of Decision and Order on 2 February 2007, concluding as a matter of law that the Sullivan Acts are constitutional "in that (A) they are a valid exercise of legislative authority, (B) they are not local acts in violation of Article II, Section 24 of the North Carolina Constitution and (C) Sullivan I, II and III do not violate Article I, Section 19 of the North Carolina Constitution." The court also "reject[ed] the arguments by the City of Asheville that: (1) the Sullivan Acts are unconstitutional under the rule announced in *Asbury v. Town of Albemarle*, 162 N.C. 247[, 78 S.E. 146] (1913); and (2) that Sullivan III unconstitutionally creates special privileges for an ineligible class of persons in violation of the exclusive emoluments prohibition contained in Article I, Section 32 of the North Carolina Constitution." Accordingly, the court denied Asheville's motion for summary judgment and granted defendants' cross-motions for summary judgment. Asheville filed its notice of appeal to this Court on 27 February 2007.

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The record on appeal contains ten assignments of error, eight of which have been brought forward in appellant's brief. The

remaining two assignments of error not brought forward in appellant's brief are not discussed below and are deemed abandoned. See N.C.R. App. P. 28(b)(6) (2008) ("Immediately following each question [in appellant's brief] shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief . . . will be taken as abandoned.").

"On appeal, an order allowing summary judgment is reviewed *de novo*." *Tiber Holding Corp. v. DiLoreto*, 170 N.C. App. 662, 665, 613 S.E.2d 346, 349 (citing *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)), *disc. review denied*, 360 N.C. 78, 623 S.E.2d 263 (2005). "Further, the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998). "'The purpose of summary judgment . . . [is] to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue.'" *Barnhill Sanitation Serv., Inc. v. Gaston County*, 87 N.C. App. 532, 536, 362 S.E.2d 161, 164 (1987) (quoting *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971)), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any

party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2007). Although determining what constitutes a genuine issue of material fact is "often difficult," our Supreme Court has stated that "an issue is genuine if it is supported by substantial evidence, and an issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citations omitted) (internal quotation marks omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and means more than a scintilla or a permissible inference." *Id.* (citations omitted) (internal quotation marks omitted).

I.

[1] Asheville contends the trial court erred by concluding that the Sullivan Acts were enacted pursuant to a valid exercise of legislative authority, arguing instead that the Legislature exceeded the constitutional limitations on its authority under Article II, Section 24, Clause 1, Subclauses (a) and (j), Article I, Section 19, and Article I, Section 32 of the North Carolina Constitution. Before addressing Asheville's arguments, in response to defendants' briefs, we must first determine whether Asheville's contention that the Sullivan Acts are unconstitutional and were not enacted pursuant to a valid exercise of legislative

authority is precluded by the doctrines of res judicata or collateral estoppel.

In *Candler*, the Court heard an action in which similarly-situated Buncombe defendants sued then-defendant Asheville "to restrain [Asheville] from putting into effect an ordinance which provide[d] a higher rate for consumers of water living outside the City than that charged to consumers residing in the City [in alleged contravention to Sullivan I]." *Candler*, 247 N.C. at 399, 101 S.E.2d at 471. In *Candler*, the Court unanimously held:

*In our opinion, in light of all the facts and circumstances revealed on this record, the Legislature had the power to enact [Sullivan I], and that such Act is constitutional and valid and is binding on the City of Asheville insofar as it pertains to the right to sell water to persons, firms, and corporations who obtain water through mains constructed and maintained at the expense of the taxpayers in these water or water and sewer districts. We further hold that such Act does not violate Section 17, Article I, of the Constitution of North Carolina, or the Fourteenth Amendment to the Constitution of the United States.*

*Id.* at 411, 101 S.E.2d at 479 (emphasis added). We find no ambiguity in the plain language of the Court's holding that Sullivan I was "constitutional and valid and [wa]s binding on the City of Asheville" and "further hold[ing] that such Act d[id] not violate Section 17, Article I, of the Constitution of North Carolina." *Id.* However, Asheville argues that *Candler* "incorrectly decided the issues" that were before the North Carolina Supreme Court at the time, was "not good law when it was decided," and "cannot be dispositive of any issue" in the present

case. Nonetheless, this Court "has no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions until otherwise ordered by the Supreme Court." *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1983) (alterations in original) (internal quotation marks omitted).

[2] Asheville next argues that *Candler* has since been overruled by *Piedmont Aviation, Inc. v. Raleigh-Durham Airport Authority*, 288 N.C. 98, 215 S.E.2d 552 (1975), asserting that *Piedmont Aviation* rejected *Candler's* "minor premise" which "rests on a conceptual confusion about rate-setting" that the power to establish rates to be charged by a municipal utility to its consumers is a governmental function, not a proprietary one. We disagree and conclude that *Candler* is still binding authority on the constitutionality of *Sullivan I.*

In *Piedmont Aviation*, several airlines ("petitioners") challenged a municipal airport authority (the "Authority") alleging that the Authority's action to increase landing fees and space rental charges at the airport was unreasonable and discriminatory. See *Piedmont Aviation*, 288 N.C. at 99, 105, 215 S.E.2d at 552-53, 556. The issue before the Court was whether petitioners were entitled to judicial review of the Authority's determination about the establishment of the landing fees. See *id.* at 100, 215 S.E.2d at 553. The Court held that "the fixing by the Authority of the fees it will charge for the use of its property is not an 'administrative decision' . . . and the procedure provided . . .

for the obtaining of judicial review of 'administrative decisions' is not applicable thereto." *Id.* at 105, 215 S.E.2d at 556.

Almost twenty years earlier in *Candler*, the Court stated: "It is clear that the power to establish rates is a governmental function and not a proprietary one." *Candler*, 247 N.C. at 407, 101 S.E.2d at 477. In *Piedmont Aviation*, however, after stating that "[a] municipality operating an airport acts in a proprietary capacity," *Piedmont Aviation*, 288 N.C. at 102, 215 S.E.2d at 555, the Court made the following singular reference to *Candler*:

Thus, in determining the fee it will charge for the privilege of landing an aircraft upon its runway and the rent it will charge for the use of its properties, the Authority is acting as the proprietor of the property, not as a regulatory agency. *The statement in Candler v. Asheville*, 247 N.C. 398, 101 S.E.2d 470, to the effect that a municipality in establishing rates it will charge for water is exercising a governmental function was not necessary to the decision in that case, is not supported by the authorities cited therefor and may no longer be deemed authoritative. That statement [in *Candler*] overlooks the distinction to be drawn between municipal action fixing rates to be charged by a public utility to its customers and municipal action fixing rates which the municipality, itself, will charge for its service. *The former function is a governmental function. The latter is a proprietary function.*

*Id.* at 102-03, 215 S.E.2d at 555 (emphasis added) (citations omitted). From the Court's plain language that the statement it corrected in *Candler* "was not necessary to the decision in that case," *Piedmont Aviation* did not overrule *Candler*. Therefore, we conclude that *Candler* is still binding authority regarding the

constitutionality of Sullivan I. See *Dunn*, 334 N.C. at 118, 431 S.E.2d at 180.

[3] Asheville finally argues that *Candler* does not dispose of this case because it "decided an altogether different constitutional question"; namely, that the challenge to Sullivan I in *Candler* was presented under Article I, Section 17 of the 1868 Constitution and under the Fourteenth Amendment of the U.S. Constitution. Again, we must disagree.

The doctrine of *res judicata* embodies the general rule that "any right, fact, or question in issue and directly adjudicated on or necessarily involved in the determination of an action before a competent court . . . on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies." *Gaither Corp. v. Skinner*, 241 N.C. 532, 535, 85 S.E.2d 909, 911 (1955). The general rule is that "[a] final judgment rendered by a court of competent jurisdiction, on the merits, is conclusive as to the rights of the parties and their privies, and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand, and cause of action." *Id.* (internal quotation marks omitted). However, "[i]t is to be noted that the phase of the doctrine of *res judicata* which precludes relitigation of the same cause of action is broader in its application than a mere determination of the questions involved in the prior action." *Id.* "The bar of the judgment in such cases extends not only to matters actually determined, but also to other matters which in the exercise of due diligence could have been

presented for determination in the prior action." *Id.* at 535-36, 85 S.E.2d at 911; see also Black's Law Dictionary 1337 (8th ed. 2004) ("[T]he effect of foreclosing any litigation of matters that never have been litigated[] because of the determination that they should have been advanced in an earlier suit . . . has gone under the name, 'true res judicata,' or the names, 'merger' and 'bar.'" (quoting Charles Alan Wright, *The Law of Federal Courts* § 100A, at 722-23 (5th ed. 1994))).

The Court's rationale for this doctrine is as follows:

The judgment or decree of a Court possessing competent jurisdiction is final as to the subject-matter thereby determined. The principle extends further. *It is not only final as to the matter actually determined but as to every other matter which the parties might litigate in the cause, and which they might have had decided. . . .* This extent of the rule can impose no hardship. It requires no more than a reasonable degree of vigilance and attention; a different course might be dangerous and often oppressive. It might tend to unsettle all the determinations of law and open a door for infinite vexation. The rule is founded on sound principle. . . . The plea of *res judicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

*Piedmont Wagon Co. v. Byrd*, 119 N.C. 460, 462-63, 26 S.E. 144, 145 (1896) (emphasis added) (first omission in original) (internal quotation marks omitted). This approach continues to prevail in our appellate courts one hundred years later:

The court requires parties to bring forward the whole case, and will not, *except under special circumstances*, permit the same parties to open the same subject of litigation in respect to matters which might have been brought forward as part of the subject in controversy. . . . The plea of *res adjudicata* applies, . . . not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject in litigation and which the parties, exercising reasonable diligence, might have brought forward at the time and determined respecting it.

*Edwards v. Edwards*, 118 N.C. App. 464, 471-72, 456 S.E.2d 126, 131 (1995) (first omission in original) (quoting *In re Trucking Co.*, 285 N.C. 552, 560, 206 S.E.2d 172, 178 (1974)).

The parties in the present case do not dispute either that a final judgment on the merits was reached in *Candler* or that there is an identity of the parties and their privies between the present case and *Candler*. However, we are not persuaded by Asheville's argument that *Candler* is not binding authority on the present case "because it decided an altogether different constitutional question." In its brief in *Candler*, then-defendant Asheville answered then-plaintiffs' (now Buncombe defendants') complaint by alleging that Sullivan I violated Article I, Section 17 (present Article I, Section 19), and Article I, Section 7 (present Article I, Section 32) of the North Carolina Constitution. In its brief for the present case, Asheville again argues that Sullivan I violates these same constitutional provisions. Additionally, in its *Candler* brief, Asheville did not allege or argue that Sullivan I violated Article II, Section 29 (present Article II,

Section 24), although it asserts this claim today. Since (1) Asheville has already litigated Sullivan I's constitutionality under Article I, Section 19 and Article I, Section 32 of the North Carolina Constitution in *Candler*, (2) Asheville could have asserted Sullivan I's unconstitutionality under former Article II, Section 29 at the time of the action in *Candler* but chose not to do so, and (3) the Court held that Sullivan I was "constitutional and valid and [wa]s binding on the City of Asheville" in spite of Asheville's arguments to the contrary, see *Candler*, 247 N.C. at 411, 101 S.E.2d at 474, we conclude that Asheville is precluded under the doctrine of *res judicata* from challenging the constitutionality of Sullivan I under any provision of the North Carolina Constitution in the present case. Our decision renders it unnecessary to address Asheville's remaining assignments of error regarding the constitutionality of Sullivan I, or to address defendants' contention that Asheville is collaterally estopped from challenging the constitutionality of Sullivan I.

[4] While defendants did not argue that Asheville is collaterally estopped from litigating the constitutionality of Sullivan II and Sullivan III under Article I, Section 19 or Article I, Section 32 of the North Carolina Constitution, defendants present arguments that Asheville is collaterally estopped from litigating the constitutionality of challenging Sullivan II and III under Article II, Section 24. We disagree.

"The companion doctrines of *res judicata* (claim preclusion) and collateral estoppel (issue preclusion) have been developed by

the courts for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Again, "[w]here the second action between two parties is upon the same claim, [the doctrine of res judicata allows] the prior judgment [to] serve[] as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action." *Id.* at 492, 428 S.E.2d at 161 (emphasis added). "'But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'" *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (emphasis added) (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 353, 24 L. Ed. 195, 198 (1877)). In other words, "the prior judgment serves as a bar only as to issues actually litigated and determined in the original action." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (emphasis added). "[A]n issue is 'actually litigated,' for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined." 47 Am. Jur. 2d *Judgments* § 494 (2006). "A very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not

apply." *Beckwith v. Llewellyn*, 326 N.C. 569, 574, 391 S.E.2d 189, 191, *reh'g denied*, 327 N.C. 146, 394 S.E.2d 168 (1990).

In the present case, in its brief and reply brief, Asheville repeatedly asserts that it neither "raised, briefed, [n]or argued" that Sullivan I violated former Article II, Section 29 (present Article II, Section 24) of the North Carolina Constitution. Asheville argues that the Court in *Candler* was not presented with, nor did it decide, the issue of whether Sullivan I was an invalid local act under present Article II, Section 24. Defendants agree that Asheville did not argue that Sullivan I was unconstitutional under former Article II, Section 29 in *Candler*. Thus, as we concluded above, the fact that Asheville *could have* alleged a violation of this constitutional provision in *Candler* is the reason Asheville is precluded by *res judicata*, not collateral estoppel, from making that same constitutional claim today. Consequently, as Asheville contended in oral argument before this Court, *its failure to argue* that Sullivan I violated this constitutional provision to the *Candler* Court *must also mean* that the issue of whether Sullivan II and Sullivan III violate Article II, Section 24 was not actually litigated in *Candler*, was not necessary to the Court's determination that Sullivan I was constitutional, and is not precluded under collateral estoppel in the present case. We agree.

However, defendants argue that *Candler*, nonetheless, is still binding authority on the question of whether Sullivan I was constitutional under former Article II, Section 29. In *Candler*, the Court stated a fundamental rule that no party in the present

case disputes: "Section 4, Article VIII, [present Article VII, Section 1] of our Constitution does not forbid the Legislature from passing special acts, amending charter of cities, towns, and incorporated villages, or conferring upon municipal corporations additional powers, or restricting the powers theretofore vested in them." *Candler*, 247 N.C. at 409, 101 S.E.2d at 478. In support of its statement, the Court cited four cases: *Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920); *Holton v. Town of Mocksville*, 189 N.C. 144, 126 S.E. 326 (1925); *Webb v. Port Commission*, 205 N.C. 663, 172 S.E. 377 (1934); and *Deese v. Town of Lumberton*, 211 N.C. 31, 188 S.E. 857 (1936). The *Candler* Court next excerpted language from *Kornegay* and *Holton* to provide additional support for this statement.

In *Holton*, the plaintiff, a property owner in the town of Mocksville, appealed from the trial court's denial of her motion for nonsuit concerning "whether upon all the evidence the plaintiff's lots had been lawfully assessed and whether or not the amounts levied against them were valid liens" "because there was no petition signed by the owners of lots abutting on the street directed to be improved by the resolution," as was required by a statute of general applicability. *Holton*, 189 N.C. at 148, 126 S.E. at 328. At trial, defendant offered into evidence chapter 86, Private Laws 1923, entitled "An act relating to the financing of street and sidewalk improvements in the town of Mocksville" which provided that "[the] board of commissioners [of the town of Mocksville] shall have power to levy special

assessments as herein provided [i.e., without petition]" as required by the statute. See *id.* at 149, 126 S.E. at 328 (alterations in original). On appeal, plaintiff "attack[ed] the constitutionality of the act, contending [(1)] that by section 4 of Article VIII of the Constitution of North Carolina, the General Assembly was without power to enact it, and [(2)] that the act [wa]s void because [it was] retroactive and retrospective." *Id.* The *Holton* Court disposed of the issue regarding the constitutionality of the Mocksville act in one paragraph, the text of which was excerpted in full by the *Candler* Court. Again, in *Candler*, the Court included the following paragraph from *Holton* in support of its statement in *Candler* that former Article VIII, Section 4 does not forbid the Legislature from passing special acts or conferring powers upon, or restricting powers of, a municipality:

Section 4 of Article VIII of the Constitution imposes upon the General Assembly the duty to provide by general laws for the improvement of cities, towns and incorporated villages. It does not, however, forbid altering or amending charters of cities, towns and incorporated villages or conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them. We find nothing in section 4, Article VIII of the Constitution rendering this act unconstitutional, nor does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate. *Kornegay v. Goldsboro*, 180 N.C. 441, 105 S.E. 187 (1920).

*Candler*, 247 N.C. at 410, 101 S.E.2d at 478-79 (emphasis added) (quoting *Holton*, 189 N.C. at 149, 126 S.E. at 328-29). Defendants point to the *Candler* Court's excerpted language from *Holton*—"nor

does the act relate to any of the matters upon which the General Assembly is forbidden by section 29 of Article II to legislate"—to support the argument that *Candler* determined that Sullivan I was constitutional under former Article II, Section 29. We do not agree. Based on the facts that (1) the constitutionality of Sullivan I under Article II, Section 29 was not an issue before the *Candler* Court, (2) the location and context of the *Holton* quotation in *Candler* was plainly citing relevant, foundational law regarding the Legislature's powers under the Constitution, and (3) nowhere else in *Candler* does the Court ever mention, let alone examine, former Article II, Section 29, we are not convinced by defendants' arguments that the Court held that Sullivan I was constitutional under present Article II, Section 24 in *Candler*. We hold the trial court erred when, in reliance on this language in *Candler* excerpted from *Holton*, it concluded "as a matter of law that the provisions and limitations imposed on the City of Asheville in [the Sullivan Acts we]re within the power of the Legislature to enact" because "*Candler* ma[de] clear that none of the Sullivan Acts at issue in this litigation are prohibited by Article II, Section 24 of the Constitution." Therefore, we hold that Asheville is not precluded under the doctrine of collateral estoppel from challenging the constitutionality of Sullivan II and Sullivan III under Article II, Section 24 of the North Carolina Constitution in the present case.

II.

[5] The trial court concluded that, while the Sullivan Acts are local acts, none are prohibited by Article II, Section 24 of

the Constitution because, as a matter of law, the Sullivan Acts "do not relate to health and sanitation and do not regulate trade." While Asheville agrees that the Sullivan Acts are local acts, it contends the trial court erred by concluding that none of the Sullivan Acts at issue in this litigation are prohibited by Article II, Section 24.

Article VII, Section 1 of the North Carolina Constitution provides, in part:

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.

N.C. Const. art. VII, § 1. In other words, "[m]unicipalities have no inherent powers; they have only such powers as are delegated to them by legislative enactment." *In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 16-17, 249 S.E.2d 698, 707 (1978). Additionally, as cited in Asheville's brief, "municipalities 'are creatures of the legislature, public in their nature, subject to its control, and have only such powers as it may confer[;] . . . powers [which] may be changed, modified, diminished, or enlarged, and, subject to the constitutional limitations, conferred at the legislative will.'" *Candler*, 247 N.C. at 407, 101 S.E.2d at 477 (quoting *Holmes v. City of Fayetteville*, 197 N.C. 740, 150 S.E. 624 (1929), *appeal dismissed per curiam*, 281 U.S. 700, 74 L. Ed. 1126 (1930)). "There is no contract between the State and the public that a municipal charter shall not at all times be subject to the

direction and control of the body by which it is granted.'" *Id.*; see also *Williamson v. City of High Point*, 213 N.C. 96, 106, 195 S.E. 90, 96 (1938) ("[Municipalities] are but instrumentalities of the State for the administration of local government, and their authority as such may be enlarged, abridged, or withdrawn entirely at the will or pleasure of the Legislature.") (internal quotation marks omitted). Our Supreme Court has further stated that

a municipal corporation has no extra-territorial powers; but the rule is not without exceptions. The Legislature has undoubted authority to confer upon cities and towns jurisdiction for sanitary and police purposes in territory contiguous to the corporation. . . . If a municipality owns and operates a water or lighting plant and has an excess of water or electricity beyond the requirements of the public, which is available for disposal, it may make a sale of such excess to outside consumers as an incident to the proper exercise of its legitimate powers. . . . It is equally clear that without legislative authority [a municipality] would not be permitted to extend its lines beyond the corporate limits for the purpose of selling [water] to nonresidents of the city.

*Williamson*, 213 N.C. at 106, 195 S.E. at 96 (omissions in original) (internal quotation marks omitted). Thus, "in common with all the courts of this country, . . . municipal corporations, *in the absence of constitutional restrictions*, are the creatures of the legislative will, and are subject to its control; the sole object being the common good, and that rests in legislative discretion." *Town of Highlands v. City of Hickory*, 202 N.C. 167, 168, 162 S.E. 471, 471 (1932) (emphasis added) (internal quotation marks omitted).

"All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448-49, 385 S.E.2d 473, 478 (1989). "The members of the General Assembly are representatives of the people. The wisdom and expediency of a statute are for the legislative department, when acting entirely within constitutional limits." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961). Nonetheless, "we are aware that . . . '[i]t is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case.'" *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 183, 581 S.E.2d 415, 425 (2003) (quoting *Glenn v. Bd. of Educ.*, 210 N.C. 525, 529-30, 187 S.E. 781, 784 (1936)). "If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.'" *Id.*

Article II, Section 24 of the North Carolina Constitution identifies fourteen "[p]rohibited subjects" about which the General Assembly "shall not enact any local, private, or special act or resolution." N.C. Const. art. II, § 24, cl. 1. "Any local, private, or special act or resolution enacted in violation of the . . . [limitations specified in Section 24] shall be void." N.C. Const. art. II, § 24, cl. 3. The purpose for this provision in our

Constitution was most recently chronicled by our Supreme Court in *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 581 S.E.2d 415 (2003):

The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December[] 1776. During the ensuing 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, private, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special acts or resolutions relating to many of the most common subjects of legislation.

. . . . .

In thus amending their organic law, the people were motivated by the desire that the General Assembly should legislate for North Carolina in respect to the subjects specified as a single united commonwealth rather than as a conglomeration of innumerable discordant communities. To prevent this laudable desire from degenerating into a mere pious hope, they decreed in emphatic and express terms that "any local, private, or special act or resolution passed in violation of the provisions of this section shall be void."

*Id.* at 185-86, 581 S.E.2d at 426-27 (omission in original) (quoting *Idol v. Street*, 233 N.C. 730, 732-33, 65 S.E.2d 313, 314-15 (1951)). Thus, the Court determined,

[i]t was the purpose of [Article II, Section 24] to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to

devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by general laws to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole State.

*Id.* at 188, 581 S.E.2d at 428 (alteration in original) (quoting *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965)). The issue in the present case turns on whether the Constitution otherwise prohibited the enactment of Sullivan II or III by virtue of Article II, Section 24. See *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 438, 450 S.E.2d 735, 740 (1994). "If so, the legislature's ability to ascribe [or deny] powers and duties to [Asheville] does not extend to [the Sullivan Acts] and they are void." See *id.*

Our review of this issue is two-fold. See *Williams*, 357 N.C. at 183, 581 S.E.2d at 425. First, we must determine whether the Sullivan Acts are local acts as contended by Asheville or whether they are general laws as contended by defendants. See *id.* Second, if they are found to be local acts, we must determine whether the Sullivan Acts (1) relate to health and sanitation or (2) regulate trade. See *id.*

A.

To consider whether Sullivan II and III are violative of Subclauses (a) or (j) of Article II, Section 24, Clause 1 of our Constitution, we must first determine whether Sullivan II and III are local acts or general laws. A determination that Sullivan II and III are general laws would render further consideration of this

issue unnecessary because (1) our Supreme Court has long held that "[a] statute is either 'general' or 'local'; there is no middle ground," *id.* (quoting *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702), and (2) Clause 1 of Section 24 is implicated only after a law is determined to be "local," "private," or "special." See N.C. Const. art. II, § 24, cl. 1.

The General Assembly may be "directed or authorized by th[e] Constitution to enact general laws," and those "[g]eneral laws may be enacted for classes defined by population or other criteria." N.C. Const. art. XIV, § 3 (emphasis added). A law is general where it

*is broad enough to reach . . . all places affected by the conditions to be remedied, so that the statute operates uniformly throughout the state under like circumstances, and its classification is reasonable and based upon a rational difference of situation or condition, . . . even though it does not actually apply to all parts of the state, or indeed, even though there are only a few places, or one place, on which the statute operates.*

*McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894 (emphasis added). Thus, "[c]onceivably, a statute may be local if it excludes only one county. On the other hand, it may be general if it includes only one or a few counties. It is a matter of classification." *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702.

Conversely, as discussed above, Article II, Section 24 of the North Carolina Constitution expressly provides that the General Assembly "shall not enact any local, private, or special act or resolution" relating to or regulating any of fourteen enumerated subjects. See N.C. Const. art. II, § 24, cl. 1. Our Supreme Court

has stated that, within the meaning of constitutional prohibitions against local laws, a law is local where,

by force of an inherent limitation, it arbitrarily separates some places from others upon which, but for such limitation, it would operate, where it embraces less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed, and where the classification does not rest on circumstances distinguishing the places included from those excluded.

*Williams*, 357 N.C. at 184, 581 S.E.2d at 425-26 (emphasis added) (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894). Accordingly, "when the persons or things subject to the law are not reasonably different from those excluded, the statute is local or special." *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894. In other words, a local law "discriminates between different localities without any real, proper, or reasonable basis or necessity—a necessity springing from manifest peculiarities clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class separately that would be useless or detrimental to the others." *Id.* "[U]ltimately the problem is resolved into the question of what facts in each case are sufficiently important to justify the exclusions and inclusions." *Id.* at 519, 119 S.E.2d at 894 (alteration in original) (internal quotation marks omitted).

Because "no exact rule or formula capable of constant application can be devised for determining in every case whether a law is local, private or special or whether general," *Williams*,

357 N.C. at 183, 581 S.E.2d at 425 (quoting *McIntyre*, 254 N.C. at 517, 119 S.E.2d at 893), the Court has "set out alternative methods for determining whether a law is general or local." *Id.* (citing *City of New Bern*, 338 N.C. at 435-36, 450 S.E.2d at 738-39).

The "reasonable classification" method of analysis, first applied in *McIntyre v. Clarkson*, 254 N.C. 510, 119 S.E.2d 888 (1961), "considers how the law in question classifies the persons or places to which it applies." *Williams*, 357 N.C. at 183, 581 S.E.2d at 425. Under this analysis, "[a] law is general if it applies to and operates uniformly on all the members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." *McIntyre*, 254 N.C. at 519, 119 S.E.2d at 894 (internal quotation marks omitted). "Classification must be reasonable and germane to the law. It must be based on a reasonable and tangible distinction and operate the same on all parts of the state under the same conditions and circumstances. Classification must not be discriminatory, arbitrary or capricious." *Id.* at 519, 119 S.E.2d at 894-95. "The Legislature has *wide discretion* in making classifications." *Id.* at 519, 119 S.E.2d at 894 (emphasis added). Accordingly, "[t]he test is whether the classification is reasonable and whether it embraces all of the class to which it relates. Classifications . . . must be natural and intrinsic and based on substantial differences." *Id.* at 519, 119 S.E.2d at 894-95; see also *City of New Bern*, 338 N.C. at 435-36, 450 S.E.2d at 738-39 ("[Under this test, a law is general if] any rational basis reasonably related to the

objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories.") (internal quotation marks omitted) (quoting *Adams v. N.C. Dep't. of Nat. & Econ. Res.*, 295 N.C. 683, 691, 249 S.E.2d 402, 407 (1978)).

In *Town of Emerald Isle v. State of North Carolina*, 320 N.C. 640, 360 S.E.2d 756 (1987), the Supreme Court departed from the "reasonable classification" test and instead "applied a general public interest method of analysis, which focuses on 'the extent to which the act in question affects the general public interests and concerns.'" *City of New Bern*, 338 N.C. at 436, 450 S.E.2d at 739 (quoting *Emerald Isle*, 320 N.C. at 651, 360 S.E.2d at 763). In *Emerald Isle*, the Court "addressed whether an act that established a public pedestrian beach access facility in Bogue Point was a local act." *Id.* There, "the act in question applied only to a site-specific portion of land on a particular . . . public pedestrian beach access facility [which, by definition,] . . . rest[ed] in but one location." *Williams*, 357 N.C. at 184, 581 S.E.2d at 426 (internal quotation marks omitted). The Court held that the purpose of the act in *Emerald Isle* was "to establish pedestrian beach access facilities for general public use in the vicinity of Boglet Inlet," and so held that the act was *not* a local act, reasoning that, "[b]y directing the establishment of public pedestrian beach access facilities including parking areas, pedestrian walkways, and restroom facilities, the legislature . . . sought to promote the general public welfare by preserving the

beach area for general public pedestrian use." *Emerald Isle*, 320 N.C. at 651-52, 360 S.E.2d at 763.

In the present case, we do not believe that the method of classification identified in *Emerald Isle* is an appropriate test to analyze whether Sullivan II and III are general laws or local acts. First, Sullivan II and III are "not site-specific as in *Emerald Isle* because "[s]uch . . . legislated change[s] could be effected as easily in [Buncombe County] as in any other [county] in the state.'" See *Williams*, 357 N.C. at 184-85, 581 S.E.2d at 426 (first and fourth alterations in original) (quoting *City of New Bern*, 338 N.C. at 436, 450 S.E.2d at 739). Additionally, while any member of the general public who travels to Bogue Point could benefit from the pedestrian beach access facilities at issue in *Emerald Isle*, Sullivan II and III expressly benefit only a small subset of North Carolinians. Specifically, Sullivan II applies only to those "water consumer[s] in Buncombe County currently or hereafter connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority" against whom the City of Asheville would seek "to charge, exact, or collect . . . a rate for water consumed higher than the rate charged for the same classification of water consumer[s] residing or located within the corporate limits of the City of Asheville." Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246. Sullivan III applies only to citizens of Asheville and citizens of other areas located outside the corporate limits of the city to whom Asheville furnishes its public enterprise services. See Sullivan III, ch. 139, 2005 N.C. Sess.

Laws 243. Consequently, the general public interest method of analysis identified in *Emerald Isle* is inapplicable to this case. See *Williams*, 357 N.C. at 185, 581 S.E.2d at 426.

To determine whether the General Assembly was authorized by the Constitution to enact Sullivan II and to prohibit Asheville from charging higher rates to water consumers for services provided outside its corporate limits, we must examine whether Sullivan II was "rationally based upon some situation unique to" Buncombe County to warrant the Legislature's decision to revoke from Asheville the authority it otherwise conferred to all cities in the State to charge differential rates to public enterprise service consumers under N.C.G.S. §§ 160A-311, -312, and -314. See *Williams*, 357 N.C. at 185, 581 S.E.2d at 426. With regard to Sullivan III, we must determine whether the Legislature's decision was warranted to modify N.C.G.S. § 160A-312 as follows: (1) to allow Asheville, unlike any other city in the State subject to N.C.G.S. § 160A-312, to be held liable for damages to those citizens outside the corporate limits for failure to furnish any public enterprise service; and (2) to restrict Asheville's discretionary management of revenue from its water distribution system, unlike any other city in the State, by requiring the city to "account for a public enterprise in a separate fund and . . . not transfer any money from that fund to another except for a capital project fund established for the construction or replacement of assets for that public enterprise." Sullivan III, ch. 139, 2005 N.C. Sess. Laws 243-44.

In 1971, the General Assembly conferred upon all cities in North Carolina the power to "establish, . . . maintain, own, [and] operate" those endeavors defined as "public enterprises," which included "[w]ater supply and distribution systems." N.C. Gen. Stat. §§ 160A-311(2), 160A-312(a) (2007). At the same time, the General Assembly empowered cities to "establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise." N.C. Gen. Stat. § 160A-314(a) (2007). The Legislature also conferred upon all North Carolina cities the power to "vary [those schedules of rents, rates, fees, charges, and penalties] according to classes of service, and [to adopt] *different schedules* [of rents, rates, fees, charges, and penalties] . . . *for services provided outside the corporate limits of the city.*" *Id.* (emphasis added). In other words, according to this Court's interpretation of N.C.G.S. § 160A-314(a) in *Town of Spring Hope v. Bissette*, 53 N.C. App. 210, 280 S.E.2d 490 (1981), *aff'd*, 305 N.C. 248, 287 S.E.2d 851 (1982), "[u]nder this broad, unfettered grant of authority, the setting of . . . rates and charges [for water and sewer services] is a matter for the judgment and discretion of municipal authorities, not to be invalidated by the courts *absent some showing of arbitrary or discriminatory action.*" *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 816, 517 S.E.2d 874, 881 (1999) (first alteration in original) (emphasis added) (internal quotation marks omitted). Finally, also in 1971, the version of N.C.G.S. § 160A-312 enacted by the General

Assembly and made generally applicable to all municipalities prior to the modifications of Sullivan III specified that, while a city may "acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, . . . in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service." N.C. Gen. Stat. § 160A-312(a).

Thus, while the Constitution does not forbid the General Assembly from "conferring upon municipal corporations additional powers or restricting the powers theretofore vested in them" by the Legislature, see *Holton*, 189 N.C. at 149, 126 S.E. at 328 (emphasis added), the issue before us is whether the General Assembly's decision to enact Sullivan II and III was based on circumstances that made the water distribution system in Asheville reasonably different from all other North Carolina municipalities which were excluded from Sullivan II and III.

According to three of the eighteen legislative findings included in its preamble, the General Assembly enacted Sullivan II expressly because

practically all, if not all, of the cost of the waterlines serving Buncombe County (outside of the corporate limits of the City of Asheville) has been paid by the County of Buncombe, the various water and sewer districts of the County of Buncombe, by the Asheville/Buncombe Water Authority pursuant to its duties to Buncombe County, and by private developers and landowners, desiring water service in such areas and not paid by the City of Asheville; and

. . . during the term of the Water Agreement, the County of Buncombe has paid directly to the City of Asheville in excess of \$37,000,000 pursuant to that Agreement; and

. . . .

. . . the complicated pattern of dealings between the City of Asheville and the County of Buncombe regarding the provision of water to water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto has now given rise to the issue of the rate that the City of Asheville may charge the water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto to whom it provides water even though [Sullivan I] remains in full force and effect . . . .

Sullivan II, ch. 140, 2005 N.C. Sess. Laws 245-46. Defendants argue that (1) these findings are "the reasons why the past, current, and anticipated future equities necessitated the enactment of [Sullivan II and III]," (2) the "long and tumultuous history" involving Asheville's water distribution system "amply justifies" the legislative action contained in Sullivan II and III, and (3) Asheville has failed to show any other public water utility in North Carolina with a history "even remotely as complex, long-standing, and unique" as Asheville's.

As mentioned above, Candler chronicled the first thirty-five years of the history of this case and made the following findings:

It is clear, under the facts disclosed on this record, that every purchaser of water in these water or water and sewer districts, from the City of Asheville, at the rates fixed for consumers of water within the city limits of Asheville, are paying as much of the debt

service and interest, as well as the cost of operating, repairing, and maintaining the water and sewer systems of the City of Asheville, as any resident of the City who purchases a like amount of water. Moreover, in addition thereto, the persons, firms, and corporations in these water or water and sewer districts are being taxed to pay the debt service, including interest on bonds issued to construct the water or water and sewer system in these respective districts, as well as taxing themselves for the repair and maintenance of such water or water and sewer system. Asheville contributed nothing to the construction of these systems, neither does it contribute anything to the cost of repairing and maintaining them. Asheville renders no service except to pump the water into the water systems, read the meters, which it did not furnish and does not service, and to bill the consumers.

It further appears from the record that a little over twenty-eight per cent of the meters through which the City of Asheville furnishes water are outside its corporate limits and the City derives a little over twenty-seven per cent of its total income from its water system from these outside consumers.

*Candler*, 247 N.C. at 410-11, 101 S.E.2d at 479. Since no party in the present case attempts to dispute the factual findings in *Candler* that chronicle the history of the water distribution system through 1958, we turn our attention to the history of the water system following *Candler*.

As discussed above, in 1960, Asheville annexed portions of the territory of the original water districts that were the subject of *Candler* and assumed \$396,000.00 in bonded indebtedness as a pro-rata share of the existing principal balance from the water districts for areas annexed into Asheville that year. This bonded indebtedness was paid off in full in 1976.

In *Candler*, the parties stipulated that, of the total 20,977 water meters in operation for the water distribution system both inside and outside the corporate limits for the fiscal year ending 30 June 1956, 5,983 or 28.5% of the water meters were located in the water districts outside Asheville's corporate limits. See *id.* at 402, 101 S.E.2d at 473. Additionally, of the \$1,056,703.00 generated in revenue from the sale of water through all water system meters, \$285,483.00 or 27% of that revenue was generated from the sale of water to consumers located outside Asheville's city limits. See *id.* at 402-03, 101 S.E.2d at 473. Fifty years later, for the fiscal year ending 30 May 2006, of Asheville's 49,615 water system meters in operation, 28,044 accounts were inside its city limits while 21,571 or 43.5% were outside its city limits, the majority of which are in unincorporated areas of Buncombe County. And, of the \$19,794,697.16 generated in revenue from the sale of water to all consumers, \$8,477,640.07 or 42.8% was generated from the meters of consumers located outside Asheville's corporate limits.

An audit was conducted of the City of Asheville and the Asheville/Buncombe Water System for the fiscal years 1957 through 2005. According to the affidavit of certified public accountant Towson who supervised that audit, for the time period following *Candler*, Asheville reported a "total operating revenue for the water system of \$447,142,263.00. Operating revenues are those funds received from the operation of the water system, primarily from the sale of water." For the same period of time,

Asheville's reported net operating revenue for the water system, i.e., the operating revenues for the water system minus the system and "other" expenditures, totaled \$113,929,113.00. Those "other" expenditures for the water system included categorizations by Asheville for "Administrative-reimburse general and other funds" (\$52,473,739.00), "Department wide expenditures" (\$39,324,144.00), and "Tax and franchise benefits paid to general fund" (\$12,372,231.00). In sum, according to the record, practically all of the cost of the waterlines serving Buncombe County outside Asheville's corporate limits has been paid by Buncombe County, by its various water and sewer districts, by the Asheville/Buncombe Water Authority pursuant to its duties to Buncombe County, and by private developers and landowners, desiring water service in such areas and not paid by Asheville. Further, according to his sworn deposition, Asheville's Director of the Water Resources Department Hanks was "not aware" of "any lines outside [Asheville's] city limits that the installation of which was paid for by [Asheville, exclusive of grant money]."

Asheville identifies five pairings of municipalities and counties to support its contention that other municipalities "currently operating municipally-owned water systems now receive or have historically received sizeable contributions toward the construction, maintenance, and operation of such systems from the counties in which the cities are located." Those pairings include Macon County and both the Town of Highlands and the Town of Franklin, Durham County and the City of Durham, Forsyth County and

the City of Winston-Salem, and Cabarrus County and the City of Concord. According to Asheville, none of these municipalities are subject to the same restrictions as those embodied in Sullivan II and III. Asheville asserts that, while the examples are not the result of an exhaustive search, they simply "confirm Asheville's denial that there is anything unique about Buncombe County's participation in financing the construction and/or operation of the water system which is now owned by [Asheville]." Further supporting Asheville's contention is a study done for fiscal year 2005-06 by the North Carolina League of Municipalities in cooperation with the University of North Carolina Environmental Finance Center which suggests that most municipalities in North Carolina charge both residential and commercial water utility consumers located outside a city's limits rates higher than those charged to the same class of consumers located inside a city's limits. However, these data do not include the rationales for the rate differentials between inside and outside consumers within each municipality, nor do they report the financial histories of the construction of the water systems, stating only: "Compare with caution. High rates may be justified and necessary to protect public health."

While we find ample support in the record to justify the Legislature's findings that Asheville and Buncombe County have experienced a "complicated pattern of dealings" with respect to the development and maintenance of its water distribution system, see Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246, it is not clear

from the record that this history is one of "manifest peculiarities clearly distinguishing" Asheville and Buncombe County from other municipalities and counties across the State. See *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894. Again, in order for Sullivan II and III to be classified as general laws, they must have been enacted based on circumstances that make the water distribution system in Asheville reasonably different from those municipalities and counties excluded from Sullivan II and III such that there is "a logical basis" for treating Asheville in a different manner. See *High Point Surplus Co.*, 264 N.C. at 656, 142 S.E.2d at 702.

We recognize that "[t]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none." *Adams*, 295 N.C. at 693, 249 S.E.2d at 408 (quoting *Silver v. Silver*, 280 U.S. 117, 74 L. Ed. 221 (1929)). "It is enough that . . . [a] statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs." *Id.* However, we are not persuaded that the history of the development of the water distribution system in Asheville is necessarily where "the evil" has exclusively and "most frequently occur[red]." See *id.* Therefore, it appears that Sullivan II and III may "embrace[] less than the entire class of places to which such legislation would be necessary or appropriate having regard to the purpose for which the legislation was designed." See *Williams*, 357 N.C. at 184,

581 S.E.2d at 426 (quoting *McIntyre*, 254 N.C. at 518, 119 S.E.2d at 894). Accordingly, we hold that Sullivan II and III are local acts.

B.

1. Relating to health and sanitation

[6] Since "an act is not constitutionally invalid merely because it is local," we must now determine whether Sullivan II and III violate Article II, Section 24 of the North Carolina Constitution. See *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 558, 359 S.E.2d 792, 797 (1987). Asheville contends Sullivan II and III relate to health and sanitation, and are thus violative of Article II, Section 24(1)(a) because the Supreme Court has specifically held that local acts which prescribe provisions regarding sewer and water service necessarily relate to health and sanitation and because "it is absolutely plain from the text" that the subject of Sullivan II and III is Asheville's water system. We disagree.

Constitutional Subclause (a) of Article II, Section 24, Clause 1 provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution . . . [r]elating to health, sanitation, and the abatement of nuisances." N.C. Const. art. II, § 24, cl. 1(a). However, the use of the nonspecific phrase "[r]elating to" suggests that even the mere mention of a subject which connotes any relationship to health or sanitation—no matter how tenuous—might constitute an act *relating to* health and sanitation and, thus, be violative of this constitutional

provision. Nevertheless, a thorough review of earlier cases that examine whether specific legislative enactments relate to health or sanitation reveals that, in order for a court to determine that a legislative enactment relates to health or sanitation, the court must conclude that an act either plainly "state[s] that *its purpose is to regulate* sanitary matters, or to regulate health[, or must conclude that the purpose of the act is to regulate health or sanitary matters after a] . . . careful perusal of the entire act, . . . [wherein] *the entire act must be considered.*" *Reed v. Howerton Eng'g Co.*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924) (emphasis added). Further, "[a]lthough the legislative findings and declaration of policy have no magical quality to make valid that which is invalid, and are subject to judicial review, they are entitled to weight in construing the statute and in determining whether the statute promotes a public purpose or use under the Constitution." *Redev. Comm'n. of Greensboro v. Sec. Nat'l Bank*, 252 N.C. 595, 611, 114 S.E.2d 688, 700 (1960).

In support of its contention that Sullivan II and III relate to health and sanitation, Asheville cites *Lamb v. Board of Education*, 235 N.C. 377, 70 S.E.2d 201 (1952), *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967), *City of New Bern v. New Bern-Craven County Board of Education*, 338 N.C. 430, 450 S.E.2d 735 (1994), and *Idol v. Street*, 233 N.C. 730, 65 S.E.2d 313 (1951).

In *Lamb*, where an act "impose[d] the duty upon the County Board of Education to make provision for 'a good supply of wholesome water,'" the Court concluded it related to health and

sanitation because "its sole purpose [wa]s to prescribe provisions with respect to sewer and water service for local school children in Randolph County [since it] purport[ed] to limit the power of the County Board of Education to provide for sanitation and *healthful conditions* in the schools by means of a sewerage system and an *adequate water supply*." *Lamb*, 235 N.C. at 379, 70 S.E.2d at 203 (emphasis added).

In *Gaskill*, the Court concluded that an act was related to health and sanitation because, on its face, it provided that a municipality "shall not be required to extend any sewerage outfalls into the area to be annexed" "in the event the sewerage system of the municipality shall have been *declared to be unfit, obsolete, or a source of unlawful pollution* to adjacent streams or waterways by the State Stream Sanitation Committee." *Gaskill*, 270 N.C. at 687, 155 S.E.2d at 149 (emphasis added).

In *City of New Bern*, the Court held that the acts which "shift[ed] the responsibility for enforcing the building code from the City to the county" were "inescapabl[y]" related to health and sanitation because "both the legislature's directions for the creation of the Code and the Building Code Council's stated purposes for the different inspections under the Code evince[d] an intent to protect the health of the general public." *City of New Bern*, 338 N.C. at 436, 440, 450 S.E.2d at 739, 741. The Court reasoned that "[t]he Code regulates plumbing in an effort to maintain sanitary conditions in the buildings and structures of this state and thus directly involves sanitation, and consequently

the protection of the health of those who use the buildings[, while t]he enforcement of the fire regulations protects lives from fire, explosion and health hazards." *Id.* at 440, 450 S.E.2d at 741.

Finally, in *Idol*, the General Assembly enacted a local act which consolidated the public health agencies and departments of Forsyth County and the City of Winston-Salem, established a joint city-county board of health "for regulating the public health interests of Winston-Salem and Forsyth County," and appointed a joint city-county health officer "for administering public health laws and regulations in Winston-Salem and Forsyth County." *Idol*, 233 N.C. at 733, 65 S.E.2d at 315. The Court held that it was "clear beyond peradventure" that the act related to health. *Id.*

Asheville also cites *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991), to assert that Sullivan II and III relate to health and sanitation because "[w]ater is not only vital to our good health but 'vital to clean living.'" The logical conclusion of Asheville's assertion suggests that *Pulliam* supports the proposition that a legislative enactment's mere reference to or invocation of water or a water system necessitates a conclusion that an act *relates to* health or sanitation. However, the full excerpt from *Pulliam* does not compel such a broad interpretation:

While we recognize the public's vital interest in dependable sanitary sewer service in municipal areas and that people living in cities and towns expect to have such service, it may be said that in today's society, electric service is also vital and that almost no one tries to live without its benefits. We also note with interest that those customers

*who don't pay their water and sewer bills are doomed to deprivation of that service however vital to clean living that service may be.*

*Pulliam*, 103 N.C. App. at 754, 407 S.E.2d at 570 (emphasis added). Thus, while *Pulliam* acknowledges that water is "vital to clean living," it also recognizes that a municipality may deny water service to consumers for *purely economic reasons*, even though those consumers may then be "doomed to deprivation" of such a "vital" service. See *id.*

As excerpted in section II(A) above, the legislative findings in the preamble for Sullivan II provide:

*[T]he citizens of Buncombe County outside the corporate limits of the City of Asheville now, or in the future to be, supplied water from lines connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto, are entitled to obtain water at a fair rate from the water system for which they have paid, through taxes, through payments for water, and through direct payments by the County of Buncombe and its water and sewer districts; and*

. . . .

. . . the Asheville/Buncombe Water Authority has developed substantial excess capacity in anticipation of the growth of population in Buncombe County and of supplying water to the additional population from facilities the cost of which has been, and in the future will be, paid out of water system revenues; and

. . . .

. . . the complicated pattern of dealings between the City of Asheville and the County of Buncombe regarding the provision of water to water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and

additions thereto has now given rise to the issue of the rate that the City of Asheville may charge the water consumers in Buncombe County connected to the waterlines currently maintained by the Asheville/Buncombe Water Authority, and replacements, extensions, and additions thereto to whom it provides water even though the Sullivan Act remains in full force and effect . . . .

Sullivan II, ch. 140, 2005 N.C. Sess. Laws 245-46 (emphasis added). Section 1 of Sullivan II provides that "*it shall be unlawful for the City of Asheville . . . to charge, exact, or collect from any water consumer in Buncombe County . . . a rate for water consumed higher than the rate charged for the same classification of water consumer residing or located within the corporate limits of the City of Asheville.*" Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246 (emphasis added). Section 2 provides that Asheville "*may . . . cause any user of water who shall fail to pay promptly his water rent for any month to be cut off and his right to further use of water from the city system to be discontinued until payment of any water rent arrearages.*" *Id.* (emphasis added). And section 3 of Sullivan II provides that "*the Board of Commissioners of Buncombe County . . . [shall] maintain the waterlines owned by the County of Buncombe and such water districts in proper repair in order that there may not be a waste of water by leakage.*" Sullivan II, ch. 140, 2005 N.C. Sess. Laws 247 (emphasis added).

Thus, while we agree with Asheville that it is "absolutely plain from the text" that the subject of Sullivan II is Asheville's water distribution system, based on the express language of its preamble and enabling provisions, we conclude that Sullivan II

relates only to matters which are purely economic in nature. While section 1 directly addresses the economic issue of equitable rates, we think that section 2 most strongly belies Asheville's contention, since section 2 provides that a water consumer who fails to promptly pay his or her water bill can and will be "cut off" from the water supply until all arrearages are fully paid. See Sullivan II, ch. 140, 2005 N.C. Sess. Laws 246. If the purpose of this enactment was "relat[ed] to health and sanitation" as interpreted by the Constitution, would it not be antithetical to that purpose to allow Asheville to deprive any of its citizens access to that which is so "vital to clean living"? See Pulliam, 103 N.C. App. at 754, 407 S.E.2d at 570. Further, while one could interpret section 3's mandate to "maintain the waterlines" as relating to the health and sanitation of the water system and its users, the enabling language expressly states that its purpose to maintain the lines is "in order that there may not be a waste of water by leakage." Sullivan II, ch. 140, 2005 N.C. Sess. Laws 247. Again, we find that this language principally contemplates preventing the economic impact of wastefulness on the water distribution system, rather than prioritizing the system's health or sanitary conditions. Therefore, we hold that Sullivan II does not relate to health or sanitation and, thus, does not violate Article II, Section 24(1)(a) of the North Carolina Constitution.

With respect to Sullivan III, while its language implicates modifications to N.C.G.S. § 160A-312 that apply to "any public enterprise" in the City of Asheville, Asheville's City Manager

Jackson stated that, at the time Sullivan III was enacted, Asheville had operated only three of the ten types of public enterprises it was authorized to operate under N.C.G.S. § 160A-311: a water supply and distribution system, a public transportation system, and several off-street parking facilities. See N.C. Gen. Stat. § 160A-311(2), (5), and (8). Accordingly, since Sullivan III "applies only to the City of Asheville[, and] . . . shall not apply to the operation of public transportation systems or off-street parking facilities and systems as public enterprises," Sullivan III, ch. 139, 2005 N.C. Sess. Laws 244, we agree with Asheville that the limitations of Sullivan III apply solely to Asheville's management of, and responsibility for, the operation of the water distribution system. Nevertheless, as we discussed above, the mere implication of water or a water system in a legislative enactment does not necessitate a conclusion that it relates to health and sanitation in violation of the Constitution.

"The best indicia of . . . legislative purpose are 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.'" *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 399, 269 S.E.2d 547, 561 (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)), *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). "In addition, a court may consider 'circumstances surrounding [the statute's] adoption which throw light upon the evil sought to be remedied.'" *Id.* (alteration in original) (quoting *State ex rel. N.C. Milk*

*Comm'n v. Nat'l Food Stores, Inc.*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)).

Although the first three editions of the act included a preamble of legislative findings mirroring those in Sullivan II, Sullivan III as ratified does not include a preamble. Thus, we will examine the plain language of Sullivan III to determine whether its express or implied purpose relates to health or sanitation.

By its terms, in addition to deleting the provision that would otherwise prohibit Asheville from being held liable for damages to those outside the corporate limits for failure to furnish any services from the water distribution system, Sullivan III provides that Asheville "shall account for . . . [the water distribution system] in a separate fund and may not transfer any money from that fund to another except for a capital project fund established for the construction or replacement of assets for [the water distribution system]." Sullivan III, ch. 139, 2005 N.C. Sess. Laws 244. In contrast to our review of Sullivan II's provision which mandated the maintenance of the waterlines "in order that there may not be a waste of water by leakage," Sullivan II, ch. 140, 2005 N.C. Sess. Laws 247, Sullivan III identifies no such purpose tying this provision to the "evil" of economic wastefulness. In our opinion, without such an expression or any other to explain its purpose, a plain reading of this provision establishing a capital project fund "for the construction or replacement of assets" for the water distribution system could be

interpreted to indicate the Legislature's intent simply to concern the growth and maintenance of a fully-functioning water distribution system in Asheville. See Sullivan III, ch. 139, 2005 N.C. Sess. Laws 244. According to this interpretation, the creation of such a fund restricting the use of revenue to the limited purposes of growing and maintaining the water system could "provide for . . . healthful conditions in the [community] by means of . . . an adequate water supply," see *Lamb*, 235 N.C. at 379, 70 S.E.2d at 203, and could likely prevent Asheville's water distribution system from becoming "declared to be unfit [or] obsolete." See *Gaskill*, 270 N.C. at 687, 155 S.E.2d at 149. Further, the evidence shows that during the period from October 1981 through June 2005, the water system had "been allowed to fall farther into disrepair" while Asheville and Buncombe County were "taking money from the water system," a condition which might be corrected with the creation of a fund dedicated to supporting the growth and maintenance of the water distribution system.

However, as we stated above, "we are aware that . . . '[i]t is well settled in this State that the courts have the power, and it is their duty in proper cases, to declare an act of the General Assembly unconstitutional—but it must be plainly and clearly the case'" ; "[i]f there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.'" *Williams*, 357 N.C. at 183, 581 S.E.2d at 425 (quoting *Glenn*, 210 N.C. at 529-30, 187 S.E. at 784). Thus, since Sullivan III was enacted on the same day as

Sullivan II and contained the same legislative findings as Sullivan II in its three earlier editions before it was ratified, we cannot be certain that the legislative purpose of Sullivan III is inconsistent with that of Sullivan II. Since any reasonable doubt must be resolved in favor of presumed constitutionality, we conclude that Sullivan III, like Sullivan II, does not relate to health or sanitation and, therefore, we hold that Sullivan III does not violate Article II, Section 24(1)(a) of the North Carolina Constitution.

## 2. Regulating trade

Subclause (j) of Article II, Section 24, Clause 1 provides that "[t]he General Assembly shall not enact any local, private, or special act or resolution . . . [r]egulating labor, trade, mining, or manufacturing." N.C. Const. art. II, § 24, cl. 1(j). "In interpreting the meaning of Article II, section 24[(1)](j), [the Supreme] Court has previously defined the word 'trade' to mean a business venture for profit and includes any employment or business embarked in for gain or profit." *Cheape*, 320 N.C. at 558, 359 S.E.2d at 798 (internal quotation marks omitted); see also *High Point Surplus Co.*, 264 N.C. at 655, 142 S.E.2d at 701-02 ("An act which restricts or regulates the operation, engaging in or carrying on of business . . . regulates trade."). "The verb 'to regulate' has been defined as meaning to govern or direct according to rule, . . . to bring under control of law or constituted authority." *Cheape*, 320 N.C. at 559, 359 S.E.2d at 798 (internal quotation marks omitted). Thus, "[b]efore a local act will fall under the

prohibition of Article II, section 24[(1)](j), its provisions must fairly be said to 'regulate trade' as defined herein." *Id.*

The Supreme Court has also determined that the term "trade" "refers to commerce engaged in by citizens of the State, and not a restricted activity conducted by the State itself." *Gardner v. City of Reidsville*, 269 N.C. 581, 591-92, 153 S.E.2d 139, 148 (1967) (emphasis added). The Court has further stated that "cities[] exist solely as political subdivisions of the State and are creatures of statute [enacted by the General Assembly]," *Davidson County v. City of High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987), and so have "no inherent powers, and can exercise only such powers as are expressly conferred by the General Assembly and such as are necessarily implied by those expressly given." *High Point Surplus Co.*, 264 N.C. at 654, 142 S.E.2d at 701; see also *Cheape*, 320 N.C. at 560, 359 S.E.2d at 798 ("A municipality, . . . being merely a creature of the General Assembly with the ability to exercise only those powers expressly conferred upon it and those necessarily implied thereby, may require a specific grant of power before it has the capacity to engage in otherwise permissible activities.") (citation omitted).

Asheville argues that when a municipality is operating in a proprietary capacity, a municipality must be treated by the General Assembly in the same manner as a business or private corporation. In support of this assertion, Asheville cites the following language from *Piedmont Aviation*: "[T]he managing board of the [municipal airport a]uthority, [acting in its proprietary capacity]

in determining landing fees and rentals which it will charge the users of its facilities, acts as does the board of directors of a private corporation owning and operating a like facility." *Piedmont Aviation*, 288 N.C. at 103, 215 S.E.2d at 555. However, it is our opinion that Asheville construes this language more broadly than its context supports:

Thus, the managing board of the Authority, in determining landing fees and rentals which it will charge the users of its facilities, acts as does the board of directors of a private corporation owning and operating a like facility, *subject only to limitations imposed upon it by statute or by contractual obligations assumed by it*. Our attention has been directed to no statutory limitation imposed upon the Authority in the matter of fixing landing fees and rentals except the provision in Ch. 755 of the Session Laws of 1959 authorizing the Authority to charge "reasonable and adequate" fees and rents, and the provision of G.S. § 63-53(5) stating that the charges for the use of its properties "shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality." No provision in these statutes requires that the Authority conduct a hearing, receive evidence and make findings of fact or that it follow any other procedural course in determining the landing fees or rentals to be charged by it. Nothing in these statutes requires the Authority to give notice to present or prospective users of its properties that the Authority is contemplating a change in such fees and rental charges. The petitioners were notified of the increases more than three months before they were to become effective.

*Id.* (emphasis added). We interpret this full excerpt to mean that, while acting in its proprietary capacity, the municipal airport authority was not bound by the legislative enactments at issue in

*Piedmont Aviation* to provide notice and a hearing while it was considering what fees it would charge users for landing fees or rentals; instead, it was bound only by the limiting enabling statutes that mandated the fees be "reasonable," "adequate," and "uniform." In other words, but for the limiting enabling statutes, the municipality was not accountable to its users while it considered what fees it would charge and, in that way only, it had discretion similar to that of "the board of directors of a private corporation owning and operating a like facility." See *id.*

Asheville cites no other authority to support its assertion that, when a municipality acts in its proprietary capacity, it is no longer a political subdivision of the State, but rather becomes a citizen of the State and must be treated in the same manner as a business or private corporation, and we are not persuaded by its argument. Therefore, we hold that Asheville, acting in its proprietary capacity to operate the water distribution system, is not a citizen of the State engaging in "trade" for the purpose of Article II, Section 24(1)(j) of the North Carolina Constitution. Asheville's assignments of error that Sullivan II and III violate Article II, Section 24(1)(j) are overruled.

### III.

Asheville next contends the trial court erred by concluding that Sullivan II and III do not (A) violate the rule established in *Asbury v. Town of Albemarle*, 162 N.C. 247, 78 S.E. 146 (1913), and (B) violate the "law of the land" clause set out in Article I, Section 19 of the North Carolina Constitution.

A.

[7] In *Asbury*, the Court heard an action in which the owner of a private waterworks plant ("plaintiff") sought to enjoin a municipality from constructing its own municipal waterworks. Plaintiff complained that the municipality was in violation of a general law known as the Battle Act, which provided:

[W]henever any incorporated town or city, which under this or by special act has been or may be authorized, from the sale of bonds, or otherwise, to build, operate, and maintain a public waterworks . . . there shall have been constructed in said town or city by any private or quasi-public corporation . . . waterworks . . . then in active operation and serving the public, which construction or operation was authorized by said town or city . . . then before constructing any proposed system of waterworks . . . heretofore or hereafter authorized by law, along or upon the streets occupied by such private or quasi-public corporation, the town or city within which such utilities are located and owned, proposing to build any public system of waterworks, shall, before undertaking to do so, first acquire, either by purchase or condemnation, the property of such system already laid, operated, and maintained by such private or quasi-public corporation.

*Asbury*, 162 N.C. at 248, 78 S.E. at 147-48 (omissions in original). After a ruling for plaintiff at trial, the municipality appealed, challenging the "constitutionality of the [Battle Act] as being an invasion of the rights of municipal corporations under the organic law." *Id.* at 252, 78 S.E. at 149. The Court stated that compelling the municipality to purchase plaintiff's system of waterworks "would be to take the money of the taxpayers and devote it to a private use exclusively, and to give something for nothing—a result not contemplated by the statute." *Id.* (emphasis

added). The Court stated that, "[i]f this be a valid exercise of legislative authority, then the right to exercise its own discretion in a purely local matter is taken from the municipality and the money of the taxpayers may be donated to a private concern." *Id.* (emphasis added). Thus, the Court reasoned that, as a result of this legislation, "the city may be compelled [by the General Assembly] to purchase something which, according to the judgment of its own authorities, is of no sort of value or use to it." *Id.* The Court held that "the statute under consideration is void in so far as it attempts to control the exercise of discretion by the defendant in the management of its purely private and property rights." *Id.* at 256-57, 78 S.E. at 151.

In the present case, Asheville contends Sullivan II and III "impermissibly intrude" on the decision-making authority of Asheville with respect to its purely proprietary and private activities, and directs our attention to the following excerpt from *Asbury*:

It may be admitted that corporations . . . such as . . . cities, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith.

*Id.* at 253-54, 78 S.E. at 149-50 (omissions in original) (internal quotation marks omitted). Asheville argues that Sullivan II and III achieve the same purpose of the Battle Act, specifically to compel the municipality to enter into a contract with another party

which the municipality "deem[s] to be disadvantageous" and not in its best interests. Asheville suggests that the private entity which tried to compel the municipality to give taxpayer money to its own private interest in *Asbury* is analogous to Buncombe County "procur[ing]" legislation that would secure for it all of the benefits enjoyed under the Water Agreement, without imposing upon Buncombe County any of the same responsibilities that had existed under the former contract. We are not persuaded that *Asbury* is analogous to the present case in the way that Asheville espouses.

The matter before the Court in *Asbury* was a cause of action arising out of "a result not contemplated by the [Battle Act]," wherein the General Assembly had effectively compelled the municipality "to take the money of [its] taxpayers and devote it to a private use exclusively"—to purchase a privately-owned waterworks facility which the municipality had determined to be "of no sort of value or use to it" because its capacity was well below that which the municipality required. See *id.* at 251-52, 78 S.E. at 149. Here, under Sullivan II and III, the General Assembly does not compel, either directly or indirectly, the transfer of taxpayer money to a private corporation to procure property from which its citizens do not derive a useful benefit. Additionally, neither Sullivan II nor Sullivan III compel Asheville to continue to operate the water distribution system and as such do not compel the use of taxpayer money for this public enterprise if Asheville determines that operating the water distribution system is no longer profitable to the municipality or its citizens. Further, as

Sullivan II does not impose an upper limit on the rates Asheville may charge its consumers—requiring only that the rates charged for each classification of water consumer be uniform—Asheville is not forbidden to set the price for its service that it believes is necessary to yield a fair return on its property. For the same reason, Asheville is not prevented by either Sullivan II or III from offering its water services on whatever terms and conditions it believes are necessary to protect the operational and financial integrity of the system.

Asheville states that Sullivan II forbids it from giving preference in water rates to Asheville's citizens and taxpayers over Buncombe County citizens who reside outside Asheville's corporate limits. Asheville further asserts that, under Sullivan III, it is forbidden even to enjoy the profits from its property, being told that it may not use those profits for the benefit of Asheville's citizens in the manner thought best by the City Council of Asheville. Although we cannot disagree with these statements, "[i]t is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures. . . . [J]udges have not been entrusted by the people of this State to be legislators." *State v. Arnold*, 147 N.C. App. 670, 673, 557 S.E.2d 119, 121 (2001), *aff'd per curiam*, 356 N.C. 291, 569 S.E.2d 648 (2002). Accordingly, the power of this Court is limited to carrying out its duty "to examine a statute and determine its constitutionality when the issue is properly presented." *Id.* Since we do not agree with Asheville that

Sullivan II and III are unconstitutional for the same reason that the Battle Act was unconstitutional in *Asbury*, we hold that Sullivan II and III do not violate the rule announced in *Asbury*.

B.

[8] Next, Asheville contends the trial court erred by concluding that Sullivan II and III do not violate the "law of the land" clause of Article I, Section 19 of the North Carolina Constitution. For the reasons stated below, we conclude that Asheville has abandoned this assignment of error.

Article I, Section 19 of the Constitution of North Carolina provides, in part, that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19. The North Carolina "law of the land" clause is interpreted to be analogous with the Fourteenth Amendment "due process of law" clause. See *Treants Enter., Inc. v. Onslow County*, 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986), *aff'd* by 320 N.C. 776, 360 S.E.2d 783 (1987); see also *Mark IV Beverage, Inc. v. Molson Breweries USA, Inc.*, 129 N.C. App. 476, 486, 500 S.E.2d 439, 446, *disc. review denied*, 349 N.C. 231, 515 S.E.2d 705 (1998). These clauses "have been consistently interpreted to permit the state, through the exercise of its police power, to regulate economic enterprises provided the regulation is rationally related to a proper governmental purpose." *Mark IV Beverage, Inc.*, 129 N.C. App. at 486, 500 S.E.2d at 446 (quoting *Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 64, 366 S.E.2d 697, 699 (1988)). "A single standard has traditionally determined whether

legislation . . . violate[s] the 'law of the land' clause: the law must have a rational, real and substantial relation to a valid governmental objective (i.e., the protection of the public health, morals, order, safety, or general welfare)." *Treants Enter., Inc.*, 83 N.C. App. at 352, 350 S.E.2d at 369-70. "The inquiry is thus two-fold: (1) Does the regulation have a legitimate objective? and (2) If so, are the means chosen to implement that objective reasonable?" *Id.* at 352, 350 S.E.2d at 370.

As the party challenging the constitutionality of the statute, Asheville has the burden of establishing its unconstitutionality. *See In re House of Raeford Farms, Inc. v. Brooks*, 63 N.C. App. 106, 109, 304 S.E.2d 619, 621 (1983), *disc. review denied*, 310 N.C. 153, 311 S.E.2d 291 (1984). In its brief, Asheville makes no argument challenging Sullivan II or III under the "law of the land" clause. For example, Asheville does not identify the relevant text of the constitutional provision it challenges; it does not identify the standard or test upon which courts must rely to determine whether a legislative act is violative of the "law of the land" clause; and most importantly, Asheville does not provide any argument as to *why* this Court should hold that Sullivan II and III do not "have a rational, real and substantial relation to a valid governmental objective." *See Treants Enter., Inc.*, 83 N.C. App. at 352, 350 S.E.2d at 369-70. In the section of its brief in which this assignment of error is referenced, Asheville directs its complete attention to arguing Assignment of Error 7, regarding its contention that Sullivan II and III violate the rule announced in

*Asbury*, as addressed in section III(A) above. Asheville's only mention of the "law of the land" clause in this section of its brief is relegated to a footnote, which states:

The trial court's only discussion of Article I, § 19 missed the mark completely, making the point that the Sullivan Acts do not violate the "equal protection" component of the constitutional provision. But *Asbury*, and Asheville's claim based on the case, are not grounded on the concept of equal protection but instead the doctrine of due process.

The Rules of Appellate Procedure "govern procedure in all appeals from the courts of the trial division to the courts of the appellate division," N.C.R. App. P. 1(a) (2008), and specify the required content in the parties' briefs. See N.C.R. App. P. 28. "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam), *reh'g denied*, 359 N.C. 643, 617 S.E.2d 662 (2005). Since "[q]uestions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned," N.C.R. App. P. 28(a), we conclude that Asheville has abandoned this assignment of error.

#### IV.

[9] Finally, Asheville contends the trial court erred by rejecting its argument that section 1 of Sullivan III unconstitutionally creates special privileges for an ineligible class of persons in violation of the exclusive emoluments prohibition contained in Article I, Section 32 of the North Carolina Constitution. Asheville argues that Sullivan III's

modifications of N.C.G.S. § 160A-312(a) create a special class of persons upon whom an unparalleled benefit is conferred by allowing property owners in Buncombe County located outside the City of Asheville who buy water from Asheville to sue the City to recover damages in an action for negligence in the event Asheville fails to supply sufficient quantities of water for their uses and purposes. For the reasons discussed below, we overrule this assignment of error.

Article I, Section 32 of the North Carolina Constitution provides that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services." N.C. Const. art. I, § 32. The purpose of this constitutional provision, as articulated by our Supreme Court, is "to prevent 'the community' from surrendering its power to another 'person or set of persons' by grant of exclusive or separate emoluments or privileges unless they are granted 'in consideration of public services.' It is not retention of powers but alienation of powers that is prohibited." *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 655, 386 S.E.2d 200, 212 (1989). A statute which confers an exemption that benefits a particular group of persons is not an exclusive emolument or privilege within the meaning of Article I, Section 32 if: "(1) the exemption is intended to promote the general welfare rather than the benefit of the individual, and (2) there is a reasonable basis for the legislature to conclude the granting of the exemption serves the public interest." *Emerald Isle*, 320 N.C.

at 654, 360 S.E.2d at 764. "Our case law, however, teaches that not every classification which favors a particular group of persons is an 'exclusive or separate emolument or privilege' within the meaning of the constitutional prohibition." *Lowe v. Tarble*, 312 N.C. 467, 470, 323 S.E.2d 19, 21 (1984), *aff'd on reh'g*, 313 N.C. 460, 329 S.E.2d 648 (1985). Accordingly, we must first determine whether Sullivan III's modifications to N.C.G.S. § 160A-312(a) confer an exclusive benefit on Buncombe County water consumers who live outside of Asheville's city limits.

Prior to Sullivan III, and as it currently applies to all municipalities except Asheville, N.C.G.S. § 160A-312(a) provides:

A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to *furnish services to the city and its citizens*. Subject to Part 2 of this Article, a city may acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations, but in no case shall a city be held liable for damages to those outside the corporate limits for failure to furnish any public enterprise service.

N.C. Gen. Stat. § 160A-312(a) (emphasis added). As it currently applies to Asheville following Sullivan III, N.C.G.S. § 160A-312(a) provides:

A city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises as defined in this Article to *furnish services to the city and its citizens and other areas and their citizens located outside the corporate limits of the city*. Subject to Part 2 of this Article, a city may

acquire, construct, establish, enlarge, improve, maintain, own, and operate any public enterprise outside its corporate limits, within reasonable limitations.

Sullivan III, ch. 139, 2005 N.C. Sess. Laws 243 (emphasis added). As discussed in section II(B)(1) above, Sullivan III applies only to the water distribution system Asheville operates in its proprietary capacity. Therefore, we must determine whether the Sullivan III modifications that allow water consumers located outside Asheville's corporate limits to hold Asheville liable for its failure to furnish water service actually confer an exclusive benefit on non-city consumers which is not available to water consumers located within Asheville's corporate limits.

At the outset of its argument under this assignment of error, Asheville states that, "[u]nder well-established doctrine," Asheville cannot be held liable in negligence for failure to supply a sufficient quantity of water to its own citizens, i.e., those water consumers located within its corporate limits. Asheville states that this rule "is an instance of the common law 'public duty' doctrine," which holds that a governmental entity cannot be sued in negligence "on account of its failure to perform a duty which it owed to the public generally and equally." See generally *Multiple Claimants v. N.C. Dep't of Health & Hum. Servs.*, 361 N.C. 372, 646 S.E.2d 356 (2007) (defining the rule of the common law public duty doctrine—that a municipality will not be held liable when performing certain governmental functions—first articulated in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), *reh'g denied*, 330 N.C. 854, 413 S.E.2d 550 (1992), identifying its

purpose and its two exceptions, and chronicling its limited expansion and clarification under *Stone v. N.C. Dep't of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998), *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), and *Myers v. McGrady*, 360 N.C. 460, 628 S.E.2d 761 (2006)). Asheville posits that Sullivan III confers a benefit on non-city water consumers which the public duty doctrine effectively disallows for its own citizens and property taxpayers. In support of this suggestion, Asheville directs this Court's attention to *Howland v. City of Asheville*, 174 N.C. 749, 94 S.E. 524 (1917), and *Mabe v. City of Winston-Salem*, 190 N.C. 486, 130 S.E. 169 (1925). However, based on the facts of the present case, we believe Asheville's reliance on these cases to sustain its argument is misplaced.

*Howland* and *Mabe* each involved claims made against a municipality by plaintiffs who alleged that the municipality's failure to provide sufficient water pressure from, and unobstructed access to, water hydrants connected to the municipally-owned waterworks system resulted in the negligent destruction of their homes by fire. In *Howland*, the Court concluded that when a city is exercising a governmental function "solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute [expressly or by necessary implication] subjects the corporation to pecuniary responsibility for such negligence." *Howland*, 174 N.C. at 806, 94 S.E. at 525 (emphasis added) (alteration in original) (internal

quotation marks omitted); see also *id.* (Clark, C.J., concurring) ("[W]here a city or town is maintaining a system of municipal waterworks[,] . . . the liability of the municipality to employees, to the public, to patrons and to any others is the same as a privately owned water company, for the reason that the municipality is then operating a business enterprise, and not governmentally.") (emphasis added). In *Mabe*, the Court similarly concluded that the municipality could not be held liable for damage to plaintiff's home because it was acting in its governmental capacity. See generally *Mabe*, 190 N.C. 486, 130 S.E. 169 (1925).

As we have addressed throughout this opinion, and according to the words of its own brief, Asheville "ha[s] repeatedly emphasized" that the sale of water outside a municipality's limits is discretionary and not part of any public duty; it is done for profit and "not as a means of regulating anything." (Emphasis added.) In fact, as we discussed in section I above, Asheville built its challenge to the Court's holding in *Candler* around its assertion that the Court erroneously concluded that Asheville's operation of its water distribution system was a governmental, rather than a proprietary, function. However, since *Howland* and *Mabe* held that the municipalities were not liable to plaintiffs because the Court determined that the municipality-owned systems were operated in their governmental, not proprietary capacities, *Howland* and *Mabe* and the public duty doctrine can only be relevant to this assignment of error if Asheville is contending that the

operation of its water distribution system is a governmental, rather than proprietary, function.

We believe that *Bowling v. City of Oxford*, 267 N.C. 552, 148 S.E.2d 624 (1966), states the rule that is relevant to determining whether Sullivan III confers a benefit on non-city water consumers which Asheville's own citizens may not demand from the City:

When a city or town engages in an activity which is not an exercise of its governmental function but is proprietary in nature, the city, like an individual or a privately owned corporation engaged in the same activity, is liable in damages for injury to persons or property due to its negligence or other wrongful act in the conduct of such activity. . . .

. . . .

When a municipal corporation operates a system of waterworks for the sale by it of water for private consumption and use, it is acting in its proprietary or corporate capacity and is liable for injury or damage to the property of others to the same extent and upon the same basis as a privately owned water company would be.

*Bowling*, 267 N.C. at 557, 148 S.E.2d at 628. Since the public duty doctrine and the immunity it grants Asheville and other municipalities from liability in tort by its own citizens is not applicable to a municipality's operation of a *proprietary* activity, we find that Sullivan III's modifications to N.C.G.S. § 160A-312(a) effectively put Asheville's non-city water consumers on equal footing with Asheville's city water consumers. Section 1 of Sullivan III simply allows Asheville to be held liable in tort by *all* water consumers of its proprietary water distribution system

according to the rule stated in *Bowling*. Thus, we conclude that the modifications to N.C.G.S. § 160A-312(a) under Sullivan III do not invoke Article I, Section 32 of the North Carolina Constitution because the modifications do not confer an exclusive benefit on water consumers located outside Asheville's corporate limits which is not already shared by water consumers located within Asheville's corporate limits.

The trial court's order granting defendants' cross-motions for summary judgment and denying Asheville's motion for summary judgment is affirmed.

Affirmed.

Judges STEELMAN and STEPHENS concur.



# City of Asheville, NC

May 16, 2006

Office of the Mayor

Senator Martin L. Nesbitt, Jr.  
Senator Tom Apodaca  
Representative Wilma M. Sherrill  
Representative Bruce Goforth  
Representative Susan C. Fisher

Dear Honorable Elected Officials:

On behalf of the Asheville City Council, I am writing to update you on the City of Asheville's initiatives to reach agreement with Buncombe County on water utility issues.

The City of Asheville has been proactive in seeking voluntary, mutual agreement on key issues. Our preference has been and will continue to be to settle all differences out of court. Our good faith efforts to reach an agreement include several coordinated initiatives.

First, the City Council held a January 31 work session and public forum for community input and open discussion of the policy alternatives. Second, the City of Asheville communicated a reasonable counteroffer to a Buncombe County offer communicated on March 17. Attached is a summary of the terms presented in offers and counter offers between the City of Asheville and Buncombe County.

Finally, as a means of facilitating open negotiations, compromise and agreement, we proposed multiple dates for a meeting of County Commissioners, City Council and the legislative delegation. On April 27, County Manager Wanda Green informed us that the city's invitation to have open dialogue with all members of City Council, County Commissioners and the local delegation present would not be accepted.

At this point, we are prepared to continue our legal challenges against the Sullivan Acts; however, we prefer a locally determined solution. City Council welcomes your leadership and support for our efforts to achieve an outcome that is beneficial to all concerned.

If we may share additional information with you, please contact me at your earliest convenience. We appreciate your representation of the citizens of Asheville, and we look forward to working closely with you in the future.

Sincerely,

Terry M. Bellamy  
Mayor

P.O. Box 7148 • Asheville, N.C. 28802 • 828-259-5600 • Fax: 828-259-5499 • [www.ashevillenc.gov](http://www.ashevillenc.gov)

*The City of Asheville is committed to delivering an excellent quality of service to enhance your quality of life.*

cc: Asheville City Council  
Gary Jackson, Asheville City Manager  
Buncombe County Chair Nathan Ramsey  
Buncombe County Vice Chair Bill Stanley  
Wanda Greene, Buncombe County Manager  
Charles L. Haltiwanger, Asheville Area Chamber of Commerce Board Chair  
Rick Lutovsky, Asheville Area Chamber of Commerce President  
Chairman Bill Moyer, Henderson County Commission  
Mayor Will Kennedy, Town of Black Mountain  
Mayor George Goosman, Town of Biltmore Forest  
Joe Martin, Woodfin Water and Sewer District Director

**SULLIVAN ACTS  
CITY/COUNTY NEGOTIATIONS**

<b>Terms</b>	<b>County 12/21/05</b>	<b>City 1/31/06</b>	<b>County 3/15/06</b>	<b>City 4/7/06</b>
Differential Rates (Sullivan Act 2)	Prohibited - Not negotiable.	Continue litigation challenging validity of Sullivan Acts.	Drop lawsuits - \$1.7 million/year compensation	6 million/year payment in lieu of differential rates (equals state average at 85% differential)
Growth Management (Sullivan Act 3)	Annexation may not be required for service.	Continue litigation challenging validity of Sullivan Acts.	Drop lawsuits - Adopt County authored JPA.	Open to new approaches and alternatives to JPA for quality development regulation. Restore municipal authority over line extensions and annexation.
Governance Structure	Independent Authority combined with MSD. Add a City appointment to MSD. County and City assets deduced to MSD.	Municipal System		Reaffirm preference for municipal utility system.
Civic Center/Capital Program	Pursue local delegation funding for various projects totaling \$100 million, including the Asheville Civic Center.	Under Civic Center Task Force consideration.	Pursue legislative authorization of a City/County sales tax for various projects including Civic Center, arena and other projects.	Reservations about using sales tax for funding Civic Center.



# Buncombe County Board of Commissioners

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Nathan Ramsey, Chairman  
Bill Stanley, Vice Chairman

David Gantt, Commissioner  
Carol Weir Peterson, Commissioner  
David Young, Commissioner

June 22, 2006

The Honorable Terry Bellamy, Mayor  
The Honorable Holly Jones, Vice Mayor  
The Honorable Robin Cape, Councilwoman  
The Honorable Jan Davis, Councilman  
The Honorable Brian Freeborn, Councilman  
The Honorable Carl Mumpower, Councilman  
The Honorable Brownie Newman, Councilman

Dear Asheville City Council:

County Commissioners remain open-minded and open to negotiating the best outcome for all citizens around management of water services in our region. The meeting of State, County, and City officials on June 12, 2006 was a good opportunity to clear the air and hear the concerns at all levels of government.

When the City terminated the regional water agreement a year ago, we were concerned about the financial impact those actions would have on County residents who live inside the City of Asheville. Indeed, the City began the FY2007 budget process with a stated \$2.4 million revenue shortfall. We were happy to read the City Manager's budget message and see that the City "successfully addressed this budget deficit through a collaborative process of identifying cost savings, reducing expenditures and re-engineering processes in a manner that will not reduce services to the public."

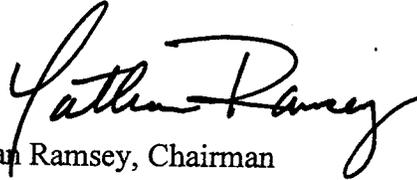
We continue to strongly believe that an independent water authority is the best solution for the region. However, we also believe that continued perceived strife between our governments is not good for our organizations or the community. Therefore, we are prepared to offer the following solution to the water issues:

- Water will be a Municipal system.
- The County and the water districts will transfer to the City both the title and responsibility for all water facilities.
- There will be no differential rates.
- There will be no diversion of water revenues, and this will be verified annually through an independent review.
- Water will not be used as a tool to force annexation.
- The City will transfer to the County both title and responsibility for McCormick Field, Nature Center, Golf Course, Recreation Park, and the Civic Center. (This relieves the City of a net operating loss that is currently \$1.1 million annually and which will grow substantially in the future. Additionally, the County could address the much-needed and long-deferred issue of improving or replacing the Civic Center.)
- All lawsuits on water issues and any related claims will be dropped.
- The County and the City will cooperate in seeking the appropriate legislation necessary to implement this agreement.

We are now at a critical time, and we have tried hard to make an offer that, although not our first choice or yours, is better than the current path towards resolution of this issue in the courts. However, if you do not agree with us, then we feel we have no choice but to take action to protect the interests of all of the citizens of Buncombe County.

We look forward to your response to our offer as well as your continued commitment to seek mutually beneficial solutions for our community.

Sincerely,



Nathan Ramsey, Chairman



Bill Stanley, Vice Chairman



Carol Peterson, Commissioner



David Gantt, Commissioner



David Young, Commissioner

cc: Senator Martin L. Nesbitt, Jr.  
Senator Tom Apodaca  
Representative Wilma M. Sherrill  
Representative Bruce Goforth  
Representative Susan C. Fisher  
Buncombe County Commissioners  
Gary Jackson, Asheville City Manager  
Wanda Greene, Buncombe County Manager  
Charles L. Haltiwanger, Asheville Area Chamber of Commerce Board Chair  
Rick Lutovsky, Asheville Area Chamber of Commerce President  
Chairman Bill Moyer, Henderson County Commission  
Mayor Will Kennedy, Town of Black Mountain  
Mayor George Goosman, Town of Biltmore Forest  
Joe Martin, Woodfin Water and Sewer District Director  
Mayor Jerry VeHaun, Town of Woodfin  
Mayor Bett Stroud, Town of Weaverville  
Mayor Letta Jean Taylor, Town of Montreat  
Joy Franklin, Asheville Citizen-Times

STAFF REPORT

TO: Mayor and City Council Members

DATE: February 20, 2007

FROM: Robert W. Oast, Jr., City Attorney  
Sam Powers, Economic Development Director

SUBJECT: Legislative Agenda for 2007

Summary Statement: Consideration of a resolution requesting legislation for the City of Asheville in the 2007 session of the North Carolina General Assembly, and appropriate action with respect to other legislative matters.

Review and Analysis. Since the discussion with Council on January 9, 2007, the General Assembly convened on January 24, and there have been several developments of relevance to the City's legislative interests.

1. The deadline for submission of requests for local legislation has been established. See my memo of February 3, 2007, attached (Attachment #1).
2. Several pieces of legislation have been initiated on subjects that Council expressed interest in: (copies of the bills referenced in a, b, and c are attached. Attachment #2):
  - a. Strengthening of sex offender laws – There have been several bills (including HB 27, 28, 29, and SB 17) introduced to strengthen and clarify laws relating to child pornography and sexual predators.
  - b. A bill (HB 39) was introduced to permit the provision of economic development incentives to "endangered manufacturers."
  - c. A bill (HB 55) was introduced to require public employers to take certain steps to verify immigration information on new employees.
  - d. As I previously advised Council, bills have been introduced (HB 86 and 87) that would affect the ability of the City to annex; one of those bills is a local act that would apply only in Buncombe County.
  - e. The Asheville Chamber of Commerce on January 12 adopted its legislative agenda (Attachment #3).

As the foregoing are matters with respect to which legislation has been introduced, the appropriate action for Council is a resolution stating Council's position (endorsing, approving, etc.). There is no particular deadline for taking this action, and with respect to some of the items, Council may wish to perform some more investigation before taking action, such as learning what the League of Municipalities' position is, or the position of other cities.

With respect to specific requests for legislative action, Council has indicated an interest in the following:

1. Sullivan Acts. As Council knows, the Sullivan Acts require the City to provide water to customers outside the City limits, and prohibit the City from charging differential rates for outside service. Under the general law, other cities can and do charge differential rates for services provided outside of the city. The attached resolution requests repeal of these acts.
2. Civic Center. A bill authorizing the City to charge a 1% room occupancy tax as a revenue source to fund improvements to the Civic Center. Council has adopted a plan for these improvements, and on February 13, directed that a request for this funding source be requested. A draft bill will be prepared and transmitted to the delegation, along with a copy of the plan.
3. Annexation. As with the last two years, there is the possibility that legislative action will be required to annex some properties into the City that cannot be annexed by other means, but whose incorporation into the City is desirable for service provision reasons. Specifically, there are some parcels between Asheville and Woodfin near UNC-A, that should have municipal services (police, fire) availability, should the need arise. We have spoken with Woodfin in the past about this. Depending on how further discussions proceed, legislative action may be necessary. Because of limitations on "blank bills," we will need to consult the delegation to determine what form this action should take.

Recommendation: At this point, action is needed with respect to the items of local legislation noted above. Council may want to obtain further information and develop a position with respect to the bills that have already been introduced.

Attachments:

- 1) Memorandum from City Attorney dated February 7, 2007
- 2) Copies of legislation
- 3) Asheville Chamber of Commerce's legislative agenda
- 4) Resolution

RESOLUTION NO. 07-

RESOLUTION REQUESTING LEGISLATIVE ACTION FOR THE CITY OF ASHEVILLE IN THE 2007 GENERAL ASSEMBLY

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WHEREAS, the 2007 session of the North Carolina General Assembly convened on January 24, 2007; and

WHEREAS, pursuant to the rules adopted by the respective members, the deadline for submission of local bills to the bill drafting office of the General Assembly is February 27 for the House, and March 7 for the Senate; and

WHEREAS, the city Council of the City of Asheville has determined that it is in the interest of its citizens to request the members of the General Assembly whose districts include Asheville to introduce certain bills to address matters of local concern;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF ASHEVILLE THAT:

The members of the General Assembly whose district includes the City of Asheville are respectfully requested to introduce legislation, and take other action as needed or appropriate, as follows:

1. Repeal of the Sullivan Acts (S.L. 1933-399, 2005-139; 2005-140).
2. Authorization for the imposition of a room occupancy tax of up to one cent per dollar, applicable within the City of Asheville, to fund improvements to the Asheville Civic Center.
3. Introduction of a bill to incorporate certain properties into the corporate limits of the City of Asheville.

The City Attorney and City Clerk are hereby directed to transmit this resolution, and such other material as may be necessary in support of the requests, to the members of the General Assembly whose district includes the City of Asheville, and to provide the General Assembly with such other and further information or assistance as may be needed or desired.

Read, approved and adopted this \_\_\_\_\_ day of February, 2007.

\_\_\_\_\_  
City Clerk

\_\_\_\_\_  
Mayor

Approved as to form:

\_\_\_\_\_  
City Attorney

Regular Meeting

Present: Mayor Terry M. Bellamy, Presiding; Vice-Mayor Diana Hollis Jones; Councilwoman Robin L. Cape; Councilman Jan B. Davis; Councilman Bryan E. Freeborn; Councilman R. Carl Mumpower; Councilman Brownie W. Newman; City Manager Gary W. Jackson; City Attorney Robert W. Oast Jr.; and City Clerk Magdalen Burleson

Absent: None

**PLEDGE OF ALLEGIANCE**

Mayor Bellamy led City Council in the Pledge of Allegiance.

**INVOCATION**

Vice-Mayor Jones gave the invocation.

**I. PROCLAMATIONS:**

**A. RECOGNITION OF SILVER WELL WORKPLACE AWARD**

Mayor Bellamy recognized and praised Ms. Destiny Mattsson, the City's Wellness Coordinator, on receipt of the Silver Well Workplace Award from the Wellness Councils of America.

**B. PROCLAMATION PROCLAIMING MAY, 2006, AS "MOTORCYCLE AWARENESS MONTH"**

Mayor Bellamy read the proclamation proclaiming May, 2006, as "Motorcycle Awareness Month" in the City of Asheville. She presented the proclamation to Mr. Roger Williams who briefed City Council on some statistics regarding motorcycle accidents and some activities taking place during the month.

**II. CONSENT AGENDA:**

Mayor Bellamy asked that Consent Agenda Items "I" and "J" be removed from the Consent Agenda, with Consent Agenda "I" being removed for an individual vote. She said that Consent Agenda Item "J" will be considered after consideration of a resolution amending the Housing Trust Fund guidelines (under New Business).

**A. APPROVAL OF THE MINUTES OF THE REGULAR MEETING HELD ON APRIL 11, 2006, AND THE WORKSESSION HELD ON APRIL 18, 2006**

**B. RESOLUTION NO. 06-77 - RESOLUTION OF INTENT TO CLOSE ALL STREETS IN THE AREA KNOWN AS CITY-COUNTY PLAZA AND SETTING A PUBLIC HEARING FOR MAY 23, 2006**

Summary: The consideration of a resolution of intent to close all streets in the area known as City-County Plaza and setting a public hearing for May 23, 2006.

N.C. Gen. Stat. sec. 160A-299 grants cities the authority to permanently close streets and alleys.

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Pursuant to this statute, Buncombe County and the City of Asheville have requested the City of Asheville permanently close all streets in the area known as City-County Plaza as bounded by College Street on the north, Davidson Street on the east, Marjorie Street on the south and South Spruce Street on the west (a/k/a Court Plaza, City Hall Drive North, City Hall Drive South, City Hall Circle and any and all other names such streets may have from time to time been titled).

Public Works Department staff has researched and determined all streets in the area known as City-County Plaza are City maintained. Closure of these street will not deny any of the adjoining property owners reasonable means of ingress and egress as the City of Asheville and Buncombe County are the only adjoining property owners. The owner of the Hays Hopson Building, although not an adjoining property owner, will be provided a courtesy notice of the intent to close

Pros:

- The closure is necessary for the successful completion of the redesign of Pack Square.
- Closure of the streets will facilitate the timely completion of the Pack Square Project.
- The closure of the streets will still facilitate pedestrian movement from one location to another in downtown Asheville. There will be no future compromise of ingress/egress to other property.
- Ties in with City Council's Strategic Operating Plan

Cons:

- Staff can find no potential challenges.

This action ties in with the City Council Strategic Operating Plan in Focus Area: Sense of place, heritage and arts, Goal 3, Task 3, by promoting downtown revitalization, assisting in the implementation of the Pack Square Renaissance Project.

City staff recommends that City Council adopt the resolution setting a public hearing for May 23, 2006, to close all streets in the area known as City-County Plaza.

**RESOLUTION BOOK NO. 29 – PAGE 436**

**C. RESOLUTION NO. 06-78 - RESOLUTION ACCEPTING AN AWARD FROM CATERPILLAR CORPORATION FOR THE RETROFIT OF 16 ORION TRANSIT BUSES WITH POLLUTION CONTROL DEVICES**

Summary: The consideration of a resolution accepting an award from Caterpillar Corporation for the retrofit of 16 Orion transit buses with pollution control devices.

The Asheville Transit System has received an award from Caterpillar Corporation for the retrofit of 16 Orion transit buses with Diesel Oxidation Catalysts to lessen emissions from the buses diesel engines. The award was made in conjunction with the Diesel Technology Forum, an industry group dedicated to the extension and promotion of clean diesel technologies.

The Diesel Oxidation Catalysts will chemically oxidize particulate matter into water vapor and other gases such as sulfur dioxide and carbon dioxide. This technology will provide a 20 to 50 percent reduction in particulate matter, a 60 to 90 percent reduction of hydrocarbons, and more than a 90% reduction in carbon dioxide. This is equivalent to removing approximately 18 tons of particulate matter from the air and is accomplished without a loss in engine efficiency.

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The entire cost of the project including materials and installation will be born by Caterpillar International. Installation will be through the local caterpillar dealer, Carolina Cat.

The benefits to the City of Asheville are:

- Cleaner air, and an advancement of transit strategy of moving towards clean diesel and eventually hydrogen power.
- Equipment will remove about 18 tons of particulate matter from air
- There is no cost to the city for the equipment or retrofit (The value of the project is unknown as Caterpillar would not disclose, preferring to frame discussion in terms of pollution removed from the air.)

There are no disadvantages or costs to the City of Asheville.

City staff recommends City Council formally accept the award from Caterpillar Corporation for the retrofit of 16 Orion transit buses with pollution control devices.

**RESOLUTION BOOK NO. 29 – PAGE 437**

**D. RESOLUTION NO. 06-79 - RESOLUTION AUTHORIZING THE MAYOR TO EXECUTE A CONTRACT WITH DIXON HUGHES FOR AUDITING SERVICES FOR FISCAL YEAR 2005-06**

Summary: The consideration of a resolution authorizing the Mayor to execute a contract with Dixon Hughes PLLC, Certified Public Accountants and Advisors, for auditing services for Fiscal Year 2005-2006.

NC General Statute sec. 159-34 requires that local governments of North Carolina have their accounts audited each fiscal

year and submit a copy of the audit to the Local Government Commission.

Based on our review of a proposal submitted by Dixon Hughes, staff recommends retaining their services for Fiscal Year 2005-2006. We have worked with Dixon Hughes in the past and they have consistently provided a quality audit for the City.

The base fee has been proposed at \$84,500. Funds are appropriated in the budget of the Accounting Division of the Finance Department.

City staff recommends adoption of the resolution authorizing the Mayor to execute a contract with Dixon Hughes PLLC, Certified Public Accountants and Advisors, for auditing services for Fiscal Year 2005-2006.

#### **RESOLUTION BOOK NO. 29 – PAGE 438**

#### **E. RESOLUTION NO. 06-80 - RESOLUTION DECLARING PROPERTY AT 8 CEDAR STREET AS SURPLUS AND ESTABLISHING THE MINIMUM PRICE**

Summary: The consideration of a resolution authorizing the marketing of surplus property at 8 Cedar Street and establishing a minimum price.

The City owns property at 8 Cedar Street (PIN No. 9657.07-58-4903) which it does not need and proposes to sell using the process provided in N. C. Gen. Stat. sec. 160A-269, negotiated offer and advertisement for upset bids.

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The property at 8 Cedar Street is located at the intersection of Fairview Road and Cedar Street in the Oakley community. It was acquired by the City in December, 1999, for the purpose of realigning the Cedar Street/Fairview Road and Liberty Street/Fairview Road intersections in order to eliminate one of two "back to back" traffic signals. Since that time the amount of traffic on Liberty Street and Cedar Street has diminished significantly due to the closing of Crayton Road and the alternative access between Tunnel Road and Sweeten Creek Road via I-240 and I-40 at Exit 51. Realignment of the intersections is no longer needed based on current and anticipated traffic flow.

The property is zoned RS-8 and improved with a single family residential structure. The lot is 0.1745 acre, rectangular in shape and level to street grade with typical residential landscaping, fencing, etc. The structure is a circa 1926 two story Dutch Colonial with white clapboard siding containing 1,674 square feet. It is structurally sound and in fair to good condition, but it does need some repairs in order to obtain a Certificate of Occupancy. Marketability prospects for the property are very good.

The property has been appraised by CDN Appraisals at \$128,000 and by BRB Appraisals at \$165,000. The appraisals were reviewed by the City's Real Estate Manager and based on that review \$158,600 is recommended as a minimum price for the property. The proceeds from the sale of the property will be general fund revenue.

The positive aspects of marketing the property are:

- The property will be marketed at the appraised value using the upset bid method of sale to ensure a competitive process.
- The sale of the property will generate revenue for the City.
- It will place the property back on the tax rolls.
- It is an efficient use of resources, because un-needed property will return to private ownership.
- It will make available moderately priced housing in a fully serviced neighborhood.

The one negative aspect is that if traffic improvements at the Cedar Street/Fairview Road intersection were ever needed the property may have to be reacquired.

Approval of the resolution will authorize marketing of the property through the process provided in N. C. G. S. 160A-269 and establish a minimum price of \$158,600.

At the March 14, 2006, City Council meeting, Council referred this item to the Housing & Community Development Committee. At the Committee meeting on April 10, 2006, they reviewed this proposed sale and determined that the subject property was not suitable to be designated as affordable housing.

City staff recommends City Council adopt the resolution authorizing the marketing of surplus property at 8 Cedar Street and establishing a minimum price of \$158,600.

**F. RESOLUTION NO. 06-81 - RESOLUTION APPOINTING A MEMBER TO THE BOARD OF ADJUSTMENT**

Summary: Ms. Cheryl Johnson has declined the appointment as an Alternate member on the Board of Adjustment, thus leaving an unexpired term until January 21, 2009. This resolution will appoint Ms. Jessica Erwin Leaven, 52 Gracelyn Road, Asheville, N.C., to serve as

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an Alternate member to the Board of Adjustment, to serve the unexpired term of Ms. Johnson, term to expire January 21, 2009, or until her successor has been appointed.

**RESOLUTION BOOK NO. 29 – PAGE 440**

**G. RESOLUTION NO. 06-82 - RESOLUTION AUTHORIZING THE CITY CLERK TO ADVERTISE AN OFFER TO PURCHASE PROPERTY ON DUNDEE STREET**

Summary: The consideration of a resolution authorizing the City Clerk to advertise an offer to purchase property on Dundee Street.

A bid has been received from Robert Simon in the amount of \$26,200 for the purchase of land on Dundee Street.

The land on Dundee Street was acquired by the City as part of the East End/Valley Street Community Improvement Program. It is a rectangular shaped lot comprising 0.115 acre±. It has a moderate slope downward from the street. It is zoned RM-8 and it is suitable as a home site. The bid from Robert Simon is in the amount of \$26,200. We have in file an appraisal prepared by Joseph F. Moore dated September 13, 2005, estimating the market value of the property at \$26,200. Mr. Simon proposes to acquire the property next door to live in and eventually build on the subject parcel

The positive aspects of the transaction are:

- The sale will be at fair market value as established by the upset bid process.
- It will return property not needed for public use to the tax rolls.
- It will transfer responsibility for maintenance to the private sector.

There is no negative impact.

City staff recommends adoption of the resolution which will initiate the sale of the property through the upset bid process.

**RESOLUTION BOOK NO. 29 – PAGE 441**

**H. ORDINANCE NO. 3348 - BUDGET AMENDMENT TO FUND WEB SITE DESIGN AND CONTENT MANAGEMENT SOFTWARE IMPLEMENTATION SERVICES**

Summary: The consideration of a budget amendment, in the amount of \$29,320, from the City Manager's contingency to fund web site design and content management software implementation services.

Pursuant to a memorandum sent to City Council on December 20, 2005, city staff is pursuing a web site redesign project along with developing a new process for updating and maintaining the city's web content.

This project was bid competitively at the local level, providing prospective vendors with a simple set of desired features. Notification of the bid was provided utilizing a local industry mailing list as well as posting on the City web site. A one week deadline was utilized because of the time-sensitive nature of this project. (Staff is now projecting that this project will be completed at the end of August rather than in July.) No local participation was received within the deadline.

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The goal of the project is to design and structure a user-friendly site with intuitive navigation that will focus on reprioritizing and reorganizing information based on users' needs and perspectives. The project will make more efficient and effective use of the

city's external web site as a tool for sharing information with the public by: (1) enhancing the ability to add, update and remove information from the site; (2) restructuring the information architecture to improve navigation and ease of use, and; (3) updating the look and feel of the site to reflect the organization's brand and professionalism.

A key component of the project is the implementation of content management software, which will make it easier for non-technical staff within each city department to add content to the city's web site, resulting in a more streamlined process that produces current, up-to-date and relevant information on the web site. The city is using Ektron CMS 400 software for this application.

COMSYS, an IT solutions company with extensive government experience, works as a partner with Ektron to implement the content management software as part of the redesign process. The budget amendment from the city manager's contingency will fund: web site design and architecture services; software installation and configuration; on-site training and support, and; the migration of priority content from the city's current site to the redesigned site.

Pros:

- Contingency funds will expedite the project's schedule for completion this fiscal year.
- The content management system will automate and streamline web management efforts, making more efficient use of staff time and resources.
- Efforts will result in a more user-friendly site based on citizen needs and feedback.
- The city will redesign its site so that a finite set of web templates provide a consistent and professional look across the organization
- The vendor has a proven track record of project success with other municipal governments.

Cons:

- Loss of the ability to use these contingency funds for other purposes in FY 2005-06.

Given City Council's commitment to improved communications and citizen service, city staff requests City Council adopt a budget amendment appropriating \$29,320 from the manager's contingency to fund the web site project.

**ORDINANCE BOOK NO. 22 – PAGE**

**I. RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE WEDDING AND RECEPTION ON MAY 13, 2006**

**RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE ASHEVILLE DOWNTOWN ASSOCIATION EVENTS ON MAY 19, JUNE 16 AND JULY 21, 2006**

**RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE BIG RED CHILI COOK-OFF ON JUNE 17, 2006**

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**RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE WINGS & STRINGS: WNC BUFFALO WING COOK-OFF ON JULY 15, 2006**

These items were removed from the Consent Agenda for an individual vote.

**J. RESOLUTION APPROVING A HOUSING TRUST FUND LOAN TO MOUNTAIN HOUSING OPPORTUNITIES FOR CROWELL PARK APARTMENTS**

This matter was removed from the Consent Agenda in order to be discussed after consideration of a resolution amending the Housing Trust Fund guidelines (under New Business).

Mayor Bellamy said that members of Council have been previously furnished with a copy of the resolutions and ordinances on the Consent Agenda and they would not be read.

Councilman Newman moved for the adoption of the Consent Agenda. This motion was seconded by Vice-Mayor Jones and carried unanimously.

**ITEMS REMOVED FROM THE CONSENT AGENDA**

**RESOLUTION NO. 06-83 - RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE WEDDING AND RECEPTION ON MAY 13, 2006**

**RESOLUTION NO. 06-84 - RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE ASHEVILLE DOWNTOWN ASSOCIATION EVENTS ON MAY 19, JUNE 16 AND JULY 21, 2006**

**RESOLUTION NO. 06-85 - RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE BIG RED CHILI COOK-OFF ON JUNE 17, 2006**

**RESOLUTION NO. 06-86 - RESOLUTION MAKING PROVISIONS FOR THE POSSESSION AND CONSUMPTION OF MALT BEVERAGES AND/OR UNFORTIFIED WINE AT THE WINGS & STRINGS: WNC BUFFALO WING COOK-OFF ON JULY 15, 2006**

Summary: The consideration of resolutions making provisions for the possession and consumption of malt beverages and/or unfortified wine at the following 2006 Special Events: Wedding and reception on May 13, 2006; Asheville Downtown Associations' Events on May 19, June 16 and July 21, 2006; Big Red Chili Cook-Off on June 17, 2006; and Wings & Strings: WNC Buffalo Wing Cook-Off on July 15, 2006.

The below listed groups have requested through the Asheville Parks and Recreation Department that City Council permit them to serve beer and/or unfortified wine at their events and allow for consumption at these events.

- A renewal of wedding vows and a reception on May 13, 2006, in the grassy knoll area of Pack Square, with indoor accommodations located at Windows on the Park, A Restaurant for Private Events.
- For many years, the Asheville Downtown Association has co-sponsored with the City of Asheville Parks and Recreation Department the Downtown After Five series to bring both

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citizens and visitors to the downtown area. This year, only the first three events will be held in Pack Square, due the Pack Square Conservancy construction. They will be held on May 19, 2006, June 16, 2006, and July 21, 2006.

- The Big Red Chili Cook-Off, hosted by Season to Season Promotions, is a fundraiser for the Humane Society. This event will be held on June 17, 2006, in Pack Square.
- Wings & Strings: WNC Buffalo Wing Cook-Off, also hosted by Season to Season Promotions, is another fundraiser for the Humane Society. This event will be held on July 15, 2006, in Pack Square.

The Asheville Parks and Recreation Department recommends City Council adopt the resolution making provisions for the possession and consumption of malt beverages and/or unfortified wine at the following 2006 Special Events: Wedding and reception on May 13, 2006; Downtown After Five events on May 19, June 16 and July 21, 2006; Big Red Chili Cook-Off on June 17, 2006; and Wings & Strings: WNC Buffalo Wing Cook-Off on July 15, 2006.

Councilwoman Cape moved to adopt Resolution Nos. 06-83, 06-84, 06-85 and 06-86. This motion was seconded by Vice-Mayor Jones and carried on a 6-1 vote, with Mayor Bellamy voting "no."

**RESOLUTION NO. 06-83 - RESOLUTION BOOK NO. 29 – PAGE 442**  
**RESOLUTION NO. 06-84 - RESOLUTION BOOK NO. 29 – PAGE 444**  
**RESOLUTION NO. 06-85 - RESOLUTION BOOK NO. 29 – PAGE 446**  
**RESOLUTION NO. 06-86 - RESOLUTION BOOK NO. 29 – PAGE 448**

**III. PUBLIC HEARINGS:**

**A. PUBLIC HEARING TO CONSIDER CONDITIONAL ZONING OF PROPERTY LOCATED AT OAK PARK ROAD AND SKY VIEW ROAD FROM RS-2 RESIDENTIAL SINGLE-FAMILY LOW DENSITY DISTRICT AND RS-4 RESIDENTIAL SINGLE-FAMILY MEDIUM DENSITY DISTRICT TO RM-8 RESIDENTIAL MULTI-FAMILY MEDIUM DENSITY DISTRICT/CONDITIONAL ZONING TO PERMIT CONSTRUCTION OF TWO DUPLEX BUILDINGS AND THREE SINGLE-FAMILY BUILDINGS**

Mayor Bellamy stated that on Tuesday, April 18, 2006, an e-mail was received from Mr. Gerald Green, representing the applicant, stating that "the Laibsons are withdrawing their appeal of the Planning and Zoning Commission's recommendation for denial of the conditional zoning of property located on Oak Park and Sky View Roads. Mr. and Mrs. Laibson have agreed to sell the property to a neighboring property owner rather than pursue the development plan."

**B. PUBLIC HEARING ON THE CITY'S CONSOLIDATED ANNUAL ACTION PLAN FOR 2006-07**

**RESOLUTION NO. 06-88 - RESOLUTION APPROVING THE CITY'S CONSOLIDATED ANNUAL ACTION PLAN FOR 2006-07**

At the request of Mayor Bellamy, Councilman Freeborn moved to excuse Mayor Bellamy from participating in this matter due to a conflict of interest. This motion was seconded by Councilman Davis and carried unanimously. Mayor Bellamy turned the meeting over to Vice-Mayor Jones.

Vice-Mayor Jones opened the public hearing at 5:12 p.m.

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Community Development Director Charlotte Caplan said that this is the consideration of a public hearing on the City's Consolidated Annual Action Plan for 2006-07 and consideration of a resolution approving said Plan. This public hearing was advertised on April 14 and 21, 2006.

The City expects to have available \$1,933,833 in CDBG funds and \$1,418,821 in HOME funds to allocate for housing and community development activities in the fiscal year beginning July 1, 2006. The City's Housing and Community Development (HCD) Committee and the Asheville Regional Housing Consortium have made recommendations for allocating these funds to 35 projects. Allocations are consistent with the draft Consolidated Strategic Housing & Community Plan for 2005-2010.

If approved, the HOME and CDBG funding will assist 528 housing units Consortium-wide (including 262 units at Pisgah View Apartments that will have a new security system). CDBG funds will also help more than 3000 low-income City residents obtain homeless services, housing counseling, business assistance, and other needed services.

Funding for the CDBG and HOME programs has been impacted by reductions in federal funding. In common with communities nationwide, Asheville's CDBG and HOME grants have been reduced by 9% from last year, and by 15% over two years. As a result many existing programs will receive less funding in this year's plan and six applications will receive no funding. After careful consideration, the HCD Committee has recommended closing the City's long-standing housing rehabilitation program, because we cannot afford the cost of staffing and funding it at an effective level. However, increased funding for Mountain Housing Opportunities' emergency repair program will provide urgently needed repairs for very low income, elderly, and disabled homeowners.

A summary of the draft Action Plan and notice of this public hearing was published on March 28, 2006. The Plan is due to be submitted to HUD by May 12, 2006.

**Advantages:**

- Allocates \$3,352,654 in compliance with federal rules and enables the City to utilize these funds
- Reflects the carefully considered recommendations of the City's Housing & Community Development Committee and the Asheville Regional Housing Consortium
- Directly addresses most of the priorities set out in the Strategic Plan
- Leverages other funding in the ratio of \$5.49 for every \$1 of CDBG and HOME funds

**Disadvantages:**

- It is not possible to fund all of the applications received at the level requested.

City staff recommends City Council approve the City's Consolidated Action Plan for 2006-07 and subsequent submission of

that Plan to the U.S. Dept. of Housing & Urban Development.

Vice-Mayor Jones closed the public hearing at 5:14 p.m.

Vice-Mayor Jones said that members of Council have previously received a copy of the resolution and it would not be read.

Ms. Caplan responded to various questions/comments from Council, some being, but are not limited to: what does the CD Administration cost consist of; what project is for the allocation to the micro-business development program; and are some of these funded programs competing for outside agency funds.

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Councilman Mumpower said that a lot of the allocations represent a significant increase over last year and feels they are pretty well directed to a core group of non-profit agencies. He was disappointed that there was no recommendation made to fund waterline infrastructure. And, he understands that it is a struggle to put the document together, but philosophically he does see some waste of those hard-earned dollars. He could not support the resolution.

Upon inquiry of Councilman Davis, Ms. Caplan said that ten programs in the Consolidated Plan will, in various ways, impact the 10-Year Plan to End Homelessness. Councilman Newman explained how the recommended funding to the Affordable Housing Coalition does move us forward towards implementation of the Plan.

Councilman Davis felt it might be beneficial to have an update of the 10-Year Plan for discussion during the budget process.

Councilman Newman, Chair of the Revenue & Finance Committee, welcomed Council's input on budgetary direction for the outside agency funding.

Vice-Mayor Jones, Chair of the HCD Committee, discussed the process for allocation of the CDBG funds and HOME funds. She pointed out the good regional cooperation by the Regional Housing Consortium in allocating the HOME funds.

Councilman Newman moved for the adoption of Resolution No. 06-88. This motion was seconded by Councilwoman Cape and carried on a 5-1 vote, with Councilman Mumpower voting "no".

Vice-Mayor Jones turned the meeting over to Mayor Bellamy.

**RESOLUTION BOOK NO. 29 – PAGE 451**

**C. PUBLIC HEARING TO CONSIDER THE PERMANENT CLOSING OF AN UNOPENED RIGHT-OF-WAY OFF CARROLL AVENUE**

Mayor Bellamy opened the public hearing at 5:36 p.m.

Assistant Director of Public Works Richard Grant said that this is the consideration of a resolution to permanently close an unopened right-of-way off of Carroll Avenue. This public hearing was advertised on March 31, April 7, April 14 and April 21, 2006.

N. C. Gen. Stat. sec. 160-299 grants cities the authority to permanently close streets and alleys.

Pursuant to this statute, Mr. Martin Barnes of Brooks & Medlock Engineering, PLLC representing the property owner Farwood Properties, Mike Farmer, President of Farwood Properties, has requested the City of Asheville to permanently close to the public an unopened right of way off of Carroll Avenue as shown on Plat Book 6, Page 6, Block "C" in the Buncombe County Register of Deeds.

Public Works Department staff has researched and determined that this unopened right-of-way is not a City maintained street. Closure of this unopened right-of-way will not deny any of the abutting properties a reasonable means of ingress or egress. There is one parcel that abuts this section of right-of-way, owned by Farwood Properties. It is identified by PIN No. 9648.07-68-1457.

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Pros:

- The closure allows the property to be used to its maximum potential.
- There will be no future compromise of ingress/regress to other property

Cons:

- In consideration of the location of the unopened right-of-way, staff can find no potential challenges regarding the closure of the alley.

City staff recommends that City Council adopt the resolution permanently closing the unopened right-of-way off Carroll Avenue.

He said that Carroll Avenue has existing drainage problems and there has been concern expressed that the development proposed in that area will only make the drainage problems worse. However, he said that the closure of the right-of-way will not affect the drainage within the proposed development because that right-of-way will be kept as open green space. He said that the development itself will have an impact on the drainage and various City departments are working on that concern.

Mayor Bellamy closed the public hearing at 5:39 p.m.

Mayor Bellamy said that the homeowners in the area were allegedly told that the closing had already been approved by City Council. She was concerned about that misinformation and felt it would be appropriate for City Council to postpone action on this closing until the conditional zoning matter comes before Council on the proposed development.

Ms. Jenny Farmer, representing Farwood Properties, said that when they met with the neighborhood for the conditional zoning issue, they had the design work already done, and felt that perhaps the neighbors assumed that the closing had already been approved by Council. She said that they are working hard with the neighborhood to resolve the issues concerning drainage and even asked for a continuance from the Planning & Zoning Commission meeting in order to work with them. This right-of-way is not used in their calculations for density, it will not be graded, and it's not required for the project, however, it is to clean up the paper street and make it a clear property line.

Councilwoman Cape moved to postpone this matter until June 27, 2006, at which time the conditional zoning public hearing will be before Council and this matter can be voted on as well. This motion was seconded by Councilman Freeborn and carried unanimously.

**RESOLUTION BOOK NO. 29 – PAGE 452**

**D. PUBLIC HEARING TO CONSIDER CONDITIONAL ZONING A PORTION OF PROPERTY LOCATED ON 430 MCDOWELL STREET FROM RS-8 RESIDENTIAL SINGLE-FAMILY HIGH DENSITY DISTRICT TO INSTITUTIONAL DISTRICT/CONDITIONAL ZONING TO PERMIT THE RENOVATION OF THE EXISTING BUILDING AND AN ADDITIONAL PARKING AREA FOR A DOCTOR'S PARK**

**ORDINANCE NO. 3349 - ORDINANCE TO CONDITIONALLY ZONE A PORTION OF PROPERTY LOCATED ON 430 MCDOWELL STREET FROM RS-8 RESIDENTIAL SINGLE-FAMILY HIGH DENSITY DISTRICT TO INSTITUTIONAL DISTRICT/CONDITIONAL ZONING TO PERMIT THE**

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**RENOVATION OF THE EXISTING BUILDING AND AN ADDITIONAL PARKING AREA FOR A DOCTOR'S PARK**

Mayor Bellamy opened the public hearing at 5:49 p.m.

Urban Planner Kim Hamel said that this is the consideration of an ordinance to conditionally zone a portion of property located on 430 McDowell Street from RS-8 Residential Single-Family High Density District to Institutional District/Conditional Zoning to permit the renovation of the existing building and an additional parking area for a doctor's park. This public hearing was advertised on April 14 and 22, 2006.

Ms. Hamel said that the subject property is located off of McDowell Street across from Asheville High School. The lot consists of 1.33 acres and is currently zoned RS-8. The applicant is requesting a rezoning of a portion of this lot to Institutional District in order to convert the existing building, formerly used as a daycare center, to an office use. The portion of the parcel fronting St. Dunstan's Road will remain RS-8 and will be subdivided into two or three residential lots.

Surrounding land uses and zoning include the Asheville High School zoned Institutional to the west across McDowell Street; retail business zoned Institutional and a single-family dwelling zoned RS-8 to the north across Grindstaff Road; single family dwellings zoned RS-8 to the east; and vacant property owned by the N.C. Dept. of Transportation zoned RS-8 to the south fronting McDowell Street.

The parcel, in its current configuration, is considered both a through lot and a corner lot with street frontages on McDowell Street, Grindstaff Road and St. Dunstan's Road. The topography is steeply sloped from the top of the property towards the west (McDowell Street). The portion of the site to be rezoned to Institutional District currently houses a vacant building that was used as a daycare center. Access to the existing building and parking area is located off of Grindstaff Road.

The conceptual site plan proposes a conversion of the existing 3,700 square foot building to an office. The building will function as a podiatry office and may also include one other general office use. The site plan illustrates use of the existing parking area off of Grindstaff Road that will consist of 6 spaces. The project also proposes construction of a new internal driveway that will connect the existing parking area to a new seven space parking lot located at the side and rear of the building. A 20-foot, Type B landscape buffer is required around the perimeter of the site where the property abuts residential uses. The applicant, Asheville Day Nursery School Inc., is meeting this requirement, except along the eastern side of the property where the buffer width has been reduced to install a privacy fence and other plantings; a fence can be installed to reduce buffer width and that is what is proposed in this case. In addition to the fence, alternative compliance has been requested for an area along the eastern side of the property where the proposed driveway, that connects the two parking lots, encroaches into the buffer. The applicant has stated that they would like to work with the adjoining property owners on providing them with an amendable planting plan. The mature vegetation shown along the west and north sides of the property will be maintained and credited towards the street tree requirements.

On Monday, March 18, 2006, the Technical Review Committee (TRC) approved the project subject to the conditions outlined in the TRC staff report. The applicant indicated at that meeting that the developer was not prepared to pursue Phase II of the project and asked that it be removed from the project review. Subsequent to the TRC meeting, the applicant provided staff with the information necessary to determine the number of parking spaces and type of landscaping required for the project. These items have been addressed on the revised plans.

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On Wednesday, April 5, 2006, the Planning and Zoning Commission reviewed this request and unanimously voted to approve the project with the conditions outlined in the TRC staff report and with an added condition that the applicant complete the minor subdivision of the lot as proposed on the concept plan within 90 days of City Council approval.

Section 7-7-8(d)(2) of the Unified Development Ordinance (UDO) states that planning staff shall evaluate conditional zoning applications on the basis of the criteria for conditional use permits set out in Section 7-16-2. Reviewing boards may consider these criteria; however, they are not bound to act based on whether a request meets all seven standards.

1. **That the proposed use or development of the land will not materially endanger the public health or safety.** The proposed project has been reviewed by the TRC and appears to meet all public health and safety related requirements. The project must meet the technical standards set forth in the UDO, the Standards and Specifications Manual, the North Carolina Building Code and other applicable laws and standards that protect the public health and safety.
2. **That the proposed use or development of the land is reasonably compatible with significant natural or topographic features on the site and within the immediate vicinity of the site given the proposed site design and any mitigation techniques or measures proposed by the applicant.** The property will be developed with minimal disturbance to the site and existing vegetation. The only land disturbing activity that will occur on site will be the construction of the proposed parking area on the south side of the building and the installation of required landscaping. This area of the site is relatively flat. Additionally, renovations required for the conversion of the building to office space will be confined to the interior of the structure.
3. **That the proposed use or development of the land will not substantially injure the value of adjoining or abutting property.** This property has been used commercially as a daycare facility. The proposed use of the property to an office is considered a low impact use and it not expected to injure the value of adjoining or abutting properties. The project will require the installation of landscape buffers where adjacent to residential uses and also parking lot landscaping that will assist in mitigating any potential negative impacts.
4. **That the proposed use or development or the land will be in harmony with the scale, bulk, coverage, density, and character of the area or neighborhood in which it is located.** This project proposes a rezoning only on the portion of the lot that is currently developed. The office will be housed within the existing structure on site. The remaining portion of the

projects were partially funded in 2002. Construction will begin on these projects this year.

This year, the City of Asheville has prepared two applications: 1) Phase II of sidewalk improvements on New Haw Creek Road. 2) French Broad Greenway Trail on the Progress Energy site located along Riverside Drive. If awarded, the City of Asheville will provide the local match of twenty percent (20%) for both of these projects. If both projects are funded, the total City of Asheville match required would be \$43,000.

In addition to the application from the City of Asheville, both the Pack Square Conservancy and Mountain Housing Opportunities are applying for additional funding. The City of Asheville would be the local government sponsor for these applications. The City is not responsible for the local match for these two projects. The match will be provided by the applying agency. For these applications, the City of Asheville will be responsible for maintenance of any improvements that fall within public right of way, and may provide staff support for project implementation.

The NCDOT will review applications and award Enhancements Grants in the Fall of 2004. Listed below are summaries of the four grant applications presented for approval.

1. New Haw Creek Road Sidewalk Improvements – Phase II

City of Asheville Match: \$ 25,000

Enhancement Funds Requested: \$ 229,200

Total Project Cost: \$ 354,200 (Total project cost with other match sources)

Project Description: The proposed project entails construction of sidewalk, curb, gutter and storm drainage along the south side of New Haw Creek Road from Arco Road west

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to the end of the NCDOT right-of-way. This project is adjacent to a Phase I project partially funded by a 2002 Enhancement Grant.

2. French Broad Greenway Trail on Progress Energy Site – Riverside Industrial District

City of Asheville Match: \$ 18,000

Enhancements Funds Requested: \$ 72,000

Total Project Cost \$ 90,000

Project Description: This greenway path project will complete another portion of the French Broad River Greenway that will be the primary north-south bicycle and pedestrian route in the City of Asheville. This 700 linear foot bike path segment will eventually be united with other greenway routes along the French Broad River and throughout the City of Asheville. Progress Energy currently owns the property that will be conveyed to the City of Asheville in 2004. The project site is bounded by Riverside Drive to the East and the French Broad River on the west. The property is comprised of existing Jean Webb Park and an undeveloped parcel that will be developed as a municipal park in the future.

3. Pack Square Streetscape Improvements – Phase II and III

City of Asheville Match: None

Match by Pack Square Conservancy: \$ 69,949

Enhancements Funds Requested: \$ 279,796

Total Project Cost: \$ 349,745

Project Description:

Phase II – Intersection of Biltmore Avenue and Patton Avenue to the west of Pack Square. Improvements include realigning the current on-street parking from diagonal to parallel spaces in an effort to make the intersection safer. Work will be comprised of new crosswalks located at the corners, sidewalks, curbing, and asphalt paving.

Phase III – Spruce Street, bisecting the center of the new park. This 155-linear foot segment of street will be resurfaced with decorative pavers to indicate it as a special route and encourage slower speeds by vehicular traffic. The pavers will also allow the space to be used as a pedestrian plaza during special events in the park. Other improvements include new curbs, sidewalks, and ADA ramps to work with the new layout and increase safety.

4. Clingman Avenue Streetscape and Greenway – Phase II

City of Asheville Match: None

property will remain RS-8 and be subdivided from the main tract in order to create two to three residential infill lots that will be located off of Dunstan's Road.

5. **That the proposed use or development of the land will generally conform to the comprehensive plan, smart growth policies, sustainable economic development strategic plan and other official plans adopted by the City.** The project is supported by several goals and strategies in the plan relating to adaptive reuse, infill development, and smart growth policies. The project supports pursuit of compatible redevelopment and adaptive reuse of an existing structure with a low impact use. Traditional neighborhood development patterns are also recognized through the creation of several residential infill lots located within the core of the neighborhood.
6. **That the proposed use is appropriately located with respect to transportation facilities, water supply, fire and police protection, waste disposal, and similar**

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**facilities.** This project site is located within the City Limits and has access to all City services including water, fire and police protection and waste disposal. The project site is located on McDowell Street that is serviced by public transportation, including a transit stop located on the corner of McDowell Street and Grindstaff Road.

7. **That the proposed use will not cause undue traffic congestion or create a traffic hazard.** This project has been reviewed by the City's Traffic Engineer who indicated that the office use would not cause undue traffic congestion or create a traffic hazard.

#### Pros

- The former use of the building as a daycare center was considered a non-conforming use. The building has been used commercially since 1956. Interior and exterior commercial up-fits to the building make it an unlikely candidate for the use to convert back to residential. A rezoning to Institutional District will allow a conforming use to occupy the lot.
- The proposed split zoning on the lot and creation of two residential parcels off of St. Dunstan's Road assists in protecting the integrity of the neighborhood by preventing access to the commercial portion of the existing parcel; and adds to the character of the neighborhood by creating additional single-family infill lots.
- Adaptive reuse of an existing structure.
- The conditional zoning process allows neighbors an opportunity to have a clear idea of how the property will be used.
- A medical office is provided on currently underutilized property in the close vicinity of other medical uses.

#### Cons

- Additional traffic may occur along St. Dunstan's Road in order to utilize the traffic signal at the corner of St. Dunstan's Road and McDowell Street.
- The rezoning could be viewed by some as an encroachment of nonresidential uses into a residential area.

Staff recommends approval of the project subject to the conditions outlined in the TRC staff report and with the following conditions: (1) That all site lighting be equipped with 90 degree cut-off fixtures and directed away from adjoining properties and that a lighting plan be submitted to the City for approval; (2) All existing vegetation to be preserved and credited towards the landscape requirements be clearly dimensioned and delineated on the plans; (3) The minor subdivision of the lot, as illustrated on the concept plan be completed within 90 days of City Council approval; and (4) The developer shall meet with neighboring property owners in developing the design of required landscape buffers where alternative compliance is proposed.

Mr. Gerald Green, representing Asheville Day Care Nursery, spoke in support of the conditional zoning. It is their hope to preserve as many existing trees as they can near the back parking lot as they construct the privacy fence. Because of existing trees and rocks, they asked that in lieu of a constructing a sidewalk along McDowell Street, that they build a transit shelter, noting that there is an existing sidewalk on the other side of McDowell Street. He asked for the ability to work with City staff on this option.

Mayor Bellamy closed the public hearing at 5:56 p.m.

Mr. Green responded to various questions/comments from Council, some being, but are not limited to: will there be any major renovations to the outside of the building; and what is the access to the property.

In response to Mayor Bellamy's concern about the buffering be decreased because of the fence, Mr. Green said that they will try to save as many existing trees as they can and will supplement the fence with additional trees, as well as shrubs.

There was a brief discussion about the need for a sidewalk in that area.

Upon inquiry of Mayor Bellamy, Planning & Development Director Scott Shuford said that there is not an issue with changing the use from residential to Institutional/Conditional Zoning regarding the access onto Grindstaff Road.

Upon inquiry of Councilman Newman, Ms. Hamel said that there is an opportunity for flexibility on the sidewalk construction and will meet with the project engineer to look at the possibilities.

Councilman Newman agreed with the statement made by Ms. Hamel that the project conforms with the City's Comprehensive Plan and moved for the adoption of Ordinance No. 3349, to conditionally zone a portion of property located on 430 McDowell Street from RS-8 Residential Single-Family High Density District to Institutional District/Conditional Zoning to permit the renovation of the existing building and an additional parking area for a doctor's park, subject to the following conditions: (1) all conditions outlined in the TRC staff report; (2) That all site lighting be equipped with 90 degree cut-off fixtures and directed away from adjoining properties and that a lighting plan be submitted to the City for approval; (3) All existing vegetation to be preserved and credited towards the landscape requirements be clearly dimensioned and delineated on the plans; (4) The minor subdivision of the lot, as illustrated on the concept plan be completed within 90 days of City Council approval; (5) The developer shall meet with neighboring property owners in developing the design of required landscape buffers where alternative compliance is proposed; (6) that a sidewalk be constructed for property frontage along McDowell Street; and (7) encourage the developer to preserve existing vegetation and work with City staff to plant additional trees to the buffer area in the back of the property. This motion was seconded by Councilman Mumpower and carried unanimously.

In response to Councilman Mumpower, Mr. Green said that he felt sure the developer would be amenable to help provide the labor for a Top-A-Stop at the site where the transit shelter would have been constructed.

Vice-Mayor Jones noted that Asheville Day Nursery provided a great service of affordable child care for over 50 years.

#### **ORDINANCE BOOK NO. 22 – PAGE**

#### **E. PUBLIC HEARING TO CONSIDER AMENDMENTS TO THE UNIFIED DEVELOPMENT ORDINANCE REGARDING REVISIONS TO THE CENTRAL BUSINESS DISTRICT**

**ORDINANCE NO. 3350 - ORDINANCE AMENDING THE UNIFIED DEVELOPMENT ORDINANCE TO STRENGTHEN THE REQUIREMENTS FOR PROJECTS LOCATED IN THE CENTRAL BUSINESS DISTRICT**

**ORDINANCE NO. 3351 - ORDINANCE AMENDING THE UNIFIED DEVELOPMENT ORDINANCE TO ADJUST THE REVIEW THRESHOLDS FOR MINOR AND MAJOR WORKS FOR THE DOWNTOWN DESIGN REVIEW PROGRAM**

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**RESOLUTION NO. 06-89 - RESOLUTION ADOPTING THE KEY PEDESTRIAN STREETS MAP TO BE USED TO SUPPORT THE CENTRAL BUSINESS DISTRICT ZONING**

**ORDINANCE NO. 3352 - ORDINANCE TO EXPAND THE DESIGN REVIEW BOUNDARY MAP**

Mayor Bellamy opened the public hearing at 6:15 p.m.

Urban Planner Alan Glines said that this is the consideration of (1) an amendment to the Unified Development Ordinance ("UDO") to strengthen the requirements for projects located in the Central Business District ("CBD"); and (2) an amendment to the UDO to adjust the review thresholds for minor and major works for the Downtown Design Review program; (3) a resolution to adopt the Key Pedestrian Streets Map to be used to support the Central Business District zoning; and (4) an ordinance to expand the design review boundary map. This public hearing was advertised on April 14 and 21, 2006.

This proposed amendment is drafted to update the Code of Ordinances regarding projects located in the Central Business District. The City is experiencing continued growth and development in the downtown Central Business District. The Downtown Commission was appointed by City Council to recommend policy and to support downtown revitalization. They have carefully considered the proposed wording changes for nearly three years. As downtown's stock of existing buildings have been renovated to new uses, opportunities for new construction have shifted to under-developed infill lots in and around the periphery of the

downtown core. This expansion from the core area will be the growth areas of the central business district. The proposed wording amendments to the UDO will provide additional requirements for new construction to ensure an urban style of development in the downtown area. Development along specific key pedestrian streets would have some additional requirements to improve the character of the street and strengthen the sense of place. The Key Pedestrian Streets Map, first developed for the City Development Plan 2025, is being submitted for adoption along with these ordinance amendments. An additional item that is being submitted for consideration is a minor expansion of the boundary map, which outlines the coverage area for the Downtown Asheville Design Guidelines. The expansion seeks to include all parcels zoned CBD into the design review area. The Downtown Asheville Design Guidelines were adopted in the late in 1980's. The guidelines provide direction for new construction or major renovations in the downtown area. The program is administered by the Downtown Commission under a mandatory review and voluntary compliance authority. The current proposal seeks to amend this design review area to expand and include the entire area of the central business district (CBD zoning district). In order to balance out the need for a wider design coverage area and clearer requirements for new construction, the Downtown Commission is recommending that the design review program match City development review thresholds that are already in place. This means that instead of reviewing all projects greater than 5,000 square feet as currently provided for in the UDO, the Downtown Commission will review projects that are Level II and Level III projects. Staff will provide compliance review for Level I projects in a similar fashion as is done currently for projects under 5,000 square feet. This change in threshold requires an amendment to the UDO section that covers the downtown design review program. In summary, the proposed changes to the Central Business District section of the UDO, the Key Pedestrian Streets Map, the amendments to the Downtown Asheville Design Guidelines and review thresholds are expected to enhance and maintain the redevelopment that has occurred in downtown and provide direction, maintain the character and reinforce the urban form for new construction.

Pros –

- The ordinance amendments protects existing downtown development as new projects are proposed.

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- The requirements for new construction ensures that new projects will add to the character of the downtown area and strengthen the urban form.
- Because the major part of downtown's stock of existing older buildings are renovated, new growth will be in the form of new in-fill construction. The amendments will be in place in time to positively affect this new development
- The dense development pattern of the core area of downtown will expand out to the edges of the Central Business District.

Cons –

- Some older businesses may find that their use would be a better fit in a more suburban setting.
- New development will place greater pressure on existing infrastructure.

The Downtown Commission voted to recommend approval of the proposed changes to the UDO covering the Central Business District. Staff concurs with this recommendation. In addition, at the Planning & Zoning Commission's February 12, 2006, meeting the Commission voted 6-0 to recommend approval of the proposed amendments with several minor changes that have been incorporated into the current ordinances contained herein.

City staff recommends City Council approve (1) an amendment to the Unified Development Ordinance ("UDO") to strengthen the requirements for projects located in the Central Business District ("CBD"); and (2) an amendment to the UDO to adjust the review thresholds for minor and major works for the Downtown Design Review program; (3) a resolution to adopt the Key Pedestrian Streets Map to be used to support the Central Business District zoning; and (4) an ordinance to expand the design review boundary map.

Ms. Julia Brant wondered if there may be a conflict of interest of some members of the Downtown Commission since some are developers. She expressed the following three concerns: (1) balconies should not encroach on the public space; (2) height limitations should be based on the existing streetscape; and (3) developers should be responsible for providing their own parking, since there are no requirements for off-street parking.

Alan Ditmore explained why he felt that all projects should be reviewed on a square footage basis, regardless of whether they are residential or commercial structures.

Mayor Bellamy closed the public hearing at 6:23 p.m.

Mr. Peter Alberice, Chair of the Downtown Commission, assured Council that any time a project is brought before the Commission in which a member has a conflict they have asked to be excused.

After discussion surrounding whether the projects should be reviewed on a square footage basis only, it was the consensus of Council to accept the recommendation of the Downtown Commission at this time and ask that the Commission take Council's comments into consideration and re-visit this in their next phase of review. In addition, this matter can be discussed further at the May 16 worksession regarding land use issues.

Planning & Development Director Scott Shuford said that sometime ago Council asked Planning staff to look at making adjustments to our general thresholds to the three levels based on whether the developments achieve the variety of Council goals. Their review did include some exemptions for downtown development that does increase the threshold. As a result of this discussion, he said that in advance of the May worksession, he will send that code amendment to Council for their initial review.

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In response to Councilwoman Cape, Mr. Alberice said that City Council has control over balconies since that issue will be handled in the conditional use permit public hearing.

Upon inquiry of Councilwoman Cape about the height limitations, Mr. Alberice said that the Downtown Commission spent an enormous amount of time in trying to come up with a way that could be quantified in the zoning ordinance that anyone could understand. As they were not able to come up with the height that was satisfactory to those proposing a mandatory height limit and those who want a height limit with more flexibility, the Commission decided to move that forward to the next phase of the Commission's review.

In response to Councilman Freeborn about no parking requirements, Mr. Alberice said that if they required parking, older buildings would be demolished to create surface parking in order to meet that requirement. He explained that most residential projects have provided parking in order to make their project marketable.

Upon inquiry of Councilwoman Cape about a fee in lieu of parking spaces, City Attorney Oast said that there are a number of vehicles available in the statutes for special tax districts and if Council is interested in pursuing those on a long basis he would look into those.

Councilman Newman was hesitant to support any additional regulations on parking, but would be interested in the Downtown Commission looking at ways to incentivize parking.

Mayor Bellamy said that members of Council have previously received a copy of the resolution and ordinances and they would not be read.

Councilman Davis moved for the adoption of Ordinance No. 3350. This motion was seconded by Vice-Mayor Jones and carried unanimously.

**ORDINANCE BOOK NO. 22 – PAGE**

Councilman Davis moved for the adoption of Ordinance No. 3351. This motion was seconded by Councilman Newman and carried unanimously.

**ORDINANCE BOOK NO. 22 – PAGE**

Councilman Freeborn moved for the adoption of Resolution No. 06-89. This motion was seconded by Councilwoman Cape and carried unanimously.

**RESOLUTION BOOK NO. 29 – PAGE 452**

Councilman Freeborn moved for the adoption of Ordinance No. 3352. This motion was seconded by Councilwoman Cape and carried unanimously.

**ORDINANCE BOOK NO. 22 – PAGE**

At 7:01 p.m., Mayor Bellamy announced a short recess.

**IV. UNFINISHED BUSINESS:**

**V. NEW BUSINESS:**

**A. RESOLUTION FINDING THAT AN UNOPENED 5-FOOT WIDE RIGHT-OF-WAY OFF FAIRMONT ROAD IS NOT PART OF AN ADOPTED STREET PLAN**

Mayor Bellamy said that she has received the following request today from Mr. Jason Kraus, Counsel for the petitioners: "Please continue the matter involving the withdrawal of the 5-foot strip off of Fairmont Road to the May 9, 2006, formal Council meeting. This request is based upon the need of counsel for the petitioners, Mr. and Mrs. Chad Rundell, to conduct further investigation as it relates to a waterline crossing the 5-foot strip."

Therefore, Councilman Davis moved to continue this matter until May 9, 2006. This motion was seconded by Councilman Mumpower and carried on a 5-2 vote, with Councilwoman Cape and Councilman Freeborn voting "no."

**B. RESOLUTION NO. 06-90 - RESOLUTION AMENDING THE HOUSING TRUST FUND GUIDELINES**

Community Development Director Charlotte Caplan said that this is the consideration of amendments to the Housing Trust Fund (HTF) guidelines

The Housing and Community Development (HCD) Committee is undertaking a thorough review of the policy and procedures for the City's Housing Trust Fund, which were established in September 2000 and last updated in October 2004. At its April 10, 2006, meeting, the Committee noted the following issues which it felt needed immediate action.

**1. Loan Limits**

The current limit on any one loan is \$250,000. While this is adequate for most developments, for those few proposals that involve large numbers of affordable units, this limit can greatly restrict the effective subsidy per unit. For example, for an 80-unit project the loan amount would be only \$3,130 per unit, and the benefit in terms of increased affordability less than \$200 in price, or \$10-\$15 a month in rent.

Staff recommends that the limit be increased to \$500,000 for development of 30 units or more that offer a high degree of affordability and leverage.

**2. Sales price limits**

The current limits were adopted in October 2004. Rapid inflation of construction costs has made these limits out of date. Permit data suggests that construction costs are currently increasing by about 8% a year. Both for-profit and non-profit developers tell us that they can no longer build a 3-bedroom single family home on an infill lot to sell for the current limit of \$135,000, and we have not received an application for HTF funds for homes for sale since February 2005. Applications for fee rebates through March 2006 are 70% down on the same period last year. The same price limits apply to both programs.

Staff recommends the following new price limits, effective immediately, which should remain realistic through Fiscal Year 2007:

Size	Existing Limit	Proposed Limit
0-bedroom (efficiency)	95,000	105,000
1-bedroom	110,000	115,000
2-bedroom	120,000	140,000
3-bedroom	135,000	160,000
4-bedroom	150,000	180,000

Staff further recommends that the same limits be considered for the fee rebate program, either immediately or on July 1, 2006, after passage of the City budget.

**3. Exception to the price limits.**

Some non-profit developers have pointed out that they are often able to make the homes they build more affordable by bringing in other forms of subsidy. These subsidies usually require sale to households with less than 80% area median income, a market that for-profit developers are barely able to serve. The non-profits have requested exemption from the HTF price limit provided that the home is made affordable to a household below 80% AMI. The HCD Committee has recommended this exception.

The Committee has also instructed staff to prepare more far-reaching proposals, which would modify some of the fund's basic policies. Staff expects to have these ready for Council's review in the summer.

Advantages:

- Larger loans to assist the largest and most affordable developments will increase the impact of the fund.
- Increased price limits will restore the fund's availability to developers.
- Price limits will not be a barrier where additional subsidy is available to serve low-income homebuyers.

Disadvantages:

- Larger loans will mean less funds available for small developments
- Homes priced close to the new limits will be less affordable, since incomes are increasing more slowly than land and construction costs.
- Less pressure on developers to build smaller, more basic homes.

Staff recommend approval of the new loan limits and sales price limits, and the exception to the sales price limits in the case of buyers under 80% AMI.

Mr. Scott Dedman, Executive Director of Mountain Housing Opportunities, said that the per unit subsidy is important and explained why he felt the 3-bedroom unit sales price should be \$150,000 not the proposed \$160,000.

Mr. Walter Plaue felt that MHO is a great leader in providing affordable homes, but voiced concern about putting the annual available money for the HTF in "one pot" and felt there may be some sense of impropriety in that MHO is the first one who would benefit from the HTF guidelines proposed today.

Mayor Bellamy requested that the three proposed changes be discussed and voted on separately.

Councilman Newman spoke about how the HCD Committee has worked hard on making the HTF as useful as possible. He said that considering the needs in the community, we need to have tools to support the big projects that deliver "a lot of mileage."

Councilman Mumpower explained why he felt the HTF should be re-visited in its entirety for possible dissolution.

Vice-Mayor Jones, Chair of the HCD Committee, offered to make a presentation about the value of the HTF if the majority of Council wishes.

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Ms. Caplan responded to Councilman Freeborn when he asked how many dollars have gone into the community as a result of the HTF and how many affordable units have been created.

Because discussion began in an area which Mayor Bellamy would have a conflict of interest, she asked to be excused. Therefore, Councilman Newman moved to excuse Mayor Bellamy from participating further in this matter due to a conflict of interest. This motion was seconded by Councilwoman Cape and carried unanimously. Mayor Bellamy turned the meeting over to Vice-Mayor Jones and left the meeting room.

After Council members voiced their concerns/support for the three proposed changes, Councilman Mumpower moved to send the sales price limits change and the exception to the price limits back to the HCD Committee for further review and consideration, taking into consideration Council's comments. This motion was seconded by Councilman Davis and carried unanimously.

Vice-Mayor Jones moved to amend the HTF guidelines to increase the loan limit to 500,000 for development of 30 units or more that offer a high degree of affordability and leverage. This motion seconded by Councilwoman Cape and carried on a 4-2 vote, with Councilman Mumpower and Councilman Davis voting "no."

**RESOLUTION BOOK NO. 29 – PAGE 454**

**C. RESOLUTION NO. 06-87 - RESOLUTION APPROVING A HOUSING TRUST FUND LOAN TO MOUNTAIN HOUSING OPPORTUNITIES FOR CROWELL PARK APARTMENTS**

Even though Mayor Bellamy did not re-enter the meeting room, Councilman Mumpower moved to excuse Mayor Bellamy

from participating in this matter due to a conflict of interest. This motion was seconded by Councilman Freeborn and carried unanimously.

Community Development Director Charlotte Caplan said that this is the consideration of a resolution approving a \$500,000 Housing Trust Fund loan for the development of 73 units of affordable rental housing on Crowell Road in West Asheville.

Mountain Housing Opportunities (MHO) has requested a Housing Trust Fund (HTF) loan in the amount of \$500,000 for a proposed \$7 million Low Income Housing Tax Credit (LIHTC) development. They also plan to use \$395,700 in HOME funds.

The available balance in the Housing Trust Fund is currently \$562,000

The application was evaluated by a panel of outside experts and staff and scored very well against the HTF criteria. MHO has an excellent track record with similar tax credit projects in Asheville. This development will be targeted to working families with income below 50% of the area median income and LIHTC rules guarantee 30 years of continued affordability. The HTF investment per unit is only \$6,850.

The requested loan amount of \$500,000 is above the current HTF loan limit of \$250,000. The HTF investment will allow the developer to meet the additional property taxes after annexation to provide an urban level of services (a condition of the zoning permit) and will also enable it score additional points in the tax credit competition. However, the request is based on a calculation of property taxes that assumes continuation of the current tax rate. If the tax rate is rolled back as a result of the recent re-valuation, the operating costs will be reduced and the project may be over-subsidized.

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The Housing and Community Development Committee reviewed the application on April 10, 2006, and has recommended awarding an HTF loan in the amount of \$500,000 with provisional terms of 0% interest and principal payments amortized over 15 years. Final terms will be subject to negotiation after July 1, 2006, and may include an interest rate above 0% and/or an accelerated repayment of principal to prevent over-subsidizing.

**Advantages:**

- Creation of 73 units of affordable housing for low income working families
- Long-term affordability (at least 30 years)
- Increased of almost \$6,000,000 in the tax base
- Increased chance of winning Low Income Housing Tax Credits for Asheville

**Disadvantages:** This loan will exhaust most of the remaining Housing Trust Fund cash balance for this fiscal year. No other significant project can be funded until additional funds are available.

City staff recommends City Council approve a \$500,000 Housing Trust Fund loan to Mountain Housing Opportunities.

Ms. Cindy Weeks, representing MHO, spoke in support of the loan.

Mr. Walter Plaue felt the City should concentrate on infill development.

Ms. Weeks responded to several questions from Council, some being, but are not limited to: how does MHO sustain affordability for the units; explain the zero interest rate; and when would the project break ground.

Councilman Newman moved to adopt Resolution No. 06-87. This motion was seconded by Councilwoman Cape and carried on a 5-1 vote, with Councilman Mumpower voting "no".

Vice-Mayor Jones then turned the meeting back over to Mayor Bellamy when she re-entered the meeting room.

**RESOLUTION BOOK NO. 29 – PAGE 450**

**D. RESOLUTION NO. 06-91 - RESOLUTION ADOPTING THE STATE LEGISLATIVE PROGRAM**

City Attorney Oast said that this is the consideration of adoption of a resolution for approving legislative action in the 2006 session of the North Carolina General Assembly.

At the Council work session on April 18, 2006, the City's legislative requests were considered by Council. Based on that

consideration, Council indicated a desire to proceed with the following items as indicated:

- A. Settlement agreement with Progress Energy regarding Lake Julian. Near the end of last year, the City and Progress Energy reached an agreement settling the 2000 litigation involving the attempted annexation of Progress Energy's Lake Julian power generating facility. Pursuant to this agreement, the City would cease attempts to annex Progress Energy's Lake Julian facility, and Progress Energy would continue to pay the City a utility franchise tax. This essentially amends an earlier (1994) agreement, formalized by legislation, settling a dispute (and threatened litigation) over the utility franchise tax.

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This settlement agreement was discussed with the legislative delegation prior to Council acting on it back in the Fall. The delegation has indicated that this matter is appropriate for consideration in the short session, and that they will take the appropriate steps to have it enacted into law.

City Attorney Oast has been in discussions with Progress Energy's attorney, former Mayor Larry McDevitt, about this matter, and he indicates that he has been in discussion with our delegation, and they are ready to act on the request.

When the settlement was initially approved back in November, it was contemplated that a detailed review of information might result in slight revisions to the area included in the coverage of the Agreement. This detailed review has been completed, and the map showing the properties to be included has been slightly revised. However, this revision has no financial consequence to the City under the Agreement, and amounts to a technical correction. For a further explanation of the revisions, see my memorandum dated April 21, 2006.

Council direction: Resolution to proceed with finalization of settlement agreement.

Note: Because Mr. McDevitt's office will take the lead in working with the delegation on this matter, no further action by the City, other than cooperating with Mr. McDevitt, should be necessary.

- B. Voluntary / legislative annexation in South Asheville. The area between the southern City limit and Henderson County is developing rapidly. For a variety of reasons, some of the commercial developments in this area wish to be annexed into the City of Asheville. Under current law, however, voluntary annexation is complicated because those areas are closer to Fletcher than they are to Asheville's primary corporate limits, even though Fletcher cannot expand into Buncombe County. Last year, legislative action was required in order to annex some commercial properties in the new development near the airport. This year, a similar situation has arisen with other commercial properties, and legislative action will likely be required again.

Council direction: Resolution to seek legislative action as necessary to enable properties in this area to voluntarily annex into the City of Asheville without specific legislative approval.

- C. Revenue for Civic Center: Although this matter may be more appropriate for consideration in the 2007 session than in this short session, Council indicated that it wished to work with the delegation in considering the menu of options available to provide needed funding for the Civic Center. This request coincides with the approval by the Civic Center task force of alternatives for renovation / expansion of the Civic Center, and the transmission of those recommendations to the Council for action. Since Council action will necessarily involve some consideration of funding, Council wishes to begin that consideration sooner rather than later, and to request appropriate assistance and direction from the legislative delegation. Council indicated that it was open to any funding mechanism except a sales tax. A detailed discussion of available options is beyond the scope of this staff report, but more information will be available and developed as the options emerge.

Council direction. Resolution to seek assistance and appropriate action as necessary to develop a funding source for this regional facility.

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- D. Repeal of Sullivan Acts: This was not discussed in detail on April 18, but has been the subject of much consideration in the last 18 months, and there is a wealth of information available from a variety of sources.

Council direction. Resolution requesting repeal of the Sullivan Acts.

- E. Child care reimbursement: There is concern within the community that Buncombe County does not receive its fair share of funds for reimbursement for child care services provided for low/moderate income families. Consideration should be given to the adoption of the 2005 Market Rate Study, and increasing overall funding.

Council direction. Resolution requesting legislative review and action as necessary to address funding inequities and insufficiencies.

- F. Funding of criminal justice system: There is concern within the community that the State's criminal justice system is not adequately funded, especially with respect to drug-related offenses. This has the effect of allowing offenders – sometimes repeat offenders – to get back on the street with little or no deterrent action.

Council direction. Resolution requesting legislative review and action as necessary to address criminal justice system funding issues, particularly as they may affect Asheville.

The 2006 session is a "short" session, meaning that there are limits on what can be considered by the General Assembly. There is also a fairly narrow window for submission of requests; the deadline for submission of material to the Bill Drafting division is May 17.

Councilman Newman introduced for Council's consideration for inclusion in the legislative package (1) campaign finance reform – allow local governments to decide if they want to create public financing for local elections; (2) concern regarding cable franchise fees – statement that Asheville is concerned about the state-wide video franchise bill which would cap PEG access fees at \$16,000 per community and delegate responsibility to the Attorney General's Office for handling citizen complaints about local TV providers (historically, local governments have played a leading role in these issues); (3) raise the minimum wage – statement that Asheville asks our legislators to raise the state minimum wage to \$7 per hour; (4) homestead exemption – reduce property taxes on low-income senior citizens who live in their own home, expand the homestead exemption act and index it for inflation; and (5) Land for Tomorrow initiative – place the Land for Tomorrow bond referendum on the ballot for consideration by the people of North Carolina.

City Attorney Oast said that the following four specific items for local legislation (settlement agreement with Progress Energy regarding Lake Julian; voluntary/legislative annexation in South Asheville; revenue for the Civic Center; and repeal of the Sullivan Acts), will require unanimity (which our delegation requests) from the Council before the legislative delegation will introduce them. The other items are relevant to the City of Asheville, but since they are not specific pieces of legislation, he was not certain unanimity by Council was necessary.

Mayor Bellamy said that this is a short session, which needs to have non-controversial items and items with unanimity of Council. She recalled that during the regular session, other items of endorsement have been submitted with the vote of Council. The majority of Council can change that process.

Councilwoman Cape moved to include items that are not unanimous to move forward, but presented separately from the items that are unanimous, in the short session of the City's

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legislative package items. This motion was seconded by Councilman Mumpower and carried on a 6-1 vote, with Mayor Bellamy voting "no."

Councilman Mumpower felt that even though the items are not unanimous, it gives us an opportunity to educate our legislative body on some of Council's interests, whether we chose to pursue those interests or not.

Councilwoman Cape moved to include the following three items specifically relating to the City of Asheville to the City's legislative package: (1) settlement agreement with Progress Energy regarding Lake Julian; (2) voluntary/legislative annexation in South Asheville; and (3) repeal of the Sullivan Acts). This motion was seconded by Vice-Mayor Jones and carried on a 6-1 vote, with Councilman Mumpower voting "no".

Because there was unanimity by City Council at the worksession for all the items City Attorney Oast just reviewed, Councilman Mumpower moved to include the following six items to the City's legislative package: (1) settlement agreement with Progress Energy regarding Lake Julian; (2) voluntary/legislative annexation in South Asheville; (3) revenue for the Civic Center; (4) repeal of the Sullivan Acts); (5) child care reimbursement; and (6) funding of criminal justice system. This motion was seconded by Councilman Freeborn.

There was a brief discussion regarding the Civic Center, noting that the Civic Center Task Force will be bringing forward their options to Council on May 9, 2006.

Councilman Newman is not supportive of a sales tax as an option for revenue for the Civic Center and requested more

analysis on the different options, e.g., hotel occupancy fee, fine dining tax, etc., available for Civic Center revenue.

The motion made by Councilman Mumpower and seconded by Councilman Freeborn to move forward on all six items carried unanimously.

After each Council member voiced their opinion on the campaign finance reform item, Councilwoman Cape moved to move that forward to the legislative delegation. This motion was seconded by Councilman Freeborn and carried on a 4-3 vote, with Mayor Bellamy, Councilman Davis and Councilman Mumpower voting "no."

After each Council member voiced their opinion on the cable franchise fees item, Councilwoman Cape moved to move that forward to the legislative delegation. This motion was seconded by Councilman Freeborn and carried on a 5-2 vote, with Mayor Bellamy and Councilman Mumpower voting "no."

After each Council member voiced their opinion on raising the minimum wage item, Councilman Newman moved to move that forward to the legislative delegation. This motion was seconded by Councilwoman Cape, and carried on a 4-3 vote, with Mayor Bellamy, Councilman Davis and Councilman Mumpower voting "no." Mayor Bellamy requested a report from the City Manager on our employee salaries.

After each Council member voiced their opinion on the homestead exemption, Councilman Davis moved to move that forward to the legislative delegation. This motion was seconded by Councilwoman Cape, and carried on a 5-2 vote, with Mayor Bellamy and Councilman Mumpower voting "no."

After each Council member voiced their opinion on the Land for Tomorrow initiative, Councilwoman Cape moved to move that forward to the legislative delegation. This motion was

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seconded by Councilman Freeborn and carried on a 5-2 vote, with Mayor Bellamy and Councilman Mumpower voting "no."

**RESOLUTION BOOK NO. 29 – PAGE 458**

**E. RESOLUTION NO. 06-92- RESOLUTION APPOINTING A MEMBER TO THE ASHEVILLE TRANSIT COMMISSION**

Vice-Mayor Jones, Chair of the Boards & Commissions Committee said that Councilman Bryan Freeborn has resigned as a member of the Asheville Transit Commission, thus leaving an unexpired term until December 31, 2006.

At the City Council worksession on April 18, 2006, City Council instructed the City Clerk to arrange interviews for Mr. Yuri Koslen, Ms. Hanna Miller and Mr. Bruce Emory.

After Council spoke highly of the candidates, Vice-Mayor Jones said that the Boards & Commissions Committee will review the structure for possible expansion of the Board. The voting was as follows: Yuri Koslen received one vote, Hanna Miller received six votes, and Bruce Emory received no votes. Therefore, Hanna Miller was appointed to serve the unexpired term of Councilman Freeborn, term to expire December 31, 2006, or until his successor has been appointed.

**RESOLUTION BOOK NO. 29 – PAGE 459**

**VI. OTHER BUSINESS:**

Councilwoman Cape suggested that when an item is withdrawn from the Council agenda that a notice be placed on the Council Chamber door for those who may not have been in the Chamber when that action happened.

City Council recognized Mr. Yuri Koslen for his efforts on Strive Not To Drive Day.

Vice-Mayor Jones announced the three upcoming board and commission vacancies.

The following claims were received by the City of Asheville during the period of March 31 – April 20, 2006: BellSouth (Water), Harriett Riddle (Sanitation), Emily Kinsella (Sanitation), Steve Earle (Water), David Wilson (Streets), Sherri Adkins (Water), Mildred Miller (Police) and Travis Smith (Police). These claims have been referred to Asheville Claims Corporation for investigation.

**VII. INFORMAL DISCUSSION AND PUBLIC COMMENT:**

Mr. Bruce Deile spoke to Council about the denial of medical treatment due to high costs. He also brought to Council's attention that an older homeless man who can't take care of himself was kicked out of the Salvation Army. Mr. Deile said that A-Hope staff said they can't force this man into a state run agency. Mayor Bellamy said that she would follow-up on this.

**VIII. ADJOURNMENT:**

Mayor Bellamy adjourned the meeting at 9:15 p.m.

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CITY CLERK

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MAYOR

## Report From Water Agreement Task Force

Task Force Members: Doug Wilson, Chuck Tessier, Ken Michalove

(Note: Jack Cecil sat in for three meetings.)

The committee agreed that their recommendation would reflect what they thought was in the best interests of the people, businesses and the future of the Asheville metropolitan area.

After considerable discussion, many meetings, and review of background material, the committee recommends that the city pursue a sale of the Water Authority to the Metropolitan Sanitary District (MSD) for the following reasons:

- The Metropolitan Sanitary District has a strong track record and culture of good service and efficiency.
- It would create a one-stop shop (plan review, permitting, inspection and acceptance) for the two major utilities.
- It would be a regional approach to utility extension and service.
- There would be reduced administrative costs. (Attachment 1)
- There would be reduced costs from highway relocation. (Attachment 2)

As you can see from Attachment 1, the discussion centered on the MSD paying fair market value to the city for the assets. There was some discussion as to what is fair market value, but the information provides a starting point.

Other considerations:

- County retains control of parks and baseball facility.
- County continues supplemental payments for police in various municipalities.
- New combined authority sets a reasonable differential rate for tap-on fees as the difference that has been sought by the city. Rates remain the same for individual users in and outside the city.
- County accepts the Civic Center from the city or otherwise joins with the city in planning and providing funding for the future of the Civic Center.
- The question of countywide land use planning remains open.

The introduction of legislation by our local delegation has been the wild card in the negotiations between the city and the county. Attached are copies of the two bills introduced, House Bills 1064 and 1065. (Attachments 3 and 4) As you can see, the legislators have reinforced the Sullivan Act which does not allow a rate differential outside city limits. This has significantly altered the dynamics of the negotiations between the city and county.

1. "Book Value" of water system capital assets is \$116,832,409 minus bonded indebtedness of \$52,479,113 as of June 30, 2004.
2. Cash and cash receipts were \$17,256,499.00 while restricted cash investments were \$11,486,118.
3. \$750,000,000.00 represents the value of the system if it were new. Figure is used for "Asset Management" to determine how much capital recovery money should be reinvested over the useful life of the assets.
4. City gets 5% gross revenue or \$1.15 million in FY 2004. County gets 2 ½% gross revenue or \$573,000.00 in FY 2004. \$1.0 million went to fund balance in FY 2004.
5. \$4.4 million per year is allocated to City for administrative / overhead.
6. MSD has approximately same revenues and funds, on average, \$14 million per year in system rehabilitation.
7. It is feasible that RWA/COA could fund the first few years of the recommended replacement program without a rate increase and with a moderate amount of borrowing (50% or less) fund the entire program as stipulated - \$350 million over 35 years.
8. In 1999, RWA stipulated in their Official Statement to bond holders of the intent to fund a five year \$26.7 million CIP (with their \$13.3 million water revenue bond issue) and another issue of \$10 million in fall of 2002. In addition, it was stipulated that "the authority will maintain financial sufficiency for the forecast period with the implementation of moderate annual rate increases of 2.5% net over the next four years." The projects are not complete, there was no bond issuance in 2002 and there remain funds (from the 1999 issue) in the bank.

1. City, County and other municipalities in Buncombe County agree to establish Independent Regional Water and Sewer Authority under Chapter 162A, Article 1. Representative Board to be appointed by City, County and other municipalities.
2. Independent Authority would have complete ownership and control of water and sewer systems.
3. Independent Authority would purchase water system from City for book value, net of bonded indebtedness. . . . . Independent Authority assumes all bonded indebtedness of the system.
4. Employees of Water Resource Department become employees of Independent Authority.
5. Independent Authority would establish differential rates for connection and tap fees. Rates would be higher outside the City.

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**Section:** Editorial  
**Page:** 9  
**Byline:** By Andrew Reed  
**Source:** Story  
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### **A Truly Independent Regional Water Authority is Best Route of This Mess**

Editor's Note: Andrew Reed is a member of the board of the League of Women Voters. The league board concurs with the opinions expressed, though they do not represent an official position of the league.

Clean, affordable water is integral to our region's physical and economic health, and the Water Authority exists for the sole purpose of providing it. The League of Women Voters of Asheville and Buncombe County proposes a simple, straightforward, and nonpartisan approach to fulfill that purpose. For it to work, all those involved must agree to negotiate in good faith toward a common goal: an efficient system that collects, treats, and delivers high-quality water at fair and equitable rates for all users. Any issue that distracts from that goal is irrelevant and, worse, counterproductive, and should not be allowed at the negotiating table. Among the side issues that must be dropped include the question of city "ownership" of the system, a temptation to keep it under city control by keeping its employees on the city's payroll, and some residents' antagonism toward planning for future growth and development. The rule for negotiations should be: If it's not germane to delivering clean, affordable water, don't even bring it up.

The Water Authority is, simply, a public infrastructure that exists to serve its users. It collects rainfall and runoff from far outside city limits. It operates treatment plants in Buncombe and Henderson Counties, and it serves both Asheville residents and tens of thousands who live outside the city. Our water system is already a regional operation, and to carry out its mission it must be truly independent.

The league proposes local and state legislation be enacted to create a truly independent Regional Water Authority. The RWA should have a nine-member board, with the City of Asheville, Buncombe County and Henderson County each having one appointment. Three more members should be voted on by customers – residential, business and institutional – one water bill, one vote, ensuring that the votes and voices of a few big industrial users don't outweigh those of 70,000 residential customers. (This voting could be done through a public election, as in Woodfin, or in conjunction with the billing process, as is done by stockholders in publicly traded corporations.)

Those six members would then appoint three more, from among any citizens who apply, by a two-thirds majority vote of the other members. A minimum of four votes would thus be required for each of these appointments.

Then, move the RWA out of City Hall and give it full control over its infrastructure, employees and revenue, as well as legal ownership of and responsibility for all assets. (Some assets will be valuable, like

the treatment plants; others, including many of the ancient clay pipes, virtually worthless.) The RWA board will set rates, which could include reasonable differentials based on the cost of delivery.

These differentials might include 1) distance, which would impact Buncombe and Henderson County residents; 2) terrain – for example, the need for additional pumping on exclusive mountaintop developments; and 3) volume (a discount for efficiency of delivery to large users balanced by a premium for high usage of limited resources). Like any business, the RWA should incorporate into its rate structure a way to pay for capital improvements.

The league would gladly provide oversight for or help organize the process of strategic planning required to make these recommendation manifest.

Two immediate benefits will come into play under our proposal. First, the City of Asheville will no longer be required to pay for road repairs following water line work, saving several million dollars a year.

Second, and independent, nonprofit public utility will be free to apply for grants to rebuild and maintain the infrastructure without having to walk the political tightrope of balancing the (often legitimate) conflicting needs of local governments.

Additional, citizens would enjoy access to clean water in an atmosphere free of the political rancor and personal bitterness that have brought us to this impasse.

It might also be valuable to establish a Water Advisory Commission to ensure the voices of a wide variety of interest groups are heard (but have no legal weight). Appointments might be made by such organizations as the Coalition of Asheville Neighborhoods, the Asheville Area Chamber of Commerce, CIBO, Citizens for Property Rights, Asheville Home Builders Association, Asheville Board of Realtors, Citizens for Safe Water and Air, and others.

Andrew Reed is a freelance writer, editor, and marketing consultant. His business is located at [MyOwnEditor.com](http://MyOwnEditor.com). He lives in Asheville.