

SEARCHING EVERYWHERE FOR A SECTION 24(1)(A) STANDARD: *CITY OF ASHEVILLE*, *TOWN OF BOONE*, AND THE UNCLEAR FUTURE OF LOCAL-STATE RELATIONS IN NORTH CAROLINA *

INTRODUCTION

Every state in the Union sets up its own framework for relations between the state and local governments. Most states broadly delegate “authority over local matters” to local governments in their state constitution or a single state statute.¹ North Carolina is one of only two states that does not take this approach.² The North Carolina Constitution, though, does limit the circumstances under which the General Assembly can pass “local acts,” which alter the powers of one or a small subset of local governments.³ Two recent decisions of the Supreme Court of North Carolina—*City of Asheville v. State*⁴ and *Town of Boone v. State*⁵—considered this constitutional limitation and the related theme of competing local and state authority.

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1. Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule?*, 84 N.C. L. REV. 1983, 1989 (2006).

2. *Id.*; see also *infra* notes 9–15 and accompanying text.

3. See N.C. CONST. art. II, § 24. Though there is “no exact rule or formula” for determining whether a law is “local” or “general,” the Supreme Court of North Carolina has generally classified local laws as those that “discriminate[] between different localities without any real, proper, or reasonable basis or necessity.” *City of Asheville v. State*, 369 N.C. 80, 90–91, 794 S.E.2d 759, 768 (2016) (quoting *McIntyre v. Clarkson*, 254 N.C. 510, 517–18, 119 S.E.2d 888, 893–94 (1961)). For more on this issue, see generally Frayda Bluestein, *Local Acts and General Laws: Another Look*, COATES’ CANONS: N.C. LOC. GOV’T L. (Sept. 12, 2012), <https://canons.sog.unc.edu/local-acts-and-general-laws-another-look/> [https://perma.cc/8AGA-2SLY] [hereinafter Bluestein, *Local Acts and General Laws*] (discussing when general state law displaces local law) and Frayda Bluestein, *What is a Local Act?*, COATES’ CANONS: N.C. LOC. GOV’T L. (Apr. 6, 2010), <https://canons.sog.unc.edu/what-is-a-local-act/> [https://perma.cc/DDT3-WK6D] [hereinafter Bluestein, *What is a Local Act?*] (defining local acts and explaining how they interact with other laws).

4. 369 N.C. 80, 794 S.E.2d 759 (2016).

5. 369 N.C. 126, 794 S.E.2d 710 (2016).

Though these two cases involved the same state constitutional provisions—article II, section 24 and article VII, section 1—and were decided on the same day, the court sided with local authority in one and with state authority in the other. In *City of Asheville*, the court found for Asheville in a dispute between the city and the General Assembly over ownership of the city’s water system.⁶ In *Town of Boone*, the court approved of—over the town’s objection—a change the legislature made limiting Boone’s extraterritorial jurisdiction.⁷ The methodologies the court used to reach these seemingly opposing conclusions are strikingly similar. In both cases, it reviewed the history behind, plain language of, relationship between, and precedent related to the constitutional provisions at issue but ultimately came to opposite conclusions after these parallel analyses.⁸

This Recent Development explores why the Supreme Court of North Carolina reached seemingly divergent conclusions in these two cases on similar issues. It explains how article VII, section 1—which gives the General Assembly broad authority over local governments—and article II, section 24—which limits how the General Assembly can legislate about local governments—relate to each other and argues that the majority erred in *Town of Boone* by failing to find that article II, section 24 applied to the law at issue in that case. It further details why the concurring justices in *Town of Boone* misapplied the section 24(1)(a) test articulated in *City of Asheville* by failing to properly account for the purpose of extraterritorial jurisdiction and Boone’s specific exercise of it. It suggests that the “material connection” test announced by the *City of Asheville* court could prove to be a workable solution to the court’s confused jurisprudence on state-local relations, provided that the test is modified to ensure that subject matters historically regulated by the General Assembly are safe from constitutional challenge.

Analysis proceeds in four parts. Part I outlines the background law, including the framework the state constitution provides for local-state relations and the related jurisprudence of the Supreme Court of North Carolina. Part II briefly summarizes the facts, reasoning, and holdings of *City of Asheville* and *Town of Boone* and explains how these decisions can be reconciled. Part III argues that article II, section 24 should apply to the law at issue in *Town of Boone* and that a proper section 24(1)(a) analysis should render the law

6. *City of Asheville*, 369 N.C. at 81, 794 S.E.2d at 762.

7. *Town of Boone*, 369 N.C. at 127, 794 S.E.2d at 712.

8. See *City of Asheville*, 369 N.C. at 102–03, 794 S.E.2d at 775–76; *Town of Boone*, 369 N.C. at 132–34, 794 S.E.2d at 715–16.

unconstitutional. Part IV suggests that, taken together, *City of Asheville* and *Town of Boone* demonstrate the need to reform section 24(1)(a) doctrine and proposes a potential solution to remedy the problem.

I. THE LEGAL BACKDROP

Under the Federal Constitution, local governments have no inherent authority or right to exist.⁹ They are purely creations of the various state governments, and their authority derives from the state government that created them.¹⁰ Unlike most other states, North Carolina does not grant broad authority over local matters to local governments through its state constitution or a single state statute.¹¹ Instead, North Carolina local governments derive their authority from a “patchwork of local and general laws.”¹² These laws include “numerous general statutes” laying out the general powers of all local governments and local acts that apply only to a given municipality or set of municipalities.¹³ In some cases, the charter establishing a particular local government provides that government with additional authority.¹⁴ There is thus little doubt that the power of local governments is expressly limited; the Supreme Court of North Carolina has described local governments “as creatures of the State,

9. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907).

10. See *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 549 (1905); see also Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

11. See Bluestein, *supra* note 1, at 1989. The approach most other states take is commonly referred to as the “home rule” approach. *Id.* at 1989–90.

12. Bluestein, *Local Acts and General Laws*, *supra* note 3.

13. Frayda Bluestein, *Local Government Authority: Piecing It Together*, COATES’ CANONS: N.C. LOC. GOV’T L. (Feb. 8, 2012), <https://canons.sog.unc.edu/local-government-authority-piecing-it-together/> [<https://perma.cc/SS9J-ECLD>].

14. *Id.* General laws from the General Assembly’s last session include a law setting a uniform system of development fees for local water and sewer authorities, Act of June 29, 2017, ch. 138, 2017 N.C. Sess. Laws 996 (codified as amended in scattered sections of N.C. GEN. STAT. §§ 130A, 153A, 160A, 162A (2017)), and a statewide ban on local governments imposing stormwater fees levied on runways and taxiways on airports. Act of June 28, 2017, ch. 132, secs. 1–2, §§ 153A-277(a1), 160A-314(a1), 2017 N.C. Sess. Laws 131, 131–32 (codified at N.C. GEN. STAT. §§ 153A-277(a1), 160A-314(a1) (2017)) (banning stormwater fees imposed by counties and cities). Local laws passed during the General Assembly’s last session included a prohibition on firing a bow and arrow from roads and rights-of-way in Richmond County alone, Act of June 29, 2017, ch. 77, 2017 N.C. Sess. Laws 506, 506, and a special dispensation allowing the city of Wilson to operate a municipal broadband system, Act of July 25, 2017, ch. 180, sec. 1, § 160A-340.2(c)(3), 2017 N.C. Sess. Laws 421, 421 (codified at N.C. GEN. STAT. § 160A-340.2(c)(3) (2017)).

[which] can exercise only that power which the legislature has conferred upon them.”¹⁵

A. *The Constitutional Framework*

Two somewhat contradictory provisions of the North Carolina Constitution govern the General Assembly’s authority over local governments. Article VII, section 1 gives the General Assembly the authority to “provide for the organization and government and the fixing of boundaries of” local governments.¹⁶ It also allows the legislature to give local governments “such powers and duties . . . as it may deem advisable” except as otherwise limited by the constitution.¹⁷ Though this provision has been infrequently considered by the Supreme Court of North Carolina, a 1968 commission studying state constitutional changes noted that article VII, section 1 is “not a delegation of power . . . but . . . merely a recognition of [the legislature’s] power in this regard” and “a general description of the General Assembly’s” authority in this area.¹⁸

Article II, section 24 is one of the limitations contemplated by article VII, section 1. It prohibits the General Assembly from enacting “any local, private, or special act or resolution” that falls into one or more of fourteen categories.¹⁹ First among the categories of prohibited bills are those “[r]elating to health, sanitation, and the abatement of nuisances.”²⁰ As if to reiterate its ultimate purpose, section 24 later notes: “[a]ny local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.”²¹

What is now article II, section 24 first became part of the North Carolina Constitution by amendment in 1917.²² Its predecessor provision, article II, section 29, was proposed primarily “to relieve the legislature of the burden of local bills.”²³ This burden can hardly be overstated; on average, more than seventy-five percent of the bills the General Assembly passed in the years leading up to the amendment’s

15. *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994).

16. N.C. CONST. art. VII, § 1.

17. *Id.*

18. N.C. STATE CONSTITUTION STUDY COMM’N, REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION 33 (1968).

19. N.C. CONST. art. II, § 24.

20. *Id.* § 24(1)(a).

21. *Id.* § 24(3). Section 24 also prevents local, private, or special acts “[r]elating to ferries or bridges; . . . [r]elating to non-navigable streams; . . . [and r]egulating labor, trade, mining, or manufacturing,” among other categories. *Id.* § 24(1).

22. N.C. CONST. of 1868, art. II, § 29; see also Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. REV. 340, 340 (1967).

23. Ferrell, *supra* note 22, at 358.

adoption were local or private.²⁴ Pamphlets promoting the amendment's passage and minutes of the 1913 commission studying proposed constitutional changes clearly support this primary purpose of relieving this legislative burden, and the pamphlets further reveal a secondary purpose: strengthening local self-government.²⁵

The two provisions are contradictory in that the state supreme court has often read article VII, section 1 as giving the General Assembly essentially unlimited authority over local governments,²⁶ while the text of article II, section 24 specifically limits the way that the General Assembly can supervise the authority of local governments. If the subject of the General Assembly's action concerns health and sanitation or any of the other thirteen listed categories, section 24's text seems to clearly indicate that the General Assembly may *only* act when it makes a law that affects *all* local governments and *may not* act when that law affects *only one or a few* governments. Though section 24 might be understood as only a limitation on the way the General Assembly exercises its "unlimited" authority with respect to local governments, there is at least a conflict between the limitations imposed by section 24 and the view, frequently expressed by the state supreme court, that article VII, section 1 gives the General Assembly plenary authority over local governments.

B. The Supreme Court of North Carolina's Section 24(1)(a) Jurisprudence

The Supreme Court of North Carolina's article II, section 24 jurisprudence has been "long . . . marked by a lack of consistency"

24. *Id.* at 352. The term "private act" is not well defined. *Id.* at 344–45 n.22. One leading treatise defines private acts as "those which apply by name or specific identification to particular persons or groups of persons in regard to their private interests." 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 43:2 (7th ed. 2009). "Special" acts on the prohibited subjects are also unconstitutional under section 24. N.C. CONST. art. II, § 24. The term "special act" is not well defined either but appears to be a synonym for a local or private act. *See* SINGER & SINGER, *supra*, at § 40:1 (describing special acts in terms similar to which the Supreme Court of North Carolina has described local acts).

25. Ferrell, *supra* note 22, at 352–53, 358–60; *see also* Williams v. Blue Cross Blue Shield of N.C., 357 N.C. 170, 186–88, 581 S.E.2d 415, 426–28 (2003) (explaining that the "history of the promulgation of Article II, Section 24 reveals" that the provision's purpose was to limit the "plethora of local, private, and special enactments" then being passed by the General Assembly).

26. *See, e.g.,* Town of Boone v. State, 369 N.C. 126, 131, 794 S.E.2d 710, 714–15 (2016) (emphasizing the General Assembly's "plenary power to create political subdivisions of local government, establish their jurisdictional boundaries, and invest them with certain powers" and referencing article VII, section 1 as support).

with “years of conflicting decisions and multiple standards.”²⁷ In the fifteen cases before *City of Asheville* and *Town of Boone* in which the court considered whether a local act violated section 24, it took an array of approaches to apply the section.²⁸ Though the purpose of the local law at issue tends to be the focus of the court’s analysis,²⁹ the level of connection required between section 24’s prohibited purposes and the local law before the law is struck down has varied,³⁰ as has the specific way the court has examined the law’s purpose.³¹ In several cases, the court articulated no reasoning at all for finding that a law related to health and sanitation.³²

Despite the state supreme court’s varied approaches, the outcomes of section 24(1)(a) cases has been remarkably consistent. Since 1917—when section 24 first became part of the constitution—the court “has rejected a claim that a local law impermissibly ‘related to’ health and sanitation” only three times.³³ Since 1930, the court has

27. Frayda Bluestein, *Local Acts Relating to Health and Sanitation: Supreme Court Weighs in on Asheville and Boone Cases*, COATES’ CANONS: N.C. LOC. GOV’T L. (Jan. 5, 2017), <https://canons.sog.unc.edu/local-acts-relating-health-sanitation-supreme-court-weighs-asheville-boone-cases/> [https://perma.cc/VF3U-MUZQ]. The analysis of cases in this area presented in this Recent Development will be relatively brief. For an excellent, detailed overview of the court’s article II, section 24 (formerly article II, section 29) cases between 1917 and 1966, see generally Ferrell, *supra* note 22, at 360–402.

28. Ferrell, *supra* note 22, at 361, 378, 390 (describing the court’s section 24 jurisprudence as varying between eras of “strict construction,” “reappraisal,” and “broad construction”).

29. See, e.g., *City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 440, 450 S.E.2d 735, 741 (1994) (“[B]oth 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 an intent to protect the health of the general public.” (emphasis added)); *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 207, 118 S.E.2d 408, 410 (1961) (“There can be little doubt but that the ‘Housing Authority Law’ relates to health and sanitation. [It] declares the purpose to be the removal of conditions which ‘cause an increase in and spread of disease and crime and constitute a menace to health, safety, morals and welfare of the citizens.’” (emphasis added) (quoting N.C. GEN. STAT. § 157-2 (1959))); *Armstrong v. Bd. of Comm’rs*, 185 N.C. 405, 409, 117 S.E. 388, 390 (1923) (“[T]he purpose [of the local act] itself is in direct contravention of the amendment.” (emphasis added)).

30. *Compare* *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951) (noting a relationship “clear beyond peradventure”), with *Sams v. Bd. of Cty. Comm’rs of Madison Cty.*, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940) (finding an “apparent” relationship).

31. *Compare* *City of New Bern*, 338 N.C. at 440, 450 S.E.2d at 741 (focusing on “the legislature’s directions for the creation of the” law at issue), with *Chadwick v. Salter*, 254 N.C. 389, 398, 119 S.E.2d 158, 164 (1961) (examining the purpose of the law in the light most favorable to the defendants).

32. See *Town of Kenilworth v. Hyder*, 197 N.C. 85, 89, 147 S.E. 736, 738 (1929); *Drysdale v. Prudden*, 195 N.C. 722, 727–28, 143 S.E. 530, 532–33 (1928).

33. *City of Asheville v. State*, 369 N.C. 80, 103 n.16, 794 S.E.2d 759, 776 n.16 (2016). The *City of Asheville* court mentions two of these cases, *Reed v. Howerton Eng’g Co.*, 188 N.C. 39, 123 S.E. 479 (1924), and *Piedmont Ford Truck Sale, Inc. v. City of Greensboro*,

rejected such a claim only once.³⁴ The court has found laws creating a housing authority,³⁵ shifting responsibility for the enforcement of building codes,³⁶ authorizing a sheriff to remove and destroy cattle,³⁷ consolidating public health agencies,³⁸ providing for water and sewer services,³⁹ governing the selection of local health officers,⁴⁰ and directing the support of hospitals⁴¹ to all relate to health, sanitation, or the abatement of nuisances, thus making them unconstitutional under section 24.

Interestingly, two of the three cases where the court upheld the local law at issue and determined that it was not related to health, sanitation, or nuisances concerned water and sewer regulations.⁴² Since these cases are both from the 1920s—an era when the court generally disfavored section 24 and declined to enforce it⁴³—they can largely be dismissed as lacking precedential value. The third and only modern case—*Piedmont Ford Truck Sale, Inc. v. City of Greensboro*⁴⁴—was somewhat unique. It considered the General Assembly’s mandate that a law of statewide applicability regarding

324 N.C. 499, 380 S.E.2d 107 (1989). *Id.* It fails to mention *Town of Kenilworth*, where the court upheld against a constitutional challenge a local act that “ratified” the Buncombe County Commissioners’ creation of a water and sewer district. *Town of Kenilworth*, 197 N.C. at 86–87, 147 S.E. at 736.

34. Of the three cases described in the previous note, *Reed* dates from 1924 and *Town of Kenilworth* from 1929. *Piedmont Ford Truck Sale, Inc.*, decided in 1989, is the only modern case. Even that case is nearly thirty years old, meaning that it was decided in a time when the General Assembly’s local acts agenda was less politically controversial and more stable. *See infra* note 141–42 and accompanying text.

35. *State ex rel. Carringer v. Alverson*, 254 N.C. 204, 207, 118 S.E.2d 408, 410 (1961).

36. *City of New Bern*, 338 N.C. at 440, 450 S.E.2d at 741.

37. *Chadwick v. Salter*, 254 N.C. 389, 398, 119 S.E.2d 158, 164 (1961).

38. *Idol v. Street*, 233 N.C. 730, 733, 65 S.E.2d 313, 315 (1951).

39. *Lamb v. Bd. of Educ. of Randolph Cty.*, 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952); *Drysdale v. Prudden*, 195 N.C. 722, 727, 143 S.E. 530, 532–33 (1928).

40. *Sams v. Bd. of Cty. Comm’rs of Madison Cty.*, 217 N.C. 284, 285, 7 S.E.2d 540, 541 (1940).

41. *Bd. of Managers of James Walker Mem’l Hosp. of Wilmington v. City of Wilmington*, 237 N.C. 179, 189, 74 S.E.2d 749, 757 (1953).

42. *See Town of Kenilworth v. Hyder*, 197 N.C. 85, 89, 147 S.E. 736, 738 (1929); *Reed v. Howerton Eng’g Co.*, 188 N.C. 39, 44, 123 S.E. 479, 481 (1924).

43. *See Ferrell, supra* note 22, at 361 (“Initially, the court was openly antagonistic to claims that the 1917 amendments [including what is now section 24(1)(a)] significantly restricted legislative power over the structure and powers of local government.”); *see also City of Asheville v. State*, 369 N.C. 80, 103 n.16, 794 S.E.2d 759, 776 n.16 (2016) (noting the court’s tendency to accept claims that “local law[s] impermissibly ‘relate[] to’ health and sanitation”). In reaffirming the court’s view that the provision of water and sewer service relates to health and sanitation, *City of Asheville* itself demonstrates the limited precedential value of *Town of Kenilworth* and *Reed*.

44. 324 N.C. 499, 380 S.E.2d 107 (1989).

solid waste in cities be applied to an area annexed by Greensboro.⁴⁵ Though ostensibly the court held that solid waste was not a subject related to health, sanitation, and nuisances, it focused more on the General Assembly's authority to ensure a statewide law was enforced in Greensboro than on the connection between the law at issue and the prohibited purposes of section 24(1)(a).⁴⁶

Though the two provisions are clearly in conflict, the court has never held that article VII, section 1 somehow displaces article II, section 24. In cases considering both provisions, the court has traditionally been so unconcerned with a conflict between the two provisions that it neglected to discuss the issue at length.⁴⁷ Instead, the court has described article II, section 24 as “the fundamental law of the State” that “may not be ignored.”⁴⁸

II. THE CASES THEMSELVES: *CITY OF ASHEVILLE* AND *TOWN OF BOONE*

During its 2013–14 session, the General Assembly passed a law transferring the City of Asheville's municipal water system to a new countywide authority, and another that eliminated the Town of Boone's extraterritorial jurisdiction—which had allowed Boone to exercise some of its municipal powers outside of its boundaries. Asheville and Boone challenged these laws, and the resulting challenges ultimately reached the Supreme Court of North Carolina in *City of Asheville* and *Town of Boone*.

45. *Id.* at 505, 380 S.E.2d at 111.

46. *See id.* at 505, 380 S.E.2d at 110–11.

47. *See City of New Bern v. New Bern-Craven Cty. Bd. of Educ.*, 338 N.C. 430, 438–42, 450 S.E.2d 735, 740–42 (1994); *Piedmont Ford Truck Sale, Inc.*, 324 N.C. at 503–06, 380 S.E.2d at 110–11; *see also* *Town of Boone v. State*, 369 N.C. 126, 158, 794 S.E.2d 710, 731 (2016) (Ervin, J., concurring in the judgment) (“[T]he fact that we reached the merits of the . . . claim under Article II, Section 24 [in *Piedmont Ford Truck Sale, Inc.*] suggests that a local act that alters local government jurisdictional boundaries and reorganizes units of local government is not immune from challenge under Article II, Section 24.”). The number of section 24 cases that do not even mention article VII, section 1 supports this proposition as well; of the court's fifteen section 24 cases before *City of Asheville* and *Town of Boone*, only *City of New Bern* and *Piedmont Ford Truck Sale, Inc.* discuss article VII, section 1. *See, e.g., Gaskill v. Costlow*, 270 N.C. 686, 687–90, 155 S.E.2d 148, 148–151 (1967) (striking down a local law directing the Town of Beaufort to provide water and sewer service in annexed areas on article II grounds without mentioning article VII).

48. *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965).

A. *City of Asheville and the Unconstitutionality of Local Acts Relating to Water and Sewer*

In May 2013, the General Assembly passed House Bill 488 (the “Asheville Act”), which “effectively required the City of Asheville to involuntarily transfer [its] public water system to a newly created metropolitan water and sewerage district.”⁴⁹ Though the bill was styled in broad terms—not as one that directly affected Asheville alone⁵⁰—the way it was crafted ensured Asheville was “the only entity that [would] ever be required to” make such a transfer.⁵¹

Asheville challenged the law as, *inter alia*, a violation of article II, section 24, arguing that it was a local act related to health and sanitation.⁵² The Court of Appeals of North Carolina reversed the trial court’s ruling for the city in favor of the State.⁵³ The city appealed to the Supreme Court of North Carolina, which reversed the court of appeals and found that the Asheville Act was an unconstitutional violation of article II, section 24.⁵⁴

After finding that the Asheville Act was a local law for purposes of section 24,⁵⁵ Justice Ervin—writing for the majority—described the court’s interpretation of section 24 since 1925 as “broad.”⁵⁶ The court articulated a new test for determining whether a law violates section 24(1)(a), namely “whether, in light of its stated purpose and practical effect, the legislation has a material . . . connection to issues involving health, sanitation, and the abatement of nuisances.”⁵⁷

49. *City of Asheville v. State*, 369 N.C. 80, 81, 794 S.E.2d 759, 762 (2016); *accord* Act of May 16, 2013, ch. 50, § 1, 2013 N.C. Sess. Laws 118, 118–19 (mandating the transfer of the water system).

50. *See* Act of May 16, 2013, § 1, 2013 N.C. Sess. Laws at 118–19; *see also* *City of Asheville*, 369 N.C. at 115 n.9, 794 S.E.2d at 783 n.29 (Newby, J., dissenting).

51. *City of Asheville*, 369 N.C. at 94, 794 S.E.2d at 770.

52. *Id.* at 83–84, 794 S.E.2d at 764.

53. *Id.* at 81, 794 S.E.2d at 762.

54. *Id.*

55. *Id.* at 98, 794 S.E.2d at 773. As noted above, what makes a law passed by the General Assembly “local” as opposed to “general” cannot be reduced to an “exact rule or formula.” *See supra* note 3 and accompanying text. Though the Supreme Court of North Carolina has used a number of tests over time to make this determination, *City of Asheville*, 369 N.C. at 90–92, 794 S.E.2d at 768–69, here it focused on the General Assembly’s intent to single out Asheville’s water system for special treatment “absent[t] any justification.” *Id.* at 95, 794 S.E.2d at 771. In other words, since the General Assembly did not articulate a rational reason for treating Asheville differently from other municipalities, and since the law was drafted “to ensure that the involuntary transfer provisions of the legislation did not apply to any municipality except” Asheville, the law was classified as local rather than general. *Id.*

56. *See City of Asheville*, 369 N.C. at 103, 794 S.E.2d at 776.

57. *Id.*

According to the court, if such a material connection exists, the law relates to health and sanitation for purposes of section 24 and is thus unconstitutional.⁵⁸ The court emphasized that only a “material connection” between the prohibited purposes in section 24 and the contested legislation is required; the prohibited purpose does not have to be the “exclusive or predominant” purpose of the local act at issue.⁵⁹

Applying that test to the Asheville Act, the court found that the stated purpose of the legislation indicated a “material connection” between the reason for its enactment and issues involving public health and sanitation.⁶⁰ Describing the “stated purpose of the legislation [as] ‘provid[ing] reliable, cost-effective, high-quality water and sewer services,’” and citing a past case that categorized water regulations as health regulations, the court had “no hesitation in concluding that the [Asheville Act] impermissibly relate[d] to health and sanitation.”⁶¹ The court found this connection was further bolstered by the practical effect of the legislation, since in defining who was responsible for providing water service, the Asheville Act also determined who would be responsible for complying with state public health regulations related to water and sewer services.⁶²

The court concluded its opinion by addressing the apparent contradiction to section 24 posed by article VII, section 1. It noted that article II, section 24 “is the fundamental law of the State and may not be ignored,”⁶³ even though article VII, section 1 “gives the General Assembly exceedingly broad authority over the ‘powers and duties’ delegated to local governments.”⁶⁴ In other words, the court recognized that while the General Assembly’s article VII authority is “exceedingly broad[,] . . . that authority is subject to limitations imposed by other constitutional provisions.”⁶⁵

Justice Newby, joined by Chief Justice Martin, dissented. Justice Newby focused on the “plenary authority” he believes article VII, section 1 gives to the General Assembly to provide for the organization of local government and argued that an article II, section 24 analysis is only required when a “power” or “duty” of a local

58. *See id.* at 104, 794 S.E.2d at 776–77.

59. *See id.* at 103, 794 S.E.2d at 776.

60. *Id.*

61. *Id.* (quoting Act of May 16, 2013, ch. 50, pmbl., 2013 N.C. Sess. Laws 118, 118).

62. *Id.* at 104, 794 S.E.2d at 776–77.

63. *Id.* at 106, 794 S.E.2d at 778 (quoting *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965)).

64. *Id.* at 105, 794 S.E.2d at 777 (quoting N.C. CONST. art. VII, § 1).

65. *Id.*, 794 S.E.2d at 777–78.

government is involved.⁶⁶ Finding that the Asheville Act involved neither a power nor a duty,⁶⁷ he reasoned that a section 24 analysis was not necessary and argued that the law was clearly constitutional.⁶⁸

B. A Focus on Boundary Fixing Leads to a Finding of Constitutionality in Town of Boone

In 2014, the General Assembly withdrew Boone's authority to exercise extraterritorial jurisdiction ("ETJ") by passing Senate Bill 865 (the "Boone Act"),⁶⁹ which Boone challenged as facially unconstitutional under article II, section 24.⁷⁰ ETJ allows a local government to exercise some, though not all, of its given powers outside its physical boundaries.⁷¹ A three-judge panel of superior court judges granted summary judgment for Boone.⁷² The State appealed directly to the Supreme Court of North Carolina, which reversed.⁷³

Using much of the same reasoning from his dissent in *City of Asheville*, Justice Newby's opinion for the court emphasized the General Assembly's "plenary power to create political subdivisions of local government, establish their jurisdictional boundaries, and invest them with certain powers."⁷⁴ The court held that a plain reading of article VII, section 1's text reveals that only the second clause—which relates to the General Assembly's authority to assign "powers and duties" to local governments—contains a limitation.⁷⁵ In contrast, the

66. *Id.* at 111, 794 S.E.2d at 781 (Newby, J., dissenting). The idea is that section 24 is triggered only when an act of the General Assembly alters the substantive authority of a local government. *See id.* at 111 n.3, 794 S.E.2d at 781 n.23. So, section 24 would apply to an act of the General Assembly limiting the ability of a local water and sewer authority to construct new pipes but would not apply to the General Assembly's adjustment of that same authority's service area. *See id.*

67. *Id.* at 114–15, 794 S.E.2d at 783.

68. *Id.* at 111–12, 794 S.E.2d at 781–82.

69. Act of June 26, 2014, ch. 33, § 1, 2014 N.C. Sess. Laws 139, 139–40; *Town of Boone v. State*, 369 N.C. 126, 129, 794 S.E.2d 710, 713 (2016).

70. *Town of Boone*, 369 N.C. at 129, 794 S.E.2d at 713.

71. DAVID W. OWENS, LAND USE LAW IN NORTH CAROLINA 29–30 (2d ed. 2011).

72. *Town of Boone*, 369 N.C. at 130, 794 S.E.2d at 713. The trial-level panel's concise two-page decision did not provide any reasoning to support its finding. *See Town of Boone v. State*, No. 14 CVS 13934, 2015 WL 9941790, at *1–2 (N.C. Super. Ct. July 29, 2015).

73. *Town of Boone*, 369 N.C. at 127, 794 S.E.2d at 712.

74. *Id.* at 131, 794 S.E.2d at 714.

75. *Id.* at 134, 794 S.E.2d at 716 (quoting N.C. CONST. art. VII, § 1). The full provision reads:

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

first clause, which allows the legislature to “provide for the organization and government and the fixing of boundaries of” local governments, gives the General Assembly essentially unfettered power in that area.⁷⁶

Since the Boone Act “retract[ed] the Town’s jurisdictional reach to its corporate limits,” the court found that it was exactly the type of action “contemplated by the first clause of article VII, section 1.”⁷⁷ The idea underlying the court’s opinion is that altering Boone’s authority is essentially the same as changing its geographic boundaries.⁷⁸ This sort of activity, in the majority’s view, is only about *where* a municipality can exercise its authority, not about *what kind* of authority a municipality has.⁷⁹ Since the text of article VII, section 1 can be read as giving the General Assembly unlimited authority over the “fixing of boundaries” and as only limiting the legislature’s authority in assigning local governments “powers and duties,” the majority concluded that the General Assembly’s power to enact the Boone Act was essentially unlimited and that article II, section 24 did not apply.⁸⁰

Three justices disagreed with the majority’s conclusion that section 24 does not apply to the Boone Act. In their concurrence, Justices Ervin and Hudson said that they would have found that, though section 24 applies to the Boone Act, the law ultimately passes a section 24 analysis and is therefore constitutional.⁸¹

In the view of Justices Ervin and Hudson, ETJ authority is more about a municipality’s ability to use certain powers than it is about boundary fixing.⁸² Working from that premise, Justice Ervin—writing for them both—argued that even if ETJ “implicates the ‘organization and government’ of units of local government as authorized by Article VII,” past precedent of the court clearly brings laws “changing

such powers and duties to counties, cities and towns, and other governmental subdivisions as it may deem advisable.

N.C. CONST. art. VII, § 1.

76. *See Town of Boone*, 369 N.C. at 132, 134, 794 S.E.2d at 715–16 (quoting N.C. CONST. art. VII, § 1).

77. *Id.* at 136, 794 S.E.2d at 718 (referencing N.C. CONST. art. VII, § 1).

78. *See id.*

79. *See id.*

80. *See id.* at 136–37, 794 S.E.2d at 718.

81. *Id.* at 137, 167, 794 S.E.2d at 718, 737 (Ervin, J., concurring in the judgment).

82. *Id.* at 152–54, 794 S.E.2d at 728–29. The general idea of this argument is that ETJ authority allows a municipality to exercise *only a limited set* of powers outside its corporate limits. Boundary fixing, in contrast, defines the area where a municipality may exercise *all* of its powers. *See id.*

the existing assignment of regulatory authority among units of local government” within the purview of section 24.⁸³ This argument, he contended, is supported by the general principle of constitutional construction that courts should seek to “harmonize” conflicting state constitutional provisions so as to “render every word operative.”⁸⁴

Applying the test outlined in *City of Asheville* to the Boone Act, Justice Ervin found that “the vast majority” of ETJ regulations did not implicate health, sanitation, and the abatement of nuisances, while conceding that some of those regulations did.⁸⁵ In his view, then, when looking at the practical effect of the entire Boone Act “in light of the presumption of constitutionality,” the Boone Act does not have a material connection to health, sanitation, or the abatement of nuisances.⁸⁶

Justice Beasley, in contrast, argued that the Boone Act failed a section 24 analysis.⁸⁷ She analogized the Boone Act to the laws at issue in past section 24 cases and argued that the “practical effect of removing” Boone’s ETJ authority was that it could no longer enforce “ordinances that relate to health and sanitation” and others that “relate to non-navigable streams.”⁸⁸ Justice Beasley argued that the court “should not analyze each of the . . . subjects [prohibited by section 24] in isolation.”⁸⁹ Since nearly all of the authority withdrawn from Boone implicates health, sanitation, abatement of nuisances, or non-navigable streams, she saw a “clear[] . . . material connection” between the Boone Act and those subjects and would hold the law unconstitutional.⁹⁰

83. *Id.* at 154–55, 794 S.E.2d at 729 (quoting N.C. CONST. art. VII, § 1).

84. *Id.* at 156–58, 794 S.E.2d at 730–31 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 92 (7th ed. 1903)).

85. *Id.* at 163, 794 S.E.2d at 735. The scope of powers that can be exercised through ETJ authority is varied. Though ETJ authority in North Carolina is referenced *infra* Part III.B, for a more detailed treatment of ETJ, see generally OWENS, *supra* note 71, at 29–36; DAVID W. OWENS, UNC SCH. OF GOV’T, THE NORTH CAROLINA EXPERIENCE WITH MUNICIPAL EXTRATERRITORIAL PLANNING JURISDICTION 8–13 (2006), <http://sogpubs.unc.edu/electronicversions/pdfs/ss20.pdf> [<https://perma.cc/F5NU-TD2H>].

86. *See Town of Boone*, 369 N.C. at 166–67, 794 S.E.2d at 737.

87. *Id.* at 167, 794 S.E.2d at 737 (Beasley, J., dissenting).

88. *Id.* at 174–75, 794 S.E.2d at 742. Local acts “[r]elating to non-navigable streams” are also prohibited by section 24. N.C. CONST. art. II, § 24(1)(e). In two lengthy footnotes, Justice Beasley quoted directly from the concurring opinion to illustrate the array of regulations related to health, sanitation, abatement of nuisances, and non-navigable streams that Boone lost the ability to enforce in the ETJ area as a result of the Boone Act. *See Town of Boone*, 369 N.C. at 175–76 nn.4–5, 794 S.E.2d at 742–43 nn.29–30.

89. *Id.* at 176, 794 S.E.2d at 743.

90. *Id.* at 176–77, 794 S.E.2d at 743.

C. *Reconciling the Two Decisions*

Perhaps the most obvious difference between *City of Asheville* and *Town of Boone* is the difference between the factual situations involved. The type of regulation at issue in each case was different,⁹¹ as was the action the General Assembly took to achieve the policy change.⁹² These factual differences certainly played some role in the different outcomes of these two cases. The facts of *Town of Boone* seem—at least at first glance—to more closely align with the language of the first clause of article VII, section 1 because the Boone Act “fix[ed] the boundaries” of Boone’s authority by limiting Boone’s ETJ authority. Thus, the court seems to give some extra weight to the fact that the General Assembly was, at least in some sense, adjusting Boone’s physical boundaries by altering its ETJ authority. *City of Asheville* also considered water and sewer regulations, which the court had considered in section 24 cases several times before.⁹³

However, it is difficult to fully attribute the different outcomes in these cases to these factual distinctions. Using the *Town of Boone* court’s logic, *City of Asheville* seemingly fits equally well into article VII, section 1’s language because the law at issue involved the “organization and government” of the water and sewer system in Buncombe County (both in terms of setting up the new type of government and limiting Asheville’s authority) and “fix[ed] the boundaries” of a newly created type of local government.⁹⁴ In other words, there is not much of a practical difference between the General Assembly’s action in the Asheville Act and its action in the Boone Act. When it fixes the boundaries of local government (what the *Town of Boone* court says the Boone Act did), the General Assembly is necessarily assigning “powers and duties” to different governments (what the *Town of Boone* court implies the Asheville Act did).

The fact that municipalities can use their ETJ authority to enforce zoning regulations and ordinances related to “erosion and

91. Compare *City of Asheville v. State*, 369 N.C. 80, 81, 794 S.E.2d 759, 762 (2016) (considering water and sewer regulations), with *Town of Boone*, 369 N.C. at 129, 794 S.E.2d at 713 (considering extraterritorial jurisdiction).

92. Compare *City of Asheville*, 369 N.C. at 115 n.9, 794 S.E.2d at 783 n.29 (Newby, J., dissenting) (describing the Asheville Act as a facially-general law), with *Town of Boone*, 369 N.C. at 129, 794 S.E.2d at 713 (noting the Boone Act only affected Boone).

93. See, e.g., *Lamb v. Bd. of Educ. of Randolph Cty.*, 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952); *Drysdale v. Prudden*, 195 N.C. 722, 727, 143 S.E. 530, 532–33 (1928).

94. See N.C. CONST. art. VII, § 1 (“The General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions . . .”).

sedimentation control” and “floodways” bolsters this lack of practical difference.⁹⁵ In fact, Boone’s exercise of this type of authority motivated the Boone Act.⁹⁶ So, though the *Town of Boone* court focused on the boundary-setting aspect of the withdrawal of Boone’s ETJ authority, it had practical implications for the “powers and duties” assigned to Boone as well. In sum, by creating a new type of local government (the “metropolitan water and sewerage district”) and setting the geographical boundaries of the district’s authority,⁹⁷ it could be argued that the Asheville Act falls exclusively under article VII, section 1, as the *Town of Boone* court held that the Boone Act did.

Since the factual backdrop of the two cases alone cannot explain the difference in outcomes, it must be explained at least in part by the way the court understood article VII, section 1 and article II, section 24 in the broader constitutional context. The court, however, largely used the same methodologies to understand this broader context. Specifically, it reviewed the history behind, plain language of, relationship between, and precedent related to both article VII, section 1 and article II, section 24 in both cases.⁹⁸ The difference in outcomes must therefore lie in the court’s application of these methodologies.

The different ways that the *City of Asheville* and *Town of Boone* majorities applied general principles of constitutional construction are significant because these differences allowed the court to reach seemingly opposite conclusions in similar cases on the same day. This is not obvious by looking at the text of each opinion at a glance. Both opinions seem to consider one constitutional provision at the expense of another. The *City of Asheville* majority took the court’s historic approach, which assumes that section 24 always applies without fully explaining why.⁹⁹ The *Town of Boone* majority mentioned both

95. OWENS, *supra* note 71, at 31.

96. See *infra* text accompanying notes 114–16.

97. See *City of Asheville*, 369 N.C. at 93–94, 794 S.E.2d at 770 (noting that the effect of the Asheville Act was to transfer the City of Asheville’s water system to a county-wide authority for all of Buncombe County).

98. See *id.* at 102–03, 794 S.E.2d at 775–76; *Town of Boone v. State*, 369 N.C. 126, 132–34, 794 S.E.2d 710, 715–16 (2016).

99. The *City of Asheville* majority begins its section 24 analysis by describing the provision as “the fundamental law of the State . . . [that] may not be ignored.” *City of Asheville*, 369 N.C. at 88, 794 S.E.2d at 767 (quoting *High Point Surplus Co. v. Pleasants*, 264 N.C. 650, 656, 142 S.E.2d 697, 702 (1965)). The court does not reference article VII, section 1 until the penultimate paragraph of its opinion, and even then, it largely dismisses the arguments of the State and Justice Newby’s dissent out-of-hand with little discussion. See *id.* at 105–06, 794 S.E.2d at 777–78; see also *supra* notes 47–48 and

article VII, section 1 and article II, section 24 fairly frequently, but ultimately reasoned that the latter provision did not apply.¹⁰⁰

Justice Ervin's concurrence in *Town of Boone* highlights the key difference between the two cases. He points out that the *Boone* majority "unduly enlarges the scope of" article VII, section 1 and "unduly narrows . . . the reach of the limitations on the scope of the legislative power set out in Article II, Section 24."¹⁰¹ This argument showcases the central difference between the two cases. *City of Asheville* more closely follows the canon of construction that constitutional provisions should be harmonized, read together, and construed to give maximum effect to all provisions. It explicitly recognized the General Assembly's very broad article VII authority over local governments, while also recognizing that such authority is limited by article II.¹⁰² *Town of Boone*, in contrast, values the meaning of one constitutional provision at the expense of another. This difference in interpretation—and not the factual differences—is the true distinction between the two cases that allowed the court to reconcile them.

III. WHY ARTICLE II, SECTION 24 SHOULD APPLY TO AND INVALIDATE THE BOONE ACT

As suggested by Justice Ervin in *Town of Boone*, the canons of constitutional construction necessitate a section 24 analysis in cases involving the constitutionality of a local act promulgated by the General Assembly. This Part further explains why section 24 should apply in *Town of Boone* and demonstrates why the Boone Act fails a careful section 24(1)(a) analysis.

A. *Why Section 24 Should Apply to the Boone Act*

As a general matter, the state constitution is a limit on—rather than a grant of—power.¹⁰³ When interpreting a constitutional provision, a "fundamental principle" is that the interpretation "give

accompanying text (discussing the court's historical lack of concern about conflicts between article II, section 24 and article VII, section 1).

100. See *Town of Boone*, 369 N.C. at 127, 794 S.E.2d at 712 (finding that article II, section 24 did not apply to the Boone Act because it simply fixed the boundaries of the Town of Boone).

101. *Id.* at 147, 794 S.E.2d at 724–25 (Ervin, J., concurring in the judgment).

102. *City of Asheville*, 369 N.C. at 105–06, 794 S.E.2d at 777–78.

103. *Baker v. Martin*, 330 N.C. 331, 338, 410 S.E.2d 887, 891 (1991); see also N.C. STATE CONSTITUTION STUDY COMM'N, *supra* note 18, at 1 ("[W]hat may appear in form to be a grant of authority to the General Assembly to act on a particular matter normally is in legal effect a limitation.").

effect to the intent of the framers [of the provision] and of the people adopting it.”¹⁰⁴ The goal in interpreting the state constitution is to “harmonize” and give effect to all its provisions.¹⁰⁵ Additionally, when interpreting conflicting general and specific statutes on the same subject, North Carolina courts err on the side of the specific statute, especially when the specific provision was adopted later than the general one.¹⁰⁶ Principles of statutory interpretation apply to constitutional interpretation.¹⁰⁷

Applying section 24 to every constitutional case concerning a local act—as the concurring and dissenting opinions in *Town of Boone* suggested—adheres to the general idea that the constitution is a limit on power since it limits the way in which the General Assembly can exercise state power. It also gives effect to the original meaning of section 24 and the broader constitution of 1971 because it helps keep the General Assembly out of an array of local matters with which it should not be concerned. In the same way, a policy of strongly enforcing section 24 harmonizes article II with article VII because such a policy gives full meaning to both provisions. When enforced in such a way, section 24 does not limit the General Assembly’s *actual* authority, but simply limits the *way* that otherwise unlimited authority to control local governments may be authorized.

104. *In re Peoples*, 296 N.C. 109, 162, 250 S.E.2d 890, 920 (1978).

105. *Lacy v. Fid. Bank of Durham*, 183 N.C. 373, 380, 111 S.E. 612, 615 (1922) (“[T]he [state constitution] should be considered as a whole and construed so as to allow significance to each and every part of it if this can be done by any fair and reasonable intendment.”); *Bd. of Educ. v. Bd. of Comm’rs*, 137 N.C. 310, 312, 49 S.E. 353, 354 (1904) (“It is [the court’s] duty to reconcile [conflicting portions of the state constitution], so that, if possible, both be given force and effect.”).

106. *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 187, 775 S.E.2d 651, 656 (2015). General provisions are those that lay out broad principles or rules in an area, while specific provisions tackle a more precise principle, rule, or issue within that area. *See id.* *LexisNexis Risk Data Management, Inc.* provides an instructive example. It considered a conflict between the “general” Public Records Act—which lays out broad rules for access to public records—with a “more specific statute” that governs “‘remote electronic access’ to court records.” *Id.* at 181, 775 S.E.2d at 652.

107. *See* *Stephenson v. Bartlett*, 355 N.C. 354, 408, 562 S.E.2d 377, 413 (2002) (Parker, J., dissenting) (describing the “rule of statutory construction” that provisions should be reconciled with each other as “equally applicable to constitutional construction”); *Baker*, 330 N.C. at 337, 410 S.E.2d at 890–91 (noting that “many tools of statutory construction are appropriate for and consistent with constitutional interpretation” while pointing out that the statutory construction doctrine of *expression unius est exclusio alterius* had not been used in constitutional interpretation); *see also* *Stephenson*, 355 N.C. at 370, 562 S.E.2d at 389 (“Issues concerning the proper construction of the Constitution of North Carolina ‘are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.’” (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 437, 478 (1989))).

Strongly enforcing section 24 also follows the general practice of giving precedence to a subsequent, specific provision when it conflicts with an older, more general one. As the court notes in *Town of Boone*, the power described in article VII, section 1 has long belonged to the General Assembly; the provision is “a general description” of relatively broad authority the General Assembly has always possessed.¹⁰⁸ In this way it broadly describes the General Assembly’s authority over all local governments on all matters. Section 24, by contrast, has its constitutional origins in 1917 and prohibits laws within the scope of its fourteen specific, enumerated provisions unless applied statewide. Since section 24 is a subsequent, specific provision, general principles of construction suggest that it should be applied to the enumerated situations despite the broad authority granted by article VII, section 1, which was adopted earlier and is more general in nature.¹⁰⁹

Finally, though the *Town of Boone* court seems to draw a sharp distinction between the General Assembly’s apparently unlimited authority for the “fixing of boundaries” of local governments and “provid[ing] for [their] organization and government” mentioned in the first clause of article VII, section 1 and its limited authority to assign “powers and duties” in the same provision’s second clause,¹¹⁰ it is unclear that such a distinction exists in the real world. As noted above, by fixing the boundaries of local government, the General Assembly is necessarily assigning “powers and duties” to different governments. For example, by setting the boundaries of a town, the

108. *Town of Boone v. State*, 369 N.C. 126, 131–32, 794 S.E.2d 710, 715 (2016) (“[T]his broad power of the General Assembly [over local governments] has remained unchanged throughout our history.” (quoting N.C. STATE CONSTITUTION STUDY COMM’N, *supra* note 18, at 85)).

109. Some may take issue with principles of construction that this Recent Development argues should be controlling. As one famous law review article observed, many different canons of construction can be used to reach many different “correct” outcomes. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950). This view is certainly an understandable one, but the principles argued for here make the most sense because they best conform with the idea in law and in life that words derive their meaning from the context around them. See, e.g., *Dunn v. Pac. Emp’rs Ins.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (“Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language.”); *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 524, 259 S.E.2d 248, 251 (1979) (“[W]ords and phrases . . . must be interpreted contextually, in a manner which harmonizes [them] with . . . other provisions . . . and which gives effect to the reason and purpose of the statute.”).

110. See *Town of Boone*, 369 N.C. at 134–35, 794 S.E.2d at 716–17.

General Assembly is necessarily giving a town the duty to enforce building codes and the power to levy taxes inside those boundaries.¹¹¹

B. Why the Boone Act Fails a Careful Section 24(1)(a) Analysis

Since section 24 should apply to the Boone Act and all other constitutional challenges involving local acts, the next step in the analysis is to apply the *City of Asheville* framework. This requires asking whether, in light of its stated purpose and practical effect, the Boone Act has a material connection to health, sanitation, and the abatement of nuisances. Given the purpose behind and practical effect of the Boone Act combined with the historical purpose of ETJ in general, the answer to this question must be yes.

1. The Boone Act was Designed to End Health Regulations Imposed by the Town of Boone

The Boone Act withdrew Boone's authority to exercise ETJ authority within one mile of its corporate limits.¹¹² ETJ authority allows a municipality to assert an array of powers outside its corporate limits, including zoning regulations, "housing and building codes and regulations on historic districts and historic landmarks, open spaces, community development, erosion and sedimentation control, floodways, mountain ridges, and roadway corridors."¹¹³

Despite the range of powers available to it, Boone primarily exercised its ETJ authority to limit development on steep slopes that surround the valley in which it is situated. Senator Dan Soucek, who sponsored the Boone Act, seemed to recognize this when he crafted his bill.¹¹⁴ His primary goal in passing the Boone Act was to change the arrangement so that Watauga County, and not the Town of Boone, was in charge of enforcing building regulations in the ETJ

111. See N.C. GEN. STAT. § 160A-206(a) (2017) ("A city shall have power to impose taxes only as specifically authorized by act of the General Assembly."); *id.* § 160A-412 (giving all cities the authority to enforce the state building code).

112. Act of June 26, 2014, ch. 33, 2014 N.C. Sess. Laws 139, 139–40; *Town of Boone*, 369 N.C. at 127–28, 794 S.E.2d at 712.

113. OWENS, *supra* note 71, at 31. Though the focus of the analysis here is Boone's specific use of ETJ authority, the ETJ powers least related to health (like designating historic districts) are also those least used by North Carolina municipalities exercising ETJ authority. See OWENS, *supra* note 85, at 11 tbl.7.

114. See Matthew Burns, *Boone Zoning Dispute First Case Heard by Three-Judge Panel*, WRAL: @NCCAPITOL (Dec. 15, 2014), <http://www.wral.com/boone-zoning-dispute-first-case-heard-by-three-judge-panel/14281318/> [https://perma.cc/KUB9-74YE].

area.¹¹⁵ Since Watauga County has very limited zoning regulations, this could open up the ETJ area to development.¹¹⁶

*City of New Bern v. New Bern-Craven County Board of Education*¹¹⁷—the Supreme Court of North Carolina’s most recent section 24(1)(a) case before *City of Asheville* and *Town of Boone*—speaks directly to the General Assembly’s authority to pass a local act reassigning the power to enforce local building regulations from one local government to another. In that case, the court unanimously invalidated a local act which shifted the enforcement of building regulations from a city to a county as an impermissible health regulation under section 24.¹¹⁸ The court reasoned that because the regulations included provisions on plumbing and fire safety, they were designed to protect the “health of those who use the buildings.”¹¹⁹ The situation in *Town of Boone* is nearly identical to that in *City of New Bern*, since the Boone Act’s primary sponsor and proponent sought to shift the responsibility for enforcing building regulations in the ETJ area from Boone to Watauga County.

The analogy between *Town of Boone* and *City of New Bern* is strengthened by the fact that politically controversial steep slope regulations—the building regulations that the Boone Act’s sponsor seemed to take the most issue with—were explicitly designed to address health-related concerns.¹²⁰ The material connection between the Boone Act and health and sanitation matters is further supported by the town’s extension of water service to areas within the ETJ while not extending such service to “unregulated growth areas,” i.e., areas outside the town’s boundaries and outside the ETJ area.¹²¹ The court

115. See *id.*; Laura Leslie, *House Resurrects, Passes Boone ETJ Bill*, WRAL: @NCCAPITOL (June 24, 2014), <http://www.wral.com/house-resurrects-boone-etj-bill-/13761065/> [https://perma.cc/28SX-R22R].

116. See Burns, *supra* note 114; Leslie, *supra* note 115.

117. 338 N.C. 430, 450 S.E.2d 735 (1994).

118. *Id.* at 440, 444, 450 S.E.2d at 741, 743.

119. *Id.* at 440, 450 S.E.2d at 741.

120. See TOWN OF BOONE, STEEP SLOPE: HOW REGULATIONS AFFECT PROPERTY OWNERS 1, http://www.townofboone.net/wp-content/uploads/documents/departments/development/pdfs/TOB_Steep_Slope_Brochure.pdf [https://perma.cc/585V-4MM4] (noting that “steep slope/viewshed regulations” were adopted by Boone for safety reasons). *City of New Bern* tells us that building regulations designed to protect safety are health regulations for section 24 purposes. See *City of New Bern*, 338 N.C. at 440, 450 S.E.2d at 741. Even if the court reversed the position it took in *City of New Bern*—that building safety regulations are health regulations—the Boone Act would still be unconstitutional on nuisance grounds. See *infra* Part III.B.2.

121. Jesse Wood, *Boone’s ETJ To Be Abolished Jan. 1, 2015 After Bill Passes House in a 66 to 46 Vote Wednesday*, HIGH COUNTRY PRESS (June 25, 2014, 4:56 PM),

has repeatedly held that water and sewer regulations are related to health and sanitation.¹²² The specific ways Boone exercised its ETJ authority also line up with a historical recognition of the ETJ (and to some degree zoning more broadly) as a health regulation.¹²³

2. The Powers of ETJ Not Related to Health are Related to the Abatement of Nuisances

Even though *many* of the powers associated with ETJ authority are related to health and sanitation, not *all* of them are. Though none of the three opinions in *Town of Boone* directly focus on connections between ETJ authority and nuisances, there is a strong case to be made that those ETJ powers that do not relate to health and sanitation do relate to the abatement of nuisances.¹²⁴

The legal definition of the word “nuisance” is quite broad. For example, Black’s Law Dictionary describes a nuisance as any “condition, activity, or situation . . . that interferes with the use or enjoyment of property.”¹²⁵ A leading treatise written just before the adoption of section 24 takes a similarly broad view,¹²⁶ as have North Carolina courts and the General Assembly.¹²⁷

<https://www.hcpress.com/news/boones-etj-abolished-after-bill-passes-house-wednesday.html> [https://perma.cc/2GWL-UJ2A].

122. See *Lamb v. Bd. of Educ. of Randolph Cty.*, 235 N.C. 377, 379, 70 S.E.2d 201, 203 (1952) (invalidating a local act directing the Randolph County Board of Education to provide adequate water services); *Drysdale v. Prudden*, 195 N.C. 722, 726–27, 143 S.E. 530, 532–33 (1928) (invalidating a local act expanding the authority of a Henderson County sanitary district to allow it to provide both water and sewer service).

123. See MUN. GOV’T STUDY COMM’N, N.C. GENERAL ASSEMBLY, REPORT OF THE MUNICIPAL GOVERNMENT STUDY COMMISSION OF THE NORTH CAROLINA GENERAL ASSEMBLY 18 (1958) (noting that granting cities ETJ authority is appropriate because “[h]ealth and safety problems arising outside the city do not always respect city limits as they spread”); Amanda Erickson, *A Brief History of the Birth of Urban Planning*, CITYLAB (Aug. 24, 2012), <https://www.citylab.com/life/2012/08/brief-history-birth-urban-planning/2365/> [https://perma.cc/BE3M-A6FF] (describing the important role public health officials played in early American urban planning).

124. The strong historical connection between ETJ authority, health policy, and Boone’s specific use of ETJ authority to regulate what the court has considered health matters establishes a “material connection” between the Boone Act and health and sanitation matters, which is all that is required for the law to be declared unconstitutional under the *City of Asheville* standard. See *City of Asheville v. State*, 369 N.C. 80, 103, 794 S.E.2d 759, 776 (2016). The connections between the abatement of nuisances and ETJ authority are examined here to bolster this argument and suggest that the court failed to explore the connection between the Boone Act and one of the three prohibited subjects in article II, section 24(1)(a).

125. *Nuisance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

126. JOSEPH A. JOYCE & HOWARD C. JOYCE, TREATISE ON THE LAW GOVERNING NUISANCES 2 (1906) (defining a nuisance as “anything that works or causes injury,

If a nuisance is defined this broadly, then “regulations on historic districts and historic landmarks, open spaces, community development, erosion and sedimentation control, floodways, mountain ridges, and roadway corridors”¹²⁸—those ETJ powers not related to health and sanitation—should be interpreted as abating nuisances, since these regulations are intended to aid property owners in enjoying their property and enhancing the value of that property.¹²⁹ In addition to protecting health and safety, Boone’s steep slope regulations—which, again, caused much of the uproar that led Senator Soucek to introduce the Boone Act—were explicitly designed to address concerns that would fall inside this broad definition of nuisances.¹³⁰

In sum, many ETJ regulations have a material relationship to health and sanitation. Those ETJ regulations that do not have a material connection to health and sanitation, furthermore, often do have such a material connection to the abatement of nuisances, given the broad legal definition of that term. The close connection between ETJ regulation and the regulation of health, sanitation, and nuisances is further evidenced by the specific ways Boone used its ETJ authority before the General Assembly withdrew it through the Boone Act. Finally, these conclusions are bolstered by historical connections the General Assembly and Supreme Court of North Carolina have drawn between health, sanitation, and the abatement of nuisances and the exercise of ETJ authority.¹³¹

damage, hurt, inconvenience, annoyance, or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property”).

127. See N.C. GEN. STAT. § 160A-174(a) (2017) (giving local governments the power to “define and abate nuisances”); see also 22 THOMAS SMITH, *STRONG’S NORTH CAROLINA INDEX, Nuisance* § 1 (4th ed. 2015) (collecting cases defining “nuisance” for purposes of tort recovery). In its sole section 24 case decided on nuisance grounds, the Supreme Court of North Carolina struck down a law allowing the killing of cattle lawfully grazing on private land on the Outer Banks because they were reducing the growth of plant life there, suggesting a broad interpretation of what constitutes a nuisance. *Chadwick v. Salter*, 254 N.C. 389, 391–92, 398, 119 S.E.2d 158, 160, 164–65 (1961); see also *infra* note 131 and accompanying text.

128. OWENS, *supra* note 71, at 31.

129. See *supra* notes 124–26 and accompanying text.

130. See TOWN OF BOONE, *supra* note 120, at 1 (noting that “steep slope/viewshed regulations” were adopted in part to further “[t]he protection of the scenic beauty and natural environment of Boone’s hillside areas vital to preservation of the character of [Boone’s] community and continued economic development”).

131. See David W. Owens, *Can a City Really Zone Land Outside the City?*, COATES’ CANONS: N.C. LOC. GOV’T L. (Apr. 12, 2011), <https://canons.sog.unc.edu/can-a-city-really-zone-land-outside-the-city/> [https://perma.cc/DU36-ACQE] (“For many years states have authorized municipal regulation of extraterritorial areas to protect public health and safety The North Carolina supreme court [sic] in 1912 upheld a law giving Greensboro

All of these facts work to establish a material connection between the purpose and effect of the Boone Act and the section 24 subjects of health, sanitation, and the abatement of nuisances. Since this law was a local act relating to subjects prohibited by section 24, the court should have held the Boone Act unconstitutional.

IV. A POTENTIAL SOLUTION TO THE DECADES-LONG STRUGGLE WITH SECTION 24(1)(A) DOCTRINE

As one commentator has pointed out, the conflicting results in these two cases have created a local-state relations dynamic that is “far from clear.”¹³² This lack of clarity, though, is nothing new. The Supreme Court of North Carolina has been far from consistent in the reasoning it applies to article II, section 24(1)(a) cases. By resolving challenges to laws under section 24(1)(a) in two markedly different ways on the same day in *City of Asheville* and *Town of Boone*, the court simply highlighted what has been a consistent problem for decades. The court should resolve this problem by reaffirming—with a slight modification—the standard it articulated in *City of Asheville*.

A. *The Court Should Reaffirm the Standard Articulated in City of Asheville (with a Slight Modification)*

Though completely new, the standard adopted by the *City of Asheville* court makes a good deal of sense. First, it takes into account factors that the court has considered in past 24(1)(a) cases—namely, a focus on the purpose of the law and the intent of the General Assembly in adopting it. Second, it is relatively straightforward to apply. Third, it lines up well with principles of constitutional construction, especially those that emphasize reading the entire constitution together. Finally, it allows for some difference of opinion for what does and does not qualify as a health regulation, as demonstrated by Justice Ervin’s concurrence and Justice Beasley’s dissent in *Town of Boone*.

The issue, though, becomes the sweeping breadth of laws which would have a material connection to prohibited subjects under this

authority to impose sanitary regulations in the area one mile beyond the city limits. The legislature in 1917 gave all cities the authority to adopt similar health and safety regulations for areas within a mile of the city limits, an authority that is found today in G.S. 160A-193.” (citation omitted)). Today, the title of section 160A-193 of the General Statutes of North Carolina is “Abatement of public health nuisances.” Though Boone exercised its ETJ authority pursuant to a different statute, section 160A-360 of the General Statutes of North Carolina, the point remains.

132. See Bluestein, *supra* note 27.

standard and may thus be unconstitutional. As the analysis in Part III, demonstrates, an array of regulations like the exercise of ETJ authority are clearly “related to health, sanitation, and abatement of nuisances” that either were historically regulated by the General Assembly through local acts or have other important purposes besides the prohibited subjects.¹³³ Article II, section 24, then, has been overlooked, at least to some degree, by both the General Assembly and the Supreme Court of North Carolina. Strongly enforcing the provision now could threaten the system of shared local-state authority that both the General Assembly and municipalities have relied on for decades.

Thus, the court should affirm the standard it articulated in *City of Asheville*—namely, “whether, in light of its stated purpose and practical effect, the legislation has a material . . . connection to issues involving health, sanitation, and the abatement of nuisances.”¹³⁴ To remedy the problem of breadth, the court should add a second part to its *City of Asheville* test. It should ask whether the General Assembly historically regulated the subject at issue¹³⁵ through local acts since article II, section 24 was added to the state constitution in 1917. If the subject was historically regulated, then the local act should be held constitutional. If the area was not historically regulated by the General Assembly through local acts, then the local act should be declared unconstitutional. Of course, this test does not affect the General Assembly’s article VII, section 1 authority to pass any local act not materially related to one of the fourteen prohibited subjects in article II, section 24.

Had the *City of Asheville* court used this test, the result would be the same. As the court’s opinion demonstrates, there was clearly a material connection between the Asheville Act and health, sanitation,

133. ETJ authority is an excellent example of a subject traditionally regulated by the General Assembly through local acts. Since 1973, the General Assembly has altered the ETJ authority of a municipality through a local act at least sixty-one times. *See OWENS, supra* note 85, at 7 n.42. Certain building code provisions are another example. *See OWENS, supra* note 71, at 55–56 n.10 (describing at least nine instances of cities getting the authority to enforce sprinkler requirements in buildings through local acts of the General Assembly).

134. *City of Asheville v. State*, 369 N.C. 80, 103, 794 S.E.2d 759, 776 (2016). As the language in *City of Asheville* suggests, “material” roughly means significant but does not require that the connection between the challenged law and the prohibited subject be “exclusive or predominant.” *See id.*

135. “Subject” in this context means the narrow topic of the legislation. Obviously, section 24 lists broad subjects on which local acts are prohibited. Subject in this context, therefore, is meant to reference specific subjects like water and sanitation, extraterritorial jurisdiction, etc.

and abatement of nuisances.¹³⁶ That, combined with a lack of regulation of local water and sewer services by the General Assembly through local acts,¹³⁷ would render the law unconstitutional under the test proposed here. Had the *Town of Boone* court used this test in evaluating the Boone Act, in contrast, the result would have been different. Though the Boone Act has a material connection to health, sanitation, and the abatement of nuisances,¹³⁸ ETJ authority was historically regulated by the General Assembly through local acts.¹³⁹ Under the proposed new test, it would thus pass constitutional muster.

B. A Modified City of Asheville Standard Provides Needed Certainty

Generally, consistent judicial standards have a number of important benefits, including increased predictability for legislators and potential litigants as well as the promise of equal treatment for these parties, regardless of the particular parties involved in a given case.¹⁴⁰ This seems especially true for constitutional cases, where a lack of doctrinal clarity can fuel cynicism about the judicial process and lead the public to believe that judges are simply “politicians in robes,” deciding cases on the basis of their own political views instead of established legal principles.¹⁴¹ The consistent section 24(1)(a) standard proposed here would bring these benefits to fruition while staying true to section 24(1)(a)’s original purpose by limiting the number of local acts under consideration by the General Assembly.

Perhaps most importantly, this formulation gives local governments more certainty that the local acts they have relied upon as good authority for years will not be subject to constitutional

136. *City of Asheville*, 369 N.C. at 104–05, 794 S.E.2d at 776–77.

137. The court struck down a local law relating to water and sewer services as early as 1928, *Drysdale v. Prudden*, 195 N.C. 722, 727, 143 S.E. 530, 532–33 (1928), so it follows that there has been no tradition of regulating water and sewer through local acts since local governments could not rely in good faith on such grants of authority.

138. See *supra* Part III.B.

139. See *supra* note 133 and accompanying text.

140. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178 (1989).

141. Perhaps the best recent example of this is *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015), where the United States Supreme Court found a constitutional right to gay marriage. Even many supporters of the decision’s outcome questioned the reasoning used to reach the result. See, e.g., Scott E. Isaacson, *Obergefell v. Hodges: The US Supreme Court Decides the Marriage Question*, 4 OXFORD J. L. & RELIGION 530, 535 (2015) (“For many, it is difficult to resist the cynical conclusion: that the five majority justices decided as they did because they simply thought it was the right thing to do, even though the Constitution provides little support for such a decision.”).

challenges. As it stands now, the only reason that many of these local acts remain in force is that no one has challenged them. In short, this approach protects the status quo in areas where the state and local governments have traditionally found that regulation through local acts works.¹⁴² Though preserving the status quo might have both positive and negative implications for municipalities, it makes sense as a goal in this context because the court is not the proper forum for a complete redefinition of the structure of local-state relations. Such large-scale changes should come from the General Assembly or through a constitutional amendment.

C. North Carolina's Current Framework for Local-State Relations Should Be Further Studied and Potentially Modified

Clearly, the test proposed here is not a panacea. It would not, for example, allow the General Assembly to pilot a new regulation through local acts materially related to one of the prohibited subjects, and it could prevent the legislature from giving a local government special authority to solve a unique problem it faces.

As noted above, the purpose of article II, section 24 has largely been achieved, as there are far fewer local bills in the General Assembly than there were in the early twentieth century. The problem now primarily seems to be that many local bills are far more politically controversial than in the past.¹⁴³ Section 24 was not

142. The concern about upsetting the status quo was raised by Justice Newby in his dissent in *City of Asheville*. *City of Asheville v. State*, 369 N.C. 80, 106, 794 S.E.2d 759, 778 (2016) (Newby, J., dissenting). Though the majority seems to adequately address this concern, *see id.* at 106 n.20, 794 S.E.2d at 778 n.20 (majority opinion), the approach to section 24 proposed here would go further in ensuring the safety of the status quo from constitutional challenge.

143. *See, e.g.*, Joe Killian, *Republican-Controlled Legislature Looks to Flex Political Muscle at the Local Level Once Again*, N.C. POL'Y WATCH (May 4, 2017), <http://www.ncpolicywatch.com/2017/05/04/republican-controlled-legislature-looks-flex-political-muscle-local-level/> [https://perma.cc/E96Y-QLYM]. This increase in partisanship of local issues is part of a national trend. *See* Katherine Levine Einstein & David M. Glick, *Cities in American Federalism: Evidence on State-Local Government Conflict from a Survey of Mayors*, 47 PUBLIUS 599, 600 (2017); Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them.*, N.Y. TIMES: THE UPSHOT (July 6, 2017), <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html> [https://perma.cc/SU7B-L5NF].

Examples of recent politically controversial North Carolina laws involving conflicts between local and state authority are numerous. *See, e.g.*, Act of March 23, 2016, ch. 3, sec. 1.1, § 115C-47, 2016 N.C. Sess. Laws 12, 12 (regulating bathroom use by transgender individuals and making various employment law changes), *repealed by* Act of March 30, 2017, ch. 4, § 1, 2017 N.C. Sess. Laws 16, 16 (2017); Act of July 2, 2015, ch. 138, § 2(c), 2015 N.C. Sess. Laws 338, 338 (altering how city council elections are conducted in Greensboro), *invalidated by* *City of Greensboro v. Guilford Cty. Bd. of Elections*, 251 F.

designed to deal with this issue. The General Assembly, then, should study the scheme of local-state relations laid out in the North Carolina Constitution to see if the current framework for such relations should be modified to respond to contemporary problems.

CONCLUSION

City of Asheville v. State and *Town of Boone v. State* highlight the Supreme Court of North Carolina's decades-long struggle to articulate a workable standard governing article II, section 24(1)(a) cases. These two cases add to the confusion in this area and, as one commentator noted, leave the General Assembly and local governments with guidance that is far from clear. This lack of clarity is especially problematic as local legislation becomes increasingly partisan and more frequently litigated.

Though the General Assembly or some other body it designates should study local-state relations in depth to see if constitutional changes are necessary to ensure a more stable framework going forward, the new test announced in *City of Asheville* could help bring more clarity to this little-understood area of the court's jurisprudence in the meantime. By adding an additional prong to the test that excludes subjects historically regulated by the General Assembly through local acts from being struck down as unconstitutional, the court preserves the status quo in areas where the state and local governments traditionally found that this type of regulation works. Such an approach provides local governments with more certainty that the local acts on which they have long relied for authority to act are safe from constitutional challenge while giving full effect to two seemingly contradictory provisions of the state constitution.

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Supp. 3d 935, 938 (M.D.N.C. 2017); Charlotte Douglas International Airport Authority Act, ch. 272, 2013 N.C. Sess. Laws 738, 738 (transferring authority over the Charlotte airport from the city to an independent commission). The political divide over these and other pieces of legislation marks a divide between rural and urban communities. See Jim Morrill, *Your Schools, Roads and Wallet Could Be Hit by City vs. Rural Battle*, CHARLOTTE OBSERVER (Jan. 27, 2017), <http://www.charlotteobserver.com/news/politics-government/article129182334.html> [<https://perma.cc/6LBV-Y7NB>].

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