STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: 13-CVS-12678

CITY OF CHARLOTTE,
A municipal corporation,

Plaintiff,

v.

THE STATE OF NORTH CAROLINA and CHARLOTTE DOUGLAS INTERNATIONAL AIRPORT AUTHORITY,

Defendants.

OPPOSITION TO PRELIMINARY INJUNCTION

The Motion for Preliminary Injunction filed by Plaintiff City of Charlotte ("City") and the State of North Carolina ("State") is moot because the law it challenges no longer exists. The law the City sought to restrain, Session Law 2013-272 (2013) (the "Authority Act"), would have created an authority, as a separate entity, to operate Charlotte Douglas International Airport (the "Airport"). On July 26, 2013, after the Court entered a temporary restraining order against the Authority Act, the General Assembly repealed it by passing Session Law 2013-258 (the "Commission Act," attached hereto as Exhibit A). The Authority Act and the Commission Act both embody the legislature's interest in ensuring the independent and effective management of the Airport, but they are very different laws. The Authority Act would have appointed an authority to manage the Airport that was completely independent of the City, and which was to be a separate body corporate and politic, with the City appointing four of eleven members. By contrast, the Commission Act creates the Charlotte Douglas International Airport Commission (the "Commission") as an *agency* of the City, with the City appointing a majority of the thirteen

commissioners. The two laws also function differently. Under the Authority Act, property related to the Airport would have transferred to the authority. The opposite is true of the Commission Act, which provides that property related to the Airport remains part of the City.

These points are all significant, as discussed below, but the most important difference between the two laws is that there will be no transfer of the Airport under the Commission Act. Under the Authority Act, a newly created outside entity would have been responsible for operating the Airport. This is not true of the Commission Act. Instead, as the legislation makes abundantly clear, the Commission is an agency of the City that was created by amending the Charter of the City of Charlotte (the "Charter"). The distinction matters. Although the City's claims against the Authority Act—all of which objected to the transfer of the Airport—lacked a strong foundation in the North Carolina Constitution, they are utterly baseless as applied to the Commission Act, under which the Airport will remain with the City. Accordingly, the Commission respectfully requests that the Court deny the City's motion for preliminary injunction and dissolve the temporary restraining order.

BACKGROUND

On February 13, 2013, the initial draft of the legislation that would become the Authority Act was filed in the Senate as Senate Bill 81 by North Carolina State Senator Bob Rucho, a representative whose district covers portions of Mecklenburg County, to explore the possible creation of an independent authority to operate the Airport. Charlotte's city leaders opposed the legislation and retained a consultant to "conduct an independent, objective review of airport governance models and the issues associated with a transition to a different governance model at Charlotte-Douglas International Airport." *See* Charlotte Airport Governance Study Final Report

1 (May 1, 2013) (Affidavit of Martin L. Brackett, Jr., Ex. A).[1] Consultant Bob Hazel, an expert on aviation economics and commercial and regulatory issues with the Oliver Wyman consulting company, concluded that "the best form of governance for the Charlotte Airport is a *properly structured* airport authority." *Id.* at 52; *see* Ely Portillo & Steve Harrison, *City-Funded Study Recommends Airport Authority*, Charlotte Observer (Apr. 25, 2013) (Brackett Aff., Ex. B). In the ensuing months, a majority of the General Assembly came to favor the creation of an independent authority, and on July 18, 2013, the General Assembly passed the Authority Act. Session Law 2013-272 (2013). The Authority Act created the Charlotte Douglas International Airport Authority (the "Authority") and vested it with the responsibility of owning, controlling, and managing the Airport. *Id.*

Minutes before the Authority Act was ratified, the City filed this action against the State of North Carolina and the Authority, claiming that the Authority Act violated the North Carolina Constitution. *See* Verified Complaint and Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction ("Complaint") (attached as Exhibit B). More specifically, the City alleged that the Authority Act was an unconstitutional local act, impaired Charlotte's contractual obligations, subverted the authority of the Federal Aviation Administration (the "FAA"), and amounted to an unconstitutional taking of Charlotte's property. Complaint ¶¶ 8-14. In conjunction with filing its lawsuit, Charlotte also sought and obtained a temporary restraining order (the "TRO") providing that:

1. The State is restrained and enjoined from taking any action to implement or enforce the Act;

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[1] This document and many others relating to the dispute over the Airport are publicly available on the City's official web site at http://www.charmeck.org/city/charlotte/Pages/Airportgovernancestudy.aspx. Although the Commission takes the position that all such documents are public records and properly the subject of judicial notice, the Commission has provided the Court with certain documents by affidavit in an abundance of caution.

2. The Charlotte Douglas Airport Authority, and all of its agents, servants, and employees are forbidden from assuming any authority or control over the Airport or any of the real or personal property owned by the City of Charlotte with respect to the Airport;

3. None of the property, licenses, debt, or contracts associated with or related to the Airport are to be transferred to the Charlotte Douglas Airport Authority;

4. Charlotte continues to own, manage, and operate the Airport and all of the property owned by the City of Charlotte with respect to the Airport pending further Order of this Court.

TRO at 3 (attached as Exhibit C).

On the afternoon of July 18, at the same time Charlotte was obtaining its TRO, the Authority's newly appointed Executive Director, T. Jerry Orr, sent a draft letter to Charlotte's City Manager, Ron Carlee, requesting assistance with the orderly transition of the Airport's management and services to the Authority. *See* Affidavit of Jerry Orr ¶ 6; Letter from T.J. Orr, Executive Director, to Ron Carlee, City Manager (July 18, 2013) (Orr Aff., Ex. A). Mr. Orr's letter also explained his understanding that the Authority Act ended his responsibilities as Charlotte's Aviation Director and made him the Authority's Executive Director. *Id.* Upon receipt of Mr. Orr's letter, Charlotte's managers told Mr. Orr that they viewed his letter as a resignation. Orr Aff. ¶ 11; Ely Portillo et al., *Vinroot Says Jerry Orr was Fired, City Says He Resigned*, Charlotte Observer (July 19, 2013) (Brackett Aff., Ex. C). When Mr. Orr explained that he had not resigned, city officials insisted that he leave the Airport. *Id.*; *see* Orr Aff. ¶ 12.

With the Authority Act stalled in the State's court system and uncertainty surrounding control of the Airport, North Carolina's Governor asked Charlotte's leaders to consider a compromise to resolve the controversy. Andrew Dunn, *Gov. Pat McCrory Hosts Negotiations on Charlotte Airport*, Charlotte Observer (July 22, 2013) (Brackett Aff. Ex. D). Although the negotiations did not lead to a mutual agreement on the future of the Airport, some of the items

proposed during those negotiations became the basis for the Commission Act, which was passed by the General Assembly on July 26, 2013.

The Commission Act repealed the Authority Act and amended Charlotte's Charter to create the Commission, a majority of whose members would be appointed by the Mayor or City Council of Charlotte. *Id.* § 3, Charter § 5.53.[2] In creating the Commission by amending Charlotte's charter, and in providing for a majority of appointments by the City, the Commission Act parallels legislation that the City proposed as an alternative to the Authority Act shortly before it passed. *See* Press Release, *Mayor Kinsey proposes alternative to current Airport Authority bill to avoid litigation* (July 16, 2013) (Brackett Aff., Ex. E); A Bill to Be Entitled An Act To Create the Charlotte Airport Commission (final draft dated July 15, 2013) (Brackett Aff., Ex. F). Upon the passage of the Commission Act, the Commission was created and charged with "operat[ing] the airport in a proper, efficient, economical, and business-like manner, to the end that it may effectively serve the public needs for which it was established at the least cost and expense to the City." *See* Commission Act § 6 ("This act is effective when it becomes law."); *id.* § 3, Charter § 5.51 ("There is created the Charlotte-Douglas International Airport Commission...."); *id.* § 3, Charter § 5.56(a).

ARGUMENT

I. The Legislature acted constitutionally in amending the City's charter to create the Commission and assign it responsibility for the Airport.

By enacting the Commission Act, the General Assembly amended the City's Charter to provide for the creation of the Commission to operate the Airport on the City's behalf. Under North Carolina law, the legislature may amend a city charter as it sees fit, and constitutional

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[2] Section 3 of the Commission Act, which amends the City's Charter, is by far the lengthiest section of the statute. For ease of reference, citations to this section also include a reference to the amended Charter section.

challenges to such amendments have uniformly failed. Indeed, the Supreme Court has rejected such constitutional challenges even when the legislature has repealed or abrogated a charter entirely. *See, e.g., Town of Highlands v. City of Hickory*, 202 N.C. 167, 162 S.E. 471 (1932) (upholding a statute repealing the charters of the former towns of Highlands and West Hickory and explaining that there are "no limitations in the Constitution of this state or of the United States upon the power of the General Assembly to provide by statute...for the repeal of a statute under which a municipal corporation in this state was organized."). If the legislature has to power to repeal a municipal charter entirely, the General Assembly must also have the authority to make amendments to a charter when it concludes, in its discretion, that changes are warranted. This is, in fact, the law.

In *Brockenbrough v. Bd. of Water Commissioners of City of Charlotte*, 134 N.C. 1, 46 S.E. 28 (1903), the legislature amended Charlotte's charter to create a board of water commissioners. Like the Commission, the water commission was created as an independent entity under and within the City. Initial commissioners were appointed, and the law provided for appointment of their successors by the board of aldermen, a predecessor to the city council. *Id; see* 1899 Private Laws, Chapter 271 (attached as Exhibit D). After the legislature passed another law giving the water commission the authority to issue bonds, members of the board of aldermen and taxpayers sued to enjoin the bond issuance, arguing that the legislature had exceeded its authority and was taking the city's property without just compensation. *Id.* at 28-29, 33. The Supreme Court flatly rejected this argument:

> It is clear that the Legislature may, in aid of municipal government, or for the purpose of discharging any municipal functions, or for any proper purpose, create municipal boards, and confer upon them such powers and duties as in its judgment may seem best.... It is uniformly held that municipal corporations are mere instrumentalities of the state for the more convenient administration of local

> government. Their powers are such as the Legislature may confer, and these may be enlarged, abridged, or entirely withdrawn, at its pleasure.

Id. at 33. Addressing the claim that the legislature could not transfer the city's control and property to the commission, the Court went on to explain that:

> There is no prohibition which we have been able to discover, and we have been pointed to none, against the creation by the Legislature of every conceivable description of corporate authority and to endow them with all the faculties and attributes of other pre-existing corporate authority. Thus, for example, there is nothing in the Constitution of this state to prevent the Legislature from placing the police department of Chicago, or its fire department or its waterworks, under the control of an authority which may be constituted for such purpose. The Constitution nowhere commits corporate objects or purposes irrevocably to authorities now existing, nor does it prohibit the committal of them to such corporate authority whose appointment may be called into life by the same law which creates the subject, and commits it to their jurisdiction.

Id. (quoting *People ex rel. Wilson v. Salomon*, 51 Ill. 37, 51 (1869)).

Similarly, in *Greensboro-High Point Airport Authority v. Johnson*, Guilford County, the City of Greensboro, and the City of High Point challenged the establishment of an authority created to operate the Greensboro-High Point Airport (now Piedmont Triad International Airport). 226 N.C. 1, 36 S.E.2d 803 (1946). The Court noted, as a point that "must be conceded," that the "municipal authority to construct, maintain and operate such airport may be confided to a municipal corporate authority created for that purpose by appropriate legislative action." *Id.* at 8, 36 S.E.2d at 808. The cities objected, claiming, among other things, that the legislature had "created in the plaintiff a municipal corporation, to all intents and purposes independent and distinct from the county or municipalities it is intended to serve, and...that the statute fails to give to the municipalities an adequate control of the Airport Authority." *Id.* The Court refused to recognize these claims:

> In considering questions concerning the powers conferred on the quasi-municipal corporation and the control over it exercised by the municipality with which it is connected, it must be remembered that counties, cities and towns derive practically all their powers from the legislature, through appropriate authority law,

> rather than constitutional grants; and the legislature, in implementing their functions or in creating a separate corporate agency to serve a particular governmental purpose, is not bound by the limitations of the general statute under which the municipalities are formed or the special charters and laws delimiting their authority. It may give to these specially created agencies such powers and call upon them to perform such functions as the legislature may deem best.

Id. at 9-10, 36 S.E.2d at 809.

For a more recent illustration, the Court need look no further than the City's Auditorium-Coliseum-Convention Center Authority (the "Coliseum Authority"). Like the Commission, the Coliseum Authority was created through an amendment to the Chapter 5 of the Charter, which deals with "Authorities, Boards, and Commissions," to vest the "control, management, and operation of the property and improvements now or hereafter made or acquired by the City for auditorium, coliseum, civic center, and baseball stadium purposes." Charter, § 5.21. As with the Commission, the Coliseum Authority is instructed to "operate the auditorium-coliseum-convention center-baseball stadium in a proper, efficient, economical, and business-like manner, to the end that such properties and facilities may effectively serve the public needs for which they were established at the least cost and expense to the City." *Id.* § 5.21; *compare* Commission Act § 3, Charter § 5.56(a) (directing the Commission to "operate the airport in a proper, efficient, economical, and business-like manner, to the end that it may effectively serve the public needs for which it was established at the least cost and expense to the City").

As these examples make clear, the General Assembly had the constitutional authority to create the Commission and assign it the responsibility of operating the Airport. *Greensboro-High Point Airport Authority*, 226 N.C. at 9-10, 36 S.E.2d at 809, *Brockenbrough*, 134 N.C. at 1; *see also* John Martinez, 1 Local Government Law § 3:4 (2d ed.) ("[T]he great weight of authority and the rule which conforms best to prevailing legal conceptions regarding the nature and role of local government is that, in the absence of any express restriction in the constitution, the rights,

powers, privileges and immunities devolved upon local government units for governmental purposes may be changed, modified, or terminated by the legislature." (footnotes omitted)); *Monaghan v. Armatage*, 15 N.W.2d 241, 244 (Minn. 1944) (rejecting a claim by the City of Minneapolis that the creation of an airport authority was unconstitutional because "the city is but a subdivision of the legislative branch of government and always subject to the paramount power of the legislature, its creator...[t]he legal situation is no different from that where the state itself holds the property and subjects it to a different or greater use"); 2 McQuillin Municipal Corporations § 4:6 (3d ed.) ("[T]he legislature may wholly or partially withdraw or resume powers conferred on municipal corporations, and the legislature may either return those powers to itself or vest them in other agencies, as by creating a commission to regulate public utilities operated in the locality." (footnotes omitted)). This authority comes from the State's status as sovereign, and it is written into the state constitution: "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.

For this reason, municipalities like the City are frequently referred to as "creatures of statute," *King v. Town of Chapel Hill*, 743 S.E.2d 666, 669 (N.C. Ct. App. 2013), "creatures of the legislature," *City of Asheville v. State*, 192 N.C. App. 1, 20, 665 S.E.2d 103, 119 (2008), or "creatures of the State," *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994). Given this central principle of state constitutional law, municipal challenges to laws altering or amending the authority originally delegated them by the legislature have a long history of failure. *See, e.g.*, *City of Asheville,* 192 N.C. App. at 20-21, 665 S.E.2d at 119 ("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." (quotation marks omitted)); *McCormac v. Robeson Cnty. Comm'rs*, 90 N.C. 441, 444-45 (1884) (holding that political subdivisions of the state "are always under the control of the power that created them"). Indeed, in this case, the State both created the City's charter and gave it the authority to operate an airport. *See* N.C. Gen. Stat. § 63-49 (authorizing municipalities to establish and operate airports). In enacting the Commission Act, it has simply amended that charter and assigned responsibility for the airport to the Commission, an entity under the City. *See* Commission Act, § 3, Charter § 5.56(a)(3) (stating that the Commission shall have the power and authority to "Exercise on behalf of the City within Mecklenburg County all the powers that the City has concerning airports under Chapter 63 of the General Statutes"). The State's constitutional authority to amend the City's Charter and create the Commission cannot be denied.

II. To the extent they even apply against the Commission, Plaintiff's claims have no basis in the North Carolina Constitution.

The Complaint challenges the Authority Act on constitutional grounds. As set forth in the Joint Motion to Dismiss filed by the State and the Commission, those claims are moot because the Authority Act has been repealed by the legislature. *See* Commission Act, § 2 ("S.L.2013-272 is repealed."); *Prop. Rights Advocacy Grp. ex rel. Its Members v. Town of Long Beach*, 173 N.C. App. 180, 183, 617 S.E.2d 715, 718 (2005) ("Repeal of a challenged law generally renders moot the issue of the law's interpretation or constitutionality."), *aff'd,* 360 N.C. 474, 628 S.E.2d 768 (2006). To the extent that the Court proceeds to consider the City's constitutional arguments as

challenges to the Commission Act, those arguments have no basis in the North Carolina Constitution.[3]

Before addressing the City's individual claims, it will be useful to discuss a few principles of state constitutional law. First, the Court must presume that the Commission Act is constitutional unless the City can show that it is unconstitutional ***beyond reasonable doubt***. *See Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) ("In determining the constitutionality of a statute we are guided by the following principle: '[e]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined *beyond reasonable doubt*.'" (emphasis added) (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967))); *see also In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997) ("Therefore, this Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute."). If there is "any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." *Baker*, 330 N.C. at 338, 410 S.E.2d at 891. As the party challenging the constitutionality of a statute, the City bears 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).

Second, the presumption of constitutionality is founded on another constitutional principle, the separation of powers. As the Declaration of Rights provides, "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. Thus, the Court may not substitute its views for

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[3] This is not to concede that the City's claims were meritorious as applied to the Authority Act. To the contrary, those challenges also would have failed for the reasons set forth below.

those of the Legislature, as those views are expressed in the Commission Act. *See Greensboro-High Point Airport Auth.*, 226 N.C. at 8, 36 S.E.2d at 808 ("We have no power to review a statute with respect to its political propriety as long as it is within the legislative discretion and has a reasonable relation to the need sought to be accomplished."); *City of Asheville*, 192 N.C. App. at 43-44, 665 S.E.2d at 133 ("It is critical to our system of government and the expectation of our citizens that the courts not assume the role of legislatures. Judges have not been entrusted by the people of this State to be legislators." (alterations omitted)). Accordingly, the Court is "limited to carrying out its duty to examine a statute and determine its constitutionality when the issue is properly presented." *City of Asheville*, 192 N.C. App. at 44, 665 S.E.2d at 133.

As the Supreme Court held in upholding the constitutional validity of the law creating the authority that operates Piedmont-Triad International Airport:

> In so far as constitutional restrictions are concerned, the General Assembly may distribute the functions of a municipality as it may deem best, the only limitation being its own sound judgment in creating a unified and efficient government. By the exercise of the same sound judgment and legislative discretion, it may, as it has attempted here to do, create a more or less autonomous agency, giving to the municipality only such control as it may consider advisable where the particular functions to be performed involve great detail and complexity, and demand close attention and skilled personnel. Perhaps in no other way could continuity and efficiency in the service be secured against political changes and petty directives."

Greensboro-High Point Airport Auth., 226 N.C. at 10, 36 S.E.2d at 810. Notwithstanding the fact that the City cannot ask the Court to second guess the legislature's policy decisions under the separation of powers doctrine, and the requirement that it must show that the law is unconstitutional beyond reasonable doubt, the City raises four constitutional challenges in its Complaint. Each of these fails for the reasons set forth below.

A. The Constitution does not prohibit the Legislature from amending the City's Charter via a local law, nor does it require legislation regarding airports to be enacted as a general law.

The City's primary objection against the Authority Act was that it was an impermissible "local law" prohibited by the State Constitution. Beyond the fact that the City based its objection on an incorrect reading of the constitutional provisions relating to the financing of airports, this argument has no application to the Commission Act.

Article VII, Section 1 of the State Constitution gives the General Assembly plenary power to grant, amend, and dissolve cities' charters through local laws. Further, the Commission Act merely authorizes the Commission to exercise powers granted under Chapter 63 of the General Statutes—a general law. *See* Amendment Act § 3, Charter § 5.56(a)(3). Such an arrangement has not only been approved by our Courts numerous times, it is precisely the arrangement under which the City has exercised authority over the Airport to date.

The General Assembly's power to amend the City's Charter is plenary. *See* N.C. Const. art. VII, § 1. "[T]he legislature has full power to amend the charter of a municipal corporation, such as a town, at its pleasure, and when the legislature passes an amendment to a municipal charter...the amendment takes effect without any acceptance on the part of the municipality." *Bethania Town Lot Comm. v. City of Winston-Salem*, 126 N.C. App. 783, 786, 486 S.E.2d 729, 732 (1997), *aff'd*, 348 N.C. 664, 502 S.E.2d 360 (1998). There is no prohibition against using local acts to issue or modify the charters of local governments. *See Bethania Town Lot Comm.*, 348 N.C. at 668, 502 S.E.2d at 361 ("The General Assembly may, by special or local act, create municipalities and change the boundaries of municipalities."); *Plemmer v. Matthewson*, 281 N.C. 722, 725, 190 S.E.2d 204, 207 (1972); *Matthews v. Town of Blowing Rock*, 207 N.C. 450, 452, 177 S.E. 429, 430 (1934); *Lutterloh v. City of Fayetteville*, 149 N.C. 65, 69, 62 S.E. 758, 760 (1908). Indeed, because an amendment to a city charter operates only in one place, it can *only* be

accomplished by local act. *See Greensboro-High Point Airport Auth.*, 226 N.C. at 10, 36 S.E.2d at 810 (observing that the Legislature's creation of a joint airport authority operated by Greensboro, High Point, and Guilford County pursuant to N.C. Gen. Stat. § 63-4 "obviously" could only be accomplished through local law); *see also City of Asheville*, 192 N.C. App. at 23, 665 S.E.2d at 120 (observing that the substance of an act, not its form, determines whether it is general or local).

Through general law, the General Assembly has granted cities, such as Charlotte, the power to "acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate airports," both on their own and jointly with other local governments. *See* N.C. Gen. Stat. § 63-2 (authorizing cities and towns to establish airports), *id.* § 63-4 (authorizing joint airports established by cities, towns and counties). Thus, the Commission Act merely directs that the Commission exercise, on the City's behalf, those powers granted under Chapter 63 of the General Statutes (Aeronautics). To that end, section 5.56(a)(3) of the City's Charter, as amended by the Commission Act, provides that the Commission shall have the power to:

> (3) Exercise on behalf of the City within Mecklenburg County *all powers that the City has concerning airports under Chapter 63 of the General Statutes and any other provision of general law*, this charter or other provision of local act applicable to the City, except as limited by this Article [of this Act].

Commission Act § 3, Charter § 5.56(a)(3) (emphasis added). The Commission's authority to operate the Airport is thus a product of general—not local—law.

Significantly, the Supreme Court expressly approved the use of local law to create an airport authority to exercise the authority granted by Chapter 63 in *Greensboro-High Point Airport.* As discussed in Section I, *supra*, the General Assembly created the Greensboro High Point Airport Authority as a joint operation of High Point, Greensboro, and Guilford County. 226 N.C. at 3, 36 S.E.2d at 805. This airport authority was created by local law. *Id.* at 12, 36

S.E.2d at 811; *see* Public-Local Laws of 1941, Chapter 98 (attached as Exhibit E). The treasurers of the three local governments refused to transfer appropriations to the new authority, arguing that the law was invalid. In particular, they argued that the local act creating the authority unconstitutionally "repealed" or "amended" N.C. Gen. Stat. § 63-4, which provides that the governing bodies of cities, towns, and counties may jointly operate airports. *See* N.C. Const. art. II, § 24; *id.* art. XIV, § 3 (providing that the General Assembly may not use local acts to repeal or amend a general law). The Court rejected that argument, and held that the local act creating the authority merely "supplemented" the general law found in N.C. Gen. Stat.§ 63-4:

> The public statute, G.S. § 63–4, permitting the three municipalities concerned to act jointly, is not repealed or modified, or its authority in any way affected by the supplementary acts under which the purpose and policy of the public statute are carried out in the creation of a single Airport Authority to serve all three municipalities—*obviously the only way in which it could be done.*

226 N.C. at 10, 36 S.E.2d at 810 (emphasis added).

In short, the Commission Act supplements the general law in exactly the same manner as the local act upheld in *Greensboro-High Point Airport Authority*. It provides the mechanism by which the City exercises its power to own and develop the Airport under Chapter 63. The Commission Act is thus allowable as an exercise of the General Assembly's plenary power to control the structure the City's government under Article VII, Section 1 of the Constitution.

The City based its other local law claim for unconstitutionality on the confluence of two provisions of the State Constitution. Article XIV, Section 3 of the State Constitution provides, in relevant part, that "no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws." N.C. Const. Art. XIV, § 3. Article V, Section 13 of the State Constitution provides that "Notwithstanding any other of this Constitution, the General Assembly may enact general laws to grant . . . powers useful in connection with the development of new and existing . . . airports," including the power

to (1) acquire airport facilities "jointly with public and private parties," (2) finance and refinance airport facilities "for public and private parties," and (3) "to secure any such financing or refinancing by all or a portion of [the airport's] revenues." Though Article V, Section 13 deals only with the *financing* of airports—and even then only in connection with *joint public-private projects*—the City wrongfully assumes that the "subject matter" of that section is "airports" generally, and thus boldly asserts that the General Assembly lacks the power to enact local laws "dealing with airports." Complaint ¶¶ 30-33. This argument fundamentally misunderstands the intent and history of Article V, Section 13.

The *sine qua non* of constitutional interpretation is the language of the text and the intent of the drafters. Thus, a constitutional provision should be read in manner that gives effect to its purpose and meaning. *See Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) ("A court should look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration, to determine the extent and nature of the remedy sought to be provided."). Both the text of Article V, Section 13, discussed above, and its history show that it was intended to deal with the *financing* of airports owned or operated *jointly by public and private parties*. It was not intended as a general grant of authority to govern airports generally, and certainly not as a prohibition against any local act "dealing with airports."

Article V, Section 13, which was adopted in 1986, is one of a series of provisions in the Finance article of the Constitution adopted following the Supreme Court's decisions in *Mitchell v. North Carolina Industrial Development Financial Authority*, 273 N.C. 137, 159 S.E.2d 745 (1968), and *Stanley v. Department of Conservation & Development*, 284 N.C. 15, 26, 199 S.E.2d 641, 649 (1973), which held that government bond issuances for industrial facilities and

pollution control facilities were not made for a "public purpose" and thus were unconstitutional. In order to reverse those decisions and provide a clear line of authority for the financing of joint public-private facilities, Article V of was amended six times between 1975 and 1986 to authorize the financing of health care facilities (art. V, § 8), capital projects for industry (art. V, § 9), the joint ownership of generation and transmission facilities (art V, § 10), capital projects for agriculture (art., § 11), higher education facilities (art. V, § 12), and finally seaports and airports (art., § 13). *See Maready v. City of Winston-Salem,* 342 N.C. 708, 719, 467 S.E.2d 615, 622 (1996) (explaining the history and purpose of these amendments).

Article V, Section 13 was thus not intended to limit the use of local laws "dealing with airports." Instead, it was intended as a grant of additional powers to *finance* airport facilities owned or used jointly by public and private parties. Both the text and the legislative history bear this out. The section begins by stating that the General Assembly may exercise the powers granted therein "*Notwithstanding any other provision of this Constitution*," thus making clear that it is an enabling provision. Likewise, the resolution adopting Article V, Section 13 was entitled "An Act . . . to Permit the General Assembly to Grant to the State and Other Public Bodies in the State *Additional Powers* to Develop New and Existing Seaports and Airports, Including Powers to Finance and Refinance *for Public and Private Parties* [Airports and Related Facilities]." *See* 1985 Sess. Laws. 933 (emphasis added). Article V, Section 13 was thus intended to grant *new* powers, not to authorize laws regarding airports generally. Such a general grant of authority to control municipal airports would have been superfluous. The General Assembly already had the express power to control local governments under Article VII, Section 1, and—as evidenced by the enactment of Chapter 63 in 1929 and the City's construction of what became

Charlotte Douglas International Airport in 1935—it had already granted local governments authority regarding airports long before the adoption of Article V, Section 13 in 1986.

The consistent practice of the General Assembly following the adoption of Article V, Section 13 also belies the City's sweeping claim that the section was intended to prohibit all local laws "dealing with airports." In 1987, the year after Article V, section 13 was adopted, the General Assembly enacted eight local acts regarding airports, including one forming an airport authority as a joint operation of the towns of Apex, Holly Springs, and Fuquay-Varina. *See* 1987 N.C. Sess. Laws 546. All told, from 1987 until the passage of the Authority Act, the General Assembly passed no less than sixty-nine local acts regarding airports. *See* Table of Local Laws Regarding Airports Passed Since 1987 (attached as Exhibit F). These included acts that authorized the City to construct a $120 million maintenance facility at the Airport for the benefit of U.S. Air. *See* 1998 N.C. Sess. Laws 173; 2002 N.C. Sess. Laws 93; Orr Aff. ¶ 27. Tellingly, the City took advantage of the authority granted by these acts and has apparently never challenged any of them as impermissible local acts "dealing with airports." The longstanding practice of the General Assembly is strong evidence of the intended purpose of Article V, section 13, and thus its proper interpretation. *See Kornegay v. City of Goldsboro,* 180 N.C. 441, 105 S.E. 187, 190 (1920) (holding the General Assembly's longstanding interpretation of a constitutional provision should be given great weight). As the history and text of Article V, Section 13 reveal, this provision was not intended to deal with "airports" generally, nor was it intended to limit the legislature's ability to enact local laws regarding airports.

B. The City's claims regarding the Airport's bonds fail because the Commission Act does not transfer the property and because the Constitution, N.C. Gen. Stat. § 159-93, and the bond documents do not prevent the State from changing the Airport's governance structure.

The Commission Act will not impair the contractual obligations owed the holders of the City's Airport Revenue Bonds. In its Complaint, the City claimed that the Authority Act was unconstitutional because transferring the Airport and its assets to the newly-formed Authority would somehow impair its contractual obligations to bondholders. Complaint ¶¶ 34-43. Though that claim ignored both the plain provisions of the bond documents and governing law, it is inapposite to the Commission Act. Because the Commission is merely an "agency of the City," and not a separate entity, there will be no transfer of either the Airport or its constituent assets—all of which will remain property of the City. Thus, to the extent any bond covenant prohibits transfer of the Airport or bond obligations to a successor entity, there will be no breach as a result of the Commission Act.

As a threshold matter, the Airport Revenue Bonds are *revenue bonds*. Thus, the only source of repayment for and security pledged by the bonds is Airport revenues.[4] The bonds are not backed by the City's taxing power and cannot be paid from general revenue.[5] Therefore, so long as the Airport and the corresponding revenues remain with a party bound by the bond covenants, there is no substantial impairment of the bondholders' contract. *See Wayne County Bd. of Comm'rs v. Wayne County Airport Auth.*, 658 N.W. 2d 804, 820 (Mich. Ct. App. 2002) (holding that transfer of airport from county to statutorily created authority did not impair revenue bonds where the bond obligations continued to bind the county's successors).

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4 *See* Section 701 of the Airport Revenue Bond Order, adopted Nov. 18, 1985. Orr Aff., Ex. 3.

5 *See* N.C. Gen. Stat. §§ 159-82 (providing that municipalities must pay revenue bonds "solely out of revenues without pledging the faith and credit of the municipality"); 159-94 ("The principal of and interest on revenue bonds shall not be payable from general funds.")

The City based its impairment of contract claim on Article I, Section 19 of the State Constitution, the so-called "Law of the Land Clause." Complaint ¶ 35. For purposes of the City's claims that clause is analogous with the Contracts Clause of the United States Constitution, which provides "No State shall . . . pass . . . any Law impairing the Obligation of Contracts . . . ." U.S. Const. art 1, § 10; *see Wiggs v. Edgecombe County*, 361 N.C. 318, 324, 643 S.E.2d 904, 908 (2007) (combining analysis of claims under the Law of the Land Clause and federal Contracts Clause); *City of Asheville*, 192 N.C. App. at 44, 665 S.E.2d at 133 (observing that rights under the Law of the Land Clause are analogous to those under federal constitution).

A contracts clause claim requires a plaintiff to show three elements: (1) that there has been an impairment of contract; (2) that the impairment is substantial; and (3) that the impairment was not a legitimate exercise of the police power. *See Fraternal Order of Police Lodge No. 89 v. Prince George's Cnty., MD,* 608 F.3d 183, 188 (4th Cir. 2010) (citing *Balt. Teachers Union v. Mayor, City Council of Balt.,* 6 F.3d 1012, 1015 (4th Cir.1993)). While a state's impairments of its own contracts is subject to "greater scrutiny" than its impairment of private contracts, there can be no Contracts Clause claim unless there is a contractual obligation that has been substantially impaired by the state. *See id.*

The Commission Act does not impair the City's contract with the holders of the Airport Revenue Bonds. As the City alleges in its Complaint, those bonds are governed by terms of the City's Bond Order, adopted November 18, 1985 (as amended from time to time, the "Bond Order"). Complaint ¶ 27. The Bond Order provides that (i) the sole source of repayment for and security pledged by the bonds shall be the Airport's revenue, which will continue to be available to the bondholders under the Commission Act, Bond Order § 701 (Orr Aff., Ex. 3), and (ii) the bond covenants shall bind "successors" to the City as well as "any officer, board, or commission

to whom" power over the airport "is transferred as a matter of law," *id.* § 1301. The formation of the Commission thus will not impair any contractual obligation owed the bondholders.

In its Complaint, the City identified two bond covenants that it alleged would be breached if the Airport, along with the bond obligations, were transferred under the Authority Act. Neither is implicated by Commission Act, which makes no transfer of the Airport or its constituent assets.

First, the City made the ambiguous claim that, "Pursuant to Section 713 of the Bond Order, Charlotte is required to satisfy certain requirements prior to selling or otherwise disposing of certain assets that make up a significant portion of the Airport." Complaint ¶ 39. Even if that allegation fairly characterized the City's obligations—*which it does not*—it would not be affected by the Commission Act, because there is no transfer.

Section 713 binds only the City. It provides that "the *City* shall not sell or dispose of all or any part of the properties constituting the airport." (*See* Bond Order § 713 (Orr Aff, Ex. 3) (emphasis added)). Section 713 does not promise, nor does it purport to promise, that the *State* will not transfer the Airport to a successor government, as would have occurred under the Authority Act. Likewise, it makes no promise that the Airport will not be governed by a Commission, with powers delegated by the City. To the contrary, Section 1301 anticipates just such an arrangement by providing that the Bond Order's covenants shall bind "successors" to the City as well as "any officer, board, or *commission* to whom" power over the airport "is transferred as a matter of law." (*See* Bond Order § 1301 (Orr Aff., Ex 3) (emphasis added)).[6]

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[6] During consideration of the Authority Act in the Legislature, the State Treasurer requested a legal analysis of the Act's implications for bond holders. While the analysis did not definitively conclude that a transfer to the Authority would be permissible, it did cite Section 1301 for the proposition that the bond covenants were "compatible with continued City ownership and continued City operation via a different organizational structure"—i.e., the formation of a City "Commission." Letter from Steve I. Turner, Hawkins, Delafield & Wood, LLP, to Hon. T. Vance Holloman, Deputy Treasurer, North Carolina Department of State Treasurer, dated March 25,2013 (Brackett Aff., Ex. G).

The Commission Act itself ensures that the bond covenants will continue to bind the City, even when it acts through the Commission. As amended by the Commission Act, Section 5.59 of the City's Charter provides that Act's provisions shall "not impair the City's obligations to . . . bondholders of the City's [Airport Revenue Bonds]" and that "all agreements and understandings" with respect to the bonds shall continue to bind the Commission. (2013 Sess. Laws 358, § 3 (amending Charlotte City Charter § 5.59).

The City's second claim, that the Authority Act's transfer of the Airport would violate N.C. Gen. Stat. § 159-93, is likewise inapplicable to the Commission Act, because there will be no transfer. Still, that statute is not implicated by either act. N.C. Gen. Stat. § 159-93 provides that the State "will not limit or alter the rights vesting in the State or municipality at the time of issuance of the bonds or notes" and "will not impair the rights and remedies of the bondholders." Because the City will retain all Airport property and will continue to be bound by the bond covenants, the Commission Act does will not breach the statutory covenant in N.C. Gen. Stat. § 159-93. Likewise, because the rights and remedies of the bondholders are statutorily limited to the Airport's revenue, which would have transferred with the bond obligations under the Authority Act, there also would have been no violation of N.C. Gen. Stat. § 159-93 under that act.

All told, the bondholders will be in exactly the same position, with the same rights and remedies that they had prior to the Commission Act.[7] Their bonds will continue to be secured by the Airport's revenue, and the City, now acting through the Commission, will remain bound by

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Letters issued by other legal analysts, concluded that, following the analysis *Wayne County Board of Commissioners*, there would be no impairment of the bonds, even if the Airport and bond obligations were transferred to the Authority under the Authority Act. *See* Letter from Donald Cunningham, Jones Walker, LLP, to Alliance for a Better Charlotte, dated March 11, 2013. (Brackett Aff., Ex. H).

[7] The Bond Order provides that there shall be no acceleration of the City's obligations upon default, Bond Order § 803 (Orr Aff., Ex. 3), and that the only remedy upon default shall be a "lock box" arrangement, whereby Airport revenues are paid first to the trustee, applied to airport operations, and then used to satisfy the bonds.

the bond covenants. Presented with similar facts, numerous courts have rejected Contracts Clause claims by bondholders where public enterprises have been transferred from one government entity to another, but the bond covenants survive. *See, e.g.*, *Wayne County Bd. of Comm'rs*, 658 N.W. 2d at 820 (holding that transfer of airport from county to statutorily-created authority did not impair revenue bonds where the bond obligations continued to bind the county's successors); *Brockenbrough*, 134 N.C. at 1, 46 S.E. at 34 (concluding that a transfer of waterworks to a newly-created board of water commissioners would not impair the rights of bondholders); *Cont'l Ill. Nat. Bank & Trust Co. of Chicago v. Ill. State Toll Highway Comm'n*, 251 N.E.2d 253, 260 (Ill. 1969) (rejecting contract clause challenge in the context of a transfer to a newly-created highway authority); *Jacksonville Port Auth. v. State*, 161 So. 2d 825, 827 (Fla. 1964) (holding that a transfer of the port from the city to a newly-created authority would not impair the obligation of the city's previously-issued bonds); *Hall v. Underwood*, 63 So. 2d 683, 694 (Ala. 1953) (concluding that the transfer of local roads to a state highway department would not constitute an unconstitutional impairment of bond contracts); *State ex rel. Warner v. Hoagland*, 16 A. 166, 171-72 (N.J. 1888) (rejecting contracts clause challenge following the transfer of certain city improvements). Accordingly, the City cannot show that the bondholders' contracts will be impaired.[8]

C. The City's claim that the State has subverted the FAA's authority by enacting the Commission Act has no constitutional basis, nor does the City have standing to assert it, and there is no foundation for the City's arguments regarding the Airport's FAA Part 139 Certificate and Sponsor Assurances.

The City's next claim is that the legislature violated Article I, Section 5 of the North Carolina Constitution by "contradict[ing]" and "subvert[ing]" the Federal Aviation

[8] The City may also lack standing to bring a claim under the contracts clause—it is not clear why the City, as opposed to the bondholders, would have standing to asset a claim that the bonds will be impaired. *See Mangum v. Raleigh Bd. of Adjustment,* 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) ("The rationale of the standing rule is that only one with a genuine grievance, one personally injured by the statute, can be trusted to battle the issue.").

Administration's ("FAA") authority to grant certificates to owners and operators of airports ("Part 139 Certificates") and the FAA's power to condition grants of federal funds upon the receipt of assurances by airport sponsors ("Sponsor Assurances"). This allegation, however, presupposes that the Commission Act requires the *transfer* of the City's Part 139 Certificate and Sponsor Assurances to the Commission. This interpretation is contrary to the plain meaning of the legislation. The Commission Act states that the Commission is an "agency of the City," *see* Commission Act § 3, Charter § 5.51, and that the Commission shall "have control, *on behalf of the City*, of the Airport Property, Airport Facilities, and all other property held or owned by the City of Charlotte with respect to the Airport," *see id.* § 3, Charter § 5.59(a) (emphasis added). Thus, the Commission will operate the Airport as an agency of the City, and the Airport's property and licenses, including the FAA Part 139 Certificate and Sponsor Assurances, will remain with the City.[9] In short, the proper interpretation of the Commission Act with regard to the FAA could not be clearer—the law is even titled "AN ACT TO CREATE THE CHARLOTTE DOUGLAS INTERNATIONAL AIRPORT COMMISSION ***UNDER THE CITY OF CHARLOTTE***." Session Law 2013-358 (2013) (emphasis added).

On July 29, 2013, the FAA sent a letter to the Attorney General and City Manager Ron Carlee regarding the Commission Act. *See* Letter from Federal Aviation Administration to the Honorable Roy Cooper/Attorney General for the State of North Carolina (July 29, 2013) (Brackett Aff., Ex. I) (the "FAA Letter"). The FAA Letter demonstrates that, where an airport is not transferred to a different entity, the operator of the airport does not need to give Sponsor Assurances or obtain a new Part 139 Certificate.

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[9] In fact, the Commission Act does not substantively change the City's legal relationship with respect to the Airport—it simply redistributes that authority. Prior to the Commission Act's passage, the City operated the Airport through its manager, who supervised the Aviation Department's director. Under the Commission Act, the City will operate the Airport through the Commission, which supervises its Executive Director.

Every statement in the FAA Letter regarding the need for issuance of a new certificate or other regulatory action is premised on the possibility that the Commission Act transfers the Airport to a new entity. *See, e.g.*, *id.* at 1 ("Until FAA makes a determination on the transfer of Federal obligations and issues an Airport Operating Certificate *to the new entity*, the city of Charlotte remains the airport sponsor and the certificate holder." (emphasis added)); *id.* (stating that "transfers however cannot take effect until FAA makes the requisite determination on the eligibility *of the new entity*" (emphasis added)); *id.* at 2-4 ("outlin[ing] the steps in the process to *transfer an airport to another eligible recipient*" (emphasis added)). Thus, if the Commission Act does not transfer the Airport to a new entity, there is no need for the FAA to issue a new certificate or take other regulatory action. In fact, the FAA Letter expressly states that the City is to remain the airport sponsor and certificate holder "until FAA approves the transfer of Federal obligations and issues an Airport Operating Certificate to the new entity." In short, because the Commission Act does not transfer the Airport to a different entity, there is no transfer for the FAA to approve, nor is there any need for issuance of a new certificate.

The fact that the Airport's Part 139 Certificate and Sponsor Assurances are not transferred to the Commission also makes the City's claims under Article I, Section 5 moot. The City's allegations, after all, applied only to the Authority Act, which deemed the Authority to have assumed and succeeded to the City's certificates, rights, obligations, liabilities, and contracts with respect to the Airport. *See* Authority Act, § 7.(b1). Because the Commission Act repealed the Authority Act in its entirety and does not purport to transfer the Airport's Part 139 Certificate or Sponsor Assurances to the newly created Commission, there is no "usurpation" of the FAA's authority, and no injury for the court to redress.

Yet even overlooking the misreading of the Commission Act and the mootness of the claim, the City's arguments regarding the FAA suffers from a number of other fatal flaws. As shown below, the City's arguments fail because (1) the legislature did not violate Article I, Section 5 of the North Carolina Constitution, (2) the City has no standing to assert a claim on behalf of the FAA, and (3) the City mischaracterizes the FAA requirements applicable to the Commission.

First, it is unclear what claim the City could make under Article I, Section 5 of the North Carolina Constitution. This post-Civil War constitutional provision is essentially the mirror image of the federal Constitution's supremacy clause. It states that every North Carolina citizen "owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention and subversion thereof can have any binding force." N.C. Const. art. I, § 5. Whatever this provision means, it certainly does not give the City the right to challenge the State's decision to amend the City's charter to assign management of the Airport to the Commission. Indeed, if any party to this litigation is usurping the rights of the FAA, it is the City, which would arrogate the FAA's authority to enforce federal aviation regulations by making this claim. Moreover, as the Commission Act expressly states, the Commission has the authority to take actions regarding the airport provided they are not "in conflict with any applicable law, rules, or regulation of the State of North Carolina, the United States, or any agency, department, or subdivision of either of them, *including the rules and regulations of the FAA*." Commission Act § 3, Charter § 5.56(a)(10) (emphasis added).

Second, the City does not have standing to assert a claim against the State or the Commission based on alleged violations of federal regulations. To have standing, the party seeking relief must demonstrate "such a personal stake in the outcome of the controversy to

assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006). "The rationale of the standing rule is that only one with a genuine grievance, one *personally injured by the statute*, can be trusted to battle the issue." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 282 (2008) (emphasis added). Here, the City cannot demonstrate a personal stake in the controversy at issue—whether the FAA's authority to grant Part 139 Certificates or accept Sponsor Assurances has been undermined—sufficient to show that it has been personally injured.

The party with standing "is the party who by substantive law has the legal right to enforce the claim in question." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000). But the federal statute governing the certification of airports grants the responsibility of whether to award certificates to the administrator of the FAA. 49 U.S.C. § 44706(a). Sponsor Assurances, meanwhile, must be given to the Secretary of Transportation as a condition to an airport sponsor receiving federal funding for an airport development project. 49 U.C.C. § 47107. Even assuming that the Commission Act somehow "contradicts and usurps" the federal government's authority—an incorrect assumption, as discussed below—any injury would accrue to the FAA and the Department of Transportation, not the City. *See Energy Investors Fund*, 351 N.C. at 337, 525 S.E.2d at 445 (holding that a party that was not the real party in interest had no standing because it lacked "the legal right to enforce the claim in question"). In essence, the City's third argument is that the State, the Authority, or (by implication) the Commission somehow violated a provision in the North Carolina Constitution recognizing the federal government's supremacy by enacting legislation related to

activities regulated by the FAA. Not only is this argument incredibly tenuous, the City does not have standing to make it.

Finally, the City's practical concerns about the Airport's Part 139 Certificate and Sponsor Assurances are misplaced. The Complaint alleges that the City faces the prospect that the FAA will shut down the Airport for regulatory noncompliance. *See* Complaint ¶ 52 (alleging that the transfer of the Airport could "result[] in the potential immediate shutdown of Airport operations in their entirety, the consequences of which will be financially devastating to Charlotte, with the effects extending nationally and internationally"); *id.* ¶ 62 (alleging that the City faces "the disruption or loss entirely of Airport services upon the Act becoming effective, and the Airport's inability to function without violating state or federal law). The likelihood of this occurring is remote. Indeed, the primary point of the FAA Letter appears to be that the Airport will continue to operate under the existing certificate with the City as its sponsor until any regulatory issues are resolved. *See* FAA Letter at 1 (Brackett Aff., Ex. I) ("Until FAA makes a determination on the transfer of Federal obligations and issues an Airport Operating Certificate to the new entity, the city of Charlotte remains the airport sponsor and the certificate holder."); *id.* at 4 ("Again, please keep in mind that until FAA approves the transfer of Federal obligations and issues an Airport Operating Certificate to the new entity, the city of Charlotte remains the airport sponsor and the certificate holder.").

In the event that the FAA did determine that the Commission needs to obtain its own certificate under 14 C.F.R. § 139.101 (2013), the FAA Letter indicates that the agency will work with the parties to make that transition. *See* FAA Letter at 4 (Brackett Aff., Ex. I) ("The FAA looks forward to working with the parties to resolve all possible issues involving Federal concerns or requirements.") The FAA also previously assured Mr. Orr that obtaining a Part 139

Certificate in the Commission's (or, for that matter, Authority's) name is a ministerial task which will not endanger operations at the nation's sixth largest airport. Orr Aff. ¶ 33. The only requirement the Commission would need to satisfy to obtain a Part 139 Certificate is to submit to the FAA a one-page application[10] and two copies of the Airport's current certification manual listing the Commission as the Airport's operator.[11] 14 C.F.R. § 139.103 (2013). The FAA will then conduct a review of the Airport's operations and certification manual—both of which the FAA has already approved with respect to the City's operations of the Airport. 14 C.F.R. § 139.107 (2013) (explaining the process for the issuance of a Part 139 Certificate); *see* Orr Aff. ¶ 34. In fact, according to Pablo Nüesch, an expert in Department of Transportation and FAA regulatory law, upon the receipt of this information, the FAA can issue a Part 139 Certificate quickly—sometimes within 24 hours. Nüesch Aff. ¶ 15. And if the process takes longer, Mr. Nüesch is aware of instances in which the FAA has permitted an independent authority to operate under a state department of transportation's Part 139 Certificate while the authority obtained its own certificate. *Id.* ¶ 14.

In sum, the only basis for the City's many allegations regarding the FAA is Article I, Section 5 of the North Carolina Constitution. Even if a transfer of the Airport somehow violated this state analogue to the federal supremacy clause, and even if the City could show it has standing to bring a claim on this basis, the Commission Act renders the whole question moot because it creates the Commission as an agency of the City—not as a new entity that would require a new certificate from the FAA. Taking this unlikely sequence one step further and

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[10] The Part 139 Certificate application is available on the FAA's website. U.S. Department of Transportation, Federal Aviation Administration, Part 139 Certification Form, http://www.faa.gov/airports/resources/forms/index.cfm?sect=part139 (last visited July 27, 2013).

[11] Although the Commission does not believe that it is required to obtain a new Part 139 Certification to operate the Airport as an agency of the City, it is prepared to submit its application to the FAA if it becomes necessary to do so. Orr Aff. ¶ 35.

assuming that a new certificate is required, the FAA has already said that the Airport would operate with the City as sponsor and certificate holder until any regulatory issues are resolved. Accordingly, the City's assertions regarding potential issues with the FAA cannot possibly provide any basis for an injunction.

D. The Commission Act did not take City property, nor would the Constitution prevent the State from assuming management of the Airport.

The Complaint's final argument for unconstitutionality regards the claim that the City has been the victim of a taking in violation of Article I, Sections 19 and 35 of the North Carolina Constitution. As with the City's other arguments, this point is made moot by passage of the Commission Act. Section 3 of the Commission Act expressly provides that "This act does not affect the title of any property. If the property was titled to the City of Charlotte prior to enactment of this Article, that title remains with the City." Commission Act § 3, Charter § 5.59(a). Moreover, the Commission Act states that the Commission "shall be an agency of the City." *Id.* § 3, Charter § 5.51. Because the Commission Act does not transfer title to the Airport to the Commission, and because the Commission is an agency of the City, there can be no claim for an unconstitutional taking.

Even if the Court interprets the Commission Act as transferring title away from the City, the City would still not have a cognizable constitutional claim. The Complaint alleges that

> In its proprietary capacity as owner and operator of the Airport, the City of Charlotte is a person entitled to the protections of Article I, Sections 19 and 35 of the North Carolina Constitution to the same extent as any private individual or corporation engaged in a similar enterprise.

Complaint ¶ 14. Thus, the City's argument for an unconstitutional taking appears based on a distinction between proprietary and governmental roles, the idea being that it can bring a claim for a taking of property it holds in a proprietary capacity. The only case the Commission has been able to identify as even arguably supporting this proposition is *Asbury v. Town of*

Albemarle, 162 N.C. 247, 78 S.E. 146 (1913). For multiple reasons, that case has no application here.

First, as set forth above, the Commission Act does not transfer the Airport. Without a transfer of property there is no taking. Second, *Asbury* did not recognize a takings claim by a city against the state, the theory that the city would assert here. Even if it had, the idea that a municipality could bring such a claim against the state was definitively rejected in later cases decided under the Fourteenth Amendment of the U.S. Constitution, which is analogous to Article I, Section 19 of our state Constitution, *City of Asheville*, 192 N.C. App. at 44, 665 S.E.2d at 133. For example, in *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923), decided just ten years after *Asbury*, the U.S. Supreme Court held that "The power of the state, unrestrained by the contract clause or the Fourteenth Amendment, over the rights and property of cities held and used for 'governmental purposes' cannot be questioned." *Id.* at 188. The Court also directly rejected the argument that the proprietary/governmental distinction gave a municipality a constitutional claim against a state:

> The basis of the distinction is difficult to state, and there is no established rule for the determination of what belongs to the one or the other class. It originated with the courts. Generally it is applied to escape difficulties, in order that injustice may not result from the recognition of technical defenses based upon the governmental character of such corporations. But such distinction furnishes no ground for the application of constitutional restraints here sought to be invoked by the city of Trenton against the state of New Jersey. *They do not apply as against the state in favor of its own municipalities.*

Id. (emphasis added).

Third, as subsequent cases make clear, the *Asbury* holding is limited to its unique facts. In *Asbury*, the legislature had passed a law requiring municipalities to buy the assets of existing private water systems before constructing municipal water systems in the same place. *See Asbury*, 78 S.E.2d at 148. The Plaintiffs in *Asbury* were the owners of a private water system

who wanted the City to purchase their waterworks, but their system was "so small as to be useless for fire protection and are worthless in the construction of a new plant." *Id.* at 149. The Supreme Court rejected the plaintiffs' claim that the city should be required to purchase their system for this reason: "To purchase it 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.* As the Court of Appeals recently held—in a case that actually *did* involve a claim against the State—*Asbury* does not apply when "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." *City of Asheville*, 192 N.C. App. at 43, 665 S.E.2d at 132; *Monaghan*, 15 N.W.2d at 244 ("We therefore hold that [the law creating the Minneapolis-St. Paul Metropolitan Airports Commission], in authorizing the transfer of the use and possession of the municipal airport to the commission without compensation to the city or to the park board, does not violate the Fourteenth Amendment to the Constitution of the United States.")

The City's argument that it has been the victim of an unconstitutional taking cannot succeed, let alone justify an injunction, because the City has not actually had anything taken from it. The Airport will continue to function largely as it has before, and it will continue to provide the important benefits referenced in the City's Complaint. The only difference will be how the City operates it. Before, the City operated the Airport via the City Manager through its Aviation Director, Jerry Orr. Now, the General Assembly has directed the City to operate the Airport via the Commission through the Commission's Executive Director, also Jerry Orr. This change simply does not provide the basis for a cognizable takings claim.[12]

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[12] Indeed, even proponents of the theory that political subdivisions should have expanded rights to pursue takings claims against the state fail to support the City's claim. One especially pertinent law review article argues at

E. The provisions of the Commission Act regarding the Commission's Executive Director do not violate the Constitution's Emoluments Clause.

While not raised in the Complaint, a legislator opposed to the Commission Act publically questioned whether the General Assembly's designation of "the Aviation Director of the City of Charlotte as of February 14, 2013" as the Commission's initial Executive Director violated Article I, Section 32 of the North Carolina Constitution (the "Emoluments Clause"). As North Carolina law makes clear, Section 3 of the Commission Act, Charter § 5.59(c)(5), is not an unconstitutional emolument.

The Emoluments Clause states 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 service." N.C. Const. art. I, § 32. An emolument is "[t]he profit arising from office, employment, or labor; that which is received as compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites." *Saine v. State*, 210 N.C. App. 594, 607, 709 S.E.2d 379, 389 (2011) (alteration in original) (internal quotation marks omitted). In North Carolina, an enactment is not an exclusive emolument or privilege "if (1) the exemption or benefit 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 that the granting of the exemption or

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length that municipalities should have broader rights to sue the state for takings, but the author nonetheless concedes that such claims should not be permitted in circumstances nearly identical to those presented here:

> In cases which involve [state assumption of management or operation of particular municipal property without a change in the use of the property], the rationale for denying constitutional protection is fairly clear. When the state assumes the management of particular municipal property, but continues to provide an equivalent service, the municipal corporation has suffered no loss of benefit from the affected property. For example, where the state asserts control over a local police force, *or directs that a municipal airport be managed by an independent authority, the service continues and a constitutionally sanctioned claim for damages is foreclosed.* If the property were private, the owners, having lost their investment, would have a valid claim for compensation. But state control preserves the municipal corporation's investment in the property by continuing its prior use.

Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property*, 67 Colum. L. Rev. 1083, 1109 (1967) (emphasis added).

benefit serves the public interest." *Peacock v. Shinn*, 139 N.C. App. 487, 495, 533 S.E.2d 842, 848 (2000), *motion for reconsideration denied*, 353 N.C. 379, 547 S.E.2d 16 (2001); *see also Town of Emerald Isle ex rel. Smith v. State*, 320 N.C. 640, 654, 360 S.E.2d 756, 764 (1987).[13]

In this instance, Section 5.59(c)(5) is intended to promote the general welfare rather than benefit a specific individual. *See* Joint Affidavit of Senator Bob Rucho and Representative Ruth Samuelson ¶¶ 3-5; Commission Act § 3, Charter Section 5.56(a) (directing the Commission to "operate the airport in a proper, efficient, economical, and business-like manner, to the end that it may effectively serve the *public needs for which it was established at the least cost and expense to the City*" (emphasis added)). North Carolina's courts have consistently recognized that statutes benefiting particular individuals or corporations are permissible so long as their overall purpose is to benefit the public. In *Crump v. Snead*, 134 N.C. App. 353, 517 S.E.2d 384, rev. denied, 351 N.C. 101, 541 S.E.2d 304 (1999), for example, a law that had the practical effect of extending the term of office of one member of the Rockingham City Council from two years to four years was upheld in the face of an Emoluments Clause challenge. *Id.* at 356, 517 S.E.2d at 387. According to the Court of Appeals, there was no Emoluments Clause violation because it was reasonable for the General Assembly to believe that the term extension, which allowed all members of the city council to serve four-year terms, was in the public interest. *Id.* at 357, 517 S.E.2d at 387. Other North Carolina courts have reached the same result. *See Green v. Kitchin*, 229 N.C. 450, 50 S.E.2d 545 (1948) (Ervin, J.) (finding no Emoluments Clause violation where a town council paid for a specific police officer to attend the National Police Academy because the officer's training benefited the public); *Blinson v. State*, 186 N.C. App. 328, 342, 651 S.E.2d

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[13] In *Peacock*, the City of Charlotte, represented by Robert E. Hagemann, successfully argued that various agreements related to the use of the Charlotte Coliseum between the City and former Charlotte Hornets owner George Shinn were not unconstitutional emoluments because the purpose of the agreements was "to promote the public benefit... even though a benefit resulted, as well, to the Shinn defendants." *Peacock*, 139 N.C. App. at 496, 533 S.E.2d at 848.

268, 278 (2007) (upholding tax incentives and subsidies to a computer manufacturer that were "intended to promote the general economic welfare of the communities involved, rather than to solely benefit [the manufacturer]"), *appeal dismissed*, 362 N.C. 355, 661 S.E.2d 241 (2008).[14]

Here, the General Assembly had a similarly reasonable basis to believe that it was in the public interest for the City of Charlotte's Aviation Director as of February 2013 to be the Executive Director of the newly created Commission. Indeed, the legislature reasonably believed that continuity in the Airport's management during the transition to the Commission's control was important for the stability of the Airport's billion-dollar economic engine. Moreover, given the ongoing uncertainty over the location of the U.S. Airways/American Airlines hub—a decision that could cause a significant economic impact on Charlotte and the surrounding region—the General Assembly reasonably concluded that it was important for the person who had been the airlines' contact until July 18, 2013, to continue to serve in that role.

Section 5.59(c)(5) of the Commission Act also does not provide a benefit to Charlotte's former Aviation Director except in connection to his public service. North Carolina's Supreme Court has held that "article I, section 32 contemplates that exclusive emoluments or privileges may be granted if 'in consideration of public services.'" *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 654, 386 S.E.2d 200, 212 (1989). The Aviation Director's service as the Commission's initial Executive Director is, of course, a "public service." Thus, any benefit he receives by virtue of his position as consideration for that service would be constitutional. *Crump*, 134 N.C. App. at 357, 517 S.E.2d at 387 (holding that salary and benefits paid to a city councilmember were "consideration for public service").

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[14] In *Blinson*, Robert F. Orr, counsel of record for the City in the current litigation, unsuccessfully argued that the incentives and subsidies granted to the computer manufacturer were unconstitutional emoluments.

Finally, it is worth noting that the General Assembly routinely appoints specific individuals to positions on commissions or boards. *See, e.g.*, N.C. Gen. Stat. § 90-650(a)(2)-(3) (Respiratory Care Board); *id.* § 89G-4(a)(2)-(3) (Irrigation Contracts' Licensing Board); *id.* § 7A-375(a) (Judicial Standards Commission); *id.* § 90-182(a) (Veterinary Medical Board). In fact, Section 120-121 of the General Statutes provides that such appointment bills must "state the name of the person being appointed." These practices indicate that the General Assembly, which has its own responsibility and authority to interpret the State Constitution, views legislative appointments to be permissible. *See Kornegay v. City of Goldsboro*, 180 N.C. 441, 105 S.E. 187, 189 (1920) ("In determining the constitutionality of an act of the Legislature, courts always presume in the first place that the act is constitutional. They also presume that the Legislature acted with integrity and with an honest purpose to keep within the restrictions and limitations laid down by the Constitution."). Thus, Section 3 of the Commission Act, Charter § 5.59(c)(5), is not an unconstitutional emolument. The provision was reasonably designed to benefit the public, was granted in consideration for ongoing public service, and is consistent with the General Assembly's longstanding practices.

III. The City cannot meet its burden for issuance of a preliminary injunction.

A. The City cannot show that it is likely to succeed on the merits.

In North Carolina, a preliminary injunction is an "extraordinary remedy" that is available only if the plaintiff is able to demonstrate (1) "likelihood of success on the merits of his case" and (2) that he is likely to "sustain irreparable loss unless the injunction is issued, or...issuance is necessary for the protection of [his] rights during the course of litigation." *Triangle Leasing Co. v. McMahon*, 327 N.C. 224, 227, 393 S.E.2d 854, 856-57 (1990) (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). Given the extraordinary nature of the

remedy, the burden is on the plaintiff to establish his right to a preliminary injunctive relief. *Pruitt v. Williams*, 288 N.C. 368, 351, 218 S.E.2d 348, 372 (1975).

To be clear, this means that a plaintiff seeking a preliminary injunction based on the alleged unconstitutionality of state legislation faces a double burden: it must show (1) that it is likely to succeed on the merits of a claim that (2) must prove beyond reasonable doubt to succeed. *See* Section II, *supra* (discussing the presumption of constitutionality accorded state legislation). Here, as shown above in Section II with regard to each of the City's claims, the City will not be able to show that the Commission Act violates the Constitution under any of its various theories. *See Setzer v. Annas*, 286 N.C. 534, 540, 212 S.E.2d 154, 157-58 (1975) ("A preliminary injunction should not be granted if a serious question exists in respect of the defendant's right to do what the plaintiffs seek to restrain and the granting thereof would work greater injury to the defendant than is reasonably necessary for the protection [pending the litigation] of the plaintiffs' rights."). As a result, the City cannot carry its burden of showing that it is likely to succeed on the merits of its claims.

B. The City cannot show that it will suffer irreparable harm without an injunction.

The City also fails to meet the second requirement for obtaining a preliminary injunction because it has not met its burden to show that it will suffer irreparable injury if the Court does not intervene. This is because the City has not provided any explanation for how the Commission Act will cause "irreparable injury" that is "real and immediate." *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 586, 561 S.E.2d 276, 286 (2002) writ denied, rev. denied, 356 N.C. 668, 577 S.E.2d 113 (2003). The Complaint's allegations regarding the Authority Act will not suffice for this purpose. To obtain an injunction against the current law, the City "must do more than merely allege that irreparable injury will occur[;][t]he applicant is required to set forth with particularity facts supporting such statements so the court can decide for itself if irreparable

injury will occur." *Id.* (quoting *Telephone Co. v. Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). Without particularized allegations regarding how the Commission Act will injure it, the City cannot meet its burden.

Treating the City's allegations against the Authority Act as if they apply to the Commission Act does not resolve the problem. Putting aside the fact that the two laws differ significantly, the facts simply do not justify a conclusion that the City will suffer irreparable harm if the Court does not enjoin the legislation. The City's Motion for Temporary Restraining Order and Preliminary Injunction lists two types of injuries that it claims would justify an injunction:

> First, the violations of the North Carolina State Constitution described herein that Charlotte and its citizens will suffer in the absence of immediate injunctive relief constitute, as a matter of law, per se irreparable harm.
>
> Second, in the absence of immediate injunctive relief, enforcement of the Act threatens to cause imminent, irreparable harm to Charlotte including, but not limited to, the consequences of default on its obligations under the Airport Bonds, the disruption or loss entirely of Airport services upon the Act becoming effective, and the Airport's inability to function without violating state or federal law.

Complaint ¶¶ 61-62. Neither of these purported injuries withstands scrutiny.

First, as set forth above, the City's claims that the Commission Act violates the Constitution are without merit. The Commission Act is not "Unconstitutional Airport Legislation Through Local Act" (Count I), will not lead to "Bond Default Resulting from Unconstitutional Impairment to Contractual Obligation" (Count II), does not approach an "Unconstitutional Subversion of Federal Aviation Authority" (Count III), and cannot be considered an "Unconstitutional Taking" (Count IV).

Second, also as detailed in Section II, the Commission Act will not cause a bond default. The only provision of the bonds that the City cites it in its Complaint as supporting its claim that

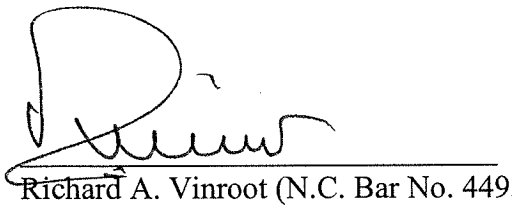
the Bond Trustee could issue a notice of default is Section 713 of the Bond Order. That provision only states that "the City shall not sell or dispose of all or any part of the properties constituting the airport." *See* Bond Order § 713 (Orr Aff, Ex. 3). There is no way to interpret the Commission Act as involving City's disposition of airport property. Moreover, the Bond Order itself contains a clause providing that the bond covenants shall bind "successors" to the City as well as "any officer, board, or commission to whom" power over the airport "is transferred as a matter of law." *Id.* § 1301. The reason for such a provision is obvious—so that the bonds do not default simply due to a change in the management structure.

Nor will the City suffer irreparable harm based on the "the disruption or loss entirely of Airport services upon the Act becoming effective, and the Airport's inability to function without violating state or federal law." Complaint ¶ 62. The Commission Act does not transfer the Airport, so it does not require issuance of a new certificate. Even if the Commission does need to apply for a new certificate from the FAA, the FAA Letter shows that the Airport will continue to operate with the City as sponsor and certificate holder in the interim. FAA Letter at 1, 4 (Brackett Aff., Ex. I). Accordingly, the City cannot show that it is likely to suffer irreparable harm due to regulatory action. This, combined with the City's failure to make a similar showing with regard to the bonds or the alleged constitutional violations, means that the City cannot meet its burden to show that it will suffer irreparable harm if the Court does not intercede. The City's Motion for Preliminary Injunction should be denied.

CONCLUSION

For the reasons set forth herein, the Commission requests the Court to enter an order denying the City's motion for a preliminary injunction.

This 30th day of July, 2013.



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This 30th day of July, 2013.

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