

In rare ruling, court finds Belville and H2GO commissioners acted in bad faith

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(From left) Brunswick Regional Water and Sewer H2GO Commissioners Trudy Trombley, Carl Antos, William Browning, Ron Jenkins, and Jeff Gerken at a December 2017 meeting. The meeting was Antos and Browning's last. (Port City Daily photo/Johanna Ferebee)

A superior court judge ruled the transfer of H2GO unlawful, but went further, saying elected officials violated state ethics laws by acting in 'bad faith' and without transparency

BRUNSWICK COUNTY — On Monday, a judge ruled that the transfer of H2GO to Belville was illegal. The ruling was exceptional — and not just because the case was apparently the first of its kind in the region. It was also a rare rebuke of elected officials by the courts.

That's in large part because elected officials in North Carolina are afforded a great deal of leeway in legal proceedings. The courts tend to avoid passing judgment on the actions taken by elected officials, and in accordance with early Supreme Court case law, grant them the "**presumption of legality**" in their actions.

Related: Belville considering appealing after H2GO transfer ruled as unlawful

It takes a considerable amount of evidence to overcome this assumption. On Monday, a judge ruled the Town of Leland and H2GO had provided that.

The co-plaintiffs outlined a series of actions and inactions of a lame duck board that, when taken piecemealed, were not found to be illegal; however, when considered as a whole, the circumstances swayed Superior Court Judge Charles Henry to “reluctantly” rule the Town of Belville’s Commissioners and the 2017 outgoing majority of Brunswick Regional Water and Sewer H2GO Commissioners violated state ethics law.

Commissioners’ actions were “unreasonable,” “oppressive,” in “bad faith,” and commissioners abused their discretion, Judge Henry’s recent order concludes.

In bad faith

Judge Henry, who was specially assigned to the complicated case, sided with co-plaintiffs Leland and H2GO Monday by issuing an order that concluded a Nov. 28, 2017 transfer between two political bodies **was illegal**.

Carried out by H2GO’s board, including outgoing members, the transfer shifted all of the sanitary district’s assets — valued at about \$60 million — to the Town of Belville.

Leland intervened because, among other reasons, more than half of the town’s approximately 20,000 residents are H2GO customers. Once H2GO sold itself to Belville, 11,244 eligible voters had no meaningful legal representation, court records show. These voters had no say in electing Belville Commissioners. And H2GO’s board was left with nothing to govern.

At a **Feb. 28 hearing** preceding Henry’s ruling, Belville’s attorney said this would be the first case to “ever undue a transaction between to governmental bodies.”

Now, the transfer is null and void. Henry also ruled H2GO’s emergency **Dec. 4, 2017 resolution** to undo the transfer, which passed 3-2 after the midnight swearing-in of a new commissioner, is valid.

But his conclusion on the commissioners’ actions went further:

“The court finds that there was competent and substantial evidence to support the legal conclusion that the commissioners of both governing boards of H2GO and Belville, acting in concert, failed to act in good faith, and their actions were so clearly unreasonable as to amount to an oppressive and manifest abuse of their discretion,” Monday’s order states.

This conclusion applies to several current and former officials: former H2GO Commissioner Carl Antos, who lost his 2017 re-election bid to Bill Beer **by 19 votes**; former Chairman William Browning, who did not seek re-election in 2017; and Ron Jenkins, the first place candidate in the

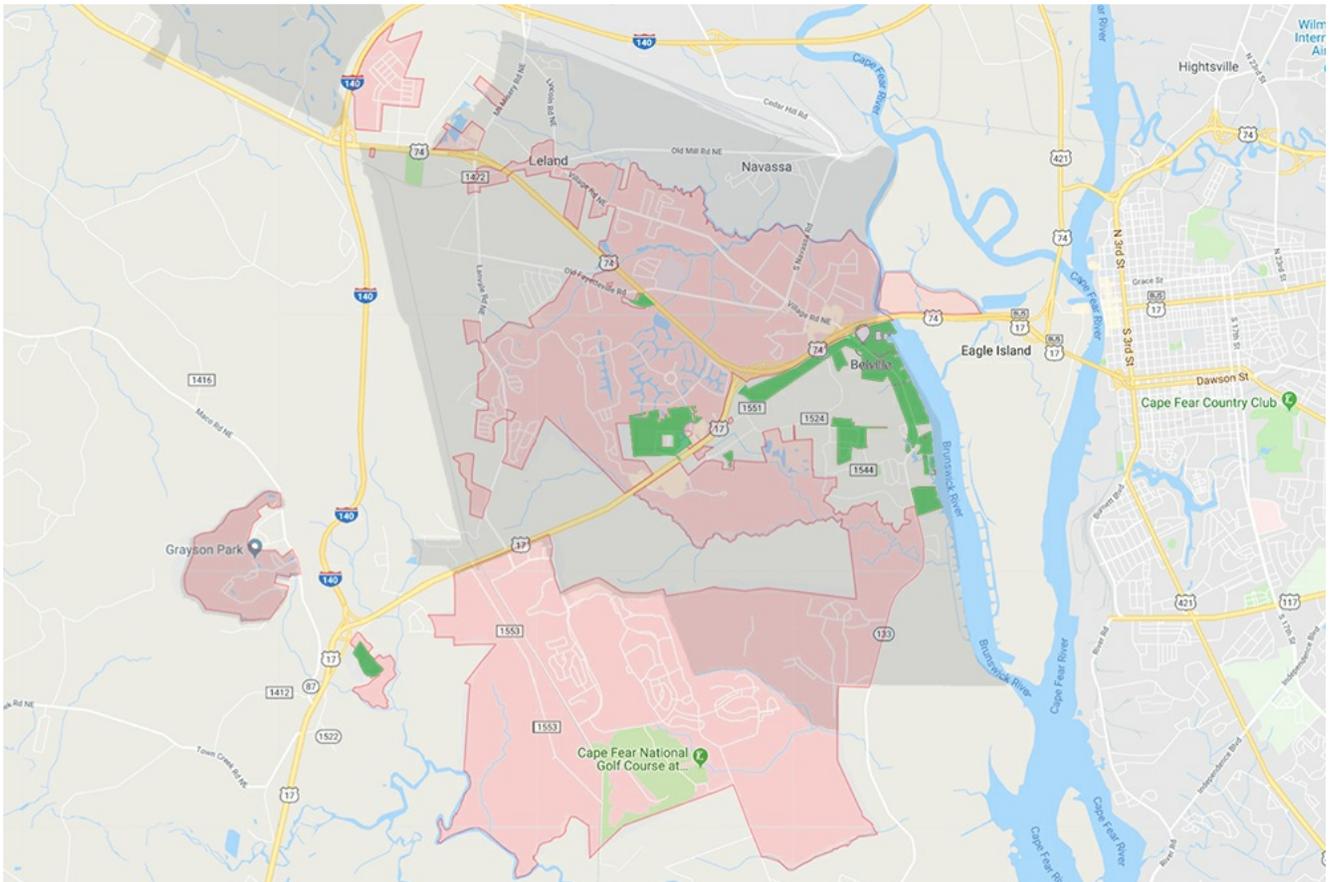
2017 re-election who remains on H2GO's board.

That legal conclusion also applies to Belville officials, namely Mayor Mike Allen, mayor pro-tem Noreen Slattery, Commissioner Donna Schardien, Commissioner Joe Breault, and Commissioner Patrick O'Bryant.

Lame duck authority

Belville attorney Jim Phillips **argued in December 2017** that the North Carolina Supreme Court makes clear that an official has full authority to act until their term is over.

However, in stripping the incoming board of its ability to govern, H2GO's lame duck board apparently crossed the line: "the court concludes that the cumulative effect of the resolutions, transfer and operating agreements was to enter into an agreement which eliminates the district's governmental discretionary power and binds the commission's successors permanently."



A map of each group's political and service boundaries can help explain why the H2GO case arose. In dark green, Belville's approximate corporate limits. In pink, Leland's approximate corporate limits. Shaded in grey, Brunswick Regional Water and Sewer H2GO's approximate service boundary. (Port City Daily graphic/ Johanna Ferebee, Courtesy Google Maps, Brunswick Regional Water and Sewer H2GO)

Big picture

The H2GO case stemmed, in large part, from the debate over whether or not to build a costly reverse osmosis (RO) plant. Antos, Browning, and Jenkins voted in favor of building the **\$34 million plant**, 3-2, in spring 2017. All three also voted 3-2 to carry out transferring all of H2GO's assets to Belville to "save the RO plant."

Though the top two vote-getters in November 2017 were so-called "pro-RO" candidates — in favor of continuing moving forward with the plant — Beer's election swung the board's power 3-2, in opposition to the project. At the time, H2GO had spent at least \$6 million on the partially-constructed plant.

As H2GO's attorney Brian Edes points out in his own analysis, Henry devoted the first 58 pages of the 68-page order to "explaining how bizarre and problematic the transaction was" (*Note: you read Edes' full take on the order at the bottom of this article*).

"As I stated in the Summary Judgment hearing and in our brief, no one would even seriously consider giving away all of the assets of a city such as the City of Wilmington because they did not like the results of an election," Edes' wrote in his Tuesday statement. "The mere thought of something like that is absurd."

With no public hearings, no public notice, and without the approval of H2GO's counsel, H2GO's outgoing majority approved transferring itself out of political existence. At 8 a.m. the next morning, in a meeting held open by Belville (with no reason stated for its Nov. 20, 2017 recess), Commissioners accepted the transfer documents.

"With little public disclosure or discussion, and the exclusion of the minority members from any prior notice or knowledge of the proposed board action, after a meeting that lasted less than one hour, the H2GO Board of Commissioners transferred to the Town of Belville over \$40 million in property and \$16 million in deposits," Henry's order states.

Ethics violation

Since the transfer, Belville has maintained its actions were in full accordance with the law.

On Monday, Henry found no North Carolina Open Meetings Law violations based on the evidence presented — a claim that remains stayed per a January **consent order**.

However, based on the set of circumstances, Henry "reluctantly" concluded H2GO's outgoing majority and Belville's Board of Commissioners violated state ethics law by failing to conduct business in an "open and public manner."

He found commissioners violated North Carolina General Statute **§160A-87(5)** because of:

- the rapid pace of the transfer
- email exchanges marked "private and confidential"
- the exclusion of H2GO's attorney

- the exclusion of H2GO Commissioners Trudy Trombley and Jeff Gerken
- failure to include notice of transfer on H2GO's Nov. 28 agenda (the item was added during the meeting with little explanation)
- the failure to contact and seek approval from the Local Government Commission (LGC)
- the failure of Walker or others with prior awareness to disclose a warning email from the LGC
- the failure to disclose the transfer to the public or provide justification for leaving open Belville's Nov. 20, 2017 meeting

What the case is 'about'

In a press release Monday morning, Leland's mayor said: "the decision upholds our democracy."

"The Town of Leland had no choice but to file a lawsuit against the prior H2GO Board and Town of Belville Board of Commissioners because that unlawful transaction would have placed control of water and sewer within Leland in the hands of a competitor that opposes Leland's growth and economic expansion, and would have risked ownership and operation of the water and sewer systems by an unqualified entity," Leland's release states.

Belville's spokesperson, Mike McGill, boiled down the town's take on what the case is about.

"Leland's lawsuit has never been about making sure their citizens have safe, clean drinking water. It's always been about power and control," McGill said.

Leland's release did not make reference to water quality, McGill pointed out — in bolded font — in his release Monday.

On Tuesday, Edes disagreed the case has anything to do with water quality. "I have argued from day one that this case is not about water quality, rather, it is about democracy and proper government. I am gratified the Court saw the case the same way."

Edes, H2GO's litigation attorney and Leland's town attorney as of September 2018, wrote in a Monday afternoon H2GO release the utility's water meets drinking standards: "As H2GO Executive Director Bob Walker testified and is noted in the Court's Order, H2GO has always provided its customers with water that meets or exceeds all applicable state and federal water quality standards."

Upon receipt of that statement, McGill fired back Tuesday. McGill said using Walker's testimony implies emerging contaminants are not a concern and that the RO plant is unnecessary.

"Since [Edes] collects two paychecks representing both Leland's citizens and H2GO's customers, we wonder if he will now push for Brunswick County to stop construction of its river water RO project," McGill wrote in his Tuesday statement. "After all, Brunswick County's solution will cost more than 100 million dollars to build and result in, by their own admission, a 25% rate increase for both Leland's citizens and H2GO's customers."

Representative Deb Butler, who introduced the **RO plant-stalling** House Bill 587 with Representative Frank Iler, provided the following:

"I have been troubled that the outgoing board attempted to circumvent the will of the voters and that would have been a terrible precedent," she wrote in an email Monday. "Now, we need to come together as a community and hold polluters accountable and get our water and our air clean for ourselves and our future generations."

Possibility of appeal

Belville announced Monday it is reviewing the case for a possible appeal, citing the plaintiffs' dismissed claims.

Edes weighed in on that possibility Tuesday: "It is my sincerest hope that Belville will honor and abide by the Court's ruling and allow all three units of local government (H2GO, Leland, and Belville) to put this ugly chapter behind them."

He said in order to succeed, Belville would have to prove the "Rule 2.1 judge specially appointed by the Chief Justice of the North Carolina Supreme Court committed legal errors that caused the entire decision to be wrong. That's a high burden here."

If Belville chooses to appeal, Edes said H2GO would certainly plan to file a cross-appeal. This could result in a decision that would be "even less favorable to Belville," he said.

Read Brian Edes' full response to the ruling below:

[Brian Edes' take on April order by Johanna Ferebee on Scribd](#)

Read Judge Charles Henry's full order below:

[April 22, 2019 order by Johanna Ferebee on Scribd](#)

Send tips and comments to Johanna Ferebee at johanna@localvoicemedia.com

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