

NORTH CAROLINA COURT OF APPEALS

FREDERICK CUBBAGE, RONALD)
W. SUTHERLAND, PHD.,)
RICHARD J. "BARNEY" BERNARD, JR.,)
JAMES D. GREGORY AND JOHN EDDY,)
)
Plaintiffs-Appellants,)

v.)

From Wake County

)
THE BOARD OF TRUSTEES OF THE)
ENDOWMENT FUND OF NORTH CAROLINA)
STATE UNIVERSITY AT RALEIGH)
and NC STATE NATURAL RESOURCES)
FOUNDATION, INC.,)
)
Defendants-Appellees.)

BRIEF FOR DEFENDANT-APPELLEE
THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND
OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH

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ISSUES PRESENTED

- I. SHOULD THIS COURT DISMISS PLAINTIFFS-APPELLANTS' APPEAL BECAUSE PLAINTIFFS-APPELLANTS LACK STANDING TO CHALLENGE DEFENDANTS-APPELLEES' SALE OF LAND?
II. DID THE TRIAL COURT PROPERLY ALLOW DEFENDANTS-APPELLEES' MOTION TO DISMISS BECAUSE PLAINTIFFS-APPELLANTS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE NORTH CAROLINA ENVIRONMENTAL POLICY ACT?
III. DID THE TRIAL COURT PROPERLY ALLOW DEFENDANTS-APPELLEES' MOTION TO DISMISS BECAUSE PLAINTIFFS-APPELLANTS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER ARTICLE XIV, SECTION 5 OF THE NORTH CAROLINA STATE CONSTITUTION?

STATEMENT OF THE CASE

On 23 September 2013, Frederick W. Cabbage, Ronald W. Sutherland, Richard J. "Barney" Bernard, Jr., James D. Gregory, and Ronald E. Cox (hereinafter "Plaintiffs-Appellants") filed a complaint for injunctive relief and petition for declaratory judgment against the Board of Trustees of the Endowment Fund of North Carolina State University at Raleigh (hereinafter "Defendant Endowment Fund"), and NC State Natural Resources Foundation, Inc. (hereinafter "Defendant Foundation," or collectively referred to as "Defendants-Appellees") in Wake County Superior Court. (R pp 2-33)

On 23 September 2013, Plaintiffs-Appellants filed a motion for a temporary restraining order and preliminary injunction in Wake County Superior Court. (R S pp 1-4; App. 1-4) On 25 September 2013, Plaintiffs-Appellants' motion for a temporary restraining order came on in the Civil Session, Wake County Superior Court. (R S p 5; App. 5) On 25 September 2013, the trial court entered an order denying Plaintiffs-Appellants motion for a temporary restraining order. (R S p 5; App. 5)

On 4 October 2013, Plaintiffs-Appellants filed a motion for a preliminary injunction in Wake County Superior Court. (R S pp 6-9; App. 6-9) On 7 October 2013, Defendants-Appellees filed

motions to dismiss Plaintiffs-Appellants' complaint for injunctive relief and petition for declaratory judgment in Wake County Superior Court. (R pp. 41-47) On 5 November 2013, Plaintiffs-Appellants filed a notice of voluntary dismissal of all claims of Ronald E. Cox. (R pp. 48-49) On 5 November 2013, Plaintiffs-Appellants filed an amended and supplemental complaint for injunctive relief and petition for declaratory judgment against Defendants-Appellees in Wake County Superior Court, with John Eddy included as one of the Plaintiffs-Appellants. (R pp. 50-131) On 7 November 2013, Defendants-Appellees filed motions to dismiss Plaintiffs-Appellants' amended and supplemental complaint for injunctive relief and petition for declaratory judgment in Wake County Superior Court. (R pp. 132-37)

On 12 November 2013, Plaintiffs-Appellants' motion for a preliminary injunction and Defendants-Appellees' motions to dismiss came on at the Civil Session, Wake County Superior Court, the Honorable Shannon R. Joseph, presiding. (R p 1) On 19 November 2013, the trial court entered an order denying Plaintiffs-Appellants' motion for preliminary injunction. (R S p 144; App. 10) On 22 November 2013, the trial court entered an

order granting Defendants-Appellees' motions to dismiss. (R pp. 138-39)

On 2 December 2013, Plaintiffs-Appellants gave notice of appeal to this Court from the trial court order entered on 22 November 2013 "which granted the Board of Trustees of the Endowment Fund of North Carolina State University at Raleigh and NC State Natural Resources Foundation, Inc.'s motion to dismiss." (R pp 142-43) On 18 March 2014, the record on appeal was docketed with this Court. On 23 April 2014, Plaintiffs-Appellants filed their brief with this Court. On 21 May 2014, Defendants-Appellees filed a motion for extension of time to file their briefs. On 23 May 2014, this Court allowed Defendants-Appellees' motion. Defendants-Appellees' brief is due to be filed with this Court on or before 26 June 2014.

STATEMENT OF THE FACTS

Defendant Endowment Fund is an entity created pursuant to N.C.G.S. § 116-36 for the financial support of North Carolina State University at Raleigh. Among the statutorily authorized powers of Defendant Endowment Fund is the power to acquire real property. N.C.G.S. § 116-36(g) (2013). The General Statutes specifically exempt the Endowment Fund from the provisions of Chapters 143, 143C, and 146 of the General Statutes. Id.

On 15 December 1977, the North Carolina Forestry Foundation, Inc. entered a deed of gift to Defendant Endowment Fund. (R p 17) The deed gifted to Defendant Endowment Fund a parcel of land known as the Hofmann Forest, which consisted of 82,029.87 acres located in Jones and Onslow counties in North Carolina. (R p 17) The deed also included the following language:

This deed is executed by party of the first part and accepted by party of the second part upon the express condition that:

(i) All net income of whatever kind earned by said land and all net proceeds from the sale or other disposition of said land shall be used solely for the support of the School of Forest Resources of North Carolina State University, Raleigh, North Carolina; and (ii) the General Assembly of the State of North Carolina shall not amend the provisions of Section 116-36 of the North Carolina General Statutes to provide that proceeds from endowment funds for the constituent institutions of the University of North Carolina shall take the place of State appropriations or any part thereof or to provide that the sale, leasing, or other disposition of properties belonging to any such endowment fund shall be subject to the provisions of Chapter 143 and 146 of the North Carolina General Statutes. In the event that any of the foregoing conditions is not fulfilled, the party of the first part shall have the right to re-enter and take possession of said land, and the title thereto shall revert to the party of the first part, its successors or assigns by operation of law.

(R pp. 18-19)

On 15 December 1977, a contract was executed between Defendant Endowment Fund and the North Carolina Forestry Foundation, Inc. which stated that "[t]he Endowment Fund shall not sell, lease, or otherwise dispose of or encumber the Hofmann Forest, or any part thereof, without the prior written consent of the Foundation." (R p 21) The contract stated that:

If the net income, of whatever kind, earned by the Hofmann Forest or the net proceeds from its sale or other disposition, or any part of said net income or net proceeds, is used by the Endowment Fund for any purpose other than the support of the School of Forest Resources of North Carolina State University at Raleigh, Raleigh, North Carolina, or if the General Assembly of the State of North Carolina shall amend the provisions of Section 116-36 of the North Carolina General Statutes to provide that proceeds from endowment funds for the constituent institutions of the University of North Carolina shall take the place of State appropriations or any part thereof or to provide that the sale, leasing, or other disposition of properties belonging to any such endowment fund shall be subject to the provisions belonging to any such endowment fund shall be subject to the provisions of Chapters 143 and 146 of the North Carolina General Statutes, then, upon the happening of any of the foregoing events, the Endowment Fund shall execute such documents and take whatever other action as shall be required to cause the title to the Hofmann Forest to revert to the Foundation or, if said property shall have been sold or disposed of, to cause the proceeds of such sale or disposition to be paid over to the Foundation.

(R p 22)

On 16 June 2008, the North Carolina Forestry Foundation, Incorporated, filed Articles of Merger with the Department of Secretary of State in North Carolina to change its name to NC State Natural Resources Foundation, Inc., Surviving Corporation and Pulp and Paper Foundation, Inc., Merged Corporation. (R p 24) That entity is now the Defendant Foundation.

On 25 October 2013, Defendant Endowment Fund entered in an "agreement for purchase and sale of real property" with Hofmann Forest LLC, a North Carolina limited liability company, with the consent and joinder of Defendant Foundation for the sale of approximately 78,902 acres known as the Hofmann Forest for a purchase price of one hundred forty-five million eight hundred thousand dollars (\$145,800,000.00). (R pp 68-102, 68, 73) Defendant Foundation joined the agreement for the purpose of agreeing to release the reversion at closing. (R p 69) The contract also states that "[r]eal estate taxes, utility charges, personal property taxes, contracts assumed by Purchaser, and rental payments under the Leases shall be prorated between the parties as of the Closing." (R pp 91-92)

STANDARD OF REVIEW

The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory

when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim. On appeal of a 12(b)(6) motion to dismiss, this Court conducts a de novo review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Burgin v. Owen, 181 N.C. App. 511, 512, 640 S.E.2d 427, 428-29 (citations omitted), disc. rev. denied and appeal dismissed, 361 N.C. 425, 647 S.E.2d 98, cert. denied, 361 N.C. 690, 652 S.E.2d 257 (2007).

ARGUMENT

I. THIS COURT SHOULD DISMISS PLAINTIFFS-APPELLANTS' APPEAL BECAUSE PLAINTIFFS-APPELLANTS LACK STANDING TO CHALLENGE DEFENDANTS-APPELLEES' SALE OF LAND.

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question . . . [and] is conferred upon the courts by either the North Carolina Constitution or by statute." Harris v. Pembaur, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." Aubin v. Susi, 149 N.C. App. 320, 324, 560

S.E.2d 875, 878, disc. rev. denied, 356 N.C. 610, 574 S.E.2d 474 (2002). See Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (Standing "refers to whether a party has sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter."), disc. rev. denied, 356 N.C. 675, 577 S.E.2d 628 (2003). The three elements of standing are:

(1) "injury in fact" - an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

(2) the injury is fairly traceable to the challenged action of the defendant; and

(3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Morgan v. Nash Cnty., ___ N.C. App. ___, 735 S.E.2d 615, 619, 2012 N.C. App. LEXIS 1369 (N.C. Ct. App. 2012), disc. rev. denied, 366 N.C. 561, 738 S.E.2d 379 (2013). "The party invoking the trial court's jurisdiction bears the burden of establishing that it has standing to maintain its action." Id. at 619, 2012 N.C. App. LEXIS 1369, at *8. "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." Coker v. DaimlerChrysler Corp., 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005).

"It is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court sua sponte." State v. Webber, 190 N.C. App. 649, 650, 660 S.E.2d 621, 622 (2008); see also, Town of Midland v. Morris, 209 N.C. App. 208, 223, 704 S.E.2d 329, 340 (2011) ("[S]tanding is a jurisdictional issue and this Court may raise the question of subject matter jurisdiction on its own motion."), disc. rev. denied and appeal dismissed, 710 S.E.2d 1, 2011 N.C. LEXIS 265 (N.C. 2011). "Subject matter jurisdiction cannot be conferred by consent or waiver, and the issue of subject matter jurisdiction may be raised for the first time on appeal." In re W.L.M., 181 N.C. App. 518, 524, 640 S.E.2d 439, 443 (2007). See In re McKinney, 158 N.C. App. 441, 444, 581 S.E.2d 793, 795 (2003) ("[B]efore a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question.").

In Neuse River Foundation, Inc., 155 N.C. App. at 116, 574 S.E.2d at 53, the plaintiffs "contend[ed] that since each of them either owns property adjacent to, works on, protects, or has concern for the welfare of the rivers allegedly polluted by defendants, they all suffer special damages to a degree

different from those suffered by the general public." This Court stated that "there is no North Carolina authority supporting the contention that injury to aesthetic or recreational interests alone, regardless of degree, confers standing on an environmental plaintiff." Id. See Hampton v. North Carolina Pulp Co., 223 N.C. 535, 542, 27 S.E.2d 538, 543 (1943) (emphasizing the difference between injury to a fishery business owner, who has standing in an action opposing the proposed location of a bridge on the river, and recreational anglers, who do not). This Court held that "[t]he environmental river associations, riverkeepers, and recreational fishermen, therefore, do not have standing to maintain an action against defendants under the circumstances alleged." Id.

In Marriott v. Chatham Cnty., 187 N.C. App. 491, 492, 654 S.E.2d 13, 14 (2007), disc. rev. denied, 362 N.C. 472, 666 S.E.2d 122 (2008), the plaintiffs-appellants were "landowners in Chatham County whose properties [were] adjacent to several large tracts of land proposed for residential development along the banks of the Haw River." The plaintiffs-appellants brought suit to enjoin the development of the property until the county amended ordinances which were established to comply with N.C.G.S. § 113A-1 and N.C.G.S. § 113A-8, and which stated:

Pursuant to Chapter 113A of the North Carolina General Statutes, the Planning Board may require the subdivider to submit an environmental impact statement with the preliminary plat if the development exceeds two acres in area, and if the Board deems it necessary for responsible review due to the nature of the land to be subdivided, or peculiarities in the proposed layout.

Marriott, 187 N.C. App. at 493, 654 S.E.2d at 15. The defendants filed a motion to dismiss on the grounds that the plaintiffs-appellants lacked standing and that they failed to state a claim upon which relief can be granted. Id. The trial court entered an order dismissing the plaintiffs-appellants' claims for "lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted." Id. at 493-94, 654 S.E.2d at 16. The plaintiffs-appellants appealed, and contended that "the trial court erred in dismissing their complaint on the grounds of lack of subject matter jurisdiction." Id. This Court held "that plaintiffs lacked standing to bring their claims and that the trial court properly granted defendants' and defendants-intervenors' motions to dismiss." Id. at 496, 654 S.E.2d at 17. Here, Plaintiffs-Appellants alleged that:

2. Plaintiff Frederick Cubbage, Ph.D is a citizen and resident of Wake County, North Carolina, and is a tenured Professor in the Department of Forestry and Environmental Resources at North Carolina State

University. Professor Cabbage uses cases from the Hofmann Forest continually as examples for sustainable forest management and to illustrate the practice of professional forestry and natural resources in his classes in natural resource policy and forest economics at North Carolina State University, and is the former Department Head of the Department of Forestry at NCSU, from 1994 to 2004. He has been to Hofmann State Forest roughly twenty times, and has supervised a Master's student whose research work was done on economically optimal timber management regimes on at the State Hofmann Forest. He has written frequently this year about practicing what we teach about sustainability, and the land ethic we will convey by retaining the State Hofmann Forest.

3. Plaintiff Ronald Sutherland, is a citizen and resident of Durham County, North Carolina, a graduate of NCSU, and holds his Ph.D degree from Duke University's Nicholas School of the Environment. He is a conservation scientist for the Wildlands Network, a national non-governmental organizational dedicated to the preservation of large tracts of uninterrupted forest like Hofmann State Forest. Mr. Sutherland has spent years researching habitat connectivity in the coastal plain of North Carolina and other adjacent southern states, and is familiar with the ecological and conservation importance of Hofmann Forest.

4. Plaintiff Richard J. "Barny" Bernard, Jr. is a citizen and resident of Durham County, North Carolina, is a North Carolina registered professional consulting forester, and is the former president of both The North Carolina Forestry Foundation, Inc. and the NC State Natural Resources Foundation, Inc. (the latter being a defendant in this matter). Mr. Bernard was responsible for the leadership and direction of the Hofmann State Forest in both of those latter positions.

5. Plaintiff James D. Gregory, Ph.D is a citizen and resident of New Hanover County, North Carolina, and is a Professor Emeritus of the Department of Forestry and

Environment at North Carolina State University. Professor Gregory has had a close association with the Hofmann State Forest for over fifty (50) years as a student and faculty member of the Department of Forestry and Environmental Resources at NCSU, and taught forest hydrology, performed research, and taught hydrology and wetlands courses to professional managers on the State Hofmann Forest.

6. Plaintiff John Eddy is a citizen and resident of Jones County who uses the Hofmann State Forest and the rivers emanating from the Hofmann State Forest, for outdoor recreation and is the owner of two tracts of nearby land that will be affected by the sale of Hofmann State Forest and its conversion to corporate investment property. Mr. Eddy's connection to the Forest and the impacts of the sale on Mr. Eddy, as well as impacts upon the Eastern North Carolina environment, are more fully described in the Affidavit of John Eddy, which is attached as Exhibit B, and incorporated herein by reference.

(R pp 50-52)

Plaintiffs-Appellants have failed to establish that they possess standing to bring their claims against Defendants-Appellees. Plaintiffs-Appellants have failed to establish that they possess an injury in fact, either by means of a legally protected interest that is concrete and particularized, or one that is actual and imminent. None of Plaintiffs-Appellants articulate a legally protected interest, and the potential injuries theorized by Plaintiff-Appellants represent generalized fears based on speculation, rather than fact. Plaintiffs-Appellants have also failed to establish that they possess an

injury that is fairly traceable to the challenged action of Defendants-Appellees. No evidence exists that the sale transaction of the Hofmann Forest will result in any injury to any Plaintiff-Appellant. Plaintiffs-Appellants likewise failed to establish that the injury will be redressed by a favorable decision. A favorable decision in this case does not foreclose Plaintiff-Appellants' unfounded, feared outcomes for the future of the Hofmann Forest. Finally, like the plaintiffs in Neuse River Foundation, Inc., Plaintiffs-Appellants failed to establish that their use of the Hofmann Forest rose to a level beyond aesthetic or recreational use. See 155 N.C. App. at 116, 574 S.E.2d at 53 (stating that "there is no North Carolina authority supporting the contention that injury to aesthetic or recreational interests alone, regardless of degree, confers standing on an environmental plaintiff").

Plaintiffs-Appellants have failed to satisfy their burden of establishing their standing to bring claims under the North Carolina Environmental Policy Act or Article XIV, Section 5 of the North Carolina State Constitution. As a result, Plaintiffs-Appellants possess neither standing nor subject matter jurisdiction to bring these claims against Defendants-Appellees, and this Court should dismiss this appeal.

II. THE TRIAL COURT PROPERLY ALLOWED DEFENDANTS-APPELLEES' MOTION TO DISMISS BECAUSE PLAINTIFFS-APPELLANTS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER THE NORTH CAROLINA ENVIRONMENTAL POLICY ACT.

Plaintiffs-Appellants argue that the trial court erred when it allowed Defendants-Appellees' motion to dismiss because Plaintiffs-Appellants stated a claim upon which relief can be granted under the North Carolina Environmental Policy Act ("SEPA"). Plaintiffs-Appellants' argument is without merit.

Chapter 113A, Article 1 of the General Statutes establishes SEPA. Pursuant to N.C.G.S. § 113A-2 (2013), a purpose of SEPA is "to require agencies of the State to consider and report upon environmental aspects and consequences of their actions involving the expenditure of public moneys or use of public land." In furtherance of that purpose, under N.C.G.S. § 113A-4 (2013),

The General Assembly authorizes and directs that, to the fullest extent possible:

. . . .

(2) Every State agency shall include in every recommendation or report on any action involving expenditure of public moneys or use of public land for projects and programs significantly affecting the quality of the environment of this State, a detailed statement by the responsible official setting forth the following:

a. The environmental impact of the proposed action;

- b. Any significant adverse environmental effects which cannot be avoided should the proposal be implemented;
- c. Mitigation measures proposed to minimize the impact;
- d. Alternatives to the proposed action;
- e. The relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity; and
- f. Any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented.

In other words, a detailed environmental statement is only required where a State agency is taking an action involving the expenditure of public monies or use of public land for a project or program significantly affecting the environment.

Here, the trial court properly denied Defendants-Appellees' motion to dismiss because Plaintiffs-Appellants failed to state a claim upon which relief can be granted under SEPA because Defendant Endowment Fund's contract to sell the Hofmann Forest (1) does not constitute the use of public monies; (2) does not constitute the use of public land; and (3) does not involve a project or program significantly affect the quality of the environment of the State. The trial court properly dismissed

Plaintiffs-Appellants' claim. This Court should affirm the trial court's order.

A. Defendant Endowment Fund's contract to sell the Hofmann Forest does not constitute the use of public monies.

1. The resources used in the execution of the sales contract are excluded from the definition of public monies.

The North Carolina Administrative Code provides guidance as to the scope of "public monies" as used in SEPA. 01 NCAC 25 .0108 (b) (4) states:

(4) "Public monies" includes all expenditures in support of the proposed activity by federal, state or local or quasi-public entities from whatever source derived, but **does not include resources used solely for processing a license, a certificate, or a permit; the lending of credit; or the resources used for the provision of technical services.**

(emphasis added).

SEPA does not apply to Defendant Endowment Fund's contract to sell the Hofmann Forest because the resources used to consummate that transaction are excluded under this definition. Closing costs and other administrative costs are resources used solely in processing the sales contract, and are more closely akin to resources used for processing a license, a certificate, a permit, for the lending of credit, or for technical services.

The use of resources for these closing costs and administrative costs does not constitute the use of public monies by Defendant Endowment Fund.

2. Charitable gifts made to Defendant Endowment Fund are subject to the intent of the gift donor.

In recognition of the fact that university endowment funds such as Defendant Endowment Fund exist exclusively for a charitable purpose to receive private gifts, the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") of Chapter 36E of the General Statutes applies to the endowment funds of the University of North Carolina system. N.C.G.S. § 116-36(m) (2013). UPMIFA establishes the standard of conduct for board members and officers of endowment funds, as well as restrictions on the expenditure of endowment fund monies. In this way, the assets of endowment funds such as Defendant Endowment Fund are unique from the assets of other State entities that may be subject to SEPA.

"Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund." N.C.G.S. § 36E-3(a) (2013).

"Subject to the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes, and duration for which the endowment fund is established." N.C.G.S. § 36E-4(a) (2013). "Unless stated otherwise in the gift instrument, **the assets in an endowment fund are donor-restricted assets** until appropriated for expenditure by the institution." Id. (emphasis added)

In other words, pursuant to UPMIFA, gifts to Defendant Endowment Fund are restricted to a specified gift purpose, and cannot be expended unconditionally by Defendant Endowment Fund. The donor can designate the gift's use, and Defendant Endowment Fund's use of the gifted property is subject to the intent of the donor. Unlike the assets of other State entities, which may be expended for any authorized public purpose, assets of Defendant Endowment Fund may **only** be expended in conformity with the gift instrument. Failure on the part of Defendant Endowment Fund to abide by the donor-imposed restrictions would result in a violation of UPMIFA and possible reversion under the gift instrument. As a result of this restriction, the charitably-donated assets of Defendant Endowment Fund cannot be considered

public monies for the purpose of SEPA. To hold otherwise could result in a profound chilling effect on private gifts made to the endowment funds for the support of the University of North Carolina system.

**3. Assets of Defendant Endowment Fund
do not arise from nor supplant
State appropriations.**

N.C.G.S. § 116-36(b) (2013) states, in pertinent part:

It is not the intent of this section that the proceeds from any endowment fund shall take the place of State appropriations or any part thereof, but it is the intent of this section that those proceeds shall supplement the State appropriations to the end that the institution may improve and increase its functions, may enlarge its areas of service, and may become more useful to a greater number of people.

The assets of Defendant Endowment Fund are not public monies because they arise from private charitable gifts, not State appropriations, and are used only to supplement, and not supplant, State appropriations. Again, in this respect, Defendant Endowment Fund is distinct from those State entities that may indeed trigger the application of SEPA through their expenditures. To hold otherwise ignores the purpose for the creation of UNC system endowment funds such as Defendant Endowment Fund.

Plaintiffs-appellants failed to establish that public monies will be expended in the execution of the sales contract between Defendant Endowment Fund and Hofmann Forest LLC. The trial court properly dismissed Plaintiffs-Appellants' claims. This Court should affirm the trial court's order.

B. Defendant Endowment Fund's contract to sell the Hofmann Forest does not constitute use of public land.

1. The Hofmann Forest is not public land as defined by SEPA.

For the purposes of SEPA, the General Statutes define "public land" as "all land and interests therein, title of which is vested in the State of North Carolina, in any State agency, or in the State for the use of any State agency or political subdivision of the State, and includes all vacant and unappropriated land, swampland, submerged land, land acquired by the State by virtue of being sold for taxes, escheated land, and acquired land." N.C.G.S. § 113A-9(7) (2013).

This definition does not apply to the Hofmann Forest. When the North Carolina Forestry Foundation, Inc., now Defendant Foundation, a private, non-profit corporation, deeded the Hofmann Forest to Defendant Endowment Fund, it retained a reversionary interest in the property. (R p 21) Defendant

Endowment Fund's title to the Hofmann Forest is therefore encumbered by that private party's reversionary interest, and as a result the Hofmann Forest is not "public land" as defined by SEPA.

2. Sale of the Hofmann Forest is not a use of public land as defined by SEPA.

SEPA defines the "use of public land" as follows:

(11) "Use of public land" means activity that results in changes in the natural cover or topography that includes:

a. The grant of a lease, easement, or permit authorizing private use of public land; or

b. The use of privately owned land for any project or program if the State or any agency of the State has agreed to purchase the property or to exchange the property for public land.

N.C.G.S. § 113A-9(11) (2013).

Applying this definition, no use of public land has occurred by the execution of a contract for the sale of land. The execution of a contract for sale does not result in a change to the natural cover or topography of the Hofmann Forest. Further, the execution of a contract for the sale of land is not a "grant of a lease, easement, or permit authorizing private use" of the land. While Plaintiffs-Appellants would like this Court to insert the word "sale" into the plain language of this

definition, in adopting SEPA the General Assembly specifically enumerated the uses that would trigger SEPA and **excluded** the sale of land. See In re Investigation of the Death of Miller, 357 N.C. 316, 325, 584 S.E.2d 772, 780 (2003) ("Under the doctrine of expressio unius est exclusio alterius, when a statute lists the situations to which it applies, it implies the exclusion of situations not contained in the list.") (citations omitted). Thus, the sale of the Hofmann Forest is not a "use of a public land" as defined in N.C.G.S. § 113A-9 and does not trigger the requirements of SEPA. The trial court properly dismissed Plaintiffs-Appellants' claims and this Court should affirm the trial court's order.

C. Defendant Endowment Fund's contract to sell the Hofmann Forest is not a project or program significantly affecting the quality of the environment of the State.

The sale of the Hofmann Forest is not a "project or program" that would have an environmental impact, because there is no "project or program" at all. The action in question is a transaction for the sale of real property and there are no environmental impacts associated with a transfer of title to a parcel of land. Presumably this is the very reason the sale of

property was specifically not included in the definition of "use of public land," as discussed supra.

"'Environmental assessment' (EA) means a document prepared by a State agency to evaluate whether the probable impacts of a proposed action require the preparation of an environmental impact statement under this Article." N.C.G.S. § 113A-9(1) (2013). "'Environmental impact statement' (EIS) means the detailed statement described in G.S. 113A-4(2)." N.C.G.S. § 113A-9(3) (2013).

01 NCAC 25 .0108(b) (3) (2013) states:

(b) For the purpose of this Chapter:

....

(3) "Environmental effect" includes direct, indirect, and cumulative impacts for the project or program that may be significant, depending upon the manner in which the activity is carried out.

01 NCAC 25 .0603 (2013) established the requirement for format and content of the environmental impact statement, and stated that the document shall include:

(6) Environmental Consequences. This section of the document shall form the scientific and analytic basis for the comparisons under Item (4) of this Rule. It shall include:

(a) direct effects and significance;

- (b) indirect effects and significance;
- (c) cumulative effects and significance;
- (d) the relationship between the short-term uses of the environment involved in the proposed action and the maintenance and enhancement of long-term productivity;
- (e) any irreversible and irretrievable environmental changes which would be involved in the proposed action should it be implemented; and
- (f) possible conflicts between the proposed activities and the objectives of federal, state, and local plans, policies, and controls for the affected area.

In Lewis v. White, 287 N.C. 625, 216 S.E.2d 134 (1975), citizens and taxpayers of the State filed a complaint seeking to enjoin the Art Museum Building Commission and others from constructing an art museum at the Polk Prison site in Wake County. The plaintiffs alleged that the Commission had failed to comply with the Environmental Policy Act by filing an EIS as required by that Act. Id. The Court upheld the trial court's dismissal of this claim and noted:

Nothing in this Act makes the filing of such statement a condition precedent to the commencement of construction of a building for which State funds have been appropriated. Furthermore, the complaint does not purport to state any respect in which the construction of an art museum at the present site of the Polk Prison could adversely affect the environment of the State or its natural beauty or the beneficial use of its natural resources. It is perfectly obvious that, nothing else appearing, the substitution of an

art museum for a prison will not adversely affect the environment.

In the absence of any allegation in the complaint as to how such proposed substitution could adversely affect 'the quality of the environment of the State,' we find no error in the conclusion and order of the Superior Court dismissing Claim No. 9.

Id. at 639-40, 216 S.E.2d at 143-44. See also The Town of Highlands v. Hendricks, 164 N.C. App. 474, 483, 596 S.E.2d 440, 447 (2004) (holding that "[t]he obtaining of an environmental impact study was not a prerequisite to the commencement of condemnation proceedings in this matter, even if the Department of Transportation initiated the condemnation proceedings"), disc. rev. denied, 359 N.C. 75, 605 S.E.2d 149 (2004).

In State v. Williams & Hesse, 53 N.C. App. 674, 281 S.E.2d 721 (1981), the State instituted condemnation proceedings against the defendants. The trial court stated that "the filing of an Environmental Impact [Statement] is not a prerequisite to the acquisition of land by condemnation." Id. at 678, 281 S.E.2d at 725. The defendant appealed to this Court, and argued that "the State had no authority to condemn the lands at issue without first filing an Environmental Impact Statement (EIS) as required by G.S. 113A-4." Id. at 677, 281 S.E.2d at 724. While this Court determined that the defendants waived the issue of

whether the State was required to file an environmental impact statement, this Court also found that the State was not required to file an environmental impact statement. Id.

Here, the execution of the contract for sale of land between Defendant Endowment Fund and Hofmann Forest LLC did not affect, or significantly affect, the quality of the environment of the State. Nothing affects the quality of the environment of the State by the execution of a contract for the sale of land. The purpose of an environmental impact statement is inconsequential where the contract is for the sale of land because there are no environmental consequences to assess. Rather, the sale of land is more closely akin to condemnation proceedings or construction of a building where neither the condemnation proceeding nor the construction project in itself affects the environment. See Lewis, 287 N.C. at 639-40, 216 S.E.2d at 143-44; Williams & Hesse, 53 N.C. App. at 674, 281 S.E.2d at 721.

Plaintiffs-Appellants' reliance on In re Environmental Management Commission, 53 N.C. App. 135, 280 S.E.2d 520 (1981) ("In re E.M.C."), is misplaced. In In re E.M.C., this Court determined "whether the issuance of a certificate authorizing acquisition of land for the construction of a reservoir

constitutes . . . a 'recommendation or report on proposals for legislation and actions involving expenditure of public moneys for projects and programs significantly affecting the quality of the environment.'" 53 N.C. App. at 141, 280 S.E.2d at 525 (citations omitted). This Court reviewed the authority of the Environmental Management Commission under N.C.G.S. § 162A-7, which is to "issue certificates only to projects which it finds to be consistent with the maximum beneficial use of the water resources in the State." Id. at 142, 280 S.E.2d at 525. This Court determined that "[w]hen G.S. 162A-7(c) is read in conjunction with the North Carolina's Environmental Policy Act, it becomes apparent that certification action by the Commission is State action which, if it significantly affects the environment, necessitates an impact statement." Id. at 143, 280 S.E.2d at 526. The effect of the execution of a contract for the sale of land is inherently different than the certificate at issue in In re E.M.C. authorizing the acquisition of land **for the construction of a reservoir**, which would affect the water resources of the State. In the case of the latter, a specific "project or program" existed - the construction of a reservoir - which was authorized by the issuance of the certificate and would significantly affect the environment. Again, no "project

or program" exists in the case of the sale in question here, and no environmental effects will occur. Plaintiffs-Appellants' argument is without merit. This trial court properly dismissed Plaintiffs-Appellants' claims and this Court should affirm the trial court's order.

III. THE TRIAL COURT PROPERLY ALLOWED DEFENDANTS-APPELLEES' MOTION TO DISMISS BECAUSE PLAINTIFFS-APPELLANTS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER ARTICLE XIV, SECTION 5 OF THE NORTH CAROLINA STATE CONSTITUTION.

Plaintiffs-Appellants argue that the trial court erred when it allowed Defendants-Appellees' motion to dismiss because Plaintiffs-Appellants stated a claim upon which relief can be granted under Article XIV, Section 5 of the North Carolina State Constitution. Plaintiffs-Appellants' argument is without merit.

Article XIV, Section 5 of the North Carolina State Constitution states:

It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

To accomplish the aforementioned public purposes, the State and its counties, cities and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by a law enacted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, constitute part of the "State Nature and Historic Preserve," and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purposes.

"Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.'" State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting Perry v. Stancil, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953)).

The will of the people as expressed in the Constitution is the supreme law of the land. In searching for this will or intent all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument. The best way to ascertain the meaning of a word or sentence in the Constitution is to read it contextually and to compare it with other words and sentences with which it stands connected.

State v. Emery, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) (citations omitted). "In interpreting our Constitution -- as in

interpreting a statute -- where the meaning is clear from the words used, we will not search for a meaning elsewhere." Preston, 325 N.C. at 449, 385 S.E.2d at 478 (citing Elliott v. Bd. of Equalization, 203 N.C. 749, 753, 166 S.E. 918, 920-21 (1932)).

Here, Article XIV, Section 5 of the North Carolina Constitution authorizes the State and its political subdivisions to preserve property; it does not prohibit the sale of property, particularly property which is owned by an endowment fund and is subject to a reversionary interest. Furthermore, the second paragraph of Article XIV, Section 5 of the North Carolina Constitution shows that the stated policy of conservation is to be advanced by the dedication of lands through legislative action, not by authorizing private individuals to contest actions taken by statutorily-created endowment funds, whose decisions the General Assembly has entrusted to the sound discretion of the boards of trustees.

Plaintiffs-Appellants cite State ex rel. Rohrer v. Credle, 322 N.C. 522, 369 S.E.2d 825 (1988), in support of their contention that the Constitution forbids Defendants-Appellees' sale of the Hofmann Forest. Credle does not support Plaintiffs-Appellants, however, because the Supreme Court in Credle did not

recognize a private cause of action in Article XIV, Section 5. Rather, the Court merely observed this constitutional provision reflects the "endorsement" by the people of North Carolina of the public policy behind legislative actions regulating the fishing of oyster bottoms. Id. at 532, 369 S.E.2d at 831. In Credle, the constitutional mandate of "the conservation and protection of public lands and waters for the benefit of the public" assisted the Court in reaching its conclusion that a private party could not acquire, by prescription, exclusive rights to harvest oyster bottoms in North Carolina's coastal waters. Id.

Article XIV, Section 5 of the North Carolina Constitution does not create a private right of action. Therefore, Plaintiffs-Appellants have not stated a claim under this provision upon which relief can be granted. The trial court properly dismissed Plaintiffs-Appellants claims. This Court should affirm the trial court's order.

CONCLUSION

For the foregoing reasons, Defendants-Appellees respectfully request that this Court dismiss Plaintiffs-Appellants' appeal, or affirm the trial court's order.

Respectfully submitted this the 26th day of June, 2014.

Roy Cooper
ATTORNEY GENERAL

Electronically Submitted
Catherine F. Jordan
Assistant Attorney General
State Bar No. 34030
cjordan@ncdoj.gov

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 716-66920
Facsimile: (919) 716-6764

Attorney for Defendant-Appellee
The Board of Trustees of the
Endowment Fund of North Carolina
State University at Raleigh

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing **BRIEF FOR DEFENDANT-APPELLEE THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH** upon Plaintiffs-Appellants by placing a copy of same in the United States Mail, first class postage prepaid, addressed to the attorney of record as follows:

James L. Conner II
Ragsdale Liggett, PLLC
P.O. Box 31507
Raleigh, N.C. 27622-1507
Counsel for Plaintiffs-Appellants

This the 26th day of June, 2014.

Electronically Submitted
Catherine F. Jordan
Assistant Attorney General

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Motion for Temporary Restraining Order and
Preliminary Injunction..... App. 1

Denial of Temporary Restraining Order App. 5

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Order Denying Motion for Preliminary Injunction App. 144

13CV012884

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
 COUNTY OF WAKE **203 SEP 23 PM 3:38** SUPERIOR COURT DIVISION
 FILE NO. 13 CVS

FREDERICK CUBBAGE, RONALD E. COX, RONALD W. SUTHERLAND, PH.D.,
 RICHARD J. "BARNY" BERNARD, JR.,
 JAMES D. GREGORY,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE
 ENDOWMENT FUND OF NORTH
 CAROLINA STATE UNIVERSITY AT
 RALEIGH AND NC STATE NATURAL
 RESOURCES FOUNDATION, INC.,

Defendants.

**MOTION FOR TEMPORARY
 RESTRAINING ORDER
 and
 PRELIMINARY INJUNCTION**

NOW COME Plaintiffs Frederick Cubbage, Ronald E. Cox, Ronald W. Sutherland, PhD, Richard J. "Barny" Bernard, Jr., and James D. Gregory, ("Plaintiffs") to move the Court, pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. §1-485 and 150B-48, and Local Rule 14, to grant a Stay and Temporary Restraining Order, to remain in effect until a hearing is had on a preliminary injunction. Plaintiffs further move for a preliminary injunction to remain in effect until a final judgment has been entered in this matter. In support of this Motion, Plaintiffs shows the Court as follows:

1. The allegations of the verified Complaint for Injunctive Relief and Petition for Declaratory Judgment are incorporated herein by reference.
2. Hofmann State Forest is the largest parcel of state owned public land in the state of North Carolina. It has been maintained since the first half of the twentieth century as a working forest, providing educational opportunities for forestry and environmental studies students at North Carolina State University, recreational

opportunities for North Carolina residents (especially residents of Onslow and Jones counties), and exceptional wildlife habitat. The Forest was founded by Professor Julius Hofmann as a legacy for the people of North Carolina, and especially, students and professors at NCSU. The forest has been maintained by a series of foundations with the intent of its being an enduring legacy to the people of North Carolina and to the wildlife of eastern North Carolina.

3. The Defendants have decided, in a series of closed meetings, to sell Hofmann State Forest into private hands.
4. The legally required procedures for the sale of Hofmann State Forest, including compliance with the North Carolina Environmental Policy Act, have not been followed and the sale is imminent.
5. The sale of this property is in violation of the North Carolina Constitution, Article XIV, Section 5.
6. Plaintiffs will suffer irreparable harm unless the sale is enjoined. Once the sale occurs, no relief this court can grant will be adequate to address the harm.
7. The status quo should be preserved until this Court can determine whether the sale violates the law and Constitution of North Carolina.
8. Plaintiffs have shown in their Complaint abundant probable cause for this Court to believe that Plaintiffs are likely to prevail on the merits.

WHEREFORE, Plaintiffs move the Court for the following relief:

- a. A temporary restraining order restraining Defendants from selling Hofmann Forest until the hearing of the motion for preliminary injunction;
- b. A preliminary injunction restraining Defendants from selling Hofmann Forest

until the hearing of the issues in this case on the merits and decision thereof;

c. Such other and further relief as this Court deems just and proper.

This the 23rd day of September, 2013.

By:




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Email: jconner@rl-law.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this the 23rd day of September, 2013, a copy of the foregoing **MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** has been duly served upon all parties to this action by U.S. mail addressed to the following:

Katherine A. Murphy
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629
Counsel for Defendants

By:



James L. Conner II
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Email: jconner@rl-law.com
Counsel for Plaintiffs

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 13-CVS-12884

FREDERICK W. CUBBAGE, RONALD)
W. SUTHERLAND, PhD, RICHARD J.)
"BARNEY" BERNARD, JR., JAMES D.)
GREGORY and RONALD E. COX,)
Plaintiffs,)

v.)

THE BOARD OF TRUSTEES OF THE)
ENDOWMENT FUND OF NORTH)
CAROLINA STATE UNIVERSITY AT)
RALEIGH; and NC STATE NATURAL)
RESOURCES FOUNDATION, INC.,)
Defendants.)

DENIAL OF
TEMPORARY RESTRAINING ORDER

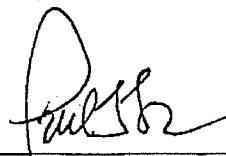
THIS MATTER coming on to be heard before the undersigned on plaintiffs' motion for temporary restraining order on 25 September 2013;

AND ALL PARTIES being present, and the Court having heard from all parties and considered all matters of record;

AND IT APPEARING to the Court that plaintiffs have failed to show that they are entitled to a temporary restraining order;

NOW, THEREFORE, plaintiffs motion for temporary restraining order is hereby DENIED.

This, the 25th day of September, 2013.



Superior Court Judge Presiding

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 13 CVS 12884

FREDERICK CUBBAGE,
RONALD W. SUTHERLAND, PhD,
RICHARD J. "BARNY" BERNARD, JR.,
JAMES D. GREGORY, and
RONALD E. COX,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE
ENDOWMENT FUND OF NORTH
CAROLINA STATE UNIVERSITY AT
RALEIGH AND NC STATE NATURAL
RESOURCES FOUNDATION, INC.,

Defendants.

**MOTION FOR PRELIMINARY
INJUNCTION**

NOW COME Plaintiffs Frederick Cubbage, Ronald E. Cox, Ronald W. Sutherland, PhD, Richard J. "Barny" Bernard, Jr., and James D. Gregory, ("Plaintiffs") to move the Court, pursuant to Rule 65 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. §1-485 and 150B-48, and Local Rule 14, to grant a preliminary injunction to remain in effect until a final judgment has been entered in this matter. In support of this Motion, Plaintiffs shows the Court as follows:

1. The allegations of the verified Complaint for Injunctive Relief and Petition for Declaratory Judgment are incorporated herein by reference.
2. Hofmann State Forest is the largest parcel of state owned public land in the state of North Carolina. It has been maintained since the first half of the twentieth century as a working forest, providing educational opportunities for forestry and environmental studies students at North Carolina State University, recreational

opportunities for North Carolina residents (especially residents of Onslow and Jones counties), and exceptional wildlife habitat. The Forest was founded by Professor Julius Hofmann as a legacy for the people of North Carolina, and especially, students and professors at NCSU. The forest has been maintained by a series of foundations with the intent of its being an enduring legacy to the people of North Carolina and to the wildlife of eastern North Carolina.

3. The Defendants have decided, in a series of closed meetings, to sell Hofmann State Forest into private hands.
4. The legally required procedures for the sale of Hofmann State Forest, including compliance with the North Carolina Environmental Policy Act, have not been followed.
5. The sale of this property is in violation of the North Carolina Constitution, Article XIV, Section 5.
6. Plaintiffs will suffer irreparable harm unless the sale is enjoined. Once the sale occurs, no relief this court can grant will be adequate to address the harm.
7. The status quo should be preserved until this Court can determine whether the sale violates the law and Constitution of North Carolina.
8. Plaintiffs have shown in their Complaint abundant probable cause for this Court to believe that Plaintiffs are likely to prevail on the merits.

WHEREFORE, Plaintiffs move the Court for the following relief:

- a. A preliminary injunction restraining Defendants from selling Hofmann Forest until the hearing of the issues in this case on the merits and decision thereof;
- b. Such other and further relief as this Court deems just and proper.

This the 4th day of October, 2013.

By:

James L. Conner II
3/18

James L. Conner II

N.C. Bar No. 12365

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Email: jconner@rl-law.com

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on this the 4th day of October, 2013, a copy of the foregoing **MOTION FOR PRELIMINARY INJUNCTION** has been duly served upon all parties to this action by U.S. mail addressed to the following:

Katherine A. Murphy
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
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Endowment Fund of North Carolina State University at Raleigh*

Paul T. Flick
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*Counsel for NC State Natural Resources
Foundation, Inc.*

By:



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Counsel for Plaintiffs

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
FILED SUPERIOR COURT DIVISION
13 CVS 12884

2013 NOV 19 P 2:02

FREDERICK W. CUBBAGE, RONALD W. SUTHERLAND, PhD, RICHARD J. "BARNY" BERNARD, JR., JAMES D. GREGORY, and JOHN EDDY,

Plaintiffs,

v.

THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH and NC STATE NATURAL RESOURCES FOUNDATION, INC.,

Defendants.

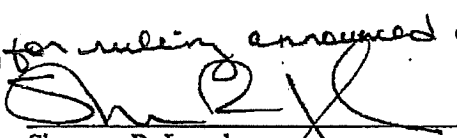
ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER having come on for hearing and being heard by the undersigned Superior Court Judge presiding over the November 12, 2013 session of the Wake County Civil Superior Court upon the Plaintiffs' Motion for Preliminary Injunction and after considering the Amended and Supplemental Complaint and the Affidavits filed herein and having heard the arguments of counsel;

IT APPEARING to the Court that the Plaintiffs have failed to demonstrate entitlement to the relief sought and that said Motion for Preliminary Injunction should be DENIED.

IT IS THEREFORE ORDERED that the Plaintiffs' Motion for Preliminary Injunction is hereby is DENIED.

This the 19 day of November, 2013, *for ruling announced in open court.*


Shannon R. Joseph
Superior Court Judge Presiding