No. COA 14-311 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS
****

FREDERICK CUBBAGE, RONALD W. SUTHERLAND, PHD., RICHARD J. "BARNEY" BERNARD, JR., JAMES D. GREGORY AND JOHN EDDY,	)	
Plaintiffs-Appellants,	)	From Wake County
v.	)	No. 13-CVS-12884
THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH AND NC STATE NATURAL RESOURCES FOUNDATION, INC.,	)	
Defendants-Appellees.	)	

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DEFENDANT-APPELLEE NC STATE NATURAL RESOURCES FOUNDATION, INC.'S BRIEF

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DEFENDANT-APPELLEE NC STATE NATURAL RESOURCES FOUNDATION, INC.'S BRIEF

****

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN DISMISSING PURSUANT TO RULE 12(B)(6) PLAINTIFFS-APPELLANTS' CLAIMS UNDER THE NORTH CAROLINA ENVIRONMENTAL POLICY ACT.

II. DID THE TRIAL COURT ERR IN DISMISSING PURSUANT TO RULE 12(B)(6) PLAINTIFFS-APPELLANTS' CLAIMS UNDER ARTICLE XIV, SECTION 5 THE NORTH CAROLINA CONSTITUION.

STATEMENT OF THE FACTS

The land comprising Hofmann Forest is currently owned by Defendant-Appellee The Board of Trustees of The Endowment Fund of North Carolina State University at Raleigh ("Endowment Fund"), subject to a reversionary interest held by Defendant-Appellee NC State Natural Resources Foundation, Inc. ("Foundation"). (R. pp. 5, 9, 21-22, 112.) The Endowment Fund is an entity created pursuant to N.C. Gen. Stat. § 116-36(a), for the purpose of, *inter alia*, acquiring and disposing of property pursuant to donor requests and otherwise providing financial support to North Carolina State University. The Foundation is a private, nonprofit corporation formed to support the College of Natural Resources at North Carolina State University. (R. pp. 5, 24, 53, 68); *see also* N.C. Gen. Stat. § 116-30.20 (2013) (encouraging the establishment of private, non-profit corporations to support the constituent institutions of The University of North Carolina and The University System).

The Foundation acquired Hofmann Forest in 1934. (R. p. 68.) On 15 December 1977, the Foundation[1] gifted Hofmann Forest to the Endowment Fund via a Deed of Gift recorded in both Jones

[1] In 2008, the North Carolina Forestry Foundation, Inc. merged with Pulp and Paper Foundation, Inc. and changed its name to NC State Natural Resources Foundation, Inc. The North Carolina Forestry Foundation, Inc. was the original signatory to the Deed of Gift. (R. p. 58, 112, 117.)

and Onslow Counties. (R. p. 110.) The Deed of Gift was conditioned on the requirement that "[a]ll 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."[2] (R. p. 111.) If proceeds were not used for that purpose, title would revert to the Foundation. (R. p. 111-12.) Further, the Deed of Gift provided that title to the land would revert to the Foundation in the event that the General Assembly amended N.C. Gen. Stat. § 116-36 to provide (a) that proceeds from endowment funds would take the place of State appropriations or (b) that sale, leasing or other disposition of properties belonging to an endowment fund would be subject to Chapters 143 [State Departments, Institutions, and Commissions] and 146 [State Lands] of the North Carolina General Statutes. (R. pp. 111-12.)

In conjunction with the Deed of Gift, the Foundation and The Endowment Fund also executed an Agreement that reiterated the conditions set forth in the Deed of Gift, restated the Foundation's reversionary interest in the property, and prohibited the Endowment Fund from selling, leasing or otherwise

[2] The School of Forest Resources of North Carolina State University is now known as the College of Natural Resources.

disposing of Hofmann Forest without the Foundation's consent. (R. pp. 114-15.) Pursuant to the Agreement, the Foundation remains responsible for operating and development expenses of Hofmann Forest, as well as taxes assessed against the property, in excess of moneys earned by Hofmann Forest. (R. p. 115.) The net income, of whatever kind, earned by Hofmann Forest, can only be used for the College of Natural Resources, and it is expressly mandated that the proceeds from any sale or disposition are solely to support the College of Natural Resources, or else those proceeds must be paid over to the Foundation. (R. pp. 111, 115.)

On 25 October 2013, the Endowment Fund and the Foundation entered an Agreement for Purchase and Sale of Real Property ("Purchase Agreement") to sell Hofmann Forest to Hofmann Forest, LLC, a North Carolina limited liability company. (R. p. 68.) The Purchase Agreement recites a purchase price of $145,800,000.00. (R. p. 73.) Of that amount, $120,800,000.00 is to be paid in cash at closing, with the remaining $25,000,000.00 to be paid over time pursuant to the terms of a purchase money promissory note. (R. p. 73.) In addition to the cash portion of the purchase price to be paid at closing, Hofmann Forest, LLC agreed to make a gift of $4,200,000.00 to the Endowment Fund at closing. (R. p. 73.)

Plaintiffs-Appellants, after the plans for a potential sale of Hofmann Forest were made public, filed a civil action on 23 September 2013 seeking declaratory and injunctive relief under the North Carolina Environmental Policy Act[3] ("SEPA") and the North Carolina Constitution ("Constitution") in an attempt to halt any planned sale of Hofmann Forest. (R. p. 2.) Plaintiffs-Appellants filed an Amended and Supplemental Complaint ("Complaint") on 5 November 2013, again seeking declaratory and injunctive relief under SEPA and the Constitution. (R. p. 50.) On 7 November 2013, the Foundation and the Endowment Fund each filed a Motion to Dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, on the grounds that Plaintiffs lacked standing to pursue their claims and that Plaintiffs had failed to state claims for which relief could be granted under both SEPA and the Constitution. (R. pp. 132, 135.)

On 12 November 2013, the Motions to Dismiss were heard by The Honorable Shannon R. Joseph, who entered an order on 22 November 2013 granting the Motions to Dismiss pursuant to Rule

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[3] The North Carolina Environmental Policy Act, N.C. Gen. Stat. § 113A-1 *et seq.*, is referred to as SEPA - the State Environmental Policy Act - as well as by the acronym NCEPA. The Foundation has utilized the acronym SEPA given the terminology originally set forth in Plaintiffs-Appellants' Complaint.

12(b)(6). (R. pp. 138-39.) Having concluded that Plaintiffs failed to state claims upon which relief could be granted, the trial court did not reach the Motions to Dismiss pursuant to Rule 12(b)(1). (R. p. 139.) On 2 December 2013, Plaintiffs filed a Notice of Appeal of the order granting the Foundation's and the Endowment Fund's Motions to Dismiss. (R. p. 142.)

STANDARD OF REVIEW

The standard of review of an order of dismissal based upon Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is whether the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760, 529 S.E.2d 693, 694 (2000). "A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim." *Id.*, at 760-61, 529 S.E.2d at 694 (citations omitted).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING THE FOUNDATION'S MOTION TO DISMISS PLAINTIFFS-APPELLANTS' CLAIMS ARISING UNDER THE NORTH CAROLINA ENVIRONMENTAL POLICY ACT.

In their Complaint, Plaintiffs-Appellants assert claims for declaratory judgment and injunctive relief arising under SEPA. In their First, Third and Fourth Causes of Action, Plaintiffs-Appellants seek a declaratory judgment that SEPA applies to the sale of Hofmann Forest, that the Foundation and Endowment Fund failed to comply with SEPA, and that the sale cannot not move forward until SEPA requirements are satisfied. In conjunction therewith, Plaintiffs-Appellants request an injunction to stop the sale of Hofmann Forest.

In essence, Plaintiffs-Appellants assert that Defendants-Appellees are required to prepare an environmental impact statement ("EIS") prior to selling Hofmann Forest under SEPA, specifically N.C. Gen. Stat. § 113A-4(2). (R. pp. 59-62.) The statute provides that every State agency shall include an EIS "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." N.C. Gen. Stat. § 113A-4(2)(2013) (emphasis added). Assuming *arguendo* that the Endowment Fund, as record owner of Hofmann Forest, is a "State agency" under SEPA,

or that SEPA applies to property in which a reversionary interest is held by a private corporation, SEPA still does not apply to the transaction at issue here because the pending sale of Hofmann Forest does not involve the "use of public land" or the expenditure of "public moneys."

A. The North Carolina Environmental Policy Act Does Not Apply Because There Is No Use of Public Land for Projects or Programs.

The proposed sale of Hofmann Forest is not a "use of public land" that would require an EIS. The term "use of public land" is defined by SEPA 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. Gen. Stat. § 113A-9(11)(2013). Subsection (a) is the only potentially applicable language. The act of transferring title to Hofmann Forest will not result in changes in the natural cover or topography of Hoffman Forest, and further, the act of transferring title does not involve "[t]he grant of a lease,

easement, or permit". Under the plain language of the statute, the sale does not involve "use of public land," and accordingly, the requirements of SEPA simply do not apply.

Plaintiffs-Appellants attempt to argue that transfer of ownership of Hofmann Forest is equivalent to an action by a state agency to award grants, issue permits, or grant licenses, which, they state, constitutes action under SEPA. In support of their position, Plaintiffs-Appellants rely on a guidance manual published by the North Carolina Department of the Environment and Natural Resources that explains for a project to be subject to SEPA, it must involve action by a state agency "such as appropriating land or money, awarding grants, issuing permits, or granting licenses." (Pl.-App. Br. p. 14.) Plaintiffs-Appellants state that the "issuance of a permit is a classic trigger for NCEPA" and that "printing and signing of a permit, just like the printing and signing of a deed, creates no environmental impact itself." (Pl.-App. Br. p. 14.)

This argument ignores the fact that permits are required in the above situations because an entity intends to implement a project or program, or in other words, to *take some specific action* that is regulated. Grants and licenses are awarded because an entity has requested permission to undertake a project or to perform some specific action for which money or

permission is needed. Those permits, grants and licenses are necessary and inextricably entwined with the action being pursued. That is not the case here as there is not a specific action, project or program tied to the transfer. The statute itself emphasizes the requirement that there be some project or program at issue. An EIS is required for "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." N.C. Gen. Stat. § 113A-4(2) (emphasis added).

Plaintiffs-Appellants cite to *In re EMC* and *Citizens for Clean Industry* to bolster their position, but reliance on such cases is misplaced. In the former case, the Orange Water and Sewer Authority ("OWASA") petitioned the Environmental Management Commission ("Commission") for a "certificate authorizing institution of eminent domain proceedings in order to construct a dam and reservoir for water supply purposes." *In re Env'l Mgmt. Comm'n*, 53 N.C. App. 135, 136, 280 S.E.2d 520, 522 (1981). In that case the Court of Appeals held that certification action by the Commission triggered the preparation of an EIS. However, there the Commission was specifically empowered by the legislature to issue certificates authorizing land and water rights acquisition, and the entire purpose of the

certificate was to allow acquisition for the purpose of constructing a dam and reservoir. In other words, there was a specific action behind the certification.

In *Citizens for Clean Industry v. Lofton*, 109 N.C. App. 229, 427 S.E.2d 120 (1993), the environmental assessment was triggered because a permit was sought that would allow a specific action - the discharge from a wastewater treatment plant. Here, no matter the speculation Plaintiffs-Appellants may raise with respect to the future of Hofmann Forest, the only issue is the sale of property to a private entity, and there is no specific action, project, program or activity linked to such sale.

SEPA recites that its purpose 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." N.C. Gen. Stat. § 113A-2 (2013). The requirement of an EIS is designed "to provide a mechanism by which all affected State agencies raise and consider environmental factors of *proposed projects*" and to provide the responsible agency "with a useful decisionmaking tool." *In re Env'l Mgt. Comm'n*, 53 N.C. App. at 144, 280 S.E.2d at 527 (emphasis added). Again, the common factor is that the EIS is to be utilized to evaluate some specific project, program

or proposed action. Because the sale of Hofmann Forest is not an activity that results in changes in the natural cover or topography of the land, there is no defined environmental impact to consider. Further, because there is no specific project or program attached to the sale, there is no action that could be argued as "significantly affecting the quality of the environment of the State."

Plaintiffs-Appellants also attempt to argue that the sale of land should be read into the definition of "use of public land" by this Court, even though "sale" is *not* included in the language of the definition. The General Assembly provided a precise definition of "use of public land," and listed the grant of a lease, permit, or easement, but not the sale of land. In addition, the "use of public land" must be an activity that results in changes in the natural cover or topography, which a sale alone does not do. It must be assumed under the doctrine of *expressio unius est exclusio alterius* that the General Assembly intentionally omitted the sale of land from this definition. "Where a statute sets forth one method for accomplishing a certain objective, or sets forth the instances of its application or coverage, other methods or coverage are necessarily excluded under the maxim *expressio unius est exclusio alterius.*" *State ex rel. Hunt v. North Carolina*

Reinsurance Facility, 302 N.C. 274, 290, 275 S.E.2d 399, 407 (1981) (internal quotation marks omitted); *see also 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." (internal quotation marks omitted)); *Dickens v. Puryear*, 302 N.C. 437, 444 n.8, 276 S.E.2d 325, 330 n.8 (1981).

It must also be emphasized that Hofmann Forest was gifted by the Foundation to the Endowment Fund, expressly subject to a reversionary interest. (R. pp. 5, 9, 21-22, 112.) "A reversionary interest is 'any future interest left in a transferor or his successor in interest.' It arises when the grantor 'transfers less than his entire interest' in a piece of land, and it is either certain or possible that he will retake the transferred interest at a future date." *Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1266 (2014) (quoting Restatement (First) of Property § 154(1)(1936)). The Endowment Fund simply holds Hofmann Forest as a gift, subject to the restrictions of the Deed of Gift and Agreement. The Foundation is a private, nonprofit corporation formed to support the College of Natural Resources at North Carolina State

University. (R. pp. 5, 24, 53, 68.) Given the manner and restriction of the title, Hofmann Forest is uniquely held and does not qualify as "public land" under SEPA.

B. The North Carolina Environmental Policy Act Does Not Apply Because There Is No Expenditure of Public Moneys for Projects or Programs.

The Endowment Fund is a creature of statute and was created to support North Carolina State University, separate and apart from the moneys received "from State appropriations and from tuition and fees collected from students and used for the general operation of the institution." N.C. Gen. Stat. § 116-36(d). The Endowment Fund meets this purpose through private gifts, like that of Hofmann Forest gifted by the Foundation. *See id.* (noting that "the trustees of an endowment fund may receive and administer as a part of the endowment fund gifts, and devises and any other property of any kind").

The Endowment Fund is specifically tasked with the responsibility for investment of the fund, "but in compliance with any lawful condition placed by the donor upon that part of the endowment fund to be invested." N.C. Gen. Stat. § 116-36(e)(2013). The Endowment Fund is also specifically authorized to buy, sell, lend, exchange, lease, transfer, or otherwise dispose of or to acquire any property, real or personal, in either public or private transactions - except when such act

would violate a lawful condition of receipt of the gift. N.C. Gen. Stat. § 116-36(g)(2013). When engaging in such activities, the Endowment Fund is not subject to Chapters 143, 143C or 146 of the General Statutes, which respectively deal with State Departments, Institutions and Commissions; the State Budget Act; and State Lands. *Id.*

Hofmann Forest was gifted by the Foundation to the Endowment Fund in 1977 with specific restrictions related to the Endowment Fund's use of the proceeds of Hoffman Forest. (R. pp. 17-24.) The Agreement expressly contemplated the possibility of the sale of Hoffman Forest. (R. p. 114). Under the Agreement and Deed of Gift to the Endowment Fund, the Foundation remains responsible for all operating and development expenses and taxes in connection with Hofmann Forest. (R. pp. 110 - 116.) The net income, of whatever kind, earned by Hofmann Forest, as well as the proceeds from any sale or distribution, can only be used to support the College of Natural Resources. (R. p. 115). Failure to honor this condition will result in Hoffman Forest reverting to the Foundation, a private entity.

The Endowment Fund is, at best, a passive record owner, that simply holds Hofmann Forest as a gift, subject to the restrictions of the Deed of Gift and Agreement. There are no "public moneys" at issue in this unique situation. The

Endowment Fund is not entitled to benefit from any moneys associated with Hofmann Forest. (As discussed above, there are also no projects and programs tied to any expenditure of public moneys with respect to the sale of Hofmann Forest.)

The only alleged "public moneys" specifically identified by Plaintiffs-Appellants to support their argument that SEPA applies to the sale of Hofmann Forest are as follows:

a. Seller's payment for preparation of a deed and other documents necessary to perform Seller's obligations under the Purchase Agreement;

b. Seller's payment of excise tax (revenue stamps);

c. If there are exceptions to title, Seller's payment to remove, satisfy or otherwise cure those exceptions; and

d. Splitting of profits from timber harvesting from the date of the Purchase Agreement through Closing between Seller and Purchaser.

(R. at 61.) Deed preparation and payment of excise taxes are specifically made a part of the Seller's closing obligations, meaning that those costs will be paid out of proceeds at closing. (R. at 92.) In other words, the profit from the sale of Hofmann Forest will be reduced by those costs. Similarly, if timber profits are split, that simply means that the

Foundation's share of net income attributable to timber sales during that time period is reduced. Again, no proceeds related to Hofmann Forest inure to the benefit of the Endowment Fund. The remaining item - payment to address exceptions to title - is speculative. The only way any moneys would be expended is if there were any exceptions to title that were uncovered. Even if any exceptions were uncovered, the Foundation is responsible for all operating and development expenses of Hofmann Forest (R. p. 22), and such payment to address any exceptions would simply reduce the net income paid to the Endowment Fund for the benefit of the College of Natural Resources at closing.

Plaintiffs-Appellants attempt to support their theory that "public moneys" are at issue by citing to the definition of "public moneys" contained in 1 NCAC 25.0108(b)(4)(2013). (Pl.-App. Br. pp. 21-22.) However, the regulations implementing SEPA that are described in Chapter 25 of the Administrative Code are applicable only when there is (1) an expenditure of public moneys or the use of public land; (2) an action by *a* state agency subject to this Chapter; *and* (3) a potential environmental effect upon, *inter alia*, natural resources. 1 NCAC 25.0108(a)(2013) (emphasis added). The term "State agencies subject to this Chapter" is a defined term, and is defined by reference to several statutes which list principal

departments such as the Department of Health and Human Services, Department of Revenue, Department of Commerce, etc., as well as their subdivisions. *See* 1 NCAC 25. 0108(b)(7)(2013) and statutes cited therein. The Endowment Fund is not state agency subject to Chapter 25 and the definition of "public moneys" relied upon by Plaintiffs-appellants is not applicable.

C. The National Environmental Policy Act Is Not Applicable.

Plaintiffs-Appellants also argue that under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), which applies only to federal land, the sale or exchange of land has been treated as triggering NEPA requirements, and cite to an opinion from the North Carolina Attorney General to support the idea that SEPA must be interpreted in the same manner:

> This question has been raised under the National Environmental Policy Act, 42 USCA § 4321 et seq., the federal Act that the State Environmental Policy Act traced with very few exceptions almost verbatim. Since the two Acts are extremely similar, **unless the State Act differs substantially from the federal Act in its wording**, the legal reasoning of the federal courts in interpreting the Federal Act applies to the State Act also.

Op. Att'y Gen., *Environmental Policy Act of 1971; Application of Ongoing Projects* (July 13, 1973) (emphasis added). The obvious flaw in Plaintiffs-Appellants' theory is that, with respect to the issues before this Court, NEPA and SEPA do differ substantially.

The central question before this Court is whether SEPA is applicable to the sale of Hofmann Forest such that an EIS must be prepared. NEPA states that all federal government agencies shall include an EIS "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). When adopting SEPA, the North Carolina General Assembly replaced the expansive jurisdictional language of NEPA, namely, "proposals for legislation and other major Federal actions," by the more restrictive language, "any action involving expenditure of public moneys or use of public land for projects or programs." *See* N.C. Gen. Stat. § 113A-4(2). Further, while NEPA does not contain definitions, our legislature expressly defined the question before this Court, including the "use of public land," and as discussed above, the definition does not include the sale of land. Therefore, any case construing NEPA is necessarily inapposite to this case.

II. THE TRIAL COURT DID NOT ERR IN GRANTING THE FOUNDATION'S MOTION TO DISMISS PLAINTIFFS-APPELLANTS' CLAIMS ARISING UNDER ARTICLE XIV, SECTION 5 OF THE NORTH CAROLINA CONSTITUTION.

Plaintiffs-Appellants have not advanced specific, applicable authority supporting their contention that the trial court erred in dismissing their claims under Article XIV,

Section 5 of the North Carolina Constitution. That Section states, in full:

> 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.

N.C. Const. art. XIV, § 5. Plaintiffs-Appellants have repeatedly cited to the first paragraph of Article XIV, Section 5, as support for their position that the sale of Hofmann Forest by the Endowment Fund or other party should be forever prohibited. A simple reading of this constitutional provision compels rejection of Plaintiffs-Appellants' sweeping

interpretation which is based upon only a part of Section 5. The provision indicates *authorization* to preserve property ("it shall be a proper function ... to acquire and preserve ..."), as opposed to *prohibition* on the sale of property, particularly property with a reversionary interest held by a private corporation.

Plaintiffs-Appellants also completely ignore the second paragraph of Section 5, which is a provision acknowledging that the State's policy of conservation is to be advanced by acquisition of lands and the dedication of lands through legislative action as part of the State Nature and Historic Preserve. The paragraph expressly provides a specific mechanism to conserve and protect the lands and waters of the state, but it does not prohibit in any way the sale of land or provide a private cause of action.

Plaintiffs-Appellants would have this Court impermissibly read into the North Carolina Constitution a prohibition on the sale of land that simply is not present. "In interpreting our Constitution - as in interpreting a statute - where the meaning is clear from the words used, we will not search for meaning elsewhere." *State ex rel. Martin v. Preston*, 325 N.C. 438, 439, 385 S.E.2d 473, 479 (1989).

Plaintiffs-Appellants label Section 5, and in particular its first paragraph, as a "constitutional mandate." In reality, it is simply a policy declaration, as confirmed by its own words: "It shall be the *policy* of this State ..." N.C. Const. art. XIV, § 5; *see also,* Milton S. Heath, Jr. and Alex L. Hess, III, *The Evolution of Modern North Carolina Environmental and Conservation Policy Legislation,* 29 Campbell L. Rev. 535, 539 (2007) (noting that with respect to Section 5, "It is worth emphasizing that the constitutional provision begins with the words, "It shall be the policy.") Although there is an express *authorization* to allow the State and its counties, cities and towns to *acquire* property for preservation purposes, there is nothing whatsoever that prohibits the sale of property generally.

To bolster their contention that the Constitution forbids the sale of Hofmann Forest, Plaintiffs-Appellants cite to *State ex rel. Rohrer v. Credle,* 322 N.C. 522, 369 S.E.2d 825 (1988). Citation to *Credle* is unavailing, 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 that the constitutional provision reflects the "endorsement" by the people of North Carolina of the public policy behind legislative actions regulating the fishing of oyster bottoms. *Credle,* 322

N.C. at 532, 369 S.E.2d at 831. In *Credle*, the constitutional policy 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.*

Plaintiffs-Appellants also cite cases under various other state constitutions for the proposition that "other states have allowed individuals to bring state constitutional challenges to various acts affecting the environment on the basis that the act violates the state's environmental constitutional amendment." (Pl.-App. Br. p. 34.) The cases cited, however, involve decidedly different issues as well as decidedly different constitutional language, and provide no support for Plaintiffs-Appellants' arguments.

For example, in the first case, *Sierra Club v. Dep't of Transp.*, the issue before the court was related to an environmental group's standing to bring claims asserting that the Hawaii Department of Transportation was required to perform an environmental assessment under state law. *Sierra Club v. Dep't of Transp.*, 167 P.3d 292, 297 (Haw. 2007). The issue was not that the plaintiffs had brought a "state constitutional challenge" on the basis that the challenged act "violate[d] the

state's environmental constitutional" provisions. In analyzing the standing issue, the court discussed Hawaii's "Environmental Rights" constitutional provision, which stated "[e]ach person has the right to a clean and healthful environment, as defined by laws relating to environmental quality ... *Any person may enforce this right against any party, public or private, through appropriate legal proceedings.*" *Id.* at 313 (citing Haw. Const., art. XI, § 9). The language therein conveyed specific rights to individuals, with a specific right of enforcement, which supported the court's interpretation that the group in question had standing. Neither the situation nor the language of the Hawaii Constitution is analogous to the matter before this Court.

In *Owsichek v. State Guide Licensing & Control Bd.*, 763 P.2d 488, 491 (Alaska 1988), the issue before the court was whether two statutes authorizing a licensing board to establish exclusive guide areas violated the Alaska Constitution's common use clause, which specifically reserved natural state, fish, wildlife, and waters to the citizens of Alaska for common use. Here, Plaintiffs-Appellants have mounted no constitutional challenge to any state statute.

Finally, in *Matter of Am. Waste & Pollution Control Co.*, 633 So.2d 188 (La. Ct. App. 1994), the challenge was to a state

agency's issuance of a construction permit for a solid waste facility. The court noted that the state's regulatory framework for environmental protection was based on the Louisiana Constitution, and went on to discuss the interrelationship of constitutional, statutory and regulatory requirements. *Id.* at 193. The Louisiana Constitution was interpreted to impose a duty of environmental protection on state agencies, require environmental protection "insofar as possible and consistent with the health, safety, and welfare of the people," and mandate the legislature to enact laws to implement said policy. *Id.* (*quoting* La. Const., art. IX, Sec. 1).

Our Constitution does not contain the same language. Article XIV, Section 5 of the North Carolina Constitution merely sets forth a policy of conservation authorizing the acquisition and preservation of natural resources, and to that end, authorizing the designation of certain land as part of the State Nature and Historic Preserve. The prohibition requested by Plaintiffs-Appellants is simply not present.

The cases cited by Plaintiffs-Appellants obviously do not interpret our Constitution. Even if the language were similar, which it is not, in construing and applying the Constitution of North Carolina this Court is not bound by the decisions of federal court, including the Supreme Court of the United States,

much less other state courts. *See State ex rel. Martin*, 325 N.C. at 449-50, 385 S.E.2d at 479 (1989). Article XIV, Section 5 of the North Carolina Constitution neither prohibits the sale of property nor creates a private right of action in Plaintiffs-Appellants.

CONCLUSION

WHEREFORE, for the reasons stated herein, Defendant-Appellee NC State Natural Resources Foundation, Inc. respectfully requests that this Court affirm the decision of the trial court dismissing Plaintiffs-Appellants' Amended and Supplemental Complaint for Injunctive Relief and Petition for Declaratory Judgment.

This the 26th day of June, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on all parties by depositing a copy, contained in a first-class-postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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This 26th day of June, 2014.

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