No. COA 14-311 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

FREDERICK CUBBAGE, RONALD W. SUTHERLAND, PHD., RICHARD J. "BARNY" BERNARD, JR., JAMES D. GREGORY AND JOHN EDDY, Plaintiffs-Appellants, v. THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH AND NC STATE NATURAL RESOURCES FOUNDATION, INC., Defendants-Appellees.	)	From Wake County

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PLAINTIFFS-APPELLANTS' REPLY TO BRIEF OF DEFENDANT-APPELLEE THE BOARD OF TRUSTEES OF THE ENDOWMENT FUND OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH

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ARGUMENT

I. PLAINTIFFS-APPELLANTS HAVE PROPERLY AND ADEQUATELY ALLEGED STANDING

A. The Trial Court Did Not Rule on Standing, Specifically Reserving the Issue.

This Court need not address this issue. The trial court specifically reserved ruling on the standing issue below. (R pp 138-139). Appellee The Board of Trustees of the Endowment Fund of North Carolina State University at Raleigh ("Appellee Board") is correct that this issue can be raised on appeal, and that this Court may rule on the issue. However, if it reviews this issue, this Court should rule that Plaintiffs-Appellants ("Appellants") have standing.

B. Appellants Have Adequately Alleged Standing.

Standing is whether a party has a sufficient stake in an otherwise justiciable controversy such that the party may properly seek adjudication of the matter. *Sierra Club v. Morton,* 405 U.S. 727, 731-32 (1972). The North Carolina Constitution grants access to the courts -- standing-- to those who suffer harm. N.C. Const. Art. I § 18. To have standing, a plaintiff must show: "(1) 'injury in fact,' or injury that is concrete and particularized, and actual or imminent; (2) causation between the challenged action of the defendant and the injury; and (3) likelihood that the injury will be redressed by a favorable decision." *Lee Ray Bergman Real Estate Rentals v. N. Carolina Fair Hous.*

Ctr., 153 N.C. App. 176, 179-80, 568 S.E.2d 883, 886 (2002). Only one plaintiff needs to have standing for the case to proceed. *Western Land Exchange Project v. U.S. Bureau of Land Mgmt.,* 315 F.Supp.2d 1068, 1076 (D.Nev 2004).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.' " *Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002), quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561, (1992) (quoting *Lujan v. National Wildlife Federation,* 497 U.S. 871, 889 (1990)). The Amended Complaint contains comprehensive standing allegations, meeting all the requirements of the law, in paragraphs 2-6, 10, 12 and 13, as well as the incorporated Affidavit of Eddy.

Appellee Board regularly uses words and phrases like "failed to establish" and "no evidence exists" to suggest to the Court that Appellants were required to prove the elements of standing below, when there has been no opportunity to do so. At trial, or perhaps on summary judgment, proof or a forecast of proof will be necessary. But on a motion to dismiss, the allegations are at issue.

It is also worth noting that Appellee Board has failed to cite to any case in which a plaintiff was found not to have standing under NCEPA to seek the relief sought by

these Appellants.

Frequently, standing turns on the first element, injury. *Neuse River Found., Inc. v. Smithfield Foods, Inc.,* 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002). An injury in fact is "'an invasion of a legally protected interest that is (a) concrete and particularized and (b) *actual or imminent,* not conjectural or hypothetical . . . . .'" *Id.* (quoting *Lujan,* 504 U.S. at 560-61) (emphasis supplied in *Neuse River Found., Inc.*). An injury does not have to have already occurred, and, instead, a showing of immediate or threatened injury is sufficient. *Mangum v. Raleigh Bd. of Adjustment,* 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008).

The Fourth Circuit recently analyzed the issue of whether a plaintiff's member had standing in order for the plaintiff to bring suit under the Clean Water Act against a smelting company located at the confluence of two waterways. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387 (4th Cir. 2011). The Court stated that "environmental plaintiffs" allege injury in fact when they allege they are persons "for whom the aesthetic and recreational values of the area will be lessened by the challenged activity" and the person must use the area affected by the challenged activity. *Id.* at 397. The member being analyzed conducted canoe and kayak trips in the area beginning slightly upstream of the confluence, continuing through the confluence and farther downstream. *Id.* The member had also decreased the number

of trips due to the concern of defendant's runoff. *Id.* The Fourth Circuit found that this was enough for the plaintiff to have standing. *Id.*

Additionally, the injury in fact requirement may be demonstrated based on a procedural injury under NCEPA. "[N]either [S]EPA nor NEPA contain explicit judicial review provisions. Nevertheless, federal courts 'have long recognized that [they] have jurisdiction over NEPA challenges pursuant to the [federal] APA," 5 U.S.C. § 702. *Dep't of Transp. v. Blue*, 147 N.C. App. 596, 604, 556 S.E.2d 609, 617-18 (2001) (citations omitted) "Likewise, this Court has adopted the view that judicial review of an alleged [S] EPA violation is available under the NCAPA's judicial review provisions, particularly G.S. § 150B–43. *Id.* "[T]he 'procedural' injury implicit in agency failure to prepare environmental impact statement is itself a sufficient 'injury in fact' to support standing as 'aggrieved parties' under [Administrative Procedure Act provision authorizing judicial review] as long as such injury is alleged by a plaintiff having 'sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have'." *Orange Cnty. v. N. Carolina Dep't of Transp.*, 46 N.C. App. 350, 360-61, 265 S.E.2d 890, 899 (1980) (internal citation omitted).

The standing allegations of Appellants are extensive and detailed. Seven paragraphs of the Amended Complaint and almost the entire Affidavit of John Eddy set

out detailed standing allegations. They are summarized as follows: one Plaintiff is a professor and former Department Head at NCSU who teaches and performs research related specifically to the Hofmann Forest; one works as conservation scientist to protect coastal habitat and biodiversity; one chaired the Forestry Foundation; one helped establish the wetlands banks and drainage systems on the Forest and holds workshops there; and one shellfishes and owns property and lives near enough the Forest to be directly injured by the proposed development of the Forest. Three of the five hold Ph.Ds in forestry or related fields; one is a civil engineer. Again, this is a mere sampling of the grounds for standing; standing does not depend on what we lawyers say in this brief, but what is alleged in the Amended Complaint and its Exhibits, including the Affidavit of John Eddy.

The connections of the Plaintiffs-Appellants to this forest are wide and deep. Their injuries are particularized, concrete, actual, and imminent. This is the group of persons in this world who are most qualified to bring this suit, and if they do not have standing, no one does.

This was recognized by the trial judge and by counsel for Appellee Board at the hearing below. Critical portions of the exchange follow, and the entire exchange is in the Hearing Transcript at pp 52 line 25 through 53 line 24:

The Court: Do you want to respond to their argument that if none of

these gentlemen has standing then no one does?
Ms. Murphy [counsel for Board]: Under SEPA if no one has standing?
The Court: If none of these guys have standing, then no one would. Who would have standing?
Ms, Murphy: . . . just an analogy which may or may not be a good one.
The Court: Might not be.
Ms Murphy: But my point is they—well—and maybe what you're getting at is –
The Court: So you're saying no one can bring a lawsuit to enforce the provisions of SEPA?
Ms. Murphy: No, I'm not saying that.
The Court: Then who can?
Ms. Murphy: In this case I'm not sure that anyone can.

The standing doctrine does not exist for the purpose of denying citizens of North Carolina access to the courts. The implicit acknowledgment by Appellee that denying these five Plaintiffs standing would mean that no one could challenge Appellee'a actions is telling. "The gist of standing is whether there is a justiciable controversy being litigated among adverse parties with substantial interests affected so as to bring forth a clear articulation of the issues before the court." *Creek Pointe HOA v. Happ*, 146 N.C. App. 159, 165, 552 S.E.2d 226, 226 (2001). These parties are certainly adverse, these parties certainly have substantial interests affected, and this is a justiciable controversy.

Pursuant to NEPA, upon which NCEPA is modeled, once a plaintiff establishes

an injury in fact, the other factors for standing are generally more relaxed.[1] *Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1172 (11th Cir. 2006). To establish causation, a plaintiff must "demonstrate only that it is reasonably probable that the challenged actions will threaten its concrete interests." *Id.*

Appellee Board relies heavily on *Neuse River Foundation, Inc.* to support its contention that Appellants lack standing. *Neuse River* is inapposite for several reasons. First, Appellee Board quotes a critical portion of *Neuse River* twice, and relies heavily upon it: "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." Board Br. at 11, 15, quoting *Neuse River* at 116, 574 S.E.2d 48, 53. Appellants, however, do not allege injury to aesthetic or recreational interests. Appellants allege injury to their ability to do their life's work, and allege injury to their property interests. This quote from *Neuse River* is inapplicable.

Second, the plaintiffs in *Neuse River* alleged public nuisance violations and sought monetary damages to be paid into a court-ordered trust for the restoration of public waters, an extraordinary remedy, and an attempt to circumvent existing law and

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[1] *See Juanita Bay Valley Community Ass'n v. City of Kirkland*, 510 P.2d 1140, 1146-47 (Wash App. 1973) (discussing NEPA and Washington's NCEPA and noting "It is well settled that when a state borrows federal legislation it also borrows the construction placed upon such legislation by the federal courts.")

policy related to hog farms and public waters. *Id.* This Court held that the plaintiffs lacked standing because this remedy simply was not available, stating "[i]t is not the role of the judicial branch of government to pre-empt the legislative branch's policy considerations and appropriate authorization of an activity." *Id.* at 118, 574 S.E.2d at 54. This is the polar opposite of what Appellants seek here: the vindication of rights and responsibilities exactly as the legislature has enacted and intended. *See* N.C. Gen. Stat. §113A-2.

In addition, *Neuse River* did not involve an action for declaratory judgment, but rather addressed standing in a public nuisance lawsuit seeking damages. Consequently, *Neuse River* is inapposite.[2]

A justiciable controversy entails "an actual controversy between parties having adverse interests in the matter in dispute." *Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, ____ N.C. App. ____, 747 S.E.2d 610, 614 (2013) (quoting *Gaston Bd. of Realtors, Inc. v. Harrison,* 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)).

> To satisfy this requirement: [T]he plaintiff shall allege in his complaint and show at the trial that a real controversy, arising out of their opposing

---

[2]The Court in *Neuse River Found., Inc.* pointed out that in determining a party's standing, "we must also examine the forms of relief sought". 155 N.C.App. at 114, 574 S.E.2d at 52.

> contentions as to their respective legal rights and liabilities ... exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. Legal rights and liabilities must rest upon some reasonably settled basis, fixed either by the common law or by statute. Thus, allegations based on statutory rights can satisfy the controversy requirement."

Id. at 614-15 (citations omitted). "North Carolina's Declaratory Judgment Act expands the controversy requirement by establishing that trial courts not only have jurisdiction over alleged prior violations of rights, but also when litigation over a potential violation 'appear[s] unavoidable.'" *Id.* (quoting *Gaston Bd. of Realtors,* 311 N.C. at 234, 316 S.E.2d at 61).

In the instant matter, Appellants seek declaratory judgment and not monetary damages. The issue of standing in the declaratory judgment context was examined by this Court in *Village Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 485-86, 520 S.E.2d 793, 795-96 (1999). In *Village Creek*, a property owners' association and landowners brought an action against a neighbor, town commissioners, planning board, and zoning administrator seeking a declaratory judgment that conditional use rezoning of a neighbor's property was invalid. The trial court dismissed the plaintiffs' complaint for lack of subject matter jurisdiction finding that the plaintiffs lacked standing. *Id.* at 484-85, 520 S.E.2d. at 795.

On appeal, the defendants argued that the complaint was properly dismissed for

lack of standing because the plaintiffs failed to allege special damages in their complaint. This Court disagreed and stated that the "Declaratory Judgment Act, authorizing the filing of declaratory judgment actions, does not require a party seeking relief be an 'aggrieved' person or to otherwise allege special damages. (citation omitted). Furthermore, our courts have not previously held that special damages must be alleged in a declaratory judgment action." *Id.* at 486. The Court held that because the Declaratory Judgment Act does not require a pleading of special damages, it is not required and the plaintiffs' complaint should not have been dismissed for lack of standing based on plaintiffs' failure to allege special damages. *Id.* As outlined above, Appellants have standing to pursue declaratory judgment and the injunction.

Appellee Board also cites to *Marriott v. Chatham County*, 187 N.C. App. 491, 654 S.E.2d 13 (2007) in support of its assertion that Appellants lack standing. This reliance is also misplaced. The Court stated in the first sentence of that opinion the gist of the case: "When plaintiffs seek a remedy which the court is without the authority to grant, plaintiffs do not have standing to pursue the claim." *Id.* at 492, 654 S.E.2d at 15. This has no application to the instant case.

In *Marriott*, this Court held that a county's adoption of minimum criteria for the development of real property and for preparation of environmental impact statements pursuant to the enabling statute was a legislative function, and consequently, the trial

court lacked authority to direct the county, the county board of commissioners, and the planning board to establish minimum criteria to be used in determining whether developers were required to submit environmental impact statements or to amend ordinances governing the same. To grant the remedy sought by the plaintiffs would violate the doctrine of separation of powers, and consequently, the trial court did not have the authority to do so. *Id.* at 495. Thus, the Court first found that the specific relief sought by the plaintiffs was unavailable and then looked at the issue of standing. While *Marriott* certainly outlines the standing requirements, its holding focused on the availability of the remedy sought and the requisite third element of redressability. The Court's decision did not turn on whether there was an "injury in fact". Because the remedies sought were "unavailable and inappropriate," the plaintiffs' claims did "not satisfy the third element of standing, which is redressability of their injury by a favorable decision." *Id.* The legal logic forming the basis of the *Marriott* decision is clearly not applicable to the instant matter.

II. APPELLEES' ARGUMENTS THAT THE NORTH CAROLINA ENVIRONMENTAL POLICY ACT (NCEPA) DOES NOT APPLY DO NOT AVAIL.

Along with Appellee Foundation, Appellee Board adopted a scattergun approach to briefing the NCEPA issues. They make a number of basic errors in the basic workings of NCEPA, and argue a number of "long shot" arguments, often unsupported

by any authority.

On the allegations of the Amended Complaint, taken as true, NCEPA applies, is triggered, and Appellees have failed to comply with the law.

A. Neither whether an EIS should be prepared nor whether significant environmental impacts are likely is before this Court.

Both Appellees make the mistake of analyzing this case as if the question were whether an EIS must be prepared, instead of the preliminary question of whether the NCEPA applies and is triggered. As explained in our brief in chief, the triggering of NCEPA begins a process during which the agency will decide, whether impacts to the environment are likely to be significant and therefore whether to prepare an environmental impact statement (EIS).

Appellee Board undertakes a multi-page analysis that starts with a lengthy quote from N.C.G.S. §113A-4(2) and goes on to analyze that provision and apply its language to several other questions raised by Appellee Board. (Appellee Bd. Br. at 16 ff). That language, however, does not determine whether NCEPA is triggered—the question in this case—but whether an EIS is required. As the statute says, "'Environmental impact statement' (EIS) means the detailed statement described in G.S. 113A-4(2)". N.C. Gen. Stat. §113A-9(3). The question of whether to prepare an EIS is not before this court, and cannot be before this court until the agency goes

through the process of preparing an EA and deciding whether to prepare an EIS or to instead submit a finding of no significant impact (FONSI). Again, "'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. Gen. Stat. §113A-9(1).

B. Responses to miscellaneous arguments about public moneys

Appellee Board argues that closing costs are not "public monies" because they are analogous to "resources used solely for processing a license, a certificate, or a permit." 01 NCAC 25 .0108 (b)(4). There are two problems with this argument. First, the definition of "public monies" defines them to be "all expenditures in support of the proposed project by federal, state or local or quasi-public entities from whatever source derived"—about the broadest definition possible, with three sets of narrow exceptions then listed. Closing costs in a sale are not listed among the exceptions, and are certainly included in the broad definition. These are public monies.

The second problem is that this argument ignores numerous allegations of the complaint regarding expenditures that go well beyond closing costs. Even if Appellee's argument were correct, it would not establish that the expenditure of public monies is not involved.

Appellee Board constructs an argument based on the Uniform Prudent

Management of Institutional funds Act ("UPMIFA"). This argument never really gains traction. First, the analysis assumes facts that cannot be assumed: they do not appear in the Complaint or its attachments. Namely, the argument assumes that the funds that would be expended on this project would come from a restricted gift that would have to be managed according to the UPMIFA. There is no particular reason for us to believe that to be true, and it certainly is not alleged in the Amended Complaint. Second, the operative statute in this case is NCEPA, which specifically defines "public monies" to include all expenditures . . . by state or quasi-public entities "from whatever source derived."

Appellee Board follows with another argument related to the source of funds. Again, the source of funds Appellees allege is not alleged in the Amended Complaint, the statute includes funds from "whatever source derived", and Appellee will have a chance on remand to prove a source of funds and then argue that source is excluded from NCEPA.

C. Public lands.

Appellee Board argues, without support, that the reversionary interest retained by Appellee Foundation takes the Hofmann Forest out of the definition of public land under NCEPA. The statutory definition of "public land" does not require fee simple ownership by the State, but instead includes "all land and interests therein."

N.C.Gen.Stat.§ 113A-9(7) (2013). This argument is unsupported and must be rejected.

Appellee Board makes a lengthy argument regarding "use of public of land". This argument was and covered in detail in Appellants' brief in chief.

D. There is no relevant "project or program" requirement.

Appellee Board suggests that the conversion of the Hofmann Forest to residential, agricultural, and commercial development, as fully alleged in the Amended Complaint and exhibits, is not a "project or program." There is no reason to accept this conjectural argument about the facts, even if their argument about the law were true, which it is not.

There is no requirement in NCEPA or its implementing regulations that—in order to trigger NCEPA—there must be something denominated a "project or program". Instead, the requirements are that there be (1) an expenditure of public monies or use of public land, (2) an action by a State agency, and (3) a potential environmental effect. 01 NCAC 25 .0108. Appellee Board's attempt to graft a non-existant additional stumbling block is not based in the law.

In fact, Appellee Board's use of that phrase is another example of its confusion about the statute. Appellee extracts the phrase "project or program" from section 113A-4(2) of the NCEPA, which applies only to the preparation of an EIS, an issue

that is not before this court.[3]

Last, Appellee Board makes an argument that a sale of land cannot be a "project or program" because it is a mere transaction. (Appellee Bd. Br. at 24-30). This argument was largely addressed in our brief in chief, but one new aspect needs comment. The parties all agree—because the statute clearly says so—that the lease of public land would trigger NCEPA. A lease is no more or less a "project or program" than a sale. There is no project or program requirement.

III. CONSTITUTIONAL ARGUMENT

Appellee Board makes an argument regarding the applicability of Article XIV, Section 5 of the North Carolina Constitution that is largely duplicative of the Appellee Foundation's brief. In the interest of judicial economy, we refer the Court to the Brief in Reply to Appellee Foundation, as well as our brief in chief.

CONCLUSION

For all the reasons stated above, and in Appellants' other briefs and pleadings, this Honorable Court should reverse the trial court's dismissal, rule that Appellants have stated a claim under the NCEPA and under the North Carolina Constitution, hold

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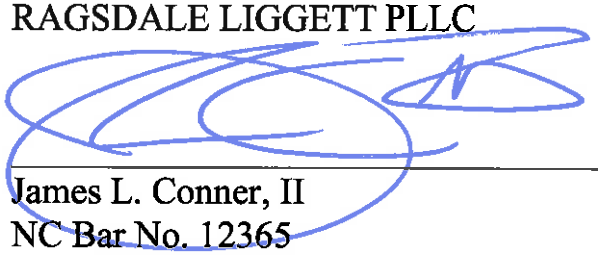
[3] This is not to suggest that there is a separate "project or program" requirement for the preparation of an EIS, but simply that whatever that language means, it appears in the language requiring preparation of an EIS, which is not before this Court.

that Appellants have adequately alleged standing, and remand this matter for further proceedings consistent with these rulings.

Respectfully submitted, this the 14th day of July, 2014.

For the Plaintiffs-Appellants:

RAGSDALE LIGGETT PLLC



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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellants certifies that the foregoing brief, which is prepared using a proportional font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance and appendixes) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing PLAINTIFFS-APPELLANTS' REPLY TO BRIEF OF DEFENDANT-APPELLEE THE BOARD OF TRUSTEES OF THE ENDOWMENT FUNDN OF NORTH CAROLINA STATE UNIVERSITY AT RALEIGH on the opposing parties by placing a copy, contained in a postage-paid envelope, into a depository under the exclusive custody of the United States Postal Service this 14th day of July, 2014, addressed as follows:

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Chapter 7. Judicial Review (Refs & Annos)

5 U.S.C.A. § 702

§ 702. Right of review

Currentness

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub.L. 94-574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

Notes of Decisions (1137)

5 U.S.C.A. § 702, 5 USCA § 702
Current through P.L. 113-120 approved 6-10-14

End of Document

West's North Carolina General Statutes Annotated
Constitution of North Carolina
Article I. Declaration of Rights

N.C.G.S.A. Art. I, § 18

Sec. 18. Court shall be open

Currentness

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

<Adoption of the Constitution of 1970>

<A complete revision to the North Carolina Constitution of 1868 was proposed in Laws 1969, c. 1258 for submission to the voters at the general election of 1970. The revision was adopted by the electorate at the election of November 3, 1970 to take effect on July 1, 1971. In addition to this revision, amendments separately submitted at the November, 1970, were also adopted and are incorporated in the 1970 Constitution.>

Notes of Decisions (392)

N.C.G.S.A. Art. I, § 18, NC CONST Art. I, § 18
The statutes and Constitution are current through Chapters 1-3, 5-17 of the 2014 Regular Session of the General Assembly.

End of Document