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.	)	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.	)	

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PLAINTIFF-APPELLANT'S REPLY TO BRIEF OF DEFENDANT-APPELLEE NC STATE NATURAL RESOURCES FOUNDATION, INC.

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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

****

PLAINTIFFS-APPELLANTS' REPLY TO BRIEF OF DEFENDANT-APPELLEE NC STATE NATURAL RESOURCES FOUNDATION, INC.

****

ARGUMENT

I. APPELLEES' ARGUMENTS THAT THE NORTH CAROLINA ENVIRONMENTAL POLICY ACT (NCEPA) DOES NOT APPLY ARE OF NO AVAIL.

Appellees 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. This Court should be suspicious of a set of arguments that are not based in the jurisprudence of the statute that is the subject of the case, but instead reach blindly for any argument to catch the Court off guard.

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 environmental impacts are likely is before this Court.

Appellee NC State Natural Resources Foundation, Inc., ("Appellee Foundation"), misunderstands NCEPA. Repeatedly, Appellee writes about the decision whether to prepare an Environmental Impact Statement ("EIS"). It analyzes the requirements relating to the decision to prepare an EIS, and argue that Appellants have not met that standard. (See, e.g. Foundation Br. at 19: "The central question before this court is whether SEPA applies to the sale of the Hofmann Forest such that an EIS must be prepared"; see also Foundation Br. at 8, 9,11 &12).

There are two problems with this tactic. First, Appellee consistently writes as though Appellants were required to prove our case below. This is a seductive mistake, because lawyers and judges are very accustomed to thinking in those terms: whether a party has proven its case. This case, however, is not in that posture. On this 12(b)(6) motion, Appellants merely need to have alleged the elements of a valid claim, as is discussed elsewhere in this brief, and in Appellants' brief in chief.

The second problem, as alluded to above, is a fundamental misunderstanding of NCEPA. NCEPA is a statute that requires State agencies to go through a process during which it is determined whether the action being examined is likely to have significant environmental impacts.

This case is not about whether an EIS must be prepared. The question of whether to prepare an EIS is the third or fourth step in NCEPA analysis, once NCEPA is triggered. This case is about whether NCEPA is triggered. Once this court decides that NCEPA is triggered by the sale of the Hofmann Forest, then Appellant Board must begin the NCEPA process. Among the first steps is for the Appellant Board to prepare an environmental assessment (EA). The preparation of the EA is for the purpose of doing the preliminary analysis to determine whether an EIS must be prepared. To

make this decision, the Board is required to consult with other State agencies[1] and consider a variety of factors in order to determine whether there is likely to be a significant environmental impact from the project. 01 NCAC 25.0506. If it decides that there will be no significant environmental impact, it issues a Finding of No Significant Impact (FONSI), and the process ends. No EIS is prepared. Only if the Board decides, with the inputs of others more expert, that a significant environmental impact is likely does it then proceed to prepare an EIS.

So, the question of whether an EIS must be prepared is not before this Court. First, it must be determined whether NCEPA applies to the sale of the Hofmann Forest, i.e. whether NCEPA is triggered. This Court should, we argue, decide that Appellants have made sufficient allegations to survive the instant motion, then the Superior Court on remand will decide whether we can prove what we have alleged - or enough of it to establish that NCEPA applies to this state action and the NCEPA process is triggered. If the trial court decides that NCEPA is indeed triggered, as we believe it should, then the Appellant Board will need to prepare an EA. As part of that process of preparing an EA, the Board will decide whether to prepare a FONSI or an EIS based, in part, upon whether it determines that significant environmental impacts are likely.

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[1] This consultation occurs through the State Clearinghouse at the Department of Administration. 01 NCAC 25.0211, .0506.

So, whether environmental impacts are likely is not before this Court, nor is it even a subject of this lawsuit. That question will be before the Appellee Board as it works through the NCEPA process.

B. The Appellee Foundation's claim that NCEPA's threshold language is more restrictive than NEPA's is false.

The Appellee Foundation, contrary to the case law (cited and discussed in our brief in chief), claim that this Court should not look to NEPA jurisprudence for help in interpreting NCEPA. They state "[w]hen adopting NCEPA, 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).

Certainly there are some different words. But the federal statute used the words "proposals for **legislation**" and "**major** Federal actions", while North Carolina used "**any** action" and "**expenditure** of public moneys or **use** of public land," with all of these terms defined expansively. The North Carolina standards are a lower threshold for the triggering of the statute, further buttressing the Plaintiffs-Appellants' case that federal case law is instructive on the issues before this Court.

C. Public monies.

As covered in detail in our brief in chief, Appellants have more than adequately

alleged expenditure of public monies and meet this prong of the three part test for triggering NCEPA.

Appellee Foundation's brief contains an edited list of the public monies identified by Appellants in our Amended Complaint. They fail to include any but the four specifics we pointed out from the contract as examples. They fail to include the specific allegation that $290,000 will be spent in public monies on revenue stamps alone. They also fail to mention paragraph 37 of the Amended Complaint, which sets out six lines of additional allegations about monies.

Appellee Foundation argues that paying monies out of income from the sale of timber or out of the sale proceeds are not expenditures. This is a specious argument, and Appellee provides no authority to support it. Whether an expenditure occurs by writing a check, handing over cash, or taking a deduction from money that would otherwise be received, it is still an expenditure. Expenditure is defined by a business dictionary to mean "payment of cash or cash equivalent for goods or services, or a charge against available funds in settlement of an obligation . . . ." www.businessdictionary.com/definition/expenditure (emphasis added).

D. Project or program.

Appellee Foundation extracts three words from the statutory language and attempts to use them to impose a requirement that does not exist in the law: that the

private entity for which the state agency is acting must have a "project or program", and that this project or program must meet some unspecified standard that Appellees claim the buyer's plans for the Hofmann Forest do not meet. There is no such requirement.

The regulations promulgated by the State provide the clearest roadmap to NCEPA requirements, and are the law of this State. *McCrann v. NCDHHS,* 209 N.C. App. 241, 704 S.E.2d 899 (2011). It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute, so long as the agency's interpretation is reasonable and based on permissible construction of the statute. *Craven Reg'l Med. Auth. v. N. Carolina Dep't of Health & Human Servs.,* 176 N.C. App. 46, 58, 625 S.E.2d 837, 844 (2006) (citing *Carpenter v. N. Carolina Dep't of Human Res.,* 107 N.C. App. 278, 419 S.E.2d 582 (1992)).

The NCEPA regulations lay this all out very clearly. "This Chapter is applicable to any situation where there is: (1) an expenditure of public monies or use of public land; and (2) an action by a state agency subject to this Chapter; and (3) a potential environmental effect upon either natural resources, public health and safety, natural beauty . . . ." We have addressed these three requirements in our brief in chief. There is no requirement here that there be a project or program, much less some narrowly

defined iteration of those terms as proposed by Appellees.

Once the Chapter applies, "compliance with this chapter will be achieved through the preparation of one or more of the following environmental documents: [an EA, a FONSI, or an EIS, and a ROD]." 01 NCAC 25 .0401 "Method of Compliance". "The agency may choose to immediately prepare an EIS. For all other projects, an EA shall be prepared." *Id.* (intermediate subsection letters omitted).[2]

Appellants have described this process in more detail in our brief in chief. Two additional regulatory sections are worth mentioning. Again, the environmental assessment (EA) is the first document to be prepared by Appellee Board. "The purpose of the EA is to provide the State Project Agency with a decision making tool to determine if a planned project is of such significance or scope and impact on the

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[2] Appellee Foundation makes the argument that the NCEPA regulations do not apply to Appellee Board. As with many of its arguments, it provides no authority for this claim. Notably, the Board does not make this argument for itself. This argument is conclusively refuted by the University system's own set of Minimum Standards, (Plaintiffs-Appellants' Br., App. 8), which were implemented under the very regulations Appellee Foundation says do not apply. The cover memorandum, signed by system President, C.O. Spangler, Jr. says: "Implementing regulations for the North Carolina Environmental Policy Act allows state agencies to prepare minimum criteria for the exemption of minor, routine projects from the provisions of the Act. The attachment prescribes such minimum criteria for constituent institutions of the University of North Carolina. These criteria have undergone review in compliance with the rules of the [NCEPA] (NCAC 25.300) and its implementing rules." The University system clearly considers itself bound by the NCEPA regulations.

environment as to require the preparation of an EIS." 01 NCAC 25.0501. "An EA is to be a concise document not to exceed 25 pages . . . ." 01 NCAC 25.0502.

Appellees suggest 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, even if their argument about the law were true.

E. Public lands.

Appellee Foundation argues that the reversionary interest retained by Appellee Foundation takes the Hofmann Forest out of the definition of public land under NCEPA. Appellee offers no authority whatsoever in support of this argument. 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.

II. APPELLANTS HAVE SUFFICIENTLY STATED A CLAIM UNDER ARTICLE XIV, SECTION 5 OF THE NORTH CAROLINA CONSTITUTION.

The North Carolina Constitution requires that the State "conserve and protect its lands and waters for the benefit of all its citizenry . . . and in every other appropriate way . . . preserve as a part of the common heritage of this State its forests . . . ." N.C. Const. art. XIV, § 5.

The Constitution does not dictate that the State can never sell state owned land. Appellants make no such argument. Instead, Appellants argue that the sale of a forest of this magnitude, the largest piece of State owned forest, the world's largest research forest, and a biological corridor, ecological reserve and headwaters of three waterways, violates the constitutional mandate of article XIV, section 5 for the State to conserve, protect and preserve the forests.

In their briefs, Appellees state that Appellants misconstrue the meaning of article XIV, section 5 of the North Carolina Constitution by ignoring the second paragraph of the amendment. The second paragraph gives the state and local government the power to acquire and dedicate additional lands and waters to conserve and protect the environment, which is not the subject of this lawsuit. As Appellees argue, this second paragraph language must be given effect and meaning. However, Appellees would have this Court ignore the language of the first paragraph of Section 5, which does apply to the facts of this lawsuit.

"'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." *Stone v. State*, 191 N.C. App. 402, 409, 664 S.E.2d 32, 37 (2008) (quoting *State ex rel. Martin v. Preston,* 325 N.C. 438, 449, 385 S.E.2d 473, 478

(1989)). This Court must review *all* the words in this constitutional section and give the words their plain meaning. *See id.* (wherein this Court analyzed the meaning of term "divert" in article V, section 6(2) of the North Carolina Constitution). Words used in the Constitution, like in statutes, "'are not to be deemed *useless or redundant.*'" *Id.* (emphasis included) (quoting *Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 366, 416 S.E.2d 4, 7 (1992)).

There are many words and phrases in the first paragraph which would be useless if the entire section was merely about the government's ability to acquire properties. For instance, the first paragraph includes these additional mandates: "to control and limit the pollution of our air and water," "to control excessive noise," and, critical here, "in every other appropriate way to preserve . . . its forests." N.C. Const. art. XIV, § 5. The Appellees attempt to limit this constitutional amendment by ignoring many of its words.

Further, "a Constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions." *Elliott v. Gardner*, 203 N.C. 749, 166 S.E. 918, 920-21 (1932). The people of North Carolina voted affirmatively and overwhelmingly "to conserve and protect North Carolina's natural resources" not to merely give the government the power to acquire additional

resources.

Sale of a minor piece of state owned forest might not violate the Constitution. But the Hofmann Forest is, by itself, half the size of the entire State Park system. Hofmann Forest is alleged by Appellants to have great ecological importance, these allegations are detailed and compelling, and it is these allegations upon which this case must be decided at this point. If all the allegations of the Amended Complaint are true and the sale of this particular forest would not violate the constitutional mandate that the State "conserve and protect its lands and waters . . . and in every other appropriate way . . . preserve as a part of the common heritage of this State its forests . . . .", then those terms of the Constitution have no significant meaning. If the sale of this forest without NCEPA compliance—that is, without even taking the hard look at environmental effects required by NCEPA before the sale occurs—does not violate this Constitutional mandate to preserve the State's forests, then those terms have no meaning at all.

CONCLUSION

For all the reasons stated above, and in Plaintiffs-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, and remand this matter for further proceedings consistent with these rulings.

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

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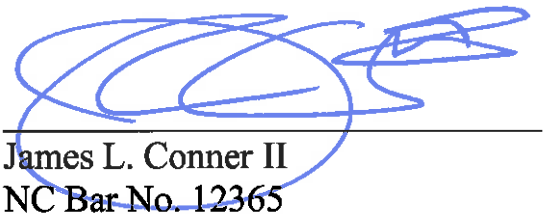
CERTIFICATE OF COMPLIANCE

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.

RAGSDALE LIGGETT PLLC

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing PLAINTIFFS-APPELLANTS' REPLY BRIEF OF DEFENDANT-APPELLEE NC STATE NATURAL RESOURCES FOUNDATION, INC. 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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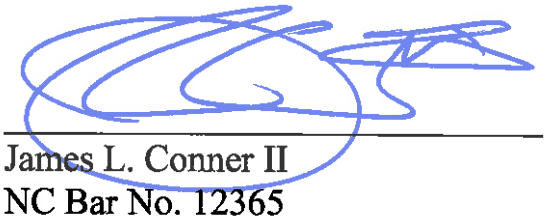
By: 

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North Carolina Administrative Code
Title 1. Department of Administration
Chapter 25. North Carolina Environmental Policy Act
Section 0500. Environmental Assessment

1 NCAC 25.0501

.0501 PURPOSE

Currentness

The purpose of the EA is to provide the State Project Agency with a decision making tool to determine if a planned project is of such significance or scope and impact on the environment as to require the preparation of an EIS.

Current with rules received through June 2, 2014

1 NCAC 25.0501, 1 NC ADC 25.0501

End of Document

North Carolina Administrative Code
Title 1. Department of Administration
Chapter 25. North Carolina Environmental Policy Act
Section 0500. Environmental Assessment

1 NCAC 25.0502

.0502 CONTENT

Currentness

The EA shall include maps and a brief discussion of the following items:

(1) need for the proposed activity,

(2) reasonable alternatives to the recommended course of action,

(3) methods proposed to mitigate or avoid significant adverse environmental impacts, and

(4) environmental effects of the proposed activity and alternatives.

Current with rules received through June 2, 2014

1 NCAC 25.0502, 1 NC ADC 25.0502

End of Document

North Carolina Administrative Code
Title 1. Department of Administration
Chapter 25. North Carolina Environmental Policy Act
Section .0500. Environmental Assessment

1 NCAC 25.0506

.0506 REVIEW PROCESS

Currentness

(a) The State Project Agency must submit 16 copies of the EA and FONSI to the Clearinghouse, and any additional copies as may be requested. The Clearinghouse shall circulate these documents to state and local officials to obtain comments and shall publish a Notice of Availability in the Environmental Bulletin. In order to have a Notice of Availability published in the Environmental Bulletin, the documents must be submitted to the Clearinghouse no later than noon on the Friday preceding the publication date of the Bulletin. Reading copies shall be made available at the Clearinghouse for any interested parties. The review period is 30 calendar days after publication in the Bulletin.

(b) Each reviewing agency and any interested party may make comments on the adequacy of the documents.

(c) Based on consideration of the comments submitted, the Clearinghouse shall advise the State Project Agency as follows:

(1) the document has been determined to lack sufficient information. Supplemental documentation which provides adequate information should be submitted to the Clearinghouse for review and comment;

(2) the document does not satisfy a finding of no significant impact and an EIS should be prepared;

(3) the document is adequate and the next appropriate level document should be prepared for review; or

(4) the document is adequate and completes the review process requirements for the act.

(d) The State Project Agency may adopt or reject the Clearinghouse's recommendation.

(e) No administrative or judicial review is permitted unless undertaken in connection with review of the agency action. No other review of an environmental document is permitted.

Editors' Notes

APPELLATE DECISIONS CITED

Citizens for Responsible Road-Ways v. North Carolina Dept. of Transp., 145 N.C.App. 497, 550 S.E.2d 253 (N.C.App., Aug. 07, 2001).

Current with rules received through June 2, 2014

1 NCAC 25.0506, 1 NC ADC 25.0506

End of Document

West's North Carolina General Statutes Annotated
Constitution of North Carolina
Article XIV. Miscellaneous

N.C.G.S.A. Art. XIV, § 5

Sec. 5. Conservation of natural resources

Currentness

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.

Credits
Added by Laws 1971, c. 630, § 1. Amended by S.L. 1999-268, § 3.

<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 (4)

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

End of Document