NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 014791

NORTH CAROLINA STATE BOARD OF EDUCATION, Plaintiff, v. THE STATE OF NORTH CAROLINA and THE NORTH CAROLINA RULES REVIEW COMMISSION, Defendants.	)	DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS, AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COME NOW the State of North Carolina and the North Carolina Rules Review Commission, by and through its undersigned counsel, Attorney General Roy Cooper, and Special Deputy Attorneys General Olga E. Vysotskaya de Brito and Amar Majmundar, and pursuant to Rules 12(b)(1), (b)(2), (b)(6), and Rule 56 of the North Carolina Rules of Civil Procedure, submit this Brief in support of their Motions to Dismiss and in opposition to Plaintiff's Motion For Summary Judgment.

INTRODUCTION

Distilling the Verified Complaint into its most elemental form reveals the Board of Education's (the "Board") objective to be declared a "Constitutional body," with virtually unbridled authority to promulgate and implement rules that potentially yield a profound impact upon the public's right to primary and secondary education. In making its demand of this Court, Plaintiff further suggests that the rules it will adopt will be unfettered by any "check," save the convening of the General Assembly who may thereafter only revise or repeal a rule through the passage of specific legislation. In doing so, the Board has proclaimed that it shall hereinafter be

exempted from compliance with the terms of the Administrative Procedures Act, (the "APA"); that a declaratory judgment should be entered to specifically delineate that irrespective of the terms of the APA, the North Carolina Rules Review Commission (the "RRC") may not exert "legislative authority" over any of the rules promulgated by the Board; and, that any review of the Board's rules by the Commission constitutes a breach of the separation of powers, and specifically, encroachment upon the obligations of the legislative branch of government.

The APA was created to address the apparent difficulties of governance in the modern administrative state in the areas of rulemaking and administrative adjudicatory procedures. N.C.G.S. 150B-1(a). The Supreme Court "explicitly [] recognized the complexity of governing in the administrative state," Adams v. N.C. Dep't of Natural & Econ. Res., 295 N.C. 683 (1978), and noted that "strict adherence to ideal notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its constitutionally vested powers," Id. at 696-97 (citations omitted). The General Assembly established the APA rulemaking framework to foster transparent governance with diffuse authority, and a structured mechanism to allow the public an opportunity to learn about and comment on pending rules. In turn, the RRC is a statutorily created, executive branch agency of State, N.C.G.S. § 143B-30.1(c), with the objective of reviewing administrative rules in accordance with APA. N.C.G.S. § 143B-30.2.

In essence, Plaintiff wishes to be viewed as a fourth branch of State government, with the authority to impact the educational opportunities of all the State's children, but without the encumbrances of sufficient checks and balances that the actual, three branches of government endure. Despite the assertions found in Plaintiff's Verified Complaint, the action filed by the Board is improperly pled, and otherwise reveals fatal defects that warrant dismissal under Rule 12.

Moreover, the Board's Motion for Summary Judgment under Rule 56, predicated solely upon the legal conclusions made in its Verified Complaint, is without merit and should be denied.

PROCEDURAL BACKGROUND

The Board filed its Verified Complaint on 7 November 2014, which featured seven various Counts. Pursuant to Rules 12(b)(1), (2) and (6). Defendants filed their Motions to Dismiss the Board's Verified Complaint on 12 January 2015. On 23 February 2015, and pursuant to Rule 41(a)(1), the Board filed a voluntary dismissal of Counts 4-7 of its Verified Complaint. Pursuant to Rule 56, on 20 March 2015 the Board filed a Motion for Summary Judgment on Counts 1-3. On or about 19 June 2015, the Board voluntarily dismissed Count 1 of its Verified Complaint.

ARGUMENT - DEFENDANT'S MOTION TO DISMISS

Article I, Section 6 of the North Carolina Constitution provides that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." There exists but three branches of government in this State. In re Alamance County Court Facilities, 329 N.C. 84, 96 (1991). By definition, the Board must fall within one of the three branches. Although Plaintiff has dismissed its pursuit of Count 1 of the Verified Complaint, this Court must still make a determination as to which branch of State government may lay claim to the Board. Assuredly, neither party contends that the Board falls within the parameters of the judicial branch. Consequently, the predicate question before this Court is whether the Board is an executive branch agency that is subject to the terms of the APA.

That preliminary question, if answered in the negative, subsequently serves to end this litigation. That is true because such a determination renders the remaining Counts 2 and 3 moot, and not properly subject to deliberation under the Declaratory Judgement Act. Morris v. Morris,

245 N.C. 30 (1956). If answered in the affirmative, then the Board is unquestionably subject to the laws of the General Assembly, including the procedural limitation found in the APA. In that sense, the Board's allegations that it is exempt because it is a "Constitutional fixture in its own right," (Verified Complaint ¶ 3), is too rendered inconsequential by virtue of the fact that although Article III founds and authorizes the executive branch of our State government (certainly a "Constitutional fixture"), the subordinate agencies of the executive branch are also subject to the terms of the APA. In this case, the recognition of the importance of education found in Article IX, Section 1 of the Constitution of North Carolina ("schools and means of education shall forever be encouraged."), and extended by Article IX, Section 5 of our State's Constitution, simply does not serve as a conduit to avoid the procedural safeguards of the APA. As described below, this conclusion is especially true in light of the Board's presentment of itself as an executive branch agency, and its repeated public acknowledgement that it is subject to the provisions of the APA.

Yet now, the Board seeks from this Court what it has failed to secure from the General Assembly: a full exemption from the terms of the APA. With its Verified Complaint, the Board takes the curious position of chastising Defendants for an alleged violation of the separation of powers, while simultaneously asking this Court to effectively amend what is otherwise unambiguous, proper, and necessary legislation. In doing so, the Board demands that this Court judicially intrude upon the General Assembly's exclusive authority to subject State agencies, like the Board, to the important review processes afforded through the APA that serve to protect the educational rights of all citizens with by unbiased and practical oversight.

Irrespective of its improper attempt to avoid legislative sanction, the Board has nevertheless failed to make the necessary legal and factual allegations necessary to survive

scrutiny under Rule 12(b). Instead, the Board offers generalized averments that present a collection of unsubstantiated and incorrect legal conclusions, worthy of dismissal.

I. STANDARD OF REVIEW.

A. N.C.G.S. § 1A-1, N.C. R. Civ. P. 12(b).

Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. Hardy v. Beaufort County Bd. of Educ., 200 N.C. App. 403 (2009). "When reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), a trial court may consider and weigh matters outside the pleadings." DOT v. Blue, 147 N.C. App. 596, 603 (2001), disc. review denied, 356 N.C. 434 (2002) (internal citations omitted). Under Rule 12(b)(2), a claim should be dismissed when the court lacks authority to exercise personal jurisdiction over the defendant. Transtector Sys. v. Electric Supply, Inc., 113 N.C. App. 148 (1993). The Court of Appeals has specifically held that the doctrine of sovereign immunity presents a question of personal jurisdiction. See Green v. Kearney, 203 N.C. App. 260, 266 (2010). Moreover, the claimant is required to affirmatively plead a waiver of sovereign immunity. Id.

Rule 12(b)(6) tests the legal sufficiency of the complaint, where the well pleaded material allegations of the complaint are taken as admitted; but conclusions of law or deductions of fact are not admitted. Sutton v. Duke, 277 N.C. 94, 98 (1970). A legal insufficiency may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. State ex rel. Tenn. Dep't of Health & Env't v. Environmental Mgt. Comm', 78 N.C. App. 763 (1986). An "esoteric analysis of the issue" in the absence of the specifically pleaded facts in the complaint does not survive a motion to dismiss under Rule 12(b)(6). Peele v. Provident Mut. Life Ins. Co., 90 N.C. App. 447,

449, disc. rev. denied, 323 N.C. 366 (1988). To prevent dismissal under Rule 12(b)(6), a party must (1) give sufficient notice of the events on which the claim is based to enable the adverse party to respond and prepare for trial, and (2) state sufficient facts to satisfy the substantive elements of a legally recognized claim. Hewes v. Johnston, 61 N.C. App. 603 (1983).

A. The Actions Of The General Assembly Are Presumed Constitutional And Plaintiff Must Demonstrate A Constitutional Defect Beyond a Reasonable Doubt.

Plaintiff "face[s] a heavy burden of persuasion" when attacking legislative acts of the General Assembly as unconstitutional. Ivarsson v. Office of Indigent Def. Servs., 156 N.C. App. 628, 631 (2003). "'Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt.'" Id. (quoting Baker v. Martin, 330 N.C. 331, 334 (1991)). Any doubt as to the legislature's power to act must be resolved in favor of the legislature. Baker, 330 N.C. at 338. Acts of the General Assembly are entitled to "great deference, and a statute will not be declared unconstitutional under [the] Constitution unless the Constitution clearly prohibits that statute." In re Spivey, 345 N.C. 404, 413 (1997). Thus, Plaintiff must show beyond a reasonable doubt that the policy choices enacted by the General Assembly, including the APA, violate Article IX, Section 5 of the Constitution.

II. THE DOCTRINE OF SOVEREIGN IMMUNITY BARS PLAINTIFF'S CLAIM.

This issue is presented pursuant to Rules 12(b)(1), (2) and (6). The doctrine of sovereign immunity is well settled in North Carolina. "It is an established principle of jurisprudence, resting on grounds of sound public policy that a state may not be sued in it its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity from

suit." Welch Contracting, Inc. v. N.C. Dep't of Transp., 175 N.C. App. 45, 51 (2005) (internal citations omitted). "By application of this principle, a subordinate division of the state or an agency exercising statutory governmental functions may be sued only when and as authorized by statute." Id.

A. Sovereign Immunity - Pleading Requirements.

In order to sustain an action against the sovereign, a claimant must allege that the State has waived its immunity to be sued before the action may proceed, and absent those allegations, the claim must be dismissed for want of personal jurisdiction. Green v. Kearney, 203 N.C. App 260, 268 (2010). "This requirement does not, however, mandate that a complaint use any particular language. Instead, consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver by the State of sovereign immunity." Fabrikant v. Currituck Cty., 174 N.C. App. 30, 38 (2005). Here, a review of the Board's Verified Complaint reveals absolutely no allegations, factual or otherwise, that Defendants have waived their sovereign immunity to this suit. According to the opinions of the Court of Appeals, the Board's claim should be dismissed pursuant to Rule 12(b).

B. Sovereign Immunity - Constitutional Claims.

The two remaining Counts of Plaintiff's Verified Complaint seek relief under the terms of the Declaratory Judgment Act. Even had Plaintiff made the necessary allegations of a waiver of sovereign immunity, jurisdiction under the Act is not automatically invoked. In fact, as it pertains to the State and its agencies, the Court of Appeals has explicitly held that sovereign immunity is not waived by the Act. Petroleum Traders Corp. v. State, 190 N.C. App. 542 (2008). Defendants have not expressly waived sovereign immunity, and in fact, no such waiver exists under the plain

terms of the Declaratory Judgment Act. As such, Plaintiff's only recourse is to cull a waiver of immunity from common law pursuant to Corum v. University of North Carolina, 330 N.C. 761 (1992). However, as was true in Petroleum Traders, Corum fails to provide Plaintiff any refuge.

In Corum, the Supreme Court held that "[t]he doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights [of our Constitution]." Id. at 785-86, 413. However, with Petroleum Traders, the Court of Appeals specifically noted that "[o]ur appellate courts have applied the holding of Corum to find a waiver of sovereign immunity **only in cases wherein the plaintiff alleged a violation of a right protected by the Declaration of Rights**." Id. at 548 (emphasis added). With Petroleum Traders, the Court of Appeals went on to specifically note that "every other case waiving sovereign immunity based on Corum," alleged a violation of a right protected by the Declaration of Rights, Id. at 550, that "Corum contains no suggestion of an intention to eliminate sovereign immunity for any and all alleged violations of the N.C. Constitution," Id. at 551, and that "Corum is properly limited to claims asserting violation of the plaintiff's personal rights as set out in the N.C. Constitution Declaration of Rights." Id. at 551.

Moreover, Petroleum Traders specifically bars claims against the sovereign predicated upon constitutional clauses that articulate procedural rules, rather than those where personal rights have been abridged by the State. That is precisely the case here as Plaintiff's claim rests entirely upon the terms of Article IX, Section 5 of the State's Constitution which provides that:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and

> shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly.

This clause is entirely procedural in nature and function, and articulates no personal rights. Indeed, Plaintiff has made no allegations that any of its rights have been abridged by Defendants, or that it has ever been compelled by Defendants to submit rules for analysis under the Administrative Procedures Act. Absent that intrusion upon rights articulated under the Constitution, no waiver of sovereign immunity may be implied. Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334 (2009).

III. THIS COURT LACKS JURISDICTION TO ENTERTAIN PLAINTIFF'S CLAIMS UNDER THE DECLARATORY JUDGMENT ACT.

This issue is presented pursuant to Rules 12(b)(1) and (6). Under N.C.G.S. § 1-253, actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relations only when there is an actual existing controversy between the parties. Wright v. McGee, 206 N.C. 52 (1934). Courts have jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance or franchise. Nationwide Mut. Ins. Co. v. Roberts, 261 N.C. 285 (1964).

It is Plaintiff who must show the existence of the conditions upon which the court's jurisdiction may be invoked. Elliott v. Ballentine, 7 N.C. App. 682 (1970). When the record shows that there is no basis for declaratory relief, the claim is subject to dismissal. Kirkman v. Kirkman, 42 N.C. App. 173, cert. denied, 298 N.C. 297 (1979). It is not necessary that one party

have an actual right of action against another, but there must be more than a mere disagreement. This means that it must be shown in the complaint that litigation appears unavoidable. North Carolina Farm Bureau Mut. Ins. Co. v. Warren, 89 N.C. App. 148, cert. denied, 322 N.C. 481 (1988). A mere difference of opinion between the parties does not constitute a controversy within the meaning of the Declaratory Judgment Act. Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230 (1984). The sufficiency of the Complaint is judged not according to whether it shows that a claimant is entitled to the declaration in accordance with his theory, but whether he is entitled to a declaration of rights at all. Hubbard v. Josey, 267 N.C. 651 (1966).

A. Plaintiff's Verified Complaint is Facially Defective.

Plaintiff's Verified Complaint features absolutely no factual allegations from which it can be concluded that an actual controversy exists between the Board and Defendants. At most, Plaintiff concocts the idea of a controversy and uses suggestive language in its allegations, to wit:

- "Because the Board is not expressly named as an exempt entity under the law, **the RRC has taken the position** that the Board is subject to its authority." (Verified Complaint, ¶ 2)
- "... the RRC since its creation in 1986 has **purported to exercise authority** over the Board..." (Verified Complaint, ¶ 4)
- "...the RRC since 1986 has **purported to exercise control** over the Board, deeming the Board an "agency" within the meaning of N.C.G.S. § 150B-2(1a)." (Verified Complaint, ¶ 24)
- The Board recognizes that its decision [to no longer voluntarily submit its rules for RRC approval] is in **direct conflict with the RRC's interpretation and application** of both N.C.G.S. § 150B2-(1a) and the RRC's enabling legislation. (Verified Complaint, ¶ 29)

Even a cursory review of these paragraphs reveals no assertion of factual, or other allegations to establish the existence of an actual controversy between the parties. Instead, the allegations in these paragraphs simply offer speculation and deductions as to what the Board perceives the RRC's position to be. Yet, these are precisely the allegations Plaintiff wield in an attempt to conjure a non-existent controversy. At no point does Plaintiff plead any facts to allege that the RRC has actively demanded that the Board submit its Rules for evaluation; any facts that RRC has claimed that the Board lacks the authority to devise and promulgate rules; any facts that the RRC has unilaterally declared that an un-submitted rule lacks force and effect; or, any facts that any member of the RRC has publically declared that the Board is bound to submit its rules for review under the APA. Likewise, Plaintiff's Verified Complaint features no facts regarding any specific rule that may serve as a source of controversy.

Not only are there no predicate allegations of a controversy between the parties, the Board candidly admits that since 1986, it has voluntarily submitted "its rules for RRC approval." (Verified Complaint ¶¶ 24, 25, 28) That voluntary submission of rules is emblematic of the cooperative relationship that actually exists between the RRC and the Board. Indeed, pursuant to N.C.G.S. § 150B-21, the Board has continuously designated a member of its staff to serve as rule-making coordinator to work with the RRC to ensure that the Board's rules sufficiently comply with the terms of the APA. See Exhibit F. Likewise, a review of the Board's website reveals that it contemplates the APA as part of its own rulemaking authority by designating an entire section to "Rules (APA)."[1] These, and other admissions, manifestly establish a lack of any controversy

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1 http://stateboard.ncpublicschools.gov/rules-apa

between the parties, either now or ever.

Indeed, since May 2014, the Board has refused to submit rules to the RRC, and has during that time adopted these rules as binding "policies." See Exhibit G. Yet despite this apparent exercise of the full extent of the Board's "constitutional authority," the RRC has remained silent and has taken no position on the Board's unilateral actions. This silence is telling: the RRC has expressed absolutely no dominion over the Board's adopted "policies," and there exists no controversy between them. As a consequence, the Board's Verified Complaint merely seeks this Court's engagement into impermissible academic exercises. Competitor Liaison Bureau of Nascar, Inc. v. Blevins, 242 N.C. 282 (1955). Our State's courts have construed the law in such a manner that the jurisdiction may be protected against such academic inquiry when the questions presented are altogether moot, arising out of no necessity for the protection of any rights or avoidance of any liability, and where the parties have only a hypothetical interest in the decision of the court. Hicks v. Hicks, 60 N.C. App. 517 (1983). That is precisely the case here.

IV. THE PRINCIPLES OF ESTOPPEL BAR PLAINTIFF'S CLAIM.

This issue is presented pursuant to Rules 12(b)(1) and (6). Since the inception of the RRC in 1986, the Board of Education has consistently sought the benefits derived from the analysis and counsel of the RRC through adherence to the APA process. Twenty-eight years later, the Board now seeks to ignore that process and proclaims itself a "Constitutional fixture" that is no longer subject to the provisions of the APA. Despite its assertion, under the doctrine of "quasi-estoppel," the Board is prohibited from unilaterally exercising its so-called "full constitutional authority":

> The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens. The principle is an application of the broader doctrine of quasi-estoppel, which states that where one having the right to accept or reject a transaction or instrument takes and retains benefits thereunder, he ratifies it, and cannot avoid its obligation or effect by taking a position inconsistent with it.

Shell Island Homeowners Ass'n v. Tomlinson, 134 N.C. App. 217, 226 (1999) (citations and quotations omitted). Admittedly, Plaintiff's Verified Complaint is crafted in such a way as to eliminate the "transactional" nature of an estoppel argument. However, quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation. See Taylor v. Taylor, 321 N.C. 244, 249 n.1 (1987). Instead of a particular transaction, this Court should recognize that the RRC functions on behalf of the general public, who have come to rely upon the procedural safeguards embedded in the APA. This need to serve and reinforce the public's expectations of uniform and properly promulgated rules that are subject to objective oversight is particularly vital in the forum of education, which is perhaps the most important of the core functions performed by the State. Rowan County Bd. of Educ. v. United States Gypsum Co., 332 N.C. 1 The Board of Education should be estopped from denying the RRC the ability to perform the public purpose assigned to it by the General Assembly, and relied upon by the general public.

V. PLAINTIFF HAS OTHERWISE FAILED TO ALLEGE SUFFICIENT FACTS UPON WHICH RELIEF MAY BE GRANTED.

This issue is presented pursuant to Rule 12(b)(6). A fundamental premise of the APA is that State agencies should not promulgate regulations without first informing the public and providing the people with an opportunity to comment. See N.C.G.S. § 150B-21.2. To ensure

that the public is included in the rulemaking process, the APA requires agencies to publish their proposed rules in the North Carolina Register. Id. § 150B-21.2(a). State agencies are prohibited from adopting any rule that differs substantially from the text published in the Register. Id. § 150B-21.2(g). During its review of a permanent rule, the RRC must determine whether changes to the rule made by the submitting agency in response to an RRC objection are "substantial." Id. § 150B-21.12(c). If they are, the revised rule must be published and reviewed in accordance with the expedited procedures normally used for temporary rules. Id. (referencing N.C.G.S. § 150B-21.1(a3) and (b)).

With its Verified Complaint, Plaintiff now seeks to thwart the important public purpose of the APA as effectuated by the RRC. Yet, other than historical anecdotes and legal conclusions, the Verified Complaint filed by Plaintiff is virtually devoid of any facts from which a claim can be stated under Rule 12(b)(6). Plaintiff's complaint amounts to a subjective interpretation of the law, and a demand that this Court accept that interpretation. In doing so, Plaintiff's assiduously attempt to avoid being labeled an "agency," and thereby seemingly avoids being made subject to the APA. In that regard, it should be noted that the General Assembly itself has specifically defined the Board as an agency by making it the head of the DPI. N.C.G.S. § 143-44.1.

The Board nevertheless persists, insisting with its Verified Complaint that Article IX, Section 5 grants it the status of a unique governmental body endowed with unfettered constitutional authority to "make all needed rules and regulations" in relation to the supervision and administration of a free public school system. Indeed, Plaintiff presses further to contend that the Board's power to promulgate rules is only limited by rule-specific legislation that is

consequently drafted by the General Assembly, and signed into law by the Governor. Despite the confidence expressed by the Board, Article IX, Section 5 features no such language:

> The State Board of Education shall supervise and administer the free public school system and the educational funds provided for its support, except the funds mentioned in Section 7 of this Article, and **shall make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly**.

(Emphasis added). The exact constitutional provision relied upon by Plaintiff to demand its authority, also serves to expressly limit that authority by subjecting the Board to the laws enacted by the State's legislature. While there is no question that the Board draws authority from the Constitution, it must be acknowledged that it is also subject to statutory provisions and scrutiny propounded by the General Assembly.

A. **Guthrie v. Taylor.**

To avoid that conclusion, and buttress its own contentions regarding its authority, Plaintiff expressly relies upon Guthrie v. Taylor, 279 N.C. 703 (1971) cert. denied 406 U.S. 920 (1972) for the proposition that because the Board's original authority was granted by the Constitution, it is a unique governmental body that may make any and all rules and regulations related to the supervision and administration of free public schools, without the safeguarding provisions of administrative oversight. According to Plaintiff, that case further serves to substantiate the claim that any rule unilaterally adopted by the Board may only be revised or repealed by specific legislation enacted by the General Assembly. Despite these assertions, Plaintiff misapprehends the holding in Guthrie, especially in light of doctrinal and statutory changes since 1971.

In Guthrie, a certified public school teacher sued on behalf of himself and all other

classroom teachers in the State for a judgment to declare the invalidity of certain rules and regulations of the Board pertaining to teacher certification. According to that Plaintiff, the certification requirements mandated by the Board went beyond the permissible scope of certification requirements found in N.C.G.S. § 115 (repealed 1981), and that as a result, the Board exceeded its authority under the statute. The Supreme Court noted that the Board derives power from the Constitution and the General Assembly. Id. at 713. The Court then held that Chapter 115 did not "specifically limit[] the authority of the State Board of Education to promulgate or administer rules and regulations" in relation to certification requirements, and in the "the silence of the General Assembly, the authority of the State Board to promulgate and administer regulations...was limited only by other provisions in the Constitution, itself." Id. at 710.

From this language, Plaintiff presumes that the Court acknowledged the Board's plenary authority to conduct rule-making, with the specific enactment of legislation serving as the sole limitation. Indeed, Plaintiff notes that "since the creation of the Board in 1868, no state constitutional amendment or decision of the Supreme Court of North Carolina has limited the Board's broad powers and duties..." (Verified Complaint, ¶ 19). Yet Guthrie was concerned with the silence found in the now repealed N.C.G.S. § 115, *et seq.* Since that time of legislative silence, the General Assembly has since instructed the Board of certain limitations on its authority by virtue of the comprehensive, explicit, and binding nature of N.C.G.S. § 115C, *et seq.* Coupled with N.C.G.S. § 150B, (as described more fully immediately below), that statute eliminates doubt that the Board is subject to the rulemaking provisions of the APA.

B. The Administrative Procedure Act.

The allegations made by Plaintiff specifically avoid reference to any limitations imposed

by virtue of "the laws of the General Assembly." Specifically, the APA was enacted in 1975, roughly four years following the Supreme Court's opinion in Guthrie. With the Act, the General Assembly no longer remained "silent" regarding the manner and method the Board may promulgate its rules. Instead, the Act provides that the Board is subject its provisions. N.C.G.S. § 150B-18 specifically provides that the Act is applicable to an "agency's exercise of its authority to adopt rules." Chapter 115C, which has in part replaced the antiquated Chapter 115, and which describes the duties of the Board of Education, specifically notes that "[a]ll actions of agencies taken pursuant to this Chapter, as agency is defined in G.S. 150B-2, is subject to the requirements of the Administrative Procedure Act, Chapter 150B of the General Statutes." N.C.G.S. § 115C-2.

Other statutes within the chapter further demonstrate that the applicability of the APA to the Board. For instance, in crafting certain exceptions to the APA, the General Assembly enacted N.C.G.S. § 115C-17, which provides in pertinent part that:

> (a) **G.S. 150B-21.2(a)(1) shall not apply to proposed rules adopted by the State Board of Education if the proposed rules are directly related to the implementation of this act** [1995 (Reg. Sess., 1996), c. 716, s. 28].
>
> (b) Notwithstanding G.S. 150B-21.3(b), **a permanent rule that is adopted by the State Board of Education, is approved by the Rules Review Commission, and is directly related to the implementation of this act**, shall become effective five business days after the Commission delivers the rule to the Codifier of Rules, unless the rule specifies a later effective date. If the State Board of Education specifies a later effective date, the rule becomes effective upon that date. **A permanent rule that is adopted by the State Board of Education that is directly related to the implementation of this act, but is not approved by the Rules Review Commission, shall not become effective.**

> (c) **G.S. 150B-21.4(b1) shall not apply to permanent rules the State Board of Education proposes to adopt if those rules are directly related to the implementation of this act** [1995 (Reg. Sess., 1996), c. 716, s. 28].

(Emphasis added). From this statute, no other logical conclusion can be drawn than the Board is subject to the APA when it creates its rules.

Perhaps as a nod to Guthrie, the General Assembly enacted N.C.G.S. § 115C-296 dealing with the Board's certification requirements for teachers, and noted in subsection (a1) that:

> The State Board shall adopt policies that establish the minimum scores for any required standard examinations and other measures necessary to assess the qualifications of professional personnel as required under subsection (a) of this section. **For purposes of this subsection, the State Board shall not be subject to Article 2A of Chapter 150B of the General Statutes.**

(Emphasis added) "In determining the will or intent of the people as expressed in the Constitution, all cognate provisions are to be brought into view in their entirety and so interpreted as to effectuate the manifest purposes of the instrument." Coley, 360 N.C. at 498 (internal quotation marks omitted). "[A]s in interpreting a statute, if the meaning is clear from reading the words of the Constitution, [courts] should not search for a meaning elsewhere." Melott, 320 N.C. at 520 (citing Elliot v. Gardner, 203 N.C. 749 (1932)).

The meaning of the last portion of Article IX, Section 5 is unambiguous. Pursuant to that plain language, the General Assembly has demonstrated its will to subject the Board to the provisions of the APA by enacting appropriate legislation as prescribed by Article IX, Section 5 of the Constitution. In that regard, tt should be further noted that:

> [S]tatutory interpretation presents a question of law. The cardinal principle in the process is to ensure accomplishment of legislative intent. To achieve this end, the court should consider "the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." **In ascertaining the intent of the legislature, the presumption is that it acted with full knowledge of prior and existing laws.**

Williams v. Alexander County Bd. of Educ., 128 N.C. App. 599, 603 (1998) (internal citation omitted) (emphasis added). Pursuant to Article IX, Section 5, the Constitutional grant of powers to the Board may be limited and defined by "laws enacted by the General Assembly." Id. Setting aside constitutional legal theories that are cloaked as allegations, there is no doubt that the Verified Complaint is fatally defective. In addressing a similar claim regarding the Board's constitutional authority, the Court of Appeals noted that:

> Finally, defendants claim "exclusive authority to regulate the professional qualifications of persons employed in North Carolina schools" as "the Constitution itself grants the State Board [this] plenary authority." This power is unfettered, the Board of Education asserts, as its "authority regarding certification of school professionals does not derive from the General Assembly at **all**." (Emphasis added.) Defendants have misapprehended their power under the N.C. Constitution and the Act. Certainly, they are subject to both. Article IX, § 5 of the North Carolina Constitution is unambiguous on this point, as it states: "The State Board of Education shall supervise and administer the free public school system . . . and shall make all needed rules and regulations in relation thereto, **subject to laws enacted by the General Assembly**." (Emphasis added.) Moreover, this Constitutional provision was interpreted by our Supreme Court in Guthrie v. Taylor, 279 N.C. 703, 710, 185 S.E.2d 193, 198 (1971), cert. denied, 406 U.S. 920, 32 L. Ed. 2d 119, 92 S. Ct. 1774 (1972). There the Court held that Article IX, § 5 "was designed to make, and did make, the powers so conferred upon the State Board of Education

subject to limitation and revision by acts of the General Assembly." Id.

North Carolina Bd. of Examiners for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 20 (1996) aff'd in part, disc. rev. improvidently all'd in part by 345 N.C. 493, 480 S.E.2d 50 (1997) (emphasis in the original). The instant case presents the same claims of Constitutional authority that was offered by the Board in that case. As was found there, the claims made by the Board here are without merit. Plaintiff's Verified Complaint is factually deficient, legally flawed, and is worthy of dismissal.

RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT

With its Motion for Summary Judgment, the Board pursues a ruling that would entirely exempt the agency from the APA process. Specifically, the Board seeks a summary declaratory judgment on Counts 2 and 3 of its Verified Complaint, praying the Court to declare that "RRC's exercise of authority over the Board violates Article IX, Section 5 of the North Carolina Constitution because it subverts the Board's general supervisory and administrative rulemaking authority on matters concerning North Carolina's free public schools;" and to further find that "the RRC's exercise of authority over the Board violates the separation of powers set forth in Article I, Section 6 of the North Carolina Constitution because it unconstitutionally delegates to the RRC the authority to review, revise, or repeal rules of the Board, which are acts that only the General Assembly is authorized to take[.]" (P Compl. P 14 (b)-(c)). Despite the allegations made by Plaintiff, there exist ample facts to suggest that not only should the Board's Motion be denied, but that Summary Judgment should be granted to the non-movants.

I. STANDARD FOR MOTION FOR SUMMARY JUDGMENT

The propriety of a summary judgment in declaratory judgment actions is governed by the same rules applicable to other actions. North Carolina Life & Accident & Health Ins. Guar. Ass'n v. Underwriters Nat'l Assurance Co., 48 N.C. App. 508, cert. denied and appeal dismissed, 301 N.C. 527 (1980), rev'd on other grounds, 455 U.S. 691 (1982). Under the rule, a party is entitled to summary judgment if it can establish through the pleadings and affidavits, that there is no genuine issue as to any material fact, that only issues of law remain and that it is entitled to judgment as a matter of law. Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 605 (1990). Facts necessary to support summary judgment must be established by pleadings, depositions, answers to interrogatories, admissions or affidavits. Cieszko v. Clark, 92 N.C. App. 290. Where the pleadings and attendant supporting documents affirmatively disclose that the nature of the controversy presents a good faith and actual dispute on one or more material issues, summary judgment cannot be used. Page v. Sloan, 281 N.C. 697 (1972). "If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper." Insurance Agency v. Leasing Corp., 26 N.C. App. 138 (1975).

The movant's burden in a motion for a declaratory summary judgment regarding the constitutionality of our statutes is especially heavy, because "a statute enacted by the General Assembly is presumed to be constitutional." Farber v. N.C. Psychology Bd., 153 N.C. App. 1, 18 (2002) (citing Wayne County Citizens Assn. v. Wayne County Bd. of Comrs., 328 N.C. 24, 29 (1991).) "Every presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." Baker v. Martin, 330 N.C. 331, 334 (1991), quoting Gardner v. Reidsville, 269 N.C. 581, 595 (1967).

Summary judgment may also be appropriate against the moving party. If the non-movants clearly establish that there is no genuine issue as to the nonexistence of material facts which are necessary as an essential element of any cause of action against them, then they are entitled to summary judgment on that action. Clodfelter v. Bates, 44 N.C. App. 107 (1979), cert. denied, 299 N.C. 329 (1980). A defending party is entitled to summary judgment if the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Little v. National Servs. Indus., Inc., 79 N.C. App. 688 (1986).

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS DEFECTIVE AND SHOULD BE DENIED IN EVERY RESPECT.

A. Plaintiff's Motion for Summary Judgement Is Premature As Defendants Have Not Yet Filed An Answer.

Entry of a declaratory judgment is improper until an answer to a complaint has been filed. "In the absence of a stipulation, a declaratory judgment may be entered **only after answer** and on such evidence as the parties may introduce upon the trial or hearing." Insurance Co. v. Roberts, 261 N.C. 285, 288, (1964) (internal citations omitted) (emphasis added). See also Hubbard, 267 N.C. 651 (1966). Defendants have made no factual stipulations concerning SBE's allegations, and have filed no answer to the Board's Verified Complaint. Therefore, especially in light of this "as applied" constitutional challenge, the Court should deny the Board's Motion for Summary Judgment.

B. The Verified Complaint Lacks Sufficient Facts To Establish That Defendants Have Impermissibly Encroached Upon The Board's Rulemaking Authority.

Requests for declaratory summary judgments in the context of "as applied" constitutional challenges of statutes are subject to a very careful and strict scrutiny by the court for factual

sufficiency. State ex rel. Edmisten v. Fayetteville Street Christian School, 299 N.C. 351, 358-360 (1980). The Board insists that RRC exceeds the bounds of certain constitutional limitations when it reviews the Rules submitted to it. Yet, factually the Board merely alleges that "[s]ince its inception in 1986, the RRC or its staff has objected to or modified every rule adopted by the Board and submitted to the RRC for approval. Moreover, the Board has declined to adopt a number of rules that it otherwise would have adopted but for the fact that the RRC would have objected to these rules or struck them down." (P Compl ¶ 25).

The Board does not allege that the RRC requires or even possesses the authority to require it to submit rules for review. Further, there is nothing in the record to guide the judicial inquiry into whether the RRC has ever rejected a Board's rule based on its finding that the Board exceeded the bounds of its Constitutional authority, whether RRC's amendments or revisions to the Board's rules submitted for its review were arbitrary or capricious, whether the length of the rules review process violated RRC's enabling statutes as applied to the Board, or any other specific allegation concerning any specific rule promulgated by the Board. Summary judgment regarding the constitutionality of a statute based on such a paucity of facts is improper:

> In short, defendants' assertions in their affidavits have not been tested by cross examination; their allegations have not been buttressed by the introduction of evidence; and there has been no resolution of the factual issues upon which defendants' constitutional claims are grounded. Yet the validity of their constitutional argument can be measured on appeal only against a fully developed factual record which clearly delineates the nature and scope of the unconstitutional intrusion which defendants assert arises from the burden imposed by the Act. Such a record is essential to the proper determination of the constitutional infirmities, if any, of a statute's application to a particular situation.

State ex rel. Edmisten, at 358-360 (1980) (citations omitted).

Without any factual allegations regarding the RRC's supposed improper dominion over the Board's authority to develop rules, or regarding any controversy over any specific RRC decision, Plaintiff's Verified Complaint nevertheless seeks to topple the RRC's rule reviewing authority. Yet the Board's Motion for Summary Judgment simply amounts to an improper solicitation of an academic legal advice, which should be rejected by this Court.

D. The Board Is An "Agency" Subject To The APA.

Unless otherwise prescribed by the General Assembly, only nonexempt agencies are subject to the rule making requirements of APA. N.C.G.S. §§ 150B-1(c), 150B-291(a). The Board is not generally exempt from the rulemaking requirements of APA. N.C.G.S. § 150B-1. If the Court concludes that the Board is an agency, then the APA rulemaking provisions must apply.

An agency is defined by the APA as "an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency." N.C.G.S. § 150B-2(1a). Therefore, a determination of whether the Board is an executive agency is necessary prior to the Court's contemplation of Plaintiff's motion for summary judgment. Although the Board claims itself to be a "constitutional body," (P Compl ¶ 1, 3,6, 13, 14, 33-36), the Supreme Court has held the contrary: "[t]he General Assembly created the State Board of Education and fixed its duties. It is an agency of the State with statewide application." Turner v. Gastonia City Bd. of Education, 250 N.C. 456, 462 (1959); Meyer v. Walls, 347 N.C. 97, 105 (1997) (citations omitted). The Verified

Complaint fails to recognize and adhere to these authorities, and fails to delineate how the Constitutional reference to the Board and its duties to "supervise and administer the free public school system and the educational funds provided for its support ... and ... make all needed rules and regulations in relation thereto, subject to laws enacted by the General Assembly" severs it from the confines of the executive branch. Moreover, the General Assembly specifically created and placed the Board as the head of "DPI", an umbrella executive department administering elementary and secondary education. See supra p 15. The Board fails to establish, as a matter of law, why as a "constitutional fixture" it is deemed divorced from the executive branch.

E. The Board Is Otherwise An Executive Agency Subject To The APA.

As an agency of state government, the nature and status of the Board is administrative or executive. Black's Law Dictionary defines executive branch as '[t]he branch of government responsible for effecting and enforcing laws; the persons who constitute this branch. The executive branch is sometimes said to be the residue of all government after subtracting the judicial and legislative branches." (7th ed., 1999).[2]. By definition, the Board would fall somewhere within the continuum of executive branch of government.

Executive branch agencies possess the power to execute the State's laws. State ex rel. Martin v. Melott, 320 N.C. 518, 523 (1987) (plurality opinion) (emphasis added). While the Board is not specifically referenced in Article III, its functions are nevertheless executive in their scope. The Board promulgates certain educational rules to be implemented by DPI. In that

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2 North Carolina courts have often looked to Black's Law Dictionary for applicable definitions. See, e.g., Angel v. Ward, 43 N.C. App. 288, 293, 258 S.E.2d 788, 792 (1979), Goard v. Branscom, 15 N.C. App. 34, 39, 189 S.E.2d 667, 670 (1972).

sense, the Board is far from unique in its capacity to promulgate rules, since the adoption of rules and policies is a legitimate part of any agency's executive role. Through their rules, executive agencies prescribe the criteria and lay down the detail of how their respective areas of responsibility enacted by legislature or Constitution are to be enforced. See, Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52 (1953).

Addressing the question of whether an agency not founded under Article III is nevertheless an executive agency, with State ex rel. Wallace v. Bone, 304 N.C. 591, 607-608 (1982), the Supreme Court noted that the Environmental Management Commission possessed the power and duty to promulgate rules and regulations to protect, preserve, and enhance the water and air resources of the State, which were executive by nature: "[i]t is crystal clear to us that the duties of the EMC are administrative or executive in character." Here, the Board's duties and powers to promulgate and administer the rules affecting elementary and secondary education in North Carolina are likewise, in fact, executive. N.C. Const. Art. IX, Sect. 5; N.C.G.S. § 115C-12. Although Plaintiff's Verified Complaint relies exclusively upon Guthrie, that case also suggests that the Board is an executive agency by declaring that: "**[w]here, as here**, power to make rules and regulations has been delegated **to an administrative board or agency** by the Constitution.... Guthrie at 712.); see also Thomas Jefferson Classical Acad. Charter Sch. v. Cleveland County Bd. of Educ., __ N.C. App. ___, 763 S.E.2d 288 (2014) (suggesting that unlike the Board, local boards of education are not executive agencies.)

Likewise, contrary to the Board's argument that it is not subject to APA, it nevertheless availed itself of and participated fully in other provisions of APA, including the provisions governing contested case hearings at the Office of Administrative Hearings. See, e.g., Rainey v.

N.C. Dep't of Pub. Instruction, 361 N.C. 679 (2007); North Carolina Chiropractic Ass'n v. North Carolina State Bd. of Educ., 122 N.C. App. 122 (1996). Outside the framework of this action, the Board has consistently held itself out as an executive branch agency:

- The Board has acknowledged in legislative hearing testimony to the General Assembly that it is, in fact, subject to rulemaking requirements of APA. (Exh A).
- The Board sought a regulatory reform seeking a full exemption from the APA's rulemaking regulations. (Exh B)
- The Board abides by N.C.G.S. § 138A-15(e) of the State Government Ethics Act by making appropriate proclamations at the beginning of the Board's meetings. (Exh C)
- The Board designated a rulemaking coordinator as required by APA rulemaking requirements. (Exh D)
- The Secretary of State formally lists the Board as a part of the Executive Branch. (Exh E).
- The Board lists itself as a division of the executive agency DPI. (Exh. F).
- The Board represents in its own website that it promulgates rules according the APA. (Exh G).

Contrary to its allegations, the Board is admittedly an executive agency subject that is subject to the terms of the APA, as executed by the RRC. Plaintiff's Motion for Summary Judgment should therefore be denied.

III. VERIFIED COMPLAINT - COUNT TWO: PLAINTIFF HAS FAILED TO ESTABLISH THAT APA-MANDATED REVIEW OF SBE'S RULES VIOLATES ART. IX, SECT. 5 OF N.C. CONSTITUTION.

Although the Verified Complaint implies that the RRC has exerted improper Constitutional control over the Board, (Verified Complaint ¶ 38, 41), those factual conclusions

were neither conceded by the RRC nor otherwise established by any record evidence. See supra p. 11. The non-existence of a genuine issue of material fact as to the scope of the RRC's exercise of authority over the Board renders the Plaintiff's motion for Summary Judgment improper.

More significantly, the Board misinterprets the Article IX, Section 5 of the N.C. Constitution. According to the Board, the Constitution grants the Board "general supervisory and administrative rulemaking authority with respect to public education **unless the General Assembly enacts specific legislation revising or repealing a particular rule adopted by the Board.**" (P Compl ¶ 37) In reality, the Constitution does not demand that the General Assembly implement **specific legislation** to address each rule adopted by the Board. Instead, the Constitution simply provides that the Board shall make all needed rules, **subject to laws enacted by the General Assembly**. See supra p 15. It is undisputed that the APA is a set of laws enacted by the General Assembly, and the Board does not challenge the facial constitutionality of those laws with its pending Motion for Summary Judgment. It is further undisputed that among other rule-making criteria, the APA requires State agencies, departments and boards to submit their temporary and permanent rules for RRC review. The "General Assembly intended only those agencies it expressly and unequivocally exempted from the provisions of the Administrative Procedure Act be excused in any way from the Act's requirements and, even in those instances, that the exemption apply only to the extent specified by the General Assembly." North Buncombe Ass'n of Concerned Citizens v. Rhodes, 100 N.C. App. 24, 28 (1990). Therefore, consistent with the express constitutional limitations, the Board's rulemaking powers are subject to the APA.

Indeed, the leading case relied upon by Plaintiff explicitly recognizes the General Assembly's power to limit the Board's constitutional powers: "the powers [Constitutionally]

conferred upon the State Board of Education [are] subject to limitation and revision by acts of the General Assembly," Guthrie at 703, and in no way suggests that the General Assembly must specifically review, revise and/or repeal each particular rule adopted by the Board. In suggesting that "[a]ny attempt by the General Assembly to review, revise, or repeal [the Board's] rules must be done "specifically[,]" (Verified Complaint ¶ 40), the Board presumably seizes on the Guthrie analysis to conclude that "[n]one of [repealed Chapter 115] provisions **specifically limits** the authority of the State Board of Education to promulgate or administer rules and regulations concerning the certification of teachers." Id. at 710-11. Guthrie was decided prior to the enactment of APA, and therefore does not address or take into account the specific rule-making schemata established by the General Assembly, and its application to the Board. Because the APA **specifically** prescribes rulemaking criteria for all nonexempt agencies, the Board is properly subject to the rulemaking laws passed by the General Assembly, and must abide by legislatively-mandated RRC review requirements. It is additionally clear that the General Assembly intended for APA to apply to the rules promulgated by the Board in the same manner as they are applicable to all other state agencies. See supra pp 17-19. The existence of these specific exemptions from certain provisions of rulemaking underscores the clear legislative intent to make the remainder of the Board's rulemaking process subject to RRC review.

North Carolina appellate courts have likewise recognized that the Board's power over the administration of elementary and secondary education is not unfettered, and is limited by General Assembly's enactments. For example, in State v. Whittle Communications, 328 N.C. 456 (1991), the Supreme Court held that local boards of education, rather than the State Board of Education, have complete and ultimate control over supplementary instructional materials in public schools,

pursuant to General Assembly's grant of such powers to the local boards. Similarly, citing its broad constitutional powers, the Board sought to regulate speech pathologists employed in public schools. North Carolina Bd. of Examiners for Speech & Language Pathologists, discussed supra. The appellate courts disagreed concluding that the Board's constitutional powers to administer public education are subject to other laws of the General Assembly, and are limited by enactment of the Licensure Act for Speech and Language Pathologists. Id. Likewise, the enactment of the APA reflects a divestment of "authority" from the Board to the RRC, in the context of procedural review of promulgated rules. See Whittington v. North Carolina Dep't of Human Resources, 100 N.C. App. 603, 612-13 (1990) (The APA is a specific set of statutes, which prescribes specific procedural limitations upon agencies' general rule-making authority.) As such, the Board's contention that APA violates Article IX of the N.C. Constitution by "subverting" the Board's constitutional powers, (P Compl p. 14, ¶ b), should be rejected.

IV. VERIFIED COMPLAINT - COUNT 3: THERE IS NO CONSTITUTIONAL VIOLATION WHEN THE RRC EXERERCISES THE ADMINISTRATIVE REVIEW AUTHROITY DELEGATED TO IT BY THE GENERAL ASSEMBLY WHILE CONTEMPLATEING THE BOARD'S PROPOSED RULES.

As with other counts of its Complaint, the Board fails to allege any specific facts that would allow the Court to conclude that the RRC unconstitutionally applied N.C.G.S. § 150B-2(1a), (P Compl p. 14, ¶ 44), and its motion for summary judgment should be denied for lack of the appropriate factual basis as outlined supra. Moreover, Plaintiff is mistaken in its assertion that the General Assembly is not allowed to delegate a power to review the Board's rules to the RRC, pursuant to the APA. The separation of powers doctrine does not require that the branches of government "must be kept wholly and entirely separate and distinct[.]"State v. Furmage, 250

N.C. 616, 626 (1959). The problems that the legislature must confront are of such complexity that strict adherence to the purist notions of the non-delegation doctrine would unduly hamper the General Assembly in the exercise of its legislative powers. See, e.g., Coastal Highway v. Turnpike Authority, 237 N.C. 52 (1953).

A modern legislature must be able to delegate -- in proper instances – "a limited portion of its legislative powers" to administrative bodies which are equipped to adapt legislation "to complex conditions involving numerous details with which the Legislature cannot deal directly." Turnpike Authority v. Pine Island, 265 N.C. at 114. North Carolina courts have "repeatedly held that the constitutional inhibition against delegating legislative authority does not preclude the legislature from transferring adjudicative and rule-making powers to administrative bodies, provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. See, e.g., Hospital v. Davis, 292 N.C. 147 (1977); Guthrie v. Taylor, 279 N.C. 703 (1971), cert. denied, 406 U.S. 920 (1972), and cases cited therein." Adams at 696-697. It should be noted that the Supreme Court specifically referenced Guthrie when it made these conclusions in Adams.

The appellate courts have further stated that the "guiding standards" provided by the legislature to the agency need be no more specific than the circumstances permit. "It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances." Id. at 698; see Broad and Gales, 300 N.C. at 273. The "General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation." Bring v. N.C. State Bar, 348 N.C. 655, 658 (1998).

The RRC's purpose is to help ensure that administrative rulemaking complies with the APA. See N.C.G.S. § 143B-30.2. Consequently, the RRC is expressly prohibited from considering "questions relating to the quality or efficacy of the rule." Id. § 150B-21.9(a). The RRC is limited to determining (1) whether promulgation of the rule in question is within the submitting agency's statutory authority, (2) whether the rule is clear and unambiguous, (3) whether the rule is reasonably necessary to implement or interpret State or federal law, (4) whether the agency submitting the rule conformed to the APA's procedural requirements for rulemaking, and (5) whether changes to the rule made by the agency during the review process are substantial enough to require an opportunity for further public comment. Id. §§ 150B-21.9(a), -21.12(c). Our appellate courts have upheld much less stringent guiding standards as being adequate to withstand a separation of powers challenges.

For instance, in Bring, the Supreme Court upheld the constitutionality of the provision in N.C.G.S. § 84-24 that provides that "the Board [of Law Examiners] shall make and amend the rules of the Board "as in their judgment shall promote the welfare of the State and the profession" as sufficient statutory guidance to prevent this delegation of authority from being declared unconstitutional." Bring at 655. Likewise, the Court of Appeals has noted that "the [law] examination shall be held in the manner and at the times as the Board of Law Examiners may determine," provided adequate guidance for the Board to prepare and administer the bar examination so that there was no unconstitutional delegation of legislative authority. Bowens v. Board of Law Examiners, 57 N.C. App. 78, 82 (1982). The Legislature's directions to the RRC summarized above are significantly more specific, provide appropriate guidance regarding its rule review authority, and are sufficient to withstand judicial scrutiny. Additionally, in the analysis

of whether the delegated guiding standards are adequate, the courts also consider whether the authority vested in the agency is subject to procedural safeguards. See, e.g., Adams, 295 N.C. at 698. "[T]he existence of adequate procedural safeguards supports the constitutionality of the delegated power and tends to 'insure that the decision-making by the agency is not arbitrary and unreasoned.'" In re Declaratory Ruling., 134 N.C. App 22, 33 (1999) (quotations omitted).

The APA itself prescribes a specific structured rule review process with statutorily imposed time requirements and a limited scope of review, which serves as a procedural safeguard in its own right. See N.C.G.S. 150B-21.1, -21.1A. 21.2. (See Exh H). Moreover, an agency's ability to obtain judicial review of the RRC's decisions is a significant procedural safeguard that the Board is free to utilize in case of an actual controversy. See Adams, 295 N.C. at 701-02. Under the APA, when the RRC returns a permanent rule to an agency, "the agency may file an action for declaratory judgment in Wake County Superior Court" to obtain review of the RRC's decision. N.C.G.S. § 150B-21.8(d). If a court finds that the RRC's objections to a rule were incorrect or otherwise improper – if, for example, the RRC determines that a particular rule is outside an agency's statutory authority and the court disagrees – the court can so declare. Id. Additional safeguards are found in N.C.G.S. § 150B-21.3(b1), (b2), which provide that the RRC's review of administrative rules is subject to a further legislative oversight

In summary, the RRC's rule review authority is guided by adequate standards, and accompanied by significant procedural safeguards to ensure that RRC decisions are not arbitrary and unreasoned. The Legislature, therefore, appropriately delegated its power to review rules to RRC, since the delegation serves the expressed legislative policy objective that rule making procedures are not "performed by the same person in the administrative process", N.C.G.S.

150B-1(a), and meaningfully constrains the RRC by placing various specific restrictions on RRC's powers to review agency rules. The Board's motion for declaratory summary judgment with regard to count three of its Complaint should be denied.

Respectfully submitted, this the 25th day of June, 2015.

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CERTIFICATE OF SERVICE

I, Amar Majmundar, attorney for Defendants, hereby certify that a copy of the foregoing Brief was duly served upon the attorneys for the Plaintiff by virtue of electronic mail, addressed as follows:

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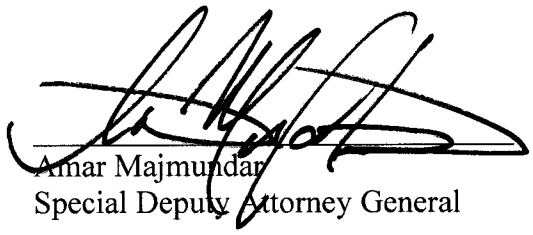
This the 25th day of June, 2015.



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