To: All RRC Commissioners
From: Brian Liebman and William Peaslee, Commission Counsel
In re: Objections to 15A NCAC 07H .0501, 15A NCAC 07H .0502, 15A NCAC 07H .0503, 15A NCAC 07H .0505, 15A NCAC 07H .0506, 15A NCAC 07H .0507, 15A NCAC 07H .0508, 15A NCAC 07H .0509, and 15A NCAC 07H .0510 (Liebman); 15A NCAC 07M .0201; 15A NCAC 07M .0202; 15A NCAC 07M .0401; 15A NCAC 07M .0701; 15A NCAC 07M .1001; and 15A NCAC 07M .1101 (Peaslee).
Date: February 15, 2023

I. History

The Coastal Resources Commission ("CRC") readopted rules and submitted the same for the consideration of the Rules Review Commission ("RRC") as part of the decennial periodic review process of G.S. 150B-21.3A. G.S. 150B-21.3A was adopted in 2013. Many of the rules have not been reviewed in thirty or more years. CRC's readoption deadline was July 31, 2020 and these rules were first submitted for RRC review nearly two years later for consideration at the RRC's July 2022 meeting.

It should be noted that the CRC made very few changes to its rules but rather simply readopted its existing rules. Indeed some of the CRC's rules failed to correct the name change of its host department from the Department of Environment and Natural Resources to the Department of Environmental Quality. Some rules contained citations to general statutes which were repealed in the late 1980s.

In advance of the July RRC meeting, counsel issued several staff opinions, including what was termed the "omnibus" staff opinion to the above captioned rules. In this July 14, 2022 "omnibus" staff opinion, staff recommended objection on two separate bases.

First, staff opined that these "rules" were subject to objection on the basis of lack of statutory authority, lack of necessity, and failure to follow the Administrative Procedure Act ("APA") because they did not meet the APA's definition of a "rule" pursuant to G.S. 150B-2(8a). Accordingly, they could not be adopted through rulemaking. Second, staff opined that, in the alternative, these rules were subject to objection on the basis of ambiguity.

The RRC granted an extension to the agency at the July meeting, extending the period of review 70 days, or roughly until the September 2022 meeting. The agency submitted a September 1, 2022 memo arguing—in relevant part—that the agency possessed authority to adopt the above-captioned "rules" as policies notwithstanding their success or failure of meeting the definition of a "rule". At the September 15, 2022 RRC meeting, the Commission voted to adopt staff's omnibus opinion and thus objected to the above-captioned rules for the reasons set forth in staff's opinion.

Subsequently, on November 23, 2022, the agency submitted revised versions of the above-captioned rules as well as another memo which again laid out the same statutory authority argument made in the September 1, 2022 memo. At the subsequent December 15, 2022 RRC meeting, the Commission heard from Mary Lucasse, but ultimately voted to table these rules for further consideration at the January 2023 meeting. RRC further asked counsel to categorize those rules subject to objection on three bases: policy objections,

necessity objections, and objections based on the inclusion of the ambiguous phrase "significant adverse impact."

Prior to the January 2023 meeting, the agency again submitted a memo revisiting the September 1, 2022 statutory authority argument, and submitted revised versions of several rules subject to the omnibus opinion. As these filings were submitted the day before the meeting, RRC again voted to table these rules, and asked staff to prepare updated opinions addressing CRC's arguments.

II. Statutory Authority

CRC has made the same statutory authority argument in each of the three memos submitted to RRC, both before and after RRC's objection at the September 2022 meeting.

First, the agency looks to the language of the Coastal Area Management Act, which identifies as a goal that the agency "establish policies, guidelines and standards" for the protection and preservation of the coastal area, N.C.G.S. § 113A-102(b)(4). It should be noted that G.S. § 113A-102 makes a distinction between "policies" and "guidelines and standards." There is not a comma after "guidelines", thus guidelines and standards are set apart from policies. *Cf.* Winkler v. N.C. State Bd. of Plumbing, Heating & Fire Sprinkler Contractors, 261 N.C. App. 106, 112-13 (2018) (interpreting a statute on the basis of the presence of a comma).

The agency further states that "[s]tate guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area." N.C. Gen. Stat. § 113A-107(a). Again, the lack of a comma after "standards" is significant. "To be followed…" relates to "standards", not to "statements of objectives and policies." Thus the General Assembly has differentiated "policies," which are not enforceable and, in staff's opinion, should not be in the North Carolina Administrative Code ("the Code"), and "standards" which are enforceable. This reading is consistent with the definition of a "rule" in G.S. 150B-2(8a) which states, in part, "any agency regulation, **standard**, or statement of general applicability…" G.S. 150B-2(8a) provides the definition for "rule" which is applicable to all of Chapter 150B. Pursuant to Article 2A of Chapter 150B only rules can be adopted by agencies and be included in the Code. N.C. Gen. Stat. § 150B-18 (2022).

In short, while the CRC has authority to adopt a policy, that policy is not adoptable as a rule unless it meets the definition of a rule. Only then may it be adopted pursuant to the APA, be entered into the Code, and become enforceable.

Second, the agency turns to a North Carolina Supreme Court decision, Adams v. Department of Natural and Environmental Resources, 295 N.C. 683 (1978), in which the Court stated that "amendments to the State guidelines by the CRC are considered administrative rule-making under G.S. 150A-10, and thus subject to the comprehensive additional safeguards contained in the Administrative Procedure Act."

Boiled down to its simplest form, CRC argues that the General Assembly gave them the authority to adopt "policies" as part of their "guidelines" for the coastal region, and that

the North Carolina Supreme Court has recognized the amendment of "guidelines"—containing the aforementioned policies—as part of administrative rulemaking under the APA. There are several fatal flaws to this argument.

a. Changes to the APA

First and foremost, the Adams decision was issued in 1978, and relies upon a version of the APA that was abrogated in 1986 when the General Assembly recodified the APA from Chapter 150A to Chapter 150B. In doing so, the General Assembly changed the definition of "rule", explicitly removing previous references to "policies".

At the time of the Adams decision, the operative definition of "rule" in G.S. 150A-10 was:

> Each agency regulation, standard or statement of general applicability that implements or prescribes law or **policy**, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include the following:
>
> . . . .
>
> (6) Interpretative rules and general statements of policy of the agency.

Following the recodification of the APA in 1986, the General Assembly specifically defined a "policy", differentiated it from a "rule", and explicitly prohibited an agency from adopting a "policy" as a "rule." As currently stated, a "policy" is defined in G.S. 150B-2(7a) as "any nonbinding interpretative statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule." The definition of "rule" is now:

> Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes establishment of a fee and the amendment or repeal or a prior rule. The term does not include the following:
>
> . . . .
>
> c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

In G.S. 150B-18, a statute titled "Scope and effect," the legislature explained the intent of this dichotomy:

> This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article. An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted as a rule in accordance with this Article.

To the extent that the APA has ever permitted an agency to adopt and enforce a policy in the same manner as a rule, it appears that the version of the APA in effect at the time Adams was decided prohibited "general statements of policy" from the Administrative Code. It is unclear whether "specific" statements of policy were allowed, and if so, where the line between these concepts lay. Moreover, it is entirely unclear whether the policies CRC seeks to enforce here would have been acceptable under the 1978 APA.

Nevertheless, the changes to the APA since 1978 have mooted this inquiry. The General Assembly revised the APA to explicitly contrast a "rule" from a "policy", and make clear that the only language which may be included in the Administrative Code and thereafter implemented and enforced are "rules" meeting the definition of G.S. 150B-2(8a) and the standards of G.S. 150B-21.9.[1] Accordingly, it is staff's opinion that CRC's contention that it is now entitled to enter policies which neither meet the definition of "rules" nor meet the standards of G.S. 150B-21.9 into the Code through the existing rules readoption process is without merit.

b. The language in Adams cited by CRC may be considered dicta

The question presented to the Court in Adams was not whether CRC was entitled to enforce policy as law, but instead whether the Coastal Area Management Act "properly delegates authority to the Coastal Resources Commission…" under the North Carolina Constitution. In answering that question in the affirmative, the Court concluded that such delegations are proper when protected by "procedural safeguards". Adams, 295 N.C. at 698. The Court then analyzed the procedural safeguards available (at the time) under state law, which consisted of "(1) those provided by the [Coastal Area Management] Act, (2) those contained in the North Carolina Administrative Procedure Act (APA), (3) the Administrative Rules Review Committee created by G.S. 120-30.26 and (4) the "Sunset" legislation enacted by the 1977 General Assembly, G.S. 143-34.10, et seq."[2]

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[1] The standards that RRC uses to review rules are based, at least in part, upon G.S. 150B-19 and 150B-19.1, which *inter alia*, require that rules adopted under the APA are within an agency's statutory authority, written in a clear and unambiguous manner, and are "reasonably necessary to implement" state or federal law.

[2] Please note that the Administrative Rules Review Committee and the "Sunset" legislation no longer exist. The Administrative Rules Review Committee was transformed, through several permutations, into the Rules Review Commission. The "Sunset" legislation in G.S. 143-34.10 was repealed in 1981.

It was in this context that the Court stated that "amendments to the State guidelines by the CRC are considered administrative rule-making under G.S. 150A-10…" Adams, 295 N.C. at 702. The Court was not explicitly holding that CRC was permitted to place policies into the Administrative Code in contravention of the APA, but instead merely noted that the guidelines adopted by CRC, like those from almost any other executive agency, are subject to the "requirements for public hearings and publication" under the APA. Id.

Thus, it is staff's opinion that CRC's contention that the Supreme Court "confirmed" that CRC is "authorized to set guidelines (including . . . policies . . .) regulating the public and private use of land and waters within the coastal area through rulemaking" overstates the strength of the holding in Adams, and does not acknowledge that the Adams Court was answering a related, but ultimately different question than the one posed here.

c. RRC's ruling does not mean that CRC may not adopt these policies

As CRC points out, it is directed by G.S. 113A-102 and 113A-107 to develop "policies, guidelines, and standards" for the protection of coastal waters. As stated in response to a question by a Commissioner at the September 2022 meeting, RRC's objection does not mean that CRC cannot establish these policies. For example, the CRC could place its "Declaration of General Policy" regarding dredged material (15A NCAC 07M .1101) on its website. Instead, the objection only means that the policies may not be adopted as a "rule" unless they meet the definition of "rule" pursuant to G.S. 150B-2(8a), and as such may not have the force of law.

d. G.S. 113A-107(c) and (f) support a narrower, rather than broader, reading of the agency's rulemaking authority

While CRC may opine that G.S. 113A-107(c) and (f) empowers CRC to adopt policies as rules, such a reading is inharmonious with the modern approach to rulemaking. G.S. 113A-107(c) states that CRC shall mail its proposed and adopted "rules establishing guidelines" to various governmental entities. G.S. 113A-107(f) states that CRC shall review its "rules establishing guidelines" every five years.

CRC may opine that this phrase empowers CRC to adopt all "guidelines" as "rules", including policies and statements. This would be a self-empowering reading of the language of the statute, and a reading that staff would suggest is contrary to the intentions of the General Assembly as exhibited in G.S. 150B-18. "Rules establishing guidelines" could equally be read to state that those standards (those items which meet the definition of a "rule") within the guidelines excluding statements and objectives, shall be mailed and reviewed.

Here the General Assembly is not empowering CRC to avoid the requirements of meeting the definition of a "rule" in G.S. 150B-21.9 but rather laying upon CRC more responsibilities to give notice and review CRC's proposed, and if adopted enforceable, rules. If the General Assembly had intended subsections (c) and (f) to be applicable to statements, policies, as well as standards, it would have said simply "guidelines".

Conclusion

Staff's opinion regarding the rules contained in the omnibus opinion has not changed. It continues to be staff's opinion that these "rules" contain policy language that does not meet the definition of a "rule" under the APA, and as such may not be adopted as a "rule" nor included in the Administrative Code. It is also staff's opinion that the agency's 11/23/22 and 1/18/23 revisions, to the extent they preserve policy language, have not satisfied the Commission's existing objection. Staff recommends that RRC continue its objection at this time.

Assuming *arguendo* that RRC finds that CRC has authority to adopt policy language as a rule, thereafter RRC must determine whether the policy must meet the standards established by G.S. 150B-21.9 for necessity and clarity. In staff's opinion, the any language adopted must meet those standards by a plain reading of G.S. 150B-21.9. In staff's opinion, much of the language is not reasonably necessary and is ambiguous.

§ 150B-2. Definitions.

As used in this Chapter, the following definitions apply:

(1) Administrative law judge. - A person appointed under G.S. 7A-752, 7A-753, or 7A-757.

(1a) Adopt. - To take final action to create, amend, or repeal a rule.

(1b) Agency. - An agency or an officer in the executive branch of the government of this State. The term 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.

(1c) Codifier of Rules. - The person appointed by the Chief Administrative Law Judge of the Office of Administrative Hearings pursuant to G.S. 7A-760(b).

(1d) Commission. - The Rules Review Commission.

(2) Contested case. - An administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty. The term does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.

(2a) Repealed by Session Laws 1991, c. 418, s. 3.

(2b) Hearing officer. - A person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.

(3) License. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes, occupational licenses, and certifications of electronic poll books, ballot duplication systems, or voting systems under G.S. 163-165.7.

(4) Licensing. - Any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. The term does not include controversies over whether an examination was fair or whether the applicant passed the examination.

(4a) Occupational license. - Any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.

(4b) Occupational licensing agency. - Any board, commission, committee, or other agency of the State that is established for the primary purpose of regulating the entry of persons into, or the conduct of persons within

a particular profession, occupation, or field of endeavor, and that is authorized to issue and revoke licenses. The term does not include State agencies or departments that may as only a part of their regular function issue permits or licenses.

(5) Party. - Any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.

(5a) Person. - Any natural person, partnership, corporation, body politic, and any unincorporated association, organization, or society that may sue or be sued under a common name.

(6) Person aggrieved. - Any person or group of persons of common interest directly or indirectly affected substantially in his, her, or its person, property, or employment by an administrative decision.

(7) Recodified as subdivision (5a) of this section by Session Laws 2021-88, s. 16(a), effective July 22, 2021.

(7a) Policy. - Any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency that is intended and used purely to assist a person to comply with the law, such as a guidance document.

(8) Residence. - Domicile or principal place of business.

(8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

a. Statements concerning only the internal management of an agency or group of agencies within the same principal office or department enumerated in G.S. 143A-11 or 143B-6, including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by G.S. 143A-2 or G.S. 143B-3, or by an occupational licensing board, as defined by G.S. 93B-1.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under G.S. 150B-4.

2. Orders establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.

j. Establishment of the interest rate that applies to tax assessments under G.S. 105-241.21.

k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in G.S. 131E-176(25), reviewed by the Commission for compliance with G.S. 131E-176(25), and approved by the Governor.

l. Standards adopted by the State Chief Information Officer and applied to information technology as defined in G.S. 143B-1320.

(8b) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011.

(8c) Substantial evidence. - Relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(9) Repealed by Session Laws 1991, c. 418, s. 3. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5; 1983, c. 641, s. 1; 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, s. 1(2)-1(5); 1987, c. 878, ss. 1, 2, 21; 1987 (Reg. Sess., 1988), c. 1111, s. 17; 1991, c. 418, s. 3; c. 477, ss. 3.1, 3.2, 9; 1995, c. 390, s. 29; 1996, 2nd Ex. Sess., c. 18, s. 7.10(g); 1997-456, s. 27; 2003-229, s. 12; 2007-491, s. 44(1)b; 2011-13, s. 2; 2011-398, ss. 15, 61.2; 2013-188, s. 7; 2013-382, s. 9.1(c); 2013-413, s. 1; 2015-2, s. 2.2(c); 2015-241, ss. 7A.3,

30.16(a); 2017-6, s. 3; 2018-13, s. 3.8(b); 2018-146, ss. 3.1(a), (b), 4.5(b); 2021-88, s. 16(a), (b).)

Article 2A.
Rules.
Part 1. General Provisions.

§ 150B-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article. An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted as a rule in accordance with this Article. (1991, c. 418, s. 1; 2011-398, s. 1; 2012-187, s. 2.)

§ 150B-19. Restrictions on what can be adopted as a rule.

An agency may not adopt a rule that does one or more of the following:

(1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.

(2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.

(3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.

(4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).

(5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:

a. A service to a State, federal, or local governmental unit.

b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.

c. A transcript of a public hearing.

d. A conference, workshop, or course.

e. Data processing services.

(6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

(7) Repealed by Session Laws 2011-398, s. 61.2, effective July 25, 2011. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 7.10(a); 2011-13, s. 1; 2011-398, s. 61.2.)

§ 150B-21.3A. Periodic review and expiration of existing rules.

(a) Definitions. - For purposes of this section, the following definitions apply:

(1) Commission. - Means the Rules Review Commission.

(2) Committee. - Means the Joint Legislative Administrative Procedure Oversight Committee.

(2a) Necessary rule. - Means any rule other than an unnecessary rule.

(3), (4) Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.

(5) Public comment. - Means written comments objecting to the rule, in whole or in part, or objecting to an agency's determination of the rule as necessary or unnecessary, received by an agency from any member of the public, including an association or other organization representing the regulated community or other members of the public.

(6) Unnecessary rule. - Means a rule that the agency determines to be obsolete, redundant, or otherwise not needed.

(b) Automatic Expiration. - Except as provided in subsection (e) of this section, any rule for which the agency that adopted the rule has not conducted a review in accordance with this section shall expire on the date set in the schedule established by the Commission pursuant to subsection (d) of this section.

(c) Review Process. - Each agency subject to this Article shall conduct a review of the agency's existing rules at least once every 10 years in accordance with the following process:

(1) Step 1: The agency shall conduct an analysis of each existing rule and make an initial determination as to whether the rule is necessary or unnecessary. The agency shall then post the results of the initial determination on its Web site and invite the public to comment on the rules and the agency's initial determination. The agency shall also submit the results of the initial determination to the Office of Administrative Hearings for posting on its Web site. The agency shall accept public comment for no less than 60 days following the posting. The agency shall review the public comments and prepare a brief response addressing the merits of each comment. After completing this process, the agency shall submit a report to the Commission. The report shall include the following items:

a. The agency's initial determination.

b. All public comments received in response to the agency's initial determination.

c. The agency's response to the public comments.

(2) Step 2: The Commission shall review the reports received from the agencies pursuant to subdivision (1) of this subsection. If a public comment relates to a rule that the agency determined to be unnecessary, the Commission shall determine whether the public comment has merit and, if so, designate the rule as necessary. For purposes of this subsection, a public comment has merit if it addresses the specific substance of the rule. The Commission shall prepare a final determination report and submit the report to the Committee for consultation in accordance with subdivision (3) of this subsection. The report shall include the following items:

a. The agency's initial determination.

b. All public comments received in response to the agency's initial determination.

c. The agency's response to the public comments.

d. A summary of the Commission's determinations regarding public comments.

e. Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.

f. A determination that all rules that the agency determined to be unnecessary and for which no public comment was received or for which the Commission determined that the public comment was without merit shall expire on the first day of the month following the date the report becomes effective in accordance with this section.

g. A determination that all rules that the agency determined to be necessary or that the Commission designated as necessary shall be readopted as though the rules were new rules in accordance with this Article.

(3) Step 3: The final determination report shall not become effective until the agency has consulted with the Committee. The determinations contained in the report pursuant to sub-subdivisions f. and g. of subdivision (2) of this subsection shall become effective on the date the report is reviewed by the Committee. If the Committee does not hold a meeting to hear the consultation required by this subdivision within 60 days of receipt of the final determination report, the consultation requirement is deemed satisfied, and the determinations contained in the report become effective on the 61st day following the date the Committee received the report. If the Committee disagrees with a determination regarding a specific rule contained in the report,

the Committee may recommend that the General Assembly direct the agency to conduct a review of the specific rule in accordance with this section in the next year following the consultation.

(d) Timetable. - The Commission shall establish a schedule for the review and readoption of existing rules in accordance with this section on a decennial basis as follows:

(1) With regard to the review process, the Commission shall assign each Title of the Administrative Code a date by which the review required by this section must be completed. In establishing the schedule, the Commission shall consider the scope and complexity of rules subject to this section and the resources required to conduct the review required by this section. The Commission shall have broad authority to modify the schedule and extend the time for review in appropriate circumstances. Except as provided in subsections (e) and (f) of this section, if the agency fails to conduct the review by the date set by the Commission, the rules contained in that Title which have not been reviewed will expire. The Commission shall report to the Committee any agency that fails to conduct the review. The Commission may exempt rules that have been adopted or amended within the previous 10 years from the review required by this section. However, any rule exempted on this basis must be reviewed in accordance with this section no more than 10 years following the last time the rule was amended.

(2) With regard to the readoption of rules as required by sub-subdivision (c)(2)g. of this section, once the final determination report becomes effective, the Commission shall establish a date by which the agency must readopt the rules. The Commission shall consult with the agency and shall consider the agency's rule-making priorities in establishing the readoption date. The agency may amend a rule as part of the readoption process. If a rule is readopted without substantive change or if the rule is amended to impose a less stringent burden on regulated persons, the agency is not required to prepare a fiscal note as provided by G.S. 150B-21.4.

(e) Exclusions. - The Commission shall report annually to the Committee on any rules that do not expire pursuant to this subsection. The following rules shall not expire as provided in this section:

(1) Rules adopted to conform to or implement federal law.

(2) Rules deemed by the Boards of Trustees established under G.S. 128-28 and G.S. 135-6 to protect inchoate or accrued rights of members of the Retirement Systems administered by the State Treasurer.

(e1) Repealed by Session Laws 2019-140, s. 3(a), effective July 19, 2019, and applicable to agency rule reports submitted to the Office of Administrative Hearings pursuant to G.S. 150B-21.3A(c)(1) on or after October 1, 2019.

(f) Other Reviews. - Notwithstanding any provision of this section, an agency may subject a rule that it determines to be unnecessary to review under this section at any time by notifying the Commission that it wishes to be placed on the schedule for the current year. The Commission may also subject a rule to review under this section at any time by notifying the agency that the rule has been placed on the schedule for the current year. (2013-413, s. 3(b); 2014-115, s. 17; 2014-120, s. 2; 2015-164, s. 7; 2015-286, s. 1.6(a); 2019-140, s. 3(a).)

§ 150B-21.9. Standards and timetable for review by Commission.

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

(4) It was adopted in accordance with Part 2 of this Article.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. - The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

295 N.C. 683
Supreme Court of North Carolina.

Jack ADAMS, Claude Brown, Henry Davis, Thurman and Roda M. Lawrence and Crow Hill Properties (a partnership)
v.
NORTH CAROLINA DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES and North Carolina Coastal Resources Commission,
and
Alphious K. EVERETT, Sr., Ray Hartsfield, Jr., Julius B. Parker and Liston Yopp
v.
NORTH CAROLINA DEPARTMENT OF NATURAL AND ECONOMIC RESOURCES and North Carolina Coastal Resources Commission.

No. 28.
|
Nov. 28, 1978.

Synopsis
Declaratory judgment action was brought attacking the constitutionality of the Coastal Area Management Act of 1974. The Superior Court, Carteret County, Ralph A. Walker, Special Judge, upheld the constitutionality of the Act, and appeal was taken. After allowing motion to bypass the Court of Appeals, the Supreme Court, Huskins, J., held that: (1) the Act is a general law which General Assembly had power to enact; (2) the Act properly delegates authority to the Coastal Resources Commission to develop, adopt and amend state guidelines for coastal area; (3) plaintiffs were in no position to obtain declaratory judgment determining whether provisions of Act had impermissibly impaired usefulness and value of their land, and (4) plaintiffs failed to allege actual or presently existing controversy with respect to "search" issue.

Affirmed.

Copeland, J., dissented and filed opinion.

West Headnotes (17)

[1] **Constitutional Law** Constitutionality of Statutory Provisions
Constitutional Law Wisdom
Constitutional Law Expediency
In passing upon constitutionality of a legislative act it is not for court to judge its wisdom or expediency; rather, it is court's duty to determine whether legislative act in question exceeds constitutional limitation or prohibition.
3 Cases that cite this headnote

[2] **Statutes** Governments and political subdivisions
Mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act; only if statutory classification is unreasonable or underinclusive will statute be voided as prohibited local act. Const.1970, art. 2, § 24.
3 Cases that cite this headnote

[3] **Statutes** Governments and political subdivisions
Constitutional prohibition against local laws simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. Const.1970, art. 2, § 24.
7 Cases that cite this headnote

[4] **Environmental Law** Coastal areas, bays, and shorelines
Coastal counties as designated in the Coastal Area Management Act of 1974 constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems

found in coastal zone. G.S. § 113A–100 et seq.; Const.1970, art. 2, § 24.

3 Cases that cite this headnote

[5] **Statutes** Laws of Special, Local, or Private Nature

Constitutional prohibition against local legislation does not require a perfect fit; rather, it requires only that legislative definition be reasonably related to purpose of act. Const.1970, art. 2, § 24.

4 Cases that cite this headnote

[6] **Zoning and Planning** Area and frontage requirements

Western boundary of coastal zone as determined by use of seawater encroachment criterion is reasonably related to purpose of the Coastal Area Management Act of 1974. G.S. § 113A–100 et seq.

[7] **Statutes** Property

Zoning and Planning Validity of statutes

Coastal Area Management Act of 1974 is a general law which General Assembly had power to enact and does not violate constitutional prohibition against local legislation. G.S. § 113A–100 et seq.; Const.1970, art. 2, § 24.

6 Cases that cite this headnote

[8] **Constitutional Law** To Executive, in General

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 Legislature cannot deal directly. Const.1970, art. 1, § 6; art. 2, § 1.

8 Cases that cite this headnote

[9] **Constitutional Law** To Executive, in General

While delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that decision-making by agency is not arbitrary and unreasoned and that agency is not asked to make important policy choices which might just as easily be made by Legislature. Const.1970, art. 1, § 6; art. 2, § 1.

5 Cases that cite this headnote

[10] **Constitutional Law** Standards for guidance

Primary sources of legislative guidance which an agency is to apply when exercising its delegated powers are declarations by the General Assembly of legislative goals and policies. Const.1970, art. 1, § 6; art. 2, § 1.

13 Cases that cite this headnote

[11] **Constitutional Law** Standards for guidance

Where there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of legislation; it is enough if general policies and standards have been articulated which are sufficient to provide direction to administrative body possessing expertise to adapt legislative goals to varying circumstances. Const.1970, art. 1, § 6; art. 2, § 1.

20 Cases that cite this headnote

[12] **Constitutional Law** Standards for guidance

Presence or absence of procedural safeguards is relevant to broader question of whether delegation of authority to administrative agency is accompanied by adequate guiding standards. Const.1970, art. 1, § 6; art. 2, § 1.

21 Cases that cite this headnote

[13] **Constitutional Law** Environment and natural resources

Zoning and Planning Validity of statutes

Coastal Area Management Act of 1974 properly delegates authority to the Coastal Resources Commission to develop, adopt and amend State guidelines for coastal area. G.S. § 113A–100 et seq.; Const.1970, art. 1, § 6; art. 2, § 1.

6 Cases that cite this headnote

[14] **Zoning and Planning** Construction, Operation, and Effect

Mandatory provisions of the Administrative Procedure Act must be read as complementing procedural safeguards of the Coastal Area Management Act. G.S. §§ 113A–100 et seq., 150A–1 et seq.

1 Case that cites this headnote

[15] **Declaratory Judgment** Necessity

An actual controversy between parties is a jurisdictional prerequisite for proceeding under the Declaratory Judgment Act.

14 Cases that cite this headnote

[16] **Declaratory Judgment** Statutes Relating to Particular Subjects

Although some of plaintiffs' land had been designated as an area of environmental concern under the Coastal Area Management Act, plaintiffs were in no position to obtain declaratory judgment determining whether provisions of the Act impermissibly impaired usefulness and value of their land where few determinations which could lead to genuine controversy overtaking of plaintiff's land had been made. G.S. § 113A–100 et seq.

4 Cases that cite this headnote

[17] **Declaratory Judgment** Statutes and ordinances

Plaintiffs in declaratory judgment action failed to allege an actual or presently existing controversy with respect to searches conducted under the Coastal Area Management Act where plaintiffs did not allege that they had been subjected to actual searches or that they had been fined for refusing access to investigators. G.S. § 113A–126(d)(1)c.

18 Cases that cite this headnote

****404** ***685** Plaintiffs Jack Adams, et al., instituted their action on 5 November 1976. Plaintiffs Alphious K. Everett, Sr., et al., instituted their action on 24 March 1977. Upon joint motion of plaintiffs and defendants these actions were consolidated for trial on 29 August 1977.

In this consolidated action, brought under the Declaratory Judgment Act, plaintiffs attack the constitutionality of the Coastal Area Management Act of 1974, G.S. 113A-100, et seq., hereinafter referred to as the Act. Plaintiffs allege in pertinent part:

1. That the Act is a prohibited local act under Article II, section 24 of the North Carolina Constitution.

2. That the Act delegates authority to the Coastal Resources Commission (hereinafter referred to as CRC) to develop and adopt ***686** "State Guidelines" for the coastal area without providing adequate standards to govern the exercise of the power delegated in violation of Article I, section 6 and Article II, section 1 of the North Carolina Constitution.

3. That the provisions of the Act, and the State guidelines adopted by the CRC, deprive them of their property without due process of law in violation of the Fifth and Fourteenth Amendments and in violation of Article I, section 19 of the North Carolina Constitution.

4. That Section 113A-126 of the Act authorizes warrantless searches by the CRC which are repugnant to the Fourth Amendment of the United States Constitution and Article I, section 20 of the North Carolina Constitution.

5. That the guidelines for the coastal area promulgated by the CRC exceed the powers delegated by the Act and are

impermissibly inconsistent with the goals of the Act as set forth in Section 113A-102.

The Coastal Area Management Act of 1974 is a "cooperative program of coastal area management between local and State governments." (G.S. 113A-101). Its basic objective is to "establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina." (G.S. 113A-102(a)).

Primary responsibility for implementing the Act is given to a fifteen-member citizen panel, the CRC, all but three of whom must have expertise in a specific phase of coastal activity such as commercial fishing, coastal engineering, coastal agriculture or coastal land development, or in local government in the twenty-county coastal area. Twelve of the fifteen are nominees of local government; all are appointed by the Governor. (G.S. 113A-104).

The CRC is assisted by the Coastal Resources Advisory Council (CRAC), composed of representatives appointed by each of the twenty coastal counties, plus four from coastal multi-county planning groups and eight from coastal towns and cities, as well as marine scientists and representatives of State agencies involved in coastal programs (G.S. 113A-105(b)).

***687** The coastal area is generally defined as including all counties bordering the Atlantic Ocean or one of the coastal sounds. G.S. 113A-103(2).

****405** A number of activities, including certain agricultural activities, are exempted from coverage of the Act by G.S. 113A-103(5)(b).

Four basic mechanisms are utilized by the Act to accomplish its objectives:

I. STATE GUIDELINES FOR THE COASTAL AREA ARE TO BE PROMULGATED BY THE CRC. G.S. 113A-106 through 108.

The CRC is to develop State guidelines for the coastal area, specifying objectives, policies and standards to be followed in public and private use of land and water in the coastal area. These guidelines are to give particular attention to the nature of development which shall be appropriate within the various types of area of environmental concern designated by the CRC. (See Part III, infra.) G.S. 113A-107. The State guidelines have a threefold effect. All county land use plans (see Part II, infra) must be consistent with the guidelines. All development permits granted (see Part IV, infra) must be consistent with the guidelines. Finally, all land policies of the State relating to acquisition, use, disposition, and classification of coastal land shall be consistent with the guidelines. G.S. 113A-108.

II. LAND USE PLANS ARE TO BE ADOPTED BY EACH COUNTY WITHIN THE COASTAL AREA. G.S. 113A-109 through 112.

A land use plan is to "consist of statements of objectives, policies, and standards to be followed in public and private use of land within the county" which shall be supplemented by maps showing the appropriate location of particular types of land or water use in particular areas. The plan shall give special attention to the protection and appropriate development of areas of environmental concern designated by the CRC. G.S. 113A-110(a). If a coastal county fails to adopt a land use plan the CRC shall promptly prepare such a plan. G.S. 113A-109. The land use plans are to be consistent with the State guidelines promulgated by the CRC. G.S. 113A-110(a). No land use plan shall become effective until it is approved by the CRC. G.S. 113A-110(f). The county land use plans have a twofold effect. No development permit shall be ***688** issued under Part IV (infra) which is inconsistent with the approved land use plan for the county in which the development is proposed. G.S. 113A-111. No local ordinance or regulation shall be adopted within an area of environmental concern (see Part III, infra) which is inconsistent with the land use plan of the county in which said ordinance or regulation is effected. Id.

III. DESIGNATION OF AREAS OF ENVIRONMENTAL CONCERN BY THE CRC THROUGH RULE MAKING. G.S. 113A-113 through 115.

"The (CRC) shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof . . . ."G.S. 113A-113(a). In specifying areas of environmental concern (AEC) the CRC is to consider the criteria listed in G.S. 113A-113(b). "Prior to adopting any rule permanently designating any (AEC) the Secretary and the (CRC) shall hold a public hearing in each county in which lands to be affected are located, at which public and private parties shall have the opportunity to present comment and views."G.S. 113A-115(a). The CRC shall review the designated AEC's at least biennially. New AEC's may be added and others deleted in accordance with the procedures outlined above.

IV. PERMITS MUST BE OBTAINED FOR DEVELOPMENT WITHIN AEC's. G.S. 113A-116 through 125.

Every person before undertaking any development in any AEC must obtain a permit. G.S. 113A-118(a). Permits for major developments are obtained from the CRC and permits for minor developments are obtained in the first instance from the county in which the development is to take place. Permits for major development are obtained through a formal, quasi-judicial proceeding. G.S. 113A-122. All permit applicants for major development are entitled ****406** to a hearing in which evidence is taken and the rules of procedure applicable to civil actions are followed insofar as practicable. A transcript of this hearing is forwarded to the CRC which renders a decision supported by findings of fact and conclusions of law. Id. Any person directly affected by any final decision or order of the CRC may appeal to the superior court for judicial review. G.S. 113A-123. Permits for minor development are procured from the designated local official pursuant to an expedited system of review. These expedited procedures are formulated ***689** at the local level. G.S. 113A-121. Any person directly affected by a decision of the designated local official may request a hearing before the CRC. Id. The procedure followed at this hearing is identical to that followed at hearings for major development permits. G.S. 113A-122.

The trial court upheld in all respects the constitutionality of the Act and the State guidelines promulgated by the CRC. Plaintiffs appealed to the Court of Appeals, and we allowed motion to bypass that court to the end that initial appellate review be had in the Supreme Court.

Attorneys and Law Firms

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John S. Curry, Carrboro, for amicus curiae (Natural Resources Defense Council, Inc., Sierra Club, Conservation Council of North Carolina, New Hope Chapter of The Nat. Audubon Society in support of appellees).

Opinion

HUSKINS, Justice:

Plaintiffs challenge the constitutionality of the Act on two grounds: (1) The Act constitutes local legislation prohibited by Article II, section 24 of the North Carolina Constitution; and (2) The Act unconstitutionally delegates authority to the Coastal Resources Commission (CRC) to develop and adopt "State guidelines" for the coastal area.

[1] The scope of review exercised by this Court when passing on the constitutionality of a legislative act is well stated in Glenn v. Board of Education, 210 N.C. 525, 187 S.E. 781 (1936):

"It is well settled in this state that the courts have the power, and it is their duty, in proper cases to declare an act of the General Assembly unconstitutional; but it must be plainly and clearly the case. If there is any reasonable doubt, it will be resolved in favor of the lawful exercise of their powers by the representatives of the people."

***690** Accord, McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961). Implicit in this presumption of constitutionality accorded to legislative acts is the principle that this Court and the General Assembly "are coordinate branches of the state government. Neither is the superior of the other." Nicholson v. Education Assistance Authority, 275 N.C. 439, 168 S.E.2d 401 (1969). In passing upon the constitutionality of a legislative act it is not for this Court to judge its wisdom and expediency. These matters are the province of the General Assembly. Rather, it is the Court's duty to determine whether the legislative act in question exceeds constitutional limitation or prohibition. "If there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution, because the Constitution is the superior rule of law in that situation." Id. Thus, this Court "will not disturb an act of the law-making body unless it runs counter to a constitutional limitation or prohibition." McIntyre v. Clarkson, supra.

The first issue for consideration is whether the Act is a local act prohibited by Article II, section 24 of the Constitution or is a general law which the General Assembly has the power to enact.

[2] In distinguishing between a general law and a local act it is important to note at ****407** the outset that Article XIV, section 3 of the Constitution expressly provides that: "General

laws may be enacted for classes defined by population or other criteria." In Surplus Co. v. Pleasants, Sheriff, 264 N.C. 650, 142 S.E.2d 697 (1965), we said: "For the purposes of legislating, the General Assembly may and does classify conditions, persons, places and things, and classification does not render a statute 'local' if the classification is reasonable and based on rational difference of situation or condition." Thus, the mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or underinclusive will the statute be voided as a prohibited local act.

[3] The above discussion indicates that the distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application. A general law defines a class which reasonably warrants ***691** special legislative attention and applies uniformly to everyone in the class. On the other hand, a local act unreasonably singles out a class for special legislative attention or, having made a reasonable classification, does not apply uniformly to all members of the designated class. In sum, the constitutional prohibition against local acts simply commands that when legislating in certain specified fields the General Assembly must make rational distinctions among units of local government which are reasonably related to the purpose of the legislation. A law is general if "any rational basis reasonably related to the objective of the legislation can be identified which justifies the separation of units of local government into included and excluded categories." Ferrell, "Local Legislation in the North Carolina General Assembly," 45 N.C.L.Rev. 340, 391 (1967). This rule of reasonable classification was formally announced in McIntyre v. Clarkson, supra, and reaffirmed in Treasure City, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964); Surplus Co. v. Pleasants, Sheriff, supra; Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972).

Plaintiffs make a two-part argument in support of their position that the Act constitutes a prohibited local act. First they contend the General Assembly may not reasonably distinguish between the coast and the remainder of the State when enacting environmental legislation; and next, that even if the coast is sufficiently unique to justify separate environmental legislation, the twenty counties covered by the Act do not embrace the entire area necessary for the purposes of the legislation. We will address these arguments seriatim.

In support of the first contention plaintiffs argue that the natural resources and environmental needs of the coastal counties are not sufficiently unique to warrant special legislative treatment in the form of "a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina." G.S. 113A-102(a). We disagree. The legislative findings on their face highlight the importance of the unique and exceptionally fragile coastal ecosystem:

"s 113A-102. Legislative findings and goals. (a) Findings. It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable ***692** resources are its coastal lands and waters. The coastal area, and in particular the estuaries, are among the most biologically productive regions of this State and of the nation. Coastal and estuarine waters and marshlands provide almost ninety percent (90%) of the most productive sport fisheries on the east coast of the United States. North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

In recent years the coastal area has been subjected to increasing pressures which are the result of the often-conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by ****408** coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina."

The following passages from 46 N.C.L.Rev. 779 and 49 N.C.L.Rev. 889-90 help to convey the exceptional qualities of the coastal zone which make it so important to this State and the nation:

"The vast estuarine areas of North Carolina 'those coastal complexes where fresh water from the land meets the salt water of the sea with a daily tidal flux' are exceeded in total area only by those of Alaska and Louisiana. Estuarine areas include bays, sounds, harbors, lagoons, tidal or salt marshes, coasts, and inshore waters in which the salt waters of the ocean meet and are diluted by the fresh waters of the inland rivers. In North Carolina, this encompasses extensive coastal sounds, salt marshes, and broad river mouths exceeding 2,200,000 acres. These areas are one of North Carolina's most valuable resources.

This vast array of land and water combines to provide one of the largest relatively unspoiled natural areas on the eastern coast of the United States. . . . This massive ***693** ecosystem provides food, cover, nesting and spawning areas for countless finfish, shellfish, waterfowl, and fur and game animals."

[4] The above cited legislative findings are confirmed by the trial record and indicate that the unique, fragile and irreplaceable nature of the coastal zone and its significance to the public welfare amply justify the reasonableness of special legislative treatment. We conclude that the coastal counties constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems found in the coastal zone. Accord, Toms River Affiliates v. Department of Environmental Protection, 140 N.J.Super. 135, 355 A.2d 679 (1976); Meadowlands Regional Development Agency v. State, 112 N.J.Super. 89, 270 A.2d 418 (1970), aff'd. 63 N.J. 35, 304 A.2d 545 (1973). See generally, Turnpike Authority v. Pine Island, 265 N.C. 109, 143 S.E.2d 319 (1965).

Plaintiffs' contention that the environmental problems of the mountains and piedmont are equally deserving of legislative attention is not a valid constitutional objection to the Act in light of our finding that the coastal area is sufficiently unique to warrant special legislative attention. "(T)here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied that the Legislature must be held rigidly to the choice of regulating all or none. . . . It is enough that the present statute strikes at the evil where it is felt and reaches the class of cases where it most frequently occurs." Silver v. Silver, 280 U.S. 117, 50 S.Ct. 57, 74 L.Ed. 221 (1929). See generally, Mobile Home Sales v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

In the second part of their argument plaintiffs contend the General Assembly did not properly define the inland limits of the coastal sounds in G.S. 113A-103(3) and hence unreasonably excluded from the coverage of the Act counties which were coastal in nature. It should be noted that the inland limits of the coastal sounds in effect constitute the western boundaries of the coastal zone for purposes of the Act.

[5] Plaintiffs' argument requires us to consider whether the General Assembly, in defining the inland limits of the coastal sound, drew boundary lines which were reasonably related to the ***694** purposes of the Act. In determining this issue it is well to note that "(w)hile substantial distinctions . . . are essential in classification, the distinctions need not be scientific or exact. The Legislature has wide discretion in making classifications." McIntyre v. Clarkson, supra. Thus, in reviewing the General Assembly's ****409** definition of the inland limits of the coastal sounds this Court recognizes that the constitutional prohibition against local legislation does not require a perfect fit; rather, it requires only that the legislative definition be reasonably related to the purpose of the Act. The following passage from Justice Holmes explains the reason why the law-making body generally has a broad discretion in making classifications and illuminates the nature of the task faced by the General Assembly in defining the inland limits of the coastal sounds:

"When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted unless we can say it is very wide of any reasonable mark. (Citation omitted.)" Louisville Gas Co. v. Coleman, 277 U.S. 32, 48 S.Ct. 423, 72 L.Ed. 770 (1928) (dissenting opinion)

To evaluate the legislative definition of the inland limits of the coastal sounds in its proper context, we must first examine the definition of coastal area in G.S. 113A-103(2). The coastal area is defined as those counties "that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean . . . or any coastal sound." This statutory definition of coastal area accurately reflects the unique geography of our coastal area. Some coastal counties are bounded by the Atlantic Ocean while others are bounded not by the ocean but by shallow, swampy, fertile coastal sounds which lie to the landward side of our extensive system of barrier islands known as the Outer ***695** Banks. The coastal sounds, of course, are the heart of the coastal area. See generally, Note, 49 N.C.L.Rev. 888-92 (1971).

These saltwater coastal sounds are in turn fed by the fresh water coastal rivers. One of the unique features of the North Carolina coastal zone is that its salty coastal sounds are contiguous with the fresh water coastal rivers. In fact,

the sounds represent the mouths of the coastal rivers. See generally, G.S. 113A-103(3) for the names of the coastal sounds and rivers. Thus, in order to determine the inland limits of the coastal sounds and hence the western boundary of the coastal areas the General Assembly had to decide where the salty, marshy, coastal sounds ended, and the fresh water coastal rivers began.

It is evident from the record that the boundaries of the coastal area could not be formulated with mathematical exactness. Affected by a number of varying conditions, the reaches of saltwater intrusion and tidal influence vary markedly from time to time and are thus incapable of exact determination. The criterion ultimately chosen by the General Assembly to distinguish the salty coastal sounds from the fresh water coastal rivers which fed into the sounds was "the limit of seawater encroachment" on a given coastal river under normal conditions. G.S. 113A-103(3). In effect, the limits of the coastal sounds were defined as those points on the coastal rivers where the salt content of the water measured below a scientifically determined amount.

The General Assembly added two refinements to the seawater encroachment criterion. The limits of seawater encroachment were legislatively established as the confluence of a given coastal river with an easily identifiable tributary near to but not always at the points indicated as the farthest inland reach of seawater encroachment. G.S. 113A-103(3). Given the difficulty of determining the precise location of the inland extent of seawater encroachment, we think the points of confluence provided a convenient method of implementing the seawater encroachment criterion. The General Assembly also excluded from the coverage ****410** of the Act all counties which adjoined a point of confluence and lay entirely west of said point. Id. Two counties Jones and Pitt were excluded from the coverage of the Act as a result of this exemptive clause. The record shows that these counties were not coastal in nature and contained insignificant quantities ***696** of coastal wetlands. We agree with the conclusion of the trial court that the slight extent of seawater encroachment into these two counties was of no significance to an accurate and reasonable definition of the coastal area.

[6] **[7]** We conclude that the western boundary of the coastal zone as determined by use of the seawater encroachment criterion is reasonably related to the purpose of the Act. The record shows, and a look at any map of eastern North Carolina will confirm, that the twenty counties included within the purview of the Act under the statutory definition of coastal area are the counties which are substantially bounded by the large open bodies of water which may be logically, scientifically, or otherwise, considered to be coastal sounds. The coastal area as defined includes all those counties which intimately affect the quality of North Carolina's valuable estuarine waters. We thus hold that the Act is a general law which the General Assembly had power to enact.

Since we hold that the Act is a general law we need not determine whether it relates to or regulates one of the subjects as to which the Constitution prohibits local legislation. See N.C.Const., art. II, s 24.

The second issue for determination is whether the Act unconstitutionally delegates authority to the CRC to develop, adopt and amend "State guidelines" for the coastal area. See G.S. 113A-107.

[8] Article I, section 6 of the North Carolina Constitution provides that the legislative, executive and judicial branches of government "shall be forever separate and distinct from each other." Legislative power is vested in the General Assembly by Article II, section 1 of the Constitution. From these constitutional provisions we glean the bedrock principle "that the legislature may not abdicate its power to make laws or delegate its supreme legislative power to any coordinate branch or to any agency which it may create." Turnpike Authority v. Pine Island, supra. It is obvious that if interpreted literally the Constitution would absolutely preclude any delegation of legislative power. However, it has long been recognized by this Court that the problems which a modern legislature must confront are of such complexity that strict adherence to ideal notions of the non-delegation doctrine ***697** would unduly hamper the General Assembly in the exercise of its constitutionally vested powers. See, e. g., Turnpike Authority v. Pine Island, supra; Coastal Highway v. Turnpike Authority, 237 N.C. 52, 74 S.E.2d 310 (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, supra, 265 N.C. at 114, 143 S.E.2d at 323; Coastal Highway v. Turnpike Authority, supra, 237 N.C. at 60, 74 S.E.2d 310. Thus, we 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, 232 S.E.2d 698 (1977); Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), Cert.

denied, 406 U.S. 920, 92 S.Ct. 1774, 32 L.Ed.2d 119 (1972), and cases cited therein.

[9] The task of determining whether a particular delegation is accompanied by adequate guiding standards is not a simple one. The difficulties involved in making that determination were succinctly summarized by Justice Sharp, now Chief Justice, in Jernigan v. State, 279 N.C. 556, 184 S.E.2d 259 (1971): "The inherent conflict between the need to place discretion in capable persons and the requirement that discretion be ****411** in some manner directed cannot be satisfactorily resolved." In her commentary the Chief Justice clearly perceives that the purpose of the adequate guiding standards test is to reconcile the legislative need to delegate authority with the constitutional mandate that the legislature retain in its own hands the supreme legislative power. See generally, Guthrie v. Taylor, supra. In applying this test we must recognize that if the General Assembly is to legislate effectively it must have the capacity in proper instances to delegate authority to administrative bodies. On the other hand, it is our duty to insure that all such delegations are indeed necessary and do not constitute a total abdication by the General Assembly. We concur in the observation that "(t)he key to an intelligent application of this (test) is an understanding that, while delegations of power to administrative agencies are necessary, such transfers of power should be closely monitored to insure that the decision-making by the agency is not arbitrary and unreasoned and that the agency is ***698** not asked to make important policy choices which might just as easily be made by the elected representatives in the legislature." Glenn, The Coastal Management Act in the Courts: A Preliminary Analysis, 53 N.C.L.Rev. 303, 315 (1974).

[10] **[11]** In the search for adequate guiding standards the primary sources of legislative guidance are declarations by the General Assembly of the legislative goals and policies which an agency is to apply when exercising its delegated powers. We have noted that such declarations need be only "as specific as the circumstances permit." Turnpike Authority v. Pine Island, supra. See also, Jernigan v. State, supra. When there is an obvious need for expertise in the achievement of legislative goals 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. 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.

[12] Additionally, in determining whether a particular delegation of authority is supported by adequate guiding standards it is permissible to consider whether the authority vested in the agency is subject to procedural safeguards. A key purpose of the adequate guiding standards test is to "insure that the decision-making by the agency is not arbitrary and unreasoned." Glenn, supra. Procedural safeguards tend to encourage adherence to legislative standards by the agency to which power has been delegated. We thus join the growing trend of authority which recognizes that the presence or absence of procedural safeguards is relevant to the broader question of whether a delegation of authority is accompanied by adequate guiding standards. See K. Davis, 1 Administrative Law Treatise, s 3.15 at p. 210 (2d ed. 1978).

[13] Applying these principles to the case sub judice we conclude that the Act properly delegates authority to the CRC to develop, adopt and amend State guidelines for the coastal area.

The State guidelines are designed to facilitate state and local government compliance with the planning and permit-letting aspects of the Act. G.S. 113A-108. Land use plans adopted by the coastal counties must be consistent with the guidelines. Id. No permit for development within the AEC's shall be granted which ***699** is inconsistent with the guidelines. Id. Finally, State land policies governing the acquisition, use, and disposition of land by State departments and agencies and any State land classification system must be consistent with the guidelines. Id.

The Act states that "State guidelines for the coastal area shall consist of statements of objectives, policies, and standards to be followed in public and private use of land and water areas within the coastal area." G.S. 113A-107(a). The Act then provides: "Such guidelines shall be consistent with the goals of the coastal area management system as set forth in G.S. 113A-102." Id. These legislative goals are spelled out as follows in subsection (b) of G.S. 113A-102:

****412** "(b) Goals. The goals of the coastal area management system to be created pursuant to this Article are as follows:

(1) To provide a management system capable of preserving and managing the natural ecological conditions of the estuarine system, the barrier dune system, and the beaches, so as to safeguard and perpetuate their natural productivity and their biological, economic and esthetic values;

(2) To insure that the development or preservation of the land and water resources of the coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations;

(3) To insure the orderly and balanced use and preservation of our coastal resources on behalf of the people of North Carolina and the nation;

(4) To establish policies, guidelines and standards for:

a. Protection, preservation, and conservation of natural resources including but not limited to water use, scenic vistas, and fish and wildlife; and management of transitional or intensely developed areas and areas especially suited to ***700** intensive use or development, as well as areas of significant natural value;

b. The economic development of the coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments;

c. Recreation and tourist facilities and parklands;

d. Transportation and circulation patterns for the coastal area including major thoroughfares, transportation routes, navigation channels and harbors, and other public utilities and facilities;

e. Preservation and enhancement of the historic, cultural, and scientific aspects of the coastal area;

f. Protection of present common-law and statutory public rights in the lands and waters of the coastal area;

g. Any other purposes deemed necessary or appropriate to effectuate the policy of this Article."

We also note that the legislative findings in G.S. 113A-102(a) and the criteria for designating AEC's in G.S. 113A-113 provide further specific standards to aid the CRC in the formulation of State guidelines.

In our view the declarations of legislative findings and goals, articulated in G.S. 113A-102 and the criteria for designating AEC's in G.S. 113A-113 are "as specific as the circumstances permit." Turnpike Authority v. Pine Island, supra. In reaching this conclusion we note that the process of developing and adopting detailed land use guidelines for the complex ecosystem of the coastal area is an undertaking that requires much expertise. Legislative recognition of this need is reflected in the composition of the CRC, which is to consist of fifteen members twelve of whom are required to have expertise in different facets of coastal ***701** problems. G.S. 113A-104. The goals, policies and criteria outlined in G.S. 113A-102 and G.S. 113A-113 provide the members of the CRC with an adequate notion of the legislative parameters within which they are to operate in the exercise of their delegated powers.

In addition to providing the CRC with a comprehensive set of legislative standards, the General Assembly has subjected the actions of the CRC to an extensive system of procedural safeguards. In effect, the General Assembly has furnished both the standards which are to guide the CRC in the exercise of its delegated powers and a procedural framework which insures that the CRC will perform its duties fairly and in a manner consistent with legislative intent.

There are four sources of procedural safeguards: (1) those provided by the Act, (2) those contained in the North Carolina Administrative Procedure Act (APA), (3) the Administrative Rules Review Committee created by G.S. 120-30.26 and (4) the "Sunset" ****413** legislation enacted by the 1977 General Assembly, G.S. 143-34.10, Et seq.

Initially, section 113A-107 of the Act sets forth in detail the procedures to be followed by the CRC in the adoption and amendment of the State guidelines. These include submission of the proposed guidelines for review and comment to the public, to cities, counties, and lead regional organizations, to all State, private, federal regional and local agencies which have special expertise with respect to environmental, social, economic, esthetic, cultural, or historical aspects of coastal development. Copies of the adopted guidelines must be filed with both Houses of the Legislature and the Attorney General. The CRC is also to mail copies of the adopted guidelines to all cities, counties, lead regional organizations, and to appropriate citizens and agencies. These broad provisions for input and review by groups representing all levels and types of agencies and interests provide a substantial curb against arbitrary and unreasoned action by the CRC. Additionally, the guidelines must be reviewed by the CRC every five years, although they may be reviewed from time to time as necessary. G.S. 113A-107(f). Any proposed amendments must follow these same procedures for public scrutiny before they can be adopted. Certified copies of any amendments must be filed with the Legislature.

***702** **[14]** Secondly, amendments to the State guidelines by the CRC are considered administrative rule-making under G.S. 150A-10 and thus subject to the comprehensive additional safeguards contained in the Administrative Procedure Act. G.S. 150A-1 Et seq. The APA sets forth specific and mandatory guidelines for rule-making, including requirements for public hearings and publication of all agency rules. The mandatory provisions of the APA must now be read as complementing the procedural safeguards in the Act itself. See G.S. 150A-9 through 17.

Thirdly, pursuant to G.S. 120-30.24 Et seq., all rules adopted by the CRC are subject to review by a permanent committee of the Legislative Research Commission known as the Administrative Rules Committee. The purpose of this legislative scrutiny is to determine whether the agency whose rules are under review "acted within its statutory authority in promulgating the rule." G.S. 120-30.28(a). An elaborate review procedure is established whereby the Administrative Rules Committee and the Legislative Research Commission lodge objections to a particular rule with the appropriate agency. If the agency does not act upon the recommendations of the Commission, the Commission "may submit a report to the next regular session of the General Assembly recommending legislative action." G.S. 120-30.33.

Finally, under the "Sunset" legislation, entitled "Periodic Review of Certain State Agencies," G.S. 143-34.10 et seq., the CRC is subjected to review by the Governmental Evaluations Commission, G.S. 143-34.16 and .17; to public hearings held by the Governmental Evaluations Commission, G.S. 143-34.18; and to hearings and recommendations of legislative committees. G.S. 143-34.19. The Act will stand repealed effective 1 July 1981 unless revived by legislative action. G.S. 143-34.12.

We conclude that the authority delegated to the CRC is accompanied by adequate guiding standards in the form of legislative declarations of goals and policies, and procedural safeguards. We therefore hold that the General Assembly properly delegated to the CRC the authority to prepare and adopt State guidelines for the coastal area.

At the trial of this case plaintiffs contended the Act effected an unconstitutional taking of their land and that the Act authorized warrantless searches violative of the Fourth Amendment. At ***703** the close of plaintiffs' evidence, the trial judge ruled that no genuine and justiciable controversy existed as to these issues and granted defendants' motion to dismiss on these issues. Plaintiffs assign this ruling as error.

[15] We have said many times that "an action for a declaratory judgment will lie only in a case in which there is an actual or real existing controversy between parties ****414** having adverse interests in the matter in dispute." Lide v. Mears, 231 N.C. 111, 56 S.E.2d 404 (1949). See generally, Consumers Power v. Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974), and cases cited therein. An actual controversy between the parties is a jurisdictional prerequisite for a proceeding under the Declaratory Judgment Act in order to "preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations." Lide v. Mears, supra. As Justice Seawell stated in Tryon v. Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942): "The (Declaratory Judgment Act) does not require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." In sum, the sound principle that judicial resources should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions, is fully applicable to the Declaratory Judgment Act. See generally, K. Davis, Administrative Law Text, s 21.01 at p. 396 (3d ed. 1972).

We now proceed to determine whether plaintiffs allege an actual, genuine existing controversy with respect to the "taking" and "search" issues.

The gist of plaintiffs' contention on the taking issue is that designation of their land as an "interim" area of environmental concern by the CRC, G.S. 113A-114, and as a "conservation area" by the local land-use plans, in practical effect determines that their property will be formally designated eventually as an AEC under G.S. 113A-115 and that all applications for development permits will be denied on the ground that all development is inconsistent with the classification of their property as a conservation area. See G.S. 113A-120(a)(7).

***704** We think it apparent that there has been no "taking" of plaintiffs' property which gives rise to a justiciable controversy at this time. Plaintiffs' assertion that their property has been "taken" by the Act rests on speculative assumptions concerning which a declaratory judgment will not be rendered. "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot

questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." Poore v. Poore, 201 N.C. 791, 161 S.E. 532 (1931).

A brief examination of relevant provisions of the Act demonstrates that plaintiffs' apprehension of diminished land values is premature and hence not justiciable.

At the outset we note that permits must be sought to develop land which falls within an AEC. G.S. 113A-118. It is further noted that the designation of land as an interim AEC under G.S. 113A-114 "does not subject development to a permit requirement; it merely requires the developer to give the state sixty days notice before undertaking the proposed activity." Schoenbaum, The Management of Land and Water Use in the Coastal Zone: A New Law is Enacted in North Carolina, 53 N.C.L.Rev. 275, 290 (1974). Before an area can be designated as an AEC the CRC must engage in full-blown administrative rule-making with public participation and consideration of factors enumerated in G.S. 113A-113. Before a permit request can be granted or denied the CRC must hold a quasi-judicial hearing and make written findings of fact and conclusions of law. G.S. 113A-122. An applicant may appeal the decision of the CRC to the superior court and then to the Court of Appeals as a matter of right. G.S. 113A-123; G.S. 7A-27(b). Significantly, the Act also provides that in his appeal of a permit denial the applicant may also litigate the question whether denial of a permit constitutes a taking without just compensation. G.S. 113A-123(b). Moreover, the Act exempts certain activities from its coverage, G.S. 113A-103(5)b, and also permits landowners to request a variance from the CRC. G.S. 113A-120(c).

[16] It is evident that plaintiffs are in no position at this point to obtain a declaratory ****415** judgment determining whether the provisions ***705** of the Act have impermissibly impaired the usefulness and value of their land. At the time this case was tried few determinations which could lead to a genuine controversy over the taking of plaintiffs' land had been made. Although some land had been designated as an AEC, no development permits were required until 1 March 1978, the "permit changeover date" designated by the Secretary of the Department of Natural and Economic Resources pursuant to G.S. 113A-125. See G.S. 113A-118(a). The remainder of plaintiffs' land was designated as an "interim" AEC and was not subject to a permit requirement. Thus, at the time this case was tried plaintiffs had no occasion to seek development permits, variances, or exemptions from coverage. Hence, they could only speculate as to the effect the Act would have on the usefulness and value of their specific plots of land. A "suspicion" that all development permits within AEC's will be denied does not constitute a controversy within the meaning of our cases. Tryon v. Power Co., supra. Accordingly, we affirm the ruling of the trial judge that there is no justiciable controversy on the taking issue entitling plaintiffs to relief under the Declaratory Judgment Act.

[17] For similar reasons we conclude that plaintiffs do not allege an actual or presently existing controversy with respect to the "search" issue. G.S. 113A-126(d)(1)c permits the CRC to assess a civil penalty of not more than one thousand dollars against any person who refuses entry to premises "not including any occupied dwelling house or curtilage" to an official of the CRC who is conducting an investigation authorized by the Act. Plaintiffs contend this provision authorizes warrantless searches in violation of the Fourth Amendment. However, plaintiffs did not allege that they had been subjected to actual searches or that they had been fined for refusing access to investigators. Since plaintiffs failed to allege a controversy as to an actual search it follows that the trial court was without jurisdiction to pass upon the constitutionality of this provision.

Plaintiffs contend the State guidelines adopted by CRC dealing with land-use planning in the coastal area, 15 NCAC 7B, exceed the authority granted by the Act and therefore the guidelines so adopted are void. Plaintiffs' argument on this issue, however, is couched in generalities which make it difficult for us to pinpoint where and in what manner the State guidelines adopted by CRC allegedly exceed the authority granted to it. Cf. ***706** State v. Kirby, 276 N.C. 123, 171 S.E.2d 416 (1970). Nonetheless, we have examined the guidelines in light of the arguments and find the arguments unpersuasive. Further discussion will serve no useful purpose. This assignment is overruled.

Plaintiffs contend the trial court erred in excluding plaintiffs' Exhibit No. 35. Plaintiffs argue that this exhibit was relevant to the determination of the local act issue. Conceding, without deciding, that the trial court erred in excluding plaintiffs' Exhibit No. 35, we are of the opinion that admission of this exhibit would not have changed the result on the local act issue and its exclusion, if error, was harmless error. See State v. Cross, 284 N.C. 174, 200 S.E.2d 27 (1973); 1 Stansbury's North Carolina Evidence s 9 (Brandis Rev. 1973).

For the reasons stated the judgments appealed from are

AFFIRMED.

BRITT, J., took no part in the consideration or decision of this case.

COPELAND, Justice, dissenting.

Article II, Section 24 of the North Carolina Constitution declares that "(t) he General Assembly shall not enact any local, private or special act or resolution" which falls within certain designated categories. Thus, there must be a two-prong analysis to determine whether a law is a prohibited local act or a valid general one.

First, the act in question must be local, which means, "primarily at least, a law that in fact, if not in form, is confined within territorial ****416** limits other than that of the whole state, . . . or (applies) to the property and persons of a limited portion of the state, . . . or is directed to a specific locality or spot, as distinguished from a law which operates generally throughout the state." McIntyre v. Clarkson, 254 N.C. 510, 518, 119 S.E.2d 888, 893 (1961).

By necessity, however, this Court has recognized that not every valid law does by definition apply equally to all areas of the State. ***707** "A law is general in the constitutional sense when it applies to and operates uniformly on all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law." State v. Dixon, 215 N.C. 161, 171, 1 S.E.2d 521, 526 (1939) (Barnhill, J., concurring), quoted in McIntyre v. Clarkson, supra, 254 N.C. at 520, 119 S.E.2d at 895. (Emphasis added.)

An examination of the Coastal Area Management Act (the Act) itself warrants the conclusion that this piece of legislation is nothing more than a device enabling the implementation of conservation and land-use management. G.S. 113A-102(b) sets forth the goals of the Act, which include insuring the development and preservation of the land, water and natural resources and setting guidelines for economic development recreation facilities, historical and cultural enhancement and transportation in the coastal area. While these results are unquestionably desirable, no one would seriously contest that they can and should apply to all of North Carolina.

It is important to note that the Act merely lays out these broad policies and sets up the system by which the goals are to be reached, specifically through a Coastal Resources Commission and a Coastal Resources Advisory Council working with local governments. I do not doubt that economic, conservation and environmental problems differ significantly among various areas throughout the State. However, these problems are specifically dealt with outside the Act by the bodies set up for that purpose.

The trial court overlooked this fact when it found that "(a) comprehensive management plan of the type envisioned by the CAMA would be beneficial in dealing with problems in other regions of North Carolina, however, the uniqueness of the problems in the coastal area provided a rational basis for inclusion of the counties covered by the Act." In fact, the legislation in question does not even attempt to deal with these "unique" problems. Furthermore, a comprehensive statewide land-use management act is possible, viable and reasonable. See, e. g., Land Policy Act of 1974, N.C.G.S. ss 113A-150 et seq.

The majority of this Court cites the legislative findings and goals in G.S. 113A-102 as signifying the importance and uniqueness of our coastal area, such that it can be singled out for this special treatment. The Mountain Area Management Act, Senate Bill 973, 1973 Session, which was introduced the same time as the ***708** Coastal Area Management Act but was not enacted, states its legislative goals in proposed s 113A-137.

"It is hereby determined and declared as a matter of legislative finding that the mountain area including its land and water resources is one of the most valuable areas of North Carolina. The forest and mineral resources of the region are of major importance to the economy of the State and nation. The clear and unpolluted streams, the vast forests, and the scenic vistas of the mountain region make it one of the most esthetically pleasing regions of the State and nation. Because of these features the mountain area of North Carolina has an extremely high recreational and esthetic value which should be preserved and enhanced.

The mountain area in recent years has been subjected to increasing pressures which are the result of the often conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the mountain area which make it economically, esthetically and ecologically rich will be destroyed. The General Assembly, ****417** therefore, finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the mountain area of North Carolina."

This language is virtually identical in all possible respects to G.S. 113A-102, quoted above in the majority opinion.

The second question which must be answered to determine if a law is a prohibited local act is whether it falls within one of the subject matters listed in N.C.Const. art. 2, s 24. The trial court found that the Act "relates to health, sanitation and the abatement of nuisances and to non-navigable streams and CAMA regulates labor, trade, mining and manufacturing." It thus determined that the Act comes within three of the categories listed in our Constitution.

Although defendants except to this finding, I feel that their argument is without merit. For instance, G.S. 113A-102 dictates that guidelines must be set as to "economic development of the ***709** coastal area, including but not limited to construction, location and design of industries, port facilities, commercial establishments and other developments." Clearly these relate to the regulation of trade. Moreover, the same section of the Act states that "water resources shall be managed in order to preserve and enhance water quality." Again, I do not see how water pollution does not relate to "health, sanitation, and the abatement of nuisances." See also Glenn, The Coastal Area Management Act in the Courts : A Preliminary Analysis, 53 N.C.L.Rev. 303, 306-07 (1974).

In summary, the North Carolina Constitution forbids the Legislature to enact local laws that deal with certain topics. It was determined that concern over these subject matters embrace the entire State. The Coastal Area Management Act is such a prohibited local law; therefore, it is unconstitutional.

For the foregoing reason, I respectfully dissent.

All Citations

295 N.C. 683, 249 S.E.2d 402, 12 ERC 1468, 9 Envtl. L. Rep. 20,064

KeyCite Yellow Flag - Negative Treatment
Affirmed as Modified by Winkler v. North Carolina State Board of Plumbing, N.C., June 5, 2020

261 N.C.App. 106

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Court of Appeals of North Carolina.

Dale Thomas WINKLER; and
DJ's Heating Service, Petitioner,
v.
NORTH CAROLINA STATE BOARD OF PLUMBING, HEATING & FIRE SPRINKLER CONTRACTORS, Respondent.

No. COA17-873
|
Filed: August 21, 2018

Synopsis

Background: Heating contractor brought action to challenge State Board of Examiners of Plumbing, Heating, and Fire Sprinklers Contractors order revoking his license following fatal carbon monoxide leak at hotel. The Superior Court, Watauga County, Jeff Hunt, J., affirmed, and contractor appealed. The Court of Appeals, Stroud, J., 790 S.E.2d 727, reversed and remanded. The Superior Court, Watauga County, Edwin G. Wilson, J., awarded attorney fees for heating contractor and the board appealed.

[Holding:] The Court of Appeals, Inman, J., held that award of attorney fees for a heating contractor was not permitted under statute governing liability for court costs in civil actions and proceedings.

Reversed.

West Headnotes (8)

[1] **Licenses** Revocation, suspension, or forfeiture; discipline in general

Award of attorney fees for a heating contractor was not permitted under statute governing liability for court costs in civil actions and proceedings, in action by contractor challenging the revocation of his license by State Board of Examiners of Plumbing, Heating, and Fire Sprinklers Contractors after three people were killed from a carbon monoxide leak from a pool heater that contractor had worked on; disciplinary actions by a licensing board were excluded from the purview of the statute. N.C. Gen. Stat. Ann. § 6-19.1.

[2] **Statutes** Intent

The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.

1 Case that cites this headnote

[3] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

The first place courts look to ascertain the legislative intent when interpreting a statute is the plain language of the statute.

1 Case that cites this headnote

[4] **Statutes** Superfluousness

Statutes Giving effect to entire statute and its parts; harmony and superfluousness

A statute must be construed, if possible, so as to give effect to every provision, it being presumed that the legislature did not intend any of the statute's provisions to be surplusage.

[5] **Statutes** Grammar, spelling, and punctuation

Placement of punctuation within a statute is used as a means of making clear and plain the English language therein; therefore, punctuation and placement should be regarded in the process of statutory interpretation.

[6] **Statutes** Grammar, spelling, and punctuation

Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language.

1 Case that cites this headnote

[7] **Statutes** Grammar, spelling, and punctuation

When a court interprets a statute, every element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb).

[8] **Licenses** Revocation, suspension, or forfeiture; discipline in general

The plain language of statute governing liability for court costs in civil actions and proceedings conveys the legislature's intent to exclude disciplinary actions by licensing boards from any awards of attorney fees under the statute. N.C. Gen. Stat. Ann. § 6-19.1.

****106** Appeal by Respondent from Order entered 15 May 2017 by Judge Edwin G. Wilson in Watauga County Superior Court. Heard in the Court of Appeals 7 March 2018. Watauga County, No. 14 CVS 416

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Opinion

INMAN, Judge.

***106** The North Carolina State Board of Examiners of Plumbing, Heating & Fire Sprinkler Contractors (the "Board") appeals from an order awarding Dale Thomas Winkler d/b/a DJ's Heating Service ("Winkler") ***107** $29,347.47 in attorneys' fees and costs pursuant to N.C. Gen. Stat. § 6-19.1. Because the statute excludes cases arising out of the defense of a disciplinary action by a licensing board, we reverse the trial court's order.

Facts and Procedural History

This is the second appeal to this Court in this case. Facts relevant to this appeal follow, but additional procedural and factual history of the litigation is included in our decision in the prior appeal. *See Winkler v. State Bd. of Examiners of Plumbing, Heating & Fire Sprinklers Contractors*, —— N.C. App. ——, 790 S.E.2d 727 (2016) (*Winkler I*).

In April 2013, the management staff at the Best Western Hotel in Boone, North Carolina, asked Winkler, who held a Heating Group 3 Class II (H-3-II) residential license, to examine the pool heater located at the hotel. Although Winkler was licensed only to work on detached residential HVAC units, he took the job. After examining the pool heater, Winkler determined that it was not working because the gas supply had been turned off. He then located the fuel supply in the pool equipment room, turned it on, and the pool heater again worked.

Days later, on 16 April 2013, two guests died in Room 225 of the hotel, which was above the pool equipment room. Hotel management closed the room until a gas fireplace in the room could be checked for leaks. At the time, the cause of the guests' death had yet to be determined.

Hotel management hired Winkler to examine the fireplace in Room 225 and the ventilation system for the pool heater. Winkler "soaped" the gas lines on both the fireplace and the pool heater and determined there were no gas leaks. Winkler did not, however, check for carbon monoxide, because he did not have the proper equipment. Winkler told

hotel management that the ventilation system seemed to be working.

Following Winkler's inspections, hotel staff reopened Room 225 in late May 2013. On 8 June 2013, a third guest died in the room and a fourth was injured.

After the third guest died, autopsies and toxicology reports for the first two guests were completed and indicated that they had died from lethal concentrations of carbon monoxide. Toxicology reports for the third and fourth guests also indicated excessive levels of carbon monoxide in their blood.

***108** The Board undertook its own investigation after issuance of the toxicology reports. Board investigators determined that carbon monoxide from the pool heater ventilation system could enter Room 225 through openings near the fireplace logs and an HVAC unit. The investigators also observed corrosion over a substantial portion of the ventilation pipe holes for the pool heater. In connection with the Board's investigation, Winkler signed an affidavit swearing that he had never performed work for which he was not licensed.

****107** Winkler ultimately admitted to the Board in a disciplinary licensing proceeding that he had installed a replacement HVAC system in the hotel lobby, performing work beyond his license qualification. The Board concluded that Winkler had engaged in misconduct in violation of his license and suspended his license for one year. The Board also required Winkler to enroll in several courses to remedy the deficiencies in his knowledge.

Winkler appealed the Board's decision to the Watauga County Superior Court. Following a hearing, the court affirmed the Board's decision in its entirety. Winkler then appealed to this Court on the ground that the Board lacked jurisdiction to discipline Winkler for his incompetence in working on the pool heater. He did not challenge the discipline for his misconduct related to the HVAC system in the hotel lobby.

On 20 September 2016, this Court held that the Board did not have jurisdiction to discipline Winkler for the pool heater inspection. *Winkler I*, —— N.C. App. at ——, 790 S.E.2d at 739. This Court remanded the matter back to the Board for entry of a new order based solely on Winkler's misconduct related to the installation of the HVAC system. *Id.* at ——, 790 S.E.2d at 739.

The Board reheard the matter, and, on 19 December 2016, issued a revised disciplinary order placing Winkler on probation for 12 months and requiring him to complete coursework and other conditions of probation.

On 24 October 2016, Winkler filed a motion for attorneys' fees and costs in Watauga County Superior Court. Winkler's motion sought fees pursuant to N.C. Gen. Stat. §§ 6-19.1 and 6-20 based on his successful defense against allegations of misconduct that the Board knew, or should have known, was outside the Board's statutory authority. The trial court entered an order on 2 May 2017 awarding Winkler $29,347.47 in attorneys' fees and costs.

***109** The Board timely appealed and moved to stay the order awarding attorneys' fees pending the resolution of this appeal. The motion to stay was granted on 7 June 2017.

Analysis

[1] The Board argues that the plain language of N.C. Gen. Stat. § 6-19.1—the statute upon which Winkler based his claim for attorneys' fees—along with the legislative intent of the statute, excludes claims for attorneys' fees incurred in disciplinary actions by licensing boards from the purview of the statute. We agree.

1. Standard of Review

We review the trial court's interpretation of N.C. Gen. Stat. § 6-19.1 *de novo*. *See, e.g., Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522, 742 S.E.2d 776, 779 (2013) (holding that questions of statutory construction are questions of law reviewed *de novo*).

2. Statutory Construction

Section 6-19.1 of the North Carolina General Statutes governs the trial court's ability to award attorneys' fees for a prevailing party in certain civil actions. The relevant portion of the statute provides as follows:

> (a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, *or a disciplinary action by a licensing board*, brought by the State or brought by a party who is contesting State action pursuant to [N.C. Gen. Stat. §] 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to

recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if:

(1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and

(2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust. ...

***110** N.C. Gen. Stat. § 6-19.1(a) (2017) (emphasis added). Winkler and the Board dispute whether the legislature intended for the phrase "or a disciplinary action by a licensing ****108** board" to include such proceedings within the scope of the statute, or to exclude them.

The Board argues that the phrase "other than" immediately following the phrase "any civil action" removes adjudications for establishing or fixing a rate and disciplinary actions by licensing boards from the overarching category of "any civil action" provided for by the statute.[1] This interpretation would result in the following reading: "**In any civil action**—*other than* an adjudication for the purpose of establishing or fixing a rate, *or* a disciplinary action by a licensing board—**brought by the State** ...." The effect of this interpretation is to exclude from the statute both adjudications for the purpose of establishing or fixing a rate *and* disciplinary actions by licensing boards.

Winkler argues, on the other hand, that the phrase "a disciplinary action by a licensing board" is a second classification, in addition to "any civil action," to which the statute applies. This interpretation leads to the following reading: "**In any civil action**—*other than* an adjudication for the purpose of establishing or fixing a rate—**or a disciplinary action by a licensing board**, **brought by the State** ...." The effect of this interpretation is to include disciplinary actions by licensing boards within the purview of the statute, while excluding only adjudications for the purpose of establishing or fixing a rate.

a. Plain Language of N.C. Gen. Stat. § 6-19.1

[2] **[3]** "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Dickson v. Rucho*, 366 N.C. 332, 339, 737 S.E.2d 362, 368 (2013) (internal quotation marks and citation omitted). The first place courts look to ascertain the legislative intent is the plain language of the statute. *See First Bank v. S&R Grandview, L.L.C.*, 232 N.C. App. 544, 546, 755 S.E.2d 393, 394 (2014) ("The plain language of a statute is the primary indicator of legislative intent." (citation omitted)); *see also N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used.").

***111** **[4]** The North Carolina Supreme Court has further explained that "[a] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) (internal quotation marks and citation omitted).

Based on the plain language of Section 6-19.1, including not only the words but also the punctuation and ordering of phrases, we reach the conclusion that disciplinary actions by licensing boards are not within the scope of the statute.

[5] **[6]** "The North Carolina appellate courts have long held that placement of punctuation within a statute is used as a means of 'making clear and plain' the English language therein; therefore, punctuation and placement should be regarded in the process of statutory interpretation." *Falin v. Roberts Co. Field Servs., Inc.*, 245 N.C. App. 144, 149, 782 S.E.2d 75, 79 (2016) (quoting *Stephens Co. v. Lisk*, 240 N.C. 289, 293-94, 82 S.E.2d 99, 102 (1954)). "Ordinary rules of grammar apply when ascertaining the meaning of a statute, and the meaning must be construed according to the context and approved usage of the language." *Dunn v. Pacific Employers Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (citations omitted).

We start by examining the language and structure of the first half of N.C. Gen. Stat. § 6-19.1, which contains the provision in dispute: "In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 or any other appropriate provisions of law[.]" N.C. Gen. Stat. § 6-19.1.

****109** The legislature's use of the word "any" before the phrase "civil action" differentiates the phrase from the two

phrases following "other than"—"*an* adjudication for the purpose of establishing or fixing a rate" and "*a* disciplinary action by a licensing board"—each introduced with a singular indefinite article, respectively "an" and "a." The singular indefinite articles convey that rate cases and licensing board actions are separate and distinct members of the class of "any civil action," and therefore are excluded from the statute.

[7] The Board argues, and we agree, that the words "other than" exclude from the broader class of "any civil actions" certain specified actions listed immediately after the words "other than." It is undisputed that the ***112** phrase "an adjudication for the purpose of establishing or fixing a rate" is modified by the exclusionary words of "other than." It follows that the exclusionary words also modify the phrase "a disciplinary action by a licensing board," which similarly begins with a singular indefinite article. This interpretation is consistent with the rule of statutory construction that "[e]very element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb)." *Falin*, 245 N.C. App. at 150, 782 S.E.2d at 79. Had the legislature sought to include disciplinary actions by licensing boards within the scope of the statute, it would not have used a single indefinite article and a singular form of the term "action."

This interpretation is also consistent with the structure of N.C. Gen. Stat. § 6-19.1. A series of commas offsets the exclusions following "other than" from the category of actions within "any civil action": "In any civil action **[comma]** *other than* an adjudication for the purpose of establishing or fixing a rate **[comma]** or disciplinary action by a licensing board **[comma]** brought by the State ...." By using the last comma to separate the phrase "disciplinary action by a licensing board" from the phrase "brought by the State ...," the legislature extended the statutory exclusion to disciplinary actions. Had the legislature intended otherwise, there would have been no need for the third comma. This structural interpretation is consistent with prior decisions by the North Carolina Supreme Court, which have quoted N.C. Gen. Stat. § 6-19.1 in a simplified form, removing those offset exclusions as follows: "In any civil action ... brought by the State or brought by a party who is contesting State action pursuant to G.S. 150B-43 ...." *See, e.g., Crowell Constructors, Inc. v. Cobey*, 342 N.C. 838, 842-43, 467 S.E.2d 675, 678 (1996); *and Able Outdoor, Inc. v. Harrelson*, 341 N.C. 167, 169-70, 459 S.E.2d 626, 627 (1995). In eliminating the exclusions and not including a comma to separate "any civil action" from "brought by the State," these prior decisions illustrate the syntax of the statute —*i.e.*, the phrase "[i]n any civil action ... brought by the State ..." is separate and distinct from the phrase "other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board[.]" This distinction exists as a means of delineating what is and is not within the scope of the statute and supports our interpretation of disciplinary actions as being categorized with the other exception to the statute.

[8] Because the phrase "a disciplinary action by a licensing board" is designated with the indefinite article "a," and is separated from the rest ***113** of the statute by way of commas, we hold that the plain language of the statute conveys the legislature's intent to exclude disciplinary actions by licensing boards from the purview of the N.C. Gen. Stat. § 6-19.1.

b. Statutory Interpretation of N.C. Gen. Stat. § 6-19.1

In addition to the plain language of N.C. Gen. Stat. § 6-19.1, the statutory interpretation and legislative history of the statute support excluding disciplinary actions by licensing boards from its scope.

Neither Section 6-19.1 nor Chapter 6 of the General Statutes in its entirety defines "any civil action" or "a disciplinary action by a licensing board." This Court, in recognizing a similar lack of definitions in Chapter 6 for the terms "agency" or "State action," has turned to Chapter 150B of the North Carolina ****110** General Statutes—specifically the North Carolina Administrative Procedure Act ("APA")—because of its reference in Section 6-19.1. *Izydore v. City of Durham*, 228 N.C. App. 397, 400, 746 S.E.2d 324, 326 (2013).

The APA sets forth the procedure for a party to appeal for judicial review from a final decision in a "contested case," when the party has exhausted all administrative remedies. N.C. Gen. Stat. § 150B-43 (2017). A contested case is defined as "an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person's rights, duties, or privileges, including *licensing* or the levy of a monetary penalty. ..." N.C. Gen. Stat. § 150B-2(2) (emphasis added). Licensing is defined as "any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license." N.C. Gen. Stat. § 150B-2(4). Therefore, disciplinary actions by a licensing board necessarily fall within the scope of the APA's definition of a "contested case."

This Court, in *Walker v. N.C. Coastal Resources Comm'n*, 124 N.C. App. 1, 476 S.E.2d 138 (1996), addressed whether attorneys' fees may be awarded pursuant to N.C. Gen. Stat. § 6-19.1 in contested cases as defined by the APA. The Court drew a distinction between the "administrative review" portion of a case—*i.e.*, the agency proceedings—and the "judicial review" portion of a case—*i.e.*, the appeal to a general court of justice from the final administrative decision. *Id.* at 11, 476 S.E.2d at 144. *Walker* held that the "judicial review" portion of the case falls within the definition of "any civil action," and accordingly affirmed an award of attorneys' fees pursuant to N.C. Gen. Stat. § 6-19.1 for the judicial review phase of the case. *Id.* at 12, 476 S.E.2d at 144-45. However, the Court held that "an administrative hearing under G.S. 150B-22 *et seq*. is not a ***114** 'civil action ... brought ... pursuant to G.S. 150A-43 [now 150B-43][,]' " and therefore N.C. Gen. Stat. § 6-19.1 did not provide for an award of attorneys' fees for the "administrative review" portion of the case. *Id.* at 12, 476 S.E.2d at 145 (citations omitted) (alterations in original).

Following *Walker*, the General Assembly amended N.C. Gen. Stat. § 6-19.1, adding the following language: "... the court may, in its discretion, allow the prevailing party to recover reasonable attorney's ~~fees~~ fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency ...." 2000 N.C. Sess. Law 2000-190, § 1. The result of this amendment was that, in contested cases under Article 3 of Chapter 150B—cases heard by the Office of Administrative Hearings—a trial court may award attorneys' fees for the administrative review proceeding, contrary to the holding in *Walker*.

By amending Section 6-19.1 after *Walker* to provide specifically for recovery of attorneys' fees incurred in the administrative review portions of Article 3 cases, and omitting any mention of the administrative review portions of Article 3A cases—the Article under which this case presently arises—the legislature revealed its intent not to provide for recovery of attorneys' fees incurred in disciplinary actions by licensing boards. *See, e.g., N.C. Dep't of Revenue v. Hudson*, 196 N.C. App. 765, 768, 675 S.E.2d 709, 711 (2009) ("When a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks, alteration, and citation omitted)).

Accordingly, we conclude that, when read as a whole and based on the legislative history of N.C. Gen. Stat. § 6-19.1, the language "a disciplinary action by a licensing board" was intended to exclude such actions from the purview of the statute.

Conclusion

For the foregoing reasons, we hold that the trial court erred as a matter of law by awarding Winkler attorneys' fees pursuant to N.C. Gen. Stat. § 6-19.1 because the language of Section 6-19.1 excludes "a disciplinary action by a licensing board" from the ****111** statute. We therefore reverse the trial court's order.

REVERSED.

Judges ELMORE and BERGER concur.

All Citations

261 N.C.App. 106, 819 S.E.2d 105

Footnotes

1 This argument is joined by the North Carolina Boards of Architecture, Chiropractic Examiners, and General Contractors and the Real Estate Commission in their joint *amicus curiae* brief.

Chapter 150A.

Administrative Procedure Act.

Editor's Note. — Session Laws 1973, c. 1331, s. 4, makes this Chapter effective on and after July 1, 1975, and provides that it shall not affect any pending administrative hearings. Session Laws 1975, c. 69, s. 4, amends Session Laws 1973, c. 1331, s. 4, so as to change the effective date of this Chapter from July 1, 1975, to Feb. 1, 1976.

Session Laws 1973, c. 1331, s. 3, provides: "All references in the General Statutes to a section of Chapter 150 of the General Statutes not contained in this act and all references in the General Statutes to Article 18 of Chapter 143 or any of the sections contained therein (143-195 — 143-198.1) or to Article 33 of Chapter 143 or any of the sections contained therein (143-306 — 143-316) are hereby amended to read 'Chapter 150[A] of the General Statutes.' "

Many of the cases in the annotations under the various sections of this Chapter were decided under corresponding sections of repealed Article 33 of Chapter 143 and repealed Chapter 150.

ARTICLE 1.

General Provisions.

§ 150A-1. Scope and policy. — (a) This Chapter shall apply except to the extent and in the particulars that any statute makes specific provisions to the contrary. The following are specifically exempted from the provisions of this Chapter: the Employment Security Commission; the Industrial Commission; the Occupational Safety and Health Review Board; the Department of Correction; the Commission of Youth Services; and the Utilities Commission. However, Articles 2 and 3 of this Chapter shall not apply to the Department of Transportation in rule-making or administrative hearings as provided for by Chapter 20 of the North Carolina General Statutes or the Department of Revenue.

Article 4 of this Chapter, governing judicial review of final agency decisions, shall apply to the University of North Carolina and its constituent or affiliated boards, agencies, and institutions, but the University of North Carolina and its constituent or affiliated boards, agencies, and institutions are specifically exempted from the remaining provisions of this Chapter.

(b) The purpose and intent of this Chapter shall be to establish as nearly as possible a uniform system of administrative procedure for State agencies. (1973, c. 1331, s. 1; 1975, c. 390; c. 716, s. 5; c. 721, s. 1; c. 742, s. 4.)

Editor's Note. — The first 1975 amendment added the second paragraph of subsection (a).

The second 1975 amendment substituted "Department of Transportation in rule-making or administrative hearings as provided for by Chapter 20 of the North Carolina General Statutes" for "Department of Motor Vehicles" in the third sentence of the first paragraph of subsection (a).

The third 1975 amendment inserted "the Department of Correction" in the second sentence of the first paragraph of subsection (a).

The fourth 1975 amendment inserted "the Commission of Youth Services" in the second sentence of the first paragraph of subsection (a).

For article on administrative evidence rules, see 49 N.C.L. Rev. 635 (1971).

For note as to constitutionality of statutes licensing occupations, see 35 N.C.L. Rev. 473 (1957).

For comment on former Chapter 150, see 31 N.C.L. Rev. 378 (1953).

Applicability of Chapter to State Personnel Commission. — See Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976).

Cited in Nantz v. Employment Security Comm'n, 290 N.C. 473, 226 S.E.2d 340 (1976).

§ 150A-2. Definitions. — As used in this Chapter,

(1) "Agency" means every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina but does not include those agencies in the legislative or judicial branches of the State government; and does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State or any agencies of such subdivisions, or county or city boards of education, other local public districts, units or bodies of any kind, or private corporations created by act of the General Assembly.

(2) "Contested case" means any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Contested cases include, but are not limited to proceedings involving rate-making, price-fixing and licensing. Contested cases shall not be deemed to include rule making, declaratory rulings, or the award or denial of a scholarship or grant.

(2a) "Effective" means that a valid rule has been filed as required by this Chapter. A rule which is effective is enforceable to the extent permitted by law.

(3) "License" means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in a trade, occupation, or other activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes.

(4) "Licensing" means any administrative action issuing, failing to issue, suspending or revoking a license. "Licensing" does not include controversies over whether an examination was fair or whether the applicant passed the examination.

(5) "Party" means each person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the hearing agency where appropriate; provided, this shall not be construed to permit the hearing agency or any of its officers or employees to appeal its own decision for initial judicial review.

(6) "Person aggrieved" means any person, firm, corporation, or group of persons of common interest who are directly or indirectly affected substantially in their person, property, or public office or employment by an agency decision.

(7) "Person" means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.

(8) "Residence" means domicile or principal place of business.

(9) "Valid" means that the rule has been adopted pursuant to the procedure required by law. A valid rule is unenforceable until it is made effective. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, ss. 61, 62; 1977, c. 915, s. 5.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "means" for "is" near the beginning of the first sentence of subdivision (2), substituted "a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing" for "specific parties are to be determined" at the end of that sentence, and substituted "declaratory rulings, or the award or denial of a scholarship or grant" for "and declaratory rulings" at the end of the third sentence of subdivision (2). The amendment also added the second sentence of subdivision (4).

The 1977 amendment added subdivisions (2a) and (9). Session Laws 1977, c. 915, s. 10 provides: "This act shall become effective on October 1, 1977, and shall expire on June 30, 1979."

Session Laws 1977, c. 915, s. 9, contains a severability clause.

The Tax Review Board Is "Administrative Agency". — See In re Halifax Paper Co., 259 N.C. 589, 131 S.E.2d 441 (1963).

Trustees of University Held Not Agency Governed by Former Statute. — See In re Carter, 262 N.C. 360, 137 S.E.2d 150 (1964).

Applicability of Former Statute. — See In re Filing by N.C. Auto. Rate Administrative Office, 278 N.C. 302, 180 S.E.2d 155 (1971); Carter v. Town of Chapel Hill, 14 N.C. App. 93, 187 S.E.2d 588 (1972).

Cited in Stevenson v. North Carolina Dep't of Ins., 31 N.C. App. 299, 229 S.E.2d 209 (1976).

§ 150A-3. Special provisions on licensing. — (a) When a licensee makes timely and sufficient application for renewal of a license or a new license (including the payment of any required license fee) with reference to activity of a continuing nature, the existing license does not expire until a decision on the application is finally made by the agency, and if the application is denied or the terms of the new license are limited, until the last day for applying for judicial review of the agency order. This subsection does not affect agency action summarily suspending such license under subsections (b) and (c) of this section.

(b) Before the commencement of proceedings for suspension, revocation, annulment, withdrawal, recall, cancellation, or amendment of a license, an agency shall give notice to the licensee, pursuant to the provisions of G.S.

150A-23(c), of alleged facts or alleged conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings . . ." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

§§ 150A-4 to 150A-8: Reserved for future codification purposes.

ARTICLE 2.

Rule Making.

§ 150A-9. Minimum procedural requirements. — It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for emergency rules which are provided for in G.S. 150A-13, the provisions of this Article are applicable to the exercise of any rule-making authority conferred by any statute, but nothing in this Article repeals or diminishes additional requirements imposed by law or any summary power granted by law to the State or any agency thereof. No rule hereafter adopted is valid unless adopted in substantial compliance with this Article. (1973, c. 1331, s. 1.)

Substantial compliance under this section, among other things, requires notice and the opportunity to be heard, as provided by § 150A-12, before the adoption of a rule. American Guar. & Liab. Ins. Co. v. Ingram, 32 N.C. App. 552, 233 S.E.2d 398 (1977).

§ 150A-10. Definition. — As used in this Article, "rule" means each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include the following:

(1) Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
(2) Declaratory rulings issued pursuant to G.S. 150A-17;
(3) Intraagency memoranda, except those to agency staff which implement or prescribe law or policy;
(4) Statements of policy or interpretations that are made in the decision of a contested case;
(5) Rules concerning the use or creation of public roads or facilities which are communicated to the public by use of signs or symbols;
(6) Interpretative rules and general statements of policy of the agency. (1973, c. 1331, s. 1.)

§ 150A-11. Special requirements. — In addition to other rule-making requirements imposed by law, each agency shall:

(1) Adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of all forms and instructions used by the agency.
(2) Make available for public inspection all rules and all other written statements of policy or interpretations formulated, adopted, or used by the agency in the discharge of its functions.
(3) With respect to all final orders, decisions, and opinions made after February 1, 1976, make available for public inspection together with all materials that were before the deciding officers at the time the final order, decision, or opinion was made, except materials properly for good cause held confidential. (1973, c. 1331, s. 1.)

§ 150A-12. Procedure for adoption of rules. — (a) Before the adoption, amendment or repeal of a rule, an agency shall give notice of a public hearing and offer any person an opportunity to present data, views, and arguments. The notice shall be given within the time prescribed by any applicable statute, or if none then at least 10 days before the public hearing and at least 20 days before the adoption, amendment, or repeal of the rule. The notice shall include:
(1) A reference to the statutory authority under which the action is proposed.
(2) The time and place of the public hearing and a statement of the manner in which data, views, and arguments may be submitted to the agency either at the hearing or at other times by any person.
(3) A statement of the terms or substance of the proposed rule or a description of the subjects and issues involved, and the proposed effective date of the rule.

(b) The agency shall transmit copies of the notice to the Attorney General, the Director of Research of the Legislative Services Commission and all persons who have requested the agency in writing for advance notice of proposed action which may affect them. The notices shall be in writing and shall be forwarded by mail or otherwise to the last address specified by the person.

(c) The agency shall publish the notice as prescribed in any applicable statute or, if none, shall publish the notice in a manner selected by the agency as best calculated to give notice to persons likely to be affected by the proposed rule. Methods that may be employed by the agency, depending upon the circumstances, include publication of the notice in one or more newspapers of general circulation or, when appropriate, in trade, industry, governmental or professional publications. If the persons likely to be affected by the proposed rule are unorganized or diffuse in character and location, then the agency shall publish the notice as a display advertisement in at least three newspapers of general circulation in different parts of the State.

(d) The public hearing shall comply with any applicable statute but is not subject to the provisions of this Chapter governing contested cases, unless a rule is required by law to be adopted pursuant to adjudicatory procedures.

(e) The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person either prior to adoption or within 30 days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the consideration urged against its adoption.

(f) No rule-making hearing is required for the adoption, amendment or repeal of a rule which solely describes the organization of the agency or describes forms or instructions used by an agency. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 63; 1977, c. 915, s. 2.)

Cross Reference. — As to review of administrative rules, see § 120-30.24 et seq.

Editor's Note. — The 1975, 2nd Sess., amendment added subsection (f).

The 1977 amendment inserted "the Director of Research of the Legislative Services Commission" in the first sentence of subsection (b). Session Laws 1977, c. 915, s. 10 provides: "This act shall become effective on October 1, 1977, and shall expire on June 30, 1979."

Session Laws 1977, c. 915, s. 9, contains a severability clause.

Substantial compliance under § 150A-9, among other things, requires notice and the opportunity to be heard, as provided by this section, before the adoption of a rule. American Guar. & Liab. Ins. Co. v. Ingram, 32 N.C. App. 552, 233 S.E.2d 398 (1977).

Notice Provisions of Other Statutes Control over This Section. — See Opinion of Attorney General to Mr. Gary K. Berman, Administrative Procedures Office, Department of Human Resources, 45 N.C.A.G. 217 (1976).

§ 150A-13. Emergency rules. — If any agency finds that an imminent peril to the public health, safety, or welfare requires adoption, amendment, or repeal of a rule, without notice or upon fewer than 20 days' notice and states in writing its reasons for that finding, it may proceed without prior notice or hearing, or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. This rule may be effective for a period of not longer than 120 days but the adoption of an identical rule under G.S. 150A-12 is not precluded. (1973, c. 1331, s. 1.)

§ 150A-14. Adoption by reference. — An agency may adopt, by reference in its rules and without publishing the adopted matter in full, all or any part of a code, standard or regulation which has been adopted by any other agency of this State or any agency of the United States or by a generally recognized organization or association. The reference shall fully identify the adopted matter by date and otherwise. The reference shall not cover any later amendments and editions of the adopted matter, but if the agency wishes to incorporate them in its rule, it shall amend the rule or promulgate a new rule therefor. The agency shall have available copies of the adopted matter for inspection and the rules shall state where copies of the adopted matter can be obtained and any charge therefor as of the time the rule is adopted. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 64.)

Editor's Note. — The 1975, 2nd Sess., amendment substituted "any other agency of this State or any agency of the United States" for "an agency of this State or of the United States" in the first sentence.

Cited in Coffer v. Standard Brands, Inc., 30 N.C. App. 134, 226 S.E.2d 534 (1976).

§ 150A-15. Continuation of rules. — When a law authorizing or directing an agency to promulgate rules is repealed and substantially the same rule-making power or duty is vested in the same or a successor agency by a new provision of law or the function of the agency to which the rules are related is transferred to another agency, by law or executive order, the existing rules of the original agency relating thereto continue in effect until amended or repealed, and the agency or successor agency may repeal any rule relating to the function. When a law creating an agency or authorizing or directing it to promulgate rules is repealed or the agency is abolished and substantially the same rule-making power or duty is not vested in the same or a successor agency by a new provision of law and the function of the agency to which the rules are related is not transferred to another agency, the existing applicable rules of the original agency are automatically repealed as of the effective date of the repeal of such law or the abolition of the agency. (1973, c. 1331, s. 1.)

Applied in State ex rel. Commissioner of Ins. v. North Carolina Fire Ins. Rating Bureau, 292 N.C. 471, 234 S.E.2d 720 (1977).

§ 150A-16. Petition for adoption of rules.—Any person may petition an agency requesting the promulgation, amendment, or repeal of a rule, and may accompany his petition with such data, views, and arguments as he thinks pertinent. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. Within 30 days after submission of a petition, the agency either shall deny the petition in writing (stating its reasons for the denial) or shall initiate rule-making proceedings in accordance with G.S. 150A-12 and G.S. 150A-13. Denial of the petition to initiate rule making under this section shall be considered a final agency decision for purposes of judicial review, which shall be limited to questions of abuse of discretion. (1973, c. 1331, s. 1.)

§ 150A-17. Declaratory rulings. — On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an agency final decision or order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review. (1973, c. 1331, s. 1.)

§§ 150A-18 to 150A-22: Reserved for future codification purposes.

ARTICLE 3.

Administrative Hearings.

§ 150A-23. Hearing required; notice; intervention. — (a) The parties in a contested case shall be given an opportunity for a hearing without undue delay.

(b) The parties shall be given a reasonable notice of the hearing, which notice shall include:

(1) A statement of the date, hour, place, and nature of the hearing;

(2) A reference to the particular sections of the statutes and rules involved; and

(3) A short and plain statement of the factual allegations.

(c) Notice shall be given personally or by certified mail. If given by certified mail, it shall be deemed to have been given on the date appearing on the return receipt. If giving of notice cannot be accomplished either personally or by certified mail, notice shall then be given as provided in G.S. 1A-1, Rule 4(j).

(d) Any person may petition to become a party by filing a motion to intervene as provided in G.S. 1A-1, Rule 24. In addition, any person interested in an agency proceeding may intervene and participate in that proceeding to the extent deemed appropriate by the hearing agency.

(e) All hearings under this Chapter shall be open to the public. (1973, c. 1331, s. 1; 1975, 2nd Sess., c. 983, s. 65.)

Chapter 150A.

Administrative Procedure Act.

Editor's Note. — Session Laws 1973, c. 1331, s. 4, makes this Chapter effective on and after July 1, 1975, and provides that it shall not affect any pending administrative hearings. Session Laws 1975, c. 69, s. 4, amends Session Laws 1973, c. 1331, s. 4, so as to change the effective date of this Chapter from July 1, 1975, to Feb. 1, 1976.

Session Laws 1973, c. 1331, s. 3, provides: "All references in the General Statutes to a section of Chapter 150 of the General Statutes not contained in this act and all references in the General Statutes to Article 18 of Chapter 143 or any of the sections contained therein (143-195 — 143-198.1) or to Article 33 of Chapter 143 or any of the sections contained therein (143-306 — 143-316) are hereby amended to read 'Chapter 150[A] of the General Statutes.' "

Many of the cases in the annotations under the various sections of this Chapter were decided under corresponding sections of repealed Article 33 of Chapter 143 and repealed Chapter 150.

150A-23(c), of alleged facts or alleged conduct which warrant the intended action. The licensee shall be given an opportunity to show compliance with all lawful requirements for retention of the license.

(c) If the agency finds that the public health, safety, or welfare requires emergency action and incorporates this finding in its order, summary suspension of a license may be ordered effective on the date specified in the order or on service of the certified copy of the order at the last known address of the licensee, whichever is later, and effective during the proceedings. The proceedings shall be promptly commenced and determined.

Nothing in this subsection shall be construed as amending or repealing any special statutes, in effect prior to February 1, 1976, which provide for the summary suspension of a license. (1973, c. 1331, s. 1.)

Editor's Note. — For comment entitled, "The Problem of Procedural Delay in Contested Case Hearings . . ." under the North Carolina APA, see 7 N.C. Cent. L.J. 347 (1976).

§§ 150A-4 to 150A-8: Reserved for future codification purposes.

ARTICLE 2.

Rule Making.

§ 150A-9. Minimum procedural requirements. — It is the intent of this Article to establish basic minimum procedural requirements for the adoption, amendment, or repeal of administrative rules. Except for emergency rules which are provided for in G.S. 150A-13, the provisions of this Article are applicable to the exercise of any rule-making authority conferred by any statute, but nothing in this Article repeals or diminishes additional requirements imposed by law or any summary power granted by law to the State or any agency thereof. No rule hereafter adopted is valid unless adopted in substantial compliance with this Article. (1973, c. 1331, s. 1.)

Substantial compliance under this section, among other things, requires notice and the opportunity to be heard, as provided by § 150A-12, before the adoption of a rule. American Guar. & Liab. Ins. Co. v. Ingram, 32 N.C. App. 552, 233 S.E.2d 398 (1977).

§ 150A-10. Definition. — As used in this Article, "rule" means each agency regulation, standard or statement of general applicability that implements or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule but does not include the following:

(1) Statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public;
(2) Declaratory rulings issued pursuant to G.S. 150A-17;
(3) Intraagency memoranda, except those to agency staff which implement or prescribe law or policy;
(4) Statements of policy or interpretations that are made in the decision of a contested case;
(5) Rules concerning the use or creation of public roads or facilities which are communicated to the public by use of signs or symbols;
(6) Interpretative rules and general statements of policy of the agency. (1973, c. 1331, s. 1.)

§ 150A-11. Special requirements. — In addition to other rule-making requirements imposed by law, each agency shall: