

**JOSH STEIN**  
**ATTORNEY GENERAL**



REPLY TO:  
MARY L. LUCASSE  
(919) 716-6962  
[MLUCASSE@NCDOJ.GOV](mailto:MLUCASSE@NCDOJ.GOV)

### **Memorandum**

To: North Carolina Coastal Resource Commission  
Fr: Mary L Lucasse, Esq.  
Re: Legal Update for November Meeting (CRC-23-24)  
Date: October 27, 2023

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#### **I. NORTH CAROLINA SUPREME COURT**

**Batson, Baldwin, and Batson/Baldwin Owners' Association v. CRC (Carteret Co.)** Docket No. 94A22. The Commission appealed the Court of Appeal's decision based on Judge Tyson's dissent that would have held that no fees should have been awarded because the Commission's decision denying the Petitioners' request for a hearing was substantially justified. The matter is fully briefed. Oral argument took place on September 20, 2023. On October 20, 2023, the North Carolina Supreme Court issued its opinion. The members of the Court were equally divided with three members voting to affirm the Court of Appeals decision and three members voting to reverse. Accordingly, the decision of the Court of Appeals stands without precedential value. This decision vacated the trial court's award of attorneys' fees and remanded to trial court for further findings.

#### **II. PETITIONS FOR JUDICIAL REVIEW (PJR)**

**Petitioners Clifton et. al. (22 CVS 1074) – Carteret Co. Superior Court.** The Commission denied the request of several lot owners in the Beaufort Waterfront RV Park to appeal the permit issued to Collette Properties LLC & Beaufort Waterway RV Park to construct a dock on the waterfront by their lots. The Chair held that the property and contract claims raised were not within DCM, CRC, or OAH's jurisdiction. Petitioners filed a PJR in superior court. An order to stay was filed December 21, 2022 at Petitioner's request to allow time to explore settlement with the permit holder. Petitioners participated in a further mediation on September 15, 2023 and continue to explore settlement.

#### **III. OFFICE OF ADMINISTRATIVE HEARINGS (OAH) - None**

**IV. VARIANCES:** The North Pier variance request was heard at your September Special meeting and granted in part and denied in part. Attached is the final agency decision that was served on October 11, 2023. Any appeal of the decision shall be filed in superior court by November 10, 2023. The Commission is scheduled to hear a variance request at its November meeting.

**V. REQUESTS BY THIRD PARTIES TO FILE CONTESTED CASES IN OAH:**

Following is a review of the outstanding requests:

**Adams, Stefanowicz, Sininger (CMT-23-15)** submitted a request for a contested case hearing to challenge the issuance of CAMA Minor Permit 07-23-CB for construction of a 2<sup>nd</sup> tier new deck at the property adjacent to Sun Skipper UOA in the Town of Carolina Beach on several grounds including lack of notice and the impacts to view. The Chair denied the request and found that the Petitioners had failed to allege facts or make legal arguments to demonstrate a hearing would not be frivolous. No petition for judicial review was filed by September 24, 2023. I will close my file.

**Brown (CMT\_23-16)** submitted a request for a contested case hearing to challenge the issuance of CAMA Minor permit M23-14 for construction of a fence on a boundary line at property located in Currituck County on the grounds that the permit is contrary to NCGS chapter 68. The Chair issued her decision denying the request for failure to identify any rules or statute. Petitioner did not file a petition for judicial review by October 9, 2023. I will close my file.

**Matthew Cregin (CMT-23-17) and Charlie Boise (CMT-23-18)** submitted requests for contested case hearings to challenge the issuance of CAMA General Permit 90200-D authoring construction of a boat slip and piling at riparian property located in Hampstead, Pender county, North Carolina. After the permit was modified and the location of the slip moved, the Commission issued a decision denying the requests as moot. Any appeal of that decision must be filed in superior court by November 7, 2023. Neither Petitioner filed a request to challenge the modified permit.

**Judy Glancy (CMT-23-19)** submitted a request for a hearing to challenge the issuance of GP No. 92406C issued to John and Elva Ellis authoring construction of an offshore sill within Bouge Sound in Newport, Carteret county, North Carolina. The Chair's decision will be issued by November 3, 2023.

IN THE SUPREME COURT OF NORTH CAROLINA

No. 94A22

Filed 20 October 2023

HOLLIS L. BATSON and CAROL D. BATSON; LAWRENCE F. BALDWIN and ELIZABETH C. BALDWIN; BALDWIN-BATSON OWNERS' ASSOCIATION, INC.

v.

COASTAL RESOURCES COMMISSION and NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 1 (2022), vacating an order entered on 23 September 2020 by Judge Charles H. Henry in Superior Court, Carteret County, and remanding the case. Heard in the Supreme Court on 20 September 2023.

*I. Clark Wright Jr. for petitioner-appellees.*

*Joshua H. Stein, Attorney General, by Mary L. Lucasse, Special Deputy Attorney General, for respondent-appellant Coastal Resources Commission.*

*No brief for respondent-appellee North Carolina Department of Transportation.*

PER CURIAM.

Justice DIETZ did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See City of Charlotte v. Univ. Fin. Props., LLC*, 373 N.C. 325 (2020) (per curiam) (affirming by an equally divided vote a Court of Appeals

BATSON V. COASTAL RES. COMM'N

*Opinion of the Court*

decision without precedential value).

**AFFIRMED.**



JOSH STEIN  
ATTORNEY GENERAL

STATE OF NORTH CAROLINA  
DEPARTMENT OF JUSTICE

REPLY TO:  
MARY L. LUCASSE  
ENVIRONMENTAL DIVISION  
(919)716-6962  
MLUCASSE@NCDOJ.GOV

October 4, 2023

**Electronically: TRoessler@kilpatricktownsend.com**

Todd Roessler, Esq., Counsel for Petitioner  
Kilpatrick Townsend & Stockton, LLP  
4208 Six Forks Road, Suite 1400  
Raleigh, NC 27609

**Re: Variance Request by North Pier Holdings LLC, CRC-VR-23-04**

Dear Todd,

At its specially scheduled September 21, 2023 meeting, the Coastal Resources Commission GRANTED in part and DENIED in part Petitioner North Pier Holding LLC's request for a variance authorizing additions and renovations to the parking area, pool area, and Building 1 of the North Pier Ocean Villas Condominiums in the Town of Carolina Beach, North Carolina. Attached is a copy of the final agency decision signed by the Chair of the Coastal Resources Commission. Thank you for agreeing to accept service on behalf of your client.

Petitioner has the right to appeal the Coastal Resources Commission's decision by filing a petition for judicial review in the superior court within thirty days as provided in N.C.G.S. § 150B-45. If Petitioner files a petition, a copy of the judicial review petition must be served on the Coastal Resources Commission's agent for service of process at the following address:

William F. Lane, General Counsel  
Dept. of Environmental Quality  
1601 Mail Service Center  
Raleigh, NC 27699-1601

As a courtesy, please email me a copy of any filed petition for judicial review. This does not take the place of service on General Counsel Lane. Call me if you have any questions.

Sincerely,

Mary L. Lucasse  
Special Deputy Attorney General  
Counsel for the Coastal Resources Commission

**Todd Roessler, Esq.**

**October 4, 2023**

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cc electronically:

M. Renee Cahoon, Chair

Christine A. Goebel, Esq.

Braxton C. Davis, DCM Director

Mike Lopazanski, DCM Deputy Director

Robb Mairs, DCM LPO Minor Permits Coordinator

Angela Willis, Administrative Assistant

Jeremy Hardison, Town Planning Director

Haley Moccia, Town CAMA LPO

STATE OF NORTH CAROLINA	)	BEFORE THE NORTH CAROLINA
	)	COASTAL RESOURCES
COUNTY OF NEW HANOVER	)	COMMISSION
	)	<b>CRC-VR-23-04</b>
	)	
	)	
IN THE MATTER OF:	)	
PETITION FOR VARIANCE	)	<b>FINAL AGENCY DECISION</b>
BY NORTH PIER HOLDINGS LLC	)	

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On August 9, 2023, Petitioner North Pier Holdings LLC (“Petitioner”) submitted a request for a variance from the North Carolina Coastal Resources Commission’s (“Commission”) oceanfront setback rules set forth at 15A N.C. Admin. Code 07H .0306(a) so it could make additions and renovations to the parking area and Building 1 of the North Pier Ocean Villas Condominiums. This matter was heard pursuant to N.C. Gen. Stat. § 113A-120.1 and 15A N.C. Admin. Code 07J .0700, *et seq.*, at the special meeting of the Commission held on September 21, 2023 in New Bern, North Carolina. Assistant General Counsel Christine A. Goebel, Esq. appeared for Respondent Department of Environmental Quality, Division of Coastal Management (“DCM”). Attorney Todd S. Roessler Esq. appeared on behalf of Petitioner.

When reviewing a petition for a variance, the Commission acts in a quasi-judicial capacity. *Riggings Homeowners, Inc. v. Coastal Resources Com’n*, 228 N.C. App. 630, 652, 747 S.E.2d 301, 314 (2013) (Commission has “judicial authority to rule on variance requests . . . ‘reasonably necessary’ to accomplish the Commission’s statutory purpose.”); *see also Application of Rea Const. Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968) (discussing quasi-judicial role in allowing variances for permits not otherwise allowed by ordinance). In its role as judge, the Commission “balance[es] competing policy concerns under CAMA’s statutory framework.” *Riggings*, 228 N.C. App. at 649 n.6, 747 S.E.2d at 312.

Petitioner and Respondent DCM are the parties appearing before the Commission. The

parties stipulated to facts and presented stipulated exhibits to the Commission for its consideration. *See*, N.C. Admin. Code 15A 07J .0702(a). If the parties had been unable to reach agreement on the facts considered necessary to address the variance request, the matter would have been forwarded to the North Carolina Office of Administrative Hearings (“OAH”) for a full evidentiary hearing to determine the relevant facts before coming to the Commission. *Id.* 07J .0702(d).

As in any court, the parties before the decision-maker are responsible for developing and presenting evidence on which a decision is made. If DCM and Petitioner had presented the Commission with other stipulated facts, the Commission may have reached a different decision. In this case, the record on which the Commission’s final agency decision was made includes the parties’ stipulations of facts, the stipulated exhibits provided to the Commission, and the arguments of the parties.

#### **FACTS STIPULATED TO BY PETITIONER AND DCM**

1. Petitioner is a North Carolina Limited Liability Company formed on May 3, 2022 as shown on the Articles of Organization filed with the North Carolina Secretary of State. Caleb Kratsa is the registered agent for Petitioner.

2. On July 27, 2022, Petitioner acquired a fee simple interest in all 42 units within North Pier Ocean Villas Condominiums (the “Property”) from North Pier Ocean Villas Homeowners Association, Inc. (the “HOA”) for a sales price of \$8.3 million following proceedings in bankruptcy court. The Property has a physical address of 1800 Canal Drive, Carolina Beach, New Hanover County, North Carolina. This transaction was recorded in Deed Book 6583 at Pages 618 and 795 of the New Hanover County Register of Deeds Office. The deeds are stipulated exhibits.

3. The Property, currently improved with condominium units, is an irregularly shaped area containing 33,541 gross square feet or approximately 0.8 acres. The Property is minimally landscaped and is level and clear, at roadway grade with the surrounding streets.

4. The Property is bounded by Carolina Beach Pier House, a rock revetment, the Carolina Beach Pier, and the Atlantic Ocean to the east, Canal Drive to the west, the Island North condominium complex to the south, and the Pier's private parking lot (which is leased to the Town for public parking) to the north.

5. According to the Flood Plain Map number 3720313000K, dated August 28, 2018, the Property is located within Zone AE (a special hazard flood zone).

6. Much of the Property is in the Ocean Erodible Area of Environmental Concern ("AEC"). Therefore, proposed development requires a permit pursuant to the Coastal Area Management Act of 1974 ("CAMA") located at N.C. Gen. Stat. §§ 113A-100, *et seq.*

7. The Property is subject to the Commission's oceanfront setback rules set forth at 15A N.C. Admin. Code 07H .0306(a).

8. The history of nourishment at Carolina Beach is summarized in the Town's 2020 Static Line Exception Report (a copy was provided to the Commission as a stipulated exhibit). That report notes that the Town's federal storm damage project was approved in 1962 and extends along 14,000 linear feet of ocean shoreline. The project was modified to include a 2,050-foot-long rock revetment at the north end of the project with an elevation of 9.5 feet NAVD. The pre-project/static vegetation line at the rock revetment runs along the center of the revetment. A map from DCM's map viewer showing the pre-project vegetation line in the vicinity of the Property is a stipulated exhibit. A stipulated exhibit showing the historic shorelines in the vicinity of the

Property was provided to the Commission.

9. On August 27, 2009, the Commission adopted a Static Line Exception for the Town of Carolina Beach (the “Town”). In 2009, the Commission developed and adopted the Static Line Exception rules to provide relief to communities with committed financial and sand resources to regularly maintain large-scale renourishment projects. The Commission-approved Static Line Exception allows setbacks to be measured from the actual vegetation line, and not the more-restrictive pre-project vegetation/static line. In addition, structures greater than 5,000 square feet only have to meet a minimum setback of 120 feet, or 60 times erosion rate. The Static Line Exception for the Town has been approved in 2009, 2014, and 2020 by the Commission and is currently in effect.

10. The applicable erosion rate in the vicinity of the Property is 3-feet per year. The applicable setback for any structures located on the Property is 180-feet from the pre-project vegetation line/static vegetation line.

11. During its May 2023 meeting the Commission requested its Science Panel in collaboration with DCM staff work on the following tasks: 1) Updating the Inlet Hazard Area Boundaries and reevaluating erosion rate setback factors, incorporating data acquired since a 2018 study, and 2) Deliberating on various methodologies for calculating erosion rates along oceanfront areas. DCM Staff estimates that these studies will be ready for the Commission’s consideration in the first half of 2024. If approved, the Commission could resume rulemaking on these issues. If there are no delays in the rulemaking process, new boundaries and erosion rates for inlet hazard areas could be in effect as early as the end of 2024.

12. Based on the most recent data for long-term erosion rates in inlet areas on the North

Carolina ocean shoreline, the Science Panel and DCM have proposed an erosion rate for the Property of 2-feet per year. This proposed rate has not been adopted by the Commission. If the 2-foot per year erosion rate is adopted, Petitioner's proposed development, including Building 1, the pool area, and the pervious paver area, would be located landward of the setback line.

13. Initially constructed by the U.S. Army Corps of Engineers in approximately 1970, a rock revetment exists along the entire ocean shoreline seaward of the Property.

14. Since 1966, pursuant to a Federal Coastal Storm Risk Management Project, Carolina Beach, including the beach in the vicinity of the Property, has regularly been renourished. Most recently, in 2022, nearly 1 million cubic yards of sand was placed on the beaches of Carolina Beach. The federal project is authorized through 2036 and is scheduled to occur every three years.

15. The condominium structures were constructed beginning in 1984 and 1985 and consist of two, cosmetically attached but structurally independent, three-level, piling-supported wood frame buildings containing 42 individual residential units: Building 1 has three floors with five units per floor for a total of 15 individual residential units. Building 2 has three floors with nine units per floor for a total of 27 individual residential units. The pool area was constructed sometime between 1985 and 1992. Building 1 (the more-waterward building), the pool area, and a proposed pervious paver area are the subject of this variance petition.

16. Following deferred maintenance by the HOA, during Hurricane Dorian in 2019, Building 1 experienced significant storm damage. Petitioner describes the building as uninhabitable. It was not condemned by the Town. The HOA chose not to make the necessary repairs for financial reasons. Building 1 remained in a state of disrepair for several years. Building 2, which is not part of this variance petition, experienced minor damage from Hurricane Dorian

and continued to be used following the storm.

17. When Petitioner acquired the Property, the buildings, in particular Building 1, were in significant disrepair, including mold and structural issues. The Town's building inspector at that time, Mr. Darrell Johnson, informed Petitioner that he had the authority to require Petitioner either secure the structures or demolish the structures to prevent them becoming storm debris. On July 28, 2020, the Town received an engineering report from Jason Wade, PE regarding the foundation and condition of Building 1. A copy of this report was provided to the Commission as a stipulated exhibit. Photos of the condition of Building 1 prior to any repair activities were provided to the Commission as a stipulated exhibit.

18. In August 2022, Petitioner began maintenance and repair on Buildings 1 and 2. The Commission was provided with a stipulated exhibit summarizing the permits applied for and issued for the Property. This includes permits to enclose and repair existing decks in Building 1, Units 112, 212, and 312. Enclosing these previously open decks adds Total Floor Area ("TFA") to the structure.

19. In February 2023, the existing pool plumbing under the in-ground pool's surrounding deck was not functioning. The concrete pool deck was cracked and created dangerous conditions for pool users. Due to these conditions, Petitioner removed the pool deck and planned to fix the plumbing, repair the retaining wall, and replace the pool deck.

20. On April 20, 2023, the Town's Local Permit Officer ("LPO") issued a Notice of Violation ("NOV") to Petitioner for conducting minor development by the unauthorized expansion of the Total Floor Area of Building 1. The Commission was provided with a copy of the NOV as a stipulated exhibit. The NOV instructed Petitioner to stop work immediately and conduct certain

restoration activities. Petitioner contends that there was a misunderstanding with the building inspector regarding enclosing the decks.

21. On April 21, 2023, the Town notified Petitioner that subject to 15A N.C. Admin. Code 07K .0103 certain maintenance and repair activities were exempt from CAMA permit requirements. These exempted activities are not subject to this variance petition. The exempt maintenance and repair activities proposed by Petitioner amount to \$3,430,900 (\$1,048,400 for Building 1, and \$2,382,500 for Building 2). A copy of this letter was provided to the Commission as a stipulated exhibit.

22. On or about May 31, 2023, DCM confirmed that the restoration required in the NOV has been resolved. A copy of this letter was provided to the Commission as a stipulated exhibit.

23. As set forth in its Application for a CAMA Minor Development Permit submitted to the Town's LPO dated May 22, 2023, Petitioner proposed the following additions and renovations of North Pier Ocean Villas Condominiums.

- The addition of four new penthouse units on the top floor of Building 2 (6,023 sq ft with no expansion of footprint) (Not subject of the variance);
- Expansion of Building 2 with decks, breezeways, replace piles, stairwells, and elevators; (Not subject of the variance)
- The addition of one new penthouse unit on the top floor of Building 1 (2,213 sq ft a vertical expansion within the existing Building 1 footprint); (Part of the variance request)
- Expansion of Building 1 with decks, breezeways, replace piles, stairwells, and elevators (enclosing three decks for a total of approximately 216 sq ft TFA; enclosing two, exposed laundry rooms for a total of approximately 266 sq ft TFA; adding three new decks for a total of approximately 663 sq ft TFA). (Part of the variance request)

- Install new pool and new 3,407 square foot pool deck, including new hot tub, removable sunshade cabanas, and grilling area on pool deck; and (Part of the variance request)
- Install a pervious paver drive area which is 8,735 sq. ft. (Part of the variance request)

Petitioner's CAMA Minor Development Permit application was provided to the Commission as a stipulated exhibit.

24. The proposed expansion of Building 1 will not expand the footprint or foundation of Building 1 with the exception of the proposed new decks, which would be constructed within the northeastern corner. The height of Building 1 will increase and the new penthouse level will add TFA. Each of the proposed three new decks will be supported by two pilings with helical anchors driven to bedrock. Unlike the existing decks, which are proposed to be enclosed, each of the three new decks would be handicap accessible in compliance with the American with Disabilities Act.

25. The footprint of the pool deck will be smaller and within the prior footprint of the pre-existing pool deck.

26. As part of the CAMA minor permit review process, notice of the proposed development was sent to adjacent riparian owners, CB Pier LLC, North Pier Associates LLC, and Island North HOA. As of May 2023, the LPO had not receive any objections to the proposed development. However, during the process of developing these stipulated facts, counsel for Staff tracked the notices sent in May of 2023 to the three adjacent riparian owners and discovered that none of the certified letters had been delivered. Copies of the notice letters and tracking information was provided to the Commission as stipulated exhibits.

27. On June 28, 2023, DCM issued CAMA Minor Permit 12-23 CB (the "Permit")

authorizing the work proposed on Building 2, including the additional penthouse units and expansion with decks, breezeways, replace piles, stairwells, and elevators. These authorized activities are not subject to this variance petition. A copy of the Permit was provided to the Commission as a stipulated exhibit.

28. A portion of the existing and proposed development for Building 1 is located within the 180-foot setback. The Permit expressly conditioned out of the Permit the following proposed work:

- (1) In accordance with 15A N.C. Admin. Code 07H .0306(a)(6), this permit does not authorize any expansion (of the Total Floor Area for the penthouse, the enclosure of the corner decks and the footprint of the covered decks in the NE corner) of Building 1 as shown on work plat drawings 3, 6, 7, and 8 of 8 received on 05/24/2023 and proposed work listed under “Building 1 CAMA Minor Permit — Expansion or changes in footprint” on the work plan provided by the authorized agent, Kievit Construction received on 05/24/2023.
- (2) In accordance with 15A N.C. Admin. Code 07H .0306(a)(3)(b), this permit does not authorize any development of the proposed pool area as shown as “PROPOSED NEW POOL AND NEW CONCRETE POOL DECK TO MATCH PREVIOUS DECK FOOTPRINT” on work plat drawing 3 and 5 of 8 received 05/24/2023, “POOL AREA” on work plat drawing 8 of 8 received 05/24/2023, and proposed work listed under “Existing Ground floor Pool and Common area” on work plan provided by the authorized agent, Kievit Construction received on 05/24/2023.
- (3) In accordance with 15A NCAC .0306(a)(3), this permit does not authorize the “PROPOSED PERVIOUS PAVER DRIVE AREA” that is waterward of the 180’ setback line as shown on work plat drawing 3 of 8 received on 5/24/2023 as a “pervious paver drive area” does not meet any of the setback exceptions in 15A N.C. Admin. Code 07H .0309(a)(1-10). (This rule requires parking areas within the setback to be clay, packed sand, or gravel and not pavers or concrete).

29. Following DCM’s issuance of the Permit, the Town required additional parking for the new penthouse units. To accommodate the additional required parking, Petitioner decreased the proposed size of the pool and pool deck. In addition, Petitioner modified the proposed paver area to construct it with either pervious pavers or concrete. An architectural drawing comparing

the different plans was provided to the Commission as a stipulated exhibit and is attached to this Order. (*See* drawing attached. A copy of this drawing was included in the DCM Staff Recommendation, p 264).

30. On July 7, 2023, the Town confirmed that structures may be repaired in a similar manner, size, and location as the original structures. The Town further notified Petitioner that no expansions or additions are permissible under CAMA, and the repairs are limited to fifty percent of the as-is market value of the existing structure and subject to certain conditions. A copy of the July 7, 2023 letter was provided to the Commission as a stipulated exhibit.

31. The Commission's rules require that "[b]efore filing a petition for a variance from a rule of the Commission, the person must seek relief from local requirements restricting use of the Property." 15A N.C. Admin. Code 07J .0701(a). Petitioner has not sought a variance from the Town's applicable lot setbacks. However, the Property has preexisting development. The proposed development on the Property meets all applicable Town setbacks. Petitioner contends that seeking a local variance will not eliminate or reduce the need for a variance from the Commission.

32. Petitioner's counsel sent three rounds of notice letters giving notice of the Variance Petition to the three adjacent riparian property owners. The first letters sent August 9, 2023 were mailed by certified mail to the same street addresses used by Petitioner in their permit application. When two of the letters was returned as undeliverable, Petitioner's counsel sent a second round by certified mail on September 8, 2023 to the Registered Agents for the adjacent owners. As of September 13, 2023, the USPS tracking did not show delivery of the second round of letters. On September 11, 2023, Petitioner's counsel sent notice by overnight Fed-Ex delivery. On September 12, 2023, notice was delivered to the receptionists at the Registered Agents of North Pier

Associates, LLC and Island North HOA, Inc. On September 14, 2023, Petitioner's counsel received email confirmation from the Registered Agent for CB Pier, LLC that notice had been received. No comments from the adjacent riparian property owners were received prior to the Commission meeting on September 21, 2023.

33. Petitioner stipulates, pursuant to 15A N.C. Admin. Code 07J .0701, that the Permit was properly conditioned to exclude proposed development that was inconsistent with the Commission's oceanfront setback rules as described in the denial letter.

34. Without a variance, Petitioner could move forward with the work authorized in the Permit but cannot add TFA to Building 1 by adding a penthouse, enclosing the three existing decks and laundry, and adding the proposed three new decks. In addition, because the pool area is within the setback, without a variance, Petitioner would be limited to 500 square feet of wooden decking around the pool (plus any required pool apron under health rules). The Commission's rules limit Petitioner to using clay, packed sand, or gravel for the new parking area and pervious area.

35. The Commission was provided with a PowerPoint showing aerial and ground-level photographs of the Property and surrounding area as a stipulated exhibit.

#### **EXHIBITS PROVIDED TO THE COMMISSION BY PETITIONER AND DCM**

1. Petitioner's CAMA Variance Request Form dated August 9, 2023 and attached Exhibits:
  - a. Exhibit C–Description of Proposed Development
  - b. Exhibit D–Petitioner's Stipulation
  - c. Exhibit F– Petitioner's Position on Variance criteria
  - d. Exhibit E–Petitioner's Proposed Stipulated Exhibits
2. Articles of Incorporation for Petitioner filed May 3, 2023 with the North Carolina Secretary of State

3. Special Warranty Deed between HOA and Petitioner recorded on July 27, 2022 beginning at Book 6583, Page 618 in the New Hanover County Registry of Deeds and Exhibits
4. Quitclaim Deed between HO and Petitioner recorded July 27, 2022 beginning at Book 6583, Page 795 in the New Hanover County Registry of Deeds and Exhibits
5. 2020 Town of Carolina Beach Static Line Exception Progress Report
6. Interlocal Agreement for contingency Plan Beach Nourishment dated December 8, 2011 by New Hanover County and the Municipalities of Wrightsville Beach, Carolina Beach, and Kure Beach
7. DCM Map Viewer photos showing Pre-Project Vegetation Line (also known as the Static Line) and historic shorelines at the Property printed out September 15, 2023
8. July 28, 2022 sealed Report from Jason Wade PE 036807
9. Town's permitting timeline for the Property prepared September 12, 2023 and attachments
10. April 20, 2023 CAMA NOV to Petitioner from Town's LPO with Restoration Plan
11. April 21, 2023 CAMA Exemption letter to Caleb Kratsa from Town's LPO with attached drawings A103 and A103.5
12. May 31, 2023 CAMA Restoration Acceptance for NOV 23-11 from Town's LPO
13. May 2023 CAMA Permit Application for 12-23 CB
14. Ocean Hazard AEC Notice dated May 5, 2023
15. Romero Architecture Drawings 1 through 8 of 8
16. May 2023 CAMA Application notice documents and tracking
17. CAMA Minor Permit 12-23CB issued June 28, 2023 (as conditioned)
18. Modified pool/parking proposal with new parking spaces
19. July 7, 2023 Letter from Town to Petitioner re maintenance and repair
20. Powerpoint with photos

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over the parties and the subject matter.
2. All notices for the proceeding were adequate and proper.
3. As set forth in detail below, on some, but not all, issues the Commission held that

Petitioner met the requirements in N.C. Gen. Stat. § 113A-120.1(a) and 15 N.C. Admin. Code 07J .0703(f) which must be found before a variance can be granted. Following is the Commission's

decision on each of the four requirements for the proposed construction:

**FIRST REQUIREMENT: Will strict application of the rule cause unnecessary hardships?**

- a. Strict application of the rule to the proposed enclosure of existing decks and laundry room, and construction of the pool deck will cause unnecessary hardships.**

The Commission affirmatively finds that strict application of the Commission's setback rule at 15A N.C. Admin. Code 07H .0306(a) would cause unnecessary hardships when applied to the proposed enclosure of the existing decks and laundry room and construction of the proposed pool and pool deck. The purpose of the setback rules is to "minimize losses to life and property resulting from storms and long-term erosion, prevent encroachment of permanent structures on public beach areas, preserve the natural ecological conditions of the barrier dune and beach systems, and reducing the public costs [of inappropriately sited development.]" 15A N.C. Admin. Code 07H .0303(b).

The Property is located behind the rock revetment along a regularly nourished shoreline. The Town has a Static Line Exception. However, at the Property the setback is measured from the static/pre-project vegetation line because despite the rock revetment and regular nourishment, the vegetation line or a dune system has not survived waterward of the rock revetment. The erosion rate in the vicinity of the Property approved by the Commission is currently 3-feet per year. (Stipulated Fact 10) Thus, under the Commission's rules, the applicable setback for any structures located on the Property is 180-feet from the pre-project vegetation line (static vegetation line). The 180-foot setback required by the Commission's rules bisects the existing Building 1. (*See plans by Romero Architecture sealed by Rob Patrick Romero R.A. No. 12520 dated May 5, 2022*)

Based on the calculations provided by Mr. Romero, the TFA for Building 1 before any renovations or construction is 11,274 square feet. (See Drawing A103, DCM's Staff Recommendation, p 186) Enclosing the three existing decks in Building 1, units 112, 212, and 312 will result in adding approximately 216 square feet to the total floor area. Enclosing the two interior outdoor laundry areas in Building 1 will add approximately 266 square feet to the total floor area of the building. Together the enclosure of these areas will result in slightly more than a four percent increase of the TFA of Building 1. These enclosures will not increase the footprint of the building. (Stipulated Fact 23)

In its Staff Recommendation, DCM Staff agrees that a strict application of the oceanfront erosion setback rules to the proposed enclosure of the outdoor laundry rooms and existing decks, will cause Petitioner unnecessary hardships. Although increasing the TFA of this partially non-conforming structure is not allowed by rule, DCM opines that the amount of TFA added would be *de minimis*. The Commission agrees. The potential for this small amount to become debris in any future storm is negligible. In addition, the proposed enclosures are located within the existing footprint. Furthermore, the Commission's decision regarding these enclosures is consistent with the Commission's approach in other variance requests.

The Commission also finds that strict application of its setback rules to the proposed pool deck construction would cause unnecessary hardships. In short, instead of proceeding with maintenance and repairs allowed under 15A N.C. Admin. Code 07K .0103 if the cost of the proposed work is less than fifty percent of the value of the existing deck, Petitioner demolished the pre-existing deck. As a result, even though the proposed replacement deck is smaller than the prior deck area, as designed it is not allowed oceanward of the setback. It appears likely that if

Petitioner had phased the work differently, it likely would have been able to construct the proposed pool deck.

In its Staff recommendation, DCM states that given the circumstances of this particular case, it would constitute an unnecessary hardship to limit the new pool deck to 500 square feet which is the maximum allowed as an exception to the setback in the Commission's rules. The Commission agrees.

For the above stated reasons, the Commission affirmatively finds that Petitioner has met the first factor required for a variance for the proposed enclosure of the existing decks on Units 112, 212, and 312 and the existing open laundry areas in Building 1, and the proposed construction of a smaller pool deck.

**b. Strict application of the rule to the proposed construction of new decks, the addition of a penthouse, and the use of concrete or pervious paver in the driveway or parking area cause necessary hardships.**

The Commission's setback rules are designed to protect life and property from harm resulting from inappropriately sited development within the ocean hazard shoreline. The "natural hazard areas along the Atlantic Ocean shoreline" are particularly vulnerable "to erosion or other adverse effects of sand, wind, and water[.]" 15A N.C. Admin. Code 07H .0301. Petitioner has proposed adding three new decks and a penthouse (which would add approximately 2,976 square feet to the TFA of Building 1) and proposed using concrete or pervious pavers in the driveway or parking areas.

The strict application of the Commission's rules to this proposed development will appropriately prevent new construction and pavers or concrete building materials waterward of the existing setback line. Not only would the proposed development expand the existing footprint of

the building, by the Commission's calculation, the proposed development would increase the TFA of Building 1 by approximately twenty-five percent.

In requesting the variance, Petitioner relies on economic arguments and suggests that a different erosion setback (one not adopted by the Commission) indicates that strict application of the Commission's existing rule will cause unnecessary hardships. The Commission disagrees. Until the Commission adopts new erosion rates, it will apply the current erosion rates. The strict application of the setback rules to proposed development on this Property is necessary to keep development further from ocean and minimize danger to life and property that can occur from inappropriately cited development and the additional of construction material in an ocean hazard area.

Moreover, the Commission's rules at 7H .0309 allow parking areas constructed from clay, packed sand, or gravel in the setback. Pursuant to Town rules, Petitioner is required to construct a certain number of parking spaces for Buildings 1 and 2. Under the Commission's rules, Petitioner is not prevented from constructing the required number of parking spaces. It is not an unnecessary hardship to restrict the use of certain construction materials in the Ocean Hazard AEC. Petitioner will be allowed to construction the required parking spaces as long as they are constructed of clay, packed sand, or gravel.

For the above stated reasons, the Commission affirmatively finds that strict application of the Commission's setback rules will not cause unnecessary hardships. Petitioner has failed to meet the first requirement necessary for a variance for the proposed construction of the new decks and penthouse on Building 1 and a pervious paver parking area.

**SECOND REQUIREMENT: Does the hardship results from conditions peculiar to Petitioner's property?**

The Commission affirmatively finds that Petitioner has demonstrated that the hardship results from conditions peculiar to the property. Specifically, Petitioner has shown that the Property is located behind a rock revetment on a beach which has been regularly nourished for over 50 years. The federal nourishment project is authorized through 2036 and is scheduled to occur every three years. (Stipulated Fact 14)

In its staff recommendation, DCM agrees that the placement of the rocks and regular nourishment cycles at the Property have resulted in data suggesting the current rate of erosion at the Property has decreased to 2-foot per year. (Stipulated Fact 12) The Science Panel is continuing to work on the Inlet Hazard Report requested by the Commission. It is not yet known what erosion rates will be approved by the Commission following its receipt of the Science Panel's updated report in 2024.

The Commission agrees that the rock revetment, the regular renourishment, and the decreasing erosion shown in the most recent data available for the Property are conditions peculiar to the Property that support the variance request. Accordingly, the Commission affirmatively finds that Petitioner has met the second requirement required before a variance can be granted.

**THIRD REQUIREMENT: Does the hardship result from actions taken by Petitioner?**

- a. Hardships relating to enclosing the existing decks and laundry areas and constructing the pool and pool deck do not result from actions taken by Petitioner.**

The Commission affirmatively holds that Petitioner has demonstrated that any hardship relating to enclosing existing decks and laundry areas in Building 1 and replacing the pool and pool deck does not result from its actions. Specifically, Building 1 and the pool area were

constructed long before Petitioner acquired the Property on July 27, 2022. Petitioner did not cause the erosion of the vegetation line and dune system oceanward of the Property. The proposed development will not expand the existing footprint of Building 1. In addition, because of Petitioner's design choice, the footprint of the proposed pool and pool deck will be smaller and within the preexisting footprint.

In the past, the Commission has granted variances for a *de minimis* expansion of total floor area created by enclosing small roof-covered porches within the existing footprint similar to the enclosure of the three existing decks and the laundry areas in Building 1. Similarly, the proposed pool and deck construction will result in a smaller amount of development in the setback than the pre-existing footprint. For these reasons, the Commission affirmatively finds that Petitioner has demonstrated that it has met the third factor required for a variance for these proposed developments.

**b. Hardships relating to construction of new decks and penthouse on Building 1 and construction of a parking area with concrete or pervious pavers result from Petitioner's actions.**

The Commission affirmatively finds that as for new construction oceanward of the setback, the hardships result from Petitioner's actions. While the location of Building 1 and the 180-foot ocean erosion setback bisecting the building was something Petitioner inherited when it purchased the Property, Petitioner could have proposed a different design for the new decks and penthouse and parking area consistent with CAMA and the Commission's rules. Instead, Petitioner proposed adding three new decks beyond the existing footprint and a new penthouse on top of the existing units. This will increase the TFA of Building 1 by close to 3,000 square feet. These proposed additions, especially those outside the existing limits of Building 1, are beyond *de minimis*. As

DCM points out in its staff recommendation, the increased square footage is more than double the “small structure” exception the Commission defines for purposes of the thirty-foot buffer rules in 15A N.C. Admin. Code 07H .0209(d)(10)(I).

Similarly, Petitioner has chosen a preferred building material for the driveway and parking area. This material (pervious pavers or concrete) is not allowed within the setback under the Commission’s rules. Petitioner can still construct the required driveway and parking areas using clay, gravel, or packed sand. Therefore, any hardships from the denial of Petitioner’s request to use hard materials to construct the driveway and parking areas results from its actions.

For these reasons, the Commission affirmatively finds that Petitioner has failed to demonstrate that it has met the third factor required for a variance to construct new decks and a penthouse on Building 1 and to construct the driveway and parking area with concrete or pervious pavers.

**FOURTH REQUIREMENT: Has Petitioner demonstrated that the requested variance is consistent with the spirit, purpose, and intent of the Commission’s rules, will secure public safety, and welfare, and preserve substantial justice.**

**a. Petitioner has demonstrated that enclosing the existing decks and laundry areas, and constructing the replacement pool deck meets the fourth requirement.**

The Petitioner has demonstrated (a) that the requested variance is consistent with the spirit, purpose, and intent of the Commission’s rules, (b) that it will secure public safety and welfare, and (c) that it will preserve substantial justice. The principal purpose of N.C. Admin. Code 07H .0303 is to site development within the Ocean Hazard AEC “to minimize danger to life and property and achieve a balance between the financial, safety and social factors that are involved in hazard area development.” This rule is based on the goals in CAMA to “minimize losses to life and property resulting from storms and long-term erosion, prevent encroachment of permanent structures on

public beach areas, preserve the natural ecological conditions of the barrier dune and beach systems, and reducing the public costs of development within ocean hazard areas, and protect common-law and statutory public rights of access to and use of the lands and waters of the coastal area.” N.C. Gen. Stat. § 113A-102(b).

The Commission first considers whether the proposed development is consistent with the spirit, purpose, and intent of the setback rules. Based on the information submitted and the argument of counsel, the Commission affirmatively finds that the small-scale enclosure of three existing decks in Building 1, Units 112, 212, and 312 (totaling 216 square feet) and the laundry areas (totaling 266 square feet) are *de minimis* in nature and meet the spirit, purpose, and intent of the setback rules because there is not a significant increase in Total Floor Area.

In addition, after Petitioner demolished the existing pool deck instead of simply undertaking repairs, the Commission’s setback rule limited Petitioner to 500 square feet total of decking in the setback. However, the proposed pool deck is smaller than the originally-existing pool deck area. Therefore, the Commission affirmatively finds that it is in keeping with the spirit, purpose, and intent of the Commission’s rules to allow the smaller deck.

The second assessment is whether the variance proposed by Petitioner will impact public safety and welfare. Petitioner submits, and the Commission agrees, that the variance authorizing the enclosure of the three existing decks and laundry areas within the existing Building 1 dimensions may improve public safety and welfare by making Building 1 stronger. The Commission is not aware of any reason to think that this proposed development would be detrimental to public safety and welfare.

Finally, the Commission agrees that granting the requested variance to enclose *de minimus*

areas and construct a smaller pool deck will preserve substantial justice. If Petitioner had not precipitously removed the pool deck, the larger deck could have been repaired without a CAMA Minor permit or variance. Petitioner proposes constructing a pool deck with a smaller footprint within the preexisting footprint of the pool area. Granting the requested variance preserves substantial justice by allowing a deck with a smaller footprint when under different circumstances a deck with a larger footprint could have been repaired and maintained in the setback.

**b. Petitioner has failed to demonstrate that adding new decks and a penthouse to Building 1 and using pervious pavers or concrete in the driveways and parking areas meets the fourth requirement.**

The Commission affirmatively finds that adding three new decks (663 square feet) and a new penthouse floor (2,213 square feet) would not be within the spirit, purpose, and intent of the Commission's setback rule. This proposed construction would add close to 3,000 square feet of TFA in the setback area. This increase is not *de minimis* nor is it within the existing Building 1 dimensions.

Petitioner's request to construct the parking and driveway out of hard pervious pavers or concrete is not consistent with the spirit, purpose, and intent of the Commission's rule. The use of these hard materials is contrary to the exception to the setback rule allowing materials which are less likely to become debris to be used for parking areas in the setback, such as clay, packed sand, or gravel parking. 15A N.C. Admin. Code. 07H .0309.

In addition, the Commission affirmative finds that adding new decks and a penthouse floor outside the Building 1 dimensions would not protect public safety and welfare because it would significantly increase the TFA of Building 1. In addition, the Commission expressed concern that adding a penthouse structure on top of Building 1 could impact lateral forces on the building. Upon

questioning by the Commission, Petitioner was unable to provide information on this issue and the stipulated exhibits provided to the Commission did not address this concern. In addition to enclosing a significant amount of new TFA, the addition of this new fourth story adds to the permanence of Building 1 and increases the difficulty of possible future attempts at relocation of Building 1 if the Property is threatened by future erosion.

Finally, the Commission finds that substantial justice will not be served by allowing a variance from the ocean erosion setbacks for the addition of TFA and the addition of hard materials in the setback. Currently, the Commission is working with its Science Panel to develop current erosion rates for the North Carolina. The Commission is not inclined to short circuit the process already begun. The Commission will review the Science Panel's Inlet Erosion Rate Report when it is completed in 2024 and proceed to adopt any required rules or rule amendments. At such time when that report is adopted by the Commission, it may offer relief to Petitioners and others. But substantial justice is not reached by granting this variance before the Commission receives the report or the Science Panel's updated findings and data.

\* \* \* \* \*

For these reasons, the Commission affirmatively finds that Petitioner has met the fourth factor required by N.C. Gen. Stat. § 113A-120.1(a) for enclosing existing decks and laundry areas and constructing the pool deck.

Petitioner has not met its burden to show that the variance request for the proposed new decks and penthouse and use of pervious pavers or concrete in the parking area and driveway is consistent with CAMA's fourth requirement.

**ORDER**

THEREFORE, the requested variance from 15A N.C. Admin. Code 07H .0306(a) is GRANTED in part and DENIED in part as set forth below:

- (1) Petitioner may enclose the existing decks in Building 1, Units 112, 212, and 312 for a total of approximately 216 square feet Total Floor Area.
- (2) Petitioner may enclose the existing exposed laundry rooms in Building 1 for a total of approximately 266 square feet Total Floor Area;
- (3) Petitioner may construct the proposed pool and pool deck as depicted in the annotated work plat drawing 5 of 8 which shows a proposal pool outlined in orange of 1014 square feet and a proposed pool deck outlined in orange of 3407 square feet. (See proposed pool and pool deck plan in Stipulated Exhibit, DCM Staff Recommendation, p 246 (attached);
- (4) This variance does not authorize construction of one new penthouse unit on the top floor of Building 1 (2,213 square feet vertical expansion within the existing Building 1 footprint);
- (5) This variance does not authorize construction of three new decks on Building 1 for a total of approximately 663 square feet Total Floor Area.
- (6) This variance does not authorize the use of pervious pavers or concrete in the driveway or parking area (approximately 8,735 square feet) waterward of the 180-foot setback line.

The partial granting of this variance does not relieve Petitioner of the responsibility for obtaining any other required permits from the proper permitting authority. This variance is based upon the Stipulated Facts and exhibits set forth above. The Commission reserves the right to reconsider the granting of this variance and to take any appropriate action should it be shown that

any of the above Stipulated Facts or exhibits are not accurate or correct.

This the 4<sup>th</sup> day of October, 2023.



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M. Renee Cahoon, Chair  
Coastal Resources Commission



STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
23 CVS \_\_\_\_\_

ROY A. COOPER, III, in his official  
capacity as GOVERNOR OF THE  
STATE OF NORTH CAROLINA,

Plaintiff,

v.

PHILIP E. BERGER, in his official  
capacity as PRESIDENT PRO  
TEMPORE OF THE NORTH  
CAROLINA SENATE; TIMOTHY K.  
MOORE, in his official capacity as  
SPEAKER OF THE NORTH  
CAROLINA HOUSE OF  
REPRESENTATIVES; and THE  
STATE OF NORTH CAROLINA.

Defendants.

**COMPLAINT**

Plaintiff Roy Cooper, in his official capacity as Governor of the State of North Carolina, seeking a declaratory judgment under N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57; and seeking a permanent injunction under North Carolina Rule of Civil Procedure 65, hereby alleges and says:

**INTRODUCTION**

1. In 2016 and again in 2018, the Supreme Court of North Carolina reaffirmed the separation of powers as a foundational principle of our state government. *See State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016); *Cooper v. Berger* (“*Cooper I*”), 370 N.C. 392 (2018) (citations omitted). In so doing, the Court held that, in order to fulfill the Governor’s constitutional duties and conform with separation-of-

powers principles, the Governor must have sufficient control over administrative bodies that have final executive authority, such as the authority to enforce laws and promulgate rules and regulations, to ensure the laws are faithfully executed. *McCrory*, 368 N.C. at 646; *Cooper I*, 370 N.C. at 418; *see also State ex rel. Wallace v. Bone*, 304 N.C. 591, 607-08 (1982) (finding it “crystal clear . . . that the duties of the [Environmental Management Commission] are administrative or executive in character and have no relation to the function of the legislative branch of government”).

2. Disregarding these constitutional principles and ignoring the clear mandates of the State’s judicial branch, the North Carolina General Assembly takes aim at these established precedents and once again seeks to significantly interfere with the Governor’s executive powers and to take much of that power for itself.

3. On October 10, the General Assembly overrode the Governor’s veto and enacted Session Law 2023-\_\_\_\_ (“Senate Bill 512”), which alters the structure and composition of the Economic Investment Committee, Environmental Management Commission, Commission for Public Health, Board of Transportation, Coastal Resources Commission, and the Wildlife Resources Commission, and prevents the Governor from performing his core constitutional function to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

4. On August 16, 2023, the General Assembly overrode the Governor’s veto and enacted Session Law 2023-108, which creates the Residential Code Council with thirteen members (six appointed by the General Assembly and 7 appointed by the

Governor, subject to confirmation by the General Assembly). While the Governor appoints a mathematical majority of the members of the Residential Code Council, Session Law 2023-108 requires an affirmative vote of nine members to approve any action, which prevents the Governor from performing his core constitutional function to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

5. Senate Bill 512 and Session Law 2023-108 unconstitutionally infringe on the Governor’s executive powers in violation of the separation of powers. N.C. CONST. art. I, § 6; *id.* art. II, § 1; *id.* art. III, §§ 1, 5(4).

6. They also fail to respect fundamental principles of representative government and the basic guarantees of the North Carolina Constitution, thus requiring the Governor to again secure the constitutional rights of his office and protect the constitutional powers allocated to the executive and judicial branches of state government by the people.

### **PARTIES AND JURISDICTION**

7. Governor Roy Cooper is a resident of Wake County, North Carolina.

8. Defendant State of North Carolina is a sovereign state with its capital in Wake County, North Carolina. The State’s laws, as enacted by the General Assembly, are being challenged as unconstitutional in this action.

9. Defendant Philip E. Berger is the President Pro Tempore of the North Carolina Senate and, upon information and belief, is a resident of Rockingham County, North Carolina.

10. Defendant Timothy K. Moore is the Speaker of the North Carolina House of Representatives and, upon information and belief, is a resident of Cleveland County, North Carolina.

11. Defendants lack sovereign immunity for the claims alleged herein, all of which arise under the exclusive rights and privileges enjoyed by—and duties assigned to—the Governor of the State of North Carolina by the North Carolina Constitution.

12. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rule of Civil Procedure 57, Governor Cooper seeks judgment declaring unconstitutional and enjoining the effectiveness of the following statutes that provide for the makeup of and appointment authority to the following executive boards and commissions:

- a. Part I of Senate Bill 512 amending N.C. Gen. Stat § 143B-437.54 (Economic Investment Committee);
- b. Part II of Senate Bill 512 amending N.C. Gen. Stat § 143B-283 (Environmental Management Commission);
- c. Part III of Senate Bill 512 amending N.C. Gen. Stat § 130A-30 (Commission for Public Health);
- d. Part IV of Senate Bill 512 amending N.C. Gen. Stat § 143B-350 (Board of Transportation);
- e. Part V of Senate Bill 512 amending N.C. Gen. Stat § 113A-104 (Coastal Resources Commission);
- f. Part VI of Senate Bill 512 amending N.C. Gen. Stat § 143-241 (Wildlife Resources Commission); and
- g. Sections 1.(a) and 1.(b) of Session Law 2023-108 enacting N.C. Gen. Stat. §§ 143-136.1 & 143-137.1 (Residential Code Council).

13. As further alleged below, a present and real controversy exists between the parties as to the constitutionality of the challenged statutes.

14. Accordingly, this action is properly brought in the Superior Court Division of the General Court of Justice pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and 7A-245(a).

15. This Court has jurisdiction over the parties and subject matter of this lawsuit, and venue is proper.

## FACTS

### **I. SEPARATION OF POWERS IS A CORNERSTONE CONSTITUTIONAL PRINCIPLE.**

16. As the Supreme Court of North Carolina reaffirmed in 2016:

Our founders believed that separating the legislative, executive, and judicial powers of state government was necessary for the preservation of liberty. The Constitution of North Carolina therefore vests each of these powers in a different branch of government and declares that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”

*McCrorry*, 368 N.C. at 635 (quoting N.C. CONST. art. I, § 6).

17. “There should be no doubt that the principle of separation of powers is a cornerstone of our state and federal governments.” *Wallace*, 304 N.C. at 601.

18. Our founders repeatedly embedded the separation of powers in our state Constitution. *See, e.g.*, N.C. CONST. art. I, § 6 (“The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.”); art. III, § 1 (“The executive power of the State shall be vested in the Governor.”); art. III, § 5(4) (“The Governor shall take care that the laws be faithfully executed.”); art. II, § 1 (“The legislative power of the State shall be vested in the

General Assembly, which shall consist of a Senate and a House of Representatives.”); art. IV, § 1 (“The judicial power of the State shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice.”).

19. These core principles guided our Supreme Court in *McCrorry v. Berger*, when Chief Justice Martin, writing for a bipartisan, six-Justice majority of the Court, held that the General Assembly had unconstitutionally encroached on the province of the Governor by establishing three commissions, according them final executive authority—including the authority to enforce the laws and promulgate rules and regulations—and then limiting the Governor’s ability to control those boards and commissions.

**A. Executive Branch Powers and Duties are Vested Exclusively in the Governor**

20. The Governor is the only executive branch officer vested with the executive power of the State under the North Carolina Constitution. N.C. CONST. art. III, § 1 (“The executive power of the State shall be vested in the Governor.”)

21. The Governor is also the sole executive branch officer with a constitutional duty to “take care that the laws be faithfully executed” as set out in Article III of the North Carolina Constitution. N.C. CONST. art. III, § 5(4).

22. Although the North Carolina Constitution creates other executive officers<sup>1</sup> that comprise the Council of State, our Constitution does not vest any powers

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<sup>1</sup> The Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Superintendent of Public Instruction, Attorney General, Commissioner of Agriculture, Commissioner of Labor, and Commissioner of Insurance.

or duties in the other members of the Council State. N.C. Const. art. III, §§ 7 & 8; N.C. CONST. art. III, § 7(2) (providing that the duties of the elected members of the Council of State “shall be prescribed by law.”). Instead, the executive power is vested solely in the Governor. N.C. CONST. art. III, § 1.

**B. It is Well-Established that Control of Executive Boards and Commissions are Essential to the Governor’s Ability to Perform His Constitutional Duties.**

23. “The clearest violation of the separation of powers clause occurs when one branch exercises power that the constitution vests exclusively in another branch.” *McCrorry*, 368 N.C. at 645. The constitutional guarantee of the separation of powers also “requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.” *See id.* at 636. To that end, “the legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation . . . .” *Wallace*, 304 N.C. at 608–09.

24. Although the General Assembly created each executive board, commission, and council at issue here, in doing so, it delegated the authority to make numerous discretionary decisions, including the extent to which administrative rules and regulations should be adopted to provide for execution of the laws enacted by the General Assembly. “As a result, the General Assembly has, in the exercise of its authority to delegate the making of interstitial policy decisions to administrative agencies, given decision making responsibilities to the executive branch.” *Cooper I*, 370 N.C. at 416 n.11.

25. The *McCrorry* Court made clear that the Governor’s ability to control executive branch officers, boards, and commissions—and, concomitantly, to control the exercise of final executive authority by those executive entities—depends on the Governor’s ability to appoint such officials, “to supervise their day-to-day activities, and to remove them from office.” 368 N.C. at 646 (emphases added).

26. Under *McCrorry*, the structure and composition of executive agencies must provide the Governor with sufficient “control over the views and priorities” of agency appointees to allow the Governor to ensure faithful execution of the laws. *Id.* at 647.

27. In 2018, the Supreme Court in *Cooper I* followed and applied the holding of *McCrorry* to sustain the Governor’s challenge to Session Law 2017-6—which established a new State Board of Elections and Ethics Enforcement:

As we have already noted, the North Carolina Constitution, unlike the United States Constitution, contains an explicit separation-of-powers provision. *See* N.C. Const. art. I, § 6 (stating that “[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other”). For that and other reasons, “the separation of powers doctrine is well established under North Carolina law.” As we explained in *McCrorry*, separation-of-powers violations can occur “when one branch exercises power that the constitution vests exclusively in another branch” or “when the actions of one branch prevent another branch from performing its constitutional duties.”

*Cooper I*, 370 N.C. at 414 (citations omitted).

28. Session Law 2017-6 required the Governor to appoint four members from a list of six provided by the Governor’s own political party and four from a list of six provided by the opposing political party (assuming the Governor belongs to one of the

two primary political parties). Thus, notwithstanding the Governor’s nominal authority to appoint all eight members of the new State Board of Elections and Ethics Enforcement, the appointment provisions of Session Law 2017-6 ensured that the Governor could not appoint a majority of members who shared the Governor’s views and priorities.

29. The Supreme Court held in *Cooper I* that this was unconstitutional:

Although we did not explicitly define “control” for separation-of-powers purposes in *McCrorry*, we have no doubt that the relevant constitutional provision, instead of simply contemplating that the Governor will have the ability to preclude others from forcing him or her to execute the laws in a manner to which he or she objects, also contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make as well.

\* \* \*

As was the case in *McCrorry*, in which we determined that the General Assembly had exerted excessive control over certain executive agencies by depriving the Governor of “control over the views and priorities” of a majority of the members of the commissions at issue in that litigation, 368 N.C. at 647, 781 S.E.2d at 257, we conclude that the relevant provisions of Session Law 2017-6, when considered as a unified whole, “leave[ ] the Governor with little control over the views and priorities” of the Bipartisan State Board, *id.* at 647, 781 S.E.2d at 257, by requiring that a sufficient number of its members to block the implementation of the Governor’s policy preferences be selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs, limiting the extent to which individuals supportive of the Governor’s policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constraining the Governor’s ability to remove members of the Bipartisan State Board.

*Id.* at 414–16.

30. The holdings and teachings of *Wallace, McCrory, and Cooper I* are clear: the separation of powers clause of the North Carolina Constitution requires that the Governor have the authority to appoint a majority of members of a State board, commission, or council exercising final executive authority. That is necessary so that the Governor, through his appointees, may “take care that the laws be faithfully executed,” N.C. CONST. art. III, § 5(4), and implement executive policy consistent with his views and priorities, on issues delegated by the General Assembly to executive agencies. The failure of Session Law 2017-6 to do so was its principal constitutional failing.

31. By enacting Senate Bill 512 and Session Law 2023-108, the General Assembly takes direct aim at this well-settled constitutional interpretation and the principle of *stare decisis*, hoping that a new Supreme Court will give a different answer to the same question about the limits of legislative power, thereby unleashing Defendants Berger and Moore to consolidate their control over all three branches of government.

32. By seeking declaratory and injunctive relief enjoining the operation of Senate Bill 512 and Session Law 2023-108, this lawsuit seeks to restore the constitutional balance of power carefully crafted by our founders—and most recently re-adopted by the people of North Carolina in the Constitution of 1971.

**II. SENATE BILL 512 AND SESSION LAW 2023-108 VIOLATE WELL-ESTABLISHED PRINCIPLES OF SEPARATION OF POWERS.**

33. Senate Bill 512 and Session Law 2023-108 seek to alter the composition of numerous boards, commissions, and councils and interfere with the Governor’s ability to perform his exclusive constitutional duty to “take care” that the laws relating to the economy, the environment, public health, transportation, and construction “be faithfully executed.” N.C. Const. art. III § 5(4).

34. The boards, commissions, and councils at issue exercise clearly executive power. That power includes the enforcement of laws through the use of state funds, issuance of permits, imposition of fines and penalties, and the adoption of rules and regulations to implement the law. *See, e.g., Wallace*, 304 N.C. at 607–08 (rulemaking is “executive in character and ha[s] no relation to the function of the legislative branch of government.”); *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, n.4 (2013) (holding that once the legislature delegates rulemaking authority to an executive agency, “[t]hrough these activities take ‘legislative’ . . . forms . . . they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power’”); *Consumer Energy Council of Am. v. Fed. Energy Reg. Comm’n*, 673 F.2d 425, 471 (D.C. Cir. 1982) (“[R]ulemaking is substantially a function of administering and enforcing the public law.”).

35. The separation of powers clause bars the General Assembly from, *inter alia*, infringing on “the power of an executive branch agency to adopt rules and regulations.” *Cooper I*, 370 N.C. at 415.

36. Under the Supreme Court’s holdings in *McCrorry* and *Cooper I*, Senate Bill 512 and 2023-108 violate the Separation of Powers and Faithful Execution clauses because they deprive the Governor of the ability to control the policy views and priorities of the executive agencies charged with implementing the State’s laws. Despite each body being an executive agency that exercises final executive power—the State’s Chief Executive does not have constitutionally sufficient control over those bodies as a result of the challenged statutes.

37. “The relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor’s ability to execute the laws in any manner.” *Cooper I*, 370 N.C. at 417.

38. Indeed, as former Chief Justice Martin pointed out in his dissent in *Cooper I*, “*McCrorry* therefore clarified that the Governor must have ‘enough control’ over a body with final executive authority, such as by an appropriate combination of appointment and removal powers, to ensure that the laws are faithfully executed.” *Id.* at 423 (Martin, C.J., dissenting).

39. As the General Assembly’s staff attorneys noted in their legislative analysis of Senate Bill 512, the legislation “may implicate several provisions of the State’s constitution,” including Article I, Section 6 (separation of powers), Article II,

Section 1 (legislative power), Article III, Section 1 (executive power), Article III, Section 5(4) (faithful execution), and Article III, Section 5(8) (appointments).<sup>2</sup>

**A. Part I of Senate Bill 512 Restructures the Economic Investment Committee in Violation of the Separation of Powers Clause and the Faithful Execution Clause**

40. The Economic Investment Committee was established under Section 143B-437.54 as an agency of the Department of Commerce to administer the Job Development Investment Grant Program. For its part, the Job Development Investment Grant Program authorizes the Economic Investment Committee to enter into agreements with businesses to provide grants in accordance with statutory criteria. N.C. Gen. Stat. § 143B-437.52. The Job Development Investment Grant Program is intended to “create new jobs for the citizens of the State by encouraging and promoting the expansion of existing business and industry within the State and by recruiting and attracting new business and industry to the State.” N.C. Gen. Stat. § 143B-437.50(1).

41. Housed within a principal executive department, the Economic Investment Committee is primarily an executive agency with authority under Section 143B-135.234(c), among other things, to:

- a. Develop criteria to be used to determine whether conditions of Job Development Investment Grant Program are met (N.C. Gen. Stat. § 143B-437.52(a));
- b. Select Job Development Investment Grant Program grant recipients and enter community economic development agreements with businesses under the Job Development Investment Grant Program

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<sup>2</sup> [https://dashboard.ncleg.gov/api/Services/BillSummary/2023/S512-SMTU-18\(e1\)-v-2](https://dashboard.ncleg.gov/api/Services/BillSummary/2023/S512-SMTU-18(e1)-v-2) (attached hereto as **Exhibit 1**)

which are binding on the State and not subject to State funds being appropriated by the General Assembly (N.C. Gen. Stat. § 143B-437.57(c));

- c. Evaluate and make recommendations on applications recommended by the Department of Commerce for the Site Infrastructure Development Fund (N.C. Gen. Stat. §143B-437.02); and
- d. Evaluate and make recommendations on applications recommended by the Department of Commerce for the Job Maintenance and Capital Development Fund (created as a restricted reserve in the Department of Commerce) (N.C. Gen. Stat. §143B-437.02).

42. Prior to the passage of Senate Bill 512, the Economic Investment Committee consisted of five members: (1) the Secretary of Commerce, (2) the Secretary of Revenue, (3) the Director of the Office of State Budget and Management, (4) one member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives for a two-year term, and (5) one member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate for a two-year term. N.C. Gen. Stat. § 143B-437.54(a) (2003). Section 143B-437.54(a) expressly prohibited members of the General Assembly from appointing its own members to serve on the Economic Investment Committee

43. Section 143B-437.54 is silent as to removal authority. However the Secretaries of Commerce and Revenue and the Director of the Office of State Budget and Management are appointed by the Governor and serve at the Governor's pleasure. N.C. Gen. Stat. § 143B-9; N.C. Gen. Stat. § 143C-2-1.

44. Section 143B-437.54 as amended by Senate Bill 512 adds two members to the Economic Investment Committee: the Speaker of the House of Representatives or their designee and the President Pro Tempore of the Senate or their designee.

45. Senate Bill 512 also repeals Section 120-123(76) and removes language from Section 143B-437.54, both of which prohibited the General Assembly from appointing its own members to the Economic Investment Committee.

46. The addition of the Speaker and President Pro Tempore as members of the Economic Investment Committee—and the ability of the General Assembly to appoint legislators—violates Article I, Section 6 of the North Carolina Constitution. *See Wallace*, 304 N.C. 591.

47. As the General Assembly’s staff attorneys noted in their legislative analysis for Senate Bill 512, “[g]iven the holding of *Wallace v. Bone*, Section [1] of the bill may pose constitutional concerns, inasmuch as that provision appoints members of the General Assembly to the Economic Investment Committee.” *See Exhibit 1* hereto at 4.

48. The addition of the Speaker and President Pro Tempore (or their designees) also deprives the Governor of the ability to appoint or remove a majority of the Economic Investment Committee members. Section 143B-437.54, as amended by Senate Bill 512, therefore allows the General Assembly to take “too much control” over a committee that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

49. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints,” allowing the General Assembly—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Economic Investment Committee. *See McCrory*, 368 N.C. at 647.

50. Taken individually, the provisions of Part I of Senate Bill 512 amending Section 143B-437.54 violate the faithful execution and separation of powers clauses by:

- a. Allowing members of the General Assembly to be appointed to the Economic Investment Committee;
- b. Reducing the Governor's appointments to less than a majority of the members of the Economic Investment Committee; and
- c. Eliminating the Governor's power to remove a majority of the members of the Economic Investment Committee.

51. Taken as a whole, Section 143B-437.54, as amended, prevents the Governor from performing his core function under the North Carolina Constitution to "take care that the laws be faithfully executed." N.C. CONST. art. III, § 5(4).

52. Taken as a whole, the General Assembly's seizure of control over the execution of the laws from the Governor by enactment of Part I of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

**B. Part II of Senate Bill 512 Restructures the Environmental Management Commission in Violation of the Separation of Powers Clause and the Faithful Execution Clause**

53. N.C. Gen. Stat. § 143B-282 creates "the Environmental Management Commission of the Department of Environmental Quality with the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State."

54. Housed within a principal executive department, the Environmental Management Commission is primarily an executive agency with authority under Sections 143B-282(1), among other things:

- a. "To grant a permit or temporary permit, to modify or revoke a permit, and to refuse to grant permits . . . with regard to controlling sources of air and water pollution."
- b. "To issue a special order . . . to any person whom the Commission finds responsible for causing or contributing to any pollution of water within such watershed or pollution of the air within the area for which standards have been established."
- c. "To conduct and direct that investigations be conducted pursuant to G.S. 143-215.3 and G.S. 143-215.108(c)(5)."
- d. "To direct the investigation of any killing of fish and wildlife."
- e. "To review and have general oversight and supervision over local air pollution control programs."
- f. "To declare an emergency when it finds a generalized dangerous condition of water or air pollution."
- g. "To declare and delineate and modify capacity use areas" and "grant permits for water use within capacity use areas."
- h. "To direct that investigations be conducted when necessary to carry out duties regarding capacity use areas."
- i. "To approve, disapprove and approve subject to conditions all applications for dam construction."
- j. "To have jurisdiction and supervision over the maintenance and operation of dams" and "direct the inspection of dams."
- k. "To have jurisdiction and supervision over oil pollution and dry-cleaning solvent use, contamination, and remediation."
- l. "To administer the State's authority under 33 U.S.C. § 1341 of the federal Clean Water Act."
- m. "To approve Coastal Habitat Protection Plans."
- n. To adopt rules for air quality and emission control standards, water quality standards, and other measures to protect the air and water resources of the State.

55. Under Section 143B-282.1, the Environmental Management Commission makes the final agency decision in contested cases that arise from civil penalty assessments.

56. As the Supreme Court stated in *Wallace*, “[i]t is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws.” *Wallace*, 304 N.C. at 608.

57. Prior to enactment of Part II of Senate Bill 512, Section 143B-283(a1) gave the Governor the right to appoint nine of the fifteen members of the Environmental Management Commission. The remaining six members were appointed by the General Assembly (three at the recommendation of the Speaker of the House of Representatives and three at the recommendation of the President Pro Tempore of the Senate).

58. Section 2.1(a) of Senate Bill 512 amends Section 143B-283(a1) to remove the appointment of two members from the Governor’s control and gives those appointments to the Commissioner of Agriculture. As a result, the Governor no longer has the ability to appoint a majority of the members of the Environmental Management Commission.

59. The Commissioner of Agriculture is an independently elected member of the Council of State not subject to appointment or removal by the Governor. There is no requirement or guarantee that the Commissioner of Agriculture will be of the same party as the Governor, let alone that they will share the Governor’s policy preferences.

60. The current Commissioner of Agriculture, for example, is not a member of the Governor’s political party and has made clear his opposition to the policy views and priorities of the Governor. In *Cooper I*, the fact that nominees were to be chosen by the leader of the political party other than the one to which the Governor belongs was sufficient to render the provision inconsistent with Article III, Section 5(4) of the North Carolina Constitution. *Cooper I*, 370 N.C. at 416 n.12 (“[W]e do not believe that the applicable standard of review, including the presumption of constitutionality, requires us to turn a blind eye to the functions appropriately performed by the leader of an opposition party in our system of government or to force the Governor to be subject to the uncertainty that will necessarily arise from a determination that the showing of an actual interference with the Governor’s executive authority is a necessary prerequisite to his or her ability to challenge legislation as violative of [the Faithful Execution Clause].”).

61. Only the Governor is vested with “[t]he executive power of the State.” N.C. Const. art. III, §§ 1.

62. Only the Governor has the constitutional duty to “take care that the laws be faithfully executed.” N.C. Const. art. III, §§ 5(4).

63. In contrast, Council of State members like the Commissioner of Agriculture have “respective duties . . . prescribed by law”—in other words, duties as assigned by the General Assembly. N.C. Const. art. III, § 7(1).

64. The fact that a majority of the members of the Environmental Management Commission are appointed by an executive branch officer, therefore, is

not sufficient to satisfy the requirements that the Governor have sufficient “control over the views and priorities” of agency appointees in order to ensure the faithful execution of the laws. *McCrorry*, 368 N.C. at 647.

65. Taking a duty assigned exclusively to the Governor by the North Carolina Constitution and diffusing it among other executive branch officers is not within the General Assembly’s legislative power and violates the separation of powers clause.

66. Section 143B-284, prior to amendment, permitted the Governor to select the Environmental Management Commission’s chairperson from among its members.

67. Section 2.1(b) of Senate Bill 512 amended Section 143B-284 to remove the Governor’s ability to appoint the chairperson. Instead, the chairperson is to be elected by and from the members—a majority of whom are no longer appointed by the Governor.

68. Under Section 143B-283(b1) before enactment of Senate Bill 512, the Governor was permitted to remove any member “for misfeasance, malfeasance, or nonfeasance” in accordance with Section 143B-13. As amended by Senate Bill 512, the Governor is further limited to remove only those members whom he appointed “for misfeasance, malfeasance, or nonfeasance.” The Supreme Court in *Cooper I* recognized that removal power solely for cause was severely limited and, therefore, insufficient. 368 N.C. at 646 (“[T]he challenged legislation sharply constrains the Governor’s power to remove members of any of the three commissions, allowing him to do so only for cause.”).

69. Because the Governor has no ability to appoint a majority of the Environmental Management Commission members, because he can only remove those members whom he appointed for cause, and because he cannot select the chairperson of the Commission, Part II of Senate Bill 512 allows the General Assembly to take “too much control” over a board that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

70. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and Commissioner of Agriculture] appoint[],” allowing the General Assembly and an official who is not vested with the executive authority of the State—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Environmental Management Commission. *See McCrory*, 368 N.C. at 647.

71. Taken individually, the provisions of Part II of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Environmental Management Commission;
- b. Eliminating the Governor’s power to remove a majority of the members of the Environmental Management Commission; and
- c. Eliminating the Governor’s power to select the chairperson of the Environmental Management Commission to serve at the Governor’s pleasure.

72. Taken as a whole, Sections 143B-283 and -284, as amended by Senate Bill 512, prevent the Governor from performing his core function under the North

Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

73. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

**C. Part III of Senate Bill 512 Restructures the Commission for Public Health in Violation of the Separation of Powers Clause and the Faithful Execution Clause**

74. Under N.C. Gen. Stat. § 130A-29, “the Commission for Public Health is created with the authority and duty to adopt rules to protect and promote the public health” and “to adopt rules necessary to implement the public health programs administered by the Department [of Health and Human Services].”

75. Housed within a principal executive department, the Commission for Public Health is primarily an executive agency with authority under Sections 130A-29(c), among other things, to adopt rules:

- a. “Necessary to implement the public health programs administered by the Department [of Health and Human Services].”
- b. “Establishing eligibility standards for participation in Department reimbursement programs.”
- c. “Establishing statewide health outcome objectives and delivery standards.”
- d. “Implementing immunization requirements for adult care homes . . . and for nursing homes.”
- e. “Establishing requirements for the sanitation of local confinement facilities.”

76. The Commission for Public Health is also authorized to:

- a. “[E]stablish reasonable standards governing the nature and scope of public health services rendered by local health departments.” N.C. Gen. Stat. § 130A-9.
- b. “[A]dopt rules concerning the imposition of administrative penalties.” N.C. Gen. Stat. § 130A-22(f).
- c. Create metropolitan water districts, sanitary districts, and mosquito control districts. N.C. Gen. Stat. § 130A-29(d).

77. Prior to enactment of Part III of Senate Bill 512, Section 130A-30(a) gave the Governor the right to appoint nine of the thirteen members of the Commission for Public Health. The remaining four members were appointed by the North Carolina Medical Society.

78. Section 3.1(a) of Senate Bill 512 amends Section 130A-30(a) to remove the appointment of four members from the Governor’s control and gives those appointments to the General Assembly—two upon the recommendation of the Speaker of the House of Representatives and two upon the recommendation of the President Pro Tempore of the Senate.

79. As amended, Section 130A-30(a) provides for 13 members: four elected by the North Carolina Medical Society, four appointed by the General Assembly, and five appointed by the Governor. One of the members appointed by the Governor must be a licensed pharmacist, one a licensed veterinarian, one a licensed optometrist, one a licensed dentist, and one a registered nurse.

80. The Governor may only remove those members whom he appointed to the Commission for Public Health “for misfeasance, malfeasance, or nonfeasance.” N.C. Gen. Stat. § 130A-30(c).

81. Because the Governor has no ability to appoint a majority of the Commission for Public Health members and because he can only remove those members whom he appointed for cause, Section 130A-130 as amended by Part III of Senate Bill 512 allows the General Assembly to take “too much control” over a board that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

82. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and North Carolina Medical Society] appoint[],” allowing the General Assembly and a non-governmental entity—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Commission for Public Health. *See McCrory*, 368 N.C. at 647.

83. Taken individually, the provisions of Part III of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Commission for Public Health; and
- b. Eliminating the Governor’s power to remove a majority of the members of the Commission for Public Health.

84. Taken as a whole, Section 130A-130, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

85. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part III of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

**D. Part IV of Senate Bill 512 Restructures the Board of Transportation in Violation of the Separation of Powers Clause and the Faithful Execution Clause**

86. Under N.C. Gen. Stat. § 143B-350, the Board of Transportation is created to “develop transportation policy and projects for the benefit of the citizens of the State.” Members of the Board of Transportation “serve as fiduciaries of the State Highway Fund and Highway Trust Fund.” N.C. Gen. Stat. 143B-350(f).

87. Housed within a principal executive department, the Department of Transportation, the Board of Transportation is primarily an executive agency with authority under Sections 143B-350(f), among other things:

- a. “To formulate policies and priorities, accountability and performance metrics for all modes, divisions, and central office of the Department of Transportation, including personnel within those divisions, and to hold those modes, divisions, and personnel accountable to those metrics.
- b. “To review and take action on each Spend Plan developed by the Department of Transportation.”
- c. “To ensure that the Department of Transportation is operating within the approved Spend Plan.”
- d. “To review and approve the Department’s use of bonds, including for federally funded projects.”
- e. “To advise the Secretary on matters to increase the performance, efficiency, and effectiveness of the day-to-day operations of the Department of Transportation.”
- f. “To ascertain the transportation needs and the alternative means to provide for these needs through an integrated system of transportation.”
- g. “To approve a schedule of all major transportation improvement projects and their anticipated cost. This schedule is designated the Transportation Improvement Program.”

- h. “To approve a schedule of State highway maintenance projects and their anticipated cost. This schedule is designated the Highway Maintenance Improvement Program.”
- i. “To assist the Secretary of Transportation in the performance of his duties in the development of programs and approve priorities for programs within the Department.”
- j. “To allocate all highway construction and maintenance funds appropriated by the General Assembly as well as federal-aid funds which may be available.”
- k. “To approve all highway construction programs.”
- l. “To review all statewide maintenance functions.”
- m. “To authorize the acquisition of rights-of-way for highway improvement projects, including the authorization for acquisition of property by eminent domain.”
- n. “To approve partnership agreements with the North Carolina Turnpike Authority, private entities, and authorized political subdivisions to finance, by tolls, contracts, and other financing methods authorized by law, the cost of acquiring, constructing, equipping, maintaining, and operating transportation infrastructure in this State, with priority given to highways, roads, streets, and bridges.”

88. The Board of Transportation is also authorized to “promulgate rules, regulations, and ordinances concerning all transportation functions assigned to the Department of Transportation.” N.C. Gen. Stat. § 143B -350(g).

89. The Board of Transportation is composed of twenty voting members. Prior to enactment of Part IV of Senate Bill 512, Section 143B-350(b) gave the Governor the right to appoint fourteen members, each from a different geographic division across the state. The remaining six at-large members were appointed by the General Assembly—three upon the recommendation of the Speaker of the House of

Representatives and three upon the recommendation of the President Pro Tempore of the Senate.

90. Section 4.1(a) of Senate Bill 512 amends Section 143B-350(b) to permit the General Assembly to appoint fourteen members of the Board of Transportation, two from each of the seven Distribution Regions across the state. Six are to be appointed beginning in 2023 and eight are to be appointed beginning in 2025. The Governor is only permitted to appoint the six at-large members of the Board of Transportation.

91. Senate Bill 512 immediately removes all members from the Board of Transportation (fourteen of whom were appointed by the Governor) as of June 30, 2023 and provides for “[a] new board of 20 voting members” to be appointed with terms beginning on July 1, 2023.

92. As the General Assembly’s staff attorneys noted in their legislative analysis for Senate Bill 512, the restructuring of the Board of Transportation “may pose constitutional concerns, inasmuch as under this provision, the Governor would have fewer appointees than the General Assembly to the Board of Transportation.” See Exhibit 1 hereto at 5.

93. Section 143B-350(e), prior to amendment, permitted the Governor to select the Board of Transportation’s chairperson from among its members. The vice-chairperson was elected by and from the members.

94. Section 4.1(a) of Senate Bill 512 amended Section 143B-350(e) to allow the Board of Transportation to elect its chairperson and vice-chairperson from among its members—a majority of whom are no longer appointed by the Governor.

95. The Governor may only remove those members whom he appointed to the Board of Transportation under Section 143B-350(d).

96. Because the Governor has no ability to appoint or remove a majority of the Board of Transportation members, Part IV of Senate Bill 512 allows the General Assembly to take “too much control” over a board that exercises “final executive authority.” *See McCrory*, 368 N.C. at 636.

97. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints,” allowing the General Assembly—not the Governor—to “exert most of the control over the executive policy that is implemented” by the State Board of Transportation. *See McCrory*, 368 N.C. at 647.

98. Taken individually, the provisions of Part III of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Board of Transportation;
- b. Eliminating the Governor’s power to remove a majority of the members of the Board of Transportation; and
- c. Eliminating the Governor’s power to select the chairperson of the Board of Transportation to serve at the Governor’s pleasure.

99. Taken as a whole, Section 143B-350, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina

Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

100. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part IV of Senate Bill 512 clearly violates the separation of powers clause. N.C. CONST. art. I, § 6.

**E. Part V of Senate Bill 512 Restructures the Coastal Resources Commission in Violation of the Separation of Powers Clause and the Faithful Execution Clause**

101. Under N.C. Gen. Stat. § 113A-104, the Coastal Resources Commission is established within the Department of Environmental Quality.

102. Housed within a principal executive department, the Coastal Resources Commission is primarily an executive agency with authority, among other things, to:

- a. “Approve Coastal Habitat Protection Plans.” N.C. Gen. Stat. § 113A-106.1.
- b. Adopt rules establishing guidelines for the coastal area, including “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.
- c. “Define rates of sea-level change for regulatory purposes.” N.C. Gen. Stat. § 113A-107.1.
- d. Adopt rules designating “geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof.” N.C. Gen. Stat. § 113A-113.
- e. Issue permits for any development in an area of environmental concern. N.C. Gen. Stat. § 113A-118.
- f. Administer the Public Beach and Coastal Waterfront Access Program “for the purpose of acquiring, improving, and maintaining property

along the Atlantic Ocean and coastal waterways to which the public has rights-of-access or public trust rights.” N.C. Gen. Stat. § 113A-134.2.

103. Prior to enactment of Part V of Senate Bill 512, Section 113A-104 gave the Governor the right to appoint nine of the thirteen members of the Coastal Resources Commission. The remaining four members were appointed by the General Assembly (two at the recommendation of the Speaker of the House of Representatives and two at the recommendation of the President Pro Tempore of the Senate).

104. Section 5.1(a) of Senate Bill 512 amends Section 113A-104(b1) to remove the appointment of three members from the Governor’s control. As amended, Section 113A-104(b1) permits the General Assembly to appoint six members, the Commissioner of Insurance to appoint one member, and the Governor to appoint six members.

105. The Commissioner of Insurance is an independently elected member of the Council of State not subject to appointment or removal by the Governor. There is no requirement or guarantee that the Commissioner of Insurance will be of the same party as the Governor or that they will share the Governor’s policy preferences.

106. The current Commissioner of Insurance, Mike Causey, for example, is not a member of the Governor’s political party and has made clear his opposition to the policy views and priorities of the Governor. In *Cooper I*, the fact that nominees were to be chosen by the leader of the political party other than the one to which the Governor belongs was sufficient to render the provision inconsistent with Article III, Section 5(4) of the North Carolina Constitution. *Cooper I*, 370 N.C. at 416 n.12 (“[W]e do not believe that the applicable standard of review, including the presumption of

constitutionality, requires us to turn a blind eye to the functions appropriately performed by the leader of an opposition party in our system of government or to force the Governor to be subject to the uncertainty that will necessarily arise from a determination that the showing of an actual interference with the Governor's executive authority is a necessary prerequisite to his or her ability to challenge legislation as violative of [the Faithful Execution Clause].”).

107. Only the Governor is vested with “[t]he executive power of the State” and only the Governor has the constitutional duty to “take care that the laws be faithfully executed.” N.C. Const. art. III, §§ 1, 5(4).

108. In contrast, Council of State members like the Commissioner of Insurance have “respective duties . . . prescribed by law”—in other words, duties as assigned by the General Assembly. N.C. Const. art. III, § 7(1).

109. The fact that a majority of the members of the Coastal Resources Commission are appointed by an executive branch officer, therefore, is not sufficient to satisfy the requirements that the Governor have sufficient “control over the views and priorities” of agency appointees in order to ensure the faithful execution of the laws. *McCrorry*, 368 N.C. at 647.

110. Taking a duty assigned exclusively to the Governor by the North Carolina Constitution and diffusing it among other executive branch officers is not within the General Assembly's legislative power and violates the Separation of Powers Clause.

111. Section 113A-104(i), prior to amendment, permitted the Governor to select the Coastal Resources Commission's chairperson from among its members. The vice-chairperson was elected by and from the members.

112. Section 5.1(a) of Senate Bill 512 removed the Governor's ability to appoint the chairperson. Instead, both the chairperson and the vice-chairperson are to be elected by and from the members—a majority of whom are no longer appointed by the Governor.

113. The Governor's ability to remove members of the Coastal Resources Commission is limited to instances of misfeasance, malfeasance, and nonfeasance. N.C. Gen. Stat. § 143B-13(d); see *Cooper I*, 368 N.C. at 646 (“[T]he challenged legislation sharply constrains the Governor's power to remove members of any of the three commissions, allowing him to do so only for cause.”).

114. Because the Governor has no ability to appoint a majority of the Coastal Resources Commission members and because he cannot select the chairperson of the Commission, Part V of Senate Bill 512 allows the General Assembly to “too much control” over a board that exercises “final executive authority.” See *McCrorry*, 368 N.C. at 636.

115. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and Commissioner of Insurance] appoint[],” allowing the General Assembly and an official who is not vested with the executive authority of the State—rather than the Governor—to “exert most

of the control over the executive policy that is implemented” by the Coastal Resources Commission. *See McCrory*, 368 N.C. at 647.

116. Taken individually, the provisions of Part IV of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Coastal Resources Commission; and
- b. Eliminating the Governor’s power to select the chairperson of the Coastal Resources Commission to serve at the Governor’s pleasure.

117. Taken as a whole, Section 113A-104, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

118. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part V of Senate Bill 512 clearly violates the Separation of Powers Clause. N.C. CONST. art. I, § 6.

**F. Part VI of Senate Bill 512 Restructures the Wildlife Resources Commission in Violation of the Separation of Powers Clause and the Faithful Execution Clause**

119. Under N.C. Gen. Stat. § 143-240 the Wildlife Resources Commission is established within the Department of Environmental Quality. The North Carolina Wildlife Resources Commission was created as “a separate State agency” with the duty to “manage, restore, develop, cultivate, conserve, protect, and regulate the wildlife resources of the State of North Carolina, and to administer the laws relating to game, game and freshwater fishes, and other wildlife resources.” N.C. Gen. Stat. § 143-239.

120. “The Wildlife Resources Commission has jurisdiction over the conservation of wildlife resources” and “all activities connected with the conservation and regulation of wildlife resources.” N.C. Gen. Stat. § 113-132(b).

121. Housed within a principal executive department, the Wildlife Resources Commission is primarily an executive agency with authority, among other things, to:

- a. Adopt rules regulating the State’s wildlife resources, including boating and water safety, hunting, fishing, and the use of public land under the Commission’s jurisdiction.
- b. Issue hunting and fishing licenses.
- c. Issue permits relating to the possession and transportation of wildlife.
- d. “Regulate the possession and transportation, including importation and exportation” of non-farm animals.
- e. Employ law enforcement officers
- f. “Lease or purchase lands, equipment, and other property . . . establish wildlife refuges, management areas, and boating and fishing access areas.” N.C. Gen. Stat. § 113-306,
- g. “Develop a plan and policy of wildlife management for all lands owned by the State.”
- h. “To adopt and publish an endangered species list” and “to adopt and implement conservation programs for endangered” species. N.C. Gen. Stat. § 113-333.

122. Prior to enactment of Part VI of Senate Bill 512, Section 113-241 gave the Governor the right to appoint eleven of the nineteen members of the Wildlife Resources Commission. The remaining eight members were appointed by the General Assembly (four at the recommendation of the Speaker of the House of Representatives

and four at the recommendation of the President Pro Tempore of the Senate). At least one member recommended by the Speaker of the House of Representatives and one member recommended by the President Pro Tempore of the Senate had to be members of the minority party in the General Assembly.

123. Sections 6.1(a) and 6.1(b) of Senate Bill 512 amend Section 113-241 to remove the Governor's ability to appoint a majority of the members of the Wildlife Resources Commission by giving one of the at-large appointments previously made by the Governor to the Commissioner of Agriculture and creating two additional seats to be appointed by the General Assembly. As amended, Section 113-241 allows the Governor to appoint ten members of the Wildlife Resources Commission, the Commissioner of Agriculture to appoint one member, and the General Assembly to appoint ten members.

124. The Commissioner of Agriculture is an independently elected member of the Council of State not subject to appointment or removal by the Governor. There is no requirement or guarantee that the Commissioner of Agriculture will be of the same party as the Governor or that they will share the Governor's policy preferences.

125. The current Commissioner of Agriculture, Steve Troxler, for example, is not a member of the Governor's political party and has made clear his opposition to the policy views and priorities of the Governor. *See Cooper I*, 370 N.C. at 416 n.12.

126. Only the Governor is vested with "[t]he executive power of the State." N.C. Const. art. III, §§ 1.

127. Only the Governor has the constitutional duty to “take care that the laws be faithfully executed.” N.C. Const. art. III, §§ 5(4).

128. In contrast, Council of State members like the Commissioner of Agriculture have “respective duties . . . prescribed by law”—in other words, duties as assigned by the General Assembly. N.C. Const. art. III, § 7(1).

129. The fact that a majority of the members of the Wildlife Resources Commission are appointed by an executive branch officer, therefore, is not sufficient to satisfy the requirements that the Governor have sufficient “control over the views and priorities” of agency appointees in order to ensure the faithful execution of the laws. *McCrorry*, 368 N.C. at 647.

130. Taking a duty assigned exclusively to the Governor by the North Carolina Constitution and diffusing it among other executive branch officers is not within the General Assembly’s legislative power and violates the Separation of Powers Clause.

131. The Governor may only remove those members whom he appointed from the Wildlife Resources Commission.

132. Because the Governor has no ability to appoint or remove a majority of the Wildlife Resources Commission members, Part VI of Senate Bill 512 allows the General Assembly to take “too much control” over a commission that exercises “final executive authority.” *See McCrorry*, 368 N.C. at 636.

133. Senate Bill 512 “leaves the Governor with little control over the views and priorities of the officers that the General Assembly [and Commissioner of

Agriculture] appoint[],” allowing the General Assembly and an official who is not vested with the executive authority of the State—not the Governor—to “exert most of the control over the executive policy that is implemented” by the Wildlife Resources Commission. *See McCrory*, 368 N.C. at 647.

134. Taken individually, the provisions of Part VI of Senate Bill 512 violate the faithful execution and separation of powers clauses by:

- a. Reducing the Governor’s appointments to less than a majority of the members of the Wildlife Resources Commission;
- b. Eliminating the Governor’s power to remove a majority of the members of the Wildlife Resources Commission; and
- c. Eliminating the Governor’s power to select the chairperson of the Wildlife Resources Commission to serve at the Governor’s pleasure.

135. Taken as a whole, Section 113-241, as amended by Senate Bill 512, prevents the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

136. Taken as a whole, the General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Part VI of Senate Bill 512 clearly violates the Separation of Powers Clause. N.C. CONST. art. I, § 6.

**G. Session Law 2023-108 Structures the Residential Code Council in Violation of the Separation of Powers Clause and the Faithful Execution Clause**

137. Prior to the enactment of Session Law 2023-108, N.C. Gen. Stat. § 143-136 created the Building Code Council, which was responsible for preparing and adopting the North Carolina State Building Code. N.C. Gen. Stat. § 143-138.

138. The Building Code Council is primarily an executive agency with authority, among other things, to adopt revisions or amendments to the North Carolina State Building Code, “including provisions applicable to the North Carolina Energy Conservation Code, the North Carolina Electrical Code, the North Carolina Fuel Gas Code, the North Carolina Plumbing Code, the North Carolina Mechanical Code, [and] the North Carolina Existing Building Code.” N.C. Gen. Stat. § 143-136(d).

139. Section 143-136 gives the Governor the right to appoint all seventeen members of the Building Code Council—without the need for Senate confirmation. The Governor may remove members from the Building Code Council at any time

140. Prior to the enactment of Session Law 2023-108, a Residential Code Committee was comprised of seven members of the Building Code Council—who were all appointed and subject to removal by the Governor. The Residential Code Committee was responsible for recommending revisions to the Building Code applicable to one- and two-family residential construction. No revision or amendment to the Building Code applicable to residential construction could be considered by the Building Code Council unless recommended by the Residential Code Committee. N.C. Gen. Stat. 143-136(c).

141. Section 1.(b) of Session Law 2023-108 repeals Section 143-136(c) and transfers the authority to adopt and amend the State Building Code as it pertains to residential construction from the Building Code Council to a new Residential Code Council.

142. The new Residential Code Council consists of thirteen members, six appointed by the General Assembly and seven appointed by the Governor. The Governor's appointees are subject to confirmation by a majority of Senators under Article III, Section 5(8) of the North Carolina Constitution. Session Law 2023-108 is silent as to the Governor's authority to remove members.

143. Session Law 2023-108 requires nine members of the Residential Code Council to constitute a quorum and nine members present are necessary to approve any action of the Residential Code Council, including amendment or revision to the North Carolina Residential Code. N.C. Gen. Stat. § 143-136.1(e).

144. Therefore, although the Governor may appoint more members of the Residential Code Council than the General Assembly appoints, Session Law 2023-108 nonetheless deprives the Governor sufficient control over a council that exercises "final executive authority." *see McCrory*, 368 N.C. at 636.

145. Because he cannot appoint enough members to constitute a quorum or take action and his appointees are subject to Senate confirmation, Session Law 2023-108 allows the General Assembly to take "too much control" over a board that exercises "final executive authority." *See McCrory*, 368 N.C. at 636.

146. Session Law 2023-108 "leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoint," allowing the General Assembly to "exert most of the control over the executive policy that is implemented" by the Residential Code Council. *See McCrory*, 368 N.C. at 647.

147. As a result, Section 143-136.1 and related amendments to Article 9 of Chapter 143 made by Session Law 2023-108 prevent the Governor from performing his core function under the North Carolina Constitution to “take care that the laws be faithfully executed.” N.C. CONST. art. III, § 5(4).

148. The General Assembly’s seizure of control over the execution of the laws from the Governor by enactment of Session Law 2023-108 clearly violates the Separation of Powers Clause. N.C. CONST. art. I, § 6.

**COUNT 1: DECLARATORY JUDGMENT (FACIAL CHALLENGE)**  
**Part I of Senate Bill 512 (Economic Investment Committee) Facially Violates the Separation of Powers Clauses of the North Carolina Constitution**

149. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

150. A present and real controversy exists between the parties as to the constitutionality of Part I of Senate Bill 512.

151. Individually, and as whole, the amendments to N.C. Gen. Stat. § 143B-437.54 and the repeal of N.C. Gen. Stat. § 120-123(76) in Part I of Senate Bill 512 unconstitutionally violate the Separate of Powers Clause that is “a cornerstone of our state and federal governments.” *Wallace*, 304 N.C. at 601.

152. Individually, and as whole, the amendments to N.C. Gen. Stat. § 143B-437.54 prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he Separation of Powers Clause requires that, as the three branches of government carry out their

duties, one branch will not prevent another branch from performing its core functions.”).

153. Accordingly, Part I of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

154. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. § 143B-437.54 and repeal of N.C. Gen. Stat. § 120-123(76) in Part I of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

**COUNT 2: DECLARATORY JUDGMENT (FACIAL CHALLENGE)**  
**Part II of Senate Bill 512 (Environmental Management Committee)**  
**Facially Violates the Separation of Powers and Faithful Execution Clauses**  
**of the North Carolina Constitution**

155. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

156. A present and real controversy exists between the parties as to the constitutionality of Part II of Senate Bill 512.

157. Individually, and as whole, the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

158. Accordingly, Part II of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

159. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

**COUNT 3: DECLARATORY JUDGMENT (FACIAL CHALLENGE)**  
**Part III of Senate Bill 512 (Commission for Public Health) Facially Violates the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution**

160. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

161. A present and real controversy exists between the parties as to the constitutionality of Part III of Senate Bill 512.

162. Individually, and as whole, the amendments to N.C. Gen. Stat. § 130A-30 in Part III of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

163. Accordingly, Part III of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

164. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. § 130A-30 in Part III of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

**COUNT 4: DECLARATORY JUDGMENT (FACIAL CHALLENGE)**  
**Part IV of Senate Bill 512 (Board of Transportation) Facially Violates the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution**

165. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

166. A present and real controversy exists between the parties as to the constitutionality of Part IV of Senate Bill 512.

167. Individually, and as whole, the amendments to N.C. Gen. Stat. § 143B-350 in Part IV of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

168. Accordingly, Part IV of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

169. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent

injunction declaring that the amendments to N.C. Gen. Stat. § 143B-350 in Part IV of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

**COUNT 5: DECLARATORY JUDGMENT (FACIAL CHALLENGE)**  
**Part V of Senate Bill 512 (Coastal Resources Commission) Facially Violates  
the Separation of Powers and Faithful Execution Clauses of the North  
Carolina Constitution**

170. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

171. A present and real controversy exists between the parties as to the constitutionality of Part V of Senate Bill 512.

172. Individually, and as whole, the amendments to N.C. Gen. Stat. § 113A-104 in Part V of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

173. Accordingly, Part V of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

174. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. § 113A-104 in Part V of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

**COUNT 6: DECLARATORY JUDGMENT (FACIAL CHALLENGE)**  
**Part VI of Senate Bill 512 (Wildlife Resources Commission) Facially Violates the Separation of Powers and Faithful Execution Clauses of the North Carolina Constitution**

175. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

176. A present and real controversy exists between the parties as to the constitutionality of Part VI of Senate Bill 512.

177. Individually, and as whole, the amendments to N.C. Gen. Stat. §§ 143-241 & 242 in Part VI of Senate Bill 512 unconstitutionally prevent the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrorry*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

178. Accordingly, Part VI of Senate Bill 512 facially violates the Separation of Powers Clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

179. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the amendments to N.C. Gen. Stat. §§ 143-241 & 242 in Part VI of Senate Bill 512 are unconstitutional and are therefore void and of no effect.

**COUNT 7: DECLARATORY JUDGMENT (FACIAL CHALLENGE)**  
**Session Law 2023-108 (Residential Code Council) Facially Violates the  
Separation of Powers and Faithful Execution Clauses of the North  
Carolina Constitution**

180. The Governor restates and incorporates by reference the preceding paragraphs of this Complaint, as if fully set forth herein.

181. A present and real controversy exists between the parties as to the constitutionality of amendments and additions to Chapter 143, Article 9 enacted by Sections 1.(a) and 1.(b) of Session Law 2023-108.

182. The enactment of N.C. Gen. Stat. § 143-136.1 and related amendments to Chapter 143, Article 9 in Session Law 2023-108 unconstitutionally prevents the Governor from performing his core executive function of ensuring that the laws are faithfully executed. *McCrory*, 368 N.C. at 635 (“[T]he separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions.”).

183. Accordingly, Session Law 2023-108 facially violates the separation of powers clause (Article I, Section 6) and the Faithful Execution Clause (Article III, Section 5(4)) of the North Carolina Constitution.

184. Pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, the Governor is entitled to a judgment and permanent injunction declaring that the enactment of N.C. Gen. Stat. § 143-136.1 and related amendments to Chapter 143, Article 9 are unconstitutional and are therefore void and of no effect.

## PRAYER FOR JUDGMENT

WHEREFORE, Plaintiff Governor Cooper prays as follows:

1. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that the amendments to N.C. Gen. Stat. § 143B-437.54 and repeal of N.C. Gen. Stat. § 120-123(76) in Part I of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

2. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that the amendments to N.C. Gen. Stat. §§ 143B-283 & -284 in Part II of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

3. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that the amendments to N.C. Gen. Stat. § 130A-30 in Part III of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

4. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that the amendments to N.C. Gen. Stat. § 143B-350 in Part IV of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

5. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and

65, declaring that the amendments to N.C. Gen. Stat. § 113A-104 in Part V of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

6. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and North Carolina Rules of Civil Procedure 57 and 65, declaring that the amendments to N.C. Gen. Stat. §§ 143-241 & 242 in Part VI of Senate Bill 512 are unconstitutional and are therefore void and of no effect;

7. That the Court enter a declaratory judgment and injunction, pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, and the North Carolina Rules of Civil Procedure 57 and 65, declaring that the enactment of N.C. Gen. Stat. § 143-136.1 and related amendments to Chapter 143, Article 9 are unconstitutional and are therefore void and of no effect; and

8. That the Court grant such other and further relief as the Court deems just and proper.

Respectfully submitted this the 10<sup>th</sup> day of October, 2023

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**COMPLAINT EXHIBIT 1**  
Bill Analysis—Senate Bill 512:  
Greater Accountability for  
Boards/Commissions



# SENATE BILL 512: Greater Accountability for Boards/Commissions.

2023-2024 General Assembly

<b>Committee:</b>	Senate Rules and Operations of the Senate	<b>Date:</b>	April 5, 2023
<b>Introduced by:</b>	Sens. Daniel, Rabon, Berger	<b>Prepared by:</b>	Kristen L. Harris Staff Attorney
<b>Analysis of:</b>	First Edition		

**OVERVIEW:** *Senate Bill 512 would amend the compositions of and appointments to various boards and commissions in North Carolina.*

## CURRENT LAW AND BILL ANALYSIS:

### PART I. UTILITIES COMMISSION

**Section 1.(a)** would transfer the North Carolina Utilities Commission (the Commission) from the Department of Commerce to the Department of State Treasurer (the Department or the Treasurer.) The Commission would be administratively located within the Department but would exercise all its prescribed statutory powers independently.

**Section 1.(b)** would increase the number of commissioners on the Commission from seven to nine and change the appointments as follows beginning July 1, 2023:

- The Governor currently appoints seven commissioners and would appoint four commissioners subject to confirmation by the General Assembly.
- The General Assembly would appoint four commissioners, two upon recommendation of the Speaker of the House of Representatives and two upon recommendation of the President Pro Tempore of the Senate.
- The Treasurer would appoint one commissioner subject to the confirmation by the General Assembly.

The Governor would designate one commissioner to serve as chair of the Commission every three years, instead of every four. In the case of death, incapacity, resignation, or vacancy for any other reason in the office of any commissioner appointed by the Governor or the Treasurer prior to the expiration of the term, the appointing authority must submit the name of a successor to the General Assembly for confirmation within four weeks of the vacancy.

**Section 1.(c)** would give two new four-year appointments beginning on July 1, 2023, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President Pro Tempore of the Senate.

**Section 1.(d)** for the three terms expiring on June 30, 2023, would give one appointment to the Governor and two to the General Assembly, one upon the recommendation of the Speaker of the House and one upon the recommendation of the President Pro Tempore of the Senate.

For the three terms expiring on June 30, 2025, would give two appointments to the Governor and one to the Treasurer.

For the term expiring on June 30, 2027, would give one appointment to the Governor.

Jeffrey Hudson  
Director



Legislative Analysis  
Division  
919-733-2578

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**Section 1.(e)** would make a conforming change.

## **PART II. ECONOMIC INVESTMENT COMMITTEE**

**Sections 2.1.** would add the Speaker of the House of Representatives and the President Pro Tempore of the Senate, or their designees, as members of the Economic Investment Committee (the Committee) and remove the prohibition that members of the Committee appointed by General Assembly cannot be members of the General Assembly. Members of the Committee, serving as ex officio members or designees of members appointed by the General Assembly, would serve until they are no longer in office or are replaced with another designee. The Committee would act only upon a decision of a majority of its members.

## **PART III. ENVIRONMENTAL MANAGEMENT COMMISSION**

**Section 3.1.** would change two of the Governor's nine appointments on the 15-member Environmental Management Commission (the Commission) to two appointments made by the Commissioner of Agriculture. Each appointing authority could reappoint a member of the Commission to an additional term if the member qualified for membership or remove a member. The General Assembly would continue to appoint six members, three upon recommendation of the Speaker of the House of Representatives and three upon recommendation of the President Pro Tempore of the Senate.

A chair and vice-chair would be elected by and from members of the Commission rather than designated by the Governor.

## **PART IV. COMMISSION FOR PUBLIC HEALTH**

**Section 4.1.** would change the 13-person membership of the Commission for Public Health as follows:

- The Governor currently appoints nine members and would appoint five.
- The General Assembly would appoint four members, two upon recommendation of the Speaker of the House of Representatives and two upon recommendation of the President Pro Tempore of the Senate.
- Four members would continue to be elected by the North Carolina Medical Society.

Any appointment to fill a vacancy created by resignation, dismissal, death, or disability would be filled by the appointing authority. Each appointing authority would be able to remove a member.

The General Assembly would make appointments for the four terms expiring on April 30, 2023.

## **PART V. BOARD OF TRANSPORTATION**

**Section 5.1.(a)** would amend the appointments to the 20-member Board of Transportation (the Board) as follows:

- The Governor currently appoints 14 members and would appoint six.
- The General Assembly currently appoints six members and would appoint 14, seven upon recommendation of the Speaker of the House of Representatives and seven upon recommendation of the President Pro Tempore of the Senate.

The Board, rather than the Governor, would select a chair and vice-chair for two-year terms.

**Section 5.1.(b)** would designate six division appointments and five at-large appointments expiring in 2024 to the General Assembly, six at-large appointments expiring in 2026 to the Governor, and two division appointments and one at-large appointment expiring in 2026 to the General Assembly.

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## PART VI. COASTAL RESOURCES COMMISSION

**Section 6.1.** would amend the appointments to the 13-member Coastal Resources Commission (the Commission) as follows:

- The Governor currently appoints nine members and would appoint six.
- The General Assembly currently appoints four members and would appoint six.
- The Commissioner of Insurance would appoint one member.

The chair and vice-chair of the Commission would be elected by the Commission members rather than selected by the Governor.

## PART VII. WILDLIFE RESOURCES COMMISSION

**Section 7.1.(a)** would increase the number of members on the Wildlife Resources Commission (the Commission) by changing the number of appointments by the General Assembly from eight to 10 members, five upon recommendation of the Speaker of the House of Representatives and five upon recommendation of the President Pro Tempore of the Senate. The Governor would continue to appoint 11 members.

**Sections 7.1.(b) and (c)** would change the Governor's two at-large member appointments to one and give the Commissioner of Agriculture one at-large appointment. This section would become effective June 30, 2025.

## PART VIII. NORTH CAROLINA RAILROAD BOARD OF DIRECTORS

**Section 8.1.** would amend the appointments to the 13-person membership of the North Carolina Railroad Board of Directors (the Board) as follows:

- The Governor currently appoints seven members and would appoint six.
- The State Treasurer would appoint one member.
- The General Assembly would continue to appoint six members, three upon recommendation of the Speaker of the House of Representatives and three upon recommendation of the President Pro Tempore of the Senate.

The Treasurer's appointee would replace a Governor's appointee with a term expiring in 2023, and the effective date of this section would be determined by actions taken by the Board and notice to the Revisor of Statutes.

## PART IX. BOARD OF DIRECTORS OF THE UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM

**Section 9.1.** would make changes to the 24-member Board of Directors of the University of North Carolina Health Care System as follows:

- There would be four ex officio members instead of eight.
- Eight at-large members would be appointed annually by the General Assembly, one upon recommendation of the Speaker of the House of Representatives and one upon recommendation of the President Pro Tempore of the Senate.
- The Board of Governors would continue to appoint 12 at-large members.
- The Board of Directors would no longer appoint four at-large members.

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The section would also provide for appointments in 2023, 2024, 2025, and 2026 to allow for staggering of terms of the members.

## PART X. MISCELLANEOUS

**Section 10.1** would provide a severability clause.

**EFFECTIVE DATE:** Except as otherwise provided, this act would be effective July 1, 2023.

### BACKGROUND:

Legislation involving appointments to boards and commissions may implicate several provisions of the State's constitution, including:

- Article I, Section 6 of the State's Constitution, which provides:

**Sec. 6. Separation of powers.**

The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

- Article II, Section 1, of the State's Constitution, which provides:

**Section 1. Legislative power.**

The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives.

- Article III, Section 1 of the State's Constitution, which provides:

**Section 1. Executive power.**

The executive power of the State shall be vested in the Governor.

- Article III, Section 5, Clauses 4 and 8, of the State's Constitution (Executive), which provides:

**Sec. 5. Duties of Governor.**

(4) Execution of laws. The Governor shall take care that the laws be faithfully executed.

...

(8) Appointments. The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for.

Such legislation has been challenged on constitutional grounds in the past – two relevant decisions of the State's Supreme Court include:

- [State ex rel. Wallace v. Bone, 304 N.C. 591, 286 S.E.2d 79 \(1982\)](#)

In this case, the Court considered a challenge to legislation that appointed four members of the General Assembly to serve on the Environmental Management Commission (EMC). The Court held that the statute allowing the General Assembly to appoint legislators to the EMC was a separation of powers violation under the State constitution, and stated:

*"It is crystal clear to us that the duties of the EMC are administrative or executive in character and have no relation to the function of the legislative branch of government, which is to make laws... [T]he legislature cannot constitutionally create a special instrumentality of government to implement specific legislation and then retain some control over the process of implementation by appointing legislators to the governing body of the instrumentality."*

**Given the holding of Wallace v. Bone**, Section 2 of the bill may pose constitutional concerns, inasmuch as that provision appoints members of the General Assembly to the Economic Investment Committee, if a court determines the Committee's duties are administrative or executive in nature.

# Senate Bill 512

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- [McCrorry v. Berger, 368 N.C. 633, 781 S.E. 2d 248 \(2016\)](#)

In this case, the Court considered a challenge to legislation that gave the General Assembly a majority of the members of the Coal Ash Commission, Oil & Gas Commission, and Mining Commission relative to the Governor. The Court held that the challenged appointment provisions violated the separation of powers clause, and stated:

*"When the General Assembly appoints executive officers that the Governor has little power to remove, it can appoint them essentially without the Governor's influence. That leaves the Governor with little control over the views and priorities of the officers that the General Assembly appoints. When those officers form a majority on a commission that has the final say on how to execute the laws, the General Assembly, not the Governor, can exert most of the control over the executive policy that is implemented in any area of the law that the commission regulates. As a result, the Governor cannot take care that the laws are faithfully executed in that area. The separation of powers clause plainly and clearly does not allow the General Assembly to take this much control over the execution of the laws from the Governor and lodge it with itself."*

**Given the holding of McCrorry v. Berger**, Section 5 of the bill may pose constitutional concerns, inasmuch as under this provision, the Governor would have fewer appointees than the General Assembly to the Board of Transportation.

Note, however, that McCrorry v. Berger did not consider how appointment of other officers of the Executive Branch, such as the Commissioners of Agriculture or Insurance, or by other bodies, such as the Medical Society, to a board or commission may impact a separation of powers analysis. Therefore, it's unclear if McCrorry v. Berger concerns would apply to other Sections of the bill.