STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 12925
COASTAL CONSERVATION ASSOCIATION, d/b/a CCA NORTH CAROLINA et al., Plaintiffs, v. STATE OF NORTH CAROLINA, Defendant.	**DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

The defendant—the State of North Carolina ("State")—submits that for the following reasons this Court should dismiss the Complaint pursuant to Rules 12(b)(1), (2) and (6).

INTRODUCTION AND SUMMARY

The plaintiffs disagree with how the General Assembly and Marine Fisheries Commission have regulated the commercial fishing industry in this state. The Plaintiffs claim that the State's laws, rules and actions regarding the regulation of fishing have led to substantial declines in certain fish stocks. In an attempt to bypass both the Legislative and Executive Branches, they allege that the General Assembly's and Marine Fisheries Commission's policy decisions breach the State's duties under the public trust doctrine. For several independent reasons, the plaintiffs' Complaint should be dismissed.

First, the plaintiffs have not alleged and cannot show that the State waived its sovereign immunity from suit. They allege only that "sovereign immunity is inapplicable" "because Plaintiffs seek declaratory and injunctive relief directly under the public-trust doctrine . . . and no other adequate remedy at law is available or appropriate." Compl. 11 ¶ 26. There is no law to

suggest that the type of relief requested or the unavailability of other remedies determines whether the State waived immunity to claims under the public trust doctrine.

Second, the plaintiffs' basic premise that, like an ordinary trust,"[t]he public-trust doctrine imposes on the State a legal duty to hold and manage in trust, for the benefit of its citizens, all of the public-trust resources of this state," Compl. 108 ¶ 300, is unsupported by law. The public trust doctrine is a unique common law doctrine that has developed entirely separately from the law that governs ordinary trusts. As a consequence, the plaintiffs have no cause of action.

Third, there is no cause of action under the public trust doctrine that allows citizens to right generalized wrongs. The power to enforce the public trust doctrine in such cases resides with the State only.

Fourth, the remedy that the plaintiffs request would cast the judiciary in the role of policymaker and regulator, which would contravene the Constitution's mandate that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6.

Lastly, if the plaintiffs are alleging independent claims under the Constitution, those claims would fail as well. The constitutional provisions that the plaintiffs cite partially safeguard their right to fish and recognize the State's authority to protect public trust resources, but do not obligate the State to bend its policies in order to meet the plaintiffs' desired policy objectives.

ALLEGATIONS IN THE COMPLAINT

For the purposes of this motion, the Court must accept as true the allegations in the Complaint. As relevant to the State's motion, the Complaint alleges as follows:

The State's ocean and coastal waters are home to certain species of fish that support both commercial and recreational fishing. These species include spot, Atlantic croaker, weakfish, river herring, southern flounder, and striped bass. See, e.g., Compl. 7-8 ¶¶ 15-17. The stocks of these species have significantly declined over the years. According to the plaintiffs, three alleged "critical failures" by the State are to blame for the decline in abundance of these stocks. First, the State has allegedly permitted two methods of commercial fishing that allegedly result in significant incidental mortality. These methods are "shrimp trawling in areas populated with juvenile fish of multiple species[ ] and [ ] the use of 'unattended' gillnets." Id. at 12 ¶ 28. Second, the State has allegedly allowed "chronic overfishing of several species of fish that are historically popular among the fishing public." Id. And finally, the State has allegedly tolerated a "lack of reporting of any harvest by the majority of commercial fishing license holders," which, according to the plaintiffs, obscures "the true status of North Carolina's coastal fish stocks." Id. at 12-13 ¶ 28.

The plaintiffs contend that "[t]he public-trust doctrine imposes a fiduciary duty on the State to manage and regulate the harvest of" coastal fish stocks "in a way that protects the right of current and future generations of the public to use public waters to fish." Id. at 109-10 ¶ 303. Based on the alleged facts, the plaintiffs conclude that the State "breached those duties under the public-trust doctrine" and thereby impaired "the right of current and future generations of the public to use public waters to fish." Id. at 110 ¶ 304; see also id. at 110 ¶ 305.

APPLICABLE STANDARDS

On a motion under Rule 12(b)(6), "[d]ismissal is proper (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face that some fact essential to plaintiff's claim is missing; and (3) when some fact disclosed in the

complaint defeats the plaintiff's claim." Signature Dev., LLC v. Sandler Commer. at Union, L.L.C., 207 N.C. App. 576, 582, 701 S.E.2d 300, 305 (2010) (quotation marks omitted). The Court must accept as true for the purposes of a Rule 12(b)(6) motion all well-pleaded facts and reasonable inferences therefrom, but the Court should disregard all legal conclusions in a complaint, as well as all unwarranted factual inferences. Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

Under Rule 12(b)(1), where the record discloses that the court lacks subject matter jurisdiction, the matter must be dismissed. Vass v. Bd. of Trustees, 324 N.C. 402, 405-08, 379 S.E.2d 26, 28-29 (1989). Under Rule 12(b)(2), "[t]he trial judge must decide whether the complaint contains allegations that, if taken as true, set forth a sufficient basis for the court's exercise of personal jurisdiction." Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 693, 611 S.E.2d 179, 182 (2005).

ARGUMENT

I. THE PLAINTIFFS' CLAIM UNDER THE PUBLIC TRUST DOCTRINE SHOULD BE DISMISSED.

The public trust doctrine implicates unique aspects of the State's sovereignty and raises several insurmountable hurdles for the plaintiffs. As discussed below, the plaintiffs cannot overcome the State's sovereign immunity and cannot state a legal claim, and their remedy runs afoul of the separation of powers doctrine. For each of these reasons, the Court should dismiss the plaintiffs' public trust doctrine claim.

A. The plaintiffs have not pleaded facts that show that the State has waived its sovereign immunity, and the State has not in fact or law waived its sovereign immunity. (Rule 12(b)(1), (2) and/or (6))

"[T]he public trust doctrine 'uniquely implicates [a state's] sovereign interests.'" Fabrikant v. Currituck Cty., 174 N.C. App. 30, 42, 621 S.E.2d 19, 27-28 (2005) (quoting Idaho

v. Coeur d'Alene Tribe, 521 U.S. 261, 284 (1997)). "Under the doctrine of sovereign immunity, the State is immune from suit absent waiver of immunity." Meyer v. Walls, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). In an action against the State, a plaintiff is required to plead facts that demonstrate that the State waived this immunity. Fabrikant, 174 N.C. App. at 38, 621 S.E.2d at 25. The plaintiffs have failed to do so. As a result, their claim should be dismissed.[1]

The plaintiffs' only allegation regarding sovereign immunity is that because the "Plaintiffs seek declaratory and injunctive relief directly under the public-trust doctrine . . ., and no other adequate remedy at law is available or appropriate. . . . sovereign immunity is inapplicable." Compl. 11 ¶ 26. Neither this allegation nor anything else in the Complaint supports a waiver of the State's sovereign immunity as to the public trust doctrine claim.

As an initial matter, although the plaintiffs nominally assert but a single "claim for relief," id. at 108 (case altered), they cite in the context of that claim the public trust doctrine and two constitutional amendments. The State reads the Complaint as alleging one claim under the public trust doctrine, and citing the constitutional provisions as support for that claim. See id. at 1 ¶ 1 ("This lawsuit is about . . . the public-trust doctrine . . . ."). Nevertheless, out of an abundance of caution, the State shows in section II of this memorandum that the plaintiffs cannot state a claim under the Constitution either.

Even if the plaintiffs were alleging three separate causes of action, it is important to understand that waivers of sovereign immunity are not dispensed in gross. For example, where a plaintiff seeks relief under common law and constitutional causes of action against a single defendant, the plaintiff must show that sovereign immunity has been waived separately for those

[1] If the plaintiffs have alleged separate claims under the Constitution, the State's sovereign immunity argument is limited to the plaintiffs' claim for relief under the common law public trust doctrine.

common law and constitutional claims. E.g., Peverall v. Cty. of Alamance, 154 N.C. App. 426, 431, 573 S.E.2d 517, 520 (2002) (separately assessing sovereign immunity for various common law and constitutional claims); see also Sanders v. State Pers. Comm'n, 183 N.C. App. 15, 17-24, 644 S.E.2d 10, 11-16 (2007) (same). The plaintiffs here cannot avoid the sovereign immunity problems that inhere in their common law claim under the public trust doctrine by glomming constitutional provisions onto it. Therefore, the Court must assess sovereign immunity with respect to the common law public trust doctrine claim without regard to any distinct constitutional claims that the plaintiffs may or may not be alleging.

Any alleged waiver of sovereign immunity must be strictly construed in the sovereign's favor. In re Thompson Arthur Paving Co., 81 N.C. App. 645, 647-48, 344 S.E.2d 853, 855 (1986). The State has waived its sovereign immunity in a number of contexts. A plaintiff may recover from the State for, among other things, breach of contract, Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976), negligence, Guthrie v. N.C. State Ports Auth., 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983), and worker's compensation, see Wilmington Shipyard, Inc. v. N.C. State Highway Comm'n, 6 N.C. App. 649, 652, 171 S.E.2d 222, 224 (1969). The plaintiffs cite no law by which the State similarly and distinctly waived its sovereign immunity under the public trust doctrine.

The plaintiffs allege only that "sovereign immunity is inapplicable" "because Plaintiffs seek declaratory and injunctive relief directly under the public-trust doctrine . . . and no other adequate remedy at law is available or appropriate." Compl. 11 ¶ 26. None of this demonstrates that the State waived its immunity to common law actions under the public trust doctrine.

The fact that the plaintiffs seek "declaratory and injunctive relief" does not waive sovereign immunity. E.g., Sanders v. State Pers. Comm'n, 236 N.C. App. 94, 111-12, 762 S.E.2d

850, 862 (2014) ("[T]he Uniform Declaratory Judgment Act does not act as a general waiver of the State's sovereign immunity in declaratory judgment actions."). Nor do the plaintiffs suggest any theory by which sovereign immunity might be waived for a common law cause of action merely because they allege that "no other adequate remedy at law is available or appropriate." Compl. 11 ¶ 26; cf. Copper v. Denlinger, 363 N.C. 784, 789, 688 S.E.2d 426, 429 (2010) (indicating that whether an "adequate remedy exists at state law" is relevant to whether a "direct constitutional claim" exists).

Accordingly, the Complaint fails to show that the State waived its sovereign immunity to claims under the public trust doctrine and the plaintiffs' claim should be dismissed.

B. The Complaint does not state a claim upon which relief can be granted because the public trust doctrine does not impose on the State the legal duties that are necessary to the plaintiffs' claim. (Rule 12(b)(6))

The heart of the plaintiffs' public trust doctrine claim is the plaintiffs' premise that the "[t]he public-trust doctrine operates according to basic trust principles that govern the trust relationship." Compl. 109 ¶ 302. From this, the plaintiffs conclude that "[t]he public-trust doctrine imposes on the State a legal duty to hold and manage in trust, for the benefit of its citizens, all of the public-trust resources of this state." Id. at 108 ¶ 300. It is this supposed "legal duty" that they appear to seek to enforce. However, neither the plaintiffs' oversimplified conception of the public trust doctrine nor their derived rule of law are correct. Therefore, no law supports their claim.

The public trust doctrine derives from the ancient English rule that the Crown held certain lands and waters for the benefit of the public. Those lands and waters could not be privately owned. Instead, they were shared by the public for various important public uses such as commerce and navigation. See, e.g., Shively v. Bowlby, 152 U.S. 1, 11 (1894). The

relationship between the Crown, the lands and waters in question, and the general public was not created under the general law of trusts. The law of trusts has never been applied in a rote fashion, if at all, to the public trust doctrine in this state. To put it plainly, "[t]he [public trust] doctrine . . . has nothing to do with private trust law." 2 Waters & Water Rights § 30.02(a) (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2021).

Under the public trust doctrine as articulated by the North Carolina courts, "certain land associated with bodies of water is held in trust by the State for the benefit of the public." Fabrikant, 174 N.C. App. at 41, 621 S.E.2d at 27. That "certain land" comprises, at least, land beneath waters that are navigable in fact. Gwathmey v. State ex rel. Dep't of Env't, Health, & Nat. Res., 342 N.C. 287, 301, 464 S.E.2d 674, 682 (1995). The State holds these lands not as a common proprietor, but instead to support the public's exercise of its public trust rights.[2] The public trust rights that the public has traditionally enjoyed in public trust lands and waters include the rights to navigate, swim, hunt, fish, and recreate. E.g., Fabrikant, 174 N.C. App. at 42, 621 S.E.2d at 27.

Our courts have established certain contours of the public trust doctrine. For example, the "public trust doctrine . . . creat[es] a presumption that the General Assembly did not intend to convey lands" that comprise the public trust "in a manner that would impair public trust rights." Gwathmey, 342 N.C. at 304, 464 S.E.2d at 684. Therefore, if the State conveys public trust lands, it is presumed to have reserved the public's trust rights to use those lands and superjacent waters. Id. Unconditional grants from the State to private parties of submerged lands have been

[2] Public trust rights are not limited to public trust lands. Public trust rights may also be exercised on certain private lands, such as the dry sand area of the State's ocean beaches. Nies v. Town of Emerald Isle, 244 N.C. App. 81, 87-94, 780 S.E.2d 187, 193-97 (2015). The plaintiffs' Complaint does not appear to implicate that aspect of the public trust doctrine.

construed to convey merely easements for wharves and not fee title. E.g., Shepard's Point Land Co. v. Atl. Hotel, 132 N.C. 517, 44 S.E. 39 (1903).

Another principle under the public trust doctrine is that no member of the public can unreasonably exclude another from use of publicly-owned trust lands and waters. E.g., Capune v. Robbins, 273 N.C. 581, 587-90, 160 S.E.2d 881, 885-87 (1968); Rea v. Hampton, 101 N.C. 51, 53, 7 S.E. 649, 650 (1888). For example, nobody can obtain an exclusive fishery in navigable waters. E.g., RJR Tech. Co. v. Pratt, 339 N.C. 588, 591-93, 453 S.E.2d 147, 149-50 (1995). Nor can any member of the public obtain a right by adverse possession in public trust property that is superior to the rights of the public. Shelby v. Cleveland Mill & Power Co., 155 N.C. 196, 199, 71 S.E. 218, 219 (1911); see also N.C. Gen. Stat. § 1-45.1.

The public trust doctrine also recognizes the public's rights to "navigate, swim, hunt, fish, and enjoy all recreational activities" in public trust waters. N.C. Gen. Stat. § 1-45.1. The State's police powers extend to public trust areas and the State may use those powers to protect the public's rights. E.g., Weeks v. N.C. Dep't of Nat. Res. & Cmty. Dev., 97 N.C. App. 215, 225-26, 388 S.E.2d 228, 234 (1990). The State has, in fact, enacted significant legislation and its agencies have adopted broad regulatory programs to manage public trust lands and uses. See, e.g., N.C. Gen. Stat. § 113A-100 et seq. (Coastal Area Management Act of 1974); 15A N.C. Admin. Code ch. 7; see also N.C. Gen. Stat. § 113A-134.3 (establishing a "program to assure the acquisition, improvement, and maintenance of a system of public access to coastal beaches and public trust waters"); id. § 146-20.1 (affirming that public trust lands that have been conveyed "remain subject to all public trust rights"); id. § 113-131 (authorizing, but not requiring, certain agencies to seek injunctive relief upon reasonable cause that any person "has unlawfully

encroached upon, usurped, or otherwise violated the public trust rights of the people of the State").

None of this, however, suggests that the law simply borrows concepts that govern garden variety trusts to apply them to the public trust doctrine. The public trust doctrine has been part of the common law of this State for over 250 years and never have the courts applied the law of ordinary trusts to determine the relative rights, duties and privileges of the State and the public.

The body of law that governs the public trust doctrine, as outlined above, is unique and developed on its own path, separately from and not in tandem with ordinary trust law. That body of public trust law limits how the State can alienate trust properties and authorizes the State to manage trust resources. In furtherance of this, the State has implemented wide-ranging and detailed statutory and regulatory programs to manage all manner of activities that have the potential to negatively affect public trust resources. Nothing in the common law of the public trust doctrine permits any one of many competing constituencies to use the courts to reshape the State's legislative and regulatory policies regarding public trust resources.

There is no law to support the plaintiffs' claim that "[t]he public-trust doctrine imposes on the State a legal duty to . . . manage . . . public-trust resources," Compl. 108 ¶ 300, in the manner that the plaintiffs suggest. The plaintiffs cannot state a claim by making legal averments that are contrary to law. See, e.g., Sutton, 277 N.C. at 98, 176 S.E.2d at 163. Accordingly, the Complaint does not set forth any claim under the public trust doctrine upon which relief can be granted.

C. The plaintiffs cannot state a claim under the public trust doctrine because only the State can enforce the public trust doctrine. (Rule 12(b)(6))

Separately, the plaintiffs face yet another insurmountable problem: only the State, not private litigants, may bring an affirmative action to enforce the public trust doctrine. The public

trust doctrine imbues the State with certain authority and the State alone may invoke judicial remedies to enforce the public trust. Indeed, "[t]he state is the sole party able to seek non-individualized, or public, remedies for alleged harm to public waters." Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 118, 574 S.E.2d 48, 54 (2002), overruled on other grounds by Comm. to Elect Forest v. Emps. Political Action Comm., 2021-NCSC-6 (2021); see also N.C. Gen. Stat. § 113-131(c) (authorizing the Attorney General, at the direction of certain agencies, to institute actions to restrain certain violations of "the public trust rights of the people of the State"). Other entities, even local governments, are not permitted to enforce generalized public trust rights. Town of Nags Head v. Cherry, Inc., 219 N.C. App. 66, 70, 723 S.E.2d 156, 158 (2012) (prohibiting a town from enforcing public trust rights). This is because "[o]ur case law clearly reflects that affirmative actions regarding public trust property must be taken by the State through the Attorney General." Id. at 75, 723 S.E.2d at 161 (quotation marks and brackets omitted). Therefore, the plaintiffs have no cause of action.

Non-state litigants can rely on the public trust doctrine in litigation in certain circumstances, but not in the circumstances of this case. For example, a private party can assert the public trust doctrine as a defense, as happened in Fish House, Inc. v. Clarke, 204 N.C. App. 130, 693 S.E.2d 208 (2010). In that case, the court allowed a defendant to interpose the public trust doctrine in defense of a trespass action. Because the land in question was a part of the public trust, the plaintiff had no right to exclude the defendant. Id. at 136-37, 693 S.E.2d at 212-13. And in Bauman v. Woodlake Partners, LLC, the court determined that a lake was not within the public trust, thus allowing the owner to charge a fee for its use. 199 N.C. App. 441, 447-54, 681 S.E.2d 819, 824-28 (2009); see also Nies v. Town of Emerald Isle, 244 N.C. App. 81, 87, 780 S.E.2d 187, 193 (2015) (involving a town that defended a taking claim on the theory that the

property allegedly taken was already public under public trust doctrine). In none of these cases, nor in any other case, did the courts permit a non-State plaintiff to litigate the rights of the general public. Accordingly, the plaintiffs' public trust claim should be dismissed for failure to state a claim.

D. The relief sought by the plaintiffs would violate the separation of powers doctrine. (Rule 12(b)(6))

What the plaintiffs are asking for in this case is no less than for the courts to step in and regulate virtually the entirety of the commercial fishing industry. Although the plaintiffs nominally seek only to have this Court declare that the State has breached the public trust doctrine and enjoin the State from further breaches, the end result would be to install the judiciary as the prime policymaker regarding commercial fishing. For there can be no way that the State can know how it can comply with the broad principles of law espoused by the plaintiffs absent the Court defining, for example, what fishing techniques would be permissible where and at what times, and to what levels fish stocks would have to improve in order to remedy the alleged breach. But these policy determinations are within the purview of the Legislative and Executive Branches, not the Judicial Branch. As such, the remedy would violate the Constitution's separation of powers requirement.

The Constitution mandates that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "Each branch of government has a distinctive purpose." State ex rel. McCrory v. Berger, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016). The Legislative Brach enacts laws to protect or promote the public's health, morals, order, safety, and welfare. The Executive Branch acts to execute those laws. The Judicial Branch determines whether any of those laws or actions are unlawful. Id.

"[I]n many ways the judicial branch poses the greatest risk to the doctrine" of the separation of powers because judges "possess the power to issue injunctions and extraordinary writs" to govern the actions of the other branches. Richmond Cty. Bd. of Educ. v. Cowell, 254 N.C. App. 422, 426, 803 S.E.2d 27, 30 (2017). "[T]he Separation of Powers doctrine prohibits the courts from using the judicial power to step into the shoes of the other branches of government." Id. That is, "the judiciary may not arrogate a duty reserved by the constitution exclusively to another body . . . ." In re Alamance Cty. Court Facilities, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991).

What the separation of powers principle prohibits is exactly what the plaintiffs seek to have this Court do. They seek an injunction to prohibit "the State from committing further breaches of its obligations under the public-trust doctrine." Compl. 112. The public trust doctrine is common law. In order for the Court to determine whether the State is breaching its alleged duty, it must first define that duty and then specify its contours, before finally measuring the State's actions against that duty. It must do this because no court has yet recognized this duty or defined its details. The Court would not simply be interpreting the law by "call[ing] balls and strikes."[3] It would first be defining the rules of the game, and then determining if those rules had been violated. Further, this duty would apply solely to the State. When a court announces a common law principle that is applicable to all, such as a tort rule, it is not taking direct aim at the other branches of government. Not so with the public trust doctrine because the public trust doctrine is uniquely sovereign. See Fabrikant, 174 N.C. App. at 42, 621 S.E.2d at 27-28. Thus, a ruling for the plaintiffs would dictate State policy and thereby usurp the constitutional authority

[3] Confirmation Hr'g on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the U.S.: Hr'g Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of Judge John G. Roberts, Jr.).

of the Legislative and Executive Branches. There could hardly be a clearer arrogation of the powers of coordinate branches of government.[4]

Worse still, the plaintiffs' rule of law would not be restricted to the context in which they present it. The courts could, and most likely would, be pressed to measure all manner of natural resource protection programs against the plaintiffs' vague public trust standard. For example, the plaintiffs' rule of law would allow any aggrieved citizen to complain that the State's water quality standards, air and water permitting programs, contamination cleanup rules, agricultural and pesticide programs, coastal development statutes, water allocation rules, dam storage discharge provisions, and so on all fail to measure up to the public trust doctrine's alleged legal demands. This would, under the guise of declaring the common law, wrest from the General Assembly and a raft of State agencies their constitutional authority. The magnitude to which the plaintiffs' proposed common law rule would inject the judiciary into the policymaking and enforcement functions of the Legislative and Executive Branches leaves no doubt that it would force the courts far outside their constitutionally prescribed lane.

For all of the foregoing reasons, the Court should dismiss the public trust doctrine claim.

[4] The plaintiffs also contend that "the General Assembly" cannot "abrogate the State's legal duty under the public-trust doctrine." Compl. 3 ¶ 6. The Supreme Court recently indicated that it has not resolved that question, i.e., "whether 'the legislature may constitutionally abolish altogether a common law cause of action.'" Comm. to Elect Forest v. Emps. Political Action Comm., 2021-NCSC-6, ¶ 78 n.46 (2021) (quoting Lamb v. Wedgewood S. Corp., 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983)). But, "[i]t is the province of our legislature to change the accepted common law in this state." State v. Lane, 115 N.C. App. 25, 30, 444 S.E.2d 233, 237 (1994); State v. Bass, 255 N.C. 42, 47, 120 S.E.2d 580, 584 (1961) ("The common law prevails in this State unless changed by statute.").

II. TO THE EXTENT THAT THE PLAINTIFFS HAVE ALLEGED FREE-STANDING CONSTITUTIONAL CLAIMS, THOSE CLAIMS SHOULD BE DISMISSED.

In order to bring forth a claim against the State under the state Constitution, the plaintiffs are required to allege facts establishing that their "state constitutional rights have been abridged." Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) ("In the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." (emphasis added)). In considering the plaintiffs' contentions, "[t]he principles governing constitutional interpretation are generally the same as those which control in ascertaining the meaning of all written instruments." Coley v. State, 360 N.C. 493, 497, 631 S.E.2d 121,125 (2006) (citations and quotation marks omitted). If the meaning is clear from the words used, a court should not search for a meaning elsewhere. State ex rel. Martin v. Preston, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989).

As indicated above, it is far from clear whether the plaintiffs are asserting independent claims under the Constitution. Regardless, the two constitutional provisions to which the plaintiffs cite in their Complaint cannot be interpreted to establish that the State has the affirmative duty that the plaintiffs assert exists.

A. The plaintiffs have not stated a claim under article I, section 38 of the Constitution because that section merely sets forth restrictions on state government regulation of hunting and fishing, not affirmative duties. (Rule 12(b)(6))

North Carolina's right-to-hunt-and-fish amendment, found at article I, section 38, was approved by voters in 2018. This provision states:

> The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote

> wildlife conservation and management and (ii) preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. Nothing herein shall be construed to modify any provision of law relating to trespass, property rights, or eminent domain.

N.C. Const. art. I, § 38.

It is clear from the language used that, like most of the declaration of rights found in article I, the hunting and fishing provision establishes restrictions on State government regulation, not affirmative duties. Specifically, the provision identifies the general "right" of "the people" to hunt, fish, and harvest wildlife and clarifies that this "right" encompasses the "right to use traditional methods." The provision further goes on to state that these rights are subject only to laws and regulations promoting conservation and management as well as the preservation of future hunting and fishing. Hence, the provision establishes a "right" of the public and then restricts the manner by which the State may curtail that right.

The Complaint fails to show that the State violated this constitutional section. Nowhere do the plaintiffs allege that the State has sought to prohibit the plaintiffs from fishing, including by use of "traditional methods," for any reason other than those specifically allowed in article I, section 38.

Instead, the plaintiffs assert that the State was obligated to do more than what the Constitution requires. They allege that the State was required to prohibit other private parties—namely those involved in commercial fishing—from interfering with their rights. This argument fails for two reasons. First, the constitutional provision does not explicitly or implicitly obligate the State to protect the plaintiffs' alleged rights from third parties. It only prohibits the State itself from unconstitutionally interfering with the plaintiffs' rights. Second, the Constitution protects the plaintiffs' "right . . . to fish." That the plaintiffs have a "right" to engage in the activity of "fish[ing]" does not imply that the State has any duty to take measures to support that

certain stocks of certain types of fish be available in certain areas for the plaintiffs to catch. There is simply no language contained within this provision upon which the Court can conclude that the State has a fiduciary duty to regulate the commercial fishing industry in any particular way. Therefore, article 1, section 38 does not create a cause of action upon which the plaintiffs may bring their case.

B. The plaintiffs have not stated a claim under article XIV, section 5 of the Constitution because this provision does not provide any individual rights or otherwise compel the State to regulate fishing in any particular way. (Rule 12(b)(6))

Article XIV, section 5 of the Constitution, which took effect in 1973, N.C. Sess. L. 1971-630, § 4, states:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be the proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.
>
> To accomplish the aforementioned public purposes, the State and its counties, cities, and towns, and other units of local government may acquire by purchase or gift properties or interests in properties which shall, upon their special dedication to and acceptance by a law enacted by a vote of three-fifths of the members of each house of the General Assembly for those public purposes, and constitute part of the "State Nature and Historic Preserve," and which shall not be used for other purposes except as authorized by law enacted by a vote of three-fifths of the members of each house of the General Assembly. The General Assembly shall prescribe by the general law the conditions and procedures under which such properties or interests therein shall be dedicated for the aforementioned public purpose.

N.C. Const. art. XIV, § 5.

The plaintiffs contend that article XIV, section 5 contains a "directive" that the State "preserve North Carolina estuaries as a part of our common ecological heritage." Compl. 37 ¶ 98. Although this constitutional provision has existed for nearly half a century, our appellate

courts have never interpreted this provision in the sweeping way the plaintiffs do. This is most likely because there is no language within this provision that indicates the creation of further individual rights.

This constitutional amendment does not create a right of the public or any obligation of the State relevant to the plaintiffs' grievances. Instead, it begins by speaking of the State's "policy" and its "proper function" to, among many other things, "preserve as a part of the common heritage of this State its . . . estuaries." By this language, it lays constitutional groundwork to support the State's multi-faceted statutory and regulatory programs that seek to safeguard the State's environment and natural resources. There is just no way to tease from this language a private cause of action to compel the State to bend its policies to the plaintiffs' preferences.

In fact, most of the text in article XIV, section 5 is dedicated to the operation of the "State Nature and Historic Preserve," which the plaintiffs never allege has any bearing on their claims. Our appellate courts have on numerous occasions turned to Professor John V. Orth's treatise when discussing the history and purpose of North Carolina's constitutional provisions, and Professor Orth has opined on this topic specifically. E.g., Berger, 368 N.C. at 656 n.14, 781 S.E.2d at 262 n.14 ("Professor John V. Orth is a legal historian and state constitutional scholar acknowledged and cited by both this Court and the United States Supreme Court."). Professor Orth states that,

> [t]he principal effect of this section . . . is to create the State Nature and Historic Preserve, into which property may be placed and from which it may be removed by a three-fifths majority in the General Assembly. Without this section, a simple majority – all that is required in most cases – would be sufficient. Heightened recognition of the importance of the environment is reflected in changed terminology.

John V. Orth & Paul M. Newby, The N.C. State Const. 206 (2d ed. 2013). Had this provision created expansive rights in individual citizens to call into question the constitutionality of a broad range of statutory programs, surely those individual rights, and not the creation of a land conservation program, would have been cited as the "principal effect of this section."

The plaintiffs claim that the Constitution "codified" the public trust doctrine. Compl. 37 ¶ 98 n.9. However, in a decision post-dating article XIV, section 5, the Supreme Court stated explicitly that there is an "absence of a constitutional basis for the public trust doctrine." Gwathmey, 342 N.C. at 304, 464 S.E.2d at 684. Indeed, less than two years after voters ratified article XIV, section 5 the General Assembly enacted the Coastal Area Management Act. This law recognized as separate legal concepts "[a]reas such as waterways and lands under or flowed by tidal waters or navigable waters, to which the public may have rights of access or public trust rights" (i.e., public trust doctrine concepts), "and areas which the State of North Carolina may be authorized to preserve, conserve, or protect under Article XIV, Section 5 of the North Carolina Constitution." N.C. Gen. Stat. § 113A-113(b)(5). Thus, both the Supreme Court and the General Assembly disagree with the plaintiffs that the Constitution "codified" the public trust doctrine.[5]

Further, the Supreme Court "has long recognized that some constitutional provisions are self-executing while others require legislative action to implement and enforce the purpose and mandates of the provision." N.C. Sch. Bds. Ass'n v. Moore, 359 N.C. 474, 512, 614 S.E.2d 504, 527 (2005). "[A] self-executing provision is complete in itself, needs no legislation to give it effect and no special means for its enforcement." Id. (citation and quotation marks omitted). Article XIV, section 5 fails to meet this standard. The provision states only a broad "policy" and

[5] The discussions above of the meaning of article I, section 38 and the contours of the public trust doctrine show that article I, section 38 did not codify the public trust doctrine either.

"function" of the State that it act in an "appropriate way to preserve . . . estuaries." This sort of imprecise, permissive language requires legislative and executive—not judicial—action to implement. N.C. Sch. Bds. Ass'n, 359 N.C. at 512, 614 S.E.2d at 527 (explaining that where a "provision requires clarification" it is not self-executing); Piedmont Mem'l Hosp., Inc. v. Guilford Cty., 218 N.C. 673, 676, 12 S.E.2d 265, 267 (1940) (holding that where a provision grants discretionary authority, it is not self-executing).

Finally, even if the Constitution did "codif[y]" the common law public trust doctrine in part, see Compl. 37 ¶ 98 n.9, this would not provide the plaintiffs with the remedy they seek. As explained in section I.B above, the common law public trust doctrine in this State does not create duties for the trustee akin to an ordinary trust.

Therefore, even if the plaintiffs have raised separate constitutional claims, the constitutional provisions cited within the Complaint do not provide a cause of action to bring forth their claims.

CONCLUSION

For all of the foregoing reasons, the Court should dismiss the Complaint in its entirety.

Respectfully submitted, this, the 4th day of March 2021.

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This the 4th day of March 2021.

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