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Re: Constitutionality of An Act to Reduce Plastic and Nonrecyclable Paper Bag Use on North Carolina's Outer Banks SL 2009-163

Mr. Ellen:

You have asked my opinion on the constitutionality of SL 2009 – 163 (the plastic bag ban). It is my opinion that this act clearly violates Article II, Section 24(1)(a) and (j) of the North Carolina Constitution and, therefore, is void under Article II Section 24(3) of the North Carolina Constitution. As explained below, SL 2009-163 is an unconstitutional local act (1) relating to health, sanitation and the abatement of nuisances and (2) regulating trade. In pertinent part this constitutional provision provides:

## North Carolina Constitutional Provision

Section 24. Limitations on local, private, and special legislation.

“(1) Prohibited subjects. The General Assembly shall not enact any local, private, or special act or resolution:

(a) Relating to health, sanitation, and the abatement of nuisances;

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(j) Regulating labor, trade, mining or manufacturing;

\*\*\*\*\*

(3) Prohibited acts void. Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.

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(4) General laws. The General Assembly may enact general laws regulating the matters set out in this Section.”

In City of Asheville vs. State of N.C., 369 N.C. 80 (December 21, 2016) the North Carolina Supreme Court, in an opinion by Justice Ervin, held that

“Where the General Assembly passed legislation that effectively required the City of Asheville to involuntarily transfer the assets it used to operate a public water system to a new metropolitan water and sewerage district, the Supreme Court held that the legislation was a prohibited local act relating to health and sanitation, in violation of Article II, Section 24 (1)(a) of the state constitution. First, the legislation was crafted such that the involuntary transfer provision would apply only to the City Asheville and their classification bore no reasonable relationship to the stated justification of the legislation. Second, in light of its stated purpose and practical effect regarding public water and sewer services, the legislation had a material connection to issues involving health, sanitation, and the abatement of nuisances.” Syllabus at 80 (emphases added)

#### The Act Relates to Health, Sanitation and the Abatement of Nuisances

The implications for the plastic bag ban are obvious. The findings of fact, codified at G.S. 130A – 309.120, include (1) distribution of plastic bags by retailers to consumers... has a detrimental effect on the environment... (2) Discarded plastic bags contribute to overburdened landfills, threaten wildlife and marine life, degrade the beaches... (4) environmental degradation... ocean pollution... removing refuse... (5) Plastic bag debris harmful to sea turtles and other land and marine life. Waters adjacent to the barrier islands, because they serve as habitat for the turtles, are particularly sensitive to waterborne debris pollution... (6) high volume of tourists...(7) comparative impact of plastic bags on the barrier islands...

These findings relate to the “health” of turtles and other wildlife. I do not rest my case on that. Some might question whether animal health was in view of the framers of our constitution.

The act very clearly relates to sanitation and the abatement of nuisances.

Preventing garbage from being disposed of improperly and collecting garbage is what sanitation departments do every day.

That this act is related to an “abatement of nuisances” is clear by the findings that the act was necessary because of the high volume of tourists and the comparative impact of plastic bags on barrier islands.

#### The Act Regulates Trade

The act regulates trade. Not only does the Act ban plastic bags in the targeted areas, it even goes so far as to mandate what type of paper bag a retailer may provide to a customer and even requires retailers to pay cash refunds to certain customers. G.S. 130A-309.123 Yet, less than five miles away from the impacted area sits Manteo which is located in the same county and whose businesses are not covered by the ban. Doubtless those who shop or dine in Manteo can take their plastic bags with them and discard them on the same barrier island.

In City of Asheville v. State of North Carolina, supra the Supreme Court distinguished between “relating to health” and “regulating trade.” “Relating to” is a looser standard than “regulating”. Id. at 100-103. But in this case the regulation of trade is so clear that the distinction makes no difference here.

In Williams v. Blue Cross Blue Shield, 357 N.C.170 (2003) in an opinion by Justice Edmunds, the Supreme Court held:

The employment discrimination provision of an Orange County anti-discrimination ordinance and its enabling legislation constituted local acts within the meaning of Article II, Section 24 of the North Carolina Constitution because, using the reasonable classification test, it could not be concluded that conditions in Orange County are suspect to such an extent that the legislature could legally create a separate classification to address employment discrimination in that county only.”

“The employment discrimination provisions of an Orange County anti-discrimination ordinance and its enabling legislation regulated labor and trade and violated the local act provisions of the North Carolina Constitution because the effect was to govern labor practices even though the intent was to prohibit discrimination.” Syllabus at 170-171 (emphases added)

#### SL2009-163 (plastic bag ban) is a Local Act

The remaining question is whether this law is a “local act”. Courts have held time and time again that calling an act public and passing it in that fashion does not make it public or shield it from the prohibitions of Article II Section 24 of the North Carolina Constitution on enumerated types of “local acts.” McIntyre v. Clarkson, 254 NC 510 (1961)

In City of Asheville v State of NC, supra at 91, the Court used this test:

“In the barest outline, a statutory classification is held to be “reasonable” if it satisfies the following five tests: (1) the classification must be based upon substantial distinctions which make one class really different from another ; (2) the classification adopted must be germane to the purpose of the law; (3) the classification must not be based upon existing circumstances only; (4) to whatever class a law may apply, it must apply equally to each member thereof; and (5) if the classification meets these requirements, the number of members in a class is wholly immaterial.

Joseph S. Ferrell, *Local Legislation in the North Carolina General Assembly*, 45 N.C. L. Rev 340 391-92 (1967). The reasonable classification test utilized to distinguish between general and local legislation is not equivalent to the rational basis test utilized in due process and equal protection cases.”

The question is whether the statutory classification and its exclusions bears no reasonable relationship to the stated justification of the legislation. SL2009-163 is grossly under inclusive for its stated justification in the following respects.

The notable feature in describing the applicable area is that it is only within the bounds of Senatorial District 1, as that district existed in 2009. The original text of the bill, as introduced by Senator Josh Stein, would have applied to the entire State. That edition included only the first three findings. The second edition of the bill included all seven findings but did not include the limitations codified as Subsection (b) of GS 130A-309.125 that restricts applicability to only certain islands or peninsulas within each county. While the bill started out its legislative journey as a statewide ban without violating these constitutional provisions, it had become a “local act” by the time it was ratified.

The first three findings in G.S. 130A-309.120 would apply to the entire state, not to just one area and not just to barrier islands. Findings 5-7 would apply to any coastal area and not just to a particular section of the barrier islands.

Finding #4 is the only finding that references proximity to a national wildlife refuge or a national seashore. It states that because the federal government places a special value on the natural environment is a reason to have this law apply in those areas. But the federal government itself operates lighthouse gift shops which distribute plastic bags. Cedar Island which is itself a National Wildlife Refuge is not within the ban. Knotts Island is adjacent to the Mackey Island National Wildlife Refuge and is within the ban. Roanoke Island, including the town of Manteo, situated between the Alligator River National Wildlife Refuge and a National Seashore is not within the ban. The Bogue Banks which run alongside the Croatan National Forest are not within the ban.

If the basis of the act is protection of sea turtles then one wonders why the areas where most sea turtles nest are not included in the applicable area. The answer is that it was an ill-conceived attempt to make a “local act” appear to be a general law by an unreasonable classification.

Bald Head Island is home to the Bald Head Island Sea Turtle Conservancy with 39 nests and 10 hatchings in 2017. The ban on plastic bags is not applicable to Bald Head Island. Only certain islands and peninsulas on barrier islands from Ocracoke and north are singled out.

Barrier islands are most relevant in that they are where sea turtles come to nest. North Carolina has some of the most important sea turtle nesting areas on the East Coast, due to the proximity of the islands to the Gulf Stream. Many of these important sea turtle nesting areas are

not covered by the ban which makes the findings justifying the ban suspect and leads to the conclusion that this is indeed a local act.

Finding Four uses sea turtle nesting as a parameter, yet data compiled from the North Carolina Wildlife Resources Commission since the 1970s in partnership with the National Park Service, USFWS, U.S. Marine Corps, U.S. Army Corps of Engineers, North Carolina Division of Parks and Recreation and the University of North Carolina – Wilmington show that more sea turtle nests are in the area that is not targeted by the ban than in the area that is impacted by the ban.

Both in 2009 (when the ban was passed) and in 2017, significantly more sea turtle nests were documented on the North Carolina coast in the area not included in the plastic bag ban (between Cape Lookout National Seashore and Brantley Island) than in the ban zone (between Ocracoke and Corolla). (Seaturtle.org, 2009 data (263 in ban zone (vs. 355 in unbanned area), 2017 data (497 in ban zone and 648 in unbanned area. Source: Global Sea Turtle Network).”

Taking the legislative findings at face value, Section 130A-309.125 Applicability misfires. It strikes the wrong target. Its justifications do not support its area of applicability. It fails the reasonable classification test.

Conclusion: SL 2009-163 is an unconstitutional local act relating to sanitation and abatement of nuisances. It is also unconstitutional because it is a local act regulating trade.

Sincerely,



Paul Stam

Attachments:  
SL2009-163/Annotated  
Maps

Letters-Robinson-Elizabeth

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2009

SESSION LAW 2009-163  
SENATE BILL 1018

AN ACT TO REDUCE PLASTIC AND NONRECYCLED PAPER BAG USE ON NORTH  
CAROLINA'S OUTER BANKS.

The General Assembly of North Carolina enacts:

**SECTION 1.** Article 9 of Chapter 130A of the General Statutes is amended by adding a new Part to read:

"Part 2G. Plastic Bag Management.

**"§ 130A-309.120. Findings.**

The General Assembly makes the following findings:

- (1) Distribution of plastic bags by retailers to consumers for use in carrying, transporting, or storing purchased goods has a detrimental effect on the environment of the State.
- (2) Discarded plastic bags contribute to overburdened landfills, threaten wildlife and marine life, degrade the beaches and other natural landscapes of North Carolina's coast, and, in many cases, require consumption of oil and natural gas during the manufacturing process.
- (3) It is in the best interest of the citizens of this State to gradually reduce the distribution and use of plastic bags.
- (4) Environmental degradation is especially burdensome in counties with barrier islands where soundside and ocean pollution are more significant, where removing refuse from such isolated places is more difficult and expensive, where such refuse deters tourism, and where the presence of a National Wildlife Refuge or National Seashore shows that the federal government places special value on protecting the natural environment in that vicinity.
- (5) The barrier islands are most relevant in that they are where sea turtles come to nest. North Carolina has some of the most important sea turtle nesting areas on the East Coast, due to the proximity of the islands to the Gulf Stream. Plastic bag debris can be harmful to sea turtles and other land and marine life. The waters adjacent to the barrier islands, because they serve as habitat for the turtles, are particularly sensitive to waterborne debris pollution.
- (6) Inhabited barrier islands are visited by a high volume of tourists and therefore experience a high consumption of bags relative to their permanent population due to large numbers of purchases from restaurants, groceries, beach shops, and other retailers by the itinerant tourist population.
- (7) Barrier islands are small and narrow, and therefore the comparative impact of plastic bags on the barrier islands is high.

**"§ 130A-309.121. Definitions.**

As used in this Part, the following definitions apply:

- (1) Plastic bag. – A carryout bag composed primarily of thermoplastic synthetic polymeric material, which is provided by a store to a customer at the point of sale and incidental to the purchase of other goods.
- (2) Prepared foods retailer. – A retailer primarily engaged in the business of selling prepared foods, as that term is defined in G.S. 105-164.3, to consumers.
- (3) Recycled paper bag. – A paper bag that meets all of the following requirements:



original  
statewide  
bill offered  
by Sen  
Josh Stein

added by  
edition 2



- a. The bag is manufactured from one hundred percent (100%) recycled content, including postconsumer content, postindustrial content, or a mix of postconsumer and postindustrial content.
- b. The bag displays the words "made from recycled material" and "recyclable."
- (4) Retail chain. – Five or more stores located within the State that are engaged in the same general field of business and (i) conduct business under the same business name or (ii) operate under common ownership or management or pursuant to a franchise agreement with the same franchisor.
- (5) Retailer. – A person who offers goods for sale in this State to consumers and who provides a single-use plastic bag to the consumer to carry or transport the goods and (i) has more than 5,000 square feet of retail or wholesale space or (ii) is one of a retail chain.
- (6) Reusable bag. – A durable plastic bag with handles that is at least 2.25 mils thick and is specifically designed and manufactured for multiple reuse or a bag made of cloth or other machine washable fabric with handles.

**"§ 130A-309.122. Certain plastic bags banned.**

No retailer shall provide customers with plastic bags unless the bag is a reusable bag, or the bag is used solely to hold sales to an individual customer of otherwise unpackaged portions of the following items:

- (1) Fresh fish or fresh fish products.
- (2) Fresh meat or fresh meat products.
- (3) Fresh poultry or fresh poultry products.
- (4) Fresh produce.

**"§ 130A-309.123. Substitution of paper bags restricted.**

(a) A retailer subject to G.S. 130A-309.122 may substitute paper bags for the plastic bags banned by that section, but only if all of the following conditions are met:

- (1) The paper bag is a recycled paper bag.
- (2) The retailer offers one of the following incentives to any customer who uses the customer's own reusable bags instead of the bags provided by the retailer: (i) a cash refund; (ii) a store coupon or credit for general store use; or (iii) a value or reward under the retailer's customer loyalty or rewards program for general store use. The amount of the incentive shall be equal to or greater than the cost to the retailer of providing a recycled paper bag, multiplied by the number of reusable bags filled with the goods purchased by the customer.

(b) Nothing in this Part shall prevent a retailer from providing customers with reused packaging materials originally used for goods received from the retailer's wholesalers or suppliers.

(c) Notwithstanding subsection (a) of this section, a prepared foods retailer may package prepared foods in a recycled paper bag, regardless of the availability of a reusable bag, in order to comply with food sanitation or handling standards or best practices.

**"§ 130A-309.124. Required signage.**

A retailer subject to G.S. 130A-309.122 other than a prepared foods retailer shall display a sign in a location viewable by customers containing the following notice: "[county name] County discourages the use of single-use plastic and paper bags to protect our environment from excess litter and greenhouse gases. We would appreciate our customers using reusable bags, but if you are not able to, a 100% recycled paper bag will be furnished for your use." The name of the county where the retailer displaying the sign is located should be substituted for "[county name]" in the language set forth in this section.

**"§ 130A-309.125. Applicability.**

(a) This Part applies only in a county which includes a barrier island or barrier peninsula, in which the barrier island or peninsula meets both of the following conditions:

- (1) It has permanent inhabitation of 200 or more residents and is separated from the North Carolina mainland by a sound. *limits*
- (2) It contains either a National Wildlife Refuge or a portion of a National Seashore. *limits*

(b) Within any county covered by subsection (a) of this section, this Part applies only to an island or peninsula that both:

*limited by final revised bill*



(1) Is bounded on the east by the Atlantic Ocean.

(2) Is bounded on the west by a coastal sound."

SECTION 2. G.S. 130A-22 reads as rewritten:

**"§ 130A-22. Administrative penalties.**

(a) The Secretary of Environment and Natural Resources may impose an administrative penalty on a person who violates Article 9 of this Chapter, rules adopted by the Commission pursuant to Article 9, or any term or condition of a permit or order issued under Article 9. Each day of a continuing violation shall constitute a separate violation. The penalty shall not exceed fifteen thousand dollars (\$15,000) per day in the case of a violation involving nonhazardous waste. The penalty shall not exceed thirty-two thousand five hundred dollars (\$32,500) per day in the case of a first violation involving hazardous waste as defined in G.S. 130A-290 or involving the disposal of medical waste as defined in G.S. 130A-290 in or upon water in a manner that results in medical waste entering waters or lands of the State; and shall not exceed fifty thousand dollars (\$50,000) per day for a second or further violation involving the disposal of medical waste as defined in G.S. 130A-290 in or upon water in a manner that results in medical waste entering waters or lands of the State. The penalty shall not exceed thirty-two thousand five hundred dollars (\$32,500) per day for a violation involving a voluntary remedial action implemented pursuant to G.S. 130A-310.9(c) or a violation of the rules adopted pursuant to G.S. 130A-310.12(b). The penalty shall not exceed one hundred dollars (\$100.00) for a first violation; two hundred dollars (\$200.00) for a second violation within any 12-month period; and five hundred dollars (\$500.00) for each additional violation within any 12-month period for any violation of Part 2G of Article 9 of this Chapter. If a person fails to pay a civil penalty within 60 days after the final agency decision or court order has been served on the violator, the Secretary of Environment and Natural Resources shall request the Attorney General to institute a civil action in the superior court of any county in which the violator resides or has his or its principal place of business to recover the amount of the assessment. Such civil actions must be filed within three years of the date the final agency decision or court order was served on the violator.

...."

**SECTION 3.** This act becomes effective September 1, 2009, and applies to retail sales made on or after that date.

In the General Assembly read three times and ratified this the 23<sup>rd</sup> day of June, 2009.

s/ Marc Basnight  
President Pro Tempore of the Senate

s/ Joe Hackney  
Speaker of the House of Representatives

s/ Beverly E. Perdue  
Governor

Approved 4:35 p.m. this 24<sup>th</sup> day of June, 2009

added this  
limitation  
and notified  
act.