No. 23-69 JUDICIAL DISTRICT NINETEEN D

NORTH CAROLINA COURT OF APPEALS

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NC CITIZENS FOR TRANSPARENT GOVERNMENT, INC. and KEVIN DRUM, Plaintiffs, v. THE VILLAGE OF PINEHURST, JOHN STRICKLAND in his official capacity as Mayor of the Village of Pinehurst; and JANE HOGEMAN in her official capacity as a member of the Village of Pinehurst Council, Defendants.	From Moore County

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PLAINTIFFS-APPELLANTS' BRIEF

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PLAINTIFFS-APPELLANTS' BRIEF

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ISSUES PRESENTED

I. N.C. Gen. Stat § 1-16A applies a 45-day statute of limitations to a lawsuit seeking to have an action "declared null and void." Otherwise, a three-year statute of limitation applies. N.C. Gen Stat. § 1-52(2). This lawsuit seeks injunctive relief under N.C. Gen. Stat. § 143-318.16 and declaratory relief under N.C. Gen.

Stat. § 143-318.16A but does not seek to have any action declared null and void. Did the Trial Court err in applying a 45-day statute of limitations?

II. N.C. Gen. Stat § 1-253 gives courts the power to grant declaratory judgment and does not set a specific statute of limitations. A three-year statute of limitations applies under N.C. Gen. Stat § 1-52(2) to liabilities created by statute. This lawsuit seeks declaratory relief under N.C. Gen. Stat § 1-253. Did the Trial Court err by applying a 45-day statute of limitations to an action seeking declaratory relief under N.C. Gen. Stat. § 1-253?

III. If a 45-day statute of limitations applies, did the Trial Court err by failing to find and articulate the date on which this claim accrued, and by failing to find that the claim was brought within the statute of limitations, when there was evidence the claim accrued 21 April 2022, and the complaint was filed 6 May 2022?

IV. Did the Trial Court err in holding that the statute of limitations barred the action without making a finding of the accrual dates of Plaintiffs' claims?

STATEMENT OF THE CASE

Plaintiffs filed their complaint and issued their summons on 6 May 2022. (R p 3). Defendants accepted service and on 8 July 2022 moved to dismiss the action. (R p 244). Defendants filed an amended, verified motion to dismiss on 30 August 2022. (R p 246). The Honorable James Webb, Moore County Superior Court Judge presiding, heard arguments on the amended motion to dismiss on 9 September 2022. (T pp 1-45). A judgment and order dismissing the case was entered on 29 September

2022. (R p 259). Plaintiffs served and filed notice of appeal on 4 October 2022. (R p 260). A transcript of the 9 September 2022 hearing was ordered on 17 October 2022 and delivered 26 October 2022. (R p 263).

STATEMENT OF THE GROUNDS OF APPELLATE REVIEW

Judge Webb's order dismissing the Plaintiffs' claims is a final judgment, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

Plaintiffs sought two rulings in their complaint. Under both the Uniform Declaratory Judgment statute, N.C. Gen. Stat. § 1-253, and the Open Meetings Law, N.C. Gen. Stat. § 143-318.16A, the Plaintiffs sought a declaration that the actions of a majority of the Pinehurst Village Council (hereinafter, "the Council") violated the Open Meetings Law. The Plaintiffs also sought an injunction against future violations under the Open Meetings Law, N.C. Gen. Stat. § 143-318.16. Plaintiffs did not ask the court to void, alter or in any way disturb any action taken by the Council.

On 20 September 2021, the full Pinehurst Village Council met in a closed session. (R p 10). The stated purpose of the meeting was a

"personnel" discussion. (R p 9). In reality, notwithstanding the explicit statutory prohibition of discussing the performance of public body members in closed session, the meeting was called to reprimand Councilmember Boesch for perceived violations of the Village Ethics Policy. (R p 10). *See* N.C. Gen. Stat. § 143-318.11(a)(6) ("A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting.")

The notice for the 20 September meeting had multiple inaccuracies, such that a person reading it would not have known when or where to go to attend any public portion of the meeting. (R p 8). Similarly, the meeting minutes contain multiple inaccuracies, such as listing the Village Manager as having attended when in fact he did not. (R p 13).

After the September meeting, a majority of the Village Councilmembers — Village Mayor John Strickland, Mayor Pro Tem Judy Davis and Councilmember Jane Hogeman (hereinafter, "the Majority") — engaged in an extensive exchange of emails. In the emails, the

Majority considered and concluded that Councilmember Boesch needed to be formally censured. (R p 14).

The Majority also considered and decided that Councilmember Drum needed to be censured. (R p 14). The basis for the Drum censure was that allegedly he had been disrespectful of Village residents. According to the Majority, being disrespectful violated the Village Ethics Policy. (R p 14). Through the course of these emails, the Majority consulted with both the Village Attorney and the Village Manager, who were copied on the emails and participated in the discussion. (R pp 14-19). Through the emails, the Majority drafted the language of censures to be proposed and the exact language that ultimately would be used to introduce and explain the perceived need for the censures. (R pp 14-19).

In a public meeting on 12 October 2021, the Village Attorney described what he had been asked to do, saying he was asked by "a consensus or a majority of the Village Council." (R p 19). After the Village Attorney provided background, as planned, Village Councilmember Hogeman read the motion that had been created and approved by the Majority in their email exchanges. (R p 20).

Councilmember Boesch was stunned and reacted to the censure motion. She said, “I’ve never seen that," and asked, "Did somebody provide that to you to read?” Councilmember Hogeman replied, “No. I worked on that.” (R p 20). “With whose help?” Councilmember Boesch asked. She continued, “I mean, you're reading something that was prepared before this meeting. And again, these are things that are being written about and against me, and I’ve never had an opportunity to see this. This. There's something so just uneasy about this. So you wrote that by yourself?" (R pp 20-21). At that point, Mayor Strickland responded and lied, saying, “As far as I know yes, and Jane’s an attorney.” (R p 21).

Despite the Mayor’s misrepresentation and misdirection that Councilmember Hogeman had worked alone, it appeared to Councilmembers Boesch and Drum that there may have been some discussion among the members of the Majority prior to the 12 October 2022 meeting. If there had been, they had been excluded from the discussion. Councilmember Boesch sent a question to the UNC School of Government asking about the propriety of that exclusion. Defendants submitted part of that email exchange to the trial court, but part was missing. The portion filed with the court did not include the question

that had been asked or what background information had been provided. Only the response from Professor Frayda Bluestein is in the record, attached to Defendants' amended motion to dismiss. (R p 257).

Professor Bluestein wrote that it would be "hard" for a public body to meet by email. (R p 257). She did not say it was impossible. She wrote, "if they are having a conversation spaced over a span of time, it's not illegal," (R p 257) but the record is devoid of what details Professor Bluestein had been provided when she responded. For example, the record does not reveal whether Professor Bluestein knew that the Majority had exchanged emails in very short blocks of time or that, in the words of the Village Attorney, the Majority reached a "consensus" to censure the two other councilmembers. (R p 51).

Following the October meetings, Councilmember Drum wanted to understand exactly what had taken place by email. Although of course the council members emails are public records, they had not been publicly disclosed. Former Councilmember Drum[1] engaged counsel to send a group of public records requests on 1 March 2022, seeking the emails

[1] Plaintiff-Appellant Drum was not re-elected in the 2021 Village Council election.

exchanged related to the proposed censures.[2] (R11 Supp pp 275-304). On 21 April 2022 — 51 days after the public records request — the Village completed providing the public records. (R11 Supp p 305).

On 6 May 2022 — 15 days later — Plaintiffs filed suit. (R p 3). The lawsuit sought a declaration that both the 20 September 2022 meeting and the October meetings by email violated the Open Meetings Law and sought an injunction prohibiting the Village Council from further violations. The Plaintiffs' claims were grounded in N.C. Gen. Stat. § 1-253, North Carolina's declaratory relief statute, as well as two distinct provisions of North Carolina's Open Meetings Law, N.C. Gen. Stat. § 143-318.16 and N.C. Gen. Stat. § 143-318.16A.

STATUTORY FRAMEWORK

The explicit purpose of the Open Meetings Law is to ensure "that the hearings, deliberations, and actions of [public] bodies [are] conducted

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[2] The Court can take judicial notice of the dates on which public records requests were initiated and completed. A court can take judicial notice of facts that are readily determinable by "sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C–1, Rule 201(b). "Judicial notice may be taken at any stage of the proceeding [,] including on appeal." *Id.* § 8C–1, Rule 201(f). Here, the dates on which the public records were provided are included on the public records themselves, which were provided by a government employee. The source is credible and the date is objective and easily verifiable.

openly." N.C. Gen. Stat. § 143-318.9. Accordingly, the Open Meetings Law guarantees broad public access to the actions of a public body and provides for information about public body operations. For example, the Open Meetings Law requires a public body to give public notice for all official meetings. N.C. Gen. Stat. § 143-318.12. Public bodies are required to keep "full and accurate minutes of all official meetings" and "keep a general account" of closed sessions to give the public "a reasonable understanding of what transpired." N.C. Gen. Stat. § 143-318.10(e).

Both Section 16 and Section 16A provide that "any person" may seek relief under the Act. N.C. Gen. Stat. §§ 143-318.16; 318.16A. Further, Section 16 explicitly states that a plaintiff need not "allege or prove special damage different from that suffered by the public at large." N.C. Gen. Stat. § 143-318.16; *accord Umstead Coal. v. Raleigh-Durham Airport Auth.*, 275 N.C. App. 384, 400, 853 S.E.2d 742, 752 (2020).

In the event a public body violates any of the Act's provisions, the Act provides three distinct remedies. First, a plaintiff may seek an injunction under Section 16 "to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii)

continuing violations of this Article." N.C. Gen. Stat. § 143-318.16. Section 16 does not contain a statute of limitations.

Under Section 16A, a plaintiff may receive one of two additional, distinct remedies: a declaration that a public body's action was illegal, or a declaration of illegality *followed by* a court's nullification of the illegal action. N.C. Gen. Stat. § 143-318.16A(a). In fact, Section 16A is titled, "Additional remedies." A court's power to nullify a public body's action is conditioned "upon such a finding" that the challenged action was undertaken in violation of the Open Meetings Law. *Id.* In other words, a court may not nullify an action unless that action is first found to violate the Act.

A court, however, may declare an action illegal without declaring it null and void. Section 16A(a) states that a court "may" use its nullification power, which gives courts "discretion" to decide "[w]hether to declare a board's action null and void". *See Dockside Discotheque, Inc. v. Bd. of Adjustment of Town of S. Pines*, 115 N.C. App. 303, 307, 444 S.E.2d 451, 453 (1994).

This discretion is not unfettered. In deciding whether to declare a public action null and void, a court must consider a non-exclusive list of

six factors. N.C. Gen. Stat. § 143-318.16A(c). If a court decides that these factors do not weigh in favor of nullification, the court may decline to nullify the challenged action. *H.B.S. Contractors, Inc. v. Cumberland Cnty. Bd. of Educ.*, 122 N.C. App. 49, 55, 468 S.E.2d 517, 521 (1996).

Section 16A thus contemplates two *independent* declaratory remedies. Courts may award plaintiffs a declaration of illegality with or without declaring an action was null and void. On several occasions, courts have chosen to give plaintiffs only a declaration of illegality without subsequently nullifying the illegal action.[3] *See Boney Publishers Inc. v. Burlington City Council*, 151 N.C. App. 651, 653, 566 S.E.2d 701, 703 (2002) (recognizing the trial court's discretion to withhold a declaration of nullification pursuant to § 16A); *H.B.S. Contractors*, 122 N.C. App. at 55 (holding that "the trial court did not abuse its discretion" in withholding a nullification declaration); *Garlock v. Wake Cnty. Bd. of Educ.*, 211 N.C. App. 200, 233, 712 S.E.2d 158, 180 (2011) (affirming the trial court's denial of "additional relief").

[3] In fact, there is no reported case in which a court nullified a public body's action under Section 16A.

In short, both the statutory language and subsequent court decisions confirm that a plaintiff may receive two distinct remedies under Section 16A. A plaintiff may win only a declaration of illegality or a declaration of illegality *and* subsequent nullification. Declaratory relief under Section 16A "may be entered as an alternative to, or in combination with, an injunction entered pursuant to [Section 16]." N.C. Gen. Stat. § 143-318.16A(d). Put together, Sections 16 and 16A provide plaintiffs with three distinct remedies: (1) an injunction, (2) a declaration of illegality, or (3) a declaration of illegality *and* subsequent nullification of a public body's act.

In line with this construction, the University of North Carolina School of Government interprets the Act as providing "three separate remedies": "declaratory judgment," an injunction against "threatened, past, or continuing violations," and "perhaps most severe," an order invalidating an action that violated the Act. Frayda S. Bluestein & David M. Lawrence, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers* 94-95 (8th ed. 2017). Moreover, the School of Government explicitly recognizes the discretionary nature of

nullification, even given a court finding that the Act was violated. *Id.* at 95.

Unlike Section 16, however, Section 16A also contains a targeted statute of limitations period. Section 16A(b) provides, in pertinent part:

> "A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void . . . If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body, the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken."

N.C. Gen. Stat. § 143-318.16A(b).

The first and central question in this appeal is whether Section 16A(b)'s 45-day statute of limitations applies to *all* claims for relief under the Open Meetings Law (injunctive or declaratory), to *only* discrete claims for nullification of a public body's acts under Section 16A, or to another combination of claims. Second, if the 45-day statute of limitations applies, *when* does the statute of limitations period began to accrue? The third question is whether the trial court complied with the

procedural requirements of Section 16A(b) — namely, that the court determine the date of a challenged action's initial disclosure.

ARGUMENT

I. STANDARD OF REVIEW

Although the trial court's order did not explicitly engage in statutory interpretation, the court implicitly interpreted the 45-day statute of limitations in Section 16A(b) to apply to all of Plaintiffs' claims for relief, including claims under Section 16 and claims under the Declaratory Judgment Act. As an interpretation of a statute of limitations, therefore, the trial court's order is reviewed *de novo*. *Goetz v. N. Carolina Dep't of Health & Hum. Servs.*, 203 N.C. App. 421, 425, 692 S.E.2d 395, 398 (2010). This Court's broad objective in interpreting the Open Meetings Law is to construe it "in favor of public access." *Garlock*, 211 N.C. App. at 221.

II. THERE ARE FIVE INDEPENDENT GROUNDS FOR REVERSING AND REMANDING THE TRIAL COURT'S ORDER.

This Court should reverse and remand the trial court's order for five reasons. First, the trial court incorrectly applied Section 16A's statute of limitations to Plaintiffs' claims for a declaration of illegality, even though those claims did not seek nullification of any Council actions. Second,

the trial court wrongfully applied Section 16A's statute of limitations to Plaintiffs' claims for injunctive relief under Section 16. Third, the trial court incorrectly applied Section 16A's statute of limitations to Plaintiffs' standalone claim for relief under the Declaratory Judgment Act. Fourth, even if the 45-day statute of limitations applied, the trial court incorrectly concluded that Plaintiffs' claims had expired, even though they filed their claims within 45 days of the date of disclosure, on 21 April 2022. Lastly, in violation of Section 16A(b)'s procedural requirements, the trial court failed to make explicit findings of fact and law as to when Plaintiffs knew or should have known about the Council's actions. Each of these defects provides independent grounds for reversing and remanding the trial court's order.

III. THE STATUTE OF LIMITATIONS IN SECTION 16A APPLIES ONLY TO CLAIMS THAT ASK A COURT TO NULLIFY A PUBLIC BODY'S ACTIONS.

Both the text of the Open Meetings Law and its underlying policy motivations disfavor applying the 45-day statute of limitations to Plaintiffs' claims for a declaration of illegality. A broad construction of the statute of limitations that applies to all claims under Section 16A would depart from the plain meaning of the statute. Such a construction

is also inconsistent with the Act's guiding policy goal: ensuring access to public meetings. This Court should construe the statute of limitations to apply only to claims that ask a court to nullify a public body's actions.

A. Applying a 45-day statute of limitations to all lawsuits under Section 16A departs from the plain meaning of the statutory text.

The statute of limitations in Section 16A(b) only bars claims that seek nullification of an action taken by a public body. Three canons of construction apply and all compel this conclusion. First, when its language is clear and unambiguous, a statute "must be construed as written." *State v. Hardy*, 67 N.C. App. 122, 125, 312 S.E.2d 699, 702 (1984). Second, a court must not construe a statute to render "any portion of it ineffective or redundant." *State v. White*, 101 N.C. App. 593, 605, 401 S.E.2d 106, 113 (1991). Third, "[c]ourts may apply a statute of limitation only to cases *clearly* within its provisions." *Clay v. Emp. Sec. Comm'n of N. Carolina*, 340 N.C. 83, 86, 457 S.E.2d 725, 727 (1995) (emphasis added).

The statute of limitations in Section 16A(b) is clear in what it includes and excludes. Section 16A requires "a suit seeking declaratory relief under this section [to] be commenced within 45 days following the

initial disclosure of the action *that the suit seeks to have declared null and void*." N.C. Gen. Stat. § 143-318.16A(b) (emphasis added). The final clause of the sentence indicates that the statute of limitations is triggered by a request to have some action declared null and void, and that the disclosure of the action is what starts the clock. In other words, only if a party seeks to have an action declared null and void does the Act require the party to commence litigation within 45 days of the initial disclosure of that action.

Key, here, is the *expresio unius* canon of interpretation: "inclusion of one is exclusion of another." *In re Spivey*, 345 N.C. 404, 412, 480 S.E.2d 693, 697 (1997). Section 16A(b) does not say that *all* suits under Section 16A are subject to the statute of limitations. Nor does it reference suits that seek only a declaration of illegality. Instead, the statute of limitations explicitly and exclusively applies to suits that seek a declaration that an action is "null and void." N.C. Gen. Stat. § 143-318.16A(b). Under the *expresio unius* canon, suits that seek only a declaration of illegality are excluded from Section 16A(b)'s statute of limitations.

The court cannot construe the statute to conflict with its clear language. For where the statutory language is clear and unambiguous, a statute "must be construed as written" without judicial construction. *Hardy*, 67 N.C. App. at 125. Here, the statute clearly contemplates that not every lawsuit under Section 16A falls under the statute of limitations.

The 45-day statute of limitations period applies to any lawsuit that "*seeks* to have [an action] declared null and void." N.C. Gen. Stat. § 143-318.16A(b) (emphasis added). Section 16A explicitly contemplates that a plaintiff may "seek[]" the nullification remedy. *Id.* A plaintiff may seek nullification, or he may not. If he does, the statute of limitations applies. If he does not "seek" nullification, then the statute of limitations does not apply.

This court consistently has described the nullification remedy as something a plaintiff sought independent of other forms of relief, including a declaration of illegality under Section 16A.[4] For example, plaintiffs in two cases sought a declaration of illegality without seeking

[4] *See Coulter v. City of Newton*, 100 N.C. App. 523, 524, 397 S.E.2d 244, 245 (1990); *Dockside Discotheque*, 115 N.C. App. at 307; *H.B.S. Contractors*, 122 N.C. App. at 49.

nullification.[5] In neither of those cases did the court indicate that a lawsuit seeking a declaration of illegality was also a claim for nullification. Therefore, not all suits under Section 16A are covered by its statute of limitations. If a plaintiff seeks only a declaration of illegality, then Section 16A(b)'s statute of limitations does not apply.

If the General Assembly wanted *all* suits under Section 16A to be governed by the statute of limitations, it could have easily said so: i.e., "all suits under this section must be filed within 45 days." The General Assembly knows how to enact broadly applicable statute of limitations provisions and does so frequently.

For example, the General Assembly has set a three-year statute of limitations governing "[*a*]*ll claims* against any and all State departments." N.C. Gen. Stat. § 143-299 (emphasis added). In all civil actions regarding employment discrimination, the General Assembly requires the action to be "commenced within 180 days." N.C. Gen. Stat. § 168A-12. However, "[a] civil action brought pursuant to [§ 168A]

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[5] *See City of Burlington v. Boney Publishers, Inc.,* 166 N.C. App. 186, 188-189, 600 S.E.2d 872, 874-875 (2004); *News & Observer Pub. Co. v. Coble*, 128 N.C. App. 307, 494 S.E.2d 784, 785, aff'd, 349 N.C. 350, 507 S.E.2d 272 (1998).

regarding *any other complaint* of discrimination shall be commenced within two years . . . ." *Id.* (emphasis added).

These statutes demonstrate that the General Assembly knows how to draft a broad statute of limitations provision. The statutory language in Section 16A(b), by contrast, is highly specific. And under the doctrine of *in pari materia*, that difference matters. *See Martin v. N. Carolina Dep't of Health & Hum. Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) (stating that statutes on the same subject matter "should be . . . compared with each other"). Simply put, comparing the above-listed statutes with Section 16A(b) suggests that the General Assembly intended for only suits seeking nullification of an action to be covered by Section 16A(b).

Even if the General Assembly intended for all open meetings suits to be covered by Section 16A(b) but drafted an imprecise statute, this Court still must construe the statute as written. "Courts may apply a statute of limitation only to cases *clearly* within its provisions." *Clay*, 340 N.C. at 86 (emphasis added). The text does not *clearly* subject all suits under Section 16A to Section 16A(b)'s 45-day statute of limitations — only suits that seek nullification of a public body's illegal actions are

explicitly subject to Section 16A(b). Under *Clay*, therefore, this Court may not construe the statute of limitations to suits that merely seek a declaration of illegality.

Finally, broadly construing Section 16A(b)'s statute of limitations to cover *all* Open Meetings suits would render a substantial part of Section 16A(b) superfluous — specifically, every word in the phrase that modifies "action": "that the suit seeks to have declared null and void." N.C. Gen. Stat. § 143-318.16A(b). This Court must not construe a statute to render "any portion of it ineffective or redundant." *State v. White*, 101 N.C. App. at 605. Instead, "a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage." *State v. Williams*, 286 N.C. 422, 431, 212 S.E.2d 113, 119 (1975). The words following "action" limit the statute of limitations' application to lawsuits which "seek[] to have [an action] declared null and void." N.C. Gen. Stat. § 143-318.16A(b). This Court must give those words their proper meaning and exclude from the statute of limitations any lawsuit that does not seek a declaration that an action is null and void.

The language of Section 16A(b) is clear. If a plaintiff seeks a declaration that a public body's action is null and void, the 45-day statute of limitations applies. If a plaintiff seeks only a declaration of illegality, Section 16A(b)'s 45-day statute of limitations does not apply.[6] Plaintiffs' claims under Section 16A should survive Defendants' Motion to Dismiss because they sought only a declaration of illegality.

B. Construing the statute of limitations narrowly furthers the policy objectives of the Open Meetings Law.

The result contemplated by the text's plain meaning — namely, that lawsuits seeking only a declaration of illegality are not barred by the statute of limitations — serves several important policy objectives. A court's "primary task" in statutory interpretation "is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *State v. Waycaster*, 375 N.C. 232, 237, 846 S.E.2d 688, 692 (2020). Thus, here,

[6] Instead, N.C. Gen. Stat. § 1-52(2), which governs any claim "[u]pon a liability created by statute, either state or federal, unless some other time is mentioned in the statute creating it," sets a three-year statute of limitations period. *See also Ludlum v. State*, 227 N.C. App 92, 94, 742 S.E.2d 580, 582 (2013) (standing for the general proposition that § 1-52(2) governs claims based on statutory liabilities whenever the underlying statute does not provide a statute of limitations period).

the court's primary task is to construe the Open Meetings Law "in favor of public access." *Garlock*, 211 N.C. at 221.

Moreover, when statutory language is clear, a court is duty-bound to presume legislative purpose and give full effect to the statutory language, even when the court doubts the efficacy of such a result. *Peele v. Finch,* 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973); *Appeal of Bass Income Fund*, 115 N.C. App. 703, 706, 446 S.E.2d 594, 596 (1994). A court may "legitimately consider" the anticipated consequences of possible constructions of a statute in determining "which of these the Legislature most probably had in mind when it enacted the statute." *Student Bar Ass'n Bd. of Governors, of Sch. of Law, Univ. of N. Carolina at Chapel Hill. v. Byrd*, 293 N.C. 594, 597-98, 239 S.E.2d 415, 418 (1977).

Narrowly construing the statute of limitations in Section 16A(b) furthers the Act's guiding policy objective: to ensure that the "hearings, deliberations, and actions of [public] bodies be conducted openly." N.C. Gen. Stat. § 143-318.9. There is value in having a public body's actions declared illegal, even if they are not declared null and void, because such a declaration clarifies the law and helps deter future violations.

Indeed, one of the primary purposes of the declaratory judgment remedy is "to 'make certain that which is uncertain and secure that which is insecure.'" *Phillips v. Orange Cnty. Health Dep't*, 237 N.C. App. 249, 256, 765 S.E.2d 811, 816 (2014) (quoting *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 449, 181 S.E.2d 799, 802 (1971)). This clarifying purpose is especially pertinent in suits in which plaintiffs seek a declaration that questionable actions involving new technologies were, in fact, illegal.

Here, for example, the General Assembly explicitly defined "Official Meeting" as "a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone or *other electronic means* . . . ." N.C. Gen. Stat. § 143-318.10 (emphasis added). This definition implicitly recognizes that new technologies for public meetings will develop over time. Adding a declaratory judgment provision was one way for the General Assembly to ensure that new meeting technologies could be addressed by the courts. Barring suits for any declaratory relief after 45 days, however, severely limits the number of Open Meetings suits that could be brought by plaintiffs, thereby

limiting the ability of the courts to clarify the law and deter future violations.

Additionally, the statutory regime is carefully designed to further these policy objectives without disrupting a public body's longstanding rules and regulations. As the text makes clear, suits that seek nullification must be brought within 45 days. N.C. Gen. Stat. § 143-318.16A(b). After 45 days, public bodies need not fear the disruption that would be caused by a court order nullifying a public action.

For example, a public body need not fear that a decision to build a school will be nullified one year after construction begins. Applying a 45-day limitations period to lawsuits seeking nullification prevents inefficient and wasteful outcomes. This protection is unnecessary in suits that seek only a declaration of illegality, for such a declaration does not nullify established government policies or halt ongoing, long-term public projects.

In its guide to the Act, the School of Government echoes this policy rationale for imposing a 45-day statute of limitations on nullification actions. The statute of limitations "on lawsuits to invalidate actions" is "quite short" precisely because nullification "could be extremely

disruptive." Bluestein & Lawrence, *supra*, at 98. Following this excursus on statutes of limitations for nullification actions, the guide immediately "returns" to discussing the injunctive remedy, suggesting that the statute of limitations is limited to the nullification remedy. *See id.*

The need to declare the law and deter future violations gives standalone declarations of illegality value without disrupting the operations of government. *See Garlock*, 211 N.C. App. at 233 (opining that a standalone declaration of illegality will prevent future violations of the Open Meetings Law). The threat of a declaration of illegality deters public bodies from breaking the Open Meetings Law. Public bodies want neither a lawsuit nor the bad press resulting from an adverse court decision. And it is reasonable to assume a public body would make every effort to comply with the law. Put together, these factors reveal a carefully designed regime that balances the interest in encouraging public meetings and clarifying the law with the interest in minimizing disruptions to longstanding policies.

IV. SECTION 16A's 45-DAY STATUTE OF LIMITATIONS DOES NOT APPLY TO ACTIONS FOR INJUNCTIVE RELIEF BROUGHT UNDER SECTION 16.

Section 16A(b)'s statute of limitations does not apply to claims for injunctive relief under Section 16. Any construction to the contrary would depart from the Act's text and policy objectives, which distinguish among all three forms of relief. Therefore, this Court should not apply Section 16A(b)'s statute of limitations to Plaintiffs' claim for injunctive relief under Section 16.

It is a well-established rule of statutory construction that where "the General Assembly includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the legislative body acts intentionally . . . in the disparate inclusion or exclusion." *State v. Mylett*, 253 N.C. App. 198, 206-07, 799 S.E.2d 419, 425 (2017), *cert. denied*, 370 N.C. 69, 803 S.E.2d 391 (2017). Thus, if one section of the Act includes a provision that another section is lacking, the Court should presume that the General Assembly did not intend for that provision to apply to the other section.

Sections 16 and 16A are distinct sections. For example, Section 16A(d) states that "a declaratory judgment pursuant to *this section* may

be entered as an alternative to, or in combination with, an injunction entered pursuant to G.S. 143-318.16." N.C. Gen. Stat. § 143-318.16A(d) (emphasis added). Other sections of the Act also refer to Sections 16 and 16A as distinct sections. Sections 143-318.16B and 143-318.16C refer to actions "brought pursuant to G.S. 143-318.16 *or* G.S. 143-318.16A." N.C. Gen. Stat. §§ 143-318.16B, 143-318.16C (emphasis added). The use of the word "or" to connect Sections 16 and 16A is disjunctive, not conjunctive. *See In re Powell*, 237 N.C. App. 441, 444, 768 S.E.2d 133, 135 (2014) ("[T]he word 'or,' as used in a statute, is a disjunctive particle . . . .") (internal quotations omitted). Thus, the two sections "are to be taken separately." *Id.* (internal quotation omitted).

Section 16A's heading is additional evidence that the General Assembly intended the two sections to be distinct. "Although the title given to a particular statutory provision is not controlling, it does shed some light on the legislative intent underlying the enactment of that provision." *State v. Fletcher*, 370 N.C. 313, 328, 807 S.E.2d 528, 539 (2017). Section 16A is entitled "Additional remedies for violations of Article." N.C. Gen. Stat. § 143-318.16A. This title suggests that the

General Assembly intended Section 16A to serve as a distinct supplement to Section 16.

The Act explicitly states that the statute of limitations only applies to suits brought under Section 16A: "[a] suit seeking declaratory relief under *this section* must be commenced within 45 days." N.C. Gen. Stat. § 143-318.16A(b) (emphasis added). The General Assembly also decided to place the 45-day limitation within a section entitled "Additional remedies," indicating that it did not intend Section 16A's limitation to apply to the standard remedy: injunctive relief under Section 16. Thus, this Court must give effect to the General Assembly's decision to include a 45-day statute of limitations in Section 16A but not in Section 16.

The General Assembly's decision to impose the 45-day statute of limitations only upon actions under Section 16A is logical in light of the policy concerns raised by the form of relief described in Section 16A(b). By contrast, injunctive relief under Section 16 does not raise the same concerns. As explained above, the 45-day statute of limitations is designed to avoid the disruption of nullifying the actions of governing bodies long after those actions have gone into effect.

However, the injunctive relief available under Section 16 does not nullify previous actions. Courts can grant injunctions only to "enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article." N.C. Gen. Stat. § 143-318.16(a). Thus, injunctions granted under Section 16 — even if granted months or years after an action — do not invalidate actions or create uncertainty. For example, returning to the analogy of a school construction project, an injunction barring future violations of the Act would not invalidate or hinder a building project already in progress.

Finally, as previously discussed, the School of Government's guide to the Act explicitly states that the rationale for the 45-day statute of limitations is that nullification actions carry the potential of extreme disruption. Bluestein & Lawrence, *supra*, at 98. The negative implication of that statement — that actions *not* seeking nullification do not require such a stringent statute of limitations — applies equally to actions for declarations of illegality and actions for injunctive relief.

Even if the statute of limitations in Section 16A applies to all suits brought under that section — both actions seeking nullification and actions only seeking declarations that the Act was violated — it should

not apply to claims seeking injunctive relief under Section 16. On a motion to dismiss, the court must construe the complaint liberally, and the court can only dismiss a complaint if it states no facts that support any claim for relief. *Frank v. Savage*, 205 N.C. App. 183, 188, 695 S.E.2d 509, 512 (2010). The Plaintiffs' pleaded facts support a claim for relief under Section 16, which has a three-year statute of limitations, even if they do not support a claim under Section 16A. Thus, the trial court erred in dismissing the claim for injunctive relief.

V. THE STATUTE OF LIMITATIONS IN SECTION 16A DOES NOT APPLY TO PLAINTIFFS' STANDALONE CLAIM FOR RELIEF UNDER THE DECLARATORY JUDGMENT ACT.

The trial court incorrectly concluded that the statute of limitations in Section 16A applies to Plaintiffs' claim for relief under North Carolina's Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253–267, which has a three-year statute of limitations. *See Chisum v. Campagna*, No. 16 CVS 2419, 2018 WL 3624749, at *5 (N.C. Super. July 27, 2018) (holding that N.C. Gen. Stat. § 1-52(1) sets a three-year statute of limitations for claims under N.C. Gen. Stat. § 1-253). Section 16A's statute of limitations provision only applies to suits "seeking declaratory

relief under *this section*," N.C. Gen. Stat. § 143-318.16A (emphasis added), not to independent claims for relief under other statutes.

The trial court improperly held that Plaintiffs' claim for relief under the Uniform Declaratory Judgment Act was barred by Section 16A's statute of limitations. (R p 259). Even if Defendants are correct in asserting that the statute of limitations period began to accrue in September or October 2021, Plaintiffs' claim under Section 1-253 would not expire until September or October 2024. Therefore, the trial court erred in dismissing Plaintiffs' claim under the Uniform Declaratory Judgment Act.

VI. IF THE 45-DAY STATUTE OF LIMITATIONS APPLIES, PLAINTIFFS CAN STILL BRING THEIR CLAIM REGARDING THE OCTOBER OPEN MEETINGS LAW VIOLATION.

Even if this Court decides that the statute of limitations in Section 16A(b) applies to all of Plaintiffs' claims, their lawsuit was still timely filed regarding the Town's alleged violation of the Open Meetings Law in October 2021. Plaintiffs allege that the violation of the Open Meetings law occurred between 8 October and 11 October 2021. [R pp 14-19]. However, these wrongdoings were not initially disclosed to Plaintiffs until 21 April 2022, when, through a public records request, they gained

access to all of the emails showing that the Majority had met electronically and conducted business. [R11 Supp p 305]. Plaintiffs filed suit 15 days later, on 6 May 2022, well within the 45-day statute of limitations period in Section 16A(b). [R p 3].

A court must determine the date that an action accrues before determining whether that cause of action is barred by the statute of limitations. *Peach v. City of High Point*, 199 N.C. App. 359, 363, 683 S.E.2d 717, 721 (2009). Section 16A requires that a lawsuit brought under that provision "commence[] within 45 days following the *initial disclosure* of the action." N.C. Gen. Stat. § 143-318.16A(b) (emphasis added). The law provides that where the challenged action is recorded in the minutes of the public body, its initial disclosure occurs when the minutes are "first [made] available for public inspection." *Id.* Where, as in this case, the challenged action is not recorded in the minutes of the public body, the "initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken." *Id.*; *see also Coulter v. City of Newton*, 100 N.C. App. 523, 526, 397 S.E.2d 244, 246 (1990) (ruling that "initial disclosure" occurs when the plaintiff first gained knowledge of the action

the lawsuit seeks to have declared null and void). In construing statute of limitations discovery rules, the court must do so "in a manner that effectuates both the policy and purpose behind such a rule." *Black v. Littlejohn*, 312 N.C. 626, 645, 325 S.E.2d 469, 482 (1985).

Here, the October Open Meetings Law violations were not disclosed to Plaintiffs until 21 April 2022. Until the emails were fully disclosed, Plaintiffs did not have an accurate and complete picture of the wrongdoing by the Majority in their decision to censure Councilmembers Boesch and Drum and their development of the text of the censure. (R pp 14-19; 49-238). Plaintiffs requested emails on 4 March 2022 but did not receive the records until 21 April 2022.[7] (R11 Supp pp 275-305). Thus, the Plaintiffs were not aware of the wrongdoing they now challenge until that date.

[7] The Court can take judicial notice of the dates on which public records requests were initiated and completed. A court can take judicial notice of facts that are readily determinable by "sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C–1, Rule 201(b). "Judicial notice may be taken at any stage of the proceeding [,] including on appeal." *Id.* § 8C–1, Rule 201(f). Here, the dates on which the public records were provided are included on the public records themselves, which were provided by a government employee. The source is credible and the date is objective and easily verifiable.

Defendants vaguely allege that Plaintiffs learned of the wrongdoing in October 2021 because Mr. Drum corresponded with another councilmember to discuss whether the emails violated any laws. However, a non-lawyer's mere suspicion of wrongdoing is not equivalent to receiving copies of documents that disclose a legal wrong. This is especially true when the wrong involves actions shrouded in secrecy. While a plaintiff in a battery case immediately learns of the defendant's wrongdoing, a plaintiff in an open meetings case often cannot quickly discern the wrongdoing, especially when the wrongdoer tries to conceal such wrongdoing by omitting it from the public minutes.

Such a situation applies here. The Village Council deliberately misled Councilmember Boesch and the rest of the public about the origin of the censure. In a public meeting on 12 October 2021, Mayor Strickland falsely stated that Councilmember Hogeman had worked alone on the censure and omitted any reference to the exchange of emails in which he and Mayor Pro Tem Judy Davis had participated. (R p 21). His statement obscured the wrongdoing that occurred. Therefore, the wrongdoing at issue in this case was not initially disclosed to Plaintiffs

until they received the documents from the public records request on 21 April 2022.

Delaying the date of initial disclosure until 21 April 2022 also facilitates greater harmony between the Open Meetings Law and the North Carolina Rules of Civil Procedure. The Rules prohibit mere speculation and gossip from forming the basis of a legal claim. Instead, Rule 8 requires plaintiffs to bring claims that are sufficiently particular, and Rule 11 requires that attorneys only sign pleadings that are grounded in fact.

Defendants, however, argue that Plaintiffs' mere suspicion of wrongdoing *required* them to bring suit. Such a result is incompatible with the Rules of Civil Procedure, since it would incentivize plaintiffs to bring unsubstantiated claims before their statute of limitations period expires. This Court should not put plaintiffs in such a Catch-22.

By undertaking due diligence before filing their claims, Plaintiffs and their counsel lived up to the letter and spirit of the Rules. The Open Meetings Law should not be used to punish them for doing what the Rules encourage and, indeed, require.

VII. THE TRIAL COURT'S ORDER FAILED TO SATISFY SECTION 16A'S PROCEDURAL REQUIREMENTS.

Even if the statute of limitations in Section 16A(b) applies to Plaintiffs' claims, the order of the trial court has procedural defects that require remand. Under Section 16A(b), if a challenged action is unrecorded in a public body's minutes, the trial court "shall determine[]" the date of initial disclosure "based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken." N.C. Gen. Stat. § 143-318.16A. In other words, a court must make findings of fact and conclusions of law to determine when the plaintiff's claim(s) began to accrue. Only then may a court conclude whether Section 16A(b)'s statute of limitations bars a plaintiff's claims. A court's failure to make statutorily required findings constitutes "reversible error" under Section 16A(b). *Knight v. Higgs*, 189 N.C. App. 696, 704, 659 S.E.2d 742, 748 (2008).

The trial court failed to comply with Section 16A(b). The words "initial disclosure" do not appear in the trial court's order granting the Motion to Dismiss. (R p 259). Neither do the words "knew or should have known." *Id.* The trial court granted Defendants' Motion to Dismiss without making *any* findings of fact or conclusions of law as to the initial

disclosure of the challenged actions, as required by Section 16A(b). These failures alone constitute grounds for remand for proceedings to determine the date of initial disclosure.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the court to reverse and remand the trial court's order.

This the 13th day of February 2023.

FIRST AMENDMENT CLINIC AT
DUKE LAW SCHOOL

By: Amanda Martin
C. Amanda Martin

Attorney for Plaintiffs-Appellants
210 Science Drive
Durham, NC 27708
Telephone: 919.613.7142
State Bar No. 21186
amartin@law.duke.edu

I certify that the attorney listed below has authorized me to list her name on this document as if she had personally signed it.

Sarah Ludington
210 Science Drive
Durham, NC 27708

Telephone: 919.613.7048
State Bar No. 19997
ludington@law.duke.edu

Brief Prepared By:
Benjamin Hunt
Certified Law Student under the
Supervision of C. Amanda Martin and
Sarah Ludington
benjamin.hunt@duke.edu

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiffs certifies that the foregoing brief, which is prepared using a 14-point proportionally spaced font with serifs, is fewer than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

Amanda Martin

C. Amanda Martin

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Plaintiffs-Appellants' Brief was filed electronically and served via email pursuant to Rule 26(c) of the North Carolina Rules of Appellate Procedure, addressed to:

Michael J. Newman
michaeln@vancamplaw.com
VanCamp, Meacham & Newman, PLLC
Two Regional Circle
P. O. Box 1389
Pinehurst, NC 28370

Dan M. Hartzog
dhartzog@hartzoglawgroup.com
Dan M. Hartzog Jr.
dhartzogjr@hartzoglawgroup.com
2626 Glenwood Ave., Ste. 305
Raleigh, North Carolina 27608

Michael J. Tadych
mike@smvt.com
Elizabeth J. Soja
beth@smvt.com
Stevens Martin Vaughn & Tadych, PLLC
6300 Creedmoor Road
Suite 170-370
Raleigh, NC 27612

This the 13th day of February 2023.

Amanda Martin

C. Amanda Martin