

NORTH CAROLINA COURT OF APPEALS

CHARLES HEATHERLY; THOMAS SPAMPINATO; W. EDWARD GOODALL, JR.; PAUL STAM; WAKE COUNTY TAXPAYERS ASSOCIATION; and THE NORTH CAROLINA FAMILY POLICY COUNCIL,
Plaintiffs-Appellants,

WILLIS WILLIAMS; and NORTH CAROLINA COMMON SENSE FOUNDATION,
Plaintiff-Intervenors-Appellants,

From Wake County

v.

STATE OF NORTH CAROLINA; CHARLES A. SANDERS; BRYAN E. BEATTY; LINDA CARLISLE, ROBERT A. FARRIS, JR., JOHN R. MCARTHUR, JIM WOODWARD, AND ROBERT W. APPLETON, Members of the North Carolina Lottery Commission, in their official capacity; NORTH CAROLINA LOTTERY COMMISSION; THOMAS N. SHAHEEN, Executive Director of the North Carolina Education Lottery, in his official capacity; MICHAEL F. EASLEY, Governor of the State of North Carolina, in his official capacity; RICHARD H. MOORE, Treasurer of the State of North Carolina, in his official capacity.
Defendant-Appellees.

DEFENDANT-APPELLEES' BRIEF

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DEFENDANT-APPELLEES' BRIEF

QUESTIONS PRESENTED

- I. DID THE TRIAL COURT ERR WHEN IT ENTERED JUDGMENT FOR DEFENDANTS ON THE GROUNDS THAT THE LOTTERY ACT DOES NOT CONSTITUTE LEGISLATION WITHIN THE PURVIEW AND MANDATES OF ARTICLE II, SECTION 23 OF THE CONSTITUTION OF NORTH CAROLINA?
- II. DID THE TRIAL COURT ERR IN HOLDING THAT THE CORPORATE PLAINTIFFS LACKED STANDING TO PROSECUTE THEIR CLAIMS?
- III. DID THE TRIAL COURT ERR IN ASSESSING COSTS AGAINST PLAINTIFFS AND PLAINTIFF-INTERVENORS?
- IV. DID THE TRIAL COURT ERR IN FAILING TO ENTER JUDGMENT FOR DEFENDANTS ON THE GROUNDS THAT PLAINTIFFS' AND PLAINTIFF-INTERVENORS' CLAIMS WERE BARRED BY LACHES?

STATEMENT OF THE CASE

This matter is before the Court on plaintiffs' and plaintiff-intervenors' appeals from the Order of 21 March 2006 in the Wake County Superior Court, the Honorable Henry W. Hight, Jr., entering judgment for defendants, dismissing for lack of standing the claims of the non-individual plaintiffs and plaintiff-intervenors, and assessing costs against both the plaintiffs and plaintiff-intervenors. (R pp. 1, 446-57) The matter was heard on the merits, defendants' motion to dismiss as to most counts having previously been denied. (R pp. 279-82) The trial court had also previously denied plaintiffs' motion for preliminary injunction. (R pp. 276-78)

The original plaintiffs brought this action on 15 December 2005 seeking to have the trial court declare unconstitutional, and enjoin the implementation of, the North Carolina Lottery provisions, Chapter 344 of the 2005 North Carolina Session Laws (hereafter the "Lottery Act"), amended by Part XXXI of Chapter 276

of the 2005 Session Laws. The original plaintiffs are three citizens and residents of Wake County, one citizen and resident of Union County, plus two non-profit organizations, the Wake County Taxpayers Association and the North Carolina Family Policy Council. (R pp. 3-25 & exhibits pp. 26-107)

Plaintiffs claim the Lottery Act was enacted in violation of Article II, Section 23 of the Constitution of North Carolina, requiring that bills raising money on the credit of the State, pledging the faith of the State, or imposing a tax, be read in the General Assembly on three separate days. Plaintiffs originally claimed also that the Lottery Act violated Article V, Section 7 of the North Carolina Constitution by providing for the drawing of money from the State Treasury without the necessary appropriation having been made by law. (R pp. 15-23)

Defendants - the State itself and the North Carolina Lottery Commission, plus seven Lottery Commission members, the Executive Director of the Lottery, the Governor, and the State Treasurer, all sued in their official capacities - answered the original complaint on 3 March 2006. Defendants denied that the Lottery Act was in any way within the scope of Article II, Section 23 of the Constitution or that the Act was enacted or implemented in violation of the Constitution. Defendants further raised affirmative defenses, including the defense of laches. (R pp. 283-302 & exhibits pp. 303-96) On 14 February 2005, the trial court allowed intervention in this action by three plaintiff-intervenors, including a citizen and resident of Martin County, plus North Carolina Fair Share and North

Carolina Common Sense Foundation, two non-profit organizations. (R pp. 174-75) In their complaint in intervention, the plaintiff-intervenors raised claims essentially identical to those of plaintiffs. (R pp. 176-99 & exhibits pp. 200-75) On 3 March 2006, defendants answered plaintiff-intervenors' complaint, denying that the Lottery Act was unconstitutionally enacted or implemented and raising the same defenses as they had against the original plaintiffs. (R pp. 397-417)

Plaintiffs moved on 15 March 2006 to amend their complaint with regard to the allegations as to one of the plaintiffs, plaintiff Spampinato. (R pp. 418-22) The motion was allowed orally in open court on 20 March 2006. (T p.3) Defendants' oral motion to have the amended complaint (R pp. 423-45) be deemed answered in the same manner as the original complaint, except to admit the new allegation concerning plaintiff Spampinato, was allowed. (T p. 4)¹

On 29 March 2006 plaintiffs gave timely notice of appeal from the trial court's 21 March 2006 Order and judgment. (R pp. 458 - 60) On 4 April 2006 plaintiff-intervenors gave timely notice of appeal from the 21 March 2006 Order. (R pp. 461-63) On 10 April 2006 defendants gave notice of appeal from the 15 February 2006 order denying their motion to dismiss. (R pp. 464-66)

On 30 May 2006 the parties stipulated to the Record on Appeal.

¹ Future citations to the Complaint in this brief will be to the original Complaint, not the amended Complaint, because the amended Complaint made only a single change to the allegations. Furthermore, in order to reduce the size of the Record, the parties stipulated that the attachments to plaintiffs' amended complaint did not need to be replicated in the record. (R p. 482)

The Record on Appeal was filed in the Court of Appeals on 8 June 2006 and docketed on 15 June 2006. Also on 15 June 2006, plaintiffs and plaintiff-intervenors filed in the Supreme Court of North Carolina a Petition for Discretionary Review Under G.S. 7A-31(b) and Appellate Rule 15, seeking review by the Supreme Court prior to determination by the Court of Appeals. That petition was denied by the Supreme Court on 15 December 2006. On 10 January 2007, the defendants filed in the Court of Appeals a withdrawal of their notice of appeal. The Court of Appeals entered an order on 16 January 2006 allowing the withdrawal of defendants' notice of appeal.

STATEMENT OF THE FACTS

The Lottery Act was proposed in House Bill 1023 of the 2005 General Assembly. A Committee Substitute was given a favorable report in the House of Representatives on 6 April 2005, and it passed its second and third readings in the House on that day. On 11 August 2005 the General Assembly enacted Senate Bill 622, the Current Operations Appropriations Act, Chapter 276 of the 2005 Session Laws; in Part XXXI of Chapter 276, the General Assembly amended House Bill 1023, so that if and when House Bill 1023 was ratified, it would be as amended by Chapter 276 (the "Budget Act"). On 30 August 2005 the Senate considered the Committee Substitute of House Bill 1023, and it passed its second and third readings that day. (R pp. 9-10, 288-89) Thus, the ratified House Bill 1023, as amended by Part XXXI of Chapter 276, is the Lottery Act which plaintiffs seek to de-rail in this litigation.

The Lottery Act establishes the North Carolina State Lottery Fund as an enterprise fund within the State Treasury. N.C.G.S. § 18C-160 (2006). Overseeing the Lottery is a Lottery Commission, located within the Department of Commerce for budgetary purposes, but otherwise functioning as "an independent, self-supporting, and revenue-raising agency of the State." N.C.G.S. § 18C-110 (2006). The Commission appoints a Director, who operates and administers the Lottery and serves as Secretary to the Commission. N.C.G.S. § 18C-120 (2006). The Commission may choose from a variety of types of lottery games to be used in the North Carolina Lottery, other than ones using certain types of video gaming machines. N.C.G.S. § 18C-130 (2006); *see also* N.C.G.S. § 18C-103(4) (2006). Lottery revenues are to be allocated 50% to prizes, at least 35% to the Education Lottery Fund, no more than 8% to Lottery expenses, and no more than 7% to Lottery retailers. N.C.G.S. § 18C-162 (2006). From the Education Lottery Fund, 5% goes to the Education Lottery Reserve Fund. Of the rest, 50% goes to reduction of class sizes in early grades and pre-kindergarten programs for at-risk four-year-olds, 40% goes to the Public School Building Capital Fund, and 10% goes to the State Educational Assistance Authority for college and university scholarships. N.C.G.S. § 18C-164(b)-(c) (2006). The Lottery Commission is required to withhold for state income tax purposes 7% from winnings reportable to the Internal Revenue Service, and revenue laws have been amended to make it clear that Lottery winnings are taxable income for non-residents winning Lottery prizes in North Carolina. N.C.G.S. §§ 105-134(2), 105-

134.5(b), 105-163.2B (2006). The State Treasurer was directed to lend up to \$10 million to the Lottery Commission for start-up expenses, at an interest rate comparable to private market short-term rates, with all loan money to be repaid within twenty-four months from the effective day of the Act. 2005 N.C. SESS. LAW 344 § 15.

Plaintiffs brought this action contending that the Lottery Act was enacted in violation of Article II, Section 23 of the Constitution of North Carolina. Article II, Section 23 reads as follows:

Sec. 23. Revenue bills.

No law shall be enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and shall have been agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

Specifically, plaintiffs claimed that the Lottery Act raises money on the credit of the State (Count One), pledges the faith of the State for payment of the Lottery debts (Count Two), imposes an "implicit tax" by providing that Lottery funds would be spent 35% for funding education and 15% for operation of the Lottery (Count Three), imposes an express tax on residents by requiring withholding of 7% of Lottery winnings for State income tax (Count Four), and creates an express tax on nonresidents by requiring them to pay North Carolina income tax on Lottery prizes (Count Five). As

to each of these counts, plaintiffs alleged that the Lottery Act is unconstitutional because it was not read on three separate days in each house of the General Assembly as is required for legislative acts that fall within the scope of Article II, Section 23. (R pp. 14-23)²

Defendants do not contend that the Lottery Act itself was enacted in accordance with the procedural requirements of Article II, Section 23; instead, defendants deny that the Lottery Act is within the scope of Article II, Section 23. Defendants further deny that the Lottery Act itself or any action pursuant to the Lottery Act violates Article II, Section 23. Moreover, in their Answers to plaintiffs' complaint and to plaintiff-intervenors' complaint, defendants noted that the Budget Act was read three separate times on three separate days in each house and that the yeas and nays on the second and third readings were recorded in both journals for the Budget Act. (R pp. 295-98; 409-13) Some of the language which became part of the Lottery Act, such as provisions regarding income tax, were contained only in the Budget Act. See §§ 31.1(aa), 31.1(bb), 31.1(dd) of Chapter 276 of the 2005 Session Laws & N.C.G.S. §§ 105-134(2), 105-134.5(b), 105-163.2B. The trial court dismissed plaintiffs' and plaintiff-intervenors' Fourth and Fifth claims for relief in granting defendants' motion to dismiss (R pp.

² Plaintiffs also alleged a Count Six, contending that the transfer of funds on loan to the Lottery Commission constituted the drawing of money from the State treasury without an appropriation in violation of Article V, Section 7 of the Constitution of North Carolina. That claim was rejected by the trial court (R pp. 454-56) and has not been made the subject of any appellate argument by plaintiffs.

281-82) and ultimately rejected all plaintiffs', and plaintiff-intervenors', claims as being without merit³. (R pp. 446-57)

STANDARD OF REVIEW

Plaintiffs cite to this Court the standard of review for a dismissal pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1) or (6), contending that the question should be determined according to "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory." *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000). This case, however, is not before the Court based on the granting of a dismissal pursuant to Rule 12(b)(6). The trial court heard defendants' 12(b)(6) motion and denied it except for two claims which are not before this Court. (R pp. 279-82) The trial court then heard and decided the case on the merits, making findings of fact and conclusions of law in its order entering judgment for defendants. (R pp. 446-56) While there were no live witnesses in this case, this was nevertheless a bench trial. Consequently, it is a decision on the merits, not a decision on a 12(b)(6) motion, that is before this Court. Accordingly, the standard of review "is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions

³ The plaintiff-intervenors' complaint essentially tracked the plaintiffs' claims. See R pp. 176-99. Because of the similarity of the claims presented by the plaintiffs and plaintiff-intervenors, defendants' arguments, although focusing on the plaintiffs' arguments and allegations, are intended to encompass the claims and arguments of the plaintiff-intervenors, except as otherwise indicated or when clearly contradicted by the context.

of law and ensuing judgment." *Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (citation omitted), *disc. review denied*, 356 N.C. 434, 572 S.E.2d 428 (2002). *Accord Caldwell v. Branch*, 638 S.E.2d 552, 556 (N.C. Ct. App. 2007). Moreover, "findings of fact made by the trial court have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support them[.] Appellate review of the trial court's conclusions of law is *de novo*." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 52, 620 S.E.2d 222, 226 (2005) (citation omitted), *disc. review dismissed*, 360 N.C. 296, 629 S.E.2d 289 (2006). Additionally, the constitutional issues are determined by the Court *de novo*. *Piedmont Triad Airport Auth. v. Urbine*, 354 N.C. 336, 338, 554 S.E.2d 331, 332 (2001), *cert. denied*, 535 U.S. 971, 152 L. Ed. 2d 381 (2002).

With regard to the 12(b)(1) dismissal of the corporate plaintiffs' claims, the Court's "review of a trial court's decision denying or allowing a Rule 12(b)(1) motion is *de novo* except to the extent that the trial court resolves issues of fact and those findings are binding on the appellate court if supported by competent evidence in the record." *Harper v. City of Asheville*, 160 N.C. App. 209, 215, 585 S.E.2d 240, 244 (2003) (citation omitted). Although there were affidavits offered here, the only real dispute was the determination of plaintiffs' status, not any factual presentations. Consequently, defendants agree with plaintiffs that the issue of the corporate plaintiffs' standing is one for this Court to decide *de novo*.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR WHEN IT ENTERED JUDGMENT FOR DEFENDANTS ON THE GROUNDS THAT THE LOTTERY ACT DOES NOT CONSTITUTE LEGISLATION WITHIN THE PURVIEW AND MANDATES OF ARTICLE II, SECTION 23 OF THE CONSTITUTION OF NORTH CAROLINA.

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(R pp. 469-70, 471-2)

Plaintiffs contend that the Lottery Act constitutes legislation imposing a tax, raising money on the credit of the State, and pledging the faith of the State for payment of a debt. If accurate, this characterization of the Lottery Act would mean that it should have been enacted according to the procedural restrictions contained in Article II, Section 23 of the Constitution. However, plaintiffs are wrong because the Lottery Act does not impose a tax, raise money on the credit of the State, or pledge the faith of the State for payment of a debt. Thus, Article II, Section 23 does not apply, and the trial court correctly entered judgment for defendants.

A. ARTICLE II, SECTION 23 IMPOSES MANDATORY PROCEDURES.

The focus of plaintiffs' complaint is that the Lottery Act falls within the category of legislation addressed by Article II, Section 23 of the Constitution and that it is mandatory that the General Assembly follow the procedural requirements dictated for the enactment of legislation described in that provision. Plaintiffs are right that legislation falling within the scope of Article II, Section 23 must be enacted as the Constitution directs in order for the legislation to be valid. Indeed, "if the entry of the ayes and nays is not actually made on the journal, the

Constitution, speaking with absolute clearness, says that the failure of such entry is *absolutely* fatal to the validity of the act." *Comm'rs v. Snuggs*, 121 N.C. 394, 399, 28 S.E. 539, 541 (1897). Thus, "a literal compliance with the language of that section is a condition precedent and one which must be performed in its entirety before the bill can ever become a law." *Id.* (citing *Bank v. Comm'rs*, 119 N.C. 214, 25 S.E. 966 (1896)).

In this case, plaintiffs' argument is to no avail. That the Lottery Act was not enacted in accordance with the procedures prescribed by Article II, Section 23 is irrelevant because the Lottery Act is not within the scope of Article II, Section 23.

B. THE LOTTERY ACT DOES NOT IMPOSE A TAX.

The heart of plaintiffs' case is their insistence that the Lottery Act imposes a tax on purchasers of Lottery tickets. To the contrary, the Lottery Act does not impose a tax. It simply permits individuals who choose to do so to purchase Lottery tickets in exchange for the possibility of winning prizes, with the "profit" from such sales being used to provide part of the funding for education in North Carolina. Therefore, the trial court correctly determined that the General Assembly was not required to enact the Lottery Act pursuant to Article II, Section 23.

According to plaintiffs, the Lottery Act necessarily creates a tax because it is intended to raise money for education. However, a tax is not defined that easily. For constitutional purposes, the courts should not lightly conclude that every act providing for the payment of a charge or fee of some sort imposes a tax. As explained

by then Judge Orr, "[r]evenue bills, as defined by law, are those that levy taxes *in the strict sense of the word* and are not bills for other purposes which may incidentally create revenue." *N.C. Eastern Mun. Power Agency v. Wake County*, 100 N.C. App. 693, 699, 398 S.E.2d 486, 490 (1990) (quoting *Hart v. Comm'rs*, 192 N.C. 161, 164, 134 S.E. 403, 404 (1926) (emphasis added), *disc. review denied & appeal dismissed*, 329 N.C. 270, 407 S.E.2d 838 (1991)).

The mere fact that Lottery funds are used to support governmental purposes, specifically the education of North Carolina students, does not somehow convert the Lottery into a tax or levy. A "tax" is "a pecuniary charge or levy enforced by government to raise money for the maintenance and expense of government." *N.C. Ass'n of ABC Bds. v. Hunt*, 76 N.C. App. 290, 292, 332 S.E.2d 693, 694, *disc. review denied*, 314 N.C. 667, 336 S.E.2d 400 (1985). Our Supreme Court has described "a tax as 'a charge' levied and collected as a contribution to the maintenance of the general government [It is] imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue."). *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 683, 446 S.E.2d 332, 347 (1994) (citations omitted). As noted by Professor Orth in his book on the North Carolina Constitution, "[a] tax is a forced contribution to government." JOHN V. ORTH, *THE NORTH CAROLINA STATE CONSTITUTION* 88 (1993).

Common sense alone dictates that the Lottery Act does not create a tax. It is not a *levy* of taxes; nor does it *force*

contributions to the government. It is not *imposed* upon North Carolina citizens. No one is required to purchase a lottery ticket; instead, one may do so purely out of personal desire or amusement. If individuals do purchase tickets, they will receive benefits in the form of opportunities to win prizes. It is this receipt of a special benefit, as a *quid pro quo*, so to speak, that distinguishes taxes from non-regulatory charges such as the price to purchase lottery tickets.⁴

The price of a Lottery ticket is analogous to the turnpike tolls which our Supreme Court held were not taxes for purposes of what was then Article II, Section 14 of the Constitution. "Tolls are not taxes. A person uses a toll road at his option; if he does not use it, he pays no toll." *N.C. Turnpike Author. v. Pine Island, Inc.*, 265 N.C. 109, 116-17, 143 S.E.2d 319, 325 (1965). In other words, in both instances, an individual chooses to engage in a totally voluntary activity for which he pays a fee.

Plaintiffs argue that the Lottery Act is distinguishable from the turnpike provisions because, in considering the turnpike

⁴ The *amicus curiae* brief cites this Court to a line of cases distinguishing between regulatory fees and regulatory taxes on the grounds that taxes are for the benefit of the general good whereas regulatory fees are for the regulation of the persons or entities paying the fees. See *San Juan Cellular Tel. Co. v. Public Serv. Comm'n of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992); *State Farm Mut. Auto. Ins. Co. v. Long*, 129 N.C. App. 164, 497 S.E.2d 451 (1998), *aff'd per curiam*, 350 N.C. 84, 511 S.E.2d 303 (1999). No inferences can be drawn from the reasoning of those cases, however, because they reflect the courts' efforts to determine whether particular instances of regulatory fees are taxes or other types of charges. Those cases have nothing to say about legislation such as the Lottery Act, which does not involve a regulatory charge or regulation of any kind.

charges, our Supreme Court noted that "[t]axes are levied for the support of government. . . . [t]olls are the compensation for the use of another's property or improvements made." *Turnpike Author.*, 265 N.C. at 117, 143 S.E.2d at 325. What plaintiffs fail to mention is that that language was quoted from an Indiana decision addressing a similar issue. See *Ennis v. State Highway Comm'n*, 231 Ind. 311, 323, 108 N.E.2d 687, 693 (1952).

In *Ennis*, the Indiana Supreme Court held that its toll road act was not a bill for raising revenue within the meaning of the state constitution. In so doing, the court observed that "[t]he payment of a tax is compulsory and not optional, and it entitles the taxpayer to receive nothing in return, other than the rights of government which are enjoyed by all citizens alike." 231 Ind. 323, 108 N.E.2d at 693. Thus, the Indiana court focused on the toll payment as one for which the payor received a benefit in return, a *quid pro quo* different from the act of simply satisfying one's tax obligations. Since the North Carolina Supreme Court in *Turnpike Authority* was quoting *Ennis* in the language emphasized by plaintiffs, our Court surely intended to communicate the same conclusion as did the *Ennis* court: the voluntary nature of the toll payment made in exchange for receiving a benefit different from simply paying one's taxes established the toll payment as something separate from a tax. The Lottery Act establishes the same type of *quid pro quo* based on a voluntary payment for which one receives a benefit entirely different from satisfying a tax obligation imposed by the government.

Plaintiffs argue that the voluntariness of the transaction is not significant. They strain to compare the profit component of the Lottery ticket to a sales, excise or use tax paid by a purchaser in a voluntary transaction. Plaintiffs are trying to compare apples and oranges. If Jane Doe buys candy from the drugstore, she engages in a voluntary transaction with the drugstore. However, the mandatory sales tax is exacted by the State, a non-party to the transaction, even though it is collected by the vendor. Jane Doe's voluntary transaction is with the drugstore, and the benefit she receives is from the drugstore. In contrast, when Jane Doe buys a Lottery ticket, the ultimate seller is the State, and she pays the price charged by the State. The benefit of receiving a Lottery ticket, and the opportunity to receive winnings from that ticket, come from the State as the result of her voluntary purchase. The part of the purchase price that ultimately ends up being used for education comprises the profit component of the purchase price. The State is allowed, when selling Lottery tickets, to make a profit.

Other courts have taken into consideration the significance of the benefit to the individual in determining whether particular charges constituted taxes for various constitutional provisions. For example, in 1875 the Circuit Court for the Southern District of New York recognized a fundamental aspect of a tax or revenue-raising bill when it ruled that a bill to raise postage rates was not a bill for raising revenue that was required to originate in the house of representatives:

Certain legislative measures are unmistakably bills for raising revenue. These impose taxes upon the people,

either directly or indirectly, or lay duties, imposts or excises, for the use of the government, and give to the persons from whom the money is exacted no equivalent in return, unless in the enjoyment, in common with the rest of the citizens of the benefit of good government. It is this feature which characterizes bills for raising revenue. They draw money from the citizen; they give no direct equivalent in return.

United States ex rel. Michels v. James, 26 F. Cas. 577, 578 (S.D.N.Y. 1875). Similarly, the Oregon Supreme Court in 1895 was faced with the question whether a bill which included fees to be paid to government officials, such as court fees, was a revenue raising bill required to originate in the state house of representatives rather than the senate.

A law which requires a fee to be paid to an officer, and finally covered into the treasury of a county, for which the party paying the fee receives some equivalent in return, other than the benefit of good government, which is enjoyed by the whole community, and which the party may pay and obtain the benefits under the law, or let it alone, as he chooses, does not come within the category of an act for raising revenue, and hence the objection made under this clause of the constitution is not well taken.

Northern Counties Trust v. Sears, 30 Ore. 388, 403, 41 P. 931, 936 (1895).

Because the Lottery Act allows persons to purchase lottery tickets and receive a benefit in return, a benefit not conferred upon citizens generally, the Lottery Act does not impose a tax. Our own courts have recognized the significance of this feature in distinguishing taxes from other types of charges. For example, in holding that municipal corporations could be held liable for assessments imposed for public improvements, despite their constitutional exemption from taxes, our Supreme Court explained:

It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit.

Town of Tarboro v. Forbes, 185 N.C. 59, 61, 116 S.E. 81, 82 (1923).
Accord Raleigh Cemetery Ass'n v. City of Raleigh, 235 N.C. 509, 70 S.E.2d 506 (1952) (following *Town of Tarboro's* reasoning in ruling that burial association's charter exempting it from assessment and taxes did not exempt it from assessments for street improvements). Because the government may charge for benefits received by the persons paying such charges, sewerage fees have been held not to constitute taxes. *Covington v. City of Rockingham*, 266 N.C. 507, 146 S.E.2d 420 (1966). Similarly, landfill fees charged by a county "are neither taxes nor assessments, but are tolls or rents for benefits received by the use of the [landfill]." *Barnhill Sanitation Serv. v. Gaston County*, 87 N.C. App. 532, 541, 362 S.E.2d 161, 167 (1987) (citation omitted), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

Plaintiffs try to escape the principle that a governmental fee or other charge in exchange for conferring a benefit does not constitute a tax by attempting to separate the benefit from the "profit" component. According to plaintiffs, the purchaser of a Lottery ticket receives a benefit from any Lottery winnings, but

not from the statutory provisions that allot the "profit" portion of the Lottery to educational purposes. In other words, plaintiffs are complaining not about the sale of the Lottery tickets *per se*, but about the fact that the Lottery makes a profit and provides funds for educational purposes. Other courts have rejected analogous arguments.⁵

Not only is it clear that the government may charge for benefits received, but it may also in effect make a profit, and use those profits for general governmental purposes, without such charges being converted into taxes. This principle has been repeatedly recognized with regard to utility charges. Thus, a federal district court concluded that the City of Rocky Mount could deliberately set water, sewer, gas and electricity charges at a rate high enough to produce additional revenues to be transferred into its general fund for general governmental purposes. *General Textile Printing & Processing Corp. v. City of Rocky Mount*, 908 F. Supp. 1295 (E.D.N.C. 1995). In that case, the court ruled that Rocky Mount's collection of a profit component in its utility rates did not convert the charges into taxes; consequently, the plaintiff's claim that it had been subjected to discriminatory

⁵ Plaintiffs cite this Court to a case that they contend held that video lottery charges constituted a tax. See *Club Ass'n of West Virginia, Inc. v. Wise*, 156 F. Supp. 2d 599 (S.D. W.Va. 2001), *aff'd per curiam*, 293 F.3d 723 (4th Cir. 2002). That case actually dealt not with the Lottery charges themselves, but rather with licensing fees that were required of persons manufacturing, selling, servicing or operating video lottery games pursuant to the West Virginia lottery laws. The tax at issue in that case was a license tax to engage in any of the activities listed above and was totally unrelated to the purchase of tickets by lottery participants.

taxation in violation of Article V, Section 2(1) of the North Carolina Constitution was rejected. *Id.* at 1310-11. Similarly, New Mexico recognizes that sewer and water charges may properly include a profit component to be provided to the general revenue fund of a city without converting the charges, or even the "profit" component, into taxes. *Apodaca v. Wilson*, 86 N.M. 516, 525 P.2d 876 (1974). See also *United States v. City of Columbia*, 914 F.2d 151, 155-56 (8th Cir. 1990) (City of Columbia could charge United States for water and electricity, including an intentional profit component paid into the general revenue fund, without converting fees into taxes, for which the United States could not be charged).

Clearly, courts have recognized that the sale by the government of a service or benefit to a citizen does not constitute a tax, even if the governmental entity effectively makes a profit from the transaction. As stated in *City of Columbia*:

While the payment of a tax does not transfer ownership, the payment of a purchase price . . . transfers ownership of water and electricity. And, while failure to pay a tax results in civil and sometimes criminal penalties, the failure to pay a portion of a utility rate results in termination of services. The United States' obligation to pay the [charge] arises only from its consensual purchase of the City's property; it does not arise automatically, as does tax liability, from the United States' status as a property owner, resident, or income earner. When the United States purchases water, electricity, and related services, and then pays the utility bill, it does so as a vendee pursuant to its voluntary, contractual relationship with the City. The City imposes the charge not in its capacity as a sovereign, but as a vendor of goods and services.

914 F.2d at 155-56. *Accord Stop Exploiting Taxpayers v. Jones*, 211 Ariz. 576, 579, 125 P.3d 396, 399 (2005) (rejecting contention that city's increase of utility rates constituted a tax increase, even

if the utility rates included a profit component designed to fund general municipal budget needs).

In this case, plaintiffs complain about voluntary purchases of Lottery tickets for which the Lottery Commission charges an amount that includes a profit component. No tax is being levied or imposed; instead, the Lottery engages in a voluntary transaction with individuals who are willing to pay for the chance of winning money from the Lottery. The Lottery and the State collect funds not as a sovereign imposing taxes, but as a vendor of Lottery tickets. Because the Lottery Act does not impose a tax, the General Assembly was not required to enact the Lottery Act pursuant to the restrictions of Article II, Section 23 of the Constitution, and the trial court properly entered judgment for defendants on plaintiffs' "implicit tax" claim in Count Three of their complaint.

C. THE LOTTERY ACT NEITHER PLEDGES THE FAITH OF THE STATE FOR PAYMENT OF A DEBT NOR ATTEMPTS TO RAISE MONEY ON THE CREDIT OF THE STATE.

Plaintiffs argue that the Lottery Act also comes within the scope of Article II, Section 23 by raising money on the credit of the State and pledging the faith of the State. Plaintiffs are wrong. The Lottery Act was in no way "enacted to raise money on the credit of the State, or to pledge the faith of the State directly or indirectly for the payment of any debt." N.C. CONST. art. II, § 23. Instead, it merely provides for the implementation of the Lottery, including the payment of winnings according to the terms of the Lottery games. Such provisions have nothing to do with raising money on the credit of the State or pledging the faith of the State for payment of a debt.

As explained by Professor Orth, "[r]aising money on the credit of the state or pledging its faith implicates borrowing - that is, securing money in the present by promising future repayment, usually with interest." JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 88 (1993). Raising funds by selling tickets and paying a percentage of those funds as winnings have nothing to do with borrowing money, which is the focus of Article II, Section 23. If plaintiffs' reasoning were correct, then every statute that provided for the State to pay money for any purpose would fall within the scope of Article II, Section 23. As pointed out long ago by the Supreme Court of Mississippi in addressing the applicability of a similar constitutional provision:

It will certainly not be contended, that an act passed by the legislature for the purpose of authorizing contracts to be made in behalf of the State, for the purchase of property, for the erection of public buildings, or for the construction of works of internal improvement, or for many other purposes, by the terms of which the State would be bound for the payment of money, can be considered a law passed to pledge the faith of the State "for the payment or redemption of a debt," and, therefore, within the operation of the constitutional provision.

State v. Johnson, 25 Miss. 625, 742, 1853 Miss. LEXIS 34, * 209 (1852) (quoting MISS. CONST. art. 7, § 9). Article II, Section 23 cannot and should not be distorted to apply to every piece of legislation that provides for the State to pay money.

The North Carolina Supreme Court has also ruled on previous occasions that various acts providing for the payment of money did not come within Article II, Section 23 or its predecessors. In *Battle v. Lacy*, 150 N.C. 573, 64 S.E. 505 (1909), the Court

rejected the idea that an act providing for the payment of money to an estate in settlement of a claim fell within the scope of what was then Article II, Section 14 of the Constitution. "It is not pledging the faith of the State for the General Assembly to order the State Treasurer to pay a debt with money." *Id.* at 575, 64 S.E. at 506. Similarly, "a lease made for an adequate consideration is not a loan of the credit of the state or of the agency making such lease." *N.C. State Ports Auth. v. First-Citizens Bank & Trust Co.*, 242 N.C. 416, 424, 88 S.E.2d 109, 114 (1955). In other words, the Court has recognized that Article II, Section 23 is not directed to legislation which merely provides for the payment of money under certain circumstances, but instead is aimed at legislation providing for the borrowing of money or pledging the State's liability for payment of debts. The Lottery Act does neither.

Should there be any doubt about the applicability of Article II, Section 23, the General Assembly dispelled such doubt by specifying that the Lottery "Commission shall be an independent, self-supporting, and revenue-raising agency of the State. The Commission shall reimburse other governmental entities that provide services to the Commission." N.C.G.S. § 18C-110. By this language, the General Assembly made it very clear that the Lottery Fund is separate and independent financially. Contrary to plaintiffs' argument, Chapter 18C cannot be read to authorize payment of Lottery prizes from other State funds.

Because the Lottery Act makes the Lottery an independent and self-supporting agency, plaintiffs have no claim under Article II,

Section 23. See *Turnpike Author.*, 265 N.C. at 117, 143 S.E.2d at 325 (holding that the credit of the State was not pledged by the issuance of turnpike authority bonds because the bonds were "payable solely from revenues from the turnpike" and the enabling legislation made it clear that they were not issued on the credit of the State). See also *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 54, 175 S.E.2d 665, 679 (1970) (where housing authority legislation specified that obligations did not create a debt or pledge faith and credit of the State, but were payable from the assets and revenues of the Corporation, no debt was created within the meaning of the Constitution).

Plaintiffs argue, however, that the language in the Lottery Act is insufficient because it does not state expressly that the Lottery provisions shall not be deemed a debt of the State or a pledge of the faith or credit of the State, in contrast to the language in the legislation at issue in the *Turnpike Authority* case. In the *Turnpike Authority* case, and most others addressing Article II, Section 23's provisions regarding the credit of the State or pledging the faith of the State for any debt, the legislation in question has authorized the issuance of some sort of bonds. Yet, even in those cases, the Court found Article II, Section 23 inapplicable if sufficient care had been taken to spell out that the State would not be liable beyond the sources of revenue expressly dedicated to payment of the bonds. Here, no bonds are involved, and there is no basis for claiming that any attempt to raise money on the credit of the State has been made or that the

faith of the State has been pledged for the payment of any debt.

In a case instructive on the question of what language the North Carolina Supreme Court deems sufficient to insulate the State from any claim under Article II, Section 23, *Foster v. N.C. Medical Care Comm'n*, 283 N.C. 110, 195 S.E.2d 517 (1973), the Court addressed legislation providing for lease agreements for hospital facilities. In *Foster*, the Court noted that, "[h]ad this provision of the Act made such obligation of the lessee payable only from revenues derived from the leased facilities, the above cited decisions [such as the *Turnpike Authority* case and *Martin v. N.C. Housing Corp.*] relating to what constitutes a debt of the State would be applicable." *Foster*, 283 N.C. at 122, 195 S.E.2d at 526. Nowhere in *Foster* does the Court suggest that any language is necessary beyond the very kind of language contained in the Lottery Act.

Plaintiffs are simply wrong in contending that the Lottery Act falls within Article II, Section 23's provisions concerning raising money on the credit of the State or pledging the faith of the State for the payment of a debt. The trial court correctly entered judgment for defendants, and this Court should affirm the trial court's order and judgment.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT THE CORPORATE PLAINTIFFS LACKED STANDING TO PROSECUTE THEIR CLAIMS.

Assignments of Error Nos. 1-2, 15, 21-22
(R pp. 468, 471-2)

Plaintiffs contend that the trial court erred in ruling that the "corporate plaintiffs" (the North Carolina Family Policy

Council or "NCFPC") and the Wake County Taxpayers Association ("Taxpayers Association"), as well as the corporate intervenor-plaintiff North Carolina Common Sense Foundation, lacked standing to bring this action. Despite plaintiffs' arguments, the trial court's ruling was correct and should be affirmed by this Court.

Essential to a court's jurisdiction over any claim, including one brought for a declaratory judgment, is "an actual or real existing controversy between parties having adverse interests in the matter in dispute." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 338, 323 S.E.2d 294, 303 (1984). See also *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) (actual controversy is a jurisdictional prerequisite for declaratory judgment action). Unless they can show they have suffered or are in danger of suffering an actual injury, the corporate plaintiffs cannot show they have "a sufficient stake" in the matter to allow them to seek adjudication. *American Woodlands Indus. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002), *disc. review denied*, 357 N.C. 61, 579 S.E.2d 282 (2003).

Plaintiffs argue that each of the organizational plaintiffs has standing in its own right. As they point out, an organization may have standing to bring a lawsuit as would any other party. See *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 169, 552 S.E.2d 220, 226-27 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002) (homeowners' association was entitled to participate in litigation on its own behalf because its duty to maintain roads within the subdivision was affected by fence at

issue in lawsuit). Plaintiffs, however, have not made allegations which would support standing for the corporate plaintiffs and intervenor-plaintiff. Their allegations (and affidavits) merely establish that they are organizations interested in monitoring and lobbying as to certain types of governmental and policy issues, and the Lottery falls within the scope of their interests. (R p. 6 ¶¶ 8-9, 178-79 ¶ 6; 162-72) As non-profit corporations, they apparently do not pay income or property taxes, but only secondary taxes such as telephone taxes and cable taxes. They do not allege that they will purchase Lottery tickets.

Plaintiffs' attempt to rely on the recent case of *Goldston v. State of North Carolina*, 637 S.E.2d 876, 2006 N.C. LEXIS 1300 (N.C. Dec. 15, 2006), is misplaced. "Only those persons may call into question the validity of a statute [sic] who have been injuriously affected thereby in their persons, property or constitutional rights." *Goldston v. Harrington*, 2006 N.C. LEXIS 1300, at * 19 (quoting *Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962)). What *Goldston* concluded was that "a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds." *Id.*, at *14 The corporate plaintiffs do not claim they will pay the Lottery charges they insist on calling a tax. Nor do they claim they pay general State taxes, such as income taxes, that might be affected under plaintiffs' strained theory that somehow State funds other than the Lottery funds themselves might be utilized to pay Lottery winnings. Plaintiffs' theory boils down

to the notion that a tax-exempt organization which opposes a governmental action on policy grounds should automatically have standing to challenge that action. No support exists for that theory, and this Court should not expand the concept of standing to such an extreme limit.

Plaintiffs also argue that they have representative standing. In *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), the Supreme Court held that

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Id. at 130, 388 S.E.2d at 555 (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 393 (1977)).

The non-profit corporations also fail the *River Birch* test. Neither the complaints nor the affidavits of the corporate taxpayers in fact establish that any of their members will purchase Lottery tickets. (R p. 6 ¶¶ 8-9, 162-72, 178-79 ¶ 6) As to the NCFPC and the Common Sense Foundation, the interests which the plaintiffs purportedly seek to protect in this case do not appear to be germane to the organizations' purposes. The alleged interests the plaintiffs ostensibly are protecting relate to the supposed imposition of a tax, raising money on the credit of the State, and pledging the faith of the State for payment of debts, all without complying with Article II, Section 23 in the enactment of the

Lottery Act. These issues hardly seem legally germane to the "family values" with which the NCFPC is concerned (R p. 6 ¶ 9) or even the "public policy research" which is the apparent purpose of the Common Sense Foundation. (R pp. 178-79 ¶ 6)

The Taxpayers' Association at least describes itself as having a purpose related to taxes, specifically the following: "to monitor the use of taxes, to initiate action to reduce excessive taxation, to eliminate wasteful spending, to encourage the wise and common sense use of taxes at all levels of government, and to monitor revenue bills in the General Assembly." (R p. 6 ¶ 8) This vague statement of purpose is only marginally tied in to the issues of this lawsuit. Moreover, the mere fact they have taxpayers of some sort as members (R p. 164 ¶ 6) is hardly sufficient to bootstrap the Taxpayers' Association into a position of standing to challenge the Lottery's enactment. Plaintiffs make no allegations of any particular type connected to the potential purchase of Lottery tickets or the issues of this lawsuit. Instead, they wish to use their positions as public policy and lobbying organizations to manufacture standing. This Court should reject their argument and affirm the trial court's decision.

III. THE TRIAL COURT DID NOT ERR IN ASSESSING COSTS AGAINST PLAINTIFFS AND PLAINTIFF-INTERVENORS.

____ Assignments of Error Nos. 3-8, 23-24
(R pp. 468-69, 472)

Plaintiffs argue that the trial court improperly assessed costs against both plaintiffs and plaintiff-intervenors. They contend that the trial court abused its discretion and erred as a

matter of law in doing so. Plaintiffs are wrong, and this Court should so rule.

Pursuant to N.C.G.S. § 1-263, the trial "court may make such award of costs as may seem equitable and just" in a declaratory judgment proceeding. Accordingly, "[i]t was within the trial court's discretion under this statute to apportion costs as it deemed equitable." *City of New Bern v. New Bern-Craven County Bd. of Educ.*, 338 N.C. 430, 444, 450 S.E.2d 735, 743 (1994). Indeed, in interpreting the court's authority under N.C.G.S. § 6-20, which allows the trial court to determine costs within its discretion, this Court has held that such decisions are not reviewable. See *Castle McCulloch, Inc. v. Freedman*, 169 N.C. App. 497, 504, 610 S.E.2d 416, 422 ("[w]here the court has taxed costs in a discretionary manner its decision is not reviewable") (citation omitted), *aff'd per curiam*, 360 N.C. 57, 620 S.E.2d 674 (2005). *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 166, 695, 510 S.E.2d 690, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 70 (1999).

In this case, plaintiffs have made no showing that the trial court abused its discretion or that it erred as a matter of law. No specific costs have been submitted and awarded, so this appeal does not present the Court with any question as to the appropriateness of a particular type of cost. Plaintiffs' unsupported argument that they should not be required to pay costs has no basis in law, and this Court should affirm the trial court's award of costs to defendants.

IV. THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT FOR DEFENDANTS ON THE GROUNDS THAT PLAINTIFFS' AND PLAINTIFF-INTERVENORS' CLAIMS WERE BARRED BY LACHES.

Defendant-Appellees' Cross-Assignments of Error Nos. 1-2
(R p. 475)

Defendants submit that the trial court should have ruled in defendants' favor on the grounds that this action is barred by laches. Because the trial court made all the findings of fact that establish the existence of laches, it erred in refusing to dismiss the lawsuit on the grounds of laches. Defendants raise this issue pursuant to their cross-assignments of error (R p. 475) as an alternative basis to support the judgment in their favor pursuant to Rule 10(d) of the North Carolina Rules of Appellate Procedure.

Laches applies "where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim." *Taylor v. Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976). The fact that plaintiffs allege unconstitutional governmental action does not bar the applicability of laches to their claims. *Cannon v. City of Durham*, 120 N.C. App. 612, 463 S.E.2d 272 (1995), *disc. review denied*, 342 N.C. 653, 467 S.E.2d 708 (1996); *Franklin County v. Burdick*, 103 N.C. App. 496, 405 S.E.2d 783 (1991), *cert. denied*, 332 N.C. 147, 419 S.E.2d 570 (1992).

For laches to occur, a plaintiff must have delayed to the disadvantage, injury or prejudice of a defendant. The amount of delay that constitutes laches depends upon the facts and

circumstances of each case. *Teachey v. Gurley*, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938); *Capps v. Raleigh*, 35 N.C. App. 290, 298, 241 S.E.2d 527, 532 (1978). As to prejudice, a substantial change in a defendant's economic, legal, and planning positions in reliance on the challenged action, such as the Lottery Act in this case, is sufficient for laches to apply. For example, a defendant's expenditure of more than \$600,000 for grading, paving, contracting for services and acquisition of property, and entering into legal obligations for the expenditure of substantial additional sums, constituted sufficient prejudice for laches to apply as a matter of law in *Capps*. 35 N.C. App. at 299, 241 S.E.2d at 532. Further, in *Save Our Schs. of Bladen County, Inc. v. Bladen County Bd. of Educ.*, 140 N.C. App. 233, 535 S.E.2d 906 (2000), the fact that the defendant board of education had entered into contracts that included options to purchase lands demonstrated that the defendant had been prejudiced by the plaintiff's delay. Similarly, our courts recognize that delay in seeking a determination of the invalidity of a zoning ordinance until after expenditures have been incurred in reliance thereupon constitutes laches, barring judicial relief. *Taylor*, 290 N.C. at 625, 227 S.E.2d at 586.

This Court has also said that laches works as a bar to a claim only when the claimant knew of the existence of the grounds for the claim. *Abernethy v. Boone Bd. of Adjustment*, 109 N.C. App. 459, 427 S.E.2d 875 (1993); *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 397 S.E.2d 657 (1990).

All of the prerequisites for laches exist in this case.

Defendants asserted laches in their Answers to both complaints (R pp. 301 ¶ 5, 416 ¶ 5). In support of that defense, they filed an Affidavit executed by Thomas Shaheen, Executive Director of the Lottery. (R pp. 391-94) That affidavit established that over 60 employees, several of whom came from other states, had undertaken employment for the Lottery. Moreover, the Lottery had expended more than \$700,000 for such purposes as salaries, temporary housing, office space, furniture, and supplies. In addition to a \$1.2 million contract for background investigations of applicants wishing to sell lottery tickets, the Lottery had awarded two major contracts to GTECH Corporation to provide and install all of the hardware, software and communication components for the lottery gaming system, the instant ticket validation system, and related services. As of 7 February 2006, the Lottery had received application fees from point-of-sale applicants totaling more than \$195,000, and background checks of those applicants, for which the Lottery is obligated to pay, were ongoing.

The evidence is uncontroverted that plaintiffs were personally or constructively aware for months of the alleged constitutional deficiency of which they complain, and yet they waited to file their complaints. Their own allegations and affidavits establish their presence at, or awareness of, the enactment of the legislation and the consideration, at the time of the Lottery Act's enactment, of the very constitutional issues they assert in this litigation. (R pp. 6 ¶ 9, 135-47) Further, plaintiffs presented the affidavit of J. Russell Capps as President of plaintiff Taxpayers'

Association. Mr. Capps was a plaintiff in *Capps*, 35 N.C. at 298, 241 S.E.2d at 532, in which summary judgment was entered against the plaintiffs on grounds that their claims were barred as a matter of law by the doctrine of laches; he, at least, should have been well aware of the need to act promptly to avoid laches.

In sum, plaintiffs were in a position to be well aware of the enactment of the Lottery Act during its consideration and at the time of its enactment. Nevertheless, they waited 3½ months to file their lawsuit, and another 2 weeks to seek injunctive relief to try to block implementation of the Lottery Act. The trial court made explicit findings that the Lottery Commission had hired employees, expended funds, and entered into contracts, that the money could not be unspent, that the reliance of persons on those contracts could not be dismissed, and that many people had altered their positions in reliance on the Lottery Act. (R p. 451 ¶¶ 42-47) The trial court further found that plaintiffs had actual or constructive knowledge of the claims and efforts to implement the Lottery Act and that they had shown no justification for delay in initiating this lawsuit. (R p. 451 ¶¶ 48-49)

The trial court's findings of fact establishing the existence of laches were fully supported by the record and are therefore conclusive on appeal. *Sunbelt Rentals*, 174 N.C. App. at 52, 620 S.E.2d at 226. Nevertheless, the trial court inexplicably declined to dismiss the litigation on grounds of laches. (R p. 452 ¶ 50) When a trial court makes findings that establish defendant's claim, as here, and do not support its judgment, its contrary ruling must

be reversed. *Dean v. Hill*, 171 N.C. App. 479, 484, 615 S.E.2d 699, 702 (2005); *Mayberry v. Home Ins. Co.*, 264 N.C. 658, 666, 142 S.E.2d 626, 632-33 (1965). Because the trial court's "finding" that the litigation should not be dismissed is not supported by the evidence or its other findings of fact, this Court should hold that the action was barred by laches.

CONCLUSION

For all the reasons discussed above, defendants submit that the trial court properly entered judgment for defendants, and this Court should affirm the ruling and judgment below or determine that judgment should have been entered in defendants' favor on the grounds of laches.

Respectfully submitted, this the 19th day of February, 2007.

ROY COOPER
Attorney General

Electronically submitted,
Norma S. Harrell
Special Deputy Attorney General
State Bar No. 6654
nharrell@ncdoj.gov

N.C. App. R. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed.

Electronically submitted,
Ronald M. Marquette
Special Deputy Attorney General
State Bar No. 5739
rmarg@ncdoj.gov

N.C. Department of Justice
Post Office Box 629
Raleigh NC 27602
Telephone: (919) 716-6900

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the foregoing **DEFENDANT-APPELLEES' BRIEF** in the above titled action upon all other parties to this cause by:

[] Transmitting a copy hereof to each said party via facsimile transmittal; and/or

[x] Depositing a copy hereof, first class postage pre-paid in the United States mail, properly addressed to:

Robert F. Orr
Pamela B. Cashwell
Jeanette Doran Brooks
NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW
225 Hillsborough Street, Suite 280
Raleigh, NC 27619
Attorney for Plaintiffs-Appellants

Jack Holtzman, Esq.
NORTH CAROLINA JUSTICE CENTER
224 South Dawson Street
P.O. Box 28068
Raleigh, NC 27611
Attorney for Plaintiff-Intervenors Appellants

Kevin W. Benedict
3200 Beechleaf Court, Suite 500
Post Office Drawer 19764
Raleigh, NC 27619-9764
Attorney for Amicus Curiae Tax Foundation

This the 19th day of February, 2007.

Electronically submitted,
Norma S. Harrell
Special Deputy Attorney General