

APPENDIX

Senate Law and Public Safety Committee
August 8, 2016
Testimony of Assistant Attorney General B. Stephan Finkel

The published notice for this meeting provides that “[a] public hearing will be held in compliance with Article V, Section IV, paragraph 6 of the New Jersey Constitution on the invalidation or prohibition of 48 N.J.R. 377(a), a rule proposal amending N.J.A.C.13:54-2.4[.]” However, Article V, Section IV, paragraph 6 of the New Jersey Constitution specifically requires the Legislature to transmit its concurrent resolution finding a rule or regulation inconsistent with the intent of the Legislature to the Governor and the head of the Executive Branch agency which promulgated, or plans to promulgate, the rule or regulation. That transmittal triggers the next provision, which affords the agency 30 days in which to amend or withdraw the existing or proposed rule or regulation. After that time, the Legislature can take the further step of passing a second concurrent resolution invalidating or disapproving the rule or regulation, after conducting a public hearing and placing a transcript of that hearing on legislators’ desks for 20 days.

As I have advised the Chair by letter, the Legislature did not transmit Senate Concurrent Resolution No. 101 to the Governor, Attorney General or Superintendent of the State Police. Respectfully, we believe this omission makes this proceeding constitutionally infirm, and will render a nullity any subsequent concurrent resolution adopted by the Legislature that purports to invalidate or prohibit the rule or regulation. The requirement of transmittal is no mere formality that can be satisfied by constructive notice or filing of the concurrent resolution with the Secretary of State. As SCR-101 acknowledges, the Constitution explicitly provides the agency proposing the rule with 30 days from the time the Legislature transmits the concurrent resolution to amend or withdraw the rule or regulation; that transmittal has yet to occur, and any legislative actions – such as this public hearing – that are taken in furtherance of an effort to invalidate or prohibit a rule or regulation prior to transmittal of the first concurrent resolution and passage of 30 days without agency action to amend or withdraw the proposal are, in our view, constitutionally suspect.

As evidence that SCR-101 had been transmitted to the Governor and the agency head as required by the Constitution, the Senate Democratic Office produced three cover letters dated July 5, 2016 (nearly three weeks after the concurrent resolution was filed with the Secretary of State), without any actual indicia of transmittal or acknowledgment of receipt to or from any of the three intended recipients. I have made inquiries that have confirmed that none of the recipients designated by the Constitution have actually received the letters purportedly transmitted to them. In our view, the 30-day clock mandated by the Constitution has not started ticking. It is unfortunate that the Legislature has chosen to pursue a path of unseemly conflict between two coordinate branches of State government and likely litigation, rather than simply transmit the concurrent resolution at this point in time and await further action on the rule proposal within the next thirty days, as the Constitution contemplates, before taking further action.