STATE OF NORTH CAROLINA

Caswell County

CAROLINA SUNROCK LLC, ET. AL

Plaintiffs,

vs.

EDWARD J. DOUGHERTY, ET AL.,

Defendants,

FILED
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CASWELL CO., C.S.C.
BY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 125

DEFENDANT BRYON SHOFFNER'S, ANITA FOUST'S, AND THE THOMAS DAY-CASWELL HOLT BRANCH OF THE NAACP'S MEMORANDUM IN SUPORT OF THEIR MOTIONS TO DISMISS

Defendants Bryon Shoffner, Anita Foust, and the Thomas Day-Caswell Holt Branch of the NAACP (the "NAACP Defendants") respectfully submit this Memorandum in support of their Motions to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

INTRODUCTION

This is a case that plainly should not have been filed. Jurisdiction is completely lacking, as is any law upon which the court can provide relief. And yet, Plaintiffs still insist on forcing the NAACP Defendants into court and threatening them with the costs of this action, solely to intimidate them from speaking out about issues of public importance.

In February of 2021, Bryon Shoffner, Anita Foust, and the Thomas Day-Caswell Holt Branch of the NAACP (collectively the "NAACP Defendants") exercised their constitutionally-protected right to petition their local county government expressing concerns about the development of polluting industries in their community. Plaintiff Carolina Sunrock ("Sunrock") now comes before the Court, complaining that in doing so, these Defendants somehow infringed upon Plaintiffs' "vested rights" to develop parcels of land, and asking this Court to tax the costs

of this action against Defendants. However, Mr. Shoffner, Ms. Foust, and the NAACP have not challenged Plaintiffs' vested rights; rather, they simply asked the county to reconsider the issuance of two local watershed permits, the Anderson Special Non-Residential Intensity Allocation (SNIA) Permit and the Anderson Watershed Protection Permit.

Plaintiffs ignore the fact that the very law they seek to employ as a tool against community activists denies them standing. Furthermore, Plaintiffs ask for a declaratory judgment in the absence of any active controversy between themselves and the NAACP Defendants. The Court consequently lacks jurisdiction to give Plaintiffs relief and cannot provide any legal judgment that would clarify the parties' respective rights. In addition, federal and state constitutional law clearly protects parties who engage in the exact type of constitutional expression Defendants in this suit have engaged in. The suit therefore has no procedural or legal merit.

Consequently, the Court should dismiss Plaintiffs' suit against Bryon Shoffner, Anita Foust, and the Thomas Day-Caswell Holt Branch of the NAACP under North Carolina Rules of Civil Procedure 12(b)(1) and (6).[1]

BACKGROUND

Bryon Shoffner and Anita Foust are residents of Caswell County, where they serve as President and Vice-President, respectively, of the Thomas Day-Caswell Holt Branch of the NAACP. Reverend Shoffner and Ms. Foust as individuals, and the Thomas Day-Caswell Holt NAACP Branch as an organization take an active role in civic affairs in order to preserve the health and safety of community residents.

[1] The NAACP Defendants take no position as to whether this action should be dismissed as to all Defendants in this action.

Over the past three years, the actions of Sunrock have been of particular interest to community advocates, including the NAACP Defendants.[2] Compl. Ex. F at 188; Compl. Ex. G at 189–92.[3] In 2018, Sunrock, a Delaware corporation with its registered office and principal place of business in Wake County, North Carolina, Compl. ¶ 1, identified a parcel of property at 1238 Wrenn Road, Prospect Hill ("Prospect Hill site") as a potential site for the development of a rock quarry and asphalt and concrete plant. *Id.* at ¶ 84. In 2019, Sunrock identified another parcel of property, this one at 12971 North Carolina Hwy 62, Burlington ("Burlington site"), as a potential site for the development of an asphalt and concrete plant. *Id.* at ¶¶ 93–94.

The Caswell County community was immediately concerned about noise, pollution, and effects on groundwater of these potential site developments, and mobilized in response to Sunrock's proposed activities. *See* Compl. Ex. F. In response to community pressure, on January 6, 2020, Caswell County passed a one-year moratorium on the development of polluting industries within Caswell County. *Id.* at ¶¶ 102–03.

During the November 2020 general election, Caswell County held an advisory referendum on whether the county should adopt a county-wide zoning ordinance that would put in place zoning regulations for all unincorporated areas of Caswell County. *Id.* at ¶ 111. While this referendum did not pass, *id.* at ¶ 112, mounting community pressure caused Caswell County on January 4, 2021 to extend the moratorium (first enacted in January 2020) on polluting industries by six months—through July 2020. *Id.* at ¶¶ 102, 114.

[2] All of the facts in Plaintiffs' Complaint are assumed true for the purposes of this memorandum. However, Defendants reserve their right to dispute any facts alleged.

[3] Given the lack of pagination in the complaint and subsequent exhibits, the page number, when cited, refers to the pdf pagination of the complete document.

Meanwhile, Sunrock proceeded with their plans to develop the asphalt and quarrying sites. In January of 2021, Caswell County issued SNIA Permits and Watershed Protection Permits for the Burlington site and the Prospect Hill site. *Id.* at ¶ 129.

This approval was met with swift advocacy by the Caswell County community. During the first week of February 2021, a variety of community members submitted letters to the Caswell County Watershed Review Board protesting the issuance of the permits for the two sites. Compl. Ex. F at 97–188; Comp. Ex. G at 189–92. The majority of these community members submitted a form letter to which they added their personal interest in appealing the issuance of the permits. *See* Compl. Ex. F at 97–187. The form letter argued that the issuance of the permits ran counter to the moratorium on polluting industries, stating:

> The project does not fall under any of the exceptions to the moratorium that the Commissioners adopted and Carolina Sunrock LLC does not have any other legal right to go ahead with the project during the moratorium. Under ordinances in effect when Carolina Sunrock purchased the property, the development required several approvals from the county and an environmental impact review. Carolina Sunrock had not received any county approvals before the moratorium went into effect. *Id.*

On February 3, 2021, Reverend Bryon Shoffner submitted an email to the Caswell County Planning Department appealing the SNIA Permit and the Watershed Protection Permit for the Burlington site. *Id.* at 188. This email did not make use of the form letter the other Defendants used. *Id.* In this email, Reverend Shoffner did not reference the moratorium or Sunrock's vested rights. *Id.* Instead, he directed the Department's attention toward the air pollution the development would generate and quoted the North Carolina Department of Environmental Quality's previously-issued letter denying Sunrock an Air Quality Permit. *See id.*

On February 3, 2021, Anita Foust submitted an email to the Caswell County Planning Department appealing the Watershed Protection Permit. Compl. Ex. G at 189. Like Reverend Shoffner, Ms. Foust did not use the form letter and did not mention the moratorium or Sunrock's

vested rights. *Id.* Ms. Foust instead put Caswell County on notice that the Watershed Protection Permit "has been issued without an environmental assessment (EA) or Environment Impact Study (EIS)." *Id.* at 190. She also pointed out that inspection of the permit was inaccessible to visually challenged people. *Id.*

On February 21, 2021, Bryon Shoffner submitted an email to the Caswell County Commissioners on behalf of Thomas Day-Caswell Holt Branch of the NAACP asking that they include the email as an appeal of the Watershed Protection Permit. *Id.* at 192. As with Reverend Shoffner's email and Ms. Foust's email, this email includes no reference to the moratorium or Sunrock's vested rights. *Id.*

Plaintiffs admit in their complaint that "[d]efendants Anita Foust, Bryon Shoffner, and Day-Holt do not directly reference the moratorium in any written appeal to the Watershed Review Board." Compl. ¶ 139. Nonetheless, they make the conclusory and unsupported allegation that "each of these defendants intends to challenge the issuance of one or more of Sunrock's permits on the grounds that no permit should have been issued to Sunrock while the moratorium was effective" because "Counsel for Defendants Anita Foust, Bryon Shoffner and Day-Holt told counsel representing Sunrock that Anita Foust, Bryon Shoffner, and Day-Holt intend to assert all arguments available to them in their legal challenge of Sunrock's permits, including that the moratorium prohibited their issuance." *Id.* at ¶¶ 139–40. The complaint contains no further evidence to support these allegations.

On October 4, 2021, Sunrock served its Complaint on Reverend Bryon Shoffner and the Thomas Day-Caswell Holt Branch of the NAACP in this suit, and served Ms. Foust on November 6, 2021. Plaintiffs request Declaratory Judgment with respect to their rights.

LEGAL STANDARD

To exercise authority over a case or controversy, a court must first have subject matter jurisdiction. Indeed, "[j]urisdiction of the court over the subject matter of an action is the most critical aspect of the court's authority to act," *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987), and "[i]f a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case for want of jurisdiction." *State v. Linemann*, 135 N.C. App. 734, 739, 522 S.E.2d 781, 785 (1999). For a court to have subject matter jurisdiction to issue a declaratory judgment, "an actual controversy must exist between the parties at the time the pleading requesting declaratory relief is filed." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986).

The North Carolina Supreme Court has determined that a complaint fails to state a claim and will be dismissed under Rule 12(b)(6) when: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 861, 821 S.E.2d 755, 759 (2018). A request for declaratory relief will be dismissed under Rule 12(b)(6) when "the complaint does not allege an actual, genuine existing controversy . . . ." *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234–35, 316 S.E.2d 59, 62 (1984) (citation omitted). For there to be a genuine controversy, litigation must appear unavoidable; "[m]ere apprehension or the mere threat of an action or a suit is not enough." *Id.* at 234, 326 S.E.2d at 62.

ARGUMENT

Plaintiffs' request for declaratory judgment and injunctive relief should be dismissed because statutory law demonstrates that they lack standing, they have not alleged a genuine controversy between Sunrock and the NAACP Defendants, and they in multiple respects fail to state a claim upon which relief can be granted.

First, statutory law governing disputes over local land development ordinances demonstrates that Plaintiffs lack standing to request injunctive and declaratory relief. In their Complaint, Plaintiffs ask for injunctive and declaratory relief under Section 160D-1403.1 of the North Carolina General Statutes, which establishes procedures for disputes regarding land development. Compl. ¶ 151. Section 160D-1403.1 only confers standing upon parties challenging a final administrative decision. N.C.G.S. § 160D-1403.1(b). Plaintiffs cannot bring forth any such challenge because the matter is currently on appeal under Section 160D-405, Compl. ¶¶ 133–53, and Plaintiffs have not received an adverse ruling from an administrative official, *see* N.C.G.S. §160D-1403.1(a).

Second, the NAACP Defendants are the incorrect parties to this lawsuit. Statutory law clearly shows that the local development ordinance administrators, not individual citizens, are the correct Defendants. N.C.G.S.§ 160D-1401. Additionally, Plaintiffs do not demonstrate a genuine controversy between themselves and the NAACP Defendants under the Declaratory Judgment Act, which both defeats jurisdiction and renders the court unable to provide any relief. *Gaston,* 311 N.C. at 234.

Third, Plaintiffs have not stated a claim upon which the Court can grant relief. The United States Constitution and the North Carolina Constitution protect Defendants' constitutional right to petition their elected official for redress of grievances. *Cheryl Lloyd Humphrey Land Inv. Co.,*

LLC v. Resco Prods., 377 N.C. 384, 384–85, 858 S.E.2d 795, 797 (2021). Defendants have done nothing other than engage in constitutionally-protected activity, which forecloses suit.

I. The Court Should Dismiss Plaintiffs' Claims Because Plaintiffs Lack Standing to Bring an Original Civil Action Under N.C.G.S. § 1603-1403.1.

Standing "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002). A motion to dismiss for lack of standing is appropriate under Rule 12(b)(1) or 12(b)(6) of the North Carolina Rules of Civil Procedure. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001); *Teague v. Bayer AG*, 195 N.C. App. 18, 22, 671 S.E.2d 550, 554 (2009) (determining that standing can also be challenged under a Rule 12(b)(6) motion). Under the most cursory review of the statutes that Plaintiffs themselves cite, Plaintiffs lack standing to bring this suit.

Plaintiffs allege that they are entitled to declaratory and injunctive relief under North Carolina Statutes 160D-108(h) and 160D-1403.1, which together establish the procedures parties must follow to dispute a decision about local land development. Compl. ¶ 151. Section 160D-108(h) states that a party who wishes to claim vested rights in a local land dispute may submit information substantiating their claim to a local administrator or, "in lieu of seeking such a determination[,] . . . a person claiming a vested right may bring an original civil action as provided by G.S. 160D-1403.1."

Section 160D-1403.1, in turn, states that "a person *with standing, as defined in subsection (b) of this section,* may bring an original civil action seeking declaratory relief [or] injunctive relief . . . in superior court . . ." to challenge a local land development regulation. N.C.G.S. § 160D-1403.1(a) (emphasis added). Subsection (b) confers standing only upon a person who 1) has a property interest in the subject matter "of a *final and binding decision* made by an administrative official charged with applying or enforcing a land development regulation"; 2) was a development

permit applicant before "before the decision-making board whose decision is being challenged"; or 3) was a development permit applicant "who is aggrieved by a final and binding decision of an administrative official charged with applying or enforcing a land development regulation." N.C.G.S. § 160D-1403.1(b) (emphasis added).

Plaintiffs do not allege which part of 160D.1403.1(b) gives them standing. Nonetheless, one thing is clear. Plaintiffs do not meet any of these three possible criteria. First, Plaintiffs do not challenge a final and binding decision. As Plaintiffs themselves state, the Caswell County Watershed Review Board "intends to conduct a quasi-judicial hearing during which it will receive evidence and determine whether the Watershed Administrator properly issued the permits at issue." Compl. ¶ 145. Plaintiffs cannot argue out of both sides of their mouths, both bemoaning the Watershed Review Board's potential hearing and arguing that the Board already issued a final decision. Second, Plaintiffs are not "challenging" any official decision. On the contrary, Plaintiffs received a SNIA permit and a watershed protection permit from Caswell County and are not challenging the propriety of that decision. Compl. ¶ 129. As a result, they clearly do not meet the third possible ground for standing, as they are not "aggrieved by a final and binding decision" of a Caswell County administrator. Therefore, the plain language of § 160D-1403.1 demonstrates that Plaintiffs lack standing under the relevant statutes.

II. The Court Should Dismiss Plaintiffs' Claims Because the NAACP Defendants Are Improper Parties to this Suit and There is No Active Controversy Between the NAACP Defendants and Sunrock.

The court must also dismiss this case because Plaintiffs improperly name the NAACP Defendants as parties. Plaintiffs do not allege that they have any legal rights that conflict with those of the NAACP Defendants. Rather, Plaintiffs intimate that *Caswell County* may sometime in the future interfere with Plaintiffs' rights if the Watershed Review Board finds that Carolina

Sunrock does not have vested rights. *See* Compl. ¶¶ 146–50. As a result, there is no active controversy between Plaintiffs and NAACP Defendants, and the court lacks jurisdiction and the ability to adjudicate this case. *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 339, 323 S.E.2d 294, 303 (1984).

The North Carolina statutes governing local land development disputes clearly shows that Defendants are the incorrect parties. Section 160D-1401 ("Declaratory judgments") is contained within Chapter 160D, the same chapter from which Plaintiffs pull Section 160D-1403.1 to improperly demand jurisdiction. This Section clearly states that in "[c]hallenges of legislative decisions of governing boards, including the validity or constitutionality of development regulations . . . [t]he governmental unit making the challenged decision shall be named a party to the action." N.C.G.S. § 160D-1401. It is a foundational rule of textual interpretation that "[p]arts of the same statute dealing with the same subject matter must be considered and interpreted as a whole." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 294 N.C. 60, 66, 241 S.E.2d 324, 328 (1978) (citation omitted). Therefore, any suit Plaintiffs bring for relief under Section 160D-1403.1 when, unlike here, they have standing should name the relevant governmental unit as defendants. As Plaintiffs challenge the validity of a legislative decision—namely, the applicability of the county moratorium—Caswell County, not the NAACP Defendants are the proper parties in this matter.

In an attempt to again circumvent the plain statutory requirements applicable to their claims, Plaintiffs resort to citing the Declaratory Judgment Act. N.C.G.S. § 1-254; Compl. ¶ 151. Plaintiffs request declaratory relief on three counts: declaratory relief as to whether Caswell County's moratorium on polluting industries applies to the Prospect Hill Quarry site, declaratory relief as to whether the moratorium applies to the Burlington Asphalt site, and declaratory relief

regarding whether they have vested rights in the Prospect Hill Quarry site and the Burlington Asphalt site. Compl. ¶¶ 154–79. But Plaintiffs utterly fail to allege any appropriate genuine controversy between themselves and the NAACP Defendants. Thus, the court must dismiss Plaintiffs request for declaratory judgment under North Carolina Rule of Civil Procedure 12(b)(1) and 12(b)(6). *See Gaston*, 311 N.C. at 234–35, 316 S.E.2d at 62; *State ex rel. Edmisten*, 312 N.C. at 339, 323 S.E.2d at 303.

The Declaratory Judgment Act requires there to be "a genuine controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities . . . . ." *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 198 (2009), 675 S.E.2d 641, 647 (citation omitted). *See also Lide v. Mears*, 231 N.C. 111, 118, 56 S.E.2d 404, 409 (1949) ("If [the plaintiff] fails to [assert an actual controversy], the other party cannot confer jurisdiction on the court"). These respective legal rights and liabilities can come from a "deed, will, written contract or . . . other legal relations [] affected by a statute, municipal ordinance, contract or franchise . . . ." N.C.G.S. § 1-254. If there is no genuine controversy over contending legal rights, jurisdiction fails, and the claim must be dismissed under 12(b)(1). *State ex rel. Edmisten*, 312 N.C. at 339, 323 S.E.2d at 303. Furthermore, if Plaintiffs fail to allege facts to establish a genuine controversy, it is impossible for the court to grant relief, and the claim must also be dismissed under 12(b)(6). *Gaston*, 311 N.C. at 234–35, 316 S.E.2d at 62.

Based on the facts alleged in Sunrock's complaint and Exhibit F appended thereto, there is no genuine controversy between the Plaintiffs and the NAACP Defendants. First, Plaintiffs have not demonstrated that the NAACP Defendants allege any legal rights in opposition to Sunrock's legal rights in the matter at hand. Reverend Shoffner and the NAACP Branch have, in fact, done no more than offer their opinion as to the grounds under which Caswell County should reconsider

issuing permits to Sunrock. Compl. Ex. F at 188; Compl. Ex. G at 192. Nor has Defendant Anita Foust sought to exercise a private right; she has encouraged Caswell County to enforce a neutrally applicable law. Compl. Ex. G at 189-90. Nothing about this suggests that there are mutually antagonistic legal rights or liabilities at issue between Sunrock and the NAACP Defendants.

Contrast the situation at hand to *North Carolina Department of Correction v. North Carolina Medical Board*, 363 N.C. 189, 675 S.E.2d 641 (2009). In this case, the North Carolina Department of Correction brought a declaratory judgment asking the court to declare the Department's rights and obligations against the Medical Board. *Id.* at 191, 675 S.E.2d at 643–44. Under the applicable statute, the Department of Correction was required to employ a physician to perform executions in instances of capital punishment. *Id.* at 199, 675 S.E.2d at 648. At the same time, Chapter 90 of North Carolina's General Statutes placed responsibility on the Medical Board to "regulate the practice of medicine" and discipline physicians who failed to "adhere to the ethics of the medical profession." *Id.* (quoting N.C.G.S. § 90-14(a)(6)). Those medical ethics allegedly precluded a physician from administering the death penalty. *Id.* As a result, the "two government entities, both seeking to fulfill their statutory duties, [were] in *irreconcilable conflict*," giving the court jurisdiction. *Id.* (emphasis added).

Nothing of the sort exists in the situation at hand. Plaintiffs have not identified any conflicting statutory duties or legal rights as between themselves and Defendants. As a result, one of the foundational elements of a Declaratory Judgment Act claim is missing.

Second, Plaintiffs' claim for relief is based upon a theory that the Caswell County moratorium interferes with their alleged vested rights in the sites they wish to develop. Compl. ¶¶ 151–53. None of the NAACP Defendants so much as mention the moratorium, and they do not express any opinion as to whether Sunrock has vested rights. Compl. Ex. F at 188; Compl. Ex. G

at 189–92. Defendants instead protested the issuance of the permits on the basis that the county issued Sunrock SNIA Permits and Watershed Protection Permits without first doing an environmental impact analysis, air quality studies, and an environmental assessment. Compl. Ex. F at 188; Compl. Ex. G at 189–92. The NAACP Defendants protested the issuance of these permits because the developments will have negative environmental effects on the health and safety of their community. Their request to the county is not dependent upon the existence of vested rights, and Plaintiffs therefore cannot point to any actual controversy between Sunrock and the NAACP Defendants.

Plaintiffs, instead, attempt to manufacture a controversy based on pure speculation and illusory possibilities. Plaintiffs state in their Complaint that the NAACP Defendants "intend" to challenge the issuance of the permits based on the moratorium and "intend to assert all arguments available to them" to oppose site development. Compl. ¶ 139-40. But Plaintiffs have alleged no facts to suggest Defendants have done so or will do so at any time in the future. Plaintiffs, therefore, expect this court to disregard the explicit statements of the NAACP Defendants in their petition to the county, Compl. Ex. F at 188; Compl. Ex. G at 189–92, based on the conclusory assumption that the NAACP Defendants "intend" to bring suit in the future. This is a clearly unreasonable argument, and courts are "not required . . . to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008) (quoting *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274, 620 S.E.2d 873, 880 (2005)) (internal quotations omitted). As a result, the court should disregard this speculation and conclude that, based on the asserted facts, there is simply no actual controversy between Sunrock and the NAACP Defendants. Additionally,

as stated above, the "mere threat of an action or a suit" is not enough to establish a justiciable controversy. *Gaston*, 311 N.C. at 234, 316 S.E. at 62.

Dulaney v. Inmar, Inc., No. COA11–1273, 2012 N.C. App. LEXIS 545 (N.C. Ct. App. May 1, 2012) (unpublished), is also instructive. In *Dulaney*, plaintiff Wendy Dulaney sought a declaratory judgment as to her rights under the non-competition she entered into with her former employer, Inmar, Inc. *Id.* at *1-2. The court dismissed her request for a preliminary injunction, finding that there was no actual controversy since "Plaintiff has not competed with Defendant." *Id.* at *10. Significantly, she could not point to any employment opportunity lost to her due to the non-compete agreement; she could only argue that the defendant "stated to her that she must comply with the Agreement" and that the defendant had in the past been successful in enforcing the non-compete in court. *Id.* at *11. Similarly, Sunrock cannot point to any action that suggests Plaintiffs challenge the permits based on Plaintiffs' theory of vested rights. Plaintiffs' claims against Defendants are therefore just as hypothetical as Dulaney's were against Inmar.

As a result, this suit is not based on any actual genuine controversy. Any judicial decision arising out of the relationship between the Plaintiffs and Defendants would be purely expository. The Declaratory Judgment Act "does not license litigants to fish in judicial ponds for legal advice," *Elliott v. Ballentine*, 7 N.C. App. 682, 684–85, 173 S.E.2d 552, 554 (1970) (citation omitted), and the suit should therefore be dismissed.

III. The NAACP Defendants Engaged in Petitionary Activity that is Protected by the United States Constitution and the North Carolina Constitution.

This suit should also be dismissed under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because Plaintiffs are foreclosed from bringing suit that challenges an individual's constitutionally-protected petitioning activity.

The crux of the matter is this: Plaintiffs attempt to challenge what cannot legally be challenged. The NAACP Defendants engaged in constitutionally-protected petitioning activity, activity that cannot be challenged in court, and they should therefore be immediately dismissed from the case. *See Cheryl Lloyd Humphrey*, 377 N.C. at 390, 858 S.E.2d at 800 ("When a lawsuit is premised on a party's petitioning activity, the First Amendment and Article I, Section 12 mandate early dismissal.").

The United States Constitution and the North Carolina State Constitutions both protect the right of individuals to petition their government for redress of grievances. *Cheryl Lloyd Humphrey,* 377 N.C. at 387, 858 S.E.2d at 798. The Petition Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Likewise, Article I, Section 12 of the North Carolina Constitution provides that "[t]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances[.]" These two Petition Clauses "prevent a person from being subjected to a lawsuit based on that person's petitioning activity." *Cheryl Lloyd Humphrey,* 377 N.C. at 387, 858 S.E.2d at 798. The right to petition, in turn, protects efforts "to influence the actions of government officials, whether in the legislative, executive, or judicial branch." *Id.* at 388, 799. Therefore, under the law, Plaintiffs have clearly failed to present an issue upon which the Court can grant relief.

Plainly, the NAACP Defendants' emails to the Caswell County Commissioners are forms of petitioning activity protected by the First Amendment of the United States Constitution and Article I, Section 12 of the North Carolina Constitution. The United States Supreme Court has previously found that an individual engages in petitioning activity where that individual "directed

[their efforts] toward influencing government action." *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961). It is hard to imagine a situation that fits this description more aptly than that of the NAACP Defendants. On February 3, 2021, Reverend Shoffner provided an email to the Caswell County Board of County Commissioners requesting that the County Commissioners reconsider their decision to issue SNIA and Watershed Protection Permits to Sunrock. Compl. Ex. F at 188. Likewise, Anita Foust in her email asked the County Commissioners to "acknowledge this email as my appeal in the appeal process." Compl. Ex. G at 189–90. On behalf of the NAACP, Reverend Shoffner also asked the email to serve as an appeal of Watershed Protection Permit, an obvious effort to influence government policy. *Id.* at 191–92. Through these emails, Defendants directly and unambiguously requested that the Caswell County Development Board adopt a policy position that touches upon a matter of extreme public importance, and clearly counts as petitioning.

Just last year, the North Carolina State Supreme Court dismissed a suit that is virtually indistinguishable from the case at hand. In *Cheryl Lloyd Humphrey Land Investment Company, LLC v. Resco Products, Inc.*, a company that owned and operated a parcel of land as an open-quarry mine alleged that the defendants had misrepresented the activities of the company at a public hearing. 377 N.C. at 385–86, 858 S.E.2d at 797–98. The defendants attended this hearing and publicly stated that residents who lived near the open-quarry mine "could be endangered by fly rock, excessive air blasts, and excessive ground vibrations from the blasting operations." *Id.* at 385, 858 S.E.2d at 797. The North Carolina Supreme Court, determining that "[t]he right to petition the government is a fundamental right" and that speaking at a public hearing constituted petition activity, dismissed the suit under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *Id.* at 390, 858 S.E.2d at 801. It is hard to imagine a case more instructive to the situation at hand. As

in *Cheryl Lloyd*, Defendants dispute the health and safety effects of land development and made their thoughts known to a public body. The two cases present the same issue, and the same resolution is warranted—a dismissal of the case as an impermissible attempt to stifle Plaintiffs' constitutionally-protected activity.

Accordingly, Plaintiffs do not present an issue upon which the Court can provide relief. Defendants engaged in constitutionally-protected activity that is foreclosed by law. The Court should therefore dismiss Plaintiffs' action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

IV. Plaintiffs' Complaint on its Face Demonstrates That It Has No Claim Under Applicable Law Regarding Local Land Development.

As previously explained, Plaintiffs claims fail from a legal standpoint. But their claims also fail from a factual standpoint because Plaintiffs' Complaint "on its face reveals the absence of facts sufficient to make a good claim . . . ." *Silver*, 371 N.C. at 861, 821 S.E.2d at 759. As previously stated, Plaintiffs invoke Section 160D-1403.1 to request injunctive and declaratory relief. This statute provides that if a party wishes to challenge a decision from an administrative official charged with enforcement of a local land development regulation, "the party with standing must first bring any claim that the ordinance was erroneously interpreted to the applicable board of adjustment pursuant to G.S. 160D-405[,]" and only after this appeal, may a party with standing bring a civil action.

As previously explained, Sunrock does not challenge any administrative decision. But assume that Sunrock *was* appropriately challenging an administrative decision. They would presumably be challenging the interpretation of an administrative decision, as described by the statute. In its Complaint Sunrock does not allege that Caswell County can never issue a moratorium, or that the county has exceeded its statutory duties, or even that there has been a

taking of their property. N.C.G.S. § 160D-1403.1(a). Instead, Sunrock alleges that any moratorium "does not apply to Sunrock's projects . . . ." Compl. ¶ 151. This anticipates an administrative decision, and Sunrock would therefore have to first bring a claim to the applicable board of adjustment before filing an original suit as stated in G.S. 160D-1403.1. In other words, Sunrock has attempted to skip the appeals process by bringing this case, despite the lack of any allegations that they have been aggrieved as contemplated by Section 160D-1403.1. Plaintiffs' Complaint therefore on its face reveals the absence of facts sufficient to make a good claim.

CONCLUSION

For the foregoing reasons, Bryon Shoffner, Anita Foust, and the Thomas Day-Caswell Hold Branch of the NAACP respectfully request that the Court grant their respective Motions to Dismiss.

This 23rd day of February, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing in the above-captioned action to the following parties by electronic mail as was agreed and consented to, and served a copy to Christopher and Julianne Woerdeman by United States mail, postage prepaid, at the below address.

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This 23rd Day of February, 2022.

By: Mitchell D. Brown
Mitchell Brown
Southern Coalition for Social Justice