

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-915

Filed: 6 March 2018

Pender County, No. 16 CVS 1099

GRIER FLEISCHHAUER, REX H. FRAZIER AND JENNIE FRAZIER, ROBERT TAYLOR AND BARRY TAYLOR, JACK V. MACKMULL; HERBERT NETHERTON AND DOROTHY L. NETHERTON, ED HARTMAN AND KATHY HARTMAN, STEPHEN J. LEARY AND PATTI LEARY, BARBARA SACCHI, JACK MATTHEWS AND SERENA MATTHEWS, JERRY TOOMES; DONALD LESAGE AND JUDY LESAGE; EDWARD MENNONA; STANLEY M. FARRIOR AND JULIE E. FARRIOR; BILL BURNS AND JULIE BURNS; LISA BERESNYAK; WALTER STARKEY; CATHERINE MURPHY; RANDY PRICE; DON TISDALE AND VICKY TISDALE; JAMES YORK AND DIANA YORK; KIM FRANCE; GWEN FRAZIER AND JENNIE FRAZIER; KEVIN KEIM; BEN AND MARY THOMPSON, Plaintiffs,

v.

TOWN OF TOPSAIL BEACH, NORTH CAROLINA, Defendant.

Appeal by plaintiffs from an order entered 13 April 2017 by Judge R. Kent Harrell in Pender County Superior Court. Heard in the Court of Appeals 7 February 2018.

*Kilpatrick Townsend & Stockton, LLP, by Phillip A. Harris, Jr., Todd S. Roessler, and Joseph S. Dowdy, for plaintiffs-appellants.*

*Rountree Losee, LLP, by Stephen D. Coggins, Anna Richardson-Smith, and Laura K. Greene, and Jack Cozort, for defendant-appellant.*

ARROWOOD, Judge.

Grier Fleischhauer; Rex H. Frazier and Jennie Frazier; Robert Taylor and Barry Taylor; Jack V. Mackmull; Herbert Netherton and Dorothy L. Netherton; Ed Hartman and Kathy Hartman; Stephen J. Leary and Patti Leary; Barbara Sacchi;

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Jack Matthews and Serena Matthews; Jerry Toomes; Donald Lesage and Judy Lesage; Edward Mennona; Stanley M. Farrior and Julie E. Farrior; Bill Burns and Julie Burns; Lisa Beresnyak; Walter Starkey; Catherine Murphy; Randy Price; Don Tisdale and Vicky Tisdale; James York and Diana York; Kim France; Gwen Frazier and Jennie Frazier; Kevin Keim; and Ben and Mary Thompson (“plaintiffs”) appeal from an order granting Town of Topsail Beach’s (“defendant” or “Topsail Beach”) motion to dismiss for lack of subject matter jurisdiction and dissolving a previously issued temporary restraining order. For the reasons stated herein, we affirm the order of the trial court.

### I. Background

Topsail Beach, a municipality organized and existing pursuant to the laws of North Carolina, is located on a barrier island along the southeastern coast of North Carolina. Plaintiffs own soundside properties on the south end of Topsail Beach. Twenty-eight undeveloped lots (“the oceanfront lots”) lie between plaintiffs’ properties and the Atlantic Ocean. Some of the plaintiffs own lots adjacent to the land, while others own lots a city block or more from the oceanfront lots.

On 19 December 2016, plaintiffs filed suit against Topsail Beach, seeking a declaratory judgment that (1) any excavation or manmade alterations of the landward dune on the oceanfront lots would violate local ordinances, the town’s land use plan, and federal law, and (2) any permits issued by defendant that would allow

the excavation or manmade alterations of the landward dune on the lots would violate local ordinances, the town's land use plan, and federal law. Plaintiffs also requested injunctive relief, enjoining defendant "from issuing any [permits] that would allow the owners of [the oceanfront lots] to proceed with excavation or any manmade alterations of the landward dune and development of the lots." That same day, plaintiffs obtained an *ex parte* temporary restraining order, prohibiting defendant from issuing building permits on "property that would allow the alteration of dunes."

On 28 December 2016, the temporary restraining order was modified and extended. On 16 February 2017, defendant answered and filed a motion to dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, motion to strike pursuant to Rule 12(f), motion to join necessary parties pursuant to Rule 12(b)(7), and motion to dissolve the temporary restraining order pursuant to Rule 65.

On 30 March 2017, defendant's motions came on for hearing in Pender County Superior Court, the Honorable R. Kent Harrell presiding. The materials considered at the hearing, including pleadings, motions, affidavits, and memoranda submitted to the court, tended to show as follows.

State and local government have concurrent responsibilities with regard to coastal area management in North Carolina. N.C. Gen. Stat. § 113A-101 (2017). Under State law, the Coastal Area Management Act ("CAMA"), N.C. Gen. Stat. § 113A-100 *et seq.*, requires the property owners of the oceanfront lots to obtain a

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CAMA minor development permit (“CAMA permit”) before constructing a residence on their lot. *See* N.C. Gen. Stat. § 113A-118(a) (2017). The North Carolina Division of Coastal Management, the agency tasked with administering CAMA, has issued minor development permits to six of the property owners of the oceanfront lots in accordance with State law.

Once an owner of an oceanfront lot obtains a CAMA permit, the owner must then obtain a zoning permit and a building permit from the municipality before he can construct a residence. The building permit process aims to ensure compliance with the State Building Code and local ordinances, including the town’s Flood Damage Prevention Ordinance (“FDPO”). The FDPO states, “[t]here shall be no alteration of sand dunes which would increase potential flood damage[.]” Topsail Beach, N.C., Code (“Town Code”) § 14-75(7) (2017), and requires property owners in a VE Zone,<sup>1</sup> where the oceanfront lots are located, to provide an engineering analysis that a proposed project will not increase potential flood damage before they may obtain a building permit. Whether a proposed project will increase potential flood damage is a site-specific inquiry. Once the town, through a permit official, decides whether to allow or deny a building permit, any “person aggrieved” may seek review of the decision to the Board of Adjustment, and, if discontent with the Board decision,

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<sup>1</sup> A VE Zone is a “coastal high hazard area[.]” defined as “special flood hazard areas . . . associated with high velocity waters from storm surges or seismic activity . . . .” Town Code § 14-75.

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may seek redress in the courts. *See* Town Code §§ 16-301, 16-351 (2017). A “person aggrieved” includes one who either has “an ownership interest in property that is the subject of the situations or conditions[,]” or:

[p]ersons who will suffer special damages that:

- a. Arise by virtue of the person aggrieved’s ownership interest in property that is adjacent to property that is the subject of situations and conditions that are the subject of a final decision . . . ; and
- b. Are distinct from any damage all the remainder of the town may suffer in consequence of the situations and conditions; and
- c. Are directly and proximately caused by situations and conditions that are the subject of a final decision.

Town Code § 16-295(a) (2017). “A town officer or official, department, board, or commission[,]” or certain associations organized to protect and foster the interest of a particular neighborhood or local area, as set out in § 16-295, may also qualify as a “person aggrieved” pursuant to the Town Code. *Id.* Presently, Topsail Beach has received no applications for a zoning permit or a building permit for the oceanfront lots.

Although State and local law manage the development of North Carolina’s coast, Topsail Beach also opts in to the National Flood Insurance Program (“NFIP”), created by the National Flood Insurance Act of 1968, 42 U.S.C. § 4001 *et seq.*, and administered by the Federal Emergency Management Agency (“FEMA”). To

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participate in the NFIP, a municipality must adopt ordinances setting forth certain minimum requirements to reduce the risk of flood damage. 44 C.F.R. § 59.22(a)(3) (2017). The minimum requirements include prohibiting the man-made alterations of naturally occurring sand dunes in VE zones that would increase potential flood damage. *See* 44 C.F.R. §§ 59.1, 60.3(e) (2017). Property owners receive lower insurance premiums through the NFIP if local law adopts heightened standards of flood protection in addition to the minimum requirements. When a participant in the NFIP fails to implement or enforce certain requirements, it may be subject to probation or suspension from the program. 44 C.F.R. § 59.24(d) (2017). The NFIP must provide the participant with notice and an opportunity to cure any deficiencies before placing the participant on probation or suspending the participant from the program. *Id.* The policyholders in Topsail Beach receive the highest possible discount on their flood insurance premiums, and Topsail Beach has not received notice that it may be subject to probation or suspension from the program, or that the premiums available to policyholders may increase.

On 14 December 2016, defendant repealed one of its local ordinances, the Dune Protection Ordinance, which provided protections for dunes that were additional to the FDPO that plaintiffs allege generally prevented development of the oceanfront lots. Although the FDPO remains in effect, plaintiffs allege the issuance of building permits and development of the oceanfront lots is now imminent. Plaintiffs claim

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that developing the oceanfront lots will increase the potential flood damage to plaintiffs' properties, and jeopardize both their participation in the NFIP and also their discounted NFIP premiums.

After hearing arguments of counsel, and reviewing the pleadings, motions, affidavits, and memoranda in the record, the trial court dismissed plaintiffs' complaint pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction because (1) the issues raised by the complaint were not ripe for review because there was no final determination about what uses of the land will be permitted by defendant, and (2) plaintiffs did not have standing to pursue their action.

Plaintiffs appeal.

II. Discussion

Plaintiffs present two issues on appeal. First, plaintiffs argue the trial court erred in concluding the issues raised in the complaint are not ripe for adjudication. Second, plaintiffs argue the trial court erred in concluding that plaintiffs did not have the standing to institute this action. We agree with the trial court that this matter is not ripe for adjudication. Therefore, we affirm the trial court's order dismissing plaintiffs' action for lack of subject matter jurisdiction, however, we do not reach the issue of whether plaintiffs had standing to institute the action.

Rule 12(b)(1) of the North Carolina Rules of Civil Procedure “permits a party to contest, by motion, the jurisdiction of the trial court over the subject matter in controversy.” *Trivette v. Yount*, 217 N.C. App. 477, 482, 720 S.E.2d 732, 735 (2011) (citing N.C.R. Civ. P. 12(b)(1) (2017)). We review a trial court’s dismissal for lack of subject matter jurisdiction *de novo* and may consider evidence outside the pleadings. *Id.* at 482, 720 S.E.2d at 735 (citation omitted).

“Jurisdiction in North Carolina depends on the existence of a justiciable case or controversy.” *Prop. Rights Advocacy Grp. ex rel. Its Members v. Town of Long Beach*, 173 N.C. App. 180, 182, 617 S.E.2d 715, 717 (2005) (citation and internal quotation marks omitted). To satisfy this requirement, the complaint must show “that litigation appears unavoidable. Mere apprehension or the mere threat of an action or suit is not enough[.]” *id.* at 182, 617 S.E.2d at 717 (citation and internal quotation marks omitted), because “[t]he resources of the judicial system should be focused on problems which are real and present rather than dissipated on abstract, hypothetical or remote questions.” *Andrews v. Alamance Cty.*, 132 N.C. App. 811, 814, 513 S.E.2d 349, 350 (1999) (citation and internal quotation marks omitted).

A speculative possibility that land development might proceed in the future does not constitute a justiciable case or controversy. *See Prop. Rights Advocacy Grp. ex rel. Its Members*, 173 N.C. App. at 183-84, 617 S.E.2d at 718. Indeed, “[a]ny challenges relating to land use are not ripe until there has been a final determination



about what uses of the land will be permitted.” *Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted).

Here, plaintiffs sought a declaratory judgment that the development of the oceanfront lots, and the issuance of permits to develop the same, violates local and federal law because any development would alter the landward dune on the properties. However, plaintiffs have not shown that defendant made a final determination as to what development of the land, if any, will be permitted by the town. Plaintiffs have not even shown that the oceanfront lot owners have submitted applications for zoning or building permits to defendant to request such a determination. Additionally, there is no evidence that FEMA has notified defendant, or any flood insurance policyholder within Topsail Beach, that, with regard to NFIP, probationary status is impending or that policyholders’ insurance premiums may increase.

In essence, plaintiffs ask us to rule that they may challenge the permissible uses of neighboring oceanfront lots based on a speculative possibility that development will proceed in the future. We decline to do so, as, until defendant makes a final decision about what uses of the oceanfront lots will be permitted, any challenge related to the use thereof will not be ripe for adjudication. *See Andrews*, 132 N.C. App. at 815, 513 S.E.2d at 351 (citation omitted). Therefore, the trial court correctly dismissed plaintiffs’ action for lack of subject matter jurisdiction.

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We note that plaintiffs argue that because defendant permitted the construction of a beach house in 2014, prior to the decision to repeal the Dune Protection Ordinance, it is clear that defendant will approve similar development, which plaintiffs allege violates federal and local laws. We disagree. It would be precipitous to presume Topsail Beach has made a final decision as to the permissible development of the oceanfront lots because defendant previously authorized a building permit for an oceanfront property. Plaintiffs' speculation that defendant will make a certain determination is insufficient to create a justiciable case or controversy. *See Prop. Rights Advocacy Grp. ex rel. Its Members*, 173 N.C. App. at 183-84, 617 S.E.2d at 718.

Plaintiffs failed to show the existence of a justiciable case or controversy. *See Andrews*, 132 N.C. App at 815, 513 S.E.2d at 351. Thus, we affirm the trial court's dismissal of plaintiffs' action for lack of subject matter jurisdiction and do not reach or decide the issue of whether plaintiffs have standing.

AFFIRMED.

Judges CALABRIA and ZACHARY concur.