

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-826

Filed: 7 April 2020

Pitt County, No. 18 CVS 1976

RONALD HOAG and HOLLY HOAG; JEREMY GONZALEZ and KRISTEN GONZALEZ; WILLIAM HARRELL and KATHRYN HARRELL; ERIC FINICAL AND SALLY FINICAL; JAMES LAWLESS and LISA LAWLESS; SANDRA HARDEE; DIANE SEMER; JOE MCDOWELL and LYNELL MCDOWELL; SCOTT PRITCHARD and DONNA PRITCHARD; VINCENT FISCHER and PATRICIA FISCHER; MICHAEL BOWMAN and JOSIE BOWMAN; JOHN LOWE and NELDA LOWE; BEECH COVE SUBDIVISION HOMEOWNERS ASSOCIATION, INC.; HOLLY RIDGE HOMEOWNER'S ASSOCIATION; and MOSS BEND HOMEOWNERS ASSOCIATION, INC., Plaintiffs,

v.

COUNTY OF PITT; BILL CLARK HOMES OF GREENVILLE, LLC; and UMBERTO G. FONTANA, Defendants.

Appeal by Plaintiffs from order entered 30 April 2019 by Judge G. Bryan Collins, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 18 February 2020.

Longleaf Law Partners, by Benjamin L. Worley, for Plaintiffs-Appellants.

Sumrell Sugg, P.A., by Scott C. Hart, for Defendant-Appellee County of Pitt.

Ward and Smith, P.A., by E. Bradley Evans, for Defendant-Appellee Bill Clark Homes of Greenville, LLC.

No brief filed by Defendant-Appellee Umberto G. Fontana.

INMAN, Judge.

Plaintiffs appeal from an order dismissing their complaint challenging a rezoning decision by Defendant County of Pitt (the “County”) in favor of Defendant Bill Clark Homes of Greenville, LLC (“Clark Homes”). On appeal, Plaintiffs argue that their complaint adequately alleged special damages sufficient to survive a motion to dismiss under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we affirm the trial court’s order dismissing Plaintiffs’ complaint.

I. FACTUAL AND PROCEDURAL HISTORY

The record below discloses the following:

Defendant Umberto G. Fontana owned a 67.5 acre tract of land (the “Property”) in Pitt County which, by February 2018, Mr. Fontana had contracted to sell to Clark Homes.¹ That month, Mr. Fontana and Clark Homes filed with the County a rezoning application requesting that the Property be rezoned from Rural Residential to Suburban Residential. The individual plaintiffs own property adjacent to or neighboring the Property. Several but not all of the individual plaintiffs opposed the rezoning and attended a County Planning Board meeting to speak in opposition. At

¹ By the time the order dismissing Plaintiff’s suit was filed, Fontana no longer had an interest in the Property. Because he has not filed a brief in this appeal, and the remaining parties do not discuss Mr. Fontana in their briefs, we limit our discussion of Mr. Fontana to our recitation of the underlying factual and procedural history.

HOAG V. COUNTY OF PITT

Opinion of the Court

that meeting, those opposed argued that the rezoning would be contrary to the County's comprehensive land use plan, would negatively impact traffic congestion, and would create unsafe traffic conditions. They also provided a petition to the County Planning Board, in which they asserted the rezoning would: (1) result in development that would be inconsistent with the character of the surrounding area; (2) result in diminution of property values nearby, including those tracts owned by Plaintiffs; (3) be detrimental to the floodplain, nearby streams, and the Tar River; (4) cause adverse impacts to local infrastructure, including NC Highway 33 E; and (5) increase traffic congestion and lead to unsafe traffic conditions in the area. The County Planning Board ultimately voted to recommend that the County Board of Commissioners deny the rezoning application.

The rezoning application, along with the Planning Board's recommendation, came before the Commissioners in a public meeting on 23 April 2018. Some of the Plaintiffs again spoke in opposition. The Commissioners voted to delay a determination on the application until a later meeting. The Commissioners next considered the matter on 7 May 2018 in another public meeting, and several of the Plaintiffs again spoke in opposition. The Commissioners voted to approve the rezoning application.

Plaintiffs filed a declaratory judgment action in Pitt County Superior Court challenging the rezoning. Plaintiffs' complaint reiterated the objections to the

rezoning raised in their petition and hearing before the County Planning Board. They further alleged that:

40. Plaintiffs are aggrieved parties who own real property immediately adjacent to and/or in close proximity to the Fontana Property.

41. Plaintiffs, as a result of the Rezoning and development permitted by the Rezoning, have suffered and will continue to suffer special damages in the form of increased stormwater run-off, increased risk of flooding, diminution in the value of their property, increase in traffic, increase in traffic congestion and less safe traffic conditions, increase in noise, and loss of neighborhood character.

42. Plaintiffs have specific personal and legal interests adversely affected by the County's approval of the Rezoning and development permitted by the Rezoning.

43. The damages suffered by the Plaintiffs are distinct from the rest of the community at large.

Clark Homes filed a combined answer and motion to dismiss under Rules 12(b)(1) and 12(b)(6). The County filed a motion to dismiss under Rule 12(b)(6) in lieu of an answer. Both motions asserted that the Plaintiffs lacked standing.

The motions were heard by the trial court on 13 November 2018. The trial court took the matter under advisement.

On 30 April 2019, the trial court entered an order dismissing Plaintiffs' complaint. The order concluded that "Plaintiffs have not sufficiently alleged special damages arising from the zoning decision at issue" and the three homeowner's association plaintiffs "have not alleged that either the associations themselves or all

members of the associations have a specific legal interest directly and adversely affected by the rezoning in question.” Plaintiffs now appeal.²

II. ANALYSIS

A. Standard of Review

Standing may be challenged by a motion to dismiss under either Rule 12(b)(1) or 12(b)(6). *Farfield Harbour Property Owners Ass’n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011). “The standard of review on a motion to dismiss under Rule 12(b)(1) is *de novo*. The standard of review on a motion to dismiss under Rule 12(b)(6) is whether, if all the plaintiff’s allegations are taken as true, the plaintiff is entitled to recover under some legal theory.” *Rowlette v. State*, 188 N.C. App. 712, 714, 656 S.E.2d 619, 621 (2008) (internal citations and quotations omitted). “In our *de novo* review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party.” *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008). “[T]he [C]ourt is not, however, required to accept mere conclusory allegations, unwarranted deductions of fact, or unreasonable inferences as true.” *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 493, 751 S.E.2d 227, 233 (2013) (citations omitted).

² Plaintiffs’ appeal is limited to the trial court’s determination on special damages. Because they do not address the trial court’s separate basis for dismissing the homeowner’s associations’ claims, we address only whether the individual property owners adequately alleged special damages necessary to confer standing.

B. Plaintiffs' Complaint

A party challenging a local government's decision to rezone another's real property "must allege and show special damages distinct from the rest of the community." *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986) (citation omitted). "Examples of adequate pleadings include allegations that the rezoning would cut off the light and air to the petitioner's property, increase the danger of fire, increase the traffic congestion and increase the noise level." *Kentallen, Inc. v. Town of Hillsborough*, 110 N.C. App. 767, 769-70, 431 S.E.2d 231, 232 (1993). The plaintiff must provide a "factual basis to support the argument that he is an aggrieved person[.]" *Cox v. Town of Oriental*, 234 N.C. App. 675, 680, 759 S.E.2d 388, 391 (2014); *see also Kentallen*, 110 N.C. App. at 769, 431 S.E.2d at 232 (observing that a party challenging a land use decision "must also allege the *facts* on which [the] claim of aggrievement is based" (citations and quotations omitted) (alteration in original) (emphasis added)).

Plaintiffs argue that their complaint adequately alleges special damages, because it generally follows the language employed by the plaintiff in *Cherry Community Organization v. City of Charlotte*, 257 N.C. App. 579, 809 S.E.2d 397 (2018). In that case, the authoring judge of this Court quoted the plaintiff's complaint and stated that "it is clear that [the plaintiff] met the minimum pleading requirements of standing to survive a motion to dismiss in accordance with Rule

12(b)(6) . . . in generally alleging special damages.” *Id.* at 584, 809 S.E.2d at 401. *Cherry Community* is of limited precedential and persuasive value because the opinion failed to garner a clear majority; one judge concurred in the result only, while the other member of the panel concurred by separate opinion and wrote “separately to concur in the result only.” *Id.* at 587, 809 S.E.2d at 403. *Cherry Community* is inapposite because it reviewed the trial court’s entry of a summary judgment order, not a motion to dismiss. The Court’s analysis that the complaint would have survived a motion to dismiss is non-binding *dicta*.

We recognize that Plaintiffs’ allegations in paragraphs 40-41 of their complaint assert general categories of damages that could, if particularized to each plaintiff, constitute special damages sufficient to confer standing. *See, e.g., Jackson v. Guilford Cty. Bd. Of Adjustment*, 275 N.C. 155, 161, 166 S.E.2d 78, 82 (1969) (holding “the owner of adjoining or nearby lands, who will sustain special damage from the proposed use through a reduction in the value of his own property, does have standing”); *Kentallen, Inc.*, 110 N.C. App. at 769-70, 431 S.E.2d at 232. But broad allegations of damages falling within those general categories does not, without more, suffice. *See Davis*, 81 N.C. App. at 508, 344 S.E.2d at 371 (“Plaintiffs alleged in their complaint that they have sustained . . . a diminution in the value of their property due to increased traffic on roads . . . and . . . increased demands upon already overburdened public utilities. We do not think these damages are special damages

distinct from those of the rest of the community.”); *Lloyd v. Town of Chapel Hill*, 127 N.C. App. 347, 351, 489 S.E.2d 898, 900-01 (1997) (holding general allegations of adverse effects on property values by owners “in the immediate vicinity” were insufficient to establish standing because they did not amount to allegations of “special damages distinct from the rest of the community” (citations omitted)). The complaint’s allegation that Plaintiffs, as nearby landowners, will suffer “increased stormwater run-off, increased risk of flooding, diminution in the value of their property, increase in traffic, increase in traffic congestion and less safe traffic conditions, [and] increase in noise,” without additional factual allegations showing the distinctiveness of these injuries to the Plaintiffs themselves, does not demonstrate standing. *See, e.g., Cherry v. Wiesner*, 245 N.C. App. 339, 351, 781 S.E.2d 871, 880 (2016) (holding a homeowner who alleged new home construction across the street was incongruous with historic character of neighborhood and would reduce property values and impair enjoyment of the neighborhood lacked standing to challenge a certificate of appropriateness approving the construction because she did not allege “special damages *distinct to respondent*” (emphasis in original)).

The allegation in the complaint that the “damages suffered by the Plaintiffs are distinct from the rest of the community at large” is insufficient to meet this distinctiveness requirement, particularly given the factual allegations made elsewhere in the complaint. First, as admitted by Plaintiffs’ counsel at the hearing

before the trial court, this allegation is merely a conclusion. Conclusory allegations are not considered as true. *Estate of Vaughn*, 230 N.C. App. at 493, 751 S.E.2d at 233. Second, Plaintiffs' factual allegations as to the nature of these damages disclose that they are not distinct to Plaintiffs. In Paragraph 31, Plaintiffs allege:

- a. that the Rezoning allowed development that is *not in character with the surrounding area*;
- b. that the Rezoning would result in the diminution of the value of *nearby properties (including those owned by Plaintiffs)*;
- c. that the Rezoning would result in development that adversely *impacts the floodplain, streams and the Tar River*;
- d. that the Rezoning would result in development that adversely impacts the *surrounding transportation infrastructure*, including NC Highway 33 E; and
- e. that the Rezoning would significantly increase traffic congestion and unsafe traffic conditions *in the area*.

(emphasis added). The language emphasized above discloses that the damages complained of are not individualized. Given that these are the only *factual* allegations of special damages, they are insufficient to support the conclusory allegation of distinctive injury.

We emphasize that we do not reach this holding because Plaintiffs decided to press their claims collectively. Landowners who elect to pool their resources and bring suit together with their neighbors are not subject to stricter pleading standards

than a lone plaintiff. But those landowners do not enjoy a relaxed requirement to plead factual allegations of special damages distinct from the community at large. Here, Plaintiffs' joint complaint could have contained specific, individualized factual allegations demonstrating the distinctiveness of each injury suffered by each of the Plaintiffs. *See, e.g., Mangum*, 362 N.C. at 644, 669 S.E.2d 283 (2008) (holding a group of plaintiffs adequately alleged special damages where each landowner identified specific injuries distinct to their individual properties at a board of adjustment hearing and those "allegations were reiterated in the petition filed in the superior court"). Those particularized allegations are simply missing from Plaintiffs' complaint.³

III. CONCLUSION

Plaintiffs lack standing to challenge the County's rezoning decision because their complaint fails to allege special damages distinct from the rest of the community. We affirm the trial court's order dismissing Plaintiffs' complaint.

AFFIRMED.

Judges STROUD and YOUNG concur.

Report per Rule 30(e).

³ Some of the plaintiffs in this case did, per the complaint, testify before the County Planning Board and the County Board of Commissioners. However, the complaint references that testimony only generally, and no transcript was attached to the complaint as part of the pleadings to be considered at the motion to dismiss stage.