STATE OF NORTH CAROLINA

COUNTY OF CHATHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
19 CVS 809

FILED
2019 NOV 26 P 4: 30
CHATHAM CO. C.S.C.

BARBARA CLARK PUGH; GENE TERRELL BROOKS; THOMAS HENRY CLEGG; THE WINNIE DAVIS CHAPTER 259 OF THE UNITED DAUGHTERS OF THE CONFEDERACY,

Plaintiffs,

vs.

KAREN HOWARD; MIKE DASHER; DIANNA HALES; JIM CRAWFORD; and ANDY WILKIE, in their official capacities as members of the Board of County Commissioners of Chatham County, North Carolina,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Karen Howard, Mike Dasher, Dianna Hales, Jim Crawford, and Andy Wilkie, in their official capacities as members of the Board of County Commissioners of Chatham County, North Carolina ("Defendants" and the "Board"), by and through their undersigned counsel, submit this Memorandum of Law in Support of Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6).

NATURE OF THE CASE

In this action, the plaintiffs, individually and with Barbara Clark Pugh ("Pugh") as an alleged member of the Winnie Davis Chapter 259 of the United Daughters of the Confederacy (the "UDC") (the individual plaintiffs and the UDC are collectively referred to as "Plaintiffs"), seek to prevent the lawful actions of the Board from taking effect. As alleged in the Complaint, the Board voted to remove a Confederate monument erected in front of the Chatham County Courthouse in

Pittsboro (the "Monument"). (Compl. ¶ 19.) Defendants maintain the UDC owns the Monument, which was first placed in front of the courthouse in 1907 pursuant to a license that, on August 19, 2019, was revoked by the Board. Plaintiffs contend that Chatham County owns the Monument, and while alleging to have no ownership interest in the same, they have filed this action seeking to prevent the Monument's removal.

ARGUMENT

Plaintiffs' Complaint should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) because Plaintiffs lack standing to bring this declaratory judgment action and have otherwise failed to state a claim upon which relief can be granted.

A. APPLICABLE STANDARDS OF REVIEW.

1. Rule 12(b)(1) – Plaintiffs' lack of standing to invoke subject matter jurisdiction.

Standing is a prerequisite to the subject matter jurisdiction of the court. *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878 (2002) (citations omitted), *disc. review denied*, 356 N.C. 610, 574 S.E.2d 474 (2002). It " 'involves a determination of whether a particular litigant is a proper party to assert a legal position.' " *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 233 N.C. App. 23, 30, 755 S.E.2d 75, 80 (2014) (quoting *Cook v. Union Cnty. Zoning Bd. of Adjust.*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007)), *aff'd*, 368 N.C. 360, 777 S.E.2d 733 (2015). As the parties invoking the jurisdiction of the Court, Plaintiffs have the burden of establishing their standing to maintain this action. *Thrash Ltd. P'ship v. Cnty. of Buncombe*, 195 N.C. App. 727, 730, 673 S.E.2d 689, 691 (2009) (citations omitted). Standing can be challenged at any stage of the proceeding, even after judgment. *Morningstar Marinas*, 233 N.C. App. at 30, 755 S.E.2d at 80; *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961), *appeal dismissed and cert. denied*, 371

U.S. 22 (1962)). Standing is properly challenged by a motion to dismiss pursuant to Rule 12(b)(1), and it is a question of law for the court. *McCrann v. Pinehurst*, 225 N.C. App. 368, 372, 737 S.E.2d 771, 775 (2013).

2. Rule 12(b)(6) – Plaintiffs' failure to state a claim.

On a motion to dismiss pursuant to Rule 12(b)(6), the ultimate question for the Court is "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, whether properly labeled or not." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (citations omitted). "Factual allegations must be accepted as true," but bare legal conclusions 'are not entitled to a presumption of truth.' " *Coleman v. Coleman*, 2015 NCBC 110 ¶ 18 (N.C. Super. Ct. Dec. 10, 2015) (quoting *Miller v. Rose*, 138 N.C. App. 582, 592, 532 S.E.2d 228, 235 (2000) (citations omitted)); *see also 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) (noting the courts are not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences" when ruling on a motion to dismiss). Dismissal under Rule 12(b)(6) is proper 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." *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citations omitted).

B. THE UDC AND INDIVIDUAL PLAINTIFFS LACK STANDING AS A "NONPROFIT ASSOCIATION" ORGANIZED AND EXISTING UNDER THE PROVISIONS OF CHAPTER 59B OF THE NORTH CAROLINA GENERAL STATUTES.

In the Complaint, the UDC alleges to be a "nonprofit association . . . organized and existing under the provisions of Chapter 59B of the North Carolina General Statutes." (Compl. ¶ 4.) Plaintiffs' own pleadings show otherwise.

As used in Chapter 59B, "nonprofit association" means "an ***unincorporated organization***, other than one created by a trust and other than a limited liability company, consisting of two or more members joined by mutual consent for a common, nonprofit purpose." N.C.G.S. § 59B-2(2) (emphasis added). The UDC, however, is nothing more than an assumed name or "d/b/a" for a corporation that was organized in 1992 under the laws of the State of North Carolina. Specifically, "The United Daughters of the Confederacy – North Carolina Division, Inc." ("UDC, Inc."), a nonprofit corporation, was created by filing Articles of Incorporation with the Secretary of State on September 16, 1992. UDC, Inc. filed an "Assumed Business Name Certificate" pursuant to N.C.G.S. § 66-71.5 ("DBA Certificate"). The DBA Certificate and Articles of Incorporation are attached hereto as Exhibit D and Exhibit E, respectively.

The DBA Certificate, which is referenced in the Complaint, reveals the UDC, Inc. is actually ***an incorporated organization*** — "The United Daughters of the Confederacy – North Carolina Division, Inc." — purportedly doing business under an assumed name — "Winnie Davis Chapter #259." (Compl. ¶ 5.) Neither the incorporated entity nor its assumed name appearing on the certificate is named as a plaintiff to this lawsuit. The UDC, in its own pleadings, failed to establish its standing to bring this action. To the extent UDC, Inc. is the real party in interest, moreover, the individual plaintiffs cannot maintain individual actions against third parties for alleged injuries to the corporation. *Poore v. Swan Quarter Farms, Inc.*, 119 N.C. App. 546, 550, 459 S.E.2d 52, 54 (1995).

C. PLAINTIFFS HAVE NOT ALLEGED OWNERSHIP OR ANY OTHER LEGALLY PROTECTED INTEREST IN THE MONUMENT.

Plaintiffs fail to clearly articulate the precise relief sought through this declaratory judgment action. Plaintiffs allege to be seeking a declaratory judgment "for the purpose of determining a question of actual controversy between Plaintiffs and Defendants with regard to the status of the monument, its location, and the decision of Defendants to remove the monument from its present location, as well as the applicability of Article 1 of Chapter 100 of the North Carolina General Statutes." (Compl. ¶ 30.) Even under a liberal construction, the Complaint fails to allege facts that establish Plaintiffs' standing to bring and maintain this action.

The North Carolina Declaratory Judgment Act provides in pertinent part:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

N.C.G.S. § 1-254. Standing under the North Carolina Declaratory Judgment Act requires a party to show it "has sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Beachcomber Props., L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 832–24, 611 S.E.2d 191, 193–94 (2005). More specifically, to establish standing, a plaintiff must show (1) "injury in fact," which is "an invasion of a legally protected interested that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) "the injury is fairly traceable to the challenged action of the defendant;" and (3) "it is likely," not "merely speculative," that the injury will be redressed by a favorable decision." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (quoting

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)); *see also Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 627–28, 684 S.E.2d 709, 716 (2009).

The allegations in the Complaint reveal Plaintiffs have no "legitimate, cognizable interest" in the Monument. Plaintiffs have not brought an action to quiet title to the Monument or even alleged they have a contractual or other legally enforceable right in the Monument. In fact, Plaintiffs explicitly deny any ownership interest in the Monument. (Compl. ¶¶ 19, 23.) An alleged injury to aesthetic interests, regardless of degree, is insufficient to constitute injury and establish standing. *Neuse River*, 155 N.C. App. at 116, 574 S.E.2d at 53. None of the plaintiffs have demonstrated a legally protected interest in the Monument sufficient to confer standing.

D. AN ALLEGED "THREAT" OF PROSECUTION FOR CRIMINAL TRESPASS AGAINST THE UDC IS NOT SUFFICIENT TO CONFER STANDING.

Plaintiffs seem to claim injury in fact based on an allegation of threatened criminal prosecution. Specifically, Plaintiffs allege at the August 19, 2019, meeting the Board resolved "in the event the UDC refuses, fails or neglects to remove the monument, the UDC would be charged with criminal trespass." (Compl. ¶ 20.) **This is a false statement**. The Board never threatened the UDC that it would be charged with criminal trespass; rather, the Board declared the Monument would be considered a ***public trespass*** if it were not removed by November 1, 2019, in which case the County itself would remove the Monument. The Board never issued any letter to the UDC or the individual plaintiffs conveying they would be charged criminally with trespass; nor did the Board ever represent in any resolution or ordinance that the UDC or the individual plaintiffs would be so charged. There is absolutely no basis for this assertion.

Assuming *arguendo* the Board told the UDC it would be charged with criminal trespass, which is denied and which Plaintiffs are unable to establish, that fact is still not sufficient to confer standing in this action. The North Carolina Supreme Court has noted "[i]t is widely held that a

declaratory judgment is not available to restrain enforcement of a criminal prosecution." *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 349, 323 S.E.2d 294, 309 (1984); *see also Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 62 (1984) ("Mere apprehension or the mere threat of an action or a suit is not enough." (citations omitted)); *Jernigan v. State,* 279 N.C. 556, 560, 184 S.E.2d 259, 263 (1971) ("A declaratory judgment is a civil remedy which may not be resorted to try ordinary matters of guilt or innocence."). Even taking Plaintiffs' allegation as true, therefore, the fear of criminal prosecution is not enough to establish standing through an injury in fact.

E. PLAINTIFFS HAVE NO STANDING TO ENFORCE N.C.G.S. § 100-2.1 BECAUSE THAT STATUTE CREATES NO PRIVATE CAUSE OF ACTION.

Plaintiffs' claims are based on the provisions set forth in N.C.G.S. § 102.1, a statute that proscribes limitations on removing and relocating "objects of remembrance" in certain situations. As explained below, Plaintiffs own allegations fail to establish that N.C.G.S. § 100-2.1 applies to the Monument. Even if that statute did apply in this situation, which it does not, Plaintiffs would still not have no standing to enforce its statutory provisions against Defendants in this case.

"Legal rights and liabilities must rest upon some reasonably settled basis, fixed either by the common law or by statute." *Time Warner Entm't Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 516, 747 S.E.2d 610, 614–15 (2013) (quoting *Briscoe v. Henderson Lighting & Power Co.,* 148 N.C. 396, 413, 62 S.E. 600, 607 (1908)). Accordingly, our courts have recognized that allegations based on statutory rights can satisfy the controversy requirement to bring a declaratory judgment action. *Id.* (citing *Carolina Power & Light Co.*, 203 N.C. at 820, 167 S.E. at 61; *Briscoe,* 148 N.C. at 413, 62 S.E. at 607). Still, "[o]ur caselaw generally holds that a statute allows for a private cause of action only where the legislature has expressly provided a private cause of action within the statute." *Time Warner*, 228 N.C. App. at 516, 747 S.E.2d at

614–15 (2013) (citations omitted) (internal quotation marks omitted), *cited in Sykes v. Health Network Sols., Inc.*, 828 S.E.2d 467, 474 (N.C. June 14, 2019), *reh'g denied*, 830 S.E.2d 830 (N.C. Aug. 14, 2019).

N.C.G.S. § 100-2.1 confers no statutory rights upon Plaintiffs to enforce through this declaratory judgment action. The statute does not expressly create a private cause of action. It is completely silent with respect to enforcement or the consequences of a violation. N.C.G.S. § 100-2.1 does not implicitly create a private cause of action, either. No part of the "statute enunciate[s] an explicit or implicit intent on the part of the General Assembly to create a statutory protection" for Plaintiffs or anyone similarly situated. *Lea v. Grier*, 156 N.C. App. 503, 509, 577 S.E.2d 411, 416 (2003); *cf. Williams v. Alexander Cnty. Bd. of Educ.*, 128 N.C. App. 599, 604, 495 S.E.2d 406, 409 (1998) (concluding teachers had cause of action under statute requiring school boards to pay specific sums to teachers participating in Effective Teaching Training Program). To find a private cause of action in a statute where none exists would be to "violate the canon *casus omissus pro omisso habendus est,* or "a case omitted is to be held as intentionally omitted." *Wilson Funeral Directors, Inc. v. N. Carolina Bd. of Funeral Serv.*, 244 N.C. App. 768, 774, 781 S.E.2d 507, 511 (2016).

F. PLAINTIFFS HAVE NO STANDING OR RIGHT TO FORCE CHATHAM COUNTY TO ADOPT A MESSAGE WITH WHICH CHATHAM COUNTY DISAGREES.

The Monument, situated on public property, represents government speech. The message conveyed by the Monument, as the Board stated when the Monument License was revoked, was at one time consistent with the ruling values of the County, but is no longer so. Although removing the Monument may offend their own values, Plaintiffs cannot force the County to adopt a message with which it disagrees.

In *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the U.S. Supreme Court considered whether the Free Speech Clause of the First Amendment entitles a private group to insist that a municipality permit it to place a permanent monument in a city park. *Id.* at 464. Summum, a religious organization (the "respondent"), requested permission from Pleasant Grove City ("the city") to erect a stone monument in Pioneer Park. *Id.* at 465. The monument would contain the "Seven Aphorisms of Summum" and be similar in size and nature to a Ten Commandments monument, which had been previously donated by a private group and was on display in the park. *Id.* The city denied the request, citing its practice to limit monuments in the park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community." *Id.*

The respondent filed suit again the city claiming it had violated the Free Speech Clause of the First Amendment by accepting the Ten Commandments monument but rejecting the proposed Seven Aphorisms monument. *Id.* at 466. The Court disagreed, concluding the city's action did not implicate the Free Speech Clause. *Id.* at 464. The Court explained the "Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." *Id.* at 467. The Court also recognized that "[p]ermanent monuments displayed on public property typically represent government speech." *Id.* at 470. Because the city was engaging in its *own* expressive conduct, *vis a vis* the placement of a permanent monument in a public park, the respondent's Free Speech rights were not implicated. *Id.* at 467–72.

The Court's decision in *Pleasant Grove* recognizes the practical reality that "to govern, government must say something," and its message should not be subject to a First Amendment heckler's veto. *Id.* at 468. That is to say, "when government speaks, it is not barred by the Free Speech Clause from determining the content of what is says." *Id.* at 467–68.

The Court reiterated these principles in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015). The Court in *Walker* considered whether Texas was entitled to refuse to issue specialty license plates featuring a Confederate battle flag — a design proposed by the Sons of Confederate Veterans. *Id.* at 2243–44. The Court reached the same result as it did in *Pleasant Grove*, holding the state's decision to reject the proposed design did not violate the applicant's rights guaranteed by the Free Speech Clause. *Pleasant Grove* and *Walker* both acknowledge the government can speak for itself, and private citizens cannot force the government to adopt a message with which it disagrees.

As a permanent monument displayed on public property, the Monument represents government speech. The Board at the August 19, 2019, meeting expressed its opinion on the propriety of the message conveyed by the Monument: "The monument represents government speech that at one time was consistent with the ruling values of the county, but now its message is inconsistent with the ruling values of the county." Plaintiffs, of course, may disagree with this position taken by the Board, but Plaintiffs have no right, constitutional or otherwise, to force the County to adopt a message with which it disagrees.

G. THE INDIVIDUAL PLAINTIFFS HAVE NO STANDING TO BRING THIS ACTION AS TAXPAYERS IN CHATHAM COUNTY.

The individual plaintiffs have failed to establish standing to bring suit as taxpayers against Defendants in this action. "Generally, an individual taxpayer has no standing to bring a suit in the public interest." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) (citing *Green v. Eure, Secretary of State*, 27 N.C. App. 605, 608, 220 S.E.2d 102, 105 (1975) ("It is not sufficient that [a plaintiff] has merely a general interest common to all members of the public.")). The individual plaintiffs, of course, each claim to be "a direct ancestor of a member of the armed forces of the Confederate States of American during the Civil War." (Compl. ¶¶ 1–3.) But as a basis for

standing, this argument has been flat-out rejected by the courts. *See, e.g.*, *Gardner v. Mutz*, 360 F. Supp. 3d 1269, 1276 (M.D. Fla. 2019) (holding "genealogical relationships" to Confederate soldiers were insufficient to establish standing because they constitute "general public interest grievance[s]" that are "not sufficiently particularized"); *McMahon v. Fenves*, 323 F. Supp. 3d 874, 880 (W.D. Tex. 2018) ("[Plaintiffs] may he more deeply attached to values embodied by the Confederate monuments than the average student rushing to class on the mall, but the identities as descendants of Confederate veteran do not transform an abstract ideological interest in preserving the Confederate legacy into a particularized injury sufficient [to establish standing].").

Under a rare exception to rule against individual taxpayer standing, a taxpayer may have standing to bring suit in his own behalf and that of all other taxpayers if he can demonstrate "a tax levied upon him is for an unconstitutional, illegal or unauthorized purpose"; carrying out a "challenged provision will cause him to sustain personally, a direct and irreparable injury"; or "he is a member of the class prejudiced by the operation of a statute." *Id.* (quoting *TexFi Indus. v. City of Fayetteville*, 44 N.C. App. 268, 270, 261 S.E.2d 21, 23 (1979).

The individual plaintiffs have not brought this action in their own behalf and that of all other taxpayers of Chatham County. A review of the Complaint, moreover, reveals no allegations that would allow the individual plaintiffs to do so. The individual plaintiffs have not alleged a tax was levied upon them that is for an unconstitutional, illegal or unauthorized purpose. The individual plaintiffs have not alleged that carrying out a challenged provision will cause them to sustain personally, a direct and irreparable injury. Finally, the individual plaintiffs have not alleged to be members of a class prejudiced by the operation of a statute. Under established North Carolina law, therefore, the individual plaintiffs have failed to satisfy any of the three theories that would allow them to sue directly as individual taxpayers.

There is another theory that allows a taxpayer to bring a derivative action on behalf of a public agency or political subdivision. A "plaintiff may have [ ] standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision, the proper authorities neglected or refused to act." *Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 46–47 (citations omitted) (internal quotation marks omitted). To establish standing to bring a derivative taxpayer action, however, a plaintiff must allege to be "a taxpayer of that particular public agency or political subdivision" and either (1) "there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision," or (2) "a demand on such authorities would be useless." *Id.* at 395–96, 553 S.E.2d at 47 (quoting *Guilford County Bd. of Comrs. v. Trogdon*, 124 N.C. App. 741, 747, 478 S.E.2d 643, 647 (1996) (internal quotation marks omitted).

The derivative taxpayer theory, like the other theories mentioned above, is not available to the individual plaintiffs in this case. The individual plaintiffs have not brought this action derivatively, on behalf of Chatham County. The Complaint is void of any allegation that "there has been a demand on and refusal by the proper authorities to institute proceedings for the protection of the interests of the political agency or political subdivision." *Fuller*, 145 N.C. App. at 395–96, 553 S.E.2d at 47 (citations omitted) (internal quotation marks omitted). The individual plaintiffs have also failed to allege, alternatively, that "a demand on such authorities would be useless." *Id.* Based on the foregoing, the individual plaintiffs have failed to establish standing to bring this action as taxpayers.

H. PLAINTIFFS HAVE FAILED TO SUFFICIENTLY ALLEGE THAT STATUTORY LIMITATIONS ON THE REMOVAL OF "OBJECTS OF REMEMBRANCE" WOULD APPLY TO THE MONUMENT AT ISSUE IN THIS CASE.

In the Complaint, Plaintiffs allege, upon information and belief, the Monument was "accepted as a gift" and that such was authorized and directed by the Board. (Compl. ¶ 17.) This is, of course, an unsupported legal conclusion and not entitled to a presumption of truth. Because Plaintiffs have failed to allege that the Board accepted the Monument by gift in accordance with the requisite statutory procedures, an essential element of Plaintiffs' claim is nonexistent and subject to dismissal.

N.C.G.S. § 100-2.1 purports to limit the relocation and removal of "objects of remembrance" located on public property in certain situations. An "object of remembrance" is "a monument, memorial, plaque, statue, marker, or display of a permanent character that commemorates an event, a person, or military service that is part of North Carolina's history." *Id.* § 100-2.1(b). Under the same subsection, "[a]n object of remembrance located on public property may not be permanently removed and may only be relocated, whether temporarily or permanently, under the circumstances listed in this subsection and subject to the limitations in this subsection." *Id.*

The statute contains an important exception to the limitations on removal. Specifically, N.C.G.S. § 100-2.1 does not apply to "[a]n object of remembrance owned by a private party that is located on public property and that is the subject of a legal agreement between the private party and the State or a political subdivision of the State governing the removal or relocation of the object." *Id.* § 100-2.1(c)(2).

As noted above, Plaintiffs have no standing to enforce N.C.G.S. § 100-2.1 because that statute provides no private cause of action. But even if it did, Plaintiffs' Complaint still fails to state a claim upon which relief can be granted. By statute, the County could only have lawfully acquired the Monument through a duly adopted resolution or ordinance. Plaintiffs have not alleged

the County accepted the Monument through either of these two methods. Because the allegations, taken as true, are insufficient to establish the County owns the Monument, Plaintiffs' claims, which are based on the application of N.C.G.S. § 100-2.1, fail as a matter of law.

Counties are bodies politic and, as creatures of legislation, derive their powers from statutes. *Lanvale Properties, LLC v. Cnty. of Cabarrus*, 366 N.C. 142, 150, 731 S.E.2d 800, 807 (2012). Counties "are authorized to exercise only those powers expressly conferred upon them by statute and those which are necessarily implied by law from those expressly given." *Davidson Cnty. v. City of High Point*, 321 N.C. 252, 257, 362 S.E.2d 553, 557 (1987) (citations omitted); *see also Cabarrus Cnty. v. City of Charlotte*, 71 N.C. App. 192, 194, 321 S.E.2d 476, 479 (1984) ("[A]ny powers which a county possesses must be exercised in conformity with the laws of the State.").

Unless a specific statute directs otherwise, each power of a county must be exercised by its board of commissioners and "carried into execution as provided by the laws of the State." N.C.G.S. § 153A-12 (2018) (originally enacted in 1868);[1] *see also Bd. of Comm'rs of McDowell Cnty. v. Hanchett Bond Co.*, 194 N.C. 137, 138 S.E. 614, 615 (1927) (noting a county exercises its power through its board of commissioners). If and to the extent a power is conferred upon a county by statute without direction or restriction as to how it is to be exercised, such power "shall be carried into execution as provided by ordinance or resolution of the board of commissioners." *Id.*

[1] In 1973, the General Assembly repealed Chapter 153 of the North Carolina General Statutes, with the exception of provisions that were transferred to Chapters 162 and 162A, and reenacted the majority of statutes pertaining to counties in Chapter 153A. An Act to Consolidate, Revise, and Amend the General Statutes Relating to Counties, H.B. 329, 1973 S.L. 822 (May 24, 1973). The statute addressing the exercise of corporate power, however, remained the same. *Compare* N.C.G.S. § 153A-12 (2018) *with* N.C.G.S. § 153-12 (1973) ("Except as otherwise directed by law, each power, right, duty, function, privilege, and immunity of the corporation shall be exercised by the board of commissioners. A power, right, duty, function, privilege, or immunity shall be carried into execution as provided by the laws of the State; a power, right, duty, function, privilege, or immunity that is conferred or imposed by law without direction or restriction as to how it is to be exercised or performed shall be carried into execution as provided by ordinance or resolution of the board of commissioners.").

Relevant to this case and by statute, a county has the power to "acquire, by gift, grant, devise, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property for use by the county or any department, board, commission, or agency of the county. N.C.G.S. § 153A-158 (2018) (originally enacted in 1868).[2] The North Carolina General Statutes provide no specific direction or restriction as to how a county must exercise its power to acquire property. Such power must, therefore, be carried into execution by ordinance or resolution of the board of commissioners. ***Therefore, the sole mechanism for the County to acquire real or personal property is by resolution or adoption of an ordinance of its board of commissioners.***

Critically, Plaintiffs failed to allege in their Complaint that such an ordinance or resolution was ever adopted by the Board in this case. As noted above, a complaint fails to state a claim upon which relief can be granted "(1) when the complaint on its face reveals that no law supports [the] claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the . . . claim." *Oates*, 314 N.C. at 278, 333 S.E.2d at 224. To adequately allege the Monument was a gift accepted by the Board, it is incumbent upon Plaintiffs to plead that such a gift was accepted in compliance with the two statutes identified above. As Plaintiffs failed to do so, the Complaint "reveals on its face the absence of fact sufficient to make a good claim" and should therefore be dismissed.

Plaintiffs' contentions that the County acquired ownership of the Monument simply by making repairs is also untenable. At the hearing on the motion for temporary restraining order, Plaintiffs did not present any legal authority supporting this contention. Defendants have found

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[2] *See* Note 2, *supra*. The statute empowering counties to acquire property also remained the same. *Compare* N.C.G.S. § 153A-158 (2018) *with* N.C.G.S. § 153-158 (1973) ("A county may acquire, by gift, grant, devise, bequest, exchange, purchase, lease, or any other lawful method, the fee or any lesser interest in real or personal property for use by the county or any department, board, commission, or agency of the county.").

no legal authority for the proposition that a local government can acquire ownership in personal property by making repairs or improvements to the same.

A review of the law of betterments provides further direction as to why Plaintiffs' contention fails. A betterments claim does not entitle a claimant a title or right to the land, but simply creates a claim for the value of the *permanent improvements* to the land over and above the value of the use and occupation of the land. *State v. Taylor*, 322 N.C. 433, 435, 368 S.E.2d 601, 602 (1988). To be entitled to compensation for betterments under N.C.G.S. § 1-340, a party must show he made permanent improvements on the property under a bona fide, reasonable belief of good title. *Atl. & E. Carolina Ry. Co. v. Wheatly Oil Co.*, 163 N.C. App. 748, 753–54, 594 S.E.2d 425, 429 (2004) (citation omitted); *see also Pamlico County v. Davis*, 249 N.C. 648, 651, 107 S.E.2d 306, 309 (1959) (holding that plaintiff has "the burden of establishing (1) that he made permanent improvements, (2) *bona fide* belief of good title when the improvements were made, and (3) reasonable grounds for such belief.").

The doctrine of betterments recognizes the same limitations to the acquisition of property in this case — that is, improvements do not create an ownership interest in the property so improved. There has been no showing by Plaintiffs that Chatham County had a *bona fide* belief that it owned the Monument in 1988 when steps were taken to protect the public from the Monument falling and injuring someone.[3] Plaintiffs cannot pursue this argument to establish legal ownership of the Monument with Chatham County.

[3] In addition to the exception listed under N.C.G.S. § 100-2.1, and as stated above, counties have broad statutory authority to remedy unsafe conditions and detriments to public health. *See, e.g.*, N.C.G.S. § 153A-121 (providing counties with express authority to "define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances"); N.C.G.S. § 153A-140 (authorizing counties "to remove, abate, or remedy everything that is dangerous or prejudicial to the public health or safety.").

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court grant their motion and dismiss the Complaint with prejudice.

This 7th day of November 2019.

POYNER SPRUILL LLP

By: ______________________________

J. Nicholas Ellis
N.C. State Bar No. 13484
jnellis@poynerspruill.com
Dylan J. Castellino
N.C. State Bar No. 49123
dcastellino@poynerspruill.com
Post Office Box 353
Rocky Mount, NC 27802-0353
Tel: 252.446.2341
Fax: 919.783.1075
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies, pursuant to Rule 5 of the North Carolina Rules of Civil Procedure, that on this date a copy of ***Defendants' Memorandum of Law in Support of Their Motion to Dismiss*** was served by facsimile and e-mail addressed to the following:

James A. Davis
301 North Main Street, Suite 2452
Winston-Salem, NC 27101
Fax: 336.659.6048
E-mail: jad@jamesadavislaw.com
cabelljregan@earthlink.net
Attorney for Plaintiffs

This 7th day of November 2019.

POYNER SPRUILL LLP

By: ______________________________

J. Nicholas Ellis
N.C. State Bar No. 13484
jnellis@poynerspruill.com
Dylan J. Castellino
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Fax: 919.783.1075
Attorneys for Defendants

BK 2043 PG 0959

FILED
CHATHAM COUNTY NC
LUNDAY A. RIGGSBEE
REGISTER OF DEEDS

FILED	May 08, 2019
AT	04:13:24 pm
BOOK	02043
START PAGE	0959
END PAGE	0959
INSTRUMENT #	04415
EXCISE TAX	(None)

ASSUMED BUSINESS NAME CERTIFICATE (NCGS §66-71.5)

Please print legibly.

1. The assumed business name is:
   Winnie Davis Chapter #259

   (You may include no more than five (5) assumed business names on this form.)

2. The real name of the person or entity engaging in business under the assumed business name is:
   The United Daughters of the Confederacy - North Carolina Division, Inc.
   SOSID 0312991

   (Corporations, LLC's, limited partnerships must provide the exact name registered with the NC Secretary of State's office and the SOSID number assigned at the time of formation. Go to www.sosnc.gov/br/search to look up your information.)

3. The nature/type of the business is: patriotic, benevolent, educational, historical, memorial

4. The street address of the principal place of business is: (PO Boxes are not acceptable)
   5332 NC Hwy 87 North, Pittsboro, NC 27312

5. The mailing address, if different from the street address, is:

6. The counties where the assumed business name will be used to engage in business are:
   ☒ All 100 North Carolina counties
   ~~mainly Chatham County~~ BCP

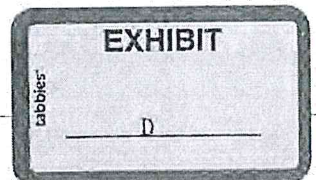
This certificate is signed by the owner/legal representative of the person or entity named above, this 7th day of May, 2019.

Signature: Barbara C. Pugh

Printed/Typed Name: Barbara C. Pugh

Title: President, Winnie Davis Chapter #259

(See instructions for who must sign for various business entity types.)



92 259 5037

0-0312991
FILED
9:00 AM
SEP 16 1992
RUFUS L. EDMISTEN
SECRETARY OF STATE
NORTH CAROLINA

ARTICLES OF INCORPORATION

OF

THE UNITED DAUGHTERS OF THE CONFEDERACY - NORTH CAROLINA DIVISION, INC.

I, the undersigned natural person of the age of eighteen years or more, acting as incorporator for the purpose of creating a nonprofit corporation under the laws of the State of North Carolina, as contained in Chapter 55A of the General Statutes of North Carolina entitled "nonprofit Corporation Act," and the several amendments thereto, do hereby set forth:

1. Name. The name of the corporation is The United Daughters Of The Confederacy - North Carolina Division, Inc.

2. Duration. The period of duration of the corporation is perpetual.

3. Purposes. The purposes for which the corporation is organized are to achieve the objectives of the United Daughters of the Confederacy, which include historical, benevolent, memorial, educational and patriotic programs, plans events and scholarships by members who are lineal or collateral descendants of men and women who served the cause of the Confederate States of America.

G. To establish a fiscal system to receive charitable donations, trusts, etc., and to carry out charitable trusts and trusts for benevolent and philanthropic purposes in line with the above stated objectives.

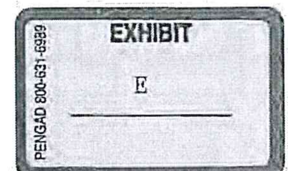
H. To engage in any lawful act or activity for which a non-profit organization may be organized under Chapter 55A of the General Statutes of North Carolina.

I. Notwithstanding any other provisions of these Articles, the purposes for which the corporation is organized are exclusively charitable, literary and educational within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986 or the corresponding provision of any future United States Internal Revenue Law.

4. Members. The corporation shall have members, received by application in a manner provided in the By-laws.

5. Election of Directors. The directors of the corporation shall be elected in the manner provided in the By-Laws.

6. Address. The address of the initial registered office of the corporation is 302 North Blount Street, Raleigh, NC, Wake County, North Carolina and the initial registered agent at such address is Mrs. E. Thomas Drake.



7. Initial Directors. The number of directors constituting the initial board of directors shall be nine (9), and the names and addresses of the persons who are to serve as directors until the first meeting of the corporation or until their successors are elected and qualified are as follows:

Mrs. E. Thomas Drake
358 Brevard Road
Asheville, NC 28806

Mrs. Benjamin Tart
Rt. 2, Box 317
Ramseur, NC 27316

Pamela Carter Foy
Rt. 21, Box 1490
Lexington, NC 27292

Mrs. Annette MacRae
P. O. Box 940
Bethel, NC 27812

Mrs. Jesse F. Grimes
Rt. 3, Box 230
Pikeville, NC 27863

Mrs. C. Knox Council, Jr.
314 Country Club Drive
Jacksonville, NC 28546

Mrs. Kenneth L. Money
3532 Kirby Smith Drive
Wilmington, NC 28409

Mrs. Roderick A. Molinare
3789 Kirklees Road
Winston-Salem, NC 27104

Mrs. Don R. Averitte
420 Olde Shannon Road
Red Springs, NC 28377

8. Incorporator. The name and address of the incorporator is:

A. Frank Johns
P. O. Box 3585
Greensboro, NC 27402

9. Powers. Notwithstanding any other provisions of these Articles, this corporation will not carry on any other activities not permitted to be carried on by (a) a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 or the corresponding provision of any future United States Internal Revenue Law or (b) a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1986 or any other corresponding provision of any future United States Internal Revenue Law.

10. Dissolution. In the event of dissolution, the residual assets of the corporation will be turned over to one or more organizations which themselves are exempt as organizations described in Section 501(c) (3) and Section 170(c)(2) of the Internal Revenue Code of 1986 or corresponding Sections of any prior or future law, or to the federal, state or local government for exclusive public purpose.

10th IN WITNESS WHEREOF, I have hereunto set my hand this the 10th day of September, 1992.

[signature] (SEAL)

NORTH CAROLINA

GUILFORD COUNTY

I, Denise Y. Willis, a Notary Public for said County and State, do hereby certify that A. Frank Johns personally appeared before me this day and acknowledged the due execution of the foregoing Articles of Incorporation for the purposes therein expressed.

WITNESS my hand and notarial seal this the 10th day of September, 1992.

Denise Y. Willis
Notary Public

My Commission Expires:

9/4/96

DENISE Y. WILLIS
NOTARY PUBLIC
GUILFORD COUNTY, NC
Commission Expires 9-4-96

0-031295

93 040 5144

FILED
9:00 AM
FEB 10 1993
RUFUS L. EDMISTEN
SECRETARY OF STATE
NORTH CAROLINA

State of North Carolina
Department of the Secretary of State
ARTICLES OF AMENDMENT
NONPROFIT CORPORATION

The undersigned nonprofit corporation, for the purpose of amending its articles of incorporation in accordance with the provisions of Section 55A-36 of the North Carolina Nonprofit Corporation Act, hereby sets forth:

1. The name of the corporation is: THE UNITED DAUGHTERS OF THE CONFEDERACY - NORTH CAROLINA DIVISION, INC.

2. The text of each amendment adopted is as follows: *(State below or attach)*

SEE ATTACHED

3. *(Check applicable paragraph)*

____The corporation has members with voting rights. At a regularly convened meeting of the members of the corporation held on the ____ day of __________ 19____, the amendment was adopted. A quorum was present at the meeting held on the above date and the said amendment received at least two-thirds of the votes entitled to be cast by members present or represented by proxy at such meeting.

✓ There are no members of the corporation having voting rights. At a ~~regularly convened meeting~~ specially called polling of the directors of the corporation held on the 15th day of January 19 93, the amendment was adopted. The amendment received the affirmative vote of a majority of the directors in office.

In testimony whereof, the corporation has caused these articles of amendment to be executed in its name by its ✓ President and ✓ Secretary this 15th day of January, 19 93.

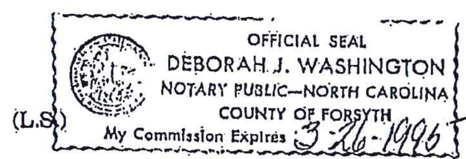
THE UNITED DAUGHTERS OF THE CONFEDERACY - NORTH CAROLINA DIVISION, INC.
Name of Corporation

Betty Carolyn H. Molinare
President or Vice President

Melanie B. Tart
Secretary or Assistant Secretary

State of North Carolina
County of Forsyth

This is to certify that on this the 27th day of January 1993, personally appeared before me Betty Carolyn H. Molinare and SEE REVERSED SIDE, each of whom, being by me first duly sworn, stated that he signed the foregoing Articles of Amendment in the capacity indicated, that he was authorized to sign, and that the statements therein contained are true and correct.



(L.S.)

Deborah J. Washington
Notary Signature

My commission expires: March 26, 1995

NOTES: Filing fee is $10. One executed original and one exact or conformed copy of these articles must be filed with the Secretary of State.

CORPORATIONS DIVISION 300 N. SALISBURY ST. RALEIGH, NC 27603-5909

State of North Carolina.

County of Nash

This is to certify that on this the 5 day of February 1993, personally appeared before me Melanie B. Tait, being by me first duly sworn, stated that she signed the foregoing Articles of Amendment in the capacity indicated, that she was authorized to sign, and that the statements therein contained are true and correct.

Peggy C. Strickland
Notary Signature

My commission expires: 4-20-93

ADMENDMENT TO THE

ARTICLES OF INCORPORATION OF THE UNITED DAUGHTERS OF THE CONFEDERACY - NORTH CAROLINA DIVISION, INC.

AMEND AS FOLLOWS:

Section 9. <u>Powers.</u>

Insert an additional paragraph after the existing paragraph to read as follows:

> No part of the net earnings of the organization shall inure to the benefit of its members, directors, officers or other persons except that the organization shall be authorized and empowered to reimburse reasonable expenses incurred for services rendered and to make payments and distributions in furtherance of the exempt purposes of the organization.