

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
NORTHERN DIVISION  
No. \_\_\_\_\_

MICHAEL ZITO and CATHERINE ZITO,	)	
	)	
Plaintiffs,	)	<b>COMPLAINT FOR A</b>
	)	<b>TAKING OF PRIVATE</b>
v.	)	<b>PROPERTY WITHOUT</b>
	)	<b>JUST COMPENSATION IN</b>
NORTH CAROLINA COASTAL	)	<b>VIOLATION OF THE UNITED</b>
RESOURCES COMMISSION,	)	<b>STATES CONSTITUTION,</b>
	)	<b>NORTH CAROLINA</b>
Defendant.	)	<b>CONSTITUTION, AND</b>
	)	<b>NORTH CAROLINA LAW</b>
	)	<b>(U.S. Const. amend. V;</b>
	)	<b>N.C. Const. art. I, § 19)</b>

1. This lawsuit challenges a final decision of Defendant North Carolina Coastal Resources Commission’s (Defendant or Commission) which prevented Plaintiffs Michael and Catherine Zito (Zitos or Plaintiffs) from rebuilding their small beach home after a fire, thereby depriving them of all economically beneficial use and value of their property.

2. Plaintiffs, who are residents of the state of Maryland, own a beachfront lot in the Town of Nags Head. Their lot is surrounded by residential homes. When Plaintiffs bought the lot in 2008, it also contained a home. But in 2016, a fire burned the home down. When Plaintiffs sought a rebuilding permit from the local government, the permit was denied.

3. Plaintiffs then sought a “variance” from the local denial from the Commission, the granting of which would have allowed the Zitos to rebuild. But the

Commission denied the variance. Without the variance, no viable developmental or economic use for the property exists. The variance denial converts their lot into open space for the public benefit. This amounts to a taking of property without just compensation, in violation of the federal and state constitutions. The Zitos seek damages under the United States Constitution and pursuant to “inverse condemnation” principles arising under North Carolina Constitution Article I, Section 19, and state common law, for the appropriation of their property.

## **THE PARTIES**

### **Plaintiffs**

4. Plaintiffs are a married couple domiciled in the state of Maryland. Plaintiff Michael Zito is a retired healthcare financial consultant. His wife, Catherine, owns a separate healthcare financial consulting business. They have three children. Together, Plaintiffs own property located at 10224 East Seagull Drive, Nags Head, North Carolina.

### **Defendant**

5. Defendant North Carolina Coastal Resources Commission is an agency of the state of North Carolina operating within the Division of Coastal Management in the North Carolina Department of Environmental Quality. The Commission was created when the state legislature adopted the North Carolina Coastal Area Management Act (CAMA) in 1974.

6. Defendant establishes policies for the North Carolina Coastal Management Program and adopts rules for implementing CAMA. The Commission

promulgates rules for coastal development, and makes certain final CAMA permitting decisions related to development in coastal areas.

7. As a state agency, Defendant is subject to the limitations of the United States Constitution and North Carolina Constitution. In particular, it may be sued for taking private property without just compensation.

### **JURISDICTION AND VENUE**

8. Plaintiffs seek damages in excess of \$75,000 for the taking of their private property without just compensation. Plaintiffs' state law damages claims are asserted as an "inverse condemnation" action arising under the North Carolina Constitution and state common law. The Court has jurisdiction of these claims under 28 U.S.C. § 1332.

9. Plaintiffs further assert that the Commission violated the Fifth Amendment's Takings Clause, as incorporated against the states by the Fourteenth Amendment. The Court has jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1332. A remedy is also sought under the Declaratory Judgment Act, 28 U.S.C. § 2201.

10. Venue is proper in this Court because this action concerns property located in the Town of Nags Head, North Carolina, within the jurisdiction of the Eastern District of North Carolina.

## FACTS

### **The Property**

11. Plaintiffs live and reside in Timonium, Maryland.

12. In 2008, Plaintiffs purchased a residentially developed oceanfront lot located at 10224 East Seagull Drive (the “Lot” or “Property”) in South Nags Head, Dare County, North Carolina, for approximately \$438,500. *See* Exhibit A.

13. The Property was originally platted in 1977 and developed with an approximately 1,700 square-foot home in 1982.

14. The Zitos’ Property lies within an established and dense coastal subdivision adjacent to the Atlantic Ocean. *See* Exhibit B.

15. Numerous beach homes exist on both sides (to the northwest and south) of the Zitos’ Lot, as well as landward (to the southwest) of the Property.

16. At the present time, more than a dozen beach homes lie on lots within the same strip of coastal land paralleling the Atlantic Ocean that contains the Zitos’ Property. These lots and homes are not set farther back from the sea than the Zitos’ Property.

17. Between 2008-2016, the Zitos used and enjoyed their beach home for family vacations and as a rental property.

18. On October 10, 2016, while the Zitos’ beach home was unoccupied, a fire burned the home to the ground. The septic system remained intact and unharmed.

19. The Zitos began to make plans to rebuild the home.

## **The CAMA Permitting Framework**

20. Rules and regulations derived from the North Carolina Coastal Area Management Act (CAMA) govern development in North Carolina's ocean areas.

21. Pertinent here, certain CAMA rules establish set-back requirements for ocean front development.

22. Property within the Ocean Erodible Area of Environmental Concern ("AEC"), 15A NCAC 7H.0304, is subject to building set-back lines based on estimated annual erosion rates and the location of the first line of stable, natural vegetation.

23. Buildings of less than 5,000 square feet must be set be set back from the first stable line of vegetation at a distance of a least 30 times the annual erosion rate. 15A NCAC 7H.0306.

24. However, a grandfather provision in the CAMA rules establishes a reduced set-back line if the standard set-back line would prohibit placement of a structure on a lot created prior to June 1, 1979, 15A NCAC 7H.0309. Development of less than 2,000 square feet on such a grandfathered lot must only be set back 60 feet from the line of vegetation. *Id.*

25. Those who wish to build in an AEC coastal area must apply for a CAMA permit to do so. Local coastal governments serve as the initial CAMA permit decision-maker. If a locality denies a permit, the applicant may seek a variance from the CAMA rule underlying the denial by filing a petition for variance with the Commission.

26. On or about July 31, 2017, Plaintiffs submitted an initial CAMA Minor Permit application to the Town of Nags Head's CAMA Local Permit Officer ("LPO").

27. The Zitos' application sought permission to rebuild their home in the existing 32' x 28' footprint, with a resulting maximum Total Floor Area of 1,792 square feet (the 2,048 square footage listed on the original CAMA minor permit application is an error). The Zitos also proposed a driveway constructed of clay, packed sand, or gravel to minimize flooding issues.

28. After Dare County inspected and approved the Zitos' existing septic system for use with a new home like that which they proposed, the Town LPO deemed the CAMA application complete.

29. The Zitos' Lot is in an AEC, where the official erosion rate is 6 feet per year. This creates a standard setback line of 180 feet (6' x 30') inland from the line of vegetation for new development. The line of vegetation in the area containing the Zitos' Lot is established by a static line of vegetation marked at the line of vegetation that existed when the Town carried out a 2011 beach renourishment project in the area. 15A NCAC 7H.0305(a)(6) and 7H.0306(a)(11).

30. The Zitos' Lot, like the other developed lots existing to the immediate sides of their property, is not set back 180 feet from the static vegetation line and that set-back rule would thus prohibit development if strictly applied.

31. The 60 foot set-back line for grandfathered, pre-1979 lots lies just landward of the west side of the Zitos' proposed home.

32. On April 26, 2018, the Town of Nags Head denied Plaintiffs' CAMA Minor Permit application because it did not meet the applicable CAMA setback requirements. *See Exhibit C.*

33. The Town has received its own CAMA Major Permit to carry out a beach nourishment project in the Zitos' area. The project would place more than three-and-a-half million cubic yards of sand on dry beach areas, including on and near the Zitos' private, now-vacant, Lot.

34. After the Town's denial, the Zitos filed a petition for a variance with the Commission to construct the 1,792 square-foot residence as proposed in their CAMA application. They argued, in part, that a variance was warranted because denial would render their property unbuildable.

35. Finding the application procedurally proper, the Commission accepted the variance petition and proceeded to consider it at a public hearing held on November 27, 2018.

36. The Commission issued a decision entitled "Final Agency Decision" denying the variance on December 27, 2018. *See Exhibit D.*

37. In the denial, the Commission determined that the Zitos had not established the hardship necessary to warrant a variance from the CAMA set-back rules.

38. The denial was not based on application of North Carolina's common law nuisance principles or any other longstanding common law background principle of state law.

39. Without the variance, the Zitos cannot develop their Property for a home or any other economically viable, developmental use.

40. Contrary to the Commission's suggestion, Plaintiffs cannot legally use their Property for campsites or for uses traditionally accessory to a residence, like a deck or pool. The Town of Nags Head's local zoning rules prohibit all such alternative uses on the Zitos' Lot, a fact confirmed to the Commission by the Town's CAMA LPO, and no exception from those local prohibitions is possible. *See Exhibit E.*

41. The other homes on either side of the Zitos' now unusable Lot continue to exist, inconsistently with the same set-back rules that prevent the Zitos from rebuilding their home. *See Exhibit B.*

### **Declaratory Relief Allegations**

42. The Zitos have the right to be free from a taking of their private property occurring without just compensation under the Fifth Amendment to the United States Constitution, and Article I, Section 19, of the North Carolina Constitution.

43. Defendant is charged with enforcing state rules that have been employed to harm and take the Zitos' private property without compensation.

44. Defendant has a legal obligation under state and federal law to provide compensation once it takes private property.

45. There is a justiciable controversy in this case as to whether Defendant's denial of a variance to rebuild the Zitos' home requires just compensation under Article I, Section 19, of the North Carolina Constitution and/or the Fifth Amendment to the United States Constitution.



46. A declaratory judgment as to whether Defendant's denial of a variance unconstitutionally takes property will clarify the legal relations between Plaintiffs and Defendant, with respect to enforcement of CAMA rules and the requirement of just compensation.

47. A declaratory judgment as to the constitutionality and legality of Defendant's denial of a variance will give the parties relief from the uncertainty and insecurity giving rise to this controversy.

## **COUNT I**

### **INVERSE CONDEMNATION UNDER THE NORTH CAROLINA CONSTITUTION AND STATE LAW**

48. Plaintiffs hereby incorporate all the foregoing allegations.

49. The North Carolina Constitution does not contain a Takings Clause analogous to that in the Fifth Amendment of the United States Constitution.

50. The North Carolina Supreme Court has concluded, however, that the "Due Course of Law" provision in Article I, Section 19, of the North Carolina Constitution incorporates a guarantee against uncompensated takings of private property for public use.

51. As such, the aforementioned state constitutional provision provides property owners with an "inverse condemnation" cause of action to recover damages when the state or a political subdivision takes private property without instituting eminent domain proceedings.

52. The state and its agencies are subject to Article I, Section 19, and the right of action it provides for a taking of private property.

53. A property owner may establish that a compensable taking has occurred, resulting in a valid state law inverse condemnation claim, by showing that the government has substantially impaired its right to possess, use, enjoy, or dispose of land.

54. Property rights may be deemed to be substantially impaired when a government act substantially reduces the value of the subject property or substantially intrudes on other property rights.

55. The Commission's variance denial substantially impairs the use, enjoyment, and value of the Zitos' Property.

56. The impairment of the Zitos' property rights is intended to benefit the general public.

57. The Commission's variance denial results in an uncompensated taking of the Zitos' Property for public benefit.

58. The Commission has not instituted formal condemnation or eminent domain proceedings against the Zitos' Property.

59. The Zitos are entitled to recover compensation under North Carolina inverse condemnation principles.

60. The Zitos are entitled to damages for the taking of their Property by the Commission under Article I, Section 19, of the North Carolina Constitution and state common law.

61. The Zitos have exhausted all applicable and relevant administrative procedures.

62. As citizens of Maryland, the Zitos may raise this state law inverse condemnation claim directly in federal court, and need not sue first in state court, pursuant to 28 U.S.C. § 1332.

## COUNT II

### **UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY RAISED DIRECTLY UNDER THE FIFTH AMENDMENT**

63. Plaintiffs hereby incorporate all the foregoing allegations.

64. The Fifth Amendment prohibits the government from taking private property without just compensation.

65. The Fifth Amendment's requirement of just compensation is self-executing and, through the Fourteenth Amendment, provides property owners with a self-executing right to damages for a taking carried out by a state entity.

66. In general, a regulatory taking occurs when the state denies a property owner all economically beneficial use of land or deprives it of significant economic value.

67. After the variance denial, the Zitos cannot do anything with their Lot except to picnic on it or walk on it or view it.

68. The Commission's variance denial has reduced the Zitos' Lot to open space for the public welfare.

69. On belief and knowledge, the variance decision strips the Zitos' residential Lot of all economically beneficial use and value.

70. Alternatively, if residual value remains, the variance deprives the Lot of at least 95% of its prior value as a residentially developable ocean front lot.

71. In light of the surrounding neighborhood, which includes at least a dozen developed lots in a substantially similar location, relative to the static vegetation line and the sea, as the Zitos' Lot, the Zitos had distinct and reasonable expectations that they could put a home on their Lot.

72. Given that their home existed on the Lot without objection from the state and without harm to the public since 1982, the Zitos had a reasonable and distinct expectation that they could rebuild the same home on their same Lot, after it burned down.

73. The primary use expectation for the Lot is as a residentially developed oceanfront parcel.

74. The Commission's variance denial has the practical effect of ousting the Zitos from their property, leaving it to potential use by the beach-going public and the Town as part of its renourishment projects.

75. The Commission did not provide, offer, or guarantee compensation to the Zitos at the time of its final decision or any other time, and nothing in the state's CAMA rules secures compensation for persons in the Zitos' position.

76. The Commission's variance denial is an uncompensated taking of the Zitos' Property for public benefit.

77. The Zitos have exhausted all applicable and relevant administrative procedures.

78. This federal takings claim seeks damages, in the form of monetary compensation, for the taking of the Zitos' Property.

## RELIEF REQUESTED

The Zitos request the following relief:

1. A declaration that the Commission's denial of the variance results in an unconstitutional taking of the Zitos' Property.
2. Damages for a taking of the Zitos' Property under North Carolina law in the amount of \$700,000.
3. Just compensation for a taking of the Zitos' Property under the Fifth Amendment in the amount of \$700,000.
4. Reasonable attorney fees and costs, as allowed by state and federal law.
5. All other appropriate relief.

This 6th day of March, 2019.

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*\*Special appearance pending*