

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 23CV028280-910

TOWN OF NAGS HEAD, a municipal corporation; TOWN OF SOUTHERN SHORES; a municipal corporation; TOWN OF DUCK, a municipal corporation; TOWN OF KILL DEVIL HILLS, a municipal corporation; TOWN OF KITTY HAWK, a municipal corporation; and TOWN OF MANTEO, a municipal corporation,
Plaintiffs,
vs.
STATE OF NORTH CAROLINA,
Defendant.

COMPLAINT

Plaintiffs, Town of Nags Head (“Nags Head”); Town of Southern Shores (“Southern Shores”); Town of Duck (“Duck”); Town of Kill Devil Hills (“Kill Devil Hills”); Town of Kitty Hawk (“Kitty Hawk”) and Town of Manteo (“Manteo”) seeking a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 *et seq.* and injunctive relief pursuant to N.C. Rule of Civil Procedure 65, hereby allege and say:

PARTIES

1. Nags Head is a municipal corporation organized and existing under the laws of North Carolina and located in Dare County, North Carolina. Nags Head is a body politic and corporate with capacity to sue as provided in N.C. Gen. Stat. § 160A-11.
2. Southern Shores is a municipal corporation organized and existing under the laws of North Carolina and located in Dare County, North Carolina. Southern Shores is a body politic and

corporate with capacity to sue as provided in N.C. Gen. Stat. § 160A-11.

3. Duck is a municipal corporation organized and existing under the laws of North Carolina and located in Dare County, North Carolina. Duck is a body politic and corporate with capacity to sue as provided in N.C. Gen. Stat. § 160A-11.
4. Kill Devil Hills is a municipal corporation organized and existing under the laws of North Carolina and located in Dare County, North Carolina. Kill Devil Hills is a body politic and corporate with capacity to sue as provided in N.C. Gen. Stat. § 160A-11.
5. Kitty Hawk is a municipal corporation organized and existing under the laws of North Carolina and located in Dare County, North Carolina. Kitty Hawk is a body politic and corporate with capacity to sue as provided in N.C. Gen. Stat. § 160A-11.
6. Manteo is a municipal corporation organized and existing under the laws of North Carolina and located in Dare County, North Carolina. Manteo is a body politic and corporate with capacity to sue as provided in N.C. Gen. Stat. § 160A-11.
7. The State of North Carolina is the Defendant (the “State”).

NATURE OF THE CASE

8. On or about September 22, 2023, both Houses of the North Carolina General Assembly ratified House Bill 259, entitled “A Bill to be Entitled an Act to Make Base Budget Appropriations for Current Operations of State Agencies, Departments, and Institutions” (the “Budget Bill”). The same day, the Budget Bill was presented to Governor Roy Cooper for signature. The Budget Bill became law, as 2023 N.C. Sess. 134, on October 2, 2023 when not vetoed by Governor Cooper as provided in Article II, Section 22(7) of the Constitution of North Carolina.
9. The Budget Bill contains a provision enumerated as Section 24.8.(a) and (b) entitled “Dare

County Affordable Housing” (the “Dare County Local Act”). The Dare County Local Act applies by its express terms only to the construction of buildings and infrastructure “under the agreement or series of agreements entered into pursuant to Section 24.1 of Session Law 2022-74” (the “Dare County Project”) previously adopted by both Houses of the General Assembly and which became law on or about July 1, 2022, to construct affordable housing units in accordance with Dare County’s development plan to increase workforce housing. In pertinent part, the Dare County Local Act provides as follows:

- a. That any local government with jurisdiction over the new construction must expedite the issuance of permits and prioritize the conduct of all necessary inspections (Section 24.8.(a)(1));
- b. Exempts the Dare County Project from all parts of Article 6 and 7 of Chapter 160D of the General Statutes, such that the Plaintiffs have no authority to enforce zoning or other regulations authorized by Articles 6 and 7 of Chapter 160D (Section 24.8.(a)(2)a.);
- c. Provides that subdivision approvals otherwise required under Plaintiffs’ ordinances adopted in accordance with Article 8 of Chapter 160D of the General Statutes shall not be required for the Dare County Project, but does call for “a plat of any subdivided land” to be recorded by “a selected qualified private partner” (Section 24.8.(a)(2)b.);
- d. Provides that Plaintiffs, if located within a one-mile radius of the Dare County Project, must provide all utilities in the same manner as they would provide utilities to all other new construction in the jurisdiction, if they have sufficient capacity (Section 24.8.(a)(3)); and
- e. Section 24.8.(b) provides that Dare County Local Act is effective when it becomes law.

10. The effect of the Dare County Local Act is to require Plaintiffs to allow the Dare County Project to be constructed within a town or area of a private party’s choosing and to be completely exempt from certain zoning and regulatory controls that otherwise apply to all other development of property within Plaintiffs’ jurisdictions. The Dare County Local Act requires this despite the fact that citizens throughout Dare County have expressed strenuous

objection to the placement of the Dare County Project in certain zoning districts and other parts of some of Plaintiffs' jurisdiction.

11. In this action, Plaintiffs seek a declaration that the Dare County Local Act is a constitutionally prohibited local or special enactment and otherwise violates certain provisions of the Constitution of North Carolina and also deprives Plaintiffs of their property for a purpose other than a constitutionally permitted purpose.

JURISDICTION AND VENUE

12. Pursuant to N.C. Gen. Stat. § 1-253 et seq., the Plaintiffs seek a declaratory judgment as to the constitutionality of certain enactments of the General Assembly. As alleged below, a present and real controversy exists between the parties as to the constitutionality of such enactments. In addition, Plaintiffs seek to restrain and enjoin the operation of such unconstitutional enactments, which would otherwise apply to Plaintiffs and impair their various rights and powers. Accordingly, this action is properly brought in the Superior Court Division of the General Court of Justice pursuant to N.C. Gen. Stat. §§ 1-253 and 7A-245(a).

13. Venue of the Plaintiffs' claims is proper in Wake County under N.C. Gen. Stat. § 1-82 in that the seat of government of the State of North Carolina lies in Wake County, and because Plaintiffs assert facial challenges to the validity of an act of the General Assembly under N.C. Gen. Stat. § 1-267.1(a1).

FACTS COMMON TO ALL CLAIMS

14. Pursuant to N.C. Gen. Stat. § 160D-101, § 160D-201(a), § 160D-301, § 160D-401, § 160D-501, § 160D-601, §§ 160D-701 and -702, § 160D-801, § 160D-901, and § 160D-1001, Plaintiffs have been granted the authority to develop, adopt, revise, and enforce zoning and other land development rules and regulations. This authority has been granted to all municipal

and county jurisdictions throughout the State of North Carolina.

15. Chapter 160D of the North Carolina General Statutes is a general law that is uniformly applicable throughout the State of North Carolina.
16. The purpose of Article 7 of Chapter 160D is to authorize zoning regulations to be made in accordance with a comprehensive plan. Defendant has granted such authority to local government units like Plaintiffs and all other municipal and county jurisdictions in the State of North Carolina for the purpose to “promote the public health, safety and general welfare.” Among other things, Plaintiffs have been granted the authority to develop zoning regulations to prevent the overcrowding of land; to avoid undue concentration of populations; to lessen congestion in the streets; to secure safety from fire, panic and danger; to facilitate the efficient and adequate provision of transportation, water, sewage, schools, parks and other public requirements; and to promote the health, safety, morals or general welfare of the community.
17. Article 7 of Chapter 160D of the General Statutes authorizes Plaintiffs to develop, adopt, and enforce regulations made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses and with the view of preserving the value of buildings and encouraging the most appropriate use of land throughout Plaintiffs’ respective jurisdictions.
18. The Dare County Local Act prohibits Plaintiffs from exercising zoning and land development regulations and authority that every other municipality and county in the State of North Carolina has been granted. The Dare County Local Act is designed to work in favor of the rights and interests of a private party – an entity or entities obtaining an agreement or series of agreements pursuant to Section 24.1 of S.L. 2022-74. The Dare County Local Act also seeks to prevent Plaintiffs from exercising the same zoning and regulatory authority that they

have over all other persons and entities within their jurisdictions over a “selected, qualified private partner” that has contracted with Dare County for an affordable housing project.

19. Pursuant to the authority granted to them by N.C. Gen. Stat. § 160D-101 *et seq.*, each of the Plaintiffs have enacted ordinances applying to and regulating land use planning, development, zoning and subdivision of property. By doing so, Plaintiffs have acted pursuant to law and under the authority granted to and exercised by the vast majority of municipalities in the State of North Carolina.
20. The Dare County Local Act is, through its specific and unequivocal terms, only applicable to local governments, specifically the Plaintiffs, in Dare County. The Dare County Local Act does not purport to apply generally or operate as a general law.
21. The Dare County Local Act became effective when it became law. It contains no transition provision.
22. The Dare County Local Act is designed to enable a private party, working with the authority and funding provided by action of the Dare County Board of Commissioners, to be exempted from laws that Plaintiffs were authorized to develop, adopt, amend and enforce, despite the fact that no other private parties or other entities receive such exemptions or special privileges. As such, the Dare County Local Act constitutes an unconstitutional private emolument which is prohibited by Article I, Section 32 of the Constitution of North Carolina.
23. Nags Head, Manteo, and Kill Devil Hills provide water service and Manteo provides sewer service subject to strict health and safety regulations for the benefit of citizens of those Plaintiffs’ jurisdictions. The Dare County Local Act affects and impairs these Plaintiffs’ ability and authority over providing drinking water, water safe for household use, and sanitary sewer services, and thus the Dare County Local Act relates to health and sanitation within

contemplation of Article II, Section 24(1)(a) of the Constitution of North Carolina.

FIRST CLAIM FOR RELIEF
(Judgment Declaring Unconstitutionality of the Dare County Local Act)

24. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 23 of this Complaint as if fully repeated here.
25. Article II, Section 24(1)(a) of the Constitution of North Carolina provides that “[t]he General Assembly shall not enact any local, private or special act or resolution: (a) [r]elating to health, sanitation, and the abatement of nuisances.”
26. Article II, Section 24(2) of the Constitution of North Carolina provides that “[n]or shall the General Assembly enact such local, private or special act by the partial repeal of a general law; but the General Assembly may at any time repeal local, private or special laws enacted by it.”
27. Article II, Section 24(3) of the Constitution of North Carolina provides that “[a]ny local, private or special act or resolution enacted in violation of the provisions of this Section shall be void.”
28. The treatment and supply of water for drinking, cooking, and cleaning purposes and for the operation of sanitary disposal systems are matters relating to health and sanitation within the meaning of Article II, Section 24(1)(a) of the Constitution of North Carolina.
29. The Dare County Local Act is a local act related to the treatment and supply of water for drinking, cooking, and cleaning purposes and for the operation of sanitary disposal systems applicable to Plaintiffs Nags Head, Manteo and Kill Devil Hills and their water and sewer systems, and therefore relates to health and sanitation. Further, Part (3) of Section 24.8.(a) of the Dare County Local Act is discriminatory, arbitrary and capricious, and is otherwise in violation of the aforementioned constitutional provisions.

30. Article XIV, Section 3 of the Constitution of North Carolina provides that “[w]henver the General Assembly is directed or authorized by this Constitution to enact general laws, or general laws uniformly applicable throughout the State, or general laws uniformly applicable in every county, city and town, and other unit of local government, or in every local court district, no special or local act shall be enacted concerning the subject matter directed or authorized to be accomplished by general or uniformly applicable laws, and every amendment or repeal of any law relating to such subject matter shall also be general and uniform in its effect throughout the State.” Further, this provision of the Constitution of North Carolina provides “[g]eneral laws uniformly applicable in every county, city and town, and other unit of local government or in every local court district shall be made applicable without classification or exception in every unit of local government, or in every local court district, as the case may be.”

31. The Dare County Local Act constitutes a local act which violates the Constitution of North Carolina for the reasons set out herein. Accordingly, the Dare County Local Act is void and may not be used as a basis to prevent Plaintiffs from developing, adopting or enforcing land use development, zoning and subdivision regulations as outlined by Chapter 160D of the North Carolina General Statutes. Nor may it be used to require the provision of health and sanitation utilities such as water and sanitary sewer disposal outside of the Plaintiffs’ jurisdiction.

32. Plaintiffs are entitled to a judgment declaring that the Dare County Local Act is unconstitutional and violates the Constitution of North Carolina; is void, unenforceable and of no force and effect; and does not prevent Plaintiffs from developing, adopting, or enforcing the ordinances they have adopted or may adopt in the future under authority of Chapter 160D

of the North Carolina General Statutes.

SECOND CLAIM FOR RELIEF
(Violation of Article I, Section 19 of the Constitution of North Carolina)

33. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 32 of this Complaint as if fully repeated here.
34. In their proprietary capacity as owners and operators of their municipal water systems, Nags Head and Kill Devil Hills are persons entitled to the protections of Article I, Section 19 of the Constitution of North Carolina.
35. In its proprietary capacity as owner and operator of its municipal water system and its sewage treatment plant, Manteo is a person entitled to the protections of Article I, Section 19 of the Constitution of North Carolina.
36. The Dare County Local Act contains no legislative findings as to the need for or purposes behind the legislation. The legislation does not provide any rational basis for subjecting Nags Head, Kill Devil Hills and Manteo to the mandatory and compulsory provisions of the Dare County Local Act that require them to provide all utilities to the private Dare County Project, if located within a one-mile radius of their jurisdictions, on the same basis that they would have to provide utilities to all other new construction located within their jurisdictions.
37. The language and express terms of the Dare County Local Act do not address, among other things: (i) why Nags Head, Kill Devil Hills and Manteo should be compelled to provide utility services to a project that is within their jurisdictions or within one-mile of their jurisdictions without regard to any criteria other than capacity, as contrasted with municipalities and counties throughout the State of North Carolina that are not compelled to provide similar utility services to other private parties; (ii) why utility service should be compulsory in the case of utility systems operated by municipalities located within one-mile of a multi-family

housing project to such project but not compulsory in other municipalities and counties who are not compelled to provide it to multi-family housing projects; and (iii) why provision of municipal utility services should be mandatory or compulsory for privately owned projects funded by State or local government but not for other types of projects.

38. The Dare County Local Act is completely devoid of any rational basis for subjecting Nags Head, Kill Devil Hills and Manteo to treatment different from that provided under North Carolina law for all other publicly owned utility systems in North Carolina, and fails to make a reasonable classification as required by controlling legal authority, providing no legal or other justification for this treatment of the utility services provided by Nags Head, Kill Devil Hills and Manteo.

39. The Dare County Local Act is discriminatory, arbitrary and capricious, and without any rational basis because, among other things: (i) it grants a right of service and utility connection to a private, multi-family development that is not required of any other type of development in the Towns of Nags Head, Kill Devil Hills or Manteo; and (ii) it provides rights and privileges to a private development project to services from Nags Head, Kill Devil Hills and Manteo that are not required by statute of other municipalities and counties throughout the State of North Carolina.

40. Thus, for all of these reasons, the Dare County Local Act is contrary to the law of the land in violation of Article I, Section 19 of the Constitution of North Carolina.

THIRD CLAIM FOR RELIEF
(Article I, Sections 19 and 35 of the Constitution of North Carolina)

41. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 40 of this Complaint as if fully repeated here.

42. In the operation of their water distribution systems, Nags Head and Kill Devil Hills act in a

proprietary capacity. In its operation of a water distribution and sanitary sewage system, Manteo acts in a proprietary capacity. In their proprietary capacities, Nags Head, Kill Devil Hills and Manteo are entitled to the protections of Article I, Sections 19 and 35 of the Constitution of North Carolina to the same extent as any private individual or corporation engaged in a similar enterprise.

43. The Dare County Local Act compels Nags Head, Kill Devil Hills and Manteo to provide utility services regardless of whether they wish to provide them or not, and without regard to the policies and regulations that guide their decisions on connections to their systems.

44. The Dare County Local Act constitutes an unlawful taking of the property and rights of Nags Head, Kill Devil Hills and Manteo to determine the propriety of and to operate their utility services, and it seeks to impair these Plaintiffs' property rights without compensation and for something other than a public purpose.

45. Accordingly, the Dare County Local Act is not a valid exercise of the sovereign power to take or condemn property for a public use, since the property is already used for precisely the same types of purposes that are contemplated by the Dare County Local Act that constitutes a taking without due process, without just compensation, and without a public purpose. The Dare County Local Act therefore violates Article I, Sections 19 and 35 of the Constitution of North Carolina.

REQUEST FOR INJUNCTIVE RELIEF

46. Plaintiffs incorporate by reference the allegations of Paragraphs 1 through 45 of this Complaint as if fully repeated here.

47. Requiring all Plaintiffs to allow the Dare County Project to be constructed in their respective jurisdictions without regard or application of any of their zoning restrictions, zoning controls,

development controls or other development standards, threatens to cause imminent, irreparable harm to Plaintiffs and their constituents.

48. Enforcement of the Dare County Local Act threatens to cause imminent and irreparable harm to Plaintiffs Nags Head, Kill Devil Hills and Manteo due to the compulsory nature of the Dare County Local Act.
49. The Dare County Local Act is designed to allow a private party the ability to construct a multi-family housing project of unprecedented and unequalled scale, size, density, intensity and which otherwise is contrary to the comprehensive land use plan and other local policies and regulations adopted by Plaintiffs under the authority granted them by Articles 6, 7 and 8 of Chapter 160D of the North Carolina General Statutes.
50. If a private developer is allowed to proceed as authorized by the Dare County Local Act, and Plaintiffs are compelled to allow such project to proceed without regard to their local development regulations and policies, Plaintiffs and their citizens will suffer irreparable harm due to the impact of the Project.
51. The Dare County Local Act will allow a private developer of the Project to change the nature and character of a zoning district, and has unprecedented and unlimited impacts on properties located near or otherwise impacted by the Project. The Dare County Local Act may cause Plaintiffs and their citizens monetary damages that are incapable of calculation and thus cause Plaintiffs and their citizens irreparable harm.
52. Thus, without immediate action to preserve the status quo, imminent and irreparable harm will be inflicted upon the Plaintiffs and their citizens.
53. For the foregoing reasons, Plaintiffs request that this Court enter a temporary restraining order, preliminary injunction, and permanent injunction enjoining the effectiveness, operation and

enforcement of the Dare County Local Act, prohibiting the Project from commencing without complying with Plaintiffs' applicable zoning and development regulations adopted under their authority granted by Articles 6, 7 and 8 of Chapter 160D of the General Statutes, and directing that Plaintiffs Nags Head, Kill Devil Hills and Manteo may continue to manage and operate their utility systems and make decisions regarding connections and services without regard to the Dare County Local Act.

DEMAND FOR JUDGMENT

WHEREFORE, Plaintiffs pray as follows:

- A. That the Court enter a declaratory judgment, pursuant to N.C. Gen. Stat. § 1-253 *et seq.*, that the Dare County Local Act is unconstitutional as an invalid local act pursuant to Article II, Section 24(1)(a) of the Constitution of North Carolina;
- B. That the Court enter a declaratory judgment, pursuant to N.C. Gen. Stat. § 1-253 *et seq.*, that the Dare County Local Act is unconstitutional as a violation of Article I, Sections 19 and 35 of the Constitution of North Carolina;
- C. That the Court enter a declaratory judgment, pursuant N.C. Gen. Stat. § 1-253 *et seq.*, that the Dare County Local Act is unconstitutional as a violation of Article XIV, Section 3 of the Constitution of North Carolina;
- D. That the Court enter a declaratory judgment, pursuant N.C. Gen. Stat. § 1-253 *et seq.*, that the Dare County Local Act is an unconstitutional taking of property from Plaintiffs Nags Head, Kill Devil Hills and Manteo without due process and without just compensation and that is not authorized by the laws of the State of North Carolina;
- E. That the Court enter a temporary restraining order, preliminary injunction and permanent injunction enjoining operation and enforcement of the Dare County Local Act (Section 24.8(a))

of the Budget Bill), forbidding any developer of a project purportedly authorized by the agreement or series of agreements entered into pursuant to Section 24.1 of S.L. 2022-74 to construct affordable housing in Dare County without complying with all local government development regulations adopted within the applicable jurisdiction;

- F. That the Court award to Plaintiffs their costs, expenses and fees, and reasonable attorneys' fees, pursuant to applicable statutory and common law, including N.C. Gen. Stat. § 6-19.1 and § 6-20;
- G. That, in the event the Court determines that the Dare County Local Act constitutes a permissible taking of property from any of the Plaintiffs, then the Court enter a judgment declaring that said Plaintiffs are entitled to just compensation for the rights taken; and
- H. That the Court grant such other and further relief as the Court deems just and proper.

HORNTHAL, RILEY, ELLIS & MALAND, L.L.P.

By: /s/ John D. Leidy

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VERIFICATION

Andy Garman, being first duly sworn, says that he is the Town Manager for the Town of Nags Head; that the contents of the Complaint are true to his knowledge except as to those matters stated on information belief, and as to such matters, he believes them to be true.

By: /s/ Andy Garman
Andy Garman, Town Manager,
Town of Nags Head

Cliff Ogburn, being first duly sworn, says that he is the Town Manager for the Town of Southern Shores; that the contents of the Complaint are true to his knowledge except as to those matters stated on information belief, and as to such matters, he believes them to be true.

By: /s/Cliff Ogburn
Cliff Ogburn, Town Manager,
Town of Southern Shores

Melissa Dickerson, being first duly sworn, says that she is the Town Manager for the Town of Manteo; that the contents of the Complaint are true to her knowledge except as to those matters stated on information belief, and as to such matters, she believes them to be true.

By: /s/Melissa Dickerson
Melissa Dickerson, Town Manager,
Town of Manteo