NORTH CAROLINA

CURRITUCK COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS 334

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CURRITUCK COUNTY, C.S.C.
BY JLT

SWAN BEACH COROLLA, L.L.C., OCEAN ASSOCIATES, LP, LITTLE NECK TOWERS, L.L.C., GERALD FRIEDMAN, NANCY FRIEDMAN, CHARLES S. FRIEDMAN, 'TIL MORNING, LLC, and SECOND STAR, LLC,

Plaintiffs,

v.

COUNTY OF CURRITUCK; THE CURRITUCK COUNTY BOARD OF COMMISSIONERS; and JOHN D. RORER, MARION GILBERT, O. VANCE AYDLETT, JR., H.M. PETREY, J. OWEN ETHERIDGE, PAUL MARTIN, And S. PAUL O'NEAL as members of The CURRITUCK COUNTY BOARD OF COMMISSIONERS,

Defendants.

COUNTY'S MEMORANDUM OF LAW

This Memorandum is submitted to Your Honor to address three matters:

(I) Why the County's Answer was never late in this case to justify the Clerk's "Entry of Default;"

(II) Why no "Default Judgment" should be entered in this case, even if the County's Answer was two weeks late (which it was not); and

(III) Why Plaintiffs have no viable claims in this case under the facts and the law.

I. THE COUNTY'S ANSWER WAS NEVER LATE, AND THEREFORE THE "ENTRY OF DEFAULT" SHOULD BE SET ASIDE

The threshold question in this case is the one that Your Honor has already identified: Did the clerk properly "enter" a default? — i.e., was the County's Answer late to begin with? If the County's Answer was never late, then the clerk erred in entering any default. If the clerk erred, the "entry" of default was a nullity; and therefore no "default judgment" can be entered against the County in any event.

Before addressing this question, it is important to point out that the issue of whether the clerk erred in entering a default in this case is properly before Your Honor at this time; and Your Honor retains full authority to set aside that entry of default, even though judge Grant previously denied the County's motion to set aside the clerk's entry of default. This is so because Judge Grant denied the County's motion to set aside the entry of default ***solely*** because Judge Grant was uncertain about whether the County's Answer to Plaintiffs' Amended Complaint was late to begin with in light of the parties' different contentions about whether the procedure in G.S. 1-298 applied in this case or Rule 12(a) (1) of the Rules of Civil Procedure applied in this case with respect to the proper timeframe for

answering. As shown in the transcript of the hearing before Judge Grant (see attached Transcript at p. 27 in particular), Judge Grant decided not to set aside the clerk's entry of default ***solely*** so that the County could appeal to the Court of Appeals for that Court to:

> ...give us on the trial bench some clarity as to how to proceed in this particular situation where it never happens again. So I'm going to deny your Motion to Set Aside the default. And you can appeal my ruling and then the Court of Appeals can give us some clarity on how we are to proceed on that.[1]

Then, when the County appealed, the Court of Appeals rendered its decision in *Swan Beach II* (see attached). However, contrary to Judge Grant's hope that the Court of Appeals would decide whether G.S. 1-298 or Rule 12(a)(1) of the Rules of Civil Procedure governed the timeframe for timely filing an Answer, the Court of Appeals decided not to address that question at all. Instead, the Court of Appeals entered a very narrow ruling. The Court held that Judge Grant's ruling to deny the Motion to Set Aside the Entry of Default was affirmed ***only*** to the extent that the County was precluded, in any Answer, to raise the affirmative defenses of "governmental immunity" and "collateral estoppel [i.e., for 'failure to exhaust administrative remedies']," which the Court had previously held in the *Swan*

[1] Judge Grant otherwise never ruled upon *any* of the factors under Rule 55(d) for determining whether to set aside the entry of default, such as whether there was "*good cause*" to set aside the entry of default in light of the County's *diligence* in the case, any *prejudice* to the Plaintiffs, and the *grave injustice* of granting a default—all of which standards are discussed further below.

Beach I appeal. (See the Opinion at p. 10 at "IV. Conclusion"). The Court ***otherwise*** did ***not*** affirm Judge Grant's decision to deny the Motion to Set Aside the Entry of Default in any other respect. Instead, the Court expressly went on to say also that "we dismiss Defendants' appeal *without prejudice to any right Defendants may have to make these arguments [about setting aside an entry of default] at some later stage.*" Id. (Emphasis added). This very careful and narrow ruling by the Court was otherwise expressed in the body of the Court's Opinion at pp. 8 and 9, where the Court said:

> [W]e hold that the trial court did not err in failing to conclude that the doctrine of governmental immunity precluded denying Defendants' motion to set aside entry of default... [And] we hold that the trial court did not err in failing to conclude that the doctrine of collateral estoppel precluded denying Defendant's motion to set aside the entry of default.

In summary, the Court of Appeals in *Swan Beach II:* (1) never addressed whether the County's Answer was ever late in light of G.S. 1-298 or Rule 12(a)(1) of the Rules of Civil Procedure, leaving this question for further decision by the trial court (i.e., Your Honor) on remand; (2) never held that it was proper for Judge Grant to deny a motion to set aside the entry of default, ***except*** that the County was prohibited in any Answer to raise the affirmative defenses of "governmental immunity" and "collateral estoppel" (for failure to exhaust administrative remedies) as the Court of Appeals had previously held in *Swan Beach I* ; and (3) Defendants retained the right "*without prejudice*" to assert "*any rights Defendants*

may have to make [their] arguments at some later stage" about setting aside an entry of default or resisting any motion for a default judgment. Thus, the issues of whether an entry of default by the clerk was ever proper in this case and whether a judgment of default should be entered in this case are squarely and properly before Your Honor.

Turning now to these issues, the County respectfully contends that its Answer was never late, and it is not even late today. (The Answer was otherwise filed long ago on August 27, 2014). The County's Answer was never late because there has never been any compliance with G.S 1-298, which governs the exclusive procedure for how a trial case proceeds after a ruling by the Court of Appeals. This statute says, in pertinent part, as follows:

> In civil cases, at the first session of superior court or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below *shall* direct the execution thereof to proceed, and if the judgment is modified, *shall* direct its modification and performance.

(Emphasis added).

In plain English, this Statute says that when the Court of Appeals affirms or modifies a superior court decision, the case must be set on the calendar of the first session of superior court after the "certification" (i.e., "mandate") of the Court of Appeals is received in the superior court, and then the trial judge must "direct" what is thereafter to happen in the case based on the Court of Appeals' ruling. As a

practical matter, setting the case at the first session of superior court is the responsibility of the trial court administrator and not the parties in the case. This is so because the parties have no way of knowing when the mandate of the Court of Appeals was actually *received* in the trial court, given that the parties get no notice of the time when the mandate is received in the trial court.

In this case, the "certification" (or "mandate") of the Court of Appeals in the "*Swan Beach I*" appeal was received in the superior court on July 30, 2014 without any notice to any of the parties. In *Swan Beach I*, the Court of Appeals held that Plaintiffs' claims were not barred by the doctrines of "failure to exhaust administrative remedies" or "sovereign immunity." At the same time, however, the Court of Appeals also held that Plaintiffs' "Tax Claim" in its Fifth Cause of Action was not actionable and should be dismissed.[2]

Under the G.S. 1-298, the trial court administrator was then required to set the case before a superior court judge at the next first session of superior court to "direct" further proceedings in the case in light of the *Swan Beach I* decision. This never happened.

[2] The Court also held that, as a technical matter, Plaintiffs properly pled a vested rights claim in their Amended Complaint such that—in the absence of other facts to be established in the case—the Complaint should not be dismissed outright under Rule 12(b)(6). As discussed further below, undisputed facts in the case (which were completely omitted by Plaintiffs in their Complaint) now establish that Plaintiffs actually have no viable vested rights claim or other constitutional claims case at all.

Had this occurred (which it did not), the superior court judge would have entered an Order that "directed" three things in light of the *Swan Beach I* decision. These are: (1) that the so-called "Tax Claim" in Plaintiffs' Fifth Cause of Action in Plaintiffs' amended Complaint be stricken; (2) that all of Plaintiffs' other claims (that had previously been dismissed by Judge Sermons) be reinstated; and (3) that the County file (within 20 days of the Order, or such other time as the court might direct) an Answer to all claims in Plaintiffs' amended Complaint, *but not* an answer to the stricken Tax Claim that was dismissed by the Court of Appeals.

Once again, because none of this ever occurred, the County's time-frame for filing an Answer was never established. Because the time-frame was never established, the County's Answer was never late — and it is still not late, even today. In any event, the County Answered the Complaint on August 27, 2014, and therefore the issue of the time for answering is a moot point.

This Statute (G.S. 1-298) specifically governs what must happen in a case after a ruling in the Court of Appeals. There is no other statute or rule of procedure that governs this topic. Therefore, this Statute solely governs this situation, unless it were tenable to contend — as Plaintiffs seem to contend — that the Statute doesn't mean what it plainly says and requires.

Plaintiffs, ignoring the statute, contend that the proper time-frame for answering the complaint was "20 days after notice of **the court's action** in ruling

on the motion" under Rule 12(a)(1) a. of the N.C. Rules of Civil Procedure. The flaw in this contention is that the Rules of Civil Procedure apply to "the court's action" ***of a superior court judge***, and **not** to "the court's action" of ***the N.C. Court of Appeals***. As explained above, G.S. 1-298 — and not Rule 12(a) of the Rules of Civil Procedure, which rules exclusively govern procedures in the Superior and District Courts—controls what happens after an ***appellate*** court ruling.

Rule 12(a), relied on by Plaintiffs, applies only where, for example, a trial court judge denies a 12(b)(6) motion of a defendant and there is no appeal by the defendant based on a "substantial right." Rule 12(a) then instructs that the defendant must file an Answer 20 days after the "court's action" *of the trial judge* when he denied the motion to dismiss. But, that is not what happened here.

Rather, here, there was an appeal to the Court of Appeals. And, when that happened, the time-frame for answering the complaint was governed exclusively by the procedure set out in G.S. 1-298, which requires that the trial judge, at a hearing mandated by that Statute, enter further orders in the case to establish what must be answered in the case (and when) based on the ruling of the Court of Appeals. But, none of that happened. As mentioned previously, this non-compliance with the Statute is not the fault of any party to this case because, as a legal and practical matter, neither party is informed by the trial court about the date

when the mandate of the Court of Appeals is *received* in the trial court to know when to set a hearing of the first session of court for the trial judge to "direct" further proceedings in the case.

Finally, the reason why the Legislature enacted G.S. 1-298 is obvious. The Statute was enacted because the Legislature recognized that parties frequently dispute the meaning of appellate court decisions. (Indeed, such a dispute has already occurred in this case where counsel for the parties in the last hearing before Your Honor sharply disputed the meaning of the Court of Appeals' decision in *Swan Beach I*). Thus, the Statute anticipates this problem and resolves it by making clear that the trial judge, at the first session of court after the appellate court's mandate is received in the trial court, interpret the appellate decision and then "direct" what is to happen next in light of the appellate decision. In other words, in enacting the Statute, the Legislature recognized that the orders or holdings of appellate decisions are not simply "self-evident" or "self-executing." Rather, they are often subject to disagreement by the parties (as here) about the proper interpretation of those decisions, such that the trial judge must—as the Statute requires—interpret the decision and then "direct" what is to happen in light of the appellate decision.

In sum, Your Honor has correctly pin-pointed the threshold issue in this case: whether the County's Answer was ever late to begin with. Under the

mandatory process and procedure set out in G.S. 1-298 (which was never followed), the County's Answer was never late; and, in any event, the Answer was filed some two years ago. Thus, no "Entry of Default" should have ever been entered by the Clerk.

Finally, it is instructive to note how the Entry of Default by the Clerk actually occurred in this case. Here, Plaintiffs simply provided to the Clerk, without any advance notice to the County, a Motion for Entry of Default. That Motion only cited to the Clerk Rule 12(a), which is entirely inapplicable to this case. The Motion *never* mentioned G.S. 1-298, which is the controlling Statute and procedure for determining the future course of the case in the trial court, including the trial court's responsibility to determine the County's time frame for answering Plaintiffs' Complaint based on the trial court's interpretation of the appellate decision. Plaintiffs never requested that the Clerk comply with G.S. 1-298 to put the case on the calendar for the first session of superior court for further action by the trial judge. Then, on the very same day of providing to the Clerk the Motion for Entry of Default, Plaintiffs also presented to the Clerk a pre-prepared Order for Entry of Default to be signed by the Clerk. Because the Clerk was never advised by Plaintiffs about G.S. 1-298 in Plaintiffs' *ex parte* Motion, the Clerk went ahead and simply signed the pre-prepared Order for Entry of Default submitted by Plaintiffs, again without any notice to Defendants. In short, the Clerk merely

signed an Entry of Default at the unilateral and totally *ex parte* request of Plaintiffs.

In the end, this Entry of Default signed by the Clerk, which was procured solely by Plaintiffs without any notice to the County and without any reference to what should have actually occurred under G.S. 1-298, was entirely unauthorized under G.S. 1-298. The "Entry" was a mistake, a nullity, and not in compliance with the procedure required by G.S. 1-298. As such, the "Entry" should be set aside as an unauthorized and improper order of the Clerk.

II. EVEN IF THE COUNTY'S ANSWER WAS LATE (WHICH IT WAS NOT), THIS COURT SHOULD NOT ENTER A "DEFAULT JUDGMENT" AGAINST THE COUNTY

Let's suppose that Your Honor somehow concludes that the County's Answer was "technically" late, even in spite of the non-compliance with G.S. 1-298 in this case. In that event, Your Honor is called upon under Rule 55(d) of the N.C. Rules of Civil Procedure to determine: (1) whether there is ***"good cause"*** to set aside the Clerk's Entry of Default; and, separately, (2) whether to order the drastic result of a "Default Judgment."[3] This is a grave matter for decision, which calls upon Your Honor's careful consideration of four broad factors.

[3] In this regard, Rule 55(b)(2) empowers Your Honor to "conduct such hearings...as [you] deem necessary;" and the Rule does not even require the taking of actual testimony. *See* Wright & Miller, 10A *Fed. Prac. & Proc. Civ.* § 2688.

These factors are: (1) the diligence of the County in defending against the case; (2) any prejudice to the Plaintiffs by the 2-week delay that occurred here in answering the complaint; (3) the grave injustice of defaulting the County, such that "the truth" of the case under the facts and the law will never be adjudicated in our system of justice; and (4) the overriding principle that, when a court considers whether to enter a Default Judgment, "***any doubt should be resolved in favor of setting aside an entry of default so that the case can be decided on the merits.***" In addition, in a "declaratory judgment" case (like this one), no "Default Judgment" can ever be entered until the trial judge ***first*** determines all of the rights and remedies of the parties on all claims raised in the case. (All of this is set out in the attached case of *Emick v. Sunset Beach & Twin Lakes, Inc.*, 180 N.C. App. 582, 638 S.E.2d. 490 (2006), which is just one case of many cases establishing these principles and responsibilities of the trial judge).

There is a further principle that this Court must follow when a Motion for Default Judgment is made. It is that, when there is an "Entry of Default" by the Clerk, there is absolutely **no automatic right** to a "default judgment" by the party moving for default. This is so because the Clerk's Entry of Default is a purely clerical and mathematical decision about whether the time-frame for answering expired (which, as mentioned previously, never occurred in this case because of the non-compliance with G.S. 1-298). But, the grave matter of a "default

judgment" is one that is solely to be decided by the careful consideration, discretion, and wisdom of the trial judge in weighing the four factors mentioned above. (See the attached summary of this law from Section 2685 in the seminal treatise by Wright & Miller, *Federal Practice & Procedure, Civil*).

In considering any Judgment of Default, Your Honor is called upon to weigh the four factors mentioned above in light of the totality of the circumstances of the case, including:

(a) the money potentially involved (here nearly $40 million);

(b) the existence of disputed issues of material facts, and whether the County has meritorious defenses;

(c) whether the issues are of substantial "public importance;"

(d) whether the grounds for the Entry of Default were clearly established under existing law (when, as here, no grounds existed for that Entry because of the failure to comply with G.S. 1-298);

(e) whether Plaintiffs have been prejudiced in any way by the two-week delay in answering the Complaint (assuming the Answer was late, which it was not in this case);

(f) the harsh effect of a default judgement that never adjudicates "the truth" of the case; and

(g) whether the delay in answering was occasioned by a good-faith mistake or uncertainty about the law such that the delay should be excused.

(*See* the *Wright & Miller* treatise, Section 2685 cited above and attached).

In applying the foregoing factors, the County respectfully submits that no Default Judgment should be ordered by Your Honor in this case, with the result that the "truth" of what really happened in this case will never be known and no "justice" in the case will ever be rendered. This is so because of the following:

(a) <u>The diligence of the County in this case</u>

The County has diligently responded to and defended against this case from day one. The County responded to Plaintiffs' initial Complaint with a Rule 12(b) Motion to dismiss. That motion was deemed meritorious and was granted by Judge Sermons.

The Plaintiffs appealed to the N.C. Court of Appeals. That Court, in *Swan Beach I* held that: (a) the defenses of failure to exhaust administrative remedies and the doctrine of sovereign immunity did not, under the circumstances of this particular case, bar the claims in Plaintiffs' Complaint; but (b) Plaintiffs' "Tax Claim" (in its Fifth Claim for Relief) was not actionable and must be dismissed. Thus, Plaintiffs' "Tax Claim" was dismissed, but its other claims were not based on the defenses of failure to exhaust administrative remedies and the doctrine of sovereign immunity. Contrary to Plaintiffs' counsel's representations to Your Honor at the last hearing before Your Honor, the Court of Appeals in *Swan Beach*

I never held that Plaintiffs had any "*meritorious*" vested rights claim[4] or federal or state substantive due process or equal protection claims. Instead that decision merely said that none of these claims were dismissible for failure to state a claim under Rule 12b)(6), and they were not barred by the affirmative defenses of failure to exhaust administrative remedies or the doctrine of sovereign immunity.

After the "mandate" (or "certification") of the Court of Appeals decision in *Swan Beach I* was received by the trial court on July 30, 2014, there was no compliance with G.S. 1-298. As mentioned above, Plaintiffs, then, without any notice to the County, provided — on the same day — a motion for Entry of Default to the Clerk and a pre-prepared Order for Entry of Default, and simultaneously obtained an Entry of Default from the Clerk (without ever mentioning G.S. 1-298 and the non-compliance with that Statute). This occurred on a Friday (August 21, 2015), and Plaintiffs then mailed their Motion and Entry of Default to the County, which received these papers on the following Monday. The County then, three days later (on August 27, 2014) *immediately* filed a motion to set aside the entry of default and filed a full Answer to the Complaint, including even an answer to Plaintiffs' Fifth Claim for Relief for the "Tax Claim" that had been dismissed by the Court of Appeals.

[4] As mentioned in the previous note, the Court of Appeals merely held that, as a technical pleading matter, Plaintiffs stated a claim for vested right, assuming only that the allegations in the complaint were true, without more. As discussed below, Plaintiffs complaint omits critical undisputed facts that show that their claims are not actionable as a matter of law at all. These undisputed facts were never before the Court of Appeals.

In addition to all of this involvement and diligence by the County in the case, the County had: (a) previously responded to discovery requests of the Plaintiffs for production of documents and requests for admissions in 2012; (b) had participated in the taking of two depositions of officials of the County by the Plaintiffs; (c) had engaged in numerous informal settlement discussions with Plaintiffs' counsel; (d) had prepared for three depositions of other County officials that Plaintiffs' had noticed for depositions on August 26 and 27, 2014, but which notices of deposition were subsequently cancelled by Plaintiffs; (e) has initiated discovery by way of interrogatories and requests for production of documents upon all Plaintiffs; and (f) has noticed Rule 30(b)(6) depositions of the corporate Plaintiffs and individual depositions of the individually-named Plaintiffs.[5]

In summary, the County has always diligently pursued and vigorously defended this case, which it otherwise vigorously contends is both factually and legally unfounded (as detailed below). The County filed an Answer to the amended Complaint *within days* of the unnoticed Motion for Entry of Default and unauthorized Entry of Default that was unilaterally and in *ex parte* fashion obtained by Plaintiffs, even though the County had no obligation to file its Answer until after compliance with G.S. 1-298 which never occurred in this case.

(b) No Prejudice to Plaintiffs in this Case

[5] These discovery requests by the County upon Plaintiffs were made on March 17, 2016.

If Plaintiffs are correct that the County's Answer was late (which it was not), the Answer was late by two weeks. That is, Plaintiffs contend that the Answer was due by August 11, 2014; and the Answer was filed August 27, which was six days from August 21 from when the Entry for Default was entered, including an intervening weekend. No witnesses or evidence were lost during those two weeks. Absolutely nothing happened during those two weeks to prejudice or harm Plaintiffs in any way. And, it would be totally unfair for Plaintiffs to point to the fact that this litigation has been going on since 2012 (for three years) and attribute *those three years* to any prejudice occasioned by a "two-week delay" in answering the Complaint.

Plaintiffs themselves claimed "vested rights" in 2004 (as alleged in their Amended Complaint at paragraph 47), but did not bring suit until 2012, some *eight* years after they claim they acquired those rights. (This means that Plaintiffs' *federal* claims are barred by the 3-year statute of limitations from 2004 as discussed later below). In any event, the multi-year course of this litigation was occasioned by the proper and orderly procedural due process rights of *both* parties to advance their contentions in the trial court and rights to appeal to the N.C. Court of Appeals. Indeed, *both* parties exercised these rights—i.e., through Plaintiffs' appeal in *Swan Beach I* and then the County's appeal in *Swan Beach II*.

Thus, this multi-year period of the present litigation cannot be said to be of any "prejudice" to Plaintiffs' rights to have this case resolved, any more than it could be said that this period of time has prejudiced the County's rights to have this case expeditiously resolved. In short, any contention by Plaintiffs that a two-week delay in answering the Complaint resulted in any "prejudice" to them is, respectfully, unfounded and unfair. That being said, *both* parties seek an expeditious and fair and full resolution of this case, including whatever additional time is necessary for due process procedures in the litigation such that parties are afforded a just resolution of the case, rather than a simple "rush to judgment"—like the erroneous Entry of Default obtained by Plaintiffs from the Clerk and the Default Judgment now requested by Plaintiffs from this Court.

(c) The Great Injustice of a Default Judgment

There can be no greater injustice than that "Justice" is not done and that "the Truth" is never known. This fundamental precept is embodied in the repeated pronouncements of our courts (and all other courts in our country) which, as mentioned previously, have repeatedly said that "***any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on the merits.***" (See the *Emick* case attached, with emphasis from the opinion added). "Justice," as Your Honor so well knows, means "Finding the Truth." It means that, just as a person should be afforded full rights to present accusations of wrong-

doing, so too the accused should be afforded full rights to contest those accusations. A Default Judgment (though sometimes appropriate in the most exceptional and rare circumstances) is nothing more than a fiat, a raw decree or dictate, a pronouncement without proof—which, by itself, is an affront, on its face, to any notion or process of "Justice" and "Finding the Truth." The injustice of decrees by mere fiat or default has been long exposed in our nation's past—not only in our juridical system, but within the contexts of our social, political, and economic systems. So, a Default Judgment should only be considered with the greatest and gravest caution.

And, this is particularly acute in the instant case where there is a serious and conclusory allegation in the Complaint, ***without any supporting facts alleged***, of "discrimination" based on religion. Discrimination, whether based on race, sex, religion, or other improper classification or purpose is not only unlawful, but constitutes a particular form of behavior that is now uniformly considered abhorrent and, indeed, egregious in today's society. The "Truth" of those types of accusations — particularly when they are lodged against a local government — demands a just search and process for discovering the "Truth" of the accusation. And that "Truth" is not served by a Judgment of Default, but by a full and fair public airing of all of the facts through our time-tested adjudicative process that truly "finds" this "Truth"—whatever it may be and wherever it may lead.

In sum, this case, with its allegations of discrimination, should be fully and fairly heard for all to hear and witness. From the Plaintiffs' perspective, an adjudication of this accusation may vindicate their contentions, if true. And, so too, from the County's perspective, an adjudication of the accusation may vindicate its contentions that no such abhorrent and egregious conduct occurred at all in the good name of the 25,000 citizens of the County. However, a Default Judgment, by fiat, dictate, and raw pronouncement — without any process for a true search and finding of the truth — serves neither purpose of vindication for *either* Plaintiffs or the County. A judgment by simple default decree is no Justice and Truth "*at all*," let alone "*for all*." Accordingly, even if the County's Answer were late by two weeks (which, again, it was not, as contended above), no "Justice" and "Truth" would ever be served if a Default Judgment were ordered in this case.

III. PLAINTIFFS OTHERWISE HAVE NO ACTIONABLE CLAIMS IN THIS CASE UNDER THE FACTS AND THE LAW

The County respectfully contends that, as the undisputed "truth" in this case unfolds, none of Plaintiffs' claims can be sustained under the facts presented and the applicable law. This is so for the reasons summarized below. This lack of merit to all of Plaintiffs' claims is not only relevant to the issue of whether the County should be defaulted in this case, but it calls for an ultimate declaration that, in the end, all of Plaintiffs' claims should be dismissed.

A. Plaintiffs Have no Vested Rights Claim

To establish a vested right to proceed with the development of Plaintiffs' Business Lots, Plaintiffs must show that they: (1) made substantial expenditures (2) in good faith reliance upon and after (3) obtaining **all** valid County approvals for the *specific* land uses sought by Plaintiffs for their Business lots. (Attached to this Memorandum is Chapter 19 on "Vested Rights" in Professor David Owens' seminal book on *Land Use Law in North Carolina*, published by the Institute of Government at UNC-CH, and frequently cited and relied upon by our appellate courts).

In this case, Plaintiffs allege that they purchased their property in 1966, when the County had no Zoning Ordinance, to develop a residential subdivision with *unspecified* "commercial uses" on certain so-called "Business Lots" to be located within the subdivision. They allege that in 1969, the County, under its then existing regulations governing the subdividing of land into different parcels for valid recording in the Register of Deeds Office (i.e., "Subdivision Regulations"), approved a final Plat for the different lot lines for the individual residential lots that would exist in the subdivision, along with the lot lines for a handful of "Business Lots" that would presumably contain some kinds of unspecified commercial or business uses in the future. After this final Plat approval by the County—which was necessary for properly recording the various lots with the Register of Deeds—the Plat was officially recorded by Plaintiffs with the Register of Deeds.

From 1968-1971 (without being specific about the years and dates), Plaintiffs allege they spent approximately $425,000 for general engineering, grading, ditch digging, dune building, landscaping, legal fees, and surveying in preparation for the development of this over-all residential subdivision. In the early 1970s, Plaintiffs began selling some of the residential lots in the subdivision that had been established on the Plat as recorded in the Register of Deeds.

Beginning in 1971, Plaintiffs allege (which is true) that the County enacted a Zoning Ordinance, with various amendments through 1989, that prohibited commercial uses in the zoning district where Plaintiffs' property (and other properties similarly zoned) were located. In 2002-2003, Plaintiffs again obtained Plat approval from the County to properly record with the Register of Deeds a reconfiguration or "recombination" of some of the original Business Lots that were previously platted and recorded in the Register of Deeds Office in 1969.

Nothing further happened for the next 30 years or more. But, then, in 2004, some 38 years after Plaintiffs purchased their property in 1966, Plaintiffs allege that they then first decided to use their Business Lots for a "convenience store, real estate offices, post office and similar uses, restaurant and accessory lodging that could include 300 units and/or apartments." (*Amended Complaint* at Paragraph 47). Plaintiffs go on to allege that, in 2011, they then desired to use their Business Lots for different uses, "an inn, retail shops, offices, a chapel for weddings, a

convenience store, and a fishing pier." (*Amended Complaint* at Paragraph 54). However, both in 2004 and in 2011, Plaintiffs were told by the County staff that these uses were not then allowed in the zoning district where Plaintiffs' property was located given the Zoning Ordinance and its amendments that had been enacted from 1971 to the present.

Thereafter, during 2008 to 2011, Plaintiffs allege that they applied to the County for various rezoning of their property to allow commercial uses on the Business Lots. But, these requests were turned down.

Plaintiffs claim in their Amended Complaint the following: (1) that from 1966 to the filing of their initial Complaint in 2012 (i.e., during all of some 46 years), they had a "vested right" to develop their Business Lots for whatever commercial or business purposes they wished, free from the zoning-ordinance restrictions that were in place from 1971 onward; (2) that the County's decisions not to grant Plaintiffs' rezoning requests in 2008 and 2011 discriminated against Plaintiffs on account of their religion, out-of-state residency, and other bias; and (3) that the County has allowed other commercial uses for other property owners in the same or similar zoning district where Plaintiffs' property is located and where commercial uses are prohibited. All of this, Plaintiffs contend, violated their substantive due process and equal protection rights under state and federal law.

Plaintiffs seek a declaratory judgment as to their vested rights and substantive due process and equal protection claims, and an order that they are entitled to use their Business Lots for essentially whatever commercial or business purposes they desire. In addition, they seek damages for lost income from the sale or development of their Business Lots, plus attorney's fees—all totaling some $38 million or more based on the evidence heard by Your Honor at the last hearing.

Here is the central problem with Plaintiffs' vested rights claim:

The County's technical Plat approvals for recording Plaintiffs' various Business Lots with the Register of Deeds did **not** constitute any kind of County *zoning approval* or other *land-use approval* for any particular business or commercial uses of Plaintiffs' Business Lots.[6] This is exactly the holding in the case of *Jones v. Davis*, 163 N.C. App. 628, 594 S.E.2d 235 (2004), where the Court held that mere plat approval by a county for the subdividing of land into lots or parcels under the county's subdivision regulations did not constitute any "*land use*" approval of any kind. (See case attached). Thus, there has *never* been any valid County approval of Plaintiffs' totally unspecified *uses* for their Business Lots. And, "***a generalized plan, idea, or concept to develop property is inadequate to establish a common law vested right***." David Owens, *Land Use Law in North Carolina* at Chapter 12, p. 194. (See attached, emphasis added). Plaintiffs never

[6] This indisputable fact is established by the County's "Affidavit of Daniel F. Scanlon, II and Ben Woody" (hereinafter referred to as the "County's Affidavit") at paragraphs 3-4.

made any expenditures (i.e., the $425,000 in 1968-1971) in good faith reliance upon and after any zoning land-use approval for *any* specific use on the Business Lots. Those expenditures (as alleged in Paragraph 27 of the *Amended Complaint*) were merely expenses incurred for engineering, grading, digging, dune building, lot fill, ditches, landscaping, and surveying for the sole purpose of securing "final plat approval" for the recording of the various parcels or lots under the 1965 Subdivision Ordinance. But, those expenditures were *not* made for any specific land uses of any kind on the Business Lots (i.e., for any store, offices, post office, restaurant, and commercial lodging as first proposed in 2004, or for any inn, retail shops, offices, chapel, convenience store, and fishing pier as later proposed in 2011) in reliance upon any zoning approval by the County. In fact, these ever-changing proposed wish list of Business-Lot uses—first specified and proposed in 2004 and then revised for entirely different uses in 2011—had been prohibited under the Zoning Ordinance since 1971, i.e., for *over 30 years* before Plaintiffs first proposed to use their Business Lots for *any* of these types of business uses.

As Professor Owens makes clear:

(a) no landowner has any vested right against any change in or adoption of a zoning ordinance;

(b) no vested right can be established in the face of knowledge of the existence of a zoning ordinance prohibiting the proposed land use;

(c) vested rights do not protect a landowner who waits to develop his property after an ordinance has been enacted prohibiting the use;

(d) vested rights attach only to site specific projects and not to generalized plans, concepts, or ideas for a use;

(e) no vested rights exist by informal talks or representations of planning staff members or other local-government officials about what might be permitted uses;

(f) the mere purchase of property does not confer any vested right; and

(g) no vested right attaches to a "phased development" not started before a zoning ordinance was enacted.

(See David Owens, Chapter 12 of *Land Use Law in North Carolina*, attached).

Most importantly, under the County's 1968 Zoning Ordinance that indisputably applied to Plaintiffs' property (including subsequent amendments to the Ordinance), no building or structure of any kind could be built on the Business lots without *first* obtaining a Permit for such construction from the County for the particular structure(s) or use(s) of any lot.[7] (This undisputed fact is entirely omitted from Plaintiffs' Complaint). Plaintiffs never applied—ever—for such a permit (which is another critical fact entirely omitted from Plaintiffs' Complaint). And, it is well settled that no vested rights exist until and unless substantial expenditures have been made *after* and in reliance upon ***all*** required permits approvals. (See the

[7] See County's Affidavit at paragraphs 8-10 and 30.

attached cases of *Griffin v. Town of Unionville*, 338 Fed. Appx. 320 (4th Cir. 2009) and *Browning-Ferris Indus. v. Guilford County Bd. Of Adjustment*, 126 N.C. App. 168, 484 S.E.2d 411 (1997)). In short, Plaintiffs could only have obtained vested rights in this case if they had made "substantial expenditures" for *specific business uses* (not vague future uses of one sort or another) *after* receiving both final plat approval under the 1965 Subdivision Ordinance *and* after receiving a *permit for construction* of those *specific* business uses as required by the 1968 Zoning Ordinance. But, none of this ever happened in this case.[8]

In addition, Plaintiffs contend in this case that they have had vested rights from 1969 to the present—for some 47 years. Although our courts have never had the occasion to decide how long a landowner may have a vested right, other courts have routinely and sensibly held that such rights can only exist for a "reasonable time." *See, e.g., Crown Media, LLC v. Gwinnett County, Ga*, 380 F.3d. 1317 (11th

[8] As previously mentioned, in *Swan Beach I*, the Court of Appeals held that Plaintiffs had, technically, properly stated a claim under Rule 12(b)(6) for a vested rights claim, such that the claim was not dismissible for failure to properly "plead" a claim. But, the Court's decision was limited to the bare-bones allegations in the Complaint, *taken as true* (which they were not). What the Court of Appeals did not know—because the complete and true facts of the case had not yet been fully established—was the fact that the 1965 Subdivision Ordinance *did not approve any kind of land use* and that Plaintiffs did *nothing*, at any time, to seek a *permit for construction* on any of the Business Lots as specifically required by the 1968 Zoning Ordinance and all subsequent amendments to that Ordinance through 2013. Had these additional and undisputed facts been before the Court at the time (e.g., on a motion for summary judgment granted by the trial court), the Court would undoubtedly have concluded that Plaintiffs had no vested rights claim as a matter of law for the simple reason that such rights could only exist if Plaintiffs had been granted a permit for the construction on their Business Lots and thereafter made substantial expenditures in reliance on that permit. But, again, that never happened here, and Plaintiffs totally omitted this undisputed fact in the allegations stated in their Amended Complaint.

Cir. 2004) (applying Georgia law) and attached. Under North Carolina law, our Legislature has established that a "reasonable time" for statutory vested rights under G.S. 153A-344.1(d) is 2 years, but no longer than 5 years. (See statute attached). This 2 to 5-year time frame makes sense because it would be absurd to allow a landowner to claim vested rights (as here) for almost half of a century—without doing anything to act upon that right—and deprive the citizens of a county from ever establishing or revising land uses in the county for the better benefit and overall welfare of its citizens for close to half of a century. Thus, in this case, even if Plaintiffs had any vested rights (which they did not), those vested rights cannot be said to exist for the "reasonable time" of nearly 50 years. Rather, such vested rights, if they existed (which, again, they did not) would only have lasted for 2 to 5 years at most after the County's Plat approval in 1969. But, Plaintiffs never did *anything* to even raise their purported vested rights until 2004, some 35 years after the Plat approval in 1969; and they never brought suit under that right until 2012, after some 43 years later and now 47 years later in 2016.

In addition to the fact that Plaintiffs have no vested rights in this case on the very facts alleged in their amended Complaint, their claim for vested rights is barred by the 3-year statute of limitations. All of Plaintiffs' federal constitutional claims under 42 U.S.C. 1983 for the alleged denial of their vested rights carry a 3-year statute of limitations, which runs from the time when Plaintiffs "could have

filed suit and obtained relief." *Tommy Davis Const., Inc. v. Cape Fear Public Utility Authority*, 807 F.3d 62 (4th Cir. 2015) (see case attached). Here, this 3-year statute of limitations began to run in 2004 when Plaintiffs allege they were first informed that they did not have any vested rights and could not develop their Business Lots for the commercial uses they then desired. And further, Plaintiffs' vested rights claim is barred by estoppel and the abandonment of that claim by: (a) Plaintiffs' decision to not file suit on that claim within the 3-year statute of limitations, and (b) their decision, instead, to seek various rezoning of their property from 2008-2011, which operates as a concession and estoppel that they never had any vest rights claim to begin with. In other words, Plaintiffs cannot be heard to contend on the one hand that they had vested rights and were free from any zoning restrictions, and then to contend on the other hand that they had a right to rezoning.

What truly happened in this case is that Plaintiffs recognized in 2004 that they never had any vested rights because, since at least 1971, the County's Zoning Ordinance prohibited commercial uses in the zoning district where Plaintiffs' Business Lots had been platted and Plaintiffs had never complied with the 1968 Zoning Ordinance (or subsequent ordinances) to obtain any permit to construct anything on their business lots. This prohibition on certain commercial uses on Plaintiffs' Business Lots had been in place for over 30 years when Plaintiffs first

proposed in 2004 to use their Business Lots for certain commercial purposes. When Plaintiffs first informed the County in 2004 that they wanted to develop these lots for certain commercial uses but were told that they had no vested rights, Plaintiffs then sought to "skin the cat" another way by applying for various rezoning. However, when these rezoning efforts were unsuccessful in 2008 and 2011, Plaintiffs filed suit in 2012 and sought "to turn the clock back" to 1966 to claim that, beginning some 46 years earlier, they had vested rights all along to use their Business Lots for whatever commercial purposes they desired. In sum, Plaintiffs never had any vested rights in this case. And, even if they had any vested rights (which they did not), such a claim based on a violation of 42 U.S.C. 1983 was time barred in 2007 (i.e., 3 years from 2004).

B. Plaintiffs Have No State or Federal Substantive Due Process Claims

To establish a state or federal substantive due process claim, a plaintiff must first show that he has a "property interest" or property right that was deprived by the violation. *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d. 430, 436 (4th Cir. 2002); *McDonald's Corp. v. Dwyer,* 430 S.E.2d 888 (N.C. 1994). This requires a showing of "a legitimate claim of entitlement," which depends upon state law. *Id.; Sack v. North Carolina State Univ.,* 574 S.E.2d 120, 1341 (N.C. App. 2002); *McNeill v. Harnett County,* 398 S.E.2d. 475, 571 (N.C. 1990). In the context of

land-use regulation, when a zoning ordinance or other regulation grants "any discretion" to the local government for approval of the proposed development, no property interest or right exists. *Henry v. Jefferson County Planning Commission*, 34 Fed. Appx. 92, 97 (4th Cir. 2002); *Biser v. Town of Bel Air*, 991 F.2d. 100, 104 (4th Cir. 1993). If a vested right exists, there is a property interest; but if no vested right exists, there is no property interest. Because a rezoning decision is an entirely "legislative act" that is in the sole "discretion" of the governing board of the local government, there is no property interest or right to rezoning. *See Ashby v. Cary*, 161 N.C. App. 499, 588 S.E.2d. 572 (2003); *Graham v. City of Raleigh*, 55 N.C. App. 107, 284 S.E.2d 742 (1981). (Copies of all of these cases are attached).

The result of all of this is simple. Because Plaintiffs had no vested rights in this case, they have no property interest or property right to sustain any substantive due process claim. In addition, because the County's decisions denying rezoning in 2008 and 2011 were purely *legislative* and *discretionary*, Plaintiffs had no property interest in their rezoning requests or any entitlement to rezoning, and thus they have no substantive due process claim under state or federal law.

C. Plaintiffs Have No State or Federal Equal Protection Claims

There is no equal protection claim in the absence of intentional and purposeful discrimination. *Sylvia Development Corp. v. Calvert County*, 48 F.3d. 810, 818-820 (4th Cir. 1995). Here, although Plaintiffs allege the serious charge

that they have been subjected to such discrimination, they have provided absolutely no evidence from which it can be reasonably concluded that the County, through a majority of its Board of Commissioners (or even any single Commissioner), engaged in such discrimination. Rather, the County has provided uncontroverted evidence that no such discrimination ever existed.[9]

Moreover, there is nothing in the minutes of any meetings or hearings of the County or of the County's advisory Planning Board (which repeatedly voted and unanimously recommended against Plaintiffs' various rezoning requests) to suggest, in any way, that Plaintiffs were subjected to unlawful discrimination of any kind. Indeed, the detailed public record discloses that the County bent over backwards, on numerous occasions, to accommodate Plaintiffs' repeated delays and withdrawals of their rezoning applications, and to accommodate different resubmittal requests by Plaintiffs in their various efforts to secure zoning approval to use their Business Lots for commercial purposes.[10] And, the County has otherwise, over many, many years, granted all kinds of different development applications of many of the Plaintiffs in this case.[11]

In short, Plaintiffs' allegations of discrimination are totally unfounded and unsupported by ***any*** evidence whatsoever. Although such allegations should never

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[9] See County's Affidavit at Paragraph 52 and Exhibit BB thereto.
[10] See County's Affidavit at paragraphs 31-50.
[11] See County's Affidavit at paragraph 51.

be taken lightly and, if true, would be no less than abhorrent, "the Truth" of those accusations should not be countenanced by their mere assertion — an assertion which is the only pathway for Plaintiffs to claim (as they do here) some $38 million dollars or more as uninsured damages from the citizenry of the County. That Plaintiffs might somehow "believe" that they have been subjected to discrimination constitutes no *evidence* that such discrimination in fact occurred. Just as the charge is serious, proof of it must be serious.

Here, although Plaintiffs may have their "belief," there is absolutely nothing in the well-documented and voluminous record of all the public hearings and considerations of Plaintiffs' rezoning requests to substantiate their allegation. Indeed, everything in the public record and the totality of the record affirmatively ***proves the complete absence*** of such discrimination. This vindication of the complete absence of discrimination is of paramount public importance to the integrity of the County as a body politic and all of its citizens. Thus, in the end, this Court should enter a declaratory judgment that Plaintiffs' equal protection claims, like their vested rights and substantive due process claims, should be dismissed.

D. Plaintiffs' Have No Damages Remedy

On all of Plaintiffs' claims, Plaintiffs seek a "declaratory judgment" of their right to develop their Business Lots as they wish and in whatever way they wish. If Plaintiffs prevail on these claims, the well-established and exclusive remedy is to

allow Plaintiffs to develop those lots as they wish. But, damages are *not* an appropriate remedy.

Our Supreme Court has long held that money damages are not an appropriate remedy for State constitutional violations where there is a less intrusive remedy recognized by State law. *Corum v. University of North Carolina*, 413 S.E.2d 276 (N.C. 1992). And, our federal courts, construing civil rights actions under 42 U.S.C. 1983, have uniformly held that damages for constitutional violations are available only if the governmental conduct is "***so arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of...adequate rectification by any post-deprivation state remedies***." *Sylvia, supra*, 48 F.3d at 827. (These cases are attached).

In short, neither our courts nor the federal courts countenance damages as a remedy where state law, as here, provides for an adequate remedy through a court order that would allow the land uses that were denied if rezoning approval was improperly denied or vested rights existed. This very remedy of an order permitting the desired land use is, in fact, the gravamen of Plaintiffs' overall request for relief. If the law were otherwise—to allow extraordinary money damages whenever a rezoning action was declared to be somehow unlawful—literally hundreds of local governments throughout the State (and tens of thousands

throughout the nation) would face the unconscionable specter of untold and uninsured damages for mere erroneous land-use decisions.

In sum, in the end, if Plaintiffs are somehow entitled under the law to develop their Business Lots as they wish (a right that they assert has existed for nearly 50 years), then the sole remedy is to give them that right because it is the very right asked for in their "declaratory judgment" action and the proper remedy afforded them under well-established North Carolina law. As explained above, however, no such right exists in this case because, in summary:

(1) Plaintiffs never had any vested rights;

(2) Plaintiffs never asserted that claim (as a federal claim) within the applicable statute of limitations;

(3) Plaintiffs have no substantive due process claims when they have no vested rights claim; and

(4) Plaintiffs' equal protection claims based on unlawful discrimination and other improper bias are completely unsubstantiated by any evidence in the face of a voluminous public record that indisputably shows that the County always treated Plaintiffs fairly and without any discrimination and bias, even though the elected representatives of the County decided that Plaintiffs' rezoning requests were not in the best interests of the overall welfare and zoning of land uses in the County.

Respectfully submitted, this the 20th day of April, 2016.

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