

STATE OF NORTH CAROLINA
COUNTY OF HAYWOOD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 20-CVS-828

BURNETTE DOYLE SUTTON,

Plaintiff,

v.

COUNTY OF HAYWOOD, acting by
and through its Development Services
Department and Board of Commissioners,

Defendant.

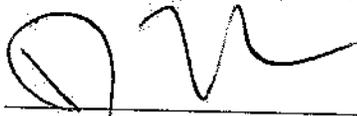
NOTICE OF HEARING

FILED
2022 SEP 23 PM 12:51
JAMES W. BOYD CO. C.S.C.

NOW COMES Plaintiff, Burnette Doyle Sutton, by and through undersigned counsel and hereby provides this Notice that Plaintiff's Motion to Determine Sufficiency of Defendant's Responses to Requests for Admissions will be heard on Monday, November 28, 2022, or as soon thereafter as the Court may hear the same, in Courtroom 3A at the Haywood County Courthouse.

Respectfully submitted this the 21st day of September, 2022.

ALLEN STAHL & KILBOURNE, P.L.L.C.



Derek J. Allen

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Attorneys for Plaintiff

emailed to Erin MD



CERTIFICATE OF SERVICE

Pursuant to Rule 5 of the North Carolina Rules of Civil Procedure, the undersigned attorney certifies that the foregoing was served upon the parties identified and as addressed below by

_____ mailing a copy to the attorney's office.

_____ handing a copy to the attorney or leaving it at the attorney's office with a partner or employee.

_____ sending a copy to the attorney's office by a confirmed telefacsimile transmittal.

emailing it to the attorney as an attachment.

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Frank Queen
Haywood County Attorney
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This the 21st day of September, 2022.



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2022 SEP 23 P 12:51
HAYWOOD CO., C.S.C.

STATE OF NORTH CAROLINA
COUNTY OF HAYWOOD

IN THE GENERAL COURT OF JUSTICE
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FILE NO. 20-CVS-828

BURNETTE DOYLE SUTTON,

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v.

COUNTY OF HAYWOOD, acting by
and through its Development Services
Department and Board of
Commissioner,

Defendant.

ORDER

THIS CAUSE came on to be heard, and was heard, before the undersigned Superior Court Judge upon the Defendant's Motions to Dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, and Defendant's Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure.

Having reviewed the court file, pleadings, and memoranda (submitted prior to and after the hearing), and having heard the arguments of counsel for both parties, it is hereby ORDERED that the Defendant's Motions are DENIED.

This the 6th day of August, 2021.

B. B. Letts
Hon. Bradley B. Letts

FILED
2021 AUG 11
HAYWOOD COUNTY, N.C.
BY [Signature]



STATE OF NORTH CAROLINA

COUNTY OF HAYWOOD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 20-CVS-828

BURNETTE DOYLE SUTTON,

Plaintiff,

v.

COUNTY OF HAYWOOD, acting by
and through its Development Services
Department and Board of
Commissioners,

Defendant.

MEMORANDUM OF LAW IN
OPPOSITION TO
DEFENDANT'S
MOTION FOR JUDGMENT
ON THE PLEADINGS AND
MOTION TO DISMISS

NOW COMES Plaintiff, Burnette Doyle Sutton, by and through undersigned counsel, and hereby provides this memorandum of law in opposition to Defendants' Motions to Dismiss and Motion for Judgment on the Pleadings.

I. FACTS

Plaintiff has owned the property at issue since February 2019. Compl. ¶ 10. In or about August 2019, Plaintiff applied to Haywood County Development Services for a permit to operate a wrecker service at the Property. Compl. ¶ 12. On or about September 5, 2019, Plaintiff received a letter stating that his planned facility does not comply with Section 114.04 of the Haywood County Ordinances, specifically because "junkyards ... service station[s], garage[s], used car lot[s], wrecker service[s] or motor vehicle storage area[s]" shall "[n]ot be located closer than 500 feet of a residence, school or business...." Compl. ¶ 13; Compl. Ex. A. Plaintiff contested that determination in September 2019 by giving notice of his appeal ("the First Appeal") to the County and requested a variance of the ordinance. Compl. ¶ 14. On October 21, 2019, the Haywood County Board of Commissioners, acting as a quasi-judicial body,



considered evidence for and against the Plaintiff's requested variance. Compl. ¶ 15. At the conclusion of the hearing, the Haywood County Board of Commissioners found that the evidence failed to allow for a variance. Compl. ¶ 16. Plaintiff filed a timely appeal of that decision via a writ of certiorari in this Court. *See Sutton v. County of Haywood*, No. 19-CVS-1282 (Haywood County). No hearing on the merits of that appeal has been held. Compl. ¶ 17.

II. ARGUMENT

A. Legal Background of Plaintiff's Claims

1. **Chapter 114 of the Haywood County Code of Ordinances is not a Valid Exercise of the Police Power, and Violates Plaintiff's Equal Protection Rights.**

Chapter 153A-121(a) of the North Carolina General Statutes provides a county government authority to enact general ordinances based on its police power:

A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances.

N.C. Gen. Stat. § 153A-121(a).

However, wrecker services are not detrimental to the health, safety, or welfare of County citizens and the peace and dignity of the County, nor are they defined as nuisances. Thus, there is no basis for the County to regulate wrecker services under its police power. Put differently, there is no basis to apply the police power specifically to wrecker services as opposed to other types of businesses that are not detrimental to the health, safety, welfare, etc., of the County.

Furthermore, the 500-foot requirement in Chapter 114 does not purport to "regulate, prohibit, or abate acts, omissions, or conditions" of wrecker services, it



merely seeks to relocate them. Thus, the 500-foot requirement is an unreasonable means to accomplish any public good, and does nothing but interfere with a property owner's right to use his property as he deems appropriate.

Plaintiff's Complaint alleges that the 500-foot requirement of Chapter 114 is an unreasonable, arbitrary, unequal, and therefore unconstitutional, exercise of the police power as applied to wrecker services.

2. Chapter 114 of the Haywood County Code of Ordinances Cannot Be Adopted Using the County's General Ordinance-Making Authority Because it is a Land Development Regulation Subject to Specific Statutory Requirements.

In addition to Section 153A-212(a), Chapter 153A (and now Chapter 160D) also provides more specific grants of ordinance-making authority. One such example is found in Article 18 of Chapter 153A, which authorizes a county government to enact ordinances regulating the development of land.

Land use regulations regulate "the location and use of buildings, structures, and land." N.C. Gen. Stat. §§ 153A-340(a) (repealed June 19, 2020), 160D-702 (effective June 19, 2020). Relevant case law states that an ordinance is considered a land use regulation when it "substantially affects land use." *Vulcan Materials Co. v. Iredell Cty.*, 103 N.C. App. 779, 782, 407 S.E.2d 283, 285-86 (1991) (moratorium on building permits is essentially a zoning ordinance); *Thrash Ltd. P'ship v. Cty. of Buncombe*, 195 N.C. App. 727, 733, 673 S.E.2d 689, 693 (2009) ("determination of whether an ordinance is a zoning ordinance . . . is whether the ordinance 'substantially affects land use'").



North Carolina courts hold that, where there is a specific statutory grant of authority, that grant is controlling, and a county cannot use its general ordinance-making power to enact that specific type of regulation. *See, e.g., Sandy Mush Props., Inc., v. Rutherford County*, 164 N.C. App. 162, 165, 595 S.E.2d 233, 235 (2004).

Rather, the county must follow the requirements of the statute granting that specific authority. *Id.* Furthermore, it is the nature of the ordinance, not the precise statutory authorization cited by the local government, which controls which statute is to be followed. *See, e.g., id.*

Among other requirements, land use regulations must be adopted after proper notice and public hearing. Section 153A-323(a) provides that,

[b]efore adopting, amending, or repealing any ordinance authorized by this Article ... the board of commissioners shall hold a public hearing on the ordinance or amendment. The board shall cause notice of the hearing to be published once a week for two successive calendar weeks.

N.C. Gen. Stat. § 153A-323(a).

In addition, “[z]oning regulations shall be made in accordance with a comprehensive plan.” N.C. Gen. Stat. § 153A-341(a). As stated by the Court of Appeals in *Sandy Mush Props., Inc. v. Rutherford County*, “[a] zoning plan consists of ordinances designed to enable the government of counties to divide the county into districts or zones for the purpose of regulating the uses of each parcel of land in the county.” *Sandy Mush Props.* at 166, 595 S.E.2d at 234.



Chapter 114—and in particular, its specific requirement that wrecker services cannot be located closer than 500 feet of a residence, school, or business (the “500-foot requirement”)—is a land use regulation, and therefore cannot be enacted through the County’s general ordinance-making power.

Specifically, the 500-foot requirement regulates the use of land within 500 feet of any residence, school, or business. Therefore, it “substantially affects land use,” and is a land use regulation.

Accordingly, it is outside of the County’s statutory grant of authority to enact Chapter 114 of the Haywood County Code of Ordinances—and the 500-foot requirement in particular—without complying with the requirements of Article 18 of Chapter 153A. Plaintiffs Complaint alleges that neither the notice requirements nor the requirement for a comprehensive plan were followed regarding Chapter 114.

B. Standard of Review

3. Standard of Review Under Rule 12(c)

Judgment on the pleadings is a summary procedure and the judgment is final. *See James, Civil Procedure § 6.17* (1965). Therefore, each motion under Rule 12(c) must be carefully scrutinized to ensure that the nonmoving party is not inappropriately deprived of a full and fair hearing. The movant is held to a strict standard and must show that no material issue of fact exists and that he is clearly entitled to judgment. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 479 F.2d 478 (6th Cir. 1973). A motion to dismiss under Rule 12(c) “is disfavored by the courts and the pleadings will be liberally construed in the light



most favorable to the nonmovant.” *Mabrey v. Smith*, 144 N.C.App. 119, 124, 548 S.E.2d 183, 187 (2001).

“All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.” *Ragsdale v. Kennedy*, 209 S.E.2d 494, 499, 286 N.C. 130, 137 (1974) (citations omitted).

4. Standard of Review Under Rule 12(b)(6)

“The standard of review on a motion to dismiss under Rule 12(b)(6) is whether, if all the plaintiff's allegations are taken as true, the plaintiff is entitled to recover under some legal theory.” *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011). “A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff could prove no set of facts in support of his claim which would entitle him to relief.” *Snug Harbor Prop. Owners Ass'n v. Curran*, 55 N.C. App. 199, 202, 284 S.E.2d 752, 754 (1981). “The rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.” *Id.*

C. Plaintiff's First and Second Causes of Action Are Not Barred by Any Applicable Statute of Limitations

As discussed above, Chapter 114 of the Haywood County Code of Ordinances, and specifically the 500-foot requirement—are land use regulations, i.e., zoning



regulations. Thus, even though Section 1-54(10) generally provides a one-year limitations period for "contesting the validity of any zoning or unified development ordinance," Section 160A-1405(b) clarifies that:

an action challenging the validity of a development regulation adopted under this Chapter or other applicable law shall be brought within one year of the accrual of such action. Such an action accrues when the party bringing such action first has standing to challenge the ordinance.

N.C. Gen. Stat. § 160A-1405(b) (emphasis added). In turn, a development applicant whose application was denied by a decision-making board acquires standing to challenge the validity of an ordinance (and thus the action accrues) when he or she receives written notice of the board's final decision.

N.C. Gen. Stat. § 160D-1403.1(b)-(c).

In addition, Section 160D-1405(c) provides, in pertinent part:

Nothing in this section or in G.S. 1-54(10) or G.S. 1-54.1 bars a party in an action involving the enforcement of a development regulation or in an action under G.S. 160D-1403.1 from raising as a claim or defense in the proceedings the enforceability or the invalidity of the ordinance. Nothing in this section or in G.S. 1-54(10) or G.S. 1-54.1 bars a party who files a timely appeal from an order, requirement, decision, or determination made by an administrative official contending that the party is in violation of a development regulation from raising in the judicial appeal the invalidity of the ordinance as a defense to the order, requirement, decision, or determination. ...

N.C. Gen. Stat. § 160D-1405(c).

This action and Haywood County File No. 19-CVS-1282 (an appeal of the County Commissioners' decision in the nature of certiorari, which Plaintiff has

moved the Court to join with this action), are raised in defense against the County's attempt to enforce Chapter 114 of its Code of Ordinances. Accordingly, under 160A-1405(c), Plaintiff's claims are not barred.

In addition, this action was filed within one year of the accrual of Plaintiff's claim under 160A-1405(b). Therefore, Plaintiff's claims have been filed within the limitations period.

D. Plaintiff's Claims Are Not Barred by Governmental Immunity

The doctrine of governmental immunity applies to protect a county or municipality from *tort* liability in the exercise of government functions. *See, e.g., Estate of Williams v. Pasquotank County Parks & Rec. Dep't*, 366 N.C. 195, 198. 732 S.E.2d 137, 140 (2012).

In addition, and incompatible with the County's assertion of governmental immunity, Section 160D-1401 of the North Carolina General Statutes provides, in pertinent part:

Challenges of legislative decisions of governing boards, including the validity or constitutionality of development regulations adopted pursuant to this Chapter, and actions authorized by G.S. 160D-108(h) or (i) and G.S. 160D-1403.1 may be brought pursuant to Article 26 of Chapter 1 of the General Statutes.

Section 160D-1403.1(a) provides, in pertinent part:

[A] person with standing ... may bring an original civil action seeking declaratory relief, injunctive relief, damages, or any other remedies provided by law or equity, in superior court or federal court to challenge the enforceability, validity, or effect of a local land development regulation for any of the following claims:



- (1) *The ordinance, either on its face or as applied, is unconstitutional.*
- (2) *The ordinance, either on its face or as applied, is ultra vires, preempted, or otherwise in excess of statutory authority.*
- (3) *The ordinance, either on its face or as applied, constitutes a taking of property.*

Plaintiff's Complaint does not allege a tort. Therefore, governmental immunity is inapplicable.

Furthermore, Plaintiff's lawsuit is an action for declaratory judgment challenging the validity and constitutionality of a local land development regulation, which is specifically authorized by Sections 160D-1401 and 160D-1403.1.

E. Plaintiff's Claims Do Not Fail to State a Claim Upon Which Relief May Be Granted

As no specific basis for Defendant's Rule 12(b)(6) Motion were given either in Defendant's Answer or Defendant's Notice of Hearing, Plaintiff refers to the other sections of this memorandum to show that his allegations state valid legal grounds for his claims, and the facts alleged show that he is entitled to the relief he requests.

F. Plaintiff's Claims Are Not Barred by Lack of Subject Matter or Personal Jurisdiction

Defendant's Motions to Dismiss and Answer assert lack of subject matter jurisdiction, "[b]ecause of the doctrine of governmental immunity," and assert lack of personal jurisdiction "[b]ecause of the doctrine of governmental immunity and the application of the statutes of limitations." Ans. at p. 2.

As discussed above, governmental immunity is inapplicable to this case, and Plaintiff's claim was brought within the applicable statute of limitations.



G. Plaintiff's Constitutional Claims are Not Barred by the Presence of an Adequate State Remedy

Defendant's argument may be well taken to the extent that Plaintiff's challenge to Chapter 114 of the Haywood County Code of Ordinances moves forward based on the mechanisms provided by state law, including Chapters 153A and 160D.

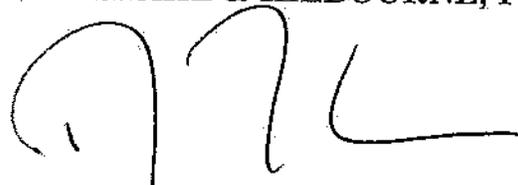
However, the essence of Plaintiff's claim is that Chapter 114 violates his Constitutional rights. As discussed above, Chapter 114 deprives him of a property right without adequate justification, and does so in an arbitrary manner which deprives him of equal protection of the law. If none of the mechanisms provided by, e.g., Chapters 153A and 160D are adequate to address these concerns, for whatever reason, then there is no adequate state remedy, and Plaintiff's Constitutional claims must go forward. Otherwise, the implication is that an unconstitutional ordinance can become unchallengeable, and thus be allowed to stand indefinitely.

III. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that Defendant's Motion for Judgment on the Pleadings and Motion to Dismiss be denied.

This the 14th day of July, 2021.

ALLEN STAHL & KILBOURNE, P.A.



Derek J. Allen



N.C. State Bar No. 24091
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~~FILED~~
CERTIFICATE OF SERVICE

2021 JUL 19 PM 2:18
HAYWOOD COUNTY, N.C.

Pursuant to Rule 5 of the North Carolina Rules of Civil Procedure, the undersigned attorney certifies that the foregoing was served upon the parties identified and as addressed below by

mailing a copy to the attorney's office.

handing a copy to the attorney or leaving it at the attorney's office with a partner or employee.

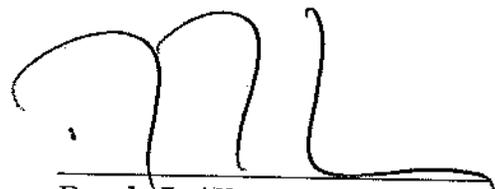
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Bryant Morehead
Haywood County Manager
Haywood County Historic Courthouse
215 N. Main Street, Third Floor
Waynesville, NC 28786

Frank Queen
Haywood County Attorney
Haywood County Historic Courthouse
215 N. Main Street, Third Floor
Waynesville, NC 28786

This the 14th day of July, 2021.



Derek J. Allen





decision to the Haywood County Board of Commissioners, which was also denied. See Exhibit A.

3. Chapter 114 of the Haywood County Ordinances, under which the Haywood County Development Services Department and Board of Commissioners made the decisions being appealed in 19-CVS-1282, is the same ordinance at issue in this cause. See Exhibit A.

4. In both causes, the parties are represented by the same counsel, respectively.

5. 19-CVS-1282 is an appeal in the nature of certiorari brought under Section 160D-1402 of the North Carolina General Statutes. See Exhibit A.

6. This cause is an action for declaratory judgment brought under Sections 160D-1401 and 160D-1403.1 of the North Carolina General Statutes.

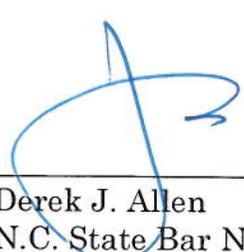
7. Section 160D-1403.1(d) provides: "An original civil action authorized by this section may, for convenience and economy, be joined with a petition for writ of certiorari and decided in the same proceedings."

8. Joining the two causes would promote convenience and economy for the Court and the parties, and ensure consistency in the Court's decisions on the issues presented.

WHEREFORE, Plaintiff respectfully requests that the Court join this cause with Haywood County Case No. 19-CVS-1282.

This the 15 day of June, 2021.

ALLEN STAHL & KILBOURNE,
P.A.



Derek J. Allen
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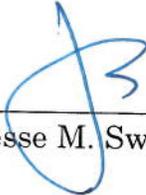
CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail addressed to the following person at the following address which is the last address known to me:

Bryant Morehead
Haywood County Manager
Haywood County Historic Courthouse
215 N. Main Street, Third Floor
Waynesville, NC 28786

Frank Queen
Haywood County Attorney
Haywood County Historic Courthouse
215 N. Main Street, Third Floor
Waynesville, NC 28786

This the 18 day of June, 2021.



Jesse M. Swords

FILED
2021 JUN 22 PM 10:03
HAYWOOD COUNTY, N.C.



STATE OF NORTH CAROLINA
COUNTY OF HAYWOOD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 20-CVS-828

2021 JUN 22 PM 1:50
HAYWOOD COUNTY, D.S.C.

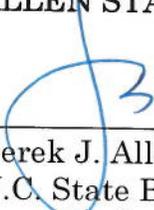
BURNETTE DOYLE SUTTON,)
)
Plaintiff,)
v.)
)
COUNTY OF HAYWOOD, acting by)
and through its Development Services)
Department and Board of)
Commissioners,)
)
Defendant.)
_____)

NOTICE OF HEARING

NOW COMES Plaintiff, Burnette Doyle Sutton, by and through the undersigned counsel and hereby provides this Notice that its Motion to Join the above-captioned matter with Haywood County Case No. 19-CVS-1282 pursuant to Section 160D-1403.1(d) of the North Carolina General Statutes will be heard on Monday, July 19, 2021 at 10:00 A.M. in the Jackson County Courthouse in Courtroom 2 before the presiding Superior Court judge.

This the 18 day of June, 2021.

ALLEN STAHL & KILBOURNE, PLLC



Derek J. Allen
N.C. State Bar No. 24091
Jesse M. Swords
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20 Town Mountain Rd. Suite 100
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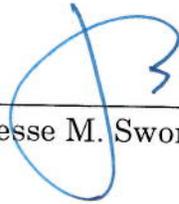
CERTIFICATE OF SERVICE

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Bryant Morehead
Haywood County Manager
Haywood County Historic Courthouse
215 N. Main Street, Third Floor
Waynesville, NC 28786

Frank Queen
Haywood County Attorney
Haywood County Historic Courthouse
215 N. Main Street, Third Floor
Waynesville, NC 28786

This the 18 day of June, 2021.



Jesse M. Swords

FILED
2021 JUN 22 PM 1:03
WAYWOOD COUNTY, N.C.



NORTH CAROLINA
HAYWOOD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 20 CVS 828

Burnette Doyle Sutton,
Plaintiff

v.

County of Haywood,
Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS
NOTICE OF HEARING

Now comes the defendant, County of Haywood, moving the court, pursuant to Rule 12(c) of the Rules of Civil Procedure, for judgment on the pleadings, or pursuant to Rule 12(b)(6), on the grounds that the pleadings demonstrate that the actions are barred by the applicable statutes of limitations; are barred by governmental immunity; fail to state a claim; are barred by lack of subject matter or personal jurisdiction; or are barred by the presence of an adequate state remedy.

The defendant will bring these motions on for hearing before the judge presiding over the Superior Court of Jackson County in during the week of July 19, 2021 as scheduled by the Court Administrator.

This ~~14~~¹⁷th day of May, 2021.

Frank G. Queen, PLLC

By: Frank G. Queen

Frank G. Queen

NC State Bar Number 7275

Haywood County Courthouse, 3rd Floor

215 N. Main Street

Waynesville NC 28786

(828) 452-6625

Fax: (828) 452-6715

frank.queen@haywoodcountync.gov

Attorney for the defendant

0

0

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on the opposing party or counsel in this matter by depositing a copy, enclosed in a first-class postage paid wrapper into a depository under the exclusive care and custody of the United States Postal Service, addressed as shown below on the date shown near his signature:

Derek J. Allen
Jesse M. Swords
Allen Stahl & Kilburne
20 Town Mountain Road, Ste 100
Asheville NC 28801

May ~~14~~, 2021

17

Frank G. Queen

Frank G. Queen



NORTH CAROLINA
HAYWOOD COUNTY

FILED
2021 FEB 15 PM 12:10
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 20 CVS 828
HAYWOOD COUNTY, C.S.C.

Burnette Doyle Sutton,

Plaintiff

v.

County of Haywood,

Defendant

MOTION FOR JUDGMENT ON THE PLEADINGS
NOTICE OF HEARING

Now comes the defendant, County of Haywood, moving the court, pursuant to Rule 12(c) of the Rules of Civil Procedure, for judgment on the pleadings, or pursuant to Rule 12(b)(6), on the grounds that the pleadings demonstrate that the actions are barred by the applicable statutes of limitations; are barred by governmental immunity; fail to state a claim; are barred by lack of subject matter or personal jurisdiction; or are barred by the presence of an adequate state remedy.

The defendant will bring these motions on for hearing before the judge presiding over the Superior Court of Haywood County in Courtroom 3A during the week of March 1, 2021 as scheduled by the Court Administrator.

This 15th day of February, 2021.

Frank G. Queen, PLLC

By: 

Frank G. Queen

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Attorney for the defendant

emailed to Erin 2/23/2021 916



CERTIFICATE OF SERVICE

FILED

2021 FEB 15 PM 12:10
COUNTY, C.S.C

The undersigned hereby certifies that a copy of the foregoing pleading was served on the opposing party or counsel in this matter by depositing a copy, enclosed in a first-class postage paid wrapper into a depository under the exclusive care and custody of the United States Postal Service, addressed as shown below on the date shown near his signature:

Derek J. Allen
Carolyn P. Small
Allen Stahl & Kilburne
20 Town Mountain Road, Ste 100
Asheville NC 28801

February 15, 2021



Frank G. Queen



NORTH CAROLINA
HAYWOOD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 20 CVS 828

Burnette Doyle Sutton,

Plaintiff

v.

County of Haywood,

Defendant

MOTIONS TO DISMISS and ANSWER

MOTIONS TO DISMISS

Now comes the defendant, County of Haywood, moving to dismiss the complaint pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, saying:

Statutes of Limitations

The defendant moves the court, pursuant Rule 12(b)(6), to dismiss the complaint for failure to bring it within the applicable statutes of limitations period.

1. The claims of the plaintiff denominated "First Cause of Action" and "Second Cause of Action" are barred by the applicable statutes of limitations.
2. The ordinance which is the subject of this action was initially enacted on 6 October 1997 and amended on 1 May 2000.
3. The complaint was filed 4 September 2020, long after the limitation periods had run (NC Gen. Stat. §153A-348(b) and (c) (3 years); §1-52 (3 years); §1-56 (10 years) or whatever other limitation period applies).

Governmental Immunity

The defendant moves the court, pursuant to Rule 12(b)(1), (2), and (6), to dismiss the complaint on the grounds of governmental immunity.

4. The actions of the county, complained of by the plaintiff, are governmental functions and the plaintiff's claims are barred by the doctrine of governmental immunity. Further, the plaintiff has not alleged any waiver of that immunity in his complaint.

Adequate State Remedy

The defendant moves the court, pursuant to Rule 12(b)(6), to dismiss the constitutional claims in the complaint on the grounds that an adequate state remedy is available.

5. The plaintiff's "Third Cause of Action – Equal Protection Violation" alleges a violation of "Plaintiff's equal protection rights" (Complaint, Paragraph 32) and alleges that the ordinance is not rationally related to a legitimate governmental interest and is "unconstitutional" (Complaint, Paragraph 30) and that the ordinance violates Plaintiff's equal protection rights (Complaint, Paragraph 32).

6. Assuming that the allegations are brought under the North Carolina Constitution's Article I, Section 19, or under Section 1 of the Fourteenth Amendment to the United States Constitution, or whatever constitutional provisions might be applicable, the constitutional claims are barred because an adequate state remedy is available, or such a remedy would have been available had not the action been filed after the statutes of limitations had run.

Failure To State A Claim

The allegations of the complaint, and each Cause of Action, fail to state a claim upon which relief may be granted and the defendant therefore moves the court to dismiss it, pursuant to Rule 12(b)(6) of the Rules of Civil Procedure.

Lack of Subject Matter Jurisdiction

Because of the doctrine of governmental immunity, the court lacks subject matter jurisdiction and the defendant therefore moves the court to dismiss the complaint pursuant to Rule 12(b)(1) of the Rules of Civil Procedure.

Lack of Personal Jurisdiction

Because of the doctrine of governmental immunity and the application of the statutes of limitations, the court lacks personal jurisdiction over the defendant and the defendant therefore moves the court to dismiss the complaint pursuant to Rule 12(b)(2) of the Rules of Civil Procedure.

ANSWER TO COMPLAINT

Without waiving the foregoing defenses and subject to the ruling by the court on the following motions to dismiss, the defendant further answers the complaint as follows:

FIRST DEFENSE
Statutes of Limitations

1. The claims of the plaintiff denominated "First Cause of Action" and "Second Cause of Action" are barred by the applicable statutes of limitations.
2. The ordinance which is the subject of this action was initially enacted on 6 October 1997 and amended on 1 May 2000.
3. The complaint was filed 4 September 2020, long after the limitation periods had run (NC Gen. Stat. §153A-348(b) and (c) (3 years); §1-52 (3 years); §1-56 (10 years) or whatever other limitation period applies).
4. The complaint should be dismissed for failure to bring it within the applicable statutes of limitations period.

SECOND DEFENSE
Governmental Immunity

5. The actions of the county, complained of by the plaintiff, are governmental functions and the plaintiff's claims are barred by the doctrine of governmental immunity.
6. The plaintiff has not alleged any waiver of that immunity in his complaint.
7. Pursuant to Rule 12(b)(1), (2), and (6), the complaint should be dismissed on the grounds of governmental immunity.

THIRD DEFENSE
Adequate State Remedy

8. The plaintiff's "Third Cause of Action – Equal Protection Violation" alleges a violation of "Plaintiff's equal protection rights" (Complaint, Paragraph 32) and alleges that the ordinance is not rationally related to a legitimate governmental interest and is "unconstitutional" (Complaint, Paragraph 30) and that the ordinance violates Plaintiff's equal protection rights (Complaint, Paragraph 32).
9. Assuming that the allegations are brought under the North Carolina Constitution's Article I, Section 19, or under Section 1 of the Fourteenth Amendment to the United States Constitution, or whatever constitutional provisions might be applicable, the constitutional claims are barred because an adequate state remedy is available, or such a remedy would have been available had not the action been filed after the statutes of limitations had run.



10. The constitutional claims in the complaint should be dismissed on the grounds that an adequate state remedy is available.

FOURTH DEFENSE
Failure To State A Claim

11. The allegations of the complaint, and each Cause of Action, fail to state a claim upon which relief may be granted and should be dismissed.

FIFTH DEFENSE
Lack of Subject Matter Jurisdiction

12. Because of the doctrine of governmental immunity, the court lacks subject matter jurisdiction and the complaint should therefore be dismissed.

SIXTH DEFENSE
Lack of Personal Jurisdiction

13. Because of the doctrine of governmental immunity and the application of the statutes of limitations, the court lacks personal jurisdiction over the defendant and the complaint should be dismissed.

SEVENTH DEFENSE

Responding to the numbered paragraphs of the complaint, the defendant says:

14. Paragraphs 1, 2, 3, 4, 5, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19 are admitted.

15. Paragraphs 6, 8, 21, 22, 24, 26, 30, 31, and 33 are untrue and denied.

16. Paragraphs 20, 25, 27, 28, and 32 state legal assertions or conclusions and not any factual matter requiring answer, but to the extent they could be construed to allege any facts they are denied.

17. Paragraphs 18, 23, and 29 are answered substantively as set out above.

18. Unless otherwise answered, the other allegations of the complaint are denied.

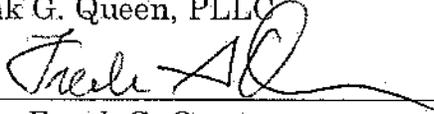
WHEREFORE, having asserted the motions to dismiss, affirmative defenses, and otherwise responded to the complaint, the defendant prays judgment:



- a. That the plaintiff take nothing from this defendant,
- b. That the claims of the plaintiff be dismissed with prejudice, and
- c. For such other and further relief which to the court may seem just.

This 29th day of December, 2020.

Frank G. Queen, PLLC

By: 
Frank G. Queen

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Attorney for the defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on the opposing party or counsel in this matter by depositing a copy, enclosed in a first-class postage paid wrapper into a depository under the exclusive care and custody of the United States Postal Service, addressed as shown below on the date shown near his signature:

Derek J. Allen
Carolyn P. Small
Allen Stahl & Kilburne
20 Town Mountain Road, Ste 100
Asheville NC 28801

December 29, 2020


Frank G. Queen

