

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

CHATHAM COUNTY

19-CVS-809

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

Plaintiffs,

v.

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

Defendants,

and

CHATHAM FOR ALL and WEST
CHATHAM BRANCH 5378 of the NAACP

Defendant-Intervenors.

**DEFENDANT-INTERVENORS'
BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendant-Intervenors West Chatham Branch 5378 of the National Association for the Advancement of Colored People (“West Chatham NAACP”) and Chatham for All (“CFA”), collectively, “Defendant-Intervenors,” submit this brief in support of their Motion to Dismiss Plaintiffs’ case pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6).

Plaintiffs brought suit to keep a Confederate monument (“the UDC Monument”) in front of the Chatham County Courthouse after Defendants, the elected representatives of Chatham County, voted to revoke the license the County gave in 1907 to Plaintiff Winnie Davis Chapter of the United Daughters of the Confederacy (“UDC”) to erect its Monument there. Plaintiffs, however, lack standing to pursue the relief they seek, and their Complaint fails as a matter of law to state any actionable claim for relief. Accordingly, the Complaint should be dismissed.

I. STATEMENT OF FACTS

Defendant-Intervenors hereby incorporate by reference the Statement of Facts from their Brief in Support of Motion to Intervene.

II. ARGUMENT

Because Plaintiffs have sought expedited treatment of their claims by filing a preliminary injunction motion, the arguments supporting dismissal are already before the Court in Defendant-Intervenors’ Response in Opposition to Plaintiffs’ Motion for Preliminary Injunction (“Response”), which Defendant-Intervenors adopt and incorporate herein by reference. For the reasons stated in that Response and the reasons set out below, this Court should dismiss Plaintiffs’ complaint with prejudice pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction or pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

A. The Court lacks subject matter jurisdiction over Plaintiffs' claims, requiring dismissal under Rule 12(b)(1).

As fully discussed in Defendant-Intervenors' Response at 4-8, the Court does not have subject matter over this action because Plaintiffs cannot carry their burden to establish they have standing. A matter should be dismissed pursuant to either Rule 12(b)(1) or Rule 12(b)(6) if the complainants lack standing to sue. *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011); *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). "Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003) (citations and internal quotation marks omitted). It is "a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 531-32 (2009) (citations and internal quotation marks omitted). Lack of standing deprives the court of subject matter jurisdiction over the action. *Neuse River Found. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002).

As argued in Defendant-Intervenors' Response, Plaintiffs fail this jurisdictional standard because:

- The individual Plaintiffs' assertions that they pay county property taxes does not confer standing upon them or differentiate them from any other members of the general public. See PI Opposition at 5 (citing *Fuller* 145 N.C. App. at 395, 553 S.E.2d 43).

- The individual Plaintiffs' claims that they have Confederate soldier ancestors have consistently and properly been rejected as a basis for standing. *Id.* (citing, e.g., *Gardner v. Mutz*, 360 F. Supp 3d. 1269, 1276 (M.D. Fl. 2019)).
- Aesthetic enjoyment of a Confederate monument does not satisfy standing requirements. *Id.* at 6 (citing *Historical Preservation Action Committee v. Reidsville*, 230 N.C. App. 598, __ S.E.2d __ (2013) (unpublished)).
- Plaintiff UDC cannot show representational standing because it fails to allege any legal injury or harm suffered by its members. *Id.* at 6-7 (citing *N.C. State Conf. of the NAACP v. N.C. State Bd. of Elections*, 283 F. Supp 3d 393, 399 (M.D.N.C. 2017)).
- Plaintiffs do not, and cannot, identify any injury in fact as required by law for them to proceed. *See* Defendant-Intervenors' Response at 7-8 (citing *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005)) & 21-23. Among other things, Plaintiffs allege that they do not own the UDC Monument. *Id.*
- N.C. Gen. Stat. § 100-2.1 establishes no private right of action for Plaintiffs. *Id.* at 7; *see also* Defendants' Motion to Dismiss Brief at 7-8.
- Plaintiffs do not have standing under the Declaratory Judgment Act. *See* Defendant-Intervenors' PI Opposition at 7; *see also* N.C. Gen. Stat. § 1-254; *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (holding that courts have jurisdiction to issue a declaratory judgment "only when the pleadings and evidence disclose the existence of an actual

controversy between parties having adverse interests in the matter in dispute.”)
(citations omitted).

Because they lack standing, Plaintiffs are not entitled to proceed with this litigation.

This Court should dismiss their complaint pursuant to Rule 12(b)(1).

B. The Complaint fails to state a claim for relief, requiring dismissal pursuant to 12(b)(6).

As fully discussed in Defendant-Intervenors’ Response at 9-21, the Complaint further fails to state a claim upon which relief can be granted. A motion to dismiss should be granted if the complaint does not “state enough to give the substantive elements of a legally recognized claim” or if the complaint “pleads facts which serve to defeat the claim[s]” it alleges. *Raritan River Steel v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609, 612 (1988) (“A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint.”). In considering a motion to dismiss, only “the well-pleaded material allegations of the complaint are taken as admitted.” *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). “[C]onclusions of law or unwarranted deductions of fact are not [taken as] admitted.” The content of the Complaint fails to clear the Rule 12(b)(6) hurdle.

As Defendant-Intervenors argued in their Response, Plaintiffs have failed to state a cause of action because:

- Plaintiffs have no private right of action under N.C. Gen. Stat. § 100-2.1. See Response at 7; see also Defendants’ Brief in Support of Motion to Dismiss at 7-8.

- Plaintiffs fail to allege that the UDC Monument was approved by the North Carolina Historical Commission. *See* Response at 13 (citing N.C. Gen. Stat. § 100-2).
- Plaintiffs fail to make factually-supported allegations that the UDC Monument is publicly owned such that N.C. Gen. Stat. § 100-2.1 would apply. *See id.* at 10-13 (noting the requirements for a county accepting a gift, which are not addressed in the complaint, and the law that licenses are freely revocable).
- Plaintiffs fail to allege that the exceptions to N.C. Gen. Stat. § 100-2.1, including the public safety exception, do not apply. *See id.* at 14-15.
- Plaintiffs' proffered construction of N.C. Gen. Stat. § 100-2.1 is inconsistent with U.S. Const. Art. III, Sec. 3 and N.C. Const. Art. I, Secs. 4 and 5. *See id.* at 16-18.
- Plaintiffs' proffered construction of N.C. Gen. Stat. § 100-2.1 also is erroneous because it would violate Chatham County's right to speak for itself and choose the messages it expresses. *See id.* at 19-20 (citing, *e.g.*, *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467-68 (2009)).

Plaintiff's complaint fails the Rule 12(b)(6) test. It does not allege the mechanism of UDC's putative gift to Chatham County in accordance with legal requirements for a county to receive a gift. The Complaint on its face fails to sufficiently allege anything other than a license, which is freely revocable and was, in fact, revoked.

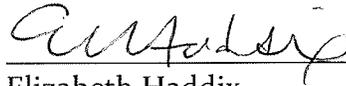
For all of these reasons, Plaintiffs have failed to state a claim for relief. Court should dismiss the Complaint pursuant to Rule 12(b)(1).

III. CONCLUSION

For the reasons set forth here, Defendant-Intervenors respectfully request that this Court dismiss Plaintiffs' Complaint with prejudice.

Respectfully submitted, this the 8th day of November 2019.

**Lawyers' Committee for Civil Rights Under
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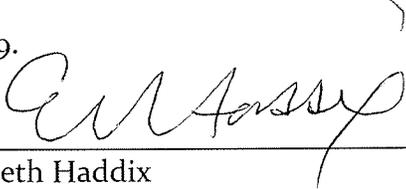
CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS has been served on all parties and/or counsel by facsimile and by direct transmission to the electronic mailing addresses shown below:

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This the 8th day of November, 2019.



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