# DRAFT (Mock)

SUPERIOR COURT OF NORTH CAROLINA
ORANGE COUNTY

JOHN JONES,
Plaintiff

- against -

COASTAL RESOURCES COMMISSION,
Defendant

MOTION FOR SUMMARY JUDGMENT

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## PRELIMINARY STATEMENT

Plaintiff, John Jones, brought this action to challenge the constitutionality of the Coastal Area Management Act of 1974 ("the Act") and to enjoin the Coastal Resources Commission ("CRC") from enforcing the Act's permit requirement upon his future plans to construct a building on his commercial lot ("property"). Furthermore, Plaintiff challenges the designation of his property as an Area of Environmental Concern ("AEC"), a designation establishing the CRC's regulatory jurisdiction.

As there exists no controversy as to material facts, Defendant prays the Court to grant its *Motion for Summary Judgment* on the following issues for the reasons herein described. *See e.g.*, Orin Haywood Weeks, Jr. v. North Carolina Department of Natural Resources and Community Development and North Carolina Coastal Resources Commission, 97 N.C. App. 215, 388 S.E.2d 228 (1990) ("[T]he device of summary judgment allows the court to pierce the pleadings to discern whether the parties forecast of evidence reveals that more than questions of law are involved.").

## QUESTIONS PRESENTED

Should the North Carolina Coastal Area Management Act of 1974, G.S. 113A-100, be declared invalid on the basis that it is unconstitutional for the following reasons:

1. That the Act is a prohibited local act under Article II, section 24, of the North Carolina Constitution;
2. That the Act delegates authority to CRC to develop and adopt "State Guidelines" for the coastal area without providing adequate standards to govern the exercise of the power delegated in violation of Article I, section 6, and Article II, section 1, of the North Carolina Constitution;
3. That the Act deprives the Plaintiff of his property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and in violation of Article I, section 20, of the North Carolina Constitution;
4. That the Act constitutes an unconstitutional 'taking' as it deprives the Plaintiff of his property without just compensation in violation of the Fifth Amendment of the United States Constitution?

## STATEMENT OF THE CASE

According to the Act, any and all new construction within an AEC requires a special development permit issued by CRC. G.S. 113-118 ("every person before undertaking any development in any area of environmental concern shall obtain . . . a permit pursuant to the provisions of this Part."). For the purpose of the Act, the statute defines 'development' as "any activity in a duly designated area of environmental concern . . . involving, requiring, or consisting of the construction or enlargement of a structure; excavation; dredging; filling; dumping;

removal of clay, silt, sand, gravel or minerals; bulkheading, driving of pilings; clearing or alteration of land as an adjunct of construction; alteration or removal of sand dunes . . ." G.S. 113A-104(5)(a). Furthermore, the Act establishes an initial permit process as well as a permit appeal process, and the Act itself contains a variance provision.

Plaintiff, John Jones, owns a commercial lot located in the highly developed business section of Atlantic Beach, which he bought for $50,000 *after* the Act was enacted in 1974. The lot is located inland of the barrier dunes in a shopping and business development on the third street inland from the ocean. Although Jones claims plans to build an office building, he has not yet applied for a CAMA development permit, building permit, nor filed any development plans or architectural drawings with the municipality. By definition, this building would be within the Outer Banks' AEC, the regulated areas of the Act.

## **ARGUMENT**

DEFENDANT'S *MOTION FOR SUMMARY JUDGMENT* SHOULD BE GRANTED BECAUSE THE ACT IS A GENERAL LAW RATHER THAN A PROHIBITED LOCAL ACT UNDER ARTICLE II, SECTION 24, OF THE NORTH CAROLINA CONSTITUTION.

The Plaintiff charges that the Act functions as a local act because it singles out a class of people and does not uniformly apply to everyone. Before turning to the case law to settle the issue of what constitutes a prohibited local act, it is important to look at the plain meaning of the Act itself. In the Act, the General Assembly expressly charges the local governments to initiate planning and to implement the provisions of the Act.

> §113A-101. *Cooperative State-local program*. – This Article establishes a cooperative program of coastal area management between local and State governments. Local government shall have the initiative for planning. State government shall establish areas of environmental concern. With regard to planning, State government shall act primarily in a supportive standard-setting and review capacity, except where local governments do not elect to exercise their initiative. Enforcement shall be a concurrent State-local responsibility.

In Helms v. City of Charlotte, 255 N.C. 647, 122 S.E.2d 817 (1961), plaintiffs challenged the constitutionality of a zoning ordinance. Because the Coastal Area Management Act of 1974 functions in much the same way as a zoning ordinance, in that a local jurisdiction places land-use restrictions upon a citizens property, the court's opinion in Helms has applicability to the case at bar. "As a general rule a zoning ordinance of a municipality is valid and enforceable if it emanates from ample grant of power by the Legislature to the city or town . . . ." Helms, 255 N.C. at 650. While the tension between a valid general law and a prohibited local law clearly was not at issue in Helms, the court's words regarding delegation of authority are noteworthy.

The General Assembly, for the purpose of legislating, may classify conditions, persons, places and things, as long as the classification is reasonable and "based on rational difference of situation and condition." The court in McIntyre v. Clarkson, 254 N.C. 510, 119 S.E.2d 888 (1961), establishes two related elements for distinguishing between a valid general law and a prohibited local act: 1) reasonable classification, and 2) uniform application. An act is a general law where it defines a class which reasonably warrants special legislative attention and applies uniformly to everyone within that class. (Likewise, an act is a local act where it unreasonably singles out a class for special legislative attention or does not uniformly apply a reasonable classification to every member of the class.) *See also* Treasure City, Inc. v. Clark, 261 N.C. 130, 134 S.E.2d 97 (1964); Surplus Co. v. Pleasants, Sheriff, 264 N.C. 650, 142 S.E.2d 697 (1965); Smith v. County of Mecklenburg, 280 N.C. 497, 187 S.E.2d 67 (1972); and Adams, 295 N.C. 683.

The court in Adams held that "the mere fact that a statute applies only to certain units of local government does not by itself render the statute a prohibited local act. Only if the statutory classification is unreasonable or under-inclusive will the statute be voided as a prohibited local act." Adams, 295 N.C. at 690, *citing* Surplus, 264 N.C. 650.

A. The Act is a general law rather than a prohibited local act because the Act employs reasonable classification.

In general, Plaintiff argues that the statutorily defined class "coastal area of North Carolina" does not warrant special legislative attention because the natural resources and environmental needs of the coastal counties are not sufficiently unique. G.S. 113A-102. According to the North Carolina General Assembly, the coastal area is unique as is evident from the plain words of the statute:

> § 113A-102. *Legislative findings and goals*. – (a) Findings. It is hereby determined and declared as a matter of legislative finding that among North Carolina's most valuable resources are its coastal lands and waters. . . . North Carolina's coastal area has an extremely high recreational and esthetic value which should be preserved and enhanced.

*See also* Heath, "The Legislative History of the Coastal Area Management Act," 53 N.C.L. Rev. 345 (1974); Schoenbaum, "The Management of Land and Water Uses in the Coastal Zone: A New Law is Enacted in North Carolina," 53 N.C.L. Rev. 275 (1974); "Report of Barrier Island", U.S. Dept. of Interior (1978); Stauble, "Barrier Islands: Dynamic Coastal Landform Requiring Complex Management Decisions," Barrier Islands: Process and Management (1989); and the North Carolina Sand Dune Law, G.S. 104B-3 ("*Legislative findings*. – It is hereby determined and declared as a matter of legislative finding that the area of the State of North Carolina lying along the Atlantic Ocean front, and in particular the outer banks of this State as hereinafter defined, is a major asset to the economy of the entire State and as such should be protected and preserved. This area is wholly or in part protected from actions of the Atlantic Ocean and storms thereon by a system of natural or constructed dunes providing a protective barrier for adjacent

lands and inland waters and land against the actions of sand, wind, and water."). This view that coastal areas are unique ecological systems is further supported by the Federal Coastal Zone Management Act of 1972. U.S.C. 1456.

In particular, Plaintiff argues that his property is unreasonably classified as an "area of environmental concern," challenging the inland boundaries of the designation as well as the general designation of the entire Outer Banks, of which his property is a part, as a sand dune and therefore an "area containing unique geological formation," as recognized by the State Geologist. G.S. 113A-113(b)(4)(vii).

Before considering the specific definitions of AEC, it is important to note the general definition of "coastal area." The coastal area is defined as those counties "that (in whole or in part) are adjacent to, adjoining, intersected by or bounded by the Atlantic Ocean . . . or any coastal sound." G.S. 113A-103(2). This Court in Adams concurred with this definition saying that "[t]his statutory definition of coastal area accurately reflects the unique geography of our coastal area." Adams, 295 N.C. at 694.

As to AEC, the Act authorizes the CRC to designate AEC singly or in combination. G.S. 113A-113(b). The CRC maintains that the Plaintiff's property qualifies as an AEC thusly:

> (4) Fragile . . . areas, and other areas containing environmental or natural resources of more than local significance, where uncontrolled or incompatible development could result in major or irreversible damage to important . . . natural systems, which may include: . . .
>
> (vii) Areas containing unique geological formations, as identified by the State Geologist; . . .
>
> (6) Natural hazard areas where uncontrolled or incompatible development could unreasonably endanger life or property, and other areas especially vulnerable to erosion, flooding, or other adverse effects of sand, wind and water, which may include: . . .
>
> (i) Sand dunes along the Outer Banks; . . .
>
> G.S. 113-113(4)(vii) and (6) and (6)(i).

In designating the Outer Banks a sand dune, the General Assembly relied upon the North Carolina Sand Dune Law, which reads in part:

> . . . area of the State of North Carolina lying along the Atlantic Ocean front, and in particular the outer banks of this State as hereinafter defined . . . . This area is wholly or in part protected from actions of the Atlantic Ocean and storms thereon by a system of natural or constructed dunes providing a protective barrier for adjacent lands and inland waters and land against the actions of sand, wind, and water. G.S. 104B-3.

In a very similar case, Adams, plaintiffs challenged the inland boundaries of the Coastal Area Management Act of 1974. Adams, 295 N.C. 683. The court referenced McIntyre, quoting: "[w]hile substantial distinction . . . area essential in classification, the distinctions need not be scientific or exact. The Legislature has wide discretion in making classifications." McIntyre v. Clarkson, 254 N.C. at 510. Moreover, the court in Adams concluded that "the coastal counties constitute a valid legislative class for the purpose of addressing the special and urgent environmental problems found in the coastal zone." Adams, 295 N.C. at 693 ("the fragile and irreplaceable nature of the coastal zone and its significance to the public welfare amply justify the reasonableness of special legislative treatment"). *See generally*, Turnpike Authority v. Pine Island, 265 N.C. 109, 143 S.E.2d 319 (1965).

B. The Act is a general law rather than a prohibited local act because the Act employs uniform application.

Plaintiff further argues that the statue is a prohibited local act because it does not uniformly apply to all areas of North Carolina. Defendant heretofore has established, through legal precedent, that the coastal area is properly distinguished from other areas of North Carolina. However, Defendant further supports this claim with the words of the court in Silver v. Silver, 280 U.S. 117, 74 L.Ed. 221, 50 S.Ct. 57 (1929), as quoted by the court in Adams:

> [T]here is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied – that the Legislature must be held rigidly to the choice of regulating all or none. . . . It is enough that the present statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs.

Silver, 280 U.S. at 118. *See generally*, Mobile Home Sales v. Tomlinson, 276 N.C. 661, 174 S.E.2d 542 (1970).

For the reason that the court in Adams held, and subsequent courts have upheld, that the Coastal Area Management Act of 1974 is a valid general law rather than a prohibited local act under Article II, section 24, of the North Carolina Constitution, Defendant prays the Court to grant *Motion for Summary Judgment* on this issue.

DEFENDANT'S *MOTION FOR SUMMARY JUDGMENT* SHOULD BE GRANTED BECAUSE THE ACT PROVIDES ADEQUATE STANDARDS TO GOVERN THE EXERCISE OF THE POWER DELEGATED TO CRC TO DEVELOP AND ADOPT "STATE GUIDELINES" FOR THE COASTAL AREA.

Plaintiff argues that the Act is in violation of Article I, section 6, and Article II, section 1, of the North Carolina Constitution, because it does not provide adequate standards to govern the exercise of the power delegated to CRC to develop and adopt "State Guidelines" for the coastal area.

It is a settled matter of law that a legislature may delegate adjudicative and rule-making powers to an administrative body provided such transfers are accompanied by adequate guiding standards to govern the exercise of the delegated powers. *See e.g.,* Adams, 295 N.C. 683 ("[W]e have repeatedly held . . . ."); Hospital v. Davis, 292 N.C. 147, 232 S.E.2d 698 (1977); Guthrie v. Taylor, 279 N.C. 703, 185 S.E.2d 193 (1971), and cases cited therein..

Defendant argues that the General Assembly has properly instructed CRC as to its delegated powers. Section 113A-101 of the Act clearly describes the statute as a "cooperative program of coastal area management between local and State governments," and further describes the nature of the relationship between the two governing bodies. G.S. 113A-101, previously quoted in its entirety. The Act further states that "[t]hese guidelines are to give particular attention to the nature of development which shall be appropriate within the various types of area of environmental concern designated by the CRC" and that CRC "shall by rule designate geographic areas of the coastal area as areas of environmental concern and specify the boundaries thereof. . . ." G.S. 113A-108 and 113A-113(b), respectively.

Not only has the General Assembly provided CRC with a comprehensive set of legislative standards, but it has devised an extensive system of procedural safeguards to which CRC actions are subjected. *See generally*, G.S. 113A, Article 7.

Defendant believes that this Court's holding in Adams, upheld by subsequent courts, sufficiently establishes as a matter of law the proper delegation of authority to CRC. Adams, 295 N.C. at 698 ("We conclude that the Act properly delegates authority to the CRC to develop, adopt and amend State guidelines for the coastal area.") In accord with this Court's decision in Adams, and subsequent cases, Defendant prays the Court to grant *Motion for Summary Judgment* on this issue.

DEFENDANT'S *MOTION FOR SUMMARY JUDGMENT* SHOULD BE GRANTED BECAUSE THE ACT DOES NOT DEPRIVE THE PLAINTIFF OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND IN VIOLATION OF ARTICLE I, SECTION 20, OF THE NORTH CAROLINA CONSTITUTION.

Plaintiff argues that the Act deprives him of his property without due process of law because the Act applies only to those citizens that hold property in the Outer Banks or other designated coastal area. Defendant maintains that the Act is not in violation of the Fifth and Fourteenth Amendments of the United States Constitution, nor is it in violation of Article I, Section 20, of the North Carolina Constitution.

A. The Coastal Area Management Act of 1974 is not unconstitutional because it has a reasonable basis in relation to the purpose and subject matter of the legislation.

Where the difference in treatment made by law has a reasonable basis in relation to the purpose and subject matter of the legislation, an act shall not be in violation of the due process clause of the Fifth or Fourteenth Amendments of the United States nor the North Carolina Constitution. Guthrie v. Taylor, 279 N.C. at 713 (holding that "Neither the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution nor the similar language in Art. I, §19, of the Constitution of North Carolina takes from the State the power to classify persons or activities when there is reasonable basis for such classification and for the consequent difference in treatment under the law."); A-S-P Associates v. City of Raleigh, 298 N.C. at 266, 258 S.E.2d at 456 (quoting the above standard); Responsible Citizens v. City of Asheville, 308 N.C. at 268-69, 302 S.E.2d 204 (1983) (echoing the above standard: "A difference in treatment exists in all such legislative classifications, however. . . . the only requirement necessary to comply with the equal protection provisions of both the federal and state constitutions is that the classification be reasonable and bear a rational relationship to a permissible state objective."). *See also* Village of Belle Terrace v. Boraas, 416 U.S. 1, 8, 94 S.Ct. 1536, 1540, 39 L.Ed.2d 797, 803 (1974) (zoning ordinance upheld against charge that it violated the equal protection guarantee where the classification was reasonable, not arbitrary, and bore a relationship to a permissible state objective).

In accord with this Court's holding in Adams, and subsequent cases, that the Coastal Area Management Act of 1974 does not deprive the Plaintiff of his property without due process of law in violation of the Fifth and Fourteenth Amendments of the United States Constitution and in violation of Article I, section 20, of the North Carolina Constitution, Defendant prays the Court to grant *Motion for Summary Judgment* on this issue.

DEFENDANT'S *MOTION FOR SUMMARY JUDGMENT* SHOULD BE GRANTED BECAUSE THE ACT DOES NOT CONSTITUTE A 'TAKING' FOR THE REASON THAT IT DEPRIVES PERSONAL PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

This issue of regulatory 'taking' has come before the state and federal courts on a number of occasions. While the North Carolina Constitution does not contain an express provision to this issue, the state courts have assumed for the purpose of jurisprudence the same definition as that of the Fifth Amendment of the United States Constitution which states: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The North Carolina Supreme Court recognized such a provision as "a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." Finch v. City of Durham, 325 N.C. 352, 384 S.E.2d 8 (1989), *citing* Long v. City of Charlotte, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982).

As early as 1887, the federal courts began to apply a nexus test to issues of regulatory 'takings'. In Mugler v. Kansas, 123 U.S. 623 (1887), the United States Supreme Court held that if a state uses its police powers to take private property for public use, there must exist a substantial relationship between the 'taking' and the police powers. Mugler, 123 U.S. at 625. This rule as used by the North Carolina courts has come to be known as the 'ends-means' test. *See* Responsible Citizens, 308 N.C. at 261 ("[T]he court is to engage in an 'ends-means' analysis . . . ."); Orin Haywood Weeks, Jr., 97 N.C. App. 215 ("The test for a reasonable exercise of a police power rule or regulation is known as the 'ends-means' test."). The 'ends-means' test as used by the North Carolina courts establishes two elements, both of which must be met: 1) that the goals of the legislation are within the scope of police powers, and 2) that the interference with owner's rights to use his property are reasonable. *Id*. at 215 ("In evaluating the regulation's effect, one first looks to the 'ends,' or goals, of the legislation to determine whether it is within the scope of the police power, and second, to the 'means,' to determine whether the interference with the owner's right to use his property as he deems appropriate is reasonable."), *citing* Finch, 325 N.C. 352.

A. The Coastal Area Management Act of 1974 is constitutionally valid because it represents a valid exercise of police powers.

Plaintiff argues that the regulation prescribed by the Act is an invalid exercise of police powers because it is not necessary to protect the public health, safety, or welfare. To rebut this argument, Defendant refers to the plain meaning of the statute:

> In recent years the coastal area has been subjected to increasing pressures which are the result of the often conflicting needs of a society expanding in industrial development, in population, and in the recreational aspirations of its citizens. Unless these pressures are controlled by coordinated management, the very features of the coast which make it economically, esthetically, and ecologically rich will be destroyed. The General Assembly therefore finds that an immediate and pressing need exists to establish a comprehensive plan for the protection, preservation, orderly development, and management of the coastal area of North Carolina. G.S. 113A-102.

The Act makes clear that a valid public concern exists and that an immediate action is needed. <***expand***> *See also* Helms, 255 N.C. at 650-51 ("As a general rule a zoning ordinance of a municipality is valid and enforceable . . . if it has a reasonable tendency to promote the public safety, health, morals, comfort, welfare and prosperity, and if its provisions are not arbitrary, unreasonable or confiscatory.").

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B. The Coastal Area Management Act of 1974 is constitutionally valid because it does not deprive Plaintiff of all beneficial use of his property.

Plaintiff argues that the Act deprives him of all beneficial and practical use of his property, and therefore constitutes as 'taking'. Defendant disagrees.

Where a regulation completely deprives an owner of the beneficial use of his property by precluding all practical uses or the only use to which it is reasonably adapted, the regulation is invalid. Helms, 255 N.C. at 653 ("[I]f the application of a zoning ordinance has the effect of completely depriving an owner of the beneficial use to which it is reasonably adapted, the ordinance is invalid."). *See also* Orin, 97 N.C. App. at 215 ("Within the second prong of the 'takings' analysis, the 'reasonable means' prong, a statute works a 'taking' of property if it (1) deprives the owner of all practical use of the property and (2) renders the property of no reasonable value."), *citing* Finch, 325 N.C. 352 and upheld by Responsible Citizens, 308 N.C. 255.

1. The Plaintiff's charge that he has suffered damage because of a regulatory 'taking' is not a justiciable controversy.

The Plaintiffs' claim of damage, by deprivation of property rights, is not ripe for judicial review. The CRC, in fact, has rendered no decision as to the development of Plaintiff's property because the Plaintiff has not applied for a development permit. "A 'suspicion' that all development permits within AEC's will be denied does not constitute a controversy within the meaning of our cases." Adams, 295 N.C. at 705, *citing* Tryon v. Power Co., 222 N.C. 200, 22 S.E.2d 450 (1942).

In the mirror case of Adams, where the plaintiff claimed a 'taking' of his property before having applied for a CAMA development permit, the court held the following:

> We think it apparent that there has been no 'taking' of plaintiffs' property which gives rise to a justiciable controversy at this time. Plaintiffs' assertion that their property has been 'taken' by the Act rests on speculative assumptions concerning which a declaratory judgment will not be rendered. 'It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.'

Adams, 295 N.C. at 704 (quoting Poore v. Poore, 201 N.C. 791, 161 S.E. 532 (1931)).

This Court in Adams concluded that "a brief examination of relevant provisions of the Act demonstrates that plaintiffs' apprehension of diminished land values is premature and hence not justiciable." *Id*. at 704. In accord with this finding, Defendant prays the Court to grant *Motion for Summary Judgment* on this charge.

2. The Act does not constitute an unconstitutional 'taking' because a property owner is not deprived of all uses of his property.

It is a recognized principle of real property law that a property owner posses a 'bundle of rights' to his property. While a regulation may restrict a property owner from using his land in some way, the property owner still has the right to use his land in the many others. However, among those rights, a land owner "has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others." Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d at 768 (1972).

*See* Lucas v. South Carolina Coastal Council, 505 U.S. (1992) ("It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . .").

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3. The Act does not deprive an owner of 'practical use' of his property where a relied upon prior use is no longer practical.

Plaintiff argues that building an office building on his lot constitutes a 'practical use' or 'the only use to which it is reasonably adapted'. Defendant vehemently disagrees that under the current conditions intense development, as is an office building, constitutes a 'practical use' of said property. An area of environmental concern may be so classified because of changes over time, be them natural or anthropogenic, that have left the area vulnerable. Defendant maintains that when an area becomes an area of environmental concern it is necessary to re-evaluate that area's 'practical uses' or uses to which it is 'reasonably adapted'. To this end, the General Assembly has provided the Act with the flexibility necessary to make those decisions.

The plain meaning of the statute once again leads one to this conclusion. Through the "Goals" section of the Act, the General Assembly has expressly charged CRC to establish policies, guidelines and standards for the "[p]rotection, preservation, and conservation of natural resources including but not limited to . . . management of transitional or intensely developed areas and areas especially suited to intensive use or development . . . ." G.S. 113A-102 (4)(i). Furthermore, the Act empowers the CRC to "designate geographic areas of the coastal area as areas of environmental concern". G.S. 113A-113(b). Area of environmental concern particularly applicable to the case at bar are described as follows:

> Fragile or historic areas, and other areas containing environmental or natural resources of more than local significance, where uncontrolled or incompatible development could result in major or irreversible damage to important . . . natural systems, which may include: . . . [a]reas containing unique geological formations, as identified by the State Geologist; and . . . [n]atural hazard areas where

> uncontrolled or incompatible development could unreasonably endanger life or property, and other areas especially vulnerable to erosion, flooding, or other adverse effects of sand, wind and water, which may include . . . [s]and dunes along the Outer Banks; G.S. 113A-113(b)(4)(vii) and (6)and (6)(i).

This plain meaning of the statute clearly indicates the changing characteristics of the coastal areas. For precisely this reason, the development permit process allows the CRC to assess each development plan on a case-by-case basis to determine the specific impact (and degree of impact) of the proposed development on the 'area of environmental concern'. Where development within an AEC is believed to cause little harm to the area, a special permit may be issue; where regulation imposes an excessive burden on the property owner, a variance may be granted.

While this Court has not directly addressed the issue of the changing character of land, the Wisconsin Supreme Court has so addressed this issue. Defendant respectfully encourages this Court to consider the findings of this authoritative court in a case very similar to the case at bar.

In Just, plaintiffs challenged a shoreline zoning ordinance as unconstitutional, claiming that their property was not 'wetlands' as defined by the ordinance. The Wisconsin Supreme Court upheld the ordinance, which prevents – with exception of special permit –situations changing the natural character of land within a designated area.

Defendant notes that in Just and in the case at bar, the situation centers around an area of land that has recently been recognized as an area of environmental concern and therefore regulated accordingly. *See* Just, 201 N.W.2d at 768 ("But as people became more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, are part of the balance of nature . . . ."). Although Just deals with 'wetlands' and the case at bar deals with 'sand dunes', both are fragile ecosystems that are vital to the grand ecological scheme and in need of protection. Therefore, for the sake of case comparison, Defendant contends that the two are interchangeable as 'areas of environmental concern'. (While the Wisconsin legislation does not specifically refer to 'wetlands' as 'areas of environmental concern, 'wetlands' are designated an AEC under CAMA.).

Plaintiffs, in both cases, claim that they have been deprived the 'reasonable use' of their property. Defendant maintains that intense development is an unreasonable, or not practical, use of property designated as an 'area of environmental concern.' The Wisconsin Supreme Court's findings are in accord with this view: "The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land which is protected from police power regulation." Just, 201 N.W.2d at 768. For this reason the Wisconsin Supreme Court held thusly: "[W]e think it is not an unreasonable exercise of [police] power to prevent harm to public rights by limiting the use of private property to its natural uses." *Id.* at 768.

Furthermore, a 'taking' does not occur simply because a government action deprives an owner of previously available property rights. Penn Central, 438 U.S. 130. This Court has held in a

number of cases that if an investor knows of a pending ordinance, the investor has no valid claim of reliance upon the prior ordinance. *See In re* Campsites Unlimited, Inc., 287 N.C. 493, 215 S.E.2d 73 (1975); Stowe v. Burke, 255 N.C. 257, 122 S.E.2d 374 (1961). This rule is particularly applicable in the case at bar where the Plaintiff bought the property after the Act was enacted.

Defendant argues that in the worse case scenario of a development permit denial (speculative at this point), Plaintiff's property would not be rendered valueless. "The mere fact that an ordinance results in the depreciation of the value of an individual's property or restricts to a certain degree the right to develop it as he deems appropriate is not sufficient reason to render the ordinance invalid." A-S-P Associates v. City of Raleigh, 298 N.C. 218, 220, 258 S.E.2d 451 (1979). *See also* Penn Central, 438 U.S. at 125 ("[I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.") Moreover, as the United States Supreme Court noted in Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413, 67 L.Ed. at 325 (1922), "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law."

Historically the courts have given deference to the legislature in matters of judicial review. As this court once noted: "[T]he settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals or general welfare." *In re* Appeal of Parker, 214 N.C. 51, 55, 197 S.E. 706 (?).

In accord with this Court's holding in CAMA cases Adams and Orin that the Coastal Area Management Act of 1974 is not unconstitutional as an improper exercise of police power, and in light of the fact that the Plaintiff's property would not be rendered valueless by a denied development permit, Defendant prays the Court to grant *Motion for Summary Judgment* on this issue of unconstitutional 'taking'.

## **CONCLUSION**

Defendant respectfully prays the Court to consider the issues herein discussed, particular in light of the coastal area as a changing land with areas of environmental concern that necessitate a re-evaluation of 'practical uses' of property within this designated area. And, furthermore, to consider that the Plaintiff does not have a justiciable controversy at this time. For all the foregoing reasons, the Court should grant Defendant's *Motion for Summary Judgment* on all issues.

Respectfully submitted,

Tyme
Attorney for Defendant