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OPINIONS AND ORDERS

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (JANUARY 25, 2023)

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOSEPH E. BLACKBURN, JR.; LINDA C. BLACKBURN, ALL SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs-Appellants,

v.

DARE COUNTY; TOWN OF NAGS HEAD; TOWN OF DUCK; TOWN OF KILL DEVIL HILLS; TOWN OF MANTEO; TOWN OF KITTY HAWK; TOWN OF SOUTHERN SHORES,

Defendants-Appellees.

No. 20-2056

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. Louise W. Flanagan, District Judge. (2:20-cw-00027-FL)

Argued: September 13, 2022
Decided: January 25, 2023

Before: AGEE, RICHARDSON, and RUSHING, Circuit Judges.

RICHARDSON, Circuit Judge:

Joseph Blackburn, Jr. and Linda Blackburn own a beach house in Dare County, North Carolina. In the early days of the COVID-19 pandemic, Dare County banned non-resident property owners from entering the county. As a result, the Blackburns could not reach their beach house for forty-five days. In response, they sued Dare County, alleging that their property was taken without compensation in violation of the Fifth Amendment. After the district court found that the ban was not a Fifth Amendment taking and dismissed the Blackburns' suit for failure to state a claim, the Blackburns appealed. But we affirm. The ban did not physically appropriate the Blackburns' beach house. And though it restricted their ability to use the house, compensation is not required under the ad hoc balancing test that determines the constitutionality of most use restrictions.

I. Background

In March 2020, Dare County's Board of Commissioners, like many governments across the country, enacted several public health restrictions to limit the spread of COVID-19. Dare County announced the restrictions on March 16 and implemented them over three phases. Phase one, which took effect immediately, declared a state of emergency and prohibited mass gatherings. Phase two, which took effect one day later, prohibited non-resident visitors from entering the county. Phase three, which took effect four days after the restrictions were announced, prohibited non-resident property owners from entering the county. In effect, Dare County told non-resident property owners: "If you want to quarantine at your

beach house, get there by March 20." This gave non-resident property owners four days to travel to the county.

The Blackburns live in Richmond, Virginia. For whatever reason, they did not travel to their beach house by March 20 when the non-resident-property-owners ban took effect. So the Blackburns could not then access their beach house until the order was partially lifted forty-five days later.

The Blackburns responded by suing Dare County for violating the Fifth Amendment's Takings Clause.[1] They sought damages, both for themselves and for a putative class of other non-resident property owners. But the district court dismissed their suit for failure to state a claim. The Blackburns timely appealed, and we review that dismissal de novo. *Ray v. Roane*, 948 F.3d 222, 226 (4th Cir. 2020).

II. Discussion

The Fifth Amendment's Takings Clause provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

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[1] The Blackburns did not bring a claim under the Privileges and Immunities Clause, which declares: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const. art. IV, § 2, cl. 1. That clause prohibits discrimination against citizens of other states simply because they are citizens of other states. *Saenz v. Roe*, 526 U.S. 489, 502 (1999). And the Supreme Court has extended it to prohibit at least some county-residency requirements. *See United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 215-18 (1984). Since the Blackburns chose to proceed solely under the Takings Clause, our analysis is limited to that claim.

The Takings Clause aims to prevent the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Supreme Court has said that, as originally understood, the Takings Clause was thought only to reach physical appropriations of property. *See Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017).[2] The rule for these physical appropriations is simple: compensation is always required. "When the government physically acquires private property for a public use [it] must pay for what it takes." *Cedar Point*, 141 S. Ct. at 2071. This is true whenever the government takes the property, by whatever means, whether for itself or for a third party. *Id.* at 2072. And a physical appropriation due to a government regulation is "no less a taking." *Id.*

For the past century, the Supreme Court has also recognized that the Takings Clause protects against restrictions on an owner's ability to use his property that "go[] too far." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). If a use restriction denies the owner

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[2] There has been some debate about what the original understanding of the Takings Clause was, and about how that should impact modern Fifth Amendment doctrine. *See, e.g.*, *Murr*, 137 S. Ct. at 1957-58 (Thomas, J., dissenting) (citing Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 San Diego L. Rev. 729 (2008)). But the Supreme Court has been clear that, while early understandings of the Takings Clause might have been limited to physical appropriations of property, that is no longer our law. *See Murr*, 137 S. Ct. at 1942; *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2071-72 (2021).

all economically beneficial use of the land, then the restriction has gone too far and—under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)—the government has made a per se taking. *See id.* at 1015-19. But such restrictions are rare. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332 (2002). Instead, most use restrictions are evaluated under a "flexible" balancing test to determine whether compensation is required. *Cedar Point*, 141 S. Ct. at 2072.[3] Laid out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this "essentially ad hoc, factual inquir[y]," asks us to examine (1) the "economic impact" of the use restriction, (2) how much the restriction interferes with "investment-backed expectations," and (3) "the character of the governmental action." *Id.* at 124.

The Blackburns allege that the order prohibiting non-resident property owners from entering Dare

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[3] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2022), changed the framework we use to evaluate Takings Clause claims. Before *Cedar Point*, takings were either "physical" or "regulatory." *See, e.g.*, *Md. Shall Issue, Inc. v. Hogan*, 963 F.3d 356, 364-65 (4th Cir. 2020). Under the old regime, regulatory takings were generally evaluated under the *Penn Central* framework, unless "the regulation worked a permanent physical occupation" or "deprived the owner of all economically beneficial use of the land." Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 Duke J. Const. L. & Pub. Pol'y 1, 5-9 (2022). In the latter two cases, a per se taking occurred.

But the Court in *Cedar Point* rejected this framework. *See* 142 S. Ct. at 2071-72. It specifically noted that the regulatory-takings label "can mislead." *Id.* at 2072. So, taking the Court's guidance, we apply the physical-appropriation versus use-restriction dichotomy used in *Cedar Point*. *See McCutchen v. United States*, 14 F.4th 1355, 1363 (Fed. Cir. 2021) (adopting the new "physical appropriation" versus "use restriction" dichotomy).

County meets each of the Supreme Court's takings tests. That is, they claim that the order was (1) a physical appropriation, (2) a use restriction amounting to a per se taking under *Lucas*, and (3) a taking under *Penn Central*'s balancing test. But they have failed to state a claim under any approach.

A. Physical Appropriation

The Blackburns first argue that the non-resident property order constitutes a physical appropriation. As explained above, this occurs when the government physically appropriates private property for itself or a third party. *Cedar Point*, 141 S. Ct. at 2071. This is true no matter if the appropriation occurs through regulation or physical entry. *Id.* at 2072. But even accepting the Blackburns' allegations at face value, Dare County's nonresident property order did not physically appropriate anything from them. The order did not authorize government officials or third parties to physically occupy or possess the Blackburns' vacation home.

The Blackburns try to get around this problem by emphasizing that the non-resident property order effectively excludes them from their own property. This, they say, makes the order a physical appropriation, because the Supreme Court has repeatedly held that an appropriation occurs when the government eliminates a property owner's right to exclude. But temporarily excluding an owner from their own property differs from eliminating the owner's right to exclude. Indeed, the Supreme Court has stressed that, when asking if a physical appropriation has occurred, the "essential question" is "whether the government has physically taken property for itself or someone else—by whatever

means—or has instead restricted a property owner's ability to use his own property." *Cedar Point*, 141 S. Ct. at 2072. By excluding the Blackburns' from their property, the order has "restricted [their] ability to use [their] own property." *Id.* But the order has not "physically taken" the property for the government or a third party. *Id.* Therefore, the district court properly held that the Blackburns' complaint failed to allege a physical appropriation.

B. *Lucas* Per Se Taking

The Blackburns next argue that the non-resident property order is a per se taking under *Lucas*. *Lucas* says that, while most use restrictions will be analyzed under *Penn Central*'s three-factor test, that ad hoc inquiry is unnecessary when a use restriction "denies all economically beneficial or productive use of land." 505 U.S. at 1015. A use restriction that deprives owners of all economically valuable use of their property is per se a taking, and no further analysis is required.

But *Lucas*'s per se rule does not apply here. Accepting the allegations in the complaint as true, Dare County's order did not deprive the Blackburns' property of all economic value. The restriction was enacted under the County's State of Emergency declaration and so would only be operative while that state of emergency persisted. And it lasted only forty-five days. This "temporary prohibition" could not have rendered the Blackburns' property valueless. *See Tahoe-Sierra*, 535 U.S. at 332. Moreover, the Blackburns could have lived in their house so long as they arrived before the ban took effect. And even during the forty-five days that the ban lasted, they were still able to rent their property to someone within the County or

certain adjoining counties. So the order was not a per se taking under the *Lucas* framework.

C. *Penn Central* Taking

The Blackburns are left with only *Penn Central*'s "ad hoc" balancing. 438 U.S. at 124. That balancing requires us to consider, at least, three factors of "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." *Id*. We look at each factor and then weigh them. After doing so, we conclude that the Blackburns have failed to plead a plausible *Penn Central* claim.

The first *Penn Central* factor—the economic impact of the regulation on the claimant—favors Dare County. Here, we weigh the diminution in value that the ban caused to the property against the value of the Blackburns' home unburdened by Dare County's order. *See, e.g.*, *Penn Cent.*, 438 U.S. at 130-31 (collecting cases); *see also* John D. Echeverria, *Making Sense of* Penn Central, 39 Env't L. Rep. News & Analysis 10471, 10474 (2009). In this Circuit, prevailing on this factor requires that a plaintiff allege that the challenged regulation caused a *substantial* diminution in value to the regulated property. *See Clayland Farms Enters., LLC v. Talbot Cnty.*, 987 F.3d 346, 354 (4th Cir. 2021) (holding that the first factor weighs against plaintiffs when they alleged only a 40% diminution in value).

The Blackburns have not met this standard. They pled no *facts* establishing a diminution in value, let alone a substantial one. Nor did they specifically allege the diminution in value caused by Dare County's

order. And while that is not required under our pleading standards, they are required to allege facts that allow us to infer what diminution they suffered. *See ACA Fin. Guar. Corp. v. City of Buena Vista,* 917 F.3d 206, 212 (4th Cir. 2019).

The complaint is wholly lacking in this regard. The sole statement in the complaint about the economic impact of Dare County's order reads: "[t]he Plaintiffs, and other similarly situated non-resident property owners, have suffered damage by the temporary complete taking of their property as they have lost the fair market rental value and value of use of said property by governmental regulations for 45 days." J.A. 12; *see also* J.A. 15 (repeating this statement). But this is a legal conclusion, because it simply alleges that there was a taking and then recites the standard for compensation. *See First Eng. Evangelical Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304, 319, 322 (1987) (holding that the remedy for temporary takings is payment of fair market value of the property for the time the regulation was in effect). Our pleading standards require more. *See ACA Fin. Guar. Corp.*, 917 F.3d at 212 ("[S]imply reciting the cause of actions' elements and supporting them by conclusory statements does not meet the required standard."); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he pleading standard Rule 8 announces . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."). So the first factor cuts against the Blackburns.

The second *Penn Central* factor might slightly favor the Blackburns. Under this factor, we examine "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn*

Cent., 438 U.S. at 124. These expectations must be founded "on a preexisting property right." *Clayland Farms*, 987 F.3d at 354. They must also be reasonable given the current use of the property. *See Quinn v. Bd. of Cnty. Comm'rs*, 862 F.3d 433, 442-43 (4th Cir. 2017) (rejecting claims that there were reasonable investment-backed expectations where the investment was based on "speculative hopes" about whether the locality would install a sewer system); *Pulte Home Corp. v. Montgomery Cnty.*, 909 F.3d 685, 696 (4th Cir. 2018) (similar).

The Blackburns have a preexisting property right in their vacation home. But even accepting their allegations, the non-resident property order did not deny the Blackburns the use of their vacation home. It simply required them to be at their home by March 20, 2020, if they wanted to use it personally. And the Blackburns remained free to rent the house to those within the county, or to sell it. *Cf. Blackburn v. Dare Cnty.*, 486 F. Supp. 3d 988, 999 n.4 (E.D.N.C. 2020) ("Nowhere did the travel restriction in the instant case prohibit plaintiffs from using someone as an agent to exercise many of their rights of ownership during the 45-day period in which the regulation was in effect."). So even if the order interfered with an investment-backed expectation to personally use the beach house for the forty-five days it was in effect, that interference is not as significant as the Blackburns suggest.

The third *Penn Central* factor favors Dare County. This factor requires courts to examine "the character" of the use restriction. *Penn Cent.*, 438 U.S. at 124. Exactly what this factor refers to is, admittedly, a little fuzzy. *Penn Central* itself offered a glimpse at

how a use restriction's "character" could be relevant: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by the government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (cleaned up). But just four years later, the Supreme Court clarified that permanent physical invasions were per se takings, not subject to *Penn Central*'s balancing at all. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982); *see also Horne v. Dep't of Agric.*, 576 U.S. 350, 357-58 (2015). So if permanent physical invasions are per se takings, what "character" merely *suggests* that a use restriction is a taking?

Rather than identify clear character traits, courts have treated this factor as an open-ended inquiry into whatever considerations they think are most relevant in each specific case. And recall that *Penn Central* is itself an "ad hoc, factual inquir[y]" with "few invariable rules." *Penn Cent.*, 438 U.S. at 124. Combine an ad hoc balancing test with an open-ended factor and you're left with doctrine that is a "veritable mess." Echeverria, *supra*, at 10477.[4] But we must do our best.

Still, one principle—to the extent that it remains distinct from per se takings doctrine—is that we should seek to "identify regulatory actions that are functionally equivalent to the classic taking in which

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[4] Our own precedent is largely unhelpful in this area. Most of our *Penn Central* cases deal with zoning decisions, a far cry from Dare County's order in this case. *See, e.g.*, *Clayland Farms*, 987 F.3d at 350; *Pulte*, 909 F.3d at 688-89; *Quinn*, 862 F.3d at 436-37.

the government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005); *Clayland Farms*, 987 F.3d at 355; *Henry v. Jefferson Cnty. Comm'n*, 637 F.3d 269, 277 (4th Cir. 2011).

Applying this principle suggests that the order is not a taking. Based on the allegations in the Blackburns' complaint, the order is not "functionally equivalent" to a government appropriation of private property. *See Clayland Farms*, 987 F.3d at 355. The Blackburns controlled their home during the entire time the order was in effect, and could have personally used it had they arrived in Dare County by March 20, 2020. *Cf. Horne*, 576 U.S. at 361-62 (holding that a physical appropriation occurred when a regulation physically transferred raisins from farmers to the government).

Nor is the order "functionally equivalent" to an ouster. *See Clayland Farms*, 978 F.3d at 355. The Blackburns were not dispossessed of their vacation home. And they were never forced to leave Dare County. In fact, just the opposite. Despite promulgating the order on March 16 and implementing the non-resident visitor ban a day later, Dare County delayed implementing this order until March 20 to give homeowners like the Blackburns a chance to travel to the County. This is a far cry from an ouster. *See Ouster*, Black's Law Dictionary (11th ed. 2019) ("The wrongful dispossession or exclusion of someone (esp. a cotenant) from property.").

Another principle we can distill from the caselaw is that we should consider the distributional impact of the order. All else being equal, a regulation is more problematic when it burdens only a small number of property owners. *Cf. Armstrong*, 364 U.S. at 49.

Perhaps this is just another way to ask if the regulation looks more similar to a direct appropriation or practical ouster. *See Lingle*, 544 U.S. at 537-40. But however we examine this idea, it does little to advance the Blackburns' cause.

The Blackburns effectively conceded that the order is a broad-based regulation by filing their suit as a putative class action. Class treatment is appropriate only when "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). So bringing a putative class action shows that the order was not narrowly targeted, and its burdens were distributed across the community. In this sense, the order is like the landmark preservation law at issue in *Penn Central*, which the Court found unproblematic in part because it applied to "over 400 individual landmarks." 438 U.S. at 134. The order here burdened non-resident property owners like the Blackburns. But its impact was not limited to them. Dare County's orders affected everyone in the community whose economic livelihood depended on non-residents. So the burden here was widely distributed.

Similarly, any benefits from Dare County's order were also widely distributed, and included the Blackburns' property. The Supreme Court has suggested that a broad-based regulation is less likely to be a taking if it provides reciprocal benefits to the regulated parcel. *See Keystone Bituminous Coal. v. DeBenedictis*, 480 U.S. 470, 491 (1987). Even though the owner is burdened because the regulation limits the use of his own property, he benefits because the regulation also restricts the use of other nearby parcels. *See Penn. Coal*, 269 U.S. at 415-16, 422 (noting that average

reciprocity of advantage can serve as a defense to takings liability).

The district court held that Dare County's order provided reciprocity of advantage because it reduced the spread of a "potentially life-threatening disease" and this was "a reciprocal public health benefit shared by residents and non-residents alike." *Blackburn*, 486 F. Supp. 3d at 1000. The Blackburns disagree, arguing that the order burdened only non-resident property owners like themselves because it effectively locked them out of the County. But the Blackburns misconstrue the order. The order did not "lock" non-resident property owners out of Dare County. In fact, Dare County delayed the implementation of the order to allow non-resident property owners like the Blackburns time to travel to their second homes. That the Blackburns chose not to avail themselves of the order's reciprocal benefits does not mean that the order lacked such benefits. So the Blackburns' contention that there is no reciprocity of advantage must be rejected.

In sum, Dare County's order is not the functional equivalent of a physical invasion or ouster. And its impact was distributed broadly. So we conclude that the third *Penn Central* factor cuts in Dare County's favor.[5]

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[5] This is not to say, as Dare County tries to argue, that regulations under the police power are per se exempt from takings challenges. They are not. *Yawn v. Dorchester Cnty.*, 1 F.4th 191, 195 (4th Cir. 2021) ("That Government actions taken pursuant to the police power are not per se exempt from the Takings Clause is axiomatic in the Supreme Court's jurisprudence."). *Some* exercises of the police power are exempt from takings challenges. But only when they adhere to traditional common-law property principles. *Lucas*, 505 U.S. at 1028-1029; *Cedar Point*, 141 S. Ct. at 2079.

Just as there is no clear guidance on what exactly the *Penn Central* factors encompass, there is no hard and fast way to weigh them. The most guidance we have received from the Supreme Court is its statement in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), that "the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 540. Yet however we stack its three factors up, the Blackburns have failed to plausibly state a claim for relief under *Penn Central*.

* * *

Dare County's order restricted the Blackburns from using their property in many ways. But not every use restriction is a taking. And, properly viewed, Dare County's order is neither a physical appropriation, a use restriction that renders the property valueless, nor a taking under *Penn Central*. The effects of the order were temporary, the Blackburns had a chance to occupy their property before it took effect, and while the order was operative they could still exercise significant ownership rights over their property. The Blackburns' complaint therefore fails to state a plausible claim for relief, and the district court's decision is

AFFIRMED.

Since the Blackburns' challenge fails to state a taking under any test, we need not and do not consider if Dare County's action followed these principles.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA (SEPTEMBER 15, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA NORTHERN DIVISION

JOSEPH E. BLACKBURN, JR.,
AND WIFE, LINDA C. BLACKBURN,
AND ALL SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs,

v.

DARE COUNTY, the TOWNS OF DUCK, SOUTHERN SHORES, KITTY HAWK, KILL DEVIL HILLS, NAGS HEAD, and MANTEO,

Defendants.

No. 2:20-CV-27-FL

Before: Louise W. FLANAGAN,
United States District Judge.

ORDER

This matter comes before the court on defendant Dare County's ("County") motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil

Procedure. (DE 23). This matter also comes before the court on defendant Towns of Nags Head, Duck, Kill Devil Hills, Manteo, Kitty Hawk, and Southern Shore's (collectively, "Towns") motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.[1] (DE 25). The issues raised have been fully briefed, and in this posture are ripe for ruling. For the reasons that follow, defendants' motions are granted.

STATEMENT OF THE CASE

Pursuant to 42 U.S.C. § 1983, plaintiffs commenced the instant action on May 15, 2020, asserting defendants unlawfully took their private property without just compensation by banning them from entering the county during a state of emergency, in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Plaintiffs assert their claims individually and on behalf of similarly situated persons. On June 24, 2020, defendant County filed the instant motion to dismiss, asserting no compensable taking occurred. Defendant Towns filed their motion to dismiss approximately one week later, asserting plaintiffs lack standing to sue them for a taking under the Fifth and Fourteenth Amendments.

STATEMENT OF FACTS

The facts alleged in the complaint may be summarized as follows. Plaintiffs are residents of Richmond, Virginia. (Compl. ¶ 3). Defendants are

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[1] Defendant Towns also join in defendant County's motion to dismiss for failure to state a claim, adopting defendant County's arguments as their own.

various bodies politic, created and existing under the laws of the State of North Carolina. (*Id.* ¶ 5). On July 22, 2013, plaintiffs acquired in fee simple a tract or parcel of land in the City of Frisco, Atlantic Township, Dare County, North Carolina, with a vacation home situated thereon, by deed recorded in Book 1936, Page 71 in the Office of the Register of Deeds of Dare County.[2] (*Id.* ¶¶ 4, 16). On March 16, 2020, defendant County declared a state of emergency due to the unprecedented public health crisis posed by COVID-19, which plaintiffs allege it has a right to do. (*Id.* ¶ 9; Emergency Decl. (DE 1-1) at 1-2). The next day, defendant County issued a declaration prohibiting mass gatherings and prohibiting nonresident visitors from entering the county. (Compl. ¶ 10; Nonresident Visitor Travel Restriction (DE 1-2) at 1-2).

Effective March 20, 2020, defendant County imposed an additional restriction prohibiting nonresident property owners, such as plaintiffs, from entering the county. (Compl. ¶ 11; Nonresident Property Owner Travel Restriction (DE 1-3) at 1–2). Workers with an entry permit, county residents, and citizens of immediately adjoining counties were not prohibited from entering the county.[3] (*Id.* ¶¶ 12-13). The travel restriction prohibiting entry of nonresident property owners was partially lifted on Monday, May 4, 2020,

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[2] The court takes judicial notice of plaintiffs' recorded deed, which shows they hold title to their property in fee simple. *See* Fed. R. Evid. 201; *Pratt v. Kelly*, 585 F.2d 692, 696 & n.5 (4th Cir. 1978).

[3] The court takes judicial notice that Currituck, Tyrrell, and Hyde counties immediately adjoin Dare county. *See United States v. Lavender*, 602 F.2d 639, 641 (4th Cir. 1979); *Gov't of Canal Zone v. Burjan*, 596 F.2d 690, 693-94 (5th Cir. 1979).

again partially lifted on May 6, 2020, and then completely lifted on May 8, 2020. (*Id*. ¶ 14).

COURT'S DISCUSSION

A. Defendant Towns' Motion to Dismiss (DE 25)

1. Standard of Review

A motion to dismiss under Rule 12(b)(1) challenges the court's subject matter jurisdiction. Such motion may either 1) assert the complaint fails to state facts upon which subject matter jurisdiction may be based, or 2) attack the existence of subject matter jurisdiction in fact, apart from the complaint. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). Where a defendant raises a "facial challenge[] to standing that do[es] not dispute the jurisdictional facts alleged in the complaint," the court accepts "the facts of the complaint as true as [the court] would in context of a Rule 12(b)(6) challenge." *Kenny v. Wilson*, 885 F.3d 280, 287 (4th Cir. 2018). When a defendant challenges the factual predicate of subject matter jurisdiction, a court "is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). The nonmoving party in such case "must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." *Id.*

2. Analysis

The United States Constitution extends the subject matter jurisdiction of the federal judiciary to "cases" or "controversies." U.S. Const. art. III, § 2, cl. 1.

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To establish Article III standing, the plaintiff seeking compensatory relief must have '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.'" *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Spokeo*, 136 S. Ct. at 1547)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). "Absent such a showing, exercise of [] power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).

"[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (internal quotations and citations omitted). "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'" *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (internal citations omitted).

The challenged regulation, which prohibited travel to the county by nonresident property owners, was promulgated by defendant County. (Compl. ¶ 11; Nonresident Property Owner Travel Restriction (DE 1-3) at 1-2); *see* N.C. Gen. Stat. § 166A-19.31(a) (allowing the chair of the county board of commissioners to promulgate prohibitions and restrictions on behalf

of the county). Although the court reasonably can infer from the allegations that defendant Towns joined in and consented to the nonresident property owner travel restriction, (*see* Emergency Decl. (DE 1-1) at 1 (evidencing defendant Towns' consent to the emergency declaration and restrictions therein); Nonresident Property Owner Travel Restriction (DE 1-3) at 1 (imposing additional restrictions pursuant to the emergency declaration)), plaintiffs allege that they are "non-resident property owners of a tract or parcel of land in the City of Frisco, Atlantic Township, Dare County, North Carolina." (Compl. ¶ 16). As plaintiffs' loss of use of their property pursuant to defendant County's regulation is not "fairly traceable" to defendant Towns' consent to apply the county's emergency declaration and accompanying restrictions to their respective jurisdictions, *see* N.C. Gen. Stat. § 166A-19.22(b), plaintiffs lack standing to sue defendant Towns. *See Spokeo*, 136 S. Ct. at 1547.

Plaintiffs argue they have standing to assert their class claims against defendant Towns because other, unspecified putative class members' claims against defendant Towns would form a "juridical link" with defendant County. (Pl. Resp. (DE 32) at 6). The "juridical link" doctrine, which applies to Rule 23 of the Federal Rules of Civil Procedure, "assume[s] the presence of standing." *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 464 (9th Cir. 1973). The doctrine does not cure plaintiffs' lack of standing under Article III of the Constitution. *See, e.g., Wong v. Wells Fargo Bank N.A.*, 789 F.3d 889, 896 (8th Cir. 2015); *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 62-66 (2d Cir. 2012); *Thompson v. Bd. of Educ. of Romeo Cmty. Sch.*, 709 F.2d 1200, 1204-06 (6th Cir. 1983). Accordingly,

defendant Towns' motion to dismiss is granted for lack of subject matter jurisdiction.

B. Defendant County's Motion to Dismiss (DE 23)

1. Standard of Review

"To survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In evaluating whether a claim is stated, "[the] court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff," but does not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citations omitted). The court "may properly take judicial notice of matters of public record." *Sec'y of State For Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007) (internal citations omitted). Additionally, the court "may consider documents attached to the complaint, as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic." *Id.* (internal citations omitted).

2. Analysis

"To state a claim under § 1983, a plaintiff [1] must allege the violation of a right secured by the Constitution and laws of the United States, and [2] must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). The Fifth Amendment to the United States Constitution provides in pertinent part that "private property" shall not "be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. This constitutional guarantee is "incorporated against the States by the Fourteenth Amendment." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987); *see* U.S. Const. amend. XIV (guaranteeing no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). In addition, the United States Supreme Court has "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Id.*

a. Physical Taking

"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . , regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002) (internal citation omitted). In *Horne v. Dep't of Agric.*, the Court found the government's imposition of a reserve requirement for a farmer's raisin crop was a direct appropriation that involved "actual taking of possession and control" of private property, thereby requiring compensation. 576 U.S. 350, 361-62 (2015). Similarly, in *Kaiser Aetna v. United States*, the Court found that "the imposition of the navigational servitude" in a pond "result[ed] in an actual physical invasion of [a] privately owned marina." 444 U.S. 164, 180 (1979). Examples of physical takings abound from World War II, when the government took possession of private resources in support of the war effort. *See*, *e.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 3, 14 (1949); *United States v. Causby*, 328 U.S. 256, 261-67 (1946); *United States v. Gen. Motors Corp.*, 323 U.S. 373, 375 (1945).

Plaintiffs allege that defendant County prohibited them and other nonresident property owners from entering the county from March 20, 2020, to May 8, 2020. (Compl. ¶¶ 10-11, 14). Taking the facts as true and drawing all reasonable inferences in plaintiffs' favor, such a prohibition is not a physical taking. Unlike the precedents discussed by the court above, the challenged restriction did not transfer possession

or control of plaintiffs' private property to defendant County for public use. Rather, the subjects of the challenged regulation are plaintiffs; the prohibition being entry into Dare County. (*See* Nonresident Property Owner Travel Restriction (DE 1-3) at 1-2). The regulation does not compel transfer of any easement, servitude, or possession or control of plaintiffs' property to the government. *See N. Transp. Co. v. City of Chicago*, 99 U.S. 635, 639, 642 (1878) *abrogated on other grounds by Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15 (1922) (finding no physical taking where "[n]o entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient."). Thus, any incidental adverse effects to exercise of plaintiffs' private property rights are not legally cognizable as a physical taking.

Plaintiffs argue that, because they allege a "temporary complete taking," defendant County's regulation is a physical taking. (Pl. Resp. (DE 31) at 8-12). Plaintiffs rely upon the foregoing physical takings cases cited by the court to no avail. The law simply does not support plaintiffs' novel interpretation of possession or control by the government.

Plaintiffs also cite several other Supreme Court precedents equally unavailing to their case. Plaintiffs argue that "'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty., Cal.*, 482 U.S. 304, 318 (1987). Plaintiffs' reliance on *First English* is unpersuasive because it begs the "logically prior question whether the temporary regulation at issue had in fact constituted a taking."

Tahoe-Sierra, 535 U.S. at 328 (quoting *First English*, 482 U.S. at 321 ("We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.")); *see also Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162, 2171-72, 2179 (2019) (discussing *First English* and overruling the requirement that a state court deny plaintiff's claim for just compensation under state law prior to asserting a claim under the Takings Clause in federal court). Finally, plaintiffs cite *Arkansas Game & Fish Comm'n* for the proposition that "if a government action would qualify as a taking when permanently continued, temporary actions of the same character would also qualify as a taking." (Pl. Resp. (DE 31) at 11). Plaintiffs' reliance is misplaced. The Court in *Arkansas Game & Fish Comm'n* held "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38 (emphasis added). Plaintiffs fail to allege a physical taking in the instant case.

b. Regulatory Taking

"[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. The United States Supreme Court recognizes regulatory takings in three situations: 1) a permanent physical occupation authorized by government, 2) a regulation permanently required a property owner to sacrifice all economically beneficial uses of his or her land, 3) the facts and circumstances of the particular case show a taking

has occurred. *Arkansas Game & Fish Comm'n*, 568 U.S. at 31-32; *Lingle*, 544 U.S. at 538-39.

For the same reasons that plaintiffs fail to allege a physical taking by defendant County, they also fail to allege a permanent physical occupation of their property sanctioned by defendant County. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 & n.12 (1982). Likewise, the 45-day restriction on plaintiffs' access to Dare County is not a total regulatory taking denying plaintiffs all economically beneficial use in their property. *See Tahoe-Sierra*, 535 U.S. at 331-32 ("[A] fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019-20 (1992) (emphasis in original) (finding a categorical taking where petitioner's two beachfront lots were rendered valueless by respondent's enforcement of the coastal-zone construction ban); (*see also* Pl. Resp. (DE 31) at 14 (conceding *Lucas* does not apply in the instant case)). Where the instant case does not involve a per se regulatory taking, the court must determine whether the facts alleged plausibly state a claim for a regulatory taking.

"In engaging in these essentially ad hoc, factual inquiries" into whether regulation of private property interests should be considered a taking, "the Court's decisions have identified several factors that have particular significance." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). These factors include "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental

action." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017) (citations omitted). "In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Penn Cent.*, 438 U.S. at 130–31; *see Andrus v. Allard*, 444 U.S. 51, 65 (1979) ("[T]he denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.").

As to the first *Penn Central* factor, plaintiffs allege that they "lost the fair market rental value and the value of use of said property by governmental regulations for 45 days." (Compl. ¶ 19). The complaint alleges no facts that sustain a reasonable inference as to the magnitude of the loss in this case, such as the frequency with which plaintiffs' previously have rented or used their property or the value of such loss to plaintiffs. *See Pulte Home Corp. v. Montgomery Cty., Maryland*, 909 F.3d 685, 696 (4th Cir. 2018) (evaluating the extent of plaintiff's loss based on the amount of land it could still develop). Moreover, "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe & Prod. of California, Inc. v. Constr. Laborers Pension Tr. for S. California*, 508 U.S. 602, 645 (1993); *see Hadacheck v. Sebastian*, 239 U.S. 394, 405, 409-10 (1915). However, plaintiffs do allege some unspecified amount of economic loss, which under the first *Penn Central* factor would provide some support of plaintiffs' takings claim.

Turning to the second *Penn Central* factor, "courts have traditionally looked to the existing use of

property as a basis for determining the extent of interference with the owner's 'primary expectation concerning the use of the parcel.'" *Esposito v. S.C. Coastal Council*, 939 F.2d 165, 170 (4th Cir. 1991) (quoting *Penn Cent.*, 438 U.S. at 136). In *Esposito*, the court explained that plaintiffs had not suffered a taking where "[t]hey continued to retain the fundamental incidents of ownership, including the right to possess the property, exclude others from it, alienate the property and continue to use it for residential and recreational purposes." *Id.* at 170; *cf. Quinn v. Bd. of Cty. Commissioners for Queen Anne's Cty., Maryland*, 862 F.3d 433, 442 (4th Cir. 2017) (finding no reasonable investment backed expectation of development based on speculative proposition that plaintiff was entitled to sewer services). Defendant County's regulation did temporarily interfere with plaintiffs' right to personally travel to their vacation property, diminishing plaintiffs' right to use the property.[4] Therefore, the second *Penn Central* factor supports plaintiffs' takings claim.

On the other hand, the third part of the *Penn Central* test decisively weighs against plaintiffs. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common

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[4] Nowhere did the travel restriction in the instant case prohibit plaintiffs from using someone as an agent to exercise many of their rights of ownership during the 45-day period in which the regulation was in effect. Indeed, the regulation on its face broadly leaves plaintiffs' authority to manage their property through local persons (*e.g.* cleaning services, construction workers, and real estate agents) intact.

good." *Id.* at 124; *see Mahon*, 260 U.S. at 415 (explaining that "an average reciprocity of advantage" indicates a regulation is not a taking). In making an assessment of whether a regulation is "functionally comparable to government appropriation or invasion of private property[,]" the court considers "the magnitude or character of the burden a particular regulation imposes upon private property rights" and "how any regulatory burden is distributed among property owners." *Lingle*, 544 U.S. at 542 (emphasis in original). "[R]easonable land-use regulations do not work a taking."[5] *Murr*, 137 S. Ct. at 1947.

Courts have long recognized that regulations that protect public health or prevent the spread of disease are not of such a character as to work a taking. In *Miller v. Schoene*, the Supreme Court considered whether diminution of value caused by state mandated destruction of property owners' red cedar trees to prevent the spread of cedar rust, a fungal disease, to neighboring apple orchards must be compensated as a taking. 276 U.S. 272, 277-79 (1928); *see Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490 (1987) (construing the due process clause challenge under the Fourteenth Amendment in *Miller* as a Takings Clause claim). The Court declined to order plaintiffs be compensated, concluding that "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Miller*, 276 U.S. at 279-80. In *Rose Acre*

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[5] In this case, the government is not directly regulating land use. Rather, it is regulating the travel of nonresident property owners, which incidentally burdens their use of their property.

Farms, Inc. v. United States, the United States Court of Appeals for the Federal Circuit considered whether regulations restricting the interstate sale and transportation of eggs and poultry from flocks contaminated by salmonella was a compensable taking. 559 F.3d 1260, 1263 (Fed. Cir. 2009). There, the court concluded that "the character of the government's act, protecting the public health by identifying diseased eggs and forcing their owner to remove them from the table market, weighs strongly against finding a taking here." *Id.* at 1281.

The instant case is more compelling than *Miller* and *Rose Acre* as to the character of the disputed government action. As plaintiffs allege, the COVID-19 pandemic is an "unprecedented" public health crisis. (Compl. ¶ 9). Both the United States and the State of North Carolina declared states of emergency several days prior to defendant County enacting the disputed travel restriction. Pres. Proc. No. 9994, 85 Fed. Reg. 15337, 15337 (Mar. 13, 2020); Exec. Or. 116, 34 N.C. Reg. 1744, 1744-45 (Apr. 1, 2020); (Compl. ¶¶ 9-11). On March 27, 2020, citing the "occurrence of widespread community transmission of the virus," the governor of North Carolina issued a broad range of public health directives, including an order that individuals stay at home and a restriction on mass gatherings. Exec. Or. 121, 34 N.C. Reg. 1903, 1903-06, 1911 (May 1, 2020). The Executive Order explicitly recognized that counties and cities may need to adopt local prohibitions and restrictions further restricting the activity of people and businesses. *Id.* at 1911-12.

Defendant County's state of emergency and ensuing restrictions were of the ilk of government health regulations seeking to "slow the spread of

COVID-19" by directing people to stay at home and not travel to the county. (*See* Nonresident Visitor Travel Restriction (DE 1-2) at 1-2; Nonresident Property Owner Travel Restriction (DE 1-3) at 1-2). As plaintiffs' class allegations indicate, the burden of this regulation was distributed broadly among those property owners who reside in places other than the county. (*See* Compl. ¶ 20 (alleging that nonresident property owners are so numerous as to form a class); see Nonresident Property Owner Travel Restriction (DE 1-3) at 1-2). The burden of the county's stay at home order also was borne by nonresident visitors. (Nonresident Visitor Travel Restriction (DE 1-2) at 1-2). Further, the stated objective of the regulation, reducing transmission of a potentially life-threatening disease in the midst of a pandemic, is a reciprocal public health benefit shared by residents and nonresidents alike. Though the travel restriction limited plaintiffs' access to their property, the restriction was temporary. In sum, the regulation is a public health program that shifted the economic burdens of preventing transmission of COVID-19 by staying at home to persons residing outside the county.[6]

Plaintiffs argue the instant case is a "temporary complete taking" where nonresident property owners "were deprived of all use during the Declaration." (Pl.

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[6] In their brief in opposition to defendant County's motion, plaintiffs argue that defendant County's regulation violates the Privileges and Immunities Clause of the Constitution. *See* U.S. Const. art. IV, § 2; *Saenz v. Roe*, 526 U.S. 489, 500-01 (1999); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985); *Toomer v. Witsell*, 334 U.S. 385, 395-98 (1948). Such a claim, which involves an entirely different constitutional protection, is not alleged in plaintiffs' complaint and therefore not before this court.

Resp. (DE 31) at 14). Plaintiffs also argue that the Supreme Court's reasoning in *Tahoe-Sierra* is not applicable to the instant case. However, the Court explained that "[t]o sever a 32–month segment from the remainder of each fee simple estate and then ask whether that segment has been taken in its entirety would ignore Penn Central's admonition to focus on 'the parcel as a whole[.]'" *Tahoe-Sierra*, 535 U.S. at 303. Subsequent cases confirm that "time is indeed a factor in determining the existence *vel non* of a compensable taking." *Arkansas Game & Fish Comm'n*, 568 U.S. at 38 (collecting cases). By asking the court to focus on plaintiffs' rights in their property during the 45-day period in which the travel restriction was in effect, rather than the impact on defendant County's regulation on plaintiffs' rights in their property as a whole, plaintiffs invite the court to ignore one of the elementary holdings of *Penn Central*, which it will not do.

Plaintiffs also argue defendant County's regulation was not effective because it allowed exemptions for workers, county residents, and residents of three neighboring counties ingress to and egress from Dare County. (Pl. Resp. (DE 31) at 17-18; *see* Compl. ¶¶ 12-13). However, the court does not scrutinize whether defendant County's regulation "substantially advances" the goal of reducing COVID-19 transmission for purposes of its analysis under the Takings Clause. *See Lingle*, 544 U.S. at 544. Restriction of the nonresident property owners from entering the county to prevent the spread of disease is reasonably related to the goal of preventing transmission of disease. *Cf. Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 25, 38 (1905).

Defendant County's concededly legitimate exercise of its emergency management powers under North Carolina law to protect public health in the "unprecedented" circumstances presented by the COVID-19 pandemic, (compl. ¶¶ 6, 9, 15), weighed against loss of use indirectly occasioned by preventing plaintiffs from personally accessing their vacation home for 45 days, (id. ¶¶ 11, 14, 16), does not plausibly amount to a regulatory taking of plaintiffs' property.

CONCLUSION

Based on the foregoing, defendant County's motion to dismiss for failure to state a claim (DE 23) is GRANTED. Defendant Towns' motion to dismiss for lack of subject matter jurisdiction (DE 25) is GRANTED. Plaintiffs' claims are DISMISSED. The clerk is DIRECTED to close this case.

SO ORDERED, this the 15th day of September, 2020.

/s/ Louise W. Flanagan
United States District Judge

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA (SEPTEMBER 15, 2020)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION

JOSEPH E. BLACKBURN, JR.,
LINDA C. BLACKBURN, AND ALL SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs,

v.

DARE COUNTY, TOWN OF NAGS HEAD, TOWN OF DUCK, TOWN OF KILL DEVIL HILLS, TOWN OF MANTEO) TOWN OF KITTY HAWK and TOWN OF SOUTHERN SHORES,

Defendants.

No. 2:20-CV-27-FL

Before: Louise W. FLANAGAN,
United States District Judge.

JUDGMENT

Decision by Court.

This action came before the Honorable Louise W. Flanagan, United States District Judge, for consideration of defendants' motions to dismiss.

IT IS ORDERED, ADJUDGED AND DECREED in accordance with the court's order entered September 15, 2020, and for the reasons set forth more specifically therein, defendant County's motion to dismiss for failure to state a claim is GRANTED. Defendant Towns' motion to dismiss for lack of subject matter jurisdiction is GRANTED. Plaintiffs' claims are dismissed.

This Judgment Filed and Entered on September 15, 2020, and Copies To:

Lloyd C. Smith, Jr./Stuart W. Yeoman/Corey A. Finn /Lloyd C. Smith, III (via CM/ECF Notice of Electronic Filing)

Brian F. Castro/Christopher J. Geis (via CM/ECF Notice of Electronic Filing)

Clay Allen Collier/Norwood P. Blanchard, III (via CM/ ECF Notice of Electronic Filing)

PETER A. MOORE, JR.
CLERK

/s/ Sandra K. Collins
Deputy Clerk

September 15, 2020

CLASS ACTION COMPLAINT AND DEMAND FOR TRIAL BY JURY (MAY 15, 2020)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA NORTHERN DIVISION

JOSEPH E. BLACKBURN, JR. AND WIFE, LINDA C. BLACKBURN, AND ALL SIMILARLY SITUATED INDIVIDUALS,

Plaintiffs,

v.

DARE COUNTY, THE TOWNS OF DUCK, SOUTHERN SHORES, KITTY HAWK, KILL DEVIL HILLS, NAGS HEAD, AND MANTEO,

Defendants.

File No.

CLASS ACTION COMPLAINT AND DEMAND FOR TRIAL BY JURY

Plaintiffs, Joseph E. Blackburn, Jr. and wife, Linda C. Blackburn, on behalf of themselves and all others similarly situated, by and through their undersigned counsel, brings this action against Dare County, the Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo, for taking of private property in violation of the, 42 USC § 1983,

the 5th and the 14th Amendments of the United States Constitution.

NATURE OF THE ACTION
JURISDICTION & VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. Section 1332(d)(2)(A), the Class Action Fairness Act, because the matter in controversy exceeds the sum or value of $5,000,000 exclusive of interest and costs, and at least one member of the class of plaintiffs is a citizen of a state different from Dare County, North Carolina. Furthermore, this action arises under a federal statue, 42 USC § 1983, and as such presents a question of federal law and the United States District Court in the Eastern District of North Carolina is the proper place for jurisdiction.

2. Venue is proper in the Eastern District pursuant to 28 U.S.C. Section 1391(b) and (c), because Dare County and the Defendant Towns are subject to personal jurisdiction in this district, and a substantial part of the events or omissions giving rise to the claims occurred in this district.

PARTIES

3. The Plaintiffs, Joseph E. Blackburn, Jr. and wife, Linda C. Blackburn, are residents of Richmond, Commonwealth of Virginia.

4. The Plaintiffs are non-resident owners of real property in Dare County, North Carolina.

5. Defendant, Dare County, is a body politic, created, and existing under the laws of the State of North Carolina. The Defendant, Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags

Head and Manteo are bodies politic, created, and existing under the laws of the State of North Carolina.

FACTS

6. The Chairman of the Dare County Board of Commissioners is and was at all relevant times, Robert L. Woodard. Pursuant to Article 1A of Chapter 166A of the North Carolina General Statutes and Chapter 92 Emergency Management of the Dare County Code of Ordinances, the Chairman of Dare County Board of Commissioners was authorized to declare a state of emergency and impose restrictions and prohibitions within Dare County.

7. Pursuant to Article 1A of Chapter 166A of the North Carolina General Statutes and Chapter 92 Emergency Management of the Dare County Code of Ordinances, and by interlocal agreements, the Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo could consent to and join into any declaration of emergency by the Chairman of the Dare County Commissioners.

8. Any and all declarations of emergencies by the Dare County Board of Commissioners as enacted, were binding upon Dare County, the Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo.

9. On March 16, 2020, Dare County declared a state of emergency due to unprecedented public health posed by COVID-19 as it has a right to do. Attached hereto is a copy of said Declaration of a State of Emergency, identified as Exhibit 1 which is incorporated herein by reference.

10. On March 17, 2020 at 2:00 p.m., the Defendants, through the Chairman of the Dare County Board of Commissioners, issued a "DECLARATION IMPOSING ADDITIONAL RESTRICTIONS AND PROHIBITIONS UNDER DARE COUNTY STATE OF EMERGENCY DECLARATION FOR COVID-19", a copy of which is attached hereto identified as Exhibit 2 and incorporated herein by reference which not only prevented mass gatherings but prohibited entry into Dare County by non-resident visitors and made a violation of said declaration punishable as a Class II Misdemeanor in accordance with N.C.G.S. 14-288.20A.

11. On March 16, 2020, under "A DECLARATION IMPOSING ADDITIONAL RESTRICTIONS AND PROHIBITIONS UNDER DARE COUNTY STATE OF EMERGENCY DECLARATION FOR COVID-19" which was effective on March 20, 2020 at 10:00 p.m., the Defendants, through the Chairman of the Dare County Board of Commissioners, imposed an additional restriction prohibiting the entry of all non-resident property owners into Dare County and made the entry of non-resident property owners a Class II misdemeanor in accordance with N.C.G.S. 14-288.20A. A copy of said Declaration is attached hereto and incorporated by reference as Exhibit 3.

12. The Defendants did not prohibit the entry of workers with an entry permit into or out of Dare County and did not prohibit the entry or exit of residents of Dare County, North Carolina under any of said emergency declarations.

13. The Defendants did not prohibit the entry of citizens of Currituck, Tyrrell, or Hyde County into Dare County.

14. The Declaration prohibiting the entry of all non-resident property owners was effective from March 20, 2020 at 10:00 p.m. until it was partially lifted on Monday, May 4, 2020, was then again partially lifted on Wednesday, May 6, 2020, and then was completely lifted as to all non-resident property owners on May 8, 2020.

15. The Declaration of Emergency identified as Exhibit 3 constituted a governmental regulation enacted by various bodies politic of the State of North Carolina who had the authority to issue said prohibitions.

16. The Plaintiffs, Joseph E. Blackburn, Jr. and Linda C. Blackburn, his wife, are the non-resident owners of a tract or parcel of land in the City of Frisco, Atlantic Township, Dare County, North Carolina, with a vacation home situated thereon which was acquired by them by deed recorded in Book 1936, page 71 on July 22, 2013 in the Office of the Register of Deeds of Dare County.

17. The Declaration, identified as Exhibit 3, prohibiting the entry of all non-resident property owners is and was a temporary complete taking by regulation by the governmental units, which are the Defendants herein, of the Plaintiffs' property rights as the Plaintiffs had no rights whatsoever to and in their real property in Dare County but were subjected to continual taxes and such utilities bills as may be required.

18. For 45 days, the Defendants imposed a regulatory scheme upon the real property of the Plaintiffs and other similarly situated non-resident property owners in Dare County and within the various Defendant municipalities which was a temporary complete taking of their real property.

19. The Plaintiffs, and other similarly situated non-resident property owners, have suffered damage by the temporary complete taking of their property as they have lost the fair market rental value and value of use of said property by governmental regulations for 45 days.

CLASS ACTION ALLEGATIONS

While reserving the right to redefine or amend the class definition prior to seeking class certification, including seeking bifurcation of issues that are not amenable to resolution on a class wide basis pursuant to Federal Rule of Civil Procedure 23, Plaintiff seeks to represent a Class of all persons who, on or after March 20, 2020 at 10:00 p.m. (the "Class Period"), were non-resident property owners of certain real properties within Dare County, North Carolina and within the various Defendant municipalities.

20. The members in the proposed Class are so numerous that individual joinder of all members is impracticable, and the disposition of the claims of all Class members in a single action will provide substantial benefits to the parties and the Court.

21. Questions of law and fact common to Plaintiffs and the Class include:

A. Whether the regulation of the emergency Declaration dated March 20, 2020, a copy of which is attached hereto as Exhibit 3, was and constituted a complete temporary taking of the Plaintiffs' real property and other non-resident property owners so as to be a taking under the 5th and 14th Amendments to the United States Constitution.

B. The only other issue is the amount of damages suffered by the Plaintiffs and others similarly situated.

22. Those common questions of law and fact predominate over questions that affect only individual Class members.

23. Plaintiffs' claims are typical of Class members' claims because they are based on the same underlying facts, events, and circumstances relating to the Defendant Dare County's and the Defendants' Towns conduct. Specifically, all Class members, including Plaintiffs, were subjected to a regulatory taking of their real property that prevented all use of said property.

24. Plaintiffs will fairly and adequately represent and protect the interests of the Class; they have no interests incompatible with the interests of the Class; and they have retained counsel competent and experienced in class action litigation.

25. Class treatment is superior to other options for resolution of the controversy because the relief sought for each Class member is small, such that, absent representative litigation, it would be infeasible for Class members to redress the wrongs done to them.

26. As a result of the foregoing, class treatment is appropriate under Fed. R. Civ. P. 23(a), 23(b)(2), and 23(b)(3). In addition, it may be appropriate pursuant to Fed. R. Civ. P. 23(c)(4), to maintain this action as a class action with respect to particular issues.

CLAIM FOR RELIEF

A Claim Under 42 U.S.C § 1983 Seeking Compensation for a Governmental "Taking" of Private Property Pursuant to the 5th and 14th Amendments of the United States Constitution

27. The allegations contained in paragraphs 1 thru 26 are reincorporated and realleged as if fully set forth herein.

28. The emergency order going into effect on March 20, 2020 prevented the named Plaintiffs, and all similarly situated non-resident class members, from accessing or having any use of their properties located within Dare County, North Carolina and the corresponding municipal Defendants, for a minimum period of forty five (45) days.

29. The emergency order preventing non-resident property owners, including the Plaintiffs, from use and access of their real property, constituted a "taking" pursuant to the 5th and 14th Amendments of the United States Constitution.

30. The Plaintiffs, and all class members, are entitled to compensation for the taking on their property.

31. The Plaintiffs and other similarly situated non-resident property owners have suffered damage by the temporary complete taking of their property as they have lost the fair market rental value and value of use of said property by governmental regulations for 45 days, and seek compensation for said loss.

PRAYER FOR RELIEF

Wherefore, Plaintiffs, on behalf of themselves and all others similarly situated property owners, pray for judgment against Defendants, Dare County and the Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo, and seek the following remedies:

1. An Order certifying the Plaintiffs, and all similarly situated non-resident property owners, as a "class" as that term is defined under Rule 23 of the Federal Rules of Civil Procedure.

2. An Order requiring the Defendant Dare County and the Defendant Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo to bear the costs of class notice;

3. An Order requiring Dare County and the Towns of Duck, Southern Shores, Kitty Hawk, Kill Devil Hills, Nags Head, and Manteo to pay all actual, compensatory damages for a temporary complete taking of the Plaintiffs', and all similar situated non-property resident, real estate property rights;

4. Pre-and post-judgment interest as allowed by law;

5. An award of attorney's fees and costs as allowed by law pursuant to 42 U.S.C. § 1983; and

6. Such other and further relief for Plaintiffs and the Class as the Court deems appropriate and just.

JURY DEMAND

Plaintiffs hereby demands a trial by jury.

This the 15th day of May, 2020.

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