MUNICIPAL LAW NOTES

NC LEAGUE OF MUNICIPALITIES
Good government. Great hometowns.

June 2019 Volume XXXVIII, No. 12

Procedure; Attorneys' Fees; Requisite Findings as to Reasonableness of Fees; Land Use; Permits

McLamb v. Town of Smithfield, __ N.C. App. __ (No. COA18-1235, Johnston─6/4/19) (***unpublished***)

- ***Holding***─**Although the trial court has considerable discretion in affixing the amount of reasonable attorneys' fees under G.S. 6-21.7, the trial court must make findings of fact to support the award. Court reverses the award of fees based on the superior court's failure to make findings of fact to support the award and remands for additional findings of fact as to the reasonableness of the fees.**

- ***Key Excerpt***─ Respondent-Town appealed from an order reversing its decision to deny petitioner's application for a conditional use permit ("CUP") to develop his commercial property along the property into a recreational vehicle park ("RV park") with cabins: at the time of application, the property was in a B-3 (Business Highway Entrance) zoning district, which permits the development of RV parks so long as respondent grants the developer a CUP. Respondent's Planning Department reviewed the application, determining that it was "consistent with applicable adopted plans, policies and ordinances and" should be approved if respondent-Town found that all four of the necessary findings of fact could be affirmatively made.

The Court affirmed the portion of the superior court's order reversing respondent-Town's decision to deny the CUP. "[N]eighboring homeowners expressed concerns about the effect of the development on their property values, traffic conditions, the appearance of the neighborhood, diminishing community pride, the inability to monitor sex offenders, and that the plan presented was 'incomplete and vague.' To the extent respondent[-Town] relied on the lay testimony that the proposed development would affect the value of other property or vehicular traffic, respondent erred. [G.S.] 160A-393(k)(3) specifically prohibits the use of lay testimony to establish: (1) '[t]he use of property in a particular way would affect the value of other property[;]' and (2) '[t]he increase in vehicular traffic resulting from a proposed development would pose a danger to the public safety.' [G.S.] 160A-393(k)(3)(a)-(b) (2017).

"The fears regarding the appearance of the neighborhood, diminishing community pride, the inability to monitor sex offenders, and that the plan presented was 'incomplete and vague' are only

generalized fears and speculation by lay witnesses. Therefore this testimony is insufficient to rebut petitioner's *prima facie* showing. *See* Little River, LLC [v. Lee Cty.], ___ N.C. App. at ___, 809 S.E.2d [42] at 50 [(2017)]."

"Accordingly, we agree with the superior court that respondent's findings are unsupported by competent, material, and substantial evidence, and its conclusions thereon are, as a matter of law, erroneous. We affirm the superior court's conclusion that opponents to the proposed development did not present competent, material, and substantial evidence to rebut the *prima facie* showing offered by petitioner."

The Court reversed the superior court's award of attorneys' fees and remanded for additional findings of fact as to the reasonableness of the fees. "Although the trial court has considerable discretion in affixing the amount of reasonable attorneys' fees under all attorneys' fees statutes, including [G.S.] 6-21.7, 'the trial court must make findings of fact to support the award.' Brockwood Unit Ownership Ass'n v. Delon, 124 N.C. App. 446, 449, 477 S.E.2d 225, 227 (1996) (citation omitted). Specifically, it is well settled that 'the record must contain findings of fact as to the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney based on competent evidence' to determine an award of counsel fees is reasonable. W. Through Farris v. Tilley, 120 N.C. App. 145, 151-52, 461 S.E.2d 1, 4 (1995) (citation and internal quotation marks omitted)."

"Here, the superior court determined petitioner was entitled to attorneys' fees pursuant to [G.S.] 6-21.7 because respondent acted outside the scope of its legal authority and abused its discretion. However, the record contains no findings with regard to the reasonableness of the attorneys' fees awarded. The court only found: '13. That pursuant to [G.S.] 6-21.7, the Petitioner is entitled to reasonable attorneys' fees and cost in this matter. 14. That Petitioner has submitted and filed an affidavit for legal fees in the amount of $13,136.34 and anticipates $1,200.00 being billed to Petitioner to conclude this matter, for a total of $14,336.34.' Therefore, we reverse the award of fees based on the superior court's failure to make findings of fact to support the award and remand for further review."

- ***Synopsis***– Appeal by respondent-Town from May 2018 order. Affirmed in part; reversed in part and remanded in part. Judge Arrowood wrote the opinion, with Judge Inman and Judge Young concurring.

Land Use; Rezoning; Notice; Failure to Follow Uniform Procedure; Void *Ab Initio*

Charde v. Town of Davidson, ___ N.C. App. ___ (No. COA18-938, Mecklenburg– 6/18/19) (***unpublished***)

- ***Holding***– **"Because the pleadings show that the Town of Davidson failed to post notice of a public input session in conformity with its own planning ordinance, the trial court did not err in granting plaintiffs judgment on the pleadings and declaring the rezoning void *ab initio*."**

- ***Key Excerpt***– In a declaratory judgment action challenging the rezoning of two adjacent parcels of land wherein part of a larger tract was subject to a Conditional Planning Area and associated Master Plan ("conditional zoning") within the Town's Lakeshore Planning Area district, the Court held that defendant-Town failed to comply with the notice requirements set forth in the Davidson Planning Ordinance (DPO) and that the trial court did not err in granting plaintiffs judgment on the pleadings and declaring Ordinance 2017-16 void *ab initio*. (It was observed that the Town conceded that it failed to comply with certain Ordinances of the DPO.)

"Section 16.2 of the DPO specifically states, 'The words "shall," "must," and "will" are mandatory in nature, implying an obligation or duty to comply with the particular provision." *Id*. at § 16.2(c)…. Accordingly, it was mandatory, not merely directory, that the sign publicizing the public input session required by Section 14.4.1 of the DPO state the time, location, purpose of the public input session, name and contact information for the applicant, and a phone number and email address at which further information could be obtained." (Citation omitted.)

"Plaintiffs' first claim alleged, *inter alia*, that the Town failed to post adequate signage regarding the public input session mandated for the proposed rezoning. In its answer, the Town 'admitted that the sign on the Subject Property did not state the time, location and purpose of the [public input session], and, instead, the website link on the sign contained said information.' Because the Town admitted that it failed to include the time, location, and purpose of the public input session on the sign, and under the DPO that information on the sign was mandatory, the trial court did not err in granting Plaintiffs judgment on the pleadings on their first claim for relief and invalidating the rezoning." (Citations omitted.)

"Defendants concede that the sign did not state the time, location, and purpose of the public input session, but assert that 'the Town uses the reference to a website on all such signs to avoid the expense of having a custom sign on each site being rezoned. It simply updates the website so any interested party can access the information.' Defendants agreed at oral argument, however, that the Town could have amended the DPO to reflect this practice, but failed to do so."

Distinguishing defendants' cited authority of Rakestraw v. Town of Knightdale, 188 N.C. App. 129, 654 S.E.2d 825 (2008), the Court stated "Here, by contrast, the Town expressly admitted that it did not comply with its own ordinance, which mandates that the sign state the time, location, and purpose of the public input session. Plaintiffs do not argue that the posted sign must contain information over and above that which is required by the DPO, as did plaintiff in Rakestraw. Rather, Plaintiffs correctly contend that the Town must have included the information on the sign required by its own ordinance, which the Town failed to do. *See* Lee [v. Simpson], 44 N.C. App. [611] at 612, 261 S.E.2d [295] at 295-96 [(1980)]…."

In concluding its opinion, the Court further observed that "Defendants further assert that there was no allegation that Plaintiffs were prejudiced by the reference to a website on the sign in lieu of the information required by the DPO. However, no statute or precedent requires a showing of prejudice in rezoning challenges when there has been a procedural violation involving proper notice." (Citations omitted.)

- ***Synopsis***− Appeal by defendants from July 2018 order. Opinion by Judge Collins, with Judge Inman concurring. Judge Dillon, concurring, writing separately.