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NO. COA11-1193
NORTH CAROLINA COURT OF APPEALS

Filed: 19 June 2012

EXPERIENCEONE HOMES, LLC and
LADOS, LLC,
Plaintiffs-Appellants,

v.

Wake County
No. 09 CVS 16153

TOWN OF MORRISVILLE,
Defendant-Appellee.

Appeal by Plaintiffs from judgment entered 31 May 2011 by
Judge Howard E. Manning, Jr. in Superior Court, Wake County.
Heard in the Court of Appeals 21 February 2012.

*K&L Gates LLP, by Kathryn F. Taylor and Jason C. Pfister,
for Plaintiffs-Appellants.*

*Pinto Coates Kyre & Brown, PLLC, by Deborah J. Bowers and
Richard L. Pinto, for Defendant-Appellee.*

McGEE, Judge.

ExperienceOne Homes, LLC (ExperienceOne) and Lados, LLC
(Lados) (Plaintiffs) are companies owned by Lanny Caldwell and
David Schmidt. ExperienceOne is a construction company, and
Lados is a real estate holding company. Plaintiffs owned four
contiguous parcels of real property located in the Town of

Morrisville (Defendant). KCR Investors, LLC (KCR) owned three additional contiguous parcels of real property (along with Plaintiffs' property, the property) abutting Plaintiffs' property. Plaintiffs and KCR entered into an agreement to develop the property by building Townes at Everett Crossing, later renamed Everett Crossing at Kitts Creek (Everett Crossing). Everett Crossing was to include 200 townhomes and three detached single-family homes.

In order to proceed with the development of Everett Crossing, Plaintiffs needed to have Defendant rezone the property. Plaintiffs applied for rezoning, and Defendant, through its Town Council (Town Council), rezoned the property to Residential Multi-Family Conditional Use (RMF-CU) by two ordinances (the rezoning ordinances) adopted 26 February 2008. Prior to Defendant's adoption of the rezoning ordinances, Plaintiffs had provided Defendant with a site plan and a preliminary subdivision plat that showed the location of the townhomes, detached residences, roads, lot sizes, and other relevant information. The RMF designation for the rezoning allowed "a variety of residential uses," including "medium or high density development." The CU designation meant that, in addition to the uses allowed in an RMF zone, individualized conditions or requirements imposed by the Town Council also

applied. The specific requirements included in the rezoning ordinances will be discussed in greater detail below. Generally, though, the rezoning ordinances zoned the property for both townhomes and detached single-family homes; required that the development "occur in a manner consistent with the provisions of the [Everett Crossing] Site Plan and Preliminary Subdivision Plat[;]" and further required that the development meet "all applicable requirements of the Morrisville Zoning Ordinance[.]"

Because of the changing housing market, Plaintiffs later determined that substituting detached single-family homes for the townhomes would be a more economically viable option. In pursuing that option, Plaintiffs requested that they be allowed to change the Everett Crossing development from one that included 200 townhomes and three detached single-family homes to one that included 202 detached single-family homes and otherwise "retain[ed] the general layout of the site plan." Plaintiffs had assured Defendant that there would be "no other major change to the layout of the site (e.g., [the site would] retain basic street pattern)[.]" At its 24 March 2009 meeting, the Town Council held a hearing on Plaintiffs' request. At that hearing, Tim Gauss, Defendant's Senior Director of Development Services, stated:

[T]his request was a bit unusual. [Plaintiffs are] making the request at this time due to time constraints related to the general economic situation and specific financing issues they are facing. The request was for two changes to be handled at an administrative level. The first was for a type of product change from townhome to single family and the second was for a change in the timing of the conditions. In addition, the request to build the detached units requires 2500 square foot lots which do not meet the minimum lot size requirement of the *Zoning Ordinance* (minimum 6000 square foot in RMF Zoning District). [Plaintiffs] would have to prepare a Flexible Design Option (FDO) request. The FDO would require Council review and approval.

Staff recommended that certain issues be handled administratively, including:

Review of a revised Flexible Design Option (FDO) application prepared by the developer to address lot size, setback, and other dimensional issues associated with the layout for the detached units; this application would be prepared simultaneously with the preliminary plat, and would be brought back through the formal process for Planning and Zoning Board and Town Council review (per the *Zoning Ordinance*).

David Schmidt (Schmidt), one of Plaintiffs' co-owners, was asked at the hearing if the proposed revision met the required lot setbacks. Schmidt answered that they were met "under the proposed Flexible Design Option." Schmidt then stated "that the Council would review the FDO themselves after the work with the

staff was done." Plaintiffs' request passed by a vote of five to two.

The Town Council passed a resolution on 24 March 2009 authorizing subsequent administrative approval of Plaintiffs' revised site plan reflecting the change to detached single-family homes, provided Plaintiffs met certain conditions. Those conditions included the following: (1) that Plaintiffs construct a bridge to connect Everett Crossing to the existing Kitts Creek subdivision; (2) that the conditions included in the rezoning ordinances be met, which included (3) that the revised plat "meets all applicable requirements of the Morrisville Zoning Ordinance[.]" It is clear from the hearing at which the 24 March 2009 resolution passed, that approval of a properly submitted FDO was one of the requirements for overall approval for the development to be converted to detached single-family homes.

When Plaintiffs submitted their FDO application to Defendant, it included a site plan very different from the one proposed at the 24 March 2009 Town Council meeting. KCR, the company that owned three of the tracts comprising the Everett Crossing plan as originally submitted, decided to pull out of the venture due to the declining economic situation. This meant that only four of the original seven tracts would be developed.

The new site plan proposed 143 detached single-family homes on 2,500 square foot lots. According to the understanding of all parties at the 24 March 2009 Town Council meeting, this reduction from the 6,000 square foot minimum lot size for detached single-family homes would have to be approved through the FDO process.

Also, the density of the housing on the land owned by Plaintiffs had increased. This increased density caused a rearranging of the placement of the lots and reduced greenspace. Further, road placement had been altered. An additional entrance into the proposed development from Church Street had been added; and the bridge connection to the Kitts Creek development, which had been one of the requirements in the 24 March 2009 resolution, was not included on the site plan since it was to have been located on the property owned by KCR.

Defendant sent an email to Plaintiffs expressing concern with these and other issues, and stated that the new site plan could not be administratively approved. Specifically, Defendant informed Plaintiffs that, in light of the major nature of the changes, the new site plan ran afoul of the requirement included in the original rezoning ordinances that changes made not alter "the 'character and nature of the proposed development'" as shown in the preliminary site plan. Defendant also informed

Plaintiffs that the new site plan did not include the bridge connection to Kitts Creek, did not conform to approved architectural renderings and elevations, and did not conform with other previously approved conditions. Defendant suggested potential ways to move forward, but reiterated that it could not administratively approve the new site plan as presented.

Plaintiffs decided to move ahead with their FDO application without any additional changes, and a hearing was conducted on Plaintiffs' FDO application on 14 July 2009. Citing the major changes to the project as proposed, the Town Council voted unanimously to deny Plaintiffs' FDO application on 14 July 2009.

Plaintiffs filed their complaint in this action on 13 August 2009, and amended it on 27 September 2010. Plaintiffs requested declaratory judgment by the trial court, stating that they were entitled to proceed with the development as proposed in the new site plan; asserting claims that Defendant had violated Plaintiffs' rights by "forcing" them to submit an FDO application; and claiming that Defendant was required to approve Plaintiffs' FDO application as submitted. Defendant filed an answer on 12 October 2009. Cross-motions for summary judgment were filed by the parties, and a hearing was held on 13 January 2011. By order filed 31 May 2011, the trial court granted Defendant's motion for summary judgment, dismissed all

Plaintiffs' claims, and denied Plaintiffs' summary judgment motion. Plaintiffs appeal.

I.

Plaintiffs first argue that the "[t]rial [c]ourt erred by holding that [Defendant] properly subjected the Development to an FDO process." We disagree.

First, the trial court's order granting summary judgment does not "hold" that Defendant properly subjected the development to an FDO process. The order does not reflect that this was an issue the trial court considered. The trial court's order determined that the FDO request was not improperly denied by Defendant. However, "[o]ur standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

In order to develop Everett Crossing, Plaintiffs originally applied for the rezoning of seven tracts of land to Multi-Family Conditional Use. The Planning and Zoning Board unanimously recommended that the rezoning request be denied. Despite the recommendation of the Planning and Zoning Board, the Town Council approved rezoning the tracts to RMF-CU. Conditional Use

Districts (CU) "are established to correspond with each of the General Use Districts" (such as RMF).

The uses permitted in a conditional [use] district are:

A.) Identical to those uses permitted in its corresponding general use district, as well as any additional requirements stated in the conditions unless specifically prohibited in the conditions, and

B.) Subject to all other requirements of that district.

Subject to certain conditions established in the rezoning ordinances, the permitted uses for Plaintiffs' real property tracts included: "Dwelling, detached; Dwelling, townhome[.]"

The ordinances included the following relevant conditions:

Development of [the tracts] must occur in a manner consistent with the provisions of the Townes at Everett Crossing [the subdivision] Site Plan and Preliminary Subdivision Plat . . . provided however that minor amendments may be reviewed and approved administratively consistent with the provisions in Part D, Article II, Section 9 - "Revisions to Approved Plans" in the version of the Morrisville Zoning Ordinance dated February 1, 2008.

A site plan amendment consistent with the general layout and number of lots shown in the revised concept design for the site attached hereto as Exhibit C shall be allowed to be reviewed and approved administratively, provided that it meets all applicable requirements of the Morrisville Zoning Ordinance, and provided that the total number of residential units shall not exceed the number included in the Site Plan

and Preliminary Subdivision Plat[.]

Defendant's Zoning Ordinance requires a minimum net lot area of 6,000 square feet for a detached single family home in an RMF district. There is no minimum net lot area listed in Defendant's Zoning Ordinance for townhomes. "The maximum number of townhouse, condominium or apartment units that can be developed on a given tract is governed by density limits, so as to provide flexibility in design."

The original site plans produced by Plaintiffs for the subdivision recognized the different lot size requirements imposed for detached single family homes in the subdivision. The Everett Crossing Site Plan and Preliminary Subdivision Plat included a "Site Data Table" (the Table). The Table included subheadings for "Townhomes" and "Single Family." Data for minimum setbacks and other requirements were included for the "Townhomes" and "Single Family" homes. However, whereas the "Single Family" section on the preliminary site plan included: "Min. Lot Area: 6000 SF[,]" the "Townhomes" section did not include any reference to "Min. Lot Area." This fact indicates that Plaintiffs understood the different lot size requirements in the Zoning Ordinance for detached single family homes and townhomes - specifically, that detached single family homes

required minimum lot areas of 6,000 square feet, while townhomes had no delineated minimum lot area requirements.

According to the rezoning ordinances: "Development of [the tracts] must occur in a manner consistent with the provisions of the Townes at Everett Crossing Site Plan and Preliminary Subdivision Plat . . . provided however that minor amendments may be reviewed and approved administratively[.]" Therefore, Plaintiffs were bound by their own original site plan that established that detached single family homes would comply with the 6,000 square foot minimum as set forth in Defendant's Zoning Ordinance unless reduction from a 6,000 square foot minimum lot area to a 2,500 square foot lot minimum constituted a "minor amendment." Pursuant to the FDO section of Defendant's Zoning Ordinance:

For projects or portions of projects containing only single-family detached housing, the Town Board may reduce lot sizes . . . if it determines that the overall desirability of the project is sufficiently enhanced due to one or more of the following features, taking into account surrounding uses, opportunities and constraints on the site:

The reduction of lot size is an integral part of a creative and innovative project design[.]

The reduced site plan that Plaintiffs submitted with their FDO application also included a "Site Data Table" including data

on the revised minimum lot area for the single-family detached homes. Next to the line for "Min. Lot Area[,] " Plaintiffs stated: "See Flexible Design Option."

As a matter of law, we hold that deviation from the established lot area minimum, as articulated in Defendant's Zoning Ordinance, especially a downward deviation of 3,500 square feet, did not qualify as a "minor amendment." Defendant properly required Plaintiffs to apply for an FDO.

We further note that deleting a substantial portion of the proposed development that required elimination of a roadway connection to the neighboring Kitts Creek development, along with a rerouting of some of the roads and a proposed second entry/exit to Church Street, among other changes, constituted a violation of the requirement of the ordinances that development "must occur in a manner consistent with the provisions of the Townes at Everett Crossing Site Plan and Preliminary Subdivision Plat[.]" These changes also required an FDO or reapplication for a new conditional use zoning ordinance. Plaintiffs' argument that the trial court erred in granting Defendant summary judgment for this reason is without merit.

II.

Plaintiffs next argue that Defendant "deprived Plaintiffs of their constitutional rights." We disagree.

Plaintiffs argue that Defendant's "continuous and willful violation of its own ordinances" deprived Plaintiffs of their substantive and procedural due process rights and constituted an "uncompensated taking of [Plaintiffs'] property[.]"

Because we hold that Plaintiffs failed to produce evidence that Defendant "violated its own ordinances," we further hold that Defendant did not deprive Plaintiffs of their constitutional rights as alleged in Plaintiffs' brief. Plaintiffs' argument is without merit.

III.

In light of our holdings above, we also hold that Plaintiffs' argument that they "are entitled to damages and attorney's fees pursuant to 42 U.S.C. §§ 1983 and 1988" also fails.

IV.

In their reply brief, Plaintiffs attempt to argue that, even if Defendant was correct in requiring Plaintiffs to apply for an FDO, Defendant improperly denied their application for the FDO. An appellant may not use a reply brief as a means of arguing issues it failed to argue in its original brief. See N.C.R. App. P. 28(h) (2012); *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 707-08, 682 S.E.2d 726, 740 (2009). Plaintiffs have

not preserved this argument for appellate review, and we dismiss it.

Affirmed.

Judges GEER and McCULLOUGH concur.

Report per Rule 30(e).