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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-938

Filed: 18 June 2019

Mecklenburg County, No. 18 CVS 943

LUKE M. CHARDE, JR. and wife, MAUREEN CHARDE, MACDONALD SNOW BOWDEN, and wife, ANNA C. BOWDEN, CLIFTON H. HAMMOND, HILDA P. HEATH, ANNIE MILDRED LOWERY, TONY M. PARTON, and wife, CAROLYN B. PARTON, ERIC D. SCHNEIDER, and wife, VICTORIA CARPENTER, JEANNE C. SLOAN, individually and as Trustee of THE JEANNE C. SLOAN TRUST dated 8/29/1994, and husband, JERRY L. SLOAN, EVELYN T. THARP, THOMAS D. WORKMAN, and wife, ANN WORKMAN, BRUCE WRIGHT, and wife, PENELOPE WRIGHT, HELMUT G. BRACKE REVOCABLE DECLARATION OF TRUSTE dated 5/10/02, DAISY M. RAEFORD, JOSEPH C. KONEN, and wife, JOAN KONEN, and MARK S. HARRIS, Plaintiffs,

v.

The TOWN OF DAVIDSON, a North Carolina body politic and corporate, DAVIDSON COMMONS EAST CONDOMINIUM ASSOCIATES, LLC, a North Carolina Limited Liability Company, BEACON IMG., INC., a North Carolina corporation, and NISHITH G. PATEL, Defendants.

Appeal by Defendants Davidson Commons East Condominium Associates, LLC, and Beacon IMG., Inc., from order entered 9 July 2018 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 February 2019.

K&L GATES, LLP, by Roy H. Michaux, Jr., for Defendants-Appellants Davidson Commons East Condominium Associates, LLC, and Beacon IMG., Inc.

Law Office of Kenneth T. Davies, P.C., by Kenneth T. Davies, for Plaintiffs-Appellees.

COLLINS, Judge.

Defendants Davidson Commons East Condominium Associates, LLC, and Beacon IMG., Inc.,[1] appeal the trial court's order granting Plaintiffs judgment on the pleadings on two of their seven claims for relief challenging a rezoning approval. 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*.

I. Background

This declaratory judgment action involves a challenge to the rezoning of two adjacent parcels of land (the "Property") in the Town of Davidson (the "Town"). The Property is part of a larger tract that was subject to a Conditional Planning Area and associated Master Plan ("conditional zoning") within the Town's Lakeshore Planning Area district. Under the conditional zoning that was then in effect, the Property could have been used for two three-story commercial/mixed-use buildings. The underlying

[1] The Town of Davidson is not a party to this appeal.

zoning for the Lakeshore Planning Area district would allow for two four-story mixed-use buildings.

Defendants, owner and developer of the Property, filed an application on 15 August 2016[2] to amend the approved conditional zoning to allow a commercial hotel to be built on the Property ("Application"). The provisions governing the requirements and consideration of the Application were outlined in Section 14 of the Davidson Planning Ordinance ("DPO"). During the following 15 months, pursuant to the DPO, a public input session was conducted by the Town Planning Staff; a Traffic Impact Analysis was filed with the Town; a Master Plan was submitted by Defendant Beacon IMG., Inc., and its consultant for technical review; a public hearing was conducted by the Davidson Town Board ("Town Board"); and the Planning Board met and recommended that the Application be denied as the proposed development was inconsistent with the Davidson Comprehensive Plan. On 14 November 2017, the Board of Commissioners voted 4-1 to approve Defendant's Application to rezone the Property to allow one, 68-foot building on the Property for use as a hotel.

Plaintiffs, a group of residents who live near the Property, filed this declaratory judgment action challenging various aspects of the rezoning. In their complaint, Plaintiffs asserted seven claims for relief, including the following:

FIRST CLAIM FOR RELIEF
PROCEDURAL VIOLATIONS:

[2] It is unclear from the Record whether the Application was filed 15 April or 15 August 2016. The parties refer to 15 August 2016.

> INADEQUATE NOTICE AND OPPORTUNITY TO BE HEARD
>
> 40. As described in greater detail hereinabove, the Town violated Plaintiffs' procedural rights in various ways, including the following:
>
> . . . .
>
> c) Failure to provide adequate notice of the Public Input Session or public hearing by adequate signage. This signage was deficient because it failed to provide the specific information necessary to constitute adequate notice in accordance with §14.5.7 of the DPO and N.C. [Gen. Stat.] §160A-384;
>
> . . . .
>
> THIRD CLAIM FOR RELIEF
> Noncompliance with DPO
>
> 49. In adopting the Rezoning, the Town failed to comply with numerous requirements of the DPO, including the following:
>
> . . . .
>
> c) The Planning Board's recommendation was not prepared or received until after the public hearing;

In its answer, the Town admitted as follows:

> 31. It is admitted that there are eight (8) steps in a chart set forth as (sic) the end of Section 14.5.7.1 of the DPO, and that step seven (7), [Board of Commissioners] public hearing, was conducted before step six (6), Planning Board recommendation. . . .
>
> . . . .

> 40. . . . [I]t is 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. . . .

After Defendants and the Town filed their answers, Defendants filed a motion to dismiss the fifth, sixth, and seventh claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, and a motion for judgment on the pleadings as to the first, second, third, and fourth claims pursuant to Rule 12(c). Plaintiffs moved for judgment on the pleadings as to their first and third claims pursuant to Rule 12(c). Plaintiffs voluntarily dismissed their fifth and seventh claims without prejudice.

Following a hearing on the motions, the trial court denied Defendants' motions to dismiss and for judgment on the pleadings, and granted Plaintiffs' motion for judgment on the pleadings as to their first and third claims. The trial court specifically concluded, "As a result of the Town of Davidson's failure to comply with applicable procedural requirements, the Rezoning - i.e. Ordinance 2017-16, approved as the Master Plan Amendment to the Conditional Planning Area for Davidson Commons East, Lots 4A and 4B - is hereby declared invalid and void *ab initio*, and the zoning immediately prior to the Rezoning shall remain in effect."[3]

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[3] The trial court also found, "Defendants Davidson Commons East Condominium Associates, LLC and Beacon Img., Inc. instructed the Court to assume that Plaintiffs had standing for purposes of all Motions heard on 22 May 2018[.]" Standing is a jurisdictional issue that cannot be stipulated to

The trial court certified its order for immediate appeal pursuant to Rule 54 of North Carolina Rules of Civil Procedure, and Defendants timely appealed.

II. Analysis

Defendants argue on appeal that the trial court erred in granting Plaintiffs' motion for judgment on the pleadings on their claims of procedural violations of the DPO because (1) Plaintiffs had adequate notice of the public input session, despite the Town's non-compliance with the DPO, and (2) the Town followed the rezoning review process mandated by the DPO.

A. Standard of Review

This Court reviews a trial court's grant of a motion for judgment on the pleadings *de novo*. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Judgment on the pleadings "is appropriate when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Groves v. Cmty. Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (internal quotation marks and citations omitted). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Id.* (citations omitted).

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or waived, *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28-29, 199 S.E.2d 641, 650 (1973), and thus the trial court erred in assuming standing. However, this Court reviews *de novo* a trial court's determination of standing, *Smith v. Forsyth Cty. Bd. of Adjust.*, 186 N.C. App. 651, 653, 652 S.E.2d 355, 357 (2007), and we conclude Plaintiffs adequately pled standing in their complaint.

B. Notice

Defendants first argue that the trial court erred in granting Plaintiffs' motion for judgment on the pleadings because the posted sign announcing the public input session, while not technically in compliance with the DPO, gave Plaintiffs adequate notice of the session.

"Municipal ordinances have the force of law." *Murdock v. Chatham Cty.*, 198 N.C. App. 309, 315, 679 S.E.2d 850, 855 (2009) (citing N.C. Gen. Stat. § 153A-47 (2018); *Jackson v. Bd. of Adj.,* 275 N.C. 155, 162-63, 166 S.E.2d 78, 83 (1969) (holding that "the General Assembly may . . . confer upon county boards of commissioners power to adopt zoning ordinances otherwise valid")). "In amending its zoning ordinance, a county is required to follow its own procedures." *Murdock*, 198 N.C. App. at 316, 679 S.E.2d at 855 (citing *Thrash L.P. v. Cty. of Buncombe,* 195 N.C. App. 727, 732-33, 673 S.E.2d 689, 693-94 (2009)); *see Lee v. Simpson*, 44 N.C. App. 611, 612, 261 S.E.2d 295, 296 (1980) ("The procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public. . . . To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.") (citations omitted).

Section 14.4.1[4] of the DPO states, in pertinent part:

> Notice of all public input sessions and associated site visits *shall*, at a minimum, *contain the time(s) and location(s) of all events, the contact information of the applicant, and a general description of the proposal.*
>
> . . . .
>
> C. The Planning Director *shall* place a sign on the site within the public view that *states the time and location, purpose of the public input session, and the name contact* (sic) *information of the applicant. It shall state a phone number and email for further information.* The sign shall be placed on the site at least 10 days prior to the public input session and remain on the property until the conclusion of the public input session process.

Town of Davidson, N.C., Davidson Planning Ordinances § 14.4.1 (2016) (emphasis added). 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); s*ee Murdock*, 198 N.C. App. at 316, 679 S.E.2d at 855 (concluding that a thirty-day period between the filing of a proposed zoning amendment and the hearing dates in amending the county's zoning ordinance was mandatory where the language in the zoning ordinance stated, "Completed applications *shall* be received a minimum of 30 days prior to the public hearing") (emphasis added) (citation omitted). Accordingly, it was mandatory, not merely

[4] Although Plaintiffs' complaint alleges the Town failed to "provide the specific information necessary to constitute adequate notice in accordance with §14.5.7 of the DPO[,]" Plaintiffs and Defendants address only Section 14.4.1 of the DPO on appeal, and at oral argument Plaintiffs explained that only Section 14.4.1 was argued by the parties before the trial court.

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.

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. *See Murdock*, 198 N.C. App. at 316, 679 S.E.2d at 855 (affirming the invalidation of a county's amendment of its zoning ordinance because the county did not comply with the thirty-day provision contained in its ordinance); *Frizzelle v. Harnett Cty.*, 106 N.C. App. 234, 243, 416 S.E.2d 421, 426 (1992) (concluding that the county's failure to follow its own notice procedures when adopting a proposed zoning amendment invalidated that amendment); *Lee*, 44 N.C. App. at 612, 261 S.E.2d at 296 (concluding that the county's failure to comply with the notice requirements of its own ordinance invalidated the resulting rezoning).

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.

Moreover, relying upon *Rakestraw v. Town of Knightdale*, 188 N.C. App. 129, 654 S.E.2d 825 (2008), Defendants argue the failure of the signage to include the required information is not fatal to the rezoning. However, *Rakestraw* is distinguishable from the present case.

In *Rakestraw*, defendant town's uniform development ordinance only required the sign "state a phone number to contact during business hours for additional information." *Id.* at 132, 654 S.E.2d at 828. The posted sign contained the requisite phone number and met all requirements of the relevant section of defendant town's uniform development ordinance. *Id.* at 134, 654 S.E.2d at 829. Plaintiff argued that the sign was required to include further information to comply with the overall statutory scheme of N.C. Gen. Stat. § 160A-384. *Id.* This Court concluded that the posted sign was "designed as part of the overall notice scheme to identify and locate the property that is the subject of the public hearing process." *Id.* at 135, 654 S.E.2d at 829. Thus, this Court held that defendant town's posted notice was sufficient to

meet the requirements of N.C. Gen. Stat. § 160A-384(c) and the relevant section of defendant town's uniform development ordinance. *Id.*

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*, 44 N.C. App. at 612, 261 S.E.2d at 295-96 ("Even though the board of commissioners may have complied with the enabling legislation's requirements of notice set out in [N.C. Gen. Stat. §] 153A-323, it must also comply with its own rules and this it did not do.").

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. *See, e.g., Murdock*, 198 N.C. App. at 316, 679 S.E.2d at 855 ("The trial court properly invalidated Chatham County's amendment of its Zoning Ordinance because it did not comply with the thirty-day provision contained in the Ordinance."); *Lee*, 44 N.C. App. at 612, 261 S.E.2d at 296 ("Because the Union County Board of

Commissioners violated its own ordinance's notice requirement, the zoning amendment must be set aside."); *George v. Town of Edenton*, 31 N.C. App. 648, 651, 230 S.E.2d 695, 697 (1976), *rev'd on other grounds*, 294 N.C. 679, 242 S.E.2d 877 (1978) ("Timeliness of notice in zoning matters is a mandatory requirement that is strictly construed even where prejudice to a property owner is not shown. . . . Failure to comply with the notice requirement invalidates the amendment to the Zoning Ordinance.").

III. Conclusion

Because the Town failed to comply with the DPO's notice requirements, the trial court did not err in granting Plaintiffs judgment on the pleadings as to their first claim of relief, and declaring Ordinance 2017-16 void *ab initio*. In light of this holding, we do not reach Plaintiffs' remaining argument.

AFFIRMED.

Judge INMAN concurs.

Judge DILLON concurs in result by separate opinion.

Report per Rule 30(e).

No. COA18-938 – *Charde v. Town of Davidson*

DILLON, Judge, concurring, writing separately.

I agree with the majority that Defendants failed to comply with the notice requirements set forth in the DPO and that, therefore, the trial court did not err in granting Plaintiffs judgment on the pleadings and declaring Ordinance 2017-16 void *ab initio*. Indeed, the Town concedes that it failed to comply with certain Ordinances of the DPO.

I write separately to address another ground which, I conclude, supports the trial court's order, namely, the Town's failure to follow the Conditional Planning Area Process set forth in its DPO.

The DPO sets out an eight-step process for obtaining a conditional rezoning: (1) initial meeting, (2) application, (3) public input session, (4) technical review, (5) board of commissioners work session, (6) planning board recommendation, (7) board of commissioners public hearing, and (8) board of commissioners decision. While the Town attempts to argue that it may conduct a rezoning *in the spirit* of the DPO and that certain steps may occur simultaneously, neither the plain language of the DPO, nor our General Statutes, supports this contention.

Section 14.5.6.1 of the DPO provides, in relevant part, that:

> The conditional planning area with conditions shall be placed on the Planning Board agenda for review and recommendation. *The Planning Board shall send a positive or negative recommendation to the Board of*

> *Commissioners*.
>
> . . .
>
> If the project receives a negative recommendation, the applicant may *resubmit* the project for further review by the Planning Board or *move forward to the Board of Commissioners* with a negative recommendation.

Town of Davidson, N.C., Davidson Planning Ordinances § 14.5.6.1 (2016) (emphasis added). This language clearly requires the Planning Board recommendation in Step 6 to come before the Board of Commissioners Public Hearing in Step 7.[5] Moreover, Section 160A-387 of our General Statutes provides that "[t]he city council shall not hold its required public hearing or take action until it has received a recommendation regarding ordinance from the planning board." N.C. Gen. Stat. § 160A-387 (2016).

Indeed, under the Town's procedure, members of the public are entitled to respond at the public hearing (Step 7) to what the Planning Board is recommending (Step 6). But members of the public are unable to address concerns raised by the Planning Board recommendation at the public hearing if they do not have access to that recommendation prior to the hearing. As the majority notes, "[t]o be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights." *Lee v. Simpson*, 44 N.C. App. 611, 612, 261 S.E.2d 295, 296

[5] Section 16.2(c) of the DPO provides that "[t]he words 'shall,' 'must,' and 'will' are mandatory in nature, implying an obligation or duty to comply with the particular provision." Town of Davidson, N.C., Davidson Planning Ordinances § 16.2(c) (2016).

(1980). The public's right to receive and be aware of the Planning Board recommendation *before* its opportunity for public comment falls within this purview.

Thus, the Town's failure to follow the process of the DPO in the underlying rezoning constitutes an additional basis for the trial court's grant of judgment on the pleadings to the Plaintiffs and declaration that Ordinance 2017-16 is invalid and void.