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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-947**

Town of Denmark,
Respondent,

vs.

Suburban Towing, Inc., et al.,
Appellants.

**Filed March 30, 2010
Affirmed in part, reversed in part, and remanded
Worke, Judge**

Washington County District Court
File No. 82-C5-98-006049

Robert A. Alsop, Joe Yao-Chou Yang, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for respondent)

David T. Magnuson, Magnuson Law Firm, Stillwater, Minnesota (for appellants)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins, Judge.*

UNPUBLISHED OPINION

WORKE, Judge

In this conditional-use-permit (CUP) dispute, appellant-property owners argue that (1) the district court judge should have been disqualified because his impartiality was

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

reasonably questioned and (2) revocation of the CUP was improper because the court failed to consider the impact on appellants' investment-backed expectations. By notice of review, respondent-town challenges the district court's refusal to award attorney fees and to impose a waiting period before appellants are permitted to reapply for another CUP. We affirm the district court on appellants' challenges, but reverse and remand for a determination of reasonable attorney fees and imposition of the stipulated waiting period.

FACTS

Appellants Suburban Towing, Inc., et al. own a parcel of property in respondent Town of Denmark. Appellants operated an auto-body repair facility, used-car lot, and impound lot on the property pursuant to a Conditional Use Permit (CUP) issued in 1995. Two years later, appellants violated the CUP by running an auto-recycling business and by having too many vehicles on the property. Appellants were given a certain amount of time in which to clean the property and desist from operating impermissible activities but failed to do so, resulting in the district court issuing a revocation order.

In June 1999, respondent moved the district court to find appellants in contempt for failure to comply with the district court's revocation order. The parties resolved the dispute and presented the court with a stipulation, finding appellants in contempt for continuing business operations but giving appellants an opportunity to purge the contempt. The stipulation was adopted by the district court. But in April 2004, appellants again failed to comply with the CUP, and respondent moved to enforce the provisions of the stipulation. The district court issued an order continuing respondent's

motion as long as appellants fulfilled certain requirements. Appellants again failed to satisfy the requirements.

On February 17, 2005, the parties reached a second stipulation in which appellants agreed to correct the violations and pay respondent's attorney fees. The next day, the district court ordered appellants to comply with the agreed-upon terms, which included discontinuing their business operations. Appellants, however, failed to comply, and in March 2006, the district court ordered the property locked.

On August 1, 2007, the parties entered into a third stipulation that invalidated all prior CUPs. The parties agreed that the district court would retain jurisdiction over the matter for two years to enforce the terms of a new CUP. Additionally, the parties agreed that respondent would be entitled to attorney fees and costs associated with revocation proceedings in the event appellants violated the terms of a new CUP. In the event respondent brought an action to revoke a new CUP, the parties agreed that appellants were required to wait a minimum of two years from the date of revocation before applying for another CUP. The court found that the agreement was fair and reasonable and adopted the stipulation in an order.

On February 4, 2008, respondent issued appellants a CUP in accordance with the third stipulation. On September 12, 2008, respondent again moved to revoke the CUP for violations. On October 10, 2008, the district court held a hearing on respondent's motion. At the hearing, the district court and the parties discussed the chronic nature of the case. During discussions, the district court judge disclosed his prior relationship with respondent, stating: "I actually used to be [respondent's] attorney at one point even.

That's how old this file goes back for me.” Similarly, when appellants’ attorney stated that the land had been purchased in 1993, the judge stated, “so you would have bought [the land] around the time that I was [] [respondent’s] attorney. . . . It was probably around ’89 or ’90 until about ’95 or ’96.”

The district court then scheduled a hearing in which to address respondent’s allegations that appellants violated the CUP. Following the January 26, 2009 hearing, the district court revoked the CUP. The district court found that appellants were notified that CUP violations needed to be remedied by a certain date, but corrected none of the deficiencies by the deadline. The court also ordered that appellants “shall not . . . reapply for a CUP . . . for [] the same use (or any similar use) for a period of twelve (12) months from the date of this Order.”

On March 19, 2009, appellants moved for amended findings, vacation of the judgment or for a new trial, claiming that the district court judge should have been disqualified because of “his impartiality.” Appellants also argued that the revocation constituted a governmental taking. At the hearing on appellants’ posttrial motions, appellants’ new attorney stated that the district court judge should have been disqualified because one of the judge’s former partners once drafted a CUP that respondent issued to appellants. He further stated that the “whole history of [the case] has been recited in [the] findings. . . . And when you draw in the . . . long and tortuous history, [] it goes back to when [the judge’s] partner prepared the [CUP].” The district court explained that any prior CUP was not at issue and that the judge had not done any work for respondent for sixteen years. The court also explained that he mentioned his former partner’s

involvement in his findings to provide a historical background and that the order specifically states that the CUP at the core of the matter was issued in 2008 when the judge had already been on the bench for several years.

The district court affirmed the February 17, 2009 order with one exception—the court concluded that the reapplication waiting period should not be imposed. The district court also denied respondent’s request for attorney fees and costs. This appeal follows.

D E C I S I O N

Disqualification

Appellants first argue that the district court judge was obligated, under the Code of Judicial Conduct, to disqualify himself because his impartiality was reasonably questioned. Whether a judge has violated the Code of Judicial Conduct is a question of law, which this court reviews de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

The Code of Judicial Conduct requires a judge to “perform the duties of judicial office impartially, competently, and diligently.” Minn. Code Jud. Conduct, Canon 2 (July 1, 2009). A judge must disqualify himself if his “impartiality might reasonably be questioned.” Minn. Code Jud. Conduct, Rule 2.11(A). One such circumstance that would require disqualification is when the judge “served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association.” *Id.*, Rule 2.11(A)(5)(a). The supreme court has stated that “it is presumed that judges will set aside collateral knowledge and approach cases with a neutral and objective disposition.” *Dorsey*, 701 N.W.2d at 248-49

(quotation omitted). In order to defeat this presumption, appellants must present “evidence of favoritism or antagonism.” *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008). A case-by-case analysis is required in determining whether a judge should be disqualified based on potential impartiality. *Id.* at 601. “[T]he question is whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge’s impartiality.” *Id.*

Appellants argue that the district court judge’s previous relationship with respondent and his former partner’s drafting of a prior CUP required disqualification. We disagree. First, the timing of appellants’ objection is troubling. Under Minn. R. Civ. P. 63.03, a party may seek to disqualify a judge “within ten days after the party receives notice of which judge . . . is to preside . . . but not later than the commencement of the trial or hearing.” No such disqualification was sought here. Further, the district court judge disclosed in October 2008 that he had a prior relationship with respondent. Had appellants been unaware of the judge’s previous relationship, the court’s discourse put them on notice, and they should have questioned the judge’s impartiality at that time, if in fact there was concern. Second, the sole issue was the 2008 CUP. Although the district court judge mentioned the existence of an earlier invalidated CUP, it was done so to provide procedural history and context.¹

Further, as the district court judge stated to appellants’ attorney, their working community is not large and that a different judge in the county used to work for

¹ The district court judge represented respondent in 1996, several years before he was appointed to the bench and was assigned this matter.

appellants' attorney. The district court stated: "by your reasoning, I suppose [the other judge] could probably never hear a . . . case that arises out of your city. . . . I mean[,] think where this goes, my old law firm represented at one point about forty percent of the municipalities in the county. I'd probably have the easiest job around." Appellants' attorney attempted to distinguish the matter by pointing to the fact that the district court judge recited the procedural history in its findings. But the district court judge would be subject to disqualification only if his prior partner participated substantially in the current matter. The controversy at hand did not involve the CUP that the judge's prior partner drafted; thus, there is no substantial participation. Therefore, we are not presented with a disqualifying situation.

Revocation of CUP

Appellants next argue that in revoking the CUP, the district court failed to consider the economic impact on appellants. Appellants contend that the district court's failure to consider the economic impact violated their due-process rights and that the action constitutes a regulatory taking. This court reviews a zoning action or one regarding a CUP to determine whether it was reasonable. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981). The denial of a CUP is judicial in character because the zoning authority is applying specific standards set by the zoning ordinance to a particular, individual use. *Id.* at 417.

Appellants are incorrect in asserting that the conditions in the CUP equate to a taking. Land-use regulation is not a compensable taking if it does not deprive the property of all reasonable use. *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d

757, 766 (Minn. 1982). Appellants do not show that their property has no reasonable use. Appellants cite to factors, including economic impact, that the court is to consider in a taking case, but because appellants have not shown that this is a taking case, the court was not required to consider the economic impact. *See Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258, 260 (Minn. App. 1992) (stating that in determining whether regulation of a property is a taking includes economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the government regulation), *review denied* (Minn. Jan. 15, 1993).

The sole issue was whether appellants complied with the conditions of the CUP. Therefore, the court was not required to consider economic considerations and impacts on investment-backed expectations because those factors apply only in determining whether a taking occurred, and no taking occurred because appellants have not shown that they have lost all reasonable use of the property. Accordingly, the district court did not err in revoking the CUP.

Attorney Fees

Respondent argues that the district court abused its discretion in denying its motion for costs, disbursements, and reasonable attorney fees. Attorney fees are not recoverable unless there is a specific contract permitting or a statute authorizing such recovery. *Barr/Nelson, Inc. v. Tonto's, Inc.* 336 N.W.2d 46, 53 (Minn. 1983). The awarding of attorney fees is discretionary with the district court. *Peterson v. City of Elk River*, 312 N.W.2d 243, 246 (Minn. 1981).

Respondent contends that it is permitted to recover attorney fees based on the August 2007 stipulation and order. A stipulation is treated as a binding contract. *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). The 2007 stipulation provides that “[t]he parties agree [that respondent] is entitled to reasonable attorney’s fees and costs associated with any revocation of the new CUP.” Respondent moved to recover attorney fees after the revocation of the 2008 CUP. Although finding that “stipulations are treated as contracts,” the district court concluded that “the Attorney’s Fees Provision is unenforceable as a contract obligation or as a condition of the CUP.”

The attorney-fees provision was a negotiated term of the stipulation. The district court, while acknowledging that stipulations are generally treated as contracts, ruled that the attorney-fees provision was unenforceable as a condition of the CUP because respondent has no authority to impose attorney fees as a condition of a CUP. However, the provision is not a condition of the CUP because it does not come into play unless the terms of the CUP have been violated. Thus, appellants are not required to pay attorney fees in order to obtain a CUP; they are responsible for attorney fees only if they fail to meet the conditions of a CUP. The district court abused its discretion in failing to award respondent attorney fees because there is a governing contract permitting such recovery. We reverse and remand for a determination of reasonable attorney fees.

Waiting Period

Similarly, respondent argues that the district court abused its discretion in striking the 12-month waiting-period restriction. In its March 27, 2009 order, the district court stated: “The Court has independently reconsidered the appropriateness of the 12-month

waiting period for reapplication [and] concludes that the waiting period should not be imposed.” Respondent contends that the waiting-period provision was negotiated by the parties in an attempt to end years of litigation. The provision is in the 2007 stipulation and states: “[i]n the event the new CUP is revoked, [appellants] agree not to apply for another CUP for a minimum period of two years from the date of revocation.” It is unknown why the waiting period was reduced to 12 months in the district court’s order.

As with the attorney-fees provision, the parties agreed to this waiting period. Similar to the attorney-fees provision, this term is not a condition of the CUP; it comes into play only if the conditions in the CUP are violated. This agreement should be enforced; therefore, we reverse and remand this issue for the district court to impose the agreed-upon waiting period.

Affirmed in part, reversed in part, and remanded.