NO. COA10-893

NORTH CAROLINA COURT OF APPEALS

Filed: 15 March 2011

R. DAVID BECK, Individually;
PLAZA WEST JEWELRY & LOAN, INC.;
JAMES GLENN HICKS, JR., Individually;
SOUTH RALEIGH PAWN, INC.; JAMES W.
MASSEY, Individually; AMERICAN GOLD
EXCHANGE, INC.; DAVID WILSON;
CAPITAL CASH, LLC; DONALD RAY SULT,
Individually; SULT ENTERPRISES, INC.,
d.b.a. BOULEVARD GOLD EXCHANGE & LOAN;
CHARLES BOYETTE, Individually;
FRIENDSHIP JEWELRY & LOAN, INC.;
WILLIAM S. DAWSON, III, Individually;
CAROLINA JEWELRY & PAWN, INC.; and
NORTH STATE JEWELRY & PAWN, INC.,
Plaintiffs,

v. Wake County
No. 09 CVS 7458

CITY OF RALEIGH,
Defendant.

Appeal by plaintiffs from order entered 22 March 2010 by Judge Kenneth C. Titus in Wake County Superior Court. Heard in the Court of Appeals 15 December 2010.

Bailey & Dixon, LLP, by Jeffrey P. Gray, for plaintiffs-appellants.

City Attorney Thomas A. McCormick, by Deputy City Attorney Dorothy K. Leapley, for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiffs, incorporated pawn shops and individuals operating pawn shops, appeal from the trial court's 22 March 2010 order

granting defendant City of Raleigh's (the "City") motion for summary judgment. After careful review, we affirm.

Background

In 2006, the Raleigh City Council began considering a zoning ordinance which would serve to restrict pawn shops to certain locations within the City. At that time, pawn shops were permitted in the Business, Thoroughfare, Industrial-1, Industrial-2, Buffer Commercial, Neighborhood Business, and Shopping Center zoning districts. On 17 February 2009, after conducting 14 meetings to discuss the issue over approximately two and one-half years, the City Council enacted Raleigh Zoning Ordinance TC 17-08. This ordinance restricted pawn shops to the Business, Thoroughfare, Industrial-1, and Industrial-2 zoning districts. Those pawn shops already in existence are allowed to remain in their current locations.

On 17 April 2009, plaintiffs filed an application and order extending time to file a complaint with the trial court, which was granted. On 1 May 2009, plaintiffs filed a complaint for declaratory judgment and a motion for preliminary injunction alleging, *inter alia*, that the City Council's enactment of TC 17-08 was arbitrary and capricious. On 1 March 2010, the City filed a motion for summary judgment. Arguments from counsel on the motion were heard on 15 March 2010. By order entered 22 March 2010, the trial court granted the City's motion for summary judgment. Plaintiffs timely appealed to this Court.

Standard of Review

This case involves a declaratory judgment action brought by plaintiffs to determine the validity of TC 17-08. "It is settled law in North Carolina that such a zoning suit is a proper case for a declaratory judgment, and also that, in such a case, summary judgment may be entered when otherwise proper, upon motion of either plaintiff or defendant." *Graham v. City of Raleigh*, 55 N.C. App. 107, 109, 284 S.E.2d 742, 744 (1981), *disc. review denied*, 305 N.C. 299, 290 S.E.2d 702 (1982).

> "The standard of review on appeal [from] summary judgment is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. The question is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is a genuine issue as to any material fact."

Woods v. Mangum, __ N.C. App. __, __, 682 S.E.2d 435, 438 (2009) (quoting *Sellers v. Morton*, 191 N.C. App. 75, 81, 661 S.E.2d 915, 920-21 (2008)), *aff'd per curiam*, 363 N.C. 827, 689 S.E.2d 858 (2010). "The burden is upon the moving party to show that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *McGuire v. Draughon*, 170 N.C. App. 422, 424, 612 S.E.2d 428, 430 (2005). "All facts asserted by the [nonmoving] party are taken as true and their inferences must be viewed in the light most favorable to that party." *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). On appeal, this Court reviews an order de novo granting summary judgment. *McCutchen v. McCutchen*, 360 N.C. 280, 285, 624 S.E.2d 620, 625 (2006).

Discussion

Plaintiffs primarily argue that the trial court erred in granting summary judgment for the City because there were material issues of fact pertaining to the reasonableness of enacting the ordinance and whether the enactment was arbitrary and capricious. Plaintiffs contend that "the ordinance does nothing that the existing ordinances governing pawn shops did not already accomplish."

> The procedures established under the General Statutes, Raleigh City Charter, and Raleigh City Code *provide the basis for a legislative, rather than a judicial determination* on the part of the City Council. Zoning petitioners are not required to offer evidence nor is the legislative body required to make findings that the requested rezoning promotes the health, morals, or general welfare of the people of Raleigh. *A zoning ordinance will be declared invalid only where the record demonstrates that it has no foundation in reason and bears no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense*. It is not required that an amendment to the zoning ordinance in question accomplish or contribute specifically to the accomplishment of all of the purposes specified in the enabling act. It is sufficient that the legislative body of the city had reasonable grounds upon which to conclude that one or more of those purposes would be accomplished or aided by the amending ordinance. The legislative body is charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. When the action of the legislative body is reviewed by the courts, the latter are not free to substitute their opinion for that of the legislative body so long as there is some *plausible basis* for the conclusion reached by that body.

Graham, 55 N.C. App. at 110, 284 S.E.2d at 744 (internal citations omitted) (emphasis added); *accord Armstrong v. McInnis*, 264 N.C. 616, 626-27, 142 S.E.2d 670, 677 (1965). "A duly adopted zoning ordinance is presumed to be valid. The burden is on the complaining party to show it to be invalid." *Graham*, 55 N.C. App. at 110, 284 S.E.2d at 744; *accord Schloss v. Jamison*, 262 N.C. 108, 115, 136 S.E.2d 691, 696 (1964) ("[A] property owner who asserts the invalidity of such zoning ordinance has the burden of establishing its invalidity."). "Ordinarily, the only limitation upon [a city council's] legislative authority is that it may not be exercised arbitrarily or capriciously." *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971). However,

> [w]hen the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare.

In re Appeal of Parker, 214 N.C. 51, 55, 197 S.E. 706, 709 (1938). Allegations that the City Council's decision was unreasonable, or arbitrary and capricious, does not create a factual dispute. The material facts are not in dispute in this case; rather, "[t]he controversy is as to the legal significance of those facts." *Graham*, 55 N.C. App. at 109, 284 S.E.2d at 744.

Here, the trial court did not err in granting summary judgment in favor of the City because there was not a material issue of fact

that would have precluded summary judgment, the record demonstrates a "plausible basis" for the enactment of the ordinance, and the decision to enact the ordinance was not arbitrary and capricious. The City Council heard from those for and against the enactment of TC 17-08 over the course of 14 meetings that took place over two and one-half years. Evidence offered at the public hearings and minutes of the City Council and its committees document that the following considerations, among others, were before the City Council and formed the basis for its adoption of the zoning ordinance: (1) pawn shops in Raleigh have tended to locate in "fragile" or "high risk" areas close to residential neighborhoods and in shopping centers; (2) having numerous pawn shops in one area can decrease the character of a residential neighborhood and discourage people from buying houses that are located close to a pawn shop; (3) adjacent property values can be affected by pawn shops; (4) pawn shops draw in a criminal element since they are often utilized by thieves to obtain cash for stolen goods; (5) the location of pawn shops can affect location decisions by other businesses; (6) restricting pawn shops to zoning districts that are further away from neighborhoods will help address concerns about the impact of pawn shops on neighborhoods; and (7) other jurisdictions have passed similar zoning laws to remedy the same concerns.

Plaintiffs contend that the evidence before the City Council constituted "unsubstantiated comments or observations" that would never "pass muster" if this were a quasi-judicial action.

Plaintiffs even encourage this Court to adopt a new standard of review that requires a whole record review to determine if there was substantial evidence to support the City Council's decision. The plausible basis standard does not require a substantial amount of evidence to support the City Council's determination. *See, e.g., Ashby v. Town of Cary*, 161 N.C. App. 499, 503-04, 588 S.E.2d 572, 574-75 (2003) (holding that a plausible basis existed for the City Council's denial of an application to rezone where the Council felt that granting the application would create a "minimal increase in traffic" on a city street); *Graham*, 55 N.C. App. at 111, 284 S.E.2d at 745 (holding that City Council had reasonable grounds to rezone petitioner's property where City Council determined that the City was in need of "Office and Institution District zoning"; that it would not harm nearby residential neighborhoods; and that the geographical location and size were appropriate for rezoning). This Court is bound to follow the standard of review set out by our Supreme Court and consistently followed by this Court despite plaintiffs' claims that the standard should require substantial evidence to support the City Council's zoning decisions. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Here, the evidence before the City Council set forth a plausible basis for enacting TC 17-08 — that the public health and safety is negatively affected by the location of pawn shops in certain zones in the City of Raleigh. Thus, the City Council's decision was reasonable and was not arbitrary and capricious. Plaintiffs point out that there were proponents of pawn shops

present at the meetings who claimed that pawn shops are beneficial to the community as they provide cash advances and purchase goods from citizens who quickly need to obtain money. Plaintiffs also focus on the fact that the Department of City Planning prepared a report in which it concluded that pawn shops already go through a rigorous licensing procedure. The "[i]mpact [a]nalysis" results contained in the report were as follows: "Retaining the existing regulations would result in no negative impacts as current City Code requires the City Council to review a Pawn Shop application and determine that the business location is not detrimental to the neighborhood prior to the issuance of the license." While this report may have supported plaintiffs' position before the City Council, the Planning Commission's recommendation is not binding upon the City Council. *See In re Markham*, 259 N.C. 566, 571, 131 S.E.2d 329, 334 (stating that the report of the Planning Commission "did not restrict or otherwise affect the legislative power of the City Council"), *cert. denied*, 375 U.S. 931, 11 L. Ed. 2d 263 (1963).

Plaintiffs also contend that the trial court relied on documents that were not before the City Council as well as an affidavit that contained hearsay; however, plaintiffs have not demonstrated how the absence of this information would have created a material issue of fact or in any way changed the outcome of the summary judgment motion. Moreover, "this Court considers the record before the legislative body in assessing the validity of a zoning action." *Ashby*, 161 N.C. App. at 503, 588 S.E.2d at 574

(2003). Accordingly, our decision in this matter is based on the record before the City Council, not the trial court.

Finally, plaintiffs argue that TC 17-08 constitutes exclusionary zoning. "Exclusionary zoning occurs when a municipality impermissibly uses its zoning power to prevent a lawful type of land use within its borders." *France Stone Co., Inc. v. Charter Twp. of Monroe*, 802 F. Supp. 90, 104 (E.D. Mich. 1992); *see also Hawthorne v. Vill. of Olympia Fields*, 790 N.E.2d 832, 844 (Ill. 2003) (Garman, J., dissenting) ("Exclusionary zoning occurs when a municipality totally excludes a business from operating anywhere within its corporate boundaries, without exception."); *Suffolk Hous. Serv. v. Town of Brookhaven*, 397 N.Y.S.2d 302, 306 (N.Y. 1977) ("Exclusionary zoning has been defined as land use control regulations which singly or in concert tend to exclude persons of low or moderate income from the zoning municipality."). North Carolina has not specifically recognized a cause of action for exclusionary zoning and plaintiffs have not persuaded us to do so here. Although exclusionary zoning has not arisen as a common law cause of action in North Carolina, this Court has addressed similar claims under the Equal Protection Clause. *Brown v. Town of Davidson*, 113 N.C. App. 553, 439 S.E.2d 206 (1994) (holding that a class of individuals was not denied equal protection under the law when the City Council denied its petition to rezone). Plaintiffs in this case stated in their complaint that the ordinance is "unconstitutional" but have not raised an equal protection argument.

Conclusion

In sum, we hold that the undisputed facts establish that a plausible basis exists for enacting TC 17-08 and that the City Council did not use its legislative authority arbitrarily or capriciously. Accordingly, we hold that the trial court did not err in granting summary judgment in favor of the City.

Affirmed.

Judges CALABRIA and ELMORE concur.

Report per Rule 30(e).