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## Coates' Canons Blog: Attorneys' Fees For Acting Outside the Scope of Authority (G.S. 6-21.7)

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Litigation is a bit like going out to lunch, Dutch treat. The general rule is that each side pays its own attorneys' fees and costs. State and federal laws, however, can change that rule, requiring the losing side to pay in certain types of cases. In 2011, the North Carolina legislature enacted G.S. 6-21.7, which allows a judge to award attorneys' fees to the prevailing party in any action in which a city or county is a party if the judge finds that the city or county "acted outside the scope of its legal authority." The award of attorneys' fees is *mandatory* if the judge also finds that the city's or county's action was an abuse of its discretion. The court of appeals recently decided the first case interpreting G.S. 6-21.7. The decision provides helpful guidance to trial courts for determining when a city or county has abused its discretion, but it doesn't directly address the scope of the statute generally.

It's not clear what types of actions are "outside the scope" of a city's or county's legal authority" for purposes of this statute. The statute doesn't define the phrase, which could be interpreted in several different ways. It might apply only when a city or county exercises powers or engages in specific activities that have not been delegated to it by the legislature. A case invalidating the use of an unauthorized impact fee, for example, would fall under this interpretation. Or it could apply any time a city or county fails to comply with any statutory or constitutional requirement. This broader interpretation would encompass situations where the city or county has the authority to undertake the activity in question, but exercises that authority in an unlawful way. Under this interpretation, for example, attorneys' fees might be available if a local government failed to provide proper notice of a hearing for a rezoning, or failed to advertise for bids on a construction contract.

Furthermore, the phrase "abuse of discretion" isn't defined in G.S. 6-21.7. Nothing in the statute explains what distinguishes an action that is merely beyond the scope of a local government's authority from one that is both unlawful and an abuse of discretion.

*Etheridge v. Currituck County* involved a rezoning of a small tract of land from agricultural to heavy manufacturing. Plaintiffs sought a preliminary injunction, alleging, among other things, that the rezoning constituted illegal "spot zoning," and requesting an award of attorneys' fees and costs under G.S. 6-21.7. (For more on what constitutes illegal spot zoning – as opposed to legal spot zoning – see David Owens' blog post [here](#).) The trial court granted the plaintiffs' motion for summary judgment, holding that the county did engage in illegal spot zoning, but the court denied plaintiffs' request for attorneys' fees. The county appealed the spot zoning ruling, and the plaintiffs appealed the denial of attorneys' fees. The court of appeals affirmed the trial court's ruling on both issues.

The opinion sets out the standard of review in cases involving statutory attorneys' fees provisions. When a statute *allows* the award of attorneys' fees, the decision is in the discretion of the trial court and can be overturned on appeal only if the trial court abused its discretion. This standard of review defers to the trial court's assessment of the facts and application of the law. When a statute *requires* an award of attorneys' fees, however, the standard on appeal is *de novo* – meaning that the court reviews the facts and applies the law as if it were the trial court. This standard allows the appellate court to substitute its own judgment for that of the lower court based on that review.

The plaintiffs made two arguments. The first was that illegal spot zoning is, by definition both an action outside the scope of the county's authority and an abuse of discretion. As summarized by the court, the argument was: "[S]ince local governments only have discretion to enact zoning legislation when they are acting within the limitations imposed by the Constitution and by statute, any action which exceeds those limitations must also exceed the discretionary authority of the local government such that the action constitutes an abuse of discretion as a matter of law, which in turn requires an automatic award of attorney's fees." *Slip op. at 17-18*. The court rejected this argument, finding that it is not supported by the plain language of the statute. The statute contains two separate standards for the award of attorneys' fees and costs: it's discretionary if the local government acts outside its authority, and it's mandatory if the action is an abuse of discretion.

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Plaintiff's argument, the court concluded, would "collapse the two distinct inquiries into one, essentially deleting a portion of the statute." *Slip op. at 19*. The wording of the statute, according to the court, clearly demonstrates a legislative belief that "a local government could erroneously act outside the scope of its legal authority but yet not be acting in a manner 'so arbitrary that it could not have been the result of a reasoned decision.'" *Slip op. at 20 (citation omitted)*.

Plaintiffs also argued that the facts of the case demonstrated an independent basis for concluding that the county abused its discretion. Upon review of the stipulated facts, including comments at the hearings and a statement made by a commissioner at the meeting, the court noted that the board considered multiple factors and points of view in its review of the application. Even though the county's reasoning was not sufficient to satisfy the legal standard for a lawful spot zoning, the court found that it was not "so unreasonable...that it could not have been the result of a reasoned decision." *Slip op. at 24 (citation omitted)*. As such, the court affirmed the trial court's decision to have each party bear its own attorneys' fees and costs.

So what does the case tell us about G.S. 6-21.7?

- If court finds that a city or county has acted outside the scope of its authority but did not abuse its discretion, the award of attorneys' fees and costs is up to the discretion of the trial judge.
- A mandatory award is triggered only if the trial court makes a separate finding of abuse of discretion.
- A finding of abuse of discretion appears to involve consideration of whether the city or county made a reasoned decision, factoring in how the decision was made and the circumstances surrounding it. But it cannot be based solely on the fact that the unlawful action was taken.

The case doesn't directly address what constitutes an action "outside the scope of legal authority." Since the *Etheridge* plaintiffs argued for a mandatory award, the court did not rule on whether a discretionary award would have been justifiable in this case. The opinion does state however, that "the trial court properly determined that the rezoning constituted illegal spot zoning and thus that the County acted *outside the scope of its legal authority*." *Slip op. at 17 (citing Alderman v. Chatham County, 89 N.C. App. 610, 616 (1988)) (emphasis added)*. This conclusion is based on language in the case law, which predates the attorneys' fees statute, but nonetheless describes illegal spot zoning as being in excess of local government authority.

What does *Etheridge* tell us about the scope of the statute as applied to future cases? Illegal spot zoning is a type of illegal action that falls in between the two possible interpretations I described at the beginning of this blog post. The defect was not purely procedural, and it arose in the exercise of a power (zoning) that is explicitly delegated to cities and counties. Although the court didn't analyze or discuss the types of actions that fall under the new statute, its conclusion that illegal spot zoning is outside the scope of the county's legal authority suggests that the attorneys' fees provision can apply even when the unit is exercising authorized powers. It remains unclear, however, whether it will apply to all illegal actions, regardless of whether the specific defect is procedural or substantive in nature.

## Links

- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=6-21.7](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=6-21.7)
- [appellate.nccourts.org/opinions/?c=2&pdf=31116](http://appellate.nccourts.org/opinions/?c=2&pdf=31116)
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