MEMORANDUM

To: Chapel Hill Board of Adjustment

From: Ralph D. Karpinos, Town Attorney

Subject: Appeal of Joseph Patterson regarding Town Staff Position on Cobb Terrace Steps

Date: December 5, 2019

Memorandum On Issues Other than Standing

The purpose of this memorandum is to present, in advance of the Board's hearing, the Town Staff's arguments other than Standing.

I. The Statute of Limitations has run on any right to challenge the validity of the path

A. This Appeal is barred by the Statute of Limitations in N.C.G.S. Chapter 160A.

Appeals from the issuance of a Special Use Permit are required to be filed within 30 days of the decision. N.C.G.S. Sec. 160A-388(e2)(2). Similarly, appeals from any decision of an administrative official charged with enforcement of a zoning ordinance are required to be filed within 30 days. N.C.G.S. Sec. 160A-388(b1)(3).

In this case, neither the 2013 special use permit approval (on an application for a neighboring property) nor the 2013 Town planning staff determination, acknowledging that the Town had effectively waived any claim to enforce the terms of the 1977 permit and path location, were appealed by any neighbor, despite the Record showing that the issue of the path location was raised and discussed at the time.

Mr. Patterson had actual or constructive notice of the Town planning staff position that the relocation of the stairs had been accepted as meeting the requirements of the special use permit in 2013, as demonstrated by his email in the 2013 Agenda materials.

The staff's position was clearly stated in the agenda items in 2013. One cannot simply ask again, in 2019, for the staff to restate its opinion and thereby trigger a new opportunity to litigate a matter settled years ago.

If Mr. Patterson in this case is able to ask for a "determination" entitling him to file an appeal to the Board of Adjustment, then the logical extension of that argument would be some other neighbor could ask the same question again and, presumably receive a similar response from someone on the Town staff which could again be appealed to this Board. Clearly, the law is not designed to allow such an unending cycle of appeals.

Finally, if any email message in 2019 did constitute a determination entitling an appeal to be filed with the Board of Adjustment, the email from Jim Huegerich on April 17 was such a message. Repeating it in another email in September should not be construed as another determination. The application filed in this case was more than 30 days after the April 17 message and should be considered barred by the 30 day Statute of Limitations. *Cf. WTOA v. Town of Cary Board of Adjustment*, 507 S.E.2d 589, 131 N.C. App. 696 (1998).

B. The Town would be unable to require relocation of the steps based on the Statute of Limitations in N.C.G.S. Sec. 1-51.

N.C.G.S. Sec. 1-51 states that the Statute of Limitations for a violation of a land-use permit is five years from when the Town is aware of the facts constituting the violation.

> **§ 1-51. Five years.**
> Within five years –
> . . . .
> (5) Against the owner of an interest in real property by a unit of local government for a violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law. This subdivision does not limit the remedy of injunction for conditions that are actually injurious or dangerous to the public health or safety. The claim for relief accrues upon the occurrence of the earlier of any of the following:
> a. The facts constituting the violation are known to the governing body, an agent, or an employee of the unit of local government.
> b. The violation can be determined from the public record of the unit of local government.
> (Emphasis added.)

The 1987 letter in the Record shows that the Town has been aware of the violation for at least 32 years. The statement in a 2013 Staff Report effectively concedes that the Town has accepted the relocated path and steps and complying with the owner's obligations under its 1977 permit.

See Record, pages 105-106 of the February 27, 2013 agenda (on an application for a neighboring property) responding to issues raised by Cobb Terrace neighbors.

> "The Cobb Terrace stairway connection has functioned as the de facto access corridor for the Northampton development for roughly the past 35 years. Unusable remnants of the old trail remain, located in the Resource Conservation District and Jordan Riparian Buffer corridor. Given that the trail corridor was replaced with the Cobb Terrace stairway, we believe the terms of the original Special Use Permit requiring a connection have been met." (Emphasis added.)

The Town Staff correctly concluded that any attempt to enforce the terms of the 1977 permit and require relocation of the stairway would be found to be barred by the Statute of Limitations.

II. Any effort of the Town to try to enforce the terms of the 1977 permit would be barred under the doctrine of laches.

Because of the time that has elapsed and the Town's acceptance of the steps as they currently exist as meeting the original terms of the development's approval, the staff is of the opinion that the doctrine of laches would defeat any effort by the Town now to require the owner of the subject property to install a path at a location other than where the current steps and path are located.

Our Court of Appeals has recognized that laches can be asserted against a municipality to prevent a municipality from enforcing its own ordinances. *Abernethy v. Town of Boone Board of Adjustment*, 109 N.C. App. 459, 427 S.E. 875 (19993); *Town of Cameron v. Woodell*, 150 N.C. App. 174, 563 S.E. 2d 198

(2002). The Court in those two cases recognized the circumstances which supported the application of the doctrine of laches, including:

> The municipality being aware of the violation.
> A failure to take any action to enforce the requirements.
> Providing some assurance that the apparent violation was acceptable.

See Abernethy, 427 S.E. 2d at 878; *Cameron*, 563 S.E. 2d at 201.

The Record in this case indicates that the Town:

> was aware of the improper location of the path and stairs as early as 1987;
> did not pursue efforts to seek compliance at that time; and,
> acknowledged, in 2013, that the current location of the path and stairs was acceptable.

The Staff opinion in the recent email messages to Mr. Patterson that the Town would not pursue any enforcement action was reasonable because any effort to do so would have been subject to rejection by the Court based on the doctrine of laches.

The Applicant apparently now argues the Town could revoke the special use permit which required the path to Cobb Terrace in another location. Revocation of the special use permit would have no material effect unless the Town then sought to take the next step and go to Court to seek compliance, where the statute of limitation and doctrine of laches would clearly preclude any attempt to shut down the current location of the steps.

III. Remedy being sought is beyond Board's authority.

The Applicant's Statement of Justification concludes with the following:

> "The board of adjustment should reverse the determination that enforcement is time barred and require the town staff to pursue appropriate remedies for the violation of the SUP."

If the Board determines that the Applicant has standing it could then consider whether this appeal is barred by the Statute of Limitations or laches.

If the Board further determines that the Town is not barred from seeking enforcement of the terms of the 1977 Special Use Permit, the Board may then consider whether to vote to enter its own opinion regarding whether the Town should pursue enforcement of the terms of the 1977 special use permit and seek relocation of the pedestrian path and steps.

However, the Board does not supervise Town staff and its determination would still be subject to the Town Council taking some action to direct the Town staff to pursue a legal effort to revoke a special use permit. Importantly, the Applicant does not need this Board to conclude the staff is in error in order to plead such a case directly to the Town Council.

Conclusion

For all of the above stated reasons, the Board of Adjustment should conclude that the Town staff reasonably concluded that the Town staff is correct in its determination that the Town is unable to require the Cobb Terrace stairway to be removed from its present location and should vote to dismiss this appeal.

§ 1-51. Five years.

Within five years -

(1) No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right-of-way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

(2) No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property.

(3) No suit, action, or proceeding shall be brought or maintained against a terrorist for damages under G.S. 1-539.2D unless such suit, action, or proceeding is commenced within five years from the date of the injury.

(4) Notwithstanding G.S. 1-52(9) or any other provision of law, no suit, action, or proceeding shall be brought or maintained against a real estate appraiser, general real estate appraiser, or appraiser trainee who is licensed, certified, or registered pursuant to Chapter 93E of the General Statutes, unless the suit, action, or proceeding is commenced within (i) five years of the date the appraisal was performed or (ii) until the applicable time period for retention of the work file for the appraisal giving rise to the action as established by the Recordkeeping Rule of the Uniform Standards of Professional Appraisal Practice has expired, whichever is greater.

(5) Against the owner of an interest in real property by a unit of local government for a violation of a land-use statute, ordinance, or permit or any other official action concerning land use carrying the effect of law. This subdivision does not limit the remedy of injunction for conditions that are actually injurious or dangerous to the public health or safety. The claim for relief accrues upon the occurrence of the earlier of any of the following:

a. The facts constituting the violation are known to the governing body, an agent, or an employee of the unit of local government.

b. The violation can be determined from the public record of the unit of local government. (1893, c. 152; 1895, c. 224; 1897, c. 339; Rev., s. 394; C.S., s. 440; 2015-200, s. 1; 2015-215, s. 1.5; 2017-10, s. 2.15(a).)

507 S.E.2d 589
131 NC App. 696

WATER TOWER OFFICE ASSOCIATES, Petitioner,
v.
TOWN OF CARY BOARD OF ADJUSTMENT, Respondent.

No. COA98-345.

Court of Appeals of North Carolina.

December 15, 1998.

[507 S.E.2d 590]

Holt & York, LLP by Barbara A. Jackson, Raleigh, for petitioner-appellant.

The Brough Law Firm by William C. Morgan, Jr., Chapel Hill, for respondent-appellee.

GREENE, Judge.

Water Tower Office Associates (WTOA) appeals from the trial court's order dismissing its petition for writ of certiorari.

In 1987, WTOA purchased two tracts of property in the Town of Cary, which it contends was zoned for commercial use. On 11 October 1996, WTOA received a letter from a Town of Cary zoning code enforcement officer, Tracy Roberts (Roberts), informing WTOA that these two tracts are zoned for residential use. On 18 October 1996, WTOA mailed a letter to the Town of Cary's planning director, Jeff Ulma (Ulma), "asking for [Ulma's] assistance in advising as well as participating with us in correcting this potentially costly error. Please let me know what is the next step to be taken." There is no evidence in the record that WTOA mailed copies of this letter to anyone other than Ulma. J.W. Shearin (Shearin), a planner for the Town of Cary, responded to WTOA's letter on 30 October 1996, stating:

> Please find attached an application for an Administrative Appeal to the Board of Adjustment in response to your letter of October 18, 1996, concerning the "next step" for addressing the issue of zoning on [your property].
>
> This application would be reviewed by the Cary Board of Adjustment to appeal staff's decision for zoning of your property. I have also included a calendar for the Town of Cary Board of Adjustment.
>
> ....
>
> Upon your review, please contact me at 469-4080 for additional information or assistance.

WTOA filed its appeal of Roberts' administrative decision that its property is zoned for residential use on 17 February 1997. The Board of Adjustment subsequently heard WTOA's appeal and affirmed Roberts' decision. WTOA filed a petition for writ of certiorari with the trial court seeking review of the decision of the Board of Adjustment. The Board of Adjustment made a motion to dismiss the petition because WTOA's appeal from Roberts' decision had not been timely filed with the Board of Adjustment. The trial court allowed the Board of Adjustment's motion on 30 June 1997, dismissing WTOA's petition for writ of certiorari with prejudice. From this order of the trial court, WTOA appeals.

The issue is whether WTOA failed to timely appeal from Roberts' adverse decision.

Appeal to the Board of Adjustment from the decision of a zoning enforcement officer "shall be taken within the times prescribed by the [B]oard of [A]djustment by general rule." N.C.G.S. § 160A-388(b) (1994). The Town of Cary's ordinances provide that appeal from a zoning officer's decision "shall be filed no later than 30 days after the date of the contested action." Cary, N.C., Code of Ordinances § 6.2.4(b) (Supp.1998). "The established rules of the Board [of Adjustment] are binding on the Board itself, as well as on the public." *Town and Country Civic Organization v. Winston-Salem Bd. of Adjustment,* 83 N.C.App. 516, 518, 350 S.E.2d 893, 895 (1986), *dismissal allowed and disc. review denied,* 319 N.C. 410, 354 S.E.2d 729 (1987); *Jackson v. Board of Adjustment,* 2 N.C.App. 408, 418-19, 163 S.E.2d 265, 272 (1968) (noting that the Board of Adjustment must abide by local ordinances

[507 S.E.2d 591]

enacted in accordance with state zoning law), *aff'd,* 275 N.C. 155, 166 S.E.2d 78 (1969). Failure to take appeal within the time period set forth deprives the Board of Adjustment of subject matter jurisdiction to hear the appeal. *Town and Country Civic Organization,* 83 N.C.App. at 518, 350 S.E.2d at 895.

In this case, the thirty-day limitations period for filing an appeal began to run, at the latest, on WTOA's receipt of Roberts' 11 October 1996 letter notifying WTOA that its property is zoned for residential use. *See Allen v. City of Burlington Bd. of Adjustment,* 100 N.C.App. 615, 618-19, 397 S.E.2d 657, 660 (1990) (noting that the time for taking appeal "begins to run when a party has actual or constructive notice of the zoning decision"). WTOA did not appeal Roberts' decision to the Board of Adjustment, however, until 17 February 1997. Because more than thirty days had elapsed since WTOA had received notice of the zoning decision, the Board of Adjustment did not have subject matter jurisdiction to hear the appeal. Despite WTOA's contentions to the contrary, it is irrelevant that the Board of Adjustment heard WTOA's appeal. *See Town and Country Civic Organization,* 83 N.C.App. at 517, 350 S.E.2d at 894; *In re Triscari Children,* 109 N.C.App. 285, 288, 426 S.E.2d 435, 437 (1993) ("[L]ack of subject matter jurisdiction cannot be waived and can be raised at any time, including for the first time on appeal to this Court.").

WTOA contends that it should not be held to the thirty-day limit for filing appeal since the letter from Shearin did not inform WTOA of this limitation. WTOA, however, is presumed to know the law. *See, e.g., In re Forestry Foundation, Inc.,* 296 N.C. 330, 342, 250 S.E.2d 236, 244 (1979); *Teer Co. v. Highway Commission,* 265 N.C. 1, 10, 143 S.E.2d 247, 254 (1965). Accordingly, the thirty-day limitation set forth in the Town of Cary's ordinances is binding on WTOA.

WTOA alternatively contends that its letter of 18 October 1996 to Ulma, which was mailed within thirty days of Roberts' decision, should be construed as an appeal of that decision. Appeal is taken, however, "by filing with the officer from whom the appeal is taken and with the [B]oard of [A]djustment a notice of appeal." N.C.G.S. § 160A-388(b). WTOA's letter to Ulma does not fulfill this statutory requirement.

Accordingly, the trial court properly dismissed WTOA's petition for writ of certiorari.

Affirmed.

LEWIS and HORTON, JJ., concur.

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427 S.E.2d 875
109 N.C.App. 459
E. Thomas ABERNETHY, Sr., E. Thomas Abernethy, Jr., Ann T. Abernethy, Kimberly Abernethy and Memory Savers, Inc., Petitioners,
v.
TOWN OF BOONE BOARD OF ADJUSTMENT, Respondent.
No. 9224SC185.
Court of Appeals of North Carolina.
April 6, 1993.

[109 N.C.App. 460] Randal S. Marsh, Boone, for petitioners.

Paletta & Hedrick, by David R. Paletta, Boone, for respondent.

LEWIS, Judge.

The procedural issue presented by this appeal is whether the trial court erred in reversing the decision of the Town of Boone Board of Adjustment. In reaching the procedural issue however we must first decide whether the defense of laches can be asserted so as to prevent a municipality from enforcing its own ordinances. We hold that on the facts of this case the defense of laches is applicable and that the trial court did not err in reversing the decision of the Boone Board of Adjustment.

The facts of this case show that in 1983, Memory Savers, Inc. ("Memory Savers") was originally granted a sign permit by the

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Town of Boone for a freestanding sign located on Blowing Rock Road. At the time the sign permit was originally issued, Memory Savers was leasing its business premises for its express photo finishing business from E.F. Coe. Thereafter, Memory Savers was informed that Mr. Coe wanted to sell the premises which Memory Savers was leasing to the Shaw-Furman Partnership, but that Memory Savers' leasehold interest in the property was delaying the transaction. As a concession to get Memory Savers to vacate their existing premises, Mr. Coe and the Shaw-Furman Partnership agreed to sell Memory Savers a new location in Southgate II, an adjacent shopping center. As a further concession, it was agreed that Memory Savers would be allowed to keep its freestanding sign. Memory Savers felt this additional concession was necessary [109 N.C.App. 461] to insure the vitality of its business since its new location would not be readily visible from the road.

Cognizant of an existing town ordinance which might interfere with Memory Savers' sign, Memory Savers conditioned the entire transaction on it being allowed to retain possession of its existing freestanding sign. The reason for the potential conflict was section 7.8.10 of the Town of Boone Zoning Ordinance. Under section 7.8.10, businesses located within shopping centers, malls, and unified business establishments are only allowed two signs which must be either attached, canopy or projecting signs. According to section 7.8.10(c), a business within a shopping center is not allowed a freestanding sign unless "the business has an exterior frontage in the commercial development of eighty (80) linear feet or more." There is no dispute that Memory Savers lacks the requisite amount of exterior frontage.

Therefore, with this ordinance in mind, Memory Savers required that the deed of conveyance contain the language: "[p]resent freestanding sign may remain 'as is' subject to City of Boone approval." Memory Savers sought approval prior to the consummation of the transaction from two different town officials. In its Petition for a Writ of Certiorari, Memory Savers claims that it contacted Carolyn Aldridge, Zoning Enforcement Officer of the Town of Boone, and Neil Hartley,

Building Inspector of the Town of Boone, both of whom informed Memory Savers that the sign in question was in compliance and that the sign permit was still valid. Relying on these statements, in late 1987 Memory Savers purchased the building in the Southgate II shopping center for $250,000.

Thereafter, in 1991, the Town of Boone began to receive complaints about the Memory Savers' sign from members of the shopping center as well as from the owner of the shopping center. As a result, the Town of Boone Department of Planning and Inspections conducted an investigation and concluded that the Memory Savers' sign violated section 7.8.10(c) of the Town of Boone Zoning Ordinance. A letter was sent to Memory Savers on 4 April 1991 informing it that its sign was not in compliance and that it must be removed. Memory Savers appealed the decision to the Boone Board of Adjustment. A hearing was held before the Boone Board of Adjustment on 6 June 1991, at which time the Board of Adjustment voted to uphold the decision of the Planning Department.

[109 N.C.App. 462] Memory Savers filed a petition for Writ of Certiorari in the Watauga County Superior Court on 10 July 1991 alleging that it was not a part of the shopping center and therefore not governed by section 7.8.10 of the Boone Zoning Ordinance. Memory Savers also raised the defenses of estoppel and laches claiming that it had relied on previous representations of the town to its detriment. At oral argument before Judge Sitton, the Town of Boone admitted that it should have taken action against Memory Savers as early as 1987 but that it had not. On the basis of the evidence presented, Judge Sitton reversed the decision of the Boone Board of Adjustment holding that the Town of Boone was guilty of laches. The Town of Boone has appealed the decision of the superior court.

The standard by which this Court reviews the decisions of a town board of adjustment sitting as a quasi-judicial body involves:

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1) Reviewing the record for errors in law,

2) Insuring that procedures specified by law by both statute and ordinance are followed,

3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

5) Insuring that decisions are not arbitrary and capricious.

Allen v. City of Burlington Bd. of Adjustment, 100 N.C.App. 615, 617-18, 397 S.E.2d 657, 659 (1990). When a superior court reviews the decision of a board of adjustment on certiorari, the superior court sits as an appellate court. CG & T Corp. v. Board of Adjustment, 105 N.C.App. 32, 411 S.E.2d 655 (1992). The superior court does not act as the trier of fact. Coastal Ready-Mix Concrete Co. v. Board of Comm'rs, 299 N.C. 620, 265 S.E.2d 379, reh'g denied, 300 N.C. 562, 270 S.E.2d 106 (1980). Therefore, this Court's role in reviewing the sufficiency and the competency of the evidence at the appellate level, is not whether the evidence before the superior court supported that court's ruling, but whether the evidence before the town board supported its decision. Id. In determining the sufficiency of the evidence which supports the town board's decision, this Court applies the whole record test, considering not just the [109 N.C.App. 463] evidence that supports the board's decision but also the evidence that detracts from it. Ghidorzi Constr. Inc. v. Town of Chapel Hill, 80 N.C.App. 438, 342 S.E.2d 545, disc. rev. denied,317 N.C. 703, 347 S.E.2d 41

(1986). In applying the whole record test neither this Court nor the superior court is allowed to replace the decision of the town board if there are two reasonably conflicting views of the evidence. Id.

Having reviewed the whole record in this matter, we hold that the trial court was correct in reversing the decision of the Boone Board of Adjustment. In its Writ of Certiorari, Memory Savers raised the legal defenses of laches and estoppel. These issues were not raised before the Board of Adjustment and the superior court was therefore the first to hear these matters. As these are legal defenses they necessarily come under part one of this Court's standard of review to determine whether an error of law occurred. When the question is whether an error of law occurred, this Court is free to undertake a de novo review. CG & T Corp. v. Board of Adjustment, 105 N.C.App. 32, 411 S.E.2d 655 (1992).

The defenses of estoppel and laches are both equitable in nature and there is often substantial overlap in their application. As a result, the Town of Boone cites City of Raleigh v. Fisher, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950), where our Supreme Court stated "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." Providing the rationale for its decision, the Supreme Court held that a contrary decision would allow citizens to acquire immunity to the law by habitually breaking it with the consent of unfaithful public servants. See also, City of Winston-Salem v. Hoots Concrete Co., 47 N.C.App. 405, 267 S.E.2d 569, disc. rev. denied, 301 N.C. 234, 283 S.E.2d 131 (1980).

Although there is substantial overlap between the doctrines of laches and estoppel, we do not feel that Fisher adequately addresses the current situation because the issue in this case is laches and not estoppel. As the Town of Boone has correctly pointed out there are no cases in North Carolina which answer the question of whether laches can be asserted against a municipality to prevent a municipality from enforcing its own ordinances. However, there are several cases in North Carolina where a municipality has been allowed to raise the defense of laches against a property holder [109 N.C.App. 464] and we have found substantial guidance in those previous decisions. Taylor v. City of Raleigh, 290 N.C. 608, 227 S.E.2d 576 (1976); Stutts v. Swaim, 30 N.C.App. 611, 228

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S.E.2d 750, disc. rev. denied, 291 N.C. 178, 229 S.E.2d 692 (1976).

Our Supreme Court has stated that laches will apply "where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim." Taylor, 290 N.C. at 622, 227 S.E.2d at 584. The mere passage of time does not by itself entitle a party to the defense of laches. Cieszko v. Clark, 92 N.C.App. 290, 374 S.E.2d 456 (1988). Instead, the facts of each case must be looked at on a case by case situation. Taylor, 290 N.C. at 622, 227 S.E.2d at 584. In addition, laches will only work as a bar when the claimant knew of the existence of the grounds for the claim. Allen v. City of Burlington Bd. of Adjustment, 100 N.C.App. 615, 397 S.E.2d 657 (1990).

Specifically, in Taylor, our Supreme Court addressed the situation of a city asserting the defense of laches against a property holder where two years and twenty-two days had elapsed since the city's adoption of a rezoning ordinance and the property holder's challenge to the ordinance. On those facts, the Supreme Court held the delay was unreasonable and had worked to the disadvantage and prejudice of the City of Raleigh. Whereas the delay in Taylor was only two years, the delay in the present matter has been closer to four years,

leaving no doubt that the delay on the part of the Town of Boone has been unreasonable.

In addition, there is no doubt that the Town of Boone was aware of the potential violation, because Memory Savers called it to the attention of two officials for the Town of Boone. The Town of Boone has been aware of the violation for close to four years and even admitted that it should have taken action as early as 1987. However, instead of taking action, the Town of Boone gave assurances to Memory Savers that there was no violation with the sign. Based on these assurances, Memory Savers relinquished its leasehold interest and incurred substantial debt to acquire space in the Southgate II shopping center.

Clearly, all the requisite elements for laches are present in this case. However, this still does not answer the fundamental question of whether laches can be asserted against a municipality, such as the Town of Boone, to prevent the municipality from enforcing [109 N.C.App. 465] its own ordinances. In answering this question, we find guidance in a passage in C.J.S.:

Delay in initiating injunction proceedings does not necessarily estop a city or zoning authority from maintaining such proceeding, and generally speaking, the defense of laches may not be asserted against it, at least where the delay is reasonable, and defendant has not suffered any disadvantage as a result thereof.

101A C.J.S. Zoning & Land Planning § 342 (1979) (emphasis added). Therefore, we believe the general rule to be that laches cannot be asserted against a municipality to prevent it from enforcing its own ordinances when the delay is reasonable and defendant has suffered no disadvantage due to the delay.

However, on the facts of this case we feel that the doctrine of laches is applicable. As we stated previously, the Town of Boone delayed for almost four years before it attempted to enforce the sign ordinance. If the two years and twenty-two days in Taylor was unreasonable, then four years is clearly unreasonable as well. There is also evidence in the record, that the Town of Boone would not even have sought to enforce the sign ordinance when it did, except for the complaints of the owner of the shopping center; the very person from whom Memory Savers purchased the property.

Further, the unreasonable delay on the part of the Town of Boone has caused Memory Savers to suffer great disadvantage. Only after Memory Savers was assured by the two town officials that its sign was in compliance did Memory Savers spend $250,000 to purchase the adjacent property. Throughout the process, Memory Savers was concerned that without the existing freestanding sign its business would suffer. Without assurances from

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the Town of Boone that it could keep its freestanding sign, Memory Savers would have never given up its leasehold interest nor would it have made the initial capital investment to procure the adjacent property. As a result, we hold that the unreasonable delay on the part of the Town of Boone has worked an unreasonable disadvantage to Memory Savers and that it would be unjust to allow the Town of Boone to now enforce its sign ordinance. For the foregoing reasons, the superior court's decision that the doctrine of laches was applicable is

[109 N.C.App. 466] Affirmed.

WELLS and COZORT, JJ., concur.

563 S.E.2d 198
150 NC App. 174

TOWN OF CAMERON, Plaintiff-Appellee,
v.
Paul W. WOODELL and Brenda H. Woodell, Defendants-Appellants.

No. COA00-1546.

Court of Appeals of North Carolina.

May 7, 2002.

[563 S.E.2d 199]

The Brough Law Firm by Michael B. Brough and G. Nicholas Herman, Chapel Hill, for plaintiff-appellee.

Van Camp, Meacham & Newman, P.L.L.C. by Thomas M. Van Camp, Pinehurst, for defendants-appellants.

TIMMONS-GOODSON, Judge.

On 17 September 1993, Paul W. Woodell and Brenda H. Woodell (collectively, "the defendants") signed a contract to purchase property in the town of Cameron. Prior to consummating the purchase, defendants informed the town clerk and mayor that they intended to sell used merchandise and automobiles on the property. The town clerk advised defendants that the property was not within the town's zoning jurisdiction. Defendants subsequently obtained the necessary permits from Moore County.

On 6 October 1993, the town of Cameron adopted an ordinance that zoned as "residential agricultural" the area where defendants' property was located. The ordinance provided that those selling used merchandise or automobiles must first obtain a conditional use permit.

Defendants acquired title to the property on 18 November 1993, more than a month after the enactment of the 6 October 1993 zoning ordinance. In November of 1993, defendants obtained a license to operate a flea market from the North Carolina Department of Revenue and in June of 1994, defendants acquired a license from the North Carolina Department of Motor Vehicles to sell automobiles on the property.

In 1997, the town of Cameron discovered that defendants' property was, in fact, located

[563 S.E.2d 200]

within the town's jurisdiction. Thereafter, the town issued a violation notice to defendants. In October 1997, defendants applied for a conditional use permit for the continued operation of their business. The application was denied by the Town of Cameron Board of Commissioners. On 11 May 1998, the town instituted an action to enjoin defendants from selling merchandise and automobiles in violation of the town's zoning ordinance.

On 12 July 2000, the trial court entered an order containing the following pertinent findings of fact:

> 15. Shortly after the defendants bid on the Woodell property the[y] contacted the mayor and clerk of the Town of Cameron as to the necessary licenses and to the status of zoning on the property. The clerk of the Town of Cameron informed them, that the property was not within the zoning area of the Town of Cameron.
>
> 16. When the defendants obtained the record title on November 18, 1993[,] they applied for and were given a license from Moore County to

operate a business for the sale of goods.

17. At the time of the issuance of the business license the Woodell[s] mistakenly believed that the Woodell property was not within any zoning district and they were not aware of the zoning ordinance enacted on October 6, 1993.

....

20. The defendants have not proven to the court that they ever made inquiry of the Town of Cameron as to whether automobile sales were permitted on the Woodell property under zoning ordinance of the Town of Cameron or that they did not rely upon any assurances of any official of the Town of Cameron as to the non-applicability of zoning the Woodell property in regard to the sale of automobiles.

21. The defendants acted in reasonable reliance upon the statements by officials of the Town of Cameron as to the lack of applicability of zoning ordinances to the Woodell property in the creation of their business for the sale of merchandise on the property in question.

....

28. The defendants are entitled to protection from enforcement of the zoning ordinance of the Town of Cameron as to the operation of their business for sale of merchandise as a flea market to the extent they operated the business as such in the fall of 1997 when they were informed of the violation in the ordinance.

29. The defendants have not established that they are entitled to protection from the enforcement of the zoning ordinance of the Town of Cameron as to the defendants' use of the property in question for the sale of automobiles.

The court concluded as a matter of law that the Town of Cameron was barred by the doctrine of laches from enforcing its zoning ordinance against the defendants as it related to the use of the Woodell property for the sale of merchandise as a flea market. The court granted injunctive relief against defendants' operation of the sale of automobiles. Defendants appeal.

The dispositive issue on appeal is whether the doctrine of laches prohibits the town of Cameron from enforcing its zoning ordinance with respect to defendants' use of the property for the sale of automobiles. For the reasons stated herein, we affirm in part and reverse in part, the judgment of the trial court.

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.,* 107 N.C.App. 154, 160, 418 S.E.2d 841, 845 (1992). Findings of fact are binding on appeal if there is competent evidence to support them, "even where there may be evidence to the contrary." *Barnhardt v. City of Kannapolis,* 116 N.C.App. 215, 217, 447 S.E.2d 471, 473, *disc. review denied,* 338 N.C. 514, 452 S.E.2d 807 (1994).

Laches is an affirmative defense that bars a claim where the "`lapse of time has resulted in some change in the condition

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of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim[.]'" *Taylor v. N.C. Dept. of Transportation,* 86 N.C.App. 299, 304, 357 S.E.2d 439, 441-42 (1987) (quoting *Taylor v. City of Raleigh,* 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976)). To prevail on the affirmative defense of laches, the party asserting the defense bears the burden of proving that (1) the claimant knew of the existence of the grounds for the claim; (2) the delay was unreasonable and must have worked to the disadvantage, injury or prejudice of the party asserting the defense; (3) the delay of time has resulted in some change in the condition of the property or in the relations of the parties; however, the mere passage of time is insufficient to support a finding of laches. *See Abernethy v. Town of Boone Bd. of Adjustment,* 109 N.C.App. 459, 464, 427 S.E.2d 875, 878 (1993). The amount of delay required to establish laches depends on the facts and circumstances of each case. *See Taylor,* 290 N.C. at 622, 227 S.E.2d at 584.

In *Abernethy,* a landowner was granted a permit by the Town of Boone for a freestanding sign. *Abernethy,* 109 N.C.App. at 460, 427 S.E.2d at 876. Thereafter plaintiff, a lessee of landowner's building, was informed that the landowner wanted to sell the premises to a third party. *Id.* The landowner and the third party agreed to sell plaintiff the property located in Southgate II, an adjacent shopping center. Plaintiff conditioned the entire transaction on being allowed to retain possession of its existing freestanding sign. *Id.* at 461, 427 S.E.2d at 876. Before agreeing to the transaction, plaintiff contacted the zoning enforcement officer for the Town of Boone who informed plaintiff that the sign was in compliance and the permit was valid. *Id.* Relying on the representations of the town officials, plaintiff vacated the premises. Four years later, the Town of Boone ordered the sign removed, because the sign violated the town's zoning ordinance. This Court held that as a general rule, "laches cannot be asserted against a municipality to prevent it from enforcing its own ordinances when the delay is reasonable and defendant has suffered no disadvantage due to the delay." *Id.* at 465, 427 S.E.2d at 878. However, this Court held that "on the facts of this case," the doctrine of laches applies and thus prohibits the Town of Boone from enforcing its own ordinances. *Id.* In applying the elements of laches to the facts, the Court held that (1) the Town was aware of the potential violation for almost four years before it attempted to enforce the ordinance; (2) the Town's representations and delay in attempting to enforce the ordinance was unreasonable and (3) the plaintiff was prejudiced by the Town's representations and delay. *Id.* The Court further concluded that "if the two years and twenty-two days in *Taylor* was unreasonable, then four years is clearly unreasonable as well." *Id.; see also Taylor,* 290 N.C. at 626, 227 S.E.2d 576, (holding that the delay was unreasonable where two years and twenty-two days had elapsed since the city's adoption of a rezoning ordinance).

Similarly, in the present case, we hold that the doctrine of laches is applicable on these facts as it relates to the defendants' use of the property for the sale of automobiles as well as to the flea market. In drawing a distinction between defendants' use of the property, the trial court concluded that the doctrine of laches was applicable as it related to the use of the property for the sale of used merchandise in a flea market, but not for the sale of automobiles. However, clearly, all the requisite elements for laches are present in both situations. As in *Abernethy,* the town of Cameron was aware of defendants' proposed use of the property in September of 1993 when they informed the town of their plans to use the property for selling used merchandise

and for selling automobiles. The town of Cameron, knowing of defendants' intended use of the property, delayed nearly four years before it attempted to enforce its zoning ordinance. There is no competent evidence in the record to support the trial court's finding that defendants did not rely upon any assurances from the town of Cameron in regards to the sale of automobiles. Instead, the evidence in the record reveals that after defendants informed the town on 17 September 1993 of their plans, the town told them it did not have zoning jurisdiction over the property. Plaintiff attempts to rely on the fact that, while the

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record discloses that defendants contracted to purchase the property in September of 1993, defendants did not obtain a permit to operate the flea market until November of 1993 and a permit to operate the flea market until June of 1994. However, the uncontroverted evidence remains that: (1) defendants informed the town of their proposed uses of the property for both businesses prior to their purchase; (2) defendants relied on the town's assurances that the property was not within the town of Cameron's zoning jurisdiction; (3) in reliance on these assurances, defendants obtained the necessary permits from Moore County to purchase the property. Clearly, if the evidence supports a finding that the town knew about defendants' use of the property as a flea market, it would logically support the same finding as to the sale of automobiles on the property.

Further, the unreasonable delay on the part of the Town of Cameron has prejudiced defendants. Only after the town of Cameron informed defendants that their property was not within the town's jurisdiction did defendants obtain permits from Moore County and begin their development of the property. We therefore conclude that the doctrine of laches precluded the town of Cameron from enforcing its zoning ordinance against defendants with respect to their use of the property for selling automobiles, as well as operating a flea market.

Plaintiff brings forth one cross-assignment of error arguing that the trial court erred in concluding that the doctrine of laches barred the town from enforcing its zoning ordinance against defendants as it relates to the use of the property as a flea market. However, in light of the above holding, we affirm the trial court's decision with respect to the defendants' use of the property as a flea market.

Affirmed in part; reversed in part.

Judges HUDSON and TYSON, concur.