

UNITED STATES DISTRICT COURT
WESTERN DIVISION OF NORTH CAROLINA
CHARLOTTE DIVISION

CASE NO.: 3:09-cv-00266

FC SUMMERS WALK, LLC,)
)
 Plaintiff,)
)
 v.)
)
 TOWN OF DAVIDSON,)
)
 Defendant.)
)
)
)

ANSWER

That the Defendant, Town of Davidson, above named, answering the Complaint of the Plaintiff above named, alleges and says as follows:

PARTIES, JURISDICTION AND VENUE

1. Admitted upon information and belief.
2. Admitted.
3. Paragraph three constitutes a legal conclusion and is thus denied.
4. Paragraph four constitutes a legal conclusion and is thus denied.

DEFINITIONS

5. Paragraph five does not contain allegations that warrant a response. If it is deemed a response is warranted, then Defendant answers as follows:
 - a. The original master plan for Summers Walk was approved by the Davidson Town Board. It is the best evidence of its contents and speaks for itself. Except as admitted the remaining allegations of subparagraph A are denied.
 - b. Chapter 18 of the Planning Ordinance of the Town of Davidson, North

Carolina, which is designated as the Adequate Public Facilities Ordinance, as adopted by the Town of Davidson is the best evidence of its contents and speaks for itself. Except as admitted the remaining allegations of subparagraph B are denied.

c. Admitted.

d. The Planning Ordinance of the Town of Davidson, North Carolina as adopted by the Town of Davidson is the best evidence of its contents and speaks for itself. Except as admitted the remaining allegations of subparagraph D are denied.

BACKGROUND FACTS

6. It is admitted that on April 9, 2002 the Town Board approved a master plan of Summers Walk. It is further admitted that in March 2004 the master plan was amended and approved by Town staff. The master plans as originally approved and amended are the best evidence of their contents and speak for themselves. Except as admitted the remaining allegations of paragraph six are denied.
7. It is admitted that the annexation of Summers Walk was approved by the Town Board on November 9, 2004 and annexation became effective June 30, 2005. Except as admitted the remaining allegations of paragraph seven are denied.
8. It is admitted that at the time the master plan of Summers Walk was approved by the Town Board in April 2002, it was subject to Chapter 18 of the Planning Ordinance of the Town of Davidson, North Carolina. A determination by the Town of Davidson Planning Director as to the adequacy of public facilities was not issued until June 10, 2005. An APFO preliminary agreement regarding

intersection capacity was reached at an August 8, 2003 meeting with plaintiff.

Except as admitted the remaining allegations of paragraph eight are denied.

9. It is admitted that Summers Walk is located on Highway 73. It is denied that Summers Walk contains any recreational facilities open to the general public. Except as admitted the remaining allegations of paragraph nine are denied.

10. It is admitted upon information and belief that the Plaintiff conveyed to Mecklenburg County land originally included in the master plan for Summers Walk. It is further admitted that the Town of Davidson has not changed the zoning of the land conveyed to Mecklenburg County. Except as admitted the remaining allegations of paragraph ten are denied.

A. THE APFO

11. The Chapter 18 of the Planning Ordinance of the Town of Davidson, North Carolina is a matter of public record and is the best evidence of its contents and speaks for itself. Except as admitted the remaining allegations of paragraph eleven are denied.

B. THE DETERMINATIONS

12. It is admitted that the Planning Director submitted an APFO determination on June 10, 2005. The remaining allegations of paragraph twelve are denied.

1. THE JUNE 10, 2005 DETERMINATION

13. It is specifically denied that Exhibit D to the Complaint is a true and accurate copy of the June 2005 determination signed by plaintiff, the planning director and approved by the Board. The original June 10, 2005 determination is the best evidence of its contents and it speaks for itself. Except as admitted the

remaining allegations of paragraph thirteen are denied.

14. The June 10, 2005 determination is the best evidence of its contents and it speaks for itself. Except as admitted the remaining allegations of paragraph fourteen are denied.
15. The June 10, 2005 determination is the best evidence of its contents and it speaks for itself. Except as admitted the remaining allegations of paragraph fifteen are denied. It is also specifically denied that a recommendation was made to the Town Board that Plaintiff must advance a pro rata share for public facilities.
16. Denied.
17. Admitted.
18. It is admitted that Plaintiff's manager, Peter Cozens signed the June 10, 2005 determination and posted bonds. Except as admitted the remaining allegations of paragraph eighteen are denied.
19. It is admitted the Plaintiff never filed an appeal of the June 10, 2005 determination. Except as admitted the remaining allegations of Paragraph nineteen are denied.

2. THE JUNE 5 2006 DETERMINATION

20. It is denied that on July 25, 2006 the Planning Director issued a written determination of adequacy of public facilities regarding Summers Walk. It is admitted that, at the request of Plaintiff, the Planning Director calculated the amount needed to advance capacity of the public facilities based upon the number of lots shown on the final plat submitted by the Plaintiff using the June

2005 determination. Except as admitted the remaining allegations of paragraph twenty are denied.

21. The June 5, 2006 projection was never intended to be presented to the Town Board for approval and was not submitted to the Town Board. Except as admitted the remaining allegations of paragraph twenty one are denied.
22. It is admitted that the Plaintiff filed a document dated August 22, 2006 entitled "NOTICE OF APPEAL". Except as admitted the remaining allegations of paragraph twenty two are denied.

3. THE MARCH 2, 2007 DETERMINATION

23. It is denied that on March 2, 2007 the Planning Director issued a written determination of adequacy of public facilities regarding Summers Walk. It is admitted that, at the request of Plaintiff, Planning Director calculated the amount needed to advance capacity of the public facilities based upon the number of lots shown on the final plat submitted by the Plaintiff using the June 2005 determination. Except as admitted the remaining allegations of paragraph twenty three are denied.
24. It is admitted that Plaintiff filed a document dated March 26, 2007 entitled "SUPPLEMENTAL NOTICE OF APPEAL". Except as admitted the remaining allegations of paragraph twenty four are denied.

4. THE SEPTEMBER 9, 2008 DETERMINATION

25. It is denied that the Planning Director issued a final determination for Summers Walk on September 9, 2008. The Planning Director prepared a settlement proposal for review purposes only. Defendant moves to strike the allegations of

paragraph twenty five pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Defendant moves to strike the allegations of this paragraph as they violate Rule 408 of the Federal Rules of Evidence. In the alternative, the allegations of paragraph twenty five are denied.

26. It is denied that the Planning Director issued a final determination for Summers Walk on September 9, 2008. The Planning Director issued a settlement proposal for review purposes only. Defendant moves to strike the allegations of paragraph twenty six pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Defendant moves to strike the allegations of this paragraph as they violate Rule 408 of the Federal Rules of Evidence. In the alternative, the allegations of paragraph twenty six are denied.

27. It is denied that the Planning Director issued a final determination for Summers Walk on September 9, 2008. The Planning Director issued a settlement proposal for review purposes only. Defendant moves to strike the allegations of paragraph twenty seven pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. Defendant moves to strike the allegations of this paragraph as they violate Rule 408 of the Federal Rules of Evidence. In the alternative, the allegations of paragraph twenty seven are denied. It was never intended that the September 9, 2008 settlement proposal be submitted to the Town Board for approval.

C. EVENTS SUBSEQUENT TO THE DETERMINATIONS

28. It is admitted that Plaintiff has made requests for copies of public records pursuant to N.C.G.S. § 132-1.. It is further admitted that plaintiff communicated

to defendant a willingness to allow defendant delayed production of the requested materials. Except as admitted the remaining allegations of paragraph twenty eight are denied.

29. It is admitted that Defendant has continued to work with Plaintiff to amicably resolve disputes. It is further admitted that Plaintiff had requested a hearing before the Board of Adjustment on more than one occasion. Except as admitted the remaining allegations of paragraph twenty nine are denied.
30. It is admitted that a hearing was scheduled before Defendant's Board of Adjustment for December 10, 2008. It is admitted that the June 10, 2005 Planning Director's determination became a final determination at the preliminary plat stage. It is further admitted that Plaintiff failed to appeal the final determination. Except as admitted the remaining allegations of paragraph thirty are denied.
31. It is admitted that at the January 6, 2009 Board of Adjustment hearing, the Board of Adjustment determined that Plaintiff's attempted appeal of the June 10, 2005 determination was not timely and the appeal was dismissed. It is specifically denied that the Board of Adjustment did not hear evidence. It is further admitted that the decision of the Board of Adjustment was filed with the Planning Director. Except as admitted the remaining allegations of paragraph thirty one are denied.
32. It is specifically denied that Plaintiff has exhausted all of its administrative remedies. Except as admitted the remaining allegations of paragraph thirty two are denied.

FIRST CLAIM FOR RELIEF

(APFO Without Authority and Ultra Vires)

33. Defendant incorporates its answers to paragraphs one through thirty three as if fully set forth herein.
34. It is admitted that defendant has created a Capital Improvement Program. Except as admitted, the remaining allegations of paragraph 34 are denied.
35. Denied.
36. Denied.
37. Denied.
38. Denied.
39. Denied.

SECOND CLAIM FOR RELIEF

(Invalid as Unconstitutional)

40. Defendant incorporates by reference its answers to paragraphs one through thirty nine as if fully set forth herein.
41. Paragraph forty one constitutes a legal conclusion and is thus denied.

THIRD CLAIM FOR RELIEF

(Invalid as Applied)

42. Defendant incorporates by reference its answers to paragraphs one through forty one as if fully set forth herein.
43. Paragraph forty three constitutes a legal conclusion and is thus denied.

FORTH CLAIM FOR RELIEF

(Facilities Not Contemplated Within the APFO at Time of Master Plan Approval)

44. Defendant incorporates by reference its answers to paragraphs one through forty three as if fully set forth herein.
45. Chapter 18 of the Planning Ordinance of the Town of Davidson, North Carolina is a matter of public record and is the best evidence of its contents and speaks for itself. Except for admitted the remaining allegations of paragraph forty five are denied.
46. Denied.
47. Denied.

FIFTH CLAIM FOR RELIEF

(Injunctive Relief)

48. Defendant incorporates by reference its answers to paragraphs one through forty seven as if fully set forth herein.
49. It is admitted that the listed bonds were posted. It is denied that the listed bonds were kept in force. Except as admitted the remaining allegations of this paragraph are denied.
50. It is admitted that the Plaintiff has posted bonds and final approval of the June 10, 2005 determination has occurred without plaintiff filing a timely appeal of the determination. Except as admitted the remaining allegations of paragraph fifty are denied.
51. Exhibit "H" is the best evidence of its contents and speaks for itself. Except as

admitted the remaining allegations of paragraph fifty one are denied.

52. Denied.

53. The June 10, 2005 determination by the Planning Director is the only determination made in this matter. Except as admitted the remaining allegations of paragraph fifty three are denied.

54. Denied.

55. Denied.

56. Paragraph fifty six constitutes a legal conclusion and is thus denied.

AFFIRMATIVE DEFENSES

First Affirmative Defense

(Statute of Limitations)

Plaintiffs' claims are barred, in whole or in part, by the applicable statute(s) of limitations.

Second Affirmative Defense

(Laches)

Plaintiffs' claims are barred, in whole or in part by the Doctrine of Laches.

Third Affirmative Defense

(Waiver)

1. Plaintiff voluntarily requested annexation by Defendant with full knowledge of § 18 of the Planning Ordinance.
2. Plaintiff requested a Determination under the Planning Ordinance pursuant to §

- 18.5.
3. Plaintiff accepted the 2005 Determination of the Planning Director and freely elected to post bonds as a voluntary mitigation payment pursuant to § 18.5.6 of the Planning Ordinance, thereby voluntarily and knowingly waiving its rights to appeal the Determination or accept other options under the Planning Ordinance.
 4. The Plaintiff has accepted the benefits of annexation, the 2005 Determination and §18 of the Planning Ordinance by furthering its development over the course of several years.
 5. The Defendant has detrimentally relied on Plaintiff's waiver of its rights to appeal the Determination or accept other options under the Planning Ordinance.
 6. Plaintiff's claims are barred, in whole or in part, by the doctrine of waiver.

Fourth Affirmative Defense

(Estoppel)

1. Plaintiff voluntarily requested annexation by Defendant with full knowledge of § 18 of the Planning Ordinance.
2. Plaintiff requested a Determination under the Planning Ordinance pursuant to § 18.5.
3. Plaintiff accepted the 2005 Determination of the Planning Director and freely elected to post bonds as a voluntary mitigation payment pursuant to § 18.5.6 of the Planning Ordinance.
4. The Plaintiff has accepted the benefits of annexation, the 2005 Determination and §18 of the Planning Ordinance by furthering its

development over the course of several years.

5. The Defendant has detrimentally relied on Plaintiff's waiver of its rights to appeal the Determination or accept other options under the Planning Ordinance.
6. Plaintiff's claims are barred, in whole or in part, by the doctrine of estoppel.

Fifth Affirmative Defense

(Failure to Exhaust Administrative Remedies)

Plaintiff's claims are barred, in whole or in part, for failure to exhaust administrative remedies.

Sixth Affirmative Defense

(Lack of Injury)

Plaintiff has suffered no injury from the conduct alleged in the Complaint.

Seventh Affirmative Defense

(Ripeness)

Plaintiff's claims are barred, in whole or in part, because they are not ripe.

Eighth Affirmative Defense

(Mootness)

Plaintiff's claims are barred, in whole or in part, because they are moot.

Ninth Affirmative Defense

(Collateral Estoppel and Res Judicata)

Plaintiff has previously raised these issues and they were fully adjudicated or plaintiff failed to raise these issues during it's appeals to the Board of Adjustment and Mecklenburg County Superior Court pursuant § 18.5.8 of the Planning Ordinance and N.C.G.S. § 160A-388.

WHEREFORE, the Defendant prays the Court that:

1. Chapter 18 of the Planning Ordinance of the Town of Davidson, North Carolina be declared valid as being authorized by the General Assembly of North Carolina;
2. Chapter 18 of the Planning Ordinance of the Town of Davidson, North Carolina be declared valid and constitutional under the State and Federal Constitutions;
3. That Chapter 18 of the Planning Ordinance of the Town of Davidson, North Carolina be declared enforceable as applied to the Plaintiff;
4. For a jury on all issues;
5. For such other and further relief as the Court may deem just and proper.

This the 1st day of February, 2010.

CLAWSON & STAUBES, PLLC

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing pleading has been electronically filed with the Clerk of District Court using the CM/ECF system which will automatically send notification of such filing to the following :

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This the 1st day of February, 2010.

CLAWSON & STAUBES, PLLC

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