

Attorney Fees when Successfully Challenging Local Land Use Regulation

Summary

The general rule in North Carolina is that each party is responsible for their own attorney fees. Successful litigants may not recover attorney fees as costs or damages unless that is expressly authorized by statute.¹ Statutes allowing for attorney fees are construed narrowly.² As there is no statutory authority for such, attorney fees are generally not available in land use litigation.

Statutory Allowances

The General Assembly has authorized awarding attorney fees to a prevailing party in specific instances, such as in private suits for the recovery of real or personal property, some personal injury cases, and for recovery of debts and enforcement of business contracts where the note or contract provides for such.³

In the governmental context, there are several general situations where recovery of attorney fees is authorized -- filing frivolous claims, a local government acting outside the scope of its authority, and state agencies taking actions without substantial justification. These statutes are:

- G.S.6-21.5, if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party;
- G.S. 6-21.7, if a city or county has acted outside the scope of its legal authority, mandatory if the court also finds the action was an abuse of discretion⁴); and
- G.S. 6-19.1, if the court finds that a state agency has acted without substantial justification and there are no special circumstances that would make an award of attorney fees unjust⁵;

¹ County of Hoke v. Byrd, 107 N.C. App. 658, 668, 421 S.E.2d 800, 806 (1992) (county not entitled to attorney fees in an action to enforce junkyard-screening ordinance).

² Bryson v. Sullivan, 330 N.C. 644, 665, 412 S.E.2d 327, 338-39 (1992) (involving alleged violations in estate administration); Sunamerica Financial Corp. v. Bonham, 328 N. C. 254, 257, 400 S.E.2d 435, 437 (1991).

³ For details, see Ann M. Anderson, *Attorney Fee Provisions in North Carolina Contracts*, SOG Administration of Justice Bulletin, Sept. 2011 (online at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1102.pdf>).

⁴ S.L. 2011-299. An "abuse of discretion" generally means a decision made without any rational basis.

⁵ Table Rock Chapter of Trout Unlimited v. Environmental Management Commission, 191 N.C. App. 362, 663 S.E.2d 333 (2008) (allowing attorney fees pursuant to G.S. 6-19.1 when state agency decision not to reclassify waters was successfully challenged as being without substantial justification and there were no special circumstances that would make the award unjust). In *Williams v. N. C. Department of Environment & Natural Resources*, 166 N.C. App. 86, 601 S.E.2d 231 (2004), the court held that it was improper to award attorney fees where a regulatory decision is ultimately overturned by the court but there was conflicting evidence and a difficult factual determination at issue (in this case, determining whether the property included coastal wetlands). The court noted that when a reasonable person could have agreed with the agency, their decision could not be characterized as "without

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Other statutes allow attorney fees for particular types of cases. These include:

- G.S. 19-8, for nuisance abatement actions;
- G.S. 41A-7, for enforcement actions under the State Fair Housing Act;
- G.S. 106-804, for enforcement of the Swine Farm Siting Act;
- G.S. 132-9, for securing disclosure of unlawfully withheld public records or for making a bad faith or frivolous claim regarding public records; and
- G.S. 143-318.16B, for enforcement of the open meetings law.
- In addition, Rule of Civil Procedure 65(e) allows an award of damages upon dissolving a temporary restraining order or preliminary injunction.⁶

Federal Constitutional Claims

Federal law allows for attorney fees when a plaintiff shows their constitutional rights have been violated. When a plaintiff brings a successful action under Section 1983 of U.S. Code Title 42 regarding a violation of constitutional rights, Section 1988 under the same Title allows the prevailing plaintiff to recover attorney fees. The award is at the court's discretion.

In *Amward Homes, Inc. v. Town of Cary*,⁷ the plaintiff successfully contended that the collection of school impact fees that were not statutorily authorized violated substantive due process and equal protection rights, a constitutional violation. This entitled plaintiffs to recovery of attorney fees and costs (some \$368,000 in this case) in addition to a refund of the fees collected.

If, however, the plaintiff in such an action prevails on statutory grounds and the constitutional issues are not addressed, no attorney fees are available.⁸

substantial justification.” The court confirmed in *Izydore v. City of Durham*, ___ N.C. App. ___, 746 S.E.2d 324, review denied, 749 S.E.2d 851 (2013), that this statute applies only to state government agencies, not to cities and counties.

⁶ *Schwarz Properties, LLC v. Town of Franklinville*, 204 N.C. App. 344, 693 S.E.2d 271 (2010).

⁷ 206 N.C. App. 38, 698 S.E.2d 404 (2010), *aff'd per curiam by evenly divided court*, 365 N.C. 305, 716 S.E.2d 849 (2011) [stands without precedential value].

⁸ *Giovanni Carandola, Ltd. v. City of Greensboro*, No. 1:05CV1166, 2007 WL 703333 (M.D.N.C. Mar. 1, 2007), *aff'd per curiam*, 258 F. App'x 512 (4th Cir. 2007).