



## Town Loses Appeal in Leith Lawsuit

**BY JOHN CHAPPELL: STAFF WRITER**

The ball is back in the state courts in legal battles between Southern Pines and an automotive dealership.

Leith Automotive sued the town after the council rezoned land off U.S. 1 near Midland Road in 2005 to keep Leith from building car dealerships there.

Leith complained that the rezoning violated its common law vested rights and due process rights. The suit also alleged state law claims for tortious interference with contract and tortious interference with prospective economic advantage.

The town was appealing to the Fourth District Court of Appeals a federal district judge's decision last year that these matters should be decided in state courts first. On July 3, the appeals court unanimously denied the town's appeal.

"A ruling in

this case on Leith's vested rights claim by necessity would impact the land-use policy of the town, a step we are hesitant to take," said Chief Judge Karen J. Williams in the opinion she wrote for the court. "Compounding this lack of clarity is that North Carolina currently has no mechanism for us to certify questions of state law to its Supreme Court."

Leith had asked for "a declaratory judgment that the dealership possessed a vested right in the previous zoning, an injunction against the town barring its enforcement of the new zoning against Leith, and monetary damages in excess of \$10,000,000' according to court documents.

On June 19, 2007, the federal district court stayed the case and abstained pending the resolution of the land-use and zoning issues in state courts.

"This case is not one involving a genuine and independent federal claim," Williams wrote in the ruling. "The federal claim in this case is inextricably woven with the state common law vested rights claim. The issue of whether Leith was denied its substantive due process rights which involves the interpretation of state land-use and zoning laws, is more appropriately heard in state court. In addition, there are no 'exceptional circumstances' present."

Williams noted that Southern Pines' decision to change the zoning was procedurally irregular, that Leith was singled out for treatment, that the zoning change was made without any studies, and that the town changing the zoning after receiving a petition "at least suggests that citizenry opposition was based not upon legitimate land-use issues" but really just because some residents don't like car dealerships.

"Both parties agree that, if Leith possesses a vested right in the property as previously zoned, the new ordinance cannot be applied to Leith," she said. "The town thus faces an uphill battle as to this argument because we have repeatedly indicated 'cases involving questions of state and local land use and zoning law are a classic example (of situations where) federal courts 'should not leave their indelible print on local and state land-use and zoning law by entertaining these cases and sitting as a zoning board of appeals.' Leith received written confirmation that zoning and (the town's land use ordinance) permitted an auto park on the property and had obtained an architectural compliance permit at the time of the rezoning."

The Town Council voted to change the zoning on the property from commercial to office, which does not permit car dealerships. The property had been zoned commercial when Leith bought it.

Leith had also spent more than \$2 million, relying on its belief that an auto park was permitted under the commercial zoning but had not yet obtained a building permit.

"Thus, its status under North Carolina law appears to us to be unclear, and we are, of course, hesitant to act as a 'zoning board of appeals' -- The case might be different if, for instance, Leith had already received its building permit and used that permit to build on the land, thus advising the neighborhood of the use -- or if Leith had simply purchased the property but taken no other actions prior to the rezoning," the court said. "As it currently stands, however, Leith sits in somewhat of a gray area on the edges of the vested rights doctrine under North Carolina law."

Gray areas need to be resolved in state courts before any federal court steps in, according to the ruling.

"Moreover, we remain ever mindful that 'land use questions are the peculiar concern of local and state governments, and traditionally, federal courts have not interfered with state courts in the area of land use policy'" Williams said. "The case involved difficult issues of state land-use policy. We ultimately conclude that the district court did not abuse its discretion in abstaining and staying the case."

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