



# City of CHARLOTTE

## MEMORANDUM

TO: Mayor Lewis and City Council Members

FROM: Gregg Guetschow, City Manager

SUBJECT: Dairy Queen Circuit Court Decision

DATE: February 1, 2019

As you are aware, Eaton County Circuit Court Judge Janice Cunningham ruled recently in favor of Brett Roberts and Dairy Queen in the appeal of the action of the Zoning Board of Appeals which upheld the decision of the Planning Commission to prohibit the use of an outdoor order speaker. I have been asked by Mayor Lewis to provide an overview of the decision and a recommendation as to whether the City should appeal the decision.

The first paragraph summarizes the facts surrounding this matter in a general way. I do not believe a further discussion of the details will be necessary to your decision regarding filing an appeal and will, therefore, dispense with it.

State statute establishes standards of review when appealing a decision of the Zoning Board of Review. Judge Cunningham relied in particular on the provision requiring that a ZBA decision “be supported by competent, material, and substantial evidence on the record.” Judge Cunningham reviewed transcripts of ZBA meetings and reviewed various briefs submitted by the parties that included the findings that were approved by the ZBA. She concluded that there were factual errors and that the decision of the ZBA was not supported by competent, material and substantial evidence on the record.

The decision read by Judge Cunningham is lengthy and any attempt to summarize it is likely to overlook points that another would emphasize as important. Nevertheless, I believe it is fair to indicate that her decision reflected an evaluation of the significance of evidence in a few key areas that differed from that of the ZBA. First, she felt the information provided by the speaker installer to be of particular importance in arriving at a determination as to whether the order system would interfere with neighbors’ quiet enjoyment of their properties. Second, she expressed the view that the opinions offered by neighbors in opposition to the speaker were motivated by animus toward the development arising from Council’s decision to rezone the property rather than by any realistic belief that the noise from the speaker would affect the tranquility of the neighborhood, particularly in light of its location along a state trunkline highway. Finally, Judge Cunningham did not reference the provision of the zoning ordinance that grants the Planning Commission the authority to establish “such

other conditions which in the opinion of the Planning Commission are necessary to provide adequate protection to the neighborhood and to abutting properties...”

That one might disagree with the emphasis Judge Cunningham placed on certain facts and findings while de-emphasizing others does not mean that she erred in reaching her decision. Likewise, dissatisfaction with her decision should not in and of itself be the factor that motivates the Council to appeal. Instead, Council's action to appeal should reflect an analysis of the likelihood that an appeal will be successful and whether Council's duty to protect the public health, safety and welfare warrants the expenditure of the additional funds required for the appeal.

In most instances, a decision by a circuit court judge may be appealed to the Court of Appeals as a matter of right. That is not true, however, when the circuit court has acted, in essence, as the appeals court in a case in which the ZBA acted as the lower “court.” The Court of Appeals must now grant leave to appeal. I think it is very unlikely that they would do so. The factors that might cause the court to grant leave – a clear and significant factual error, a substantial injustice affecting a large number of persons, or an important matter of law to be decided – are not present here. Even if leave were granted in the case, these same factors are likely to play a role in the Court of Appeal's decision to overturn the conclusion reached by Judge Cunningham.

Through January 2019, the City has expended \$14,549.50 for legal fees associated with the appeal to the Circuit Court. Some might argue that this represents a waste of taxpayers' money. I do not subscribe to this view. The defense of the right of the Planning Commission to decide that the prohibition of an order speaker is a reasonable condition was an important matter. Similarly, the concerns of the neighbors for the potential impact of the order speaker on the character of their neighborhood warranted serious consideration.

Nevertheless, for the reasons I have highlighted above, I cannot recommend that Council authorize taking this matter to the Court of Appeals. Additional funds must be expended to file the appeal. It would be very difficult to justify the cost given the slim chance that leave would be granted and the even slimmer chance the City would prevail.