AFFIRM in PART, REVERSE and REMAND in PART; Opinion Filed May 25, 2018.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-00138-CV

PATSY B. ANDERTON AND DOYLE ANDERTON, INDIVIDUALLY AND D/B/A A-1 GRASS, SAND AND STONE, Appellants
V.
CITY OF CEDAR HILL, TEXAS, Appellee

On Appeal from the 14th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-09-12187-A

OPINION

Before Justices Lang, Fillmore, and Schenck
Opinion by Justice Schenck

Patsy B. Anderton and Doyle Anderton, individually and d/b/a A-1 Grass, Sand and Stone (the Andertons), appeal the trial court's final judgment on remand, dismissing as moot the Andertons' claims for non-conforming use rights in Lots 5 and 6 and awarding attorney's fees to the City of Cedar Hill (the City). In their first three issues, the Andertons urge that the trial court erred in denying their motion for summary judgment against the City. In their seventh issue, the Andertons urge that because the final judgment on remand does not include a specific ruling on their motion for summary judgment, the case should be remanded to the trial court. In their fourth, fifth, and sixth issues, the Andertons argue the trial court erred in awarding the City its attorney's fees. We affirm the portion of the trial court's judgment dismissing as moot the Andertons' claims for non-conforming use rights in Lots 5 and 6, reverse the portion of the trial court's judgment

awarding the City its attorney's fees, and remand the issue of attorney's fees for further proceedings consistent with this opinion.

BACKGROUND

This case appears before this Court following an earlier remand to the trial court. *See Anderton v. City of Cedar Hill*, 447 S.W.3d 84, 87 (Tex. App.—Dallas 2014, pet. denied). Because the procedural history of this case is well-known to the parties, we focus only on those facts relevant to this appeal.

In 2000, the City adopted a Comprehensive Plan to implement changes along its major corridors to rely heavily on local retail. Around that same time, the Andertons purchased an existing landscaping and building materials business—a commercial rather than local retail business—that operated on Lots 5 and 6 in the River Oaks Section 2 Addition located along the west side of U.S. 67. The Andertons initially undertook a lease on the two lots. In 2001, the City rezoned Lot 5 from a special use zoning district for exclusive mini-warehouse storage to local retail. The Andertons continued their business operations. In 2007, the Andertons bought Lots 5, 6, and 7. Later that year, the City began questioning the Andertons' use of Lot 5 as part of a commercial business instead of in compliance with the local retail zoning. The Andertons requested a change to the zoning of the lots to make their legally non-conforming use of the property a legally conforming use; the City denied that request. The City also issued five citations against the Andertons for unlawful expansion of a non-conforming land use as to Lot 5, but a jury would later unanimously find the Andertons "not guilty" as to all five citations.

In 2009, the City filed its original petition against the Andertons for violations of its zoning ordinance and building code. It sought declaratory judgment, civil penalties, injunctive relief, and attorney's fees, which collectively and among other things would have had the effect of prohibiting

the Andertons from operating their business on Lots 5 and 7.[1] The Andertons responded by asserting counterclaims against the City for alleged violations of vested rights under Chapter 245 of the Texas Local Government Code, inverse condemnation, and violations of federal due process and equal protection rights. The City moved for partial summary judgment on its claims involving the Andertons' use of Lots 5, 6, and 7 as well as the Andertons' counterclaims. The Andertons moved for summary judgment on their counterclaims and on all the City's claims.

The trial court granted partial summary judgment in favor of the City and later entered a final judgment that incorporated the partial summary judgment. The Andertons appealed the trial court's decisions regarding their Chapter 245 counterclaim, their inverse condemnation counterclaim, the non-conforming use status of Lot 5, and the award of the City's attorney's fees. This Court (1) reversed the trial court's judgment to the extent it granted summary judgment against the Andertons on their claims of non-conforming use rights in Lot 5, (2) reversed the trial court's judgment to the extent it dismissed the Andertons' inverse condemnation claim as not ripe, (3) reversed the trial court's award of attorney's fees to the City, (4) affirmed the final judgment in all other respects,[2] and (5) remanded the non-conforming use and inverse condemnation claims and the issue of attorney's fees for further proceedings. *See Anderton*, 447 S.W.3d at 98. Thus, as the case was postured for remand following the first appeal, the Andertons had largely prevailed and were postured, on remand, on the offense with respect to the remaining claims.

Following this Court's remand of the case, the City passed two zoning amendments that, according to its own amended petition, made the Andertons' use of Lots 5 and 6 lawful as they requested but were denied prior to the City filing this lawsuit. The City's amended petition thus abandoned all claims except that of attorney's fees pursuant to the Uniform Declaratory Judgments

[1] The City later amended its petition to include a request for declarations related to the Andertons' use of Lot 6.

[2] The Andertons did not appeal the portions of the order requiring them to remove a small structure on Lot 6 and construct any future structure in accordance with the City's building code. Nor did they appeal the portion of the order incorporating the agreed injunction prohibiting them from parking their trucks on Lot 7. Since both parties agreed the only issues raised in that appeal involved Lot 5, this Court affirmed those portions of the trial court's order. *See Anderton*, 447 S.W.3d at 88.

Act (UDJA). The City urged that because the trial court had previously granted judgment in favor of the City on some of its claims and because none of those rulings were overturned on appeal, the City was entitled to costs and reasonable and necessary attorney's fees. The City also filed a plea to the jurisdiction seeking dismissal of the Andertons' counterclaims. The same day the City filed its amended petition and plea to the jurisdiction, the Andertons filed an amended counterclaim and a traditional and no-evidence motion for summary judgment. The Andertons' amended counterclaim sought only declaratory judgment that their uses of Lots 5 and 6 were legal and attorney's fees pursuant to the UDJA. The City filed its own motion for summary judgment on the Andertons' claim for attorney's fees and later filed a response to the Andertons' summary judgment motion and objections to the Andertons' summary judgment evidence.

The trial court held a hearing on the City's plea to the jurisdiction and on the summary judgment motions of both parties. At that hearing, the trial court denied the City's plea to the jurisdiction because the claims for attorney's fees remained extant. The case then proceeded to a bench trial on that issue.[3] The parties both submitted affidavits and offered testimony as to their competing claims. The trial court later entered a final judgment on remand, dismissing the Andertons' claims for non-conforming use rights in Lots 5 and 6 as moot and awarding the City its attorney's fees. At the request of the Andertons, the trial court issued findings of fact and conclusions of law. The trial court later denied the Andertons' request for additional and amended findings of fact and conclusions of law, their motion for new trial, and their request for entry of amended final judgment on remand. This appeal followed.

[3] At a hearing on the City's plea and the competing motions for summary judgment, the trial court heard the parties' arguments and then stated, "I don't think that I can make an award of . . . attorney's fees for summary judgment on the basis of the summary judgment record. I think it is an issue that should be and, therefore, will be tried." The trial court's disposition of the competing summary judgment motions will be further addressed in the discussion *infra*.

DISCUSSION

I. Did the trial court err in denying the Andertons' Motion for Summary Judgment?

In their first issue, the Andertons seek to continue their pursuit of the remaining claims notwithstanding the City's effective surrender as to them and the City's resulting claim of mootness. They urge the trial court erred in denying the Andertons' summary judgment motion because the City never filed a written response or offered any controverting evidence on the issue of whether the Andertons had legally conforming rights as to Lots 5 and 6.

The Andertons sought (1) declaratory judgment that their uses of Lots 5 and 6 were legal non-conforming uses and (2) an award of attorney's fees pursuant to the UDJA. The City filed a response to the Andertons' motion in which it argued its passage of two zoning amendments rendered the Andertons' non-conforming use claims moot. The City attached to its response an affidavit of its planning director and a copy of the two zoning amendments that (1) classify the use of "landscape materials sales" as a use permitted within the affected district and (2) expressly state that "the business on Lots 5 and 6 fall[s] within the new definition of landscape materials sales." Thus, the record shows the City filed a response and supporting evidence in response to the Andertons' motion for summary judgment filed after remand.

Although the majority of the Andertons' arguments supporting their first issue appear to rely on their assertions the City did not file a written response with controverting evidence, the Andertons also urge that the City's two zoning amendments "might not have totally mooted the case because the City could later decide to rezone the property to adversely impact the Andertons' business." We construe the Andertons' brief to urge that their non-conforming use claims related to Lots 5 and 6 were not rendered moot by the City's new zoning amendments pursuant to one of the exceptions to the general mootness doctrine. *See* TEX. R. APP. P. 38.9.

Before we address whether either exception to the mootness doctrine applies, we will first address whether the claim at issue is moot. An issue becomes moot when (1) it appears that one

seeks to obtain a judgment on some controversy, which in reality does not exist or (2) when one seeks a judgment on some matter which, when rendered for any reason, cannot have any practical legal effect on a then-existing controversy. *City of Farmers Branch v. Ramos*, 235 S.W.3d 462, 469 (Tex. App.—Dallas 2007, no pet.). At the time it rendered judgment, the trial court had no practical ability to alter the legal relationship between the parties. Accordingly, we conclude the record establishes that the Andertons' claim as to the non-conforming use status of Lot 5 was rendered moot by the City's two zoning amendments and the trial court was obliged to dismiss barring some valid exception. *See id.*

There are two exceptions that confer jurisdiction regardless of mootness: (1) the issue is capable of repetition, yet evading review; and (2) the collateral consequences doctrine. *City of Dallas v. Woodfield*, 305 S.W.3d 412, 418 (Tex. App.—Dallas 2010, no pet.). The "capable of repetition, yet evading review" exception has been used to challenge acts performed by the government. *See id.* It is limited to situations where (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, or the party cannot obtain review before the issue becomes moot; *and* (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Id.* While the Andertons urge that the City could rezone the subject property again to adversely impact their business, they direct us to no basis in the record that would support the conclusion that this prospect is reasonably likely. Given that the mere theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test, we cannot conclude the Andertons have shown the "capable of repetition" exception applies. *See id.*

The supreme court has also recognized the "collateral consequences" exception to the mootness doctrine. *Marshall v. Hous. Auth. of City of San Antonio*, 198 S.W.3d 782, 789 (Tex. 2006). This doctrine applies to the narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. To

sustain jurisdiction on this basis, the Andertons would have to show: 1) concrete disadvantages or disabilities have in fact occurred, are imminently threatened to occur, or are imposed as a matter of law; and (2) the concrete disadvantages and disabilities will persist even after the judgment is vacated. *Id.* The Andertons, however, do not argue, and the record does not reflect, any concrete disadvantages or disabilities that will persist should their claim be dismissed as moot.

We conclude the Andertons have not shown the trial court erred in denying their summary judgment motion. Accordingly, we overrule the Andertons' first issue.

In light of our resolution of their first issue and arguments, we need not address the Andertons' second or third issue. *See* TEX. R. APP. P. 47.1.[4]

II. Did the trial court err by not including a specific ruling on the Andertons' Motion for Summary Judgment?

In their seventh issue, the Andertons urge that because the final judgment on remand does not include a specific ruling on their motion for summary judgment, the case should be remanded to the trial court. In support of this issue, the Andertons cite to an opinion from another court of appeals, in which the court held that a trial court's refusal to rule on a motion for summary judgment within a reasonable time after it is filed and heard "*may* amount to an abuse of discretion and entitle the complaining party to a writ of mandamus compelling the trial judge to rule." *See In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi 1999, orig. proceeding [mand. denied]) (emphasis added).

However, the Andertons' authority is distinguishable because it is premised on a trial court's failing to rule in a reasonable time on a motion for summary judgment, whereas, the trial court here actually ruled on the issue presented in the Andertons' motion for summary judgment. In their motion for summary judgment filed after remand, the Andertons sought (1) declaratory

[4] In their second issue, the Andertons deny making any judicial admission that would justify the trial court's denial of their summary judgment motion. In their third issue, the Andertons urge that because the City did not file a written response and there was no disputed fact issue as to the non-conforming use status of Lot 5, the trial court erred as a matter of law by denying their summary judgment motion.

judgment that their use of Lot 5 was a legal non-conforming use and (2) an award of attorney's fees pursuant to the UDJA. At the hearing on the City's plea to the jurisdiction and the parties' competing motions for summary judgment, the trial judge concluded the hearing by stating he would not decide the issue of attorney's fees on the summary judgment record and would instead hear the issue at a later date at trial. In the final judgment on remand, the trial court (1) ordered that the Andertons' claims for non-conforming use rights in Lots 5 and 6 were moot and dismissed as such and (2) awarded the City, but not the Andertons, attorney's fees. Thus, the trial court explicitly ruled on the Andertons' non-conforming use claim and impliedly denied their claim for attorney's fees. Accordingly, we conclude the trial court did not err by failing to include a specific ruling on the Andertons' summary judgment motion in the final judgment on remand. *See James v. Tex. Workforce Comm'n*, No. 05-12-00635-CV, 2013 WL 1628244, at *2 (Tex. App.—Dallas Feb. 19, 2013, no pet.) (mem. op.) (trial court's failure to make written ruling on motion for summary judgment is not error where final order grants opponent's motion and both motions addressed same essential issue).

We overrule the Andertons' seventh issue.

III. Did the trial court err in awarding the City its attorney's fees?

In their fifth issue, the Andertons urge it was unjust and inequitable for the trial court to award attorney's fees to the City as the allegedly prevailing party. In their sixth issue, the Andertons contend the City did not properly segregate its attorney's fees and thus the trial court erred by awarding the City fees that were not all reasonable and necessary as to the UDJA causes of action.

The final judgment on remand does not indicate on what basis the trial court awarded the City its attorney's fees. Based on the judge's statements at the trial on the merits on the issue of attorney's fees, the Andertons urge that the trial judge's consistent position was that the ultimate prevailing party should be awarded attorney's fees, which would present a potentially complicated

question in view of the result in the first appeal and the City's effective surrender as to the remaining claims.[5] *See Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791–92 (1989) (suggesting a party seeking substantial relief and achieving relatively little might be regarded as not "prevailing"). Ultimately, courts applying "prevailing party" standards have opted for a net judgment standard regardless of the degree of success. *See id.* at 790; *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (holding that the degree of the plaintiff's overall success goes to the reasonableness of a fee award and the most critical factor in determining the reasonableness of a fee award is the degree of success obtained). The UDJA, however, does not condition the entitlement to fees on prevailing party status. *See SAVA gumarska in kemijska industria d.d. v. Advanced Polymer Scis., Inc.*, 128 S.W.3d 304, 323 (Tex. App.—Dallas 2004, no pet.). The City responds that the trial court did not in fact (or erroneously) apply a prevailing party standard, although it could consider the outcome of the parties' claims as part of its just and equitable determination. The City directs us to the trial court's second conclusion of law, which notes that the UDJA "is not a prevailing party statute." Regardless of whether the trial court may have considered which party prevailed in this case, its fourth conclusion of law affirmatively indicates the trial court awarded the City its attorney's fees as "equitable and just based on the claims asserted in this case, the objectives sought by the parties and the outcome of this case."

As noted, a trial court "may award costs and reasonable attorney's fees as are equitable and just" in a declaratory judgment proceeding. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009. In a declaratory judgment action, the prevailing party is not entitled to attorney's fees as a matter of law. *Advanced Polymer Scis., Inc.*, 128 S.W.3d at 324. In the exercise of its discretion, the trial court may decline to award attorney's fees to either party. *Id.* Or, the trial court may award attorney's fees to the non-prevailing party. *Id.* Whether it is "equitable and just" to award any

[5] During closing arguments, the trial judge asked the Andertons' counsel whether the judge had "to determine first who is the ultimate prevailing party . . . isn't the City the prevailing party and shouldn't the City be entitled to its fees?"

portion of reasonable and necessary attorney's fees depends, not on direct proof, but on the concept of fairness, in light of all the circumstances of the case. *See Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 162–63 (Tex. 2004). Thus, for example, an unreasonable amount of fees cannot be awarded, even if the court believed them to be "just." *See Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998). Conversely, the court may conclude that it is not equitable or just to award even reasonable and necessary fees. *See id.* As in cases involving only a modicum of success in the context of the prevailing party statute, even fees supported by uncontradicted testimony may be "unreasonable" in light of the amount involved, the results obtained, and in the absence of evidence that such fees were warranted due to circumstances unique to the case. *See Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009) (reversing court of appeals' decision to render fees under section 38.001(8) of the civil practice and remedies code and remanding for retrial on issue of attorney's fees); *see also Hensley v. Eckerhart*, 461 U.S. 424, 439 (1983) (holding that "the extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees" under prevailing party standard).[6] Instead, courts applying a "prevailing party" test for entitlement to fee recovery consider the degree of success a factor governing the amount of fees that would be reasonable, paralleling the analysis (insofar as quantum is concerned) under the UDJA. *Farrar*, 506 U.S. at 115 (even as to prevailing party, sometimes reasonable fee is no fee at all).

Guiding legal principles that inform the trial court's determination of an award of attorney's fees likewise inform our determination of whether the trial court's decision amounts to an abuse of discretion. *See Bocquet*, 972 S.W.2d at 21 (holding requirements that any fees awarded be reasonable and necessary are matters of fact, and requirements that fees be equitable and just are matters of law). We conclude the trial court erred in awarding the City its attorney's fees.

[6] *See also Sw. Bell Tel. Co. v. City of El Paso*, 346 F.3d 541, 551 (5th Cir. 2003) ("To qualify as a prevailing party, 'the plaintiff must (1) obtain actual relief, such as an enforceable judgment or a consent decree; (2) that materially alters the legal relationship between the parties; and (3) modifies the defendant's behavior in a way that directly benefits the plaintiff at the time of the judgment or settlement.'").

We begin our review with a brief description of the parties' status and positions as this case began and ended. *See Smith*, 296 S.W.3d at 548. At bottom, this case involved the City's efforts to materially restrict or practically terminate the Andertons' use of their property to conduct their business. After unsuccessfully seeking to restrict or eliminate the Andertons' business through citations, the City proceeded to litigation. At the start of this litigation, the City sought to limit the Andertons' use of their land by permanently enjoining them from operating their business on Lots 5 or 7 (or making any use of those lots other than local retail), and from expanding their business from Lot 6 or either adjacent lot. The City later amended its claims to include attacking the Andertons' use of Lot 6. In contrast, the Andertons sought to defend their existing use of their land by a variety of defenses and counterclaims. Both sides moved for summary judgment, and the trial court ultimately entered judgment in favor of the City. The Andertons appealed as to their claims related to Lot 5 and obtained reversal and remand of their claims of non-conforming use rights and inverse condemnation, as well as reversal of the trial court's award of attorney's fees to the City. *See Anderton*, 447 S.W.3d at 98. On remand, the City surrendered its surviving claims, leaving the Andertons free to operate their business largely as they had prior to the initiation of the dispute.

Turning to the particular claims, the City urges that one of its main objectives was in curtailing the illegal use of Lot 4. It directs us to the trial court's finding of fact that the City Manager testified at trial that the City's objectives in the suit "included curtailing the illegal use of Lot 4." However, the record reflects the City Manager's testimony was that the "dispute originally arose out of the City's knowledge that the [Andertons were] actually using part of [the City's] property (Lot 4) for the business that was primarily located on Lot 6." Further, none of the parties' pleadings indicate either party ever brought any specific claim related to Lot 4. In fact, in its third amended petition, the City stated that the Andertons had "ceased to occupy Lot 4" after the City notified them that the expansion of business operations onto adjacent lots was unlawful.

Based on the foregoing, we cannot conclude it would be equitable or just to award either party attorney's fees related to the Andertons' use of Lot 4.

Next, we will examine the parties' claims, objectives, and outcomes related to Lot 5. The parties' pleadings indicate the City first sued the Andertons in 2009, seeking (1) declaratory judgment that the Andertons' uses of their properties were non-conforming uses pursuant to the City's zoning ordinances and (2) to enjoin the Andertons from their non-conforming use of the properties, specifically "using said properties for sand and gravel storage and sales and from any other use not in conformance with the [City's] zoning ordinances." The Andertons asserted counterclaims, seeking declaratory judgment (1) that their use of Lot 5 was a legal non-conforming use, (2) that the City could not terminate or adversely impact its project on Lot 5 pursuant to Chapter 245 of the local government code, and (3) that the City could not prevent the Andertons' use of Lot 5. The Andertons asserted a counterclaim for inverse condemnation based on the City's attempts to prevent the Andertons from using Lot 5 for landscaping and building materials sales, but later non-suited that claim. The Andertons also sought unsuccessfully to enjoin the City from interfering with the Andertons' use of Lot 5.

The City concedes that its own claim and the Andertons' non-conforming use claims related to Lot 5 became moot when the City passed its zoning amendments after remand from this Court. The City's attorney testified that he had reduced the requested attorney's fee amount by excluding fees related to Lot 5 before the remand, but he had included the fees incurred after remand. Based on the foregoing, we cannot conclude it would be equitable or just to award the City any of its attorney's fees related to the Andertons' use of Lot 5.

We now turn to Lot 6. Many of the claims and objectives related to Lot 6 were the same as those related to Lot 5.[7] Additionally and specific to Lot 6, the City sought to: (1) declare the

[7] The City first sued the Andertons in 2009, seeking (1) declaratory judgment that the Andertons' use of their properties were non-conforming uses pursuant to the City's lawful and applicable zoning ordinances and (2) to enjoin the Andertons from their non-conforming use of the properties,

Andertons' demolition of a building on Lot 6 violated City ordinances; (2) mandate the construction of a barrier around Lot 6 to prevent future expansion of the Andertons' non-conforming use onto Lots 5 and 7, and (3) enjoin the further construction of a new building on Lot 6, pending their obtaining applicable permits. The Andertons also sought an injunction to require the City to issue a building permit to allow the Andertons to rebuild the building on Lot 6. The City argues it was successful in (1) mandating the reconstruction of the building on Lot 6; (2) obtaining a declaratory judgment that the Andertons' operation from the building on Lot 6 constituted a violation of the 2003 International Building Code; and (3) enjoining the Andertons from conducting business from the building on Lot 6 until a permit was obtained. The trial court's 2012 final judgment declared the Andertons were unlawfully operating their business without building permits on Lot 6, ordered the Andertons to remove an existing "porch structure," and ordered any new structure be constructed in accordance with the building code. The Andertons did not appeal those portions of the 2012 final judgment, nor did they obtain the injunction they sought. *See Anderton*, 447 S.W.3d at *passim*. As with Lot 5, the remaining non-conforming use claims related to Lot 6 became moot when the City passed its zoning amendments after remand from this Court. The City thus appears to have accomplished some, although not all, of its objectives related to Lot 6.[8] But the Andertons appear to have been largely successful in defending their use of Lot 6, if not their construction on Lot 6. Based on the foregoing, we cannot conclude it would be equitable or just to award the City its attorney's fees related to the Andertons' use of Lot 6.

specifically "using said properties for sand and gravel storage and sales and from any other use not in conformance with the [City's] zoning ordinances." The Andertons asserted counterclaims, seeking declaratory judgment (1) that their use of Lot 6 was a legal non-conforming use, (2) that the City could not terminate or adversely impact its project on Lot 6 pursuant to Chapter 245 of the local government code, and (3) that the City could not prevent the Andertons' use of Lot 6. The Andertons asserted—and, after remand, nonsuited—a counterclaim for inverse condemnation based on the City's attempts to prevent the Andertons from using Lot 6 for landscaping and building materials sales.

[8] Additionally, any injunctions the City obtained or the Andertons failed to obtain would be irrelevant to whether either party succeeded on its claims under the UDJA. *See, e.g., Jackson v. State Office of Admin. Hearings*, 351 S.W.3d 290, 301 (Tex. 2011) (holding award of attorney's fees under UDJA is unavailable if claim for declaratory relief is merely incidental to other claims for relief).

Finally, we review the parties' claims, objectives, and outcomes related to Lot 7. The only issue related to Lot 7 appears to have been the expansion of non-conforming business operated on Lot 6 onto Lot 7, specifically the staging and parking of heavy trucks on Lot 7. In the City's motion for partial summary judgment filed before the 2012 final judgment, the City argued the Andertons "admit they never acquired non-conforming use rights to Lot 7, and claim they have ceased using Lot 7 for outdoor storage purposes . . . ." Thus, the Andertons did not actively contest the issue and the trial court granted that motion and granted declaratory judgment that the Andertons had no non-conforming use rights in Lot 7. The parties later agreed to an injunction to confirm the Andertons would no longer park vehicles on Lot 7. The declaratory judgment and the agreed injunction were later made a part of the 2012 final judgment, and the Andertons did not appeal any of the portions of the 2012 final judgment related to Lot 7.

In reviewing the foregoing actions, we note that although the City was successful in obtaining declaratory judgments related to its claims related to Lot 7 (relating to parking) and to some of its claims regarding Lot 6 concerning removal of a structure, the Andertons were wholly successful in their claims related to Lot 5 and in some of their claims regarding Lot 6. And there appear to be no claims related to Lot 4, despite the City's suggestion that the use of this lot served as the instigation for this suit. Thus, although the City initially sought to limit the Andertons' use of Lots 5, 6, and 7, the Andertons were still able to operate their business on Lots 5 and 6, leaving aside the injunction on parking their trucks on Lot 7 and rebuilding a small structure on Lot 6. In light of all of the circumstances of this case, we cannot conclude awarding the City its attorney's fees of $166,250 was "equitable and just."

Accordingly, we sustain the Andertons' fifth issue, reverse the trial court's award of the City's attorney's fees, and remand the issue of attorney's fees to the trial court for further consideration in light of this opinion. *See* TEX. R. APP. P. 43.3. In light of our resolution of the Andertons' fifth issue, we need not discuss their sixth issue. *See* TEX. R. APP. P. 47.1; *Bocquet,*

972 S.W.2d at 21 ("court may conclude it is not equitable or just to award even reasonable and necessary fees"). Further, in light of our resolution of the Andertons' first and fifth issues, we need not discuss their fourth issue.[9] *See* TEX. R. APP. P. 47.1.

CONCLUSION

We reverse the portion of trial court's final judgment on remand awarding the City its attorney's fees and remand the issue of attorney's fees to the trial court for further consideration in light of this opinion. *See* TEX. R. APP. P. 43.3. We affirm the remainder of the trial court's final judgment on remand.

/David J. Schenck/
DAVID J. SCHENCK
JUSTICE

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[9] In their fourth issue, the Andertons argued that because the trial court erred in denying summary judgment to the Andertons, it also erred in awarding the City its attorney's fees.

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

PATSY B. ANDERTON AND DOYLE ANDERTON, INDIVIDUALLY AND D/B/A A-1 GRASS, SAND AND STONE, Appellants

No. 05-17-00138-CV V.

CITY OF CEDAR HILL, TEXAS, Appellee

On Appeal from the 14th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-09-12187-A.
Opinion delivered by Justice Schenck, Justices Lang and Fillmore participating.

In accordance with this Court's opinion of this date, we **AFFIRM** the portion of the trial court's judgment dismissing as moot the Andertons' claims for non-conforming use rights in Lots 5 and 6, **REVERSE** the portion of the trial court's judgment awarding the City its attorney's fees, and **REMAND** the issue of attorney's fees for further proceedings consistent with this opinion.

It is **ORDERED** that appellants PATSY B. ANDERTON AND DOYLE ANDERTON, INDIVIDUALLY AND D/B/A A-1 GRASS, SAND AND STONE, recover their costs of this appeal from appellee CITY OF CEDAR HILL, TEXAS.

Judgment entered this 25th day of May, 2018.