NO. COA10-60

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2010

GATES FOUR HOMEOWNERS ASSOCIATION, INC., et al.,

Petitioners,

v. Cumberland County
No. 08 CVS 13276

THE CITY OF FAYETTEVILLE,

Respondent.

Appeal by petitioners from orders entered 30 September 2009 by Judge Richard L. Doughton in Cumberland County Superior Court. Heard in the Court of Appeals 2 September 2010.

Hodges & Coxe, P.C., by C. Wes Hodges, II, for petitioners.

City Attorney for the City of Fayetteville Karen M. McDonald for respondent.

Parker, Poe, Adams & Bernstein L.L.P., by Benjamin Sullivan, Anthony Fox, and Susan W. Matthews, for respondent.

ELMORE, Judge.

This appeal arises from an order granting summary judgment in favor of the City of Fayetteville (respondent or City). We affirm.

Background

On 28 July 2008, respondent adopted a resolution of intent to consider the involuntary annexation of the Gates Four subdivision,

a gated community. Subsequently, respondent adopted and approved the "Annexation Report and Plan of Services: City of Fayetteville, North Carolina: Gates Four Annexation Area" (annexation report). The annexation report included two sections that have particular importance to the case at hand. Section 1.6 included a general statement about the City's municipal service plan: "The general municipal services plan delineated in Section 3 of this report describes the City of Fayetteville municipal services that will be provided to the potential annexation area. The municipal services evaluated include police protection . . . ." Section 3 included information regarding the City's plan to provide police protection to the Gates Four annexation area. Prior to annexation, Gates Four used private contractors for the collection of solid waste, the Cumberland County Sheriff's Department for police protection, and the Stoney Point Volunteer Fire Department for fire and rescue services. Gates Four is a private community with restricted access, and the streets within the subdivision are owned and maintained by the property owners' association.

On 20 October 2008, respondent adopted an ordinance annexing the Gates Four subdivision. This was the second time that respondent had included Gates Four in an annexation plan, but Gates Four was excluded from the prior annexation by a settlement, which delayed annexation until 2008. This left Gates Four as an unincorporated area almost completely surrounded by respondent's borders. Thereafter, on 18 December 2008, the Gates Four Homeowners Association, along with the homeowners themselves

(collectively, petitioners), petitioned the Cumberland County Superior Court to review respondent's actions. Pursuant to respondent's motion for summary judgment and petitioners' submission of the affidavit of Michael J. Molin, the Honorable Richard L. Doughton granted respondent's motion for summary judgment and granted in part and denied in part respondent's motion to strike the affidavit of Michael J. Molin. Petitioners now appeal.

Standards of Review

Interpretation of a statute presents a question of law and is therefore subject to *de novo* review. *Carolina Power & Light Co. v. City of Asheville*, 161 N.C. App. 1, 6, 587 S.E.2d 490, 494 (2003), *reversed on other grounds*, 358 N.C. 512, 597 S.E.2d 717 (2004). This case also raises questions regarding the propriety of summary judgment, which is a matter of law and subject to *de novo* review. *See Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986). When deciding whether to grant summary judgment, a court must determine whether the pleadings, depositions, and discovery materials demonstrate that there is no genuine issue of material fact, and that a party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2009).

We review a trial court's ruling on a motion to strike an affidavit for abuse of discretion. *Blair Concrete Servs., Inc. v.*

Van-Allen Steel Co., 152 N.C. App. 215, 219, 566 S.E.2d 766, 768 (2002).

Discussion

Petitioners appeal the trial court's decision to grant respondent's motion for summary judgment on three grounds. First, petitioners argue that respondent has failed to show *prima facie* compliance with N.C. Gen. Stat. § 160A-47(3)(a), or, in the alternative, that respondent's plan for the provision of police protection was illusory and otherwise failed to comply with the requirements of the statute. Second, petitioners argue that there were genuine issues of material fact as to whether respondent's involuntary annexation failed to provide for a "meaningful extension of municipal services" to the annexed area. Finally, petitioners argue that the trial court erred by striking portions of Michael J. Molin's affidavit based on lack of personal knowledge. We affirm, except as to the striking of the last sentence of Paragraph 8 of the Molin affidavit.

I. Substantial Compliance with N.C. Gen. Stat. § 160A-47(3)(a)

The authority to annex is given to municipalities by statute and is, therefore, subject to the requirements imposed by those statutes. Sections 160A-49, 160A-47, and 160A-48(c) of our General Statutes control what is required of a municipality in order to validly annex an area. Judicial review of an annexation is limited to determining if the municipality has substantially complied with

the requirements of those three statutes. *Forsyth Citizens v. City of Winston-Salem*, 67 N.C. App. 164, 165, 312 S.E.2d 517, 518 (1984). In this case, only the provisions of § 160A-47 are relevant. Section 160A-47(3) requires the annexing city to issue an annexation report setting forth a plan to extend its municipal services to the annexed area "on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation." N.C. Gen. Stat. § 160A-47(3) (2009). A petitioner must establish more than just a technical violation because an annexing city only has to substantially comply with the statutory requirements. *See Huntley v. Potter*, 255 N.C. 619, 627, 122 S.E.2d 681, 686 (1961) ("[s]ubstantial compliance means compliance with the essential requirements" of the annexation statutes). Once substantial compliance has been shown, "[t]he burden is on petitioner to establish by competent and substantial evidence the City's noncompliance with G.S. 160A-47(3)." *In re Annexation Ordinance*, 304 N.C. 549, 551, 284 S.E.2d 470, 472 (1981) (quotations and citations omitted).

Our Supreme Court has established that § 160A-47 requires a municipality to "provide information which is necessary to allow the public and the courts to determine whether the municipality has committed itself to provide a nondiscriminatory level of service and to allow a reviewing court to determine after the fact whether the municipality has timely provided such services." *In re Annexation Ordinance*, 304 N.C. at 554, 284 S.E.2d at 474. However,

a plan does not have to specify the "number of additional personnel" or the "amount of additional equipment which will be required to extend services to the annexed area." *Id.* Instead, a plan satisfies § 160A-47(3) if it contains the following: "(1) information on the level of services then available in the City, (2) a commitment by the City to provide this same level of services in the annexed area within the statutory period, and (3) the method by which the City will finance the extension of these services." *Id.* at 555, 284 S.E.2d at 474 (citing *Moody v. Town of Carrboro*, 301 N.C. 318, 271 S.E.2d 265 (1980)).

On appeal, petitioners argue that respondent did not make an express statement demonstrating that respondent had committed itself to providing the same level of municipal services to the Gates Four area on a nondiscriminatory basis. Petitioners base their argument on the language in Section 3 of the annexation report, which states, "the City of Fayetteville will be required to provide each major municipal service that the city performs within its corporate limits to the proposed annexation area . . . on substantially the same basis and in the same manner as such services are provided within the Fayetteville corporate limits prior to annexation." Petitioners are quite right that this language alone does not demonstrate that the City has committed itself to providing the same level of services to the Gates Four area on a nondiscriminatory basis. However, Section 1.6 of the annexation report states, "The general municipal services plan delineated in Section 3 of this report describes the City of

Fayetteville municipal services that *will be provided* to the potential annexation area." (Emphasis added.)

When read in conjunction, it becomes clear that Sections 1.6 and 3 set forth the municipal services that respondent has committed to provide on a nondiscriminatory basis. We conclude that, when taken in combination, Sections 1.6 and 3 substantially comply with the requirements of § 160A-47(3) by indicating and describing municipal services that will be provided to the annexed area on substantially the same basis and in the same manner as such services are provided within the rest of the municipality. Therefore, because petitioner has failed to show by competent evidence that respondent has not complied with the statute, the trial court did not err in concluding that respondent's annexation report satisfied the requirements of § 160A-47(3).

Petitioners also contend that the annexation report failed to show the level of services then available in the municipality, as well as the level of services to be provided in the annexation area, thereby failing to meet the minimum requirements of the statute. This Court, however, has found that lists of services can satisfy the level of services requirements. *See Matheson v. City of Asheville*, 102 N.C. App. 156, 166, 402 S.E.2d 140, 146 (1991); *Thrash v. City of Asheville*, 95 N.C. App. 457, 469, 383 S.E.2d 657, 664 (1989). In both cases, the City of Asheville used the same language: "the full range of police services will be provided to the area on the same basis and manner as provided within the rest of the City. These services include a regular patrol division,

criminal investigations, community relations/crime prevention, ordinance enforcement and traffic control." *Matheson*, 102 N.C. App. at 165, 402 S.E.2d at 145-46; *Thrash*, 95 N.C. App. at 467-68, 383 S.E.2d at 664. In both cases, the City of Asheville went on to provide information regarding the number of additional personnel that would be needed to service the annexation area. *Matheson*, 102 N.C. App. at 165, 402 S.E.2d at 145; *Thrash*, 95 N.C. App. at 467-68, 383 S.E.2d at 663. As discussed above, however, a statement describing additional personnel or equipment is not required. *In re Annexation Ordinance*, 304 N.C. at 554, 284 S.E.2d at 474.

Section 3.1 of the annexation report provides a list of the police services provided by the City, which "include industrial, commercial, residential neighborhood patrol, (using mounted horses, bicycles, patrol vehicles and foot patrol), criminal investigations and public safety dispatching." According to Section 3 of the annexation report, these services "must be provided on substantially the same basis and in the same manner as such services are provided within the Fayetteville corporate limits prior to annexation." Additionally, the annexation report states that no new personnel will be required to provide these services to Gates Four because additional police officers were included in the original annexation plan from 2003, and none of those officers were removed from the area when Gates Four was not included in the annexation. Section 3.1 does not include a discussion of how police protection in the annexation area will be funded, presumably

because the determination has been made that no new units or equipment will be required.

In light of the similarity between the list of services provided in the annexation report and the lists provided in *Matheson* and *Thrash*, we hold that the City's annexation report is sufficient. Respondent commits to providing City of Fayetteville municipal services to the Gates Four annexation area in Section 1.6; then, in Section 3, the report indicates that those municipal services must be provided on substantially the same basis and in the same manner as the services provided within the corporate limits. Section 3.1 then enumerates the specific police services that the City offers. In *Matheson* and *Thrash*, this Court concluded that lists of this type satisfy the level of services requirement that our Supreme Court laid down in *In re Annexation Ordinance*. *Matheson*, 102 N.C. App. at 166, 402 S.E.2d at 146; *Thrash*, 95 N.C. App. at 469, 383 S.E.2d at 664. Thus, respondent has shown substantial compliance with § 160A-47(3) through the outline of police services that will be provided to the annexation area. After respondent demonstrated substantial compliance, the burden was on petitioner to show actual noncompliance by respondent. This they have not done. Accordingly, this assignment of error is overruled.

In addition to the arguments discussed above, petitioners have argued in the alternative that, even if the annexation report complied with § 160A-47(3)(a), the plan for extension of police services for the Gates Four area is illusory and otherwise failed

to comply with the statute. To support this argument petitioners rely on *Fix v. City of Eden*, 175 N.C. App. 1, 622 S.E.2d 647 (2005). In *City of Eden*, this Court affirmed a judgment finding an annexation ordinance null and void. *Id.* at 3, 622 S.E.2d at 649. There, the city's annexation report stated that it was committed to providing "water . . . services to the Indian Hills Area on substantially the same basis and in the same manner as such services are provided within the rest of the City prior to annexation." *Id.* at 7, 622 S.E.2d at 651. This Court found those statements to be illusory because the city would only be able to provide those services if it were able to successfully negotiate a series of agreements with Dan River Water, Inc., a federally protected water service provider. *Id.* at 9, 622 S.E.2d at 652. This Court upheld the trial court's conclusion that the city could not simply assume that the water service provider would grant access to its infrastructure at the terms sought by the city. *Id.* We concluded that, "in the absence of an agreement or analysis in the report discussing the feasibility and costliness of providing water services if Dan River refuses to bargain with the City, the trial court properly concluded that the City's statement regarding its commitment to provide water services is illusory." *Id.*

Unlike *City of Eden*, the case at bar does not include any evidence of the kind of contingent or conditional prerequisites for the extension of services that this Court objected to in *City of Eden*. Here, the extension of police services does not require negotiation with an outside corporation, and no assumptions must be

made regarding respondent's ability to provide the services it has promised to provide. Therefore, the concerns present in *City of Eden* are simply not evident in this case, and we conclude that respondent's proposed extension of services is not illusory.

II. "Meaningful Extension of Services"

Petitioners' second argument on appeal is that there are genuine issues of material fact as to whether the City's annexation plan provides for a meaningful extension of municipal services to the annexed area. We conclude that there are no genuine issues of material fact and that respondent's plan does provide for the meaningful extension of services.

Our Supreme Court, in *Nolan v. Village of Marvin*, established the requirement that an annexing municipality must provide the area to be annexed with a meaningful extension of services. 360 N.C. 256, 261-62, 624 S.E.2d 305, 308-09 (2006). Here, the question raised is whether replacing an annexed area's existing municipal services with a comparable level of municipal services (provided by the annexing municipality) meets the meaningful extension requirement set forth in *Nolan*. We hold that it does.

In *Nolan*, of the nine municipal services listed in N.C. Gen. Stat. § 160A-35(3), only administrative services were provided to residents of the Village of Marvin by the municipality. *Id.* at 258, 624 S.E.2d at 306-07.[1] The other eight services were provided

[1] N.C. Gen. Stat. § 160A-35 is the equivalent of N.C. Gen. Stat. § 160A-47, except that it applies to annexations by municipalities with a population under 5,000, while § 160A-47

by state, county, volunteer organizations, or not at all. *Id.* at 258, 624 S.E.2d at 307. In concluding that the annexation plan presented by the Village of Marvin did not provide for a meaningful extension of services, the Supreme Court determined "only that the level of municipal services proposed" by the Village of Marvin was insufficient. *Id.* at 262, 624 S.E.2d at 308. This decision was based on the fact that administrative services were the only services to be extended, and, in addition, they were only necessary in the annexed area because of the annexation itself. *Id.* at 262, 624 S.E.2d at 308-09.

Subsequent to the decision in *Nolan*, this Court decided *Norwood v. Village of Sugar Mountain*, 193 N.C. App. 293, 667 S.E.2d 524 (2008). In *Norwood*, this Court determined that the Supreme Court did not intend to impose a requirement that a municipality add additional employees or equipment in order to provide meaningful police protection. *Id.* at 311, 667 S.E.2d at 536. Instead, this Court determined "that our review as to whether the extension of municipal services is meaningful should [not] center on the quality of services provided." *Id.* at 312, 667 S.E.2d at 536. Instead, "the qualitative analysis is grounded in nondiscrimination, and our inquiry into what types of services are provided is quantitative, not qualitative." *Id.* Therefore, "it is not the number of incidents that the police will be involved in that concerns this Court, but rather the category of service[s]

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applies to annexations by municipalities with populations greater than 5,000.

provided." *Id*. Thus, when reviewing for an "extension of meaningful services," we look at the type of services extended and, when reviewing for the non-discriminatory manner of providing the services, we look at the levels of service.

The case at hand can be distinguished from *Nolan* because the City does provide extensive municipal services of the types listed in § 160A-47, and the annexation report states that the City will provide those services to the annexation area. This was not the case in *Nolan*; in that case, the municipality only offered administrative services to its residents, and only those administrative services were to be extended. *Nolan* at 258, 624 S.E.2d at 307. Here, upon annexation, respondent has promised to extend police protection (provided by the City itself), fire protection (provided by the City and through contracts with volunteer fire departments), as well as solid waste and recycling collection and disposal (provided by contracting with a solid waste collection firm) "on substantially the same basis and in the same manner as such services are provided within the Fayetteville corporate limits prior to annexation." Under *Norwood*, when reviewing whether an extension of services is meaningful, we must only determine if the category of services to be extended are of the type required by statute. 193 N.C. App. at 312, 667 S.E.2d at 536. The categories of services which respondent promises to extend in the annexation report are the exact categories of services required by § 160A-47(3)(a). Therefore, we conclude that respondent has provided for the meaningful extension of services.

Petitioners argue that there are genuine issues of material fact regarding the extension of services because respondent does not plan to add additional police personnel or equipment. As stated above, however, the law does not require a municipality to add employees or equipment in order to provide a meaningful extension of services. *Id.* Therefore, because petitioners only argue that summary judgment was inappropriate because respondent will not add police personnel or equipment, this argument fails.

We conclude that it was proper for the trial court to grant summary judgment in favor of respondent because there was no genuine issue of material fact and, even when viewed in a light most favorable to petitioners, the record indicates that respondent has complied with the meaningful extension of services requirement set forth in *Nolan*, and is entitled to judgment as a matter of law.

III. Molin Affidavit

Petitioners' final argument on appeal is that the trial court erred by granting respondent's motion to strike portions of the affidavit of Michael J. Molin (Molin Affidavit). We conclude that it was proper for the trial court to grant the motion to strike Paragraphs 10, 17, 22, 25, 26, 28, and 29 in full, the final sentence of Paragraph 12, and the first sentence of Paragraph 23. However, it was improper for the trial court to grant the motion to strike the final sentence of Paragraph 8.

Petitioners offered the Molin Affidavit in response to respondent's motion for summary judgment. Rule 56(e) of our Rules

of Civil Procedure states: "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2009). Paragraphs 10, 17, 22, 25, 28, the final sentence of Paragraph 12, and the first sentence of Paragraph 23 contain no evidence to support an inference that Mr. Molin had personal knowledge with respect to the plans of respondent. Each of these paragraphs deals directly with the level of services that respondent promised to provide to the annexation area.

This Court has determined that, where no inference of personal knowledge can be drawn from the affidavit itself, there is a presumption that it does not exist. *Currituck Assocs.-Residential P'ship v. Hollowell*, 170 N.C. App. 399, 403, 612 S.E.2d 386, 389 (2005). Therefore, because we can draw no inference that Mr. Molin had personal knowledge of the plans set forth in the annexation report, we presume that he did not have personal knowledge. Accordingly, we affirm the trial court's decision to strike Paragraphs 10, 17, 22, 25, 28, the final sentence of Paragraph 12, and the first sentence of Paragraph 23.

In contrast to the above-listed paragraphs, the Molin Affidavit did contain evidence to support Michael J. Molin's personal knowledge regarding the historical level of police protection provided by the Sheriff's Department because he had served on the board of the Homeowners Association for sixteen years

and had been a resident of Gates Four for twenty-nine years. These two facts are sufficient to establish that Mr. Molin had personal knowledge regarding the level of police protection as mentioned in the last sentence of Paragraph 8. Therefore, it was improper for the trial court to strike that portion of the Molin Affidavit.

Conclusion

For the reasons listed above, we hold that the trial court correctly concluded that the annexation report showed substantial compliance with the statutory requirements, that respondent's plan for the extension of police protection does provide a "meaningful extension of services," and that the trial court properly granted respondent's motion to strike those portions of the Molin Affidavit that were not based on personal knowledge. Therefore, the decision of the trial court is affirmed as to all parts, except the striking of the last sentence of Paragraph 8. We remand for the sole purpose of re-entering that sentence into the record.

Affirmed.

Judges JACKSON and STEPHENS concur.

Report per Rule 30(e).