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NO. COA12-1386
NORTH CAROLINA COURT OF APPEALS

Filed: 19 November 2013

HISTORICAL PRESERVATION ACTION
COMMITTEE, INC., AND NORTH
CAROLINA DIVISION SONS OF
CONFEDERATE VETERANS, INC.,

Plaintiffs,

v.

Rockingham County
No. 12 CVS 518

CITY OF REIDSVILLE, NORTH
CAROLINA; NORTH CAROLINA
DEPARTMENT OF CULTURAL RESOURCES;
NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION; and UNITED
DAUGHTERS OF THE CONFEDERACY -
NORTH CAROLINA DIVISION, INC.,

Defendants.

Appeal by plaintiffs from orders filed 12 and 19 July 2012
by Judge Mark E. Klass in Rockingham County Superior Court.

Heard in the Court of Appeals 24 April 2013.

*Conner Gwyn Schenck, PLLC, by Timothy R. Wyatt, for
plaintiff-appellants.*

*Attorney General Roy Cooper, by Special Deputy Attorney
General Karen A. Blum and Assistant Attorney General Tammy
A. Bouchelle, for defendant-appellees.*

STEELMAN, Judge.

Where plaintiffs did not allege a sufficient injury that was fairly traceable to defendants, plaintiffs were not "persons aggrieved" as defined under the Administrative Procedure Act and did not have standing to seek judicial review under N.C. Gen. Stat. § 150B-43.

I. Factual and Procedural Background

On 23 May 2011, a van struck the Confederate monument that was located in the center of a roundabout at the intersection of North Scales and Morehead streets in Reidsville, North Carolina. The monument had been located at this intersection for over 100 years. According to newspaper articles from the early 1900s, the United Daughters of the Confederacy (UDC) began raising money for the construction of the monument in 1907. In 1910, the UDC erected and dedicated the monument at a public ceremony. The City of Reidsville permitted the erection of the monument. The monument consisted of a statue of a Confederate soldier, standing atop a granite obelisk. The UDC held a celebration on 29 June 2010 to commemorate the monument's 100th anniversary.

After the 2011 traffic accident, the monument was badly damaged, the statue of the soldier having been dislodged from the obelisk and broken into many pieces. At an 8 June 2011 Reidsville city council meeting, the council heard input from the public as to what should be done concerning the damaged

monument. Interim City Manager Michael Pearce addressed the question of the ownership of the monument and stated that while the City believed it owned the monument, the UDC contended that they had erected the monument and never intended for the City to have ownership of it. In July 2011, after researching public records, the Reidsville City Attorney concluded that the UDC was the "rightful owner" of the monument. The City Manager and the state president of the UDC corresponded concerning the future of the monument. The UDC consulted with three specialists who determined that the statue of the soldier could not be repaired. The City of Reidsville and the UDC agreed that while the base of the monument could be repaired, it would not be possible to repair the statue, and a replacement statue would have to be made. The base of the monument would be moved on 1 September 2011, and placed in storage pending the construction of a new statue of the soldier. The UDC stated that it would not erect the statue at the original location, but that they would move it to an alternate location. The City acknowledged that the monument belonged to the UDC and agreed to work with the UDC to supply the manpower and equipment to move the base of the monument. On 1 September 2011, a Reidsville Public Works crew moved the base of the monument to a site where it would be stored, while the UDC worked to reconstruct a replica statue. On

25 September 2011, the insurance carrier of the motorist who damaged the monument tendered payment in the amount of \$105,000 to the UDC, which executed a property damage release that relieved the motorist of further liability.

On 19 September 2011, the Historical Political Action Committee, Inc., (HPAC) wrote to the City of Reidsville, advising them of the "questionable legality of an apparent agreement" between the City and the UDC. HPAC asserted that the Rockingham County chapter of the UDC did not agree with the decision of the state UDC president, that the Rockingham County chapter of the Sons of Confederate Veterans (SCV) did not agree with the decision, and that over 1,000 individuals had signed a petition to the City Council in favor of returning the restored monument to its previous location. HPAC further asserted that the UDC did not own the monument, that the City took ownership of the monument in 1910, but that subsequent action by the North Carolina General Assembly in 1921 and 1931 transferred ownership of the monument and the land in the intersection to the State.

On 3 December 2011, the North Carolina Division of the UDC, at a meeting of the organization's membership, voted unanimously to relocate the Reidsville monument to property owned by the organization in the Reidsville City Cemetery. They awarded the contract for the replacement of the statue, and determined that

the original base of the monument would still be used as a tie to the original monument. The date for the completion of the monument was set to be 1 August 2012.

On 7 December 2011, HPAC and SCV (collectively plaintiffs) filed petitions for declaratory rulings with the North Carolina Department of Transportation (NCDOT) and the North Carolina Department of Cultural Resources (NCDRCR) (collectively defendants). Plaintiffs requested a declaratory ruling from each defendant that the monument had been state property and that the monument was improperly removed from state property.

On 23 February 2012, NCDOT and NCDRCR issued declaratory rulings denying all relief requested by plaintiffs because plaintiffs lacked standing to seek a declaratory judgment under N.C. Gen. Stat. § 150B-4. On 22 March 2012, plaintiffs filed a complaint and petition for judicial review in Rockingham County Superior Court pursuant to N.C. Gen. Stat. § 150B-43. On 13 April 2012, plaintiffs amended their complaint to add the United Daughters of the Confederacy North Carolina Division, Inc. as a party defendant. Plaintiffs sought judicial review of the declaratory rulings of NCDOT and NCDRCR. They additionally sought a declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 and 1-254 that the monument was public property, that the City had improperly disposed of the monument, and that the UDC improperly

accepted the monument. Plaintiffs also asserted a claim for attorneys' fees. Plaintiffs alleged they were injured by the removal of the monument on the following grounds: economic injury to owners of businesses in and around the Reidsville Historic District, improper disposition of public property by the City of Reidsville, and aesthetic injury to SCV members because of the "direct conflict between the Monument's removal and the SCV's purpose[.]"

On 7 June 2012, plaintiffs voluntarily dismissed all claims against the UDC and on 30 August 2012, plaintiffs voluntarily dismissed all claims against the City of Reidsville. On 25 June 2012, plaintiffs voluntarily dismissed their claim for declaratory judgment pursuant to N.C. Gen. Stat. § 1-253 and 1-254 as applied to NCDOT and NCDCCR. These actions left only plaintiffs' claims for judicial review pursuant to N.C. Gen. Stat. § 150B-43 of the rulings of the NCDOT and NCDCCR and their claim for attorneys' fees to be resolved by the trial court.

In orders filed 12 July 2012 and 19 July 2012, the trial court granted defendants' motions to dismiss the petitions for judicial review for lack of subject matter jurisdiction because plaintiffs lacked standing under N.C. Gen. Stat. § 150B-43. The trial court dismissed plaintiffs' claim for attorneys' fees

because of lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted.

Plaintiffs appeal each of the orders of the trial court.

II. Standing

In its only argument on appeal, plaintiffs contend that the trial court erred in dismissing their petition for judicial review on the grounds that plaintiffs lacked standing. We disagree.

A. Standard of Review

We review the trial court's ruling on a motion to dismiss for lack of standing *de novo*. *Templeton v. Town of Boone*, 208 N.C. App. 50, 53, 701 S.E.2d 709, 712 (2010).

B. Analysis

There is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court. *A fortiori*, no appeal lies from an order or decision of an administrative agency of the State . . . unless the right is granted by statute.

In re Emp't Sec. Comm., 234 N.C. 651, 653, 68 S.E.2d 311, 312 (1951) (citations omitted). The right to judicial review of a declaratory ruling pursuant to N.C. Gen. Stat. § 150B-4 is governed by N.C. Gen. Stat. § 150B-43. Pursuant to N.C. Gen. Stat. § 150B-43, in order to have standing to seek judicial review of an adverse agency determination, the following five

requirements must be met: "(1) the plaintiff must be an aggrieved party;¹ (2) there must be a final agency decision; (3) the decision must result from a contested case; (4) the plaintiff must have exhausted all administrative remedies; and (5) there must be no other adequate procedure for judicial review." *Steward v. Green*, 189 N.C. App. 131, 136, 657 S.E.2d 719, 722 (2008) (footnote added) (quoting *Petition of Wheeler*, 85 N.C. App. 150, 153, 354 S.E.2d 374, 376 (1987)).

A "[p]erson aggrieved" means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision." N.C. Gen. Stat. § 150B-2(6) (2011) (emphasis added). Our Supreme Court has given the following definition:

The expression "person aggrieved" has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: Adversely or injuriously affected; damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from

¹ Similarly, we note that in order to obtain a declaratory ruling pursuant to N.C. Gen. Stat. § 150B-4, one must also be a "person aggrieved." N.C. Gen. Stat. § 150B-4 (2011). The order before us is the trial court's dismissal of the petition for judicial review. We therefore review the trial court's determination that plaintiffs are not persons aggrieved under N.C. Gen. Stat. § 150B-43.

an infringement or denial of legal rights.

In re Halifax Paper Co., 259 N.C. 589, 595, 131 S.E.2d 441, 446 (1963) (citations omitted).

The requirement that a person be aggrieved is very similar to the requirement of standing. *Orange Cnty. v. N.C. Dep't of Transp.*, 46 N.C. App. 350, 361, 265 S.E.2d 890, 899 (1980). The rationale of the concept of standing is that only a person "with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue." *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973). Injury in fact is "an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Neuse River Found., Inc. v. Smithfield Foods*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citation omitted). In order for a plaintiff to have standing, the injury must also be "fairly traceable to the challenged action of the defendant." *Id.*

In the instant case, plaintiffs alleged in their petition for judicial review that they were "injured by the removal of the Monument and other actions taken in violation of above-named statutes and rules in ways that include. . . [:]" (1) economic injury to members who own businesses around the Reidsville Historic District; (2) injury from the improper disposition of

public property; and (3) aesthetic injury unique to SCV members. We address each of these allegations.

1. Economic Injury

Plaintiffs contend that HPAC members include certain business owners who were economically injured by the removal of the monument from the Reidsville Historic District. They cite to N.C. Gen. Stat. § 160A-400.1 as support for proof of their injury. Part 3C of Article 19 of Chapter 160A, entitled Historic Districts and Landmarks, was enacted in 1989 to provide municipalities with the power to regulate historic districts and monuments. 1989 N.C. Sess. Law, ch. 706. Because “[t]he historical heritage of our State is one of our most valued and important assets[,]” Part 3C gives municipalities the power to establish historic preservation commissions, which have the power to designate certain areas and objects within the city as historic districts and landmarks. N.C. Gen. Stat. §§ 160A-400.1, 400.7, 400.8 (2011). The statute provides no support for plaintiffs’ contention that the removal of a monument lowers the economic value of land or decreases business activity within a historical district. Plaintiffs cite no other support for this injury and do not allege any specific profit margins or statistics that otherwise make this alleged injury plausible or concrete. See *Neuse River Found., Inc.*, 155 N.C. App. at 114,

574 S.E.2d at 52. This alleged injury was not sufficient to confer standing upon plaintiffs. See *Diggs v. N.C. Dep't of Health and Human Servs.*, 157 N.C. App. 344, 348, 578 S.E.2d 666, 668-69 (2003) (rejecting the plaintiff's argument that she was a "person aggrieved" under N.C. Gen. Stat. § 150B-4 when plaintiff failed to demonstrate that her hypothetical injury was "certain to come to pass, . . . imminently threatened, or . . . even likely to occur").

2. Improper Disposition of Public Property

Plaintiffs also allege that HPAC members were injured by the improper disposition of public property by the removal of the monument by the City of Reidsville. In their brief, plaintiffs contend that "citizens and taxpayers have standing to challenge the illegal or wrongful disposition of public property by a municipality." In support of this contention, plaintiffs cite *Metcalf v. Black Dog Realty, LLC*, 200 N.C. App. 619, 684 S.E.2d 709 (2009). The issue in *Metcalf* was whether the plaintiffs had standing to seek a declaratory judgment that a piece of property, owned by defendant, was subject to certain use restrictions based upon an alleged dedication of the property for use as a courthouse or park. *Id.* at 627, 684 S.E.2d at 715-16. In *Metcalf*, plaintiffs sought a declaratory judgment under N.C. Gen. Stat. § 1-254, which gives courts the power to

construe all instruments. N.C. Gen. Stat. § 1-254 (2011). We held that "at least to the extent that this is an action to quiet title, the pleadings have raised an actual controversy [which] is a proper subject for an action under the Uniform Declaratory Judgment Act." *Metcalf*, 200 N.C. App. at 628, 684 S.E.2d at 716 (alteration in original).

Metcalf provides no support for plaintiffs' contention that they have standing because plaintiffs did not assert an action to quiet title under the Uniform Declaratory Judgment Act. Plaintiffs' claim for declaratory judgment under N.C. Gen. Stat. § 1-253 and § 1-254 was dismissed. Thus, on appeal, plaintiffs' ability to seek judicial review of the administrative decision is governed by N.C. Gen. Stat. § 150B-43 and not N.C. Gen. Stat. § 1-254. Under N.C. Gen. Stat. § 150B-43, plaintiffs must demonstrate that they have standing. *Orange Cnty.*, 46 N.C. App. at 360, 265 S.E.2d at 898-99. Plaintiffs cannot show that they are injured by the improper disposition of public property that is a result of an administrative decision. See N.C. Gen. Stat. § 150B-2(6) (2011). In their petition for judicial review, plaintiffs allege that the City of Reidsville removed the monument from the real property in violation of certain legal requirements, including: that the City of Reidsville failed to obtain prior approval of the North Carolina Historical

Commission; that the defendant City failed to obtain a prior written permit from NCDOT; and that the City of Reidsville gifted the monument to the UDC without a written preservation agreement. These are not decisions of either NCDOT or NCDRCR. They are the actions of the City of Reidsville, which is no longer a party to this action. Plaintiffs are not persons aggrieved under N.C. Gen. Stat. § 150B-43 to seek judicial review of the declaratory rulings of NCDOT and NCDRCR as a result of the actions taken by the City of Reidsville.

3. Aesthetic Injury

Plaintiffs also contend that they are persons aggrieved because SCV members have "derived a particular aesthetic enjoyment from the monument and are injured by its removal." In the environmental context, to have standing a plaintiff must allege "(1) injury to a protected interest that cannot be considered merged in the general public right; (2) causation; and (3) proper, or individualized, forms of relief." *Neuse River Found., Inc.*, 155 N.C. App. at 116, 574 S.E.2d at 53. Injury to aesthetic or recreational interests alone, regardless of degree, will not confer standing on an environmental plaintiff. *Id.* Likewise, aesthetic injury, without more, is insufficient to constitute injury and confer standing upon plaintiffs who seek judicial review of an administrative agency decision.

4. Procedural Injury

Finally, we address plaintiffs' contention that they have standing as a party to the declaratory ruling and that they are a "person aggrieved" by the declaratory ruling because the declaratory rulings themselves invade plaintiffs' legally protected interest.

We have previously rejected this proposition where a plaintiff sought judicial review "of the North Carolina Veterinary Medical Board's denial of plaintiff's request for an administrative hearing." *In re Denial of Request for Full Admin. Hearing*, 146 N.C. App. 258, 260, 552 S.E.2d 230, 231 (2001). In that case, the plaintiff argued she was a person aggrieved because "her legal right to a hearing was denied, [and] such denial confers upon her the necessary aggrieved status to demand an administrative hearing." *Id.* at 262, 552 S.E.2d at 232. We held that "[p]rocedural injury, standing alone, cannot form the basis for aggrieved status under the NCAPA." *Id.*; see also *Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res.*, 337 N.C. 569, 590, 447 S.E.2d 768, 780-81 (1994) (reviewing case law and determining that procedural injury must be accompanied with an actual injury, such as an infringement on property or personal rights, to qualify as "injury in fact").

Plaintiffs on appeal cite to alleged procedural errors made by defendants that amounted to violations of the NCAPA, including that defendants failed to deny plaintiffs' requests for hearing in writing within thirty days. Plaintiffs assert that they are injured by this action for the first time on appeal, and therefore, failed to preserve this issue for appellate review. N.C.R. App. 10(a)(1). Further, plaintiffs cite no other actual injury to accompany the procedural injury. *Empire Power Co.*, 337 N.C. at 590, 447 S.E.2d at 780-81.

Plaintiffs also contend that the trial court's failure to conduct judicial review "effectively up[held] the portions of the Declaratory Rulings that address the substantive legal merits of Plaintiff's Request." It is clear from the rulings of NCDOT and NCDCCR that the petitions did not meet the statutory requirements for a declaratory ruling under N.C. Gen. Stat. § 150B-4, and that the "petition [was] denied in its entirety." While the declaratory rulings do address the merits, they do so only in the alternative and are therefore not binding precedent. *See Hayes v. City of Wilmington*, 243 N.C. 525, 536, 91 S.E.2d 673, 682 (1956) ("[I]n every case what is actually decided is the law applicable to the particular facts; all other legal conclusions therein are but *obiter dicta*[.]").

The trial court reviewed the pleadings and other materials presented with regard to the motions and arguments of counsel, and found that plaintiffs lacked standing. We note that the mere fact that plaintiffs were denied a hearing at the administrative agency does not confer upon them the necessary aggrieved status to demand an administrative hearing under N.C. Gen. Stat. § 150B-43.

III. Attorneys' Fees

Plaintiffs contend that because they do not lack standing, the trial court erred in dismissing the claims for attorneys' fees. For the reasons discussed above, this argument is without merit.

IV. Conclusion

We hold that plaintiffs have not demonstrated that their personal, property, employment or other legal rights have been injured by the decisions of NCDOT or NCDCCR. Because plaintiffs have not alleged sufficient injury, plaintiffs are not "persons aggrieved" under N.C. Gen. Stat. § 150B-43 and thus, lack standing to seek judicial review.

The order of the trial court is affirmed.

AFFIRMED.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).