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NO. COA05-1277

NORTH CAROLINA COURT OF APPEALS

Filed: 1 August 2006

WILLIAM R. BURNETTE, and wife,
SANDRA H. BURNETTE, GENEVA
MOZINGO and wife, SHARON H.
MOZINGO, THOMAS L. DUPREE and
wife, MARGARET S. DUPREE,
ROBERT H. PLEASANTS, and wife,
MARGARET J. PLEASANTS, LAWRENCE
M. PIERCE and wife, RITA L.
PIERCE, KEVIN L. MATHERS and
wife, BRENDA L. MATHERS,
KENNETH S. WADSWORTH and wife,
JEAN L. WADSWORTH, MARVIN D.
TURNER and wife, ANNE S. TURNER,
THOMAS W. FLEETWOOD and wife,
DIANE F. FLEETWOOD, JOHN D.
BOOTH and wife, ERLENE S. BOOTH,
GERALD T. MOZINGO and wife,
JANIE A. MOZINGO, and ROBERT T.
HINNANT and wife, SANDRA I.
HINNANT,
Petitioners

Wayne County
No. 04 CVS 1383

v.

CITY OF GOLDSBORO,
Respondent

Appeal by petitioners from judgment entered 21 October 2004 by Judge Kenneth F. Crow in Wayne County Superior Court. Heard in the Court of Appeals 10 May 2006.

Eldridge Law Firm, P.C., by James E. Eldridge, for petitioner-appellants.

Everett, Womble, Finan, Lawrence & Brown, L.L.P., by W. Harrell Everett, Jr. and Darrell K. Brown, for respondent-appellee.

HUNTER, Judge.

William R. Burnette, *et al.*, ("petitioners") appeal from an order granting partial summary judgment entered 21 October 2004. For the reasons state herein, we affirm the trial court's order of partial summary judgment.

On 17 June 2004, petitioners petitioned for review of the actions of the City of Goldsboro ("respondent") in adopting an involuntary annexation ordinance on 19 April 2004. An amended petition for review was filed on 30 August 2004.

On 7 October 2004, respondent moved for partial summary judgment on four of the claims alleged in petitioners' petition. Specifically, respondent moved for summary judgment on petitioners' claims that: (1) respondent failed to deliver a required statement to the Clerk of the Wayne County Board of Commissioners as required; (2) the proposed annexation area did not meet the requirements for annexation under N.C. Gen. Stat. § 160A-48(b), in that the annexation area was not adjacent or contiguous to the City's municipal borders due to another annexation being declared null and void; (3) respondent failed to comply with the procedural requirements set forth in N.C. Gen. Stat. § 160A-49 in failing to set a date for the required public information hearing in adopting the resolution of intent and that an attempt to set a date in a later adopted resolution of intent was not adopted by a two-third's majority of the City Council's voting members; and (4) respondent lacked authority to issue bonds sufficient to finance the construction of the major sewer lines.

Petitioners filed a Partial Voluntary Dismissal without Prejudice as to the first claim that respondent failed to deliver the required statement to the clerk of the county board of commissioners. In an order entered 21 October 2004, the trial court granted partial summary judgment to respondent on the remaining issues. Following a trial on the merits of the remaining claims, petitioners appeal from the order of partial summary judgment.

I.

Petitioners first contend that the trial court committed reversible error in granting partial summary judgment, as petitioners had standing to collaterally attack respondent's voluntary annexation. We disagree.

Summary judgment is properly granted when (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c), see also *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000).

N.C. Gen. Stat. § 160A-50(a) (2005) establishes the criteria for appeal from an annexation. The statute states that:

(a) Within 60 days following the passage of an annexation ordinance under authority of this Part, any person owning property in the annexed territory who shall believe that he will suffer material injury by reason of the failure of the municipal governing board to comply with the procedure set forth in this Part or to meet the requirements set forth in G.S. 160A-48 as they apply to his property may file a petition in the superior court of the

county in which the municipality is located seeking review of the action of the governing board.

Id. (emphasis added).

In *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 544 S.E.2d 821 (2001), this Court addressed the issue of standing to challenge an alleged void voluntary annexation. "In passing on the validity of an annexation or zoning ordinance, one of the court's first concerns is whether the plaintiff has standing to bring the action." *Id.* at 138, 544 S.E.2d at 823. *Ayden* first noted that in *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976), where the plaintiffs challenged annexation and zoning ordinances in an area where the plaintiffs did not own property, the North Carolina Supreme Court held that, "without actual ownership of annexed property, the plaintiffs lacked standing to challenge the annexation ordinance, notwithstanding any injury to them occasioned by [a] proposed sewer easement." *Ayden*, 143 N.C. App. at 138-39, 544 S.E.2d at 823. *Ayden* noted that *Taylor* relied on the case of *Gaskill v. Costlow*, 270 N.C. 686, 155 S.E.2d 148 (1967), which "held that challenges by private individuals to annexations generally are limited to plaintiffs with specific statutory authority to bring suit (e.g., owners of real property within an area to be annexed)." *Ayden*, 143 N.C. App. at 139, 544 S.E.2d at 823. *Ayden* noted the *Gaskill* Court applied the general rule that:

"[U]nless an annexation ordinance be absolutely void (e.g., on the ground of lack of legislative authority for its enactment), in the absence of specific statutory authority

to do so, private individuals may not attack, collaterally or directly, the validity of proceedings extending the corporate limits of a municipality. Such an action is to be prosecuted only by the State through its proper officers."

Ayden, 143 N.C. App. at 139, 544 S.E.2d at 823 (emphasis omitted) (quoting *Taylor*, 290 N.C. at 617-18, 227 S.E.2d at 581-82). Following *Gaskill* and *Taylor*, our Courts have repeatedly held that ownership of property within the annexed area, as required by statute, is necessary to have standing to challenge an annexation ordinance. See *Town of Seven Devils v. Village of Sugar Mountain*, 125 N.C. App. 692, 693, 482 S.E.2d 39, 40 (1997); *Joyner v. Town of Weaverville*, 94 N.C. App. 588, 590, 380 S.E.2d 536, 537 (1989); *McKenzie v. City of High Point*, 61 N.C. App. 393, 400-01, 301 S.E.2d 129, 131 (1983).

In *Ayden*, the plaintiffs alleged that not all property owners had signed the voluntary annexation petition in question, thus voiding the annexation. *Ayden*, 143 N.C. App. at 140, 544 S.E.2d at 824. This Court found, however, that the question was not properly before the trial court, as standing to sue was a jurisdictional issue not concerning the ultimate merits of the lawsuit. *Id.* *Ayden* noted that this Court has previously held in *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986), that once a lack of standing was determined, the Court would not address the plaintiff's assertions that an annexation was void for failure to follow statutory procedures. *Ayden*, 143 N.C. App. at 140, 544 S.E.2d at 824. *Ayden* concluded that, "even if the alleged irregularities would, if proved, render the annexation voidable by

an appropriate plaintiff, this does not eliminate the requirement that plaintiff have standing." *Id.*

Here, petitioners alleged the proposed annexation area ("Area II") did not meet the requirements for annexation under N.C. Gen. Stat. § 160A-48(b) (2005), as Area II was adjacent and contiguous to the City's municipal borders only through a previous annexation ("Area I"). Petitioners contend that the Area I annexation was void as all owners of real property within Area I did not sign the petition for voluntary annexation.

However petitioners admit that they do not own property in Area I, only in Area II. As our prior case law has clearly established, petitioners must have standing to bring such a challenge, and in this case, petitioners do not meet the statutory requirement of N.C. Gen. Stat. § 160A-50(a) of property ownership to challenge the Area I annexation. As petitioners lacked standing to challenge the prior annexation, the trial court did not err in finding summary judgment for respondents as a matter of law.

II.

Petitioners next contend in a related assignment of error that the trial court committed reversible error in granting partial summary judgment as there were genuine issues of material fact with regards to the claims. We disagree.

Petitioners contend that a material issue of fact existed as to whether the petition for voluntary annexation for Area I was signed by all property owners, as required by N.C. Gen. Stat. § 160-31 (2005). However, as discussed *supra*, petitioners lacked

standing to bring this claim. Thus, even if material issues of fact existed as to the prior annexation of Area I which might be brought by an appropriate party, petitioners' lack of standing to bring the claim bars the trial court's consideration of the claim for lack of jurisdiction. See *Ayden*, 143 N.C. App. at 140, 544 S.E.2d at 824. Therefore, the trial court, as a matter of law, did not err in granting partial summary judgment to petitioners.

As petitioners lacked standing to bring an action challenging respondent's prior annexation, the trial court did not err in granting partial summary judgment as a matter of law to respondent on the challenged claims.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).