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DONALD J. ECKI
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SUMMIT COUNTY,
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IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STATE OF OHIO, ex rel.)	CASE NO. CR 2005 03 1931
MARCELLA GAYDOSH)	
)	
Plaintiff)	JUDGE SPICER
)	
-vs-)	
)	
CITY OF TWINSBURG, et al.)	<u>ORDER and NOTICE OF</u>
)	<u>PRETRIAL</u>
Defendants)	

cv

- - -

This matter is before the Court upon a motion to dismiss pursuant to Civ.R. 12(B)(6), or in the alternative, for summary judgment filed by Defendant City of Twinsburg. Plaintiff, Marcella Gaydosh, responds in opposition. Defendant replies.

Also pending before the Court is a motion for leave to file a cross-claim filed by Intervenor Twinsburg Township against the City of Twinsburg. Subsequently, the parties jointly filed a motion for additional time for the City of Twinsburg to respond. It was asserted that an extension would allow the parties an opportunity to discuss the matter, potentially avoiding protracted litigation. Upon due consideration, the Court hereby grants an additional extension of thirty days from the date of this order for the City of Twinsburg to file its response.

Factual History

This case has its origins in a separate action between the parties. On May 23, 2002, the City of Twinsburg annexed a certain parcel of property lying within Twinsburg Township at

Chamberlin Road and SR 82 (the "Chamberlin road property"). At the time of annexation, the property was zoned "Industrial" under Twinsburg Township's zoning regulations. In the same ordinance affecting annexation, Ordinance 38-2002, the City of Twinsburg attempted to reclassify the annexed territory as "Light Industrial" under its own zoning code.

Gaydosh filed a mandamus action, challenging Ordinance 38-2002 upon the grounds that because it affected a change in a zoning district, and was not submitted to the city's voters, the ordinance conflicted with Section 7A.01 of the City of Twinsburg's Charter.

The Ninth District Court of Appeals issued a decision prohibiting the enforcement of Ordinance 38-2002 in relationship to the change in zoning designation. It also ordered the City of Twinsburg to amend its zoning map to reflect that the area was still zoned "Industrial" under Twinsburg Township's regulations.

On May 24, 2004, the City of Twinsburg passed Ordinance 76-2004, by which it adopted Twinsburg Township's "Industrial" zoning classification, and assumed all responsibility and authority over the administration of zoning regulations over the parcel. Subsequently, Gaydosh filed the present action seeking declaratory and injunctive relief. In her complaint, she challenges the City of Twinsburg's annexation and enforcement of zoning regulations over the parcel because neither action was submitted to the voters for approval. She also challenges on the same grounds the annexation of several other parcels, as well as seeks to prohibit the assertion of zoning authority over these parcels by subsequent ordinance.

The City of Twinsburg moves to dismiss the present action pursuant to Civ.R. 12(B)(6), alternatively moving for summary judgment. Because of the reliance on evidentiary materials supporting the motion, the Court will treat the City of Twinsburg's motion as one for summary judgment.

Summary Judgment Standard

Pursuant to Civ.R 56(C), summary judgment is proper where (1) there is no genuine issue of material fact, and (2) viewing the evidence most strongly in favor of the party opposing the motion, the moving party is entitled to judgment as a matter of law. *Turner v. Turner* (1993), 67 Ohio St.3d 337. The burden is on the moving party to show that there is an absence of genuine issues of material fact. *Mitseff v. Wheeler* (1988), 39 Ohio St.3d 112. The nonmoving party then must offer specific facts showing a genuine issue exists for trial. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party may not rest upon the mere allegations and denials in the pleadings but instead must point to or submit some evidence that shows the existence of a genuine dispute over material facts. *Henkle v. Henkle* (1991), 75 Ohio App.3d 732, 735.

Annexation

Gaydosh argues the annexation of any territory by the City of Twinsburg must be approved by the electors. Gaydosh cites R.C. 709.10 and Section 7A.01 of the City of Twinsburg's Charter in support. In its motion, the City of Twinsburg argues that the issue is moot, and alternatively, that R.C. 709.10 does not require a referendum on the issue of annexation.

Mootness

The City of Twinsburg argues that any challenge to annexation becomes moot once a municipality enacts legislation accepting annexation, and that there is strong public policy in Ohio against subsequent de-annexation.

The City of Twinsburg cites *State ex rel. Board of Trustees v. Davis* (1982), 2 Ohio St.3d 108, 111, in which it was held "[a]bsent an injunction or order staying further action, the

adoption by the city council of an ordinance accepting annexation renders moot a case seeking to enjoin annexation,”

In response, Gaydosh argues the issue is not moot because the City of Twinsburg has not taken final action regarding the annexation of the subject parcels. Rather, Gaydosh argues that Section 7A.01 of the City of Twinsburg’s charter requires that any proposed annexation must be submitted to the voters for approval.

Section 7A.01 states:

“any change in zoning classifications or districts, or in the uses permitted in any zoning use classifications or districts within the City of Twinsburg must first be submitted to the Planning Commission, for consideration and report. In the event the City Council should approve any of the preceeding requested changes, upon the report of the Planning Commission, it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, *but it shall be mandatory that the same be approved by a majority vote of all votes cast of the qualified electors of the City of Twinsburg and if each ward in which the property so changed is located at the next scheduled election.*” (emphasis added)

Gaydosh contends that because the annexation of any territory to the City of Twinsburg naturally involves a change in the geographic boundaries of the city, it will also effectuate a change in the City of Twinsburg’s zoning districts. Gaydosh cites in support *Chamberlin Development Inc. v. The Planning Comm’n of the City of Twinsburg* (June 30, 1998), 9th Dist. App. No. 18647, 1998 Ohio App. Lexis 2990; *State ex rel. Gaydosh v. City of Twinsburg Ins. Co.*, 2003 Ohio 5779; *State ex rel. Gaydosh v. City of Twinsburg*, Ninth Dist. CA 21238.

Thus, the issue presented is whether Section 7A.01 requires submission of a proposed annexation to the voters. Upon due consideration, the Court finds that Section 7A.01 has no application to the annexations at issue. By its express terms, Section 7A.01 of the City of Twinsburg’s Charter addresses only changes made to zoning. It makes no mention of annexation.

Moreover, Gaydosh has provided no support for the implicit application of Section 7A.01. The cases cited by Gaydosh focus exclusively on zoning matters, and the applicability of Section 7A.01 before a change to zoning may be effective. None of the cited cases hold that Section 7A.01 applies in a like manner to the annexation of territory.

In the alternative, Gaydosh argues the issue of annexation is one that is easily capable of evading review, and thus the issue may nevertheless be reviewed though technically moot. The Court finds this argument equally unpersuasive. While an ordinance accepting annexation renders a challenge to the annexation moot, one may nevertheless seek a preliminary injunction or temporary restraining order in order to preserve the status quo while the action for injunction is pending. See *State ex rel. Board of Trustees v. Davis* (1982), *supra.*; *Weathersfield Twp. Bd. of Trs. v. Smathers*, 11th Dist. App. No. 2004-T-0090, 2005 Ohio 6080; *Painesville Twp. Bd. of Trustees v. City of Painesville*, 11th Dist. App. No. 97-L-090, 1998 Ohio App. Lexis 2942. Moreover, Gaydosh has not presented any evidence that the timing or nature of the City of Twinsburg's legislative action has prevented her from requesting a preliminary injunction.

Compliance with R.C. 709.10

R.C. 709.10, entitled "Effective date and rights of inhabitants," states:

"The annexation shall become effective thirty days after the passage of the resolution or ordinance by the legislative authority of the municipal corporation accepting annexation, provided that if the resolution or ordinance is subjected to a referendum, the annexation, if approved by the electors, shall become effective thirty days after such approval..."

Based upon the plain language of the statute, the Court finds that R.C. 709.10 does not require voter approval in order for a municipal annexation to become effective. Rather, the statute provides that the annexation will become effective thirty days after the passage of an ordinance accepting annexation. If that ordinance should then be subjected to a referendum, then

the effective date will be delayed until thirty days after the referendum has been held and the electors have voiced their approval.

A referendum is a pro-active measure by the citizens of the municipality. It requires a petition to be filed within thirty days of an ordinance's passage. It also must bear the signatures of at least ten percent of the number of electors who voted for governor at the most recent general election for the office of governor in the municipal corporation. See R.C. 731.29.

In the present case, Gaydosh does not allege, or provide any evidence, that any ordinance accepting annexation of the parcels at issue were ever subjected to a referendum. Accordingly, the Court agrees with the City of Twinsburg that there is no basis for the proposition that it violated R.C. 709.10 in the annexation of the parcels in question by not submitting the matter to the voters.

Zoning

The City of Twinsburg argues that it passed Ordinance 76-2004 in conformity with R.C. 519.18, which reads in part:

“Upon annexation of township territory to an existing municipal corporation the zoning regulations then in effect shall remain in full force and shall be enforced by the township officials until the legislative authority of said municipal corporation shall either officially adopt the existing zoning regulations or new regulations for such territory.”

The City of Twinsburg argues that Ordinance 76-2004 merely adopted the existing “Industrial” zoning classification over the Chamberlin Road property, and asserted the City of Twinsburg’s authority over the subsequent administration of zoning regulations over the property.

In response, Gaydosh does not challenge the ordinance under R.C. 519.18, but rather argues that Ordinance 76-2004 effectuated a change in a zoning regulation, and as such under

Section 7A.01 of the City of Twinsburg Charter, the matter must be submitted to the voters. Thus, the issue before the Court is whether Ordinance 76-2004 constitutes a “change” in a zoning regulation.

In *State ex rel. Gaydosh v. City of Twinsburg*, Ninth Dist. CA 21238, the Ninth District Court of Appeals held that an ordinance purporting to change the zoning classification of the Chamberlin Road property from “Industrial” under Twinsburg Township’s zoning regulations to “Light Industrial” under the City of Twinsburg’s zoning regulations constituted a change in a “zoning district.” The Court explained that a zoning district is a geographic area delineated on the Zoning Map subject to the community’s land use regulations. Thus, the Court held that a change in the geographic boundaries of land within the city subject to a zoning regulation will also constitute a change in a zoning district.

In *Chamberlain Dev. v. Planning Comm'n*, 9th Dist. App. No. 18647, 1998 Ohio App. Lexis 2990, the Court stated, in deciding whether another matter constituted a zoning change, that “[a]ny ambiguity in a charter provision should be liberally construed in favor of permitting the people to vote on the issue.”

Pursuant to R.C. 519.18, the annexation of territory by a municipality does not automatically result in that new territory being subject to the municipality’s zoning regulations. Rather, the existing zoning regulations of the township remain in place, and the authority to enforce such regulations continues to reside with the township. It is upon the adoption by the municipality of the existing or new regulations for the annexed territory that the authority to enforce zoning regulations over the annexed territory becomes vested in the municipality. At that point, there is a change in the geographic regions within the municipality which are subject to the municipality’s zoning regulations.

Thus, the Court finds that by adopting Twinsburg Township's zoning regulation for the Chamberlin property, and asserting its authority to enforce such zoning regulation, Ordinance 76-2004 affected a change in the City of Twinsburg's zoning districts, and Section 7A.01 of the City of Twinsburg Charter applies and requires the matter to be submitted to the voters.

Attorney Fees

As a final matter, the City of Twinsburg argues that the present action cannot be considered a statutory taxpayer action because Gaydosh has not posted a security deposit for the costs of the action as required by R.C. 733.59.

R.C. 733.59 states:

“If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. *No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.*” (emphasis added)

Instead, the City of Twinsburg argues that the present action can only be considered a common law taxpayer suit for which attorney fees cannot be awarded. *State ex rel. Citizens for Better Portsmouth v. Sydnor* (1991), 61 Ohio St.3d 49, 54, 572 N.E.2d 649. Thus, the City of Twinsburg argues that it is entitled to judgment against Gaydosh's claims for attorney fees. Gaydosh does not respond in opposition.

Upon due consideration, the Court denies the City of Twinsburg's motion for judgment in relation to the payment of attorney fees. Local Rule 7.06 states:

“No civil action or proceeding shall be accepted for filing without a deposit as security for costs in the sum set forth on the following Schedule of Filing Fees unless otherwise ordered by the Court. When, in the opinion of the Clerk, the security deposit tendered or the documents offered for filing are not in compliance with the rules of this Court, the Clerk may require the party to

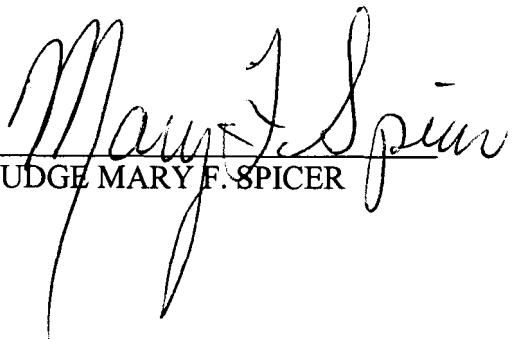
secure the approval or direction of the Court before accepting the security deposit or documents. If the matter concerns a pending case, approval shall be obtained from the judge to whom the case is assigned. If the matter is not yet a pending case, approval shall be obtained from the Administrative Judge.”

The City of Twinsburg has set forth no evidence that Gaydosh was permitted to file the instant action without posting the required security deposit, or even that the deposit posted was inadequate. Accordingly, the Court finds that summary judgment upon the issue is unwarranted at this time.

Conclusion

Based upon the foregoing, the Court grants the City of Twinsburg’s motion for summary judgment in part, and denies the motion in part. **A pretrial is hereby scheduled for this matter on February 17, 2006 at 8:30 a.m.**

It is so ordered.


JUDGE MARY F. SPICER

cc: Attorney Warner Mendenhall
Attorney Clair E. Dickinson
Attorney Alfred E. Schrader

tc/dle
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