# COMMONWEALTH OF KENTUCKY ROWAN CIRCUIT COURT CIVIL BRANCH DIVISION 1 CIVIL ACTION NO. 21-CI-90143

#### **ELECTRONICALLY FILED**

MINDY DAVENPORT, SUE HAMILTON, PENNY GOZZARD, TIM MASSEY, JESSICA BLAKEMAN, DEBRA FRENCH and JASON GRIFFITH

**PLAINTIFFS** 

v.

LAURA WHITE-BROWN, in her official capacity as Mayor of Morehead;

and

MIKE KASH, BETH OUSLEY, DAVID PERKINS and GLEN TEAGER, in their capacities as City of Morehead Councilmembers

**DEFENDANTS** 

#### <u>DEFENDANTS' RULE 12.02 MOTION TO DISMISS</u> PLAINTIFFS' COMPLAINT FOR DECLARATORY RELIEF

Defendants, Laura White-Brown, in her official capacity as Mayor of Morehead ("Mayor White-Brown") and Mike Kash, Beth Ousley, David Perkins, and Glen Teager, in their official capacities as City of Morehead Councilmembers ("Councilmembers") (collectively, "Defendants"), by counsel, and pursuant to Kentucky Rule of Civil Procedure 12.02, hereby move the Court to dismiss the Complaint for Declaratory Relief ("Complaint") filed by the Plaintiffs, Mindy Davenport, Sue Hamilton, Penny Gozzard, Tim Massey, Jessica Blakeman, Debra French, and Jason Griffith (collectively, "Plaintiffs").

As grounds for this Motion, Defendants state that Plaintiffs have failed to allege facts sufficient to meet any one of the three constitutional requirements necessary to establish

constitutional standing. Further, Plaintiffs have failed to state a claim upon which relief may be granted because the TIF Statute in question does not afford Plaintiffs with a right to sue, and even further, Plaintiffs sued the wrong parties. Accordingly, Defendants move this Court to enter an Order dismissing with prejudice all claims asserted by Plaintiffs. A Memorandum of Law in Support of the Defendants' Motion to Dismiss is attached hereto.

#### NOTICE OF HEARING

The parties will please take notice that this Motion shall come on for hearing on the 16th day of July, 2021 at the hour of 9:00 a.m. in the Rowan Circuit Court, or as soon thereafter as counsel may be heard.

Respectfully submitted,

/s/ Felisa S. Moore

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#### **CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing Motion to Dismiss was served by electronic mail and the Court's electronic filing system this the 6th day of July, 2021 to:

Ben Carter KENTUCKY FOR EQUAL JUSTICE CENTER 222 S. First Street, Ste. 305 Louisville, KY 40202 502-303-4062 ben@kyequaljustice.org

Honorable Judge William Lane Rowan Circuit Court Division I 44 West Main Street Mt. Sterling, KY 40353

/s/ Felisa S. Moore
COUNSEL FOR DEFENDANTS

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MIKE KASH, BETH OUSLEY, DAVID PERKINS and GLEN TEAGER, in their capacities as City of Morehead Councilmembers

**DEFENDANTS** 

# DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR RULE 12.02 MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR DECLARATORY RELIEF

Defendants, Laura White-Brown, in her official capacity as Mayor of Morehead ("Mayor White-Brown") and Mike Kash, Beth Ousley, David Perkins, and Glen Teager, in their official capacities as City of Morehead Councilmembers ("Councilmembers") (collectively, the "Defendants"), jointly submit the following Memorandum in Support of their Motion to Dismiss Plaintiffs' Complaint for Declaratory Relief.

#### INTRODUCTION

Plaintiffs' Complaint for Declaratory Relief seeks to invalidate Ordinance No. 20:2020 (the "Ordinance") adopted by the Morehead City Council on December 14, 2020. [Complaint, at

pg.1 at ¶ 2]. The stated purpose of the Ordinance is "to encourage investment and redevelopment" in an area of the community long-designated for business and commercial development but occupied primarily by a mobile home park. [Complaint, Ordinance at pg.1]. The means chosen by the City of Morehead (the "City") and Rowan County to pursue these worthwhile ends were: (i) the establishment of the Morehead Gateway Development Area (the "Development Area"); and (ii) the provision of "Redevelopment Assistance" by sharing with a private developer some of the incremental tax revenues produced by redevelopment as a means of underwriting the costs of the required "Public Infrastructure." [Id.].

#### The Process.

The statutory framework followed by the City in adopting the Ordinance is set forth in KRS 65.7041-65.7083 (the "TIF Statute"), which was enacted by the Kentucky General Assembly in 2007 to advance the declared public purpose of increasing property values, employment opportunities, and economic activity in communities within the Commonwealth. The process followed by the City in this case is the same as that which has produced classic public-private partnerships resulting in increased development and job creation in cities and counties throughout the state.

The City undertook the following comprehensive process before adopting the Ordinance:

- Relied upon a detailed tax increment financing ("TIF") impact analysis prepared by a highly-qualified economic consultant.
- Received a presentation of the TIF plan at a public City Council meeting on September 14, 2020.
- Published notice, in accordance with KRS Chapter 424, on September 24, 2020 advertising a Public Hearing to be held October 6, 2020.

The Rowan Fiscal Court adopted a companion TIF for the same property at issue in this action, however, Rowan County is not a party to this action.

- Conducted a joint City/Rowan County Public Hearing on October 6, 2020.
- Held a public meeting on December 7, 2020, where the City Council conducted a first reading of the Ordinance.
- Held a public meeting on December 14, 2021, where the City Council conducted a second reading of the Ordinance and voted to pass the Ordinance without objection.

#### The Property.

The property at issue in this action (the "Development Area"), is located at the northeast quadrant of the I-64 – Kentucky 32 (Flemingsburg Road) interchange. At the time the Ordinance was adopted, it was principally occupied by the North Fork Mobile Home Park ("North Fork"). The property was, and still is, zoned as Highway Business B-2, which anticipates development of precisely the type envisioned by the Ordinance—retail and restaurant establishments. Among the land uses specifically prohibited in the B-2 zone is "manufactured home communities". In effect, this means that at the time the Ordinance was adopted, North Fork was a non-conforming use that could never be expanded, and once abandoned by the property owner, could never be reestablished.

#### The Basis for this Motion to Dismiss.

Plaintiffs lack both statutory and constitutional standing. Here, the TIF Statute does not provide Plaintiffs with the right to sue the Defendants for their alleged injury. To be clear, the TIF Statute does not create *any* special categories of standing for persons seeking to challenge the actions of local governments. Additionally, the Complaint itself fails to name the City and Rowan County —the parties with the actual personal pecuniary interest in the matter—as defendants. As such, Plaintiffs lack statutory standing and have failed to allege a claim upon which relief may be granted.

Furthermore, Plaintiffs have failed to allege sufficient facts in their Complaint to meet any one of the three constitutional requirements necessary to establish constitutional standing to

challenge the Ordinance.<sup>2</sup> First, Plaintiffs have failed to plead a legally cognizable injury since Plaintiffs have not alleged a legal right to remain at the Development Area after termination of their leases by their landlord. Second, Plaintiffs have failed to allege—and cannot allege—that adoption of the Ordinance caused the legal termination of their property interest. Lastly, even if Plaintiffs were successful in this action, a declaration of the Ordinance as void would not, and could not, revive Plaintiffs' leases with their landlord, reinstate their property interest, or otherwise redress the harm they allege. Any one of these deficiencies alone would require dismissal, yet here, Plaintiffs have failed to meet any of the three constitutional standing requirements.

Accordingly, and as set forth more fully below, Plaintiffs lack both statutory and constitutional standing to bring this action and the Complaint should be dismissed with prejudice.<sup>3</sup>

#### FACTUAL BACKGROUND

The sole purpose and relief sought by Plaintiffs in this action is "to challenge the validity of Ordinance 20:2020 and have the Court declare it void." [Complaint, at pg.1 at ¶ 2]. The

Because Defendants seek dismissal of Plaintiffs' claims under Kentucky Rule of Civil Procedure ("Rule") 12.02, Defendants address herein only Plaintiffs' lack of standing to assert their claims. This Motion does not address Plaintiffs' allegations (which are premised on misstatements of both law and fact) that Defendants failed to satisfy statutory requirements in their adoption of the Ordinance.

In addition to these arguments, the Defendants assert that the passing of the Ordinance was procedurally proper and constitutionally sound. Such actions taken by local governments serve a valid public purpose, that is the continued economic development of an underutilized area. "Kentucky courts have consistently approved such undertakings as legitimate public purposes as long as they are for the promotion of economic welfare, relief of unemployment and stimulation of industry." *Dannheiser v. City of Henderson*, 4 S.W.3d 542, 545 (Ky. 1999) (citing *Stovall v. Eastern Baptist Institute*, 375 S.W.2d 273 (Ky. 1964); *see also Industrial Development Authority v. Eastern Kentucky Regional Planning Comm.*, 332 S.W.2d 274 (Ky. 1960). This is true whether the government acts pursuant to the statutes at issue herein or independent thereof under their broad "home rule" powers. Kentucky law does "not prevent all public incentives when offered in furtherance of a valid public service, such as the economic development efforts in this case." *Id.* Just as was true in *Dannheiser*, the goals of the City, County, and the Defendants were to further the economic development in the region. "Kentucky precedent shows that [the Defendants] must only prove that the development bears a reasonable or sufficient relationship to the purpose of economic growth as long as there is a sufficient relation to the accomplishment of a legitimate public purposes there

Ordinance was passed by the Councilmembers and signed by Mayor White-Brown on December 14, 2020. [*Id.* at ¶ 3]. The Ordinance established the Development Area at a location formerly known as North Fork to provide "new space for businesses, including new retail space and new restaurant space." [*Id.* at ¶ 4; pg. 7 at ¶ 46-47]. The project is estimated to have a significant economic and fiscal impact on the local economy – "[o]ver a 30-year period, the proposed [p]roject is estimated to support over 290 jobs annually and account for over \$970 million in total economic impact." [*Id.* at pg. 5-6].

Plaintiffs are former residents of North Fork who leased lots from Joanne Fraley on a month-to-month basis ("Fraley" or "landlord"). [*Id.* at ¶ 6-12]. In March of 2021, Fraley sent letters to each of the Plaintiffs giving them more than 30 days' notice, until April 30, 2021, to vacate their respective lots. [*Id.* at ¶ 6-12; Exhibit 6, pg. 2]. There is no allegation in the Complaint that Fraley acted beyond her legal rights in requiring Plaintiffs to vacate or that Plaintiffs had any legal right to remain at the Development Area beyond the date specified by Fraley. At the time of the filing of the Complaint, all seven Plaintiffs have since relocated and no longer reside in North Fork, and Fraley no longer owns the North Fork property. [*Id.*] Plaintiffs blame the Ordinance for their relocation.

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is no necessity for the courts to interfere with the public purpose. Here, the Defendants have satisfied that test.

The respective residencies of each Plaintiff is as follows: (1) Plaintiff Mindy Davenport is a resident of Morehead, Kentucky; (2) Plaintiff Sue Hamilton is a resident of Clearfield, Kentucky; (3) Plaintiff Penny Gozzard is a resident of Morehead, Kentucky; (4) Plaintiff Tim Massey is a resident of West Liberty, Kentucky; (5) Plaintiff Jessica Blakeman is a resident of Morehead, Kentucky; (6) Plaintiff Debra French is a resident of Morehead, Kentucky; and (7) Plaintiff Jason Griffith is a resident of Winchester, Kentucky. [Id. at ¶ 6-12].

#### **LEGAL STANDARD**

When considering a motion to dismiss under CR 12.02, "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Gall v. Scroggy*, 725 S.W.2d 867, 869 (Ky. App. 1987) (citing *Ewell v. Central City*, 340 S.W.2d 479 (Ky. 1960)). Matters of public record, for which a court may take judicial notice, may be considered on a motion to dismiss without converting the motion into one for summary judgment. *Netherwood v. Fifth Third Bank, Inc.*, 514 S.W.3d 558, 563 (Ky. App. 2017); *Polley v. Allen*, 132 S.W.3d 223, 226 (Ky. App. 2004). Furthermore, documents central to the issues raised in the complaint and referenced therein, even if not attached to the complaint, "are subject to consideration without having to convert the motion under review to a summary judgment." *Netherwood*, 514 S.W.3d at 564. A complaint must be dismissed where a court determines that "the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Edmonson County v. French*, 394 S.W.3d 410, 413 (Ky. App. 2013). This determination is a question of law for the Court. *See Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010).

#### **ARGUMENT**

I. BECAUSE PLAINTIFFS HAVE NOT—AND CANNOT—DEMONSTRATE THAT THEY HAVE CONSTITUTIONAL STANDING TO ASSERT THEIR CLAIMS, AS A MATTER OF KENTUCKY LAW, THE COURT MUST DISMISS PLAINTIFFS' COMPLAINT.

The Complaint must be dismissed because Plaintiffs have not—and cannot—establish that an actual controversy exists entitling them to the relief they seek under Kentucky's Declaratory Judgment Act. Specifically, Plaintiffs' claims arise under KRS § 418.045, which provides in pertinent part: "[a]ny person ... whose rights are affected by ... municipal ordinance *provided* always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his rights or duties, even though no consequential or other relief be asked."

(emphasis added). In addition to statutory standing, Kentucky Courts have repeatedly held that, before a party is entitled to a declaration of its rights or duties, that party must establish it has constitutional standing to assert its claims. *Garriga v. Sanitation Dist. No. 1*, 2003 Ky. App. Unpub., 2003 WL 22871550, \*20 (Ky. App. Dec. 5, 2003).<sup>5</sup> It is at this threshold step that Plaintiffs' Complaint fails.

A. Plaintiffs lack standing because they have not alleged a personal injury fairly traceable to the Defendants' allegedly unlawful conduct that is likely to be redressed by their requested relief.

To have standing, "[t]he plaintiffs must establish a judicially recognizable interest that is neither remote nor speculative." *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 328–329 (Ky. 1992) (quoting *HealthAmerica Corporation of Kentucky v. Humana Health Plan, Inc.*, 697 S.W.2d 946 (Ky. 1985)). Under Kentucky's Declaratory Judgment Act, courts will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties. *See Commonwealth ex rel. Watkins v. Winchester Water Works Co.*, 303 Ky. 420, 197 S.W.2d 771 (1946). To challenge the validity of a municipal ordinance, Plaintiffs must make a showing of a "direct interest resulting from the ordinance" sufficient to confer standing. *See City of Ashland v. Ashland F.O.P. No. 3*, Inc., 888 S.W.2d 667, 668 (Ky. 1994). Here, Plaintiffs' conclusory recitation that "[t]his Court has subject matter jurisdiction over this action pursuant to KRS 418.040, KRS 418.045, and Kentucky Rule of Civil Procedure 65" is insufficient to establish standing. [Complaint, at pg. 4 at ¶ 16].

<sup>&</sup>lt;sup>5</sup> All unpublished decisions are attached hereto as Exhibit 1.

In 2018, the Kentucky Supreme Court formally adopted the *Lujan* test "as the constitutional standing doctrine in Kentucky[.]" *Kasey v. Beshear, Commonwealth Cabinet for Health and Family Services, Department of Medicaid Services v. Sexton by and through Appalachian Regional Healthcare, Inc.*, 566 S.W.3d 185, 196 (Ky. 2018). In *Sexton*, the Court stated:

at bottom, for a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability. In other words, [a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

*Id.* Plaintiffs have not—and cannot—meet any one of these three constitutional requirements, and thus, their claims fail as a matter of law.

#### i. Plaintiffs have not pled a legally cognizable injury.

First, Plaintiffs must demonstrate they have suffered a legally cognizable injury. "An injury has been defined as '[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice." *Kasey v. Beshear*, 2021 Ky. App. Unpub., 2021 WL 942812, \*2 (Ky. App. 2021) (citing *Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

To establish the first requirement, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. For an injury to be particularized, it must affect the plaintiff in a personal and individual way. This means the plaintiff personally has suffered some actual or threatened injury. For an injury to be concrete, it must actually exists.

Id.

As set forth in the Complaint, the Plaintiffs allege that "Defendants ignored procedural protections and basic statutory requirements when they established the Development Area." [Complaint, pg. 5 at ¶ 1]. Plaintiffs further contend that Defendants failed to base their findings "substantial evidence", and further failed to "provide ... the residents of North Fork ...with notice required by the Kentucky Constitution." [*Id.* pg. 2 at ¶ 5]. Plaintiffs conclude that these alleged

failures by Defendants ultimately resulted in their relocation. But Plaintiffs do not contend they had the right to remain on the premises after their leases were terminated. Indeed, Plaintiffs point to no provision in their lease agreement with Fraley, or other law, that would permit them to remain on the North Fork property after Fraley's more-than-30-day-notice terminating the lease. This is a fatal flaw.

Plaintiffs allege that upon receipt of Fraley's notice, they vacated the Development Area and have since taken up new residence. [Complaint at ¶ 6-12]. The Complaint is silent on this critical fact—there is no allegation that Plaintiffs had a right to continue to occupy the premises after the termination of their leases. As such, Plaintiffs have not alleged "[t]he violation of ... [a] legal right, for which the law provides a remedy." *Kasey*, 2021 WL 942812, \*2. That is because Plaintiffs were not divested of any continuing right to remain on the premises—because no such right ever existed. Accordingly, Plaintiffs have not alleged—and cannot allege—a **legally cognizable** injury sufficient to confer standing upon them. That reason alone is enough for this Court to find that Plaintiffs do not have standing, and thus, dismissal is required.

#### ii. The Ordinance did not cause Plaintiffs' alleged injuries.

Even if Plaintiffs had a legally cognizable injury—which they do not—to establish standing, they would still need to show that Defendants' passing of the Ordinance caused their alleged injury. In other words, the injury must be "fairly traceable to the defendant's allegedly unlawful conduct." *Sexton*, 566 S.W.3d at 196. Here, Plaintiffs argue that their alleged injury was a result of Defendants' failure: (1) to follow the "procedural protections and basic statutory requirements when [the Defendants] established the Development Area" [Complaint, pg. 5 at ¶ 1]; (2) to "make findings required by state law before establishing the Development Area" [*Id.* at pg. 10 at ¶ 2]; and (3) to provide sufficient notice to Plaintiffs prior to the adoption of the Ordinance

[Complaint, pg. 14 at ¶ 3]. None of these allegations, when taken as true, were the cause of Plaintiffs' alleged injuries.

The cause of Plaintiffs' alleged injuries was Fraley's decision, as a private landowner, to terminate the month-to-month lease agreements with Plaintiffs. Fraley lawfully chose not to renew Plaintiffs' leases as she had the legal right to do. By Plaintiffs' own allegations in the Complaint, Plaintiffs received Fraley's notice to vacate, and upon receiving said notice, chose to relocate. [*Id.* at ¶ 6-12; Exhibit 6, pg. 2]. Plaintiffs do not allege—and cannot allege—that the Ordinance required Fraley to terminate their leases.

Even if Plaintiffs' mistaken substantive allegations that Defendants failed the observe the procedural requirements, make the required factual findings, or provide sufficient notice to Plaintiffs were true—which they are not—those alleged acts did not, and could not have, *caused* the relocation of the Plaintiffs. The Ordinance does not **require** the property to be redeveloped (and, as it happens, some TIF's are never "activated" because the anticipated development does not occur). The Ordinance did not require Fraley to forgo renewal of the leases; nor did it require the Plaintiffs to vacate the leased premises. The Ordinance neither compels nor empowers a landowner to take any action with respect to existing property interests. To be clear, notwithstanding the adoption of the Ordinance, Fraley, as a private landowner, could have chosen to terminate the Plaintiffs' property interests irrespective of the development project. For this reason, the Plaintiffs have failed to demonstrate that Defendants' alleged conduct was the cause of their alleged injuries necessary to confer standing upon them.

#### iii. Plaintiffs' alleged injuries would not be redressed by a favorable ruling.

If Plaintiffs were somehow able to establish the first two elements of the *Lujan* test, to have standing, they would still need to demonstrate that their alleged injury is "likely to be redressed by

the requested relief." *Sexton*, 566 S.W.3d at 196. Here, however, successful adjudication of Plaintiffs' claims would not, and could not, result in any remedy that could redress their alleged harm. Just as Plaintiffs cannot show a legally cognizable injury caused by Defendants' adoption of the Ordinance, they too are unable to show how a declaration that the Ordinance is void would somehow redress their alleged injuries. This too is fatal to Plaintiffs' claims.

As alleged by Plaintiffs, their leases have terminated, and they have since vacated the Development Area. [*Id.* at ¶ 6-12; Exhibit 6, pg. 2]. A declaration from this Court that the Ordinance is void will not change that. Plaintiffs' month-to-month leases were terminated in accordance with contractual rights independent of and unrelated to the adoption of the Ordinance. In short, Plaintiffs have failed to allege how the relief sought in this action could possibly redress the injuries of which they complain, and therefore, Plaintiffs lack standing.

# B. Plaintiffs lack standing, and therefore, the Compliant must be dismissed because this Court lacks subject matter jurisdiction.

This Court should dismiss this action because Plaintiffs lack standing, and thus, this Court does not have subject matter jurisdiction to resolve this matter. Kentucky courts have held that "issues involving standing are inherent in the concept of subject matter jurisdiction." White v. City of Hillview, 2010 Ky. App. Unpub., 2010 WL 3292944, \*2 (Ky. Ct. App. Aug. 6, 2010). "If the plaintiffs lack standing with respect to a particular claim, the court is without jurisdiction to consider the issue they raise." Id. The Kentucky Court of Appeals in White reasoned that trial courts have "the broad authority ... to make factual determinations that are decisive of the purely legal question of its own jurisdiction or to dismiss the action if it determines that its jurisdiction has not been established." Id. (citing Berthelsen v. Kane, 759 S.W.2d 831 (Ky. App. 1988)).

Among other things, standing requirements are "designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which

may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented. . .". *Garriga*, 2003 WL 22871550 at \*20. No interests are served by allowing Plaintiffs to continue pursuing a claim that cannot possibly redress the injuries they allege. For this reason, and all others stated herein, this Court must dismiss this action.

### II. DISMISSAL IS REQUIRED BECAUSE PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

#### A. The TIF Statute does not provide a private right of action.

Unlike statutes such as KRS Chapter 100 (zoning), KRS Chapter 81A (annexation), and Chapter 99 (urban renewal/condemnation of blighted areas), the TIF Statute at issue establishes no special rights of action for persons seeking to challenge the actions of local governments. Statutes which **do** create such rights have often been referred to as establishing "statutory standing." However, as the Kentucky Supreme Court in *Sexton* has noted:

Put differently, "[t]he question whether a plaintiff can sue for violations of [a statute] is a matter of statutory standing, 'which is perhaps best understood as not even standing at all.' ... Dismissal for lack of statutory standing is properly viewed as dismissal ... for failure to state a claim [upon which relief may be granted." *Sexton*, 566 S.W.3d at 191 (citing 13A Fed. Prac. & Proc. Juris. § 353 (3d ed.) (quoting *CGM*, *LLC v. BellSouth Telecomms.*, *Inc.*, 664 F.3d 46, 51-53 (4th Cir. 2011)).

"Statutory standing is simply statutory interpretation: the question it asks is whether [the legislature] has accorded *this* injured plaintiff the right to sue the defendant to redress his injury." *Sexton*, 566 S.W.3d 185, 191 (citing *Graden v. Conexant Sys., Inc.*, 496 F.3d 291, 295 (3d Cir. 2007)). Here, Plaintiffs have failed to allege whether the statute also affords them with the right

to sue. That is because the TIF Statute **does not**. For that reason. Plaintiffs have failed to state a claim upon which relief may be granted.

#### B. Plaintiffs have sued the wrong parties.

The City is not named as a defendant in this action (nor, for that matter, is Rowan County, which adopted a companion TIF for the same property at issue in this case). The law in Kentucky is clear that "suits by or against a municipal corporation should be in its corporate name and not by or against the individuals composing it, or the council or its officers, or its corporate authorities." *Buckner v. Clay*, 206 S.W.2d 827, 829 (Ky. App. 1947). The Plaintiffs' failure to add the City as a defendant is a fatal error. The named Defendants, "either as individuals or officers, have no actual personal pecuniary interest in the matter." *Id.* As such, the Complaint fails to "state a claim against [the City] and a judgment so obtained would be in effectual unless the City had been made a party to the action." *Id.* 

#### **CONCLUSION**

Dismissal is required because Plaintiffs lack both constitutional and statutory standing. First, Plaintiffs have failed to meet any one of the three elements required to confer standing; failure to satisfy just one element is enough to require dismissal. Second, Plaintiffs have failed to state a claim because the TIF Statute in question does not afford Plaintiffs with a right to sue, and even further, Plaintiffs sued the wrong parties. Accordingly, for the reasons stated herein, Defendants respectfully request this Court to dismiss Plaintiffs' Complaint.

#### Respectfully submitted,

/s/ Felisa S. Moore

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#### **CERTIFICATE OF SERVICE**

This is to certify that a true and accurate copy of the foregoing was served by electronic mail and the Court's electronic filing system this the 6th day of July, 2021 to:

Ben Carter KENTUCKY FOR EQUAL JUSTICE CENTER 222 S. First Street, Ste. 305 Louisville, KY 40202 502-303-4062 ben@kyequaljustice.org

Honorable Judge William Lane Rowan Circuit Court Division I 44 West Main Street Mt. Sterling, KY 40353

/s/ Felisa S. Moore
COUNSEL FOR DEFENDANT

126108.170528/8581531.2

# **EXHIBIT 1**

#### Garriga v. Sanitation Dist. No. 1

Court of Appeals of Kentucky December 5, 2003, Rendered

NO. 2001-CA-002593-MR, NO. 2002-CA-001192-MR

#### Reporter

2003 Ky. App. LEXIS 305 \*; 2003 WL 22871550

MARIA C. GARRIGA, APPELLANT v. SANITATION DISTRICT NO. 1, APPELLEE AND DONALD AND MARION STITES, APPELLANTS v. SANITATION DISTRICT NO. 1, APPELLEE

Subsequent History: Related proceeding at Alliance for Kentucky's Future, Inc. v. Envtl. & Pub. Prot. Cabinet, 2008 Ky. App. Unpub. LEXIS 5 (Ky. Ct. App., Oct. 10, 2008)

Related proceeding at <u>Alliance for Kentucky's</u>
<u>Future v. Envtl. & Pub. Prot. Cabinet, 2008 Ky.</u>
<u>App. LEXIS 401 (Ky. Ct. App., Oct. 10, 2008)</u>

Prior History: [\*1] APPEAL FROM KENTON CIRCUIT COURT. HONORABLE GREGORY M. BARTLETT, JUDGE. ACTION NO. 00-CI-002364. APPEAL FROM BOONE CIRCUIT COURT. HONORABLE JOSEPH F. BAMBERGER, JUDGE. ACTION NOS. 99-CI-00860 AND 01-CI-00510.

**Disposition:** AFFIRMED.

#### **Core Terms**

circuit court, condemn, sanitation district, condemnation proceeding, initiating, wastewater treatment plant, facilities, constructing, acquisition, justiciable, wastewater treatment, lack standing, acres, interlocutory order, sewage, declaratory judgment, board of directors, amended complaint, instrumentality, regulation, Regional, parties, planning commission, motion to dismiss, contest, zoning

#### **Case Summary**

#### **Procedural Posture**

Appellant taxpayer challenged an order of the Kenton Circuit Court (Kentucky), which dismissed her claims against appellee sanitation district for declaratory judgment and injunctive relief, alleging, inter alia, that *Ky. Rev. Stat. Ann. § 220.035* was unconstitutional. Appellant property owners challenged an interlocutory order and judgment of the Boone Circuit Court (Kentucky), which authorized the sanitation district to condemn their property.

#### Overview

On appeal, both the taxpayer and the property owners contended that Ky. Rev. Stat. Ann. § 220.035 violated Ky. Const. §§ 2, 3, 27, 28, 29, 59 and 60. The taxpayer was attempting to invoke the circuit court's jurisdiction under the Declaratory Judgment Act, Ky. Rev. Stat. Ann. § 418.045. Affirming, the court first held that both the taxpayer and the property owners lacked standing to challenge the constitutionality of Ky. Rev. Stat. Ann. § 220.035 because the taxpayer failed to demonstrate that she had been adversely affected by § 220.035 and because the property owners, while they suffered an injury, failed to establish any causal relationship between their injury and § 220.035(4). Addressing appellants' remaining claims, the court held that: (1) the sanitation district's committee did not act arbitrarily in

approving the acquisition of the property owners' land; (2) the taxpayer failed to state a violate claim of fraud because she did not show reliance; and (3) the sanitation district was not required to submit a draft plan to a regional planning commission or comply with the Clean Water Act prior to initiating condemnation.

#### **Outcome**

The court affirmed the order of the first circuit court dismissing the taxpayer's complaint, and it affirmed the interlocutory order and judgment of the second circuit court, which authorized the sanitation district to condemn the property owners' property.

#### LexisNexis® Headnotes

Governments > Public Improvements > Sanitation & Water

# <u>HN1</u>[♣] Public Improvements, Sanitation & Water

A sanitation district is governed by a board of directors which is empowered to control and manage the affairs of the district and which is charged with devising a plan for the improvements for which the district was created. <u>Ky. Rev. Stat.</u> Ann. §§ 220.140, 220.170, and 220.220.

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

#### **HN2**[**\preceq**] Justiciability, Standing

Standing is a jurisdictional issue which can be raised at any stage of an action.

Procedure > ... > Justiciability > Standing > Ge neral Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Constitutional Law > Bill of Rights > General Overview

#### **HN3**[**\( \)**] Justiciability, Standing

The concept of standing is implicit in § 14 of the Kentucky Bill of Rights, which states, in part, that all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

#### **HN4**[**★**] Justiciability, Standing

<u>Ky. Const. § 14</u> contemplates access to the courts only for those litigants suffering an "injury."

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

# <u>HN5</u>[**±**] Preliminary Considerations, Justiciability

*Ky. Const. § 112(5)* limits the original jurisdiction of the circuit courts to "justiciable causes."

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

# **HN6**[★] Preliminary Considerations, Justiciability

A "justiciable cause" has been defined by the Supreme Court of Kentucky as a controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting it.

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

# **HN7**[♣] Preliminary Considerations, Justiciability

In Kentucky a court does not have jurisdiction to decide a question unless there is a real or justiciable controversy involving specific rights of particular parties.

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Constitutional Law > The Judiciary > Case or Controversy > General Overview

Governments > Courts > Authority to

Adjudicate

# **HN8**[♣] Preliminary Considerations, Justiciability

The existence of a "justiciable controversy" is a fundamental prerequisite to a court's authority to adjudicate the rights of the parties involved in a particular case.

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

#### **HN9**[**\( \)**] Justiciability, Standing

When read in conjunction, <u>Ky. Const. §§ 14</u> and <u>112(5)</u> place substantial restrictions on the power of judicial review by limiting its availability to those litigants who have suffered an "injury" and pled a "justiciable controversy."

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

Constitutional Law > ... > Case or Controversy > Standing > General Overview

#### *HN10*[♣] Justiciability, Standing

The limitation placed upon the power of judicial review via <u>Ky. Const. §§ 14</u> and <u>112(5)</u> is a limitation upon the court's subject-matter

jurisdiction, and as such, it cannot be waived.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

# **HN11**[♣] Subject Matter Jurisdiction, Jurisdiction Over Actions

The concept of standing is an essential component of subject-matter jurisdiction.

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

#### **HN12**[**\precedit**] Justiciability, Standing

Standing to sue means that a party has a sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy.

Civil

Procedure > ... > Justiciability > Standing > Per sonal Stake

Constitutional Law > ... > Case or

Controversy > Standing > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

#### **HN13**[♣] Standing, Personal Stake

As an aspect of justiciability, the standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of the court's jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

#### **HN14**[**\Delta**] Justiciability, Standing

If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

# **HN15 Subject Matter Jurisdiction, Jurisdiction Over Actions**

A determination regarding a trial court's subject matter jurisdiction is a question of law.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Governments > Courts > Authority to Adjudicate

# **<u>HN16</u>**[**★**] Subject Matter Jurisdiction, Jurisdiction Over Actions

Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

# **HN17**[ Subject Matter Jurisdiction, Jurisdiction Over Actions

A court lacks discretion to consider the merits of a case over which it is without jurisdiction.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

# **HN18 Subject** Matter Jurisdiction, Jurisdiction Over Actions

The objection of want of jurisdiction may be made at any time and the court or tribunal may act on its own motion, and should do so when the lack of jurisdiction is called to its attention.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

<u>HN19</u>[♣] Subject Matter Jurisdiction, Jurisdiction Over Actions

The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings.

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

#### **HN20**[**★**] Justiciability, Standing

Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented.

Civil Procedure > Judgments > Declaratory Judgments > General Overview

#### **HN21**[**★**] Judgments, Declaratory Judgments

See Ky. Rev. Stat. Ann. § 418.045.

Civil

Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Judgments > Declaratory Judgments > General Overview

# **HN22**[ **Jurisdictional Sources, Constitutional Sources**

Ky. Rev. Stat. Ann. § 418.045 does not confer jurisdiction on a trial court, but rather makes declaratory judgment available as a remedy for a cause of action already within the court's jurisdiction.

Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

#### **HN23**[**\( \)**] Justiciability, Standing

A litigant must demonstrate that he has a legal interest in the judgment he is seeking in order to invoke the circuit court's jurisdiction under the Declaratory Judgment Act. A litigant must first allege a personal stake in the outcome of the controversy to justify exercise of the court's remedial powers on his or her behalf. In the context of a constitutional challenge to a statute or regulation, a litigant must demonstrate that he has been adversely affected by the statute or regulation.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > Public Improvements > Sanitation & Water

### **HN24**[♣] Separation of Powers, Legislative Controls

A sanitation district is a creature of the legislature and the legislature is empowered to establish its board of directors. Civil

Procedure > ... > Justiciability > Standing > Ge neral Overview

Evidence > Burdens of Proof > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

#### **HN25**[♣] Justiciability, Standing

It is incumbent upon a party who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously affected thereby.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Appellate Review

Real Property Law > Eminent Domain Proceedings > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Process

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

# **<u>HN26</u>**[**★**] Eminent Domain Proceedings, Appellate Review

By enacting *Ky. Rev. Stat. Ann. § 220.035*, the legislature has sought to add an additional safeguard to the condemnation process so as to ensure that the rights of property owners are protected from arbitrary action.

Real Property Law > Eminent Domain Proceedings > General Overview

# **HN27**[♣] Real Property Law, Eminent Domain Proceedings

See Ky. Rev. Stat. Ann. § 416.560(1).

Governments > Public Improvements > Sanitation & Water

# **HN28**[♣] Public Improvements, Sanitation & Water

A sanitation district constitutes an autonomous political subdivision with full authority within its boundaries as to the construction and operation of sanitation improvements. A sanitation district is not an instrumentality or agency of local government.

Evidence > Burdens of Proof > General Overview

Torts > Business Torts > Fraud & Misrepresentation > General Overview

#### **HN29**[**★**] Evidence, Burdens of Proof

In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud by clear and convincing evidence as follows: (a) material representation (b) which is false (c) known to be false or made recklessly (d) made with inducement to be acted upon (e) acted in reliance thereon and (f) causing injury.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Real Property Law > Eminent Domain Proceedings > General Overview

#### **HN30**[₺] Zoning, Comprehensive Plans

See Ky. Rev. Stat. Ann. § 100.324(4).

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Governments > State & Territorial Governments > Property

Real Property Law > Eminent Domain Proceedings > General Overview

#### **HN31**[♣] Zoning, Comprehensive Plans

See Ky. Rev. Stat. Ann. § 100.361(2).

Governments > Public Improvements > Sanitation & Water

# **HN32**[♣] Public Improvements, Sanitation & Water

The construction of a wastewater treatment facility by a sanitation district is no doubt a "government function."

Business & Corporate Compliance > ... > Real Property Law > Zoning > Comprehensive Plans

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

#### **HN33**[**★**] Zoning, Comprehensive Plans

The power of a sanitation district to initiate condemnation proceedings is not contingent upon prior approval from the local planning commission.

Governments > Legislation > Interpretation

#### **HN34**[**★**] Legislation, Interpretation

The law does not require an exercise in futility.

Governments > Legislation > Interpretation

#### **HN35**[**★**] Legislation, Interpretation

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.

Governments > Public Improvements > Sanitation & Water

Real Property Law > Eminent Domain Proceedings > General Overview

# **HN36**[♣] Public Improvements, Sanitation & Water

See Ky. Rev. Stat. Ann. § 220.310.

Governments > Legislation > Interpretation

#### *HN37*[♣] Legislation, Interpretation

It is a rule of statutory construction that where an act treats a subject in general terms and contains no provisions which contradict or conflict with the provisions of a prior statute having particular and specific terms, the new act must be regarded as not having intended to affect the existing statute. Both will be construed together.

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Real Property Law > Eminent Domain Proceedings > General Overview

# **HN38**[♣] Pipelines & Transportation, Eminent Domain Proceedings

If there is reasonable probability that a public utility will comply with all applicable standards, will meet all requirements for the issuance of necessary permits, and will not otherwise fail or be unable to prosecute its undertaking to completion, there is a right of condemnation.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > Elements > Public Use

Real Property Law > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

# **HN39 Special Proceedings, Eminent Domain Proceedings**

A condemning authority may determine without let or hindrance the amount of land necessary for a public purpose.

Administrative Law > Judicial Review > Standards of Review > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Appellate Review

Real Property Law > Eminent Domain Proceedings > General Overview

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

#### **HN40**[♣] Judicial Review, Standards of Review

A court will deny the right of a condemning authority to take only where there has been a gross abuse or manifest fraud.

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > General Overview

Real Property Law > Eminent Domain Proceedings > Constitutional Limits & Rights > General Overview

Real Property Law > Eminent Domain Proceedings > General Overview

# **HN41**[♣] Special Proceedings, Eminent Domain Proceedings

Where a taking of land or water rights or other property is made for a public use, there is no valid objection if a reasonable regard for probable future expansion is kept in mind and a taking of considerably greater extent than is required by present necessities is made.

Administrative Law > Judicial Review > Standards of Review > General Overview

Governments > Courts > Authority to Adjudicate

#### <u>HN42</u>[₺] Judicial Review, Standards of Review

The judicial power of government should not be invoked against the discretion of an agency of the executive branch in determining what is in the public interest, including what particular property is needed in connection with a valid public project, unless there is such a clear and gross abuse of that discretion as to offend the guaranty of *Ky. Const.* § 2 against the exercise of arbitrary power.

**Counsel:** BRIEFS FOR APPELLANTS: Todd V. McMurtry, Robert E. Manley, Matthew W. Fellerhoff, Rhonda S. Frey, Cincinatti, Ohio.

ORAL ARGUMENT FOR APPELLANTS: Robert E. Manley, Cincinatti, Ohio.

BRIEFS FOR APPELLEE: William T. Robinson,

III, Gerald F. Dusing, Luann Devine, Covington, Kentucky.

ORAL ARGUMENT FOR APPELLEE: Gerald F. Dusing, Luann Devine, Covington, Kentucky.

**Judges:** BEFORE: JOHNSON AND PAISLEY, <sup>1</sup> JUDGES; AND JOHN D. MILLER, SENIOR JUDGE. <sup>2</sup> ALL CONCUR.

**Opinion by: JOHNSON** 

#### **Opinion**

#### AFFIRMING

JOHNSON, JUDGE: Maria Garriga has appealed from an order of [\*2] the Kenton Circuit Court entered on November 2, 2001, which dismissed her complaint for declaratory judgment and injunctive relief. Having concluded that Garriga lacks standing to challenge the constitutionality of KRS<sup>3</sup> 220.035, and that her complaint for declaratory judgment and injunctive relief fails to state a claim upon which relief can be granted, we affirm the order of the Kenton Circuit Court. Donald and Marion Stites have appealed from an interlocutory order and judgment of the Boone Circuit Court entered on May 16, 2002, authorizing Sanitation District No. 1 (SD1) to condemn approximately 144 acres of their property for the purpose of constructing a wastewater treatment plant and related facilities. Having concluded that SD1 is authorized to condemn the property in question, that the Stiteses lack standing to challenge the constitutionality of KRS 220.035, and that the Stiteses were provided with a fair and impartial trial on the issue, we affirm the interlocutory order and judgment of the Boone Circuit Court.

<sup>&</sup>lt;sup>1</sup> This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

<sup>&</sup>lt;sup>2</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>&</sup>lt;sup>3</sup> Kentucky Revised Statutes.

[\*3] SD1 is a political subdivision of the Commonwealth of Kentucky, organized pursuant to KRS Chapter 220. KRS 220.020 vests the Secretary of the Natural Resources and Environmental Protection Cabinet (NREPC) with the authority "to establish sanitation districts within any county of the Commonwealth[,]" so as to address several concerns relating to sewage disposal and water pollution, all of which are enumerated in KRS 220.030. HN1 [ A sanitation district is governed by a board of directors which is empowered to "control and manage the affairs of the district" and which is charged with devising a plan "for the improvements for which the district was created." <sup>4</sup> SD1 is a multi-county sanitation district formed pursuant to KRS 220.135. SD1 provides sanitation services to Boone, Campbell, and Kenton counties.

The Stiteses own approximately 476 acres of land along the Ohio [\*4] River in Boone County, Kentucky. In 1995 SD1 engaged the services of Woolpert LLP, a professional services engineering firm, for the purpose of establishing a plan to construct a regional wastewater treatment plant. In 1999 after an extensive review process, SD1's board of directors concluded that approximately 144 of the 476 acres owned by the Stiteses provided the best location for the wastewater treatment plant. Thereafter, SD1 attempted to negotiate with the Stiteses for the purchase of the 144 acres needed for the facility. The negotiation process culminated with SD1 offering the Stiteses \$ 6,000.00 per acre for the land needed to construct the wastewater treatment plant. The Stiteses declined SD1's offer and indicated that they were only willing to sell their entire 476-acre tract.

On or about June 27, 2000, the board of directors of SD1 passed a resolution to acquire, by eminent domain, the land owned by the Stiteses for the purpose of constructing a wastewater treatment plant and related facilities. Shortly thereafter, SD1 requested the judge/executives of Boone, Kenton, and Campbell counties to review its proposed land

On November 16, 2000, Garriga, who is a resident of Kenton County and a ratepayer of SD1, filed a complaint for declaratory judgment and injunctive relief in the Kenton Circuit Court, requesting, *inter alia*, "[a] declaration that condemnation of the Stiteses' property by SD1 for construction of a wastewater treatment plant was unconstitutional."

- (1) A fiscal court may:
- (a) Review and approve, amend, or disapprove proposed district land acquisitions;
- (b) Review and approve, amend, or disapprove proposed district construction of capital improvements;
- (c) Review and approve, amend, or disapprove proposed service charges or user fees; and
- (d) Review and approve, amend, or disapprove the district's proposed budget.

(4) In the case of districts governed by the provisions of <u>KRS 220.135</u>, the county judges/executive shall exercise the powers listed in subsection (1) of this section. They shall meet jointly at least once each fiscal year to exercise these powers. Their votes shall be equally weighted. In the case of review and approval of proposed service charges or user fees, a majority of the votes of the county judges/executive shall be required to override the recommendation of the district board of directors.

acquisition pursuant to <u>KRS 220.035</u> [\*5] . <sup>5</sup> [\*6] On July 31, 2000, a special meeting of the judge/executives of Boone, Kenton, and Campbell counties was held concerning SD1's proposed land acquisition. The meeting provided members of the public an opportunity to comment upon SD1's plan to construct a wastewater treatment plant on the Stiteses' property. <sup>6</sup> The committee of judge/executives heard extensive arguments from several interested parties, after which they passed a resolution approving SD1's request to condemn the Stiteses' property.

<sup>&</sup>lt;sup>5</sup> SD1 has the authority to condemn property for sanitation purposes pursuant to <u>KRS 220.310</u>. Pursuant to <u>KRS 220.035</u>, SD1 must obtain approval from the committee of judge/executives designated to represent the counties within its district prior to initiating condemnation proceedings. <u>KRS 220.035</u> provides, in relevant part, as follows:

<sup>&</sup>lt;sup>6</sup> Prior to this special meeting, six public meetings had been held concerning SD1's proposed wastewater treatment facility.

<sup>&</sup>lt;sup>4</sup>See KRS 220.140, 220.170, and 220.220.

Garriga contended that KRS 220.035 was unconstitutional and that SD1 had made several material misrepresentations regarding the cost projections for its wastewater treatment facility to the committee of judge/executives. On January 19, 2001, SD1 filed a motion to dismiss Garriga's complaint. In particular, SD1 claimed that Garriga lacked standing to challenge the constitutionality of KRS 220.035. On February 15, 2001, Garriga filed an amended complaint for declaratory judgment and injunctive relief. 7 SD1 filed a motion to dismiss Garriga's amended complaint on March 2, 2001. For [\*7] whatever reason, SD1 elected not to challenge Garriga's standing to contest the constitutionality of KRS 220.035 on the grounds asserted in her amended complaint, with one notable exception. 8

[\*8] On May 2, 2001, SD1 filed a petition in the Boone Circuit Court to condemn approximately 144 of the 476 acres owned by the Stiteses. <sup>9</sup> The petition alleged that acquisition of the Stiteses' property was necessary "in order to effect the proper collection, treatment and disposal of sewage and other wastes produced within [the area served by SD1.]" On May 9, 2001, the Boone Circuit Court entered an order appointing three commissioners, who subsequently assessed the reduction in the fair market value of the Stiteses'

<sup>7</sup> In her amended complaint, Garriga contended that *KRS* 220.035 violated §§ 2, 3, 27, 28, 29, 59 and 60 of the Kentucky Constitution. More specifically, Garriga claimed that: (1) *KRS* 220.035(4) arbitrarily delegated authority to executive officers in violation of § 2 of the Kentucky Constitution; (2) *KRS* 220.035(4) delegated legislative powers to executive officers in violation of §§ 27, 28, and 29 of the Kentucky Constitution; (3) *KRS* 220.035 created discriminatory classifications among counties without a reasonable basis in violation of §§ 2, 59 and 60 of the Kentucky Constitution; and (4) *KRS* 220.035(4) violated the *Equal Protection Clauses of* § 3 of the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution.

property by reason of the taking at \$518,000.00.

On July 2, 2001, the Stiteses filed a motion in the Boone Circuit Court to dismiss the condemnation petition filed by SD1. 10 The Stiteses claimed that SD1 had failed to comply with several statutory requirements prior to initiating the condemnation proceedings. On September 6, 2001, the Stiteses filed an answer to the condemnation petition and a statement of exceptions to the award of the commissioners, [\*9] in which they averred, inter alia, that SD1 had failed to comply with several statutory requirements prior to filing condemnation petition, and that KRS 220.035 was unconstitutional. Pursuant to KRS 416.620, the Stiteses requested a jury trial concerning the commissioners' award. On September 17, 2001, SD1 filed a motion for an interlocutory order and judgment.

[\*10] On November 2, 2001, the Kenton Circuit Court entered an order granting SD1's motion to dismiss Garriga's complaint. The court concluded that Garriga's complaint failed to state a claim upon which relief could be granted. More specifically, the court concluded that *KRS* 220.035 was constitutional. As for Garriga's contention that SD1 misrepresented the cost projections for its wastewater treatment facility to the committee of judge/executives, the court concluded that she had failed to "state a claim that is cognizable by this court or upon which relief may be granted."

<sup>&</sup>lt;sup>8</sup> In its motion to dismiss Garriga's amended complaint, SD1 only challenged Garriga's standing to contest the constitutionality of <u>KRS</u> 220.035(4) with respect to her contention that the statute violated the <u>Equal Protection Clauses of § 3 of the Kentucky Constitution</u> and the <u>Fourteenth Amendment to the United States Constitution</u>.

<sup>&</sup>lt;sup>9</sup> The action was styled Case No. 01-CI-00510.

<sup>&</sup>lt;sup>10</sup>This motion was preceded by a complaint for declaratory and injunctive relief filed by Terrance and Victoria Brennan on July 30, 1999, requesting, inter alia, an order enjoining SD1 from taking any action to acquire or condemn the Stiteses' property. The Brennans own several acres of farmland directly adjacent to the property owned by the Stiteses. The action was styled Case No. 99-CI-00860. Thereafter, the Belleview Legal Action Commission, John Arrasmith and Kevin Peach, both members of the Commission, Richard and Shirley Ammon, and the Stiteses all filed motions to intervene in the matter, which were subsequently granted. On December 28, 1999, the Boone Circuit Court entered an order holding the case in abeyance. On July 26, 2001, the court entered an order consolidating Case. No. 99-CI-00860 and Case No. 01-CI-00510 under Case No. 01-CI-00510. The Belleview Legal Action Commission, John Arrasmith, Kevin Peach, and the Ammons are not parties to this appeal.

Garriga's appeal followed.

On November 14, 2001, the Stiteses filed a motion to disqualify Boone Circuit Judge Joseph F. Bamberger from hearing their case. In support of their motion, the Stiteses produced a copy of an interlocutory order and judgment signed by Judge Bamberger that was file-stamped September 25, 2001. On November 15, 2001, the court entered an order denying the Stiteses' motion. In its order, the court noted that the interlocutory order and judgment complained of was not authorized, entered of record, or circulated. The court explained that it was standard procedure for copies [\*11] of a tendered order to be stamped and dated prior to a decision being made in the matter. The court further explained that ordinarily a proposed order is held until a decision is rendered, at which time the order is entered and circulated. On January 10, 2002, the Stiteses filed a motion for designation of a special judge pursuant to KRS 26A.020. On February 4, 2002, the Supreme Court of Kentucky entered an order denying the Stiteses' request for a special judge.<sup>11</sup>

On May 15, 2002, the Boone Circuit Court entered an order denying the Stiteses' various motions to dismiss that had been filed throughout the course of the litigation. On May 16, 2002, the court entered an interlocutory order and judgment, authorizing SD1 to condemn approximately 144 acres of the Stiteses' [\*12] property for the purpose of constructing a wastewater treatment plant and related facilities. <sup>12</sup> The Stiteses' appeal followed.

On appeal, Garriga and the Stiteses both contend that KRS 220.035 violates §§ 2, 3, 27, 28, 29, 59 and 60 of the Kentucky Constitution. More specifically, the appellants claim [\*13] that: (1) KRS 220.035(4) arbitrarily delegates authority to executive officers in violation of § 2 of the *Kentucky Constitution*; (2) *KRS* 220.035(4) delegates legislative powers to executive officers in violation of §§ 27, 28, and 29 of the Kentucky Constitution; (3) KRS 220.035 creates discriminatory classifications among counties without a reasonable basis in violation of §§ 2, 59 and 60 of the Kentucky Constitution; and (4) KRS 220.035(4) violates the Equal Protection Clauses of § 3 of the Kentucky Constitution and the Fourteenth Amendment to the United States Constitution.

Garriga additionally contends that: (1) committee of judge/executives designated to represent SD1 acted arbitrarily in violation of § 2 of the Kentucky Constitution when it approved the acquisition of the Stiteses' land and raised her rates; (2) the Kenton Circuit Court erred by dismissing her complaint because she adequately alleged that SD1 misrepresented to the committee judge/executives the cost of the wastewater treatment facility; and (3) SD1 acted in excess of its statutorily granted powers [\*14] by initiating the condemnation proceedings on its own behalf.<sup>13</sup>

The Stiteses additionally argue that SD1's decision to condemn their property was arbitrary, fraudulent, and illegal. More specifically, the Stiteses contend that: (1) SD1 violated *KRS 100.324* by failing to submit a draft of its plan to construct a wastewater treatment facility to the Boone County Regional Planning Commission prior to initiating the condemnation proceedings; (2) SD1's proposed wastewater treatment plant is in violation of applicable zoning laws; (3) SD1 failed to obtain a permit from the NREPC prior to initiating the condemnation proceedings as required by *KRS* 

<sup>&</sup>lt;sup>11</sup>The Court concluded that the Stiteses' motion "failed to demonstrate any disqualifying circumstance which would require the appointment of a special judge pursuant to *KRS 26A.015*, et seq."

<sup>&</sup>lt;sup>12</sup>The Boone Circuit Court also entered findings of fact and conclusions of law accompanying its interlocutory order and judgment, in which the court concluded, *inter alia*, that SD1 had negotiated in good faith with the Stiteses prior to initiating condemnation proceedings. The court noted that it had already entered orders addressing the remaining contentions raised by the Stiteses in their various motions to dismiss. After a thorough review of the record, however, we were unable to find any orders relating to the constitutional challenges to *KRS* 220.035 raised by the Stiteses.

Thus, it appears that the court neglected to specifically address these issues.

<sup>&</sup>lt;sup>13</sup> The Stiteses also joined in this argument.

224.73-100; (4) SD1 violated multiple provisions of the Clean Water Act; 14 (5) SD1 failed to obtain proper approval for its wastewater treatment plant as required by KRS 220.220, 220.240, 220.250, and failed 220.035; (6) SD1 to follow mandates [\*15] of *KRS* 220.310; (7) SD1 took more property than necessary for its wastewater treatment facility; (8) SD1 failed to negotiate in good faith as required by the Eminent Domain Act of Kentucky; 15 and (9) their right to a fair trial was denied by the trial judge as a result of his conduct throughout the proceedings.

We begin our analysis with SD1's contention that lacks standing Garriga to contest constitutionality of KRS 220.035(4). We note at the outset that SD1 failed to raise the issue of standing in its motion to dismiss Garriga's amended complaint. 16 Garriga cites Tabor v. Council for Burley Tobacco, 17 and argues that we are precluded from addressing any questions related to standing due to the fact SD1 failed to raise this issue before the circuit court. We disagree. Given this [\*16] Court's failure to address the issue of standing in *Tabor*, we conclude that *Tabor* has no precedential value as to this issue.

HN2 [ Standing is a jurisdictional issue which can be raised at any stage of an action. HN3 [ The concept of standing is implicit in § 14 of the Kentucky Bill of Rights, which states, in relevant part, as follows:

All courts shall be open, and every person for an

injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and [\*17] justice administered without sale, denial or delay.

**HN4** This provision contemplates access to the courts only for those litigants suffering an "injury." <sup>18</sup> In addition, § 112(5) of the Kentucky Constitution *HN5*[♠] limits the original jurisdiction of the circuit courts to "justiciable causes." 19 [\*18] HN6[7] A "justiciable cause" has been defined by the Supreme Court of Kentucky as a "'controversy in which a present and fixed claim of right is asserted against one who has an interest in contesting it[.]" 20 Consequently, HN7 in Kentucky "a court does not have jurisdiction to decide a question unless there is a real or justiciable controversy involving specific rights of particular parties" [emphasis original]. <sup>21</sup> HN8[1 The existence of a "justiciable controversy" is a fundamental prerequisite to a court's authority to adjudicate the rights of the

<sup>&</sup>lt;sup>14</sup> <u>33 U.S.C. §§ 1251, et seq</u>.

<sup>&</sup>lt;sup>15</sup> The Eminent Domain Act of Kentucky is codified in <u>KRS 416.540</u>, <u>et seq</u>.

<sup>&</sup>lt;sup>16</sup> As previously discussed, SD1 raised the issue of standing in its motion to dismiss Garriga's original complaint, however, SD1 failed to question Garriga's standing in its motion to dismiss Garriga's amended complaint, except as to the equal protection issue.

<sup>&</sup>lt;sup>17</sup> <u>Ky.App.</u>, 599 <u>S.W.2d</u> 466, 468 (1980). Garriga quotes the following language in support of her argument: "It appears that the question of standing is being raised for the first time on this appeal; therefore, we will not consider it." *Id*.

<sup>&</sup>lt;sup>18</sup> For a similar approach under the "open courts provision" of the Texas Constitution, see <u>Texas Association of Business v. Texas Air Control Board</u>, 852 S.W.2d 440, 443-47, 36 Tex. Sup. Ct. J. 607 (Tex. 1993).

<sup>&</sup>lt;sup>19</sup> Article III of the United States Constitution contains a similar provision. In particular, Article III § 2 defines the power of the federal judiciary in terms of nine categories of "cases" and "controversies." The Supreme Court of the United States has repeatedly noted that the requirement for "cases" and "controversies" imposes substantial constitutional limits on federal judicial power. See, e.g., United States National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 446, 113 S. Ct. 2173, 2178 124 L. Ed. 2d 402, 412 (1993). "The exercise of judicial power under Art III of the Constitution depends on the existence of a case or controversy" (quoting Preiser v. Newkirk, 422 U.S. 395, 401, 95 S. Ct. 2330, 45 L. Ed. 2d 272 (1975)).

<sup>&</sup>lt;sup>20</sup> West v. Commonwealth, Ky., 887 S.W.2d 338, 341 (1994) (quoting Black's Law Dictionary, 865 (6th ed. 1990)).

<sup>&</sup>lt;sup>21</sup> Veith v. City of Louisville, Ky., 355 S.W.2d 295, 297 (1962) (citing Commonwealth ex rel. Watkins v. Winchester Water Works, 303 Ky. 420, 197 S.W.2d 771 (1946); Elrod v. Willis, 303 Ky. 724, 198 S.W.2d 967 (1946); and Revis v. Daugherty, 215 Ky. 823, 287 S.W. 28 (1926)).

parties involved in a particular case.

HN9 When read in conjunction, § 14 and § 112(5) of the Kentucky Constitution place substantial restrictions on the power of judicial review by limiting its availability to those litigants who have suffered an "injury" and pled a "justiciable controversy." *HN10* The limitation placed upon the power of judicial review via §§ 14 and 112(5) of the Kentucky Constitution is a the court's subject-matter limitation upon jurisdiction, and as such, it cannot be waived.  $^{22}$  [\*21] *HN11*[ $^{\bullet}$ ] The concept of standing is an essential component of subject-matter jurisdiction. As the Supreme Court stated in Kraus v. Kentucky State Senate, <sup>23</sup> HN12 [7] "standing to sue means [\*19] that a party has a sufficient legal interest in an otherwise justiciable controversy to obtain some judicial decision in the controversy." HN13 [7] "As an aspect of justiciability, the standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of [the court's] jurisdiction and to justify exercise of the court's remedial powers on his behalf" [emphasis original]. <sup>24</sup> The following observation provided by the Supreme Court of Connecticut fairly summarizes our position on the issue:

**HN14**[ ] "If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause." **HN15**[ ] "A determination regarding a trial court's subject matter jurisdiction

Jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things.

is a question of law" . . .

[citations omitted].

HN16 [ ] "Subject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . HN17 [ ] [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . HN18 [ ] The objection of want of jurisdiction may be made at any time . . . and the court or tribunal may act on its own motion, and should do so when [\*20] the lack of jurisdiction is called to its attention. . . . HN19 [ ] The requirement of subject matter jurisdiction cannot be waived by any party and can be raised at any stage in the proceedings" [citation omitted].

HN20 [ ] "Standing is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights. Rather it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented..." [citations omitted]. 25

If we were to conclude that standing is unreviewable on appeal at least three undesirable consequences could result. First and foremost, appellate courts would be impotent to prevent lower courts from exceeding their constitutional and statutory limits of authority. Second, appellate courts could not arrest collusive suits. Third, by operation of the doctrines of res judicata and collateral estoppel, judgments rendered in suits addressing only hypothetical injuries could bar relitigation of issues by a litigant who eventually suffers an actual injury.

*Id. at 445*. For a thorough discussion of the values served by limiting the availability of judicial review to those litigants who have standing, *see* Erwin Chemerinsky, *Federal Jurisdiction* § 2.3, pg. 57-59 (3d ed. 1999). In particular, Professor Chemerinsky explains, *inter alia*, that the standing doctrine promotes separation of powers by limiting judicial encroachment upon the other branches of government. We find this observation to be particularly insightful in light of the fact that Kentucky has long been a "strict adherent" to the principles embodied in the separation of powers doctrine. *See*, *e.g.*,

<sup>&</sup>lt;sup>22</sup> See, e.g., <u>Cann v. Howard, Ky.App.</u>, 850 S.W.2d 57, 59 (1993). "Subject-matter jurisdiction may not be waived or conferred by agreement of the parties" [citation omitted]. *Id.* Subject-matter jurisdiction is defined in Black's Law Dictionary 857 (7th ed. 1999) as:

<sup>&</sup>lt;sup>23</sup> Ky., 872 S.W.2d 433, 439 (1993).

<sup>&</sup>lt;sup>24</sup> Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (citing <u>Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962))</u>.

<sup>&</sup>lt;sup>25</sup> Fort Trumbull Conservancy, LLC v. Alves, 262 Conn. 480, 815 A.2d 1188, 1193-94 (Conn. 2003). In addition, as the Supreme Court of Texas pointed out in <u>Texas Air, supra</u>:

[\*22] Furthermore, we note that our holding today is consistent with the results reached by the majority of jurisdictions that have addressed this issue.<sup>26</sup>

[\*23] We will now determine whether Garriga has standing to contest the constitutionality of *KRS* 

<u>Legislative Research Commission v. Brown, Ky., 664 S.W.2d 907, 912 (1984)</u>. "The separation of powers doctrine is fundamental to Kentucky's tripartite system of government[.]"

<sup>26</sup> See, e.g., *United States v. Hays*, 515 U.S. 737, 742, 115 S. Ct. 2431, 132 L. Ed. 2d 635 (1995) (the question of standing is not subject to waiver); Gunaji v. Macias, 2001 NMSC 28, 130 N.M. 734, 31 P.3d 1008, 1013-14 (N.M. 2001) (lack of standing is a potential jurisdictional defect, which may not be waived and may be raised at any stage of the proceedings, even sua sponte by the appellate court); Hood River County v. Stevenson, 177 Ore. App. 78, 33 P.3d 325, 326-27 (Or.App. 2001) (standing is an essential feature of justiciability that can be raised at any stage in the action); Transcontinental Gas Pipe Line Corp. v. Calco Enterprises, 132 N.C. App. 237, 511 S.E.2d 671, 675 (N.C.App. 1999) (standing is an aspect of subject-matter jurisdiction and as such it can be raised at anytime, even on appeal); Buckeye Foods v. Cuyahoga County Board of Revision, 78 Ohio St. 3d 459, 1997 Ohio 199, 678 N.E.2d 917 (Ohio 1997) (the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings); Newman v. Newman, 235 Conn. 82, 663 A.2d 980, 990 (Conn. 1995) (lack of standing is a subject-matter jurisdictional defect that cannot be waived); Texas Air, 852 S.W.2d at 445 (standing is a component of subject-matter jurisdiction and as such it cannot be waived and may be raised for the first time on appeal); State v. Baltimore, 242 Neb. 562, 495 N.W.2d 921, 926 (Neb. 1993) (because the requirement of standing is fundamental to a court's exercising jurisdiction, a litigant or a court before which a case is pending can raise the question of standing at any time during the proceeding); Bennett v. Board of Trustees for University of Northern Colorado, 782 P.2d 1214, 1216 (Colo.App. 1989) (standing is a jurisdictional issue which can be raised at any stage of an action, including the appeal); Pace Construction Co. v. Missouri Highway & Transportation Commission, 759 S.W.2d 272, 274 (Mo.App. 1988) (lack of standing cannot be waived); State by McClure v. Sports & Health Club, Inc., 370 N.W.2d 844, 850 (Minn. 1985) (an objection to want of standing goes to the existence of a cause of action, is jurisdictional, and may be raised at any time); Smith v. Allstate Insurance Co., 483 A.2d 344, 346 (Me. 1984) (standing may be raised by the court on its own motion for the first time on appeal); Stewart v. Board of County Commissioners of Big Horn County, 175 Mont. 197, 573 P.2d 184, 188 (Mont. 1977) (objections to standing cannot be waived and may be raised by the court sua sponte). See also 59 Am.Jur.2d, Parties, § 34 (2002). "An appellate court may, on its motion, address the issue of standing, where standing, as a component of subject-matter jurisdiction, is not subject to waiver." [footnote omitted].

<u>220.035(4)</u> in the Kenton Circuit Court action. In her amended complaint, Garriga requested, *inter alia*, a declaration that the statute violated §§ <u>2</u>, <u>3</u>, <u>27</u>, <u>28</u>, <u>29</u>, <u>59</u>, and <u>60 of the Kentucky Constitution</u>. Thus, Garriga was attempting to invoke the circuit court's jurisdiction under <u>KRS 418.045</u>, (the <u>Declaratory Judgment Act</u>), which provides, in relevant part, as follows:

HN21[ Any person interested under a deed, will or other instrument of writing, or in a contract, written or parol; or whose rights are affected by statute, municipal ordinance, or other government regulation; or who is concerned with any title to property, office, status or relation; or who as fiduciary, or beneficiary is interested in any estate, provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties[.]

It should be noted that <u>HN22</u>[ "[KRS 418.045] does not confer jurisdiction on a trial court, but rather makes declaratory judgment available as a remedy for a cause [\*24] of action already within the court's jurisdiction" [emphases original][citations omitted]. <sup>27</sup> As previously discussed, under § 112(5) of the Kentucky Constitution, circuit courts are vested with original jurisdiction over all "justiciable causes." Thus, we must first determine whether Garriga's amended complaint alleges a "justiciable cause."

[\*25] In <u>Freeman, supra</u>, the Supreme Court concluded that <u>HN23</u>[7] a litigant must demonstrate that he has a legal interest in the

<sup>&</sup>lt;sup>27</sup> Reynolds v. Reynolds, 86 S.W.3d 272, 275 (Tex.App. 2002). See also Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947, 951, 42 13 Ky. L. Summary 13 (1995), "question of whether a litigant demonstrates the existence of an actual controversy affecting his rights which is sufficient to invoke, under the state declaratory judgment act, the court's jurisdiction remains a separate issue from that of whether a party has standing"; and Freeman v. Danville Tobacco Board of Trade, Inc., Ky., 380 S.W.2d 215, 216 (1964), "consistently our decisions recognize that the existence of an actual controversy concerning a justiciable question is a condition precedent to an action under our Declaratory Judgment Act" [citations omitted]).

judgment he is seeking in order to invoke the circuit court's jurisdiction under the Declaratory Judgment Act. <sup>28</sup> In <u>Associated Industries, supra</u>, the Court stated that a litigant must first allege "'a personal stake in the outcome of the controversy" <sup>29</sup> to justify exercise of the court's remedial powers on his or her behalf. In the context of a constitutional challenge to a statute or regulation, a litigant must demonstrate that he has been adversely affected by the statute or regulation. <sup>30</sup>

[\*26] In respect to her contention that <u>KRS</u> 220.035(4) violates §§ 2, 3, 27, 28, 29, 59 and 60 of the Kentucky Constitution, Garriga has failed to demonstrate that she has been adversely affected by the statute. Garriga argues that she has "taxpayer standing" due to the fact SD1 raised the rates she must pay as a resident of the sanitation district. Notwithstanding her status as a ratepayer of the sanitation district, Garriga has failed to establish any causal connection between any alleged increase in her rates <sup>31</sup> and <u>KRS 220.035(4)</u>. <sup>32</sup> Garriga also claims that KRS 220.035(4) diminishes her right to

vote "because, unlike residents of single-county sanitation districts, residents of SD1 are denied the power to elect all members of the committee that oversees their sanitation district." However, this argument ignores the fact that there is no constitutional right for a citizen to vote for the board of directors of a sanitation district. HN24 [ ] A sanitation district is a creature of the Legislature and the Legislature is empowered to establish its board of directors. <sup>33</sup> Consequently, we are of the opinion that Garriga [\*27] lacks standing to challenge the constitutionality of KRS 220.035 in the Kenton Circuit Court. Therefore, while we affirm the judgment of the Kenton Circuit Court, we do so for a different reason. 34 We hold that Garriga's constitutional claims fail based on her lack of standing.

[\*28] We will now determine whether the Stiteses have standing to challenge the constitutionality of <u>KRS 220.035</u> in the Boone Circuit Court. We raise this issue *sua sponte*. <sup>35</sup>

It is beyond argument that the Stiteses have suffered a distinct and palpable injury as a result of SD1's decision to condemn their property. Notwithstanding this fact, we conclude that the Stiteses have failed to establish any causal relationship between their injury and *KRS* 220.035(4). As the Supreme Court stated in *Stein v. Kentucky State Tax Commission*, <sup>36</sup> *HN25* "it is incumbent upon a party who assails a law invoked in the course thereof to show that the provisions of the statute thus assailed are applicable to him and that he is injuriously [\*29] affected thereby"

<sup>&</sup>lt;sup>28</sup> Freeman, 380 S.W.2d at 216-17.

<sup>&</sup>lt;sup>29</sup> <u>Associated Industries</u>, 912 S.W.2d at 951 (quoting <u>Warth</u>, 422 <u>U.S. at 498</u>).

<sup>&</sup>lt;sup>30</sup> See, e.g., <u>22A Am.Jur.2d</u>, <u>Declaratory Judgments</u>, § 26 (1988). See also <u>Commonwealth v. Louisville Atlantis Community/Adapt</u>, <u>Inc.</u>, <u>Ky.App.</u>, <u>971 S.W.2d 810</u>, <u>817</u>, <u>44 11 Ky. L. Summary 10 (1997)</u>, "before one seeks to strike down a state statute he must show that the alleged unconstitutional feature injures him" (quoting <u>Second Street Properties, Inc. v. Fiscal Court of Jefferson County, Ky., 445 <u>S.W.2d 709</u>, <u>716 (1969)</u>); and <u>Bischoff v. City of Newport, Ky.App.</u>, <u>733 S.W.2d 762</u>, <u>763 (1987)</u>, "an action for declaratory judgment is statutory. It may be brought to declare rights under a municipal ordinance only where the rights of the plaintiff are affected by the ordinance and an actual controversy exists" [citations omitted]).</u>

<sup>&</sup>lt;sup>31</sup> SD1 maintains that Garriga's rates have not been raised and that her alleged injury is merely speculative.

<sup>&</sup>lt;sup>32</sup>The committee of judge/executives designated to represent the sanitation district encompassing Boone, Kenton, and Campbell counties lacks the authority to raise the rates of residents located within the district. Pursuant to *KRS 220.510*, the board of directors of SD1 is vested with the authority to "determine the rates and compensation or rentals to be charged for the use of the sanitary works."

<sup>&</sup>lt;sup>33</sup> See Sanitation District No. 1 of <u>Shelby County v. Shelby County, Ky.App., 964 S.W.2d 434, 437, 45 4 Ky. L. Summary 19 (1998)</u>; and KRS Chapter 220.

<sup>&</sup>lt;sup>34</sup> Keesee v. Smith, 289 Ky. 609, 612, 159 S.W.2d 56, 58 (1941).

<sup>&</sup>lt;sup>35</sup> As previously discussed, the concept of standing is a fundamental prerequisite to a court's authority to adjudicate the rights of the parties involved in a particular case. Thus, it is within our purview to raise this issue *sua sponte*.

<sup>&</sup>lt;sup>36</sup> 266 Ky. 469, 99 S.W.2d 443, 445 (1936).

[citations omitted]. <sup>37</sup> Pursuant to KRS 220.035(4), the committee of judge/executives in the case sub judice was required to "review and approve, amend, disapprove" the proposed district acquisition. The statute, at the very least, provides property owners with an additional level of review by local officials prior to the institution of a condemnation proceeding by a sanitation district. That is to say, HN26 by enacting KRS 220.035, the Legislature sought to add an additional safeguard to the condemnation process so as to ensure that the rights of property owners are protected from arbitrary action. This additional safeguard provided by KRS 220.035(4) has not "injuriously affected" the Stiteses. Consequently, the Stiteses lack standing to contest constitutionality of KRS 220.035 in the Boone Circuit Court. However, as previously discussed, the Boone Circuit Court did not address the Stiteses' constitutional challenges. Thus, we hold that the circuit court did not err by not addressing the constitutional issues, since the Stiteses lacked standing to [\*30] raise those issues.

We will now address the remaining arguments raised by Garriga. She contends that the committee of judge/executives designated to represent SD1 "acted arbitrarily in violation of § 2 of the Kentucky Constitution when it approved the acquisition of the Stites[es'] land and raised [her] rates." The crux of Garriga's argument is premised upon the contention that the decision of the committee judge/executives to approve the acquisition of the Stiteses' property was made in the absence of "substantial evidentiary support" and therefore arbitrary. We disagree. The committee judge/executives heard extensive arguments from several interested parties prior to approving the acquisition of the Stiteses' property. The evidence [\*31] is overwhelming the committee's decision was based on a professional, impartial and comprehensive analysis.

<sup>37</sup> See also <u>State ex rel. Sanchez v. Stapleton, 48 N.M. 463, 152 P.2d 877, 882 (N.M. 1944)</u>, ("one may not attack the constitutionality of the law which was enacted primarily for his benefit").

Garriga further argues that pursuant to <u>KRS</u> <u>416.560(1)</u>, SD1 lacked the authority to initiate condemnation proceedings on its own behalf. <u>KRS</u> <u>416.560(1)</u>, provides, in relevant part, as follows:

HN27 Notwithstanding any other provision of the law, a department, instrumentality or agency of a consolidated local government, city, county, or urban-county government, other than a waterworks corporation the capital stock of which is wholly owned by a city of the first class or a consolidated local government, having a right of eminent domain under other statutes shall exercise such right only by requesting the governing body of the consolidated local government, city, county, or urban-county to institute condemnation proceedings on its behalf.

Garriga maintains that SD1 is a department, instrumentality or agency of local, city, or county government. We disagree. As the Court stated in City of South Hills v. Sanitation District No. 1, 38 HN28 a "[sanitation] district constitutes an autonomous political subdivision with full [\*32] authority within its boundaries as to the construction operation of sanitation improvements." <sup>39</sup> A sanitation district is not an instrumentality or agency of local government. Garriga has failed to cite any authority holding otherwise. 40

In closing, Garriga contends the Kenton Circuit Court erred in dismissing her complaint because she "adequately alleged that SD1 misrepresented to the committee of judge/executives the cost of the wastewater treatment center." We disagree. <u>HN29</u>[ "In a Kentucky action for fraud, the party claiming harm must establish six elements of fraud

<sup>&</sup>lt;sup>38</sup> Ky., 318 S.W.2d 873, 874 (1958).

<sup>&</sup>lt;sup>39</sup> See also <u>KRS 220.110(1)</u>.

<sup>&</sup>lt;sup>40</sup> Garriga's reliance on <u>Bernard v. Russell County Air Board, Ky.,</u> <u>718 S.W.2d 123 (1986)</u>, is misplaced. Clearly, a County Air Board is not an autonomous political subdivision.

by clear and convincing evidence as follows: a) material representation b) which is false c) known to be false or made recklessly d) [\*33] made with inducement to be acted upon e) acted in reliance thereon and f) causing injury" [citations omitted]. 41 Thus, in order for Garriga to state a viable claim for fraud under Kentucky law, she was required, *inter alia*, to allege that she somehow acted or failed to act due to the alleged fraudulent misrepresentation. We agree with SD1 that Garriga has failed to establish that she "undertook any action, or refrained from any action, as a result of a misrepresentation made to her."

We will now address the remaining arguments raised by the Stiteses. The Stiteses contend that SD1 violated *KRS 100.324* by failing to submit a draft of its plan to the Boone County Regional Planning Commission prior to initiating the condemnation proceedings. *KRS 100.324(4)*, provides as follows:

HN30 Any proposal for acquisition disposition of land for public facilities, changes [\*34] in the character, location, or extent of structures or land for public facilities, excluding state and federal highways and public utilities and common carriers by rail mentioned in this section, shall be referred to the commission to be reviewed in light of its agreement with the comprehensive plan, and the commission shall, within sixty (60) days from the date of its receipt, review the project and advise the referring body whether the project is in accordance with the comprehensive plan. If it disapproves of the project, it shall state the reasons for disapproval in writing and make suggestions for changes which will, in its opinion, better accomplish the objectives of the comprehensive plan. No permit required for construction or occupancy of such public facilities shall be issued until the expiration of the sixty (60) day period or until the planning commission issues its report, whichever occurs first.

The Stiteses claim that pursuant to <u>KRS 100.324(4)</u>, SD1 was required to submit a draft of its proposal to acquire their land prior to initiating the condemnation proceedings. We disagree.

KRS 100.361(2), provides, in relevant [\*35] part, as follows:

HN31 Any proposal affecting land use by any department, commission, board, authority, agency, or instrumentality of state government shall not require approval of the local planning unit. However, adequate information concerning the proposals shall be furnished to the planning commission by the department, commission, board, authority, agency, or instrumentality of state government.

In Edelen v. County of Nelson, 42 this Court held that cities and counties, as instrumentalities of state government, are immune from complying with zoning regulations. The Court reasoned that "the legislature, by enacting KRS 100.361(2), showed its intent that zoning regulations may not override implementation of governmental functions." 43 As noted previously, a sanitation district constitutes an autonomous political subdivision with full authority within its boundaries as to the construction and operation of sanitation improvements. 44 HN32[7] The construction of a wastewater treatment facility by a sanitation district is no doubt a "government function." Thus, SD1 was not required to submit a draft of its plan to the Boone County Regional Planning Commission prior [\*36] to initiating the condemnation proceedings. We are not unmindful that sanitation districts are required to provide local planning commissions with "adequate information" concerning any proposed land acquisition. Nevertheless, HN33  $\uparrow$  the power of a sanitation

<sup>&</sup>lt;sup>41</sup> <u>United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464, 468, 46 6 Ky. L. Summary 44 (1999).</u>

<sup>&</sup>lt;sup>42</sup> Ky.App., 723 S.W.2d 887, 889 (1987).

<sup>&</sup>lt;sup>43</sup> *Id*.

<sup>&</sup>lt;sup>44</sup> City of South Hills, 318 S.W.2d at 874. See also KRS 220.110(1).

<sup>&</sup>lt;sup>45</sup> KRS 100.361(2).

district to initiate condemnation proceedings is not contingent upon prior approval from the local planning commission. Likewise, the Stiteses' argument that SD1's proposed wastewater treatment plant is in violation of local zoning laws also fails as SD1 is not required to comply with local zoning regulations. <sup>46</sup> *HN34* The law does not require an exercise in futility.

The Stiteses further contend [\*37] that pursuant to <u>KRS 224.73-100</u>, SD1 was required to obtain a permit from the NREPC prior to initiating the condemnation proceedings. <u>KRS 224.73-100</u> provides, in relevant part, as follows:

Any corporation authorized to do business in this state and organized for the purpose of constructing, maintaining and operating sewer lines and sewage treatment facilities may, if it is unable to contract or agree with the owner after a good faith effort to do rights-of-way condemn necessary constructing, maintaining and operating pipelines and, if necessary, pumping stations; . . . Provided, however, that before any corporation shall be authorized to use the provisions of this section, it shall have presented plans and specifications to the Natural Resources Environmental Protection Cabinet and received from said cabinet a permit to operate and maintain said sewage treatment facilities[.]

The statute fails to draw a distinction between public and private corporations. Thus, the Stiteses maintain that since SD1 is a "corporation", <sup>47</sup> it was required to obtain a permit from the NREPC prior to initiating the condemnation [\*38] proceedings. We disagree.

HN35[\*] "The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature." <sup>48</sup> KRS 224.73-100 was enacted primarily for the purpose of providing sewage treatment companies with the power to condemn rights-of-way necessary for the construction, maintenance and operation of sewage treatment facilities. <sup>49</sup> [\*40] The Stiteses' argument ignores the fact that SD1 derives its power to condemn from KRS 220.310, which provides, in relevant part, as follows:

HN36 The board of directors [of the sanitation district] may, by resolution reciting the need, order the condemnation for the district of any real [\*39] property or interest therein that may, in the opinion of the board, be necessary for the proposed construction of any structure authorized by KRS 220.010 to 220.520, and any property taken for a public use may again be taken by the district if necessary. Proceedings for condemnation shall be conducted in the manner prescribed in the Eminent Domain Act of Kentucky. <sup>50</sup>

Thus, SD1 was not required to proceed under <u>KRS</u> <u>224.73-100</u>. To hold otherwise would render <u>KRS</u> <u>220.310</u> nugatory. <sup>51</sup> The Stiteses' arguments to the

<sup>&</sup>lt;sup>46</sup> <u>Edelen, 723 S.W.2d at 889</u> (zoning regulations may not override implementation of government functions).

<sup>&</sup>lt;sup>47</sup> KRS 220.010(3) defines "public corporation" as "any county, city, school district, water district or drainage district, and any other governmental agency or political subdivision clothed with the power of levying general or special taxes or issuing bonds payable from special funds."

<sup>&</sup>lt;sup>48</sup> <u>Kentucky Insurance Guaranty Association v. Jeffers, Ky., 13</u> <u>S.W.3d 606, 610 (2000)</u>.

<sup>&</sup>lt;sup>49</sup> KRS 224.73-100 was originally enacted as KRS 220.660 in 1964. The statute was renumbered as KRS 224.130 in 1966 and later renumbered as KRS 224.73-100 in 1991. Prior to the enactment of KRS 220.660, only metropolitan sewer districts created pursuant to KRS 76.010, sewer construction districts created pursuant to KRS 76.305, and sanitation districts created pursuant to KRS 220.020 were authorized to condemn property for the construction, maintenance and operation of sewage treatment facilities. See KRS 76.110(1), KRS 76.325(5), and KRS 220.310. Pursuant to KRS 224.73-100, "any corporation authorized to do business in this state and organized for the purpose of constructing, maintaining and operating sewer lines and sewage treatment facilities" is now authorized to "condemn rights-of-way necessary for constructing, maintaining and operating" its facilities.

<sup>&</sup>lt;sup>50</sup> KRS 220.310 was enacted in 1942.

<sup>&</sup>lt;sup>51</sup> See Commonwealth v. McKinney, Ky., 594 S.W.2d 884, 886-87 (1979). HN37 Tit is a rule of statutory construction that where

contrary are to no avail. 52

[\*41] The Stiteses further contend that SD1 violated multiple provisions of the Clean Water Act. <sup>53</sup> More specifically, the Stiteses claim that "the draft Regional Facilities Plan and the plan for Western Regional Waste Water Treatment Plant have been written in a manner that is contrary to the requirements of the Clean Water Act[.]" This argument lacks merit as SD1 was not required to comply with the Clean Water Act prior to initiating the condemnation proceedings. The Supreme Court was faced with a similar situation in *Cornett, supra*, wherein the Court quoted, with approval, the following language contained in *Falkner v. Northern States Power Co.*: <sup>54</sup>

**HN38** [ ] If there is reasonable probability that the public utility will comply with all applicable standards, will meet all requirements for the issuance of necessary permits, and will not otherwise fail or be unable to prosecute its undertaking to completion, there is a right of condemnation. 55

This reasoning is applicable to the case *sub judice*.

an act treats a subject in general terms and contains no provisions which contradict or conflict with the provisions of a prior statute having particular and specific terms, the new act must be regarded as not having intended to affect the existing statute. Both will be construed together" (quoting <u>Board of Education v. Citizens Fidelity Bank & Trust Co., Ky., 263 S.W.2d 112, 113 (1953))</u>. See also <u>Hopkinsville-Christian County Planning Commission v. Christian County Board of Education, Ky.App., 903 S.W.2d 531, 532-33, 42 9 Ky. L. Summary 5 (1995)</u>.

<sup>52</sup>We also note that SD1 is required to obtain approval from the NREPC for any proposed improvements within the district pursuant to <u>KRS 220.240</u>. Notwithstanding, we find no support for the proposition that SD1 is required to obtain approval from the NREPC prior to initiating condemnation proceedings. *See*, *e.g.*, <u>Northern Kentucky Port Authority, Inc. v. Cornett, Ky., 625 S.W.2d 104, 105 (1981).</u>

As the Court stated in *Cornett*, "action must be tempered with wisdom." <sup>56</sup> We conclude that SD1 has established a reasonable probability that it "will comply with all applicable [\*42] standards" and that it "will meet all requirements for the issuance of necessary permits[.]" <sup>57</sup> Likewise, the Stiteses' argument that, pursuant to *KRS* 220.220, 220.240, 220.250, and 220.035, SD1 was required to obtain prior approval for its wastewater treatment plant before initiating the condemnation proceedings, is without merit.

The Stiteses next contend that SD1 is taking more property than necessary for the construction of its sewage treatment plant. In *Kroger Co. v. Louisville & Jefferson County Air Board*, <sup>58</sup> the Supreme Court noted that, "it is fundamental that <u>HN39</u>[] a condemning authority may determine without let or hindrance the amount of land necessary for a public purpose" [citations [\*43] omitted]. <sup>59</sup> It necessarily follows that, <u>HN40</u>[] "[a] court will deny the right to take only where there has been '[a] gross abuse or manifest fraud." <sup>60</sup> After a thorough review of the record, we are simply unable to conclude that "[a] gross abuse or manifest fraud."

<sup>53 33</sup> U.S.C. § 1251, et seq.

<sup>&</sup>lt;sup>54</sup> 75 Wis. 2d 116, 248 N.W.2d 885, 893 (Wis. 1977).

<sup>&</sup>lt;sup>55</sup> Cornett, 625 S.W.2d at 105.

<sup>&</sup>lt;sup>56</sup> Id. See also 26 Am. Jur. 2d Eminent Domain § 29 (1996).

<sup>&</sup>lt;sup>57</sup> Id

<sup>&</sup>lt;sup>58</sup> Ky., 308 S.W.2d 435, 439 (1957).

<sup>&</sup>lt;sup>59</sup>Furthermore, it has been said that <u>HN41</u>[•] "where a taking of land or water rights or other property is made for a public use, there is no valid objection if a reasonable regard for probable future expansion is kept in mind and a taking of considerably greater extent than is required by present necessities is made" [footnote omitted]. 26 Am. Jur. 2d, Eminent Domain, § 34 (1996).

Cooksey, Ky.App., 948 S.W.2d 122, 123, 44 8 Ky. L. Summary 14 (1997) (quoting Kroger Co., supra at 439)). See also Commonwealth, Dep't of Highways v. Burchett, Ky., 367 S.W.2d 262, 266 (1963), HN42[ ] "the judicial power of government should not be invoked against the discretion of an agency of the executive branch in determining what is in the public interest, including what particular property is needed in connection with a valid public project, unless there is such a clear and gross abuse of that discretion as to offend the guaranty of Const. § 2 against the exercise of arbitrary power."

has taken place in respect to SD1's decision to condemn the land in question.

[\*44] The Stiteses further argue that SD1 failed to negotiate in good faith prior to initiating the condemnation proceedings as required by the Eminent Domain Act. This argument is simply untenable as the record discloses extensive efforts on the part of SD1 to purchase the land in question prior to initiating the condemnation proceedings. The Stiteses' assertions to the contrary are not supported by the record.

The Stiteses next contend that their right to a fair trial was denied by the trial judge as a result of his conduct throughout the proceedings. After a thorough review of the record, we were unable to find any evidence which suggests that the Stiteses' right to a fair trial was somehow denied by the conduct of the trial judge.

Based upon the foregoing reasons, the order of the Kenton Circuit Court dismissing Garriga's complaint for failure to state a claim is affirmed. The interlocutory order and judgment of the Boone Circuit Court authorizing SD1 to condemn approximately 144 of 476 acres owned by the Stiteses for the purpose of constructing a wastewater treatment plant and related facilities is affirmed.

ALL CONCUR.

KeyCite Red Flag - Severe Negative Treatment
Order Withdrawn, Published at Kasey v. Beshear, Ky.App., April 9, 2021
2021 WL 942812

Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED Court of Appeals of Kentucky.

Angelika KASEY; Michele Newtz; Christina Tobin; Julia Sharp; and TLC Rescue – Teresa's Legacy Continues, Inc., Appellants

V.

Andrew BESHEAR and Ryan Quarles, Appellees

NO. 2018-CA-1643-MR | MARCH 12, 2021; 10:00 A.M.

APPEAL FROM FRANKLIN CIRCUIT COURT, HONORABLE PHILLIP J. SHEPHERD, JUDGE, ACTION NO. 18-CI-00006

## **Attorneys and Law Firms**

BRIEFS FOR APPELLANTS: Nolia G. Batey, Katie Brophy, Julia W. Springsteen, Louisville, Kentucky.

BRIEF FOR APPELLEES: M. Stephen Pitt, S. Chad Meredith, Matthew F. Kuhn, Joseph A. Bilby, Frankfort, Kentucky.

BEFORE: CALDWELL, DIXON, AND L. THOMPSON, JUDGES.

## **OPINION**

# **CALDWELL**, JUDGE:

\*1 Angelika Kasey, Michele Newtz, <sup>1</sup> Christina Tobin, Julia Sharp, and TLC Rescue – Teresa's Legacy Continues, Inc. (collectively "Appellants"), appeal the opinion and order of the Franklin Circuit Court dismissing their complaint against Governor Andrew Beshear<sup>2</sup> and Commissioner of

Agriculture, Ryan Quarles (collectively "Appellees"). After careful review, we affirm.

# FACTUAL AND PROCEDURAL BACKGROUND

The focus of this lawsuit is on KRS<sup>3</sup> Chapter 258, Animal Control and Protection. Relevant to this case are KRS 258.095 (definitions for KRS 258.095 to 258.500), KRS 258.117 (creates the Animal Control Advisory Board), KRS 258.119 (creates the animal control and care fund and sets forth the requirements for counties to qualify for funds), and KRS 258.195 (pertains to the employment or appointment of animal control officers and the establishment and maintenance of animal shelters). To distinguish these from the remaining statutes in the chapter, we will refer to them collectively as the "animal shelter statutes."<sup>4</sup>

In January 2018, the Appellants, as citizens and taxpayers of Kentucky, filed suit against the Appellees for their alleged failure to monitor or enforce compliance with the animal shelter statutes. More specifically, the Appellants alleged

[s]ince the enactment of the [animal shelter statutes], the [Appellees] have failed and refused to monitor or enforce the laws leaving them largely useless and of no import. The evidence will show only 12% of Kentucky's 120 counties are in compliance with the [animal shelter statutes] while over 50% are in violation of three (3) or more parts of the [animal shelter statutes]. Major problems existent [sic] include but are not limited to pet overpopulation leading to crowded shelters, insufficient work force at shelters, and lack of education of shelter personnel. Additionally, a number of shelters are inadequate as a result of aging and poorly maintained facilities built with inappropriate materials that cannot be properly cleaned and disinfected; poor ventilation; lack of appropriate veterinary care; and lack of appropriate quarantine areas.

(Record (R.) at 4.)

The Appellees filed a motion to dismiss per CR <sup>5</sup> 12.02(a) and (f) in lieu of an answer. They made a number of arguments as to why their motion was appropriate; however, most relevant for purposes of this appeal was the argument that the Appellants lacked standing. In February 2018, the circuit court conducted a hearing on the Appellees' motion. At the time, the court voiced concern about its ability to grant the Appellants' requested relief. Regardless, the court set a

briefing schedule giving the Appellants the opportunity to respond.

\*2 In their response, the Appellants claimed to have standing because they suffered actual damage. Also, they claimed to have "a real and substantial interest in the outcome" of the case because they used "substantial post-tax funds to provide services the state and counties should otherwise be funding," thereby unjustly enriching the Commonwealth. (R. at 47.) Attached to the Appellants' response was a study whose purported goal was "to assess current conditions in Kentucky's county shelters and determine the degree of compliance with Kentucky shelter laws." (R. at 50.) It concluded that a majority of Kentucky's animal shelters were not compliant with existing laws and two major factors contributing to this are a lack of funding and unsatisfactory laws. (R. at 71-72.) Notably, the Appellants did not assert in their response that the animal control and care funds are being mishandled or misappropriated.

After the Appellees filed a reply, the Appellants filed a notice of submission, and neither party requested additional briefing or oral argument. In October 2018, the circuit court issued its opinion and order wherein it dismissed the Appellants' complaint because they lacked standing and had presented a nonjusticiable political question. This appeal followed.

## **ANALYSIS**

The threshold issue before us is whether the Appellants have constitutional standing to pursue this suit in circuit court. Matters of constitutional standing are reviewed *de novo*. *Overstreet v. Mayberry*, 603 S.W.3d 244, 251-52 (Ky. 2020).

In 2018, the Kentucky Supreme Court formally adopted the *Lujan*<sup>6</sup> test "as the constitutional standing doctrine in Kentucky[.]" *Commonwealth Cabinet for Health and Family Services, Department of Medicaid Services v. Sexton*, 566 S.W.3d 185, 196 (Ky. 2018). The Court stated

at bottom, for a party to sue in Kentucky, the initiating party must have the requisite constitutional standing to do so, defined by three requirements: (1) injury, (2) causation, and (3) redressability. In other words, [a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.

*Id.* (quotation marks and footnotes omitted). Although we affirm the opinion and order of the circuit court, because it did not apply this test to the case *sub judice*, we must do so now.

First, the Appellants must demonstrate they have suffered a personal injury. An injury has been defined as "[t]he violation of another's legal right, for which the law provides a remedy; a wrong or injustice." *Injury*, Black's Law Dictionary (11th ed. 2019).

To establish the first requirement, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling. For an injury to be particularized, it must affect the plaintiff in a personal and individual way. This means the plaintiff personally has suffered some actual or threatened injury. For an injury to be concrete, it must actually exist.

*Overstreet*, 603 S.W.3d at 252 (internal quotation marks and footnotes omitted).

As citizens and taxpayers in Kentucky, the Appellants assert they have a right to the enforcement of Kentucky laws. This right, they suggest, has been violated by the Appellees' failure to enforce the animal shelter laws. Additionally, they argue they have "far more 'skin in the game' than the average citizen" because "they contributed substantial funds and time to provide services the state and counties should otherwise be funding."

To begin, we cannot say that the failure to enforce Kentucky laws is the type of concrete and particularized injury contemplated by the Court when it adopted the *Lujan* test. The only reason this case becomes particularized to the Appellants is because they voluntarily decided to expend their personal time and resources to care for stray and abandoned animals, although they were under no legal obligation to do so. The Appellants have not provided us with any Kentucky case law allowing a party to assert standing due to a voluntary injury. We decline to expand the doctrine of standing to include such a theory.

\*3 The Appellants also asserted standing as taxpayers. In *Overstreet v. Mayberry*, where the Court dealt exclusively with the injury element of standing, the Court explained that taxpayers in Kentucky have been permitted to sue the government or its agents "on behalf of themselves ... to challenge the propriety of city, county, or state tax or expenditure of public funds," or "on behalf of the

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Commonwealth as a matter of equity[.]" *Overstreet*, 603 S.W.3d at 263-65. Given the Appellants' pleadings, specifically the allegations above, it appears they attempted to gain standing under the first theory.

The Court alluded that the cases where taxpayers had successfully obtained standing on behalf of themselves were those where

taxpayers [sought] to enjoin the imposition of an illegal tax or expenditure of public funds or to compel compliance with certain statutory or constitutional requirements attached thereto.

Id. at 263-64. However, the Appellants did not allege in the circuit court that the funds made available through the animal shelter laws were being illegally expended. In a footnote in their reply brief for this Court, the Appellants stated "[o]f significant note and concern are distributions made in obvious contravention of KRS 258.119[.]" Also, attached to their reply was a series of spreadsheets purporting to reflect the dispersal of grant funds. We are not permitted to review an argument for the first time on appeal. We have said repeatedly

we will not allow appellants, under the guise of 'developing' an argument raised in the trial court, to feed one can of worms to the trial judge and another to the appellate court.

*Grundy v. Commonwealth*, 25 S.W.3d 76, 84 (Ky. 2000) (internal quotation marks and footnote omitted). Thus, the Appellants failed to show they suffered the type of injury required to demonstrate standing.

Considering the Appellants need to successfully meet all elements of the *Lujan* test to have constitutional standing, we need not proceed with our analysis. However, because further analysis may prove insightful, we will continue.

If the Appellants had pled a particularized injury, the Appellants would have needed to show the Appellees were the cause of their injury. In other words, the injury must be "fairly traceable to the defendant's allegedly unlawful conduct." *Sexton*, 566 S.W.3d at 196. Here, the Appellants argued that their injury was a result of the Appellees' failure to monitor and enforce compliance with the animal shelter laws.

This is problematic for two reasons. Again, we note that the Appellants' chose to spend their time and resources rescuing animals; they had no legal obligation to do so. If the Appellants had not chosen to pursue this cause, no matter how noble, there would be no injury particular to the Appellants.

Additionally, the animal shelter statutes do not vest enforcement power with the Governor or the Commissioner of Agriculture. KRS 258.117 creates the Animal Control Advisory Board (ACAB) and attaches it to the Department of Agriculture for administrative purposes. The purpose of the ACAB is to

evaluat[e] applications for and [review] disbursements from the animal control and care fund, create[e] training programs, and other duties relating to animal control and care in the counties of the Commonwealth.

KRS 258.117(1). The ACAB is further instructed to "promulgate administrative regulations to carry out the provisions of this section." *Id*.

KRS 258.119 creates the animal control and care fund (the "Fund") and sets forth the terms for how the Fund is to be funded, spent, and distributed to the counties. Further, it states that if the counties have received funds and failed to follow the terms of the statute, then the money must be refunded to the Department of Agriculture. KRS 258.119(5). Again, oversight of the distribution of the Fund was given to the ACAB; however, the responsibility to establish and enforce these programs was granted to "[t]he governing body of each county" and animal control officers. KRS 258.195(1).

\*4 The only action required of the Governor is to appoint the members of the ACAB, and we can find no statutory obligation imposed upon the Commissioner of Agriculture. KRS 258.117(2). Thus, even if we were to acknowledge that the Appellants' injuries were not self-inflicted, we cannot say the cause of those injuries was the Governor or the Commissioner of Agriculture's failure to enforce the animal shelter statutes.

Had the Appellants established the first two elements of the *Lujan* test, they would have lastly needed to show their injury was "likely to be redressed by the requested relief." *Sexton*, 566 S.W.3d at 196. The Appellants requested the following relief:

[D]eclaratory judgment that the Defendants['] of lack financing for, oversight of, and enforcement of the statutory requirements of Kentucky's county animal shelters is in conflict with the Kentucky Constitution and KRS 258 et seq.

• • • •

That the Court declare the respective rights and duties of the parties and enter judgment declaring the Plaintiffs have been and are being denied rights as citizens of this Commonwealth to the enforcement of laws of this jurisdiction.

That mandamus issue to the Governor of the Commonwealth of Kentucky requiring him to recommend to the General Assembly of Kentucky, either at its next regular session or at a special session, that the General Assembly enact legislation pertaining to the animal shelters required by the [animal shelter statutes] to obtain necessary compliance therewith and enforcement including but not limited to adequate training, monitoring, and enforcement mechanisms.

That mandamus issue to the Governor of the Commonwealth of Kentucky and the Commissioner of Agriculture to take all necessary and appropriate action to assure the laws set forth in KRS 258 *et seq.* are faithfully executed.

(R. at 3-5.) The circuit court correctly held that it could not grant this requested relief because it blatantly violates the separation of powers doctrine. As the circuit court so aptly stated

while these goals may be worthy and laudable, they present public policy questions that are within the province of the legislature, not the judiciary. The solution to the problem presented in the [c]omplaint is to enact better legislation, not to impose reform of the status quo concerning animal shelters by judicial fiat.

(R. at 123.)

As a final point, we note that, at its core, this case concerns animal rights. The statutes at issue in this case, and others within the chapter, set forth standard guidelines for the humane care of stray and abandoned animals. The Appellants asserted that this standard, while inadequate, has not been met in the majority of Kentucky counties. Unfortunately, standing requirements have made it difficult for animal rights activists to enforce animal protections. Varu Chilakamarri, Taxpayer Standing: A Step Toward Animal-Centric Litigation, 10 ANIMAL L. 251, 252 (2004). While some of our sister states have addressed the issue of standing in animal rights cases differently, Kentucky does not appear to have considered it. In the case sub judice, the Appellants have attempted to show standing via their status as citizens and taxpayers of Kentucky. Perhaps, given the right facts and circumstances, one could obtain such standing. However, for the reasons set forth above, we cannot say the Appellants have properly pled it here.

## **CONCLUSION**

For the foregoing reasons, we affirm the October 26, 2018 opinion and order of the Franklin Circuit Court.

ALL CONCUR.

#### **All Citations**

Not Reported in S.W. Rptr., 2021 WL 942812

#### Footnotes

- There appears to be some discrepancy as to whether Michele Newtz is suing as an individual or on behalf of the corporation Fiona's Legacy. The complaint lists Michele Newtz on behalf of Fiona's Legacy while the notice of appeal simply lists Michele Newtz. The distinction has no bearing on the outcome of this case; however, because the notice of appeal refers to Michele Newtz individually, we will also do so.
- Suit was originally filed against former Governor Matthew Bevin. In February 2020, we entered an order granting Governor Beshear's motion to be substituted as a party in Governor Bevin's stead. The record was amended to reflect the substitution.
- 3 Kentucky Revised Statutes.
- 4 With some exceptions, the remainder of the statutes in KRS Chapter 258 pertain to rabies, vaccinations, and euthanasia.
- 5 Kentucky Rules of Civil Procedure.
- 6 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).
- The Appellants cited to *Humane Society of the United States v. The United States Postal Service*, 609 F.Supp.2d 85 (D.D.C. 2009), as support for their position. In that case, the Humane Society challenged the United States Postal Service's (USPS) distribution of a magazine that promoted chicken fighting. The USPS argued the Humane Society lacked standing because it was a voluntary organization and its injury was voluntarily inflicted. In an effort to show it had

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standing, the Humane Society attached an affidavit and articles indicating that the circulation of the publication increased its expenditure of funds for emergency services. The Court concluded "[the Humane Society's] decision to dedicate time and resources to [reducing illegal animal fighting] may be a voluntary budgetary decision, but if the need to care for animals on an emergency basis is increased by USPS's circulation of [the publication], then the financial injury to the Humane Society is neither voluntary nor self-inflicted." *Id.* at 91. While we may have been persuaded by this theory of standing, at least for the Appellant, TLC Rescue, the Appellants did not attempt to put forth any evidence indicating TLC's decision to budget additional monies was the result of the Appellees' actions.

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2010 WL 3292944 Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

NOT TO BE PUBLISHED Court of Appeals of Kentucky.

Harris G. WHITE, Jr., and Annette White;
Patricia Conway; Harold McLaughlin
and Lorraine McLaughlin; David Riggle
and Ora Riggle; Donald Riggle; Mark
J. Zenemka, Wade Webb and Rose
Webb; Irvin Coy; Fonda Vandiver and
Wilbert Vandiver; Darrell Johnston;
Larry Tackett; Jeffrey G. White; Lori
Price and Paul Price, Appellants.

v.

CITY OF HILLVIEW, Kentucky, Appellee.

No. 2009–CA–001334–MR. | Aug. 6, 2010.

Discretionary Review Denied by Supreme Court Sept. 14, 2011.

West KeySummary

1 Municipal Corporations ← Proceedings to prevent or contest annexation in general

Petitioners failed to establish standing to contest the city's annexation of county territory. None of the petitioners were resident voters or owners of real property within the limits of the territory proposed to be annexed. Further, none of the petitioners were residents of the city seeking annexation. Const. § 2; KRS 81A.420, 418.045.

Appeal from Bullitt Circuit Court, Action No. 08–CI–00535; Stephen P. Ryan, Special Judge.

# **Attorneys and Law Firms**

John E. Spainhour, Shepherdsville, KY, for appellants.

Mark E. Edison, Shepherdsville, KY, for appellee.

Before COMBS, KELLER, and LAMBERT, Judges.

**OPINION** 

COMBS, Judge.

\*1 Appellants; Harris G. White, Jr., and Annette R. White; Patricia Conway; Harold McLaughlin and Lorraine McLaughlin; David Riggle and Ora Riggle; Donald Riggle; Mark G. Zenemka; Wade Webb and Rose Webb; Irvin Cov; Fonda Vandiver and Wilbert Vandiver; Darrell Johnston; Larry Tackett; Jeffrey G. White; and Paul Price and Lori Price, appeal from an opinion and order of the Bullitt Circuit Court dismissing with prejudice their challenge to the validity of a city ordinance purporting to annex certain territory in the county. The appellants argue that the ordinance is invalid because the city failed to comply with the provisions of Kentucky Revised Statute[s] (KRS) 81A.420 pertaining to annexation without the consent of affected landowners. In the alternative, they contend that the annexation scheme is unconstitutional as it promotes the exercise of arbitrary power. After carefully considering counsels' arguments and the pertinent statutes, we affirm.

On February 18, 2008, the city proposed annexation of a portion of the right of way of East Blue Lick Road and adjoining portions of the CSX railroad property in Bullitt County. In accordance with the provisions of KRS 81A.420, the city published its ordinance proposing the annexation. The appellants, who were the plaintiffs below, responded with a petition to the city's mayor opposing the proposed annexation. The city attorney rejected the petition. In a letter dated April 9, 2008, the city attorney explained that the provisions of KRS 81A.420 limit "the class of protestants to resident voters or owners of real property within the limits of the territory proposed to be annexed." The attorney concluded that "you fail to meet either of these requirements."

On April 18, 2008, the plaintiffs filed an unverified complaint for declaratory judgment and injunctive relief against the City of Hillview. The plaintiffs alleged that they were in fact resident voters and/or owners of real property within the limits of the territory proposed to be annexed and that they had properly petitioned the mayor in opposition to the proposed annexation. They alleged that the city was about to proceed to adopt an ordinance annexing the subject property without first having conducted an election and placing the matter on the ballot as required by the provisions of KRS 81A.420. In their first amended complaint, the plaintiffs alleged that the statutory annexation scheme violated various provisions of both the federal and state constitutions.

The City of Hillview responded with a motion to dismiss the complaint pursuant to the provisions of Kentucky Rule[s] of Civil Procedure (CR) 12.02. The City contended that each of the appellants lacked standing to challenge the annexation since they were not resident voters or owners of real property within the limits of the territory proposed to be annexed. It contended further that the provisions of KRS 81A.420 were constitutional.

On March 23, 2009, the trial court entered an opinion and order granting the City's motion to dismiss. The trial court concluded that the plaintiffs lacked standing to challenge the annexation since none of them was a resident voter or owner of record of the land annexed. And it rejected the plaintiffs' contention that they had any other direct interest in the territory sufficient to confer standing. The trial court upheld the constitutionality of the annexation statute and denied the plaintiffs' subsequent motion to alter, amend, or vacate. This appeal followed.

\*2 The appellants present two issues for our review. They contend that the trial court erred by concluding that they lacked standing to contest the annexation of the subject territory. In the alternative, they argue that the trial court erred by concluding that the Commonwealth's statutory annexation scheme does not violate Section 2 of the Kentucky Constitution. We shall address these issues in the order in which they were presented by the parties' briefs.

The appellants contend that the trial court erred by concluding that they lacked standing to contest the annexation of the subject property. We note at the outset that issues involving standing are inherent in the concept of subject matter jurisdiction. If the plaintiffs lack standing with respect to a particular claim, the court is without jurisdiction to consider the issue they raise. The parties have not disputed the broad authority of the trial court in this case to make factual

determinations that are decisive of the purely legal question of its own jurisdiction or to dismiss the action if it determines that its jurisdiction has not been established. *See Berthelsen v. Kane*, 759 S.W.2d 831 (Ky.App.1988). We review questions related to the court's jurisdiction *de novo*.

The plaintiffs cannot establish standing to contest the annexation of the subject territory either under the provisions of the Commonwealth's declaratory judgment act or under its statutory annexation scheme. KRS 418.045 provides as follows:

[a]ny person ... whose rights are affected by statute, municipal ordinance, or other government regulation ... provided always that an actual controversy exists with respect thereto, may apply for and secure a declaration of his right or duties...." (Emphasis added.)

The plaintiffs must establish a judicially recognizable interest that is neither remote nor speculative. *Fourroux v. City of Shepherdsville*, 148 S.W.3d 303 (2004) *citing City of Louisville v. Stock Yards Bank and Trust Co.*, 843 S.W.2d 327 (Ky.1992).

KRS 81A.400 -.470 set out the methods for annexation by cities other than those of the first class; these provisions are applicable to the City of Hillview. They permit annexation by two separate methods: by the unanimous consent of all the property owners in the area proposed to be annexed (KRS 81A.412) and without the consent of the affected landowners (KRS 81A.420). Pursuant to the provisions of KRS 81A.420, those in the area to be annexed who are resident voters or owners of real property within the limits of the territory proposed to be annexed have standing to petition the mayor in opposition to the proposed annexation. Additionally, the courts have held that a taxpayer who does not vote or own property in the area to be annexed but who does live in the municipality that is seeking the annexation has standing "if he shows that he is being personally, substantially, and adversely affect by the annexation, and that the damage to himself is different in character from that sustained by the public generally." King v. City of Corbin, 535 S.W.2d 85, 86 (Ky.1976).

\*3 In this case, the circuit court concluded that none of the plaintiffs had established his or her standing to contest annexation under the statute since none of them was a resident voter or owner of real property within the limits of the territory proposed to be annexed; nor were they residents of the city seeking annexation. The trial court relied on the deeds

filed in the record and cited our decision in *Fourroux v. City of Shepherdsville*, 148 S.W.3d 303 (Ky.App.2004).

In *Fourroux*, we considered whether Harris White (an appellant herein) and others had established standing to challenge Shepherdsville's ordinance annexing a portion of Highway 1020 in Bullitt County. In that case, White asserted his standing by claiming ownership to the centerline of Highway 1020 by virtue of his ownership of property adjacent to the west side of that highway. He also claimed a potential reversionary interest in the property to the center line in the event that the road ever ceased to be used as a public highway. We concluded that White lacked a judicially recognizable interest in the city's ordinance, observing as follows:

Deeds in the record clearly show that the Commonwealth has fee simple title to the road deeded to the Commonwealth by appellants White and Myers' predecessors in title. Appellants' assertion of a reversionary interest is a mere expectancy. It does not create standing as there is no present or substantial direct interest affecting appellants. It also does not create a "justiciable controversy" giving the court jurisdiction of the action for declaratory judgment purposes. Under the declaratory judgment act, courts will not decide speculative rights or duties which may or may not arise in the future, but only rights and duties about which there is a present actual controversy presented by adversary parties. Commonwealth ex rel. Watkins v. Winchester Water Works Co., 303 Ky. 420, 197 S.W.2d 771 (1946). Additionally, appellants originally testified and deeds in the record indicate that appellants did not own any part of Highway 1020 but instead owned property west of Highway 1020. Appellants were not "owners of record" as required by KRS 81A.412. (Emphasis added.)

Fourroux, 148 S.W.3d at 307. White had also contended that his status as an owner of property in an agricultural conservation district adjacent to the annexed territory afforded him standing to contest the city's ordinance. We disagreed, holding that "the potential of putting the existence of the district 'at risk' does not make an actual controversy" sufficient to justify the court's jurisdiction under the provisions of the Declaratory Judgment Act. Id. at 308.

Again, in the case presently before us, the circuit court specifically rejected the appellants' contention that they retained any reversionary interest in East Blue Lick Road and/or in the railroad crossing easements or that they were otherwise "owners of record" as contemplated by the provisions of KRS 81A.412.

\*4 The appellants are not owners of real property in the city seeking annexation—nor are they residents of the city. Thus, the circuit court did not err by concluding that they are not "owners of record of the land to be annexed" as contemplated by the provisions of 81A.412. Consequently, we agree with the conclusion of the trial court that the appellants do not have standing under that statute to seek an adjudication of their claim.

Since the appellants sought a determination related to the validity of a municipal ordinance, they do fall within the general scope of the declaratory judgment act. However, they have not made a showing of a "direct interest resulting from the ordinance" sufficient to confer standing. See City of Ashland v. Ashland F.O.P. No. 3, Inc., 888 S.W.2d 667, 668 (Ky.1994). The appellants contend that our decision in Fourroux can be distinguished since the city's annexation of East Blue Lick Road affects them more directly. The appellants argue that the annexation permits the use of heavy trucks on East Blue Lick Road. They contend that this misuse or abuse of the road impairs its condition and interferes with their lawful use of the road. Additionally, the appellants contend that the city's annexation decision deprives them of the opportunity to benefit from a municipal sewer system leaving them dependent on septic systems instead. We are not persuaded that these allegations constitute a judicially cognizable interest in the city's ordinance sufficient to justify the court's jurisdiction under the provisions of the declaratory judgment act.

There is nothing to prevent a city from annexing only a particular portion of the territory adjacent to it. A city is not required to consider the potential impact of its failure to offer municipal services to those outside the property proposed for annexation. 56 Am.Jur.2d *Municipal Corporations* Sec. 45 (2000). Moreover, the appellants' longstanding use of the road does not entitle them to its exclusive use. Violations of regulations or safety issues must be addressed in another forum.

As an alternative to their standing argument, the appellants contend that the trial court erred by failing to conclude that the provisions of KRS 81A.420 are unconstitutional because they vest arbitrary power in the city in contravention of Section 2 of the Kentucky Constitution.

[I]f Hillview can annex [the roadway and adjacent railroad easement], and not provide [the appellants] a forum and standing to protest the sufficiency of the annexation,

then the annexation scheme is arbitrary and violates the Kentucky Constitution.

Appellants' brief at 7–8. Section 2 of the Kentucky Constitution provides that "absolute and arbitrary power ... exists nowhere in a republic...." It has been said that "whatever is contrary to democratic ideas, customs and maxims is arbitrary. Likewise whatever is essentially unjust and unequal or exceeds the reasonable and legitimate interests of the people is arbitrary." *Sanitation District of Jefferson County v. Louisville*, 308 Ky. 368, 213 S.W.2d 995, 1000 (Ky.1948).

\*5 Annexation is a "political act within the exclusive control of the legislature." *Louisville Shopping Center, Inc., v. City of St. Matthews,* 635 S.W.2d 307, 310 (Ky.1982). By enacting the provisions of KRS 81A.420, the General Assembly created a uniform method by which a city such as Hillview could enlarge its boundaries even where it could not obtain the unanimous consent of those owning property or living within the territory proposed to be annexed.

The statutory provisions include a variety of requirements on the part of the city in seeking to expand its limits: precise compliance with a detailed annexation procedure requiring an ordinance describing the city's intention to annex; direct notice to the affected landowners; publication of the annexation ordinance; an extensive waiting period; the participation of resident voters and owners of real property within the limits of the territory proposed to be annexed; a possible election on the annexation question; and, depending on the results of the election, the passage of an ordinance finally annexing the territory.

If fewer than 50% of the resident voters or owners of real property within the limits of the subject territory file a petition of opposition with the mayor of the city seeking the annexation, the General Assembly has authorized the city to enact an ordinance annexing the territory described in the ordinance *without* submitting the issue to an election. Consequently, where residents and landowners of a territory proposed to be annexed largely agree to annexation, the legislature has seen fit to exclude the participation of non-residents and non-landowners.

The legislation has not resulted in the exercise of arbitrary power by the city. On the contrary, the General Assembly has carefully crafted a procedure by which cities must take into account the benefits and the burdens of the expansion of its municipal boundaries and must consider the positions of those deemed legitimately interested in and affected by the decision.

There is no evidence to suggest that the City of Hillview exceeded its legislative authority. Nor did it undertake an application of the statute that was otherwise arbitrary or capricious. There was no violation of Section 2 of the Kentucky Constitution under the facts of this case.

We affirm the order of the Bullitt Circuit Court dismissing this action.

ALL CONCUR.

**All Citations** 

Not Reported in S.W.3d, 2010 WL 3292944

#### Footnotes

1 The city was later permitted to amend its legal description of the area proposed for annexation.

**End of Document** 

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