

RENDERED: AUGUST 6, 2010; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-001333-MR

PAUL PRICE AND LORI PRICE;  
HAROLD MCLAUGHLIN AND  
LORRAINE MCLAUGHLIN;  
HARRIS G. WHITE, JR., AND  
ANNETTE WHITE; AND  
DAVID CROSS

APPELLANTS

v. APPEAL FROM BULLITT CIRCUIT COURT  
HONORABLE STEPHEN P. RYAN, SPECIAL JUDGE  
ACTION NO. 07-CI-01303

CITY OF HILLVIEW; STN REALTY  
KENTUCKY, LLC AND SABERT  
CORPORATION

APPELLEES

OPINION  
AFFIRMING

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BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

COMBS, JUDGE: Appellants, Paul Price and Lori Price; Harold McLaughlin and  
Lorraine McLaughlin; Harris G. White, Jr., and Annette R. White; and David

Cross (“the challengers”), appeal from an opinion and order of the Bullitt Circuit Court dismissing with prejudice their challenge to the validity of a city annexation ordinance. They argue that the ordinance is invalid because the City of Hillview failed to comply with provisions of Kentucky Revised Statute[s] (KRS) 81A.412 permitting annexation by consent. After carefully considering the law and counsels’ arguments, we affirm the dismissal.

The challengers were all residents of East Blue Lick Road in Shepherdsville -- except for Cross, a beneficial user of East Blue Lick Road. On October 16, 2007, they filed a complaint for declaratory judgment and injunctive relief against the City of Hillview, STN Realty Kentucky, LLC, and Sabert Corporation. STN Realty and Sabert are related entities. Sabert operates a plastics plant on Blue Lick Road; STN Realty owns the “Sabert property.” In 2005, the Sabert property was annexed by the City of Hillview pursuant to the provisions of KRS 81A.412, which expressly permits annexation through consent.

In their lawsuit, the challengers sought a judgment declaring the city’s annexation of the Sabert property to be void. They also sought a permanent injunction to prevent the city’s construction of a sewer main within the right of way of East Blue Lick Road and to prevent the use of that road by heavy trucks accessing the Sabert property. The challengers argued that the city’s purported annexation of the subject property was ineffective for various reasons; that installation of the sewer main was illegal; and that the use of heavy trucks on East Blue Lick Road impaired its condition, interfered with their lawful use of the road,

and was otherwise unlawful. They also argued that the rezoning of the subject property was invalid since the annexation was void.

The City of Hillview, STN Realty, and Sabert responded with a motion to dismiss the complaint. They contended that each of the challengers lacked standing to challenge the annexation ordinance and that the zoning issue had already been directly considered and decided against them in a separate proceeding. *See White v. City of Hillview*, 2008 WL 2468741 (Ky.App. 2008), *discretionary review denied* (Ky. 2009). They also claimed that the plaintiffs had failed to state a claim upon which relief could be granted in challenging Bullitt County's decision to install a sanitary sewer line in the public right of way and the use of the road by heavy trucks. Additionally, they contended that the plaintiffs had failed to join indispensable parties.

The trial court treated the motion to dismiss as a motion for judgment on the pleadings. Kentucky Rule[s] of Civil Procedure (CR) 12.03. However, a motion is not a pleading. *Underhill v. Thomas*, 299 S.W.2d 633 (Ky. 1957). Consequently, the matter was more correctly disposed of procedurally by the City's motion to dismiss pursuant to the provisions of CR 12.02. The trial court concluded that the challengers lacked standing to contest the annexation ordinance since none of them was a resident voter or owner of record of the land annexed and none of them could show any damage unique or different in character from that sustained by the public in general. The court determined that the doctrine of *res judicata* barred their claims concerning the rezoning of the Sabert property and that

their failure to join indispensable parties prevented a challenge to the construction of a sanitary sewer system. Finally, the trial court concluded that the challengers were not authorized to assert a private right of action based on the alleged violation of the weight restrictions over East Blue Lick Road. This appeal followed.

On appeal, the challengers present three issues for our review. First, they contend that the trial court erred by concluding that they lacked standing to contest the annexation of the Sabert property. Next, they contend that the trial court erred by concluding that the doctrine of *res judicata* barred them from challenging the zoning of the Sabert property by contesting its annexation. Finally, the challengers argue that the trial court erred by upholding the constitutionality of the Commonwealth's statutory annexation scheme.

Since the challengers' final assignment of error does not involve an issue resolved by the trial court in this proceeding, we decline to address it. This issue was specifically addressed by the court in a companion case.<sup>1</sup> The remaining issues are discussed in the order in which they were presented in the parties' briefs.

We shall first consider the challengers' contention that the trial court erred by concluding that they lacked standing to contest the annexation of the Sabert property. We note preliminarily that issues involving standing are implicit in the concept of subject matter jurisdiction. If the challengers lack standing, the court is without jurisdiction to consider the issues that they raise. The parties have not disputed the broad authority of the trial court in this context to make factual

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<sup>1</sup> Our opinion in that matter is also rendered this date.

determinations that are decisive of the purely legal question of its jurisdiction or to dismiss the action if it determines that its jurisdiction has not been established. We review questions related to the court's jurisdiction *de novo*.

The challengers cannot establish standing either under the provisions of Kentucky's declaratory judgment act or under the provisions of its statutory annexation scheme. KRS 418.045 provides that "[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 challengers 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 ("affected landowners") 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 affected 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).

In this case, the circuit court concluded that none of the challengers had standing to contest the annexation under the statute since none of them was a resident voter or owned real property within the limits of the territory proposed to be annexed; nor were they residents of the city seeking annexation. The trial court did not err in its factual findings related to the challengers’ residency or ownership of real property. The challengers were clearly not residents of the city seeking annexation, and the circuit court did not err by concluding that they were 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 challengers do not have standing under the pertinent statutes to seek an adjudication of their claim related to the city’s annexation ordinance.

The court also considered the challengers’ contention that -- despite the provisions of the annexation statute -- they had alleged a personal, substantial, and adverse affect as a result of the city’s decision to annex the Sabert property sufficient to afford them standing. The court expressly rejected that contention, however. The challengers argue on appeal that their “unique proximity” to the annexed territory alone should be sufficient to confer standing. We do not agree.

In *Fourroux v. City of Shepherdsville*, *supra*, this court rejected the claims of non-owner, non-resident challengers that their purported reversionary interest to the centerline of a portion of Highway 1020 conferred upon them standing to challenge the city's annexation ordinance related to the highway. The court characterized their purported interest as a "mere expectancy" not amounting to a present or substantial, direct interest in the annexation of the highway.

In this case, the challengers are not residents, property owners, taxpayers, or voters in the territory annexed; nor are they residents, property owners, taxpayers, or voters of the City of Hillview. In light of these facts, the challengers concede that no Kentucky court has yet held that owners of property *near land subject to an annexation ordinance* have standing to challenge that ordinance solely by virtue of the proximity of their property to the annexed territory. Many of our sister states have declined to expand the concept of standing in this context, and we so decline as well under the circumstances presented here. *See Adam v. City of Hastings*, 676 N.W.2d 710 (Neb. 2004); *City of Tallahassee v. J.R.*, 771 So.2d 587 (Fla.App. 2000). The challengers 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). Consequently, we hold that the trial court did not err by dismissing on this basis.

Next, the challengers argue that the trial court erred by concluding that the doctrine of *res judicata* precluded their challenge to the city's annexation of the Sabert property. They contend that the zoning appeal process and the

annexation process are distinctly different statutory schemes and that participation in one does not foreclose pursuit of the other. We agree with this observation in principle. However, it is apparent that the trial court correctly concluded that principles of *res judicata* were not involved in this case. Therefore, we need not comment further on this assignment of error.

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

ALL CONCUR.

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