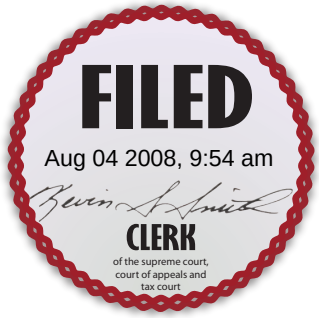

ATTORNEY FOR APPELLANT:

FREMONT O. PICKETT
Shoals, Indiana

ATTORNEY FOR APPELLEE:

SHANNON L. ROBINSON
Kelley, Belcher & Brown
Bloomington, Indiana

IN THE
COURT OF APPEALS OF INDIANA

KEVIN R. BOYD, as a Member of the Board of County Commissioners of Martin County, Indiana, On behalf of all Horse Drawn Buggy Operators and all other Citizens, Buggy Owner or Operators, so situated as affected parties as a Class,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 14A05-0712-CV-694
THE BOARD OF COUNTY COMMISSIONERS OF DAVIESS COUNTY, INDIANA,	)	
Appellee-Defendant.	)	

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Dean A. Sobecki, Judge
Cause No. 14D01-0704-MI-60

August 4, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Kevin R. Boyd appeals the dismissal of his complaint for declaratory judgment. We affirm.

FACTS AND PROCEDURAL HISTORY

On April 20, 2007 Boyd filed a complaint alleging Daviess County lacked authority to pass an ordinance requiring those who operate horse-drawn vehicles in the County to purchase a permit from the County. It also alleges Martin County residents who applied for permits were denied because they were not residents of Daviess County. Attached to the complaint is Ordinance 2003-4, which amends the original ordinance passed in 1987 and increases the fee for the permit from $25 to $40.

Boyd brought the action "as a member of the Board of County Commissioners of Martin County, Indiana, and on behalf of all Horse Drawn Buggy Operators and all other citizens, buggy owner or operators, so situated as affected parties, as a class." (Appellee's App. at 6.)[1] The Board of County Commissioners of Daviess County alleged Boyd failed to state a claim on which relief can be granted because he is not a real party in interest.

On June 22, 2007, Boyd filed a document titled "Consent To Joinder As Additional Plaintiffs" and signed by several owners/operators of horse-drawn vehicles.

[1] The Board has filed a motion to strike portions of Boyd's brief, case summary, and appendix because they contain or refer to materials that are not part of the record. We have granted that motion by separate order. Boyd's counsel of record is Fremont O. Pickett. However, his appendix was verified by Wyndham Gabhart, purporting to be co-counsel for Pickett. Gabhart is not admitted to practice in Indiana. Even if Boyd's appendix had been properly verified, it would not have assisted us in considering his claims, as it did not contain the complaint. Our review of a motion to dismiss focuses on the allegations in the complaint. We are able to address the issues Boyd raised because the Board has provided a complete, verified appendix.

(*Id*. at 22.) On September 28, 2007, the trial court received a letter signed by the purported "Additional Plaintiffs," in which they stated they had not intended to become parties to the litigation.[2]

On October 5, 2007, the trial court held a hearing on several pending motions, including the Board's motion to dismiss, then gave the parties thirty days to submit additional arguments or information on the issue of the case's status as a class action. Boyd submitted nothing to the court during that time. On November 29, 2007, the trial court dismissed the action, finding Boyd was not acting on behalf of the Board of Commissioners of Martin County, no action was taken to certify the case as a class action, and Boyd was not a real party in interest.

DISCUSSION AND DECISION

Motions to dismiss for lack of standing are brought under Ind. Trial Rule 12(B)(6). *State ex rel. Steinke v. Coriden*, 831 N.E.2d 751, 754 (Ind. Ct. App. 2005), *trans. denied* 841 N.E.2d 188 (Ind. 2005). When reviewing a motion to dismiss, we must take as true all the allegations of the complaint. *Id*. We may dismiss only if the plaintiff would not be entitled to relief under any set of circumstances. *Id*. We view the pleadings in the light most favorable to the non-moving party, Boyd, and draw every reasonable inference in his favor. *Id*.

> The judicial doctrine of standing focuses on whether the complaining party is the proper person to invoke the court's power. It is designed to assure that litigation will be actively and vigorously contested. The standing requirement is a limit on the court's jurisdiction which

[2] It appears they may have believed the "Consent To Joinder As Additional Plaintiffs" was a petition against the ordinance.

> restrains the judiciary to resolving real controversies in which the complaining party has a demonstrable injury.
>
> This Court recently described the interest which a party must possess to confer standing:
>
> > "[I]n order to invoke a court's jurisdiction, a plaintiff must demonstrate a personal stake in the outcome of the lawsuit and must show that he or she has sustained or was in immediate danger of sustaining, some direct injury as a result of the conduct at issue."

Schloss v. City of Indianapolis, 553 N.E.2d 1204, 1206 (Ind. 1990) (citations omitted), *reh'g denied*.

Boyd contends his action was brought as a class action from the outset, and indeed, his complaint purports to be filed on behalf of a class.[3] However, stating in the complaint the action is a class action does not amount to certification as a class action.

---

[3] Boyd asserted standing under T.R. 19(F)(1). (Appellee's App. at 15.) Although Boyd appears to have abandoned that position on appeal, (Appellant's Reply Br. at 11), we briefly address it for clarity. T.R. 19(F)(1) governs the naming of a governmental organization versus the naming of a governmental official. Nothing in the text of this rule purports to confer standing to prosecute an action simply by virtue of being a County Commissioner. Furthermore, counties do not have standing to assert the rights of their citizens. *Bd. of Comm'rs of Howard County v. Kokomo City Plan Comm'n*, 330 N.E.2d 92, 101 (Ind. 1975) ("[A] county has no sovereign powers and cannot act as parens patriae, asserting the claims of its residents.").

Boyd also argued to the trial court that he has standing under the Declaratory Judgment Act. (Tr. at 13.) Ind. Code § 34-14-1-2 provides:

> Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Boyd emphasized the words "any person," but he must be a person "whose rights, status, or other legal relations are affected by a . . . municipal ordinance." Ind. Code § 34-14-1-2.

"A primary requirement of the Uniform Declaratory Judgment Act 'is that the plaintiffs demonstrate that they have standing for the relief requested.'" *Ad Craft, Inc. v. Area Plan Comm'n of Evansville & Vanderburgh County*, 716 N.E.2d 6, 15 (Ind. Ct. App. 1999) (quoting *Town of Munster v. Hluska*, 646 N.E.2d 1009, 1012 (Ind. Ct. App. 1995)), *reh'g denied*. Boyd's complaint does not allege he owns a horse or horse-drawn vehicle, has been required to obtain a permit, has been ticketed for not having a permit, or has been denied a permit. Boyd asserts several times in his briefs that he owns a horse and a horse-drawn vehicle, but these statements are not supported by citations to the record.

See T.R. 23(C)(1); *Rose v. Denman*, 676 N.E.2d 777, 781 (Ind. Ct. App. 1997) (court hearing required prior to certification).

T.R. 23(A) lists four prerequisites to a class action:

> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

In addition, one of the prerequisites of T.R. 23(B) must be met: there must be a risk of inconsistent verdicts, the ability of class members not a party to the action to protect their interests would be substantially impaired, the party opposing the class acted on grounds generally applicable to the class, or questions of law or fact common to the members of the class predominate over questions affecting individuals. The plaintiff bears the burden of establishing the prerequisites have been met. *N. Ind. Pub. Serv. Co. v. Bolka*, 693 N.E.2d 613, 615 (Ind. Ct. App. 1998), *trans. denied* 706 N.E.2d 169 (Ind. 1998). Whether an action is maintainable as a class action is committed to the discretion of the trial court, and we review its decision for abuse of discretion. *Id*.

As the trial court noted, "there were no motions filed or action taken to qualify this as a class action under Trial Rule 23." (Appellee's App. at 5.) The record is devoid of information from which the trial court could conclude the prerequisites of T.R. 23 were met, even though the trial court explicitly gave the parties thirty days after the hearing to provide that information. Therefore, the trial court did not abuse its discretion in concluding the action could not proceed as a class action.

Boyd filed a document captioned "Consent To Joinder As Additional Plaintiffs." (*Id*. at 22.) He does not appear to argue that these people were in fact joined as plaintiffs. Boyd believes "somebody's gone behind our back and talked to these people," (Tr. at 30), but he does not appear to dispute that they are not parties to this action and do not wish to be parties.

Finally, Boyd asserts he has standing under the public standing doctrine. The usual standards for establishing standing need not be met "when a case involves enforcement of a public rather than a private right." *State ex rel. Cittadine v. Ind. Dep't of Transp.*, 790 N.E.2d 978, 980 (Ind. 2003) (quoting *Schloss*, 553 N.E.2d at 1206 n.3). "Specifically, the public standing doctrine eliminates the requirement that the relator have an interest in the outcome of the litigation different from that of the general public." *Id*. Boyd did not raise this argument before the trial court; therefore it is waived. *Van Meter v. Zimmer*, 697 N.E.2d 1281, 1283 (Ind. Ct. App. 1998) ("A party may not advance a theory on appeal which was not originally raised at the trial court.").

Boyd argues, without citation to authority, that it is for the court, rather than a party, to invoke the public standing doctrine.[4] "A party waives an issue where he fails to develop a cogent argument or provide adequate citation to authority and portions of the

[4] Boyd asserts he "can find no cases where the 'Public Standing Doctrine' issue is brought before the lower Court by any Counsel." (Appellant's Reply Br. at 8). However, that is exactly what happened in *Steinke*, 831 N.E.2d at 753, one of the cases cited by the Board.

record." *City of East Chicago v. East Chicago Second Century, Inc.*, 878 N.E.2d 358, 369 (Ind. Ct. App. 2007), *reh'g denied*; *see also* Ind. App. R. 46(A)(8)(a).[5]

Therefore, we affirm the dismissal of Boyd's case.

Affirmed.

VAIDIK, J., and MATHIAS, J., concur.

[5] Boyd also invokes an "Aggravated Status Rule," (Appellant's Reply Br. at 8), but he does not provide any citation to authority establishing such a rule. Therefore, this argument is also waived. *See East Chicago*, 878 N.E.2d at 369.