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AUGUST 18, 2004 (2004-SC-0213-D & 2004-SC-0297-D)

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002593-MR

MARIA C. GARRIGA

APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE GREGORY M. BARTLETT, JUDGE
ACTION NO. 00-CI-002364

SANITATION DISTRICT NO. 1

APPELLEE

AND

NO. 2002-CA-001192-MR

DONALD AND MARION STITES

APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT
HONORABLE JOSEPH F. BAMBERGER, JUDGE
ACTION NOS. 99-CI-00860 AND 01-CI-00510

SANITATION DISTRICT NO. 1

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND PAISLEY,¹ JUDGES; AND JOHN D. MILLER, SENIOR JUDGE.²

JOHNSON, JUDGE: Maria Garriga has appealed from an order of 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 KRS³ 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.

¹ This opinion was prepared and concurred in prior to Judge Paisley's retirement effective December 1, 2003.

² 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.

³ Kentucky Revised Statutes.

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. 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."⁴ 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 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

⁴ See KRS 220.140, 220.170, and 220.220.

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 acquisition pursuant to KRS 220.035.⁵ On July 31, 2000, a special meeting of

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

- (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.

. . .

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.⁶ 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.

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." 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

(4) In the case of districts governed by the provisions of KRS 220.135, 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.

⁶ Prior to this special meeting, six public meetings had been held concerning SD1's proposed wastewater treatment facility.

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 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

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.⁹ 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

⁷ 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.

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

⁹ The action was styled Case No. 01-CI-00510.

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’ 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, in which they averred, inter alia, that SD1 had failed to comply with several statutory requirements prior to filing the condemnation petition, and that KRS 220.035 was unconstitutional. Pursuant to KRS 416.620, the Stiteses requested a jury trial concerning

¹⁰ 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.

the commissioners' award. On September 17, 2001, SD1 filed a motion for an interlocutory order and judgment.

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." 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 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.¹¹

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' property for the purpose of constructing a wastewater treatment plant and related facilities.¹² 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 that: (1) KRS 220.035(4) arbitrarily delegates authority to executive officers in violation of § 2 of the Kentucky

¹¹ The Court concluded that the Stiteses' motion "fail[ed] to demonstrate any disqualifying circumstance which would require the appointment of a special judge pursuant to KRS 26A.015, et seq."

¹² 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.

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) 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 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 of judge/executives the cost of the wastewater treatment facility; and (3) SD1 acted in excess of its statutorily granted powers by initiating the condemnation proceedings on its own behalf.¹³

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

¹³ The Stiteses also joined in this argument.

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 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 220.035; (6) SD1 failed to follow the mandates 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 Garriga lacks standing to contest the 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

¹⁴ 33 U.S.C. §§ 1251, et seq.

¹⁵ The Eminent Domain Act of Kentucky is codified in KRS 416.540, et seq.

¹⁶ 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.

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 Court's failure to address the issue of standing in Tabor, we conclude that Tabor has no precedential value as to this issue.

Standing is a jurisdictional issue which can be raised at any stage of an action. 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 justice administered without sale, denial or delay.

This provision contemplates access to the courts only for those litigants suffering an "injury."¹⁸ In addition, § 112(5) of the Kentucky Constitution limits the original jurisdiction of the circuit courts to "justiciable causes."¹⁹ A "justiciable cause"

¹⁷ Ky.App., 599 S.W.2d 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.

¹⁸ For a similar approach under the "open courts provision" of the Texas Constitution, see Texas Association of Business v. Texas Air Control Board, 852 S.W.2d 440, 443-47 (Tex. 1993).

¹⁹ 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

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, 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].²¹ 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.

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." The limitation placed upon the power of judicial
review via §§ 14 and 112(5) of the Kentucky Constitution is a
limitation upon the court's subject-matter jurisdiction, and as

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)).

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

²¹ 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)).

such, it cannot be waived.²² The concept of standing is an essential component of subject-matter jurisdiction. As the Supreme Court stated in Kraus v. Kentucky State Senate,²³ "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." "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].²⁴ The following observation provided by the Supreme Court of Connecticut fairly summarizes our position on the issue:

"If a party is found to lack standing, the court is without subject matter jurisdiction to determine the cause." "A determination regarding a trial court's subject matter jurisdiction is a question of law" . . . [citations omitted].

²² See, e.g., Cann v. Howard, Ky.App., 850 S.W.2d 57, 59 (1993). "[S]ubject-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:

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.

²³ Ky., 872 S.W.2d 433, 439 (1993).

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

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

"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

²⁵ Fort Trumbull Conservancy, LLC v. Alves, 815 A.2d 1188, 1193-94 (Conn. 2003). In addition, as the Supreme Court of Texas pointed out in Texas Air, supra:

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

Furthermore, we note that our holding today is consistent with the results reached by the majority of jurisdictions that have addressed this issue.²⁶

We will now determine whether Garriga has standing to contest the constitutionality of KRS 220.035(4) in the Kenton

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

²⁶ 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, 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, 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, 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, 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, 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, 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, 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].

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

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 "[KRS 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" [emphases original][citations omitted].²⁷ As previously discussed, under § 112(5) of the Kentucky Constitution, circuit courts are vested with original

²⁷ 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 (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), "[c]onsistently 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]).

jurisdiction over all "justiciable causes." Thus, we must first determine whether Garriga's amended complaint alleges a "justiciable cause."

In Freeman, supra, the Supreme Court concluded that 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.²⁸ In Associated Industries, supra, the Court stated that a litigant must first allege "'a personal stake in the outcome of the controversy'"²⁹ 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.³⁰

In respect to her contention that KRS 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

²⁸ Freeman, 380 S.W.2d at 216-17.

²⁹ Associated Industries, 912 S.W.2d at 951 (quoting Warth, 422 U.S. at 498).

³⁰ See, e.g., 22A Am.Jur.2d, Declaratory Judgments, § 26 (1988). See also Commonwealth v. Louisville Atlantis Community/Adapt, Inc., Ky.App., 971 S.W.2d 810, 817 (1997), "'[b]efore one seeks to strike down a state statute he must show that the alleged unconstitutional feature injures him'" (quoting Second Street Properties, Inc. v. Fiscal Court of Jefferson County, Ky., 445 S.W.2d 709, 716 (1969)); and Bischoff v. City of Newport, Ky.App., 733 S.W.2d 762, 763 (1987), "[a]n 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]).

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 rates³¹ and KRS 220.035(4).³²

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. A sanitation district is a creature of the Legislature and the Legislature is empowered to establish its board of directors.³³ Consequently, we are of the opinion that Garriga lacks standing to challenge the constitutionality of KRS 220.035 in the Kenton Circuit Court. Therefore, while we affirm the judgment of the Kenton

³¹ SD1 maintains that Garriga's rates have not been raised and that her alleged injury is merely speculative.

³² 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."

³³ See Sanitation District No. 1 of Shelby County v. Shelby County, Ky.App., 964 S.W.2d 434, 437 (1998); and KRS Chapter 220.

Circuit Court, we do so for a different reason.³⁴ We hold that Garriga's constitutional claims fail based on her lack of standing.

We will now determine whether the Stiteses have standing to challenge the constitutionality of KRS 220.035 in the Boone Circuit Court. We raise this issue sua sponte.³⁵

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,³⁶ "[i]t 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" [citations omitted].³⁷ Pursuant to KRS 220.035(4), the committee of judge/executives in the case sub judice was required to "review and approve, amend, or

³⁴ Keese v. Smith, 289 Ky. 609, 612, 159 S.W.2d 56, 58 (1941).

³⁵ 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.

³⁶ 266 Ky. 469, 99 S.W.2d 443, 445 (1936).

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

disapprove" the proposed district land 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, 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 the 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 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 of 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 of judge/executives heard extensive arguments from several interested parties prior to approving the acquisition of the Stiteses' property. The evidence is overwhelming that the committee's decision was based on a professional, impartial and comprehensive analysis.

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

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 a "[sanitation] district constitutes an autonomous political subdivision with full authority within its boundaries as to the construction and operation of

³⁸ Ky., 318 S.W.2d 873, 874 (1958).

sanitation improvements.”³⁹ 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. “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” [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.”

³⁹ See also KRS 220.110(1).

⁴⁰ Garriga’s reliance on Bernard v. Russell County Air Board, Ky., 718 S.W.2d 123 (1986), is misplaced. Clearly, a County Air Board is not an autonomous political subdivision.

⁴¹ United Parcel Service Co. v. Rickert, Ky., 996 S.W.2d 464, 468 (1999).

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:

Any proposal for acquisition or disposition of land for public facilities, or changes 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 KRS 100.324(4), 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 part, as follows:

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 "[t]he 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 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 to initiating the condemnation proceedings. We are not unmindful that sanitation districts are required to provide local planning

⁴² Ky.App., 723 S.W.2d 887, 889 (1987).

⁴³ Id.

⁴⁴ City of South Hills, 318 S.W.2d at 874. See also KRS 220.110(1).

commissions with "adequate information" concerning any proposed land acquisition.⁴⁵ Nevertheless, the power of a sanitation 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.⁴⁶ The law does not require an exercise in futility.

The Stiteses further contend that pursuant to KRS 224.73-100, SD1 was required to obtain a permit from the NREPC prior to initiating the condemnation proceedings. KRS 224.73-100 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 so, condemn rights-of-way necessary for constructing, maintaining and operating its 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 and Environmental Protection Cabinet and received from said cabinet a permit to operate and maintain said sewage treatment facilities[.]

⁴⁵ KRS 100.361(2).

⁴⁶ Edelen, 723 S.W.2d at 889 (zoning regulations may not override implementation of government functions).

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

"The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature."⁴⁸ 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.⁴⁹ The Stiteses' argument ignores the fact that SD1 derives its power to condemn from KRS 220.310, which provides, in relevant part, as follows:

The board of directors [of the
sanitation district] may, by resolution

⁴⁷ KRS 220.010(3) defines "[p]ublic 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."

⁴⁸ Kentucky Insurance Guaranty Association v. Jeffers, Ky., 13 S.W.3d 606, 610 (2000).

⁴⁹ 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, "[a]ny 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.

reciting the need, order the condemnation for the district of any real 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.⁵⁰

Thus, SD1 was not required to proceed under KRS 224.73-100. To hold otherwise would render KRS 220.310 nugatory.⁵¹ The Stiteses' arguments to the contrary are to no avail.⁵²

The Stiteses further contend that SD1 violated multiple provisions of the Clean Water Act.⁵³ More specifically, the Stiteses claim that "[t]he 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

⁵⁰ KRS 220.310 was enacted in 1942.

⁵¹ See Commonwealth v. McKinney, Ky., 594 S.W.2d 884, 886-87 (1979). "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" (quoting Board of Education v. Citizens Fidelity Bank & Trust Co., Ky., 263 S.W.2d 112, 113 (1953)). See also Hopkinsville-Christian County Planning Commission v. Christian County Board of Education, Ky.App., 903 S.W.2d 531, 532-33 (1995).

⁵² We also note that SD1 is required to obtain approval from the NREPC for any proposed improvements within the district pursuant to KRS 220.240. 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., Northern Kentucky Port Authority, Inc. v. Cornett, Ky., 625 S.W.2d 104, 105 (1981).

⁵³ 33 U.S.C. § 1251, et seq.

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.:⁵⁴

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. As the Court stated in Cornett, “[a]ction must be tempered with wisdom.”⁵⁶ We conclude that SD1 has established a reasonable probability that it “will comply with all applicable standards” and that it “will meet all requirements for the issuance of necessary permits[.]”⁵⁷ 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.

⁵⁴ 248 N.W.2d 885, 893 (Wis. 1977).

⁵⁵ Cornett, 625 S.W.2d at 105.

⁵⁶ Id. See also 26 Am.Jur.2d Eminent Domain § 29 (1996).

⁵⁷ Id.

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,⁵⁸ the Supreme Court noted that, "[i]t is fundamental that a condemning authority may determine without let or hindrance the amount of land necessary for a public purpose" [citations omitted].⁵⁹ It necessarily follows that, "[a] court will deny the right to take only where there has been '[a] gross abuse or manifest fraud.'"⁶⁰ After a thorough review of the record, we are simply unable to conclude that "[a] gross abuse or manifest fraud'" has taken place in respect to SD1's decision to condemn the land in question.

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

⁵⁸ Ky., 308 S.W.2d 435, 439 (1957).

⁵⁹ Furthermore, it has been said that "[w]here 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).

⁶⁰ Commonwealth, Transportation Cabinet, Dept. of Highways v. Cooksey, Ky.App., 948 S.W.2d 122, 123 (1997) (quoting Kroger Co., supra at 439)). See also Commonwealth, Dept. of Highways v. Burchett, Ky., 367 S.W.2d 262, 266 (1963), "[t]he 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."

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.

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