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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001334-MR

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. — APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE STEPHEN P. RYAN, SPECIAL JUDGE
ACTION NO. 08-CI-00535

CITY OF HILLVIEW, KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, KELLER, AND LAMBERT, JUDGES.

COMBS, JUDGE: 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 Coy; 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.[1] 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."

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

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.

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).

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.

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,* 213 S.W.2d 995, 1000 (Ky. 1948).

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.

BRIEF FOR APPELLANTS:

John E. Spainhour
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BRIEF FOR APPELLEE:

Mark E. Edison
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