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ATTORNEYS FOR APPELLANT
INDEPENDENCE HILL CONSERVANCY
DISTRICT:

CATHERINE A. PARAS
Merrillville, Indiana

DAVID M. AUSTGEN
JOSEPH C. SVETANOFF
Austgen Kuiper & Associates, P.C.
Crown Point, Indiana

ATTORNEY FOR APPELLEE
MERRILLVILLE CONSERVANCY
DISTRICT:

WILLIAM L. TOUCHETTE
Merrillville, Indiana

IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF THE MERRILLVILLE)
CONSERVANCY DISTRICT,) No. 45A03-0610-CV-467
)
)

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
Cause No. 45C01-6204-CV-509

October 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Independence Hill Conservancy District (“IHCD”) appeals the trial court’s order granting Merrillville Conservancy District’s (“MCD”) petition to annex certain real estate owned by GCC Merrillville Ventures, LLC (“GCC”), to MCD’s sanitary sewer service territory. We affirm.

Issues

We restate the issues as follows:

- I. Whether the trial court erred in denying IHCD’s motion to dismiss MCD’s annexation petition; and
- II. Whether the trial court improperly applied res judicata in determining that IHCD had no standing to object to MCD’s petition.

Facts and Procedural History

On April 18, 2005, MCD and GCC filed a petition to add two parcels of GCC’s real estate to MCD’s sanitary sewer service territory. The subject property was listed under Lake County real estate tax key numbers 15-118-01 and 15-118-02. On August 26, 2005, IHCD filed a written objection to the annexation petition. At a hearing on September 13, 2005, the trial court sustained MCD’s objection to the participation of IHCD on the ground that IHCD lacked standing to object, pursuant to Indiana Code Section 14-33-4-2(e). Appellant’s App. at 125. On November 14, 2005, the trial court granted MCD and GCC’s annexation petition.

On May 9, 2006, MCD filed with the trial court another petition to annex GCC’s real estate to MCD’s sanitary sewer service territory and a resolution adding real estate to MCD’s sanitary sewer service territory. This petition referred to two parcels of real estate owned by GCC. Parcel I is approximately 42.96 acres, and its approximate location is 4300 West 81st

Avenue in Merrillville. Parcel I is listed under Lake County real estate tax key number 08-15-0118-0033. Parcel II is approximately 7.87 acres, and it is contiguous to the eastern border of Parcel I. Parcel II is listed under Lake County real estate tax key number 08-15-0118-0058. On May 12, 2006, the trial court set the issues for hearing on July 13, 2006. The court ordered MCD to provide notice of the hearing as required by Indiana Code Sections 14-33-4-2 and -2-12, and to forward copies of the filings to the Indiana Natural Resources Commission (“INRC”) for technical review pursuant to Indiana Code Sections 14-33-2-17 and -4-2. The trial court further ordered:

5. [INRC] shall make a determination and report to the Court whether the proposed addition to [MCD] meets the following conditions:
 - A. The proposed addition to the District appears necessary;
 - B. The proposed addition to the District holds promise of economic and engineering feasibility;
 - C. The proposed addition to the District will serve the public health;
 - D. The proposed addition to the District proposes to cover and serve a proper area; and
 - E. The proposed addition to the District can be established and operated in a manner compatible with similar governmental entities.

Appellant’s App. at 158; *see* Ind. Code § 14-33-2-17.

On July 5, 2006, INRC filed a report on MCD’s annexation petition. INRC determined that annexation of Parcel I met all five of the above-referenced conditions.

Regarding Parcel II, INRC stated in relevant part,

GCC’s Parcel #2 currently lies within the boundaries of IHCD. MCD’s Resolution indicates that IHCD currently does not provide wastewater collection or have any sanitary sewer lines to this particular area. GCC has indicated that they filed an “Application for Preliminary Determination of Availability” with IHCD on July 20, 2004. MCD was informed by GCC that

IHCD has never placed GCC's "Application for Preliminary Determination of Availability" on any meeting agenda. GCC and MCD are of the opinion that IHCD is unwilling or unable to promptly provide sanitary sewer service to the area known as Parcel #2. At this time no documentation has been received that indicates Parcel #2 has been removed from the boundaries of IHCD.

Appellant's App. at 206-07.

At the July 13, 2006, hearing, MCD withdrew Parcel II from its petition. Also at the hearing, IHCD filed an objection to the petition.¹ The trial court continued the hearing until July 18, 2006. On July 18 and 19, 2006, the trial court held a hearing on MCD's revised petition as to Parcel I only. At the hearing, IHCD filed a motion to dismiss for lack of personal jurisdiction, a memorandum in support thereof, and a verified motion for continuance. The trial court denied both of IHCD's motions. The trial court then heard argument and evidence from MCD and IHCD regarding the revised petition. At the end of the hearing, the trial court requested findings of fact and conclusions thereon from all parties.

On August 18, 2006, IHCD filed its proposed order, including findings of fact and conclusions thereon. On August 21, 2006, MCD filed its proposed order, including findings of fact and conclusions thereon. On September 7, 2006, the trial court granted MCD's revised petition and adopted MCD's proposed order verbatim. The trial court found, among other things, that IHCD had no standing to object to the revised petition. IHCD now appeals.

¹ The parties seem to agree that IHCD's objection was filed on July 13, 2006. We note, however, that the copy in IHCD's appendix is stamped "Filed in Open Court June 13, 2006." Appellant's App. at 210.

Discussion and Decision

I. Motion to Dismiss

First, IHCD argues that the trial court erred in denying its motion to dismiss MCD's annexation petition for lack of personal jurisdiction.² IHCD argues that MCD failed to provide it with proper notice of the July 13, 2006, hearing. According to Indiana Code Section 14-33-2-12, MCD was required to provide written notice to "each freeholder who has not signed the [annexation] petition and who owns land in the proposed district[.]"

"Freeholder", for purposes of IC 14-33, means a person who holds land:

- (1) in fee;
- (2) for life; or
- (3) for some indeterminate period of time;

whether or not in joint title with at least one (1) other person.

Ind. Code § 14-8-2-104. IHCD argues that on December 10, 1990, it purchased from Lincoln Utilities, Inc., "[a]ll property, tangible and intangible, that is an integral or component part or necessary for the operation or control of [the] existing wastewater system in Merrillville, Lake County, Indiana," which it alleges includes "the specific lateral sewer of [Parcel I]." Appellant's Br. at 18; *see also* Hearing Exhibit B (Bill of Sale). IHCD contends that "[a]t the very least, the IHCD has acquired a constructive easement upon the GCC Parcel." *Id.* IHCD concludes that because it allegedly acquired this specific lateral sewer and/or holds this easement on Parcel I, it qualifies as a "freeholder" for purposes of Indiana Code Section 14-33-4-2. *Id.*

² In its appellant's brief, IHCD characterizes its motion as "a motion to dismiss for lack of personal jurisdiction based on Indiana T.R. 12(B)(2)[.]" Appellant's Br. at 16. Actually, IHCD designated it to the trial court as a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to Trial Rule 12(B)(6). Substantively, however, the motion did challenge the trial court's personal jurisdiction, so we will treat it as a Trial Rule 12(B)(2) motion for purposes of this opinion.

At the hearing on July 18, 2006, MCD objected to IHCD's motion to dismiss on the basis that "it fails on its face, not to mention the fact that it's quite tardy, [IHCD's] objection having been filed, the issues already having been framed. And these sorts of motions ... are supposed to be filed as the first thing out of the box, not the last thing." Tr. at 33. In order to preserve the question of personal jurisdiction, the issue must be raised either by an Indiana Trial Rule 12(B)(2) motion or in the answer. *State v. Omega Painting, Inc.*, 463 N.E.2d 290, 290-91 (Ind. Ct. App. 1984). "A party who seeks affirmative relief from a court voluntarily submits himself to the jurisdiction of the court, and is thereafter estopped from challenging the court's personal jurisdiction." *Sims v. Beamer*, 757 N.E.2d 1021, 1026 n.3 (Ind. Ct. App. 2001).

Five days before IHCD filed its motion to dismiss for lack of personal jurisdiction, IHCD filed a written objection to MCD's annexation petition, in which it requested that the trial court "deny and/or dismiss [MCD's annexation petition] and for all other relief which is just and proper in the premises." Appellant's App. at 213. Clearly, IHCD submitted itself to the jurisdiction of the trial court by seeking affirmative relief, and thus IHCD was estopped from subsequently challenging the trial court's personal jurisdiction. We find no error in the trial court's denial of IHCD's motion to dismiss.

II. Res Judicata

IHCD also alleges that the trial court erred in concluding that IHCD had no standing to object to MCD's petition. IHCD specifically claims that the trial court improperly applied the doctrine of res judicata by relying upon its November 14, 2005, order on MCD's prior

annexation petition. The trial court's order of September 7, 2006, states in pertinent part as follows:

[U]nder the circumstances of MCD's and GCC's request to add GCC's [Parcel I] to MCD's sanitary sewer service territory, I.C. 14-33-4-2 only confers standing on the following entities and persons to object in proceedings seeking to add area to the sanitary sewer service territory of an existing conservancy district: 1) The Indiana Natural Resources Commission; 2) An owner of real property in MCD; or 3) An owner of real property in the area being added to MCD (GCC is the sole owner of the real estate being added to MCD).

....

MCD and GCC objected to IHCD's participation in the current annexation proceedings on the grounds of res judicata because this Court's 11-14-05 "ORDER" specifically found that IHCD had no standing to participate in MCD's and GCC's annexation proceedings according to I.C. 14-33-4-2(e) and (f). MCD informed Presiding Judge Christina Miler that rhetorical paragraph 10 of this Court's 11-14-05 "ORDER" states:

10. During the 9-13-[05] hearing, the Court sustained MCD's objection to the participation of IHCD on the ground that IHCD lacked standing under I.C. 14-33-4-2(e) and (f) to object to MCD's addition of GCC's real estate to MCD's sanitary sewer territory.

Therefore, MCD and GCC contended that according to the principles of res judicata, the factual circumstances of MCD's and GCC's annexation proceedings which supported the lack of standing ruling contained in this Court's 11-14-05 ORDER, also compel a ruling that IHCD had no standing to participate in MCD's and GCC's instant annexation proceedings regarding ... Parcel I.

Appellant's App. at 33, 35.

In its "Conclusions of Law and Order" issued on September 7, 2006, the trial court "reaffirm[ed]" its November 14, 2005, order that IHCD lacked standing to object. *Id.* at 46. However, IHCD ignores the fact that the trial court also explicitly concluded that "IHCD has no standing to object in these proceedings under I.C. 14-33-4-2(e) because *the evidence herein has shown* that IHCD is not the Indiana Natural Resources Commission; IHCD is not

an owner of real property in MCD's territory; and IHCD is not an owner of any land to be added to MCD." *Id.* (emphasis added). In fact, the trial court's order includes a detailed description of all the exhibits and testimony presented by MCD and IHCD at the hearing. *Id.* at 39-46.

It appears, then, that while the trial court noted MCD's res judicata argument as part of its recounting of the proceedings, the court relied upon the evidence in determining that IHCD had no standing to object to MCD's annexation petition. Therefore, IHCD's claim that the trial court improperly applied res judicata fails.³

Affirmed.⁴

BAKER, C. J., and FRIEDLANDER, J., concur.

³ In its appellant's brief and reply brief, IHCD presents no argument, evidence, or legal authority to challenge the trial court's determination, based on the evidence before it, that IHCD is not "an owner of real property" pursuant to Indiana Code Section 14-33-4-2(e). While IHCD contends that it had, "at the very least," an easement on the property at issue here, it makes this argument only in the context of its alleged entitlement to notice as a "freeholder" under Indiana Code Section 14-33-2-12. Appellant's Br. at 18. Therefore, we will not review the trial court's determination that IHCD lacked standing beyond the issue of res judicata.

⁴ IHCD also contends that because the trial court adopted verbatim MCD's twenty-three-page proposed order, this Court must set aside the order as "clearly erroneous" pursuant to Indiana Trial Rule 52(A). Appellant's Br. at 28. Given our resolution of the above issues, we need not address this argument.