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THE DOOR FINALLY OPENS TO CHALLENGE AGENCY DECISIONS THAT AFFECT THE ENVIRONMENT

*Board of County Commissioners of Sumner County v. Bremby*¹

I. INTRODUCTION

Over 22 years ago, Kansas enacted the Act for Judicial Review and Civil Enforcement of Agency Actions (“KJRA”) to provide uniform procedures to challenge agency actions.² In those years, very few courts even mentioned K.S.A. § 77-611(b), which grants persons standing if they become parties to the agency proceeding that led to the challenged action. However, the minimal use of this section makes this case no less extraordinary.

In a case of first impression, the Sumner County Board, citizens, and Tri-County Association challenged the issuance of a landfill permit as parties to the agency proceeding and argued that the landfill’s potential deficiencies could have an effect on property and water quality in the area. After 22 years, the Court finally clarified how a person becomes a party to an agency proceeding and ultimately granted the parties standing. This note will explore the Court’s holding and analysis, compare the Court’s interpretation of K.S.A. § 77-611(b) to other states that have the same standing provision, explore the speculative and generalized environmental injury that the Court accepts as sufficient to fulfill the traditional standing test, and comment on the potential environmental and developmental impacts of this holding.

II. FACTS AND HOLDING

Waste Connections applied, in August 2002, to the Kansas Department of Health and Environment (“KDHE”) for a permit to construct and operate a municipal solid waste landfill.³ In response, the

¹ 189 P.3d 494 (Kan. 2008).

² Martha J. Coffman, *Procedures Under the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions*, K.S.A. 77-601 Et Seq., 76-Feb J. KAN.

³ *Bd. of County Comm’rs of Sumner County*, 189 P.3d at 498.

Board of Commissioners of Sumner County (“Board”) had a study conducted to evaluate the location site.⁴ The study revealed many environmental and regulatory deficiencies which were reported to the KDHE during a comment period.⁵ The KDHE held public hearings in Harper County concerning the permit where Tri-County members and Mr. Holland, a member of Tri-County owning a life estate north of the landfill site, expressed concerns about environmental issues and the landfill’s location.⁶

The KDHE issued the permit in August 2005.⁷ The Board, Tri-County, and Mr. Holland (“appellants”) filed a petition under the KJRA. Appellants claimed standing under K.S.A. § 77-611(b) as parties to the agency proceedings that led to the agency action.⁸ The petition alleged that the KDHE failed to take into account environmental concerns with the proposed landfill and that if the landfill leaks, the leakage could contaminate the ground water in the area and the Chikaskia River as well as cause damage to real property bordering the site.⁹

Waste Connections intervened and filed a motion to dismiss arguing that the appellants have not suffered an injury.¹⁰ The District Court, ignoring the injury argument, granted the motion holding that the KDHE did not have a ‘proceeding’ as defined by K.S.A. § 77-611(b), and

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* “Tri-County is an organization formed to preserve and enhance the quality of life in Harper, Kingman, and Sumner Counties and to promote environmental protection.” *Id.* Mr. Holland’s property contains a pond which drains a portion of the area where the landfill would be located. *Id.*

⁷ *Id.* At the time of issuing the permit, KDHE did not make any reference to the appellant’s environmental concerns. KDHE did respond to public comments and in the summary section revealed that of the “317 units of communication regarding the proposed landfill, 290 expressed opposition.” *Id.* Only 20 expressed approval. *Id.*

⁸ *Id.* The court quickly dismissed K.S.A. § 77-611(d) finding the statute inapplicable to the present facts. *Id.* at 499.

⁹ *Id.* at 498-99. The Chikaskia River is a source of water for some residents of Sumner County. *Id.* at 499. The real property potentially damaged by the landfill included Mr. Holland’s life estate and unspecified property of unspecified Tri-County members. *Id.* at 499.

¹⁰ *Id.* at 499. Waste Connections plead in the alternative for a more definite claim stating that the allegation failed to state a cause of action. *Id.*

therefore appellants did not have standing.¹¹ The Court of Appeals reversed, concluding that the appellants had standing as parties to the agency proceedings under K.S.A. § 77-611(b).¹² The court also found that Tri-County met the requirements for organizational standing.¹³

The Kansas Supreme Court agreed with the appellate court.¹⁴ The Court held that K.S.A. § 77-611(b) defines 'procedure' as the process that an agency performs its statutory duties and therefore when a person or organization submits written comments during a comment period or voices concerns at a public hearing where the agency is carrying out its statutory duty, that person is considered a party participating in the proceedings and will have standing to challenge the outcome of that proceeding. Furthermore, when a person or organization can show threat of community water contamination and property damage if deficiencies in a landfill exist, then that person or organization has sufficiently alleged an injury for standing under the constitutional test.¹⁵

III. LEGAL BACKGROUND

A. Standing under K.S.A. § 77-611(b)

One method to obtain standing for judicial review of a final or nonfinal agency action under the KJRA is through K.S.A. § 77-611(b) which provides that a person has standing if that person "was a party to the agency proceedings that led to the agency action."¹⁶ K.S.A. § 77-602(f)

¹¹ *Id.*

¹² *Id.* The court relied on *Families Against Corporate Takeover v. Mitchell*, 268 Kan. 803 (2000) to find that the permit process is a proceeding within the meaning of the statute.

Id.

¹³ *Id.* The court relied on *Tri-County Concerned Citizens, Inc. v. Bd. of Harper County Comm'rs*, 95 P.3d 1012 (2004) to hold that Tri-County met the associational standing requirements. *Id.* The court made no findings concerning the Board's or Mr. Holland's standing. *Id.*

¹⁴ *Id.* at 507.

¹⁵ *Id.* at 505-07.

¹⁶ KAN. STAT. ANN. § 77-611 (2007) provides that a person has standing in four circumstance: "(a) A person to whom the agency action is specifically directed; (b) a person who was a party to the agency proceedings that led to the agency action; (c) if the

defines 'party to agency proceeding' as a person "allowed to intervene or participate as a party in the proceeding."¹⁷ Despite being enacted over 22 years ago, K.S.A. § 77-611(b) has rarely been mentioned.

MCI Telecommunications Corporation v. State Corporation Commissioners of the State of Kansas, an unpublished trial court decision, was the first court to use § 77-611(b) to grant standing.¹⁸ The Court found that MCI Telecommunications participated in the agency proceeding by filing a request for a hearing regarding AT&T's proposed Kansas service.¹⁹ However, K.S.A. § 77-611(b) was not discussed by the appellate court which granted the petitioners standing using K.A.R. § 82-1-232(b).²⁰

In *W.S. Dickey Clay Manufacturing Company v. State Corporation Commissioners of State of Kansas and the Gas Service Company*,²¹ the Supreme Court dismissed the appellants' argument for standing under K.S.A. § 77-611(b). The Kansas Corporation Commission held a hearing for a franchise agreement between the Gas Service and the City of Pittsburg.²² An employee of Dickey Clay Manufacturing Company ("Dickey") attended the public hearing but did not formally enter an appearance, present any testimony or otherwise participate.²³ The Court rejected the allegation that Dickey had standing pursuant to K.S.A. § 77-611(b) because Dickey failed to participate at the hearing in any manner.²⁴

Standing under K.S.A. § 77-611(b) was not used again until 2000 in *Families Against Corporate Takeover v. Mitchell* and, for the first time, the Supreme Court accepted appellants' argument.²⁵ The case involved a

challenged agency action is a rule and regulation, a person subject to that rule; or (d) a person eligible for standing under another provision of law."

¹⁷ *Id.* at § 77-602(f). The definition also includes if the party was named in the proceeding or if the proceeding was specifically directed to the party, both of which are inapplicable in the present case. *Id.*

¹⁸ No. 59,613, 1987 Kan. App. Lexis 752 (Kan Ct. App. Jan. 29, 1987).

¹⁹ *Id.* at *2

²⁰ *Id.* at *3. The statute was relevant since the situation involved an order issued without a hearing. *Id.*

²¹ 241 P.2d 744 (Kan. 1987).

²² *Id.* at 587.

²³ *Id.* Dickey was a significant consumer of natural gas in the State of Kansas. *Id.* at 586

²⁴ *Id.* at 747.

²⁵ 1 P.3d 884, 890 (Kan. 2000).

challenge of the KDHE's issuance of a National Pollution Discharge Elimination System permit for a hog farm where members of Families against Corporate Takeover ("FACT") submitted comments and participated in the public hearing concerning the permit.²⁶ FACT filed a petition in the District Court asserting standing under § 77-611(b) as a party that participated in the agency proceeding.²⁷ The Court concluded that submission of a written comment and participation in a public hearing is sufficient to be considered a party that participated in that agency proceeding.²⁸

Since 2000 and before the present case, only two cases have mentioned K.S.A. § 77-611(b).²⁹

B. Survey of 'Party to a Proceeding' in Other States

Although this is an issue of first impression in Kansas,³⁰ other states have interpreted the same standing requirement. The following is a brief survey of a few states' interpretation of that states' requirement but is not an exhaustive review. This survey shows that states are not in complete agreement on how a person becomes a party to an agency decision or even what 'proceeding' means.

In *State ex rel. DePonti Aviation Company, Incorporation v. Minneapolis-St. Paul Metropolitan Air Commissioner*, Relator assumed incorrectly that its appearance and participation in a public hearing made it

²⁶ *Id.* at 886. FACT also hired two consultants who also submitted comments at the hearing. *Id.* 890.

²⁷ *Id.* at 889.

²⁸ *Id.* at 890.

²⁹ In *Lawrence Ltd. P'ship v. Bd. of Douglas County Comm'rs*, No. 91,356, 2004 WL 1178364 (Kan. Ct. App. May 21, 2004) the court barely discussed standing under K.S.A. § 77-611(b) because the plaintiffs did not seek judicial review of the Board of Tax Appeal proceedings. The court held that the plaintiff was not a party to the proceeding and did not have standing. *Id.* at *3. In *Dorsey ex. rel. Dorsey v. Kan. Dept. Soc. and Rehab. Serv.*, No. 92293, 2005 WL 81557, at *3 (Kan. Ct. App. Jan. 14, 2005) the statute is invoked but for the alternative definition of a party to whom the agency action was directed.

³⁰ *Bd. of County Comm'rs of Sumner County v. Bremby*, 189 P.3d 494, 501 (Kan. 2008).

a party to the proceeding.³¹ The court refused to accept that simply participating in a public hearing made a person a party to that proceeding. Instead, the court defined the rule as a person who participated “as an active contestant on the merits for the determination of issues of law on fact and whose particular interest could be affected by the outcome of the trial.”³²

In *Medical Waste Association, Incorporation v. Midwest Waste Coalition, Incorporation*, in Maryland, the court reasoned that since the format of administrative agencies were designed to encourage citizen participation, that in the absence of a different method specified by statute, “anyone clearly identifying himself to the agency for the record as having an interest in the outcome of a matter being considered by the agency...becomes a party to the proceeding.”³³ Maryland has determined that putting a name in writing as a protestor,³⁴ testifying before the agency,³⁵ submitting into evidence a letter or protest,³⁶ and identifying one’s self on an agency record as a party³⁷ are all sufficient for that person to become a party to that agency proceeding.

In *Indianapolis Downs, LLC v. Indiana Horse Racing Commission*, the appellate court held that by virtue of an invitation to comment and an acceptance of that invitation by submission of a position statement, a person becomes a party to the agency proceeding that led to the challenged action.³⁸ In this case, the court found standing because Downs was invited and submitted a comment concerning how funds of riverboat revenue would be allocated.³⁹

³¹ 32 N.W.2d 560, 564 (Minn. 1948).

³² *Id.*

³³ 612 A.2d 241, 249 (Md. 1990) (quoting *Morris v. Howard Research & Dev. Corp.*, 365 A.2d 34, 37 (Md. 1976)).

³⁴ *Baxter v. Montgomery County Bd. of Appeals*, 235 A.2d 536, 536 (Md. 1967).

³⁵ *Bryniarski v. Montgomery County Bd. of Appeals*, 230 A.2d 289, 293-94 (Md. 1967).

³⁶ *Hertelendy v. Montgomery County Bd. of Appeals*, 226 A.2d 672, 680 (Md. 1967).

³⁷ *DuBay v. Crane*, 213 A.2d 487, 489 (Md. 1965).

³⁸ 827 N.E.2d 162, 170 (Ind. Ct. App. 2005).

³⁹ *Id.* at 166, 170. However, that same year, the Indiana Supreme Court denied petitioners standing when it voiced opposition to the permit at a public hearing; consequently the court held that the company did not successfully intervene. *Indiana Ass’n of Beverages*

In *Wood v. Metropolitan Nashville & Davidson County Government*, in Tennessee, the appellate court denied petitioner the right to intervene reasoning that having a general interest, attending the hearings, and advocating his position does not make him a party to that agency proceeding.⁴⁰

States also have different definitions of 'proceeding.' Washington defines a 'proceeding' as "an act which is done by the authority or direction of the court, agency, or tribunal, express or implied."⁴¹ Colorado defines a 'proceeding' as "any agency process for any rule or rule-making, order or adjudication, or license or licensing."⁴² Missouri defines an 'agency proceeding' as "an adversary proceeding in a contested case in which the state is represented by council..."⁴³

This survey demonstrates that many of the states that refuse to allow a person's participation at a hearing or submission of a written comment to be sufficient for that person to become a party to that agency proceeding, refused due to the lack of a specialized injury requirement.

C. Requirement of Injury under the Kansas Standing Law

Kansas has been consistent in defining the test for an injury sufficient for standing, requiring that the complainant suffer an actual injury not shared by the general community. As early as 1965, the Kansas Supreme Court in *M.W. Watson, Incorporation v. City of Topeka* held that a private person may generally not maintain an action for mere public

Retailers, Inc. v. Indiana Alcohol and Tobacco Comm'n, 836 N.E.2d 255, 258 (Ind. 2005).

⁴⁰ 196 S.W.3d 152, 155, 159 (Tenn. Ct. App. 2005).

⁴¹ *Muckleshoot Indiana Tribe v. Wash. Dept. of Ecology*, 50 P.3d 668, 677 (Wash. Ct. App. 2003). The court held that negotiations with federal, state, and city agencies over six years to negotiate flow levels that would provide sufficient flow for fish habitat and navigation were agency proceedings within that definition. *Id.* at 671, 677.

⁴² *CF & I Steel, L.P. v. Air Pollution Control Div.*, 77 P.3d 933, 936 (Colo. Ct. App. 2003).

⁴³ *Braddock v. Mo. Dept. of Mental Health*, 200 S.W.3d 78, 80 (Mo. Ct. App. 2006) (citing Mo. Rev. Stat. § 536.085(1) (2000)). The statute does not include proceedings for determining the eligibility or entitlement of an individual to a monetary benefit or its equivalent. *Id.*

rights.⁴⁴ Plaintiff must plead and prove that he has sustained a special injury different from that of the public generally.⁴⁵ However, even with the presentation of this strict rule, the court held that although plaintiff will be accorded no different treatment under the challenged ordinance than other building contractors similarly situated, the denial of the ordinance adversely affected his interest and thus granted standing.⁴⁶

In *Winters v. Kansas Hospital Service Association*, in 1977, the appellate court denied petitioner standing because the injury was speculative and not imminent.⁴⁷ The appellate court based its decision on the fact that at least four steps would have to take place before petitioner was injured.⁴⁸

In 1987, the court stated in *Harrison by and through Harrison v. Long* that in order to have standing, the plaintiff must show that he personally suffered an injury and that there was some casual connection between the claimed injury and the challenged conduct.⁴⁹ The court found standing because the alleged conduct was forcing the plaintiff, a doctor, to settle a malpractice suit which would not only increase his insurance rate but also hurt his professional reputation.⁵⁰

The appellate court reiterated that a petitioner must allege a special injury separate from the general public in *Linsea v. Board of County Commissioners of Chase County*.⁵¹ The court refused to grant petitioner standing to challenge the removal of cedar trees from the courthouse

⁴⁴ 400 P.2d 689, 691 (Kan. 1965). In this case, plaintiff is challenging part of a city ordinance requiring an applicant for a building fee to pay one-quarter cent per square feet per day for any encroachment on public streets. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 588.

⁴⁷ 562 P.2d 98, 102 (Kan. Ct. App. 1977).

⁴⁸ *Id.* at 68-69. The four steps were: first, Winters required hospital services, a fact which there was no evidentiary showing of probability, second Winters would have to be furnished hospital services by Blue Cross, third Winters would not be a Blue Cross subscriber at the time of hospitalization, and fourth that the Blue Cross member hospital would make a retroactive adjustment for the fiscal year during which Winters is hospitalized. *Id.* at 68.

⁴⁹ 734 P.2d 1155, 1158 (Kan.1987).

⁵⁰ *Id.*

⁵¹ 753 P.2d 1292, 1296 (Kan. Ct. App. 1988).

because petitioner's injury was no different than the rest of the county residents.⁵²

Again in *Bodine v. Osage County Rural Water District No. 7*, in 1997, the Court refused to grant standing for mandamus to challenge a water rate because the petitioner did not suffer a different injury from all taxpayers since all county residents paid the same water rate.⁵³

Again in 2008, the court reaffirmed that in order to have standing "the plaintiff must show that the conduct of which he complains has caused him to suffer an injury in fact that a favorable judgment will redress."⁵⁴ Clearly, the Court has been consistent in stating that a speculative or community injury is not sufficient to have standing. However, as *M.W. Watson, Inc. v. City of Topeka* demonstrates, the Court sometimes eases the requirement for a non-generalized injury when the petitioner has suffered a specialized injury.⁵⁵

IV. INSTANT DECISION

A. Standard of Review

Judge Davis delivered the opinion of the Court by first explaining the importance of standing, emphasizing that a person and organization has to fulfill the constitutional standing test even if that person or organization fulfills the standing requirements of a statute.⁵⁶ The Court also explained that it must accept all facts in the petition as true.⁵⁷

⁵² *Id.* at 1293, 1296.

⁵³ 263 Kan. 418, 421, 431 (1997).

⁵⁴ *State ex rel. Morrison v. Sebelius*, 949 P.2d 1104, 1114 (Kan. 2008).

⁵⁵ 400 P.2d 689, 691 (Kan. 1965).

⁵⁶ *Bd. of County Comm'rs Sumner County v. Bremby*, 189 P.3d 494, 498-99 (Kan. 2008).

⁵⁷ *Id.* at 500. This is true because discovery has not yet occurred since this is a motion to dismiss. *Id.*

B. Standing under the KJRA

First, the Court analyzed the definition of a ‘party to an agency proceeding’ under § 77-602(f)(2) of the KJRA and concluded that appellants will only have standing if the appellants were allowed to participate as parties in the proceedings in which the permit was granted.⁵⁸

The Court next defines ‘party’ under the KJRA. The Court rejects Waste Connections’ argument that the language in *W.S. Dickey Clay Mgf. Co. v. Kansas*,⁵⁹ means that a person can only have standing if the agency action was directed towards that person.⁶⁰ The Court used Black’s Law Dictionary and defined party as a person “who takes part in a transaction.”⁶¹ The Court reasoned that this definition is consistent with the KJRA and concludes that whether a person is a party is determined by that person’s participation in a lawsuit or action.⁶²

The Court next defined ‘agency proceeding’ as the process by which an agency carries out its statutory duties.⁶³ In forming this definition, the Court placed significant importance on the fact that K.S.A. § 77-612(a) defines the rule making processes as a ‘proceeding,’ reasoning that the rule making process is similar to the permit process.⁶⁴ The Court also reasons that since K.S.A. § 77-615, which governs notice requirements, specifically refers to ‘adjudicative proceedings’, if the legislature intended the term proceeding to refer only to ‘adjudication

⁵⁸ *Id.* The court rejects Waste Connections’ argument that the court of appeals erred in focusing on the appellants’ participation in the agency determination instead of the appellants’ participation as parties to the proceeding. *Id.*

⁵⁹ 740 P.2d 585 (Kan. 1987).

⁶⁰ *Bd. of County Comm’rs of Sumner County v. Bremby*, 189 P.3d 494, 501 (Kan. 2008). The Court reasoned that since K.S.A § 77-611(b) was not the court’s focus and Dickey did not participate at all, this statement was merely dicta. *Id.*

⁶¹ *Id.* at 502 (quoting BLACKS LAW DICTIONARY 1154 (8th ed. 1999)).

⁶² *Id.*

⁶³ *Id.* The Court notes that when engaging in statutory construction, it is important to consider all parts of the statute together. *Id.* The Court rejected Waste Connections’ argument that the term is synonymous with adjudication. *Id.*

⁶⁴ *Id.* at 502. The permit process is similar to the rule process because the rule process begins with a proposed rule, public notice and comment period, and issuance of final rule. *Id.* The permit process involves an application, a comment period and possible public hearing, and then the denial or issuance of a permit. *Id.* at 503.

proceedings' in K.S.A. § 77-611(b), than the legislature would have included the term adjudication before proceeding.⁶⁵ Therefore, the Court holds that the permit process is a proceeding under the KJRA.⁶⁶

The Court accepted appellants' argument that since each appellant participated in a public comment period offered during the permit process, each had become a party to that agency proceeding.⁶⁷ The Court relied on *Families Against Corporate Takeover v. Mitchell*,⁶⁸ which stood for the proposition that a interested person's submission of written comments during a public notice period or comments during a public hearing held by an agency qualify as sufficient participation to become parties to that agency proceeding.⁶⁹ The Court reasoned that since the petition alleged that the board submitted an environmental study in the comment period and both Tri-County members and Mr. Holland voiced concern at the public hearing, the appellants have standing as parties who participated in the agency proceeding that led to the challenged action.⁷⁰

C. Constitutional Standing Test

The Court first explained the rules for standing. In order to have individual standing, a person must demonstrate that he suffered a cognizable injury and that a casual connection exists between the challenged conduct and the injury.⁷¹ An association has standing to sue on behalf of its members if the members would have had standing to sue themselves, and the interest that the association wishes to protect is related

⁶⁵ *Id.* at 502.

⁶⁶ *Id.*

⁶⁷ *Id.* at 504-05.

⁶⁸ 1 P.3d 884 (Kan. 2000). The court concluded that FACT had standing under the K.S.A. § 77-611(b) since members participated in the agency proceedings that led to the agency action. *Id.* at 890.

⁶⁹ *Bd. of Comm'rs*, 504. Per K.A.R. 28-29-6a(c), a public hearing will be held if there is enough local interest and all comments will be part of the permit record and considered when deciding to approve the permit. *Id.* at 503.

⁷⁰ *Id.* at 504-505.

⁷¹ *Id.* at 505.

to the organization's interest.⁷² The Court discussed each appellant separately.

i. Tri-County

The Court held that Tri-County pleaded the requirements for associational standing.⁷³ The Court granted standing since the appellants alleged that various members voiced concern at the public hearing, and that if the landfill is unsuitable, the members will suffer damage to real property and risk contamination to their soil, groundwater, and surface water.⁷⁴ Further, Tri-County's purpose as an organization is to preserve and enhance the quality of life in Harper, Kingman, and Sumner Counties and therefore the interest the association seeks to protect by this action is to ensure that the landfill meets environmental standards.⁷⁵

ii. The Board

The Court held that the Board has standing since the petition alleged that the Board is responsible for ensuring the health, safety, and general welfare of its citizens and the proposed landfill could, if the site does not meet regulatory and environmental standards, contaminate water used by Sumner County residents.⁷⁶ Therefore, the Court held that since the challenge is consistent with the Board's purposes, and the Board alleged a potential harm linking to the issuance of the permit, the Board has standing.⁷⁷

⁷² *Id.* The court relies on *NEA-Coffeyville v. v. Unified Sch. Dist. No. 445*, 996 P.2d 821 (Kan. 2000) for the test for associational standing. The court points out that neither test, association nor individual standing, requires party participation. *Id.*

⁷³ *Id.* at 506-07.

⁷⁴ *Id.* at 506.

⁷⁵ *Id.*

⁷⁶ *Id.* at 507.

⁷⁷ *Id.*

iii. Mr. Holland

The Court also holds that Mr. Holland has standing. Mr. Holland died during this trial process and pleaded only a life estate in the land directly north of the landfill site.⁷⁸ The Court, however, refused to dismiss Mr. Holland's claim simply because the petition alleged that he owned a life estate. However, the Court admits that if the property is a life estate, Mr. Holland or his estate may no longer have an interest in the case.⁷⁹

D. Conclusion

The Court held that each appellant has standing under both K.S.A. § 77-611(b) and the constitutional test, and therefore remanded the case for further proceedings.⁸⁰

V. COMMENT

A. Party to an Agency Proceeding Defined

K.S.A. § 77-611(b) was enacted more than 22 years ago, and the Kansas Court has just now explained how a person becomes a party to an agency proceeding.⁸¹ In analyzing this section, the Court's methods and conclusions are supported by logic and are consistent with sister states. Despite the minimal use of this section, this holding will have environmental and developmental impacts.

Resorting to similar statutes and Black's Law Dictionary are common methods employed by courts to define ambiguous words. Missouri, in *Braddock v. Missouri Department of Mental Health*,⁸² and Colorado, in *CF & I Steel, L.P. v. Air Pollution Control Division*,⁸³ both

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Coffman, *supra* note 2, at 21.

⁸² 200 S.W.3d 78, 82 (Mo. Ct. App. 2006) (citing Mo. Rev. Stat. § 536.087.1 (2000)).

⁸³ 77 P.3d 933, 936 (Colo. App. 2003) (citing COLO. REV. STAT. § 24-4-102(1), (13) (2002)).

used statutes that clearly defined ‘agency hearing.’ Washington, like Kansas, lacked a statute that clearly defined ‘agency proceeding.’ Therefore, in *Muckleshoot Indian Tribe v. Washington Department of Ecology*, the court relied on Black’s Law Dictionary and chose the broader definition of “an act which is done by authority or direction of the court, agency, or tribunal, express or implied.”⁸⁴ Washington and Kansas alike, assumed that since the legislature did not place any limiting language on agency proceeding, ‘proceeding’ had to be defined broader than just adjudicative proceedings.⁸⁵ Therefore, it seems that even if the Kansas Court had resorted to Black’s Law Dictionary as opposed to looking at other statutes, the definition of proceeding would have been defined the same. Further, this definition is consistent with other states’ definition.

At first glance, Kansas appears to adopt a rule that is inconsistent with other states when determining how a person becomes a party to an agency ‘procedure.’ However, the difference between Kansas’ rule and other states that declined to adopt this rule seems to be the requirement that the party has a specific interest in the agency outcome. For example, in *State ex rel. DePointi Aviation Co. Inc. v. Minneapolis-St. Paul Metro. Air Commission*, the court made the distinction between participating simply by clarifying the interest and participating on the merits with a particular interest that would be affected.⁸⁶ Likewise, in *Wood v. Metro. Nashville & Davidson County Gov’t* the court in Tennessee specifically rejected the holding that a person could become a party to the proceeding if that person suffered only a general injury.⁸⁷ Further, in states that did allow participation in a public hearing or the submission of a written comment to confer party status on the petitioners, each petitioner suffered an individualized injury.⁸⁸

⁸⁴ 50 P.3d 668, 677 (Wash. Ct. App. 2003) (quoting BLACK’S LAW DICTIONARY 1204 (6th ed. 1990). The rejected definition is “the form and manner of conducting juridical business before a court or judicial officer.” *Id.*

⁸⁵ *Bd. of County Comm’rs of Sumner County v. Bremby*, 189 P.3d 494, 502 (Kan. 2008). The Court also relied on the fact that the rule-making process is called a proceeding in K.S.A. § 77-615, since the two processes are very similar. *Id.*

⁸⁶ 32 N.W.2d 560, 564 (Minn. 1948).

⁸⁷ 196 S.W.3d 152, 158 (Tenn. Ct. App. 2005).

⁸⁸ In *Indianapolis Downs, L.L.C. v. Ind. Horse Racing Comm’n*, 827 N.E.2d 162, 170 (Ind. Ct. App. 2005), Downs had an individual interest in where the riverboat revenue

Although K.S.A. § 77-611(b) does not mention a requirement for a specialized injury, the Court held that a person must still meet the constitutional standing test. Therefore, petitioners must suffer a specialized injury in order to have standing.⁸⁹ With these two tests properly combined, Kansas' rule is fairly consistent with other states' rule.

The fears that this holding will grant anyone and everyone standing to contest agency actions are unfounded. It is argued that this holding will allow citizens and organizations to constantly challenge permits making it financially impossible for the permit holder to run its business due to high court costs.⁹⁰ It is true that the Court's holding makes it possible that a person could become a party to an agency proceeding by merely sending a letter or even a postcard with a comment about the agency action.⁹¹ However, the person must also fulfill the constitutional standing test and therefore must plead and prove a specialized injury in order to have standing.⁹² Therefore, anyone and everyone will not have standing to challenge an agency action.

It may be true that this new standing requirement could prevent many businesses and individuals from gaining a permit that would have environmental impacts. Therefore, a developer who wants to build a new condominium may have trouble getting a building permit if the citizens can show that the construction will cause water drainage damage or possibly that the construction will merely damage the natural environment of the neighborhood. These examples remain unanswered, but at least the first seems plausible in light of the ease in which the Court allows appellants to claim an environmental injury.

B. New Injury Standard for Environmental Cases?

would be allocated. Even in *Medical Waste Assoc. v. Md. Waste Coalition, Inc.*, 612 A.2d 241, 249 (Md. 1990), which had the loosest requirement, the court still required the person to have an interest in the outcome of the matter.

⁸⁹ *Bd. of County Comm'rs of Sumner County*, 189 P.3d at 499.

⁹⁰ Intervenor-Appellee's Supplemental Brief at 14, *Bd. of County Comm'rs of Sumner County v. Bremby*, 189 P.3d 494 (No. 06-96658-S). For example, appellees point out that Waste Connections had as of 2006, expended over \$3,000,000 on the landfill, not counting the litigation through the appeal and the Kansas Supreme Court. *Id.* at 15.

⁹¹ *Id.* at 13-14.

⁹² *Bd. of County Comm'rs of Sumner County*, 189 P.3d at 499, 505.

The court rejects its traditional injury test and accepts as a sufficient injury one that is both generalized and speculative. The Court acknowledges that if the landfill is unsuitable and leaks, it will cause contamination to the soil, groundwater, and surface water. However, the Court then abandons the ‘ifs’ without explanation, and concludes that the appellants will suffer an injury if the challenge to the permit is not permitted.⁹³

The Court fails to distinguish cases like *Winters* where the court refused to grant standing because multiple steps had to occur before the petitioner would suffer an actual injury.⁹⁴ In this case, the landfill must not be kept per state regulations, must leak into nearby water sources, and then the appellants would have an injury. Further, the KDHE has a Landfill Remediation Program designed for long-term groundwater monitoring and landfill inspections.⁹⁵ The unit is responsible for reviewing and approving corrective actions to remediate contaminants in the ground water.⁹⁶ However, the Court fails to even mention Kansas’ efforts to prevent water contamination and instead accepts appellants’ injury without sufficient analysis.

The Court also fails to discuss the argument that the injury alleged by the appellants is merely an injury suffered by the rest of the community and not individualized to the appellants. The only individualized injury specifically pleaded by the appellants is the damage to the pond of Mr. Holland’s. However, Mr. Holland no longer has an interest in that land since he died during the proceeding and only owned a life estate.⁹⁷

⁹³ *Id.* at 506.

⁹⁴ *Winters v. Kan. Hosp. Med. Serv. Ass’n*, 562 P.2d 98, 101-02 (Kan. Ct. App. 1977).

⁹⁵ Kansas Department of Health and Environment: Assessment and Restoration Section, <http://www.kdheks.gov/ars/> (last visited October 26, 2008).

⁹⁶ *Id.*

⁹⁷ Intervenor-Appellee’s Brief at 1, *Bd. of County Comm’rs*, 189 P.3d 494 (No. 06-96658-A). The Court refuses to dismiss Mr. Holland from the case despite claiming that the court must take all facts pleaded as true and appellants pleaded that Mr. Holland owned a life estate. *Bd. of County Comm’rs*, 189 P.3d at 507. Further, K.S.A. § 60-1801, which describes actions that can survive the death of a party, does not include the current type of action. KAN. STAT. ANN. § 60-1801 (2008). Therefore, accepting all facts alleged in the petition as true, the court should have dismissed Mr. Holland’s action since he has

Further, the Board never attempts to allege an individualized injury but rather pleads that the community's water supply might be contaminated if deficiencies in the landfill exist. The Court fails to explain how this is different from trying to keep cedar trees in front of the court house⁹⁸ or challenging water rates⁹⁹ since these decisions, like contamination of a community's drinking water, affects all members of the community equally. Further, the Court gives Tri-County much leeway by accepting the water contamination injury and the injury to the unspecified real property owned by Tri-County members who border the landfill site.¹⁰⁰

The fact that landfills have leaked and damaged the environment may explain the Court's acceptance of this speculative, generalized injury. In 1990, two-thirds of the solid waste generated in the United States was disposed in landfills.¹⁰¹ The environmental hazard the appellants fear most is leachate which is a contaminated solution that can seep into aquifers and flow into nearby surface waters contaminating water supplies.¹⁰² An EPA study showed that nearly 90 percent of municipal landfills have ground water contamination and nearly 44 percent have surface water contamination.¹⁰³ Even though modern landfills are less likely to

no property interest near the landfill and thus cannot suffer an injury due to the issuance of the permit.

⁹⁸ See *Linsea v. Bd. of County Comm'rs*, 753 P.2d 1292, 93, 96 (Kan. Ct. App. 1988).

⁹⁹ *Bodine v. Osage County Rural Water Dist. No. 7*, 949 P.2d 1104 (Kan. 1997).

¹⁰⁰ *Bd. of County Comm'rs of Sumner County v. Bremby*, 189 P.3d 494, 506 (Kan. 2008). The court fails to discuss that Tri-County's only named member no longer has a property interest near the proposed landfill. See *id.* It is true that Tri-County alleges that numerous members will suffer property damage and participated at the hearing. *Id.* However, Tri-County should have to specifically plead what property is harmed and a person who participated at the hearing other than Mr. Holland in order to have standing.

¹⁰¹ Christopher D. Knopf, *CLOSING THE LOOP: REQUIRING DOUBLE-SIDED COPYING AND NON-CHLORINE BLEACHED RECYCLED PAPER FOR FEDERAL COURT PAPERS*, 1995 WIS. L. REV. 345, 366 (1995).

¹⁰² John Rousakis & Bernard A. Weintraub, *PACKAGING, ENVIRONMENTALLY PROTECTIVE MUNICIPAL SOLID WASTE MANAGEMENT, AND THE LIMITS TO THE ECONOMIC PREMISE*, 21 *ECOLOGY L.Q.* 947, 955 (1994).

¹⁰³ Knopf, *supra* note 101, at 367.

contaminate groundwater, leakage is still a risk.¹⁰⁴ In light of the mixed history and public opposition of landfills, the Court's acceptance of a "potential harm as well as an actual harm"¹⁰⁵ could be read as a step to putting agency decisions with environmental impacts in the hands of citizens.

Regardless of the reasons for the Court's holding, the Court opened the door for citizens and organizations to challenge agency decisions that affect the environment. This holding may hold dramatic consequences for developers and agencies that make any decisions that affect the environment by allowing citizens to challenge any agency action. This holding may persuade interested permit seekers to avoid even applying for a permit if the action will have environmental impacts. Therefore, depending on how lax the Court remains with its environmental injury standard, this holding could stifle development in Kansas. However, at the cost of development, this case finally allows citizens and organizations to have a voice that can be heard when agencies make decisions that affect their community's environment.

VI. CONCLUSION

The Court's holding opens a path for citizens and organizations to challenge agency decisions that might have a potential environmental impact. Not only does the Court decide that citizens can become parties to an agency hearing by merely voicing a concern during a public comment period, but it also accepts a generalized, speculative injury. This holding grants citizens quite a bit of power to challenge agency decision that will have an impact on the environment. However, the holding fails to explain whether this generalized, speculative injury concerning water

¹⁰⁴ R.J. Slack, J.R. Gronow, & N. Voulvoulis, *Household Hazardous Waste in Municipal Landfills: Contaminants in Leachate*, Science of the Total Environment, Vol. 337, Issue 1-3, 119, 120 (Jan. 20, 2005).

¹⁰⁵ Robert L. Glicksman, *Coal-Fired Power Plants, Greenhouse Gases, and State Statutory Substantial Endangerment Provisions: Climate Change Comes to Kansas*, 56 U. KAN. L. REV. 517, 561 (2007). This quote is by Secretary Bremby in his decision to deny a permit for coal-powered plants in Kansas in which he explained that it would be irresponsible to ignore potential harm to the environment. *Id.* at 561.

contamination will be extended to air, trees, plants, or possibly even aesthetic concerns. It is fair to say that until the Court answers these questions, agencies and developers might be careful in making any decisions that have public opposition which affect the environment.

The answer will come when this case is decided on the merits. The deciding court will demonstrate to future petitioners as well as the current appellants, whether the appellants' efforts were well spent or whether the court will apply the usual deference standard to the agency decision and find that the issuance of the permit was reasonable.

ERIN P. SEELE

