

STATE OF INDIANA) IN THE MONROE CIRCUIT COURT
) SS:
COUNTY OF MONROE) CAUSE NUMBER: 53C04-2006-MI-000958

ANDREW GUENTHER, individually and in his capacity)
as appointed Republican member of the Bloomington Plan)
Commission,)
and)
WILLIAM ELLIS, in his capacity as Chairman of the)
Monroe County Indiana Republican Party,)
Petitioners,)
)
v.)
)
CITY OF BLOOMINGTON, INDIANA,)
and)
JOHN HAMILTON, in his capacity as Mayor for the City)
of Bloomington,)
and)
CHRISTOPHER COCKERHAM, in his capacity as)
contested member of the Bloomington Plan Commission.)
and)
NICHOLAS KAPPAS, in his capacity as contested former)
member of the Bloomington Plan Commission.)
Respondents.)

Amended Verified Complaint for Declaratory Judgment and
Writ of Quo Warranto

COME NOW the Petitioners, **ANDREW GUENTHER** individually, and in his capacity as appointed member of the Bloomington Plan Commission, and **WILLIAM ELLIS**, in his capacity as Chairman of the Monroe County Republican Party, by counsel *Carl Lamb & Associates, P.C.*, respectfully request the Court to:
(1) **Issue a Declaratory Judgment** finding that the *de facto appointment* of **NICHOLAS KAPPAS** to the Bloomington Plan Commission was void *ab initio*;

(2) **Issue a Declaratory Judgment** finding that Mayor John Hamilton lost jurisdiction and, as such, authority to make any appointment to the Bloomington Plan Commission; (3) **Issue a Writ of Quo Warranto** which vacates the de facto appointment of **CHRISTOPHER COCKERHAM**, which appointment was wrongly made by the Respondents; and (4) **Order JOHN HAMILTON to recognize, and certify, and install ANDREW GUENTHER** to the Seat at Issue on the Plan Commission, because **WILLIAM ELLIS** did appoint **ANDREW GUENTHER** to the Seat on the Bloomington Plan Commission pursuant to IC § 36-1-8-10.

Petitioners, by counsel, hereby request with this Declaratory Judgment, that the Court declare whether or not the appointment, by Respondents, of **NICHOLAS KAPPAS**, to the Bloomington Plan Commission, was statutorily permissible, valid, and/or void.

Petitioner, by counsel, hereby request with Declaratory Judgment, that the Court declare whether (or not) the Mayor John Hamilton had any authority to appoint any member to the Bloomington Plan Commission, once the previous appointment had lapsed by more than ninety (90) days.

Petitioners, by counsel, hereby further request by this *Writ of Quo Warranto*, that Respondents provide proof *ex quo warranto* **CHRISTOPHER COCKERHAM** was appointed, and specifically how said appointment comported with the requirements of IC § 36-1-8-10, and if said appointment was illegal, invalid, and/or void, Petitioners request that this court declare the appointment of **CHRISTOPHER COCKERHAM**, by JOHN HAMILTON void *ab initio* as a matter of law.

Petitioners, by counsel, hereby further request by the proposal of this order, that the appointment of **ANDREW GUENTHER**, by **WILLIAM ELLIS**, be declared valid and legal by this court as a matter of law, and, if said appointment was valid and

legal, request that this court order **JOHN HAMILTON** to certify, recognize, and install **ANDREW GUENTHER** on the Bloomington Plan Commission.

Petitioners, by counsel, hereby further request that the court award the Petitioners the costs of this proceeding, including their attorneys' fees; and grant such further relief as justice requires.

THE PARTIES

- 1) Petitioner **ANDREW GUENTHER** (hereinafter "*Mr. Guenther*") is a resident of Monroe County, Indiana. Mr. Guenther has served as a member of the Bloomington Environmental Commission and was appointed to the Seat at Issue on the Bloomington Plan Commission ("*Seat at Issue*") ("*Plan Commission*") by William Ellis on April 16, 2020. Mr. Guenther is a member of the Republican Party.
- 2) Petitioner, **WILLIAM ELLIS** (hereinafter "*Mr. Ellis*"), is a resident of Monroe County, Indiana, is the Chairman of the Monroe County, Indiana, Republican Party, and, in this capacity, appointed Mr. Guenther to the Seat at Issue on April 16th, 2020.
- 3) Respondent **CITY OF BLOOMINGTON, INDIANA** (hereinafter "*the City*") is an Indiana municipality duly organized pursuant to the laws of the State of Indiana.
- 4) Respondent **NICHOLAS KAPPAS** (hereinafter "*Mr. Kappas*") is a resident of Monroe County, Indiana, and was recognized by the City and Respondents as holding the Seat at Issue from February 15th, 2016, until December 31st, 2019.
- 5) Respondent, **JOHN HAMILTON** (hereinafter "*Mayor Hamilton*"), is a resident and Mayor of the City of Bloomington, Indiana, and claims to have appointed Respondent **CHRISTOPHER COCKERHAM** to the Seat at Issue on May 7th, 2020.

6) Respondent **CHRISTOPHER COCKERHAM** (hereinafter “*Mr. Cockerham*”) is a resident of Monroe County, Indiana, and was invalidly appointed on May 7th, 2020, by Mayor Hamilton to the Seat at Issue.

JURISDICTION

7) Petitioners incorporate herein all preceding paragraphs.

8) Indiana Code § 34-14-1-2 reads, in relevant part:

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

9) Petitioners’ purpose in filing for “Declaratory Judgment” in this Amended Complaint for Declaratory Judgment and Writ of Quo Warranto (“*Complaint*”) is to seek this court’s determination that the de facto appointment of Mr. Kappas to the Bloomington Plan Commission was void *ab initio*. Mr. Ellis’s right to appoint Mr. Guenther; and Mr. Guenther’s status as a member of the Plan Commission, are derived primarily from a statute (IC § 36-1-8-10) and a municipal ordinance (Bloomington Municipal Code (“*BMC*”) 2.13.010), and the question of validity of Mr. Kappas’s appointment arise primarily under the same statutes and codes.

10) As is stated in ¶¶ 40-43 (Prima Facie Impossibility of IC § 36-1-8-10), the declared validity of Mr. Kappas’s de facto appointment would make the *lex scripta* of IC § 36-1-8-10 *prima facie* impossible to observe.

11) However, the declared invalidity of Mr. Kappas's *de facto* appointment would simplify the legal argumentation behind the pleadings and decisions made under Counts 2 and 3 of this Complaint.

12) Indiana Code § 34-14-1-1 reads:

“Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect. The declaration has the force and effect of a final judgment or decree.”

13) Petitioners' purpose in filing for the *Writ of Quo Warranto* in this Complaint is to obtain this court's determination of (1) Mr. Ellis's lawful authority to appoint Mr. Guenther, (2) Mr. Guenther's entitlement to be appointed, and (3) the invalid nature of the appointment of Mr. Cockerham. Petitioners further state that it is this court's decisions in a quo warranto action which are the appropriate authority to determine the legitimate appointee: “*Quo warranto* is the proper remedy for determination of the right of a party to hold office.” *City of Gary v. Johnson*, 621 N.E.2d 650, 1993 Ind. App., see also: *State ex rel. Brown v. Circuit Court of Marion County* (1982), Ind., 430 N.E.2d 786, 787, *Brenner v. Powers*, (584 N.E.2d 569, 576).

14) Pursuant to Indiana Code § 34-17-1-1 (1):

“An information may be filed against any person or corporation ... when a person usurps, intrudes into, or unlawfully holds or exercises a public office ... within Indiana.”

15) Pursuant to, Indiana Code § 34-17-2-6 (c), when an information is filed by a person other than the prosecuting attorney, that person “shall state the person's interest in the matter and any damages the person has sustained,” and so, Petitioners state their interest in the matter, and their standing to file a Writ of Quo Warranto, and their standing to file for declaratory judgment, immediately below.

Standing and Interest of Both Petitioners for a “Quo Warranto”

16) A private person has standing to file a “quo warranto only if he claims an interest on his own relation or a special interest beyond that of a taxpayer ... distinct from that of the general public, which interest must be in the right or title to the office.” *City of Gary v. Johnson* (621 N.E.2d 650, 1993), citing *Hovanec v. Diaz*, (272 Ind. 342, 1979).

17) **Mr. Guenther** brings this action in that he claims a special interest, beyond that of a taxpayer, in his own relation, which interest is in the right or title to the office.

(a) In particular, Mr. Guenther was duly appointed by Mr. Ellis, who had the right to make the appointment, to the Seat at Issue, however, Respondents rejected the appointment of Mr. Guenther, and instead, claimed to have appointed Mr. Cockerham, thus usurping Mr. Guenther’s rightful title to the office.

(b) Since Mr. Guenther’s appointment to the office was usurped by Mr. Cockerham, Mr. Guenther’s interest in the right or title of the office is *clearly and unequivocally* beyond that of a taxpayer, and distinct to that of the general public.

18) **Mr. Ellis** brings this action in that he claims a special interest, beyond that of a taxpayer, in his own relation, which interest is in the right or title to the office.

(a) In particular, Mr. Ellis duly appointed, according to the legal requirements of IC § 36-1-8-10, Mr. Guenther to the Seat at Issue, however, Respondents

rejected the appointment of Mr. Guenther, and instead, claimed to have appointed Mr. Cockerham, thus usurping Mr. Ellis's rightful authority to appoint title of office.

(b) Since Mr. Ellis's authority to appoint to the office was usurped by Mayor Hamilton, Mr. Ellis's interest in the right or title of the office is *clearly and unequivocally* beyond that of a taxpayer, and distinct to that of the general public.

19) As such, the Court has jurisdiction over the parties and subject matter.

Standing of Both Petitioners for a Declaratory Judgment

20) Pursuant to IC § 34-14-1-2, Mr. Ellis has standing to bring a declaratory judgment action because Mr. Ellis's right to appoint a member to the Plan Commission is derived from a statute (IC § 36-1-8-10) and a municipal ordinance (Bloomington Municipal Code ("BMC") 2.13.010), and seeks to question the validity of this right, and obtain a declaration of his right, the claim to which right is made *a fortiori* by the invalid nature of Mr. Kappas's appointment to the Seat at Issue.

21) Pursuant to IC § 34-14-1-2, Mr. Guenther has standing to bring a declaratory judgment action because Mr. Guenther's right to the Seat at Issue and his status as a member to the Plan Commission are derived from a statute (IC § 36-1-8-10) and a municipal ordinance (Bloomington Municipal Code ("BMC") 2.13.010), and Mr. Guenther seeks to question the validity of this right and status, and obtain a declaration of his right and his status, the claim to which right and status is made *a fortiori* by the invalid nature of Mr. Kappas's appointment to the Seat at Issue.

RELEVANT FACTS

22) Petitioners incorporate herein all preceding paragraphs.

Mr. Kappas's Appointment Was Void *Ab Initio*

23) Pursuant to, and in accordance with, BMC 2.13.000, the Plan Commission was created and established in the Executive Department by Ordinance 83-6 § 2 (part), 1983.

24) Mr. Kappas was appointed, **de facto**—*which de facto appointment the Petitioners contest the validity of*—to the Seat at Issue, by Mayor Hamilton and the City, on February 15th, 2016, and Mr. Kappas was informed that his term on the Seat at Issue expired on December 31st, 2019.

25) At the time¹ of Mr. Kappas's *de facto appointment*, IC § 36-1-8-10 (b) provided three requirements (“*Affiliation Requirements*”), for appointees to boards with limits on political affiliation. IC § 36-1-8-10 (b) then read that:

(b) **Whenever a law or political subdivision's resolution requires that ... the membership of a board not exceed a stated number of members from the same political party, at the time of an appointment, one (1) of the following must apply to the appointee:**

- (1) The most recent primary election in which the appointee voted was a primary election held by the party with which the appointee claims affiliation.
- (2) If the appointee has never voted in a primary election, the appointee claims a party affiliation.
- (3) The appointee is certified as a member of that party by the party's county chairman for the county in which the appointee resides.

¹ At the date on which the City attempted to appoint Mr. Kappas, House Bill 1395 (which amended (IC) § 36-1-8-10), had not yet been passed. Thus, the text of (IC) § 36-1-8-10 was different, and, with respect to this difference, Petitioners will state from which version they quote at every instance.

26) BMC § 2.13.010 (“PLAN COMMISSION: Appointment and Qualifications”) reads, and has read, since 1997,² in part:

The commission shall consist of twelve members who by statute shall be appointed in the following manner: ...

(5) Five citizens, **no more than three of whom may be of the same political party**, appointed by the mayor.

27) Given this limit to the maximum number of members appointed by the mayor to the Plan Commission who are in the same party, IC § 36-1-8-10 (b) applies to mayoral appointments to the Plan Commission, and thus, the Affiliation Requirements apply to said mayoral appointments.

28) At the time of Mr. Kappas’s *de facto appointment*, to belief and knowledge:

- (a) Mr. Kappas had not voted in a primary election (Affiliation Requirement 1);
- (b) nor had Mr. Kappas claimed a party affiliation (Affiliation Requirement 2);
- (c) nor had Mr. Kappas been certified as a member of a party, with which he claimed affiliation, by a county chairman for that party (Affiliation Requirement 3).

Therefore, at the time of the (*de facto*) appointment, Mr. Kappas met none of the Affiliation Requirements, one of which had to be met to be appointed to the Seat at Issue. (It is primarily from this non-compliance that the Petitioners derive their contention that Mr. Kappas’s appointment was void *ab initio*.)

29) To knowledge and belief, during the term of Mr. Kappas’s *de facto appointment* to the Seat at Issue, he never retroactively acted on any of the Affiliation Requirements by (1) voting in a primary election; (2) claiming a party affiliation; nor (3) having party affiliation certified by the county chairman of a party.

² Which is to say, prior to, and throughout, the *de facto* appointment of Mr. Kappas.

30) Petitioners also cite, in support of their contention (§ 28), (which contention is that the non-compliance of Mr. Kappas with the statutory requirements for appointment to the Seat at Issue made his appointment void *ab initio*), the amendments made to IC § 36-1-8-10 by HB 1395,³ which added the following:

(c) **If a certification** by a county chairman of a political party **is required under subsection (b), the certification must be filed** with the office of the circuit court clerk not later than the time the appointee's oath of office is filed with the clerk under IC 5-4-1. If the county chairman's **certification is not filed** with the circuit court clerk's office **as required by this subsection, the appointment is void.**

31) Petitioners interpret HB 1395 to change IC § 36-1-8-10 in two (2) ways: to provide an addendum (*filing requirements*) to one of the Affiliation Requirements ((b)(2/3)); and to clarify, that *even if merely the addendum* to one of these Affiliation Requirements were not to be met, the appointment would still be void *ab initio*. Petitioners do **not** interpret HB 1395 to amend the legislative intent of IC § 36-1-8-10, which intent Petitioners allege **WAS** then, and **IS** now, to prevent and void appointments which do not meet the Affiliation Requirements given in the same section.

Mr. Ellis, Not Mayor Hamilton, Was Legally Required to Appoint to Seat at Issue

32) Mr. Christopher Smith (*“Mr. Smith”*), on or around January 2, 2012, was appointed, legally, and validly, to the Seat at Issue, by Mark Kruzan, former Mayor of

³ Which, to knowledge and belief, were made following the appointment of Mr. Kappas, but prior to the appointment of Mr. Guenther and the filing of the Complaint.

the City, and held the Seat at Issue until January 5, 2016, and was, *de jure*, the most recent holder of the Seat at Issue, prior to the appointment of Mr. Guenther.

33) That, currently,⁴ IC § 36-1-8-10 (d) reads, in relevant part:

If the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, both of the following apply:

- (1) The member may continue to serve on the board for only ninety (90) days after the expiration date of the member's term.
- (2) The county chairman of the political party of the member whose term has expired **shall** make the appointment.

And that, pursuant to and in accordance with this code, Mayor Hamilton would have had ninety (90) days from the expiration of Mr. Smith's term (which 90 days expired on April 4th, 2016) in which to announce his selection to fill the Seat at Issue, at which point, the law requires, by its mandatory language, that "The county chairman of the political party of the member shall make the appointment."

34) That this clear mandatory language should be obeyed, since "*it is not a proper function of this court to ignore the clear language of a statute and, in effect, rewrite the statute in order to render it consistent with a particular view of sound public policy.*" (*T.B. v. Indiana Dep't of Child Servs.*, (971 N.E.2d 104, 110); see also *Robinson v. Monroe Cnty.*, (663 N.E.2d 196)). [Emphasis Added].

35) That, *even if Mr. Kappas's appointment was valid*, pursuant to and in accordance with the code referenced in ¶ 33, Mayor Hamilton would have had only ninety (90) days from the expiration of Mr. Kappas's term (which Petitioners contend expired on December 31, 2019) in which to announce his selection to fill the Seat at Issue.

⁴ Following the amendments made by HB 1395.

36) That Mayor Hamilton did not announce a *valid* appointee for the successor of Mr. Smith before April 4th, 2016, nor did Mayor Hamilton announce an appointee as the (*de facto*) successor to Mr. Kappas *before April 16, 2020, which was 106 days after December 31st, 2019*, at which time Mr. Ellis announced the appointment of Mr. Guenther.

37) That, since (1) Mr. Smith was a Republican, since (2) Mayor Hamilton did not make a valid appointment to succeed Mr. Smith, and since (3) Mr. Ellis was the county chairman of the Republican Party, THEN (4) Mr. Ellis was required to make the appointment to the Seat at Issue, after April 14th, 2016.

38) That, IF Mr. Kappas was a valid appointee for the successor of Mr. Smith, then Mayor Hamilton would have had to announce a valid Appointee by March 30th, 2020, ninety (90) days after the expiration of Mr. Kappas's *de facto term*.

39) That Mr. Ellis made the appointment on April 16th of 2020 (106 days after Dec. 31, 2019, and 1561 days after Jan. 6, 2016), and that both Mr. Guenther and Mr. Ellis communicated this appointment to the City and media throughout the City in general, and, communicated this appointment in particular, to Mayor Hamilton.

Prima Facie Impossibility of IC § 36-1-8-10 with Politically Unaffiliated Members

40) IC § 36-1-8-10 (d) states clearly and unequivocally (*numbers added*) that:

[2] If the term of an appointed member of a board expires and [3] the appointing authority does not make an appointment to fill the vacancy ... [4] The county chairman of the political party of the member shall make the appointment.

41) If, hypothetically, (1) an unaffiliated (or “independent”⁵) person were to be an appointed member, (2) his term were to expire, and (3) the appointing authority were not to make an appointment, *then* (4) the county chairman of *a non-existent political party* (which is to say, that party with which the unaffiliated person is affiliated) would be required to make the replacement appointment.

42) Thus, **if: (1) Mr. Kappas, while unaffiliated with any political party, were to be validly appointed to the Plan Commission**, and (2) his term expired, and (3) the appointing authority did not make an appointment, then (4) the observance of the *lex scripta* of IC § 36-1-8-10 (d) would become, *prima facie*, impossible, and **this would require the court to interpret the code in some alternate manner.**

43) The legislative intent of both BMC § 2.13.010’s requirement (*which limits members of the same political party*), and IC § 36-1-8-10 (d)’s procedure (*which grants appointing authority to the chair of the political party of the past member*), is to ensure the representation of parties other than the predominant one, which, in Bloomington, at this time, is the Democratic Party.

Mr. Cockerham Was Not a Statutorily Permissible Choice of Appointee

44) That IC §§ 36-1-8-10 (b)-(c) reads, currently:

(b) **Whenever a law or political subdivision's resolution requires ... that the membership of a board not exceed a stated number of members from the same political party, at the time of an appointment, one (1) of the following must apply to the appointee:**

⁵ For clarity: Webster’s Dictionary defines an independent as “not bound by or committed to a political party,” and is synonymous with “unaffiliated.” Members of the American Independent Party (primarily noted for George Wallace’s 1968 Presidential campaign), are, by definition, **not** lower-case “i” “independents.” The upper case “I” (Independent) Party is not recognized in Indiana.

- (1) The most recent primary election in Indiana in which the appointee voted was a primary election held by the party with which the appointee claims affiliation.
- (2) If the appointee has never voted in a primary election in Indiana, the appointee is certified as a member of that party by the party's county chair for the county in which the appointee resides.
- (c) If a certification by a county chairman of a political party is required under subsection (b), **the certification must be filed with the office of the circuit court clerk not later than the time the appointee's oath of office is filed with the clerk** under IC 5-4-1. If the county chairman's certification is not filed with the circuit court clerk's office as required by this subsection, the appointment is void.

45) Upon information and belief, Mr. Cockerham voted as a Democrat in the most recent primary prior to the appointment, that being the primary of 2019.

46) According to Indiana law, a party that submits an early and/or absentee vote, is only showing “*an intent*” of their anticipated vote. A vote is not an official vote until the actual election, and the official primary of 2020 was on June 2nd, 2020. Therefore, at the time of the appointment, the most recent primary in which Mr. Cockerham could have taken part was the primary of 2019.

47) To knowledge and belief, no such certification has been filed regarding Mr. Cockerham’s affiliation with any political party.

48) That, therefore, Mr. Cockerham meets Affiliation Requirement (1) as a Democrat and fails to meet Affiliation Requirement (2) as a Republican or as affiliated with any other party.

49) That, as stated in ¶ 17, BMC § 2.13.010 (“PLAN COMMISSION: Appointment and Qualifications”) reads in relevant part:

The commission shall consist of twelve members who by statute shall be appointed in the following manner: ...

- (5) Five citizens, **no more than three of whom may be of the same political party**, appointed by the mayor.

50) The valid mayor-appointed Plan Commission members at this moment, which members are Beth Cate, Karin St. John, and Jillian Kinzie, are all Democrats, which is three (3) appointments, the maximum number, along with one (1) Republican, Brad Wisler.

51) That Mr. Cockerham's appointment was therefore *prima facie* invalid, even if made with valid authority, since Mr. Cockerham's appointment would have exceeded the limits provided in BMC § 2.13.010.

Mr. Guenther's Previous Environmental Commission Seat Did Not Conflict

52) That on or around June 5, 2020, Mr. Guenther, was notified by legal counsel representing the City of Bloomington, Indiana, that he was not allowed to sit on both the Plan Commission and Environmental Commission, and for that reason (in part), Mayor Hamilton had nominated Mr. Cockerham to the Seat at Issue.

53) That, during Mr. Kappas's *de facto appointment*, he served on the City of Bloomington's Environmental Commission, to which he was appointed by the Bloomington Common Council on June 3, 2015, and that, to knowledge and belief, the City did not raise any issues regarding the incompatibility of the positions.

54) That Mayor Hamilton appointed Mr. Guenther to the Environmental Commission on September 19, 2018.

55) That Mr. Guenther is unpaid for and has not received any benefit from his position on the Environmental Commission, and thus that this office cannot be

considered a “*lucrative office*” for the purposes of Art. 2 § 9 of the Indiana Constitution.

56) That as a matter of law, when Mr. Guenther was appointed to the Plan Commission, if there was a statutory conflict in being a member of both the Environmental and Plan Commission, that Mr. Guenther’s position on the Environmental Commission terminated automatically with his acceptance of the Plan Commission appointment.

Other Relevant Facts

57) That, notwithstanding the legitimate appointment made by the Petitioners, the Respondent City of Bloomington, Indiana, by Respondent Mayor Hamilton, announced the *de facto mayoral appointment*, on May 5, 2020, (20 days after the appointment of Mr. Guenther, 126 days after the termination of Mr. Kappas’s appointment, and 1581 days after the termination of Mr. Smith’s appointment) of Mr. Cockerham to the Seat at Issue.

58) That at no time did the Petitioners accept and/or concede to the Mayor’s wrongful and delinquent appointment, nor, at any time, did the Petitioners waive any rights that they may have, individually and / or as a group, in the matters before this Court.

59) That prior to the June 8, 2020 Plan Commission meeting, Mr. Guenther notified the Plan Commission in writing that Mr. Guenther, not Mr. Cockerham, was legally appointed to the Seat at Issue, and, as such, made a formal demand for the Seat at Issue.

60) After the June 8, 2020, Plan Commission meeting, during which the Seat at Issue was invalidly held by Mr. Cockerham, the Petitioners issued a press release stating their position on this matter.

COUNT 1: DECLARATORY JUDGMENT OF AB INITIO
INVALIDITY OF MR. KAPPAS'S APPOINTMENT; INVALIDITY OF MAYOR
HAMILTON'S RIGHT TO APPOINT COCKERHAM; AND CHRIS COCKERHAM BE
DECLARED A "DEMOCRAT" AS OF PRIMARY 2019

61) Petitioners incorporate herein all preceding paragraphs.

62) Mayor Hamilton's appointment of Mr. Kappas to the Seat at Issue on the Plan Commission, on or around February 15th of 2016, should be declared invalid *ab initio*, because Mr. Kappas did not meet the statutory requirements under IC § 36-1-8-10 (b) for membership on a board with a limit on the maximum members affiliated with the same political party.

63) IC § 36-1-8-10 (b), at the time of Mr. Kappas's invalid appointment, required that one of three Affiliation Requirements must apply to the appointee:

- (1) The most recent primary election in which the appointee voted was a primary election held by the party with which the appointee claims affiliation.
- (2) If the appointee has never voted in a primary election, the appointee claims a party affiliation.
- (3) The appointee is certified as a member of that party by the party's county chairman for the county in which the appointee resides.

64) Since the BMC requirement (of not exceeding three members from the same political party), places the mayoral appointments to the Plan Commission under the

purview of IC § 36-1-8-10, the validity of said appointments rely upon meeting at least one of the Affiliation Requirements, from the then-current IC § 36-1-8-10 (b).

65) Assuming, *arguendo*, the court decides that IC § 36-1-8-10, as it was written at the time of Mr. Kappas's appointment, would not have voided his appointment, then the court must consider whether or not the current IC § 36-1-8-10 was applicable to Mr. Kappas, since there was no grandfather clause. The purpose behind HB 1395 was merely to clarify, and not change, legislative intent.

66) HB 1395 adds an addendum stipulating the method of filing certifications requirement under IC § 36-1-8-10, which addendum is merely a clarification for observance of the code's Affiliation Requirements. Petitioners believe that HB 1395 provides more evidence that *both* the clear and unequivocal language, *and* the legislative intent, of IC § 36-1-8-10 *both was* (at the time of Mr. Kappas's appointment), and *is now*, to void the appointments of those who do not meet the Affiliation Requirements set forth in the same section.

67) To knowledge and belief, Mr. Kappas did not meet any of the Affiliation Requirements, at least one of which needed to be met, and therefore, Mr. Kappas's appointment to the position was void *ab initio*.

68) As is stated in ¶¶ 40-43 (Prima Facie Impossibility of IC § 36-1-8-10), the declared validity of Mr. Kappas's de facto appointment would make the *lex scripta* of IC § 36-1-8-10 *prima facie* impossible to observe.

69) However, the declared invalidity of Mr. Kappas's de facto appointment would simplify the legal argumentation behind the pleadings and decisions made under Counts 2 and 3 of this Complaint.

70) For these reasons, the Petitioners state that a declaratory judgment must be issued to void Mr. Kappas's membership on the Plan Commission.

71) Further, Petitioners contend that Mayor John Hamilton lost any jurisdiction and/or authority to make the Plan Commission selection in question, once he failed to do so timely.

72) Further, Petitioners contend, as a matter of law, Mr. Cockerham is a “Democrat” as defined under relevant statutory provisions as is last identified and legal election was in the Primary 2019, where he voted as a “Democrat.”

COUNT 2: WRIT OF QUO WARRANTO INVALIDATING

MR. COCKERHAM APPOINTMENT; AND

COUNT 3: ORDER FOR MAYOR HAMILTON TO RECOGNIZE, AND CERTIFY, AND INSTALL MR. GUENTHER TO THE SEAT AT ISSUE

Relief Through a Writ of Quo Warranto

73) Petitioners incorporate herein all preceding paragraphs.

74) Mayor Hamilton's appointment of Mr. Cockerham to the Seat at Issue on the Plan Commission should be declared *sine warranto*, Mayor Hamilton should be required to recognize Mr. Ellis's appointment of Mr. Guenther to the Seat at Issue on the Plan Commission, since:

- (a) Mayor Hamilton did not have authority to make an appointment to the Seat.
- (b) Mr. Ellis used his legal authority to appoint Mr. Guenther to the seat at issue.
- (c) Mr. Cockerham was not a statutorily permissible or valid appointee.
- (d) Mr. Guenther's previous environmental commission work did not constitute a conflict with a seat on the Plan Commission

Mayor Hamilton Did Not Have Authority to Make an Appointment

75) Mr. Smith's term ended on January 5th, 2016, leaving Mayor Hamilton until April 4th, 2016 to make a replacement appointment to the Seat at Issue.

76) Assuming, *arguendo*, Mr. Kappas's term was valid, Mayor Hamilton would have had until March 30th, 2020, to make a replacement appointment to the Seat at Issue.

77) Assuming, *arguendo*, that the City claims that Mr. Kappas's term was valid, and expired at the Plan Commission meeting on January 13th, 2020, Mayor Hamilton would have had until April 12th, 2020, to make a replacement appointment to the Seat at Issue.

78) Regardless of which of these dates is selected, Mayor Hamilton failed to act timely according to the statutory requirements of IC § 36-1-8-10 (d), which lack of timeliness, according to the same code, required the chairman of the political party to make the appointment to the Seat at Issue.

Mr. Ellis Used His Legal Authority to Appoint Mr. Guenther to the Seat at Issue

79) IC § 36-1-8-10 states in part:

(d) If the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, both of the following apply:

(1) The member may continue to serve on the board for only ninety (90) days after the expiration date of the member's term.

(2) The county chairman of the political party of the member whose term has expired shall make the appointment.

80) The mandatory language of this statute shows, clearly and unequivocally, that, if Mayor Hamilton did not make the appointment to the Seat at Issue within 90 days of the termination of the previous member's term, the right to appoint the holder of the Seat at Issue, became the chairman of the party with which the previous member was affiliated, which chairman was then required to make the appointment. As is established in ¶¶ 32-39 (Mr. Ellis, Not Mayor Hamilton, Was Legally Required to Appoint to Seat at Issue), Mayor Hamilton *did not* make the appointment timely, and thus, *Mr. Ellis was required to make the appointment.*

81) On the date of April 15th of 2020, Mr. Ellis did appoint Mr. Guenther and make this announcement, which announcement was also communicated to the City and to Mayor Hamilton by both Messrs. Mr. Ellis and Mr. Guenther.

Prima Facie Impossibility of IC § 36-1-8-10 if Mr. Kappas was Unaffiliated

82) As is shown in ¶¶ 40-43, if Mr. Kappas is an independent, was validly appointed, and the appointing authority (Mayor Hamilton) did not make the appointment in the allotted time, the observance of Indiana's *lex scripta* would be *prima facie* impossible.

83) Further, the legislative intent of these statutes, as shown in ¶ 43, is to favor the representation of the **non**-dominant party, which dominant party, in Bloomington, at this time, is the Democratic Party.

84) Petitioners thus state that, if Mr. Kappas was a validly appointed independent, and the code is interpreted in a manner which includes its legislative intent, said intent would strongly favor the appointment of the Republican Party's appointment to this seat.

Mr. Cockerham Was Not a Statutorily Permissible Choice of Appointee

85) That IC § 36-1-8-10 (b) currently requires that one of the following must apply to the appointee:

- (1) The most recent primary election in Indiana in which the appointee voted was a primary election held by the party with which the appointee claims affiliation.
- (2) If the appointee has never voted in a primary election in Indiana, the appointee is certified as a member of that party by the party's county chair for the county in which the appointee resides.

86) Since the BMC requirement (of not exceeding three members from the same political party), places the mayoral appointments to the Plan Commission under the purview of IC § 36-1-8-10, the validity of said appointments rely upon meeting at least one of the Affiliation Requirements from the current IC § 36-1-8-10 (b).

87) To knowledge and belief, in the most recent primary in Indiana in which Mr. Cockerham voted, Mr. Cockerham voted as a Democrat. Therefore, Mr. Cockerham meets Affiliation Requirement (1) only if affiliated with the Democratic Party.

88) The only manner in which Mr. Cockerham, thus, could not be affiliated with the Democrats, would be by meeting Affiliation Requirement (2) on behalf of another party, and being “certified as a member of that party by the party's county chair for the county in which the appointee resides.”

89) IC 36-1-8-10 (c) reads:

If a certification by a county chairman of a political party is required under subsection (b), the certification must be filed with the office of the circuit court clerk not later than the time the appointee's oath of office is filed with the clerk under IC 5-4-1. If the county chairman's certification is not filed with the circuit court

clerk's office as required by this subsection, the appointment is void.

90) That Mr. Ellis, in his capacity as county chairman of the Republican Party, did not certify Mr. Cockerham's affiliation with the Republican Party, and that, to knowledge and belief, no certifications of any form have yet been filed, and therefore, Mr. Cockerham must, for the purposes of making an analysis under IC §§ 36-1-8-10 (b)-(c), be regarded as a Democrat.

91) BMC § 2.13.010 ("PLAN COMMISSION: Appointment and Qualifications") reads, in part:

The commission shall consist of twelve members who by statute shall be appointed in the following manner: ...

(5) Five citizens, **no more than three of whom may be of the same political party**, appointed by the mayor.

92) Of the mayoral appointments made to the Plan Commission, three (3) are Democrats, which is the maximum permitted by BMC § 2.13.010.

93) Therefore, Mr. Cockerham, as a Democrat by the tests required by Indiana Code, exceeds the maximum number of members of the same political party on the Plan Commission permitted by Bloomington Municipal Code, and was not a permissible appointee.

Mr. Guenther's Previous Environmental Commission Seat Did Not Conflict

94) Assuming, *arguendo*, the Respondents state that Mr. Guenther is not able to hold both positions due to the conflict, (which issues the City never raised when they Mr. Kappas, de facto, held both positions), the Petitioners **emphasize** that Mr. Guenther states that his acceptance of appointment to the Seat at Issue automatically

terminated, as a matter of law, Mr. Guenther's title to any other offices in conflict with the Seat at Issue.

Conclusion of Court for Writ of Quo Warranto

95) Wherefore, respondents have usurped, intruded upon, and unlawfully misappropriated, and have awarded, held, and exercised the position of member of the Plan Commission for the City of Bloomington, and they have prevented the Petitioners lawful rights to accession and succession to that position.

96) For these reasons, the Petitioners state that a Writ of Quo Warranto must be issued to void Mayor Hamilton's appointment of Mr. Cockerham to the Plan Commission.


CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Petitioners, by counsel, pray that this honorable Court award them the following relief:


- (1) **Issue a Declaratory Judgment** finding that the de facto appointment of NICHOLAS KAPPAS to the Bloomington Plan Commission was void *ab initio*.
- (2) **Issue a Declaratory Judgment** finding Mayor John Hamilton did not have the right and/or authority to make the Plan Commission appointment once he failed to do so timely under the relevant statutes.
- (3) **Issue a Declaratory Judgment** finding that Chris Cockerham is a "Democrat," as defined under Indiana law at the time and as relevant to the instant cause of action and, as such, is not eligible for the appointment to the Bloomington Plan Commission as of May 2020;

- (4) **Issue a Writ of Quo Warranto** which vacates the de facto appointment of CHRISTOPHER COCKERHAM, which appointment the Respondents made wrongly.
- (5) **Order JOHN HAMILTON to recognize, and certify, and install ANDREW GUENTHER** to the Seat at Issue on the Plan Commission.
- (6) **Award the Petitioners the costs** of this proceeding, including their attorneys' fees; and grant such further relief as justice requires.


I, William Ellis, in my capacity as the chairman of the Monroe County Republican Party, hereby affirm under the penalties for perjury that the foregoing statements are true and accurate to the best of my knowledge, ability, and belief.

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William Ellis

I, Andrew Guenther, in my capacity as appointed member of the City of Bloomington's Plan Commission, hereby affirm under the penalties for perjury that the foregoing statements are true and accurate to the best of my knowledge, ability, and belief.

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Andrew Guenther

Respectfully submitted,
CARL LAMB & ASSOCIATES, PC
Attorney at Law

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CARL PAUL LAMB
Indiana Attorney Number: 10286-53
Attorney for the Petitioners

CERTIFICATE OF SERVICE

I, *Carl Paul Lamb*, hereby certify that a true and accurate copy of the foregoing document has been transmitted via E-Service Filing on the 6th day of July 2020 to the following:

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Nicholas Kappas
Sent via Facebook Message

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7/6/2020 | 3:08:18 PM EDT

Carl Paul Lamb

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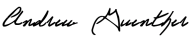
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