

STATE OF INDIANA ) IN THE MONROE CIRCUIT COURT  
 )SS:  
COUNTY OF MONROE ) Case Number: 53C08-2006-MI-000958

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 Indiana Republican Party )  
Petitioners, )

v. )

CITY OF BLOOMINGTON, INDIANA, )  
And )

JOHN HAMILTON, in his official capacity )  
as Mayor for the City of Bloomington, Indiana, )  
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. )

**RESPONDENTS' SECOND MOTION TO DISMISS**

Respondents, City of Bloomington, Indiana, John Hamilton, Christopher Cockerham, and Nicholas Kappas, by counsel, and pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure move the Court to dismiss Petitioners' July 6, 2020, *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto* and in support state:

1. Petitioners filed their *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto* (the "Complaint") on July 6, 2020, seeking to strike down City of Bloomington Mayor John Hamilton's appointment of Respondent Christopher Cockerham to

the City of Bloomington Plan Commission seat formerly occupied by Respondent Nicholas Kappas.

2. Petitioners have failed to plead facts sufficient to establish their legal standing to bring the claims set forth in their Complaint under Indiana law.

3. A motion under Trial Rule 12(B)(6) tests the legal sufficiency of a claim rather than the facts supporting that claim. *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306, 308 (Ind. 2012); *Meyers v. Meyers*, 861 N.E.2d 704, 705 (Ind. 2007).

4. A trial court must grant a motion to dismiss under Trial Rule 12(B)(6) if the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. *McPeck v. McCardle*, 888 N.E.2d 171 (Ind. 2008).

5. In determining whether the facts alleged in the complaint are incapable of supporting relief, “the court must look only to the complaint and may not resort to any other evidence in the record.” *Dawson v. Newman*, 845 N.E.2d 1076, 1080 (Ind. Ct. App. 2006), *trans. denied*. When ruling on a motion to dismiss under Trial Rule 12(B)(6), the court should consider all of the allegations in the complaint to be true and resolve all inferences in favor of the non-moving party. *Allen*, 980 N.E.2d at 308; *State v. American Family Voices, Inc.*, 898 N.E.2d 293 295–96 (Ind. 2008).

6. Where a party lacks standing to pursue a claim, dismissal under Trial Rule 12(B)(6) is appropriate. *In re Paternity of G.W.*, 983 N.E.2d 1193, 1196 (Ind. Ct. App. 2013); *Long v. Biomet, Inc.*, 901 N.E.2d 37, 40 (Ind. Ct. App. 2009); *R.J.S. v. Stockton*, 886 N.E.2d 611, 614 (Ind. Ct. App. 2008).

7. Standing is defined in Indiana as having a “sufficient stake in an otherwise justiciable controversy.” *Ind. Civil Rights Comm’n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 945 (Ind. 1999).

8. The purpose of the standing requirement is to ensure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. *Pence v. State*, 652 N.E.2d 486, 487 (Ind. 1995). Standing is “a significant restraint on the ability of Indiana courts to act, as it denies the courts any jurisdiction absent an actual injured party participating in the case.” *Id.* at 488; *see also Garau Germano, P.C. v. Robertson*, 133 N.E.3d 161, 170 (Ind. Ct. App. 2019), *reh'g denied* (Oct. 17, 2019), *trans. denied* (Ind. Feb. 13, 2020).

9. Indiana law expressly limits the parties with standing to bring an information of *quo warranto*. Indiana Code, Section 34-17-2-1 states:

An information described in IC 34-17-1-1 may be filed:

(1) by the prosecuting attorney in the circuit court, superior court, or probate court of the proper county, upon the prosecuting attorney's own relation, whenever the prosecuting attorney:

(A) determines it to be the prosecuting attorney's duty to do so; or

(B) is directed by the court or other competent authority; or

(2) by any other person on the person's own relation, whenever the person claims an interest in the office, franchise, or corporation that is the subject of the information.

10. Petitioner Ellis claims standing to bring the claims in the Complaint as the Republican Party Chair for Monroe County, and as the individual who attempted to appoint Petitioner Guenther to the seat formerly occupied by Nicholas Kappas. Petitioner Ellis does not claim that he is entitled to occupy the seat. Compl. ¶ 18.

11. Petitioner Guenther claims standing to bring the claims in the Complaint under subpart (2) of Indiana Code, Section 34-17-2-1(a), claiming an interest in the office in his own relation as being appointed by Petitioner Ellis, the Monroe County Republican Party Chair. Compl. ¶ 17.

12. Petitioners erroneously claim that Ellis, as the Republican Party Chair, was entitled to appoint Guenther to the City of Bloomington Plan Commission under the current version of Indiana Code, Section 36-1-8-10(d) which states:

(d) Notwithstanding any other law, 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 chair of the political party of the member whose term has expired shall make the appointment.

13. Indiana Code, section 36-7-4-207(a) and Bloomington Municipal Code (BMC), section 2.13.010 govern the appointment of the members of the City of Bloomington Plan Commission. In accordance with Indiana Code, Section 36-7-4-207(a), BMC Section 2.13.010 provides 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.

14. Petitioners allege the vacant seat to which Republican Party Chair Ellis sought to appoint Guenther was held by Nicholas Kappas. Compl. ¶ 1, 4.

15. Petitioners allege Kappas's seat was one of the five members appointed by the Mayor. Compl. ¶ 24.

16. Petitioners allege Kappas's term began February 15, 2016 and expired on December 31, 2019. Compl. ¶ 4.

17. Petitioners allege Kappas did not have a party affiliation and/or designation. In other words, Petitioners admit that Kappas was neither a Democrat nor a Republican. Compl. ¶ 28–30.

18. Petitioners argue Indiana law allowed Ellis to appoint Guenther because, although Kappas was not a Republican (Compl. ¶ 28–30), Kappas’s predecessor was a Republican and Kappas’s appointment was void under Indiana law because Kappas did not have a political affiliation. Compl. ¶ 33, 36–39.

19. Petitioners’ claim of Ellis’s entitlement to appoint Guenther is unsupported by Indiana law.

20. Petitioners incorrectly assert that the version of Indiana Code, Section 36-1-8-10 in effect in 2016 gave appointment authority to the Chair of the Monroe County Republican Party after 90 days of the expiration of the prior member’s term. Indiana Code, Section 36-1-8-10(d), upon which Petitioners rely for this assertion, did not exist until July 2017, over a year after Kappas’s appointment. POLITICAL SUBDIVISIONS—BOARDS AND COMMISSIONS—MEMBERS AND MEMBERSHIP, 2017 Ind. Legis. Serv. P.L. 193-2017 (H.E.A. 1395) (WEST). Prior to July 1, 2017, Indiana Code, Section 36-1-8-10 never divested the appointing authority of its duty to appoint members to a board. *Id.*

21. Petitioners incorrectly argue that Indiana Code, Section 36-1-8-10 voids and prohibits all appointments of individuals who do not have a party affiliation, or whose affiliated party does not have a county party chair and does not conduct primaries, to boards which require the membership of a board not to exceed a stated number of members from the same political party.

22. Petitioners’ Complaint seeks to add this language to Indiana Code, Section 36-1-8-10, something the legislature has not seen fit to do since the codification of that statute in 1988, and over the course of numerous revisions and amendments to that section thereafter.

23. Indiana Code, Section 36-1-8-10(b) only sets out the procedure to apply to determine the party affiliation or the lack thereof of an appointee under limited circumstances.

24. Indiana Code, Section 36-1-8-10(b) covers two different types of appointments, one which affirmatively requires party affiliation for appointment to a board, and one which prohibits appointment of too many members of a single political affiliation.

25. Despite having opposing functions, the language of Indiana Code, Section 36-1-8-10(b) sets out a single standard for determining party affiliation to apply in both circumstances.

26. In the first type of appointment, which requires a political affiliation, if a statute requires that a certain seat on a board seat must be held by a Republican, and the proposed appointee has not voted in a Republican primary and has not been certified by the Republican party chair for the county, then the appointee cannot be appointed to the board and such appointment would be void. (See, e.g., Indiana Code, Section 3-6-5-2 which affirmatively requires the appointment of “one (1) member from each of the major political parties” to county election boards).

27. Under the second type of appointment, such as those under Indiana Code, Section 36-7-4-207, the appointee’s party affiliation is determined pursuant to the same procedure; however, the application is different. For example, in a board organized under Indiana Code, Section 36-7-4-207(a) where no more than three of the five members may be from the same political party, if there are three Republicans on the board, and a proposed additional appointee either voted in a Republican primary or has been certified by the county Republican party chair as a Republican, then the appointee is a Republican, and cannot be appointed to the board. However, if neither of those are true, then the appointee is not a

Republican, and his/her appointment would not result in a violation of Indiana Code, Section 36-7-4-207(a).

28. In the present case, this Court is dealing with the second type of appointment under Indiana Code, Section 36-7-4-207(a)(5), which requires the membership of the plan commission not to exceed three citizen members from the same political party. Petitioners' interpretation of Indiana Code, Section 36-1-8-10 would make Section 36-1-8-10 internally inconsistent and also put Section 36-1-8-10 in conflict with the plain language of Indiana Code, Section 36-7-4-207 which limits the number of members of the same political party, but does not condition appointment upon a required party affiliation.

29. Petitioners' other argument in favor of their proposed interpretation of Indiana Code, Section 36-1-8-10, that it would be impossible to apply the statute without reading a party affiliation requirement into it, is also without merit. Compl. ¶¶ 40–43.

30. From 1988 through July 1, 2017, the appointing authority never lost the authority to make appointments of any member, regardless of political affiliation, even after a member's term had expired. During that time, the appropriate procedural remedy against an appointing authority for an unfilled vacancy was to file a mandamus action. Ind. Code. § 34-27-3-1.

31. Indiana Code, Section 36-1-8-10 has existed since 1988. In its original form it read as follows:

(a) As used in this section, "Board" means an administration, agency, authority, board, bureau, commission, committee, council, department, division, institution, or other similarly designated body of a political subdivision.

(b) Whenever a law or political subdivision's resolution requires that an appointment to a Board be conditioned upon the political affiliation of the appointee, or that the membership of a Board not exceed a stated number of members from the same political party, at the time of an appointment the appointee must:

(1) Have voted in the most recent primary election held by the party with which the appointee claims affiliation; or

(2) If the appointee did not vote in the most recent primary election held by the party with which the appointee claims affiliation, be certified as a member of that party by the party's county chairman for the county in which the appointee resides.

PUBLIC OFFICERS—APPOINTMENT AND REMOVAL—PARTY AFFILIATION, 1988 Ind. Legis. Serv. 185-1988 (West).

32. In 1996, Indiana Code, Section 36-1-8-10 was amended to include language about what must happen when a member's term expires and no appointment is made by the appointing authority. The additional language stated:

(c) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, the member may continue to serve on the board for only sixty (60) days after the expiration date of the member's term.

LOCAL GOVERNMENT—CONVENTION, TOURISM, AND VISITOR PROMOTION FUND—PORT AUTHORITY, 1996 Ind. Legis. Serv. P.L. 68-1996 (S.E.A. 221) (WEST)

33. The language added to the statute in subpart (c) existed from 1996 through July 1, 2017, when the statute was amended to read as follows:

(d) Notwithstanding any other law, 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 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.

POLITICAL SUBDIVISIONS—BOARDS AND COMMISSIONS—MEMBERS AND MEMBERSHIP, 2017 Ind. Legis. Serv. P.L. 193-2017 (H.E.A. 1395) (WEST)

34. As is clear from the legislative history, until July 1, 2017, the appointing authority never lost the authority to make appointments of any member, regardless of political affiliation, even after a member's term had expired. Therefore the correct legal procedure to follow under the current law when there is a vacant seat of a member without party affiliation is not to rewrite the statute as Petitioners propose, but to follow the same procedure the statute operated under for the 31 years before the addition of subpart (d) in



2017. In other words, where a member lacks a party affiliation, the appointing authority retains its legal duty to make the appointment, and can be required by mandamus action to make an appointment in compliance with Indiana Code, Section 36-1-8-10 and Indiana Code, Section 36-7-4-207. *See, e.g. State ex rel. Rogers v. Davis*, 230 Ind. 479, 485, 104 N.E.2d 382, 384 (Ind. 1952).

35. Because Kappas was lawfully appointed and was not a Republican, Ellis, the Republican Party Chair, did not have lawful authority to appoint Guenther to the City of Bloomington Plan Commission. That authority remained with Mayor Hamilton, as it has under all versions of the Statute since at least 1988.

36. “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 (Ind. Ct. App. 2012); *See also Robinson v. Monroe Cnty.*, 663 N.E.2d 196 (Ind.Ct.App.1996) (concluding that a court can not ignore unambiguous language of statute's exemption of particular class of individuals from abiding by certain safety requirement regardless of court's view as to the wisdom of the exemption).

37. If Petitioners wish for Indiana Code, Section 36-1-8-10 and Indiana Code, Section 36-7-4-207 to be rewritten to affirmatively require affiliation with a party having a county party chair or having a primary election to be eligible for appointments to boards where membership shall not exceed a stated number of members from the same political party, then their appropriate remedy is through the Indiana Legislature, and not through this Court. This Court cannot provide Petitioners the relief they seek under existing law.

38. Because Ellis did not have lawful authority to appoint Guenther to the City of Bloomington Plan Commission, Guenther was not entitled to be appointed. Neither Ellis nor Guenther has suffered any actual injury, and neither has any substantive right to enforce

the claims that are being made in the litigation. *See Pence*, 652 N.E.2d at 487; *Hovanec v. Diaz*, 397 N.E.2d 1249, 1250 (Ind. 1979) (affirming a grant of a motion to dismiss because the petitioner could not show that he had a right or title to the office, or an interest that differs from that of the general public).

39. Petitioners have failed to allege any facts that they have interest in the office at issue in their Complaint as required by Indiana Code, Section 34-17-2-1.

40. Considering all of the allegations in the complaint to be true and resolving all inferences in favor of the non-moving party, the facts alleged in the Complaint are incapable of supporting relief as neither Ellis nor Guenther have legal standing to bring the claims in the Complaint.

41. This Court must therefore dismiss Petitioners' Complaint.

WHEREFORE Respondents, by counsel, move the Court to dismiss Petitioners' Complaint pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure, and for all other just and proper relief.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 10, 2020, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS) and the forgoing document was served upon the following parties or their attorneys of record via IEFS:

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