

IN THE  
INDIANA COURT OF APPEALS

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Cause No. 20A-MI-01900

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<b>ANDREW GUENTHER</b> , individually	)	
and in his capacity as appointed member	)	
of the Bloomington Plan Commission,	)	
And	)	
<b>WILLIAM ELLIS</b> , in his capacity as	)	
Chairman of the Monroe County Indiana	)	
Republican Party,	)	
Appellees-Petitioners,	)	Appeal from the Monroe Circuit Court
v.	)	
	)	Trial Court Cause No. 53C08-2006-MI-00958
<b>CITY OF BLOOMINGTON</b> ,	)	
<b>INDIANA</b> ,	)	The Honorable Erik C. Allen, Special Judge
And	)	
<b>JOHN HAMILTON</b> , in his official	)	
capacity as Mayor for the City of	)	
Bloomington, Indiana,	)	
And	)	
<b>CHRISTOPHER COCKERHAM</b> , in	)	
his capacity as contested member of the	)	
Bloomington Plan Commission,	)	
And	)	
<b>NICHOLAS KAPPAS</b> , in his capacity	)	
as contested former member of the	)	
Bloomington Plan Commission,	)	
Appellants-Respondents.	)	

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**RESPONDENTS' MOTION TO ACCEPT JURISDICTION OVER  
INTERLOCUTORY APPEAL PURSUANT TO APPELLATE RULE 14(B)**

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Appellants-Respondents, by counsel, and pursuant to Indiana Appellate Rule 14(B), jointly move the Court to accept jurisdiction over an interlocutory appeal of the trial court's August 14, 2020 Order denying *Respondents' Second Motion to Dismiss* the Appellees-

Petitioners' *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto* ("Order"), and state as follows:

### **BACKGROUND FACTS AND PROCEDURAL HISTORY**

1. Petitioners filed their *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto* ("Amended Complaint") against Respondents on July 6, 2020.

2. In their Amended Complaint, Petitioners alleged that former Plan Commission member Nicholas Kappas's appointment was void *ab initio* and that Petitioner Ellis, the Republican Party Chair for Monroe County, had authority to appoint Petitioner Guenther, a Republican, to the Plan Commission.

3. Petitioners claim Indiana law allowed Ellis to appoint Guenther because, although Kappas was not a Republican, Kappas's predecessor was a Republican and Kappas's appointment was void *ab initio* because Kappas did not have a political affiliation.

4. Petitioners' Complaint rests on their argument that Indiana Code Section 36-1-8-10 (2018) 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.

5. Petitioners therefore seek to overturn the Respondent Mayor John Hamilton's appointment of Respondent Christopher Cockerham to the seat that was formerly held by Kappas and have the Court certify Ellis's authority to appoint Guenther to the Plan Commission.

6. On July 10, 2020, Respondents filed *Respondents' Second Motion to Dismiss* as to Petitioners' Amended Complaint pursuant to Indiana Trial Rule 12(B)(6). Respondents argue Indiana Code, Section 36-1-8-10 does not create a blanket party

affiliation requirement and Petitioners failed to raise cognizable claims upon which relief can be granted because Petitioners lack standing to file their Amended Complaint.

7. On August 14, 2020, the Court issued its order denying *Respondents' Second Motion to Dismiss* ("Order").

8. On August 17, 2020, Respondents filed their motion to certify the Order for interlocutory appeal.

9. On September 14, 2020, the trial court granted Respondents' motion to certify the Order for interlocutory appeal and noted the certification in the Chronological Case Summary.

### **REASONS FOR ACCEPTING JURISDICTION OVER INTERLOCUTORY APPEAL**

#### **I. Standards governing interlocutory appeals.**

10. Appellate Rule 14(B) provides for permissive appeals from interlocutory orders "if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal." Ind. App. R. 14(B).

11. The grounds for granting an interlocutory appeal Appellate Rule 14(B) include:

(i) The appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment.

(ii) The order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case.

(iii) The remedy by appeal is otherwise inadequate.

12. This Court routinely accepts jurisdiction over discretionary interlocutory appeals from the denial of motions to dismiss pursuant to Trial Rule 12(B)(6) related to threshold matters such as standing and jurisdiction. *See, e.g., Indiana Family & Soc. Servs.*

*Admin. v. Anderson by Everroad*, 2020 WL 5241236, at \*1 (Ind. Ct. App. Sept. 3, 2020); *Parsley v. MGA Family Grp., Inc.*, 103 N.E.3d 651, 655 (Ind. Ct. App. 2018), *reh'g denied* (July 13, 2018); *Munoz v. Woroszylo*, 29 N.E.3d 164 (Ind. Ct. App. 2015); *Vissing v. Clark County Bd. Of Aviation Com'rs*, 20 N.E.3d 166 (Ind. Ct. App. 2014); *In re Paternity of G.W.*, 983 N.E.2d 1193 (Ind. Ct. App. 2013); *North Gibson School Corp. v. Truelock*, 971 N.E.2d 707 (Ind. Ct. App. 2012); *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602 (Ind. 2007); *PricewaterhouseCoopers, LLP v. Massey*, 860 N.E.2d 1252 (Ind. Ct. App. 2007); *Community Hosp. v. Avant*, 790 N.E.2d 585 (Ind. Ct. App. 2003); *Group Dekko Services LLC v. Miller*, 717 N.E.2d 967 (Ind. Ct. App. 1999); *Weldy v. Kline*, 652 N.E.2d 107 (Ind. Ct. App. 1995).

13. This case raises a novel and unresolved question of standing which is ripe for guidance from the Indiana appellate courts at this stage of the litigation. Like the cases cited above, this Court should accept jurisdiction of this interlocutory appeal.

**II. The Respondents will suffer substantial expense, damage or injury if the Order is erroneous and the determination of the error is withheld until after judgment under Appellate Rule 14(B)(1)(c)(i).**

14. If the Order is erroneous, and this Court does not accept jurisdiction of this interlocutory appeal, Respondents will be forced, at considerable expense of time and resources to the City of Bloomington and its taxpayers, to answer and plead in response to the Amended Complaint, conduct potential lengthy discovery, and defend against Petitioners' claims at trial.

15. Additionally, if Respondents are required to wait until after a final judgment in the trial court to appeal the threshold standing issue, Respondent Cockerham may be erroneously removed from the Plan Commission until disposition of the appeal. This could reduce the Plan Commission from nine members to an even eight members, create the

potential for four-to-four votes, and further complicate the Plan Commission's ability to efficiently hear and rule upon residents' and businesses' petitions.

16. Such time-consuming and costly efforts could be avoided altogether if the interlocutory appeal of Respondents' Second Motion to Dismiss on the basis of standing is decided in Respondents' favor by this Court.

**III. Respondents' interlocutory appeal involves substantial questions of law the early determination of which will promote a more orderly disposition of the case under Appellate Rule 14(B)(1)(c)(ii).**

17. Pursuant to Appellate Rule 14(B)(1)(c)(ii), the Order presents substantial questions of law which have broad implications not just for the parties to this litigation, but for all citizens and municipalities in Indiana. Given the significance of the Order, which opens the door to retroactive challenges to independent municipal commission members and extensive litigation involving competing statutory interpretations and prospective appointments to municipal boards and commissions, the threshold issue of standing should be addressed now rather than after a trial on the merits and subsequent appeal.

18. The primary statute at issue in this case, Indiana Code Section 36-1-8-10, addresses two different types of appointments: The first type affirmatively requires party affiliation for appointment to a board; and the second type requires membership of a board not exceed a stated number of members from the same political party. This Court is only addressing the second type of appointment, made under Indiana Code, Section 36-7-4-207(a)(5), requiring the appointed membership of the Bloomington plan commission not to exceed three members from the same political party.<sup>1</sup>

19. Petitioners 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

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<sup>1</sup> Indiana Code, Section 36-7-4-207(a)(5) states: "Five (5) citizen members, of whom no more than three (3) may be of the same political party, appointed by the city executive."

does not have a county party chair and does not conduct primaries, to boards which require that the membership of a board not exceed a stated number of members from the same political party.

20. Respondents argue that Indiana Code, Section 36-1-8-10 only sets out the procedure to apply for determining the party affiliation, or the lack thereof, of an appointee under limited circumstances, and does not create a blanket party affiliation requirement.

21. Respondents argue Petitioners' interpretation of Section 10 is internally inconsistent and leads to irrational and disharmonizing results when read in conjunction with the plain language of statutes which limit the number of members of the same political party appointed to a board, but expressly do not condition appointment upon having a required party affiliation.

22. Petitioners' interpretation of Section 36-1-8-10 would add a party affiliation requirement to statutes such as Indiana Code, Section 36-7-4-207(a)(5) which currently has no such requirement, and is contrary to the plain language of those statutes. This is a type of statutory interpretation our Supreme Court has explicitly forbidden. *See ESPN, Inc. v. Univ. of Notre Dame Police Dep't*, 62 N.E.3d 1192, 1195 (Ind. 2016) (mandating that courts "avoid interpretations that depend on selective reading of individual words that lead to irrational and disharmonizing results.").

23. The subsection of the statute upon which Petitioners rely for their claim of standing, Indiana Code, Section 36-1-8-10(d), was only added in 2017, and has not yet been interpreted by the appellate courts as to how it should be read in conjunction with other statutes regarding appointments to various boards and commissions, such as Indiana Code, Section 36-7-4-207. As a result, there is no clear guidance for the trial court to follow in deciding this question of law.

24. The parties would benefit from interpretation from the Indiana appellate courts as to who has standing to bring this novel type of claim. These important legal questions are fully capable of being decided by the Indiana appellate courts as a matter of law on the existing record.

25. The early determination of this substantial legal question will promote a more orderly disposition of the case in that resolution of this unresolved question of law on interlocutory appeal will negate—or, at a minimum, significantly streamline—the disposition of claims on the merits.

### CONCLUSION

For the foregoing reasons, Appellants-Respondents move the Court to grant this Motion, accept jurisdiction of the interlocutory appeal, and reverse the trial court’s August 14, 2020 *Order on Respondents’ Second Motion to Dismiss*.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

The undersigned certifies that the foregoing was served upon the following parties via the Indiana E-Filing System on October 19, 2020:

Carl Lamb (carl@carllamblaw.com) and Matthew Fox (matt@carllamblaw.com), 1101 West 2nd Street, Bloomington, Indiana 47403; counsel of record for Petitioners Andrew Guenther and William Ellis.

/s/ Daniel A. Dixon  
Daniel A. Dixon, #30585-53



STATE OF INDIANA )  
 ) SS:  
COUNTY OF MONROE )

IN THE MONROE CIRCUIT COURT  
CAUSE NO. 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. )

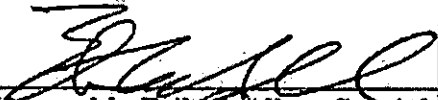
CITY OF BLOOMINGTON, INDIANA, )  
And )  
JOHN HAMILTON, in his official capacity )  
as Mayor for the City of Bloomington, Indiana, )  
And )  
CHRISTOPHER COCKERHAM, in his )  
capacity as contested member of the Bloomington )  
Plan Commission, )  
And )  
NICHOLAS KAPPAS, in his capacity as )  
contested former member of the Bloomington )  
Plan Commission, )  
 )  
Respondents. )

**ORDER ON RESPONDENTS' MOTION TO CERTIFY ORDER FOR  
INTERLOCUTORY APPEAL AND TO STAY PROCEEDINGS**

This matter came before the Court on the Respondents' Motion to certify this Court's August 14, 2020 Order on Respondents' Second Motion to Dismiss for interlocutory appeal and to stay proceedings pending certification, acceptance, and disposition of appeal, and the Court, having considered the same and been duly advised in the premises, and having taken the matter under advisement, now grants Respondents' motion.

WHEREFORE, Respondents Motion for Certification of Order for Interlocutory Appeal and to Stay Proceedings is GRANTED.

Date: Sept 14, 2020

  
The Honorable Erik C. Allen, Special Judge  
Monroe Circuit Court

*Distribution attached*

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STATE OF INDIANA )  
 ) SS:  
COUNTY OF MONROE )

IN THE MONROE CIRCUIT COURT 4  
CASE NO. 53C04-2006-MI-958

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,

vs.

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

NICK KAPPAS, in his capacity as contested former  
member of the Bloomington Plan Commission,  
Respondents.

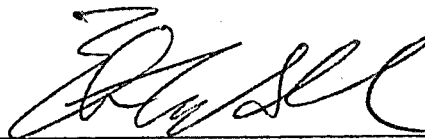
ORDER ON RESPONDENTS' SECOND MOTION TO DISMISS

This case came before the Court for a hearing on August 5, 2020, on the Respondents' Second Motion to Dismiss and the Petitioners appeared by counsel of record, Carl Lamb and Matthew Fox, and Respondents appeared by counsel of record, Larry Allen and Michael Rouker, and all counsel appeared by telephone. Petitioners participated in the telephonic hearing through a Zoom connection with their counsel's office. The Court having examined the pleadings and considering the arguments of counsel and being duly advised now finds and orders as follows:

1. Respondents' Second Motion to Dismiss pursuant to Trial Rule 12(B)(6) is hereby denied.

2. The prior order of the Court staying discovery is hereby vacated.

SO ORDERED this 14<sup>th</sup> day of August, 2020.



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Erik C. Allen, Special Judge  
Monroe Circuit Court 4

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