IN THE
COURT OF APPEALS OF INDIANA

CAUSE NO. 20A-MI-1900

THE CITY OF BLOOMINGTON, INDIANA, et al.,	)	Appeal from Monroe Circuit Court VIII
Appellants-Respondents,	)	Cause No. 53C08-2006-MI-000958
v.	)	
ANDREW GUENTHER, et al.,	)	
Appellees-Petitioners.	)	The Honorable Erik C. Allen, Special Judge

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BRIEF OF APPELLEES'

Carl Paul Lamb, 10286-53
Matthew Fox, 31713-49
CARL LAMB & ASSOCIATES, P.C
1101 West Second Street
Bloomington, Indiana 47403
P: (812) 332-1420
F: (812) 332-4415
E: carl@carllamblaw.com

Attorneys for the Appellees-Petitioners

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I. APPELLEES' STATEMENT OF THE ISSUE

The *Brief of the Appellants-Respondents* raised two issues on appeal. Appellees ("*Ellis and Guenther*") summarize these issues, into a single issue as follows:

I. Whether Ellis and Guenther have standing to bring an *Amended Complaint for Declaratory Judgment and Writ of Quo Warranto*.

II. APPELLEES' STATEMENT OF THE CASE

Pursuant to Rule 46(B)(1) of the Rules of Appellate Procedure, Appellees-Petitioners ("Ellis and Guenther") agree with Appellants-Respondents' ("Bloomington's") statements contained in the *Statement of The Case* portion of their *Brief of Appellants-Respondents.*

III. APPELLEES' STATEMENT OF FACTS

Pursuant to Rule 46(B)(1) of the Rules of Appellate Procedure, Ellis and Guenther generally agree with all, but the following statements contained on page eight (8) of the Appellants' *Statement of Facts* contained in their *Brief of the Appellants-Respondents* (also referred to herein as "*Appellant's Brief*"), specifically, the characterization that "[t]he definition of political affiliation for appointees remained unchanged from its codification in 1988 through the 2017 amendment…" (Appellant's Br. 8).

Prior to the 2017 amendments, I.C. 36-1-8-10(b)(3) permitted a person to unilaterally declare oneself affiliated with a political party without either voting in a primary election for the party with which the appointee claims affiliation or being certified as a member of that party by the party's county chair for the county in which the appointee resides. As such, Ellis and Guenther dispute the characterization asserted by Bloomington that the definition of political affiliation for appointees remained unchanged….through the 2017 amendment." (Appellant's Br. 8).

On that condition, Appellees would add the following additional facts:

Ellis and Guenther's *Amended Complaint* requested the trial court to issue:

> (1) "Declaratory Judgment finding that the *de facto appointment* of **NICHOLAS KAPPAS** to the Bloomington Plan Commission was void *ab initio.*

(2) "Declaratory Judgment finding that Mayor John Hamilton lost jurisdiction and, as such, authority to make any appointment to the Bloomington Plan Commission;

(3) "Declaratory Judgment 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; and

(4) "a Writ of Quo Warranto which vacates the de facto appointment of **CHRISTOPHER COCKERHAM,** which appointment was wrongly made by the Respondents; and

(5) "Order [for] **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." (Appellant's App. Vol. II, p. 10-11).

Pursuant to I.C. §34-14-1-2, Ellis and Guenther allege to have standing to bring a declaratory judgment action because their rights are derived from I.C. §36-1-8-10, and Bloomington Municipal Code 2.13.010. (Appellant's App. Vol II. p. 16).

At the time Kappas was appointed by Mayor Hamilton to serve on the City of Bloomington's Plan Commission, Kappas was already serving on the City of Bloomington's Environmental Commission, a position Kappas had held since on or about June 3, 2015. (Appellant's App. Vol. II, p. 24, 33). At the time of Kappas's appointment to the Plan Commission, Kappas had not (a) voted in a primary election, (b) claimed a party affiliation, (c) been certified as a member of a party which he claimed affiliation by the chairman of that party. (Appellant's App. 18). Hamilton failed to appoint a valid appointee to succeed Chris Smith before April 16, 2016, nor

did he appoint a valid appointee to succeed Kappas until April 16, 2020. (Appellant's App. 21).

Cockerham voted as a Democrat in the most recent primary election prior to his appointment, that being the primary election of 2019. (Appellant's App. Vol. II, p. 23). Ellis and Guenther allege that Mr. Cockerham's absentee Republican vote in 2020, did not establish Cockerham to be a Republican under I.C. § 36-1-8-10. (Appellant's App Vol. II, p. 23-24). Mr. Cockerham voted Democrat in the 2019 primary election. (Appellant's App. Vol. II, p. 23). At the time of Mr. Cockerham's appointment to the City of Bloomington Plan Commission, the June 2, 2020 primary election had not taken place. (Appellant's App. Vol. II, p. 23). At the time of Cockerham's appointment, the most recent primary election Mr. Cockerham had voted in was the primary of 2018, in which Cockerham voted Democrat. (Appellant's App. Vol. II, p. 23).

SUMMARY OF ARGUMENT

The Trial Court's August 14, 2020 *Order on Respondent's Second Motion to Dismiss* (also referred to as "Order Denying Motion to Dismiss") should be affirmed because Ellis and Guenther had standing to bring their *Amended Complaint* seeking a writ of *quo warranto* and an order for *declaratory judgment.* (Appellant's App. Vol. II p. 6, 10-35). Ellis and Guenther have an interest in bringing a *Declaratory Judgment* and *Quo Warranto* action that is different than that of the general public. *City of Gary v. Johnson,* 621 N.E. 2d 650, 1993, citing: *Hovanec v. Diaz,* 397 N.E. 2d 1249 (Ind. 1979)

The 2017 amendments to I.C. § 36-1-8-10 require an appointee to a plan commission to have political party affiliation. The appointment of Kappas to the Plan Commission should be declared void. Hamilton's appointment of Kappas was invalid because Kappas did not meet the requirements of the appointment. When appointed to the City of Bloomington's Plan Commission, Kappas was already a member of City of Bloomington's Environmental Commission and not affiliated with a political party.

Ellis had the statutory right to make the appointment of Guenther to the Plan Commission. Even if Mayor Hamilton's subsequent appointment of Cockerham to Bloomington's Plan Commission was made with rightful authority, the appointment should not be recognized, since Cockerham for purposes of the appointment was a

Democrat, and any placement of Cockerham on the City of Bloomington Plan Commission would have exceeded the limits provided in BMC Section 2.13.010.

Bloomington's argument that I.C. § 36-1-8-10 does not require party affiliation is untenable and contrary to the legislative intent behind I.C. § 36-1-8-10 because, hypothetically, if an unaffiliated (or "*independent*") person were to be an appointed member, and then that person's term expired, and the appointing authority were not to make the replacement appointment, then 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.

Bloomington's proposed application and arguments surrounding I.C. § 36-1-8-10, ignore the plain language and reasonable construction of I.C. § 36-1-8-10. To get the results that Bloomington wants this court to expand the pleadings, add language to the statute, or disregard what is contained in the statute to reach the result it wants.

Bloomington has waived its arguments surrounding the First Amendment issue. (Appellant's Br. 20-23). Even if this court rejects the waiver argument, several Indiana statutes already have party affiliation requirements. Numerous opportunities will still exist for persons not affiliated with a political party to participate in board and commission positions in city government, if this Court affirms the Trial Court's Order denying Bloomington's Motion to Dismiss. Only four (4) of the City of Bloomington's approximately forty (40) boards and commissions could be considered to have a

political party affiliation requirements, to wit, the Plan Commission (I.C. § 36-7-4-207); Board of Park Commissioners (I.C. § 36-10-4-3), Bloomington Urban Enterprise Association (I.C. § 5-28-15), and the Public Transportation Corporation (I.C.§ 36-9-4-15).

The First Amendment freedom of association protections would not be implicated by Ellis and Guenther's proposed interpretation of I.C. § 36-1-8-10. Ellis and Guenther's proposed interpretation and application will not inhibit or restrict nonparty candidates having reasonable access to unelected positions in city government. There is no realistic concern that that major parties will have a monopoly over city government positions like the one at issue here, if the Court affirms the Trial Court's Order.

The appointing authority, in this case a Democratic mayor, initiating a *mandamus* action in scenarios where appointment of a person without party affiliation to a board and commission is contemplated would defeat the intention of I.C. § 36-1-8-10, which was clearly to remove appointing authority, in this case to the mayor, when said authority fails to make an appointment is not made within ninety (90) days. The purpose of including a ninety (90) day deadline to make an appointment would be defeated if the appointing authority could simply bring a mandamus action as proposed by Bloomington, after the expiration of the ninety (90) day deadline. (Appellant's Br. 23, 25).

Ellis and Guenther both had standing to bring the *Amended Complaint.* As such, The Trial Court's Order Denying Motion to Dismiss should be affirmed.

ARGUMENT

A. Standard of Review

This Court's review of a trial court order dying a motion brought under Rule 12(B) is *de novo. Arflack v. Town of Chandler,* 27 N.E. 3d 297, 302 (Ind. Ct. App. 2015) *citing Bellows v. Bd. of Comm'rs of Cnty of Elkhart,* 926 N.E. 96, 110 (Ind. Ct. App. 2010). The Court is limited to an inquiry on whether the *Amended Complaint* has "stated some factual scenario in which a legally actionable injury has occurred." *Id* .

In performing this task, the Court looks only to the *Amended Complaint,* accepts as true the facts alleged in the *Amended Complaint,* considers the pleadings in the light most favorable to Ellis and Guenther, and draws every reasonable inference in favor of Ellis and Guenther (the non-moving parties). *Arflack v. Town of Chandler,* 27 N.E. 3d 297, 302 (Ind. Ct. App. 2015), *citing Trail v. Boys and Girls Clubs of NW Ind.,* 845 N.E. 2d 130, 134 (Ind. 2006).

In addition, the "factual allegations of the answer are taken as true, to the extent they have not been denied or do not conflict with the complaint." *Blue Rhino Global Sourcing, Inc. v. Well Traveled Imports, Inc.*, 888 F. Supp. 2d 718, 721 (M.D.N.C. 2012); *see also Gregory and Appel, Inc. v. Duck,* 459 N.E. 2d 46, 49-50 (Ind. Ct. App. 1984); *Ocasio v. Turner,* 19 F. Supp. 3d 841, 845 (N.D. Ind. 2014). As such, this appeal should be decided on pleadings alone.

Assertions of lack of standing are often resolved under Trial Rule 12(B)(6). *R.J.S. v. Stockton,* 886 N.E. 2d 611, 614 (Ind. Ct. App. 2008).

This Court must affirm the Trial Court's Order denying Bloomington's Motion to Dismiss if it satisfied that Ellis and Guenther had standing to bring their Amended Complaint for *quo warranto* and *Declaratory Judgment.*

A private citizen, like Ellis and Guenther, can bring a *quo warranto* as a private party, if they claim, "an interest in his own relation or a special interest beyond that of a taxpayer." *City of Gary v. Johnson,* 621 N.E. 2d 65,0 652 (Ind. Ct. App. 1993). As quoted in Bloomington's Appellant's Brief, "[a]lthough a private person may pursue a *quo warranto* action, he must demonstrate a personal interest distinct from that of the general public." *Hovanec v. Diaz,* 272 Ind. 342, 343, 397 N.E.2d 1249, 1250 (1979); (Appellant's Br. 12).

This court may affirm the trial court's Order on any independent basis. *Yoder Grain, Inc. v. Antalis,* 722 N.E.2d 840, 851 (Ind. Ct. App. 2000).

Ellis and Guenther have standing to seek declaratory relief under I.C. 34-14-1-2. Since Ellis and Guenther sought a claim for Declaratory Judgment, the standard of review for Declaratory Judgment Act must be considered. Under the Declaratory Judgment Act, the purpose of the statute "is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and

the statute is to be *liberally construed and administered.*" I.C. § 34-14-1-12 (*emphasis added*).

B. Ellis and Guenther had standing to bring their *Amended Complaint* seeking a writ of *quo warranto* and declaratory judgment.

The dispositive issue for this Court to decide is whether Ellis and Guenther had standing to file an action seeking declaratory judgment and a writ of *quo warranto*. Even if this Court agrees with Bloomington's contention that I.C. §36-1-8-10 does not implant a party affiliation requirement into I.C. § 36-7-4-207, the Trial Court's Order can nevertheless be affirmed. The relief sought by Ellis and Guenther in their *Amended Complaint* can be granted, at the very minimum, at least in part, despite how this Court interprets party affiliation requirements under I.C. § 36-1-8-10.

Ellis and Guenther's *Amended Complaint* demonstrates, on its face, sufficient alleged facts to establish standing for both Petitioners. (Appellant's App. Vol. II, p. 10-35, specifically the following paragraphs of the *Amended Complaint*: ¶¶ 1, 2 17, 18, 21, 28-30, 32-33, 35-39, 45, 47, 48, 51-60). Ellis and Guenther's interest in their claims, is clearly different than the general public and/or "taxpayer." *City of Gary v. Johnson,* 621 N.E. 2d 650, 652 (Ind. Ct. App. 1993); *Hovanc v. Diaz,* 272 Ind. 342, 397 N.E. 2d 1249, 125 (1979).

Bloomington cites *City of Gary*, in support of their assertion that Ellis and Guenther lack standing. *City of Gary v. Johnson*, 621 N.E. 2d 65,0 652 (Ind. Ct. App. 1993) (Appellant's Br. 12). Thomas Johnson brought a writ of *quo warranto* action as

a "private citizen and taxpayer" in an effort to remove a Councilman from office and void City resolutions voted upon by said Councilman. The court of appeals reversed, concluding that Johnson did not have standing, relying heavily upon *Hovanec v. Diaz*, 272 Ind. 342, 397 N.E. 2d 1249, 1250 (1979), which held that "an individual must demonstrate a personal interest distinct from that of the general public, which interest must be in right or title to the office." *Id.*

In *City of Gary*, Thomas Johnson did not claim any similar interest in a vacant Councilman position, in *City of Gary*, Mr. Johnson simply claimed a right to bring his request for a writ of *quo warranto*, solely upon his status of being a "taxpayer and property-owning resident of the City of Gary." *City of Gary* at 652.

Petitioner Guenther's status is well beyond that of Mr. Johnson as it relates to the alleged relevant facts before this Court and Mr. Guenther's request for a writ of *quo warranto* and declaratory judgment as the sufficiently pled in their *Amended Complaint. (*Appellant's App. Vol. II, p. 10-35).

In our case, unlike in *City of Gary*, Petitioner Guenther's personal interest is apparent since he alleges that he is the rightful appointee to the City of Bloomington Plan Commission, pursuant to Indiana Code, Section 36-1-8-10. (Appellant's App. Vol. II, p. 15-16).

Guenther asserts that his authority for the appointment to the vacancy rests in the fact that both appointments of Respondent Cockerham and Kappas were void.

(Appellant's App. Vol. II, p. 18, 24) No such claim was made by Mr. Johnson in *City of Gary*. *Id.*

To further support their claim Ellis and Guenther lack standing, Bloomington cites *Hovanec v. Diaz*, a case where the appellant, Judge John Hovanec appealed the trial court's decision in a Quo Warranto proceeding that declared the office of Lake State City Judge vacant. *Hovanec* at 1249.(Appellant's Br. 12, 28).

Appellee Jeffrey Diaz's criminal defense attorney in an unrelated habaes corpus hearing in Lake Superior Court discovered Judge Hovanec's change of residence and filed his own Quo Warranto action in Lake Circuit Court under Article VI § 6 of the Indiana Constitution. *Id.*

The court of appeals found that Jeffrey Diaz, lacked standing because Mr. Diaz only claimed an interest as a criminal defendant in the city court in question, and that he was a taxpayer, who could be found liable for "tortious acts of Hovanec as usurper of its city court." *Id* at 1250. Additionally, the court of appeals noted that Mr. Diaz lacked standing because "Judge Hovanec has acted as the *de facto* officer. 'All that is required to make officers *de facto* is that they are claiming the office and in possession of it, performing its duties and claiming under color of election.' *Rule, supra,* 207 Ind. At 552, 194 N.E. at 153." *Id.* Under no circumstances could Mr. Diaz show any interest in the office of Judge.

Unlike Mr. Diaz in *Hovanec*, here, Guenther has a legitimate and articulable basis for claiming an interest for a seat on the City of Bloomington Plan Commission. Ellis likewise has asserted facts giving rise to standing for a *quo warranto* request and, at the very minimum, his request for declaratory relief. Under no scenario could Defendant Diaz claim a right to the elected position of judge, and therefore his interest fell "short of that necessary to maintain a quo warranto proceeding." *Id* As such, the Court should not rely upon *Hovanec* as dispositive on the issue of standing to the facts before this Court.

Moving on, Bloomington cited *Ind. Civil Rights Comm'n v. Indianapolis Newspapers, Inc.* 716 N.E. 2d 943, 945 (Ind. 1999) in support of their argument alleging Petitioners do not have standing. (Appellant's Br. 12, 13). In *Ind. Civil Rights,* the Indiana Supreme Court found that a tenant Belzer who had been denied a residential tenancy based upon familial status discrimination had standing, not as a "subject" of familial discrimination, but, that his standing was based upon being an "aggrieved person under the Indiana Civil Rights Law." *Id* at 946.

The alleged facts of the *Amended Complaint* are sufficiently consistent with *Ind. Civil Rights Comm'n,* and do not support Respondents' request for a dismissal for lack of standing.

The Indiana Supreme Court found that I.C. § 22-9.5-6-1(c) allows an "aggrieved person," like Belzer to file a complaint with the Indiana Civil Rights

Commission. *Id.* The Indiana Supreme Court believed that Belzer had "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." The court cited *Pence v. State*, 652 N.E. 2d 486, 488 (Ind. 1995) for the idea that the party challenging the law must show "adequate injury or the immediate danger of sustaining some injury." *Id.*

Here, Ellis and Guenther are clearly in risk of suffering immediate danger of some injury because if the Court does not invalidate the appointment of Cockerham to the Plan Commission, either through Declaratory Judgment or Writ of *Quo Warranto*, then Guenther will lose the rightful entitlement to the disputed seat on the City of Bloomington Plan Commission, and Ellis' will not be able to exercise his legitimate appointment powers as chairman of the Monroe County Republican Party, and as conferred upon him by the legislature when the legislature added subpart (d) to the 2017 amendment of I.C. § 36-1-8-10. Both Petitioners have a sufficient stake in this controversy for the reasons alleged in the *Amended Complaint*. (Appellant's App. Vol. II, p. 10-35).

Ellis and Guenther have a "present and substantial interest in the relief which is sought." *Cook v. City of Evansville* (1978), 178 Ind. App. 20, 381 N.E. 2d 493, 494.

Bloomington cited *Pence v. State,* 652 N.E. 2d 486, 487 (Ind. 1995). (Appellant's Br. 12, 28). In *Pence*, the Indiana Supreme Court accepted a petition for emergency transfer of appellants Michael R. Pence and the Indiana Policy Review

Foundation, who were challenging the constitutionality of Public Law 4-1992, which amended sections of the Indiana Code to bring it into accord with the Americans with Disabilities Act and increased the amount the State was required to contribute to the General Assembly. The trial court had granted the appellee's motion for summary judgment. *Id.*

The court in *Pence*, was not deciding, as they are here, standing of parties to bring a Declaratory Judgment and *Quo Warranto* action in the context of analysis under Trial Rule 12(B)(6) motion to dismiss.

As the Indiana Supreme Court noted, "challenging the constitutional validity of a statute, casts a higher and more difficult burden upon the court and litigants. The merits of such constitutional claims are preceded in court by the threshold question of standing." *Id.* Bloomington did not make any constitutional claims at the Trial Court. The challenging party must be able to satisfy the court that they have a "substantive right to enforce the claim that is being made in the litigation." *Id.*

Dispositive to the issue of standing in *Pence* was that the appellants alleged an interest only as citizens, and in the case of appellant Pence, who claimed an additional interest to challenge the constitutionality of the Public Law, as a taxpayer. *Id.*

Unlike *Pence*, neither Ellis or Guenther are challenging the constitutionality of a statute, which carries a higher burden for the Courts and litigant. Additionally, here both Ellis and Guenther have alleged articulable facts asserting an interest to challenge

the seat vacancy that goes well beyond that of a taxpaying citizen as was the case for the appellants in *Pence*. As the Indiana Supreme Court explained in *Pence*, the status as solely a taxpayer or citizen, "rarely will be sufficient" for standing. *Id* at 488.

Petitioners Guenther and Ellis are "actual injured" parties, with articulable interests in the claims and relief sought in their *Amended Complaint* that are not "merely a general interest common to all members of the public" like was present in *Pence*, *City of Gary*, and *Hovanec*.

As explained in the dissent in *Pence*, the "openness of Indiana courts is a foundational policy objective expressly recognized in Article 1, Section 12 of the Indiana Constitution." *Id* at 489. Affirming the trial court's Order denying Bloomington's *Second Motion to Dismiss* will further this foundational policy because it will permit Ellis and Guenther to conduct discovery and allow them an opportunity to litigate their claims which they have an interest in well beyond that which was present in *Pence.* At the very least, the Guenther has standing to bring an action for *quo warranto* and declaratory judgment seeing on issues related to a seat on the City of Bloomington Plan Commission. *See Brenner v. Powers*, 584 N.E. 2d 569 (Ind. Ct App. 1992).

Accepting the alleged facts in their *Amended Complaint* as true, Guenther was the rightful appointee for the City of Bloomington Plan Commission seat vacancy, and Guenther as established by the allegations of the Amended Complaint, that he has a

right to the disputed seat on the City of Bloomington Plan Commission. (Appellant's App. Vol. II, p. 10-35). Additionally, under Indiana law, Ellis had the authority to appoint Guenther to the Plan Commission. As such, both Ellis and Guenther have a sufficient stake in the claims of this action whereby they have established standing, and therefore the Trial Court's order should be affirmed.

Ellis and Guenther have surpassed the threshold required to bring a complaint seeking declaratory relief and a writ of quo warranto, as facts have been alleged showing Ellis and Guenther have a stake in the controversy that is well beyond that of a normal taxpayer. *Hovanec*, 272 Ind. 342, 397 N.E. 2d at 1250 (1979), (Appellant's App. Vol. 2, p. 10-35). After the 2017 amendments to Indiana Code Section 36-1-8-10, party affiliation is required. If this Court accepts the statutory interpretation proposed by Bloomington, the purpose of the 2017 changes to Indiana Code Section 36-1-8-10 will be eroded.

Ellis and Guenther's right to seek declaratory relief is permitted under I.C. § 34-14-1-2, which states:

> "Any person interested under a deed, will, written contract, or other writings constituting a contract, or 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." I.C. § 34-14-1-2 (1988).

Ellis and Guenther have standing to bring a declaratory action because their legal rights are derived from I.C. § 36-1-8-10, and Bloomington Municipal Ordinance

Code ("BMC") 2.13.010. The Trial Court's Order denying Bloomington's Motion to Dismiss should be affirmed since Ellis and Guenther have alleged sufficient facts in their Amended Complaint, asserting a right to seek declaratory relief under I.C. § 34-14-1-2. (Appellant's App. Vol. II, p. 16). Ellis has a right to make appointments under I.C. § 36-1-8-10, as the Republican Party Chair, and Guenther was rightfully appointed to the Plan Commission which is derived from both Indiana statute and local ordinance.

Conversely, Kappas did not have recognized political party affiliation and therefore his appointment to the City of Bloomington Plan Commission was void. I.C. § 36-1-8-10 has specific party affiliation requirements for appointments to a board like the City of Bloomington Plan Commission that in this case were not complied with. To explain, pursuant to the relevant portions of I.C. § 36-1-8-10:

> "(a) As used in this section, "board" means an administration, an agency, an authority, a board, a bureau, ***a commission***, a committee, a council, a department, a division, an institution, an office, a service, or another 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, one (1) 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." (***emphasis added***)

Here, at the time that Kappas was appointed, party affiliation could not be established by Kappas' most recent primary election in which he voted, nor a claim to a party affiliation, nor a certification of membership by a county party chair, as required by the statute, therefore Kappas' appointment was void. (Appellant's App. 18).

Next, Appellees' agree with Appellants that this Court is required to give words contained in a statute their plain meaning, and to consider the structure of the statute as a whole. (Appellant's Br. 13). However, Ellis and Guenther's interpretation of the plain reading and meaning of the statute results in a different outcome, to wit, that after the 2017 amendments to I.C. 36-1-8-10, party affiliation is required to be appointed to the City of Bloomington Plan Commission. (Appellant's App. Vol. II, p. 19-20).

The clear and mandatory language of I.C. 36-1-8-10 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 (2012);*Robinson v. Monroe Cnty.*, 663 N.E. 2d 196 (1996).

Prior to Kappas holding the position on the Plan Commission, it was held by Republican Chris Smith. As such, it follows that Ellis, the Republican Party Chair,

would have an articulable basis to assert the right to appoint Guenther to the Plan Commission based upon the 2017 amendments to I.C. § 36-1-8-10. At the time Ellis appointed Guenther to the Plan Commission, the amendments to I.C. 36-1-8-10 had already been established.

A declaration that Kappas' appointment is void, would expedite a decision on who had the authority to make the appointment for the vacancy. Bloomington has failed to prove that the trial court could not issue declaratory judgment and that Ellis and Guenther had standing to request a declaratory judgment as prayed for in their *Amended Complaint.* (Appellant's App. Vol. II, p. 10-11.)

When ruling upon a Rule 12(B)(6) Motion to Dismiss, the Court is required to look at the Amended Complaint "in the light most favorable to the [Petitioner], with every inference drawn it [their] favor." *King v. S.B.*, 837 N.E. 2d 965, 966 (Ind. 2005). As such, it follows that the Court should make the inference that Kappas' appointment was not valid, and therefore both Ellis and Guenther have standing.

Next, even if Kappas was a valid appointment, Cockerham was not a statutorily permissible choice for appointee to the City of Bloomington Plan Commission. Cockerham's appointment should be declared void. Again, pursuant to I.C. § 36-1-8-10, in relevant portion reads:

> "(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, one (1) 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.

(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 I.C. 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." I.C. §36-1-8-10

In their Appellant's Brief, Bloomington asserts that this Court should consider I.C. § 36-8-3.5-6 as a basis to reject Ellis and Guenther's proposed interpretation of I.C. § 36-1-8-10 and I.C. § 36-7-4-207(a)(5) (Appellant's Br. 16-17). The composition of the police merit board, and the context and language of the I.C. § 36-8-3.5-6, significantly differs from language of I.C. § 36-7-4-207(a)(5), and therefore should not be considered as a basis to reverse the Trial Court's decision.

To explain, I.C. § 36-8-3.5-6 mandates that four (4) of the five (5) persons on a merit commission "must be of different political parties." Likewise, I.C. § 36-7-4-207(a)(5), as a practical matter, mandates political affiliation, just that no more than three (3) of the citizen members can be of the same political party, who presumptively, would mean they have to be affiliated with a political party, especially in light of the

2017 amendments to I.C. § 36-1-8-10. The use of the permissive "may" in the context of I.C. § 36-7-4-207(a)(5) does not require this Court to agree with Bloomington's assertion that the legislature intended "not to mandate political affiliation for all members." (Appellant's Br. 17). The fact that I.C. § 36-7-4-207(a)(5) uses the word "may" versus "must" is not dispositive that the legislature did not intend to require party affiliation requirement.

The choice of phrasing by the General Assembly in drafting I.C. § 36-8-3.5-6 was likely more a function of the fact that I.C. §36-8-3.5-6 governs a police merit board where there are just two (2) prospective appointees whose political party affiliations are at issue, as opposed to I.C. § 36-7-4-207(a)(5) where there are five (5) appointed positions at issue. If the General Assembly would have used the approach for I.C. § 36-7-4-207(a)(5), when drafting I.C. § 36-8-3.5-6 it would lead to an unnatural construction that would be unclear. Reading the Police Merit Board statute in conjunction with the statute governing Plan Commission is not necessary because of the significant differences in the construction of the two entities and the statute's governing the appointments of the two distinct entities.

Bloomington's comparison of the two statutes fails, because there lacks a reasonable parallel between the Police Merit Statute and the statute for Plan Commission. If the General Assembly would have used the statutory construction

approach of I.C. § 36-8-3.5-6 when drafting I.C. § 36-7-4-207(a)(5), then I.C. § 36-7-4-207(a)(5) would be unintelligible.

Finally, I.C. § 36-7-4-207(a)(5) was drafted prior to the 2017 amendments of I.C. § 36-1-8-10, and the legislative intent to require political party affiliation was clear after the 2017 amendments.

Next, upon information and belief, and likely confirmed upon completion of discovery in the trial court cause, Cockerham voted as a Democrat in the most recent primary prior to being appointed, that being the primary of 2019. (Appellant's App, Vol. II, p. 23). Cockerham's vote in the 2020 primary as a Republican, was not an official vote until after his appointment, therefore, the Court must look to Cockerham's vote in the primary election for 2019, at which time he voted Democrat. (Appellant's App, Vol. II, p. 23).

Upon information and belief, no certification as described under I.C. § 36-1-8-10 (b)-(c), has been filed with the Monroe County Clerk's office. (Appellant's App, Vol. II, p. 23).

For these reasons, Ellis and Guenther have established the standing required for the Trial Court to issue a declaratory judgment finding that the appointment of Cockerham to be void, even if the Court finds no issue with the disputed appointment of Kappas. Ellis' appointment of Guenther was after the 2017 amendments to I.C. § 36-1-8-10 took effect. (Appellant's App, Vol. II, p. 25). At the very minimum, Ellis

and Guenther have articulated alleged facts that support the request for Declaratory Relief in their *Amended Complaint*. Therefore, the Trial Court's Order should be affirmed.

C. At the trial court Bloomington did not make the argument that Ellis and Guenther's interpretation of Indiana Code Section 36-1-8-10 will open additional First Amendment litigation, and therefore Bloomington has waived that argument on appeal.

The general rule in Indiana is that matters not raised before the trial court may not be raised before the appellate court. *Tesfamariam v. Woldenhaimanot,* 956 N.E. 2d 118, 122 (Ind. Ct. App. 2011) (citing *M.S. v. C.S.*, 938 N.E. 2d 278, 285 (Ind. Ct. App. 2010). In their Appellant's Brief, Bloomington acknowledged that the First Amendment matter "was not directly at issue on this interlocutory appeal…"(Appellant's Br. 20).

This is the first time that Bloomington has raised these issues, and they have, in fact, waived the argument. *See Plank v. Cnty. Hosp. of Ind., Inc;,* 981 N.E. 2d 49, 53 (Ind. 2013) (quoting *Freytag v. Comm'r of Internal Revenue,* 501 U.S. 868, 111 S. Ct. 2631, 115 L.E. 2d 764 (1991)) ("Declining to review an issue not properly preserved for review is essentially a 'cardinal principle of sound judicial administration."). The Trial Court did consider the First Amendment issue, and therefore, Bloomington has waived the opportunity to make the argument on appeal.

D. Even if this Court finds that Bloomington has not waived its First Amendment arguments, Bloomington's assertion that political party affiliation requirements under Indiana Code Section 36-1-8-10 will to a flood of litigation surrounding the freedom of association guaranteed by the First Amendment is not likely.

Affirming the Trial Court's Order denying Bloomington's Motion to dismiss will not lead to unnecessary First Amendment litigation. The right of freedom of association under the First Amendment, is not absolute. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). Ellis and Guenther's proposed interpretation of I.C. 36-1-8-10 will not unduly burden persons who want to participate in city government that do not have political party affiliation.

Bloomington cited *Anderson v. Celebrezze,* 460 U.S. 780 (1983), in their Brief (Appellant's Br. 21,22), to support their contention that Ellis and Guenther's interpretation of I.C. § 36-1-8-10 would impinge the freedom of association protections guaranteed by the First Amendment of the United State Constitution.

Anderson involved a dispute surrounding the state of Ohio's filing deadline for independent candidates for the office of the President of the United States. *Id* at 782-83.

The Supreme Court appraised

> " …the 'extent and nature' of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline." *Id* at 806.

In *Anderson,* Justice Stevens writing for the majority opinion of the Supreme Court held that Ohio's March filing deadline for independent candidates running for President, was not justified by the Ohio's "asserted interest in protecting political stability."

Although important for citizens for the City of Bloomington, whatever burden that I.C. § 36-1-8-10 places on independent candidates, pales in comparison to the election of the President of the United States, "an election of nationwide importance." Further, I.C. § 36-1-8-10 protects against fractioning of major political parties, an interest that in the context of an appointment to a Plan Commission, is more probative than in the context of a nationwide election for the President of the United States. Citizen involvement and participation in matters related to the City of Bloomington Plan Commission is not as robust as a nationwide election, especially a presidential election.

I.C. § 36-1-8-10 does not implicate any national interest, nor does it monopolize election campaigns, such as was the case in *Anderson. Anderson*, 460 US at 794-95.

Any political party affiliation requirements of I.C. § 36-1-8-10 do not unduly diminish the First Amendment's value of promoting debate on public issues that is "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

Any burden imposed by I.C. § 36-1-8-10 on individual citizens who have not affiliated with a political party is minimal, and Bloomington has failed to show that the First Amendment would be implicated and impaired if this Court interprets I.C. § 36-1-8-10 as proposed by Ellis and Guenther. I.C. § 36-1-8-10 does not "unnecessarily burden the availability of political opportunity." *Clements v. Fashing*, 457 U.S. 957, 964 (1982) [internal quotations omitted].

In fact, only four (4) boards and commissions in the City of Bloomington have partisan balancing requirements that would be potentially affected by the Ellis and Guenther's proposed application of I.C. § 36-1-8-10, including, Plan Commission (I.C. § 36-7-4-207); Board of Park Commissioners (I.C. § 36-10-4-3), Bloomington Urban Enterprise Association (I.C. § 5-28-15), and the Public Transportation Corporation (I.C.§ 36-9-4-15).

Bloomington acknowledged that there are already statutes in Indiana that mandate political party affiliation, i.e., I.C. 36-8-3.5-6, the statute governing Merit Commissions for Police and Fire. (Appellant's Br. 16-17). The concern that requiring party affiliation requirements will lead to unnecessary First Amendment litigation is therefore misplaced. A political party affiliation requirement imposed by I.C. § 36-1-8-10, will not lead to "irrational and disharmonizing results" as several statutes already have political party affiliation requirements.

Upholding the Trial Court's Order Denying Bloomington's Motion to Dismiss will not require persons without political party affiliation to surrender their first amendment rights to participate in city government. Although not a government benefit, the opportunity to serve on a city Plan Commission does confer a benefit to the person serving on said commission.

Further, statutes that condition the availability of a government benefit upon political party affiliation have survived assertions that said statutes attacks undermine the First Amendment freedoms. *Libertarian Party of Indiana et al., v. Packard,* 741 F. 2nd 981, 990-91 (7th Cir. 1984). In *Packard,* as it relates to the First Amendment Claim, the 7th Circuit Court of Appeals held, that "…Indiana's Personalized License Plate Act does not condition the availability of a government benefit on the surrender of first amendment rights." *Id* at 991. Requiring part affiliation for the Plan Commission does not unreasonably compel individuals with no party affiliation, to support a party with which they disagree.

Independent are not affiliated with any political party. I. C. § 3-5-2-26.6, Additionally, independent candidates have to comply with separate processes than their Republican, Democrat, and Libertarian counterparts. *See* I.C. § 3-8-6-4.

In sum, the trial court's order can be affirmed without implicating tax payer's first amendment rights. *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 659 (1976) (per curiam)

Therefore, Bloomington's assertion that if the Court affirms the Trial Court's Order, then citizens who are not affiliated with a political party would be effectively banned from serving on Boards and Commissions is overstated. Person who are unaffiliated will have more than just a "handful of small roles in governance." (Appellants' Br. 22).

As such, this Court should reject Bloomington's argument that the First Amendment will be implicated by affirming the Trial Court's Order.

E. Bloomington's proposed remedy of a mandamus action would undermine the legislative intent behind the 2017 amendment to Indiana Code, Section 36-10-8-10, which shifted the appointing authority to the county chairman of the political member whose term has expired when the original appointing authority failed to make an appointment within ninety (90) days.

Bloomington cites to no case law that supports their proposed procedure (*mandamus action*) to follow when there is a vacant seat of a member without any alleged party affiliation under the addition of subpart (d) in 2017 to Indiana Code, Section 36-10-8-10. (Appellant's Br. 1-30).

Additionally, mandamus actions are not favored when there is another adequate remedy at law, in this case a *quo warranto* action. *State ex rel. Brown v. Circuit Court of Marion County*, 430 N.E. 2d 786, 787 (Ind. 1982); *State ex rel. Grile v. Hughes*, (1967) 249 Ind. 173, 231 N.E. 2d 138.

Following the procedure for what existed prior to the 2017 amendment of I.C. § 36-10-8-10, would be a reasonable process to follow, but for the 2017 amendment,

which clearly divested the original appointing authority of the power to make the appointment of a vacancy when the appointing authority did not make the appointment, as is the case here, within "90 days after the expiration date of the member's term."

Following Bloomington' proposed course of action under the alleged facts before the Court would result in inconsistent results with the clear language of the 2017 addition of subpart (d) to I.C. § 36-10-8-10.

CONCLUSION

Ellis and Guenther sufficiently pled facts in their *Amended Complaint*, establishing as a matter of law, that they have standing to seek both declaratory relief and a writ of *quo warranto.* As such, the trial court's order denying the Respondent's Trial Rule 12(B)(6) Motion to Dismiss should be affirmed.

Respectfully submitted,

/s/ Carl Paul Lamb

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CARL PAUL LAMB
Attorney No. 10286-53
Attorney for Appellees-Petitioners

/s/ Matthew Fox

_____

MATTHEW FOX
Attorney No. 31713-49
Attorney for Appellees-Petitioners

WORD COUNT CERTIFICATE

Pursuant to Appellate Rule 44(E), I certify that this *Brief of Appellees* contains fewer than 14,000 words, excluding the items listed in Appellate Rule 44(C) as counted by Microsoft Word, which was used to prepare the Brief.

/s/ Carl Paul Lamb

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Carl Paul Lamb

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been electronically filed using the Indiana E-Filing System (IEFS) and that the foregoing document was served upon the following person(s) using the service contact entered in the IEFS on February 5, 2021.

Attorneys for the Respondents-Appellants:

Daniel Dixon, daniel.dixon@bloomington.in.gov

Michael Rouker, Michael.rouker@bloomington.in.gov

Larry Allen, larry.allen@bloomington.in.gov

/s/ Carl Paul Lamb

_____

Carl Paul Lamb, 10286-53
CARL LAMB & ASSOCIATES, P.C.
1101 West Second Street
Bloomington, Indiana 47403
Tel: (812) 332-1420
Fax: (812) 332-4415
carl@carllamblaw.com

CARL LAMB & ASSOCIATES, PC
Attorneys at Law
1101 West 2nd Street
Bloomington, Indiana 47403
Telephone: (812) 332-1420
Facsimile: (812) 332-4415
E-Mail:carl@carllamblaw.com