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IN THE
INDIANA COURT OF APPEALS
CAUSE NO. 20A-MI-1900

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

REPLY BRIEF OF APPELLANTS-RESPONDENTS

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SUMMARY OF ARGUMENT

I. Petitioners' mere claim of a legal duty to make the appointment to the Plan Commission is insufficient to survive a Trial Rule 12(B)(6) motion to dismiss. Petitioners fail to develop an argument in support of their desired interpretation of Indiana Code Section 36-1-8-10 and fail to demonstrate a legal interest in the contested Plan Commission seat in their own relation, or a special interest beyond that of a taxpayer. Petitioners therefore lack standing to file their Amended Complaint.

II. Petitioners misunderstand the City of Bloomington's argument with regard to mandamus. Mandamus actions are the appropriate remedy to file against an appointing authority to compel the filling of a vacant board or commission seat formerly held by an individual lacking a party affiliation.

ARGUMENT

I. Indiana Code Section 36-1-8-10 does not implant a party affiliation requirement into the Plan Commission statute, and Petitioners therefore lack standing to pursue the legal claims in their Amended Complaint.

The primary issue for the Court to decide in this interlocutory appeal is whether the 2017 amendment to Indiana Code Section 36-1-8-10 implants a political party affiliation requirement for members into the statute governing the City of Bloomington Plan Commission. If, as the City maintains, the City of Bloomington Plan Commission does not have a political party affiliation requirement for members, then Petitioners lack standing to bring the claims in their Amended Complaint.[1]

A. Petitioners mistakenly presume their legal conclusion of William Ellis being the appropriate person to make the appointment to the Plan Commission is a fact deemed admitted pursuant to Trial Rule 12(B)(6).

Merely claiming that Ellis was legally entitled to appoint Guenther to the Plan Commission seat is insufficient to survive a motion to dismiss under Indiana Trial Rule 12(B)(6). Petitioners' claim that Ellis was legally entitled to appoint

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[1] To the extent Petitioners have presented facts and arguments to this Court which are immaterial to the limited threshold question of standing—such as whether Christopher Cockerham was a Democrat or a Republican at the time of his appointment—they must be disregarded. See Appellee's Brief at Page 9 (the final paragraph in its entirety); Page 10 (within the final paragraph, the entire sentence beginning with "Even if Mayor Hamilton's subsequent appointment . . ."); Page 26 (the final paragraph in its entirety); and Page 29 (the 2nd and 3rd full paragraphs in their entirety); *See also*, *Stytle v. Angola Die Casting Co.*, 783 N.E.2d 316, 320 (Ind. Ct. App. 2003) (citing *GKN Co. v. Magness*, 744 N.E.2d 397, 401 (Ind. 2001)) (noting that in civil cases where the motion to dismiss presented pure questions of law, no fact finding was required).

Guenther is not a fact that is deemed admitted under the rule, as Petitioners appear to believe; it is a legal conclusion that is properly tested through a Trial Rule 12(B)(6) motion to dismiss. *See* LEGAL CONCLUSION, Black's Law Dictionary (11th ed. 2019) ("A statement that expresses a legal duty or result but omits the facts creating or supporting the duty or result."). Although facts are deemed admitted and viewed in the light most favorable to the non-movant, legal conclusions are reviewed *de novo*. *Gordon v. Purdue Univ.*, 862 N.E.2d 1244, 1250–51 (Ind. Ct. App. 2007); *Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). The City of Bloomington's motion to dismiss under Rule 12(B)(6) tests "the law of the claim". *Anderson v. Anderson*, 399 N.E.2d 391, 406 (Ind. Ct. App. 1979). Petitioners must do more than make a mere claim, they 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). They have failed to make such a demonstration.

Petitioners' claimed legal duty to fill the appointment to the vacant Plan Commission seat, which serves as the sole foundation for their standing to bring their claims in *quo warranto* and for declaratory judgment, relies on the presumption that their interpretation of Indiana Code 36-1-8-10 is correct. As the City has demonstrated in its Appellants' Brief, Petitioners' interpretation of Indiana Code Section 36-1-8-10 is incorrect. Petitioners' interpretation of Indiana Code Section 36-1-8-10 conflicts with the plain language of Indiana Code Section 36-7-4-207, and all other similar statutes, which do not expressly condition appointment

upon a required party affiliation. Interpreting the statute in the manner Petitioners argue would lead to irrational and disharmonizing results. Therefore, the facts pleaded in the Amended Complaint fail to demonstrate Petitioners have suffered any harm or have any legal claim distinct from the general public.

Furthermore, Indiana law prohibits Petitioners from seeking both declaratory judgment and an information in *quo warranto* in the same proceeding. The declaratory judgment statute "was intended to furnish an adequate and complete remedy *where none before had existed*." *Ember v. Ember*, 720 N.E.2d 436, 439 (Ind. Ct. App. 1999) (emphasis added). The long-established adequate and complete remedy for determining right to an office is an information in the nature of *quo warranto*. *See Madden v. Houck*, 403 N.E.2d 1133, 1135–36 (Ind. Ct. App. 1980) (holding the trial court erred in not granting defendant's motion to dismiss plaintiffs complaint for declaratory judgment alleging defendant was not qualified to hold office because declaratory judgment would not necessarily fully resolve the question).

B. Petitioners fail to develop an argument in support of their proposed interpretation of Indiana Code Section 36-1-8-10.

Petitioners waived their claims because they failed to present a cogent argument on appeal. Ellis and Guenther assume without explanation, citation to legislative materials, or reference to principles of statutory construction that the legislative intent of the 2017 amendment to Indiana Code Section 36-1-8-10 was to mandate a party affiliation for members of boards such as the Plan Commission. *See* Appellees' Br. at 23, 25, 29. Petitioners merely cite to their Amended Complaint,

but do not support their claims in their Brief of Appellees. Indiana Appellate Rule 46(A)(8)(a) requires the argument section of a brief to "contain the contentions of the appellant on the issues presented, supported by cogent reasoning. Each contention must be supported by citations to the authorities, statutes, and the Appendix or parts of the Record on Appeal relied on . . . ." The Court cannot consider an assertion on appeal when it is not supported by citation to authority as required by the rules. *Thacker v. Wentzel*, 797 N.E.2d 342, 345 (Ind. Ct. App. 2003). This Court has noted that it "will not search the record to find a basis for a party's argument nor will [it] search the authorities cited by a party in order to find legal support for its position" *Thomas v. State*, 965 N.E.2d 70, 77 (Ind. Ct. App. 2012), *trans. denied*, (quoting *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. Ap. 1997)). While Petitioners argue against Bloomington's interpretation of Indiana Code Section 36-1-8-10, they fail to explain why their proposed interpretation should be adopted.

Furthermore, in making their unsupported argument that the 2017 amendment to Indiana Code Section 36-1-8-10 implanted a party affiliation requirement into the Plan Commission statute, Petitioners concede that the Plan Commission statute did not mandate a party affiliation until 2017. If the intention of the Indiana General Assembly in 2017 had been to materially change the way 17 boards and commissions functioned and invalidate appointments of individuals without a party affiliation, one would expect to find a citation or reference to

something evincing intent to do so. Petitioners have not produced evidence of any such intent.[2]

Petitioners' failure to marshal support for their alternative interpretation of Indiana Code Section 36-1-8-10 bolsters the City of Bloomington's argument that the statute only sets out the standards to apply to determine the party affiliation, or the lack thereof, of an appointee to a board or commission. William Ellis did not have lawful authority to appoint Andrew Guenther to the City of Bloomington Plan Commission seat held by Nicholas Kappas, a political independent with no party affiliation, and Guenther's appointment is therefore a legal nullity. Neither Ellis nor Guenther has an interest in the vacant Plan Commission seat in their own relation or a special interest beyond that of a taxpayer. Neither has suffered any actual injury and neither has any substantive right to enforce the claims that are being made in the Amended Complaint.

C. The City of Bloomington argued that principles of statutory interpretation support its argument as to the correct application Indiana Code Section 36-1-8-10, and is not seeking a determination as to whether that statute violates the Freedom of Association clause.

The City of Bloomington raised the potential implication of the First Amendment Freedom of Association clause in the context of its arguments related to statutory interpretation. This Court should interpret Indiana Code Section 36-1-8-10 with the presumption that the Indiana General Assembly intended to comply

[2] Petitioners also failed to offer an explanation as to why Ellis sat on his claimed duty to challenge the validity of Kappas's appointment from the enactment of the July 1, 2017 amendment of I.C. 36-1-8-10 through April 16, 2020.

with the Indiana and Federal Constitutions when drafting it. *Boehm v. Town of St. John*, 675 N.E.2d 318, 321 (Ind. 1996); *Price v. State*, 622 N.E.2d 954, 963 (Ind. 1993); *Smith v. Indianapolis St. Ry. Co.*, 158 Ind. 425, 427–28, 63 N.E. 849, 850 (Ind. 1902). The City of Bloomington did not ask this Court to determine whether Indiana Code Section 36-1-8-10 violates the First Amendment to the United States Constitution. The City of Bloomington argued that the General Assembly could not have intended the onerous and potentially unconstitutional consequences that would result from the Petitioners' interpretation.

Petitioners' interpretation of the two statutes at the heart of this case would bar individuals from a large number of statutory boards and commissions for no reason other than their lack of party affiliation. The constitutional implications of this approach are a cause for serious concern. Conversely, under the City of Bloomington's interpretation, these boards and commissions would remain open to participation from individuals exercising their right to not have a party affiliation. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

II. Petitioners misinterpretation of the City of Bloomington's argument on mandamus fails to comprehend the remedy that has always been present outside of *quo warranto*, where courts could mandate an appointment for a vacancy.

The legislative history of Indiana Code Section 36-1-8-10 provides historical guidance that the appointing authority retains its legal duty to make appointments to board and commission seats held by individuals without a party affiliation, and can be required, through a mandamus action, to make said appointments. Petitioners have misinterpreted the City of Bloomington's argument with regard to

how a mandamus action would be filed to cause an appointment to a seat formerly held by an individual without a party affiliation.

First, in Petitioners' summary of the argument, they appear to think that the appointing authority would initiate an action for mandamus. Appellees' Brief at 12 ("The appointing authority, in this case a Democratic mayor, initiating a *mandamus* action in scenarios where appointment of a person without party affiliation . . . ."). This argument is not raised or developed in the actual body of the Appellees' Brief. However, for the avoidance of doubt, the City of Bloomington's argument is that the appointing authority would be the responding party to a mandamus action, not the initiating party.

Second, the Petitioners assert that "mandamus actions are not favored when there is another adequate remedy at law, in this case a *quo warranto* action." Appellees' Brief at 35. This assertion makes no sense. In the context of the City of Bloomington's argument, mandamus would be used to compel the appointing authority to make an appointment to a vacant board or commission seat. To elucidate this point, the City of Bloomington cited to the case of *State ex rel. Rogers v. Davis*, wherein a circuit court judge was mandated to appoint a Democratic Party member to the vacant seat on a local voter registration board. 230 Ind. 479, 485, 104 N.E.2d 382, 384 (Ind. 1952); *See* Appellant's Brief at 25–26. An information in *quo warranto* is the proper remedy to determine the right of an individual occupying an office. *Hovanec*, 397 N.E.2d at 1250. The *quo warranto* proceeding deals mainly with the right of the incumbent officer and does not determine the rights of any

adverse claimant. *Reynolds v. State ex rel. Titus* 61 Ind. 392 (Ind. 1878). If a mandamus action is being filed to compel an appointing authority to fill a vacant seat, then there is not an incumbent officer occupying that seat to challenge through an information in *quo warranto*. The Petitioners' arguments with regard to mandamus are misplaced and should be disregarded by the Court.

CONCLUSION

Indiana Code Section 36-1-8-10 does not implant a political party affiliation requirement into the Plan Commission statute, Indiana Code Section 36-7-4-207(a)(5). This Court must therefore reverse the trial court, hold that Petitioners lack standing to file their Amended Complaint, and order the underlying cause of action dismissed.

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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 12, 2021.

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