

## MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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## IN THE COURT OF APPEALS OF INDIANA

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The City of Bloomington, et al.,  
*Appellants-Respondents,*

v.

Andrew Guenther, et al.,  
*Appellees-Petitioners.*

April 6, 2021

Court of Appeals Case No.  
20A-MI-1900

Appeal from the Monroe Circuit  
Court

The Honorable Kara E. Krothe,  
Judge

The Honorable Erik C. Allen,  
Special Judge

Trial Court Cause No.  
53C08-2006-MI-958

**Altice, Judge.**

## **Case Summary**

[1] Purportedly pursuant to Ind. Code § 36-1-8-10(d), William Ellis, in his capacity as the Chair of the Republican Party for Monroe County, appointed Andrew Guenther to fill a vacant seat on the City of Bloomington Plan Commission (Plan Commission). Subsequently, Bloomington Mayor John Hamilton (Mayor Hamilton) appointed Christopher Cockerham to fill the same seat. Ellis and Guenther (collectively, Petitioners) then filed an Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto against the City of Bloomington (the City), Mayor Hamilton, Cockerham, and Nicholas Kappas (collectively, Respondents). Petitioners sought a declaratory judgment as to whether Mayor Hamilton's appointment of Cockerham to the Plan Commission was statutorily permissible and requested an order recognizing Ellis's authority to appoint Guenther and installing Guenther as a member of the Plan Commission. Respondents filed a motion to dismiss pursuant to Ind. Trial Rule 12(B)(6), claiming Petitioners lacked standing, which the trial court denied. After the trial court certified its ruling, this court accepted jurisdiction over this interlocutory appeal. Respondents present two issues for our review, one of which we find dispositive: Do Petitioners have standing to bring a declaratory judgment action and to seek a Writ of Quo Warranto?

[2] We affirm.

## Facts & Procedural History

[3] The make-up of the Plan Commission is governed by Ind. Code § 36-7-4-207 and Bloomington Municipal Code § 2.13.000 *et seq.* The Plan Commission consists of twelve members, five of whom are appointed by the Mayor. I.C. § 36-7-4-207(a)(5); B.M.C. § 2.13.010. Of the five mayoral appointments, “no more than three (3) may be of the same political party.” I.C. § 36-7-4-207(a)(5); B.M.C. § 2.13.010. Since 1988, Ind. Code § 36-1-8-10(b) has defined what constitutes a political affiliation for appointees to all commissions of a political subdivision in Indiana:

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

(1) The most recent primary election in 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.

[4] On January 2, 2012, then Bloomington Mayor Mark Kruzan appointed Christopher Smith, a Republican, to the Plan Commission for a term that ended on January 5, 2016. When Smith was appointed, three of the other mayoral appointees were Democrats. On February 15, 2016, Mayor Hamilton

appointed Kappas to fill Smith's vacancy. As was true when Smith was appointed, when Kappas was appointed, three of the other mayoral appointments to the Plan Commission were Democrats. At the time of his appointment, Kappas had never voted in a political party's primary election, nor had he sought certification by a party chair as a member of a political party. Thus, pursuant to I.C. § 36-1-8-10(b), Kappas had no party affiliation. Kappas served his full term, which expired on December 31, 2019.

[5] In 2017, the General Assembly amended I.C. § 36-1-8-10(d) to provide:

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.

Mayor Hamilton did not appoint a timely replacement to fill the vacancy left by Kappas. Thus, on April 16, 2020, 106 days after the expiration of Kappas's term, Ellis, in his capacity as the Chair of the Republican Party for Monroe

County, appointed Guenther<sup>1</sup>, a Republican, to fill the vacant seat on the Plan Commission. On May 7, 2020, however, Mayor Hamilton rejected Ellis's appointment of Guenther and appointed Cockerham to fill the seat. As a result, Cockerham now serves as a de facto member of the Plan Commission.

[6] On June 9, 2020, Petitioners filed a Verified Complaint for Writ of Quo Warranto against the City, Mayor Hamilton, and Cockerham, who in turn filed a motion to dismiss on June 29, 2020. Before the trial court took any action on the motion to dismiss, Petitioners, on July 6, 2020, filed an Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto. The amended complaint named the original respondents and added Kappas as a respondent. Petitioners sought a declaratory judgment that Kappas's appointment to the Plan Commission was void *ab initio* because he did not meet the requirements of I.C. § 36-1-8-10(b) when he was appointed. They also requested a declaratory judgment that Mayor Hamilton did not have authority to appoint Cockerham to the Plan Commission because more than ninety days had passed since Kappas's term expired. In addition, Petitioners requested a Writ of Quo Warranto vacating Cockerham's appointment to the Plan Commission and installing Guenther as a member.

[7] Respondents filed a motion to dismiss and supporting memorandum, claiming Petitioners lacked standing. Specifically, Respondents argued that the

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<sup>1</sup> At the time, Guenther was also serving on the City's Environmental Commission, a seat that he had held since September 18, 2018.

Petitioners' interpretation of I.C. § 36-8-1-10(b) and (d) is counter to legislative intent<sup>2</sup> and conflicts with the plain language of I.C. § 36-7-4-207.<sup>3</sup> Respondents claimed that because Kappas had no political affiliation, Ellis, as the Chairman of the Republican Party, did not have authority to appoint Guenther to the Plan Commission and thus, Guenther had no right to be a member thereof.<sup>4</sup>

[8] On August 5, 2020, the trial court held a hearing on the motion to dismiss, and on August 14, 2020, the trial court issued its order summarily denying the motion. On September 14, 2020, the trial court granted the Respondents' request to certify its order for interlocutory appeal. This court accepted jurisdiction on November 13, 2020. Additional facts will be provided as necessary.

## Discussion & Decision

[9] A motion to dismiss for lack of standing may be brought under T.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Thomas v. Blackford Cnty. Area Bd. of Zoning Appeals*, 907 N.E.2d 988, 990 (Ind. 2009). "A successful 12(B)(6) motion alleging lack of standing requires that the lack of standing be

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<sup>2</sup> For the first time on appeal, Respondents argue that Petitioners' attempt to impose a political affiliation requirement on mayoral appointees to the Plan Commission has constitutional ramifications, particularly regarding the freedom of association guaranteed by the First Amendment of the United States Constitution.

<sup>3</sup> Respondents assert subsection (a)(5) of this statute does not condition appointment upon a required political affiliation but rather only limits the number of members from any political party.

<sup>4</sup> Respondents maintain that at the expiration of the term of an appointee with no political affiliation, the Mayor has the authority to appoint a replacement.

apparent on the face of the complaint.” *Id.* Whether a party has standing is purely a question of law and requires no deference to the trial court’s decision. *Common Council of Mich. City v. Bd. of Zoning Appeals of Mich. City*, 881 N.E.2d 1012, 1014 (Ind. Ct. App. 2008). We therefore apply a de novo standard, keeping in mind that “the allegations of the complaint are required to be taken as true.” *Thomas*, 907 N.E.2d at 990.

[10] Standing is defined as having a “sufficient stake in an otherwise justiciable controversy.” *Redev. Comm’n of Town of Munster v. Ind. State Bd. of Accounts*, 28 N.E.3d 272, 276 (Ind. Ct. App. 2015) (quoting *Ind. Civil Rights Comm’n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 945 (Ind.1999)), *trans. denied*. In other words, only those persons who have a personal stake in the outcome of the litigation and who show that they have suffered or were in immediate danger of suffering a direct injury as a result of the complained-of conduct will be found to have standing. *Oman v. State*, 737 N.E.2d 1131, 1135 (Ind. 2000); *Hammes v. Brumley*, 659 N.E.2d 1021, 1029-30 (Ind. 1995); *Shourek v. Stirling*, 621 N.E.2d 1107, 1109 (Ind. 1993); *Higgins v. Hale*, 476 N.E.2d 95, 101 (Ind. 1985). Absent this showing, complainants may not invoke the jurisdiction of the court. *Higgins*, 476 N.E.2d at 101. “It is generally insufficient that a plaintiff merely has a general interest common to all members of the public.” *State ex rel. Cittadine v. Ind. Dep’t of Transp.*, 790 N.E.2d 978, 979 (Ind. 2003) (citing *Terre Haute Gas Corp. v. Johnson*, 221 Ind. 499, 505, 45 N.E.2d 484, 486 (1942)).

[11] Pursuant to the Declaratory Judgment Statute:

[A]ny person ... whose rights, status, or other legal relations are affected by a statute, [or] municipal ordinance ... may have determined any question of construction or validity arising under the ... statute, [or] ordinance.

Ind. Code § 34-14-1-2. In construing this statute, the term “affected” is used to assess a party’s standing to assert his or her claims. *Reed v. Plan Comm’n of Town of Munster*, 810 N.E.2d 1126, 1127 (Ind. Ct. App. 2004).

[12] *Quo warranto* is the proper remedy for determination of the right of a party to hold office. *City of Gary v. Johnson*, 621 N.E.2d 650, 652 (Ind. Ct. App. 1993) (citing *State ex rel. Brown v. Circuit Court of Marion Cnty.*, 430 N.E.2d 786, 787 (Ind. 1982)). The action is governed by Ind. Code § 34-17-1-1, which provides that an information may be filed against any person when that person “usurps, intrudes into, or unlawfully holds or exercises a public office.” I.C. § 34-17-2-1(a)(2) provides that such an information may be filed by the prosecuting attorney or “by any other person on the person’s own relation, whenever the person claims an interest in the office” that is the subject of the information. Indiana law is well-settled that “a private person may bring a *quo warranto* ‘only if he claims an interest on his own relation or a special interest beyond that of a taxpayer.’” *Hampton v. Barber*, 153 N.E.3d 1204, 1207 (Ind. Ct. App. 2020) (quoting *City of Gary*, 621 N.E.2d at 652). The individual “‘must demonstrate a personal interest distinct from that of the general public, which interest must be in the right or title to the office.’” *Id.* (quoting *City of Gary*, 621 N.E. 2d at 652).

[13] It is undisputed that Kappas was not affiliated with a political party when he was appointed. The parties dispute the implications of this fact given the language of I.C. § 36-1-8-10(b) and (d). In their complaint, Petitioners sought a declaratory judgment that Kappas's appointment to the Plan Commission was void *ab initio* because Kappas did not meet the requirements of subsection (b). They also requested a declaratory judgment that under their interpretation of I.C. § 36-1-8-10(b) and (d), Mayor Hamilton did not have the authority to appoint Kappas's replacement, but rather, such authority was vested in Ellis.<sup>5</sup>

[14] Respondents argue that Petitioners erroneously interpret I.C. § 36-1-8-10(b) as requiring a political affiliation and thus, maintain that Kappas was validly appointed even though he had not voted in a primary election or been certified as a member of a political party. In such instance, the Respondents argue that subsection (d) did not vest Ellis, as the Chair of the Republican Party, with authority to appoint a replacement for Kappas who was not affiliated with any political party.

[15] The resolution of the underlying dispute is a matter of statutory interpretation. In this appeal, however, we need only consider whether Petitioners have

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<sup>5</sup> Petitioners present two arguments which they claim support their position that Ellis had the authority to appoint Guenther to fill Kappas's seat. First, if Kappas's appointment is declared void *ab initio*, Petitioners assert that the authority to appoint a replacement under subsection (d) should be vested in the chairman of the political party with which the most recent valid appointee was affiliated. In this case, Petitioners claim that Ellis had the authority to appoint Guenther because Smith, a Republican, held the seat on the Plan Commission before Kappas. Second, they argue that under their interpretation of subsection (b), mayoral appointees to the Plan Commission must be affiliated with a political party and since there were already three Democrat mayoral appointees on the Plan Commission, Kappas's seat had to be filled by a Republican. Hence, Ellis, as the Chairman of the Republican Party, had the authority to make the appointment.

standing to challenge the construction and interpretation of the relevant statutes. Reviewing the amended complaint in a light most favorable to the Petitioners, we conclude that they have stated sufficient facts to demonstrate that they have standing to bring their complaint for declaratory judgment and request for a *writ of quo warranto*. Clearly, Petitioners have a personal stake in the outcome of the proceedings, and such is distinct from that of the general public. Indeed, under their interpretation of I.C. § 36-1-8-10(b) and (d), Ellis had the rightful authority as Chairman of the Republican Party to appoint Guenther to the Plan Commission and Mayor Hamilton usurped that authority when he rejected that appointment and instead appointed Cockerham. Guenther also has a personal stake in that he claims he was duly appointed by Ellis to a seat on the Plan Commission and his right to that seat was allegedly usurped when, in his view, Mayor Hamilton acted without authority and appointed Cockerham. The trial court did not err in denying the Respondents' motion to dismiss.

[16] Judgment affirmed.

Mathias, J. and Weissmann, J., concur.