

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

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,)

v.)

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.

PETITIONERS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Petitioners, ANDREW GUENTHER (“Guenther”) individually, and in his
capacity as appointed member of the Bloomington Plan Commission, and WILLIAM
ELLIS (“Ellis”), in his capacity as Chairman of the Monroe County Republican Party,

by counsel *Carl Lamb & Associates, P.C.*, for their *Proposed Conclusions of Law* state and show as follows:

I. Background

In their July 6, 2020, *Amended Complaint*, Petitioners sought relief for a Declaratory Judgment and a Writ of *Quo Warranto*, requesting the Court to issue appropriate *Orders* that (1) Mayor Hamilton's appointment of Kappas and Cockerham to the City of Bloomington's Plan Commission (Plan Commission) should be declared void, (2) that Ellis had the authority to make the appointment of Guenther to the Plan Commission, and finally, that (3) Guenther was entitled to the appointment on the Plan Commission.

The Respondents filed a *Second Motion to Dismiss* on July 10, 2020, which was subsequently denied by the Court on August 14, 2020. The Court granted the *Respondent's Motion to Certify Order for Interlocutory Appeal and Stay of Proceeding* on August 17, 2020.

On April 6, 2021, the Court of Appeals affirmed this Court's *Order on Respondent's Second Motion to Dismiss*. Thereafter, on April 12, 2021, the Petitioners filed their renewed motion for the court to issue declaratory judgment and writ of *Quo Warranto*. Respondent's Answer and Affirmative Defenses to the Petitioners' Amended Complaint was filed on April 30, 2021. The parties filed the following *Agreed Factual Stipulations* on August 13, 2021.

II. Agreed Factual Stipulations

- 1) Andrew Guenther is a resident of City of Bloomington, Monroe County, Indiana.
- 2) William Ellis is a resident of Monroe County, Indiana.
- 3) The City of Bloomington, Indiana is an Indiana municipality duly organized pursuant to the laws of the State of Indiana.
- 4) William Ellis is the Chairman of the Monroe County, Indiana, Republican Party.
- 5) John Hamilton is the Mayor of the City of Bloomington, Indiana, and a resident of the City of Bloomington, Indiana.
- 6) Nicholas Kappas is a resident of the City of Bloomington, Indiana.
- 7) Christopher Cockerham is a resident of the City of Bloomington, Indiana.
- 8) The City of Bloomington Plan Commission consists of ten members. Five of the ten members are appointed by the Mayor. Pursuant to Bloomington Municipal Code and Indiana Code, no more than three of the five mayoral appointees may be of the same political party.
- 9) Nicholas Kappas was a member of the City of Bloomington Plan Commission from February 10, 2016, through January 6, 2020.
- 10) Nicholas Kappas held one of the five seats appointed by the Mayor.
- 11) Nicholas Kappas's seat on the City of Bloomington Plan Commission was previously held by Christopher Smith.
- 12) Christopher Smith was on the City of Bloomington Plan Commission from January 2, 2012, through January 5, 2016.
- 13) During his term on the City of Bloomington Plan Commission, Christopher Smith was affiliated with the Republican Party of Monroe County, Indiana.

- 14) During and before Nicholas Kappas's term on the City of Bloomington Plan Commission, Nicholas Kappas did not vote in a primary election.
- 15) During and before Nicholas Kappas's term on the City of Bloomington Plan Commission, Nicholas Kappas did not claim a party affiliation.
- 16) During and before Nicholas Kappas's term on the City of Bloomington Plan Commission, Nicholas Kappas was not certified as a member of a political party by the chairman for any such political party.
- 17) Nicholas Kappas's seat on the City of Bloomington Plan Commission remained vacant from the expiration of his term on about January 6, 2020, through April 16, 2020.
- 18) After Nicholas Kappas's term on the City of Bloomington Plan Commission expired, three of the five mayor-appointed seats were held by Democrats, one of the five mayor-appointed seats was held by a Republican, and the seat held by Nicholas Kappas was vacant.
- 19) On April 16, 2020, William Ellis appointed Andrew Guenther to the vacant seat on the City of Bloomington Plan Commission formerly held by Nicholas Kappas claiming authority to make the appointment pursuant to Indiana Code, Section 36-1-8-10.
- 20) On April 16, 2020, Andrew Guenther was affiliated with the Republican Party of Monroe County, Indiana.
- 21) The City of Bloomington rejected William Ellis's appointment of Andrew Guenther to the City of Bloomington Plan Commission.
- 22) On May 7, 2020, Mayor John Hamilton appointed Christopher Cockerham to the vacant seat on the City of Bloomington Plan Commission.
- 23) On May 7, 2020, Christopher Cockerham claimed affiliation with the Republican Party.
- 24) In 2019, Christopher Cockerham voted in the Monroe County Democratic Party primary election.

- 25) Prior to May 7, 2020, Christopher Cockerham requested, received, completed, and submitted his ballot for the 2020 Republican Party primary election to the office of the Monroe County Circuit Court Clerk.
- 26) In-person voting in the 2020 Indiana Primary had been scheduled to occur on May 5, 2020, but was delayed until June 2, 2020, due to the COVID-19 pandemic.
- 27) On May 7, 2020, Christopher Cockerham was not certified by the chair of the Monroe County Republican Party as a member of the Republican Party.
- 28) Mayor Hamilton reaffirmed his appointment of Christopher Cockerham to the City of Bloomington Plan Commission on June 3, 2020.
- 29) Christopher Cockerham first occupied the Plan Commission seat vacated by Nicholas Kappas during the Plan Commission meeting on June 8, 2020.
- 30) William Ellis and Andrew Guenther objected to the appointment of Christopher Cockerham to the City of Bloomington Plan Commission.
- 31) On September 19, 2018, Andrew Guenther was appointed to the City of Bloomington Environmental Commission by Mayor John Hamilton.
- 32) Andrew Guenther remains an active and voting member of the City of Bloomington Environmental Commission.
- 33) Andrew Guenther was a member of the City of Bloomington Environmental Commission at the time William Ellis appointed him to the Plan Commission.
- 34) Nicholas Kappas was a member of the City of Bloomington Environmental Commission from June 4, 2015, through January 30, 2019.
- 35) Nicholas Kappas's appointment to the City of Bloomington Plan Commission was not challenged prior to the instant litigation.
- 36) Andrew Guenther voted in the 2019 Monroe County Republican Party primary election, which was the most recent primary election he voted in prior to his appointment by Ellis.

- 37) On January 2, 2021, Andrew Guenther publicly resigned from the Republican Party.

Petitioners' Proposed Conclusions of Law

- A. Any of the above factual stipulations more properly characterized as a conclusion of law are hereby incorporated into these proposed conclusions of law, as appropriate, hereinbelow.
- B. Resolution of this action requires disposition of the parties' opposing views of statutory interpretation, specifically, I.C. 36-1-8-10(b) and (d); I.C. 36-7-4-207 and Bloomington Municipal Code section 2.13.010.
- C. Petitioners' assert relief for the Writ of *Quo Warranto*, which is the "proper remedy for the determination of the right of a party to hold office." *City of Gary v. Johnson*, 621 N.E.2d 650, 1993 Ind. App., see also: *State ex rel. Brown v. Circuit Court of Marion County* (1982), Ind., 430 N.E.2d 786, 787, *Brenner v. Powers*, (584 N.E.2d 569, 576). A mandamus action is only appropriate when no other remedy at law is available. Here there is an appropriate alternate remedy available – a *Quo Warranto* and Declaratory relief action. See: *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.
- D. *Quo Warranto* is statutorily enumerated under I.C. 34-17-1-1 which allows parties like Guenther and Ellis to request relief when a person like the Mayor Hamilton "usurps, intrudes into, or unlawfully holds or exercises a public office. I.C. 34-17-2-1(a)(2).
- E. The Petitioners have standing to bring the action for *Quo Warranto*, because they have a personal stake in the outcome of the litigation that is distinct from that of the general tax paying public. *Hampton v. Barber*, 153 N.E. 3d 1204, 1207 (Ind. Ct. App. 2020). (quoting *City of Gary*, 621 N.E. 2d at 652). The Petitioners' interest in the disputed position on the Plan Commission (and the appointment thereto), is distinct from that of the general public, the 2017 amendments to I.C. 36-1-8-10 entitle Ellis to appoint Guenther, and for Guenther to be a member of the Plan Commission. See *City of Gary*, 621 N.E. 2d at 652. Ellis and Guenther's stake in the controversy in this action far exceeds the interest of the taxpayer in *City of Gary*, 621 N.E. 2d at 652.

- F. The taxpayer in *City of Gary* had not cognizable claim under any statute, like we have here, because Petitioners' interpretation of the statutes and municipal code in dispute is reasonable, unlike any conceivable set of facts that simply were not present in *City of Gary. Id.*
- G. Here, Petitioners 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 Write 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 they added subpart (d) to the 2017 amendment of Indiana Code, Section 36-1-8-10. In other words, Ellis and Guenther have "sufficient stake in an otherwise justiciable controversy." *Redev v. Comm'n of Town of Munster v. Ind. Stat 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).
- H. Petitioners have suffered direct injury because Ellis's appointment was not recognized, and Cockerham's appointment was recognized. Mayor Hamilton usurped Ellis' statutory right to appoint Guenther to the Plan Commission. Respondents' conduct has clearly harmed Petitioners. Petitioners clearly have standing to bring an action for *Quo Warranto*.
- I. Under the Declaratory Judgment Statute, I.C. § 34-14-1-2: any person ... 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." Ind. Code. Section 34-14-1-2.
- J. The Petitioners have standing to bring their action for Declaratory Judgment because their rights are affected by Indiana Law, including but not limited to, I.C. 36-1-8-10 and I.C. 36-7-4-207(a)(5).
- K. The Court can exercise its discretion and issue a declaratory judgment under Indiana Code § 34-14-1-2, finding Guenther is the rightful appointed member of the Plan Commission, and that Ellis had the right to make the appointment.

- L. Both Guenther’s status as an appointed member of the Plan Commission, and Ellis’s right to appoint Guenther to the Bloomington Plan Commission, are derived from statute, specifically, I.C. 36-1-8-10; I.C. 36-7-4-207, and, Bloomington Municipal Code (“BMC”), 2.13.010.
- M. The 2017 amendments to I.C. 36-1-8-10 require an appointee to a Plan Commission to have political party affiliation.

Pursuant to 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.”

(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.

(d) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, both the following apply:

- (1) The member may continue to serve on the board of 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." (*emphasis added*).
- N. No certification as described under I.C. 36-1-8-10 (b)-(c), has been filed with the Monroe County Clerk's office, Kappas did not proper party affiliation.
- O. One hundred and six (106) days after the expiration of Kappas's term, Ellis, in the capacity as Chair of the Republican Party for Monroe County, appointed Guenther to serve on the vacant seat on the Plan Commission, since under I.C. 36-1-8-10(d), Mayor Hamilton had failed to timely appoint a replacement for Kappas. Mayor Hamilton's subsequent appointment of Respondent Cockerham, on May 7, 2020, should be found void because of Respondent's failure to comply with the amendments to I.C. 36-1-8-10.
- P. Kappas's appointment by Mayor Hamilton was improper because he had not voted in a primary election or been certified as a member of a political party. Kappas did not have the necessary party affiliation required by I.C. 36-1-8-10(b).
- Q. The appointment of Kappas to the Plan Commission should be declared void, as Hamilton's appointment of Kappas was invalid because Kappas did not meet the political affiliation requirements for appointment. Mayoral appointees to the Plan Commission must be affiliated with a political party and since three (3) democrats' appointees on the Plan Commission, the seat previously held by Respondent Kappas had to be filled by a Republican.
- R. Since Kappas appointment was void, Ellis had the authority to appoint Guenther, a Republican, since Ellis was the chairman of the Republican party, with which the most recent appointee (Smith) was affiliated.
- S. Kappas did not declare membership in a party, have a signed letter from a political party chair, nor did he ever vote in a primary election in Indiana.
- T. Since Kappas appointment should be rendered void or contrary to the statute, the political party of the member of the Plan Commission immediately preceding Kappas (in this case, Republican Chris Smith) should dictate which political party chair has the authority to make an appointment after ninety (90)

days have passed without the vacancy being filled, in this case Chairman William Ellis of the Monroe County Republican Party Chair.

- U. It would have not been reasonable for the Petitioners to have discovered the statutory issues with Kappas' appointment until this litigation arose, There lacked any case law interpreting the 2017 updates to I.C. 36-1-8-10 at the time Petitioners filed their Original Complaint.
- V. Ellis had the legal authority and obligation to appoint a member to the Bloomington Plan Commission, not Mayor Hamilton. Ellis' right to appoint Guenther vested in Ellis when Mayor Hamilton failed to timely make the appointment.
- W. I.C. 36-1-8-10 (d) is mandatory, it states, "county chairman of the political party whose term has expired *shall* make the appointment" after the timeline of 90 days has expired. (*emphasis added*).
- X. Kappas' appointment should be found to be void. Smith was a Republican at the time of his appointment and resignation and therefore it is follows that the vacancy should have been filed by a Republican. Mr. Smith's successor should be chosen by the Chairman of Smith's political party, as Mayor Hamilton far exhausted the 90-day time restraint by over 1,500 days.
- Y. It is inappropriate and inconsistent to interpret I.C. 36-1-8-10 as not requiring a political party requirement.
- Z. Kappas met none of the requirements of IC 36-1-8-10, which requires political affiliation be determined by the last primary election voted in or a signed letter from a political party chairman certifying the appointee as a member of their Party (pre-2017 amendments, appointees could also simply claim a party affiliation).
- AA. The clear legislative intent behind I.C. 36-1-8-10 appears to be 1) preventing appointing authorities from leaving minority political party positions on local boards/commissions vacant; and 2) to provide a mechanism by which those same appointments could be made in a timely manner.
- BB. Mayor Hamilton and the City were given adequate notice of Mr. Ellis' appointment of Mr. Guenther.

- CC. Mr. Ellis and Mr. Guenther alerted the City of the appointment of Mr. Guenther via press releases, notice given at the Plan Commission meeting, numerous emails to city staff and the Office of the Mayor, and media coverage of the event.
- DD. Andrew Guenther's membership on the City of Bloomington Environmental Commission does not preclude him from serving on the Plan Commission.
- EE. Kappas served on both the Environmental Commission and the Plan Commission concurrently, with the blessing of Mayor Hamilton.
- FF. Guenther receives no financial benefit for serving on the Environmental Commission, and thus it is not considered a "lucrative office" under the Indiana Constitution.
- GG. Guenther's appointment to the Plan Commission was never recognized or addressed by the City of Bloomington in an official capacity, and thus his appointment to the Environmental Commission could not conflict, or be expected to end to avoid conflict, with his appointment to the Plan Commission.
- HH. As a matter of law, Mr. Guenther's service on the Environmental Commission would automatically terminate with his acceptance of his position with, and subsequent seating on, the Plan Commission.
- II. Christopher Cockerham's affiliation as a Democrat immediately preceding his appointment should render his appointment null and void.
- JJ. In the Monroe County Indiana Primary Election of 2019, Christopher Cockerham pulled a Democratic Party ballot.
- KK. Christopher Cockerham did not officially vote in a Republican Party primary until after his appointment to the Plan Commission by Mayor Hamilton.
- LL. Thus, Cockerham's appointment to the Plan Commission established a Plan Commission with four (4) Democratic citizen Mayoral appointees, in contravention of I.C. 36-1-8-10 and BMC 2.13.010.
- MM. The date of the 2020 Primary Election was pushed back due to the COVID-19 Pandemic.

- NN. Notwithstanding the legitimate appointment made by Petitioners, Mayor Hamilton announced the de facto Mayoral appointment of Cockerham on May 5, 2020, which was twenty (20) days after the appointment of Guenther, one hundred twenty-six (126) days after the termination of Kappas's appointment, and one thousand five hundred eighty-one (1581) days after the termination of Smith's appointment.
- OO. At no time did Petitioners accept or concede to the Mayor's wrongful and delinquent appointment, nor did any time did the Petitioners waive any rights that they may have before this Court.
- PP. Prior to the June 8, 2020, Plan Commission meeting, Mr. Guenther notified the Plan Commission in writing that Mr. Guenther, not Mr. Cockerham, was legally appointed to the Seat at Issue, and, as such, made a formal demand for the seat at issue.
- QQ. After the June 8, 2020, Plan Commission meeting, during which the Seat at Issue was invalidly held by Mr. Cockerham, the Petitioners issued a press release stating their position on the issue.
- RR. House Bill 1395 adds an addendum stipulating the method of filing certifications requirement under IC 36-1-8-10, which addendum is merely a clarification for observance of the Code's affiliation requirements.
- SS. House Bill 1395 makes it even clearer that the legislative intent, behind I.C. 36-1-8-10, was, and is, to void the appointments of those who do not meet the Affiliation Requirements set forth in the same section.

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Respondents.

WRIT OF QUO WARRANTO AND DECLARATORY JUDGMENT

Pursuant and accordance with the *Agreed Factual Stipulations and Conclusions of Law*, incorporated herein,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

- (1) The City of Bloomington Mayor, John Hamilton's de facto appointment of Nicholas Kappas is hereby declared VOID *ab initio*.

- (2) The City of Bloomington Mayor, John Hamilton's de facto appointment of Christopher Cockerham to the City of Bloomington's Plan Commission (Plan Commission) is hereby declared VOID *ab initio*.
- (3) The Court FINDS that Christopher Cockerham is a "Democrat" as defined under Indiana law and therefore Christopher Cockerham was not eligible for the appointment on the City of Bloomington's Plan Commission as of May 2020.
- (4) The Court FINDS that pursuant to I.C. 36-1-8-10, Ellis had the authority to make the appointment of Andrew Guenther to the Plan Commission, and Mayor Hamilton wrongly usurped William Ellis' appointing powers by appointing Christopher Cockerham.
- (5) The Court ORDERS that Andrew Guenther is immediately entitled to his previously rightfully appointed seat on the City of Bloomington Plan Commission.
- (6) Christopher Cockerham is hereby ordered to vacate and relinquish his wrongfully appointed seat on the Plan Commission upon receipt of this Writ of *Quo Warranto* and Declaratory Judgment.

SO ORDERED this ____ day of October 2021.

Erik C. Allen, Special Judge
Monroe Circuit Court 8

Distribution to:
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