

STATE OF INDIANA)
) SS:
COUNTY OF MONROE)

IN THE MONROE CIRCUIT COURT 8
CASE NO. 53C08-2006-MI-958

ANDREW GUENTHER, individually
and in his capacity as appointed Republican
member of the Bloomington Plan Commission,

and

WILLIAM ELLIS, in his capacity as
Chairman of the Monroe County, Indiana
Republican Party,

Petitioners,

vs.

CITY OF BLOOMINGTON, INDIANA,

and

JOHN HAMILTON, in his capacity as Mayor
for the City of Bloomington,

and

CHRISTOPHER COCKERHAM, in his capacity
as contested member of the Bloomington Plan Commission,

and

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

**FINDINGS OF FACT, CONCLUSIONS,
AND JUDGMENT**

This case is before the Court on the Petitioners' Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto, and the Court being duly advised now finds and orders as follows:

A. The parties, each by counsel, submitted Agreed Factual Stipulations that are as follows:

- 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.

B. Petitioners' Amended Complaint seeks 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 Nick Kappas ("*Kappas*") and Christopher Cockerham ("*Cockerham*") to the City of Bloomington's Plan Commission (*Plan Commission*) should be declared void, (2) that William Ellis, as the Chairman of the Monroe County Republican Party, had the authority to make the appointment of Andrew Guenther to the Plan Commission, and finally, that (3) Guenther was entitled to the appointment on the Plan Commission.

C. The Respondents filed a *Second Motion to Dismiss* on July 10, 2020, which was 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.

D. 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 *Agreed Factual Stipulations* that are set forth above on August 13, 2021.

E. Indiana Code 36-1-8-10 was enacted in 1988 in its original form and provided as follows:

“(a) As used in this section, “board” means an administration, agency, authority, board, bureau, commission, committee, council, department, division, institution, office, service, or other 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 the appointee must:

(1) Have voted in the most recent primary election held by the party with which the appointee claims affiliation; or

(2) If the appointee did not vote in the most recent primary election held by the party with which the appointee claims affiliation, be certified as a member of that party by the party’s county chairman for the county in which the appointee resides.”

F. The current version of Indiana Code 36-1-8-10, which includes the amendment effective as of July 1, 2017, provides as follows:

“(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 chair 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 IC 5-4-1. If the county chair’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 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.”

G. A 1996 amendment to I.C. 36-1-8-10 added the following:

“(c) Notwithstanding any other law, if the term of an appointed member of a board expires and appointing authority does not make an appointment to fill the vacancy, the member may continue to serve on the board for only sixty (60) days after the expiration date of the member’s term.”

This language in subsection (c) existed from 1996 until June 30, 2017, and the new language that is set forth in subsection (d) in paragraph F. above became effective on July 1, 2017.

H. Bloomington Municipal Code 2.13.010 provides, in relevant part, as follows:

The commission shall consist of twelve members who by statute shall be appointed in the following manner: (5) Five citizens, no more than three of whom may be of the same political party, appointed by the mayor.

I. 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.

J. 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.

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 “usurps, intrudes into, or unlawfully holds or exercises a public office.” I.C. 34-17-2-1(a)(2).

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.

Here, Petitioners are at 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 they added subpart (d) to the 2017 amendment of Indiana Code, Section 36-1-8-10. 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)).

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 harmed Petitioners. Petitioners have standing to bring an action for *Quo Warranto*.

K. 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.

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).

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.

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.

L. There is no dispute that Christopher Smith was a validly appointed member of the Bloomington Plan Commission from January 2, 2012 until January 5, 2016, and that he was a member of the Republican Party of Monroe County, Indiana.

M. At the time that Christopher Smith’s appointment ended the Mayor of Bloomington was the only statutorily identified appointing authority, however, I.C. 36-1-8-10(b) required “. . . the appointee **must**: (1) Have voted in the most recent primary election held by the party with which the appointee claims affiliation; or (2) If the appointee did not vote in the most recent primary election held by the party with which the appointee claims affiliation, be certified as a member of that party by the party’s county chairman for the county in which the appointee resides.” (emphasis added).

N. Nicholas Kappas was appointed to the Bloomington Plan Commission from February 10, 2016 until January 6, 2020. The parties stipulate that Nicholas Kappas’ seat was formerly held by Christopher Smith, that before and during Nicholas Kappas’ term on the Bloomington Plan Commission he did not vote in a primary election, he was not certified as a member of a political party by the political chairman for any political party, and he did not claim a party affiliation. This appointment is contrary to the mandatory language of I.C. 36-1-8-10(b)

in effect as of February 10, 2016 as set forth in paragraphs E. and M. above. Since the appointment of Nicholas Kappas did not comply with the mandatory statutory provisions, his appointment was void *ab initio* and the seat was effectively vacant.

O. Due to Nicholas Kappas' appointment being void *ab initio* the seat remained effectively vacant as of July 1, 2017, which is when the amendment to I.C. 36-1-8-10 identified in paragraph F. above became effective. The provision of I.C. 36-1-8-10(d) implemented by the 2017 amendment became the guiding authority for appointing a Bloomington Plan Commission member as of July 1, 2017.

P. Once the 2017 version of I.C. 36-1-8-10(d) became effective, in order to give effect to the newly effective statute it stands to reason that the county chair of the political party of the *last validly appointed* member whose term expired would have authority to make an appointment if the initial appointing authority failed to do so. This interpretation also makes sense as sound public policy in order to dissuade any political party from attempting to invalidly appoint a member and seek political gain in the hopes that no one challenges the invalid appointment. This interpretation also avoids a political party gaining advantage and avoiding the intent of I.C. 36-1-8-10(d)(2), by eliminating the input of a competing party chairman if an invalid appointment does get by without contest which is the scenario in the instant case. Allowing such a result is clearly contrary to the plain language and intent of I.C. 36-1-8-10(d)(2).

Q. Since Kappas' appointment is determined to be invalid and void *ab initio* and the seat effectively vacant since January 5, 2016, as of July 1, 2017, either the Mayor of Bloomington or the Monroe County Republican Party Chairman could make a valid appoint to the Bloomington Plan Commission, and the first to make a valid appointment at that time would be the proper appointing authority. Based upon the conclusions set forth in paragraph P. above, even if Kappas' appointment was acknowledged based upon a failure to timely contest the appointment, once his term ended on January 6, 2020, the Court concludes that the party chairman for the last validly appointed member would have authority to appoint if the appointing authority, in this case the Mayor of Bloomington, failed to make an appointment for 90 days after Kappas' term ended.

R. The parties stipulate that the term Kappas was serving on the Bloomington Plan Commission ended on January 6, 2020, and at that time Kappas' seat was one of the five seats appointed by the Mayor and that three of the five seats were held by Democrats, one seat was held by a Republican, and Kappas' seat was vacant. Further, the seat occupied by Kappas remained vacant from the expiration of his term on January 6, 2020 through April 16, 2020. This period of vacancy is 100 days (2020 was a leap year).

S. On April 16, 2020, William Ellis, as Chairman of the Monroe County Republican Party, appointed Andrew Guenther to fill the seat vacated by Kappas on the Bloomington Plan Commission. The parties further stipulate that as of April 16, 2020, Andrew Guenther was affiliated with the Republican Party and had voted in the 2019 Republican primary election.

T. The parties stipulate that the City of Bloomington rejected the appointment of Andrew Guenther, and on May 7, 2020, Mayor Hamilton appointed Christopher Cockerham to the seat vacated by Kappas on the Bloomington Plan Commission. As of May 7, 2020, Christopher

Cockerham claimed affiliation with the Republican Party, however, in the most recent primary election in 2019 he voted in the Democratic primary election, and he was not certified by the chair of the Monroe County Republican Party as a member of the Republican Party. Prior to May 7, 2020, Christopher Cockerham had requested, received, completed and submitted his ballot for the 2020 Republican Party primary election to the office of the Monroe County Circuit Court Clerk. In-person voting for the 2020 primary election was postponed from May 5, 2020, to June 2, 2020, therefore, the 2020 primary election was not completed until on or after June 2, 2020. Until a primary election is completed it is not the most recent primary election. Mayor Hamilton re-affirmed his appointment of Cockerham on June 3, 2020. Mr. Cockerham began occupying the seat vacated by Kappas at the June 8, 2020, Bloomington Plan Commission meeting.

U. The Court concludes that Kappas' appointment was void *ab initio* and Chairman Ellis had the authority to appoint Andrew Guenther to the Bloomington Plan Commission on April 16, 2020, that Guenther was then a valid appointment and the seat was no longer vacant. Therefore, the appointment of Christopher Cockerham is an invalid appointment.

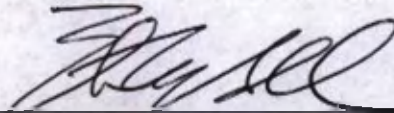
V. Even if an improperly appointed individual, such as Kappas, is acknowledged due to no timely objection or contest being raised, the Court still concludes that the chairman of the political party of the last properly appointed individual retains appointing authority in the circumstance that I.C. 36-1-8-10(d)(2) become applicable. In this alternative, once Kappas' seat was vacated on January 6, 2020, as of April 16, 2020, Chairman Ellis had the authority to make an appointment for the vacant seat since Mayor Hamilton had not done so. Therefore, the Court again concludes that Chairman Ellis had the authority to appoint Andrew Guenther to the Bloomington Plan Commission on April 16, 2020, that Guenther was then a valid appointment and the seat was no longer vacant. Therefore, the appointment of Christopher Cockerham is an invalid appointment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The appointment of Nicholas Kappas to the Bloomington Plan Commission is hereby declared void *ab initio*;
2. The appointment of Christopher Cockerham to the Bloomington Plan Commission is hereby declared void *ab initio*;
3. Christopher Cockerham was a "Democrat" for purposes of I.C. 36-1-8-10 at the time of his appointment to the Bloomington Plan Commission and was not eligible for appointment under the circumstances then existing;
4. William Ellis, as Chairman of the Monroe County Indiana Republican Party, had authority to make the appointment of Andrew Guenther to the Bloomington Plan Commission on April 16, 2020;
5. Andrew Guenther is immediately entitled to the appointed seat on the Bloomington Plan Commission; and

6. Christopher Cockerham is hereby ordered to vacate and relinquish his improperly appointed seat on the Bloomington Plan Commission upon receipt of this Writ of *Quo Warranto* and Declaratory Judgment.

SO ORDERED this 18th day of November, 2021.



Erik C. Allen, Special Judge
Monroe Circuit Court 8

Distribution:
Carl Lamb
Michael Rouker
Larry Allen
Daniel Dixon