Filed: 02/02/2022 10:19 PM

IN THE
COURT OF APPEALS OF INDIANA

CAUSE NO. 21A-MI-02600

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

BRIEF OF APPELLEES

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I. APPELLEES' STATEMENT OF THE ISSUES

The *Brief of the Appellants* raised six (6) issues on appeal. Appellees ("*Ellis and Guenther*" or "*Appellees*") restate the issues as follows:

1. Whether the trial court erred when it found that both Ellis and Guenther had standing to bring an *Amended Complaint for Declaratory Judgment and Writ of Quo Warranto* ("Complaint").

2. Whether the trial court erred in ruling in favor of Ellis and Guenther on the claims contained in the *Amended Complaint* and rejecting the City of Bloomington's arguments that they were barred by waiver and laches.

3. Whether Guenther's position on the Environmental Commission should have been a reason for the trial court to deny recognizing Guenther's appointment to the Plan Commission.

4. Did the trial court abuse its discretion by issuing a Declaratory Judgment and a Writ of *Quo Warranto* in the same trial court action?

II. APPELLEES' STATEMENT OF THE CASE

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

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 in the Appellants' *Statement of Facts* contained in their *Brief of the Appellants* (also referred to herein as "*Appellant's Brief*"):

First, Ellis and Guenther dispute 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. 10).

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 chairman 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 from its codification in 1988 through the 2017 amendment." (Appellant's Br. 10).

Next, Ellis and Guenther contend that the City of Bloomington's *Statement of Facts*, attempt to expand, skew, or otherwise improperly inject argument, into the trial court's conclusions and orders reached by the trial court in the November 18, 2021, *Findings of Fact, Conclusions, and Judgment* (Appellant's Br. 8-12; Appellants App. Vol. II, pp. 14-22).

The trial court's *Findings of Fact, Conclusions, and Judgment*, found, concluded, and ruled that:

"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 *ad 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 the appointment under the circumstances then existing;

4. Williams 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." (Appellant's App. Vol. II. pp. 14-22).

The trial court recognized that in order to resolve the parties' dispute, it had to make "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. (Appellant's App. Vol. II. pp. 18).

The trial court found that Ellis and Guenther had standing to bring an action for *Quo Warranto* for Declaratory Judgment under I.C. 34-14-1-2." (Appellant's App. Vol. II. pp. 18-19).

Next, the trial court ruled that "[s]ince the [Mayor's] appointment of Nicholas Kappas did not comply with the mandatory statutory provisions, his appointment was void *ab initio,* and the seat was effectively vacant." (Appellant's App. Vol. II. p. 20).

Since the trial court ruled that Kappas's appointment was void *ab initio*, the trial court reasoned that the seat remained vacant as of July 1, 2017, when the latest version of I.C. 36-1-8-10 became effective. (Appellant's App. Vol. II p. 20).

The trial court concluded that "[o]nce 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 appointing authority failed to do so." (Appellant's App. Vol. II p. 20).

The trial court reasoned that this interpretation "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." (Appellant's App. Vol. II p. 20).

Further expounding on its reasoning supporting its conclusion that Ellis had authority to appoint Guenther, the trial court explained that "…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." (Appellant's App. Vol. II, p. 20).

Finally, the trial court also found that "[e]ven if an improperly appointed individual, such as Kappas, is acknowledged due to no timely objection or contest being raised, the [trial] 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." (Appellant's App. Vol. II, p. 21). As such, the trial court ruled that "as of April 16, 2020, Chairman Ellis had the authority to make an appointment [of Guenther] for the vacant seat since Mayor Hamilton had not done so…and the appointment of Christopher Cockerham is an invalid appointment. " (Appellant's App. Vol. II, p. 21).

SUMMARY OF ARGUMENT

The trial court's *Findings of Fact, Conclusions, and Judgment* should be affirmed because Ellis and Guenther had standing to bring their *Amended Complaint* seeking a writ of *Quo Warranto* and *Declaratory Judgment.* Bloomington's conduct caused harm to Ellis and Guenther. Both Ellis and Guenther had an interest in bringing a *Declaratory Judgment* and *Quo Warranto* action that was distinct from the general tax paying public.

The Appellant's fear of irrational and disharmonizing results is overstated and speculative. If this Court affirms the trial court's ruling, the Freedom of Association Clause of the United States Constitution will not be infringed, instead, numerous

opportunities will continue to exist for persons not affiliated with a political party to participate in board and commission positions in city government.

Furthermore, the trial court properly concluded that a mandamus action was not appropriate because there is existed an appropriate alternate remedy available in both the *Declaratory Judgment* and *Quo Warranto* actions.

Ellis and Guenther had a risk of continuing to suffer direct and immediate harm if the Court did not invalidate the appointments of Cockerham and Kappas. Reversing the trial court's ruling would deny Guenther his rightful appointment to the Plan Commission and would improperly usurp the legitimate appointment powers conferred upon Ellis when the Indiana legislature added subpart (d) to the 2017 amendment of I.C. 36-1-8-10.

Ellis and Guenther did not waive their rights under I.C. 36-1-8-10 for failing to challenge the appointment of Kappas prior to filing an *Amended Complaint*. Any delay in challenging the appointment of Kappas was reasonable, and under the circumstances, the trial court did not err in finding Ellis had statutory authority to assert his rights under the 2017 amendment of I.C. 36-1-8-10. It was within the trial court's discretion to deny the Appellant's arguments of waiver and laches, especially since Mayor Hamilton failed to make an appointment to the vacant seat within ninety (90) days after Kappas's term ended.

Brief of Appellees, Guenther and Ellis

I.C. 36-7-4-216(b)(2) did not prevent Guenther from being appointed to the Plan Commission by Ellis, while being an unpaid member of the Environmental Commission because Guenther has never been able to serve or hold a seat on the Plan Commission while being on the Environmental Commission. While Guenther was rightfully appointed to the Plan Commission, his appointment has never been recognized and he has never taken participated as an active member on the Plan Commission. Kappas, on the other hand, actually simultaneously served on both the Environmental and Plan Commissions. The trial court's ruling that since Kappas seat was void *ab initio*, the seat would default back to a Republican seat for appointment purposes was based upon sound public policy.

It was not abuse of the trial court's discretion, to deny Bloomington's arguments that I.C. 36-7-4-216(b)(2) barred Guenther and Ellis from both seeking, and succeeding, on both their Quo Warranto and Declaratory Judgment claims.

Finally, the trial court did not err in issuing a Writ of Quo Warranto, providing Ellis and Guenther declaratory relief and doing so led to a more efficient and judicious resolution of the parties' controversy surrounding the disputed seat on the Plan Commission.

ARGUMENT

I. The trial court did not err when it found that Ellis and Guenther had standing to bring the *Amended Complaint for Declaratory Judgment and Writ of Quo Warranto* ("Complaint") because Ellis had the lawful authority under Indiana Code 36-1-8-10 to appoint Guenther to vacancy on the Bloomington Plan Commission therefore Ellis and Guenther had a sufficient personal stake in the outcome of an otherwise justiciable controversy, distinct from that of the general public.

Once again on appeal, the Appellants are asserting that under Trial Rule 12(B)(6) of the Indiana Rules of Trial Procedure, the Appellees lacked standing to bring the claims asserted in the *Amended Complaint*. (Appellant's App. Appellant's Br. pp. 15-34). The Court of Appeals previously denied the Appellees [Respondent's] *Second Motion to Dismiss* on April 6, 2021[1]. (Appellant's App. Vol. II, p. 16).

Finding (J) and (K) of the trial court's *Findings of Fact, Conclusions, and Judgment* found that Guenther and Ellis had standing to bring their action for *Quo Warranto* and *Declaratory Judgment*. Appellant's App. Vol. II, pp. 16-18). These findings should be affirmed.

A. Standard of Review and Governing Law

Appellees agree with Appellants that issue of standing receives *de novo* review on Appeal. This Court may affirm the trial court's *Findings of Fact, Conclusions, and Judgment* on any independent basis. *Yoder Grain, Inc. v. Antalis,* 722 N.E. 2d 840, 851 (Ind. Ct. App. 2000).

[1] The City of Bloomington, et al., v. Andrew Guenther, et al. – 20A-MI-1900

The determination of whether parties like Ellis and Guenther have 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 Appears of Mich. City,* 881 N.E. 2d 1012, 1014 (Ind. Ct. App. 2008).

To have standing in the context of a *Quo Warranto* action, this Court must believe that Guenther and Ellis had "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 order to invoke the jurisdiction of the trial court, Ellis and Guenther must have a "personal stake in the outcome," and they must have "suffered, or were in immediate danger of suffering direct injury." *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).

In other words, for this Court to affirm trial court's finding that Ellis and Guenther had standing, the Court must be satisfied that Appellees have an interest in the Plan Commission vacancy that goes beyond the "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).

In the context of Appellees' request for Declaratory Judgment, pursuant to I.C. 34-14-1-2, in order to have standing, this Court must affirm the trial court's finding that Guenther and Ellis's "rights, status, or other legal relations…[were] affected by statute, [or] municipal ordinance." Ind. Code section 34-14-1-2; *Reed v. Plan Comm'n of Town of Munster,* 810 N.E. 2d 1126, 1127 (Ind. Ct. App. 2004). If the Court finds this, then pursuant to the Declaratory Judgments Statute, Ellis and Guenther would have standing to "have determined any question of construction or validity arising under " I.C. 36-1-8-10. Ind. Code section 34-14-1-2.

The Declaratory Judgment Statute is "remedial" in nature and is meant to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations….[and it] is to be liberally construed and administered." *Bryarly v. State,* 111 N.E. 2d 277, 232 Ind. 47, 50 (Ind. 1953) (citing: § 3-1112 Burns' 1946 Repl.); Ind. Code section 34-14-1-12, *Holcomb v. City of Bloomington,* 158 N.E. 3d 1250, 1256 (Ind. 2020).

Still, the Declaratory Judgments Statute, is not meant to resolve "theoretical cases," there must be a "justiciable controversy or question." *Id;* (quoting: *Ind. Educ. Emp't Relations Bd. v. Benton Cmty. Sch. Corp.,* 266 Ind. 491, 365 N.E. 2d 752, 755

(1977), *City of Mishawaka v. Mohney,* 156 Ind. App. 668, 297 N.E. 2d 858, 860 (1973), *Zoercher v. Alger,* 202 Ind. 214, 172 N.E. 186, 189 (1930).

With those principles in mind, it is clear the trial court did not err in finding that Guenther and Ellis had standing. (Appellant's App. Vol. II., pp. 18-19).

B. The trial court's finding that Guenther and Ellis had standing to bring both an action for Quo Warranto and Declaratory Judgment should be affirmed.

The trial court did not err in its interpretation of I.C. 36-1-8-10, I.C. 36-7-4-207 and Bloomington Municipal Code section 2.13.010, and therefore the trial court's finding that Guenther and Ellis had standing should be affirmed.

Statutory interpretation requires giving words in the statute "their plain meaning and [to] consider the structure of the statute as a whole." *ESPN, Inc. v. Univ. of Notre Dame Police Dep 't,* 62 N.E. 3d 1192, 1195 (Ind. 2016) (quoting: *West v. Office of Indiana Sec'y of State,* 54 N.E. 3d 349, 353 (Ind. 2016).

The trial court's interpretation of I.C. 36-1-8-10(b), I.C. 36-7-4-207 and Bloomington Municipal Code section 2.13.010 was appropriate and constitutionally permissible. Affirming the trial court's judgment will not lead to "irrational and disharmonizing results" and *Id* at 355.

The trial court's finding that Ellis and Guenther had standing was a result of sound statutory interpretation. The Judgment was based upon the fact that Mayor Hamilton's appointment of Kappas to the Plan Commission was "contrary to the

mandatory language of I.C. 36-1-8-10(b) in effect as of February 10, 2016." (Appellant's App. Vol. II., p. 19-20).

I.C. 36-1-8-10(b) required the appointee to have either voted in the most recent primary election held by the party with which the appointee claims affiliation", or that "if the appointee did not vote in the most recent primary election held by the party with which the appointee claims affiliation, [that appointee must have] be[en] certified as a member of that party's county chairman for the county in which the appointee resides." Ind. Code section 36-1-8-10(b).

It follows then, that since the appointment of Kappas was contrary to plain mandatory language of I.C. 36-1-8-10(b), that the appointment would be void *ab initio* and therefore Ellis would have the standing to make the appointment of Guenther since Ellis was the political party chairman of the last validly appointed member, Christopher Smith, a Republican. (Appellant's App. Vol. II, pp. 50-51).

Next, the trial court declaring that Ellis had authority to appoint Guenther was consistent with the legislative intent and plain language of the 2017 version of I.C. 36-1-8-10(d). (Appellant's App. Vol. II, p. 20). The trial court's ruling was based upon sound public policy because the ruling prevents one political party from gaining a political advantage over the other. (Appellant's App. Vol. II, p. 20).

The ruling will not lead to disharmonizing results because if the trial court would have ruled in Bloomington's favor, then in the future a political party could

attempt to gain an advantage, by as the trial court explained, "eliminating the input of a competing party chairman if an invalid appointment does get by without contest." (Appellant's App. Vol. II, p. 20).

Additionally, I.C. 36-1-8-10 was amended specifically to restrict how one may declare a party affiliation. The amendment to I.C. 36-1-8-10 shows that the legislature clearly intended to limit the scope of political party affiliation by restricting the conditions upon which a person may be recognized as a member of a political party. (See I.C. 36-1-8-10 (b)[2]

Bloomington's interpretation of I.C. 36-1-8-10 would make it impossible for a political party without an organized party chairman, or a primary to certify a member, to appoint a replacement member under the conditions and requirements of the amended I.C. 36-1-8-10.

Next, the Appellant's Brief incorrectly attempts to expand the scope of the trial court's ruling, apparently to make the argument that the ruling will lead to "irrational and disharmonizing results." (Appellant's Br. 22, 24). The trial court's ruling will not "contradict and render meaningless the plan language of no less than 17 statutes

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2(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.

creating boards under Title 36 and the Indiana Code limiting the number of appointees from a single political party, but not expressly requiring party affiliation." (Appellant's Br. 22, 24). The trial court's ruling does not "mandate party affiliation for any board." (Appellant's Br. 22).

Instead, the trial court's ruling simply found that "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." (Appellant's App. Vol. II., p. 18).

Furthermore, this Court should reject Bloomington's argument that 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). 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.

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." 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 Merit Commission for Police and Fire Board is significantly different structurally compared to a Plan Commission and is therefore not dispositive on the issue of whether Ellis and Guenther had standing.

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.

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, based upon the mandatory language referred to herein above.

C. Affirming the trial court's decision will not lead to unnecessary litigation or challenges asserting constitutional violations.

The trial court's *Findings of Fact, Conclusions and Judgment* will not lead to additional litigation for alleged violations of freedom of association guaranteed by the First Amendment of the United States Constitution. Also, to the extent, Bloomington failed to timely raise their constitutional argument regarding Ellis and Guenther's interpretation of I.C. 36-1-8-10, the argument has been waived. *Reed v. Bethel*, 2 N.E. 3d 98, 107 (Ind. Ct. App. 2014) ("[A] party may not object on one ground at trial and seek reversal on appeal using a different ground.")

The interpretation of I.C. 36-1-8-10 adopted by the trial court will not, as Bloomington argues, "lead to irrational and disharmonizing results." (Appellant's Br. p. 22). Nor would it contradict and render meaningless the plan language of no less than 17 statutes creating boards under Title 36 of the Indiana Code…" (Brief of

Appellant at p. 24). The trial court's interpretation of the statute was based upon its clear reading of the 2017 amendments to I.C. 36-1-8-10 took effect, which clarified the statutory requirements for political affiliation in the context of boards like the Plan Commission, in the context of the facts before the trial court

Bloomington's assertion that a flood of litigation and uncertainty would develop if the trial court's ruling were affirmed, is too speculative in nature and given the limited number of persons who serve on these types of boards and commissions. It is unlikely a flood of litigation would result, and the trial court could limit its ruling to the facts before the Court in a way that would not unduly impair or undermine rights of freedom of association.

Next, 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. Rights of persons without party affiliation to serve the public are already limited in other contexts, like the various Indiana County election boards where party affiliation is required.

Bloomington cited *Anderson v. Celebrezze,* 460 U.S. 780 (1983), in their brief (Brief of Appellant at p. 31), 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 explained that,

> " …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." Furthermore, 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 trial court's ruling, including, 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 concern that requiring party affiliation requirements will lead to unnecessary First Amendment litigation is overstated. Even if we stretch the trial court's ruling to the extent requested by Appellants, interpreting a political party affiliation requirement into I.C. 36-1-8-10, will not lead to "irrational and disharmonizing results" as several statutes already have political party affiliation requirements.

Furthermore, statutes that condition the availability of a government benefit upon political party affiliation have survived assertions, like those made by the Bloomington that said statutes attacks undermine the First Amendment freedoms. *See: Libertarian Party of Indiana et al., v. Packard,* 741 F. 2nd 981, 990-91 (7th Cir. 1984). In *Libertarian Party,* 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 party affiliation for the Plan Commission does not unreasonably compel individuals with no party affiliation, to support a party with which they disagree.

Independents 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.

This Court can affirm the trial court's decision, without infringing upon an Indiana taxpayer's first amendment rights. *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 659 (1976). Persons that are unaffiliated with any political party would still have a legitimate role in local government.

D. The trial court's finding that Guenther and Ellis had standing should be affirmed.

The trial court did not err in finding that Ellis and Guenther had standing to bring a *quo warranto* action. Bloomington cites *City of Gary,* to support of their assertion that Ellis and Guenther lack standing to bring an action for *Quo Warranto*. *City of Gary v. Johnson,* 621 N.E. 2d 65,0 652 (Ind. Ct. App. 1993) (Brief of Appellant, 18).

In *Gary,* 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.

Guenther's status is well beyond that of Mr. Johnson as it relates to the stipulated facts that were before the trial court, and Mr. Guenther's request for a writ of *quo warranto* and declaratory judgment.

In our case, unlike in *City of Gary,* Guenther's personal interest is apparent since he alleged that he is the rightful appointee to the City of Bloomington Plan Commission, pursuant to Indiana Code, Section 36-1-8-10.

Guenther authority for the appointment to the vacancy rests in the fact that both appointments of Cockerham and Kappas were found to be void *ab initio*. (Appellant's App. Vol. II, p. 21). 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).

In *Hovanec,* the 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 Ellis and Guenther did not have standing. (Appellant's Br. 17, 19). 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 require this Court to reverse the trial court's ruling.

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 affirm the trial court's ruling that found the appointments of Kappas and Cockerham to the Plan Commission void *ab initio*, 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 Guenther and Ellis have a sufficient stake in this a justiciable controversy.

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.

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.

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*.

Moving on, 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." Ind Code. Section 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.

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 were found to be void by the trial court.

As the trial court explained, 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. Vol. II, pp. 19-20).

Prior to Kappas holding the position on the Plan Commission, it was held by Republican Christopher Smith. (Appellant's App. Vol. II, pp. 18). As such, it was reasonable for the trial court to find 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.

In sum, the trial court's order can be affirmed without implicating taxpayer'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 this Court affirms the trial court's decision, 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. 32).

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

Ellis and Guenther do not lack standing and Kappas's and Cockerham's appointments were properly found by the trial court to be void *ab initio.* Mayor Hamilton lost the authority to make the appointment to vacancy after he failed to do so within the 90 days permitted under I.C. 36-1-8-10.

Finally, if this Court affirms the trial court's ruling that Ellis and Guenther have standing, then this Court should also uphold the trial court's finding which rejected

Bloomington's claim that mandamus action was the appropriate remedy. The trial court found, "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…"(Appellant's App. Vol. II, p. 18); *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.

For these reasons, the trial court's finding of standing should be affirmed.

II. The trial court properly ruled in favor of Ellis and Guenther, neither waiver nor laches barred the claims asserted in their *Amended Complaint*.

The Appellant's Brief failed to include the applicable standard of review for deciding the appellant's arguments surrounding waiver and laches. (Appellant's Br. 38-46). Including the applicable standard of review is required by Ind. Appellate Rule 46(A)(8)(b).

The trial court did not make a specific finding rejecting Bloomington's affirmative defense of waiver and laches, however, by ruling in favor of Guenther and Ellis, the trial court effectively rejected the waiver and laches arguments. The trial court's ruling should be affirmed in all respects.

A. Standard of Review

Since the trial court entered findings of fact and conclusions of law with its judgment, the applicable standard of review is found under Trial Rule 52(A), "…the court on appeal shall not set aside the findings or judgment unless [it's] clearly

erroneous…" T.R. 52(A); *Hannon v. Metropolitan Development,* 685 N.E. 2d 1075, 1078 (Ind. Ct. App. 1997). In other words, to reverse the trial court's ruling, this Court must be satisfied that the trial court must be "definitely and firmly convinced that the trial court committed error." *AmRhein v. Eden,* 779 N.E. 2d 1197, 1206 (Ind. Ct. App. 2002). Furthermore, "[t]o the extent that the judgment is based on erroneous findings, those findings are superfluous and are not fatal to the judgment if the remaining valid findings and conclusions support the judgment." *Williams v. Rogier,* 611 N.E. 2d 189, 196 (Ind. Ct. App. 1993). Finally, conclusions of law, are reviewed *de novo. AmRhein* 779 N.E. 2d at 1206.

B. It was not clearly erroneous for the trial court to declare Kappas's appointment void *ab initio*, and Ellis and Guenther did not waive their right to challenge Kappas' appointment through the trial court action.

Ellis and Guenther did not knowingly waive their right to challenge Kappas' appointment to the Plan Commission. Furthermore, Ellis and Guenther aren't retroactively challenging Kappas' appointment to the Plan Commission; they are simply requesting the Court to affirm the trial court's decision finding Kappas's appointment void *ab initio*. It was within the trial court's discretion to declare Kappas's appointment void.

Additionally, no stipulated facts exist that clearly establish that Ellis had actual knowledge of the existence of a purported "duty to act in both making a legitimate appointment to the Plan Commission to replace Christopher Smith and challenging

Kappas' occupancy of Smith's former seat." (Appellant's Brief at p. 37). No stipulated facts establish that at the time Smith's term expired that "Ellis clearly had actual knowledge of the existence of Indiana Code Section 36-1-8-10." (Appellant's Brief p. 37) No facts exist to suggest that Ellis intended to relinquish any rights he may have under I.C. 36-1-8-10, which waiver requires. *See Lafayette Car Wash, Inc. v. Boss,* 282 N.E. 2d 838 (Ind. 1972).

Next, to support their assertion that "Ellis voluntarily and intentionally relinquished his known right to appoint a replacement to Smith and challenge Kappas's holding of the seat on the Plan Commission," Bloomington in their *Brief,* at page thirty-eight (38), cited *Indiana State Highway Comm'n v. Pappas*, 169 Ind. App. 611, 349 N.E. 2d 808 (1976). In *Highway Comm'n,* s the Highway Commission had approached Pappas and offered him $12,600 for his property as part of condemnation process required for a highway construction project. *Id* at 810.

The stipulated facts here are clearly distinguishable from *Highway Comm'n,* where the Court of Appeals held that the Indiana State Highway Commission had "waived its right to evict Pappas every time is gave him another 30-day extension of permission to stay on the premises." *Id* at 813-14. The context of the issue of waiver is entirely different.

Unlike Ellis, a political party chair requesting declaratory judgment rights to establish respective rights of the parties under a recently amended I.C. 36-1-8-10, the

highway commission, was a political party, operating under clearly established processes for highway construction. In *Highway Comm'n,* the Commission "voluntarily and intentionally relinquished their eviction rights.

Bloomington is incorrectly asserting that Ellis waived his ability to request the Court to declare an appointment to a Plan Commission invalid as part a request for a writ of *Quo Warranto*, all in the context of litigation surrounding a novel issue of whether or not political affiliation should be applied to boards such as the City of Bloomington, Plan Commission.

Ellis did not voluntarily relinquish a known right, with the intention to relinquish said right. *M.O. v. Indiana Dept. of Ins. Patient's Compensation Fund,* 968 N.E.2d 254, 261 (Ind. Ct. App. 2012). Ellis never claimed to have the power in 2016 to make the appointment, it was not until Mayor Hamilton made the improper appointment of Cockerham did the question of statutory interpretation arise.

The right of Ellis to appoint Guenther to the Plan Commission should exist regardless of any delay Ellis and Guenther had in asserting their rights in the disputed seat on the Plan Commission. This Court can affirm the trial court's ruling that Kappas' appointment was void *ab initio* without consideration of any delay in Ellis and Guenther's challenge of said appointment because the issue of the validity of the appointment needs to be resolved in order to dispose of the conflict surrounding the

correct interpretation of I.C. 36-1-8-10 is within their discretion under the declaratory judgment statute.

Any delay in asserting that Kappas's appointment should be declared void is excusable. The trial court's ruling should be affirmed.

C. Laches does not bar Ellis and Guenther's claims, and any delay was excusable and did not establish acquiescence to Kappas's invalid appointment.

Relief based on laches is discretionary. *State ex rel. Harris v. Mutschler,* 115 N.E. 2d 26, 20 (Ind. 1953). It was well within the trial court's discretion to deny Bloomington's affirmative defense of laches.

The trial court's decision to grant relief in quo warranto and for declaratory judgment was not clearly erroneous because no circumstances existed that would have made it reasonable for the Ellis and Guenther to assert the rights they received based on the amendments to I.C. 36-1-8-10.

The facts in *State ex rel Hogue v. Slack,* 200 Ind. 241, 162 N.E. 670, 674 (1928), a case almost 100 years old, are distinguishable from the facts before the Court here. In *Hogue,* the Indiana Supreme Court held that 20 months was too long to assert a claim to a disputed office position. Here, Ellis made his appointment timely (only 106 days after the expiration of Kappas's term), shortly after the time had elapsed for Mayor Hamilton to make the appointment. Although laches has been used in cases involving *Quo Warranto*, the facts here are sufficiently different whereby the application of laches is

inappropriate because there lacked sufficient knowing acquiescence of the existing conditions-the invalid appointment of Kappas. *Chico Corp. v Delaware-Muncie Bd. of Zoning Appeals,* 466 N.E. 2d 472, 475 (Ind. Ct. App. 1984). It would have been unreasonable for Ellis and Guenther to have "challenged" the validity of Kappas's appointment when he was appointed in 2016 as asserted by Bloomington, especially since the 2017 amendments had not taken effect.

Under the stipulated facts before this Court, it is well within this Court's powers to reject Bloomington's argument that laches barred the Bloomington's claims for *Quo Warranto* and Declaratory Judgment.

Ellis's right to appoint Guenther did not arise until after Mayor Hamilton failed to make a timely replacement appointment. Ellis timely appointed Guenther. Laches should not impair their claim for *Quo Warranto* under these circumstances.

Unlike *Hutter v. Weiss,* 132 Ind. App. 244, 259, 177 N.E. 2d 339, 346 (1961), which was cited by Bloomington in their latest Brief, (at pp. 41-42). Ellis's appointment of Guenther took place within weeks of his appointment powers being vested. In *Hutter,* the court found a delay of 20 months in bringing a *quo warranto* action was barred by laches). No similar unreasonable delay existed here.

Any prejudice to the City of Bloomington if this Court's affirms the trial court's ruling is outweighed by the harm to Ellis and Guenther.

Any issues that Bloomington has with how the Court ultimately interprets 36-1-8-10 is a matter better suited for further legislative, not judicial action. It would be inappropriate under these circumstances for the court to reverse the trial court's ruling under a theory of laches. Any limitation imposed on the Appellants by not being able to appoint citizens without party affiliation, to boards like the Plan Commission, would be a prejudice is overstated.

Affirming the trial court's ruling would provide greater certainty in the future because when appointment issues arise, the affected citizen will know how to properly apply I.C. 36-1-8-10. Any restrictions or limitations imposed on persons without political affiliation, will provide an impetus for those political independents to organize and lobby for changes to the statute.

For those reasons, laches does not prevent this Court from affirming the trial court's decision, and Ellis and Guenther did not waive their claims asserted in the *Amended Complaint*. Under the circumstances as explained herein, any delay in Ellis and Guenther's challenge of the validity of Kappas' appointment was excusable and this Court can resolve the statutory interpretation issues without any unfair prejudice to Bloomington.

III. I.C. 36-7-4-216(b)(2) did not prevent Guenther from being appointed to the Plan Commission by Ellis, while being a member of the Environmental Commission.

The trial court recognized that both Guenther and Kappas served on the Bloomington Environmental Conclusion as the parties had stipulated to those facts. (Appellant's App. Vol II., pp. 16)

However, unlike Kappas, Guenther never held the vacant seat on the Bloomington Plan Commission. To this date, Guenther has not been able to effectively "hold" the seat, as even after the trial court ruled that Guenther was "immediately entitled to the appointed seat on the Bloomington Plan Commission," the City of Bloomington, sought and received a stay of the trial court's order, and to this date, Cockerham maintains the seat on the Plan Commission. (Appellant's App. Vol II., pp. 13, 20-21). Cockerham has not relinquished or vacated the Plan Commission seat.

A. Standard of Review.

Once again, since the trial court entered findings of fact and conclusions of law with its judgment, the applicable standard of review is found under Trial Rule 52(A), "…the court on appeal shall not set aside the findings or judgment unless [it's] clearly erroneous…" T.R. 52(A); *Hannon v. Metropolitan Development,* 685 N.E. 2d 1075, 1078 (Ind. Ct. App. 1997).

The trial court's ruling cannot be reversed unless this Court is "definitely and firmly convinced that the trial court committed error." *AmRhein v. Eden,* 779 N.E. 2d 1197, 1206 (Ind. Ct. App. 2002).

Additionally, "[t]o the extent that the judgment is based on erroneous findings, those findings are superfluous and are not fatal to the judgment if the remaining valid findings and conclusions support the judgment." *Williams v. Rogier,* 611 N.E. 2d 189, 196 (Ind. Ct. App. 1993). Finally, conclusions of law, are reviewed *de novo. AmRhein* 779 N.E. 2d at 1206.

B. **Guenther never held the disputed Plan Commission seat, at all relevant times, it has been held by either Smith, Kappas, or Cockerham.**

No case law appears to exist interpreting a situation that we have here, where an appointment of an existing member of a Commission, like the Environmental Commission, is appointed to another Commission seat, but never actually gets to hold or perform any duties as a member of the disputed seat.

Pursuant to I.C. 36-7-4-216(b)(2), states,

"(b) A citizen member may not hold:

(1) an elected office (as defined in I.C. 3-5-2-17) or

(2) any other appointed office in municipal, county, or state government.

except for membership on the board of zoning appeals as required by section 902 of this chapter and, in the case of an area plan commission, membership on the body from which the member must be appointed under this series."

The trial court was well within its discretion to deny the City of Bloomington's argument that Guenther's position on the Environmental Commission barred Guenther from being appointed to the Plan Commission. City of Bloomington's interpretation of

I.C. 36-7-4-216(2) would have been more persuasive if Kappas had not simultaneously held two Commission seats, and if Guenther actually held the seat on the Plan Commission. Guenther has never taken or acted in the capacity as a member of the Plan Commission. Guenther has never been an active and voting member of the Plan Commission. Through the pendency of this matter, Cockerham has held the disputed Plan Commission seat. (Appellant's App. Vol II., pp. 16).

Next, Guenther position on the Environmental Commission was unpaid, and he did not receive any financial benefit from his position on the Environmental Commission, and therefore his position on the Environmental Commission cannot be considered a "lucrative office" for the purposes of Article 2 section 9 of the Indiana Constitution.

Bloomington did not articulate or point to specific facts indicating how Guenther's enumerated duties on the Environmental Commission, governed by B.M.C. section 2.12.050, will in anyway prejudice his ability to serve the public, or undermine the impartiality of either of the Commission positions.

On the other hand, Kappas actually served on the Plan Commission while being an active member on the Environmental Commission, which was clearly against the plain language of I.C. 36-7-4-216(b)(2) because Kappas actually "held" the position on both commissions of municipal government. (Appellant's App. Vol. II, p. 16). Holding

two (2) positions simultaneously would have provided an additional basis to find that Kappas's appointment was void *ab initio*.

As such, Guenther should not be barred from holding a seat on the Plan Commission because of his membership on the Environmental Commission.

IV. The trial court did not err un exercising its discretion to issue a writ for *quo warranto* and a declaratory judgment.

A. Standard of Review

To the extent that Bloomington is alleging the trial court made an inappropriate legal conclusion on to the issue of whether or not Ellis and Guenther could seek both relief for declaratory judgment and a writ of quo warranto, the standard of review would be de novo. *Gittings v. Deal,* 109 N.E. 3d 963, 970 (Ind. 2018). Otherwise, the Court would apply a "clearly erroneous" standard to the extent this issue involved findings or judgment of the trial court. *Hannon v. Metropolitan Development,* 685 N.E. 2d 1075, 1078 (Ind. Ct. App. 1997).

B. The trial court did not err in granting Guenther and Ellis both declaratory relief and a writ of Quo Warranto.

The trial court properly concluded that it had the discretion to issue a declaratory judgment under I.C. 34-14-1-2, and a Writ of *Quo Warranto* ordering Cockerham "to vacate and relinquish his improperly appointed seat on the Bloomington Plan Commission." (Appellant's App. Vol. II p. 19, 22)

It was within the trial court's decision to do so. A full and adequate remedy was not available under the court's ruling without the trial court issuing declaratory relief in conjunction with the Writ of *Quo Warranto.* "The determinative factor…," in granting declaratory relief is "whether the declaratory action will result in a just and more expeditious and economical determination of the entire controversy." *Volkswagenwerk, A.G. v. Watson,* Ind. App., 390 N.E. 2d 1082, 1085 (Ind. Ct. App. 1980).

The stipulated facts and circumstances here, are sufficiently distinguishable from *Madden v. Houck,* 403 N.E. 2d 1133 (Ind. Ct. App. 1980). In *Madden*, the complainant did not also seek a Writ for *Quo Warranto,* like Ellis and Guenther did here. *Id* at 1136. Instead, the complainant only sought declaratory judgment which the Court of Appeals concluded that since "…issuance of a declaratory judgment would not completely resolve the controversy, we conclude that the trial court erred in denying Madden's motion to dismiss." *Id.* Since the trial court's ruling completely determined that relevant rights of the affected parties to the Plan Commission seat, it was a more efficient and expeditious resolution of the parties' entire controversy. *Volkswagenwerk, A.G. v. Watson,* Ind. App., 390 N.E. 2d 1082, 1085 (Ind. Ct. App. 1980).

Indiana law does not support the City of Bloomington's request to reverse the trial court's ruling. Ellis and Guenther had the legal authority to seek, and it was

within the trial court's discretion, to issue a Judgment that had both declaratory relief and a Writ of Quo Warranto.

CONCLUSION

For the foregoing reasons, the trial court's *Findings of Fact, Conclusions and Judgment* should be affirmed in its entirety.

Respectfully submitted,

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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 2, 2022.

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