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IN THE  
COURT OF APPEALS OF INDIANA

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The City of Bloomington,  
Indiana, et al.,

*Appellants-Respondents,*

v.

Andrew Guenther, et al.,

*Appellees-Petitioners,*

May 20, 2022

Court of Appeals Case No.  
21A-MI-2600

Appeal from the Monroe Circuit  
Court

The Honorable Erik C. Allen,  
Special Judge

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

**Robb, Judge.**

## Case Summary and Issue

- [1] The City of Bloomington’s (“City”) Plan Commission (“Commission”) consists of ten members, five of whom are citizens appointed by the mayor. In 2020, a dispute arose when William Ellis, the Chairman of the Monroe County Republican Party (“Chairman”), and John Hamilton, Mayor of the City (“Mayor”), each appointed a person to the same vacant citizen member seat on the Commission. The Chairman and his appointee, Andrew Guenther, sued the City; the Mayor; the Mayor’s appointee, Christopher Cockerham; and a former member of the Commission, Nicholas Kappas, seeking a declaratory judgment and Writ of Quo Warranto naming Guenther the rightful holder of the seat. The trial court determined that Guenther was entitled to the seat and ordered Cockerham to vacate the seat. The City appeals, raising several issues that we consolidate and restate as one: whether the trial court’s judgment is clearly erroneous. Concluding that the judgment is clearly erroneous based upon our *de novo* review of the relevant statutes, we reverse.

## Facts and Procedural History

- [2] The parties stipulated to the following facts: The Commission consists of ten members, five of whom are appointed by the Mayor.<sup>1</sup> Pursuant to the Indiana

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<sup>1</sup> Although the parties stipulated there are ten members of the Commission, it appears that during the relevant time, the Bloomington Municipal Code called for twelve members. The two additional members have no bearing on this case, however.

Code and the City's Municipal Code, no more than three of the five mayoral appointees may be of the same political party.

[3] From January 2, 2012 through January 5, 2016, one of the mayoral seats on the Commission was held by Christopher Smith, who was affiliated with the Monroe County Republican Party. When Smith's term expired, Kappas was appointed to Smith's seat and served from February 10, 2016 through January 6, 2020. Before and during Kappas' term on the Commission, Kappas did not vote in a primary election, did not claim a party affiliation, and was not certified as a member of a political party. Kappas' appointment to the Commission has not been challenged prior to this litigation.

[4] Following the end of his term on January 6, 2020, Kappas' seat on the Commission was vacant. At that time, three citizen member seats were held by Democrats and one citizen member seat was held by a Republican. On April 16, the Chairman appointed Guenther, who was affiliated with the Republican Party, to the vacant seat, claiming authority to do so pursuant to Indiana Code section 36-1-8-10. Guenther voted in the Monroe County Republican party primary election in 2019, the most recent primary election to be held prior to his appointment to the Commission.<sup>2</sup> The City rejected Guenther's appointment, and on May 7, the Mayor appointed Cockerham to Kappas' seat.

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<sup>2</sup> On January 2, 2021, Guenther resigned from the Republican Party.

[5] In 2019, Cockerham had voted in the Monroe County Democratic Party primary election. In 2020, in-person voting for the Indiana primary election had been scheduled to occur on May 5 but was rescheduled to June 2 due to the COVID-19 pandemic. *See* Executive Order 20-07 (signed March 20, 2020), [https://www.in.gov/gov/files/EO\\_20-07\\_Rescheduling\\_Primary.pdf](https://www.in.gov/gov/files/EO_20-07_Rescheduling_Primary.pdf) (last visited May 18, 2022) [<https://perma.cc/9FVL-STXH>]. Prior to his appointment to the Commission on May 7, 2020, Cockerham had requested, received, completed, and submitted his ballot for the 2020 Monroe County Republican Party primary election. On that date, Cockerham had not been certified by the Chairman as a member of the Republican Party. The Mayor reaffirmed Cockerham’s appointment on June 3. Cockerham first took his seat at a Commission meeting on June 8.

[6] On June 10, the Chairman and Guenther (“Petitioners,” where appropriate) filed a Verified Complaint for Writ of Quo Warranto against the City, the Mayor, and Cockerham. In July, Petitioners amended the complaint to add Kappas (together with the City, the Mayor, and Cockerham, “Respondents,” where appropriate) as a respondent and to also request declaratory judgment. The amended complaint requested the trial court declare Kappas’ appointment to the Commission in 2016 void *ab initio* because he did not meet the requirements of Indiana Code section 36-1-8-10(b) when he was appointed; declare the Mayor lost authority to make an appointment to the Commission after the seat was vacant for more than ninety days and that the Chairman had such authority thereafter pursuant to Indiana Code section 36-1-8-10(d); and

issue a Writ of Quo Warranto vacating Cockerham’s appointment as wrongfully made and installing Guenther as a member of the Commission.<sup>3</sup>

The parties submitted the above agreed factual stipulations, proposed findings, and supporting briefs to the trial court, and the trial court made a decision on the paper record.

[7] The trial court issued its Findings of Fact, Conclusions, and Judgment on November 18, 2021. The trial court described the task before it as resolving “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.” Appealed Order at 5. The trial court found that Kappas’ appointment, given that he was unaffiliated with a political party, was “contrary to the mandatory language of I.C. 36-1-8-10(b) in effect as of [the date of his appointment],” and therefore his appointment was void *ab initio* and the seat was effectively vacant after Smith’s term expired on January 5, 2016. *Id.* at 6-7, ¶ N.

[8] On July 1, 2017, Indiana Code section 36-1-8-10 was amended and subsection (d) was added, giving the “county chairman of the political party of the member whose term has expired” authority to make an appointment if the initial

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<sup>3</sup> Respondents filed a motion to dismiss the complaint, claiming Petitioners lacked standing. The trial court denied the motion but granted the Respondents’ request to certify its order for interlocutory appeal. On appeal, this court affirmed the trial court, holding that Petitioners “stated sufficient facts to demonstrate that they have standing to bring their complaint for declaratory judgment and request for a *writ of quo warranto*” because they have a personal stake in the outcome of the proceedings distinct from that of the general public. *City of Bloomington v. Guenther*, No. 20A-MI-1900 at \*4, ¶ 15 (Ind. Ct. App. April 6, 2021).

appointing authority (here, the Mayor) does not make an appointment to fill the vacancy within ninety days. The trial court found that as of July 1, 2017, with Kappas' appointment void *ab initio* and the seat effectively vacant since January 5, 2016, either the Mayor or the Chairman, as “the county chair of the political party of the *last validly appointed* member whose term expired[,]” could have made a valid appointment to the Commission, and whichever did so first would have made a valid appointment. *Id.* at 7, ¶¶ P, Q. Thus, the trial court concluded that the Chairman's appointment of Guenther on April 16, as the first appointment to the vacant seat last held by a Republican, was valid. *Id.* at 8, ¶ U. The trial court also found that even if Kappas' appointment were acknowledged because there was no timely contest to his appointment, the Chairman still had authority pursuant to Indiana Code section 36-1-8-10(d) to validly appoint Guenther because the Mayor failed to act within ninety days of Kappas vacating the seat. *Id.* at 8, ¶ V.

[9] Finally, the trial court found that Cockerham, the Mayor's purported appointee, was not eligible to serve on the Commission because the Bloomington Municipal Code limits the five mayoral appointees to no more than three of the same political party and Indiana Code section 36-1-8-10(b)(1) states that the most recent primary election in which the appointee voted must have been a “primary election held by the party with which the appointee claims affiliation.” Although Cockerham claimed affiliation with the Republican party as of the date of his purported appointment by the Mayor, he had voted in the Democratic primary in 2019. He had submitted a ballot in the

2020 Republican primary prior to his appointment, but he was not certified by the Chairman as a member of the Republican Party and because of the COVID-19 pandemic, in person voting for the 2020 primary election was moved from May 5 to June 2. The trial court found that “[u]ntil a primary election is completed it is not the most recent election.” *Id.* at 8, ¶ T. Therefore, the trial court found that not only was the Mayor’s appointment of Cockerham too late, but it also ran afoul of the Indiana and Bloomington Municipal Codes because Cockerham was a Democrat at the time of his appointment, which would have made four Democratic appointees on the Commission.

[10] Accordingly, the trial court entered the following orders:

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 the 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.

*Id.* at 8-9. Enforcement of the trial court's order is stayed pending resolution of the City's appeal.

## Discussion and Decision

### I. Standard of Review

[11] The City raises numerous issues for our review, including issues related to the First Amendment to United States Constitution, the Petitioners' standing, waiver, laches, and whether the Petitioners used the proper procedural vehicle to raise their claims. But this challenge to the trial court's order primarily presents a question of statutory interpretation and we conclude that it is unnecessary to individually address all the claims and defenses asserted in this appeal to decide this case.

[12] The trial court issued a thorough order addressing its view of the issues presented. And as the trial court noted in its order, this case rests on resolving the parties' opposing views of Indiana Code section 36-1-8-10(b) and (d), Indiana Code section 36-7-4-207, and Bloomington Municipal Code section 2.13.010. *See* Appealed Order at 5. When reviewing judgments with findings of fact and conclusions thereon, we "shall not set aside the findings or judgment unless clearly erroneous, and due regard shall be given to the opportunity of the

trial court to judge the credibility of the witnesses.” Ind. Trial Rule 52(A). Here, there were no witnesses, and the findings mirror the parties’ agreed stipulations. Thus, we assess only the trial court’s legal conclusions and interpretation of statutes, which, as matters of law, we review *de novo*. *Gittings v. Deal*, 109 N.E.3d 963, 970 (Ind. 2018).

[13] In statutory construction, our primary goal is to ascertain and give effect to the intent of the legislature. *U.S. Steel Corp. v. N. Ind. Pub. Serv. Co.*, 951 N.E.2d 542, 552 (Ind. Ct. App. 2011), *trans. denied*. The language of the statute itself is the best evidence of legislative intent, and we must give all words their plain and ordinary meaning unless otherwise indicated by the statute. *Id.* Moreover, “[w]e may not add new words to a statute which are not the expressed intent of the legislature.” *City of Lawrence Utils. Serv. Bd. v. Curry*, 68 N.E.3d 581, 585 (Ind. 2017). “[W]hen engaging in statutory interpretation, we avoid an interpretation that renders any part of the statute meaningless or superfluous.” *ESPN, Inc. v. Univ. of Notre Dame Police Dep’t*, 62 N.E.3d 1192, 1199 (Ind. 2016) (internal quotation marks omitted). “And statutes concerning the same subject matter must be read together to harmonize and give effect to each.” *Clippinger v. State*, 54 N.E.3d 986, 989 (Ind. 2016).

## II. Relevant Statutes

[14] The 200 series of Indiana Code chapter 36-7-4 sets forth the rules by which a legislative body of a county or municipality wanting to exercise planning and

zoning powers may, by ordinance, establish a plan commission. Indiana Code section 36-7-4-207(a) describes the membership of a city plan commission:

ADVISORY. In a city having a park board and a city civil engineer, the city plan commission consists of nine (9) members, as follows:

(1) One (1) member appointed by the city legislative body from its membership.

(2) One (1) member appointed by the park board.

(3) One (1) member or designated representative appointed by the city works board.

(4) The city civil engineer or a qualified assistant appointed by the city civil engineer.

(5) Five (5) citizen members, *of whom no more than three (3) may be of the same political party*, appointed by the city executive.

(Emphasis added.)

[15] Bloomington Municipal Code section 2.13.010 describes the appointment and qualifications of its plan commission and largely mirrors Indiana Code section 36-7-4-207(a):

The commission shall consist of ten members<sup>[4]</sup> who by statute shall be appointed in the following manner:

- (1) One member appointed by and from the membership of the common council.
- (2) One member appointed by and from the membership of the board of park commissioners.
- (3) One member appointed by the board of public works from its membership or as its designated representative.
- (4) The city civil engineer or a qualified assistant appointed by the city civil engineer.
- (5) Five citizens, *no more than three of whom may be of the same political party*, appointed by the mayor.
- (6) One nonvoting member appointed by and representing the Monroe County plan commission.

Bloomington Municipal Code,

[https://library.municode.com/in/bloomington/codes/code\\_of\\_ordinances?noDeId=TIT2ADPE\\_CH2.13PLCO](https://library.municode.com/in/bloomington/codes/code_of_ordinances?noDeId=TIT2ADPE_CH2.13PLCO) (last visited May 18, 2022)

[<https://perma.cc/2JMY-RV5S>] (emphasis added).

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<sup>4</sup> The Commission has ten members instead of the nine stated in Indiana Code section 36-7-4-207(a) pursuant to the authority of Indiana Code section 36-7-4-213, which states that if a municipality with a municipal plan commission is located in a county with a county plan commission, “a designated representative of the county plan commission shall serve as an advisory member of the municipal plan commission” and vice versa. “Each advisory member has all the privileges of membership, except the right to vote.” Ind. Code § 36-7-4-213.

[16] At the time Kappas was appointed, Indiana Code section 36-1-8-10 read 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 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, the appointee claims a party affiliation.

(3) The appointee is certified as a member of that party by the party’s county chairman for the county in which the appointee resides.

(c) 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, the member may continue to serve on the board for only sixty (60) days after the expiration date of the member’s term.

Ind. Code § 36-1-8-10 (2002).<sup>5</sup> But during Kappas' term, Indiana Code section 36-1-8-10 was amended to read (including only those sections that were amended):

(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.

\* \* \*

(d) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not

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<sup>5</sup> In the trial court's order, it stated that when Smith's appointment ended in January 2016, section 36-1-8-10(b) provided that "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." Appealed Order at 6, ¶ M. Although this was the language when the statute was first enacted in 1988, it was amended several times thereafter, and the version in effect at the time of Kappas' appointment is as quoted here.

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 chairman of the political party of the member whose term has expired shall make the appointment.

Ind. Code § 36-1-8-10 (2017).<sup>6</sup>

### III. Is Party Affiliation Required to Serve on a Plan Commission?

[17] We address first the trial court's conclusion that Kappas' appointment was void *ab initio* because he was not affiliated with a political party. This is the threshold question upon which the Petitioners premised their suit.<sup>7</sup>

[18] Indiana Code section 36-7-4-207(a), part of the series that establishes planning and zoning commissions and describes their membership, states that a plan

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<sup>6</sup> Technical corrections were made to this section effective March 15, 2018, but they did not alter the substance of the statute.

<sup>7</sup> The Respondents argue the Petitioners did not have standing and assert this case should be dismissed on that basis. As noted above, *supra* n.3, their standing was already challenged in the trial court by a motion to dismiss and was addressed by this court on appeal of the trial court's denial. Quo warranto is the proper remedy for determining the right of a party to hold office, *City of Gary v. Johnson*, 621 N.E.2d 650, 652 (Ind. Ct. App. 1993), and the Petitioners' complaint alleged Cockerham had no right to the seat on the Commission and that Guenther did, *City of Bloomington*, 20A-MI-1900 at \*4. The fact that we disagree with the Petitioners' position at this point does not strip the Petitioners of their standing to raise the question at the outset.

commission consists of nine members, five of whom are to be citizen members appointed by the executive. Of those five, “no more than three (3) may be of the same political party[.]” Ind. Code § 36-7-4-207(a)(5); *see also* Bloomington Mun. Code § 2-13.010(5). Unlike, for instance, Indiana Code section 3-6-4.1-2 that states the Indiana Election Commission consists of four individuals appointed by the governor, each of whom “must be a member of a major political party of the state[.]” section 36-7-4-207 does not impose a party affiliation requirement on the citizen members of a plan commission.<sup>8</sup> Instead, it imposes a limitation on the appointing authority. *See Harrell v. Sullivan*, 40 N.E.2d 115, 119, 220 Ind. 108, 119 (1942) (“A statute which provides for a board or commission of a certain number, no more than a certain proportion of whose members shall belong to the same political party, imposes a limitation and not a qualification.”), *overruled on other grounds by State ex rel. Buttz v. Marion Circuit Court*, 72 N.E.2d 225, 225 Ind. 7 (1947).

[19] Section 36-1-8-10(b) by its terms acknowledges the two different types of boards: those conditioning appointment to a board on the political affiliation of the appointee and those limiting the membership of a board to a stated number

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<sup>8</sup> Another formulation that differs from section 36-7-4-207 is found, for example, in section 36-8-3.5-6(a), which states a police or fire merit commission consists of five commissioners, two of whom are appointed by the executive but “must be of different political parties,” one of whom is appointed by the legislative body, and two of whom are elected by the active members of the department but “must be of different political parties[.]” Like section 3-6-4.1-2, section 36-8-3.5-6(a) has a political party affiliation requirement.

We also note that Indiana Code section 3-6-4.1-2 imposes both a party affiliation requirement *and* a party affiliation limitation on members of the Indiana Election Commission, requiring that each member of the commission “must be a member of a major political party of the state” but also limiting the commission to having not more than two members of the same political party.

of members from the same political party. In the latter case, section 36-1-8-10(b) explains how to determine the party affiliation of a citizen member for purposes of abiding by this limitation, but it does not graft a party affiliation requirement onto section 36-7-4-207(a) where none is stated therein. *See City of Lawrence Utils. Serv. Bd.*, 68 N.E.3d at 585 (noting we “may not add new words to a statute which are not the expressed intent of the legislature”). Tellingly, despite acknowledging the case rested on interpretation of section 36-1-8-10 and section 36-7-4-207(a), the trial court only analyzed section 36-1-8-10 in reaching its decision. But to harmonize and give effect to the language of *both* sections 36-7-4-207(a) and 36-1-8-10(b), we conclude section 36-1-8-10(b) only applies if a citizen member’s claimed party affiliation must be proven for purposes of honoring the limitation in section 36-7-4-207(a)(5). Where a citizen member claims no party affiliation and therefore does not impact the political party affiliation limitation, section 36-1-8-10(b) is irrelevant.

[20] In determining legislative intent, we “consider the objects and purposes of the statute as well as the effects and repercussions of” our interpretation. *State v. Int’l Bus. Machs. Corp.*, 964 N.E.2d 206, 209 (Ind. 2012) (quoting *Bushong v. Williamson*, 790 N.E.2d 467, 471 (Ind. 2003)). To accept the trial court’s interpretation that section 36-1-8-10 mandates a party affiliation for a plan commission member would be to accept an interpretation that conflicts with the plain language of section 36-7-4-207(a) and excludes unaffiliated citizens from serving when *all* citizens have an interest in “improv[ing] the health, safety, convenience, and welfare of their [communities] and . . . plan[ning] for [their]

future development[.]” Ind. Code § 36-7-4-201(b) (stating the purpose of the local planning and zoning statutes). As long as a citizen member appointee to a plan commission has the qualifications described in Indiana Code section 36-7-4-213 and his or her appointment does not mean there are more than three members of a given political party among the citizen members, the appointment is valid.

[21] As the Petitioners did not challenge Kappas’ qualifications on any basis other than his lack of political party affiliation, and as we have found that section 36-7-4-207 does not require a member of a plan commission to have a party affiliation, we conclude the trial court clearly erred in declaring Kappas’ appointment void *ab initio*. Further, because Kappas’ appointment was valid, and because he was unaffiliated with a political party, the Chairman had no authority pursuant to Indiana Code section 36-1-8-10(d) to appoint a citizen member to fill the vacancy when the Mayor did not make an appointment for more than ninety days. The chair of a political party only has appointment authority when the member whose term has expired is a member of that political party. Thus, the trial court also clearly erred in declaring the Chairman had the authority to appoint Guenther to the Commission and in ordering that Guenther was immediately entitled to the seat.

#### IV. Which Primary Election in Which Cockerham Voted Was the Most Recent?

[22] Having determined that Kappas’ appointment was valid and that because Kappas was politically unaffiliated, the Chairman was not authorized by

section 36-1-8-10(d) to appoint Guenther, a member of his party, to Kappas' vacant seat, we must consider whether the Mayor's appointment of Cockerham comports with the party limitation of section 36-7-4-207(a). Although it was not necessary to refer to section 36-1-8-10(b) in determining whether Kappas, a politically unaffiliated citizen, was properly appointed to the Commission, that section does come into play when considering whether Cockerham's appointment was valid.

[23] After Kappas' term ended in 2020, there were three Democrats and one Republican citizen member serving on the Commission. *See* Appellant's Appendix, Volume 2 at 51, ¶ 18. Therefore, according to the limitation set by section 36-7-4-207(a) and Bloomington Municipal Code section 2.13.010 on the makeup of the Commission, Kappas' seat could not be filled by a member of the Democratic Party. The Mayor appointed Cockerham on May 7, 2020 to fill the vacant seat. Cockerham had voted in the Democratic Party primary election in 2019 but had, prior to his appointment on May 7, "requested, received, completed, and submitted his ballot for the 2020 Republican Party primary election to the office of the Monroe County Circuit Court Clerk." *Id.* at 52, ¶ 25. Cockerham was not certified by the Chairman as a member of the Republican Party as of May 7, 2020. In-person voting for the 2020 primary

election had originally been scheduled for May 5 but was delayed to June 2 due to the COVID-19 pandemic.<sup>9</sup>

[24] Section 36-1-8-10(b) states that to be of a particular political party for purposes of membership on a commission, one 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.<sup>[10]</sup>

(Emphasis added.) Subsection (1) is the relevant section for determining Cockerham's political affiliation, as he has voted in primary elections and therefore subsection (2) does not apply. The trial court found that "the 2020

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<sup>9</sup> In addition to moving the date of in-person voting for the primary election due to the COVID-19 pandemic, Indiana election officials offered no-excuse mail-in absentee voting for the primary which it appears Cockerham took advantage of. See *Frederick v. Lawson*, 481 F.Supp.3d 774, 780 n.2 (S.D. Ind. 2020).

<sup>10</sup> Although subsection (b)(2) does not apply here because Cockerham has voted in an Indiana primary election, we must note that subsection is difficult to understand, as "that party" does not obviously refer to any particular party. As originally enacted, section 36-1-8-10 provided that when political affiliation must be determined with respect to appointment to a board, the appointee at the time of the appointment must either have voted in the most recent primary election held by the party with which the appointee claims affiliation or "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[.]" Ind. Code § 36-1-8-10(b) (1988) (emphasis added). In the original version, "that party" clearly referred to the party with which the appointee claims affiliation. Through various amendments over the years, "the party with which the appointee claims affiliation" has been dropped from this subsection of the statute, and although that may still be the intended reference for "that party," it is not so stated on the face of the statute.

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.*” Appealed Order at 8, ¶ T (emphasis added). The trial court therefore concluded that Cockerham “was a ‘Democrat’ for purposes of I.C. 36-1-8-10 at the time of his appointment to the [] Commission and was not eligible for appointment under the circumstances then existing[.]” *Id.* at 8, ¶ 3. We disagree.

[25] The only temporal limitation in section 36-1-8-10 is that the vote purportedly creating a party affiliation must have been cast in the most recent primary election. There is nothing in the statutory language, structure, or purpose suggesting the General Assembly directed that even after that primary election vote is cast a party affiliation does not arise until after the polls are closed. Notably, the function of the verb “held” in subsection 36-1-8-10(b)(1) is to identify *who* held the election, not *when* it occurred.

[26] The parties stipulated and the trial court found that Cockerham requested and submitted a ballot for the 2020 Republican Party primary election prior to the Mayor appointing him to the Commission on May 7. Although in-person voting for the 2020 primary election did not occur until June 2,<sup>11</sup> when Cockerham requested a ballot for the Republican Party primary election, he could not have thereafter requested a ballot for the Democratic Party primary. *See* Ind. Code § 3-11-4-17.7(d) (“If a voter requests a replacement ballot for a

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<sup>11</sup> Absentee ballots are not opened until election day. Ind. Code § 3-11.5-4-5.

primary election, the county election board may not provide the voter with a primary election ballot for a political party different from the political party indicated in the voter’s application for an absentee ballot.”); *see also* Ind. Code § 3-11.5-4-2 (allowing recast of certain absentee ballots with the proviso that in a primary election, the voter may not change the choice of the voter’s party by a replacement ballot unless the voter was issued an incorrect party ballot). And Cockerham did not vote again in person on June 2 to replace his absentee vote. Essentially, there is only a small set of circumstances arising between requesting an absentee ballot and election day that would have rendered Cockerham’s ballot in the Republican Party primary election invalid, none of them would have allowed Cockerham to change his ballot to vote in the Democratic primary, and none of those circumstances have been alleged here. Therefore, once Cockerham submitted his ballot, he had “voted” in the most recent Republican primary election, so he could claim an affiliation with that party.

[27] Although we conclude that Cockerham was eligible to serve on the Commission when the Mayor appointed him on May 7 because the most recent primary election in Indiana in which he voted was a primary election held by the Republican party, *see* Ind. Code § 36-1-8-10(b)(1), we also note that the Mayor reaffirmed Cockerham’s appointment on June 3, one day after in-person voting for the 2020 Republican Party primary election was held. Even if the trial court’s conclusion as to what constitutes “the most recent primary election” is correct, any defect in Cockerham’s earlier appointment would have been remedied when the Mayor, as the only authorized appointing authority for

Kappas' vacant seat, took this action after voting for the primary had concluded. The trial court clearly erred in declaring Cockerham was ineligible for the vacant seat and ordering him to immediately vacate and relinquish his seat on the Commission.

[28] In sum, we conclude Kappas' appointment to the Commission was valid even though he was politically unaffiliated because service on a plan commission does not require political affiliation and his appointment did not run afoul of the party affiliation limitation. In turn, when Kappas' term ended, the Chairman did not obtain authority after ninety days to make an appointment to the vacant seat because the seat had not previously been held by a member of his political party. And finally, Cockerham's appointment did not cause the membership of the Commission to exceed the stated number of members allowed from the same political party.

## Conclusion

[29] Finding the trial court's judgment to be clearly erroneous, we reverse. Cockerham was validly appointed to the Commission and may continue his service thereon.

[30] Reversed.

Riley, J., and Molter, J., concur.