

STATE OF INDIANA)
) SS:
COUNTY OF MONROE)

IN THE MONROE CIRCUIT COURT

CAUSE NO. 53C06-2203-PL-000509

COUNTY RESIDENTS AGAINST ANNEXATION,)
INC., et al.,)
)
 Remonstrators)
)
 Vs.)
)
)
)
 CITY OF BLOOMINGTON, INDIANA, et al.,)
)
 Respondents.)

ENTRY OF JUDGMENT ON COUNT II OF REMONSTRATORS' COMPLAINT

This matter came before the Court on (i) a Motion for Partial Judgment on the Pleadings filed on May 6, 2022, by Respondents, City of Bloomington, Indiana, *et al.*, (“City” or “Bloomington”) pursuant to Rule 12(C) of the Indiana Rules of Trial Procedures, (ii) a Motion for Partial Summary Judgment filed on June 6, 2022, by Remonstrators, County Residents Against Annexation, Inc., *et al.*, (“Remonstrators”) pursuant to Indiana Trial Rule 56, and the City’s response/cross-motion and Remonstrators’ replies/responses thereto.

The Court, having reviewed the papers and pleadings filed and designated in this action, having heard the arguments of counsel, and being duly advised, now grants Bloomington’s motion and denies Remonstrators’ motion concerning Count II of Remonstrators’ Petition for Appeal of Annexation, for Declaratory Judgment, and for Damages (“Complaint”).

I. MATERIAL FACTS

A. Bloomington's Annexation Consideration and Adoption.

1. On March 29, 2017, following multiple public outreach sessions, with certified notices to every property owner, and Council meetings with public comment and debate, (Ex. A. pp. 6-7, ¶¶ 4-6), the City of Bloomington Common Council formally introduced eight annexation ordinances for eight separate annexation "areas." (Ex. A p. 7, ¶ 7; Ex's. A-1 – A-7, pp. 13-104).

2. The City's proposed annexations were initially halted mid-stream by legislation adopted by the Indiana General Assembly in 2017, which the City challenged and the Indiana Supreme Court ultimately held in late 2020 to be special legislation in violation of Article 4 Section 23 of the Indiana Constitution. *See Holcomb v. City of Bloomington*, 158 N.E.3d 1250 (Ind. 2020).

3. After certification of the opinion in *Holcomb*, the City resumed its consideration of the annexations, including adopting updated fiscal plans for each of the remaining annexation areas (Ex. A p. 7, ¶ 10), publishing and sending new notices via certified mail to every landowner over sixty days in advance of public hearings (Ex. A pp. 7-8, ¶ 11), and holding formal public hearings beginning on August 4, 2021, and then extended to August 11, 2021 (Ex. A pp. 8-9, ¶¶ 14-17; Ex. E p. 219; Ex. K pp. 332-35; Ex. I pp. 293-97).

4. The August 4, 2021, public hearing was initially held as a hybrid meeting – where participation could be in person or via zoom – but was later recessed for an hour and reconvened as a zoom only meeting (Ex. A p. 8, ¶¶ 12-17).¹ In addition, even after everyone from the public had an opportunity to comment on August 4th, the Council again recessed and reconvened the

¹ Indiana Code § 5-14-1.5-5 requires no additional notice of a reconvened meeting where the date, time, and place of the meeting is publicly announced at the original meeting (Ex. A p. 8, ¶ 14).

public hearing a week later, on August 11, 2021, to allow for additional public participation if desired (Ex. A pp. 8-9, ¶¶ 15, 17).

5. Seventy-four (74) members of the public spoke and offered their perspectives on the annexation proposal during the two days of the formal public hearing (Ex. A p. 8, ¶ 16).

6. No one filed a complaint seeking to invalidate or otherwise challenge the City's public hearings within thirty days, as required by Indiana Code § 5-14-1.5-7(b) (Ex. A p. 9, ¶ 20).

7. Before the final passage of its annexation ordinances, the City hosted at least 14 meetings for members of the public to express their opinions (Ex. A p. 9, ¶ 21).

8. The City ultimately adopted seven annexation ordinances on September 15 and September 22, 2021, respectively (Ex. A p. 9, ¶ 18). The seven annexation "areas" adopted under these ordinances are sometimes referred to separately as Area 1A, Area 1B, Area 1C, Area 2, Area 3, Area 4, and Area 5, respectively (*E.g.*, Ex. B. pp. 148-162). This completed the annexation proceedings before the Council.

B. Opportunities to Petition against Bloomington's Annexations.

9. On October 8, 2021, Bloomington published notice of the passage of the annexation ordinances and sent notice via certified mail to every affected landowner in the annexation areas. (Ex. A p. 9, ¶ 22; Ex. A-10 pp. 115-43).

10. The notices marked the beginning of the 90-day remonstrance petitioning period under Indiana Code §§ 36-4-3-11(d) and -11.1(e), running from October 8, 2021, through January 6, 2022 ("Remonstrance Period") (Ex. A p. 9, ¶ 23).

11. The annexation remonstrance petitioning process and timing are fixed by statute, and remonstrance petitions must be filed with the county auditor during the 90-day remonstrance

period. *See* Ind. Code §§ 36-4-3-11 through 11.2. It is a separate proceeding from the annexation proceedings before the City Council.

12. During the entire Remonstrance Period, the Monroe County Auditor's Office ("Auditor") was open to the public and available to receive remonstrance petitions: "[a]t no time was any member of the general public prevented from accessing the Auditor's Office," and "[a]t no time during regular business dates and times was the Auditor's Office inaccessible to the general public" (Ex. C. p. 166).

13. The Auditor also set up an area on the main floor of the Monroe County Courthouse where individuals could quickly and safely sign remonstrance petitions (Ex. C pp. 166-67; Ex. D p. 201). Additionally, the Auditor's Office accepted petitions by email and U.S. mail (Ex. C pp. 166-67; Ex. D p. 180).

14. Still further, the entire process of completing a remonstrance petition could be completed remotely, as was done by many other remonstrance petitioners (Ex. D pp. 170-80, 190, 195); *see also* I.C. §§ 33-42-17-1 through -12 (providing for remote notarization).

15. The City also provided dedicated spaces and opportunities for remonstrators to sign remonstrance petitions, including in the atrium of the Bloomington City Hall during the entire Remonstrance Period, as well as an after-hours location at the City of Bloomington Utilities headquarters from October 18, 2021, to October 22, 2021 (Ex. A pp. 9-10, ¶¶ 24-28; Ex. A-10; Ex. A-12 p. 147). In each location, the City established protocols for safely dealing with the public during the COVID-19 pandemic (Ex. A p. 10, ¶ 29).

16. The Remonstrators also provided their own opportunities for completing remonstrance petitions, including socially distanced open-air driveway events (Ex. G pp. 267-71; Ex. K pp. 322-23), at least four masked signature collecting events at the Monroe County

Fairgrounds (Ex. E pp. 223, 226-27; Ex. G pp. 272-76; Ex. I pp. 298-99; Ex. K pp. 326-30), and numerous door-to-door petition gathering efforts (Ex. G pp. 277-79; Ex. D p. 177). Remonstrators also offered and provided their own special accommodations to any owner who could not leave their home during the Remonstrance Period (Ex. G p. 281).

C. COVID-19.

17. Governor Eric Holcomb issued his first executive order declaring a public health emergency for the COVID-19 outbreak on March 6, 2020 (Ex. N p. 375). As part of a series of subsequent orders, the governor suspended or altered the operation of numerous statutes and requirements of Indiana law under his emergency powers (Ex. N pp. 374-89). However, none purported to alter or suspend any of Indiana's annexation statutes or proceedings.

18. On March 16, 2020, the Indiana Supreme Court similarly exercised its emergency rulemaking powers to toll or suspend various time limits and procedures under its rules. *See* Ind. Supreme Court Case No. 20S-CB-123. While none of the Supreme Court's orders altered or suspended any of Indiana's annexation statutes or proceedings, all of those orders were lifted before the Remonstrance Period commenced *Id.*

19. By October of 2021, when the Remonstrance Period began, the State had lifted many restrictions on public places – including mask mandates – and was encouraging each individual to use their best judgment in exercising caution regarding COVID-19 (Ex. N pp. 390-409).

20. Despite numerous emergency orders from all levels of government over the course of the COVID-19 pandemic, Remonstrators have not identified any order, rule, or provision that applied to or changed any part of the annexation statutes or procedures, and none prohibited an individual from executing and filing a remonstrance petition with the Monroe County Auditor during the Remonstrance Period.

21. During the Remonstrance Period, no property owner in any annexation territory formally requested in writing that the Monroe County Auditor declare an emergency and extend the Remonstrance Period (Ex. C p. 167).²

22. There is no evidence that during the Remonstrance Period, either the Monroe County Auditor, the Monroe County Commissioners, the Mayor or Common Council of the City of Bloomington, the Indiana Supreme Court or any other court, or any other official or body entered any finding or declaration that anyone was prevented from filing a remonstrance petition due to COVID-19.

23. Remonstrators have not designated any evidence identifying any individual that asserted *during* the Remonstrance Period that they were prevented from submitting a Remonstrance Petition due to COVID-19.

24. Remonstrators also have not identified any particular days within the Remonstrance Period on which property owners were prevented from signing Remonstrance Petitions or otherwise accessing the Monroe County Courthouse, Auditor's office, City Hall, or the courts.

D. Auditor's Certification.

25. COVID-19 had no measurable impact on the number of remonstrance petitions gathered by the Remonstrators. In total, the Auditor received 3,671 petitions for remonstrance from unique landowners (Ex. B). Of the petitions received, the Auditor certified 3,283 of them as valid remonstrances (Ex. B).³ Concerning the two areas at issue in this lawsuit, the Auditor received 1,150 petitions from unique owners in Area 1A, and 1,226 from Area 1B (Ex. B). These

² Margaret Clements stated that she spoke with the County Auditor about a possible extension (Ex. E p. 205). However, Clements did not make any formal written request (Ex. E pp. 205, 225-231).

³ The City reserved the right to contest the number of valid petitions, and the Court makes no findings concerning the validity of the petitions here.

numbers were comparable to the signatures gathered by activists on a pre-annexation petition in which the numbers for Areas 1A and 1B fell short of 65% of the total number of landowners, which is the percentage required by statute to defeat an annexation on remonstrance signatures without a hearing (Ex. B; Ex. E pp. 221-22).

26. The Auditor certified her final determination on February 23, 2022 (Ex. B), completing the proceedings with the Auditor (I.C. 36-4-3-11.2(g) and 11(d).

E. Remonstrators' Complaint and Request for Relief Due to COVID-19.

27. Following the Auditor's certification, the Remonstrators filed their Complaint in this matter on March 16, 2022.

28. Count I of the Complaint is a remonstrance against the annexation in Areas 1A and 1B, citing various provisions of Indiana Code 36-4-3.

29. Count II of the Complaint asks the Court to "enter an Order granting an extension of time of not less than 90 days in which property owners and representatives may execute Remonstrance Petitions in light of the extraordinary circumstances presented by the COVID-19 pandemic in the entire country and in Monroe County, Indiana".

30. Count III of the Complaint requests a declaratory judgment that the Monroe County Auditor disqualified remonstrance petitions for Areas 1A and 1B "that may or should be included within her Certification"; and as a result, the annexation ordinance for those areas should be declared "null, void, and illegal".

31. On May 6, 2022, the City filed its Motion for Partial Judgment on the Pleadings pursuant to T.R. 12(C) concerning Count II.

32. Thereafter, in May and June of 2022, the Remonstrators' searched for any individual who would be willing to sign an affidavit stating that they were prevented from remonstrating due

to COVID-19 [(Ex. H p. 290-91; Ex. F p. 253, 257; Ex. M (Barrow RFP at pages bates-labeled 0263-65, and 0274-75 in the bottom right corner) (bottom center pages illegible)].

33. Remonstrators then filed their Motion for Entry of Partial Summary Judgment pursuant to T.R. 56(B) on June 6, 2022.

34. As a part of their initial June 6 summary judgment filing, the Remonstrators designated the affidavits of only two property owners who asserted their own personal inability to execute a remonstrance petition due to COVID-19. When the City sought to depose the affiants, Remonstrators withdrew multiple affidavits⁴, leaving only one by a property owner who did not sign a petition – the affidavit of Russell Nunn.

⁴ See Bloomington's October 11, 2022 Motion to Strike Certain Affidavits Submitted in Support of Plaintiff's Motion for Partial Summary Judgment in the Entirety or in Part, and To Strike Associated Portions of Plaintiffs' Motion For Partial Summary Judgment, at ¶ 5.

35. When deposed, Mr. Nunn stated that he was not prevented from signing a remonstrance petition:

24 | Q One of the contentions here in this lawsuit is
25 | that the COVID and COVID-related restrictions

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Page 44

1 | and the COVID pandemic prevented people from
2 | signing a remonstrance petition or participating
3 | fully in the process.

4 | A Okay.

5 | Q Were you prevented in some way from signing a
6 | remonstrance petition?

7 | A I would not say I was prevented, no.

(Ex. L pp. 351-52). When pressed as to why he signed the affidavit, Mr. Nunn stated that the wording “confused me” (Ex. L. p. 357).

36. Mr. Nunn claimed that he did not take any steps to sign a remonstrance petition during the remonstrance signature proceeding because he did not “go around a lot of other people, to be honest with you, other than when I have to and that’s work and – or people that I’m 100 percent sure have been vaccinated” (Pet. p. 106: Nunn Dep. 24:7-18.). On questioning by counsel for Remonstrators, the following exchange took place:

6 Q I think you were asked a little bit about this
7 earlier in your deposition today, but do you
8 still standby your statement in paragraph 8?
9 A That's kind of an ambiguous statement I made.
10 COVID-19 itself probably did not prevent me from
11 doing it. The fear of catching it again did. I
12 didn't have COVID at the time; so I can't say
13 that COVID-19 prohibited me from doing that.

14 Q Okay. Would it be more fair if that statement
15 read the presence of the COVID-19 virus and the
16 risk of infection prevented you from executing a
17 remonstrance petition?
18 A Yes, it would.

(Pet. p. 108).

37. During 2021, including during the Remonstrance Period, Mr. Nunn continued to go to work each day and interact with the public (Ex. L pp. 340-41, 358), went on family trips to Kings Island, attended a weekly bowling league, participated in golf outings, traveled to high school bowling tournaments, and worked in his off time at local speedway events (Ex. L pp. 343-49, 355-56, 358-59). Mr. Nunn did not wear a mask during these events (Ex. L p. 345), did not know the vaccination status of all the people he knew at these events (Ex. L. p. 359), and agreed when deposed that that fear of COVID-19 did not prevent him from any of these activities (Ex. L pp. 352, 360-62).

38. Mr. Nunn also stated that he was not aware of the numerous avenues and opportunities available to him to sign a petition, whether in person or remotely (Ex. L pp. 352, 362-63). He never inquired to the Auditor's Office, the City, or the County about the annexation

or signing a petition, and only learned about the lawsuit after being asked by Remonstrators or their attorney to sign the affidavit (Ex. L. pp. 353-54).

39. Mr. Nunn is a property owner in Area 1B (Pet. p. 66).

40. Mr. Nunn is not a party to this lawsuit (Pet. p. 66).

41. There are no property owners identified from Area 1A that have asserted an inability to execute a remonstrance petition due to COVID-19.

42. In support of their request for summary judgment on Count II, Remonstrators have not identified any statute, rule, or law violated by the City in its consideration of the annexations, the adoption of the annexation ordinances, or the petitioning process.

II. ANALYSIS AND LEGAL CONCLUSIONS

43. The primary issue before the Court is whether due to the existence of the COVID-19 pandemic, the Court can now declare that an emergency existed after the fact and set a new 90-day annexation remonstrance window. *See* Complaint Count II. The Court concludes that the Remonstrators' request in Count II exceeds the Court's authority under Indiana's annexation statutes found in Indiana Code 36-4-3, and as limited by our appellate courts. In addition, even if Indiana Code 34-7-6 (the "Emergency Extension Statute") allowed the Court to alter the annexation remonstrance window by providing new dates for signing remonstrance petitions (and necessarily also thereby excluding the original dates), the statute does not apply under the designated facts presented in this matter.

Standard of Review

44. "[S]ummary judgment is appropriate only when the evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law" *Ballard v. Lewis*, 8 N.E.3d 190, 193 (Ind. 2014); Ind. Trial Rule 56(C).

45. When “the relevant facts are not in dispute and the interpretation of a statute is at issue, such statutory interpretation presents a pure question of law for which summary judgment disposition is particularly appropriate”. *Sanders v. Bd. Of Comm’rs of Brown Cnty.*, 892 N.E.2d 1249, 1252 (Ind. Ct. App. 2008). “In ruling on a summary judgment motion, a trial court must rely upon the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other evidentiary matters designated by the parties pursuant to T.R. 56(C).” *Abbott v. Bates*, 670 N.E.2d 916, 921 (Ind. Ct. App. 1996).

The Court’s Limited Role in Annexation Proceedings

46. The Court begins with its role in annexation proceedings. “[A] remonstrator’s challenge to an annexation is not a regular lawsuit.” *Bradley v. City of New Castle*, 764 N.E.2d 212, 215 (Ind. 2002). Rather, “annexation ‘is essentially a legislative function.’ Therefore, courts play only a limited role in annexations and must afford the municipality’s legislative judgment substantial deference.” *In re Annexation of Certain Territory to City of Muncie*, 914 N.E.2d 796, 801 (Ind. Ct. App. 2009) (“*Muncie*”)(quoting *City of Fort Wayne v. Certain Southwest Landowners*, 764 N.E.2d 221, 224 (Ind. 2002) (“*Fort Wayne*”). The Indiana Supreme Court has explained:

It is well-established that we avoid scrutinizing legislative processes, even those that are constitutionally mandated. The General Assembly has delegated part of its power to re-establish and change governmental unit boundaries to local legislatures. We do not abandon our deferential approach simply because the state legislature has delegated a legislative function to subordinate agents, the municipalities.

Bradley, 764 N.E.2d at 206; see also, e.g., *City of Carmel v. Certain Southwest Clay Township Annexation Territory Landowners*, 868 N.E.2d 793 (Ind. 2007) (“*Southwest Clay*”) (“In assessing a municipality’s ordinance and plan, a court should keep in mind that annexation is ‘a legislative function.’”).

47. “Courts are not authorized to dissect the minutiae of what are essentially legislative decisions.” *Fort Wayne*, 764 N.E.2d at 229. But that does not mean the trial court is without a role. *Town of Fortville v. Certain Fortville Annexation Territory Landowners*, 51 N.E.3d 1195, 1198 (Ind. 2016). “Rather, the court is obligated to ensure the annexing municipality has ‘not exceeded its authority and that the statutory conditions for annexation of been satisfied.’”) *Id.* (internal citation omitted). If those conditions have been met, “then the trial court is bound to approve annexation of the affected territory”. *Id.*

48. A remonstrance is “the right to have a day in court, it is not a right to obstruct annexation”. *Doan v. City of Fort Wayne*, 252 N.E.2d 415, 418 (Ind. 1969). Landowners, like the Remonstrators here, also “have no vested interest in the maintenance of municipal boundaries at any particular location”. *Bradley*, 764 N.E.2d at 215. Rather, “the act [of annexation] simply changes the property and its owner, in their civil relation to certain public authority”. *Id.* (quoting *Stilz v. City of Indianapolis*, 55 Ind. 515, 523 (1877)).

49. “Indeed, to the extent annexation statutes have seemed to require courts to make determinations of a non-judicial nature, courts have refused, finding themselves to be without the power to do so under the separation of powers clause of the Indiana Constitution, Art. 3, § 1.” *City of Hobart v. Chidester*, 596 N.E.2d 1374, 1376 (Ind. 1992) (“*Chidester P*”).

50. Though the annexation statutes have been recodified and/or amended over the years, the three separate proceedings of the annexation process have remained the same:

- (1) legislative adoption of an ordinance annexing of certain territory and pledging to deliver certain services within a fixed period,
- (2) an opportunity for remonstrance by affected landowners, and
- (3) judicial review.

Southwest Clay, 868 N.E.2d at 796 (internal citation omitted).

51. “[A]s a legislative function, annexation becomes a question subject to judicial cognizance only upon review as provided by statute.” *City of Carmel v. Steele*, 865 N.E.2d 612, 616 (Ind. 2007) (internal citation omitted). “The court is not authorized to act unless a remonstrance is filed; if a remonstrance is not filed, the annexation becomes effective.” *Chidester I*, 569 N.E.2d at 1376.

52. This proceeding is the third stage of annexation – judicial review. Once judicial review is triggered by the filing of remonstrance petitions, the Court’s review is limited to the elements contained in Indiana Code 36-4-3-13. *See, e.g., City of Boonville v. American Cold Storage*, 950 N.E.2d 764, 770 (Ind. Ct. App. 2007) (“Accordingly, our supreme court determined that judicial review of annexation should not extend beyond the confines of Sections 11 through 13 dealing with remonstrances.”); Ind. Code § 36-4-3-12 (providing for the court to “hear and determine the remonstrance without a jury” and enter judgment “without delay”); Ind. Code § 36-4-3-13 (directing the Court on the factors and evidence to be considered “at the hearing under section 12 of this chapter”).

53. In this judicial review proceeding, the Remonstrators ask the Court to alter the statutory 90-day timeline in the remonstrance petition proceeding – which proceeding has already concluded. This is beyond the Court’s limited authority in annexation remonstrances. *E.g., Bradley*, 764 N.E.2d at 218 (alleged procedural wrongs and defects in annexation process were outside of the scope of judicial review in remonstrance proceeding).

54. Nor have Remonstrators pled or designated evidence of “plausible claims of fraud or discrimination”, or that “the annexing municipality commits procedural wrongs so severe that courts must act to protect remonstrators’ substantial rights”. *Bradley*, 764 N.E.2d at 217-18. Indeed, while Remonstrators complain about the City’s decision to proceed with annexation during

COVID-19, the Remonstrators have not identified a single statute, rule, or law that the City violated in considering and ultimately adopting its annexation ordinances.

55. Under the current statutory scheme for annexation, the county auditor – and not a trial court – receives the remonstrance petitions during the 90-day remonstrance petition proceeding and determines the number of certifiable petitions. *See* Ind. Code § 36-4-3-11.2. To trigger the Court’s jurisdiction, the remonstrance petition for judicial review must be filed with the court within 15 days after the auditor certifies the petitions. Ind. Code § 36-4-3-11(d).

56. Before July 2015, annexation remonstrance petitions were required to be filed directly with the court before the expiration of the 90-day remonstrance window, and the trial court made the initial determination of the sufficiency of the petitions. *See* I.C. 36-4-3-11(a) & -11(b). Yet even when courts directly received the petitions under prior versions of the statute, requests for additional time to file petitions were held to be beyond the court’s authority⁵. *See In re Petition to Annex into City of Jefferson*, 891 N.E. 2d 1157, 1163 (Ind. Ct. App. 2008) (finding trial court lacked jurisdiction to hear remonstrance when signed petitions were filed three days after the 90-day statutory deadline expired); *Petercheff v. City of Indianapolis*, 179 N.E.2d 866, 866-67 (Ind. 1962) (holding that remonstrators could not supplement petitions after remonstrance period expired).

57. Accordingly, extending or changing the dates of the expired Remonstrance Period is beyond this Court’s authority.

⁵ As the Court of Appeals outlined in *City of Jefferson*, while cases previously found trial courts “without subject matter jurisdiction over the action” when acting outside the confines of its limited review in a remonstrance, changing nomenclature more accurately describes the pre-judicial petition proceedings as “the procedural prerequisites to the trial court’s exercise of subject matter jurisdiction over remonstrance proceedings.” 891 N.E.2d at 1161. Whether characterized as jurisdictional or procedural prerequisites, it is beyond the Court’s authority to extend the statutory deadlines.

The Emergency Extension Statute

58. In support of their summary judgment request, the Remonstrators rely on the Emergency Extension Statute, found at Indiana Code 36-7-4, to invite the Court to create a new, second 90-day remonstrance proceeding.

59. Section 1 of the Emergency Extension Statute provides that:

This chapter applies to a *proceeding*:

(1) *pending* before a court, a body, or an official, that exists under the constitution or laws of Indiana;

(2) in which certain limitations of time are or may be fixed by law or rule for doing any acts in the proceeding; *and*

(3) if an emergency exists or arises by reason of:

- (A) war;
- (B) insurrection;
- (C) pestilence; or
- (D) act of God;

which *prevents* the performance of an act that is essential to conserve substantial rights.

I.C. 34-7-6-1 (emphasis added).

60. Where the chapter applies, the court, judge, body, or official has the authority to find and declare in the record “the existence of an emergency” and “the time during which the emergency existed”. I.C. 34-7-6-2.

61. In the event that the court, judge, body, or official in the proceeding is unable to act, the Indiana Supreme Court, upon petition, may find and declare an emergency and shall certify such a finding in an order to the court, judge, body, or official. I.C. 34-7-6-4.

62. In addition, where an emergency is found, the time during which the emergency existed must also be excluded and not considered:

In computing the time within which the act is required to be done under the limitations fixed by law or rule, the time during which such emergency existed *shall be excluded, and shall not be considered.*

I.C. 36-7-6-3 (emphasis added).

63. Even if the Emergency Extension Statute could be used to generate a new Remonstrance Period, Remonstrators' request fails under two conditions for the statute's applicability: The Remonstrance Period is not "pending" and the designated evidence demonstrates that COVID-19 did not "prevent" the filing of a remonstrance petition during that period.

64. As outlined above, the annexation process involves three separate proceedings. *Southwest Clay*, 868 N.E.2d at 796. The judicial review proceeding is not triggered until after the 90-day remonstrance petition proceeding has expired and the county auditor has completed her review and certification. I.C. 36-4-3-11 through -12. The Court plays no role in the county auditor's process. *Id.*

65. In essence, the statute does not permit parties to wait until a deadline has passed – in this case several months after it expired – and then claim that an emergency should have extended the expired time limit. The Remonstrators were, therefore, required to seek an emergency declaration from the Auditor before the Remonstrance Period expired. The Monroe County Auditor made no emergency declaration or findings under the statute (Ex. C p. 167) nor did the Auditor receive any formal written request to do so (Ex. C p. 167).

66. And, if the Auditor was "not able to act for any reason" the Remonstrators' remedy still would not be to petition this Court to extend the deadline. Rather, the statute directs that they instead were required to petition the Indiana Supreme Court for relief. Ind. Code § 36-7-6-4. The Remonstrators failed to do so, and they cannot avail themselves of the Emergency Extension Statute to obtain a new 90-day remonstrance period at this juncture.

67. Nor is the Remonstrators' request for a new 90-day remonstrance window workable now that the Remonstrance Period proceeding is no longer pending. The annexation statute sets forth specific procedures that trigger the Remonstrance Period; and altering the procedures would run afoul of the Court's limited role in annexation proceedings. For example:

- a the 90-day remonstrance window begins on the date the municipality publishes notice of the adoption of the annexation and mails the notice to every landowner in the annexation territory. Ind. Code § 36-4-3-11.1. A new remonstrance period would require new notices and likely involves new owners as real estate parcels are regularly bought and sold; and
- b the aforementioned notices must be published within thirty days after the City adopts the annexation ordinances, Ind. Code §§ 36-4-3-7 5-3-1-2(h), a window that has long since passed.

Nothing in the Emergency Extension Statute suggests that the Court may change these other provisions of the annexation statute and order the adoption of new ordinances or the posting and mailing of new notices and instructions.

68. The Court observes that Remonstrators' proposed order seeks the entry of injunctive relief. However, no motion seeking injunctive relief is pending before the Court. In addition, under Indiana Trial Rule 65(C), relief requiring the City to recommence the notice procedures would require a bond or other security from the Remonstrators to cover all such costs and damages as may be incurred by the City in the event the City is later found to have been wrongfully enjoined. And, under Indiana Trial Rule 52(A)(1), the Court would be required to make special findings of fact. In resolving dispositive motions, the Court is construing the evidence or pleadings favorably to the non-moving party.

69. Moreover, were the Court to agree with Remonstrators and apply the Emergency Extension Statute, the Court has no ability to determine which days within the Remonstrance Period were impacted by the emergency or on which days landowners were “prevented” from signing a petition, whether at the Auditor’s Office, City Hall, a drive-way signing event, a mask-required signing event at the county fairgrounds, or through some online or remote, contactless system. Remonstrators designated no evidence of this sort; and if the Court were to determine that the emergency existed during the entire 90-day remonstrance petition proceeding, then the entire 90-day period must be excluded from the proceeding. That is, all 3,283 petitions certified by the Auditor must be declared a nullity and the proceeding must begin anew. Indeed, if an emergency of the sort contemplated by the statute existed, Remonstrators could not have gathered sufficient petitions to defeat five of the seven annexation ordinances on signatures alone, so landowners in all annexation territories must do it again; and if an emergency of that magnitude existed, one would have expected the Remonstrators to avail themselves of the Emergency Extension Statute during the remonstrance petition proceeding. They did not – and the Court cannot now alter any timelines from that proceeding.

70. Further, the judiciary’s treatment of requests for relief from statutory mandates as a result of COVID-19 are also instructive. Recently, litigants have attempted to use COVID-19 and the Indiana Supreme Court’s emergency orders as grounds to avoid the accumulation of interest. Our courts have admonished that while the Indiana Supreme Court can use emergency powers to control and alter *practice and procedure* in the courts of Indiana, it is “well settled” that the court “cannot change a rule of substantive law nor could the General Assembly vest it with such legislative power”. *PNC Bank, N.A. v. Page*, 186 N.E.3d 633, 637 (Ind. Ct. App. 2022) (internal citations omitted) (holding that courts could not toll interest in mortgage contracts due to COVID-

19); *see also Denman v. St. Vincent Medical Group, Inc.*, 176 N.E.3d 480, 503 (Ind. Ct. App. 2021) (holding that post-judgment interest statutes could not be tolled by courts due to COVID-19).

71. Still further, the Indiana Supreme Court recently held that trial courts could not use generalized references to “the COVID-19 pandemic” as a basis to find good cause when a party objects to a virtual hearing under Indiana Administrative Rule 14. *Civil Commitment of B.N. v. Health & Hosp. Corp.*, 199 N.E.3d 360 (Ind. 2022).

72. If generalized references to the COVID-19 pandemic cannot support a finding of “good cause” under Indiana Administrative Rule 14, it seems illogical to support a finding to trigger the Emergency Extension Statute here.

73. Assuming *arguendo* the Court were to treat judicial review of an annexation remonstrance as an extension of the 90-day petitioning proceeding, the Remonstrators’ request still must fail because the designated evidence demonstrates that COVID-19 did not prevent property owners in the annexation areas from filing a remonstrance petition.

74. In interpreting a statute, courts are to apply the plain and ordinary meaning of the words used. *Matter of Lawrance*, 579 N.E.2d 32, 38 (Ind. 1991). Merriam-Webster defines “prevent” as “to keep from happening or existing” and “to deprive of power or hope of acting or succeeding”. *Merriam-Webster Dictionary*.

75. The designated evidence demonstrates that landowners were not “deprive[d] of the power or hope of acting or succeeding” in filing remonstrance petitions during the Remonstrance Period. To the contrary, thousands of petitions were filed during the period – enough to ostensibly stop five of the City’s seven annexation ordinances from proceeding further (Ex. B). More specifically, for the annexation areas subject to this judicial review proceeding, the Auditor received 1,150 petitions in Area 1A, and 1,226 from Area 1B (Ex. B). Nor did COVID-19 prevent

the Monroe County Auditor from completing her certification or the Remonstrators from filing their petition within fifteen days with this Court.

76. The Remonstrators also have not identified any particular dates during the Remonstrance Period in which the public was prevented from filing a petition with the Auditor. Rather, the undisputed designed evidence demonstrates that during the Remonstrance Period: “At no time was any member of the general public prevented from accessing the Auditor’s Office,” and “At no time during regular business dates and times was the Auditor’s Office inaccessible to the general public”. (Ex. C. p. 166).

77. The affidavit of Russell Nunn from Area 1B establishes that neither Mr. Nunn nor anyone else claiming that they were prevented from filing a petition due to COVID-19 has taken any steps to seek additional time to file a remonstrance petition. Nor is Mr. Nunn or any other unnamed individual a party to this case. Instead, Remonstrators seek to assert the interests of non-parties through the Emergency Extension Statute. Arguably, the Remonstrators lack the standing to do so. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991) (holding that “one may not assert a cause of action based solely on the infringement of the rights of others”).

78. However, assuming Remonstrators have standing to assert Mr. Nunn’s interests, the record forecloses a finding that COVID-19 prevented Mr. Nunn from signing a remonstrance petition during the Remonstrance Period. When submitted to deposition questioning, Mr. Nunn revealed that during 2021, including during the Remonstrance Period, he continued to go to work each day and interact with the public (Ex. L p. 340-41, 358), went on family trips to Kings Island, participated in golf outings, worked in his off-time at local speedway events, participated in a weekly bowling league, and traveled to high school bowling tournaments (Mr. Nunn’s work and mask-free participation in the indoor bowling events specifically occurred during the 90-day

Remonstrance Period during which Remonstrators now say the COVID19 “emergency” “prevented” Mr. Nunn from signing a petition) (Ex. L pp. 343-49, 355-56, 358-59). The Court is not making any credibility determinations about this testimony, as it cannot do so at the summary judgment stage. The Court, instead, concludes that this testimony is insufficient to support the legal determinations, as a matter of law, that an emergency existed and that this emergency prevented the act of executing and submitting a remonstrance petition during the Remonstrance Period.

79. Mr. Nunn also testified that while COVID-19 did not prevent him from signing a petition, it was “fear of catching it [COVID-19] again” (Pet. p. 108; Nunn Dep. 63:6-18). Mr. Nunn is one person; 3,283 other people signed remonstrance petitions that were certified by the Auditor. Mr. Nunn testified he was not aware of the various methods available to him to sign a petition in a way that eliminated any contact with individuals about whose vaccination status he did not know, such as through contactless driveway signings or remotely (Ex. L pp. 352, 362-63). Mr. Nunn admitted it would have made a difference to whether he signed a petition had he known of these other options that were available to him (Ex. L. p. 363). Mr. Nunn’s fear of the virus, whether rational or irrational, and not knowing the vaccination status of those around him, did not prevent him from working, golfing, or bowling. Again putting aside any credibility issues, which the Court cannot indulge at this stage, this evidence is insufficient as a matter of law to conclude an emergency existed during the Remonstrance Period or to carry Remonstrators’ request for a new 90-day remonstrance signature proceeding.

80. In sum, the designated evidence establishes that COVID-19 did not prevent the filing of remonstrance petitions with the Monroe County Auditor during the Remonstrance Period, and

the Emergency Extension Statute does not provide the relief Remonstrators seek under Count II as a matter of law.

Equitable Tolling Doctrine

81. Remonstrators also cite the equitable tolling doctrine as a basis to now provide for a new 90-day period for the remonstrance petition proceeding.

82. The equitable tolling doctrine provides that, using principles of equity, a party may be precluded from invoking a statute of limitation as a defense where the action was prevented “by fraud or other misconduct”. *Blackford v. Welborn Clinic*, 172 N.E.3d 1219, 1224 (Ind. 2021). Upon finding that fraud or misconduct occurred, the general statute of limitations may be tolled or extended. *Id.*

83. Here, the parties dispute whether the 90-day remonstrance period is a “statute of limitations” to which the equitable tolling doctrine even applies, or instead a statute of repose where it does not. In support of their request, Remonstrators cite to the Supreme Court’s reference in *Petercheff* to the remonstrance deadline as “in effect a statute of limitations as to the filing of remonstrances to annexation proceedings” *Petercheff* at 866. However, neither equitable tolling nor the distinction between a statute of repose and statutes of limitations were at issue in *Petercheff*. Rather, *Petercheff* holds that remonstrators – like those here – cannot file new petitions after the remonstrance period has expired, depriving a trial court of authority to review the annexation altogether. *Id.* at 867.

84. “[S]tatutes of repose—absent express language to the contrary— supersede or ‘override’ equitable rules of tolling.” *Blackford*, 172 N.E.3d at 1225. Accordingly, if the 90-day remonstrance statute that is not subject to extension or modification by a court is a statute of repose, equitable tolling would not be available.

85. The Court finds that the 90-day remonstrance window is a statute of repose. Statutes of repose “mark the outer boundaries of substantive legal rights because they limit the time during which a cause of action can arise—i.e., no cause of action exists once the repose period expires”. *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 637 n. 4 (Ind. 2012) (cited with approval by *Blackford*, 172 N.E.3d at 1224). A statute of limitations generally begins with an injury, whereas a statute of repose bars actions after a time period has run from the “occurrence of some event other than the injury which gave rise to the claim”. *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326 (Ind. Ct. App. 1991). “A statute of limitation extinguishes a remedy while a statute of repose may bar a cause of action even before it arises.” *Id.* In contrast to a statute of limitation, statutes of repose “are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists”. *Gill*, 970 N.E.2d at 637 n.4 (citations omitted).

86. With the 90-day remonstrance period, the General Assembly set a time frame that began the day after the notice was published and ended 90 days later. As discussed at length above, annexation itself is a legislative process. *Herd*, 891 N.E.2d. at 1160. The remonstrance proceeding begins after notice, not after any injury to the party. *See Kissel*, 579 N.E.2d at 1326. After the 90-day period established by the legislature, no person may file, nor may the auditor accept a remonstrance petition. Ind. Code §§ 36-4-3-11.1 & -11.2. Only upon the auditor’s certification of remonstrance petitions (which must happen within 15 days of receiving the petitions) may a cause of action for judicial review arise. *Bradley*, 764 N.E.2d at 215; *Herd* 891 N.E.2d at 1161. The legislature, in keeping with other statutes of repose, set a definite period for

filing remonstrance petitions. As such, the remonstrance period is not subject to equitable tolling. *See Blackford*, 172 N.E.3d at 1225.

87. While the City's timing regarding the initiation of the annexation process that led to the remonstrance period may have been poorly planned at best, and even if the 90-day remonstrance period were subject to equitable tolling, there is no evidence to support a finding that fraud or other misconduct by the City prevented the filing of petitions during the original Remonstrance Period. Absent fraud or ongoing misconduct, a claim for equitable tolling cannot be made. *Blackford*, 172 N.E.3d at 1225.

88. Instead, Remonstrators rely on the City Council's decision to hold its annexation public hearing via Zoom. Aside from Zoom meetings being legally appropriate, Remonstrators designate no evidence that this in any way "prevented" the later act of remonstrating before the expiration of the 90-day Remonstrance Period as is required for equitable tolling. Moreover, none of the Remonstrators themselves, nor any of their affiants, allege that they personally were impeded from testifying during the public hearing or remonstrating as a result of the remote public hearing.

89. There is no designated evidence that any City actions – alleged fraud or misconduct or otherwise – prevented Remonstrators from remonstrating.

90. There is no dispute to the City's designated evidence that it properly notified landowners of the Remonstrance Period after the adoption of the annexation ordinances, which occurred at public meetings of the City Council (Ex. A. p. 9-11).

91. The City's designated evidence that the Monroe County Auditor's Office and the City Hall were open and available during the entirety of the actual Remonstrance Period is also undisputed (Ex. A. p. 9-11; Ex. C p. 166).

92. Remonstrators' photos of instructions for receiving assistance taken within City Hall and five months after the Remonstrance Period do not demonstrate otherwise (Ex. E pp. 232-33, 236; Ex. A pp. 10-11, ¶ 30), nor support a finding of fraud or misconduct by the City that prevented some unknown person from filing a remonstrance petition.

93. The Remonstrators' request for the Court to provide a new 90-day remonstrance proceeding using equitable tolling fails.

III. ENTRY OF JUDGMENT ON COUNT II

94. As to Count II only of Remonstrators' Petition for Appeal of Annexation, for Declaratory Judgment, and for Damages filed on March 16, 2022, the Court **GRANTS** Bloomington's Rule 12(C) motion that was treated as a motion for summary judgment and disposed of under rule 56 of the Indiana Rules of Trial Procedure; and **DENIES** Remonstrators' Motion for Partial Summary Judgment.

95. The Court sets an attorney-only telephonic scheduling conference for March 3, 2023, at 9:00 a.m. for purposes of setting the date(s) for a remonstrance hearing and deadlines. Counsel for Remonstrators to initiate the call with the Court.

SO ORDERED: February 23, 2023.



Hon. Nathan G. Nikirk, Special Judge
Monroe Circuit Court 6

Distribution: All attorneys of record