

STATE OF INDIANA)
)
COUNTY OF MONROE)
) IN THE MONROE CIRCUIT COURT
) CAUSE NO. 53C06-2203-PL-509

COUNTY RESIDENTS
AGAINST ANNEXATION, INC.,
Et. Al.,
 Petitioners,

vs.

THE COMMON COUNCIL of the City of Bloomington,
Monroe County, Indiana,
CITY OF BLOOMINGTON, Monroe County, Indiana,
JOHN HAMILTON in his official capacity as
Mayor of Bloomington, Monroe County, Indiana, and
CATHERINE SMITH in her official capacity as Auditor
of Monroe County, Indiana,
 Respondents.

**OBJECTION TO
MOTION TO LIFT STAY AND RESET TRIAL DATE**

Come now the Petitioners, by counsel, William J. Beggs and Ryan M. Heeb, and for their Objection to Motion to Lift Stay and Reset Trial Date state as follows:

1. Since the Court issued its September 5, 2023 Order staying this matter pending the resolution of the City’s constitutional challenge (the “Stay Order”), nothing of substance has changed in this case that would justify granting the City’s motion and lifting the Stay Order.

2. Despite the fact the cases in cause numbers 53C06-2203-PL-00608 and 53C06-2203-PL-00609 have been dismissed, the City’s challenge to the constitutionality of Indiana Code § 36-4-3-11.7 (the “2019 Law”) remains pending just as it was at the time the Stay Order was entered. That is, the City’s identical challenge to the 2019 Law is still pending in cause number 53C06-2203-PL-00610 (the “Smith Cases”) *and* in this case. *See City’s Answer, Affirmative Defenses 8 and 9.*

3. The constitutionality of the 2019 Law is critical to whether the Stay Order is lifted because if the 2019 Law is unconstitutional then the Petitioners may lack the requisite number of valid signed remonstrances to bring this case as required by Indiana Code § 36-4-3-11.3(c). In other words, this Court may not have subject matter jurisdiction.

4. The number of valid signed remonstrances is a threshold jurisdictional issue. *See In re Petition to Annex Approximately 7,806 Acres of Real Estate into City of Jeffersonville*, 891 N.E.2d 1157, 1161 (Ind. Ct. App. 2008) (stating “‘Ind. Code § 36–4–3–11(a) provides the specific averments necessary for a remonstrance to be valid and confer jurisdiction on the court’ and that, ‘[s]hould the remonstrance be found insufficient, the trial court is without subject matter jurisdiction over the action and cannot proceed further.’”¹)

5. The City has not moved to amend its Answer in the present case to withdraw its Affirmative Defenses asserting a constitutional challenge to the 2019 Law. Counsel for the City made clear at the hearing on September 1, 2023 that the City intends to challenge the constitutionality of the 2019 Law in this case and will request a ruling on constitutionality at the trial of the present case.

6. To the extent the City does not intend to amend its *Answer* to withdraw its *Affirmative Defenses 8 and 9*, there still has not been compliance with IC 34-33.1-1-1 which requires certification to the Attorney General’s office and an opportunity for intervention by that office.

7. To the extent to City attempts to argue it waives any constitutional challenge to the 2019 Law’s application to Areas 1A and 1B (the areas that are the subject of this case), the fact

¹ The *In re Petition to Annex* case was decided in 2008. This was before Indiana Code § 36-4-3-11 was amended and before Indiana Code § 36-4-3-11.1, which is at issue in this case, was adopted by the Indiana General Assembly.

remains that the constitutionality of the 2019 Law can (and presumably would) be reviewed sua sponte by the Indiana Court of Appeals or the Indiana Supreme Court if this case were to be appealed. See *Morse v State*, 593 N.E.2d 194, 197 (Ind. 1992). As our Supreme court held decades ago, “When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it. It constitutes a protection to no one who has acted under it. It is to be regarded as having never, at any time, been possessed of any legal force.” *Oolitic Stone Co. of Indiana v Ridge*, 174 Ind. 558, 91 N.E. 944 (Ind. 1910) (citing Cooley’s *Constitutional Limitations* (7th Ed.) P. 259).

8. The City’s effort to lift the Stay Order has created a mess. At present, the City’s position in its legal filings is that the 2019 Law is constitutional in Areas 1A and 1B, but that it is unconstitutional in Areas 1C, 2, 3, 4 and 5. This creates an impossible scenario for the elected officials involved, who have taken (and soon will take) oaths to uphold the constitution of the state of Indiana. How, one wonders, could the Auditor or the Mayor uphold their oaths if the 2019 Law is *constitutional* in Areas 1A and 1B but *unconstitutional* in the other areas the City is litigating in the Smith Cases?

9. Because the City has challenged the constitutionality of the 2019 Law on its face, if the City prevails it will have necessarily proved “that there are *no* set of circumstances under which the statute can be constitutionally applied.” *Zoeller v. Sweeny*, 19 N.E.3d 749, 751 (Ind. 2014) (citing *Baldwin v. Reagan*, 715 N.E.2d 332, 337 (Ind. 1999)) (emphasis in original). In turn, this Court would lack subject matter jurisdiction.

10. According to the parties’ preliminary Witness Lists and discovery responses, at least 50 witnesses are expected to be called to testify at trial. The City has requested (without objection) that five (5) days be set aside for the trial in this case. Significant additional discovery

and expert discovery remains to be completed as well as extensive trial preparation. In addition, substantial numbers of residents are expected to disrupt their lives in order to attend the trial. In light of those facts, lifting the Stay Order when the City's own challenge to this Court's subject matter jurisdiction is in its late stages would not be logical under the circumstances, especially because the summary judgment motions in the Smith Cases are set to be heard on or before December 10, 2023.

11. Thus, the City's dismissal of cause numbers 53C06-2203-PL-00608 and 53C06-2203-PL-00609 made no substantive change to the circumstances of this case or to the basis for Petitioners' original Motion for Stay. The City's apparent contrary conclusion is an exaltation of form over substance. Whether this Court has subject matter jurisdiction in the present case is still very much in contest by way of the Smith Cases and the City's Affirmative Defenses in the present case.

12. If the Petitioners prevail in this case and the City prevails in its challenge to the constitutionality of the 2019 Law, the City will undoubtedly claim that this court lacked subject matter jurisdiction in the present case and move to set aside any judgment in favor of Petitioners. The trial will have been for nothing.

13. Because the City is presently and actively litigating its desire to invalidate the 2019 Law and obtain a recount of the remonstrance petitions in the *Smith* case, this Court's subject matter jurisdiction is being challenged and, therefore, the Stay Order should remain in place.

14. It would be unduly burdensome to the Petitioners, and indeed prejudicial to them, for the Stay Order to be lifted where, as here, the subject matter jurisdiction of this Court is in question and may well be decided at or soon after a hearing in the Smith Cases that is set to occur in a little over sixty (60) days.

15. Petitioners respectfully propose that the Court deny the City’s instant Motion and set this matter for status hearing soon after the appeal period of the result in the Smith Cases expires so that this issue can be promptly revisited then. It is entirely possible that the summary judgment order in the Smith Cases will not be appealed and, therefore, reconvening this case then to consider whether to continue the Stay Order would make sense.

WHEREFORE, the Petitioners, by counsel, respectfully request that the Court:

1. Deny the City’s Motion to Lift Stay and Reset Trial Date;
2. Order that the Stay Order remain in effect until further order of this Court;
3. Order the parties to notify this Court when a judgment in the Smith Cases has been entered;
4. Set this case for status conference within a short time after the appeal period in the Smith Cases has expired so that this Court can promptly consider whether the Stay Order should remain in place;
5. And for all other just and proper relief in the premises.

Respectfully submitted,

/s/ William J. Beggs
William J. Beggs, #16644-49
Ryan M. Heeb, #34626-53
BUNGER & ROBERTSON

CERTIFICATE OF SERVICE

I certify that on September 29, 2023, I electronically filed the foregoing document using the Indiana E-filing System (IEFS) and that the foregoing document was served upon all counsel of record via the same.

/s/ William J. Beggs
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