

STATE OF INDIANA)
) SS: IN THE MONROE CIRCUIT COURT
COUNTY OF MONROE) CAUSE NO. 53C06-2203-PL-000509

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

**RESPONSE TO REMONSTRATORS’ OBJECTION TO MOTION TO STAY AND
RESET TRIAL DATE**

Respondents, the City of Bloomington, Indiana, *et al.* (collectively, “Bloomington” or “City”), by counsel, for its Response to Remonstrators’ Objection to Motion to Stay and Reset Trial Date, and in support, states as follows:

1. Bloomington has fully complied with all the Court’s requirements to end the stay issued in its September 5, 2023 Order on Motion to Stay – namely, the lawsuits pending under cause numbers 53C06-2203-PL-000608 and 5306-2203-PL-000609 have now been “fully and finally decided” after Bloomington dismissed them with prejudice.

2. Accordingly, on September 21, 2023, Bloomington filed its Motion to Lift Stay and Reset Trial Date, seeking a prompt resolution on County Residents Against Annexation, Inc.’s, et al. (“Remonstrators”) claims in this case.

3. Now, Remonstrators again seek to further delay this case to avoid a trial on the merits *on their own claims*.

4. On September 29, 2023, Remonstrators filed an Objection to Motion to Lift Stay and Reset Trial Date (“Objection”), attempting to manufacture other reasons for the Court to continue staying this case.

5. Remonstrators primarily claim that “this Court may not have subject matter jurisdiction”¹ if Indiana Code § 36-4-3-11.7 (“2019 Law”) is determined to be unconstitutional in other cases unrelated to Annexation Areas 1A or 1B, citing *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) (“*Jeffersonville*”). (Objection, ¶¶2-4).

6. Remonstrators’ continued assertion that this Court may lack subject matter jurisdiction over Remonstrators’ own case based on *Jeffersonville* is not well-reasoned and has been expressly rejected by the Indiana Court of Appeals. Whether remonstrators meet the statutory threshold to bring a remonstrance appeal is *not* a matter of the trial court’s subject matter jurisdiction. See *Fight Against Brownsburg Annexation v. Town of Brownsburg, Indiana*, 32 N.E.3d 798, 804 (Ind. Ct. App. 2015) (“Accordingly, we decline to follow [*Jeffersonville*], and we hold that challenges to the sufficiency of a remonstrance petition under Indiana Code Section 36-4-3-11 are not properly raised by a [challenge to subject matter jurisdiction].”) Rather, “[t]he question of subject matter jurisdiction only entails a determination of whether a court has jurisdiction over the general class of actions to which a particular case belongs.” *Id.* (citing *Troxel v. Troxel*, 737 N.E.2d 745, 749 (Ind. 2000)). This Court, and any trial court in an annexation case,

¹ Petitioners have made this same argument in their Objection to Motion for Certify Order for Interlocutory Appeal, filed on September 22, 2023. (“In other words, the challenge to the constitutionality of the 2019 Law is a challenge to the subject matter jurisdiction of this Court.”) To the extent this Court does not lift the stay in this matter, Petitioners’ subject matter jurisdiction arguments to oppose interlocutory appeal should be disregarded for the reasons discussed in this Response. See also *Fight Against Brownsburg Annexation v. Town of Brownsburg, Indiana*, 32 N.E.3d 798, 803-805 (Ind. Ct. App. 2015).

has subject matter jurisdiction to hear the case because the Indiana Code authorizes the filing of annexation appeals in the circuit or superior courts of the county in which the annexed territory is located. Ind. Code § 36-4-3-11(d). That is, the main thrust of the Remonstrators' objection—subject matter jurisdiction—has been neutered by the Indiana Court of Appeals and the Indiana Code. Remonstrators continued insistence on their subject matter jurisdiction is unfounded.

7. *Fight Against Brownsburg Annexation's* subject matter jurisdiction analysis was recently followed in *Sturdy Road Prairie Ridge Property Owners' Association, Inc. v. City of Valparaiso*, 211 N.E.3d 517, 2023 WL 3221451 at *2-*4 (Ind. Ct. App. May 3, 2023) (mem. op.), *trans. denied* (Sept. 7, 2023), where the Court of Appeals reversed the trial court's determination that it lacked subject matter jurisdiction over a remonstrance appeal based on *Fight Against Brownsburg Annexation's* analysis. *See* Ind. App. R. 65(D)(2) (2023 ed.).

8. Moreover, this Court has subject matter jurisdiction to make a determination on Remonstrators' claims regardless of whether another trial court-level proceeding makes a determination on the constitutionality of the 2019 Law—particularly when Bloomington has already dismissed its constitutional claims challenging the 2019 Law as it relates to Annexation Areas 1A and 1B with prejudice. *See Fight Against Brownsburg Annexation*, 32 N.E.3d at 804.

9. However, to the extent that Remonstrators insist this Court does not have subject matter jurisdiction *over their own claims*, Remonstrators are free to dismiss them. But Remonstrators are not free to continually delay this case by erroneously arguing that the Court may some day in the future not have subject matter jurisdiction over Remonstrators' own remonstrance case due to a decision in a different case.

10. Additionally, Remonstrators contend that the City has not complied with Ind. Code § 34-33.1-1-1 – based on a defense the City asserted in its Answer filed on May 5, 2022.² Remonstrators raised this issue for the very first time at the stay hearing on September 1, 2023 – nearly **18 months after** the City asserted the affirmative defense, and **after** the Court-ordered deadline for briefing on the Motion to Stay. *See 6/20/23 Order Setting Hearing on Petitioners’ Motion to Stay.*

11. Remonstrator’s waiver of the issue notwithstanding, even though the cited statute does not actually require the City to notify the attorney general, the City notified the attorney general’s office that the constitutional issue had been asserted as an affirmative defense in this case on May 11, 2022. A copy of the City’s notice to the attorney general’s office is attached as Exhibit A. Had Remonstrators not waited to raise the issue for the first time until the stay hearing, the City would have been able to notify the Court of this fact at that time. Regardless, the attorney general has chosen thus far not to intervene. *See* Ind. Code § 34-33.1-1-1 (permitting but not requiring the attorney general to intervene).

12. As indicated in Bloomington’s Motion to Lift Stay and Reset Trial Date, Bloomington has already dismissed its constitutional claims challenging the 2019 Law as it relates to Annexation Areas 1A and 1B (the **only** annexation areas at issue in this case) **with prejudice**. This is still not enough for Remonstrators, who now claim that the constitutionality of the 2019 Law “can” be reviewed *sua sponte* by an appellate court if this case gets appealed. (Objection, ¶7). This is no justifiable reason to indefinitely stay this matter pending the outcome of other lawsuits that do not involve the City’s annexation of Areas 1A and 1B. At this point,

² Seeking to preserve its rights when it filed its Answer on May 5, 2022, Bloomington asserted as a defense that Indiana Code §§ 36-4-3-11.7 and 13-18-15-2 are unconstitutional. *See Paint Shuttle, Inc. v. Continental Cas. Co.*, 733 N.E.2d 513, 524-525 (Ind. Ct. App. 2000) (failure to assert defense in responsive pleading results in waiver).

Remonstrators are reaching for straws. If this case is delayed because any court or any legislature anywhere could one day make a determination that could have been an issue in this case, no annexation remonstrance could ever proceed.³

13. Nor can Remonstrators legitimately request to delay because of needed trial preparations. (Objection, ¶10). At the time of the Court’s Stay Order, the case was 69 days from trial under a Court-ordered case management plan. Bloomington was diligently preparing for trial and conducting discovery under the case management plan, even if Remonstrators were not. *Accord* 8/29/23 Order Granting Motion to Compel. The parties can and should cooperate on an updated case management with a new trial date, and there can be no prejudice to Remonstrators to proceed to trial under a similar timeframe.

14. Remonstrators’ Objection to lift the stay in this case should be seen for what it is – yet another attempt to avoid a trial on the merits on their own claims. In fact, the absurdity of Remonstrators’ position is revealed in paragraphs 8 and 9 of its objection, where they declare there is an “impossible scenario” facing elected officials who have taken or will take “oaths to uphold the constitution of the state of Indiana,” all because Bloomington dropped a constitutional challenge to the 2019 Law in the 1A and 1B *Smith* cases. The Indiana judiciary will decide the constitutionality of the 2019 Law in due time, but there is no external case challenging that law as applied to the annexation of areas 1A and 1B. This does not present a jurisprudential crisis of any kind—including a constitutional one.

15. Indiana appellate courts have long recognized this tactic of delay by remonstrators in annexation cases, and explained that Indiana’s annexation scheme “expresses the desire and

³ Further, delaying the merits to reach the constitutional issue first is inconsistent with the long-standing principles of constitutional avoidance. *See Indiana Land Trust Co. v. XL Investment Properties, LLC*, 155 N.E.3d 1177, 1182 (Ind. 2020).

intent of the Legislature that proceedings embracing appeals from the adoption of annexation ordinances should be conducted expeditiously and without delay.” *Keene v. Michigan City*, 174 N.E.2d 48, 50 (Ind. 1961). When remonstrators continuously avoid proceeding to a trial on their own petition, “a municipality could be endlessly delayed by disgruntled property owners in annexation proceedings.” *In re Annexation Ordinance No. X01-74*, 383 N.E.2d 481, 484 (Ind. Ct. App. 1978).

16. Remonstrators cannot be prejudiced by requiring them to pursue their own claims in this case, particularly where all requirements of the Court’s September 5, 2023 Order on Motion to Stay have been satisfied and all of the City’s constitutional claims in the *Smith* litigation relating to Annexation Areas 1A and 1B have been dismissed with prejudice. If the Remonstrators do not want to incur the time and expense of a trial *on their own complaint*, they can dismiss it at any time. The City will not object. As it stands, Remonstrators brought this case. They should be required to “actively and vigorously pursue their claims.” *See Chosnek v. Rolley*, 688 N.E.2d 202, 206 (Ind. Ct. App. 1997).

WHEREFORE Respondents, the City of Bloomington, Indiana, *et al.*, by counsel, respectfully request this Court enter an order acknowledging the satisfaction of the requirements for lifting the stay and setting a telephonic scheduling conference for the purpose of resetting the trial date.

Respectfully submitted,

/s/ Andrew M. McNeil

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing “Response to Objection to Motion to Lift Stay and Reset Trial Date” has been served upon the following counsel of record by electronic service through the Court’s system, this 6th day of October, 2023:

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