

STATE OF INDIANA) IN THE MONROE CIRCUIT COURT
) SS:
COUNTY OF MONROE) CAUSE NUMBER:

ANDREW GUENTHER, individually)
and in his capacity as appointed)
member of the Bloomington Plan)
Commission,)
and)
WILLIAM ELLIS, in his capacity)
as Chairman of the Monroe County)
Indiana Republican Party.)

Petitioners,)

-v-)

CITY OF BLOOMINGTON,)
INDIANA,)
JOHN HAMILTON, in his official)
capacity as Mayor for the City of)
Bloomington, Indiana, and)
CHRISTOPHER COCKERHAM, in)
his capacity of contested member of the)
Bloomington Plan Commission.)

Respondents.)

VERIFIED COMPLAINT FOR WRIT OF *QUO WARRANTO*

Petitioners, **ANDREW GUENTHER** individually, and in his capacity as appointed member of the Bloomington Plan Commission, and **WILLIAM ELLIS**, in his capacity as Chairman of the Monroe County Republican Party, by counsel *Carl Lamb & Associates, P.C.*, respectfully request the Court to issue a *writ of quo warranto* which vacates the appointment of **CHRISTOPHER COCKERHAM**, which said appointment was wrongly made by the Respondent **CITY OF BLOOMINGTON, INDIANA** and by

Co-Respondent **JOHN HAMILTON**, in his official capacity as Mayor for the City of Bloomington, Indiana **and** to certify and install Petitioner Andrew Guenther on the Bloomington Plan Commission (“Plan Commission”), because John Hamilton, as Mayor for the City of Bloomington, failed to comply with Indiana Code § 36-1-8-10, and accept William Ellis’ rightful and legal appointment of the vacancy on the Plan Commission.

Petitioners, by counsel, hereby request the Respondents provide proof that the appointment of Cockerham comported with the requirements of I.C. § 36-1-8-10, *otherwise*, Petitioners request that appointment by Hamilton of Cockerham be voided as a matter of law, and that Ellis' appointment of Guenther to the Bloomington Plan Commission be approved, for attorneys’ fees and costs, and any other relief deemed appropriate in the premises.

THE PARTIES

- 1) Petitioner **ANDREW GUENTHER** (hereinafter “*Guenther*”) is resident of Monroe County, Indiana. Guenther has served as a member of the Bloomington Environmental Commission and was appointed to the Bloomington Plan Commission by William Ellis on April 16, 2020. Guenther is a member of the Republican Party.
- 2) Petitioner, **WILLIAM ELLIS** (hereinafter “*Ellis*”), is a resident of Monroe County, Indiana, and is the Chairman of the Monroe County Indiana Republican Party.
- 3) Respondent **CITY OF BLOOMINGTON, INDIANA** (hereinafter “*the City*”) is an Indiana municipality duly organized pursuant to the laws of the State of Indiana.
- 4) Respondent, **JOHN HAMILTON** (hereinafter “*Mayor Hamilton*”), is a resident and Mayor of the City of Bloomington, Indiana. Respondent
- 5) Respondent **CHRISTOPHER COCKERHAM** (hereinafter “*Cockerham*”) is a resident of Monroe County, Indiana, and was appointed on May 7,

2020, by Mayor Hamilton, to the Bloomington Plan Commission, an appointment which is being challenged by this litigation.

JURISDICTION

- 6) Petitioners incorporate herein all preceding paragraphs.
- 7) A *Quo Warranto* action is the proper remedy for determining whether or not Cockerham has the right to be on the Bloomington Plan Commission. *Brenner v. Powers*, 584 N.E. 2d 569, 576 (Ind. Ct. App. 1992).
- 8) Pursuant to Indiana Code § 34-17-1-1(1):

"[a]n information may be filed against any person or corporation....[w]hen a person usurps, intrudes into, or unlawfully holds or exercises a public office...within Indiana..."
- 9) A writ of *quo warranto* must be brought in the name of the State of Indiana or other prosecuting officer, *however*, a private person may bring a *quo warranto* if he claims an interest in his own relation, or a special interest beyond that of a taxpayer. *Brenner*, 584 N.E. 2d at 575; see also: *Hovanec v. Diaz*, (1981) Ind., 397 N.E. 2d 1249; *Ziffrin v. Ziffrin Truck Lines, Inc.* (1959) 239 Ind. 468, 158 N.E. 2d 793; *McGuirk v. State* (1930) 201 Ind. 650, 169 N.E. 521.
 - a. That *Guenther* brings this action in that he “claims an interest in his own relation, or a special interest beyond that of a taxpayer.” In particular, he was duly appointed by the Party Chair to the said position in question.
- 10) Pursuant to, Indiana Code § 34-17-2-6(c), when an information is filed by a person other than the prosecuting attorney, that person "shall state the person's interest in the matter and any damages the person has sustained.
- 11) Petitioner Andrew Guenther has a special interest in this matter beyond that of a taxpayer because the Respondent usurped Andrew Guenther's position on the Bloomington Plan Commission (hereafter "*Commission*") that was rightfully the Petitioner's pursuant to I.C. § 36-1-8-10, thereby damaging the Petitioner since he could not act in the position for which he was rightfully appointed.
- 12) As such, the Court has jurisdiction over the parties and subject matter.

RELEVANT FACTS

- 13) Petitioners incorporate herein all preceding paragraphs.
- 14) That pursuant to and in accordance with the Bloomington Municipal Code (“BMC”) 2.13.000, the Bloomington Plan Commission was created and established in the Executive Department by Ordinance 83-6 §2 (part), 1983.
- 15) That pursuant to and in accordance with BMC 2.13.010, “Appointment and Qualifications,” the Plan Commission (hereafter “Plan Commission”) is composed of twelve members. The most relevant appointments as they pertain to the instant action are as follows:
 - a. One (1) member by and from the membership of the Bloomington Common Council,
 - b. one (1) member appointed by and from the membership of the parks & recreation board,
 - c. one (1) member appointed by the membership of the board of public works, the city civil engineer or their designee,
 - d. and five (5) citizens, no more than three of which may be of the same political party, to be appointed by the Mayor.

See in relevant part, Bloomington Municipal Code 2.13.
- 16) On or around January 2, 2012 until January 5, 2016, Chris Smith served on the Plan Commission. Chris Smith was appointed by former City of Bloomington Mayor Mark Kruzan. Chris Smith was a Republican.
- 17) Nick Kappas succeeded Chris Smith's position and was appointed to the Plan Commission, by Mayor Hamilton and served on the same from February 15, 2016 through December 31, 2019.
- 18) Nick Kappas served on both the City of Bloomington's Plan Commission and Environmental Commission.
- 19) Nick Kappas' position with the Plan Commission expired on December 31, 2019.
- 20) Throughout his service to the Plan Commission, Nick Kappas did not have a Party affiliation and/or designation.

- 21) Guenther was appointed by Mayor Hamilton to the Environmental Commission. In Guenther's case, he was appointed on September 19, 2018. Nick Kappas was also appointed to the Environmental Commission, but by the Bloomington Common Council, on June 3, 2015.
- 22) Guenther's position on the Environmental Commission is unpaid and Guenther has not received any financial benefit from the position.
- 23) That pursuant to and in accordance with Indiana Law, Mayor Hamilton had ninety (90) days in which to announce his selection to replace Kappas.
- 24) That, however, more than ninety (90) days elapsed without Mayor Hamilton taking any formal action as required under Indiana Law.
- 25) After more than ninety-three (93) days from the termination of Kappas' term [even if we use January 13, 2020 as the target date, which the Petitioner contends the end of the term was December 31, 2019], Ellis announced his appointment to the Plan Commission, to-wit, *Andrew Guenther*.
- 26) As a matter of law, when Guenther was appointed to the Plan Commission, his position on the Environmental Commission automatically, as a matter of law, terminated with his acceptance of the position with the Plan Commission.
- :
- 27) That Petitioner William Ellis, who is the Chairman of the Monroe County Indiana Republican Party, had communicated his appointment to the City of Bloomington and, in particular, the Mayor of the City of Bloomington, Indiana.
- 28) That Guenther communicated his appointment to the City of Bloomington Plan Commission, City of Bloomington Legal Department and the City of Bloomington, by its Mayor, John Hamilton.
- 29) That notwithstanding the appointment by the Petitioners, the Respondent City of Bloomington, Indiana, by Respondent Mayor Hamilton, announced on May 5, 2020, the mayoral appointment of Christopher Cockerham to fill the Plan Commission position.
- 30) That at no time did the Petitioners accept and/or concede to the Mayor's wrongful and delinquent appointment.

- 31) That at no time did the Petitioners waive any rights that they may have, individually and/or as a group, in the matters before this Court.
- 32) That on or around June 5, 2020, Guenther, was notified by legal counsel representing the City of Bloomington, Indiana that he was not allowed to sit on both the Plan Commission and Environmental Commission, and for that reason (in part), the Respondent Hamilton had nominated Cockerham.
- 33) That prior to the June 8, 2020 City of Bloomington, Plan Commission meeting, Guenther, notified the Plan Commission, *in writing*, that Guenther believed the Plan Commission position was legally his position, and not Cockerham and, as such, was making a formal **DEMAND** for the position in question.
- 34) After the June 8, 2020, Plan Commission meeting, the Petitioners issued a press release stating their position on this matter.

COUNT 1

Relief Through a Writ of *Quo Warranto*

- 35) Petitioners incorporate herein all preceding paragraphs.
- 36) Respondent Hamilton's appointment of Cockerham to the Bloomington Plan Commission should be vacated since Hamilton did not have authority to override Petitioner Ellis' appointment of Andrew Guenther.
- 37) Pursuant to Indiana Code §§ 36-1-8-10(a)-(c):
 - “(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 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.**

(c) If a certification by a county chair of a political party is required under subsection (b), the certification must be filed with the office of the circuit court clerk not later than the time the appointee's oath of office is filed with the clerk under [IC 5-4-1](#). If the county chair's certification is not filed with the circuit court clerk's office as required by this subsection, the appointment is void. (***Emphasis Added***) *As added by P.L.185-1988, SEC.1. Amended by P.L.68-1996, SEC.4; P.L.167-2001, SEC.10; P.L.199-2001, SEC.28; P.L.126-2002, SEC.91; P.L.127-2017, SEC.15; P.L.193-2017, SEC.3; P.L.86-2018, SEC.336.*

- 38) Upon information and belief, Cockerham voted as a Democrat in the most recent primary prior to the appointment, *that being the Primary of 2019*, and it is the Petitioner's contention that Cockerham's alleged affiliation as a Republican in the 2020 Primary was unverifiable and untimely as the 2020 Primaries had not taken place.¹
- a. That according to Indiana law, a party that submits an early vote and/or absentee vote, is only showing "an intent" of their anticipated vote. A vote is not an official vote until the actual election and for 2020, the official Primary was June 2nd, 2020.
- b. That, as such, Cockerham for purposes of his alleged April 2020 appointment was a "Democrat" not a "Republican" as required by statute.
- 39) No certification was filed with the Monroe Circuit Court certifying Cockerham was a Republican prior to Mayor Hamilton appointing Cockerham to the Plan Commission.
- 40) As such, the Respondents should not be able to assert that Cockerham is a Republican, at least for purposes of making an analysis under I.C. 36-1-8-10(b) and (c).

¹ It should be noted according to the 2020 Indiana Election Calendar, which is published by the Indiana Election Division, states that Tuesday May 5th, 2020, is the first day that a voter may vote an absentee ballot in the Office of the Circuit Court Clerk or Satellite Office.

- 41) Pursuant to Indiana Code § 36-1-8-10(d):
- "(d) 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, 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 chair of the political party of the member whose term has expired ***shall make the appointment.*** (Emphasis Added) *As added by P.L.185-1988, SEC.1. Amended by P.L.68-1996, SEC.4; P.L.167-2001, SEC.10; P.L.199-2001, SEC.28; P.L.126-2002, SEC.91; P.L.127-2017, SEC.15; P.L.193-2017, SEC.3; P.L.86-2018, SEC.336.*
- 42) Kappas' term expired on December 31st, 2019. There was a meeting on January 13, 2020, but Kappas was not in attendance (presumably due to the expiration of his term). However, the City of Bloomington, Indiana might argue that the term expired on January 13, 2020, which even, arguendo, if it did, the Mayor still failed to act timely herein.
- 43) During the ninety (90) days after Kappas' term expired, Mayor Hamilton, despite having the authority to, did not make an appointment for the Commission spot that opened up as a result of Kappas' vacancy.
- 44) Upon information and belief, Kappas is neither a Republican or Democrat, but his predecessor, Chris Smith, was a Republican.
- 45) Ellis is the chairman of the Monroe County Republican Party.
- 46) As such, and pursuant to, I.C. 36-1-8-10(d)(2), on April 16, 2020, Ellis made the appointment of Guenther to the Plan Commission, because Ellis was the chairman of the Republican Party, and the member whose term expired, Kappas, has no political affiliation.
- 47) Ellis was the appropriate person to make the appointment of the vacant position, because the member immediately preceding Kappas, Chris Smith was a Republican, and Ellis is the chairman of the Monroe County Republican Party.

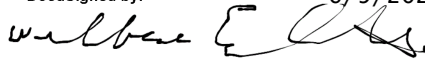
- 48) Respondents have usurped, intruded upon, and unlawfully misappropriated, and have awarded, held, and exercised the position of member of the Plan Commission for the City of Bloomington, and they have prevented the Petitioners lawful rights to accession and succession to that position.
- 49) For these reasons, the proper remedy for voiding Respondent Hamilton's appointment of Cockerham to the Plan Commission, and having Guenther take his place, is through a writ of *quo warranto*.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, Petitioners, by counsel pray that this honorable Court award them the following relief:

- A. Issue an immediate *writ of quo warranto* removing Christopher Cockerham from his present, and unlawfully awarded, position as member of the Bloomington Plan Commission.
- B. Order the Respondent Hamilton to certify and install Guenther in the vacated position as member of the Bloomington Plan Commission.
- C. Award the Petitioners the costs of this proceeding, including their attorneys' fees; and
- D. Grant such further relief as justice requires.

I, *William Ellis*, in my capacity as the chairman of the Monroe County Republican Party, hereby affirm under the penalties for perjury that the foregoing statements are true and accurate to the best of my knowledge, ability, and belief.

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William Ellis

I, *Andrew Guenther*, in my capacity as appointed member of the City of Bloomington's Plan Commission, hereby affirm under the penalties for perjury that the foregoing statements are true and accurate to the best of my knowledge, ability, and belief.

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Andrew Guenther

Respectfully submitted,

CARL LAMB & ASSOCIATES
Attorney at Law

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CARL PAUL LAMB
Indiana Attorney Number: 10286-53
Attorney for the Petitioners

CERTIFICATE OF SERVICE

I, *Carl Paul Lamb*, hereby certify that a true and accurate copy of the foregoing document has been e-filed and served on 9th day of June, 2020, addressed to the following:

CITY OF BLOOMINGTON

c/o John Hamilton, Mayor
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Bloomington, Indiana 47404
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MIKE ROUKER

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DocuSigned by:

6/9/2020 | 3:45:36 PM EDT

Carl Paul Lamb

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