

STATE OF INDIANA) IN THE MONROE CIRCUIT COURT
)SS:
COUNTY OF MONROE) Case Number: 53C08-2006-MI-000958

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.)

DEFENDANTS' FIRST MOTION TO DISMISS

Respondents, City of Bloomington, Indiana, John Hamilton, and Christopher Cockerham, by counsel, and pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure move the Court to dismiss Petitioners' June 9, 2020, *Verified Complaint for Writ of Quo Warranto* and in support state:

1. Petitioners filed their *Verified Complaint for Writ of Quo Warranto* (the "Complaint") on June 9, 2020, seeking to strike down City of Bloomington Mayor John Hamilton's appointment of Respondent Christopher Cockerham to the City of Bloomington Plan Commission seat formerly occupied by Independent Nick Kappas.

2. Petitioners have failed to plead, and by their own averments cannot plead, facts sufficient to establish their legal standing to bring the claims set forth in their Complaint.

3. A motion under Trial Rule 12(B)(6) tests the legal sufficiency of a claim rather than the facts supporting that claim. *Allen v. Clarian Health Partners, Inc.*, 980 N.E.2d 306, 308 (Ind. 2012); *Meyers v. Meyers*, 861 N.E.2d 704, 705 (Ind. 2007).

4. A trial court must grant a motion to dismiss under Trial Rule 12(B)(6) if the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. *McPeck v. McCardle*, 888 N.E.2d 171 (Ind. 2008).

5. In determining whether the facts alleged in the complaint are incapable of supporting relief, “the court must look only to the complaint and may not resort to any other evidence in the record.” *Dawson v. Newman*, 845 N.E.2d 1076, 1080 (Ind. Ct. App. 2006), *trans. denied*. When ruling on a motion to dismiss under Trial Rule 12(B)(6), the court should consider all of the allegations in the complaint to be true and resolve all inferences in favor of the non-moving party. *Allen*, 980 N.E.2d at 308; *State v. American Family Voices, Inc.*, 898 N.E.2d 293 295–96 (Ind. 2008).

6. Where a party lacks standing to pursue a claim, dismissal under Trial Rule 12(B)(6) is appropriate. *In re Paternity of G.W.*, 983 N.E.2d 1193, 1196 (Ind. Ct. App. 2013); *Long v. Biomet, Inc.*, 901 N.E.2d 37, 40 (Ind. Ct. App. 2009); *R.J.S. v. Stockton*, 886 N.E.2d 611, 614 (Ind. Ct. App. 2008).

7. Standing is defined in Indiana as having a “sufficient stake in an otherwise justiciable controversy.” *Ind. Civil Rights Comm’n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 945 (Ind. 1999).

8. The purpose of the standing requirement is to ensure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. *Pence v. State*, 652 N.E.2d 486, 487 (Ind. 1995). Standing is “a significant restraint on the ability of Indiana courts to act, as it denies the courts any jurisdiction absent an actual injured party participating in the case.” *Id.* at 488; *see also Garau Germano, P.C. v. Robertson*, 133 N.E.3d 161, 170 (Ind. Ct. App. 2019), *reh'g denied* (Oct. 17, 2019), *trans. denied* (Ind. Feb. 13, 2020).

9. Indiana law expressly limits the parties with standing to bring an information of *quo warranto*. Indiana Code, Section 34-17-2-1 states:

An information described in IC 34-17-1-1 may be filed:

(1) by the prosecuting attorney in the circuit court, superior court, or probate court of the proper county, upon the prosecuting attorney's own relation, whenever the prosecuting attorney:

(A) determines it to be the prosecuting attorney's duty to do so; or

(B) is directed by the court or other competent authority; or

(2) by any other person on the person's own relation, whenever the person claims an interest in the office, franchise, or corporation that is the subject of the information.

10. Petitioner Ellis does not plead any interest in the office in his own relation.

11. Petitioner Guenther claims standing to bring the Complaint in *quo warranto* under subpart (2) of Indiana Code, Section 34-17-2-1(a), claiming an interest in the office in his own relation as being appointed by Petitioner Ellis, the Monroe County Republican Party Chair. Compl. ¶ 9.

12. Petitioners erroneously claim that Ellis, as the Republican Party Chair, was entitled to appoint Guenther to the City of Bloomington Plan Commission under Indiana Code, Section 36-1-8-10(d) which states:

(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.

13. Indiana Code, section 36-7-4-207(a) and Bloomington Municipal Code (BMC), section 2.13.010 govern the appointment of the members of the City of Bloomington Plan Commission. BMC section 2.13.010 provides in relevant part:

The commission shall consist of twelve members who by statute shall be appointed in the following manner:

...
(5) Five citizens, no more than three of whom may be of the same political party, appointed by the mayor.

14. Petitioners allege the vacant seat to which Republican Party Chair Ellis sought to appoint Guenther was held by Nick Kappas. Compl. ¶ 17.

15. Petitioners allege Kappas' seat was one of the five members appointed by the Mayor. Compl. ¶ 17.

16. Petitioners allege Kappas' term expired on December 31, 2019. Compl. ¶ 19.

17. Petitioners allege Kappas did not have a party affiliation and/or designation. In other words, Petitioners admit that Kappas was not a Republican. Compl. ¶ 20, 44.

18. Petitioners allege Mayor Hamilton failed to appoint a replacement member to fill Kappas's seat within 90 days of December 31, 2019, and that Ellis, as Republican Party Chair was legally authorized to appoint Kappas's replacement. Compl. ¶ 24, 46.

19. Petitioners claim Indiana law allowed Ellis to appoint Guenther because, although the member whose term had expired was not a Republican (Compl. ¶ 20, 44), his predecessor was a Republican. Compl. ¶ 47.

20. Petitioners' claim of Ellis's entitlement to appoint Guenther is unsupported by Indiana law.

21. The statute upon which Petitioners rely does not contain a default provision covering a member who does not have a party affiliation, or is an Independent. Petitioners' Complaint seeks to add language to the statute which the legislature did not see fit to write. Specifically, Petitioners ask this Court to read a requirement into the statute granting authority to the predecessor party of the departing member when the departing member claims no party affiliation or is an Independent. "It is not a proper function of this court to ignore the clear language of a statute and, in effect, rewrite the statute in order to render it consistent with a particular view of sound public policy." *T.B. v. Indiana Dep't of Child Servs.*, 971 N.E.2d 104, 110 (Ind. Ct. App. 2012); *See also Robinson v. Monroe Cnty.*, 663 N.E.2d 196 (Ind.Ct.App.1996) (concluding that a court can not ignore unambiguous language of statute's exemption of particular class of individuals from abiding by certain safety requirement regardless of court's view as to the wisdom of the exemption).

22. Because Kappas was not a Republican, Ellis, the Republican Party Chair, did not have lawful authority to appoint Guenther to the City of Bloomington Plan Commission.

23. Because Ellis did not have lawful authority to appoint Guenther to the City of Bloomington Plan Commission, Guenther was not entitled to be appointed, has not suffered any actual injury, and does not have any substantive right to enforce the claim that is being made in the litigation. *See Pence*, 652 N.E.2d at 487; *Hovanec v. Diaz*, 397 N.E.2d 1249, 1250 (Ind. 1979) (affirming a grant of a motion to dismiss because the petitioner could not show that he had a right or title to the office, or an interest that differs from that of the general public).

24. Additionally, Ellis failed to allege any facts that he has any interest in the office in his personal relation as required by Indiana Code, Section 34-17-2-1, and he also lacks standing to bring the claims in the Complaint for this reason.

25. Considering all of the allegations in the complaint to be true and resolving all inferences in favor of the non-moving party, the facts alleged in the Complaint are incapable of supporting relief as neither Ellis nor Guenther have legal standing to bring the claims in the Complaint.

26. This Court must therefore dismiss Petitioners' Complaint.

WHEREFORE Respondents, by counsel, move the Court to dismiss Petitioners' Complaint pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure, and for all other just and proper relief.

Respectfully Submitted

/s/ Daniel A. Dixon
Daniel A. Dixon, #30585-53
Assistant City Attorney
City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
(812) 349-3426
daniel.dixon@bloomington.in.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2020, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS) and the foregoing document was served upon the following parties or their attorneys of record via IEFS:

Carl Lamb
carl@carllamblaw.com

Matthew Fox
matt@carllamblaw.com

/s/ Daniel A. Dixon
Daniel A. Dixon, #30585-53
Assistant City Attorney
City of Bloomington
401 N. Morton Street
Bloomington, IN 47404
(812) 349-3426
daniel.dixon@bloomington.in.gov