

STATE OF INDIANA        )  
                                  ) SS:  
COUNTY OF PORTER     )

IN THE PORTER SUPERIOR COURT  
  
CAUSE NO: 64D01-2203-PL-002328

STURDY ROAD PRAIRIE RIDGE        )  
PROPERTY OWNERS' ASSOCIATION,    )  
INC., on behalf of Members Prairie Ridge    )  
Annexation Territory Property Owners        )  
Opposed to City of Valparaiso Annexation    )  
Ordinance No. 14, 2021,                        )

Plaintiffs, Remonstrators,                    )

v.    )

CITY OF VALPARAISO, INDIANA,                )  
COMMON COUNCIL OF THE CITY                )  
OF VALPARAISO, INDIANA;                        )  
MATTHEW R. MURPHY, MAYOR OF                )  
CITY OF VALPARAISO; ORDINANCE                )  
NO. 14, 2021, CITY OF VALPARAISO,            )  
and VICKI URBANIK, AUDITOR                    )  
OF PORTER COUNTY, INDIANA,                    )

Defendants.    )

**CITY DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO DISMISS**

The City of Valparaiso (“City”) passed an ordinance annexing property into the City. The Plaintiffs are remonstrators who seek to undo the City’s annexation (collectively, the “Remonstrators”). They claim they are not bound by waivers of their right to remonstrate. But the General Assembly gives local county auditors the power to determine if annexed property is subject to a remonstrance waiver. Porter County Auditor Vicki Urbanik (the “Auditor”) determined that all of the property in the annexation territory at issue is subject to a remonstrance waiver. That conclusion is a “final determination” that is not subject to judicial review under the plain language

of the governing statutes. Ind. Code § 36-4-3-11.2. The Court should therefore enforce the Auditor’s decision and dismiss the Remonstrator’s improper judicial review petition.

## BACKGROUND

The City adopted an ordinance on October 25, 2021 that annexed a subdivision in Valparaiso known as “Prairie Ridge.” Complaint ¶¶ 4, 9.<sup>1</sup> The Remonstrators are a group of property owners who claim to own 59 of the 69 lots in Prairie Ridge and want to halt the annexation. *Id.* To oppose the annexation, they filed a remonstrance with the Auditor. Complaint Ex. D. Under Indiana law, a remonstrance is the sole means for landowners in an annexation territory to attack the legislative decision to annex property. *See Certain Martinsville Annexation Territory Landowners v. City of Martinsville*, 18 N.E.3d 1030, 1033 (Ind. Ct. App. 2014). In order to invoke this right of review, a remonstrance must be signed by 65 percent of the owners who either pay property taxes in the annexation territory or own 80 percent of the assessed value of the property in the annexation territory. *See* Ind. Code § 36-4-3-11.3. This requirement ensures that one issue to be decided in most annexation cases is the number of valid signatures on the remonstrance. *Id.* “If the remonstrance is not signed by a sufficient number of landowners, then the landowners in the annexed territory do not have standing to challenge the annexation.” *Certain Tell City Annexation Territory Landowners v. Tell City*, 73 N.E.3d 210, 215 (Ind. Ct. App. 2017).

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<sup>1</sup> The Remonstrators sued the City as well as its mayor and common council. These parties are collectively referred to as the “City.”

This calculation is not a simple counting exercise. In addition to determining which property owners paid taxes, many property owners have surrendered the right to remonstrate against annexation through signed waivers of that right. *See* Ind. Code § 36-9-22-2(c). The General Assembly has declared that these waivers are not only enforceable (subject to some exceptions), but **must** be included in contracts extending sewer service to property outside the municipality. *Id.* Throughout Indiana, local municipalities have extended sewer service and in exchange have required property owners to waive the right to remonstrate. The Remonstrators' complaint acknowledges that prior owners of their property have executed these type of remonstrance waivers. *See, e.g.*, Complaint ¶¶ 22, 25.

Prior to 2015, the General Assembly left to the courts the task of reviewing remonstrance waivers and counting signatures on a remonstrance petition. *Tell City*, 73 N.E.3d at 215. But in 2015, the General Assembly created a new statute that shifted that responsibility to Indiana's county auditors. *See* Ind. Code § 36-4-3-11.2 ("Section 11.2"). The statute requires the auditor to make the "final" decision on the validity of signatures, including whether any are barred by remonstrance waivers:

Not later than fifteen (15) business days after receiving the documentation regarding any valid waiver of the right of remonstrance from the annexing municipality under subsection (h), if any, the county auditor's office shall make a final determination of the number of owners of real property within the territory to be annexed:

- (1) who signed the remonstrance; and
- (2) whose property is not subject to a valid waiver of the right of remonstrance;

using the auditor's current tax records as provided in section 2.2 of this chapter. The county auditor shall file a certificate with the legislative body of the annexing municipality certifying the number of property owners not later than five (5) business days after making the determination.

Ind. Code § 36-4-3-11.2.

The remonstrance petition for Prairie Ridge had 62 signatures. Complaint Ex D. The Auditor reviewed the remonstrance and determined that 59 signatures were invalid because they were barred by waivers of the right to remonstrate. Complaint Ex. E. The Auditor also concluded that the remaining three signatures were for property covered by other signatures and could not be counted in determining the final total. *Id.* The Auditor issued its certification on February 28, 2022 and stated that the petition did not contain sufficient signatures for the remonstrance to proceed:

I further certify that I have checked the signatures on the various counterparts and verifying affidavits of said petitioners with the tax records in my office; that all persons signing verifying affidavits that indicate the person is the owner of real property in the proposed annexation area four (4) are owners of real estate in said proposed annexation territory, and that said petition was signed as follows:

Petitioners'	_____ 0 _____	real property owners whose property is not subject to a valid waiver or remonstrance
	_____ 59 _____	real property owners whose property is subject to a valid waiver of remonstrance
	_____ 3 _____	non real property owners, duplicate signers or signers for exempt parcels.
	_____ 62 _____	total signatures

IN WITNESS THEREOF, I have hereunto set my hand and the official seal of the Auditor of the County of Porter on this 28<sup>th</sup> day of February, 2022.

Vicki Urbank

Complaint at Ex. E.<sup>2</sup>

<sup>2</sup> The complaint suggest that the Auditor somehow improperly delayed release

Despite the Auditor determining that the remonstrance lacked the required signatures, the Remonstrators proceeded to file this action. In their complaint, the Remonstrators acknowledge that the Auditor “found that none of the signatures on the Remonstrance Petition was valid.” Complaint ¶¶ 38-48. The Remonstrators seek to overturn the Auditor’s decision in order to proceed with their challenge to the annexation. Complaint ¶¶ 49-54. Their complaint therefore asks for a “judgment invalidating the Auditor’s Verification Statement dated February 28, 2022.” Complaint at p. 10.

### ARGUMENT

The Remonstrators cannot proceed with their challenge to the annexation unless they can overturn the Auditor’s certification under Section 11.2. *See* Ind. Code § 36-4-3-11.2. Because annexation is a legislative act, judicial review of an annexation is only available as allowed by statutes. Section 11.2 vests the power to review signatures **exclusively** in the Auditor. *Id.* It makes the Auditor’s decision a “final determination” and includes no language authorizing judicial review of that decision. *Id.* Nor does the statute allowing judicial review of other aspects of an annexation extend to review of the Auditor’s certification. Ind. Code § 36-4-3-13. Because the General Assembly intended the Auditor’s certification to be the “final” word on the issue of signatures, the Remonstrators cannot challenge that final determination and their complaint must be dismissed.

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of the certification of signatures, but the complaint shows that the Auditor completed the task within the statutorily required period. Complaint at ¶¶ 43-48.

**I. Annexation is a legislative process and judicial review is allowed only as provided by the General Assembly.**

The General Assembly has an unlimited right to set the boundaries of Indiana's cities and towns. *Bradley v. City of New Castle*, 764 N.E.2d 212, 215 (Ind. 2002). That legislative act is solely within the power of the General Assembly and not subject to second-guessing by other branches of government. *Id.* Through Indiana's annexation statutes, the General Assembly delegated its power to set boundaries to the cities and towns. *Id.* "When a municipality annexes territory, no property changes hands and no private rights of landowners are affected." *Holcomb v. City of Bloomington*, 158 N.E.3d 1250, 1256-57 (Ind. 2020). The act of annexation "simply changes the property and its owner, in their civil relation to certain public authority." *Bradley*, 764 N.E.2d at 215.

Since the power to change municipal boundaries is a purely legislative function, "[i]t is subject to judicial review only as provided by statute, and '[t]he larger object of the annexation statute is, as it always has been, to permit annexation of adjacent urban territory.'" *Id.* (quoting *Rogers v. Mun. City of Elkhart*, 688 N.E.2d 1238, 1242 (Ind. 1997). "Therefore, a remonstrator's challenge to annexation is not a regular lawsuit, but rather a special proceeding the General Assembly may control." *Bradley*, 764 N.E.2d at 215. *See also City of Carmel v. Certain Home Place Annexation Territory Landowners*, 874 N.E.2d 1045, 1051 (Ind. Ct. App. 2008) ("Annexation is subject to judicial review only so far as the General Assembly has authorized it by statute."); *Town of Lapel v. City of Anderson*, 17 N.E.3d 330, 332 (Ind. Ct. App. 2014) (same).

The courts “do not abandon [this] deferential approach simply because the state legislature has delegated a legislative function to subordinate agents, the municipalities.” *Bradley*, 764 N.E.2d at 215. Because annexation “is essentially a legislative process . . . courts should not micromanage it.” *Id.* See also *Matter of Annexation Ordinance No. X-07-91*, 645 N.E.2d 650, 652 (Ind. Ct. App. 1995) (“The power of annexation is fundamentally legislative, and the judicial role in annexation cases is limited to that prescribed by statute.”). “Although the applicable statutes have undergone many changes over the years, certain general propositions of law have long applied. [This include that] as 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, 615-16 (Ind. 2007) (footnotes omitted) (citations omitted). See also *Town of Cedar Lake v. Certain Cedar Lake 2014 Annexation Territory Landowners*, 85 N.E.3d 643, 651-52 (Ind. Ct. App. 2017) (“And as a legislative function annexation becomes a question subject to judicial intervention only upon review as provided by statute.”).

The Remonstrators must overturn the Auditor’s certification in order to proceed with their judicial review petition. In order to do so, they must show that the General Assembly extended the right to judicial review to include review of the Auditor’s decision. Absent express statutory authority for that review, the Remonstrators cannot proceed with their challenge to the annexation. *Cedar Lake*, 85 N.E.3d at 651-52.

**II. Because the General Assembly did not grant the right of judicial review over the Auditor’s certification, the Remonstrators’ complaint must be dismissed.**

There is no right to review of the Auditor’s certification under Indiana’s annexation statutes. The 2015 statute creating Section 11.2 states that the Auditor “make[s] a final determination of the number of owners of real property within the territory to be annexed.” Ind. Code § 36-4-3-11.2. That final determination includes a final determination of those remonstrators “whose property is not subject to a valid waiver of the right of remonstrance.” *Id.* This finality requirement carries out the purposes of the annexation code by streamlining disputes and avoiding protracted litigation about signatures on a remonstrance. Section 11.2 must be given its plain and ordinary meaning. *Abbott v. State*, 183 N.E.3d 1074, 1080 (Ind. 2022). No reasonable person could read Section 11.2’s “final determination” language as allowing further review of the Auditor’s certification. *Lake Imaging, LLC v. Franciscan All., Inc.*, 182 N.E.3d 203, 207 (Ind. 2022) (“The best evidence of this intent is the statutory language itself, which, when given its plain and ordinary meaning.”).

Had the General Assembly intended to grant a right of judicial review over the Auditor’s decision, it would have said so. But the annexation statutes provide no language suggesting that the Auditor’s decision was subject to judicial review and not a “final determination.” Ind. Code § 36-4-3-11.2. It is “just as important to recognize what a statute does not say as it is to recognize what it does say” and courts will not “add something to a statute that the legislature has purposely omitted.” *Orange v. Indiana Bureau of Motor Vehicles*, 92 N.E.3d 1152, 1155 (Ind. Ct. App. 2018). Had



the General Assembly intended to allow the Remonstrators to appeal the Auditor's "final determination," they could have easily provided a process for doing so. Section 11.2 says just the opposite, as it made the Auditor's decision "final." Ind. Code § 36-4-3-11.2. To read a right of judicial review **into** the statute would read the word "final" **out** of the statute. This construction overrides the statute's plain language and "puts something into a statute that the legislature apparently designedly omitted." *Vanderburgh Cty. v. West*, 564 N.E.2d 966, 967 (Ind. Ct. App. 1991).

It would make little sense for the General Assembly to declare the Auditor's certification to be "final" yet treat it as subject to further dispute through judicial review. Nor would it make sense to create an entirely new process of county auditor review yet place courts back in the pre-2015 position of litigating the validity of signatures on a remonstrance. *State v. Evans*, 810 N.E.2d 335, 337 (Ind. 2004) ("We presume the legislature intended logical application of the language used in the statute, so as to avoid unjust or absurd results."). That reading of Section 11.2 defeats its purpose of changing the process for reviewing signatures on a remonstrance. *Tyson v. State*, 51 N.E.3d 88, 92 (Ind. 2016) ("We decline to interpret the statute in a way that undermines its clear purpose . . ."). The language of Section 11.2 is the "best evidence" of legislative intent. *Lake Cnty. Bd. of Commissioners v. State*, 181 N.E.3d 960, 968 (Ind. 2022). The plain language of Section 11.2 shows that the General Assembly did not want both the Auditor and the courts to review the signature issue, as the Auditor must make the "final determination." Ind. Code § 36-4-3-11.2.

There are numerous ways the General Assembly could have expressed a contrary intent and allowed judicial review. It could have said that the Auditor must make a “determination” without making saying the determination is “final.” Or, as it has elsewhere, the General Assembly could have expressly allow judicial review of the Auditor’s determination. *See* Ind. Code § 6-1.5-5-7 (“A final determination of the Indiana board is subject to judicial review under IC 6-1.1-15.”); Ind. Code § 8-23-17-33 (“A final determination of the agency is subject to judicial review under IC 4-21.5-5.”); Ind. Code § 36-9-41-8 (allowing taxpayers to seek “judicial review of the final determination of the department of local government finance”). The General Assembly did none of these things. Section 11.2 gives no hint that the General Assembly intended to undo the finality of the Auditor’s certification. That right cannot be read into the statute without any statutory language to support it. *Indiana Off. of Util. Consumer Couns. v. Citizens Wastewater of Westfield, LLC*, 177 N.E.3d 449, 458 (Ind. Ct. App. 2021) (“We may not read into a statute that which is not the expressed intent of the legislature; thus, it is just as important to recognize what a statute does not say as it is to recognize what it does say.”).

This conclusion is confirmed by the statute providing the limited right to judicial review of annexations. Under Ind. Code § 36-4-3-13, remonstrators may obtain judicial review of only four narrow categories of issues in an annexation. These include whether:

- the annexation territory is contiguous with the municipality’s borders, Ind. Code § 36-4-3-13(b) & (c);

- the property is “needed and can be used” for development in the “reasonably near future” or that the territory meets certain density, subdivision or zoning requirements, Ind. Code § 36-4-3-13(b) or (c);
- the fiscal plan adopted by the municipality to address the annexation satisfies the statutory requirements for those plans, Ind. Code § 36-4-3-13(d); and
- the municipality satisfied an outreach process to inform the public about the annexation, Ind. Code § 36-4-3-13(i).

The statute makes clear these are the **only** issues in a remonstrance proceeding. Ind. Code § 36-4-3-13. If an annexation satisfies these criteria, “the court **shall** order a proposed annexation to take place.” *Id.* Indiana courts have also made clear that landowners within the annexation territory (like the Remonstrators here) may **only** seek judicial review of the issues authorized under Ind. Code § 36-4-3-13. *Bradley*, 764 N.E.2d at 215.

The General Assembly did **not** include review of the Auditor’s final determination as one of the matters subject to judicial review under Ind. Code § 36-4-3-13. “It is presumed that in enacting legislation, the Legislature is aware of existing law on the same subject.” *Gallagher v. Marion Cnty. Victim Advoc. Program, Inc.*, 401 N.E.2d 1362, 1365 (Ind. Ct. App. 1980). Yet in passing Section 11.2, the General Assembly did not amend Ind. Code § 36-4-3-13 to expand the right to judicial review to include the Auditor’s final determination. This right cannot be engrafted

onto the statute when the plain language does not itself do so. *Kitchell v. Franklin*, 997 N.E.2d 1020, 1026 (Ind. 2013) (“Courts may not “engraft new words” onto a statute or add restrictions where none exist.”).

The Auditor’s certification concluded that the Remonstrators cannot meet the required number of signatures to initiate a remonstrance. The Auditor’s conclusion is “final determination” and not subject to challenge under Indiana annexation law. “If the remonstrance is not signed by a sufficient number of landowners, then the landowners in the annexed territory do not have standing to challenge the annexation.” *City of Boonville v. American Cold Storage*, 950 N.E.2d 764, 766 (Ind. Ct. App. 2011). The Court should therefore dismiss the Remonstrators’ complaint as a matter of law.

### CONCLUSION

Because the Remonstrators are barred from challenging the Auditor’s final determination under Section 11.2, the City respectfully requests that the Court dismiss their complaint.

Respectfully submitted,

*/s/ Mark J. Crandley*

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## CERTIFICATE OF SERVICE

I certify that on May 19, 2022 the foregoing Brief was filed through the Indiana E-filing System (“IEFS”) and was served electronically to counsel of record listed below.

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