

IN THE
INDIANA COURT OF APPEALS

Case No. 22A - PL - 02781

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)
Appellant/Plaintiff)

Appeal from:
The Porter Superior Court
Case No: 64D01-2203-PL-2328

vs.)

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)
VALPARIASO; and VICKI URBANIK,)
AUDITOR OF PORTER COUNTY,)
INDIANA,)
Appellees/Defendants)

Honorable Michael A. Fish,
Judge

**BRIEF OF APPELLANT STURDY ROAD PRAIRIE RIDGE
PROPERTY OWNERS' ASSOCIATION, INC.**

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STATEMENT OF THE ISSUES

- I. The Remonstrators' Complaint alleged that a sufficient number of remonstrance signatures against the City of Valparaiso's involuntary annexation were not subject to a valid waiver of their right to remonstrate, such that the annexation would be void or subject to judicial review. The allegations include that the only valid waiver expired by operation of law before the City initiated its annexation, and that subsequent individual waivers were invalid. These individual waivers were not executed by property owners and lacked additional consideration; so they could not bind remonstrators as subsequent property owners. Given these allegations, was it error to dismiss the Complaint under Trial Rule 12(B)(1) or 12(B)(6)?

- II. Does the language of the municipal annexation statute preclude judicial review of the Porter County Auditor's determination that there are valid waivers of the right to remonstrate because the statute uses the word "final"? If so, can the legislature immunize a county Auditor's legal conclusion from judicial review?

STATEMENT OF THE CASE

This case involves the attempted use of the power of annexation by the City of Valparaiso (“City”), first through a “super-voluntary” process under I.C. § 36-4-3-5.1, and then subsequently as an involuntary annexation using I.C. § 36-4-3-3, to expand the corporate boundaries of the City and annex the Prairie Ridge neighborhood. (the “Annexation Area”). (Appellant’s App. Vol. II, pp. 17-18, at ¶¶ 31-34). Sturdy Road Prairie Ridge Property Owners’ Association, Inc. (“Prairie Ridge POA”) is an Indiana not-for-profit corporation whose members are owners of real property within the Annexation Area. (Appellant’s App. Vol. II, pp. 14-15 at ¶¶ 1-3).

In 2020, the City initiated a super-voluntary annexation, despite the fact that the City did not own 100% of the property in the Annexation Area. (Appellant’s App. Vol. II, p.17 at ¶¶ 31-32) Thereafter, in 2021, the City re-started the process as an involuntary annexation. (Appellant’s App. Vol. II, p.18 at ¶ 34). On October 25, 2021, the City Council adopted its ordinance No. 14, 2021 to annex the Annexation Area. (Appellant’s App. Vol. II, p.15 at ¶ 9, and, pp. 27-32, Exh. B).

A Petition Requesting the Remonstrance Against Annexation consisting of four (4) counterparts was filed with the Porter County Auditor, containing the signatures of 59 remonstrators who are members of Prairie Ridge POA.¹ (“Remonstrators”). (Appellant’s App. Vol. II, p.18 at ¶ 38-39; & pp. 36-68 Exh. D).

¹ There were two (2) additional counterparts signed at the Auditor’s offices by 3 individuals, who were also included in the four (4) counterparts submitted by the Remonstrators. (Appellant’s App. Vol. II, p.70).

On February 28, 2022, the Auditor, Vicki Urbanik, filed her Certificate with the City Council. (Appellant's App. Vol. II, p.18 at ¶ 41; & pp. 69-70, Exh. E).

On March 18, 2022, the Prairie Ridge POA, as the representative of the 59 Remonstrators, filed its Complaint for Judicial Review, with exhibits. (Appellant's App. Vol. II, pp. 14-70). The exhibits included, the list of remonstrators, a copy of Ordinance No. 14, 2021, the Remonstrance Petition, and the Auditor's Certificate.

On May 19, 2022, the City Defendants filed their Motion to Dismiss under Trial Rule 12(B)(1) and 12(B)(6). (Appellant's App. Vol. II, pp. 71-73; & 74-86). On June 20, 2022, Prairie Ridge POA filed its Response in opposition to the Motion to Dismiss. (Appellant's App. Vol. II, pp. 87-96). The City Defendants filed their Reply in support of the Motion on July 7, 2022. (Appellant's App. Vol. II, pp. 97-107). The Trial Court held a hearing and heard argument from the parties on September 16, 2022. (Appellant's App. Vol. II, p.10; & p.13).

On October 20, 2022, the trial court entered its Order Granting Motion to Dismiss. (Attachment to Br. & Appellant's App. Vol. II, p.13). Prairie Ridge POA filed this appeal on November 21, 2022. The notice of completion of transcript was filed on January 4, 2023. (Appellant's App. Vol. II, p.11). Prairie Ridge POA moved for a 14 day extension on the deadline to file its Appellant's Brief, which was granted by the motions panel on January 19, 2023.

STATEMENT OF THE FACTS

In 2020 the Planning Department of the City of Valparaiso, Indiana (“City”), initiated a super-voluntary annexation of certain real property under Indiana Code § 36-4-3-5.1. (Appellant’s App. Vol. II, p.17 at ¶ 31). The City was attempting to annex the real property described as follows:

A PARCEL OF LAND IN THE SOUTHEAST QUARTER OF SECTION 31, TOWNSHIP 35 NORTH, RANGE 5 WEST OF THE SECOND PRINCIPAL MERIDIAN IN CENTER TOWNSHIP, PORTER COUNTY, INDIANA, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS: COMMENCING AT THE NORTHWEST CORNER OF SAID SOUTHEAST QUARTER; THEN SOUTH 00 DEGREES, 6 MINUTES, 45 SECONDS EAST ALONG THE WEST LINE OF SAID SOUTHEAST QUARTER, A DISTANCE OF 866.00 FEET TO THE POINT OF BEGINNING; THENCE CONTINUING SOUTH 00 DEGREES, 6 MINUTES, 45 SECONDS EAST ALONG SAID WEST LINE, A DISTANCE OF 1,212.00 FEET; THENCE SOUTH 89 DEGREES, 48 MINUTES 17 SECONDS EAST, PARALLEL TO THE NORTH LINE OF SAID SOUTHEAST QUARTER, A DISTANCE OF 1,079.72 FEET; THENCE NORTH 00 DEGREES 6 MINUTES 45 SECONDS WEST, PARALLEL TO THE SAID WEST LINE, A DISTANCE OF 1,212.00 FEET; THENCE NORTH 89 DEGREES 48 MINUTES 17 SECONDS WEST, PARALLEL TO SAID NORTH LINE, A DISTANCE OF 1,079.72 FEET, TO THE POINT OF BEGINNING. CONTAINING 30.04 ACRES, MORE OR LESS.

(“Annexation Area”). (Appellant’s App. Vol. II, pp. 15-17 at ¶¶ 10 & 31).

The Annexation Area consists solely of the Prairie Ridge neighborhood on the south side of Valparaiso. (Appellant’s App. Vol. II, p.15 at ¶ 9). The City attempted to use the super-voluntary annexation, despite the fact that the City did not own all of the property in the Annexation Area. (Appellant’s App. Vol. II, p.17 at ¶ 32). After the City abandoned its super-voluntary annexation efforts, it started a new, involuntary annexation for the entire Annexation Area. (Appellant’s App. Vol. II, p.18 at ¶ 34).

Eventually, the City, through its Common Council (“City Council”) adopted Ordinance No. 14, 2021, which was signed by the City’s Mayor, on October 25, 2021. (Appellant’s App. Vol. II, p.18 at ¶¶ 36-37). Exhibit ‘A’ to Ordinance No. 14, 2021 contained the following legal description for the Annexation Area:

<p>Exhibit A – Annexation Territory</p> <p><u>Legal Description – Prairie Ridge Subdivision</u></p> <p>An area of land located in the southeast quarter of Section 31, Township 35 North, Range 5 West of the second principal meridian in Center Township, Porter County, Indiana, being more particularly described as: COMMENCING AT THE NORTHWEST CORNER OF SAID SOUTHEAST QUARTER; THEN SOUTH 00 DEGREES, 6 MINUTES, 45 SECONDS EAST ALONG THE WEST LINE OF SAID SOUTHEAST QUARTER, A DISTANCE OF 866.00 FEET TO THE POINT OF BEGINNING; THENCE CONTINUING SOUTH 00 DEGREES, 6 MINUTES, 45 SECONDS EAST ALONG SAID WEST LINE, A DISTANCE OF 1,212.00 FEET; THENCE SOUTH 89 DEGREES, 48 MINUTES 17 SECONDS EAST, PARALLEL TO THE NORTH LINE OF SAID SOUTHEAST QUARTER, A DISTANCE OF 1,079.72 FEET; THENCE NORTH 00 DEGREES 6 MINUTES 45 SECONDS WEST, PARALLEL TO THE SAID WEST LINE, A DISTANCE OF 1,212.00 FEET; THENCE NORTH 89 DEGREES 48 MINUTES 17 SECONDS WEST, PARALLEL TO SAID NORTH LINE, A DISTANCE OF 1,079.72 FEET, TO THE POINT OF BEGINNING. CONTAINING 30.04 ACRES, MORE OR LESS.</p>

(Appellant’s App. Vol. II, p.31 at Exh. B p.4).

Sturdy Road Prairie Ridge Property Owners’ Association, Inc. (“Prairie Ridge POA”) is an Indiana not-for-profit corporation whose members are all of the property owners within the Annexation Area. (Appellant’s App. Vol. II, pp. 14-15 at ¶¶ 1-3). As of October 25, 2021, there were 69 properties in the Annexation Area subject to property taxes. (Appellant’s App. Vol. II, p.16 at ¶14). Prairie Ridge POA represents 59 of its members in this appeal who are remonstrating against the attempted annexation. (“Remonstrators”) (Appellant’s App. Vol. II, p.16 at ¶ 16; pp. 25-26, Exh. A). After

Ordinance No. 14, 2021 was adopted, the 59 Remonstrators signed the petition that was submitted to the Porter County Auditor. (“Remonstrance Petition”) (Appellant’s App. Vol. II, p.18 at ¶¶ 38-39; & pp. 36-68, Exh. D). These 59 signatures represent more than sixty-five percent (65%) of the owners of land subject to property taxes in the Annexation Area. (Appellant’s App. Vol. II, p.18 at ¶40). These 59 Remonstrators own 59 out of 69, which is 85.5%, of the total number of taxable properties, (Appellant’s App. Vol. II, p.16 at ¶¶ 16-17).

At one point in time, the entire Annexation Area was owned by an Indiana limited liability company named Valpo Sturdy Road LLC, which was the developer of the Prairie Ridge neighborhood. (Appellant’s App. Vol. II, p.16 at ¶ 19). On December 8, 2004, Valpo Sturdy Road, LLC, by its member Richard Hornat, and the City of Valparaiso, by its Mayor Jon Costas, executed a waiver of the right to remonstrate against future annexation. (“Original Waiver”) (Appellant’s App. Vol. II, p.17 at ¶¶ 22-24; & pp. 33-35, Exh. C). As consideration for the Original Waiver, the City agreed to extend certain municipal services to the property, and Valpo Sturdy Road LLC agreed to waive the right to remonstrate against future annexation. (Appellant’s App. Vol. II, p.34, Exh. C). The legal description for the property subject to the Original Waiver is the same property identified in Ordinance No. 14, 2021, and is shown below:

LEGAL DESCRIPTION: A parcel of land in the S.E. ¼ of Section 31, Township 35 North, Range 5 West of the 2nd P.M. in Center Township, Porter County, Indiana described as follows: Commencing at the N.W. corner of said S.E. ¼; thence S 00°06'45" E along the West line of said S.E. ¼, 861.00 feet to the Point of Beginning; thence continuing S 00°06'45" E along said West line, 1212.00 feet; thence S 89°48'17" E, parallel to the North line of said S.E. ¼, 1079.72 feet; thence N 00°06' 45" W, parallel to said West line, 1212.00 feet; thence N 89°48'17" W, parallel to said North line, 1079.72 feet to the Point of Beginning. Containing 30.04 Acres, more or less, and subject to all Legal Highways and Easements.

(Id.).

Subsequently, and during the term of the Original Waiver, the City caused waivers to be signed for each lot within the Prairie Ridge subdivision (“Individual Waivers”). (Appellant’s App. Vol. II, p.17 at ¶ 25). The Individual Waivers affecting properties owned by 49 of the 59 Remonstrators were signed by someone who was not the property owner at the time the waiver was executed. (Appellant’s App. Vol. II, p.17 at ¶ 26). There was no additional consideration from the City for the Individual Waivers. (Appellant’s App. Vol. II, p.17 at ¶ 26).

The Original Waiver signed by Mr. Hornat and Mayor Costas on December 8, 2004, expired fifteen (15) years later in 2019. (Appellant’s App. Vol. II, p.20 at ¶ 57).

No valid waiver exists for 49 of the 59 Remonstrators, which means at least seventy-one (71%) of the owners of taxable properties in the Annexation Area remonstrated without a valid waiver of their right to remonstrate. (Appellant’s App. Vol. II, p.17 at ¶¶ 26-27).

Despite the fact that the Original Waiver expired in 2019, and that at least 49 of the Individual Waivers were not valid because they were not signed by or on behalf of a property owner, the Porter County Auditor, Vicki Urbanik, erroneously determined that a valid waiver existed for each Remonstrator. (Appellant’s App. Vol. II, p.20 at ¶ 50). On February 28, 2022, Auditor Urbanik filed her Certificate with the City Council with her determination to this effect. (Appellant’s App. Vol. II, p.18 at ¶ 41).

SUMMARY OF ARGUMENT

The Prairie Ridge POA members have been given the right to remonstrate against municipal annexations by the Indiana General Assembly. According to the remonstrance statutes, if a super-majority of property owners in the Annexation Area (at least sixty-five percent (65%)) remonstrate against the annexation, it is void as a matter of law. If a simple majority of property owners (at least fifty-one percent (51%)) remonstrate, they are entitled to petition for judicial review of the annexation.

This right to remonstrate can be waived by a property owner, which may also bind subsequent owners like an easement or restrictive covenant. To be binding, the waiver must be expressly authorized by statute, be validly executed, and there must be sufficient notice to subsequent owners. However, the execution of a waiver of the right to remonstrate by a person who does not own the property cannot bind the property or any subsequent property owner. A waiver of the right to remonstrate is a contract. The existence of a contract is a question of law reserved for the courts.

The trial court erred in dismissing the Complaint for Remonstrance and for Judicial Review because Prairie Ridge POA alleged that over eighty-five percent (85%) of the property owners in the Annexation Area signed the Remonstrance Petition opposing the annexation. Further, Prairie Ridge POA alleged that signatures representing at least sixty-five percent (65%) of the property owners were not subject to any valid waiver of the right to remonstrate against annexation. In this regard, Prairie Ridge POA alleged that one (1) valid waiver affecting the entire Annexation Area was executed in 2004, that it expired 15 years later by operation of law, and no longer

restricted the Remonstrators. Prairie Ridge POA also alleged that other purported waivers are invalid because they were executed by persons who were not property owners and also because the Individual Waivers lacked additional consideration.

For purposes of ruling on the Motion to Dismiss, the allegations in the Complaint must be taken as true, and Prairie Ridge POA satisfied its burden of pleading. Taking these allegations as true, then, the City's attempted involuntary annexation is void as a matter of law, and the Remonstrators would be entitled to relief. It was error for the trial court to overlook these factual allegations in dismissing the Complaint.

The Courts have the jurisdiction and authority to review legal questions regarding annexations. This includes the legal question of whether or not a waiver of the right to remonstrate against annexation is valid. The legislature cannot prevent a court from reviewing such a legal issue, nor can the General Assembly insulate the legal conclusions of a County Auditor, or any other official, from judicial review.

The City asked the trial court to read into the annexation statutes, by way of implication, a limitation on the judicial power of review that does not exist in the text of the statute. As this Court has previously stated, courts do not add limitations to a statute that the legislature has not seen fit to include. A statute precluding judicial review of the Auditor's legal conclusion regarding the validity of a waiver of the right to remonstrate would impermissibly intrude into the role of the courts.

Dismissing the Complaint denied the Remonstrators their rights to remonstrate against an involuntary annexation. The courts can, and should, review whether a valid waiver of the right to remonstrate exists. If a sufficient number of signatures on the

Remonstrance Petition are not limited by any valid waiver, then the Remonstrators are entitled to judicial review or a judgment that the City's annexation is void.

The October 20, 2022 Order of the trial court dismissing this cause should be reversed. Otherwise, the Remonstrators have no rights at all to challenge an annexation, and the Auditor's legal conclusions are effectively immune from judicial review.

STANDARD OF REVIEW

This is an appeal from an Order granting the City Defendants' Motion to Dismiss under Trial Rules 12(B)(1) and 12(B)(6). There were no materials presented to the trial court outside of the pleadings. The standard of review on appeal is the same as it was at the trial court. *Residences at Ivy Quad Unit Owners Ass'n v. Ivy Quad Dev.*, 179 N.E.3d 977, 981 (Ind. 2022); *Austin Lakes Joint Venture v. Avon Utils.*, 648 N.E.2d 641, 643 (Ind. 1995). All the factual allegations from the Complaint must be taken as true under both 12(B)(1) and 12(B)(6). *Residences at Ivy Quad*, 179 N.E.3d at 981 (reviewing 12(B)(6)); *Austin Lakes Joint Venture*, 648 N.E.2d at 643 (reviewing 12(B)(1)). All reasonable inferences from those allegations must be drawn in favor of Prairie Ridge POA, as the non-moving party. *Residences at Ivy Quad*, 179 N.E.3d at 981. The appellate courts review dismissals under Trial Rules 12(B)(1) or 12(B)(6) *de novo*. *Id.* Similarly, the Court of Appeals reviews questions of law *de novo*, and gives the trial court's conclusions of law "no deference." *Town of Brownsburg v. Fight Against Brownsburg Annexation*, 124 N.E.3d 597, 601 (Ind. 2019).

A Motion to Dismiss under Trial Rule 12(B)(1) challenges the court's subject matter jurisdiction over the case. *Austin Lakes Joint Venture*, 648 N.E.2d at 645. Whereas, Rule 12(B)(6) tests the legal sufficiency of the claim, but not the facts supporting it. *Residences at Ivy Quad*, 179 N.E.3d at 981 (quoting *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 466 (Ind. 2017)).

ARGUMENT

I. THE REMONSTRATORS ARE ENTITLED TO JUDICIAL REVIEW OF THE ATTEMPTED ANNEXATION.

The act of annexing property by a municipality is ultimately a legislative one. The General Assembly regulates annexations, and the policy questions of *whether* and *what property* to annex are not subject to judicial review. *Fight Against Brownsburg Annexation*, 124 N.E.3d at 603. However, legal conclusions are not entitled to any deference, and “whether the annexation was lawful is a legal question for the courts.” *Id.* In the Complaint, Remonstrators, through their representative Prairie Ridge POA, presented the court with factual allegations that would support legal conclusions that valid waivers of their right of remonstrance did not exist. Remonstrators sought judicial review of the Porter County Auditor’s conclusions of law to the contrary, and requested a judicial decree that the City’s annexation was void as a matter of law.

The legislature has seen fit to provide property owners subject to a potential annexation with a voice in the proceedings, through the right to remonstrate against being annexed. Ind. Code §§ 36-4-3-11 – 36-4-3-13. At the times relevant to this action, the number of owners of taxable properties needed to resist an involuntary annexation was sixty-five percent (65%) for an outright defeat of the annexation, and fifty-one percent (51%) for the right to judicial review. I.C. § 36-4-3-11.3. This right to remonstrate can be voluntarily waived by property owners, and this type of waiver can bind subsequent owners. I.C. § 36-4-3-11.7. Such a waiver must be expressly authorized by statute. *Doan v. City of Fort Wayne*, 253 Ind. 131, 252 N.E.2d 415, 416 (Ind. 1969); *Rogers v.*

City of Evansville, 437 N.E.2d 1019, 1026 (Ind. Ct. App. 1982) *reh'g denied, trans. denied*.

The General Assembly has done away with immortal waivers and expressly limits the duration of any waiver executed after June 30, 2003, to fifteen (15) years from the date of execution. I.C. § 36-4-3-11.7(c). With regard to the Annexation Area, the Original Waiver signed in 2004 was subject to this fifteen (15) year limitation and expired in 2019, at which point it no longer restricted the right of the property owners to remonstrate. Of course, the City's annexation began in 2021, well after the Original Waiver expired.

In the present case, owners of 59 out of the 69 taxable properties in the Annexation Area, consisting of over 85% of the owners, signed the Remonstrance Petition ("Remonstrators"). At least 49 of the Remonstrators are not subject to any Individual Waiver because the Individual Waiver purporting to attach to their property was not signed by a former owner or on behalf of any owner. *See Rogers*, 437 N.E.2d at 1026-27. These 49 Remonstrators represent 71% of the owners of taxable properties in the Annexation Area. Separately, there is justification to find that none of the Individual Waivers are valid because they covered the same subject matter as the Original Waiver and the City did not give any additional consideration to support them.

All facts alleged in the Complaint must be accepted as true to rule on the City's Motion to Dismiss. Accepting them as true shows the Remonstrators have met their burden of pleading and would be entitled to the relief they seek. These facts would support an order declaring the annexation ordinance to be void under I.C. § 36-4-3-11.3(b). In the alternative, these facts support an order that Remonstrators are entitled to judicial review under I.C. § 36-4-3-11.3(c).

A. NO VALID WAIVER EXISTS FOR REMONSTRATORS CONSISTING OF MORE THAN SIXTY-FIVE PERCENT OF THE PROPERTY OWNERS IN THE ANNEXATION AREA.

The entire Annexation Area became subject to a waiver of the right to remonstrate when Mr. Hornat, as a member of Valpo Sturdy Road LLC, and Mayor Costas for the City, executed the Original Waiver on December 8, 2004. However, that waiver was subject to legislation, which limited its duration to a fifteen (15) year term. I.C. § 36-4-3-11.7(c)(2). Accordingly, the Original Waiver expired by December 9, 2019, and was no longer a valid waiver either in 2021 when Ordinance No. 14, 2021 was adopted, or in 2022 when Auditor Urbanik issued her Certificate to the City Council. I.C. § 36-4-3-11.7(c)(2) (“A remonstrance waiver executed after June 30, 2003, and before July 1, 2019, is subject to the following: [...] (2) A waiver that is not void under subdivision (1) expires not later than fifteen (15) years after the date the waiver is executed.”).

Individual Waivers signed after the Original Waiver also purported to affect individual lots in the Prairie Ridge subdivision. There are purported Individual Waivers for all 59 Remonstrators involved in this appeal. However, at least 49 of these Individual Waivers were not valid at the time they were signed and could not bind the property or subsequent owners because they were not executed by an owner or on behalf of an owner. *See discussion of Rogers, infra* at 28-29. With 49 out of 69 owners of taxable properties signing the Remonstrance Petition, the Ordinance is opposed by at

least 71% of the owners in the Annexation Area who are not subject to any waiver of their right to remonstrate. Therefore, the annexation is void. I.C. § 36-4-3-11.3(b).

B. THE CITY'S ANNEXATION IS VOID OR REMONSTRATORS ARE ENTITLED TO JUDICIAL REVIEW.

The annexation statutes currently provide two levels of successful remonstrance against involuntary annexation. First, if at least 65% of the owners of taxable properties sign a remonstrance petition, then the annexation is void. I.C. § 36-4-3-11.3(b)(1). A void annexation cannot be attempted again for four (4) years. I.C. § 36-4-3-15(b). The second level of remonstrance is achieved if at least 51% of property owners in the annexation territory sign the petition. If at least 51%, but less than 65%, of property owners remonstrate, then they are entitled to petition for judicial review of the annexation. I.C. § 36-4-3-11.3(c)(1). In judicial review, the burden is on the municipality to prove compliance with the law, and ultimately to demonstrate that the annexation is in the best interests of the property owners to be annexed.² I.C. § 36-4-3-13(f) & (i); *Fight Against Brownsburg Annexation*, 124 N.E.3d at 603; *Bradley v. City of New Castle*, 764 N.E.2d 212, 216 (Ind. 2002).

At this stage of the proceedings, both the trial court and this Court must accept as true that there are 69 taxable properties in the Annexation Area. (Appellant's App.

² Similarly, the City, as the party asserting the existence of a valid waiver of the right to remonstrate, will bear the burden of proof on that issue, as well. *Rogers v. City of Evansville*, 437 N.E.2d 1019, 1027 (Ind. Ct. App. 1982) *reh'g denied, trans. denied* ("The waiver issue was advanced by the City and they bore the burden of proof.").

Vol. II, p.16 at ¶14). Of these 69 properties, there are 59 owners who signed the Remonstrance Petition. (Appellant’s App. Vol. II, p.16 at ¶16). At least 49 of the Remonstrators are not subject to either the Original Waiver or any Individual Waivers. (Appellant’s App. Vol. II, p.17 at ¶26). Therefore, no valid waiver exists for 49 signatures on the Remonstrance Petition, out of the 69 taxable properties. (Appellant’s App. Vol. II, pp. 20-21 at ¶¶ 58-59). The number of Remonstrators who are not subject to a valid waiver of the right to remonstrate is 71% of the taxable property owners, which would mean that the annexation is void because more than 65% of the owners of taxable properties signed the Remonstrance Petition. I.C. § 36-4-3-11.3(b). (Appellant’s App. Vol. II, p.17 at ¶27).

In the alternative, if at least 36 of the Remonstrators are not subject to any valid waivers, then they would be entitled to judicial review pursuant to the annexation statutes because, then, at least 51% of the owners of taxable properties in the Annexation Area signed the Remonstrance Petition. I.C. § 36-4-3-11.3(c)(1). (Appellant’s App. Vol. II, pp. 21-22 at ¶¶ 67-70).

II. THE LEGISLATURE CANNOT PREVENT A COURT FROM REVIEWING LEGAL QUESTIONS AFFECTING THE SUBSTANTIAL RIGHTS OF PROPERTY OWNERS.

The courts have the inherent authority to decide “whether the annexation was lawful.” *Fight Against Brownsburg Annexation*, 124 N.E.3d at 603. Although, the ability for courts to review annexation ordinances does not extend to evaluation of local legislative policy decisions of whether to annex territory or what territory to annex. *Id.*

A court reviewing whether an annexation was lawful fails to fulfill its role “simply by taking a municipality’s word for it.” *Id.* at 604. It follows then, that a court cannot fulfill this role “simply by taking” the word of a county Auditor on whether or not a waiver of the right to remonstrate is valid.

A waiver of the right to remonstrate against an annexation is only valid if:

- a. it is expressly authorized by statute;
- b. signed by a property owner; and
- c. there is sufficient notice given to subsequent owners.

Doan, 252 N.E.2d at 418; *Rogers*, 437 N.E.2d at 1026. As the Indiana Supreme Court has recognized, “[t]he right to remonstrate is an extremely important one. The legislature created the right to give affected landowners a legal means to challenge annexation if they ‘deem themselves aggrieved or injuriously affected.’” *Doan*, 252 N.E.2d at 416.

Ultimately, whether or not a valid waiver exists must be decided by a court. The interpretation of a statute is not a legislative question. *Certain Tell City Annexation Terr. Landowners v. Tell City*, 73 N.E.3d 210, 216 (Ind. Ct. App. 2017) *trans. denied* (“Statutory interpretation is a question of law reserved for the court and is reviewed *de novo*.” quoting *Town of Whitestown v. Rural Perry Twp. Landowners*, 40 N.E.3d 916, 921 (Ind. Ct. App. 2015)). Determining whether, and to what extent, a statute authorizes a waiver is not a legislative question. *Id.* Neither is reviewing if a waiver was signed by an owner of a property, nor whether sufficient notice was given to subsequent owners. These are all legal questions, which are reserved for the courts. *Id.*

A. THE COURTS CANNOT ADD LIMITATIONS ON THE REMONSTRATORS' RIGHTS THAT ARE NOT IN THE STATUTE.

The annexation statutes set forth a process for property owners to exercise their “extremely important” right to remonstrate. *Doan*, 252 N.E.2d at 416. The adoption of an Annexation Ordinance begins a limited period for signing a Remonstrance Petition. I.C. § 36-4-3-11.1(d). Once a Remonstrance Petition is timely submitted to the Auditor, the Auditor must deliver a copy of the Petition to the City Council within five (5) business days. I.C. § 36-4-3-11.2(g). The City Council has fifteen (15) business days to provide the Auditor with any documentation it may have regarding any valid waiver of the right of remonstrance.³ I.C. § 36-4-3-11.2(h). After receiving the City Council’s information, the Auditor has another fifteen (15) business days to make a final determination of the number of owners in the annexation area who signed the Remonstrance Petition, and the number of properties not subject to a valid waiver. I.C. § 36-4-3-11.2(i). The Auditor must file a Certificate containing her determination with the City Council not later than five (5) business days after the determination. *Id.*

The filing of the Auditor’s Certificate with the City Council triggers the running of the statute of limitations to file the Remonstrance Petition with the court. I.C. § 36-4-3-11(d). The remonstrance statutes do not have as a pre-requisite to filing the petition with the court, that the Auditor determine whether a sufficient number of remonstrators are

³ Despite the City’s suggestion that Remonstrators had an opportunity to litigate before the Auditor (Appellant’s App. Vol. II, p.101), there is no corresponding opportunity in the statute for property owners to submit documentation to the Auditor or to challenge the City’s documentation.

not subject to a valid waiver. *See* I.C. § 36-4-3-11(d); I.C. § 36-4-3-11.3. All that is required is a sufficient number of property owners have signed the Petition (at least 51%). *Id.*

In section 13, which governs the judicial review process, the statute provides that the “*remonstrance petitions* filed with the court under section 11 of this chapter are evidence of the number of owners of land that oppose the annexation minus any written revocations of remonstrances filed with the court.” I.C. § 36-4-3-13(e)(2)(E) (emphasis added).⁴ This section does not refer at all to the Auditor’s Certificate in evaluating the number of persons opposing the annexation.

In prior annexation cases, this Court has held that the trial courts cannot add limitations on the right to remonstrate that are not written in the statute. *Tell City*, 73 N.E.3d at 215-16. When reviewing the remonstrance statutes, it is just as important to recognize what the statute does not say as it is to understand what it says because a court “may not engraft new words onto a statute or add restrictions where none exist.” *Id.* at 215.

In the *Tell City* case, the Court of Appeals reversed a trial court order that disqualified remonstrator signatures based on restrictions on the right to remonstrate that were not found in the annexation statute. *Id.* at 219. The trial court delegated the review of signatures on a remonstrance petition to the county auditor. *Id.* at 212. The auditor in *Tell City* reviewed the petition and the tax records, then disqualified 145 out

⁴ This subsection would apply in the present case, if Remonstrators were found to be entitled to judicial review, as it states: “This clause applies only to an annexation for which an annexation ordinance is adopted after June 30, 2015.” I.C. § 36-4-3-13(e)(2)(E).

of 438 signatures because the signatures did not exactly match the name that appeared on the tax record for the property. *Id.* at 213. The trial court simply accepted the auditor's determination and concluded that without the 145 disqualified signatures the petition lacked sufficient signatures to proceed with judicial review. *Id.* In holding that this decision was improper, the appellate court stated: "The statute here did not explicitly state that the signatures on a remonstrance petition must match the property owners' corresponding names as listed on their property tax duplicates. **Thus, we may not add such a requirement to the statute.**" *Id.* at 219 (emphasis added). It was reversible error to add a restriction to the statute limiting the right to remonstrate.

The City has argued in the present case, that the legislature's use of the phrase "final determination" in section 11.2, and the absence of any explicit right to judicial review of the Auditor's final determination (or Certificate) in sections 11 and 13, must mean that no court can review the Auditor's determination. (Appellant's App. Vol. II, p.78; Tr. Vol. II pp. 9-11). While the City suggests that it is Remonstrators who are attempting to expand the statute, it is really the City that has asked the courts to "engraft new words onto a statute or add restrictions where none exist," as the City seeks to add an unwritten requirement to the statute. *Tell City*, 73 N.E.3d at 219. City's position on this issue is untenable.

Within the annexation and remonstrance statutes, it is not the Auditor's Certificate that serves as evidence of the number of remonstrators, it is the Remonstrance Petition itself. I.C. § 36-7-4-13(e)(2)(E). All that is required to file the Petition with the court is that at least 51% of the owners of taxable properties in the

Annexation Area have signed the Remonstrance Petition. I.C. §§ 36-4-3-11(d) & 36-4-3-11.3. Said another way, the right to judicial review is not conditioned on how many signatures the Auditor determines are or are not subject to a waiver of remonstrance. In the present case, Remonstrators meet this minimum threshold and are entitled to have the court evaluate whether the Auditor's determination was lawful.

B. A COUNTY AUDITOR'S LEGAL CONCLUSION IS NOT IMMUNE FROM JUDICIAL REVIEW.

The Remonstrators state a claim under the remonstrance statutes and are entitled to be heard by the court because enough property owners signed the Remonstrance Petition.

The annexation statutes do not explicitly provide for judicial review of the Auditor's Certificate, just as they also do not specifically preclude Remonstrators from filing the Petition when the Auditor determines valid waivers exist. The Auditor's determination is a legal conclusion that is inherently subject to judicial review. The Indiana Supreme Court in *Bradley v. City of New Castle*, 764 N.E.2d 212 (Ind. 2002) held that where remonstrators' substantial rights are implicated, the scope of judicial review can be expanded beyond the strict provisions of sections 11 through 13. 764 N.E.2d at 216-18. The Supreme Court stated that "annexing municipalities may commit procedural wrongs so severe that courts must act to protect remonstrators' substantial rights." *Id.* at 217. Similarly, "due process and due course of law may require judicial relief where plausible claims of fraud or discrimination are established." *Id.* at 218.

Where substantial rights of remonstrators are not affected by irregularities or

imperfections, then courts will not grant relief not provided for in the annexation statute. *Id.*

The remonstrators in *Bradley* did not make any claims that their substantial rights had been impacted or prejudiced by what they claimed to be violations of other laws. *Id.* at 216. For example, they argued that the City of New Castle did not adopt its ordinances in strict compliance with statutes outside of the annexation statutes, but failed to identify any specific harm they suffered as a result. *Id.* at 216-17. The Supreme Court held that these claims were relatively technical in nature and did not amount to a violation of the remonstrators' substantial rights, so they were not entitled to be heard on those claims. *Id.* at 218.

In contrast to *Bradley*, the Remonstrators in the present case have alleged violations of their substantial rights. In particular, the "extremely important" right to remonstrate against annexation in the first place. *Doan*, 252 N.E.2d at 416. This is a legislatively conferred right and should be enforceable. Collectively, the Remonstrators constitute over 65% of the owners of taxable property in the Annexation Area. The General Assembly has made the legislative determination that if at least 65% of the owners of taxable property oppose an annexation, then the annexation is void. I.C. § 36-4-3-11.3(b). The remonstrance needs no justification at all to defeat the annexation.

Waivers of the right to remonstrate must be expressly authorized by statute. *Doan*, 252 N.E.2d at 418. When the legislature put an expiration date on remonstrance waivers, the City still had over 4 years to complete the annexation of Prairie Ridge before the Original Waiver would expire in December of 2019. I.C. § 36-4-3-11.7(c)(2)

(effective July 1, 2015, *see* P.L. 228-2015 § 18). The time for the City to use the Original Waiver to prevent remonstrances ran out, and now it must face the possibility of property owners exercising their right to remonstrate against the present involuntary annexation.

Judicial review is especially appropriate in this case because Auditor Urbanik either failed to recognize that the Original Waiver expired by operation of law in 2019, which would be legal error; or, Auditor Urbanik concluded that the Individual Waivers recorded against individual lots were valid, even when 49 of them were not signed by owners. Either way, Auditor Urbanik made a legal conclusion that are subject to judicial review.

This Court has recognized that a waiver of the right to remonstrate is a contract. *Rogers*, 437 N.E.2d at 1026-27. The Indiana Supreme Court requires that a waiver against future annexations must be expressly authorized by statute. *Doan*, 252 N.E.2d at 416. Moreover, in order to be valid, a waiver of the right to remonstrate must be signed by a property owner and properly recorded to bind subsequent owners. *Rogers*, 437 N.E.2d at 1027.

In *Rogers*, a developer sold lots, and after having sold the lots, then tried to execute waivers of the right to remonstrate affecting the previously sold properties. *Id.* at 1027. The City of Evansville argued these waivers were effective and prevented subsequent owners from remonstrating against Evansville's annexation. *Id.* This Court held that the developer lacked legal authority to bind property he did not own, and those waivers signed after he sold the lots were invalid. *Id.* 1028. Therefore, the

remonstrators were not subject to a waiver of their rights, and they were entitled to judicial review. *Id.*

The right to remonstrate against annexation is a right attached to the property. It cannot be bargained away by someone who is not an owner. *Rogers*, 437 N.E.2d at 1027. In the present case, 49 Individual Waivers, like the developer's waivers at issue in *Rogers*, were executed by someone who did not own the 49 lots in question. If the person who signed the waiver lacked the authority to bind the property, the waiver is not valid. *Id.* It would be an error of law if Auditor Urbanik determined these waivers signed by a non-owner are valid. Despite any specific authorization in the remonstrance statute, a court can review that determination to protect the Remonstrators' substantial rights. *Bradley*, 764 N.E.2d at 217-18.

C. ONLY A COURT MAY ULTIMATELY DECIDE WHETHER A VALID WAIVER OF THE RIGHT TO REMONSTRATE AGAINST ANNEXATION EXISTS.

Contrary to the City's arguments, judicial review of the Auditor's Certificate does not render the phrase "final determination" in section 11.2 a dead letter or mere surplusage. (Appellant's App. Vol. II, pp. 100-01; Tr. Vol. II, p.24). The following rules of statutory interpretation are relevant to this issue. If the language of a statute is plain and unambiguous there is no need for construction of its meaning. *Tell City*, 73 N.E.3d at 216 (internal citations omitted). All statutory language used by the legislature is deemed to have been used intentionally. *Weiss v. State*, 903 N.E.2d 557, 562 (Ind. Ct. App. 2009) *trans. denied* (quoting *Merritt v. State*, 829 N.E.2d 472, 475 (Ind. 2005)). With respect to

remonstrance statutes, as previously discussed, a court “may not engraft new words onto a statute or add restrictions where none exist.” *Tell City*, 73 N.E.3d at 215.

There are several reasonable and harmonious readings of the phrase “final determination” in I.C. § 36-4-3-11.2 that would not add unwritten restrictions on the right to remonstrate or render the phrase meaningless. One such reading is that this determination is “final” in the sense that the Auditor reaches a conclusion of her review of the City’s materials, which she must do within 15 business days of receiving the documentation from the City Council. I.C. § 36-4-3-11.2(i). For another reasonable interpretation, the Auditor’s Certificate is the triggering event for the running of the 15 business day statute of limitations for Remonstrators to file for judicial review. I.C. § 36-4-3-11(d). In general, there is no right to judicial review of nonfinal decisions. The fact that the Auditor’s determination is “final” opens the door to judicial review, it does not close it. I.C. § 36-4-3-11(d).

Overall, the Remonstrators’ reading of the statute is consistent and harmonious with the General Assembly’s intentional omission of the Auditor’s Certificate from any requirement for judicial review in sections 11, 11.3, or 13. This reading of the statute is also consistent with the long-standing precedent establishing that the legislature cannot immunize legal conclusions from judicial review.

Remonstrators cited to the trial court, as examples, eminent domain cases from the Indiana Supreme Court, where the statute in question purported to foreclose judicial review of administrative determinations, and to make a trial court’s decision

final and unappealable. *Hagemann v. City of Mt. Vernon*, 238 Ind. 613, 154 N.E.2d 33 (Ind. 1958); *Slentz v. City of Fort Wayne*, 233 Ind. 226, 118 N.E.2d 484 (Ind. 1954).

In the case of *Slentz v. City of Fort Wayne*, the Indiana Supreme Court was presented with a challenge to the administrative eminent domain act that provided the action of a board of public works would be “final and conclusive on all persons.” *Slentz*, 118 N.E.2d at 229. The Court held that the words “final and conclusive” meant only that the board’s legislative determination regarding the “necessity for the taking of property” would be given deference by the courts when it was “properly and legally determined.” *Id.* at 234. The Court further explained, “the legislature cannot deprive the courts of their inherent power to review such actions when they are infested with fraud, capriciousness or illegality.” *Id.*

Then, in *Hagemann*, the Indiana Supreme Court reiterated and extended the holding from *Slentz* to make certain that, despite the use of the words “final and conclusive” in the statute, the affected property owners could “challenge the legality of the proceedings” on appeal to the trial court. *Hagemann*, 154 N.E.2d at 37. In an earlier case, the Supreme Court considered a section of the eminent domain act that further declared: “The order and judgment of such court shall be final and conclusive upon all parties, and no appeal shall lie therefrom except upon questions affecting solely the jurisdiction of the court.” *City of South Bend v. Whitcomb & Keller, Inc.*, 224 Ind. 99, 64 N.E.2d 580, 581 (Ind. 1946). The Court held that “the General Assembly was without power to take from this court its constitutional appellate jurisdiction,” over the decisions of a trial court. *Id.*

The Indiana Supreme Court, in the cases of *Hagemann* and *Slentz*, held that the legislative decisions of whether to exercise the power of eminent domain to acquire property, or what property to acquire, were generally not the subject of judicial review. But questions involving how the legislative action is taken, including questions of fraud, illegality, or arbitrary and capricious action, even within the legislative function were still subject to judicial review. Separately, the statutes at issue foreclosed the possibility of appellate review of the trial court, which the Supreme Court found was unconstitutional. *Whitcomb & Keller, Inc.*, 64 N.E.2d at 581. The legislature could not intrude on the function of the courts and prevent judicial review of issues involving the legality of the legislative actions. *Hagemann*, 154 N.E.2d at 37; *Slentz*, 118 N.E.2d at 488. Similarly, the legislature could not, by statute, control the function of appellate review of a trial court's ruling. *Whitcomb & Keller, Inc.*, 64 N.E.2d at 581.

Applying the holdings from *Hagemann* and *Slentz* to the present circumstances is not a stretch, by any means. The General Assembly cannot make Auditor Urbanik's legal conclusion final and unappealable any more than it could immunize local legislative bodies from judicial review, or insulate trial courts from appellate review in the statutes at issue in *Hagemann*, *Slentz*, and *Whitcomb & Keller, Inc.*

The legislative decision of whether to annex and what property to annex, is owed the same amount of deference as the determination of the necessity of taking property by eminent domain. *Fight Against Brownsburg Annexation*, 124 N.E.3d at 603; *Hagemann*, 154 N.E.2d at 36-37. Those decisions are not among the questions presented in this case. Remonstrators are not asking the courts to step in and evaluate the City's policy

decisions. Instead, Remonstrators are asking the courts to evaluate whether or not valid contracts exist, in the form of waivers of the right to remonstrate, and whether the Auditor's legal conclusion as to these matters is immune from judicial scrutiny. These are legal issues, and the Auditor's determination is not entitled to any deference.

Whether a valid contract exists is a legal question over which courts have jurisdiction. *Austin Lakes Joint Venture*, 648 N.E.2d at 650 (existence of a contract is a matter to be determined by the trial court). Legal questions and legal conclusions are reviewed by courts *de novo*. *Fight Against Brownsburg Annexation*, 124 N.E.3d at 601. A waiver of a property owner's right to remonstrate against annexation is a contract. *Rogers*, 437 N.E.2d at 1026-27. Therefore, in an annexation remonstrance case a court ultimately must answer whether a valid waiver of the right to remonstrate exists. *Fight Against Brownsburg Annexation*, 124 N.E.3d at 603; *Rogers*, 437 N.E.2d at 1026-27. Otherwise, a county Auditor can make binding, unappealable, legal conclusions affecting the substantial rights of property owners without any judicial oversight, even by the Indiana Supreme Court. This would be tantamount to a declaration by the courts that Remonstrators have no rights to remonstrate and contest annexation if the Auditor's legal conclusion cannot be reviewed. The "extremely important" right to remonstrate would be totally illusory.

CONCLUSION

Dismissal of the Complaint was improper under the applicable standard of review. Remonstrators have carried their burden of pleading facts that support a claim for relief. The courts must accept as true the fact that no less than 49 out of 69 property owners signed the Remonstrance Petition without any valid waiver of their rights. This would mean Remonstrators would be entitled to a judgment that the City's annexation ordinance is void as a matter of law. The remonstrance statutes do not, and cannot, prevent the courts from exercising their inherent authority to review legal questions and legal conclusions. Courts have subject matter jurisdiction over the issues presented in the Complaint, and the Complaint sets forth facts that support a plausible claim for relief. Dismissal was error; Remonstrators are entitled to be heard on their Complaint.

Based on the facts and law discussed above, this Court should reverse the trial court's order of October 20, 2022 granting the City Defendants' Motion to Dismiss, and remand this matter to the trial court for additional proceedings.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this brief contains no more than 14,000 words.

Dated: 2 / 17 / 2023

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Certificate of Service

I hereby certify that the on the 17th day of February, 2023, service of a true and complete copy of the foregoing *Brief of Appellant, Sturdy Road Prairie Ridge Property Owners' Association, Inc.* was electronically filed with the Clerk of the Indiana Supreme Court, the Court of Appeals, and the Tax Court.

I further certify that on the 17th day of February, 2023, service of a true and complete copy of the foregoing *Brief of Appellant, Sturdy Road Prairie Ridge Property Owners' Association, Inc.* was served by E-Service through the Indiana E-Filing System to the following parties on appeal or counsel of record:

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