IN THE
INDIANA COURT OF APPEALS
CAUSE 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,	)	Appeal from the Porter Superior Court 1
Plaintiffs, Remonstrators,	)	
v.	)	Trial Court Cause No. 64D01-2203-PL-002328
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,	)	Hon. Michael A. Fish, Trial Court Judge
Defendants.	)	

PETITION TO TRANSFER OF APPELLEES THE CITY OF VALPARAISO, COMMON COUNCIL OF THE CITY OF VALPARAISO, AND MATTHEW R. MURPHY, MAYOR OF CITY OF VALPARAISO

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QUESTIONS PRESENTED ON TRANSFER

1. In this case of first impression, did the Court of Appeals improperly hold that "final" did not mean "final" when it concluded that annexation remonstrators could challenge an auditor's decision concerning the sufficiency of signatures on a remonstrance even though the governing statute says the auditor's decision is a "final determination," a holding that changes the rights of property owners and municipalities across Indiana and conflicts with plain statutory language that the General Assembly added to the annexation code in 2015 in order to streamline annexations?

2. Should the Court grant transfer to resolve a split in Court of Appeals cases as to whether trial courts may exercise subject matter jurisdiction when remonstrators fail to meet the statutory prerequisites for bringing a remonstrance?

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

The City of Valparaiso ("City") adopted an ordinance on October 25, 2021 that annexed a subdivision in Valparaiso known as "Prairie Ridge." Appendix ("App.") Vol. IV, p. 14-15. The Appellants are a group of property owners who claim to own 59 of the 69 lots in Prairie Ridge and want to halt the annexation (the "Remonstrators"). *Id*. To oppose the annexation, the Remonstrators needed to file a remonstrance petition with the Porter County Auditor. I.C. § 36-4-3-11.2. Among other requirements, the 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. I.C. § 36-4-3-11.3.

The Remonstrators claim they satisfy the threshold to bring their remonstrance. App. Vol. II, p. 16, 18. But under I.C. § 36-4-3-11.2 ("Section 11.2"), the Auditor "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." *Id*. The Porter County Auditor issued a certification on February 28, 2022 finding that the remonstrance lacked sufficient signatures because all of the Remonstrators were either bound by remonstrance waivers or not owners of property in the territory to be annexed:

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

App. Vol. II, p. 70.

The Remonstrators filed a remonstrance petition with the trial court on March 18, 2022. App. Vol. II, p. 14. That petition seeks to overturn the Auditor's decision in order to proceed with their challenge to the annexation. App. Vol. II, p. 20-21. Their complaint therefore asks for a "judgment invalidating the Auditor's Verification Statement dated February 28, 2022." App. Vol. II, p. 23.

The City moved to dismiss on the grounds that the Remonstrators did not have sufficient signatures to initiate a remonstrance because the Auditor's final determination found that the Remonstrators relied on signatories who were bound by remonstrance waivers. App. Vol. II, p. 74. The trial court entered its order of dismissal on October 13, 2022. App. Vol. II, p. 13. The Remonstrators then timely appealed.

The Court of Appeals reversed in a memorandum opinion, finding that the

Auditor's decision was not "final" and allowing the Appellants to proceed with their challenge to the remonstrance even though the Auditor had concluded that they lacked sufficient signatures to proceed.

ARGUMENT

The Court should grant transfer to address the question of first impression regarding the role auditors serve in the annexation process under Section 11.2. The General Assembly overhauled the annexation code in 2015. One revision it included was Section 11.2's language giving auditors the power to make a "final determination" about the sufficiency of remonstrance signatures. I.C. § 36-4-3-11.2. The Opinion was the first Indiana appellate decision to address the meaning of Section 11.2. It stripped Indiana's auditors of their power to make the "final determination" regarding the signatures supporting a remonstrance and made it so an auditor's decision has no meaning for either the annexing municipality or remonstrating landowners. I.C. § 36-4-3-11.2. By reducing the Auditor's role to a non-binding nullity, the Opinion marks a substantial departure from the statute that injures both municipalities and property owners alike. It undoes the 2015 overhaul of the annexation code by putting the signature issue back into litigation despite the 2015 code revisions. Municipalities now once again face delays in annexation as parties litigate the question of remonstrance signatures. And property owners cannot rely on the prompt resolution of their remonstrances when county auditors rule in **their**

favor, as the Opinion treats the auditors' decision as non-binding even when an auditor agrees with the remonstrators. This case therefore raises an "important question of law" and is "a case of great public importance that has not been, but should be, decided by the Supreme Court." Ind. App. R. 57(H).

The Court should also grant transfer to resolve the split in Court of Appeals cases regarding whether the prerequisites for a remonstrance are matters of subject matter jurisdiction. The General Assembly mandated that these requirements be met before a party could invoke the statutory judicial review process. The Opinion itself recognized that Indiana cases have reached different results on this question. Slip Op. 8. The Court should grant transfer to address this "conflict in Court of Appeals' decisions." Ind. App. R. 57(H)(1).

I. Plain statutory language requires Indiana's auditors to make the "final determination" as to whether enough owners have signed a remonstrance.

The General Assembly has an unlimited power to set the boundaries of Indiana's cities and towns. *Bradley v. City of New Castle*, 764 N.E.2d 212, 215 (Ind. 2002). Through Indiana's annexation statutes, the General Assembly delegated its power to set boundaries to Indiana's cities and towns. *Id*. When municipalities act to annex territory, they exercise this same power and are only fettered by the limitations set by Indiana's annexation statutes, I.C. § 36-4-3-1, *et seq*.

Since the power to change municipal boundaries is purely legislative, "[i]t is

subject to judicial review **only** as provided by statute." *Bradley*, 764 N.E.2d at 215 (quoting *Rogers v. Mun. City of Elkhart,* 688 N.E.2d 1238, 1242 (Ind. 1997) (emphasis added). The General Assembly limits property owners' ability to challenge annexation to the "remonstrance" process set out in the annexation code. *See Certain Martinsville Annexation Territory Landowners v. City of Martinsville*, 18 N.E.3d 1030, 1033 (Ind. Ct. App. 2014). Because this remonstrance process is a creature of statute, it is subject to change as the General Assembly sees fit, including by eliminating it entirely. *Bradley*, 764 N.E.2d at 215 (holding that a remonstrance is "a special proceeding the General Assembly may control"). *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 General Assembly can expand and contract the right to review of an annexation as it sees fit. *Bradley*, 764 N.E.2d at 215. It could allow no remonstrance at all. It could allow plenary review of any aspect of the annexation. Or it could do something in between, such as limit the topics subject to the statutory remonstrance process. *Id*. This ensures that not every concern or challenge a remonstrator has about an annexation will be subject to a judicial remedy. *Id*.

One requirement the General Assembly placed on remonstrance petitions is that

they must be signed by certain percentages of property owners. *See* I.C. § 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).

Calculating signatures to support a remonstrance is not a simple counting exercise. Among other issues, the count must examine who owns the property in the annexation territory, the assessed value of the property, and which owners have surrendered the right to remonstrate through remonstrance waivers. *See* I.C. § 36-4-3-11.3. 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 as a means of protecting the interests of municipalities who expend public resources to extend vital services to those not within their borders. I.C. § 36-9-22-2(c). Throughout Indiana, local municipalities have extended sewer service outside their borders and, in exchange, have required property owners to waive the right to remonstrate. *Id*.

Prior to 2015, the General Assembly left it to the courts to review remonstrance waivers and count signatures on remonstrance petitions. *Tell City*, 73 N.E.3d at 215. This

produced years of costly litigation that bogged down the process of annexation. *See, e.g., Covered Bridge Homeowners Ass'n, Inc. v. Town of Sellersburg*, 971 N.E.2d 1222, 1233 (Ind. Ct. App. 2012); *City of Kokomo ex rel. Goodnight v. Pogue*, 940 N.E.2d 833, 839 (Ind. Ct. App. 2010); *City of Greenwood v. Town of Bargersville*, 930 N.E.2d 58, 69 (Ind. Ct. App. 2010).

In 2015, the General Assembly sought to eliminate these disputes and streamline annexations by creating an administrative process that gives neutral county auditors the duty to make the "final determination" about the validity and sufficiency of signatures on a remonstrance. *See* I.C. § 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.

I.C. § 36-4-3-11.2 (emphasis added).

The remonstrance petition for Prairie Ridge had 62 signatures. App. Vol. II, p. 70. The Auditor reviewed the remonstrance and determined that 59 signatures were invalid because they were barred by waivers of the right to remonstrate. *Id*. 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 her certification on February 28, 2022 and stated that the petition did not contain sufficient signatures. If the Auditor's decision is final, the Remonstrators cannot proceed with their remonstrance case.

II. The Opinion improperly allowed the remonstrance to proceed despite the "final determination" made by the Auditor.

The plain language of Section 11.2 makes the Auditor's decision a "final determination." I.C. § 36-4-3-11.2. Section 11.2 must be given its plain and ordinary meaning. *Abbott v. State*, 183 N.E.3d 1074, 1080 (Ind. 2022). The plain and ordinary meaning of final is "not to be altered or undone." MIRIAM WEBSTER'S DICTIONARYX, *final* (2022 ed.). This plain language makes the Auditor's decision conclusive. It would make little sense for the General Assembly to declare the Auditor's determination to be "final" yet treat it as subject to review and revision. *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."). Nor would it make sense to

create an entirely new auditor review process 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.").

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." I.C. § 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). The General Assembly could have easily provided a process for challenging the Auditor's decision if it intended that to be the subject of a remonstrance. Section 11.2 says just the opposite, as it made the Auditor's decision "final." I.C. § 36-4-3-11.2. The Opinion read a right of judicial review **into** the statute by reading the word "final" **out** of it. 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).

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 saying the determination is "final." Or, as it has elsewhere, the General Assembly could have expressly allowed judicial review of the Auditor's determination. *See* I.C. Code § 6-1.5-5-7 ("A final determination of the Indiana board is subject to judicial review under IC 6-1.1-15."); I.C. § 8-23-17-33 ("A final determination of the agency is subject to judicial review under I.C. § 4-21.5-5."); I.C. § 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 "final" means something less than final. That meaning 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.").

Beyond Section 11.2's plain language, its context within the larger annexation code further demonstrates that the General Assembly intended the Auditor's decision to be

the final word on signatures. For instance, Section 11.2 must be read in para materia with I.C. § 36-4-3-13, the statute that authorizes judicial review of an annexation ("Section 13"). *State v. Pemberton*, 186 N.E.3d 647, 650 (Ind. Ct. App. 2022). This statute limits judicial review to four issues, none of which includes the Auditor's "final determination":

- whether the annexation territory is contiguous with the municipality's borders;
- whether 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;
- whether the fiscal plan adopted by the municipality to address the annexation satisfies the statutory requirements for those plans, I.C. § 36-4-3-13(d); and
- whether the municipality satisfied an outreach process to inform the public about the annexation.

I.C. § 36-4-3- 13.

Section 13 makes these the **only** issues subject to judicial review in a remonstrance proceeding. I.C. § 36-4-3-13. If an annexation satisfies these criteria, "the court **shall** order a proposed annexation to take place." *Id*. (emphasis added). This Court has already instructed that this plain language limits remonstrances to the issues authorized under I.C. § 36-4-3-13. *Bradley*, 764 N.E.2d at 215. *See also City of Hobart v. Chidester*, 596 N.E.2d 1374, 1376–77 (Ind. 1992). The General Assembly did **not** include review of the Auditor's final determination as one of the matters subject to judicial review under Section 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).

III. The Opinion improperly allowed the remonstrance to proceed despite the "final determination" made by the Auditor.

Despite the plain language of Section 11.2, the Opinion concluded that the Auditor's final determination had no bearing on the ability to bring a remonstrance. It reached this conclusion for two separate reasons, neither of which change the unambiguous plain language of Section 11.2.

First, the Opinion pointed to the fact that I.C. § 36-4-3-11 requires the Auditor's certification to be included as an exhibit in a judicial review petition. Slip Op. 7-8. But that statute only sets out the procedural requirement of what is attached to a complaint **if** an auditor found that the signature requirement was met. *Id*. It does not purport to override the finality of an auditor's decision set out in Section 11.2. Those statutes should be read in harmony if at all possible. *State v. Universal Outdoor, Inc.*, 880 N.E.2d 1188, 1191 (Ind. 2008). But the Opinion puts them in direct conflict by reading Section 11's list of items to attach to the complaint as overriding the Auditor's duty under Section 11.2. Slip Op. 7-8.

Second, the Opinion cited non-annexation statutes to claim that the "final determination" language was just meant to signify that the auditor's work was done

and the right to judicial review was triggered. But this fails to give meaning to all the words in the statute. Section 11.2 could have had the same effect given by the Opinion by just describing the auditor's decision as a "determination." But the General Assembly used the term "final" to describe the "determination." The word "final" has a commonly understood meaning that must be given effect. *Lockerbie Glove Co. Town Home Owner's Ass'n, Inc. v. Indianapolis Historic Pres. Comm'n*, 194 N.E.3d 1175, 1182 (Ind. Ct. App. 2022). "Under [Indiana's] surplusage canon, courts should give effect to every word and 'eschew those [interpretations] that treat some words as duplicative or meaningless.'" *Estabrook v. Mazak Corp.*, 140 N.E.3d 830, 836 (Ind. 2020) (quoting *Cutchin v. Beard*, 171 N.E.3d 991, 997 (Ind. 2021)). The Opinion says nothing about the General Assembly's mandate that the Auditor's determination would be "final," a separate term that would be rendered surplusage if the Opinion is left to stand. *Preston v. State*, 735 N.E.2d 330, 333 (Ind. Ct. App. 2000).

In any event, the statutes allowing judicial review of an annexation do not even use the phrase "final determination" as the triggering event for judicial review. I.C. § 36-4-3-11(d). The statute makes the filing of a different document—the auditor's "certification" filed with the municipality—as the event that triggers judicial review. *Id*.

The Opinion does not otherwise attempt to give meaning to General Assembly's choice of the word "final." It would make no sense to require the Auditor to review the

remonstrance and make a determination about signatures without giving that determination **any** meaning or effect. There would be no reason to include the "final determination" language in Section 11.2 if the auditor's decision was not "final" but remained subject to further attack on judicial review. Indiana's county auditors have enough work to do without being tasked with making determinations that have no teeth. The Opinion's reading of the statute makes the "final determination" language useless and without any effect. *Estabrook*, 140 N.E.3d at 836. It allowed the Remonstrators to challenge the annexation regardless of what the Auditor found. This makes the Auditor's work an empty exercise without any impact on the annexation. Section 11.2 can apply the way the Remonstrators want only by removing the "final determination" language from the statute. But the General Assembly included this requirement on purpose and it should not be rendered meaningless through the Remonstrators' construction. *Id*. The only way to actually carry out the plain words of Section 11.2 is to make the Auditor's decision "final" and not subject to ongoing attack. *See* I.C. § 36-4-3-11.2.

IV. The Court should grant transfer to resolve a split cases as to whether courts have subject matter jurisdiction when a remonstrance lacks the statutory prerequisites.

One basis for the Court to grant transfer is to address conflicting holdings between Court of Appeals cases so as to provide a single authoritative decision. Ind. App. R. 57(H). The Opinion acknowledged that there is a conflict in Court of Appeals' decisions that would trigger this grounds for transfer. Slip Op. at 6. The Opinion did when it analyzed

whether the lack of signatures was an issue of subject matter jurisdiction. While it determined that the issue should not be phrased in terms of subject matter jurisdiction, it recognized that other cases had treated the issue as a matter of subject matter jurisdiction. *See id*. The Opinion cited *Fight Against Brownsburg Annexation v. Town of Brownsburg*, 32 N.E.3d 798, 805 (Ind. Ct. App. 2015) for the proposition that the requirements for a remonstrance are not a matter of subject matter jurisdiction despite the fact they are prerequisites to suit. In doing so, it acknowledged that *Brownsburg* "disagree[d] with prior Court of Appeals opinions allowing such a challenge under Rule 12(B)(1)." Slip Op. at 6. This language acknowledges that there is a split in the Court of Appeals cases regarding whether the remonstrance requirements are a matter of subject matter jurisdiction.

This split among the cases has direct implications for this case. That is because the Opinion concluded that it need not to address the facts under the subject matter jurisdiction standard but could accept the facts pled in the complaint under the standard for a Rule 12(B)(6) motion. Slip Op. at 8. Under that standard, the Opinion ignored the Auditor's mandatory "final determination" and accepted as true the allegations of the complaint. *Id*. Under that standard, any remonstrance would survive a motion to dismiss regardless of the auditor's conclusions, effectively rendering them meaningless.

CONCLUSION

The City respectfully requests that the Court grant transfer and vacate the Opinion of the Court of Appeals.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that the foregoing Petition to Transfer contains no more than 4,200 words, as determined by the word processing system used to prepare this brief (Microsoft Word XP).

/s/Mark J. Crandley
Mark J. Crandley

CERTIFICATE OF SERVICE

I certify that on June 15, 2023 the foregoing Petition to Transfer filed through the Indiana E-filing System ("IEFS") and was served electronically to counsel of record listed below on June 15, 2023. All e-filed documents are deemed served when they are electronically served through the IEFS in accordance with Rule 68(F)(1).

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