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Boone Circuit Court
Boone County, Indiana

STATE OF INDIANA	)	IN THE BOONE COUNTY CIRCUIT COURT
	) SS:	
COUNTY OF BOONE	)	CAUSE NO. 06C01-2301-PL-00046

ERIC COOK; JEANETTE COOK; KEITH BALL; PATRICIA BALL; REX COOK; SHERRI COOK; CHAD REVELL; SAMUEL SHEPHERD; SALLY SHEPHERD; BRANDON CROW; and NATALIE CROW,

Plaintiffs,

vs.

CITY OF LEBANON,

Defendant.

CITY OF LEBANON'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO INDIANA TRIAL RULE 12(B)(6)

The State of Indiana, Boone County, and the City of Lebanon have long sought an investment into the development of new businesses, particularly those which will provide advanced manufacturing, agri-science, bioscience, and other "economy-of-the-future" jobs. Compl., Ex. 2, p. 1. Plaintiffs, on the other hand, constitute a group of Boone County property owners who wish to thwart or otherwise delay those investments.[1] Despite the unanimous support

[1] At least some Plaintiffs are members of an organization called Boone County Preservation Group ("BCPG"). See Eric and Jeannette Cook, Facebook, https://www.facebook.com/groups/716024849540052/search/?q=cook, (last accessed January 22, 2023) (establishing that Plaintiffs Eric and Jeannette Cook are members of BCPG); see also Patricia and Keith Ball, Facebook, https://www.facebook.com/groups/716024849540052/search/?q=ball (last accessed January 22, 2023) (establishing that Plaintiffs Patricia and Keith Ball are members of BCPG). Representatives of the BCPG have explicitly told local media outlets that this litigation was filed in hopes that it would "be a thorn in [the City's] side" and that this suit was intended "to be a

of those who are affected the most—the owners of property on which these investments are set to occur—Plaintiffs advance a novel legal argument with the sole purpose of delaying any development actions on the part of the City for as long as possible. Unfortunately for Plaintiffs, Indiana law, common sense, and good public policy bar Plaintiffs' unjust and meritless attempt to deprive their neighbors of the benefits they have requested and to which they are entitled.

Therefore, the City of Lebanon, Indiana ("City"), moves the Court for an Order dismissing the Complaint filed by Plaintiffs and in support thereof, states as follows:

I. Factual Background

The City adopted two ordinances on December 12, 2022: Ordinance Numbers 2022-37 ("-37") and 2022-38 ("-38"). Compl. Ex. 1; Compl. Ex. 2 (collectively, the "Ordinances"). The Ordinances were adopted as the second phase of a two-part annexation process by which the City of Lebanon annexed previously unincorporated property to revitalize it into a "transformational economic development opportunity" for the region. -38, p. 1. The area contemplated by the Ordinances contained approximately 5,225 acres of unincorporated land (the "Annexed Area") in Boone County contiguous to the City. -38, p. 1. Pursuant to Indiana Code section 36-4-3-5.1 ("Section 5.1"), landowners of property contained in the Annexed Area *voluntarily* and *unanimously* began the annexation process by petitioning the City for annexation. *Id.* Pursuant to Section 1.8(B) of its Unified Development Ordinance ("UDO"), the City received and considered a Development Proposal/Concept Plan for the Annexed Area to justify the assignment of LEAP and Single-Family Residential zoning classification to the Annexed Area, held required public

delaying action." WBAA, https://www.wbaa.org/government/2023-01-12/complaint-filed-against-city-of-lebanon-could-delay-plans-for-industrial-park (last accessed January 30, 2023).

hearings regarding the annexation and zoning classification, adopted a fiscal plan for the Annexed Area, and met all other statutory criteria for the Phase II Annexed Area. *Id.*, p. 1-2.

On December 12, 2022, the City adopted the Ordinances. Compl. Ex.s 1 & 2. Ordinance Number 2022-37 was specifically adopted for purposes of amending Chapters 4, 7, and 11 of the City of Lebanon's UDO to create a "LEAP" zoning district. -37, p. 1; Compl., ¶ 1. Thereafter, -38 was adopted for purposes of formally annexing the Annexed Area and establishing initial zoning classifications for the real property contained therein, as required by Section 1.8(B) of the City's UDO. UDO § 1.8(B) ("All territory which may hereafter be annexed to the city shall be classified into one or more of the district set forth in Chapter 4: Zoning Districts.").[2]

On January 10, 2023, Plaintiffs initiated the present suit by filing a complaint in which they allege to own properties adjacent to the Annexed Area. Compl., ¶ 11. Plaintiffs further contend that the Ordinances caused diminishment of their property values, ability to have peaceful enjoyment of their residences and property, and "denigrates their health and welfare due to the likelihood for substantial increased traffic, noise and pollution." *Id.* For the reasons stated herein, Plaintiffs' claims are frivolous, lack merit, and are intended solely for the purpose of delaying Phase II of the LEAP Annexation Plan.

II. Analysis

The City moves to dismiss Plaintiffs' Complaint pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure. A Rule 12(B)(6) motion "tests the legal sufficiency of the plaintiff's

[2] While the UDO was not attached in its entirety to Plaintiffs' complaint, the Court may nonetheless consider it at the Motion to Dismiss stage as it is a public document of which the Court may take judicial notice and is referenced in Plaintiffs' complaint. *Moss v. Horizon Bank, N.A.,* 120 N.E.3d 560, 564 (Ind. Ct. App. 2019) ("because the extraneous matters on which the trial court relied were matters of which it could take judicial notice, it was not required to convert Chicago Title's action to a summary judgment motion (footnote omitted)); *Bd. of Comm'rs of Delaware Cnty. v. Evans*, 979 N.E.2d 1042, 1046 (Ind. Ct. App. 2012).

claim, not the facts supporting it." *Residences at Ivy Quad Unit Owners Ass'n v. Ivy Quad Dev.*, 179 N.E.3d 977, 981 (Ind. 2022) (internal citations omitted). In order to prevail against a 12(B)(6) challenge, Plaintiffs must show that they have "stated some factual scenario in which a legally actionable injury has occurred." *Id.* (internal citations omitted). Alternatively, the City's Motion to Dismiss should be granted where the allegations contained in the complaint are "incapable of supporting relief under any set of circumstances." *Id.* (internal citations omitted).

I. This matter should be dismissed because Plaintiffs' substantive argument wholly misconstrues Indiana's zoning statutes and the authorities granted to municipal governments.

Plaintiffs' Complaint suffers from both procedural and substantive defects. Fundamentally, the City's Motion to Dismiss should be granted as Plaintiffs' substantive claims are without merit. Plaintiffs' sole substantive argument[3] for challenging the Ordinances is a putative violation of Indiana Code section 36-7-4-601(a), which reads:

> The legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance under the 600 series. However, no zoning ordinance may be adopted until a comprehensive plan has been approved for the jurisdiction under the 500 series of this chapter.

Ind. Code 36-7-4-601(a) ("Section 601(a)"); Compl. ¶ 4-8. Plaintiffs' reliance on this provision runs contrary to its purpose and meaning, and adoption of Plaintiffs' interpretation of Section 601(a) would contravene good public policy.

A. Indiana Code section 36-7-4-601(a) empowers cities to zone the territory within their limits, rather than constrains them.

[3] Plaintiffs also challenge the Ordinances as they allege the property owners failed to follow the UDO in so far as it requires the submission of a concept plan alongside property owners' petition for annexation. This argument ignores the fact that the owners of property within the Annexed Area filed an Amended Petition alongside a concept plan, as required by Sections 1.8 and 9.19 of the UDO. Therefore, Plaintiffs' allegations are factually inaccurate and this argument is not briefed at length herein. The City, however, reserves the right to brief this issue, if necessary, in its reply brief.

Importantly, the term "jurisdiction" is not defined in the 600 series of Indiana's zoning statutes. Plaintiffs, therefore, ask the Court to interpret "jurisdiction" to only include that territory which was previously incorporated into a municipality's comprehensive plan. Compl. ¶ 5. Plaintiffs contend that the City's January 2020 comprehensive plan prescribed "the perimeters and jurisdictional area for the City of Lebanon's Zoning District and authority" and, therefore, the City's comprehensive plan cannot be used as a basis for showing Ordinances -37 and -38 were compliant with Section 601(a). *Id*. This interpretation, however, is without citation, impracticable, and wholly misconstrues the purpose of Section 601(a).

Section 601(a) vests municipalities with the exclusive authority to adopt zoning ordinances for the geographic area over which they have jurisdiction, with the limitation that they have created a comprehensive plan some time prior to their adoption of new zoning ordinances. Plaintiffs do not challenge the City's right to enact zoning ordinances within its territorial borders, nor that the City adopted a comprehensive plan. Rather, they contend that the zoning provisions contained in -38 are invalid because a portion of the property contained within the Annexed Area was not contemplated by the comprehensive plan.

It is true that Section 601(a) requires a municipality to adopt an initial comprehensive zoning plan prior to the designation of zoning districts. *See e.g. Pro-Eco, Inc. v. Board of Comm'rs*, 956 F.2d 635, 636 (7th Cir. 1992) (upholding the District Court's finding that a municipality could not adopt zoning ordinances where it had yet to ever adopt a comprehensive plan); *see also Triple G Landfills, Inc. v. Board of Comm'rs*, 774 F. Supp. 528, 533-34 (S. D. Ind. Sept. 30, 1991) ("Accordingly, the Court finds that the Ordinance is a zoning ordinance but is invalid under Indiana Code Section 36-7-4-601(a) because it was passed in the absence of a comprehensive zoning plan."). This requirement is different, however, than the jurisdictional limitation proffered by

Plaintiffs. Where Indiana courts have addressed Section 601(a)'s comprehensive plan requirement, they have required only that the municipality have adopted *any* form of initial comprehensive plan prior to zoning specific property. *Id.* The requirement that municipalities enact an initial comprehensive plan before adopting any zoning ordinances intuitively makes sense, as it requires cities to consider and adopt a broad-stroke strategy for land development within their municipal boundaries. A comprehensive plan also provides citizens, businesses, and courts with an understanding and ability to predict and interpret the processes and zoning criteria that a city intends to use. But Section 601(a), and the cases interpreting it, do not prevent municipalities from simultaneously enacting zoning ordinances alongside their annexation of contiguous, previously-unincorporated property when they have already created a comprehensive plan and zoned the property alongside the newly annexed area pursuant thereto. To read the Section 601(a)'s second sentence in the manner proffered by Plaintiffs would effectively create an extra-statutory limitation on municipalities' right to govern areas within their city limits.

Plaintiffs' argument seems to be that the words "the jurisdiction" in the sentence "no zoning ordinance may be adopted until a comprehensive plan has been approved for the jurisdiction under the 500 series of this chapter," Indiana Code section 36-7-4-601(a), refers to a geographic area. In this mistaken view, there must be a comprehensive plan explicitly referencing a geographic area before any zoning can occur in that geographic area. The proper interpretation of "the jurisdiction" in that sentence, however, is that it refers to a political entity with jurisdictional power—which in the instant case, is the City of Lebanon. This interpretation is evidenced by the previous sentence, which reads: "[t]he legislative body having jurisdiction over the geographic area described in the zoning ordinance has exclusive authority to adopt a zoning ordinance under the 600 series." *Id.* Clearly, "jurisdiction" and "geographic area" do not mean the same thing—as

Plaintiffs seem to believe—as shown by the legislature treating them as two separate concepts in that sentence.

All that is required by Section 601(a) prior to the adoption of zoning ordinances is that the municipality have ever adopted a comprehensive plan. Here, "the jurisdiction" (i.e. the City of Lebanon) *does* have a comprehensive plan in place. Accordingly, under Indiana Code section 36-7-4-601(a), the City may enact zoning ordinances such as those included in -38. This is not only clear from the statute; it is also consistent with decisions like *Pro-Eco*, 956 F.2d at 636 and *Triple G Landfills*, 774 F. Supp. at 533-34.

B. Plaintiffs' baseless reading of Section 601(a) contravenes sound public policy.

Plaintiffs' reading of Section 601(a) also contravenes sound public policy. Despite Plaintiffs failing to demonstrate or allege any actual harm here, other than Plaintiffs' insistence that the City violated Plaintiffs' novel reading of Section 601(a), Plaintiffs seek to place additional burdens on municipalities undergoing annexation and planning for the development of newly annexed land that do not have any basis in the text of Section 601(a) or a demonstration of a specific harm that only this reading of Section 601(a) could prevent.

Here, the City did exactly as it was required by Section 601(a). The City updated and adopted a comprehensive plan pursuant to the "500 series" on or about January 13, 2020. Compl. ¶ 5. The plain language of the plan demonstrates that the City did not intend for the January 2020 Comprehensive Plan to be a limitation on its jurisdictional authorities. In it, the City clarified that the comprehensive plan was "not an ordinance and does not contain the actual decision that should be made." Compl., Ex. 3. Rather, the City's comprehensive plan is merely "a policy document that will help guide decision-making related to land use, growth, public investments, and economic

development." Despite Plaintiffs' claims, the City's comprehensive plan existed prior to and was used by the City in crafting Ordinances -37 and -38.

If this Court adopts Plaintiffs' reading of Section 601(a), it would imbue comprehensive plans with far more power than the Indiana Legislature contemplated in passing Section 601(a) or courts reviewing disputes involving Section 601(a) and comprehensive plans have previously held. Under Plaintiffs' reading of Section 601(a), cities across the State of Indiana would be charged with making a decision unintended by Indiana's legislature: whether to (1) include all property which it *may* at some time in the future annex into their comprehensive plans or (2) amend their comprehensive plans every time a new parcel is annexed, regardless of size or proximity to previously-zoned properties. The former would require cities to update their comprehensive plans to specifically include/contemplate each parcel of land they intend to/may intend to annex, prior to that land even being subject to the their territorial boundaries, and thus the jurisdiction of the comprehensive plan.

Plaintiffs would like municipalities to begin enacting policies and plans related to land that is not yet under their jurisdiction or, alternatively, undertake the long and expensive process amending their comprehensive plans every time a new parcel is annexed rather than what occurred here, where the City established a zoning classification for 100% of the property owners that requested to be annexed into the City. Indeed, the circumstances of the instant case demonstrate how unworkable Plaintiffs' contrary reading would be. Although some annexations occur as the result of a municipality reaching out and deciding to annex territory nearby, other annexations—like the one at issue here—occur where nearby landowners file a unanimous petition to be annexed. Ind. Code § 36-4-3-5.1(a). It is not realistic to require a municipality to draft a comprehensive plan explicitly referencing every nearby geographic area on the off chance that the landowners there

petition to be annexed; and yet that is what Plaintiffs' mistaken reading of Section 601(a) would require.

Having failed to successfully challenge annexation through the mechanisms created by Indiana's Legislature, Plaintiffs now ask this Court to impose new procedural hurdles (without basis in the statute or sound public policy) merely to frustrate and further delay the project. This Court must disregard Plaintiffs' improper reading of 601(a), which is based solely on their desired outcome, and dismiss this Complaint with prejudice.

C. Plaintiffs' ignore the City's UDO requirements for annexation.

Plaintiffs further ignore the City's UDO Section 1.8 setting forth Annexation and Initial Zoning for territory annexed into the City. Pursuant to UDO Section 1.8, the Plan Commission shall make zoning district recommendations to the Common Council for newly annexed area. UDO, § 1.8(B). Further, UDO Section 1.8(B) requires, "All territory which may hereafter be annexed to the city shall be classified into one or more of the districts set forth in Chapter 4: Zoning Districts. Before the Common Council of the city shall consider the ordinance for annexation, which shall include therein a description of the district or districts, the City Plan Commission shall conduct a public hearing …., and make a recommendation on the new zoning classification to the Common Council." *Id.*

In fact, Plaintiffs acknowledge that the City's UDO mandates that an annexation ordinance shall require the territory to be annexed to be classified into a zoning district completely contradicting their prior arguments in their Complaint. Compl. ¶ 9. By Plaintiffs' own admissions, the City was required to have a zoning classification in -38. Comp. Ex. 3. This authority stems from Indiana's adoption of the "Home Rule" requires that "any doubt as to the existence of a power of a [political] unit, shall be resolved in favor of its existence." Ind. Code 36-1-3-3(b); *see also*

City of Carmel v. Martin Marietta Materials, Inc., 883 N.E.2d 781, 787-88 (Ind. 2008). Here, the City's adoption of -37 and -38 were done in accordance with all applicable procedures and, to the extent they created zoning districts, complied with the UDO.

The City did just as it was required under the UDO. Upon annexing the property, it adopted the new zoning classifications lawfully adopted in -37 to the parcels contained within the Annexed Area. That the City adopted zoning ordinances pursuant to the UDO does not make its actions "illegal" under the 600 series or any other portion of the Indiana Code.

II. Plaintiffs' challenge to ordinance -37 fails on the face of the Complaint.

Plaintiffs ask this Court to declare invalid Ordinance -37, which creates a new type of zoning classification under the City's UDO for all property subject to the City's zoning ordinances, based solely on their conclusory allegation that Ordinance -37 is "illegal." Compl. ¶ 7. In reality, Ordinance -37 is a properly enacted zoning ordinance that the City has the power to enact if it so chooses, and despite Plaintiffs' bombastic and baseless allegations, this claim must be dismissed.

A municipality's plan commission is empowered to propose an amendment to the text of a zoning ordinance. Ind. Code § 36-7-4-607. The commission, after certification, sends the proposed amendment to the relevant legislative body. *Id.*; *see also* Ind. Code § 36-7-4-605. The legislative body can then adopt the certified proposal, if it chooses, which means the proposed language "takes effect as other ordinances of the legislative body." *Id.* Additionally, there is a presumption that the ordinances adopted by a city are valid. *City of Fort Wayne v. Kotsopoulos*, 704 N.E.2d 1069, 1070 (Ind. Ct. App. 1999).

Instead of alleging that the City failed to follow these procedures, or that the City's compliance with these procedures was somehow defective, Plaintiffs merely provide this Court with the conclusory allegation that Ordinance -37 is illegal. Compl. ¶ 7. This is because even

Plaintiffs know that the City not only had the authority to enact Ordinance -37, the City properly did so. Exhibit 1 to Plaintiffs' Complaint demonstrates that Ordinance -37 merely created a new type of zoning classification under the City's UDO, which can be applied to any piece of property subject to the City's zoning jurisdiction. As Plaintiffs fail to allege that the City failed to follow the statutory scheme for enacting a zoning ordinance, their conclusory allegation cannot be considered by this Court. *See Buchanan v. State*, 122 N.E.3d 969, 972 (Ind. Ct. App. 2019). Plaintiffs have failed to provide any allegations in support of their claim regarding Ordinance -37 and it is presumed to be a valid ordinance. *See Kotsopoulos*, 704 N.E.2d at 1070. Therefore, this Court must dismiss Plaintiffs' claim challenging Ordinance -37.

III. Plaintiffs lack standing to challenge -38 as they were enacted upon the unanimous request of all property owners within the Annexed Area.

Plaintiffs attempt to veil their challenge to the Ordinances as a zoning challenge rather than a challenge to the annexation. Compl. ¶ 4. This is because they know they are incapable of challenging the Ordinances as annexation ordinances.

Generally speaking, annexation may be challenged by two mechanisms: judicial appeals and remonstrance actions. *City of Carmel v. Steele*, 865 N.E.2d 612, 615 (Ind. 2007) ("The framework of Indiana's annexation laws has long featured three basic stages: (1) legislative adoption of an ordinance annexing tertian territory . . . ; (2) an opportunity for remonstrance by affected landowners; and (3) judicial review."); *see also In re Remonstrance Appealing Ordinance Nos. 98-004 v. Storm*, 769 N.E.2d 622, 629 (Ind. Ct. App. 2002); *Deaton v. Greenwood,* 582 N.E.2d 882, 885 (Ind. Ct. App. 1991) ("Remonstrance is the exclusive manner for landowners to obtain relief from annexation proceedings."). Importantly, the Legislature has altered the procedure through which a voluntary annexation under Indiana Code section 36-4-3-5.1 may be contested. Landowners residing within an annexed territory generally have a right to remonstrate,

see Indiana Code section § 36-4-3-11, but the Legislature has specifically eliminated that right where annexation is petitioned pursuant to Section 5.1. Ind. Code § 36-4-3-5.1(i). Therefore, in the case of Section 5.1 Super Voluntary annexations, landowners may only challenge annexation via judicial appeal and on the very limited grounds of contesting contiguity. Ind. Code § 36-4-3-5.1(i); Ind. Code § 36-4-3-15.5(b).

It is not in dispute that the all property owners in the Annexed Area unanimously sought annexation pursuant to Section 5.1 and that the Annexed Area met Indiana's contiguity requirements for annexation. Therefore, Plaintiffs are barred from bringing a remonstrance action or judicial appeal challenging the Ordinances.

Indiana Courts have carved out one other scenario wherein Section 5.1 may be challenged: declaratory judgment actions filed by taxpayers of the city annexing unincorporated area. *In re Remonstrance Appealing Ordinance Nos. 98-004 v. Storm*, 769 N.E.2d 622, 629 (Ind. Ct. App. 2002). Under this section, a taxpayer of the city may seek declaratory judgment if she is able to establish (1) the city common council's actions were clearly or patently illegal; (2) the council acted without subject matter jurisdiction; (3) the council's annexation actions constituted an abuse of discretion; or (4) wastage of public funds has occurred or is imminent and is something more than furnishing normal services and facilities attendant to legal annexation. *Id*. (quoting *Prock v. Town of Danville,* 655 N.E.2 553, 557 (Ind. Ct. App. 1995)). This second requirement creates multiple issues for Plaintiffs. First, the Complaint fails to allege that Plaintiffs are taxpayers of the City. Second, Plaintiffs fail to allege any actions taken on behalf of the City which fall into one of the four *In re Remonstrance* categories because, as discussed above, the City had subject matter jurisdiction over the Annexed Area and all actions it took by and through the Ordinances were lawful.

Because Plaintiffs do not fall into the limited categories of persons who may seek declaratory judgment challenging annexation, they lack standing to bring the present suit.

III. Conclusion

Cities are entitled to a presumption that the ordinances they adopt are valid. *See Kotsopoulos*, 704 N.E.2d at 1070. To require municipalities to undertake the costly and time-consuming process of amending their comprehensive plans every time they annex contiguous, previously-unincorporated property would create an unintended limitation on their authorities which may only be remedied through the expensive and time-consuming process of amending their comprehensive plan. Plaintiffs fail to cite any authority for this interpretation of Section 601(a) because it runs wholly afoul of the legislature's intent and public policy.

Here, the City properly annexed and zoned the approximately 5,225 acres as unanimously requested by 100% of the property owners of land contained therein. Because Plaintiffs lacked standing to bring this matter, and failed to prove wrongdoing even if they had standing, the City asks the Court dismiss this action with prejudice and for an order granting them all other relief just and proper.

This the 31st day of January, 2023.

Respectfully submitted:

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on January 31, 2023, a copy of the foregoing document was served upon all counsel of record by function of uploading it to Indiana's E-Filing System (IEFS).

/s/ Robert S. Schein
Robert S. Schein