STATE OF INDIANA

COUNTY OF LAKE

IN THE LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE
HAMMOND, INDIANA

CASE NO. 45D01-2011-MI-766

LAKE COUNTY COUNCIL,
Plaintiff,

v.

LAKE COUNTY COMMISSIONERS,
Defendant.

ORDER GRANTING RELIEF REQUESTED BY LAKE COUNTY COUNCIL AND DENYING RELIEF REQUESTED BY LAKE COUNTY COMMISSIONERS

The plaintiff, Lake County Council, appears by Attorney Ray Szarmach and Attorney Derek Molter, and the defendant, Lake County Commissioners, appears by Attorney Matthew Fech and Attorney Joseph Chapelle for hearing on all motions and issues raised by the Complaints for Declaratory Judgment, responses and Motions for Summary Judgment filed by each.

The Council has statutory authority to pass all ordinances for governing Lake County, Indiana while the Commissioners have the authority to implement the ordinances so enacted as the County executive. In addition, the Commissioners may, pursuant to I.C. 36-2-3.5-4(c)(2):

> approve or veto ordinances passed by the legislative body, in the manner prescribed by I.C. 36-2-4-8.

Prior to July 1, 2019, I.C. 36-2-4-8(c)(1) provided as follows:

(1) An ordinance or resolution passed by the legislative body of a county subject to IC 36-2-2.5 or IC 36-2-3.5 is considered adopted only if it is:

(A) approved by signature of a majority of the county executive (in the case of a county subject to IC 36-2-3.5) or by signature of the single county executive (in the case of a county subject to IC 36-2-2.5);

(B) neither approved nor vetoed by a majority of the executive (in the case of a county subject to IC 36-2-3.5) or by the single county executive (in the case of a county subject to IC 36-2-2.5), within ten (10) days after passage by the legislative body; or

(C) passed over the veto of the executive by a two-thirds (2/3) vote of the legislative body, within sixty (60) days after presentation of the ordinance or resolution to the executive.

Effective July 1, 2019, the Indiana General Assembly amended I.C. 36-2-4-8 (c) to eliminate all of the language cited above.[1]

In October, 2020, the Council passed two ordinances, one, 1451B, establishing the Council as the Lake County Purchasing Agency and the other, 1451M, establishing a Lake County Data Processing Agency. On October 30, 2020, the Commissioners vetoed both Ordinances. The Council subsequently overrode the vetoes.

The Council argues that the elimination of the veto and override language of I.C. 36-2-4-8(c) by the Indiana General Assembly effectively leaves the Commissioners with no authority to veto the October, 2020 ordinances passed by the Lake County Council, citing I.C. 36-2-4-2:

A county executive or county fiscal body adopting an ordinance, order, resolution, or motion for the government of the county or the transaction of county business must comply with this chapter.

[1] Senate Bill 35, which restores the language of I.C. 36-2-4-8(c)(1), was signed by the Governor into law on April 8, 2021. Its intent, according to its authors and its language, was to be retroactive.

The Commissioners respond that the Council has no authority to sue the Commissioners as it is not a "person" as defined by I.C. 34-14-1-2 of the Indiana Declaratory Judgment Act. Furthermore, no statutory authority exists for the Council to file a lawsuit under I.C. 36-2-3.5-5. Finally, the Commissioners assert that because I.C. 36-2-3.5-4(c) (2) grants the Commissioners the authority to veto ordinances passed by the Council, the only effect that the elimination of the veto and override language of I.C. 36-2-4-8 has upon this case is to take away the right of the Council to override the Commissioner's veto.

Does the Council have authority to bring a declaratory judgment action against the Commissioners? I.C. 34-14-1-13 of the IDJA provides:

> The word "person" wherever used in this chapter shall be construed to mean any person, partnership, limited liability company, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever.

Indiana Appellate Courts have never decided the issue of whether or not a county council is a "person" under the IDJA. Indiana state agencies and officials lack standing to bring declaratory judgment actions, *Ind. Fireworks Distribs. Ass'n v. Boatwright,* 764 N.E.2d 208 (Ind. 2002); *Indiana Wholesale Wine & Liqour Co. v. State ex rel. Indiana Alcoholic Vev. Comm'n* 695 N.E.2d 99 (Ind. 1998). However, the rationale behind this finding is the state officials and agencies involved have the:

> ...authority to protect public safety without the prerequisite of a declaratory judgment, *Boatwright, id.,* at 710, 711.

A county surveyor, however, was found to fit the definition of a "person" under the statute, although the defendant drainage board made no argument otherwise and waived the issue on appeal, *Clark County Drainage Bd. V. Isgrigg,* 963 N.E.2d 9 (Ind. Ct. App. 2012), *affirmed on rehearing* 963 N.E.2d 678 (Ind. Ct. App. 2012). Some time ago, Judge James J. Richards's dismissal of a declaratory judgment action by the Lake County Plan Commission against the Lake County Council on the grounds that the Plan Commission had no personal stake in the outcome was affirmed by the Indiana Court of Appeals, *Lake County Plan Comm'n v. County Council,* 706

N.E.2d 601 (Ind. Ct. App. 1999). No finding was made as to whether or not the Plan Commission was a "person" under the IDJA.

I.C. 36-2-3-2 establishes a seven-member elected county council in all Indiana counties without a consolidated city and having a population of less than 250,000 but more than 270,000. Lake County has no consolidated city and has a population greater than 270,000. The statute establishes the Council as an entity separate from the other branches of government. It uniquely legislative and has no enforcement functions under I.C. 36-2-3.5-2. Its stake in the outcome of the litigation at hand is the very efficacy of the ordinances it enacts. The words "...or municipal or other corporation of any character whatsoever...", broadly interpreted, grants the Council standing under the IDJA.

The question then becomes: Does I.C. 36-2-3.5-5 preclude the Council from bringing this action? Again, the Council was created by the legislature as a separate entity. Clearly, pursuant to I.C. 36-2-3.5-4, the Commissioners are the sole county governmental body authorized as executive of the county to bring lawsuits on behalf of the county. The Council does not have this authority under I.C. 36-2-3.5-5. However, this case was not filed by the Council on behalf of Lake County. It was filed only on its own behalf, as a governmental entity created by the legislature. Nothing in I.C. 36-2-3.5-5 would prohibit the Council from instituting litigation on its own behalf against the Commissioners.

Now, the dilemma: If the Court adopts the Council's position, the Commissioners have no veto power over the ordinances it enacts; if the Court adopts the Commissioner's position, the Council has no power to override its veto.[2]

As learned counsel has no doubt studied over the years, from civics and social studies classes in high school to the weighty philosophical discussions in constitutional law class in law school, the power of veto in the executive and the power to override that veto by the legislature is

[2] Notwithstanding the intent and language of Senate Bill 35 regarding its retroactivity, the Court wishes to avoid the risk of running its ship onto the shoals of a constitutional question as to the efficacy of the retroactive application of a statute.

critical to efficient operation of government.[3] In words which eclipse any poor prose this judicial officer could conjure:

> The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the Executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote. And in the one mode or the other, the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the Executive, the rules of just reasoning and theoretic propriety would of themselves teach us, that the one ought not to be left to the mercy of the other, but ought to possess a constitutional and effectual power of self-defense.
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> But the power in question has a further use. It not only serves as a shield to the Executive, but it furnishes an additional security against the enaction of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.
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> The propriety of a negative has, upon some occasions, been combated by an observation, that it was not to be presumed a single man would possess more virtue and wisdom than a number of men; and that

[3] Even though *State v. Buncich*, 51 N.E.2d 136, 144 (Ind. 2016) holds that the constitutional separation of powers relates solely to state government and does not apply to local officers, the Indiana General Assembly through its enactment of statutes pertaining to local government, has created a process for veto and override which is essential to the efficient operation of county government. This process obviously has its roots in the separation of powers doctrine.

unless this presumption should be entertained, it would be improper to give the executive magistrate any species of control over the legislative body.

But this observation, when examined, will appear rather specious than solid. The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the Executive, but upon the supposition that the legislature will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of other members of the government; that a spirit of faction may sometimes pervert its deliberations; that impressions of the moment may sometimes hurry it into measures which itself, on maturer *(sic)* reflexion *(sic)*, would condemn. The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design. The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable, that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them. *The Federalist Papers: No.73* (Hamilton, 1788).

Or, as stated more succinctly by the Illinois Supreme Court as the Civil War raged:

The convention which framed our Constitution designed to provide for the enactment and enforcement of salutary laws in the mode best calculated to promote the general welfare. They supposed, as one of the means of best attaining this end that the executive of the State should not only be intrusted *(sic)* with the enforcement of all laws, but should also be vested with a voice in their adoption. In distributing the powers of government, they could, if they had

> chosen to do so, have authorized the general assembly to adopt laws independent of all executive action. But to prevent the evils of hasty, illy *(sic)* considered legislation, they conferred upon the governor the power to arrest the passage of a bill until his objections could be heard, and the bill be again considered and adopted, *People ex rel. Harless v. Hatch,* 33 Ill. 9, 136 (1863).

The right of the Commissioners to veto and the right of the Council to override are essential to the proper and efficient statutory functioning of government in Lake County, Indiana. For reasons unknown, the Indiana General Assembly chose to eliminate that part of I.C. 36-2-4-8 that set forth the process for veto by the Commissioners and override by the Council. Notwithstanding the retroactive restoration of the statutory right to veto and override by the Indiana General Assembly, it is still necessary for the courts to step in to redress this two-year elimination of a necessary process.

Pursuant to I.C. 33-33-45-7, 8 and 9 and I.C. 33-28-1-5, the Lake Superior Court has the power and authority to:

> ...make all proper judgments, sentences, decrees, orders and injunctions, issue all processes and do other acts as may be proper to carry into effect the same, in conformity with Indiana laws and Constitution of the State of Indiana.

The complete elimination of those processes in legislation does not eliminate the statutory requirement that they be utilized. If Superior Courts have the authority to make such orders to a county as to maintain a road, *Cass County v. Gotshall,* 681 N.E.2d 227, 230 (Ind. Ct. App. 1977); to secure quarters for judicial functions, *State ex rel Wineholt v. LaPorte Superior Court,* 249 Ind. 152, 155 (Ind. 1967); to mandate funds, *In re Ripley Cir. Ct.* (1986), Ind., 495 N.E.2d 696; *Vigo Cty. Council, supra; Lake Co. v. Lake Co. Ct.* (1977), 266 Ind. 25, 359 N.E.2d 918, *Allen County Council v. Allen Circuit Court, 38th Judicial Dist.,* 549 N.E.2d 364 (Ind. 1990); to release prisoners from a county jail, *Fox v. Rice,* 936 N.E.2d 316, 320 (Ind. Ct. App. 2010); how much more so does the Superior Court have the authority to craft a procedure for a county council and county commissioners to follow to secure one of the most fundamental statutory governing principles.

The Council and the Commissioners followed the proper statutory procedure in dealing with Ordinances 1451B and 1451M even though that procedure no longer existed in the Indiana Code. The Court sees no reason, particularly in light of the signing of Senate Bill 35 into law, to disturb what has already been accomplished regarding these ordinances.

As to the Ordinances themselves, I.C. 36-2-3.5-4(a) provides:

> All powers and duties of the county that are executive or administrative in nature shall be exercised or performed by its executive, except to the extent that these powers and duties are expressly assigned to other elected officers.

I.C. 36-1-3.5-5 provides:

> **(a)** This section applies to Lake County.
> **(b)** Jurisdiction over the following local matters, which before the 1981 regular session of the general assembly have been subjects of statutory concern, is transferred to the legislative body of the county:
> **(1)** Frequency of salary payments (formerly governed by IC 17-3-73-2).
> **(2)** Mileage allowances for deputy county auditors (formerly governed by IC 17-3-29-1).
> **(3)** County purchasing agency (formerly governed by IC 17-2-77).
> **(4)** County data processing agency (formerly governed by IC 17-2-74).

The goal of construing a statute is to determine and give effect to the intent of the legislature, *Uhlman v. Panares*, 908 N.E.2d 650 (Ind. Ct. App. 2009). The first place to look for evidence of the intent and meaning of a statute is the language of the statute itself, to give its words their plain and ordinary meaning, *Cooper Indus. LLC v. City of South Bend*, 899 N.E.2d 1274, 1283 (Ind. 2009).

A reading of both statutes, giving their words a plain and ordinary meaning, demonstrates that jurisdiction over the executive and administrative duties of the purchasing agency and the data processing agency in Lake County were "...expressly assigned..." by the Indiana General Assembly through its enactment I.C. 36-1-3.5-5(b)(3) and (4), as permitted by I.C. 36-2-3.5-4(a), to Lake County's legislative body, the Lake County Council. The inapplicability of separation of powers to counties as set forth in *Buncich, id.*, renders unpersuasive any arguments urging the harmonization of I.C. 36-1-3.5-5 with other statutes that grant executive authority to the Commissioners.

The Council enacted the Ordinances and established a county purchasing agency and a county data processing agency as provided in I.C. 36-1-3.5-5(b)(3) and (4). The Commissioners vetoed the Ordinances, the Council overrode the vetoes. The Ordinances are valid.

IT IS THEREFORE ORDERED AND DECREED by the Court as follows:

1. The passage of ordinances 1451B and 1451M, the veto of them by Commissioners, and the subsequent override of the vetoes by the Council, are affirmed, ratified and shall remain in full force and effect as actions taken by the government of Lake County, Indiana in accordance with fundamental statutory governing principles. The validity of both Ordinances is confirmed pursuant to I.C. 34-14-1.

2. The Lake County Council has jurisdiction over the Lake County Purchasing Agency and the Lake County Data Agency pursuant to I.C. 36-1-3.5-5(b)(3) and (4) and Lake County Ordinances 1451B and 1451M.

3. The Motion for Summary Judgment filed by the plaintiff, Lake County Council is granted. The Motion for Summary Judgment and Counterclaim for declaratory relief filed by the defendant, Lake County Commissioners, are denied.

4. There being no just reason for delay, a final and appealable order is entered in favor of the plaintiff, Lake County Council, and against the defendant, Lake County Commissioners.

Dated April 16, 2021

JOHN M. SEDIA, JUDGE
LAKE SUPERIOR COURT
CIVIL DIVISION ROOM ONE