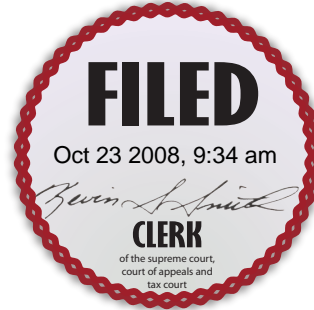


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE PETITION TO ANNEX AN)
APPROXIMATELY 7,806 ACRES OF REAL)
ESTATE INTO THE CITY OF)
JEFFERSONVILLE, INDIANA,)
)
BRUCE HERDT, LOUIS EVANS, and)
CHARLIE MILBURN, as Individuals and as)
Representatives of the Affected Landowners,)
)
Appellants-Petitioners,)
)
vs.)
)
CITY OF JEFFERSONVILLE, INDIANA,)
and COMMON COUNCIL FOR)
JEFFERSONVILLE, INDIANA,)
)
Appellees-Respondents.)

No. 10A01-0804-CV-167

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel Donahue, Judge
Cause No. 10C01-0711-PL-513

October 23, 2008

OPINION ON REHEARING – NOT FOR PUBLICATION

BROWN, Judge

Bruce Herdt, Louis Evans, and Charlie Milburn (collectively “Remonstrators”) petition for rehearing of a published opinion in which we affirmed the trial court’s dismissal of their complaint against the City of Jeffersonville (“City”) and the Common Council of the City of Jeffersonville. Herdt v. City of Jeffersonville, No. 10A01-0804-CV-167 (Ind. Ct. App. August 15, 2008).

In challenging the City’s annexation of certain land, the Remonstrators failed to file a petition for remonstrance signed by the required number of affected landowners within ninety days after publication of the City’s annexation ordinance, as required by Ind. Code § 36-4-3-11. After the deadline, the Remonstrators attempted to cure the defect by filing the signatures as an exhibit, and then as part of an amended complaint, but the trial court granted the City’s motion to dismiss for lack of jurisdiction. We affirmed the trial court’s dismissal of the complaint in a published opinion in which we held that Ind. Code § 36-4-3-11 precludes the filing of an amended complaint to add the necessary signatures after the deadline. See slip op. at 10.

On rehearing, the Remonstrators argue that we “failed to address the Remonstrators’ argument that counsel had authority to sign the Complaint for Remonstrance.” Petition for Reh’g at 1. They argue that the signature lists they collected authorized the filing of a remonstrance on behalf of the landowners and that, therefore, once signed by the attorneys, “the original Complaint for Remonstrance was properly signed and the trial court’s ruling should be reversed.” Id. at 3. However, in our opinion, we noted that Ind. Code § 36-4-3-11(a) provides that the written remonstrance must be signed by “at least sixty-five percent (65%) of the owners of land in the annexed territory” or by “the owners of more than seventy-five percent (75%) in assessed valuation of the land in the annexed territory.” We noted that Ind. Code § 36-4-3-11(b) provides that, “[o]n receipt of the remonstrance, the court shall determine whether the remonstrance has the necessary signatures.” Accordingly, the statute specifically requires that the remonstrance contain the landowner signatures and does not provide for authorization of counsel to sign on behalf of the landowners.

The Remonstrators again cite Kolar v. City of La Porte, 198 N.E.2d 878 (Ind. Ct. App. 1964) in support of their arguments. See Petition at 3-4. In the opinion, we distinguished this case as follows:

The Remonstrators cite Kolar v. City of La Porte, 198 N.E.2d 878 (Ind. Ct. App. 1964), in support of their argument that their attorneys had authority to sign the remonstrance and, “as a result, the landowner signatures were not required to be submitted with the complaint.” Appellant’s Brief at 10. They also rely on Kolar to argue that “[a]ttachment by the attorney of landowners’ signatures as remonstrators is sufficient and

effective if the attorney was authorized by the remonstrators to do so.” Id. at 8-9.

In Kolar, we reversed the trial court’s grant of a motion to dismiss where the landowners had attached the signatures to the remonstrance on typed signature pages rather than filing the original signature pages. 198 N.E.2d at 882. We find Kolar distinguishable, however, because in that case the statute at issue providing the procedural requirements for a valid remonstrance did not specifically require that the remonstrance be signed by the landowners. See Kolar, 198 N.E.2d at 881 (“We find no provision in the act which requires the remonstrators to sign the remonstrances or that the same shall bear the written signatures of the remonstrators.”). The current version of Ind. Code § 36-4-3-11(a) contains this express provision. Moreover, there was no suggestion in Kolar that the filing of the signatures was untimely, unlike in the present case.

Slip op. at 8 n.3. The Remonstrators’ continued reliance on Kolar adds nothing new to arguments we have already addressed.

The Remonstrators also reassert their position that Trial Rule 15 “allows amendment of a complaint and relation back for purposes of [the] statute of limitations.”

Petition at 5. However, in our opinion, we noted:

With respect to annexation cases, we have held that “the normal rules of civil procedure do not apply in a statutory proceeding of this kind . . . to the extent of where the statute is in conflict with normal procedural rules.” Bata Shoe Co., Inc. v. City of Salem, 153 Ind. App. 323, 328, 287 N.E.2d 350, 353 (1972). Thus, we must determine whether Ind. Code § 36-4-3-11 conflicts with the provisions of Trial Rule 15 for amending a complaint.

Slip op. at 9.¹ The Remonstrators assert without argument that the “annexation statute is not in conflict with the ‘normal procedural rules.’” Petition at 10. However, we

¹ The Remonstrators cite Wachstetter v. County Properties, LLC, 832 N.E.2d 574, 579 (Ind. Ct. App. 2005), and Lincoln Nat’l Bank v. Munderger, 528 N.E.2d 829, 833 (Ind. Ct. App. 1988), for the proposition that “Indiana courts have found that the trial rules govern procedure and practice in all civil suits and conflicting statutes have no force or effect.” Petition at 9. Bata, however, provides an exception

addressed the issue at length in the opinion and found that, in the present case, the statute does conflict with the normal procedural rules:

Ind. Code § 36-4-3-11(b) provides that, “[o]n receipt of the remonstrance, the court shall determine whether the remonstrance has the necessary signatures.” We recognize that this language does not require the trial court to make its determination of the sufficiency of the remonstrance within the statutorily prescribed period. See In re Annexation of Certain Territory, 138 Ind. App. 207, 213, 212 N.E.2d 393, 397 (1965) (“Of the 30 days provided by the statute the remonstrators will take some time preparing documents, obtaining signatures and checking records. To require the court in the remaining part of the 30 days to make its determination is not reasonable, nor do we believe it to be the intention of the legislature.”), reh’g denied. Nevertheless, Ind. Code § 36-4-3-11(a) provides that the remonstrance to be received by the trial court must be filed within ninety days after publication of the annexation ordinance. Accordingly, we hold that this statute precludes the filing of an amended petition for remonstrance pursuant to Trial Rule 15 to add the statutorily required signatures after the ninety-day limitations period has run.

Slip op. at 9. The Remonstrators’ assertion to the contrary fails for lack of argument.

Finally, according to the Remonstrators, we found that they had raised certain due process claims for the first time in a motion to correct errors and had thus waived review of the claims. They argue that this finding is incorrect because they raised the due process claims in their original and amended complaints. In fact, the Remonstrators grossly mischaracterize our discussion of this issue, which dealt rather with their argument “that their complaint raises a claim for declaratory judgment that the annexation ordinance is invalid because of certain due process claims committed by the City.” Slip op. at 10. We held that nothing in their original or amended complaints could

to this rule for annexation cases, and we limited the principle in Bata accordingly. See 153 Ind. App. at

be construed as a claim for declaratory judgment. We further held that, “[a]lthough the Remonstrators argued in their motion to correct errors that *they wished to elaborate on their procedural due process claims*, ‘[a] party may not raise an issue for the first time in a motion to correct error or on appeal.’ Troxel v. Troxel, 737 N.E.2d 745, 752 (Ind. 2000).” Id. (emphasis added). In other words, we held that, to the extent that any language in their motion to correct errors could be construed as a claim for declaratory judgment, the Remonstrators could not raise this issue for the first time in a motion to correct errors. The question whether the Remonstrators raised procedural due process claims in their original and amended complaints was therefore of no moment.

As the Remonstrators’ arguments are either reassertions of their earlier positions or are based on a misunderstanding of our opinion, the petition for rehearing is denied.

BAKER, C. J. and MATHIAS, J. concur