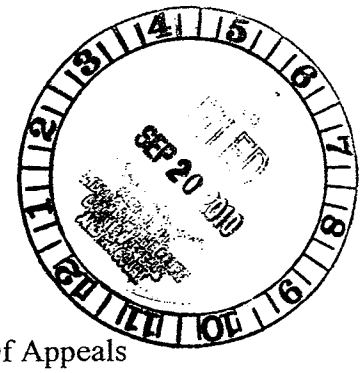

IN THE
INDIANA SUPREME COURT

CASE NO. _____

CITY OF GREENWOOD, et al. Appellants, v. TOWN OF BARGERSVILLE, et al. Appellees.	Court Of Appeals No. 41A05-0912-CV-00684 Appeal from the Johnson Superior Court Trial Court Cause No. 41D01-0809-PL-00066 The Honorable Thomas K. Milligan, Special Judge

REPLY IN SUPPORT OF PETITION TO TRANSFER OF APPELLEE THE TOWN OF BARGERSVILLE

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The City of Greenwood's opposition to transfer ignores the reasons why transfer is necessary. Greenwood concedes that this case addresses novel issues of statewide importance regarding whether sewer agreements can consent to annexation. It concedes that this is a question of law that affects hundreds of Indiana towns. It recognizes that many towns rely on sewer agreements with terms like those at issue here. While not disputing these facts, Greenwood replays its merits arguments and continues to misapply the Consent Statute in at least four respects.

First, Greenwood contends that the agreements cannot satisfy the "affirmative" consent requirement it reads into the statute. Greenwood claims only a document like a "petition" for annexation is sufficient. Petitions for annexation come with strict procedural requirements. IC § 36-4-3-5(b). The Consent Statute, however, is silent on *how* consent may be manifested and did not require the formality of a petition.[1]

In any event, Greenwood's "affirmative consent" argument ignores the active assent to annexation given by the sewer agreements. The agreements allow Bargersville to unilaterally annex the landowners. No further permission is needed from the landowners. The agreements go beyond "apathy" and reflect an affirmative agreement for annexation as part of the bargained-for-exchange between

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[1] Bargersville did not make a general mailing of form petitions but sent them to owners of agricultural property not covered by sewer agreements. App. 1465-72.

Bargersville and the landowners. By surrendering opposition, the landowners took an affirmative position in favor of annexation. Far from passivity, the landowners intentionally paved the way for Bargersville to annex their property.

If there was any doubt, the sewer agreements require the landowners to sign additional "consents." Greenwood has no explanation for this language, but continues to misstate who is bound by it. Greenwood claims the agreements only require "developers" to sign "consents." Response 9. The parties ***stipulated*** that 304 ***current*** landowners have signed the sewer agreements. App. 654-59. Greenwood suggests there is a difference between "developers" and "landowners." There are no prior landowners included in the 304 who signed the agreements. That some among this number were developers does not change the fact that they are also ***current*** landowners who have their own right to consent.

Greenwood then resorts to claiming that the agreements are ambiguous and this "ambiguity" must be construed against Bargersville. Greenwood is a stranger to the agreements and cannot construe them against the wishes of the contracting parties. Only Greenwood disputes that the agreements consent to annexation and no landowner has opposed the annexation. Instead, landowners have supported the annexation, including by Mr. Duke's letter stating that he understood his sewer agreements gave consent.[2]

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[2] Greenwood claims that a contract giving some remedies in the face of a breach excludes the right to invoke other remedies. Consent is not a "remedy" subject to this rule. The doctrine is also inapplicable given that the language in the agreements already gives consent, so no "remedy" is eliminated by implication.

Second, Greenwood disregards that the Consent Statute works together with the statues governing the extension of sewer service. Towns may extend service beyond their borders *only* if landowners give remonstrance waivers. IC § 36-9-22-2. The Consent Statute works with this requirement by preventing nearby cities from usurping the town's interests and "cherry-picking" the territory developed by the town's efforts. Given that towns have followed the General Assembly's command and obtained remonstrance waivers to protect their investment in extraterritorial sewer service, the Consent Statute naturally contemplates that remonstrance waivers would be sufficient consent. However, the Consent Statute could not refer *only* to "remonstrance waivers" because there might be situations where landowners consent through other means. The statute therefore broadly refers to "consent" to capture *all* circumstances where landowners agree to a town's annexation.

Third, Greenwood claims that the agreements do not consent because that right did not exist until the 2005 amendment to the Consent Statute. Landowners have always had a statutory right to consent to annexation. IC § 36-4-3-2.1(d); IC § 36-4-3-2.2(e); IC § 36-4-3-4; IC § 36-4-3-4.1(a). The Consent Statute added one consequence of giving consent; it did not create a new right.

Finally, Greenwood claims that towns can protect their expectations by signing interlocal agreements. This argument contradicts the Consent Statute by putting towns back at the mercy of cities for their consent. Nor are interlocal agreements sufficient to protect towns' interests. As the amici explain, there is no

guarantee that cities would enter into such an agreement. Moreover, requiring the blessing of cities allows them to coerce towns and landowners to provide benefits to the city even when the city does not have the ability to provide service to the territory. There is no reason to believe the General Assembly intended the Consent Statute to allow cities to extract tribute from towns.

Critically, there is no status quo when it comes to municipal borders. Even if a town had an interlocal agreement, it would not prevent the city from rendering that agreement worthless simply by readjusting its borders. Under the Opinion, a town could not rely on its sewer agreements even where the nearby city was not within three miles when the town extended its sewers but now is through the city's own annexations. Similarly, a city can come into being (through reorganization of a town or otherwise) after an interlocal agreement is signed. Neither of these scenarios are hypothetical; both are happening currently throughout Indiana.

Instead of the chimerical protection of interlocal agreements, the General Assembly authorized towns to extend sewers only on the condition that the towns protect their ability to annex by including a remonstrance waiver in their sewer agreements. This system protects all those involved. Cities themselves can negotiate with landowners and provide services, something Greenwood admits it did not do with these landowners. As the General Assembly wanted, landowners can then turn to towns, who obtain the statutorily required consent by receiving the required sewer remonstrance.

CONCLUSION

Bargersville respectfully requests that the Court grant transfer and affirm the trial court's summary judgment.

Respectfully submitted,

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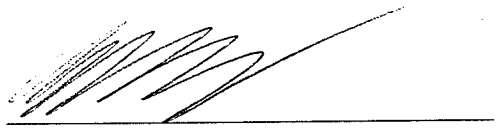
WORD COUNT CERTIFICATE

I verify that the foregoing Reply in Support of Transfer contains no more than 1,000 words, as determined by the word processing system used to prepare this petition (Microsoft Word XP).



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the foregoing has been served this 20th day of September, 2010, by depositing a copy of the same in the United States Mail, first-class postage prepaid, and properly addressed to the following counsel of record:

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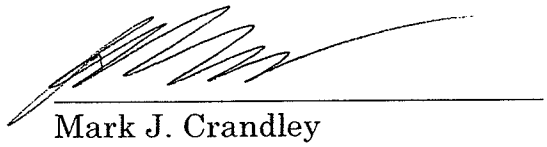

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