



## QUESTION PRESENTED ON TRANSFER

The General Assembly modified Indiana annexation law in 2005 to allow towns to annex property within three miles of a city where 51 percent of the landowners consent to that annexation. IC § 36-4-3-9 (“Consent Statute”). Prior to the amendment, nearby cities could unilaterally block annexation by a town. The Court of Appeals determined that the Town of Bargersville’s annexation did not satisfy this standard because the sewer service agreements on which it was partly based did not demonstrate that the landowners consented. The General Assembly has stated a public policy in favor of annexation when a town provides sewer service to property. The sewer service agreements carried out this policy by not only waiving the right to remonstrate, but surrendering *any* objection to annexation and obligating landowners to sign “consents” necessary to carry out the agreements. The landowners have not disputed that they consented. By rejecting Bargersville’s annexation, the Court of Appeals determined a question of first impression that affects towns across the state that have settled expectations that they can annex property based on similar sewer service agreements.

The issue for transfer is whether a landowner consents to annexation when it agrees to receive sewer service from a town and in exchange waives the right to remonstrate, surrenders all objections to annexation, and agrees to sign any “consents” required by the town.

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## BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

The General Assembly modified Indiana annexation law in 2005 to allow towns to annex property within three miles of a city where 51 percent or more of the landowners consent to that annexation. Bargersville initiated an annexation in 2008 that included property within three miles of Greenwood. After twice amending its annexation ordinance to remove landowners who did not want to be annexed and after conducting its public hearing, Bargersville adopted its annexation ordinance on October 15, 2008. App. 514-15, 1081.

Greenwood has not consented to Bargersville's annexation. App. 657. Greenwood subsequently initiated its own annexation that sought to take for itself some of the same territory. Greenwood also brought suit against Bargersville claiming that the landowners had not consented to Bargersville's annexation and that Greenwood had the exclusive right to the territory.

The parties stipulated that more than 51 percent of the current landowners in the territory signed one of three different documents that Bargersville understood to indicate the landowners' consent. App. 657-59.<sup>1</sup> These contracts included sewer service agreements with landowners who connected to Bargersville's sewers ("Sewer Service Agreements"). App. 515, 813-18.

The Sewer Service Agreements include a term called an "Annexation Waiver." App. 814. The Annexation Waivers state that each of the landowners:

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<sup>1</sup> Many of these documents are recorded and bind subsequent owners. Including these additional landowners, the percentage of consents rises to 90 percent. App. 657-59.

covenants and agrees . . . that no objection to any annexation of the [property] or any part thereof by the Town shall be made, that no remonstrance shall be filed, nor shall any appeal from any judgment approving such annexation be taken.

*Id.*

The Sewer Service Agreements also provide that landowners must “execute and deliver any and all consents . . . as may be reasonably required to carry out the provisions of this Agreement.” App. 821.

No landowners remonstrated, testified on behalf of Greenwood, joined its lawsuit or otherwise disputed that they had given consent through the sewer service agreements or otherwise. App. 515.<sup>2</sup> Instead, a landowner who was a party to a Sewer Service Agreement intervened to support the annexation and another provided a letter stating that he consented to annexation through his Sewer Service Agreements. App. 400, 520.

Bargersville serves all of the residential customers in the Annexation Territory. App. 540, 1085-1101, 1608. Greenwood’s annexation would take more than 300 parcels that are connected to Bargersville’s sewers. *Id.*

The parties cross-moved for summary judgment. Greenwood argued that none of the various documents landowners have signed were adequate to reflect landowner consent. Special Judge Milligan entered summary judgment in

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<sup>2</sup> The owners of only four parcels in the Annexation Territory expressed concern about the annexation at the public hearing on the annexation. App. 515.

Bargersville's favor by determining that the Sewer Service Agreements and other documents showed that the landowners consented to the annexation. App. 23.<sup>3</sup>

Greenwood appealed and the Court of Appeals reversed in an opinion ("Opinion") focusing only on the Sewer Service Agreements. The Opinion held that they did not reflect consent by the landowners and, without those agreements, Bargersville did not have written consent from more than 51 percent of the landowners in the annexation territory.

### ARGUMENT

Despite the absence of landowner objections to the annexation, the Opinion determined that Bargersville did not have the needed consent. This conclusion rests on the Opinion's view that landowners have three choices in regard to an annexation: consent, opposition, or "apathy." Opinion 18. The Opinion placed the burden on Bargersville to demonstrate that a landowner passed the tipping point from "apathy" to consent. Without offering guidance as to how much indicia of consent is needed, the Opinion found as a matter of law that this tipping point was not reached under Bargersville's Sewer Service Agreements.

All agree this is a case of first impression. The Opinion itself said as much, Opinion at 16, and the trial court explained that the issues before it were "of first impression in Indiana." App. 12. Greenwood itself believes the case raises "unique questions of first impression." Greenwood Br. 1.

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<sup>3</sup> The trial court also granted summary judgment on Bargersville's counterclaim challenging a sewer infrastructure project Greenwood initiated that encroached on sewer infrastructure Bargersville already had in place. App. 33.



The Opinion's analysis conflicts with both the statutory framework for extending sewer service outside a town's boundaries and the nature of the consent actually given by landowners throughout Indiana under that framework. It conflicts with the statutory framework because it upsets settled expectations of Indiana towns, which could not have extended services without a promise that they could later annex the property. It conflicts with the consent given by the landowners because they have surrendered not just the right to remonstrate, but any possible objection to annexation, including their right to withhold consent. The Opinion also provides no guidance for towns to determine what records they need to create in order to stave off inevitable challenges from cities like Greenwood. Because these are novel issues with statewide impact, the Court should grant transfer and reverse the Opinion.

**I. The Opinion Conflicts With The Statutory System For The Extraterritorial Extension Of Sewer Service And The General Assembly's Stated Policy Allowing Towns To Annex Those They Serve.**

Indiana law allows municipalities to extend sewer service outside of their territorial jurisdiction to ensure that residents in rural areas have access to those services. IC § 36-9-22-2(c). In exchange, the General Assembly *requires* landowners to surrender their right to remonstrate against annexation. *Id.* A remonstrance is a statutory protest against annexation that is "the exclusive manner for landowners to obtain relief from annexation proceedings." *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind. Ct. App. 1991). The General

Assembly therefore requires landowners to surrender their ability to stop annexation in exchange for access to sewer service.

Following the General Assembly's instructions, Bargersville and many towns throughout the state entered into sewer service agreements that not only waive the right to remonstrate, but surrender any other opposition or objection to annexation.

In 2005, the General Assembly modified the Consent Statute in line with these interests so that a town may now annex property even if a nearby city objects to it. IC § 36-4-3-9. The town's annexation now can go forward so long as 51 percent of the landowners consent to that annexation. *Id.*

Statutes should be read together and in their context. *Schafer v. Sellersburg Town Council*, 714 N.E.2d 212, 218 (Ind. Ct. App. 1999). The Consent Statute works hand-in-hand with the existing sewer service statutes, as the Consent Statute amounts to a further protection for towns like Bargersville that have engaged in the expensive task of extending sewer service to non-residents. The result of those sewer extensions is an expectation that the town can later annex the property. The Consent Statute carries out this expectation by preventing cities like Greenwood from unilaterally stopping a town's annexation of the territory it serves and that has been developed through the town's resources. This statutory system makes the application of the Consent Statute straightforward. If remonstrance is a landowner's exclusive remedy for blocking annexation, and if the General Assembly has required that landowners waive that right in return for valuable municipal

services, landowners naturally consent to annexation when they agree to surrender the right to remonstrate in return for service.

The Opinion moved away from this statutory system. It held that agreements with remonstrance waivers required by IC § 36-9-22-2(c) are insufficient under the Consent Statute, even when the contract goes on to surrender any *other* “objection” to annexation and require landowners to sign “consents” necessary to effect annexation. Under the Opinion, none of this was enough.

The cornerstone of the Opinion is its conclusion that a landowner might be apathetic about a town’s annexation. In the Opinion’s view, a landowner exercises her right to “apathy” even where she receives sewer service from the town and executed an agreement that surrendered all opposition to annexation, including by giving the statutorily required waiver of the right to remonstrate. Far from apathy, the landowners affirmatively paved the way for annexation by surrendering these rights. *Jewell v. City of Bardstown*, 260 S.W.3d 348, 350 (Ky. Ct. App. 2008) (“[B]y purchasing land subject to annexation-consent covenants, the land owner consented to annexation and was estopped from subsequent revocation of that consent.”).

The effect of the Opinion is to nullify the responsibilities the landowners have to Bargsville to not oppose an annexation. Despite their promise not to do so, landowners can now object to – and effectively stop – an annexation by simply withholding their consent.

Moreover, Greenwood’s overlapping annexation would enable Greenwood to capture municipal revenues from an area that was developed because of

Bargersville's services. Bargersville extended services based on the promise that landowners would not obstruct a future annexation. The Opinion allows cities to poach territory developed by a town under the guise of landowner "apathy" even where landowners have taken affirmative steps to allow annexation by entering into the Sewer Service Agreements. This anomaly discourages towns throughout the state from extending services to those who need them, the opposite of what the General Assembly intended.<sup>4</sup>

The Opinion expressly refused to consider the public policy embedded in the General Assembly's statutory framework for extending sewer service. Opinion 16. The Opinion instead instructs towns to enter into interlocal agreements with the cities. This argument would place Bargersville at the mercy of Greenwood just like before the 2005 statutory amendment to the Consent Statute. Nothing suggests that Greenwood would enter into an agreement that would protect Bargersville's interest in territory Greenwood wants to annex. If interlocal agreements are towns' sole recourse, towns have lost the Consent Statute's protection and landowners will lose the benefits of sewer service.

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<sup>4</sup> The Opinion immediately affects the owners of the 739 parcels whose interests may be permanently impaired by the Opinion, including the possibility that they will lose access to sewer service. The Opinion also threatens more litigation. Bargersville has already initiated an annexation of those portions of its 2008 annexation that were not included in Greenwood's second-in-time annexation. Greenwood appears intent on seeking its own annexation of that property, setting the stage for another dispute.

## II. The Opinion Should Have Read The Consent Requirement In Harmony With The Sewer Service Statutes.

This Court's tools of statutory construction require the Consent Statute to be read in harmony with the statutes governing the extension of sewer services. *Saintignon v. State*, 749 N.E.2d 1134 (Ind. 2001). The General Assembly expressly required towns to obtain waivers of the right to remonstrate as a precondition to extending sewer service. The General Assembly expected that towns would be able to annex the territory they served. The sewer statutes removed the roadblock of remonstrances. The 2005 modification of the Consent Statute removed a second roadblock by taking away cities' unilateral right to stop an annexation.

The Opinion says these agreements allow the landowners to be "apathetic" even though they surrender the landowner's right to remonstrate and any other objection to annexation. A remonstrance is the sole means landowners have to contest an annexation. *Deaton*, 582 N.E.2d at 885. By waiving the right to remonstrate, the Sewer Service Agreements take away the landowners' means of *not* consenting. The landowners' promise not to remonstrate took away their option of sitting on the fence and placed them squarely in favor of annexation.

Moreover, the Opinion failed to acknowledge that sewer services agreements can contain an infinite variety of terms. Towns across Indiana have done what the General Assembly wished and entered into sewer service agreements with landowners. There is no statutory form these agreements must satisfy. The Consent Statute reflects this reality by not mandating consent by any one means or with any particular magic words. The General Assembly's use of the term

“consent” captures a broad array of existing contracts between towns and the landowners. It does not mean that the General Assembly disenfranchised landowners who had already given consent under their statutorily required remonstrance waivers. Conversely, the Consent Statute could not simply refer to the waiver of remonstrances under IC § 36-9-22-2 because annexation could arise in circumstances where landowners consented by means other than a remonstrance waiver. The General Assembly would not want to prevent annexation in those contexts by only allowing annexation through remonstrance waivers. To reflect the variety of contracts in existence, the General Assembly used the broadest possible term (“consent”) and did not limit that consent to remonstrance waivers. In other words, remonstrance waivers are a *subset* of consent, not something different from it.

Bargersville’s sewer services agreements typify the variety of terms that agreements can contain that transcend the right to remonstrate. Even if a waiver of remonstrances alone could allow landowners to be apathetic, the Opinion erred in determining that the Sewer Service Agreements did not take additional steps necessary to consent to annexation. Missing from the Opinion is any description of what landowners must do to effectuate their consent. Whatever standard a landowner must meet, the Sewer Service Agreements satisfy it.

The Sewer Service Agreements contain a provision styled as an “Annexation Waiver.” App. 814. The Annexation Waiver surrenders *all* of the landowners’ rights as to Bargersville’s ability to annex their property. The landowners promise

that they will make “no objection to any annexation.” *Id.* This promise removes all rights to object to annexation, which would include stopping an annexation by withholding consent. This waiver of objections and the giving of consent are opposite sides of the same coin: When a person does not object to an act, she consents to it. *Stratton v. Jarvis*, 177 N.E.2d 42, 43 (Ind. Ct. App. 1961) (“non-action is tantamount to their consent that this appeal should be dismissed.”).

The Opinion’s characterization of the Sewer Service Agreements as some sort of passive assent or apathy misunderstands the agreements. As Judge Milligan concluded, the common meaning of consent includes the surrender of objections: “Even more interesting are the antonyms, words with an opposite meaning to another word, to consent. Roget’s 21st Century Thesaurus lists objection and protest as antonyms of consent.” App. 29. Because the Annexation Waiver surrendered the right to “object,” Judge Milligan correctly determined the waivers of objections “were the equivalent of consenting to Bargersville’s annexation.” App. 29-30.<sup>5</sup>

The Annexation Waiver would be meaningless if the landowners could break their promise and stop an annexation through apathy. The provision is intended to preclude *any* means landowners have to stop an annexation, including the

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<sup>5</sup> The Opinion took issue with the trial court consulting a thesaurus and its reliance on antonyms of “consent.” Opinion 17. Since the key question is what is consent, the trial court naturally looked at what was *not* consent, an approach other courts have followed. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *United States v. Carter*, 511 F.3d 1264 (10th Cir. 2008); *Schroyer v. Frankel*, 197 F.3d 1170 (6th Cir. 1999); *United States v. GE*, 460 F. Supp. 2d 395, 404 (N.D.N.Y. 2006); *Jones v. Schweiker*, 551 F. Supp. 205 (D. Md. 1982).

withholding of consent. The Annexation Waiver would give Bargersville nothing if the landowners could still defeat annexation by simply withholding consent.

Greenwood purports to stand in the landowners shoes and object for them by claiming the Sewer Service Agreements do not consent to annexation. As discussed in Section IV *infra*, Greenwood does not have standing as a stranger to those contracts to construe them in a way that is adverse to the interests of the contracting parties. No signatory to the Sewer Service Agreements supports Greenwood's construction of them. In any event, the landowners cannot surrender their right to not be annexed yet retain the right to stop an annexation under the Consent Statute.

If there was any doubt that the landowners consented, the Sewer Service Agreements require the parties to sign additional "consents." App. 821 The landowners bound by the Sewer Service Agreements do not merely consent to annexation, but also agree to execute documents or "consents" deemed necessary to carry out Bargersville's annexation. Even under Greenwood's "magic words" approach, the contracts themselves already make clear that landowners have consented and are bound to execute further documents to carry out that consent.

Finally, the only other court to directly consider the issue agreed that surrendering the right to "object" to an annexation consented to it. In *Gregg v. Whitefish City Council*, 99 P.3d 151 (Mont. 2004), the court held that sewer service agreements containing remonstrance waivers (or, in that statute's terminology, "protest" waivers) amounted to consents to annexation. *Gregg* reviewed an



annexation under a statute that allowed a municipality to require “consent” for an annexation in return for providing sewer and water service to those living outside of the municipality. *Id.* at 157-58. The court had little difficulty finding that the city’s protest waivers were “consent” even though the landowners themselves disputed that they had consented. *Id.* at 158. *Gregg* made no distinction between the contract language surrendering the right to object to an annexation and consent to that annexation. *Id.*<sup>6</sup>

**III. Transfer Is Necessary To Provide Guidance To Towns As To Exactly What Steps They Must Take To Memorialize Landowner Consent.**

Greenwood claims – and the Opinion apparently agrees – that the statute incorporates a requirement of “affirmative” consent. Greenwood Br. 21; Opinion 10. The General Assembly did not use that word or require any type of technical language to be used in giving consent. Unlike other statutes in the Annexation Code, the Consent Statute does not even require the consent to be in writing. IC § 36-4-3-2.1(d); IC § 36-4-3-2.2(e). The Opinion appears to believe that only a document like a formal petition for annexation could satisfy the consent standard. The Annexation Code provides the details such petitions must satisfy, requiring technicalities like all-caps type and particular wording. *See* Ind. Code § 36-4-3-5(b).

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<sup>6</sup> The Opinion claims *Gregg* is not instructive “because the statute at issue in that case provides that a municipality may annex territory unless a majority of the landowners file written objections to the annexation.” Opinion 18. But Indiana annexation law operates that same way. IC § 36-4-3-7(a).

Conversely, the Consent Statute says only that “annexation by the town” can go forward so long as it is “consented to by at least fifty-one percent (51%) of the owners of land in the territory the town proposes to annex.” Ind. Code § 36-4-3-9. To require any particular form of consent would read terms into the statute and defeat the flexibility the General Assembly intended the term “consent” to have in light of the existing contracts between towns and landowners at the time it enacted the statute.

The Opinion cites dictionary definitions to assert that Bargersville did not meet its “affirmative” consent requirement. Those definitions look to “approval” or “permission” for annexation or “voluntary assent” or “concurrence in” Bargersville’s annexation. Bargersville received just this type of permission or concurrence when landowners agreed for all purposes not to oppose Bargersville when it sought to annex their property.

However, the Opinion leaves towns throughout the state in a quagmire as to their rights under the Consent Statute. Regardless of whether these towns and their customers understood that the landowners provided consent in their sewer service agreements, the Opinion compels towns to execute some additional document that the Opinion fails to specify.

The Opinion also found that the Sewer Service Agreements could not consent to annexation because there was no right to consent prior to the 2005 amendment to the Consent Statute. That holding casts doubt on the meaning of all sewer service agreements that Indiana towns have with landowners, including those that use

Greenwood's "magic words" approach. The Opinion failed to recognize that landowners had a right to consent to annexation long before the Consent Statute went into effect under numerous statutes in place before the modification of the Consent Statute. IC § 36-4-3-2.1(d); IC § 36-4-3-2.2(e); IC § 36-4-3-4(b); IC § 36-4-3-4(h); IC § 36-4-3-4.1(a). The Consent Statute did not create a new right for landowners, but instead took away the power of cities like Greenwood to block an annexation.

#### **IV. The Opinion Purports To Resolve Important Questions In Disputes Between Municipalities.**

Beyond its impact in the annexation context, the Opinion addresses the methodologies lower courts must use in disputes between municipalities. As municipalities grow due to the type of development that annexation fosters, so to does the type and number of territorial disputes between municipal entities. *Town of Dyer v. Town of St. John*, 919 N.E.2d 1196 (Ind. Ct. App. 2010); *Board of Commissioners of Hendricks County v. Town of Plainfield*, 909 N.E.2d 480 (Ind. Ct. App. 2009). The Court should grant transfer to provide guidance as to how the lower courts should resolve these internecine disputes between equal bodies of government.

First, the Opinion found that no deference was due the legislative decisionmaking made by Bargersville's town council in enacting the ordinance. Like any other legislative body, the council reviewed the facts and exercised

policymaking judgment in determining that it had received the consent of the landowners. *Bradley v. City of New Castle*, 764 N.E.2d 212, 216 (Ind. 2002).

Second, instead of deference, the Opinion placed the burden of proof on Bargersville to show that its ordinance was justified. Greenwood was the party challenging the ordinance and had the burden of proof. *Mathys v. City of Berne, Inc.*, 501 N.E.2d 1142 (Ind. Ct. App. 1986). A plaintiff can escape this burden only by bringing a remonstrance under IC 36-4-3-13. Greenwood therefore gave itself the benefit of a remonstrance without taking on its burdens.

Third, the Opinion changed the rules for standing in annexation cases. Indiana law narrows the standing rules in annexation cases, rejecting attempts to challenge annexations on grounds unrelated to a plaintiff's interests. *Bradley*, 764 N.E.2d at 216; *Prock v. Town of Danville*, 655 N.E.2d 553, 559 (Ind. Ct. App. 1995). The Consent Statute did not confer rights to cities but ended their ability to unilaterally stop an annexation. The landowners were the only parties with standing to challenge whether they had given consent.

Greenwood instead construes contracts to which it is a stranger and impermissibly claims a right to use the contracts to speak on behalf of landowners. *Harold McComb & Son, Inc. v. JPMorgan Chase Bank, NA*, 892 N.E.2d 1255, 1258 (Ind. Ct. App. 2008).

Greenwood claims it has special standing under *City of Hobart v. Town of Merrillville*, 401 N.E.2d 726 (Ind. Ct. 1980). That case is limited to giving city

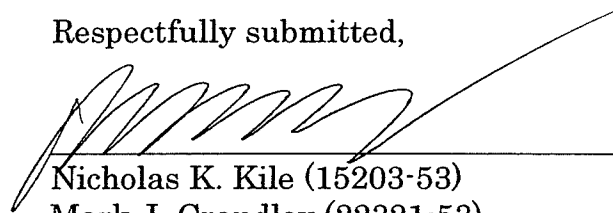
standing as to its own interest in consenting to annexation, not the right of landowners. *Id.* at 728.

Greenwood's assertion of standing defeats the General Assembly's intent in enacting the Consent Statute. The purpose of the Consent Statute was to take away the cities' unilateral right to stop the annexation. Instead, Greenwood reads the statute as expanding its right to block a town's annexation by giving it the opportunity to raise challenges that belong solely to landowners.

### CONCLUSION

Bargersville respectfully requests that the Court grant transfer and vacate the Court of Appeals' Opinion.

Respectfully submitted,



Nicholas K. Kile (15203-53)  
Mark J. Crandley (22321-53)  
Hillary Close (25104-49)  
BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204  
Telephone: (317) 236-1313  
Facsimile: (317) 231-7433

Brian J. Deppe (4492-41)  
DEPPE FREDBECK & BOLL  
Nine East Court  
Franklin, Indiana 46131

Attorneys for Appellee Town of Bargersville

**WORD COUNT CERTIFICATE**

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

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that a copy of the foregoing has been served this 16th day of August, 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:

Karl Mulvaney  
Wayne C. Turner  
Gregory A. Neibarger  
Bingham McHale LLP  
2700 Market Tower  
10 West Market Street  
Indianapolis, Indiana 46204

Shawna Koons-Davis  
City Attorney, The City of Greenwood  
225 S. Emerson Avenue, Suite B  
Greenwood, Indiana 46143

