

IN THE INDIANA SUPREME COURT

Cause No. \_\_\_\_\_

CITY OF GREENWOOD, INDIANA,  
FELSON and JANE BOWMAN, and  
ZINKAN & BARKER  
DEVELOPMENT COMPANY, LLC

Appellants-Defendants

vs.

TOWN OF BARGERSVILLE,  
INDIANA,

Appellee-Plaintiff

Indiana Court of Appeals  
Cause No. 41A05-0912-CV-684

Appeal from the Johnson County  
Superior Court

Cause No. 41D01-0809-PL-66

Hon. Thomas K. Milligan, Special Judge

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BRIEF OF AMICI CURIAE INDIANA MUNICIPAL MANAGERS ASSOCIATION,  
TOWN OF EATON, TOWN OF WHITESTOWN, TOWN OF YORKTOWN, ROGER  
BYRON PARKS, PH.D and BARGERSVILLE COMMUNITY FIRE PROTECTION  
DISTRICT IN SUPPORT OF PETITION TO TRANSFER

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PROTECTION DISTRICT AND  
ROGER BYRON PARKS, Ph.D.

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## INTEREST OF AMICI CURIAE

Amicus Curiae the Indiana Municipal Managers Association (the "IMMA") is a non-profit association whose membership includes town managers charged with managing the affairs of Indiana's towns. Eaton, Yorktown, and Whitestown are "towns" as defined by Indiana Code section 36-1-2-21. Prior to amendment Indiana Code section 36-4-3-9 allowed cities to unilaterally prevent towns from annexing property within three miles of the cities' borders. The General Assembly modified the statute in 2005 to allow landowners in the proposed annexation areas to consent to annexation regardless of the wishes of the neighboring city. Many towns (including amici) contemplate annexation of territory within three miles of cities. The opinion below clouds the annexation process and separates utility customers from a role in the governance of the municipal entity providing them utility services.

The Bargersville Community Fire Protection District ("BCFPD") is a legal entity formed under Indiana Code section 36-8-11-2, *et seq.*, providing fire protection services to a designated portion of White River Township, Johnson County, including the Town of Bargersville. The BCFPD is a taxing entity that funds services through a property tax levy on parcels within the designated territory included in the territory that Bargersville proposes to annex. BCFPD has a specific interest in public policy issues related to the relationship between boundaries, revenue and services discussed in this brief.

*Amicus Curiae* Roger Byron Parks, Ph.D., is professor Emeritus of Public and Environmental Affairs at Indiana University. For over 35 years, Dr. Parks has studied the organization and governance structures of metropolitan areas and their effects on effectiveness, efficiency, equity and responsiveness of public service delivery. His academic interest in public policy issues related to the delivery of public services and the detailed aspects of public participation in democratic government provide a unique perspective on certain public policy issues raised by this case.

### SUMMARY OF ARGUMENT

When cities expand buffer zones through annexations that push toward or touch neighboring towns, the balance between municipal boundaries, municipal revenues and municipal services may be adversely affected. This is particularly the case where such expansions and attendant city annexations impair or frustrate the contractual expectations of the parties to sewer service agreements that contain provisions waiving the service recipient's right to oppose future annexation by the town providing service. This scenario raises serious constitutional issues not considered by the Court of Appeals. Affirmance of the trial court's entry of summary judgment in favor of Bargersville avoids these constitutional issues and preserves a democratic and balanced system of local services.

## ARGUMENT

**I. The Opinion below impairs the efficacy of utility service agreements because it does not recognize the fluid nature of city “buffer zones.”**

There are 566 municipalities in Indiana.<sup>1</sup> Of Indiana’s 566 municipalities, 119 are cities and 447 are towns.<sup>2</sup> Thus, over 79% of the municipalities in Indiana are potentially affected by the construction and application of Indiana Code section 36-4-3-9(b)(2)(B) allowing towns to annex within a city buffer zone, so long as the town obtains the consent of 51% of the land owners in the annexation area. The number of consents a town must obtain therefore potentially increases each time a city annexes territory within 3 miles of a neighboring town. Consequently, the decision in this case is likely to impact nearly every town in Indiana.

Indiana Code section 36-4-3-9 enables cities to directly impact the economic growth of neighboring towns by adjusting city boundaries to within three miles of a town. By example, Crown Point can impact the growth and development of Schererville, St. John, and Merrillville. Lebanon can impact Whitestown. Muncie can impact Yorktown and Selma. Noblesville can impact Cicero and Fishers.

Amici write to enunciate and protect the interests of towns that have extended municipal sewer services using sewer service agreements and to protect

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<sup>1</sup> According to the State Board of Accounts, <http://www.in.gov/sboa/2435.htm> (last visited Aug. 16, 2010).

<sup>2</sup> *Id.*

landowners in unincorporated areas from outcomes that frustrate notions of local democracy and contractual expectations. Absent relief by this Court, sewer service agreements extending service extra-territorially by towns are placed in legal limbo.

**A. Sewer Service Agreements and Changing Political Geography.**

The decision below potentially negates or impairs thousands of municipal sewer service agreements throughout the State. This brief addresses certain negative outcomes if the opinion of the Court of Appeals stands. Critical to this inquiry, however, is recognition that the “3-mile” provision found in Indiana Code section 36-4-3-9(b) is not static but a geographic wild card that may be in constant flux. This important fact was not adequately addressed by the appellate court.

Bargersville’s annexation took place within 3 miles of Greenwood’s boundaries, thus triggering application of Indiana Code section 36-4-3-9. However, because the “3-mile” provision of section 9(b) may be *ever-changing*, the parcels affected by the “3-mile” provision shift whenever a city alters its boundaries. Consequently, each time a *city* changes its boundaries, that city may avail itself of the benefits of Indiana Code section 36-4-3-9, and there is no method for a *town* to predict the future actions of neighboring cities.

Cities can alter their boundaries and thus increase their 3-mile influence under Indiana Code section 36-4-3-9 in three ways:

1. By resorting to the annexation provisions of Indiana Code section 36-4-3;

2. By resorting to the provisions of Indiana Code section 36-1.5 and changing the boundaries of a municipality through “modernization”; or
3. By resorting to the provisions of Indiana Code section 36-4-1.5 and changing from an incorporated town into an incorporated city, thus providing the former town the benefits of Indiana Code section 36-4-3-9, and enabling that former town to intervene in the business of its municipal neighboring towns.

All 566 municipalities in Indiana have the opportunity to utilize one or more of these three statutes as a means of changing its boundaries. Accordingly, the decision of the Court of Appeals enables cities that expand boundaries to intervene in interpreting the sewer service agreements between towns and landowners, even if those sewer service agreements were signed many years prior to the city’s “new” 3-mile buffer zone. Such an outcome not only frustrates the interests of the incorporated towns, but also frustrates the democratic rights of landowners both as voters and potential elected officials to participate in the municipal government providing them services.

On the most basic level, incorporated cities can always exercise the annexation provisions of Indiana Code section 36-4-3, which alter the city’s corporate boundaries, and, consequently, alter which parcels are affected by the 3-mile provision of Indiana Code section 36-4-3-9. The decision of the Court of Appeals

regarding “consent” therefore enables a city to undertake any annexation it desires with the secondary outcome being that the city can subsequently intervene in the sewer service agreements between towns and landowners simply by annexing areas closer to the town.

Cities can also change boundaries under Indiana Code section 36-4-1.5, thereby availing the city of Indiana Code section 36-4-3-9. In Hendricks County, for example, Plainfield, Avon and Brownsburg are currently incorporated as towns, and as such are not entitled to the protections of Indiana Code section 36-4-3-9. However, if Avon utilizes Indiana Code Chapter 36-4-1.5 to become a city, the decision of the Court of Appeals provides that Avon could subsequently exert influence over the future growth of both Brownsburg and Plainfield under Indiana Code section 36-4-3-9 by challenging the “consent” language in Brownsburg’s or Plainfield’s sewer service agreements.

Cities can also change their boundaries through Indiana Code section 36-1.5-1-4, which allow a broad range of local government entities to potentially reorganize as cities, while “exercising the power to reorganize without complying with other laws”. Entities reorganized under Indiana Code Article 36-1.5 as cities would thus be afforded the benefits of Indiana Code section 36-4-3-9. By extension, the decision of the Court of Appeals potentially affords such a newly organized city the opportunity to re-interpret or effectively vitiate the terms of sewer service agreements of nearby towns. To the knowledge of the amici, the provisions of

Indiana Code Article 36-1.5 have not been adjudicated to provide any town with precedent upon which it can rely in this regard.

Indiana municipalities are currently enduring a period of revenue constraints, both statutory and economic. That municipalities are starving for revenue increases the likelihood that some municipalities may exercise unusual alternatives to capture revenue not otherwise available, thereby increasing the likelihood of these sorts of “boundary change” strategies.

This Court must not lose sight of the fact that municipal sewer service in the Greenwood buffer is provided by Bargersville, *without cost to Greenwood*. By avoiding the cost of capital sewer service, snagging increasing tax revenues through annexation (as areas develop because of available sewer service the annexing city did not pay to build) is a real temptation.

**B. Interlocal Agreements Do Not Solve Problems of Changing Political Geography.**

The Court of Appeals adopted the notion that a Greenwood/Bargersville interlocal agreement would have “protected” Bargersville’s economic interests. *City of Greenwood v. Town of Bargersville*, 950 N.E.2d 58, 71 n.19 (Ind. Ct. App. 2010). Such is not the case and underscores a central flaw in the opinion below. First, interlocal agreements cannot be compelled. *Town of Plainfield v. Town of Avon*, 757 N.E.2d 705, 712 (Ind. App. 2001). Persons in a city buffer wanting sewer service that a neighboring town is willing to provide but the city is not, will now simply do without. It is no stretch of the imagination to conclude that towns may decline to

provide necessary and desirable sewer service to persons outside the town's boundary because the town recognizes it may ultimately lose the revenue generated by additional development, prompted once sewers are installed, once a neighboring city is in a position to annex that territory.

More fundamentally problematic however is the fact that some of amici have extended sewer service into areas that were not in any city buffer when built but now are. Naturally, the service agreements extending such service contain the remonstrance waiver language required by Indiana Code section 36-9-22-2(c). This is precisely the situation faced by Whitestown, which built out sewer lines now inside the Lebanon buffer by virtue of annexations by Lebanon *after the Whitestown service was extended.*

**II. Allowing a municipality to re-interpret at its own discretion contract provisions between third parties raises serious constitutional issues.**

If allowed to stand, Greenwood or any other city will be able to void contract agreements between citizens and their nearby towns by simply changing the city boundaries. Merely by Greenwood extending its boundaries to within three (3) miles of the contracting parties, under the Court of Appeals' view, Greenwood, a non-party to the contract, can negate contract terms that are critical to the contracting parties. In fact, it permits non-party Greenwood to assert an interpretation of the sewer agreements to which neither party to the agreement accepts or believes reflects their agreement. This constitutionally suspect aspect of

the Court of Appeals' opinion should cause this Court to pause and consider the broader ramifications of such view.

The Indiana Constitution protects its citizens' expectations in contract. Ind. Const. Art. I § 24 ("No *ex post facto* law, or law impairing the obligation of contracts, shall ever be passed."). The United States Constitution also protects those contractual rights. U.S. CONST Art. I, § 10 cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts").

A change in the law embodied in a contract that substantially postpones, obstructs, or retards its enforcement or lessens its value, whether such change relates to its validity, construction, or enforcement, impairs the obligation of the contract. *City of Indianapolis v. Robison*, 186 Ind. 660, 117 N.E. 861, 862 (Ind. 1917). Article I, section 24 applies only to contracts made prior to the passage of the statute. *Chandley Enterprises, Inc. v. Evansville*, 563 N.E.2d 672, 674 (Ind. 1990). This case triggers this constitutional provision because it involves application of a 2005 statute to contracts created before enactment.

Indiana follows the constitutional avoidance canon, sometimes called constitutional doubt canon or canon of saving construction. "[W]e avoid constitutional declarations when a dispute can be resolved through non-constitutional means." *Foundations of East Chicago, Inc. v. City of East Chicago*, 927 N.E. 2d 900, 905, (Ind. 2010). "Unconstitutional intention will not be attributed to the legislature if reasonably avoidable." *Price v. State*, 622 N.E.2d 954, 963 (Ind.

1993). "If a statute can be construed to support its constitutionality, such construction must be adopted." *Burris v State*, 642 N.E.2d 961, 968 (Ind. 1994); see *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 465-466 (1989) (avoid interpretations that would render a statute unconstitutional).

Under both sets of constitutional law, a stranger to a contract cannot unilaterally insert itself into the deal and force contract provisions to be void or unenforceable. That is exactly what Greenwood is attempting to do here. By interpreting state law under the doctrine of constitutional avoidance so that Greenwood's unilateral actions do not void contract provisions of others, the constitutional issues are avoided in this case.

Although the parties did not raise constitutional issues, protecting non-party constitutional rights should be a major consideration of this Court when addressing the issues in this case. Keeping in mind non-party constitutional rights is certainly a major role for amici curiae assistance to the Court. In this case, by following the constitutional avoidance doctrine in interpreting the state annexation laws at issue, serious constitutional problems do not arise. Amici respectfully request the Court to remember and consider the constitutional concerns of citizens when addressing the statutory framework for annexation.

**III. The trial court ruling preserves a democratic and balanced system of local services; the appellate opinion below distorts that balance.**

Public policy professionals and elected officials strive to operate local government within a framework consisting of three important cornerstones that preserve local democracy. Local democracy is most functional when municipal boundaries, municipal revenues, and municipal services operate in harmony.

This basic framework addresses the complaint of “taxation without representation” that has echoed in public policy for centuries. Indiana’s statutes affirm this framework. State statutes dictate how municipal boundaries are established and adjusted; how municipal boundaries dictate the capture of certain revenues; how residents within certain boundaries are allowed to vote and run for elected office; and how municipal services must be extended equitably to persons and properties within certain boundaries. When all of the machinations of the General Assembly and all local governments throughout Indiana since the 19<sup>th</sup> century are acknowledged, the governmental framework of boundaries, revenues and services is fundamentally consistent on multiple levels. The amici seek to preserve this framework by affirming the importance of municipal services being contained within or contractually attached to municipal boundaries.

With regard to municipal services, the amici note two clear legislative actions. First, Indiana Code section 36-4-3-13 is absolute in its requirement that municipal services extend to *all* areas within municipal boundaries. Indeed, the

General Assembly amended this statute to eliminate provisions allowing differential services with regard to matters such as topography, patterns of land use, etc., which were contained in previous iterations.

Second, Indiana Code section 36-9-22-2(c) requires municipalities to obtain waivers of remonstrance in return for the extension of municipal sewer service. This is clear evidence that the General Assembly recognizes that municipalities sometimes extend municipal services extra-territorially in order to stimulate, encourage or serve economic growth; and legislative recognition that future annexation by the extending entity is not only fostered but likely. To suggest the General Assembly intended for a municipality to require a remonstrance waiver in order to extend services and also allow a different neighboring city that is not a party to the service agreement to annex that service territory defies logic.

An annexation such as pursued by Greenwood has several practical drawbacks. Because the customers of the town's municipal sewer service are placed inside of the city's boundaries, those customers are separated from participation in the town's governance. Such customers cannot vote in town elections or serve in elective or appointed office of the town, thus impeding the opportunity of those customers to shape public policy with regard to some of the municipal services they receive.

This is avoided when the fundamental framework of municipal boundaries, services and revenues is respected as the trial court's order did. Citizens can fully

participate in local government and have democratic influence over the amount of revenues they contribute and how those revenues are consumed through services. Under the opinion below, citizens will have no say in the governance of Bargersville, which provides them with sewer service. In turn, Bargersville loses to Greenwood the potential revenue which is prompted by development spurred on by Bargersville's sewer extensions.

If allowed to stand, the opinion below also produces results contrary to notions of efficient, cost-effective local government. Greenwood's proposed annexation negatively impacts the BCFPD, which not only provides fire protection to the Town of Bargersville, but also protects the area served by Bargersville's extended sewers. The BCFPD was created under Indiana Code section 36-8-11-2. It is a separate taxing entity. Ind. Code § 36-8-11-18. Although several statutes address funding issues in the event that part of a fire protection district is annexed, the relief these statutes provide may, in certain circumstances, be incomplete. By example, Indiana Code section 36-4-3-7(d) states that once the annexation takes effect "on the second January 1 that follows the date the ordinance is adopted", *id.*, the municipality is liable for a proportionate share of the bonds and notes the district may have outstanding. Ind. Code § 36-4-3-7(e). This does little if anything however, to help a district that has hired and trained firefighters and purchased equipment to serve a once expansive territory, but has already retired the debt incurred to meet its former needs.

## CONCLUSION

The decision of the trial court was correct. For the purposes of Indian Code section 36-4-3-9(b)(2)(B), a waiver of the right to oppose annexation contained in a town sewer service agreement is a form of consent to annexation by the town.

Reversing the Court of Appeals and affirming the trial court recognizes the fact that shifting city political boundaries can have undue and unanticipated consequences for towns, avoids constitutional issues regarding the impairment of contracts, and preserves a harmonious balance of boundaries, revenues and services in municipal government.

WORD COUNT CERTIFICATE

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