IN THE
INDIANA SUPREME COURT

No. _____

CITY OF GREENWOOD, INDIANA, FELSON and JANE BOWMAN, and ZINKAN & BARKER DEVELOPMENT COMPANY, LLC.,	)	Indiana Court of Appeals Cause No. 41A05-0912-CV-00684
Appellants (Plaintiffs Below),	)	Appeal from the Johnson County Superior Court
vs.	)	Lower Court Cause No. 41D01-0809-PL-00066
TOWN OF BARGERSVILLE, INDIANA,	)	
Appellee (Defendant Below).	)	The Honorable Thomas K. Milligan, Special Judge

BRIEF IN RESPONSE TO PETITION TO TRANSFER

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I.
QUESTION PRESENTED ON TRANSFER

Did the Court of Appeals correctly decide that sewer service agreements which waive the right to remonstrate against annexation are not "consents" to a town's annexation of land within three miles of a city, as contemplated by Ind. Code §36-4-3-9?

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II.
BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

Appellants, the City of Greenwood ("Greenwood"), Felson and Jane Bowman, and Zinkan & Barker Development Company, LLC ("Private Plaintiffs"), sought declaratory and injunctive relief against the Town of Bargersville ("Bargersville") to prevent Bargersville from annexing land within three miles of Greenwood's boundary without obtaining its consent or the consent of 51% of the current landowners in the proposed annexation area ("Annexation Territory"). (App. 41-52) Bargersville's counterclaim sought to enjoin Greenwood's simultaneous annexation of part of the Annexation Territory, and contended that Greenwood lacked standing to object to its proposed annexation. (App. 134-157)

Both Greenwood and Bargersville filed motions for summary judgment based upon stipulated facts. (App. 463-464, 602-647; 1130-1191) Bargersville and Greenwood agreed that the Annexation Territory was located within three miles of Greenwood's corporate boundaries and that Bargersville's annexation ordinance was governed by Ind. Code §36-4-3-9, which required the consent of Greenwood or of 51% of the landowners in the Annexation Territory. (App. 12, 657) The primary dispute was whether Bargersville proved that 51% of the landowners "consented" to the town's annexation through sewer service agreements that waived the landowners' rights to remonstrate or object to annexation. (Opinion, 14-21)

The trial court granted Bargersville's summary judgment motion and denied Greenwood's motion. It determined that Greenwood and the Private Plaintiffs had

standing to challenge Bargersville's proposed annexation, but found the remonstrance waivers in Bargersville's sewer service agreements were tantamount to consents to annexation under the I.C. §36-4-3-9 (the "Consent Statute"). The trial court concluded Bargersville had consent from more than 51% of the landowners in the Annexation Territory; Bargersville had "exclusive annexation of the disputed territory"; and "Greenwood's second-in-time annexation was void as a matter of law." (App. 37, 38)

Greenwood and the Private Plaintiffs appealed this decision. The Court of Appeals issued a unanimous decision which reversed the trial court's grant of summary judgment to Bargersville, and remanded the case for further proceedings. (Opinion, 22)

The Court of Appeals held that Greenwood had standing to contest Bargersville's annexation of land within three miles of Greenwood's boundaries under I.C. §36-4-3-9. The Court reasoned that Greenwood's statutory right to withhold its consent to annexation gave it a significant protectable interest in the three-mile buffer zone, consistent with *City of Hobart v. Town of Merrillville*, 401 N.E.2d 726 (Ind.Ct.App. 1980). (Opinion, 11-12) The Court further recognized that Greenwood was not seeking to enforce Bargersville's sewer service agreements, but to obtain a judicial interpretation of the efficacy of those agreements as "consents" to Bargersville's attempted annexation.

The Court of Appeals then held that waiving the right to object to, remonstrate against, or appeal an annexation was not the same as consenting to an annexation under the Consent Statute. (Opinion, 17) The Court recognized that the Consent Statute gave a landowner the choice of signing a consent to annexation, remonstrating against annexation, or "doing nothing", so "doing nothing" was not the same as "consenting."

(Opinion, 18) The Court further recognized that Bargersville's sewer service agreements only waived the landowners' right to object, remonstrate, or appeal against an annexation, and that most of those agreements were signed before 2005, when the Consent Statute first gave the landowners the right to consent to this type of annexation. Because the remonstrance waivers in Bargersville's sewer service agreements were not "consents" to annexation, the Court of Appeals held that Bargersville had not met the statutory 51% threshold and thus could not annex land within three miles of Greenwood's boundaries.[1]

III.
ARGUMENT

A. BARGERSVILLE DID NOT OBTAIN CONSENT OF 51% OF THE CURRENT LANDOWNERS IN THE ANNEXATION TERRITORY

1. The Consent Statute

I.C. §36-4-3-9(b), as amended in 2005, states:

> **(b) A town must obtain the consent of the legislative body of a second or third class city before annexing territory within three (3) miles of the corporate boundaries of the city unless:**
>
> (1) the town that proposes to annex the territory is located in a different county than the city; or
>
> (2) the annexation by the town is:
>
> (A) an annexation under section 5 or 5.1 of this chapter; or

[1] As the Court of Appeals reversed the trial court on this basis, it did not address the other arguments Greenwood raised on appeal. (See, Appellant's Brief, 38-44) Greenwood will not reiterate those arguments given the word limit imposed by Appellate Rule 44(E), but they independently support the reversal of the trial court's judgment.

> **(B) consented to by at least fifty-one percent (51%) of the owners of land in the territory the town proposes to annex.**
>
> (c) In determining the total number of landowners of the annexed territory and whether signers of a consent under subsection (b)(2)(B) are landowners, the names appearing on the tax duplicate for that territory constitute prima facie evidence of ownership. Only one (1) person having an interest in each single property, as evidenced by the tax duplicate, is considered a landowner for purposes of this section.

(Emphasis added.)

Under I.C. §36-4-3-9(b), the city's interest in its 3-mile "buffer zone" can be extinguished only by its own consent or by the consent of a majority of current landowners. Obtaining a property owner's consent to a town's proposed annexation is an affirmative step that protects the city's interest in this protected zone.

By contrast, a remonstrance against a standard involuntary annexation fails when 36% or more of the landowners do not sign a remonstrance petition. I.C. §36-4-3-11(a). Thus, the Consent Statute establishes a higher threshold for a town to annex land within three miles of a city than in typical involuntary annexation proceedings.

Before 2005, I.C. §36-4-3-9 required the City's consent for all proposed annexations of land within three miles of the City's boundaries. In 2005, the Legislature created an alternative: the town could instead obtain the consent of the majority of landowners within the proposed annexation area. When the Legislature vested the landowners with that right, it decided that a simple majority could prevail over the City's decision to reject a town's annexation proposal.

Bargersville suggests it can initiate annexation proceedings for land within the 3-mile buffer zone and, if 65% of the landowners do not remonstrate, enact the proposal

without obtaining the landowners' consent or the City's consent. Bargersville's approach would convert this unique type of annexation into a standard annexation and thus fail to give the Consent Statute any meaning. *See, State v. Universal Outdoor, Inc.*, 880 N.E.2d 1188, 1191 (Ind. 2008). Bargersville's interpretation also violates the principle that courts must "presume the legislature intended the language used in the statute to be applied logically, consistent with the statute's underlying policy and goals, and not in a manner that would bring about an unjust or absurd result." *Cooper Indus. LLC v. City of South Bend*, 899 N.E.2d 1274, 1283 (Ind. 2009).

Although *Town of Porter v. Bethlehem Steel Corp.*, 451 N.E.2d 69, 72 (Ind.Ct.App. 1983) interpreted the former version of I.C. §36-4-3-9 which gave the city an absolute veto power over a town's proposed annexation, its description of the Consent Statute is still accurate: it is "a mandatory provision which required the Town to obtain consent from the City of Portage when it sought to annex territory located within three miles of the third-class city. In effect, the Consent Statute is an additional factor . . . to be met by the Town *before* annexation." *Porter*, 451 N.E.2d at 71. (Emphasis added.)

When the legislature used the word "consent" in I.C. §36-4-3-9, it understood the meaning of that word in the context of other annexation statutes. The legislature knew that the right to remonstrate or object could be waived, but I.C. §36-9-22-2 did not encompass "consent." The legislature also understood "consent" required an affirmative approval of annexation, because this approval was part of the pre-2005 version of the Consent Statute, which required the city's affirmative consent to a town's annexation of property within 3 miles of its borders. When the legislature amended the statute in 2005,

it used the word "consent" rather than "waiver" to describe what the landowners must do to approve the annexation, and thereby divest the city of its buffer zone against its wishes. The legislature's choice of words must be given effect. I.C. §36-4-3-11.5. "Specific words in a statute ought not to be enlarged when it is apparent that they were not intended to be given such construction." *Lutheran Hospital of Ft. Wayne, Inc. v. Department of Public Welfare*, 397 N.E.2d 638, 642-43 (Ind.Ct.App. 1979).

2. Waiving the Right to Remonstrate is Not Consent

Bargersville's sewer service agreements provide "that no objection to any annexation ... shall be made ... no remonstrance shall be filed, nor shall any appeal from any judgment approving such annexation be taken." (App. 814) Nothing in this document requires the landowner to grant consent to this form of annexation. "A contract which excludes some remedy given by law should be so definite and positive in its terms as to show the clear intention of the parties to do so." *Simon Prop. Group, L.P. v. Mich. Sporting Goods Distribs., Inc.*, 837 N.E.2d 1058, 1074 (Ind.Ct.App. 2005), *trans. denied*, citing *Strauss v. Yeager*, 48 Ind. App. 448, 93 N.E. 877, 882 (1911) (same). By withholding consent, a landowner has not "made any objection," "filed a remonstrance" nor "taken any appeal."

Consent is not achieved under the Consent Statute by waiving the landowner's right to object to annexation. The verb "object" is defined by the Random House Dictionary (2010) to mean "to offer a reason or argument in opposition." *See also,* Merriam-Webster Dictionary of Law (1996) ("to state in opposition or as an objection"). The landowners who signed these agreements promised not to "offer a reason or

argument *in opposition*" to annexation. This concept cannot be stretched beyond its plain and ordinary meaning by obliging the landowners to take further, affirmative steps *in support of* annexation (*i.e.,* consent). Even if the word "object" is ambiguous, that ambiguity must be construed against Bargersville as its drafter. *MPACT Constr. Group, LLC v. Superior Concrete Constructors, Inc.*, 802 N.E.2d 901, 910 (Ind. 2004).

Consent is defined as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent." Black's Law Dictionary (8th ed. 2004). Stated differently, consent is the "[c]apable, deliberate, and voluntary assent or agreement to, or concurrence in, some act or purpose . . . ." Webster's Revised Unabridged Dictionary (1996). Consent involves affirmative action, particularly in the manner in which I.C. §36-4-3-9(b) uses the term.

The current owners of 44 parcels in the Annexation Territory signed documents titled "Petition For And Consent To Annexation Into The Town of Bargersville" (the "Petitions"). (Stip. ¶¶1, 23, App. 654, 657). In each Petition, the landowner expressly "*petitions for and consents to the annexation* into the Town of Bargersville of the Annexation Area . . . ." (Stip., Ex. A, App. 662-682) (emphasis added). This is the type of "[c]apable, deliberate, and voluntary assent or agreement to, or concurrence" that constitutes consent to annexation under the statute.

Critically, the landowner's right to consent to annexation under the Consent Statute did **not** exist when most of Bargersville's sewer service agreements were executed. (App. 662-682) "Unless the contract provides otherwise, all applicable law in force at the time the agreement is made impliedly forms a part of the agreement ... but

laws enacted subsequent to the execution of the agreement are not deemed part of the agreement unless the contractual language clearly indicates such to have been the intention of the parties; the parties are presumed to have had the law in mind." *Ethyl Corp. v. Forcum-Lannom Associates, Inc.*, 433 N.E.2d 1214, 1220 (Ind.Ct.App. 1982) (emphasis added); *Mouch v. Indiana Rolling Mill Co.*, 93 Ind. App. 540, 151 N.E. 137 (1926).[2] Before 2005, landowners had no right to consent to a town's annexation of land within three miles of a City, and thereby override the City's refusal. Thus, it could not have been the purpose or intent of these sewer service agreements to waive a right that did not then exist.

Finally, Bargersville's argument violates an essential tenet of contract interpretation, *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). *See, e.g., Metropolitan Dev. Com'n. of Marion County v. Villages, Inc.*, 464 N.E.2d 367, 369 (Ind.Ct.App. 1984), *cert. denied.* Under this axiom, when "certain persons or things are specified in a ... contract ... an intention to exclude all others from its operation may be inferred." *Id.*, fn 2. Thus, "if a statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded." (*citing* Black's Law Dictionary (5th Ed.) As Bargersville's sewer service agreements explicitly waived three rights, other landowner rights pertaining to annexation are necessarily retained.

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[2] Besides being untimely, *Amici's* newly raised constitutional arguments fail for this reason. (Amici Brief, 11)

3. The Sewer Service Agreements Do Not Contemplate the Delivery of Any Written Consent for Annexation

Bargersville also claims that the language "execute and deliver any and all consents ... as may be reasonably required to carry out the provisions of this Agreement and to fully accomplish its purposes and intents" in its sewer service agreements somehow "gave landowners a duty to sign" consents to any action if Bargersville "deemed that necessary." This language does not enlarge the remonstrance waiver into a consent.

First, if the waiver provisions in these agreements constituted "consent," then requiring the delivery of a written "consent" to accomplish the agreement's "purpose" would not be necessary. (App. 821)

Second, this language is contained only in the agreements signed by the developers, not in agreements signed by the landowners. (App. 814-1031) The developers' agreements did not contemplate the delivery of *anything* by the landowners – only by the developers. (App. 821, 818)

This issue is not simply about Bargersville's failure to include the "right" kind of language in its agreements. A town cannot include any provision in its sewer service agreements that goes beyond waiving the statutory right to remonstrate. I.C. §36-9-22-2. Bargersville's sewer service agreements can waive only the right to remonstrate, not the right to consent under the Consent Statute.

4. The Opinion's Interpretation of the Consent Statute Does Not Conflict With the Statutory System for Sewer Service

I.C. §36-9-22-2 authorizes a municipality to obtain a waiver only of the right to remonstrate for the provision of sewer service. This statutory language must "be deemed to have been intentionally used." *In re Annexation Ordinance No. X01-74*, 383 N.E.2d at 647. While this statute uses the term "waive . . . rights to remonstrate" specifically, the Consent Statute does not. If the legislature had intended to add "consent" to the rights waivable under I.C. §36-9-22-2, it could have done so in 2005 when it amended the Consent Statute. "The mode in which a municipality can seek modification of its territorial boundaries is exclusively established by the State Legislature." *In re Annexation Proposed by Annexation Ordinance No. X01-74*, 174 Ind. App. 645, 647, 383 N.E.2d 481, 483 (Ind.Ct.App. 1978); 62 C.J.S. Municipal Corp., §50.

There is no conflict between these two statutes. The legislature made a policy choice to protect the three-mile buffer zone from involuntary annexation without landowner or city consent, and that consent is not subject to being "traded" for sewer service through a waiver under I.C. §36-9-22-2. While Bargersville and *Amici* challenge this policy as unsound, that complaint must be directed to the legislature, not this Court.

5. Bargersville Understood that Actual Landowner Consents Were Required

Bargersville's protests about the Court of Appeals' failure to describe in greater detail the type of consent needed is belied by Bargersville's own actions. Bargersville drafted and mailed petitions to landowners asking for their consent to annexation, and received 44 such signed consents. Bargersville also revised some of its sewer service

agreements in 2007 to add a provision "consenting" to all future annexations (App. 684-685) Bargersville's actions demonstrate an awareness of the proper use of these terms, and an ability to draft appropriate language without further instruction from this Court.[3]

6. The Court of Appeals Correctly Rejected Montana Annexation Law

The Court of Appeals correctly decided that *Gregg v. Whitefish City Council*, 99 P.3d 151 (Mont. 2004) is not persuasive authority for deciding what is "consent" under Indiana's Consent Statute. In Montana, a municipality is authorized to annex territory *unless* a majority of landowners file written *objections* to the annexation. Mont. Code Ann. §7-2-4710. This is the reverse of Indiana's annexation law. Montana's statute puts the onus on the landowner to object to annexation and, absent any objection, deems that the landowner has consented. *See Gregg*, 99 P.3d at 161 ("Pursuant to [Montana Code] §7-2-4710 . . . a property owner's consent to annexation is implied if they fail to file a written protest.").[4] By contrast, I.C. §36-4-3-9 provides that a town *may not annex property within three miles of city unless* the city or 51% of the current landowners affirmatively *consent to* the town's annexation proposal.

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[3] Bargersville's use of a "prospective" consent is still ineffective under under *Doan v. City of Fort Wayne*, 253 Ind. 131, 252 N.E.2d 415, 418-419 (1969). (Appellant's Brief, 38-42)

[4] Montana's statutes also provide that a landowner consents to annexation when he or she accepts service. Mont. Code Ann. §7-13-4314 (titled "Annexation As Requirement For Receiving Service"). Indiana has no such statute. Instead, I.C. §36-4-3-9 requires that specific consents to this unique annexation be obtained, not that they are implied from the provision of sewer service.

Unlike Montana's statute, an Indiana landowner has no duty to object. Instead, an Indiana town has the duty to obtain written consent from the city or 51% of current landowners to proceed with this particular species of annexation. *See, Town of Porter*, 451 N.E.2d at 72, citing *City of Hobart*, 401 N.E. 2d at 730.

Bargersville also contends that *Gregg* is analogous because Montana's protest statute is similar to Indiana's remonstrance statute, but an annexation under the Consent Statute is not a remonstrance proceeding. Montana recognizes only written objections or "protests" to annexation; it does not have a separate Consent Statute. Mont. Code Ann. §7-2-4710. This is the opposite of Indiana's Consent Statute, where annexation can proceed only if the majority of landowners consent first. This statutory burden is not imposed in Montana, thus *Gregg* is inapplicable.

B. GREENWOOD AND PRIVATE PLAINTIFFS HAVE STANDING

Courts generally recognize that each municipality has standing to bring a declaratory judgment action to resolve competing annexation resolutions. *See* 56 AM. JUR. 2d, Municipal Corporations, §66; *Town of Spencer v. Town of East Spencer*, 522 S.E.2d 297, 299-300 (N.C. App. 1999) (declaratory judgment action was the appropriate vehicle for determining which municipality had priority in annexing overlapping territory). Likewise, cities with competing annexation claims to a territory may challenge such annexations in court. *See Snohomish County v. Hinds*, 810 P.2d 84 (Wash.Ct.App. 1991); *City of Wataug v. City of Johnson City*, 589 S.W.2d 901 (Tenn. 1979); *State ex rel City of Jackson v. Grimm*, 555 S.W.2d 643 (Mo.Ct.App. 1977); *see also* supporting cases

in 17 A.L.R. 5th 195, RIGHT OF ONE GOVERNMENTAL SUBDIVISION TO CHALLENGE ANNEXATION PROCEEDINGS BY ANOTHER SUCH SUBDIVISION, §16. These authorities establish that both Greenwood and Bargersville have standing to challenge each other's competing annexation proposals and to have the Court declare their respective rights.

Furthermore, Greenwood has the specific right to challenge Bargersville's annexation under the Consent Statute. *City of Hobart*, 401 N.E.2d 726, recognizes a municipality has the unabridged authority to protect its statutory right to withhold consent for any attempted annexation within three miles of its municipal boundary. *Hobart* based its decision on three grounds – Indiana's Declaratory Judgment Act, I.C. §34-14-1-13 (formerly §34-4-10-13); the fact there was a true controversy between two adverse parties; and because the decision had a material "effect upon the rights, status or other legal relationships" between the two municipalities. *Id.*

All three *Hobart* factors are satisfied here. As a municipality, Greenwood may bring a claim under the Act. Likewise, this is an actual controversy between two adverse municipalities, both of which could annex this unincorporated property under certain circumstances. Furthermore, the dispute between Greenwood and Bargersville directly pertains to the legal relationship between these two municipal entities, and each seeks to annex portions of the same territory. *Hobart* recognizes that the Consent Statute gives a City a protectable interest in the three-mile zone surrounding its borders. Greenwood's statutory right to withhold consent would be meaningless if it could not challenge a town's illegal attempt to bypass its refusal to consent.

Greenwood also satisfies "traditional" standing requirements because it has a very real stake in this controversy. *Deaton v. City of Greenwood*, 582 N.E.2d 882, 885 (Ind.Ct.App. 1991). Bargersville relies on these same principles to challenge Greenwood's annexation proposal. If Bargersville has standing, Greenwood has the same right, if not a greater one, to challenge Bargersville's ordinance, given its statutorily protected interest in its 3-mile buffer zone.[5]

C. BARGERSVILLE'S STATUTORY BURDEN TO DEMONSTRATE CONSENT IS A QUESTION OF LAW

Bargersville contends the courts must defer to its Council's "legislative finding" that 51% of the landowners consented to annexation. Greenwood does not challenge Bargersville's procedure in approving the annexation ordinance, or its analysis of the benefits of annexation. Greenwood challenges Bargersville's **statutory authority** to commence annexation under the Consent Statute, which is a question firmly entrusted to the judiciary. *Bradley v. City of New Castle*, 764 N.E.2d 212, 217 (Ind. 2002) (Judicial review limited to the statutory requirements for annexation under I.C. §36-4-3-13). Bargersville's Council has no factual issue to resolve because the question of landowner consent is a question of law based upon stipulated facts. (App. 654-660)

Bargersville had the burden of proving consent because it carried the burden of proof on its claim for injunction and declaratory judgment, and the burden to show

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[5] Likewise, Private Plaintiffs have standing to challenge Bargersville's attempted annexation as landowners in the Greenwood Annexation Territory. (Reply Brief, 20-25)

compliance with the requirements of the annexation statute when its ordinance was challenged. *See, Bradley*, 764 N.E.2d at 216; (App. 150-157) The Opinion correctly decided this question of statutory interpretation *de novo*.

D. PUBLIC POLICY FAVORS GREENWOOD'S POSITION

Finally, Bargersville, through its *Amici*, Indiana Municipal Managers Association, *et al.* ("*Amici*") attacks Greenwood's position on public policy grounds. These contentions all fail, however, as Greenwood's position supports the very policies the legislature protected by enacting the Consent Statute.

The *Amici* note that the essential purpose of Indiana annexation law is to allow a municipality to expand its boundaries in a planned and orderly fashion and ensure its residents receive services in a uniform manner. The Consent Statute secures this purpose by giving land immediately surrounding a City special protection from annexation by towns, presumably because the City may wish to annex it at a future date. That purpose is protected only by requiring consent as the Consent Statute provides.

The *Amici* also contend that the Opinion separates the provision of municipal services from the collection of revenue. Not true. The sewer service agreements are contracts that run with the land, and require the developer and subsequent owners to pay force main connection charges, sewer availability fees and other charges to the town for its promise to reserve sewer capacity.

To the extent Bargersville relied on additional property tax revenue from the Annexed Territory to pay for its sewer capacity, it should have entered into an interlocal

agreement with Greenwood to protect that interest. Bargersville's decision to offer sewer service to the landowners within three miles of Greenwood's boundaries, without obtaining Greenwood's prior consent, either through the Consent Statute or an interlocal agreement, was taken at its own risk. Bargersville's "settled expectations" of extending municipal services to landowners within the 3-mile zone in return for revenue was at best an unreasonable gamble. This is particularly true here, because Bargersville's sewer service agreements were signed when the only means of consent was through the City.

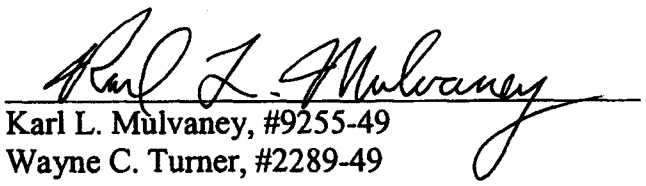
The *Amici* contend that if "consent" cannot be found in sewer service agreements, no town would willingly provide municipal services to unincorporated territories. This only applies to land within three miles of a City, and for towns that act unilaterally, without a city's consent. Towns may still provide municipal service to these residents if 1) they negotiate an interlocal agreement; 2) they obtain the City's consent to annexation; or 3) the majority of landowners consent to annexation to gain municipal services.[6] This approach supports the Consent Statute's policy by giving the current landowners a choice in which municipality to join, and the ability to assert pressure on a neighboring City in their demand for services. By applying this statute as it was written, the Court of Appeals has protected these policies and the Statute's legislative intent.

[6] Bargersville also had the option to become a city if it wished to take advantage of the Consent Statute.

VI.
CONCLUSION

Greenwood respectfully requests that transfer be denied.

Respectfully submitted,



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WORD COUNT CERTIFICATE

The undersigned hereby certifies that the foregoing Brief in Response to Petition to Transfer complies with Indiana Appellate Rule 44 word limitation in that it contains 4,197 words, which does not exceed the 4,200 word limit.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served upon the following counsel of record by first class United States Mail, postage prepaid, this 8th day of September, 2010.

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