

IN THE  
SUPREME COURT OF INDIANA

CAUSE NO. \_\_\_\_\_

FOUNDATIONS OF EAST CHICAGO, ) Court of Appeals of Indiana  
INC., Successor by Merger to EAST ) Cause No. 49A02-0711-CV-987  
CHICAGO COMMUNITY )  
DEVELOPMENT FOUNDATION, INC. and )  
TWIN CITY EDUCATION FOUNDATION, INC. )  
Appellant-Plaintiff, ) Appeal From the Marion Superior Court  
v. ) Cause No. 49D13-0705-PL-019348  
CITY OF EAST CHICAGO )  
Appellee-Defendant. ) The Honorable S. K. Reid, Judge  
and )  
STATE OF INDIANA )  
Appellee-Intervenor Defendant. )

**AMICUS CURIAE BRIEF OF THE INDIANA GAMING  
COMMISSION IN SUPPORT OF PETITION TO TRANSFER**

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I

**STATEMENT OF INTEREST OF**  
**AMICUS CURIAE**

The Indiana Gaming Commission ("Commission") was created by the Indiana General Assembly. The Commission is charged with the statutory responsibility of administering, regulating, and enforcing the system of riverboat gambling in Indiana, including riverboat gambling which is conducted in East Chicago. The opinion of the Indiana Court of Appeals ("opinion below") presents issues which impact upon the Commission's regulatory authority not only over the riverboat casino which operates in East Chicago, but over other riverboat casinos which operate elsewhere within the State of Indiana.

II

**BACKGROUND CONCERNING THE**  
**ISSUES ON TRANSFER**

In 1993, Showboat Marina Partnership initiated the process of applying for a riverboat casino license to operate a riverboat casino in the City of East Chicago pursuant to Indiana's Riverboat Gambling Act. *Zoeller v. East Chicago Second Century, et al* 904 N.E.2d 213, 21 (Ind. 2009). Showboat entered into a local development agreement by which Showboat committed to contribute annually for the benefit of economic development, education, and community development in the City. (*Id.*) The local development agreement provided that varying percentages of the total contribution would be paid to the City, to two nonprofit

foundations<sup>1</sup>, and to a for-profit corporation.<sup>2</sup> (*Id.*) The Commission approved Showboat's license application and issued a gaming license to Showboat on January 8, 1996.

Thereafter, the casino went through a series of ownership changes and license transfers. *Zoeller v. East Chicago Second Century*, 904 N.E.2d at 217. After the license was transferred to RIH Acquisitions, IN, LLC ("Resorts") on April 21, 2005, the Commission asked the Attorney General to investigate the local development agreement payments to the two nonprofit Foundations and Second Century. (*Id.* and Appellant's App., pp. 2312-14).<sup>3</sup> The Commission's request for the investigation resulted from the City's allegations to the Commission that the Foundations and Second Century had misused funds which had been paid to them pursuant to the local development agreement. The Commission noted that "(t)he City, in a written objection to the transfer and by witnesses at the public hearing on April 21, 2005 alleged, among other things, that the Foundations and Second Century have misappropriated and misused funds, violated their respective by-laws and rules and engaged in practices which undermined their respective missions." (Appellant's App., pp. 2312-2313). Clearly, the City viewed the Commission as having regulatory authority over the local development agreement at issue and that the Commission could – and should – terminate the agreement.

Later, the City again expressed its position that the local development agreement was subject to the Commission's regulatory authority. In correspondence to the Commission dated April 5, 2006, the City stated that "(t)he Gaming Commission has regulatory authority to

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<sup>1</sup> Twin City Education Foundation and East Chicago Community Foundation, which subsequently have been merged to become Foundations of East Chicago LLC.

<sup>2</sup> East Chicago Second Century, Inc.

<sup>3</sup> This citation and some others in this brief are to the Appellant's Appendix filed by the City, as Appellant, in the related appeal of *City of East Chicago, Indiana v. Second Century, Inc., et al* now pending in the Supreme Court as Cause No. 49A02-0608-CV-631 ("related litigation"). The Commission is a party in the related litigation. Twin City Education Foundation and East Chicago Community Foundation have filed a notice in the related litigation to inform the Supreme Court that the Foundations will request that the Supreme Court consolidate the related litigation and this appeal.

invalidate any agreement inconsistent with the Indiana Riverboat Gambling Law or which undermines public confidence in the riverboat gambling industry." (Appellant's App., pp. 2319-2321). The City urged the Commission to invalidate the East Chicago local development agreement and redirect the funds from the Foundations and Second Century to the City itself. (*Id.*, at 2320 and 2333).

On June 8, 2006, the Office of Attorney General presented its Interim Investigative Report to the Commission. (Appellant's App., pp. 2128-2200). The report concluded that its findings "would permit the Commission to disapprove" the local development agreement with respect to Second Century. (Appellant's App., p. 2200). On the same day, the Commission adopted Resolution 2006-58, disapproving any further payments from Resorts to Second Century and requesting that Resorts submit a proposal to the Commission "aimed at adequately assisting in the economic development of the City." (Appellant's App., p. 2202). Thereafter, consistent with the Resolution, Resorts suspended all further payments to Second Century and redirected those funds into a separate account pending a final determination of the disposition of the funds. (Appellant's App., pp. 2205-06). The disposition of those funds is now the subject of other litigation.

Second Century then filed suit for judicial review of the Commission's June 8th Resolution.<sup>4</sup> (Appellant's App., pp. 2103-2122). The City intervened in that case and filed its cross-petition for judicial review. (Appellant's App., pp. 2259-2282). In its cross-petition, the City requested that the trial court require the Commission to cancel the local development agreement, order Resorts to submit a new economic development plan, and take other action to effectively terminate future payments to the Foundations and Second Century. (Appellant's

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<sup>4</sup> The judicial review action is stayed pending completion of the appeal in the related appeal.

App., pp. 2277-2278). The City's requested relief in the action for judicial review echoed its earlier position taken at the Commission: that regulatory authority over the local development agreement properly is vested in the Commission.

Local development agreements are used throughout the riverboat casino industry in Indiana to provide for local economic development, which is one of the important purposes of the Riverboat Gambling Act. (Plaintiff's App., Volumes V and VI, pp. 1-926). Each agreement is different. (*Id.*) In some agreements, multiple governmental entities are parties. For example, parties to the local development agreement for the French Lick casino include the Town of French Lick, the Town of West Baden Springs, and Orange County. The Commission receives and maintains updated copies of all local development agreements. In accordance with its statutory mandate to provide "strict regulation of facilities, persons, associates, and gambling operations", the Commission must be able to analyze and determine whether the terms and purpose(s) of each such agreement are adequately performed. I.C. § 4-33-1-2(2). They remain under the Commission's regulatory jurisdiction, as does the local development agreement for the East Chicago casino.

### III

#### SUMMARY OF ARGUMENT

There are two reasons to grant transfer in this case: (1) the Court of Appeals has decided an important question of law that has not been, but should be, decided by the Supreme Court, and (2) the Court of Appeals has significantly departed from accepted law or practice. Ind. Appellate Rule 57(H). By deciding that the City can revise or rescind the East Chicago local development agreement without subordinating or limiting the City's authority to the ultimate regulatory

jurisdiction of the Commission, the opinion below improperly usurps the Commission's statutory authority to administer, regulate, and enforce the system of riverboat gambling in Indiana. That authority includes the power to disapprove and rescind the City's redirection of funds to itself. To the extent the opinion below is interpreted to mean that any Indiana governmental entity which is receiving local development agreement payments from a casino may rescind or revise the agreement independent of Commission oversight and ultimate regulatory authority, the opinion improperly limits and redistributes the Commission regulatory authority.

#### IV

#### ARGUMENT

A. The Opinion Below Improperly Usurps the Commission's Regulatory Authority.

The Commission – not the City - has been charged by the General Assembly with the statutory responsibility of administering, regulating, and enforcing the system of riverboat gambling in Indiana, including riverboat gambling in East Chicago. Ind. Code § 4-33-4-1. In doing so, the Commission is required to maintain the integrity of riverboat gambling in the State. 68 IAC 1-4-2(a). The City has no concomitant duty.

While the Commission does not expressly approve contracts which are entered into by the riverboat licensees, it nevertheless maintains oversight over such contracts. 68 IAC 1-4-2(b). That includes the right to disapprove and/or cancel any contract or transaction which does not comply with the purposes of the Act. (*Id.*) The Commission's regulatory powers include revocation and suspension of the riverboat licenses, and all other reasonable or appropriate actions to enforce the statutory provisions by which the riverboat casino industry is operated within the State. I.C. § 4-33-4-1(14) and (16).

While the Commission does not expressly approve local development agreements which are submitted to the Commission, those agreements nevertheless remain critically important to the Commission's regulatory responsibilities. One of the purposes behind allowing riverboat gambling is to foster economic development. I.C. § 4-33-1-2. The license applicant must provide assurances that economic development will occur in the community where the casino operates. I.C. § 4-33-6-7(b). The Commission may take the proposed economic development into consideration when granting a riverboat license to competing applicants. I.C. § 4-33-6-7(a). Although local development agreements were not required by statute, once they were proposed by licensees and placed in effect, they became subject to the Commission's regulatory authority. The Commission therefore assumes such agreements are enforceable, and that they will be placed in effect and followed in accordance with their terms. An abandonment or rescission of such an agreement would represent a significant change from those commitments, which may be considered relevant by the Commission when considering a subsequent renewal or transfer of the license. So, the Commission relies on what the local development agreements say, including to whom the local development payments are to be made and for what purposes.

In addition to the Commission's express regulatory authority contained in the Riverboat Gambling Act, "(i)t is a well-settled principle of law that an administrative agency, in addition to the express powers conferred by statute, also has such implicit power as is necessary to effectuate the regulatory scheme outlined by statute". *Banco Beverage v. Alcoholic Bev. Comm.*, 595 N.E.2d 250, 254 (Ind. 1992). An agency's implicit power and authority is inherent in its broad grant of power from the legislature to regulate what is necessary to effectuate the regulatory scheme outlined by statute. *Northern Indiana Public Service Company v. Citizens Action Coalition of Indiana, Inc., et al*, 548 N.E.2d 153 (Ind., 1989). With local economic

development as a primary purpose behind riverboat gambling, the Commission therefore clearly has implied regulatory authority over local economic development agreements which are funded by riverboat gambling operations. The implied authority is in addition to the express terms contained in the statutory and administrative provisions.

It is well understood and accepted within the casino regulatory system in Indiana that the Commission has the regulatory authority to disapprove local development agreements if the Commission determines that either their terms or operations – or both – fail to comply with the purposes of the Riverboat Gambling Act, including the promotion of local economic development. The Office of Attorney General understood that the findings of its report "would permit the Commission to disapprove" continuing payments to Second Century. The City understood the same, first when urging the Commission in administrative proceedings to invalidate the agreement and later when arguing the same in the judicial review litigation in court. It had been the Commission's disapproval of continuing payments to Second Century which spawned both the ensuing litigation and the opportunity for a redirection of those funds. Clearly, the Commission's regulatory authority over the East Chicago local development agreement was recognized and accepted before the opinion below redistributed that authority, at least in part, to the City as one of the recipients of the funds.

The Commission respectfully submits that the opinion below improperly usurps its express, implied, and well-recognized right and power to oversee local development agreements. To whom the local development funds are to be distributed may be a material factor considered by the Commission in the event it needs to evaluate the terms or operation of a local development agreement. The recipients should not be changed without the Commission's oversight and right to disapprove and/or cancel the changes in whole or in part. Changes which

are made may affect local economic development, which the Commission is charged to support through its regulation and oversight. There is no basis for the City – or for any other local governmental entity – to unilaterally revise or rescind the local development agreements independent of the Commission's ultimate regulatory authority.

B. The Opinion Below Improperly Dilutes the Commission's Authority to Uniformly Regulate the Casino Industry in Indiana. While the opinion below is factually limited to the East Chicago casino, the implications of the opinion are far-reaching. Each of the casinos operating in Indiana have local economic development agreements through which funds are distributed to the local community for economic development. The Commission's ability to oversee – and, if necessary, to disapprove and/or cancel – these other local development agreements will be made much more unwieldy and burdensome if local governmental entities – with no casino regulatory jurisdiction – are empowered to revise or rescind the agreements without the Commission's oversight and right to disapprove and/or cancel.

## V

### CONCLUSION

For the foregoing reasons, the Commission respectfully requests the Supreme Court grant transfer, vacate the opinion below, and affirm the regulatory authority of the Commission over local development agreements in such a way that local governmental units as well as other recipients of local development funds may not revise or rescind such agreements without the Commission's oversight and right to disapprove and/or cancel any such agreement in whole or in part.



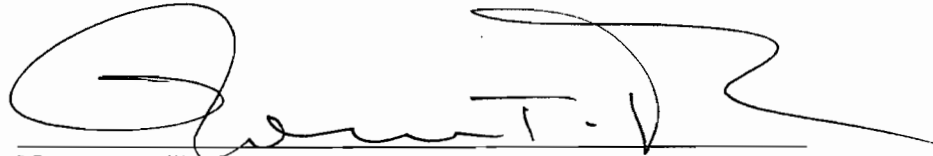
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VI

**WORD COUNT CERTIFICATE**

I verify that this *Amicus Curiae* Petition for Transfer (excluding cover page, table of contents, table of authorities, word count certificate, certificate of service and signature block) contains no more than 4,200 words.



Norman T. Funk

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been mailed this 28<sup>th</sup> day of May, 2009, by first class United States mail, postage prepaid to the following counsel of record:

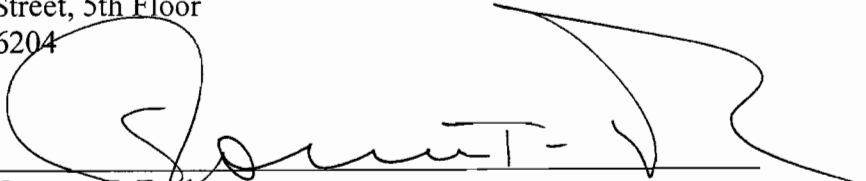
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