

IN THE
Supreme Court of Indiana

No. _____

Court of Appeals Cause No. 49A02-0711-CV-987

FOUNDATIONS OF EAST CHICAGO, INC.,)	Appeal from the
successor by merger to EAST CHICAGO)	Marion Superior Court
COMMUNITY DEVELOPMENT)	
FOUNDATION, INC. and TWIN CITY)	Cause No.
EDUCATION FOUNDATION, INC.,)	49D13-0705-PL-019348
)	
Appellant (Plaintiff Below),)	The Honorable
)	S.K. Reid, Judge
v.)	
)	
CITY OF EAST CHICAGO,)	
)	
Appellee (Defendant Below), and)	
)	
STATE OF INDIANA,)	
)	
Appellee (Intervenor-Defendant)	
Below).)	

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

Appellee the State of Indiana, by counsel, respectfully requests that this Court strike the *Amicus Curiae* Brief of the Indiana Gaming Commission in Support of Petition to Transfer, which was prepared and filed by counsel outside the Attorney General’s office. The Attorney General is charged with the responsibility of representing the State and its agencies when they are sued. Ind. Code §§ 4-6-2-1, -5-3. The appearance by outside counsel on behalf of the Indiana Gaming Commission without the Attorney General’s consent is statutorily prohibited, and this Court should therefore strike the Commission’s *amicus curiae* brief.

STATEMENT OF FACTS

On May 3, 2007, the Foundations of East Chicago, Inc. (“FEC”) filed its Complaint for Declaratory Judgment, Preliminary and Permanent Injunction in this matter, naming as defendants the City of East Chicago and the Indiana Gaming Commission (“Commission”). Appearances were filed on behalf of the Commission by Deputy Attorney General Heather L. Hagan on August 13, 2007, and Solicitor General Thomas M. Fisher on August 20, 2007. Ex. 1, 2. At no other point in this litigation has any other attorney appeared on the Commission’s behalf.

On September 12, 2007, FEC stipulated to the dismissal of the IGC from the lawsuit. Ex. 3. That same day, the State of Indiana, by counsel Thomas M. Fisher and Heather L. Hagan, moved to intervene in the matter as of right for the purpose of defending the constitutionality of Indiana Code § 4-33-6-7(c), the statute being challenged by FEC. On September 13, 2007, the trial court granted the State’s motion to intervene.

Since its dismissal from the lawsuit, the Commission has remained uninvolved in this matter, and did not seek leave to appear as *amicus curiae* in either the trial court or the Court of Appeals. However, on May 28, 2009, without consulting the Office of the Attorney General, the Commission filed a Motion to Appear as *Amicus Curiae* and for Permission to File an *Amicus Curiae* Brief in support of FEC’s Petition to Transfer, which is currently pending before this Court. Accompanying the Motion was the Appearance of Norman T. Funk and Rori L. Goldman, from the law firm of Hill, Fulwider, McDowell, Funk & Matthews, on

behalf of the Commission. The Attorney General has never consented in writing or otherwise to the Commission's use of outside counsel in this case.

ARGUMENT

Indiana Code § 4-6-2-1 provides that the Attorney General “shall prosecute and defend all suits that may be instituted by or against the state of Indiana.” Indeed, the purpose of the office of the Attorney General is to provide “[i]ndependent legal representation for the State” and to “establish a general legal policy” for State agencies. *Indiana State Toll-Bridge Comm’n v. Minor*, 139 N.E.2d 445, 448 (Ind. 1957); *see also* State Attorneys General Powers and Responsibilities 12 (Emily Myers & Lynne Ross eds., 2007) (“[T]he Attorney General’s authority to control litigation obviously furthers the major objective of statewide consistency in the development of legal policy.”). Thus, the legislature has chosen to vest the sole responsibility for the legal representation of the State in the Attorney General. *State ex rel. Sendak v. Marion County Superior Court*, 373 N.E.2d 145, 149 (Ind. 1978). To that end, no State agency is permitted to hire another attorney to perform legal services unless the Attorney General provides written consent to do so. *Id.* (citing Ind. Code § 4-6-5-3).

The Attorney General has not provided written consent to the Commission to hire outside counsel in this matter and does not now consent to the use of such counsel. The Attorney General’s earlier representation of the Commission in this case up until the point of its dismissal demonstrates that the Attorney General and

his deputies have, from the time this case was initiated, considered themselves counsel of record on behalf of the Commission.

The Attorney General intends to file a brief on behalf of the State of Indiana in response to the Petition for Transfer by the June 22 deadline. It is the Attorney General's responsibility to harmonize the interests of all state government agencies and officials and to reach a decision as to litigation policy that the Attorney General deems to be in the best interests of the State as a whole. The Attorney General will carry out that responsibility in this matter.

CONCLUSION AND REQUEST FOR RELIEF

For the foregoing reasons, the State respectfully requests that this Court strike the *Amicus Curiae* Brief of the Indiana Gaming Commission in Support of Petition to Transfer.

Respectfully submitted,

GREGORY F. ZOELLER
Attorney General of Indiana
Atty. No. 1958-98

By: _____

Thomas M. Fisher
Solicitor General
Atty. No. 17949-49

Heather L. Hagan
Deputy Attorney General
Atty. No. 24919-49

Ashley E. Tatman
Deputy Attorney General
Atty. No. No. 25433-79

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of June, 2009, a copy of the foregoing was served via First Class United States mail, postage pre-paid upon the following:

Norman T. Funk
Rori L. Goldman
HILL, FULWIDER, McDOWELL,
FUNK & MATTHEWS
One Indiana Square, Ste. 2000
Indianapolis, Indiana 46204

Peter J. Rusthoven
Mark J. Crandley
Deborah Pollack-Milgate
Paul L. Jefferson
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204-3535

James A. Knauer
William Bock III
Steven E. Runyan
KROGER, GARDIS & REGAS, LLP
111 Monument Circle, Ste. 900
Indianapolis, Indiana 46204-5125

Heather L. Hagan
Deputy Attorney General

Office of the Attorney General
IGC South, Fifth Floor
302 W. Washington St.
Indianapolis IN 46204
Telephone: (317) 234-4918
Facsimile: (317) 232-7979
Heather.Hagan@atg.in.gov