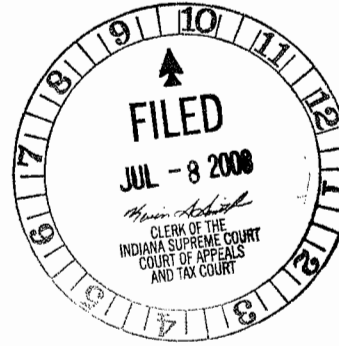


IN THE  
COURT OF APPEALS OF INDIANA

No. 49A02-0711-CV-00987



**FOUNDATIONS OF EAST CHICAGO, INC.,** }  
successor by merger to **EAST CHICAGO** }  
**COMMUNITY DEVELOPMENT** }  
**FOUNDATION, INC. and TWIN CITY** }  
**EDUCATION FOUNDATION, INC.,** }

**Appellant (Plaintiff Below),** }

v. }

**CITY OF EAST CHICAGO and** }  
**ATTORNEY GENERAL OF INDIANA,** }

**Appellees (Defendants Below).** }

**Appeal from the**  
**Marion Superior Court**

**Trial Court No.**  
**49D13-0705-PL-019348**

**The Honorable**  
**S.K. Reid, Judge**

**REPLY BRIEF OF APPELLANT**

**Peter J. Rusthoven** [# 6247-98]  
**Mark J. Crandley** [# 22321-53]  
**Deborah Pollack-Milgate** [# 22475-49]  
**Paul L. Jefferson** [# 23939-49]  
**BARNES & THORNBURG LLP**  
**11 South Meridian Street**  
**Indianapolis, Indiana 46204**  
**Telephone: (317) 236-1313**

**Counsel for Appellant**  
**Foundations of East Chicago, Inc.**

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## INTRODUCTION

The arguments by the City and the Attorney General cannot rescue the Judgment below, or eliminate the constitutional infirmities of a statute that, among other things, expressly authorizes the City's abrogation and seizure of contract rights under Agreements whose validity and enforceability have been judicially upheld.

The City and the Attorney General rest their arguments on propositions – notably, attempted characterization of moneys distributed under the Agreements as “public funds” – that cannot be reconciled with this Court's decision in *City of East Chicago v. East Chicago Second Century, Inc.*, 878 N.E.2d 358 (Ind. Ct. App. 2007) (“*East Chicago I*”).

The City's claim that the Foundations lack “standing” to challenge the Contract Voiding Section ignores baseline standing law, conflating the City's theory that the Foundations violated Agreement “conditions” (a “merits” argument that is wrong on its own terms) with *standing* to defend the Foundations' claimed rights under the Agreements. The Foundations have a personal stake in the outcome of this action, and are threatened with direct injury by the Contract Voiding Clause. That is the beginning and end of “standing” analysis.

The Attorney General's defense of the Contract Voiding Section's constitutionality rests on an all-but-limitless view of State regulatory authority – a view this Court rejected in *Carter v. City of East Chicago*, 881 N.E.2d 1114 (Ind. Ct. App. 2008) (“*East Chicago II*”). The Attorney General's arguments also render numerous constitutional protections against abuse of Legislative power (including the express prohibitions of the Indiana and Federal Constitutions on impairing contract rights) effectively meaningless and unenforceable.

The Contract Voiding Section flouts vital constitutional protections. This Court should not let it stand.

## ARGUMENT ON REPLY

### I. The City Persuaded The Trial Court Here To Adopt Theories That This Court Rejected In *East Chicago I*.

The City starts by trying to distinguish the core arguments made and rejected in *East Chicago I* from the same arguments it persuaded the trial court to embrace here (while telling that court that none of Judge Bradford's rulings in the earlier case – later upheld by this Court – were at issue in the instant case). The City's strained parsing of *East Chicago I* cannot obscure what is self-evident on comparing the Judgment below with this Court's decision. The Judgment rests on embracing the City's core theories – *i.e.*, that moneys covered by the Agreements are “public funds”; that the Foundations are “conduits,” not “third-party beneficiaries”; and that there is no “public oversight” of the Agreements. None of these propositions, on which the Judgment depends, can be squared with this Court's *East Chicago I* decision.<sup>1</sup>

*First*, the City says this Court made no “holding” on whether funds distributed to the Foundations are public funds, because it said it did “not decide whether funds such as those addressed in the letter agreements might ever, as a matter of law, be ‘public.’” 878 N.E.2d at 376 n.15 (quoted in City Br. 5). This misses the point. Yes, the Court did not need to decide categorically that funds under such agreements can never be “public” under any circumstances. But what the Court *did* do is reject precisely the “public funds” argument that *the City actually advanced* in *East Chicago I*, and then re-advanced – this time successfully – to the trial court here. The pertinent holding, which the City studiously ignores, is unambiguous:

East Chicago relies on the “public funds” definition in Ind. Code § 36-1-8-9.5 and asserts its opponents [the Foundations and Second Century] ignored that “most obviously relevant statute.” A “development agreement” is an agreement

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<sup>1</sup> The Attorney General continues to premise his defense of the Contract Voiding Section on the same propositions, though now without expressly articulating them. The Attorney General also neglects even to cite *East Chicago II*, which rejected his expansive “regulatory power” arguments. See Part III, *infra*.

between a licensed riverboat owner and a unit setting forth the licensed owner's financial commitments to support economic development in the unit. Ind. Code § 36-1-8-9.5(a). A "unit" is a county, municipality, or township. Ind. Code § 36-1-2-23. "Funds *received by a unit* under a development agreement are public funds[.]" Ind. Code § 36-1-8-9.5(b) (emphasis supplied).

*East Chicago I*, 878 N.E.2d at 376 (briefing citation omitted) (holding that "East Chicago offers no explanation why those funds channeled directly to the Foundations and Second Century by a riverboat owner represent money 'received by a unit'").<sup>2</sup>

This incorrect statutory reading is precisely what the trial court adopted *via* the City-drafted entry. See Judgment 18 (Concl. 21) (resting "public funds" holding on IC § 36-1-8-9.5(b), which "provides that '[f]unds received by a unit under a development agreement are public funds'" (court's emphasis). The City now attempts no defense on appeal of the mistaken statutory "construction" it persuaded the trial court to embrace. Nor does it even mention this Court's "public funds" analysis and holding in *State Bd. of Accounts v. Ind. Univ. Found.*, 647 N.E.2d 342 (Ind. Ct. App. 1995), with which the Judgment here also cannot be reconciled.

**Second**, the City says *East Chicago I*'s express rejection of its "conduit" thesis is somehow irrelevant to its "conduit" thesis here. Foundations' counsel will not try to paraphrase the City's articulation of this argument (City Br. 6):

[T]his Court did not hold that [the Foundations'] predecessors were not intended to be "conduits." Rather, this Court held in *East Chicago I* that whether TCEF and ECCF were intended to be conduits was irrelevant for purposes of third party beneficiary analysis because the promisor intended to assume a direct obligation to TCEF and ECCF.

In other words, the *East Chicago I* court did not state that Second Century, TCEF and ECCF were not conduits. Rather, the Court only concluded that whether or not they were conduits public funds did not resolve the question of whether there were third party beneficiaries. Accordingly, in this respect as well *East Chicago I* does not control the issues presented in this appeal.

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<sup>2</sup> As the Foundations pointed out (but the City also ignores) *East Chicago I* likewise declined to embrace the Attorney General's "local government public funds" characterization. *Id.* See Founds. Br. 8 n.5.

Foundations' counsel are candidly at a loss to understand what "distinction" the City attempts to make. The City's conduit argument here, like its conduit argument in *East Chicago I*, was precisely that the Foundations lacked enforceable third-party beneficiary rights because they were "mere conduits" for funds intended to benefit East Chicago citizens. This Court rejected that theory. *See* 878 N.E.2d at 374-75 ("We decline to hold Second Century and the Foundations cannot be third-party beneficiaries on the ground they are 'conduits'"; "Second Century and the Foundations are third-party beneficiaries"). Yet this supposed absence of third-party beneficiary rights that the Foundations were entitled to defend, because they supposedly were just "conduits," was central to the trial court's decision. *See, e.g.*, Judgment 20 (Concl. 34) (funds are "merely channeled through the Foundations as a conduit"); *id.* 45 (Concl. 155) (Foundations "were merely intended to be conduits for the funds in order to advance the well being of the citizens of East Chicago"); *id.* 46 (Concl. 157) (same). There is *no* distinction between the argument made and rejected in *East Chicago I* (holding the City's "conduit" thesis could not defeat the Foundations' third-party beneficiary rights) and the argument made and accepted below (holding the Foundations did *not* have enforceable third-party beneficiary rights subject to Constitutional protection, because they were merely "conduits").

**Third**, the City tries to evade this Court's detailed explication (*see* 878 N.E.2d at 376 n.15) of existing public oversight with respect to the Agreements. The City now tries to recast the issue not as "lack of oversight" but rather as supposedly one of "minimal" oversight, saying *East Chicago I* "did not reach the only 'oversight' issue relevant to this case." City Br. 6-7.

This simply does not square with the view adopted by the trial court in entering the City-prepared Judgment. *See, e.g.*, Judgment 13 (Fndg. 70) (citing "apparent *lack* of proper oversight of the development funds") (emphasis added); *id.* 24 (Concl. 53) (saying "*lack* of local

governmental oversight over riverboat economic development finds [*sic*] contributed to a private foundation is a circumstance unique to East Chicago”) (emphasis added). As the Foundations showed (Br. 11-13), these holdings cannot be reconciled either with record evidence or with this Court’s discussion – in the very context of rejecting the City’s “public policy” arguments – of pertinent public oversight mechanisms. Nor, of course, can it be reconciled with the fact that under those exiting oversight mechanisms, *Second Century’s* funding under the same Agreements has been terminated following investigation by the Commission and Attorney General – an outcome that they did *not* reach or recommend following comparable investigation of the Foundations.

## **II. The Foundations Have Standing To Challenge The Validity Of The Contract Voiding Section.**

The City persists in saying that the Foundations – who were receiving payments under the Agreements when the Contract Voiding Section was passed, and would lose such payments if it is upheld – “lack standing” to challenge the Section’s validity. This is insupportable.

The Foundations pointed out (Br. 14-17) that (1) Judge Bradford ordered the Foundations substituted for TCEF and ECCDF, rejecting the City’s thesis that the Foundations had improperly removed “board membership for the City”; (2) the Attorney General had urged the very board changes to which the City now objects; and (3) change in board structure could not affect the Foundations’ *standing* to challenge the Contract Voiding Section, but would at most provide the City with a *merits* argument (albeit a bad one) about the terms of the Agreements.

The City now concedes that the status of TCEF and ECCDF as third-party beneficiaries was “a point which this Court determined in *East Chicago I.*” Br. 10. It asserts, however, that since the Foundations’ succession to the predecessors’ rights was “subject to any conditions to

which the property was subject before the merger” (quoting IC § 23-17-19-5(a)(2)), the Court must see if “there are limitations upon such third party rights” under the Agreements. Br. 10. It then reverts to its current refrain that changes in the Foundations’ board violated a “condition” of the third-party beneficiary rights, thus depriving the Foundations of “standing.” *See id.* 10-14.

This current City thesis conflicts with what it told Judge Bradford in *East Chicago I*. There, the City said “Showboat [the initial operator] and the City *never reached a meeting of the minds* concerning the structure, governance, and control of the [predecessor] Foundations.” *East Chicago I*, City S.J. Br. 39, App. 0632 (emphasis added). The City also said:

[I]t is apparent from the descriptions of Board membership contained in the [initial Letter Agreement] that the entities which have taken on the names TCEF and ECCDF and are litigants in this action *are entirely different from the more streamlined Foundations* contemplated in the original letter. The TCEF discussed in the [initial Agreement] would have had 7 board members. The current TCEF board has 28 members. . . . Thus, TCEF and ECCDF do not have a legitimate claim to rights under the terms of the [initial Agreement].

*Id.* 40, App. 0633 (emphasis added). Hence, over the course of this controversy the City has variously asserted (a) the Agreements created no obligations as to the board makeup of TCEF and ECCDF; (b) the board makeup of TCEF and ECCDF was “entirely different from the more streamlined” version the Agreements “contemplated” – *ergo* supposedly depriving TCEF and ECCDF of third-party beneficiary rights; and now (c) departure from the TCEF-ECCDF board structure (in favor of a more streamlined version) also violates the Agreements’ “conditions” on third-party beneficiary rights – *ergo* supposedly depriving the Foundations of “standing.”

More important, the City’s current “standing” thesis conflicts with what this Court *held* in *East Chicago I*. As shown, the City said there that departure by TCEF and ECCDF from the Agreement-contemplated board structure violated a condition of the predecessor entities’ third-party beneficiary rights. The Court’s holding that TCEF and ECCDF *did* have such rights –

which the City concedes was held in *East Chicago I* – necessarily rejected the City’s argument that the board structure was a “condition” of such rights. The City’s rejected “board structure condition” argument has no more validity here, where it is recycled and asserted as a barrier to the Foundations’ rights, than it did when asserted in *East Chicago I* as a supposed barrier to the predecessor entities’ rights to which the Foundations automatically succeeded by merger.

In any event, the City’s “condition” argument has no bearing on the Foundations’ *standing*. “The judicial doctrine of standing is intended to assure that litigation will be actively and vigorously contested.” *State ex rel. Cittadine v. Ind. Dep’t of Transp.*, 790 N.E.2d 978, 979 (Ind. 2003) (citation omitted). Standing requires only that the Foundations have “a personal stake in the outcome of the litigation,” such that “they have suffered or [are] in immediate danger of suffering a direct injury as a result of the complained-of conduct.” *Id.* (citations omitted). There is no question the Foundations meet this standard as to the “complained-of conduct” here – enactment of the Contract Voiding Section, which expressly authorizes the City’s appropriation of the Foundations’ claimed (and consistently honored) third-party beneficiary rights, in violation of the United States and Indiana Constitutions.

The City’s “condition” argument improperly conflates a “merits” theory – i.e., whether the Foundations supposedly violated contract limits on their rights – with the “standing” inquiry.

As one court has aptly explained:

The point is not that to establish standing a plaintiff must establish that a right of his has been infringed; *that would conflate the issue of standing with the merits of the suit*. It is that he must have a colorable claim to such a right. . . . The injury must be to the sort of interest that the law protects when it is wrongfully invaded. The cases simply require litigants to possess such an interest, *which is quite different from requiring them to establish a meritorious legal claim*.

*Aurora Loan Servs. v. Craddieth*, 442 F.3d 1018, 1024 (7<sup>th</sup> Cir. 2006) (emphasis added; multiple citations omitted). Here, it is plain that the Foundations “have a colorable claim” to rights under

the Agreements, *id.*, and that their interests “assure that [the] litigation will be actively and vigorously contested,” *Cittadine*, 790 N.E.2d at 979. This is not altered by the City’s “merits” argument (identical to the theory advanced and rejected in *East Chicago I*) that departure from supposed “board structure conditions” should substantively defeat such rights.

While the foregoing disposes of the City’s “lack of standing” claim, the City’s other assertions on this score are also unpersuasive. For example, it says that Judge Bradford, in ordering the Foundations’ T.R. 25(C) substitution for the predecessor entities in *East Chicago I*, “determined only that [the Foundations] could be substituted for ECCF and TCEF in the contract case,” and “did not hold that the [Foundations] had rights under the [Agreements].” Br. 17. As it relates to *standing*, however, Judge Bradford’s substitution ruling *necessarily* means he determined the Foundations had sufficient basis to “stand in the shoes” of its predecessors for purposes of defending third-party beneficiary rights. This applies whether those rights are being attacked on “contract” or “policy” bases (as in *East Chicago I*) or *via* special legislation (as here). This is particularly clear since Judge Bradford’s order was made over the City’s written and oral objections, making precisely the “board structure” argument it then recycled for Judge Reid (while representing to her that no issue in this case had been before Judge Bradford).<sup>3</sup>

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<sup>3</sup> The Foundations also note that neither the City nor the Attorney General disputes that the board structure changes were urged by the Attorney General himself. While the Foundations’ standing does not depend on this, it would indeed be manifestly unfair to hold that such changes – made in part to respond to concerns raised by the Attorney General as to payments to the Foundations’ predecessors under the Agreements – has the effect of depriving the successor entity of *any* rights to such payments under the Agreements (and, under the City’s view, even of “standing” to defend its claim to such rights). Foundations’ counsel also respectfully protest the City’s pejorative characterizations of the discussions with the Attorney General and response to his concerns. *See* City Br. 14 (calling the merger “a strategic litigation decision intended to undermine the Attorney General’s ability to bring a successful oversight lawsuit against TCEF and ECCF”); *id.* 15 (saying “TCEF and ECCF took the hurried step of dissolving to avoid scrutiny and oversight by the Attorney General”). It is neither accurate nor fair to say that a party’s discussions with and response to matters raised by a public official constitute an attempt to “undermine” that official’s authority, or to “avoid scrutiny and oversight” by that official. To the contrary, such discussions and response demonstrate cooperation with and respect for such authority, and for the official’s scrutiny and oversight functions. Such conduct should be encouraged, not disparaged.

### **III. The Attorney General's Rationales For Upholding The Contract Voiding Section Render Vital Constitutional Protections Essentially Meaningless And Unenforceable.**

The Attorney General's defense of the Contract Voiding Section is rooted *passim* in the "public funds" characterization rejected by this Court in *East Chicago I*, and in the infinitely elastic "regulatory authority" theories that (as shown *infra*) this Court ejected in *East Chicago II*. The Attorney General posits an effectively limitless view of the Legislative power, along with a narrowly circumscribed vision of the Judiciary's ability to require adherence to the State and Federal Constitutions. Indeed, the Attorney General even argues that contract rights are not "property" entitled to constitutional protection (even, it would seem, for purposes of express constitutional prohibitions on impairing the obligation of contracts). Embracing the Attorney General's theories would, for all practical purposes, render vital State and Federal constitutional protections meaningless and unenforceable. Fortunately, those rationales are not the law.<sup>4</sup>

#### **A. The Contract Voiding Section Impairs Contract Rights.**

The Attorney General's expansive view of the Legislative power is especially evident in his argument that a statutory provision that expressly authorizes total evisceration of existing contract rights somehow does not run afoul of explicit constitutional prohibitions on impairing the obligations of contracts. In the Attorney General's view, allowing a State subdivision to seize for itself a party's contract rights should instead be viewed as simply another form of "regulation," permissible because the State has extensive regulatory authority over gaming. *See,*

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<sup>4</sup> The Attorney General's argument is also punctuated with insinuation as to the circumstances in which the Agreements were entered. This unfortunate rhetoric is unsupported by evidence. *See, e.g.,* AG Br. 4 n.1 (citing newspaper article for assertions about some Second Century principals being "associates" of former mayor). As important, such innuendo is irrelevant. It is undisputed that the Agreements were approved by the Commission at the outset of riverboat gaming in East Chicago; that the Commission and the Attorney General thereafter have reviewed the Agreements, and have investigated the use by Second Century and by the Foundations of their respective portions of the funds distributed thereunder; and that as a result, the Commission and Attorney General have determined that distributing funds to Second Century should cease – while making no such decision or even recommendation as to the Foundations.

e.g., AG Br. 12 (“Riverboat gambling and the distribution of riverboat gambling proceeds are heavily regulated in Indiana”); *id.* 13 (“In such a highly regulated and strictly policed environment, [the Foundations] and its predecessors had no reasonable expectation that their ability to receive and spend casino gaming revenue would continue *ad infinitum* without further regulation”); *id.* 15 (“General Assembly has plenary authority over legalized gambling”).

The Attorney General cannot credibly defend the proposition, advanced by appellees below and embraced by the trial court, that the State may take the Foundations’ contract rights because it has power to eliminate legalized gaming altogether (*see* Judgment 32-35). Parties to contracts involving gaming of course recognize the Legislature could repeal legalized gaming – just as parties to contracts involving alcoholic beverages recognize that Indiana could, under the 21<sup>st</sup> Amendment, ban all traffic in alcoholic beverages in our State. In each instance, parties to such contracts have no “reasonable expectation” that the State will forever allow the underlying activity. But it does *not* follow that *while* gaming or sale of alcohol is permitted, the State may therefore interfere in any way it may choose with rights under contracts involving such activities (much less that it can authorize one of its subdivisions simply to seize such contract rights). As the Seventh Circuit observed in the closely related context of unconstitutional takings, the fact that the State creates a field of endeavor does not authorize it to take private property, even if such property would not have existed without such State authorization:

[The State] cannot lawfully amend its corporation law to confiscate the assets of all corporations incorporated, or licensed to do business, by virtue of that law. The fact that the state legislature authorized the creation of the plaintiff foundation does not make the foundation a state agency; the legislature also authorizes the creation of business and professional corporations, not to mention religious and charitable corporations, *without thereby acquiring a right to confiscate such entities’ assets.*

*Ill. Clean Energy Cmty. Found. v. Filan*, 392 F.3d 934, 936 (7<sup>th</sup> Cir. 2004) (emphasis added) (citing *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 638-40 (1819)).

It is no response to dismiss this fundamental principle as an “abstract proposition,” and then assert “the General Assembly has plenary authority over legalized gambling and surely *does* possess the power to staunch the flow of gambling revenue intended for local development – the very point of allowing casino gambling in the first place – to recipients it deems not to be serving the public interest” (AG Br. 15 (original emphasis)). Colorful, conclusory rhetoric cannot obscure that the “gambling revenue” here is *not* tax money, or funds the Legislature required to be distributed to local governments, or dollars that the statute mandates be spent by a city or county (or by any private party) for any purpose. *Some* types of revenues generated by legalized gambling fit into one or more such statutory categories; and the Legislature is free to change the current statutory directions. But the funds here are gaming operator revenues that the operator was *not* statutorily required to distribute to the City, the Foundations or anyone else, but which the operator *agreed* to distribute under contracts. The parties to and third-party beneficiaries of such contracts have rights thereunder that the State is *not* free to impair (much less simply seize) whenever it may decide that doing so somehow furthers “the public interest.”

Further, *East Chicago II* itself refutes the Attorney General’s bald assertion that extensive regulation power usurps private contract rights. There, the Attorney General argued that:

The Showboat Agreement is a local development agreements [sic] (“LDA”) executed to give substance to that *legislative directive and to benefit the people of East Chicago*. Accordingly, the Showboat Agreement (and other LDAs) are not ordinary contracts, and the recipients of funds under it are not ordinary beneficiaries. They are in essence *public stewards of casino funds* intended for public benefit – as the text of the Showboat Agreement itself suggests.

AG *East Chicago II* Reply Br. 2 (emphasis added); *see also* AG *East Chicago II* Br. 3. Thus, the Attorney General argued that, because the Agreements purportedly did nothing more than give

effect to a legislative directive for the allocation of funds intended to benefit the public, ordinary contract principles did not apply.<sup>5</sup>

This Court, however, rejected the Attorney General's thesis that due to these asserted "public" interests and the State's asserted regulatory authority, moneys distributed under the Agreements were converted into "public charitable trust funds" subject to seizure by the Attorney General (or, by implication, the General Assembly). *See* 881 N.E.2d at 1116-17.<sup>6</sup>

Indeed, this Court rejected the argument that there is *any* statutory requirement for riverboat gambling proceeds to be used for economic development in East Chicago. *See id.* The Attorney General asserts that local development agreements are "every bit as subject to legislative alteration" as other "modes" of supposed regulation, and also links such agreements to statutes dealing with "economic development funds." Br. 9, 13, 36 (citing *inter alia* IC § 4-33-6-7(a) & (b)). But *East Chicago II* construed these statutory sections *contrary* to the position now re-urged by the Attorney General. *See* 881 N.E.2d at 1116 & n.2.

The Attorney General's overweening view of the State's regulatory power also ignores that the Foundations' purpose is *not* "assisting economic development" (AG Br. 16 (quoting IC § 4-33-1-2's statement of Riverboat Gambling Act's intent, and saying the Foundations "could not have reasonably expected to be free from regulation ensuring that its funding was being used for the purposes intended by" that Act). This assertion, of course, elides yet again that the so-

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<sup>5</sup> The Attorney General also urged in *East Chicago II* the now-rejected "conduit" thesis. *See* AG *East Chicago II* Br. 8 ("Second Century was merely the conduit through which . . . benefits were to flow").

<sup>6</sup> Similarly, the Attorney General argues here that the "Agreement is not much like an ordinary commercial contract at all. It is really just an agreement to carry out regulation of a casino licensee in a particular way." AG Br. 20. The same argument, in virtually the same prose, was made by the Attorney General (and rejected by this Court) in *East Chicago II*. *See* AG *East Chicago II* Br. 10 ("[The Showboat Agreement is not much like an ordinary commercial contract at all. Rather, it is an agreement to carry out regulation of a casino licensee in a particular way.]")

called “funding” is not coming from the State, and does not otherwise involve “public funds.” But in any event, the Foundations’ purposes *differ* from the statutory “economic development” goals from which the Attorney General tries to extract State authority to abrogate contract rights. The Foundations’ core purposes are *community and educational* development. *See, e.g.*, App. 760, 762; Tr. 161, 163. The Act’s reference to “economic development” cannot conceivably confer power to destroy private contract rights intended to advance these different goals – furthered, *e.g.*, by the Foundations’ grants to church projects and awards of student scholarships, *see, e.g.*, Ex. 39, App. 400, 2125, 2131 – anymore than it would permit the State to seize gaming revenues that a riverboat operator had contractually agreed to donate to an art museum.

Nothing is added by the Attorney General’s assertion that the Contract Voiding Section supposedly operates only “*prospectively*” (Br. 14, 15 (original emphasis) (trying to distinguish impairment cases cited in Founds. Br. 12-15)). This bears not an instant’s scrutiny. The Section patently operates to destroy rights under existing Agreements, entered long before the Section’s enactment. The Attorney General’s own prose refutes his “prospective only” assertion. He purports to distinguish *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383 (8<sup>th</sup> Cir. 1994) by saying the court there “found it relevant that no previous regulation applied retroactively *to agreements made before the enactment of the statute,*” AG Br. 14-15 (emphasis added). Obviously, this is equally true of the application of the Contract Voiding Section to the Agreements here.

Finally, the Attorney General concedes that “heightened scrutiny” applies when the State is a party to the contract, but asserts that this does not apply here because the City (not the State itself) is a party to the Agreements. *See* AG Br. 18-20. United States Supreme Court cases, including those cited and quoted by the Attorney General, refute this. *See Energy Reserves*

*Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 413 n.14 (1983) (“In almost every case, the Court has held a *government unit* to its contractual obligations when it enters financial or other markets”) (emphasis added) (quoted in AG Br. 20); *cf. Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 369-70 (2<sup>d</sup> Cir. 2006) (“The presence or absence of a state [itself] as a party to the contract is not determinative of the deference issue”; refusing to “open [the] end-run attack around Contracts Clause law” that would be created by allowing “state legislatures [to] delegate to an agency the power to impair a public contract of a government subdivision that the subdivision itself would have more difficulty impairing”).<sup>7</sup>

\* \* \*

In sum, none of the Attorney General’s arguments can hide or justify what it is self-evident on the face of the challenged statute: The Contract Voiding Section explicitly authorizes direct, total impairment by the City, for its own financial benefit, of existing contract rights. If impairment as blatant and express as that authorized by this Section does not violate the Indiana and Federal Contract Clauses, it is hard to imagine what *would* run afoul of those constitutional provisions.

**B. The Contract Voiding Section Takes Property Without Compensation.**

The Attorney General’s argument that no property has been taken rests throughout on the premises that (1) the State can “regulate” property rights out of existence, whenever it sees fit, where regulation is prevalent and is a lawful exercise of sovereign police power over “public funds”; and (2) the Foundations have no property interest because the citizens of East Chicago are the true beneficiaries under the Agreements. Again, these “public fund” and “conduit”

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<sup>7</sup> The Attorney General’s assertion that the City has not entered “financial or other markets” (Br. 20) is simply incorrect. The “other market” is the gaming industry; and the Agreements are private contracts, not required by statute, under which a gaming operator agreed to donate portions of its own revenues.

premises (and any variant thereof) cannot be squared with this Court's *East Chicago I* and *East Chicago II* decisions.

The Attorney General also says that contract rights are not protected property interests. This is indefensible. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (“Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid.”) (citations omitted); *Home Sav. of Am. F.S.B. v. United States*, 51 Fed. Cl. 487, 494 (2002) (“Plaintiffs are correct that the Fifth Amendment affords protection to private property, *including contract rights.*”) (emphasis added) (citations omitted). Where the government “uses its power to appropriate a contract for public use – i.e., if it steps into the shoes of one of the contracting parties,” a taking occurs. *Home Savings*, 51 Fed. Cl. at 495 (citing *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923)).

The Attorney General tries to distinguish *Illinois Clean Energy* – a “takings” case virtually on all fours with this one – by claiming there is some constitutional distinction between property rights in funds already received and future income streams. *See* AG Br. 27. *Illinois Clean Energy* neither holds nor suggests anything of the sort. To the contrary, Judge Posner’s opinion for the court concludes: “[T]he State of Illinois would be violating the Constitution if it confiscated *any part* of the foundation’s assets.” 392 F.3d at 938 (emphasis added).

The Attorney General also echoes here his expansive proposition that “when a legislative body has the power to regulate, it also has the power to destroy or disregard contract rights in the field it is regulating.” Br. 28. As shown, this is simply untrue. Even if the activity in question would not *exist* absent State authorization, the State may not simply destroy (or seize without compensation) rights under contracts that involve that activity. *See supra* at 10-11. Moreover, this argument was rejected in *East Chicago II*, in which this Court upheld Second Century’s

contract rights in the face of the same extensive regulation asserted here by the Attorney General to make a taking permissible. *See* 881 N.E.2d at 1116.

**C. The Contract Voiding Section Is Unconstitutional Special Legislation.**

The Contract Voiding Section concededly is “special legislation.” The pertinent issue is whether it is permissible special legislation under the standards articulated in our Supreme Court’s modern jurisprudence on this topic. The Attorney General says the “court’s only job” when it comes to enforcing Article IV, Section 23 of our State’s Constitution is “to determine the existence of a conceivable basis” for the legislation. Br. 40. The Attorney General’s view of the Judiciary’s role misapplies Supreme Court precedent, and returns this important constitutional protection to its former status as a judicially unenforceable nullity.

To be sure, our Supreme Court observed in *Municipal City of South Bend v. Kimsey* that the “challenging party must negate every conceivable basis which might have supported the [legislative] classification.” 781 N.E.2d 683, 694 (Ind. 2003) (quoted in AG Br. 36). *Kimsey* itself shows, however, that this does *not* mean that special legislation will be upheld whenever a party can dream-up a speculative rationale for the enactment (which can of course be done in every case). To the contrary: *Kimsey* rejected numerous purported justifications for the special legislation there, all of which would satisfy the elastic view of “conceivable” urged by the Attorney General here. The *Kimsey* Court rejected such rationales because they were

all couched in terms of characteristics of . . . [the] county, not necessarily those possessed by a county of this population size. They ranged from the need to preserve rural land around urban areas . . . , which the trial court “judicially noticed,” to preventing competing cities . . . within the same county from annexing each other’s land, which the Attorney General advanced in the trial court.

*Id.* In rejecting the identical logic used by the Attorney General here, *Kimsey* noted:

Preserving rural land near urban areas or preventing competing annexation by different municipalities may indeed be legitimate concerns, but there is no basis to

conclude they are unique to St. Joseph County. Although the trial court took judicial notice of the fact that St. Joseph County is largely urban but contains significant rural areas, the same is true of Lake and Allen Counties. Several counties have multiple municipalities capable of exercising annexation powers. In short, we are directed to *nothing in the record* and *no relevant facts susceptible of judicial notice* that are unique to St. Joseph County. Accordingly, this legislation is unconstitutional special legislation.

*Id.* (emphasis added). As this shows, “conceivable” does not mean “imaginable” for purposes of making a litigation argument. It means instead a genuinely possible justification for the special legislation, supported by record evidence or judicially noticeable facts, that specifically relates to and supports the General Assembly’s classification.

The Attorney General advances four proposed justifications here: (1) a “long history of corruption leading up to the creation of the [Agreements]” (which in fact were approved by the Commission over ten years ago, App. 2220); (2) “local concerns about potential misuse and lack of oversight” of funds distributed under the Agreements; (3) the Agreements’ direction of some funds to a for-profit corporation (Second Century, which is not a party to this case); and (4) the Foundations’ merger. AG Br. 36. None of these provides a legitimate basis, legally or logically, for the Contract Voiding Section.<sup>8</sup>

*First*, appellees’ own purported “evidence” shows allegations of corruption in riverboat gaming locales other than East Chicago. Founds. Br. 33 & n.21. Indeed, the allegations are not even confined to Lake County. App. 2336, 2355, 2374, 2396. It is also evident that East Chicago is not the only gaming locale in which “concerns” have arisen about use of local development agreement funds. *See* Ind. Gaming Comm’n Trans. from Nov. 9, 2006 at 139

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<sup>8</sup> The Legislature itself advanced no justification for adopting this targeted, special legislation. *See Kimsey*, 781 N.E.2d at 691 (“Article IV issues will be simplified if . . . [the legislation is] accompanied by legislative findings as to the facts justifying the legislation’s limited territorial application”).

(noting a commissioner's vote against license transfer due to economic development concerns); Sept. 13, 2007 at 95-108 (noting concerns about Gary licensees' economic development).

**Second**, the Contract Voiding Section does not remedy such "concerns," even if they *were* confined to East Chicago. The City's own supposed "corruption" under a former mayor is now said to justify redirecting funds to the City itself. But even if one indulges the unsupported notion that the Legislature preferred the current mayoral administration, the special legislation it adopted is *not* so limited. To the contrary: The unique contract abrogation power conferred on the City will apply to *any* contracts within its purview (past, present or future), and under *any* mayor (including a re-elected Mayor Pastrick). Our Supreme Court's observation in addressing the contract impairment challenge in *Clem v. Christole, Inc.*, 582 N.E.2d 780 (Ind. 1991), is no less apt in the context of the special legislation issue here: The challenged law goes "patently beyond the necessities of the case" that is offered to justify it. *Id.* at 783.

**Third**, if the Legislature's concern was presence of a private corporate parties as beneficiaries of the Agreements, this would not distinguish the contracts here from other local development agreements under which private corporations receive funds. *See* App. 974 (Harrison County Community Foundation); App. 499 (Barden Foundation in Gary). Again, claiming that this aspect justifies the Contract Voiding Section ignores *Kimsey's* mandate that the characteristic must "support the classification."

**Fourth**, the merger of the predecessor entities into the Foundations does not justify the special legislation. In addition to being entirely speculative – in this instance, not even supported by the City's newspaper articles "evidence" – the Contract Voiding Section is *not* limited to the "post-merger" situation. By its terms, it equally authorizes the City to expropriate the rights of any future beneficiary under any future local agreement, regardless of the identify of that

beneficiary, or the make-up of its board of directors, or whether it has or has not engaged in any structural reorganization *via* a merger.

*Finally*, the Attorney General ignores that in cases where our Supreme Court has upheld special legislation, “rational basis” review applied because the “distinguishing features” said to justify the classification were objectively verifiable, and the legislation related directly to such features. *See Ind. Gaming Comm’n v. Moseley*, 643 N.E.2d 296, 301 (Ind. 1994) (differences among large communities along bodies of water in Lake County justified different referenda procedures); *State v. Hoovler*, 668 N.E.2d 1229, 1234 (Ind. 1996) (Tippecanoe was the sole county facing EPA Superfund exposure); *Williams v. State*, 724 N.E.2d 1070, 1086 (Ind. 2000) (objectively verifiable fact of high Lake County caseloads justified different judicial resources). *No* Supreme Court case under its modern “special legislation” jurisprudence has upheld a classification based on speculative, *post hoc* litigation rationales that are unsupported by record evidence or judicially noticeable facts (much less on the basis of speculation about what the Legislature supposedly “might” have thought based on newspaper stories).

**D. The Contract Voiding Section Violates The Single Subject Clause.**

The Contract Voiding Section is the sole provision of the 2007 Budget Act that involves neither appropriating nor raising State revenue. Other sections of the Act cited by the trial court (*see* Judgment 29-30 (Concl. 79)) may have tenuous relationships to budgetary topics; but the Contract Voiding Section has *no* credible connection. If the “standard” proposed by the Attorney General were sufficient, then there is essentially no matter that could not be included in a budget act, and the Single Subject Clause is a nullity.

As discussed in the Foundations’ opening Brief, our Supreme Court has recently indicated that it does *not* view the Clause as a nullity, but rather as providing constitutional

protections against abuses of the Legislative power. *See* Founds. Br. 28-29 (discussing *Bonney v. Ind. Fin. Auth.* 849 N.E.2d 473 (Ind. 2006)). At some point, the Single Subject Clause must impose real limits on what the Legislature may do. If this is not such a case, it is difficult to imagine what would be.

**E. The Contract Voiding Section Violates Separation Of Powers Principles.**

Lastly, it is evident that the effect of the Contract Voiding Section is to “reverse” Judge Bradford’s ruling on the Agreements – a ruling this Court affirmed. The Judicial Branch determined that the Foundations were third-party beneficiaries with vested contract rights. The Legislature determined otherwise by enacting the Contract Voiding Section. The Legislature improperly chose to act as the Judiciary, overruling the latter’s conclusion in a specific case.

The Attorney General tries to distinguish *Thorpe v. King*, 248 Ind. 283, 227 N.E.2d 169 (1967), saying that the Contract Voiding Section “did not resuscitate a prior act of local government declared invalid by a court’s final judicial decree.” AG Br. 43. Not so. The City had previously acted *via* ordinance unilaterally to alter the Agreements in its favor (*see East Chi. I App. 0364, Ex. G, Ord. 05-0006*) – something the Judiciary held it had no right to do, but which the Contract Voiding Section resuscitated. Further – and regardless of “resuscitation” *vel non* – separation of powers prohibitions are violated *whenever* one branch of government “exercise[s] any of the functions of another.” IND. CONST. art. III, § 1.

The Attorney General also says that the Legislature has altered the “common law,” and that a decision limiting the General Assembly’s power to do so “would constitute an infringement by the judiciary on the functions of the legislature.” AG Br. 43. This, too, is not so. The General Assembly has not changed any “common law” principles. Common law refers to “all that part of the positive law, juristic theory, and ancient custom of any state or nation

which is of *general and universal application*, thus marking off special or local rules or customs.” BLACK’S LAW DICT. 276 (6<sup>th</sup> ed. 1990) (emphasis added). The Contract Voiding Section voids *particular contracts with a particular city* – contracts previously held to be enforceable, and not subject to unilateral “reformation” by that city. This targeted eradication of particular rights under particular contracts does not even purport to alter “common law” principles of general application to contracts governed by Indiana law.

### CONCLUSION

This Court should reverse, declare the Contract Voiding Section invalid, and prohibit any action by the City under this constitutionally impermissible enactment.

Respectfully submitted,



Peter J. Rusthoven [# 6247-98]  
Mark J. Crandley [# 22321-53]  
Deborah Pollack-Milgate [# 22475-49]  
Paul L. Jefferson [# 23939-49]  
BARNES & THORNBURG LLP  
11 South Meridian Street  
Indianapolis, Indiana 46204  
Telephone: (317) 236-1313

Counsel for Appellant  
Foundations of East Chicago, Inc.

## WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44(E) & (F), I verify that the foregoing Reply Brief of Appellant (exclusive of APP. R. 44(C) items) contains no more than 7,000 words, as determined by the word processing system used to prepare the Reply Brief (Microsoft Word XP).

A handwritten signature in black ink, appearing to read "Peter J. Rusthoven", written over a horizontal line.

Peter J. Rusthoven [# 6247-98]

## CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(D), I certify that on July 8, 2008 I caused copies of the foregoing Reply Brief of Appellant to be served on the following by United States mail, first-class postage prepaid:

James A. Knauer, Esq.  
William Bock III, Esq.  
Steven Runyan, Esq.  
KROGER, GARDIS & REGAS LLP  
111 Monument Circle, Suite 900  
Indianapolis, Indiana 46204

Thomas M. Fisher, Esq.  
Heather L. Hagan, Esq.  
OFFICE OF THE ATTORNEY GENERAL  
Indiana Government Center South, 5<sup>th</sup> Floor  
302 West Washington Street  
Indianapolis, Indiana 46204



Peter J. Rusthoven [# 6247-98]