

IN THE
SUPREME COURT OF INDIANA

No. 49S02-0908-CV-383



**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).

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

**Appeal from the
Marion Superior Court**

**Trial Court No.
49D13-0705-PL-19348**

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

APPELLANT FOUNDATIONS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Section 302 of the 2007 Budget Act authorizes the City of East Chicago unilaterally to void or rewrite the Agreements at issue whenever and however it wants, redirecting past and future payments to itself. The question in this case (*East Chicago III*) is straightforward: Does the Section violate constitutional protections against abuses of the Legislative power, including State and Federal prohibitions against impairing contract obligations, and our 1851 Constitution's explicit bar of special legislation when nothing precludes a law of general applicability?

This Court's decisions in *East Chicago I* (*City of E. Chi. v. E. Chi. Second Century, Inc.*, 908 N.E.2d 611 (Ind. 2009)) and *East Chicago II* (*Zoeller v. E. Chi. Second Century, Inc.*, 904 N.E.2d 213 (Ind. 2009)) shed dispositive light on that question. In particular, those decisions resolve three crucial points contrary to the City's positions during this protracted litigation:

(1) The Agreements, which were incorporated by the Gaming Commission as conditions to its issuance of the East Chicago riverboat license, are not void, or terminable at will by the City, or subject to unilateral alteration by the City.

(2) The Foundations have third-party beneficiary rights under the Agreements (though such rights are of course subject to the ultimate regulatory authority of the Commission and hence, to alteration *via* the Commission's administrative processes).

(3) Authority to alter the Agreements is indeed a regulatory task committed to the Commission (which, like any administrative agency, may not exercise such authority arbitrarily, or capriciously, or without regard to the due process and other rights of those it regulates).

The Court's decisions on these issues undermine the trial court's bases for upholding Section 302, and the Court of Appeals' rationale for evading the constitutional questions. The Court's resolution of those issues also underscores that Section 302 is constitutionally infirm.

SUPPLEMENTAL ARGUMENT

I. The Court Has Now Determined That The Agreements Are Valid, Confer Third-Party Rights, And Are Subject To Commission Regulatory Oversight.

Though its assorted positions during this litigation are far from a model of consistency, the City has contended throughout that the Agreements are “void,” or “terminable at will” or otherwise subject to its unilateral alteration, and confer no third-party beneficiary rights on the Foundations. The Court has now rejected these core City positions, while emphasizing the Gaming Commission’s central role in adopting and overseeing the Agreements.

As the Court held in *East Chicago II*, “the Commission incorporated the terms of the [Agreements] as conditions to [the initial operator]’s receipt and maintenance of the license.” 904 N.E.2d at 217; *see id.* (successor operator “continued to make the [Agreement] payments as required to maintain the license”). The Court reaffirmed these points in its subsequent decision in *East Chicago I*. *See* 908 N.E.2d at 611. The latter case then made clear that the Commission-approved Agreements could not “be reformed, declared unenforceable, terminable, and void against public policy” (*id.* at 622) at the City’s behest:

The City does not have the authority unilaterally to terminate or alter the terms and conditions of a license issued by the Gaming Commission. Such alterations lie within the duties and powers that the Riverboat Gambling Act confers upon the Gaming Commission, which has historically acted by taking into serious account the views and arrangements of the cities in which gaming operations are conducted.

Id. at 623-24; *see id.* at 624 (Foundations “are correct that the agreements imbedded in the license do not appear [to be] terminable at will”).¹

East Chicago I also put an end to the City’s centerpiece claim that the Foundations lack third-party beneficiary rights under the Agreements. To the contrary: The Foundations do have

¹ The Court also rejected the City’s incongruous contention that the Agreements – under which the City itself continued to receive payments not only during the license’s initial five-year term but also during all renewal periods – had somehow “expired after five years.” *Id.* at 623.

such rights, having “justifiably relied on the revenue that has flowed as a result of the local development agreements and the license issued by the Gaming Commission.” *Id.* at 625. Those rights are simply not “a permanent bar to altering the methods employed to further economic development in East Chicago,” because “the arrangements contained in the license issued by the Commission” (*i.e.*, the Agreements’ provisions) “may be revised through resort to the Commission’s administrative processes.” *Id.*

As the above quotations reveal, the Court’s prior decisions in this controversy emphasize the Commission’s vital oversight responsibilities. To repeat: It is the Commission, after full public hearing and investigation, that “incorporated” the Agreements’ terms as “conditions” to the gaming license. *East Chicago II*, 904 N.E.2d at 217; *East Chicago I*, 908 N.E.2d at 611. It is the Commission that has authority to alter the Agreements, as part of “the duties and powers that the Riverboat Gambling Act confers upon [it].” *Id.* at 623-24. The Foundations have legal rights under the Agreements; but those rights are subject to revision *via* “the Commission’s administrative processes.” *Id.* at 625. Simply put, “The Commission’s role in these events is a central one.” *Id.* at 623.

II. The Court’s Earlier *East Chicago* Cases Undermine The Court of Appeals And Trial Court Decisions, Along With The City’s “No Oversight” Thesis.

The Court of Appeals majority said it need not address constitutionality of Section 302, saying the City could “*always*” change the Agreements, 905 N.E.2d at 35; that the Foundations had no third-party beneficiary rights, *id.* at 36-38; that the Agreements were terminable at will by the City, *id.* at 35-36, 39; and that the City could set “new conditions to the continuation of the [gaming] license,” *id.* at 39. These rationales have now been rejected by this Court.

The trial court judgment (now on appeal to this Court) relied on the same or similar rationales in holding Section 302 was constitutionally permissible. In particular, its conclusions

that there was no impairment of contract rights and no uncompensated “taking” depended on its view that the Foundations were not third-party beneficiaries but just a “conduit” through which distributions under the Agreements were “channeled.” App. 30 (Concl. 34); *see* App. 55 (Concl. 155) (because Foundations were mere “conduits,” “there is no private property at stake that could be taken”); App. 58 (Concl. 169) (funds distributed to Foundations were merely “gratuitous payments”); App. 60 (Concl. 178) (Foundations “lose[] nothing compensable”).

In adopting these erroneous views, the Court of Appeals majority and the trial court embraced City-advanced theories (in the trial court’s case, by signing an edited version of the City’s tendered entry). This Court’s *East Chicago* decisions also undermine another claimed justification for Section 302 – namely, that there is insufficient “oversight” of the Agreements. *See, e.g.*, App. 23 (Fndg. 70); App. 34 (Concl. 53); City Br. 6-7, 14-16; Att’y Gen. Br. 16-18, 30, 36. This notion is refuted by this Court’s emphasis on the Commission’s “central” role in regulating local development agreements, including the Agreements here. It is further refuted by (a) the Commission’s *exercise* of that role in cutting-off further funding for Second Century (but not the Foundations), *see East Chicago I*, 908 N.E.2d at 616; and (b) the Court’s upholding of the Attorney General’s own authority to seek “constructive trust” and other relief as to funds paid to Second Century before that cut-off, *see East Chicago II*, 904 N.E.2d at 218-22.²

² The Court’s earlier *East Chicago* decisions also do not treat alleged Second Century misconduct as if it were somehow attributable to the Foundations, in contrast to the judgment on appeal and the arguments of the City and Attorney General. *See, e.g.*, App. 19-21 [Fndgs. 50-61] (titled “Concerns Regarding Payments to Second Century”); City Br. 1-2 (adopting, also, Att’y Gen. Br. Statement of Facts); Att’y Gen. Br. 3-7, 20-22, 30.

III. The Court's Prior *East Chicago* Cases Also Demonstrate That Section 302 Violates Constitutional Protections Against Abuses Of Legislative Power.

The Court's earlier decisions, including *East Chicago P's* recognition and explication of the Foundations' contract rights and the "central" role of the Commission's regulatory authority, also undermine the trial court judgment that Section 302 is constitutionally permissible.

First, it cannot credibly be disputed that Section 302 impairs contract rights, and takes property interests, that this Court has now confirmed exist under the Agreements. That those rights and interests are limited by and subject to regulation does not mean that constitutional protections against their impairment or taking disappear. "Heavy regulation of an industry may reduce reasonable expectations" of those with contract rights; but it "does not automatically foreclose the possibility of contract impairment. Courts have found substantial impairment of contracts in heavily regulated areas of commerce." *In re Workers' Comp. Refund*, 46 F.3d 813, 820 (8th Cir. 1995) (citations omitted). Numerous cases reject the view that extensive regulation means that contract rights in the regulated field may be freely impaired. *E.g.*, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978) (employee pensions); *Verizon W. Va., Inc. v. W. Va. Bureau of Employment Programs*, 586 S.E.2d 170, 210 (W. Va. 2003) (collecting cases finding impairment in heavily regulated areas); *Minn. Ass'n of Health Care Facilities, Inc. v. Minn. Dep't of Pub. Welfare*, 742 F.2d 442, 451 (8th Cir. 1984) (nursing home rates); *Holiday Inns Franchising, Inc. v. Branstad*, 29 F.3d 383, 385 (8th Cir. 1994) (franchise agreements).

Thus, the trial court seriously erred in embracing the City-advocated notion that when a legislature "has the power to regulate in a field, it also has the power to destroy or disregard contracts rights in that field" (App. 52-53 (Concl. 145)). This Court and its Federal counterpart have long held otherwise. *See City of Indianapolis v. Consumers Gas Trust Co.*, 140 Ind. 107, 114, 39 N.E. 433, 435 (1895) (it is "a well settled legal principle" that the "power to regulate . . .

must be held not to carry with it the additional right to prohibit, annul, or destroy rights arising out of contract”); *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362, 398 (1894) (“This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation”); *cf. Owensboro v. Cumberland Tel. & Tel. Co.*, 230 U.S. 58, 73 (1913) (allowing a city to revoke contracts by legislative action “would be to place every contract made by the city by virtue of an ordinance . . . subject to the mercy of changeable city councils”).³

In sum, this Court has confirmed that the Agreements confer contract rights on the Foundations. Those rights are subject to Commission regulation, bounded by due process and other safeguards against arbitrary, capricious exercise of regulatory authority. But the Legislature may not simply abrogate those rights (or authorize such abrogation at the City’s whim). Section 302 does just that. It is not some “temporary alteration of the contractual relationships of those within its coverage, but work[s] a severe, permanent, and immediate change in those relationships – irrevocably and retroactively.” *Clem v. Christole, Inc.*, 582 N.E.2d 780, 784 (Ind. 1991) (quoting *Allied*, 438 U.S. at 250). This is constitutionally prohibited.

Second, the Court’s earlier *East Chicago* decisions illustrate that Section 302, which is concededly special legislation, is constitutionally impermissible because there was no bar to enacting a law of general applicability. In discussing the Commission’s vital, “central” role, *East Chicago I* does not point to matters “unique” to East Chicago. It cites instead statutorily conferred powers that apply to Commission regulation of riverboat gaming in *every* locale where such gaming is authorized. These include authority “to renew an existing license;” to approve or

³ The City’s related notion that contract rights are not “property” for Federal and Indiana Takings Clause purposes is equally mistaken. *See, e.g., Pulos v. James*, 261 Ind. 279, 302 N.E.2d 768 (1973) (statute authorizing metropolitan plan commissions to invalidate covenants in land sale contracts violated Takings Clauses); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923) (if “contract . . . is taken for public use, the Government is liable”); *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 (1977) (“Contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid”).

disapprove “any sale or transfer of a license;” “to revoke or cancel the licenses and their attendant conditions;” and to “alter the terms and conditions of a license” as part of “the duties and powers that the Riverboat Gambling Act confers upon the Gaming Commission.” 908 N.E.2d at 623-24. All this applies not just to East Chicago, but across the State’s riverboat gaming landscape. *East Chicago I* likewise noted that the Commission “has historically acted by taking into serious account the views and arrangements” not of East Chicago alone, but “of the cities in which gaming operations are conducted.” *Id.*

Similarly, *East Chicago II* is clear that fostering local development – a key focus of the Agreements here – is an important statutory objective that the Commission evaluates not just in East Chicago, but in every riverboat gaming venue:

Our General Assembly explicitly declared that one of the purposes behind allowing riverboat gambling was to foster economic development. Thus, securing a riverboat license requires an applicant to obtain the endorsement of the city or community in which the riverboat would operate by providing assurances that economic development will occur in the endorsing city or community. The Indiana Gaming Commission may take the proposed economic development into consideration when granting riverboat licenses to competing applicants.

904 N.E.2d at 218 n.1 (statutory citations omitted).

Thus, nothing about the pertinent Commission regulatory authority, including as to local development agreements, is limited or confined to East Chicago, or requires enactment of special legislation targeted at that City alone, or otherwise renders it impossible or impracticable for the Legislature to enact laws of general applicability to all riverboat venues. This includes laws responding to claimed legislative concerns about “corruption.” As the Foundations showed, the City’s newspaper “evidence” on this topic is not evidence at all; is not confined to riverboat gaming issues (much less to matters involving the Agreements or the Foundations); and is not confined to East Chicago. *See* *Founds. Br. of Appellant* 31-34 & nn.18-22 (documenting *inter*

alia that this Court’s “special legislation” cases rely on “the presence or absence of evidence satisfying judicial notice and other baseline evidentiary standards”). But even assuming (a) legislative concern about corruption, and (b) that such concern arose in whole or in significant part from perceptions of past events in East Chicago, this would *not* preclude or inhibit enacting a law of general applicability addressing potential corruption involving local development agreements in *every* riverboat gaming locale (which law would necessarily respond to any perceived “corruption” problems as to the East Chicago Agreements).

This itself is fatal to attempted defense of Section 302’s constitutionality. Again, the trial court, the City and the Attorney General do not dispute the obvious: Section 302 is “special legislation.” Hence, the only pertinent inquiry under our 1851 Constitution’s special legislation provisions is whether the Section addresses topics on which a law of general applicability could not be enacted. For all their speculation on what the Legislature “could” or “may” or “might” have had in mind in adding Section 302 to the Budget Act on the 2007 session’s final day, the City and Attorney General have never advanced any reason (speculative or otherwise) why problems with potential corruption involving local development agreements cannot be addressed by a law of general applicability. The trial court judgment also simply ignores this.

In short, this Court’s earlier *East Chicago* decisions show that the Commission’s regulatory authority with respect to local development agreements arises from statutorily conferred powers that apply to all Indiana riverboat gaming venues, not just East Chicago. There is no reason any problems at which Section 302 was supposedly directed could not have been addressed by a law of general applicability.

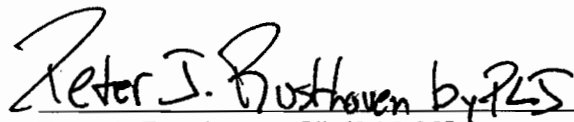
Finally, the Court’s *East Chicago I* decision highlights Section 302’s violation of “separation of powers” principles. As the Foundations showed below, by enacting the Section,

the Legislature effectively overruled a judicial judgment (then pending on appeal) rejecting the City's assertion of unilateral power to void or alter the Agreements as it wished. *See* Founds. Br. of Appellant 34-37 (discussing *inter alia Thorpe v. King*, 248 Ind. 283, 227 N.E.2d 169 (1967)). For all practical purposes, the City "appealed" to the Legislative Branch for relief denied it by the Judiciary. The Branch with actual and ultimate authority to resolve the City's appeal is headed by this Court. Its *East Chicago I* decision has now affirmed Judge Bradford's judgment disposing of the City's claimed authority to redirect to itself funds that the Agreements provide will be distributed to the nonprofit Foundations. This underscores that in enacting Section 302, the Legislature "usurped [and] infringed upon" the powers and duties of the Judicial Branch, whose "independence is essential to an effective running of the government." *State v. Monfort*, 723 N.E.2d 407, 411 (Ind. 2000).

CONCLUSION

For the reasons shown, this Court's *East Chicago I* and *East Chicago II* decisions refute the judgment's reasoning in upholding Section 302, and rationales of the Court of Appeals majority for not addressing the constitutional issues presented. These decisions also underscore that Section 302 violates constitutional safeguards against abuse of legislative power, including the prohibitions on impairing contract rights and on "special legislation" when nothing precludes a law of general applicability. Section 302 is unconstitutional. This Court should so declare.

Respectfully submitted,



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WORD COUNT CERTIFICATE

Pursuant to Indiana Appellate Rule 44(F) and in compliance with the Court's Order herein of September 21, 2009, I verify that the foregoing Supplemental Brief (exclusive of Appellate Rule 44(C) items) contains no more than 4,200 words, as determined by the word processing system used to prepare the Brief (Microsoft Word XP).



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CERTIFICATE OF SERVICE

Pursuant to Indiana Appellate Rule 24(D), I certify that on September 21, 2009 I caused copies of the foregoing Supplemental Brief to be served on the following by United States mail, first-class postage prepaid:

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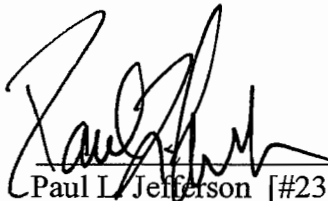
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