

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL***29D03-0502-MI-169******Findings Conclusions and Judgment***

2. In response to the City's annexation ordinance, on February 18, 2005 the Landowners timely filed their *Petition Remonstrating Against the Proposed Annexation of Home Place into the City of Carmel*.

3. The Court entered its *Order of Certification*, certifying the remonstrance, on May 10, 2005. That order also set this cause down for an evidentiary hearing, in compliance with the applicable statute, I.C. 36-4-3-11(c), within sixty (60) days after entry of the certification order.

4. The statute governing the evidentiary hearing, I.C. 36-4-3-13, requires an annexing city, in this case Carmel, to meet a threshold burden of demonstrating the City's compliance with (1) either I.C. 36-4-3-13(b) or -13(c), and (2) I.C. 36-4-3-13(d).

5. At the beginning of the hearing on July 7, 2005, the parties stipulated that the evidence satisfies all requirements of I.C. s 36-4-3-13 (b) (*i.e.*, that Home Place is contiguous to Carmel, that Home Place has the requisite population density or is at least 60% subdivided, and that the zoning for Home Place permits commercial, business, or industrial uses).

6. The parties did not stipulate, however, that the evidence satisfies all requirements under I.C. s 36-4-3-13(d). Specifically, the requirements for the proposed annexation under I.C. s 36-4-3-13(d)(2) – that Carmel's "written fiscal plan must show . . . [t]he method or methods of financing the planned service . . . and explain how specific and detailed expenses will be funded and . . . indicate the taxes, grants, and other funding to be used" – was a contested issue at the evidentiary hearing.

7. By Resolution No. 07-02-04-01, on July 2, 2004 the City adopted an eighteen-page document entitled *Fiscal Plan: Home Place Annexation Area* (hereafter "the fiscal plan") in an attempt to comply with the requirements of I.C. 36-4-3-13(d). Attached to the fiscal plan was a fourteen-page document entitled *CITY OF CARMEL – Net impact, Home Place Annexation –*

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL

29D03-0502-MI-169

Findings Conclusions and Judgment

Revised June 23, 2004. See Respondent's Exhibit B. The City later considered a fifteen-page version of the original fourteen-page financial projections entitled *CITY OF CARMEL – Net Impact, Home Place Annexation – Revised July 22, 2004* (hereafter "the financial projections"). See Respondent's Exhibit J. Both parties used and referred to the second version of the financial projections at the hearing as if it were attached to and incorporated into the fiscal plan. Accordingly, the Court finds that the revised financial projections were duly adopted by the City of Carmel as a part of its fiscal plan.

8. In pertinent part, the financial projections of the anticipated expenditures and revenues directly associated with Carmel's proposed annexation of Home Place show sizeable net losses to the City from the proposed annexation for the first three (3) years after the annexation would take effect:

	<u>2006</u>	<u>2007</u>	<u>2008</u>
Net Revenues (Expenditures)	(\$986,743)	(\$975,250)	(\$1,476,950)

Respondent's Exhibit J at 4.

9. In pertinent part, the financial projections assert that for the first two years after the annexation the City will precisely offset these substantial losses, and in the third year after the annexation will absorb the projected losses, with other unspecified "revenues":

	<u>2006</u>	<u>2007</u>	<u>2008</u>
Other available net revenues	\$986,743	\$975,250	\$3,812,561

Respondent's Exhibit J at 4.

10. The City's original and revised financial projections were prepared by Curtis Coonrod, an independent certified public accountant who has projected revenues and expenditures for the City of Carmel for ten (10) years.

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL**29D03-0502-MI-169*****Findings Conclusions and Judgment***

11. At the hearing, Mr. Coonrod testified that the asserted "other available net revenues" are "funds that have accrued over time and are available," agreeing with the Landowners' counsel that the asserted "other available net revenues" are "Carmel's cash."

12. In his rebuttal testimony against the financial analysis of the Landowners' expert witness, Eric Reedy, Mr. Coonrod observed that, in his opinion, "the least reliable place to look for the available balance of any unit is that formal budget document [filed by Carmel with the Indiana Department of Local Government Finance, and primarily relied upon by Mr. Reedy in forming his opinion that Carmel has no available cash to pay for the proposed annexation]. The more reliable place to look," Mr. Coonrod continued, is "the Clerk-Treasurer's records, the Clerk-Treasurer's annual report" Mr. Coonrod testified further that the City of Carmel is already in a period of "drawing down its operating budget."

13. At the hearing, Carmel introduced no documents to prove the existence of the "other available net revenues" as asserted in Respondent's Exhibit J and as reiterated, just as unreviewably, in the testimony of Mr. Coonrod.

14. No elected official of the City of Carmel testified at the remonstrance hearing.

15. The evidence contains a direct conflict on the key question of whether Carmel indeed does have the "other available net revenues" asserted in Respondent's Exhibit J and described as "Carmel's cash" during Mr. Coonrod's testimony. Mr. Reedy testified for the Landowners that he saw no available operating balance for the City of Carmel "in 2006 or any year subsequent to 2006." He based his opinion not only on the formal report that Carmel filed with the Indiana Department of Local Government Finance but also on "the most recent annual

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL**29D03-0502-MI-169****Findings Conclusions and Judgment**

report of the City of Carmel," the kind of document that Mr. Coonrod himself called "the more reliable place to look" for Carmel's available operating balance.¹

16. Both on its own terms and in the context of other pertinent evidence, the City's evidence that it will pay for the proposed annexation with "other available net revenues" is merely a "vague promise" that fails to "show . . . the method or methods of financing" the annexation as required by I.C. s 36-4-3-13(d)(2). Carmel's fiscal plan therefore does not "represent[] a *credible* commitment by the municipality to provide the annexed area with comparable capital and non-capital services." *Bradley v. City of New Castle*, 764 N.E.2d 212, 216 (Ind. 2002) (emphasis added).

¹ The Court declines to adopt Carmel's characterization of this conflict in the evidence as being "only" a disagreement about the sources of the projected funding for the fiscal plan. *See, e.g.*, the closing argument of Carmel's counsel and also the post-hearing *Brief of City of Carmel* at 4-5 (conflict between Mr. Coonrod's and Mr. Reedy's testimony went "only" to "the specific sources of funds that the fiscal plan identifies"). On direct examination, Mr. Reedy several times unequivocally doubted the existence of Carmel's asserted "other available net revenues," funds that allegedly already exist, according to Mr. Coonrod's portrayal of them as "Carmel's cash" or "funds that have accrued over time and *are* available" (emphasis added to highlight the present-tense verb). On direct examination, Mr. Reedy testified that he disputes four parts of Mr. Coonrod's fiscal analysis: (1) one part regarding the automatic tax levy for annexing cities in Indiana; (2) another regarding the projected "other available net revenues" at page 4 of Respondent's Exhibit J, (3) another involving a street bond, which Mr. Reedy thought required an increase in property tax; and (4) a final area involving the sewer fund, which he also saw as requiring a property-tax increase. His testimony on cross-examination, that he disputes the sources of Carmel's projected funds because, unlike Mr. Coonrod, he foresees a significant property-tax increase, goes only to the tax-related Items No. 1, No. 3, and No. 4 of his listed disagreements with Mr. Coonrod. Mr. Reedy's testimony on cross does not negate his several unequivocal statements that Carmel's asserted "other available net revenues" do not exist, and it is that second item in his disputed issues that is the sole focus of this Order.

The Court also concludes, however, that the conflict between Mr. Coonrod's and Mr. Reedy's testimony would be material even if it went to "only" the sources of Carmel's proposed funding for the annexation because I.C. s 36-4-3-13(d)(2)'s focus on "method or methods of financing" would make such a disagreement material. A conflict in the evidence on what sources would fund the annexation is particularly relevant when the overarching issue is whether Carmel's fiscal plan "represents a *credible* commitment by the municipality to provide the annexed area with comparable capital and non-capital services." *Bradley v. City of New Castle*, 764 N.E.2d 212, 216 (Ind. 2002) (emphasis added).

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL**29D03-0502-MI-169****Findings Conclusions and Judgment**

17. Any conclusion of law that is more properly denominated a finding of fact is hereby incorporated into these findings as if it were fully stated herein.

CONCLUSIONS OF LAW

1. Any finding of fact that is more properly denominated a conclusion of law is hereby incorporated into these conclusions as if it were fully stated herein.

2. In Indiana, "[a]nnexation is essentially a legislative process, and courts should not micromanage it." *Bradley*, 764 N.E.2d at 214. Because of the constitutional separation of powers, *see* IND. CONST. art. 3, sect. 1, judicial review of a municipality's compliance with the statutory requirements for annexation is necessarily limited:

The trial court's role [in hearing and deciding a proposed annexation's compliance with statutory requirements] is to decide whether the municipality has operated within its authority and satisfied the statutory conditions for annexation. .

Id. at 216 (citation omitted).

3. Although annexation is still an essentially legislative process in Indiana, that process has changed dramatically in the past thirty-five (35) years. Most pertinent to this Order is the unmistakable evolution of a legislative intent to require more precision from fiscal plans when municipalities must justify proposed annexations in court:

- In 1971, I.C. 18-5-10-25(c) required only a showing that "[t]he annexing city has developed a fiscal plan" The Indiana Court of Appeals, finding the statute ambiguous, construed that general requirement to hold that "factor (c) is not satisfied by evidence which fails to show . . . how [the annexing city] intends to finance its provision of such services." *Harris v. City of Muncie*, 163 Ind.App. 522, 531, 325 N.E.2d 208, 214 (1975).
- In 1992, I.C. 36-4-3-13(d)(2) required a written fiscal plan that showed "[t]he method or methods of financing the planned services." *Bradley*, 764 N.E.2d at 218 (quoting I.C. 36-4-3-13(d)(2) (West Supp. 1992)).

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL**29D03-0502-MI-169****Findings Conclusions and Judgment**

- Today I.C. 36-4-3-13(d)(2) requires a written fiscal plan showing “[t]he method or methods of financing the planned services. The plan must explain how specific and detailed expenses will be funded and must indicate the taxes, grants, and other funding to be used.”

Thus, although annexation is still clearly an essentially legislative process, the General Assembly has just as clearly evinced an evolving intent to require cities to provide more “specific and detailed” explanations of how they plan to pay for proposed annexations. The Court concludes further that the even more dramatic modifications of Indiana’s annexation process enacted in 1999 at I.C. 36-4-3-13(e) – changes that for the first time give remonstrators an opportunity to defeat a proposed annexation even if an annexing city complies with the requirements of I.C. 36-4-3-13(a) (requiring satisfaction of -13(d) and either -13(b) or -13(c)) – further demonstrate a legislative intent to reduce the courts’ “considerable deference,” *Bradley*, 764 N.E.2d at 216 (applying Indiana’s 1992 annexation statutes), to cities in annexation proceedings.

4. The statutory requirement of a written fiscal plan has three purposes: (1) to “permit [] landowners to make an intelligent decision about whether to accept annexation or remonstrance”; (2) to “make [] the opportunity for remonstrance and judicial review more realistic. As a practical matter, *more than vague promises are needed* for a court to test a city’s ability to provide like services to the annexed territory”; and (3) “to protect the right of landowners to institute proceedings to force an annexing city to provide the services promised under the plan.” *City of Hobart v. Chidester*, 596 N.E.2d 1374, 1377-78 (Ind. 1992) (emphasis added). This Order resolves issues involving the second of these three purposes.

5. Traditionally, and still today under the current version of I.C. 36-4-3-13, a remonstrance proceeding puts the annexing city to its proof. “Even though the burden of pleading is on the remonstrator, the burden of proof [at a hearing on an annexation remonstrance]

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL**29D03-0502-MI-169****Findings Conclusions and Judgment**

is on the municipality to demonstrate compliance with the statute.” *Rogers v. City of Elkhart*, 688 N.E.2d 1238, 1240 (Ind. 1997). The constitutional separation of powers, however, limits the degree to which Indiana courts will scrutinize fiscal plans in annexation proceedings:

Although the municipality bears the burden of proof when properly challenged, we afford legislative judgment considerable deference. It is well-established that we avoid scrutinizing legislative processes, even those that are constitutionally mandated. . . .

Therefore, a trial court hearing a remonstrance is not an examiner conducting an audit of a challenged fiscal plan. Rather, it should focus on whether that plan represents a *credible* commitment by the municipality to provide the annexed area with comparable capital and non-capital services.

Bradley, 764 N.E.2d at 216 (applying Indiana’s 1992 annexation statutes) (emphasis added).

6. Carmel’s burden of proof here is of course the civil standard requiring only a preponderance of the evidence. “A ‘preponderance of the evidence,’ when used with respect to determining whether or not one’s burden of proof has been met, simply means ‘the greater weight of the evidence.’” *Estate of Reasor v. Putnam County*, 635 N.E.2d 153, 160 (Ind. 1994). Evidence that supports only an inference that an event “might have” occurred is not sufficient: “the ‘might have’ standard is not a correct statement of the burden of proof . . . [because it] invites the [trier of fact] to speculate.” *Anderson v. Pre-Fab Transit Co.*, 409 N.E.2d 1157, 1160 (Ind. Ct. App. 1980). It is well settled that “civil liability . . . may not be predicated purely on speculation.” *Kaminski v. Cooper*, 508 N.E.2d 29, 31 (Ind. Ct. App. 1987) (citation omitted). In weighing the evidence, “the trier may disregard oral evidence if [it is] considered unreasonable or inconsistent with facts and circumstances shown by other evidence in the case.” *Wilson v. Indiana Gas & Water*, 126 Ind.App. 302, 306, 130 N.E.2d 498, 501 (1955), *trans. denied*.

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL**29D03-0502-MI-169****Findings Conclusions and Judgment**

7. The Landowner's remonstrance petition here should be granted because Carmel has not met its burden of proving a fiscal plan that complies with I.C. 36-4-3-13(d)(2) and thus "represents a *credible* commitment . . . to provide the annexed area with comparable capital and non-capital services." *Bradley*, 764 N.E.2d at 216 (emphasis added). Even under the more deferential judicial review that applied under earlier annexation statutes, *see, e.g., id.*, Carmel's "vague promises" about the asserted "other available net revenues" with which it would pay for annexing Home Place cannot support a judgment for Carmel.

By themselves, Mr. Coonrod's undocumented assertions about the existence of "other available net revenues" merely repeat the "vague promises" in Respondent's Exhibit J of those alleged "revenues," and thus neither Respondent's Exhibit J nor Mr. Coonrod's testimony nor a combination of Respondent's Exhibit J and Mr. Coonrod's testimony can support a judgment for Carmel; conflicts or inconsistencies between Mr. Coonrod's oral testimony and other evidence, though, further undermine Carmel's credibility on this essential part of its case. One inconsistency lies between the language of Respondent's Exhibit J and Mr. Coonrod's testimony: whereas Respondent's Exhibit J speaks of "other available net revenues," Mr. Coonrod spoke of a supply of "cash" that is already at Carmel's disposal. Even for public entities, however, "revenues" refers to incoming new funds, *see BLACK'S LAW DICTIONARY* (6th ed.) at 1319 (defining "public revenues"), not to a currently available, static supply of "cash." Further, Mr. Coonrod himself raised questions about Carmel's current operating balance by stating, in rebuttal, that Carmel has been "drawing down its operating balance." Most telling of all, Mr. Reedy's assessment of Carmel's operating balance – that the City has no operating balance at all – directly conflicts with Mr. Coonrod's assurance that the cash is there – and Mr. Reedy based his assessment in part on what Mr. Coonrod himself called "the more reliable place to look" for

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL**29D03-0502-MI-169****Findings Conclusions and Judgment**

Carmel's available balance, the Clerk-Treasurer's annual report for the City. Carmel could have called any of a number of sworn public officials, especially the City's Clerk-Treasurer, to testify in behalf of the proposed annexation; perhaps the simplest, most persuasive solution of all would have been to introduce a certified copy of the City's financial records to prove that the asserted "other available net revenues" do indeed exist. Instead of these ready alternatives, though, the City's evidence requires the Court to accept the undocumented assertions of Carmel's third-party accountant that the funds are available. Accordingly, the Court can only conclude that Carmel has not sustained its burden of proving a fiscal plan that satisfies I.C. s 36-4-3-13(d)(2) and thus "represents a *credible* commitment . . . to provide the annexed area with comparable capital and non-capital services." *Bradley*, 764 N.E.2d at 216 (emphasis added). The Landowners' petition therefore should be granted.

8. Moreover, although the Court is aware of no precedent deciding a fiscal plan's compliance specifically with I.C. 36-4-3-13(d)(2), and although the current annexation statutes are far less deferential toward annexing cities about such requirements than they were in the past, the conclusion that the Landowners' petition here should be granted is fully consistent with precedent on the larger issue of the showing required by annexing cities in judicial proceedings. In *Bradley*, our Supreme Court superseded the Indiana Court of Appeals' decision and affirmed the trial court's ruling that the City of New Castle's fiscal plan satisfied the applicable statutory requirements and the three general goals for fiscal plans identified in *City of Hobart v. Chidester*, 596 N.E.2d 1374, 1377-78 (Ind. 1992). See Conclusion No. 4, *supra* at 7. The trial judge in *Bradley* found as fact errors of arithmetic and an inaccurate statement of costs in New Castle's fiscal plan, see 764 N.E.2d at 219, but the trial judge also concluded that the City's "written plan also allowed for a complete judicial review" and that the plan's errors "could easily be identified

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL***29D03-0502-MI-169******Findings Conclusions and Judgment***

by the lay public as well as the Court” and, again, “were clearly identified.” *Id.* at 220. The trial judge in *Bradley* ultimately concluded that, “[a]t the end of the trial in this case, the remonstrators had complete information as to the City’s plans for provisions of services to the annexed areas.” *Id.* at 221 (emphasis added). Here, however, without more than undocumented testimony on the “other available net revenues,” neither the remonstrators nor the Court has complete information about Carmel’s plans for annexing Home Place. The distinction between *Bradley* and this case requires that the Landowners’ remonstrance petition here be granted.

Additionally, the “other available net revenues” evidence in this case bears a striking resemblance to the annexing city’s evidence that the Indiana Court of Appeals squarely rejected in *Harris v. City of Muncie*, 163 Ind.App. 522, 325 N.E.2d 208 (1975). The 1971 statute at issue in *Harris*, I.C. 18-5-10-25(c) (now repealed), required in pertinent part only that the annexing city show that it “has developed a fiscal plan” 163 Ind.App. at 525, 325 N.E.2d at 210. The 1971 statute did not expressly require a written fiscal plan, and the City of Muncie did not produce one on its own initiative. The remonstrance hearing, however, pointed up a more fundamental problem with both the City of Muncie’s annexation process and, more relevant for assessing Carmel’s evidence in this case, with the evidence put on by the city to justify its proposed annexation. On the witness stand, Muncie’s mayor did not know, and could not point the court to any formal plan showing, the specifics of how Muncie planned to provide or fund essential services. See 163 Ind.App. at 530, 325 N.E.2d at 213. The best help that Muncie’s mayor could offer was that Muncie’s alleged justification for the proposed annexation was somewhere “in the total budget” and thus in effect shielded from meaningful review by the trial court. The Court of Appeals rejected this approach, squarely holding that even the relatively

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL***29D03-0502-MI-169******Findings Conclusions and Judgment***

vague, undemanding requirements of the now-repealed I.C. s 18-5-10-25(c) required a more reviewable, more credible showing than the one made by the City of Muncie:

[W]e . . . hold that factor (c) is not satisfied by evidence which fails to show . . . how [the annexing city] intends to finance its provisions of such services. We further hold that such evidence must be sufficiently specific to enable the court to determine whether the proposed schedule is reasonable in itself and whether, if followed as planned, it would in fact enable the city to provide services as required.

163 Ind.App. at 531, 325 N.E.2d at 214. In this case, Carmel, unlike the City of Muncie in *Harris*, obviously adopted a written, relatively detailed fiscal plan. At the same time, the key issue of the existence of Carmel's alleged "other available net revenues" is just as unreviewable as the overall fiscal planning was in *Harris*. Thus, under the far more demanding statutory requirements of I.C. 36-4-3-13(d)(2) in this case, the reasoning of *Harris* clearly means that the evidence on the manner in which Carmel would pay for annexing Home Place is not "sufficiently specific to enable the court to determine whether the proposed schedule is reasonable in itself and whether, if followed as planned, it would in fact enable the city to provide services as required." 163 Ind.App. at 531, 325 N.E.2d at 214. Accordingly, *Harris* also requires the conclusion that the City of Carmel's evidence fails to sustain the City's burden here, and that the proposed annexation of Home Place therefore should not occur.

JUDGMENT

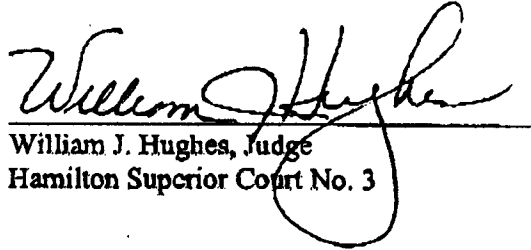
IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that:

1. The *Petition Remonstrating Against the Proposed Annexation of Home Place into the City of Carmel* filed February 18, 2005 by Petitioners, Certain Homeplace Annexation Territory Landowners, against Respondent, the City of Carmel, is **GRANTED**.

CERTAIN HOMEPLACE LANDOWNERS v. CARMEL***29D03-0502-MI-169******Findings Conclusions and Judgment***

2. Judgment is therefore hereby entered in favor of Petitioners Certain Homeplace Annexation Territory Landowners and against Respondent the City of Carmel; and, accordingly, Respondent's proposed annexation of Home Place as provided under Carmel City Ordinance C-264 shall not occur.

SO ORDERED THIS 4th DAY OF OCTOBER, 2005.



William J. Hughes, Judge
Hamilton Superior Court No. 3

Copies to:

Stephen R. Buschmann

Nicholas K. Kile

Douglas C. Hancy