

IN THE
INDIANA SUPREME COURT

No. 49A02-0711-CV-00987

FOUNDATIONS OF EAST CHICAGO,)
INC., successor by merger to EAST)
CHICAGO COMMUNITY)
DEVELOPMENT FOUNDATION, INC.) Appeal from the Marion Superior Court
and TWIN CITY EDUCATION)
FOUNDATION, INC.,) Trial Court Cause Nos.
) 49D13-0705-PL-019348
Appellant (Plaintiff Below),)
) The Honorable S.K. Reid, Judge
v.)
)
CITY OF EAST CHICAGO and)
STATE OF INDIANA,)
)
Appellees (Defendants Below).)
)

AMENDED BRIEF OF *AMICI CURIAE*, NEIGHBORHOODS INCORPORATED
OF HAMMOND, INDIANA, ST. CATHERINE HOSPITAL, INC., WORKFORCE
DEVELOPMENT SERVICES, INC., CALUMET COLLEGE OF ST. JOSEPH INC., JANELLE
SCOTT, AND THE HON. WILLIAM H. HUDNUT, III IN SUPPORT OF APPELLANT'S
PETITION TO TRANSFER

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I.

STATEMENT OF INTEREST

The *amici curiae* participating in this brief are Neighborhoods Incorporated of Hammond, Indiana (“NI”), St. Catherine Hospital, Inc. (“SCH”), Workforce Development Services, Inc. (“WDS”), Calumet College of St. Joseph Inc. (“CCSJ”), Janelle Scott (“Ms. Scott”), and The Hon. William H. Hudnut, III (“Mayor Hudnut”). NI and WDS are community organizations which operate educational and community development programs in Northwest Indiana, including East Chicago, Indiana. SCH is a hospital located in East Chicago and CCSJ is a college which draws its student from northwest Indiana, including East Chicago. Ms. Scott is a college student who lives in East Chicago. NI, SCH, WDS, CCSJ and Ms. Scott have all been the recipients of grants or scholarships which were funded by Appellant, Foundations of East Chicago, Inc. (“FEC”). Mayor Hudnut, as former Mayor of the City of Indianapolis, and through his subsequent work at The Urban Land Institute, has an interest and a perspective about FEC and the importance of philanthropy and community development. Collectively, the *amici curiae* are interested in the important constitutional, legal, and public policy issues raised on transfer, and their interests are aligned with FEC, which seeks transfer and reversal of the Indiana Court of Appeals’ published plurality opinion, Founds. of East Chicago, Inc. v. City of East Chicago, 905 N.E.2d 30 (Ind. Ct. App. 2009). Importantly, FEC’s contractual rights should be recognized and protected by this Court. If not, the primary funding of FEC will be diverted to Appellee, City of East Chicago (the “City”), and FEC’s grant and funding efforts may be significantly (if not critically) impaired.

II.

SUMMARY OF ARGUMENT

This *Amici Curiae* Brief supports FEC's Petition to Transfer, and requests this Court to grant transfer and reverse the Indiana Court of Appeals' published plurality opinion, Founds., supra, and to vacate the ruling of the trial court. The *amici* support the extensive philanthropic and charitable donations which FEC has infused into East Chicago, Indiana through its grants and scholarships.

The *amici curiae* (with the exception of Mayor Hudnut) have either received support from FEC in the form of grants or scholarships, and FEC's good work in the East Chicago community is well documented. These *amici* are concerned, however, that the FEC's funding of grants and scholarships will be irrevocably impaired if the rulings of the court of appeals and the trial court are allowed to stand.

The *amici* respectfully submit that, on the basis of constitutional, legal and public policy issues, the rulings of the Indiana Court of Appeals should be reversed and vacated, and respectfully request the Court to issue an order reaffirming FEC's contractual rights so that it may continue its work consistent with its mission.

III.

ARGUMENT

A. Introduction.

The *amici curiae* have a joint interest in assuring the vitality and independence of the private, philanthropic sector in Northwest Indiana, including East Chicago, Indiana. Through its grants and scholarships, FEC (and its merged predecessors) has infused much needed money into worthy projects, programs and scholarships which has positively impacted East Chicago. The law of charity typically allows a foundation otherwise pursuing the public interest to do so

without official interference. See, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 586 (1983) (“[E]ntitlement to tax exemption depends on meeting certain common law standards of charity – namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy.”). This independence is the bedrock of the ability of charitable organizations to serve the public good and achieve the charitable purposes defined by the laws and charters that govern them. Here, the continued viability of FEC is at the core of this litigation, as is the enforcement of the private contractual arrangements which led to the establishment of FEC and its merged not-for-profit predecessors. Importantly, the original private contractual agreement provided that, upon commencement of gaming operations, the East Chicago casino operator “agree[d] to contribute annually to and for the benefit of the economic development, education and community development in the City in an amount equal to three (3%) percent of [the casino’s] adjusted gross receipts” (App. 127). Of this amount, one (1%) percent went to the Twin City Educational Foundation, Inc. (“TCEF”) (App. 128), and one (1%) percent went to the East Chicago Community Foundation, Inc. (“ECCF”). (App. 129) Formed in February, 2007, FEC’s stated purpose in the merger of TCEF and ECCF is “[t]o benefit and support the citizens of the City of East Chicago, Indiana [], and the school systems and other educational and training entities serving the City, by promoting and carrying out the City’s charitable, developmental and educational functions benefiting the City[.]” (App. 2599) (quoting FEC Articles of Incorporation).

There can be no serious dispute that FEC (and its predecessors) have been faithful to this mission. Since 1997, FEC (and its merged predecessors) have given more than \$23,000,000 in grants to local churches, government, schools, and organizations that make East Chicago a safer and healthier place to live and learn. See <http://www.foundationsofeastchicago.org>. Also, FEC

has awarded more than \$2,300,000 in scholarships to East Chicago students, and it has invested in East Chicago's public and parochial schools, including \$5,500,000 in books and building and grounds improvement. See <http://www.foundationsofeastchicago.org/changing-lives-through-education>. The \$23 million given by FEC includes:

- \$2,000,000 to put families in safe, clean, and affordable homes
- Over \$450,000 to teach teens and adults valuable job skills
- Over \$160,000 in hearing assistance
- \$208,000 to help recent immigrants to transition to a new life
- \$100,000 to the City to run park programs for kids of all ages, and
- \$200,000 for after-school arts programs for elementary school children

See <http://www.foundationsofeastchicago.org/shaping-the-future-many-ways>.

The following *amici's* experience with FEC further underscores the success and importance of FEC's philanthropic efforts:

1. Neighborhoods Incorporated of Hammond, Indiana.

NI is a not-for-profit organization dedicated to community development in Hammond, Indiana and the Calumet Region. Traditionally, urban neighborhood development limited itself to focusing on decaying areas or low-to-moderate income households; however, NI is different in that it aides homeowners of all incomes, from the most prosperous to low or fixed incomes, to add value to their respective properties. NI goes beyond traditional community development activities through its innovative projects, partnering with other organizations to bring to the Calumet Region events consistent with its goals. NI recognizes that Calumet Region residents need more than a place to live; they also need a place to enjoy. NI organizes and advocates unique, positive and upbeat events for all ages and interests, and is continuously working to make the Calumet Region a highly desirable place to live. FEC has extended grants to NI for its programs in the New Addition Section of East Chicago, Indiana. (App. 2174). As noted in NI's 2008 annual report, which is available on its website, FEC has been a four year investor in NI's

programs, including NI's "Operation Restoration" and its "Best House On The Block Contest" in the New Addition Neighborhood of East Chicago. See 2008 Annual Report available at <http://www.neighborhoodsinc.com/newannualreport.html> (pp. 2-4, 7). Without the FEC's grants, NI would not be able to offer these programs in East Chicago.

2. St. Catherine Hospital, Inc.

SCH opened its doors in East Chicago, Indiana on May 17, 1928, as a dream realized through a successful partnership between the Manufacturers Association of East Chicago and the Poor Handmaids of Jesus Christ (the Ancilla Domini Sisters). Many "first ever" procedures were performed at SCH due to a successful collaboration between doctors, nurses, staff and the East Chicago community. In 2001, SCH became a member of the Community Healthcare System, ending the involvement of the Ancilla Domini Sisters although it continues to maintain its Catholic traditions. SCH continues to uphold its founding commitments to the East Chicago community, providing compassionate care to all who come through its doors.

SCH is an FEC grant recipient. (App. 2185-86). Through grants, FEC has given much needed financial support to SCH's "STOP Diabetes in East Chicago" program. Diabetes is a public health concern and financial burden to our society, especially in East Chicago. Diabetes is the leading cause of blindness, kidney disease and amputations, but also may cause long term cardiovascular complications, heart attacks and stroke. In 2005, the death rate for diabetes in Lake County, Indiana was nearly forty percent (40%) higher than the national average, and in East Chicago, the percentage of Hispanics and African Americans admitted to SCH with diabetes or complications associated with diabetes has increased twenty-eight percent (28%) since 2004. Through its "STOP Diabetes in East Chicago" program, SCH has approached the problem in several ways including establishing partnerships with local churches, providing prevention

education by bilingual health care professionals, working in partnership with church pastors to provide diabetes information to be shared with the congregation, and offering health screenings. Due to the program, over 1,000 people attended free diabetes education classes that were conducted in local churches and participants demonstrated a thirty-five percent (35%) improvement on session post testing. Also, 102 East Chicago residents attended diabetic self-management classes. The FEC's financial participation was important as many of the residents do not have financial means to attend these classes, and would have been unable to attend without FEC's grant support. Without this type of program, which is financially supported by FEC, these improvements in diabetes control and management might not have occurred in East Chicago. See Verified Motion for Leave to Appear as *Amici Curiae* (the "Verified *Amici* Motion"), Exhibit "A".

3. Workforce Development Services, Inc.

WDS is a 501(c)(3) non-profit organization that works to assist job seekers to obtain the skills needed to get jobs in the ever-changing Northwest Indiana labor market and to assist businesses to find the employees they need to remain or become competitive in today's business climate. WDS programs are designed to assist in meeting the training and employment needs of workers and employers. WDS operates four WorkOne service centers (including one located in East Chicago, Indiana) in conjunction with the Indiana Department of Workforce Development to provide employment, education and training services for workers, students and employers in Northwest Indiana.

WDS is a recipient of FEC grant funds. (App. 2200). FEC provided grant money for WDS programs designed to meet the needs of a community about careers, education, training, interviewing skills, job seeking skills, and community services. Also, grants have been extended

to upgrade enrolled clients in their basic skill levels and to enter higher vocational college training. In a recent program funded with grant money by FEC, forty students were allowed to participate at Purdue University (Calumet Campus) in teaching sessions with the emphasis on engineering and math topics. This program enhanced the students' math skills, allowed them to experience a college environment, and gave them exposure to careers in engineering, medicine and the sciences. The FEC grants funded these important programs, which provided educational opportunities that these students might not have had otherwise.

4. Calumet College of St. Joseph Inc.

CCSJ was founded in 1951 by the Missionaries of the Precious Blood, thereby establishing an educational outpost in the Calumet Region. Over the years, CCSJ has continued to serve the Calumet Region by offering quality college education in the Catholic tradition. CCSJ is a small, family oriented, four year college offering masters, bachelors, and associates degrees as well as certificate programs, and it serves a diverse student population largely from the surrounding urban areas from Northwest Indiana and Illinois.

CCSJ is a recipient of FEC grant money. (App. 2131-32). One of CCSJ's historical focus areas has been to provide education for law enforcement personnel and, according to its estimates, CCSJ has awarded associate, baccalaureate, and masters degrees to over fifty East Chicago, Indiana police officers, including the current and prior police chiefs. FEC has been an active supporter of higher education of East Chicago's residents, and of CCSJ, by funding scholarships for fifteen students since 2001.

CCSJ has an active focus on social justice in its surrounding communities, and FEC has been a generous supporter of a number of CCSJ's initiatives. Since 1998, FEC has committed almost \$55,000 in funding five of CCSJ's activities in this area to benefit the citizens of East

Chicago, including projects in health care, education and public safety. Most recently, with FEC's sponsorship and support, the CCSJ's public safety institute has joined with numerous other civic groups to undertake collaborative efforts to address pressing public safety concerns, with the support and involvement of the local police. The first of the collaborations, "Building Neighborhoods," will work to promote citizen engagement in neighborhood stabilization in five targeted neighborhoods experiencing crime problems. Subsequent initiatives to address other sources of criminal activity, such as truancy and recidivism, are currently being developed.

The FEC's innovative approach to fostering these broad-based community collaborations leverages existing resources to allow them to be more effective in combination than they would be able to individually. Expected benefits over a two to three year period would include a measurable reduction in crime, especially violent crime, more stable neighborhoods as measured by police calls for service, and improved school attendance rates. The impact on the community as a whole could be significant in terms of economic development and the overall quality of life in East Chicago. CCSJ believes that FEC is uniquely positioned to undertake these types of efforts. Further, CCSJ is concerned that if FEC's traditional funding resources are curtailed, then there is no alternative public or private agency to fulfill this vital role and help make East Chicago a better city. Absent the FEC's contribution, many of these programs would likely be curtailed, some significantly, or some may simply cease to function in East Chicago. See Verified *Amici* Motion, Exhibit "B".

5. Janelle Scott.

Ms. Scott is just one example of an East Chicago resident receiving college scholarship money. With a four year FEC college scholarship, Ms. Scott was able to attend and graduate from Marian College. In the fall, and with an FEC scholarship for her first year post-graduate

studies, Ms. Scott will be pursuing post-graduate studies in clinical psychology at Midwestern University.

6. The Hon. William H. Hudnut, III.

Mayor Hudnut served four terms as the Mayor of the City of Indianapolis, Indiana and is a Senior Fellow Emeritus at The Urban Land Institute in Washington, D.C. During Mayor Hudnut's four mayoral terms, Indianapolis benefited from philanthropic contributions that were used to fund many important social services. Without those funds, several institutions could have not survived, and Indianapolis would have been deprived of the benefits received from them. If FEC were to lose its funding stream, and the resulting loss of approximately \$3,500,000 per year in contributions, then FEC's ability to fund worthwhile activities in Northwestern Indiana would be restricted. Since leaving public office, Mayor Hudnut has come to appreciate the role that foundations play in undergirding important work and education, health care, policy formation, and human services. Mayor Hudnut serves on two non-profit boards, The Police Foundation of Washington, D.C. and Union Theological Seminary in New York, neither of which could have survived without charitable dollars. Philanthropy supports a net that prevents many people from falling into severe deprivation. In today's current economic climate, Mayor Hudnut believes it is particularly necessary to maintain that net, and to continue charitable support to the maximum extent possible. See Verified *Amici* Motion, Exhibit "C".

B. The *Amici* Support FEC's Petition To Transfer And, Based Upon Constitutional, Legal, And Public Policy Grounds, The Indiana Court Of Appeals' Published Plurality Opinion Should Be Vacated.

In the published plurality opinion below, Chief Judge Baker assumes that FEC has standing to pursue this litigation, and further assumes that § 302 of the 2007 Budget Act¹ was

¹ P.L. 234-2007, § 302.

unconstitutional, but then opined that enforcing the private funding agreements would be a “patent violation of public policy.” Found., 905 N.E.2d at 35. In a scant two paragraphs, and without citation to any authority, Chief Judge Baker opined that the City “always retained the authority to change the recipient of the licensee’s local economic development funds.” Id. The source of the public policy is not discernible as it is not predicated on any viable constitutional, statutory, or common law principle. To the contrary, such principles would compel the conclusion that § 302 is unconstitutional (or at least, impermissible) and that private funding agreements should not be impaired.

As a general principle, under the Contract Clause of the United States Constitution, art. I, § 10, cl. 1 no state may pass any “Law impairing the Obligation of Contracts” Here, Chief Judge Baker’s plurality opinion implies that an inherent residual power to designate the beneficiary of the private funding agreement somehow, someway inures to the benefit of the City. As a matter of constitutional law, however, the state is not privileged to impair contractual rights purely on the ground that the revenue flows from activities licensed by the state. Specifically, under the Constitutional Contract Clause, the state is not privileged to invade the assets of a private corporation purely on the grounds that it is a creature of state law. Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 638-40 (1819). Patently, a state cannot amend its laws or enlarge its regulatory power for the purpose of confiscating assets even if it seeks to do so from a private foundation authorized and funded due to state legislation. See, e.g., Illinois Clean Energy Cmty. Found. v. Filan, 392 F.3d 934, 936-37 (7th Cir. 2004). Here, FEC finds itself in a similar predicament: The private funding agreements were voluntarily established by another private entity, the owner/licensee of the East Chicago casino, and the obvious intent at the time of the formation of those funding agreements was that, in the event the license was

awarded and so long as the license lasts, then private foundations were to receive designated gaming funds and use them for charitable and community development purposes in East Chicago. There is no public policy prohibition to such an arrangement, and there is much wisdom in designating these proceeds to a private foundation given the inherent constitutional and legal restraints placed upon the City.

In a similar vein, § 302 also offends Indiana's counterpart to the United States Constitution's Contract Clause contained in art. 1, § 24 of the Indiana Constitution. See, e.g., Clem v. Christole, Inc., 582 N.E.2d 780 (Ind. 1991). In Clem, this Court emphasized the importance of this constitutional protection:

Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

582 N.E.2d at 784.

Here, at the time of formation of the private funding agreements, the contracting parties evidenced a clear intent to allocate two percent (2%) of the net gaming proceeds to private foundations. The clear import of these agreements, and the intended independence of the private foundations, will be destroyed if the contractual obligations are impaired and the funds are diverted directly to the City. In the record, FEC has documented the millions of dollars which it has infused for the betterment of East Chicago, Indiana. Importantly, there is oversight for these designated gaming funds and, as this Court recently held, the Indiana Attorney General has authority to bring an action and to request and impose a constructive trust if the circumstances warrant. See Zoeller v. East Chicago Second Century, Inc., 904 N.E.2d 213 (Ind. 2009). Given this oversight and protection, there is no rational purpose served by § 302. See, e.g., Energy

Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983).² Accordingly, the private funding agreements should be enforced, and the post-contract legislative enactments to divert funds to the City should be negated. This result is also consistent with the law of contracts. 11 Richard A. Lord, Williston on Contracts §30:23 (4th ed. 2004) (“As a rule of construction, changes in the law subsequent to the execution of a contract are not deemed to become part of agreement unless its language clearly indicates such to have been intention of parties”).

IV.

CONCLUSION


The *amici curiae* respectfully request that FEC’s Petition to Transfer be granted, and the Indiana Court of Appeals’ published plurality opinion vacated. Appellant, Foundations of East Chicago, Inc. should be entitled to receive the designated funds. If not, FEC’s charitable contributions through grants and scholarships will be impaired, and residents of East Chicago and non-profit community organizations will also be adversely impacted. If FEC’s funding is curtailed, then the *amici* are concerned that many of the programs and services offered by recipient not-for-profit organizations operating in East Chicago may also be adversely impacted, and this adverse impact will extend to the *amici* who are recipients of FEC’s grants and

² In Energy Reserves, the United States Supreme Court articulated a three part test as to whether a law violates the Contract Clause of the United States Constitution. The threshold inquiry is whether the state regulation operated as a substantial impairment of a contractual relationship. 459 U.S. at 411. If the state regulation constitutes a substantial impairment, the state must have a significant and legitimate public purpose behind the regulation to justify its enactment. Id. Finally, even if a significant and legitimate public purpose exists, the law must be reasonable and appropriate for its intended purpose. Id. at 412-13. Moreover, a stricter standard is applied when a governmental unit itself enters into a contractual relationship and then attempts to alter or impair the relationship (as is the case here): “When a State itself enters into a contract, it cannot simply walk away from its financial obligations. In almost every case, the Court has held a governmental unit to its contractual obligations when it enters financial or other markets.” Id. at 412 n.14. Here, § 302 fails the second and third prongs of the test; moreover, the City should not be allowed to impair its own agreements.


scholarships. In turn, this will adversely impact programs and services offered by *amici* in East Chicago.

Respectfully submitted,

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WORD COUNT CERTIFICATE

Pursuant to Rule 44(F) of the Indiana Rules of Appellate Procedure, I verify that this Brief contains no more than 4,200 words. I verify that the full document containing this Brief contains 3,680 words.

Respectfully submitted,

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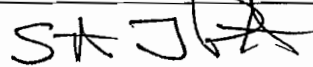
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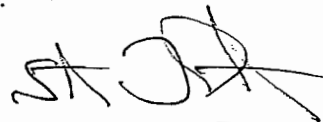
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AMENDED CERTIFICATE OF SERVICE

Pursuant to this Court's June 9, 2009 Order, the undersigned hereby certifies that the Brief of *Amici Curiae* has been amended and was served on June 15th, 2009 by placing a copy of same in the U.S. first class mail addressed to:

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All copies of the Amended Brief, including this Amended Certificate of Service, were returned to the Clerk of this Court on the date of service.



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