

STATE OF INDIANA)
) SS:
COUNTY OF ST. JOSEPH)

IN THE ST. JOSEPH CIRCUIT/SUPERIOR COURT

CAUSE NO. 71D07 - 0604-PL-00144

STEVE BONNEY, JOHN GIBSON,)
ANITA GIBSON, TOM PIETRZAK,)
RANDY NACE, CLARINDA NACE,)
JUNE NACE, and THE CITIZENS)
ACTION COALITION OF INDIANA, INC.)
an Indiana not for profit corporation;)

Plaintiffs,)

v.)

INDIANA FINANCE AUTHORITY;)
STATEWIDE MOBILITY PARTNERS,)
LLC; ITR CONCESSION COMPANY,)
LLC; THE INDIANA DEPARTMENT OF)
TRANSPORTATION; MITCHELL E.)
DANIELS, Governor of Indiana; TIM)
BERRY, Treasurer of Indiana;)

Defendants.)

- FILED -

APR 12 2006

St. Joseph Superior Court
Clerk

**COMPLAINT FOR DECLARATORY AND
PERMANENT INJUNCTIVE RELIEF**

Plaintiffs, Steve Bonney, John Gibson, Anita Gibson, Tom Pietrzak, Randy Nace, Clarinda Nace, June Nace, and The Citizens Action Coalition of Indiana, Inc., an Indiana Not for Profit Corporation, ask the Court to declare that House Enrolled Act 1008, and the Lease and Concession Agreement to be Entered into between the Indiana Finance Authority and ITR Concession Company, LLC on behalf of Statewide Mobility Partners, LLC, are void because they violate multiple provisions of the Indiana Constitution and because neither ITR Concession Company nor Statewide Mobility Partners is authorized to do business in Indiana.

The constitutional violations include the following: The Act contains multiple unconstitutional special laws, in violation of Article 4 §§ 22 and 23 of the Indiana Constitution,

including a provision protecting Perry Township, in Marion County from a road construction project (Interstate 69) that was otherwise scheduled to go through it and that would have benefited the remainder of the State, and protecting that portion of Interstate 69 running from Indianapolis to Martinsville from becoming a Toll Road. In addition, the Act and the Lease purport to exempt the interest of Defendants Statewide Mobility Partners and ITR Concession Company from ad valorem taxation, in violation of Article 10 § 1 of the Indiana Constitution. The Act also directs the proceeds of the State's transfer of the Toll Road into special highway funds, in violation of Article 10, § 2 of the Indiana Constitution and Article 8, § 2 of the Indiana Constitution, which require such proceeds to be used to pay the public debt, to be deposited in the General Fund, or to be deposited in the Common School Fund. The Act and Lease also amount to the grant of an exclusive franchise to a private company to operate a public work, coupled with provisions lending the State's credit to such private company, in violation of Article 1 § 23 of the Indiana Constitution and Article 11 § 12 of the Indiana Constitution, and the core values that animated the adoption of the Indiana Constitution. The Act also violates both Article 1, §§ 12 and 23, and Article 4 §§ 22 and 23 of the Indiana Constitution because it contains an unreasonably short, special statute of limitations for challenges to the Lease, which does not apply to any other legal action. Finally, the Act violates the Separation of Powers clause of Article 3, § 1 by permitting the Governor and other executive branch agencies to turn any road in this State into a toll road, except for that portion of Interstate 69 running from Indianapolis to Martinsville.

In addition to declaratory relief, Plaintiffs seek permanent injunctive relief prohibiting the Defendant Indiana Finance Authority from entering into the lease, prohibiting Defendants ITR Concession Company and Statewide Mobility Partners from taking possession of the Toll Road

under the lease, and prohibiting the Defendant Indiana Finance Authority and Defendant Berry from Depositing the proceeds of the Toll Road transfer into any of the special trust funds established by HEA 1008, or any other fund other than to pay the public debt, the General Fund, or the Common School Fund. Plaintiffs also seek Permanent Injunctive Relief prohibiting Defendant Indiana Department of Transportation from varying the route or toll status of proposed Interstate 69 by virtue of the special provisions of the legislation protecting Perry Township from the construction project and protecting that portion of the road running between Indianapolis and Martinsville from becoming a toll road. Plaintiffs reserve the right to seek injunctive relief on a preliminary basis should that become necessary or appropriate. In further support of their claims, Plaintiffs state:

A. PARTIES AND VENUE

1. Plaintiff, Steve Bonney, is a resident of Tippecanoe County, Indiana and a citizen and taxpayer of the State of Indiana.
2. Plaintiff, John Gibson, is a resident of Marion County, Indiana and a citizen and taxpayer of the State of Indiana.
3. Plaintiff, Anita Gibson, is a resident of Marion County, Indiana and a citizen and taxpayer of the State of Indiana.
4. Plaintiff, Tom Pietrzak, is a resident of St. Joseph County, Indiana and a citizen and taxpayer of the State of Indiana.
5. Plaintiff, Randy Nace, is a resident of White County, Indiana and a citizen and taxpayer of the State of Indiana.
6. Plaintiff, Clarinda Nace, is a resident of White County, Indiana and a citizen and taxpayer of the State of Indiana.

7. Plaintiff, June Nace, is a resident of White County, Indiana and a citizen and taxpayer of the State of Indiana.

8. Plaintiff, The Citizens Action Coalition of Indiana, Inc. (“CAC”) is an Indiana not for profit corporation representing the interest of its Indiana citizen members on public policy issues. Numerous citizen taxpayer members of the CAC will be adversely effected by the terms of the Act and the Lease. Consequently, under the principles of associational standing, CAC seeks to serve its organizational purpose by protecting the interest of its individual members against the adverse effects they would experience as a result of the Act and the Lease and the Concession Agreement.

9. Plaintiffs will suffer injury by reason of the unconstitutional and unlawful provisions of the Act and the Lease set forth herein, unless the Court grants declaratory and injunctive relief. Moreover, these citizens have a right to and seek to procure enforcement of a public duty and an interest in having the laws of the state properly executed.

10. Defendant Indiana Finance Authority (“IFA”) is a governmental corporation that currently leases and operates the Indiana Toll Road. IFA is, for purposes of State constitutional law, an arm of the State.

11. Defendant Statewide Mobility Partners, LLC is, on information and belief, a Limited Liability Company registered in the State of Delaware. The name and address of its Registered Agent in Delaware is: The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. Statewide Mobility Partners has not made the required filings to do business in Indiana.

12. Defendant ITR Concession Company, LLC is, on information and belief, a Limited Liability Company registered in the State of Delaware. The name and address of its Registered

Agent in Delaware is: The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. ITR Concession Company has not made the required filings to do business in Indiana.

13. Defendant Indiana Department Of Transportation is a State agency charged with responsibility for building and maintaining roads in Indiana.

14. Defendant Mitchell E. Daniels is Governor of Indiana.

15. Defendant Tim Berry is Treasurer of Indiana.

16. Venue in this Court is proper because this County is a county where the land or some part thereof is located or the chattels or some part thereof are regularly located or kept, and the complaint includes a claim relating to such land or such chattels.

B. FACTS APPLICABLE TO ALL COUNTS

17. On or about March 15, 2006, Governor Daniels signed into law HEA 1008, ostensibly “AN ACT to amend the Indiana Code concerning transportation and to make an appropriation.” (“the Act”)

18. The Act, popularly known as “Major Moves” establishes both a means for converting the Indiana East/West Tollway, a publicly owned toll road, to private ownership and the method by which defendant Indiana Department of Transportation (“INDOT”) may enter into further public/private contracts for the construction and/or operation of toll roads. Other provisions of the Act permit the Governor, INDOT and/or the IFA to turn any road in Indiana into a Toll Road.

19. The Act authorizes the IFA to select an “operator” with whom it may enter into a “public / private agreement” only after it has conducted a request for proposals process that accords all offerors fair and equal treatment.

20. The IFA has designated Defendant ITR Concession Company as the party to enter the Lease and Concession Agreement on behalf of Statewide Mobility Partners (SMP).

21. ITR and/or SMP have agreed to pay the sum of 3.8 billion dollars in return for the rights and privileges set forth in greater detail in a lease and concession agreement (the "Lease"), an unexecuted copy of which is attached hereto and by this reference incorporated as Exhibit "A".

22. At financial closing, currently scheduled for June 30, 2006, ITR and/or SMP will, pursuant to the terms of the Lease, deposit with IFA the sum of 3.8 billion dollars for later distribution according to the Act.

23. Following certain "adjustments," the IFA will cause to be deposited, in trust, sums sufficient to fund the "Major Moves" and the "Next Generation" Funds.

24. Proceeds will also assist in funding the buy-out of certain pension obligations created by the Act.

25. In addition to the foregoing, IFA will, on a forward going basis, be empowered to enter into public/private agreements for the construction of roadways through the state of Indiana, save for a specific, designated, geographic area, which under the Act receives special protection from the IFA both as to the extension of Interstate 69 and the creation or leasing of tolls or toll roads.

26. Because all of the proceeds of the "lease" are received at once and not--as is customary in commercial leases--amortized over the life of the leasehold, the funds received are either immediately spent for the special projects set out in the Act or held in trust so as not to escheat to the State's General Fund.

27. Sections 5 and 7 of the Act require distribution of funds to “local Major Moves construction funds,” one for each of seven counties described by population. Each of five of the population parameters in the Act applies to a separate, specific county through which the Indiana Toll Road runs. The counties so described are Lake County, Porter County, LaPorte County, St. Joseph County and Elkhart County. The remaining two designations were apparently designed to apply to Steuben and LaGrange Counties, but, because the populations of those counties have changed since the 2000 census in an amount sufficient to take them out of the descriptions, those descriptions do not currently apply to any county.

28. Sections 9, 23 and 39 of the Act prohibit building Interstate 69 through Perry Township in Marion County and prohibit operating Interstate 69 as a toll road between Indianapolis and the City of Martinsville. Both of these prohibitions are accomplished by means of descriptions of the Township and City by a combination of population and geography that applies only to Perry Township and Martinsville.

29. During the seventy-five (75) year life of the lease/concession (exhibit A), the monitoring of performance by the lessee remains the responsibility of the IFA.

30. It is contemplated that the consignee/lessee will refinance via, *inter alia*, leasehold mortgages; accordingly, IFA is required by the Act to subordinate its security interest in valuable assets to the lessee’s creditors from time to time.

31. Moreover, although “quiet enjoyment” is conveyed to the lessee for a period of 75 years, and the transaction is otherwise characterized as a “sale” for purposes of Federal Income Tax, the property demised to lessee is ostensibly exempt from all Indiana ad valorem property taxes pursuant to the terms of the Act.

32. The Act requires that any challenge to the Lease and Concession Agreement under the Act be brought within 15 days of the IFA's designation of an operator. This action is timely brought pursuant to that provision.

33. A real and actual controversy exists as to the validity of the Act and the Lease, which controversy ought to be decided in order to safeguard the rights of the plaintiffs.

C. CLAIMS FOR RELIEF

Count I – Unconstitutional Disposition of Funds

34. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 33, inclusive.

35. The disposition of funds detailed in the Act contravenes Article 10 § 2 of the Indiana Constitution, which states, in pertinent part:

All revenues derived from the sale of any of the public works belonging to the State, and from the net annual income thereof...shall be annually applied, under the direction of the General Assembly, to the payment of the principal of the Public Debt.

36. Whether treated as a sale (as it is indeed characterized) or a long term lease, neither the proceeds nor the net annual income are directed to be used to reduce the public debt but, rather, are used to fund a variety of construction and other projects throughout the state.

37. In addition, the disposition of funds violates Article 8, § 2 of the Indiana Constitution, which provides that the Common School Fund consists of, among other things "All lands that

have been, or may hereafter be, granted to the State, where no special purpose is expressed in the grant, and the proceeds of the sales thereof. . . .”

38. Under the Act, the proceeds of the sale of the Toll Road are not deposited in the Common School fund, but, rather, are used to fund a variety of construction and other projects throughout the state.

39. In addition, the disposition of funds under the Act violates Article 1, §23 of the Indiana Constitution, since the Act grants “to certain citizens and classes of citizens privileges and immunities which, upon the same term, shall not equally belong to all citizens.”

40. Such uses of the proceeds in violation of the Indiana Constitution injure the Plaintiffs in their capacities as taxpayers.

WHEREFORE, Plaintiffs pray that the Court declare invalid the provisions of the Act directing the use of the proceeds of the Lease, enjoin the Defendant Treasurer and IFA from making any use of the proceeds other than to pay the public debt and deposit the remainder into the Common School fund, and grant all other appropriate relief.

Count II – Unlawful Tax Exemption and Lending of Credit

41. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 40, inclusive.

42. Section 39 of the Act adds a new provision to the Indiana Code, IC 8-15.5-7-1, which exempts the Defendants ITR Concession Company and State Mobility Partners from certain Indiana taxes among which are all ad valorem property taxes.

43. In addition, under the terms of the Lease, IFA indemnifies ITR Concession Company and State Mobility Partners in the event they become liable to pay such taxes or other taxes specific to Toll Road Operators.

44. Indiana's constitution strictly limits the exemptions which may be granted by the Legislature to those expressly set forth in Article 10, § 1.

45. Private toll road operations are not among the exemptions permitted by Article 10, § 1 and, accordingly the tax exemption provisions of the Act contravene this section of Indiana's Constitution.

46. In addition, Article 11, § 12 of the Indiana Constitution prohibits the credit of the State from being "given, or loaned, in aid of any person, association or corporation." Moreover, Article 1 §23 of the Indiana Constitution prohibits the General Assembly from granting "to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." The indemnification provisions violate these constitutional prohibitions.

47. Plaintiffs will be injured, in their capacity as taxpayers, by the tax exemption provisions of the Act and the indemnification provisions of the Lease.

WHEREFORE Plaintiffs pray that this Court declare the tax exemption provisions in the Act and the indemnification provisions in the lease invalid and unenforceable, and enjoin Defendant IFA from indemnifying Defendants ITR Concession Company and Statewide Mobility Partners, and grant all other appropriate relief.

Count III – Lending of Credit – Other Provisions

48. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 47, inclusive.

49. The Act contemplates a lengthy, seventy-five (75) year public private partnership in which, for a fee, the State agrees to provide policing and such other services as required by the lessee; in addition, the State agrees throughout this period, to facilitate such further financing as

the lessee may from time to time need by, for example, subordinating the State's security interest(s) in valuable assets of the lessee.

50. One of the cardinal purposes of Indiana's Constitution was to avoid the financial crisis which can be created by lending the State's credit. To that end, our Constitution forbids the lending of credit to any person, association or corporation, Article 11 § 12.

51. In addition, Article 1, §23 of the Indiana Constitution prohibits the General Assembly from granting "to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

52. The provisions of the Act described above violate these constitutional prohibitions.

53. Plaintiffs will be injured in their capacities as taxpayers by the lending of the State's credit in the form of subordination of the State's security interest and other acts to facilitate future financing.

WHEREFORE, Plaintiffs pray that the Court declare those provisions of the lease purporting to require the State to subordinate its security interest and otherwise facilitate future financing void and unenforceable, enjoin their enforcement, and grant all other appropriate relief.

Count IV – Unconstitutional Special Laws

54. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 53, inclusive.

55. Article 4 § 22 of the Constitution of the State of Indiana forbids any local or special law providing for, inter alia, "the laying out, opening, working on highways" and also forbids local or special laws "Vacating roads."

56. Article 4, § 23 of the Indiana Constitution provides that, in all other cases, the General Assembly may not pass a special law where a general law could be made applicable.

57. The Act specifically provides for the transfer and continued operation of the Indiana East/West Tollway, a “highway” within the intention of the Constitution.

58. The Act further provides specific protection against the further development of Interstate 69 for a particular township.

59. Those two provisions are special laws for “the laying out, opening, working on highways” and/or for “vacating roads.”

60. In addition, the provisions of the Act creating or purporting to create the local Major Moves construction funds restricted to those Counties through which the Indiana Toll Road runs are special laws where a general law could be made applicable.

61. Moreover, Article 1, §23 of the Indiana Constitution prohibits the General Assembly from granting “to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” The provisions described herein violate this provision.

62. The provisions of the Act described above violate these constitutional prohibitions.

63. Furthermore, through legislative oversight, two of the Toll Road counties, Steuben and LaGrange are not described by the population categories.

64. Plaintiffs have been injured in their capacity as taxpayers by these special and/or local laws.

WHEREFORE, Plaintiffs pray that the Court declare the entire statute invalid as a local or special law, declare invalid those portions exempting Perry Township from the construction of Interstate 69, and the Indianapolis – Martinsville leg of Interstate 69 from Toll Road status, and declare invalid those portions of the statute creating the local Major Moves construction funds and requiring deposit of proceeds into them. Plaintiffs further ask that the Court enjoin

Defendants IFA, and the Department of Transportation from giving effect to the provisions exempting Perry Township from the construction of Interstate 69, and the Indianapolis – Martinsville leg of Interstate 69 from Toll Road status, and enjoin Defendants IFA and the Treasurer from Paying or transferring any funds pursuant to the provisions creating the local Major Moves construction funds, and grant all other appropriate relief.

**Count V – Unconstitutional Grant of Exclusive Franchise to
a Private Company to Operate a Public Work**

65. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 64, inclusive.

66. The Act and Lease purport to grant an exclusive franchise to a private company to operate a public work, namely the Indiana Toll Road.

67. As such, the Act and the Lease violate Article 1, §23 of the Indiana Constitution in granting to a citizen privileges and immunities which, upon the same terms, shall not equally belong to all citizens.

WHEREFORE, Plaintiffs pray that the Court declare invalid the Act and the exclusive franchise created by the Act and the Lease, enjoin its enforcement, and grant all other appropriate relief.

Count VI – Entities Not Authorized to Do Business

68. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 67, inclusive.

69. Neither Statewide Mobility Partners, LLC, nor ITR Concession Company, LLC, have registered with the Indiana Secretary of State, nor have they obtained the requisite authority to do or transact business within the State of Indiana.

WHEREFORE, Plaintiffs pray that the Court declare the Lease invalid, enjoin its enforcement, and grant all other appropriate relief.

Count VII – Unconstitutionally and Unreasonably Short Special Statute of Limitations

70. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 69.

71. Section 12 of the Act provides that any action to contest the validity of a public-private agreement entered into under this chapter may not be brought after the fifteenth day following the publication of the notice of the designation of an operator under the public-private agreement.

72. This provision creates an unreasonably short special statute of limitations, which provision is unconstitutional in that it constitutes special legislation in violation of Article 4, §§22 and 23 of the Indiana Constitution and because it is a special law regulating practice in the courts of justice.

73. In addition, said provision violates the provisions of the Indiana Constitution guaranteeing every person a remedy for injury done to him by due course of law, Article 1, §12, and prohibiting the General Assembly from granting to any citizen, or class of citizens, privileges or immunities which upon the same terms, shall not belong equally to all citizens, Article 1, §23.

WHEREFORE, Plaintiffs pray that the Court declare invalid the special statute of limitations as well as the entire Act and Lease, enjoin its enforcement, and grant all other appropriate relief.

Count VIII – Separation of Powers

74. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 73, inclusive.

75. The Act permits the Governor, INDOT and/or the IFA to turn any road in this State, with the exception of that portion of Interstate 69 running from Indianapolis to Martinsville, into a toll road.

76. The designation of an existing highway as a Toll Road is a legislative function.

77. Accordingly, these provisions violate Article 3, Section 1 of the Indiana Constitution, which divides the powers of Indiana Government into Legislative, Executive and Judicial, and prohibits a member of one branch from exercising any power belonging to any of the other branches.

78. Alternatively, if the designation of existing roads as toll roads is an Executive function, then those provisions of the Act purporting to prohibit the designation of that portion of Interstate 69 running from Indianapolis to Martinsville as a toll road violates Article 3, § 1 of the Indiana Constitution.

WHEREFORE, Plaintiffs pray that the Court declare invalid the Act and the Lease in their entirety, enjoin their enforcement, and grant all other appropriate relief.

Count IX - Non-Severability of the Provisions of the Act

79. Plaintiffs incorporate herein the allegations of their complaint numbered 1 through 78, inclusive.

80. With respect to the provisions of the Act identified herein as invalid, such invalidity is such that the remainder of the Act is so essentially and inseparably connected with and so dependent upon the invalid provision that it cannot be presumed that the remainder would have been enacted without the invalid provision. The remainder is incomplete and incapable of being executed in accordance with the legislative intent without the invalid provision.

81. Accordingly, the entire Act and Lease are invalid.

WHEREFORE, Plaintiffs pray that the Court declare invalid the Act and the Lease in their entirety, enjoin their enforcement, and grant all other appropriate relief.

Respectfully submitted,

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