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January 13, 2004

OFFICIAL OPINION 2004-1

The Honorable Thomas Saunders
Indiana House of Representatives
200 West Washington Street
Indianapolis, Indiana 46204

Re: Constitutionality of "special legislation"

Dear Representative Saunders:

This letter is in response to your request for an opinion on the constitutionality of Ind. Code § 6-3.5-7-22.5 as amended by P.L. 224-2003 § 258. In particular you have asked if it is advisable for Randolph County to expend county option income tax funds collected under this statute on volunteer fire department buildings, apparatus and other equipment.

BRIEF ANSWER

We have sufficient constitutional concerns regarding Ind. Code § 6-3.5-7-22.5, as amended by P.L. 224-2003 § 258, to advise that additional legislative direction is warranted prior to the expenditure of any funds associated with the increased CEDIT rate other than for the renovation of the former county hospital.

FACTUAL BACKGROUND

Indiana Code § 6-3.5-7-22.5 was first enacted in 2001 as P.L. 185-200 § 4; it was also included in the same form in the 2001 budget bill as P.L. 291-2001 § 180. It authorized Randolph County (described by population but not by name) to impose a county economic development income tax ("CEDIT") in excess of that otherwise allowed by law if the county council adopted an ordinance finding that the funds were needed for:

financing, constructing, acquiring, renovating, and equipping the county courthouse and for renovating the former county hospital for additional office space, educational

facilities, nonsecure juvenile facilities, and other county functions, including the repayment of bonds issued, or leases entered into for renovating the former county hospital for additional office space, educational facilities, nonsecure juvenile facilities, and other county functions.¹ (emphasis added)

The 2001 version of the law further provided that if such an ordinance was adopted, the tax rate could not be imposed at a rate or for a time greater than necessary to pay the costs incurred in connection with the programs so described (courthouse and county jail modification)², that the county treasurer was required to establish a “county courthouse revenue fund” into which all revenues derived from the increased tax rate would be deposited,³ and that tax revenues derived from the CEDIT could be used for these two stated purposes (courthouse and county hospital renovation).⁴ Finally, the 2001 version of the statute explicitly stated:

(g) A county described in subsection (a) possesses:

(1) unique fiscal challenges to finance the operations of county government due to the county's ongoing obligation to repay amounts received by the county due to an overpayment of the county's certified distribution under IC 6-3.5-1.1-9 for a prior year; and

(2) unique capital financing needs due to the imminent transfer from the governing board of the county hospital of facilities no longer needed for hospital purposes and the need to undertake immediate improvements in order to make those facilities suitable for use by the county for additional office space, educational facilities, nonsecure juvenile facilities, and other county functions.⁵

The statute was amended in 2002 by P.L. 90-2002 § 299 by redefining the population to conform to Randolph County's 2000 census figures and changing a reference to the “board of tax commissioners” to “department of local government finance.” No other changes were made.

In 2003 the statute was amended by P.L. 224-2003 § 258 as part of the budget bill. The 2003 amendments:

(1) eliminated renovation of the county courthouse as one of the purposes for which the CEDIT funds could be used and added a provision affirmatively stating that the revenues could NOT be used for renovating the courthouse;⁶

(2) added two subsections providing that the council could adopt an ordinance to use the increased CEDIT revenues for “financing constructing, acquiring, renovating” buildings for firefighting apparatus for a volunteer fire department servicing any part of the county;⁷

¹ Ind. Code § 6-3.5-7-22.5(c), P.L. 291-2001.

² Ind. Code § 6-3.5-7-22.5(d) P.L. 291-2001, § 180.

³ Ind. Code § 6-3.5-7-22.5(e) P.L. 291-2001, § 180.

⁴ Ind. Code § 6-3.5-7-22.5(f). P.L. 291-2001, § 180.

⁵ Ind. Code 6-3.5-7-22.5(g) P.L. 291-2001, § 180.

⁶ Ind. Code § 6-3.5-7-22.5 (c), (c)(1), and (d), P.L. 224-2003 § 258.

⁷ Ind. Code § 6-3.5-7-22.5 (c)(2) and (c)(3), P.L. 224-2003 § 258.

(3) changed the name of the fund into which these CEDIT revenues are to be deposited from the “county courthouse revenue fund” to the “county option tax revenue fund”;⁸ and

(4) eliminated the specific reference in the final subparagraph relating to the imminent transfer of the county hospital facilities and replaced it with the more generic statement that the county “possesses ... unique capital financing needs related to the purposes described in [new] subsection (c).⁹ The original language of subparagraph (g)(1) relating to the county’s ongoing obligation to repay certain amounts remains.

You are particularly concerned about the County’s expenditure of these CEDIT funds on volunteer fire department matters in light of the Indiana Supreme Court’s recent decision in *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003).

LEGAL ANALYSIS

Indiana Constitution Art. 4, § 22 specifically forbids the General Assembly from passing “local or special laws” on subjects falling in any of sixteen categories, including the “assessment and collection of taxes for State, county, township, or road purposes.”

At issue in *State v. Hoovler*¹⁰, a 1996 case based on facts quite similar to those of concern in this opinion, was P.L. 44-1994, which permitted a county (defined by population, but not by name) to impose a CEDIT rate in excess of that otherwise allowed by law if revenues were required to enable the county to fund its obligations as a potentially responsible party in the clean-up of a Superfund site. Tippecanoe County was the only county falling within the population parameters, and the only county to have been identified as an operator of a Superfund site.

The Indiana Supreme Court held that, while P.L. 44-1994 was a “special law” because it “authoriz[ed] a special tax rate to be available only to one Indiana County”, in as much as it allowed “a limited increase in the rate of existing taxes but [did] not authorize any new property valuations or changes in the system of tax gathering” it did not provide “for the assessment and collection of taxes” and thus, as a matter of law did not violate Art. 4, § 22¹¹.

Having concluded that a statute permitting an enhanced CEDIT rate does “not fall within any of the categories enumerated in Section 22”¹², the *Hoovler* court considered the statute’s validity under Indiana Constitution Art. 4 § 23, which provides:

⁸ Ind. Code § 6-3.5-7-22.5 (e), P.L. 224-2003 § 258

⁹ Ind. Code § 6-3.5-7-22.5 (e), P.L. 224-2003 § 258

¹⁰ 668 N.E.2d 1229 (Ind. 1996)

¹¹ *Id.* at. 1233.

¹² *Id.*

In all cases enumerated in [Art. 4, § 22], and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.

Reviewing the record before it, the *Hoovler* court determined that “permitting increased taxes due to Tippecanoe County’s unique exposure to Superfund liability is not a matter necessarily subject to a general law applicable in all counties” (emphasis added) and found that the enhanced CEDIT statute did not violate Ind. Const. Art. IV § 23.¹³ The court noted, however, that the population range language alone would have been insufficient to identify eligible counties because that “fails to bear a rational relationship to the subject matter in question and the reason for which does not inhere in the statute.”¹⁴

More recently, the court revisited Art. 4 § 23 in *Municipal City of South Bend v. Kimsey*¹⁵. At issue in *Kimsey* was IC 36-4-3-13(g), which allowed a simple majority (50%) of landowners in St. Joseph County (defined by population, but not by name) to defeat annexation by a municipality, whereas opposition of 65% of affected landowners in the other 91 counties was required to defeat annexation. The court had little difficulty determining that the legislation, if “special”, did not accomplish any of the enumerated results prohibited by Art. IV § 22.¹⁶ Having done so, it set about determining whether this special legislation “had a factual basis upon which to rest [the] assertion that a general statute could not apply.”¹⁷ Based on a thorough review of the record, the court found that although there were justifications for subsection (g)’s application to a county with a population of between 200,000 and 300,000, “none of these justifications are inherent in the population range and none turn on facts unique to St. Joseph County.”¹⁸ The court concluded:

Although reasons have been advanced to explain why annexation in St. Joseph County must be handled differently than it is in every other county in the state, no facts supporting those reasons have been set forth in the record by the proponents of the special legislation, and we are directed to judicial notice of none. Therefore, under Article IV, Section 23, the application of subsection (g) to prevent the City of South Bend from annexing the Copperfield area is unconstitutional.¹⁹

Applying the holdings of both *Hoovler* and *Kimsey* to Ind. Code § 6-3.5-7-22.5, as amended by P.L. 224-2003 § 258, we note that the General Assembly took specific notice of the fact that Randolph County faced unique fiscal challenges due to an ongoing obligation to repay an overpayment on a certified distribution. In its earlier iterations, the statute also made specific reference to the imminent transfer of the county hospital facilities requiring immediate improvements. Thus, there would

¹³ *Id* at 1235.

¹⁴ *Id* at 1234.

¹⁵ 781 N.E.2d 683 (Ind. 2003).

¹⁶ *Id.* at 686.

¹⁷ *Id.* at 694. Both *Kimsey* and *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296 (Ind. 2004) give a comprehensive review of the constitutional underpinnings and case law precedent for Art. IV § 23.

¹⁸ *Id.*

¹⁹ *Id* at 697.

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certainly appear to be an adequate basis to support the necessity of an increased CEDIT rate for renovations to the former county hospital.

We are less convinced about the 2003 amendment permitting these increased revenues to be used in connection with volunteer fire departments in Randolph County. Under *Kimsey*, we are not convinced that Randolph County's obligation to repay a previous overpayment is by itself sufficient to justify a "special legislation where a general law may apply", unless of course it is the only county having such a burden. Perhaps there are also facts capable of judicial notice that make Randolph unique among our 92 counties in its need for additional CEDIT revenue to pay for volunteer fire department improvements, but those are not stated in the statute.

CONCLUSION

We have sufficient constitutional concerns regarding Ind. Code § 6-3.5-7-22.5, as amended by P.L. 224-2003 § 258, to advise that additional legislative direction is warranted prior to expenditure of any funds associated with the increased CEDIT rate other than for the renovation of the former county hospital.

By way of general advice, I would recommend that the legislature give careful attention to the drafting of "special legislation". The Supreme Court has made clear in *Kimsey* that legislation which may fall under the type prohibited by Indiana Constitution Art. 4, § 22 must have a "factual basis upon which to rest assertion that a general statute could not apply."²⁰ This could be in the form of language included in a preamble or within the statute that specifies the legislature's rationale to support the special legislation.

Please feel free to contact me further on this important subject.

Sincerely,

Stephen Carter
Attorney General

Jennifer Thuma
Deputy Attorney General

²⁰ *Id* at 697.