

September 3, 2009

OFFICIAL OPINION 2009-6

Mr. Leigh Morris, Chairman
Northwest Indiana Regional Development Authority
9800 Connecticut Drive
Crown Point, IN 46307

RE: Northwest Indiana Regional Development Authority

Dear Mr. Morris:

This letter is in response to your request for an opinion regarding the statutory authority of the Porter County Council (Council) to withdraw from the Northwest Indiana Regional Development Authority (RDA) and to instruct the Porter County Auditor to discontinue transferring funds to the RDA development authority fund. Two questions are posed:

1. Is there statutory authority for Porter County to withdraw from the RDA?
2. Is there statutory authority for Porter County to withhold payment of its membership contribution to the RDA?

BRIEF ANSWERS

1. There is no statutory authority for Porter County to withdraw from the RDA as the General Assembly has not created a mechanism for it to do so.
2. Porter County lacks statutory authority to withhold payment of its contribution to the RDA.

ANALYSIS

Membership in the RDA

The General Assembly created the RDA in 2005.¹ It established the RDA “as a separate body corporate and politic,” Ind. Code § 36-7.5-2-1, with specified duties, Ind. Code 36-7.5-3-1, and a broad array of duties and powers, Ind. Code §§ 36-7.5-3-1, 36-7.5-3-2.² These powers and duties

¹ Pub. L. 214-2005, adding Ind. Code § 36-7.5 to the Indiana Code.

²The General Assembly, at Pub. L. 214-2005, Sec. 89, made specific legislative findings when it created the RDA:

The general assembly finds the following:

- (1) The eligible counties (as defined in IC 36-7.5-1-11, as added by this act) face unique and distinct challenges and opportunities related to transportation and economic development that are different in scope and type than those faced by other units of local government in Indiana.

are to be discharged in “an eligible county.” Lake County and Porter County are the only two eligible counties. Ind. Code § 36-7.5-1-11.³

The RDA is governed by a seven-member Development Board. Ind. Code § 36-7.5-2-3. The Lake County cities of Gary, East Chicago, and Hammond appoint one (1) member each, while the Lake County Council and the Lake County Board of Commissioners jointly appoint a fourth member. The Porter County Council and the Porter County Board of Commissioners jointly appoint a member as well. The other two members are appointed by the Governor. One of the gubernatorial appointments must, depending on when it is made, be based on a recommendation from the mayor of Valparaiso or Portage. Ind. Code § 36-7.5-2-3.⁴

The Development Authority Fund

a. Sources of the Fund

The Development Board is to establish and administer a Development Authority Fund (Fund). The primary source of money in the Fund is the \$3.5 million annual transfers from each of the following entities: the cities of Gary, Hammond, East Chicago and the counties of Lake and Porter. Although raising the money for payments to the Fund may be accomplished through various mechanisms, Porter County’s share is derived from a county economic development income tax. (CEDIT). Ind. Code § 36-7.5-4-1(b)(2).⁵ Regardless of their source, however, transfers to the Fund are mandatory.

(2) A unique approach is required to fully take advantage of the economic development potential of the Chicago, South Shore, and South Bend Railway and the Gary/Chicago International Airport and the Lake Michigan shoreline.

(3) The powers and responsibilities provided to the northwest Indiana regional development authority established by IC 36-7.5-2-1, as added by this act, are appropriate and necessary to carry out the public purposes of encouraging economic development and further facilitating the provision of air, rail, and bus transportation services, projects, and facilities, shoreline development projects, and economic development projects in the eligible counties.

³ “Eligible county” is defined in terms of population base. The stated population bases would apply only to Lake and Porter Counties as members of the RDA. Pub. L. 47-2006 amended Ind. Code Art. 36-7.5 to allow LaPorte County the option to join the RDA. LaPorte County did not exercise this option. As a consequence, the RDA still consists of Lake and Porter Counties.

⁴ Although the current joint appointee of the Porter County Council and the Porter County Board of Commissioners is not attending meetings, a quorum for the meeting of the Development Board requires only five (5) members. I.C. § 36-7.5-2-6(c).

⁵ (1) Riverboat admissions tax revenue, riverboat wagering tax revenue, or riverboat incentive payments received by a city or county described in IC 36-7.5-2-3(b) and transferred by the county or city to the fund.

(2) County economic development income tax revenue received under IC 6-3.5-7 by a county or city and transferred by the county or city to the fund.

(3) Amounts distributed under IC 8-15-2-14.7 [Major Moves] .

(4) Food and beverage tax revenue deposited in the fund under IC 6-9-36-8 [Food and Beverage Tax].

(5) Funds received from the federal government.

(6) Appropriations to the fund by the general assembly.

IC § 36-7.5-4-2 (2009) Revenue transfers to fund

Sec. 2. (a) Except as provided in subsection (b), beginning in 2006 the *fiscal officer of each city and county described in IC 36-7.5-2-3(b)* shall each transfer three million five hundred thousand dollars (\$3,500,000) each year to the development authority for deposit in the development authority fund established under section 1 of this chapter....

(c) The following apply to the transfers required by subsections (a) ...:

(1) . . . [T]he transfers shall be made without appropriation by the city or county fiscal body or approval by any other entity.

(2) Except as provided in subdivision (3), after December 31, 2005, each fiscal officer shall transfer eight hundred seventy-five thousand dollars (\$875,000) to the development authority fund before the last business day of January, April, July, and October of each year. Food and beverage tax revenue deposited in the fund under IC 6-9-36-8 is in addition to the transfers required by this section. ...

(4) The transfers shall be made from one (1) or more of the following:

(A) Riverboat admissions tax revenue received by the city or county, riverboat wagering tax revenue received by the city or county, or riverboat incentive payments received from a riverboat licensee by the city or county.

(B) Any county economic development income tax revenue received under IC 6-3.5-7 by the city or county.

(C) Any other local revenue other than property tax revenue received by the city or county. ... (Emphasis added.)

b. Porter County's contribution to the Fund

The statutory authority for Porter County's CEDIT contains specific directions that certain revenue is to be transferred to the RDA and, after the requisite transfer is accomplished, to property tax relief.

IC 6-3.5-7-13.1 (2008) Economic development income tax funds; deposits; uses

(b) As used in this subsection, "homestead" means a homestead that is eligible for a standard deduction under IC 6-1.1-12-37. Except as provided in sections 15, 23, 25, 26, and 27 of this chapter, revenues from the county economic development income tax may be used as follows: . . .

(4) By a city or county described in IC 36-7.5-2-3(b) for making transfers required by IC 36-7.5-4-2. If the county economic development income tax rate is increased after April 30, 2005, in [Porter County] , the first three million five hundred thousand dollars (\$3,500,000) of the tax revenue that results each year from the tax rate increase shall be used by the county only to make the county's transfer required by IC 36-7.5-4-2. The first three million five hundred thousand dollars (\$3,500,000) of the tax revenue that results each year from the tax rate

(7) Other local revenue appropriated to the fund by a political subdivision.

(8) Gifts, donations, and grants to the fund. ...

increase shall be paid by the county treasurer to the treasurer of the northwest Indiana regional development authority under IC 36-7.5-4-2 before certified distributions are made to the county or any cities or towns in the county under this chapter from the tax revenue that results each year from the tax rate increase. In [Porter County] all of the tax revenue that results each year from the tax rate increase that is in excess of the first three million five hundred thousand dollars (\$3,500,000) that results each year from the tax rate increase must be used by the county and cities and towns in the county for homestead credits under subdivision (5).... (Emphasis added.)

In addition, the General Assembly included a noncode statutory provision at Pub. L. 214-2005, Sec. 91, that specifically authorized Porter County to impose or increase the CEDIT for the purpose of generating necessary funds for Porter County's contribution to the RDA.⁶

The Council passed the necessary ordinance increasing the CEDIT at its meeting of May 24, 2005.⁷ The CEDIT revenue under this ordinance and by operation of statute must be used to satisfy the \$3.5 million contribution. Any excess must be applied for homestead credits. See Ind. Code § 6-3.5-7-13.1(b)(4).

Can Porter County withdraw from the RDA?

The General Assembly, in establishing the RDA, did not provide for an "eligible county" to withdraw from this "separate body corporate and politic." Two years after the establishment of the RDA, the General Assembly, through Pub. L. 232-2007 adding Ind. Code Art. 36-7.6 to the Indiana Code, did establish a five-year minimum participation period for interested counties and cities wishing to participate in a development authority, but this minimum participation period does not apply to the RDA.⁸

⁶ (a) Notwithstanding IC 6-3.5-7-5 and IC 6-3.5-7-6, the county council of an eligible county (as defined in IC 36-7.5-1-11, as added by this act) may after the effective date of this act but before July 1, 2005, adopt an ordinance to impose or increase the county economic development income tax under IC 6-3.5-7, with the imposition of the tax or the increase in the tax rate to take effect July 1, 2005.

(b) If the county council of [Porter County] adopts an ordinance under this SECTION before July 1, 2005, to increase the county's economic development income tax rate, then notwithstanding IC 6-3.5-7-11 or any other provision of IC 6-3.5-7 the initial certified distribution of the tax revenue that results from the tax rate increase shall be distributed to the county treasurer from the account established for the county under IC 6-3.5-7 according to the following schedule during the eighteen (18) month period beginning on July 1 of the year in which the county adopts the ordinance to increase the tax rate:

- (1) One-fourth (1/4) on October 1 of the year in which the ordinance to increase the tax rate was adopted.
- (2) One-fourth (1/4) on January 1 of the calendar year following the year in which the ordinance to increase the tax rate was adopted.
- (3) One-fourth (1/4) on May 1 of the calendar year following the year in which the ordinance was adopted.
- (4) One-fourth (1/4) on November 1 of the calendar year following the year in which the ordinance was adopted.

⁷ See http://www.porterco.org/council_minutes_2005-05-24.html for the minutes of the Porter County Council's May 24, 2005, meeting.

⁸ Pub. L. 232-2007, Sec. 7.

As the statutory provisions for the RDA are clear and unambiguous, a minimum participation period cannot be read into the plain language. *Huntington Co. Comm. Sch. Corp. v. State Bd. of Tax Commissioners*, 757 N.E.2d 235, 240 (Ind. Tax Ct. 2001) (citations and internal punctuation omitted) (“Indiana law is clear: a statute may be construed and interpreted only if it is ambiguous[.]”). The legislature did not provide for the withdrawal from the RDA by an “eligible county.”

Can Porter County withhold its transfer to the RDA?

It is evident from the plain language of the statutes that an eligible county, as a part of the RDA, does not have the discretion to decide not to pay its contribution. Ind. Code § 36-7.5-4-2(a) states unequivocally that “the fiscal officer of each...county...*shall*...transfer three million five hundred thousand dollars (\$3,500,000) each year to the development authority[.]” In addition, such “transfers *shall* be made without appropriation by the city or county fiscal body or approval by any other entity.” Ind. Code § 36-7.5-4-2(c)(1) (emphasis added). In addition, Ind. Code § 6-3.5-7-13.1(b)(4) states that the first \$3.5 million of the tax revenue resulting from an increase in the CEDIT to fund Porter County’s contribution to the RDA “*shall* be paid by the county treasurer to the treasurer of the northwest Indiana regional development authority,” with any excess to be applied for homestead credits.⁹

The mandatory nature of the county treasurer’s obligation is made clear by other portions of RDA-related code. For example, the code references “transfers *required* by IC 36-7.5-4-2” at Ind. Code § 6-3.5-7-13.1(b)(4); and states that an appropriation to the RDA may be distributed “*only if all transfers required* from...counties to the development authority under IC 36-7.5-4-2 have been made.” (Emphasis added.)

Although Porter County elected to fund its contribution through CEDIT, should it rescind the ordinance creating this funding source, Porter County would still be obligated by statute to pay its contribution from “[a]ny other local revenue other than property tax revenue received by the ...county....” See Ind. Code § 36-7.5-4-2(c)(4)(C). Porter County’s election to utilize CEDIT to satisfy its contribution was not an election on Porter County’s part to participate in the RDA. Rescinding the CEDIT ordinance does not terminate Porter County as an “eligible county” in the RDA nor would such action negate its responsibility to pay its membership contribution.

The Effect of Recent Legislation

During the recent special session of the Indiana General Assembly, which ended June 30, 2009, the legislature enacted statutory provisions affecting the RDA. Pub. L. 182-2009 (ss). The legislature added a definition for “eligible municipality” and provided that such an entity could become a member of the RDA but only when “a county that...was a member of the development authority on January 1, 2009, ...subsequently ceases to be a member of the development authority.” Pub. L. 182-2009 (ss), Secs. 421, 422, 423. The definition for “eligible municipality”

⁹ Although the Porter County Council directed the county auditor not to pay the next installment of Porter County’s contribution to the RDA, it is the county treasurer who actually makes the disbursement. It is also evident that such transfers are to occur without any appropriation by another county entity and without any approval of another county entity. See Ind. Code § 36-7.5-4-2(c)(1).

is confined to Porter County. Where Porter County has ceased to be a member, the fiscal bodies of at least two Porter County municipalities could adopt ordinances to become members of the RDA. Such municipalities would become members of the RDA and have the authority to jointly appoint a representative to the Development Board to serve in the place of the current representative who was jointly appointed by the Porter County Council and Porter County Commissioners under current law at Ind. Code § 36-7.5-2-3(b)(3). See Ind. Code § 36-7.5-2-3(h), (i) as added by Pub. L. 182-2009, Sec. 423.

The General Assembly, however, did not repeal or amend any pre-existing statutory provisions that created the RDA and established its current membership. There is nothing to indicate that the legislature implied any repeal. “[T]he implied repeal of a statute is recognized only when a later act is so repugnant to an earlier one as to render them irreconcilable, and a construction which will permit both laws to stand will be adopted if at all possible.” *Northern Indiana Public Service Co., v. Citizens Action Coalition of Indiana, Inc.*, 548 N.E.2d 153, 159 (Ind. 1989).

A rule of statutory construction requires that where it can be presumed the legislature was aware of existing statutes when it enacted later legislation in the same area, the seemingly differing statutes should be construed together to produce a harmonious result. *Town of Merrillville v. Merrillville Conservancy Dist.*, 649 N.E.2d 645, 649 (Ind. Ct. App. 1995). “Where statutes address the same subject, they are *in pari materia*, and we harmonize them if possible.” *Hall Drive Ins, Inc. v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002). Also see *United States Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 802 (Ind. 2000).

Because the legislature did not amend or repeal existing statutory provisions affecting RDA membership, the “eligible municipality” provision enacted through the special session creates a contingency that would become operational should Porter County cease to be a member of the RDA through some means. See Pub. L. 182-2009(ss), Sec. 227, amending Ind. Code § 6-3.5-7-13.1(b)(4)¹⁰ and Sec. 426, amending Ind. Code § 36-7.5-4-2.¹¹ Should Porter County cease to be a member, the eligible municipalities could, in accordance with Ind. Code § 36-7.5-2-3(i), assume Porter County’s position. The transfer of CEDIT to the RDA would then become the contribution of the Porter County municipalities. Pub. L. 182-2009(ss), Sec. 426, amending Ind. Code § 36-7.5-4-2. The Porter County treasurer would be required to continue to transfer the \$3.5 million CEDIT contribution to the treasurer of the RDA. Pub. L. 182-2009(ss), Sec. 227, amending Ind. Code § 6-3.5-7-13.1(b)(4).

Because current law does not permit Porter County to cease to be a member of the RDA, as detailed *supra*, the “eligible municipality” provision cannot presently be employed.

CONCLUSIONS

¹⁰“However, if a county having a population of more than one hundred forty-five thousand (145,000) but less than one hundred forty-eight thousand (148,000) ceases to be a member of the development authority and two (2) or more municipalities in the county have become members of the development authority as authorized by IC 36-7.5-2-3(i)...”

¹¹“If a county having a population of more than one hundred forty-five thousand (145,000) but less than one hundred forty-eight thousand (148,000) ceases to be a member of the northwest Indiana regional development authority under IC 36-7.5 but two (2) or more municipalities in the county have become members of the northwest Indiana regional development authority as authorized by IC 36-7.5-2-3(i)...”

1. Porter County, as an “eligible county” under Ind. Code § 36-7.5-1-11, did not have the option to join the RDA. Legislative findings indicate the intent was to create a “separate body corporate and politic” with the necessary powers and duties to discharge certain “public purposes” unique to Lake County and Porter County. To that end, the legislature created the RDA, established its powers and duties, and provided for funding through state and local means. The General Assembly did not create an “opt in” or “opt out” provision for RDA members, even though it has done so in subsequent, similar legislation that does not affect the RDA. While Pub. L. 214-2005 did provide Porter County with the option to employ CEDIT to fund its membership contribution, the exercise of this option does not equate to “joining” the RDA. The General Assembly could establish a means to cease membership in the RDA but has elected not to do so. Porter County cannot unilaterally cease membership in the RDA.
2. Statutory language is unequivocal. RDA members are required to transfer annually, in installments, a \$3.5 million contribution to the RDA. The legislature used “shall” in its mandatory sense and bolstered this by referring to such contributions as “required” contributions. In addition, the Porter County Council cannot direct the county auditor not to transfer to the RDA the contribution for Porter County. Ind. Code §§ 6-3.5-7-13.1(b)(4), 36-7.5-4-2(a),(c)(1). The county treasurer is required to make such transfers “without...approval by any other entity.”
3. Legislative enactments through Pub. L. 182-2009(ss), creating the option for “eligible municipalities” to become members of the RDA, is contingent upon Porter County ceasing to be a member of the RDA. As Porter County cannot cease to be a member of the RDA, the “eligible municipality” option is not presently available.

Sincerely,

Gregory F. Zoeller
Attorney General

Kevin C. McDowell
Deputy Attorney General