Filed: 11/19/2019 4:30 PM
Clerk
Tippecanoe County, Indiana

STATE OF INDIANA	)	**IN THE TIPPECANOE CIRCUIT COURT**
	) **SS:**	
COUNTY OF TIPPECANOE	)	**CAUSE NO.: 79C01-1909-PL-000115**
WEST LAFAYETTE COMMUNITY SCHOOL CORPORATION,	)	
Plaintiff,	)	
v.	)	
ERIC HOLCOMB, in his official capacity as Governor of the State of Indiana,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISMISS

This Plaintiff's Complaint should fail for the numerous reasons cited in Defendant's Motion to Dismiss Brief. But there are two reasons for dismissal that merit particular attention for this reply, namely: (1) the claim is not ripe, so Plaintiff has no standing to bring suit, regardless of whether Plaintiff is making a facial or as-applied challenge; and (2) the Takings Clauses under the Constitutions of Indiana and United States do not apply to Plaintiff, a political subdivision of the State. Plaintiff's response to the motion to dismiss does nothing to undermine the compelling reasons why this case should be dismissed.

Ripeness and Standing

Plaintiff acknowledges that the "Declaratory Judgments Act requires a justiciable controversy or question, which is met when a case presents the 'ripening seeds' of a controversy." (Pla. Resp. p. 5, *citing Indiana Dep't of Envtl. Mgmt. v. Twin Eagle LLC*, 798

N.E.2d 839, 843 (Ind. 2003)). But Plaintiff goes on to argue that a mere facial attack on the constitutional validity of the statute somehow automatically grants jurisdiction. It does not. Rather, facial challenges have an even higher threshold than an as-applied challenge. Indeed the Indiana Supreme Court has afforded the actions of the political branches a robust presumption of constitutionality. *See generally Willis v. State*, 492 N.E.2d 45, 47 (Ind. Ct. App. 1986). Statutes come to the courts "clothed with the presumption of constitutionality." *Bunker v. Nat'l Gypsum Co.,* 441 N.E.2d 8, 11 (Ind. 1982) (quoting *Sidle v. Majors,* 341 N.E.2d 763, 766 (Ind. 1976)). "[T]he burden to rebut this presumption is upon any challenger and all reasonable doubts must be resolved in favor of an act's constitutionality." *Id. citing Dague v. Piper Aircraft Corp.,* 418 N.E.2d 207, 214 (Ind. 1981).

Against the plain guidance from the courts, Plaintiff wants to shift this burden. And overcoming such a burden is particularly difficult in a facial challenge such as this, where the Plaintiff must demonstrate that "no set of circumstances" exists "under which the statute can be constitutionally applied." *Baldwin v. Reagan,* 715 N.E.2d 332, 337 (Ind. 1999). Plaintiff has not, and cannot make that demonstration.

Moreover, case law cited by Plaintiff itself make clear that, even under Plaintiff's new claim of a facial challenge, a case is ripe only if there is a "live, focused case of real consequence to the parties." (See Pla. Resp. p. 5 *citing Triple Landfills, Inc. v. Bd. of Comm'rs of Fountain Cly., Ind*, 977 F.2d 287, 291 (7th Cir. 1992). Indeed, the court in *Triple Landfills, Inc.* noted the same two-part test for ripeness that Defendant addressed in his motion to dismiss, which Plaintiff steadfastly ignores: "first, whether the relevant issues are sufficiently focused so as to permit judicial resolution without further factual

development; and, second, whether the parties would suffer any hardship by the postponement of judicial action." *Id.* at 289. Plaintiff has utterly failed to show that any delay of judicial action *if* it were ever approached by a charter school to lease or purchase the Happy Hollow Elementary School property in West Lafayette (the "Property") *would* provide a hardship to the school corporation. This string of contingencies is far from the kind of live controversy necessary to ripen a case.

Furthermore, the time frame allotted under Ind. Code § 20-26-7.1-4 (c)(1) is minimal. After the Department issues a notice of the Property's vacancy, a charter school only has thirty days to provide its intent to lease or purchase the Property. The Plaintiff cannot show a controversy because it has alleged no charter school expressing an interest in leasing or purchasing the Property. Therefore, it is clear that Plaintiff does not have standing and its claim is not ripe, as Plaintiff has failed to show any kind of hardship that would satisfy under the ripeness test. This Court should dismiss Plaintiff's Complaint because Plaintiff cannot show it has standing and the case is not ripe.

Plaintiff's cited law does not apply as a means of relief because the Takings Clauses and "Just Compensation" do not apply to a State's relationship with a political subdivision.

Defendant provided numerous cases and a general discussion outlining that "Just Compensation" under the Takings Clauses of the Indiana and United States Constitutions does not apply to intergovernmental takings between local governments and the State, which is precisely the situation before the Court. Plaintiff argues that "[j]urisdictions outside of Indiana differ as to whether a state is required to compensate

a 'public' owner of property that is already devoted to public use." (See Pla. Resp. p. 11.) But Plaintiff cites only one case from Utah in 1962 that Plaintiff claims supports its argument. But even in that case the Utah Supreme Court cited another case recognizing that the norm "has always been held that the Commonwealth may take property of a political subdivision or agency without payment therefor (citing authorities), the right to compensation in such cases being only a matter of grace or allowance by the Legislature." *State By & Through Rd. Comm'n v. Salt Lake City Pub. Bd. of Ed.*, 13 Utah 2d 56, 57, 368 P.2d 468, 469 (1962), quoting *Borough of Speers v. Commonwealth of Pennsylvania*, 383 Pa. 206, 117 A.2d 702, 703. The Supreme Court of Utah then noted that "[o]ur consideration of that case and other authorities relied on indicates that the resolution of such a problem depends on the intent shown in the particular statute involved. Therefore, the critical inquiry here is **whether our legislature intended** that a school board's property should be taken for highway purposes without being paid for it. *Id*. at 57-58 (**emphasis added**.) In the Utah case, the court emphasized the legislative intent behind the statute, not the takings clause generally. In the case at hand, the legislative intent it clear that no "just compensation" is warranted. Plaintiff misstates the Utah case, and it does not apply to the facts in this case.

Further, numerous cases cited by Defendant, and a general consensus amongst legal scholars, clearly demonstrate that just compensation is not required when the State takes public property and repurposes it for further public use. There are numerous other cases not previously mentioned that support this principle: *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (holding that **nothing** in the United States Constitution prohibits

the State from taking municipal corporations' property without providing compensation.) See also *Commissioners of Highways of Towns of Annawan v. United States*, 653 F.2d 292, 297 (7th Cir. 1981); *See also City of Hugo v. Nichols,* 656 F.3d 1251 (10th Cir. 2011) holding that a political subdivision could not bring a Supremacy Clause claim against its parent state.)

Plaintiff argues that Indiana is different than other states because Indiana's Constitution contains the words "no person's property", and argue that the school Property in question is not "public" property. But, as already cited in Defendant's Motion to Dismiss Brief, the Indiana Supreme Court has held, "insofar as the Takings Clauses are concerned, the federal and state constitutions are textually indistinguishable" and a "Taking cannot be in violation of one without the other." *Cheatham v. Pohle*, 789 N.E.2d 467, 473 (Ind. 2003). The Indiana Supreme Court has made clear that the clauses are indistinguishable, therefore this Court cannot placate Plaintiff's misguided argument that Indiana's Constitution somehow is so inherently different as to allow a State's political subdivision's to somehow be compensated for a taking from the State.

Essentially Plaintiff is also arguing that it is a "person" under the Indiana Constitution for purposes of the Takings Clause. But Plaintiff disregards a case directly on point by the Indiana Supreme Court which states that the Fifth Amendment and just compensation do not apply to a school corporation–that it only applies to "private property." As the Indiana Supreme Court notes: "it is hardly conceivable that it limits the authority of the legislative body over one of the subalternate governmental instrumentalities which it has created and endowed with administrative powers, and

over the public property placed by legislative enactment in its custody and control." *Sch. Town of Windfall City v. Somerville*, 181 Ind. 463, 104 N.E. 859, 862 (1914). Again, the Supreme Court of Indiana for purposes of due process and constitutional rights (including Fifth Amendment assertions) held that school corporations are not private entities, but rather "purely subalternate governmental agencies." *Id.* at 862. As school corporations are known political subdivisions of the State, and municipalities and subdivisions of the State cannot request just compensation even if there is a taking, Petitioner's claim cannot move forward as the law cited is inapplicable to them.

WHEREFORE, the Defendant respectfully requests that the Court dismiss the Plaintiff's Complaint as Plaintiff has failed to state a claim upon which relief can be granted.

Respectfully submitted,

Curtis T. Hill, Jr.
Attorney General of Indiana
Attorney No. 13999-20

By: */s/Kelly S. Earls*
Kelly S. Earls
Deputy Attorney General
Attorney No. 29653-49

CERTIFICATE OF SERVICE

I certify that on November 19, 2019~~November 19, 2019~~~~November 15, 2019~~, the foregoing was served upon the following person(s) via IEFS, if Registered Users, or by depositing the foregoing in the U.S. mail, first class postage prepaid, if exempt or non-registered user:

Ryan C. Munden
REILING TEDER & SCHRIER, LLC
rcm@rtslawfirm.com

Robert C. Reiling, Jr
REILING TEDER & SCHRIER, LLC
rcr@rtslawfirm.com

/s/Kelly S. Earls
Kelly S. Earls
Deputy Attorney General

Office of the Indiana Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 234-4464
Facsimile: (317) 232-7979
E-mail: Kelly.Earls@atg.in.gov