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**CURTIS T. HILL, JR.**  
INDIANA ATTORNEY GENERAL

August 14, 2017

**OFFICIAL OPINION 2017-4**

Cynthia Hoye, Executive Director  
Indiana State Fair Commission  
1202 East 38<sup>th</sup> Street  
Indianapolis, Indiana 46205

**RE: Deep Tunnel Easement Beneath Indiana State Fairgrounds**

Dear Ms. Hoye:

**YOUR REQUEST**

I am in receipt of an e-mail message dated July 7, 2017, from Will Forrest, your Director of Legal Affairs at the Indiana State Fair Commission.

**FACTUAL BACKGROUND**

As Mr. Forrest relates, Citizens Energy Group (“Citizens”), an Indianapolis utility, wishes to begin building immediately a deep tunnel under the State Fairgrounds<sup>1</sup> property. The tunnel is a massive public works project slated to be in full operation some time during the year 2025.<sup>2</sup> Penetrating down to the bedrock some 250 feet below the level of the carnival Midway and the Dairy Barn, this tunnel will surely earn its collective nickname as a part of the “Big Dig.”

The “Dig” moniker refers to an ambitious series of engineering projects to be carried out over the course of the next decade, following on the terms of Indianapolis’ execution of a consent decree with the U.S. Environmental Protection Agency (represented in this case by its Region V office in Chicago). According to the planning documents, 17 more tunnels are slated to follow at various locations around the county. The goal of this enormous undertaking is to curtail the long-time “combined sewer overflow” problem. Common to many older cities, the

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<sup>1</sup> “Fairgrounds” refers to the real estate owned by the Commission that was originally conveyed to the state by the Indiana state board of agriculture by warranty deed dated May 31, 1921, and recorded in the office of the recorder of Marion County on April 21, 1923, in Land Record 74, page 347.” Ind. Code § 15-13-1-12. The property is commonly known as 1202 East 38<sup>th</sup> Street, Indianapolis, IN 46205.

<sup>2</sup> **CONSENT DECREE**, *United States v. State of Indiana v. City of Indianapolis*, (Civil Action No. 1:06-cv-1456-DFH-VSS), (S.D. Indiana 2006), at Table 7-5/15) (hereinafter, “CONSENT DECREE”).

combined sewer overflow problem is caused by disintegrating pipes and an unsophisticated century-old infrastructure design. This witches' brew of dirty water and harmful bacteria, conveyed through corroded, crumbling conduit, is no longer acceptable to federal water-quality regulators. An overwhelmed system capacity, particularly during significant precipitation events, allows human waste to flow into the city's rivers.

In order to build and operate this improvement, Citizens is seeking from the Commission a perpetual easement for a deep sewer tunnel under the Fairgrounds in furtherance of the City's ongoing remediation project for untreated wastewater discharges. While the Commission is not opposed to granting an easement for this purpose, our opinion is still being sought in order to determine whether the Commission has statutory authority to grant such an easement without having to pass special legislation allowing it to do so.

### **BRIEF ANSWER**

The answer to the question of whether the Commission has itself the requisite authority to permit the dig by granting a perpetual easement hinges on whether such an easement would be deemed a "disposition" of a portion of the Fairgrounds real estate. We conclude that such an easement does not constitute a "disposition of Fairgrounds property." Therefore, the Commission may grant a deep sewer tunnel easement under the Fairgrounds to Citizens without the need for legislation. Under the facts presented, if it grants such an easement, the Commission will not be "disposing" of a part of the Fairgrounds.

### **ANALYSIS**

The Indiana State Fair Commission, a body corporate and politic, "has complete control over the use of the Fairgrounds."<sup>3</sup> It is required to "maintain and develop the fairgrounds,"<sup>4</sup> and to administer the Fairgrounds "to provide for maximum use of the fairgrounds and property of the commission for the benefit of the citizens of Indiana."<sup>5</sup>

However, the Commission does not own the Fairgrounds; rather, it "holds the fairgrounds in trust for the state."<sup>6</sup> Yet the Commission is concerned about the restriction imposed by Ind. Code § 15-13-4-2(b), which states as follows (emphasis supplied):

The commission may not *dispose of* any part of the fairgrounds *except as authorized by a statute* specifically providing for disposal of that part of the fairgrounds.

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<sup>3</sup> Ind. Code § 15-13-3-6 (internal punctuation omitted).

<sup>4</sup> Ind. Code § 15-13-3-1 (internal punctuation omitted).

<sup>5</sup> Ind. Code § 15-13-3-2 (internal punctuation omitted).

<sup>6</sup> Ind. Code § 15-13-4-2(a).

In the past, and as permitted by Ind. Code § 15-13-4-5,<sup>7</sup> the Commission has granted easements for a variety of utilities, including electrical lines<sup>8</sup> and sewer service.<sup>9</sup> Unlike the present circumstances, these easements have been for utilities that provide service to, and directly benefit, the Fairgrounds.

The deep tunnel perpetual easement is needed to effectuate the 2006 Consent Decree between the City of Indianapolis and the U.S. Environmental Protection Agency in an attempt to curtail the volume and frequency of incidents of untreated wastewater being discharged during rain events into the city's antiquated combined sanitary and storm-water sewers.<sup>10</sup> For its part, Citizens must construct a 28-mile-long network of 18-foot-diameter deep rock tunnels at a depth of some 250 feet beneath the city.<sup>11</sup>

The lynchpin of the analysis here will be whether the tunnel will materially impair or interfere with, or be inconsistent with, the existing public use of the Fairgrounds. No evidence has been adduced, nor even contended, that would suggest any such disruption or preclusion of traditional activities conducted at the Fairgrounds. Thus, the analysis of whether what is occurring here would be deemed a "disposition" of Fairgrounds property or merely a grant of a co-existing interest is similar to eminent domain analysis, where the end result is the functional equivalent of a "taking." Although here one is granting an interest in *public* property for public purposes rather than *private* property for public purposes, there is no fundamental foreclosure of the continued use of the property for the benefit of fairgoers. This action then cannot be regarded as a "disposal" of the property within the meaning of Ind. Code 15-13-4-2 (b):

The prior public use doctrine applies when a municipality or private corporation, to whom the power of eminent domain has been delegated, seeks to exercise that power with respect to property already devoted to public use. *Greater Clark County Sch. Corp. v. Pub. Serv. Co., Ind., Inc.*, 179 Ind. App. 331, 333, 385 N.E.2d 952, 954 (1979). **"The general rule is that where the proposed use will either destroy such existing use or interfere with it to such an extent as is tantamount to destruction, the exercise of the power will be denied unless the**

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<sup>7</sup> "The following may not take an interest in the fairgrounds or property owned by the commission without the consent of the commission: (1) A political subdivision. (2) A utility." Ind. Code § 15-13-4-5.

<sup>8</sup> Electric Line Easements, Deed Record 1289, Page 491; and Instrument 201500093478, Marion County Recorder's Office.

<sup>9</sup> Sewer Service Agreement, Deed Record 1346, Pages 454-61, Marion County Recorder's Office. Whether deemed as ownership or as a holding of land in trust for the citizens of Indiana, the basic legal principles of land ownership would be applied here. Thus, it is a fundamental principle of the rights of land owners that "whoever has the land possesses it all the way to Heaven and all the way to Hell." It is still the presiding view that "subsurface property rights extend to the greatest depth possible." These principles are usually stated in the Latin: "Cujus est solum, ejus est usque ad coelum est ad inferno." See 2 William Blackstone, COMMENTARIES 18; J. Sprankling, OWNING THE CENTER OF THE EARTH, 55 UCLA L.Rev. 979 (2008).

<sup>10</sup> City of Indianapolis Consent Decree and Amendments to 2006 Clean Water Act Consent Decree: No. 1:06-cv-01456-SEB-TAB, <http://www.epa.gov/enforcement/city-indianapolis-consent-decree-and-amendments-2006-clean-water-act-consent-decree-no> (July 21, 2017).

<sup>11</sup> Citizens Energy Group, <http://www.citizensenergygroup.com/Our-Company/Our-Projects/Dig-Indy> (July 21, 2017).

**legislature has authorized the acquisition either expressly or by necessary implication.” *Id.* (citation omitted).<sup>12</sup>**

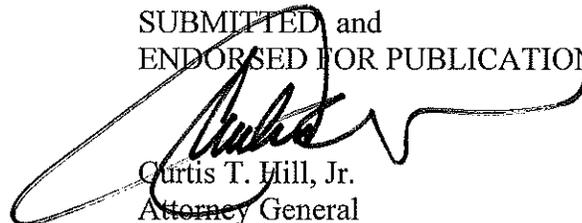
But such is not the case here.

In this case, the easement area will be roughly 20 feet wide. It will be excavated by “boring” equipment that will not substantially disrupt the Fairgrounds’ surface. Even when the tunnel is finished, the Commission will not be restricted from regular use of the property, including erecting buildings or other structures directly over the deep tunnel in the bedrock below. The only significant limitation will be that nothing may penetrate the surface above the tunnel to a depth of more than 200 feet within the path of the easement area. These relatively minor disturbances do not constitute a “taking” of the property in the sense of disposing of property. In other words, the modifications being permitted by the Commission in this case are within the accustomed regulatory land use powers of the Commission whose job it is to preserve the Fairgrounds for the enjoyment of future generations.

### CONCLUSION

The granting of the proposed easement is consistent with, and therefore will not substantially interfere with, the public use to which the Fairgrounds is dedicated. It is my opinion that the Indiana State Fair Commission has the authority to grant a perpetual deep tunnel sewer easement running under the Fairgrounds for the use of Citizens Energy Group, and that by doing so, the Commission will not be acting contrary to Ind. Code §15-13-4-2 (b), which would have required special legislation. The question presented in this case could have been propounded and answered in musical terms. For in the words of singer/songwriter Robert Lamm of the rock group Chicago, to the question “Can you dig it?,” the correct answer is, “Yes you can.”<sup>13</sup>

SUBMITTED and  
ENDORSED FOR PUBLICATION:



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<sup>12</sup> *Lake County Parks and Recreation Board v. Indiana-American Water Company*, 812 N.E.2d 1118, 1122 (Ind. Ct. App. 2004) (emphasis added).

<sup>13</sup> R. Lamm, CHICAGO, *Saturday in the Park* (Columbia Records 1972)