

## ALERTS

### Government Services - Indiana Court Of Appeals Provides Incentive For Cities And Towns To Declare Exclusive Sewer Service Territories Outside Their Borders

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In a landmark opinion that gives municipalities around Indiana needed guidance, the Indiana Court of Appeals has held that a city or town can obtain exclusive jurisdiction to provide sewer service in a territory outside its borders so long as it is the first entity to enact an ordinance declaring the exclusive right to serve that territory. The decision gives cities and towns that provide municipal sewer service a powerful incentive to enact ordinances declaring the exclusive right to provide sewer service in the four-mile area outside their borders.

In *Town of Newburgh v. Town of Chandler*, two different towns claimed a conflicting right to serve sewer customers in territory outside their boundaries. Each town had the right to serve customers within four miles of their borders under Ind. Code § 36-9-2-18. Here, the four-mile boundary of the two towns overlapped and both were serving some customers within the territory. Both then claimed that they had the exclusive right to serve that same territory.

The Court of Appeals broke this deadlock in a unanimous opinion authored by former Chief Justice Shepard sitting as a senior judge. The opinion did so by employing the “first in time” rule. The Court held that each town had the right to declare itself the exclusive provider of sewer service for the territory. The opinion noted that each town had the statutory power to “regulate the furnishing of the service of collecting, processing, and disposing of waste substances and domestic or sanitary sewage. This includes the power to fix the price to be charged for that service.” Indiana Code § 36-9-2-16. In this context, the term “regulate” includes the right to “prohibit” conduct by other parties, which the Court read as including the right to prohibit other cities and towns from providing sewer service in the territory. Ind. Code § 36-1-2-15 (1980).

The Court determined next that the proper way for a city or town to exercise this authority was to enact an ordinance declaring itself the exclusive sewer provider for the territory. The Court reached this conclusion because the Home Rule Act provides that the enactment of an ordinance is the default means for exercising a power, and therefore was the means for municipalities to exercise their right to prohibit others from providing sewer service in a territory. Because an ordinance was required to claim the service territory, the first town to enact an ordinance would prevail. In this case, the Town of Newburgh prevailed because it was the first entity to enact an ordinance declaring the exclusive right to serve the territory.

By putting the proverbial flag in the ground, a city or town may lock in the

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right to provide the service before a nearby municipality seeks to do so. Moreover, even if a city or town does not have any neighboring municipalities at present, such an ordinance may protect against the threat of encroachment into sewer service territories from future annexation by cities and town that are currently at a distance further than the four-mile area.

For more information, contact the Barnes & Thornburg Governmental Services attorney with whom you work, or one of the following attorneys: Mark J. Crandley at 317-261-7924 or [mark.crandley@btlaw.com](mailto:mark.crandley@btlaw.com), or Nicholas K. Kile at 317-231-7768 or [nicholas.kile@btlaw.com](mailto:nicholas.kile@btlaw.com).

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