

1 **BILL NO. G-17-11-12**

2 **General Ordinance No. G-30-17**

3 **AN ORDINANCE AMENDING CHAPTER 37 OF**
4 **THE FORT WAYNE CODE OF ORDINANCES**
5 **CONCERNING ADMINISTRATION AND**
6 **AWARDING OF**
7 **MUNICIPAL CONTRACTS**

8 Whereas, there appears to be a public perception that individuals and
9 businesses influence the award of City government contracts through contributions
10 made to political candidates, campaigns, and/or other elected officials who are the
11 decision makers with regard to government contracts, and that obtaining said
12 contracts without making such contributions is difficult.

13 Whereas, the Common Council of Fort Wayne has determined there is a need
14 to maintain public confidence in the integrity of decisions in awarding government
15 contracts;

16 Whereas, it is in the public's interest to take formal action to insulate these
17 decisions from the political influence of campaign contributions to or for the benefit
18 of the affected decision-makers;

19 Whereas, the Common Council desires to be a leader in Indiana by
20 establishing higher standards in local government;

21 Whereas, if a contribution is made for the purpose of influencing the
22 selection of a contract, the contributor is seeking to interfere with the merit-based
23 selection process and the contribution creates a conflict of interest between the
24 contributor (whose interest is in being selected) and its prospective client (whose
25 interest is in obtaining the best possible services);

26 Whereas, contracts for municipal services not awarded purely on merit-based
27 selection may potentially lead to inferior management and performance;

1 Whereas, ethical contractors seeking to avoid the perception of participating
2 in pay to play practices may refrain from seeking to do business with the City and
3 this may lessen the pool of qualified contractors willing to do business with the City;

4 Whereas, pay to play practices as such may exist in the City could lead to the
5 City paying higher fees because the contractor must recoup contributions, or because
6 contract negotiations may not occur on an arm's length basis;

7 Whereas, such pay to play practices will not stop through voluntary effort
8 because governmental officials who participate may have an incentive to continue to
9 accept contributions for fear of being disadvantaged relative to opponents;

10 Whereas, this ordinance provides a specific prohibition to ensure that contract
11 selection is based on the merits, not on the amount of money given to a particular
12 candidate for office, while respecting the right of industry participants to participate
13 in the political process;

14 Whereas, the ordinance takes the form of a restriction on providing
15 compensated services following the making of contributions rather than a prohibition
16 on making contributions in excess of the relevant ceilings;

17 Whereas, the ordinance is not a restriction on contributions that is applicable
18 to the public but, rather, it is focused exclusively on conduct of those seeking
19 profitable business from governmental agencies;

20 Whereas, nothing in this ordinance shall impact any individual's or entity's
21 ability to express their First Amendment right to contribute to the campaign of any
22 individual candidate for elected office in any amount permitted by applicable federal
23 and state law, but rather, this ordinance is intended to address the appearance of
24 corruption in the awarding of government contracts by minimizing the risk of a quid
25 pro quo exchange;

1 Organizations” as it relates to local offices) apportioned in any manner
2 among all City of Fort Wayne candidates for or holders of a public office
3 having ultimate responsibility for the award of the contract, or campaign
4 committee supporting such candidates or officeholders, , or to any City or
5 Allen County party committee, or to any political action committee (PAC)
6 that regularly engages in the support of municipal elections and/or municipal
7 parties.

8 (B) Any other provision of the law to the contrary
9 notwithstanding, the City or any of its departments or agencies or
10 independent authorities as the case may be, **“shall not enter into**
11 **negotiations with or accept bids”** of any nature from any **business entity**
12 for the rendition of materials, supplies, goods, equipment or contractual
13 services or any other consulting services if, **at any time during the**
14 **negotiations or bid process or one (1) calendar year immediately**
15 **preceding the date of the first communications between a business entity**
16 and the City of Fort Wayne regarding a specific contract or agreement, the
17 **“business entity”** has made any contributions of money, or pledge of a
18 contribution, including an in-kind contribution, in **excess** of the amounts
19 specified in I.C. 3-9-2-4 (7) (a provision dealing with “Contributions by
20 Corporations and Labor Organizations” as it relates to local offices)
21 apportioned in any manner among all City of Fort Wayne candidates for or
22 holders of a public office having ultimate responsibility for the award of the
23 contract, or campaign committee supporting such candidates or officeholders,
24 or to any City or Allen County party committee, or to any political action
25 committee (PAC) that regularly engages in the support of municipal elections
26 and/or municipal parties.

26 (C) No **business entity** which enters into negotiations for or
27 agrees to any contract or agreement with the City of Fort Wayne or any of its
28 departments or agencies or independent authorities for the rendition of
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1 materials, supplies, goods, equipment or contractual services or any other
2 consulting services, shall make any contribution of money, or pledge of a
3 contribution including an in-kind contribution in **excess** of amounts specified
4 in I.C. 3-9-2-4 (7) (a provision dealing with "Contributions by Corporation
5 and Labor Organizations" as it relates to local offices) apportioned in any
6 manner among all City of Fort Wayne candidates for or holders of a public
7 office having ultimate responsibility for the award of the contract, or
8 campaign committee supporting such candidates or officeholders, or to any
9 City or Allen County part committee, or to any political action committee
10 (PAC) that regularly engages in the support of municipal elections and/or
11 municipal parties, **between the time of first communications** between the
12 **business entity** and the City of Fort Wayne regarding a specific contract or
13 agreement and the later of the termination of negotiations or the **completion**
14 of the contract or agreement.

15 (D) For purposes of this ordinance, a "**business entity**" means and
16 includes any *natural* or *legal* person providing or offering to provide
17 materials, supplies, goods, equipment, or professional services or other
18 consulting services. A *natural* or *legal* person includes *an individual, firm,*
19 *proprietorship, corporation, limited liability company, professional*
20 *corporation, partnership, or any other organization or association.* The
21 definition of **business entity** includes in the aggregate *all officers* of the
22 **business entity**, and all *partners, principals, or others* in the **business entity**,
23 who have any ownership interest or distributive share of seven and one-half
24 percent (7.5 %) or more of the **business entity**, and all *subsidiaries* directly
25 controlled by the **business entity**. An *individual* included in the definition of
26 **business entity** shall also include the *individual's spouse*, if any, and any
27 *child* living in the same household as the individual or spouse.
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1 (E) For purposes of this section, the office or offices considered to
2 have ultimate responsibility for the award of a contract shall be the Mayor,
3 the Common Council and any elected officer of the Council.
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5 (F) **Contributions Made Prior to the Effective Date.** Any
6 contract or agreement entered into before the effective date of this ordinance
7 shall not be affected, governed by or in any way in violation of this
8 ordinance. Further, no contribution of money or other thing of value,
9 including in kind contributions, shall be deemed a violation of this ordinance
10 if that contribution was made by the **business entity** prior to the effective
11 date of this ordinance. Notwithstanding the foregoing, any **business entity**
12 which is a party to a contract with the City of Fort Wayne, or any of its
13 departments, agencies, or independent authorities prior to the effective date
14 of this ordinance which contract remains in existence subsequent to the
15 effective date of this ordinance, shall be subject to subsection (C) of this
16 ordinance as to any contributions made after the effective date of the
17 ordinance, and prior to the termination or completion of the contract.

18 (G) **Contribution Statement by Business Entity.** Prior to
19 entering into negotiations, and/or submitting a formal bid through any bid
20 process utilized by the City or any of the City departments, and prior to
21 entering into any contract or agreement with a **business entity** to procure its
22 contractual services, goods, materials, equipment, or supplies, the City or its
23 departments, agencies or independent authorities, as appropriate, shall obtain
24 from the **business entity** a sworn statement made under penalty of perjury
25 that the **business entity**, including in the aggregate all covered principals,
26 partners, officers and subsidiaries, has not made a contribution or
27 contributions which would prohibit the City from negotiating with and/or
28 contracting with the **business entity** as outlined in subsections (A) and (B) of
29 this ordinance. The effectiveness of any award of a contract or agreement
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1 covered by this ordinance shall be conditioned upon satisfactory compliance
2 with this requirement.
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6 (H) **Return of Excess Contributions.** A **business entity**,
7 candidate, officeholder, candidate committee, party committee or PAC may
8 cure a violation of this ordinance if, within 30 days after the contributions
9 made by the **business entity** in excess of those specified in subsections (A),
10 (B), or C of this ordinance, the Common Council is notified of the violation
11 in writing and the amount of the contribution in excess of the limits specified
12 in subsections (A), (B), or (C) is returned to the **business entity**.

13 (I) **Other Prohibited Conduct; Penalty.**
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15 (1) It shall be a violation of this ordinance to: (i) make a
16 contribution in violation of this ordinance; (ii) knowingly conceal or
17 misrepresent a contribution given or received; (iii) make contributions
18 through intermediaries for the purpose of concealing or
19 misrepresenting the source of the contribution; (iv) make any
20 contribution to a campaign committee, City or Allen County party
21 committee, or to a PAC on the condition or with the agreement that it
22 will be contributed to a candidate or campaign committee of any
23 candidate for Fort Wayne office or any holder of Fort Wayne office in
24 violation of this ordinance; (v) engage or employ a lobbyist or
25 consultant with the intent or understanding that such lobbyist or
26 consultant will make any contribution, which if made by the **business**
27 **entity** itself would subject the **business entity** to the restrictions of
28 this ordinance; (vi) fund contributions made by third parties,
29 including consultants, attorneys, family members and employees, in
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1 violation of this ordinance; (vii) engage in any exchange of
2 contributions to circumvent the intent of this ordinance; or (viii),
3 directly or indirectly, through or by any other person or means, do any
4 act which would subject the **business entity** to the restrictions of this
5 ordinance.

6
7 (2) All professional services agreements and other contracts
8 for covered services between a **business entity** and the City of Fort
9 Wayne or its departments, agencies or independent authorities, as
10 appropriate, shall provide by operation of law that it shall be a
11 material breach of the agreement for the **business entity** to engage in
12 conduct prohibited by this ordinance.

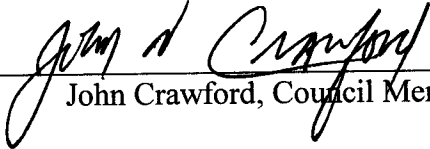
13 (3) Any **business entity** which violates this ordinance also
14 shall be disqualified from eligibility for future Municipal contracts for
15 a period of four (4) calendar years from the date of the violation.

16
17 J. **Severability.** If any provision of this ordinance, or the
18 application of any such provision to any person or circumstance, shall be held
19 invalid, the remainder of this ordinance to the extent it can be given effect, or
20 the application of such provision to persons or circumstances other than those
21 for which it is held invalid, shall not be affected thereby, and to this extent
22 the provisions of this ordinance are severable.


23 **SECTION 2.** That the City is directed to take all action necessary and
24 proper for the implementation of this Ordinance.

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SECTION 3. After passage and any and all necessary approval by the Mayor and any and all publication required, this ordinance shall have an effective date of January 1, 2018.

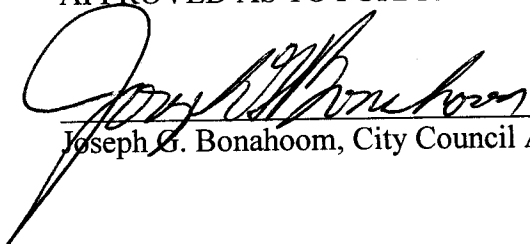


John Crawford, Council Member



Jason Arp, Council Member

APPROVED AS TO FORM AND LEGALITY



Joseph G. Bonahoom, City Council Attorney

BILL NO. G-17-11-12

REPORT OF COMMITTEE ON REGULATIONS

November 21, 2017

Michael Barranda Chair

John Crawford Co-Chair

All Council Members

An Ordinance amending Chapter 37 of the Fort Wayne Code of Ordinances concerning Administration and Awarding of Municipal Contracts

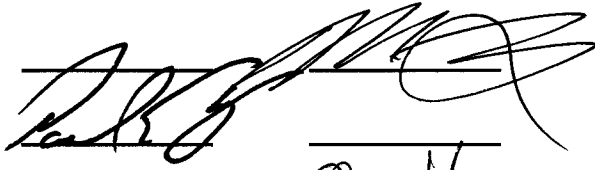
COMMITTEE ON REGULATIONS HAVE HAD SAID Ordinance under consideration and beg leave to report back to the Common Council that said Ordinance

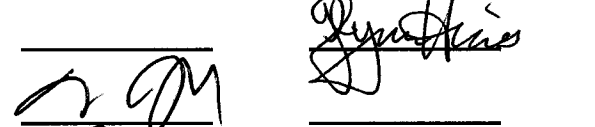
DO PASS

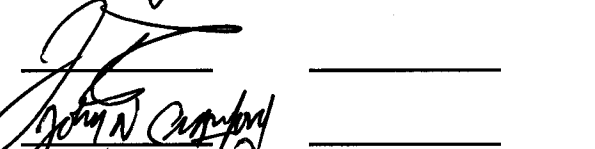
DO NOT PASS

ABSTAIN

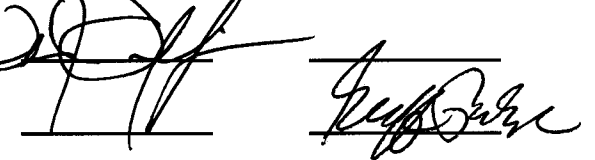
NO REC

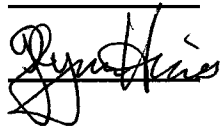


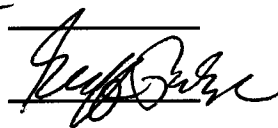




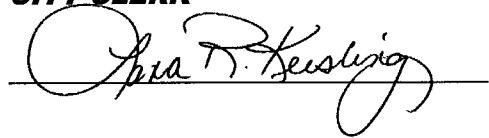








**LANA R. KEESLING
CITY CLERK**



Public Hearing Date: 11/21/17

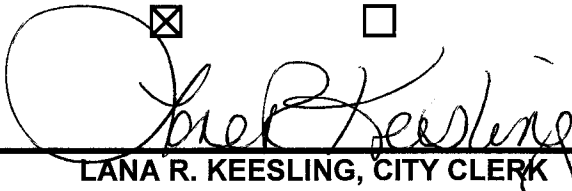
Read the first time in full and on motion by Councilman Barranda.

Read the second time by title and referred to the Regulations Committee.

Read the third time in full and on motion by Councilman Crawford, placed on passage by the following vote:

<u>TOTAL VOTES</u>	<u>AYES</u>	<u>NAYS</u>	<u>ABSTAINED</u>	<u>ABSENT</u>
ARP	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
BARRANDA	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
CRAWFORD	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DIDIER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ENSLEY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
FREISTROFFER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
HINES	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
JEHL	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PADDOCK	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

DATED: November 28, 2017




 LANA R. KEESLING, CITY CLERK

Passed and adopted by the Common Council of the City of Fort Wayne, Indiana, as

General Ordinance No. G-17-11-12 on the 28th day of November, 2017

ATTEST:

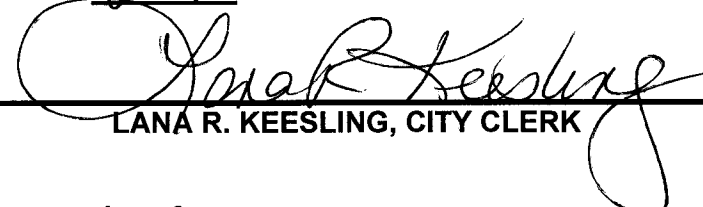


 LANA R. KEESLING
 CITY CLERK



 THOMAS C. HENRY
 PRESIDING OFFICER

Presented by me to the Mayor of the City of Fort Wayne, Indiana, on the 29th of November 2017, at the hour of 8:27 o'clock A.M. E.S.T.



 LANA R. KEESLING, CITY CLERK

Approved and signed by me this _____ day of _____

2017, at the hour of _____ O'clock _____ E.S.T.

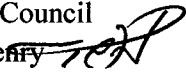
 THOMAS C. HENRY, MAYOR



CITY OF FORT WAYNE

THOMAS C. HENRY, MAYOR

To: Members of City Council

From: Mayor Tom Henry 

Date: December 7, 2017

Re: Ordinance G-17-11-12

I want to congratulate you on your recent attempt to address local campaign finance protocols, policies and procedures. There is no question from a philosophical and ideological view this issue needs to be addressed. I am concerned though that your ordinance is; A) in violation of the state Home Rule Act, specifically, that local governments have no regulatory power over campaign finance; B) not permissible under state law because local governments cannot regulate conduct that has been assigned by the Indiana General Assembly to other units and agencies of government (here the Indiana Election Division and county election boards) and; C) a violation of the state and federal constitutions.

Again, although I believe your intent to be admirable, the ordinance seems to be flawed in several specific areas:

- It sets campaign finance limits as a condition for contracting eligibility that do not exist in state law
- It sets contribution limits for contract eligibility on business entities that state law does not limit
- It restricts campaign finance activities in ways the state law does not
- It imposes campaign finance reporting requirements inconsistent with state law
- It is a violation of the free speech and association rights of candidates and donors, especially for spouses and children of business owners who are not themselves seeking office.

One of my biggest concerns is at a minimum the ordinance could be challenged in court for a determination that the City exceeded its authority under both the state Home Rule Act and the U.S. Constitution. In either case, the City would not only have to pay for its own defense, but, if unsuccessful on the federal claims, would have to pay damages to the plaintiff as well as pay the plaintiff's attorneys fees. This is worrisome, to say the least.

However, since I do agree something needs to be done to make the campaign donation process more transparent, I would prefer to return the ordinance to you, unsigned, for further discussion, debate and modification.

Therefore, I am formally requesting you revisit the ordinance, make the appropriate adjustments and return the proposed statute to me for further examination. Again, I support the intent but struggle with the legality and enforcement components of the ordinance.

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I am also including, for your review, legal opinions of four of the leading law firms in the state outlining what they observe as the illegal, unauthorized and unconstitutional aspects of the ordinance.

Unfortunately, a veto by operation of law is now at play and will require you to either sustain it and rework the ordinance in order to comply with state and federal statutes, or override it and possibly subject our City to legal action. Should you choose the former, my administration stands ready to work with you to ensure any new revisions are consistent with current state and federal law.

Taft/Memorandum

TO: Carol Helton, City Attorney, Fort Wayne
FROM: Chou-il Lee
DATE: December 7, 2017
RE: Legal Analysis of Bill No. G-17-11-12

Please accept this memorandum summarizing the permissibility of contributions from the CHA Consulting PAC to Cornell R. Robertson for County Engineer. The contribution is permissible as presented but there are additional considerations to be noted, as discussed below.

1. There are no limits on contributions to candidates for County Engineer contributions, beyond the corporate contribution bar.
2. Individual contributors should avoid giving over \$1,000 in a two year period to avoid the no bid contract bar, if the individual has an ownership interest in the company that wishes to be eligible for the award of no bid contracts from the county engineer. But contracts from the company's PAC will not affect eligibility for the award of no bid contracts.
3. Since the county engineer is a county office and not a city of Columbus office, there is no requirement to report the PAC contribution other than in the PAC's usual filings with the Ohio Secretary of State.

Please let me know if you have any additional questions or concerns.

INTRODUCTION AND BACKGROUND

This memorandum includes my legal analysis of Bill No. G-17-11-12 (the "Bill"), passed by the Common Council of the City of Fort Wayne (the "Council"). The Bill seemingly addresses purchasing and contracting regulations by the Council. But, in the context of addressing purchasing and contracting, the Bill seeks to regulate campaign finance contributions involving local officials and campaign committees.

Generally, the Bill restricts "providing compensated services following the making of contributions . . ." Specifically, the Bill states, in part, that the City or any of its departments "shall not enter into an agreement or otherwise contract with" any "business entity" for materials, supplies, equipment, goods or contractual services or any other consulting services, including contracts and agreements awarded, if within one calendar year immediately preceding the date of the contract or agreement that "business entity" has made any contribution of money, or pledge of a contribution, including an in-kind contribution, in excess of the amounts specified in [Indiana code]." (Bill, p. 3). The Bill also requires reporting of political contributions through certification statements, which are not required by state or federal campaign finance laws.

The Bill is invalid under Indiana law mainly because it seeks to regulate conduct that is within the purview of the State of Indiana (“State”) and has been fully addressed by the general assembly. Put simply, local governments do not have authority to adopt campaign finance regulations. The Bill also runs afoul of Indiana and federal constitutional law and exposes the City to potential litigation. While this Memorandum will not delve too deeply into those issues — mainly because the invalidity under Indiana law is so clear — the City should be aware of the far-reaching negative effects of this Bill if it is passed.

I. The Bill is Invalid Because it is an Attempt to Regulate Conduct Which is Regulated by the State

This issue has been addressed by the Indiana Attorney General in two official opinions and as recently as 2011. Ironically, the 2011 opinion was issued in relation to an Ordinance being considered by the Common Council of the City of Fort Wayne. Attorney General Zoeller issued his opinion on August 5, 2011, a copy is attached hereto and made a part hereof. In 2011, the Council was considering passage of an ordinance which would have prohibited a city contractor from making political contributions to candidates or office holders.

Attorney General Zoeller opined that the ordinance would be “invalid as an attempt to regulate, without specific statutory authority, conduct which is regulated by a state agency.” While the Bill does not prohibit all contributions, and rather seeks to limit the amount of contributions, it is my conclusion that Attorney General Zoeller’s opinion is still applicable. The Attorney General’s analysis focuses on a local unit’s attempt to *regulate* campaign finance, not prohibit it outright.

As mentioned above, the regulation of campaign financing, including contributions, is within the statutory authority of the State Election Commission and the subject of specific statutory requirements at Ind. Code Chpt. 3-9-2. “It is well established in our law that where the legislature properly enacts a general law which occupies the area, then a municipality may not by local ordinance **impose restrictions which conflict with rights granted or reserved by the General Assembly.**” *Suburban Homes Corp. v. City of Hobart*, 411 N.E.2d 169, 171 (Ind. Ct. App. 1980). We find no statutory authority for a local unit of government to regulate conduct related to campaign financing, including contributions. In the absence of express statutory authority, local ordinances that impose restrictions that are in conflict with rights granted or reserved by the Legislature are invalid. *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987).

2011 Ind. Op. Att’y Gen. No. 6 (Aug. 5, 2011) (emphasis added).

The Bill has the effect of regulating campaign finance and it “imposes restrictions” on and penalties for political contributions. Accordingly, it would be “invalid as an attempt to regulate, without specific statutory authority, conduct which is regulated by a state agency.”

Furthermore, I.C. 36-1-3-8(a)(7) (part of the Home Rule Chapter of Indiana Code) expressly withholds from municipalities “the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.” The Bill would violate this provision in

two separate instances: 1) regulation of campaign finances as discussed above; and 2) regulation of public bidding and purchasing statutes. The state legislature dedicated two separate chapters of Indiana Code to competitive bidding and the awarding of public works projects. For the Council to attempt to interject itself into provisions of state law which are so heavily regulated, is a direct violation of the Home Rule Act.

Finally, the Council lists several recitals for the rationale and intent of the Bill. In fact, the Council goes to great lengths to define and delineate its' intent. The Council expresses the intent to limit the appearance of corruption or a "pay to play". It goes further to include the following language:

Whereas, nothing in this ordinance shall impact any individual's or entity's ability to express their First Amendment right to contribute to the campaign of any individual candidate for elected office in any amount permitted by applicable federal and state law, but rather, this ordinance is intended to address the appearance of corruption in the awarding of government contracts by minimizing the risk of a quid pro quo exchange.

The Council's choice in language is a clear attempt to fall within the accepted regulations put forth in and reliance upon Buckley v. Valeo 424 U.S. 1 (1976) and Citizens United v. FEC 130 S.Ct. 876 (2010). Such reliance is misplaced for the reasons stated above. The *Buckley* case addressed regulations that were enacted by the Federal Election Campaign Act (the "Act"). The Act was passed by the Congress of the United States of America (the "Congress") in 1971. Congress has the specifically granted authority to regulate elections, as does the state legislature. Not only does that power not extend to local municipalities, it is specifically withheld.

II. The Bill, if Adopted, Creates Untenable Constitutional Issues and Exposes the City to Potential Litigation¹

In addition to the statutory concerns discussed above, the Bill creates state and federal constitutional questions. It also creates a risk of litigation. While the Attorney General did not analyze these concerns in his 2011 opinion, he did acknowledge the existence of constitutional issues when he stated "Although not addressed in this letter, the proposed ordinance also raises other legal concerns such as First Amendment protection for political contributions."

First, election activities and campaign finance enjoy protections under the federal and state constitutions in the areas of free speech and association. As such, any attempt to regulate in this area requires strict scrutiny to be constitutionally valid; and the Bill does not meet that standard. In fact, there are many available alternatives available to the City to ensure "fair play" in contracting and purchasing and ones that impose much fewer burdens. It would be difficult for

¹ It is believed that the language discussed in relation to the *Buckley* and *Citizens United* cases was selected to address First Amendment Constitutional concerns. The answer to that question would only be answered in a law suit over the issue. It is my opinion that an ordinance enacted by a city legislative body, which has not been granted the authority to enact such an ordinance, is not the same analysis as an act passed by the US Congress which has clear authority. Therefore, an attempt to correlate the decision in *Buckley* and reinforced in *Citizens United* regarding "quid pro quo" and "appearance of corruption" would be improper.

the City to argue that the Bill's solution to ensure "fair play" is the least burdensome, especially when it imposes such stark penalties on campaign contributors and committees. Consequently, it is highly unlikely that the defense of the Bill on constitutional grounds would be successful.

Second, the creation of a class of "business entity" that contributes and may be penalized under the Bill, compared to a class of "business entity" that does not contribute, is problematic under the Indiana constitution's Equal Privileges and Immunities clause.

Finally, the risk of litigation if the Bill is enacted is high. The City could be entangled in litigation where it may be responsible to pay damages and attorney's fees. Because of the serious federal constitutional issues the Bill raises, parties could take action to enforce constitutional rights that are being infringed upon by the Bill. Those actions would involve 42 U.S.C. § 1983 and § 1988. Actions pursuant to these statutes would make the City potentially responsible not only for its own defense costs, but also for damages and the plaintiff's attorney's fees. Even if there was no federal constitutional challenge, the City would be exposed to litigation in state court where parties could seek court intervention to determine that the City has exceeded its authority under the Home Rule Act in enacting the Bill. In either regard, the City would be forced to expend resources unnecessarily to defend the Bill.

CONCLUSION

For these reasons, the Bill is invalid and would be unenforceable if enacted. What is more, the Bill exposes the City to potential litigation where the City may be held responsible for damages and for payment of the opposing party's attorney's fees.

Sincerely,



Chou-il Lee

CL



December 7, 2017

Carol Helton
City Attorney
200 E. Berry Street
Fort Wayne, IN 46802

Ms. Helton:

On November 28, 2017, the Common Council of the City of Ft. Wayne (the “Council”) adopted Bill No. G-17-11-12 regulating the award of municipal contracts to those making designated campaign contributions (the “Bill”). You have asked Kroger Gardis & Regas, LLP to opine on the legality of the Bill under Indiana law and the U.S. Constitution. After reviewing the Bill, relevant statutes, and federal and Indiana case law, it is our opinion that, more likely than not:

1. The Bill violates the Home Rule Act;
2. The Bill is preempted by existing State regulation;
3. The Bill is in conflict with Indiana purchasing statutes.

In addition to these concerns, the Bill also creates serious doubt concerning its constitutionality under the First Amendment to the U.S. Constitution.

The opinions set forth herein represent our best legal judgment of the probable outcome of the issues discussed if challenged by an individual subject to the requirements of the Bill. These opinions are not binding on a court that may review the legality of the Bill and there can be no assurance that a court considering any issue opined on herein would not hold contrary to such opinions.

Synopsis of Bill

Generally, the Bill purports to address a perceived “pay to play” problem in the award of City contracts. The Bill:

1. Would prohibit the City from *entering into contracts* with a “business entity” that exceeds certain political contribution limits;¹

¹ Bill, § 37.28(A).

2. Would prohibit the City from *entering into negotiations or accepting bids* from a “business entity” that exceeds certain political contribution limits;² and
3. Would prohibit any “business entity” that has a contract with the City from exceeding certain political contribution limits.³

The Bill purports to incorporate Indiana’s statute limiting contributions to candidates for school board and local offices;⁴ however, whereas the foregoing statute is tailored to “corporations” and “labor organizations,” the Bill expansively opens its scope by broadly defining “business entity.” Under the definitions section,⁵ the Bill would apply to each of the following:

1. Any individual contractor or sole proprietor;
2. Any other business entity, including a partnership or other association;
3. Any individual officer of a company
4. Any individual partner or owner of a business with at least a 7.5% ownership interest
5. Any spouse or dependent child of any above individual.

In addition, the Bill would ban “excess” contributions to any Political Action Committees (PAC) “that regularly engages in the support of municipal elections and/or municipal parties.” This broad sweep includes contributions to PACs that are limited to independent expenditures or PACs that support *any* municipal election or municipal party, even if the PAC does not support an election or party within the City.

Analysis

A. The Bill Likely Violates the Home Rule Act

Indiana’s Home Rule Act (the “Act”), codified at Ind. Code §§ 36-1-3-1 through -9, grants to units of local government “all the powers they need for the effective operation of government as to local affairs.”⁶ The Act also provides local units with “all the powers necessary or desirable in the conduct of its affairs, even though not granted by statute.”⁷ Any doubt as to

² Bill, § 37.28(B).

³ Bill, § 37.28(C).

⁴ See Ind. Code § 3-9-2-4(7).

⁵ Bill, § 37.28(D).

⁶ Ind. Code § 36-1-3-2.

⁷ Ind. Code § 36-1-3-4(b)(2).

the existence of a power of a unit is resolved in favor of its existence.⁸ Although the Act grants broad authority to local units of government, this authority is not without limitation. The General Assembly has specifically withheld certain powers from local governments and reserved them to the state. Ind. Code § 36-1-3-8 provides, in relevant part, that “a unit [of local government] does not have. . . the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.”⁹ In regard to elections, the Act also specifically withholds from local governments the “power to order or conduct an election, except as expressly granted by statute.”¹⁰

The issue of whether a local unit may regulate in the area of campaign finance has been the subject of two relevant Indiana Attorney General opinions. In 1983, the Indiana Attorney General issued an opinion on the question “whether a municipal ordinance may impose limitations upon the amount of money which a candidate for the mayoralty may raise or spend in his or her campaign.”¹¹ In examining the ordinance, the Attorney General observed that the General Assembly had authorized the State Election Board to “carry out the provisions of the campaign finance statute” and there is “no statute granting local units of government such regulatory authority.” Thus, the Attorney General concluded:

It is, therefore, my Official Opinion that the Indiana General Assembly has entrusted the power to regulate the conduct of elections, including political contributions and expenses, to the Indiana State Election Board. Accordingly, *any attempt* by a unit of local government to impose by ordinance a limitation on campaign receipts or expenditures in a mayoral election is void as an attempt to regulate conduct which is regulated by a state agency.”¹²

Similarly, in 2011, the Indiana Attorney General reviewed another proposed Bill by the City of Fort Wayne that would have “prohibit[ed] a city contractor from making political contributions to candidates or office holders.”¹³ In examining the proposal, the Attorney General noted that the dispositive question was whether “the ordinance infringes upon those powers reserved to the State” under Ind. Code § 36-1-3-8(a)(7). After detailing the statutory regulatory system for the conduct of elections, the Attorney General concluded that the “the regulation of campaign financing, including contributions, is within the statutory authority of the State Election Commission and the subject of specific statutory requirements.” Accordingly, the Opinion concluded as follows:

⁸ Ind. Code § 36-1-3-3(b).

⁹ Ind. Code § 36-1-3-8(a)(7).

¹⁰ Ind. Code § 6-1-3-8(a)(12).

¹¹ 1983-84 *Op. Ind. Att’y. Gen.* 52.

¹² *Id.* (Emphasis added).

¹³ 2011 *Op. Ind. Att’y. Gen.* No. 6

Based on the above analysis, it is my opinion that the proposed ordinance, if enacted by the City of Fort Wayne, would be invalid as an attempt to regulate, without specific statutory authority, conduct which is regulated by a state agency.¹⁴

The Bill is defective for the same reasons cited by the Attorneys General in the 1983 and 2011 Opinions. Subsection 37.28(C) is an express limit on campaign contributions and is facially preempted by the Act. Subsections 37.28(A) and (B), while disguised as contracting requirements, are nonetheless aimed at limiting campaign contributions, and therefore are still *de facto* regulations of campaign finance. Based on the foregoing, it is our opinion that a court would, more likely than not, find that the Bill is an invalid attempt by a local unit to regulate conduct that is regulated by a state agency.

B. The Bill is Likely Preempted by State Regulation

As discussed in the 2011 Attorney General Opinion cited above, the regulation of campaign finance in the State of Indiana, including contributions, is within the full, and exclusive statutory authority of the State Election Commission and the subject of specific statutory requirements at Ind. Code 3-9, *et seq.* Indeed, the power granted to administer elections on a local level is vested in the *county* election board, not a local municipality.¹⁵ It is well established that “where the legislature properly enacts a general law which occupies the area, then a municipality may not by local ordinance impose restrictions which conflict with rights granted or reserved by the General Assembly.”¹⁶ As the Attorney General noted, “[w]e find no statutory authority for a local unit of government to regulate conduct related to campaign financing, including contributions. In the absence of express statutory authority, local ordinances that impose restrictions that are in conflict with rights granted or reserved by the Legislature are invalid.”¹⁷

Accordingly, even if the Bill did not violate the Act, the field of election law is so fully occupied by existing state law, a court would more likely than not find that the Bill is preempted by State regulation.¹⁸

C. The Bill is in Direct Conflict with the Purchasing Statutes

Ind. Code 5-22, *et seq.* and Ind. Code § 36-1-12 (the “Purchasing Statutes”) contain the rules a municipality must follow when engaged in public purchasing. For example, under the competitive bidding procedures of Ind. Code § 5-22-7-8, the municipality is required to award a

¹⁴ *Id.* (citing *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987)).

¹⁵ See Ind. Code 3-5, *et seq.*

¹⁶ See *e.g. Suburban Homes Corp. v. City of Hobart*, 411 N.E.2d 169, 171 (Ind. Ct. App. 1980).

¹⁷ 2011 Op. Ind. Att’y Gen. No. 6 (citing *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987)).

¹⁸ *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (1987) (“It is hornbook law municipal ordinances and regulations are inferior in status and subordinate to the laws and statutes of the state. When a state statute totally preempts the field, a city may not further legislate therein. If a city attempts to impose regulations *in conflict* with rights granted or reserved by the Legislature, such ordinances or regulations are invalid.”)

bid to the “lowest responsible and responsive bidder.”¹⁹ For requests for proposals, the award shall be made to “the responsible offeror whose proposal is determined in writing to be the most advantageous to the governmental body.”²⁰ Public works contracts are likewise required to be awarded to the “lowest responsible and responsive bidder.”²¹

The qualifications, responsibility, and responsiveness of offerors and prospective contractors are detailed under Ind. Code § 5-22-16-1. While ability, capacity, integrity and character are all elements of responsibility, past campaign contributions are not. Accordingly, if an individual or entity who was barred from contracting with the City as a result of the Bill was the lowest responsible bidder, or had the most advantageous proposal, they would more likely than not be successful in a cause of action to overturn the Bill.

D. The Bill Restricts Speech Potentially in Violation of the First Amendment

i. Limits on “Business Entity” Contributions (Subsection C)

The U.S. Supreme Court has long recognized that political contributions are a form of constitutionally protected speech under the First Amendment.²² The Court has also long distinguished between limits on independent expenditures and limits on campaign contributions.²³ As discussed above, the Bill restricts both types of speech.

a) *Independent Expenditures*

The U.S. Supreme Court has held that courts must apply “exacting scrutiny” to independent expenditures, which means that the regulation is valid “only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.”²⁴ The Court has recognized “a ‘sufficiently important’ governmental interest in ‘the prevention of corruption and the appearance of [quid pro quo] corruption.’”²⁵ In *Citizens United*, however, the Court held that independent expenditure limits, even expenditures by corporations, do not constitute the least restrictive means to combat *quid pro quo* corruption.²⁶

¹⁹ Ind. Code § 5-22-7-8.

²⁰ Ind. Code § 5-22-9-7.

²¹ Ind. Code § 36-1-12-4.

²² *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014) (“The right to participate in democracy through political contributions is protected by the First Amendment....”).

²³ *Id.* (“we see no need in this case to revisit Buckley’s distinction between contributions and expenditures and the corollary distinction in the applicable standards of review.”) (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)).

²⁴ *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1444 (2014).

²⁵ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 345 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

²⁶ *Id.* (“[W]e now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”).

Thus, to the extent that the proposed Bill limits independent expenditures, there are serious concerns that it does not pass constitutional muster.

b) *Contributions*

With respect to contribution limits, the U.S. Supreme Court applies a slightly less but nonetheless “rigorous standard of review,” under which the government must “demonstrate . . . a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms.”²⁷ In other words, the restriction on speech must be “a means narrowly tailored to achieve the desired objective.”²⁸ Under this standard, the Court has struck down a number of restrictions on political contributions because they were not “closely drawn” to address *quid pro quo* corruption or its appearance.²⁹ These decisions include striking down a restriction on contributions by minors where the government produced “scant evidence” that parents were making donations “through their minor children to circumvent contribution limits applicable to the parents.”³⁰ Thus, the Bill’s application to children of individuals potentially raises similar concerns.

Similarly, the Bill features other applications that could prove challenging to survive the Supreme Court’s “closely drawn” test. For example, its application to spouses could pose a similar problem to that of dependent children, perhaps even more so, in a day and age when wives and husbands are free to disagree with their spouse’s political views. Moreover, the Bill’s application to partners or business owners with at least a 7.5% interest in the firm potentially poses a problem as well, since it could restrict the speech of a minority owner who has no control over the direction of the firm or which contracts it enters. Its application to any Allen County party committee also presents a potential problem under the “closely drawn” test because countywide parties also support candidates for *County* offices who have no control over the award of *City* contracts. Next, the Bill applies to firms or individuals who end up making excess contributions only to a *losing* candidate, which would have little impact on fighting *quid pro quo* corruption. Finally, as discussed above, the Bill restricts contributions to *any* PAC that supports municipal elections or parties anywhere in the State, even if the PAC does not support a *City* election or party.

Thus, the breadth of these features pose significant hurdles for surviving a constitutional challenge because they may not be “narrowly tailored” to achieve the City’s desired objective of prohibiting *quid pro quo* corruption and its appearances.

²⁷ *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1444 (2014).

²⁸ *Id.* at 1457.

²⁹ See *Wagner v. Fed. Election Comm’n*, 793 F.3d 1, 5 n.3 (D.C. Cir. 2015) (collecting decisions), *cert. denied sub nom. Miller v. F.E.C.*, 136 S. Ct. 895 (2016).

³⁰ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 232 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

ii. *Prohibition on City Authority to Negotiate or Contract with a "Business Entity" that Exceeds Contribution Limits (Subsections A and B).*

In Subsections A and B, the Bill attempts to enforce the above restrictions by prohibiting the City from negotiating or contracting with the Business Entity that exceeds the restrictions. However, the "unconstitutional conditions" doctrine, as a general proposition, prohibits the government from putting conditions on receiving a benefit (such as employment or a government contract) that would otherwise be unconstitutional if adopted outright.³¹ It is unlikely that the City could avoid any of the potential constitutional infirmities discussed above simply by recasting them as a limit on the City's authority to enter into contracts. Courts generally do not elevate form over substance.

Opinion

Based upon the foregoing and subject to the qualifications and limitations contained herein, and the facts and review of documents and information described above, it is our opinion that more likely than not:

1. The Bill violates the Home Rule Act;
2. The Bill is preempted by existing State regulation;
3. The Bill is in conflict with Indiana purchasing statutes; and

In addition to these concerns, the Bill also creates serious doubt concerning its constitutionality under the First Amendment to the U.S. Constitution.

Sincerely,

KROGER GARDIS & REGAS, LLP

Kroger Gardis & Regas, LLP

³¹ See, e.g., *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013) ("the Government may not deny a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech even if he has no entitlement to that benefit.") (internal quotes omitted).

November 21, 2017

WRITER'S DIRECT NUMBER: (317) 236-2339
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EMAIL: THOMAS.DOWNS@ICEMILLER.COM

Via Electronic Mail

Ms. Carol Helton, Esq.
City of Fort Wayne
200 E. Berry Street, Suite 430
Fort Wayne, IN 46802

RE: Proposed Ordinance Concerning Administration and Award of Municipal Contracts

Dear Carol:

We are writing to follow up on our various communications with you regarding concerns raised by you and Joe Bonahoom, attorney to the Common Council of the City of Fort Wayne ("City") with respect to the proposed ordinance that would, if enacted, prohibit the City from awarding a purchasing contract to a "business entity" that has made political contributions to a candidate for local office or to a political committee or political action committee organized and operating within Allen County within a one year period prior to the award of a contract ("Proposal").

We understand that this is not the first time the City has been presented with a proposed ordinance that would, similar to the Proposal, effectively prohibit individuals and business entities of all types from making political contributions while those same individuals and business entities are doing business with the City. In O.A.G. 2011-6 ("Opinion"), the Indiana Attorney General, when asked to review a proposed ordinance on this subject matter ("2011 Proposal"), opined that the 2011 Proposal was prohibited under IC 36-1-3-1 *et seq.* ("Home Rule Statute"), as an attempt by the City to regulate conducted regulated by a state agency. The Attorney General noted that the Home Rule Statute provides that the City does not have the power to regulate conduct that is regulated by a state agency, except as expressly granted by statute. (IC 36-1-3-8). He further noted that the conduct of elections is granted to the state and is the "subject of comprehensive regulation." He found no express authority for the City to further regulate elections. Inasmuch as the purpose of the Proposal is identical to the purpose of the 2011 Proposal, it is reasonable to conclude that the conclusion in the Opinion would apply to the Proposal.

Although the Attorney General does mention the doctrine of preemption, the Opinion does describe the concept, citing *Suburban Homes Corp. v. City of Hobart*, 411 N.E.2d 169 (Ind. App. 1980):

It is well established in our law that where the legislature properly enacts a general law which occupies the area, then a municipality may not by local ordinance impose restrictions which conflict with rights granted or reserved by the General Assembly. See, e. g., . (1939), 216 Ind. 155, 23 N.E.2d 590; *Bd. of Public Safety v. State ex rel. Benkovich* (1979), Ind.App., 388 N.E.2d 582. ...

Ms. Carol Helton, Esq.
November 21, 2017
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[I]t has been observed that where the legislature does not intend to occupy the area, a local ordinance may be sustained where it merely supplements the burdens imposed by the statute with additional requirements that are logically consistent with the statutory purpose. *City of Indianapolis v. Sablica* (1976), 264 Ind. 271, 342 N.E.2d 853;

Suburban Homes Corp. v. City of Hobart, 411 N.E.2d 169, 171 (Ind. App. 1980). It is reasonable to conclude that the State has chosen to "occupy the field" of elections, leaving no opportunity for the City to further regulate this area.

As a matter of statutory construction, the General Assembly is presumed to know how to express its intent. If the General Assembly had intended to prohibit individuals or business entities doing business with the City from also making political contributions, it could easily have done so when it enacted, in 1997, comprehensive purchasing legislation, or at any time in the past twenty years. This can be contrasted with the regulations governing state officers and employees, which expressly prohibit an officer or employee from accepting certain gifts, even meals (except those of a nominal amount) from persons or entities with whom they do business, but which expressly exempts political contributions from the list of prohibited items. 40 IAC 2-1-6(a)(6).

Conclusion

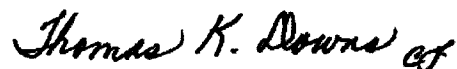
It is reasonable to conclude that the Proposal is preempted, violates Home Rule, and is at least inconsistent with the General Assembly's regulation of gifts to state officers and employees.

The foregoing discussion expresses the professional judgment of the attorneys participating in the consideration of this matter as to the legal issues addressed in this letter. This discussion involves complex questions of law and by expressing our views on these issues, the undersigned does not become an insurer or a guarantor of that expression of professional judgment, nor does the rendering of these views guarantee the outcome of any legal dispute which may arise.

This letter is being furnished to you for your sole use only in connection with the consideration of the issues discussed in this letter and no other party is entitled to rely on this memorandum without our express written consent. Kindest regards.

Very truly yours,

ICE MILLER LLP



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MEMORANDUM

From: A. Scott Chinn
To: Carol Helton, City of Fort Wayne City Attorney
Date: December 7, 2017
Re: Legal Analysis of Bill No. G-17-11-12

BACKGROUND

The purpose of this memorandum is to provide a review of Bill No. G-17-11-12 for potential legal concerns with the text and scope of the proposal and to identify issues, risks and liabilities that could arise if the proposal is passed into law. Bill No. G-17-11-12 (the "Proposal") includes various restrictions and regulations regarding political contributions made to elected officials and candidates for office in the City of Fort Wayne. In part, the proposal seeks to restrict City departments and agencies from awarding contracts, negotiating, and accepting bids from business entities seeking the same from the City based on specified campaign contribution activity to City of Fort Wayne candidates or office holders. In addition, the proposal seeks to regulate directly those business entities' campaign finance activities by making specified contributions a violation punishable in a number of ways including debarment from City work. Finally, the proposal requires reporting in the form of contribution certification statements (in a form not otherwise required by campaign finance reporting laws).

The particular focus of this analysis is on state law preemption and Home Rule Act issues. While there are also potential constitutional problems with portions of this proposal, it is my conclusion that the proposal is invalid under Indiana law and that a reviewing court might find the proposal unlawful even prior to reaching the constitutional questions.

ANALYSIS

The City of Fort Wayne has the ability to legislate and enforce ethics policies as well as policies that cover City purchasing and contracting covering the actions of employees, elected officials and persons doing business or seeking to business with the City. But the provisions of

the Proposal go beyond purchasing and contracting regulation. The provisions both directly and indirectly regulate campaign finance matters involving local officials and campaign committees.

There are serious, and I conclude dispositive, legal concerns over the Proposal's attempt to regulate campaign finance in any respect. The State of Indiana already fully regulates elections and campaign finance, including with respect to local government officials. In addition, because election activities and campaign finance enjoy free speech and association protections under the federal and state constitutions, any attempt to regulate in this area requires special scrutiny to avoid constitutional infringement.

1. The Proposal Violates State Law

Generally speaking, local governments in Indiana are free to regulate in all areas except where prohibited by state law. That state preemption of local regulation can come in two forms: (a) express preemption under the Home Rule Act or another statute in the Indiana Code, or (b) preemption implied by the state's decision to partially or fully occupy the field of regulation in a particular area. The Proposal appears to violate State law preemption requirements in at least four material respects.

First, the Home Rule Act expressly withholds from local governments the "power to order or conduct an election, except as expressly granted by statute." IC 36-1-3-8(a)(12). The Proposal does not cite as authority a single Indiana statute that authorizes local governments, including the City of Fort Wayne, to regulate campaign finance or to tie purchasing and contracting decisions to campaign finance activity. Indeed, the only statutory citation in the entire Proposal is to one of Indiana's campaign finance laws, IC 3-9-2-4. In 1983, the Indiana Attorney General issued an opinion on the question "whether a municipal ordinance may impose limitations upon the amount of money which a candidate for the mayoralty may raise or spend in his or her campaign." See 1983-84 Ind. Op. Atty. Gen. 52, 1983 Ind. OAG No. 7, 1983 WL 41848 (Ind.A.G.). The Attorney General's opinion, in part relying on the Home Rule Act, was sweeping in its conclusion that local governments lacked any regulatory power over campaign finance: "It is, therefore, my Official Opinion that the Indiana General Assembly has entrusted the power to regulate the conduct of elections, including political contributions and expenses, to the Indiana State Election Board. Accordingly, *any attempt* by a unit of local government to impose by ordinance a limitation on campaign receipts or expenditures in a mayoral election is void as an attempt to regulate conduct which is regulated by a state agency." *Id.* (emphasis added). Then, in 2011, the Indiana Attorney General concluded that another City of Fort Wayne proposal similar to the Proposal here violated the Home Rule Act. See 2011 Ind. OAG No. 6 (Ind.A.G.), 2011 WL 13161580 (finding unlawful proposal barring campaign contributions from city contractors and their spouses).

Second, there is no question that regulating campaign committees and campaign finance, including with respect to elections for local offices, is an election function regulated by Indiana law and part of the conduct of an election. In addition to expressly putting local regulation of elections and campaign finance off limits, the Home Rule Act also makes it impermissible for local governments to regulate conduct the regulation of which is committed to a state agency. See IC 36-1-3-8(a)(7). There is an entire article of the Indiana code dedicated to regulating campaigns, campaign committees, and campaign finance. See generally IC 3-9; and see IC 3-9-

5-4(1) (regulating campaign finance reports for "Candidates for *local office* and their candidate's committees.") (emphasis added). The 2011 opinion from the Attorney General details the repose of these laws into the exclusive hands of the Indiana Election Division and local election boards. 2011 Ind. OAG No. 6, 2011 WL 13161580 at *2.¹ Moreover, the obligations and powers to receive, review, and enforce the regulatory requirements of campaign finance filings for candidates for local office are expressly vested in county election boards, not municipal entities of any type. See IC 3-9-5-4 (candidates for local office required to file campaign finance reports with county election board); IC 3-6-5-14 (county election board granted the power to administer election laws); IC 3-6-5-31 (granting to county election board the power to investigate violations of election law, including campaign finance laws). Thus, the Proposal is preempted under IC 36-1-3-8(a)(7).

Third, even if the Proposal was not clearly preempted under either the elections clause or the state regulation clause of the Home Rule Act, the field of election law is so fully occupied by existing state law that a court will likely find it is closed to the local government regulations imposed by the Proposal. *City of Indianapolis v. Fields*, 506 N.E.2d 1128, 1131 (1987) ("It is hornbook law municipal ordinances and regulations are inferior in status and subordinate to the laws and statutes of the state. When a state statute totally preempts the field, a city may not further legislate therein. If a city attempts to impose regulations *in conflict* with rights granted or reserved by the Legislature, such ordinances or regulations are invalid.") (emphasis added). As outlined above, the Indiana General Assembly has already clearly decided to vest authority over local government elections and campaign finance in county election boards. Moreover, the Indiana Election Commission and the Indiana Election Division of the Office of Secretary of State also exist to regulate elections, including some aspects of local government elections. The Indiana Election Code provisions that enable the various public agencies that govern elections and that provide the statutory regulations for elections are compiled in a code book that is more than 600 pages long. The powers vested are clear and the regulatory statutes are set forth in great detail. In the area of campaign finance, the Indiana Election Division issues an annually updated "Campaign Finance Manual" that has over 120 pages of information.²

From a review of the Indiana Election Code, it is difficult to see how it could be reasonably said that the General Assembly has left open the area of election law for regulation by municipalities – entities it has not chosen to enable with election powers and duties. Moreover, state law does *not* impose limitations or prohibitions based on one's status as a contractor (which the Proposal defines broadly as a "business entity"). And several of the Proposal's provisions clearly conflict with state campaign finance law. Specifically, the Proposal, among other things:

- purports to set campaign finance limits as a condition for contracting eligibility that do not exist in state law;

¹ The Attorney General's view about the invalidity of the 2011 Fort Wayne proposal was confirmed by Indiana Election Division Republican Co-Director Brad King, who made a public statement in connection with the proposal that "[t]here are no statutes granting any local government the authority to adopt campaign finance regulations." *The Journal Gazette*, July 13, 2011, "City ponders campaign-gift curbs/Bill flawed, some on council warn".

² See <http://www.in.gov/sos/elections/files/2018%20Campaign%20Finance%20Manual.Final.pdf>.

- sets contribution limits for contract eligibility on businesses entities that state law does not limit (e.g., partnerships, limited liability companies, associations);
- seeks to restrict the campaign finance activities of party committees and political action committees in ways that state law does not;
- and imposes campaign finance reporting requirements that are in addition to and inconsistent with those required by state law (which places regulation for that reporting on the Indiana Election Division and local election boards).

Fourth, the Proposal conflicts not only with state election law but also in part with state purchasing laws. As just one example, the Proposal would bar the low bidder in a competitive procurement from receiving a contract award if the bidder (or even his or her spouse) had made aggregate campaign contributions of more than \$2,000 spread over one year to an indeterminate amount of candidate committees, party committees and political action committees. That outcome violates any statute that requires that a contract be awarded to the low bidder. *See, e.g.*, IC 5-22-7-8 (“A contract must be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder.”); IC 36-1-12-4(a)(8) (requiring local governments to “award the contract for public work or improvements to the lowest responsible and responsive bidder”).

2. Constitutional Implications

Although the focus of this memorandum is on the Proposal’s invalidity under state law, it is important to acknowledge that the Proposal suffers from constitutional problems as well. There are at least two potentially significant constitutional issues with the Proposal: (1) unconstitutional overbreadth because of the Proposal’s regulation of persons and entities not involved in City contracting decisions; and (2) a violation of free speech and associations rights of candidates and donors since there is no compelling justification for the regulation nor any attempt to narrowly tailor the restrictions.

The definition of “business entity” in the Proposal is disturbingly overbroad in that it applies to spouses and children of individuals who are not engaging in seeking contract awards from the City. Moreover, to regulate political parties and political action committees who receive contributions from contractors but are not making contracting decisions for the City produces a host of scenarios attenuated from any legitimate purpose of the Proposal and would be unlikely to pass constitutional muster under free speech and association principles. Finally, there are many less restrictive alternatives available to the City in trying to ensure fair play in contracting than to enact such burdensome and attenuated regulations on constitutionally protected campaign finance activity.

3. Litigation Risks and Liabilities

There is little question that the Proposal is of a species of legislation that draws legal challenges. And as the analysis above would indicate, there are several significant legal problems with the Proposal that may be challenged. At a minimum, the law could be challenged in state court for a determination that the City has exceeded its authority under the Home Rule Act in enacting the Proposal. However, the Proposal also raises serious federal constitutional questions that could give rise to litigation. Actions to enforce constitutional rights are brought

pursuant to 42 U.S. C. § 1983 and § 1988. Under those statutes, the City would not only pay for its own defense of the Proposal, but, if unsuccessful, would also have to pay damages to the plaintiff as well as pay the plaintiff's attorneys fees. Under federal law, the City would likely have to pay for the plaintiff's attorneys fees even if, after the litigation commenced, the City decided to stop enforcement of the Proposal. Even if a court invalidated the Proposal solely on state-law grounds, as indicated above is likely, the fact of a plaintiff bringing federal constitutional claims may render the City liable for the plaintiff's attorneys' fees expended to develop and bring those claims.

CONCLUSION

Based on the 1983 and 2011 opinions of the Office of Indiana Attorney General and my review and analysis of the state's election code and preemption case law, it is highly likely that the Proposal violates the limitations imposed on the City by the Indiana Home Rule Act. The Indiana Election Code clearly vests the power to conduct elections and regulate campaign finance in the Indiana Election Division and county election boards – not in municipalities. Thus, the Proposal is preempted by state law. And because the Proposal is far broader than necessary to achieve its aims, enactment of the Proposal leaves open the potential for constitutional litigation that could cost the City hundreds of thousands of dollars.

**FORT WAYNE COMMON COUNCIL
ROLL CALL (VOTE)
REGULAR SESSION**

Date: 12/12/17
Bill # G-17-11-12 Override Veto

THE COMMON COUNCIL OF THE CITY OF FORT WAYNE, INDIANA, MET IN ROOM 030, COUNCIL DISCUSSION ROOM, GARDEN LEVEL - CITIZENS SQUARE, TUESDAY EVENING, IN REGULAR SESSION. PRESIDENT TOM DIDIER IN THE CHAIR, COUNCIL ATTORNEY JOSEPH BONAHOOM AND LANA R. KEESLING, CITY CLERK, AT THE DESK, PRESENTS THE FOLLOWING MEMBERS

.....

ARP	yes	BARRANDA	NO	CRAWFORD	yes
DIDIER	yes	ENSLEY	yes	FREISTROFFER	yes
HINES	-NO-	JEHL	yes	PADDOCK	NO

.....

ABSENT: -0-

Final Vote Tally		
In Favor	Against	Abstain
6	3	—

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Public Hearing Date: N/A


Read the first time in full and on motion by Councilman Barranda.

Read the second time by title and referred to the Regulations Committee.

Read the third time in full and on motion by Councilman Crawford, placed on passage by the following vote:

<u>TOTAL VOTES</u>	<u>AYES</u>	<u>NAYS</u>	<u>ABSTAINED</u>	<u>ABSENT</u>
ARP	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
BARRANDA	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
CRAWFORD	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
DIDIER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ENSLEY	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
FREISTROFFER	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
HINES	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
JEHL	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
PADDOCK	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

DATED: December 12, 2017


LANA R. KEESLING, CITY CLERK

Passed and adopted by the Common Council of the City of Fort Wayne, Indiana, as

General Ordinance No. G-17-11-12 on the 12th day of December, 2017

ATTEST:


LANA R. KEESLING
CITY CLERK


PRESIDING OFFICER