A. Scott Chinn
Partner
scott.chinn@FaegreBD.com
Direct **+1 317 237 1291**

Faegre Baker Daniels LLP
300 North Meridian Street ▾ Suite 2700
Indianapolis ▾ Indiana 46204-1750
Main **+1 317 237 0300**
Fax **+1 317 237 1000**

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 form 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.