

November 21, 2017

WRITER'S DIRECT NUMBER: (317) 236-2339  
DIRECT FAX: (317) 592-4605  
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. ...

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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

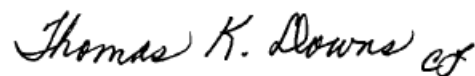
It is reasonable to conclude that the Proposal is preempted, violates Home Rule, and is at least inconsistent with the General Assembly's regulation of gifts to state officers and employees.

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

A handwritten signature in cursive script that reads "Thomas K. Downs of".

Thomas K. Downs

kla/s

Karen Arland