December 7, 2017

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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:

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[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

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[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]

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[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.

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[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

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[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).