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).
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> 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 Litigation[1]

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

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