STATE OF INDIANA

OFFICE OF THE ATTORNEY GENERAL
302 WEST WASHINGTON STREET, IGCS 5TH FLOOR
INDIANAPOLIS, INDIANA 46204

CURTIS T. HILL, JR.
ATTORNEY GENERAL

September 24, 2018

OFFICIAL OPINION 2018-7

Mr. Matthew C. Greller
Accelerate Indiana Municipalities
125 W. Market St., Suite 100
Indianapolis, IN 46204

RE: City Ordinance and the Regulation of Campaign Contributions by City Contractors

Dear Mr. Greller:

In a letter to the Indiana Attorney General dated May 31, 2018, you requested on behalf of your members, which are Indiana municipalities, an official opinion of the Office of the Attorney General ("OAG") on the validity of Fort Wayne General Ordinance No. G30-17 ("the Ordinance"). Proposed by the Common Council of the City of Fort Wayne ("the Council"), the Ordinance would prohibit businesses and individuals that conduct business with the City of Fort Wayne ("the City") from making political contributions to candidates for local office, both in the City and throughout Allen County. The Ordinance also excludes from public contracts any business entity that has made any contribution of money, or pledge of a contribution, in excess of the dollar limits specified in Indiana statute.[1]

ISSUE PRESENTED

Does the City, or any other municipality in the State of Indiana, have the power to disqualify individuals and corporations from consideration for professional services contracts with local government based solely on the fact that they made otherwise lawful political campaign contributions to a candidate or candidates in local races?

[1] *See* Ind. Code § 3-9-2-4(7).

TELEPHONE (317) 232-6201 - FAX (317) 232-7979

BRIEF ANSWER

The City—whether acting through the Council, its Mayor, or both—lacks the authority to regulate campaign contributions in local races, whether directly or indirectly, by the means deployed in these ordinances.

Indiana's Home Rule Act[2] prohibits local units of government from regulating in areas that are otherwise preempted by State statute, as was explained in a previous Attorney General opinion in 2011.[3] The present Ordinance is also contrary to State statutes governing local public contracting. In addition to the statutory violations, the Ordinance likely violates the First Amendment to the United States Constitution by imposing unconstitutional speech restrictions on those who desire to seek contracts with government.

BACKGROUND

In 2011, the Council proposed an ordinance[4] that would have prohibited a city contractor from making political contributions to city office holders or candidates for city office. That proposal was dropped after the Attorney General opined that the proposed ordinance would be invalid as an attempt to regulate conduct that is within the purview of a State agency. The 2011 opinion specifically noted that "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."[5] In summary, the OAG found "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 Legislature are invalid."[6] Accordingly, the ordinance at issue in the 2011 matter was deemed invalid "as an attempt to regulate, without specific statutory authority, conduct which is regulated by a state agency."[7]

Notwithstanding the 2011 opinion, the concept of restricting campaign contributions was resurrected in 2017 with a twist. Rather than prohibiting campaign contributions by contractors or potential contractors, the new Ordinance prohibits the City from doing business with those who have made political contributions over a certain limit. The Ordinance, which is discussed in more detail below, was approved by the Council in November 2017. Mayor Tom Henry vetoed

---

[2] Ind. Code § 36-1-3-8.
[3] 2011 *Op. Ind. Att'y Gen.* No. 6, 2011 WL 13161580 (August 5, 2011) available at https://www.in.gov/attorneygeneral/files/Official%20Opinion%202011-6.pdf (last visited September 5, 2018).
[4] Bill No. G-11-07-11
[5] 2011 *Op. Ind. Att'y Gen.* No. 6 at p. 2.
[6] *Id.*
[7] *Id.* at 3.

the bill, expressing concerns that it violated state law and implicated First Amendment issues. The Council overrode the veto,[8] and the Ordinance took effect January 1, 2018.

The Ordinance purports to prohibit the City, or any of its departments or agencies, from contracting with any "business entity" that has made contributions to Fort Wayne candidates or office holders in excess of the limits stated in Ind. Code § 3-9-2-4(7). That statutory limit, which applies to corporations and labor unions, is "an aggregate of two thousand dollars ($2,000) apportioned in any manner among all candidates for school board offices and local offices."

Other provisions of this Ordinance are essentially mirror images of those set forth above, proscribing the award of public works or the purchase of goods and services based on certain conditions. For example, subsequent sections would prohibit the City from awarding a contract or otherwise entering into an agreement for materials, supplies, goods, contractual services or other consulting services if, in the year before the award of the contract or agreement, the proposed contracting party made any kind of political contribution to any candidate for city office or any political action committee of the City or in Allen County. This appears to be a locally based effort to prohibit political contributions by businesses and individuals engaged in businesses that are accustomed to contracting with cities, towns and counties.

A further narrowing provision was added months later. *See* Bill No. S-18-05-32 (2018). This more narrowly drawn measure passed into law on June 26, 2018 (once again, over the Mayor's veto). The Ordinance, as revised, narrowed much of the broad scope of its previous iteration. The previous version applied to all manner of commerce with government; the new version limited itself to contracts for "professional services." It may be that those promoting passage of this Ordinance in its revised form regarded the procurement territory of "professional services" as being far less likely to be achieved through sealed competitive bidding, and thus most in need of the oversight represented by this Ordinance. *See* General Ordinance No. S-57-18, at 37.28(A).

This Ordinance is clearly designed to remove what are popularly referred to as "pay to play" practices from the funding of local procurement of public works and other contracts for public funding or public supply. The bill's Preamble, among other things, declares that:

> Whereas, it is in the public's interest... to insulate [procurement] decisions from the political influence of campaign contributions...;
>
> * * *

[8] *Fort Wayne Journal Gazette*, "Council overrides mayoral veto of 'pay-to-play." December 12, 2017, http://www.journalgazette.net/news/local/20171212/council-overrides-mayoral-veto-of-pay-to-play , initially retrieved on May 17, 2018.

> Whereas, if a contribution is made for the purpose of influencing the selection of a contract, the contributor is seeking to interfere with the merit-based selection process…;
>
> Whereas, contracts for municipal services not awarded purely on merit-based selection may potentially lead to inferior management and performance;
>
> * * *
>
> Whereas, pay to play practices as such may exist in the City, could lead to the City paying higher fees because the contractor must recoup contributions, or because contract negotiations may not occur on an arm's length basis;
>
> Whereas, this ordinance provides a specific prohibition to insure that contract selection is based on the merits, not on the amount of money given to a particular candidate for office….

The language of the Preamble to the Council's new legislation is more substantive than an attempt to deliver better pricing or quality goods and services whenever the City finds itself in the marketplace. However, the attempt by the Council to address "pay to play" practices is not permitted by units of local government under current Indiana law, as set forth in in this opinion.

LEGAL ANALYSIS

As a threshold matter, it is necessary to address the Home Rule Act. Under Indiana's Home Rule Act, codified at Ind. Code §§ 36-1-3-1through -12, units of local government have "all the powers they need for the effective operation of government as to local affairs." Ind. Code § 36-1-3-2. 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." Ind. Code § 36-1-3-4(b)(2). "Any doubt as to the existence of a power of a unit shall be resolved in favor of its existence." Ind. Code § 36-1-3-3(b).

Although the Home Rule 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…[t]he power to regulate conduct that is regulated by a state agency, except as expressly granted by statute." Ind. Code § 36-1-3-8(a)(7).

The statutory framework regulating campaign financing is contained in Ind. Code § 3-9 *et seq.*, and campaign contributions are specifically addressed in Ind. Code § 3-9-2 *et seq.* The

Indiana Election Commission is charged with administration of Indiana election laws and has the authority to adopt rules concerning campaign finance, including campaign contributions. Ind. Code §§ 3-6-4.1-14(a)(1), (a)(2)(B).

Indiana courts have repeatedly held that "local ordinances impermissibly intrude on state regulatory systems where they prohibit conduct authorized by the state . . . ." *Town of Avon v. West Central Conservancy Dist.*, 937 N.E.2d 366, 377 (Ind. Ct. App. 2010), *rev. on other grounds*, *Town of Avon v. West Central Conservancy Dist.*, 957 N.E.2d 598 (Ind. 2011); *see also*, *Ind. Dep't. of Natural Resources v. Newton County*, 802 N.E.2d 430, 432 (Ind. 2004) (recognizing that the Home Rule Act prohibits a local government from imposing "duties on activities regulated by a state agency"); *City of Gary v. Indiana Bell Telephone Co.*, 732 N.E.2d 149, 153 (Ind. 2000) (recognizing "this broad grant of authority notwithstanding, the Home Rule Act also specifically withheld certain powers from local governments and reserved them to the State.").

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 § 3-9-2 *et seq*. "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).

There is 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).

As applied to the instant matter, the Ordinance exceeds the scope of Ind. Code § 3-9-2-4(7) in several respects. First, it applies to contributions by "business entities," which include individuals, firms, proprietorships, officers of a business entity, and anyone with a 7.5% or greater share of the business entity. It limits the total amount a business entity can contribute to all the City candidates and political action committees supporting them. It also applies to contributions by the individual's spouse as well as children living in the same household. The Ordinance also restricts "in-kind" contributions, which are not mentioned in the statute. Finally the Ordinance requires contractors and bidders to certify that they have complied with the Ordinance's limits, and puts enforcement in the hands of the City by requiring that those who have made excessive contributions be excluded from City contracts.

As referenced above, in 2011 then-Attorney General Gregory F. Zoeller issued his opinion analyzing Fort Wayne's previous attempts to regulate campaign contributions, in an effort to make clear that the regulation of political contributions is a *state function*. As succinctly stated in the opinion, the State "occupies the field." Here the State has broadly and in great

detail exercised its authority in the area of campaign finance, preempting any local attempt to regulate the same. By enacting local legislation that goes well beyond the boundaries set by our statutes, the City ventured into an area of State preemption, however honorable may have been its intentions.

As discussed above, the present Ordinance purports to impose limits that are in direct conflict with those set forth in State statute. The City *still* lacks the authority today that it lacked in 2011. Simply put, as indicated in 2011, Fort Wayne lacks the authority to legislate in a subject matter area preempted by the State, and particularly where the proposed legislation directly conflicts with the State's proper and authorized legislative and executive activity.

The Preamble to the Ordinance attempts to avoid the state preemption problem by framing the Ordinance as something other than a restriction on campaign contributions, declaring that "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 elective office in any amount permitted by... 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."

We need not belabor this point further. The City of Fort Wayne has again attempted to assert authority in the realm of campaign finance at the local level. It has no more authority to do so today than it did in 2011.

Indiana's principal procurement statutes, Ind. Code 5-22, *et. seq.* and Ind. Code § 36-1-12, set forth the process for public purchases by municipalities. Ind. Code § 5-22-16 *et seq.* describes the qualifications for prospective contractors. It does not include any reference to political contributions, and the purchasing statutes do not give municipalities the authority to impose additional qualifications. Excluding qualified bidders based on the presence or absence, of political contributions would also violate Ind. Code § 5-22-7-8 and other purchasing statutes[9] which require that a contract be awarded *to the lowest responsible and responsive bidder.*

It is well established that making political contributions and expenditures constitute "speech"—a form of expression protectable by the First Amendment.[10] "Contributing money to a candidate is an exercise of an individual's right to participate in the electoral process through both political expression and political association."[11] Limits on political contributions are permissible because the government has a legitimate interest in preventing *quid pro quo* corruption.[12] However, the restrictions must be "closely drawn to avoid unnecessary abridgment

---

[9] *See, e.g.,* Ind. Code § 36-1-12-4; Ind. Code § 36-9-31-4.

[10] *See, e.g., Citizens United v. Federal Election Commn.,* 558 U.S. 310 (2010). The OAG cautioned the City regarding possible free-speech issues in its 2011 opinion. *See* 2011 *Ind. Att'y Gen. Op.* No. 6 at p. 3, n. 1 ("Although not addressed in this letter, the proposed ordinance also raises other legal concerns such as First Amendment protection for political contributions").

[11] *McCutcheon v. Fed. Election Commn.,*134 S. Ct. 1434, 1438, 572 U.S. 188 (2014).

[12] *Buckley v. Valeo,* 424 U.S. 1, 25-26 (1976) (*per curiam*).

of associational freedoms."[13] Aggregate limits by individuals fail this test and violate the First Amendment.[14] Limiting contributions by spouses and children of business owners and officers is especially problematic, since they may not share the views of the business owners and officers. An officer contributing the maximum to one candidate would essentially foreclose any contributions by other officers, owners with a 7.5% interest or more, and the spouses and children of those officers and owners. Such a restriction does not pass constitutional muster.

The Ordinance's statement that "nothing in the ordinance shall impact any individual's or entity's ability to express their [sic] First Amendment rights to contribute to the campaign of any … candidate…" does not cure the constitutional problems. The attempt to frame the restriction as a purchasing regulation fails because the Ordinance imposes unconstitutional conditions on those seeking to do business with the City. "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.'"[15]

CONCLUSION

The State of Indiana has enacted statutes regulating elections and political contributions, and municipalities do not have the authority to regulate in this area. The State has also set out the requirements for municipal contracts and purchasing. The Ordinance at issue here imposes additional requirements for the City that exceed the Council's authority under the Indiana Home Rule Act. Accordingly, these additional requirements are invalid. In addition, the Ordinance imposes restrictions on political speech that likely violate the First Amendment by limiting the contributions on the part of those desiring to do business with public entities.

SUBMITTED, and
ENDORSED FOR PUBLICATION:

Curtis T. Hill, Jr.
Attorney General

Scott C. Newman, Chief Counsel
Kevin C. McDowell, Assistant Chief Counsel
Donna S. Sembroski, Deputy Attorney General

---

[13] *McCutcheon v. Fed. Election Commn., supra,* at 1456 (2014).
[14] *Id.*
[15] *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214 (2013).