

August 5, 2011

OFFICIAL OPINION 2011-6

The Honorable Thomas J. Wyss
Indiana State Senate
200 W. Washington St.
Indianapolis, IN 46204

RE: Proposed City Ordinance in Fort Wayne

Dear Senator Wyss:

In your letter of July 14, 2011, you requested an opinion concerning the validity of a proposed city ordinance (Bill No. G-11-07-11) being considered by the Fort Wayne Common Council. The proposed ordinance would prohibit a city contractor from making political contributions to candidates or office holders.

BRIEF ANSWER

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.

ANALYSIS

Bill No. G-11-07-11 prohibits a city contractor from making a political contribution of any amount to a candidate or holder of any elected city office or their respective political fundraising committees. The restriction on making contributions also extends to the owner of a city contractor, spouse or domestic partner of the owner of a city contractor, subcontractor of any city contractor, owner of any subcontractor of any city contractor, and the spouse or domestic partner of any owner of any subcontractor of any city contractor. The term “contribution” is defined in the ordinance to mean “any gift, subscription, loan, advance, deposit of money, allotment of money, or anything of value given or transferred by one person to another, including in cash, by check, by draft, through a payroll deduction or allotment plan, by pledge or promise, whether or not enforceable, or otherwise, *for purposes of influencing in any way the outcome of any election.*” (Emphasis added.) The definition of “contribution” also references Ind. Code Chpt. 3-9-5 which is a chapter within the Indiana election code concerning campaign contributions and reports required of candidates and committees.

We analyze this issue by looking to Indiana’s Home Rule Act, codified at Ind. Code §§ 36-1-3-1 through -9. The Home Rule Act grants to units of local government “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...the 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).

In analyzing the city’s proposed ordinance, the question is whether the ordinance infringes upon those powers reserved to the state. The city does not have the “power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.” *Id.* at § 8(a)7. Elections are governed by state law and are the subject of comprehensive state regulation. Title 3 of the Indiana Code contains the election statutes enacted by the General Assembly and these statutes apply “to each election at which the electorate of the state or a political subdivision: (1) nominates or chooses by ballot public officials; or (2) decides a public question lawfully submitted to the electorate.” Ind. Code § 3-5-1-1. The types of elections to which this title applies include a “[m]unicipal election, in which the electorate of a municipality chooses by ballot public officials for the municipality” Ind. Code § 3-5-1-2(2). The statutory framework regulating campaign financing is contained in Ind. Code Art. 3-9, and campaign contributions are specifically addressed in Ind. Code Chpt. 3-9-2. The Secretary of State is the state’s chief election official. Ind. Code § 3-6-3.7-1. 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.”).

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).

Consistent with the broad grant of authority provided by the Home Rule Act, the Office of Attorney General has issued previous opinions recognizing local unit’s powers with respect to certain actions and issues (see, for example, 2003 *Ind. Att’y Gen. Op. No. 01: Distribution of County*

Option Income Tax; 2003 *Ind. Att’y Gen. Op.* No. 06: Smoking bans; 2003 *Ind. Att’y Gen. Op.* No. 07: Political subdivision establishment of Rainy Day Funds). However, we cannot conclude that the proposed ordinance at issue in this instance fits within the Act’s broad grant of authority.

CONCLUSION

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.¹

Sincerely,

Gregory F. Zoeller
Attorney General

Matthew J. Light
Chief Counsel

¹ Although not addressed in this letter, the proposed ordinance also raises other legal concerns such as First Amendment protection for political contributions.