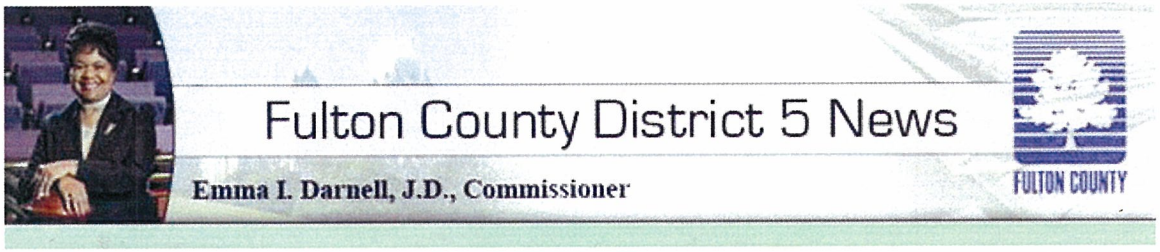

To: Residents of District 5

From: Emma I. Darnell, Vice-Chair, District 5
Fulton County Board of Commissioners

Subject: Resolution Amending the Fulton County Code of Laws Regarding Campaign Contributions, Etc.

Date: August 12, 2011

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I. PURPOSES

1. To promote public trust and principles of open government
2. To avoid the actual impropriety and the appearance of impropriety in the awarding of contracts
3. To encourage competition and promote cost-effectiveness and efficiency in the administration of the procurement operation

II. PRIMARY PROVISION

Restriction on Amount of Campaign Contribution

No person bidding for or performing County contracts will be eligible to bid on or perform a County contract if that person (or entity) (1) has made a contribution or expenditure of over $500 to the campaign or to any committee that acts on behalf of a political candidate within one year prior to the date of the bid or award (2) made a gift or other payment to a Fulton County Commissioner or to any Fulton County employee

III. PENALTIES

1. Disqualification of Bid or Proposal
2. Termination of Contract

Enclosure: (1)

RESOLUTION AMENDING THE FULTON COUNTY CODE OF LAWS REGARDING CAMPAIGN CONTRIBUTIONS FROM ENTITIES DOING BUSINESS WITH, OR SEEKING TO DO BUSINESS WITH, FULTON COUNTY

WHEREAS, it is essential to the proper operations of Fulton County Government that the business of the County be conducted in an environment that is free from both actual impropriety and the appearance of impropriety; and

WHEREAS, each year, the Fulton County Board of Commissioners considers and decides upon the award of contracts with private persons and business entities for goods and services needed for County governmental purposes; and

WHEREAS, in the aggregate, such contracts annually amount to the expenditure of tens of millions of taxpayer dollars; and

WHEREAS, the Board of Commissioners finds that the public trust, principles of open government, and the promotion of equal access and fairness in all business opportunities with Fulton County will be better served by limiting County contracts with persons and entities that make campaign contributions or gifts to Fulton County government officials or candidates;

NOW, THEREFORE, BE IT RESOLVED, that the Board of Commissioners hereby amends Article V of Chapter 102 of the Fulton County Code of Laws, by adding a new Division 3, as follows:

Division 3.

Section 1 . Definitions.

(a) *Person.* For purposes of this division, "person" shall mean (1) an individual or natural person or (2) a legal entity (including a business, professional or non-profit corporation, a general or limited liability partnership, a joint venture, a limited liability company, trust or association).

Section 2. Qualifications of Persons Bidding for or Performing County Contracts.

(a) *Pre-award Qualifications.* No person shall be eligible to submit any bid or proposal to Fulton County or to be awarded or to perform any contract with, for or on behalf of Fulton County, if that person has, within one year prior to the date of the submission of any bid or proposal or the award of any contract to such person:

(1) made any contribution or expenditure in excess of $500 in the aggregate to the campaign of, or to any political committee that acts on behalf of, a candidate for or holder of the office of Fulton County Commissioner; or

(2) made, directly or indirectly, any payment, gift or other contribution to or for the benefit of any holder of the office of Fulton County Commissioner or to any Fulton County employee.

For purposes of determining the total amount of a person's contributions or expenditures under Section 2(a)(1):

(1) if the prospective bidder or contracting party is an individual or natural person, all contributions and expenditures made by that person, by members of that person's immediate family (parents, siblings, spouse, or children) and by any legal entity in which that person or members of his or her immediate family own or control more than 10% of the stock or other beneficial interests, shall be aggregated; and

(2) if the prospective bidder or contracting party is a legal entity other than an individual, all contributions or expenditures made by or on behalf of the entity itself, its officers, directors, partners, members, or salaried

employees of the entity, and of any affiliated or subsidiary entities, shall be aggregated.

(b) *Post-Award.* No person who has been awarded a contract by Fulton County shall, during the term of that contract, 1) make any contribution or expenditure to or on behalf of a candidate for, or holder of, the office of Fulton County Commissioner or to any political committee that acts on behalf of such candidate or office holder, or 2) make any gift or other payment to any candidate for or holder of the office of Fulton County Commissioner or to any Fulton County employee.

Section 3. Required Certifications.

(a) *At the Time of Bidding.* Any person who submits a bid or proposal to Fulton County shall include, as a part of the bid or proposal and any resulting contract awarded by the County, a written certification under penalty of perjury that the person 1) has not made, either directly or indirectly, any contributions or expenditures in excess of the amount permitted in Section 2(a), and 2) is not disqualified or ineligible to submit the bid or proposal and is fully qualified to bid or perform the contract.

(b) *During Performance of a Contract.* Any person who has been awarded a contract by Fulton County shall submit with every request for payment, and no less frequently than annually, a written certification under penalty of perjury that the person has not made any contributions, expenditures, gifts or other payments prohibited by Section 2(b).

Section 4 . Violations and Remedies.

(a) *Disqualification of Bids or Proposals.* Any bid or proposal submitted by or on behalf of a person who is ineligible to bid under Section 2(a) shall be void and shall not be considered by Fulton County, and no contract may be awarded and no payments made by Fulton County to such person pursuant to any contract awarded to such person in violation of this provision.

(b) *Termination for Breach.* Any contract between Fulton County and any person who makes a contribution, expenditure, gift or other payment to any candidate for or holder of the office of Fulton County Commissioner or to any Fulton County employee in violation of Section 2(b), shall be terminable by the County for cause, and the person shall be liable to compensate the County for the full amount of any damages caused or

sustained by the County as a result of the termination of the contract, just as in the case of any other material breach of the contract.

(c) *Standing.* Fulton County and any qualified competing bidder shall each have standing to enforce the provisions of this division.

Section 5 . Contributions Made Prior to Effective Date.

No contribution of money or any other thing of value, including in-kind contributions, made by persons seeking to obtain contracts or conducting contract work with Fulton County prior to the enactment of this division shall be deemed a violation of this division, nor shall an agreement for property, goods, or services, of any kind whatsoever, be disqualified thereby, if that contribution was made prior to the effective date of this division.

BE IT FURTHER RESOLVED, that if any section, subsection, sentence, clause, phrase, or portion of this Resolution and Code amendment is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

BE IT FURTHER RESOLVED, that this Resolution and Code amendment shall become effective upon adoption and shall be incorporated into the Fulton County Code of Laws. The official Codifier may renumber the sections of this Resolution and Code amendment as appropriate to accommodate such codification.

BE IT FURTHER RESOLVED, that all resolutions and ordinances and parts of resolutions and ordinances in conflict with this Resolution and Code amendment are hereby repealed to the extent of the conflict.

SO PASSED AND ADOPTED, this _____ day of August, 2011.

SPONSORED BY:

_____
Emma I. Darnell, Vice - Chair
District 5

ATTEST:

_____
Mark Massey, Clerk to the Commission

APPROVED AS TO FORM:

_____
R. David Ware, County Attorney

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August 5, 2011
Privileged and Confidential
Attorney-Client Communication
Advisory Letter #11-15

The Honorable Thomas J. Wyss
Indiana Senate
State House
200 W. Washington Street
Indianapolis, Indiana 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 the city from awarding public contracts to certain contributors. A copy of the proposed ordinance is attached for ease of reference.

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 § 3-9-5 *et seq.* 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 specifically withheld from local units of government. 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 title 3, article 9, and campaign contributions are specifically addressed in chapter 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); *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 § 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 Op. Atty. Gen. Ind. 01*: Distribution of County Option Income Tax; *2003 Op. Atty. Gen. Ind. 06*: Smoking bans; *2003 Op. Atty. Gen. Ind. 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 board 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].

Thank you for your inquiry. If I can be of further assistance, please let me know.

Sincerely,

Matthew J. Light
Chief Counsel, Advisory &
ADR Services Division

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