

1       **RESOLUTION AMENDING THE FULTON COUNTY CODE OF LAWS**  
2       **REGARDING CAMPAIGN CONTRIBUTIONS FROM ENTITIES DOING**  
3       **BUSINESS WITH, OR SEEKING TO DO BUSINESS WITH, FULTON**  
4       **COUNTY**  
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7           **WHEREAS**, it is essential to the proper operations of Fulton County  
8 Government that the business of the County be conducted in an environment  
9 that is free from both actual impropriety and the appearance of impropriety; and

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

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

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

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

1 employees of the entity, and of any affiliated or subsidiary  
2 entities, shall be aggregated.  
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4 (b) *Post-Award.* No person who has been awarded a contract by  
5 Fulton County shall, during the term of that contract, 1) make any  
6 contribution or expenditure to or on behalf of a candidate for, or  
7 holder of, the office of Fulton County Commissioner or to any  
8 political committee that acts on behalf of such candidate or office  
9 holder, or 2) make any gift or other payment to any candidate for  
10 or holder of the office of Fulton County Commissioner or to any  
11 Fulton County employee.  
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13 **Section 3. Required Certifications.**  
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15 (a) *At the Time of Bidding.* Any person who submits a bid or  
16 proposal to Fulton County shall include, as a part of the bid or  
17 proposal and any resulting contract awarded by the County, a  
18 written certification under penalty of perjury that the person 1)  
19 has not made, either directly or indirectly, any contributions or  
20 expenditures in excess of the amount permitted in Section 2(a),  
21 and 2) is not disqualified or ineligible to submit the bid or proposal  
22 and is fully qualified to bid or perform the contract.  
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24 (b) *During Performance of a Contract.* Any person who has been  
25 awarded a contract by Fulton County shall submit with every  
26 request for payment, and no less frequently than annually, a  
27 written certification under penalty of perjury that the person has  
28 not made any contributions, expenditures, gifts or other payments  
29 prohibited by Section 2(b).  
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31 **Section 4 . Violations and Remedies.**  
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33 (a) *Disqualification of Bids or Proposals.* Any bid or proposal  
34 submitted by or on behalf of a person who is ineligible to bid  
35 under Section 2(a) shall be void and shall not be considered by  
36 Fulton County, and no contract may be awarded and no  
37 payments made by Fulton County to such person pursuant to any  
38 contract awarded to such person in violation of this provision.  
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40 (b) *Termination for Breach.* Any contract between Fulton  
41 County and any person who makes a contribution, expenditure,  
42 gift or other payment to any candidate for or holder of the office  
43 of Fulton County Commissioner or to any Fulton County  
44 employee in violation of Section 2(b), shall be terminable by the  
45 County for cause, and the person shall be liable to compensate  
46 the County for the full amount of any damages caused or

1           sustained by the County as a result of the termination of the  
2 contract, just as in the case of any other material breach of the  
3 contract.  
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5           (c) *Standing*. Fulton County and any qualified competing bidder  
6 shall each have standing to enforce the provisions of this  
7 division.  
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9           **Section 5 . Contributions Made Prior to Effective Date.**

10           No contribution of money or any other thing of value, including in-  
11 kind contributions, made by persons seeking to obtain contracts  
12 or conducting contract work with Fulton County prior to the  
13 enactment of this division shall be deemed a violation of this  
14 division, nor shall an agreement for property, goods, or services,  
15 of any kind whatsoever, be disqualified thereby, if that  
16 contribution was made prior to the effective date of this division.  
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18           **BE IT FURTHER RESOLVED**, that if any section, subsection, sentence,  
19 clause, phrase, or portion of this Resolution and Code amendment is for any  
20 reason held invalid or unconstitutional by any court of competent jurisdiction,  
21 such portion shall be deemed a separate, distinct and independent provision, and  
22 such holding shall not affect the validity of the remaining portions hereof.

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

28           **BE IT FURTHER RESOLVED**, that all resolutions and ordinances and  
29 parts of resolutions and ordinances in conflict with this Resolution and Code  
30 amendment are hereby repealed to the extent of the conflict.  
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**SO PASSED AND ADOPTED**, this \_\_\_\_\_ day of August, 2011.

**SPONSORED BY:**

\_\_\_\_\_  
Emma I. Darnell, Vice - Chair  
District 5

**ATTEST:**

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Mark Massey, Clerk to the Commission 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 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<sup>1</sup>.

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

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