OFFICE OF THE ATTORNEY GENERAL

December 27, 2002

OFFICIAL OPINION 2002-6

The Honorable Luke Kenley
The Honorable Dean Young
The Honorable P. Eric Turner
Indiana General Assembly
State House
Indianapolis, IN 46204

RE: Inventory Tax Deduction – HEA 1001

Dear Senator and Representatives:

This letter responds to your request for an answer to the following questions:
1) Do legislative bodies that compose the Grant County Income Tax Council individually take the action by resolution or ordinance?
2) Can the Grant County Income Tax Council rescind an ordinance to grant assessed value deduction for inventory prior to January 1, 2003, if the Council determines that the 2002 general reassessment does not support the viability of a personal property assessed value deduction for inventory?
3) Can the Grant County Income Tax Council adopt an ordinance granting an assessed valuation deduction for inventory in 2002 that is conditioned on the Council imposing a County Economic Development Income Tax (CEDIT) rate in 2003?

BRIEF ANSWER

1) Any member of a county income tax council may present an ordinance for passage. To do so, the member must pass a resolution to propose the ordinance to the county income tax council and distribute a copy of the proposed ordinance to the auditor of the county. Any member of a county income tax council may exercise its votes by passing a resolution and transmitting the resolution to the auditor of the county.
2) The inventory tax deduction statute at Indiana Code section 6-1.1-12-41(f) presents language that expressly provides, "[a]n ordinance adopted under this section in a particular year applies to each subsequent assessment year ending before January 1, 2006." It appears to state expressly that the decision to enact the inventory tax deduction may not be rescinded. Because there does not appear to be a general "rescission statute," it appears that the more specific statute that addresses the inventory tax deduction will control. Therefore, once the inventory tax deduction is adopted, the ability to rescind is lost.
3) Article 1, Section 25 of the Indiana Constitution provides that "no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution." Because the proposed ordinance would not be effective unless another ordinance is passed, it is likely that this will be seen as a violation of the constitutional principle.

LEGAL ANALYSIS

House Enrolled Act 1001 passed in the 2002 legislative session contains a provision that deals with the inventory tax deduction. That deduction cited at Indiana Code section 6-1.1-12-41(f) provides in pertinent part:

> An ordinance may be adopted in a county to provide that a deduction applies to the assessed value of inventory located in the county. The deduction is equal to one hundred percent (100%) of the assessed value of inventory located in the county for the appropriate year of assessment. An ordinance adopted under this section in a particular year applies to each subsequent assessment year ending before January 1, 2006.

1) Your initial question appears to ask what the appropriate procedures are for a county income tax council to vote and take action. Indiana counties have created county income tax councils. The powers and duties of such councils are established by statute. The term "acting" is comprised of the powers and duties expressly granted by law that include imposing the county option income tax, rescinding the county option income tax, increasing the homestead credit, and other duties which are put into effect by the council's ordinance. These powers and duties may be exercised by any member of the county income tax council provided they are enacted according to statute. The statutes provide that any member of a county tax council may exercise its votes by passing a resolution

and transmitting the resolution to the auditor of the county. A resolution is necessary for a member of a county income tax council to present an ordinance for passage. See IND. CODE §§ 6-3.5-6-2 (1984)(amended 1994); 6-3.5-6-4 (1984)(amended 1994); 6-3.5-6-5 (1984)(amended 1997).

With respect to the inventory tax deduction, a clear reading of the statutes expressly provides for the passage of that deduction to be done by ordinance. "An ordinance may be adopted…." Ind. Code 6-1.1-12-41(f). Additionally, the home rule statutes, as well as county income tax council statutes expressly provide for the enactment of legislation in that same manner. See IND. CODE § 36-1-3-6(b)(1) and see IND. CODE §§ 6-3.5-6-2, 6-3.5-6-5. Most importantly however, is the express language found in the enabling statute at IND. CODE §§ 6-1.1-12-41(h)(3) that provides, "[t]o adopt an ordinance under subsection (f), a county income tax council shall use the procedures set forth in IC 6-3.5-6 concerning the imposition of the county option income tax." Those statutes point to the proper method of enacting an ordinance to impose the county option income tax.

2) You next ask whether the county may rescind the ordinance once it is adopted. The enabling statute itself is silent on the manner in which a county income tax council may rescind such an ordinance. The statute also specifically states: "An ordinance adopted under this section in a particular year applies to each subsequent assessment year ending before January 1, 2006." IND. CODE § 6-1.1-12-41(f). The statute therefore expressly contemplates that once an ordinance under this statute is adopted, it stays in place until 2006. Moreover, the law requires the department of local government finance to incorporate the deduction in the personal property return forms before March 1 of that year. Further, the law provides that the township assessor must calculate and provide the deduction if the taxpayer fails to claim it. These provisions also suggest that the Legislature intended the deduction to remain in place once adopted.

Additionally, the county option income tax statutes that expressly provide for the ability to rescind ordinances, grant this authority for certain ordinances, and provide the manner and time frames for the rescission to occur. IND. CODE §§ 6-3.5-6-2 to –12.5. No such language appears in the enabling statute for the inventory tax deduction or in the county option income tax statutes. Therefore, it is likely that the express language of the enabling statute which states that once the decision to grant such a deduction is made it applies to each assessment year ending before January 1, 2006 will control. Moreover, business enterprises drawn to invest in a county as a result of the adoption of the ordinance would likely claim that the county's rescission upset vested reliance interests. Accordingly, this Office strongly recommends that the county not attempt to rescind the ordinance once adopted, unless the General Assembly clarifies the county's ability to rescind the inventory deduction.

3) Your last question deals with the ability to adopt an ordinance granting the inventory tax deduction contingent upon the county income tax council imposing a CEDIT rate in 2003. The question actually brings the Indiana Constitution at Article 1, Section 25 and its interpretation into question. Article 1, Section 25 of the Indiana Constitution provides that "no law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." Although the home rule statutes grant local governments great discretion in managing their own affairs, see IND. CODE §§ 36-1-3-1 to –9 (1980), because the delegated powers are derived directly from the state, local governments are still required to enact laws that do not offend constitutional guidelines. *See District of Columbia v. John R. Thompson Co.*, 346 U.S.100 (U.S. 1953) and *Massey v. City of Mishawaka*, 177 Ind. App. 79 (Ind. App. 1978). When it appears that a law is not in full force and effect from the date fixed by the authority of the legislature, and there appears to be another contingency required to make the law effective outside of the language of the proposed legislation itself, the law appears to be an improper delegation of legislative authority, and a violation of the Indiana Constitution. *See Johnson et. al. v. Board of Park Comm'rs of Ft. Wayne et al.*, 174 N.E. 91 (Ind. 1930).

Although it is well settled that the legislature may designate a part or all of a local governing body to make a law effective by signature or vote, a law must in and of itself be in full force and effect by the act of the legislature first. Such vote for as to whether a local unit of government will avail itself of such law is just that a determination as to whether that body will avail themselves of the provisions of the law. It has no application to any of the processes necessary to the proposal becoming a complete law. It is complete legislation and authority in and of itself. However, attempting to enact the inventory tax deduction, contingent upon the CEDIT being passed, appears to create a law that derives its effectiveness from the passage of another law as opposed to authority from the legislative authority of the local governing body.

An ordinance that is thus made contingent upon the passage of another statute or ordinance as a condition subsequent is subject to a constitutional challenge. It is our opinion that, at the least, the language placing the condition upon the effectiveness of the ordinance is not likely to withstand such a constitutional challenge.

CONCLUSION

Based on our research, we conclude that a county income tax council takes action by ordinance. In order for a member of a

county income tax council to present an ordinance for passage, they must first pass a resolution. The manner in which that is to be done is found in the county income tax council statute in Indiana Code §§ 6-3.5-6-1 to –12.5.

Without language specifying otherwise, it appears that the enabling statute provides that once the inventory tax deduction statute is passed, the ability to rescind the decision is lost. It additionally appears that the decision will be carried into each subsequent assessment until January 1, 2006.

Lastly, it appears that an ordinance granting an assessed valuation deduction for inventory 2002 conditioned upon the county tax council imposing a CEDIT rate does not meet constitutional scrutiny.

Sincerely,

Stephen Carter
Attorney General

Tracy L. Richardson
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

January 30, 2003

OFFICIAL OPINION 2003-1

The Honorable Lawrence M. Borst
Indiana State Senator
Indiana State Senate, 430 State House
Indianapolis, IN 46204-2785

RE: Distribution of County Option Income Tax

Dear Senator Borst:

You have requested an official opinion on the statutory authority regarding distribution of County Option Income Taxes ("COIT") and specifically whether the State Budget Agency or the Indiana Department of Revenue has the statutory authority to intercept a portion of Marion County's COIT distribution to pay a portion of the past-due debt owed by Marion County for the cost of juvenile corrections.

BRIEF ANSWER

It is our opinion that the Indiana General Assembly has authorized County Option Income Taxes as a funding source solely for counties. The statutes require the Department of Revenue to collect these taxes and distribute them to the counties. Indiana statutes do not authorize the State Budget Agency or the Indiana Department of Revenue to "intercept" County Option Income Tax funds collected by the Indiana Department of Revenue for distribution to counties.

BACKGROUND

You have sought this opinion based on a December 2, 2002 letter from the State Budget Director to the Marion County Auditor stating, in part:

> the State of Indiana has subtracted $2,525,243 from Marion County's December payment for County Option Income Tax... to pay a portion of the past-due debt owed by Marion County to the State for the cost of juvenile corrections.

RELEVANT STATUTES

I. COUNTY OPTION INCOME TAX

Indiana Code Section 6-3.5-6 authorizes counties to adopt a County Option Income Tax, and the Consolidated City of Marion County-Indianapolis has adopted an ordinance authorizing such a tax.

The manner in which the Indiana Department of Revenue must handle the COIT payments it collects from taxpayers is prescribed by Indiana Code Section 6-3.5-6-16:

(a) A special account within the state general fund shall be established for each county that adopts the county option income tax. Any revenue derived from the imposition of the county option income tax by a county shall be deposited in that county's account in the state general fund.

(b) Any income earned on money held in an account under subsection (a) becomes a part of that account.

(c) Any revenue remaining in an account established under subsection (a) at the end of a fiscal year does not revert to the state general fund.

The distribution of COIT revenues to the counties is covered by Indiana Code Section 6-3.5-6-17:

Distribution of revenue to counties. (a) Except as provided in section 2.5 of this chapter[1], revenue derived from the imposition of the county option income tax shall, in the manner prescribed by this section, be distributed to the county that imposed it. The amount that is to be distributed to a county during an ensuing calendar year equals the amount of county option income tax revenue that the department, after reviewing the recommendation of the state budget agency, estimates will be received from that county during the twelve (12) month period beginning July 1 of the immediately preceding calendar year and ending June 30 of the ensuing calendar year.

(b) Before June 16 of each calendar year, the department, after reviewing the recommendation of the state budget agency, shall estimate and certify to the county auditor of each adopting county the amount of county option income tax revenue that will be collected from that county during the twelve (12) month period beginning July 1 of that calendar year and ending June 30 of the immediately succeeding calendar year. The amount certified is the county's "certified distribution" for the immediately succeeding calendar year. The amount certified may be adjusted under subsection (c) or (d).

(c) The department may certify to an adopting county an amount that is greater than the estimated twelve (12) month revenue collection if the department, after reviewing the recommendation of the state budget agency, determines that there will be a greater amount of revenue available for distribution from the county's account established under section 16 of this chapter.

(d) The department may certify an amount less than the estimated twelve (12) month revenue collection if the department, after reviewing the recommendation of the state budget agency, determines that a part of those collections needs to be distributed during the current calendar year so that the county will receive its full certified distribution for the current calendar year.

(e) One-twelfth (1/12) of each adopting county's certified distribution for a calendar year shall be distributed from its account established under section 16 of this chapter to the appropriate county treasurer on the first day of each month of that calendar year.

(f) Except as provided in section 2.5 of this chapter, upon receipt, each monthly payment of a county's certified distribution shall be allocated among, distributed to, and used by the civil taxing units of the county as provided in sections 18 and 19 of this chapter.

(g) All distributions from an account established under section 16 of this chapter shall be made by warrants issued by the auditor of state to the treasurer of state ordering the appropriate payments.

A "county having a consolidated city" (*i.e.*, Indianapolis-Marion County) is also subject to additional calculations that take into account obligations for qualified economic development tax projects, the county's welfare administration fund, and after December 31, 2002, the county hospital care for the indigent property tax levy and uninsured parents program property tax levy.[2] The General Assembly has set by statute how Marion County's COIT distribution is to be divided among its various civil taxing units.[3]

II. DEPARTMENT OF REVENUE AUTHORITY

The Indiana Department of Revenue is an "agency of the state of Indiana for purpose of administering, collecting, and enforcing the taxes placed under its authority."[4].The "taxes placed under its authority" are known as "listed taxes"[5], and include the county option income tax. However, if any statutory provisions relating to the Department of Revenue's authority to impose, collect, or administer listed taxes "conflicts with a provision of the law relating to the listed taxes, the provision of the law relating to the listed taxes controls for the purpose of imposing, collecting, or administering that listed tax."[6]

III. STATE BUDGET AGENCY AUTHORITY

The powers of the State Budget Agency are described in Indiana Code Section 4-12-1-1:

(a) This chapter shall be known and may be cited as the budget agency law.

(b) Its general purposes and policies may be perceived only from the entire chapter, but among them are four (4) of particular significance, namely:

(1) Vesting in the budget agency duties and functions and rights and powers which make the execution and administration of all appropriations made by law the exclusive prerogative and authority of that agency, and otherwise denying such prerogative and authority to the budget committee.

(2) Designating an officer of the executive department and four (4) members of the general assembly as members of the budget committee through which they may work between regular sessions of the general assembly and cooperatively propose and recommend to the general assembly the appropriations, which appear to be necessary to carry on state government in the succeeding budget period.

(3) Giving the members of the budget committee, who are members of the general assembly, the authority to engage in activities incidental and germane to their legislative powers, including investigations of appropriations made and to be made by law, before and after sessions of the general assembly.

(4) Making the gathering of information, data, and expert opinion, with reference to the revenues of the state from current sources, and with reference to procuring additional revenues to meet appropriations which may be recommended, and making the evaluation of such data and opinion and of appropriations requested by agencies of the state, the concurrent prerogative and authority of the budget committee and the budget agency.

The Budget Agency is authorized to transfer, assign and reassign appropriations, but Indiana Code Section 4-12-1-12(e) limits this authority:

> (e) The budget agency may transfer, assign and reassign any appropriation or appropriations, or parts of them, excepting those appropriations made to the Indiana state teacher's retirement fund established by IC 21-6.1, made for one specific use or purpose to another use or purpose of the agency of state to which the appropriation is made, <u>but only when the uses and purposes to which the funds transferred, assigned and reassigned are uses and purposes the agency of state is by law required or authorized to perform. No transfer may be made as in this subsection authorized unless upon the request of and with the consent of the agency of state whose appropriations are involved. Except to the extent otherwise specifically provided, every appropriation made and hereafter made and provided, for any specific use or purpose of an agency of the state is and shall be construed to be an appropriation to the agency, for all other necessary and lawful uses and purposes *of* the agency, subject to the aforesaid request and consent of the agency and concurrence of the budget agency.</u> (emphasis added)

We have also reviewed the various provisions of Indiana Code relating to reimbursement to the State by the counties for half of the costs of keeping juvenile offenders in Department of Corrections facilities[7] and find no statutory authority allowing for a set off against funds otherwise payable to a county.

ANALYSIS

Our analysis starts with the fact that the COIT is a purely local tax, imposed by the county fiscal body and not by the State. It is considered a "pass through" tax, collected by the Department of Revenue for the benefit of a county and disbursed back to the county under a statutory framework. By statute COIT payments are held in a special account in the county's name; all income earned on the account is for the benefit of the county; the funds never become part of the State general fund.[8] The fact that taxpayer COIT payments must be submitted to the Department of Revenue does not alter its essential character as a local tax.[9]

The legislature's grant of authority to counties to levy an income tax must be read within the context of Indiana's Home Rule statute[10] and its broad grant of authority to exercise "all the powers that they need for the effective operation of government as to local affairs." The additional legislative authority to levy an income tax upon its citizens and to make these funds available to the counties to fulfill this essential governmental purpose mark these funds as unique from other taxes collected by the Department of Revenue.

Indiana Code Section 6-3.5-6-17 is explicit that the Department of Revenue shall distribute COIT funds to the county that imposed it. To the extent that the funds are collected by the State and kept in a special account within the State general fund as required by Indiana Code Section 6-8.1-3-1, they are deemed allocated and appropriated to the county on whose behalf they were generated.[11]

The Department of Revenue collects these county funds for the county's benefit and use, and in this respect can be seen as having a fiduciary duty to act on behalf of the county as directed by the legislature. The General Assembly has given neither the Department of Revenue nor the Budget Agency the general power to make set offs, garnishments, and interceptions or otherwise allow for the withholding of COIT distributions to counties.

We are also fully aware that Indiana Code Section 4-24-7-4 mandates that a county council appropriate sufficient funds to

cover a county's share of the cost of housing juvenile offenders in state institutions. As the Indiana Court of Appeals so aptly stated in *Etherton v. Wyatt*, "we are cognizant of the need for flexibility by the Budget Agency in dealing with the arduous task of balancing the state budget. However, if the Budget Agency is to reduce a legislative appropriation, it must do so in conformity with the statutory requirements and upon some reasonable basis to support its action."[12] In this regard, *Mass Transportation Authority* seems to suggest a more legally supportable framework in which to achieve an ultimate resolution.[13]

CONCLUSION

It is our opinion that the Indiana General Assembly has authorized County Option Income Taxes as a funding source solely for counties. The statutes require the Department of Revenue to collect these taxes and distribute them to the counties. Indiana statutes do not authorize the State Budget Agency or the Indiana Department of Revenue to "intercept" County Option Income Tax funds collected by the Indiana Department of Revenue for distribution to counties.

We trust that this response has adequately addressed your inquiry. If we can be of further assistance in this matter, please do not hesitate to contact me.

Sincerely,
Stephen Carter
Attorney General

Susan Gard
Deputy Attorney General

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[1] The underlined language was added by P.L.178-2002 § 61. There is no section 2.5 of IC 6-3.5-6, and we assume that a correct citation will be substituted during technical changes made during the forthcoming legislative session. We have, however, reviewed both P.L.178-2002 and other laws enacted during the 2002 legislative session and found no exceptions for a county's payment obligations to the State for housing of juvenile offenders.
[2] Ind. Code § 6-3.5-6-17.6b (2002). This code section was amended both by P.L.178-2002, SEC. 66 and by P.L.120-2002 SEC. 55. Neither law refers to the other. The differences between the two versions are immaterial for the purpose of this official opinion.
[3] IND. CODE § 6-3.5-6-1 (1998).
[4] Ind. Code § 6-8.1-2-1.
[5] Ind. Code § 6-8.1-1-1.
[6] Ind. Code § 6-8.1-1-6 (1998).
[7] Ind. Code § 11-10-2-3; Ind. Code § 4-24-7.
[8] Ind. Code § 6-3.5-6-16.
[9] *Cf. Lake County Council v. State Board of Tax Commissioners*, 706 N.E.2d 270, 277 n. 12 (Ind. Tax Ct. 1999), *overruled on other grounds*, 730 N.E.2d 680 (Ind. 2000); *State v. Hoovler*, 668 N.E.2d 1229, 1234 (Ind. 1996).
[10] *See generally* Ind. Code § 36-1-3.
[11] *See, e.g., State ex rel Mass Transportation Authority of Greater Indianapolis v. Indiana Revenue Board*, 253 N.E.2d 725, 734 (Ind. App. 1969), *cert. den*. 400 U.S. 877 (1970) ("[a]n allocation by law is an appropriation of revenues").
[12] *Etherton v. Wyatt*, 293 N.E.2d 43, 51 (Ind. App. 1973).
[13] *Mass Transport Authority*, 253 N.E.2d. at 734.

OFFICE OF THE ATTORNEY GENERAL

January 31, 2003

OFFICIAL OPINION 2003-2

State Representative Daniel A. Dumezich
State Representative Dan Stevenson
State of Indiana House of Representatives
Third Floor State House
Indianapolis, Indiana 46204

RE: Local Ordinances and State Laws

Dear Representatives Dumezich and Stevenson:

This letter is in response to your request for an opinion on the following questions:

Question 1. May a city or town enact a local ordinance that is similar to an existing state statute in order to capture the revenue generated by any resulting fines levied by the city or town for violations of the local ordinance?

Question 2. Does state law prohibit a city or town from enacting a local ordinance that mirrors an existing state statute in order to capture the revenue generated by any resulting fines levied by the city or town for violations of the local ordinance?

Question 3. Does state law allow or specifically prohibit a city or town from enacting a seat belt ordinance, which is similar to the existing state statute regarding seat belts, in order to allow the city to keep the revenue generated by the levied fines at the local level in lieu of returning those fines to the state?

Question 4. How would such a seat belt ordinance differ from other local ordinances that mirror state law such as fines levied for infractions like speeding?

BRIEF ANSWERS

Questions 1 & 2: The Home Rule Act expressly prohibits local units of government from adopting local ordinances which assign a penalty for an act that constitutes a crime or infraction under state statute. A state statute must be evaluated to determine if the statute deals comprehensively with a subject matter; local ordinances might not be preempted if a state statute does not deal comprehensively with a subject matter and there is room for supplemental local regulation. However, a city or town may not enact a local ordinance where there is an existing state statute dealing comprehensively with the subject matter and local law is considered preempted by state law.

Question 3: The General Assembly has preempted any local initiatives regarding motor vehicle equipment, such as seatbelts, by enacting comprehensive statewide laws regarding such equipment and by withholding any reference to a local unit's specific statutory authority to supplement the state law. Funds collected as judgments for violations of state statutes regarding seat belt violations are required by statute to be deposited into the state general fund.

Question 4: The General Assembly has established uniform and comprehensive state standards for motor vehicle equipment and has withheld from local units any statutory authority to supplement state laws on the matter. Conversely, when enacting state laws regulating the movement of traffic, the legislature contemplated the need for additional local regulations addressing particular local needs, such as speed, and specifically granted local units the statutory authority to supplement state law.

ANALYSIS

1. Local Ordinance Analysis under the Home Rule Act:

Local ordinances passed by cities and towns must be analyzed in light of Indiana's Home Rule Act ("Act"). The validity of any local ordinance should be evaluated in the context of the legislative intent behind the Home Rule Act and the corresponding history of case law regarding the Act. The Act applies to local units of government, which include counties, municipalities, and townships.[1] Under the Act, a local unit of government is granted broad authority, with few exceptions, to adopt any local law needed "for the effective operation of government as to local affairs."[2]

Under the Home Rule Act, a local unit of government is not precluded from enforcing an ordinance it enacts even if there is no express grant by the legislature permitting a municipality to pass such an ordinance.[3] However, under the Act, certain powers are withheld from local control and a local unit may not exercise power that is expressly denied by the Indiana Constitution or by statute.[4]

The Home Rule Act expressly prohibits local units from adopting a local ordinance designating a penalty for conduct that constitutes a crime or infraction under state statute.[5] Pursuant to state law, a "crime" is defined as a felony or misdemeanor for which a person may be imprisoned, and an "infraction" is defined as a violation of a statute for which a person may be fined, but not imprisoned.[6] The Home Rule Act prohibits local units from assigning a local penalty for conduct which already constitutes a crime or infraction under state law.[7]

However, when a state statute does not deal comprehensively with a subject matter, local regulation might not be considered preempted by state law.[8] One must review the breadth of a statute to determine if it excludes local governance of a subject matter.[9] "When a state statute totally preempts the field, a city may not further legislate therein. If a city attempts to impose regulations in conflict with rights granted or reserved by the Legislature, such ordinances or regulations are invalid."[10]

2. State Statutes Regarding Safety Belt Standards:

Pursuant to state law, occupants of the front seat of an automobile must use a safety belt and also insure that any accompanying children are properly restrained.[11] State law provides that the failure to use a safety belt, or the failure to properly restrain a child passenger, constitutes a Class D infraction.[12] State law prescribes a penalty of up to twenty-five dollars ($25) for a violation which constitutes a Class D infraction.[13] Circuit, superior, county, city and town courts have jurisdiction over all infractions.[14] Funds collected as judgments for violations of state statutes constituting infractions are required by statute to be deposited into the state general fund.[15]

The state statutes regarding the use of seatbelts are comprehensive statutes and do not authorize or otherwise provide local units of government with an opportunity to pass additional supplemental laws regarding seat belts which address local problems and conditions. Presumably, in passing a statewide comprehensive seat belt law, the legislature took into account the fact that its citizens were highly mobile and thus there was a need for uniform seat belt laws across the state. In addition, the need for safety provided by the uniform state law applies generally to all instances where a vehicle is in movement and no specific situations need to be addressed by local law.

The state statutes regarding penalties for failure to use a safety belt in a vehicle differ from state statutes regarding speed limit use. Statutes regarding safety belt use fall under Article 19 of Title 9 of the Indiana Code, "Motor Vehicle Equipment." The provisions of the article do not grant statutory authority to local units to adopt additional regulations regarding such equipment. On the other hand, state speed limits are set under Article 21 of Title 9, "Traffic Regulations." The state traffic regulations are not all-inclusive. Local authorities are given specific statutory authority to adopt additional regulations that do not conflict with or duplicate a state statute, such as regulating the speed of vehicles.[16] Local units of government are also given specific statutory authority to deposit fines assessed for violations of local traffic regulation laws into the general fund of the local unit.[17] Therefore, unlike motor vehicle equipment laws for which the legislature has established uniform and comprehensive state standards, the legislature contemplated the need for additional local regulations addressing particular local concerns when enacting state laws regulating the movement of traffic. In sum, the legislature preempted any local initiatives regarding motor vehicle equipment by enacting comprehensive statewide laws regarding such equipment and withholding any reference to a local unit's statutory authority to supplement the state law.

CONCLUSION

It is my opinion that the Home Rule Act prohibits local units of government from adopting any local ordinance that prescribes a penalty for conduct constituting an infraction under any Indiana Code provision regarding seat belt use. At the same time, the state law that requires funds collected as judgments for infraction violations be deposited into the state general fund preempts any local ordinance designating the funds be deposited otherwise.

Sincerely,

Stephen Carter
Attorney General

Rebecca Walker
Deputy Attorney General

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[1] IND. CODE §§ 36-1-3-1 (1998); 36-1-2-23 (1998).
[2] IND. CODE § [0]36-1-3-2 (1998).
[3] IND. CODE § 36-1-3-4 (1998); *See Beta Steel Corp. v. Porter County, Indiana,* 695 N.E.2d 979, 982 (Ind. Ct. App. 1998).
[4] IND. CODE §§ 36-1-3-5(a)(1) to – 8 (1998).
[5] IND. CODE § 36-1-3-8(a)(8) (1998).
[6] IND. CODE § 33-1-13-1 (1998). Traffic infraction proceedings are considered civil in nature rather than criminal. *Preston v. State*, 735 N.E.2d 330, 332 (Ind. Ct. App. 2000) (*citing Wirgau v. State,* 443 N.E.2d 327, 329-30 (Ind. Ct. App. 1982)).

[7] IND. CODE § 36-1-3-8(a)(8) (1998).
[8] *See generally State v. Town of Roseland*, 383 N.E.2d 1076 (Ind. App. 1979) (holding the town may enact local speeding ordinances and a fine assessed under such an ordinance may be retained locally).
[9] *See DeHart v. Town of Austin, Indiana*, 39 F.3d 718, 723 (7th Cir. 1994).
[10] *City of Indianapolis v. Fields,* 506 N.E.2d 1128, 1131 (Ind. Ct. App. 1987) (*citing City of Indianapolis v. Sablica*, 264 Ind. 271, 342 N.E.2d 853, 854 (Ind. 1976); *City of Hammond, Lake County v. NID Corp.*, 435 N.E.2d 42, 47 (Ind. Ct. App. 1982)).
[11] IND. CODE §§ 9-19-10-2 (1998); 9-19-11-2 to – 3 (1998).
[12] IND. CODE §§ 9-19-10-8 (1998); 9-19-11-2 to – 3 (1998).
[13] IND. CODE § 34-28-5-4 (1998).
[14] IND. CODE §§ 33-4-3-11 (1998); 33-5-2-8 (1998); 33-10.1-2-2 to – 7 (1998).
[15] IND. CODE § 34-28-5-5(c) (1998).
[16] IND. CODE §§ 9-21-1-2(a) (2002); 9-21-5-6 (1998).
[17] IND. CODE § 9-21-1-2(b) (2002).

OFFICE OF THE ATTORNEY GENERAL

May 27, 2003

OFFICIAL OPINION 2003-3

Department of Local Government Finance
Beth Henkel, Commissioner
Indiana Government Center North
100 North Senate Avenue 1058(B)
Indianapolis, IN 46204

RE: School corporations unfunded retirement or severance liability

Dear Commissioner Henkel:

This advisory letter responds to your request for an opinion regarding the proper interpretation and construction of recent statutory amendments embodied in P.L. 253-2001 relating to the funding of school corporation retirement or severance plans. The following is our legal analysis of the statutory codification of this public law.

ANALYSIS

P.L. 253-2001 was adopted in response to concerns that many local school corporations are contractually obligated to pay severance and retirement benefits to their employees, and that such obligations are presently unfunded liabilities of the individual school corporations. The new law requires certain retirement or severance plans to be funded on an "actuarially sound basis". In addition, P.L. 253-2001 (as amended by H.E.A. 1088, 113th Gen. Assem., 1st Reg. Sess., 2003) authorizes a school corporation with unfunded liability to issue bonds for the purpose of reducing the unfunded liabilities, on a one-time basis, on or before December 31, 2004.

The requirement that funding be done on an "actuarially sound basis" is codified at Ind. Code §§ 20-5-64-1 and 20-5-64-2, which provide:

> Sec. 1. This chapter applies to a school corporation that:
> (1) after June 30, 2001, establishes a retirement or severance plan that will require the school corporation to pay post-retirement or severance benefits to employees of the school corporation; or
> (2) includes in a collective bargaining agreement or other contract entered into after June 30, 2001, any provisions to increase:
> (A) the benefit; or
> (B) the unfunded liability;
> under any retirement or severance provisions that will require the school corporation to pay post-retirement or severance benefits to employees of the school corporation.

Ind. Code § 20-5-64-1.

Sec. 2. (a) A school corporation must fund on an actuarially sound basis the post-retirement or severance benefits that will be paid to employees under a plan, an agreement, or a contract described in section 1(1) of this chapter or an increase described in section 1(2) of this chapter.

(b) A school corporation must place the assets used to fund on an actuarially sound basis the post-retirement or severance benefits in a separate fund or account, and the school corporation may not commingle the assets in the separate fund or account with any other assets of the school corporation.

Ind. Code § 20-5-64-2.

The authorization for a school corporation to issue bonds to reduce its existing unfunded contractual liability for retirement or severance payments has been codified at Ind. Code § 20-5-4-1.7, which defines "retirement or severance liability" for which bonds may be issued:

(a) For purposes of this section, "retirement or severance liability" means the payments anticipated to be required to be made to employees of a school corporation upon or after the termination of their employment by the school corporation under an existing or previous employment agreement.

(b) In addition to the purposes set forth in section 1 of this chapter, a school corporation may issue bonds to implement solutions to contractual retirement or severance liability....

....

For purposes of our analysis we have assumed that the school corporation's retirement or severance plans are "governmental plans" as defined by the Employee Retirement Income Security Act ("ERISA"):

The term "governmental plan" means a plan established or maintained for its employees by... the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

29 U.S.C. § 1002(32). Pursuant to 29 U.S.C. § 1003(b)(1), governmental plans are exempt from ERISA and its detailed requirements relating to funded and unfunded liabilities.

Neither the Indiana Code nor the Indiana Administrative Code defines "unfunded liability." However, the Indiana Pension Handbook (Indiana Legislative Services Agency, Office of Fiscal and Management Analysis, November 2002) defines "unfunded actuarial liability", at page 210, as

[t]he unfunded actuarial liability (sometimes called the unfunded liability) of a retirement system at any time in the excess of its actuarial liability as [sic] that time over the value of its cash and investments.

This definition is consistent with the concept of "unfunded liability" used in other jurisdictions[1]. *See, e.g., Dombrowski v. City of Philadelphia*, 245 A.2d 238, 240 (Pa. 1968), ("the amount required to provide retirement benefits for employees covered by the system based upon their service prior to the current year," for which monies have not been previously set aside or appropriated.)

QUESTIONS

1. What factors should be considered in determining what is a change in a plan that would trigger the requirement that a benefit be funded on an actuarially sound basis?

Ind. Code § 20-5-64(1) requires that a retirement or severance plan "*established after June 30, 2001*" be funded on an actuarially sound basis. In this instance, the appropriate focus is on whether an existing plan is amended or whether a new plan is established. The Federal Circuit Court of Appeals and the U.S. Court of Federal Claims have recently addressed this issue in *LTV Steel Company, Inc. v. United States*, 215 F.3d 1275 (Fed. Cir. 2002), *on remand*, 89 A.F.T.R.2d 2002-2733 (Ct. Cl. 2002).

In 1986, LTV Corporation filed for Chapter 11 reorganization and terminated three pension plans having unfunded liabilities in excess of $2 billion. In 1987, LTV reached an agreement with the Steelworkers union pursuant to which LTV made payments to an Individual Account Trust ("IAT") [an unqualified plan under 26 U.S.C. § 401] that would fund the difference between what the Pension Benefit Guaranty Corporation ("PBGC") was paying beneficiaries under the terminated plans and what the beneficiaries would have received had the plans not been terminated. The ultimate issue became whether the benefits paid pursuant to the 1987 IATs were subject to FICA and FUTA taxes, or whether the payments were made "in the case of an agreement in existence on March 24, 1983", in which case the payments would be tax exempt. The Court of Appeals analysis is particularly helpful:

> The 1987 agreements terminated the beneficiaries' rights under the pre-1983 agreements and replaced them with a new and significantly different set of rights under the IAT programs.... Amending an on-going plan, however, is quite different from terminating a plan and resuming the payment of benefits under a new and different plan. *Under ERISA, plans are frequently amended in response to statutory changes, economic conditions and agreements between the parties, and the parties are free to amend plans within broad statutory limits.*

215 F.3d at 1278, 1279 (emphasis added). We find this logic persuasive, and are of the opinion that amendments to plans in existence prior to June 30, 2001 do not necessarily result in the establishment of a "new" plan under Ind. Code § 20-5-64 (1).

However, if an existing plan is amended pursuant to a collective bargaining agreement or other contract after June 30, 2001 so that there is an increase in an existing benefit or a new benefit is added, then the increases must be funded on an actuarially sound basis.

2. Would provisions providing for payment of accumulated sick pay or severance or retirement or self-insured health care benefits for retirees constitute unfunded liabilities?

The specific collective bargaining agreement and the applicable retirement plan provide relating to the specific benefit must be analyzed on a case-by-case basis. If these are "payments anticipated to be required to be made to employees of a school corporation upon or after termination" of employment, then they are a "retirement or severance liability" defined in Ind. Code § 20-5-4-1.7(a). As a general proposition, it would seem that retirement benefits (which we assume are monthly cash benefits payable under TIRA), self-insured health care benefits (if the school corporation is required to make payments on behalf of the teacher for continuation of such coverage), and severance pay are each a "retirement or severance liability" under Ind. Code § 20-5-4-1.7(a). *See, e.g., Crawford County Community School Corporation v. Enlow*, 734 N.E.2d 685, 691 (Ind. Ct. App. 2000) holding that a teacher's "eligibility to receive a pension from the Indiana state teachers' retirement fund is a separate issue from his eligibility to receive severance pay under the 1993-1997 collective bargaining agreement" but concluding that under the applicable collective bargaining agreement, the teacher was entitled to severance pay upon his retirement from the school district.

Whether accumulated sick leave is a "retirement or severance liability" is more problematic. Several cases brought under ERISA have held, on a fact-specific basis, that accrued sick leave is not an "employee benefit" but a "payroll practice" paid out of [the employer's] general assets. *See, e.g., McGraw v. FD Services, Inc.,* 811 F. Supp. 222 (D. S.C. 1993); *Abella v. W.A. Foote Memorial Hospital, Inc.*, 740 F.2d 4 (6th Cir. 1984). But, if a teacher is typically entitled to a cash payment for accumulated sick days upon retirement, then such payment would be a "retirement or severance liability" within the meaning of the statute.

3. If a school corporation has an existing retirement or severance plan as of June 30, 2001, and thereafter enters into a new contract that contains the same retirement or severance plan after June 30, 2001, but costs of the retirement or severance plan have increased, would the new contract be subject to the requirement that the unfunded liabilities be funded on an actuarially sound basis?

If the new collective bargaining agreement does not contain a provision that increases an existing benefit[2], or whose effect is not to increase the unfunded liability, then actuarially sound funding would not be required. An increase in the cost of providing a benefit (i.e., an increase in health insurance premiums) would not be considered an increase in the benefit itself. *Cf., Blue Cross of Massachusetts, Inc. v. Commissioner of Insurance*, 465 N.E.2d 252, 255-56 (Mass. 1984). However, any incremental increase in unfunded liability would be subject to the actuarially sound funding requirements.

4. Is continuation of an automatic escalator clause in a collective bargaining agreement or contract entered into after June 30, 2001 a "change in plan" triggering the requirement that such a liability be funded on an actuarially sound basis? For example, assume a contract sets sick pay based upon the pay for substitute teachers, which may increase over time, and also provides that a teacher, upon severance or retirement, is entitled to payment for accumulated sick days. If that provision were carried forward in a contract entered into after June 30, 2001, would this severance or retirement benefit have to be funded on an actuarially sound basis?

Funding on an actuarially sound basis is required when a collective bargaining agreement or other contract entered into after June 30, 2001 contains provisions for the increase of (A) a benefit, or (B) the unfunded liability, under any retirement or severance provisions of an existing plan. Ind. Code § 20-5-64-1(2). It is important to note that the statute is written in the disjunctive; either an increase in benefit, or an increase in unfunded liability will trigger the enhanced funding requirements. Furthermore, we cannot conceive of a collective bargaining agreement explicitly providing for an increase in unfunded liability, and interpret subsection (B) as meaning a provision the effect of which will increase unfunded liability under an existing plan.

While the continuation of an automatic escalator clause in a new contract may not be an "increase in benefit", its effect may well be to increase unfunded liability. It is our interpretation that if the post-June 30, 2001 collective bargaining agreement results in a increase in the unfunded liability of an existing plan, that incremental increase would have to be funded on an actuarially sound basis.

5. Under what circumstances must an actuarial study by performed to determine whether a retirement or severance plan adopted after June 30, 2001, is actuarially sound?

The statute does not require an actuarial study; it simply mandates that a retirement or severance plan adopted after June 30, 2001 must be funded "on an actuarially-sound basis."[1] Thus, a defined contribution plan, which "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participants account," can never have an "insufficiency of funds in the plan to cover promised benefits... since each beneficiary is entitled to whatever assets are dedicated to his individual account." *Hughes Aircraft Company v. Jacobson*, 525 U.S. 432, 439 (1999) (internal citations omitted). Consequently, if a defined contribution plan is adopted after June 30, 2001, no actuarial study is needed because the plan is self-funding.

On the other hand, if a retirement plan adopted after June 30, 2001 is not self-funding, then an actuarial study or some other appropriate calculation must be made to ensure that that it is funded on an actuarially sound basis.

6. If a school corporation has an existing retirement or severance plan as of June 30, 2001, and thereafter enters into a new contract that converts all unfunded liabilities into a plan funded through defined contributions, must the school corporation perform an actuarial study?

No. As explained in response to Question 5, above, a defined contribution plan is, by definition, actuarially sound.

7. Some school corporations have an existing Social Security Bridge Program for retirees. Can representatives negotiate a transition to a Section 401(a) or 403(b) defined contribution account without funding the existing benefit in an actuarially sound manner, so long as the future unfunded liability will be less than it is currently?

A qualified pension plan meeting the statutory requirements of 26 U.S.C. § 401(a) or a qualified annuity plan under 26 U.S.C. § 403(b) are subject to ERISA's requirements relating to funded liabilities, and are actuarially sound by statutory definition. If there is no unfunded liability under the new plan, and if the effect of the new plan does not increase pre-existing unfunded liability, then Ind. Code § 20-5-64-1 (2) is inapplicable. That code section imposes funding requirements only on liabilities arising after June 30, 2001; it does not address liabilities already existing at that date.

We trust that the foregoing responds to your questions.

Sincerely,

Stephen Carter
Attorney General

Susan Gard
Deputy Attorney General

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[1] The term is also defined at 29 U.S.C. § 1002 (29) and (30), but is more specifically tailored to ERISA's statutory scheme.
[2] We define "benefit" in this situation as the beneficiary's contractual entitlement.
[3] An "actuarially-sound system contains monies to pay future liabilities". *City of Natchitoches v. Williams*, 657 So.2d 320, 323 (La. App. 1995).

OFFICE OF THE ATTORNEY GENERAL

May 27, 2003

OFFICIAL OPINION 2003-4

Charles Johnson, III, C.P.A.
State Examiner
State Board of Accounts
302 W. Washington St.
4th Floor, Room E148
Indianapolis, IN 46204-2765

Re: Compensating Firefighters for Substituted Hours

Dear Mr. Johnson:

You requested our opinion on whether it is permissible for a firefighter to receive compensation for hours a volunteer firefighter substituted for that of another firefighter who worked in his place and did not receive compensation. You also requested that our opinion specifically address 29 C.F.R. § 553 ("Application of the Fair Labor Standards Act to Employees of State and Local Governments"), in addition to any other applicable statutes, rules or regulations.

BRIEF ANSWER

It is our opinion that the practice of "Exchange of Work Time" set forth in the Collective Bargaining Agreement, Article 14, ("CBA, Article 14"), between Firefighters Union Local #1348 and the City of Muncie, is not in violation of federal statutes.

FACTS

The audit report of the City of Muncie, filed with the State of Indiana on September 15, 1999, contained an audit result and comment regarding the substitution of working hours by firefighters, with the approval of their superiors. The findings in the audit report indicated that the firefighters had other firefighters ("volunteer firefighters") substitute for them; however, these firefighters did not reciprocate those substituted hours performed by the volunteer firefighters. The firefighters that did not work received compensation for those hours not worked. However, the volunteer firefighters were not compensated for the substituted hours worked.

The audit report also contained information concerning whether paragraph 2 of the CBA, Article 14 is in violation of Indiana statute.

CBA, Article 14, paragraph 2, reads as follows:

> All Fire Fighters shall be allowed to exchange working time, subject to the approval of their Lieutenant and/or their Captain and/or Battalion Chief and/or Deputy Chief of DEPARTMENT, and/or Chief and/or Chief of DEPARTMENT provided that the Fire fighter with whom the exchange is made is deemed qualified to perform the duties to be exchanged. No Fire fighter shall receive additional compensation for working out of classification.
>
> Fire fighters shall be limited to a maximum of up to (10) ten exchanges or substitutions, without a requirement to reciprocate the (10) ten exchanges or substitutions per calendar year. This restriction does not affect the right of fire fighters to exchange or substitute fully reciprocated working time.

Under the facts as presented by the State Board of Accounts, we conclude that the contract provisions concerning compensating firefighters for hours not actually worked set forth in paragraph 2 of the CBA, Article 14 between Local #1348 and the City of Muncie are not in violation of federal statutes or regulations.

LEGAL ANALYSIS

Our analysis of the legality of firefighters not reciprocating substituted hours worked by other firefighters and receiving compensation for hours not worked is addressed below in the following manner:

A. Pursuant to 29 C.F.R. § 553.31, can firefighters have other firefighters work their scheduled shift, but not be required to reciprocate those substituted hours?
B. Is CBA, Article 14, paragraph 2, specifically provided for by federal statute?

A. Application of 29 CFR § 553.31 to non-reciprocal work by firefighters.

Your letter indicates that firefighters, with the approval of their superiors, were allowed to have volunteer firefighters work their scheduled shift hours. However, firefighters were not required to reciprocate the work performed by the volunteer firefighters for up to ten (10) exchanges or substitutions per calendar year based upon CBA, Article 14. In addition, those firefighters that did not work were given credit as if they did perform the work and received compensation for hours worked by the volunteer firefighters. The volunteer firefighters received no credit or compensation for the substituted hours worked.

Pursuant to 29 CFR § 553.31(a), which speaks to the Fair Labor Standards Act ("FLSA") exemption set forth at 29 U.S.C. § 207(p)(3), individuals employed in fire protection or law enforcement activities working in the same capacity, may be allowed to

substitute for one another, at their own option and with the approval of the public agency (in this case, the fire department), during scheduled work hours. It would appear that firefighters who do not reciprocate those substituted hours violate this regulation. There are three parties affected by the substitution practice at the fire department: the paid firefighters, the volunteer firefighters, and the City of Muncie. However, according to the facts described in your letter, the volunteer firefighters who substitute for the paid firefighters do not appear to be protected by, or have a claim under, the FLSA. 29 U.S.C. § 203(e)(4)(A) states:

> The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if—
>
> i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
>
> ii) such services are not the same type of services which the individual is employed to perform for such public agency.

With respect to the remaining parties, the FLSA is considered to be remedial social legislation and should be construed liberally in favor of workers whom it was designed to protect. *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 282 (7th Cir. 1993). Any exemption from its terms must be narrowly construed. *Id.* In this case, it is the employees who have negotiated something different from what is called for in the FLSA.

29 C.F.R. § 553.31 ("Substitution—section 7(p)(3)") directly addresses the FLSA exception found at 29 U.S.C. § 207(p)(3), and provides:

> (a) Section 7(p)(3) of the FLSA provides that two individuals employed in any occupation by the same public agency may agree, solely at their option and with the approval of the public agency, to substitute for one another during scheduled work hours in performance of work in the same capacity. The hours worked shall be excluded by the employer in the calculation of the hours for which the substituting employee would otherwise be entitled to overtime compensation under the Act. Where one employee substitutes for another, each employee will be credited as if he or she had worked his or her normal work schedule for that shift.
>
> (b) The provisions of section 7(p)(3) apply only if employees' decisions to substitute for one another are made freely and without coercion, direct or implied. An employer may suggest that an employee substitute or "trade time" with another employee working in the same capacity during regularly scheduled hours, but each employee must be free to refuse to perform such work without sanction and without being required to explain or justify the decision. An employee's decision to substitute will be considered to have been made at his/her sole option when it has been made (i) without fear of reprisal or promise of reward by the employer, and (ii) exclusively for the employee's own convenience.
>
> (c) A public agency which employs individuals who substitute or "trade time" under this subsection is not required to keep a record of the hours of the substitute work.
>
> (d) In order to qualify under section 7(p)(3), an agreement between individuals employed by a public agency to substitute for one another at their own option must be approved by the agency. This requires that the agency be aware of the arrangement prior to the work being done, i.e., the employer must know what work is being done, by whom it is being done, and where and when it is being done. Approval is manifest when the employer is aware of the substitution and indicates approval in whatever manner is customary.

In certain career fields, strict compliance and rigid regulation without any room for flexibility can prove to be a detriment to both employer and employee. Specifically, in a career field such as fire fighting, the firefighters' work schedules are so unique that they are addressed specifically within the FLSA. For instance, 29 U.S.C. § 207(k) creates an exception to deal specifically with overtime compensation due the firefighters when working something other than a 40 hour week. Furthermore, because of the unorthodox work week, 29 U.S.C. § 207(k) provides that a firefighter with a work period of at least seven days but less than 28 days shall receive overtime compensation for all hours worked in excess of a number bearing the same ratio to the total days worked as 212 hours to 28 days. Thus, the FLSA allows both the employer and the employee the flexibility to find a practical solution in a career field such as fire fighting. Finding a flexible solution means that the parties involved must be able to negotiate.

Nothing in FLSA requires employers to continue to employ or employees to continue to work, except on terms mutually agreeable to both. *Atlantic Co. v. Walling*, 131 F.2d 518 (5th Cir. 1942). Employers and employees are free to make any terms they choose beyond the minimums set out within the FLSA. *Id.* Thus, it would appear that firefighters could have other firefighters work their scheduled shift without reciprocating as long as the employees within the protection of the FLSA freely reached this agreement and the agreement exceeds the statutory minimum protection.

B. CBA, Article 14, paragraph 2, is specifically provided for by Federal Statute

FLSA's minimum protections cannot be abridged by any collective bargaining or other contract. *Vadino v. A. Valey Engineers*, 903 F.2d 253 (3d Cir. 1990). The reciprocity requirement in 29 C.F.R. § 553.31(a) is a minimum requirement that the firefighters are free to exceed when negotiating and reaching an agreement. The FLSA was created to protect employees such as the firefighters from being taken advantage of by employers with unfair bargaining power. If the collective bargaining terms freely negotiated exceed the minimum requirement mandated by the FLSA, the firefighters should be allowed to receive the benefits. For example, in a case where the employer and employee contracted with reference to wages in excess of the statutory minimum, the court upheld the contract because it exceeded the statutory minimum and was freely agreed to by both parties. *St. Clair v. Russell & Pugh Lumber Co*., 51 F. Supp. 47 (D. Idaho 1943).

In the facts described in the letter, the issue revolves around employees being compensated for time at work when they were not there. As a California court of appeals explained in *City of Sacremento v. Public Employees Retirement System,* there is nothing in the FLSA which would prohibit an employer and an employee covered by the FLSA's 40-hour maximum workweek from agreeing to work more or less hours each week as long as the employer compensates the employee with overtime when the employee exceeds the maximum. 280 Cal. Rptr. 847, 852 (Cal. App. 1991). "Since there is no absolute limitation in the Act...on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as that required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed...." *Id.* (citing 29 C.F.R. § 778.102).

In a 1996 advisory opinion, the Department of Labor Wage and Hour Administrator determined that a negotiated agreement allowing firefighters to trade scheduled work days and off-duty days did not fall within the provisions of 29 C.F.R. § 553.31. Opinion Letter of the Wage and Hour Administrator Maria Echaveste (FLSA-1318, Jan. 30, 1996). Under that agreement, firefighters were given 12 days per year where they could avoid being locked into working or an off-duty day and could switch or "trade" by voluntarily placing the scheduled work day or off-duty day into a pool for redistribution. Like the provision in CBA, Article 14, paragraph 2, the switching or trading of days was not done in a reciprocal manner where two employees reciprocated substituting for each other. The Administrator determined that the trading of days into a pool was not found to be an issue within the provisions of the FLSA. The provision was found to be necessary to allow firefighters to adapt their work schedules to reduce the average hours worked in a workweek or work period.

As the United States Supreme Court has noted, Congress intended "to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights." *Jewell Ridge Coal Corp. v. United Mine Workers*, 325 U.S. 161, 167 (1945). Contracts between employer and employee inconsistent with, and prohibited by, terms of the FLSA are illegal and not binding on the employee. *Chepard v. May*, 71 F. Supp. 389 (S.D.N.Y. 1947). However, the contracts are not considered illegal if the employee the FLSA was designed to protect has agreed to a contract that rewards him or her with benefits that exceed the statutory minimums.

CONCLUSION

In conclusion, the practice of firefighters receiving compensation for substituted hours they have not worked is not a violation of federal statutes. The fire fighters are in a unique career field that requires certain flexibility in scheduling and compensating, which is provided for in some areas of the FLSA. Allowing the city and the fire fighters to freely negotiate a collective bargaining agreement that can effectuate the needs of the employer and employees best attains this flexibility. Although the FLSA may override contracts, courts have generally found it makes sense to let private arrangements endure. *Dinges v. Sacred Heart St. Mary's Hospital*, 164 F.3d 1056 (7th Cir. 1999). In this case, it is our opinion that the contract is not in violation of the FLSA if the employee the FLSA was designed to protect has agreed to a contract that rewards him with benefits that exceed the statutory minimums.

Sincerely,

Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

June 17, 2003

OFFICIAL OPINION 2003-5

The Honorable Tim Berry
Treasurer of State
Indianapolis, Indiana 46204

Re: Withdrawal from Principal of Common School Fund

Dear Treasurer Berry:

This letter responds to your request for an advisory opinion on the duties and responsibilities of your office as they relate to the retroactive application of House Enrolled Act 1001, (Public Law 224-2003). In your letter dated May 5, 2003 you stated:

> Section 115 [of the Act] directs me to transfer $25 million out of the Common School Fund, back to the Abandoned Property Fund, and then into the General Fund, even though Article 8 of the Constitution appears to prohibit any transfers out of the Common School Fund for any purpose. Although authorized by HB 1001 to make these transfers, I am reluctant to do so in light of the directives contained in the Constitution without your assurance that the transfers would be lawful.

It is our opinion that to the extent that Section 115(b) of House Enrolled Act 1001, (Public Law 224-2003) requires the Treasurer to diminish the principal of the Common School Fund, it violates Article 8 of the Indiana Constitution.

FACTUAL BACKGROUND

According to your letter, on January 30, 2003, the State's Abandoned Property Fund had a balance in excess of $500,000.00. On that date, the Office of the Treasurer transferred twenty-five million dollars ($25,000,000) from the Abandoned Property Fund to the Common School Fund. This transfer was authorized by Indiana Code § 32-34-1-34, which provides, in pertinent part:

> (b) If the balance of the principal of the abandoned property fund established by [IC 32-34-1-33] exceeds five hundred thousand dollars ($500,000), the treasurer of state may, and at least once each fiscal year shall, transfer to the common school fund of the state the balance of the principal of the abandoned property fund that exceeds five hundred thousand dollars ($500,000).

The January transfer was the first and only transfer during the current fiscal year. Subsequently the General Assembly passed, and the Governor signed, the budget bill for the biennium 2003-2005, House Enrolled Act 1001 (Public Law 224-2003). Section 115 provides, in its entirety:

> (a) Notwithstanding IC 32-34-1-34, the treasurer of state shall transfer on:
> (1) June 30, 2003;
> (2) June 30, 2004; and
> (3) June 30, 2005;
> any balance (excluding amounts needed to fund appropriations to the attorney general for personal services and other operating expenses for the unclaimed property program) in the abandoned property fund that exceeds five hundred thousand dollars ($500,000) to the state general fund.
>
> *(b) After June 30, 2002, and before July 1, 2005, the treasurer of state may not transfer any amount in the abandoned property fund to the common school fund. If any money was transferred before June 30, 2003, in a manner that is inconsistent with this subsection, the treasurer of state shall take the necessary action to restore the money to the abandoned property fund and transfer the money as required under subsection (a).* (emphasis added).
>
> (c) This SECTION expires July 1, 2004.

Your question recognizes the conflict between the language in subsection (b) requiring the Treasurer to withdraw principal from the Common School Fund in order to restore it to the Abandoned Property Fund, and Article 8, Section 3 of the Indiana Constitution, which provides:

> The principal of the Common School fund shall remain a perpetual fund, *which may be increased*, *but shall never be diminished*; and the income thereof shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever. (emphasis added).

The constitutional intent that the principal of the Common School Fund remain forever protected is also expressed in Article 8, Section 7, where it is characterized as a trust:

> All trust funds, held by the State, shall remain inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created.

The office of Treasurer of State is created by our Constitution at Article 6, Section 1: "There shall be elected, by the voters of the state... a Treasurer of State... [who]... shall perform such duties as may be enjoined by law..." As the holder of a constitutional office, you are required to take an oath to "support the Constitution of this State... and also an oath of office." Ind. Const. art. 15 § 4. Lest there by any question that the constitution prevails over any statutory enactment, Indiana Code Section 1-1-2-1 provides:

> The law governing this state is declared to be:
> First. The Constitution of the United States and of this state.
> Second. All statutes of the general assembly of the state in force, and *not inconsistent with such constitutions*.

The duties of Treasurer are set by statute, and include the following:

> Indiana Code Section 4-8.1-2-1: The treasurer of state is responsible for the safekeeping and investment of moneys and securities paid into the state treasury.
> Indiana Code Section 4-8.1-2-5: (a) The treasurer of state may not use or permit any other person to use the moneys or property received by him or paid into the state treasury, except as permitted by law.
> Indiana Code Section 21-1-3-1: On and after November 3, 1943, the treasurer of state shall be the exclusive custodian of the common school fund and the Indiana University permanent endowment fund not held in trust by the several counties… The state board of finance shall have full and complete management and control of such funds and is hereby authorized and directed to invest the common school funds and the Indiana University permanent endowment funds as provided in this title and IC 20.

ANALYSIS

The drafters of Indiana Constitution found the right of a state-supported free education to be of such importance that they dedicated Article 8 solely to that subject:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

Ind. Const. art. 8, § 1.

The sole purpose of Article 8 was to establish a perpetual, inviolable source of funds to provide for such education, and the mechanism chosen was the Common School Fund. Thus, Article 8, Section 2 lists sources of funds that as of 1851, were absolutely committed to the Fund; Section 3 creates the Fund and provides that while it "may be increased... [it] shall never be diminished"; Section 4 requires the General Assembly to invest the Fund "in some safe and profitable manner" and to make provision by law for distribution of the interest to counties; Section 5 requires reinvestment of unused interest; Section 6 holds the counties liable for "*preservation* of so much of the said fund as may be entrusted to them" (emphasis added); Section 7 emphasizes the intent that the Fund be held in trust by the State and remain "inviolate, and be faithfully and exclusively applied to the purposes for which the trust was created"; and Section 8 creates a state superintendent of public instruction. Very early on, our courts recognized that all sections of Article 8,

> being devoted to one subject, all of its sections must be construed together. Regarded thus, we find that the whole section designates what then existing matters should constitute the common school fund, naming such as were appropriated by the state, and also a certain trust fund, viz., the congressional township, donated by congress to be thus used; which aggregate fund, it is declared, *may be increased but not diminished.*

Quick v. White-Water Township, 7 Ind. 570, 576-77 (Ind. 1856) (emphasis added).

Our courts have historically and uniformly held that "the fund set apart for the common schools is a trust fund of a class and character that cannot be diverted, directly or indirectly, to any other purpose than that to which it is devoted by express law." *Board of Commissioners of Rush County v. State ex rel. Hord*, 3 N.E. 165 (Ind. 1885) (citations omitted). Such cases typically involve an action by the Attorney General to compel an official to turn monies over to the Fund, and the Court holdings consistently refer to the inviolability of the Fund. As an example, in 1892, the court of appeals stated:

> [t]he constitution provides that 'the principal of the common school fund shall remain a perpetual fund, which may be increased, but shall not be diminished.' It is the property of the State. "Fines and other additions to the school fund" become a part of the permanent principal of the fund. No part of this principal can be divested and applied to uses other than that or which the fund was created.

State ex rel. Michener v. Board of Commissioners of Shelby County, 32 N.E. 92, 93 (Ind. App. 1892), *citing Board of Commissioners of Bartholomew County v. State ex rel. Baldwin*, 19 N.E. 173, 179 (Ind. 1888).

The Office of the Attorney General has previously provided guidance to the General Assembly as to their authority to redirect certain funds by legislative act that are not constitutionally mandated to be made part of the Common School Fund under Article 8, Section 2. This legislative action can be clearly distinguished from redirecting funds once they have been lawfully vested and have accrued to the Common School Fund as a constitutional trust.

Case law confirms the principle that once monies are vested in the Common School Fund, they must remain in the trust. In *State v. Elliott*, 357 N.E.2d 276 (Ind. App. 1976), the trial court had properly entered a judgment of forfeiture on a surety bond. The surety did not obtain a stay pending appeal and the funds were remitted to the State Treasurer for deposit in the Common School Fund. The trial court ultimately held that the surety was entitled to return of the bond, and ordered the Treasurer to remit the funds. In reversing, the court of appeals reasoned simply, "[a]fter such funds are received by the Treasurer of the State, they become vested in the Common School Fund and cannot be remitted". *Id*. at 280. *See also* 1952 Op. Att'y Gen No. 29, at 123-4 ("[t]he Constitution has provided that funds may not be withdrawn from the Common School Fund … Funds once lawfully vested in the Common School Fund are beyond recall.").

The only instance in which monies have been allowed to be withdrawn from the principal of the Common School fund appears to be *State v. Long*, 568 N.E.2d 1108 (Ind. App. 1991). In *Long*, when a criminal defendant failed to appeal, the trial court issued a warrant for his arrest and ordered his bail forfeited. The clerk of court then sent the money to the Common School fund. However, the trial court did not mail notice of the forfeiture either to the defendant or to the father who posted bail, nor did it enter judgment against the bond, both of which were required by statute. On these facts, the court of appeals held,

> The clerk independently and improperly sent the money to the State Auditor without an order from the trial court to execute judgment of forfeiture, and in such case we do not conclude the money accrued to the fund. The trial court could still, and did, exert control over the improperly placed funds.

Id. at 1112. The narrow holding in *Long* stands for the proposition that before a forfeiture can be made part of the Common School Fund, it must indeed be a forfeiture and furthermore, money improperly or erroneously placed in the Common School Fund may be re-directed to the correct recipient.

However, the transfer of funds from the Abandoned Property Fund made in January 2003 by the Office of the Treasurer was, at the time it was made, neither improper nor erroneous. No judicial order or other determination terminating the rights of a third party was (or is) necessary. The Treasurer was required and authorized by statute to make such a transfer, and in doing so followed the statutory duty and mandate. As held in *State v. Elliot,* upon the proper transfer, the funds vested as part of the principal and accrued to the Common School Fund, which we have noted, *may be increased*, *but shall never be diminished.*

The general rule in Indiana is that legislation may apply retroactively with two exceptions: (1) the General Assembly shall not impair vested rights; and (2) the General Assembly shall not violate a constitutional guarantee. *State ex rel. Mass Transportation Authority of Greater Indianapolis v. Indiana Revenue Board*, 253 N.E.2d 725, 730 (Ind. App. 1969); *Guthrie v. Wilson*, 162 N.E.2d 79 (Ind. 1959).

To sanction the withdrawal of the funds transferred on January 30, 2003, would appear to be a direct violation of the constitutional guarantee of Article 8 of the Indiana Constitution that the Common School Fund remain inviolate and be used only for the support of the common schools and for no other purpose. Any other conclusion would concede an unfettered authority by

the General Assembly to redirect all principal not originating from the sources listed in Article 8, Section 2 to other purposes. Based on the language of the Indiana Constitution as to the inviolability of the Fund, as well as the consistent holdings by the state judiciary on this matter, we do not perceive that to be the constitutional intent.

CONCLUSION

It is our opinion that to the extent House Enrolled Act 1001 (Public Law 224-2003) requires the Treasurer to diminish the principal of the Common School Fund, it is unconstitutional as a violation of Article 8 of the Indiana Constitution.

You should be aware that this opinion is not binding on a court, which could reach a different conclusion. *Welliver v. Coate*, 114 N.E. 775, 780 (Ind. App. 1917). However, we believe it to be the correct answer, one upon which you may rely in your actions, and one which this office will be prepared to defend if subject to court challenge.

Sincerely,

Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General

OFFICE OF THE ATTORNEY GENERAL

August 12, 2003

OFFICIAL OPINION 2003-6

The Honorable R. Tiny Adams
Indiana House of Representatives
State House
200 W. Washington Street
Indianapolis, IN. 46204

RE: Smoking bans

Dear Representative Adams:

This letter responds to your request for an advisory opinion on the constitutionality of ordinances that provide exemptions to smoking bans in public places. We note by way of background that efforts to ban smoking in restaurants, bars and workplaces are being proposed throughout Indiana. Advocates cite problems associated with the health effects from secondhand smoke and the related rise in medical costs for treating smoking-related health problems such as emphysema, bronchitis and cancer that plague both privately and publicly funded health care programs.[1] Authors of such bans additionally emphasize children, the elderly and certain other individuals may be especially vulnerable to the effects of secondhand smoke. The State of Indiana is also attempting to address the problems associated with the effects of secondhand smoke through public education and awareness programs.[2]

Recently, local governments exercising their authority under Indiana's Home Rule statute have begun to address the problem by passing ordinances that completely ban smoking in public places such as restaurants, workplaces and other enclosed areas.[3] Questions have arisen regarding the scope of the authority of local governments to enact such legislation, as well as the appropriate language necessary to craft exceptions that do not offend the constitutional guarantees of equal protection and Privileges and Immunities Clause.

The specific ordinance you cite in your question involves a smoking ban ordinance that grants exemptions to restaurants with fully enclosed smoking areas, or bars or taverns that exclusively serve the adult population. That leaves the remainder of owners of restaurants and eateries that are not bars or taverns, or that do not contain fully enclosed smoking areas subject to a smoking ban ordinance. This opinion addresses these questions.

BRIEF ANSWER

It is our opinion that legislation seeking to provide exceptions to a general ban on smoking will likely survive constitutional scrutiny under an equal protection analysis if the classifications created in the ordinance bear a rational relationship to a legitimate government concern. We further believe the legislation would survive constitutional scrutiny under the Privileges and Immunities Clause if the preferential treatment granted by the ordinance is reasonably related to innate characteristics that distinguish the preferentially treated classes, and the preferential treatment granted is uniformly available to all individuals similarly situated.

LEGAL ANALYSIS

Equal protection under the law is a right afforded by the United States Constitution.[4] This right is distinct from that granted by the Indiana Constitution under the Privileges and Immunities Clause.[5] This opinion provides an analysis of both of these distinct rights and privileges afforded to the citizens of Indiana.

Equal Protection

The Equal Protection Clause of the United States Constitution provides "[n]o state shall…deny to any person within its jurisdiction the equal protection of the laws."[6] The provision does not forbid classifications, but forbids the government from treating people differently who are similarly situated.[7] When determining whether an ordinance violates the provisions of the Equal Protection Clause, it is fundamental to note the ordinance will initially be subject to the rules of statutory construction. "When interpreting an ordinance, the Court of Appeals will apply the same rules as those employed for construction of state statutes."[8] One of those generally accepted rules is "legislation under constitutional attack in this court is clothed in a presumption of constitutionality."[9] A challenger has the burden to rebut this presumption.[10] All reasonable doubts will be resolved in favor of the act being deemed constitutional where any construction is found that could support its constitutionality.[11]

To determine if an ordinance violates the Equal Protection Clause, a court will first look to "the applicable level of scrutiny" for the ordinance.[12] If there is a suspect classification, such as race or religion, or a burden on the exercise of a fundamental right, such as freedom of speech, the ordinance will be subject to strict scrutiny.[13] Where the construction of an ordinance is subject to strict scrutiny, "state action must be a necessary means to a compelling governmental purpose and be narrowly tailored to that purpose."[14]

The type of legislation in question involves smoking ban ordinances that grant exemptions to restaurants with fully enclosed smoking areas, or bars or taverns that exclusively serve the adult population. That leaves the remainder of owners of restaurants and eateries that are not bars or taverns, or that do not contain fully enclosed smoking areas subject to a smoking ban ordinance. These are not the distinguishing characteristics or classifications of a suspect class. Suspect classes encompass distinctions based on classifications of "race, alienage, or national origin".[15] This is not the case where the classification created by the government seeks to distinguish restaurant owners that do not have a fully enclosed dining/smoking area and are not considered a bar or tavern. Therefore, not being a suspect classification, the court will not subject the legislation to strict scrutiny.

Equal protection will also be afforded if there is an abridgement of a "fundamental right." A "fundamental right" is defined as a right "explicitly or implicitly guaranteed [to each citizen] by the Constitution."[16] These rights include "rights to travel, rights to vote, rights of access to the courts, and rights of personal privacy."[17]

Again, the right of restaurant ownership and the right to engage in business without regulation does not rise to the level of a "fundamental right" contemplated by the United States Constitution.

We conclude the ordinance addressed creates no suspect classification, nor results in the abridgement of a fundamental right. Therefore, the standard of review (scrutiny) for equal protection in this instance would be the rational basis test. The ordinance in question will survive a constitutional challenge under the equal protection analysis if the classification created by the ordinance has a rational relationship to the expressed, legitimate government goal.[18]

In analyzing the classifications created by this particular smoking ban ordinance, the rational basis scrutiny appears to be met. If the government interest cited is limiting exposure of secondhand smoke to adults and children in an effort to decrease health related problems, there appears to be a rational basis to not allowing restaurants that cannot severely limit exposure of secondhand smoke to unwilling adults and children to benefit from the exemptions. With an enclosed area for smoking, there are far less incidents of exposure of unwilling adults and children to secondhand smoke. Within a tavern, only adults over the minimum legal age who willingly risk exposure to secondhand smoke will be exposed. By granting the exemption only to restaurants with these

types of facilities, or taverns, the articulated, legitimate government interest of minimizing the exposure of its more vulnerable citizens to secondhand smoke for health reasons is still served. Therefore, it is our opinion a smoking ban ordinance that carves out exceptions bearing a rational relationship to a legitimate government interest will survive a constitutional challenge.

Privileges and Immunities

"[T]here is no settled body of Indiana law that compels application of a federal equal protection analytical methodology to claims alleging special privileges or immunities under [the Indiana Constitution]."[19] Indiana courts have held that under this clause there is an "independent interpretation and application" from the equal protection guarantee under the United States Constitution.[20] Although your question does not directly ask about the Privileges and Immunities Clause, it will be addressed here as it provides guarantees that similarly situated individuals will be afforded equal treatment under the Indiana Constitution. Because the challenges appear to address the "preferential treatment" of the exemptions of local smoking ban ordinances, this clause is more likely to be used in a constitutional challenge.

Similar to the equal protection analysis, any ordinance passed will be "clothed in a presumption of constitutionality."[21] The burden is the challenger to show the ordinance does not meet the necessary constitutionality.[22] But there is a different analysis and standard of review for constitutionality under the Privileges and Immunities Clause.

Indiana's Privileges and Immunities Clause provides, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."[23] In interpreting legislation where similarly situated individuals appear to be subject to differing treatment, two requirements must be met to find no violation of the Privileges and Immunities Clause has occurred. First, the distinctive treatment the ordinance mandates must be reasonably related to innate characteristics that distinguish the preferentially treated classes. In other words, in applying that standard, a court will look to whether there are inherent distinctions within the classifications that make the preferential treatment logical.

"Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[24] In other words, the preferential treatment must be equally applicable and available to anyone who fits in this distinguishing class. Finally, in determining whether the exceptions created in a similar ordinance is in compliance with Indiana's Privileges and Immunities guarantee, a court will grant a great deal of deference to the discretion of the legislature.[25] "[T]he courts must accord considerable deference to the manner in which the legislature has balanced the competing interests involved."[26] "So long as the classification is based upon substantial distinctions with reference to the subject matter, we will not substitute our judgment for that of the legislature; nor will we inquire into the legislative motives prompting such classification."[27]

In the ordinance questioned, two of the classifications or "distinctions" accorded the "preferential treatment" of being exempt from the smoking ban include restaurants with full enclosures that separate a smoking area from the general dining area, and taverns or bars that only allow entry to individuals of a certain legal age. The classifications appear to have inherent characteristics that call for the distinguishing treatment. Initially, in a restaurant with a fully enclosed area, separate from the main dining area, there is far less chance that an unsuspecting diner, (who incidentally could be asthmatic), or young child will be exposed to secondhand smoke. In a bar or tavern exclusively off-limits to minors, there is no chance of exposure to secondhand smoke for young children, and only a chance of exposure to adults who willingly assume the risk. The stated purpose of such legislation is the protection of children and individuals from the effects of secondhand smoke in an effort to maintain the health of the unit's citizenry. Another stated purpose of the legislation is to control the increasing health costs due to smoke-related illnesses. Therefore because these two specific instances have distinguishing characteristics that give them the ability to limit an individual's exposure to secondhand smoke, restaurant owners granted this "preferential treatment" due to their distinguishing characteristic of the ability to limit an unwilling individual's exposure to secondhand smoke have features innately unique that logically call for the exemptions.[28]

CONCLUSION

Therefore, we conclude that legislation that seeks to provide exceptions to a general ban on smoking will likely survive constitutional scrutiny under an equal protection analysis if the classifications created in the ordinance bear a rational relationship to a legitimate government concern. We further believe the legislation would survive constitutional scrutiny under a privileges and immunities analysis if the preferential treatment granted by the ordinance is reasonably related to innate characteristics that distinguish the preferentially treated classes, and the preferential treatment granted is uniformly available to all individuals similarly situated.

This office is prepared to support the legal defense of any local ordinance that seeks to ban smoking in public places based upon the legal rationale provided in this opinion.

Sincerely,

Stephen Carter
Attorney General

Tracy L. Richardson
Deputy Attorney General

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[1] M. Scollo, A. Lal, A. Hyland, S. Glantz, *Review of the quality of studies on the economic effects of smoke-free policies on the hospitality industry*, Tobacco Control. 2003 Mar; 12(1):13-20, at http://tc.bmjjournals.com/cgi/content/abstract/12/1/13.
[2] Indiana Tobacco Use Prevention and Cessation Trust Fund at Ind. Code § 4-12-4.
[3] Ind. Code § 36-1-3 *et seq*.
[4] U.S. Const. Amend. XIV, § 1.
[5] Ind. Const. Art. 1, Section 23.
[6] U.S. Const. Amend. XIV, § 1.
[7] *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (citing *F.S. Royster Guano Co v. Va.*, 253 U.S. 412, 415 (1920)).
[8] *City of Evansville v. V. Zirkelbach*, 662 N.E.2d 651, 653 (Ind. Ct. App. 1996) (citing *Boyle v. Kosciusko County*, 565 N.E.2d 1157, 1159 (Ind. Ct. App. 1991)).
[9] *Matter of Tina T.*, 579 N.E.2d 48, 56 (Ind. 1991).
[10] *Id.*
[11] *Id.*
[12] *Platt v. State*, 664 N.E.2d 357, 364 (Ind. Ct. App. 1996) *trans denied, cert. denied*, 50 U.S. 1187 (1997).
[13] *Id.* (citation omitted).
[14] *Id.*
[15] *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 440 (1985).
[16] *Plyer v. Doe*, 457 U.S. 202, 232 (1982) (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 61 (1973) (Stewart, J. concurring)).
[17] *Panhandle E. Pipeline Co. v. Madison County Drainage Bd.*, 898 F. Supp. 1302, 1315 n.6 (S.D. Ind. 1995).
[18] *Shepler v. State*, 758 N.E.2d 966, 969 (Ind. Ct. App. 2001) (citing *State v. Alcorn*, 638 N.E.2d 1242, 1244 (Ind. 1994)).
[19] *Collins v. Day*, 644 N.E.2d 72, 75.
[20] *Id.*
[21] *Matter of Tina T.*, 579 N.E.2d 48, 56.
[22] *Id.*
[23] Ind. Const. Art. I, Section 23.
[24] *Collins*, 644 N.E.2d 72, 80.
[25] *Id.*
[26] *Id.* at 79 - 80 (citations omitted).
[27] *Id.* at 80 (citing *Chaffin v. Nicosia*, 310 N.E.2d 867, 869 (Ind. 1974)).
[28] *See Hall Drive Ins., Inc. v. City of Fort Wayne*, 773 N.E.2d 255 (Ind. 2002). Restaurant contained a general dining area, and separate but not fully enclosed tavern under one roof. Found: The architectural arrangement did not carry the inherent characteristic of being able to almost eliminate the exposure of secondhand smoke to children and unwilling adults while dining. *Id.* The Court found to grant this business owner the exception "would be contrary to the express purpose of the ordinance to reduce the exposure of children to second-hand smoke." *Id.* at 258.

OFFICE OF THE ATTORNEY GENERAL

August 12, 2003

OFFICIAL OPINION 2003-7

Mr. Charles Johnson, III, C.P.A.
State Examiner
State Board of Accounts
302 West Washington Street
4th Floor, Room E418
Indianapolis, Indiana 46204-2765

RE: Political Subdivision Establishment of Rainy Day Funds

Dear Mr. Johnson:

You requested an advisory opinion concerning the application of Indiana Code Sections 36-1-8-5 and 5.1 concerning the establishment of rainy day funds by political subdivisions. Our office withheld issuing an advisory opinion pending the outcome of legislative action taken in 2003.

As you may be aware, two separate acts were passed during the 2003 legislative session which amended Section 36-1-8-5.1. First, Public Law 173-2003 (House Enrolled Act 1242) was signed by Governor O'Bannon on May 7, 2003. Subsequently, Public Law 267-2003 (Senate Enrolled Act 166) was signed by the Governor on May 8, 2003. Pursuant to the established rule of statutory construction, when two inconsistent acts are passed by the same session of the legislature, the more recently passed statute is controlling.[1] Therefore, because Public Law 267-2003 was passed subsequent to Public Law 173-2003, it is effective.

This advisory opinion focuses on the questions that you originally submitted which still appear to be relevant even with the 2003 legislative changes to the pertinent statutes. Please contact my office should you have additional questions or concerns with respect to the 2003 legislative changes or regarding the information included in this opinion.

This letter is our response to your request for an opinion on the following issues:

1. Whether the sources of a rainy day fund established by a political subdivision under Indiana Code Section 36-1-8-5 and -5.1 are limited to funds raised by a general or special tax levy.

2. Whether, pursuant to Indiana Code Section 36-1-8-5(b), the fiscal body of a political subdivision is required to transfer the entire balance of an unused fund or whether the fiscal body may transfer only a portion of the fund.

3. Whether Indiana Code Section 36-1-8-5.1(c) allows a political subdivision to transfer ten percent (10%) of the total budget for each fund or ten percent (10%) of the total budget for all funds combined.

4. Whether the reference to "intent" in Indiana Code Section 36-1-8-5.1(b) is a reference to the intent of the fund from which the balance was transferred or the intent of the rainy day fund. In addition, you asked how rainy day funds may be used or whether there are limits to such use.

5. Whether a political subdivision that has transferred money from a statutorily created fund with specific statutory restrictions into a rainy day fund is able to make disbursements for a purpose other than as provided by the originating fund's statutory restrictions.

6. How the requirement of Indiana Code Section 36-1-8-5(b), indicating the purpose of a tax levy be "fulfilled," may be applied to transfers to the rainy day fund under Indiana Code Section 36-1-8-5.1

BRIEF ANSWERS

1. The sources of a rainy day fund established by a political subdivision are limited to funds raised by a general or special tax levy under Indiana Code Section 36-1-8-5, or supplemental distributions made by the Indiana Department of Revenue from various county accounts under Indiana Code Section 36-1-8-5.1(a)(2)-(4).

2. The fiscal body of a political subdivision is required to transfer the entire balance of an unused fund under Indiana Code Section 36-1-8-5 to either its general fund or a rainy day fund, but certain limitations apply. Per fiscal year, the amount transferred to a rainy day fund may not exceed ten percent (10%) of the political subdivision's total budget. The transfer may occur only when no other statute provides that the unused funds are to be transferred elsewhere.

3. The statutory reference to "ten percent (10%) of the political subdivision's total budget" in Indiana Code Section 36-1-8-5.1(c), indicates the capped amount a political subdivision may transfer into a rainy day fund (under Indiana Code Section 36-1-8-5) is ten percent (10%) of the total budget for all of the political subdivision's funds combined.

4. The reference to "intent" in Indiana Code Section 36-1-8-5.1(b) is a reference to the intent of the rainy day fund. Rainy day funds are intended to be used during times of economic downturn in order to stabilize a political subdivision's budget so that

spending may be maintained without increasing taxes. Therefore, any appropriation consistent with that general intent would be proper.

5. Indiana Code Section 36-1-8-5(b) indicates that unused balances of funds may be transferred to the rainy day fund "unless a statute provides that it be transferred otherwise." Therefore, the original statute creating the fund from which the transfer may come is controlling as to any limitations or directions concerning the transfer of the unused funds. Once appropriately transferred to the rainy day fund, disbursements need only be for a use that is consistent with the intent of the rainy day fund and any previous statutory restrictions do not apply.

6. The determination concerning whether the purpose of a tax levy has been fulfilled should be based on an analysis of the specific provisions of the appropriation act and its stipulations concerning the purpose and use of the funds appropriated.

ANALYSIS

I. Overview:

"Rainy day funds," also commonly referred to as budget stabilization funds, are budgetary tools used by state and local government entities. "Rainy day funds" act as a savings account used to stabilize a budget so that spending may be maintained during times of economic downturn and revenue shortfalls without requiring an increase in taxes.[2] The funds can be used as a cushion during a period of recession while more long-term restructuring can be debated and implemented.[3]

As an analogy, the State of Indiana has established a rainy day fund, referred to as the "Counter-Cyclical Revenue and Economic Stabilization Fund." The stated purpose of the fund is to assist in the stabilization of revenue during periods of economic recession.[4] The fund is administered by the state treasurer who may combine amounts in the fund with other monies "for the purposes of cash management."[5]

The statute granting political subdivisions the authority to create a rainy day fund is not as detailed as the state statute establishing the state's "Counter-Cyclical Revenue and Economic Stabilization Fund." The pertinent statutes regarding the rainy day funds are set out below (2003 legislative amendments are italicized):

36-1-8-5 Funds raised by general or special tax levy; disposition of unused balance

Sec. 5. (a) This section applies to all funds raised by a general or special tax levy on all the taxable property of a political subdivision.
(b) Whenever the purposes of a tax levy have been fulfilled and an unused and unencumbered balance remains in the fund, the fiscal body of the political subdivision shall order the balance of that fund to be transferred as follows, unless a statute provides that it be transferred otherwise:
(1) Funds of a county, to the general fund or rainy day fund of the county, as provided in section 5.1 of this chapter.
(2) Funds of a municipality, to the general fund or rainy day fund of the municipality, as provided in section 5.1 of this chapter.
(3) Funds of a township for redemption of poor relief obligations, to the poor relief fund of the township or rainy day fund of the township, as provided in section 5.1 of this chapter.
(4) Funds of any other political subdivision, to the general fund or rainy day fund of the political subdivision, as provided in section 5.1 of this chapter. However, if the political subdivision is dissolved or does not have a general fund or rainy day fund, then to the general fund of each of the units located in the political subdivision in the same proportion that the assessed valuation of the unit bears to the total assessed valuation of the political subdivision.
(c) Whenever an unused and unencumbered balance remains in the civil township fund of a township and a current tax levy for the fund is not needed, the township fiscal body may order any part of the balance of that fund transferred to the debt service fund of the school corporation located in or partly in the township; but if more than one (1) school corporation is located in or partly in the township, then any sum transferred shall be transferred to the debt service fund of each of those school corporations in the same proportion that the part of the assessed valuation of the school corporation in the township bears to the total assessed valuation of the township.
(d) Transfers to a political subdivision's rainy day fund must be made after the last day of the political subdivision's fiscal year and before March 1 of the subsequent calendar year.[6]

36-1-8-5.1 Rainy day funds established by political subdivisions
Sec. 5.1. (a) A political subdivision may establish a rainy day fund to receive transfers of unused and unencumbered funds under:
(1) section 5 of this chapter*;*
(2) IC 6-3.5-1.1-21.1;

(3) IC 6-3.5-6-17.3; and
(4) IC 6-3.5-7-17.3.
(b) The rainy day fund is subject to the same appropriation process as other funds that receive tax money. Before making an appropriation from the rainy day fund, the fiscal body shall make a finding that the proposed use of the rainy day fund is consistent with the intent of the fund.
(c) In any fiscal year, a political subdivision may transfer under *section 5 of this chapter* not more than ten percent (10%) of the political subdivision's total budget for that fiscal year to the rainy day fund.
(d) The department of local government finance may not reduce the actual or maximum permissible levy of a political subdivision as a result of a balance in the rainy day fund of the political subdivision.[7]

To summarize, the above statutes give a political subdivision the general authority to establish a rainy day fund comprised of leftover funds raised by general or special tax levies under Indiana Code Section 36-1-8-5, or from supplemental distributions made by the Indiana Department of Revenue from various county accounts.[8] The fund is "subject to the same appropriation process as other funds that receive tax money."[9] Specifically, the fiscal body of the political subdivision must make a finding that the use of the rainy day fund is consistent with the "intent of the fund" before making an appropriation.[10] The statute sets a cap on the amount that a political subdivision may transfer under Section 5 to the rainy day fund in any fiscal year.[11] Finally, the Department of Local Government Finance is instructed not to reduce the actual or maximum permissible levy of a political subdivision based on the balance in the rainy day fund.[12]

When the meaning of a statute is ambiguous, the rules of statutory construction are useful. First and foremost, one should determine the intent of the legislature.[13] The words of a statute are to be given their plain and ordinary meaning.[14] One must presume the legislature is aware of existing statutes in the same area when it enacts a statute.[15] Related statues should be construed together to give force and effect to each statute.[16] The "goals of the statute and the reasons and policy underlying the statute's enactment" should be considered.[17] Statutes of a general nature may be modified or limited to the extent that a later more specific statute is inconsistent with the earlier enactment.[18] The latter of two statutes covering the same subject is controlling as to any conflicting provision.[19]

Given the generally accepted definition of "rainy day funds" for state and local governmental purposes, the general intent of the legislature in enacting Indiana Code Sections 36-1-8-5 and 5.1 was presumably to grant political subdivisions the authority to preserve certain leftover revenue for locally related uses during economic downturns. By enacting the statute, the legislature has determined that allowing local entities to create rainy day funds furthers a legitimate public purpose.

The emphasis on empowering the local government to run its own affairs is a consistent trend of the state legislature. In 1980, the legislature adopted the Home Rule Act. Under the Act, a local unit of government is granted broad authority, with few exceptions, to adopt any local law needed "for the effective operation of government as to local affairs."[20] A local unit may legislate only when given specific authority to do so in the enacting statute.[21] Indiana Code Section 36-1-8-5.1 gives the local units of government such authority to create and use the rainy day funds within the statutorily created guidelines.

II. The Sources for a Political Subdivision's Rainy Day Funds:

First, you asked whether sources of the rainy day funds are limited to funds raised by a general or special tax levy. The changes in 2003 indicate that rainy day funds may be comprised of leftover funds raised by a general or special tax levy under Indiana Code Section 36-1-8-5, or from supplemental distributions made by the Indiana Department of Revenue from various county accounts described at Indiana Code Section 36-1-8-5.1(a)(2)-(4).

You also asked how the requirement at Indiana Code Section 36-1-8-5(b) indicating that the purpose of the tax levy be "fulfilled" applies to a transfer to a rainy day fund under that statute. Such a determination must be made with respect to the specific provisions of the appropriation act and the stipulations concerning the purpose and use of the funds appropriated.[22]

You questioned when the purpose of a "general fund tax levy" would ever be fulfilled for a transfer under Indiana Code Section 36-1-8-5. In interpreting a statute, one must presume the legislature "intended the language used in the statute to be applied logically and was not intended to bring about an unjust or absurd result."[23] The most logical interpretation of "general tax levy" under Indiana Code Section 36-1-8-5 is not as a general tax levy used through the general fund for usual and ordinary expenses of government. In this instance, "general or special tax levy" most likely means a levy for a special reason raised "either by an assessment on real estate specially benefited, or by a general tax on all the property, real and personal located in the taxing district."[24] In other words, in the context of the statute, "general" most logically is used to describe not a general fund tax levy, but a special tax levy that is levied generally on all property or persons in the taxing district.

III. The Statutory Limitations on Transfers to the Rainy Day Fund under Indiana Code Section 36-1-8-5:

Second, you asked whether the fiscal body of a political subdivision is required to transfer the entire balance of an unused fund under Indiana Code Section 36-1-8-5, or whether only a portion of the unused balance may be transferred to a rainy day fund. The statute provides that the unused balances "shall" be transferred into the general fund "or" the rainy day fund in accordance with Section 5.1, "unless a statute provides that it be transferred otherwise."[25] The use of the term "shall" in a statute implies a mandatory obligation.[26] The use of the conjunction "or" is a signal that indicates an alternative exists.[27] Based on the statutory direction, a political subdivision is required to transfer leftover balances from funds raised by general or special tax levies to either the political subdivision's general fund or the rainy day fund, but certain limitations apply.[28]

The statute sets out three limitations on transfers to a rainy day fund under Section 5. First, Section 5.1 clarifies that per fiscal year, total transfers into a rainy day fund under Indiana Code Section 36-1-8-5 may not exceed ten percent (10%) of the political subdivision's total budget in any given fiscal year, as clarified below.[29] Second, the leftover unused and unencumbered funds may be transferred to either the general fund or the rainy day fund; nothing in the statute would appear to prohibit a political subdivision from dividing the amount transferred between its general fund and rainy day fund if the political subdivision so chose.[30] Third, a transfer of funds may occur only when no other statute provides that the unused and unencumbered funds are to be used in another manner.[31]

The statutes do not set a limit on the ultimate size a rainy day fund may reach; however, Section 5.1(c) sets a cap on the amount a political subdivision may transfer into a rainy day fund in any given fiscal year under Indiana Code Section 36-1-8-5. The statute indicates no more than ten percent (10%) of the "political subdivision's total budget" for the fiscal year may be transferred to the rainy day fund. You asked whether: 1) the language of the statute means the amount to be transferred is capped at ten percent (10%) of the total budget per individual fund, resulting in no more than ten percent (10%) of any fund being transferred; or 2) whether the amounts to be transferred are capped at ten percent (10%) of the total budget for all of the political subdivision's funds combined, which could result in a transfer of more than ten percent (10%) from a single fund, but only if the amount transferred is not more than ten percent (10%) of the subdivision's total budget. In the statutory language, the possessive form of "political subdivision" modifies "total budget." The legislature chose only the term "budget" and not the term "fund" when delineating what sets the cap. Given its plain and ordinary meaning, "political subdivision's total budget for that fiscal year" would appear to imply an all-inclusive total of all of the political subdivision's funds combined. Therefore, if ten percent (10%) of a fund's balance is $10,000, but ten percent (10%) of the political subdivision's total budget is $100,000, the subdivision may transfer $100,000 from the fund into its rainy day fund.

IV. Acceptable Appropriations from the Rainy Day Fund:

You also asked for clarification regarding the language of Section 5.1(b) which deals with appropriations from a rainy day fund by the political subdivision.[32] That section indicates that a fiscal body must make a finding that any appropriation from its rainy day fund is for a use that is "consistent with the intent of the fund."[33] You asked whether the statute refers to the intent of the rainy day fund or the original intent of the fund from which the balance was transferred. Within Section 5.1(b), the word "fund" is modified by the adjective "rainy day" twice within the same sentence. Once modified within the sentence, it is appropriate to assume the same modification applies to the noun thereafter. Had the legislature intended to refer to another type of fund within the same sentence, presumably it would have used another adjective to describe "fund." Therefore, a fiscal body must make a finding that any appropriation from a rainy day fund is for a use that is consistent with the intent of the rainy day fund. Rainy day funds are intended to be used during times of economic downturn in order to stabilize a budget so that spending may be maintained without a tax increase. Any appropriation during an economic downturn which is consistent with that general intent would be appropriate.

You also asked whether it is proper for a political subdivision to transfer amounts in funds raised by general or special tax levies for a specific purpose to a rainy day fund where the funds may ultimately be used for other purposes. Indiana Code Section 36-1-8-5(b) indicates that unused and unencumbered balances of funds raised by general or special tax levies shall be transferred to the general fund or rainy day fund of the subdivision "unless a statute provides that it be transferred otherwise." Therefore, the original statute creating the fund from which the transfer may occur is controlling as to any limitations or directions concerning the transfer of unused funds. The legislature maintains "full power and control over the disposition of revenues derived from taxation, except when there exists some constitutional provision to the contrary, and this power extends to such taxes as are raised by the political subdivisions of the state under the authority of the state."[34] Therefore, barring any legislative direction providing that the unused funds be transferred elsewhere, the funds should be transferred into the political subdivision's general or rainy day fund. Once deposits are made into the rainy day fund, nothing would prohibit a disbursement from the rainy day fund for a purpose outside of those for which the unused funds were originally raised. According to the statutory language, disbursements from the rainy day

fund need only be for a use that is consistent with the intent of the rainy day fund, i.e., as noted previously, to provide relief during economic downturns.[35]

CONCLUSION

In summary, the above information is intended to provide you with some guidance as to the implementation of Indiana Code Sections 36-1-8-5 and -5.1 until the legislature amends the existing statues or enacts a more specific statute regarding rainy day funds. Political subdivisions should be encouraged to develop policies to guide the creation, maintenance and use of rainy day funds for stabilization purposes.

Sincerely,

Stephen Carter
Attorney General

Rebecca Walker
Deputy Attorney General

[1] *Baldwin v. Reagan*, 715 N.E.2d 332, 340 (Ind. 1999).
[2] Nat'l Assoc. State Budget Officers, *Budget Processes in the States* 43-44 (Jan. 2002).
[3] *Id.* at 44. In addition to rainy day funds, state and local governments also often have "contingency funds." Contingency funds are often used primarily for disaster relief or unforeseen expenditures.
[4] Ind. Code § 4-10-18-2.
[5] *Id.*
[6] Ind. Code § 36-1-8-5 (1980), Pub. L. No. 211, Sec. 1. Amended by Pub. L. No. 251-2001, Sec. 1 and Pub. Law. No. 173-2003, Sec. 18.
[7] Ind. Code § 36-1-8-5.1 (2001), Pub. L. No. 251-2001, Sec. 2. Amended by Pub. L. No. 90-2002, Sec. 461, Pub. L. No. 173-2003, Sec. 18, and Pub. L. No. 267-2003, Sec. 15.
[8] Ind. Code §§ 36-1-8-5—5.1.
[9] Ind. Code § 36-1-8-5.1(b).
[10] *Id.*
[11] Ind. Code § 36-1-8-5.1(c).
[12] Ind. Code § 36-1-8-5.1(d).
[13] *MDM Inv. v. City of Carmel*, 740 N.E.2d 929, 934 (Ind. Ct. App. 2000).
[14] Ind. Code §1-1-4-1(1); *See Town of Merrillville v. Merrillville Conservancy Dist.*, 649 N.E.2d 645, 649 (Ind. Ct. App. 1995).
[15] *Town of Merrillville*, 649 N.E.2d at 649.
[16] *Ind. Waste Sys., Inc. v. Bd. of Comm'rs of the County of Howard, Ind.*, 389 N.E.2d 52, 59 (Ind. App. 1979).
[17] *Hall Drive Ins, Inc. v. City of Fort Wayne*, 773 N.E.2d 255, 257 (Ind. 2002).
[18] *Etherton v. Wyatt*, 293 N.E.2d 43, 49 (Ind. App. 1973).
[19] *Ind. Waste Sys., Inc.,* 389 N.E.2d at 59.
[20] Ind. Code § 36-1-3-2.
[21] *City of Hammond v. N.I.D. Corp*., 435 N.E.2d 42, 48 (Ind. Ct. App. 1982).
[22] *See Ristine v. State of Indiana*, 20 Ind. 328 (1863).
[23] *Ind. Ins. Guar. Ass'n v. Blickensderfer*, 778 N.E.2d 439, 442 (Ind. Ct. App. 2002) (citing *Civil Rights Comm'n v. County Line Park, Inc*., 738 N.E.2d 1044, 1048 (Ind. 2000)).
[24] *South Bend Pub. Transp. Corp. v. City of South Bend*, 428 N.E.2d. 217, 221 (Ind. 1981) (citing *Dep't of Pub. Sanitation of the City of Hammond v. Solan*, 97 N.E.2d 495, 500 (Ind. 1951)).
[25] Ind. Code § 36-1-8-5.
[26] *Ind. Civil Rights Comm'n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 947 (Ind. 1999).
[27] *Field v. Area Plan Comm'n. of Grant County, Ind.,* 421 N.E.2d 1132, 1137 (Ind. Ct. App. 1981).
[28] These same limitations would not appear to apply to supplemental distributions made by the Indiana Department of Revenue under Indiana Code Section 36-1-8-5.1(a)(2)-(4).
[29] Ind. Code § 36-1-8-5.1(c).
[30] Ind. Code § 36-1-8-5(b).
[31] *Id.*

[32] Ind. Code § 36-1-8-5.1(b).
[33] *Id.*
[34] *South Bend Pub. Transp. Corp.*, 428 N.E.2d 224.
[35] IND. CODE § 36-1-8-5.1(b).

OFFICE OF THE ATTORNEY GENERAL

August 27, 2003

OFFICIAL OPINION 2003-8

The Honorable Ralph Ayres
Indiana House of Representatives
Indiana State House
Indianapolis, Indiana 46204

RE: Redevelopment Commission's Acquisition and Disposition of Property

Dear Representative Ayres:

This letter responds to your request for an opinion on the following question:

> Is a redevelopment commission of a unit (county, city or town), created pursuant to Indiana Code section 36-7-14-3, separate from such unit, and therefore able to acquire and dispose of property and appropriate non-property tax revenues for purposes of redevelopment or economic development within the boundaries of the unit, without the approval of the legislative body of that unit?

BRIEF ANSWER

Although initially established by a unit of government, a redevelopment commission created pursuant to Ind. Code § 36-7-14-3 is a special taxing district and a political subdivision, and not merely an agency of the unit. Redevelopment commissions have been granted broad powers by the General Assembly regarding acquisition and disposition of property, issuance of bonds for redevelopment, and the general conduct of business. Ind. Code chapter 36-7-14 contains comprehensive and detailed sections governing the powers of a redevelopment commission, its acquisition and disposition of property, and the various mechanisms available for funding its activities. While approval of the fiscal or legislative body of the establishing unit is required for some transactions, other transactions do not require such approval.

ANALYSIS

A redevelopment commission is established by a unit of local government and funded in part by a special benefits tax:

> (a) A unit may establish a department of redevelopment controlled by a board of five (5) members to be known as "__________ Redevelopment Commission", designating the name of the municipality or county.
> (b)... [A]ll of the territory within the corporate boundaries of a municipality constitutes a taxing district for the purpose of levying and collecting special benefit taxes for redevelopment purposes as provided in this chapter.... [A]ll of the territory in a county, except that within a municipality that has a redevelopment commission, constitutes a taxing district for a county.
> (c) All of the taxable property within a taxing district is considered to be benefited by redevelopment projects carried out under this chapter to the extent of the special taxes levied under this chapter

Ind. Code § 36-7-14-3. Once established,

> redevelopment commissions constitute special taxing districts and are not independent municipal corporations subject to Indiana constitutional debt limitations.

South Bend Public Transportation Corporation v. City of South Bend, 428 N.E.2d 217 (Ind. 1981); *Alanel Corporation v. Indianapolis Redevelopment Commiss*ion, 154 N.E.2d 515 (Ind. 1958). *See also* 1989 Ind. OAG No. 3 ("A city department of redevelopment established pursuant to Indiana Code Section 36-7-14-3 is a special taxing district.")

Although sometimes characterized as a department of the establishing municipality or county, *see, e.g.,* Ind. Code § 36-7-14-19(c) (instruments conveying title to land shall be to "the 'City (Town or County) of _____ for the use and benefit of its department of redevelopment'"); Ind. Code § 36-7-14-20(a) (petitions for eminent domain filed "in the name of the unit on behalf of the department of redevelopment"); Ind. Code § 36-7-14-28 (budget for tax levy shall be formulated and filed "in the same manner as executive departments of the unit are required to formulate and file budgets. This budget is subject to review and modification in the same manner as the budgets and tax levies formulated by executive departments of the unit."), the powers of a redevelopment Commission are quite broad.

Among other powers, a redevelopment commission may:

> (1) acquire by purchase, exchange, gift, grant, condemnation, or lease, or any combination of methods, any personal property or interest in real property needed for the redevelopment of blighted areas located within the corporate boundaries of the unit;
> (2) hold, use, sell (by conveyance by deed, land sale contract, or other instrument), exchange, lease, rent, or otherwise dispose of property acquired for use in the redevelopment of blighted areas on the terms and conditions that the commission considers best for the unit and its inhabitants;
> (3) sell, lease, or grant interests in all or part of the real property acquired for redevelopment purposes to any other department of the unit or to any other governmental agency for public ways, levees, sewerage, parks, playgrounds, schools, and other public purposes on any terms that may be agreed on;...
> (19) expend, on behalf of the special taxing district, all or any part of the money of the special taxing district;...
> (22) accept loans, grants, and other forms of financial assistance from the federal government, the state government, a municipal corporation, a special taxing district, a foundation, or any other source.....

Ind. Code § 36-7-14-12.2.

Adding detail to the general powers granted by Indiana Code § 36-7-14-12.2, the General Assembly has provided that certain actions of a redevelopment commission require approval of the unit's executive and legislative bodies. For example, a redevelopment commission "may not proceed with the acquisition of a blighted area until the approving order of the plan commission is issued and approved by the municipal legislative body or county executive." Ind. Code § 36-7-14-16(b). In order to receive such approval, a redevelopment commission must have first submitted a comprehensive package of documentation, including maps and plats of the blighted area and an estimate of the cost of acquisition and development. Ind. Code section 36-7-14-15.

In addition, a redevelopment commission may enter into a lease (as opposed to purchase) of a property to serve the public purpose only with the approval "by an ordinance of the fiscal body of the unit." Ind. Code § 36-7-14-25.2(c). For such a lease,

> (f) A redevelopment commission entering into a lease payable from allocated taxes under [Ind. Code § 36-7-14-39] or other available funds of the redevelopment commission may:
> (1) pledge the revenue to make payments under the lease pursuant to IC 5-1-14-4; and
> (2) establish a special fund to make the payments.
> (g) Lease rentals may be limited to money in the special fund so that the obligations of the redevelopment commission to make the lease rental payments are not considered debt of the unit or the district for purposes of the Constitution of the State of Indiana.

Ind. Code §36-7-14-25.2 (f) and (g). Further, "except as provided" in the statutory sections cited above, "no approvals of any governmental body or agency are required before the redevelopment commission enters into a lease under this section." Ind. Code §36-7-14-25.2 (h). Petitions objecting to leases paid for by the levy of special benefits taxes are heard by the Department of Local Government Finance, whose decision is final. Ind. Code § 36-7-14-15.2(e). It is important to note that Ind. Code §36-7-14-25.2 (f) and (g) is applicable only when the redevelopment commission will be the lessee and lease payments flow from the commission to a landlord; those subsections are not applicable when it is the redevelopment commission that is the landlord.

Otherwise, the statutes do not require a redevelopment commission to obtain approval of the municipality or county in acquiring property, although the commission is required to make certain filings from time-to-time. *See, e.g.,* Ind. Code § 36-7-14-13 (annual report to be filed with unit's executive); Ind. Code § 36-7-14-17(b) (hearing notices); Ind. Code § 36-7-14-17(c) (declaratory resolutions and other information relating to property tax allocations); Ind. Code § 36-7-14-28 (budget for tax levy).

Certain other activities of a redevelopment commission require the approval of the Department of Local Government Finance. For example, "[a]ll laws relating to the giving of notice of the issuance of bonds, the giving of notice of a hearing on the

appropriation of the proceeds of the bonds, the right of taxpayers to appear and be heard on the proposed appropriation, and *the approval of the appropriation by the department of local government finance* apply to all bonds issued under this chapter that are payable from the special benefits tax levied pursuant to section 27 of this chapter or from taxes allocated under section 39 of this chapter" Ind. Cod § 36-7-14-25.1(k). Furthermore, a redevelopment commission may borrow money in anticipation of receipt of taxes by issuing warrants the amount of which has been certified or approved the department of local government finance. Ind. Code § 36-7-14-27.5, and it is the Department of Local Government Finance (and the State Board of Accounts) that makes "the rules and prescribe[s] the form and procedures they consider expedient for the implementation" of the distribution and allocation of property taxes in support of a redevelopment commission. Ind. Code § 36-7-14-39(h).

In the case of special tax levies for bonds issued by a redevelopment commission and leases entered into pursuant to Ind. Code § 36-7-14-25.2, such "tax levies... are reviewable by other bodies vested by law with the authority to ascertain that the levies are sufficient to raise the amount that, with other amounts available, is sufficient to meet the payments under the lease payable from the levy of taxes." Ind. Code § 36-7-14-27(e).

As far as the disposal of property is concerned, the statutes do not require approval of the legislative body of the unit. The statute generally governing the disposal of real or personal property by a political subdivision[1] does not apply "to the disposal of property by a redevelopment commission established under IC 36-7." Ind. Code § 36-1-11-1(a)(4). Moreover, while Ind. Code § 36-7-14-22 requires a redevelopment commission to follow appraisal, notice and bidding procedures quite similar to those required of a municipality, it may ultimately execute a deed, lease, land sale contract and other conveyances, "in the name of 'City (or Town or County) of ___________________, Department of Redevelopment'" and such instrument "shall be signed by the president or vice president of the redevelopment commission and attested by its secretary. A seal is not required on these instruments or any other instrument executed in the name of the department." Ind. Code § 36-7-14-22(i).

When a redevelopment commission seeks the benefit of a property tax levy, it is required by Ind. Code § 36-7-14-28 (b) to formulate and file a budget. This property tax levy budget is subject to review and modification "in the same manner as the budgets and tax levies formulated by executive departments of the unit" by the legislative branch. Tax levy revenues obtained for the payment of land, rights-of-way, or other acquisition costs must be deposited in the redevelopment district capital fund; other revenues obtained from the tax levy are to be deposited in the redevelopment district general fund. Ind. Code § 36-7-14-28 (c). No such budget submission and review is required for non-property tax revenues.

A redevelopment commission may enter into a lease under Ind. Code § 36-7-14-25.2(c) either "payable from allocated taxes under [Ind. Code § 36-7-14-39]" or *other available funds of the redevelopment commission")* (emphasis added).

CONCLUSION

Although initially established by a unit of government, a redevelopment commission created pursuant to Ind. Code § 36-7-14-3 is a special taxing district and a political subdivision, and not merely an agency of the unit. Recognizing that "the planning, replanning, development, and redevelopment of economic development areas are public and governmental functions that cannot be accomplished through the ordinary operations of private enterprise", Ind. Code § 36-7-14-2.5(a), redevelopment commissions have been granted broad powers by the General Assembly regarding acquisition and disposition of property, issuance of bonds for redevelopment, and the general conduct of business. Ind. Code chapter 36-7-14 contains comprehensive and detailed sections governing the powers of a redevelopment commission, its acquisition and disposition of property, and the various mechanisms available for funding its activities. While approval of the fiscal or legislative body of the establishing unit is required for some transactions, other transactions do not require such approval.

Sincerely,

Stephen Carter
Attorney General

Gregory F. Zoeller
Deputy Attorney General

[1] "Political subdivision" means municipal corporation or special taxing district. Ind. Code § 36-1-2-13.