ORDINANCE 21-2017

AN ORDINANCE TO AUTHORIZE THE MAYOR OF THE CITY OF NEW PHILADELPHIA TO JOIN A COALITION OF MUNICIPALITIES RETAINING SPECIAL COUNSEL FOR PURPOSES OF INITIATING LITIGATION TO CHALLENGE THE CONSTITUTIONALITY OF AMENDMENTS TO CHAPTER 718 OF THE OHIO REVISED CODE RELATING TO MUNICIPAL INCOME TAX, AND DECLARING AN EMERGENCY.

WHEREAS, the Council of the City of New Philadelphia, Ohio recognizes, as a home rule power of local self-government, that municipal income tax administration and collection is vital to health, safety and welfare of the municipality; and

WHEREAS, the City of New Philadelphia, Ohio relies on the revenue from effective municipal income tax administration and collection to provide the services that maintain the health, safety and welfare of the municipality; and

WHEREAS, the Ohio General Assembly has attempted to assert control over the administration and collection of municipal income taxes by claiming that a municipality has no authority to impose an income tax unless it adopts a code in strict compliance with R.C. chapter 718; and

WHEREAS, the established law of Ohio is clear that any such preemption of municipal income tax codes by the State of Ohio violates the Ohio Constitution and home rule provisions that allow a municipal corporation the right to administer and enforce its own municipal income tax; and

WHEREAS, more specifically, the State of Ohio has enacted HB 5 in 2014 comprehensively rewriting the entire municipal income tax law and HB 49 in 2017 authorizing centralized collection by the State of Ohio of municipalities' net profits taxes; and

WHEREAS, the City of New Philadelphia, Ohio desires to assert its home rule authority to control the administration and collection of the municipal income tax, in order to provide for the health, safety and welfare of the municipality; and

NOW, THEREFORE BE IT RESOLVED BY THE COUNCIL OF THE CITY OF NEW PHILADELPHIA, OHIO AS FOLLOWS:

SECTION 1. The Mayor of the City of New Philadelphia, Ohio is authorized to join a coalition of municipalities being formed for the purpose of initiating litigation to challenge the constitutionality of amendments to Chapter 718 of the Ohio Revised Code contained in H.B. 5 and H.B 49, and retain the law firm of Frost Brown Todd LLC as special counsel for the coalition of municipalities.

SECTION 2. This Ordinance shall be an emergency measure necessary for the preservation of the health, welfare and safety of the residents of the City of New Philadelphia, Ohio, such emergency arising from the need for immediate judicial proceedings given that the

effective date of Am. sub. HB 49 is January 1, 2018; WHEREFORE, this Ordinance shall be in full force and effective upon its passage.

PASSED: November 13, 2017

SAM HITCHCOCK
PRESIDENT OF COUNCIL

ATTEST:

JULIE COURTRIGHT
CLERK OF COUNCIL

APPROVED:

MAYOR JOEL B. DAY

SPONSORED BY: FINANCE COMMITTEE

Frost BrownTodd
ATTORNEYS

**Eugene L Hollins**
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September 19, 2017

Interested Municipal Coalition Members

Re: Municipal Coalition to Challenge Centralized Collection and Other Provisions of Ohio Revised Code Chapter 718 Regarding Municipal Income Tax

Dear Mayors, Councilmembers,
and Other Municipal Representatives:

Once again, municipalities in Ohio are faced with an impending deadline to make state-mandated changes to their municipal income tax code. H.B. 49 (the biennial budget bill) contained numerous additional provisions relating to centralized collection of municipal net profits taxes by the Ohio Department of Taxation. According to the bill, if a municipality does not adopt these new provisions by January 2018, that city or village risks losing its authority to collect any income taxes at all.

While municipalities adopted new income tax ordinances in 2015 rather than file litigation to challenge the General Assembly's authority to dictate a uniform municipal income tax code, most if not all ordinances were careful to reserve the right to argue in the future that home rule prohibits the state preempting local income tax ordinances or threatening to invalidate our income tax authority. Given the latest foray by the legislature into our taxing authority, a number of municipalities have decided that we have no option but to challenge the constitutionality of the recent amendments to Chapter 718.

I am enclosing a memorandum regarding Potential Constitutional Challenges to House Bill 49 for your information and consideration. I ani also enclosing a draft ordinance in the event that your municipality desires to join the effort, together with a potential cost sharing proposal. Please do not hesitate to contact me if you have any questions or if I can provide you with any additional information.

Sincerely,

Eugene L Hollins

Enclosures

SCHEDULE OF COST SHARING FOR HB49 LITIGATION

Recent litigation by a coalition of municipalities with regard to small cells and public right of way (HB 331) has provided a potential cost sharing template for use by municipalities interested in challenging the recent municipal income tax code amendments. This template is based on population of cities and villages, and is set forth in the table below.

| Population | | Contribution |
|---|---|---|
| Village | Under 5,000 | $1,000 |
| 5,000 | 10,000 | $2,000 |
| 10,000 | 25,000 | $4,000 |
| 25,000 | 50,000 | $6,000 |
| 50,000 | 75,000 | $8,000 |
| Over 75,000 | | $10,000 |

*Please note that a municipality can choose to either (1) make a contribution without joining the litigation as a named plaintiff, or (2) become a party to the action. To become a party, it will be necessary for FBT to send the municipality an engagement letter and run a conflict check. Certainly, this process is not unduly burdensome and could be completed within the timeframe necessary to include such municipality on the pleadings. For those municipalities desiring to simply make a contribution to the coalition, we will be establishing a municipality to be the holder of deposited funds.

If the litigation successfully concludes with funds st ill remaining, refunds of the retainer amounts will be made on a pro rata basis.

Thank you for your consideration and please do not hesitate to contact me with any questions.

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# MEMORANDUM

To: Interested Municipal Coalition Members

From: Gene Hollins and FBT Government Services Practice Group

Date: September 27, 2017

Re: Potential Constitutional Challenges to House Bill 49

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## I. Background

I House Bill 49 alters the net profit tax by facilitating the centralized filing and administration of the net profit portion of the municipal income tax paid from a business or profession conducted both within and without the boundaries of a municipal corporation . Taxpayers, other than individuals, may now "opt in" and file their net profit municipal income tax returns solely through the State of Ohio Department of Taxation under R.C. 718.80(A).

House Bill 49 also eliminated the "nexus to nowhere" sales provision which established a taxable situs in a municipal corporation if the "property [wa]s shipped from a place within the municipal corporation to purchasers outside the municipal corporation, provided the taxpayer is not, through its own employees, regularly engaged in the solicitation or promotion of sales at the place where delivery is made."

Several Ohio municipalities are considering the formation of a coalition to file a mandamus action in the Ohio Supreme Court, or an injunctive and/or declaratory judgment action in a Court of Common Pleas, against the municipal income tax provisions as set forth in HB 49, as well as the original legislation comprehensively rewriting the municipal income tax statute, HB 5 (enacted in 2014).

## II. Potential Challenges

A. Violation of the Home Rule Amendment

- Municipal power over matters of local self-government is derived from the Constitution. *Gesler v. Worthington Income Tax Bd. of Appeals,* 138 Ohio St.3d 76, 2013-Ohio-4986, ¶17. The Home Rule Amendment to the Ohio Constitution, Article XVII, Section 3 provides that "Municipalities shall have authority to exercise all powers of local self-government * * *."

- With regard to taxing power, "[i]t is well established that '[t]he municipal taxing power is one of the "powers of local self-government" expressly delegated by the people of the state to the people of municipalities," *Id.* at if18, citing *Cincinnati Bell Tel. Co. v. Cincinnati,* 81 Ohio St.3d 599, 605, 693 N.E.2d 212 (1998), and as such is not tested by the well-known home rule "conflict analysis" that is applicable when a municipality exercises its police power.

- Rather, any General Assembly restrictions on local income tax authority must be based on the specific constitutional authority granted the state in two other sections of the Ohio Constitution: Article XIII, Section 6 provides that the General Assembly "shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation * * * so as to prevent the abuse of such power." Second, under Article XVIII, Section 13, "[l]aws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes * * *."*Panther II Transp., Inc. v. Seville Bd. of Income Tax Rev.,* 138 Ohio St.3d 495, 497, 2014-Ohio-1011,,r11c2014).

- The Ohio Supreme Court has consistently held that "[t]he taxing authority of a municipality may be preempted or otherwise prohibited . . . by an express act of the General Assembly." *Cincinnati Bell,* 81 Ohio St.3d at 605 (syllabus). The Ohio Supreme Court has interpreted the requirement of "an express act of restriction" to mean only that the state "does not preempt local taxes merely by enacting a similar tax of its own." *Panther II Transp., Inc.,* 138 Ohio St.3d at 500. "[M]unicipal governments have a plenary power to tax, but the General Assembly has authority to impose specific limits on that power." *Panther II,* 138 Ohio St.3d at ,r 11 (citing *Cincinnati Bell* at 602; *Gesler,* 138 Ohio St.3d 76 at ,r 17, 21).

- Telling statement in uncodified Section 6 of HB 5: *"In order to ensure a fair, stable, and efficient system of local taxation, and to prevent any abuse of power by municipal corporations, the General Assembly hereby exercises its authority under those Articles to restrict the taxing powers of municipal corporations by requiring that any income tax or withholding tax levied by a municipal corporation must be levied in accordance with this act and any provisions of Chapter 718. of the Revised Code that remain unchanged by this act."*

- What if the General Assembly itself chose not to impose a tax (as with income taxation of corporate entities) and therefore did not justify its preemption on a concern about "double taxation" by municipalities? What if the General Assembly attempted instead to simply legislate a rigid template for the exercise by a municipality of its powers of local self-government?

- General Assembly reached beyond its authority to limit or restrict the municipal taxing authority by dictating a code to the municipalities and by authorizing centralized collection of corporate net profits tax.

B. Other Potential Challenges

- Single Subject Rule - Section 15(D), Article II of the Ohio Constitution provides: "No bill shall contain more than one subject, which shall be clearly expressed in its title." Dublin v. State involved a challenge to a rider in the biennial appropriation bill relating to municipal control over public utility use of the right of way. The Court in Dublin stated: "[T]he very fact that such a budgetary need justifies inclusion of many diverse appropriations in an appropriations bill increases the need to exercise caution to avoid violating the single-subjec t rule by adding still more diverse items to the bill that are not so necessarily connected to creating a budget. With so many diverse items already included in the bill, it becomes increasingly incredible that non-appropriation items can be added to the bill without violating the single-subject rule."

- Equal Protection/Uniform Application of Tax - *Youngstown Sheet & Tube Co. v. City of Youngstown*, 91 Ohio App. 431, 108 N.E.2d 571 (Mahoning County 1951), found that the Youngstown income tax was "a denial of equal protection because the tax was imposed on individuals at one rate and on corporations at a substantially higher rate." Under HB 49, taxpayers may now "opt out" complying with the net profits provisions of Chapter 718 administered by the municipal corporation and "opt in" to new Sections 718.80 through 718.95 whereby the state tax commissioner is the sole administrator of each municipal income tax for which the taxpayer is liable. Applying different tax codes to similarly situated taxpayers in a municipality could be challenged, on its face, as violating equal protection.

- Lack of statutory authority - Oddly, the state has no authority to administer the new centralized collection of net profits tax unless it is granted such authority by each and every municipality . Uncodified Section 803.l0O(B) of HB 49 provides: "In accordance with division (A) of section 718.04 of the Revised Code, each municipal corporation shall adopt, by ordinance or resolution, the provisions of sections 718.80 [through] 718.95 of the Revised Code on or before January 31, 2018. Such resolution or ordinance shall specify that the enactment of those provisions applies to taxable years beginning on or after January 1, 2018." The State admits that it has no authority, but forces each municipality to grant it the authority or risk losing its authority to collect income taxes at all. These new provisions are not self-executing.

## III. Writ of Mandamus

Certainly, with respect to statutes of great public interest and widespread impact, there is precedent for an action to be filed directly with the Ohio Supreme Court to determine what are largely questions of law. In *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123 (1999), the Supreme Court considered the constitutionality of the Tort Reform Act. The Supreme Court stated, "This court has previously held that a mandamus action may test the constitutionality of a statute....Moreover, where this court has found a statute unconstitutional it may direct the public bodies or officials to follow a constitutional course in completing their duties." This is especially true where a declaratory judgment action or mandatory injunction in a Court of Common Pleas would not be "complete in its nature, beneficial and speedy."

Given that H.B. 49 imposes deadlines on municipalities to adopt changes as described above within an unreasonable timeline, it is arguable that no remedy other than a writ of mandamus from the Ohio Supreme Court will be effective to provide municipalities relief from an unconstitutional statute. Pending further research, we would recommend filing a mandamus action directly with the Ohio Supreme Court.