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December 11, 2014

VIA HAND DELIVERY

The Honorable David Tandy
Chair, Labor and Economic Development Committee
Louisville Metro Council
601 W. Jefferson Street, Suite 103
Louisville, KY 40202

Re: Response to November 20, 2014 Letter from Neal Hayes

Dear Councilman Tandy:

We are writing to respond to a recent letter from Neal Hayes of Kircher, Suetholz & Grayson, PSC,¹ related to the proposed minimum wage ordinance (the "Proposed Ordinance"). Copies of this correspondence are enclosed for distribution to all Councilmembers.

Contrary to Mr. Hayes's assertions, we have been nothing but transparent in sharing the legal research that underlies our conclusion that Louisville Metro Council ("Metro Council") lacks authority to enact and enforce the Proposed Ordinance. Our purpose in being open has also been clearly and publicly communicated: we want our clients, Metro Council, and Jefferson County taxpayers to avoid an unnecessary, expensive, and time-consuming lawsuit.

Mr. Hayes, however, takes the opposite approach. Not only does he fail to cite a single federal or state court or attorney general opinion that supports his contention that KRS 83.520

¹ Mr. Hayes claims that his letter is not written "on behalf of any client." Hayes Letter, p. 1. Mr. Hayes's law firm's business, however, includes "routinely participat[ing] in organizing drives and political campaigns . . . and strategiz[ing] with workers and their Unions for solutions that do not always require traditional legal methods." See Kircher, Suetholz & Grayson, PSC, "Activism" (2014), available at http://unionsidelawyers.com/?page_id=22 (last visited Dec. 8, 2014). Moreover, minimum wage increases pressure employers that are already paying significantly above the minimum rate, including employers engaged in collective bargaining with unions (Mr. Hayes's clients), to raise pay even higher to avoid wage compression. Therefore, while Mr. Hayes may not have been formally retained by a specific client to write his letter, his agenda is not neutral.

somehow exempts Metro Council from the codified and common law preemption doctrines that limit the authority of all Kentucky municipalities, he justifies his barebones argument by assuring Councilmembers that he is simply avoiding showing his opponents (us) his hand. Hayes Letter, p. 5.

Our response, aimed at providing the information missing from Mr. Hayes's analysis, includes three major points:

- KRS 82.082 determines whether ordinances—enacted by any municipality from Metro Council to cities of the sixth class²—conflict with state law and are therefore preempted;
- While the powers of Metro Council differ by statute from the powers of other cities in some respects, nothing in state law provides Metro Council with the authority to enact its own minimum wage while precluding other cities from taking the same action; and
- Regardless of whether it can be enacted, the problems with the Proposed Ordinance's enforcement mechanism, which Mr. Hayes declined to address, render it useless.

I. KRS 82.082: A Limitation on All Municipal Power

A. Source of Home Rule Authority vs. Preemption Limitation on Power

Mr. Hayes fails to address the role of statutory and common law preemption doctrine in determining whether Metro Council has been delegated authority to enact the Proposed Ordinance. Instead, his conclusions are rooted solely in KRS 83.410 and KRS 83.520, neither of which addresses the dispositive question here: when does state law so occupy the field as to invalidate local legislation? *See* Hayes Letter, p. 3-4.

KRS 67C.101(2)(a) provides a consolidated local government with “all powers . . . that cities of the first class and their counties are . . . authorized to exercise under the Constitution and the general laws of the Commonwealth . . . including . . . home rule powers.”³ Thus, Metro Council possesses the home rule authority granted to it by KRS 67.083 (the county home rule

² In January 2015, House Bill 331—enacted by the General Assembly in the 2014 legislative session—will become effective. This bill eliminates the current municipal classification system and creates a two-class system: (1) cities of the first class, and (2) all other cities. KRS 83.520 and KRS 82.082, according to the final text of the legislation, are not affected. *See* H.B. 331, 2014 Gen. Assemb., Reg. Sess. (Ky. 2014), *available at* <http://www.lrc.ky.gov/record/14RS/HB331.htm> (last visited Dec. 4, 2014).

³ *See* Sheller-Eifler September 11, 2014 Letter, p. 2, n. 2.

statute),⁴ KRS 83.520 (the first-class city home rule statute) and KRS 82.082 (the general city home rule statute).

KRS 83.520, on which Mr. Hayes hinges his argument, provides:

The legislative body of a city of the first class shall have the power to exercise all of the . . . powers . . . not in conflict with the Constitution and so as to provide for the health, education, safety and welfare of the inhabitants of the city. . . .

We agree that, coupled together, the above-referenced statutes extend home rule authority to Metro Council. *See* Sheller-Eifler September 11, 2014 Letter, p. 2, n. 2. Identifying the source(s) of Metro Council's home rule authority, however, is only the first step in determining whether Metro Council can lawfully enact the Proposed Ordinance.

The second step—the step Mr. Hayes skipped—involves analyzing whether Metro Council's use of that power creates a conflict with state law that must be resolved in favor of the Commonwealth. KRS 82.082(2) fleshes out the definition of “conflict”:

A power or function is in conflict with statute if it is expressly prohibited . . . or there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes

Mr. Hayes, however, contends that because KRS 83.520 does not expressly include the “comprehensive scheme” language, Metro Council is not subject to the implied preemption principles in KRS 82.082(2). Hayes Letter, p. 4. As explained in our previous opinion, KRS 82.082(2) is a codified version of common law preemption doctrine⁵ that acts as a “limitation on

⁴ Home rule authority for counties is not addressed in depth in this letter. However, the applicable home rule statute—KRS 67.083—does not provide Metro Council with the authority to enact the Proposed Ordinance either. County powers are “expressly delegated” by the General Assembly, and extend only to certain “functional areas” listed in statute. KRS 67.083(3); *Fiscal Ct. of Jefferson Cnty. v. City of Louisville*, 559 S.W.2d 478, 482 (Ky. 1977) (cautioning that “governmental powers [must be granted] to counties . . . with the precision of a rifle shot and not with the casualness of a shotgun blast”). Additionally, county ordinances must be “necessary for the operation of the county” and must be consistent with state law to be valid. KRS 67.083(3). There is no state law that provides counties with the authority to raise minimum wage beyond the state rate.

⁵ *See* Ky. Op. Att’y Gen. 93-71 (1993) (providing that KRS 82.082(2) “represents nothing more than a codification of rules of law developed by the courts of this Commonwealth in construing the validity of municipal ordinances”); *Sheffield v. City of Ft. Thomas*, 620 F.3d 596, 611 (6th Cir. 2010) (explaining that KRS 82.082(2) is a codification of common law preemption doctrine); Kentucky Legislative Research Commission, Informational Bulletin No. 145: Kentucky Municipal Statutory Law (Nov. 2014), available at <http://www.lrc.ky.gov/lrcpubs/ib145.pdf> (last visited Dec. 3, 2014) (finding KRS 82.082(2) “merely restates the well-established common law in Kentucky on the relationship of local ordinances to state law”).

the exercise of power by all cities”—including cities of the first class and Metro Council. Ky. Op. Att’y Gen. 93-71 (1993); Sheller-Eifler September 11, 2014 Letter, p. 2, n. 2. KRS 82.082 and common law preemption derive from the basic principle that municipal ordinances—whether enacted by Metro Council, or a city of the first through sixth class—“are subordinate to the laws of the state[.]” *Owensboro v. Bd. of Trustees*, 190 S.W.2d 1005, 1008 (Ky. 1945). Therefore, while one of the sources of Metro Council’s home rule authority is KRS 83.520, that grant of power is still limited by KRS 82.082(2).

Mr. Hayes’s argument that the provisions in KRS Chapter 83 giving first-class cities a “complete grant of home rule” that is “broadly construed” exempt Metro Council from KRS 82.082(2) “comprehensive scheme” preemption is entirely unsupported. Hayes Letter, p. 3-4; *see also* KRS 83.410(3); KRS 83.520. As discussed in more detail below, these phrases are meant to provide cities of the first class with more power than lower-class cities related to the inner-workings of municipal government—not exclude them from KRS 82.082(2). Preemption still acts as a limitation on Metro Council’s power, just as it acts as a limitation on all municipal power. *See George v. City of Raceland*, 130 S.W.2d 825, 825-26 (Ky. 1939) (finding that a municipality “possesses only such powers as the state through its legislature has expressly or impliedly conferred upon it and any doubt concerning the existence of a particular power of a municipality is resolved against the municipality”).⁶

Here, the Proposed Ordinance would prohibit conduct explicitly allowed by KRS Chapter 337, a comprehensive system of state laws designed to uniformly address wage and hour issues in Kentucky. *See generally* *Ky. Licensed Beverage Ass’n v. Louisville-Jefferson Cnty. Metro Gov’t*, 127 S.W.3d 647, 649-50 (Ky. 2004). Because there is a conflict with this comprehensive scheme, the Proposed Ordinance would be invalid and unenforceable if enacted as exceeding Metro Council’s home rule authority under KRS 82.082.

B. Supporting Legal Authority

Mr. Hayes excuses his failure to cite any of the readily available authority on these issues due to his unwillingness to reveal his full argument to us. Hayes Letter, p. 5. More likely, he withheld the pertinent information because it supports our position. Rudimentary legal research reveals that both of the Commonwealth’s appellate courts and its chief law enforcement official recognize that KRS 82.082(2) acts as the primary limitation on the home rule authority of Metro Council and first class cities.

For example, in *Kentucky Licensed Beverage Association v. Louisville-Jefferson County Metro Government*, the Kentucky Supreme Court held that under KRS 82.082, Metro Council does not have the authority to assess civil fines against a liquor licensee’s employees because there is already a comprehensive scheme of state law dealing with that issue. 127 S.W.3d at 649,

⁶ This case has been cited for this general principle since the General Assembly enacted the municipal home rule statute in 1980. *See Pinnacle Dev. II, LLC v. RML Constr., LLC*, 410 S.W.3d 169 (Ky. App. 2013); Ky. Att’y Gen. Op. 93-71 (1993).

651.⁷ If Metro Council could have bypassed the comprehensive scheme test under KRS 82.082 by defaulting to its “broader” KRS 83.520 first-class city home rule powers, surely one of the parties, the lawyers, the trial judge, the three Court of Appeals’ judges, or seven justices on the Kentucky Supreme Court would have asserted that argument. KRS 83.520, however, is not cited in the decision.

In another example, the Kentucky Attorney General⁸ directly dismissed the assertion that first-class cities were not subject to statutory preemption in an opinion analyzing the validity of an ordinance regulating the registration and sale of firearms. Ky. Att’y Gen. Op. 93-71 (1993).⁹ The opinion provides:

[C]ities of the first class, like any other city in the Commonwealth . . . , may not exercise a power or function if it is expressly prohibited by a statute or if there is a comprehensive scheme of legislation on the same general subject embodied in the Kentucky Revised Statutes.

See also *City of Louisville v. Michael A. Woods Inc.*, 883 S.W.2d 881, 883 (Ky. App. 1993) (concluding an ordinance enacted by a first-class city was not preempted because “no conflict exists as is proscribed in KRS 82.082(2)”); Ky. Op. Att’y Gen. 11-003 (2011) (finding Metro Council, under KRS 82.082(2), could not enact an ordinance declaring pain clinics unlawful because there was already comprehensive scheme(s) of state law dealing with prescription medication).

Additionally, Mr. Hayes neglects to apprise you of two significant canons of statutory construction that also confirm the conclusion that Metro Council is subject to the same preemption principles as other municipalities. When KRS 82.082 was enacted in 1980, KRS 83.520 had been on the books for eight years. The General Assembly is presumed by law to have known of the earlier statute, KRS 83.520, when it enacted the latter, KRS 82.082. *Haven Point Enter., Inc. v. United Ky. Bank, Inc.*, 690 S.W.2d 393, 395 (Ky. 1985). Therefore, if there is any

⁷ Though three justices dissented from the result, all seven agreed that KRS 82.082 controls whether the ordinance is preempted by state law. *Ky. Licensed Beverage Ass’n*, 127 S.W.3d at 651 (Cooper, J., dissenting) (citing *City of Louisville v. Michael A. Woods, Inc.*, 883 S.W.2d 881 (Ky. App. 1993), which applies KRS 82.082 to analyze whether an ordinance enacted by a first-class city was preempted).

⁸ “An attorney general’s opinion is highly persuasive” *York v. Commonwealth*, 815 S.W.2d 415, 417 (Ky. App. 1991). Courts give “great weight to [an attorney general’s] . . . reasoning and opinion[s.]” *Id.*

⁹ The opinion cites KRS 83.520 but does not interpret it to provide cities of the first class broader home rule authority than other municipalities. Ky. Att’y Gen. Op. 93-71 (1993). Instead, the opinion counts KRS 82.082(2) among the statutes that limit “the breadth of the legislative grant of power contained in KRS 83.520” *Id.*

conflict between the laws, the last to be enacted—KRS 82.082—is given effect over the earlier. *Troxell v. Trammell*, 730 S.W.2d 525, 528 (Ky. 1987).

Moreover, a specific statute preempts a general statute where the two are not in sync. *Id.* Here, KRS Chapter 83 provides that there can be no conflict between state law and ordinances enacted by cities of the first class. KRS 83.410(1); KRS 83.520. The precise meaning of “conflict,” however, must be gleaned from the more specific statute—KRS 82.082(2). That statute explains that “conflict” means direct conflict or action where there is already a comprehensive scheme of state law on the same general subject. Therefore, KRS 82.082(2) controls and the Proposed Ordinance is subject to preemption.

It is worth noting that every attorney¹⁰ and judge to consider this issue so far, with the lone exception of Mr. Hayes, has recognized that KRS 82.082(2) and/or common law preemption doctrine is the controlling law on the matter. Attorneys and judges who disagree on the end result of the preemption question in any particular case all concur that preemption must be addressed. One has to wonder how hundreds of years of combined legal experience, backed by numerous judicial and attorney general opinions, can be wrong and Mr. Hayes (J.D. 2010) can be right.¹¹

II. Other Cities’ Power to Act

Mr. Hayes also dismisses our conclusion that all municipalities within Jefferson County have the authority to enact their own minimum wage if Metro Council has the power to enact the Proposed Ordinance. Hayes Letter, p. 4. He again looks solely to KRS 83.520 for support, arguing that the “complete grant of home rule” provided in that statute coupled with the lack of “comprehensive scheme” language gives Metro Council broader authority to change statewide wage and hour laws than other cities. *Id.* A plain meaning reading¹² of KRS 83.520, however, refutes his argument:

[T]he provisions of KRS Chapter 65, 66, 76, 77, 79, 80, 91, 95, 96, 97, 98, 99, 103, 104, 106, 107, 108 and 109 shall be considered permissive rather than mandatory . . . and any restrictions therein .

¹⁰ Mr. Hayes makes much of our failure to expressly mention KRS 83.520 and implies we did not discuss the statute because it hurts our position. Our initial letter, however, was a response to the Jefferson County Attorney’s August 25, 2014 analysis which relied solely upon KRS 82.082 and also did not mention KRS 83.520.

¹¹ Mr. Hayes acknowledges that a “crafty” lawyer could expose and rebut the flaws in his argument. Hayes Letter, p. 5. On the contrary, even first-year law students understand that single statutory provisions are not considered in isolation from their surrounding legislative and judicial interpretation.

¹² *Wheeler & Clevenger Oil Co., Inc. v. Washburn*, 127 S.W.3d 609, 614 (Ky. 2004) (noting that “[t]he most commonly stated rule in statutory interpretation is that the ‘plain meaning’ of the statute controls”).

. . . shall not be construed as abridging in any manner the complete grant of home rule set forth in this grant of power. . . .

The “complete grant of home rule” provided to cities of the first class is clearly meant to give first-class cities broad authority with respect to statutes within the eighteen KRS Chapters cited, all of which relate to the inner-workings of day-to-day government (*e.g.*, taxation, annexation, fire and police protection, planning and zoning, water services, etc.). That is because cities are granted different powers under these statutes based upon classification, with first-class cities retaining the most power because of their unique responsibilities.¹³ *See, e.g.*, KRS 76.010 (allowing cities of the first and second classes, and the county containing such a city, to establish a joint metropolitan sewer district); KRS 83A.085 (first-class cities are not required to establish the office of city clerk); KRS 96.040 (allowing a city of the first class or consolidated local government to own or operate a utility operated under a franchise). These differing powers relating to municipal government, however, have zero bearing on whether all municipalities—including cities of the first class and Metro Council—are subject to express and implied preemption under KRS 82.082(2).

Further, all cities—including cities of the first class—are granted home rule authority (subject to codified and common law preemption) under KRS 82.082(1). There is no express provision in any of the above-referenced statutes that prohibits any municipality of any class from enacting a local minimum wage law. When Louisville Metro Government was formed, all incorporated cities other than those of the first class remained intact:

All cities other than those of the first class, . . . upon the successful passage of the question to consolidate a city of the first class and its county, shall remain incorporated . . . and *shall continue to exercise all powers* and perform the functions permitted by the Constitution and general laws of the Commonwealth . . . applicable to the cities of the class to which they have been assigned.

KRS 67C.111(1) (emphasis added). Therefore, if Metro Council is legally permitted to enact the Proposed Ordinance, so can every other city within and outside of Jefferson County.

III. Enforcement Problems

Mr. Hayes, like the Kentucky Equal Justice Center,¹⁴ declined to address the issue of enforcement because “if [Metro] Council [cannot] . . . raise the minimum wage, enforcement [is] . . . irrelevant.” Hayes Letter, p. 2. But the opposite truism is exactly why we should confront the

¹³ *See* KRS 83.410(4) (explaining that the powers within KRS Chapter 83 are granted “based upon a legislative finding that the urban crisis cannot be solved by actions of the General Assembly alone, and that the most effective agency for the solution of these problems is the government of a city of the first class”).

¹⁴ The Kentucky Equal Justice Center sent an opinion letter to Metro Council on October 30, 2014. We submitted a response to Metro Council on November 13, 2014.

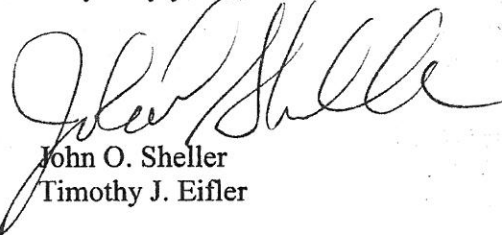
issue now: even if the Proposed Ordinance passes the preemption test, it will be useless, as Metro Council does not have the authority to compel citizens to obey it.

Section VI of the Proposed Ordinance purports to provide a private right of action in court, "authorized [by] KRS 337.020," to any individual aggrieved by a violation of its provisions. This enforcement mechanism, however, exceeds Metro Council's authority. See Sheller-Eifler September 11, 2014 Letter, p. 6. KRS 337.020 only provides relief in the courts or the Kentucky Labor Cabinet for an individual aggrieved by a violation of state law; it does not authorize relief for a violation of some local ordinance. Under well-settled Kentucky law, subject matter jurisdiction of the courts is determined by common law, state statute, and the state Constitution, and the jurisdiction of an administrative agency is "limited to that solely granted by the Legislature." See Ky. Const. §§ 110-113; *Hyatt v. Commonwealth*, 72 S.W.3d 566, 577 (Ky. 2002); *Auxier v. Bd. of Embalmers & Funeral Directors*, 553 S.W.2d 286, 288 (Ky. App. 1977). Metro Council cannot determine what matters a court or administrative agency may hear.

Thus, the enforcement mechanism is invalid, rendering the Proposed Ordinance a meaningless political gesture. Metro Council's time, and taxpayers' money, is better spent on efforts that are meaningful and legally sound.

Once again, we respectfully request that the Metro Council carefully consider these arguments and abandon the Proposed Ordinance. Thank you for your consideration, and please do not hesitate to contact us if you have any questions.

Very truly yours,



John O. Sheller
Timothy J. Eifler

JOS/ml

cc: The Honorable Greg Fischer, Mayor of the City of Louisville (via hand delivery)
The Honorable Mike O'Connell, Jefferson County Attorney (via regular mail)
The Honorable Bill Dieruf, President of the Jefferson County League of Cities (via regular mail)
Jonathan Steiner, Executive Director and CEO, Kentucky League of Cities (via regular mail)
The Honorable Jack Conway, Kentucky Attorney General (via regular mail)
The Honorable Robert Stivers, President of the Kentucky Senate (via regular mail)
The Honorable Greg Stumbo, Speaker of the Kentucky House of Representatives (via regular mail)
The Honorable Joe Bowen, Co-Chairman of the Interim Joint Committee on Local

The Honorable David Tandy

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Government (via regular mail)

The Honorable Steve Riggs, Co-Chairman of the Interim Joint Committee on Local Government (via regular mail)

Kent Oyler, President and CEO of Greater Louisville, Inc. (via e-mail)

Sarah Davasher-Wisdom, VP of Government Affairs & Collaboration, Greater Louisville Inc. (via e-mail)

Stacy Roof, President and CEO of the Kentucky Restaurant Association, Inc. (via e-mail)

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