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To: Mary Ellen Ponder
From: Winston Calvert
Date: May 28, 2015
Subject: Minimum Wage Ordinance

You asked me to prepare an ordinance establishing a minimum wage in the City of St. Louis. The attached ordinance would create a minimum wage, initially setting the minimum wage at \$10.00 per hour and raising the minimum wage gradually each year until it reaches \$15.00 per hour in 2020. Thereafter the minimum wage will be set each year depending on the changes in rate of inflation in the St. Louis metropolitan area. This gradual escalation of the minimum wage is designed to ensure that the economic benefits to workers are achieved while providing businesses time to adjust to paying the increased wage to their workforce. The ordinance also provides exceptions for small businesses and special provisions for certain types of employees like tipped workers. The ordinance, if timely adopted, would be effective before August 28, 2015.

In addition to preparing the ordinance, you asked me to review the legality of the minimum wage ordinance. The City's authority to adopt a minimum wage is well-grounded in the Missouri Constitution and the City Charter. The Missouri Constitution acknowledges that the City has all of the power that the General Assembly would have the ability to confer on a city. Mo. Const. art. VI, § 19(a). Although the City does not need enabling legislation to adopt an ordinance, the General Assembly has recently acknowledged that municipalities may adopt minimum wage ordinances before August 2015. The Charter also gives the City broad authority to regulate business conduct that impacts the health, welfare, and wellbeing of those who live and work here. *See, e.g.*, Charter, at §§ 1(25), (26), (33).

Some have contended that a minimum wage ordinance would be preempted by state law. There is one statute still on the books, § 67.1571, RSMo., that prohibits municipal minimum wage ordinances, but that statute was declared unconstitutional in 2001. The more recent bill passed by the General Assembly acknowledges that municipalities may adopt such ordinances before August 2015. Moreover, the City's minimum wage ordinance would simply supplement the state's minimum wage law and would not be in conflict with the state law. Accordingly, courts should reject any preemption challenge to the City's minimum wage ordinance.

I. The City of St. Louis has the authority to adopt a minimum wage ordinance.

Under the Missouri Constitution, the City has “all powers which the general assembly of the state of Missouri has authority to confer upon any city, provided such powers are consistent with the constitution . . . and are not limited or denied either by the charter . . . or by statute.” Mo. Const. art. VI, § 19(a). The General Assembly has the authority to confer upon any city the power to adopt a minimum wage. *See, e.g., City of Kansas City v. Carlson*, 292 S.W.3d 368 (Mo. App. 2009); *Marshall v. City of Kansas City*, 355 S.W.2d 877 (1962).

The City is further empowered to enact all ordinances that promote the health, safety, peace, comfort, and the general welfare of those who live and work here. *Bezayiff v. City of St. Louis*, 963 S.W.2d 225, 229 (Mo. App. 1997). Thus the City has the general authority to adopt a minimum wage ordinance unless prohibited by state law. *See W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

Finally, the Charter specifically empowers the City to:

- “regulate all acts, practices, conduct, business, occupations, callings, trades, uses of property and all other things whatsoever detrimental or liable to be detrimental to the health, morals, comfort, safety, convenience or welfare of the inhabitants of the city,” Charter, at § 1(25);
- “prescribe limits within which business, occupations and practices liable to be . . . detrimental to the health, morals, security or general welfare of the people may lawfully be established, conducted or maintained,” Charter, at § 1(26); and
- “do all things whatsoever expedient for promoting and maintaining the comfort, education, morals, peace, government, health, welfare, trade, commerce or manufactures of the city or its inhabitants,” Charter, at § 1(33).

The City’s authority to enact a minimum wage ordinance is, therefore, well-grounded in the City’s authority under the Missouri Constitution and the Charter. The City may enact ordinances within this scope of authority without enabling legislation at the state level, and any such ordinance will be presumed to be valid and lawful. *City of St. John v. Brockus*, 434 S.W.3d 90, 93 (Mo. App. 2014); *Smith v. City of St. Louis*, 409 S.W.3d 404 (Mo. App. 2013); *City of Kansas City v. Carlson*, 292 S.W.3d 368, 372 n. 3 (Mo. App. 2009).

II. The City’s minimum wage would not be preempted by state law.

Some have previously contended that a City minimum wage ordinance would be preempted by state law. “The issue of preemption may fairly be divided into two questions: Has the Missouri legislature expressly preempted the area? And, is the city’s regulation in conflict with state law?” *Miller v. City of Town & Country*, 62 S.W.3d 431, 438 (Mo. App. 2001). A review of Missouri law demonstrates that no enforceable state statute expressly preempts the minimum wage ordinance and the ordinance would not conflict with state law. Accordingly, if challenged, the minimum wage ordinance should be upheld.

A. State law does not expressly preempt a minimum wage ordinance.

Missouri law does not expressly preempt all local wage laws. State law preempts an area of law when the state “has created a comprehensive scheme on a particular area of the law, leaving no room for local control. When state law has so completely regulated a given area of the law, then it is said to be occupied, and preempts any local act.” *Borron v. Farrenkopf*, 5 S.W.3d 618, 624 (Mo. App. 1999) (citations omitted). Missouri law does require that employers at least pay a minimum wage, but state law does not provide that the only permissible wage is the state minimum wage. State law does not grant the state the authority to prescribe a comprehensive wage scheme for all workers, and it does not prohibit or regulate wages that exceed the state minimum wage rate. In short, Missouri has not created a comprehensive regulatory scheme requiring all employers to pay all employees a particular wage.

In addition, there is no enforceable state statute that would expressly preempt this minimum wage ordinance so long as the ordinance is effective on August 28, 2015. However, there is one extant statute and one bill recently passed by the General Assembly that, at first glance, appear to preempt the minimum wage ordinance. But neither should prevent the City from enacting and enforcing its minimum wage ordinance.

First, § 67.1571, RSMo., provides that “[n]o municipality . . . shall establish, mandate or otherwise require a minimum wage that exceeds the state minimum wage.” On its face, this statute seems to preempt the attached minimum wage ordinance. However, in *Missouri Hotel and Motel Association v. City of St. Louis*, Case No. 004-02638 (22nd Jud. Cir. July 31, 2001), the Circuit Court for the City of St. Louis held that § 67.1571 was unconstitutional. Of course, “an unconstitutional law is no law,” *Ex parte Smith*, 36 S.W. 628, 630 (Mo. 1896), and a public official cannot rely upon an unconstitutional law, *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014); *Johnston v. Mo. Dep’t of Soc. Services*, No. 0516-CV09517, 2006 WL 6903173, at **4-5 (Mo. Cir. Ct. Feb. 17, 2006).

Acknowledging that § 67.1571 was not enforceable, the General Assembly recently passed House Bill 722, which provides that “[n]o political subdivision shall establish, mandate, or otherwise require an employer to provide to an employee . . . [a] minimum or living wage rate.” Even if House Bill 722 were valid,¹ it would not prevent the City from adopting the attached ordinance because it does not preempt any “local minimum wage ordinance . . . in effect on August 28, 2015.” The General Assembly thereby acknowledged that local minimum wage ordinances may be adopted if they are effective on August 28, 2015. If the attached minimum wage ordinance is effective on August 28, 2015, it will not be preempted by House Bill 722.

B. The City’s minimum wage does not conflict with other state laws.

The other way an ordinance could be preempted is if it conflicts with state law. The usual test for determining if a conflict exists is whether the ordinance “prohibits what the statute permits” or “permits what the statute prohibits.” *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 211 (Mo. banc 1986). Although preemption forbids a conflict with

¹ House Bill 722 is likely invalid for several reasons. Among these reasons is that the bill contains language, such as the definition of “employment benefits,” that is unconstitutionally vague, and because it violates the single subject requirement of Article III, Section 23 of the Missouri Constitution.

state law, it does not prohibit extra regulations at the municipal level. *Borron v. Farrenkopf*, 5 S.W.3d 618, 622 (Mo. App. 1999); *State ex rel. Hewlett v. Womach*, 196 S.W.2d 809, 814 (Mo. banc 1946). If an ordinance “merely prohibits more than the state statute, the two measures are not in conflict.” *Carlson*, 292 S.W.3d at 371; *see also Miller*, 62 S.W.3d at 438 (“An ordinance that merely enlarges on the provision of a statute by requiring more than the statute requires creates no conflict between the two.”). Courts will “construe ordinances to be upheld ‘unless the ordinance is expressly inconsistent or in irreconcilable conflict with the general law of the state.’” *Id.* at 373; *see, e.g., Borron*, 5 S.W.3d at 622; *Frech v. City of Columbia*, 693 S.W.2d 813, 815 (Mo. banc 1985); *Womach*, 196 S.W.2d at 814.

As noted above, there is a state minimum wage statute, § 290.502, RSMo., but that statute simply sets a floor for hourly wages—it does not provide that the only permissible wage is the minimum wage, it does not grant the state the authority to prescribe a comprehensive wage scheme for all workers, and it does not prohibit or regulate wages that exceed the state minimum wage rate. A local ordinance requiring employers to pay above the minimum wage thus fills in a gap where no state law currently applies. Such an ordinance does not conflict with state law—it merely requires “more than the state statute.” *Carlson*, 292 S.W.3d at 371-72. This kind of local supplementation of state laws is nothing new. *See, e.g., Brockus*, 434 S.W.3d 90; *Frech*, 693 S.W.2d 813; *Vest v. City of Kansas City*, 194 S.W.2d 38 (1946); *Bhd. of Stationary Eng’rs v. City of St. Louis*, 212 S.W.2d 454 (Mo. App. 1948). Similarly, courts in other states have acknowledged that municipal minimum wage ordinances do not conflict with state laws that set an hourly wage floor. *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149, 1159-60 (N.M. Ct. App. 2009); *City of Baltimore v. Sitnick*, 255 A.2d 376, 385-86 (Md. Ct. App. 1969).

The General Assembly’s adoption of House Bill 722 should remove any remaining doubt that a City minimum wage would not conflict with state law. House Bill 722 specifically contemplates that local minimum wage ordinances may continue to exist, so long as the ordinances are in effect on August 28, 2015. This recognition of existing ordinances setting higher minimum wages than the state law amounts to an acknowledgement that regulation of wages is not uniform throughout the state, thus undermining any suggestion that the attached ordinance would conflict with state law.