Frost Brown Todd LLC
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 am 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 still 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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Frost Brown Todd LLC
ATTORNEYS

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

I. Background

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 ¶18, 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, ¶ 11 (2014).

- 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 ¶ 11 (citing *Cincinnati Bell* at 602; *Gesler*, 138 Ohio St.3d 76 at ¶ 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-subject 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 803.100(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.

Frost Brown Todd LLC
ATTORNEYS

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November 6, 2017

VIA ELECTRONIC AND/OR REGULAR MAIL:

City of Celina
George E. Moore
Law Director
225 North Main Street
Celina, OH 45822

Re: Frost Brown Todd Engagement Letter

Dear George E. Moore:

We are pleased that you have asked Frost Brown Todd to serve as your counsel in this matter. This letter will confirm our discussion with you regarding your engagement of our firm and will describe the basis upon which our firm will provide legal services to you. Accordingly, we submit for your approval the following provisions governing our engagement. If you agree, please sign this letter in the space provided below. If you have any questions about these provisions, do not hesitate to call. Again, we are pleased to have the opportunity to serve you.

Client; Scope of Representation. Our client in this matter will be City of Celina ("you" or the "Client"). The Client will be engaging FBT to represent Client in a court action against the State of Ohio challenging the constitutionality of House Bill 49 (the biennial budget bill) and House Bill 5 (the municipal income tax statute enacted in 2014) on behalf of Client and other cities and villages. You may limit or expand the scope of our representation from time to time, provided that any substantial expansion must be agreed to by us. While we would be interested in assisting you in other matters, unless we are specifically engaged for some other future matter this will confirm that our representation of you is limited to the foregoing matter and will end when it is concluded.

Fees. Our fees are based primarily upon the time expended by our attorneys and paralegals on the engagement, including attorney and paralegal travel time which is charged at regular hourly rates. Attorneys and paralegals have been assigned hourly rates based upon their experience and level of expertise. Our base hourly rates for work performed by our attorneys that will be working on this matter currently range from: $215 to $365. My hourly rate is $365.00. Hourly rates are reviewed periodically and may be increased from time to time. It may be necessary to add or change attorneys working on your behalf.

This is a representation of multiple communities. The Client and each of the other communities shall pay a retainer to Frost Brown Todd LLC, and Frost Brown Todd LLC will bill against the retainer. In the event the representation ends with money left in the retainer, the retainer will be returned to each community on a pro rata basis. Based on the population of your municipality, we have established a retainer of $ 4000.00.

Consent to Future Conflicts. You are aware that our firm is a relatively large law firm and represents many other companies and individuals. Some may be direct competitors of yours or otherwise may have business or legal interests that are contrary to your interests. It is therefore possible that during the time we are working for you, an existing or future client may seek our assistance in connection with a transaction, pending or potential litigation, or another matter or proceeding in which such a client's interests are, or potentially may become, adverse to your interests. This can create situations where work for one client on a matter might preclude us from assisting other clients on unrelated matters.

To avoid the potential for this kind of restriction on our practice, we ask you to agree, and you hereby do agree, that Frost Brown Todd may continue to represent, or may undertake in the future to represent, any existing or future client in any matter (including but not limited to transactions, litigation or other dispute resolution proceedings), even if the interests of that client in the other matter are directly adverse to the interests of the Client as long as that other matter is not substantially related to this specific engagement. For example, our firm represents many clients, including but not limited to construction contractors, subcontractors, material suppliers, architects, engineers, and their sureties and insurers ("Construction Clients"), who may be involved in projects for Celina. It is possible that during the time that we are representing Celina, some of our present or future Construction Clients currently have or will have disputes or transactions with Celina. Thus, this advance waiver waives any conflicts that may arise between Celina and any Construction Client for matters not substantially related to the current engagement. We do not, however, intend for you to waive your right to have our firm maintain the confidentiality of client information obtained by us in the course of representing you. Thus, if our representation of another client in a matter is directly adverse to you, our lawyers who have had significant involvement in our work for you will not work on the matter for such other client, and appropriate measures will be taken to assure that proprietary or other confidential information of a non-public nature concerning you which we acquire as a result of representing you will not be made available to lawyers or others in our firm involved in such matter. You are hereby advised, and have had the opportunity, to consult with other counsel about this prospective waiver. You also understand and acknowledge that, in the course of our representation of other clients pursuant to this prospective waiver, we may obtain confidential information of interest to you that we cannot share with you.

ABA Statement of Policy. We wish to inform you, and then you acknowledge, that it is our firm's policy to comply strictly with the terms of the ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information (December 1975) in any response that you request we make to your auditors regarding "loss contingencies" affecting you.

Additional Standard Terms. Our engagement is also subject to the policies included in the enclosed memorandum.

We appreciate the opportunity to represent you. Please return a signed copy of this letter to me via email to confirm that these terms of our engagement are acceptable to you. Our representation of you will commence upon your acceptance of the terms of our engagement. However, please note that your instructing us or continuing to instruct us on this matter will constitute your full acceptance of the terms set out above and attached.

We look forward very much to working with you on this matter.

Very truly yours,

FROST BROWN TODD LLC

Eugene L. Hollins

GLH/jk

Enclosures

The foregoing is understood and accepted:

City of Celina, Ohio.

By: _____

Its: _____

FROST BROWN TODD LLC

ADDITIONAL TERMS AND CONDITIONS OF CLIENT ENGAGEMENTS

1. Expenses. Expenses we incur on the engagement are charged to the Client's account. Expenses include such items as court costs, charges for computerized research services and hard copy document reproductions, long distance telephone, travel expenses, messenger service charges, overnight mail or delivery charges, extraordinary administrative support, filing fees, fees of court reporters and charges for depositions, fees for expert witnesses and other expenses we incur on your behalf. Our charges for these services reflect our actual out-of-pocket costs based on usage, and in some areas, may also include our related administrative expenses.

2. Monthly Statements. Unless a different billing period is agreed upon with the Client, the Firm will render monthly statements indicating the current status of the account as to both fees and expenses. The statements shall be payable upon receipt. If statements are not paid in full within 30 days, we reserve the right to add a late charge of 1% per month of the amount due. If it becomes necessary for the Firm to file suit or to engage a collection agency for the collection of fees or expenses, the Client shall pay all related costs and expenses, including reasonable attorneys' fees.

3. Advance Payments. Any advance payment to be paid by the Client will normally be less than the Firm's ultimate fees and expenses. Such a payment or series of payments is not intended as a limitation upon the Firm's fees and expenses. The Firm may apply the advance payment toward any unpaid fees and expenses, in which event the Client shall make an additional deposit to restore the advance payment to its original level. Additional advance payments must be made within fifteen days of the date the request is made. Any unexpended balance of advance payments will be refunded to the Client, without interest, at the end of this engagement.

4. Litigation Matters. If this engagement involves litigation, the Client may be required to pay the opposing party's trial costs. Such costs include filing fees, witness fees, and fees for depositions and documents used at trial. We will not settle litigated matters without the Client's express consent. We require the Client's active participation in all phases of the case.

5. Insurance coverage. Unless we have been explicitly retained to address insurance coverage issues (as documented in this engagement letter), we have no responsibility or obligation to (a) identify any potentially applicable insurance coverage, (b) provide notice to any carrier, or (c) advise the Client on issues relating to insurance coverage at any point during our representation.

6. Termination. The Client has the right to terminate our representation at any time by notifying us of your intention to do so in writing. We will have the same right, subject to an obligation to give the Client reasonable notice to arrange alternative representation. In the event that either party should elect to terminate our relationship, our fees and expenses incurred up to that point still will be due to us. Upon payment to us of any balance due for fees and expenses, we will return to the Client, or to whomever the Client directs, any property or papers of the Client in our possession.

7. Withdrawal. Under the rules of professional conduct by which we are governed, we may withdraw from our representation of the Client in the event of, for example: nonpayment of our fees and expenses; misrepresentation or failure to disclose material facts concerning the engagement; action taken by the Client contrary to our advice; and in situations involving a conflict of interest with another client. If such a situation occurs, which we do not expect, we will promptly give the Client written notice of our intention to withdraw.

8. Post-Engagement Services. The Client is engaging our Firm to provide legal services in connection with a specific matter. After completion of that matter, changes may occur in the applicable laws or regulations that could have an impact on the Client's future rights and liabilities. Unless the Client engages us after completion of the matter to provide additional advice on issues arising from the matter, the Firm has no continuing obligation to advise the Client with respect to future legal developments.

9. Retention and Disposition of Documents. At the Client's request, its documents and property will be returned to the Client upon conclusion of our representation in the matter described above, although the firm reserves the right to retain copies of any such documents as it deems appropriate. Our own files pertaining to the matter will be retained by the firm. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and accounting records. All documents and property, including those belonging to the Client, that are retained by the firm will be transferred to the person responsible for administering our records retention program. For various reasons, including the minimization of unnecessary storage expenses, and consistent with professional conduct rules, we reserve the right to destroy or otherwise dispose of any such documents or other materials retained by us *within a reasonable time after the termination of the engagement* without further notice to the Client.

10. Parent/Subsidiary/Affiliate Relationships. The Client may be a subsidiary of a parent organization or may itself have subsidiary or affiliated organizations. The Client agrees that the Firm's representation of the Client in this matter does not give rise to an attorney-client relationship between the Firm and any parent, subsidiary or affiliate of the Client (any of them being referred to as "Affiliate"). The Firm, during the course of its representation of the Client, will not be given any confidential information regarding any of the Client's Affiliates. Accordingly, representation of the Client in this matter will not give rise to any conflict of interest in the event other clients of the Firm are adverse to any of the Client's Affiliates.

11. Consultation with Firm Counsel. From time to time, issues arise that raise questions as to our duties under the professional conduct rules that apply to lawyers. These might include conflict of interest issues, and could even include issues raised because of a dispute between us and a client over the handling of a matter. The firm has several in-house ethics counsel who assist the firm's lawyers in such matters. We believe that it is in our clients' interest, as well as the firm's interest, that in the event that issues arise during a representation about our duties and obligations as lawyers, we receive expert analysis of our obligations. Accordingly, as part of our agreement concerning our representation, the Client agrees that if we determine in our own discretion during the course of the representation that it is either necessary or appropriate to consult with our firm's counsel (either the firm's internal counsel or, if we choose, outside counsel), we have the Client's

consent to do so and that our representation of the Client shall not, thereby, waive any attorney-client privilege that the firm may have to protect the confidentiality of our communications with our internal or outside counsel.

12. Retirement Plan Advice. If the Client engages the Firm to provide legal services with respect to a retirement plan that is subject to the Employee Retirement Income Security Act, the Client should be aware that certain "covered service providers" must disclose some very specific information to the Client as a responsible fiduciary before the Client engages those services. While the Firm would not usually be serving as a "covered service provider," there are some situations in which it might be. A description of the disclosures required in those situations can be located at www.dol.gov/ebsa/newsroom/fs408b2finalreg.html.

13. Authorization. By the Client's agreement to these terms of our representation, the Client authorizes us to take any and all action we deem advisable on the Client's behalf on this matter. We will, whenever possible, discuss with the Client in advance any significant actions we intend to take.

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