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CONFIDENTIAL & PRIVILEGED ATTORNEY-CLIENT COMMUNICATION

Honorable Larry Suffredin
Commissioner, 13th District
Board of Commissioners of Cook County
118 North Clark Street
Chicago, IL 60602

Re: Proposed Charitable Bond Fund Ordinance

Dear Commissioner Suffredin:

You have asked the State's Attorney's Office for advice regarding a proposed ordinance ("Ordinance") that would enact a new Article to the Cook County Code of Ordinances, namely, Article III, titled "Charitable Rotating Criminal Bond Funds and Third Party Sureties." In summary, the Ordinance expresses Cook County's (the "County") policy to encourage certain individuals and not-for profit entities (collectively, "Surety" or "Sureties") to post bail for accused persons who cannot afford to do so.

More specifically, the Ordinance also asserts that the County "will work with the Chief Judge of Cook County to revise the local rules to encourage Judges to do the following": (1) ensure that a criminal defendant whose bail is posted by a Surety not be deemed ineligible for representation by the Cook County Public Defender's Office; (2) order that bail funds posted by a Surety not be used to pay attorney's fees absent the Surety's "explicit voluntary consent;" (3) order the Clerk of the Circuit Court ("Clerk") not to deduct any fees, court costs or penalties from bail funds that were posted by a Surety absent the Surety's "explicit voluntary consent," and to return available bail funds to the Surety at the conclusion of the case; (4) order that, where a Surety has posted the bail and a judgment of forfeiture has been entered in favor of the state, no part of such posted bail shall be forfeited to the state; and (5) direct the Clerk to return the Surety's posted bail money to the Surety by direct deposit within ten days of the conclusion of the case.

The question presented, our conclusions, and a discussion of the reasons supporting our conclusions follow.

QUESTION PRESENTED

Does the County have the home rule authority to enact the Ordinance?

CONCLUSION

We believe that, although the disposition of bail funds is likely not a matter pertaining to a home rule unit's "government and affairs" for purposes of Article VII, § 6(a) of the Illinois Constitution, the County has the home rule power to enact the Ordinance because it merely expresses the County's policy preferences with respect to charitable bail bonds and other third-party sureties, and does not purport to alter state law or compel any particular action on the part of the judiciary.

DISCUSSION

Cook County is a home rule unit of government and, as such, may "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt." 1970 Ill. Const. Art. VII § 6(a). Section 6(i) provides that "[h]ome rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the state's exercise to be exclusive." 1970 Ill. Const. Art. VII § 6(i). Put more simply, the question that is faced when determining whether an ordinance of a home rule unit is valid is twofold: (1) whether the subject matter pertains to the home rule unit's "government and affairs"; and if so, (2) whether the ordinance is preempted by a statute that specifically denies home rule power or declares the State's authority in the field to be exclusive. *See Carbondale v. Yehling*, 96 Ill. 2d 495, 498 (1983).

The ultimate construction of the qualifying phrase "pertaining to its government and affairs" in Article VII section 6(a) is a matter for the courts. Illinois courts have invalidated various home rule ordinances in the past by determining that they pertained to the "administration of justice," which was of statewide concern and did not pertain to the home rule unit's "government and affairs." *See, e.g.*, *Ampersand v. Finley*, 61 Ill. 2d 537, 542 (1975) (invalidating a Cook County ordinance providing for a $2 court filing fee intended to finance the County's law library as interfering with the statewide system of justice); *City of Oakbrook Terrace v. Suburban Bank and Trust Co.*, 364 Ill. App. 3d 506 (2d Dist. 2006) (finding city ordinance imposing two-year amortization period for nonconforming signs conflicted with Eminent Domain Act's statutory requirement of just compensation, infringing upon statewide administration of justice); *Village of Glenview v. Zwick*, 356 Ill. App. 3d 630, 640 (1st Dist. 2005) ("*any burden* on the court system" such as an ordinance shifting the burden of paying the village's attorney fees on the unsuccessful litigant, affected the administration of justice, which was a matter of statewide concern) (emphasis added); *Carbondale*, 96 Ill. 2d at 501, 504 (ordinance imposing duties upon county and judicial officials, defining specific remedies available in court proceedings, and

prescribing the order of certain court proceedings impermissibly interfered with the statewide administration of justice); *Cummings v. Daley*, 58 Ill.2d 1, 4 (1974) (invalidating a home rule city ordinance that attempted to determine the method of judicial review of decisions of the city's administrative agencies); *Paper Supply Co. v. City of Chicago*, 57 Ill.2d 553, 580 (1974) (same).

As noted above, the Ordinance's subject matter involves the disposition of bail funds. The General Assembly has enacted numerous statutes on this subject, particularly in the Code of Criminal Procedure (725 ILCS 5/100-1 *et seq*.). *See, e.g.*, 725 ILCS 5/100-2 (provisions of Code of Criminal Procedure govern the courts in all criminal proceedings); 725 ILCS 5/110-7 (directing the manner in which bail, fines and fees to be collected and distributed, subject in some cases to the discretion of the court, including payment of attorney fees); 725 ILCS 5/110-8 (directing the distribution of bail funds, including authorizing the court to enter judgment upon bail forfeiture to the State); 725 ILCS 5/110-15 (authorizing the Supreme Court to change the bail distribution requirements of 725 ILCS 5/110-7 in certain cases); 725 ILCS 5/110-17 (providing that unclaimed bail deposits will be considered abandoned and disposed of as provided by statute through an unclaimed property fund administered by the State); 725 ILCS 225/18 (recovery on forfeited bail bond to be as provided by statute); 725 ILCS 5/113-3.1 (authorizing the court to order disposition of certain bail funds in its discretion, including to pay attorney fees); 625 ILCS 5/16-104a (providing for the disposition of certain bail funds in traffic cases).

We believe that the bail-related statutes noted above pertain to the administration of justice, which as discussed above, has been held not to be a matter of local concern for purposes of Article VII, § 6(a) of the Illinois Constitution. Particularly to the extent that an ordinance on this subject could be construed to alter the state's bond scheme, tread on a court's administrative rules, or restrict any particular judge's exercise of judicial discretion, it would be vulnerable to a constitutional challenge.

However, as noted above, the Ordinance is aspirational in nature and does not compel any specific result. As such, it does not alter state law, impact court rules, or restrict judicial discretion. Although it expresses the County's intent to "work with the Chief Judge of Cook County to revise the local rules to encourage Judges" to take specific steps that would promote the use of charitable bond funds, there is no way to enforce that commitment to future collaboration.

Rather, the Ordinance merely expresses a policy preference in favor of rules that would encourage the posting of bail by third parties on behalf of individuals who themselves are unable to pay.[1] We believe that the encouragement of such a policy goal clearly pertains to the County's "government and affairs" for purposes of Article VII, §6(a). Moreover, we are unaware of any statute that expressly prohibits the County from enacting an ordinance to encourage this practice. Accordingly, we believe that the County has the home rule power to enact the Ordinance.

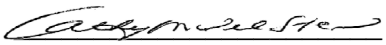
* * *

1 Normally, an expression of County policy would be enacted via resolution rather than by ordinance. While this might be procedurally more appropriate, that is an issue of form which we believe has no bearing on the constitutional question you have posed.

Please feel free to contact our office should you have any additional questions about this letter or the opinion sought. We condition this opinion upon the facts presented and may wish to revisit this matter should new information be made available.

Very truly yours,

KIMBERLY M. FOXX
State's Attorney of Cook County

By: 
Cathy McNeil Stein
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