Board of Commissioners of Cook County

Minutes of the Finance Public Hearing and Committee Meeting

Tuesday, October 20, 2015 **2:00 PM** **Cook County Building, Board Room, 569 118 North Clark Street, Chicago, Illinois**

ATTENDANCE

Present Chairman Daley, Vice Chairman Sims, Commissioners Arroyo, Boykin, Butler, Fritchey, García, Moore, Morrison, Silvestri, Steele, Suffredin (12)

Absent Commissioners Gainer, Goslin, Murphy, Schneider and Tobolski (5)

PUBLIC TESTIMONY

Chairman Daley asked the Secretary to the Board to call upon the registered public speakers, in accordance with Cook County Code.

1. Betty Boles - SEIU Local 73
2. Tanya Triche - Illinois Retail Merchants Association
3. Elise Houren - Chicagoland Chamber of Commerce
4. William Kyle
5. Bekah Devino - ONE Northside
6. George Blakemore
7. Honorable Carlos Ramirez-Rosa – Chicago Alderman, 35th Ward
8. Linda Jennings - National Nurses United
9. Erica Nanton - RISE
10. Carl Wolf - Respond Now
11. James Nelson - SOUL
12. Maria Fitzsimmons
13. Chris Lamberti - Workers United
14. Kim Atkins
15. Marta Popadiak
16. Ron Baiman - Benedictine University
17. David Borris
18. Gianna Chacon
19. Gabriel Lara - Quinn Community Center
20. Melissa Rubio
21. Rev. Charles Straight - Faith United Methodist Church
22. Rev. Wendy Witt - Chicago Temple United Methodist Church
23. Michael Collins - Center for Progressive Strategy and Research

24. Kohmee Parrett - SOUL
25. Evie Raffanti - Reclaim Chicago
26. Beth Lanford - St. Peter's United Church of Christ
27. William Clark
28. Hayley Goldstein - IIRON
29. Lonnie Wilson - IIRON
30. Liz Ryan Murray - National Peoples Action
31. Brian Gladstein - Common Cause Illinois
32. Gerri Hudson
33. Kevin Bailey
34. Michael Brennan
35. Sam Toia – President and CEO, Illinois Restaurant Association (written testimony)
36. Amisha Patel – Executive Director, Grassroots Collaborative (written testimony)
37. Laurie Reynolds – Prentice H. Marshall Professor, University of Illinois College of Law (written testimony)

Commissioner Sims asked for the State's Attorney's Office to give an opinion on the proposed ordinance. Donald Pechous, Acting Bureau Chief, Civil Actions Bureau, Office the State's Attorney responded.

15-5825

Sponsored by: ROBERT STEELE, County Commissioner

PROPOSED ORDINANCE

COOK COUNTY RESPONSIBLE BUSINESS ACT

BE IT ORDAINED, by the Cook County Board Of Commissioners that Chapter 21 - Fees, Sections 32-2 - 32- 14 of the Cook County Code is hereby enacted as follows:

Section 32-2. Short Title._

This chapter shall be known and may be cited as the "**Cook County Responsible Business Act.**"

Section 32-3. Definitions.__

The following words and terms shall have the meanings set forth in this section, except where otherwise specifically indicated.

(a) *Person* means a natural person, corporation, limited liability company, partnership or other entity and, in case of an entity, includes any other entity which has a majority interest in such entity or effectively controls such other entity as well as the individual officers, directors and other persons in active control of the activities of such entity.

(b) *Employer* means any individual, partnership, association, corporation, limited liability company, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons are gainfully employed.

(c) *Covered employee* means any individual permitted to work by an employer in any occupation in Cook County.

(d) *Covered employer* means (1) any employer, except for religious organizations or local governments, who employs at least 750 employees in Cook County, or (2) any franchisor who employs at least 750 employees in Cook County or whose franchisees, collectively, employ at least 750 employees in Cook County.

(e) *Franchise* has the same meaning as provided in section 3 of the Franchise Disclosure Act of 1987, 815 ILCS §705/3.

(f) *Franchisor* has the same meaning as provided in section 3 of the Franchise Disclosure Act of 1987, 815 ILCS §705/3.

(g) *Franchisee* has the same meaning as provided in section 3 of the Franchise Disclosure Act of 1987, 815 ILCS §705/3.

(h) *Department* shall mean the department or office that the President and Board of Commissioners shall create and/or designate to enforce this ordinance.

(i) *Full-time* means 35 hours or more hours of work in each work week.

(j) *Part-time* means 1 to 34 hours of work in each work week.

Section 32-4. Wage Rate

(a) Wage rate shall be an hourly rate defined as follows:

(1) Starting December 1, 2015, $10.00
(2) Starting December 1, 2016, $11.25
(3) Starting December 1, 2017, $12.50
(4) Starting December 1, 2018, $13.75
(5) Starting December 1, 2019, the wage rate shall be equal to Cook County Living Wage hourly rate as defined under Section 34-160 of the Cook County Code of Ordinances and on December 1 of each successive year, the wage rate shall increase consistent with and equal to Cook County Living Wage hourly rate.

Section 32-5. Disclosure, Annual Fee, and Posting Requirement_

(a) Every covered employer shall submit on or before February 1 of each year to the Department a sworn statement containing the following:

(1) The total number of employees employed as of November 30 of the previous calendar year;

(2) The percentage of full-time employees and the percentage of part-time employees employed in the previous calendar year, as a share of the total number of employees employed in the previous calendar year. The breakdown of full-time and part-time employees shall be reported

by each quarter in the previous calendar year.

(3) The average hourly wage rate of full-time and part-time employees as of November 30 of the previous calendar year. For any salaried employees, their hourly wage rate for purposes of calculating the average hourly shall be their annual salary divided by the number of total hours worked in the previous calendar year.

(4) The total number of employees, regardless of their full-time or part-time status, who are paid less than the wage rate defined in Section 32-4 in the previous calendar year.

(b) At the time of submission of the sworn statement, every covered employer who paid more than 750 employees, regardless of full-time or part-time basis, less than the wage rate defined under Section 32-4 in the previous calendar year, shall pay, for each employee the covered employer paid wages less than the wage rate defined under Section 32-4 in the previous calendar year, an annual fee of $750 for each dollar of difference between the wage that the employer paid the employee in the previous calendar year and the wage rate defined under Section 32-4, rounding this difference up to the next whole dollar if it is a rate of fifty cents or more over the dollar and rounding down if it is 49 cents or lower.

(c) Any covered employer who directly, or through any officer, agent, employee or franchisee, makes any false statement or representation on the sworn statement shall be fined not less than $250 nor more than $1,000.

(d) Based on the sworn statement submitted by every covered employer, the Department shall issue a "Certificate of Good Standing" to all covered employers who were not required to pay the annual fee as required under this section. All covered employers who receive a Certificate of Good Standing are required to post this Certificate of Good Standing in a conspicuous place visible by the public and places where notices to employees are customarily placed. Each covered employer shall take steps to ensure that the Certificate is not altered, defaced, or covered by other material.

(e) The Cook County Department of Revenue shall also post the list of covered employers who were issued the Certificate of Good Standing on the Cook County's website to be made available to the public.

(f) The Cook County Department of Revenue shall prepare templates that comply with the requirements of this section and such templates shall be made available to all employers within the boundaries of the Cook County.

Section 32-6. Recordkeeping.

Every covered employer shall keep accurate records of all pay and full-time or part-time status of their employees for three years. All these records shall be kept in the English language and, at all times during business hours, shall be subject to and available for inspection and copying by the Cook County Department of Revenue.

Section 32-7. Prohibited Acts.

(a) It shall be unlawful for any covered employer to, directly, or through any officer, agent, employee or franchisee, designate, classify or deem, or cause such covered employer's franchisees to designate, classify or deem, an employee as an independent contractor or temporary employee, reduce an employee's wages or hours of work, or terminate an employee for the purpose of avoiding such covered employer's obligations under this Ordinance.

Any action to classify or deem an employee as an independent contractor or temporary employee, reduce an employee's wages, work hours, or terminate an employee within sixty (60) days of November 30 of each calendar year shall raise a rebuttable presumption that such action was taken to avoid such covered employer's obligations under this Ordinance.

(b) It shall be unlawful for any covered employer or any other person to threaten, penalize, punish, restrain, coerce, attempt to coerce, or in any other manner discriminate or retaliate against any person for exercising rights protected under this Ordinance. Rights protected under this Ordinance include, but are not limited to: the right to file a complaint or inform any person about any party's alleged noncompliance with this Ordinance; and the right to inform any person of his or her potential rights under this Ordinance and to assist him or her in asserting such rights. Protection of this section shall apply to any person who mistakenly, but in good faith, alleges violations of any provision of this Ordinance. Taking adverse action against a person within ninety (90) days of such person's exercise of rights protected under this Ordinance shall raise a rebuttable presumption that such action was in retaliation for the exercise of such rights.

Section 32-8. Enforcement and Penalty.__

(a) Any person may file a complaint with Cook County Department of Revenue against any covered employer who makes a false statement or representation on sworn statements as required under Section 32-5 or who otherwise violates, disobeys, omits, neglects, or refuses to comply with the requirements under any provision of this Ordinance.

(b) The Department is authorized to take appropriate steps to enforce and coordinate enforcement of this Ordinance, including the investigation of any possible violations of this Ordinance.

(c) After investigating a possible violation of this Ordinance, and providing any covered employer the opportunity to respond to the allegations:

(1) If the Department determines that the covered employer violated the requirements under Section 32-4, Cook County Department of Revenue shall assess and collect any fee due and unpaid, together with an interest charge of 1.25 percent per month or fraction thereof. The covered employer shall also pay a penalty of not less than $250.00 nor more than $1,000.

(2) If the Department determines that the covered employer violated any provision in Section 32-6, Cook County Department of Revenue may order any appropriate relief including, but not limited to, requiring the covered employer to reclassify a person as an employee, restore work hours, reinstatement, payment of lost wages to the employee, and the payment of an additional sum as an administrative penalty that does not exceed the amount of the award of lost wages.

Section 32-9. License suspension and revocation_

(1)Any license, permit, registration or franchise issued by the County may be suspended or revoked by the issuing authority if it is determined after a hearing that the licensee, or any person controlled by the licensee, has willfully failed to pay or remit any fee, interest or penalty due under the requirements of this Ordinance. No license shall be suspended or revoked under this subsection if, within ten days after the issuance of a license suspension or revocation order, the

total fee liability, including interest and penalties, is paid.

Section 32-10. Family Sustainability Commission_

(a) *Established:* There is hereby established a Commission which shall be known as the Family Sustainability Commission.

(b) *Appointment of members:* The Family Sustainability Commission shall consist of (9) members of the Board President appoints as follows:

(1) One member to represent the President of the County Board;
(2) One member to represent the Cook County Board;
(3) One member to represent health care agency;
(4) One member to represent court system;
(5) One member to represent housing agency;
(4) Two members to represent nonprofit community based organizations;
(5) Two members to represent worker organizations.

(c) *Powers and duties:* The Family Sustainability Commission shall have the authority to advise the Cook County Board of Commissioners on an annual basis in the appropriation of monies in the Fund to address issues affecting residents in Cook County in the area of health care, pre-trial services, the criminal justice system, housing assistance to low-income communities, grants to community-based organizations, to provide assistance to low-income individual and families concerning family care assistance, heating assistance, nutrition assistance, job training and placement assistance, and advocating for workers' rights.

(d) *Preference for employees of affected employers:* In the provision of services, the Family Sustainability Commission shall give preference to employees who meet the following conditions: they were employed in the previous calendar year by an employer who is required to pay a fee by Section 32-5 Subsection (d); and they were paid less than the wage rate defined under Section 32-4 in the previous calendar year by that employer.

Section 32-11. Family Sustainability Fund

Upon the passage of this Ordinance, the Comptroller shall create a special fund to be entitled the "Family Sustainability Fund." All annual fees collected pursuant to Section 32-5 of this Ordinance must be deposited into the Family Sustainability Fund.

Section 32-12. Administrative rules and regulations._

The Department is authorized to adopt, promulgate and enforce rules and regulations and to administer and enforce this Ordinance.

Section 32-13. Severability.

All portion of this Ordinance are severable, and if any of its provisions or any sentence, clause or paragraph shall be held unconstitutional by any court of competent jurisdiction, the decision of such court shall not affect or impair any of the remaining provisions.

Effective date: This ordinance shall be in effect ninety days after its enactment into law

Legislative History: 10/7/15 Board of Commissioners referred to the Finance Committee

No action taken on this item

Commissioner Boykin requested that the opinion of the Office of the State's Attorney be entered into the record.

ADJOURNMENT

A motion was made by Vice Chairman Sims, seconded by Commissioner Steele, to adjourn the meeting. The motion carried by the following vote:

Ayes: Chairman Daley, Vice Chairman Sims, Commissioners Arroyo, Boykin, Butler, Fritchey, García, Moore, Morrison, Silvestri, Steele and Suffredin (12)

Absent: Commissioners Gainer, Goslin, Murphy, Schneider and Tobolski (5)

Respectfully submitted,

Chairman

Secretary

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Cook County President Toni Preckwinkle and Cook County Commissioners
C/o Commissioners Robert Steele and John P. Daley
118 N. Clark Street, Room 567 - Chicago, IL 60602

October 20, 2015

To President Preckwinkle and County Commissioners:

We are writing today in full support of the Responsible Business Act. The Grassroots Collaborative is a coalition of 9 member organizations, representing more than 110,000 members living in Cook County. Our membership is broad and diverse, made up of working families from across the county.

We know from our members, that as our economy continues to recover, that recovery is not being passed down to the employees of many major corporations. Working families are struggling to make ends meet. Instead, major corporations like McDonald's and Walmart should be required to pay their workers a living wage.

At the same time that working families are struggling, our city, county and state are all facing deep revenue crises. And often, the only solutions proposed put an even greater burden on working families. It is time to ask those who have benefitted from the economic recovery, in this case profitable corporations, to pay their fair share. We urge you to support the Responsible Business Act, which would enact progressive revenue policy, moving the county towards greater equity and fairness for its working families.

When companies don't pay a living wage, public services are even more necessary to ensure strong communities. Every family should have access to quality childcare, affordable housing, and good health care. Cook County residents are paying more in sales tax to support these vital services. When these corporations pad their profits instead of paying a living wage, it leaves the rest of us to make sure that their workers - our neighbors - have what they need to survive.

The Responsible Business Act requires large businesses that employ more than 750 workers in Cook County to pay a small fee to the county for each employee that is paid less than a living wage. This ordinance will strengthen services like child care and housing that low wage workers depend on, create jobs that grow the economy, and level the playing field for small businesses that play by the rules.

Cook county residents are already being asked to pay more in sales tax to support the public services we so desperately need, now it's time to ask the corporations to pay their fair share. The Responsible Business Act will require profitable companies to do their part.

We urge you to pass the Responsible Business Act. Thank you for your time and consideration.

Sincerely,

Amisha Patel, Executive Director

Action Now Institute. American Friends Service Committee, Great Lakes Region
Brighton Park Neighborhood Council . Chicago Coalition for the Homeless . Chicago Teachers Union . Enlace Chicago
Illinois Hunger Coalition . ONE Northside
Service Employees International Union Healthcare Illinois Indiana

LOCAL 73
SEIU
Stronger Together
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 73
www.seiu73.org

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October 20, 2015

Testimony before the Cook County Finance Committee

The 28,000 SEIU Local 73 members working in education, public safety, healthcare, housing and human services, and the thousands working for Cook County, strongly support the Responsible Business Ordinance. Large companies should pay their employees a living wage. If they do not, they should at least pay a fine to Cook County to support public services that we all rely on. Corporations operating in Cook County make lots of money, but pay poverty wages. Their employees rely on government subsidies and services to survive.

The cost of living is higher than what many workers earn

- The median hourly wage in Cook County is $18.41 an hour.
- One out of four employees in the Chicagoland area make less than $11.63 an hour.
- According to MIT's living wage calculator, for a single mother in Cook County to earn a living wage to provide for her family, she would have to earn $24 per hour.

Corporations operating in Cook County enjoy healthy profits

- McDonalds profits before taxes – its operating margin—was almost 30% in the last fiscal quarter
- Walmart amassed more than 120 billion dollars in profits in its most recent report of annual income
- Walgreens had 21 billion dollars in profit in fiscal year 2014

Cook County subsidizes corporate profits through essential public services

- John H. Stroger Hospital spent over $236 million dollars in uncompensated care in 2014, much of which was for health services for working families whose employers provide inadequate health benefits, if any, and who cannot afford basic health services.
- The more than $200 million dollars that the Cook County Board appropriated to fund Public Safety in 2015 provides security that allows companies to engage in economic activity and earn profits for shareholders, even as the poverty wages they pay destabilizes at-risk communities.

According to the Responsible Business Ordinance, the fees from companies that don't pay a living wage would "address issues affecting residents in Cook County in the area of health care, pre-trial services, the criminal justice system, housing assistance to low-income communities, grants to community-based organizations, to provide assistance to low-income individual and families concerning family care assistance, heating assistance, nutrition assistance, job training and placement assistance, and advocating for workers' rights."

At a time when the Cook County Board is considering budget cuts and layoffs to essential public safety and health services, SEIU Local 73 supports the Responsible Business Ordinance to raise wages and expand the revenue base, and to fund services that employees of large companies depend on, but that these corporations refuse to provide themselves.

Betty Boles
Vice President
SEIU Local 73

UNIVERSITY OF ILLINOIS
AT URBANA-CHAMPAIGN

College of Law
504 East Pennsylvania Avenue
Champaign, IL 61820

October 20, 2015

To the members of the Finance Committee of the Cook County Board of Commissioners:

I regret that I am unable to testify in support this important proposal, but I write to provide my opinion that the Responsible Business Act can be defended as a legitimate exercise of Cook County's home rule authority. My legal memo explaining that opinion is attached.

I have been a professor of law at the University of Illinois College of Law for nearly 35 years. Over those years, municipal government law has been my primary area of academic research. I am the author of numerous law review articles on different municipal law topics, and co-author (with Prof. Richard Briffault of Columbia University College of Law) one of the leading State and Local Government Law casebooks. Over the past decade, my academic research has been enormously enriched by my pro bono consultation with a number of organizations seeking to improve working conditions and terms of employment for low and middle income wage earners. In fact, one of my earliest collaborations dates to the 2006 effort to pass a Big Box Living Wage Ordinance in the City of Chicago. Though that ordinance was vetoed by Mayor Daley, my unshakable conviction then and now is that the law was well within the city's home rule powers. Since that time, I have provided legal analysis of at least 10 different municipal ordinance proposals introduced around the country. Though most of the laws have proposed minimum wage hikes (for instance, I wrote a legal memo in support of Chicago's home rule authority to pass its recently adopted minimum wage ordinance), others have involved proposals for different types of worker protections, such as mandatory sick leave and wage theft protection. The issue that repeatedly surfaces in these cases involves the government's legal authority to pass the ordinance. The Responsible Business Act is no different, and it is important for the County to determine whether it can implement this law with a good faith belief that the law is within the county's home rule powers. My attached analysis concludes that this law meets the legal requirements that have been articulated in Illinois.

Cook County's revenue raising powers have few legal limitations. Both taxes and non-tax charges such as fees and special assessments are well within the county's home rule authority. Though these powers are of course not unlimited, in my opinion the proposed fee fits well within the legal parameters. The courts of Illinois have not ruled specifically on the type of regulatory fee proposed here, it is true, but the legal principles articulated in the few fee challenges resolved in the courts seem to be satisfied by the Responsible Business Act. First, the County can reasonably estimate the cost that low wage earners impose on the County, on its economy, and on the general welfare. Second, the County can reasonably decide to apportion a share of those costs to the businesses included within the scope of the ordinance's coverage. Third, the County will earmark the revenues generated by the fee to provide services that will offset the costs that have been directly traced to the low income workers in the county. Each step

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is reasonable and rational, backed by evidence and supported by the policy determination that the ordinance pertains to the county's affairs.

I know that some question has been raised about the relationship between this fee and Chicago's new minimum wage law. In my mind, the fee has nothing to do with the minimum wage, because it is a charge levied on the employer whose revenues go to the county and enhance its social services. This fee does not require any employer to pay anything to any employee; rather it is a levy that seeks to offset the tremendous burden that low wage employees impose on Cook County. It is true that an employer can avoid the fee by raising its employees' wages, but it is not required to do so. It is my expectation, in fact, that some employers will find that paying the fee makes more economic sense than raising its employees' wages to a level that will exempt the employer from the fee, but in any event that is the choice of the employer.

And as one final note, I would also say that the fact that no legal challenge has yet been filed to Chicago's new minimum wage suggests that even its opponents recognize that local governments in Illinois have extremely broad and flexible powers to protect the health, safety, and welfare of their citizens, and that the debate over the extent to which those powers are exercised is one that should play out in the legislative, and not the judicial, branch of the state of Illinois.

Sincerely,

Laurie Reynolds

Laurie Reynolds
Prentice H. Marshall Professor
University of Illinois College of Law

Proposed Fair Share Fee for Cook County: Evaluated from the Perspective of Illinois' Home Rule System, the Illinois Constitution, and Common Law Principles

Laurie Reynolds, Prentice H. Marshall Professor, University of Illinois College of Law
August 25, 2014

I. Introduction and Summary

The proposed Fair Share Fee would levy an annual charge on large employers in Cook County for each of its low-wage employees. This fee would be earmarked for several specific purposes, including recoupment of unreimbursed health care costs; pre-trial services for criminal defendants; housing assistance for low-income individuals; direct assistance to low-wage workers and their families; and a small amount dedicated to the administrative costs associated with calculating and collecting the fee. As a matter of public policy, this fee seeks to recover some of the costs imposed on the public fisc by low-wage workers.

In terms of the legal framework, this memo considers the doctrinal issues that are likely to determine the validity of the proposed fee and concludes that there are solid legal arguments supporting the County's authority to adopt this fee. For reasons I discuss below, Illinois caselaw is sparse when it comes to providing the analytical tools that should apply to evaluate the Cook County fee. Nevertheless, I believe that the following issues will be relevant:

1. Does the fee past muster under the Illinois Constitution's Uniformity of Taxation clause, which requires that any classification established in any fee "be reasonable and the subjects and objects within each class shall be taxed uniformly"? Art. IX, §2.

2. Does the Illinois Constitution's statement that home rule units may not "license for revenue" apply to this fee? Art. VII § 6(e). If so, is the fee consistent with that provision?

3. Will the fee apply within the boundaries of the many home rule municipalities located within Cook County, in spite of the Constitution's provision that: "If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction"? Art. VII, §6(c).

4. Does the fee meet the common law requirements that apply to regulatory fees?

Based on my reading of the relevant caselaw in Illinois and in other states, I believe that the four questions posed above can be answered in the affirmative, based on the following rationales:

1. The ordinance seems to meet the test articulated by Illinois Supreme Court in its

application of the Uniformity Clause, which requires that the classification of a charge "must be based on a real and substantial difference between the people taxed and not taxed, and must bear some reasonable relationship to the object of the legislation or to public policy."[1]

2. The Constitution's prohibition explicitly applies to "licenses" and not to "fees," raising the plausible argument that the prohibition on revenue does not even apply to fees that are not part of a broader licensing scheme. More fundamentally, however, even if this fee is subject to the ban on revenue raising, it can be defended as a carefully calibrated fee that does nothing more than recoup costs imposed on the public by the feepayer.

3. In the area of revenue raising, the Illinois Supreme Court has made clear that overlapping identical charges levied by both a home rule county and a municipality located within the borders of that county do not conflict, and both may be legally applied within the borders of the home rule municipality.[2]

4. If the Illinois Supreme Court follows the general lines of common law doctrinal reasoning to evaluate this fee, it will ask whether it imposes a proportionate and reasonable charge on the feepayer, whether it reflects the county's reasonable assessment that large employers with low-wage workers impose costs on the public fisc, and whether the funds are explicitly earmarked for use in ways that will directly offset these unreimbursed costs. I believe that there are solid doctrinal arguments in support of the fee with regard to all three criteria.

II. The Difference Between Taxes and Fees

Since the 1970s, governments at all levels have substantially increased their reliance on non-tax revenue raising devices, such as fees, assessments, and other charges. In fact, non-tax sources of revenues are frequently preferred by governments seeking to avoid public condemnation for raising taxes. Taxes, as you are well aware, are levied without consideration of whether the taxpayer will benefit from the programs funded, services provided, or materials purchased with the tax revenue. Rather, taxes are general charges levied uniformly across the taxpaying class, and they can be dedicated to any legitimate public purpose within the government's competence. Non-tax revenue devices, in contrast, are premised on the assumption that the targeted payer class can be singled out for a particular charge, either because the payer is enjoying a special benefit from a government service, because the payer is using government property, because the payer receives a benefit from government regulatory programs, or because the payer has imposed a cost or burden on the general public that the charge seeks to recover.

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[1] Searle Pharmaceuticals, Inc. v. Dept. of Revenue, 512 N.E.2d 1240, 1246 (Ill. 1987).

[2] City of Evanston v. County of Cook, 219 N.E.2d 823 (Ill. 1972).

The tax vs. non-tax distinction is crucial to local governments in many states because of substantial legal limitations on local government taxation powers. That means that cash-strapped municipalities have to find ways to finance their programs using financial techniques that will avoid the fatal tax label. Most of the cases around the country involving challenges to non-tax revenue devices deal with precisely this issue – the payer files suit to challenge a non-tax fee or assessment, arguing that it is really nothing more than a tax in disguise. If the court agrees, then the charge will be invalidated and rescinded, because the local government does not have broad enough powers of taxation to sustain it as a tax.

Illinois local governments with home rule powers, which include Cook County, are in a radically different position. The tax vs. fee distinction has no traction when it comes to tax limits, because under the 1970 Constitution, Illinois home rule units have extensive authority to levy taxes. So long as the tax does not fall upon "occupations, income, or earnings" (Ill. Const. Art. VII, §6(e)), and so long as the General Assembly does not specifically prohibit a particular tax, home rule units may tax freely. Thus, as a matter of legal doctrine, the fee option does not have the strategic legal advantage in Illinois that it has in many other states where local governments cannot tax or are subject to stringent limits on their powers of taxation. This unusual situation undoubtedly explains the relative paucity of case law in Illinois regarding challenges to local fees.

In general, and though categorization is not precise, local government fees fall into one of four categories: user fees (for example, charges for services provided by the government, such as trash collection or sanitary sewer service); fees levied for the use of government property (for example, fees levied on individuals for the use of publicly owned docks), impact fees (fees levied on real estate developers as a precondition to development approval) and regulatory fees (fees levied in exchange for government implementation of a regulatory scheme). The Cook County fee falls within the last category, but it is not a regulatory fee of the standard variety. The more common regulatory fee, and the one that has been subject to at least some litigation in Illinois, is a fee adopted for purposes of raising the funds necessary to pay for the implementation of a regulatory scheme to which the feepayer is subject. Thus, for example, a local government may create a licensing scheme to regulate vending machines; the fees charged will pay for the cost of the implementation of the regulatory scheme. This Cook County fee is slightly different: the county seeks to impose a fee, not for the purposes of regulating the fee payer, but for the purpose of recouping the costs and burdens imposed by the feepayer on other county programs and regulatory schemes. Though I have found no caselaw in Illinois dealing with this type of regulatory fee, it seems to fit within the common law parameters articulated by other courts, particularly the California Supreme Court, which has stated that the costs imposed on the feepayer must "bear a fair or reasonable relationship to the payor's burdens on ... the regulatory activity. "[3]

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[3] Sinclair Paint Co. v. State Bd. of Equalization, 937 P.2d 1350, 1357 (Cal. 1992).

III. The Cook County Fee and the Illinois Constitution

A. The Uniformity Clause

The Uniformity Clause of the Illinois Constitution provides that: "In any law classifying the subjects or objects of non-property taxes or fees, the classes shall be reasonable and the subjects and objects within each class shall be taxed uniformly." Art. IX, §2. Because fees are explicitly included in the Uniformity Clause, the Cook County fee will be subject to constitutional scrutiny on that point. To sustain the fee against uniformity challenges, the county will have to establish that the classification, which defines a subset of Cook County employers, is "based on a real and substantial difference between those who are taxed and those who are not taxed" and that the classification bears "some reasonable relationship to the object of the legislation or to public policy."[4] It bears noting that the level of review under the Uniformity Clause is more searching than the similar review triggered under the state Constitution's Equal Protection Clause,[5] but the type of inquiry is nearly identical.

Numerous cases in Illinois use the Uniformity Clause to mount legal challenges to Illinois taxes, and each case turns on its specific facts. It is likely that the courts' doctrinal analysis of the Uniformity Clause, though it has been applied almost exclusively to taxes, will be directly applicable to fees, since the constitutional provision subjects both types of revenue raising devices to the same legal requirements. At this preliminary point, it is important to note that the classification between large and small employers is one that has been sustained in laws adopted at different levels of government across the state, and like those laws, this one makes the claim that large employers should be subject to a different regulatory regime because of their greater financial liquidity and stability, and also because of their greater impact on the programs being funded by this fee. With regard to the relationship between the fee and the object of the legislation, once again this legal inquiry will be heavily fact dependent. It will involve a judicial evaluation whether the charge is rationally related to the various programs to which its proceeds will be dedicated. As studies have shown, low-wage workers require substantial public assistance because of their low incomes; a fee that recoups some of those revenues from the employers that pay their workers at that level seems to bear a reasonable relationship to a legitimate public policy.

B. License for Revenue

The Illinois Constitution explicitly states that home rule units may not "license for revenue," Article VII §6(e), unless the General Assembly provides explicit statutory

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[4]Primeco Personal Comms. v. Ill. Commerce Comm'n, 750 N.E.2d 202, 210 (Ill. 2001).

[5] "The uniformity clause imposes more stringent limitations than the equal protection clause on the legislature's authority to classify the subjects and objects of taxation." Allegro Services v. Met. Pier and Expos. Auth., 665 N.E.2d 1246 (Ill. 1996).

authorization. The delegates to the Constitutional Convention expressed uncertainty about the meaning of the term they had adopted. As one delegate stated:

> The courts are still going to have to interpret what you mean by licensing for revenue. I don't know today – I don't think anybody knows what we mean specifically by licensing for revenue. Is that a tax? What do you mean by a license for revenue? What's it measured by?" IV Record of Proceedings, Sixth Illinois Constitutional Convention, at 3196.

The first question to consider under this clause is whether the Cook County fee is even subject to its prohibition – that is, does the clause "license for revenue" apply to fees? Is "license" used as a general term to encompass all non-tax charges, or does it apply only to those instances in which municipalities implement a licensing program and adopt a license fee as part of that program? Does the fact that the Illinois Constitution has used the term "fees" in other parts of the Constitution indicate an intent to distinguish "license" from "fees" in this instance? No caselaw or constitutional history provides guidance to these questions.

But, even assuming that the Cook County fee is subject to the "license for revenue" prohibition, the fee can be defended as a non-revenue measure. The money generated will not be deposited into the County's general revenue fund, but rather will be specifically earmarked to programs that bear a direct relationship between the feepayer (the employer paying low wages) and the services the county provides to the low wage earners. In that way, the earmarking provision may be crucial to sustaining its legitimacy as a fee.

Even when this constitutional provision has been specifically applied to local government licensing fees by the Illinois courts, the caselaw is ambiguous. In general, it appears that so long as all proceeds minus administrative costs are directly earmarked for programs with which the feepayer has the requisite reasonable relationship, the fee will not be deemed an impermissible revenue raising fee. In cases applying the provision, the courts have focused on the amount of revenue generated by a licensing fee to determine whether the proceeds were excessive, and thus passed the line from a permissible regulatory license fee to an impermissible revenue raising fee. In one case, an Illinois appellate court concluded that because the fee schedule "far exceeded" the cost of administration of the regulatory scheme,[6] it was an impermissible license for revenue. Yet in another case, a different Illinois appellate court concluded that though the revenue generated by the fee exceeded the cost of implementation by a margin of five to one, it was still a valid regulatory fee.[7]

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[6] Quad Canteen Service Corp. v. Ruzak, 406 N.E.2d 616 (2nd Dist. 1980).

[7] A&H Vending Service, Inc. v. Village of Schaumburg, 522 N.E.2d 188 (1st Dist. 1988).

C. Conflict Between County and Municipality

The Illinois Constitution explicitly states that: " If a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction." Article VII, §6(c). Thus, for example, a home rule county's zoning ordinance has no applicability to a municipality that has adopted its own zoning ordinance. But when it comes to revenue raising measures, the Illinois Supreme Court has had the occasion to define exactly what the constitution means by "conflict." In City of Evanston v. County of Cook, 291 N.E.2d 832 (Ill. 1973), the court made clear that overlapping, identical revenue raising devices do not fall within that prohibition. In that case, the court upheld the county's tax on the sale of motor vehicles, even though the municipality had adopted a virtually identical tax. Finding no conflict, the court concluded that both taxes could be imposed concurrently. This case seems to strongly support the county's claim that the fee should apply countywide, even if a municipality has adopted a similar fee.

IV. Common Law Limitations on Regulatory Fees

For the reasons described above, Illinois courts have not developed clear strands of analysis to distinguish fees from taxes, and as a result, the categorization of this county fee is of less importance than it would be in other states. Nevertheless, common law analysis developed in other states reveals several important features that may be relevant to the legality of the Fair Share Fee. It is not surprising that California is the state with the most carefully developed judicial criteria for evaluation of government fees. Pursuant to Proposition XIII, any tax increased adopted by the California legislature must have a 2/3 majority. As a result, the state government has turned increasingly to non-tax revenues (fees and other charges) as a way to fund state programs. Predictably, those non-tax techniques are frequently challenged in court with the argument that they are really nothing more than taxes in disguise. Thus, the court has had the occasion to develop judicial criteria to distinguish fees (which can be adopted by a majority vote of the legislature) from taxes (which require a 2/3 majority).

The first aspect of California common law that may be relevant to the Cook County tax is the courts' recognition of the validity of regulatory fees that are imposed to recoup costs that the feepayer's activities have imposed on the general public. The case of *Sinclair Paint Co. v. State Board of Equalization* is the paradigmatic case establishing the legitimacy of government fees levied to mitigate the burdens caused by the feepayer. In that case, the California legislature adopted the Lead Poisoning Prevention Act, which established a program of evaluation, screening, and other services for children suffering from lead poisoning. The program was to be funded by fees assessed on manufacturers and individuals who had contributed to lead contamination in California. The Sinclair Paint Co. sued, claiming that this was an invalid tax, rather than a legitimate regulatory fee. The California court disagreed, establishing some important guidelines for the determination whether a particular government charge qualifies as a regulatory fee. The fee structure adopted in the Act, the court concluded, was a valid regulatory fee because: "It requires manufacturers and other persons whose products have exposed children

to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community."[8] The Cook County fee is based on a substantially similar rationale, and though this fee appears to be the first of its kind in Illinois, it can be defended as a burden-mitigating regulatory fee using the California line of analysis.

Assuming that the category of regulatory fees is broad enough in Illinois to encompass those fees that seek to mitigate the damage caused by past activity, the subsequent legal analysis is likely to focus on three separate aspects of the fee. First, a valid regulatory fee must have a nexus between the behavior of the feepayer and the uses to which the revenue derived will be put. Though no fine calibration of each individual feepayer's precise burden is necessary, the fee must be based on a reasonable claim that the class of feepayers is responsible for producing the societal burdens to which the fee revenues will be directed. This is an inquiry similar to that already applicable to fees under the Illinois Uniformity Clause, which requires a showing that the class of feepayers has been reasonably drawn to insure that those charged are actually responsible for producing the costs that the fee seeks to recoup.

The second legal requirement in the regulatory fee analysis is to establish that the fee levied does not exceed the burdens imposed on the public by the feepayer's activity. At this point in the analysis, a court would ask for evidence that the low-wage employees of the targeted large employers receive public subsidies whose costs are being recouped by the imposition of the fee. Again, this is not a precise calculation, but one that can be defended by the type of study referred to in the announcement of this new fee. This inquiry is substantially similar to the ban on "license for revenue" in the Illinois Constitution.

Finally, for a regulatory fee to be valid, its proceeds cannot simply be deposited in the general revenue fund of the local government. Earmarking is crucial, in order to ensure that the money generated is actually used to offset the burdens that have triggered its creation. In this regard, the fee's proposed distribution to various social agencies and government programs is a crucial and necessary part of its structure and should be explicitly articulated in the ordinance.

V. Conclusion

Based on my research, I conclude that the Cook County fee can be defended as a lawful implementation of the broad revenue raising powers afforded to home rule units of government by the Illinois Constitution. Because I have not found any Illinois caselaw involving regulatory fees adopted to offset burdens imposed on the public by the feepayer's activity, and because the scope of the Illinois Constitution's "license for revenue" prohibition is undefined, my opinion is based less on Illinois law than on my general understanding of how local fees are structured in other states. All in all, there are sound doctrinal arguments that support the fee's legality, and I believe that all of these arguments are based on a reasonable interpretation of the Illinois Constitution, Illinois caselaw, or common law precedent as established in other states.

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[8] Sinclair Paint Co. v. State Board of Equalization, 937 P.2d 1350, 1356 (Cal. 1997).

OFFICE OF THE STATE'S ATTORNEY
COOK COUNTY, ILLINOIS
CIVIL ACTIONS BUREAU

ANITA ALVAREZ
STATE'S ATTORNEY

500 RICHARD J. DALEY CENTER
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AREA 312-603-5440

October 19, 2015

Honorable Richard R. Boykin
Commissioner – 1st District
Cook County Board of Commissioners
118 North Clark Street, Room 567
Chicago, Illinois 60602

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

In Re: 15-281(AMENDED): Cook County Responsible Business Act

Dear Commissioner Boykin:

We received your request for advice with regard to the County's home rule authority to institute the Cook County Responsible Business Act (the "Ordinance"), which would require covered employers to pay an increasing living wage rate to all employees countywide. Additionally, the Ordinance imposes interest and a maximum penalty of $1000 on employers who do not pay the living wage rate.

ISSUE PRESENTED

Whether Cook County has the authority to enact the Ordinance in both unincorporated and incorporated areas of the Cook County.

CONCLUSION

In light of the fact that the Illinois Supreme Court has found that wage laws do not fall within a home rule unit's government and affairs, the County lacks the home rule authority to enact the Ordinance. The Illinois Supreme Court identified similar laws within the scope of State labor regulations, and concluded that the State has a far more vital interest in regulating labor conditions than do local entities. Consistent with that analysis, we conclude that the enactment of an ordinance requiring employers to pay a living wage and instituting interest and a penalty on those employers who do not comply likely does not fall within a home rule unit's government and affairs.

DISCUSSION

Any analysis regarding the validity of home rule power must begin with the legal question of whether the problem pertains to local government and affairs, as required by section 6(a) of the 1970 Illinois Constitution. As a home rule unit of local government, the County 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 welfare and to tax. 1970 Ill. Const., art. VII, § 6(a). Notwithstanding the forgoing, if the home rule entity's action does not pertain to its "government and affairs" it is invalid.

County's Home Rule Authority within the Scope of Labor Regulations

The Illinois Supreme Court's ruling in *Bernardi v. City of Highland Park,* 121 Ill. 2d. 1 (1988) directly calls into question the County's home rule authority to enact the proposed Ordinance. As a general rule, the authority of home rule units under section 6(a) is limited in those fields traditionally subject to comprehensive State regulation. *Bernardi,* 121 Ill. 2d at 14 citing *Kalodimos v. Village of Morton Grove*, 103 Ill. 2d 483, 501 (1984). In *Bernardi*, the court considered whether a home rule municipality must conform to the requirements of the Illinois Prevailing Wage Act. *Bernardi,* 121 Ill. 2d at 5. The court opined that "[e]stablishing minimum requirements to . . . improve working conditions has traditionally been a matter of State concern, outside the power of local officials to contradict, and it remains so today." *Id.* at 14.

Identifying a long list of wage-related statutes as within the scope of State labor regulations, the court opined that a departure from the prevailing wage is beyond the authority of a home rule unit because the State has a far more vital interest in regulating labor conditions than do local entities. *Id.* at 15-16. The court concluded that allowing home rule units to govern local labor conditions would destroy the General Assembly's "carefully crafted and balanced economic policies." *Id.* at 16.

An Alternative Interpretation of Bernardi

While we believe our interpretation of *Bernardi* to be dispositive with regard to ordinances within the scope of labor and employment such as the Responsible Business Act, we note that the passage of a similar ordinance by the City of Chicago that will raise the minimum wage for Chicago workers to $13 per hour ("Minimum Wage Ordinance") suggests a different interpretation of *Bernardi*. It is clear from our discussions with the City that prior to the enactment of the Minimum Wage Ordinance, the City considered the Supreme Court's ruling in *Bernardi*. Still, in the preamble to its Minimum Wage Ordinance, the City of Chicago cites its home rule authority pursuant to section 6(a) of the 1970 Illinois Constitution. Therefore, we must conclude that the City has interpreted *Bernardi* in such a way to preserve its home rule power to enact ordinances within the scope of labor regulation.

We presume that the City relied on an alternative interpretation of *Bernardi* that is premised on the idea that the State's vital interest in labor regulations does not foreclose a home rule unit from enacting similar ordinances in all cases. This argument relies heavily on a belief that the *Bernardi* court expressly held that the State's interest is to set minimum standards with regards

to labor regulations. *See, Bernardi,* 121 Ill. 2d at 14 (discussing "[e]stablishing ***minimum requirements*** to . . . improve working conditions has traditionally been a matter of State concern, outside the power of local officials to contradict, and it remains so today." (emphasis added)). Proponents of this interpretation cite to a myriad of cases where Illinois courts have routinely upheld local laws that provide greater protection than state laws. *See, Crawford v. City of Chicago,* 304 Ill. App. 3d 818, 828 (1st Dist. 1999) (City of Chicago's policy of extending benefits to same sex domestic partners upheld); *see also, Village of Bolingbrook v. Citizens Utils. Co.,* 158 Ill. 2d 133, 134-143 (1994) (environmental ordinances that regulate sewage discharge more restrictively than state law); *Kalodimos,* 103 Ill. 2d 483 (gun safety ordinance that regulated hand guns more restrictively than state law).

Adopting this rationale, it could be argued that the City's Minimum Wage Ordinance, and likewise, a similar labor regulation such as this Ordinance, would not interfere with the protection of the state's interests as long as such an ordinance provides more protections to workers than state law requires. While the argument can certainly be made, in light of the Supreme Court's clear holding that labor regulations are not a matter pertaining to local government and affairs, and the fact that none of the local laws cited by *Crawford, Village of Bolingbrook,* or *Kalodimos* pertain to the regulation of labor and employment, we conclude that our interpretation is the more correct legal position. Nevertheless, because the City's Minimum Wage Law has yet to be challenged, we cannot say conclusively as to which interpretation our courts would adopt.

Application of the Ordinance to Incorporated Areas of the County

Even assuming the Ordinance were found to be valid, any municipality could prevent the application of the Ordinance within its own municipal boundaries by enacting its own ordinance that conflicts with it.

Section (c) of Article VII of the Illinois Constitution clearly acknowledges the right of municipalities (home rule or non-home rule alike) to object to the assertion of county authority within their borders. It provides that: "[i]f a home rule county ordinance conflicts with an ordinance of a municipality, the municipal ordinance shall prevail within its jurisdiction." Ill. Const. 1970, art. VII, Sec. 6(c). The Report of the Committee on Local Government of the 1970 constitutional convention recognized the problem of legislating in the same field by both a municipality and a home-rule county not as a question of preemption of authority but as a matter of resolving conflicts in ordinances. (7 Proceedings 1591, 1646-1650.) In defining the problem to be resolved by section 6(c) the committee proposal states: [. . .] "there may be differences or actual conflicts and inconsistencies between municipal legislation and county legislation. Some provision must be made to resolve these potential disagreements and conflicts" (p. 1647).

The Attorney General opined that "[c]ounty home-rule powers ... embrace the entire county, including areas within municipal boundaries. In many cases, the extension of county authority into municipal territories will be beneficial and fully acceptable to city officials. An example is the operation of a county hospital and county health services for all residents of the county, including city dwellers. In other cases, however, city officials may object to the assertion of county authority within municipal boundaries, and there may be differences or actual conflicts and inconsistencies

between municipal legislation and county legislation. *Some provision must be made to resolve these potential disagreements and conflicts"* 1972 Op. Atty Gen. No. S-496 at page 6 (italics added).

Therefore, any municipality who wished to ensure that area businesses are not subject to the Ordinance could simply adopt an ordinance that expressly provides that the County's Ordinance shall not apply within its municipal boundaries. We note however, that the preference for municipalities represented by Section 6(c) does not render inoperative a home rule county's taxing ordinance within a municipality's boundaries when the municipality has legislated in the same field. *City of Evanston v. County of Cook*, 53 Ill. 2d 312, 317-318, 291 N.E.2d 823 (1972). However, since the County's Ordinance is a regulation and not a tax, 6(c) would apply, and a conflicting municipal ordinance would render the County's Ordinance inoperative within the municipality's boundaries.

There may be other constitutional issues arising from this legislation such as due process and equal protection considerations. For example, an argument can be made that imposing the $1,000 fee upon employers of 750 employees or more, and not upon all employers, creates an unreasonable and arbitrary classification in violation of the uniformity clause. 1970 Ill. Const., art. I, § 2; art. IX, § 2. We would be happy to address these issues in more detail. However, because *Bernardi* appears to create a fundamental challenge to the County's home rule authority, we believe that there is no need to discuss additional constitutional challenges to the Ordinance.

If this Office can be of further assistance to you in this matter, please contact us.

Sincerely,

ANITA ALVAREZ
STATE'S ATTORNEY OF COOK COUNTY

Donald Pechous
Assistant State's Attorney
Acting Bureau Chief, Civil Actions Bureau

ILLINOIS
RESTAURANT
ASSOCIATION

October 20, 2015

Cook County Board of Commissioners
118 N. Clark St.
Chicago, IL 60602

Dear Commissioner,

I am writing you on behalf of the Illinois Restaurant Association to express my opposition to Commissioner Steele's proposed Ordinance 15-5825, which will mandate that all employers with 750 or more employees in Cook County must pay their employees a minimum wage of $10.00 starting December 1, 2015, with an increase each year until 2018, at which point the minimum wage would be $13.75.

Last year, the IRA opposed this sort of unilateral approach when the City of Chicago moved to raise its minimum wage to $13 an hour by 2019. We supported a uniform, reasonable increase to the minimum wage at the state level. We continue to be adamantly opposed to a piecemeal approach to this issue, where municipalities are creating a patchwork of regulations and minimum wage rates across the state.

Cook County's unemployment rate is already higher than any other surrounding county at 6.0%. The County Board has just voted to once again raise the county's sales tax to one of the highest levels in the United States. We should not be giving our largest employers in the county another reason to potentially pack up and look for more business-friendly environments, and take those good-paying, career-oriented jobs with them.

Restaurants are the largest private sector employer in the state of Illinois – employing over 529,000 people and registering over $23 billion in annual sales. Sales from Illinois' foodservice industry alone contribute $1.8 billion in sales taxes to state and municipal coffers. We need to encourage an environment where businesses, especially restaurants, can thrive, not one where they are constantly waiting for the next blow to their bottom line.

I urge you to oppose this mandate that will put Cook County businesses at an even higher competitive disadvantage with neighboring counties and states. The Illinois Restaurant Association stands with the local business community in opposition to proposed Ordinance 15-5825.

Sincerely,

Sam Toia
President & CEO
Illinois Restaurant Association

ILLINOIS
RESTAURANT
ASSOCIATION

Cc: The Honorable Toni Preckwinkle
The Honorable Richard Boykin
The Honorable Robert Steele
The Honorable Jerry Butler
The Honorable Stanley Moore
The Honorable Deborah Sims
The Honorable Joan Patricia Murphy
The Honorable Jesus Garcia
The Honorable Luis Arroyo
The Honorable Peter Silvestri
The Honorable Bridget Gainer
The Honorable John Daley
The Honorable John Fritchey
The Honorable Larry Suffredin
The Honorable Gregg Goslin
The Honorable Timothy Schneider
The Honorable Jeffrey Tobolski
The Honorable Sean Morrison