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November 15, 2017

VIA FIRST CLASS MAIL & EMAIL

Councilman Michael H. Vincent – Council President
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Councilman Irwin G. Burton, III
Councilman George B. Cole – Council Vice President
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Sussex County Council
2 The Circle, P.O. Box 589
Georgetown, DE 19947

Re: Public Comment on Sussex County Ordinance Affecting Labor Unions
Introduced on October 31, 2017; Notice of Objection.

Dear Members of Sussex County Council:

Patrice Gilliam-Johnson, Ph.D, Secretary of the Department of Labor of the State of Delaware, asked the State of Delaware Department of Justice to offer our views regarding the above-referenced Ordinance in the form of a public comment. Please accept this letter as our public comment on her behalf. The at-issue proposed Ordinance intends to “add a new chapter 117 to Sussex County Code Entitled ‘Labor Unions’” (hereafter the “Ordinance”). We write to express our respectful view that Sussex County Council is without legal authority to enact the Ordinance.

The Ordinance seeks to regulate the conduct of employers, employees, and collective bargaining units representing those employees in Sussex County. Specifically, the Ordinance expressly intends to remove “restraint or coercion regarding the payment of mandatory dues, fees, or other payments to a labor organization as a condition of that employment” At Section 1, the Ordinance states that the “right to work shall not be infringed or restricted in any way based on membership in, affiliation with, or financial support of a labor organization.” Title 9 of the Delaware Code is devoid of any express or implied grant of authority to Sussex County to regulate labor organizations or otherwise affect the employee/employer relationship with respect to collective bargaining. To assist in an understanding of our position, we offer the following legal analysis.

As it must, the Ordinance expressly incorporates and relies upon the County’s general home rule authority to enact ordinances set forth at 9 *Del. C.* § 7001. Sussex County’s power to enact ordinances therein is expressly limited as follows:

This grant of power does not include the power to enact private or civil law concerning civil relationships, except as incident to the exercise of an expressly granted power, and does not include the power to define and provide for the punishment of felonies.¹

The Ordinance is a private or civil law because it attempts to establish new rights and causes of action between private individuals and parties.² The relationships between an employer and employee, between an employee and a collective bargaining organization, and between the collective bargaining organization and the employer are all “civil relationships” as contemplated by 9 *Del. C.* § 7001.³ It is beyond dispute that the Ordinance concerns these relationships. There is no express grant of authority to Sussex County to legislate these issues. Sussex County has the power to affect civil relationships *only* where there is an express grant of authority by the General Assembly. In *Hickman v. Workman*,⁴ the Delaware Supreme Court recognized Sussex County’s right to reapportion its Council Districts after three Sussex County citizens attempted to prevent the County from complying with a federal court order that found that the existing Council Districts were malapportioned in violation of the Equal Protection Clause of the Constitution of the United States. In that decision, our Supreme Court recognized an express grant of authority to reapportion Council Districts.⁵ Nothing in Title 9 permits Sussex County to legislatively affect the relationships touched upon by the Ordinance and *Hickman* cannot be of assistance in its defense. Beyond the lack of an express grant of legislative authority to Sussex County, the General Assembly has expressly forbidden the delegation of labor regulation authority to political subdivisions.⁶ In each of these Acts, the General Assembly addressed the

¹ *Id.* § 70001(a).

² *See New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1160 (N.M. Ct. App. 2005) (“[P]rivate law has been defined as consisting of substantive law which establishes legal rights and duties between and among private entities, law that takes effect in lawsuits brought by one private entity against another.”) (citation omitted).

³ *Id.* (acknowledging employee/employer as a “civil relationship” in the context of restraints on general powers arising from that home rule statute).

⁴ 450 A.2d 388 (Del. 1982).

⁵ *Id.* at 392.

⁶ *See* 19 *Del. C.* §§ 1301-1319 (the “Public Employment Relations Act” or “PERA”); 19 *Del. C.* §§ 1601-1618 (the “Police Officers’ and Firefighters’ Employment Relations Act” or “POFERA”).

exclusive manner in which these identified groups of employees, no matter what county they work or reside in, collectively bargain and resolve disputes arising out of that collective bargain. Sussex County is not free to supplement these longstanding general statutes with additional local obligations. For these reasons, the Ordinance cannot withstand judicial scrutiny.

Our Court of Chancery construed New Castle County's general powers in a manner recognizing the "civil relationship" limitation on home rule authority decades ago. In that matter, New Castle County sought to regulate subdivision drainage in the absence of an express grant of power to do so.⁷ The Court of Chancery held that "the express grant [of authority to the County] is to regulate drainage in subdivisions. There is nothing to indicate that in so doing the County may alter civil relationships between landowners that would otherwise exist at law."⁸ Similarly, nothing in the authority delegated to Sussex County by Title 9 grants it the authority to alter civil relationships between employers, employees, and collective bargaining units. Yet the Ordinance does just that.

For more than 50 years, union security agreements requiring compulsory payment of union dues have been legal under federal and state law.⁹ Union security agreements exist to ensure that workers who opt not to join a union (yet still reap the benefits of collective bargaining) pay their so-called "fair share." "Fair share" is a routine feature of collective bargaining across the United States and in the State of Delaware. The Ordinance seeks to legally prohibit these kinds of agreements and create individual legal causes of action designed to set

⁷ *Glassman v. Weldin Farms, Inc.*, 359 A.2d 669, 679 (Del. Ch. 1976), *modified and remanded on other grounds by Weldin Farms, Inc. v. Glassman*, 414 A.2d 500, 506 (Del. 1980); *see also NVF Co. v. Garrett Snuff Mills, Inc.*, 2002 WL 130536, at *4 (Del. Super. Jan. 30, 2002) (citing *Glassman's* recognition of the limitation on county home rule and noting "[i]f the County cannot foreclose a private cause of action, it also cannot create one").

⁸ *Id.*

⁹ *See Friedrichs v. California Teachers Ass'n*, 2013 WL 9825479 (C.D. Cal. Dec. 5, 2013) (rejecting claims that "fair share" was unconstitutional); *aff'd*, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff'd by an equally divided Court*, 136 S.Ct. 1083 (2017); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1954); *Radio Officers' Union of Commercial Telegraphers Union, A.F.L. v. NLRB*, 347 U.S. 17, 41 (1954); *Hughes v. Gen. Motors Corp.*, 1985 WL 189303, at *3 (Del. Super. 1985) ("The union security agreements permitted by 8(a)(3) [of the NLRA] require employees to pay dues . . .").

aside these bedrock principles of American collective bargaining. The fact that one Court of Appeals has determined that the NLRA does not preempt political subdivisions of the states offers no refuge for the Ordinance.¹⁰ Even if Sussex County could avail itself of this decision, it would still have to show the legal ability to legislate on these topics in the first instance. No such ability exists.

The County has no express legal authority to affect these kinds of civil relationships. It does not have the express legal authority to establish new causes of action in this field. It does not have the express legal authority to confer legal or equitable jurisdiction upon state courts as set forth in the Ordinance.¹¹ For these reasons, the Ordinance cannot withstand judicial scrutiny.

We appreciate that our form of government permits, at every level, the opportunity to test new ideas in the crucibles of the legislative and judicial branches. The Department of Labor did not request, and we have not offered, an opinion about the underlying merits of the proposed ordinance. This letter is for the purpose of indicating our legal opinion that Sussex County Council is without legal authority to enact the Ordinance. Under current state law, we believe that only the Delaware General Assembly has the authority to power to enact private or civil law concerning civil relationships in this context.

Respectfully,



Aaron R. Goldstein
State Solicitor

cc: Patrice Gilliam-Johnson, Secretary DOL (by email only)
Matthew P. Denn, Attorney General (by email only)
LaKresha Roberts, Chief Deputy Attorney General (by email only)
J. Everett Moore, Jr., Esquire – Counsel to Sussex County Council (by mail & email)

¹⁰ See *UAW, Local 3047, et al. v. Hardin*, 842 F.3d 407, 421 (6th Cir. 2016), *cert. denied*, 86 U.S.L.W. 3150 (U.S. Oct. 2, 2017).

¹¹ Because the ordinance is not “authorized by statute,” the Justice of the Peace would be without subject matter jurisdiction to hear matters involving the enforcement or violation of the Ordinance. See 10 *Del. C.* § 9301(2).