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**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

FILED

2016 AUG 30 P 3:48

Case No: CV-16-868008

Judge: MICHAEL J RUSSO

CLERK OF COURTS
CUYAHOGA COUNTY

CITY OF CLEVELAND
Plaintiff

STATE OF OHIO
Defendant

JOURNAL ENTRY

MOTION FOR TEMPORARY RESTRAINING ORDER AND FOR PRELIMINARY AND PERMANENT INJUNCTION, FILED 08/23/2016, IS GRANTED IN PART. OSJ.

Judge Signature

Date

STATE OF OHIO)	IN THE COURT OF COMMON PLEAS
) SS:	
CUYAHOGA COUNTY)	CASE NO. CV-16-868008
CITY OF CLEVELAND)	
)	
Plaintiff,)	
)	
Vs.)	<u>OPINION AND ORDER FOR</u>
)	<u>PRELIMINARY INJUNCTION</u>
STATE OF OHIO)	
)	
Defendant.)	

This cause is before the Court on plaintiff city of Cleveland's ("City") verified complaint for Declaratory Judgment, Temporary Restraining Order, and Injunctive Relief and "Motion for Temporary Restraining Order and for Preliminary and Permanent Injunction," filed August 23, 2016. The defendant, state of Ohio ("State"), responded by brief on August 25, 2016. An expedited hearing was held on August 26, 2016.

The City provided notice of the filing of its motion to the State, so the motion must proceed as a preliminary injunction rather than as a temporary restraining order. Civ. R. 65(A). The Court grants the City's motion for the reasons explained below.

1) FACTS

On June 10, 2003 the City enacted Cleveland Codified Ordinance Chapter 188 (CCO 188), commonly called the Fannie Lewis Law, through the passage of City Ord. No. 2031-A-02. The Fannie Lewis Law establishes certain labor requirements for construction contracts that are placed for bid by the City. Specifically, it requires that a minimum of 20% of the total work hours performed under a construction contract be performed by Cleveland residents, and that no fewer than 4% of those resident work hours be performed by low-income persons. CCO §188.02(a). Such terms are further defined by the ordinance. *Id.* At the time of its passage, this ordinance comported with state laws R.C. §153.013 and §5525.26.

On May 31, 2016, the Governor of Ohio signed into law R.C. §9.49, which becomes effective on August 31, 2016. The statute was introduced through H.B. 180 and passed by the General Assembly on May 11, 2016. The statute preempts and restricts local authority in the establishment of the terms of contracts for public improvements, and it would prohibit the City's enforcement of the Fannie Lewis

Law. The General Assembly declared its intent to recognize Section 34 of Article II of the Ohio Constitution with this act and it repealed R.C. §153.013 and §5525.26. The City seeks a declaration that R.C. § 9.49 was improperly characterized as arising under Ohio Constitution, Article II, § 34, and that the statute otherwise violates the City's Home Rule authority under Ohio Constitution, Article XVIII, § 3.

2) PRELIMINARY INJUNCTION

In determining whether to grant injunctive relief, a trial court considers four factors: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction. *State ex rel. Cleveland v. Foxworth*, 8th Dist. Cuyahoga No. 101651, 2015-Ohio-1825, ¶ 25. The Court should apply a balancing of the four factors to determine whether to grant injunctive relief. *Procter & Gamble Co. v. Stoneham*, 140 Ohio App. 3d 260, 747 N.E. 2d. 268 (2000).

a) LIKELIHOOD OF SUCCESS ON THE MERITS

The following constitutional analysis discusses the likelihood of the City to succeed on the merits. The Court finds that it is likely that the City will succeed on the merits of the case, as discussed below, and then will consider the other factors in the balancing test to determine whether injunctive relief is proper.

i) *Ohio Constitution, Article II, § 34*

Article II, Section 34 of the Ohio Constitution empowers the General Assembly to enact laws "providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." "Section 34 is a 'broad grant of authority to the legislature to provide for the welfare of all working persons'." *Lima v. State*, 122 Ohio St. 3d 155, 2009-Ohio-2597, 909 N.E. 2d 616, ¶ 11. The Court finds that R.C. § 9.49 was improperly enacted because it does not provide for the comfort, health, safety, and welfare of employees; rather, R.C. § 9.49 seeks only to dictate the terms by which municipalities may contract for laborers in construction projects within their realm. There are no protections afforded to employees under R.C. § 9.49. Because the Court finds that the General Assembly had no authority to enact this statute under Ohio Constitution Article II, Section 34, the Court next must consider whether this statute unconstitutionally interferes with the City's Home Rule authority under Ohio Constitution, Article XVIII, Section 3.

ii) Ohio Constitution, Article XVIII, § 3—Home Rule authority

There is a three-part test to determine whether a provision of a state statute takes precedence over a local ordinance. See *City of Canton v. State*, 95 Ohio St. 3d 149, 2002-Ohio 2005, 766 N.E.2d 963, ¶19. A state statute takes precedence over a local ordinance when 1) the ordinance is in conflict with the statute; 2) the ordinance is an exercise of the police power, rather than of local self-government; and 3) the statute is a general law. *Id.*

(1) Conflict

There is no dispute by the parties that the ordinance and statute conflict, so the Court must now determine if the ordinance is an exercise of the police power. The Court notes, however, that R.C. § 9.49 limits its scope only to “laborers” whereas CCO 188 seemingly encompasses all persons employed in the course of a construction project. Additionally, it is not clear that R.C. § 9.49 applies to subcontractors as well as general contractors, which is made clear in CCO 188. Finally, CCO 188 applies to any agreement where the city “grants a privilege” or expends funding, and the Court contemplates whether this could apply to the permitting of private construction contracts, whereas R.C. § 9.49 specifically only applies to public projects.

(2) Exercise of Police Power

“Municipalities [] have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with the general laws.” Ohio Const., Article XVII, Section 3. Police-power ordinances “protect the public health, safety, or morals, or the general welfare of the public.” *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St. 3d 96, 2008-Ohio-4605, 896 N.E. 2d 967. This ordinance was passed under the authority of “the rights of the City as a Charter City to address legitimate welfare and poverty issues that were found to exist in the City” as an exercise of the City’s Home Rule authority. Contrary to the position taken by the State, the Court finds that this ordinance is not a residency requirement for citizens as prohibited by *Lima*. The City provided evidence at the preliminary injunction hearing that the number of residents working for a contractor has no bearing in awarding of the contract, and that any contractor on any project may employ between zero and 100% of Cleveland residents. The Court finds that while the Fannie Lewis Law benefits City residents, it is not a use of the City’s police power. It does not protect the general welfare of the public. Rather, it is a job creation

tool exercised by the City when public funds are expended. The Fannie Lewis Law is an exercise of local self-government to create contracting requirements within the municipality of Cleveland.

(3) General Law

Even if the ordinance were an exercise of police power rather than of self-government, the statute is not a general law as determined by the Ohio Supreme Court in *City of Canton*, supra. To constitute a general law for the purposes of home-rule analysis, a statute must: 1) be part of a statewide and comprehensive legislative enactment; 2) apply to all parts of the state alike and operate uniformly throughout the state; 3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations; and 4) prescribe a rule of conduct upon citizens generally. *Id.* at ¶21. For the reasons below, the Court finds that R.C. § 9.49 is not a general law and must cede to OCC 188 pursuant to the City's constitutional Home Rule authority.

(a) STATEWIDE AND COMPREHENSIVE LEGISLATIVE ENACTMENT

The Court finds that R.C. § 9.49 is not part of a comprehensive and statewide legislative scheme. The State argues that there are chapters full of statutes relating to construction in the revised code. The statute in question, however, does not. It was enacted, according to the General Assembly, for the betterment of all employees. The Court finds that R.C. § 9.49 is piecemeal in both its intent and application. For example, R.C. § 9.49 does not serve the betterment of the Cleveland employees who have benefited under OCC 188. The employees who the State wrongfully argues are being excluded from employment in Cleveland are no more likely to be employed under either OCC 188 or R.C. § 9.49.

(b) APPLY STATEWIDE AND OPERATE UNIFORMLY

The Court finds that R.C. § 9.49 applies statewide and operates uniformly.

(c) POLICE POWER V. LIMITATION OF HOME RULE

The Court finds that the enactment of R.C. § 9.49 was undertaken to limit Home Rule authority as it relates to construction contracts. The State purports to label the law as relating to residency requirements in order to avoid a Home Rule analysis and argues such, but the Court finds the State's argument disingenuous. The statute provides no police, sanitary, or similar regulations. After more than a decade of successful application of the Fannie Lewis Law, the State is attempting to abrogate the City's self-rule through the passage of R.C. § 9.49. The State argues that the City should have been

barred from injunctive relief because it waited until the week before the law becomes effective to file its motion. The Court finds that argument unpersuasive when the City has filed its Complaint before R.C. § 9.49 takes effect, but when the State enacted R.C. § 9.49 *over 12 years* after the Fannie Lewis Law was passed.

(d) PROSCRIBES A GENERAL RULE OF CONDUCT

The Court finds that R.C. § 9.49 fails to proscribe a general rule of conduct for citizens across the state. Instead, it proscribes requirements that municipalities must follow when contracting with construction companies.

b) IRREPARABLE HARM TO THE PLAINTIFF

The Court finds that denying the City's motion would cause irreparable harm to its ability to exercise its Home Rule authority as a Charter City under Ohio Constitution, Article XVIII, Section 3 and to promote programs within its boundaries that address economic disparity. The Court further finds that it would harm the City as well as its residents and businesses that contract with the City should the status quo be altered.

c) INJURY TO OTHERS

The City presented testimonial evidence as to current, ongoing and prospective contracts that would be affected by the enactment of R.C. § 9.49. The Fannie Lewis law is well-known amongst prospective construction contractors. The Court further finds no evidence of other people who would be injured by maintaining the status quo during the pendency of this litigation.

d) SERVICE OF THE PUBLIC INTEREST

In addition to the evidence presented by the City regarding the contracts that would be effected by the enactment of R.C. § 9.49, the City further provided evidence of the benefits provided to residents from the penalty and enforcement section of CCO 188. The Court finds that the public interest would be well served by maintaining the status quo.

3) CONCLUSION

Having reviewed the papers and exhibits filed in support of and in opposition to the City's motion, and having considered argument and evidence presented at the hearing, and balancing all the determinative factors for a preliminary injunction, the Court finds the evidence weighs in favor of

issuing the order, and the City's motion for a preliminary injunction is granted. The Court finds the following:

- 1) The General Assembly's reference to Article II Section 34 of the Ohio Constitution as a justification for enacting R.C. §9.49 is improper, not well taken, and unconstitutional.
- 2) R.C. §9.49 violates the Ohio Constitution by infringing upon the City's Home Rule powers of local self-government.
- 3) R.C. §9.49 is not a general law and violates the Ohio Constitution by infringing upon the City's Home Rule authority to adopt and enforce within the City's limits such local police, sanitary and other similar regulations, as are not in conflict with the general laws.

The State of Ohio is hereby immediately and preliminarily restrained and enjoined from enforcing HB 180 and R.C. §9.49 until determination of this matter by a trial on a permanent injunction. A full trial on the permanent injunction is set for November 7, 2016 at 10:00 a.m. in Cuyahoga County Common Pleas Courtroom 17-C. This order is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise. Pursuant to Ohio Civil Rule 65(C) no security shall be required of the City or of any officer of the City.

Under Civ. R. 54(B), the Court expressly determines that there is no just reason for delay should an interlocutory appeal of this order be pursued.

So ordered.



Michael J. Russo, Judge

8-30-2016
Date

CERTIFICATE OF SERVICE

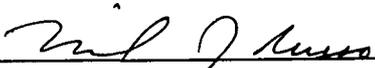
A copy of the foregoing Opinion and Order for Preliminary Injunction was sent by e-mail this
30th day of August, 2016 to:

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MICHAEL J. RUSSO, JUDGE