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To: Board of Supervisors
From: Janet Lyness, Johnson County Attorney
RE: Legality of Minimum Wage Ordinance
Date: August 14, 2015

Below is the research on the legality of Johnson County adopting its own Minimum Wage Ordinance setting a minimum wage in excess of the one set by state law. The review included, among other things, the federal and state minimum wage laws, the legislative history of the state minimum wage law, portions of the Iowa Code setting forth various county powers, Iowa cases and secondary sources addressing traditional state law preemption in the context of home rule, and cases and secondary sources addressing the private law exception to home rule.

FEDERAL LAW PREEMPTION

The federal minimum wage, as set forth in the Fair Labor Standards Act, does not preempt local minimum wage laws. In fact, the federal law specifically reserves for local governmental bodies, as well as states, the ability to adopt their own, higher, minimum wages, stating that "[n]o provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter . . . ." 29 U.S.C. § 218(a) (2015). Thus, if preemption is to be had, it will come from state law.

TRADITIONAL STATE LAW PREEMPTION

In Iowa, cities and counties are given home rule authority pursuant to an amendment to the Iowa Constitution. The home rule authority granted to each is largely identical. With respect to counties, Article III, § 39A of the Iowa Constitution sets forth the County Home Rule Amendment, adopted in 1978. It provides:

> Counties or joint county-municipal corporation governments are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly. The general assembly may provide for the creation and dissolution of joint county-municipal corporation governments. The

> general assembly may provide for the establishment of charters in county or joint county-municipal corporation governments.
>
> If the power or authority of a county conflicts with the power and authority of a municipal corporation, the power and authority exercised by a municipal corporation shall prevail within its jurisdiction.
>
> The proposition or rule of law that a county or joint county-municipal corporation government possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Const. art. III, § 39A.

After being formally adopted, this constitutional amendment was "implemented" by the legislature when it readopted and amended several portions of Iowa Code Chapter 331. Specifically, Iowa Code § 331.301 provides, in relevant part:

> 331.301 General powers and limitations.
> 1. A county may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent county power.
> 2. A power of a county is vested in the board, and a duty of a county shall be performed by or under the direction of the board except as otherwise provided by law.
> 3. The enumeration of a specific power of a county, the repeal of a grant of power, or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law.
> 4. An exercise of a county power is not inconsistent with a state law unless it is irreconcilable with the state law.
> 5. A county shall substantially comply with a procedure established by a state law for exercising a county power unless a state law provides otherwise. If a procedure is not established by state law, a county may determine its own procedure for exercising the power.
> 6. a. A county shall not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.
> b. A county shall not impose any fee or charge on any individual or business licensed by the plumbing and mechanical systems board for the right to perform plumbing, mechanical, HVAC, refrigeration, sheet metal, or hydronic systems work within the scope of the license. This paragraph does not prohibit a county from charging fees for the issuance of permits for, and inspections of, work performed in its jurisdiction.

7. A county shall not levy a tax unless specifically authorized by a state statute.

Iowa Code § 331.301 (2015).

Under this Constitutional/statutory scheme, often referred to as legislative home rule, "the legislature retains the unfettered power to prohibit a municipality from exercising police powers, even over matters traditionally thought to involve local affairs. Conversely, as long as an exercise of police power over local affairs is not 'inconsistent with the laws of the general assembly,' municipalities may act without express legislative approval or authorization." *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008) (quoting Iowa Const. art. III, § 38A)). Thus, a municipality or county may not act on a matter if the legislature has directed otherwise because, when exercised, the state's legislative power 'trumps" the local power. *See id.*

Since the adoption of Municipal and County Home Rule, Iowa appellate courts have been called upon to determine whether local legislation is inconsistent with state law or otherwise exceeds a county's home rule authority. Generally, local ordinance is inconsistent with state law only when it is irreconcilable with state law. Iowa Code §§ 331.301(4), 364.2(3). This irreconcilability is often explained as when an ordinance "prohibits an act permitted by statute, or permits an act prohibited by statute." *Baker v. City of Iowa City*, 750 N.W.2d 93, 99-100 (Iowa 2008) (internal citations omitted). And when determining just what the legislature has permitted or prohibited, the courts "look to the legislative intent in enacting the state statutes and [] require that any local ordinance remain faithful to this legislative intent, as well as to the legislative scheme established in the relevant state statutes." *Id.* at 100 (quoting *Goodell v. Humboldt County*, 575 N.W.2d 486, 500 (Iowa 1998)).

In applying these concepts, the Iowa Supreme Court has recognized three distinct types of preemption—express preemption, implied conflict preemption and implied field preemption. Express preemption "applies where the legislature has specifically prohibited local action in a given area." *Seymour*, 755 N.W.2d at 538. The Supreme Court recognizes that express preemption "is most consistent with the notion that 'limitations on a municipality's power over local affairs are not implied; they must be imposed by statute.'" *Id.* (quoting *City of Des Moines v. Gruen*, 457 N.W.2d 340, 343 (Iowa 1990)). Still, the Court has gone well beyond the bounds of express preemption in determining whether local ordinances are irreconcilable with state law. "In order to ensure maximum loyalty to legislative intent, [the Supreme Court] has developed the residual doctrine of implied preemption, notwithstanding language in [Supreme Court] cases disapproving of implied limitations on municipal power." *Id.*

As noted above, implied preemption comes in two forms. Implied conflict preemption occurs when, "although there is no express preemption, the statute on its face contains a mandate that by its very nature is preemptory." *Id.* Put another way, "even though an ordinance may not be expressly preempted by the legislature, the ordinance cannot exist harmoniously with a state statute because the ordinance is diametrically on opposition to it." *Id.* The Supreme Court describes the legal standard for conflict preemption as "demanding." *Id.* at 539. The Court has ruled that a local law must be irreconcilable with the state law in order to be preempted by it; that the Court presumes that the municipal ordinance is valid; and, if possible, the Court must "interpret the state law in such a manner as to render it harmonious with the ordinance." *Id.* "In

order to be irreconcilable, the conflict [between the state and local law] must be obvious, unavoidable, and not a matter of reasonable debate." *Madden v. City of Iowa City*, 848 N.W.2d 40, 49 (Iowa 2014) (internal citations omitted). "When a state law merely sets a standard, a local law setting a higher standard would not conflict with the state law and would be authorized under section 331.301(6)." *Goodell*, 575 N.W.2d at 500. Moreover, legislative silence on a matter cannot "be interpreted as a prohibition of local action under home rule in light of [the Supreme Court's] obligation to harmonize and reconcile a statute with an ordinance whenever possible." *Id.* at 50.

Implied field preemption, on the other hand, "occurs when the legislature has so covered a subject by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law." *Seymour*, 755 N.W.2d at 539. Similar to conflict preemption, the test for field preemption is stringent. *Id.* "Extensive regulation of [an] area alone is not sufficient. In order to invoke the doctrine of field preemption, there must be some clear expression of legislative intent to preempt a field from regulation by local authorities, or a statement of the legislature's desire to have uniform regulations statewide." *Id.* (citations omitted). Even though there are no "magic words" that must be used by the legislature, "[t]here must be persuasive concrete evidence of an intent to preempt the field in the language that the legislature actually chose to employ." *Id.* The Supreme Court describes field preemption as "a narrow doctrine that cannot be enlarged by judicial policy preferences." *Id.* As such, arguments that statewide regulation of an area is preferable to local regulation, alone, carry no weight. *See Goodell*, 575 N.W.2d at 498 ("It would be inconsistent with Iowa's county home rule amendment, our home rule statutes and this court's prior cases to imply preemption based on an argument that statewide regulation of an area is preferable to local regulation, in the absence of an expression of legislative intent to completely regulate the area in question.")

In applying these rules of law to the issue at hand, whether the state's minimum wage law preempts the County from adopting a local minimum wage law that sets a higher minimum wage, it is clear there is no express preemption. The state minimum wage law, Iowa Code Chapter 91D, is silent on whether a county or city may also adopt its own minimum wage law. The administrative rules also reference no limitations on local ordinances.

Regarding implied conflict preemption, given the presumption of validity, the requirement that an interpreting court harmonize the state and local statutes, and the fact that any conflict cannot be reasonably subject to any debate, it would appear a local minimum wage is not irreconcilable with the state minimum wage. The state minimum wage act arguably does little more than set a minimum standard that must be met with respect to the wages to be paid in the state. Allowing a city or county to adopt a higher standard would not seem to create the level of conflict necessary to find implied conflict preemption.

Regarding implied field preemption, the doctrine is also to be very narrowly interpreted. As for the state minimum wage statute, it contains relatively little regulation overall. In fact, it can be contained on a single page. Additionally, there is no language in the statute (or the legislative history) that expresses the legislature's intent to preempt the field or even that there should be uniformity throughout the state. As such, it would also appear that a local minimum wage ordinance would not be subject to implied field preemption.

THE PRIVATE LAW EXCEPTION

As part of the home rule implementing legislation adopted in 1981, the Iowa legislature added language to Section 331.301 that contains what is known as the private law exception to home rule. Specifically, Section 331.301(1) provides that: "A county may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the county or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents. *This grant of home rule powers does not include the power to enact private or civil law governing civil relationships, except as incident to an exercise of an independent county power*." (emphasis provided). This means that even if a local minimum wage ordinance can withstand traditional state law preemption analysis, it could still be found to be preempted by state law if it (1) constitutes a private or civil law governing civil relationships, and (2) is not adopted incident to an exercise of an independent county power.

There do not appear to be any Iowa Appellate cases interpreting the private law exception to home rule, as it is set out in Section 331.301(1).[1] There are, however, numerous other states that have the private law exception in either their constitutional home rule language or the legislation associated with it. Several of these states have produced appellate decisions interpreting, on some level or another, the private law exception to home rule. Based on these cases, the difficulty in interpreting the private law exception often comes not from determining whether a particular ordinance constitutes a private or civil law governing civil relationships, but, rather, just what it means for such an ordinance to be incident to an exercise of an independent county or city power—or, based on the language found in some of the states' statutes or constitutions, what it means for an ordinance to be *an* incident to an exercise of an independent county or city power. (It appears that in some states the word incident is used as a noun while in others, and apparently in Iowa, it is used as an adjective.) The cases interpreting this language appear to depend heavily on both the nature of the ordinance being considered and the precise language of the exception as found in the state's statutes or constitution. Some examples follow.

One of the cases most often cited in regards to the private law exception comes from Massachusetts. In Massachusetts, the private law exception is contained in the constitution as a specific limitation on the power of local governments. Specifically, Article II, Section 7(5), provides that nothing in the constitution is intended to grant to any city the power to "enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power." The Supreme Judicial Court of Massachusetts set out to interpret this language in the 1970 case of *Marshal House, Inc. v. Rent Review and Grievance Board of Brookline*, 260 N.E.2d 200 (Mass. 1970). The local ordinance in question in *Marshal House* was a local rent control ordinance that had been adopted by a city. The Court started by pointing out

[1] I know of one Iowa District Court case interpreting the private law exception, from the context of a Cedar Rapids ordinance requiring certain language be included into residential lease agreements. In *Landlords of Linn County and Rehman Enterprises v. City of Cedar Rapids*, Linn County Case No. EQCV069920, Judge Baumgartner cited many of the cases below in finding that the ordinance at issue was prohibited by the private law exception to home rule.

that the language from Article II, Section 7(5) is ambiguous and that the ambiguity is not substantially clarified by the legislative history. The Court then cites a law review article interpreting similar language from the American Municipal Association's model home rule legislation. "This is a phase of home rule which has not generally been adequately considered. Obviously, we do not wish to give our cities the power to enact a distinctive law of contracts, for example. On the other hand, the exercise of municipal powers is very likely to have important bearings upon private interests and relationships. The approach of the . . . [language now in § 7(5)] is to strike a balance by enabling home rule units to enact private law only as an incident to the exercise of some independent municipal power." *Id.* at 204 (alteration in original) (internal citation omitted). With this balancing in mind, the Court found that the rent control ordinance at issue was indeed a private or civil law governing civil relationships, despite the public objectives that went behind its adoption. *Id.* at 205-06. Regarding whether the ordinance was an incident to a separate city power, the municipal defendant argued that a rent control ordinance would be incident to its police powers. The Court, however, appears to hold that "a municipal civil law regulating a civil relationship is permissible (without prior legislative authorization) only as an incident to the exercise of some independent, individual component of the municipal police power." *Id.* at 206-07. That is, in order to enact a rent control ordinance, doing so would have to be an incident to some other police power rather than an end unto itself. The Court then struck down the ordinance. There are several other cases from Massachusetts which follow this general pattern and cite *Marshal House*. *See, e.g.*, *Bannerman v. City of Fall River*, 461 N.E.2d 793 (Mass. 1984).

A few years after *Marshal House* the Superior Court of Delaware upheld an ordinance that required a seller of real property to have it inspected for housing code violations and created the presumption of a warranty when the seller failed to do so. *Tucker v. Crawford*, 315 A.2d 737 (Del. Sup. 1974). The Court found that the ordinance was adopted as an incident to the city's police powers and, therefore, was adopted as an incident to an independent city power. *Id.* at 740. Like Iowa's, the private law exception is found in Delaware's code as opposed to its constitution. Unlike Iowa's, however, the code section involved does not specifically reference a grant of traditional police powers in addition to home rule power.

In 1975, the Indiana Court of Appeals decided *City of Bloomington v. Chuckney*, 331 N.E.2d 780 (Ind. Ct. App. 1975). At issue in Chuckney was the City of Bloomington's attempt to adopt portions of the Uniform Residential Landlord and Tenant Act as a local ordinance. In Indiana, the private law exception is contained only in its code, as opposed to its constitution, and the phrase "an incident" is used. The Court held that "portions of [the ordinance] so directly affect the landlord-tenant relationship that they cannot be upheld as an incident to the exercise of an independent municipal power." *Id.* at 783. The Indiana Court appears to focus on just how pervasive the ordinance is, with the presumption being that if the ordinance interfered less with the landlord-tenant relationship it may have survived the challenge. *Chuckney* was later distinguished by the Indiana Court of Appeals in a case addressing a City of Bloomington ordinance that required rental properties to be properly registered or permitted. In *Noble v. Alis*, 474 N.E.2d 109 (Ind. Ct. App. 1985), the Court found that, unlike in *Chuckney*, the requirements of the ordinance were directly related to the city's housing code and a valid exercise of the city's power.

There are two more-recent cases related to local minimum wage ordinances in Louisiana and New Mexico. In *New Orleans Campaign for a Living Wage, et al., v. City of New Orleans*, 825 So.2d 1098 (La. 2002), the Louisiana Supreme Court upheld the constitutionality of state legislation explicitly prohibiting local minimum wage ordinances. One of the concurring justices, however, wrote a detailed opinion describing how the judge believed that, even absent the specific state prohibition, the private law exception would have prohibited a local minimum wage ordinance. Specifically, the concurrence expressed agreement with the *Marshal House* court in finding that the phrase private or civil relationship must be "broad enough to include law controlling ordinary and usual relationships between employers and employees." *Id.* at 1117. Under Louisiana law, this finding would have been sufficient to find the local ordinance was improper because the Louisiana legislature had not adopted the language allowing such an ordinance when incident to an independent municipal power.

The New Mexico Court of Appeals considered a local minimum wage ordinance in *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149 (N.M. 2005). In New Mexico, the private law exception to home rule is contained in the constitution and is written similarly to the wording used in Section 331.301(1). "This grant of powers shall not include the power to enact private or civil laws governing civil relationships except as incident to the exercise of an independent municipal power . . . ." N.M. Const. art. X, § 6(c). The New Mexico court began by going through a traditional preemption analysis, similar to the above, before determining that a local minimum wage act is not expressly denied by the state law. The Court next addressed the private law exception, starting with whether the ordinance was a private or civil law:

> Plaintiffs contend that the ordinance is a private or civil law governing the civil relationship of employer and employee because it seeks to establish legal duties between private businesses and their private employees, and it establishes a new cause of action against private businesses that do not pay the wage. We agree. While there are no bright-line divisions between public law and private law . . . private law has been defined as consisting of the 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. That definition certainly applies to this ordinance, which sets a mandatory minimum wage term for labor contracts between private parties that the employee may enforce by bringing a civil action against the employer. The fact that the city administrator may punish violation of the ordinance as a misdemeanor does not convert the ordinance into public law nor does it alter the basic nature of the ordinance, which is to set and enforce a key contract term between private parties. The relationship between private employer and employee has been described as a civil relationship because it is governed by the civil law of contracts. We conclude that the ordinance is a private or civil law governing civil relationships within the meaning of the home rule amendment.

New Mexicans for Free Enterprise, 126 P.3d at 1160 (internal citations omitted). The Court then conducted an analysis of whether, despite being a private law, the ordinance was adopted incident to an independent municipal power. Despite the plaintiffs' urging, the Court declined to follow the reasoning of the *Marshal House* court with respect to what constitutes an independent municipal power, arguing "because New Mexico municipalities have been delegated a generic

police and general welfare power, we think that forcing a municipality to point to an 'individual component' of its police power puts an unduly restrictive gloss on the exception and reads words into the home rule amendment that are not there." *Id.* at 1161. Instead, the Court took a much broader view of the phrase independent municipal power.

> The exemption refers to an "independent municipal power," which we conclude means any power other than home rule. There is no indication in the phrase "independent municipal power" that such a power must be in some way particularized or tailored; as long as there is a power granted by the legislature that is independent from home rule power, that is enough. We take the view that as long as a municipality can point to a power that the legislature has delegated to it, and the regulation of the civil relationship is reasonably incident to, and clearly authorized by that power, the exemption can apply.

Id. at 1161. Additionally, the Court concluded there should be two prerequisites to a municipality's regulation of a civil relationship:

> Where a municipality has been given powers by the legislature to deal with the challenges it faces, those may be sufficiently independent municipal powers to allow regulation of a civil relationship as long as (1) the regulation of the civil relationship is reasonably "incident to" a public purpose that is clearly within the delegated power, and (2) the law in question does not implicate serious concerns about non-uniformity in the law.

Id. at 1161. The Court then applied its reasoning to the municipal minimum wage ordinance at hand. First, the Court found that New Mexico statutes giving municipalities the power to provide for the general welfare of their residents, the police power to generally protect the property of its municipality and its residents, and the police power to preserve peace and order within the municipality, were independent municipal powers for the purposes of the private law exception—that is, independent from the home rule amendment. *Id.* at 1162. The Court also found that the minimum wage ordinance was reasonably incident to the public purpose clearly within that delegated power. The Court then went on to find that the minimum wage ordinance did not seriously implicate concerns about non-uniformity. Here, the Court focused on the limited applicability of the ordinance—it only applied to employers who were registered or licensed in the city, as opposed to for labor provided in the city. *Id.* at 1164. The Court also emphasized that the nature of the ordinance and the circumstances of the case were crucial to its finding.

Given the fact that interpretation of the private law exception would be a matter of first impression for an Iowa Appellate Court, it is not possible to determine whether the Court would adopt the reasoning of the Massachusetts Supreme Court, the New Mexico Court of Appeals, or something different. It appears safe to assume that a local minimum wage ordinance would be considered a private or civil law governing civil relationships. Beyond that, the crucial issue likely would be whether such an ordinance was considered incident to some independent county power. The most obvious "independent power" to rely upon would be the County's police and general welfare powers. If the Court adopted the reasoning of the New Mexico case, such an ordinance may be found constitutional. Another potential "independent power" is found in Iowa

Code Section 331.301(6), which prohibits counties from adopting lower standards than the state but allows counties to adopt higher standards than the state. This subsection gives an Iowa county the independent power to adopt higher standards and a minimum wage ordinance is simply incident to this power.

CONCLUSION

It would seem there is a good case to be made that a local minimum wage ordinance is not preempted by Iowa's state minimum wage ordinance under the express, implied conflict or implied field preemption doctrines. Moreover, a local minimum wage ordinance should survive the private law exception to home rule if, despite the fact that it is a private or civil law governing civil relationships, it is adopted incident to one or more independent county powers—namely the ability to adopt higher standards than the state's and the County's police power.