



MAYOR KIM WOLFE

mayorwolfe@cityofhuntington.com

January 25, 2011

Emmet S. Pugh, III, Chairman
West Virginia Municipal Home Rule Board
Office of the Governor, State Capitol
1900 Kanawha Boulevard East
Charleston, WV 25305

Dear Mr. Pugh:

Please accept my letter as the City of Huntington's formal request that the West Virginia Municipal Home Rule Board reconvene in order to review documentation which is pertinent to Huntington's Home Rule Plan modification.

This information was requested from the City of Huntington during the September 24, 2010 meeting of the Home Rule Board. Please find attached certification which is pertinent to the Amended Plan as well as the fiscal feasibility component that the Board requested. I am hopeful that this additional data will be acceptable to the Board so that we may move forward with our plan.

If further information or clarification is needed, please contact me at 304-696-5540. I look forward to hearing from you.

Sincerely,

A handwritten signature in cursive script that reads "Kim Wolfe".

Kim Wolfe
Mayor

Enclosures

Office of the Mayor

P.O. Box 1659 • Huntington, WV 25717 • Phone: (304) 696-5540 • Fax: (304) 696-4493
www.cityofhuntington.com

Fiscal Impact of Municipal Occupation Tax (MOT) and Local Option Sales and Use Tax

As Estimated by Finance Division, City of Huntington, January 10, 2011

Zip	Estimated Payroll*	Estimated Employment*	Containment#	Contained Payroll	Contained Employment
25701	\$ 512,543,200	17,371	100%	\$ 512,543,200	17,371
25702	\$ 218,315,400	5,684	75%	\$ 163,736,550	4,263
25703	\$ 75,385,400	2,292	100%	\$ 75,385,400	2,292
25704	\$ 168,673,800	4,906	80%	\$ 134,939,040	3,925
25705	\$ 214,856,800	6,772	25%	\$ 53,714,200	1,693
	\$ 1,189,774,600	37,026		\$ 940,318,390	29,544

Zip	Tax Rate	Gross MOT Taxes	Reduce for Cap/Exempt**	MOT Tax Estimate
25701	1.00%	\$ 5,125,432	\$ (768,815)	\$ 4,356,617
25702	1.00%	\$ 1,637,366	\$ (245,605)	\$ 1,391,761
25703	1.00%	\$ 753,854	\$ (113,078)	\$ 640,776
25704	1.00%	\$ 1,349,390	\$ (202,409)	\$ 1,146,982
25705	1.00%	\$ 537,142	\$ (80,571)	\$ 456,571
		\$ 9,403,184	\$ (1,410,478)	\$ 7,992,706

Estimated Sales and Use Tax Income

Estimated New Annual Revenue:

LESS:

- Revision of City Service Fee (User Fee) of \$3.00/week
- B&O Tax - Manufacturing Elimination
- B&O Tax - Retail Reduction to 0.25%
- B&O Tax - Service Reduction to 0.50%
- Total Reductions

Net New Revenue

* Data from Zip Code Business Patterns data, US Census Bureau (5 year average 2004-2008)
 # Estimated by Finance Division using neighborhoodlink.com website data
 ** Reduced by 15% for Cap of \$1,250 per year and exemptions for retirement contributions and delayed collections



West Virginia University

College of Law

January 20, 2011

Emmet S. Pugh, III, Chair
West Virginia Municipal Home Rule Board
Office of the Governor, State Capitol
1900 Kanawha Blvd., East
Charleston, W. Va. 25305

Re: Certification of the City of Huntington's
Amended Home Rule Plan

Dear Chairman Pugh:

I have been asked by the City of Huntington to examine the validity of proposed amendments to its Home Rule Plan, specifically the Occupation Tax and the Sales, Services and Use Tax. As one who has written a book on the West Virginia Constitution as well as articles about West Virginia local government law and its intersection with the State and Federal Constitutions, has taught local government law at the law school level, has advised a variety of local governments and local government officials on a spectrum of issues, and has litigated local government issues, I feel comfortable in rendering an opinion on Huntington's amendments. That opinion is that the amendments are valid.

As you know, the West Virginia Legislature in 2007 created the Municipal Home Rule Pilot Program, which the Legislature clearly has the power to do under West Virginia Constitution Article VI, § 39a as well as under its general police powers. The statute, West Virginia Code § 8-1-5a, authorized your Board to select as many as five applying municipalities for participation in the pilot program and to approve their plans and any subsequent amendments. § 8-1-5a(f). The Legislature assuredly has the power to create agencies and authorize them to make such determinations, and subsections (d) through (j) of the statute are more than sufficient to meet the legislative obligation to provide your Board with adequate standards in the completion of its assigned duties. *E.g.*, *State ex rel. Marockie v. Wagoner*, 191 W.Va. 458, 469, 446 S.E.2d 680, 691 (1994); *State ex rel. West Virginia Housing Fund v. Copenhaver*, 153 W.Va. 636, 649, 171 S.E.2d 545, 553 (1969).

Robert M. Bastress
John W. Fisher II Professor of Law

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Equal Opportunity/Affirmative Action Institution

The Constitution expressly authorizes the Legislature to confer taxation powers on municipalities, Article VI, § 39a; Article X, § 9, and its general police power would also support such enactments. Section 8-1-5a(a) articulates the legislative findings that cities in West Virginia “face numerous challenges managing their budgets” and delivering essential services. Furthermore, the Legislature projected that broad based home rule power and flexibility may enable cities to meet those challenges. Subsection (j) then conferred power on the selected pilot cities to pass any ordinance not inconsistent with the federal or state constitutions or with Chapters 60A through 62 of the Code (dealing with criminal laws), with the proviso that the cities may not convert existing employees’ defined benefit pensions into defined contribution plans. Huntington’s proposed amendments in no way implicate Chapters 60A through 62, nor do they attempt any alterations in employee pension plans.

The grant of authority in subsection (j) quite clearly embraces municipal power to generate revenues by any constitutional means. There is no constitutional provision, state or federal, that conflicts with the proposed occupational and sales, services, and use taxes. Both taxes are time-honored means for state and local governments to finance their operations. (In fact, by virtue of home rule authority or express legislation, almost all other states permit their cities to impose either a local income tax or a local sales tax.) The proposed Huntington taxes are surely supported by rational bases that enable the City to meet any due process or equal protection requirements. The taxes are uniform in their application and generate no issues under Article X, § 9 of the Constitution. In any event, our Supreme Court has held that that section’s uniformity clause relates only to taxes on persons and property, or *ad valorem* taxes, and does not apply to occupational and transactional taxes or to service fees. *E.g., City of Moundsville v. Steele*, 152 W.Va. 465, 164 S.E.2d 430 (1968); *Mullens v. City of Huntington*, 117 W.Va. 740, 188 S.E.2d 120 (1936). Finally, the City’s home rule power enables it to define the scope of its taxes as it deems appropriate. The definitions may differ from analogous state taxes; they just cannot conflict with state law. Thus, for example, the City does not have to provide for add back deduction (as West Virginia does) on the self-employment tax.

As to enforcement of the use tax, I am informed by Huntington officials that the tax will be uniformly enforced without regard to the location of the taxable purchase. Thus, out-of-state and in-state acquisitions of sales and services will be given the same treatment, which will resolve any constitutional issues about use tax administration.

For the foregoing reasons, I certify that Huntington’s proposed tax amendments are within the powers created by § 8-1-5a for pilot home rule cities, do not implicate any of the powers prohibited by that section, and do not violate any provision of the West Virginia or United States Constitutions.

Should you like elaboration or explanation on any of my reasoning or conclusions, please do not hesitate to ask for them.

Sincerely yours,

A handwritten signature in cursive script that reads "Robert M. Bastress, Jr." The signature is written in dark ink and is positioned above the typed name.

Robert M. Bastress, Jr.
John W. Fisher, II Professor of Law
West Virginia University College of Law



Office of the Director of Finance
City Hall, P. O. Box 1659
Huntington, WV 25717-1659
Telephone: (304) 696-5969
Fax: (304) 781-8350

Municipal Occupation Tax and Local Option Sales and Use Tax Fiscal Feasibility Revision January 2011

As requested at the meeting of the West Virginia Municipal Home Rule Board on Friday, September 24, 2010, the City of Huntington administration offers a more detailed discussion of the feasibility of a sales, service and use tax specific to the City of Huntington.

The proposed one percent (1.0%) sales, service and use tax for Huntington is feasible. Mr. Mark Muchow of the West Virginia Tax Department stated at the September 24 meeting that the Tax Department "...has the capacity to administer the tax reform as proposed by the City of Huntington." Mr. Muchow emphasized that the upfront costs to the Tax Department are significant but would be the same regardless of which city chose to implement a local sales tax whether by Home Rule authority or current statutory authority. The administration believes it is within the spirit of the Home Rule legislation to attempt "pilot projects" to determine whether they are feasible and desirable on a more significant basis throughout the state.

I. Administrative Costs

The City is cognizant of the administrative burden of the cost of implementation to the Tax Department. However, we do not believe this cost should be a factor in the Home Rule board's decision. The onetime cost to implement the local option sales tax could occur using current statutory authority. Any city willing to forgo its B&O tax could require the Tax Department to implement a local option sales tax using statutory authority. The administrative cost should not be "attached" to this proposal. The City recognizes the need to assist with the administrative burden and would recommend that the Tax Department retain one percent (1.0%) of all revenue collected as is allowed in current statute.

II. Administrative Burden

We recognize that the Tax Department's Compliance & Taxpayer Services Division and Auditing Division will receive additional questions and additional workload initially from the implementation of this proposal. However, this will occur whenever the first city chooses its statutory right to implement a local sales tax. Huntington's proposal should not be assigned with the entire administrative burden that could occur at anytime regardless of Home Rule authority. It is our belief that sharing data between the Tax Department and the City of Huntington Finance Division will uncover businesses which are evading both local taxes and state sales taxes. This cooperative effort should increase the overall revenue collected by both entities.

III. Streamlined Sales Tax Project

The feasibility of the local option tax is dependent upon meeting the requirements of the Streamlined Sales Tax Project of which West Virginia and 22 other states are members. Of the 23 member states, 17 also have local sales taxes in addition to state sales taxes. Of concern is the "destination sourcing" requirement that the sale of a tangible product or service is "sourced" to the jurisdiction where the purchaser receives the product/service. While it is conceivable that some products will be sold at a retailer/service provider outside the City limits and shipped to the purchaser in the City of Huntington, the vast majority of transactions will occur between a Huntington business and a purchaser who is physically present in Huntington at the time of the sale (i.e. restaurants, retailers, service providers). Additionally, service providers from outside city limits are already accustomed to tracking sales by location for Business and Occupation ("B&O") Tax purposes. We do not believe this will prove an undue burden for businesses.

IV. Streamlined Sales and Use Tax Agreement ("SSUTA")

States with local sales taxes (17 of the 23 members) must map the boundaries and provide notice to all sales and use tax filers. The Finance Division along with the Department of Development and Planning of the City will provide assistance in preparing maps based upon City boundaries. Additionally the City will provide a list of all businesses located within the City and all real property located in the City. These items will assist in determining boundaries and identifying all Zip+4 codes affected by the proposed local sales tax.

Notice requirements vary but should be accomplished within the timelines set forth in the SSUTA. Assuming a favorable vote by the Home Rule Board, we propose an October 1, 2011 start date for the local sales tax. This should provide adequate time both to the Tax Department and Finance Division of the City to make all required notifications. October 1 is also the first day of a quarter as required by the SSUTA.

V. Use Tax

While we believe the total amount of use tax will be minimal in comparison to the sales tax, it must be implemented in the same fashion. Businesses located in Huntington who purchase goods outside of Huntington (whether it is out of the state or in the state) and bring them back to Huntington will be subject to the 1% use tax. This will require a level of education to Huntington businesses from the early stages. While the Tax Department will be responsible for overall education, the City will supplement with notices concerning the use tax to its businesses via the quarterly B&O Tax billing. City businesses are already aware of the use tax on purchases from outside the state. They will now have to account for those purchases outside of the City but within the state. All existing use tax credit mechanisms will remain in place.

VI. Municipal Occupation Tax – Employer Ability to Collect

We believe the question of feasibility of the Municipal Occupation Tax (MOT) is no longer in question. The City notified several thousand businesses of the impending MOT in mid-September, 2010. A subsequent notice was sent after the Home Rule Board tabled the proposal. This extra time has allowed the affected businesses to implement the withholding procedures needed to implement the MOT. To aid in the process the City website was updated to allow employers to keep up with the progress of the Ordinance and to access frequently asked questions and forms. Additionally, the Finance Director created a special email account

(MOTquestions@cityofhuntington.com) to answer direct questions by employers. We believe that if given Home Rule Board approval in January 2011, the MOT could become effective April 1, 2011.

VII. Municipal Occupation Tax – Occupation Tax versus Income Tax

The MOT provides for a mechanism to require self-employed individuals to pay the tax on net earnings. Those net earnings would be for the percentage of activity within the City multiplied by the total “active” business income (from IRS Schedule C or E). A question was raised concerning other adjustments to income such as appear on IRS Form 1040 (Lines 23-37 One-half of self-employment tax, Student Loan Interest, Tuition and Fees and others). These adjustments will not be taken into account in the MOT whether for self-employed individuals or individuals who earn wages, salaries or tips from W-2 income.

There is a clear distinction. The state of West Virginia imposes an income tax on its residents and uses the federal adjusted gross income as its basis before West Virginia exemptions. The MOT is a tax on persons actively working in the City whether by wages or self-employment. As such, the basis of its calculation is not the same as federal or state definitions of “income” and is defined by the City as outlined in the Ordinance.

Browning, Debbie A

From: Brandi Jacobs-Jones [bjacobs-jones@cityofhuntington.com]
Sent: Thursday, February 03, 2011 11:09 AM
To: Browning, Debbie A
Cc: 'Emmett Pugh'; Moore, Angel R; 'Admin Mayor Kim Wolfe'
Subject: Tax Implementation timeline

Debe,
The implementation timeline for the proposed tax program would be as follows, if approved by the March 17, 2011 meeting (or earlier):

Municipal Occupation Tax would begin July 1, 2011

Local Option Sales Tax would begin January 1, 2012

Employers were contacted Fall of 2010 advising them of the prospect of the Municipal Occupation Tax and they were advised to make necessary computer/accounting changes in preparation for the 1% tax, but to not implement until the Home Rule Board made its ruling and the City provided them official notice.

The Sales Tax requires 180-day notices from the WV Department of Tax and Revenue , we would not begin collection until January 1, 2012. This is also the implementation date of any changes that might be made by the state legislature concerning food taxes.

If additional information is needed, please let me know.

Brandi

From: Browning, Debbie A [<mailto:Debbie.A.Browning@wv.gov>]
Sent: Wednesday, February 02, 2011 4:55 PM
To: Brandi Jacobs-Jones
Cc: Emmett Pugh; Moore, Angel R
Subject:

FYI-One of our Home Rule Board members asked if the City could furnish an implementation timeline for your proposed tax program.

debe browning

Debbie Browning
Executive Assistant
West Virginia Department of Commerce
Building 6, Room 525
Charleston, West Virginia 25305-0311
304.558.2234 or 304.957.2006-direct
debbie.a.browning@wv.gov

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