

LAW OFFICES

Crabbe, Brown & James LLP

500 SOUTH FRONT STREET
SUITE 1200
COLUMBUS, OHIO 43215

TELEPHONE 614.228.5511
FAX 614.229.4559

Email: adouglas@cbjlawyers.com

www.CBJLawyers.com

WRITER'S DIRECT DIAL NUMBER

Andy Douglas

for

City of Toledo

Ohio Senate Finance Committee Hearing

June 9, 2015

J. ROTH CRABBE (1906-1989)
CHARLES E. BROWN (1927-2004)

VINCENT J. LODICO
JEFFREY M. BROWN
LARRY H. JAMES
JOHN P. KENNEDY
RICHARD D. WETZEL, JR.
JOHN C. ALBERT
GEORGE R. McCUE, III
MICHAEL R. HENRY
ROBERT C. BUCHBINDER
STEVEN A. DAVIS
MICHAEL T. SHANNON
ROBERT J. GEHRING+
CHRISTINA L. CORL*
DANIEL J. HURLEY
STEVEN E. MILLER
ANDY DOUGLAS

PHILLIP A. TEMPLETON
MATTHEW R. PLANEY
JEFFREY D. HOUSER~
EILEEN R. BOWER
JENNIFER L. PRINDLE

OF COUNSEL
THOMAS H. GERKEN
JANET A. GRUBB
DAVID L. LANDEFELD#
BRIAN E. HURLEY
RITA McNEIL

GOLDMAN & BRAUNSTEIN, LLP
William A. Goldman
Michael Braunstein^

CINCINNATI OFFICE
30 GARFIELD PLACE, STE. 740
CINCINNATI, OHIO 45202
TELEPHONE 513.784.1525
FAX 513.784.1250

LANCASTER OFFICE
111 S. BROAD STREET, STE. 209
LANCASTER, OHIO 43130
TELEPHONE 740.689.1743
FAX 740.689.1746

~Also Admitted in Indiana
+Also Admitted in Kentucky
*Also Admitted in Michigan & Georgia
^Also Admitted in California & Louisiana
#Also Admitted in Florida

Chairman Oelslager, Vice Chairman Coley, Ranking Member Skindell and Members of the Senate Finance Committee: Thank you for this opportunity to testify today regarding HB 64.

My name is Andy Douglas. I am an Attorney with the firm of Crabbe, Brown & James here in Columbus. In concert with others, I represent the City of Toledo (City) with regard to certain legislation now before you for your consideration. I appear in my representative capacity and as a past nineteen-year-member of Toledo City Council during the years 1961-1980.

Appearing also today, as both a sign of respect and urgency, are the Mayor of Toledo, Paula Hicks-Hudson, the Chief of Staff, Bob Reinbolt, and the Director of Law, Adam Loukx.

I testify today respectfully requesting, on behalf of the City, that you review and then subsequently delete, from Sub. HB 64, certain of the proposed language.

The language we seek to have deleted presents a real threat to the Home Rule Authority of the City and others likely situated. What we believe is the offending language is found in proposed Amendment styled as SC2563. Approval by you of this Amendment is vital to thwarting the danger now facing us and all other recipients of Local Government Funding. We very respectfully and sincerely ask that you support this Amendment.

By the 1912 version of the Ohio Constitution, qualifying cities and villages were granted certain powers that exist outside those found in the Ohio Revised Code. Thus, Article XVIII, Section 3 of our Constitution provides:

"Municipalities shall 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 general laws."

Pursuant to this authority, the City, in accordance with Section 7, Article XVIII of the Constitution framed and adopted a Charter for the City. Exercising its

powers, the City enacted an ordinance providing for the use, within the City, of traffic law photo-monitoring devices euphemistically known as "red light cameras." In recent opinions, the Ohio Supreme Court upheld the City's authority, under its Home Rule Powers, to enact the ordinance and to implement the placing and use of these much-needed traffic control devices. Those determinations should end the attempts to circumvent the City's constitutional right to install and maintain the much-maligned devices.

Strange as it may seem to some, eliminating the devices is not the City's main concern with the proposed legislation. Of much greater impact is the permanent and lasting damage that passing the legislation could, and surely will, do to the City's clear authority under its Article XVIII, Sections 3 and 7 powers. While the proposed legislation is probably being submitted by its supporters for righting a perceived wrong, the City believes, however, it is just mean-spirited and punitive in nature. To, for any reason, take yet more funds from the City that are properly allocated to it by longstanding legislative enactments is Draconian in nature. As a former City Councilman, I can attest to the need for and the use of the City's allocation from the Local Government Fund. It is one of the lifelines of a City's financial structure. If enacted, the proposed legislation will establish a dangerous precedent that others following you could use to further erode, if not

effectively eliminate, the City's powers of Home Rule. We plead with you not to let this happen.

While the foregoing sets forth, in a limited fashion, the City's primary objection to the legislation, there are also a number of legal arguments that can be made as to why the proposed legislation should not be enacted. The following is one argument that we make to you now in order to preserve its future use if that becomes necessary. The discussion is not meant to be a legal treatise of any sort and certainly it is not exhaustive in any regard. We just believe that it should be called to your attention because you are the first line of defense against this unfairness and, if you believe the argument, then you are in the position to do something about what we believe is not only bad precedent but a severe injustice.

The 130th General Assembly passed Amended Substitute Senate Bill No. 342. In part, the Bill enacted Section 4511.093 of the Ohio Revised Code. The law was subsequently signed by the Governor. In part (B) of R.C. 4511.093, the law provides that:

"(1) A local authority shall use a traffic law photo-monitoring device to detect and enforce traffic law violations only if a law enforcement officer is present at the location of the device at all times during the operation of the device **and** if the local authority

complies with sections 4511.094 and 4511.095 of the Revised Code." (Emphasis added.)

The passage of this law effectively, of course, eliminated the use of the traffic control devices at issue. The law resulted, for lack of a better term, in the "constructive prohibition" of the devices. Toledo, believing this to be a clear violation of its Home Rule powers, filed suit in the Common Pleas Court of Lucas County seeking an order to permanently enjoin the enforcement of Am. Sub. SB No. 342. In a well-reasoned opinion (copy attached), Judge Mandros ordered that:

"Defendants are permanently enjoined from enforcing Ohio Revised Code Sections 4511.093(B)(1) and (3), 4511.095, 4511.096, 4511.097, 4511.098, 4511.099, 4511.0911(A) and (B) and 4511.0912." (Emphasis added.)

It is clear that the Court found, among other sections of Am. Sub. SB No. 342, Section 4511.093(B)(1) to be unconstitutional. The result of this finding is that those sections found unconstitutional are not the law and, in fact, never were the law. The effect is not that 342 was bad law, but rather that it never was the law. See *Roberts v. Treasurer* (2001) 147 Ohio App.3d 403.

As far back as 1886, the United States Supreme Court held (subsequently followed by a number of Ohio cases including the Ohio Supreme Court) in *Norton v. Shelby County* (1886) 118 U.S. 425, 442 that:

"An unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."

In the proposed legislation now before you, new Section 4511.0915 of the Revised Code is sought to be enacted. Section 4511.0915(A)(1) provides:

"If the local authority operated any traffic law photo-monitoring device without *fully complying with sections 4511.092 to 4511.0914* of the Revised Code, the local authority shall file a report that includes a detailed statement of the civil fines the local authority has billed to drivers for any violation of any municipal ordinance that is based upon evidence recorded by a traffic law photo-monitoring device, including the gross amount of fines that have been billed." (Emphasis added.)

Accordingly, this new proposed section in Sub. HB No. 64 (4511.0915), clearly relies on sections 4511.092 to 4511.0914 (which, of course, includes 4511.093) as its predicate for tampering with the City's local government fund allocation and if the City does not "fully comply" with those sections, and the City has or will operate the devices, then the City's share of the local government fund is diminished and/or abolished. This, of course, can't stand because the sections relied on by the proposed legislation have been found unconstitutional and, thus, it

is though they never existed and, therefore, the City need not nor can it comply with law that does not exist.

It follows then, we believe, that the proposed Section 4511.0915 falls by its own weight since it relies for its authority on specific sections of Senate Bill 342 that have been found to be unconstitutional and thus of no force and effect.

To sum up, in accordance with all of the foregoing and, specifically, because the proposed legislation violates the City's powers of Home Rule, we ask this Honorable Committee to delete from Sub. HB 64, in accordance with Amendment SC2563, lines 51102 through 51138, 81189 through 81734 and the Revised Code section numbers designed to implement the legislation.

I thank you for your kind attention to our concerns. If the Committee would like to ask questions, I would be happy to answer those questions as best I am able.