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**To:** Welcoming Lebanon Ordinance Task Force  
**From:** Kira A. Kelley, Esq  
**Re:** Welcoming Lebanon Ordinance, § 6

**Date:** July 8, 2020

Dear Welcoming Lebanon Ordinance Task Force:

I write regarding the Task Force’s topic of discussion for this week, Provision 6. This letter explores legal considerations for Provision 6 as adopted, and suggests edits to ameliorate any concerns around its ambiguity and enforceability.

As Attorney Waugh noted during our discussion on June 23, 2020, no legal opinion is complete without an acknowledgement of uncertainty: only a judge may declare a provision of law to be invalid. You, as a task force assisting in a legislative function, need only a good faith basis to believe that enforcement of this law could occur in compliance with existing state and federal law. To that end, I offer the following statements of facts and law to help you make that decision, as well as proposed revisions to assist with clarity.

**1. Provision Six Does Not Violate Federal Law: Mere Notification Does Not Equate to Active Interference with a Federal Function.**

A law requiring Lebanon to notify its residents that federal immigration authorities are in town is entirely different from a law attempting to *regulate those authorities themselves*.

The United States government has federal Constitutional immunity from state and municipal interference; unless Congress specifies otherwise “the federal function must be left free of regulation.” *Hancock v. Train*, 426 U.S. 167, 179 (1976) (*substantive holding superseded by statute* Pub.L. No. 95-96, § 116, 91 Stat. 711 (1977)). This means that the federal government must be able to perform its functions without needing to conform to state or local regulations.

This Ordinance does not interfere with immigration officers or federal law enforcement: Provision 6 neither regulates federal immigration officers nor saddles them with extra obligations. Notifying residents when immigration authorities are in Lebanon imposes no restrictions or barriers to the function of these authorities, but advances a crucial safety interest in allowing Black and Latinx residents to take precautions against discrimination.



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New Hampshire courts have not yet reviewed an Ordinance such as this one but the Ninth Circuit Court of Appeals agrees with the above analysis, finding that notification provisions *do not* interfere with federal immigration enforcement. *United States v. California*, 921 F.3d 865 (9th Cir. 2019). That Court upheld provisions in a California State law, AB 450, requiring local institutions to give notice of upcoming immigration enforcement activities: “the mere fact that those notices contain information about federal inspections does not convert them into a burden on those inspections.” *Id.* Other provisions of AB 450 (for example those requiring employers to withhold consent to searches by immigration officials) were overturned, but the notification provision withstood all legal challenges.

In summary: using the Leb Alert system to inform people when ICE or Border Patrol are in the area allows people to, for example, plot alternate routes to the hospital if they have medical appointments and Border Patrol has blocked off the interstate. Notifying the community when ICE or Border Patrol are in the area allows people of color and people with accents to take extra precautions (such as bringing documentation with them or traveling with a friend) but *does not interfere with federal agency functions*.

**2. Any perceived ambiguities in Provision 6 can easily be resolved with adequate procedural guidelines or minor modifications.**

An Ordinance, like any law, should clearly define its requirements and prohibitions so that the people it governs know how they must act in order to comply. On its face, Provision 6 sets out a standard for: who this provision requires action from (Agents of the City); when action is required (upon the sighting of a federal immigration authority in Lebanon on official business); and what action should ensue (notifying residents).

This Task Force is an excellent sampling of Lebanon residents and Agents to test the clarity of this language on. Perhaps you could discuss whether you can discern, by the terms of Provision 6 as written, what the Ordinance requires of you. In areas where you are uncertain, you could insert terms to be more explicit.

For example, Attorney Waugh raised First Amendment concerns regarding compelled speech, which would arise if Provision 6 were enforced against an off-duty City official. The question of whether Provision 6 requires compelled speech from City Agents while not



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acting on behalf of the City could be definitively answered in the negative to ameliorate both ambiguity and this Constitutional concern.

A Lebanon Agent will know from the plain text that the Ordinance requires action when a federal immigration officer is “in the City for the purpose of questioning, detaining or gathering immigration status information from any person or persons, or other enforcement action.” This would be a reasonable assumption for a City Agent to make upon sighting Customs and Border Patrol officials setting up a checkpoint or upon seeing federal immigration authorities pulling a vehicle over, knocking on someone’s door, visiting the Lebanon Police Department, or conversing with residents while in uniform.

If you would like to simplify what Agents should be on the look-out for, as well as add specificity as to what notification entails, consider whether Provision 6 reads more clearly as follows: “If any Agent of the City of Lebanon becomes aware of a Federal immigration authority’s presence in the City in an official, not personal, capacity, the Agent shall inform residents of the City of that presence through LebAlert and by posting the sighting on Lebanon’s facebook page.”

The procedures for how to fulfill the obligation of Provision 6 might fit best as separate guidelines, added to the guidelines governing other uses of Leb Alert, procedures for notifying residents about school closures, or other routine safety notifications. Lebanon could consider how the California Labor Commissioner clarified AB 450’s requirement that employers give notice when immigration officers request access to their premises and records: by creating a template.<sup>1</sup>

Regarding ambiguity over enforcement, which I believe you are scheduled to discuss in more depth later in the proceedings: private civilian enforcement is a valuable tool for shaping accountable governments, much favored in this state. For example, a recent Amendment to the New Hampshire Constitution allows taxpayers to sue their governing districts when taxpayer funds are spent unlawfully. N.H. CONST. Pt. I, Art. 8.

<sup>1</sup> Available online at: [https://www.dir.ca.gov/DLSE/LC\\_90.2\\_EE\\_Notice.pdf](https://www.dir.ca.gov/DLSE/LC_90.2_EE_Notice.pdf)



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The District Court Enforcement Guide<sup>2</sup> from the New Hampshire Bar Association offers an overview for what enforcement of a local Ordinance might look like. Generally, and especially with the creation of the taxpayer standing amendment, lawsuits against government officials are liberally allowed by private plaintiffs, including for violations of ordinances. *See, e.g. State v. Merski*, 115 N.H. 48 (1975). In the absence of special enforcement mechanisms in an Ordinance, standard procedures can be used such as drafting and filing a complaint in District Court.

### **CONCLUSION**

As you all aptly noted in discussions around the goals of this Task Force, you are charged with editing an Ordinance to uphold the intent of the voters, while minimizing risks to the City and resolving confusion to the extent possible.

*The only Ordinance you could pass that eliminates risk altogether would be one with no binding effect.* By passing this bold, binding Ordinance, the voters have made clear that they consent to some risk and indeed prefer the slight risk of a legal challenge over the risks that people face every day from the threat of racism and xenophobia from federal immigration officers.

I encourage you all to identify your concerns as specifically as possible both with Provision 6 and with the full Ordinance, and to explore ways to address issues that leave the tangible protections of this Ordinance intact.

I look forward to supporting you in this process and I am heartened by the care this Task Force brings to its charge.

Sincerely,

  
Kira A. Kelley

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<sup>2</sup> [www.nh.gov/osi/resource-library/laws-rules-cases/documents/2001-nhba-district-court-enforcement-guide.pdf](http://www.nh.gov/osi/resource-library/laws-rules-cases/documents/2001-nhba-district-court-enforcement-guide.pdf)