

RELEASED TO THE PUBLIC

Lebanon City Manager's Office

Date: 8/18/2020

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Sm**Definitions**

As used in this ordinance, the following words and phrases shall mean and include:

Administrative warrant. "Administrative warrant" means an immigration warrant issued by a federal agency charged with the enforcement of civil immigration laws, used as a non-criminal, civil warrant for immigration purposes.

Agency. "Agency" means every department, agency, division, commission, council, committee, board, or other body of the City of Lebanon established by authority of state law, the Lebanon City Charter, or an ordinance, executive order, or order of the Lebanon City Council.

Agent. "Agent" means any person employed by or acting on behalf of an Agency, whenever any such person is acting within the scope of that person's employment or agency capacity, or when utilizing or disclosing any information that may be learned in the course of that person's employment or agency capacity. The term includes any volunteer acting on behalf of an Agency, as well any person with access to Agency information which is not available to the general public.

Citizenship or immigration status. "Citizenship or immigration status" means all matters regarding questions of citizenship of the United States or any other country or of the authority to reside in or otherwise be present in the United States.

Federal immigration authorities. "Federal immigration authorities" means federal agencies, departments, or employees tasked with enforcement of immigration law and border entry, including without limitation, the Department of Homeland Security (DHS), Immigration Control and Enforcement (ICE), and U.S. Customs and Border Patrol (CBP).

Immigration detainer. "Immigration detainer" means an official request issued by ICE, or another federal agency charged with the enforcement of civil immigration laws, to another federal, state, or local law enforcement agency to detain an individual based on a violation of a civil immigration law or notify ICE or other federal immigration agency of a person's release from custody.

From: [H. Bernard Waugh, Jr.](#)
To: "Devin Wilkie"
Cc: [Mulholland, Shaun](#)
Subject: RE: Welcoming Lebanon Ordinance: definitions
Date: Saturday, August 15, 2020 3:44:16 PM
Attachments: [image003.png](#)

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Hi Devin:

Again sorry for the delays. On Wednesday I listened to the full recording of the last (8/4) meeting of the Task Force, and I don't think the definitions were discussed. So in this E-mail I am addressing your proposed definitions which were sent out prior to the last meeting, plus your comments from August 5 (pasted in below). My comments should not be considered final – we all learn from each other and I'm certainly expecting some back and forth. In accord with our practice I am copying the City Manager on this E-mail, given that he reviews the City's legal bills.

- On the issue of housing and economic status, I've been going back and forth with Diane Root on that, and we are still tweaking a draft (hopefully to be distributed soon) which adds those two items back into the list of non-discrimination criteria, but then also adds an "exception" paragraph (to Provision #4 in my prior draft) for when economic information is being used to administer any program of benefits based on financial need. So I'm hoping that will address those concerns, rather than trying to define "discriminate." I would really hesitate to try to do that, because the term "discriminate" is already "defined" so-to-speak by a vast body of federal statutes and case law decisions interpreting them, thus raising the danger of somebody arguing that whatever definition we were to add was somehow intended to be different from how the term is used in established law. (Even state law – RSA 354-A:2, XV – defines "unlawful discriminatory practice" using references to specific federal statutes.)
- On the term "agent," the concern I've expressed before is trying to make sure nobody who holds some capacity as a City agent doesn't try to claim that this Ordinance violates his/her/their free speech rights. (As you may know there's a whole body of case law, starting with the US Supreme Court's *Pickering* decision, holding that governmental employers can't restrict their employees' free speech rights, if those rights are exercised in a non-disruptive way that doesn't interfere with governmental operations. [I'm not looking at those cases right now, but there's a famous one from back when Pres. Reagan was shot, and a police dispatcher was fired, because when she heard the news she muttered "Next time I hope they get him." Her firing was overturned because the comment was part of her free speech rights.] But this is a very nuanced doctrine, and the latitude of someone whose responsibilities include communications with the public is more restricted as to their speech than is someone whose workspace is in a basement somewhere. [A police officer definitely is *not* free to mutter racist epithets when dealing with the public, for example. And someone in a position as public as the Manager, for example, would probably be deemed to be *always* acting in his/her official capacity whenever s/he is in public.]
 - Of course even without *any* definition of "agent," it remains true that

constitutional law is superior to a local ordinance anyway, so that if the Ordinance were challenged, the City's attorney would certainly argue that there is an *understood* free speech exception. Nevertheless, I would prefer to see a definition something like the following:

“Agent” means any person employed by or acting on behalf of an Agency, whenever any such person is acting within the scope of that person's employment or agency capacity, or when utilizing or disclosing any information learned in the course of that person's employment or agency capacity. The term includes any volunteer acting on behalf of an Agency, as well any person with access to Agency information which is not available to the general public.”

- Again, just a suggestion. But including the language about volunteers allows the volunteer language to be taken out of the provisions of the ordinance itself (thus being able to avoid the question of why it is mentioned in Provision #1, but not the other provisions). Plus I agree – as your comments suggest - that special mention of the issue of using or disclosing information is especially important in the context of this Ordinance.
- While we're discussing “agent,” let me also address your “Agency” definition. I would suggest, right after the words “or other body” adding the words “*of the City of Lebanon*” and then, just before the words “an ordinance” add the words “*state law, the Lebanon City Charter, or...*” The reason is, there are several official City positions which are not really covered by any ordinance or other order of the Council – for example, members of the planning and zoning boards. (It looks like you took your language from the Chicago model also, but the difference is that Chicago is a “home rule” city, whereas New Hampshire doesn't have any true home rule – any authority the City of Lebanon has is traceable to the Legislature in some manner.)
- On “Administrative Warrant” for greater clarity I would suggest following the definition in the Chicago ordinance by inserting, after the words “federal agency,” the words “*charged with the enforcement of civil immigration laws.*”
- The other definition on your list that raises my eyebrows is your definition for “U, S, or T Visa” – which, with all due respect, seems fairly circular and unenlightening. Here however I am handicapped by my lack of knowledge of immigration law. The logical thing would be to add a cross-reference to the federal statute where these three types of visa are defined. But I have not at first blush found such a statute, and I can't help suspecting that these terms are informal nicknames not actually used in the statutes.

Alternatively – as a former state legislator I admired always used to say, “Is this trip really necessary?” In other words is there a real need for these terms to be used or defined at all? The place they are used in the existing Lebanon draft is Provision 5, Paragraph 6. I don't see any similar provision in the Chicago ordinance. The Hanover ordinance does contain similar language (page 4, paragraph 3), but doesn't contain any relevant definition.

In summary, I would suggest: *either* (a) figuring out what the proper cross-

references to federal law are (and I could do a more thorough search); *or* (b) doing like Hanover and omitting any definitions of those terms (which in any event are only going to be relevant if the person makes a written request); *or* (c) my preference, which is re-writing the provision so that those terms aren't used. For example, consider changing the last sentence of Provision 5, Paragraph 6 to the following: *"Nothing in this paragraph prevents the sharing of information at the request of the individual to whom such information pertains, if authorized by that person in writing, for example for purposes of demonstrating that individual's qualifications for a particular type of visa."* With that kind of wording, no definition would be needed.

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I hope these comments are helpful. Please get back to me in any way you feel appropriate.

Sincerely,
Bernie Waugh

From: Devin Wilkie <devin.wilkie@gmail.com>
Sent: Thursday, August 13, 2020 8:51 AM
To: H. Bernard Waugh, Jr. <bwaugh@dwmlaw.com>
Subject: Re: Welcoming Lebanon Ordinance: definitions

Hello,

No problem; I completely understand! I wanted to be sure to get this to you quickly so you can get to it whenever you are able, but of course there's no rush.

Best,
Devin

—

Devin R. Wilkie (he/him)

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Writers' Night Out in Lebanon

Lebanon Arts & Culture Commission



On Wed, Aug 12, 2020 at 4:48 PM H. Bernard Waugh, Jr. <bwaugh@dwmlaw.com> wrote:

Hi Devin:

Please don't think I'm ignoring you. I was ill several days last week, as you know. I have been corresponding with Diane Root today re Provision #1, and I'm talking with her by phone on Friday. I will have a response to you by then also. Again, sorry about the delay.

Bernie Waugh

From: Devin Wilkie [mailto:devin.wilkie@gmail.com]

Sent: Wednesday, August 5, 2020 11:47 AM

To: H. Bernard Waugh, Jr. <bwaugh@dwmlaw.com>

Subject: Welcoming Lebanon Ordinance: definitions

Hello,

I hope this message finds you safe and healthy. I have been assigned to examine the definitions used in the ordinance, and since we did not have time to begin this discussion last night it was suggested that I reach out to you on some of the more challenging elements of the list. I see you also received the attached document containing the definitions I've collected. Most of them are in other such ordinances in order to clarify the entities or documents covered by terms, in case multiple interpretations are considered (as we've seen even among our task force members and advisors). I do wonder, given your concern with housing and economic status as you mentioned in the comments of your proposal, if you might be able to suggest a definition of 'discriminate' that would allow us to continue including those categories. My understanding is that the word refers to making an unjust or prejudicial distinction between individuals; if instead it merely means to acknowledge a difference, then there is even greater concern, as I'm sure the city is required to acknowledge differences in age, marital status, language, and so on for the forms and documents it provides, even down to, for instance, senior discounts.

Would you be able to provide a definition of 'discriminate' that assuages your concerns regarding the inclusion of housing and economic status in the list?

I know the other term eliciting controversy and confusion is 'agent.' Given this is the definition used in Chicago's ordinance that is and has remained in effect for some time now, I am not sure I see the concern others have expressed, but I wonder if there is a way to address that within the definition. Since it would render the ordinance all but useless to limit 'agent' to one of these persons only when they're on the clock as information they obtain there could be kept private but be corroborated or sought after hours, I think it's imperative that we find a solution that ensures the ordinance retains its usefulness. I'm wondering if something like the following:

Agent. "Agent" means any person employed by or acting on behalf of an agency, who may have access to information from or contact with the public.

Would have the effect of clarifying the reason why this needs to apply to all people just as does a code of conduct or other expectation of professionalism.

If you have any other suggestions to incorporate this necessity into the ordinance elsewhere, rather than here in the definitions, we can certainly examine that at the next task force meeting instead, and keep the simpler definition of 'agent.'

If you have concerns or suggestions regarding any of the other definitions, or feel there is no way they can be misinterpreted. It sounds like you may be getting a few requests from other task force members and are also (hopefully) recovering from what kept you offline yesterday, so I understand this may not be something you can turn to quickly. It would be great, though, if we are able to prepare something (in this as well as the other cases) that can be proposed for approval at the next meeting.

Thank you,
Devin

—

Devin R. Wilkie (he/him)

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