From: H. Bernard Waugh, Jr.
To: Karen LiotHill Gmail *DNU*
Cc: Mulholland, Shaun
Subject: Fair and Impartial Policing Task Force - Re: Welcoming Lebanon Ordinance, Provision 6
Date: Tuesday, July 7, 2020 3:26:25 PM

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Hi Karen:

It's my understanding that your Task Force will tonight be addressing the issue of Provision 6 of the Welcoming Lebanon Ordinance passed by the voters. As you know in my opinion to the City dated January 6, 2020 (which has already been released to the public), it was my view that that Section 6 has a high likelihood of being held unlawful. ***The gist of this E-mail is that I have re-examined that issue in light of the discussion at the June 23 meeting, and Attorney Kelley's recent memorandum, but that I continue to hold the same opinion on that issue.*** [This E-mail constitutes an edit of the one I sent you on Monday at 12:14 p.m., in light of the materials distributed to the Task Force (and to me) by Beth Beraldi Monday at 3:17 p.m., including the Memorandum from Attorney Kira Aakre Kelly, bearing a date of July 8, 2020.]

A. LAWFULNESS OF PROVISION #6:

As I understand Attorney Kelley's position and argument – from last meeting and from her Memorandum – she claims that Provision 6 is lawful. But her ***only*** supporting citation is to a portion of the opinion in *U.S. v. California*, 921 F.3d 865 (2019) which I discussed in my prior opinion. That decision upheld a California law (a portion of AB 450) which requires employers to notify their employees whenever they have been notified that federal agents will be inspecting certain ***employer*** records, which the 1986 federal Immigration Reform and Control Act requires ***employers*** to keep. (That federal law also notably requires 72-hour notice to those employers themselves prior to such an inspection).

The Ninth Circuit's opinion held that the California state law requirement did not violate the "intergovernmental immunity" (or "noninterference") principle - that is, it did not constitute a state law interference with federal law enforcement. ***BUT…*** it's clear to me from the detailed discussion in the Court's opinion that its ruling was based fairly ***narrowly*** on the ***purpose and overall context*** of the inspections involved: The specific law which those inspections seek to enforce is a law imposing certain duties on ***employers***, not their employees. And penalties

under that law are imposed on employers, not employees. In light of all those circumstances, the court held that enforcement of that law simply was not impacted or burdened by the state law requirement of notifying employees: "*AB 450 is directed at the conduct of employers, not the United States or its agents, and no federal activity is regulated. We agree….[that] the mere fact that those notices contain information about federal inspections does not convert them into a burden on those inspections.*" (921 F.3d at 880)

Attorney Kelley's interpretation of the above holding is reflected in subtitle #1 of her Memo: "*Mere Notification Does Not Equate to Active Interference with a Federal Function."* Thus she appears to read the Ninth Circuit's holding as saying that "mere notification" can ***never*** constitute unlawful interference. I do not read the ruling at all so broadly. The Court simply ruled on ***this*** particular notification law, based on its *de facto* impact on the federal functions covered by the relevant federal statute.

By contrast, Provision #6 of the Welcoming Lebanon Ordinance is very broad, and would require notifications to the public by the City itself, ***regardless*** of the reason why federal immigration authorities were present in Lebanon – as long as their presence were ***in any way*** related to immigration law. Thus, ***unlike*** the California law upheld by the Ninth Circuit, Provision #6 would often require warnings to be given to the very persons against whom federal authorities were attempting to enforce legal requirements. [I realize many people consider some of those laws to be unjust ones, but that cannot affect my legal analysis under the "noninterference" principle.] To use a loose analogy outside the realm of immigration law, suppose, for example, that a person had just robbed a bank and were running away from the scene. If someone, knowing those facts, were to stop the robber on the street, "notify" him/her how close the police are behind, and also "notify" the robber of an escape route of which s/he may be unaware, that person would clearly be interfering with (or "burdening") the enforcement of the criminal laws, and might even be considered an accessory, even though that person's involvement constitutes "mere notification." In my view Provision #6 would often put the City in that same kind of position. And it remains my opinion that that ***would*** be highly likely to be held to violate the noninterference principle. Again, I would certainly be glad to reconsider my view if there were other case citations more closely on point, or if we had evidence that other cities around the US were enacting similar notification provisions based upon their own legal review. I have seen no such supporting materials.

B. VAGUENESS:

I also continue to hold the view, as set forth in my prior opinions, that Provision 6 is too vague and indefinite to be implemented. Attorney Kelley claims the problems can be "easily" resolved. Admittedly clarity could be improved. But I would suggest that would not be at all simple. As just one example, who counts as an "agent" of the City for this purpose? Will every single employee of the Public Works Department (for example) now have the duty

to stay on the alert for the presence of federal immigration authorities in Lebanon, in addition to their other duties? And who are they to report to on this subject to make sure a notification takes place? I will not continue listing these difficulties here, because in any event, even if these and similar matters were clarified, it would in my view not resolve the underlying problem of basic unlawfulness.

C. HOW SHOULD CITY OFFICIALS DEAL WITH LEGAL UNCERTAINTY?

A final point made by Attorney Kelley's Memo, vis-à-vis Provision #6, is that there is always some uncertainty and risk involved in legal opinions, and in this case – for the sake of those affected by the threat of immigration enforcement – she believes it is "worth it" for the City to taking the legal risk.

For 40 years I have given legal advice to towns and cities. As I said a month ago, I am only the City's attorney, and it's up to the City's officials, not me, to make actual policy decisions. But it ***is*** part of my role as the City's attorney to try to inform the City's officials about the extent of the risk, as best I can. Hence I often try to give a rough indication of my level of confidence in my opinion – especially in a "gray area" where no specific case or statute covers it. And I've usually said that units of government shouldn't rely on a legal opinion unless an attorney representing the City as a client (and not one representing some other party) is at least roughly "70% confident" in that opinion. In this case I would rate the chances of Provision #6 being held lawful at no better than 30%. Of course no one knows the actual likelihood of a legal challenge.

It is certainly true that clients – including municipalities – may choose to undergo a high degree of legal risk "on principle" (that is, because they believe the underlying policy matter is worth the risk). Again, that is the governing body's decision, not mine. But I do often caution public officials that they should be ***more reluctant*** to "stand on principle" when they are representing a governmental body than when they are dealing with their own personal affairs. Why? Because they are risking the City's taxpayers' money, not just their own. And they are risking the City's future reputation and law enforcement credibility, not just their own.

Again, I hope these comments are helpful in the Task Force's consideration of this issue.

Sincerely,

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