JULY 17, 2020

PART I. COUNCILOR PRENTISS'S ALTERNATIVE DRAFT FOR PROVISION #6 – HIGHWAY CHECKPOINTS.

I won't rehash the opinion I've already given on the version of Provision 6 passed by the voters as part of the initiative petition – I remain of the opinion that it is most likely unlawful and unenforceable. Instead I have been asked to address a proposed substitute version which reads as follows:

> "In order to maintain public safety and the orderly processes for all citizens traveling in and through the city of Lebanon, the presence of checkpoints along our roads and highways that interfere with the flow of traffic should be reported to the public. If any Agent of the City becomes aware of a Federal immigration authority's presence at said checkpoint in the City for the purposes of questioning, detaining or gathering immigration status information from any person or persons, or other enforcement action, the City shall act to notify the public as soon as they become aware. This should be done by both the City of Lebanon and community organizations once they become aware. Notification can be made through the LebAlert system as well as partner organization communications protocols."

I realize the Task Force had already begun to edit this at the last meeting. For now I'll assume, for argument's sake, that it would be possible to put this in a form which eliminates concerns over ambiguity and vagueness. Instead I'll focus on the cusp of it – namely, that agents of the City would be required to notify the public whenever there were a highway checkpoint where federal immigration authorities were present.

SUMMARY OF OPINION: I have found no case or statute directly on point. This is therefore a "gray area" of law. However based on the indirect reasoning discussed below I do ***not*** recommend the enactment of this type of provision by the City, because in my view the odds are at least 50-50 that it would be held to violate implied federal preemption and intergovernmental immunity, by frustrating and interfering with federal law enforcement.

Based on the discussion at the prior meeting, I realize this response may be frustrating to the Task Force. However my role is to "call them as I see them," and that also includes letting you know, when I can, the extent to which the law itself is unclear.

DISCUSSION: This is a complex subject, and I've tried to avoid writing a full legal brief:

1. The gist of the legal issue is whether a city is impliedly preempted from providing public notice and publicity of federal immigration checkpoints on the ground that doing so would frustrate and interfere with federal law enforcement. By contrast with the legal issues raised by Provisions 1-5 of the Ordinance, here I have found ***zero*** case law on the question of whether it is lawful for a local government to have a program of notifying

the public of the existence of either state or federal highway checkpoints. It is thus an inherently "gray area" of law, and my reasoning must necessarily be round-about. But I have taken an alternative approach of trying to determine the extent to which the law enforcement purpose of checkpoints involves the element of surprise or secrecy – reasoning that ***if*** such surprise is part of that purpose, then publicizing the location of the checkpoint ***would*** likely tend to frustrate that purpose.

2. One established legal principle it's key to grasp to start with, is that for any governmental agent (ICE, police, etc.) to stop a motorist ***for no reason at all*** is unconstitutional, and constitutes a "seizure" for purposes of the 4th Amendment prohibition on searches and seizures, as well as under Part I, Article 19 of the N.H. Constitution. In most cases the stop – to be constitutional – must be justified by either: (a) that the officers making the stop have a warrant aimed at a particular individual(s), issued by a justice, and based on probable cause to believe they will find evidence of a violation of law, or (b) that the officer(s) themselves have reasonable individualized suspicion based on their own observations. Many many criminal law court decisions turn on whether a vehicle stop was constitutional, because when it isn't, any evidence arising from that stop cannot be used in court.

3. ***However***, an exception to the warrant/probable cause requirement has developed in some limited circumstances – including sobriety checkpoints and immigration checkpoints. These are instead considered "administrative" stops, and in order to be constitutional the public need must be high, there must be certain safeguards to prevent over-inconveniencing the traveling public, and most importantly, the authorities *must treat everyone alike* (almost the ***opposite*** of the normal "individualized suspicion" requirement).

    [A helpful analogy is the arena (which I myself am more familiar with) of whether city officials can legally enter a person's home. ***Usually***, a government agent's entry into a person's property is presumed to be unconstitutional violation of that person's property rights ***unless*** the police, building inspector (or, say, planning board member) has either: (a) the person's express permission, or (b) a search warrant issued by a justice, and based on probable cause that the entry will turn up evidence of a crime. ***However,*** in the property arena as well, there is also an "administrative" exception to this general rule, which in NH is embodied in the "Administrative Inspection Warrant" statute, RSA 595-B. To get an administrative inspection warrant, officials do ***not*** need any individualized suspicion – instead they must meet standards for conducting a "*routine*" inspection, testing or sampling (for example inspections for building code compliance). Again, instead of aiming at a particular suspicion, officials are required to treat everyone who is similarly situated impartially and alike.]

4. A comparatively clear example of what makes an "administrative" checkpoint lawful is found in the NH case law on sobriety checkpoints, as reflected in two NH Supreme Court opinions, *State v. Koppel*, 127 N.H. 286 (1985) and *State v. Hunt*, 155 N.H. 465 (2007).

    a. In the *Koppel* case, the Court said sobriety checkpoints ***might*** be constitutional. ***But***…in order for them to be so, the State is required to show that the checkpoint significantly advances the public interest in a manner that outweighs the accompanying intrusion on individual rights, and must also prove that no less intrusive means are available to accomplish the goal. The Court was skeptical that a checkpoint was the least intrusive way to ***detect*** drunk drivers. But the Court said roadblocks might also serve to ***deter*** drunk driving. And the court specifically said the maximum ***deterrence*** effect occurs only when there is sufficient ***publicity*** about the roadblocks.

    b. In the *Koppel* case, it was held that the State had ***failed*** to meet its burden, in particular because there had been ***no*** advance warning to the public by way of either advance road signs or publicity. In response to the *Koppel* decision, the Attorney General published a set of guidelines to be followed for sobriety checkpoints, and finally in 1996 the Legislature passed RSA 265:1-a, which prohibits sobriety checkpoints unless a superior court justice has determined that the proposed methodology satisfies constitutional guarantees. The AG guidelines require "***aggressive***" advance publicity to the media. In the 2007 *Hunt* case, the defendants argued the checkpoint where they were arrested was unlawful because the AG's guidelines had not been followed, particularly in the area of advance publicity. But the Court said that "***Aggressive notice – whatever that may be – is a worthwhile aspirational goal***, but not a constitutional requirement." The Court determined that there had been ***some*** advance publicity, which the Court found constitutionally adequate.

5. ***My point is***, that in the realm of sobriety checkpoints, part of the State's purpose – and part of what renders those checkpoints constitutional – is the ***deterrent*** effect on drunk driving arising from the ***publicity*** surrounding the checkpoints. In my opinion, therefore, a city ordinance which ***increases*** the amount of such publicity would be highly ***unlikely*** to be found to be impliedly preempted on the ground that it frustrates the State's purpose. On the contrary, such public notice would be ***consistent*** with the State's purpose. As the Court said in the *Hunt* case, "aggressive notice…is a worthwhile aspirational goal."

    a. ***What about precise location?*** I would be much less optimistic if the local ordinance required disclosure of the precise location of the sobriety checkpoint. Just as a common-sense matter, it would seem that the deterrent effect would be less if the precise location were publicized, since the checkpoint could be avoided simply by avoiding that one location. In the NH Supreme Court case *Opinion of the Justices***,** 128 N.H. 14 (1986), the Court upheld the facial

constitutionality of a proposed Legislative bill on sobriety checkpoints (one which was not actually enacted at that time). The Court's description of the bill states: "The bill contains a general notice requirement, calculated to achieve the maximum deterrent effect ***while not compromising the effectiveness…through disclosure of the precise locations***" (emphasis added). Moreover, the AG-issued guidelines require publicity of the ***general*** area of the checkpoint, but not the precise location. I conclude that publicity disclosing the ***precise*** locations is ***not*** required in order to make the roadblock constitutional, and thus it remains a possibility that doing so ***would*** frustrate the State's goals in establishing the sobriety checkpoint.

6. If N.H. law on sobriety checkpoints seems a bit muddy, I would call it a model of clarity compared with federal law on immigration checkpoints. Specifically, I have looked at US Supreme Court cases to determine whether the constitutionality of immigration checkpoints – similar to the case of sobriety checkpoints – hinges to any degree on advance publicity and lack of surprise, reasoning that if it does, then a City ordinance adding to that publicity would be unlikely to be held to frustrate federal law enforcement.

    a. The prime US Supreme Court decision establishing the legality of "administrative" immigration checkpoints as not violative of the Fourth Amendment is *US v. Martinez-Fuerte*, 428 U.S. 543 (1976). The Court applied a balancing test similar to that in *Koppel.* The checkpoints involved were ***permanent*** checkpoints not far from the Mexican border (implying no governmental attempt at secrecy). Flashing signs warned drivers of the checkpoint in advance. The Court said the intrusion on travelers is minimal and "the generating of concern or even fright on the part of lawful travelers is appreciably less in the case of a checkpoint stop," and that travelers are "much less likely to be frightened or annoyed by the intrusion" (citation omitted). "***Motorists using these highways are not taken by surprise, as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere***" (emphasis added).

    b. Looking at *Martinez-Fuerte* all by itself (especially the sentence I've put in italics), it ***does*** appear that advance public knowledge and lack of "surprise" would arguably be a key element in making these checkpoints constitutional, similar to the case of sobriety checkpoints in New Hampshire. Unfortunately, however, subsequent US Supreme Court decisions have basically "reinterpreted" *Martinez-Fuerte* on that point.

    c. Specifically, *Michigan State Police v. Sitz*, 496 U.S. 444 (1987) applied the *Martinez-Fuerte* balancing test to find that Michigan sobriety checkpoints did not violate the federal 4th Amendment. Justice Rehnquists's majority opinion adds a judicial gloss to the court's discussion of motorist "surprise" in the earlier

case. Basically Rehnquist said all that's required is the fact that checkpoints are ***inherently*** less surprising and frightening for law-abiding motorists. The factor of advance notice was not touched on, because the case involved a ***facial*** challenge to sobriety checkpoints. But *Sitz* does make it clear that advance knowledge is ***not a necessary*** prerequisite for constitutionality. That point is made even more clear reading Justice Stevens' dissent in *Sitz*. His dissent was based precisely on the surprise nature of the Michigan sobriety checkpoints: "[These checkpoints are] operated at night at an unannounced location. Surprise is crucial to its method." Stevens said the majority "mistakenly assumes that there is virtually no difference between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint." Stevens goes on to say that "There is a critical difference between a seizure that is preceded by fair notice and one that is effected by surprise." Unfortunately (at least from the standpoint of clarity on the Task Force's inquiry), Justice Stevens' viewpoint did ***not*** prevail in *Sitz*.

d. The *Martinez-Fuerte* decision was also interpreted in the later case of *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000), which involved roadblock checkpoints which had been established for purposes of narcotics enforcement (including dog-sniffing). The Court (J. O'Connor) said that, by contrast with *Martinez-Fuerte* and *Sitz*, checkpoints were simply too intrusive in the case of "ordinary law enforcement" such as narcotics laws. The Court based the distinction on the high degree of public interest in enforcement of DWI and immigration laws. But the element of "surprise" was ***not*** analyzed. Thus the *Edmond* case tends to bolster the notion that the "no surprise" factor was ***not*** crucial to immigration checkpoint constitutionality in the *Martinez-Fuerte* case.

7. **Conclusion:** If federal case law on immigration checkpoints were as clear as NH case law on sobriety checkpoints, I could have some degree of confidence in saying that it would be lawful for the City to require the checkpoints to be publicized – as long as the precise locations were not disclosed. But given the way that the US Supreme Court in the *Sitz* case "reinterpreted" the rationale behind *Martinez-Fuerte*, it is my opinion that there remains a significant risk that it is constitutional for federal immigration authorities to rely on surprise, and that for the City's to give public notice of immigration checkpoints could be held to be a frustration of, and thus interference with, federal law enforcement.

PART II – FREE SPEECH AND THE WHISTLEBLOWER PROTECTION LAW.

A. ***Free Speech.*** In paragraph 6 of my list of legal concerns dated June 19, I raised the question of City employees acting in their own capacity, and suggested there may be instances where free speech rights might supersede the City's authority to enforce the Welcoming Lebanon Ordinance. Suppose, for example, that an employee in, say, Public Works, who has no policy-making function within the City, were to (on his

own time) write a letter to the editor disparaging undocumented immigrants. That would arguably violate Provision #1 of the Ordinance, but would probably be held to be within that employee's Free Speech rights.

Note: that while I did recommend clarifying the definition of a City "agent," I do ***not*** recommend trying to draft a specific "free speech" exception in the Ordinance. The law on government employee free speech is complex, and each case would turn on its specific facts. Besides, the First Amendment ***already*** supersedes and constitutes an implied overlay upon any ordinance the City might enact. Rather than trying to draft a "free speech exception" (which would probably multiply the length of the Ordinance by orders of magnitude), the City officials responsible for deciding when and how to enforce the Ordinance should treat each instance individually, keeping the possibility of free speech rights in mind, and relying on legal advice if necessary.

B. ***The Whistleblower Protection Act*** (RSA 275-E**.**) The Welcoming Lebanon Ordinance prohibits, among other things, "disclosing" any information concerning citizenship or immigration status (Provision #3). On the other hand, RSA 273-A:2, I(a) says that "No employer shall harass, abuse, intimidate, discharge, threaten, or otherwise discriminate against any employee…because…the employee, in good faith, ***reports or causes to be reported…a violation of any law*** or rule adopted under the laws of this state…or ***the United States***…" (emphasis added).

RSA 275-E is a state law, and hence will take precedence over local ordinances including the Welcoming Lebanon Ordinance where there is a direct conflict. In my opinion there may be cases where there ***is*** a direct conflict. Suppose, for example, that a person in police custody – with no prompting or inquiry from the officers involved – voluntarily admits the fact that he is not lawfully in the US. If a police officer, based on that admission, were to notify federal immigration authorities of that violation, RSA 275-E would prohibit the City from disciplining or issuing a citation to that officer, or taking any other adverse action against that officer for violating the Welcoming Lebanon Ordinance.

Admittedly this conclusion may seem odd because based on case law, the underlying purpose of RSA 275-E is to prevent retaliation when an employee reports on violations of law ***committed by the employer*** (or at least someone which a commonality-of-interest with the employer), whereas in my example it is a violation of law involving a completely separate third party. Nevertheless in my opinion, the language of 275-E:2, I(a) is clear and unambiguous, and would be construed by the courts to mean exactly what it says.

Is Provision #3 Invalid on Its Face? Despite the above discussion, it is my view that the prohibition on disclosure is not invalid on its face. There are two general reasons:

(a) First, the only type of retaliation prohibited by RSA 275-E is ***employer*** retaliation. In my example, therefore, the City itself could not take any action based on the officer's report to ICE. But it is established in New Hampshire that criminal complaints may be filed by private persons, as long as the offense is not one punishable by jail time (*see State v. Merski*, 115 N.H. 48 (1975), as limited by *State v. Martineau*, 148 N.H. 259 (2002).) RSA 275-E does not protect against actions by non-employers, hence the officer making such a report might still be subject to such a private complaint.

(b) In addition, only the act of "reporting" is covered by RSA 275-E. In many if not most cases, City employees will not acquire knowledge of someone's citizenship or immigration status without having violated the Ordinance's prohibition on targeting, profiling, questioning or inquiring. Those activities are ***not*** protected under RSA 275-E, and the City is ***not*** prohibited from taking adverse action against the employee based on those activities. (Moreover, in my view the courts would be unlikely to expand the scope of 275-E, given that the underlying focus of the statute is on employees reporting ***employer*** wrongdoing. Granted this is also a "gray area," given that there are no NH case (and few from other states) on reporting of third party violations of law.)

Should the Ordinance Be Amended to Recognize RSA 275-E? That is up to the Task Force, and ultimately the City Council. But in my opinion there is no need for such an amendment. In those cases where 275-E supersedes the City ordinance, that preemption occurs regardless of whether the Ordinance contains an express exception. Thus, as in the case of Free Speech (discussed above), no express exception is legally necessary. In any event, however, it will clearly be important for whomever is enforcing the Ordinance to remain aware of 273-E's potential impact, and act accordingly on a case-by-case basis.

Sincerely,
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