



CITY OF SOMERVILLE, MASSACHUSETTS  
LAW DEPARTMENT

March 18, 2011

The Honorable Board of Aldermen  
City Hall  
Somerville, MA 02143

Re: Proposed amendments to the Somerville Responsible Employer Ordinance

Dear Honorable Board Members:

This office has been asked to review the validity of proposed amendments to the Somerville Responsible Employer Ordinance. Certain of these changes propose to require a minimum number of Somerville residents on public construction projects and on projects in which any City funds are applied. In my opinion, the proposed provisions may likely be legal as to projects that are fully funded by the City or a combination of City and Federal funds. However, it is well-settled law that such an ordinance as it applies to privately funded projects, including projects utilizing public funds, would violate the privileges and immunities clause (art. 4, § 2, cl. 1) of the United States Constitution.

In 1981 the Supreme Judicial Court struck down a Boston regulation that required "on any construction project funded in whole or in part by City funds" that the workers hours be performed by 50% bona fide Boston residents, 25% minorities and 10% women. The court found that the regulation violated the commerce clause (art. 1, § 8, cl. 3) of the Constitution of the United States based on its negative impact on interstate commerce. Massachusetts Council of Construction Employees, Inc. et al, v. Mayor of Boston, et al, 384 Mass 466 (1981). The court had at first addressed the privileges and immunities clause and stated that because the Boston regulation, just as the proposed amendments here, negatively impacted other citizens of the Commonwealth as well as out-of-state residents, it would be more difficult to find a violation. The court made no ruling on the basis of the privileges and immunities clause. The Supreme Judicial Court then turned to the commerce clause and found a clear and direct constitutional obstacle to the City's order based on its negative impact on interstate commerce.

However, the Supreme Court of the United States reversed the decision and remanded the case back to the Supreme Judicial Court for further action. See, White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204 (1983). In doing so, the court narrowed the focus of its



analysis to “the propriety of applying the Mayor’s executive order to *projects funded wholly with city funds and projects funded in part with federal funds.*” *Id.*, at 209 (emphasis added). The court found that “[i]nsofar as the city expended only its own funds in entering into construction contracts for public projects it was a market participant” *Id.*, at 215 (emphasis added). The court reasoned that the commerce clause established no barrier to such market participation and that the “[i]mpact on out-of-state residents figures in the equation only after it is decided that the city is regulating the market rather than participating in it. . . .” It should be noted that the Supreme Court specifically refused to address whether the order violated the privileges and immunities clause and remanded it back to the Supreme Judicial Court for such determination. *Id.*, at 215 f.n. 12.

The privileges and immunities clause<sup>1</sup> “was intended to fuse a collection of independent states into one nation and was designed to ensure that a citizen of one State that ventures into another State is accorded the same privileges enjoyed by the citizens of that State.” Opinion of the Justices to the Senate, 393 Mass. 1201, at 1202 (1984), citing, Toomer v. Witsell, 334 U.S. 385, 395 (1948). To survive constitutional muster it would be necessary to show that there was a substantial reason for the discrimination. The City would have to demonstrate that the non-residents being discriminated against “constitute a peculiar source of the evil at which the [ordinance] is aimed.” Opinion of the Justices to the Senate, supra at 1204, Citing Toomer, at 398.

While the courts have allowed such discrimination against non-citizens for matters such as differentiation in the fees charged for recreational hunting licenses, see, e.g., Baldwin v. Fish and Game Comm’n of Montana, 436 U.S. 371 (1978), they have consistently held that limiting a work opportunity impinges on a fundamental right. See, e.g. Toomer, supra, which negated a substantial difference in licensing fees for commercial shrimp fishers based on residency. The proposed amendments in the present matter clearly fall within the latter category. It is simply well-settled law that a city’s efforts to bias employment decisions in favor of its residents on construction projects funded with public monies discriminates against a protected privilege. See, United Bldg. and Const. Trades Council v. Camden, 465 U.S. 208, 220 (1984).

It should be noted that in Camden, the court addressed a city ordinance that merely encouraged developers and contractors to make “every good faith effort” to achieve the goal that at least 40% of the employees on projects funded in whole or in part by city funds be Camden (N.J.) residents. Nevertheless, the court held that an out-of-state resident’s interest in employment by private employers on public works projects in another state to be sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause and found that Camden’s ordinance discriminated against a protected privilege. However, the court then remanded the matter to the New Jersey Supreme Court for purposes of determining whether sufficient justification existed to allow the discrimination to stand. See, Camden, Id. at 222-224.

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<sup>1</sup> “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”

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There is a two-part standard for addressing privileges and immunities challenges. The first is whether the classification strikes at the heart of an interest that is fundamental to the purpose of the clause. As noted above, the courts have consistently found that work, the “means of a livelihood,” is fundamental to the promotion of interstate harmony, Baldwin, supra, at 388. The next issue to decide is whether there is a substantial reason to allow the City to discriminate against non-residents. However, even assuming that there is a substantial reason, such as unemployment among Somerville residents, the City would have to show that non-residents were the peculiar source of that problem. Since that would not be possible to demonstrate, the amendments to the ordinance cannot pass constitutional muster.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Matthew J. Buckley  
Assistant City Solicitor

cc: Mayor Joseph A. Curtatone  
Francis X. Wright, Jr., City Solicitor