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	SUBJECT	Preparation for Local Hiring Work Session		

TO

DATE:

Council President Young
 Councilmember Stokes, Chair, Taxation, Finance and Economic Development Committee
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May 2, 2013

Current Legislation

City Council Bill 12-0159 requires that employers of certain public works projects hire a certain percentage of Baltimore City residents. In order for the preference to survive a legal challenge based on the Privileges and Immunities Clause of the Constitution, the City must prove that nonresidents are the cause of local unemployment; a test that no city to date has passed. The City must prove to a court's satisfaction that 1) the discrimination against nonresidents is justified by a "substantial reason" and 2) that nonresidents "constitute a peculiar source of the evil at which the statute is aimed." *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 222 (1984)(citing *Toomer v. Witsell*, 334 U.S. 385, 398 (1948)). The test has proven insurmountable in past attempts to defend local hire laws due to the many factors contributing to unemployment.

In preparation for the work session for CCB 12-0159, this memo investigates the required legal standard, how courts have applied it, and what proof, if any, could legally justify a local preference law so that it would pass Constitutional muster. It also reiterates the ways the City can encourage employers to hire local residents without offending the Constitution.

To succeed against a Privileges and Immunities challenge, the City must provide a court with a constitutionally adequate justification for treating nonresidents differently than residents. To do this to the satisfaction of a court of law, the City must prove that nonresidents are the cause of local unemployment. In other words, even if the "substantial reason" for the law is to remedy the unemployment of residents and reward taxpaying citizens with jobs, a justification cited by most cities defending similar laws, this alone is not enough. "[T]he effect of the Privileges and Immunities Clause cannot be avoided 'solely under the guise of avoiding economic losses to residents.'" *Merit Constr. Alliance v. City of Quincy*, 2012 U.S. Dist. LEXIS 54210, *7 (D. Mass. 2012)(citations omitted). The courts do not take issue with the goal of lowering local unemployment. It is the discriminatory means to achieve that end that is legally objectionable. "The means and the end must be constitutionally legitimate." *Houston Contractors Assoc v. Metro Trans. Authority*, 945 F. Supp. 1013, 1021 (S.D. TX 1996).

Since the goal of lessening unemployment can be achieved without discriminating against nonresidents, courts strike down local preference laws almost uniformly. In a 2012 case concerning a local preference law in Quincy, Massachusetts, the court held that Quincy would have to provide evidence "that nonresidents were a particular source of the unemployment of Quincy's blue-collar workers." *Merit Constr. Alliance*, 2012 U.S. Dist. LEXIS 54210 at *7. Noting that Quincy had failed to present any proof that nonresidents were causing the City's



unemployment, the judge opined that one could “reasonably infer” the opposite, that nonresidents *helped* the local economy by using public transportation, shopping and dining in Quincy restaurants, thereby arguably increasing the number of available jobs. *Id.* In other words, Quincy must prove that its residents are unemployed solely or particularly because nonresidents are taking the available jobs in Quincy. As another judge put it: “Even if I were to accept that poor economic conditions are a sufficiently substantial reason to defeat the [challenge] (and I have seen no case that has so held) I cannot accept that nonresidents are the peculiar source of the evils Worcester has described as the *Camden* case requires. It is more than a stretch to suggest that nonresident employment on public construction projects – or in the construction sector generally – is responsible for the far reaching economic problems the City describes.” *Utility Contractors’ Ass’n of New England v. City of Worcester*, 236 F. Supp. 2d 113, 120 (D. Mass. 2002). Another judge, when analyzing a legal challenge to a state preference, held “New Jersey, absent a special showing of specific dangers posed by out-of-state employees, may not attempt to resolve its problems on the backs of citizens of our neighboring states.” *Neshaminy Constructors v. Krause*, 437 A.2d 733, 738 (N.J. Super. Ct. Ch. Div. 1981).

Courts are therefore recognizing that because “the Supreme Court has rejected the argument that employed nonresidents are automatically a source of high residential unemployment so as to enable protectionist legislation to pass scrutiny under the Privileges and Immunities Clause, the Court finds it difficult to issue guidance to Defendants to enable the reformation of the [preferential law].” *Lakeside Roofing Co. v. Nixon*, 2012 U.S. Dist. LEXIS 28442, *21 (E.D. Mo. 2012). In other words, the legal test is a virtually impossible one to pass; presumably because nonresidents are not the actual cause of local unemployment. Even a federal judge was unable to issue guidance as to how to make such a preference legal.

Therefore, the only possible way to for CCB 12-0159 to survive a Privileges and Immunities challenge, is to be supported by statistical proof that Baltimore City residents who are unemployed are jobless *because* and *only* because nonresidents are filling available jobs. The study must rule out other factors of unemployment like lack of education and lack of job skills. Only then would a court find that the law passes the constitutional test. This study would be expensive, with little likelihood of success. A similar study was commissioned during a legal challenge to the minority and women business law and was very expensive. In cases where cities offer statistical proof to the court to justify the resident hiring preference, the data suggests that the local unemployment is caused not by the influx of nonresidents taking local jobs, but by the lack of education and job training of the local residents. *See, e.g. Hicklin v. Orbeck*, 437 U.S. 518, 526-28 (1978). There is no reported case of a City satisfying this burden of proof.

We were unable to get a meaningful response from the San Francisco Law Department about their hiring preference, despite several attempts. Similarly, the Boston Law Department did not return our calls and emails. Perhaps the legal vulnerability of the legislation is the cause of their unresponsiveness. Since there is no reported case where a City has passed this test, we are unable to issue guidance on how a successful study would be conducted.

Other Ways to Encourage Hiring Local Residents

There are legal ways to encourage the hiring of residents. These include:

- Creating job linkage and training programs
- Focusing the hiring preference on income level rather than residency in a way that satisfies the Equal Protection Clause of the United States Constitution
- Focusing the preference on those who are unemployed or who have graduated from job training programs in a way that satisfies the Equal Protection Clause of the United States Constitution
- Contractually modeling the Section 3 federal program so that when federal funding is involved and a preference would be consistent with the purpose of that federal funding, placing terms in a City contract with a company to employ low-income residents of the area where the federal funds are expended, just as is done now at Housing and Community Development and the Housing Authority of Baltimore City through the Fair Housing & Equal Opportunity Office, which already has in place mechanisms for qualifying businesses as Section 3 businesses and for granting bidders Section 3 preferences
- Amending the Charter requirement that a competitively bid project be awarded to the lowest responsive and responsible bidder to allow the Board of Estimates to promulgate rules, consistent with constitutional law, for creating a bidding preference for contracts funded in part by federal funds in order to leverage the purpose of those funds

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