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OPINION NO. 2004-01

TO: Terry Ellis, City Manager
FROM: Stephen M. Kemp, City Attorney
DATE: November 3, 2004
SUBJECT: Implementation Issues for City of Peoria Arising from Passage of 2004 Ballot Proposition 200

QUESTION:

With the adoption by the voters of 2004 Ballot Proposition 200 ("Prop 200"), what issues will confront the City of Peoria in its implementation of the various Prop 200 provisions?

OPINION:

When an initiative is subject to construction and interpretation, it is the duty of the reviewing entity to construe the initiative in such a manner as to effectuate the intent of those who framed its provisions and the intent of the electorate in adopting it. State v. Gallagher, 205 Ariz. 267, 69 P.3d 38 (App. 2003). Whether the underlying policy behind the matter is appropriate is a question for the legislature or qualified electors to decide.

Prop 200 includes a variety of separate provisions¹ that may impact many different aspects of City operations. I will attempt to address each of those potential impacts grouped by operation area:

1. Elections (City Clerk) –
 - a. Prop 200 Requirement: The application for a voter registration² must include a new statement pertaining to the requirement that the applicant provide evidence of U.S. citizenship.³ (including a voter who is changing voter registration from one county to another)

¹ See attached for the full language of Proposition 200, Analysis by Legislative Council, Fiscal Impact Statement, Arguments "For" and "Against" and the Ballot Format.

² Proposition 200, §4, adding A.R.S. §16-166(G).

³ Proposition 200, §3, adding A.R.S. §16-152(A) (23).

City Impacts: Initially this requirement will need to be approved by the United States Department of Justice under Section 5 of the Voting Rights Act. Whether the provision will be approved will depend on whether it is seen as depressing participation in the electoral process by a group of voters protected under the act. Submission of the proposition as it is a statewide statute will be the responsibility of the Arizona Secretary of State. Should the City enact any ordinances, rules or regulations governing its elections pursuant to Proposition 200, such ordinances, rules or regulations will need to be submitted separately to the United States Department of Justice for pre-clearance pursuant to Section 5 of the Voting Rights Act of 1965, as amended.⁴

b. Prop 200 Requirement: The County Recorder must reject an application for a voter registration unless the applicant provides “satisfactory evidence of U.S. citizenship,” falling under one of six listed categories.⁵

City Impacts: As with the prior provision, this requirement will need to be approved by the United States Department of Justice under Section 5 of the Voting Rights Act. Assuming this provision is upheld, it conflicts with the language of A.R.S. § 16-120, which addresses the process of registration to vote. At a minimum, we would suggest that the City Clerk’s Office notify prospective voters that their registration will not be complete until the County Recorder has verified their citizenship status.

c. Prop 200 Requirement: The County Recorder must retain the citizenship information in the person’s permanent voter file for two years and then destroy it.

City Impacts: Clearly this appears to be a record that a public officer is required to hold and retain as a matter of law and would appear to be a public record subject to disclosure. The amendments to A.R.S. § 16-152 were designed to protect persons who are successful petitioners for a protective order, such as an order of protection or an injunction against harassment from having their address disclosed. However, there is no provision that applies to citizenship information and documentation, so a holder of such a protective order could have their address disclosed through the disclosure of citizenship information submitted to the County Recorder, not a voter registration. This appears to defeat the purpose of the prior amendments to A.R.S. § 16-152.⁶

d. Prop 200 Requirement: A qualified elector must present identification (either one form of photo identification or two different forms of identification with name and address) to be eligible to receive a ballot.⁷

⁴ See, 42 U.S.C. §1973, Section 5

⁵ Proposition 200 §4, adding A.R.S. §16-166(F)

⁶ See, A.R.S. §16-152.D.

⁷ Proposition 200 §5, amending A.R.S. §16-579(A)

City Impacts: As with the prior items, this requirement will need to be approved by the United States Department of Justice under Section 5 of the Voting Rights Act. Should the provision be approved, the City Clerk's Office will be required to collect satisfactory evidence of United States Citizenship from prospective new voters. Poll workers at City elections will be required to demand presentation of one form of Photo ID with name, address and photograph, or two forms of ID without photograph, but with name and address ID to the poll workers.

Please note that the Arizona Driver's License will not be sufficient as it does not contain any indication of citizenship status. The following documents will be sufficient evidence of citizenship:⁸

1. State driver's license or state ID card where the state indicates citizenship status on the face of the document.
2. Birth certificate from a state or possession of the United States where upon birth citizenship is automatic.⁹
3. Photocopy or presentation of United States Passport.
4. Presentation of United States citizenship naturalization records.
5. Documents permitted by U.S. Immigration Reform and Control Act of 1986.¹⁰
6. Bureau of Indian Affairs Card Number Tribal Treaty Card Number or Tribal Enrollment Number.¹¹

Under Proposition 200, a person does not become registered to vote until these documents have been physically verified by the county recorder, even if the voter registration application has been received. This provision would appear to conflict with the provisions of A.R.S. §16-120.

In a case where a voter uses a post office box as their address for all purposes, including state driver's license or state ID card, a voter may only have one piece of ID that would contain their residence address, their voter ID card. In such cases their ID would be insufficient and they would be ineligible to vote in person on Election Day.

⁸ Proposition 200 §4, A.R.S. §16-166.F.amended,

⁹ Please note that birth in certain possessions of the United States that are trusteeship possessions may not automatically confer United States citizenship on persons born in such possessions.

¹⁰ See, §29 U.S.C. §§1132, et.seq..

¹¹ This would appear to be duplicitous to subsection 2, except that Native Americans born in the United States were not granted citizenship until 1925.

It should be noted that no such verification requirement will exist for early voting under A.R.S. § 16-541. Consequently a person who could not provide the required ID under the proposed amendment would remain eligible to cast an early ballot.

The City Clerk's Office will be expected to conduct training of all its poll workers on the acceptable forms of Identification.

2. Eligibility for Public Benefits (Police, Fire, Library, Community Services, Code Compliance).

a. Prop 200 Requirement: Governmental units administering "State and local public benefits" that are "not federally mandated" must identify each applicant for benefits. The governmental unit must refuse to accept a government-issued ID "unless the issuing authority has verified the immigration status of the applicant."¹²

City Impacts: The concept of "State and local public benefits that are not federally mandated" ("Public Benefits") is not defined in Prop 200. Determining which City operations provide Public Benefits is the key to understanding how the implementation of Prop 200 will impact the City.

First, the meaning of "federally mandated" is unclear. Certainly, some benefits are well established as federally mandated and outside the control of states to regulate or govern. These include Social Security, Federal Railroad and Veteran's Pensions and other benefits subject to regulation under the federal Employee Retirement and Income Security Act as amended.

It is our opinion that in those cases where the federal government through legislation or regulation has established the terms and conditions of eligibility for the benefit, that such benefits are "federally mandated," even if the states or local governments are permitted to administer the program. An example of such a program on a City level is the Section 8 Housing Program and the City-operated Public Housing Program. Eligibility for such programs is established by the United States Department of Housing and Urban Development. As such, the terms of Proposition 200 would not apply.

Conversely, there are programs federally funded where the distribution of funds is within the discretionary control of the City. An example is the Federal Community Development Block Grant programs. These types of programs do have restrictions on the use of the funds, but the City is granted considerable latitude in appropriating and expending the funds within those restrictions.¹³

¹² Proposition 200, §6, adding A.R.S. §46-140.01(A)(3)

¹³ See, 42 U.S.C. §5301 (U.S. Housing and Community Development Act of 1974, as amended)

The Arizona Supreme Court has addressed the nature of federal funds in El Paso Natural Gas Co. v. Mohave County, 133 Ariz. 59, 649 P.2d 262 (1982). The Supreme Court held that source of money being federal funds does not preempt the state's laws on budgeting and finance. The federal funds must be budgeted by the county and subject to the expenditure limitation provisions under Arizona law for local governments. The Court noted that federal law can preempt state law in the following situations:¹⁴

1. Where Congress has occupied the field by adoption of an all embracing federal plan of control, as outlined above.
2. Where an express preemption exists.
3. Where state laws would obviously frustrate congressional purposes.

Community Development Block Grant Funds are an example of the third preemption principle. There is no citizenship verification provision for expenditure of these grant funds. The City may not discriminate on basis of national origin, race, gender, sex, religion or disability in the distribution and use of such funds. Requiring proof of citizenship and reporting of immigration status could result in eligible individuals electing not to participate and as a result, frustrate the congressional intent to upgrade areas inhabited by primarily low and moderate income individuals.

The stated purpose of the Community Development Block Grant program is to provide funding to local governments as direct or indirect recipients for the purposes of funding services and projects to low and moderate income individuals, thereby enabling such persons to participate more fully in society. Requiring proof of citizenship status may well discourage participation by eligible individuals in programs funded by these federal funds and frustrate the congressional purpose in providing such funds.

Therefore it is the opinion of this Office that recipients of benefits funded exclusively under the United States Housing and Urban Development Community Development Block Grant Program are not subject to the requirements of Proposition 200. Other federal programs will have to be individually evaluated to determine if the terms of Proposition 200 will impact the program. The application of Proposition 200 will depend on the nature of the federal funding and whether the application of Proposition 200 to such programs frustrates the Congressional purpose in providing such funds in light of the intended goals to be accomplished under the federal program.

Proposition 200 applies to the provision of public benefits by state and local government. However, the term "public benefits" is not defined. There is a

¹⁴ See Maryland v. Louisiana, 451 U.S. 725, 101 S.Ct. 2114 (1981).

definition for this term in federal law. The term “state or local public benefits” is defined under the federal laws that restrict welfare and public benefits for aliens (adopted in 1997). Presumably, the use of the term in federal law is what led the Proposition 200 drafters to use the term in the proposition. Thus, the federal definition should serve as a starting point for interpreting “public benefit” as used in Proposition 200.¹⁵

Under federal law “state or local public benefit” means:

1. Any grant, contract, loan, professional license, or commercial license provided by either a State or local government or appropriated funds of a State or local government.
2. Any retirement, welfare, health, disability, public or assigned housing, postsecondary education, food assistance, unemployment benefit – or any other “similar benefit” for which payments or assistance are provided by either a State or local government or appropriated funds of a State or local government.

The definition does not include any of the following:

3. Any contract, professional license, or commercial license for a nonimmigrant whose entry visa is related to such U.S. employment or a citizen of a freely associated state under P.L. 99-239 or 99-658.
4. Benefits for an alien who is work-authorized or lawfully admitted for permanent residence who is qualified for such benefits and a treaty obligation exists.
5. Issuance or renewal of a professional license for a foreign national not physically present in the U.S.
6. Any federal public benefits as defined in federal law.

The provisions of 8 U.S.C. §1625 use this term as part of requiring an applicant for state and local public benefits (as defined in section 1621(c) of this title) to provide proof of eligibility.

Conversely, Arizona law does not contain a definition for the term “public benefits”. Public is a term of art which refers to public expense, whether at private or public schools. Dreher v. Amphitheatre Unified School District, 22 F3d. 228 (9th Cir. 1994). Arizona Courts have defined benefits as compensation and benefits paid under workers compensation laws. MacIntyre v. Industrial Comm. Of Arizona, 192 Ariz. 6, 960 P.2d 52 (App. 1998)

¹⁵ See, 8 U.S.C. §1621(c).

Where the language is unclear, Arizona Courts look to the plain meaning of the language of the statute as the most reliable indication of meaning. Powers v. Carpenter, 203 Ariz. 116, 51 P.3d 338 (2002). Public is defined in Webster's New Riverside University Dictionary as: "the community or people as a group".¹⁶

The word "benefits" is defined as "Payments made or entitlements available in accord with a wage agreement, insurance contract or public assistance program."¹⁷

Therefore the ordinary meaning of the term "public benefits" would appear to be payments made or entitlements available to the community as a group, such as a public assistance program. In most public assistance programs, benefits are available to any applicant provided the necessary financial eligibility requirements are met.¹⁸

The question then becomes what programs and operations that the City of Peoria provides are a financial benefit or entitlement to the community as a whole. The following programs and operations would appear to meet these criteria:

1. Provision of Library Cards and Services—open to all city residents.-
2. Provision of Special Interest Classes, AM/PM and Youth day care, summer care and adult recreation programs.¹⁹
3. Provision of Emergency Medical Services and other fire services made available to all members of the public at no charge.
4. Provision of Police Block Watch, Community Relations and similar services that are made available to the public for no charge.
5. Code Compliance services .

There are however, other city functions that do not appear to fall within the meaning of the term "public benefits". For example, utility services. These services are only available to City residents who own property or have consent of their landlord and are not services provided to all residents. Another example is admission to special events where tickets are issued and a fee is charged. Essentially only invitees of the city are admitted, not the community as a whole.

¹⁶ Webster's New Riverside University Dictionary, Houghton Mifflin Co., Boston, MA, 1984.

¹⁷ Webster's New Riverside University Dictionary, Houghton Mifflin Co., Boston, MA, 1984.

¹⁸ AHHCCS (Arizona Health Care Cost Containment Program) any person is eligible, provided the financial resource requirements are met. See A.R.S. §36-2901.6

¹⁹ While the City does charge a fee for these programs, they are made routinely available to all persons through scholarships even if the fee is not paid.

City Court services are available only to defendants and not the community as a whole. Such services would not appear to fall within the definition of public benefits under Proposition 200.²⁰

Each affected City operation will need to develop internal policies to determine how they will confirm the identity of applicants for Public Benefits. This Office will be pleased to work with each operation to address future questions on a case by case basis.

f. Prop 200 Requirement: Governmental units administering “State and local public benefits” that are “not federally mandated” must verify that each applicant is eligible for the benefits.²¹ The governmental unit must refuse to accept a government-issued ID “unless the issuing authority has verified the immigration status of the applicant.”²²

City Impacts: The scope of Public Benefits is discussed above. Each affected City operation must develop internal policies to determine how they will verify the eligibility of applicants for Public Benefits.

g. Prop 200 Requirement: Governmental units administering “State and local public benefits” that are “not federally mandated” must provide other governmental employees with “information to verify the immigration status” of any applicant for benefit.²³

City Impacts: This appears to force local governments to cooperate with each other in verifying immigration status of persons receiving benefits.

h. Prop 200 Requirement: Governmental units administering “State and local public benefits” that are “not federally mandated” must assist the employees in obtaining the information from federal immigration authorities.²⁴

City Impacts: This appears to conflict to some degree with the provisions of 28 C.F.R. §65.83, part 1. Under this federal regulation, the United States Attorney General may only involve local governments in the administration of immigration laws where the Attorney General has determined that an emergency exists and that it is appropriate to seek assistance from a state or local government in enforcing the law. Absent such a determination by the Attorney General, there is no legal basis for the Department of Homeland Security to

²⁰ Other examples of services provided for charges include building, fire and planning inspections, subdivision review and regulation, provision of police reports. The operative determination would appear to be whether the service is provided in consideration of a fee or to the City as a whole.

²¹ Proposition 200 §6 adding A.R.S. §46-140.01(A)(1)

²² Proposition 200 §6, adding A.R.S. §46-140.01(A)(3)

²³ Proposition 200 §6, adding A.R.S. §46-140.01(A)(2)

²⁴ Proposition 200 §6, adding A.R.S. §46-140.01 (A)(2)

provide and for the city to obtain information from federal immigration authorities for the purpose of enforcing Proposition 200.

i. Prop 200 Requirement: Governmental units administering “State and local public benefits” that are “not federally mandated” must require all employees to make a written report to federal immigration authorities for any violation of federal immigration law by any applicant for benefits discovered by an employee.²⁵

City Impacts: The Department of Homeland Security may only cooperate with the state and city if the Attorney General has determined that appropriate circumstances exist and an agreement in writing is entered. Without such an agreement, there will be no basis to report violations of federal immigration law. At best, the city will be limited to providing a “courtesy report” that will have no legal status.²⁶

The Office of the City Attorney will develop a report form for City use. The CAO will send the report form to all City departments and conduct training on the law’s requirements concerning reporting. The CAO will establish a City procedure that requires all completed report forms to be submitted to the CAO for review and transmittal to federal immigration authorities.

Proposition 200 does provide for criminal liability in the event an employee or their supervisor fails to make the required report.²⁷ Additionally, the statute creates a separate mandamus right of enforcement. To the extent such failure to report and individual’s immigration status would occur in the scope of employment, the employee or supervisor would be entitled to a defense and indemnification by the City pursuant to Peoria City Code §2-51. The necessary requirements contained in the code will be the responsibility of the employee to meet.

Proposition 200 may be subject to Court actions seeking to have it declared un-constitutional. Until a court of competent jurisdiction issues an order preventing the enforcement of Proposition 200, upon completion of the canvass and Proclamation by the Governor, the proposition will go into effect.

I trust that this outlines the issues in this matter. Should you have any questions, please contact our Office.

²⁵ Proposition 200 §6, adding A.R.S. §46-140.01(A)(4)

²⁶ Such a report may not provide probable cause for the Department of Homeland Security to proceed with immigration law enforcement, since the city has no legal basis to make it, however that question is one for federal authorities to resolve and beyond the scope of this opinion.

²⁷ See, Proposition 200 §6, proposed A.R.S. §46-410.01