

Honorable Councilmember Rae Gabelich
Chairperson
City of Long Beach Economic Development and Finance Committee
333 W. Ocean Boulevard
Long Beach, CA 90802

September 21, 2009

Dear Councilmember Gabelich:

I am pleased to note the presence of Councilmember Robert Garcia's Equal Benefits Ordinance (EBO) proposal on the September 21, 2009 agenda of the City's Economic Development and Finance Committee.

I was also pleased to see this proposal referred to the City's Human Relations Commission for consideration at Committee Member Reyes-Uranga's urging as well as that of others on the Council.

Please consider the following potential challenges as your Committee and others deliberate on this matter:

- **Challenge:** Enacting an Equal Benefits Ordinance could prove fiscally unsound

The City currently employs a "lowest responsible bidder" standard when awarding contracts. This specific language exists at several locations in our City Charter (Art XVII, Section 1720 and Art. XVIII, Section 1801) and our Municipal Code (Sec. 2.84.030[B]; 2.86.060 and 3.52.130[B]). This specific language serves to protect local taxpayers and helps to assure that the City receives the most value for its public funds whenever awarding contracts.

An Equal Benefits Ordinance, as currently proposed, would *prohibit* the City from awarding a contract to qualifying vendors and contractors who do not offer benefits parity to their registered domestic partners, despite that those vendors and contractors may prove to be the lowest responsible bidder.

- **Challenge:** Enacting an Equal Benefits Ordinance could subject our City to costly and unnecessary litigation

In his proposal, Council member Garcia cites several jurisdictions that have "been successful in implementing and enforcing" EBO's. Unfortunately he omits some other jurisdictions that attempted such ordinances unsuccessfully or where the Courts later restricted their scope.

Example: Portland, Maine adopted an equal benefits ordinance, which was challenged, in Federal Court, by Catholic Charities. The Court

invalidated a portion of the law affecting health and pension benefits and allowed that city to enforce portions dealing with other benefits, such as employee assistance programs, bereavement leave, and leaves of absence.

Example: In New York City, Mayor Michael R. Bloomberg won a court victory in 2006 giving him permission to ignore a local EBO. Much like Mr. Garcia's proposal for Long Beach, the New York law in question would have prevented the city from doing business with some companies that did not offer domestic partner benefits to their employees.

In the 4-3 ruling, New York State's High Court said the Mayor did not have to enforce the Equal Benefits Ordinance, enacted by the city council over his veto, because the measure violated a state statute requiring public contracts to be awarded to the lowest bidder. The court concluded that *a municipality may not withhold a contract simply because the lowest bidder does not offer equal benefits to domestic partners of its employees.*

"The provision of equal benefits for domestic partners and spouses may be a desirable end, but it is not one that New York City is free to pursue by departing from the requirements of the competitive bidding statute," the Court declared.

While it can certainly be argued that these court cases (and many others) may not be controlling in Long Beach, the point is that EBO's were attempted in those jurisdictions and litigation followed. Litigation, whether the city prevails or not, is quite costly. It is my argument that these are potential financial costs that we need not expose ourselves to since there may exist other, less compulsory, means to achieve Mr. Garcia's stated goals.

- **Challenge:** Enacting an Equal Benefits Ordinance could, itself, be considered discriminatory

It's important to recall that nothing in current Federal or State law requires businesses to offer benefits parity to their registered domestic partners. While an argument can certainly be made that all businesses *should* do so, this practice is not currently required by law. Thus, businesses that do not do so are, in fact, operating lawfully and, in fact, constitutionally.

Please consider that wherever government, in this case, Long Beach, extends privileges and benefits (contracts) to some who are otherwise behaving lawfully, i.e. businesses that offer benefits parity, it should not then withhold those same privileges and benefits from others who are also otherwise behaving lawfully, i.e. businesses that do not offer benefits parity, not and remain true to our society's ideal of equal treatment under the law.

In written discussion of this challenge with Council member Garcia's Legislative Director, Mr. Daniel Brezenoff and I discussed the potentially discriminatory aspects of this proposal. Mr. Brezenoff and I agreed to a distinction between proper and improper discrimination and Mr. Brezenoff stated that to improperly discriminate is to, in part, "use the power of...law...to exclude people from privilege..."

I believe that, if enacted as currently proposed, this may be precisely what the City would be doing, using the power of law to exclude people from privilege.

Here's an example: Company X does not offer RDP benefits parity. In not doing so, Company X is operating *lawfully*. We may not like it. We make think its wrong, but it is *lawful* nonetheless. Company X offers the lowest responsible bid for a Long Beach contract. But Company X is not awarded the contract because it does not offer RDP benefits parity.

In this hypothetical, Long Beach has in fact just used the power of law to exclude people from privilege (the privilege of doing business with the City of Long Beach).

In short, in this hypothetical, Long Beach has just discriminated, and, I believe, improperly.

Suggested Alternatives:

I've never been one to identify public policy challenges without offering, in turn, potential solutions to those challenges.

Please consider the following alternatives to Council member Garcia's Equal Benefits Ordinance, as currently proposed:

1. Offer preference points in our bidding process to businesses that offer benefits parity to their registered domestic partners. We currently offer preference points to support and encourage local companies that desire to do business with the City so this method of encouragement and support in our bidding process is not without precedent. Broward County, Florida's EBO uses this model (legislative encouragement v. legislative mandate) and with considerable success
2. Assist businesses that offer benefits parity without offering preference points. Long Beach already conducts considerable outreach for and offers a great deal of assistance and consideration in the competitive bidding process to various types of businesses such as Disadvantaged, Minority, Woman, Disabled Veteran, and Long Beach Business Enterprises. This outreach, assistance and consideration is clearly described in Long Beach's Diversity Outreach Program and perhaps simply amending this existing program to include business enterprises that demonstrate they

provide benefits for registered domestic partners that are equal to those provided for married spouses is another way to accomplish Mr. Garcia's goal

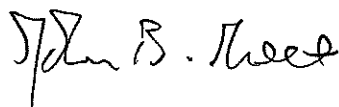
3. Apply a free market solution to this challenge. The City could do nothing but continue to adhere to our own existing laws that require a lowest responsible bidder standard. Businesses that currently offer benefits parity should simply make sure that *their* bids for City contracts always meet or exceed the "lowest responsible bidder" standard. If the City always awards its contracts accordingly, then Council member Garcia's goal in this area is met. The effect of this solution is as elegant as it is simple: Businesses that offer benefits parity will always be the *most* eligible according to existing City standards and, so, will *always* be awarded our contracts, so they win. The City *always* awards its contracts to businesses that offer benefits parity because those businesses also happen to *always* be the ones that meet the lowest responsible bidder standard, so it wins also. The taxpayers continue to *always* get the best value for their contract dollar, so they win too.

Please consider these potential challenges and proposed alternative solutions as the Economic Development and Finance Committee deliberates on this matter.

Please know that I am *not* opposed to this proposal, to any degree, on philosophical grounds. I believe companies *should* extend benefits parity to their registered domestic partners. I'm simply not convinced that enacting an EBO is the most effective or fiscally sound City response to those businesses that currently do not choose to do so.

Thank you very much for your ongoing service to our community and please either respond to this email or call me directly, at 562-577-4166, if you or your colleagues on the Committee have any questions.

Most Respectfully,



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cc: Council Member Gary DeLong, Committee Vice Chair
Council Member Tonia Reyes-Uranga, Committee Member