

Municipal Legal Non-Citizen Resident Voting **Summary of Citizens Union’s Legal Analyses**

Citizens Union’s Municipal Affairs Committee (MAC) has been studying the issue of whether to extend the right to vote in New York City local elections (no state or federal office) for over two years. At the direction of the board last year and before it received a report and recommendation from the MAC on this issue, Citizens Union staff and interested board members were asked to conduct an analysis regarding the legality of instituting legal non-citizen resident voting in New York City, through efforts of a CU-CUF Board Working Group, the Municipal Affairs Committee, and additional attorneys, academics, and staff.

In 2014, a City College Capstone Team delivered presentations and report to the MAC reporting on its history, evaluating policy considerations in New York City, implementation issues, and comparative research within the United States and abroad. Additionally, CU’s former Legislative Counsel Peggy Farber drafted a memo examining whether legal non-citizen resident voting in NYC is permissible under federal and state law – respectively, yes and maybe.

In 2015, Lisa Grumet and Michael Twomey of New York Law School drafted a memo examining issues raised by the Farber memo, and whether a referendum would be required to institute legal non-citizen resident voting in NYC, but that it may be politically desirable to have a referendum to show public support for expanding the electorate.

Subsequently, the CU-CUF Board Working Group reviewed the aforementioned memos. – The working group assessed that the federal law does not specifically permit legal non-citizen resident voting, but rather does not prohibit it or address it. It was the working group’s consensus that legal non-citizen resident voting is an open question legally and could possibly be decided without a referendum.

Included below is a summary of the legal analyses from these memos, the thinking of the Board Working Group, and additional information as staff continues to monitor political and legal considerations regarding municipal legal non-citizen resident voting.

1. Municipal Legal Non-Citizen Resident Voting Appears Permissible under Federal and State Law (Farber Memo)

a. Federal law permits non-citizen voting in local elections. (*Pope v. Williams*, 193 U.S. 621, 632-33 (1904) New York State Constitution’s voting franchise provision (Article II § 1) “merely guarantees the voting rights of citizens, and does not prohibit non-citizen voting,” as evidenced by the past practice of non-citizen parents voting in school board elections. The board working group believes that to say federal case law permits it is too strong. The group’s interpretation is that federal law and case law does not address or prohibit legal non-citizen resident voting.

b. NYS Election Law §5-102 expressly limits voting to United States citizens, but §1-102 “permits local governments to enact laws that are inconsistent with state election law.” It is unclear whether NYC can opt out of the state’s citizenship requirement.

c. The Brennan Center and others have interpreted broad home rule authority as permissive of municipal resident voting, through provisions empowering municipalities to pass local laws relating to “property, affairs, or government,” including the “mode of selection” of government officers (N.Y. Const., Article IX, § 2(c)(1); N.Y. Mun. Home Rule L § 10(1)(a))

d. The aforementioned assessments of state law are predominantly based on statute. Though these statutes have been examined by lower courts to some degree, the New York Court of Appeals has not weighed in on them, which presents some element of litigation risk.

2. Enactment of Legal Non-Citizen Resident Voting Is Likely Permissible via Passage by City Council and Mayoral Signature, but Politically Preferable through a Local Referendum (Grumet-Twomey Memo)

a. Municipal Home Rule Law §23(2)(e) requires a referendum to enact a local law that “changes the method of nominating, electing or removing an elective officer.”

b. Legislative history indicates that the provision for changing the method of “nominating” or “electing” an officer: was meant to address “method of selection,” or the process of voting rather who can vote; was added legislatively in 1939, after the 1938 Constitutional Convention; and was championed by George Hallett, then Secretary of Citizens Union.

c. Historical context indicates that New Yorkers in 1937 were concerned with proportional representation and charter provisions regarding voting for executive officials – not with the composition of the electorate.

d. “No New York court has ruled on whether extending the franchise to noncitizens qualifies as ‘changing the method’ of election... [h]owever, court decisions and Attorney General opinions further support a narrow construction of ‘method.’... [R]eferenda were required for [removing an officer,] changing an elective office to an appointive office, changing from an at-large to a ward or district election process, and changes to the primary election process. ... In contrast, no referendum was required in a case involving changes in ward boundaries.”

e. It therefore *appears* that legal non-citizen resident voting would not trigger a referendum because of a change in “method” of election. However, “if the City maintains that changing the electorate does not qualify as changing the ‘method’ of electing an officer for the purposes of the referendum provision, it may be harder for the City to argue that it qualifies as changing the ‘mode of selection’” of local elected officials. This is significant because “mode of selection” is the home rule power under which municipalities may legislate in this area. Still, case law interprets “mode” more broadly than “method.”

f. Legal non-citizen resident voting likely does not require a referendum because “expanding the electorate is qualitatively different from changing the procedures by which the electorate exercises its powers” and it “is sufficiently related to matters of New York City’s government and to the mode of selection of its officers to permit the Council to address the matter by local law.”

g. “Proceeding without a referendum could have the effect of weakening the City’s position in any future litigation. However, there is significant support for an argument that no referendum is required, and the litigation risks should be weighed against the risk that a referendum could fail.” (Grumet-Twomey Memo, page 9) Some in the working group believe it may not weaken the city’s position.

3. CU Working Group Reinforces Analysis of Legal Memos

a. In response to the Grumet-Twomey Memo, the working group determined that the memo was persuasive in that a referendum is likely not required, particularly since the local law applying the City's contribution limits to all city candidates, whether or not they take public funding, was adopted without a referendum. It is important to note that the city's original campaign finance system was enacted by charter referendum approved by the voters laying the foundation and that it could be argued that additional provisions that have been made were consistent with the intent of the voter approved program.

b. While there was general consensus that a referendum is not required, there were those who felt that it was not a "slam dunk" legally to proceed without a referendum.

c. The working group considered that while a referendum is likely not required legally, it might be preferable for political reasons, to gain the support of the city and as a sign of respect to the current electorate. Should legal noncitizen resident voting only be enacted as a result of council and mayoral action and without a compelling public education campaign, it could prompt a backlash that might result in a referendum being presented to rescind such an act.

d. The group also cautioned that Citizens Union should examine administrative implementation issues, such as: how to set up ballots and voting machinery so that some people can vote for all contested offices while others vote for only municipal elections; how to ensure that the NYC Board of Elections has the required capacity; the cost of this implementation; how to address this during municipal special elections when the BOE is set up for state or federal elections

4. Question Emerging on Whether Municipal Legal Non-Citizen Resident Voting Would Affect Citizens' Votes in Violation of the "One Person, One Vote" Doctrine:

a. The Supreme Court has recently agreed to hear *Evenwel v. Abbott*, No. 14-940, likely in 2016, to determine whether "one person, one vote" means that local and state districts should be composed of the same number of people, or the same number of eligible voters.

b. If the Supreme Court holds that a citizen's vote can be affected by counting all people for districting purposes, it could affect whether legal non-citizen residents can vote.