



Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM

When: Aug 5, 2024 11:00 AM Eastern Time (US and Canada)
Topic: Ordinance Committee Meeting

Please click the link below to join the webinar:

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Webinar ID: 930 2651 9301

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1. Agenda

Subject	1.1. Motion to amend/adopt agenda
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	1. Agenda
Department	
Type	
Recommended Action	

2. Adopt Draft Minutes

Subject	2.1. Adopt Draft Minutes from July 18
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	2. Adopt Draft Minutes
Department	Council and Board
Type	
Recommended Action	
Subject	2.2. Adopt Draft Minutes from July 22
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	2. Adopt Draft Minutes
Department	Council and Board
Type	
Recommended Action	

3. Public Forum

Subject	3.1. Verbal Comments
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	3. Public Forum
Department	Council and Board
Type	

4. Police Oversight Ordinance Discussion (30 Minutes)

Subject	4.1. Police Oversight Ordinance Discussion
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	4. Police Oversight Ordinance Discussion (30 Minutes)
Department	Council and Board
Type	
Recommended Action	

5. Trespass Ordinance Discussion (30 Minutes)

Subject	5.1. Trespass Ordinance Discussion
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM

Category	5. Trespass Ordinance Discussion (30 Minutes)
Department	Council and Board
Type	
Recommended Action	

6. Graffiti/ Public Nuisance Ordinance Discussion (30 Minutes)

Subject	6.1. Graffiti/ Public Nuisance Ordinance Discussion
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	6. Graffiti/ Public Nuisance Ordinance Discussion (30 Minutes)
Department	Council and Board
Type	
Recommended Action	

7. Any Other Committee Business

Subject	7.1. Any Other Committee Business
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	7. Any Other Committee Business
Department	Council and Board
Type	
Recommended Action	

8. Adjournment

Subject	8.1. Motion to adjourn
Meeting	August 5, 2024 - Ordinance Committee Meeting - Monday, August 5, 2024, 11:00 AM, Bushor Conference Room 1st Floor, City Hall OR REMOTELY via ZOOM
Category	8. Adjournment
Department	Council and Board
Type	
Recommended Action	

Ordinance Committee
Thursday, July 18, 2024
Sharon Bushor Conference Room
at City Hall or Remote via Zoom. Burlington, Vermont
DRAFT MINUTES

Members Present: Councilor Shannon (Chair), Councilor Bergman, Councilor Brown McKnight

Staff Present: Kim Sturtevant (Assistant City Attorney), Erik Ramakrishnan (Assistant City Attorney), Charles Dillard (Interim Planning Director), Brian Pine (CEDO Director)

Public Present: Todd DeLuca, Michael Monte (Champlain Housing Trust CEO)

Public Present (Remote): Sharon Bushor, Christopher Aaron-Felker,

Meeting called to order at 10:08 AM.

1. Adopt the Agenda

1.01 Adopt the Agenda

Motion to Adopt Agenda as is.

Motion by Councilor Bergman, Seconded by Councilor Brown McKnight

Final Resolution: Motion Passes

Yes: Unanimous

2. Adopt Draft Minutes from July 1

2.01 Adopt Draft Minutes from July 1

Motion to Adopt Minutes from July 1 as written.

Motion by Councilor Bergman, Seconded by Councilor Brown McKnight

Final Resolution: Motion Passes

Yes: Unanimous

3. Public Forum

3.01 Verbal Comments

Todd DeLuca, a Ward 4 resident, spoke to the graffiti ordinance, asking that the Committee allow more time for public feedback before moving forward, expressing concerns of timing, liability, and retaliation, emphasizing the importance of ensuring the Committee familiarizes themselves with the relevant history, carefully consider due process, and how the ordinance upholds the ideals of free speech and inclusivity.

Sharon Bushor informed the Committee the Zoom link to the meeting was not highlighted and asked the Committee to ensure it is highlighted going forward so as to ensure members of the public can readily access the meeting through their phones or computers. Bushor also advised

that Ordinance Committee meeting times during work hours are difficult for members of the public to attend and requested the Committee schedule some meetings for after work hours. In regards to the condo conversion ordinance, Bushor expressed support for more opportunities for home ownership but has concerns about the current proposed draft creating more houselessness, stating the initial intent of the ordinance was to protect tenants from being displaced. Bushor suggested that the condo conversion fee should not apply in cases where renters become homeowners of converted units, and that collected conversion fees should go toward a fund dedicated to providing more affordable housing.

Christopher Aaron-Felker expressed support for the Committee addressing the condo conversion ordinance as its repeal will open many options for entry-level home ownership in Burlington. Aaron-Felker echoed Bushor's request for more meetings after work hours and requested the Committee halt their work on the graffiti ordinance, stating it does not support free speech.

Public Comment closed at 10:29 PM.

4. Condo Conversion Discussion

4.01 Condo Conversion Ordinance Discussion

CEDO Director Pine shared the background of the condo conversion ordinance's adoption, stating it was drafted and adopted because the rental housing market stood to lose hundreds of rental units to condo conversions, including units with some form of federal assistance, and many renters were at risk of being displaced. Director Pine said the adoption of the condo conversion ordinance prompted the State to develop its own legislation around condo conversions, which would still be in effect if Burlington repealed its ordinance but does not offer tenants nearly as many protections. Director Pine recommended the Committee move forward with shortening the notice periods to no less than a year while keeping the conversion fee as written because the fees go to the Housing Trust Fund and help the City bolster its public resources. Director Pine also suggested the Committee look into policies adopted by other states and cities concerning renters' right of opportunity to purchase, intended to allow renters to more easily organize to buy property as a cooperative.

Michael Monte, CEO of Champlain Housing Trust, described CHT's approach and experience in converting four rental properties in the last 15 years, where CHT provided 2 years notice, provided relocation benefits to tenants, and offered alternative rental housing to protect renters from displacement, emphasizing the ordinance should reflect a similar approach. Monte added there should also be more provisions for permanent affordability and requirements for the City to create more resources to support conversions as well as tenants' relocations. Monte also stated one-bedroom converted units do not sell well. Councilor Brown McKnight asked for clarification on which units were more marketable, to which Monte replied most buyers want at least three bedrooms. Councilor Shannon noted wanting to dig into marketability issues at a future time.

Councilor Shannon requested that Director Pine and Monte submit a list of their specific concerns and recommendations to the Committee for consideration and discussion. Councilor Bergman seconded the request, expressing skepticism toward the current draft and an interest in

increasing possibilities of home ownership. Councilor Shannon emphasized the draft is probably oversimplified and was brought to the Committee to prompt discussion and advance other ideas to achieve the needs of home buyers and renters.

Councilor Brown McKnight asked Monte to provide a range of examples for the Committee to reference as case studies.

Councilor Shannon said private landlords should be included in future sessions and asked Director Pine to reach out to Eric Farrell and Stu McGowan. Director Pine agreed to reach out to them and to continue working with the Committee and Monte on this ordinance. Councilor Shannon agreed to keep Director Pine informed of when the Committee would meet on this item.

5. Trespass Ordinance Discussion

5.01 Trespass Ordinance Discussion

Attorney Sturtevant shared a draft resolution on the proposed trespass ordinance changes.

Jon Murad, Chief of Police, said he has done research into the current policy, but could not find a singular narrative as to when the City decided to prohibit officers from issuing trespass orders on behalf of people in lawful possession. He said that there is no written policy on this issue, but it has been in effect since he arrived in October 2018.

Councilor Brown McKnight asked if the City could reach out to Williston to see what policy they have on this issue.

Chief Murad said he could put the current practice into written form to share with the Committee.

Councilor Bergman asked for the Department and the City Attorney's Office to look into other models that have been put out by organizations like the ACLU.

6. Graffiti Ordinance Discussion

6.01 Graffiti Ordinance Discussion

Councilor Shannon asked who the arbiter of what is harassing or intimidating graffiti would be. Attorney Ramakrishnan clarified that the draft ordinance does not label certain speech to be hate speech, but rather increases the penalties for illegal graffiti or stickering if there is a harassing or intimidating element based on a protected class. He continued that the courts decide intent on a regular basis.

Councilor Shannon wondered if the City should reach out to the ACLU about this issue. Councilor Bergman agreed that would be a good idea. He continued that he liked the current draft ordinance and how the City does not have to bring every case as the ordinance gives private individuals harmed by harassing graffiti a chance to bring the case to court to end the illegal action.

Councilor Shannon also supported the draft language because it only applies to graffiti or stickering that is already illegal.

Councilor Bergman encouraged Todd DeLuca to submit his concerns in writing so the Committee can address each potential issue point-by-point.

Councilor Brown McKnight expressed her support for the ordinance given the rise in anti-trans, anti-gay, and anti-black graffiti.

7. Any Other Committee Business

7.01 Any Other Committee Business

The next Committee meeting is set for 7:30PM on July 22 in the Bushor Conference Room or remote.

8. Adjournment

8.01 Motion to Adjourn

The meeting was adjourned at 11:54 AM.

Ordinance Committee
Monday, July 22, 2024
Sharon Bushor Conference Room
at City Hall or Remote via Zoom. Burlington, Vermont
DRAFT MINUTES

Members Present: Councilor Shannon (Chair), Councilor Bergman, Councilor Brown McKnight

Staff Present: Kim Sturtevant (Assistant City Attorney), Charles Dillard (Interim Director of Planning), Sarah Russell (Special Asst. to End Homelessness)

Public Present: Sharon Bushor

Meeting called to order at 7:36 PM.

1. Adopt the Agenda
1.01 Adopt the Agenda

Motion to Adopt Agenda as is.

Motion by Councilor Bergman, Seconded by Councilor Brown McKnight

Final Resolution: Motion Passes

Yes: Unanimous

2. Adopt Draft Minutes from July 18
2.01 Adopt Draft Minutes from July 18

Motion to Postpone Adoption of the Minutes from July 18 until August 5.

Motion by Councilor Bergman, Seconded by Councilor Brown McKnight

Final Resolution: Motion Passes

Yes: Unanimous

3. Public Forum
3.01 Verbal Comments

Sharon Bushor: I think the change to the ordinances to make them reference and align with State statute is not helpful for residents who want to understand what the rules are. I wonder if it would be helpful to have some guidance language in the ordinance in addition to the reference to State statute.

Public Forum was closed at 7:41PM.

4. Deliberative Agenda
4.1 CDO – Emergency Shelters ZA-24-03

Charles Dillard shared a presentation on the proposed changes to ZA-24-03 Emergency Shelters.

Charles Dillard summarized the 2024 HOME Act (Act 47) that established statewide standards for emergency shelters. He said the Planning Commission added two additional district types to the proposed ordinance change that are not required by Act 47: Institutional Districts and Enterprise – Light Manufacturing Districts. He said a change to the use table for the Residential-Corridor District is needed to allow Emergency Shelters in those locations.

Charles Dillard added that the current ordinance makes reference to Emergency Shelters only operating at night and Act 47 prohibits regulating the hours of an Emergency Shelter at the municipal level.

Councilor Brown McKnight asked whether the City discussed the proposed changes with the institutions in the City and if the City has any plans to put a shelter in the institutional districts. Charles Dillard said the institutions were not consulted and there are no plans to place a shelter in those districts currently.

Councilor Shannon asked about changes in staffing requirements that would result from Act 47. Sarah Russell said that it is standard for the City to always have two staff on duty along with a security guard.

Councilor Brown McKnight asked if this change will improve or worsen the job of managing the Emergency Shelters. Sarah Russell said the changes will help Emergency Shelters be set up more quickly. She continued that these changes encourage local providers to site and open new shelters to replace the motel program. Charles Dillard said the changes will make things easier for DPI and not require changes to the ordinance should the State adjust the statute.

Sarah Russell added that the current ordinance cap of 180 days is not sufficient time for people to transition to permanent housing as it usually take around 280-360 days.

Councilor Shannon asked why the Enterprise – Light Manufacturing district (ELM) is one of the allowed districts for shelters despite not allowing residential. Charles Dillard said the Planning Commission's rationale was that the ELM has many surface parking lots and other undeveloped land that could be used for shelter space. He added that the ELM has close transit lines and service providers.

Councilor Bergman said he supported the ordinance changes as drafted. He said that the statute allows for the regulation of noise and that could be the method to address certain issues if they arise.

Motion to change the draft ordinance to allow Emergency Shelters to be sited in the SEID, but not in the ELM otherwise.

Motion by Councilor Shannon, no second.

Sarah Russell said that allowing shelters to be in the ELM is due to potential concerns about having shelters in more-densely populated residential areas. She continued that she wants to work with the hospital since there have been some success with establishing shelters in hospital parking lots in other places.

Motion to recommend the draft changes to the Emergency Shelters ordinance back to the City Council with the additional change of including Emergency Shelters as an allowed use in the Residential Corridor and warn the zoning change for public hearing.

Motion by Councilor Brown McKnight, Seconded by Councilor Bergman

Final Resolution: Motion Passes

Yes: Unanimous

4.2 BCO – Ch. 30 re: Vehicle for Hire Board Composition and Requiring Vehicle for Hire Operators to Accept Electronic Payment for Fares

Attorney McClenahan shared the proposed changes in resolution form. The resolution is available in the meeting agenda packet.

Attorney McClenahan said the proposed changes came from the Vehicle for Hire Licensing Board. She said the first change was to allow the TEUC Committee Chair to appoint board members from among the councilors on the Committee if the Board does not have enough members to do its work. All councilors agreed to this change.

Attorney McClenahan said the second change was to require licensed taxi drivers to accept electronic payment. All councilors agreed to this change.

4.3 BCO – Appendix E re: Taxi Fares on Rides Originating from the Patrick Leahy Burlington International Airport

Attorney McClenahan said the change to Appendix E makes clear that use of a taxi meter is required for rides originating at the airport that are expected to be less than 50 miles in duration. The change also requires the use of the Vehicle for Hire Board's set rates when rides originate at the airport. All councilors agreed to this change.

Motion to refer the proposed changes to Chapter 30 and Appendix E back to the City Council for inclusion on the consent agenda and requesting that City staff fill in the effective date of the update as appropriate and to publicize the change as required.

Motion by Councilor Bergman, Seconded by Councilor Brown McKnight

Final Resolution: Motion Passes

Yes: Unanimous

4.4 Police Oversight Discussion

Councilor Shannon said she wanted to have a discussion about the goals of the police oversight board. She said her main goal was to establish trust between the board and the community and

trust between officers and the board. Councilor Brown McKnight agreed and said there should be a variety of professional expertise and that the board represents the demographics of the Burlington population.

Councilor Bergman said that the current proposal is a compromise from all sides and that not everyone will agree with the outcomes of the board.

Councilor Shannon said that the Committee should prepare to brainstorm ideas for the board for the next meetings.

5. Adjournment

5.1 Motion to Adjourn

Without objection, the meeting was adjourned at 8:58 PM.

Resolution Relating to

CHANGES TO CITY CHARTER ARTICLES 62, 63, AND 65
REGARDING POLICE OVERSIGHT

RESOLUTION 7.5.

Sponsor(s): Charter Change
Committee

Introduced: 07/15/24

Referred to:

Action: adopted as amended

Date: 07/15/24

Signed by Mayor: 07/17/24

CITY OF BURLINGTON

In the year Two Thousand Twenty-Four.....

Resolved by the City Council of the City of Burlington, as follows:

1 That WHEREAS, over the past several years, as part of its continued commitment to oversight and
2 accountability, the City Council and the Administration have continued to take steps to revise Burlington's
3 police oversight, transparency, and accountability practices; and

4 WHEREAS, pursuant to a resolution adopted by the Council on February 6, 2023, the City Council
5 requested the Ordinance Committee and Charter Change Committee to hold joint meetings, allowing for
6 community and stakeholder input on the disciplinary authority of the Chief of Police, the oversight role of the
7 Police Commission, and the creation of a separate community oversight body independent from the
8 Burlington Police Department; and

9 WHEREAS, over a span of eight months, the Joint Ordinance and Charter Change Committee met
10 fourteen times, seeking and receiving community and stakeholder input on the issues; and

11 WHEREAS, the Joint Committee voted to move forward a proposed charter change for public
12 comment with the understanding it may be placed upon the ballot after a final vote of the Burlington City
13 Council; however, after the first public hearing before the City Council on January 16, 2024 it was referred to
14 the Police Commission for review and comment; and

15 WHEREAS, the Police Commission met over the span of three months and brought forth their
16 thoughts to the City Council prior to the proposed Charter Change being brought back up by the Charter
17 Change Committee who met substantively four times regarding police oversight between June 12, 2024 and
18 July 1, 2024; and

19 WHEREAS, the Charter Change Committee unanimously referred the proposed language below to the
20 full City Council for consideration and voted 2-1 to place the proposed language on the November 5, 2024
21 ballot and warn the language for public hearing;

* * * * *

DISTRIBUTION:

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has been sent to the following
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RESOLUTION RELATING TO

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Adopted by the City Council

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..... Clerk

Approved....., 20

..... Mayor

Vol. Page

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NOW, THEREFORE, BE IT RESOLVED that the City Council approves the amendments to the city charter recommended by the Charter Change Committee and requests the Mayor to place the following question on the ballot of the General Election to be held on November 5, 2024 and the City Clerk to set public hearings on the this question in accordance with Charter §303 and 17 V.S.A. § 2645:

"Shall the Charter of the City of Burlington, Acts of 1949, No. 298 as amended, be further amended to amend Article 62, Police Department; Article 63, Chief of Police and Captain; and Article 65, Removal or Suspension, thereto to read as follows:

ARTICLE 62. POLICE DEPARTMENT

183 Board of police commissioners; composition; terms.

The board of police commissioners shall consist of seven (7) legal voters and should represent the diverse nature of said city's constituents, including those from historically marginalized communities, to be appointed by the city council with mayor presiding to serve for three (3) years and until their successors are appointed and qualified.

184 Same-powers and duties.

(a) The city council shall make rules and regulations for the government of the entire police ~~foree-department~~ and shall fix the qualifications of applicants for positions and service on said ~~foree-department~~ and to the extent permitted by applicable law, the chief of police shall furnish the city council with any information they may require concerning the finances of the police department. The chief of police shall be responsible for all expenditures made by the police department and no expenditures shall be made by the department except in conformity with the standards promulgated by the city council.

(b) The board of police commissioners shall have such authority and responsibility relating to the management, auditing, or monitoring of the police department, its services and facilities, as may be delegated from time to time by resolution, ordinances, and orders of the city council. Said board shall notify the mayor, and the chief administrative officer, and city council, in writing, of any and all changes, modifications or additions to the rules and regulations of the department.

(c) Without limitation to the foregoing, the board of police commissioners and the chief of police may propose rules and regulations for the government of the entire police department in a manner not inconsistent with those established by the city council. Adoption of such proposed rules and regulations requires joint approval by the board of police commissioners and the chief of police. In the event joint approval is not provided by the board of police commissioners and the chief of police, either party may bring forward to the city council the proposed rule or regulation for the city council's consideration.

(d) The board of police commissioners shall have the authority to receive and review all civilian and internal allegations of misconduct by members of the police department. The mayor's proposed budget and the city council shall annually appropriate an amount necessary for the adequate support and facilitation of such review. To the greatest extent permitted by law, the chief of police shall provide the board of police commissioners timely updates of any review, investigation, or disposition of alleged misconduct. The board of police commissioners shall have the ability to request additional information from the chief of police and access to those documents or other evidence relied upon by the chief of police in reviewing allegations of misconduct as the city council shall designate by ordinance. For complaints of alleged misconduct that constitute an offense subject to an investigation of the Vermont Criminal Justice Training Council pursuant to 20 V.S.A 2401 et seq. or for which the chief of police intends

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..... Mayor

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to impose discipline constituting loss of pay, suspension, or termination, the complaint may not be disposed until the board of police commissioners is notified of the proposed disposition.

After receiving notice from the chief of police of the recommended or actual disposition relating to the review of alleged misconduct, the board of police commissioners shall have the authority to:

(i) recommend an alternative disposition to the chief of police within a time established by ordinance; or

(ii) independently investigate any allegation of misconduct by members of the police department upon a 2/3 majority vote. Such investigation or review shall be conducted by an independent investigator hired by the board of police commissioners, and approved by the city attorney's office, and completed within a time established by ordinance. Upon the conclusion of such an investigation, the board of police commissioners may make a recommendation per subsection (i). The board of police commissioners shall not have the authority to investigate or impose discipline upon the chief of police. Matters regarding the alleged misconduct of the chief of police shall be addressed in conformity with section 190(b) of this Charter and other relevant Vermont statutes.

(e) Upon receiving a recommendation by the board of police commissioners in subsection (d), the chief of police may accept the recommendation subject to the notice and hearing provisions in Article 62, section 190(a) or reject the recommendation. In the event the chief of police rejects the recommendation, the chief of police shall immediately notify the board of police commissioners. Upon receiving notice of the rejection, the board of police commissions may, upon a 2/3 majority vote, request that an independent panel decide the disposition of the matter within a time established by ordinance, subject to the notice and hearing provisions set forth in in Article 62, section 190(a). The disposition of the independent panel shall be final, subject to any applicable right of appeal or grievance process.

This independent panel shall consist of three (3) to five (5) persons appointed per ordinance.

ARTICLE 63. CHIEF OF POLICE AND CAPTAIN

185 Officers of police ~~foree~~department designated.

(a) The direction and control of the entire police ~~foree~~department, except as herein otherwise provided, shall be vested in a police officer who shall be called the chief of police, and such other ranking police officers as the city council shall authorize, subject to the ordinances, resolutions, and orders of the city council; and, provided that the mayor shall retain the powers and duties of chief executive officer pursuant to §116. The order of rank and succession within the police department shall be as designated by the city council by regulation.

(b) Except as herein otherwise provided, such officers shall have the powers and duties granted to police officers by Vermont law and assigned to them by regulations adopted under section 184 of this Charter.

ARTICLE 65. REMOVAL OR SUSPENSION

190 Chief of police may remove member for cause; hearing.

(a) Whenever it shall appear to the chief of police that any member of said ~~foree~~police department has become incompetent, inefficient or incapable from any cause, or is or has been negligent or derelict in his or her official duty, or is guilty of any misconduct in his or her private or official life, or whenever any well-grounded complaints or charges to such effect are made in writing to the chief of police by a responsible person against such member, the chief of police may investigate and, after appropriate notice and hearing, dismiss such member from the ~~foree~~police department, order a reduction in rank, or suspend the member without pay for a specified time period in excess of 14 days. In connection with any possible dismissal, demotion, or suspension for more than 14 days, the chief of police's notice to the member shall be given at least 48 hours prior to any hearing and shall include a description of the

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Adopted by the City Council

....., 20

..... Clerk

Approved....., 20

..... Mayor

Vol. Page

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charges being considered. In connection therewith, the chief of police shall have the power to subpoena documents and witnesses and to administer the oath to such witnesses. Such a subpoena will be subject to enforcement or modification in conformity with the procedures set forth in 3 V.S.A. §§ 809a and 809b. The board of police commissioners, or in the case it has already offered an opinion on discipline pursuant to §184(d)(i), or in the case that the voting number of commissioners falls below four (4) due to declared actual or apparent conflict(s) of interest, an independent panel comprised as in §184(e) shall hear any appeal filed in a timely manner with respect to such actions of the police chief. The time of filing an appeal and the nature of the appellate process shall be as determined by such board of regulation. Following its consideration of any such appeal, the board may affirm, modify, or vacate the decision made by the police chief.

(b) Whenever it shall appear to the mayor that the chief has become incompetent, inefficient, or incapable from any cause, or has been negligent or derelict in his or her official duty, or is guilty of any misconduct in his or her private or official life, or whenever any well-grounded complaints or charges to such effect are made in writing to the mayor by a responsible person, the mayor may suspend the chief of police from duty pending a hearing thereon by the city council. The city council shall forth-with notify the chief of police of the charges preferred by them, or of the complaints or charges presented by such responsible person in writing, and shall thereupon proceed to consider and investigate the same. It shall appoint a time and place for the hearing of such complaints and charges so made, shall give the chief of police reasonable notice of the same, not less than 48 hours, and the city council shall have the power to subpoena documents and witnesses and to administer the oath to such witnesses. Such a subpoena will be subject to enforcement or modification in conformity with the procedures set forth in 3 V.S.A. §§ 809a and 809b.

(c) If, upon hearing, the city council shall find such complaints or charges to be well founded, it may dismiss the chief of police from the ~~free~~ police department, demote him or her in rank, or suspend him or her without pay for a period not to exceed 60 days. The procedures outlined in this section shall control in the event of any conflict with section 129 of this Charter as pertains to the removal of the chief of police.

(d) The chief of police may, without notice or hearing for any infraction, violation, or disobedience of any of the rules and regulations of the police department that may seem to the chief of police sufficient, suspend from duty without pay any member of the police ~~free-department~~ for a period not to exceed 14 days.

AND BE IT FURTHER RESOLVED, the Ordinance Committee shall prepare a draft ordinance outlining the composition of the independent panel authorized by §184(e) of the amended City Charter, if enacted, and shall transmit the draft ordinance to the City Council on or by its meeting on September 23, 2024.

*Materials underlined added

**Materials stricken deleted

KS/Resolutions 2024/Changes to City Charter Arts. 62, 63, & 65 Regarding Police Oversight
7/11/24

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ORIGINAL

RESOLUTION RELATING TO

Changes to City Charter Articles 62, 63, and 65 Regarding Police Oversight

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as amended

Adopted by the City Council

July 15....., 20 24.....

[Signature]

..... Clerk

Approved..... July 17....., 20 24.....

[Signature]..... Mayor

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CITY OF BURLINGTON

ORDINANCE _____

Sponsor: _____

Public Hearing Dates: _____

In the Year Two Thousand Twenty-Four

An Ordinance in Relation to

BURLINGTON CODE OF ORDINANCES-
Sections 21-45 – 21-49
Trespass

First reading: _____

Referred to: _____

Rules suspended and placed in all

Stages of passage: _____

Second reading: _____

Action: _____

Date: _____

Signed by Mayor: _____

Published: _____

Effective: _____

2

3 **It is hereby Ordained** by the City Council of the City of Burlington as follows:

4

5 That Chapter 21, Offenses and Miscellaneous Provisions, Article I, In General, of the Code of Ordinances of
6 the City of Burlington be and hereby is amended to read as follows:

7

8 **ARTICLE I. In General**

9

10 **Secs. 21-1 – 21-44** As written.

11

12 **Sec. 21-45 Unlawful trespass.**

13

14 It shall be unlawful for a person who, without legal authority or the consent of the person in lawful
15 possession, enters or remains on any land or in any place as to which notice against trespass is given by:

16

17 (a) Actual communication by the person in lawful possession or his agent or by a law enforcement officer,
18 community service officer, community support liaison, urban park ranger, parks patrol, the city's
19 contracted private security, or any other city official authorized to enforce the city's ordinances, acting
20 on behalf of such person or his agent; or

21

22 (b) Signs or placards so designed and situated as to give reasonable notice.

23

24 A violation of this section shall be a civil matter and enforced in accordance with the provisions of 24 V.S.A.
25 section 1974a and section 1977 et seq. A civil penalty of not more than five hundred dollars (\$500.00) may
26 be imposed for a violation of this section. The civil penalty may, at the discretion of the prosecuting official,

be eliminated or reduced upon the successful completion of a restorative or reparative justice program through the community justice program. In lieu of further process and prosecution, persons ticketed for violations of this section may pay a waiver penalty under the schedule set out below:

Waiver Penalty:

First offense: The waiver penalty shall be two hundred fifty dollars (\$250.00).

Second offense, within a six-month period: The waiver penalty shall be three hundred dollars (\$300.00).

Third offense or more, within a twelve-month period: The waiver penalty shall be four hundred dollars (\$400.00).

Each time that the violation occurs will constitute a separate violation of this section. Any law enforcement officer, community service officer, community support liaison, urban park rangers, parks patrol, the city's contracted private security, or any other city official authorized to enforce the city's ordinances, can enforce this section.

The Chief of Police or their designee may enter into an agreement with individual commercial property owners and/or businesses leasing a commercial property regarding notice and enforcement of trespass. Such agreement shall be pursuant to a policy of the Police Department approved by the Police Chief and shall be subject to review and approval as to legal form by the City Attorney's Office.

Sec. 21-45A Notice of trespass on city property.

- (a) Purpose. The purpose of this section is to enable a city official in charge of city property to issue a notice of trespass and enforce that notice against an individual whose behavior is dangerous, illegal, or unreasonably disruptive, while recognizing the rights of individuals to engage in constitutionally protected activities on public or city-owned property.
- (b) City official/officers authorized to issue notice of trespass. The city council hereby expressly delegates its authority to issue a notice of trespass to any city official who is in charge, at the time of issuance, of the city property for which the notice of trespass is issued and to any sworn officer, community service officer, or community support liaison of the Burlington police department or the City's urban park rangers, parks patrol, contracted private security, or any other city official authorized to enforce the city's ordinances, in the exercise of their official duties (hereinafter "official/officer").
- (c) Issuance of notice of trespass – Initial conference. If an individual violates any city ordinance, rule or regulation, or State law, or within a public building fails to follow the lawful directive of a city official/~~or police~~-officer authorized under subsection (b) of this section, that official/officer may issue a notice

of trespass for a violation which was committed while on or within a city facility, building, or outdoor area, including a municipal park, for the specific property where the violation occurred, excluding a right-of-way. Prior to issuance of the notice of trespass, the issuing official/officer must ensure that the person to whom a notice of trespass will be issued has been informed of the basis for the notice of trespass and has been given an opportunity and reasonable amount of time to change or address the underlying conduct – that is, a verbal warning must have been issued. No verbal warning is required if the reason for the trespass is an accusation of serious harmful conduct such as arson, assault, harassment or a threat of such conduct. Notices of trespass may be issued at the Fletcher Free Library as provided in Section 21-43.

(d) Service of notice – Content. In most cases, the notice of trespass must be hand-delivered to the person to whom it is issued by an authorized city official/~~or a law enforcement~~ officer; however, if the circumstances do not permit safe delivery of the notice in person, in the discretion of the authorized city official/~~or law enforcement~~ officer, it may be mailed to the individual's legal address. The written notice of trespass shall detail the basis for which the notice of trespass was issued, the length of time for which the notice of trespass remains in effect, and the consequences for violating the terms of the notice of trespass; it shall also advise the recipient of the right to contest the notice of trespass and the location at which to file the appeal.

(e) Length of notice of trespass.

(1) Generally. For minor, first-time violations, such as having an open container of alcohol, the notice may be issued for up to one (1) day. For moderate violations, such as other nonviolent disorderly conduct, or for a second offense within thirty (30) days, the notice may be issued for up to thirty (30) days. For more serious violations or a third offense within sixty (60) days, the notice may be issued for up to one hundred eighty (180) days. Generally, it is expected that the length of time should reflect the severity or repetitiveness of the underlying conduct. Only for more serious offenses such as conduct that involves violence, harassment, or threats of physical harm to an individual may a notice be issued for over one hundred eighty (180) days, and in any event, a notice of trespass may not be issued for more than one (1) year.

(2) Fletcher Free Library. Due to the nature and character of the Fletcher Free Library, the following durations apply to violations made under the library ordinance. For a violation of Section 21-43(a)(1), a notice of trespass may be issued for up to one hundred eighty (180) days. For a violation of Section 21-43(a)(2), a notice of trespass may be issued for a period up to sixty (60) days. For a violation of Section 21-43(a)(3), a notice of trespass may be issued for a period of one (1) day.

(f) Appeal.

(1) Process. The recipient of a notice of trespass may appeal the notice of trespass by filing an appeal, in writing, within seven (7) calendar days of the issuance of the notice. The written appeal shall include the appellant's name, address, phone number, and indicate whether a hearing is requested. No fee shall be

charged for filing the appeal. The appeal shall be filed at the location designated in the notice of trespass. Except for in exigent circumstances, any such appeal shall stay the operation of the notice of trespass beyond the day the appeal is filed, pending a hearing and/or written decision.

(2) Exigent circumstances. For purposes of this chapter, "exigent circumstances" means any situation in which the issuing city official/~~or~~ officer determines that a person presents an immediate and substantial threat or danger to the health, safety, or welfare of another person. In such circumstances, an appeal shall not stay the operation of the notice of trespass.

(3) Designated hearing panels. All appeals made under this chapter shall be heard by the public safety committee of the city council, which will make an annual report to the city council on the number of appeals.

(4) Procedure. When an appeal is filed, the designated hearing panel shall meet within ten (10) business days to consider the appeal. If no hearing is requested, the designated hearing panel may consider any written submissions as part of its decision. If a hearing is requested, the appellant must be provided at least three (3) business days' written notice of the date, time, and location of the hearing. The designated hearing panel shall allow oral and/or written testimony and evidence from the appellant and the issuing city official/~~or~~ officer. In reviewing the notice of trespass, the panel will utilize the preponderance of the evidence standard with the burden of proof on the charging official/officer or their representative. The designated hearing panel shall issue a written decision within ten (10) business days of the hearing. The designated hearing panel may extend the time period for hearing if the operation of the notice of trespass is stayed or if the appellant consents.

(5) Waiver requests. An individual who has received a notice of trespass may request a waiver from the issuing official/officer (or in the absence of that official/officer from another city official/officer authorized to issue the notice) in order to access the property for which the notice of trespass was issued for purpose of work, residence, access to government services, or the exercise of constitutionally protected activities. If that waiver is denied, an appeal may be made to the designated hearing panel. In addition, in the context of any appeal of a notice of trespass, the designated hearing panel shall also consider any waiver request from the individual appealing.

(g) Enforcement. Once a notice of trespass has been issued, unless the notice has been stayed by receipt of an appeal or the notice has been overturned by a decision on appeal, a violation of the notice may be enforced pursuant to Section 21-45 (a civil violation) or 13 V.S.A. § 3705 (a criminal violation). Unless the notice of trespass was issued for conduct involving violence, harassment, or threats of physical harm to an individual, enforcement pursuant to 13 V.S.A. § 3705 may only commence with issuance of a citation and a request to leave the premises; however, arrest is permissible for refusal to leave the premises within a reasonable period after issuance of the citation.

Sec. 21-46 Disorderly conduct.

It shall be unlawful for a person who, with the intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof:

- (a) Engages in fighting or in violent, tumultuous or threatening behavior; or
- (b) Makes unreasonable noise; or
- (c) In a public place uses abusive or obscene language; or
- (d) Without lawful authority, disturbs any lawful assembly or meeting or persons; or
- (e) Obstructs vehicular or pedestrian traffic.

A violation of this section shall be a civil matter and enforced in accordance with the provisions of 24 V.S.A. section 1974a and section 1977 et seq. A civil penalty of not more than five hundred dollars (\$500.00) may be imposed for a violation of this section. The civil penalty may, at the discretion of the prosecuting official/officer, be eliminated or reduced upon the successful completion of a restorative or reparative justice program through the community justice program. In lieu of further process and prosecution, persons ticketed for violations of this section may pay a waiver penalty under the schedule set out below:

Waiver Penalty:

First offense: The waiver penalty shall be two hundred fifty dollars (\$250.00).

Second offense, within a six-month period: The waiver penalty shall be three hundred dollars (\$300.00).

Third offense or more, within a twelve-month period: The waiver penalty shall be four hundred dollars (\$400.00).

Each time that the violation occurs will constitute a separate violation of this section. Any city official/~~law enforcement~~-officer can enforce this section.

Sec. 21-47 Unlawful mischief.

It shall be unlawful for a person who, having no right to do so or any reasonable ground to believe that he has such a right, intentionally does damage to property of any value not exceeding two hundred fifty dollars (\$250.00).

A violation of this section shall be a civil matter and enforced in accordance with the provisions of 24 V.S.A. section 1974a and section 1977 et seq. A civil penalty of not more than five hundred dollars (\$500.00) may be imposed for a violation of this section. The civil penalty may, at the discretion of the prosecuting official/officer, be eliminated or reduced upon the successful completion of a restorative or reparative justice

program through the community justice program. In lieu of further process and prosecution, persons ticketed for violations of this section may pay a waiver penalty under the schedule set out below:

Waiver Penalty:

First offense: The waiver penalty shall be two hundred fifty dollars (\$250.00).

Second offense, within a six-month period: The waiver penalty shall be three hundred dollars (\$300.00).

Third offense or more, within a twelve-month period: The waiver penalty shall be four hundred dollars (\$400.00).

Each time that the violation occurs will constitute a separate violation of this section. Any city official/~~law enforcement~~ officer can enforce this section.

Sec. 21-48 City Hall Park.

(a) Prohibited activities. Notwithstanding other rules and regulations, the following activities are prohibited at City Hall Park and may be ticketed under this section.

(1) Disorderly conduct as defined by Section 21-46; ~~Any person who, with the intent to cause public inconvenience, or annoyance or recklessly creating a risk thereof:~~

~~a. Engages in fighting or in violent, tumultuous or threatening behavior; or~~

~~b. Makes unreasonable noise; or~~

~~c. In a public place uses abusive or obscene language; or~~

~~d. Without lawful authority, disturbs any lawful assembly or meeting or persons; or~~

~~e. Obstructs vehicular or pedestrian traffic.~~

(2) Unlawful mischief as defined by Section 21-47; ~~Any person who, having no right to do so or any reasonable ground to believe that he has such a right, intentionally does damage to property, private or public.~~

(3) Graffiti and defacement of property as defined by Section 21-29;

(4) Possession of open or opened intoxicating liquor as defined in 23 V.S.A. § 1200(4), except as permitted pursuant to a valid liquor license and/or an outdoor consumption permit for properly organized and supervised activities or events held within the limits of City Hall Park;

(45) Possession of a regulated drug as defined in 18 V.S.A. § 4201(29);

(6) Public urination and/or defecation as defined by Section 21-24.

(b) Enforcement.

(1) First offense. Any violation of any provision of subsection (a) above shall be deemed a civil offense and shall be punishable by a penalty of a minimum fine of two hundred dollars (\$200.00) to a maximum fine of five hundred dollars (\$500.00). The waiver penalty for purposes of the municipal complaint (civil ticket) shall be two hundred dollars (\$200.00). The recipient of a municipal complaint for violation of this section (first offense) shall not be permitted within the City Hall Park for the balance of the day on which the alleged offense occurred.

(2) Second offense. Any violation of any provision of subsection (a) above by an individual who has previously violated any provision of subsection (a) above shall be deemed a civil offense and shall be punishable by a penalty of a minimum fine of three hundred dollars (\$300.00) to maximum fine of five hundred dollars (\$500.00). In addition, the recipient of a municipal complaint for violation of this section (second offense) may be issued an order of no trespass prohibiting the recipient from entering the City Hall Park for a period of up to 90 days commencing immediately upon said issuance. The waiver penalty for purposes of the municipal complaint (civil ticket) second offense shall be three hundred dollars (\$300.00); payment of which shall also be deemed acceptance of the no trespass order. Both the fine and the no trespass order may, at the discretion of the prosecuting official/officer, be waived in whole or in part upon the successful completion of a restorative or reparative justice program through the community justice program.

(3) Third and subsequent offense. Any violation of any provision of subsection (a) above by an individual who has on two (2) or more occasions violated any provision of subsection (a) above shall be deemed a civil offense and shall be punishable by a penalty of from four hundred dollars (\$400.00) to five hundred dollars (\$500.00). In addition, the recipient of a municipal complaint for violation of this section (third and subsequent offense) may be issued an order of no trespass prohibiting the recipient from entering the City Hall Park for a period of up to one (1) year commencing immediately upon said issuance. The waiver penalty for purposes of the municipal complaint (civil ticket) third or subsequent offense shall be four hundred dollars (\$400.00); payment of which shall also be deemed acceptance of the no trespass order. Both the fine and the no trespass order may, at the discretion of the prosecuting official/officer, be waived in whole or in part upon the successful completion of a restorative or reparative justice program through the community justice program.

Sec. 21-49 Church Street Marketplace District trespass authority.

- (a) Purpose. The Burlington city council finds and declares that the following substantial government interests will be advanced by the ability to issue a no trespass order created by this section, based on conditions the police department and the Church Street Marketplace District commission have identified and confront in the Church Street Marketplace District on a regular basis:
- (1) The abatement or removal of nuisances determined to be against the public health, safety or welfare of citizens;
 - (2) The protection of citizens from physical threats or injury and from damage to property;
 - (3) The prevention of harassment and intimidation of any member of the public;
 - (4) The prevention of violent crime;
 - (5) The orderly control and safety of pedestrian, car and cart traffic on Church Street; and
 - (6) The provision and maintenance of a safe, attractive environment in areas designed to attract tourist revenue.
- (b) Findings. The substantial government interests identified in subsection (a) of this section are undermined by unlawful and inappropriate behavior in the Church Street Marketplace District. Such behaviors include, but are not limited to, disorderly conduct, unlawful mischief, the possession and consumption of intoxicating liquor, and the possession and use of regulated drugs.

Specifically:

- (1) Unlawful behavior within the Church Street Marketplace District diminishes this public asset and deprives citizens and visitors of its full use and enjoyment;
- (2) In addition to more serious criminal acts that threaten personal injury and property damage, a wide range of illegal disorderly behaviors can and often do transform the Church Street Marketplace District into an unwelcoming, unattractive and ultimately unsafe public space requiring increased expenditures for public safety and maintenance;
- (3) Laws intended to preserve and protect public spaces like the Church Street Marketplace District for the benefit of all people are effective only if those present on the space obey the law. The current criminal and civil penalties for violating these types of laws are frequently inadequate to deter the illegal behavior, to prevent its recurrence, or to provide for the removal of offenders from the public space;

(4) Compliance with behavior laws within the Church Street Marketplace District will be enhanced by the immediate administrative sanction of removing offenders from the Church Street Marketplace District in addition to issuing tickets to them. For repeat offenders and for more serious offenses, exclusion for extended periods will further provide a necessary additional remedy to protect the public;

(5) The failure to comply with these and other laws creates a public nuisance.

(c) Prohibited activities. Notwithstanding other laws, ordinances, rules and regulations, the following activities are prohibited within the Church Street Marketplace District and may result in a no trespass order authorized under this section.

(1) Disorderly conduct as defined by Section 21-46;

(2) Unlawful mischief as defined by Section 21-47;

(3) Graffiti and defacement of property as defined by Section 21-29;

(4) Possession of open or opened intoxicating liquor as defined by 23 V.S.A. § 1200(4), except as permitted pursuant to a valid liquor license and/or an outdoor consumption permit for properly organized and supervised activities or events held within the limits of the Church Street Marketplace District;

~~(45)~~ Possession of a regulated drug as defined in 18 V.S.A. § 4201(29);

(6) Offense of retail theft as defined by 13 V.S.A. §2575 from a business in the Church Street Marketplace District;

(7) Public urination and/or defecation as defined by Section 21-24.

(d) Enforcement.

(1) First offense. Any person ticketed for a prohibited activity noted in subsection (c) of this section as a first offense may also be issued an order of no trespass, and will not be permitted within the Church Street Marketplace District for the balance of the day on which the alleged offense occurred.

(2) Second offense. Any person ticketed for a prohibited activity noted in subsection (c) of this section as a second offense may also be issued an order of no trespass prohibiting the recipient from entering the Church Street Marketplace District for a period of up to ninety (90) days, commencing immediately upon said issuance.

- (3) Third and subsequent offense. Any person ticketed for a prohibited activity noted in subsection (c) of this section as a third or subsequent offense may also be issued an order of no trespass prohibiting the recipient from entering the Church Street Marketplace District for a period of up to one (1) year commencing immediately upon said issuance.
- (4) Hearing procedure and staying of order of no trespass.
- a. Recipients of an order of no trespass issued pursuant to subsections (d)(2) and (3) of this section may appeal said order to a hearing panel designated by the Church Street Marketplace commission pursuant to the procedure detailed below. Any such appeal shall stay the order of no trespass pending the hearing and written decision of the hearing panel.
 - b. Any individual subject to the trespass provisions of subsection (d)(1), (2), or (3) of this section may request in writing that a hearing panel of the Church Street Marketplace commission hold a public hearing for the purpose of challenging the issuance of the order of no trespass and/or to request a waiver to access the Church Street Marketplace District for purpose of work, residence, access to government services, the exercise of constitutionally protected activities, and/or for any other good reason as determined by a hearing panel.
 - c. Recipients shall have thirty (30) days from the date of issuance of an order of no trespass to request a hearing. Requests shall be sent to the executive director of the marketplace commission at 2 Church Street, Suite 2A, Burlington, VT 05401-4457.
 - d. If a hearing is requested, the hearing shall be scheduled within ten (10) calendar days of receipt of the request, and a written notice of the hearing shall be sent to the recipient at least seven (7) calendar days prior to the hearing.
 - e. The hearing panel shall consist of three (3) people designated by the Church Street Marketplace commission or its designee, and be comprised of one (1) representative from the business community, one (1) representative from the social services community, and one (1) representative from the general public.
 - f. The hearing panel shall allow for oral and/or written testimony and evidence from the recipient of the order of no trespass, the issuing city official/~~police~~-officer, and any other witnesses requesting to be heard.
 - g. The hearing panel shall issue a written decision within ten (10) calendar days of the hearing.

1-9 General penalty; continuing violations.

(a) Criminal violations. Except as otherwise expressly provided, however, whenever in this Code or in any ordinance of the city any act is prohibited or is made or declared to be unlawful or an offense, or whenever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, where no specific penalty is provided therefor, the violation of any such provision of this Code or any ordinance shall be prosecuted as a criminal offense and shall be punished by a fine not less than fifty dollars (\$50.00) and not exceeding five hundred dollars (\$500.00). Each day any violation of any provision of this Code or any ordinance shall continue shall constitute a separate violation.

The court before which a conviction shall be had shall order any continuing violations to cease, to be removed, or to be abated. A person convicted may also be found liable for any damages sustained by the city or any other person as a direct result of the ordinance violation and may be ordered by the court after hearing to pay restitution as a part of the sentence.

(b) Civil offenses. Selected provisions of the Code of Ordinances have been specifically designated as carrying a civil penalty. Violations of such ordinances shall be enforced as provided by state law and as provided herein. Upon a determination that a civil ordinance violation has occurred, those municipal officials authorized by the city to enforce civil ordinance violations shall issue a "municipal complaint" in the form provided by the court at 24 V.S.A. § 1977. The municipal official issuing the complaint shall appear to represent the city in any contested case before the traffic and municipal ordinance bureau or other forum provided by law. Unless otherwise provided in this Code, the fine for a violation of an ordinance designated as a civil offense shall be not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00). The waiver penalty for purposes of the municipal complaint (civil ticket) shall be fifty dollars (\$50.00) for each offense unless otherwise specifically provided in this Code.

(c) First offense civil, second offense criminal. Selected provisions of the Code of Ordinances have been specifically designated as carrying a civil penalty for a first offense in any six-month period and a criminal penalty for a second and subsequent offense in the same six-month period.

(1) First offense: A first offense by a person during any six-month period shall be deemed a civil ordinance violation and shall be punishable by a fine of from fifty dollars (\$50.00) to five hundred dollars (\$500.00). The waiver fine shall be fifty dollars (\$50.00). Any law enforcement officer may issue a municipal complaint ticket for such offense.

(2) Second and subsequent offenses: A second offense of the same ordinance during a six-month period shall be deemed to be a criminal offense and shall be punishable by a fine from one hundred dollars (\$100.00) to five hundred dollars (\$500.00). Each subsequent offense of the same ordinance shall be deemed to be a criminal offense and shall be punishable by a fine of from two hundred dollars (\$200.00) to five hundred dollars (\$500.00).

(3) Intent of enforcement under section 1-9(c). It is the intent of this subsection to preserve the public health, safety and welfare by prohibiting and punishing repeated violations of these ordinances. To that end, the city attorney's office will, in their discretion and when they deem it appropriate, explore all options available to the city, in addition to prosecution and as alternatives to prosecution, which will achieve the stated intent of this section.

(d) Issuance of ordinance violation ticket. Any law enforcement officer who cites an accused for violation of any city ordinance which is punishable as a criminal offense shall issue a "Notice of Ordinance Violation Ticket," unless instructed by the city attorney, an assistant city attorney or city grand juror to issue a standard district court citation.

The ticket shall be a citation to appear in district court as contemplated by V.R.Cr.P. 3 and shall contain the name of the accused, the ordinance(s) violated, the date and time to appear in district court, and any other information required by law for a valid citation.

The ticket shall also contain a "Notice of Ordinance Violation" section which shall allow and inform the accused of the following:

(1) The option for the accused to waive process and prosecution by paying a waiver fee of between fifty dollars (\$50.00) and two hundred dollars (\$200.00) for each count to the police department within seventy-two (72) hours of issuance.

(2) That upon full and timely payment of the waiver fee the accused shall not be required to appear in court and the citation portion of the ticket shall be null and void.

(3) That if the accused elects not to make full and timely payment of the waiver fee, he or she shall appear in court on the date and time indicated on the ticket for prosecution.

Should the waiver not be exercised and prosecution be had, this subsection in no way alters or pre-empts any fine, penalty or other remedy as provided by this ordinance.

(e) Public nuisances.

(1) Any property within the city found to be maintained in violation of any provisions of this code or which in any other way endangers the health, safety and welfare of the residents of the city is hereby declared to be a public nuisance and may be ordered abated in any manner provided by law.

(2) Because of the effect of such conduct on the whole community, it shall also constitute a public nuisance to do anything declared by this Code to be a civil or criminal offense maliciously and with the intent to intimidate or harass another person because of, or in any manner reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression or identity, mental, physical, or sensory disability, or service in the U.S. Armed Forces or the National Guard. As used in this paragraph, the term "person" may refer to a specific person or more generally to any person within a classification of persons who the individual committing the offense intended to intimidate or harass. The City Attorney on behalf of the City or any individual resident of the City aggrieved by a public nuisance as defined in this paragraph may petition the superior court to enjoin the conduct if there is a reasonable likelihood the conduct will be repeated. A prevailing petitioner shall be entitled to recover reasonable attorneys' fees and costs. The respondent shall be entitled to recover reasonable attorneys' fees and costs if the court finds that the action was wholly without merit and brought with a bad faith intent to cause unwarranted annoyance, embarrassment, oppression, or expense.

(Ord. of 9-29-82; Ord. of 12-12-83; Ord. of 9-8-86; Ord. of 6-24-91; Ord. of 1-9-95; Ord. of 6-22-98; Ord. of 9-14-98)

Charter reference—Penalty for violating ordinances, § 50; city council authorized to provide penalties, § 53; liability of persons violating ordinances, § 54.

State law reference—Authority of municipality to define public nuisance and to provide for penalty for violation of any ordinance, 24 V.S.A. § 2291(14) and (15).

21-29 Graffiti and defacement of property.

(a) Findings and purpose. This section seeks to help prevent the spread of graffiti and defacement of property, public and private. Graffiti and the defacement of property are destructive of the rights and values of property owners. They are aesthetic blights on the entire community. Graffiti and defacement of property are acts of vandalism, detrimental to the city, and are, therefore, public nuisances.

(b) Definitions.

(1) "Graffiti" means any inscription, word, figure, painting or other defacement that is written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed to any surface of public or private property by any graffiti implement, without being authorized to do so by the owner of the property or the owner's duly authorized agent.

(2) "Graffiti implement" means an aerosol paint container, a broad-tipped marker, gum label, paint stick or graffiti stick, etching equipment, brush or any other device capable of scarring or leaving a visible mark on any natural or manmade surface.

(3) "Defacement" means any application or causing the application to any surface of public or private property of paint, varnish, lead, crayon, wax, ink, dye or other substance, or the carving, chiseling, writing, or other such act of any mark, figure or letter on such property without being authorized to do so by the owner of the property or the owner's duly authorized agent.

(c) Prohibited acts. It shall be unlawful for any person to make graffiti or deface any surface of public or private property unless authorized by the owner of the property or the owner's duly authorized agent.

(d) Penalties. A violation of this ordinance is a civil offense and shall be punishable by a fine of five hundred dollars (\$500.00) with a waiver penalty of four hundred dollars (\$400.00). At the discretion of the prosecuting officer or city attorney, this penalty or a part thereof may be waived upon the successful completion of community service related to the elimination of graffiti and defacement.

(e) To encourage and facilitate enforcement, the city shall maintain and advertise an electronic mail address or similar electronic means by which members of the public may provide photographs, video footage, or information to the police department about violations of this section and the identities of responsible parties. Such system shall entail direct electronic communication with the police

department and not the posting of information online and readily available to the public.

2024/08/01

Dear Councilor Shannon, Attorney Sturtevant, and Attorney Ramakrishnan,

The following is a recapitulation and elaboration on public comments I have made regarding the draft graffiti ordinance in previous ordinance committee meetings.

Introduction

My concerns with this draft "graffiti" hate ordinance center around its potential to chill freedom of speech and to facilitate selective prosecution of Burlington residents. These 1st and 14th Amendment issues could lead the city to abuse the rights of its residents, further the suppression of the political conversation surrounding gender affirming care and women's rights, and result in significant liability for the already overburdened taxpayers.

This draft ordinance is a response to a 2023 resolution passed unanimously by city council which condemned transphobia and called for the city to alter the graffiti ordinance to address the condemned speech:

"BE IT FURTHER RESOLVED that the City Council's Ordinance Committee shall, in coordination with the Burlington Police Department and City Attorney's Office, examine Burlington's graffiti ordinance and consider changes that address continued defacement of public property, and graffiti that spreads hateful and harmful messages."

This same resolution also called for the continued tracking of condemned speech in order to suppress it:

"Be it further resolved that city council supports the continuation of tracking of all transphobic and other hate speech in an annually published report available to the public to ensure the ongoing commitment to decreasing the amount of hate speech in our City"

These quotations in the resolution could lead a reasonable person to conclude that the city intends to suppress disfavored speech and intends to do so, at least in part, through this draft ordinance.

Historical Context

To better understand the context surrounding this draft ordinance and the resolution condemning transphobia, I have looked into some of the history leading up to the condemnation and following it, which I will briefly recap here:

- In 2018, Peggy Luhrs organized a meeting at the Peace and Justice Center that executive director Rachel Siegel described as anti-trans.
- In response, in March 2019 Siegel and staff barred Luhrs from attending a gala event at the ECHO Center celebrating her friend Robin Lloyd. Bill Oetjen recorded some of the incident.
- December 2019, Rachel Siegel announces her departure from the Peace and Justice Center.
- January 2020, Luhrs was going to hold an event at the Fletcher Free Library, but after threats of protests, Luhrs canceled the event.
- In response to this library event, later in January 2020, City Councilor Perri Freeman introduced a resolution supporting transgender individuals that was passed unanimously by city council.
- Peggy Luhrs ran in the March 2021 election for central district city council against incumbent Perri Freeman.
- At some point around 2021 stickers start appearing supporting women's rights and questioning gender affirming care.
- Around 2021, Olivia Taylor and others start scraping stickers off of signs.
- Around the summer of 2022, then-State-Representative Emma Mulvaney-Stanak helped organize a GoFundMe to buy stickers, distribute them around town and use them (as graffiti) to cover the condemned stickers.
- September 2022, gay rights activist Fred Sargeant is physically assaulted while protesting the Vermont Pride Parade
- In March 2023, City Council passed a resolution condemning transphobia.
- October 2023, Burlington Police issue 3 citations for graffiti violations to Bill Oetjen
- Around April 2024, the city received a letter from Bill Oetjen's lawyer.
- May 2024, The City Attorney's Office introduces a draft graffiti ordinance for consideration by the Ordinance Committee.
- May 2024, all 3 graffiti citations are dismissed.

This timeline looks to contain acts of retaliation for speech, suppression of speech, and the involvement of prominent political figures and organizations in the city.

State v. William Oetjen

Ask almost anyone in Burlington and they will tell you that graffiti has become much more prevalent in the last few years. It seems as if the graffiti ordinance is not enforced. When I learned in October of 2023 that Bill Oetjen had received three graffiti citations, presumably for disfavored stickers, I made a public records request to the police department for all graffiti citations, arrests, and calls from January 1st, 2021 to March 2024. During that time there were only four citations and a single arrest. This is concerning as it looks like selective prosecution of a disfavored viewpoint. Furthermore, according to discussion in a prior ordinance committee meeting, months were spent developing evidence used to prosecute Oetjen, yet still all three citations were dismissed in May.

I am concerned that this draft ordinance could be used to continue this selective prosecution of disfavored viewpoints. However, the city is unwilling to speak to the public about the Oetjen prosecution at this time. This deprives the public of information which I believe is necessary to fully understand the potential liability stemming from any future prosecutions under this draft ordinance. Therefore I have asked this committee to wait until the city can discuss this prosecution and any potential litigation resulting from it before proceeding further with this draft ordinance.

Unprecedented Ordinance

Another concern about the specific form of this ordinance is its unprecedented nature. The draft introduced in May contained a sentencing enhancement that turned a civil violation into a criminal violation. This has no precedent in case law, at least that was my understanding from the discussion at the ordinance committee meeting.

To avoid enhancing a civil violation to a criminal one, this public nuisance version was drafted. But at the July 1st ordinance committee meeting, Attorney Ramakrishnan said, if I recall correctly, that this public nuisance draft ordinance is also unprecedented. Relying on another unprecedented approach is worrying, especially since the ordinance is responding to a resolution calling for a reduction in disfavored speech.

Criminal due process relies on a burden of proof that is beyond a reasonable doubt in order to protect people from the very serious consequences of a criminal conviction. In stark contrast to this protection, public nuisance does not even require the accused to be issued a civil citation. And the standard of proof is much lower. As a lay person it has been difficult for me to even find out what it might be, perhaps "preponderance of evidence" or "clear and convincing evidence" or "reasonable likelihood."

While those due process standards might be reasonable for a \$500 ticket, the penalties for being declared a public nuisance could be thousands of dollars in legal fees and court fees and possibly even jail time if the accused is found to be in contempt.

Combining an unprecedented sentencing enhancement with lowered due process and increased penalties is very concerning because it may fail to protect the first amendment rights of our residents and needlessly open the city up to expensive litigation.

Overbreadth

This current draft ordinance is not really a graffiti ordinance. The only change to the graffiti ordinance is a requirement to have an anonymous reporting system, something which need not

be in the ordinance at all, as I believe Attorney Ramakrishnan mentioned at the last ordinance committee meeting.

This current draft ordinance applies to every ordinance violation in the city code, civil or criminal. This goes far beyond what the resolution called for and could have a chilling effect on speech. Any ordinance violation from riding a bicycle on the sidewalk on Main Street to yelling for help while being assaulted could lead to a person being prosecuted as a public nuisance by almost anyone in Burlington.

What is a Person?

The Ordinance defines the victim of the nuisance quite broadly:

"As used in this paragraph, the term "person" may refer to a specific person or more generally to any person within a classification of persons who the individual committing the offense intended to intimidate or harass."

This would empower one or many private individuals in Burlington, or the city attorney on their behalf, to prosecute. Combined with the low standards of proof to get a conviction and recoup attorney's fees, there is a concerning potential for excessive prosecution. And there is little risk that the accused could recover their own attorney's fees, since the standard for that is quite high:

"The respondent shall be entitled to recover reasonable attorneys' fees and costs if the court finds that the action was wholly without merit and brought with a bad faith intent to cause unwarranted annoyance, embarrassment, oppression, or expense."

Graffiti in Burlington

As a draft ordinance that should, according to the 2023 Resolution, address hateful messages in Burlington, it would make sense if the protected classes corresponded to hate speech seen in Burlington graffiti. Yet the ordinance lists many classes that are not targets of hate speech in Burlington and omits many classes that are targets: landlords, capitalists, Joan Shannon, and zionists to name a few.

Graffiti stickers targeting Joan Shannon are some of the most pervasive and offensive stickers in Burlington. A citywide defamatory stickering campaign has been ongoing for years and left largely unaddressed by the City. Other stickers call for the deaths of capitalists or for landlords to be shot. Jews/Israelis/Zionists are targeted with genocidal slogans like "From the River to the Sea" or pictures of grotesquely mutilated children.

In contrast, the stickers condemned by the city's 2023 resolution contain comparatively bland political slogans like "No one is born in the wrong body" and "Defend women's sex-based rights spaces and sports." These stickers contain no incitement, threats, obscenity, or defamation, yet they have been branded as hateful by the city.

Alternative Approaches

There is no doubt that graffiti is a problem that has exploded in the last few years. Ask anyone in Burlington. Many people are upset about this and would, I think, consider graffiti a genuine public nuisance. However, this draft ordinance does not address the graffiti problem in Burlington.

Threats of violence are also a problem in Burlington. Yet this ordinance will do little to address this problem.

To address graffiti the city could, if it chose to, enforce the graffiti ordinance. This approach might go a long way to fixing the entire graffiti problem in the city, not just stickers with disfavored viewpoints.

The city has the power to make criminal ordinances. It could make repeated graffiti violations a criminal offense if I understand correctly, should it wish to impose harsher consequences (and use appropriate due process) to deter repeat offenders.

The city could use existing criminal statutes for harassment, threats, or unlawful mischief to prosecute violators. Vermont also has an existing hate crime enhancement statute. Unlawful mischief is how UVM typically charges graffiti violators, like the student charged this spring.

The city could also just clean up graffiti. In fact it has done so. In 2021, the city created a graffiti cleanup team. And according to the head of BPRW:

"BPRW prioritizes public complaints registered in Viewworks/See Click Fix, including complaints about stickers/graffiti on City property. City staff may also remove stickers/graffiti identified during their duties on City property, but we have no official policy."

Conclusion

I hope the ordinance committee will pause to consider alternatives to this "graffiti" ordinance which creates an unprecedented hate public nuisance that applies to every ordinance violation in the city code, that weakens due process, that imposes harsh penalties, that does little to address most graffiti or hate in Burlington, that chills the speech of Burlington residents and exposes the city to civil rights lawsuits.

Please keep in mind that people who speak about gender affirming care or women's rights in Burlington already experience retaliation. The last time I spoke at city council about this graffiti ordinance, I was summarily kicked out of a local group that has nothing to do with graffiti or women's rights or transgender issues. I was simply told, "Because of our goals of inclusivity, we've decided to remove you."

In July I was the victim of an assault in the Old North End. At one point, as I was running for my life from someone threatening to break my neck, I yelled for help. When the police arrived I was issued a ticket for disorderly conduct. Afterwards I couldn't help but wonder, had I chosen my words less carefully as I was being assaulted, would some stranger have grounds to prosecute me as a public nuisance? It chills me to think about it.

Thank you for taking the time to consider my perspective.

Best regards,
Todd DeLuca
Ward 4

Appendix: Some Sources

Burlington City Council Resolution Condemning Transphobia, 2023/03/13
<https://burlingtonvt.portal.civicclerk.com/event/7212/files/attachment/4235>

Women's Rights Advocate Peggy Luhrs Leaves Behind a Complicated Legacy 03/09/2022
<https://m.sevendaysvt.com/news/womens-rights-advocate-peggy-luhrs-leaves-behind-a-complicated-legacy-35057193>

The 12-minute video by Bill Oetjen showing Luhrs being barred from the gala by Siegel and trespassed from the ECHO Center by the police.
https://youtu.be/LDuO1cwTg5M?si=99mZ_32waVntkLeB

Transformation Continues as Rachel Departs
March 28, 2021
<https://www.pjcv.org/blog/rachels-goodbye/>

Concerns raised over anti-transgender Burlington City Council candidate, 2021/03/01
<https://vtdigger.org/2021/03/01/concerns-raised-over-anti-transgender-burlington-city-council-candidate/>

2020/01/27 Burlington City Council Meeting
<https://burlingtonvt.portal.civicclerk.com/event/6244/files/agenda/8272>

Vermont LGBTQ+ groups contend with anti-trans protesters

<https://vtdigger.org/2022/10/07/vermont-lgbtq-groups-contend-with-anti-trans-protestors/>

Resolution: Support for Transgender and Non Binary Individuals (Perri Freeman)

<https://www2.burlingtonvt.gov/Archives/bd/BMJHYE4AC2A7/Signed%20CC%20Resolution%20Support%20For%20Transgender%20And%20Nonbinary%20Individuals.pdf>

Burlington group takes down anti-trans stickers while officials consider their options
June 20, 2023?

<https://www.communitynews.net/home/burlington-group-takes-down-anti-trans-stickers-while-officials-consider-their-options>

Burlington Ordinance Committee Meeting on 2024/05/16 (CivicClerk):

<https://burlingtonvt.portal.civicclerk.com/event/7212/media>

State of Vermont v. William Oetjen (2023-2024)

<https://portal.vtcourts.gov/app/RegisterOfActions/#/8769D4A57CEF30F724C9754AFF4DD1EB022C604F1B3C1C2341CFC9ECFBB889C2/anon/portalembd>

Public Nuisance Draft Graffiti Ordinance

<https://burlingtonvt.portal.civicclerk.com/event/7298/files/attachment/5128>

Burlington creates team to remove increased graffiti in town

<https://vtdigger.org/2021/04/26/burlington-creates-team-to-remove-increased-graffiti-in-town/>



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July 22, 2024

Burlington City Hall
149 Church Street
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VIA FEDEX and EMAIL

RE: Concerns with Proposed Revisions to City Ordinances 1-9 and 21-29

Dear Mayor Mulvaney-Stanak, City Councilors Neubieser, Bergman, Kane, Carpenter, Traverse, Brown McKnight, Litwin, Broderick, Grant, Doherty, Barlow, and Shannon, and Assistant City Attorney Ramakrishnan:

We are writing to you once again in our capacity as legal counsel for William Oetjen regarding proposed revisions to the City of Burlington's Municipal Ordinance 1-9 (General penalty; continuing violations) ("Individual Nuisance Enforcement Provision") and 21-29 (Graffiti and Defacement of Property) ("Graffiti Crowdsourcing Provision"), discussed at the Ordinance Committee's July 1, 2024, and July 18, 2024, meetings. We write to express serious concerns about both proposed provisions and the risks they raise surrounding unconstitutional viewpoint discrimination under the First Amendment to the United States Constitution.

Factual Background

As you already know, on March 21, 2024, we sent a demand letter to the City expressing concerns about what appeared to be selective enforcement of the City's Graffiti Ordinance (Municipal Ordinance 21-29) against Mr. Oetjen based on the viewpoints expressed in stickers he posted on public property around the City. That correspondence is attached to this letter as **Attachment 1**. We briefly summarize the factual background underlying our March 21 letter below, as well as developments since that correspondence.

Mr. Oetjen's Stickering and the City's Response

In 2020, in keeping with Burlington's longstanding culture of public stickering campaigns on social and cultural issues, Mr. Oetjen began placing homemade stickers in public places around Burlington, including on the backs of traffic signs and on telephone poles. These stickers express Mr. Oetjen's views that recent efforts to advance transgender rights have harmed non-transgender women and girls. Individuals opposing Mr. Oetjen's views responded with their own stickers and signs, and some reached out to the City seeking government intervention to shut down this public debate. A GoFundMe campaign led in part by now-Mayor Mulvaney-Stanak raised over \$900 "to

buy thousands of stickers supporting trans people” intended to counter Mr. Oetjen’s stickers.¹ Now-Mayor Mulvaney-Stanak, in a June 2022 Facebook post publicizing the GoFundMe page, wrote, “When I see harmful messages up, acts of love and visuals affirming people’s identity and basic humanity (i.e., new stickers on public signs) is not additional graffiti. It is a necessary act of love.”² To our knowledge, the City did not issue citations to any individuals for placing these pro-trans stickers in and around the same locations as Mr. Oetjen’s stickers.

The City of Burlington has repeatedly expressed its disagreement with the content of Mr. Oetjen’s speech – as it is legally entitled to do – and publicly resolved to find a way to punish and silence the messages expressed in his stickering – which the City is *not* legally entitled to do. For example, in March 2023, the City passed a resolution which alleged that Burlington residents are “spread[ing] hate through . . . aggressive stickering.”³ In response to this stickering and other acts the resolution characterizes as “transphobic,” the resolution states that the City Council “supports the continuation of tracking all [instances of] . . . hate speech.”⁴ Further, the resolution states that “the City Council’s Ordinance Committee shall, in coordination with the Burlington Police Department and the City Attorney’s Office, examine Burlington’s graffiti ordinance and consider changes that address continued defacement of public property, and graffiti that spreads hateful and harmful messages.”⁵

Approximately six months later, Mr. Oetjen was served with three citations for alleged violations of the Graffiti Ordinance, totaling up to \$1,500 in fines. The citations alleged that Mr. Oetjen violated the Graffiti Ordinance on September 17, 2023, September 21, 2023, and October 1, 2023. Mr. Oetjen believes that all three citations concern stickers which read: “Defend Women’s sex-based rights, spaces, and sports.”

Cornell First Amendment Clinic Raises Concerns About Selective Enforcement

On March 21, 2024, the Cornell Law School First Amendment Clinic sent a letter to the City expressing concerns about selective enforcement of the Graffiti Ordinance against Mr. Oetjen based on his viewpoints, in violation of the United States and Vermont Constitutions. We noted that the Graffiti Ordinance appeared not to have been enforced against anyone *except* Mr. Oetjen since at least March 2022, despite the existence of other plainly offending conduct (including the counter-stickering campaign now-Mayor Mulvaney-Stanak helped organize and promote, discussed above). We acknowledged that the City is legally entitled to regulate graffiti and other defacement of property, but noted that selective application of such a law to target speech on the basis of its content raises serious constitutional concerns. We also noted “grave concerns with the City’s resolutions to further silence and punish Mr. Oetjen’s expression of protected viewpoints

¹ *Id.*; *The Inclusive Sticker Project*, GoFundMe, https://www.gofundme.com/f/the-inclusive-sticker-project?utm_campaign=p_cp+share-sheet&utm_medium=copy_link_all&utm_source=customer.

² Emma Mulvaney-Stanek (@State Representative Emma Mulvaney-Stanek), Facebook (June 23, 2022), <https://www.facebook.com/profile/100063930290010/search/?q=gofundme>.

³ City Council, *Resolution 5.07 Relating to Supporting LGBTQIA+ Community Members and Condemning Transphobia*, City of Burlington (Mar. 13, 2023).

⁴ *Id.*

⁵ *Id.*

through ‘track[ing]’ and penalizing what the City labels as ‘hate speech’”—concerns we address in further detail below.

The Clinic, on behalf of Mr. Oetjen, sought to resolve these concerns without resorting to litigation, requesting that the City: (1) dismiss the three citations issued to Mr. Oetjen for allegedly violating the Graffiti Ordinance; (2) issue an official acknowledgment that the selective application of the Graffiti Ordinance against Mr. Oetjen was improper and pledge to refrain from any such unconstitutional enforcement strategies moving forward; and (3) conduct a systematic assessment of the City’s enforcement of the Ordinance and other City regulations which regulate citizen speech to ensure that all citizens are subject to equal treatment under the law.

The City’s Response

On April 25, 2024, the City Attorney’s Office responded to the First Amendment Clinic’s letter. The City Attorney’s office stated that it was willing to withdraw the citations against Mr. Oetjen if he would agree to a mutual release the City included in its letter, but contested the First Amendment Clinic’s assertions about viewpoint discrimination and did not agree to the other requests set forth in the Clinic’s letter. This correspondence is attached to this letter as **Attachment 2**.

Ultimately, Mr. Oetjen declined to sign the release, but the City dismissed the three citations against him.

Proposed Amendments to the Municipal Code to Further Target Mr. Oetjen’s Speech

On May 16, 2024, following up on the City Council’s March 13, 2023, resolution addressing Mr. Oetjen’s stickering,⁶ the City’s Ordinance Committee met to discuss proposed revisions to the Graffiti Ordinance (Municipal Ordinance 21-29). These proposed revisions raised First Amendment concerns which we do not detail in this letter, given that they no longer appear to be under consideration for adoption.

On July 1, 2024, and July 18, 2024, the Ordinance Committee met again to discuss a new set of proposed revisions, this time to Municipal Ordinance 1-9 (General penalty; continuing violations) (“Individual Nuisance Enforcement Provision”) and 21-29 (Graffiti and Defacement of Property) (“Graffiti Crowdsourcing Provision”). The draft revisions are attached to this letter as **Attachment 3**; the underlined text represents the proposed additions to the existing ordinances.

The Individual Nuisance Enforcement Provision creates a private cause of action – a right for an individual to bring a lawsuit in court – if they are “aggrieved by” someone else committing any violation of any City ordinance “maliciously and with the intent to intimidate or harass another person” or group of people “because of, or in any manner reasonably related to, associated with, or directed toward,” that person’s or group’s race, religion, ancestry, gender, disability, or veteran status, among other categories. Through that private lawsuit, the “aggrieved person” could obtain an injunction – a court order mandating that the other person stop their offending behavior – as well as attorneys’ fees (meaning the person they successfully sued has to reimburse the aggrieved

⁶ City Council, *Resolution 5.07 Relating to Supporting LGBTQIA+ Community Members and Condemning Transphobia*, City of Burlington (Mar. 13, 2023).

person for what they spent on an attorney to bring the action). The City Attorney could bring a similar suit.

The Graffiti Crowdsourcing Provision states that “the city shall maintain and advertise an electronic mail address or similar electronic means by which members of the public may provide photographs, [etc.] . . . to the police department about violations of this section and the identities of responsible parties.”

We understand that both the Individual Nuisance Enforcement Provision and the Graffiti Crowdsourcing Provision remain under consideration by the Ordinance Committee.

The Proposed Provisions Raise Serious Constitutional Concerns

The Individual Nuisance Enforcement Provision and the Graffiti Crowdsourcing Provision both appear to be attempts to accomplish indirectly what the City knows it cannot do directly under the Constitution. The City knows that “the First Amendment protects individuals’ right to engage in hate speech, and the state cannot try to inhibit that right, no matter how unseemly or offensive that speech may be to the general public or the state.” *Volokh v. James*, 656 F.Supp. 3d 431, 445 (S.D.N.Y. 2023). *See also Counterman v. Colorado*, 600 U.S. 66, 87 (2023); *Virginia v. Black*, 538 U.S. 343, 358 (2003); *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). The City also knows that it cannot selectively enforce its laws to punish only subsets of illegal conduct reflecting speech and viewpoints which City officials find hateful and harmful. *See LaTrieste Rest. & Cabaret Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994). Through the proposed revisions, then, the City attempts to outsource this selective enforcement to the public—explicitly through the Individual Nuisance Enforcement Provision and indirectly through the Graffiti Crowdsourcing Provision. The proposed provisions amount to nothing but censorship by mob rule, and a thinly-veiled attempt to silence and punish certain views which the City and an apparently significant number of Burlington residents believe amount to hate speech.

Through the Individual Nuisance Enforcement Provision, the City seeks to transform its Graffiti Ordinance from a low-priority civil ordinance it rarely bothers enforcing into a tool by which a member of the public can drag their neighbor into court over posting a sticker on a telephone pole. Its language – and the context in which it was drafted – makes clear it is specifically targeted at Mr. Oetjen’s speech: it requires no stretch of the imagination to predict an imminent suit against Mr. Oetjen under the Individual Nuisance Enforcement Provision, alleging that a sticker stating, “No one was EVER ‘born into the wrong body,’” amounts to “malicious[]” violation of the Graffiti Ordinance “with the intent to . . . harass” transgender individuals based on their “gender expression.” Mr. Oetjen will then be forced to either represent himself without an attorney or pay for an attorney to defend against this suit, and may potentially be liable for the legal fees of the person or entity bringing the suit against him.⁷

The Individual Nuisance Enforcement Provision’s broad language would also appear to support a suit by a Jewish resident of Burlington against someone flying a flag which slightly exceeds the

⁷ The Individual Nuisance Enforcement Provision’s clause providing for a respondent like Mr. Oetjen to recover his own attorneys’ fees if a court ultimately finds that “the action was wholly without merit and brought with a bad faith intent to cause unwarranted annoyance, embarrassment, oppression, or expense” is not enough to erase the chilling effect of threatened litigation.

City's allowed size dimensions and reads, "From the River to the Sea, Palestine Will Be Free."⁸ Or, looking to a less-recent example, a suit by a Vietnam veteran against someone posting stickers on the backs of traffic signs calling Vietnam veterans "baby killers." These possibilities do not describe or further a healthy democracy; they describe an Orwellian dystopia.

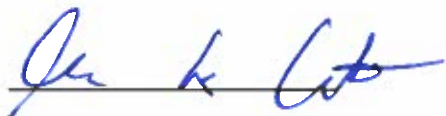
The Individual Nuisance Enforcement Provision's language is also vague and confusing to the point of being unconstitutional—that is, the provision does not provide a reasonable person with notice of what conduct may expose them to legal action, and it is so standardless as to invite arbitrary enforcement. *See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Both provisions chill the speech rights of Burlington residents, including Mr. Oetjen.

At bottom, the Individual Nuisance Enforcement Provision and Graffiti Crowdsourcing Provision have no real discernible, permissible functions. In light of the legal and practical concerns they raise, then, we urge the City Council to decline to adopt these proposed provisions and reiterate its commitment to enforcing its laws in a manner that is viewpoint neutral, allowing the marketplace of ideas to flourish in the public square as it has for so long in Burlington's history.

We welcome the opportunity to discuss our concerns in further detail if such discussion would be helpful.

Sincerely,

**CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC⁹**

By: 

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Counsel for William Oetjen

⁸ See, e.g., Joe Hernandez, *How interpretations of the phrase 'from the river to the sea' made it so divisive*, NPR (Nov. 9, 2023), <https://www.npr.org/2023/11/09/1211671117/how-interpretations-of-the-phrase-from-the-river-to-the-sea-made-it-so-divisive>.

⁹ Clinic intern Paul Janes drafted portions of this letter. Cornell Law School First Amendment Clinic is housed within Cornell Law School and Cornell University. Nothing in this letter should be construed to represent the views of these institutions, if any.

Attachment 1



Cornell Law School

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jc2537@cornell.edu
cn266@cornell.edu

March 21, 2024

Burlington City Hall
149 Church Street
Burlington, VT 05401

VIA FEDEX and EMAIL

Dear Mayor Weinberger, Chief Murad, and Councilors Hightower, Bergman, Magee, Carpenter, Traverse, Paul, Dieng, King, Grant, Doherty, Barlow, and Shannon:

We are writing to you in our capacity as legal counsel for William Oetjen regarding what appears to be selective enforcement of the City of Burlington's Municipal Ordinance 21-29 (Graffiti and Defacement of Property) ("the Ordinance"), against Mr. Oetjen in violation of the United States and Vermont State Constitutions. This letter serves as a formal demand for the prompt dismissal of three citations issued to Mr. Oetjen for allegedly violating this ordinance, dated September 17, 2023, September 21, 2023, and October 1, 2023.

Factual Background

Community Activism

In 2018, in connection with an organization calling itself Gender Critical Vermont ("GCV"), Mr. Oetjen began engaging in public advocacy focused on a subset of women's rights he believes are underrepresented in mainstream media. Mr. Oetjen, who also serves as the Vice Chair of the City of Burlington Republican Party, contends that recent efforts to advance the rights of adults and children identifying as transgender have infringed on the rights of women and girls who are natal females (also referred to as "cisgender females" or those "assigned female at birth"). Mr. Oetjen believes that much of the discussion around these issues lacks nuance and critical thinking, both locally in Burlington and nationally in the media. Through his activism, Mr. Oetjen aims to bring awareness to what he believes is an underrepresented viewpoint in his community—in other words, he aims through his activism to make the "other side" of this issue known and to enhance community discussion.

Burlington City officials have made clear their opposition to Mr. Oetjen's advocacy work and the views he expresses since at least early 2020.¹ For example, in January 2020, Mr. Oetjen and GCV helped organize an event at a local library to discuss these issues. Activists opposed to GCV attempted to have the event canceled, but the library, in consultation with the City

¹ Although City officials have the right to free speech and can express disagreement or concerns about statements they find objectionable, their public denunciation of Mr. Oetjen's opinions suggests that the selective enforcement of the Ordinance against him is driven by animus rather than by neutral enforcement of the ordinance.

Attorney's Office, refused, citing legal constraints under the First Amendment.² In the face of community backlash, GCV canceled the event, stating it hoped to reschedule for a place and time with enhanced safety measures in place. In response to the cancellation, Mayor Miro Weinberger stated, "I welcome the news that [Gender Critical Vermont's] meeting was cancelled,"³ though he went on to note the City's legal responsibilities under the First Amendment.⁴ The City Council also weighed in on this matter.⁵ In a resolution introduced by Councilor Perri Freeman, the City Council condemned GCV's views and the event itself as "hate speech."⁶

The Sticking Campaign

City officials' stated public opposition to Mr. Oetjen's beliefs (to which they are entitled), is precisely why Mr. Oetjen believes his advocacy is necessary. In 2020, in keeping with Burlington's longstanding culture of sticking campaigns on social and cultural issues, Mr. Oetjen began placing homemade stickers on public property around Burlington. Mr. Oetjen places stickers on public property such as the backs of traffic signs and telephone poles, often alongside stickers that others have already placed in these locations. Unlike the elaborate designs seen in other sticking campaigns, Mr. Oetjen's stickers feature minimalist black and white text setting forth a variety of messages, including:

- "Defend Women's sex-based rights, spaces, and sports."
- "Lifelong medical dependency isn't 'kindness.' It's a business model."
- "No one was EVER 'born into the wrong body.'"

Mr. Oetjen places his stickers places where he believes they are most likely to be seen by passers-by. Through his sticking, Mr. Oetjen aims to show solidarity with those in the community who may share his views. Moreover, by placing these stickers in high-visibility places, he aims to disrupt what he views as an "echo chamber" on gender issues in Burlington and to create bandwidth in the community for a more robust dialogue on the subject.

² See Mary Danko, *Response to Library Meeting Room Booking: Gender Critical Vermont*, Fletcher Free Library (Jan. 27, 2020), <https://www.fletcherfree.org/response>. In a later response, the Library Director Mary Danko informed the community that the library will look at its Meeting Room Policy "for improvement." *Id.* (Jan. 28, 2020).

³ Statement from Mayor Miro Weinberger in Support of Burlington's Transgender Community (Jan. 28, 2020), <https://www.burlingtonvt.gov/Press/statement-from-mayor-miro-weinberger-in-support-of-burlingtons-transgender-community>.

⁴ *Id.*

⁵ Molly Walsh, *Amid Backlash, Group Cancels Burlington Talk on Transgender 'Agenda'*, Seven Days, (Jan. 27, 2020, 11:14 PM), <https://www.sevendaysvt.com/OffMessage/archives/2020/01/27/amid-backlash-group-cancels-burlington-talk-on-transgender-agenda>.

⁶ *Id.*

The Targeting Begins

Individuals who oppose Mr. Oetjen's views have responded to Mr. Oetjen's activism with their own stickers and signs.⁷ Others reached out to the Mayor seeking government intervention to shut down this public debate. The Mayor's chief of staff, Jordan Redell, responded in July of 2022 to such requests, stating that the Mayor's office was looking into courses of action that would "lawfully address [the] concerns" about Mr. Oetjen's stickers.⁸ Redell noted that the Mayor's concerns were with the impact of the stickers' *message* rather than the stickers *per se*—underscoring that the City's enforcement of the ordinance against Mr. Oetjen alone stems from its disagreement with the viewpoint expressed, rather than the act of stickering on public property itself.⁹

We have been advised that in July 2022, Mr. Oetjen received a personal visit to his home from Burlington Police Chief Jon Murad regarding the stickers. Then, in October 2022, we understand that Mr. Oetjen received a call from an individual at the Burlington Community Justice Center (CJC)¹⁰ offering Mr. Oetjen an opportunity to participate in "restorative justice measures" as a way to resolve the stickering dispute. Mr. Oetjen declined to engage with the CJC.

The City's December 2022 Resolution

Government officials continued to escalate their involvement and commentary regarding Mr. Oetjen's viewpoints. In December 2022, State Representative Emma Mulvaney Stanack spoke at a Neighborhood and Planning Assembly for Burlington Wards 2 and 3.¹¹ During this meeting, Representative Mulvaney Stanack stated that she and other groups "demanded a meeting" with the Mayor so he can finally "take action" regarding Mr. Oetjen's stickering.¹² Representative Mulvaney Stanack thanked the Community Justice Center for their efforts in removing the stickers. She expressed her "hope" that, following the meeting, Mr. Oetjen's speech would be "eviscerated" and the city would "have inclusive wonderful welcoming messages going up instead."¹³ Representative Mulvaney Stanack was involved in a campaign to create and share pro-trans stickers at this time.¹⁴

In March 2023, the City passed a resolution addressing Mr. Oetjen's stickering, among other topics. The resolution starts by alleging that Burlington residents are "spread[ing] hate through . . . aggressive stickering."¹⁵ In response to this stickering and other acts the resolution

⁷ See, e.g., Lilly St. Angelo, *Someone Is Posting Anti-Trans Stickers Across Burlington. Can Police Do Anything About It?*, Burlington Free Press, (July 22, 2022), <https://www.burlingtonfreepress.com/story/news/2022/07/22/anti-trans-stickers-burlington-vt-response-prevention-transphobic/65368335007/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Community Justice*, Burlington Cmty. Just. Ctr., <https://www.burlingtoncjc.org>.

¹¹ *Burlington Wards 2 and 3 NPA Meeting*, Town Meeting TV (Dec. 8, 2022), <https://www.cctv.org/watch-tv/programs/burlington-wards-2-and-3-npa-meeting-43> (comments beginning at minute 29).

¹² *Id.*

¹³ *Id.*

¹⁴ See Town Meeting TV, *Burlington Wards 2&3 NPA - 10/12/2023*, YouTube, (Nov. 9, 2023), https://www.youtube.com/watch?v=bD0U_XdWJcM (comments at minute 32).

¹⁵ City Council, *Resolution Relation to Supporting LGBTQIA+ Community Members and Condemning Transphobia*, City of Burlington at 5 (Mar. 13, 2023).

characterizes as “transphobic,” the resolution states that the City Council “supports the continuation of tracking all [instances of] . . . hate speech.”¹⁶ Further, the resolution states that “the City Council’s Ordinance Committee shall, in coordination with the Burlington Police Department and the City Attorney’s Office, examine Burlington’s graffiti ordinance and consider changes that address continued defacement of public property, and graffiti that spreads hateful and harmful messages.”¹⁷

The Resolution’s Aftermath

Six months later, on October 3, 2023, Mr. Oetjen was served with three citations for alleged violations of the Ordinance, totaling up to \$1,500 in fines, reduced to \$1,200 upon waiver of a hearing. (See Exhibits A–C.) The citations alleged that Mr. Oetjen violated the Ordinance on September 17, 2023, September 21, 2023, and October 1, 2023. Mr. Oetjen believes that all three citations concern stickers which read: “Defend Women’s sex-based rights, spaces, and sports.” (See example at Exhibit D.)

On October 6, 2023, Mr. Oetjen filed a Public Records Request with the Burlington Police Department requesting “(1) copies of enforcement [o]f graffiti and defacement of property (03/01/2022–10/06/2024)” and “(2) citations issued for the same.” The Department’s response to this request appears to indicate that the three violations for which Mr. Oetjen was fined reflect the *only* instances in which the City has enforced the Ordinance against *anyone* over the 18 months preceding Mr. Oetjen’s Public Records Request. (See Exhibit E.)

The Vermont Judicial Bureau scheduled a hearing for February 28, 2024, on the three citations against Mr. Oetjen. Mr. Oetjen requested a continuance of the hearing while he secured legal counsel. The continuance was granted on February 14, 2024, and the hearing has been rescheduled for April 4, 2024. Mr. Oetjen requested a further continuance of the hearing to a date after April 19, 2024.

The Chilling Effect

The citations issued to Mr. Oetjen have significantly impacted his life, forcing him to grapple with whether to persist in advocating for his deeply held beliefs or to remain silent. Mr. Oetjen has largely ceased his stickering and other activism in the wake of the citations, intimidated by the prospect of additional punishment.

¹⁶ *Id.* at 45–46.

¹⁷ *Id.* at 51–54.

Selectively Ticketing Mr. Oetjen for his Viewpoint Violates the First and Fourteenth Amendments

Application of a statute or regulation may be unconstitutional even when “its general validity as a measure enacted in the legitimate exercise of state power is beyond question.” *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). Selectively enforcing a facially valid statute can violate the United States Constitution’s Equal Protection clause when there is “an element of intentional or purposeful discrimination,” which “may appear on the face of the action taken with respect to a particular class or person.” *Snowden v. Hughes*, 321 U.S. 1, 8 (1944). Claims of selective prosecution are appropriately evaluated “according to ordinary equal protection standards.” *Wayte v. United States*, 470 U.S. 598, 608 (1985). Further, the Vermont Constitution’s “Common Benefits” clause is coextensive with the Equal Protection clause, and therefore similarly protects against selective prosecution. See *Brigham v. State*, 692 A.2d 384, 395 (Vt. 1997).

It is a violation of the right to Equal Protection to selectively prosecute Mr. Oetjen in retaliation for the content of his speech. Selective enforcement of laws violates Equal Protection if “(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as . . . intent to inhibit or punish the exercise of constitutional rights.” *In re Letourneau*, 726 A.2d 31, 38 (Vt. 1998); *LaTrieste Rest. & Cabaret Inc. v. Village of Port Chester*, 40 F.3d 587, 590 (2d Cir. 1994).

Ticketing Mr. Oetjen under Municipal Ordinance 21-29 demonstrates the City’s selective treatment of Mr. Oetjen compared with others similarly situated. The Ordinance appears not to have been enforced against anybody except Mr. Oetjen since at least March 2022, despite the existence of other plainly offending conduct. We understand and are prepared to demonstrate that other similarly offending conduct routinely goes unpunished in Burlington—a short walk around downtown Burlington reveals a rich, unchecked culture of stickering in the City.

The City of Burlington has also made clear that its actions come as retaliation for the exercise of Mr. Oetjen’s First Amendment rights. In *LaTrieste*, the “seminal selective enforcement case in the Second Circuit,” *Payne v. Huntington Union Free Sch. Dist.*, 219 F. Supp. 2d 273, 277 (E.D.N.Y. 2002), a zoning board selectively enforced a zoning classification against plaintiffs because they were hosting “topless dancing” at their restaurant. *LaTrieste*, 40 F.3d at 588–89. The Second Circuit acknowledged that this was expressive conduct within the outer perimeter of First Amendment protection. *Id.* at 590–91. The content of Mr. Oetjen’s stickers falls even more squarely within the protections of the First Amendment than topless dancing. The First Amendment indisputably protects the dissemination of controversial or even hateful speech. See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992), *Virginia v. Black*, 538 U.S. 343, 358 (2003), *Counterman v. Colorado*, 600 U.S. 66, 87 (2023).

The City of Burlington has, multiple times over, expressed its disagreement with the content of Mr. Oetjen’s speech. For example, in its March 2023 Resolution, the City Council resolved to coordinate with the Burlington Police Department to “examine Burlington’s graffiti ordinance” and address “graffiti that spreads hateful and harmful messages.” But the City’s distaste for Mr. Oetjen’s viewpoint only makes it that much more worthy of protection. What the City believes to be “hateful and harmful” has *never* qualified as an exception to First Amendment protection.

Attempting to stamp out what the City views as “hate speech” through tracking and regulation is not only vague; it also violates the First Amendment and Vermont’s analogous constitutional provisions. *See Volokh v. James*, 656 F. Supp. 3d 431, 436 (2023).

To be clear, the City of Burlington is entitled to regulate graffiti and other defacement of public property. However, it is a clear violation of Equal Protection to selectively apply such a law in order to target protected speech on the basis of its content, as the City appears to have done here.¹⁸

Demand for Relief

In view of the foregoing, we respectfully demand that the City take the following actions:

Immediate Dismissal of Citations: Promptly dismiss the citations issued to Mr. Oetjen for allegedly violating City of Burlington Ordinance, 21-29, Graffiti and Defacement of Property, dated September 17, 2023, September 21, 2023, and October 1, 2023.

Official Acknowledgment and Rectification: Issue an official acknowledgment from the City of Burlington that the selective application of Ordinance 21-29 against Mr. Oetjen was improper and a pledge to refrain from any such unconstitutional enforcement strategies moving forward, both with respect to Mr. Oetjen and other members of the Burlington community.

Equal Enforcement: Conduct a systematic assessment of the City’s enforcement of the Ordinance and other City regulations which regulate citizen speech to ensure that all citizens are subject to equal treatment under the law. The results of this assessment should be made available to the public.

Should the City fail to comply with these demands, we are fully prepared to initiate legal proceedings to seek not only the relief requested herein but also compensatory and punitive damages, as well as the recovery of legal fees and costs incurred as a result of the City’s unconstitutional actions.

Please provide the City’s response to the foregoing demands by no later than **5:00 p.m. on Monday, March 25**.

We would also welcome the opportunity to discuss this matter further and seek a resolution without the need for litigation.

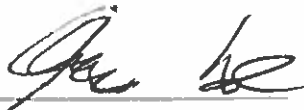
Thank you for your prompt attention to this serious matter. We look forward to your prompt and affirmative response.

This letter is written without prejudice to all of our client’s rights in this matter, legal and equitable, all of which are expressly reserved.

¹⁸ We also note grave concerns under both the Vermont Constitution and the U.S. Constitution with the City’s resolutions to further silence and punish Mr. Oetjen’s expression of protected viewpoints through “track[ing]” and penalizing what the City labels as “hate speech.”

Sincerely,

**CORNELL LAW SCHOOL
FIRST AMENDMENT CLINIC¹⁹**

By: 

Jared K. Carter
Christina N. Neitzey
Myron Taylor Hall
Ithaca, New York 14853
Tel.: (607) 255-9182
jc2537@cornell.edu
cn266@cornell.edu

Counsel for William Oetjen

Cc:

City Attorney's Office
City Hall
149 Church Street
Burlington, VT 05401

¹⁹ Clinic students Alexander Venditti and Gregory Jameson drafted portions of this letter.

Cornell Law School First Amendment Clinic is housed within Cornell Law School and Cornell University. Nothing in this letter should be construed to represent the views of these institutions, if any.

Exhibit A

**VERMONT CIVIL VIOLATION, FISH AND WILDLIFE
VIOLATION, MUNICIPAL VIOLATION**

☐ COL ☒ VT License State VT 022656 4106042 ☐ VCVC ☐ F&W ☒ Municipal ☐ Form 800 Rev 1/2021

Driver License Number 41931805 Hunting/Fishing/Trapping License Number _____

Defendant Last or Organization Name WILLIAM First _____ Mid Initial _____

Defendant Current Mailing Address 762 NORTH AVE Home Phone _____

City BURLINGTON State VT Zip Code 05408 Business Phone _____

Date of Birth 05-16-59 ☒ Male ☐ Corp/Org ☐ Female ☐ Other 508 Height 160 Weight 180 Hair BLU Eyes _____

Vehicle or Boat Reg number: VEE State VT Year 2001 Make _____ Color _____ Model _____

Violation Date 09-17-23 Time 1651 Municipality BURLINGTON

Highway NORTH AVE Place or Landmark RT 127

Defendant did then and there commit the following acts in violation of Vermont Road law:

GRAFFITI AND DEFACEMENT OF ROAD

Alcohol Lev. 0 % Actual Speed 0 MPH Posted Limit 0 MPH ☐ Accident ☐ Fatality ☐ Seat Belt Viol

☐ Commercial Vehicle ☐ Hazardous Material 21-29 Municipal Ordinance

In violation of V.S.A. § _____ 49 C.F.R. § _____ Violation Code 21-29

PENALTIES	If you REQUEST A HEARING, and the State proves the violation, the penalty must be within the penalty range. Commonly, the waiver amount plus \$88.00 in court costs are assessed.	POINTS	If you DO NOT WANT A HEARING, you may pay the waiver amount instead of appearing in court.
	PENALTY RANGE		
	MINIMUM \$	WAIVER AMOUNT <u>\$400.00</u>	
	MAXIMUM \$ <u>500</u>		
RESTITUTION (FAW) :			

I have just and reasonable grounds to believe the person named above committed this violation.

Delivered To ☒ Defendant ☐ Prop. Agent or Corp. Officer Date Served 10-03-2023 ☒ In Hand ☐ U.S. Mail

Officer No. 41038 Officer Name (printed) RYAN J. CO Other Number 338

Dept. No. 405 Department Name BURLINGTON PD ☐ Related criminal charge

Parent or Guardian Last Name _____ First Name _____

Street Address _____ City _____ State _____ Zip Code _____

Sign your name: Civil Rule Act Certification Signed under penalty of perjury. I state:

☒ Defendant said he/she is NOT on active duty in the U.S. armed forces

☐ Defendant is under 17 years of age.

☐ Defendant is a business or corporation.

☐ Defendant said he/she is on active duty as regulated to be on active duty in the U.S. armed forces

Officer Signature [Signature] ORIGINAL

Exhibit B

VERMONT CIVIL VIOLATION, FISH AND WILDLIFE VIOLATION, MUNICIPAL VIOLATION									
☐ COOL License State VT		258W 022656		4106043 VCVC ☐ FAW ☐ Municipal ☒				Form 900 Rev. 1/2021	
Driver License Number 40751805		Hunting/Fishing/Trapping License Number							
Defendant Last or Organization Name ORSON		First WILLIAM		Mid Initial					
Defendant Current Mailing Address 762 NORTH AVE		Home Phone							
City Burlington		State VT		Zip Code 05408		Business Phone			
Date of Birth 05-16-59		☒ Male ☐ Female		☐ Corp/Org ☐ Other		Place of Birth 588		Height 60	
Vehicle or Boat Reg number		State		Year		Make		Color	
Violation Date 09-21-25		Time 1734		Municipality Burlington					
Highway NORTH AVE		Place or Landmark 2-127							
Defendant did then and there commit the following acts in violation of Vermont local law: GRAFFITI AND DEFACEMENT OF PROP									
Alcohol Lev 0. %		Actual Speed MPH		Posted Limit MPH		☐ Accident		☐ Felony	
☐ Commercial Vehicle		☐ Hazardous Material		Municipal Ordinance 21-29		☐ Seat Belt Viol		Violation Code 1-29	
In violation of V.S.A. §		40 C.F.R. §							
PENALTIES	If you REQUEST A HEARING and the State proves the violation, the penalty must be within the penalty range. Commonly, the waiver amount plus \$55.00 in court costs are assessed.		POINTS PENALTY RANGE MINIMUM \$ MAXIMUM \$500 RESTITUTION (FAW) *		If you DO NOT WANT A HEARING, you may pay the waiver amount instead of appearing in court. WAIVER AMOUNT \$400.00				
	I have just and reasonable grounds to believe the person named above committed this violation								
	Delivered To (Defendant's Reg Agent, or Corp. Officer)		Date Served		☒ In Hand ☐ U.S. Mail				
	Officer No. A4058		Officer Name (printed) E. VEH		Officer Signature [Signature]				
Dep. No. 405		Department Name Burlington PD		☐ Revised criminal charge					
Parent or Guardian Last Name		First Name							
Street Address		City		State		Zip Code			
Service members' Civil Relief Act Declaration: Signed under penalty of perjury, I state: ☒ Defendant said he/she is NOT on active duty in the U.S. armed forces. ☐ Defendant is under 17 years of age. ☐ Defendant is a business or corporation. ☐ Defendant said he/she is on active duty or is scheduled to be on active duty in the U.S. armed forces.									
Officer Signature: [Signature]		ORIGINAL							

Exhibit C

**VERMONT CIVIL VIOLATION, FISH AND WILDLIFE
VIOLATION, MUNICIPAL VIOLATION**

☐ COL		Form 300 Rev 10021	
License State: VT		 4106044 VCVC ☐ F&W ☐ Municipal	
Driver License Number: 40931805		Hunting/Fishing/Trapping License Number	
Defendant Last or Organization Name: OETSEN		First Name: WILLIAM	
Defendant's Current Mailing Address: 162 NORTH AVE		Home Phone: -	
City: BURLINGTON		State: VT Zip Code: 05408	
Date of Birth: 05-16-59		Sex: ☒ Male ☐ Female	
Vehicle or Boat Reg number: -		Year: - Make: - Color: - Model: -	
Violation Date: 10-01-23		Time: 1610 Municipality: BURLINGTON	
Highway: NORTH AVE		Place of Offense: 13.7	
Defendant did then and there commit the following acts in violation of Vermont local law:			
GRAFFITI AND DEFACEMENT OF PROP			
Alcohol Law: 0 %	Actual Speed: - MPH	Posted Limit: - MPH	☐ Accident ☐ Fatality ☐ Seat Belt Viol
☐ Commercial Vehicle		☐ Hazardous Material	
In violation of VSA § 21-29		40 C.F.R. § - Violation Code -	
PENALTIES If you REQUEST A HEARING and the State proves the violation, the penalty must be within the penalty range. Commonly, the waiver amount plus \$65.00 in court costs are assessed.	POINTS PENALTY RANGE MINIMUM \$ - MAXIMUM \$ 500 RESTITUTION (FAW) + -		If you DO NOT WANT A HEARING, you may pay the waiver amount instead of appearing in court. WAIVER AMOUNT \$400.00
	I have just and reasonable grounds to believe the person named above committed this violation.		
	Delivered To (Driver's Reg Agent or Corp. Officer) 10-03-2023 Date Served 10-03-2023 In Hand ☒ U.S. Mail ☐		
	Officer Name (Printed) W. H. H. 20 Officer Signature [Signature] Dept. No. 403 Dispatch Name W. H. H. 20 ☐ Based criminal charge		
Parent or Guardian Last Name -		First Name -	
Street Address -		City -	State - Zip Code -
Sentences/penalties: Civil Relief Act Declaration: Signed under penalty of perjury, I state: ☒ Defendant said he/she is NOT on active duty in the U.S. armed forces. ☐ Defendant is under 17 years of age. ☐ Defendant is a business or corporation. ☐ Defendant said he/she is on active duty or is scheduled to be on active duty in the U.S. armed forces.			
Officer Signature [Signature]		ORIGINAL	

Exhibit D



Exhibit E



POLICE DEPARTMENT
CITY OF BURLINGTON

Public Records Request

Pursuant to 1 V.S.A. § 310-320, I, William Oetjen, am requesting the following records from the Burlington Police Department:

- 1) copies of enforcement if graffiti and defacement of property (03/01/2022 - 10/06/2023)
2) citations issued for same

Requested Date: 10/6/23

Please clarify or explain your request if necessary:

Track It #27789

You have the right to appeal a determination that a record is exempt to the agency head, pursuant to 1 VSA § 318. Such an appeal will be decided within 5 business days of the receipt of your appeal. If you are aggrieved by a denial by the agency head, you may then appeal to the superior court pursuant to 1 VSA §319.

If you need assistance please contact the Records Department via phone (802)540-2370 or email recordsgroup@bpdvt.org.

RECORDS USE ONLY

This record is Redacted by JRH on 11/30/23. The reasons for redaction, narrowing, or denial are that releasing these records:

- ☐ Could reasonably be expected to interfere with enforcement proceedings
 - ☐ Would deprive a person of a right to a fair trial or an impartial adjudication
 - ☒ Could reasonably be expected to constitute an unwarranted invasion of personal privacy
 - ☐ Could reasonably be expected to disclose the identity of a confidential source
 - ☐ Would disclose police techniques and procedures, risking circumvention of the law
 - ☐ Could reasonably be expected to endanger the life or physical safety of any individual
- Other:

ANTONIO B. POMERLEAU BUILDING • ONE NORTH AVENUE • BURLINGTON, VT 05401

NOV 29 2023

William Oetjen
762 North Avenue
Burlington, Vermont, 05402
October 6, 2023

Jon Murad
Chief of Police
1 North Avenue
Burlington, Vermont
Re: Public Records Request

Dear Chief Murad:

Pursuant to Vermont Public Records Request 1 VSA Sec 315-320 I hereby request copies of the following:

- (2)
1. Copies of all records regarding enforcement of Burlington Municipal Ordinance 21-29 (Graffiti and Defacement of Property) between March 1, 2022 and October 6, 2023.
 2. Copies of all citations issued pursuant to Municipal Ordinance 21-29 (Graffiti and Defacement of Property) between the dates of March 1st 2022 and October 6, 2023;

I make this request on behalf of myself as a resident of Burlington.

If you believe that I am not entitled to some of these records, please inform me within three business days, as required by 1 V.S.A. 318(a)(2), and inform me of the specific exemption that you believe applies to each record or portion of a record being withheld. If an otherwise public record has a portion that is exempt from disclosure, I request that you redact only the exempt portion and release a copy of the redacted record.

If some or all of my request is denied, please notify me of the person responsible for the denial, and inform me of the appeal procedures.

If there is anything I can do, or if you have any questions, please do not hesitate to contact me at: 802-373-4568. Thank you for your prompt attention to this matter.

Sincerely,


William Oetjen

10/20/23, 9:46 AM

22BU010981: Vandalism - graffiti

Narrative Type *Officer* *Narrative Template*
Summary 387: Murad, J: ☐ *Confidential*

Narrative

Brief noncustodial discussion with William Oetjen re ongoing municipal-code-applicable graffiti issue in NNE. See 21BU009428 as well. See Axon.

<i>Offense Suspect</i>	<i>Offense Victim</i>	<i>IBR Victim-Offender</i>	<i>Bias/Motivation (anti)</i>
<i>V. was LEO</i>	<i>V. was LEO Assignment</i>		<i>Other ORI</i>

LEOKA Narrative

③

10/20/23, 9 44 AM

23BU022656: Ordinance Violation - Other

<i>Narrative Type</i>	<i>Officer</i>	<i>Narrative Template</i>
Report	226: Labrecqu	☐
		<i>Confidential</i>

Narrative

First video was shot on 9/17/23 at 1651 hours - Oetjen UM at N Ave @ 127

Second video is available in Axon under this incident # and was shot on 9/21/2023 at 1734 hours.

Third video is available in Axon under this incident # and was shot on 10/01/23 at 1610 hours.

4

Narrative Type Officer Narrative Template
 Report 368: Yeh, K: 1 ☐ ☐
 Confidential

Narrative

On September 29th, 2023 I was instructed by Lieutenant Henry to investigate a municipal ordinance of a male placing stickers on a street sign at the on/off ramp of Rt 127 at North Ave/North Beach. Officer Costanzi and I responded, canvassed the area and did not locate any stickers affixed to the signs.

I reviewed video (Clip 1) uploaded to Valcour. On the video it shows a male, Oetjen, walking up to a type 1 object markers sign at the intersection of North Ave and RT 12 on/off ramp. Oetjen has a sticker in his hand and walks up to the sign and affixes the sticker to the rear of the sign. On video you cannot see what the sticker says because Oetjen affixes the sticker to the rear of the sign, (facing away from the video). Oetjen is seen putting the sticker on the sign then rubbing his hand against it to affix the gum label to the sign. Per Deputy Chief Labrecque Video 1 was taken on 9/17/23 at 1651 hours.

I reviewed video (Clip 3) uploaded to AXON of Oetjen walking with his dog and placing a white sticker on the rear of a sign on North Ave at the on/off ramp to RT 127. I cannot read what the sticker says in the video however I can see prior to Oetjen placing the sticker, the back of the sign had no stickers. Per Deputy Chief Labrecque video 3 was taken on 10/01/23 at 1610 hours.

I reviewed video (Clip 2) uploaded to AXON of Oetjen walking with his dog and placing a white sticker on the rear of a sign on North Ave at the on/off ramp to RT 127. I cannot read what the sticker says in the video however I can see prior to Oetjen placing the sticker, the back of the sign had no stickers. Per Deputy Chief Labrecque video 2 was taken on 10/01/23 at 1610 hours.

On October 3rd, 2023 at 1525 hours I responded to 762 North Ave to issue William Oetjen municipal violations. Upon arrival I observed Oetjen walking southbound on the sidewalk to his residence. His residence is the last residence just south of the RT 127/ North Ave on/off ramps. Oetjen walked out of his residence and advised he was not in the armed forces. I then issued William Oetjen DOB: three Vermont Municipal Ordinance Violations for the three previous incidents. I then walked to the yield sign at North Ave and the Beltline and observed a sticker on the sign that read " Defend Women's sex-based rights, spaces and sports."

(5) I spoke with who advised he was the individual who observed and took the photos of Oetjen.

Per the City of Burlington Code of Ordinance:

21-29 Graffiti and defacement of property.

(a) Findings and purpose. This section seeks to help prevent the spread of graffiti and defacement of property, public and private. Graffiti and the defacement of property are destructive of the rights and values of property owners. They are aesthetic blights on the entire community. Graffiti and defacement of property are acts of vandalism, detrimental to the city, and are, therefore, public nuisances.

(b) Definitions.

(1) "Graffiti" means any inscription, word, figure, painting or other defacement that is written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed to any surface of public or private property by any graffiti implement, without being authorized to do so by the owner of the property or the owner's duly authorized agent.

(2) "Graffiti implement" means an aerosol paint container, a broad-tipped marker, gum label, paint stick or graffiti stick, etching equipment, brush or any other device capable of scarring or leaving a visible mark on any natural or manmade surface.

(3) "Defacement" means any application or causing the application to any surface of public or private property of paint, varnish, lead, crayon, wax, ink, dye or other substance, or the carving, chiseling, writing, or other such act of any mark, figure or letter on such property without being authorized to do so by the owner of the property or the owner's duly authorized agent.

(c) Prohibited acts. It shall be unlawful for any person to make graffiti or deface any surface of public or private property unless authorized by the owner of the property or the owner's duly authorized agent.

(d) Penalties. A violation of this ordinance is a civil offense and shall be punishable by a fine of five hundred dollars (\$500.00) with a waiver penalty of four hundred dollars (\$400.00). At the discretion of the prosecuting officer or city attorney, this penalty or a part thereof may be waived upon the successful completion of community service related to the elimination of graffiti and defacement.

Per the code of Ordinances the stickers adhesive backing would be a "Graffiti implement" which would be the gum label.

EOR

**VERMONT CIVIL VIOLATION, FISH AND WILDLIFE
VIOLATION, MUNICIPAL VIOLATION**

☐ CDL ☒ 022656 License State VT		 4106042 VCVC ☐ FSW ☐ Municipal ☒		Form 800 Rev. 1/2001
Driver License Number 4106042		Hunting/Fishing/Trapping License Number		
Defendant Last or Organization Name OETSEN First WILLIAM Mid Initial				
Defendant Current Mailing Address 762 NORTH AVE			Home Phone	
City BURLINGTON State VT Zip Code 05408		Business Phone		
Date of Birth 05-16-59		☒ Male ☐ Female	☐ Corp/Org ☐ Other	Height 5'8" Weight 160 Hair BLK Eyes BLU
Vehicle or Boat Reg number: VE		State VT Year 16 Make VE	Color VE Model VE	
Violation Date 04-17-23 Time 1651 Municipality BURLINGTON		Place or Landmark VE-127		
Defendant did then and there commit the following acts in violation of Vermont local law: GRAFFITI AND DESTRUCTION OF PROP				
Alcohol Lev 0. %	Actual Speed MPH	Posted Limit MPH	☐ Accident ☐ Fatality ☐ Seat Belt Viol	
☐ Commercial Vehicle ☐ Hazardous Material		Municipal Ordinance 21-29		
In violation of V.S.A. §		49 C.F.R. §		Violation Code 21-29
If you REQUEST A HEARING and the State proves the violation, the penalty must be within the penalty range. Commonly, the waiver amount plus \$65.00 in court costs are assessed.		If you DO NOT WANT A HEARING, you may pay the waiver amount instead of appearing in court.		
PENALTIES		WAIVER AMOUNT \$400.00		
POINTS		RESTITUTION (F&W)		
PENALTY RANGE		MINIMUM \$		
MAXIMUM \$ 500		RESTITUTION (F&W)		
I have just and reasonable grounds to believe the person named above committed this violation.				
Delivered To Officer Reg. Agent, or Corp. Officer		Date Served 05-03-2023 ☒ In Hand ☐ U.S. Mail		
Officer No. 44358		Officer Name (printed) KYLE		
Date No. 403		Department Name BURLINGTON PD		
Parent or Guardian Last Name		First Name		
Street Address		City	State	Zip Code
Sign members Civil Relief Act Declaration. Signed under penalty of perjury. I state: ☒ Defendant said he/she is NOT on active duty in the U.S. armed forces. ☐ Defendant is under 17 years of age. ☐ Defendant is a business or corporation. ☐ Defendant said he/she is on active duty or is prohibited to be on active duty in the U.S. armed forces.				
Officer Signature: [Signature]				ORIGINAL

**VERMONT CIVIL VIOLATION, FISH AND WILDLIFE
VIOLATION, MUNICIPAL VIOLATION**

☐ COL License State: VT		 4106043 VCVC ☐ F&W ☐ Municipal ☒		Form 500 Rev 1/82	
Driver License Number: 40751805		Hunting/Fishing/Trapping License Number:			
Defendant Last or Organization Name: JOHNSEN First: WILLIAM				Address: 762 NORTH AVE.	
City: Burlington State: VT Zip Code: 05408		Home Phone: _____			
Date of Birth: 05-16-59 ☒ Male ☐ Female ☐ Corp/Org ☐ Other		Height: 5'8" Weight: 160 Hair: BRN Eyes: BLU			
Vehicle or Boat Reg. number: _____ State: _____ Year: _____ Make: _____		Color: _____ Model: _____			
Violation Date: 09-21-25 Time: 1734 Municipality: Burlington		Place or Landmark: NORTH AVE			
Defendant did then and there commit the following acts in violation of Vermont local law:					
GRAFFITI AND DEFACEMENT OF PROP					
Alcohol Lev. 0 %		Actual Speed MPH		☐ Accident ☐ Felony ☐ Seat Belt Viol	
☐ Commercial Vehicle		☐ Hazardous Material		Municipal Ordinance: 21-29	
In violation of V.S.A. § _____		40 C.F.R. § _____		Violation Code: 11-29	
PENALTIES	If you REQUEST A HEARING and the State proves the violation, the penalty must be within the penalty range.		If you DO NOT WANT A HEARING, you may pay the waiver amount instead of appearing in court.		WAIVER AMOUNT: \$400.00
	Minimum \$ _____ Maximum \$ 500 Restitution (FAW) + _____				
	I have just and reasonable grounds to believe the person named above committed this violation.				
	Delivered To (Defendant Reg. Agent, or Corp. Officer): _____ Date Served: 10-03-2025		☒ In Hand ☐ U.S. Mail		
Officer No. 14078		Officer Name (printed): E. YEAH		Officer Signature: 	
Dept. No. 403		Department Name: Burlington PD		☐ Noted criminal charge	
Parent or Guardian Last Name: _____		First Name: _____			
Street Address: _____		City: _____		State: _____ Zip Code: _____	
Serviceperson's Civil Rights Act Declaration: Signed under penalty of perjury, I state: ☒ Defendant said he/she is NOT on active duty in the U.S. armed forces. ☐ Defendant is under 17 years of age. ☐ Defendant is a business or corporation. ☐ Defendant said he/she is on active duty or is scheduled to be on active duty in the U.S. armed forces.					
Officer Signature: 					ORIGINAL

VERMONT CIVIL VIOLATION, FISH AND WILDLIFE
VIOLATION, MUNICIPAL VIOLATION

☐ COL		Form 500 Rev. 02/01																															
License State	138U	4106044																															
VT	022656	VCVC ☐ F&W ☐ Municipal ☒																															
Driver License Number		Hunting/Fishing/Trapping License Number																															
40931805																																	
Defendant Last or Organization Name		First																															
OETSEN		WILLIAM																															
Defendant Current Mailing Address		Home Phone																															
762 NORTH AVE																																	
City	State	Zip Code	Business Phone																														
BURLINGTON	VT	05408																															
Date of Birth	☐ Male ☐ Female	☐ Corp/Org ☐ Other	Place of Birth																														
05-16-59			508 20 020 BCL																														
Vehicle or Boat Reg. number	State	Year	Make																														
			Color																														
Model																																	
Violation Date	Time	Municipality																															
10-01-23	1610	BURLINGTON																															
Highway	Place or Landmark																																
NORTH AVE	127																																
Defendant did then and there commit the following acts in violation of Vermont/Local law:																																	
GRAFFITI AND DEFACEMENT OF PROP																																	
Alcohol Lev.	Actual Speed	Posted Limit	☐ Accident ☐ Fatality ☐ Seat Belt Viol																														
0. %	MPH	MPH																															
☐ Commercial Vehicle		☐ Hazardous Material																															
		Municipal Ordinance																															
		2129																															
In violation of V.S.A. §		48 C.F.R. §																															
		Violation Code																															
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Officer Signature [Signature]		ORIGINAL																															

Attachment 2

KIMBERLEE J. STURTEVANT, ESQ..
ACA, Director of Litigation
HAYLEY I. MCCLENAHAN, ESQ.
Assistant City Attorney
ERIK RAMAKRISHNAN, ESQ.
Assistant City Attorney



149 Church Street
Burlington, VT 05401-8489
Phone: (802) 865-7121
Fax: (802) 865-7123
TTY: (802) 865-7142

CITY OF BURLINGTON, VERMONT
OFFICE OF
THE CITY ATTORNEY
AND
CORPORATION COUNSEL

April 25, 2024

VIA ELECTRONIC & U.S. MAIL

Jared K. Carter, Esq.
Christina N. Neitzey, Esq.
Cornell Law School First Amendment Clinic
Myron Taylor Hall
Ithica, NY 14853

Re: Vermont Judicial Bureau, Municipal Complaint Nos. 4106042, -043, -044

Dear Jared and Christina:

I am writing to respond to your letter dated March 21, 2024. To avoid further burden and expense of judicial intervention, the City is willing to withdraw the above-referenced Municipal Code Violation Complaints if your client will agree to the mutual release attached at the end of this letter.

I want to make clear, however, that the City does not concede the points raised in your letter. Mr. Oetjen was not engaged in protected political speech as the letter suggests. He defaced public and private property in violation of a content-neutral graffiti ordinance. Your letter at page 2 concedes that he placed homemade stickers on the backs of traffic signs and telephone poles and in other locations throughout the City that were not his property. In some cases, the City had to replace traffic signs that he damaged, at a cost to the taxpayer. In a word, this was vandalism, not protected speech.

Regarding the specific legal arguments in your letter, you cited *LaTrieste Restaurant & Cabaret Inc. v. Village of Port Chester* (2d Cir. 1994) 40 F.3d 587. There, the court held that prosecutorial discretion may not be exercised for discriminatory purposes, with a malicious bad-faith intent to harm, or to punish the exercise of constitutional rights. Essentially the same test was

considered by the U.S. Supreme Court in *Wayte v. U.S.* (1985) 470 U.S. 598 (“*Wayte*”), a case also cited in your letter where the Court found no abuse of prosecutorial discretion.

In *Wayte*, the defendant self-reported his violation of a criminal law as a form of protest and was prosecuted along with others who had done similarly. He argued that the government was selectively enforcing the law only against those who had self-reported to punish them for political speech. The Court held that the defendant failed to meet his burden of proof in demonstrating an abuse of prosecutorial discretion. Instead, the Court accepted the government’s explanation that prosecuting only individuals who had sent protest letters was a question of expediency since intent was an element of proof.

Similarly, here, Mr. Oetjen was not ticketed to punish him for his speech. He was ticketed because he was caught, with the assistance of the community, defacing and damaging public and private property.

Your letter also cites *R.A.V. v. St. Paul* (1992) 505 U.S. 377 (“*R.A.V.*”), but the facts of that case are readily distinguishable. In *R.A.V.*, the City of St. Paul had a content-based ordinance that specifically forbade tagging property with racist graffiti. The City of Burlington has no such ordinance. Burlington Code of Ordinances Section 21-29 is content neutral and simply makes it unlawful “for any person to make graffiti or deface any surface of public or private property unless authorized by the owner of the property[.]” Again, at page 2 of your letter, you concede that your client did exactly that.

It is also worth noting that *R.A.V.* has been limited to its facts in subsequent cases, including the following: *Virginia v. Black* (2003) 538 U.S. 343; *Wisconsin v. Mitchell* (1993) 508 U.S. 476; *State v. Talley* (Wash. 1993) 858 P.2d 217; and *State v. Geddes* (Iowa 2023) 998 N.W.2d 166. These cases make clear that, although hate speech may be protected under the First Amendment, doing something that is otherwise illegal as a form of hate speech warrants no constitutional protection.

Please let me know if you would like to discuss these matters further. Otherwise, if your client is amenable to executing the attached release, we will proceed to dismiss the instant cases.

Very truly yours,

/s/ ERIK RAMAKRISHNAN, ESQ.
eramakrishnan@burlingtonvt.gov

Mutual Release

The undersigned parties hereby agree that Vermont Judicial Bureau, Municipal Complaint Nos. 4106042, -043, -044 shall be dismissed with prejudice by the City of Burlington, and the parties shall forever release and discharge one another from claims of any kind arising from or relating to the complaints and the facts and circumstances giving rise thereto.

Signed: _____
Joseph McNeil, Acting City Attorney,
City of Burlington

Signed: _____
William Oetjen

Attachment 3

1-9 General penalty; continuing violations.

(a) Criminal violations. Except as otherwise expressly provided, however, whenever in this Code or in any ordinance of the city any act is prohibited or is made or declared to be unlawful or an offense, or whenever in such Code or ordinance the doing of any act is required or the failure to do any act is declared to be unlawful, where no specific penalty is provided therefor, the violation of any such provision of this Code or any ordinance shall be prosecuted as a criminal offense and shall be punished by a fine not less than fifty dollars (\$50.00) and not exceeding five hundred dollars (\$500.00). Each day any violation of any provision of this Code or any ordinance shall continue shall constitute a separate violation.

The court before which a conviction shall be had shall order any continuing violations to cease, to be removed, or to be abated. A person convicted may also be found liable for any damages sustained by the city or any other person as a direct result of the ordinance violation and may be ordered by the court after hearing to pay restitution as a part of the sentence.

(b) Civil offenses. Selected provisions of the Code of Ordinances have been specifically designated as carrying a civil penalty. Violations of such ordinances shall be enforced as provided by state law and as provided herein. Upon a determination that a civil ordinance violation has occurred, those municipal officials authorized by the city to enforce civil ordinance violations shall issue a "municipal complaint" in the form provided by the court at 24 V.S.A. § 1977. The municipal official issuing the complaint shall appear to represent the city in any contested case before the traffic and municipal ordinance bureau or other forum provided by law. Unless otherwise provided in this Code, the fine for a violation of an ordinance designated as a civil offense shall be not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00). The waiver penalty for purposes of the municipal complaint (civil ticket) shall be fifty dollars (\$50.00) for each offense unless otherwise specifically provided in this Code.

(c) First offense civil, second offense criminal. Selected provisions of the Code of Ordinances have been specifically designated as carrying a civil penalty for a first offense in any six-month period and a criminal penalty for a second and subsequent offense in the same six-month period.

(1) First offense: A first offense by a person during any six-month period shall be deemed a civil ordinance violation and shall be punishable by a fine of from fifty dollars (\$50.00) to five hundred dollars (\$500.00). The waiver fine shall be fifty dollars (\$50.00). Any law enforcement officer may issue a municipal complaint ticket for such offense.

(2) Second and subsequent offenses: A second offense of the same ordinance during a six-month period shall be deemed to be a criminal offense and shall be punishable by a fine from one hundred dollars (\$100.00) to five hundred dollars (\$500.00). Each subsequent offense of the same ordinance shall be deemed to be a criminal offense and shall be punishable by a fine of from two hundred dollars (\$200.00) to five hundred dollars (\$500.00).

(3) Intent of enforcement under section 1-9(c). It is the intent of this subsection to preserve the public health, safety and welfare by prohibiting and punishing repeated violations of these ordinances. To that end, the city attorney's office will, in their discretion and when they deem it appropriate, explore all options available to the city, in addition to prosecution and as alternatives to prosecution, which will achieve the stated intent of this section.

(d) Issuance of ordinance violation ticket. Any law enforcement officer who cites an accused for violation of any city ordinance which is punishable as a criminal offense shall issue a "Notice of Ordinance Violation Ticket," unless instructed by the city attorney, an assistant city attorney or city grand juror to issue a standard district court citation.

The ticket shall be a citation to appear in district court as contemplated by V.R.Cr.P. 3 and shall contain the name of the accused, the ordinance(s) violated, the date and time to appear in district court, and any other information required by law for a valid citation.

The ticket shall also contain a "Notice of Ordinance Violation" section which shall allow and inform the accused of the following:

(1) The option for the accused to waive process and prosecution by paying a waiver fee of between fifty dollars (\$50.00) and two hundred dollars (\$200.00) for each count to the police department within seventy-two (72) hours of issuance.

(2) That upon full and timely payment of the waiver fee the accused shall not be required to appear in court and the citation portion of the ticket shall be null and void.

(3) That if the accused elects not to make full and timely payment of the waiver fee, he or she shall appear in court on the date and time indicated on the ticket for prosecution.

Should the waiver not be exercised and prosecution be had, this subsection in no way alters or pre-empts any fine, penalty or other remedy as provided by this ordinance.

(e) Public nuisances.

(1) Any property within the city found to be maintained in violation of any provisions of this code or which in any other way endangers the health, safety and welfare of the residents of the city is hereby declared to be a public nuisance and may be ordered abated in any manner provided by law.

(2) Because of the effect of such conduct on the whole community, it shall also constitute a public nuisance to do anything declared by this Code to be a civil or criminal offense maliciously and with the intent to intimidate or harass another person because of, or in any manner reasonably related to, associated with, or directed toward, that person's race, color, religion, ancestry, national origin, gender, sexual orientation, gender expression or identity, mental, physical, or sensory disability, or service in the U.S. Armed Forces or the National Guard. As used in this paragraph, the term "person" may refer to a specific person or more generally to any person within a classification of persons who the individual committing the offense intended to intimidate or harass. The City Attorney on behalf of the City or any individual resident of the City aggrieved by a public nuisance as defined in this paragraph may petition the superior court to enjoin the conduct if there is a reasonable likelihood the conduct will be repeated. A prevailing petitioner shall be entitled to recover reasonable attorneys' fees and costs. The respondent shall be entitled to recover reasonable attorneys' fees and costs if the court finds that the action was wholly without merit and brought with a bad faith intent to cause unwarranted annoyance, embarrassment, oppression, or expense.

(Ord. of 9-29-82; Ord. of 12-12-83; Ord. of 9-8-86; Ord. of 6-24-91; Ord. of 1-9-95; Ord. of 6-22-98; Ord. of 9-14-98)

Charter reference—Penalty for violating ordinances, § 50; city council authorized to provide penalties, § 53; liability of persons violating ordinances, § 54.

State law reference—Authority of municipality to define public nuisance and to provide for penalty for violation of any ordinance, 24 V.S.A. § 2291(14) and (15).

21-29 Graffiti and defacement of property.

(a) Findings and purpose. This section seeks to help prevent the spread of graffiti and defacement of property, public and private. Graffiti and the defacement of property are destructive of the rights and values of property owners. They are aesthetic blights on the entire community. Graffiti and defacement of property are acts of vandalism, detrimental to the city, and are, therefore, public nuisances.

(b) Definitions.

(1) "Graffiti" means any inscription, word, figure, painting or other defacement that is written, marked, etched, scratched, sprayed, drawn, painted, or engraved on or otherwise affixed to any surface of public or private property by any graffiti implement, without being authorized to do so by the owner of the property or the owner's duly authorized agent.

(2) "Graffiti implement" means an aerosol paint container, a broad-tipped marker, gum label, paint stick or graffiti stick, etching equipment, brush or any other device capable of scarring or leaving a visible mark on any natural or manmade surface.

(3) "Defacement" means any application or causing the application to any surface of public or private property of paint, varnish, lead, crayon, wax, ink, dye or other substance, or the carving, chiseling, writing, or other such act of any mark, figure or letter on such property without being authorized to do so by the owner of the property or the owner's duly authorized agent.

(c) Prohibited acts. It shall be unlawful for any person to make graffiti or deface any surface of public or private property unless authorized by the owner of the property or the owner's duly authorized agent.

(d) Penalties. A violation of this ordinance is a civil offense and shall be punishable by a fine of five hundred dollars (\$500.00) with a waiver penalty of four hundred dollars (\$400.00). At the discretion of the prosecuting officer or city attorney, this penalty or a part thereof may be waived upon the successful completion of community service related to the elimination of graffiti and defacement.

(e) To encourage and facilitate enforcement, the city shall maintain and advertise an electronic mail address or similar electronic means by which members of the public may provide photographs, video footage, or information to the police department about violations of this section and the identities of responsible parties. Such system shall entail direct electronic communication with the police

department and not the posting of information online and readily available to the public.

August 2, 2024

Sent Via Email:

Erik Ramakrishnan
Assistant City Attorney
City of Burlington
eramakrishnan@burlingtonvt.gov

Re: Request for comment on proposed ordinance

Attorney Ramakrishnan:

The ACLU Foundation of Vermont (ACLU-VT) has received your August 1, 2024, request for feedback regarding the City's proposed changes to its Code of Ordinances, seeking to address code violations committed with the intent to intimidate or harass on the basis of a suspect classification. We appreciate the City's outreach and are grateful for the opportunity to review the draft changes prior to the Ordinance Committee taking formal action. Although the ACLU-VT is sympathetic to the inclusive vision motivating the proposed ordinance changes, we believe the draft amendments to Section 1-9 raise, at a minimum, several serious and difficult legal concerns. Moreover, the proposed private enforcement mechanism risks undermining the very sense of community the Ordinance Committee seeks to protect. We therefore urge the City and the Ordinance Committee to reconsider the proposed changes.

We understand that the Ordinance Committee plans to consider these changes this coming Monday; with that short deadline in mind, we cannot provide a comprehensive analysis of the proposed changes. However, our initial review suggests that the proposed changes raise a number of legal and constitutional concerns or, at a minimum, present challenging and thorny questions ripe for legal challenge. Specifically, we have the following reservations:

- *The proposed changes may be motivated by opposition to a particular message.* Although the changes to the ordinance are drafted as content-neutral, it appears that the motivation for the change was to discourage a particular stickering campaign because of its content. As the City knows, it "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972). Particularly given this backdrop, the proposed changes raise concerns regarding both First Amendment retaliation and future selective enforcement. Likewise, regardless of whether the City moves forward with a dedicated reporting line for



PO Box 277
Montpelier, VT 05601
(802) 223-6304
acluvt.org

graffiti complaints, the First Amendment requires that any ultimate enforcement be viewpoint- and content-neutral.

- *The proposed changes are likely unconstitutional as applied to expressive conduct or speech.* In its letter, the City relies on court cases approving enhanced sanctions for prohibited conduct undertaken with a particular motive. Although the First Amendment may tolerate enhanced penalties for hate crimes, see *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), it typically protects individuals' right to hate speech, see *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023). Accordingly, the proposed changes raise significant First Amendment concerns when applied to expressive activities like stickering or graffiti—which may sometimes occur on private property, but more often take place in public space or on surfaces where expression has at least been historically tolerated. In short, while a hate-motivation enhancement could be permissible for some ordinance violations, we have serious questions about whether these changes could be lawfully applied to the conduct sparking this proposal.
- *The proposed changes may be unconstitutionally vague.* “A [law] can be impermissibly vague for two independent reasons: First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000) (citing *Chicago v. Morales*, 527 U.S. 41, 56–57 (1999)). The proposed changes likely do both. First, they provide insufficient notice of what conduct the ordinance now proscribes. It is unclear what it means to “do anything declared . . . to be a civil or criminal offense maliciously,” or to act “in any manner reasonably related to, associated with, or directed toward” any of the characteristics listed. And under the second rationale, this lack of clarity coupled with the delegation of its enforcement to the public creates the risk of arbitrary enforcement by both the City and private residents.

- *The proposed changes problematically expand the definition of a public nuisance.* Although the City has the authority to define a public nuisance, *see* 24 V.S.A. § 2291(14), the parameters of that definition are not boundless. Rather, a public nuisance requires “some interference with a public right” that is “common to all members of the general public.” *Hagan v. City of Barre*, No. 320-5-09 Wncv (Vt. Super. Ct. June 29, 2009) (quoting Restatement (Second) of Torts, § 821B, cmt g) (attached). Unlike an *individual* right—like the right each person has not to be assaulted or harassed—a *public* right “is the right to a public good, such as an indivisible resource shared by the public at large”—“like air, water, or public rights of way.” *Id.* (quoting *State v. Lead Indus. Ass’n Inc.*, 951 A.2d 428, 448 (R.I. 2008) (cleaned up)). The proposed changes risk impermissibly subsuming and conflating the two.

In addition to the legal issues above, we have concerns with the proposal to allow Burlington residents to initiate private enforcement actions against their neighbors—particularly for their perceived speech through expressive activities like stickering or graffiti. As the City knows, “[t]he First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed,” *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992) (internal citations and quotations omitted); that prohibition remains regardless of how the City seeks to enforce its own policies. But even if private enforcement of an ordinance somehow absolved the City of its First Amendment obligations—and it does not—a private right of action for public nuisances as defined here strikes us as misguided. Allowing “any individual resident of the City” to initiate court proceedings against another based on their perception that an act was “because of, or in any manner reasonably related to, associated with, or directed toward” someone else’s protected characteristics risks weaponizing public ordinances into instruments of private conflict, wielded primarily by those of means and privilege against more vulnerable community members.

That risk is especially acute for any ordinance touching on expression or speech, like stickering or graffiti: particularly where residents disagree vehemently about challenging and divisive topics—whether about race and policing; Israel and Gaza; gender and the family; or any other topic that elicits strong reactions on all sides—it is easy to imagine a private

enforcement mechanism transferring contestation from the public square (where it belongs) to the courts (where it does not). We understand that the provision is designed to target the kind of act that, as described in your cover letter, “harms the community.” But—while no-one would equate the Committee’s motivation with Texas’s in enacting its notorious SB8—in both cases, encouraging such private resident-vs-resident enforcement mechanisms can erode the very community fabric the Committee seeks to preserve.

Instead, we urge the City to encourage its residents to respond to divisive or even hateful speech as they have always done: with more speech of their own. Burlington has a long and proud tradition of residents robustly engaging one another through protected speech—even speech that is hateful or hurtful. We strongly urge the Committee to honor that tradition by allowing residents to fully express their views without risk of penalty or retribution, and to reject any ordinance change that risks chilling uninhibited expression.

ACLU-VT appreciates the opportunity to weigh in on this important issue. Thank you again for contacting us and for soliciting our views.

Sincerely,



Harrison Stark
Senior Staff Attorney



Hillary Rich
Staff Attorney



Lia Ernst
Legal Director

STATE OF VERMONT
WASHINGTON COUNTY

FILED

2009 JUN 29 P 1:17

CHRISTOPHER HAGAN
Plaintiff

v.

CITY OF BARRE
Defendant

SUPERIOR COURT
WASHINGTON COUNTY
Docket No. 320-5-09 Wncv

RULING ON MOTION FOR PRELIMINARY INJUNCTION

This case involves the power of a Vermont municipality to restrict where a person who has been convicted of a sex offense may live. An ordinance enacted by the City of Barre restricts such people from moving into any area within 1,000 feet of a public or private school, and of any park, playground, recreation center, beach, pool, gym, sports field, or sports facility owned or operated by the City. Barre Ordinances § 11-36.¹

Although other cases around the country addressing similar restrictions have raised various constitutional challenges, only two issues are presented by the plaintiff in this case: (1) does the municipality, as opposed to the state, have the legal authority to create such restrictions by virtue of its general powers, and (2) if not, may it nonetheless do so pursuant to its express power to regulate public nuisances.

¹ Although the City's counsel asserted at the hearing that the ordinance only bars people who are *currently* listed on the registry, the court finds no such restriction in its language. It states that anyone who meets the definition of a "sex offender" as defined in 13 V.S.A. § 5401(10), except someone with an existing conviction who was already living there when the ordinance was passed, is barred from living in the exclusion area. Barre Ordinances, § 11-36 (a)(1). That statute defines "sex offender" as anyone who has been convicted of certain crimes: the definition is not limited to the time period during which a person is required to register. Thus, although the registration requirement can end after ten years for certain convictions – 13 V.S.A. § 5407(e) – the ordinance appears to bar anyone who has ever had a listed conviction from living in the relevant areas of Barre City for the rest of their lives.

Plaintiff Christopher Hagan, who currently lives within the restricted area of Barre City ("Barre" or "the City"), seeks a preliminary injunction barring the City from enforcing the restriction against him. An evidentiary hearing was held on that motion on June 11. The City has agreed not to enforce the ordinance until July 7 or this court's ruling, whichever first occurs. Although the court proposed to the parties that the preliminary hearing be merged with the final hearing given the identical nature of the issues, the City objected. Thus, the court's ruling today addresses only the motion for a preliminary injunction and does not dispose of the entire case.

Findings of Fact

The witnesses at the hearing were Mr. and Mrs. Hagan, a Field Representative from the Vermont State Housing Authority, the District Director for the Department of Children & Families' Economic Services Division, and the City Manager from Barre. Based upon the testimony and exhibits presented at the hearing, the court finds the following facts established by a preponderance of the evidence.

Hagan met his wife Amy in 2006, and they married in 2007. They have two children, a ten-year-old and a one-year-old. Hagan has a conviction from 2000 or 2001 for lewd and lascivious behavior that occurred in 1998 or 1999. As a result of that conviction, he is currently required to register with the state whenever he changes his residence, as well as reregistering each year even if he resides in the same location. At the hearing, no details were provided regarding the nature of the underlying offense.

According to Hagan, he was originally placed on probation with something under three months to serve, but later was found in violation of probation for failing to find employment. That violation led to him serving the balance of his sentence and

undergoing the sex offender education program while incarcerated. He completed the program and was released in January of 2005. He then left the state to attend college in Iowa, and returned to Vermont in 2006. He believes that the Department of Corrections has assessed him as having a low risk to re-offend, but no evidence was presented from the Department of Corrections to confirm that.

In February 2009, Hagan and his family were living in Richmond in a trailer they rented from its owner. They were receiving Section 8 housing benefits. That month, they received notice that the owner of the trailer park was evicting them because the trailer owner had not paid the lot rent (despite the fact that the Hagans had been dutifully paying their rent on the trailer). They searched for a new residence, and found their current apartment in Barre City. They had to find an apartment suitable for Section 8 benefits – which required that it fall below a certain rent level including utilities, and could be satisfactorily inspected by Section 8 staff. They also desired one that would allow them to have their dog and cats. They searched quite a bit before finding this apartment.

After seeing the apartment, Hagan told the landlord of his sex offense and his need to register with the state. Hagan explained that because of the nature of his offense, he was not listed on the publicly accessible part of the sex offender registry, only the part that can be accessed by state officials and other specified entities such as certain types of employers. Apparently the landlord and Hagan therefore believed that the Barre ordinance was inapplicable to Hagan. Hagan and his wife signed the Section 8 paperwork, although apparently Hagan did not sign the actual lease with the landlord. His wife did sign the lease that day. It is unclear precisely when all of this occurred, although it appears to have been on or around April 1.

Hagan then went directly to the Department of Public Safety to register the new address, and was told there that his conviction would trigger the ordinance. He was directed to the Barre City Chief of Police for more information, and went to talk to him. The Chief explained that the apartment was within the restricted area covered by the ordinance.

The Hagans then called Senator Bernie Sanders' office and were referred back to the Barre City offices. The mayor returned their call, and suggested they come to the City Council hearing a few days later to raise the issue. Mr. Hagan did so. At the council meeting on April 7, he explained his situation and asked the Council to consider making an exception, or amending the ordinance in some way, to allow his family to live in the apartment. The Council apparently told him that it would take ninety days to amend the ordinance, and that he would have to leave within fifteen days of receiving a written notice to do so.² About two weeks later Hagan received the notice, which threatens fines of \$500 a day for every day he remains. The City has stayed enforcement of the notice while this case is pending.

It is unclear precisely when the Hagans actually moved into the apartment in Barre. However, Hagan concedes that it was after he had notice that the apartment was in the restricted zone. The Hagans felt they had no options, as the trailer they were living in was about to be removed from the lot by the owners of the trailer park.

The Hagans are both currently unemployed. Amy Hagan is not seeking work, as she is the children's primary caregiver. Christopher Hagan is actively seeking work. He has had a number of restaurant jobs in the past, most recently in March or April. They

² The record does not make clear whether the City is in fact considering some sort of amendment to the ordinance that might allow for individual appeals or waivers.

currently have no income and no savings, and are living on state benefits including food stamps, Section 8, Medicaid, and Reach-up benefits. They have no funds for a security deposit on another apartment, no vehicle, and no funds to pay a mover.

A Field Worker for the Section 8 program, Reenie Sargent, testified for Hagan. She explained that to obtain Section 8 benefits, families must meet low-income requirements and the apartments must be at a low enough rent to qualify. Sargent worked with the Hagans to find an apartment, and inspected this one to make sure it met Section 8 standards. She described it as a very nice apartment, much nicer than they are likely to find elsewhere for the price. The landlord agreed to lower the rent so that the Hagans could qualify for the apartment. Sargent met with the Hagans and the landlord the day they signed the paperwork. She has a copy of their lease in her file – which she did not bring to court – but was not sure whether only Mrs. Hagan or both of the Hagans signed it.

Although Sargent was aware of the Barre ordinance, because of the distance of the apartment from any school it did not occur to her that the ordinance was an issue.³ When the Hagans contacted her about the problem, Mr. Hagan was suggesting that he move out and let the rest of the family stay while he tried to convince the City to make an exception for him. Sargent and her supervisor discussed the matter, and Sargent advised Hagan to stay because if he left he would have to reapply for Section 8 and would be denied under federal law because of his criminal record.⁴ While he would be able to appeal that and get a hearing, there would be no guarantee that he would succeed at the

³ It is not clear from the record why this apartment is within the exclusion zone.

⁴ Why he qualified initially, but would not qualify later, was never explained. While it may be because there are different standards for families as opposed to individuals, there is no evidence about that in the record.

hearing. In addition, the waiting list for Section 8 is currently closed and not expected to reopen until the end of the summer. Even if an applicant gets approved, the waiting list is currently three to five years.

If the entire family moves out of the apartment, their Section 8 benefits would remain in place if they could find another qualified apartment. However, Sargent predicted that it would be very difficult for the Hagans to immediately find another apartment in the approved price range.

If the Hagans moved out now because of the enforcement of the City ordinance against them, thus breaking their lease, Vermont State Housing rules would likely require a hearing to determine whether their Section 8 benefits would be terminated as a result. Although Sargent "would hope" that the reasons for their move would lead to continuation of the Hagans' benefits, she could not say what the hearing officer would do. She also noted that there would be an issue with regard to whether the Hagans would get their security deposit back or not.

Central Vermont Community Action can provide people with assistance in making deposits on new apartments, getting their belongings moved, and finding new housing. The same is true of the Department of Children and Families. The City of Barre also has funds administered by the police department that allow for grants to assist families (including a \$40,000 fund created by a donation to the City to help low-income people). However, the Hagans would have to apply for the funds and go through a process to determine whether they would receive them. Thus, neither the DCF District Director nor the City Manager could say with certainty that the Hagans would receive such funds.

Conclusions of Law

Hagan challenges the ordinance on two grounds. First, he argues that local municipalities in Vermont lack any general implied power to enact such ordinances. Second, he argues that the ordinance is not a proper exercise of the municipal power to regulate public nuisances. He seeks a preliminary injunction on the ground that enforcement of the ordinance will require him to become homeless.

Barre contests both claims, and in addition argues that Hagan should be denied preliminary injunctive relief because he chose to move into his residence knowing of the restriction. Barre also argues that Hagan has failed to show that he will risk any irreparable harm if he is forced to move.

The Criteria for Preliminary Relief

The current issue before the court is whether Hagan is entitled to a preliminary, as opposed to a permanent, injunction, pursuant to V.R.C.P. 65. Although the Vermont courts have not established clear standards governing the issuance of preliminary injunctions, federal law is instructive because of the similarity of the state and federal rules. See Drumheller v. Drumheller, 2009 VT 23, ¶ 29, __ Vt. __ (looking to federal law for interpretation of Vermont rules).

Hagan asserts that to obtain a preliminary injunction here, Hagan must show that “irreparable harm” will occur without an injunction, and show either “(a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant’s favor.” County of Nassau v. Leavitt, 524 F.3d 408, 414 (2d Cir. 2008)(citation

omitted). Although there is room for argument over whether these are the precise standards a Vermont court should apply,⁵ Barre does not dispute them. Thus, the court will proceed under these standards for today's purposes. However, as the Leavitt case points out, because in this case "the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard." Id. (quoting Wright v. Giuliani, 230 F.3d 543, 547 (2d Cir.2000)).

"To satisfy the irreparable harm requirement, [p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm." Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir.2007) (internal quotation marks omitted). Hagan argues that he will suffer irreparable harm if he (with or without his family) is forced to move because he has nowhere to go, no funds to obtain a new apartment, no vehicle to move his belongings, and will likely lose his or the family's Section 8 benefits at least for some period of time.

⁵ For example, In re J.G., 160 Vt. 250, 255 n. 2 (1993), suggests in dicta that courts should also evaluate the potential harm to other parties and the public interest. It is also unclear whether the standards in Vermont are different depending upon whether the injunction sought is "mandatory" (ordering someone to do something) or "prohibitory" (ordering someone to stop doing something). See, Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, 136 Vt. 213, 219 (1978)(questioning in dicta whether there is any difference). See Bosch v. Lamattina, 2008 WL 4820247, * 4 (E.D.N.Y. 2008) (explaining difference); Compare, O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F. 3d 973, 976-80 (10th Cir. 2004), with United Food and Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority, 163 F. 3d 341, 348 (6th Cir. 1998) (rejecting distinction). The City does not claim, however, that the requested injunction would be anything other than prohibitory, so the court need not resolve that issue today.

Numerous cases from other jurisdictions conclude that being made homeless and/or losing housing benefits (such as Section 8) constitutes irreparable harm.⁶ *See, e.g., Watson v. Federal Emergency Management Agency*, 437 F. Supp. 2d 638, 648-49 (S.D. Tex.) (“likelihood of eviction and all of the problems associated with homelessness” constitutes irreparable harm), *vacated on other grounds*, 2006 WL3420613 (5th Cir. Sept. 6, 2006); *McNeill v. New York City Housing Authority*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989) (“The threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable injury, and satisfies the first prong of the test for preliminary injunctive relief.”); *Baumgarten v. County of Suffolk*, 2007 WL 1490482, *5 (E.D.N.Y. May 15, 2007) (the prospect of homelessness constitutes irreparable harm); *Estevez v. Cosmopolitan Associates LLC*, 2005 WL 3164146 *3 (E.D.N.Y. Nov. 28, 2005) (“Not only will plaintiffs lose their housing, they may also lose permanently the benefits conferred by the enhanced vouchers, which are available to eligible tenants only so long as they remain in the same housing. Plaintiffs will suffer actual and imminent harm if injunctive relief is not granted....”); *Edwards v. Habib*, 366 F.2d 628, 630 (D.C. Cir. 1965) (Wright, J., concurring) (“Certainly being evicted into the street is irreparable damage. Respondent suggests that petitioner can raise the money ... from charitable institutions. I think petitioner need not be relegated to charitable institutions as long as a court sits to enforce her rights. ... As to where the public interest lies, I suggest that the public interest lies in keeping [th]is family housed, at least until the courts can determine petitioner's rights.”).

⁶ Some of the cases cited by Hagan for this proposition are not on point, because they involve foreclosures and evictions from long-time residences rather than short-term rentals. *See, e.g., Bosch*, 2008 WL 4820247 at *1. The court relies only on those cases discussing eviction from rental property.

The City does not argue with this proposition, but does argue that the facts do not support a conclusion that Hagan risks homelessness or the loss of Section 8 benefits. While the City is correct that there is evidence of various potential sources of funds for a new apartment, and of the possibility that Hagan might appeal the termination of his Section 8 benefits if he moved alone, the court concludes that the availability of such benefits is speculative rather than certain. *Accord*, Watson, 437 F. Supp. 2d at 648-49 (rejecting argument that other sources of assistance are available, because “the assistance is not automatic” and “any potential relief remains speculative”).

The evidence establishes a likelihood that if Hagan moves alone, he will lose Section 8 assistance as well as having no funds and nowhere to go, and that if the whole family moves out they risk losing Section 8 benefits and may or may not receive assistance in finding and paying for a new apartment. The speculative nature of the assistance, and the relatively certain nature of the detriment, leads to the conclusion that they face imminent and actual homelessness for at least some period of time. As other courts have found, this court concludes that forced homelessness and the likely loss of housing benefits under Section 8 would meet the legal test for irreparable harm.

To determine the next element necessary for the issuance of an injunction here, the court must proceed to evaluate Hagan’s likelihood of success on the merits of his claims.⁷ First, however, the court will address the “clean hands” doctrine.

⁷ As noted above, there is dictum in one Vermont case suggesting that the court should also weigh the potential harm to others if an injunction is issued, as well as “the public interest.” In re J.G., 160 Vt. at 255 n. 2. Here, the City has not asserted that these issues must be considered, and presented no evidence for the court to weigh in this regard. Although the point of the ordinance is presumably to give parents some sense of security, and to protect children from sexual assault, there is nothing in the record from which the court can conclude that the ordinance is actually likely to do so. The only thing in the record on that issue, in fact, suggests the opposite. *See*, 2009 Act No. 1, An Act Relating to Improving Vermont’s Sexual Abuse Response System, § 51 (noting the Legislature’s concern that exclusion ordinances such as this “could have a negative impact on public safety” rather than a positive one, and urging municipalities to “ensure they are

The "Clean Hands" Doctrine

The City argues that any injunctive relief should be barred here by what is referred to as the "clean hands" doctrine. Savage v. Walker, 2009 VT 8, ¶ 10, __ Vt. __. The adage is that one who seeks equity must do equity. In other words, "where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue." 27A Am. Jur. 2d Equity § 98 (West, Westlaw through May 2009). A party will be barred from equitable relief if his claim is "tainted with deceit and impurity of motive." Id. The doctrine bars relief to those who act with "fraud or deceit." Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815 (1945). The doctrine "is not an automatic or absolute bar to relief" but is one to be applied in the discretion of the court. 11A Charles Alan Wright, Arthur Miller, and Mary Kay Kane, Federal Practice and Procedure: Civ. 2d § 2946 (West, Westlaw through 2009 update).

The City's position is that Hagan moved into his apartment after he had learned that the exclusion ordinance barred him from residing there. While true, the court does not find this to be the sort of unfair or dishonest conduct that the clean hands doctrine aims to bar. In fact, Hagan did nothing dishonest. To the contrary, his conduct was remarkably straightforward: he told the landlord about his offense and his placement on the registry, and he went to the Chief of Police and then to the City Council to explain his situation and request reconsideration of the restriction. He originally intended not to

receiving accurate and substantive information about the lack of efficacy of such laws"). See also, Nicholson v. Connecticut Half-Way House, Inc., 218 A.2d 383, 385-86 (Conn. 1966)(noting that although the neighbors in that case objected to "the presence in the neighborhood of persons with a demonstrated capacity for criminal activity.... This present fear of what may happen in the future, although genuinely felt, rests completely on supposition."). Thus, the court has no appropriate basis on which to find that there will be harm to others, or to the public interest, if the City is enjoined from enforcing the ordinance against Hagan.

move in with his wife and children until the issue was resolved, but was advised by the Vermont State Housing Authority that he *should* move in. Under these circumstances, the court does not find that his conduct was deceitful, fraudulent or dishonest. The clean hands doctrine does not bar Hagan's request for relief.⁸ The court will therefore proceed to address the substantive issues in this case.

Municipal Powers in Vermont

The parties in this case are in sharp disagreement over what legal doctrine applies to Barre's municipal powers. Plaintiff cites Dillon's Rule, a doctrine of narrow powers; Defendant cites Home Rule, a doctrine of broad local powers.⁹

Dillon's Rule, which is named for a rather ancient treatise by an Iowa judge named Dillon,¹⁰ is as follows: "absent a home rule constitutional provision, a municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. 484, 485-86 (1977). *See also*, Hunters, Anglers and Trappers Ass'n of Vt. v. Winooski Valley Park Dist., 2006 VT 82, ¶ 7, 181 Vt. 12. "Non-home-rule municipalities have no inherent powers." Columbia Crossing LLC v. City of Columbia, Illinois, 2008 WL 2875251 *3 (S.D. Ill. 2008).

⁸ In addition, there is authority in other jurisdictions for the proposition that "where the purpose of a suit is to test the validity of an order of an administrative agency, the unclean hands doctrine does not apply." City of El Paso v. State Line, Inc., 570 S.W.2d 409, 414 (Tex. Civ. App. 1978).

⁹ For a summary of the two doctrines, see Columbia Crossing LLC v. City of Columbia, Illinois, 2008 WL 2875251 at *3-4 (S.D. Ill. 2008).

¹⁰ "'Dillon's Rule' originated with John F. Dillon, former Chief Justice of the Supreme Court of Iowa and former circuit judge for The United States Eighth Judicial Circuit." Williams v. Town of Hilton Head Island, 429 S.E.2d 802, 804 n. 1 (S.C. 1993).

Home Rule is at the other end of the spectrum. “[H]ome rule authority reverses Dillon’s Rule.” 2 McQuillin Mun. Corp. § 4.11 (3rd Ed.) (West, Westlaw updated through Oct. 2008). Under Home Rule, “a city is free to write its own charter and define for itself what functions and powers, consistent with statutes and the constitution, its agencies will have.” Vermont Dep’t of Public Service v. Massachusetts Municipal Wholesale Electric Co., 151 Vt. 73, 80 (1988). Home rule “generally refers to a state constitutional provision or other legislative action that grants local governments the full power of self-government not inconsistent with the constitution or laws of the state.” Terrence S. Welsh, Containing Urban Sprawl: is Reinvigoration of Home Rule the Answer?, 9 Vt. Env. L. Jrl.131, 136 (Winter 2008).¹¹ The Home Rule movement “gathered steam in 1875” and was a “response to the effects of Dillon’s Rule on interpreting the scope of municipal authority...” Id. It led to states “enact[ing] constitutional amendments to protect the autonomy of local governments.” Id.

No such provision, however, exists in the Vermont Constitution. Vermont has “consistently adhered to the so-called Dillon’s rule...” Hunters, Anglers and Trappers, 2006 VT 82, ¶ 7 (citation omitted). This doctrine has been established in our case law for many years. See, Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. at 485-86; Welch v. Town of Ludlow, 136 Vt. 83, 87 (1978) (“In Vermont, where we have no home rule constitutional provision, a town has only those powers specifically authorized by the Legislature.”); In re Northeast Washington Co. Community Health Center, 148 Vt. 113, 114 (1987) (“In Vermont, there is no home rule constitutional provision and towns have

¹¹ There can be gradations of Home Rule, making it something other than an all-or-nothing proposition. For a discussion of its history and varying interpretations, see Richardson, Gough & Puentes, Is Home Rule the Answer? Clarifying the Influence of Dillon’s Rule on Growth Management (Brookings Inst., Jan. 2003) (available at http://www.brookings.edu/reports/2003/01metropolitanpolicy_richardson.aspx) (last visited June 25, 2009). However, for purposes of this case, the court finds no need to delve into fine distinctions.

only those taxing powers specifically authorized by the Legislature.”); Central Vermont Quality Services, Inc. v. City of Rutland, 780 F. Supp. 218, 220 (D. Vt. 1991)(“Vermont is not a ‘home rule’ state.”).

The City concedes that there is no statewide “Home Rule” in the Vermont Constitution. However, the City argues that by adopting Section 104 of the City’s charter, the Legislature has expressly granted Barre “Home Rule.”

City charters in Vermont must be approved by the Legislature. “The charters that govern all of Vermont’s municipal subdivisions require the approval of the General Assembly in order to take effect.” Special Preface, 24 V.S.A. app. at xix (2008); 17 V.S.A. § 2645(d) (amendments to charters “shall become effective upon affirmative enactment of the proposal, either as proposed or as amended by the general assembly.”). Once adopted, they “have the force of state law...” Special Preface, 24 V.S.A. app. at xix.¹²

The specific charter language to which Barre points is as follows:

The city shall have all the powers granted to towns and municipal corporations by the constitution and laws of this state together with all the implied powers necessary to carry into execution all the powers granted; *it may enact ordinances not inconsistent with the constitution and laws of the State of Vermont or with this charter...*

24 V.S.A. app. § 104(a) (City of Barre Charter)(emphasis added).

¹² Although the language of the Vermont Supreme Court opinions suggests that Home Rule can be granted only by a constitution, this appears to be incorrect. “Home rule arises in two different forms: as a constitutional guarantee to local government or as a statutory grant or delegation of authority.” Jill Welch, Home Rule Doctrine and State Preemption – The Iowa Supreme Court Resurrects Dillon’s Rule and Blurs the Line Between Implied Preemption and Inconsistency, 30 Rutgers L. J. 1548, 1552 (1999). The court thus assumes for purposes of this decision that the Vermont Legislature has the power to grant Home Rule by statute (or, as here, by approval of a city’s charter).

The City is correct that the highlighted language is arguably consistent with the idea of "Home Rule." As one court has explained, "[u]nder 'Home Rule,' there is a presumption that the state intends to bestow its powers on a municipality so long as the proposed municipal action is 'not inconsistent with the Constitution and general law of the state.'" City of Charleston v. Government Employees Ins. Co., 869 F. Supp. 378, 383 (D.S.C. 1994), vacated, amended, remanded to state court (1994). The phrasing noted in Charleston is identical to that in the Barre Charter: "*not inconsistent with the constitution and laws of the State of Vermont...*" The question is whether such language alone was intended by the Legislature to create Home Rule in Barre.

Barre does not explain when the language at issue was placed in the Charter. As noted in the Special Preface to the appendix that lists Vermont charters, it was apparently not until 1995 that municipal charters began to be formally published as part of the appendix to Title 24. Even then, it apparently took a "period of years" to begin compiling a complete set of charters. Special Preface, 24 V.S.A. app. at xix. The appendix thus does not have a complete history of all charters and their amendments, and does not indicate when the language at issue here became a part of the Barre Charter. The court cannot be certain, then, whether it has been part of the Charter for many years or was added recently.

If the language has been part of the charter for many years, then it has existed over a period when our Supreme Court has continually stated that there is no Home Rule in Vermont. Under that scenario, the repeated declarations by the highest court in this state that no such powers exist here would be sufficient evidence that the language does not mean what Barre claims.

If, instead, the language in Section 104 was added recently, the question is whether it was intended to overturn years of settled precedent in Vermont. It does appear that the Legislature *could* choose to grant Home Rule to some municipalities and not others. There is “no requirement that all laws governing the operation of municipal corporations be uniform statewide.” Smith v. Town of St. Johnsbury, 150 Vt. 351, 357 (1988) (noting that charter provisions vary). However, there are several reasons that lead this court to conclude that it was not the Legislature’s intent to grant Barre special powers of Home Rule not granted to all municipalities.

First, the language in Barre’s charter does not contain the expansive language that would make clear that new powers were being granted to the City. In Charleston, for example, the legislature passed a statute beginning with the same general language as used in Barre (“regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State,”), but adding that it granted to each municipality in the state the power to enact laws:

including the exercise of powers in relation to roads, streets, markets, law enforcement, health and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order and good government in it...

City of Charleston, 869 F. Supp at 383 (quoting § 5-7-30 of the South Carolina Code).

The intent of the legislature in South Carolina was clear because of the express delegation of such broad powers.

Other states have often made their intentions clear by expressly using the words “Home Rule” when taking such a significant step in altering the traditional balance of state and local powers. For example, when South Carolina created Home Rule, it did so

by enacting the "Home Rule Act," a title that left little question about its purpose. Williams v. Town of Hilton Head Island, 429 S.E.2d 802, 805 (S.C. 1993). *See also, e.g.*, Colo. Const. art. XX § 6 (expressly entitled "Home Rule for Cities and Towns"); N.H. Rev. Stat. Ann. § 49-B:1 ("It is the purpose of this chapter to implement the home rule powers..."); N.Y. Const. art. IX, § 2 (referring in title to "home rule powers of local governments").

Second, Barre offers no explanation whatsoever as to why the Vermont Legislature would have singled out Barre as deserving of special consideration not granted to all municipalities in our state. Although counsel for Barre represented at the hearing that there are some other towns or cities in Vermont with similar language in their charters, it is undisputed that there is no such provision applicable to all municipalities in the state. There is nothing before the court to suggest why the Legislature would have intended special treatment for only a few localities.

Third, Barre has offered not one whit of legislative history to suggest that the legislature ever discussed making such a significant change to Vermont law, or that Barre made any proposal to the Legislature asking for Home Rule powers. Given that the case law has been clear for years that Vermont has no "Home Rule," the court finds it inconceivable that the Legislature would have made such a significant change without noting that it was doing so, engaging in public discourse over the issue, or otherwise leaving some record of its intent. Barre cites no evidence of such intent, and the charter itself reflects no Reporter's Notes or other explanation suggesting that such a significant change to state law was intended.

Finally, to the extent that the purpose of the language in the charter is at all ambiguous, it must be construed against the City: "The general rule is that the charter of a municipal corporation is to be strictly construed against it; the presumption being that the Legislature granted in clear and unmistakable terms all that it intended to grant." E.B. & A.C. Whiting Co. v. City of Burlington, 106 Vt. 446, 461 (1934). "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 John F. Dillon, Municipal Corporations, § 55 (2d ed. 1873). Moreover, "rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language." Estate of Kelley v. Moguls, Inc., 160 Vt. 531, 533 (1993) (citing Whiting, 106 Vt. at 464). For all of these reasons, the court does not find the charter language to be a grant of Home Rule powers to the City.¹³

Barre makes another argument in support of the ordinance: that Section 109 of the Barre Charter gives the City broad powers of regulation. That section states as follows:

Nothing in this Charter shall be so construed as in any way to limit the powers and functions conferred upon the City of Barre and the Council by general or specific enactments in force or effect or hereafter enacted; and the powers and functions conferred by this Charter shall be cumulative and in addition to the provisions of such general or special enactments.

Barre Charter, § 109. However, Hagan does not argue that the charter limits powers already existing, or that it is not cumulative to any such powers. The argument is, instead,

¹³ The City argues that the Hunters, Anglers and Trappers case stands for the proposition that Dillon's Rule is eroding. The court disagrees. That case expressly reaffirms the doctrine: "[Plaintiff] is correct that [w]e have consistently adhered to the so-called Dillon's rule that a municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." Hunters, Anglers and Trappers, 2006 VT 82, ¶ 7 (citations and internal quotations omitted). While the Court went on to find that Dillon's Rule did not apply to the particular municipal action there – restriction of hunting and trapping – that was because the court found the restriction came within an exception to the rule for "proprietary" as opposed to "governmental" actions. Id. No claim is made here that such an exception applies.

that there is no other source for the power the City seeks. The City argues that this language "confers broader powers upon the City of Barre than those powers that would be relied upon by general State law." Barre City's Statement in Opposition, p. 5. The court finds to the contrary. This provision creates no substantive powers at all. Rather, it merely states that it should not be construed as a limitation on any existing powers.

The City also argues that a separate statute gives all municipalities the power to "adopt, amend, repeal and enforce ordinances or rules for any purposes authorized by law." 24 V.S.A. § 1971(a). That statute, however, requires some other source of law to authorize the use of the powers. It cannot create a power not already granted by the Constitution or the Legislature.

Dillon's Rule is still applicable in Vermont, and the court is unconvinced by the claim that a special exception exists for the City of Barre. The court concludes that Hagan is therefore highly likely to succeed on the merits of this claim.

The Doctrine of Public Nuisance

The City argues in the alternative that its delegated power to define and restrict nuisances is an adequate legal basis for its ordinance in this case.¹⁴ The Vermont Legislature has expressly given municipalities the power to "define what constitutes a public nuisance, and to provide procedures and take action for its abatement or removal as the public health, safety or welfare may require." 24 V.S.A. § 2291(14). However, that power is not limitless. In addressing the Legislature's power to define nuisances, the Vermont Supreme Court has explained:

¹⁴ The ordinance itself makes no mention of "nuisance" -- for example, it does not say "we hereby deem anyone who has been convicted of a sex offense to be a public nuisance." Therefore, there is some question as to whether the City intended the ordinance to arise from its power to regulate nuisances. However, the City certainly has the power to regulate nuisances, and the court does not consider the failure to specify that source of power as fatal to the City's claim.

The legislature has no power arbitrarily or capriciously to declare any or every act a nuisance, and cannot enlarge its power over property or pursuits by declaring them nuisances; nor can it by mere declaration make that a nuisance which is not so in fact and thereby destroy or prevent a lawful use of property. The action of the legislature in this regard is subject to review by the courts. Although much must be left to the discretion of the legislature it usurps judicial power when it declares an act a nuisance when it is not.

Vermont Salvage Corp. v. Village of St. Johnsbury, 113 Vt. 341, 354 (1943). The same is true of the power delegated by the legislature to the municipalities. The question, then, is where the boundaries of nuisance lie.

A brief excursion into the history of public nuisance law leads any reader quickly to harsh critiques of the entire doctrine. For example:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all people ... There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem...

W. Keeton, et al., Prosser & Keeton on Torts § 86, at 616-17 (5th ed. 1984). The Vermont Supreme Court agrees that "the concept of public nuisance is vague and amorphous..." Napro Development Corp. v. Town of Berlin, 135 Vt. 353, 356 (1977).

Two separate lines of nuisance law have developed over time: private nuisance and public (or "common") nuisance. Both "are inextricably linked by their joint origin as a common law writ, dating to twelfth-century English common law." Rhode Island v. Lead Industries Ass'n, 951 A. 2d 428, 443 (R.I. 2008). Private nuisance developed as a way to address "invasions of the plaintiff's land due to conduct wholly on the land of the defendant." W. Keeton, *supra* § 86, at 617. In contrast, "[i]n its inception a public, or

common, nuisance was an infringement of the rights of the Crown. ... By the time of Edward III the principle had been extended to the invasion of the rights of the public, represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town.” Restatement (Second) of Torts, § 821B, comment a (1979) (West, Westlaw through April 2009).

A public nuisance “consist[s] of an interference with the rights of the community at large...” W. Keeton, *supra* § 86 at 618. “[T]o be considered a public nuisance, an activity must disrupt the comfort and convenience of the general public by affecting some general interest.” Napro, 135 Vt. at 357. As the Restatement points out, something does not become a public nuisance merely because it affects “a large number of persons.” Restatement § 821B, cmt g. Instead,

[t]here must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.

Id. A public right “is the right to a public good, such as ‘an indivisible resource shared by the public at large, like air, water, or public rights of way.’” Lead Industries Ass’n, 951 A. 2d at 448 (citation omitted).

The court inquired at the hearing what the City proffers as the public interest being protected by the residence restriction. Counsel for the City stated that it is “the right of parents to feel secure that their children, in locations where children will be at - schools, playgrounds, daycares - the ability to enjoy the comfort and feeling that they’re safe.” While one can hardly argue with the goal, the question is whether this is the kind of “public right” that is traditionally protected by the public nuisance doctrine.

A similar argument was made by the State of Rhode Island in a case involving the exposure of children to lead paint. The court rejected the claim, explaining:

Although the state asserts that the public's right to be free from the hazards of unabated lead had been infringed, this contention falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance. The state's allegation that defendants have interfered with the "health, safety, peace, comfort or convenience of the residents of the [s]tate" standing alone does not constitute an allegation of interference with a public right. The term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way. Expanding the definition of public right based on the allegations in the complaint would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended...

Id. at 453 (citations omitted). Thus, the court concluded that "[t]he right of an individual child not to be poisoned by lead paint is strikingly similar to other examples of nonpublic rights cited by courts, the Restatement (Second), and several leading commentators." Id. at 454.

Another court has rejected the City of Chicago's claim that the manufacture and sale of firearms to those whom the manufacturers and sellers knew or should have known might use them illegally constituted a public nuisance. The "public right" asserted in that case was "the right to be free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons in the city of Chicago..." City of Chicago v. Beretta U.S.A. Corp., 821 N.E. 2d 1099, 1114 (Ill. 2004). The court addressed at length the question of whether this constituted the sort of public right that can be regulated by public nuisance laws. The court noted: "we question whether there is a public right, as opposed to an individual

right, to be free from the threat of illegal conduct by others.” *Id.* The court concluded that it found no authority to support the claim that there is a “public right to be free from the threat that members of the public may commit crimes against individuals.” *Id.* at 1114-15.

While noting that it did not “intend to minimize the very real problem of violent crime and the difficult tasks facing law enforcement and other public officials... [nor] ... to dismiss the concerns of citizens who live in areas where gun crimes are particularly frequent,” the court concluded that such regulations were not within the scope of public nuisance law. *Id.* at 1116. Thus, the court concluded that “there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs” – the right to be free from the possibility that others would commit crimes in the neighborhood. *Id.*¹⁵ *See also, Napro*, 135 Vt. at 358 (“the central basis of the public nuisance concept is interference, and the fact that even some significant portion of the public disapproves” of someone’s conduct does not mean that it is interfering with a public right).¹⁶

This court fully understands the legitimate concerns motivating the ordinance in this case. The community is understandably and rightfully concerned with protecting its children from sexual abuse. Sexual assaults upon children are horrifying crimes, and the court shares the City’s desire to reduce the incidence of such victimization in our

¹⁵ Cases involving municipal attempts to control the spread of firearms have gone both ways, with some courts finding public nuisance law applicable and others rejecting such a theory. *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 276 (E.D.N.Y. 2004) (listing cases). This court finds the Seventh Circuit’s analysis to be compelling.

¹⁶ If public nuisance law gave municipalities the power to exclude sex offenders because of the fear that they might commit future crimes, it would presumably also allow towns to bar anyone with a past conviction for drunk driving, or speeding, or any other activity the town feared a person might do again in their town in the future.

Vermont communities. However, the narrow question before the court is not whether the end is justified, but whether the means used are legally supportable. To the extent that there is any lack of clarity about the City's power to enact such ordinances, that question must be "resolved by the courts against the [City]..." 1 John F. Dillon, *Municipal Corporations*, § 55.¹⁷

The ordinance here seeks to exclude people with past criminal convictions because of the fear that they may in the future assault individual children. As the Restatement points out, however, within the arena of the public nuisance doctrine the right "not to be assaulted" is an "individual right" as opposed to a "public right." Restatement § 821B, cmt g. As in Beretta and Lead Industries, the court does not intend to minimize the fears of City residents or their desires to protect their children. However, as in those cases, the court finds that the ordinance here addresses concerns that are not traditionally within the legal concept of a "public right." It thus goes beyond the established scope of public nuisance law. Plaintiff is therefore likely to succeed on the merits of this claim.

Order

The court having found that Hagan has a substantial likelihood of success on the merits, and is likely to suffer irreparable harm if the ordinance is enforced against him, the motion for a preliminary injunction is granted.

¹⁷ Whether geographic exclusion ordinances are the best way to reach the City's goal here is currently the subject of debate in the public arena. *See, e.g.*, 2009 Act No. 1, An Act Relating to Improving Vermont's Sexual Abuse Response System, § 51 (noting the Legislature's concern that exclusion ordinances such as this "could have a negative impact on public safety" rather than a positive one, and urging municipalities to "ensure they are receiving accurate and substantive information about the lack of efficacy of such laws"). Such policy considerations, however, are not before this court.

The City of Barre is hereby enjoined from enforcing Ordinance § 11-36 against Hagan while this case is pending. The City having waived the posting of security, none shall be required. The court will schedule a status conference to discuss with counsel how to proceed to a final resolution of the case.

Dated at Montpelier this 29th day of June, 2009.

A handwritten signature in dark ink, appearing to read 'Helen M. Toor', written over a horizontal line.

Helen M. Toor
Superior Court Judge