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AND

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Memorandum

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To: Miro Weinberger, Mayor and City Council

Cc: Mike Schirling, Chief of Police, Ron Redmond, Marketplace Commission, Mike Kanarick, Mayor's Office, Kenneth Schatz, City Attorney, and Eugene Berman, Assistant City Attorney

From: Gregg Meyer, Assistant City Attorney 

Date: June 12, 2012

Re: Constitutional Analysis - Proposed Marketplace District No Trespass Ordinance

Introduction

This memorandum addresses the constitutionality of the proposed Church Street Marketplace District No Trespass Ordinance (Marketplace ordinance).¹

Summary

Based on a review of Vermont, Federal, and state case law, it is the City Attorney Office's opinion that the Marketplace ordinance, with some suggested changes to the current draft, would be at minimum risk of being found unconstitutional if challenged in court. The suggested changes include (1) adding "Purpose" and "Findings" sections (that explain the reason for the ordinance and the goals the City Council seeks to accomplish by its passage), (2)

¹ Because the Marketplace ordinance is modeled on the nearly identical BCO §21-48 and BCO §21-43, which cover City Hall Park and the Fletcher Free Library, this analysis and the suggested changes to the Marketplace ordinance apply to those ordinances as well.

expanding access to the ordinance's hearing process to first time offenders, and (3) clarifying and streamlining the hearing process. A new draft with changes is attached as Exhibit A.

Discussion

The City, with special emphasis from the Marketplace Office, the Marketplace Commission, and the Police Department seek the enactment of "no trespass" authority to respond to ongoing behavior problems on the Church Street Marketplace.² It is City Attorney Office's opinion that the City Council has the power to delegate this authority by enacting the proposed ordinance.³ In order for it to be constitutional, the ordinance must be "rationally related" to "substantial government interests" and provide constitutionally adequate due process of law.⁴ We believe these tests have been satisfied.

A. The proposed ordinance is rationally related to substantial governmental interests.

The following substantial government interests are at issue:

- (a) The abatement or removal of nuisances determined to be against the public health, safety or welfare of citizens;
- (b) The protection of citizens from physical threats or injury and from damage to property;
- (c) The prevention of harassment and intimidation of members of the public;
- (d) The prevention of violent crime;
- (e) The orderly control and safety of pedestrian, car and cart traffic on Church Street; and
- (f) The provision and maintenance of a safe, aesthetically attractive environment in areas designed to attract tourist revenue.

² The proposed ordinance lists four (4) problem behaviors – disorderly conduct, unlawful mischief, public consumption of alcohol, and public consumption of drugs. The ordinance could conceivably list other prohibited activities that trigger the no trespass provision, including, but not limited to, aggressive panhandling.

³ See 24 V.S.A. § 2291 (14) and (15) and City Charter Article 19, §48-28, 5, 6 and 36.

⁴ Free speech rights must also be protected but because the proposed ordinance is content neutral, narrowly tailored, and limited to the Marketplace District, First Amendment concerns are minimal. This is discussed further below.

See Madsen v. Women's Health Center, 512 U.S. 753 (1994) and Gresham v. Peterson, 225 F.3d 899 (7th Cir.2000) (preventing intimidating or harassing behavior, keeping public places safe, and providing for the free flow of pedestrian and vehicular traffic all encompass legitimate and substantial municipal government interests.)

According to reports made to the Police Department as well as observations made by the Police Department within the Marketplace District, the above substantial government interests are undermined by unlawful and inappropriate behavior such as disorderly conduct, unlawful mischief, the possession and consumption of intoxicating liquor, and the possession and use of regulated drugs. Specifically, the Police Department and Marketplace Commission assert that:

1. Unlawful and inappropriate behavior in the Marketplace District diminishes the 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 behavior can and often do transform the Marketplace District into an unwelcoming, unattractive and ultimately unsafe public space requiring increased expenditures for public safety and maintenance of the space.
3. Laws intended to preserve and protect public spaces like the 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. Anti-social behavior on the Marketplace enhances a sense of fear, intimidation, and disorder within the Marketplace District and creates an environment where additional and similar behavior is often replicated.
5. The failure to comply with these and other laws creates a public nuisance.

Based on the above, the Police Department and Marketplace Commission maintain that the proposed ordinance - with its "no trespass" and removal authority - will significantly limit such problems and thereby advance the City's substantial government interests in protecting the

health, safety, and welfare of the public among others. Accordingly, it is the City Attorney Office's opinion that the proposed ordinance is rationally related to the City's substantial government interests. The United States Supreme Court's "rational relationship" test requires only that there be some "reasonably conceivable state of facts that could provide a rational basis" for the legislative action. Heller v. Doe, 509 U.S. 312 (1993) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307 (1993)).

B. The proposed ordinance provides adequate due process of law.

Since "the decision to remain in a public place of one's choice is as much a part of liberty as the right to travel or the freedom of movement," City of Chicago v. Morales, 527 U.S. 41 (1999), and because people "have a constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally," Catron v. City of St. Petersburg, 658 F. 3d 1260 (11th Cir. 2011), some form of due process is required in the proposed ordinance. To determine what type, several factors must be weighed and balanced:

1. First, we need to look at the private interest affected by the official action – i.e. in this case the liberty interest in not being removed by the police from a public place;
2. Second, we look at the risk of an erroneous deprivation of that interest through the procedures used – i.e. in this case the possibility of an order of no trespass being wrongfully issued - and the probable value, if any, of additional or substitute procedural safeguards; and
3. Third, we look at the government's interest – i.e. in this case the maintaining of the public's health, safety and sense of order in the Marketplace District – along with the cost of additional or substitute procedural requirements if needed.

See Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

When courts apply this Mathews test, there are varying results. Zinnermon v. Burch, 494 U.S. 113, 127-28 (1990). For example, no due process is required if the deprivation of liberty caused by the government action is de minimis. Id. In other situations, if the government's

interest in immediate action outweighs the private interest at stake, then a post-deprivation hearing will satisfy the Constitution. Id. Lastly, in certain circumstances when the private interest at stake is significant and the potential for an erroneous deprivation is high, then the government interest will be outweighed by the private interest and a hearing will be required prior to potential deprivation in order to satisfy constitutional due process requirements. Id.⁵

In the present case, when applying the Mathews test to the proposed ordinance, it is the City Attorney Office's opinion that the deprivation of liberty at issue – for a first time offense the removal from the Marketplace District for twenty four (24) hours or less - is limited and as such, does not outweigh the police department's expressed need to take quick action in response to what they deem to be an emergent situation in the Marketplace District. Accordingly, the post-deprivation hearing provided for meets constitutional due process requirements.

Moreover, with regard to second or third offenses – which may result in a possibly longer periods of removal from the Marketplace District and are therefore more significant deprivations of liberty – it is our opinion that the post-deprivation hearing process still provides adequate due process because it allows for an opportunity to challenge the validity of the removal as well as to seek reversal of the order shortly after it is issued. And because the order is tolled pending resolution of the hearing in any event, the impact of a potentially erroneous deprivation is further minimized.⁶

⁵ Examples of pre-deprivation hearing situations include: the termination of employment, the cutting off of utility service, the suspending of students from public school, the forfeiture of prisoner's good-time credits, the issuance of writ allowing repossession of property, and terminating welfare benefits. Zinermon, supra. (Internal citations omitted). Post-deprivation hearings are sufficient when the necessity of quick action by the government, or the impracticality of providing any pre-deprivation process, is present. Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982). "Where the potential length or severity of the deprivation does not indicate a likelihood of serious loss, and where the procedures are sufficiently reliable to minimize the risk of an erroneous determination, then a prior hearing is not required." Id.

⁶ The Vermont Supreme Court notes that post-deprivation due process can satisfy the Constitution. "A post-deprivation hearing will satisfy due process when the circumstances necessitate quick action, the length and severity of the deprivation is not serious, and the procedures underlying the decision to effect the deprivation sufficiently minimize the risk of an erroneous deprivation. Hegarty v. Addison County Humane Soc., 176 Vt. 405 (2004).

In sum, it is our opinion that the proposed ordinance, although clearly giving authority to the police to potentially deprive people of a constitutionally protected liberty interest, provides adequate due process of law via quick access to a post-deprivation hearing process and thus is constitutionally defensible.

C. The case of Catron v. St. Petersburg

The case of Catron v. St. Petersburg, 658 F. 3d 1260 (2011), is instructive to this analysis. In Catron, several homeless residents challenged the constitutionality of two (2) city ordinances related to trespass and storage of personal effects on public property. Id. Similar to the proposed ordinance, the St. Petersburg, Florida trespass ordinance authorized police and other city agents to exclude and remove individuals from specific city lands if they engaged in various prohibited behaviors. Id. Also similar to the proposed ordinance, the removal and exclusion in St. Petersburg was done by police officers issuing trespass warnings to “any individual who violates any city ordinance, rule or regulation, or state law or lawful directive of a city employee or official.” Id. Upon receipt of a warning, such persons were subject to arrest if found in violation of the warning and under the ordinance, the trespass warnings were limited - for first-time violations the trespass warning period could not exceed one year; for all other violations, the trespass-warning period could not exceed two years. Id.

The key issue in Catron was the fact that the St. Petersburg ordinance did not provide for a hearing process in which a recipient of a trespass order could challenge or seek reversal of the order before or after it was issued. Id. The only process they had available was if they chose to appeal the underlying violation that resulted in the order of no trespass. Id. Because of this limitation, the Eleventh Circuit Court of Appeals struck down the ordinance as unconstitutional

stating that any process available in the ordinance violation appeal was insufficient to address the deprivation of liberty. Id.

Contrary to Catron, in the present case the proposed Marketplace ordinance provides recipients with a hearing opportunity to challenge the validity of the order of no trespass. The no trespass hearing process is separate and apart from any underlying ordinance violation appeal available, and although the hearing is post-deprivation, the fact that the order will be tolled pending resolution of the hearing leads us to conclude the ordinance satisfies the requirements of the Constitution.

D. The First Amendment

In addition to protected liberty interests, freedom of speech is also potentially implicated by the proposed ordinance. Removing a person from a public space prevents that person from asserting protected speech during the removal period. However, as noted earlier, because the ordinance specifically targets conduct, not speech, this concern is minimal. “Nothing in the United States Constitution, including the First Amendment, prevents a public entity, be it state or local, from even-handed enforcement of a general trespass law, vis a vis, public property.” Joliet v. Franklin, 613 N.E. 2d 766 (IL 1993). This is because “a public entity, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.” Adderley v. Florida, 385 U.S. 39 (1966).

In a public forum such as the Marketplace District, “the government may impose reasonable restrictions on the time, place, or manner of protected speech.” Costello v. City of Burlington, 632 F.3d 41, 45-46 (2d Cir. 2011). The United States Supreme Court articulated a three-part test to determine whether such restrictions interfere with rights guaranteed by the First Amendment. Id. citing Ward v. Rock Against Racism, 491 U.S. 781, 791, (1989). “To withstand

constitutional scrutiny, government restrictions must be (1) content neutral, in that they target some quality other than substantive expression; (2) narrowly tailored to serve a significant governmental interest; and (3) permit alternative channels for expression.”

As the Costello Court noted, “it is undisputed that Burlington's noise control ordinance is content neutral.” Id. The same can be said for the proposed Marketplace ordinance in that the specific ordinance violations listed that could potentially lead to removal from the Marketplace District are clearly content neutral. Therefore, the inquiry is whether the proposed Marketplace ordinance is narrowly tailored to serve Burlington's interest in protecting the public health, safety, and welfare of residents and visitors. We believe the answer is yes.

The Costello Court found that the City's noise ordinance was narrowly tailored and left alternative channels for protected speech. The same can be said for the proposed Marketplace ordinance. The proposed ordinance is specifically intended to assist the police in preserving the public's health, safety and welfare. “Narrow tailoring is satisfied so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” Id. Since the regulation does not burden substantially more speech than is necessary to further the City's legitimate interests, it is our opinion that it is narrowly tailored to achieve its goal. Id.

Lastly, the removal authority in the proposed Marketplace ordinance applies only to the Marketplace District. As such, a recipient of a “no trespass” order can assert his or her free speech rights anywhere else in the City. “When a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.” Id., citing Hill v. Colorado, 530 U.S. 703, 726, (2000).

E. Suggested changes to the proposed marketplace ordinance

In order to minimize the chance of a successful constitutional challenge to the proposed Marketplace ordinance, the ordinance must clearly articulate the City's substantial governmental interests, how those interests are rationally related to the "no trespass" authority being sought, and adequate due process must be made available to those affected. For these reasons, it is our opinion that "Purpose" and "Findings" sections should be added to the ordinance as reflected in the attached Exhibit A.

Regarding the due process provision of the ordinance, our suggestions, which are also reflected in Exhibit A, are as follows: (1) clarify that appeals to the Judicial Bureau of any of the underlying municipal ordinance violations triggering the order of no trespass will not toll the order of no trespass; (2) explain that an appeal to the Marketplace Commission Hearing Panel of the no trespass order will in fact toll the order; (3) expand the hearing process to include any individual removed from the Marketplace District, including first time offenders; (4) include access to government services and constitutionally protected activities as additional reasons for allowing access to the Marketplace despite an order of no trespass; (5) give specific time frames for requesting a hearing, for providing notice of a hearing, for setting hearings, and for issuing final decisions; and (6) replace the two (2) tiered hearing process with a one tiered process.

Regarding this last point, it is our opinion that the Hearing Panel alone can provide adequate due process without requiring its decision be reviewed and approved by the Marketplace Commission as a whole.⁷

⁷ It is also our opinion that the Chief of Police (or his or her designee) or the Director of the Marketplace Commission could serve as the hearing officer.

F. Conclusion

In sum, with the above referenced suggestions, it is our opinion that the proposed Marketplace ordinance would likely survive a constitutional challenge.⁸

⁸ The proposed changes could be applied to the City Hall Park and Library ordinances to minimize risk of constitutional challenges as well.

Exhibit A

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

(a)

Purpose - The Burlington City Council finds and declares that the following substantial government interests will be advanced by this ordinance based on conditions the Police Department and the Church Street Marketplace District Commission have identified and confront in the 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 members of the public;
- (4) The prevention of violent crime;
- (5) The orderly control and safety of pedestrian, car and cart traffic on Church Street;
- (6) The provision and maintenance of a safe, aesthetically attractive environment in areas designed to attract tourist revenue.

(b)

Findings - These substantial government interests are undermined by unlawful and inappropriate behavior in the 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 and inappropriate behavior within the Marketplace District diminishes this very precious 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 behavior can and often do transform the Marketplace District into an unwelcoming, unattractive and ultimately unsafe public space requiring increased expenditures for public safety and maintenance of the space.

- (3) Laws intended to preserve and protect public spaces like the 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 Marketplace District will be enhanced by the immediate administrative sanction of removing offenders from the 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) Anti-social behavior on the Marketplace enhances a sense of fear, intimidation, and disorder within the Marketplace District and creates an environment where additional and similar behavior is often replicated.
- (6) The failure to comply with these and other laws creates a public nuisance.

(c)

Prohibited activities. Notwithstanding other rules and regulations, the following activities are prohibited within the Church Street Marketplace District and may be ticketed under this section.

(1)

Disorderly conduct. 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. 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) *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 the Church Street Marketplace District.

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

(d)

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 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 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 Church Street Marketplace District 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, be waived in whole or in part upon the successful completion of a restorative or reparative justice program through the Community Justice Center.

(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 Church Street Marketplace District 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, be waived in whole or in part upon the successful completion of a restorative or reparative justice program through the Community Justice Center.

(4) *Hearing procedure and tolling of order.*

a. Recipients of any municipal ticket(s) resulting in an order of no trespass issued pursuant to this section may appeal said ticket(s) to the Vermont Judicial Bureau pursuant to 4 VSA §1107 and 24 VSA § 1974a. Any such appeal to the Judicial Bureau shall not toll an order of no trespass.

b. Recipients of an order of no trespass issued pursuant 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 toll an order of no trespass pending the hearing and a written decision of the Hearing Panel.

c. Any individual subject to the trespass provisions of subsections (1), (2), or (3) of this section may request in writing to the Marketplace Commission that a Marketplace Commission Hearing Panel hold a public hearing to challenge the issuance of the no trespass order and/or to permit said individual such access to the Church Street Marketplace District for purposes of work, residence, access to government services, the exercise constitutionally protected activities, or other good reason, as determined by a Hearing Panel.

d. Recipients shall have thirty (30) days from the date of issuance of an order of no trespass to request a hearing. If a hearing is requested, the hearing shall be scheduled within ten (10) calendar days 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. A hearing panel comprised of three (3) Church Street Marketplace Commissioners or their designees shall hear oral testimony, receive written evidence, and issue a written decision within ten (10) calendar days of the hearing.