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To: Burlington City Councilors
Brennan, Knodell, Siegel, and Tracy

Re: Church Street Marketplace District Trespass Authority Ordinance

Dear City Councilors,

You have asked me to advise concerning the legal and constitutional validity of the recently enacted *Church Street Marketplace District Trespass Authority* ordinance. The ordinance purports to authorize public officials to banish certain individuals from simply being within the Church Street Marketplace District for certain periods of time upon issuance of an ordinance violation ticket that alleges that the individual in question committed disorderly conduct, unlawful mischief, was in possession of an open container of intoxicating liquors, or was in possession of regulate drugs.

I am of the view that this ordinance is neither lawful nor constitutional.

The Purported Prohibition of Otherwise Lawful Activity.

There is an important distinction to keep in mind about this ordinance. Not at issue is whether the City may enforce against repeated incidents of disorderly conduct, unlawful mischief, open container, or illegal drug possession or other unlawful conduct. Nor at issue is the City's authority to seek legal injunction in Superior Court under 24 V.S.A. § 2121 against behavior that constitutes a public nuisance.

At issue is an ordinance that does something very different. It purports to make unlawful *otherwise lawful use of a public right of way* by individual members of the public simply by dint of a no trespass order issued by a City official. In other words, it is the issuance of the no trespass order *itself* that purports to convert the otherwise lawful use of Church Street by the subject individual to an unlawful use. This is an important distinction insofar as the U.S. Supreme Court has recognized that members of the public 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. *City of Chicago v. Morales*, 527 U.S. 41 (1999), "[A]n and individuals' decision to remain in a public place of his choice is as much a part of his liberty as…the right to move 'to whatsoever place one's own inclination may direct.'"

The Ordinance Is *Ultra Vires* Because It Lacks Authorizing State Legislation.

In my view the most glaring shortcoming in the scheme is the absence of any authorization from the Legislature to enact it. Just like the proposed gun control ordinance now

under consideration, a Charter change approved by the voters and then enacted by the General Assembly is first required.

Implicit in the ordinance is the assumption that the City of Burlington "owns" Church Street in the same way that a private landowner "owns" his or her land and can order certain individuals off that land. In the case of public streets, nothing could be further from the truth. Church Street is "owned" by the very people whose banishment the ordinance purports to authorize. It is the City, which purports to do the banishing, which does not own it at all. This is settled law, with two of the leading precedents involving the City of Burlington in the early 20th Century.

"A municipality does not own the highways within its limits, for the highways are public ways; but a municipality is charged by state government with the duty of maintaining for the public use highways so located," *City of Montpelier v. McMahon,* 85 Vt. 275 (1911). "Defendant's counsel misconceives the rights of the city in its streets. It has no property right in the lands taken for a highway. It does not even own the easement which is in the public." *Burlington Light and Power Co. v. City of Burlington*, 93 Vt. 27 (1918). "A dedication of a road as a highway is the setting apart of land for public use." *Springfield v. Newton*, 115 Vt. 39 (1947). "A highway is a free and public roadway or street, one which every person has the right to use. Its prime essentials are the right of common enjoyment on one hand, and the duty of public maintenance on the other." *Okemo Mountain v. Town of Ludlow*, 164 Vt. 477 (1995).

Secondly, control over municipal streets is vested the State. "Subject to constitutional limitations, the state has absolute control of its public streets and highways, including those of its municipal and quasi municipal corporations." *Valcour v. City of Morrisville*, 108 Vt. 242 (1936); *City of Burlington v. Burlington Traction Co.*, 98 Vt. 24 (1924). A municipality possesses only such authority to regulate the use of public streets and highways as has been expressly granted by the legislature. *Burlington Light and Power; Burlington Traction;* and *Valcour,* all *supra.* Also *see Rutland Cable Television v. City of Rutland*, 122 Vt. 162 (1960) [City of Rutland was granted no authorization by the Legislature to grant an exclusive franchise to a single cable television operator to locate its wires and poles in the City streets and highways].

Burlington can therefore banish certain persons from Church Street if and only if the Legislature first gives it the authority to do so. The question whether such power has been granted is subject to "Dillon's Rule," which provides that because Vermont is not home rule state, the municipalities are the creatures of the state and possess only such powers which are expressly granted to them by the state or necessary implied. *Hinesburg Sand & Gravel v. Town of Hinesburg,* 135 Vt. 484,486 (1977); *Valcour v. Village of Morrisville*, 104 Vt. 119, 131-31 (1932). The grant of such powers is strictly construed against the municipality and any doubt about such grant is construed against the municipality. "If any fair, reasonable, substantial doubt exists concerning this question it must be resolved against the [grant of power]." *In re Petition of Ball Mountain Dam*, 154 Vt. 189, 192 (1990) c.f. *Valcour, supra.*

I can find no authority expressly granted or necessarily implied in the Charter provisions creating the Church Street Marketplace District, 24 V.S.A. App. Ch. 3 §§321-327, or elsewhere for that matter, authorizing the banishment of certain individual members of the public from Church Street; that is, from engaging in otherwise lawful uses of Church Street which other members of the public are entitled to engage. Without a Charter change granting such authorization, this ordinance is *ultra vires* (meaning beyond the City's powers), is void, and in

my judgment, should not be enforced.

The Ordinance Interferes With The Federal Constitutional Right To Travel.

No trespass ordinances such of this have been recognized by at least two federal courts to have significant potential constitutional problems. *Catron v. City of St. Petersburg*, 658 F.2d 1260 (11th Cir. 2011) and *Cuellar v. Bernard* (U.S.D.C. W.D. Tex., March 27, 2013. The ordinance in the *Catron* case "[o]n its face…does not cover the public rights of way." By contrast our ordinance deals *exclusively* with the right to make lawful use of a public right of way.

The U.S. Constitution protects as fundamental the right to travel both interstate within the United States as well as the right to travel within a particular state. *Shapiro v. Thompson*, 394 U.S. 618 (1989); *Selevan v. New York Thruway Authority*, 584 F.3d 82 (2nd Cir. 2009); *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2nd Cir. 2003). A state law implicates that constitutional right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right. *Selevan* at 100 c.f. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Our ordinance meets each of these three tests: it actually deters travel on a public street, impeding that travel is a primary objective, and it serves to penalize exercise of the right to travel on the street.

That in turn compels that the City policy be narrowly tailored to advance a compelling governmental interest. Where a state or local regulation infringes upon a constitutionally protected right such as the right to travel, the courts apply a strict scrutiny requiring the municipality to show that the regulation is narrowly tailored to serve a compelling governmental interest. *Id.; Shapiro, supra.*

Our ordinance allows Burlington officials to issue what effectively are prior restraints on the exercise of an otherwise *lawful* fundamental constitutional right, and to discriminate among "offenders" with broad and virtually unfettered discretion to banish some, but not all, offenders and for varying lengths of time. It does not establish any standards for the exercise of that discretion.

Absence of Ascertainable Standards for the Exercise of Discretion Whether to Banish an "Offender."

This lack of standards was fatal to the no-loitering ordinance stricken in *Chicago v. Morales, supra,* and in both of the federal trespass cases discussed above, the no trespass orders were challenged constitutionally because no guidance was provided as to when police officers would or would not issue such orders to specific individuals. Similarly, the Vermont Supreme Court ruled in *City of Burlington v. New York Times Co.*, 148 Vt. 275 (1987) that such unfettered discretion regarding the use of the public streets is impermissible. There it struck as unconstitutional a Burlington ordinance which purported to bar the placement of street newspaper vending machines without prior permission from the City because this gave city officials unlimited authority whether to grant or refuse a permit to use the street and requiring the citizen to contend with city officials on a case-by-case basis without the benefits of standards and guidelines.

The subject of a no-trespass order banishing him/herself from Church Street confronts the

authorities similarly on a case-by-case basis with no guidelines. First, there are no standards setting forth criteria under which offenders will actually be issued get a banishment order, and which will not. Second, it also provides that the duration of the banishment for repeat offenders is "up to" 90 days for second and "up to" one year for third and subsequent offenders, without any standards for either the issuing official or the appeals body to determine how that duration is to be meted out.

Denial of Procedural Due Process.

The ordinances at issue in these two federal no-trespass cases discussed purported to authorize the issuance of no trespass order in public places *other than streets* but which were otherwise generally open to the public. *Catron* also allowed the constitutional challenge to the no trespass order ordinance because it provided "no way to contest the trespass warning…" Our ordinance purports to cure that by providing a post deprivation due process hearing.

Overlooked, however is that our situation is even more egregious because the object of a no trespass order *is* to banish the recipient *from a public right of way*. As discussed above, under Vermont law the recipient of such a banishment order has a *property* right to the otherwise lawful use of Church Street. That in turn triggers the 14th Amendment due process requirement that the City provide a *pre-deprivation* due process hearing before it can deprive that property right. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *Quinn v. Grimes*, 2004 VT 89. Due process requires notice of the proposed action, notice of the City's the factual basis therefore, and an opportunity to be heard *before* it takes effect. *Grimes* at ¶¶21-26.

Our ordinance provides none of that.

For first offenders the no-trespass order is effective immediately and runs its course before any pre-deprivation due process can reasonably be had: it is effective for one day – the day the order is issued. §21-49(d)(1). For second and subsequent offenders, the order is similarly immediately effective before any due process notice is given or hearing is had. The putative offender is not informed of a date or time at which the due process hearing will be heard. Rather the ordinance puts the onus on the alleged offender to arrange for a hearing with the Commission and the order remains in effect until s/he does. This can result in a pre-hearing deprivation of the property right for a significant period of time, especially if the trespass order is issued in the evening or on a weekend or holiday outside of the Marketplace Commission's normal business hours. (Nor does the ordinance explain how the District's offices can be reached to file an appeal without navigating Church Street).

Next, as discussed above, because none of this scheme has been authorized by the General Assembly, there is no authority granted to the City to designate a hearing panel within the Church Street Marketplace Commission – or any other body for that matter – with authority to conduct such a due process hearing. Such authority and specificity is the case with hearings before the Housing Board of Review and the Development Review Board, for example. The Planning Act has elaborate requirements governing the DRB's conduct of hearings, including public notice of the hearings, timeliness, and failure to promptly act on certain types of applications. There is simply no such comparable legislative authorization here.

Moreover, the ordinance purports to separate the determination of the validity of the underlying allegation – disorderly conduct, unlawful mischief, open container, or drug

possession, which presumably will be determined by the Judicial Bureau or the Superior Court -- from the hearing on the trespass order *despite the fact that the validity of the underlying accusation is a condition precedent to the trespass order*. It is difficult to fathom how the trespass order could be deemed "valid" by a Marketplace Commission Hearing Panel if the underlying allegation is adjudicated by the Judicial Bureau not to be, or how the Hearing Panel could even render a decision until the underlying allegation is adjudicated.

Lack Of Meaningful Judicial Review.

The ordinance does not provide for any effective judicial review[1] of a no-trespass order, not the least because the scheme is authorized by no legislation. If one seeks judicial review of the ticket from the Judicial Bureau, such appeal shall *not* toll the order of no trespass. The stay ends upon the issuance of the Hearing Panel's written decision. Due process requires the opportunity to contest the validity of the no trespass order before any sanctions for violating same can become effective. *Wagner Seed Co. v. Daggett*, 800 F.2d 310 (2nd Cir. 1986); *Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115 (2nd Cir., 1975); *Ex Parte Young*, 209 U.S. 123 (1908).

Please feel free to call me with any questions or comments.

Very truly yours,

/s/ John L. Franco, Jr.
John L. Franco, Jr.

[1] Presumably, state Superior Court review is available under the extraordinary relief provisions of V.R.C.P. 75. An aggrieved individual could also seek review under the federal Civil Rights Act 42 U.S.C. § 1983.