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EXECUTIVE DIRECTOR

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September 25, 2017

Burlington City Council  
149 Church Street  
Burlington, Vermont, 05401

AMERICAN CIVIL  
LIBERTIES UNION  
OF VERMONT

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MONTPELIER, VT 05601

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**Re: Proposed Criminalization of Petty Code Violations**

Esteemed Members of the Burlington City Council:

The ACLU of Vermont (“ACLU-VT”),<sup>1</sup> joined by Vermont Legal Aid, writes to object to the August 28<sup>th</sup> Burlington City Council resolution calling for the drafting of “an ordinance that creates a criminal penalty for repeat offenders of . . . violations of . . . , but not limited to, public urination, public drunkenness, littering, and sexually aggressive catcalling.” See attached.<sup>2</sup> We are concerned that an ordinance seeking to criminalize such conduct would be counter-productive and costly, further the criminalization of poverty and mental illness in Burlington, and potentially expose the City to liability. Rather than criminalizing low-level offenses, the City should expend necessary resources and take practical steps to better address poverty, homelessness, substance abuse, mental illness, and other root causes of low-level code violations. Imposing criminal penalties before providing the resources necessary for adequate supports would be both ineffective and inhumane. If the City moves forward with such an ordinance, we will work with impacted individuals to oppose and challenge it.

**Criminalizing Petty Code Violations Will Cause Severe Collateral Consequences**

It would be a mistake to believe that the “consequences” threatened by the proposed ordinance can be meaningfully limited or contained in practice. Inevitably, they will be severe and they will fall upon some of the most vulnerable members of our society: the poor, people with mental illness, and people struggling with addiction. Creating criminal penalties for even small-

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<sup>1</sup> Founded in 1967, the ACLU of Vermont is a nonpartisan, non-profit advocacy organization dedicated to defending the constitutional and civil rights of all Vermonters. With more than 7,500 Vermont members, including 800 Burlington residents, ACLU-VT is the statewide affiliate of the national ACLU, which has a membership of over 1.6 million. The ACLU works to advance civil liberties through impact litigation, advocacy, and education.

<sup>2</sup> Burlington City Council, *Resolution Relating to Referral to Ordinance Committee: Ordinance Changes Concerning Quality of Life Issues in Downtown Core*, adopted August 28, 2017.

time offenses, such as littering, will in many cases result in vulnerable individuals spending days or months in jail, only to wind up worse off than they were before.

For example, under an ordinance conforming with the August 28<sup>th</sup> resolution, a person ticketed for littering two or more times could be arrested and taken into custody. If a judge decides to hold that person on bail, they must either pay the bail amount or be jailed until the conclusion of the criminal case, which can last months. Many low-income people do not have the money to secure release, and consequently will remain incarcerated for lengthy periods of time.<sup>3</sup> And, even if the judge decides to release the person on conditions, if the person violates those conditions they can be arrested and jailed again without a right to bail (conditions of release can be onerous; in the cases of people suffering from addiction, for example, a condition requiring them to stay sober—but without adequate assistance or treatment—often results in re-incarceration).

Regardless of whether they are released on conditions, on bail, on a plea, after probation revocation, or after dismissal, low-income people commonly lose their jobs, miss rent payments, miss car payments, lose their property which may be left in the open, and lose contact with medical and other service providers—all from even a night or two behind bars. This is in addition to the emotional distress that commonly accompanies arrest and incarceration.<sup>4</sup>

While the proposed ordinance is said to be needed to provide “consequences” for petty violators, these consequences will only make it more likely that more people will be returning to Burlington’s streets, more vulnerable to substance abuse and mental illness than before.

### **Practical Solutions to Reduce So-called “Quality of Life” Violations**

Burlington is a city known for its welcoming and supportive community. Consistent with this reputation, the City can and should look to other cities and towns that have found creative solutions and alternatives to the criminalization of low-level offenses, and take more affirmative steps to address the underlying causes of poverty, substance abuse, and homelessness among its residents.

To give one example, the City should develop and implement pre-booking diversion programs such as LEAD (Law Enforcement Assisted Diversion) in place of criminalizing non-violent behavior related to substance abuse and mental illness. Cities such as Seattle, Santa Fe, Albany, and others have adopted LEAD to directly address community needs without the added costs and problematic externalities of criminalization. These

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<sup>3</sup> Because courts are closed on holidays and weekends, a person arrested ahead of the weekend may spend up to four days in jail before even seeing a judge—more than enough time to result in damaging collateral consequences to that individual.

<sup>4</sup> As highlighted in a recent finding by the Vermont Human Rights Commission, the Vermont prison system is an abusive, dangerous, and terrifying place for someone with a mental illness. See Erin Mansfield, “Vermont Agencies Accused of Discriminating Against Patient,” VTDigger, September 17, 2017, available at <https://vtdigger.org/2017/09/17/vermont-agencies-discriminated-psychiatric-patient-commission-says/#.WcEzrrJ96iQ>.

programs bypass the courts,<sup>5</sup> connecting people directly to intensive case-management, transitional and permanent housing, and substance abuse or mental health treatment. Follow-up interactions with the criminal justice system are coordinated with the case managers. Police receive training in harm reduction. The programs have the real potential to end the revolving jailhouse door for code violators.

There are other practical solutions the City can pursue in place of criminalization. To address the frequently cited problem of public intoxication, Burlington should increase the availability of warming and wet shelters, with sufficient staffing to provide meaningful support and connect individuals with available long-term treatment options. Similarly, appropriately staffed community-based temporary shelter facilities should be available for people experiencing mental health crisis. Other cities have sought to address public urination by installing more public restrooms. The Portland Loo (<http://theloo.biz/>) has become one of the more popular options as it can be easily monitored and does not require a new structure to be built, but offers a private option to those without their own facilities. To address littering, cities have increased the number of trash receptacles and/or the frequency of sanitation sweeps of particular areas. To counteract disruptive behavior and “catcalling,” where such conduct does not fall within already available criminal prohibitions,<sup>6</sup> there are public awareness campaigns, outreach, and restorative processes.

These are complex problems, but the City ultimately has a choice: it can think creatively and use its resources to address these problems, or it can criminalize some of its most vulnerable communities. The choice should be clear.

## **Conclusion**

The ACLU recognizes the concerns of Burlington officials and the need to maintain a safe and inviting atmosphere. However, the ordinance under consideration will not address the root causes of the behavior it seeks to deter; it will only exacerbate the problem. Burlington has the resources to provide the necessary services, supports, facilities, and public education to quell so-called “quality of life” concerns. If Burlington opts not to prioritize those investments and takes the easier route of criminalization, the financial costs are likely to be high, just as the human cost is certain to be severe.

Should the City choose to further criminalize low-level offenses, there could be a number of constitutional remedies available to impacted individuals. For example, an ordinance conforming with the resolution could be preempted by state law, 18 V.S.A. § 4801,<sup>7</sup> implicate Vermont’s Constitutional prohibition on imprisonment for debt, VT

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<sup>5</sup> The significant local and state resources saved through such programs cannot be overstated. For example, instead of having Burlington’s police writing additional reports and testifying in court, the police can remain in the community protecting Burlington residents from danger and investigating serious crimes. For the state, additional court and correctional costs, which already total more than 10% of Vermont’s entire budget, can be forgone.

<sup>6</sup> For example, 13 V.S.A. § 1026 (Disorderly conduct) or 13 V.S.A. § 1062 (Stalking).

<sup>7</sup> 18 V.S.A. § 4801 states that:

Const. Ch. II, § 40, violate the First Amendment, *State v. Tracy*, 200 Vt. 216 (2015), and constitute cruel and unusual punishment under the Eighth Amendment, *Robinson v. California*, 370 U.S. 660 (1962). Because the criminalization ordinance would likely have a disparate impact on individuals with disabilities and people of color, it would also risk violating federal and state anti-discrimination laws.

For the foregoing reasons, we urge the Burlington City Council to reconsider its resolution and reject any ordinance that further criminalizes low-level offenses. If you have any questions, please do not hesitate to contact me at [jdiaz@acluvt.org](mailto:jdiaz@acluvt.org) or 802-223-6304 ext. 113. Thank you for your consideration.

Sincerely,



Jay Diaz  
Staff Attorney

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“(a) It is the policy of the State of Vermont that alcoholism and alcohol abuse are correctly perceived as health and social problems rather than criminal transgressions against the welfare and morals of the public.

(b) The General Assembly therefore declares that:

(1) alcoholics and alcohol abusers shall no longer be subjected to criminal prosecution solely because of their consumption of alcoholic beverages or other behavior related to consumption which is not directly injurious to the welfare or property of the public; and

(2) alcoholics and alcohol abusers shall be treated as sick persons and shall be provided adequate and appropriate medical and other humane rehabilitative services congruent with their needs.”

**Resolution Relating to**

REFERRAL TO ORDINANCE COMMITTEE: ORDINANCE  
CHANGES CONCERNING QUALITY OF LIFE ISSUES IN  
DOWNTOWN CORE

**\*\*revised version\*\***

**RESOLUTION** \_\_\_\_\_

Sponsor(s): Councilors Wright,  
Knodell, Hartnett, Paul, Shannon  
Introduced: \_\_\_\_\_  
Referred to: \_\_\_\_\_  
\_\_\_\_\_  
Action: \_\_\_\_\_  
Date: \_\_\_\_\_  
Signed by Mayor: \_\_\_\_\_

**CITY OF BURLINGTON**

In the year Two Thousand Seventeen .....

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

- 1 That WHEREAS, Mark Mackillop, owner of Muddy Waters Café on Main Street, came to the June 5, 2017
- 2 meeting of the City Council asking for help dealing with issues that he described as harassment, threats,
- 3 vulgarity and public drunkenness occurring on the street by his business at the corner of Church and Main
- 4 Streets; and
- 5 WHEREAS, Mr. Mackillop indicated that many other business owners are worried and that he was
- 6 delivering a collective message from them; and
- 7 WHEREAS, this serious issue has now escalated further with an act of violence that resulted in a near-
- 8 fatal stabbing in the area of Church and Main Streets in early August; and
- 9 WHEREAS, such behavior is an issue of public safety that we cannot allow to continue; and
- 10 WHEREAS, it is imperative that our downtown is a friendly and safe place for all to come and enjoy;
- 11 and
- 12 WHEREAS, Burlington Police Chief Brandon Del Pozo, in a Burlington Free Press article on August
- 13 11, 2017, expressed frustration that quality of life offenses such as public drunkenness, fighting, and public
- 14 urination are dealt with through civil tickets and that some repeat offenders are unconcerned about the
- 15 financial repercussions of not paying the fines; and
- 16 WHEREAS, it is important that there are consequences for repeat offenders of these quality of life
- 17 offenses; and
- 18 WHEREAS, it is vital to the continued success of our downtown, for our Burlington residents and
- 19 businesses as well as tourists, that we have a safe, friendly and inviting atmosphere for all to enjoy;
- 20 NOW, THEREFORE, BE IT RESOLVED that the City Council directs the Ordinance Committee to
- 21 draft an ordinance that creates a criminal penalty for repeat offenders of these types of violations of aggressive
- 22 and disruptive behavior, such as, but not limited to, public urination, public drunkenness, littering, and
- 23 sexually aggressive catcalling and that the Ordinance Committee shall bring such an ordinance back to the full
- 24 Council as soon as possible but no later than the council's second meeting in November.
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lb/EBlackwood/Resolutions 2017/Police – Ordinance Changes Concerning Quality of Life Issues – Referral to Ordinance Committee  
8/14/17