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

PUBLIC MEMORANDUM

To: City Council, Mayor Weinberger
From: Daniel Richardson, City Attorney
Re: Sex Work Charter Change Item
Date: December 13, 2021 (Rev. Apr. 4, 2022)

Introduction

The Mayor's Office has requested the following memo, which may be distributed publicly, to answer the question: What legal impact will the repeal of Section 48, subsection 7 have on the City of Burlington?

Charter Repeal Does Not Alter State Statute

To analyze the impact of a charter repeal, it is helpful to start with the understanding that a charter provision is a specific power—usually sought by a municipality—and granted by the legislature that becomes specific to that municipality. Often a charter acts as an enabling provision giving the municipality authority for a particular action or a function of government. Sometimes, this power is exclusive to the municipality, and sometimes, it is a non-exclusive power that both the municipality and the state may utilize.

Section 48, subsection 7, is a non-exclusive power. This section gives the City the power to create ordinances to “suppress common prostitutes” and “houses of ill fame and disorderly houses.” At the same time, the State of Vermont has Chapter 59 of Title 13 of the Vermont Statutes Annotated, which regulates and criminalizes acts that fall under specific definitions of “Lewdness and Prostitution.” These two sets of regulatory systems—state and local—have long been co-existent. There is no language either in charter or statute to suggest that Burlington's charter provisions overrule or otherwise nullify the applicability of Chapter 59, and in theory either framework has been available to law enforcement and prosecutors.

Up and until the fall of 2021, the City had an ordinance regarding prostitution on its books. The City repealed that ordinance, and it currently does not have any sex work or prostitution regulations or ordinances in effect.

When the City repealed the ordinance, sex work was not suddenly legalized in the City. That is because 13 V.S.A. Ch. 59 remained and remains a valid part of the state statutory regime, and it remains valid law.

If Section 48, subsection 7 is repealed, it will be of little or no legal effect as Title 13, Chapter 59 of the Vermont Statutes Annotated will still be good law and will still apply in Burlington and be available to all law enforcement officers and prosecutors.

Practical Implications

What repeal of this charter provision means is that the Council will be ending its own power to regulate or criminalize these activities and places. This repeal has greater reach than the repeal of an ordinance because it removes the City's authority to regulate in this area and not simply a particular Council's resolution. By repealing the power to generate ordinances in this area, the City would be ending it not just for the present Council but for future Councils as well—unless a future charter change restored such authority.

Again, this repeal just removes the City's power while keeping the existing state statutes concerning lewdness and prostitution in place.

Practically speaking, my Office does not anticipate any practical difference. The old ordinance, like the charter section proposed for repeal, had arcane and sexist language that did not reflect the current values or sensibilities of how society should regulate or criminalize this area. As a result, the ordinance did not appear to have been used by Burlington Police in recent memory.

For anyone investigating or prosecuting such a case, the state statute remains the better route as it has relatively clear language, more modern construction, supporting case law, and consistency with other criminal law statutory structures. As such, the City's language filled with euphemism and somewhat arcane commanding language regarding prostitution has become more relic, than a reliable source of criminal law.

For these reason, my Office is of the opinion that the repeal of the charter language sought in this provision will not impact the legal status of prostitution in Burlington and will not impact how law enforcement or prosecutors in the City are enforcing in this area.

Historic Comparisons

Out of 255 municipalities in Vermont, only seven purport to punish either "common prostitutes" or "prostitution." These include three village, one town, and three cities.¹ Ten more villages, one town, and one city have slightly different charter provisions that empower the municipality

¹ These include: the Villages of Cambridge (24 App. V.S.A. § 213-61), Ludlow (24 App. V.S.A. § 235-114), and Orleans (24 App. V.S.A. § 261-17; the Town of Chester (24 App. V.S.A. § 111-301); and the Cities of Newport (24 App. V.S.A. § 7-23), Rutland (24 App. V.S.A. § 9-3.1, and Burlington (24 App. V.S.A. § 3-48(7)).

to “suppress houses of ill-fame and disorderly houses” or “to suppress and restrain disorderly and gaming houses” or “bawdy-houses” without an express reference to prostitution.²

In total, 19 municipalities (13 villages, two towns, and four cities) have charter provisions that either expressly or impliedly give them the power to criminalize or regulate prostitution. The vast majorities of these municipalities are incorporated villages, the majority of which were formed between 1870 and 1910.³

It appears that the language that Burlington now seeks to strike arose during that time. These provisions do not appear to be wide spread, but it is also possible that other municipalities have struck similar language. For example, the City of Montpelier has a prostitution ordinance similar to Burlington’s former ordinance that cites 24 App. V.S.A. § 5-301 as the sources of its authority, but this section does not include language concerning prostitution (either in direct or more euphemistic language). The strong implication is that Montpelier likely removed this authorization language at some prior point without reviewing the ordinance enabled by the statutory authority. This is similar to another situation where Montpelier relied on enabling language for an ordinance that had previously been repealed. See *City of Montpelier v. Barnett*, 2012 VT 32 (striking City’s ordinances to prevent swimming in Berlin Pond based, in part, on the repeal of earlier statutes used to promulgate ordinances).

While it is difficult, short of further, extensive research, to determine precisely when such language concerning prostitution entered into municipal charters, the evidence strongly suggests that such powers were likely drafted or generated more than 100 years ago. These powers are not wide spread throughout Vermont, and they are more likely to be found in smaller incorporated villages than in either towns or larger municipalities. As it presently stands, the majority of Vermonter do not live in municipalities with such charter provisions and the vast majority of municipal governments, whether such charter provisions exist or not, do not appear to be actively regulating or enforcing such provisions.⁴ This simply reinforces the point made above that these provisions, while reflective of a certain period, are no longer active parts of the web of public safety and law enforcement provisions currently in active use at the local level in Vermont.

If you have any questions, please feel free to reach out to me prior to tonight’s meeting.

² These include the Villages of North Bennington (24 App. V.S.A. § 251-1101), Newfane (24 App. V.S.A. § 249-701), North Troy (24 App. V.S.A. § 253-3), Derby Line (24 App. V.S.A. § 217-701), Derby Center (24 App. V.S.A. § 215-501), Lyndonville (24 App. V.S.A. § 237-4), Wells River (24 App. V.S.A. § 285-4), Manchester (24 App. V.S.A. § 239-4), Alburgh (24 App. V.S.A. § 203-401), Jacksonville (24 App. V.S.A. § 227-15); the Town of St. Johnsbury (24 App. V.S.A. § 151-8); and the City of Vergennes (24 App. V.S.A. § 15-11).

³ See *Edward T. Howe, Vermont Incorporated Villages: A Vanishing Institution*, 73 Vermont History 16-39 (Winter/Spring 2005), at https://vermonthistory.org/journal/73/05_Howe.pdf (detailing the history of incorporated villages in Vermont and noting that the majority of such villages were formed between 1870 and 1910).

⁴ To this last point, most incorporated villages do not have a separate government structure, let alone an active police force or municipal infrastructure, and they are unlikely to enforce criminal ordinance. By way of example, the Village of Jacksonville is effectively part of the Town of Whitingham, which does not have a police force.