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OF  
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June 10, 2013

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

Re: Church Street Marketplace District Trespass Authority Ordinance  
Opinion Supplement

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Dear City Councilors,

Following my June 4<sup>th</sup> opinion letter to you I researched case law regarding “banishment.” There is a wealth of authority in this area which further undermines the legality and constitutionality of the City’s ordinance.

**Banishment Is A Criminal, Not Civil, Procedure.**

The ordinance purports to establish a “civil” procedure for the removal of individuals from the marketplace. This is an oxymoron. Such an order is a form of banishment which is historically criminal and not civil in nature, *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2<sup>nd</sup> Cir. 1996) [holding that a tribal banishment of an individual member from the tribe is reviewable under federal habeas corpus].

(t)he related devices of banishment and exile have throughout history been used as punishment...Banishment was a weapon in the English legal arsenal for centuries, but it was always judged a harsh penalty even by men who were accustomed to brutality in the administration of criminal justice. 85 F.3d at 889.

Following an extensive discussion of the history of banishment as a severe restraint on the constitutional rights to travel and of association, it held that the tribe’s characterization of the practice as “civil” was erroneous. This reasoning was followed in *Quair v. Sisco*, 359 F. Supp.2d 948 (E.D. CA. 2004), noting that historically banishment was construed as a punitive sanction criminal in nature despite the purportedly “civil” label given the proceedings.

**“Banishment” Need Not Involve Exile From a State, a County, or a Whole City.**

*City of New York v. Lenny Andrews a/k/a Bloody Pimp*, 719 N.Y.S.2d 442 (2000) rejected the City of New York’s attempt in a civil proceedings to banish suspected prostitutes and gang members from Queens Plaza. It refused a requested injunction as an attempt to use civil powers to enforce the criminal law, and recognized the implications on the federal constitutional right to travel and the liberty interest to remain and even loiter for innocent purposes in public areas of choice were implicated. The court in *KNL v. State*, 803 So.2d 1245, 1249 (Miss. Ct. App. 2002) did not dispute the characterization of a sentencing condition

banning a teen convicted of shoplifting from a shopping mall as a “banishment,” but held it to be a reasonable and appropriate probationary sentencing condition given the nature of the conviction, which is discussed below.

The banishment afoot in our ordinance is not just a non-criminal banishment from a discrete area of the City as part of a sentencing condition, but banishment from the “community commons” – *the* heart of the City, the place where people gather in the community.

**Banishment Must Be Specifically Authorized by the Legislature.**

Because of the traditionally recognized punitive nature of banishment, the common law rule is that banishment may not be practiced in any form unless specifically authorized by the legislature. Where not authorized by statute, it is prohibited. *Montana v. Muhammad*, 43 P.3d 318, ¶26 (Mont. 2002); *Collette v. State*, 206 S.E.2d 70 (Ga. App. 1974) c.f. 24B CJS Criminal Law §1991 and 21 Am Jur. 2d. Criminal Law §609.

Burlington not only lacks legislative authorization regarding prohibiting otherwise lawful use of the streets as discussed previously, there is no legislative authorization generally for banishments of this type at all.

**Banishment Is Upheld Where It Is Part of A Criminal Sentencing Proceeding and Where It Meets Specific Pre-requisites.**

A majority of jurisdictions that have reviewed the question have held that while banishing a defendant from a state is invalid because it infringes on the right to travel, is not rationally related to probation, and “dumps” one’s state’s problems onto another. However conditions of a criminal probation barring travel to small geographical areas have been upheld as valid criminal sentencing conditions. *Commonwealth v. Pike*, 701 N.E.2d 951 (MA. 1998); *New Mexico v. Wacey*, 83 P.3d 611 (N.M. App. 2004). Banishment is permitted in Mississippi as a condition of sentence for a person convicted of a crime provided the court make findings that (1) it bears a reasonable relationship to the purposes of probation, (2) is limited and the ends of justice are best served by it, (3) public policy is not violated and the objectives of rehabilitation are not defeated, and (4) the rights under the 1<sup>st</sup>, 5<sup>th</sup>, and 14<sup>th</sup> amendments to the U.S. Constitution are not violated. *Means v. State*, 43 So.3d 438 (Miss., 2010). Georgia has similar conditions. *Collette, supra*. Other jurisdictions require that it must serve a reasonable relationship, must serve a rehabilitative purpose, and serve the interest of the defendant and the public. *McCreary v. Mississippi*, 582 So.2d 425 (Miss. 1991); *Wyche v. State*, 148 S.E.2d 738 (Ga. Ct. App. 1990); *U.S. v. Cothran*, 855 F.2d 749 (11<sup>th</sup> Cir. 1988); *Markley v. State*, 507 So.2d 1043 (AL. Crim. App. 1987); *People v. Watkins*, 239 Cal. Rptr. 255 (Cal. Ct. App. 1987); *U.S. v. Abushaar*, 761 F.2d 954 (3d Cir. 1985); *State v. Morgan*, 389 So.2d 364 (LA. 1980).

This is a huge difference from our ordinance. In a criminal proceeding the accused has the rights to

- the appointment of counsel if s/he cannot afford one;
- trial by jury;
- proof beyond a reasonable doubt;

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- sentencing by a judge who is a trained and licensed lawyer appointed by the Governor and confirmed by the Legislature;
- the statutory rights and protections of the sentencing statutes; and
- the statutory rights governing probation and violation of probation.

Our ordinance provides none of these.

- It is not part of any criminal sentencing proceeding.
- It is an entirely extrajudicial proceeding. It does not even involve an application to a civil court for an injunction.
- It is a summary banishment issued administratively by a City official.
- In cases of orders issued over holiday weekends it is summarily and automatically effective without recourse for up to 79 hours on holiday weekends; up to 55 hours on non- holiday weekends; up to 31 hours during a business week with an intervening holiday such as Christmas or Bennington Battle Day; and up to 15 hours during an ordinary business week.
- It provides no standards such as those articulated required in *Means* and the other cases discussed above for imposition of a banishment condition.
- Neither the City official giving the trespassing order nor the hearing panel are neutral and detached magistrates; there is no requirement of any legal training for them at all.

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

Very truly yours,

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

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