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MEMORANDUM ON NONCITIZEN VOTING

To: Mayor and City Council
From: Eileen M. Blackwood, Esq. and Gene Bergman, Esq., City Attorney's Office
Date: September 30, 2014

The City Attorney's Office has been asked the following questions concerning noncitizen voting:

1. Can noncitizens vote at town meeting or in local (city and school) elections?
2. Can they vote at NPA meetings?
3. If they cannot vote in elections or at meetings, is there a way to change the law so that they can?
4. Can noncitizens serve on NPA steering committees, city boards, or city commissions?
5. If not, is there a way to change the law so that they can?
6. Can noncitizens serve as city department heads?
7. If not, is there a way to change the law so that they can?

1. **Vermont Law Prohibits NonCitizens from Voting in Public Elections**

Section 42, Chapter II of the Vermont Constitution (emphasis added) establishes who is eligible to be "a voter of this state":

Every person of the full age of eighteen years *who is a citizen of the United States*, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a voter of this state:

The City of Burlington will not tolerate unlawful harassment or discrimination on the basis of political or religious affiliation, race, color, national origin, place of birth, ancestry, age, sex, sexual orientation, gender identity, marital status, veteran status, disability, HIV positive status or genetic information. The City is also committed to providing proper access to services, facilities, and employment opportunities. For accessibility information or alternative formats, please contact Human Resources Department at 865-7145.

You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person.

Every person who will attain the full age of eighteen years by the date of the general election who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to vote in the primary election.

Section 2121 of Title 17 of the Vermont Statutes Annotated (emphasis added) further codifies those qualifications as follows:

(a) Any person may register to vote in the town of his or her residence in any election held in a political subdivision of this state in which he or she resides who, on election day:

- (1) *is a citizen of the United States;*
- (2) is a resident of the state of Vermont;
- (3) has taken the voter's oath; and
- (4) is 18 years of age or more.

(b) Any person meeting the requirements of subdivisions (a)(1)-(3) of this section who will be 18 years of age on or before the date of a general election may register and vote in the primary election immediately preceding that general election.

Historically, Vermont's original Constitutions of 1777 and 1793 permitted noncitizens to vote. Even after citizenship was required for statewide elections, noncitizens continued to be able vote at the local level, but eventually that distinction was abolished, and the legislature set one standard for all elections in the state.¹ Section 2656 of Title 17 now reads, "Regardless of the type of voting used, the qualifications to vote in any municipal election shall be as provided in chapter 43 of this title and all municipalities shall revise and post checklists as provided in

¹ All U.S. states permitted noncitizens to vote until New York was the first state in 1804 to abolish noncitizen voting, and by the early twentieth century, all states (and the federal government) had followed suit. Even where statewide voting is prohibited, noncitizens have been allowed to vote in local elections, municipal or school, in some communities.

chapter 43 of this title prior to any municipal meeting at which there will be voting.” Chapter 43 includes section 2121 cited above, which requires voters to be U.S. citizens.

Therefore, under current Vermont law, noncitizens cannot vote in public elections, even in municipal or local elections.

2. Noncitizens May Participate in NPA’s

The City of Burlington’s Neighborhood Planning Assemblies are created pursuant to a 1982 resolution of the Burlington City Council. Who is a member, who can participate, and the extent of their role is therefore determined by the council resolution that created them, or by bylaws that an individual NPA may have adopted.

The city council authorizing resolution states that “[a]ll voters of a particular ward of the Neighborhood Planning Assembly for such ward shall become voting members.” The resolution also refers to providing information to and receiving input from citizens. However, a recent council resolution, adopted September 8, 2014 to create the NPA for Ward 8, expressed the intent of the NPAs “to be open and accessible to all residents regardless of voter status.” This provision was intended to eliminate the prior limitation in the authorizing resolution and, as the findings state, allow noncitizens who currently are not voters to fully participate in the NPA’s.

3. Can the State Law Be Changed to Allow NonCitizens to Vote?

In the 1863 case of *Woodcock v. Bolster*, 35 Vt. 632 (1863), the Vermont Supreme Court analyzed then-existing voting laws and concluded that according to Vermont statutes at the time, a man (women could not vote at the time) had to be a freeman to vote in state elections, but had to be a taxpayer to vote in local elections. The court concluded that “[i]t has not been questioned but that it is actually within the power of the legislature to regulate the right of voting in such meetings, and the right of holding office, according to their pleasure, and that there is nothing in the constitution restraining its exercise.” *Id.* at 639. However, since then, the Vermont constitution has been amended to state that the privileges of voters are given to “a citizen of the U.S.” This more specific language in the constitution means the legislature does not have free rein to decide who can and cannot vote.

Arguably, section 42 of the constitution does not specifically state that “only” citizens have voting privileges (and noncitizens do not), and perhaps, arguably, this opens the door for the state legislature to be able to expand voting rights to noncitizens (as long as everyone who meets the requirements in the constitution is assured voting rights), but as one Vermont trial judge explained in a case reviewing this provision, “[f]or purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time.” *Noble v. Sec. of State*, 2010 WL 4567689 (Vt. Sup. Ct. Civil Div. Oct. 21, 2010)(citation omitted). By so specifically laying out the four

requirements to be a legal voter, the amenders of the constitution essentially foreclosed the extension of the right to others who do not meet the requirements (noncitizens, nonresidents, those under 18, for example). Although neither has issued a formal opinion on the issue, it also appears unlikely that the Vermont Secretary of State or the Vermont Legislative Council would advise the legislature that it has the authority to give additional voting rights. Therefore, it appears that a constitutional amendment would be required to allow noncitizens to vote in local elections.

According to the Vermont Constitution, Chapter II, §72, a constitutional amendment must be introduced at a biennial session convening every four years after 1975—the upcoming biennium beginning in 2015 is the next one. The Senate must propose the amendment by a two-thirds vote, with the concurrence of a majority of the House. The measure then must wait for the next biennium (beginning in 2017) where a majority of that Senate and that House must concur. Then, the measure would be submitted to the voters for a majority vote (at the general election in November 2018, according to 17 V.S.A. §1842), and if passed, the governor would issue a proclamation acclaiming that the amendment has become part of the constitution.

4. **Can noncitizens serve on NPA steering committees, city boards, or city commissions?**

Who can serve on NPA steering committees and city boards is determined by the authority creating each of those bodies. Burlington’s city charter, which is a state law, states that **the following boards consist of “legal voters of said city”**: the boards of

- assessors,
- tax appeals,
- public works commissioners,
- cemetery commissioners,
- police commissioners,
- light commissioners,
- fire commissioners,
- health, parks and recreation commissioners,
- school commissioners,
- registration of voters,
- airport commissioners, (24 App. V.S.A. Ch. 3, §§43, 120)
- fence viewers, (24 V.S.A. §§831, 871)
- Church Street Marketplace commissioners, (9 legal voters of the State, not just Burlington) (24 App. V.S.A. Ch. 3, §322)
- city councilors, and
- school commissioners (and the mayor)(*Id.* §130(b))

Because, as explained above, legal voters must be citizens, noncitizens cannot currently serve on these boards. These requirements can only be changed by the state legislature. However, the city can request legislative changes to its charter through the charter change process.

Other city boards do not currently require legal voting status and thus are open to noncitizens: the boards of

- development review,
- conservation,
- library commissioners,
- planning commissioners,
- retirement,
- housing board of review, and
- design advisory.

Any other subcommittees or advisory committees established by the council or city departments would also not be limited to legal voters, unless their authorizing documents specifically made such a limitation. City appointees to the CCTA and CSWD boards also do not have to be legal voters. With the recent resolution opening the NPA's to all residents, noncitizens should be permitted to serve on NPA steering committees. Therefore, currently, noncitizens can serve on these boards without any need for any change to law or policy.

5. **If not, is there a way to change the law so that they can?**

A charter change could be pursued to change the requirement of legal voting status to serve on the first 13 boards identified above, and perhaps even the city council and board of school commissioners, although as elected positions, it seems somewhat more awkward for individuals to be able to serve in a position, but not to be able to vote for themselves.

6. **Can non-citizens serve as city department heads?**

The city charter currently requires that certain city department heads—the city assessor, city attorney, CAO, city constable, civil defense director, CEDO director, harbormaster, HR director, cemetery superintendent, BED general manager, fire chief, parks and recreation director, planning director, police chief, public works director, and school superintendent—be legal voters of the city or be under an extension of that requirement for personal hardship. As noted above, legal voters in Vermont must be citizens, so non-citizens may not serve in any of those positions.

There is no similar limit for any other department head not specifically mentioned (for example, BCA director, code enforcement director, BT general manager, airport director, city engineer, CSM director, or library director) or for any other city employee. Thus, currently non-citizens can serve in these positions, as long as they are legally able to work in the U.S.

The Immigration Reform and Control Act of 1986 prohibits discrimination in employment because of citizenship status, 8 U.S.C. § 1324b(a)(1)(B), if a person is a legal

permanent or temporary resident, refugee, or asylum seeker, but it also contains an exemption for any discrimination that is required by state law. Because the city's charter is a state law, the department-head-residency requirement falls within that exemption, and the city's charter requirement that the enumerated department heads be legal voters of Burlington stands.

7. If not, is there a way to change the law so that they can?

A change to the city's charter could eliminate the requirement that the enumerated department heads be legal voters of the city. If the requirement were changed to "resident"² or eliminated, for example, individuals holding green cards (permanent residents) or other legal status that allows them to work in the U.S., could serve as one of the enumerated department heads.

² The privileges and immunities clause of the U.S. Constitution (Art. IV, sec. 2) provides that in any state, the citizens (although this has been interpreted to also include residents in some circumstances) of another state in the U.S. are entitled to the same privileges and immunities as the citizens of that home state. The U.S. Supreme Court has, however, held that municipalities may require its own direct employees to be residents of the municipality, although that case was decided before the 1986 Immigration Reform and Control Act. McCarthy v. Philadelphia Civil Comm'n, 424 U.S. 645 (1976).