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November 21, 2012

Maurice Jones, City Manager
City of Charlottesville
605 East Main St.
Charlottesville, VA 22902

Re: *North Downtown Residents Association Report*

Dear Mr. Jones:

As an organization not only committed to defending the rights of the oppressed but with offices in Charlottesville and employees who are residents of Albemarle County, The Rutherford Institute¹ is deeply disturbed by the Report by the North Downtown Residents Association ("NDRA"), some portions of which were included in City staff's November 19th proposal for "curb[ing] negative behavior in downtown." This Report evidences the NDRA's desire to sacrifice civil liberties and oppress the poor in our community for the sake of commercial and aesthetic interests.

As a public policy matter, many of the proposals being advanced, aimed ostensibly at the disadvantaged in our community, are so devoid of a spirit of neighborliness and lacking in a commitment to the protection of fundamental rights as to cast a pall on this much-lauded birthplace of Thomas Jefferson. Moreover, as a legal matter, the proposals contained in the NDRA report are at once unnecessary and rife with legal pitfalls. It is our recommendation that the City of Charlottesville reject these proposals for the reasons outlined herein.

Public Policy Concerns

Criminalizing the Poor. The tone, tenor and language of the NDRA report betrays a predominant desire to simply "clean up" the appearance of the Downtown Mall by

¹ As a non-profit civil liberties organization headquartered in Charlottesville, Virginia, The Rutherford Institute strives to educate the public on civil rights issues and to provide free legal representation to those whose fundamental liberties have been threatened or infringed.

ridding it of persons who have nowhere else to go. Homelessness is a tragic reality in Charlottesville, and efforts to sanitize affluent commercial venues of all evidence of an issue that cries out for our community's attention threaten to harden and dehumanize our City.

While the Report is replete with references to the "feelings" of patrons and business owners about the presence of "panhandlers" and "vagrants" on the Downtown Mall, it is lacking in evidence that the individuals referred to as such have perpetrated any actual crimes or done anything—apart from simply being poor and being present in a public place—to deserve the opprobrium of our community. This should be a red flag to any public policymaker, as it signals the desire to criminalize and further marginalize a *class* of persons (the poor and/or homeless).

The Council should also reject legislation that is aimed at protecting the "feelings" of Downtown Mall patrons and visitors. Enduring "feelings" of discomfort or distaste as a result of the words or actions of others is, after all, a part of the price that Americans pay to live in and enjoy a free society. It is no proper role of any government body to guarantee "feelings" of happiness or to insulate citizens from tragic and persistent social problems such as homelessness and poverty.

Silencing the Poor. The Report states, "Panhandlers are not above the law, and do not have the right to destroy the ambience of the Mall with their hand-lettered, cardboard signs." On this premise, the NDRA absurdly proposes to require homeless persons using signs to solicit charity to comply with the onerous "special requirements" for signage that are applicable to the "Downtown and University Corner architectural design control districts."

While "panhandlers" are certainly not "above the law," it is both cruel and ludicrous to purport to require them to navigate the system of special signage regulations in order to silently and unobtrusively seek charity from their fellow man. The NDRA's open disdain for "hand-lettered, cardboard signs" simply does not justify an ordinance targeting the poor, who would likely not be using their signs in the first place if they had the means of designing and constructing the type of signs that meet with the approval of wealthy merchants and patrons.

Increasing police presence and surveillance. To the extent that there is no actual data indicating a true crime problem on the Downtown Mall, increasing police presence there is likely to do nothing but add to the average citizen's impression that our society is evolving into a full-fledged police state. For the same reason, the NDRA's proposal for the City to invest in a costly camera system for the Downtown Mall should be rejected. Such a measure, even if genuinely undertaken in the interest of "safety," would certainly result in a chilling effect on citizens' exercise of fundamental civil liberties and would further erode the basic privacy of ordinary, law-abiding members of our community.

These weighty countervailing factors tip the scale solidly against the use of surveillance cameras and increased police presence in the heart of our City. As we know firsthand from the countless citizens who contact our organization daily, Americans are increasingly unsettled by the idea of “Big Brother” looking over their shoulders. Even citizens who are careful to obey the law—indeed, perhaps these individuals in particular—feel violated by the watchful eyes of cameras as they gather in public spaces in their hometown. The sense of intrusion engendered by these forms of technology leads to a generalized resentment of local government that is detrimental to the health and well-being of the community.

Legal Concerns

Banning “Sitting or laying [sic] on the Mall”. The Report requests that the City Council enact ordinances prohibiting “lying down or sitting on the Mall within ten feet of a building” and “sleeping on the Downtown Mall,” because “Those who sit or lay [sic] on the ground are very damaging to the image of the Mall.” As evidence of the great damage the poor are doing to the sacred “image” of this commercial zone, the NDRA Report includes photographs of obviously poor human beings peacefully sleeping or sitting in this public space. Many would weep at these photos. But lest the Council be tempted, instead, to accept the NDRA’s proposal, please be aware that the criminalization of such common, necessary human activities as sitting and lying down presents a host of legal pitfalls.

First, we submit that it would be difficult to demonstrate consistent enforcement of a law prohibiting “lying down” or “sitting,” as these are common, innocuous human activities. Even-handed enforcement of such a scheme would require law enforcement to interfere not only with homeless persons who seek to rest innocently in the shade of a building, but also with toddlers who have grown tired from walking and are waiting for a parent to finish a shopping errand with a vendor.

Second, at least one federal district court has struck down a municipal ordinance prohibiting homeless persons from lying down, sleeping, standing, sitting, or performing other life-sustaining activities in public places. In *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D. Fl. 1992), the court emphasized the involuntariness of the homeless’ plight in holding that the ordinance violated the Eighth Amendment’s ban against cruel and unusual punishment. The court cited a host of other court decisions striking down various vagrancy laws.²

The freedom to loiter in public places for innocent purposes is a liberty interest that is protected by the Due Process Clause of the Fourteenth Amendment.³ We believe that the kind of ordinances under consideration—in addition to being poor public

² See, e.g., *Robinson v. California*, 370 U.S. 660 (1962); *Headley v. Selkowitz*, 171 So.2d 368 (Fla. 1965); *Parker v. Municipal Judge*, 83 Nev. 214 (1967).

³ *City of Chicago v. Morales*, 527 U.S. 41, 53-54 (U.S. 1999).

policy—present blatant constitutional problems of overbreadth and vagueness that cannot be ignored.⁴

Criminalizing speech. As you recognized in your November 19th Report to the City Council, outlawing offensive language is unconstitutional where such language does not rise to the level of “fighting words.” The Report’s recommendation in Appendix 3B of “A Constitutional Way To Restrict Verbal Assault” is misguided and misleading. While the title of the Appendix suggests that it would be constitutional for the City to criminalize “language containing no information or ideas of social value,” this proposition apparently rests upon the drafter’s personal and unsubstantiated belief that:

The fighting-words doctrine does not meet the demands of Rule of Law. It should be abandoned and prohibitions against verbal abuse should rest instead on the second criterion of the *Chaplinsky* case, that is: a civilized society must assure order and morality by protecting its citizens from verbal abuse, and that utterances that are not an essential part of an exposition of ideas and have no social value as steps to truth are not constitutionally protected.

Report, Appendix 3B, p. 34.

The Council should bear in mind that the fighting words doctrine so conclusively dismissed by the drafter has been a critical component of the United States Supreme Court’s First Amendment jurisprudence since 1942. In *Chaplinsky v. New Hampshire*, the Supreme Court explained that one of the *justifications* for ruling that “fighting words” are not constitutionally protected (in addition to preventing physical violence) is that they were not valuable as speech⁵. However, the Court nowhere suggested that expression might be criminalized on this basis alone. Indeed, such a notion would permit the banning of all sorts of speech that may be silly, foolish, or unnecessary, but certainly retains its protection under the First Amendment.

The Report asks the Council to essentially upend the First Amendment by allowing speech to be criminalized unless government officials deem it to be *worthy* of protection. It would be utterly foolish, as well as tragically ironic, for the City that boasts the home-place of Thomas Jefferson to mount such a laughable challenge to established First Amendment law in an effort to *restrict* free speech.

Conclusion

The proposals for public action contained in the NDRA Report are unwise, uncharitable, and in many respects, constitutionally infirm.

⁴ See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

⁵ 315 U.S. 568, 572 (1942).

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In view of the foregoing considerations, The Rutherford Institute hereby requests that you and the City Council reject the proposals that would subject our community to increased government surveillance and greater police presence, pit City officials against our homeless population for the sake of sanitizing the Downtown Mall, and blatantly violate the First Amendment. Let us work together, instead, to find humane solutions to problems that are far more pressing than issues of public image and private commercial profits.

Sincerely yours,



John W. Whitehead
President

cc: Charlottesville City Council
Tim Longo, Charlottesville Chief of Police