

MEMORANDUM

October 16, 2015

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Public Hearing:** Bill 39-15, Offenses – Purchase of Prostitution - Prohibited

Bill 39-15, Offenses – Purchase of Prostitution - Prohibited, sponsored by Lead Sponsors Councilmembers Huckler and Rice and Co-Sponsors Navarro and Riemer, was introduced on September 29, 2015. A Public Safety Committee worksession is tentatively scheduled for October 26 at 2:00 p.m.

Background

Bill 39-15 would make purchasing prostitution a violation of County law. Although selling or buying prostitution would violate the current State Criminal Law prohibiting solicitation of prostitution, Bill 39-15 would add an alternative enforcement mechanism for the police to combat human trafficking in the County. A person is often forced to work as a prostitute by human traffickers at a young age. The Bill would authorize a police officer to issue either a civil or criminal citation to the customer for purchasing prostitution in the County. A civil citation would be prosecuted by the County Attorney's Office and could result in a maximum fine of \$500 for a first violation and \$750 for subsequent violations. A criminal citation would be prosecuted by the State's Attorney and could result in both a fine up to \$1000 and up to six months in jail. The Bill would be enforceable only against the customer. The Office of the County Attorney found no legal impediment to its enactment. See ©4-8.

This packet contains:	<u>Circle #</u>
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Bill No. 39-15
Concerning: Offenses – Purchase of
Prostitution – Prohibited
Revised: 10-9-15 Draft No. 5
Introduced: September 29, 2015
Expires: March 29, 2017
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsors: Councilmembers Hucker and Rice
Co-sponsor: Councilmembers Navarro and Riemer

AN ACT to:

- (1) prohibit the purchase of prostitution;
- (2) establish enforcement procedures and penalties; and
- (3) generally amend County law relating to offenses.

By adding

Montgomery County Code
Chapter 32, Offenses – Purchase of Prostitution
Section 32-23A

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec 1. Sections 32-23A is added as follows:**

2 **32-23A. Purchase of prostitution.**

3 **(a) Definitions.**

4 In this Section, the following terms have the meanings indicated:

5 Prostitution means the performance of a sexual act, sexual contact, or
6 vaginal intercourse for hire.

7 Purchase means to offer or agree to pay money to another person in
8 return for a service.

9 Sexual act has the meaning stated in Md. Criminal Law Art. §3-301, as
10 amended.

11 Sexual contact has the meaning stated in Md. Criminal Law Art. §3-
12 301, as amended.

13 Vaginal intercourse has the meaning stated in Md. Criminal Law Art.
14 §3-301, as amended.

15 **(b) Prohibition. A person must not purchase prostitution in the County.**

16 **(c) Enforcement; penalties.**

17 **(1) A police officer may issue a civil citation or a criminal citation**
18 **to a person whom the officer reasonably believes has violated**
19 **this Section.**

20 **(2) A violation of this Section is a Class A violation.**

21 *Approved:*

22 _____
George Leventhal, President, County Council

Date

23 *Approved:*

24 _____
Isiah Leggett, County Executive

Date

LEGISLATIVE REQUEST REPORT

Bill 39-15

Offenses – Purchasing Prostitution - Established

DESCRIPTION: Bill 39-15 would prohibit purchasing prostitution. The Bill would also establish enforcement procedures and penalties.

PROBLEM: Police need alternative enforcement mechanisms to eliminate human trafficking in the County.

GOALS AND OBJECTIVES: Eliminate human trafficking in the County.

COORDINATION: Montgomery County Police.

FISCAL IMPACT: To be requested.

ECONOMIC IMPACT: To be requested.

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Class A Violation.



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

TO: J. Thomas Manger, Chief of Police

VIA: Edward B. Lattner, Chief, Division of Government Operations *EBJ*
County Attorney's Office

FROM: David E. Stevenson *DES/EBJ*
Associate County Attorney

DATE: October 9, 2015

RE: Bill 39-15, "Offenses – Purchase of Prostitution – Prohibited"
Comments by the County Attorney's Office

I have read and reviewed the content of Bill 39-15, and I see no legal issues..

Bill 39-15 proposes to add a new Section 23A to Chapter 32, Article I, "Offenses," of the Montgomery County Code. The new Section 32-23A that Bill 39-15 proposes to add to the County Code will make the "purchase" of prostitution-type services a civil and criminal violation of County law. And by making the "purchase of prostitution" a County offense, Bill 39-15 will make the citation and adjudicatory enforcement procedures of Section 1-18 of the County Code applicable to the prosecution of criminal and civil violations against persons who offer or agree to pay money to another person for prostitution-type sexual services. Thus, Bill 39-15 will supplement the existing framework of State criminal laws, by adding an alternative enforcement mechanism for law enforcement agencies to employ in combatting human trafficking that occurs in the County.

Compared to state law.

A person's act of "purchasing" (offering or agreeing to pay money to another person) for prostitution-type services is already a violation of a State criminal statute. Under current State law, a person may not knowingly engage in an "assignment" ("the making of an engagement for prostitution"). Knowingly engaging in an "assignment" is a violation of Section 11-306 (a) (1) of the Criminal Law Article of the Maryland Code. And a person who seeks and obtains prostitution-type services from another person has engaged in an "assignment." Attorney Grievance Commission v. Marcalus, 414 Md. 501, 518-19 (2010). Additionally, under current

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State law, a person may not knowingly procure or solicit an act of prostitution from another person. This is a violation of Section 11-306 (a) (5) of the Criminal Law Article of the Maryland Code. Under State law, a person who violates Section 11-306 (a) of the Criminal Law Article is guilty of a misdemeanor, and is subject to imprisonment for up to one year, a fine of up to \$500, or both imprisonment and the fine.

Although a prosecution of a person who "purchases prostitution" can be initiated under Section 11-306 (a) of the Criminal Law Article by the arrest of the "purchaser," or by the filing of a criminal charging document against the "purchaser" in the District Court, Section 4-101 of the Criminal Procedure Article, titled "Charge by Citation," does not authorize the issuance of a citation to the "purchaser" of prostitution. So, under current law, and unless Bill 39-15 is enacted, law enforcement officers cannot issue a citation to a person who "purchases prostitution," charging the purchaser/solicitor/assignor with a violation of law.

While the language of proposed Section 32-23A of the County Code is more "plain English" than the language of Section 11-306 (a) of the Criminal Law Article, if Bill 39-15 is enacted, new Section 32-23A of the County Code will prohibit the same conduct (in the form of "purchasing prostitution") as Section 11-306 (a) already prohibits (in the form of an "assignment" for, or the "procurement/solicitation" of, prostitution).

Analysis

The content of Bill 39-15 is "constitutional," and "legal." Under the Express Powers Act, the County may enact local laws on any matter covered by the express powers granted by the Act. See Section 10-202 (a) of the Local Government Article of the Maryland Code. And, under the Express Powers Act, the County Council may enact any County law that "may aid in maintaining the peace, good government, health, and welfare of the county." Section 10-206 (a) (2) of the Local Government Article. This power to legislate for the general welfare of the county is a delegation of the State's "police power," and the "police power" is a broad and expansive legislative power. County Council v. Investors Funding, 270 Md. 403, 411-415 (1973). The only restriction on the County's police power is that the Council cannot enact a law that conflicts with a State general public law. Rockville Grosvenor, Inc. v. Montgomery County, 289 Md. 74, 96 (1980).

Conflict

In order for the County to be in conflict with State law, the local law must prohibit an activity which is expressly permitted by State law, or permit an activity which is expressly prohibited by State law. Some element of irreconcilability or legal inconsistency is required, such that both the State and the local laws cannot be applied together. City of Baltimore v. Sitnick, 254 Md. 303, 317 (1969). There are no such conflicts between the existing State law and

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the County law proposed by Bill 39-15. A mere lack of uniformity in detail does not create a legal inconsistency or conflict. Ibid.

Moreover, where a State statute prohibits certain conduct, a local law may be enacted to prohibit the same conduct. And the local law may even enlarge upon the scope of the conduct that is considered criminal, and provide for more severe penalties for the conduct prohibited by the State law. The enlargement of the scope of prohibited criminal activity, and the provision of different penalties, does not render local legislation enacted under "concurrent power" in conflict with the existing State statute. Rossberg v. State, 111 Md. 394, 414-18 (1909).

In a situation such as ours, where there is a State law regulating a field (but the State has not preempted the field), and a charter county wishes to enact a law in the same regulatory field, the State and the charter county have concurrent powers to address the same subject matter. City of Baltimore v. Sitnick, 254 Md. 303, 311-12 (1969) (Baltimore City may enact a minimum wage that is higher than the State's minimum wage). Where, as in the case of the regulation of prostitution-type conduct, the State has not preempted the entire field, a charter county may enact supplemental local legislation in that field. Id. 254 Md. at 317. The fact that a local law enlarges upon the provisions of a statute creates no conflict between the local law and the statute. Ibid.

There are three differences between the existing State statute, and the proposed County law. One difference is that the proposed County law would authorize a criminal penalty of up to six months in jail (as opposed to one year in jail), and a fine of up to \$1,000 (rather than a maximum of \$500). The second difference is that the County law would authorize a civil penalty of up to \$500 for a first violation, and up to \$750 for subsequent violations. The existing State law doesn't authorize civil penalties. The third difference has already been highlighted. The proposed County law will allow law enforcement officers to issue citations to persons who "purchase prostitution."

There is, however, no conflict between the provisions of Bill 39-15, and the content of the current State statute prohibiting persons from soliciting acts of prostitution, and from engaging in assignments for acts of prostitution. The fact that Bill 39-15 will allow the issuance of citations for "purchasing prostitution," when the parallel State law cannot be enforced in this fashion, the fact that proposed Section 32-23A will authorize a higher criminal fine, and the fact that Section 32-23A will authorize civil penalties (when the parallel State law does not) are differences between the two laws. But these differences are not "conflicts." although the proposed County law will authorize the imposition of civil penalties (while the existing State law does not), imposing a civil penalty for "purchasing prostitution" does not "permit an activity which is prohibited by State law." Providing for a different type of penalty for a prostitution-type offense is not "permitting" the offense. Bill 39-15's authorization of civil penalties doesn't constitute a conflict with State law.

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Finally, the fact that Section 11-306 (a) prohibits “knowing” participation in “assignments,” and “solicitations,” whereas the word “knowingly” does not expressly appear in the text of proposed Section 32-23A of the County Code does not present a conflict between the existing State law and the proposed County law, or represent a material difference between the substantive provisions of the two laws. Although Bill 39-15 does not make use of the word “knowingly,” the manner in which the terms “purchase” and “prostitution” are defined in the proposed County law includes the concept of a “knowing” participation in an act of prostitution. A violation of proposed Section 32-23A requires an offer or agreement to pay money to another person in return for the performance of a sexual act, sexual contact, or vaginal intercourse, which service is offered for hire. A person who presents an offer, or enters into an agreement, which is prohibited by Bill 39-15, clearly does so “knowing” that the person is engaging in an assignment for prostitution, or is soliciting an act of prostitution. The substantive provisions of the two laws will be virtually identical.

These differences between the terms of the existing State statute, and the provisions of the proposed County law do not present conflicts between the State law and the proposed County law. The proposed County law to prohibit the “purchase of prostitution” simply supplements (within Montgomery County) the provisions of State law that already prohibit human trafficking.

Preemption

The County is not expressly preempted by State law from enacting a law that addresses the subject matter of human trafficking, because Section 11-302 of the Criminal Law Article states: “A person charged with a crime under this subtitle [the Prostitution and Related Crimes Subtitle] may also be prosecuted and sentenced for violating any other applicable law.” Any “other applicable law” includes a law enacted by a charter county. So, the Legislature has expressly permitted charter counties to enact laws dealing with human trafficking. In view of Section 11-302, it is also clear that the State has not impliedly preempted local legislation in this subject area by completely occupying the field of the regulation of human trafficking.

Conclusion

The content of Bill 39-15 is consistent with the provisions of the State’s laws regulating human trafficking. And I do not see the enactment of Bill 39-15 as significantly increasing the County’s liability exposure to false arrest and malicious prosecution claims. In my view, there is no need to propose any substantive amendment to the content of Bill 39-15. Bill 39-15 should be enacted in its current form.

The content of proposed Section 32-23A of the County Code are not vague or ambiguous. The proposed County law contains words that are commonly used. It uses no legal or technical terms which would make it difficult to understand. Any person of common intelligence

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who reads the law should be aware of what actions are prohibited.

cc: Bonnie Kirkland, Assistant CAO
Marc P. Hansen, County Attorney
Robert Drummer, Senior Legislative Attorney

15-004055
Bill 39-15 analysis (EBL)