

**STATE OF VERMONT
WASHINGTON SUPERIOR COURT**

Christopher Hagan,
Plaintiff

v.

Docket No.

City of Barre,
Defendant

PLAINTIFF’S MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Vt. R. Civ. P. 65(b), the plaintiff, Christopher Hagan, moves for the issuance of a preliminary injunction enjoining the defendant from enforcing the Exclusion Ordinance against him until such time as the Court issues a final ruling on the merits of his claim.

I. Facts

The plaintiff, Christopher Hagan, moved to Barre, Vermont in April 2009, along with his wife, their children, and the couple’s dog. Aff. of Christopher Hagan ¶¶ 2, 4 (attached hereto as Appendix A and hereinafter “Chris Hagan Affidavit”). Mr. Hagan was convicted in a Vermont court in 2001 of lewd and lascivious conduct, *id.* ¶ 3, a conviction that makes him a “sex offender” under Vermont law. *See* Vt. Stat. Ann. tit. 13, § 5401(10). Following his successful completion of sex offender treatment, the Vermont Department of Corrections classified Mr. Hagan as a low risk to re-offend, which means that he is considered to pose the lowest possible risk of re-offense. Mr. Hagan was discharged from prison in 2005, and is not now on probation, parole, community release, or any other form of Department of Corrections supervision.

Mr. Hagan and his family receive assistance from the Vermont State Housing Authority (“VSHA”) in the form of its Section 8 rental assistance vouchers. The United States Department of Housing and Urban Development now encourages state and local housing authorities to bar

convicted sex offenders from housing assistance programs, 24 C.F.R. § 982.553(a)(2)(2), but Mr. Hagan obtained the assistance of VSHA prior to any such requirement taking effect and is thus grandfathered into the housing assistance program. The family currently pays \$198 per month in rent on the Barre apartment after the VSHA has contributed its portion. Chris Hagan aff. ¶ 10.

After the family's prior landlord lost possession of her property in the early spring of this year, Christopher and his family located a "clean and spacious" apartment in Barre that was within their price range and that was owned by a landlord willing to accept the family's Section 8 assistance payments. Aff. of Amy Hagan ¶ 7 (attached hereto as Appendix B and hereinafter "Amy Hagan Affidavit"). However, after moving in to the apartment, Chris learned that the defendant had issued an ordinance (the "Exclusion Ordinance") that purports to restrict where individuals convicted of the crimes enumerated at Vt. Stat. Ann. tit. 13, § 5401(10) may live within Barre. Chris Hagan aff. ¶ 5. The city contends that the Hagan family's apartment is located within the Exclusion Ordinance's coverage area (the "exclusion zone").

Since moving to Barre, Mr. Hagan has not been arrested, has not engaged in any dispute with his neighbors, and has not been the subject of any complaints to the family's landlord. *Id.* ¶¶ 6-8; *see also* Amy Hagan aff. ¶¶ 5, 6. Mr. Hagan requested that the defendant grant him a waiver from the ordinance on account of his good behavior, but the defendant refused. On April 23, 2009, Mr. Hagan received a notice from the Barre police department informing him that he has fifteen days to move outside the exclusion zone. The defendant will treat Mr. Hagan as being in violation of the Exclusion Ordinance beginning on Friday, May 8, 2009, with additional, separate violations accruing for each day that Mr. Hagan resides in the apartment with his family.

Mr. Hagan and his family have no savings. Chris Hagan aff. ¶ 12. Their lease runs until October, and they paid a deposit of \$1090 in order to move into the Barre apartment. Amy Hagan aff. ¶¶ 3, 4. If Mr. Hagan moves out of the apartment as directed by the defendant, he will

be unable to afford housing for himself. Chris Hagan aff. ¶¶15, 16. Moreover, he has been notified by VSHA that if he moves out of the apartment, he will lose VSHA assistance and will have to re-apply if he wishes to reenter the Section 8 program in the future. *Id.* ¶ 14. Neither Christopher nor Amy Hagan wish to be separated from their current family living arrangement. *Id.* ¶ 17; Amy Hagan aff. ¶ 8.

In order to prevent being forced to move out, Mr. Hagan filed suit in this Court and now moves for a preliminary injunction.

II. Mr. Hagan is Entitled to a Preliminary Injunction

Vermont Rule of Civil Procedure 65 permits the issuance of a preliminary injunction prior to resolution of the merits of a plaintiff's claim. The Vermont Supreme Court has not had occasion to set forth the showing that a movant must make in order to be granted a preliminary injunction, but the relevant portion of the Vermont rule is substantially similar to its federal counterpart, *compare* Vt. R. Civ. P. 65(b) *with* Fed. R. Civ. P. 65(a), and plentiful federal case law setting forth the preliminary injunction standard is illustrative. *Drumheller v. Drumheller*, 2009 VT 23, ¶ 29 (citing federal decisions “for guidance in applying the Vermont rule” where the Vermont rule is “substantially identical” to the federal rule). *Accord In re J.G.*, 160 Vt. 250, 255 n.2 (1993) (analogizing the Vermont standard for granting a stay of incarceration transfer to the federal preliminary injunction standard). In order to be entitled to a prohibitory preliminary injunction that maintains the status quo, the moving party must show “irreparable harm in the absence of the injunction,” and either “a likelihood of success on the merits,” or “sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor.” *County of Nassau v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008). Mr. Hagan meets both these prongs, and as such, the Court should

preliminarily enjoin the defendant from enforcing the Exclusion Ordinance against Mr. Hagan until the Court rules on the merits of his claim.

A. Mr. Hagan Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction

The showing of irreparable harm is the threshold prerequisite for issuance of a preliminary injunction. *Faiveley Transport Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009). The moving party’s anticipated harm must be “an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.” *Shapiro v. Cadman Towers, Inc.*, 51 F.3d 328, 332 (2d Cir. 1995). Trial courts in this Circuit have routinely recognized that the “threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable harm and satisfy the first prong of the test for preliminary injunctive relief.” *Tellock v. Davis*, No. 02-cv-4311, 2002 WL 31433589, at *7 n.2 (E.D.N.Y. Oct. 31, 2002). *See also Bosch v. Lamattina*, No. 08-cv-238, 2008 WL 4820247, at *5 (E.D.N.Y. Nov. 4, 2008) (where plaintiff seeks preliminary injunction against eviction, “[i]t is clear that Plaintiff faces irreparable harm in the absence of injunctive relief”); *Baumgarten v. County of Suffolk*, No. 07-cv-539, 2007 WL 1490482, at *5 (E.D.N.Y. May 15, 2007) (“[T]here is no doubt that Plaintiff faced irreparable harm in the absence of injunctive relief” where a judge lifted the stay on her eviction and “Plaintiff faced homelessness.”); *Calvagno v. Bisbal*, 430 F. Supp. 2d 95, 100 (E.D.N.Y. 2006) (plaintiffs’ “imminent danger of being evicted” satisfies the irreparable harm prong by confronting plaintiffs with “losing their only residence”); *Estevez v. Cosmopolitan Assocs. LLC*, No. 05-cr-4318, 2005 WL 3164146, at *3 (E.D.N.Y. Nov. 28, 2005) (Plaintiffs who stand to “lose their housing” and possibly “also lose permanently the benefits

conferred by” rental assistance program “will suffer actual and imminent harm if injunctive relief is not granted, and such harm would not be remedied by monetary damages.”).¹

There is little question that Mr. Hagan faces imminent irreparable harm if the Court does not preserve the status quo and enjoin the defendant from enforcing the ordinance against him. The defendant served the Exclusion Order notice on Mr. Hagan on April 23rd, and by the terms of the Ordinance, will begin levying fines of up to \$500 per day on him beginning on May 8th. Absent an injunction, Mr. Hagan has only two choices to avoid these fines, *i.e.*, moving out of the family’s apartment alone, or moving the entire family out with him. If he moves out alone, Mr. Hagan – who requires the VSHA assistance voucher to pay his current rent – will be unable to afford the deposit and monthly rent on a different apartment, rendering him homeless. Moreover, if he moves out alone, Mr. Hagan will lose his housing assistance voucher and face great difficulty getting it back: he will first have to convince the VSHA to permit him to apply for another voucher despite his criminal record, and then, even if successful, will face a very long waiting period before being issued a voucher.

On the other hand, if the Hagans wish to preserve their family living situation and move out together, they face similar problems. As a threshold matter, they will lose their deposit on the Barre apartment as a consequence of breaching the lease. They will then have to tender the deposit on a new apartment, which they cannot afford. Moreover, it is unlikely that the family can locate a new apartment and move there within the time allotted to avoid accrual of the daily \$500 fines.

Accordingly, Mr. Hagan has demonstrated that he faces imminent harm should the Court not maintain the status quo by enjoining the defendant from enforcing the Exclusion Ordinance against him.

¹ All unreported cases have been attached hereto as Appendix C.

B. Mr. Hagan Can Demonstrate a Likelihood of Success on the Merits

Mr. Hagan can satisfy the second prong of the preliminary injunction requirement by demonstrating a likelihood of success on the merits of his claim. Mr. Hagan’s lone claim in this suit is that the defendant exceeded its authority under Vermont law by enacting an ordinance that purports to restrict where an individual may live based solely upon the individual’s criminal record, and without reference to any acts the individual has taken to offend, annoy, or injure the municipality or its populace. As the law of Vermont firmly supports Mr. Hagan’s contention, he can demonstrate a likelihood of success on the merits of his claim.

It is well settled that when interpreting municipal authority, Vermont has “consistently adhered” to the rule of construction known as Dillon’s Rule.² *In re Petition of Ball Mountain Hydroelectric Dam*, 154 Vt. 189, 192 (1993). Dillon’s Rule has two tenets: first, that “a municipality has only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof,” *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977), and second, that if “any fair, reasonable, substantial doubt exists concerning” whether or not a municipality enjoys a particular power, the question “must be resolved against” the municipality. *Valcour v. Village of Morrisville*, 104 Vt. 119, 130 (1932).

2 It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted *in express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, – not simply convenient, but indispensable. Any fair, reasonable, substantive doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

John F. Dillon, 1 *Commentaries on the Law of Municipal Corporations* § 237 (5th ed. 1911) (emphasis in original).

1. The Defendant Has Not Been Expressly Granted the Power to Bar Individuals from Living Within its Borders

Dillon’s Rule affords a municipality no deference in the interpretation of its authority. Case law applying the Rule demonstrates the textual specificity that courts must insist upon in order to determine that a power has been authorized. An application of this principle shows that the defendant here has not been granted the power to bar individuals from within its borders by enacting the Exclusion Ordinance.

The Vermont Supreme Court “construe[s] municipal acts strictly” when determining whether a legislative enactment grants a given power to municipalities. *Robes v. Town of Hartford*, 161 Vt. 187, 190 (1993). In *Ball Mountain Hydroelectric Dam*, for example, the municipal petitioners sought to construct and operate a hydroelectric generation facility in order to sell the resulting electricity to retail electrical utilities throughout the state – but not to inhabitants of the municipalities involved. 154 Vt. at 191. The court’s analysis turned on the General Municipal Plant Enabling Act, which permitted Vermont municipalities to “operate one or more plants for the manufacture . . . of . . . electricity *for the use of such municipality and for the use of the residents of such municipality* and for such other customers outside such municipality as the [public service] board may approve.” *Id.* (quoting Vt. Stat. Ann. tit. 30, § 2902(a)) (alteration in original) (emphasis added). The court held that the petitioners lacked the authority to operate an electrical plant solely for the benefit of non-residents, as the statutory language “requires a municipality in good faith to serve customers outside such municipality only after it has served itself and its residents.” *Id.* at 192-3 (internal quotation omitted).

The subjects on which Vermont municipalities’ may issue ordinances are collected at Vt. Stat. Ann. tit. 24, §§ 2201-2299k. Municipalities are granted the authority to “promot[e] the public health, safety, welfare, and convenience,” *id.* § 2291, but only in the specific areas

enumerated in that section. None of the topics listed in § 2291 – ranging from the creation of sidewalks and bicycle paths, § 2291(1), to the regulation of sale and conveyance of sewage capacity, § 2291(22) – permits the defendant to restrict the ability of an individual to reside within Barre. The defendant’s legislatively approved municipal charter is similarly devoid of any mention of the ability to exclude an individual from residing within the municipality. *See* Vt. Stat. Ann. tit. 24 Appendix, § 1-105 (enumerating additional, specific subjects which defendant may regulate by ordinance).

2. Excluding Individuals from Living Within Its Borders Is Not Incident, Subordinate, or Necessary to the Exercise of Any of the Defendant’s Enumerated Powers

Where a municipality has not been explicitly granted a particular power, it may nonetheless exercise the power if doing so is incident, subordinate, or necessary to the exercise of an enumerated power. Here, however, the defendant’s purported ability to forbid individuals from living within its borders is in no way incident, subordinate, or necessary to the exercise of any of its narrow enumerated powers, and is therefore unlawful.

The Vermont Supreme Court has interpreted the “incident, subordinate, or necessary” prong of Dillon’s Rule as requiring a commonsense analysis of the relationship between the challenged activity and the enumerated power to which the municipality claims the activity is incidental, subordinate, or necessary. In *Hinesburg Sand & Gravel*, the court held that although municipalities’ statutory duty to keep town roads in good repair would authorize operation of a municipal gravel pit as incidental or necessary to maintaining roads, a municipality’s decision to operate a pit in such a way as to render “[a]bout seven-eighths of . . . pit production . . . for private sale as against one-eighth for town use” was “neither incidental nor subordinate to any

authorized town function.” 135 Vt. at 486. The fact that the relationship between the purported incidental power (production for private sale) subsumed the expressly granted power (production for municipal use) improperly rendered the express power “a mere pretext” for the incidental power. *Id.* (internal quotation omitted).

Similarly, the court held a municipality to have acted unlawfully where it enacted an ordinance setting a speed limit on a state highway that ran through its borders and then began issuing tickets to speeding motorists and collecting the resulting revenue. *State v. Yorkey*, 163 Vt. 355, 355 (1995). The municipality argued that although its ordinance set the speed limit identical to that set by the State for the same stretch of road, it was impliedly permitted to do so by Vt. Stat. Ann. tit. 24, § 2291(4), which permits municipalities “to regulate the speed of vehicles.” The court was unswayed, noting that by creating a municipal speed limit identical to the applicable state speed limit, the challenged ordinance did not regulate speed “in any meaningful sense,” but was instead a pretextual “revenue-raising measure” that was concocted to permit the municipality’s police to ticket motorists within its borders. *Id.* at 359.

The decisions of other Dillon’s Rule jurisdictions are in accord with the Vermont Supreme Court’s view that an incidental or necessary exercise of authority must be tightly yoked to the accomplishment of an enumerated power in order to be lawful. *E.g., Plummer v. City of Fruitland*, 89 P.3d 841, 844-5 (Idaho 2003) (statute authorizing municipalities to create “contracts, franchises or otherwise . . . that may provide solid waste collection for all or geographic parts of a city” did not grant by necessity or implication the power to enforce an exclusive garbage collection contract); *Home Builders Ass’n of Central Ariz. v. City of Apache Junction*, 11 P.3d 1032, 1039 (Ariz. App. Ct. 2000) (statute authorizing municipalities to levy fees offsetting cost of “providing necessary public services” did not grant by necessity the power to levy such fees for support of public education where “nothing in the constitution or statutes

giving powers to cities and towns suggests that cities have any authority over or responsibility for public school matters”).

The primary purpose analysis to determine whether an action is undertaken incidentally to or necessarily for an enumerated power is illustrated by instances in which a challenged municipal action has properly sprung from an enumerated power. In *Valcour*, the defendant municipality was permitted by statute to operate a municipal electrical plant and to sell any power produced to consumers within the municipality. 104 Vt. at 130. Although no statute expressly authorized it, the defendant’s practice of selling surplus power outside of the municipality’s borders was ratified by the Supreme Court as being “purely incidental to the primary object for which it was created,” because “dictates of a common business prudence require” that the surplus electricity be put to some revenue-generating purpose rather than being wasted. *Id.* at 132. See also *Lucia v. Vill. of Montpelier*, 60 Vt. 537, 545 (1888) (lawful for municipality to construct a backup water main to safeguard against damage to the primary main where legislature explicitly delegated ability to construct a comprehensive water supply system); *Bates v. Bassett*, 60 Vt. 530, 536 (1888) (lawful for municipality to rent out unused space in city hall to defray costs of the building’s refurbishment where statutory grant of authority to provide a city hall conveyed the authority to pay for the building by the means of the municipality’s choosing).

Here, the defendant does not enjoy an enumerated general writ to determine the composition of its populace. Therefore, no power impliedly or necessarily authorizes Barre to issue an ordinance excluding an individual from residing within the municipality in furtherance of the ability to determine its own population, and the ordinance is void as a matter of law.

a. The Defendant’s Nuisance Regulation Power Does Not Encompass Individuals Whose Actions Do Not Create Public Harms

Vermont municipalities have been delegated the authority to abate nuisances by the legislature. However, municipalities’ power to regulate nuisances is not a blank check: an individual’s acts or omissions must actually create a public nuisance to fall within the ambit of a municipality’s nuisance abatement power. As nothing Mr. Hagan has done (or not done) can be fairly described as causing a nuisance, the defendant is without the power to use its nuisance power to regulate his domicile.

In relevant part, the legislature has explicitly set forth that municipalities “shall have” the power to “define what constitutes a public nuisance, and to provide procedures and take action for its abatement or removal as the public health, safety or welfare may require.” Vt. Stat. Ann. tit. 23, § 2291(14). Despite the lack of statutory specificity, the rubric of public nuisance is not amorphous. A public nuisance is a “thing, condition or use of some continu[ous] . . . act” that through “offensive odors, noises, substances, smoke . . . emanations, sights, or the like, works hurt, annoyance, inconvenience, or damage to the public or to another.” 6A McQuillan, *The Law of Municipal Corporations* § 24:60 (3d ed. 2007) (internal footnotes omitted). Accordingly, “whether or not a particular activity is proscribed by ordinance is not necessarily determinative of the question whether such activity does or does not constitute a nuisance.” *Id.*

Rather than being created by fiat of local government, “to be considered a public nuisance, an activity must disrupt the comfort and convenience of the general public by affecting some general interest,” *Napro Development Corp. v. Town of Berlin*, 135 Vt. 353, 357 (1977). Hence, the Vermont Supreme Court has held that an individual accused of diverting water off of his property onto a public road does not create a public nuisance unless the action results in

damage to the public, *i.e.*, that “the travelling [sic] public were, to some extent, impeded, hindered, or obstructed, in the use of the highway for the purpose of travelling over it.” *State v. Smith*, 54 Vt. 403, 412 (1882). *See also State v. Woodward*, 23 Vt. 92, 99 (1850) (dispute of fact over the alleged public nuisance of enclosing a portion of a public common exists where “the act complained of does not divest the property, or any part of it, from the use of the public, or in any manner impair the public use and enjoyment of it,” but may be deemed a nuisance per se where the action “wholly exclud[es] the public from the enjoyment” of the land). *Accord Berkeley County Comm’n v. Shiley*, 295 S.E.2d 924, 926 (W. Va. 1982) (county government could not bar landowner from holding concerts on his property via its public health nuisance abatement powers where “[t]here was no evidence that ‘public health’ was affected in any way by” the concerts); *Eastern Oil Refining Co. v. Ct. of Burgesses of Wallingford*, 36 A.2d 586, 588 (Conn. 1944) (striking ordinance declaring as a public nuisance “any building or premises . . . which *in the opinion of* the [municipal government] is prejudicial to public health, or an unreasonable annoyance to persons” (emphasis added)).

Where an individual engages in offensive *action*, however, the individual’s undertaking may be lawfully deemed a public nuisance. Thus, a lakeside property owner who constructs a dam “for the purpose of controlling the height of the water, and thereby raising it above, or lowering it below, its natural level” adversely affects “the common rights of all persons and produce[s] a common injury . . . therefore constitute[s] a public nuisance.” *Hazen v. Perkins*, 92 Vt. 414, 420-21 (1918). An individual who begins to construct a piazza over part of a city street creates a public nuisance when his construction project “encroache[s] upon” the public way, *City of Montpelier v. McMahon*, 85 Vt. 275, 281 (1911) (internal quotation omitted), as does the operator of a slaughterhouse that generates offensive odors during the processing of “putrid flesh,” *State v. Woodbury*, 67 Vt. 602, 606 (1895), or the individual who erects a private building

in a public square. *State v. Wilkinson*, 2 Vt. 480, 487-88 (1829), *overruled on other grounds by State v. Burpee*, 65 Vt. 1, 6 (1892).

The defendant's own nuisance ordinances reflect the action requirement. *See Barre Ordinances* § 11-1(a) (making it unlawful “for any person to ring, cause to be rung, conspire to ring and/or participate in the ringing of a false fire alarm within the city”); § 11-2 (forbidding one “to solicit a ride, employment or business from the occupant or occupants of any vehicle”); § 11-3 (barring individuals from distributing “handbills . . . or any other advertising matter of any kind whatsoever, by placing the same in or upon any motor vehicle standing or parked”); § 11-5(b) (“No person shall discharge within the limits of the city any . . . rifle or firearm . . . without a permit from the chief of police.”); § 11-6 (forbidding the discharge of “dynamite, gunpowder, nitroglycerine or other explosive substance for any purpose within the limits of the city” without a permit and supervision); § 11-8 (prohibiting “the practice of going in and upon private residences by solicitors, peddlers, hawkers, itinerant merchants or transient vendors of merchandise not having been requested or invited so to do”); § 11-9 (making an open fire); § 11-10(a)(1)(c) (barring loitering, but only that which causes a breach of the peace, creates “any disturbance or annoyance to the comfort and repose of any person,” obstructs the passage of persons or vehicles, or “[o]bstruct[s], molest[s], or interfere[s] with any person lawfully in any public place”); § 11-10(c)(2)(a)(1) (forbidding panhandling where, “during or after soliciting if that conduct is intended or is likely to cause a reasonable person to fear bodily harm to oneself or to another or damage to or loss of property”); § 11-11 (making it unlawful for a person to permit a nuisance or obstruction “to remain in or upon any street, highway, lane or other public place”); § 11-12 (constructing cellar doors that project into the street); § 11-13 (forbidding one to “cry any wares, or ring, or cause to be rung any bell or bells or use or cause to be used, any drum, horn, or other noisemaking instrument in any street, to the disturbance of the peace and comfort

of the inhabitants thereof”); § 11-14 (sledding or skating on public roads or sidewalks); § 11-15(c)(1) (making unlawful any noise “that, either by persistence, loudness, content, or time of occurrence, annoys, disturbs, injures, or endangers the reasonable quiet, comfort, repose or the health or safety of others within the City of Barre.”); § 11-16 (washing windows at night; sweeping litter into the streets); § 11-17 (defacing a building); § 11-18 (forbidding one to play “in any street or public place any amusement having a tendency to injure or annoy persons therein, or to endanger the security of property”); § 11-19 (depositing rubbish in public streets); § 11-20 (depositing rubbish in public fountains); § 11-21 (destroying lampposts); § 11-22 (permitting snow or ice to fall from a roof onto a public way); § 11-23 (shoveling snow onto a public way); § 11-24 (willfully defacing street signs); § 11-25 (operating a loaded vehicle on public streets so loaded as to cause “such load or any portion [to] becom[e] dislodged, detached or in any manner a hazard to other users of said streets and roads”); § 11-26 (excavating an open pit without proper fencing); § 11-27(d)(1)(a) (consuming alcohol in a public place); § 11-28 (harassing dogs); § 11-29 (collection of bad debts by the city); § 11-30 (false security alarms); § 11-31 (entering into public parks outside of their hours of operation); § 11-33 (circuses); § 11-34 (unlawful trespass onto private property); § 11-35 (disorderly conduct under the same conditions as the defendant’s ban on loitering).³

With respect to the Exclusion Ordinance, however, the defendant has neither predicated exclusion from the relevant areas of the municipality upon an offensive occurrence, nor notified Mr. Hagan of any offensive act or omission of his that has done injury to the municipality or its populace. The Exclusion Ordinance is triggered by an individual’s establishing a residence within the city, which consists merely of “moving to a new residence and dwelling there with the intent to remain indefinitely,” *Godino v. Cleanthes*, 163 Vt. 237, 240 (1995). Lacking the

³ The relevant ordinances have been attached hereto as Appendix D.

requirement of an offensive act, the Exclusion Ordinance therefore exceeds the defendant's lawful authority.

b. The Exclusion Ordinance is Not a Valid Zoning Regulation

To the extent that the defendant may defend its ordinance on the basis of it being a zoning ordinance, little need be said about the defendant's ability to issue the Exclusion Ordinance as an exercise of its zoning power. Municipalities have been expressly delegated the authority to adopt zoning measures "to govern the use of land and the placement, spacing, and size of structures," Vt. Stat. Ann. tit. 24, § 4411(a). However, a municipality may only adopt zoning measures "in conformance with its adopted municipal plan," *id.*, and then only by the procedure set forth in Vt. Stat. Ann. tit. 24, § 4442.

The Exclusion Ordinance purports to govern natural persons, not land and structures. Moreover, the defendant has not amended its municipal plan or following the necessary procedure in order to promulgate a zoning bylaw. Hence, the Exclusion Ordinance may not, as a matter of law, be justified as an exercise of the defendant's zoning power.

C. The Court Should Waive Rule 65(c)'s Security Provision in this Case

Finally, the Court should waive Vt. R. Civ. P. 65(c)'s requirement that security be provided by Mr. Hagan prior to the issuance of any injunction. The rule provides that the Court may waive the security requirement "for good cause shown," and the Second Circuit has interpreted Fed. R. Civ. P. 65(c) – which contains no explicit good cause exception – to permit a court to "dispense with security where there has been no proof of likelihood of harm to the party enjoined." *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1356 (2d Cir. 1974). Given both Mr. Hagan's indigence and the complete absence of any harm to the defendant posed by Mr.

Hagan's presence in Barre, the Court should exercise its ability to excuse Mr. Hagan from posting security for an injunction.

III. Conclusion

For the above-stated reasons, the Court should enjoin the defendant from enforcing the Exclusion Ordinance against Mr. Hagan until such time as the Court issues a final order on the merits of Mr. Hagan's claim.

Respectfully submitted,

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Dated this 6th day of May, 2009.