

STATE OF VERMONT
WASHINGTON SUPERIOR COURT

Christopher Hagan,)
Plaintiff)
)
v.) Docket No.320-5-09 WnCv
)
City of Barre,)
Defendant)

**BARRE CITY’S STATEMENT IN OPPOSITION TO THE PLAINTIFF’S MOTION
FOR PRELIMINARY INJUNCTION WITH INCORPORATED SUPPORTING
MEMORANDUM OF LAW**

The City of Barre, by and through undersigned counsel, states its opposition to the Motion for Preliminary Injunction filed with the Court by Plaintiff. The City also states its opposition to Plaintiff’s request that the Court waive Plaintiff’s obligation to post security pursuant to V.R.C.P. 65 (c) in the event that the Court grants the Preliminary Injunction Motion.

GENERAL BACKGROUND

The City of Barre “Barre” enacted its Child Safety Ordinance by virtue of Ordinance Number 2008-03 on July 29, 2008.¹ Barre enacted the Child Safety Ordinance to protect children attending schools, recreation facilities, and other similar places by keeping convicted sex offenders from residing within a thousand feet of these locations where minor children are present. “Sex offender” is defined in Vermont’s Statutes at 13 V.S.A. §5401(10). Plaintiff claims that Barre exceeded its authority under Vermont law by enacting an ordinance limiting where an individual may reside based upon the classification of “sex offender”.

The Supreme Court has held that “[a]n injunction is an extraordinary remedy and will not be granted routinely unless the right to relief is clear. *State Building Division v. Town of*

¹ The correct title of the challenged ordinance is “Child Safety Ordinance” which plaintiff pejoratively renames as “The Exclusion Ordinance”. Plaintiff repetitively refers it is “the Exclusion Ordinance” throughout his Memorandum.

Castleton Board of Adjustment 138 Vt. 250, 256 (1980). The Court continued “[i]t may issue only in cases presenting some acknowledged and well-defined ground of equity jurisdiction, as when it is necessary to prevent irreparable injury or a multiplicity of suits”. *Id.* at 256-257. “. . . V.R.C.P. 65 (d) requires the Court to specify with detail in its order granting an injunction the reasons for issuance and the acts restrained.” *Id.* at 257 (Internal citations omitted). Plaintiff articulates a two prong test which the Court should follow in evaluating Plaintiff’s Rule 65 Motion for Preliminary Injunction. Under Plaintiff’s analysis in order to grant an injunction the Court requires the moving party to 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 the balance of hardships tipping decidedly in the movant’s favor.” Plaintiff’s Motion at p. 3. The Plaintiff is unable to demonstrate that he meets either of these prongs in order for the Court to enjoin the City from enforcing its Child Safety Ordinance against the Plaintiff. The Court should deny Plaintiff’s Motion.

A. The Plaintiff Will Not Suffer Irreparable Harm in the Absence of a Preliminary Injunction

Plaintiff will not suffer irreparable harm if he is required to move from his present address at Kent Place. While it is true that he would have to reapply for a new certificate in the event that he decided to sever himself away from his family and apply for his own separate apartment with separate rental assistance, the Plaintiff has the option available to him of moving the housing certificate so long as the family moves along with him. The certificate is portable and the certificate follows the tenants so long as there is no change in the composition of the household.²

² Mr. Hagan’s present housing certificate is grandfathered with respect to the point raised by him that if he were to now apply for a housing certificate he would likely be denied because of his criminal record. Even though he would be denied as a matter of administrative rule because of his criminal record, he has certain rights available to him concerning the denial.

Notwithstanding, if Mr. Hagan chose to separate himself from his family he could appeal the administrative decision denying housing assistance because of his past criminal record. The factors that are considered on appeal would be: 1) the length of the time since the crime occurred; and 2) proof that Mr. Hagan has been rehabilitated. The burden of proof is on the applicant to show his rehabilitation. Mr. Hagan has asserted in this Complaint that he has successfully completed sex offender treatment and he is now classified by the Department of Corrections as a low risk to re-offend. See ¶ 12 of Plaintiff's Complaint. Further, in ¶ 50 of his Complaint he describes himself as being forthright and having a "virtually non-existent risk of re-offense". It seems that Mr. Hagan would have a strong argument to overcome the routine denial and he would likely have a successful appeal awarding a housing certificate in his own name alone, if he is able to prove his assertions. However, he has strongly indicated in his Complaint that he desires to remain with his family unit consisting of his wife, their two sons, and the family dog. See ¶ 5 of Plaintiff's Complaint. Accordingly, it is likely that if required to move, Mr. Hagan would move with his family intact which would preserve his housing certificate, thereby insuring his ability to find alternative housing with the grandfathered Vermont State Housing Authority subsidy intact.

B. The Plaintiff is Unable to Demonstrate a Likelihood of Success on the Merits

1. Barre's Charter confers authority upon the Barre City Council necessary to enact the Child Safety Ordinance.

Plaintiff, in bringing this Motion, relies upon the rule of construction known as "Dillon's Rule." The thrust of Dillon's Rule, as relied upon by Plaintiff, is to the effect that the municipality has only 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 and Gravel Co. v. Town of Hinesburg, 135 Vt. 484, 486 (1977). The Plaintiff, in supporting his position, claims that the enabling statute, 24 V.S.A. §2201-2299k fails to confer enabling authority to Barre. Plaintiff concludes that none of the enumerated powers granted to municipalities enables Barre to enact the child safety ordinance. The Plaintiff further concludes that Barre’s municipal charter is “...similarly devoid of any mention of the ability to exclude an individual from residing within the municipality.”³ See Plaintiff’s Memorandum at page 8 (referring to Section 105 of Barre’s Charter which enumerates six non-exclusive subject matter categories upon which the City may enact ordinances).

Barre invites the Court’s attention to Section 104 of the Barre City Charter which grants broad ordinance enactment authority to the City including sufficiently broad authority to enact the Child Safety Ordinance. That provision provides as follows:

Sec. 104. General Corporate Powers

- (a) The City shall have all the powers granted to towns and municipal corporations by the Constitution and laws of this State together with all the implied powers necessary to carry to execution all the powers granted; it may enact ordinances not inconsistent with the Constitution and laws of the State of Vermont or with this Charter . . . (Emphasis added).

Even Sec. 105 of the Barre City Charter, relied upon by Plaintiff for the six enumerated areas of regulation, ends with sweeping language empowering the City to enact the Child Safety Ordinance where it states as follows:

The specification of the powers herein shall not be deemed to limit the general grant of ordinances promulgating authority conferred by Section 104, or the ordinances adopted by the City prior to enactment of this act.

³ See page 11 of Plaintiff’s Motion for Preliminary injunction.

Section 105, relied upon by Plaintiff, makes it clear that the Section 105 enumeration of powers is not exclusive when it states that “[t]he general grant of ordinance promulgating authority in Section 104 shall include, but shall not be limited to, the authority . . .”

Chapter 1 of the Barre City Charter is replete with references that demonstrate the intention of the Charter enactment as a legislative enactment to confer broad ordinance authority upon the council. For example, Section 109 entitled “Reservation of Powers to the City” states as follows:

Nothing in this Charter shall be so construed as in any way to limit the powers and functions conferred upon the City of Barre and the Council by general or specific enactments in force or effect or hereafter enacted; and the powers and functions conferred by this Charter shall be cumulative and in addition to the provisions of such general or special enactments.

The Barre City Charter is granted to Barre City by the Vermont Legislature. Barre’s governance Charter contains provisions that differ from general State law. In the instant case, the Charter confers broader powers upon the City of Barre than those powers that would be relied upon by general State law. The Supreme Court has found that the Charter language takes precedence for that particular municipality. The Supreme Court held that “[w]hether the legislatively-adopted town Charter or the statute is controlling is a matter of statutory construction,” and that “[w]here two statutes deal with the same subject matter and one is general and the other is specific, the more specific statute controls.” The Charter will supersede State law since a Charter is a law that is more specific to a particular town. *Town of Brattleboro v. Garfield*, 2006 VT 56, citing, *Looker v. City of Rutland*, 144 Vt. 344, 346 (1984).

2. The Court should give effect to the clear intent of Charter Section 104.

Barre’s Charter Section 104(a) provides, in pertinent part, that “[t]he City shall have all the powers granted to towns and municipal corporations by the Constitution and the laws of the

State of Vermont. . . (Emphasis added). Interestingly, a review of the Vermont Constitution would reveal that there's no reference in the Constitution that specifically allocates or otherwise confers any powers to the municipalities. The Constitution on its face delineates powers to the state. Therefore, the only reasonable construction to be given of Section 104 is that the words "...powers granted to towns . . . by the Constitution..." clearly would refer to Barre's ability to "...enact [any ordinance] not inconsistent with the Constitution and laws of the State of Vermont...". Barre Charter, Sec. 104. Chapter 1, Article 5 of the Vermont Constitution addresses the police power. The above analysis of Section 104 enabling all police powers in the Constitution to be passed to the municipality with the municipality having the ability to enact ordinances not inconsistent with the Constitution clearly gives that authority to enact the Child Safety Ordinance pursuant to the police powers conferred upon the Barre Charter by virtue of the above analysis of the Section 104 language.

When construing statutes, the Court's primary objective is to effectuate the intent of the legislature. *Burlington Electric Dept. v. Vermont Dept. of Taxes*, 154 Vt. 332 (1990). In ratifying Section 104 of the Charter, the legislature has given the City all powers held by towns and municipal corporations by the Constitution, and because there are no specific powers enumerated in the Constitution explicitly delegated to the municipalities, that Section must be read in conjunction with the other section of Section 104 which clearly grants authority to the municipality to "... enact ordinances not inconsistent with the Constitution . . . of the State of Vermont ...". The Court reads operative sections of the statutory scheme and context and the entire scheme in *pari materia*. *Galkins v. Town of Chester*, 168 Vt. 82, 87 (1998). When Sections 104, 105, and 109 of the Barre Charter are read together it becomes clear that the charter is replete with references granting broad ordinance enacting authority to Barre. To hold

otherwise would be tantamount to abrogating the special effect to be accorded to the conclusion that explicit language in the Charter which provides that “the City shall have all the powers granted to towns and municipal corporations by the Constitution . . .” To conclude that the language in Section 104 grants nothing in the way of powers to Barre derivative from the Vermont Constitution, when the express language so provides that the legislature meant to convey all the powers to Barre as recognized in the Vermont Constitution would have the effect of rendering Sec. 104 of the Charter a nullity. Statutes are entitled to reasonable construction, but it is essential that construction not be such that will render the act ineffective or lead to irrational consequences. *In Re: A.C.* 144 Vt. 47 (1984). Further, there is a presumption that the Legislature does not intend to enact meaningless legislation. *State v. Yorkey*, 163 Vt. 355 (1995). Thus when the Court construes a statute, it must do so in a manner that will not render it ineffective or meaningless. *State v. Baldwin*, 140 Vt. 501, 511 (1981).

Plaintiff incorrectly asserts that Dillon’s Rule, as interpreted by the Supreme Court, relegates Barre to a straight jacket rendering Barre powerless to enact the Child Safety Ordinance. The Supreme Court noted that “[it is] the general proposition that, absent a home rule constitutional provision, a municipality has only those powers and functions specifically authorized by the legislature . . .” *Hinesburg Sand and Gravel v. Town of Hinesburg*, 135 Vt. 184, 485-486 (1977). (Emphasis added). The Court has further determined that “the limitations imposed by Dillon’s Rule are not dispositive . . . [I]f the legislature has delegated sufficient authority to the [municipality] to satisfy the demands of the Vermont Constitution, it follows that the [municipality] needs no further legislative approval under Dillon’s Rule.” . . .” *HAT Ass’n of Vt v. Winooski Val. Park District*, 2006 VT 82 at ¶7. The broad powers granted to Barre by the legislature via Charter Section 104 sets Barre apart from other municipal corporations who may

rely only upon ordinance authority granted by Title 24, Vermont Statutes Annotated Sections 2201-2299k. These distinctions are recognized by the Supreme Court where the Court noted that “[t]here is, of course, no requirement that all laws governing the operation of municipal corporations be uniform statewide . . . the ability of communities with appropriate legislative oversight to determine their powers and the means to exercise them through Charter provisions is well recognized in our law and policy . . . (internal citations omitted) . . . home rule necessarily upsets statewide uniformity and is valid” *Smith v. Town of St. Johnsbury*, 150 Vt 351, 357 (1988).

Authority for Barre’s Child Safety Ordinance is found in Chapter 1, Article 1 of the Vermont Constitution, which provides, in pertinent part, that “. . . all persons are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending of life and liberty, . . . and pursuing an obtaining happiness and safety . . .” (emphasis added). The Child Safety Ordinance was enacted for the specific purpose of insuring the safety of Barre’s children.

The Child Safety Ordinance is clearly an exercise in the police power. The police power is found in Chapter 1, Article 5 of the Vermont Constitution which provides as follows:

Article 5th That the people of this State by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same.

Enactment of the Child Safety Ordinance is also enabled by the police power of Chapter 1, Article 5 of the Vermont Constitution delegated to Barre by virtue of Section 104 of Barre’s Charter which delegates to Barre power to “enact ordinances not inconsistent with the Constitution and laws of the State of Vermont or with this Charter . . .” See Section 104 of Barre’s Charter. The last paragraph of Section 105 amplifies and underscores the broad general

grant of ordinance enacting authority conferred by the legislature upon Barre where Section 105 states that “specification of powers herein shall not be deemed to limit the general grant of ordinances promulgating authority conferred by Section 104 . . .” McQuillin’s Rule provides that “the power to ordain and publish such acts, laws, and regulations, not inconsistent with the Constitution and laws of the State as shall be needed to the good order of the city, authorizes a municipal corporation to establish all suitable ordinances for administering the government of the City, the maintenance of peace and order, the preservation of health of the inhabitants, and the convenient transaction of business within its limits and, and for the performance of the general duties required by law of municipal corporations.” *McQuillin, The Law of Municipal Corporations, Section 24*: 45 (3d ed.). Barre’s Child Safety Ordinance is enacted pursuant to general corporate authority granted to Barre via its Charter to provide for the good order and maintain the health of Barre’s most vulnerable citizens – Barre’s innocent youth. The police power created by the framers of the Vermont Constitution passes to Barre City Council by virtue of its Charter which authorizes the Council to enact “...ordinances not inconsistent with the Constitution and laws of the State of Vermont.”

Section 104 constitutes a delegation of police power by implication from the Vermont Constitution at Chapter 1, Article 5. McQuillin states as follows:

[d]elegations of police power to municipal corporations may be by statute or charter, either in express terms or by implication. The mode of delegation of the power ordinarily is unimportant, if it is in fact delegated. However, a statute or charter provision must itself be constitutional and valid in order to vest police power in a particular matter in a municipality.

McQuillin, the Law of Municipal Corporations, Section 24: 39 (3d ed.)

“‘Police power’ is power to prescribe within limits of federal and state Constitutions reasonable regulations necessary to preserve public order, health, or morals.” *State v.*

Quattropani, 99 Vt. 360 (1926). The delegation of the police power to the municipality is in and of itself the delegation of a specific enumerated power. The specific ordinances that can be enacted pursuant to the police power are those “reasonable regulations necessary to preserve public order, health, or morals.” The Child Safety Ordinance is specifically enacted to preserve the health and well being of children. *Id.* The Court has analyzed how some states’ constitutions specifically delineate every power, and noted that this operates to actually debilitate government. *Sabre v. Rutland, R. Co.*, 86 Vt. 347 (1913). The Vermont and US Constitutions, on the other hand, “make a general distribution of powers.” *Sabre* at 365. “The efficient exercise of the police power inherent in the people of this state is not to be frittered away by overnice speculations upon the distribution of the powers of government.” *Id.* at 365. In the *Town of Brattleboro v. Nowicki*, a case about a municipality’s exercise of its delegated police powers, the Court held that a municipality may exercise powers that are “necessarily and fairly implied in or incidental to the powers expressly granted.” *Town of Brattleboro v. Nowicki*, 119 Vt 18 (1955).

3. 2009 Act No. 1 Confirms the Authority of the City to Enact the Child Safety Ordinance.

The Vermont General assembly recently enacted 2009 Act No. 1 entitled “An Act Related to Improving Vermont’s Sexual Abuse Response System.” This is a major enactment by the Vermont General Assembly geared to protecting potential victims of registered sex offenders. Section 51 of the Act directly and sharply contradicts Plaintiff’s assertion that the legislature has not authorized Barre to enact such an ordinance as Barre’s Child Safety Ordinance. Interestingly, Section 51 of the Act makes it clear that the legislature recognizes municipal authority to enact the Child Safety Ordinance. The Court’s attention is invited to Section 51 of the Act.

“(a) Some local communities in Vermont have recently enacted or debated local ordinances that are designed to prevent sexual violence against children by restricting where registered sex offenders can live. These restrictions usually prohibit a sex offender from living within a certain distance of a school, park, playground, or child care facility.

“(b) The General Assembly is very concerned that such policies could have a negative impact on public safety in our rural state by isolating offenders or driving them underground. Densely populated towns and city centers that have ordinances push offenders out into more rural communities where there are fewer opportunities for successful reintegration and law enforcement supervision. Sex offender compliance with the State Registry is currently over 99%, and the General Assembly believes that keeping this high rate is essential to public safety.”

“(c) (Omitted.)

“(d) Therefore, the General Assembly respectfully requests that the Vermont League of Cities and Towns, Inc. work proactively with local communities to ensure they are receiving accurate and substantive information about the lack of efficacy of such laws and to encourage communities to focus on prevention and other strategies to improve community safety.” (Emphasis added.)

Source: 2009 Act No. 1

If the General Assembly contemplated that municipalities lack authority to enact an ordinance such as the Child Safety Ordinance, it is difficult to imagine a better opportunity to make such a prohibitory announcement than the opportunity presented by 2009 Act No. 1. The fact that the General Assembly chose, rather, to implore the Vermont League of Cities and Towns, Inc. to work proactively with local communities to dissuade them from enacting such an ordinance is, and ought to be, a most clear signal from the Vermont legislature that the municipalities enjoy the authority to enact a Child Safety Ordinance such as the one challenged by Plaintiff in the instant case.

The Rule of Construction, “*expressio unius est exclusio alterius*,” applies when contrast enforces the affirmative inference that that which is omitted was intended to have opposite treatment. *In Re: Downer’s Estate*, 101 Vt. 167 (1928). See also *Grenafegé v. Department of*

Employment Security, 134 Vt. 288 (1976); See also *In Re: Oszajca*, 199 B.R. 103, and *Bkrtcy. Vt.* (1996). Because 2009 Act No. 1 omits any declaration that it could have made that the authority to enact such residency ordinances is denied to municipalities, the Doctrine of “*expressio unius est exclusio alterius*,” enforces the affirmative inference that the Vermont General Assembly has affirmed by implication the authority of municipalities in Vermont to enact Child Safety Ordinances. *In Re: Downer’s Estate*, *supra*.

Even Dillon’s Rule recognizes a third category of powers granted to municipalities which Dillon states as “third, those [powers] essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient but indispensable.” John F. Dillon, *Commentaries on the Law of Municipal Corporation* § 237 (5th ed. 1911). Protecting the health and well being of Barre’s youth is not merely a convenience but is indeed an indispensable function pursuant to Barre’s corporate goals to enact any ordinance not inconsistent with the Constitution and laws of the State of Vermont.” Sec. 104. General Corporate Powers, Barre City Charter.

4. The City has the power to enact the Ordinance pursuant to 24 V.S.A. § 2291(14)

Vermont Statute 24 §2291(14) empowers municipalities to define a public nuisance and to enact ordinances abating public nuisances. Although the Plaintiff has specifically articulated his misplaced contention that “the Rubric of Public Nuisance is not amorphous,”⁴ the Supreme Court specifically has determined that “the concept of public nuisance is vague and amorphous. *Napro Development Corp. v. Town of Berlin*, 135 Vt. 353, 356 (1977). The State has expressly delegated to Barre the power to define and abate public nuisances. The Plaintiff’s use of the

⁴ The Plaintiff mischaracterizes the reach of the Child Safety Ordinance. On numerous occasions the Plaintiff describes the effect of the Child Safety Ordinance as barring individuals from living within the borders of the City of Barre. See Motion for Preliminary Injunction at Page 7, as an example. Mr. Hagan is able to live within the borders of Barre. Pursuant to the Child Safety Ordinance he may not live within those zones which are within one thousand feet of the designated locations where children may be present. So long as he is in an area of Barre that is not zoned as being within a thousand feet of the protected areas, Mr. Hagan may certainly live there.

McQuillin definition (Plaintiff's Memo at 11) is not the sole standard for determining what would constitute a public nuisance, and the fact that the State left it to municipalities to "define" public nuisance is, combined with the Court's statement in *Napro v. Berlin*, supra, that the public nuisance standard is vague and amorphous, certainly leads to the conclusion that public nuisance may mean take on varied meanings in different municipalities. The standard derived from the *Napro* case is articulated by the Court where the Court states that "to be considered a public nuisance, an activity must disrupt the comfort and convenience of the general public by affecting some general interests." *Id.* at 357. There is no requirement in the law, as argued by the Plaintiff, that there be some "action requirement" in order to constitute a public nuisance. The definition of what might constitute a "public nuisance" has been left to the policy making ability of the Barre City Council which is in the best position to know what may disrupt the comfort of its citizens. Protecting children from the real possibility of harm from those who may be classified by the State of Vermont as having low, moderate, or high risk of reoffending is a proper matter for the Council to address by concluding that exposure of Barre's youth to convicted sex offenders constitutes an unreasonable interference with the children's use and their parents' free use of public and private property. Creating the buffer zone fosters the comfortable enjoyment of life and property in those situations where children are present. *Napro* at 358. The City Council's definition of what constitutes a public nuisance will be accorded considerable weight and the Court will "indulge every presumption in support of the [Council]." *Eno v. City of Burlington*, 125 Vt 8 (1965).

The Supreme Court of Arkansas held that the operation of a half-way house constituted a nuisance, and while describing the make-up of the population in the half-way house the Court noted that one of the residents was a sex offender. *Arkansas Release Guidance Foundation v.*

Needler, 252 Ark. 194, 196 (1972). Hence the Arkansas Supreme Court concluded that the presence of a sex offender was a contributing factor to the creation of a public nuisance.

CONCLUSION

The City respectfully requests that the Court deny Plaintiff's Motion for Preliminary Injunction for failure to meet either prong of the articulated test, *i.e.* (1) Plaintiff cannot make a showing of irreparable harm since the housing certificate is portable so long as the family members remain together and Plaintiff has gone to great lengths to assert his belief in the strength of the family unit, especially his family unit, thereby rendering his assertion that he might apply for housing for himself alone and apply for a new certificate of housing as a hollow threat since it is inconsistent with his avowals of wanting to keep his family living in one unit, and (2) Plaintiff has not stated a case against the City's authority to enact the Ordinance in question, given that Barre's home rule provisions in Charter Sec. 104 support Barre's authority to enact the Child Safety Ordinance.

Dated: June 8, 2009

Respectfully submitted,

City of Barre

By: _____

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