

**STATE OF VERMONT
WASHINGTON SUPERIOR COURT**

Christopher Hagan,
Plaintiff

v.

Docket No. 320-5-09 WNCV

City of Barre,
Defendant

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO ISSUANCE OF A PRELIMINARY INJUNCTION

The defendant to this action has tendered opposition to Mr. Hagan's motion for a preliminary injunction, and the plaintiff respectfully submits a reply to that opposition in anticipation of oral argument scheduled for June 11, 2009. For the reasons set forth below, Mr. Hagan is likely to succeed on the merits of his claim and should therefore be granted a preliminary injunction preventing the defendant from enforcing Barre Ordinances § 11-36 ("the Exclusion Ordinance") against Mr. Hagan until such time as the Court rules on the merits of his claim.

I. Mr. Hagan will prevail on the merits of his claim because the defendant cannot identify its authority to issue an ordinance controlling where an individual may establish domicile

In its opposition to the plaintiff's motion for a preliminary injunction, the defendant identifies two textual provisions of its charter that it argues grant it the authority to control where an individual may establish her or his domicile. However, controlling authority from the Vermont Supreme Court mandates that absent a home rule constitutional provision, a municipality may not exercise a power unless the power is specifically enumerated. Vermont has no home rule constitutional provision, and thus, the defendant may not issue an ordinance

excluding residents from particular areas of Barre unless the power to do so has been specifically enumerated. As no such specific enumeration exists, the defendant has exceeded its lawful authority and its Exclusion Ordinance is void. The defendant's other arguments – that it has been vested with a general police power co-extensive to that of the State of Vermont, and that the constitutionality of the Exclusion Ordinance dictates its propriety despite having no specific grant of authority for its issuance – are similarly incorrect.

A. The defendant's charter does not provide legal authority to dictate where individuals may establish domicile

The defendant makes much of §§ 104(a) and 109 of its legislative charter, arguing that the two sections are “sweeping language” that grant “broad ordinance authority” upon the city council, in effect permitting the defendant to issue ordinances on any subject unless prohibited by state law. Def.'s Opp. at 4. Vermont has not amended its constitution to provide for municipal home rule, and the Vermont Supreme Court has made clear that in the absence of home rule, a municipality needs specific authorization from the legislature in order to exercise a particular power. The defendant's contention reverses the existing state-municipal relationship set forth by the Vermont Supreme Court and is untenable as a matter of law. Moreover, the language in the defendant's charter does not imbue it with a general police power, and the constitutionality of the ordinance does not control its legality as an exercise of municipal power.

1. Vermont municipalities have no innate authority, and any power must be specifically authorized by the legislature.

Section 104(a) of the defendant's legislative charter grants the municipality the general power to “enact ordinances not inconsistent with the constitution and laws of the State of Vermont or with [its own] charter.” All Vermont municipalities enjoy a similar general

ordinance-making grant from Vt. Stat. Ann. tit. 24, § 1971 (providing that a “municipality may adopt, amend, repeal and enforce ordinances or rules for any purposes authorized by law”). The defendant contends that this general ordinance power permits it to issue ordinances on any subject not explicitly prohibited by Vermont law. The flaw in the defendant’s reliance upon § 104 of its charter lies in the polar difference between the two prevailing models of state-municipal relations in the United States. Vermont adheres to the traditional model, the so-called “Dillon’s Rule” theory of municipal power that treats municipalities as possessing no authority beyond that which is specifically authorized under state law. Other states have adopted an opposite system, called “home rule,” in which municipalities are typically granted the authority to act in any manner not specifically forbidden by state law. Regrettably for the defendant, the Vermont Supreme Court has been clear that absent adoption of home rule via a constitutional amendment, Dillon’s Rule must be applied to any question of Vermont municipal authority.

The longstanding American view of municipalities is that they are political subdivisions of a State, exercising only those “governmental powers of the state as may be intrusted [sic] to them,” with the State retaining the ability “at its pleasure” to “modify or withdraw all such powers” or even “unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.” *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). The strict rule of construction that Vermont adheres to when adjudging municipal power – Dillon’s Rule – flows from this conception of State-municipal relations. Dillon’s Rule has two tenets that must be applied to any claimed municipal authority: first, in the absence of “a home rule constitutional provision, a municipality has only those powers and functions specifically authorized by the legislature.” *In re Ball Mountain Dam*, 154 Vt. 189, 192 (1990). Second, “[i]f any fair, reasonable, substantial doubt exists concerning this question it must be resolved against” the municipality’s claimed authority. *Valcour v. Vill. of Morrisville*, 104 Vt. 119, 130 (1932). The

defendant is therefore correct to observe that Dillon’s Rule is a “straight jacket,” *see* Def.’s Opp. at 7. The policy judgment behind Dillon’s Rule is that municipalities must seek specific, affirmative approval to deviate from state law of uniform application codified at Title 24 of the Vermont Statutes.

Logically, the breadth of this grant is also limned by the decisional law of this State’s courts. *E.g.*, *Estate of Girard v. Laird*, 159 Vt. 508, 513 n.3 (1993) (noting courts’ “obligation to develop and explain the law of Vermont for its citizens who rely on and use it”); *State v. Burpee*, 65 Vt. 1, 32-33 (1892) (“It is a fundamental principle of the common law that the adjudication of the highest tribunal or court of last resort, in matters of law, shall stand as rules of law in all similar cases.”) (internal quotation omitted). In the instant matter, the defendant’s general ability to issue ordinances within the bounds of Vermont law must therefore comport with the decisions of the Vermont Supreme Court that require municipalities to possess specific enumerated authority to exercise any particular power.

2. Vermont has not granted its municipalities home rule

The competing model of state-municipal relations is “home rule,” an arrangement under which some States have amended their constitutions to explicitly provide municipalities with “the ability to enact legislation without specific state permission.” Gerald Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1059, 1116 (1980). In home rule jurisdictions, municipalities are typically granted the ability to legislate on matters of local concern without requiring an enumerated grant of power from the state legislature. *See, e.g.*, Ill. Const. art. VII, § 6(a) (providing that “a home rule unit may exercise any power and perform any function pertaining to its government and affairs”).¹

¹ As a result of the home rule distinction between matters of local concern and matters of state concern, courts in home rule jurisdictions have encountered great difficulty “where local governments assert powers in areas that

At present, Vermont is not a home rule jurisdiction. This is because, as the Vermont Supreme Court has explained, “[i]n Vermont, there is no home rule constitutional provision.” *In re Northeast Washington County Cmty. Health Ctr.*, 148 Vt. 113, 114 (1987) (holding that because Vermont has no home rule constitutional provision, “towns only have those taxing powers specifically authorized by the Legislature.”). Compare Vt. Const. (no home rule provision) with Or. Const. art. 6, § 10 (granting any county the ability to “adopt, amend, revise or repeal [its] county charter” by majority vote of its residents).²

Vermont is hardly an outlier in its decision not to grant its municipalities home rule; many states similarly adhere to Dillon’s Rule and require explicit legislative authorization for any municipal exercise of power.³ Of course, nothing prevents Vermont from amending its constitution and providing its municipalities with home rule powers. It is simply the case that Vermont has not done so. The non-existence of a home rule provision in the Vermont Constitution leaves the defendant without plenary authority over its own affairs, as the Vermont Supreme Court has made clear that “absent a home rule constitutional provision, a municipality has only those powers and functions specifically authorized by the legislature.” *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 485-6 (1997).

are closer to the line between municipal affairs and matters of statewide concern,” and, as a result, “on the whole, courts have construed these local powers narrowly” as a reliable way out of the home rule thicket. Daniel B. Rodriguez, *Localism and Lawmaking*, 32 Rutgers L.J. 627, 637 (Spring 2001).

- 2 In its opposition, the defendant implies that Vermont is a home rule jurisdiction, *see* Def.’s Opp. at 8, by quoting *Smith v. Town of St. Johnsbury*, 150 Vt. 351, 357 (1988). However, the defendant has quoted an explanatory parenthetical that follows the citation of a New Jersey Supreme Court decision, rather than a holding of our high court that Vermont has home rule. New Jersey has home rule, *see* N.J. Const. art. IV, § 7(7) (“No general law shall embrace any provision of a private, special or local character.”); Vermont does not.
- 3 These include Connecticut, Mississippi, North Carolina, and Virginia. *See* Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 Colum. J.L. & Soc. Probs. 93, 101 n.43 (Fall 2005) (collecting jurisdictions).

3. The reservation of powers in defendant's charter cannot reserve to the municipality a power it has not been explicitly granted

In the alternative, the defendant contends that § 109 of its charter reserves to it the right to issue the Exclusion Ordinance.⁴ As Vermont municipalities have no broader power than that specifically granted by the legislature, there is no innate residuum for the defendant's charter to preserve.

The Vermont Supreme Court has made clear that municipalities in this state enjoy no innate powers. *E.g., Northeast Washington County Cmty. Health Ctr.*, 148 Vt. at 114. Moreover, courts are not to read municipal charters as vesting powers by implication. *Conn v. Middlebury Union High Sch. Dist. No. 3*, 162 Vt. 498, 504 (1994) (“[T]his Court does not grant powers to municipalities. Only the Legislature has the authority to grant such power.”). In *Conn*, the defendant municipality conducted a floor vote at a public meeting to secure permission to borrow \$270,000 for five years, in apparent disregard for the municipal debt procedure statute, Vt. Stat. Ann. tit. § 1758(a) (requiring, *inter alia*, that debt to be incurred for more than one year be voted on by Australian ballot). *Conn*, 162 Vt. at 499-500. When voters in the municipality brought suit challenging the propriety of the debt issuance, the municipality argued that Vt. Stat. Ann. tit. 24, § 1788 implies a general, pre-existing municipal debt issuance power, providing as it does that “[t]he existing power of a municipality to authorize public improvements by a majority vote . . . is not repealed nor affected by the provisions of this subchapter.” The Vermont Supreme Court disagreed, holding that § 1788’s language “cannot be construed, on its face, to be a grant of power,” because a reference to any existing municipal authority “ordinarily means the powers are granted elsewhere or exist apart from the statute at issue.” *Conn*, 162 Vt. at 501. Therefore,

⁴ Section 109 of the defendant's legislative charter sets forth that the charter shall not “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 special 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.”

municipalities must anchor any claim to authority to an express, specific grant of power from the legislature conferred by the legislative charter, special act, or statute. *Id.* at 503.

The Vermont Supreme Court's aversion to granting municipal authority by implication is illustrative here. The city contends that § 109 of its charter reserves to it the power to issue ordinances restricting where individuals may live notwithstanding the explicit enumeration of ordinance-granting powers found in § 105 of its charter and Vt. Stat. Ann. tit. 24, § 2291. The city has not identified, however, where the legislature has in the first instance specifically granted the defendant the express power to legislate on the subject of where Barre residents may dwell. In the absence of express language granting the defendant the power it purports to wield, this Court should follow the teaching of *Conn* and decline the city's invitation to read sweeping powers into its charter.

4. The defendant has not been invested with the general police power of the State of Vermont

The final charter-based argument that the defendant raises in its opposition to Mr. Hagan's motion for a preliminary injunction contends that its legislative charter delegates to the City of Barre "all police powers in the Constitution" that are vested in the State of Vermont. This position is without support.

States retained "a residuary and inviolable sovereignty" following the formation of our federal union which forbids them from being "relegated to the role of mere provinces or political corporations." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (internal quotation omitted). "The police power is not a grant derived from or under a written constitution; rather, it is inherent in state government." *State v. Curley-Egan*, 2006 VT 95, ¶ 10 (internal quotations omitted). See also 6A McQuillan, *The Law of Municipal Corporations* § 24:37 (3d ed. 2007) (the police power

to protect the health, safety, and welfare of the citizenry “is an inherent attribute” of state sovereignty. Municipalities have no such automatic sovereignty, *e.g.*, *Northern Ins. Co. of New York v. Chatham County*, 547 U.S. 189, 193 (2006), and a State must therefore explicitly delegate its sovereign power to a municipality in some measure in order for the municipality to exercise or enjoy the sovereign power in question. In Vermont, the legislature “possesses the authority to delegate the police power to other state or municipal instrumentalities,” *Curley-Egan*, 2006 VT 95 at ¶ 11, and has done so in limited measure to entities as varied as the University of Vermont, Vt. Stat. Ann. tit. 16, § 2283(a) (permitting the university to establish a police department). The legislature has also delegated specific pieces of Vermont’s police power to municipalities; these are enumerated in Vt. Stat. Ann. tit. 24, § 2291.

Nowhere in the Vermont Statutes has the legislature delegated the entirety of the State’s police power to the City of Barre. The State’s police power runs the gamut from public health measures such as the control of regulated drugs, Vt. Stat. Ann. tit. 18, §§ 4201-4252, to the definition of criminal offenses, *id.* tit. 13, §§ 1-7576, to compulsory education, *id.* tit. 25, § 1121. The rational interpretation of defendant’s charter § 104(a) is that the defendant enjoys the same powers granted to all Vermont municipal corporations in Title 24. This clause in the defendant’s charter distinguishes Barre from other municipal corporations that do not enjoy some of the powers conferred by Title 24. *See, e.g.*, Vt. Stat. Ann. tit. 24 app., § 601-5 (enumerating the powers of the Rutland County Recreational District, but not providing an ordinance issuance power). This Court should therefore not construe the defendant’s charter as investing the city with police powers co-extensive to those of the State of Vermont.

C. The constitutionality of a municipal ordinance is not determinative of its legality

In its opposition, the defendant relies upon *Hunters, Anglers & Trappers Ass'n of Vermont v. Winooski Valley Park Dist.*, 2006 VT 82, for the proposition that any municipal ordinance that does not violate the Vermont Constitution also satisfies Dillon's Rule. *See* Def.'s Opp. at 7. Briefly, our high court's discussion of the interplay between the Vermont Constitution and Dillon's Rule was confined to the particular facts of *Hunters, Anglers & Trappers*: in that case, the appellant challenged an ordinance adopted by the appellee as violating Vt. Const. ch. 2, § 67 (forbidding restrictions on hunting and fishing unless "made and provided by the General Assembly"). The Supreme Court held that Vt. Stat. Ann. tit. 10, § 6302 permits conservation district municipalities to acquire and manage property, and that municipalities are permitted to manage the property they own as any private property owner would, Vt. Stat. Ann. tit. 10, § 6307(a) – a proprietary power that includes posting land against hunting. *Hunters, Anglers & Trappers*, 2006 VT 82, at ¶ 7. The question of law in *Hunters, Anglers & Trappers* was therefore not whether the Dillon's Rule test is subsumed by the constitutionality of a municipality's exercise of power, but whether the Vermont Constitution's requirement that the legislature prescribe restrictions on hunting and fishing is satisfied by the combination of two statutes specifically delegating to municipalities the ability to own and manage property in the same manner as a private person. Here, the defendant's Exclusion Ordinance purports to govern both public and private property, and is being wielded against Mr. Hagan despite his living on private property not controlled by the defendant, so *Hunters, Anglers & Trappers* is inapposite.

II. Conclusion

For the above reasons, Mr. Hagan has demonstrated that the defendant does not possess the legal authority necessary to issue the Exclusion Ordinance. He therefore has shown a likelihood of success on the merits of his claim, and this Court should preliminarily enjoin the defendant from enforcing the Exclusion Ordinance against Mr. Hagan until the Court issues a final ruling.

Respectfully submitted,

The American Civil Liberties Union Foundation of Vermont

_____/s/_____
Dan Barrett
ACLU Foundation of Vermont
137 Elm Street
Montpelier, VT 05602
(802) 223-6304
dbarrett @ acluvt.org

Attorney for Christopher Hagan

Dated this 10th day of June, 2009.

CERTIFICATE OF SERVICE

I hereby certify that, given the proximity of tomorrow's oral argument, I have served the above by email and facsimile upon the following individuals:

Oliver Twombly
Law Offices of Oliver Twombly, P.C.
188 South Main Street
Barre, VT
05641
Counsel for the Defendant

_____/s/_____
Dan Barrett
ACLU Foundation of Vermont
137 Elm Street
Montpelier, VT 05602
(802) 223-6304
dbarrett @ aclvt.org

Attorney for Christopher Hagan

Dated this 10th day of June, 2009.