

Hagan v. City of Barre, No. 320-5-09 Wncv (Toor, J., June 29, 2009)

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STATE OF VERMONT  
WASHINGTON COUNTY

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CHRISTOPHER HAGAN  
Plaintiff

v.

CITY OF BARRE  
Defendant

SUPERIOR COURT  
Docket No. 320-5-09 Wncv

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RULING ON MOTION FOR PRELIMINARY INJUNCTION

This case involves the power of a Vermont municipality to restrict where a person who has been convicted of a sex offense may live. An ordinance enacted by the City of Barre restricts such people from moving into any area within 1,000 feet of a public or private school, and of any park, playground, recreation center, beach, pool, gym, sports field, or sports facility owned or operated by the City. Barre Ordinances § 11-36.<sup>1</sup>

Although other cases around the country addressing similar restrictions have raised various constitutional challenges, only two issues are presented by the plaintiff in this case: (1) does the municipality, as opposed to the state, have the legal authority to

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<sup>1</sup> Although the City's counsel asserted at the hearing that the ordinance only bars people who are *currently* listed on the registry, the court finds no such restriction in its language. It states that anyone who meets the definition of a "sex offender" as defined in 13 V.S.A. § 5401(10), except someone with an existing conviction who was already living there when the ordinance was passed, is barred from living in the exclusion area. Barre Ordinances, § 11-36 (a)(1). That statute defines "sex offender" as anyone who has been convicted of certain crimes: the definition is not limited to the time period during which a person is required to register. Thus, although the registration requirement can end after ten years for certain convictions – 13 V.S.A. § 5407(e) – the ordinance appears to bar anyone who has ever had a listed conviction from living in the relevant areas of Barre City for the rest of their lives.

create such restrictions by virtue of its general powers, and (2) if not, may it nonetheless do so pursuant to its express power to regulate public nuisances.

Plaintiff Christopher Hagan, who currently lives within the restricted area of Barre City (“Barre” or “the City”), seeks a preliminary injunction barring the City from enforcing the restriction against him. An evidentiary hearing was held on that motion on June 11. The City has agreed not to enforce the ordinance until July 7 or this court’s ruling, whichever first occurs. Although the court proposed to the parties that the preliminary hearing be merged with the final hearing given the identical nature of the issues, the City objected. Thus, the court’s ruling today addresses only the motion for a preliminary injunction and does not dispose of the entire case.

#### Findings of Fact

The witnesses at the hearing were Mr. and Mrs. Hagan, a Field Representative from the Vermont State Housing Authority, the District Director for the Department of Children & Families’ Economic Services Division, and the City Manager from Barre. Based upon the testimony and exhibits presented at the hearing, the court finds the following facts established by a preponderance of the evidence.

Hagan met his wife Amy in 2006, and they married in 2007. They have two children, a ten-year-old and a one-year-old. Hagan has a conviction from 2000 or 2001 for lewd and lascivious behavior that occurred in 1998 or 1999. As a result of that conviction, he is currently required to register with the state whenever he changes his residence, as well as reregistering each year even if he resides in the same location. At the hearing, no details were provided regarding the nature of the underlying offense.

According to Hagan, he was originally placed on probation with something under three months to serve, but later was found in violation of probation for failing to find employment. That violation led to him serving the balance of his sentence and undergoing the sex offender education program while incarcerated. He completed the program and was released in January of 2005. He then left the state to attend college in Iowa, and returned to Vermont in 2006. He believes that the Department of Corrections has assessed him as having a low risk to re-offend, but no evidence was presented from the Department of Corrections to confirm that.

In February 2009, Hagan and his family were living in Richmond in a trailer they rented from its owner. They were receiving Section 8 housing benefits. That month, they received notice that the owner of the trailer park was evicting them because the trailer owner had not paid the lot rent (despite the fact that the Hagans had been dutifully paying their rent on the trailer). They searched for a new residence, and found their current apartment in Barre City. They had to find an apartment suitable for Section 8 benefits – which required that it fall below a certain rent level including utilities, and could be satisfactorily inspected by Section 8 staff. They also desired one that would allow them to have their dog and cats. They searched quite a bit before finding this apartment.

After seeing the apartment, Hagan told the landlord of his sex offense and his need to register with the state. Hagan explained that because of the nature of his offense, he was not listed on the publicly accessible part of the sex offender registry, only the part that can be accessed by state officials and other specified entities such as certain types of employers. Apparently the landlord and Hagan therefore believed that the Barre ordinance was inapplicable to Hagan. Hagan and his wife signed the Section 8

paperwork, although apparently Hagan did not sign the actual lease with the landlord. His wife did sign the lease that day. It is unclear precisely when all of this occurred, although it appears to have been on or around April 1.

Hagan then went directly to the Department of Public Safety to register the new address, and was told there that his conviction would trigger the ordinance. He was directed to the Barre City Chief of Police for more information, and went to talk to him. The Chief explained that the apartment was within the restricted area covered by the ordinance.

The Hagans then called Senator Bernie Sanders' office and were referred back to the Barre City offices. The mayor returned their call, and suggested they come to the City Council hearing a few days later to raise the issue. Mr. Hagan did so. At the council meeting on April 7, he explained his situation and asked the Council to consider making an exception, or amending the ordinance in some way, to allow his family to live in the apartment. The Council apparently told him that it would take ninety days to amend the ordinance, and that he would have to leave within fifteen days of receiving a written notice to do so.<sup>2</sup> About two weeks later Hagan received the notice, which threatens fines of \$500 a day for every day he remains. The City has stayed enforcement of the notice while this case is pending.

It is unclear precisely when the Hagans actually moved into the apartment in Barre. However, Hagan concedes that it was after he had notice that the apartment was in the restricted zone. The Hagans felt they had no options, as the trailer they were living in was about to be removed from the lot by the owners of the trailer park.

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<sup>2</sup> The record does not make clear whether the City is in fact considering some sort of amendment to the ordinance that might allow for individual appeals or waivers.

The Hagens are both currently unemployed. Amy Hagan is not seeking work, as she is the children's primary caregiver. Christopher Hagan is actively seeking work. He has had a number of restaurant jobs in the past, most recently in March or April. They currently have no income and no savings, and are living on state benefits including food stamps, Section 8, Medicaid, and Reach-up benefits. They have no funds for a security deposit on another apartment, no vehicle, and no funds to pay a mover.

A Field Worker for the Section 8 program, Reenie Sargent, testified for Hagan. She explained that to obtain Section 8 benefits, families must meet low-income requirements and the apartments must be at a low enough rent to qualify. Sargent worked with the Hagens to find an apartment, and inspected this one to make sure it met Section 8 standards. She described it as a very nice apartment, much nicer than they are likely to find elsewhere for the price. The landlord agreed to lower the rent so that the Hagens could qualify for the apartment. Sargent met with the Hagens and the landlord the day they signed the paperwork. She has a copy of their lease in her file – which she did not bring to court – but was not sure whether only Mrs. Hagan or both of the Hagens signed it.

Although Sargent was aware of the Barre ordinance, because of the distance of the apartment from any school it did not occur to her that the ordinance was an issue.<sup>3</sup> When the Hagens contacted her about the problem, Mr. Hagan was suggesting that he move out and let the rest of the family stay while he tried to convince the City to make an exception for him. Sargent and her supervisor discussed the matter, and Sargent advised Hagan to stay because if he left he would have to reapply for Section 8 and would be

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<sup>3</sup> It is not clear from the record why this apartment is within the exclusion zone.

denied under federal law because of his criminal record.<sup>4</sup> While he would be able to appeal that and get a hearing, there would be no guarantee that he would succeed at the hearing. In addition, the waiting list for Section 8 is currently closed and not expected to reopen until the end of the summer. Even if an applicant gets approved, the waiting list is currently three to five years.

If the entire family moves out of the apartment, their Section 8 benefits would remain in place if they could find another qualified apartment. However, Sargent predicted that it would be very difficult for the Hagans to immediately find another apartment in the approved price range.

If the Hagans moved out now because of the enforcement of the City ordinance against them, thus breaking their lease, Vermont State Housing rules would likely require a hearing to determine whether their Section 8 benefits would be terminated as a result. Although Sargent “would hope” that the reasons for their move would lead to continuation of the Hagans’ benefits, she could not say what the hearing officer would do. She also noted that there would be an issue with regard to whether the Hagans would get their security deposit back or not.

Central Vermont Community Action can provide people with assistance in making deposits on new apartments, getting their belongings moved, and finding new housing. The same is true of the Department of Children and Families. The City of Barre also has funds administered by the police department that allow for grants to assist families (including a \$40,000 fund created by a donation to the City to help low-income people). However, the Hagans would have to apply for the funds and go through a

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<sup>4</sup> Why he qualified initially, but would not qualify later, was never explained. While it may be because there are different standards for families as opposed to individuals, there is no evidence about that in the record.

process to determine whether they would receive them. Thus, neither the DCF District Director nor the City Manager could say with certainty that the Hagens would receive such funds.

### Conclusions of Law

Hagan challenges the ordinance on two grounds. First, he argues that local municipalities in Vermont lack any general implied power to enact such ordinances. Second, he argues that the ordinance is not a proper exercise of the municipal power to regulate public nuisances. He seeks a preliminary injunction on the ground that enforcement of the ordinance will require him to become homeless.

Barre contests both claims, and in addition argues that Hagan should be denied preliminary injunctive relief because he chose to move into his residence knowing of the restriction. Barre also argues that Hagan has failed to show that he will risk any irreparable harm if he is forced to move.

### The Criteria for Preliminary Relief

The current issue before the court is whether Hagan is entitled to a preliminary, as opposed to a permanent, injunction, pursuant to V.R.C.P. 65. Although the Vermont courts have not established clear standards governing the issuance of preliminary injunctions, federal law is instructive because of the similarity of the state and federal rules. *See Drumheller v. Drumheller*, 2009 VT 23, ¶ 29, \_\_\_ Vt. \_\_\_ (looking to federal law for interpretation of Vermont rules).

Hagan asserts that to obtain a preliminary injunction here, Hagan must show that “irreparable harm” will occur without an injunction, and show either “(a) a likelihood of success on the merits or (b) 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)(citation omitted). Although there is room for argument over whether these are the precise standards a Vermont court should apply,<sup>5</sup> Barre does not dispute them. Thus, the court will proceed under these standards for today's purposes. However, as the Leavitt case points out, because in this case “the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood-of-success standard.” Id. (quoting Wright v. Giuliani, 230 F.3d 543, 547 (2d Cir.2000)).

“To satisfy the irreparable harm requirement, [p]laintiffs must demonstrate that absent a preliminary injunction they will suffer an injury that is neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.” Grand River Enter. Six Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir.2007) (internal quotation marks omitted). Hagan argues that he will suffer irreparable harm if he (with or without his family) is forced to move because he has nowhere to go, no funds to obtain a new apartment, no vehicle to move his

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<sup>5</sup> For example, In re J.G., 160 Vt. 250, 255 n. 2 (1993), suggests in dicta that courts should also evaluate the potential harm to other parties and the public interest. It is also unclear whether the standards in Vermont are different depending upon whether the injunction sought is “mandatory” (ordering someone to do something) or “prohibitory” (ordering someone to stop doing something). *See*, Committee to Save the Bishop's House v. Medical Center Hospital of Vermont, 136 Vt. 213, 219 (1978)(questioning in dicta whether there is any difference). *See* Bosch v. Lamattina, 2008 WL 4820247, \* 4 (E.D.N.Y. 2008) (explaining difference); *Compare*, O Centro Espirita Beneficiente Uniao do Vegetal v. Ashcroft, 389 F. 3d 973, 976-80 (10<sup>th</sup> Cir. 2004), *with* United Food and Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority, 163 F. 3d 341, 348 (6<sup>th</sup> Cir. 1998) (rejecting distinction). The City does not claim, however, that the requested injunction would be anything other than prohibitory, so the court need not resolve that issue today.

belongings, and will likely lose his or the family's Section 8 benefits at least for some period of time.

Numerous cases from other jurisdictions conclude that being made homeless and/or losing housing benefits (such as Section 8) constitutes irreparable harm.<sup>6</sup> *See, e.g., Watson v. Federal Emergency Management Agency*, 437 F. Supp. 2d 638, 648-49 (S.D. Tex.) (“likelihood of eviction and all of the problems associated with homelessness” constitutes irreparable harm), *vacated on other grounds*, 2006 WL3420613 (5<sup>th</sup> Cir. Sept. 6, 2006); *McNeill v. New York City Housing Authority*, 719 F. Supp. 233, 254 (S.D.N.Y. 1989) (“The threat of eviction and the realistic prospect of homelessness constitute a threat of irreparable injury, and satisfies the first prong of the test for preliminary injunctive relief.”); *Baumgarten v. County of Suffolk*, 2007 WL 1490482, \*5 (E.D.N.Y. May 15, 2007) (the prospect of homelessness constitutes irreparable harm); *Estevez v. Cosmopolitan Associates LLC*, 2005 WL 3164146 \*3 (E.D.N.Y. Nov. 28, 2005) (“Not only will plaintiffs lose their housing, they may also lose permanently the benefits conferred by the enhanced vouchers, which are available to eligible tenants only so long as they remain in the same housing. Plaintiffs will suffer actual and imminent harm if injunctive relief is not granted....”); *Edwards v. Habib*, 366 F.2d 628, 630 (D.C. Cir. 1965) (Wright, J., concurring) (“Certainly being evicted into the street is irreparable damage. Respondent suggests that petitioner can raise the money ... from charitable institutions. I think petitioner need not be relegated to charitable institutions as long as a court sits to enforce her rights. ... As to where the public interest lies, I suggest

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<sup>6</sup> Some of the cases cited by Hagan for this proposition are not on point, because they involve foreclosures and evictions from long-time residences rather than short-term rentals. *See, e.g., Bosch*, 2008 WL 4820247 at \*1. The court relies only on those cases discussing eviction from rental property.

that the public interest lies in keeping [th]is family housed, at least until the courts can determine petitioner's rights.”).

The City does not argue with this proposition, but does argue that the facts do not support a conclusion that Hagan risks homelessness or the loss of Section 8 benefits. While the City is correct that there is evidence of various potential sources of funds for a new apartment, and of the possibility that Hagan might appeal the termination of his Section 8 benefits if he moved alone, the court concludes that the availability of such benefits is speculative rather than certain. *Accord*, Watson, 437 F. Supp. 2d at 648-49 (rejecting argument that other sources of assistance are available, because “the assistance is not automatic” and “any potential relief remains speculative”).

The evidence establishes a likelihood that if Hagan moves alone, he will lose Section 8 assistance as well as having no funds and nowhere to go, and that if the whole family moves out they risk losing Section 8 benefits and may or may not receive assistance in finding and paying for a new apartment. The speculative nature of the assistance, and the relatively certain nature of the detriment, leads to the conclusion that they face imminent and actual homelessness for at least some period of time. As other courts have found, this court concludes that forced homelessness and the likely loss of housing benefits under Section 8 would meet the legal test for irreparable harm.

To determine the next element necessary for the issuance of an injunction here, the court must proceed to evaluate Hagan’s likelihood of success on the merits of his claims.<sup>7</sup> First, however, the court will address the “clean hands” doctrine.

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<sup>7</sup> As noted above, there is dictum in one Vermont case suggesting that the court should also weigh the potential harm to others if an injunction is issued, as well as “the public interest.” *In re J.G.*, 160 Vt. at 255 n. 2. Here, the City has not asserted that these issues must be considered, and presented no evidence for the court to weigh in this regard. Although the point of the ordinance is presumably to give parents some sense

### The “Clean Hands” Doctrine

The City argues that any injunctive relief should be barred here by what is referred to as the “clean hands” doctrine. Savage v. Walker, 2009 VT 8, ¶ 10, \_\_\_ Vt. \_\_\_. The adage is that one who seeks equity must do equity. In other words, “where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue.” 27A Am. Jur. 2d Equity § 98 (West, Westlaw through May 2009). A party will be barred from equitable relief if his claim is “tainted with deceit and impurity of motive.” Id. The doctrine bars relief to those who act with “fraud or deceit.” Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815 (1945). The doctrine “is not an automatic or absolute bar to relief” but is one to be applied in the discretion of the court. 11A Charles Alan Wright, Arthur Miller, and Mary Kay Kane, Federal Practice and Procedure: Civ. 2d § 2946 (West, Westlaw through 2009 update).

The City’s position is that Hagan moved into his apartment after he had learned that the exclusion ordinance barred him from residing there. While true, the court does not find this to be the sort of unfair or dishonest conduct that the clean hands doctrine aims to bar. In fact, Hagan did nothing dishonest. To the contrary, his conduct was remarkably straightforward: he told the landlord about his offense and his placement on

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of security, and to protect children from sexual assault, there is nothing in the record from which the court can conclude that the ordinance is actually likely to do so. The only thing in the record on that issue, in fact, suggests the opposite. *See*, 2009 Act No. 1, An Act Relating to Improving Vermont’s Sexual Abuse Response System, § 51 (noting the Legislature’s concern that exclusion ordinances such as this “could have a negative impact on public safety” rather than a positive one, and urging municipalities to “ensure they are receiving accurate and substantive information about the lack of efficacy of such laws”). *See also*, Nicholson v. Connecticut Half-Way House, Inc., 218 A.2d 383, 385-86 (Conn. 1966) (noting that although the neighbors in that case objected to “the presence in the neighborhood of persons with a demonstrated capacity for criminal activity.... This present fear of what may happen in the future, although genuinely felt, rests completely on supposition.”). Thus, the court has no appropriate basis on which to find that there will be harm to others, or to the public interest, if the City is enjoined from enforcing the ordinance against Hagan.

the registry, and he went to the Chief of Police and then to the City Council to explain his situation and request reconsideration of the restriction. He originally intended not to move in with his wife and children until the issue was resolved, but was advised by the Vermont State Housing Authority that he *should* move in. Under these circumstances, the court does not find that his conduct was deceitful, fraudulent or dishonest. The clean hands doctrine does not bar Hagan's request for relief.<sup>8</sup> The court will therefore proceed to address the substantive issues in this case.

### Municipal Powers in Vermont

The parties in this case are in sharp disagreement over what legal doctrine applies to Barre's municipal powers. Plaintiff cites Dillon's Rule, a doctrine of narrow powers; Defendant cites Home Rule, a doctrine of broad local powers.<sup>9</sup>

Dillon's Rule, which is named for a rather ancient treatise by an Iowa judge named Dillon,<sup>10</sup> is as follows: "absent a home rule constitutional provision, 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, 485-86 (1977). *See also*, Hunters, Anglers and Trappers Ass'n of Vt. v. Winooski Valley Park Dist., 2006 VT 82, ¶ 7, 181 Vt. 12. "Non-home-rule municipalities have no

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<sup>8</sup> In addition, there is authority in other jurisdictions for the proposition that "where the purpose of a suit is to test the validity of an order of an administrative agency, the unclean hands doctrine does not apply." City of El Paso v. State Line, Inc., 570 S.W.2d 409, 414 (Tex. Civ. App. 1978).

<sup>9</sup> For a summary of the two doctrines, see Columbia Crossing LLC v. City of Columbia, Illinois, 2008 WL 2875251 at \*3-4 (S.D. Ill. 2008).

<sup>10</sup> "'Dillon's Rule' originated with John F. Dillon, former Chief Justice of the Supreme Court of Iowa and former circuit judge for The United States Eighth Judicial Circuit." Williams v. Town of Hilton Head Island, 429 S.E.2d 802, 804 n. 1 (S.C. 1993).

inherent powers.” Columbia Crossing LLC v . City of Columbia, Illinois, 2008 WL 2875251 \*3 (S.D. Ill. 2008).

Home Rule is at the other end of the spectrum. “[H]ome rule authority reverses Dillon’s Rule.” 2 McQuillin Mun. Corp. § 4.11 (3<sup>rd</sup> Ed.) (West, Westlaw updated through Oct. 2008). Under Home Rule, “a city is free to write its own charter and define for itself what functions and powers, consistent with statutes and the constitution, its agencies will have.” Vermont Dep’t of Public Service v. Massachusetts Municipal Wholesale Electric Co., 151 Vt. 73, 80 (1988). Home rule “generally refers to a state constitutional provision or other legislative action that grants local governments the full power of self-government not inconsistent with the constitution or laws of the state.” Terrence S. Welsh, Containing Urban Sprawl: is Reinvigoration of Home Rule the Answer?, 9 Vt. Env. L. Jrl.131, 136 (Winter 2008).<sup>11</sup> The Home Rule movement “gathered steam in 1875” and was a “response to the effects of Dillon's Rule on interpreting the scope of municipal authority...” Id. It led to states “enact[ing] constitutional amendments to protect the autonomy of local governments.” Id.

No such provision, however, exists in the Vermont Constitution. Vermont has “consistently adhered to the so-called Dillon's rule...” Hunters, Anglers and Trappers, 2006 VT 82, ¶ 7 (citation omitted). This doctrine has been established in our case law for many years. See, Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. at 485-86; Welch v. Town of Ludlow, 136 Vt. 83, 87 (1978) (“In Vermont, where we have no home rule constitutional provision, a town has only those powers specifically authorized by the

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<sup>11</sup> There can be gradations of Home Rule, making it something other than an all-or-nothing proposition. For a discussion of its history and varying interpretations, see Richardson, Gough & Puentes, Is Home Rule the Answer? Clarifying the Influence of Dillon’s Rule on Growth Management (Brookings Inst., Jan. 2003) (available at [http://www.brookings.edu/reports/2003/01metropolitanpolicy\\_richardson.aspx](http://www.brookings.edu/reports/2003/01metropolitanpolicy_richardson.aspx)) (last visited June 25, 2009). However, for purposes of this case, the court finds no need to delve into fine distinctions.

Legislature.”); In re Northeast Washington Co. Community Health Center, 148 Vt. 113, 114 (1987) (“In Vermont, there is no home rule constitutional provision and towns have only those taxing powers specifically authorized by the Legislature.”); Central Vermont Quality Services, Inc. v. City of Rutland, 780 F. Supp. 218, 220 (D. Vt. 1991)(“Vermont is not a ‘home rule’ state.”).

The City concedes that there is no statewide “Home Rule” in the Vermont Constitution. However, the City argues that by adopting Section 104 of the City’s charter, the Legislature has expressly granted Barre “Home Rule.”

City charters in Vermont must be approved by the Legislature. “The charters that govern all of Vermont’s municipal subdivisions require the approval of the General Assembly in order to take effect.” Special Preface, 24 V.S.A. app. at xix (2008); 17 V.S.A. § 2645(d) (amendments to charters “shall become effective upon affirmative enactment of the proposal, either as proposed or as amended by the general assembly.”). Once adopted, they “have the force of state law...” Special Preface, 24 V.S.A. app. at xix.<sup>12</sup>

The specific charter language to which Barre points is as follows:

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 into 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...*

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<sup>12</sup> Although the language of the Vermont Supreme Court opinions suggests that Home Rule can be granted only by a constitution, this appears to be incorrect. “Home rule arises in two different forms: as a constitutional guarantee to local government or as a statutory grant or delegation of authority.” Jill Welch, Home Rule Doctrine and State Preemption – The Iowa Supreme Court Resurrects Dillon’s Rule and Blurs the Line Between Implied Preemption and Inconsistency, 30 Rutgers L. J. 1548, 1552 (1999). The court thus assumes for purposes of this decision that the Vermont Legislature has the power to grant Home Rule by statute (or, as here, by approval of a city’s charter).

24 V.S.A. app. § 104(a) (City of Barre Charter)(emphasis added).

The City is correct that the highlighted language is arguably consistent with the idea of “Home Rule.” As one court has explained, “[u]nder ‘Home Rule,’ there is a presumption that the state intends to bestow its powers on a municipality so long as the proposed municipal action is ‘not inconsistent with the Constitution and general law of the state.’” City of Charleston v. Government Employees Ins. Co., 869 F. Supp. 378, 383 (D.S.C. 1994), vacated, amended, remanded to state court (1994). The phrasing noted in Charleston is identical to that in the Barre Charter: “*not inconsistent with the constitution and laws of the State of Vermont...*” The question is whether such language alone was intended by the Legislature to create Home Rule in Barre.

Barre does not explain when the language at issue was placed in the Charter. As noted in the Special Preface to the appendix that lists Vermont charters, it was apparently not until 1995 that municipal charters began to be formally published as part of the appendix to Title 24. Even then, it apparently took a “period of years” to begin compiling a complete set of charters. Special Preface, 24 V.S.A. app. at xix. The appendix thus does not have a complete history of all charters and their amendments, and does not indicate when the language at issue here became a part of the Barre Charter. The court cannot be certain, then, whether it has been part of the Charter for many years or was added recently.

If the language has been part of the charter for many years, then it has existed over a period when our Supreme Court has continually stated that there is no Home Rule in Vermont. Under that scenario, the repeated declarations by the highest court in this state that no such powers exist here would be sufficient evidence that the language does not mean what Barre claims.

If, instead, the language in Section 104 was added recently, the question is whether it was intended to overturn years of settled precedent in Vermont. It does appear that the Legislature *could* choose to grant Home Rule to some municipalities and not others. There is “no requirement that all laws governing the operation of municipal corporations be uniform statewide.” Smith v. Town of St. Johnsbury, 150 Vt. 351, 357 (1988) (noting that charter provisions vary). However, there are several reasons that lead this court to conclude that it was not the Legislature’s intent to grant Barre special powers of Home Rule not granted to all municipalities.

First, the language in Barre’s charter does not contain the expansive language that would make clear that new powers were being granted to the City. In Charleston, for example, the legislature passed a statute beginning with the same general language as used in Barre (“regulations, resolutions, and ordinances, not inconsistent with the Constitution and general law of this State,”), but adding that it granted to each municipality in the state the power to enact laws:

including the exercise of powers in relation to roads, streets, markets, law enforcement, health and order in the municipality or respecting any subject which appears to it necessary and proper for the security, general welfare, and convenience of the municipality or for preserving health, peace, order and good government in it...

City of Charleston, 869 F. Supp at 383 (quoting § 5-7-30 of the South Carolina Code).

The intent of the legislature in South Carolina was clear because of the express delegation of such broad powers.

Other states have often made their intentions clear by expressly using the words “Home Rule” when taking such a significant step in altering the traditional balance of state and local powers. For example, when South Carolina created Home Rule, it did so

by enacting the “Home Rule Act,” a title that left little question about its purpose. Williams v. Town of Hilton Head Island, 429 S.E.2d 802, 805 (S.C. 1993). *See also, e.g.*, Colo. Const. art. XX § 6 (expressly entitled “Home Rule for Cities and Towns”); N.H. Rev. Stat. Ann. § 49-B:1 (“It is the purpose of this chapter to implement the home rule powers...”); N.Y. Const. art. IX, § 2 (referring in title to “home rule powers of local governments”).

Second, Barre offers no explanation whatsoever as to why the Vermont Legislature would have singled out Barre as deserving of special consideration not granted to all municipalities in our state. Although counsel for Barre represented at the hearing that there are some other towns or cities in Vermont with similar language in their charters, it is undisputed that there is no such provision applicable to all municipalities in the state. There is nothing before the court to suggest why the Legislature would have intended special treatment for only a few localities.

Third, Barre has offered not one whit of legislative history to suggest that the legislature ever discussed making such a significant change to Vermont law, or that Barre made any proposal to the Legislature asking for Home Rule powers. Given that the case law has been clear for years that Vermont has no “Home Rule,” the court finds it inconceivable that the Legislature would have made such a significant change without noting that it was doing so, engaging in public discourse over the issue, or otherwise leaving some record of its intent. Barre cites no evidence of such intent, and the charter itself reflects no Reporter’s Notes or other explanation suggesting that such a significant change to state law was intended.

Finally, to the extent that the purpose of the language in the charter is at all ambiguous, it must be construed against the City: “The general rule is that the charter of a municipal corporation is to be strictly construed against it; the presumption being that the Legislature granted in clear and unmistakable terms all that it intended to grant.” E.B. & A.C. Whiting Co. v. City of Burlington, 106 Vt. 446, 461 (1934). “Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.” 1 John F. Dillon, *Municipal Corporations*, § 55 (2d ed. 1873). Moreover, “rules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language.” Estate of Kelley v. Moguls, Inc., 160 Vt. 531, 533 (1993) (citing Whiting, 106 Vt. at 464). For all of these reasons, the court does not find the charter language to be a grant of Home Rule powers to the City.<sup>13</sup>

Barre makes another argument in support of the ordinance: that Section 109 of the Barre Charter gives the City broad powers of regulation. That section 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.

Barre Charter, § 109. However, Hagan does not argue that the charter limits powers already existing, or that it is not cumulative to any such powers. The argument is, instead,

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<sup>13</sup> The City argues that the Hunters, Anglers and Trappers case stands for the proposition that Dillon’s Rule is eroding. The court disagrees. That case expressly reaffirms the doctrine: “[Plaintiff] is correct that [w]e have consistently adhered to the so-called Dillon’s rule 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.” Hunters, Anglers and Trappers, 2006 VT 82, ¶ 7 (citations and internal quotations omitted). While the Court went on to find that Dillon’s Rule did not apply to the particular municipal action there – restriction of hunting and trapping – that was because the court found the restriction came within an exception to the rule for “proprietary” as opposed to “governmental” actions. Id. No claim is made here that such an exception applies.

that there is no other source for the power the City seeks. The City argues that this language “confers broader powers upon the City of Barre than those powers that would be relied upon by general State law.” Barre City’s Statement in Opposition, p. 5. The court finds to the contrary. This provision creates no substantive powers at all. Rather, it merely states that it should not be construed as a limitation on any existing powers.

The City also argues that a separate statute gives all municipalities the power to “adopt, amend, repeal and enforce ordinances or rules for any purposes authorized by law.” 24 V.S.A. § 1971(a). That statute, however, requires some other source of law to authorize the use of the powers. It cannot create a power not already granted by the Constitution or the Legislature.

Dillon’s Rule is still applicable in Vermont, and the court is unconvinced by the claim that a special exception exists for the City of Barre. The court concludes that Hagan is therefore highly likely to succeed on the merits of this claim.

#### The Doctrine of Public Nuisance

The City argues in the alternative that its delegated power to define and restrict nuisances is an adequate legal basis for its ordinance in this case.<sup>14</sup> The Vermont Legislature has expressly given municipalities 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.” 24 V.S.A. § 2291(14). However, that power is not limitless. In addressing the Legislature’s power to define nuisances, the Vermont Supreme Court has explained:

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<sup>14</sup> The ordinance itself makes no mention of “nuisance” -- for example, it does not say “we hereby deem anyone who has been convicted of a sex offense to be a public nuisance.” Therefore, there is some question as to whether the City intended the ordinance to arise from its power to regulate nuisances. However, the City certainly has the power to regulate nuisances, and the court does not consider the failure to specify that source of power as fatal to the City’s claim.

The legislature has no power arbitrarily or capriciously to declare any or every act a nuisance, and cannot enlarge its power over property or pursuits by declaring them nuisances; nor can it by mere declaration make that a nuisance which is not so in fact and thereby destroy or prevent a lawful use of property. The action of the legislature in this regard is subject to review by the courts. Although much must be left to the discretion of the legislature it usurps judicial power when it declares an act a nuisance when it is not.

Vermont Salvage Corp. v. Village of St. Johnsbury, 113 Vt. 341, 354 (1943). The same is true of the power delegated by the legislature to the municipalities. The question, then, is where the boundaries of nuisance lie.

A brief excursion into the history of public nuisance law leads any reader quickly to harsh critiques of the entire doctrine. For example:

There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word “nuisance.” It has meant all things to all people ... There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem...

W. Keeton, et al., *Prosser & Keeton on Torts* § 86, at 616-17 (5<sup>th</sup> ed. 1984). The Vermont Supreme Court agrees that “the concept of public nuisance is vague and amorphous...” Napro Development Corp. v. Town of Berlin, 135 Vt. 353, 356 (1977).

Two separate lines of nuisance law have developed over time: private nuisance and public (or “common”) nuisance. Both “are inextricably linked by their joint origin as a common law writ, dating to twelfth-century English common law.” Rhode Island v. Lead Industries Ass’n, 951 A. 2d 428, 443 (R.I. 2008). Private nuisance developed as a way to address “invasions of the plaintiff’s land due to conduct wholly on the land of the defendant.” W. Keeton, *supra* § 86, at 617. In contrast, “[i]n its inception a public, or

common, nuisance was an infringement of the rights of the Crown. ... By the time of Edward III the principle had been extended to the invasion of the rights of the public, represented by the Crown, by such things as interference with the operation of a public market or smoke from a lime-pit that inconvenienced a whole town.” Restatement (Second) of Torts, § 821B, comment a (1979) (West, Westlaw through April 2009).

A public nuisance “consist[s] of an interference with the rights of the community at large...” W. Keeton, *supra* § 86 at 618. “[T]o be considered a public nuisance, an activity must disrupt the comfort and convenience of the general public by affecting some general interest.” Napro, 135 Vt. at 357. As the Restatement points out, something does not become a public nuisance merely because it affects “a large number of persons.” Restatement § 821B, cmt g. Instead,

[t]here must be some interference with a public right. A public right is one common to all members of the general public. It is collective in nature and not like the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured.

Id. A public right “is the right to a public good, such as ‘an indivisible resource shared by the public at large, like air, water, or public rights of way.’” Lead Industries Ass’n, 951 A. 2d at 448 (citation omitted).

The court inquired at the hearing what the City proffers as the public interest being protected by the residence restriction. Counsel for the City stated that it is “the right of parents to feel secure that their children, in locations where children will be at - schools, playgrounds, daycares - the ability to enjoy the comfort and feeling that they're safe.” While one can hardly argue with the goal, the question is whether this is the kind of “public right” that is traditionally protected by the public nuisance doctrine.

A similar argument was made by the State of Rhode Island in a case involving the exposure of children to lead paint. The court rejected the claim, explaining:

Although the state asserts that the public's right to be free from the hazards of unabated lead had been infringed, this contention falls far short of alleging an interference with a public right as that term traditionally has been understood in the law of public nuisance. The state's allegation that defendants have interfered with the "health, safety, peace, comfort or convenience of the residents of the [s]tate" standing alone does not constitute an allegation of interference with a public right. The term public right is reserved more appropriately for those indivisible resources shared by the public at large, such as air, water, or public rights of way. Expanding the definition of public right based on the allegations in the complaint would be antithetical to the common law and would lead to a widespread expansion of public nuisance law that never was intended...

Id. at 453 (citations omitted). Thus, the court concluded that "[t]he right of an individual child not to be poisoned by lead paint is strikingly similar to other examples of nonpublic rights cited by courts, the Restatement (Second), and several leading commentators." Id. at 454.

Another court has rejected the City of Chicago's claim that the manufacture and sale of firearms to those whom the manufacturers and sellers knew or should have known might use them illegally constituted a public nuisance. The "public right" asserted in that case was "the right to be free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property, caused by the presence of illegal weapons in the city of Chicago..." City of Chicago v. Beretta U.S.A. Corp., 821 N.E. 2d 1099, 1114 (Ill. 2004). The court addressed at length the question of whether this constituted the sort of public right that can be regulated by public nuisance laws. The court noted: "we question whether there is a public right, as opposed to an individual

right, to be free from the threat of illegal conduct by others.” Id. The court concluded that it found no authority to support the claim that there is a “public right to be free from the threat that members of the public may commit crimes against individuals.” Id. at 1114-15.

While noting that it did not “intend to minimize the very real problem of violent crime and the difficult tasks facing law enforcement and other public officials... [nor] ... to dismiss the concerns of citizens who live in areas where gun crimes are particularly frequent,” the court concluded that such regulations were not within the scope of public nuisance law. Id. at 1116. Thus, the court concluded that “there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs” – the right to be free from the possibility that others would commit crimes in the neighborhood. Id.<sup>15</sup> *See also, Napro*, 135 Vt. at 358 (“the central basis of the public nuisance concept is interference, and the fact that even some significant portion of the public disapproves” of someone’s conduct does not mean that it is interfering with a public right).<sup>16</sup>

This court fully understands the legitimate concerns motivating the ordinance in this case. The community is understandably and rightfully concerned with protecting its children from sexual abuse. Sexual assaults upon children are horrifying crimes, and the court shares the City’s desire to reduce the incidence of such victimization in our

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<sup>15</sup> Cases involving municipal attempts to control the spread of firearms have gone both ways, with some courts finding public nuisance law applicable and others rejecting such a theory. *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 276 (E.D.N.Y. 2004) (listing cases). This court finds the Seventh Circuit’s analysis to be compelling.

<sup>16</sup> If public nuisance law gave municipalities the power to exclude sex offenders because of the fear that they might commit future crimes, it would presumably also allow towns to bar anyone with a past conviction for drunk driving, or speeding, or any other activity the town feared a person might do again in their town in the future.

Vermont communities. However, the narrow question before the court is not whether the end is justified, but whether the means used are legally supportable. To the extent that there is any lack of clarity about the City’s power to enact such ordinances, that question must be “resolved by the courts against the [City]...” 1 John F. Dillon, *Municipal Corporations*, § 55.<sup>17</sup>

The ordinance here seeks to exclude people with past criminal convictions because of the fear that they may in the future assault individual children. As the Restatement points out, however, within the arena of the public nuisance doctrine the right “not to be assaulted” is an “individual right” as opposed to a “public right.” Restatement § 821B, cmt g. As in Beretta and Lead Industries, the court does not intend to minimize the fears of City residents or their desires to protect their children. However, as in those cases, the court finds that the ordinance here addresses concerns that are not traditionally within the legal concept of a “public right.” It thus goes beyond the established scope of public nuisance law. Plaintiff is therefore likely to succeed on the merits of this claim.

#### Order

The court having found that Hagan has a substantial likelihood of success on the merits, and is likely to suffer irreparable harm if the ordinance is enforced against him, the motion for a preliminary injunction is granted.

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<sup>17</sup> Whether geographic exclusion ordinances are the best way to reach the City’s goal here is currently the subject of debate in the public arena. *See, e.g.*, 2009 Act No. 1, An Act Relating to Improving Vermont’s Sexual Abuse Response System, § 51 (noting the Legislature’s concern that exclusion ordinances such as this “could have a negative impact on public safety” rather than a positive one, and urging municipalities to “ensure they are receiving accurate and substantive information about the lack of efficacy of such laws”). Such policy considerations, however, are not before this court.

The City of Barre is hereby enjoined from enforcing Ordinance § 11-36 against Hagan while this case is pending. The City having waived the posting of security, none shall be required. The court will schedule a status conference to discuss with counsel how to proceed to a final resolution of the case.

Dated at Montpelier this 29th day of June, 2009.

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Helen M. Toor  
Superior Court Judge