

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT

MARK MOE,)
)
Plaintiff,)
)
v.)
)
TOWN OF BARNSTABLE,)
)
Defendant.)

VERIFIED COMPLAINT

1. This is an action for declaratory and injunctive relief in which plaintiff Mark Moe, a registered Level 2 sex offender, challenges an ordinance of the Town of Barnstable which prohibits him from taking up residence in the town at any location within 2,000 feet of a facility which has the principal purpose of providing services to children. The complaint alleges that plaintiff Moe, who has strong family ties within the town, lives with members of his extended family at a location which is within a restricted zone. While Moe has no alternative other than homelessness, the ordinance imposes a fine of \$300 per day for every day that he remains at his current address. The plaintiff asserts that the residency restriction imposed by the ordinance is inconsistent with the Commonwealth’s comprehensive statutory scheme for the regulation, supervision and treatment of sex offenders and therefore violates Article 89 §6 of the Massachusetts Constitutional Amendments (Home Rule Amendment). The plaintiff also asserts that the ordinance is an *ex post facto* law which violates Art. 1, §10 of and the Fourteenth Amendment to the

United States Constitution and Art. 24 of the Massachusetts Declaration of Rights and that its enforcement against him deprives him of due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and Articles 1, 10, 12 and 24 of the Massachusetts Declaration of Rights.

2. The plaintiff's claims for declaratory and injunctive relief are brought pursuant to G.L. c. 214, § 1 and G.L. c. 231A. Plaintiffs' federal law claims are brought pursuant to 42 U.S.C. § 1983.

PARTIES

3. Plaintiff Mark Moe is an adult resident of Town of Barnstable in Barnstable County.
4. Defendant Town of Barnstable is a municipal corporation organized under the laws of the Commonwealth of Massachusetts.

FACTS

5. Eighteen years ago, plaintiff Moe was adjudged delinquent in juvenile court proceedings in the state of California. The basis for the adjudication was that Moe, who was then sixteen years old, had engaged in sexual acts with his thirteen-year-old girlfriend. This is the plaintiff's only sex offense.
6. In 2000, Moe moved from California to Massachusetts to be close to members of his immediate and extended family who lived in the Barnstable area.
7. In 2007, Moe learned that he was required by the provisions of G.L. c. 6, §§ 178C-Q to register as a sex offender. Although he contests his obligation to register in Massachusetts, Moe registered as a sex offender and has re-registered at various times since then due to changes of address.

8. Following his initial registration as a sex offender, Moe did not receive actual notice of his right to a classification hearing before the Sex Offender Registration Board (“SORB”) and, as a result, was classified *in absentia* as a Level 2 sex offender, solely on the basis of the California adjudication. An application for reclassification is not permitted by SORB regulations prior to five years after initial classification.
9. Due in part to his status as a registered sex offender, Moe has had difficulty in finding and holding employment. He is currently unemployed and has no regular source of income. In January 2009, having no other place to reside, Moe accepted the offer of his cousin to live with her and her mother in Barnstable.
10. Moe’s mother, who is disabled, is a long-time resident of Barnstable whose home is a short distance from Moe’s current place of residence. Moe’s mother is not able to provide him with a place to stay, but his proximity to her home allows him to provide her with regular support and assistance.
11. In 2006, the Town of Barnstable adopted the “Barnstable Active Safety Information for Child Awareness Ordinance,” General Ordinances of the Town of Barnstable, c. 147, §§ 147-8 through 147-10 and 147-11 through 147-13 (“BASIC Ordinance”). The BASIC ordinance provides, with certain exceptions that are not applicable to plaintiff Moe, that “[n]o person designated as level 2 or 3 under the provisions of MGL c. 6, § 178K(2), in whole or in part by reason of a sexual offense against a child, shall take up residence apart from a person related by blood or marriage within the first degree of kindred within the Town within 2,000 feet of the boundaries of land containing a facility with the principal purpose of providing services to a child.” Violation of the ordinance is

punishable by a fine of \$300 per day. (A true copy of the BASIC Ordinance is attached as Exhibit A.)

12. Unknown to plaintiff Moe at the time that he moved there, his cousin's home is located within 2,000 feet of a home daycare provider which the Town of Barnstable has designated as a facility with the principal purpose of providing services to children.
13. On February 17, 2009, two Barnstable police officers came to Moe's home and served him with a citation for a single violation of the BASIC Ordinance. The violation notice stated that failure to pay the \$300 "non-criminal fine" or to request a hearing within 21 days could result in the issuance of a criminal complaint. Although the plaintiff requested a hearing on the violation, the Town of Barnstable, on February 27, 2009, applied to the Barnstable District Court for a criminal complaint. On May 5, 2009, following a hearing, the clerk-magistrate issued a criminal complaint charging the plaintiff with a municipal ordinance violation. That case is now pending.
14. Moe continues to reside with his cousin and is therefore subject to repeated citation by the Town of Barnstable for violation of the BASIC Ordinance and a fine of \$300 per day for each day that he remains there. Should he be forced to leave his current residence, the BASIC Ordinance will make it difficult if not impossible to find other housing in Barnstable, forcing him to leave the city and, very likely, to become homeless.
15. The enforcement of the BASIC Ordinance will cause substantial damage to plaintiff Moe in that he will be required to leave the home where he now resides with members of his extended family and, in addition, will be deprived of regular contact with family members who live in Barnstable.

16. Sex offender residency restrictions, including the BASIC Ordinance, are not effective in reducing recidivism by sex offenders, do not protect children. Such restrictions detract from public safety by destabilizing former offenders, making it more likely that they will become homeless, more difficult to track and at increased risk of recidivism.

FIRST CAUSE OF ACTION (Home Rule Amendment)

17. Plaintiff incorporates the allegations of paragraphs 1-16 as if fully set forth.
18. In order to protect the public by reducing the risk of recidivism, the Commonwealth of Massachusetts has adopted a comprehensive scheme for the control, regulation, supervision and treatment of sex offenders. The statutory framework includes, *inter alia*, civil commitment of dangerous offenders, mandatory registration of sex offenders, classification of sex offenders according to risk and community notification, limited restrictions on residence, special conditions of probation requiring GPS monitoring of their movements and restriction of access to certain areas, and, for certain offenders, lifetime community parole.
19. The Commonwealth's statutory scheme for the control, regulation, supervision and treatment of sex offenders necessarily preempts local legislation on the same subject.
20. Local residence restrictions for sex offenders such as the BASIC ordinance significantly interfere with the implementation of state law and policy in that they act as a deterrent to registration and/or promote homelessness or lack of a fixed address, making it difficult to locate and monitor sex offenders and to provide community notification. By requiring sex offenders to relocate and separating them from their families, local residence

restrictions also remove offenders from supportive environments and interfere with reintegration and treatment, thereby increasing the risk of recidivism.

21. Piecemeal sex offender residence restrictions adopted by individual cities and towns create an arbitrary patchwork of areas closed to sex offenders and shift the burden of housing sex offenders to communities which have not adopted such measures.
22. Because the BASIC Ordinance directly conflicts with state law and policy, the enactment and enforcement of the ordinance by the Town of Barnstable violates the provisions of the Home Rule Amendment, Article 89 §6 of the Articles of Amendment to the Constitution of the Commonwealth, and the requirements of G.L. c. 43B, § 13.

SECOND CAUSE OF ACTION (Ex Post Facto)

23. Plaintiff incorporates the allegations in paragraphs 1-22 as if fully set forth.
24. The BASIC Ordinance was not in effect at the time that plaintiff Moe was adjudicated delinquent in California.
25. The BASIC Ordinance serves to punish past conduct in that it is punitive in nature, does not qualify as a legitimate non-punitive, remedial, civil regulatory scheme, is excessive in relation to its alleged regulatory purpose and does not have a reasonable, rational connection to a legitimate non-punitive objective.
26. The BASIC ordinance is an *ex post facto* law which violates Article I, §10, cl. 1 of and the Fourteenth Amendment to the United States Constitution and Article 24 of the Massachusetts Declaration of Rights.

THIRD CAUSE OF ACTION (Due Process: Privacy and Intimate Association)

27. Plaintiffs incorporate the allegations in paragraphs 1-26 as if fully set forth.

28. The BASIC Ordinance restricts the right of the plaintiff and members of his extended family to live together in the Town of Barnstable because they do not meet its narrow definition of family as “person[s] related by blood or marriage within the first degree of kindred.” This narrow definition of family violates the plaintiff’s right of privacy and intimate association and to the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and Articles 1, 10 and 12 of the Declaration of Rights.

FOURTH CAUSE OF ACTION (Substantive Due Process)

29. Plaintiffs incorporate the allegations in paragraphs 1-28 as if fully set forth.
30. The BASIC Ordinance violates Moe’s rights under the Fourteenth Amendment to the United States Constitution and Articles 10 and 12 of the Declaration of Rights in that it effectively limits plaintiff Moe’s ability to reside anywhere in the Town of Barnstable without regard to whether his place of residence poses an actual threat to children. The ordinance is not rationally related to any legitimate governmental objective and subjects the plaintiff Moe to arbitrary, capricious and unreasonable restrictions on his freedom of movement, association and residence.

FIFTH CAUSE OF ACTION (Due Process: Vagueness)

31. Plaintiffs incorporate the allegations in paragraphs 1-30 as if fully set forth.
32. The BASIC Ordinance violates the Fourteenth Amendment to the United States Constitution and Articles 10 and 12 of the Declaration of Rights in that it fails to provide fair notice of prohibited areas of residence, making it impossible for plaintiff or any other person of ordinary intelligence to know with reasonable precision what conduct

is being regulated and affording city officials excessive and arbitrary discretion in its application and enforcement.

IRREPARABLE INJURY

33. As a direct and proximate result of the enactment and enforcement of the BASIC Ordinance, plaintiff has suffered, and will continue to suffer, irreparable injury through the immediate impact on his life and the continuing violation of his rights as described herein.

WHEREFORE, plaintiff requests that this Court:

- A. Enter an order of notice to the defendants to show cause why a preliminary injunction should not issue;
- B. Enter a preliminary injunction enjoining and restraining the Town of Barnstable, its officers, employees and agents from enforcing the provisions of the BASIC Ordinance so far as they apply to plaintiff Moe or otherwise restricting the plaintiff's continuing residence in Barnstable on the basis of his status as a registered sex offender;
- C. Enter a permanent injunction enjoining and restraining the Town of Barnstable, its officers, employees and agents from enforcing the provisions of the BASIC Ordinance or otherwise restricting the plaintiff's continuing residence in Barnstable on the basis of his status as a registered sex offender;
- D. Enter a declaratory judgment declaring that the BASIC Ordinance is inconsistent with the Commonwealth's comprehensive statutory scheme for the regulation, treatment and supervision of sex offenders and therefore violates Article 89 §6 of the Massachusetts Constitutional Amendments (Home Rule Amendment) and that the BASIC Ordinance

violates the Art. 1, § 10 of and the Fifth and Fourteenth Amendments to the United States Constitution and Articles 1, 10, 12 and 24 of the Massachusetts Declaration of Rights;

E. Award plaintiff the costs of this action including reasonable attorneys' fees; and

F. Grant such further relief as this Court deems appropriate.

MARK MOE
By his attorneys,

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VERIFICATION

I, Mark Moe, have personal knowledge of all of the facts stated above in Pargraphs 1-15 and hereby swear under the pains and penalties of perjury that all of those facts are true and accurate.

DATE: