

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

SUPERIOR COURT  
C.A. NO. \_\_\_\_\_

<b>AIDS SUPPORT GROUP OF CAPE COD,</b>	)
<b>INC.,</b>	)
<b>Plaintiff</b>	)
	)
v.	)
	)
<b>TOWN OF BARNSTABLE, BOARD OF</b>	)
<b>HEALTH OF THE TOWN OF BARNSTABLE,</b>	)
<b>and THOMAS MCKEAN, in his official</b>	)
<b>capacity as Director of Public Health</b>	)
<b>of the Town of Barnstable,</b>	)
<b>Defendants</b>	)
	)

**COMPLAINT FOR DECLARATORY JUDGMENT, TEMPORARY  
RESTRAINING ORDER AND PRELIMINARY AND PERMANENT INJUNCTION**

**Parties**

1. Plaintiff AIDS Support Group of Cape Cod, Inc. (ASGCC) is a Massachusetts nonprofit corporation with a principal place of business at 96-98 Bradford Street, Provincetown MA, 02657. ASGCC also operates program sites at 336 Commercial Street, Provincetown MA, and at 428 South Street, Hyannis MA, 02601.

2. Defendant Town of Barnstable is a municipal corporation.

3. Defendant Board of Health of the Town of Barnstable is a local board of health created pursuant to G.L. c. 111, § 26.

4. Defendant Thomas McKean is sued in his official capacity as the Director of Public Health of the Town of Barnstable.

## **Facts**

5. ASGCC provides comprehensive support services to support people living with HIV/AIDS and hepatitis C virus (HCV). It also implements programs to reduce the spread of these infections to others.

6. ASGCC's services include medical case management, peer support, housing, nutritional programs, testing, and risk reduction strategies.

7. The epidemics of HIV and HCV are a public health crisis in Massachusetts and the country. HIV and HCV are blood-borne infections and the sharing of injection drug equipment is one of the primary sources of HIV and HCV transmission.

8. Recent surveys indicate that approximately one-third of injection drug users (IDUs) aged 18-30 are infected with HCV; prevalence among older IDUs is in the 70%-90% range. In 2009 12% of IDUs in the Northeast acquired HIV infection.

9. The current opioid crisis has dramatically increased the spread of these infections in Massachusetts, especially in Barnstable County. Barnstable County leads Massachusetts in the rate of new HCV infections among people aged 15 to 25 according to a 2015 study. For the period of July – September, 2015, 70% of the clients for whom ASGCC made a service referral were positive for HCV.

10. The transmission of HIV and HCV causes devastating personal and societal harm. HIV, though no longer fatal if treated, is life altering. It also requires lifelong and expensive medical treatment averaging \$379,668 per person. HCV causes end stage liver disease and is the leading cause of liver transplantation in the United States. A new breakthrough treatment for

HCV that has a high cure rate costs \$100,000 for a 12-week treatment. A significant percentage of this cost will be paid from public funds.

11. HIV and HCV are preventable diseases.

12. Providing injection drug users with access to clean needles is essential in preventing the spread of HIV and HCV.

13. There is a consensus in the governmental, public health, and medical communities that providing access to clean needles prevents the spread of these diseases and does not increase substance abuse.

14. ASGCC employs the standard, effective public health approach to reducing HIV and HCV infection among IDUs known as “harm reduction,” a set of strategies aimed at reducing the negative consequences of substance abuse while encouraging and facilitating entry into substance abuse treatment.

15. Access to clean syringes is an essential aspect of harm reduction.

16. ASGCC’s services to IDUs focus on drug user health. New client engagement starts with an intake process and an assessment of a client’s risk behaviors and education about how to prevent disease transmission, including the dangers of sharing needles.

17. ASGCC then provides services including testing, assistance with health insurance, linkage to medical care, and referrals for housing, mental health services, and substance abuse treatment.

18. ASGCC has been offering IDU clients access to clean needles and syringes since 2009.

19. The number of syringes it provides to clients at any one time is based on client drug habits and the need to ensure that a clean needle is used each time a person injects.

20. ASGCC does not sell, nor has ASGCC ever sold, hypodermic needles or syringes.

21. ASGCC also provides clients with free bio-hazard sharps containers and counsels all clients about the importance of proper disposal. During the period July 1, 2014 to June 30, 2015, ASGCC provided its Hyannis clients with 937 bio-hazard sharps containers. During that same period it distributed 112,604 syringes and collected on return 115,209, for a return rate of 102%.

22. In light of the tragic epidemic of opiate drug overdoses in Massachusetts, ASGCC also provides its IDU clients with free Narcan (Naloxone), an opioid antagonist administered by nasal spray used to reverse opioid overdoses. From 2012 to 2014, the number of confirmed cases of unintentional opioid overdose deaths in Massachusetts rose by 57%. In 2014 more than 1,200 people in Massachusetts died from unintentional opioid overdoses, and the problem is worsening. During the period July 1, 2014 to June 30, 2015, there were 216 reported overdose reversals as a result of this program. An additional 66 overdoses reversals were reported during July-September 2015.

23. On September 22, 2015 Thomas McKean, Director of Public Health of the Town of Barnstable, handed ASGCC employee Donna Mello a handwritten document (the "Order," attached as Exhibit A).

24. The typewritten words "Warning Notice" on the top were crossed out and the words "cease and desist" were written in hand.

25. The Order stated after the word "Offense": "MGL 111 Sect. 215 and Chapter 94C, Section 27."

26. Although the words "Ordinance or Regulation" are typed at the top of the form, no ordinance or regulation was cited.

27. Nor was any opportunity for a hearing, or other remedial step, indicated on the Order. Shortly thereafter, the Town sent a follow-up letter to similar effect, attached as Exhibit B.

28. If intravenous drug users in Barnstable County are not provided with easy access to clean needles and other equipment, the rates of HIV, HCV and hepatitis B infections in the County will definitely increase and there will be potential for a catastrophic outbreak.

29. ASGCC's Hyannis site normally sees 20-30 clients per day who are intravenous drug users. Since the Order, only two to three intravenous drug user clients appear daily.

30. ASGCC's clients who are intravenous drug users lack the financial or other means to obtain clean syringes elsewhere.

31. The availability of clean syringes is the draw for clients to seek ASGCC's services, which then facilitates access to a broader range of health and safety measures, including Narcan. Clients who no longer come for clean needles will not obtain Narcan and will be at greater risk of death by overdose.

### **Jurisdiction**

32. Pursuant to G.L. c. 231A, § 1, this Court has the power to make binding declarations of right, duty, status, and other legal relations where an actual case or controversy has arisen among the parties.

33. ASGCC has stopped providing its clients with clean needles as a result of the Order.

34. Should this Court not consider this case, ASGCC will continue to be unable to provide its critical and life-saving services to its clients in Hyannis.

35. There is an actual controversy which is ripe for decision. ASGCC asserts that: (1) the defendants acted without lawful authority to issue the Order; (2) the statutes cited in the Order, G.L. c. 215 § 111 and G.L. c. 94C, § 27, do not prohibit, restrict, or limit the possession,

distribution or exchange of hypodermic needles by ASGCC; and (3) the Order contravenes Massachusetts law because the legislature repealed all prohibitions and restrictions on the possession and distribution of needles in 2006 and, accordingly, ASGCC's activities that are the subject of the Order are lawful.

36. ASGCC has standing to seek a declaratory judgment because the Order prevents it from accomplishing its critical mission.

37. There are no other parties to be joined.

38. There are no administrative remedies required to be exhausted under the Town Code. Even if there were, this Court has jurisdiction to hear this case without regard to exhaustion of administrative remedies because only questions of law are presented, the decision has public significance, and irreparable harm would result if judicial action were delayed by the implementation of an administrative process.

### **Requests for Relief**

WHEREFORE, the plaintiff requests that this Court:

(1) Issue a temporary restraining order enjoining the defendants, and their agents and employees, from enforcing the cease and desist orders dated September 22, 2015 and September 23, 2015, or otherwise prohibiting or restricting the possession, distribution or exchange of hypodermic needles and syringes by plaintiff AIDS Support Group of Cape Cod;

(2) Issue a Short Order of Notice to defendants, returnable within 10 days of the filing of this Complaint;

(3) Issue a preliminary injunction enjoining defendants, and their agents and employees, from enforcing the cease and desist orders dated September 22, 2015 and September 23, 2015, or

otherwise prohibiting or restricting the possession, distribution or exchange of hypodermic needles and syringes by plaintiff AIDS Support Group of Cape Cod;

(4) Issue a permanent injunction enjoining defendants, and their agents and employees, from enforcing the cease and desist orders dated September 22, 2015 and September 23, 2015, or otherwise prohibiting or restricting the possession, distribution or exchange of hypodermic needles and syringes by plaintiff AIDS Support Group of Cape Cod;

(5) Enter an Order declaring that the defendants had no lawful authority or power to issue the cease and desist order dated September 22, 2015;


(6) Enter an Order declaring that the cease and desist orders dated September 22, 2015 and September 23, 2015 contravene Massachusetts law, and that the possession, distribution and exchange of hypodermic needles and syringes are legal under Massachusetts law.


(7) Award plaintiff its attorneys' fees and costs; and

(8) Grant such other relief as the Court deems just.

Respectfully submitted,

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By its attorneys,

  
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