

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

SUPERIOR COURT
C.A. NO. _____

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

**PLAINTIFF AIDS SUPPORT GROUP OF CAPE COD’S MOTION FOR
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Pursuant to M. R. Civ. P. 65, plaintiff AIDS Support Group of Cape Cod respectfully moves that the Court issue a temporary restraining order, and a preliminary injunction, against the defendant on Requests for Relief numbers 1 and 3 set forth in the Complaint filed herewith. Specifically, 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 (*see* Reasons for Granting Temporary Restraining Order, *infra*); and
2. 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.

In support of this motion, plaintiff has filed: 1) Plaintiff's Memorandum of Law in Support of Motion for Temporary Restraining Order and Preliminary Injunction; 2) the Affidavit of Max Sandusky; and 3) the Affidavit of Camilla Graham, M.D.

REASONS FOR GRANTING TEMPORARY RESTRAINING ORDER

As more fully set forth in the above-referenced filings, this is an action for declaratory judgment arising from an unlawful cease and desist order (the "Order") dated September 22, 2015 issued by the defendants prohibiting AIDS Support Group of Cape Cod (ASGCC) from distributing clean needles and syringes to its clients who are intravenous drug users at its Hyannis location. The Order contravenes Massachusetts law because in 2006 the legislature repealed *all* prohibitions, restrictions and limitations then existing in G.L. c. 94C, § 27 on the possession, distribution and exchange of hypodermic needles by any person or entity in order to address the public health crisis of HIV and Hepatitis C Virus (HCV) transmission. *See* St. 2006, § 172; G.L. c. 94C, § 27 as it existed prior to its repeal is attached as Ex. C to Plt's Memorandum of Law. The Order creates a public health emergency in light of the explosion of HIV/HCV transmission and deaths from drug overdoses as a result of the opiate addiction epidemic in Massachusetts. The ordered cessation of providing clean needles will mean that intravenous drug users will use dirty needles and contract deadly diseases; they will also be at substantial risk of fatal drug overdoses as clients who no longer come to ASGCC for clean needles will also no longer receive Narcan, an opiate antagonist administered by nasal spray used to reverse

overdoses. *See Sandusky Aff.*, ¶¶ 17, 21, 23, 25; *id.* at 33 (“virtual certainty that there has been HCV transmission as a result of the Cease and Desist Order, and that increasing disease transmission will occur if it continues to be enforced”). *See also* *Graham Aff.*, ¶¶ 13 and 25 (expert medical opinion that Order “will create the potential for a catastrophic outbreak” and “eliminate the possibility of countless overdose reversals”).

This Court should issue a temporary restraining order enjoining enforcement of the Order because the Board of Health has not terminated the Order, but rather on November 3, 2015 only “suspended” it for seven days with no assurances of continued suspension at the expiration of November 10, 2015. *See Sandusky Aff.*, ¶¶ 26-30. Since the Board of Health saw fit last week to institute a seven- day suspension of the Order, there is no basis for the defendants to argue against a TRO maintaining the status quo for a short while longer pending a hearing on the preliminary injunction motion. Plaintiff agrees to a preliminary injunction hearing in less than ten days if the defendants so request.

Background on the parties’ interactions with respect to the Order is as follows: 1) After ASGCC retained counsel, its counsel sent a demand letter dated October 19, 2015 insisting on the immediate lifting of the Order; 2) Defendants responded on October 27, 2015 by scheduling a Board of Health meeting, which is not an administrative hearing, on the matter for November 10, 2015 (p. 1 attached); 3) ASGCC’s counsel responded by email dated October 27, 2015 indicating that no administrative remedy was required and indicating that ASGCC would file suit in light of the immediate harm (pp. 2-3 attached); 4) Defendants responded on October 28, 2015 by scheduling a special Board of Health meeting for November 3 (p. 2 attached); 4) By email dated November 3, 2015 ASGCC’s

counsel indicated that it would file suit the next day and seek a TRO if the Order were not lifted on November 3, and provided town counsel with all of its filings (p. 4 attached); 5) At the November 3, 2015 meeting, the Board orally agreed to suspend the Order for only seven days pending discussions among the parties with no assurance that the suspension would be extended (*see* Sandusky Aff. ¶¶ 28-29); 6) the meeting agenda for the November 10, 2015 meeting is attached as p. 5.

Given the public health consequences of the continued enforcement of the Order, there are compelling grounds to maintain the status quo for an additional short period of time until the Court can hear the parties on plaintiff's motion for preliminary injunction.

Respectfully submitted,

AIDS SUPPORT GROUP OF CAPE COD,
By its attorneys,



Andrew Musgrave, BBO #678980
amusgrave@aac.org
AIDS Action Committee of Massachusetts
75 Amory Street
Boston, MA 02119
(617) 437-6200



Bennett H. Klein, BBO #550702
bklein@glad.org
Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
617-426-1350



Town of Barnstable
Regulatory Services
Richard Scali, Director
Public Health Division
Thomas McKean, Director
200 Main Street, Hyannis, MA 02601

Office: 508-862-4644

Fax: 508-790-6304

October 27, 2015

Mr. Bennett H. Klein, Senior Attorney and
AIDS Law Project Director
Gays & Lesbians Advocates and Defenders
30 Winter Street
Boston, MA 02108 and

Mr. Andrew Musgrave, Legal Director
AIDS Action Committee 75 Armory Street
Boston, MA 02119

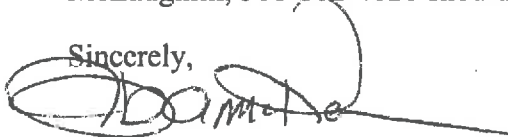
Dear Attorney Klein and Attorney Musgrave:

We received your letter dated October 19, 2015 concerning the cease and desist order issued on September 22, 2015, regarding the distribution of needles/syringes at 428 South Street, Hyannis, Massachusetts.

In response to your letter, this matter has been placed on the agenda for the next regularly scheduled meeting of the Barnstable Board of Health, to be held on Tuesday November 10, 2015 at 3:00 p.m. The meeting will take place at the Town Hall Building, 367 Main Street Hyannis, Massachusetts, within the second floor Hearing Room. At the meeting, you will be provided the opportunity to present any evidence that you believe supports the position stated in your letter. At the conclusion of the hearing, the Board of Health will determine whether the cease and desist order shall be affirmed, modified or rescinded.

You are welcome to contact the Board's legal counsel for this matter, Ruth Weil and Charles McLaughlin, 508-862-4620 should you have any questions.

Sincerely,


Thomas A. McKean
Health Agent and
Director of Public Health
Town of Barnstable

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Bennett Klein

From: Bennett Klein
Sent: Wednesday, October 28, 2015 11:27 AM
To: 'Weil, Ruth'
Cc: amusgrave@aac.org; McLaughlin, Charles
Subject: RE: Receipt and Response to Your October 19th Letter (Please See Attached pdf)

Thank you for your response. Why don't we speak tomorrow at 11. We can use our conference line: 1-605-477-2100, code 202383.

From: Weil, Ruth [<mailto:Ruth.Weil@town.barnstable.ma.us>]
Sent: Wednesday, October 28, 2015 10:21 AM
To: Bennett Klein
Cc: amusgrave@aac.org; McLaughlin, Charles
Subject: RE: Receipt and Response to Your October 19th Letter (Please See Attached pdf)

Dear Mr. Klein:

Thank you for your e-mail. We would welcome the opportunity for a conference call with you and Mr. Musgrave regarding the above. We are available today any time after 1 and tomorrow any time after 11. Additionally, in response to your e-mail, the Board of Health has agreed to hold a special meeting on Tuesday, November 3rd at 3:00 p.m. to allow you to address your client's concerns about the issuance of the cease and desist order.

We look forward to speaking with you. All the best, Ruth

Ruth J. Weil
Town Attorney
Town of Barnstable
367 Main Street
Hyannis, MA 02601
508-862-4620 (telephone)
508-862-4724 (fax)

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From: Bennett Klein [<mailto:bklein@glad.org>]
Sent: Tuesday, October 27, 2015 3:58 PM
To: Weil, Ruth
Cc: Weil, Ruth; amusgrave@aac.org
Subject: RE: Receipt and Response to Your October 19th Letter (Please See Attached pdf)

Dear Ms. Weil:

Andy Musgrave and I are in receipt of the letter from Thomas McKean. We are close to filing a lawsuit and seeking immediate relief. We do not view the meeting of November 10 referenced in the letter as any bar to that action or the grounds for the Court granting a TRO and/or a preliminary injunction. The cease and desist order presents serious issues of the violation of our client's rights under Massachusetts law as well as some equally serious due process violations connected with the issuance of the Order. Andy and I would appreciate the opportunity for a conference call with you and Mr. McLaughlin before this matter heads off in a very significant direction. Would you be available to speak with us tomorrow or Thursday? We can speak any time on Wednesday up until finishing at 3:30 or any time on Thursday.

Thank you for your consideration.

Sincerely,

Ben Klein

GLAD

From: McKean, Thomas [<mailto:Thomas.McKean@town.barnstable.ma.us>]

Sent: Tuesday, October 27, 2015 2:21 PM

To: Bennett Klein

Cc: Weil, Ruth

Subject: Receipt and Response to Your October 19th Letter (Please See Attached pdf)

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Bennett Klein

From: Bennett Klein
Sent: Tuesday, November 03, 2015 10:36 AM
To: Weil, Ruth (Ruth.Weil@town.barnstable.ma.us)
Cc: amusgrave@aac.org
Subject: AIDS Support Group of Cape Cod
Attachments: 2015.11.04 - Complaint.pdf; 2015.11.04 - P's Memo of Law ISO Motion.pdf; 2015.11.04 - P's Motion for TRO and PI.pdf; Exhibits to the Complaint.pdf; Exhibits to the Memo.pdf; 2015.10.29 - Affidavit of Max Sandusky.pdf; Expert Affidavit - Camilla Graham.pdf

Dear Ms. Weil:

As I am about to go into a meeting and then drive to Hyannis, I wanted to provide you now with the papers we will file tomorrow in Barnstable Superior Court if the cease and desist order is not lifted at today's hearing. As I indicated in our phone conversation last Thursday, we will be seeking a temporary restraining order tomorrow and thereafter a preliminary injunction.

Can you provide me with a way to contact you tomorrow, whether phone, text, or email, so that I can let you know what courtroom we will be heard in.

In addition, can you let me know whether you will agree to accept service of the papers on behalf of the defendants or whether I should have them served.

I don't have Charlie's email, so please forward to him.

I very much hope that we can resolve this matter today.

Sincerely,
Ben Klein

From: Annie Sloan
Sent: Tuesday, November 03, 2015 10:31 AM
To: Bennett Klein
Subject:

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GLAD
EQUAL JUSTICE UNDER LAW

Annie Sloan
Pronouns: she/her/hers
Legal Assistant
Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston MA 02108
(617) 426-1350
www.glad.org

Town of Barnstable

Board of Health

200 Main Street, Hyannis MA 02601



- Office: 508-862-4644
FAX: 508-790-6304



Wayne Miller, M.D.
Paul Canniff, D.M.D.
Junichi Sawayanagi

BOARD OF HEALTH MEETING AGENDA

Tuesday, November 10, 2015 at 3:00 PM

Town Hall, Hearing Room, 2ND Floor

367 Main Street, Hyannis, MA

I. Hearing – Sewer Connections:

Stewart Creek Properties overdue for sewer connection.

- A. Thomas & Michelle Russell, Hyannis owner – 44 Betty's Pond Road, Hyannis.
- B. Scott & Jo Ann Dias, Hyannis owner – 17 Hill Street, Hyannis.
- C. Rui Miranda, Hyannis owner – 61-65 Nautical Way, Hyannis
- D. Adrien and Rosanie Joseph, Hyannis owner – 83 Nautical Road, Hyannis.
- E. Matthew and Catherine Conley, Hyannis owner – 35 Point Lane, Hyannis.
- F. Christine Cotell, Hyannis owner – 31 Woodbury Avenue, Hyannis.
- G. James Mitchell, Key West, FL owner – 38 Betty's Pond Road, Hyannis.
- H. Mark & Peter Kunen, Bend, OR owner – 3 Keating Road, Hyannis.

II. Septic Variance:

Michael Pimentel, JC Engineering, representing James and Sarah Hermitage, owner – 54 Nyes Neck Road, Centerville, Map/Parcel 223-010, 18,095 square feet parcel, on-site well, repair, no increase in flow, multiple variance requests.

III. Clarification on number of bedrooms

Attorney John Kenney representing Richard and Evelyn Morris, owners – 216 Ebenezer Road, Osterville, Map/Parcel 122-088, number of bedrooms.

IV. Septic Installer (New):

Carmen Shay, Mashpee, MA

V. Proposed Changes in Fees.

VI. Old / New Business:

- A. Minutes.
- B. Grease Trap Policy

VII. Hearing and Discussion (Continued) Regarding 428 South Street, Hyannis

Discussion and possible vote to affirm, modify, or rescind the Department's order of September 23, 2015 directing the AIDS Support Group of Cape Cod to Cease and Desist Distribution of Needles and Syringes (Continued from the November 3, 2015 Board meeting.)

