

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

SUPERIOR COURT
C.A. NO. 1572CV00586

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)
)

**JOINT REQUEST TO REPORT THE CASE FOR DETERMINATION BY THE
APPEALS COURT**

Pursuant to Mass. R. Civ. P 64(a), the parties jointly request that the Court report the case for determination by the appeals court on the grounds that: (1) the parties have agreed to all material facts; (2) this case presents a sole question of law that is an issue of first impression and broad public significance; and 3) the question of law at issue here has already been ruled on once by this Court in the context of its preliminary injunction decision. The question of law is: Does Massachusetts law permit the non-sale distribution of needles and syringes by any private individual or entity, or do the provisions set forth in G.L. 94C, §§ 27 and 27A and/or G.L. c. 111, § 215 constrain such non-sale distribution to locally approved programs implemented by the Department of Public Health. The statement of agreed upon material facts is set forth *infra*.

INTRODUCTION

This case arose when the defendants Town of Barnstable, its Board of Health, and the Director of Public Health issued cease and desist orders dated September 22, 2015 and

September 23, 2015 prohibiting plaintiff AIDS Support Group of Cape Cod (ASGCC) from distributing needles and syringes at its Hyannis location. The orders asserted that ASGCC's distribution of needles to its clients violated G.L. c. 111, § 215 and G.L. c. 94C, § 27.¹

On November 4, 2015, ASGCC filed a Complaint for Declaratory Judgment alleging that the cease and desist orders violated Massachusetts law, specifically that nothing in the statutes cited in the orders prevented ASGCC from distributing needles to clients, notwithstanding that it had neither sought nor received local approval from the Town of Barnstable. ASGCC moved for preliminary relief. By Memorandum of Decision and Order on Plaintiff's Motion for Preliminary Injunction dated December 1, 2015, this Court (Veary, J.) enjoined enforcement of the orders after examining and interpreting G.L. c. 111, § 215 and G.L. c. 94C, § 27. There has been no further activity in the litigation since that Decision.

GROUND TO REPORT THE CASE

Mass. R. Civ. P. 64(a) provides that "[t]he Court, upon request of the parties, in any case where the parties agree in writing as to all the material facts, may report the case to the appeals court for determination without making any decision thereon." This vehicle has been employed in cases where, as here, there is a question of law, particularly of statutory interpretation, that is of broad public importance. *See, e.g., Suffolk Constr. Co. v. Div. of Capital Asset Mgmt.*, 449 Mass. 444, 444-445 (2007) (report of question whether by enacting the public records law the Legislature intended to extinguish the protection provided by the attorney-client privilege to

¹ In brief, G.L. c. 111, § 215, passed in 1993, authorized the Department of Public Health to "promulgate rules and regulations for the implementation of not more than ten pilot programs for the exchange of needles in cities and town ... upon nomination by the department," and required that "[l]ocal approval shall be obtained." G.L. c. 94C, § 27, as amended in 2006, was enacted to permit the sale of syringes and needles without a prescription and provides that hypodermic needles may only be "sold" by a pharmacist. The legislature recently amended c. 111, § 215 to specify that approval be by a "board of health" in the city or town. *See* Massachusetts 2017 Fiscal Year Budget, Outside Sections, §65 (July 8, 2016).

public officers of employees and governmental entities subject to the law); *City of Fall River v. AFSCME Council 9*, 61 Mass. App. Ct. 404, 404 (2004) (considering “whether there is a conflict between the provision of the civil service law, G.L. c. 31, and a collective bargaining agreement, related to the discharge of employees with provisional appointments under the civil service law). *See also Transamerica Ins. Group v. Turner Constr. Co.*, 33 Mass. App. Ct. 446, 447 n.2 (1992) (discouraging reports of “commonplace” issues and setting forth factors such as “exceptional novelty” of an issue and “significance beyond the immediate case”).

This case easily fits within the framework for a report of the case for determination by the appeals court. It is imperative that the appellate courts decide the issue presented by this case so that social service programs and municipal officials throughout Massachusetts have clarity about any legal requirements, or the absence thereof, for the distribution of hypodermic needles and syringes.

A report of this case for determination by the appeals court is also consistent with principles of judicial economy and efficiency. This Court has in one instance passed on the statutory interpretation issue here in the context of determining a reasonable likelihood of success on the merits of plaintiff’s request for preliminary relief. Since both parties assert that they will appeal a final judgment against them, no further purpose would be served by rendering another decision on the identical question in the context of dispositive motions.

PROPOSED QUESTION OF LAW AND AGREED UPON FACTS TO BE REPORTED

The parties, pursuant to Mass. R. Civ. P. 64, hereby request that the court report the above-captioned case to the appeals court for determination of the case and the following question of law:

Does Massachusetts law permit the non-sale distribution of hypodermic needles and syringes by any private individual or entity or do the provisions set forth in G.L. c. 94C §§27, 27A and/or G.L. c. 111 §215 constrain such non-sale distribution to locally approved programs implemented by the Department of Public Health.

The parties have agreed to the following facts and further agree that these facts are the only facts necessary for a determination of this case:

1. 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. ASGCC also operates program sites at 336 Commercial Street, Provincetown, MA, 428 South Street, Hyannis, MA and in Falmouth, MA. .

2. The town of Barnstable is a municipal corporation with its principal place of business at 367 Main Street, Hyannis, MA.

3. ASGCC distributes hypodermic needles and syringes at 428 South Street, Hyannis.

4. ASGCC does not sell, and has never sold, hypodermic needles or syringes.

5. The number of syringes ASGCC provides to clients at any one time is based on its assessment of client needs in order to fulfill the goal that a client use a clean needle every time he or she injects. ASGCC provides a collection receptacle for the return of used needles at its Hyannis site.

6. ASGCC also operates a locally approved “needle exchange” program in Provincetown implemented by the Department of Public Health pursuant to G.L. c. 111, § 215.

7. The Department of Public Health does not require a “one-for-one” exchange of needles in order for a participant to qualify to receive hypodermic needles and syringes at a locally approved “needle exchange” program implemented under G.L. c. 111, § 215.

8. At its Provincetown site ASGCC does not require a “one-for-one” exchange of needles in order for a participant to qualify to receive hypodermic needles and syringes.

9. With respect to its Hyannis program site, ASGCC has neither sought at any time nor received “local approval” from the town of Barnstable to operate as a program implemented by the Department of Public Health pursuant to G.L. c. 111, § 215.

10. On September 22, 2015 the town of Barnstable served ASGCC with an order that it cease distributing syringes at its Hyannis program site (the “Order”). Under “Offense,” the Order stated: “MGL 111 § 215 and Chapter 94 C, § 27.” Under “Facts,” the Order stated: “Syringes were being distributed to persons without local approval.” A true and accurate copy of the Order is attached as Exhibit A and made part of this statement of facts

11. The town of Barnstable sent a follow-up order to ASGCC dated September 23, 2015 with the heading: “Order to Cease and Desist Distribution of Needles/Syringes.” A true and accurate copy of the September 23, 2015 letter is attached as Exhibit B and made part of this statement of facts.

AIDS SUPPORT GROUP OF CAPE COD,
By its attorneys,

 7/15/16

Bennett H. Klein, BBO #550702

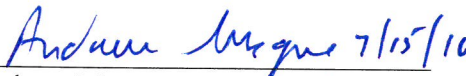
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 7/15/16

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AIDS Action Committee of Massachusetts

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(617) 437-6200

Respectfully submitted,

TOWN OF BARNSTABLE ET AL,

By its attorneys,

 7/15/16

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Town of Barnstable Legal Department

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TOWN OF BARNSTABLE
Ordinance or Regulation

BAR-W

~~WARNING NOTICE~~
CEASE AND DESIST

Name of Offender/Manager Joseph Carleo, Executive Director dob _____
Address of Offender 428 South Street P.O. Box 1522 Provincetown MA MV/MB Reg.# _____
Village/State/zip Hyannis MA 02601 02651 SS# _____
Business Name Aids Support Group of Cape 5:00 am (pm) on Sept 21, 2015
Business Address 428 South St Co & 02601 Signature of Enforcing Officer [Signature]
Village/State/zip Hyannis MA 02601
Location of Offense 428 South Street Hyannis MA Public Health
Enforcing Dept/Division _____
Offense MGL 111 Sect 215 and Chapter 94C, Section 27
Facts Syringes were being distributed to persons without local approval.

This will serve only as a warning. At this time no legal action has been taken. It is the goal of Town agencies to achieve voluntary compliance of Town Ordinances, Rules and Regulations. Education efforts and warning notices are attempts to gain voluntary compliance. Subsequent violations will result in appropriate legal action by the Town.

WHITE - OFFENDER CANARY - ORD/REG. PROG PINK - ENFORCING OFFICER GOLD - ENFORCING DEPT.



BARNSTABLE
POLICE DEPARTMENT

MATTHEW K. SONNABEND
DEPUTY CHIEF

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Thomas A. McKean, RS, CHO
Director of Public Health

Town of Barnstable
Department of Regulatory Services

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**Town of Barnstable
Regulatory Services
Richard Scali, Director
Public Health Division**

Thomas McKean, Director
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Office: 508-862-4644

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September 23, 2015

Mr. Joseph Carleo
Executive Director
AIDS Support Group of Cape Cod
336 Commercial Street
P.O. Box 1522
Provincetown, MA 02657

and Ms. Donna Mello
AIDS Support Group of Cape Cod
428 South Street
Hyannis, MA 02601

ORDER TO CEASE AND DESIST DISTRIBUTION OF NEEDLES/ SYRINGES

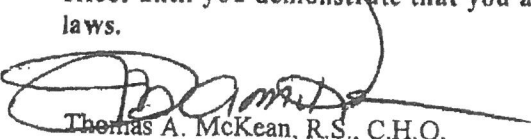
At 5:00 p.m. on September 21, 2015, needles/syringes were distributed to a person from the property managed by you or your staff, located at 428 South Street Hyannis Massachusetts.

Pursuant to M.G.L. 111, Section 215, the Massachusetts Department of Public Health is authorized to promulgate rules for the implementation of not more than ten pilot programs for the exchange of needles in cities and towns within Massachusetts upon nomination by the Department. This Section of the Massachusetts General Law specifically reads as follows: "local approval shall be obtained prior to implementation of each pilot program in any city or town." You failed to receive approval of the Barnstable Town Council to distribute needles/syringes within the Town of Barnstable.

In addition, in accordance with M.G.L.A. 94C Section 27, hypodermic syringes or hypodermic needles may be sold in Massachusetts only by a pharmacist or wholesale druggist licensed under the provisions of Chapter 112, a manufacturer of or dealer in surgical supplies or manufacturer of or dealer in embalming supplies.

On September 22, 2015 at 10:20 a.m., Deputy Chief Matthew Sonnabend was accompanied by Thomas McKean, Director of Public Health for the Town of Barnstable, who handed Donna Mello a handwritten cease and desist order at 428 South Street Hyannis, Massachusetts, where syringes were being distributed.

You, your employees, volunteers and agents are hereby ordered to immediately cease and desist the distribution of any needles/syringes within the Town of Barnstable. This cease and desist order shall remain in effect until you demonstrate that you and your organization are operating in compliance with the above cited laws.


Thomas A. McKean, R.S., C.H.O.
Director of Public Health
Town of Barnstable