STATE OF VERMONT

SUPERIOR COURT Rutland Unit	CIVIL DIVISION Docket No. 261-5-16 Rdcv
John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Plaintiffs v. City of Rutland Vermont, Defendant	

DECISION ON MOTION FOR SUMMARY JUDGMENT

This case comes before the court on cross-motions for summary judgment. The Complaint attacks a City of Rutland ordinance that purports to restrict where certain people can live. The case hinges on the question whether the City of Rutland has the power to declare people nuisances. It does not. Accordingly, the court grants Plaintiffs' motion, denies Defendant's, and enters judgment voiding the ordinance's residency restrictions.

BACKGROUND

The material facts are undisputed. Plaintiffs are all residents of Rutland. Each was ordered by the City to move out of a legal residence or face fines of up to $500 per day. These orders were made on the strength of the City's Child Safety Ordinance, which restricts the residency of people who meet the definition of "sex offender" under 13 V.S.A. § 5401(10)(B). *See* Rutland, Vt. Rev. Ordinances §§ 4301–4304, 4306.[1] Under the ordinance, "sex offenders"

[1] The Ordinance also restricts the presence of "sex offenders" in certain facilities. *Id.* § 4305. This restriction, however, is not at issue in this case, and so plays no part in the court's analysis below.

cannot live within 1000 feet of public schools, private schools, religious schools, preschools, daycares, parks, playgrounds, recreation centers, bathing beaches, swimming or wading pools, gyms, sports fields or facilities, or the parking lots or land surrounding any of the above. *Id.* §§ 4303, 4304. Each of the Plaintiffs is a "sex offender." None is alleged to have engaged in any activity of any kind, apart from living in a restricted area.

The ordinance was enacted based on the City's finding that the "residency of sex offenders near schools and recreation facilities" constitutes "a public nuisance being contrary to the safety and welfare of the citizens of the City of Rutland . . . ." Rutland, Vt. Rev. Ordinances § 4302. Purportedly, it was "enacted pursuant to the authority granted the city in 24 V.S.A. § 2291 to promote public health, safety, welfare and convenience and also pursuant to sections 3.1 and 5.1 of the Revised Charter of the City of Rutland." Rutland, Vt. Rev. Ordinances § 4301. The Revised Charter includes among its enumerated powers the power to "abate, enjoin, and remove nuisances." City of Rutland Revised Charter (1974), § 3.1(50), 24 App. V.S.A. ch. 9.

ANALYSIS

"[W]henever a town attempts to exercise powers not within the proper province of local self-government, whether the right to do so is claimed under express legislative grant or by implication from the charter, the act must be considered as altogether ultra vires and therefore void." *Sargent, et al. v. Clark, et al.*, 83 Vt. 523, 526 (1910) (citing Cooley, Constitutional Limitations (6th Ed.) 260). Simply stated, the question in this case is whether the City, in adopting the Child Safety Ordinance acted *ultra vires*. In Vermont, as elsewhere, municipalities " 'owe their origin to, and derive their powers and rights wholly from, the legislature.' " *City of Montpelier v. Barnett*, 2012 VT 32, ¶ 20, 191 Vt. 441 (quoting *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868)). In the case of the City, the source of those powers is its charter. If the City, as well-intentioned as it may have been, exceeded the authority conferred by its charter, the Child Safety Ordinance "must be considered as altogether ultra vires and therefore void." Conversely, if the City acted within the scope of its authority, the ordinance is enforceable.

Dillon's Rule—the tenet that municipalities "owe their origin to, and derive their powers and rights wholly from, the legislature"—has been the undisturbed rule in Vermont for decades. *See Daims v. Town of Brattleboro*, 2016 VT 55, ¶ 9, 202 Vt. 276 (tracing operation of Dillon's Rule to *E.B. & A.C. Whiting Co. v. City of Burlington*, 106 Vt. 446, 461 (1934)). The City argues that its charter departs from Dillon's Rule and that the rule, therefore, has diminished application. Plaintiffs argue that Dillon's Rule carries the force of constitutional law, and that grants of power to the City must be read narrowly. Plaintiffs overstate the potency of Dillon's Rule, but the City understates it. *See* Defendant's Cross Motion for Summary Judgment (citing *City of Montpelier v. Barnett*, 2012 VT 32, ¶ 20, 191 Vt. 441, for the proposition that Dillon's Rule is essentially a canon of statutory construction). Dillon's Rule, instead, is a common law doctrine, developed and curated by the court. *See* 2 McQuillin Mun. Corp. § 4:11 (3d ed.).

While the Legislature may abrogate Dillon's Rule, it must do so in clear and unequivocal language. *See Estate of Kelly v. Moguls, Inc.*, 160 Vt. 531, 533 (1993) ("[R]ules of the common law are not to be changed by doubtful implication, nor overturned except by clear and unambiguous language."). As the City argues, its charter is a legislative enactment, entitled to the same effect as a statute. *See, e.g.*, *Handverger v. City of Winooski*, 2011 VT 130, ¶ 9, 191 Vt. 556. Admittedly, the charter contains language saying that its provisions ought to be liberally construed. 24 App. V.S.A. ch. 9 § 3.1 ("The powers of the City of Rutland under this charter shall be construed liberally in favor of the City . . . ."). That language, however, does not purport to modify Dillon's Rule. To the extent that the language is ambiguous on the matter,[2] that ambiguity must be resolved against the City. 1 John F. Dillon, Mun. Corporations, § 55 (2d ed. 1873) ("Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."). The City's charter, therefore, leaves Dillon's Rule undisturbed.

The Washington Civil Division has ruled that a Barre ordinance very similar to this one was an impermissible exercise of municipal power. *See Hagan v. City of Barre*, 2009 WL 6551407, No. 320-5-09 Wncv (Vt. Super. Ct. June 29, 2009) (Toor, J.). As the product of a sister

[2] As the discussion below shows, it is not.

court, *Hagan* is not binding precedent, but its analysis is persuasive. In that case, the City of Barre argued that the following language in its charter converted it to a Home Rule municipality:

> 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* . . . .

24 App. V.S.A. ch. 1 § 104(a) (City of Barre Charter) (emphasis added). The court noted that this language is consistent with that used in Home Rule jurisdictions. *Hagan*, 2009 WL 6551407, * 6.[3] The court pointed out, however, that this language had been in place since at least 1995.[4] Since then, the Vermont Supreme Court had repeatedly held that Vermont is a Dillon's Rule jurisdiction. *Id.* (citing *Hunters, Anglers, & Trappers Ass'n of Vt. v. Winooski Valley Park Dist.*, 2006 VT 82, ¶ 7, 181 Vt. 12). Because the language in Barre's charter went unchanged during this time, the court concluded that the language was not as broad a delegation of power as the city argued. *Id.* The Rutland Charter is of similarly indefinite provenance, but has remained unmodified for the same period.[5] The *Hagan* court's conclusion that this language should not be read as an intentional departure from the common law is persuasive.

The City devotes considerable effort to distinguishing *Hagan*. The City rests its argument on the following language in its charter: "The powers of the City of Rutland *under this charter* shall be construed liberally in favor of the City and, *except as expressly limited herein specific mention of particular powers* in this charter *shall not be construed as limiting* in any way the

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[3] *Hagan* has no pagination in Westlaw. The pin cites here reflect the pagination given to a single-column printout of the opinion.

[4] The legislature did not start compiling city charters until this time, and legislative history has proven difficult to research. This language may well have been a part of Barre's charter long before 1995; it was enough for the *Hagan* court that the language went unchanged while the Vermont Supreme Court continued to hold that there is no Home Rule in Vermont.

[5] Now, even longer. The City argues that the legislative history indicates a desire to confer home-rule-style power because the Legislature *abandoned* a broader provision in favor of the language cited above. *See* Defendant's Reply Memorandum in Support of its Cross-Motion for Summary Judgment (citing 1973 (Adj. Sess.) Vt. Acts & Resolves, 616 (granting Rutland "all the powers possible for [a] Municipality [to have] under the Constitution and laws of the state of Vermont")). How substituting narrower language for broader supports such an implication does not appear. In any event, the implication carries no weight.

general powers as stated herein." 24 App. V.S.A. ch. 9 § 3.1. (emphasis added). To the extent there is a distinction, however, the language of the Barre charter is even more expansive:

> *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 specific enactments.

24 App. V.S.A. ch. 1 § 104 (emphasis added). In either event, the obvious construction is the same: rather than granting powers beyond those generally and specifically enumerated, the provisions make clear that the specific enumerations do not limit the more general. Thus, the *Hagan* court read the Barre language the same way this court reads the Rutland language: as a mere statement "that [section 109] should not be construed as a limitation on any existing powers." *Hagan*, 2009 WL 6551407, * 9.

Finally, it bears noting that unlike the Barre charter, the Rutland charter has language that explicitly tracks the common expression of Dillon's Rule jurisdictions: "[the City shall] have and . . . exercise all other rights, powers, privileges, and immunities *conferred upon towns of the State of Vermont by law or necessary to carry out its corporate functions and duties*." 24 App. V.S.A. ch. 9 § 3.1. *Cf., e.g., Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 166 (Colo. 2008) (The Colorado constitution confers on municipalities "all other powers necessary, requisite, or proper for the government and administration of its local and municipal matters"). To the extent that the Rutland Charter reflects any given municipal jurisprudence, it reflects Dillon's Rule—and does so even more clearly than the Barre charter. Thus, the City's attempt to distinguish *Hagan* on the basis that the Rutland Charter mandates a more liberal construction is unavailing.

Properly understood, the imperative to construe the charter liberally is not an abrogation of Dillon's Rule. Rather, it is essentially a renunciation of the *expressio unius* canon of statutory construction—a caveat not to read the specific enumeration of powers in the City's charter as describing the full extent of its authority. Provisions against such limited readings have deep roots in American legal culture. *Cf., e.g., People ex rel. Woolworth's Estate v. State Tax Comm'n*, 192 N.Y.S. 772, 774 (N.Y. Sup. Ct. App. Div. 1922) ("It sometimes happens that, in a statute the language of which may fairly comprehend many different cases, some only are

expressly mentioned by way of example merely . . . and not as excluding others of a similar nature."); *Kantrowitz v. Kulla*, 20 Abb. N. Cas. 321, 324 (N.Y. City Ct. Oct. 1, 1887) (Nehrbas, J., concurring) ("A strict construction of [the statute in controversy] would undoubtedly exclude [the relief sought]. But I agree . . . that the section, being in its nature remedial, should be liberally construed, and that the maxim '*expressio unius est exclusio alterius*' should not be strictly applied."); J.G. Sutherland, Statutes and Statutory Construction § 47:25 (1891) (2016 Update) ("The maxim generally has force only when the items expressed are members of an associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice."). It follows that such an ancient and uncontroversial admonition stands for no more radical a proposition than not to give the City's charter a limited reading. It is not a grant of a power as yet unrecognized in any other Vermont municipality. *Cf. Hagan*, 2009 WL 6551407, * 7 (noting that Dillon's Rule is the general presumption in Vermont, and that the language discussed above does not suggest that the Legislature, through enacting these provisions for a handful of municipalities, meant to give "special treatment [to] only a few localities").

In Rutland, therefore, as elsewhere in the state, "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." *In re Ball Mountain Dam Hydroelectric Project*, 154 Vt. 189, 192 (1990) (quoting *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977)). Where there is "any fair, reasonable, [or] substantial" doubt that power has been granted to a municipality, that doubt must be resolved against the City. *Id.* The City's Charter nowhere specifically confers authority to declare a person, thing, or condition to be a nuisance; it authorizes the City only "to abate, enjoin, and remove nuisances." 24 App. V.S.A. ch. 9 § 3.1(50). Any authority for the Child Safety Ordinance, therefore, must be found in the more general provisions of Title 24, which are in turn incorporated by general reference in the Charter. *See* 24 App. V.S.A. ch. 9 § 3.1 (powers conferred include "all other rights, powers, privileges, and immunities conferred upon towns of the State of Vermont by law").

Under Title 24, all Vermont municipalities have the power "to define what constitutes a public nuisance." 24 V.S.A. § 2291(14). Facially, this provision may appear to confer virtually unrestrained authority to declare anything to be a nuisance. Closer scrutiny, however, reveals that this power is more properly understood as the authority to *identify*, rather than *declare*.

In addressing the Legislature's power to define nuisances, the Vermont Supreme Court has explained:

> 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). Thus, even, the Legislature does not enjoy unfettered authority to expand the definition. *A fortiori*, a municipality, which enjoys authority only as delegated by the Legislature, has no authority to "declare[] an act a nuisance when it is not." The question, then, is where the boundaries of nuisance lie.

The doctrine of public nuisance is a notoriously indefinite field of law, but it is generally understood to cover "condition[s], activit[ies], or situation[s] . . . that interfere[] with the use or enjoyment of property," "act[s] or failure[s] to act resulting in an interference with the use or enjoyment of property," or "a class of torts arising from such conditions, acts, or failures to act." Black's Law Dictionary 1096–97 (2004 8th ed.). The term, at any rate, has a definition at common law,[6] and modifying the common law is the role of the courts and the Legislature. *See Demag v. Better Power Equipment, Inc.*, 2014 VT 78, ¶ 25, 197 Vt. 176 (noting that "[s]tate legislatures certainly have the power to modify the common law at any time . . . [but] maintenance and modernization of the common law is this Court's responsibility until and unless

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[6] An amorphous, elusive, pliable, convenient, perfunctory, and conclusory definition, s*ee, e.g.*, *Napro Development Corp. v. Town of Berlin*, 135 Vt. 353, 356 (1977) ("[T]he concept of public nuisance is vague and amorphous . . . ."); *Hagan*, 2009 WL 6551407, * 8 ("A brief excursion into the history of public nuisance law leads any reader quickly to harsh critiques of the entire doctrine."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 86, at 616 ("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, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."); Roger A. Cunningham et al., The Law of Property ("A 'nuisance' is a state of affairs. . . . [T]he word 'nuisance' has had an extremely elastic meaning; sometimes it is little more than a pejorative term, a weasel word used as a substitute for reasoning."), but a definition, nevertheless. The primary unifying quality of all public nuisances appears to be "the interest invaded—the use and enjoyment of land." R.F.V. Heuston, Salmond on the Law of Torts 50–51 (17th ed. 1977); *see also Napro Dev. Corp.*, 135 Vt. at 357 ("[Prosser] describes [nuisance] as a French word meaning harm, which entered into English law at an early date as a tort against land.").

Slippery as that definition may be, a wide survey of authorities—Black's Law Dictionary, common-law decisions in Dillon's Rule states, and treatises on municipal law—admits of no definition for "public nuisance" that extends to persons.

the Legislature decides otherwise"). In Dillon's Rule jurisdictions, therefore, municipalities have no inherent power to modify the common law unless there is a clear legislative direction in that regard. *See, e.g.*, *State v. Deyo*, 2006 VT 120, ¶ 23, 181 Vt. 89 ("we are not to presume that the legislature intended to work any change in the common law beyond what the statute itself declares in either express terms, or by unmistakable implication") (quoting *Record v. State Highway Bd.*, 121 Vt. 230, 236–37 (1959)); *E.B. & A.C. Whiting Co.*, 106 Vt. 446, 460–61 ("A municipal corporation is a creature of the Legislature, and it possesses only such powers or rights as are expressly granted to it by the Legislature, or fairly implied in or incident to those expressly granted . . . ."); *see also* 56 Am. Jur. 2d Municipal Corporations § 194 ("The general rule is that municipal corporations possess and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to [such] powers . . . ."); *cf. F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179, 183–84 (1967) ("Where the enabling statute is silent on the question, the [F.T.C.] is justified in adhering to [the] common-law rule [in question].") (agency context); *Abbott ex rel. Abbott v. Burke*, 20 A. 3d 1018, 1044 (N.J. 2011) (applying the holding in *Flotill* to judicial bodies and municipal corporations); *Matawan Reg'l Teachers Ass'n v. Matawan-Aberdeen Reg'l Sch. Dist. Bd. of Educ.*, 538 A. 2d 1331, 1333 (N. J. Super. Ct. App. Div. 1988) ("It must be assumed that by its silence the Legislature intended the common-law rule to apply [to how a board of education conducts its voting]."). As discussed above, no such direction appears in the Rutland charter. 24 V.S.A. § 2291(14) does not clearly delegate such power; it therefore must be assumed no delegation has been made. *See In re Ball Mountain Dam Hydroelectric Project*, 154 Vt. at 192. Thus, while the City may identify certain conditions as nuisances, it lacks authority to expand or contract the law of public nuisances.

The common law of public nuisance does not contemplate the City's definition. The court's holding in *Hagan* is once again instructive. A "public nuisance" is one affecting the general population's entitlement to indivisible resources such as "air, water, or public rights of way." 2009 WL 6551407, * 9 (citing *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 448 (R.I. 2008); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 86, at 616)). "[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 Development Corp. v. Town of Berlin*,

135 Vt. 353, 357 (1977). The doctrine does not extend to the right to feel free from harassment in public places.[7] *See Hagan*, 2009 WL 6551407, * 9.

The City's own briefings betray the novel and expansive character of the ordinance in this case. The City gives the following examples of nuisances at common law: slaughterhouses, *State v. Woodbury*, 67 Vt. 602, 603-04 (1894) (because of their tendency to emit "noxious odors"); the keeping and sale of liquor, *State v. Murphy*, 71 Vt. 127, 128 (1898); appropriating public property to private use, *City of Montpelier v. McMahon*, 85 Vt. 275, 277 (1911); and interference with the water level of a lake. *Hazen v. Perkins*, 92 Vt. 414, 416 (1918). The City argues that the cases concerning the keeping and sale of liquor and interference with the water levels of a lake deserve particular attention, and that their reasoning—that they constitute interference with the general public interest—also applies to residency restrictions for sex offenders.

The City does not explain why this should be so. The *Murphy* court did not explain why the keeping and sale of liquor was a public nuisance, but it was the activity and premises together that constituted the nuisance. 71 Vt. at 134-35. *Hazen*, in turn, held that it was a nuisance for the owner of a property abutting a public lake to alter the level of the water, because doing so interfered with the regulation and control of a public resource. 92 Vt. at 420-21. This diminished the lake's usefulness as an avenue of navigation, and was thus an injury to a resource common to the public. *Id.* at 422-23. The reasoning behind the nuisance in *Murphy* is less clear—the Vermont Supreme Court did not analyze the propriety of the statute itself—but it regulated a business once commonly believed to be injurious to the public. *Cf.* 45 Am. Jur. 2d Intoxicating Liquors § 23 ("[T]he liquor traffic is . . . dangerous to public health, safety, and morals, and is therefore essentially within, and its regulation or prohibition is fully justified under, the police

[7] It bears note that there has been a legislative finding that residency restrictions of the sort at issue here likely frustrate the goal of securing the safety of the community. *See* 2009 Act No. 1, *An Act Relating to Improving Vermont's Sexual Abuse Response System*, § 51(b) ("The general assembly is very concerned that such policies could have a negative impact on public safety in our rural state by isolating offenders or driving them underground."). The City correctly argues that the wisdom of this finding is not before the court. It is just as inappropriate, however, for the City to usurp the legislature's policy prerogative by employing a creative definition of the term "public nuisance." *See City of Montpelier v. Barnett*, 2012 VT 32, ¶ 20, 191 Vt. 441 ("[Dillon's Rule] expresses the liberal commitment to the *state* as the centralized source of political power) (citing G. Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059 (1980) (tracing Dillon's Rule to liberalism's hostility toward decentralized forms of power)) (emphasis added); *see also Woodstock Burying Ground Assoc. v. Hager*, 68 Vt. 488, 489 (1896) ("[The law] guards and upholds [the people's] material rights and shields them [only] from unwarrantable invasion.").

power.") (footnotes omitted). Both cases also dealt with a near certainty of future harm. The property owner in *Hazen* was expected to continue to interfere with the lake's water levels. As for *Murphy*, the sale of liquor is the *raison d'etre* of a liquor distributor—the forbidden conduct there was certain to recur if not abated.

The putative threat posed by convicted sex offenders is of a far different character. Whatever that danger is—and the City has not meaningfully articulated it—it is less concrete than in the foregoing cases. More fundamentally, the harm in those cases arose from the activities that the nuisances represented. The liquor store in *Murphy* sold liquor; the waterflow obstruction in *Hazen* interfered with a public resource. Here, by contrast, the City declares Plaintiffs nuisances for no discernible activity but drawing breath. Even if the presence of sex offenders were somehow a concern affecting the rights of the common public—a proposition persuasively rejected in *Hagan*, 2009 WL 6551407, * 10 (residency restrictions "address[] concerns that are not traditionally within the legal concept of a 'public right'")—it is an injury distinguishable from those in *Murphy* and *Hazen*.

What the City has done here is effectively to declare an entire class of persons to be a public nuisance, by simple virtue of their physical existence. Plaintiffs have been convicted and punished; the City cannot now say to them, anymore than they could to any other citizen, "we don't want your type in our town." The boldness and breadth of this assertion is virtually without precedent. McQuillin on Municipal Law, for instance, sets forth 93 examples of public nuisance. [8] Nearly all pertain to threats to the use or enjoyment of property. *Id.* § 24:93; *see also id.* § 24:62 (defining public nuisances generally as things producing "offensive odors, noises, substances, smoke, ashes, soot, dust, gas, fumes, chemical diffusion, smog, disturbance and vibration of earth, water, air or structures, emanations, sights" and things working "hurt, annoyance, inconvenience or damage to the public"). Of those examples, only two living creatures are cited as nuisances in and of themselves: pigeons and lions. *Id.* § 24:93. Pigeons are nuisances because they spread disease and tend to blight the properties where they are found, *see, e.g.*, *City of Des Plaines v. Gacs*, 382 N.E.2d 402, 406 (1978) ("The city council found that pigeons are disease carriers and a serious contamination hazard to the community."); so, even

[8] This list is non-exclusive. McQuillin has other sections discussing the breadth of types of nuisances, including the keeping and slaughtering of animals. *See* McQuillin, §24:282 *et seq*. Section 24:93 is nevertheless illustrative of the relative proportions of given categories of nuisances.

they are defined as a nuisance with respect to the enjoyment of property. Lions stand alone as innately dangerous creatures, and are nuisances for the irremediable threat that they pose to the community. *See City of Warren v. Testa*, 461 N.E.2d 1354, 1361 (Ohio C.P. 1983) (lions will kill upon random, and even innocuous, provocation). The harm threatened by convicted sex offenders does not touch the land or public health, is far less certain, and far more amenable to supervision and control. The irregularity of designating living things as nuisances in and of themselves, moreover, advises caution against so designating people, notwithstanding the fact of their conviction. While it may be understandable that the City has misgivings concerning sex offenders, that does not justify their classification as public nuisances.[9]

The City, finally, cites to a decision from a Wisconsin intermediate court to show that residency restrictions properly fall within the ambit of nuisance ordinances. *City of South Milwaukee v. Kester*, 2013 WI App 50, 830 N.W.2d 710 (Wisc. Ct. App. 2013). That court upheld enforcement of an ordinance forbidding certain classes of sex offenders from residing within 1000 feet of an elementary school, or where children are known to gather. *Id.* ¶ 1. That case is inapposite for several reasons. First, Wisconsin is a Home Rule jurisdiction; the City of South Milwaukee therefore had far broader power than the City of Rutland. *See* Wis. Const. Art. 11, § 3 (declaring Wisconsin a Home Rule state). Wisconsin's courts, moreover, are more deferential than Vermont's when scrutinizing municipal power. *Compare Kester*, 2013 WI App 50, ¶ 9 ("When a municipality has enacted an ordinances that defines a public nuisance per se, courts should not interfere in this determination absent a showing of oppressiveness or unreasonableness.") *with E.B. & A.C. Whiting Co.*, 106 Vt. at 461 ("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.").

[9] The court notes that singling out a particular class of individuals for discriminatory treatment raises obvious constitutional concerns. *See, e.g.*, *Hoffman v. Village of Pleasant Prairie*, 249 F. Supp. 3d 951, 961–62 (E.D. Wis. 2017) (finding an ordinance similar to the one at issue here to violate the ex post facto and equal protection clauses). The ordinance, moreover, could be attacked as offending the right to private association. *Cf., e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984) (the right to intimate association, including the decision who to live with, is protected from "unjustified interference by the State"); *Whalen v. Roe*, 429 U.S. 589, 599 n. 25 (1977) (noting that "the right to be let alone" is among the most significant rights protected by society) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (Fourth and Fifth Amendment context)). Those issues not having been briefed, however, and the *ultra vires* argument being sufficient to dispose of this case, the court declines to wade into constitutional waters.

Moreover, the ordinance in *Kester* is narrower than the one here: it applies to "certain types of child sex offenders" living within "1000 feet of children's facilities" or other areas "frequented by children." *Id.* ¶ 11. The City's ordinance, on the other hand, applies to every individual convicted for any sex offense living within 1000 feet of a wider array of properties. 23 Rutland, Vt. Rev. Ordinances § 4304(a) (proscribing registered sex offenders, as defined in 13 V.S.A. § 5401, from living within 1000 feet of schools, daycare facilities, and "recreation facilit[ies]"); 13 V.S.A. 5401(A)(10) (setting forth 26 crimes that confer sex offender status, along with conviction for attempt for any of those crimes); 23 Rutland, Vt. Rev. Ordinances § 4303(c) (defining "recreation facilities" as parks, playgrounds, recreation centers, bathing beaches, swimming or wading pools, gymnasia, sports fields or facilities and their curtilage). The City has enacted a much broader ordinance pursuant to an indisputably more limited power. *Kester*, therefore, is not persuasive.[10]

The threat of injury contemplated by the City's residency restriction is outside of those typically contemplated by the common law of nuisances. The authority set out in 24 V.S.A. § 2291(14) to define what constitutes a public nuisance does not clearly and unambiguously authorize the City to modify that doctrine. To the extent that the wording of § 2291 creates an ambiguity with regard to the delegation of this power, the court resolves that ambiguity against the City. The proposition that the City may declare sex offenders to be public nuisances based simply upon where they reside, therefore, is incompatible with Vermont's municipal jurisprudence. The City lacked authority to enact the residency restriction at issue here. That provision, therefore, cannot be enforced.

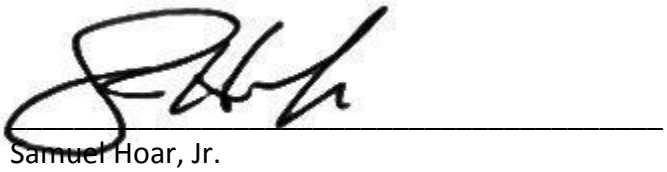
ORDER

Plaintiffs' Motion for Summary Judgment (Motion 5) is **granted**. Defendant's Cross-Motion for Summary Judgment (Motion 6) is **denied**. The court hereby declares that § 4304 of the Rutland Child Safety Ordinance is *ultra vires* and so invalid. The City is permanently

[10] *Kester* is unpersuasive for another reason. While its holding appears not to have been the subject of an appeal to the Wisconsin Supreme Court, its conclusion has been rejected, on constitutional grounds, by a federal court in the same judicial district. The *Hoffman* case, cited in footnote 9 above, found unconstitutional an ordinance similar to the one at issue in *Kester*. 249 F. Supp. 3d at 961-62. That concern alone would suffice to cause this court to reject *Kester* as in any way instructive.

enjoined from enforcing that section of the ordinance against Plaintiffs or any other similarly situated individuals.

Electronically signed on December 08, 2017 at 02:16 PM pursuant to V.R.E.F. 7(d).



Samuel Hoar, Jr.
Superior Court Judge