

# **IMMIGRATION ISSUES FACING LOCAL GOVERNMENTS**

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## **I. Scope Note**

A large influx of people to a community can cause growing pains regardless of the circumstances that lead to the increase in population. Impacts can be felt on schools, municipal services, housing, quality of life, and employment opportunities. Communities in Massachusetts have a variety of regulatory tools at their disposal to address these issues brought on by overcrowding. When the population increase is comprised of a large number of illegal immigrants, the issues become more complex. This article will review some of the regulations enacted by communities in various parts of the country to control what has been perceived as the problems caused by large numbers of illegal immigrants. These local efforts to prohibit the housing of illegal immigrants have been challenged in the federal courts, and this article will review the case law to date. Finally, we will look at what strategies are available in Massachusetts to address some of the impacts of overcrowded housing conditions, whether caused by illegal immigrants or otherwise.

## **II. National Response to Illegal Immigrant Populations**

The issue of whether local communities may enact regulations or ordinances specifically targeted at illegal immigrants has become a matter of national news. Communities have raised concerns of overcrowded housing, leading to health and quality of life issues. Various attempts by communities to control the influx of illegal aliens, largely by trying to limit their ability to legally rent an apartment or other place to live, have led to civil litigation. At the center of the legal controversy is whether the Federal government has pre-empted state and local governments from enacting regulations aimed at illegal immigrants.

### **A. The Escondido and Hazelton Responses**

Perhaps the best-known examples of municipal regulations aimed at controlling illegal immigrants within a community are the ordinances enacted in Escondido, California, and Hazelton, Pennsylvania. In Escondido, the city council in October of 2006 adopted an ordinance entitled “Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido”, which penalized any person or business owning a housing unit that harbors an illegal alien in the dwelling unit, unless expressly permitted by federal law. Enforcement provisions allowed the city to suspend the owner’s business license, precluding the collection of rents, and set forth fines and jail terms for repeated

offenses. The ordinance further provided that the city would not find that a person is an illegal alien until verified with the federal government. The city of Hazelton enacted two ordinances, the first of which required all occupants of rental units to obtain an occupancy permit. In order to obtain the occupancy permit, the applicant was required to show proof of citizenship or legal residence. The second ordinance, entitled the Illegal Immigration Relief Act Ordinance, prevented businesses from employing or harboring illegal aliens.

Both cities had their ordinances promptly challenged in federal court. In Garrett v. Escondido, 2006 WL 3613703 (S.D. Cal. 2006), the court granted plaintiffs, who included landlords who owned property in the city and illegal immigrants, a temporary restraining against the city, prohibiting it from enforcing the ordinance. The city later settled the litigation and agreed to a permanent injunction against enforcing the ordinance. The Hazelton ordinance did not fare well, either. The court in Lozano v. Hazelton, 2006 WL 3085510 (M.D. Pa. 2006) granted a temporary restraining order (TRO) against the enforcement of both ordinances.

## **B. Federal Law**

### **1. Supremacy Clause**

One of the major arguments used against the Hazelton and Escondido ordinances was the argument that the ordinances violated the Supremacy Clause of the United States Constitution, because, the plaintiffs argued, the federal government has pre-empted the field of regulating immigration. The Supreme Court has stated that “Power to regulate immigration is unquestionably exclusively a federal power....But the court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power...” Decanas v. Bica, 424 U.S. 351, 355 (1976). In Decanas, the Supreme Court held that a California statute that prohibited employers from knowingly employing an illegal alien if such employment would have an adverse effect on lawful resident workers was not pre-empted by federal law. The Court found that the central concern of the federal Immigration and Nationality Act (INA) is the terms and conditions of admission to the United States, not employment of aliens. Id. at 359.

There are three ways that a local ordinance may be preempted by federal law: 1) where the local law attempts to regulate immigration; 2) where the local law attempts to operate in an area occupied by federal law; and 3) where implementation of the local law is an obstacle or burdens or conflicts in any manner with any federal laws or treaties. Garrett, supra at p. 8. The Garrett court examined all three prongs of this test in finding a likelihood of success on the merits to support its issuance of a TRO.

The court in the Garrett case found that the ordinance did not attempt to regulate immigration, since immigration under the INA is essentially a determination of who should or should not be admitted to the country. Decanas v. Bica, 424 U.S. at 355. Thus, the Escondido ordinance did not violate the first part of the test. The court did find,

however, that it was likely that the ordinance violated the second prong of the test, in that the federal government had already enacted laws providing for fines and penalties for harboring illegal aliens. See 8 U.S.C. §1324. The court, in ruling on the likelihood of success on the merits, found “serious concerns” that the field of regulating the harboring of illegal immigrants had been occupied by the federal government and that the ordinance was therefore preempted.

The court had similar constitutional concerns as to the whether the ordinance burdened or conflicted with federal laws. The ordinance contemplated using the federal government’s Systematic Alien Verification for Entitlements program (SAVE) to determine if a person was an illegal alien. The SAVE program is used to determine eligibility for public benefits, and the court doubted whether the program could be used for the purpose of regulating landlord-tenant relations. Even if the SAVE program could be used, the court had serious concerns as to the burdens the ordinance would place on the program.

The court in the Lozano case did not discuss the likelihood of success on the merits to any great extent. It focused instead on the potential irreparable harm to the plaintiffs, who included illegal immigrants who faced eviction, as well as American citizens who faced eviction because of difficulty in establishing citizenship. The court also noted that the potential harm to the city was only bare assertions by the city that it faced higher costs for social services, and that illegal immigrants were contributing to an increase in crime.

## **2. Due Process**

Plaintiffs in the Garrett case also argued that the ordinance deprived them of liberty and property interests without due process of law. The right to notice and opportunity to be heard prior to being deprived of a liberty or property interest is a fundamental protection. Board of Regents v. Roth, 408 U.S. 564 (1972). The court found that the plaintiff landlords had a property interest in the rents they collected under their leases. The ordinance did not provide any form of administrative review to either the landlord or the tenant to contest the findings of the city or the federal government as to the illegal alien status, prior to the landlord being required to evict the tenant. Further, the court noted that illegal aliens are also protected by the Due Process clause, which applies to all “persons”. Thus, the court in Garrett concluded that there was a substantial likelihood of success on the merits, coupled with a threat of irreparable harm to the plaintiffs.

## **III. Potential Massachusetts Responses.**

To address potential problems occasioned by overcrowded conditions that strain public resources, there are a number of regulatory tools in Massachusetts already. In addition to state statutes and regulations, cities and towns may enact local bylaws, ordinances and regulations that supplement the state requirements. Any local bylaw or

ordinances, however, must be carefully tailored to ensure that they are not pre-empted by federal or state laws. Local regulations that specifically target illegal aliens are likely to be challenged, whereas local regulations that address overcrowding as a general matter are less likely to be found unconstitutional.

#### **A. Health Laws.**

Boards of health have a number of state laws available to help them address issues related to overcrowded or substandard housing. The first is the state Sanitary Code, which contains minimum standards of fitness for human habitation. 105 CMR 410.00. The code sets forth detailed standards for living quarters, regulating numerous aspects of living space, from ceiling height to heat and hot water. Of particular relevance to controlling overcrowded conditions, the Sanitary Code requires that each dwelling unit have at least 150 square feet of floor space for its first occupant, and 100 square feet of floor space for each additional occupant. Each room occupied for sleeping purposes by one occupant requires 70 square feet of floor space, and 50 feet of floor space for each person if the sleeping room is for more than one person 105 CMR 410.400. In rooming units, the requirements are 80 square feet for every sleeping room occupied by one person, and 60 square feet of floor space per person for each room occupied by more than one person. *Id.* Local health agents are authorized to enforce the Sanitary Code, including the right to conduct inspections, and may seek fines for violations. 105 CMR 400.015 et seq. If a health agent finds that a dwelling or portion thereof is unfit for human habitation, the board of health, after complying with the required procedures, may condemn the dwelling, order it vacated, and order the premises secured. 105 CMR 410.831.

Boards of health are empowered to inquire into nuisances and sources of filth under G.L. c. 111 §122 et seq. Section 22 provides that the board of health “shall examine into all nuisances, sources of filth and causes of sickness within its town... which may, in its opinion, be injurious to the public health, shall destroy, remove or prevent the same as the case may require, and shall make regulations for the public health and safety relative thereto....” This power to examine into nuisances can be applied to any situation, whether housing, employment, or otherwise. What constitutes a nuisance has been defined by a number of cases. See *Lenari v. Kingston*, 342 Mass. 705 (1961) (smoke, odors, flies, rodents, and wild dogs that came from town dump onto property of neighbor constituted a nuisance); *Shea v. National Ice Cream Co., Inc.*, 284 Mass. 497 (1933) (excessive noise from cigar factory); *Malm v. Dubrey*, 325 Mass. 63 (1949) (noise from freight yard). To be a nuisance, a condition must “materially interfere with the physical comfort of existence, not according to exceptionally refined, uncommon or luxurious habits of living, but according to the simple tastes and unaffected notions generally prevailing among plain people.” *Malm, supra* at 65. This power to address nuisances, while not to be exercised lightly, is available if warranted by the situation.

Boards of health also have broad authority to enact local regulations. General Laws chapter 111 §31 provides that the board of health may adopt reasonable health regulations. The courts have stated that health regulations stand on the same footing as a

statute, ordinance, or by-law. Drusik v. Board of Health of Haverhill, 324 Mass. 129, 138 (1949). This means that all rational presumptions are to be made in favor of the validity of the regulations, and the regulations will be upheld if the board can make findings that show a rational basis for the regulations. In addition, any local regulations must be consistent with state and federal law. A regulation will be deemed to be consistent with state and federal law “unless the legislative intent to preclude local action is clear, either because of an explicit statement or because the local enactment prevents the achievement of a clearly identifiable purpose.” Wendell v. Attorney General, 394 Mass. 518, 524 (1985). Thus, boards of health may enact local regulations to address health issues that may be caused by overcrowded housing conditions, if the board finds that there is a problem and there is a rational relationship between the problem and the regulation.

## **B. Lodging Houses.**

The board of selectmen, city council, or other licensing authority has the authority to issue licenses for lodging houses. According to G.L. c. 140, § 22:

"Lodging house", as used in sections twenty-two to thirty-one, inclusive, shall mean a house where lodgings are let to four or more persons not within second degree of kindred to the person conducting it, and shall include fraternity houses and dormitories of educational institutions, but shall not include dormitories of charitable or philanthropic institutions or convalescent or nursing homes licensed under section seventy-one of chapter one hundred and eleven or rest homes so licensed, or group residences licensed or regulated by agencies of the commonwealth.

Additionally, the Supreme Judicial Court has stated that:

A dictionary definition of ‘lodging’ is ‘accommodation in a house, esp. in rooms for rent’ and of ‘lodging house,’ ‘a house in which lodgings are let, esp. a house other than an inn or hotel.’ . . . The term ‘lodging house’ implies a degree of permanence in the occupancy, at least as distinguished from the transiency of hotel and motel accommodations.

Selvetti v. Building Inspector of Revere, 353 Mass. 645 (1968). Lodging houses are required to obtain an annual license from the licensing authority, and are subject to inspection by the licensing authority, its agents, and the police. G.L. c. 140 §§23, 25. The purpose of the annual license is to ensure that the premises are “orderly, law abiding operations, responsibly managed by appropriate persons, and that the facilities are safe, sanitary, and suitable for human habitation.” Newbury Junior College v. Brookline, 19 Mass. App. Ct. 197, 204 (1985). The licensing board, after proper hearing, can revoke a license, and the annual renewal is an opportunity to ensure that lodging houses are being used in accordance with the proper occupancy limit and are up to state and local codes.

### **C. Building Code.**

The local building inspector has authority to inspect buildings to ensure compliance with the state Building Code, 780 CMR 100 et seq. The authority of the inspector extends beyond the construction stage. The Building Code also sets forth maximum occupancy limits for various uses, including multi-family and lodging houses. 780 CMR 120.5.2. The Code also requires periodic inspections of many residential uses, such as lodging houses, for continual compliance. 780 CMR 106 and Table 106. The building inspector is charged with enforcing the Building Code, and may seek injunctive relief or fines. G.L. c. 143 §3A; 780 CMR 106 et seq. For structures that are found to be unsafe, there is a procedure for condemning, securing, and removing the structure. See G.L. c. 143 §6 et seq. and 780 CMR 121.0 et seq.

### **D. General Bylaws.**

In addition to the requirements of state laws and codes, cities and towns have the authority under the state Home Rule Amendment, by the enactment of bylaws or ordinances, to exercise any power or function which the General Court has the power to confer upon municipalities, which is not inconsistent with the Constitution or laws of the United States or the Commonwealth. This allows cities and towns quite a bit of latitude in fashioning local solutions to specific problems.

The town of Milford made headlines recently when it took steps to address the number of apartments in town that were overcrowded, resulting in potential health threats by the spread of contagious diseases, as well as noise, accumulation of trash and garbage, disruption of neighborhoods, and overcrowding of streets with vehicles. The town enacted a general bylaw (a copy of which was provided by Gerald Moody, esq., the Milford Town Counsel, and is attached hereto) regulating “Occupancy of Buildings.” (The Milford Bylaw is based on a similar bylaw enacted by Yarmouth in 1981, also attached.)

The Milford Occupancy bylaw provides that no person shall rent or lease or offer to rent or lease any building or portion thereof for human habitation without first registering with the board of health, which shall determine the number of persons that may lawfully occupy the rental premises under the Sanitary Code and any local regulations. The certificate of registration, with the occupancy limit, must be posted on the premises. No tenant shall rent, lease or occupy any building or portion thereof if the number of persons occupying the premises exceeds the number of persons authorized in the certificate of registration.

Ordinances of this nature have the advantage of avoiding the Due Process and Supremacy Clause challenges of ordinances aimed specifically at illegal immigrants. At the same time, in theory, ordinances and bylaws that set and enforce occupancy limits should address the overcrowding of dwelling units and the accompanying problems.

## E. Zoning.

Zoning is the traditional means for addressing land use issues. The stated goals of the Zoning Act, G.L. c. 40A, include lessening congestion in the streets, conserving health, preventing overcrowding of land, avoiding undue concentration of population, and encouraging housing for persons of all income levels. See chapter 808 of the Acts of 1975, Section 2A. Thus, traditional zoning by-laws address the density of allowed housing, such as height, number of units, minimum lot size, and other dimensional requirements. Regulating the number of occupants in each dwelling unit through zoning, however, is somewhat trickier.

One approach that has been attempted is to define the term “family” so as to regulate the persons that can live together in a single dwelling unit. In theory, this limits the number of occupants and addresses overcrowding. The leading case in this regard is Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), in which the Supreme Court upheld as constitutional a zoning ordinance that limited a “family” to no more than two persons living together as a single housekeeping unit who were not related by blood, marriage or adoption. The Court ruled that the ordinance advanced the legitimate public goal of providing for quiet neighborhoods unburdened by overcrowding.

In Massachusetts, the Supreme Judicial Court has not issued a definitive ruling, but has gone so far as to agree that an eight bedroom house rented to eight unrelated tenants violated a zoning ordinance prohibiting the designing, arranging, or construction of a structure for more than one family. Commonwealth v. Jaffe, 398 Mass. 50 (1986). The court stated that it “need not decide the definition to be given the words ‘one family’ because the use of a house by eight unrelated adults who evidence ‘a complete lack of communal living’ and who, under the terms of their lease, may each be evicted by their lessor without affecting the tenancy of the other tenants on the lease, does not fall within any reasonable construction of the words ‘one family’”. Id. at 54-55. Defendants, citing cases from other jurisdictions, urged the court to adopt the notion of a single housekeeping unit rather than a biologically related family as the test for single-family zoning. The court found, however, based on the lease, the use of separate mailboxes, and other evidence, that even if the ordinance could be construed as referring to a single housekeeping unit, rather than a biological family, the living arrangement did not constitute a single housekeeping unit either.

The Appeals Court addressed the issue in Worcester v. Bonaventura, 56 Mass. App. Ct. 166 (2002). The city sought to enforce its orders directing defendants to cease and desist from operating condominium units as lodging houses as defined in the zoning bylaw. Defendants claimed that the bylaw was unconstitutionally vague. The bylaw defined a lodging house similar to the definition found in state law, and defined a family as one or more persons occupying a dwelling unit and living together as a single housekeeping unit, not including a group of more than three persons who are not within the second degree of kinship. The court found that, taken together, the definitions defined a lodging house as a dwelling unit that is rented to four or more persons not constituting a family, and was not unconstitutionally vague. Relying on Village of Belle

Terre, the court agreed that the city ordinance was rationally related to the goals of preserving the quiet character of neighborhoods.

More recently, the Attorney General's office disapproved a zoning bylaw amendment enacted by the Milford Town Meeting that defined "family" as "one or more persons occupying a dwelling unit and living together as a single housekeeping unit, not including a group of more than three persons who are not within the second degree of kinship." The Attorney General's office noted that the amendment would restrict the extent to which an extended family could reside together, which the Attorney General's office concluded would infringe rights regarding family relations guaranteed by the United States and Massachusetts Constitution. The Attorney General distinguished the Bonaventura case by noting that that case involved only a challenge as to whether the definition of a lodging house under the ordinance was unconstitutionally vague. It further noted that the court in Bonaventura only considered the extent to which the ordinance limited the number of unrelated persons living together. The Attorney General concluded, based upon Moore v. City of East Cleveland, 431 U.S. 494 (1977), that the Milford definition of family would heavily intrude on choices concerning family living arrangements, while only marginally addressing the residential overcrowding problems that formed the basis for the bylaw amendment. A copy of the Attorney General office's ruling is attached hereto.

#### **IV. Conclusion.**

We have surely not seen the last of attempts by local governments to regulate illegal immigrant populations to address social ills which are perceived to be exacerbated by the illegal immigrants. Whether it is strain on municipal services, health concerns, crime, or overcrowding, the problems caused when too many people are occupying too little space are not easily solved. Consistent use and enforcement of existing statutes and regulations in Massachusetts can address many of the issues, but it requires a commitment of time and money that not all municipalities have. Carefully drawn local regulations can help, but can end up costing more in the long run with legal challenges if improperly targeted at illegal aliens.