



Matthew R. Segal, *Legal Director*
ACLU Foundation of Massachusetts
211 Congress Street, 3rd Floor
Boston, Massachusetts 02110
Phone: 617-482-3170, ext. 330 Fax: 617-451-0009
email: msegal@aclum.org

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By email: council@town.barnstable.ma.us

Barnstable Town Council
367 Main Street
Hyannis, MA 02601, Suite 301
Worcester, MA 01608

Re: Barnstable's Proposed Ordinance on "Problem Properties"

Dear Members of the Barnstable Town Council:

I am writing to express concerns of the American Civil Liberties Union of Massachusetts regarding the proposed ordinance on "Problem Properties." While we appreciate efforts that have been made to try to provide due process of law and also protect victims of crimes, the ordinance as written threatens to cause unwarranted discrimination against tenants, reduce cooperation with law enforcement, and deprive people of property without adequate due process. We believe there are other ways to respond to legitimate complaints of neighbors about noise, sanitation, and crime problems.

The proposed ordinance, which would be codified as Chapter 160 of the Barnstable General Ordinances, would hold property owners responsible for costs associated with certain illegal "incidents" on those properties, even if the owners themselves had nothing to do with those illegalities. The ordinance would require the Chief of Police to warn the property owner if, within a 12-month period, two "incidents" involving criminal offenses occurred at the property. If a third incident occurs, the property owner can be billed "for the costs the Town incurred for its police response." The ordinance allows for an appeal only if filed within seven days of receipt of notice of penalties. We have several concerns about this proposal.

First, the ordinance allows for significant financial penalties to be imposed on property owners where only the police decide on the "validity" of complaints made about the property. Incidents triggering liability can include any time the police are called, regardless of whether criminal charges are brought and without regard to the outcome of any court proceedings. This provision vests too much power in the hands of the police. It ignores situations where one neighbor repeatedly files complaints about a tenant with the police because of an ongoing dispute or racial or other biases, where certain neighbors may have special connections or friendships

with the police, and indeed where police officers themselves sometimes abuse their authority when they live in a neighborhood and have a dispute with a neighbor.

Second, the ordinance would encourage property owners to profile prospective tenants by age, race, and possibly other legally impermissible characteristics. Because property owners could be liable for costs associated with their tenants' potentially illegal acts, owners will necessarily seek to deny housing to prospective tenants based on the mere suspicion that they will commit illegal acts. But property owners, of course, are not trained to profile criminals. In the absence of a reliable way to predict criminal tendencies, some property owners will assess the risk of renting to specific tenants through racial, social, and economic biases. See B. A. Glesner, *Landlords As Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W. RES. L. REV. 679, 780 (1992). While we understand the difficulties of effective law enforcement, encouraging property owners to make prejudicial decisions is not a tenable solution.

Third, the ordinance is likely to have the perverse effect of decreasing cooperation between citizens and law enforcement officers. Given that property owners could be required to bear costs associated with crimes on their properties, they might be disinclined to report such crimes to the police. The same is true of the tenants themselves; they might fear that any reporting on the criminal acts of their co-tenants will lead to rent increases or eviction proceedings. See Glesner, *supra*, at 782. Thus, instead of enlisting the police for help when crimes occur, property owners and tenants alike might view the ordinance as a reason to keep criminal behavior under wraps.

To its credit, the proposed ordinance provides that predicate criminal incidents do not include crimes in which an occupant of the property was a victim. However, that provision does not go far enough. For example, a woman may visit a friend who rents an apartment from a landlord. The visitor's ex-spouse finds her there and attacks her. Although she is a victim of a crime, because she is not an occupant of the apartment, the landlord and innocent tenant would not be protected from the penalties of the proposed ordinance.

Finally, the proposed ordinance fails to provide due process, despite attempts to do so. As noted above, the ordinance appears to authorize the Town to assess costs against property owners even for "incidents" that do not result in a conviction for any offense. Thus, it is entirely unclear what standard will be used to determine whether a criminal "incident" in fact occurred or that the complaint is valid. Worse yet, a property owner can face substantial costs for these incidents—up to and including foreclosure—even if she was unaware of the alleged crime. Although the ordinance permits property owners to appeal, it is unclear what standards and rules

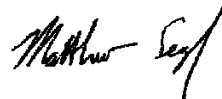
will apply. The ordinance also allows only seven days to file an appeal, which is very short and may not even allow adequate time to consider whether to proceed.

Creating such strict and severe liability for the *alleged* crimes of others would contradict well-established legal principles. Typically, a property owner is liable for the conduct of an occupant only if the owner has consented to, or is at least aware of, such conduct. *See* 49 AM. JUR. 2D Landlord and Tenant § 6. Chapter 160's proposed departure from that principle represents a serious threat to due process.

The ACLU of Massachusetts understands that the Town Council has been involved in lengthy deliberations on this ordinance, and we appreciate the care and attention that have gone into those deliberations. However, as presently drafted, the proposed ordinance will be unfair to both property owners and prospective tenants. We therefore urge you to reject it. At the very least, the ordinance should be modified so that it imposes only modest penalties, and so that it reaches only property owners who were complicit in behavior that resulted a criminal conviction.¹

Thank you for your consideration. Please do not hesitate to contact me with any questions about this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Matthew Segal", written in a cursive style.

Matthew R. Segal

¹ We realize that much of this proposed ordinance may be modeled on provisions in a Boston ordinance on problem properties. However, Boston's ordinance appears to focus on what may truly be serious problem properties; it requires eight valid complaints within a 12-month period, compared to only three such incidents in the Barnstable proposal. In any event, we believe the flaws we have identified in Barnstable's proposed ordinance are also present in Boston's ordinance.