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Recent Decision in Case Challenging Sex Offender Residency Regulations Yields Important Lessons

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Many municipalities have enacted ordinances regulating the residency of sex offenders. Such ordinances typically prohibit sex offenders, or a certain class of sex offenders, from living within a certain distance of prohibited locations. It starts with a few municipalities enacting such regulations out of a desire to protect residents, particularly vulnerable ones like children, from dangerous criminals who have preyed on others and who are thought to be likely to reoffend if provided with opportunities to do so. It's not unusual for surrounding municipalities to quickly follow suit in enacting such ordinances. After all, they want to protect their residents from these dangerous offenders and may fear an influx of sex offenders from the neighboring municipalities where residency is now regulated. Although such ordinances are increasingly common, a recent federal court decision underscores the importance of the following: 1) Understanding the permissible purposes for enacting such an ordinance (protecting the public health, safety and general welfare is permissible whereas a purpose to ban all or most sex offenders from the community is not); 2) basing the decision to regulate sex offender residency on evidence or data justifying such regulation; 3) drafting the ordinance narrowly to achieve the permissible goal; and, 4) the need to proceed correctly from the outset.

In *Hoffman, et al. v. Village of Pleasant Prairie*,^[1] a federal judge for the Eastern District of Wisconsin held that a village ordinance regulating the residency of child sex offenders (offenders) within the Village's borders, which was enacted to keep offenders out of the Village and made more than ninety percent of the Village off-limits to offenders, with the remaining ten percent largely non-residential and not including most low-income housing, and which banished offenders from the Village and without justification differentiated between offenders who were or were not living in the Village at the time of their most recent offense, was unconstitutional.

The facts of the case follow. In April 2016, the Village of Pleasant Prairie enacted an ordinance regulating the residency of child sex offenders, referred to as Designated Offenders, within its borders. The ordinance prohibited Designated Offenders from residing in the Village within 3000 feet of a "prohibited location." Prohibited locations" included "[a]ny school, licensed day-care center, park, trail, playground, place of worship, athletic field used by Minors, or any other place designated by the Village as a place where Minors are known to congregate."^[2] The ordinance also prohibited Designated Offenders from moving into the Village unless they were already domiciled in

the Village at the time of their most recent offense. Designated Offenders were excluded from any potential violation of the ordinance if they resided continuously in a home before and after the ordinance's effective date but this provision was limited by a ban on renewing rental agreements with Designated Offenders which would extend for more than 6 months beyond the ordinance's effective date. The ordinance further restricted where offenders could live by banning them from residing within 500 feet of each other, and applied to all Designated Offenders without any inquiry into the danger any individual offender posed to the community. The ordinance contained a grandfather clause which allowed Designated Offenders to stay in their residence if a "prohibited location" was established near them after they took residence. It also allowed Designated Offenders to live with their close family members provided those family members had resided in the otherwise prohibited area for at least two years.

In passing the ordinance, the Village prepared a map showing that the ordinance would make more than ninety percent of the Village off limits to Designated Offenders. The remaining ten percent was largely nonresidential and the interaction between the rule prohibiting offenders from living within 3000 feet of a prohibited location and the rule prohibiting offenders from living near one another further limited the possible dwelling places. Most of the Village's low-income housing was excluded from where offenders could reside and was the only housing offenders could afford.

When enacting the ordinance, the Village did not obtain or consider any studies or data regarding the safety risk of allowing Designated Offenders to live near "prohibited locations" or near one another. The Village also had no evidence that Designated Offenders living outside the Village at the time of their last offense posed a greater safety risk than those who lived in the Village. The Village administrator stated that the ordinance's purpose and goal was to reduce the number of child sex offenders living in the Village.

In June 2016, approximately two months after the ordinance was passed, a group of sex offenders impacted by the ordinance filed an action for summary judgment alleging the ordinance was unconstitutional.[3] Six of the nine plaintiffs did not live in the Village at the time of their offense and rented their abodes. They were informed either by a letter from the Village's Police Chief, by conversations with their probation officers or other Designated Offenders that they had to leave the Village by October 18, 2016. Plaintiffs suffered stress as a result of the threat posed by the ordinance, the difficulties in attempting to secure new housing, and fear of the consequences of homelessness.

Shortly thereafter, in September, the Village repealed the ordinance and created an amended ordinance which lowered the 3000 foot prohibited zone to 1500 feet; this would still preclude offenders from living in over sixty percent of the Village's land area and seventy-five percent of its residences. The restriction on offenders living near each other was removed entirely, as was the limit on renewing leases for offenders living in a prohibited zone. The amended ordinance stated that it did not apply to an offender whose latest conviction was ten or more years prior to the offender taking residence in the Village.

Despite the Village's amendment of the ordinance, the offenders continued their challenge against the original ordinance on two constitutional grounds.[4] 1) The ordinance was alleged to violate the Ex Post Facto Clause in Article I of the Constitution because it "makes more burdensome the

punishment imposed for offenses committed prior to enactment of the Ordinance and it applies retroactively" and 2) the Ordinance was alleged to violate the Equal Protection Clause of the Fourteenth Amendment because it differentiates between offenders who were or were not domiciled in the Village at the time of their most recent offense, without a rational basis for doing so.

Ex Post Facto Clause

With regard to the first claim, the court concluded the ordinance did indeed violate the Ex Post Facto clause and that although the Village's subsequent repeal of the ordinance and its replacement with an amended ordinance mooted Plaintiffs' claims for injunctive relief, it did not moot the fact that the violations occurred or moot Plaintiffs' claims for monetary relief. Despite the fact that the Village ordinance's stated purpose was "not to impose a criminal penalty" but instead to protect the health and welfare of the Village's citizens, the court concluded the ordinance was punitive after assessing its nature by analyzing it under the following five factors:[5]

1. Does the law inflict what has been regarded in our history and tradition as punishment?
2. Does it impose an affirmative disability or restraint?
3. Does it promote the traditional aims of punishment?
4. Does it have a rational connection to a non-punitive purpose?
5. Is it excessive with respect to this purpose?

The court rejected cases offered by the Village as support that such ordinances are nonpunitive, stating that the "most relevant decisions from across the nation reveal that the Ordinance is nigh unprecedented in its punitive effect." Slip op. at 9. With regard to the first factor, the court found that unlike many other laws restricting sex offender residency, the ordinance did not simply limit where offenders could live but banished Plaintiffs from the Village and banishment has been regarded as punishment in our history and tradition. With regard to the second factor, the ordinance imposed severe restraints on Designated Offenders by limiting their residence to ten percent of the Village's land area, an area which is largely nonresidential. Turning to the third factor, the court found the ordinance advances "traditional punishment aims of incapacitation, in keeping Designated Offenders segregated to tiny zones of the community; retribution, by imposing its restrictions based solely on Plaintiffs' prior offense conduct; and deterrence, in attempting to keep Designated Offenders away from children to deter recidivism." Slip op. at p. 10. Finally, the court noted that the fourth and fifth factors, deemed the "most important" consideration in the ex post facto analysis, are typically considered together because the "less rational a restrictions connection to its stated purpose, the more excessive it will be in addressing that purpose." *Id.* at 11 (cites omitted).

In reviewing these factors, the court reviewed case law from across the nation, noting that the Village's ordinance went further than any of the ordinances in other cases by banning Designated Offenders from the Village without any individualized inquiry into their risk to the community[6] or offering any method for a Designated Offender to obtain an exemption, even in limited circumstances, the Ordinance's banishment applies to Designated Offenders for life, and the grandfather clause was of limited help to most of the Plaintiffs because it only allowed them to remain in the Village until October 2016. And, "[m]ost importantly, the Village has admitted that the Ordinance was based on its own conjecture about the dangers posed by sex offender. No data or studies on the matter were considered" in passing the ordinance. *Id.* at 13. The court noted that if

"the Village had even a sliver of factual material to support the stated goals of the Ordinance, the outcome of this claim would likely be different." *Id.* at 14. The court stated that the lack of evidence "eliminates the possibility" that the Village's action was rational. *Id.* The court concluded that Plaintiffs provided sufficient evidence that the ordinance's stated non-punitive purpose is overborne by its punitive effects. Therefore the ordinance violated the Ex Post Facto Clause.

Equal Protection

The court rejected the Village's argument that Plaintiffs lacked standing to pursue an equal protection claim on the grounds that they were grandfathered in by the Amended Ordinance and therefore did not suffer a concrete injury. The court stated that as with the mootness argument under the ex post facto claim, the "ameliorative" effect of the Amended Ordinance is not the relevant inquiry and that Plaintiffs have standing to remedy a past wrong.

The court noted that the Fourteenth Amendment's Equal Protection Clause "commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *Id.* at 16 (cite omitted). Laws typically do not violate the Equal Protection clause if the classification drawn by the regulation is rationally related to a legitimate state interest. However, when a statute burdens a person's fundamental constitutional rights, courts apply a higher level of scrutiny. Although the parties disputed whether Plaintiffs are members of a protected class requiring that the court give the ordinance heightened scrutiny, the court stated that it was unnecessary to determine that, concluding that the ordinance fails to pass even the lesser threshold of rationality. The court explained that to prove an equal protection claim under rational basis review, Plaintiffs needed to show that (1) the Village intentionally treated them differently from others similarly situated, (2) the Village intentionally treated them differently because of their membership in the class to which they belonged, and (3) the difference in treatment was not rationally related to a legitimate state interest. This is a "lenient" standard requiring the ordinance be upheld if the court can reasonably conceive of any justification for it. *Id.* at p.17.

Plaintiffs argued the ordinance violates equal protection rights because it treats certain Designated Offenders differently from others without reason. Those offenders domiciled in the Village at the time of their last offense were allowed to remain the Village while those who were not were "variously blocked from moving into the Village, compelled to leave in a short time frame, or forced to remain in their current home forever if they wished to stay in the Village." *Id.* at 17. According to the court, the Village admitted that it had no evidence that the difference between these groups (domicile at time of offense) has any bearing on their safety risk to the court and failed to offer any justification for it, misunderstanding Plaintiffs as advancing their equal protection claim based on their status as sex offenders versus non-sex offenders and instead offering reasons for distinguishing on that general basis. The court indicated it would likely have been compelled to find the ordinance constitutional had the Village offered any justification but that its failure to do so left the court with no choice but to conclude that the ordinance violated Plaintiffs' equal protection rights in "making an irrational domicile-based distinction between Designated Offenders. *Id.* at 19. The court stated that the "bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," and concluded based on the Village administrator's comments and the lack of evidence

supporting the ordinance's restrictions, that that was "precisely what motivated the Village's action." *Id.*

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[1] Case No. 16-CV 697-JPS (E.D. Wis., 4/17/2017).

[2][2] Slip op. at pp. 2-3.

[3] Summary judgment is appropriate where there are no genuine issues of material fact and the case can be decided as a matter of law. However, because the Plaintiffs wanted their damages determined by a jury, the court later characterized their motion as one for partial summary judgment.

[4] A third claim for a declaratory judgment regarding one Plaintiff is not discussed here.

[5] Slip op. at 9 citing *Does #1-5 v. Snyder*, 834 F.3d 696, 701 (6th Cir. 2016) (citing *Smith*, 538 U.S. at 97).

[6] Significantly, the court said it disagreed with a Wisconsin appellate court opinion addressing the ex post facto factors and upholding a sex offender ordinance, *City of South Milwaukee v. Kester*, 830 N.W.2d 720 (Wis. Ct. App. 2013) to the extent that its says a broad evidence-free assumption about sex offenders is sufficient to make a regulation non-punitive. It says *Kester* mentions no data or studies on the dangerousness of such persons in the community.

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