

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN DOES I-IV,	)	
on their own behalf and on behalf	)	
of a class of those similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:06-cv-0865 RLY-WTL
	)	
CITY OF INDIANAPOLIS; MARION	)	
COUNTY SHERIFF,	)	
	)	
Defendants.	)	AMENDED COMPLAINT / CLASS ACTION

Amended Complaint for Declaratory and Injunctive Relief

Introduction

1. The City of Indianapolis has amended Sec. 631-106 of the Revised Code of the Consolidated City and County to prohibit certain sex offenders from being within one thousand (1000) feet of certain areas of the County. Violations are punished as infractions. The ordinance is unconstitutional for numerous reasons. Accordingly, an injunction should be entered preventing the ordinance from being effective.

Jurisdiction, venue and cause of action

2. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1331.
3. Declaratory relief is authorized pursuant to Federal Rules of Civil Procedure Rule 57 and 28 U.S.C. §§ 2201 and 2202.
4. Venue is proper in this district pursuant to 28 U.S.C. § 1391.
5. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law of rights secured by the laws of the United States.

Parties

6. The City of Indianapolis is a municipal entity that will enforce Sec. 631-106 of the Revised Code of the Consolidated City and County.
7. The Marion County Sheriff supervises police authorities who will enforce Sec. 631-106 of the Revised Code of the Consolidated City and County.
8. John Doe I - IV are adult residents of Marion County, Indiana.

Class action allegations

9. Plaintiffs bring this action on their own behalf and on behalf of a class of those similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Additionally, plaintiff John Doe II brings this action on behalf of a sub-class.

10. The class is defined as:

all persons who currently, or will in the future, live in, work in, or visit Marion County, and who are, or will be, persons within the category of sex offenders specified in Section 631-106(a) of Chapter 631 of the Revised Code of the Consolidated City and County

11. The sub-class, represented by John Doe II is defined as:

all members of the class who will vote and whose voting places are within 1000 feet of the areas specified in Section 631-106(a) of Chapter 631 of the Revised Code of the Consolidated City and County

12. The requirements of Rule 23(a) are met with respect to the class. Specifically:

- a. The class is so numerous that joinder of all members is impracticable. Although the exact number of class members is not yet known it is believed to include many hundreds of persons.
- b. There are questions of law or fact common to the class, specifically whether Section 631-106 of Chapter 631 of the Revised Code of the Consolidated City and County violates rights secured by the United States Constitution.
- c. The claims of the representative parties are typical of those of the class.

- d. The representative parties will fairly and adequately represent the interests of the class.
- 13. The further requirements of Rule 23(b)(2) are met with regard to the class in that at all times the defendants have acted and have refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.
- 14. The requirements of Rule 23(a) are met with respect to the sub-class. Specifically:
 - a. The sub-class is so numerous that joinder of all members is impracticable. Although the exact number of class members is not yet known it is believed to include many hundreds of persons. At the current time there are more than 100 polling sites in Marion County that are in elementary, middle, or high schools, all of which are presumably within 1000 feet of public playgrounds or within 1000 feet of sports fields or facilities.
 - b. There are questions of law or fact common to the class, specifically whether Section 631-106 of Chapter 631 of the Revised Code of the Consolidated City and County violates the right to vote secured by the United States Constitution.
 - c. The claims of the representative parties are typical of those of the class.
 - d. The representative parties will fairly and adequately represent the interests of the class.
- 15. Counsel for plaintiffs are appropriate and adequate attorneys to represent the class and sub-class and should be so appointed pursuant to Rule 23(g), Federal Rules of Civil Procedure.

Legal background as to Indiana law concerning sex offenders

- 16. Indiana Code § 5-2-12-4 (repealed 7/1/06) and Indiana Code § 11-8-8-5 (eff. 7/1/06) list various sexual and other offenses against children as well as rape, criminal deviate conduct and possession of child pornography, if the person has a prior unrelated conviction for possession of child pornography.
- 17. Until July 1, 2006, persons convicted of these offenses were required to register pursuant to standards and requirements specified in Indiana Code § 5-2-12. These have been repealed

effective July 1, 2006, and have been replaced by standards and requirements contained in Indiana Code § 11-8-8.

18. Effective July 1, 2006, Indiana Code § 35-42-4-11 will create a new statutory section that defines an “offender against children.” There was no such statutory category prior to July 1, 2006.

19. Indiana Code § 35-42-4-11 (eff. 7/1/06) provides that an “offender against children” means a person required to register as an offender under IC 5-2-12 who has been:

- (1) found by a court to be a sexually violent predator under:
 - (A) IC 35-38-1-7.5; or
 - (B) the law of another jurisdiction that identifies the person as likely to repeatedly commit a sex offense; or
- (2) convicted of one (1) or more of the following offenses:
 - (A) Child molesting (IC 35-42-4-3).
 - (B) Child exploitation (IC 35-42-4-4(b)).
 - (C) Child solicitation (IC 35-42-4-6).
 - (D) Child seduction (ID 35-42-4-7).
 - (E) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age.
 - (F) An offense in another jurisdiction that is substantially similar to an offense described in clauses (A) through (E).

20. Prior to July 1, 2006, Indiana Code § 35-38-1-7.5 (amended 7/1/06) noted that a sexually violent predator had the meaning set forth in Indiana Code § 5-2-12-4.5 (amended 7/1/06), which, in turn, stated that a sexually violent predator was an “individual who suffers from a mental abnormality or personality disorder that makes the individual likely to repeatedly engage in any of the offenses described in section 4 of this chapter.” Indiana Code § 5-2-12-4.5 (amended 7/1/06).

21. However, effective July 1, 2006, Indiana Code § 5-2-12-4.5 (eff. 7/1/06) states that a sexually violent predator has the meaning set out in Indiana Code § 35-38-1-7.5 which, as of

July 1, 2006, provides that a sexually violent predator is a person who suffers from a mental abnormality or personality disorder that will make the individual likely to engage in the offenses specified in Indiana Code § 11-8-8-5. However, the statute also provides that a person will automatically be found to be a sexually violent predator if: the person commits specific enumerated sex offenses or if the person commits an offense specified in Indiana Code § 11-8-8-5 while having a previous unrelated conviction for an offense described in Indiana Code § 11-8-8-5 for which the person must register as a sex offender pursuant to Indiana Code § 11-8-8.

Factual allegations

22. On May 23, 2006, the amended Chapter 361 of the Revised Code of the Consolidated City and County became effective after being signed by the Mayor of Indianapolis.

23. The amended ordinance is attached.

24. Section 631-106(a) provides that :

It shall be unlawful for any person deemed to be an offender against children and required to register under IC 5-2-12 or who have been found by a court to be a sexually violent predator, under IC 35-38-1-7.5, or the law of any jurisdiction that identifies the person as being likely to repeatedly commit a sex offense, or has been convicted of one (1) or more of the following offenses:

- a) Child molesting, under IC 35-42-4-3;
- b) Child exploitation (IC 35-42-4-4(b));
- c) Child solicitation (IC 35-42-4-6);
- d) Child seduction (IC 35-42-4-7);
- e) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age;
- f) An offense in another jurisdiction that is substantially similar to an offense described in clauses (a) through (e);

to be within one thousand feet (1000') of a public playground, recreation center, bathing beach, swimming or wading pool, sports field or facility, when children are present unless such person or persons are accompanied by an adult person who is not also required to register under IC 5-2-12.

25. The ordinance does not define what “accompanied by an adult person” means. Specifically, there is no explanation as to how close the accompanying person must remain to the sex offender in order to satisfy the ordinance. Nor is there any explanation as to whether the person must be known by the sex offender or whether a sex offender may be accompanied by strangers, such as on a bus or at a sporting event.

26. There is no definition in the ordinance as to whether the terms public playground, recreation center, bathing beach, swimming or wading pool, sports field or facility refer to areas that are owned by the City of Indianapolis, owned by another public entity, owned by a private entity but opened to the public, or owned by private entity and not opened to the public.

27. It is virtually impossible to travel through the streets and interstate highways in Marion County without passing within 1000 feet of a playground open to the public, recreation center, bathing beach, swimming or wading pool, sports field or facility.

28. Moreover, there is no way for a person to know if he or she is passing within 1000 feet of a playground open to the public, recreation center, bathing beach, swimming or wading pool, sports field or facility.

29. As written the ordinance penalizes persons who are on public transportation, taxis, airplanes or other vehicles that they do not control that pass within 1000 feet of a playground open to the public, recreation center, bathing beach, swimming or wading pool, sports field or facility

30. Section 631-106(b) of the ordinance provides, in part, that:

It shall be unlawful for any person required to register under IC 5-2-12 to bring or accompany any other person required to register under IC 5-2-12 to a public playground, park, recreation center, bathing beach, swimming or wading pool (*sic*), sports field or facility, when children are present or are expected to be present at such facility or venue.

31. There is no explanation in the ordinance as to how a person required to register may determine whether children “are expected to be present at such facility or venue.”

32. A person who violates the ordinance is guilty of an infraction that is punishable by progressive fines: \$600 for the first violation, \$1,000 for the second, and \$2,500 for subsequent violations within the same year. Section 631-106(e).

33 John Doe I is a resident of Marion County, Indiana.

34. John Doe I was convicted in Indiana of the offense of child exploitation as well as another offense.

35. After a period of incarceration John Doe I was placed on probation although his probation expired in 2004.

36. John Doe I is not a risk to children or other persons.

37. John Doe I received counseling through the Indianapolis Counseling Center and, after a number of hearings, was awarded joint custody of his son who is currently seven (7) years of age.

38. John Doe I and his son frequently go to playgrounds in Indianapolis parks as well as to pools operated by the City of Indianapolis

39. Because of the challenged ordinance, he is now not allowed to travel to these areas with his son.

40. He does not have another adult who can regularly accompany him and his son when they visit the parks and other recreation areas. Moreover, he does not understand what the requirement that he be “accompanied by an adult person” means so that if he has an adult accompany him and his son he does not know how close the adult has to be to him to not be in violation of the ordinance.

41. John Doe I is employed. His office is within 1000 feet of a park with a playground operated by the City of Indianapolis. He will therefore violate the ordinance if he goes to work.
42. John Doe I and his son regularly use the interstate highways passing through Indianapolis to go to Cincinnati and Kentucky. However, the interstates pass within 1000 feet of public playgrounds, recreation centers, bathing beaches, swimming or wading pools, sports fields and/or facilities.
43. John Doe I is a student at IUPUI. However, he has not discovered any way that he can travel to the university without passing within 1000 feet of public playgrounds, recreation centers, swimming or wading pools, sports fields and/or facilities.
44. John Doe I is unable to travel through Indianapolis without passing within 1000 feet of public playgrounds, recreation centers, bathing beaches, swimming or wading pools, sports fields and/or facilities.
45. John Doe II is a resident of Marion County who was convicted of child molesting.
46. He served a prison term and his probation has been completed.
47. John Doe II is a truck driver and he regularly drives to Chicago on Interstate 65 through Indianapolis. His route on the interstate takes him within 1000 feet of public playgrounds, recreation centers, bathing beaches, swimming or wading pools, sports fields and/or facilities.
48. He is therefore unable to travel through Indianapolis and do his job without violating the ordinance.
49. He wishes to vote at the next election. However, his precinct is within an elementary school and is within 1000 feet of a playground and sport field. He is not eligible to vote via an absentee mail ballot.

50. John Doe III is a resident of Marion County who was convicted of child molesting more than a decade ago.
51. Following his conviction he completed many years of counseling.
52. He is employed and when he goes to and from work he is forced to drive within one thousand feet (1000') of public playgrounds, recreation centers, sports fields and facilities.
53. He would like to retain the right to enter parks, pools, sport fields and facilities and other similar areas in Indianapolis for the purpose of engaging in innocent activities without being subject to penalty.
54. He is unable to travel through Indianapolis without violating the ordinance
55. John Doe IV is a Marion County resident who lives with his wife and nine year old son.
56. He was convicted of rape of an adult in another state decades ago and has been classified as a sexually violent predator.
57. He is not, as a matter of fact, a sexually violent predator.
58. To get out of the subdivision where he and his family reside he must pass either a public school and its recreation areas or a baseball field.
59. He and his family like to travel to parks and other similar areas in Indianapolis and he wishes to be able to continue to do so without being accompanied by another adult.
60. He does not understand the meaning of the word "accompanied by an adult person" as used in the challenged ordinance.
61. He is required to travel for his employment and in doing so he is required to use roads and interstates in and through Marion County that pass within 1000 feet of the prohibited areas specified in the challenged ordinance.
62. He is therefore unable to travel through Indianapolis without violating the ordinance.

63. The challenged ordinance requires persons within its prohibitions to move from their homes or leave their jobs if their homes or jobs are within one thousand (1000) feet of a public playground, recreation center, bathing beach, swimming or wading pool, sports field and/or facility.

64. The challenged ordinance is causing plaintiffs irreparable harm for which there is no adequate remedy at law.

65. At all times defendants have acted under color of state law.

Legal claims

66. The challenged ordinance, Section 631-106 of the Revised Code of the Consolidated City and County, is unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

67. The challenged ordinance, Section 631-106 of the Revised Code of the Consolidated City and County, violates the right of the plaintiffs and the putative class to intrastate travel in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

68. The challenged ordinance, Section 631-106 of the Revised Code of the Consolidated City and County, is fundamentally irrational and arbitrary and is therefore unconstitutional as violating the due process clause of the Fourteenth Amendment to the United States Constitution.

69. The challenged ordinance, which has the affect of forcing plaintiffs and the putative class to leave their jobs and renders them unable to move through the City of Indianapolis, amounts to punishment of one already convicted of a crime and is therefore an unconstitutional violation of the *ex post facto* clause of the United States Constitution, art. I, § 10, cl. 1 and/or the double jeopardy clause of the fifth amendment to the United States Constitution as incorporated into the

Fourteenth Amendment.

70. To the extent that the challenged ordinance, Section 631-106 of the Revised Code of the Consolidated City or County prevents John Doe II and members of the putative sub-class from being able to vote it is unconstitutional as violating the First and Fourteenth Amendments to the United States Constitution.

Requested relief

WHEREFORE, plaintiffs request that this Court:

1. Accept jurisdiction of this case and set it for hearing at the earliest opportunity.
2. Certify this case as a class action with the class and sub-class as described above.
3. Declare that the ordinance, Section 631 of the Revised Code of the Consolidated City and County is unconstitutional and void for the reasons noted above.
4. Enter a preliminary, later to be made permanent, injunction, enjoining the application and enforcement of Section 631 of the Revised Code of the Consolidated City and County.
5. Award plaintiffs their costs and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988.
6. Award all other proper relief.

/s/ Kenneth J. Falk
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Attorneys for Plaintiffs and the
putative class

Certificate of Service

I hereby certify that on this 25th day of July, 2006, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

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/s/ Kenneth J. Falk
Kenneth J. Falk

INTRODUCED: 03/27/2006

REFERRED TO: Parks and Recreation Committee

SPONSOR: Councillors Moriarty Adams, Gray and Brown

DIGEST: amends Chapter 631, Article 1 of the Revised Code to add a new section limiting access of persons required to and or listed on the Indiana State Sex Offender Registry, as a result of a conviction of a child related offense, to public park facilities and playground areas

SOURCE:

Initiated by: Councillor Moriarty Adams

Drafted by: Aaron E. Haith, General Counsel

LEGAL REQUIREMENTS FOR ADOPTION:

Subject to approval or veto by Mayor

PROPOSED EFFECTIVE DATE:

Adoption and approvals

GENERAL COUNSEL APPROVAL: _____

Date: March 24, 2006

CITY-COUNTY COUNCIL GENERAL ORDINANCE NO. , 2005

A PROPOSAL FOR A GENERAL ORDINANCE amending Chapter 631, Article 1, of the Revised Code of the Consolidated City and County to add restrictions that limit access of persons required to and or listed on the Indiana State Sex Offender Registry, as a result of a conviction of a child related offense, to certain park facilities and playground areas and providing penalties for violations of this section as is hereby amended.

WHEREAS, the Indiana State Legislature has found that sexually violent predators, as defined by IC 35-38-1-7.5, present a continuing danger to the public sufficient to require that such persons be monitored on parole for the remainder of their lives pursuant to IC 35-50-6-1; and

WHEREAS, the Council finds that, effective July 1, 2006, any person deemed to be a offender against children and required to register under IC 5-2-12 who have been found by a court to be a sexually violent predator, under IC 35-38-1-7.5, or the law of any jurisdiction that identifies the person as being likely to repeatedly commit a sex offense, or has been convicted of one (1) or more of the following offenses:

- a) Child molesting, under IC 35-42-4-3;
- b) Child exploitation (IC 35-42-4-4(b));
- c) Child solicitation (IC 35-42-4-6);
- d) Child seduction (IC 35-42-4-7);
- e) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age; or
- f) An offense in another jurisdiction that is substantially similar to an offense described in clauses (a) through (e);

represent a continuing threat to the health and safety of children; and

WHEREAS, public parks and playgrounds are provided for the use, education, training, entertainment and enjoyment of children and families of children and such venues are intended to be and should be free of the dangers presented to their health and welfare by persons so identified and required to register under IC 5-2-12; and

WHEREAS, the Council finds that the public safety and welfare of the community, particularly children, will be best served by prohibiting persons required to register under IC 5-2-12 for one (1) or either of the offenses hereinabove be prohibited from going within one thousand feet (1000') of a public playground, recreation center, bathing beach, swimming or wading pool, sports field or facility, when children are present unless such person or persons are accompanied by an adult person who is not also required to register under IC 5-2-12.

BE IT ORDAINED BY THE CITY-COUNTY COUNCIL OF THE
CITY OF INDIANAPOLIS AND OF MARION COUNTY, INDIANA:

SECTION 1. Chapter 631 of the Revised Code of the Consolidated City and County is hereby amended by deleting the text that is stricken through and adding the language that is underlined as follows:

Sec. 631-106. Generally prohibited conduct.

(a) It shall be unlawful for any person deemed to be a offender against children and required to register under IC 5-2-12 who have been found by a court to be a sexually violent predator, under IC 35-38-1-7.5, or the law of any jurisdiction that identifies the person as being likely to repeatedly commit a sex offense, or has been convicted of one (1) or more of the following offenses:

- a) Child molesting, under IC 35-42-4-3;
- b) Child exploitation (IC 35-42-4-4(b));
- c) Child solicitation (IC 35-42-4-6);
- d) Child seduction (IC 35-42-4-7);
- e) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age; or
- f) An offense in another jurisdiction that is substantially similar to an offense described in clauses (a) through (e);

to be within one thousand feet (1000') of a public playground, recreation center, bathing beach, swimming or wading pool, sports field or facility, when children are present unless such person or persons are accompanied by an adult person who is not also required to register under IC 5-2-12.

(b) It shall be unlawful for any person required to register under IC 5-2-12 to bring or accompany any other person required to register under IC 5-2-12 to a public playground, park, recreation center, bathing beach, swimming or wading pool, sports field or facility, when children are present or are expected to be present at such facility or venue.

(a c) It shall be unlawful for any person to use profane, obscene, lewd, threatening or abusive language; or to fight, quarrel or throw any stone or missile; or to behave in a loud or disorderly manner; or to commit any offense against decency, good morals or contrary to law; or to litter, dump or deposit any garbage or other offensive substance or article upon any park, playground or any other property under the control or supervision of the department of parks and recreation, or on any property leased or loaned or on which a concession has been granted by it; or to use or participate with others in using any such places for any subversive, seditious or other unlawful purposes.

(b d) No unlawful, threatening, abusive, profane, lewd or indecent language, gesture or conduct shall be permitted in or in the vicinity of any bathing beach, wading or swimming pool, recreation center or playground; nor shall any person who is lawfully at any such place be so annoyed or unlawfully touched.

(e) A person who violates any provision of this section shall be guilty of an infraction punishable by:

1. A fine not exceeding three hundred dollars (\$300) for a first violation.
2. A fine not exceeding five hundred dollars (\$500) for a second violation within one (1) year.
3. A fine not exceeding two thousand five hundred dollars (\$2,500) for each additional violation within one (1) year.

SECTION 2. This resolution shall be in full force and effect upon adoption and compliance with I.C. 36-3-4-14.

The foregoing was passed by the City-County Council this ____ day of _____, 2006, at ____ p.m.

ATTEST:

Monroe Gray
President, City-County Council

Jean Ann Milharcic
Clerk, City-County Council

Presented by me to the Mayor this ____ day of _____, 2006, at 10:00 a.m.

Jean Ann Milharcic
Clerk, City-County Council

Approved and signed by me this ____ day of _____, 2006.

Bart Peterson, Mayor