STATE OF NEW HAMPSHIRE

County of Strafford

Dover District Court
Docket No.

State
v.
Richard Jennings

This matter comes before the Court on a violation of Dover City ordinance 131-20. The relevant portion of the ordinance is as follows:

> Any person who is a convicted sex offender involving a minor, and is required to register for life, shall not reside within a 2500 foot radius of the property line of a school or daycare center.

The ordinance further provides for a fine of up to $1,000 for a violation. The defendant, Richard Jennings, was charged with violating the ordinance. The parties do not dispute that the defendant is a registered sex offender[1] subject to the ordinance or that he lived within 2500 feet of a school.

Instead, the defendant has moved to dismiss the charges, alleging that the ordinance is invalid and unconstitutional for the following reasons: (1) it is *ultra vires* as beyond the scope of the State's statutory grant of legislative authority to the City; (2) to the extent that it is not *ultra vires*, the ordinance is preempted by the State statute governing convicted sex offenders; (3) in the alternative, if the City had the authority to enact the ordinance, then it violates the defendant's substantive due process rights under the State and Federal Constitutions, and (4) if the ordinance does not violate the defendant's due process rights, it violates his equal protection rights under this State's Constitution.

[1] The references in this opinion to registered sex offenders refer only to those subject to the ordinance enacted by the City as some sex offenders would not be covered by the ordinance.

After a review of the relevant case law, the Court finds that the ordinance is not *ultra vires* or preempted. Moreover, the ordinance does not violate the defendant's substantive due process rights. However, the Court finds that the ordinance violates the defendant's equal protection rights. Therefore, the ordinance is an unconstitutional exercise of the City's powers, and the charges against the defendant are dismissed.

FACTUAL FINDINGS

The City of Dover considered the ordinance at issue in 2005. The idea for the ordinance came from then City Councilor Matthew Mayberry who mentioned it to Police Chief William Fenniman. Mr. Mayberry testified that he became aware of the idea of having an ordinance to prevent convicted sex offenders from living in the City of Dover through a constituent who raised the issue. He testified that he originally was in favor of completely barring sex offenders from living within the City. The purpose of the ordinance would be to protect children from sex offenders who had served out their sentences, had been released into the community, and might re-offend.

Councilor Mayberry brought his idea to Chief Fenniman who began to research the idea to determine if such an ordinance would be constitutional. After reviewing the few existing ordinances that he could find, and the court cases on those ordinances, he determined that they could not ban convicted sex offenders from living in the City as a whole, as Councilor Mayberry had originally requested. So instead, the Chief reviewed ordinances that limited where a convicted sex offender could live within a municipality.

When looking at those ordinances, Chief Fenniman determined that an ordinance that prevented convicted sex offenders from living within 2500 feet of schools, daycare centers, or

playgrounds was too broad in restricting where convicted sex offenders could live in the City. When he left out playgrounds, he felt that he had an ordinance that would provide enough places for convicted sex offenders to live, but would keep them away from schools and daycare centers where children were located.

Chief Fenniman further testified that he drafted the ordinance with the City's attorney, and that they did not consult with any experts regarding whether the ordinance would have the desired effect of preventing convicted sex offenders from harming children. Instead, they reviewed the cases where similar ordinances had been found to be unconstitutional, and drafted the Dover ordinance to avoid the issues raised in those cases. Councilor Mayberry told the Court that for him the ordinance was a matter of common sense. Therefore, he did not seek the input of any experts, or conduct any research to determine if the ordinance would indeed have the desired effect of preventing convicted sex offenders from being in the proximity of children and having the opportunity to re-offend. He explained to the Court that he did not need an expert because no one could tell him that a sex offender was ever rehabilitated as he felt that once someone was a sex offender they always would continue to be a sex offender.

The ordinance came before the Dover City Council for its first reading on September 14, 2005. The Council voted to refer the matter to a public hearing. However, one of the Council members wanted a legal opinion on the proposed ordinance, and another asked for someone from the American Civil Liberties Union to address the matter.

The matter was set for a public hearing on October 12, 2005. The minutes of the City Council meeting that night show that the Mayor opened the public hearing on the ordinance, but then closed it as no members of the public appeared to speak on the ordinance. Later that evening, the Council had a second reading of the ordinance. After a brief discussion and some

questions by Council members directed to Chief Fenniman, the ordinance was passed by a unanimous vote. No experts were invited to comment on the ordinance, and the only legal opinions were offered by Chief Fenniman. Indeed, the minutes (State's Exhibit 1) reflect that the Chief offered the only testimony in presenting the ordinance to the City Council.

Although there were some questions about how the ordinance would work, there were no questions asked about the effectiveness of the proposed ordinance. Instead, Chief Fenniman commented on the constitutionality of the ordinance as presented. In addition, the State presented testimony at trial that the City's assistant assessor also made a presentation to the Council regarding the areas where any convicted sex offenders could live - which included a motor home court/trailer park, several apartment complexes, and several hundred homes costing less than $200,000.00.

One Councilor did question whether the ordinance might, in effect, label and restrict sexual offenders in a way that basically convicted them before they were found guilty of any further offense. That Councilor, however, voted in favor of the ordinance noting the seriousness of the crimes at issue. Councilor Mayberry testified that the total time devoted to the ordinance at the meeting was about 15 minutes, with maybe another 15 minutes devoted to the ordinance when it was presented for its first reading on September 14, 2005. He did tell the Court that there were many discussions between various City Councilors prior to the meeting regarding the ordinance, but that the only public hearing was held on October 12, 2006 when the ordinance passed.

The testimony at trial established that once the ordinance went in to effect, there had been numerous violations found by the City's police department. However, the Department's policy was to notify the offenders of the violation, and then give them 30 days to move and come into

compliance with the ordinance. Detective Harrington, who handles the interactions with registered sex offenders moving into the City, testified that since the ordinance went into effect, she had dealt with 14 registered sex offenders who wanted to live in a restricted area. She did not believe that any of them found other places to live in the City. She also testified that she knew of 4 registered sex offenders who had come to the City to live in the non-restricted areas, At the time the ordinance passed, she said there were 29 registered sex offenders on the public list for the City (35 in total), but that as of the time of trial, there were only 17 on that list.

The City also offered the testimony of Lt. Terlemezian who stated that in his opinion the ordinance was responsible for reducing the number of sex crimes against children in the City, although he could cite no study showing that the ordinance had any effect on the City's crime rate. Instead, he relied on the raw numbers he had collected showing that the total sexual assault cases investigated by the City was 33 in 2002, but by 2007 that number had dropped to 18 (State's Exhibit 6). However, on cross examination, the defendant pointed out that those same statistics showed that when sexual assaults involving children were considered, the number of prosecutions for sex crimes against children varied only a minimal amount from 7 in 2002, to 5 for each of 2003, 2004 and 2005. There was a drop in those prosecutions to 4 in 2006 after the ordinance passed, but the number went up to 6 in 2007. No additional facts or explanations were provided by the State as to how to interpret this data.

The defendant's attorneys cross examined the City's witnesses, producing testimony that no scientific studies were requested or reviewed to determine if the ordinance would accomplish the result sought by the City, that being to prevent convicted sex offenders from re-offending against children. In addition, the defendant presented the testimony of Carolyn Lucet, an expert

in the treatment of sex offenders, including those who have offended against children. She testified that she treated both sex offenders and children assaulted by sex offenders.

Ms. Lucet testified that numerous studies have been compiled to determine if ordinances restricting where convicted sex offenders may live are effective in preventing those individuals from re-offending. She stated that none of those studies found that any of the ordinances or statutes were effective. Indeed, she noted that the effect of such ordinances may be to make it more likely that some sex offenders could re-offend because they could prevent the sex offender from living with a relative or friend to provide the support they would need not to re-offend. She further noted that between 93-95% of sexual assaults against children were by someone the child knew, not a stranger. Therefore, the ordinance did not address the 93-95% of situations involving sexual assaults against children.

LEGAL RULINGS

The defendant challenges the City's ordinance on numerous grounds. First, he asserts that it is *ultra vires*, and that the City does not have the authority to enact an ordinance proscribing where convicted sex offenders may live. He argues that only the State government may pass such legislation, and that it has not delegated that power to the City. Second, he argues that to the extent the City has any such authority, the State has preempted it by passing a comprehensive statute governing convicted sex offenders. Third, and finally, he argues that even if the City may enact such an ordinance, the ordinance as enacted violates the State's constitutional provisions of due process and its guarantee of equal protection under the law. For the reasons set forth below, the Court finds that the ordinance violates the defendant's equal protection rights under the New Hampshire Constitution. The Court will address each of the challenges below.

I. Ultra Vires

The defendant argues that the ordinance is *ultra vires*, that is it is beyond the power of the City to enact. Under the New Hampshire Constitution, the State has plenary control over municipalities; municipalities having only those powers which the State grants to them. City of Manchester Sch. Dist. v. City of Manchester, 150 N.H. 664, 666 (2004) (citing State v. Goffstown, 100 N.H. 131, 133 (1956)). Moreover, when exercising the power granted to them, municipalities may only exercise that power in a way "that is consistent with the provisions of their enabling statute." City of Portsmouth v. Karosis, 126 N.H. 717, 718 (1985) quoting Dugas v. Town of Conway, 125 N.H. 175, 181 (1984) quoting Town of Tuftonboro v. Lakeside Colony, Inc., 119 N.H. 445, 448 (1979).

In spite of this, when an ordinance is challenged as *ultra vires*, it is presumed valid and the burden is on the party arguing for the invalidity of the ordinance to show that it exceeds the municipality's power. Piper v. Meredith, 110 N.H. 291, 298 (1970). "If any fair reason can be given for including [the ordinance] within the scope of police powers," the ordinance must be upheld. Id. Based on this case law, the State contends that the ordinance is valid, arguing that it was enacted pursuant to N.H. R.S.A. 47:17 under the police powers of the City.

The New Hampshire Legislature has explicitly granted to cities the power to make laws and regulations in a large number of enumerated areas, as well as the power to make any other regulations "which may seem for the well-being of the city...". N.H. R.S.A. 47:17 XV. In a similar fashion, towns have the power to make bylaws for, *inter alia*, the "making and ordering [of] their prudential affairs." N.H. R.S.A. 31:39 I(l).

The New Hampshire Supreme Court has interpreted section 31:39 "to afford towns wide, but not unlimited, latitude in making by-laws 'which generally fall into category of health, welfare, and safety...'" Derry Sand & Gravel, Inc. v. Town of Londonderry, 121 N.H. 501, 505 (1981) quoting Beck v. Town of Raymond, 118 N.H. 793, 797–98 (1978). In Derry Sand & Gravel, the Supreme Court held that the town had authority to regulate the disposal of garbage and waste under section 31:39. Derry Sand & Gravel, 121 N.H. at 505–06. The incidental effect this statute had on the use of land was not enough to make it a zoning regulation. Id. at 506.

Consistent with this wide grant of authority, our Supreme Court has upheld a wide range of ordinances enacted under section 31:39. See Town of Freedom v. Gillespie, 120 N.H. 576, 579 (1980) (regulating sewerage); Town of New Boston v. Coombs, 111 N.H. 359, 361 (1971) (requiring permit to locate mobile home within town); Piper, 110 N.H. at 298 (regulating building heights); State v. Zetterberg, 109 N.H. 126, 129 (1968) (restricting areas where surfing was allowed). Derry Sand & Gravel, Gillespie and Zetterberg involved ordinances that regulated areas dealing directly with public health and safety. Coombs and Piper, on the other hand, involved land use regulations that would have been the subject of zoning ordinances had they been part of "comprehensive regulations." Beck, 118 N.H. at 798.

Demonstrating that this police power is not absolute, some ordinances have been struck down as beyond the scope of the statutory grant of authority. See Girard v. Town of Allenstown, 121 N.H. 268, 272 (1981) (rent control); Beck, 118 N.H. at 800 ("slow-growth" ordinance). In Girard, the Supreme Court struck down an ordinance limiting the amount by which owners of rental property could raise rents and establishing a board to regulate rental housing in the town.

Girard, 121 N.H. at 270. Unlike other ordinances that have been upheld, this ordinance did not purport to regulate a matter relating to public health or safety, nor was it a land use regulation. The ordinance in Beck was struck down because it was too comprehensive to be enacted under a town's police power. Beck, 118 N.H. at 799–800. A land use ordinance as comprehensive as the one in Beck needed to be enacted under the zoning statute. Id. at 799.

In support of his argument that the ordinance is *ultra vires*, the defendant points to the Legislature's recent rejection of H.B. 340, which would have prohibited a registered sex offender from living within 1,000 feet of a school or child-care facility. See H.B. 340, 160 Gen. Court, 2007 Sess. (N.H. 2007). The defendant argues that the consideration of such a statute by the Legislature, even though it was rejected, establishes that the Legislature recognized that it controls this area of the law. This argument fails, however, because no clear meaning can be discerned from the Legislature's failure to enact a bill, and no significance can be attached to it. See Dover News, Inc. v. City of Dover, 117 N.H. 1066, 1069 (1977). The mere fact that the Legislature considered, but rejected, a statute that is very similar to the one at issue here does not mean that the Legislature believes that the City cannot enact such an ordinance.

The defendant also points to the effect that the ordinance will have on the surrounding communities as being relevant to this analysis. The defendant argues that if the ordinance is enforced, it will force convicted sex offenders to move to other towns and cities, thereby unfairly shifting to those locales any burden associated with having a convicted sex offender living within their boundaries. See Cmty. Res. for Justice, Inc. v. City of Manchester, 154 N.H. 748, 756 (2007); Britton v. Town of Chester, 134 N.H. 434, 440 (1991). However, both Community

Resources for Justice and Britton examined a municipality's power to enact zoning statutes under N.H. R.S.A. 674:16, not a municipality's exercise of its police powers.

R.S.A. 674:16, the enabling legislation for zoning regulations, grants municipalities the power to enact zoning ordinances "[f]or the purpose of promoting the health, safety, or the general welfare of the community." In Britton, the New Hampshire Supreme Court interpreted the word "community" as used in 674:16 as "the 'community' . . . in which a municipality is located and of which it forms a part." Britton, , 134 N.H. at 441. In this case, the City of Dover did not rely on R.S.A. 674:16 for the authority to pass ordinance 131-20. The City instead relied on N.H. R.S.A. 47:17 and 31:39. Neither of these enabling statutes contain the word "community." Rather, both refer to the well-being of the municipality itself. Therefore, the broader definition of "community" is not applicable in this case.

Furthermore, the ordinance in Community Resources for Justice created a total ban on halfway houses. Cmty. Res. for Justice, 154 N.H. at 750. Similarly, the ordinance in Britton originally required single-family homes to be placed on a two-acre lot, duplexes on a three-acre lot, and it excluded multi-family housing from all five zoning districts, although at the time of the Supreme Court's decision it permitted multi-family housing on only about 1.73% of the land in the town. Britton, 134 N.H. at 438. These restrictions, combined with the imposition of expensive procedures for developing that land, effectively barred all low-income housing from the town. Id. at 439. Ordinance 131-20 does not reach so far as to effectively ban sex offenders from the City of Dover, even those with low incomes. To the contrary, the testimony established

that there are a large number of rental properties outside of the protective zone, as well as over three hundred properties priced under $200,000.00.

The provisions enacted by the City of Dover in ordinance 131-20 were based upon concerns related to public safety. Although the ordinance has an incidental effect on land use, it is not so comprehensive so as to be considered a zoning statute.

II. Preemption

The defendant next argues that ordinance 131-20 is preempted by state law. "Municipal legislation is deemed preempted 'if it expressly contradicts State law or runs counter to legislative intent underlying a statutory scheme.'" Town of Lyndeborough v. Boisvert Properties, LLC, 150 N.H. 814, 816–17 (2004), quoting JTR Colebrook v. Town of Colebrook, 149 N.H. 767, 770 (2003). The preemption of municipal ordinances may be express or implied. N. Country Envtl. Servs., Inc. v. Town of Bethlehem, 150 N.H. 606, 611 (2004). "Implied preemption may be found when the comprehensiveness and detail of the State statutory scheme evinces legislative intent to supersede local regulation." Id. Unless there is a clear manifestation of legislative intent to preempt a field, a municipality may act so long as the action does not conflict with State law. Corey v. Town of Merrimack, 140 N.H. 426, 428 (1995).

The defendant contends that the Registration of Criminal Offenders Act, N.H. R.S.A. 651-B, in combination with the Sexual Predator Act, N.H. R.S.A. 135-E, implicitly preempts the ordinance. The Registration of Criminal Offenders Act provides that sexual offenders must register with the state. N.H. R.S.A. 651-B:2. The rest of the Act sets out requirements for the

frequency of reporting, the information required to be reported, the duration of registration, penalties for a failure to report, and an appeals process.

The Act also vests rule-making authority in the Department of Safety. N.H. R.S.A.651-B:8. Pursuant to this authority, the Department of Safety has established a detailed set of rules. See N.H. Code R. Saf-C 5501.01 et seq. In addition, the Sexual Predator Act provides for the civil commitment of sexually violent predators. Neither the Registration of Criminal Offenders Act nor the Sexual Predator Act explicitly preempts local legislation. Although the Registration of Criminal Offenders Act and the Sexual Predator Act may be detailed statutory schemes, they are not detailed and comprehensive with respect to residency restrictions on sex offenders.

In Boisvert Properties, the New Hampshire Supreme Court considered whether N.H. R.S.A. 215-A preempted local regulation of off highway recreational vehicle trails on private land. Boisvert Properties, 150 N.H. at 816. The court held that, given the statute's detailed framework for establishing trails on public land and its silence as to the establishment of trails on private land, the statute did not preempt local regulation of trails on private land. Id. at 819.

Similarly, in Dover News, the legislature had prohibited "obscene material", and provided that exposing a minor to "harmful materials" was unlawful. Dover News, 117 N.H. 1068–69. Because the Legislature had not passed legislation controlling the display of adult materials, a local ordinance controlling this display was not preempted. Id. at 1069.

In this case, the Legislature has preempted the fields for the registration of sex offenders and the civil commitment of violent sex offenders. However, the Legislature has not entered the

field of residency restrictions on sex offenders, thereby leaving "it open for the cities and towns to do so." Id.

The defense argues that the Legislature's failure to enact HB 340 (legislation that would have restricted where convicted sex offenders may live) indicates that the Legislature does not wish to impose residency restrictions on sex offenders. However, the Legislature's failure to enact a measure is not legislative action which would preempt a municipality's enacting an ordinance in the field. Dover News, 117 N.H. at 1069 ("We can discern no clear meaning from the legislature's failure to enact the proposed amendment and for our purpose ascribe no significance to it.").

Pursuing the preemption argument further, the defense cites Northern New Hampshire Mental Health Housing, Inc. v. Town of Hampstead, 121 N.H. 811 (1981), and Region 10 Client Management, Inc. v. Town of Hampstead, 120 N.H. 885 (1980), for the proposition that an ordinance with the effect of discouraging sex offenders from residing inside a municipality's borders is *per se* preempted. However, both Northern New Hampshire Mental Health Housing and Region 10 involved an explicit statutory mandate for the locating of the mentally ill throughout the state. See N. N.H. Mental Health Housing, Inc., 121 N.H. at 812; Region 10, 120 N.H. at 886. The defendant does not point to any corresponding statute mandating the locating of sex offenders throughout the state as there is none. Northern New Hampshire Mental Health Housing and Region 10 are therefore inapplicable.

III. Substantive Due Process

The defendant next argues that ordinance 131-20 violates his substantive due process rights, specifically that the ordinance is an improper exercise of the police power by the City of Dover; one that violates the defendant's constitutional right to substantive due process of law. In considering this argument, this Court must apply the rational basis test since it must determine whether the ordinance is a proper exercise of Dover's police power. Boulders at Strafford, LLC v. Town of Strafford, 153 N.H. 633, 636 (2006). The rational basis test requires only that the ordinance be rationally related to a legitimate government objective. Id. at 641. Under the rational basis test, the ordinance is presumed valid and the burden is on the party challenging its validity. Cmty. Res. for Justice, 154 N.H. at 756–57. A court may not examine the factual basis for the ordinance; the inquiry is only whether the legislative body passing the ordinance could reasonably believe the facts on which the ordinance is based to be true. Id. at 757.

The City's interest in passing ordinance 131-20 was the protection of children from sex offenders. This is a legitimate interest. See Dover News, 117 N.H. at 1071 ("Dover's concern about the morals of minors is a valid state interest."); Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1015 (8th Cir. 2006) (citing Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 4 (2003)); State v. Seering, 701 N.W.2d 655, 665 (Iowa 2005), ACLU of N.M. v. City of Albuquerque, 137 P.3d 1215, 1228 (N.M. Ct. App. 2006). The defendant does not appear to dispute that this interest is legitimate. Therefore, the ordinance must be rationally related to this objective to be valid.

The City could reasonably believe that restricting registered sex offenders from living within 2500 feet of schools and daycare centers would reduce the incidence of child molestation. See Weems, 453 F.3d at 1015 (upholding 2000 foot restriction); Doe v. Baker, No. 1:05-CV-2265, 2006 WL 905368, at *5 (N.D. Ga. Apr. 5, 2006) (upholding 1000 foot restriction); Seering, 701 N.W.2d at 665 (upholding 2000 foot restriction); ACLU of N.M., 137 P.3d at 1228 (upholding 1000 foot restriction). The ordinance, therefore, is a valid exercise of the City's police power from the standpoint of substantive due process.

The defendant states that "[t]o survive a substantive due process challenge, an ordinance must be devoid of unreason and arbitrariness, and the means selected for the fulfillment of the policy must bear a real and substantial relation to that end." This misstates the law. This articulation of the rational basis test was rejected by the New Hampshire Supreme Court in Boulders at Strafford, 153 N.H. at 641, in favor of a test that requires only that the ordinance be rationally related to its objective.

The defendant also points to empirical studies cited by its expert suggesting that the restriction of where sex offenders live does not have a relation to public safety. However, under the rational basis test, the court does not "independently examine factual basis for the ordinance." Cmty. Res. for Justice, 154 N.H. at 757.

IV. Equal Protection

Both parties agree that the intermediate scrutiny test applies for purposes of determining whether the ordinance violates the defendant's equal protection rights. In addressing an equal protection challenge to an ordinance that affects the right to use and enjoy property, the New

Hampshire Supreme Court has adopted an intermediate scrutiny test that is congruent with the intermediate scrutiny test under the Fourteenth Amendment. See Cmty. Res. for Justice, 154 N.H. at 762. The Court has done so recognizing that the right to use and enjoy property is an important and substantive right. Id. at 757. In this action, the City's ordinance clearly impacts the rights of certain individuals to use and enjoy property. Therefore, this Court agrees that the intermediate scrutiny test is the appropriate test to apply.

Since the intermediate scrutiny test applies, the burden is on the government to show that the challenged legislation is substantially related to an important governmental objective. Id. (and at 761-62, citing United States v. Virginia, 518 U.S. 515, 533 (1996) under the Federal Constitution). Therefore, the government may not rely upon justifications that are "hypothesized or invented *post hoc* in response to litigation", nor may the government rely upon overbroad generalizations to support its actions. Id. quoting Virginia, 518 U.S. at 533. In applying this test to the ordinance before the Court, the burden is on the City of Dover to show that the ordinance is substantially related to an important governmental objective.

After reviewing a number of cases addressing similar ordinances around the country, this Court recognizes that in nearly all of those cases the courts have upheld the ordinances under a rational basis test, not the intermediate scrutiny test indicated by our Supreme Court. See Validity of Statutes Imposing Residency Restrictions on Registered Sex Offenders, 2 A.L.R. 6th 227, at section 17 (2007); but see Elwell v. Twp. of Lower, 2006 WL 3797974, at *14 (N.J. Super. Ct. Law Div. Dec. 22, 2006) (holding residency restriction invalid when applying a due

process balancing test similar to intermediate scrutiny). Therefore, those cases do not govern the outcome of this matter.

In reviewing the evidence in this case using the intermediate scrutiny test, the Court finds that the State has failed to meet its burden of establishing that the ordinance bears a substantial relation to an important government interest. There is no question but that the State's interest in protecting minors is "compelling." Osborne v. Ohio, 495 U.S. 103, 109 (1990) (quoting New York v. Ferber, 458 U.S. 747, 756–58 (1982)). However, the State has not produced any evidence showing a causal connection between the residency restrictions and the protection of minors. Instead, the State argues that its stated basis for the ordinance, which is the common sense cited by Councilor Mayberry, is sufficient.

Although the stated basis for the ordinance may meet the government's burden in a case where the rational basis test is applied, unexamined "common sense" is insufficient under the standard set by the New Hampshire Supreme Court for the review of an ordinance that impairs a substantive constitutional right. In cases where the government action impairs a substantive constitutional right, New Hampshire's Supreme Court requires that this Court apply the intermediate scrutiny test. Using that test, the State must provide some evidence showing that the ordinance is substantially related to its objective of protecting minors. In this case, the State offered no such evidence. Without any evidence to relate the passing of the ordinance to its stated purpose, the State cannot meet its burden.

According to the State, the basic premise of its argument is that the ordinance separates sex offenders from children, depriving these offenders of proximity to children and, therefore,

the opportunity to re-offend. However, on its face, the ordinance does not prevent sexual offenders from being near children. The ordinance restricts how close a sex offender may live to a school or a daycare center, but does not prevent sex offenders from otherwise being near a school or daycare center. As noted by the defendant, the ordinance may very well concentrate sex offenders in certain areas of the City, including apartment complexes and mobile home parks, where children are likely to be found, thereby increasing the opportunity for them to re-offend there. The State offered no evidence of what effect the ordinance may have on the children living in those locations.

In addition, even if the State could establish that restricting where convicted sex offenders live will reduce the likelihood that they will re-offend, the State has failed to show how a 2500 foot buffer zone is substantially related to protecting children, as opposed to 1000 feet or 500 feet. Indeed, since no expert testimony or studies were considered by the City, it is impossible to know if an ordinance that was substantially less restrictive might be as effective, or even more effective, than the one enacted by the City, assuming that the ordinance was constitutional.

In an after-the-fact attempt to justify the ordinance, the State points to statistics that it says show that sexual assaults were lower in 2007 than in 2002, implying that the new City ordinance played some role in that decline (State's Exhibit 6). However, the State's statistics show that the total number of sexual assault investigations with child victims resulting in an arrest actually increased from 2006, when the ordinance was first in effect, to 2007. The total number of cases in 2007 was actually higher than it had been in any year since 2002. In any

event, given that these statistics were based upon such small numbers, and were provided with no other information or analysis to make them meaningful, the Court finds that they cannot be used to draw any conclusions relating to the ordinance. In order to attribute any meaning to them, the State would have to present significantly more factual information, which it failed to do.

Since the burden is on the State, and the State has failed to produce any evidence showing a substantial relationship between ordinance 131-20 and the protection of minors, ordinance 131-20 is invalid as violating the defendant's equal protection rights. Therefore, the charges against the defendant are hereby dismissed.

SO ORDERED.

July 30, 2009

Mark F. Weaver, Special Justice