SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

THE PEOPLE OF THE STATE OF NEW YORK

-against-

IND. #
02-354

YOEL OBERLANDER,

Defendant.

Following a Violation of Probation hearing in this matter, the defendant moved for an Order dismissing the violation. The defendant claimed Local Law No. 1 of 2007 was preempted by New York State Law.

The Violation of Probation alleges that the defendant violated the conditions of probation in that he "moved to a residence within 1,000 feet of a 'Rockland County pedophile-free child safety zone' in violation of Local Law No. 1 of 2007." Local Law No. 1 of 2007 provides that a sex offender shall not reside, work or loiter within a child safety zone. "The term child safety zone shall mean one thousand feet of the real property comprising a public or private, elementary, middle or high school, child care facility, park playground, public or private youth center or public swimming pool." Id.

The Court previously considered a pre-hearing motion to dismiss based upon the Constitutionality of the local law. In a decision and Order dated June 18, 2008, this Court held that Local Law No. 1 of 2007 was not Unconstitutional on its face or as applied to the defendant.

The defendant's Constitutional challenge was based upon the Free Exercise Clause of the First Amendment. The defendant claimed that because he is an

observant orthodox Jew, he must live within walking distance of a Schul or temple. As a result he claims that the statute placed a burden on the practice of his religion. However, this Court held that the statute was facially neutral and did not unduly burden the defendant's practice of his religion. In that prior motion, the Court was not presented with the claim that Local Law No.1 of 2007 was preempted by State legislation.

Sex offender residency restrictions are multiplying throughout New York State, as local legislatures scramble to outmaneuver each other with highly restrictive ordinances designed to banish registered offenders from their communities.

"Not in my backyard" residency restrictions are spreading unchecked through county, town and village ordinance books from Suffolk County to Niagara Falls. More than 80 such laws have recently been enacted in New York. Police and prosecutors are now enforcing them, ordering offenders to move from restricted zones and filing criminal charges for non compliance. Even without vigorous enforcement, the ordinances interfere with parole and probation officers' efforts to find suitable housing for offenders. Alfred O'Connor, State Preemption of Local Sex-Offender Residency Laws N.Y.L.J. November 24, 2008 (hereinafter O'Connor).

The New York State Constitution allows municipalities broad police power relating to the welfare of its citizens. People v. Speakerkits, Inc., 83 N.Y.2d 814 (1994); N.Y.S. Club Assoc. v. City of N.Y., 69 N.Y.2d 211 (1987). However, that local police power may not be exercised in an area in which it is preempted by State law. Id. See also Levy v. City Commission on Human Rights, 85 N.Y.2d 740 (1995); Village of Nyack v. Daytop Village, Inc., 78 N.Y.2d 500 (1991);

People v. Cook, 34 N.Y.2d 100 (1974). Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field." Matter of Cohen v. Bd. of App. Village of Saddle Rock, 100 N.Y.2d 395 (2003)(quoting Albany Area Builder's Assoc. v. Town of Guilderland, 74 N.Y.2d 372 (1989)).

"Under [the preemption] doctrine, even in the absence of an express conflict, a local law which regulates subject matter in a field which has been preempted by State legislation is deemed inconsistent with the 'State's transcendent interest.'" Ba Mar, Inc. v. County of Rockland, 164 A.D.2d 605 (2nd Dep't 1991)(quoting Albany Area Builder's Assoc. v. Town of Guilderland, 74 N.Y.2d 372 (1989)). "On the other hand, the mere fact that both the State and local governments seek to regulate the same subject matter does not, in and of itself, render the local legislation invalid on preemption grounds.

In order for the preemption doctrine to prohibit local legislation in a particular area there must be an intent on the part of the State to occupy the entire field." Id. "The legislative intent to preempt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so and that desire may be inferred from a declaration of State policy by the Legislature or from the legislative enactment of a comprehensive and detailed regulatory scheme in a particular area." N.Y.S. Club Assoc. v. City of N.Y., 69 N.Y.2d 211, 217 (1987). Additionally, "that intent may be implied from the nature of the subject matter being regulated and the purpose and scope of the State legislative scheme, including the need for State-wide uniformity in a given area." Albany Area Builder's Assoc. v. Town of Guilderland, 74 N.Y.2d 372, 400 (1989).

In nearly factually identical circumstances, a New Jersey Appellate Court struck down local legislation imposing housing restrictions of sex offenders

holding that State law preempted local legislation (preempting more than 100 local sex offender ordinances). G.H. v. Township of Galloway, 401 N.J. Super. 392 (App. Div. 2008). In doing so, that Court held that New Jersey's version of Megan's Law constituted a comprehensive legislative scheme enacted to protect citizens from sex offenders. Id.

New Jersey has no statewide sex offender residency law. But the court held the Legislature had manifested an intention to "occupy the field" of community regulation of sex offenders so as to preclude local ones. The court based its conclusion on Megan's Law and its multilayered enforcement and monitoring mechanisms," the court wrote, "constitute a comprehensive system chosen by the Legislature to protect society from the risk of re-offense by CSO's (convicted sex offenders) and to provide for their rehabilitation and reintegration into the community." Registration and community notification rules reflect legislative "expectation (s) that CSO's would be living among the general population" where they are more likely to find suitable housing, "with support systems provided by family members and others, reasonable proximity to employment, public transportation networks and treatment programs." Local ordinances, the court found, "inadvertently increase the chance of re-offense" by either banishing offenders from entire communities or confining them to areas without adequate housing or transportation.

Using an analysis similar to that used by the New York Court of Appeals, the New Jersey Court set forth five factors useful in analyzing preemption claims:

1. Does the ordinance conflict with state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?

2. Was the state law intended, expressly or impliedly, to be exclusive in

the field?

3. Does the subject matter reflect a need for uniformity?....
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature?

Id. See also N.Y.S. Club Assoc. v. City of N.Y., 69 N.Y.2d 211, 217 (1987); Albany Area Builder's Assoc. v. Town of Guilderland, 74 N.Y.2d 372, 400 (1989).

The New Jersey court's analysis is relevant in New York because our states have similar laws governing community supervision of sex offenders. New York's Megan's Law also establishes an individualized, three tiered registration and classification scheme based on the perceived risk of re-offense. New York like New Jersey authorizes targeted community notification concerning most sex offenders.

Parole officers in New York, like their counterparts in New Jersey, exercise broad veto authority over the proposed residences of sex offenders. Extended parole supervision is the rule in both states.

New York has a statewide sex offender residency restriction. In 2005, the Legislature barred all under supervision sex offenders whose victims were minors, and all level 3 offenders, from knowingly "entering" (and, for practical purposes, residing) within 1,000 feet of the "real property boundary line of a public or private elementary [school], parochial, intermediate, junior high, vocational or high school." The restriction is enforceable as a condition of parole or probation. This statewide restriction is not widely known. Local legislatures continue to approve residency ordinances while apparently unaware of it. In fact, New York has one of the strictest sex offender residency law in the nation.

Yet, by excluding certain low risk offenders, and including geographic and

durational limits, it strikes some balance between the perceived need for buffer zones, and the long-term goal of reintegrating offenders into the community. Local residency laws don't. They permanently exclude offenders from communities, setting off a chain-reaction of fear-driven and increasingly restrictive laws.

Megan's Law and the state residency restriction are powerful indications of the New York Legislature's intention to "occupy the field" of community management of sex offenders. See O'Connor, supra.

Clearly New York has promulgated a detailed legislative scheme regarding the registration of sex offenders. Correction Law §168 *et. sec*. New York's Sex Offender Registration Act [hereinafter "SORA"] was enacted to combat "the danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, and that the protection of the public from these offenders is of paramount concern or interest to government." The legislature stated that the

system of registering sex offenders is a proper exercise of the state's police power **regulating present and ongoing conduct**."[emphasis added]. Section 1 of the Laws of 2008 further states that "the legislature has enacted a series of laws to monitor sex offenders and protect the public from victimization, specifically, a system to: register sex offenders; provide law enforcement agencies, entities with vulnerable populations, and the general public access to information contained in the state's sex offender registry; prohibit high risk sex offenders from entering upon school grounds; and civilly confine dangerous sex offenders who would likely re-offend if released. Such laws have enhanced the state's ability to protect the public and prevent further victimization, sexual abuse and exploitation." In addition to SORA, at the time of the alleged offense, Penal Law §65.10(4-a) and the Executive Law §259-c(14) were in effect. Those sections limited the proximity of sex offenders to school grounds and day care centers. Clearly, the State has a "comprehensive and detailed regulatory scheme" in the area. The State's intent to preempt the field can clearly be inferred.

The State has also expressly stated its intention of preempting the area by enacting further changes to the Executive Law and the Social Services Law Chapter 568 of the Laws of 2008. Under the newly enacted §243 of the Executive Law, local probation departments will be expressly charged with the approval of sex offenders' housing for offenders, like the defendant, who are on probation. Under the amended section, the local probation departments must evaluate the housing of offenders using five statutory requirements rather than the bright line linear designations of Local Law No. 1 of 2007. The "Approval Memorandum" accompanying the new legislation states that "the placement of [sex] offenders in

the community **has been and will continue to be** a matter that is properly addressed by the State. [emphasis added].

In any event, Local Law No. 1 of 2007 impermissibly conflicts with the State enactments in the area in that it prohibits all housing described in the statute without regard to the approval of the probation department. Further, the local ordinance prohibits the offenders presence within 1000 feet of a child safety zone whereas the state law merely prohibits entry onto such premises.

Additionally, the mandatory criteria to be applied under the new statutory scheme contains no such arbitrary bright line rule concerning the location of an offender's home. Rather, the new regulations requires consideration of the "proximity of entities with vulnerable populations" as but one of the criteria.

As the State has expressed its intention to preempt the area, and, the ordinance conflicts with State law, Local Law No. 1 of 2007 is invalid. A Violation of Probation based upon such law cannot be maintained.

The result would be the same even if the Court was to reach the merits of the alleged violation.

The People bear the burden of establishing a violation of probation by a preponderance of evidence. C.P.L. §410.70(3). In considering the evidence presented, it is clear that the People met this burden. It was established that the defendant resided in pedophile-free child safety zone in violation of Local Law No. 1 of 2007.

However, a defendant must be afforded an opportunity to demonstrate a "justifiable excuse" for a technical violation. Black v. Romano, 471 U.S.606, 612 (1985). See also People v. Costanza, 281 A.D.2d 120 (3rd Dep't 2001); People v. Brandon F., 299 A.D.2d 962 (4th Dep't 2002). In this case, the defendant easily

met this burden as he established that compliance with the housing requirement was nearly impossible.

At the time the violation was filed, the defendant's residence, other than its location within a buffer zone, was considered to be appropriate by the Department of Probation for a sex offender. As such, when he was informed that the residence violated Local Law No. 1, the defendant was instructed to remain in that residence until new housing could be located.

There was no central map or list of addresses available to probationers or probation officers to determine where to look for appropriate housing. The Department of Probation could not suggest addresses or even particular areas to the defendant. Instead, the probationer was instructed to submit an address to his probation officer. The probation officer would then forward the address to the Rockland County Planning Department. The planning department would then determine if the address fell within a safety zone.

According to his probation officer, the defendant submitted fifteen addresses for approval. Each time, the probation officer rejected the address as it fell within a safety zone. The probation officer conceded that no appropriate addresses existed in the Village of Monsey and that it was likely that none existed in the Town of Ramapo.

It is clear that the defendant tried to comply with the law. The defendant, on approximately fifteen occasions was able to find available housing. Each time, the defendant's proposed residence was rejected, not based upon the Probation Department's assessment of suitability, but, solely because it violated Local Law No.1. There was no resource available that would allow the defendant to determine the suitability of housing prospectively. The cumbersome procedure only exacerbates the central problem facing the defendant, namely, the lack of

housing in suitable locations.

Accordingly, the defendant's motion is granted and the Violation of Probation is dismissed.

This Decision shall constitute the Order of the Court.

E N T E R

Dated: New City, New York
January 22, 2009

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WILLIAM A. KELLY
J.S.C.

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