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COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
ATLANTIC COUNTY – LAW DIVISION
DOCKET NO. ATL-L-6395-06

G.H.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	OPINION
TOWNSHIP OF GALLOWAY,	:	
	:	
Defendant.	:	

Decided February , 2007

Appearances

For plaintiff: *Frank L. Corrado (Barry, Corrado, Grassi & Gibson, P.C., Attorneys), cooperating counsel for American Civil Liberties Union of New Jersey Foundation, with Co-counsel Edward Barocas (American Civil Liberties Union of New Jersey Foundation)*

For defendant: *Michael J. Blee and Edward O. Lind, III (Rovillard & Blee, L.L.C.)*

1. BACKGROUND

This action filed on July 14, 2006, presents three legal challenges to the validity of Galloway Township Ordinance No. 1616 of 2005 (hereinafter “the Ordinance”). The Ordinance prohibits certain sex offenders from residing or living within 2,500 feet of any school, park, playground or day care center in Galloway Township (hereinafter “the Township”).

The Ordinance which passed a final reading at a meeting of the Galloway Township Council on July 26, 2005 is titled "An Ordinance of the Galloway Township Municipal Code Authorizing Sex Offender Residency Prohibition" and provides the following at Section 1:

Section 1. Sex offender residency prohibition:
2, 500 feet

(a) No person over the age of 18 who has been convicted of a violation of any crime against minor as listed in N.J.S.A. 2C:7-2, and who as a result of said conviction is required to register with the proper authorities pursuant to N.J.S.A. 2C:7-1 et seq. Registration and Notification of Release of Certain Offenders shall not be permitted to reside or live within 2,500 feet of any school, park, playground or day care center in the Township.

(b) A person who resides or lives within 2,500 feet of any school, park, playground or day care center in the Township shall have (60) days from receipt of written notice of the prohibition set forth herein to move. Failure to move to a location, which is in compliance with this section within that time period, shall constitute a violation of this section.

(c) This section shall not apply to a person who has established a residence prior to July 12, 2005.

(d) Any violation of this section shall be punishable by one or more of the penalties contained in section 1-3, including: a fine of not less than \$1,250.00, nor more than \$5,000.00; imprisonment for a term not

exceeding 6 months; a period of community service not exceeding 90 days.

Any Ordinance of [sic] Ordinances in conflict with the provisions of this Ordinance is repealed to the extent of such conflict.

This Ordinance shall become effective immediately upon final adoption and publication thereof according to law.

G.H. challenges the Ordinance on the following grounds: (1) The Ordinance is preempted by state law; (2) the Ordinance offends substantive due process; and (3) the Ordinance constitutes “punishment” and therefore violates both the *ex post facto* and double jeopardy clauses of the state Constitution.

II. THE FACTS

When this litigation commenced, G.H., a convicted sex offender, was 20 years old and a resident of Ocean County, New Jersey. He was a freshman student at Richard Stockton College (hereinafter “Stockton”) located in Pomona, in Galloway Township. During his first college semester in Spring 2006, G.H. lived on the Stockton campus. While he desires to live on campus for the balance of his college career, the Ordinance prohibits him from doing so. The Ordinance does not, however, preclude G.H. from enrolling in or attending classes or other events at Stockton College.

G.H. has no family. He has lived in foster homes since age twelve and will remain in the custody of the Division of Youth and Family Services until age twenty-one.

G.H. is a registered Tier 1 (low-risk) sex offender pursuant to the New Jersey Sex Offender Registration and Notification statute, N.J.S.A. 2C:7-1 et seq. (hereinafter “Megan’s Law”). In 2002, G.H., age 15 years, was adjudicated delinquent for criminal sexual contact in violation of N.J.S.A. 2C:14-3(b). The victim was thirteen years old. G.H. had denied the incident occurred, however, he was convicted at the conclusion of a juvenile hearing. G.H., who has no other criminal record, was sentenced to two years juvenile probation which he completed successfully.

G.H. was deemed a low risk sex offender by an Ocean County Superior Court judge. G.H. is subject to restrictions on his activities as imposed by Megan’s Law for Tier 1 offenders, including registration with the municipality in which he resides. G.H. is not subject to Community Supervision for Life, as required by N.J.S.A. 2C:43-6.4. All Megan’s Law registrants are subject to lifetime parole supervision (“Community Supervision for Life” or “CSFL”) except for

those offenders convicted of fourth degree sexual contact. See N.J.S.A. 2C:7-2(a) and N.J.S.A. 2C:43-6.4.

Upon the adoption of the Ordinance in July 2005 by the Galloway Township Council, all registered sex offenders convicted of a crime against a minor pursuant to N.J.S.A. 2C:7-2, regardless of tier ranking, are prohibited from residing within 2,500 feet of any school, park, playground or day care facility in the Township. The Ordinance applies to any person over the age of 18 required to register under Megan's Law who established a residence in Galloway Township on or after July 12, 2005. Failure of any such person to move from the prohibited location within 60 days after receiving written notice from the Township of the Ordinance prohibition constitutes a violation of the Ordinance. Violation of the Ordinance subjects the offender to criminal penalties, including a fine of between \$1,250 and \$5,000; imprisonment for up to 6 months; and up to 90 days of community service.

In conjunction with adoption of the Ordinance, the Township adopted a "Sex Offender Buffer Map" which designates areas that are off limits to Megan's Law offenders. Stockton College is designated as a "land of interest" on the map with a 2,500 foot buffer zone

around the College. According to an affidavit of the Township Engineer, sex offenders are prohibited from residing in 63% of the Township's approximately 41 square miles.

In May 2006, at the conclusion of Stockton's Spring semester, G.H. was informed by Township police that the Ordinance prohibited him from living on the Stockton campus. He was required to move within 60 days. Enforcement of the Ordinance will require G.H. to abandon any residence on campus or in the area surrounding Stockton College. Hence, in July 2006, prior to G.H.'s return to Stockton for the Fall semester, the instant lawsuit was filed.

Pursuant to a Consent Order entered on August 8, 2006, enforcement of the Ordinance was stayed as to G.H. pending resolution of this litigation. Additionally, the Consent Order permitted G.H. to proceed anonymously in this litigation.

A certification from the Intake Manager for the American Civil Liberties Union of New Jersey asserts that 55 municipalities in New Jersey have passed sex offender residency prohibition ordinances. The ordinances vary significantly with regard to the geographic scope of the residency prohibitions, the type of locations covered, and which tier levels of registrants are affected by the ordinance.

III. LEGAL ANALYSIS OF G.H.'S CHALLENGES TO THE ORDINANCE

A. Does state, statutory law preempt the Ordinance?

N.J.S.A. 40:48-1 authorizes the governing body of every municipality to “make, amend, repeal, and enforce ordinances” in conjunction with regulating a diverse range of subject matter and behaviors. N.J.S.A. 40:48-2 provides the following:

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

N.J. Const., Art. 4, § 7, ¶ 11 provides that:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The power of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

The authority of a municipality to adopt ordinances reasonably related to the public health, safety and welfare is clear. Nevertheless, such authority is not without limit. In addressing this state's constitutional grant of powers to municipalities, the Supreme Court in State v. Crawley, 90 N.J. 241, 247-248 (1982) noted that one of the limitations on a municipality's powers is state preemption:

Nevertheless, two principles limit the permissible scope of municipal legislation. First, as stated in *Wagner v. Newark*, 24 N.J. 467, 478 (1957), the grant of legislative powers to municipalities "relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." Second, municipalities may not enact ordinances on matters otherwise competent for local legislation if the State has preempted the field. *Overlook Terrace Management Corp. v. West New York Rent Control Bd.*, 71 N.J. 451, 460-62 (1976); *Summer v. Teaneck Twp.*, 53 N.J. 548, 554-55 (1969); *Kennedy v. Newark*, 29 N.J. 178 (1959).

In the matter of Mack Paramus Co. v. Mayor and Council of Paramus, 103 N.J. 564, 573 (1986), the Court stated that legislative intent was a critical factor in determining whether the state has

exhausted a field to such an extent that preemption bars municipal legislation:

Although it is a judicially-devised standard, the doctrine of state preemption turns upon the intention of the Legislature. If the court determines that the Legislature intended “its own actions, whether it exhausts the field or touches only part of it, to be exclusive,” then it will conclude that the State has preempted the field, thereby barring any municipal legislation. *State v. Uletsky*, 54 N.J. 26, 29 (1969); see *Summer v. Teaneck*, 53 N.J. 548, 555 (1969)

In *Overlook Terrace Management Corp.*, *supra*, the Supreme Court enumerated five factors to be considered in preemption analysis:

1. Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the Legislature has permitted?
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? [Citations omitted]. [71 N.J. at 461.]

Megan's Law, including the CSFL provisions, are included within the Code of Criminal Justice. N.J.S.A. 2C:1-1 et seq. N.J.S.A. 2C:1-5(d) provides that

Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.

The Supreme Court, in Crawley, supra at 250-251, addressed the fact that the Legislature intended the Code of Criminal Justice to be a clear, complete, and comprehensive system of criminal law designed for uniform statewide treatment. The Crawley court observed that there exists general legislative intent to exclude local legislation from areas covered by the Code of Criminal Justice. See also, State ex. rel. Atlantic County Prosecutor v. Atlantic City, 379 N.J. Super. 515, 520-521 (App. Div. 2005).

Both Megan's Law and the CSFL legislation provide comprehensive regulation of almost every aspect of the lives of convicted sex offenders. The constitutionality of Megan's Law, which addresses registration and community notification, as well as Internet

posting of personal information about convicted sex offenders, was upheld in a challenge by a convicted sex offender in Doe v. Poritz, 142 N.J. 1 (1995). While Doe v. Poritz did not address state preemption since the challenge was to a state statute, the Supreme Court's decision underscored the magnitude and scope of Megan's Law, and its impact on the lives of convicted sex offenders. The Township's minimization of the intent, purpose and impact of Megan's Law as merely addressing registration of sex offenders and community notification fails to recognize that the statute is broad, comprehensive and far reaching.

The Legislature's findings and declarations set forth in Megan's Law at N.J.S.A. 2C:7-1 provide the following:

The Legislature finds and declares:

a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.

b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving

incidents involving sexual abuse and missing persons.

Hence, Megan's Law not only requires convicted sex offenders to register with local law enforcement agencies, it also requires such offenders to verify their addresses annually, and to report any change of address. N.J.S.A. 2C:7-2.

Additional evidence of the Legislature's intent in comprehensively regulating and controlling sex offenders' post-conviction behaviors is found in the recent enactment of P.L. 2007, c.19, effective March 1, 2007. This legislation amends N.J.S.A. 2C:7-2 to (1) upgrade the penalty for failure to register as a sex offender from a fourth degree offense to a crime of the third degree; (2) creates a new criminal offense for a sex offender who provides false information or fails to verify residency with law enforcement; and (3) requires verification of the proposed residence of a registrant prior to release from confinement or supervision.

N.J.S.A. 2C:7-8 requires each convicted sex offender to undergo individualized assessment of the risk of re-offense and establishes the levels of community notification of the risk of re-offense for each offender. Specifically, N.J.S.A. 2C:7-8(c) provides the following:

c. The regulations¹ shall provide for three levels of notification depending upon the risk of re-offense by the offender as follows:

(1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;

(2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection;

(3) If risk of re-offense is high, the public shall be notified in accordance with the Attorney General's guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

N.J.S.A. 2C:7-13(g) requires that detailed personal information about registered sex offenders remain publicly available on the Internet, including among other things, the street address, zip code, municipality, and county in which the offender resides. The establishment of the Internet registry provides additional confirmation

¹ A reference to "Attorney General Guidelines" promulgated as required by N.J.S.A. 2C:7-8 providing for procedures for the notification required under Megan's Law. The guidelines identify factors relevant to risk of reoffense and provide for three levels of notification ("tiers") depending upon the degree of the risk of reoffense.

that control and regulation of sex offenders' post-conviction activities are a matter of state rather than local supervision.

N.J.S.A. 2C:43-6.4 subjects most convicted sex offenders to community supervision for life. The Senate Judiciary Committee Statement, Senate No. 320 - L.1994, c.130 attached to this statutory provision provides that

This community supervision would begin upon completion of any term of imprisonment imposed and persons on community supervision would be monitored as if on parole and would be subject to conditions appropriate **to protect the public and foster rehabilitation...** [emphasis added]

N.J.S.A. 2C:43-6.4(b) provides in pertinent part:

... Persons serving a special sentence of parole supervision for life shall remain in the legal custody of the Commissioner of Corrections, shall be supervised by the Division of Parole of the State Parole Board, shall be subject to the provisions and conditions set forth in subsection c. of section 3 of P.L.1997, c. 117 (C.30:4-123.51b) and sections 15 through 19 and 21 of P.L.1979, c. 441 (C.30:4-123.59 through 30:4-123.63 and 30:4-123.65), and shall be subject to conditions appropriate **to protect the public and foster rehabilitation...** [emphasis added]

Pursuant to N.J.S.A. 2C:43-6.4, the State Department of Corrections (DOC) adopted regulations which establish uniform and

detailed conditions to be imposed upon certain convicted sex offenders whose offenses were committed prior to January 14, 2004. N.J.A.C. 10A:71-6.11. N.J.A.C. 10A:71-6.12 imposes identical uniform, detailed and wide-ranging conditions upon certain convicted sex offenders whose offenses were committed on or after January 14, 2004.

In the interest of brevity, not all of the DOC regulatory conditions will be addressed in this decision. However, among those conditions relevant to the preemption issue before the court, are the following:

1. An offender may only reside at a residence approved by the assigned parole officer. N.J.A.C. 10A:71-6.11(b)(5); N.J.A.C. 10A:71-6.12(d)(5).

2. An offender must obtain the permission of the assigned parole officer prior to any change of residence. N.J.A.C. 10A:71-6.11(b)(6); N.J.A.C. 10A:71-6.12(d)(6).

3. An offender must obtain the permission of the assigned parole officer prior to leaving the state of the approved residence for any purpose. N.J.A.C. 10A:71-6.11(b)(7); N.J.A.C. 10A:71-6.12(d)(7).

4. An offender must obtain the permission of the assigned parole officer prior to securing, accepting, or engaging in any employment, business, or volunteer activity and prior to a change of employment. N.J.A.C. 10A:71-6.11(b)(14); N.J.A.C. 10A:71-6.12(d)(14).

5. If the offender's victim is a minor, the offender must refrain from initiating, establishing, or maintaining contact with any minor; refrain from attempting to initiate, establish or maintain contact with any minor; and refrain from residing with any minor without the prior approval of the assigned parole officer. N.J.A.C. 10A:71-6.11(c); N.J.A.C. 10A:71-6.12(e).

6. Exceptions to the regulations discussed in paragraph 5 above exist when (1) the minor is engaged in a lawful commercial or business activity; in such case, the offender may engage in the lawful commercial or business activity, if the activity takes place in an open area to the public view; (2) the minor is in the physical presence of his or her parent/legal guardian; (3) the offender is present in a public area as long as the offender is not associating with a minor, and the public area is not one frequented mainly or exclusively by minors; or

(4) the appropriate court authorizes contact with the minor. N.J.A.C. 10A:71-6.1(d); N.J.A.C. 10A:71-6.12(f).

In addition to the provisions of the Code of Criminal Justice discussed above, the Legislature's intense interest in preventing recidivism by sex offenders is evident in other legislation known as the "Sex Offender Monitoring Pilot Project Act," N.J.S.A. 30:4-123.80. The legislative findings and declarations for this statutory provision establishing continuous satellite-based monitoring of certain sex offenders as part of a two-year pilot program approved by the Legislature on August 11, 2005 provide the following at N.J.S.A. 30:4-123.81:

The Legislature finds and declares:

a. Offenders who commit serious and violent sex crimes have demonstrated high recidivism rates and, according to some studies, are four to five times more likely to commit a new sex offense than those without such prior convictions, thereby posing an unacceptable level of risk to the community.

b. Intensive supervision of serious and violent sex offenders is a crucial element in both the rehabilitation of the released inmate and the safety of the surrounding community.

c. Technological solutions currently exist to provide improved supervision and

behavioral control of sex offenders following their release.

d. These solutions also provide law enforcement and correctional professionals with the new tools for electronic correlation of the constantly updated geographic location of reported crimes, to possibly link released offenders to crimes, or to exclude them from ongoing criminal investigations.

e. Continuous 24 hours per day, seven days per week, monitoring is a valuable and reasonable requirement for those offenders who are determined to be a high risk to reoffend, were previously committed as sexually violent predators and conditionally discharged, or received or are serving a special sentence of community or parole supervision for life. A pilot program should be established to study its effectiveness.

Megan's Law, including the CSFL requirements, and the DOC administrative regulations enacted pursuant to Megan's Law, regulate most aspects of the lives of convicted sex offenders in the interest of (1) protecting the public, and (2) fostering the rehabilitation of sex offenders. The Division of Parole has oversight, among other things, of an offender's ability to own firearms; alcohol use; location of residence; employment; ability to travel; contact with minors; curfew; association in volunteer activities; counseling; drug and alcohol, medical and/or psychological examination and so on.

While it is clear that the Legislature intended that the lives of convicted sex offenders be subject to intense supervision and oversight by the state, nevertheless, the Legislature was also concerned that publicly available information about convicted sex offenders not be utilized to prohibit them from availing themselves of certain amenities and significant rights which are indigenous to everyday common life. N.J.S.A. 2C:7-16(c) specifically provides that:

Except as authorized under any other provision of law, use of any of the information disclosed pursuant to this act for the purpose of applying for, obtaining, or denying any of the following, is prohibited:

- (1) Health insurance;
- (2) Insurance;
- (3) Loans;
- (4) Credit;
- (5) Education, scholarships, or fellowships;
- (6) Benefits, privileges, or services provided by any business establishment, unless for a purpose consistent with the enhancement of public safety; or
- (7) **Housing or accommodations.**
[emphasis added]

In addition to providing that any person who uses information about a sex offender disclosed pursuant to Megan's Law to deny a sex offender the rights set forth in the above statutory provision is

guilty of a crime of the third degree, any offender aggrieved by the misuse of information available through Megan's Law is authorized to bring a civil action in the appropriate court to request preventive relief. Such relief includes permanent or injunctive relief, in addition to any other remedies or procedures that may be available under other provisions of law. N.J.S.A. 2C:7-16(b) and (d).

In Doe v. Poritz at 12-13, the Supreme Court acknowledged the difficult and complex task confronted by the Legislature in balancing the need for protection of the public, in particular women and children, against minimizing intrusion into the lives of sex offenders who have served their period of incarceration.

The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish; that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, further assured by our opinion and judicial review, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense. The Registration and Notification Laws are not retributive laws, but laws

designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State's or our country's fundamental belief that criminals, convicted and punished, have paid their debt to society and are not be punished further.

They represent only the conclusion that society has the right to know of their presence not in order to punish them, but in order to protect itself. The laws represent a conclusion by the Legislature that those convicted sex offenders who have successfully, or apparently successfully, been integrated into their communities, adjusted their lives so as to appear no more threatening than anyone else in the neighborhood, are entitled not to be disturbed simply because of that prior offense and conviction; but a conclusion as well, that the characteristics of some of them, and the statistical information concerning them, make it clear that despite such integration, reoffense is a realistic risk, and knowledge of their presence a realistic protection against it.

The choice the Legislature made was difficult, for at stake was the continued apparently normal lifestyle of previously-convicted sex offenders, some of whom were doing no harm and very well might never do any harm, as weighed against the potential molestation, rape, or murder by others of women and children because they simply did not know of the presence of such a person and therefore did not take the common-sense steps that might prevent such an occurrence. The Legislature chose to risk unfairness to the previously-convicted offenders rather than unfairness to the children and women who

might suffer because of their ignorance, but attempted to restrict the damage that notification of the public might do to the lives of rehabilitated offenders by trying to identify those most likely to reoffend and limiting the extent of notification based on that conclusion.

The above discussion in conjunction with a brief review below of the *Overlook Terrace* factors as applied to the instant matter, leads to the inescapable conclusion that the Ordinance is preempted by the applicable provisions of the Code of Criminal Justice:

(1) *The Ordinance conflicts with state law, not only because of conflicting policy, but because it forbids what the Legislature has permitted.*

When enacting Megan’s Law and the CSFL statute, the Legislature was clearly concerned with a wide variety of activities and behaviors engaged in by convicted sex offenders. The law provides parole officers with authority to approve sex offenders’ residences and require them to comply with the intensive lifetime supervision conditions. The Legislature recognized that “reoffense is a realistic risk,” entitling society to protect itself and its children through comprehensive registration, community notification laws, and CSFL which has as its purpose protection of the public **and** rehabilitation of the offender.

Simultaneously, the Legislature confronted the reality that some convicted sex offenders are non-threatening and are entitled not to be unduly disturbed purely because of prior offense and conviction. G.H. is one such example. He is not subject to community supervision for life, due to his conviction for the low-level offense of fourth degree criminal sexual contact. The Ordinance directly contradicts the Legislature's intent that G.H. and other offenders similarly situated not be subject to restrictions on his residency.

Of particular significance in examining the conflict between the Ordinance and Megan's Law is the statutory provision which prohibits anyone from using a sex offender's status as a Megan's Law registrant to deny, among other things, "housing or accommodations." N.J.S.A. 2C:7-16. The Ordinance is in direct conflict with this prohibition. The Ordinance which imposes geographical prohibitions on a sex offender's residence patently violates N.J.S.A. 2C:7-16(c)(7) by prohibiting convicted sex offenders from residing in the restricted areas.

Further, determination as to where a sex offender may reside is statutorily vested with his parole officer and not with the municipality. The Ordinance's buffer zones interfere with a parole officer's

discretion to approve the most appropriate residence location for a convicted sex offender, and potentially frustrate two of the Megan's Law objectives, namely, prohibition and reintegration of eligible offenders into the community.

For a variety of reasons related to a sex offender's individual circumstances, it is entirely possible that the most appropriate residence for a particular sex offender could be in one of the Township's buffer zones. Considering the very strong emphasis by the Legislature in permitting public access to information as to where sex offenders reside, if the Legislature had intended to limit sex offenders' residences via the imposition of prohibited "buffer zones," clearly it would have done so.

Further evidence of the conflict between state law and the Ordinance is found in N.J.S.A. 2C:7-2(f) and N.J.S.A. 2C-43.6.4. Both statutory provisions permit the Supreme Court to relieve a sex offender from obligations imposed by Megan's Law and the CSFL statute if no additional crimes have been committed within 15 years of conviction or release from incarceration and upon demonstrating that the offender is not likely to pose a threat to the safety of others. The Ordinance provides for no such "termination clause."

(2) State law was intended to be exclusive in the field.

The Ordinance specifically provides that “It is the intent of the Township Council to protect and ensure the health, safety and welfare of children within the Township and not to penalize registered sex offenders.”

The Township argues that Megan’s Law is nothing more than a registration and notification statute, noting that the Ordinance does not address registration and/or notification but merely restricts residency within a fair and reasonable distance from protected areas. However, the Supreme Court, in Doe v. Poritz, supra at 25, emphasized that Megan’s Law was crafted to protect the public through thoughtful and carefully designed legislation which specifically focused on the risk of offense posed by each offender who is required to register:

All of these provisions of the laws, the requirements for registration, the provisions for notification, the Tiers, and the many other related parts, are tied together by the statement of legislative purpose mentioned above found at the beginning of the Registration Law: to aid law enforcement in apprehending sex offenders and to enable communities to protect themselves from such offenders. Together these laws are fairly designed to achieve those purposes. The Community Notification Law, along with the

Attorney General's Guidelines, provide a coherent system of notification calibrated to the degree of risk of reoffense: low risk offenders or higher will trigger notification of law enforcement who will thereby have ready access to all offenders in the area when needed either because of reported or perceived threats, or actual incidents when quick response is most important; moderate offenders and higher will trigger a notification calculated to alert organizations charged with the supervision and care of children or women, which are likely to encounter them, to their potential presence and risk; and high-risk offenders will trigger notification to that portion of the community likely to encounter them.

We are aware of the uncertainties that surround all aspects of the subject of sex offender recidivism and the effectiveness of preventive measures. Legislatures, despite uncertainty, must sometimes act to deal with public needs, basing such action on what they conclude, in a welter of conflicting opinions, to be the probable best course. Our Legislature could reasonably conclude that risk of reoffense can be fairly measured, and that knowledge of the presence of offenders provides increased defense against them. Given those conclusions **the system devised by the Legislature is appropriately designed to achieve the laws' purpose of protecting the public.** [emphasis added]

The Supreme Court also confronted the potential ostracism of sex offenders by the public, and the Legislature's attempt to address such concerns in Megan's Law through the establishment of the three

tiers. The Court discussed the fact that the Legislature carefully addressed what the Court characterized as a “pressing societal problem,” namely, a threat to public safety:

There is no point in predicting the extent of potential ostracism, in avoiding the conclusion that some ostracism will result, or in calming concerns by observing that the offenders themselves are responsible for their plight for having committed their crimes in the first place, for that justification would apply to any excessive punishment by government. **Here government has done all it can to confine that impact, allowing it only where clearly necessary to effect public safety**, and if the Tier level selected and the methods of notification conform to the statute and its intent, as defined and limited herein, Tier Two and Tier Three public notification will be appropriately confined and applied only to those whose apparent future dangerousness requires it, and the statute will not only have survived constitutional attack, but in fact will operate as the Legislature intended. We must not prejudge society with the ogre of vigilantism or harassment, although its potential obviously calls for the vigorous steps suggested by the Attorney General, and we must not assume that those in responsible positions will violate the intent of this law by giving notification far beyond that which is authorized, and we must not assume that the press, for whatever reason, will disregard the notification confinement which this law requires. [emphasis added]

We are satisfied that this statute, **rationaly and carefully addressed to a pressing**

societal problem, is not what those who drafted the Constitution had in mind as an abuse of government's power to punish. What government faced here was a difficult problem, a question of policy, and it understandably decided that public safety was more important than the potential for unfair, and even severe, impact on those who had previously committed sex offenses. Id. at 110. [emphasis added]

In rejecting the various attacks upon Megan's Law, the Supreme Court observed that it was sailing on "truly uncharted waters, for no other state has adopted such a far-reaching statute." Id. at 109. In upholding the constitutionality of the statute, the Court stated

To rule otherwise is to find that society is unable to protect itself from sexual predators by adopting a simple remedy of informing the public of their presence. That the remedy has a potentially severe effect arises from no fault of government, or of society, but rather, from the nature of the remedy and the problem; it is an unavoidable consequence of the compelling necessity to design a remedy. Id. at 109-110.

State v. Leahy, 381 N.J. Super. 106, 111 (App. Div. 2005) decided a decade after Doe v. Poritz, reemphasized that public safety concerns about sex offender recidivism are at the heart of Megan's Law:

In enacting Megan's Law the Legislature made the judgment that convicted sex offenders represent a risk because of a high rate of recidivism and that knowledge of their identities and whereabouts is necessary for public safety. *N.J.S.A. 2C:7-1; John Doe v. Poritz*, 142 *N.J.* 1, 93, 662 *A.2d* 367 (1995).

That the state law through (1) the enactment of extremely comprehensive legislation, (2) the development of the Attorney General guidelines, and (3) the adoption of DOC regulations regulating and monitoring sex offenders' post-conviction behaviors (including location of the sex offender's residence through parole officer approval) is exclusive in the field both expressly and impliedly, is patently clear.

The Township argues that several proposed (but not enacted) legislative initiatives which would prohibit sex offenders from residing in certain restricted areas suggest that Megan's Law does not preempt the field. However, the introduction of legislation not enacted is not a consideration in addressing whether the Ordinance is preempted by Megan's Law and the CSFL statute. As noted in Kendall Pk. Chap. Of Deborah v. New Brunswick, 159 N.J. Super. 249 (App. Div. 1978) "no controlling inference as to legislative intent should be drawn from pending amendatory bills that have not been

adopted by the Legislature. See *Donaldson v. North Wildwood Bd. of Ed.*, 65 N.J. 236, 240-241 (1974).”

The fact that legislation regulating sex offender residency has been introduced is not necessarily evidence of the Legislature’s intent, although a logical argument could be made that the failure to enact such legislation is evidence that the Legislature is satisfied with Megan’s Law, as it currently is written. Pending legislation does not answer the question of whether Megan’s Law preempts the Ordinance. Rather, the answer lies in the existing comprehensive statutes which regulate the post conviction lives of sex offenders.

(3) *The subject matter reflects a need for uniformity.*

The Legislature has recognized that in protecting the public from sex offender recidivism, uniformity regarding the post conviction treatment of convicted sex offenders is essential. State law uniformly regulates sex offenders’ lives, taking into account their “tier” rating and the unique factors involved in each offender’s personal life and employment circumstances. N.J.S.A. 2C:7-8(d) requires the Attorney General to develop procedures “to promote uniform application of the notification guidelines required by this section.”

In the matter of Summer v. Township of Teaneck, 53 N.J. 548, 552-553 (1968), the Supreme Court addressed the issue of “uniform treatment,” noting that while N.J.S.A. 40:48-2 is to be construed liberally in favor of local government, nevertheless, there are implied limitations upon what the court described as this “pervasive grant”:

As said in *Wagner v. Mayor and Municipal Council of City of Newark*, 24 N.J. 467, 478 (1957), the grant “relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability.” So, for example, a municipality cannot legislate upon the subject of wills or title to real property. The needs with respect to those matters do not vary locally in their nature or intensity. Municipal action would not be useful, and indeed diverse local decisions could be mischievous and even intolerable. Hence the municipality may not legislate upon an aspect of a subject “inherently in need of uniform treatment.” *In re Public Service Election and Gas Co.*, 35 N.J. 358, 371 (1961).

It is difficult to take issue with the observations of G.H. at pages 19-20 of plaintiff’s brief:

Ordinances like Ordinance 1616 multiplied with variations across the state, have created an unworkable, confusing and inequitable patchwork of divergent restrictions on where sex offenders can or cannot live. Proliferation

of local ordinances has also created the prospect of an unseemly “race” among municipalities to exclude sex offenders, so that certain communities or areas would become “sex offender ghettos.”

Even worse, were the matter left to local legislation, much or all of the state could become off limits to sex offenders in a piecemeal, uncoordinated fashion. Moreover, and particularly in smaller municipalities, ordinances like Ordinance 1616 could easily result in complete banishment of sex offenders from a particular municipality.

The Township is correct in observing that the unique demographics within each municipality, including municipal land area and population density, preclude uniform statewide treatment of geographical sex offender residency prohibitions. However, the Legislature clearly recognized that concerns about sex offender recidivism and the implications for public safety is an issue of statewide importance requiring uniform treatment, in particular, uniform treatment through regulating the degree of risk each offender poses, based upon the offender’s “tier” ranking and providing for individualized supervision, including approval of living arrangements. The imposition of prohibited buffer zones within the Township which are applicable to all sex offenders regardless of their likelihood to reoffend flies in the face of the state’s uniform treatment of sex

offenders, based upon individualized assessment of the risk of recidivism.

(4) The state scheme is so pervasive and comprehensive that it precludes coexistence of municipal regulations; and (5) The Ordinance stands as an obstacle to the accomplishment and execution of the full purposes of the objectives of the Legislature.

These factors have, for the most part, been addressed above. However, at the risk of some redundancy, state law governing the behavior and activities of registered sex offenders is pervasive, comprehensive, and has several purposes: (1) to protect public safety by providing notification to the public as to location of sex offenders; (2) to minimize or eliminate recidivism by sex offenders; (3) to permit sex offenders to conduct their daily lives without unnecessary ostracism or retaliation due to their sex offender registrant status; and (4) to provide an opportunity for rehabilitation and reintegration into society.

Limitation by a municipality as to where sex offenders may reside within that municipality clearly collides with a parole officer's authority to determine the most appropriate place of residence for a sex offender. Further, such limitations directly collide with the intent of the Legislature in providing that a sex offender may not be denied

housing or accommodations due to his status as a Megan's Law registrant.

Hence, I conclude that the Ordinance is preempted by state law.

B. Does the Ordinance offend substantive due process because it is overbroad and unnecessarily impairs G.H.'s rights?

N.J. Const., Art. I, ¶ 1 provides that

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

In the matter of Caviglia v. Royal Tours of America, 178 N.J. 460, 471-473 (2004), the Supreme Court stated the following:

The Fourteenth Amendment to the United States Constitution guarantees that no state may “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *N.J. Const. art. I, § 1*.

Although Article I, Paragraph 1 does not contain the express terms “equal protection” or “due process,” we have construed the expansive language of that provision as guaranteeing those fundamental constitutional rights. *Greenberg v. Kimmelman*, 99 N.J. 552, 568, 494 A.2d 294 (1985); *see also Sojourner A. v. New Jersey Dep’t of Human*

Servs., 177 N.J. 318, 332, 828 A.2d 306 (2003). Under both constitutions, a statute is invalid on substantive due process grounds if it “seeks to promote [a] state interest by impermissible means,” and is invalid on equal protection grounds when it does not apply “evenhandedly” to similarly situated people. *Greenberg, supra*, 99 N.J. at 562, 494 A.2d 294. Analyses under equal protection and due process “proceed[] along parallel lines,” and “overlap” to some degree. *Id.* at 569, 494 A.2d 294.

A state statute generally does not run afoul of federal substantive due process protections if the statute “reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory.” *Id.* at 563, 494 A.2d 294 (citing *Nebbia v. New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940, 957 (1934)). If the statute is founded on some conceivable rational basis to promote a public purpose, it will survive constitutional scrutiny. *Ibid.* A more exacting standard applies to a statute that infringes on a fundamental right. See *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147, 178 (1973) (requiring compelling state interest); *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1936, 52 L.Ed.2d 531 (1977).

When evaluating substantive due process and equal protection challenges under the New Jersey Constitution, this Court applies a balancing test. *Sojourner, supra*, 177 N.J. at 332, 828 A.2d 306; *Greenberg, supra*, at 99 N.J. at 567, 494 A.2d 294; *Barone v. Dep’t of Human Servs., Div. of Med. Assistance & Health Servs.*, 107 N.J. 355, 368, 526 A.2d 1055 (1987). That test weighs the “nature of

the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.” *Greenberg, supra*, 107 N.J. at 368, 526 A.2d 1055. We require that the means selected by the Legislature “bear a real and substantial relationship to a permissible legislative purpose.” *Taxpayers Ass’n of Weymouth Tp. v. Weymouth Tp.*, 80 N.J. 6, 44, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977) (citing *Nebbia, supra*, 291 U.S. at 525, 54 S.Ct. at 505, 78 L.Ed. at 950); *see also Katobimar Realty Co. v. Webster*, 20 N.J. 114, 123, 118, A.2d 824 (1955).

Hence, in applying the balancing test when reviewing and analyzing a substantive due process challenge under the state Constitution, the court must weigh “the nature of affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.” Visiting Homemaker Service of Hudson County v. Hudson Cty. Bd. of Freeholders, 380 N.J. Super. 596, 610 (App. Div. 2005), quoting Greenberg, 99 N.J. at 567.

That the Ordinance violates substantive due process and must be invalidated does not require elaborate discussion. Clearly, the state has a legitimate interest in protecting the public, in particular women and children, from recidivism by sex offenders. In upholding the constitutionality of Megan’s Law, the Supreme Court referred to

the legislation as a “far-reaching statute.” Doe v. Poritz at 109. The Court further recognized that the remedies provided for by Megan’s Law will have a “potentially severe effect” on convicted sex offenders. Nevertheless, such result was deemed an unavoidable consequence of the compelling necessity to design a remedy. Ibid.

The “potentially severe effect” identified by the Supreme Court, of course, did not include the more extreme regulation imposed by the Ordinance in prohibiting Megan’s Law registrants over the age of 18 convicted of a crime against a minor identified in N.J.S.A. 2C:7-2 (regardless of the risk of offense) from residing in certain areas of the Township. That the residency prohibition in the Ordinance is more draconian than the “potentially severe effect” of the Megan’s Law remedies (which the Township characterizes as simply involving registration and notification) is patently obvious.

Notwithstanding the valid, but comprehensive, and potentially “severe” steps taken by the Legislature in protecting the public from convicted sex offenders through the enactment of Megan’s Law, the Ordinance, in a purported attempt to protect the public, regulates the location of sex offenders’ residences in a manner that is overly broad. It fails to balance the nature of the rights affected and the intrusion

upon those rights by the Ordinance, with the public need for the prohibitions set forth in the Ordinance. Visiting Homemaker Service of Hudson County v. Hudson Cty. Bd. of Freeholders, 380 N.J. Super. 596, 610 (App. Div. 2004), quoting Greenberg, 99 N.J. at 567.

The Ordinance does not differentiate the various tiers of offenders, or attempt to assess the actual risk posed by a particular offender, both of which were critical factors considered by the Doe Court in upholding Megan's Law. Rather, the Ordinance paints all sex offenders with the same broad brush, namely, that they are all equally likely to reoffend, but are less likely to do so if they are "geographically" limited with regard to residency.

The geographical restrictions on where G.H. (or any other sex offender for that matter) may reside, substantially intrude upon significant individual freedoms involving private, family and/or personal choices, such as where to reside. The Ordinance restricts G.H., a low risk offender not subject to CSFL, from residing in many areas of the Township, and in particular, from living on the Stockton campus, resulting in a clear and unnecessary intrusion upon G.H.'s choice about how he pursues his higher education. The rights

affected are significant, and are unnecessarily burdened by the Ordinance.

As noted in Doe v. Poritz, supra, at 110, in upholding the constitutionality of Megan's Law:

Here government has done all it can to confine that impact [potential for ostracism], allowing it only where clearly necessary to effect public safety, and if the Tier level selected and the methods of notification conform to the statute and its intent, as defined and limited herein, Tier Two and Tier Three public notification will be appropriately confined and applied only to those whose apparent future dangerousness requires it, and the statute will not only have survived constitutional attack, but in fact will operate as the Legislature intended.

G.H.'s argument that the Ordinance is "overly broad, ineffective and irrational" is eminently sustainable. The Ordinance does not distinguish among sex offenders, taking into account the actual risk posed by a class of offenders. All offenders from the lowest risk to the most dangerous offender are subject to the same residency restrictions under the Ordinance.

While the Ordinance applies only to offenders who have committed crimes against minors, the legislative record in support of the Ordinance is devoid of any justification for the Township's

identical treatment of all such sex offenders, regardless of tier ranking. There is no evidence in the legislative record that “blanket” residency restrictions applicable to all sex offenders reduces sexual offenses against children or that residency restrictions even if appropriately limited reduce the risk of recidivism.

Hence, I conclude that the Ordinance offends substantive due process because it is overbroad and unnecessarily impairs G.H.’s rights.

C. Does the Ordinance constitute punishment and therefore violate both the *ex post facto* and double jeopardy clauses of the state Constitution?

The *ex post facto* clause of the state Constitution, N.J. Const., Art. IV, § 7, ¶ 3 provides that “The Legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract that existed when a contract was made.” Hence, the state is prohibited from enacting retroactive punishment for prior offenses or for an act that was not punishable at the time it was committed. State v. Coruzzi, 95 N.J. 557, 578 (1984). The *ex post facto* clause is applicable to municipal ordinances as well as state statutes. State v. C.I.B. Int’l., 83 N.J. 262, 270 (1980).

The double jeopardy clause, N.J. Const., Art. I, ¶ 11, provides that “no person shall, after acquittal be tried for the same offense.” Hence, in reviewing plaintiffs’ challenge under the *ex post facto* and double jeopardy clauses of the state Constitution, the court must determine whether the Ordinance is so punitive either in its purpose or effect, that while it may have been intended as a civil remedy, in reality, it is tantamount to a criminal penalty. Auge v. NJ Dept. of Corrections, 327 N.J. Super. 256, 262-263 (App. Div. 1999).

In Doe v. Poritz, supra at 46, the Supreme Court addressed whether Megan’s Law constituted “punishment”:

... The determination of punishment has ordinarily consisted of several components. An initial inquiry is whether the legislative intent was regulatory or punitive: if the latter, that generally is the end of the inquiry, for punishment results; if the former, the inquiry changes to whether the impact, despite the legislative intent to regulate, is in fact punitive, usually analyzed in terms of the accepted goals of punishment, retribution and deterrence. Despite some ambivalent language, a punitive impact – one that effects retribution or accomplishes deterrence – renders the law or the specific provision of the law that is attacked, punishment, but only if the sole explanation for that impact is a punitive intent. In other words, the law is characterized as regulatory in accordance with the legislative intent even if there is some punitive impact, if that impact is simply an

inevitable consequence of the regulatory provisions themselves. The law is characterized as punitive only if the punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes – that is, if the law is “excessive,” the excess consisting of provisions that cannot be justified as regulatory, that result is a punitive impact, and that, therefore can only be explained as evidencing a punitive intent.

The preamble to the Ordinance states the following:

WHEREAS, the Township of Galloway is aware of an incident that occurred in the Township of Hamilton, which led to the adoption of Megan’s Law, which law requires individuals convicted of sexual offenses to register with the authorities; and

WHEREAS, there are presently no State laws which concern or touch upon the prohibition of convicted sex offenders from residing or living near areas where children regularly meet and congregate; and

WHEREAS, the Township believes that it is in its residents’ best interests to adopt additional regulations regarding convicted sex offenders, so as to protect the health, safety and welfare of the children of the municipality.

While the protection of the “health, safety and welfare of children” is certainly a valid government objective, the Ordinance suggests a punitive intent. In referring to the events which precipitated the enactment of Megan’s Law, the Ordinance preamble

emphasizes that there is no statewide “prohibition” on where sex offenders may reside, thereby suggesting that additional sanctions against sex offenders are warranted. The Ordinance goes well beyond notification and registration, and outright prohibits sex offenders from residing in substantial areas of the Township.

The “grandfather” clause is also evidence of a legislative recognition that the Ordinance is punitive. Further, sex offenders who fail to move within the requisite time period are subject to significant criminal penalties, including fines between \$1,250 and \$5,000 and imprisonment for up to six months. Sanctions for violating the Ordinance substantially exceed those permitted to be prescribed by a governing body for Ordinance violations. See N.J.S.A. 40:49-5.

While all indications are that the intent of the Council in enacting the Ordinance constituted a punitive measure, the effect of the Ordinance is clearly punitive. The Ordinance imposes restrictions on the residency and movement only of convicted sex offenders, as opposed to other criminals who have committed serious offenses.

The Ordinance does not take into account an individual sex offender’s propensity to reoffend. It assumes that all sex offenders pose the same degree of risk. Applicability of the Ordinance to

Stockton College prohibits any former juvenile sex offender from living on or within 2,500 feet of the campus, regardless of the degree of the offense.

In contrast to Megan's Law which survived an *ex post facto* challenge, the Ordinance is not regulatory and remedial. Its sole purpose is deterrence and retribution, namely, to keep sex offenders from living in large geographical areas of the Township. It limits residency and movement of Megan's Law registrants without distinguishing as to the registrant's tier ranking, likelihood of reoffense, or when the offense was committed. It exacts retribution for prior acts by the offender. As to G.H. in particular, the Ordinance precludes him entirely from living on or in the immediate vicinity of Stockton College.

Doe v. Poritz recognized that sex offenders who have completed their term of incarceration "have paid their debt to society." Nevertheless, having paid that debt it is not subject to debate that some of them will reoffend. However, in upholding the constitutionality of Megan's Law, the Supreme Court acknowledged that the statute was "far reaching" and in many cases would have a "severe impact" on the lives of sex offenders. However, the court

emphasized at pages 74-75 that the Legislature, in addressing a pressing societal problem, specifically a threat to public safety, confined the severe impact only where clearly necessary to effect public safety.

Notwithstanding the comprehensive regulation of sex offenders' lives through the enactment of Megan's Law and the CSFL statute, the Ordinance residency prohibitions have crossed the threshold of comprehensive regulation and have entered the realm of punishment. The Ordinance is extensive and has been persuasively characterized by G.H. as taking "an-all-or-nothing categorical approach."

It is clear that the Ordinance violates the *ex post facto* and double jeopardy clauses of the state Constitution.

III. CONCLUSION

G.H.'s request to invalidate Ordinance No. 1616 of 2005 on all grounds articulated is hereby granted.

This decision will be posted on www.njcourtsonline.com. An Order is enclosed.

February 5, 2007

Valerie H. Armstrong, A.J.S.C.

