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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

PROPOSED SEX OFFENDER ORDINANCE

INTRODUCTION

This City Attorney's office supports the strongest possible regulation of sex offenders permitted under law. The City Attorney's office has prepared a draft ordinance prohibiting sex offenders from being present within 300 feet of a public or private school, day care facility, facility providing children's services, libraries, video arcades, playgrounds, parks, and amusement centers. The ordinance is modeled after one adopted by National City, and adds residency restrictions.

Some of the provisions contained in the draft ordinance are under constitutional attack in the California Supreme Court. There are four cases currently pending in the California Supreme Court:

#07-457 In re E.J., S156933. Original proceeding.

#07-458 In re S.P., S157631. Original proceeding.

#07-459 In re J.S., S157633. Original proceeding.

#07-460 In re K.T., S157634. Original proceeding.

In each of these four matters, the Court issued an order to show cause why residence restrictions imposed by the state law that allow local control of sex offenders (Penal Code section 3003.5) should not be found to be unconstitutional.

We advise that the City regulate residence and presence in separate provisions. If the state law (Jessica's Law) is upheld by the Supreme Court then the City's proposed residence restriction would be enforceable.¹

¹ The Court may adopt nuances that may require further modifications and refinement of the proposed ordinance.

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The regulation of presence is more difficult. The Council can choose to adopt the presence prohibition, which will likely then be subject to immediate constitutional challenge. One important point to consider is the impact of adopting an ordinance that is later declared unconstitutional. Thus, it is imperative that the Council act with care and prudence. It has been the considered opinion of the City Attorney to await the Supreme Court action on Jessica's Law. Once we have the residence ordinance in place supported by the Supreme Court we could then turn to the issue of presence. However, if the Council wants to take a riskier approach it could adopt both the presence and residence restrictions and risk both being found to be unconstitutional. This could result in any party prosecuted under the ordinance found to be unconstitutional bringing a lawsuit against the City.

The Council may recall that the Council adopted the Social Host Ordinance without making sure that it was drafted correctly, only to have it found to be unconstitutional. This set our enforcement effort back for about a year and a half.

Again, this area of the law is unfortunate because the evidence clearly shows that sex offenders are likely to repeat their unlawful behavior. This is why it is especially important that those of us who favor the strictest enforcement not be led astray by those attempting to take political advantage of the problem.

LEGAL ANALYSIS

There are a number of legal challenges that we will face: preemption, right to travel, privacy, and self-incrimination. It will be argued that the state has likely occupied the field of consequences for sex offender registration, preempting any local action. If Jessica's Law is upheld then this argument will be directed at the presence prohibition of all sex offenders being within 300 feet of all the parks, schools, libraries, and day care facilities in San Diego. Other legal challenges exist, but we believe we could overcome them with a more precise ordinance.

Preemption

The argument will be made that absent Jessica's Law,² attempts by cities to determine where sex offenders can live or be present are preempted by state law. Article XI, section 5, of the California Constitution allows charter cities to regulate matters of municipal concern, but prohibits charter cities from regulating matters of statewide concern; in these areas, charter cities' laws are preempted. *Johnson v. Bradley*, 4 Cal. 4th 389, 399 (1992); *Howard Jarvis Taxpayers Ass'n. v. City of San Diego*, 120 Cal. App. 4th 374, 385 (2004).

² In referring to "Jessica's Law", this report intends to refer to the residency restrictions unless otherwise noted.

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Again, the argument will be made that state law preempts local government from regulating criminal aspects of sexual conduct, because of the extensive state regulation of that subject. *Lancaster v. Municipal Court*, 6 Cal. 3d 805, 807 (1972). It is imperative that Jessica's Law be upheld because it changes the basic preemption law and allows cities like San Diego to adopt local controls of sex offenders.

With regard to presence there will be an argument that it is also preempted. Jessica's Law does not address the ability of local jurisdictions to regulate presence. If Jessica's Law is upheld we can argue that preemption is no longer an issue by implication. However, we have prepared the ordinance so that presence and residence are separately addressed to ensure that if we win on residence, arguments against presence are not used to defeat enforcement of the residence restriction.

The Council should know that residence and presence restrictions could be upheld on a point by point basis. Restrictions from schools and libraries may pass Constitutional muster, restrictions from amusement centers may not.

There are other Constitutional challenges that can be made to presence restrictions and those include arguments based on the right to intra-state travel, right to privacy, self-incrimination, vagueness, and over-breadth.

Other Legal Challenges

Offenders have brought other challenges against sex offender laws in other states. These include: ex post facto claims, double jeopardy claims, cruel-and-unusual-punishment claims, claims that the law illegally interferes with contracts, claims that it amounts to a regulatory taking, claims that it violates freedom of association, and claims that it violates due process because there is no individualized finding of dangerousness before the ordinance applies to each offender. One state Supreme Court has found an unconstitutional taking in the state's sex offender residency restrictions. The statute provided no exemption for sex offenders who purchased a home in a lawful area that met the residency restrictions, but that later became unlawful because a childcare facility, church, or school subsequently moved within 1000 feet of the offender.

San Diego Police Department

The San Diego Police Department's 290 Unit is responsible for sex offender registration issues. The police department also participates in the Sex Offender Management Council (SOMC) and the Sexual Assault Felony Enforcement Task Force (SAFE).

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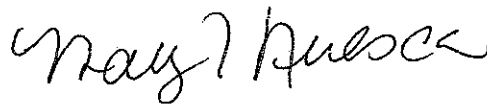
Options

1. Adopt the proposed ordinance based on the National City model.
2. Direct the City Attorney to further refine the proposed ordinance to increase the likelihood that it passes constitutional muster.
3. Direct that the matter be brought to City Council or the Public Safety and Neighborhood Services Committee after the California Supreme Court issues its opinion on Jessica's Law.

CONCLUSION

The City of San Diego should act under the Constitution to pass the strongest measures possible to regulate sex offenders. The Council must act with care and prudence to ensure any ordinance passed is constitutional. There should be no political grandstanding with this critical law enforcement issue.

Respectfully submitted,



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Deputy City Attorney

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