

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Appeal No. 2012AP724
(Milwaukee County Case No. 2010CV010262)

CITY OF SOUTH MILWAUKEE,

Plaintiff-Respondent,

v.

TODD J. KESTER,

Defendant-Appellant.

**NONPARTY BRIEF OF WISCONSIN ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**

**On Appeal from an Order Entered in the
Circuit Court for Milwaukee County, the
Honorable Maxine A. White Presiding**

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CITY OF SOUTH MILWAUKEE,

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**NONPARTY BRIEF OF WISCONSIN ASSOCIATION
OF CRIMINAL DEFENSE LAWYERS**

The Wisconsin Association of Criminal Defense Lawyers (“WACDL”) submits this non-party brief to address the impact on statewide laws, regulations, and policies concerning those convicted of sex offenses of municipal ordinances restricting their residency. These local ordinances create a patchwork of inconsistent rules. In Milwaukee County, for example, Whitefish Bay currently has no such ordinance but Bayside does. Compare Whitefish Bay Municipal Code with Bayside Ord. 62-139. Comparing ordinances indicates that the rules differ from one community with restrictions to another. Compare, *e.g.*, Bayside Ord. 62-139 (2000 foot zone; includes zones around recreational trails) with S. Milwaukee Muni. Code 23.167 (1000 foot zone; no zones around recreational trails). This patchwork creates obstacles for criminal defense lawyers, who are obligated to advise their clients on possible collateral consequences of pleading guilty to sex offenses, *cf. Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), and cannot accurately advise clients regarding the pros and cons of entering pleas, possible conditions of probation and extended supervision, and the potential risks and benefits of appealing convictions.

As demonstrated below, the extensive statewide regulation of sex offenders preempts these local ordinances by violating the spirit of and defeating the purpose of that regulation. Specifically, the ordinances directly interfere with establishing residences for those on supervision and interfere with DOC's obligation to provide "a just, humane and efficient program of rehabilitation." *See* Wis. Stat. §301.001. They also make maintaining accurate sex offender registries harder. *See id.* §301.45.

**LOCAL MUNICIPAL ORDINANCES RESTRICTING
WHERE PERSONS CONVICTED OF SEX OFFENSES CAN
LIVE ARE PREEMPTED BY WISCONSIN STATE LAWS
REGULATING SEX OFFENDERS**

A. When dealing with matters of statewide concern, a municipality may only adopt ordinances that complement state law.

The courts long have recognized that the powers of municipalities are derived from the legislature. *See, e.g., Flannagan v. Buxton*, 145 Wis. 81, 129 N.W. 642 (1911). As a result, "[a] municipality's ability to regulate matters of statewide concern is limited." *DeRosso Landfill Co v. City of Oak Creek*, 200 Wis.2d 642, 651, 547 N.W.2d 770 (1996). A municipal ordinance therefore is preempted if

(1) the legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; (4) it violates the spirit of state legislation. Should any one of these tests be met, the municipal ordinance is void.

Id. at 651-52. The question whether a municipal ordinance is preempted is one of law and is reviewed independently. *Id.*

B. Regulation of those convicted of sex offenses is a matter of statewide concern, reflected in laws and regulations concerning living arrangements for those under supervision, civil commitment, and sex offender registration.

As the court below correctly held, “the placement and supervision of sex offenders in the community is a matter of statewide concern.” (R.15:53-54). This statewide concern is reflected in legislation which both pervasively regulates people on supervision and substantially affects those who have completed their sentences. *See, e.g.*, Wis. Stat. §301.48. The statutory “lifetime tracking” for some offenders, *see id.* “evinces a legislative intent to regulate the post-conviction lives” of sex offenders. *G.H. v. Township of Galloway*, 951 A. 2d 221, 229 (N.J. Super. Ct. 2008), *aff’d*, 971 A.2d 401 (N.J. Sup. Ct. 2009).

Many state statutory provisions are directed at persons convicted of sex offenses who are on supervision as part of the conviction, whether that supervision be probation, parole, or extended supervision. Chapter 301, whose purposes are both “to prevent delinquency and crime” and “to provide a just, humane and efficient program of rehabilitation of offenders” primarily governs DOC in these endeavors. Wis. Stat. §301.001. Specifically, the legislature mandated DOC to “work to minimize, to the greatest extent possible, the residential population density of sex offenders....” *Id.* §301.03(19). To help achieve this goal, the legislature directed DOC to limit initial placement of “each person[,] who has been convicted of a sex offense” and is on parole or extended supervision, to one of three places:

1. The county in which the person resided on the date of the sex offense.
2. The county in which the person was convicted of the sex offense.
3. A sex offender treatment facility.

Id. §301.03(20). State law also requires the department to approve

the residence of any sex offender on extended supervision. *Id.* §302.116(2).

The statewide regulation of people convicted of sex offenses often continues beyond the completion of their criminal sentences. Wisconsin Statutes §301.48 requires the DOC to “maintain lifetime tracking” of certain sex offenders. As part of “lifetime tracking,” the statutes require the department to create an “individualized exclusion zone,” *id.* §301.48(3)(c), which is an area the tracked person may not enter. *Id.* §301.48(1)(a). The provision is specific enough that, in creating exclusion zones, it requires that the department “focus on areas where children congregate, with perimeters of 100 to 250 feet.” *Id.* §301.48(3)(a)(3)(c). Because affected persons cannot enter an exclusion zone, they cannot reside in an exclusion zone. Thus, this statute regulates the residency of some sex offenders who completed their sentences and reflects a legislative determination which sex offenders should be subject to continued regulation.

In addition, the legislature requires most people convicted of sex offenses or in the system after 1993 to register with the state, regardless whether they have completed their sentences. *Id.* §301.45. These people must report “[t]he address at which the person is or will be residing.” *Id.* §301.45(2)(a)(5).¹

The state scheme regulating sex offenders also provides for the civil commitment of some sex offenders. *Id.* §980.02(2)(a). Although those committed initially are placed in institutional care, *id.* §980.06, the law anticipates that supervised release may occur, *id.* §980.08. Counties of intended placement, which usually are the person’s county of residence, *see id.* §980.08(4)(cm), are charged with finding a place for a person on supervised release to live. As in

¹ A person who is homeless cannot be convicted of violating this statute for failing to report his address when he is unable to provide this information. *State v. Dinkins*, 2012 WI 24, 339 Wis.2d 78, 810 N.W.2d 787. DOC Administrative Directive #11-04 provides that a homeless registrant must call and speak with a staff member every seven days on a weekday to report his or her residential status, where he or she has been frequenting or sleeping, and where he or she plans to do so for the next seven days.

similar situations involving those on criminal supervision,

[i]n identifying prospective residential options, the county department shall consider the proximity of any potential placement to the residence of other persons on supervised release and to the residence of persons who are in the custody of the DOC and regarding whom a sex offender notification bulletin has been issued to law enforcement agencies.

Id. §980.08(4)(e).

C. Municipal Ordinances Restricting Residency Conflict with, Defeat the Purposes of, and Violate the Spirit of State Regulation of Those Convicted of Sex Offenses.

Statewide regulation of sex offenders has several purposes: (1) protecting the public, especially children, *see State v. Smith*, 2009 WI App 16, ¶11, 316 Wis.2d 165, 762 N.W.2d 856; (2) “minimiz[ing], to the greatest extent possible, the residential population density of sex offenders,” *see id.* §301.03(19); (3) providing “a just, humane and efficient program of rehabilitation,” *see Wis. Stat.* §301.001; and (4) assisting law enforcement, *see id.* Municipal ordinances restricting the residency of sex offenders conflict with the means the legislature has chosen to achieve these goals and defeats these purposes.

The notion behind residency restrictions on sex offenders is that, if a neighborhood can keep known offenders out, the neighborhood’s children will be safe. But, although the general public perception is that sex offenders are strangers, most victims know their abusers. Jill S. Levenson, Sex offender residence restrictions: A report to the Florida Legislature 4 (Oct. 2005), <http://www.royallcreations.com/fatsa/residencerestrictionsFL.pdf> (last accessed 9/21/12) (“Levenson”). In one study, for example, only 7% of victims reported sexual abuse by strangers while 93% of those child victims knew their abuser. *Id.* When a child has a prior relationship with an abuser, access to the child is not likely to be impeded by residency restrictions. *See Iowa Co. Attorneys*

Association, Statement on Sex Offender Residency Restrictions (2006) (App. 1-6).

In addition, although the general public believes that most sex offenders will repeat their crimes, the United States Department of Justice has found that “sexual perpetrators were less likely to be rearrested for any new crime than were other types of offenders.” *Id.* at 3. Canadian researchers studying more than 29,000 sex offenders from North America and Europe found only a 14% recidivism rate. *Id.* By contrast, the Alabama Department of Corrections, in a study of approximately 11,000 inmates released in 2003, found a 30.3% recidivism rate for robbers. *See* The Sentencing Project, State Recidivism Studies, http://sentencingproject.org/doc/publications/inc_StateRecidivismStudies2010.pdf (last accessed 9/24/12).

Moreover, the playgrounds, schools, athletic fields, pools, and libraries that these local ordinances seek to protect, *see, e.g.*, City of South Milwaukee Ordinance § 167-3, are not where sex crimes against children typically occur. Levenson at 4. Most such offenses occur in the child’s own home or in the home of a friend, neighbor or relative. *Id.*

Not surprisingly, no evidence exists to show that residency restrictions reduce recidivistic sexual abuse. Levenson at 9. Colorado, for example, found that child sex offenders who re-offended were no more likely to live near schools or child care centers than those who did not re-offend. Col. Dept. of Public Safety, Report on Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community (March 2004), http://dcj.state.co.us/odvsom/Sex_Offender/SO_Pdfs/FullSLAFinal01.pdf (last accessed 9/21/12).

Similarly, the Minnesota Department of Corrections found that proximity of sex offenders to parks or schools did not increase re-offense. Minn. Dept. of Corrections, Residential Proximity & Sex Offense Recidivism in Minnesota (2007), <http://www.corr.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf> (last accessed 9/21/12). For the 13 high-level sex

offenders re-arrested for a new sex offense in Minnesota in 2003, residential proximity to schools or parks was not a factor. *Id.* Instead of residential proximity, social or relationship proximity mattered because the recidivists victimized those they knew and gained access through social contact. *Id.* Iowa experienced no drop in convictions for sexual abuse after enacting statewide residency restrictions. Sex-offender residency laws get second look, USA Today (2/26/07), http://www.usatoday.com/news/nation/2007-02-25-sex-offender-laws-cover_x.htm (last accessed 9/21/12).

Not only do residency restrictions fail to improve safety, they reduce it. They directly interfere with the DOC's attempts to establish suitable residences, *see* pages 7-9 *infra*, they interfere with the rehabilitation of sex offenders, *see* pages 9-10 *infra*, and they reduce the ability of law enforcement to find them, *see infra* at 10-11.

1. Municipal Residency Restrictions Directly Interfere with Establishing Residences for Sex Offenders on Supervision

Generally, DOC supervises sex offenders who are released from prison. *See* Wis. Stat. §301.03(20). Establishing a residence is key to this process. As the Department recently declared:

Lacking a residence is unacceptable as a supervision strategy. Every effort must be made ... in establishing a residence if the offender is unable to propose suitable housing.

Dinkins, 2009 WI 24 ¶53 (quoting DOC Admin. Directive #11-04). As part of this process, the DOC requires agents to

closely monitor the offender's movement relative to residence. A thorough on-site inspection of the residence and neighborhood, including visual inspection of the offender's sleeping quarters, is required prior to approving a residence.

DOC, *Supervision of Sex Offenders: A Handbook for Agents* 9.22 (2011).

Because municipal ordinances typically ban those convicted of sex offenses from living in virtually all of the municipality, *see, e.g., G.H.* 951 A.2d at 229, they interfere with this task. By interfering with DOC's ability to carry out its responsibilities, the local ordinances defeat the purpose and violate the spirit of state legislation. *See id.* (discussing similar problems while holding that Megan's Law preempts local municipal sex offender residency restrictions).

Moreover, the housing difficulties make supervision more difficult. Residency restrictions tend to drive those who have committed sex offenses to less populated areas and those areas tend to have fewer supervising agents and services. Minn. Dept. of Corrections at 11; *see also* Levenson at 5. In addition, these more remote areas tend to lack transportation, which limits employment and treatment opportunities. Minn. Dept. of Corrections at 11; *see also* Levenson at 5.

Capricious local treatment of this statewide issue also defeats the legislative directive requiring minimization of the density of the residential population of sex offenders. *See* Wis. Stat. § 301.03(19) & (20). Those convicted of sex offenses must live somewhere. By placing so many areas off-limits, residency restrictions tend to cluster sex offenders in the small areas which are left. Note, the Good Left Undone: How to Stop Sex Offender Laws From Causing Unnecessary Harm at the Expense of Effectiveness, 38 Am. J. Crim. L 263, 270 (2011). Attempting to avoid becoming one of those small areas, "a growing number of Wisconsin communities are passing laws banishing offenders from living in all but small pockets of land." More communities pass offender laws, Milwaukee Journal Sentinel Online (7 / 28 / 07) , <http://www.jsonline.com/news/wisconsin/29474219.htm> (last accessed 9/21/12). Nor is this domino effect solely a Wisconsin phenomena. New Jersey and New York, both of which have had courts hold that local ordinances are preempted, have noted the same problem. *See G.H.*, 951 A.2d at 236; *People v. Blair*, 873 N.Y.S.2d 890 (City Ct. Albany 2009).

Nothing makes the local communities with current ordinances unique concerning the need to protect children from those who have committed sex offenses. *See G.H.*, 951 A.2d at 236 (making a similar point concerning New Jersey communities). The communities range from cities, *see, e.g.*, Green Bay Ord. 27.620-622, to the suburbs, *see, e.g.*, Glendale Ord. Ch. 5.8, to the rural towns, *see, e.g.*, Town of Delafield Ord. 10.11. A school in one such place is just as likely as one in another to have children congregate at it.

2. Residency restrictions interfere with the rehabilitation of sex offenders.

Residency restrictions also interfere with the rehabilitation of sex offenders. They can increase isolation, create stress, and lead to decreased stability. Levenson at 5. Increasing stress on sex offenders then can contribute to re-offending. Jill S. Levenson & Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet from Danger or One Step From Absurd?*, 49 Int'l J. Offender Therapy & Compl. Criminology 168, 175 (2005) (“Levenson & Cotter”). As the Minnesota Department of Corrections has noted, “Rather than lowering sexual recidivism, housing restrictions may work against this goal by fostering conditions that exacerbate sex offenders’ reintegration into society.” Minn. DOC at 4.

By interfering with DOC’s provision of “a just, humane and efficient program of rehabilitation,” *see* Wis. Stat. §301.001, the local ordinances violate the spirit and purpose of statewide regulation and therefore are preempted. *See DeRosso Landfill Co.*, 200 Wis.2d at 651-52 (setting forth standard for preemption).

3. Residency restrictions make the tracking of sex offenders more difficult, contrary to the intent of sex offender registration

Residency restrictions on sex offenders increase their homelessness. Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 Harv. C.R.-C.L. L. Rev. 531, 533-34 (2007); Levenson and Cotter at 175. Residency restrictions do so by creating a shortage of housing

options and concentrating sex offenders in places lacking employment opportunity, social support, and services. Levenson at 5; Minn. Dept. of Corrections at 11; *see also* App. 2. They also increase homelessness because, as in this case, the restrictions may prohibit those who have committed sex offenses from living with supportive family. Good Left Undone at 269. This lack of services, family support, and employment can make them even more transient. Levenson at 5.

Once sex offenders become homeless, tracking them in sex offender registries becomes much more difficult. After the Iowa legislature passed statewide residency restrictions, for example, the number of sex offenders on the registry who were unaccounted for more than doubled. Jason Peckenpaugh, Controlling Sex Offender Reentry: Jessica's Law Measures in California 1, 33 (2006), <http://ssrn.com/abstract=977263> (last accessed 9/21/12). The law resulted in some sex offenders in Dallas County living out of their cars at highway rest stops and becoming hard to track. *Id.* In California, the number of sex offenders registering as "transient" jumped more than 800 percent. Laws to Track Sex Offenders Encouraging Homelessness, Washington Post Online, (12/27/08), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/26/AR2008122601722.html> (last accessed 9/21/12). Similarly, in Florida, large numbers of sex offenders ended up living under a bridge, on corners, in fields, or in wooded areas. Good Left Undone at 269.

Wisconsin results have been no different. In Green Bay, which has a local ordinance restricting the residency of those convicted of sex offenses, Green Bay Ord. 27.620-622, there has been a rise in the number of registered sex offenders who are homeless or who are not reporting where they live. Fox 11, Impact of Sex Offender Ordinance in GB (7/26/11), http://www.fox11online.com/dpp/news/local/green_bay/impact-of-sex-ordinance-in-GB (last accessed 9/21/12). Once the offenders are homeless, they are harder to find and public safety decreases. *Id.*

Because these local ordinances decrease compliance with sex

offender registries, making local law enforcement harder, they defeat the purpose of “preventing delinquency and crime.” *See* Wis. Stat. §301.001. They therefore defeat the purpose of the law requiring sex offender registration and violate the spirit of state legislation of sex offenders. State laws, particularly laws relating to sex offender registry, *see id.* §301.45, therefore preempt local ordinances restricting residency. *See DeRosso Landfill Co.*, 200 Wis.2d at 651-52.

CONCLUSION

For these reasons, WACDL asks that the Court hold that Wisconsin statewide laws regulating sex offenders pre-empt municipal ordinances restricting the residency of those convicted of sex offenses.

Dated at Milwaukee, Wisconsin, September 27, 2012.

Respectfully submitted,

WISCONSIN ASSOCIATION OF
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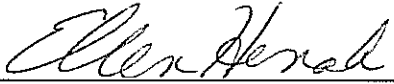


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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,951 words.


Ellen Henak

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.


Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 27th day of September, 2012, I caused 10 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.


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