THE STATE OF NEW HAMPSHIRE
SUPREME COURT

JUNE SESSION
2012 TERM

No. 2012-0108

William Thomas
Plaintiff-Appellee

v.

Ken Merrifield, et al.
Defendants-Appellants

BRIEF FOR THE PLAINTIFF-APPELLEE

Rule 7 Mandatory Appeal from a Final Decision on the Merits
in the Merrimack County Superior Court

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(15 minutes of oral argument requested)

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TEXT OF RELEVANT OF AUTHORITIES

NH Const. Part 1 Art. 12. Protection and Taxation Reciprocal

Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent.

Franklin City Ordinance § 247

§247-1 Definitions.
As used in this chapter, the following terms shall have the meanings indicated:

PREMISES
The property, building structure, playground area, athletic field or court, public beach, municipal ski area, and the Winnipesaukee River Trail, as described on recorded deed and Tax Map.
[Amended 10-1-2007 by Ord. No. 10-08]

RADIUS
Distance shall be measured from the property boundary lines.

REGISTERED SEX OFFENDER
This chapter shall apply to offenders who have been convicted of the crime against a person under the age of 18 and as a result, are required to register for life pursuant to RSA 651-B:6, I.

SCHOOL/CHILD-CARE FACILITY
Any public or private educational facility that provides services to children in grades K through 12 or licensed day-care facility that is clearly marked.
[Amended 10-1-2007 byOrd. No. 10-08]

§ 247-2 Restrictions.
[Amended 10-1-2007 by Ord. No. 10-08]

A.
Any person who is a registered sex offender, as defined in § 247-1 above, and is required to register for life shall not reside within a radius of 2,500 feet of the property line of a school, child-care facility, playground area, athletic field or court, public beach, or a municipal ski area.

B.
Any person who is a registered sex offender involving a minor and is required to register for life, as defined above, is prohibited from entering upon the premises of a school or child-care facility, unless specifically authorized by the school administration or child-care facility administration.

C.
A deeded property owner shall not allow a registered sex offender to reside at the owner's property should the property be within the radius of 2,500 feet of the property lines referenced in Subsection A.

§ 247-3 Exceptions.

A registered sex offender residing within 2,500 feet of a school or day care is not in violation if the residency was established prior to the date of passage or in the event of a new facility being established after the date of residency.

§ 247-4 Violations and penalties.

A.
Any person violating the provisions of this chapter shall be subject to a fine of not less than $500 for the first offense and shall relocate within 30 days. Any subsequent violations of this chapter by the same person shall be subject to a fine of not less than $1,000.

B.
No deeded property owner shall allow a registered sex offender to reside within the prohibited zones. If a deeded property owner is found to have allowed a registered sex offender to reside in a prohibited zone, he or she shall be warned by registered mail that he or she in violation of the provisions of this chapter. Subsequent violations of this chapter by the deeded property owner shall subject the deeded property owner to a fine up to $500 for each offense.
[Added 10-1-2007 by Ord. No. 10-08]

QUESTIONS PRESENTED

The Appellee agrees with the questions presented by the Appellant.

STATEMENT OF THE CASE AND FACTS

William Thomas is a 66 year old man who moved to New Hampshire with a friend to seek a quiet, peaceful life. Mr. Thomas is a man of modest means and it took him a while to find affordable housing. He found a suitable, affordable two bedroom apartment at 13 Madison Street, Franklin and signed a lease on August 27, 2010.

Almost three decades ago Mr. Thomas pled guilty to a sexual assault on a minor. He was incarcerated for three years at MCI Billerica. For three decades he has complied with all registration requirements imposed upon him.

On September 7, 2010 Mr. Thomas went to the Franklin Police Department to register as a sexual offender. He was informed that the apartment he had rented was less than 2,500 feet from a public school and that, pursuant to Franklin's sex offender ordinance, he had 30 days to move.

The ordinance in question is Franklin City Code § 247. It was adopted by the Franklin City Council on October 1, 2007. The ordinance prohibits any person who has been convicted of a crime against a person under the age of 18 and as a result is required to register for life from residing within 2,500 of the property line of a school, child-care facility, playground area, athletic field or court, public beach, or a municipal ski area. It imposes a fine of not less than $500 for a first violation and requires an individual to relocate within 30 days. A subsequent violation is punished by a fine of not less than $1000.

Mr. Thomas filed a Petition for Injunctive and Declaratory Relief in Merrimack Superior Court. After hearing, the Court (Smukler, J.) granted Mr. Thomas's request for preliminary relief and ordered that he be allowed to remain in his home during the pendency of this action and on

January 18, 2012 the Court granted Mr. Thomas's Motion for Summary Judgment and ruled that the ordinance violates the equal protection clause of the New Hampshire Constitution.

SUMMARY OF THE ARGUMENT

William Thomas has a right to equal protection of the law afforded all citizens under part 1, article 12 of the New Hampshire Constitution. The right to use and enjoy property is an important substantive right, which the Franklin ordinance restricts for one subset of the population, registered sex offenders who offended against children under the age of 18.

The stated objective behind the ordinance is the protection of children. Mr. Thomas does not contest that the safety of children is an important governmental interest. However, in order for a restriction on an important substantive right to be constitutional, the government must present evidence that would support a finding that the general ban of sex offenders from residing within 2,500 feet of a school, day care, playground, athletic field, public beach, or ski area would actually further its objective to protect children. The Appellant has failed to present evidence to support this conclusion.

ARGUMENT

The City of Franklin has failed to prove that the ordinance will protect children

The City of Franklin argues that City Code § 247 was enacted to protect the children living in the City and attending its schools. The Superior Court (Smukler, J.) found that the City failed to present sufficient evidence to support a finding that the general ban on sex offenders from living within 2,500 feet of a school, day care center, playground, athletic field, public beach or ski area would protect child safety. This ruling should be upheld.

City Code § 247 was adopted by the Franklin City Council on October 1, 2007. The ordinance prohibits any person who has been convicted of a crime against a person under the age of 18 and as a result is required to register for life from residing within 2,500 of the property line of a school, child-care facility, playground area, athletic field or court, public beach, or a municipal ski area. It imposes a fine of not less than $500 for a first violation and requires an individual to relocate within 30 days. A subsequent violation is punished by a fine of not less than $1000.

The City of Franklin has not created a map depicting the restricted areas. However, based on the numerous places that are designated as restricted areas in the ordinance, it is reasonable to assume that the majority of the City of Franklin, and certainly most if not all of its affordable housing units are within the 2500 foot exclusion zone. Thus, as a consequence of the ordinance, the City of Franklin is virtually walled off from receiving new sexual offenders.

The right to use and enjoy property is an important substantive right. The court employs an intermediate scrutiny test to review equal protection challenges to ordinances that infringe upon an important substantive right. *Cmty. Res. for Justice, Inc. v. City of Manchester*, 154 N.H.

748, 758 (2007). "The intermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective. The burden to demonstrate that the challenged legislation meets this test rests with the government. To meet this burden, the government may not rely upon justifications that are hypothesized or 'invented post hoc in response to litigation,' nor upon 'overbroad generalizations.'" Id. at 762 (internal citations omitted)

Not only did the City fail to provide evidence to support its contention, but, as will be discussed below, the use of buffer zones actually destabilizes the sex offender population, making it harder to monitor and putting children at greater risk.

In its Brief, the City of Franklin wrote that "[t]he Appellee, William Thomas, has not challenged the technical procedure followed by the City in adoption of the ordinance but, rather, challenges the ability of the City to legislate in this area." (Brief of Appellant, p. 5). This is incorrect. Mr. Thomas does challenge the technical procedure, or rather the lack of any procedure, followed by the City in adopting the ordinance.

Ordinances like § 247 are potent tools; they have the power to disrupt and destroy the lives of individuals. Convicted sex offenders who have paid their debt to society and are deemed parole eligible may be prohibited from going home and rejoining their families. They are thus deprived of the support that they need to successfully reintegrate into society. Families may be forced to make a draconian choice: stay in their homes without their loved ones, or give up their homes in order to establish new residences, leaving behind communities, churches, neighborhoods and schools where they have established roots. Since landlords aren't jumping at the opportunity to rent to sex offenders, many offenders may find themselves homeless. Joseph Lester, *Off to Elba! The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40

Akron L. Rev. 339, 359 (2007). It is incumbent upon the municipality seeking to pass such an onerous restriction to demonstrate that it will further its stated goal. However the City of Franklin did absolutely no investigation into the efficacy of this law before enacting it. No experts in this area were consulted. (Appendix to Appellant's Brief, p. 10) And, despite the assertion in the Appellant's brief that "Franklin was diligent about researching similar legislation in other states, case law, and sex offender residency restrictions," the record indicates that no written material was considered by the Franklin City Council in connection with Ordinance §247. (Appendix to Appellant's Brief, p. 70)

The Franklin City Councilors adopted this ordinance based on "an undeniable belief in the common sense of their action". (Appellant's Brief, p. 6) The intermediate scrutiny test may not be a mathematical formula, but whatever the test requires, it cannot be met by a mere belief in the common sense of one's action; the test requires at least some factual predicate, some proof, a modicum of evidence. *Cmty. Res. for Justice, Inc. v. City of Manchester*, 157 N.H. 152 (2008). "Common sense" is just another name for speculation.

There is no scientific, objective or empirical evidence that supports the use of sex offender residency restrictions.

By the time that the City of Franklin approved §247 in 2007, there was over a decade of experience with sex offender residency restrictions. The first statewide residence restriction was passed in Florida in 1995. By 2004, 14 states had similar laws. Jill S. Levenson, *Residence Restrictions and their Impact on Sex Offender Reintegration, Rehabilitation, and Recidivism,* ATSA Forum, XVII(2). By 2006 the bloom was off the rose and it was becoming apparent that creating buffer zones around schools or other places where children congregate did not have the intended effect of protecting children, but rather might be having the unintended consequence of putting them in even more danger.

> While advocates of residency restrictions argue that limiting offenders' access to children will reduce the temptation and ability to reoffend, empirical evidence correlating recidivism and residency is lacking. In fact, a Minnesota study found no correlation between residential proximity to schools or parks and sex offender recidivism. Concluding that class-based residency restrictions do not enhance community safety, the study recommends case-by-case or individualized restrictions. Similarly, a Colorado study, commissioned to determine the relationship between recidivism and residency, found that sex offenders who did reoffend did not live any closer to schools or child-care facilities than non-recidivist sex offenders.

Cassie Dallas, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond* 41 Tex. Tech L. Rev. 1235 (2009). Indeed, no state has enacted a new residency restriction after 2006.

Legal and professional commentators have identified several problems with residency restrictions that render them ineffective as a matter of public policy. In general the laws have been criticized because 1) they are overbroad, meaning that individuals with little potential to re-offend are treated the same as those who actually are predators; 2) they destabilize the offender, seriously interfering with his ability to find housing, employment, receive treatment and successfully reintegrate into society; 3) they may lead to a concentration of offenders in unrestricted areas, which, among other things, can depress property values; 4) they encourage offenders who would otherwise register to go underground so that the authorities lose track of them; 5) they displace families as well as individual offenders; 6) they encourage one community to merely pass on its perceived problem to the next town; 7) they are useless in keeping determined sex offenders away from children, since they only regulate where an offender sleeps, not where he may go during the daytime when schools are in session; and 8) they provide a false

sense of security and divert resources from the true source of danger to children – family members and family friends.

As one law professor has written:

> Ultimately, if more offenders go underground, then the net result of sex offender residency restrictions will be negative. When an offender is off the radar, then the existing compliance, treatment, and monitoring options will have no effect. An offender is also unlikely to find any stability or employment when living underground. Such a scenario is a recipe for recidivism. An offender will be without any social contacts or employment and probably living in transitional housing. ... Further, to the degree that offenders end up going underground, current probation officer and police monitoring is undermined. The result is that offenders have less supervision, not more. Further, the lack of positive social networks and treatment opportunities for sex offenders subject to residency restriction schemes means that the offenders will lack the resources to help them cope with temptation. Instead of having professional help, offenders under an aggressive residency restriction scheme are left to fend with their demons alone. Thus, even if residency restrictions create some positive effect on recidivism, the net effect is still likely to be an overall increase in re-offending.

Corey Rayburn Yung, *Banishment By A Thousand Laws: Residency Restrictions On Sex Offenders*, 85 Wash. U. L. Rev. 101, 146 (2007). See also, David A. Singleton, *Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws*, 3 U. St. Thomas L.J. 600 (2006); Jill S. Levenson and Leo P. Cotter, *The Impact of Sex Offender Residence Restrictions: 1,000 Feet From Danger or One Step From Absurd*, 49 International Journal of Offender, Therapy and Comparative Criminology, 168 (2005); *No Easy Answers: Sex Offender Laws in the US*, Human Rights Watch Vol. 19, No. 4 (2007).

These are exactly the reasons that prompted the Iowa County Attorneys Association to urge the repeal of the sex offender residency law. (Appendix to Brief, p.

13) Iowa Code § 692A.2A, took effect on July 1, 2002. It restricted sex offenders from residing within 2,000 feet of a school or day care center. The Iowa County Attorneys Association issued its statement urging repeal of the law on December 11, 2006. After four years of seeing the results of the law on a daily basis, the Association concluded that the law simply did not protect children. And, it should be noted, that this statement was issued after the law had been upheld by the Eighth Circuit in *Doe v. Miller,* 405 F. 3rd 700 (8th Cir.) *cert. denied,* 126 S. Ct. 757 (2005).[1]

In 2007 the state of Minnesota considered adopting a state wide residency restriction for sex offenders. The state decided not to enact the law after it performed the only objective analysis done by any jurisdiction to date. The Minnesota Department of Corrections issued a report titled Residential Proximity & Sex Offense Recidivism in Minnesota. The conclusion was that not a single sex offenses would likely have been deterred by a residency restriction law. The report concludes:

> A residency restrictions law would likely offer, at best, a marginal impact on the incidence of sexual recidivism. This is not to say, however, that housing restrictions would never prevent a sex offender from reoffending sexually. Based on the results presented here, however, the chances that it would have a deterrent effect are slim. Indeed, over the last 16 years, not one sex offender released from a MCF has been reincarcerated for a sex offense in which he made contact with a juvenile victim near a school, park, or daycare center close to his home. In short, it is unlikely that residency restrictions would have a deterrent effect because the types of offenses such a law are designed to preent are exceptionally rare and, in the case of Minnesota, virtually non-existant over the last 16 years.

Residential Proximity & Sex Offense Recidivism in Minnesota, April 2007 p. 25.[2]

Fortunately, New Hampshire can make the same claim.

[1] The law was repealed by 2009 Acts, ch. 119, § 31.
[2] The full report can be viewed at www.doc.state.mn.us

No court has upheld a residency restrictions when using a heightened scrutiny standard

Courts are mixed as to whether sex offender residency restrictions are constitutional. Some courts have upheld them. The Eighth Circuit is the only federal circuit court so far to rule on statewide residency restrictions. In *Doe v. Miller*, supra, the Eighth Circuit found that Iowa's residency statute was rationally related to a legitimate state interest. *See also,* People v. Leroy, 357 Ill. App. 3d 530, 828 N.E. 2d 769 (2005) (prohibiting sex offenders from living within 500 feet of a playground or a facility providing programs or services for children bears a reasonable relationship to the goal of protecting children); *Lee v. State*, 895 So. 2d 1038 (Ala. Crim App. 2004) (prohibiting sex offenders from living within 2000 feet of a school is reasonable); *ACLU of NM v. City of Albuquerque*, 139 N.M. 761, 137 P. 3d 1215 (2006) (prohibiting sex offenders from residing within 1000 feet of a school is rationally related to the City's objective to protect children from sex offenders); *Spangler v. Collins*, 2012 U.S. Dist. LEXIS 54313 (S.D. Ohio Apr. 16, 2012) (Ohio's ordinance prohibiting sex offenders from residing within 1000 feet of a school, pre-school or day care center does not implicate any fundamental rights).

Other courts have determined that sex offender residency restrictions are unconstitutional. *See, Mikaloff v. Walsh*, 2007 U.S. Dist. LEXIS 65076 (N.D. Ohio Sept. 4, 2007) (law violates ex post facto); *Fross v. County of Allegheny*, 2011 Pa. LEXIS 1159, 41-42 (Pa. May 25, 2011) (town ordinance violates doctrine of pre-emption); *G.H. v. Township of Galloway*, 199 N.J. 135 (N.J. 2009) (same); *Hagan v. City of Barre*, 2009 Vt. Super. LEXIS 27 (Vt. Super. Ct. June 29, 2009) (City ordinance was ultra vires)

The feature common to all of the courts that have upheld the constitutionality of residency restrictions is that they used the "highly deferential" rational basis test. Not a single court put the government to its proof. The question before this court – does the City's sex offender sex offender residency restriction violate equal protection under a heightened scrutiny analysis – is a case of first impression. When applying the more meaningful intermediate scrutiny test, the answer is that it does.

> But do sex offender residency statutes actually protect children, or do they undermine community safety? Are these laws common sense, appropriate responses to a serious threat posed to the nation's children, or are they fear-driven reactions to high-profile media coverage of child abduction and sexual assault cases? Moreover, suppose these restrictions are not based on any evidence that they are effective in preventing or reducing child sexual abuse, but are instead hot-blooded legislative responses to public outcry generated from extensive media coverage of child abduction cases. Under such circumstances, should a court, faced with an equal protection challenge to the law, apply a toothless, highly deferential rational basis analysis? Or, should the court conduct a more meaningful review--with bite?

David A. Singleton, Sex Offender Residency Statutes and the Culture of Fear: The Case for More Meaningful Rational Basis Review of Fear-Driven Public Safety Laws, 3 U. St. Thomas L.J. 600, 601 (2006). The more meaningful review required under our state constitution leads to the inevitable conclusion that the City's residency restriction violates equal protection because it does not further the goal of protecting children.

CONCLUSION

For the reasons stated above the Appellant requests that this Honorable Court affirm the grant of summary judgment by the Trial Court.

REQUEST FOR ORAL ARGUMENT

The Plaintiff-Appellee requests fifteen minutes of oral argument. Attorney Keshen will argue the case for the Appellee.

Respectfully submitted,

WILLIAM THOMAS

By and through his attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2012, two true and complete copies of the foregoing Brief were mailed, postage prepaid, to Attorney Paul T. Fizgerald.

Barbara R. Keshen