THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS. **SUPERIOR COURT**

William Thomas

v.

Ken Merrifield and David Goldstein

No. 10-CV-682

ORDER

The petitioner, William Thomas, seeks an order declaring that Franklin City Code § 247-2 (a) and (c) are unconstitutional and enjoining the respondents, Ken Merrifield, Mayor of Franklin, and David Goldstein, Police Chief of Franklin, from enforcing § 247-2 (a) and (c). On December 27, 2010, the court granted the petitioner's preliminary injunction. The petitioner now moves for summary judgment on the merits. The respondents object. Because § 247-2 (a) and (c) violate the petitioner's equal protection rights, his motion for summary judgment is GRANTED.

In order to prevail on summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." RSA 491:8-a, III. A fact is "material" if it affects the outcome of the litigation. *Horse Pond Fish and Game Club v. Cormier*, 133 N.H. 648, 653 (1990). In considering a party's motion for summary judgment, the court examines the evidence submitted and makes all necessary inferences from that evidence in the light most favorable to the non-moving party. *Gould v. George Brox, Inc.*, 137 N.H. 85, 87 (1993). "The non-moving party may not rest on mere allegations or denials in his pleadings, ... [and the] response ... must set forth specific facts showing that there is a genuine issue for trial." RSA 491:8-a, IV. "To the extent that the non-moving party either ignores or does not dispute facts set forth in the moving party's affidavits, they are deemed

to be admitted for the purposes of the motion." *N.H. Div. of Human Serv. v. Allard*, 141 N.H. 672, 674 (1997). Mindful of this standard, the court will set forth the undisputed facts.

In May 2007, the City of Franklin adopted ordinance § 247. Under § 247-2 (a), registered sex offenders are prohibited from "resid[ing] 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." Under § 247-2 (b), a registered sex offender is prohibited from entering a school or childcare facility, unless specifically authorized. Finally, § 247-2 (c) prohibits deeded property owners from allowing registered sex offenders to reside at the owner's property if the owner's property is within a 2,500-foot radius of any of the places described in subsection (a). The term "registered sex offenders" is defined as "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." Franklin City Code, § 247-1. During the meeting to pass § 247-2, Counselor Rabinowitz, a supporter of the ordinance, stated that "he ha[d] not seen one single piece of evidence that th[e] ordinance will protect the children." He also stated that "it will give a false sense of protection."

Approximately twenty-seven years ago, the petitioner was convicted of sexually assaulting a minor child in Middlesex County, Massachusetts. He was incarcerated for approximately three years and then released. As a result of his conviction, the petitioner is required to register for life as a sex offender. There is no allegation that the petitioner has ever failed to comply with the registration requirement. In August of 2010, the petitioner and a friend moved from Massachusetts to Franklin, New Hampshire. They found an apartment to rent. The petitioner disclosed his sexual offender status to the landlord, and the two signed a one-year lease on August 27, 2010. The petitioner was required to put down a $1,000 security deposit. On September 7, 2010,

the petitioner registered as a sex offender with the Franklin Police Department, as required by RSA 651-B. At that time, the petitioner was informed that the apartment he had rented was located within a 2,500-foot radius of a school and, therefore, he was in violation of § 247-2 (a). The petitioner was given thirty days to relocate. The instant action followed.

On September 27, 2010, the petitioner sought a preliminary injunction restraining the respondents from enforcing § 247-2 (a) and (c). In support, he argued that: (1) the City of Franklin acted beyond its legal authority, or *ultra vires*, when it enacted city code § 247; (2) because the legislature has enacted a scheme pertaining to the registration and conduct of sex offenders, § 247 is preempted; (3) § 247, both facially and as applied, violates his substantive due process rights under the New Hampshire Constitution; and (4) § 247, both facially and as applied, violates his rights to equal protection of the laws under the New Hampshire Constitution.

On December 27, 2010, the court granted the petitioner's request for a preliminary injunction. The court held that § 247-2 (a) and (c) violated the petitioner's equal protection rights because the respondents failed to demonstrate that the residency restriction bore a substantial relationship to governmental interest of protecting child safety. *Thomas v. Merrifield*, Merrimack County No. 10-CV-682, Order of Dec. 27, 2010 at 10. The court rejected the petitioner's remaining arguments. The petitioner now moves for summary judgment on his declaratory judgment and permanent injunction claims. The petitioner reasserts his *ultra vires*, preemption, and equal protection arguments; however, he has not reasserted his due process argument. The petitioner admits that he qualifies as a "registered sex offender" under § 247-1.

As a preliminary matter, the respondents assert that two disputed facts preclude summary judgment: (1) that certainly most if not all of the city's affordable housing units are within the 2,500-foot exclusion zone; and (2) as a consequence of the ordinance, the City of Franklin is vir-

tually walled off from receiving new sex offenders. For the purpose of adjudicating the instant motion, the court will accept the respondents' facts—they are the non-moving parties. This is not dispositive, however, because the disputed facts do not "affect the outcome of the litigation." *Horse Pond Fish and Game Club*, 133 N.H. at 653. In other words, these facts are not material to the court's ultimate determination. Consequently, they do not preclude summary judgment. The court will now address the merits.

The petitioner seeks declaratory judgment and injunctive relief. Declaratory judgments are governed by RSA 491:22, I, which provides, in pertinent part, "Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive." A petition for declaratory judgment is a proper method for attacking the constitutionality of a statute or ordinance. *Boehner v. State*, 122 N.H. 79, 83 (1982). Further, "[t]he existence of an adequate remedy at law or in equity shall not preclude any person from obtaining ... declaratory relief." RSA 491:22, I. Where a petition for declaratory judgment is granted, "it has become common practice for the claimant to request and for the court to grant injunctive relief to prevent the responding party from taking any action inconsistent with the court's opinion." Gordon J. MacDonald, N.H. CIVIL PRACTICE AND PROCEDURE, §36.28, 36-24 (2010).

The petitioner first argues that § 247-2 (a) and (c) violate his right to equal protection under the law afforded all citizens under part I, article 12 of the New Hampshire Constitution. "[A]n equal protection challenge to an ordinance is an assertion that the government impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner." *Dow v. Town of Effingham*, 148 N.H. 121, 124 (2002). "In considering an equal protec-

tion challenge under [the New Hampshire] Constitution, [the court] must first determine the purpose and scope of the State-created classification and the individual rights affected." *Cmty. Res. for Justice, Inc.*, 154 N.H. at 758 (quotation omitted). "Classifications based upon suspect classes or affecting a fundamental right are subject to strict scrutiny." *Id.* "Classifications involving 'important substantive rights' are subject to intermediate scrutiny." *Id.* "Finally, absent some infringement of a fundamental right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality." *Id.*

The court recognizes, as do both parties, that the right to use and enjoy property is an important substantive right. Therefore, the city's residency restriction must be evaluated under the intermediate scrutiny standard. *Id.* The burden is on the respondents to demonstrate that the ordinance is substantially related to an important governmental objective. *Id.* at 761-62. The stated objective behind the residency restriction is the protection of child safety. The petitioner does not contest that child safety is an important governmental interest; rather, he asserts that the respondents have not presented evidence that would support a legislative finding that the general ban of sex offenders from living within 2,500 feet of a school, day care, playground, athletic field, public beach, or ski area would protect child safety. The court agrees.

In its prior order, the court reviewed the record and determined that the respondents failed to present sufficient evidence to support a finding that § 247-2 (a) and (c) are substantially related to the governmental interest of protecting child safety. *See Thomas*, No. 10-CV-682, at 6-11. In light of the respondents' objection to the petitioner's motion for summary judgment, the court sees no reason to revisit its analysis. The respondents argue that "significant information was gathered and discussions held during the drafting of the ordinance." Respondents' Objection to Petitioner's Motion for Summary Judgment, at 4. Their argument is unpersuasive for two rea-

sons. First, it is inconsistent with the undisputed record. The meeting minutes reveal that Counselor Rabinowitz, who voted for the residency restriction, had "not seen one single piece of evidence that th[e] ordinance will protect children." Second, the respondents' argument is far too generalized and, therefore, is insufficient. *Cmty. Res. for Justice, Inc.*, 154 N.H. at 762 (to meet its burden under intermediate scrutiny, "[t]he government may not rely upon ... overbroad generalizations."). Thus, § 247-2 (a) and (c) violate the petitioner's equal protection rights.

Because § 247-2 (a) and (c) violate the petitioner's equal protection rights, the court need not reach the petitioner's remaining arguments. The petitioner's motion for summary judgment is GRANTED. The court cautions that § 247-2 (b) is unaffected by this order. Thus, although the petitioner may reside within 2,500 feet of a school, he may not set foot upon its premises without prior authorization.

So ORDERED.

Date: January 18, 2012

LARRY M. SMUKLER
PRESIDING JUSTICE