



COPY

Submitted by MCJ  
Date 9/23/15  
Received by KL  
Date 9-23-15

TOWN OF CHARLTON  
Minutes of Regular Selectmen's Meeting  
Tuesday – September 1, 2015 at 6:30pm

Present: Vice-Chairman – Joseph J. Szafarowicz, Clerk – Cynthia B. Cooper and Members – David M. Singer and John P. McGrath. Also present: Town Administrator - Robin L. Craver. Absent: Chairman – Frederick C. Swensen.

*NOTE: Some matters may have been taken out of agenda order but were typed up in agenda order for ease of locating information when necessary.*

I. Call to Order:

1. Chairman Szafarowicz called the meeting to order at 6:37pm with the pledge to the flag and a moment of silence for Bruce Hebert. (Lakes & Ponds, Prindle Lake Dam Committee)
2. Chairman Szafarowicz reminded everyone to treat each other courteously and be acknowledged by the Chair before speaking. Those in attendance are requested to turn off cell phones or put them on vibrate so as not to disrupt the proceedings and remove hats, if any.

II. Consent Agenda:

1. Minutes of Regular Meeting – August 18, 2015. **Motion by Mrs. Cooper to approve the minutes, seconded by Mr. McGrath, motion carries with Mr. McGrath and Mr. Singer abstaining.**

III. Community Relations, Announcements and Open Forum:

- Chairman Szafarowicz read the announcements. He stated that we have a new phone system in the town hall and thanked Curt Meskus for putting in many, many hours installing this system.
- Chief Pervier came forward and said that the Fireworks on Saturday as part of Old Home Day, somewhere between 4 and 5pm, the road will be shut down and traffic will be re-routed. On Monday, Main St. from 9am – 5pm will be shut down and traffic will be re-routed. He thanked all the individuals and businesses that helped to make the fireworks happen.

IV. Appointments/Resignations:

V. Scheduled Appointments:

**6:40pm** – Motorsports Zoning – Russ Jennings. Mr. Jennings came forward and said that he is not here representing Sunset City. He is here regarding a conversation he had with Mr. Singer regarding motorsports in general and zoning and his project where currently, it could end up in someone's back yard. These things need offset distances. He has also spoken with the Town Administrator. He is here to ask the Board to consider setting up a committee to establish someplace in zoning for Motorsports so that it does not wind up directly in someone's back yard. He also spoke with Alan Gordon who would be glad to speak to his board about it. Mr. Singer feels it a great idea. It's a way to bring everyone together and work together on a solution. He also said he would be happy to sit on this committee. Mr. McGrath agreed. Mr. Jennings stated that Mr. Gordon suggested attending the Planning Board meeting tomorrow night and run it by them. They know zoning.

**7:00pm** – Solar panels on landfill(s) – Matt Gagner and Nelson Burlingame came forward. They had an owner of a solar company come to them and they wanted to put solar panels on the landfill. Matt walked the area with them. The Board of Health had a concern about the old, old, landfill, the company would like to utilize that as

well. The Board of Health is responsible for maintaining this area and they have to mow it twice a year. This company would be responsible for maintaining the area. Mr. Singer would like a list of all the Board of Health's concerns and how they will be addressed. The Board of Health is concerned about the old, old landfill. They said that someday, the DEP will be knocking on the door and telling them they have to cap it. The money portion to cap it will be up to the Selectmen. Mr. McGrath thanked the Board of Health for coming up with a revenue source. Mrs. Craver suggested starting out with our consultant, CDM about their concerns if it makes sense to put these things on and what kind of assurances would we need. Then we would write an RFP that would have everything the town would want to protect itself. **Motion by Mr. McGrath start investigating the possibility of putting solar on the capped landfill, seconded by Mrs. Cooper.** Mr. Burlingame asked if they could add to the motion both landfills. **Mr. McGrath amended his motion to include the old landfill and the capping. Mrs. Cooper amended her second. Vote on motion: motion passes unanimously.** Mrs. Craver will also contact DEP about the capping of the old landfill.

VI. New Business:

1. Site Plan Application – ZPT Energy Solutions LLC Solar Array. Mrs. Craver stated that we have received a copy of a site plan application submitted to the Planning Board by ZPT Energy Solutions LLC to develop a 3.86 Megawatt commercial ground mounted solar array on approximately eighteen acres of a 67-acre site located at 294 Southbridge Road (Route 169) (Assessors Map 62, Block A, Parcels 6 and 8). Said property is located behind Incom Fiberoptics and is zoned Industrial-General. The Board is asked to review and provide comments, if any, no later than Wednesday, September 9<sup>th</sup>. Mr. Singer asked that the Planning Board take into consideration and require that there is adequate shielding so that it is not an eyesore.
2. Special License Request – Class Reunion at Masonic Home. Mrs. Craver stated that attached is a request from Cathleen Kuehl for a special liquor license for Wine and Malt beverages to be used on Saturday, September 5, 2015 at Masonic Home for a class reunion from 5:30pm to 9:30pm. This request has been approved by the Building Commissioner, Fire Department and Police Department. Per the Board's policy, the license if approved, should be issued for two additional days for the following reasons:

Day 1 – to allow delivery of alcohol to establishment (no sales allowed)

Day 2 – For sale on the approved date and time as listed

Day 3 – To allow for pick-up of any unused alcohol (no sales allowed)

Mrs. Craver would recommend the Board approve the special license as requested with the dates on the license to be September 4, 2015 through September 6, 2015. For information purposes, Masonic Home has closed the Overlook Catering therefore, they have no liquor license at this time. This is the purpose of the request for special license. **Motion by Mr. Singer to approve the license for September 4 – September 6, seconded by Mr. McGrath, motion passes unanimously.**

VII. Old Business:

1. Open Special Town Meeting Warrant. Mrs. Craver stated that at the Board's last meeting, the calendar and date for the Special Town Meeting on October 20, 2015 was approved. Tonight the Board is scheduled to open the warrant. Once opened, she will notify the Department Heads. **Motion by Mr. McGrath to open the Special Town Meeting Warrant for the Special Town Meeting on October 20, 2015 and that the calendar be provided to the departments, seconded by Mr. Singer, motion passes unanimously.**

VIII Committee Reports:

Mr. McGrath stated that they had the Municipal Building Committee Meeting and satisfied the questions regarding the ongoing accessibility project.

IX BOS Policy Review:

X Town Administrator Report: Mrs. Craver reviewed her report. Mr. Singer asked how the state could overrule the federal in the sex offender issue. Mr. McGrath suggested waiting for Town Counsel to review. Mrs. Craver will let Town Counsel know the Board has concerns with this. She reminded the Board about the Boards & Goals meeting for next Tuesday. Also, the Board had asked her about a contact for residents regarding Casella. We started out at 500 feet but realized it needed to be wider so we are sending out about 100 letters. She is also working with Bigelow Nurseries to get the two trees put in on the common.

XII Other Business: (unknown at time of posting)

XIII Next Meeting Announcement:

- \* BOS Goals & Objectives – September 7, 2015 at 6:00pm
- \* Government Study Committee/BOS – September 15, 2015 at 5:00pm
- \* Regular Selectmen’s Meeting – September 1, 2015
- \* BOS Special Meeting – September 22, 2015 at 6:00pm
- \* Regular Selectmen’s Meeting – September 29, 2015

XIV Adjourn/Executive Session:

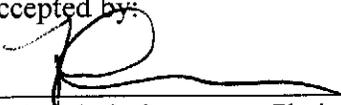
**Motion by Mr. McGrath to enter into executive session at 7:22 pm under M.G.L. c. 30A, sec. 21, #1 – to discuss the reputation, character, physical condition or mental health, rather than professional competence of an individual or discuss the discipline or dismissal of, or complaints or charges against a public officer, employee, staff member or individual, #3 – to discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and #6 – to consider the purchase, exchange, lease or value of real estate if the chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body, seconded by Mr. Singer. Roll call vote taken: Mrs. Cooper – aye, Mr. McGrath – aye, Mr. Singer and Chairman Szafarowicz – aye. The Chair declares that an open meeting may have a detrimental effect on the negotiating position of the public body and that the board will reconvene to open session for the purpose of adjourning.**

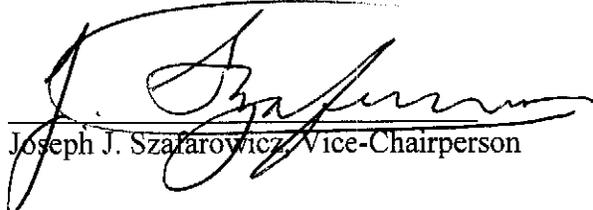
**Motion by Mr. McGrath to adjourn at 7:45pm, seconded by Mr. Singer, motion carries.**

Submitted by:

Mary C. Devlin  
Administrative Assistant

Accepted by:

  
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Frederick C. Swensen, Chairman (absent)

  
\_\_\_\_\_  
Joseph J. Szafarowicz, Vice-Chairperson

  
\_\_\_\_\_  
Cynthia B. Cooper, Clerk

\_\_\_\_\_  
David M. Singer, Member

  
\_\_\_\_\_  
John P. McGrath, Member

TOWN OF CHARLTON  
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Phone: (508) 248-2206  
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TO: Board of Selectmen  
FROM: Robin L. Craver, Town Administrator   
DATE: August 31, 2015  
SUBJECT: Town Administrator's Report – for Selectmen's meeting of 9/01/15

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**Sex Offender ByLaw**- The Supreme Judicial Court has invalidated all sex offender residency bylaws across the state in a case against the City of Lynn, which means that the Charlton is null and void now. Town Counsel has informed the Chief of Police that he should not take any actions to enforce the by law. The complaint alleged, and the court agreed the following claims under the United States and Massachusetts Constitutions: (1) violation of the Home Rule Amendment (Massachusetts Constitution); (2) violation of the clauses prohibiting ex post facto laws; (3) violation of the right to substantive due process; (4) violation of the right to familial association; (5) violation of the right to be protected from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and cruel or unusual punishment under art. 26 of the Massachusetts Declaration of Rights; and (6) violation of the right to travel.

I have attached the decision for your review as provided by Town Counsel.

**Special Town Meeting**- We are in the process of developing a draft warrant and have had several requests for articles. I expect I will have a preliminary list for you next week.

**Craver, Robin**

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**From:** Jim Cosgrove <jcosgrove.law@verizon.net>  
**Sent:** Sunday, August 30, 2015 1:30 PM  
**To:** Craver, Robin; Swensen, Frederick; Pervier, James  
**Cc:** Patti Geddes  
**Subject:** SJC Decision Invalidating City of Lynn Sex Offender Residency Bylaw  
**Attachments:** James Cosgrove.vcf  
  
**Importance:** High

Dear Robin, Rick and Chief:

Below is a copy of the Supreme Judicial Court's decision of this past Friday, Aug. 28, invalidating the City of Lynn's sex offender residency bylaw. You probably have seen media reports as to same. I am forwarding it since Charlton, as you know, had enacted such a bylaw.

I did not carefully review all of the decision, so as to hold down legal expense, but the portions to which I have added highlighting (and bold font in a couple of instances) below make clear the Court's diktat that local municipalities cannot regulate the residency of convicted sex offenders. So I advise against any attempt to enforce the Charlton bylaw.

Cordially,

James F. Cosgrove, Town Counsel

JOHN DOE<sup>1</sup> & others<sup>2</sup> vs. CITY OF LYNN.

<sup>1</sup> A pseudonym.

<sup>2</sup> Charles Coe and Paul Poe, also pseudonyms. The named plaintiffs are registered **sex offenders** suing on behalf of themselves and other persons similarly situated.

SJC-11822

SUPREME JUDICIAL COURT OF MASSACHUSETTS

2015 Mass. LEXIS 620

April 9, 2015, Argued  
August 28, 2015, Decided

**NOTICE:**

THIS OPINION IS SUBJECT TO FORMAL REVISION BEFORE PUBLICATION IN THE MASSACHUSETTS REPORTER USERS ARE REQUESTED TO NOTIFY THE CLERK OF THE COURT OF ANY FORMAL ERRORS SO THAT CORRECTIONS MAY BE MADE BEFORE THE BOUND VOLUMES GO TO PRESS.

**PRIOR-HISTORY:** Essex. Civil action commenced in the Superior Court Department on April 12, 2012. The case was heard by Timothy Q. Feeley, J., on a motion for partial summary judgment, and entry of final judgment was ordered by him. The Supreme Judicial Court granted an application for direct appellate review.

**HEADNOTES-1**

*Sex Offender. Municipal Corporations, By-laws and ordinances, Home rule. Constitutional Law, Home Rule Amendment.*

**COUNSEL:** John A. Kiernan (Robert E. Koosa with him) for the defendant.

John Reinstein (Benjamin H. Keehn, Committee for Public Counsel Services, & Jessie J. Rossman with him) for the plaintiffs.

Amy M. Belger, Andrew S. Crouch, & Jennifer J. Cox, for Jacob Wetterling Resource Center & others, amici curiae, submitted a brief.

**JUDGES:** Present: Gants, C.J., Spina, Cordy, Botsford, Duffly, Lenk, & Hines, JJ.

**OPINION BY:** HINES

**OPINION**

HINES, J. In this appeal, we determine whether an ordinance imposing restrictions on the right of **sex offenders** to reside in the city of **Lynn** (city) is prohibited by the Home Rule Amendment, art. 89, § 6, of the Amendments to the Massachusetts Constitution, and the Home Rule Procedures Act, G. L. c. 43B, § 13. The plaintiffs, who represent a certified class of **sex offenders** subject to the ordinance, challenged the constitutionality of the ordinance on various grounds.<sup>3</sup> A judge in the Superior Court invalidated the ordinance under the Home Rule Amendment. The city appealed and we granted the plaintiffs' application for direct appellate review. We affirm the Superior Court judgment based on our conclusion that the ordinance is inconsistent with the comprehensive statutory scheme governing the oversight of convicted **sex offenders**, and therefore, it fails to pass muster under the Home Rule Amendment and the Home Rule Procedures Act.<sup>4</sup> *Background.* We summarize the undisputed facts as drawn from the summary judgment record.

**FOOTNOTES**

<sup>3</sup> The complaint alleged the following claims under the United States and Massachusetts Constitutions: (1)

violation of the Home Rule Amendment (Massachusetts Constitution); (2) violation of the clauses prohibiting ex post facto laws; (3) violation of the right to substantive due process; (4) violation of the right to familial association; (5) violation of the right to be protected from cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution and cruel or unusual punishment under art. 26 of the Massachusetts Declaration of Rights; and (6) violation of the right to travel.

4 We acknowledge the amicus brief filed by Jacob Wetterling Resource Center, Association for the Treatment of Sexual Abusers, Massachusetts Association for the Treatment of Sexual Abusers, Inc., Reform **Sex Offender** Laws, Inc., and Florida Action Committee.

1. *The ordinance.* The city adopted an "Ordinance Pertaining to **Sex Offender** Residency Restrictions in the [city]" (ordinance) on January 12, 2011. The stated purpose of the ordinance is to "reduce the potential risk of harm to children of the community by impacting the ability of registered **sex offenders** to be in contact with unsuspecting children in locations that are primarily designed for use by, or are primarily used by children." Observing that "[r]egistered **sex offenders** continue to reside in close proximity to public and private schools, parks and playgrounds," and that "registered **sex offenders** will continue to move to buildings, apartments, domiciles or residences in close proximity to schools, parks and playgrounds," the city council enacted the ordinance to "add location restrictions to such **offenders** where the [S]tate law is silent." The ordinance imposes broad restrictions, with only narrow exceptions, on the ability of level two and level three registered **sex offenders** to reside in the city.<sup>4</sup> The ordinance establishes the area within 1,000 feet of a school or park as a residential exclusion zone for level two and level three **sex offenders**, and includes in its description of "school" all public, private, and church schools, and any other business permitted as a school. The ordinance also applies to all temporary and permanent residences except a "residence at a hospital or other healthcare or medical facility for less than fourteen consecutive days or fourteen (14) days in the aggregate during any calendar year." The geographical and temporal reach of the ordinance effectively prohibits all level two and level three **sex offenders** from establishing residence, or even spending the night in a shelter, in ninety-five per cent of the residential properties in **Lynn**.<sup>6</sup> The ordinance would affect, at least in some degree, all 212 registered level two and level three **sex offenders** residing in the city, as of April 22, 2014. A **sex offender** required by the ordinance to move from his or her residence could encounter similar restrictions in attempting to relocate to nearby cities and towns. At least forty municipalities have adopted **sex offender** residency restrictions.<sup>7</sup> The expansive coverage of the ordinance is mitigated by narrow exceptions to the residency restrictions applicable to those who (1) have established, prior to the effective date of the ordinance, a permanent residence within a restricted area by purchasing real property or by being the lessee of an unexpired lease or rental agreement; (2) are a "minor"; (3) are "residing with a person related by blood or marriage within the first degree of kindred"; or (4) have been residing at a permanent residence before the school or park creating the applicable restricted area was established.

## FOOTNOTES

<sup>5</sup> The "Ordinance Pertaining to **Sex Offender** Residency Restrictions in the City of **Lynn**" (ordinance) also creates "Child Safety Zones," wherein level two and level three **sex offenders** are prohibited from entering a

school, park, or recreational facility except in certain circumstances and from "loiter[ing]" within 1,000 feet of such facilities. The parties, however, focused their arguments on the residency provision of the ordinance. The plaintiffs' motion for partial summary judgment sought invalidation of the entire ordinance. The city of **Lynn** (city) did not present any argument, and the court entered a judgment declaring that the "Residency Ordinance" violates the Home Rule Amendment. Thus, we know of no compelling reason to uphold any provision of the ordinance in light of the comprehensive State law discussed herein. Accordingly, we affirm the grant of partial summary judgment in favor of the plaintiffs, which invalidated the entire ordinance.

6 We note here the undisputed record evidence that of the 19,320 real estate parcels zoned as residential, 18,421 are located within 1,000 feet of a school or park.

7 According to an affidavit dated February 20, 2014, submitted as part of the summary judgment record and not disputed by the city, the following list of forty municipalities have enacted residency restrictions on certain **sex offenders**: Ashland; Ayer; Barre; Barnstable; Braintree; Charlemont; Charlton; Chelsea; Colrain; Dedham; Dudley; Fall River; Fitchburg; Framingham; Hanover; Hanson; Hopkinton; Hubbardston; Leominster; **Lynn**; Marlborough; Mendon; Natick; Norwood; Oxford; Pembroke; Revere; Rockland; Shirley; Somerset; Southborough; Spencer; Springfield; Swansea; Townsend; Waltham; Warren; Webster; West Boylston; and Weymouth. The plaintiffs note that the Attorney General's office has continued to approve similar regulations, citing a letter from the Attorney General to North Reading, sent under G. L. c. 40, § 32, which approved North Reading's residency restriction **bylaw** on January 20, 2015.

Failure to comply with the ordinance results in a penalty of \$300 for each day that a **sex offender** subject to the ordinance remains in a restricted area thirty days after receiving a notice to move from the city, or if such **sex offender** moves within the city into a restricted area. Additionally, if there is a "subsequent offense," the **sex offender's** "landlord, parole officer and/or probation officer, and the . . . **Sex Offender** Registry Board" (board) shall be notified that the **offender** has violated a municipal ordinance.

2. *Procedural history.* The plaintiffs, who represent a certified class of "all registered [1]level [two] and [1]level [three] **sex offenders** who are now or who may in the future be prohibited from living at various places in the [city] by the city's ordinance pertaining to **sex offender** residency restrictions," commenced this action after receiving the notices to move, as authorized under the ordinance. The city sent letters notifying each that he lives within a restricted area under the ordinance and that he has thirty days from the date of the letter "to relocate to another address which is in compliance with the [o]rdinance" or be subject to a fine of \$300 for each day of residing in a restricted area.\* The plaintiffs filed a motion for partial summary judgment on the counts in the complaint asserting that the ordinance (1) violates the Home Rule Amendment; (2) is an ex post facto law under the Federal and State Constitutions; and (3) violates the plaintiffs' right to travel under the Massachusetts Constitution.† The city defended the ordinance by arguing, with regard to the Home Rule Amendment, that the

residency restriction is not inconsistent with State law, and that the shared purpose — the protection of children from sexual predators — supports and supplements the law governing the oversight of **sex offenders**.

## FOOTNOTES

<sup>8</sup> The letters state that the city is "unaware of any statutory exceptions" that may apply.

<sup>9</sup> During the course of litigation, the parties argued repeatedly over the scope of discovery. The judge limited the subjects allowed in discovery and impounded identification of the plaintiffs' names. The judge also denied the city's motions to compel the criminal records and **Sex Offender** Registry Board (board) classification recommendation files for the members of the plaintiff class. Although the city argues that there are numerous material disputes of fact deriving from the limited discovery, the information that was sought is not relevant to the issue of whether the ordinance violates the Home Rule provisions. See art. 89, § 6, of the Amendments to the Massachusetts Constitution; G. L. c. 43B, § 13.

In a thorough and well-reasoned memorandum of decision, the judge granted partial summary judgment to the plaintiffs and invalidated the ordinance under the Home Rule Amendment, concluding that that "the totality of the circumstances support an express legislative intent to forbid local activity in the area of the civil regulation and management of the post-incarceration lives of convicted **sex offenders**." In particular, the judge determined that the ordinance is inconsistent with G. L. c. 6, §§ 178C-178Q, the **Sex Offender** Registry Law (registry law); and G. L. c. 123A, the law providing for the "Care, Treatment and Rehabilitation of Sexually Dangerous Persons" (SDP law). In light of this disposition, however, the judge declined to review the remaining constitutional claims.

*Discussion.* The city argues on appeal that the ordinance was adopted as a valid exercise of its police power, that there is no evidence of legislative intent to occupy the field governing the management of postincarceration **sex offenders**, and the ordinance does not conflict with State law. The plaintiffs counter that the judge correctly determined that the ordinance is unconstitutional and urges this court to affirm the judge on the broader constitutional grounds asserted in their motion for partial summary judgment. We decline to reach the broader constitutional grounds but we agree that the judge properly invalidated the ordinance as unconstitutional under the Home Rule Amendment.

A local regulation is unconstitutional under the Home Rule Amendment if it is "inconsistent" with the constitution or laws of the Commonwealth. *Connors v. Boston*, 430 Mass. 31, 35 (1999). This principle is derived from the language of the Home Rule Amendment that provides: "Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter, whether or not it has adopted a charter pursuant to section three." Art. 89, § 6, of the Amendments to the Massachusetts Constitution. "[T]he touchstone of the analysis [of whether a local ordinance is inconsistent with State law] is whether the State Legislature intended to preempt the city's authority to act." *Connors, supra*, citing *Bloom v. Worcester*, 363 Mass. 136, 155 (1973). Review of a

local ordinance is focused on the Legislature's preemption prerogative because, as the title suggests, the Home Rule Amendment was enacted to restore to municipalities the "right of self-government in local matters." Art. 89, § 1, of the Amendments to the Massachusetts Constitution. The genesis of the Home Rule Amendment as a means to expand municipal legislative authority" thus informs the analytical directive that in reviewing a local ordinance, the "question is not whether the Legislature intended to grant authority to municipalities to act . . . , but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question]." *Wendell v. Attorney Gen.*, 394 Mass. 518, 524 (1985). "Municipalities enjoy 'considerable latitude' in this regard," and a local regulation will not be invalidated unless the court finds a "sharp conflict" between the local and State provisions. *Easthampton Sav. Bank v. Springfield*, 470 Mass. 284, 289 (2014), quoting *Bloom*, 363 Mass. at 154. A sharp "conflict" appears when either the legislative intent to preclude local action is clear, or, absent plain expression of such intent, the purpose of the legislation cannot be achieved in the face of the local by-law." *Easthampton Sav. Bank, supra*, quoting *Grace v. Brookline*, 379 Mass. 43, 54 (1979). Where, as here, the Legislature is silent on the issue of local regulation, we also may infer an intent to forbid local regulation if "legislation on a subject is so comprehensive that an inference would be justified that the Legislature intended to preempt the field." *Easthampton Sav. Bank, supra*, quoting *Wendell*, 394 Mass. at 524. The burden is on the challenger to establish that the local enactment is "inconsistent" with the Constitution or State law. *Springfield Preservation Trust, Inc. v. Springfield Library & Museums Ass'n, Inc.*, 447 Mass. 408, 418 (2006), citing *Grace, supra* at 49-50.

## FOOTNOTES

<sup>10</sup> The Home Rule Amendment was approved by a convention of the House and Senate in 1963 and 1965, and adopted by the voters in 1966. Massachusetts Legislative Research Council Report Relative to Revising the Municipal Home Rule Amendment, 1971 Senate Doc. No. 1455, at 58-59. It annulled art. 2 of the Amendments to the Massachusetts Constitution, *id.* at 58, which had established municipalities as "hierarchical subordinates to the state Legislature that could only enact local legislation after receiving an affirmative grant of power" from the Legislature. See Jerison, Home Rule in Massachusetts, 67 Mass. L. Rev. 51, 51 (1982). Article 89, § 1, of the Amendments to the Massachusetts Constitution declared: "It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish by law in accordance with the provisions of this article."

We turn now to the application of these principles to the ordinance. Based on our *de novo* review of the judge's decision, *Twomey v. Middleborough*, 468 Mass. 260, 267 (2014), citing *Ritter v. Massachusetts Cas. Ins. Co.*, 439 Mass. 214, 215 (2003), we conclude that the ordinance is inconsistent with the comprehensive scheme of legislation intended to protect the public from convicted **sex offenders** and, thereby, manifests the "sharp conflict" that renders it unconstitutional under the Home Rule Amendment. Although the registry law and the other laws governing **sex offenders** do not expressly prohibit local regulation, **we infer from the comprehensive nature of the statutory scheme for oversight of sex offenders and the negative effect that the ordinance may have on the monitoring and tracking of sex offenders, that the Legislature intended to**

## **preclude local regulation of sex offender residency options.**

To provide context for our conclusion that the Legislature intended to preclude further regulation of **sex offender** residence options, we first recapitulate the depth and breadth of the legislation mandating oversight of **sex offenders**. In 1999, the Legislature enacted a comprehensive package of laws which effected a major overhaul of the statutory scheme governing the identification, treatment and postrelease management of convicted **sex offenders**. St. 1999, c. 74. That package of laws, described as "An Act improving the **sex offender** registry and establishing civil commitment and community parole supervision for life for **sex offenders**," includes the registry law, G. L. c. 6, §§ 178C-178Q. St. 1999, c. 74, as amended by St. 2003, c. 26, § 12. The stated purpose of the act is to "assist local law enforcement agencies' efforts to protect their communities by requiring **sex offenders** to register and to authorize the release of necessary and relevant information about certain **sex offenders** to the public as provided in this act." St. 1999, c. 74, § 1. It accomplishes that purpose through three primary mechanisms: (1) compelling **sex offenders** to register and maintain current personal information with the board and local police, and distributing such information in accordance with the registry law, G. L. c. 6, §§ 178C-178Q, inserted by St. 1999, C. 74, § 2, as amended by St. 2003, c. 26, § 12; (2) civilly confining certain **offenders** deemed most likely to reoffend, G. L. c. 123A, inserted by St. 1999, c. 74, §§ 3-8; and (3) controlling certain aspects of the postincarceration lives of certain **sex offenders**, G. L. c. 127, § 133D, inserted by St. 1999, c. 74, § 9 (community parole supervision for life).

The first mechanism in the 1999 registry law, as amended through St. 2013, c. 63, requires that **sex offenders** update their registration information annually and when they change residences, employment, or schooling; a **sex offender** who is homeless must also update their registration information every thirty days and wear a global positioning system (GPS) device. G. L. c. 6, §§ 178F, 178F 1/2, 178F 3/4. The law defines who is considered a "**sex offender**"; creates the board; requires **sex offenders** to register with the board; requires the board to create a central computerized registry of **sex offender** information and transmit that data to the Federal Bureau of Investigation and to police departments in the municipalities where the **offender** intends to live and work; creates a classification system for **offenders** subject to judicial review; and, after classification, requires **sex offenders** to maintain current registration information with local police. G. L. c. 6, §§ 178C, 178D, 178E, 178F, 178F 1/2, 178K, 178L, 178M. The law creates criminal penalties for failing to register and provides a mechanism for terminating the obligation to register. G. L. c. 6, §§ 178F, 178G, 178H, 178K.

The registry law further provides guidelines for determining the **offender's** classification level, which is based on the risk of reoffense and the public safety interest in making registration information available to the public. See G. L. c. 6, § 178K (2) (a)-(c). In that regard, the classification level assigned to each **sex offender** depends, in part, on the amount of personal information deemed necessary for public safety and appropriate for public availability.<sup>11</sup> Registration information for level one **sex offenders** is not provided to the public, information for level two and level three **offenders** is available to the public by request or on the Internet,<sup>12</sup> and information for level three **offenders** may be disseminated actively to the public. G. L. c. 6, §§ 178D, 178I, 178J.

## **FOOTNOTES**

<sup>11</sup> The classification levels are to be determined based on the risk of reoffense, the degree of dangerousness posed to the public, and whether a public safety interest is served by public availability of information about the **sex offender**. G. L. c. 6, § 178K.

<sup>12</sup> Initially, only registration information for level three **sex offenders** was publically available on the Internet.

St. 2003, c. 140, § 5. Level two **sex offenders** were added in 2013. St. 2013, c. 38, §§ 7-13. See *Moe v. Sex Offender Registry Bd.*, 467 Mass. 598, 616 (2014) (declaring unconstitutional retroactive application of amendment regarding level two data).

This framework demonstrates the legislative priority attached to monitoring the residence, employment, and schooling locations of **sex offenders** as a means to protect the public from **sex offenders**. That monitoring **sex offenders** is a priority is demonstrated clearly by the Legislature's choice to insert only a narrow residency restriction in the registry law. That restriction only bars level three **offenders** from residing in rest homes or similar long-term care facilities. G. L. c. 6, § 178K (2) (e). Although we concluded in *Doe v. Police Comm'r of Boston*, 460 Mass. 342, 343 (2011), that this restriction was unconstitutional without an individualized hearing to determine the risk posed by the petitioner to the vulnerable community sought to be protected, the restriction is instructive of legislative intent. This provision demonstrates that the Legislature considered and addressed potential risks involved with **sex offender** residency in relation to a vulnerable population. We note that the Legislature limited its restriction to those **offenders** seeking to reside in an integrated setting with a vulnerable population and did not include those seeking to reside geographically close to a vulnerable population. We infer from the details of the rest home restriction that the Legislature intended to exercise control over any **sex offender** residency requirements at the State level and that the Legislature may not have considered it appropriate to create a blanket prohibition on residency. The ordinance, which restricts all level two and level three **sex offenders** from living in ninety-five per cent of the residential areas of the city, conflicts with the relatively narrow rest home restriction created by the Legislature and is thus inconsistent with State law.

As a final observation on the legislative choice to define the **sex offender** residency restriction narrowly, we note the grave societal and constitutional implications of the de jure residential segregation of **sex offenders**. Except for the incarceration of persons under the criminal law and the civil commitment of mentally ill or dangerous persons, the days are long since past when whole communities of persons, such Native Americans and Japanese-Americans may be lawfully banished from our midst.<sup>13</sup> Also, because of the tension between a **sex offender's** liberty interest, *Doe v. Sex Offender Registry Bd.*, 460 Mass. 336, 338 (2011), and the imperatives of public safety, the Legislature has demonstrated a concern for careful crafting of laws in a field fraught with constitutional peril.<sup>14</sup> See *Opinion of the Justices*, 423 Mass. 1201, 1202-1203 (1996) (providing guidance from this court in determining constitutionality of community notification provisions of registry law). For this reason as well, the Legislature cannot have intended to permit local regulation of **sex offender** residency.

## FOOTNOTES

<sup>13</sup> For later-condemned examples of banishing communities of people in the United States, see *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-627, 630-631 (1970) (early 1800s treaties forcing Indian tribes to migrate to new land uninhabited by settlers) and *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (1940s exile of persons of Japanese ancestry from west coast).

<sup>14</sup> Constitutional peril is demonstrated through several cases challenging the constitutionality of the **sex offender** statutes. See, e.g., *Commonwealth v. Cole*, 468 Mass. 294, 296 n.4, 308 (2014) (community parole supervision for life [CPSL] violates separation of powers provision of Massachusetts Constitution); *Moe v.*

*Sex Offender Registry Bd.*, 467 Mass. 598, 599 (2014) (retroactive community notification of level two offenders violates due process provision of Massachusetts Constitution); *Doe v. Sex Offender Registry Bd.*, 459 Mass. 603, 621 (2011) (challenging CPSL statute on ex post facto grounds); *Opinion of the Justices*, 423 Mass. 1201, 1202-1203 (1996) (advising Senate of implication of double jeopardy provision of Federal Constitution and due process, ex post facto, equal protection, and cruel and unusual punishment provisions of Federal and Massachusetts Constitutions on community notification).

Apart from the conflict with the registry law's narrowly defined residency restriction, the ordinance also is inconsistent with the registry law in that it would undermine the effectiveness of the law's classification system. The Legislature set forth guidelines to be used by the board in classifying **sex offenders** and included consideration of whether the "**sex offender** is residing in a home situation that provides guidance and supervision." G. L. c. 6, 178K (1) (c). The board expanded on that factor by requiring consideration of whether an **offender's** "living and work situation is stable." 803 Code Mass. Regs. § 1.40(12) (2013) (identifying supportive home environment as factor minimizing **sex offender's** risk to reoffend and degree of dangerousness). By requiring level two and level three **sex offenders** to move from their residences or face a civil penalty of \$300 per day, the ordinance disrupts the stability of the home situations of **sex offenders**. As a supervised and stable home situation has been recognized as a factor that minimizes the **sex offender's** risk of reoffense,<sup>15</sup> this disruption is inconsistent with the Legislature's goal of protecting the public. Insofar as the ordinance is intended to impose residency restrictions on those **sex offenders** who may pose a risk to public safety that cannot be accommodated by the registry law, the second mechanism in the 1999 package of laws, the SDP law, serves that purpose. St. 1999, c. 74, §§ 3-8, amending G. L. c. 127A. Through the civil commitment procedure under G. L. c. 123A, the Legislature already has provided a method to exclude those **sex offenders** determined to be most likely to reoffend from the general population, even after their incarceration has been completed. G. L. c. 123A. Before a **sex offender** is released from incarceration, confinement, or commitment (with a limited exception for an **offender** imprisoned for six months or less on a parole violation), a determination is made whether that **offender** is likely to be a sexually dangerous person. G. L. c. 123A, §§ 12-13. If a judge determines, in accordance with certain procedures and evidentiary standards, that an **offender** has been "convicted of a sexual offense, suffers from a mental abnormality or personality disorder that renders him a menace to the health and safety of others, and is likely to engage in sexual offenses if not confined," the Commonwealth may civilly confine the **offender**.<sup>16</sup> *Commonwealth v. Fay*, 467 Mass. 574, 580, cert. denied, 135 S. Ct. 150 (2014), citing G. L. c. 127A, §§ 1, 14. See *Fay, supra* at 585, n.13. Accordingly, the SDP law is the Legislature's chosen method to control **sex offenders** where it has been determined that maintaining and distributing the **offender's** registry information is insufficient to protect a community's public safety interest. The SDP law, therefore, further demonstrates the intent of the Legislature to focus on maintaining and distributing **sex offender** information as a means to protect the public for **offenders** who are not deemed dangerous enough to confine and the ordinance conflicts with that purpose by intruding on the controls deemed appropriate by the Legislature.

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<sup>15</sup> See 803 Code Mass. Regs. § 1.40(12) (2013). See generally *In re Taylor*, 60 Cal. 4th 1019, 1040-1041 (2015) (finding residency restrictions unconstitutional where restrictions increased homelessness and "hampered the surveillance and supervision" of **offenders** subject to restriction); Levenson & Cotter, *The*

Impact of **Sex Offender** Residence Restrictions: 1,000 Feet from Danger or One Step from Absurd?, 49 Int'l J. **Offender** Therapy & Comp. Criminology 168, 169, 175 (2005) (decreased housing options from residency restrictions result in homelessness and transience, make monitoring and treatment more difficult, and exacerbate **sex offender** recidivism); Yung, Banishment by a Thousand Laws: Residency Restrictions on **Sex Offenders**, 85 Wash. U. L. Rev. 101, 141-142 (2007) (potential of **sex offender** ghettos to provide networking opportunities for future offenses and create "environments in which sexual violence is the norm, not the exception").

<sup>16</sup> A committed **sex offender** may be discharged after a hearing if the trier of fact does not find that the person remains a sexually dangerous person. G. L. c. 123A, § 9. If discharge is granted, notice is given to local police where the **offender** plans to reside and other applicable parties. *Id.*

The third mechanism in the 1999 package of laws, the community parole supervision for life (CPSL) law,<sup>17</sup> together with other parole and probation laws, was intended to allow the Commonwealth to control **sex offenders'** postincarceration lives by requiring certain conditions dependent on the **offender's** particular situation. See G. L. c. 127, §§ 133A (parole), 133D (CPSL), and 133D 1/2 (parole and CPSL controls); G. L. c. 265, § 47 (probation controls). In addition to discretionary controls that may be assessed, the Legislature mandated that all persons under such controls wear a GPS device and be subject to certain geographic exclusion zones, "in and around the victim's residence, place of employment and school and other areas defined to minimize the [**offender's**] contact with children, if applicable." G. L. c. 127, § 133D 1/2. G. L. c. 265, § 47. See *Commonwealth v. Guzman*, 469 Mass. 492, 493 (2014) (GPS monitoring mandatory where defendant sentenced to probationary term for enumerated offense).<sup>18</sup> The targeted approach to controlling **sex offenders** based on their particular circumstance and the GPS requirements set forth by the Legislature demonstrates the intent to encourage **sex offender** monitoring with minimum disruption to the stability of a broad population of **offenders**.

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<sup>17</sup> In *Commonwealth v. Cole*, 468 Mass. 294, 305-306 (2014), we held that the CPSL law, G. L. c. 127, § 133D, violated the constitutional mandate of separation of powers.

<sup>18</sup> The city argues that parole and probation statutes may not be considered in our analysis because none of the named plaintiffs is subject to the controls contained therein. The statutes, however, are instructive as to the Legislature's intent for controlling **sex offenders** after incarceration and, therefore, are relevant to our analysis even if they do not affect the named plaintiffs.

In addition to the three mechanisms contained in the 1999 package of laws, other laws support the legislative goal of protecting communities through monitoring **sex offenders** and controlling only specific situations most likely to cause harm. First, the various methods used to encourage registration demonstrate that maintaining current **sex offender** information is a primary goal. In addition to the criminal penalties contained in the registry law, G. L. c. 6, § 178H, the Legislature mandates that transient benefits be withheld, G. L. c. 18, § 38, and motor vehicle licenses and registration be suspended, G. L. c. 90, § 22 (j), if a **sex offender** has not maintained current registration information. The Legislature also has imposed narrow restrictions to protect certain vulnerable communities from interaction with **sex offenders** instead of broadly affecting housing options for **sex offenders**. General Laws c. 6, § 178K (2) (e), inserted by St. 2006, c. 303, § 6, prohibits level three **sex offenders** from living a rest home or other regulated long-term care facility.<sup>19</sup> In addition to this restriction, the Legislature has limited a **sex offender's** ability to live with adopted or foster children, G. L. c. 119, § 26A, or to work as a child care provider, G. L. c. 15D, §§ 7, 8, a school bus operator, G. L. c. 90, §§ 8A, 8A 1/2, or an ice cream truck vendor, G. L. c. 265, § 48.

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<sup>19</sup> This court deemed this provision to be unconstitutional as applied where there was no individualized determination of the risk of danger to the facility residents intended to be protected by the provision. *Doe v. Police Comm'r of Boston*, 460 Mass. 342, 351 (2011).

**Conclusion.** The totality of the 1999 statutory scheme, incorporating as it does a series of interdependent policies and practices specifically designed to protect the public from level two and level three sex offenders by monitoring and notification to the public, evinces the Legislature's intent to have the first and final word on the subject of residency of sex offenders. In addition, insofar as the ordinance effects a wholesale displacement of sex offenders from their residences, it frustrates the purpose of the registry law and, therefore, is inconsistent and invalid under the home rule provisions. *Wendell*, 394 Mass. at 527-528, citing *Bloom*, 363 Mass. at 156. Accordingly, we affirm the judgment of the Superior Court invalidating the "Residency Ordinance." In light of this disposition, we need not reach the broader constitutional grounds asserted by the plaintiffs and the amici. *Commonwealth v. Raposo*, 453 Mass. 739, 743 (2009), quoting *Commonwealth v. Paasche*, 391 Mass. 18, 21 (1984) ("We do not decide constitutional questions unless they must necessarily be reached").

*So ordered.*