

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE  
COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY  
CAPE MAY COUNTY – LAW DIVISION  
DOCKET NO. CPM-L-651-05

STEVEN ELWELL AND :  
JENNIFER ELWELL, :  
 :  
 :  
 Plaintiffs, :  
 :  
 :  
 v. :  
 :  
 :  
 TOWNSHIP OF LOWER, :  
 :  
 :  
 Defendant. :

Civil Action  
OPINION

Decided December 22, 2006

Appearances

For plaintiffs: *Frank L. Corrado (Barry, Corrado, Grassi & Gibson, P.C., Attorneys); Edward Baracas, American Civil Liberties Union of New Jersey Foundation*

For defendant: *Anthony Monzo and Thomas Hillegas (Monzo Catanese, P.C., Attorneys)*

*Stephen M. Latimer* submitted a brief for *amicus curiae* New Jersey Chapter of the Association for the Treatment of Sexual Abusers (*Laughlin & Latimer, Attorneys*)

*Richard D. Pompelio* submitted a brief for *amicus curiae* New Jersey Crime Victims' Law Center

I. BACKGROUND

This action filed on November 28, 2005, presents four legal challenges to the validity of Lower Township's Ordinance No. 2005-

14 adopted in August 2005, and as amended on December 5, 2005 by Ordinance No. 2005-25 (collectively the “Ordinance”). The Ordinance, codified in Sections 279-1 et seq. of the Lower Township Code, is titled “Registered Sex Offender Prohibition Zones.”

The Ordinance prohibits registered sex offenders from residing or loitering within 500 feet of any school, park, playground, recreation area, or day care facility or within 25 feet of a school bus stop located in Lower Township (hereinafter the “Township”), or adjacent municipalities. The Ordinance defines “registered sex offender” as any person over age 18 who is required to register pursuant to N.J.S.A. 2C:7-1 et seq. “Megan’s Law.”

Plaintiff Steven Elwell (hereinafter “Elwell”) is a Tier 1 registered sex offender. Plaintiff Jennifer Elwell is Elwell’s wife and the mother of their two children. The Ordinance was adopted during a period of time when the plaintiffs were in the process of locating a home in order to move into the Township.

Plaintiffs’ Complaint challenges the Ordinance on four specific grounds: (1) The Ordinance is preempted by state law; (2) it deprives plaintiffs of substantive due process under the New Jersey Constitution; (3) it violates the *ex post facto* and double jeopardy

clauses of the New Jersey Constitution; and (4) the Ordinance is *ultra vires* and unconstitutionally vague.

## II. FACTS

Plaintiffs and their two young children currently live in Middle Township. Elwell is a registered Tier 1 (lowest risk) sex offender subject to the provisions of Megan's Law. His sex offender registrant status results from a conviction in 2001 for aggravated sexual assault. Hence, he must comply with various post conviction restrictions imposed on Tier 1 offenders by Megan's Law, including registration with the municipality in which he resides.

Pursuant to N.J.S.A. 2C:43-6.4, Elwell is also subject to lifetime parole supervision (hereinafter "Community Supervision for Life" or "CSFL") and limitations on his ability to leave the State of New Jersey. Consequently, his parole officer is required to approve any change in Elwell's residency. Such approval would include relocation to Lower Township, based upon an assessment of the appropriateness of the residence and its location.

Due to having outgrown their current residence, the plaintiffs decided to move from their Middle Township home to Lower Township where they have family ties. Subsequent to the decision to

relocate, the Lower Township Council adopted Ordinance No. 2005-14 which prohibited all registered sex offenders from residing or loitering within 2,500 feet of any school, park, playground, recreation area, day care facility or school bus stop within the Township or adjacent municipalities. As noted above, the geographical prohibitions were reduced by subsequent amendment. All other provisions of the Ordinance remained intact.

The Ordinance provides that it is to be enforced by the Lower Township Police Department. Penalties for violation of the Ordinance include a fine ranging from \$100 to \$1,250 and/or imprisonment or community service not to exceed 90 days. A person convicted of violating the Ordinance within one year of a prior violation shall be sentenced to an additional fine of \$1,250.

The Ordinance defines “loitering” as a person<sup>1</sup>, who either on foot or in a motor vehicle “wanders or remains idle in essentially one location, sits, lounges, loafs, walks about aimlessly, or repeatedly frequents the same location or repeatedly circles in a motor vehicle.”

The Ordinance states that it is the intent of the Township Council (“Council”) “to protect and insure the health, safety and

---

<sup>1</sup> While the Ordinance does not define “person”, review of the Ordinance in its entirety implies that “person” as used throughout the Ordinance applies only to Megan’s Law registrants.

welfare of children within the Township and not to penalize registered sex offenders.”

The prohibited conduct is set forth in § 279-1:

The Township Council finds and declares that the health, safety, and welfare of children will be enhanced by prohibiting registered sex offenders from residing or loitering within the Township of Lower within 500 feet of any school, park, playground, recreation area, day care facility or within 25 feet of a school bus stop located within Lower Township or adjacent municipalities.

The plaintiffs opposed the enactment of the Ordinance at the Council’s public hearing on the Ordinance. Of particular concern to plaintiffs was the inclusion of Tier 1 offenders in the Ordinance prohibitions.

Plaintiffs assert that enforcement of the Ordinance will effectively banish them from a significant portion of the Township due to the geographic prohibitions, thereby circumscribing their ability to move about freely and to establish residence in a location which will not violate the Ordinance. Additionally, the Ordinance will restrict Elwell’s ability (for fear of violating the loitering prohibition), from being within 500 feet of a school, park, playground, recreation area or day care facility, or within 25 feet of a school bus stop, even though

he may be engaging in legitimate and lawful activity with his own children.

A certification from Rehana Lewis, the Intake Manager for the American Civil Liberties Union of New Jersey, asserts that at least 45 other New Jersey municipalities have enacted ordinances limiting where sex offenders may reside. The restrictions in these ordinances vary considerably, with the buffer zones ranging from 500 feet to 2,500 feet. Some ordinances include as “prohibited areas” school bus stops, bowling alleys, libraries, convenience stores or recreation areas. Some ordinances exclude Tier 1 offenders. Several ordinances cover almost the entire municipality. Other ordinances exempt homeowners and apply only to renters, while other ordinances include “grandfather” clauses.

### III. LEGAL ANALYSIS OF PLAINTIFFS’ CHALLENGES TO THE ORDINANCE

a. Does state statutory and common law preempt the Ordinance?

N.J.S.A. 40:48-1 authorizes the governing body of every municipality to “make, amend, repeal, and enforce ordinances” in order to regulate a diverse range of subject matter and behaviors.

N.J.S.A. 40:48-2 provides the following:

Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this state or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law.

N.J. Const. Art 4, § 7, ¶ 11 provides that:

The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The power of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

While the authority of a municipality to adopt ordinances reasonably related to the public health, safety and welfare is clear, nevertheless, such authority is not without limit. In addressing this state's constitutional grant of powers to municipalities, the Supreme Court in State v. Crawley, 90 N.J. 241, 247-248 (1982) noted that one of the limitations on a municipality's powers is state preemption:

Nevertheless, two principles limit the permissible scope of municipal legislation. First, as stated in *Wagner v. Newark*, 24 N.J. 467, 478 (1957), the grant of legislative powers to municipalities “relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability.” Second, municipalities may not enact ordinances on matters otherwise competent for local legislation if the State has preempted the field. *Overlook Terrace Management Corp. v. West New York Rent Control Bd.*, 71 N.J. 451, 460-62 (1976); *Summer v. Teaneck Twp.*, 53 N.J. 548, 554-55 (1969); *Kennedy v. Newark*, 29 N.J. 178 (1959).

In the matter of Mack Paramus Co. v. Mayor and Council of Paramus, 103 N.J. 564, 573 (1986), the Court stated that legislative intent was a critical factor in determining whether the state has exhausted a field to such an extent that preemption bars municipal legislation:

Although it is a judicially-devised standard, the doctrine of state preemption turns upon the intention of the Legislature. If the court determines that the Legislature intended “its own actions, whether it exhausts the field or touches only part of it, to be exclusive,” then it will conclude that the State has preempted the field, thereby barring any municipal legislation.

*State v. Uletsky*, 54 N.J. 26, 29 (1969); see *Summer v. Teaneck*, 53 N.J. 548, 555 (1969)

In *Overlook Terrace Management Corp.*, *supra*, the Supreme Court enumerated five factors to be considered in preemption analysis:

1. Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, that is, does the ordinance forbid what the Legislature has permitted?
2. Was the state law intended expressly or impliedly to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Legislature? [Citations omitted]. [71 N.J. at 461.]

Megan's Law, including the CSFL provisions, are included within the Code of Criminal Justice. N.J.S.A. 2C:1-1 et seq. N.J.S.A. 2C:1-5(d) provides that

Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.

The Supreme Court, in Crawley, supra at 250-251, addressed the fact that the Legislature intended the Code of Criminal Justice to be a clear, complete, and comprehensive system of criminal law designed for uniform statewide treatment. The Crawley court observed that there exists general legislative intent to exclude local legislation from areas covered by the Code of Criminal Justice. See *also*, State ex. rel. Atlantic County Prosecutor v. Atlantic City, 379 N.J. Super. 515, 520-521 (App. Div. 2005).

Both Megan's Law and the CSFL legislation provide comprehensive regulation of almost every aspect of the lives of convicted sex offenders. The constitutionality of Megan's Law, which addresses registration and community notification, as well as Internet posting of personal information regarding convicted sex offenders was upheld in a challenge by a convicted sex offender in Doe v. Poritz, 142 N.J. 1 (1995). While Doe v. Poritz did not address state preemption since the challenge was to a state statute, the Supreme Court's decision underscored the magnitude of Megan's Law, and its impact on the lives of convicted sex offenders. The Township's minimization of the intent, purpose and impact of Megan's Law as "merely" addressing registration of sex offenders and community

notification fails to recognize that the statute is broad, comprehensive and far reaching.

The Legislature's findings and declarations set forth in Megan's Law at N.J.S.A. 2C:7-1 provide the following:

The Legislature finds and declares:

a. The danger of recidivism posed by sex offenders and offenders who commit other predatory acts against children, and the dangers posed by persons who prey on others as a result of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety.

b. A system of registration of sex offenders and offenders who commit other predatory acts against children will provide law enforcement with additional information critical to preventing and promptly resolving incidents involving sexual abuse and missing persons.

Megan's Law not only requires convicted sex offenders to register with local law enforcement agencies, it also requires such offenders to verify their addresses annually, and to report any change of address. N.J.S.A. 2C:7-2.

N.J.S.A. 2C:7-8 requires each convicted sex offender to undergo individualized assessment of the risk of re-offense and establishes the levels of community notification of the risk of re-

offense for each offender. Specifically, N.J.S.A. 2C:7-8(c) provides the following:

c. The regulations<sup>2</sup> shall provide for three levels of notification depending upon the risk of re-offense by the offender as follows:

(1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;

(2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection;

(3) If risk of re-offense is high, the public shall be notified in accordance with the Attorney General's guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

N.J.S.A. 2C:7-13(g) requires that detailed personal information about registered sex offenders remain publicly available on the Internet, including among other things, the street address, zip code, municipality, and county in which the offender resides.

---

<sup>2</sup> A reference to "Attorney General Guidelines" promulgated as required by N.J.S.A. 2C:7-8 providing for procedures for the notification required under Megan's Law. The guidelines identify factors relevant to risk of reoffense and provide for three levels of notification ("tiers") depending upon the degree of the risk of reoffense.

N.J.S.A. 2C:43-6.4 subjects most convicted sex offenders to community supervision for life. The Senate Judiciary Committee Statement, Senate No. 320 - L.1994, c.130 attached to this statutory provision provides that

This community supervision would begin upon completion of any term of imprisonment imposed and persons on community supervision would be monitored as if on parole and would be subject to conditions appropriate **to protect the public and foster rehabilitation...** [emphasis added]

N.J.S.A. 2C:43-6.4(b) provides in pertinent part:

... Persons serving a special sentence of parole supervision for life shall remain in the legal custody of the Commissioner of Corrections, shall be supervised by the Division of Parole of the State Parole Board, shall be subject to the provisions and conditions set forth in subsection c. of section 3 of P.L.1997, c. 117 (C.30:4-123.51b) and sections 15 through 19 and 21 of P.L.1979, c. 441 (C.30:4-123.59 through 30:4-123.63 and 30:4-123.65), and shall be subject to conditions appropriate **to protect the public and foster rehabilitation...** [emphasis added]

Pursuant to N.J.S.A. 2C:43-6.4, the State Department of Corrections (DOC) adopted regulations which establish uniform and detailed conditions to be imposed upon certain convicted sex offenders whose offenses were committed prior to January 14, 2004.

N.J.A.C. 10A:71-6.11. N.J.A.C. 10A:71-6.12 imposes identical uniform, detailed and wide-ranging conditions upon certain convicted sex offenders whose offenses were committed on or after January 14, 2004.

In the interest of brevity, not all of the DOC regulatory conditions will be addressed in this decision. However, among those conditions relevant to the preemption issue before the court, are the following:

1. An offender may only reside at a residence approved by the assigned parole officer. N.J.A.C. 10A:71-6.11(b)(5); N.J.A.C. 10A:71-6.12(d)(5).

2. An offender must obtain the permission of the assigned parole officer prior to any change of residence. N.J.A.C. 10A:71-6.11(b)(6); N.J.A.C. 10A:71-6.12(d)(6).

3. An offender must obtain the permission of the assigned parole officer prior to leaving the state of the approved residence for any purpose. N.J.A.C. 10A:71-6.11(b)(7); N.J.A.C. 10A:71-6.12(d)(7).

4. An offender must obtain the permission of the assigned parole officer prior to securing, accepting, or engaging in any

employment, business, or volunteer activity and prior to a change of employment. N.J.A.C. 10A:71-6.11(b)(14); N.J.A.C. 10A:71-6.12(d)(14).

5. If the offender's victim is a minor, the offender must refrain from initiating, establishing, or maintaining contact with any minor; refrain from attempting to initiate, establish or maintain contact with any minor; and refrain from residing with any minor without the prior approval of the assigned parole officer. N.J.A.C. 10A:71-6.11(c); N.J.A.C. 10A:71-6.12(e).

6. Exceptions to the regulations discussed in paragraph 5 above exist when (1) the minor is engaged in a lawful commercial or business activity; in such case, the offender may engage in the lawful commercial or business activity, if the activity takes place in an open area to the public view; (2) the minor is in the physical presence of his or her parent/legal guardian; (3) the offender is present in a public area as long as the offender is not associating with a minor, and the public area is not one frequented mainly or exclusively by minors; or (4) the appropriate court authorizes contact with the minor. N.J.A.C. 10A:71-6.1(d); N.J.A.C. 10A:71-6.12(f).

In addition to the provisions of Code of Criminal Justice discussed above, the Legislature's intense interest in preventing recidivism by sex offenders is evident in other legislation known as the "Sex Offender Monitoring Pilot Project Act," N.J.S.A. 30:4-123.80. The legislative findings and declarations for this statutory provision establishing continuous satellite-based monitoring of certain sex offenders as part of a two-year pilot program approved by the Legislature on August 11, 2005 provide the following at N.J.S.A. 30:4-123.81:

The Legislature finds and declares:

a. Offenders who commit serious and violent sex crimes have demonstrated high recidivism rates and, according to some studies, are four to five times more likely to commit a new sex offense than those without such prior convictions, thereby posing an unacceptable level of risk to the community.

b. Intensive supervision of serious and violent sex offenders is a crucial element in both the rehabilitation of the released inmate and the safety of the surrounding community.

c. Technological solutions currently exist to provide improved supervision and behavioral control of sex offenders following their release.

d. These solutions also provide law enforcement and correctional professionals with the new tools for electronic correlation of the constantly updated geographic location of reported crimes, to possibly link released offenders to crimes, or to exclude them from ongoing criminal investigations.

e. Continuous 24 hours per day, seven days per week, monitoring is a valuable and reasonable requirement for those offenders who are determined to be a high risk to reoffend, were previously committed as sexually violent predators and conditionally discharged, or received or are serving a special sentence of community or parole supervision for life. A pilot program should be established to study its effectiveness.

Megan's Law, including the CSFL requirements, and the DOC administrative regulations enacted pursuant to Megan's Law, regulate most aspects of the lives of convicted sex offenders in the interest of (1) protecting the public, and (2) fostering the rehabilitation of sex offenders. The Division of Parole has oversight, among other things, of an offender's ability to own firearms; alcohol use; location of residence; employment; ability to travel; contact with minors; curfew; association in volunteer activities; counseling; drug and alcohol, medical and/or psychological examination and so on.

While it is clear that the Legislature intended that the lives of convicted sex offenders be subject to intense supervision and

oversight by the state, nevertheless, the Legislature was also concerned that publicly available information about convicted sex offenders not be utilized to prohibit them from availing themselves of certain amenities and significant rights which are indigenous to everyday common life. N.J.S.A. 2C:7-16(c) specifically provides that:

Except as authorized under any other provision of law, use of any of the information disclosed pursuant to this act for the purpose of applying for, obtaining, or denying any of the following, is prohibited:

- (1) Health insurance;
- (2) Insurance;
- (3) Loans;
- (4) Credit;
- (5) Education, scholarships, or fellowships;
- (6) Benefits, privileges, or services provided by any business establishment, unless for a purpose consistent with the enhancement of public safety; or
- (7) **Housing or accommodations.**  
[emphasis added]

In addition to providing that any person who uses information about a sex offender disclosed pursuant to Megan's Law to deny a sex offender the rights set forth in the above statutory provision, is guilty of a crime of the third degree, any offender aggrieved by the misuse of information available through Megan's Law is authorized to

bring a civil action in the appropriate court to request preventive relief. Such relief includes permanent or injunctive relief, in addition to any other remedies or procedures that may be available under other provisions of law. N.J.S.A. 2C:7-16(b) and (d).

In Doe v. Poritz at 12-13, the Supreme Court acknowledged the difficult and complex task confronted by the Legislature in balancing the need for protection of the public, in particular women and children, against minimizing intrusion into the lives of sex offenders who have served their period of incarceration.

The essence of our decision is that the Constitution does not prevent society from attempting to protect itself from convicted sex offenders, no matter when convicted, so long as the means of protection are reasonably designed for that purpose and only for that purpose, and not designed to punish; that the community notification provided for in these laws, given its remedial purpose, rationality, and limited scope, further assured by our opinion and judicial review, is not constitutionally vulnerable because of its inevitable impact on offenders; that despite the possible severity of that impact, sex offenders' loss of anonymity is no constitutional bar to society's attempt at self-defense. The Registration and Notification Laws are not retributive laws, but laws designed to give people a chance to protect themselves and their children. They do not represent the slightest departure from our State's or our country's fundamental belief

that criminals, convicted and punished, have paid their debt to society and are not be punished further.

They represent only the conclusion that society has the right to know of their presence not in order to punish them, but in order to protect itself. The laws represent a conclusion by the Legislature that those convicted sex offenders who have successfully, or apparently successfully, been integrated into their communities, adjusted their lives so as to appear no more threatening than anyone else in the neighborhood, are entitled not to be disturbed simply because of that prior offense and conviction; but a conclusion as well, that the characteristics of some of them, and the statistical information concerning them, make it clear that despite such integration, reoffense is a realistic risk, and knowledge of their presence a realistic protection against it.

The choice the Legislature made was difficult, for at stake was the continued apparently normal lifestyle of previously-convicted sex offenders, some of whom were doing no harm and very well might never do any harm, as weighed against the potential molestation, rape, or murder by others of women and children because they simply did not know of the presence of such a person and therefore did not take the common-sense steps that might prevent such an occurrence. The Legislature chose to risk unfairness to the previously-convicted offenders rather than unfairness to the children and women who might suffer because of their ignorance, but attempted to restrict the damage that notification of the public might do to the lives of rehabilitated offenders by trying to identify

those most likely to reoffend and limiting the extent of notification based on that conclusion.

The above discussion in conjunction with a brief review below of the *Overlook Terrace* factors as applied to the instant matter, leads to the inescapable conclusion that the Ordinance is preempted by the applicable provisions of the Code of Criminal Justice:

(1) *The Ordinance conflicts with state law, not only because of conflicting policy, but because it forbids what the Legislature has permitted.*

When enacting Megan's Law and the CSFL statute, the Legislature was clearly concerned with a wide variety of activities and behaviors engaged in by convicted sex offenders. The law provides parole officers with authority to approve sex offenders' residences and require them to comply with the intensive lifetime supervision conditions. The Legislature recognized that "reoffense is a realistic risk," entitling society to protect itself and its children through comprehensive registration, community notification laws, and CSFL which has as its purpose protection of the public **and** rehabilitation of the offender. Simultaneously, the Legislature confronted the reality that some convicted sex offenders are non-threatening and entitled not to be unduly disturbed purely because of prior offense and conviction.

Of particular significance to the conflict between the Ordinance and Megan's Law is the statutory provision which prohibits anyone from using a sex offender's status as a Megan's Law registrant to deny, among other things, "housing or accommodations." N.J.S.A. 2C:7-16. The Ordinance is in direct conflict with this prohibition. The Ordinance which imposes geographical prohibitions on a sex offender's residence patently violates N.J.S.A. 2C:7-16(c)(7) by prohibiting convicted sex offenders from residing in the restricted areas.

Further, determination as to where a sex offender may reside is statutorily vested with his parole officer and not with the municipality. The Ordinance's buffer zones interfere with a parole officer's discretion to approve the most appropriate residence location for a convicted sex offender.

For a variety of reasons related to a sex offender's individual circumstances, it is entirely possible that the most appropriate residence for a particular sex offender could be in one of the Township's buffer zones. Considering the very strong emphasis by the Legislature in permitting public access to information as to where sex offenders reside, if it had intended to limit sex offenders'

residences via the imposition of prohibited “buffer zones,” clearly it would have done so.

(2) State law was intended to be exclusive in the field.

The Ordinance specifically provides that “It is the intent of the Township Council to protect and ensure the health, safety and welfare of children within the Township and not to penalize registered sex offenders.”

While the Township argues that Megan’s Law is nothing more than a registration statute, the Supreme Court, in Doe v. Poritz, supra at 25, emphasized that Megan’s Law was crafted to protect the public through thoughtful and carefully designed legislation which specifically focused on the risk of offense posed by each offender who is required to register:

All of these provisions of the laws, the requirements for registration, the provisions for notification, the Tiers, and the many other related parts, are tied together by the statement of legislative purpose mentioned above found at the beginning of the Registration Law: to aid law enforcement in apprehending sex offenders and to enable communities to protect themselves from such offenders. Together these laws are fairly designed to achieve those purposes. The Community Notification Law, along with the Attorney General’s Guidelines, provide a coherent system of notification calibrated to

the degree of risk of reoffense: low risk offenders or higher will trigger notification of law enforcement who will thereby have ready access to all offenders in the area when needed either because of reported or perceived threats, or actual incidents when quick response is most important; moderate offenders and higher will trigger a notification calculated to alert organizations charged with the supervision and care of children or women, which are likely to encounter them, to their potential presence and risk; and high-risk offenders will trigger notification to that portion of the community likely to encounter them.

We are aware of the uncertainties that surround all aspects of the subject of sex offender recidivism and the effectiveness of preventive measures. Legislatures, despite uncertainty, must sometimes act to deal with public needs, basing such action on what they conclude, in a welter of conflicting opinions, to be the probable best course. Our Legislature could reasonably conclude that risk of reoffense can be fairly measured, and that knowledge of the presence of offenders provides increased defense against them. Given those conclusions **the system devised by the Legislature is appropriately designed to achieve the laws' purpose of protecting the public.** [emphasis added]

The Court also confronted the potential ostracism of sex offenders and the Legislature's attempt to address such concerns in Megan's Law through the establishment of the three tiers. The Court discussed the fact that the Legislature carefully addressed what the

Court characterized as a “pressing societal problem,” namely, a threat to public safety:

There is no point in predicting the extent of potential ostracism, in avoiding the conclusion that some ostracism will result, or in calming concerns by observing that the offenders themselves are responsible for their plight for having committed their crimes in the first place, for that justification would apply to any excessive punishment by government. **Here government has done all it can to confine that impact, allowing it only where clearly necessary to effect public safety**, and if the Tier level selected and the methods of notification conform to the statute and its intent, as defined and limited herein, Tier Two and Tier Three public notification will be appropriately confined and applied only to those whose apparent future dangerousness requires it, and the statute will not only have survived constitutional attack, but in fact will operate as the Legislature intended. We must not prejudge society with the ogre of vigilantism or harassment, although its potential obviously calls for the vigorous steps suggested by the Attorney General, and we must not assume that those in responsible positions will violate the intent of this law by giving notification far beyond that which is authorized, and we must not assume that the press, for whatever reason, will disregard the notification confinement which this law requires. [emphasis added]

We are satisfied that this statute, **rationaly and carefully addressed to a pressing societal problem**, is not what those who drafted the Constitution had in mind as an

abuse of government's power to punish. What government faced here was a difficult problem, a question of policy, and it understandably decided that public safety was more important than the potential for unfair, and even severe, impact on those who had previously committed sex offenses. Id. at 110. [emphasis added]

In rejecting the various attacks upon Megan's Law, the Supreme Court observed that it was sailing on "truly uncharted waters, for no other state has adopted such a far-reaching statute." Id. at 109. In upholding the constitutionality of the statute, the Court stated

To rule otherwise is to find that society is unable to protect itself from sexual predators by adopting a simple remedy of informing the public of their presence. That the remedy has a potentially severe effect arises from no fault of government, or of society, but rather, from the nature of the remedy and the problem; it is an unavoidable consequence of the compelling necessity to design a remedy. Id. at 109-110.

State v. Leahy, 381 N.J. Super. 106, 111 (App. Div. 2005) decided a decade after Doe v. Poritz, reemphasized that public safety concerns about sex offender recidivism are at the heart of Megan's Law:

In enacting Megan's Law the Legislature made the judgment that convicted sex

offenders represent a risk because of a high rate of recidivism and that knowledge of their identities and whereabouts is necessary for public safety. *N.J.S.A. 2C:7-1; John Doe v. Poritz*, 142 N.J. 1, 93, 662 A.2d 367 (1995).

That the state law through (1) the enactment of extremely comprehensive legislation, (2) the development of the Attorney General guidelines, and (3) the adoption of DOC regulations regulating and monitoring sex offenders' post-conviction behaviors (including location of the sex offender's residence through parole officer approval) is exclusive in the field both expressly and impliedly, is patently clear.

(3) *The subject matter reflects a need for uniformity.*

The Legislature has recognized that in protecting the public from sex offender recidivism, uniformity regarding the post conviction treatment of convicted sex offenders is essential. State law uniformly regulates sex offenders' lives, taking into account their "tier" rating and the unique factors involved in each offender's life and employment circumstances. N.J.S.A. 2C:7-8(d) requires that the Attorney General develop procedures "to promote uniform application of the notification guidelines required by this section."

In the matter of Summer v. Township of Teaneck, 53 N.J. 548, 552-553 (1968), the Supreme Court addressed the issue of “uniform treatment,” noting that while N.J.S.A. 40:48-2 is to be construed liberally in favor of local government, nevertheless, there are implied limitations upon what the court described as this “pervasive grant”:

As said in *Wagner v. Mayor and Municipal Council of City of Newark*, 24 N.J. 467, 478 (1957), the grant “relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability.” So, for example, a municipality cannot legislate upon the subject of wills or title to real property. The needs with respect to those matters do not vary locally in their nature or intensity. Municipal action would not be useful, and indeed diverse local decisions could be mischievous and even intolerable. Hence the municipality may not legislate upon an aspect of a subject “inherently in need of uniform treatment.” *In re Public Service Election and Gas Co.*, 35 N.J. 358, 371 (1961).

It is difficult to take issue with the observations of plaintiffs at pages 16-17 of their brief:

Ordinances like the Lower Township ordinance, multiplied with variations across the state, have created an unworkable, confusing and inequitable patchwork of divergent restrictions on where sex offenders

can or cannot live. Proliferation of local ordinances has also created the prospect of an unseemly “race” among municipalities to exclude sex offenders, so that certain communities or areas would become “sex offender ghettos.”

Even worse, were the matter left to local legislation, much or all of the state could become off limits to sex offenders in a piecemeal, uncoordinated fashion. Moreover, and particularly in smaller municipalities, ordinances like Ordinance 279-1 could easily result in complete banishment of sex offenders from a particular municipality.

Such consequences, when accomplished randomly and without statewide consideration, would be intolerable.

The Township is correct in observing that the unique demographics within each municipality, including municipal land area and population density, preclude uniform statewide treatment of geographical sex offender residency prohibitions. However, the Legislature clearly recognized that concerns about sex offender recidivism and the implications for public safety is an issue of statewide importance requiring uniform treatment, specifically, uniform treatment through regulating the degree of risk each offender poses and providing for individualized supervision, including approval of living arrangements. The imposition of prohibited buffer zones

within the Township which are applicable to all sex offenders regardless of their likelihood to reoffend flies in the face of the uniform treatment of sex offenders, based upon individualized assessment of the risk of recidivism.

(4) The state scheme is so pervasive and comprehensive that it precludes coexistence of municipal regulations; and (5) The Ordinance stands as an obstacle to the accomplishment and execution of the full purposes of the objectives of the Legislature.

These factors have, for the most part, been addressed. However, at the risk of some redundancy, state law governing the behavior and activities of registered sex offenders is pervasive, comprehensive, and has several purposes: (1) to protect public safety by providing notification to the public as to location of sex offenders; (2) to minimize or eliminate recidivism by sex offenders; (3) to permit sex offenders to conduct their daily lives without unnecessary ostracism or retaliation due to their sex offender registrant status; and (4) to provide an opportunity for rehabilitation and reintegration into society.

Limitation by a municipality as to where sex offenders may reside within that municipality clearly collides with a parole officer's authority to determine the most appropriate place of residence for a sex offender. Further, such limitations directly collide with the intent

of the Legislature in providing that a sex offender may not be denied housing or accommodations due to his status as a Megan's Law registrant.

b. Does the Ordinance offend substantive due process because it is overbroad and unnecessarily impairs plaintiffs' rights?

N.J. Const. art. I, Paragraph 1 provides that

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

In the matter of Caviglia v. Royal Tours of America, 178 N.J. 460, 471-473 (2004), the Supreme Court stated the following:

The Fourteenth Amendment to the United States Constitution guarantees that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *N.J. Const. art. I, § 1*.

Although Article I, Paragraph 1 does not contain the express terms "equal protection" or "due process," we have construed the expansive language of that provision as guaranteeing those fundamental constitutional rights. *Greenberg v. Kimmelman*, 99 N.J. 552, 568, 494 A.2d 294 (1985); see also *Sojourner A. v. New Jersey Dep't of Human Servs.*, 177 N.J. 318, 332, 828 A.2d 306 (2003). Under both constitutions, a statute is

invalid on substantive due process grounds if it “seeks to promote [a] state interest by impermissible means,” and is invalid on equal protection grounds when it does not apply “evenhandedly” to similarly situated people. *Greenberg, supra*, 99 N.J. at 562, 494 A.2d 294. Analyses under equal protection and due process “proceed[ ] along parallel lines,” and “overlap” to some degree. *Id.* at 569, 494 A.2d 294.

A state statute generally does not run afoul of federal substantive due process protections if the statute “reasonably relates to a legitimate legislative purpose and is not arbitrary or discriminatory.” *Id.* at 563, 494 A.2d 294 (citing *Nebbia v. New York*, 291 U.S. 502, 537, 54 S.Ct. 505, 516, 78 L.Ed. 940, 957 (1934)). If the statute is founded on some conceivable rational basis to promote a public purpose, it will survive constitutional scrutiny. *Ibid.* A more exacting standard applies to a statute that infringes on a fundamental right. See *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 728, 35 L.Ed.2d 147, 178 (1973) (requiring compelling state interest); *Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1936, 52 L.Ed.2d 531 (1977).

When evaluating substantive due process and equal protection challenges under the New Jersey Constitution, this Court applies a balancing test. *Sojourner, supra*, 177 N.J. at 332, 828 A.2d 306; *Greenberg, supra*, at 99 N.J. at 567, 494 A.2d 294; *Barone v. Dep’t of Human Servs., Div. of Med. Assistance & Health Servs.*, 107 N.J. 355, 368, 526 A.2d 1055 (1987). That test weighs the “nature of the affected right, the extent to which the governmental restriction intrudes upon it, and

the public need for the restriction.” *Greenberg, supra*, 107 N.J. at 368, 526 A.2d 1055. We require that the means selected by the Legislature “bear a real and substantial relationship to a permissible legislative purpose.” *Taxpayers Ass’n of Weymouth Tp. v. Weymouth Tp.*, 80 N.J. 6, 44, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977, 97 S.Ct. 1672, 52 L.Ed.2d 373 (1977) (citing *Nebbia, supra*, 291 U.S. at 525, 54 S.Ct. at 505, 78 L.Ed. at 950); see also *Katobimar Realty Co. v. Webster*, 20 N.J. 114, 123, 118, A.2d 824 (1955).

Hence, in applying the balancing test in reviewing and analyzing a substantive due process challenge under the state Constitution, the court must weigh “the nature of affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.” Visiting Homemaker Service of Hudson County v. Hudson Cty. Bd. of Freeholders, 380 N.J. Super. 596, 610 (App. Div. 2005), quoting *Greenberg*, 99 N.J. at 567.

That the Ordinance violates substantive due process and must be invalidated does not require elaborate discussion. Clearly, the state has a legitimate interest in protecting the public, in particular women and children, from recidivism by sex offenders. In upholding the constitutionality of Megan’s Law, the Supreme Court referred to the legislation as a “far-reaching statute.” Doe v. Poritz at 109. The

Court further recognized that the remedies provided for by Megan's Law will have a "potentially severe effect" on convicted sex offenders. Nevertheless, such result was deemed "an unavoidable consequence of the compelling necessity to design a remedy." Ibid. The "potentially severe effect" identified by the court, of course, did not include the intrusive regulation by the Council in prohibiting all Megan's Law registrants (regardless of the risk of offense) from residing in certain areas of the Township. That the residency prohibition in the Ordinance is more draconian than the "potentially severe effect" of the Megan's Law remedies is quite obvious.

Notwithstanding the valid, comprehensive, and potentially "severe" steps taken by the Legislature in protecting the public from convicted sex offenders through the enactment of Megan's Law, the Ordinance, in a purported attempt to protect the public, regulates the location of sex offenders' residences in a manner that is overly broad. It fails to balance the nature of the rights affected and the extreme intrusion upon those rights by the Ordinance, with the public need for the prohibitions set forth in the Ordinance.

The Ordinance does not differentiate the various tiers of offenders, or attempt to assess the actual risk posed by a particular

offender (critical factors considered by the Doe Court in upholding Megan's Law). Rather, the Ordinance paints all sex offenders with the same broad brush, namely, that they are all equally likely to reoffend, but are less likely to do so if they are "geographically" limited with regard to residence and loitering.

The geographical restrictions on where the plaintiff (or any other sex offenders for that matter) may reside or "loiter," substantially intrude upon significant family matters involving private and personal choices about how to raise and care for children, and decision-making about where to reside. The Ordinance restricts Elwell, a low risk offender, from accompanying his children to the school bus stop, going into a school or to a public park with his children, for fear of being charged with "loitering" because he is a convicted sex offender. The rights affected are significant, and are unnecessarily burdened by the Ordinance.

As noted in Doe v. Poritz, supra, at 110, in upholding the constitutionality of Megan's Law:

Here government has done all it can to confine that impact [potential for ostracism], allowing it only where clearly necessary to effect public safety, and if the Tier level selected and the methods of notification conform to the statute and its intent, as

defined and limited herein, Tier Two and Tier Three public notification will be appropriately confined and applied only to those whose apparent future dangerousness requires it, and the statute will not only have survived constitutional attack, but in fact will operate as the Legislature intended.

c. Does the Ordinance constitute punishment and therefore violate both the *ex post facto* and double jeopardy clauses of the state Constitution?

The *ex post facto* clause of the state Constitution, N.J. Const. art. IV, § 7, ¶ 3 provides that “The Legislature shall not pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract that existed when a contract was made.” Hence, the state is prohibited from enacting retroactive punishment for prior offenses or for an act that was not punishable at the time it was committed. State v. Coruzzi, 95 N.J. 557, 578 (1984). The *ex post facto* clause is applicable to municipal ordinances as well as state statutes. State v. C.I.B. Int’l., 83 N.J. 262, 270 (1980).

The double jeopardy clause, N.J. Const., art. I, ¶ 11, provides that “no person shall, after acquittal be tried for the same offense.” Hence, in reviewing plaintiffs’ challenge under the *ex post facto* and double jeopardy clauses of the state Constitution, the court must

determine whether the Ordinance is so punitive either in its purpose or effect, that while it may have been intended as a civil remedy, in reality, it is tantamount to a criminal penalty. Auge v. NJ Dept. of Corrections, 327 N.J. Super. 256, 262-263 (App. Div. 1999).

In Doe v. Poritz, supra at 46, the Supreme Court addressed whether Megan's Law constituted "punishment":

... The determination of punishment has ordinarily consisted of several components. An initial inquiry is whether the legislative intent was regulatory or punitive: if the latter, that generally is the end of the inquiry, for punishment results; if the former, the inquiry changes to whether the impact, despite the legislative intent to regulate, is in fact punitive, usually analyzed in terms of the accepted goals of punishment, retribution and deterrence. Despite some ambivalent language, a punitive impact – one that effects retribution or accomplishes deterrence – renders the law or the specific provision of the law that is attacked, punishment, but only if the sole explanation for that impact is a punitive intent. In other words, the law is characterized as regulatory in accordance with the legislative intent even if there is some punitive impact, if that impact is simply an inevitable consequence of the regulatory provisions themselves. The law is characterized as punitive only if the punitive impact comes from aspects of the law unnecessary to accomplish its regulatory purposes – that is, if the law is "excessive," the excess consisting of provisions that cannot be justified as regulatory, that result is

a punitive impact, and that, therefore can only be explained as evidencing a punitive intent.

The Ordinance specifically states that “It is the continuing intention of the Township Council to protect and ensure the health, safety and welfare of children within the Township **and not to penalize registered sex offenders....**” [emphasis added] Such disclaimer, however, does not end the inquiry.

The plaintiffs have provided as part of the record in this matter a guest column published in The Press of Atlantic City written by a Councilman who voted in favor of the Ordinance. The column stated among other things:

And if Elwell is representative of a Tier 1 offender, then we made the right decision to include them in our ordinance. As a teacher myself, I think we should **reserve the deepest dungeons in the castle** for those who take advantage of their authority and betray our students. [emphasis added]

While the above language from the guest column suggests that at least one Councilman may have intended to punish sex offenders, including Tier One sex offenders, through the enactment of this Ordinance, this court is reluctant to conclude based upon this newspaper column alone, that the intent of the Ordinance was punitive. However, a close examination of the specific provisions of

the Ordinance does indeed suggest that the intent was punitive.

First, the Ordinance constitutes an express prohibition on sex offender residency in particular geographic areas of the Township, as opposed to registration and/or notification requirements. The inclusion of a grandfather clause to exclude from the requirements of the Ordinance sex offenders who established a residence within a prohibited area prior to the effective date of this section, suggests that the Council recognized the rather draconian measures undertaken when imposing geographical prohibitions.

If a sex offender resides within a prohibited area, there is no grace period within which the offender is permitted to relocate prior to being subjected to the Ordinance's monetary/incarceration/community service sanctions. Such penalties, which include the possibility of incarceration, equate to traditional quasi criminal consequences providing a strong indication that Council intended the Ordinance to be punitive. Hence, if Elwell purchases a home in the Township in a non-prohibited area, he could be charged with a violation of the Ordinance, if a new bus stop is located within 25 feet of his home subsequent to his purchase of the property and he does not immediately relocate.

While all indications are that the intent of the Council in enacting the Ordinance constituted a punitive measure, the effect of the Ordinance is clearly punitive. The Ordinance imposes restrictions on the residency and movement only of convicted sex offenders, as opposed to other criminals who have committed serious offenses. The Ordinance does not take into account an individual sex offender's propensity to reoffend. It assumes that all sex offenders pose the same degree of risk.

The Ordinance, in the guise of protecting the public, does no such thing. By way of brief example, a convicted Tier 1 (low risk) sex offender may not "loiter" within 25 feet of a school bus stop while waiting to place his school age child safely on the bus, yet a Tier Three (highest risk) sex offender may "loiter" 25.5 feet from a school bus stop without violating the Ordinance. Elwell may not reside within 500 feet of a playground, yet a Tier Three sex offender may reside within 501 feet of the same playground and not be charged with violating the Ordinance.

In contrast to Megan's Law which survived an *ex post facto* challenge, the Ordinance is not regulatory and remedial. Its sole purpose is deterrence, to keep sex offenders away from certain areas

of the Township. It limits residency and movement of all Megan's Law registrants without distinction as to the sex offender's tier ranking, nature of offense, or whether the offender's victim was an adult or a minor.

It is clear that the Ordinance violates the ex post facto and double jeopardy clauses of the State Constitution, and therefore must be invalidated.

d. Is the ban on loitering *ultra vires* and void for vagueness?

In State v. Crawley, 90 N.J. 241 (1982), the City of Newark appealed a ruling of the Superior Court Law Division that a municipal loitering ordinance was preempted by the Code of Criminal Justice. In upholding the judgment of the Superior Court, the Supreme Court, relying upon N.J.S.A. 2C:1-5(d) stated at 252:

To summarize, the basic purpose of the New Jersey Code of Criminal Justice is to create a comprehensive system of criminal law. The legislative history does not suggest that the Legislature intended to leave this area of criminal law to a patchwork of municipal regulations. The exclusion of a loitering provision from the Code expressed state policy not to penalize such conduct.

The Township has no authority to regulate loitering. The fact that the Ordinance is directed only at sex offenders does not render it

valid. The Ordinance does not include a *mens rea* requirement. In other words, sex offenders, and only sex offenders, may not loiter in the prohibited areas regardless of their purpose in doing so. This is in contrast to existing anti-loitering statutes which require an actual intent to engage in either criminal or quasi-criminal conduct while loitering. See N.J.S.A. 2C:33-2.1 (loitering for purpose of obtaining or distributing controlled dangerous substances); N.J.S.A. 2C:34-1.1 (loitering for purpose of engaging in or promoting prostitution); N.J.S.A. 19:34-6 (loitering at a polling place with purpose to obstruct or interfere with a voter). The Ordinance is *ultra vires*.

In addition to being *ultra vires*, the Ordinance is unconstitutionally vague, and therefore, void. In State v. Golin, 363 N.J. Super. 474, 481-482 (App. Div. 2003), the Appellate Division underscored the fact that municipal ordinances are presumed to be valid.

However,

A penal ordinance offends due process if it does not provide legally fixed standards and adequate guidelines for police and others who enforce the laws. *Betancourt v. Town of W. New York, supra*, 338 N.J. Super. at 422, 769 A.2d 1065 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S.Ct. 839, 847, 31 L. Ed.2d 110, 120 (1972)); *Town*

*Tobacconist v. Kimmelman*, 94 N.J. 85, 118, 462 A.2d 573 (1983)). “Vague language and inadequate standards permit the subjective and therefore impermissible enforcement of penal ordinances by the police.” *Betancourt v. Town of W. New York*, *supra*, 338 N.J. Super. at 422, 769 A.2d 1065 (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2299, 33 L. Ed.2d 222, 227-28 (1972)). To withstand a void-for-vagueness challenge, a penal ordinance must define the offense “with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L. Ed.2d 903, 909 (1983).

Id. at 482-483.

In State v. Hoffman, 149 N.J. 564 (1997), the Supreme Court addressed whether N.J.S.A. 2C:33-4(a) (a portion of the harassment statute) was unconstitutionally vague. The court stated at 581-582:

A statute that is vague creates a denial of due process because of a failure to provide notice and warning to an individual that his or her conduct could subject that individual to criminal or quasi-criminal prosecution. *Screws v. United States*, 325 U.S. 91, 102-02, 656 S.Ct. 1031, 1035, 89 L.Ed. 1495, 1503 (1945). This Court has stated that

“[c]lear and comprehensible legislation is a fundamental prerequisite of due process of law, especially where criminal responsibility is involved. Vague laws are unconstitutional even if they fail to touch constitutionally protected conduct, because *unclear or incomprehensible*

*legislation places both citizens and law enforcement officials in an untenable position. Vague laws deprive citizens of adequate notice of proscribed conduct, and fail to provide officials with guidelines sufficient to prevent arbitrary and erratic enforcement.*

[*State v. Afanador*, 134 N.J. 162, 170, 631 A.2d 946 (1993) (alteration in original) (quoting *Town Tobacconist v. Kimmelman*, 94 N.J. 85, 118, 462 A.2d 573 (1983)) (emphasis added.)]

The Ordinance does not provide clear notice to a sex offender as to what behavior is permitted and what behavior is prohibited.

Section 279-2 of the Ordinance defines loitering as:

Whether on foot or in a motor vehicle, a person who wanders or who remains idle in essentially one location, sits, lounges, loafs, walks about aimlessly, or repeatedly frequents the same location, or repeatedly circles in a motor vehicle.

Pursuant to the definition of loitering, it is difficult to determine objectively, how many visits within 25 feet of a school bus stop by a sex offender constitutes “repeated” visits and over what period of time. Or, what is meant by “walking about aimlessly”, or “loafing”, or “lounging”, or “remaining idle”? Does the term “remaining idle” at the school bus stop apply to Elwell who may be standing there with his child until the bus arrives?

In Betancourt v. Town of West New York, 338 N.J. Super. 415, 424 (App. Div. 2001), the Appellate Division held that a juvenile curfew ordinance was unconstitutionally vague:

... The ordinance's language does not give a clear standard as to what conduct is forbidden. This, in turn, gives the police officer on the street broad discretion to decide which activities and which juveniles fall within the ordinance's exceptions.

Enforcement of the loitering provision in the instant Ordinance lies with the Township Police Department. The anti-loitering provision targets only Megan's Law registrants and vests unacceptably broad discretion with law enforcement to determine whether a sex offender has "loitered" within 25 feet of a school bus stop, let alone 500 feet of a school, park, playground, recreation area or day care facility.

In the matter of State v. Caez, 81 N.J. Super. 318, 319 (App. Div. 1963) when reversing a conviction of a defendant who allegedly violated the City of Hackensack's loitering ordinance, the Appellate Division addressed concerns about arbitrary enforcement of ordinances which restrict a person's ability to move about or stand still:

We begin with the fundamental proposition that no ordinance may unreasonably or unnecessarily interfere with a person's

freedom, whether it be to move about or to stand still. *Territory of Hawaii v. Anduha*, 48 F. 2d 171 (9 Cir. 1931); *City of St. Louis v. Gloner*, 210 Mo. 502, 109 S.W. 30, 15 L. R. A., N. S., 973 (Sup. Ct. 1908); *Pinkerton v. Verberg*, 78 Mich. 573, 44 N.W. 579, 7 L. R. A. 507 (Sup. Ct. 1989). An ordinance which proposes to restrict such freedom must contain standards which make it reasonable and prevent arbitrary enforcement. "It is offensive to fundamental concepts of justice and violative of due process of law to impose sanctions for violations of laws whose language is doubtful, vague and uncertain." *Maplewood v. Tannenhaus*, 64 N.J. Super. 80, 89 (App. Div. 1960). Penal laws must be clear enough so that "... all men subject to their penalties may know what acts it is their duty to avoid... Before a man can be punished, his case must be plainly and unmistakably within the statute. *State v. Gaynor*, 119 N. J. L. 582, 584 (E. & A. 1937).

In *Camarco v. City of Orange*, 61 N.J. 463 (1972), the New Jersey Supreme Court affirmed the Appellate Division's decision in *Camarco v. City of Orange*, 116 N.J. Super. 531 (1971) in a case involving a constitutional challenge to a loitering ordinance in the City of Orange. In so affirming, the Court stated:

The Appellate Division readily recognized that if the ordinance broadly proscribed loitering or idling without more it would be unconstitutional. 116 *N.J. Super.* at 534; see *State v. Caez*, 81 *N.J. Super.* 315 (App. Div. 1963); *People v. Diaz*, 4 *N.Y.S. 2d* 313, 151

*N.E. 2d 871 (1958; cf. Coates v. Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971)).* On the other hand it recognized with equal readiness that if the ordinance simply proscribed loitering which obstructs, molests or interferes with others lawfully in public places or which threatens an immediate breach of the peace it could withstand constitutional attack.

The City of Orange loitering ordinance included a definition of loitering (somewhat similar to the definition in the Township's Ordinance), but thereafter articulated specifically what kinds of loitering were prohibited, e.g., obstructing the passage of pedestrians; obstructing, molesting or interfering with any person lawfully in a public place. On the other hand, the Township's Ordinance simply prohibits convicted sex offenders from loitering in specific locations which are readily accessible to other members of the public, without proscribing what specific types of loitering are prohibited.

That the anti-loitering provision of the Ordinance which singles only sex offenders is vague and uncertain, is not subject to debate.

Therefore, I conclude that the loitering provision of the Ordinance is invalid as being void for vagueness.

IV. CONCLUSION

Plaintiffs' request to invalidate the Ordinances on all grounds articulated is hereby granted.

This decision will be posted on [www.njcourtsonline.com](http://www.njcourtsonline.com). An order will be prepared by the court.

December 22, 2006

---

Valerie H. Armstrong, A.J.S.C.

