

## **Legal Q&A**

**By Lauren Ford Crawford, TML Legal Counsel**

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### **What state laws restrict where registered sex offenders may live?**

Paroled sex offenders may not go in, on, or within 500 feet of any place where children are known to congregate, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility. TEX. GOV'T CODE §508.187. This area, known as a "Child Safety Zone," may act to restrict where such sex offenders may live. *Id.* In addition, sex offenders who are required to comply with Child Safety Zone restrictions may not supervise or participate in any program that regularly provides athletic, civic, or cultural activities for children who are 17 years of age or younger. *Id.* at §50.187(b).

Certain sex offenders on community supervision (probation, for example) may also be required to follow these guidelines as a condition of their probation. TEX. CODE CRIM. PROC. art. 42.12; § 13B. Once offenders have completed their sentence, there are no state regulations preventing them from being around children.

### **Are registered sex offenders required to notify a city when they move in?**

Yes. According to Article 62.051(a) of the Texas Code of Criminal Procedure, sex offenders who are required to register under state law must either register or verify their registration with the city police department in any city where the person intends to live for more than seven days. This means that even registered sex offenders who do not intend to move to the city, but will be in town on an extended visit, are required to register with the police department. This registration must include the person's name, date of birth, physical characteristics, social security number, driver's license number, address, photo, type of offense, indication of the status of the punishment (parole, community supervision, and so on), and any association of the person with a school as a student or employee. *Id.* art. 62.051(c). For certain high risk offenders, the Texas Department of Public Safety (DPS) will provide additional notice by mail to homeowners within a specified area of the person's declared address. *Id.* art. 62.056.

### **Is a city police department required to notify anyone when a sex offender moves to the city?**

When a city police department receives notice from a penal institution, court, or other agency that a registered sex offender whose victim was seventeen or younger or a student at a public or private school is about to be released from a penal institution and intends to move into the city, the department must notify the local school district and private schools. *Id.* art. 62.053(e). This notice may include any information that the department determines is necessary to protect the public, except for the person's social security number, driver's license number, or telephone number. *Id.* art. 62.053(f). In addition, the department may not release as part of this notice any information that would identify the victim of the offense for which the person is required to register. *Id.*

In addition, for certain high-risk sex offenders, a city police department may, but is not required to, provide notice to the public in any way it deems appropriate, in addition to the notice provided by the DPS. *Id.* art. 62.056. The notice may include publishing a notice in a newspaper, holding a neighborhood meeting, posting notices in the area where the person intends to live, distributing printed notices to area residents, or establishing a Web site for the purpose of providing notice. *Id.* art. 62.056(d).

**May a home rule city have an ordinance restricting where sex offenders may live within the city?**

Yes. In March 2007, the Texas attorney general's office released opinion GA-0526, which addresses whether a city may prohibit registered sex offenders from living in certain locations within the city. Tex. Att'y Gen. Op. No. GA-0526. The opinion held that because a home rule city's residency restriction ordinance is not inconsistent with, but rather complementary to, the current child safety zone statutes, state law does not generally preempt a home rule city's residency restriction ordinance. *Id.* at 4. The attorney general declined to consider possible challenges to sex offender residency ordinances on state or federal constitutional grounds, citing the fact-intensive nature of such a consideration. *Id.* at 5-6.

**May a general law city have an ordinance restricting where sex offenders may live within the city?**

GA-0526 also concluded that a general law city is not granted the authority under current state law to create an ordinance restricting the residency of sex offenders. Since general law cities operate under the general laws of the state, rather than a home rule charter, the attorney general concluded that a general law city may not pass such an ordinance without express authorization from the Texas Legislature. *Id.* at 2. However, many general law cities across the state already have sex offender residency restrictions in place and have not repealed them in the wake of GA-0526. General law cities that have distance limitations or that are considering distance limitations should consult with local legal counsel regarding the validity of such ordinances.

**Have any sex offender residency ordinances been challenged?**

The City of Commerce, Texas, recently received notice of a federal lawsuit challenging the city's sex offender ordinance. The ordinance states that no sex offender may live within 1,000 feet of a college, school, daycare facility, park, or playground. It also went beyond basic residency restrictions, stating that no child sex offender may knowingly be present in or loiter within 300 feet of a college, school, daycare facility, park, or playground or knowingly attend any public festival or celebration. The plaintiff, filing anonymously as a "John Doe," challenged the ordinance on the grounds that it is: (1) unconstitutionally vague; (2) in violation of the *ex post facto* clause of the United States Constitution; (3) in violation of the substantive due process clause of the Fifth Amendment to the United States Constitution; and (4) an impairment to the sex offender's property rights. Many Texas cities have similar ordinances, and TML will follow this litigation closely.

Cities in other states, and other states themselves, have had similar ordinances and statutes challenged. While many ordinances and statutes have been upheld (*See, for example, Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006), *cert. denied*, 127 S.Ct. 2128 (2007)), recently one federal court struck down the State of Ohio's residency statute. In *Mikaloff v. Walsh* (slip op., No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007)), the defendant was a registered sex offender who lived rent-free in his mother's home with his family since before the state's residency law was enacted in 2003. *Id.* at \*2. After an amendment to the law in 2005 allowed prosecutors to seek injunctive relief to force sex offenders living within prohibited areas to move, the defendant was asked to move or be evicted. *Id.* at \*3. The court held that the residency restriction placed an onerous affirmative disability and restraint on sex offenders and served retributive and deterrent purposes. *Id.* at \*8-\*11. Therefore, since the statute punished offenders whose convictions were in place before the punishment was attached to the convictions, the statute was an *ex post facto* punishment on offenders convicted before the law was enacted. *Id.* at \*13. While the court found the entire statute to be in violation of the *ex post facto* clause, it focused mainly on the fact that there were no grandfathering or "move to the offender" exceptions. *Id.* at \*2-\*10, \*12. The law forced any offender already living in an area when the law was enacted, or even when a school or daycare was built in the area, to move. The state has not appealed the ruling. It is important to note that this ruling, while an interesting first in sex offender residency ordinance challenges, is not binding on Texas cities or courts.