

STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

JOHN DOE, RICHARD ROE, and MELVIN MOE,

Plaintiffs,

-against-

THE COUNTY OF RENSSELAER,

Defendant.

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: 41-0775-2007 Index No. 223240

Appearances: Kindlon and Shanks, P.C.
 Attorneys For Plaintiffs
 Terence L. Kindlon, Esq., of counsel
 74 Chapel Street
 Albany, New York 12207

Rensselaer County Attorney
Attorneys For Defendant
Stephen A. Pechenik, Esq., of counsel
Rensselaer County Office Building
Troy, New York 12180

DECISION/ORDER

Zwack, J.:

In this proceeding, plaintiffs, registered sex offenders, are seeking to enjoin defendant Rensselaer County from enforcing sex offender residency restrictions contained in a local law. Plaintiffs now move for summary judgment pursuant to CPLR 3212. Defendant opposes the motion.

Rensselaer County Local Law 6 of 2006 became effective in July 2006 and it provides for residency restrictions for certain sex offenders. The local law defines the term "sex offender" as "a person who has been convicted of a sexual offense against a minor and has received a level 2 or 3 designation as defined under Article 6-C of the New York State Correction Law." The restriction provided for in the law is that "[a] sex offender as herein defined shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility." The following exceptions are provided for within the law:

A sex offender as herein defined residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this local law if any of the following apply:

- a. The sex offender is serving a sentence at a jail, prison, juvenile facility or other correctional institution or facility.
- b. The sex offender has established a residence prior to October 1, 2006, or a school or child care facility is newly located on or after October, 2006.
- c. The sex offender is a minor or a ward under a guardianship.

Plaintiffs now move for summary judgment, asserting that the relevant facts are not contested. Plaintiffs are level III registered sex offenders and two of the three plaintiffs have completed their time under parole supervision. Rensselaer County's Local Law 6 of 2006 applies to plaintiffs, except that apparently defendant has agreed that the law would not apply to plaintiffs during the pendency of this case.

Plaintiffs set forth multiple arguments in support of their summary judgment motion. First, plaintiffs argue that New York State law preempts the Rensselaer County local law. Plaintiffs argue that New York State already has multiple statutes relating to sex offenders. Plaintiffs specifically note that in the Governor's Approval Message for Chapter 568 of the Laws of 2008, requiring state agencies to issue regulations on housing options for certain sex offenders, the Governor stated, "this bill recognizes that the placement of these offenders in the community has been and will continue to be a matter that is properly addressed by the State..." (Governor's Approval Message No. 33 of 2008). Plaintiffs also note that recent trial court decisions have struck down similar residence restrictions in Rockland and Albany counties (*People v Oberlander*, 2009 WL 415558 [Sup. Ct. Rockland County] [unreported disposition]; *People v Blair*, 23 Misc. 3rd 902 [Albany City Ct. 2009]).

Defendant opposes the motion and argues that plaintiffs have failed to meet their burden of proving that there are no triable issues of fact. Specifically, defendant argues that none of the plaintiffs are presently on probation and that courts have ruled similar local laws constitutional. With regard to plaintiffs' state preemption argument, defendant argues that

residential status of unsupervised sex offenders is not affected by state legislation and therefore may be regulated by local laws. Defendant argues that because plaintiffs are not subject to probation, parole or other post-release supervision, that plaintiffs have not made a showing that Local Law No. 6 is preempted by state law. Defendant argues that there is neither express nor implied state preemption because despite a local law and state legislation discussing the same subject matter, this does not compel a finding that the local law is preempted by the state law. Defendant argues that the adoption of local laws such as Local Law number 6 is appropriate given public safety concerns raised by moderate and higher risk but unsupervised sex offenders.

The Court notes that plaintiffs have argued on their motion that while two of the three plaintiffs are no longer subject to parole supervision or post-release supervision, one of the plaintiffs is subject to post-release supervision until a date in 2012. Defendant argues in its opposition papers that none of the plaintiffs are subject to any supervision presently. The Court does not find that this discrepancy between the parties' papers prevents the Court from deciding the motion based upon the facts of this case. It appears undisputed between the parties that all 3 plaintiffs are subject to defendant's local law, but for the present stay of enforcement that has apparently been agreed to by the parties.

The Court also notes that although a copy of the complaint was not annexed to the motion papers, a copy has been obtained by the Court.

The Court will first address plaintiffs' preemption argument. The Court first notes that while New York State law imposes residency restrictions upon certain sex offenders as a mandatory condition of a sentence of probation or conditional discharge, the Rensselaer County local law imposes more stringent residency restrictions which apply whether or not the sex offender is subject to supervision in the form of probation or parole (Penal Law §65.10 [4-a]). Therefore, as noted in plaintiffs' complaint, the situation can arise where a residence approved for purposes of parole supervision may violate Rensselaer County local law. The state law has a 1000 foot provision, while the Rensselaer County local law does not permit certain sex offenders to move within 2000 feet of a school or child care facility. As noted by defendant, it is also true that certain sex offenders, who are not subject to the state law because they are not subject to parole or probation supervision, would be subject to the Rensselaer County local law.

A local law may be ruled invalid as inconsistent with State law not only where an express conflict exists between the state and local laws, but also where the State has clearly evinced a desire to preempt an entire field thereby precluding any further local regulation (citations omitted). Where it is determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interest because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe (citations omitted) or (2) imposes additional restrictions on rights granted by State law (citations omitted).

Such laws, were they permitted to operate in a field preempted by State law, would tend to inhibit the operation of the State's general law and thwart the operation of the State's overriding policy concerns (citations omitted).

Jancyn Manufacturing Corp. v County of Suffolk, 71 N.Y.2d 91 [1987]; *DJL Restaurant Corp. v City of New York*, 96 NY2d 91 [2001]).

The State Legislature may expressly articulate its intent to occupy a field, but it need not. It may also do so by implication.

An implied intent to preempt may be found in a “declaration of state policy by the State Legislature... or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area” (citations omitted). In that event, a local government is “precluded from legislating on the same subject matter unless has received ‘clear and explicit’ authority to the contrary” (citations omitted).

(*DJL Restaurant Corp.*, 96 NY2d at 95).

The Court notes that this issue has been comprehensively addressed and analyzed by courts in Rockland County and Albany County (*People v Oberlander*, 2009 WL 415558 [Sup. Ct. Rockland County January 22, 2009]; *People v Blair*, 23 Misc3rd 902 [Albany City Ct. February 18, 2009]). The opinions in those cases reference New York’s detailed legislative scheme relating to the community management of sex offenders and concluded that the State has impliedly and expressly preempted the regulation and management of sex offenders, including sex offender residency restrictions (*see id.*). Specifically, New York has the Sex Offender Registration Act (SORA), also known as Megan’s Law, the Sex Offender Management and Treatment Act, which created Article 10 of the Mental Hygiene Law, and also has statewide sex offender residency restrictions enforceable as a condition of parole or probation, detailed above. As noted by plaintiffs, and as cited in the above two opinions, additional compelling proof is found in the Approval Memorandum to Chapter 568 of the Laws of 2008, which enacted changes to the Executive

Law and the Social Services Law relating to prior approval by probation departments for sex offender housing. The Approval Memorandum states in relevant part that “the placement of these offenders in the community has been and will continue to be a matter that is properly addressed by the State.” After considering New York’s comprehensive legislative scheme, this Court concurs with the analysis in the recent court opinions addressing similar local laws. Based upon the foregoing, this Court finds that sex offender residency restrictions are an area preempted by the State and therefore Rensselaer County Local Law No. 6 of 2006 is preempted and cannot be given effect.

In light of the foregoing, the Court does not reach plaintiffs’ remaining arguments.

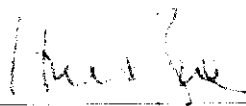
Accordingly, it is

ORDERED, that plaintiffs’ motion for summary judgment is granted in part; and it is further

ORDERED, that Rensselaer County Local Law No. 6 of 2006 is unenforceable, as set forth above.

This constitutes the Decision and Order of the Court. All papers including this Decision and Order are returned to the attorneys for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: June 24, 2009
Troy, New York


Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion CPLR 3212 dated March 30, 2009; Affirmation CPLR 3212 of Ference L. Kindlon, Esq. dated March 30, 2009; Memorandum of Law CPLR 3212 dated March 30, 2009;
2. Affirmation in Opposition of Stephen A. Pechenik, Esq. dated June 10, 2009; together with Exhibit "A"; Memorandum of Law dated June 9, 2009.