

TO: Mayor Rybak  
Council Member Hodges, Intergovernmental  
Relations Chair  
Council Member Ostrow, Ways and Means Chair  
Council Member Samuels, Public Safety and  
Regulatory Services Chair  
Council Member Schiff, Zoning and Planning Chair

FROM: Erik Nilsson  
Assistant City Attorney

DATE: March 3, 2006

RE: Taylors Falls' Sex Offender Residency Ordinance

## **MEMORANDUM**

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### **INTRODUCTION**

This memorandum is in response to your request for a review of the relevant legal authority bearing on the adoption of an ordinance that would restrict where designated sex offenders can reside within the City.

### **BACKGROUND**

#### **I. Taylors Falls' Ordinance**

On February 13, 2006, the City Council of the City of Taylors Falls, Minnesota, adopted an ordinance (copy attached) prohibiting designated sex offenders from residing: 1) within 2,000 feet of any school, licensed day care center, park, or playground; or 2) within 1,000 feet of any designated public school bus stop, place of worship which provides regular educational programs, or other places where children are known to congregate. See section 540.003, subd. 1. The ordinance also contains a prohibition on designated sex offenders participating "in a holiday event involving children under 18 years of age, such as distributing candy or other items to children on Halloween, wearing a Santa Claus costume on or preceding Christmas, or wearing an Easter Bunny costume on or preceding Easter." See section 540.003, subd. 2. Finally, it makes it illegal for a landlord to rent any part of their real property to a sex offender who is otherwise subject to the residency restrictions of the ordinance. See section 540.004. The provision amended Chapter 5 of the Taylors Falls' City Code applicable to nuisances and was not adopted as a zoning measure.

“Designated offender[s]” consist of any person who has been convicted of a designated sexual offense, in which the victim was less than 16 years of age, or has been categorized as a Level III offender pursuant to Minn. Stat. §244.052. See section 540.002, subd. 1. The residency prohibition applies to both permanent and temporary residences with permanent residence defined as “a place where the person abides, lodges, or resides for fourteen (14) or more consecutive days.” See section 540.002, subd. 3. There are several exceptions to the ordinance including: 1) offenders who established and registered their residence location pursuant to state law prior to adoption of the ordinance, 2) when the offender at issue is a minor, 3) when the school, bus stop, or daycare center was constructed or opened after the offender established and properly registered their residence location pursuant to state law, 4) when the residence location is also the primary residence of the person’s parents, grandparents, siblings, spouse, or children, and 5) when the residence is a property owned or leased by the Minnesota Department of Corrections. See section 540.003, subd. 5.

Violations of the ordinance by either a designated sex offender or landlord can be prosecuted by the city attorney akin to a misdemeanor offense with a maximum fine of \$1,000 and/or 90 days in jail.

## **II. Provisions in Other Jurisdictions**

Taylor Falls was the first and only municipality in Minnesota to adopt a sex offender residency restriction. It is my understanding the cities of Maplewood and St. Paul are currently reviewing this issue as well. The St. Paul City Attorney’s Office is advocating a cautious approach that will wait to see if the Taylor Falls’ ordinance leads to litigation. The model municipal ordinance for Taylor Falls and other municipalities across the country was originally adopted in Miami Beach, Florida (copy attached). There are currently 13 states that have enacted sex offender residency restrictions. The states with statutory provisions are Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, Oregon, and Tennessee.

## **III. Legal Challenges**

There is not a lot of case law addressing state or local sex offender residency restriction provisions. This is because these provisions have all been recently enacted. The leading case is the 8<sup>th</sup> Circuit Court of Appeals review of Iowa’s state statute in Doe v. Miller, 405 F.3d 700 (8<sup>th</sup> Cir. 2005)(cert denied)(see also state lawsuit; State of Iowa v. Seering, 701 N.W.2d 655 (Iowa 2005). In Doe, a class of sex offenders filed suit, contending that Iowa Code § 692A.2A, which prohibits a convicted sex offender from residing within 2,000 feet of a school or a registered child care facility, was unconstitutional. The federal district court agreed with the plaintiff class and declared the statute unconstitutional on several grounds. The 8<sup>th</sup> Circuit decision reversed the district court in holding that the state law was not unconstitutional.

The plaintiff class made several different arguments that the statute was unconstitutional, including that it was an unconstitutional *ex post facto* law with respect to offenders who committed an offense prior to adoption of the law, that it violated their rights to avoid self-incrimination in conjunction with the state residency registration requirements, and that it violated their procedural due process and substantive due process rights. Of particular note, the substantive due process argument alleged that the law infringed on the fundamental rights to travel and associate, and was not narrowly tailored to serve a compelling state interest. The 8<sup>th</sup>

Circuit determined that the residency restriction did not implicate any fundamental right that would trigger strict scrutiny of the statute. The statute was reviewed, therefore, under the more deferential “rational basis” standard with the legitimate state interest of promoting the safety of children meeting this standard.

#### **IV. State Law**

Minnesota state law includes provisions on sex offender residence registration and community notification in Minn. Stat. § 243.166, § 243.167, and § 244.052. With regard to residency restrictions on level III offenders specifically, Minn. Stat. § 244.052, subd. 4a(a) states, “the agency responsible for the offender’s supervision shall take into consideration the proximity of the offender’s residence to that of other level III offenders and proximity to schools and, to the greatest extent feasible, shall mitigate the concentration of level III offenders and concentration of level III offenders near schools.” The provision continues, “[i]f a [property owner or landlord] has an agreement with an agency that arranges or provides shelter for victims of domestic abuse, the owner or property manager may not knowingly rent rooms to both level III offenders and victims of domestic abuse at the same time.” Minn. Stat. § 244.052, subd. 4a(b).

#### **V. Current Initiatives**

Previous Minnesota legislative sessions have considered bills addressing the issue of residence locations of level III sex offenders. It is likely this issue will be raised again during the current legislative session. During the 2003 session, the Minnesota Department of Corrections (DOC) submitted a report (copy attached) in which it recommended against the adoption of blanket proximity restrictions on residence locations of level III offenders. The DOC supported efforts aimed at improving the current system, whereby case-by-case conditions are imposed upon supervised release by each offender’s institutional caseworker. See Minn. Stat. § 244.052, subd. 4a above.

The Report also stressed the difficulty caseworkers face in finding an appropriate residence for level III offenders upon release. The Report states, “[r]esidential choices are already limited under current statutes that do not prohibit level three offenders from living near schools. Additional restrictions would severely affect already meager placement choices. Minneapolis . . . [has] a well-dispersed system of neighborhood schools that would create a restriction on the majority of residential property.” See attached Report, p. 9. The Report also concludes that adoption of a 1,500-foot restriction would exclude every residential area of Minneapolis with minor exceptions. See Report, p. 10. In the Appendix to the Report on pages 19-22, there are graphical depictions of a 1,500-foot residency prohibition within the City of Minneapolis. The City cannot legally adopt an ordinance that has the practical effect of eliminating the ability of a sex offender from locating his/her residence anywhere within the City.

### **ANALYSIS**

#### **I. Charter Authority**

Taylor Falls is a statutory city with a population of 1,000 people. Minneapolis is a home rule charter city.

As a creation of the legislature, a municipal corporation has no inherent powers and possesses only those powers expressly granted by its charter, general state laws, or the state constitution. However, in addition to these express powers, a municipal corporation may exercise those powers necessarily or fairly implied in or incident to the express powers. See Mangold Midwest Co. v. Village of Richfield, 247 Minn. 347, 143 N.W.2d 813 (1966). The threshold determination when considering a regulatory ordinance is whether the City can locate the specific authority to regulate in the particular field at issue. The Minneapolis City Charter confers on the City Council a power to regulate. Ukkonen v. Gustafson, 309 Minn. 260, 264, 244 N.W.2d 139, 141 (1976). Chapter 4, § 5 of the Charter provides as follows:

The City Council shall have full power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the government and good order of the City, for the oppression of vice and intemperance, and for the prevention of crime, as it shall deem expedient, and in and by the same to declare and impose penalties and punishments, and enforce the same against any person or persons who may violate the provisions of any ordinance, passed and ordained by it, and all such ordinances are hereby declared to be and have the force of law.

This provision is known as the “general welfare” clause of the City Charter. In discussing the powers of the Minneapolis City Council in the case of State v. Morrow, 175 Minn. 386, 388, 221 N.W. 423 (1928), the Court concluded:

Such a general welfare clause as that found in the charter of Minneapolis is intended to make the powers of the council sufficiently expansive to enable them to meet and provide for new conditions as they arise.

Furthermore, a general welfare clause will be construed liberally to allow self-protection by the municipality. Mangold Midwest Co., 143 N.W.2d at 820. Based on the City’s police powers and the general welfare clause, it would have the necessary authority to regulate the residence location of designated sex offenders for the twin purposes of promoting child welfare and public safety.

## **II. Preemption**

If the determination is made that the City has the requisite authority to adopt an ordinance similar to the Taylors Falls’ model, the next issue is whether state law preempts it. State preemption occurs in four situations: (1) when a conflict exists between a state statute and a local ordinance; (2) where the legislature intended to occupy the field; (3) where the statutory scheme includes implicit preemption of the subject matter; and (4) where the legislature explicitly preempts the field. Mangold Midwest Co., 143 N.W.2d at 819.

Conflict preemption generally occurs when a statute and an ordinance contain “express or implied terms that are irreconcilable.” Id. A conflict exists if an ordinance “permits what the statute forbids” or if the ordinance “forbids what the statute expressly permits.” Id. No conflict

exists, however, if the ordinance is simply complementary or in furtherance of the statute. Id. Further, there is no conflict when a city or other local government entity adds regulations that provide for greater consequences than those covered by the state. City of Duluth v. Evans, 158 Minn. 450, 197 N.W. 737 (1924).

Local ordinances also may be preempted where the legislature has fully and completely covered a subject matter, indicated that the field is solely of state concern, or that the subject matter itself is such that local regulation would have an unreasonably adverse effect on the state population. Mangold Midwest Co., 143 N.W.2d at 819. This can fairly be divided into two distinct areas: occupation of the field or preemption by implication. Occupation of the field exists where the subject matter has been fully and completely legislated on the state level, leaving no room for local governments to operate. Implied preemption occurs where the scheme itself, or some other language by the legislature implies that local action would be unwanted and against the goals of the legislation. The legislature could do so by stating that the legislation is being passed in order to bring regularity or consistency to a subject matter.

In the absence of a more thorough preemption analysis and based on the state law provisions cited above, it does not appear that there would be a conflict between a proposed local ordinance and state law. The Taylors Falls' ordinance is drafted very carefully to avoid conflict with state law, particularly the state registration requirements.

It also does not appear that the state has taken a patterned or comprehensive approach to the issue overall. In that situation, local government units tend to be given more leeway in preemption issues where the matter primarily affects the local populace. American Dog Owners Ass'n. Inc., v. City of Minneapolis, 453 N.W.2d 69, 72 (Minn. Ct. App. 1990). In American Dog Owners, the court held that the City had a particular local interest in taking appropriate measures for animal control. Id. The court did not imply that there was no interest on the state level in animal control, but rather that the City of Minneapolis had a particular interest that warranted further protection and regulation. Id. Based on the significantly higher concentration of level III sex offenders in Minneapolis, there is added support for the City's position if challenged on preemption grounds.

## **CONCLUSION**

The City has the requisite authority to adopt a sex offender residency restriction based, in part, on the Taylors Falls model. It does not appear that such an ordinance would be preempted by state law, although the argument would certainly be raised in a likely lawsuit. The City cannot legally adopt an ordinance that would eliminate the ability of a sex offender from residing anywhere within the City. In that regard, the scope of the Taylors Falls' ordinance is probably too broad. If adopted wholesale, the likely effect would be that the whole City constitutes a prohibited residence location. The schematics provided in the DOC 2003 Report illustrate the expansive geographic prohibition if a 1,500-foot restriction was adopted around just schools. It also concludes that a 1,500-foot restriction around schools and parks would effectively prohibit all residence within the City. If the City Council seeks to legislate in this area, it must take the time to determine the scope and expanse of a residence restriction with regard to various chosen institutions, whether schools, parks, bus stops, etc. The likely outcome of such an analysis could be a decreased proximity restriction (i.e. 1,500 feet instead of 2,000) or an

ordinance that would only apply to schools or schools and parks. Appropriate staff should be directed to conduct a mapping analysis to determine the impact of a desired ordinance. Finally, in order to avoid legal challenges raised in the Doe v. Miller case and a likely preemption argument, the ordinance would not apply to properly registered offenders who already reside in Minneapolis, even if within close proximity to a school. The ordinance would also not be implicated when the institution (school, park, day care center, etc.) was constructed or opened after an offender properly registered their residence.

The immediate recommendation is as follows:

- If the City Council desires to introduce subject matter for an ordinance, the proper referral would be to the Public Safety & Regulatory Services Committee. The ordinance would not find a proper fit within the Zoning Code, as it is not a bulk regulation nor does it regulate a use per se.
- Appropriate City staff should be directed to conduct a mapping analysis to determine the scope and possible scale of a residence location restriction before the language of the ordinance is drafted. It does not appear that the Taylors Falls' proximity restrictions can be adopted wholesale, as they would have the likely effect of completely prohibiting a sex offender from residing anywhere within the City.

If you need additional information or wish to discuss this memorandum in greater detail, please contact me at (612) 673-2192.

#### Attachments

cc: Steven Bosacker, City Coordinator  
William McManus, Chief of Police  
Tim Dolan, Assistant Police Chief