

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

ETHAN WRAY, CLARK CARTER,
JAMES GOLDSTON,

Plaintiffs,

-against-

THE COUNTY OF ALBANY, and
DISTRICT ATTORNEY OF THE
COUNTY OF ALBANY,

Defendants.

DECISION AND ORDER

Index No.: 2622-08

RJI No.: 01-08-092848

(Supreme Court, Albany County All Purpose Term)

Appearances:

KINDLON and SHANKS, P.C.
Attorneys for Plaintiffs
(Terence L. Kindlon, Esq., and
Kathy Manley, Esq., of Counsel)
74 Chapel Street
Albany, N.Y. 12207

NAPIERSKI, VANDENBURGH & NAPIERSKI, LLP
Attorneys for Defendants
(Thomas J. O'Connor, Esq., of Counsel)
296 Washington Avenue Extension
Albany, N.Y. 12203

Roger D. McDonough, J.:

Plaintiffs move for summary judgment. Defendants oppose the motion and cross-move for summary judgment.

Background

Plaintiffs Wray and Goldston are level two registered sex offenders. Plaintiff Carter is a level three registered sex offender. In September of 2006, the Albany County Legislature enacted Local Law No. "8". The law restricts certain level two and level three sex offenders from residing "within one thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility." Violations of Local Law "8" are punishable as a misdemeanor.

All of the plaintiffs were charged with violating Local Law "8". Mr Goldston received an adjournment in contemplation of dismissal ("ACOD") based on his relocation to a new

residence. Mr. Wray pleaded guilty to the charge in Albany City Court and was sentenced to a conditional discharge. Mr. Carter also pleaded guilty to the charge and his sentence was “wrapped up” with a sentence on an unrelated felony count.

The Court has previously denied plaintiffs’ requests for a temporary restraining order and preliminary injunction. All parties now seek an ultimate ruling from the Court on the merits.

Discussion

Preemption Argument

Plaintiffs principally argue that the local law should be invalidated because it has been preempted by state law. Defendants argue that the preemption argument fails as to the class of sex offenders, like plaintiffs, who are not on probation, parole or subject to post-release supervision.

A local law may be stricken down if a state law preempts it. The preemption doctrine is a recognition of the Legislature’s primacy with respect to matters of State concern (*see, Albany Area Bldrs. Assn., v Town of Guilderland*, 74 NY2d 372, 377 [1989]). “The Legislature may expressly state their intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area” (*Matter of Cohen v Board of Appeals of Village of Saddle Rock*, 100 NY2d 395, 400 [2003]). In order to evaluate plaintiffs’ assertion of preemption, this Court is obligated to first examine whether the State has acted upon this subject and then whether such action evinces a desire that its laws and regulations “should preempt the possibility of discordant local regulations” (*Incorporated Vil. of Nyack v Daytop Vil.*, 78 NY2d 500, 508 [1991]).

Plaintiffs argue that the numerous State statutes dealing with sex offenders demonstrates the requisite intent on the part of the Legislature to preempt local laws with respect to sex offenders. They point to, *inter alia*, Correction Law § 168; Penal Law 65.10; and Executive Law § 259-c. Correction Law § 168 imposes registration requirements on sex offenders. Penal Law § 65.10 imposes location, but not residential, restrictions upon certain sex offenders who are on probation or have received a conditional discharge. The relevant portions of Executive Law § 259-c impose location, but not residential, restrictions on certain level three sex offenders and

require the Parole Board to notify local social services departments of the release of level two and three offenders in their county if it appears that the individuals are likely to seek homeless services. Plaintiffs also rely upon the Sex Offender Management and Treatment Act which was passed in 2007. This legislation permits civil confinement of certain sex offenders. Plaintiffs also rely upon the policy statements which accompanied the passage of Correction Law § 168 and the Sex Offender Management and Treatment Act.

Plaintiffs place particular reliance upon the most recent legislative pronouncement in this area – Chapter 568 of the Laws of 2008 which was enacted on September 25, 2008¹ and became effective on January 23, 2009. Chapter 568 is titled as “AN ACT to amend the executive law and the social services law, in relation to requiring rules and regulations to be promulgated which shall include guidelines and procedures on the placement of certain sex offenders.” The “certain sex offenders” addressed by Chapter 568 are those designated as level two or level three. Chapter 568 mandates, *inter alia*, the promulgation of rules and regulations for the Division of Parole to consider when investigating and approving the residence of level two or level three sex offenders. Chapter 568 also mandates the promulgation of rules and regulations for local probation departments to consider when investigating and approving the residence of level two or level three sex offenders. Lastly, Chapter 568 mandates the promulgation of rules and regulations for local social service officials to use to determine the placement of applicants and recipients of public assistance who are designated level two or level three sex offenders.

Plaintiffs assert that all of the aforementioned legislation, and particularly Chapter 568, demonstrate that the State has expressed a desire to legislate in the field of sex offender monitoring, regulating and management, thereby preempting and prohibiting localities from doing so.

Defendants agree with plaintiffs as to the preemptive impact of Chapter 568 on the issue of residential status for level two and level three sex offenders subject to probation, parole or other parole-release supervision. However, defendants assert that Chapter 568 leaves the residential status of unsupervised sex offenders unaffected by state legislation and thus

¹ The Court’s Decision and Order on the preliminary injunction issue was rendered on September 23, 2008.

“amenable to local legislation.”

Discussion

As a result of defendants’ significant concession as to the preemption argument, the issue before the Court is now rather narrow. While defendants have conceded that Local Law “8” has been preempted, and is thus invalid, as to sex offenders subject to probation, parole or other post-release supervision, they seek to salvage Local Law “8” by asserting that the State’s actions, including Chapter 568, do not preempt Local Law “8” as to the residential status of unsupervised sex offenders. The Court finds this argument to be unpersuasive.

Initially, the Court notes that Local Law “8” applies to all level two and level three offenders who have been convicted of a sexual offense against a minor. The local law in no way limits its applicability to “unsupervised sex offenders”. As such, defendants’ instant concession effectively eviscerates the local law by admitting that it has no applicability to level two and level three offenders who are subject to probation, parole or other post-release supervision. Regardless, a review of Chapter 568 reveals that it also addresses the residential status of certain “unsupervised sex offenders”. Specifically, Chapter 568 addresses the residential status of level two and level three offenders who are seeking shelter assistance from local social service officials. Said portion of Chapter 568 is in no way limited to sex offenders on parole, probation or subject to post-release supervision. It is therefore manifestly clear that the Legislature enacted legislation that significantly impacts the residential status of both supervised and unsupervised level two and level three sex offenders.

As noted earlier, in preemption cases, the Court must first examine whether the State has acted on a particular “subject”. While the parties disagree in their assessment of what “subject” is at issue,² the Court finds that the “subject” is residential restrictions on level two and level three sex offenders, as this is the specific matter addressed by the local law. The Court also finds that the Legislature has specifically, via Chapter 568, enacted legislation addressing the residency

² Plaintiffs argue that the “subject” is sex offender monitoring, regulating and management. Defendants initially argued that the “subject” was the residency of convicted sex offenders, but they now seek to limit the preemption subject to the residency of unsupervised sex offenders.

of level two and level three sex offenders. In light of the enactment of Chapter 568, the Court finds that the State has acted upon the specific subject addressed by Local Law "8". Further, the Court holds that the breadth and detail of Chapter 568 evince a legislative intent to preempt the possibility of discordant local legislation regarding the residency of level two and level three sex offenders. Accordingly, the Court is constrained to invalidate Local Law "8" as it has been preempted by the Legislature in enacting, *inter alia*, Chapter 568 of the Laws of 2008.

Remaining Arguments

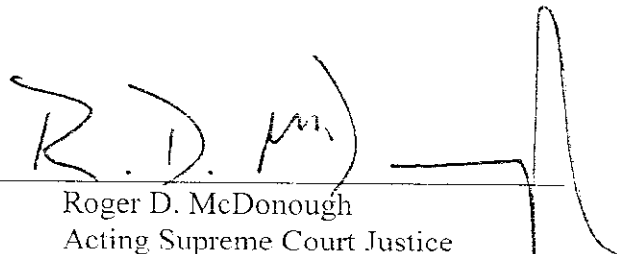
In light of the Court's conclusion as to preemption, the remaining issues at bar have been rendered academic.

Based on the foregoing, it is **HEREBY ORDERED** that plaintiffs' motion for summary judgment is hereby granted to the extent that Local Law "8" of 2006 is deemed invalid based on the State's preemption of the subject of the residency of level three and level three sex offenders.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being returned to the counsel for plaintiffs who is directed to enter this Decision and Order without notice and to serve defendants' counsel with a copy of this Decision and Order with notice of entry. The Court will transmit a copy of the Decision and Order and the papers considered to the County Clerk. The signing of the Decision and Order and delivery of a copy of the Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: Albany, New York
July 10, 2009



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered:

- 1) Plaintiffs' Notice of Motion, dated January 20, 2009;
- 2) Affirmation of Terence L. Kindlon, Esq., dated January 20, 2009;
- 3) Plaintiffs' Memorandum of Law, dated January 20, 2009;
- 4) Correspondence from Plaintiff's Counsel, dated January 26, 2009, with supplemental case law;
- 5) Correspondence from Plaintiff's Counsel, dated February 19, 2009, with supplemental case law;
- 6) Defendants' Notice of Cross-Motion, dated March 31, 2009;
- 7) Affidavit of Thomas J. O'Connor, Esq., dated March 31, 2009, with annexed exhibits;
- 8) Defendants' Memorandum of Law, dated March 31, 2009;
- 9) Plaintiff's Memorandum of Law, dated April 8, 2009;
- 10) Correspondence from Plaintiff's Counsel, dated May 7, 2009, with supplemental case law.