

G.H. v. Township of Galloway,
Docket No. ATL-L-6395-06 (Sup. Ct. N.J., Atlantic County – Law Div. Feb. 5, 2007)

On appeal to the Superior Court of New Jersey, Appellate Div.

The ACLU opposes legitimate efforts to protect children from sexual predators who attempt to live in their neighborhoods. The ACLJ is now representing the Township of Galloway, New Jersey in defense of an important law designed to protect children against preying, convicted sex offenders. The ACLU has filed suit claiming that the Township's Ordinance No. 1616 of 2005 violates several of New Jersey's constitutional protections. The Township of Galloway, like many other communities in New Jersey, enacted Ordinance No. 1616 to serve as a buffer zone for children, forbidding convicted sex offenders (over age 18) from residing within "2,500 feet of any school, park, playground or day care center in Galloway Township."¹

Background of the Case:

Incredibly, the ACLU Foundation of New Jersey is seeking, on the plaintiff's behalf, freedom for convicted sex offenders to live in the place of their choice without regard for the safety of children. Currently, convicted sex offenders must register with the State of New Jersey under Megan's Law.² Once registered, the Township's residency requirements apply. The plaintiff is a "Tier 1" convicted sex offender in the State of New Jersey who challenged Ordinance 1616 in July 2006. The plaintiff asserted three constitutional claims involving 1) state law preemption; 2) substantive due process; and 3) *ex post facto* laws, together with double jeopardy under the State Constitution. The lower court struck down Ordinance 1616, but the ACLJ has appealed on the Township's behalf to defend Ordinance 1616. The ACLJ will defend the validity of Ordinance 1616 against all three claims, showing the compelling need to protect children against sex offenders.

As we recently argued at the Superior Court, the chilling reality is "that convicted sex offenders and alas, would-be sex offenders, regularly prey on their young defenseless victims at places where they are likely to be, namely the schools parks, playgrounds and day care centers which have been designated as prohibited areas of residence by the Township." Buffer zones are necessary to protect this most vulnerable segment of society.

Preemption by State Law

The plaintiff's preemption claim argued that Megan's law preempted the enactment of Ordinance 1616, claiming that the comprehensive nature of the State law forbade the Township from enacting additional laws pertaining to sex offenders. Megan's Law is a broad law that leaves the details of statewide regulation up to the localities. There is nothing to indicate that the State of New Jersey, in enacting Megan's Law, intended to prohibit further measures to carry out the important

¹*G.H. v. Township of Galloway*, No. ATL-L-6395-06, slip op. At 1 (Feb. 5, 2007); Township Ord. 1616, § 1.

²N.J.S.A 2C:7-1, *et seq.* (New Jersey Sex Offender Registration and Notification statute).

government interest behind Megan’s Law, such as a buffer zone. Municipalities are charged with protecting the public welfare; one aspect of that duty recognizes the severe and highly probable danger of recidivism by convicted sex offenders.

The restrictions created by Ordinance 1616 merely extend the protection of Megan’s Law. The goal of Megan’s Law is to protect the community through notification either on the Internet or through personal notification to the surrounding residents. The goal of the Township was to add to that protection by creating safe zones in areas frequented by children. In this way, the State statute and local ordinance compliment one another.

Substantive Due Process

Ordinance 1616 does not violate a convicted sex offender’s constitutional right to substantive due process. While Ordinance 1616 has the potential to affect a sex offender’s personal choice as to where he resides, it does not do so in a constitutionally significant way. The impact is slight when considering the interests at stake. On this issue of law, New Jersey courts balance the interests of both sides, and in this case, the balance tips decidedly in the Township’s favor. Courts in other states have dealt with this issue before and concluded that there is no fundamental right for sex offenders to reside in the place of their choice.³

The issue in this case is *not* whether the plaintiff can live in the Township; rather, Ordinance 1616 speaks only to where in the Township he may live. Additionally, the interest of the Township’s children far outweighs the desire of a convicted sex offender to live in the place of his choice. Even the United States Supreme Court recognized that the risk of recidivism among sex offenders is “frightening and high.”⁴ The Appellate Court must recognize the Township’s vitally important interests in protecting the health, safety and welfare of its families.

***Ex Post Facto* Laws and Double Jeopardy.**

The plaintiff also claimed that Ordinance 1616 imposed a punishment in addition to his conviction that violated the constitutional prohibitions against *ex post facto* laws⁵ and the Double Jeopardy Clause.⁶ Claims under *ex post facto* and Double Jeopardy clauses are based on the premise of an impermissible second punishment for previously punished conduct. The Township never intended additional punishment when it enacted Ordinance 1616; rather, the Township intended to institute a protective measure designed to combat a known, “frightening” and high” recidivism plight. As the Supreme Court of New Jersey explained, whether a statute constitutes punishment

³See *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005); *People v. Leroy*, 357 Ill. App. 3d 530 (Ill. App. Ct. 2005).

⁴*McKune v. Lile*, 536 U.S. 24, 33-34 (2002).

⁵N.J. Const., Art. IV, § 7, ¶ 3.

⁶N.J. Const., Art. I, ¶ 11.

depends upon whether the legislative intent was punitive.⁷ Furthermore, residency restrictions are not commensurate with punishment in and of themselves. The law requires more to establish punitive intent, and the Supreme Court has recognized the legitimacy of similar proactive measures:

The Supreme Court over the years has held that restrictions on several classes of offenders are nonpunitive, despite the absence of particularized determinations, including laws prohibiting the practice of medicine by convicted felons, laws prohibiting convicted felons from serving as officers or agents of a union, and of course laws requiring the registration of sex offenders.⁸

Thus, Ordinance 1616 is a necessary and constitutional proactive measure to combat a very difficult recidivism problem. It is neither an *ex post facto* law nor an additional punishment under the Double Jeopardy Clause.

Although the Superior Court ruled in the plaintiff's favor on these issues, the ACLJ disagrees with that decision; on appeal, we will oppose the ACLU in their latest effort to grant more freedom to convicted sex offenders. The ACLJ believes that the threat, and even the fear of harm constitutes irreparable injury to the Township and its residents. The Township should be able to take proactive measures to protect its children from criminal acts that scar them for life.

⁷*Doe v. Portiz*, 142 N.J. 1, 46 (N.J. 1995).

⁸*Doe v. Miller*, 405 F.3d at 721-22.