COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

ESSEX COUNTY NO. SJC-11822

THREE REGISTERED SEX OFFENDERS

V.

CITY OF LYNN

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# BRIEF AND SUPPLEMENTAL ADDENDUM FOR THE PLAINTIFFS-APPELLEES FROM A FINAL JUDGMENT OF THE ESSEX COUNTY SUPERIOR COURT

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TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

## Constitutional Provisions



## Statutes



## Other Authorities

## ISSUES PRESENTED

1. Whether the City of Lynn's ordinance restricting the right of level two and level three sex offenders to live in Lynn violates the Home Rule Amendment, where the ordinance both intrudes upon and conflicts with the comprehensive statutory regime enacted by the Legislature to regulate sex offenders' lives and keep track of their whereabouts.

2. Whether the Lynn ordinance, which effectively banishes level two and three sex offenders from Lynn, violates the "fundamental right" of such individuals "to move freely within the Commonwealth" and "live where they choose," Doe v. Police Comm'r of Boston, 460 Mass. 342, 347-348 (2011), as guaranteed by arts. 1, 10, and 12 of the Massachusetts Declaration of Rights.

## STATEMENT OF THE CASE

This class action for declaratory and injunctive relief challenges the constitutionality of the "Ordinance Pertaining to Sex Offender Residency Restrictions in the City of Lynn" (ordinance) adopted by the City of Lynn (Lynn or the city) on January 12, 2011. With a few narrow exceptions, the ordinance

prohibits level two and level three sex offenders from living within 1,000 feet of any school or park in Lynn. Because ninety-five percent of Lynn lies within 1,000 feet of a school or park (Add. 15; RA 1170-1171),[1/] the ordinance effectively banishes all level two and three sex offenders from Lynn.

The complaint was filed in Essex County Superior Court on April 12, 2012, on behalf of five registered sex offenders identified as John Doe, Richard Roe, Michael Moe, Charles Coe and Paul Poe (RA 3, 100-125).[2/] The complaint sought preliminary injunctive relief (RA 112), and plaintiffs served the city with a motion for a preliminary injunction with supporting affidavits, a memorandum of law, and motion for class

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[1/]A supplemental addendum to this brief is cited by page number as "(Add. )," and is reproduced, post. The record appendix filed by Lynn is cited by page number as "(RA )." Lynn filed its record appendix without first serving the plaintiffs with a designation of the parts of the record which it intended to include. Cf. Mass. R.A.P. 18(b). With this brief, the plaintiffs have filed a motion for leave to submit a supplemental record appendix. The supplemental record appendix is cited by page number as "(SRA )." Lynn's brief is cited by page number as "Defendant's brief at ___."

[2/]With the complaint, the plaintiffs filed affidavits of indigency disclosing their true names, along with motions to impound those affidavits and for leave to proceed under pseudonyms; these motions were allowed (RA 4; SRA 1-5).

certification. The motion for a preliminary injunction was not filed because Lynn agreed not to enforce the ordinance pending a decision by the court.

On May 9, 2012, an individual identified by the pseudonym John Smith moved to intervene as a plaintiff (RA 4; SRA 6). The motion to intervene, along with the intervener's motion for leave to proceed under a pseudonym, was allowed on May 23, 2012 (RA 4; SRA 6). On December 6, 2012, the plaintiffs moved for class certification (RA 4; SRA 12). Lynn did not serve the plaintiffs with any opposition to the motion for class certification, and it was filed without opposition pursuant to Superior Court Rule 9A. On February 13, 2013, the Superior Court (Feeley, J.) certified a plaintiff class of "all registered [l]evel [two] and [l]evel [three] sex offenders who are now or who may in the future be prohibited from living at various places in the City of Lynn by the city's ordinance pertaining to sex offender residency restrictions" (RA 5; SRA 12, 15).

Over the ensuing months, resolution of the case by way of summary judgment was impeded only by Lynn's stated intent to present evidence to contest the affidavits submitted by plaintiffs' experts (RA 918-925; SRA 17). However, at the end of December 2013,

the city (represented by new counsel), served answers to interrogatories indicating that it had not determined whether it would rely on any expert testimony (RA 926-930). Accordingly, at a status conference held on January 21, 2014, Judge Feeley set a schedule for consideration of summary judgment, requiring that plaintiffs' motion for summary judgment be served by February 20, 2014, but allowing Lynn two months to serve its opposition (RA 5). The city indicated for the first time at that hearing that it intended to conduct fact discovery and depose the named plaintiffs (RA 921).

Lynn undertook various discovery efforts to obtain facts concerning the underlying details of the offenses committed by the named plaintiffs and by all members of the plaintiff class. The only justification articulated by the city for this broad discovery was that it was necessary to show there was a risk of recidivism which was somehow not reflected in the risk level classifications made by the Sex Offender Registry Board (SORB) (RA 494-496).[3/]

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[3/]The city has never disputed that each of the named plaintiffs was ordered to leave his home under threat of substantial penalties, and the area restricted by

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The city began by deposing plaintiff Charles Coe. As summarized by Judge Feeley,

> [q]uestions were asked about Coe's mental and physical health treatment, medication use, driving history, vehicle ownership, voting history, alcohol and drug use, relations with his neighbors and landlord, daily routine, church and community activities, telephone and TV access, criminal records and the details about his sex offense convictions.
>
> (RA 539)

Counsel objected to some of these questions and instructed Poe not to answer in order to permit the objections to be presented to the court. Following the deposition, the plaintiffs filed a motion for a protective order to limit questioning to three issues: "(a) the plaintiffs' residence in Lynn; (b) whether they have been ordered to move; and (c) what impact, if any, being required to move would have on them" (RA 294). The motion for a protective order was allowed (RA 546).

Undeterred, Lynn filed a pair of motions seeking access to (a) the criminal offender record information pertaining to the named plaintiffs and all members of the plaintiff class (RA 547), and (b) SORB's

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[3/] (CONTINUED FROM PREVIOUS PAGE)
the ordinance extends to virtually the entire City of Lynn.

"Classification Recommendation Files" concerning the named plaintiffs and all members of the plaintiff class (RA 560). The motions were denied (RA 1083-1085).

On May 2, 2014, the plaintiffs identified as Richard Roe and Michael Moe sought leave to withdraw from the case as named plaintiffs and class representatives (RA 875). Judge Feeley allowed their motions on June 4, 2014, concluding that, in light of the "aggressiveness" with which Lynn had approached Poe's deposition, it was "not unreasonable" that Roe and Moe would be "reluctan[t] to submit themselves to that sort of inquiry" (RA 1085-1086).[4/]

On May 14, 2014, the plaintiffs filed a motion for partial summary judgment together with a statement of material facts based on the affidavits of the named plaintiffs, the plaintiffs' experts' affidavits describing the impact of residency restrictions on sex offender registration and management, and a mapping analysis of the ordinance's geographic reach (SRA 19). The motion argued that the ordinance runs afoul of the Home Rule Amendment (count one of the complaint), is an

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[4/]In the same order, the judge allowed the remaining named plaintiffs' motion for a general order impounding all filings identifying them by their true names (RA 1079-1083).

ex post facto law (count two), and violates the plaintiffs' right to move freely within the Commonwealth (count four) (RA 255-257).

Pursuant to Superior Court Rule 9A, the motion was filed with Lynn's opposition and statement of additional facts, and plaintiffs' response to those additional facts (SRA 19). On July 7, 2014, Judge Feeley issued a memorandum of decision and order allowing the plaintiffs' motion for partial summary judgment on the Home Rule Amendment claim (Add. 8; RA 1165, 1172). In so ruling, the judge concluded that "the Legislature intended to preempt the subject area because the legislation on the subject is so comprehensive and coordinated on a uniform, state-wide basis that a local enactment such as the [o]rdinance would frustrate the uniform and comprehensive approach to the civil regulation and management of the post-incarceration lives of convicted sex offenders," and, in the alternative, that "the totality of the circumstances support an express legislative intent to forbid local activity in the area of the civil regulation and management of the post-incarceration lives of convicted sex offenders" (Add. 32; RA 1188).

The judge explicitly declined to reach the

plaintiffs' claim that the ordinance unconstitutionally curtailed their right to move freely within the Commonwealth (Add. 16; RA 1172). Instead, he sua sponte ordered the entry of final judgment for the plaintiffs on the Home Rule Amendment claim pursuant to Mass. R. Civ. P. 54(b), and stayed further proceedings in the Superior Court on the remaining claims pending the outcome of the instant appeal (Add. 35-36; RA 1191-1192). Final judgment was entered on July 8, 2014 (RA 11; SRA 49).

Lynn filed a timely notice of appeal on July 29, 2014 (RA 11; SRA 50-51). Following entry of the case in the Appeals Court, the plaintiffs sought direct appellate review. The city filed a limited opposition but agreed that direct appellate review was appropriate. On January 15, 2015, this Court allowed the plaintiffs' application for direct appellate review.

## STATEMENT OF FACTS

On February 12, 2011 (Add. 6-7), the City of Lynn joined dozens of other cities and towns in Massachusetts, including the neighboring communities of Chelsea and Revere (RA 291), in adopting residency restrictions for sex offenders. Lynn's ordinance prohibits any person "convicted of a criminal sex offense and designated as a [l]evel [two] or [three] sex offender by the Massachusetts Sex Offender Registry Board pursuant to [G.L.] c.6, §178C" from establishing a permanent or temporary residence "within [1,000] feet of any [s]chool or [p]ark in the City of Lynn" (Add. 2-3 [ordinance, sections 3:00 and 4:00]).

This is not a narrow restriction. It covers virtually the entire city and applies to even the most transient stays. Given the number of schools and parks in the city, few areas lie outside the scope of the ordinance. As shown by a mapping analysis submitted by the plaintiffs -- and never disputed by the city -- ninety-five percent of the residential properties in Lynn are within 1,000 feet of a school or park as defined by the ordinance (RA 61).[5/]

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[5/]Of the 21,899 parcels in Lynn, 20,895 are located within 1,000 feet of a school or park; of the 19,320

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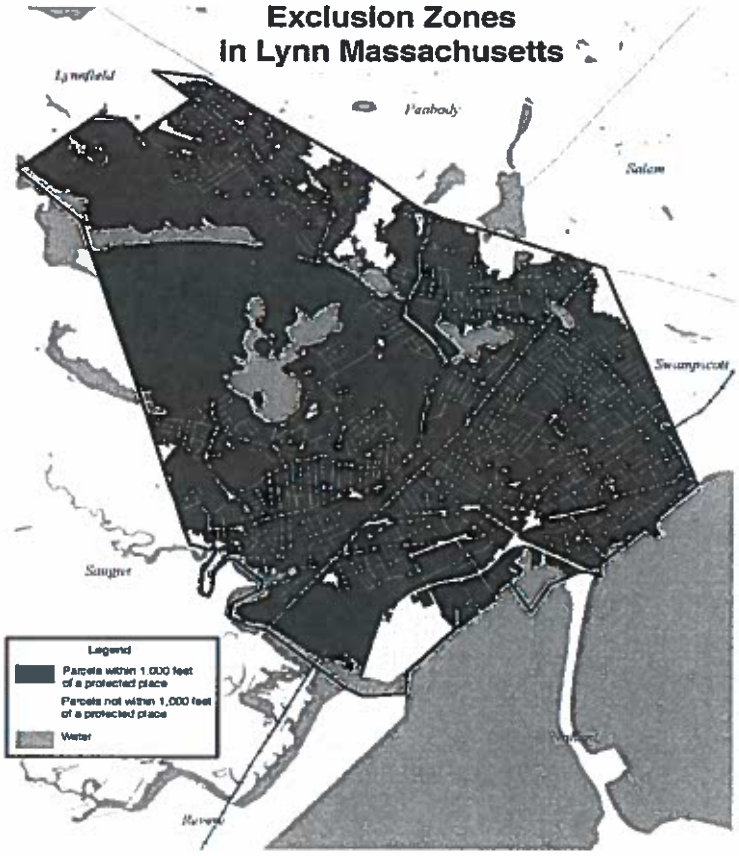


There are a few narrow exceptions to the residency restriction, but they do little to reduce the sweep of its prohibition. A grandfather clause excludes residences established prior to the effective date of the ordinance (February 12, 2011) but, as a practical matter, applies only to sex offenders who had purchased a home in Lynn before that date (Add. 3-4 [ordinance,

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[5/](CONTINUED FROM PREVIOUS PAGE)
properties zoned as residential, 18,421 are located within 1,000 feet of a school or park (RA 61).

section 4:00(C)(1)(a)-(b)]).[6/] An exemption for living with family members is likewise limited, applying only to sex offenders who reside with a family member "within the first degree of kindred" (Add. 4 [ordinance, section 4:00(C)(3)]).

The ordinance applies to both a "permanent address" ("a place where a person lives, abides, lodges or resides for fourteen . . . or more consecutive days") and to a "temporary address" ("a place where a person lives, abides, lodges or resides for a period of less than fourteen . . . consecutive days or fourteen

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[6/]Section 4:00 provides that a level two or three sex offender "does not commit a violation of this section" if the offender established a permanent residence in Lynn prior to the ordinance's effective date, and

> a. [p]ermanent [r]esidence was established by purchasing the real property where the residence is established, or
>
> b. [p]ermanent [r]esidence was established through a valid, fixed term written lease or rental agreement, executed prior to the effective date of this ordinance, whose term has not yet expired.

(Add. 3-4, [ordinance, section 4:00(C)(1)(a)-(b)]) (emphasis supplied). Since residential leases are typically of short duration and will ultimately expire, only home ownership pre-dating the ordinance is effectively exempted.

. . . days in the aggregate during any calendar year") (Add. 3 [ordinance, section 3:00]). Thus, Lynn has effectively prohibited a homeless level two or three sex offender from taking shelter in Lynn overnight, if that shelter should be within 1,000 feet of a school or park.

The residency restrictions established by the ordinance are augmented by so-called "Child Safety Zones" which impose further restrictions on the movement of sex offenders in Lynn. Of particular significance is a provision prohibiting sex offenders from "loitering on or within [1,000] feet of any property in which there is a [s]chool, [p]ark or other private or public [r]ecreational [f]acility" (Add. 4 [ordinance, section 5:00(A)(3)]).[1/] Loitering is defined as "enter[ing] or remain[ing] on property while having no legitimate purpose therefor, or, if a legitimate purpose exists, remaining on that property beyond the time necessary to fulfill that purpose"

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[1/]The ordinance also prohibits any level two or three sex offender from "entering upon the premises of a [s]chool unless previously authorized specifically in writing by the school administration" (Add. 4 [ordinance, section 5:00(A)(1)]). Nothing in this restriction requires that any student actually be in the building.

(Add. 5 [ordinance, section 5:00(A)(3)]).[8/] The loitering provision allows any "authorized person" to ask an offender to leave the premises; a violation occurs after the offender has been asked to leave once and does not do so (Add. 4-5 [ordinance, section 5:00(A)(3)]).

The penalties set by the ordinance are severe, particularly for persons with limited income. Violations of the exclusionary zones are subject to a $300 non-criminal fine for each day that a person remains in a restricted area thirty days after receiving a notice to move from the city (Add. 4, 5 [ordinance, sections 4:00(D), 7:00(A)]). In the event of a "subsequent offense," the ordinance further requires "notification to [the] offender's landlord, parole officer and/or probation officer, and [SORB] that the [r]egistered [s]ex [o]ffender has violated a municipal ordinance" (Add. 5 [ordinance, section 7:00(B)]).

The ordinance applies to a large number of Lynn residents. When this action was filed there were 131 level two and sixty-one level three registered sex

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[8/]The term "no legitimate purpose" is left undefined by the ordinance.

offenders living in Lynn (RA 102).[9/] This included the named plaintiffs, each of whom is a level three sex offender currently residing in Lynn who has registered as required by law with the Lynn Police Department (RA 51, 140, 253). On February 14, 2012, the Lynn City Solicitor sent a "Notice to Move" to a number of sex offenders then residing in the city, including each of the named plaintiffs (RA 18-21).[10/] The notices, which were identical in form, stated that the residence of the recipient was located within 1,000 feet of a school

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[9/]SORB's website contains updated information regarding the number of level two and level three sex offenders living in Lynn at any particular time. See http://sorb.chs.state.ma.us/HTMLTownOutput.ASP?NTown=LYNN (reporting 136 level two and sixty-one level three sex offenders in Lynn) (last visited March 23, 2015). The record does not disclose how many, if any, of these individuals live in the five percent of Lynn not covered by the ordinance or might qualify for one of its limited exceptions.

[10/]Lynn asserts in its brief that the city issued its Notices to Move to the named plaintiffs and other registered sex offenders living in Lynn whom it had determined to be in violation of the ordinance "[a]pproximately a month" after the ordinance was "approved." Defendant's brief at 13, citing RA 17-21. This is incorrect. The ordinance was approved on January 12, 2011 (Add. 7), and by its terms became effective "thirty-one . . . days" thereafter, i.e., on February 12, 2011 (Add. 6 [ordinance, section 10:00]). Notices to move were not sent to the named plaintiffs and others until February 14, 2012 (RA 18-21). Therefore, contrary to Lynn's suggestion, the ordinance went unenforced for over a year following its effective date.

or playground, and that, as a level three sex offender, the recipient was prohibited from living there (RA 18-21). The notice advised that the recipient had thirty days to "relocate to another address," and would be assessed a fine of $300 per day for each day that the sex offender remained at that address thereafter (RA 18-21). The notice did not identify any alternative housing that might be available.

The summary judgment record showed that each of the named plaintiffs will suffer substantial hardship if forced to leave his home. Plaintiff Doe is fifty years old and has multiple disabilities. His only sources of support are monthly SSI payments and food stamps. He is an insulin-dependent diabetic, has a history of serious cardiac disease, suffers from severe and disabling back pain, and is being treated for depression and anxiety (RA 51-54, 967-972). Plaintiff Coe is sixty-five years old and physically disabled. He lives in a rooming house in Lynn. Public assistance provides his only source of income (RA 253-254, 980-981). Plaintiff Poe is fifty-eight years old, is developmentally disabled, and receives monthly SSI payments. After receiving the city's "Notice to Move," Poe was homeless for a month and lived on the street

(RA 140-142, 981-984).

In support of their motion for summary judgment, the plaintiffs submitted affidavits of three experts concerning the impact of sex offender residency restrictions (RA 22-23 [Affidavit of Dr. Laurie Guidry]; RA 55-56 [Affidavit of Timothy App]; RA 70-78 [Affidavit of Professor Jill Levenson, Ph.D.]). The experts' extensive clinical experience, their own research, and the published literature in the field all established that residency restrictions greatly diminish housing availability for sex offenders, leading to transience, homelessness, and instability among sex offenders. This in turn creates a substantial deterrent to compliance with registration laws. As Dr. Guidry put it, "When sex offenders are left with nowhere to live, they begin to disappear" (RA 22 [Guidry affidavit]). Because residency restrictions drive sex offenders "underground" (RA 56 [App affidavit]), one of their principal effects is to increase "the number of offenders who fail to register, abscond, or become more difficult to track and monitor" (RA 78 [Levenson affidavit]).

Local residency restrictions also create obstacles to the reintegration of sex offenders. The affidavits

of plaintiffs' experts showed that the housing instability caused by residency restrictions "is consistently and strongly correlated with increased criminal recidivism [and] parole failure" (RA 76 [Levenson affidavit]). For this reason, Dr. Guidry concluded that residency restrictions like Lynn's "undermine sex offender registration, interfere with effective management of sex offenders by decreasing stability [,] and . . . may ultimately increase the danger of sexual abuse in the community" (RA 23 [Guidry affidavit]).

Further, the impact of local residency restrictions is often exacerbated when, after one locality adopts a residency restriction, surrounding localities respond with similar measures (RA 76 (Levenson affidavit)]. Massachusetts' experience reflects this "domino effect" (RA 76 [Levenson affidavit]). Of the forty municipalities which had adopted residency restrictions as of February 20, 2014, thirty-two were adjacent to a community that also had adopted such a restriction (RA 291-292).[11/]

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[11/]In response to the affidavits of plaintiffs' experts, Lynn submitted a report from a forensic psychologist, John White (RA 743). Dr. White's report did not

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## SUMMARY OF THE ARGUMENT

1. Purporting to act under the authority of the Home Rule Amendment, the City of Lynn has adopted an ordinance mandating the eviction of some 200 registered sex offenders. The strict provisions of this ordinance effectively banish all level two and level three sex offenders from Lynn. This outcome violates both the Home Rule Amendment and the constitutionally protected right to move freely within the Commonwealth, and cannot stand.

The memorandum of decision issued by the Superior Court judge in this case (Add. 9-36) explains with exceptional thoroughness and clarity (1) how the Legislature has occupied the field with respect to the post-incarceration lives of registered sex offenders, and (2) why, in light of this unmistakable legislative intent, Lynn's sweeping residency restriction intrudes upon and conflicts with the comprehensive regulatory

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[11]/(CONTINUED FROM PREVIOUS PAGE)
contest the evidence concerning the effects of residency restrictions. To the contrary, Dr. White acknowledged that residency restrictions "cause[] hardship," and conceded that "no empirical research . . . support[ed]" them," as the Superior Court noted in his memorandum of decision (Add. 26; 1182) (quoting Dr. White's report).

regime enacted and repeatedly modified by the Legislature over the course of almost twenty years, in violation of Art. 89, §6, of the Amendments to the Massachusetts Constitution (the Home Rule Amendment). For the reasons stated in Judge Feeley's decision -- which is in full accord with the well-reasoned opinions by the high courts of New York, New Jersey, and Pennsylvania -- it "defies common sense" to think that the Legislature intended to leave the constitutionally delicate matter of where a registered sex offender may be permitted to live "to the whims and political motivations of individual cities and towns" (Add. 31-32). (pp. 22-38).

2. An opinion by this Court affirming the judgment below solely on the plaintiffs' Home Rule Amendment claim, however, will still leave sex offenders in Massachusetts vulnerable to the vagaries of the political process, because the Legislature could amend the current statutory scheme to explicitly allow local residency restrictions. This Court should therefore reach the issue of whether the Lynn ordinance violates the right of level two and three sex offenders "to move freely within the Commonwealth" and "live where they choose," Doe v. Police Comm'r of Boston, 460 Mass. 342,

347-348 (2011), as guaranteed by arts. 1, 10, and 12 of the Massachusetts Declaration of Rights, notwithstanding the fact that Judge Feeley explicitly declined to do so. DIRECTV, LLC v. Department of Revenue, 470 Mass. 647, 652 (2015) (court "may consider any ground supporting" ruling on summary judgment, and "need not rely [only] on the rationale cited" below).

The undisputed facts in this case establish that Lynn has ordered the plaintiffs to leave their homes solely on the basis of their status as level three sex offenders. This is precisely the situation struck down in Doe v. Police Comm'r of Boston, supra, when the Court held that G.L. c.6, §178K(2)(e), unconstitutionally sought to force Doe from the rest home "where he [had chosen] to live," see id. at 351, "solely on the basis of [his] level three classification." 460 Mass. at 349.

Notwithstanding this Court's decision in Doe, Lynn and more than forty other Massachusetts' towns and municipalities have adopted ordinances that would drive sex offenders out of their homes solely on the basis of their classification levels. These blatantly unconstitutional ordinances have often been adopted in geographic clusters that starkly reflect the not-in-my-backyard mentality which underlies them.

It is not easy to conjure a more ominous attack on individual rights than the "Notice to Move" at issue in this case. Governmental action that forces a person to leave his home "not in connection with any particular activity" but solely on the basis of his designated classification as a registered sex offender "asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark of totalitarian government." Doe v. Attorney General, 426 Mass. 136, 149-150 (1997) (Fried, J., concurring). Nevertheless, the Attorney General's office has continued to approve such local measures -- even after Judge Feeley's decision in this case -- simply because "no Massachusetts appellate court has yet reviewed municipal restrictions on where sex offenders may be" (Add. 39 [Letter pursuant to G.L. c.40, §32, from AAG Margaret J. Hurley to Barbara Stats, Town Clerk, Town of North Reading, January 20, 2015). The Court should therefore reach the question raised by count four of the complaint, and make clear that the Declaration of Rights does not, and never will, tolerate such a measure. (pp. 38-47).

## ARGUMENT

### I.

### THE SUPERIOR COURT CORRECTLY RULED THAT THE ORDINANCE VIOLATES THE HOME RULE AMENDMENT BECAUSE IT INTRUDES UPON AND CONFLICTS WITH THE LEGISLATURE'S COMPREHENSIVE STATUTORY REGIME TO REGULATE SEX OFFENDERS' LIVES.

Under the Home Rule Amendment, local government ordinances and by-laws cannot be "inconsistent with the constitution or laws" of the Commonwealth. Art. 89, §6 of the Amendments to the Massachusetts Constitution. Even in the absence of explicit language forbidding local activity, there are two ways that a local ordinance can be "inconsistent" with the laws of the Commonwealth. First, when legislation on the subject matter "is so comprehensive that an inference would be justified that the Legislature intended to preempt the field." Easthampton Savings Bank v. Springfield, 470 Mass. 284, 289 (2014) (internal citation omitted). And second, when the local ordinance directly conflicts with state law provisions, and thus "would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject." Boston Gas Co. v. City of Somerville, 420 Mass. 702, 704 (1995).

The Superior Court concluded that the ordinance

exceeds Lynn's authority under the Home Rule Amendment because the Legislature has preempted the field with a comprehensive regime to manage sex offenders' lives and because the ordinance would directly conflict with statutory sex offender registration and notification requirements. The judge's decision was correct.

### A. The ordinance is preempted by comprehensive statewide legislation regulating and managing sex offenders' lives.

Over the past two decades, the Legislature has built a comprehensive and coordinated statewide system for the post-incarceration management of sex offenders. See generally Opinion of the Justices, 423 Mass. 1201 (1996) (responding to Legislature's request for advisory opinion as to constitutionality of sex offender notification legislation proposed in 1996); Roe v. Attorney General, 434 Mass. 418, 421-426 (2001) (describing legislative enactments from 1996 to 1999); Doe v. Police Comm'r of Boston, 460 Mass. 340, 345-346 (2011) (summarizing regime as of 2011). The Superior Court carefully reviewed this extensive body of statewide legislation to infer a legislative intent to preempt local regulation of sex offenders (Add. 20-30; RA 1176-1186).

1. Chapter 74 of the Acts of 1999

The foundation of the current system was enacted in 1999, see Chapter 74 of the Acts of 1999, St. 1999, c.74, §§1-20 (Chapter 74 or the act). The act had three major provisions designed to address both "the danger of recidivism posed by sex offenders" and "the lack of information known about sex offenders" residing in individual communities. St. 1999, c.74, §1. Collectively, these provisions provide a comprehensive system to regulate offenders lives and protect public safety.

First, the Sex Offender Registration and Notification Law (SORNL), G.L. c.6, §§178C-178P, inserted by St.1999, c.74, §2, instituted a broad program to identify, classify, and track all sex offenders living, working, or studying in Massachusetts. The statute created SORB, a statewide agency authorized with the power to make detailed individualized risk assessments of the thousands of persons in Massachusetts who have been convicted of a sex offense. G.L. c.6, §§178K-M, inserted by St. 1999, c.74, §2. SORNL also requires that: (a) all registration information be provided directly to local police departments, G.L. c.6, §178E, (b) level two and three

sex offenders "appear in person annually at the local police department in the city or town in which such sex offender lives," G.L. c.6, §178F 1/2, (c) registered sex offenders provide advance notice of any change of address, G.L. c.6, §178E, and (d) the public have access to information about level two and level three sex offenders in their communities, G.L. c.6, §§178D, 178I, 178J.

Second, the Legislature substantially revised G.L. c.123A to address the "paramount interest" of protecting "vulnerable members of our communities" from sex offenders following completion of their sentences. St. 1999, c.74, §§1, 3-8. Those revisions amended G.L. c.123A to address the treatment of sex offenders deemed too dangerous for release into the community. In order "to protect the public from sexually dangerous persons, and to provide them treatment and rehabilitation," Commonwealth v. Bruno, 432 Mass. 489, 500 (2000), the revised statute provides a procedure for the indefinite civil commitment of a sex offender found to "suffer[] from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility." G.L. c.123A, §§1, 12-13, as amended by St. 1999, c.74, §§6, 8.

Finally, the Legislature authorized community parole supervision for life (CPSL) following conviction for certain offenses, most notably offenses involving child victims. As with commitments pursuant to Chapter 123A, CPSL was to follow the completion of the offender's underlying sentence. Persons under CPSL were placed "under the jurisdiction, supervision and control of the parole board in the same manner as a person under parole supervision" subject to conditions established by the board for "protecting the public from such person committing a sex offense or kidnapping as well as promoting the rehabilitation of such persons," including a requirement for sex offender treatment. G.L. c.127, §133D(a), as amended by St. 1999, c.74, §9.[12/]

Reviewing these provisions in detail, the Superior Court correctly concluded that

> [a]ll three statutory creations cover the field of post-incarceration regulation and management of convicted sex offenders on a

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[12/]The ongoing nature of the Legislature's involvement in this area is underscored by the final section of Chapter 74, which established a special commission "to advise the general court as to the viability of requiring appropriate treatment for defendants charged with a sex offense as a condition of bail." St. 1999, c.74, §20.

> uniform, state-wide basis. All three statutory creations serve the same purpose, at least in part: to protect the public from sexual recidivism by convicted sex offenders.

(Add. 29; RA 1185).

2. Amendments to the comprehensive regime

The same concerns that animated the Legislature to enact Chapter 74 has motivated subsequent amendments to SORNL[13/] and to Chapter 123A.[14/] Since 1999, the Legislature has continuously engaged with the post-release regulation of sex offenders. Of particular significance is the fact that the Legislature has considered the question of where sex offenders may live or be present but has adopted only narrow restrictions.[15/] For example, in 2006 the Legislature amended SORNL to

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[13/]See St. 2003, c.77; St. 2003, c.140; St. 2004, c.149; St. 2006, c.139; St. 2006, c.303; St. 2008, c. 215; St. 2010, c.256; St. 2010, c.267; St. 2011, c.178; St. 2013, c.38; St. 2013, c.63.

[14/]See St. 2004, c.66; St. 2008, c.451; St. 2010, c.267.

[15/]A number of statewide sex offender residency restrictions were proposed, but not enacted, in the 2011-2012 legislative session (2011 H.B. Nos. 2122, 2214, 2136, 3149, 3150), and in the 2013-2014 session (2013 H.B. Nos. 1133, 1331, 1333). Similar bills have been filed in the current legislative session (2015 H.B. Nos. 1117, 1119, 1303) (all available on the Legislature's web site, https://malegislature.gov/Bills/Search).

prohibit level three offenders from residing in a "convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded." G.L. c.6, §178K(2)(e), inserted by St. 2006, c.303, §6. As the judge noted (Add. 29; RA 1185), G.L. c.265, §47, enacted by St. 2006, c.303, §8, mandates GPS monitoring for sex offenders placed on probation. See also G.L. c.6, §178F, enacted by St. 1999, c.74, §2 (requiring that sex offenders who are homeless register more frequently than those who are not); G.L. c.6, §178F 3/4, enacted by St. 2010, c.256, §42 (requiring GPS monitoring for homeless registered sex offenders). Similarly, and as also noted by the Superior Court (Add. 29; RA 1185), G.L. c.127, §133D 1/2, enacted by St. 2006, c.303, §7, also requires that certain offenders under parole supervision or CPSL wear a global positioning system (GPS) device and that such offenders be excluded from areas near the victim's home, school, and place of employment and, if applicable, other areas "defined to minimize the parolee's contact with children."

These targeted measures implicating where various subcategories of registered sex offenders can be

demonstrate that the Legislature has no intent of leaving the subject of residency restrictions to local regulation.

3. The interconnectedness of the regime

The foregoing enactments are designed to work together with the statewide authority exercised by the judiciary, the probation department, and the parole board. Subject to constitutional limitations, see Commonwealth v. Pike, 428 Mass. 393, 401-405 (1998), judges may impose special conditions of probation affecting where a particular sex offender may go or live. See, e.g., Commonwealth v. Canadyan, 458 Mass. 574, 574-575 (2010) ("As conditions of probation, the defendant was ordered to stay away from children under the age of eighteen years, . . . and wear a [GPS] monitoring device"). The parole board is similarly conferred with broad powers to supervise and assist released offenders in their transition into the community in a manner that will reduce recidivism. See generally, G.L. c.27, §4, and G.L. c.127, §§128 et seq. (parole).

Local residency restrictions on sex offenders simply cannot be reconciled with this comprehensive statutory scheme crafted by the Legislature over the past two decades. The Lynn ordinance imposes a blanket

restriction on all level two and level three sex offenders. In stark contrast, the state statutory provisions address the same public safety concerns with individualized risk determinations and a recognition that public safety is promoted by providing for treatment, supervision, and assistance in finding suitable housing. These two regimes cannot coexist. As the Superior Court cogently concluded:

> [r]egulating the lives of convicted sex offenders is [a] subject matter that garners an immense amount of legislative concern and effort, and which is better suited to uniform, state-wide regulations than to a piecemeal, municipality by municipality, approach. . . .
>
> Sex offenders have to live somewhere. . . . Although local cities and towns have an interest in the safety and protection of their residents, regulating the lives of convicted sex offenders is simply too wide-spread, uniform, and complex a problem to be left to a locally driven, piece-meal approach. From a common sense perspective, enforcement of the [o]rdinance will drive sex offenders underground (hampering registration and notification/dissemination efforts) or into a dwindling number of other cities and towns without similar residency restrictions. Other than local residency restrictions such as the [o]rdinance, all other efforts at regulating and managing convicted sex offenders in order to protect the public and reduce sexual recidivism have been established by uniform, state-wide legislation. It defies common sense that the Legislature consciously left such a crucial area regulating the lives of convicted sex offenders to the whims and political

motivations of individual cities and towns.

(Add. 31-32; RA 1187-1188)

4. Preemption decisions in other jurisdictions

The Superior Court's conclusion that the Legislature has occupied the field with respect to where registered sex offenders may live finds strong support in cases from other jurisdictions. The highest courts of New York,[16] New Jersey,[17] and Pennsylvania[18] have all held that state laws comparable to Massachusetts' statutory scheme preempt local sex

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[16] People v. Diack, 24 N.Y.3d 674, 677 (2015) ("We hold that the State's comprehensive and detailed statutory and regulatory framework for the identification, regulation and monitoring for registered sex offenders prohibits the enactment of a residency restriction law such as Local Law 4").

[17] G.H. v. Township of Galloway, 401 N.J. Super. 392, 400, 405-09 (N.J. App. Div. 2008) ("We conclude that the [residency restriction] ordinances conflict with the expressed and implied intent of the legislature to exclusively regulate this field, as a result of which the ordinances are preempted"), aff'd per curium, 199 N.J. 135, 136 (2009) (affirming judgment "substantially for the reasons expressed" by the Appellate Division).

[18] Fross v. County of Allegheny, 610 Pa. 421, 440 (2011) (county's sex offender residency restriction preempted where it would "subvert[]" General Assembly's regulatory regime by "banish[ing]" sex offenders from their homes and "consign[ing]" them to "localized penal colonies of sorts, without any consideration of the General Assembly's policies of rehabilitation and reintegration").

offender residency restrictions. Federal district court judges in Colorado[19] and New York[20] have reached the same conclusion.[21]

Lynn's ordinance is preempted because it is equally inconsistent with Massachusetts' statewide regime.

B. The undisputed facts also show a direct conflict between the Lynn ordinance and state law requiring sex offenders to register.

A local ordinance is also barred by the Home Rule Amendment when it conflicts with and would frustrate the intent of a statewide statute. See, e.g., American Motorcyclist Ass'n v. Park Comm'n of Brockton, 412 Mass. 753, 755-758 (1992) (local regulation banning

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[19]Ryals v. City of Englewood, 962 F. Supp. 2d 1236, 1249-52 (D. Colo. 2013) (holding that the comprehensive statutory scheme preempts the "fatal combination" of a local residency restriction that effectively bans all sex offenders from the town without any individualized consideration), question certified, 560 Fed. Appx. 726, 727 (10th Cir. 2014) (certifying preemption question to the Colorado Supreme Court).

[20]See Terrance v. City of Geneva, 799 F. Supp. 2d 250, 254-57 (W.D.N.Y. 2011) (local residency restriction preempted where statewide "legislative pronouncements to date establish that the regulation and management of sex offenders (including sex offender residency restrictions) is the exclusive province of the State").

[21]But see City of South Milwaukee v. Kester, 347 Wis. 2d 334, 347-349 (Wis. App. 2013), rev. denied, 350 Wis. 2d 729 (Wis. 2013).

motorcycles from public roadways under the commission's jurisdiction barred by Home Rule Amendment where regulation "directly conflicted" with statutory right to operate motor vehicles on the ways of the Commonwealth). The Lynn ordinance is invalid under this analysis because it directly conflicts with the statewide sex offender registration and notification scheme.

When enacting SORNL, the Legislature made the predicate finding that significant reform was necessary because "law enforcement agencies' efforts to protect their communities, conduct investigations and quickly apprehend sex offenders [were being] impaired by the existing lack of information known about sex offenders who live within their jurisdictions." St. 1999, c.74, §1. SORNL was therefore designed to further the goal of assisting "local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register." Id.

The key provision of SORNL -- central to achieving this goal -- is the requirement that offenders must register and periodically update the information regarding their whereabouts maintained by SORB, including their current home address. See G.L. c.6,

§178E, inserted by St. 1999, c.74, §2 (initial registration); G.L. c.6, §178F, inserted by St. 1999, c.74, §2 (annual verification of information). Local residency restrictions like the Lynn ordinance conflict with SORNL's registration requirement in two related ways. First, a sex offender who has established or wishes to establish residency within a restricted area has a substantial disincentive to register since compliance perforce discloses the offender's home address. As Professor Levenson averred, one of the principal effects of residence restrictions is to increase "the number of offenders who fail to register, abscond, or become more difficult to track and monitor" (RA 78 [Levenson affidavit]). Similarly, Dr. Guidry concluded that residency restrictions "actually interfere" with registration regimes, because "[w]hen sex offenders are left with nowhere to live, they begin to disappear" (RA 22 [Guidry affidavit]). The resulting decrease in registration directly undercuts the stated purpose of SORNL.[22/]

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[22/]This conclusion is stated succinctly in a 2006 statement issued by the statewide association of prosecuting attorneys in Iowa:

> Law enforcement has observed that the [Iowa]

(CONTINUED ON NEXT PAGE)

Second, registered sex offenders who must seek alternative housing because they have been forced out of their homes by residency restrictions are significantly more vulnerable to "homelessness and transience" (RA 74 [Aff. Levenson]). "Increased homelessness and transience . . . frustrate the purpose of a state-wide, comprehensive registration and notification/ dissemination system," as the Superior Court concluded (Add. 26; RA 1182). Specifically, transience both makes it "more difficult to monitor and keep track of sex offenders," and "adversely affect[s] what is a recognized mitigating factor on a sex offender's risk to reoffend" (Add. 26; RA 1182), citing 803 Code Mass.

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[22/](CONTINUED FROM PREVIOUS PAGE)

> residency restriction is causing offenders to become homeless, to change residences without notifying authorities of their new locations, to register false addresses or to simply disappear. If they do not register, law enforcement and the public do not know where they are living. The resulting damage to the reliability of the sex offender registry does not serve the interests of public safety.

Iowa County Attorneys Association, Statement on Sex Offender Residency Restrictions in Iowa, at 1-2 (December 11, 2006) (available on the website of the Center for Sex Offender Management, http://csom.org/index.html) (last visited March 22, 2015).

Regs. 1.40(12).[23/]

These counterproductive effects of residency restrictions render the Lynn ordinance fundamentally incompatible with SORNL's stated purpose of ensuring that law enforcement has current and accurate information about the location of sex offenders. Because of this "sharp conflict," Easthampton Savings Bank v. Springfield, 470 Mass. at 289 (internal citation omitted), with the statewide statutory scheme, the ordinance is invalid under the Home Rule Amendment. The judge's ruling on these grounds was also correct

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[23/]The SORB regulation cited by Judge Feeley provides in part that a sex offender

> who is currently residing in a positive and supportive environment lessens the likelihood of reoffense by reducing the stressors in his life and surrounding himself with family, friends and acquaintances.
>
> * * *
>
> The SORB shall give consideration to the offender whose current living and work situation is stable and considered to be a positive and supportive environment that minimizes the likelihood of reoffense and degree of dangerousness posed by the offender.

803 Code Mass Regs. 1.40(12)

and should be affirmed.

C. This case was appropriately brought as a class action by the three named plaintiffs.

Lynn argues at length, see Defendant's brief at 17-31, that the named plaintiffs cannot assert a Home Rule Amendment claim because they are not currently on probation or parole and therefore "do not have to receive the approval of any agents of the state before deciding where to live." Defendant's brief at 44. This argument badly misses the mark.

The named plaintiffs are appropriate class representatives. The class is defined as "all registered [l]evel [two] and [l]evel [three] sex offenders who are now or who may in the future be prohibited from living at various places in the City of Lynn by the city's ordinance pertaining to sex offender residency restrictions" (RA 5; SRA 12, 15). The ordinance applies to all level two and three sex offenders living within 1,000 feet of a school or park, without distinction. The class simply follows suit and makes no distinction between those who are on probation or parole and those who were not. Accordingly, Lynn's confusing contention that the named plaintiffs are not

in a position to have brought this suit is entirely without merit. See People v. Diack, 24 N.Y.3d at 677-678, 685-686 (overturning residency restriction on preemption grounds even though individual defendant before the court was not on probation or parole and therefore not subject to key provisions of the statewide regulatory regime relied upon to show preemption).[24/]

Lynn has never disputed that each of the named plaintiffs has in fact been ordered to leave his home under threat of substantial penalties solely on the grounds that he is a level three sex offender living within 1,000 feet of a school or park. Under these circumstances, the city's contention that the plaintiffs are not proper parties borders on the frivolous.

II.

THE ORDINANCE VIOLATES THE FUNDAMENTAL RIGHT TO MOVE FREELY WITHIN THE COMMONWEALTH AND TO CHOOSE WHERE ONE LIVES.

"[T]he Massachusetts Declaration of Rights

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[24/]Lynn did not have the benefit of the Court of Appeals' opinion in Diack when it filed its brief, which relies heavily on the opinion of the intermediate appellate court that Diack rejected. Defendant's brief at 40-42 (urging Court to adopt reasoning of People v. Diack, 41 Misc. 3d 36 (N.Y. App. 2013), reversed, 24 N.Y.3d 674 (2015).

guarantees a fundamental right to move freely within the Commonwealth." Commonwealth v. Weston W., 455 Mass. 24, 32-33 (2005). See also Johnson v. City of Cincinnati, 310 F.3d 484, 498 (6th Cir. 2002).[25/]

In Doe v. Police Comm'r of Boston, 460 Mass. 342 (2011), the Court held that this right includes "the right to choose where one lives," id. at 348, which

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[25/] The right to travel locally through public spaces and roadways -- perhaps more than any other right secured by substantive due process -- is an everyday right, a right we depend on to carry out our daily life activities. It is, at its core, a right of function. In the words of Justice Douglas [concurring in Aptheker v. Secretary of State, 378 U.S. 500, 519-20 (1964)]:

> Freedom of movement, at home and abroad, is important for job and business opportunities -- for cultural, political, and social activities -- for all the commingling which gregarious man enjoys. Those with the right of free movement use it at times for mischievous purposes. But that is true of many liberties we enjoy. We nevertheless place our faith in them, and against restraint, knowing that the risk of abusing liberty so as to give rise to punishable conduct is part of the price we pay for this free society.

Johnson v. City of Cincinnati, 310 F.3d at 497-498 (striking down ordinance excluding convicted drug offenders from designated "drug-exclusion zones" as violative of the constitutional right to travel locally through public spaces and roadways).

may not be stripped away simply because an individual has been classified as a sex offender and required to register. Absent some other lawful restraint on their liberty, sex offenders "are free to live where they choose and to move freely within and without the Commonwealth." Id. at 347-348, citing Coe v. Sex Offender Registry Bd., 442 Mass. 250, 258 (2004) ("Level three sex offenders are not prohibited from leaving their residence or places of employment, and are not restricted in traveling in and outside of the Commonwealth").[26/]

The unconstitutional sex offender residency restriction at issue in Doe v. Police Comm'r of Boston, supra, prohibited level three sex offenders from living in a "rest home or other long-term care facility." 460 Mass. at 345, citing G.L. c.6, §178K(2)(e). The Court held that this statute was unconstitutional because it sought to curtail Doe's fundamental right "to live where he chooses . . . solely on the basis of [his] level three classification." Doe v. Police Comm'r of

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[26/]The right to move freely within the Commonwealth and to choose where one lives inheres within arts. 1, 10, and 12 of the Declaration of Rights. Commonwealth v. Weston W., 455 Mass. at 33; Doe v. Police Comm'r of Boston, 460 Mass. at 348.

Boston, 460 Mass. at 349.

But for the particular address that they happen to call "home," the plaintiffs in this case are in precisely the same position as Doe: The Lynn ordinance, just like the statute in Doe, seeks to force registered sex offenders out of their homes "solely" on the basis of their classification status. As the Superior Court concluded,

> [t]here is no individual determination of risk of sexual recidivism/dangerousness to be made under the ordinance before the ordinance restricts areas of permissible residency of level two and level three registered sex offenders. The ordinance applies to any person having been convicted of a sex offense, classified by SORB as a level two or level three sex offender, living in the [c]ity within 1,000 feet of a school or park, and not being subject to one of the limited exceptions (RA 544).

It is hard to imagine a more "sweeping restriction on the right to free movement," Weston W., 455 Mass. at 34, than forced relocation from one's own home. Lynn's ordinance cannot survive rational basis review, much less strict scrutiny, because the "fit" between the plaintiffs' classification status and the ordinance's asserted goal, i.e., "protect[ing] the [c]ity's children from registered [level two and three] sex

offenders" (Add. 1 [ordinance, section 1:00(B)]), "has not been sufficiently established." Doe v. Police Comm'r of Boston, 460 Mass. at 349. Indeed, no such fit exists: the record in this case shows conclusively that "[t]here is no established link between residential restrictions and reduced sexual [offense] recidivism," and "no established correlation between proximity to schools . . . and sex offense recidivism" (RA 71 [Levenson affidavit]).[27/]

Even the city's own expert acknowledged that "there are no empirical studies supporting residency

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[27/]Dr. Guidry similarly averred that no empirical evidence supports the notion that sex offenders' proximity to schools or parks leads to reoffense:

> For example, a study conducted by the Minnesota Department of Corrections concluded that not one offense perpetrated over a 16-year period (a total of 224 recidivistic adult sex offenses studied) would have been prevented by a general residential restriction law. The bottom line is that adult sex offenders do not molest children because they live near schools or parks.

(RA 22)

The Minnesota study to which Dr. Guidry referred is G. Duwe, W. Donnay & R. Tewskbury, Does Residential Proximity Matter? A Geographic Analysis of Sex Offense Recidivism, 35 Criminal Justice and Behavior 484 (April 2008).

restrictions" (Add. 26; RA 1182) (quoting White submission). There is, however, a great deal of empirical support for the "common sense view" that sex offender residency restrictions and "an increase in homelessness and transience" among sex offenders go hand-in-hand (Add. 26; RA 1182). This transience undercuts the very purpose of the ordinance:

> Although the fears and concerns of local citizens are often understandable, and the enactment of these types of [residency] restrictions is well intended, some of the effects can actually compromise public safety -- rather than increase it -- by exacerbating known risk factors for sex offenders (e.g., housing and employment instability, loss of community supports and increased hostility and resentment).

Bumby, K. Talbot, T., & Carter, M., Managing the Challenges of Sex Offender Reentry, Center for Sex Offender Management, Department of Justice, 10 (Feb. 2007).

The Superior Court expressly did not reach the plaintiffs' claim that Lynn's ordinance unconstitutionally curtails the fundamental right of level two and level three sex offenders to move freely within the Commonwealth and live where they choose (Add. 16; RA 1172). This Court should nevertheless reach the issue

for several reasons. As an initial matter, this Court, "of course, may consider any ground supporting the . . . [summary judgment] motion," Champagne v. Commissioner of Correction, 395 Mass. 382, 386 (1985) (internal citations omitted), and is free to affirm a correct result "based on reasons that are different from those articulated by the judge below." Clair v. Clair, 464 Mass. 205, 214 (2013). Here, the Court has all of the information necessary to conclusively decide this issue. The claim presents a pure question of law that is squarely controlled by Doe v. Police Comm'r of Boston, supra. There is no material factual dispute and thus no practical impediment to this Court's consideration of the merits of the claim in this case.[28/]

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[28/]Lynn contends that any "facial challenge" to the ordinance must fail, on the theory that it cannot be shown there are "no set of circumstances" under which the imposition of residency restrictions on level two and level three sex offenders might be permissible. Defendant's brief at 46-47 (citing Gillespie v. Northampton, 460 Mass. 148 (2011)). This argument ignores the

> critical difference between a challenge to a statute, which although it provides proper procedural safeguards, is applied unconstitutionally to a particular individual, and a statute which simply omits safeguards which are clearly required by the Constitution.

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Further, there is a substantial need to address this issue now. A residency restriction "that forces a person to leave [his home and] renders him homeless," Doe v. Police Comm'r of Boston, 460 Mass. at 348, imperils basic human rights. As courts have recognized with respect to similar residency restrictions across the country, the Lynn ordinance will unquestionably render many of the plaintiff class members homeless. See, e.g., In re Taylor, 60 Cal. 4th 1019, ___ (Cal. 2015) (slip op. at 2-3) (residency restriction "greatly increased the incidence of homelessness among" sex offenders on parole in San Diego). This transience "place[s] burdens on registered sex offender parolees that are disruptive in a way that hinders their treatment, jeopardizes their health and undercuts their ability to find and maintain employment, significantly undermining any effort at rehabilitation."

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[28] (CONTINUED FROM PREVIOUS PAGE)

> While the "no set of circumstances" test arguably bars a facial challenge in the former situation, it cannot be interpreted as barring a facial challenge in the latter.

United States v. Shields, 522 F. Supp. 2d 317, 336 (D. Mass. 2007). Compare Chief of Police of the City of Worcester v. Holden, 470 Mass. 845, 859-861 (2015) (citing "no set of circumstances" test in rejecting facial Second Amendment challenge to "suitable person" standard for issuance of gun license).

Id. at 17. Notwithstanding such counterproductive outcomes, over forty municipalities in Massachusetts have adopted their own individual restrictions, often in reaction to a neighboring community's restriction. This has already created clusters of restricted housing; without a clear message from this Court, they will continue to proliferate until offenders are effectively banished from the Commonwealth, in direct contravention of Doe's constitutional holding. See also Commonwealth v. Pike, 428 Mass. at 404 (banishment from the Commonwealth as a condition of probation "struggles to serve any rehabilitative purpose," and is constitutionally invalid) (internal citation omitted).

Sex offenders have frequently been the "target of public ire and scorn," and are perennially at risk of being subjected to harsh legislative measures that "sweep away settled expectations suddenly and without individualized consideration." Doe v. Sex Offender Registry Bd., 450 Mass. 780, 786 (2008) (internal citation omitted). The Lynn ordinance targets level two and three sex offenders, as a class and indiscriminately, in blatant violation of their right to live where they choose. The Court should make clear that the Declaration of Rights does not accommodate

such a flagrant affront to basic human dignity.

## CONCLUSION

For the reasons set forth above, the order allowing the plaintiffs' motion for partial summary judgment should be affirmed, judgment for the plaintiffs should be ordered on counts one and four of the complaint, and the Court should award attorney's fees and costs to appellate counsel other than counsel assigned by the Committee for Public Counsel Services in an amount to be determined by the Court. Fabre v. Walton, 441 Mass. 9, 10 (2004).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the rules of court that pertain to the filing of briefs.

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## STATUTORY ADDENDUM

### Massachusetts Declaration of Rights

#### Article 1

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

#### Article 10

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

#### Article 12

No subject shall be held to answer for any crimes or offence,

until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Art. 89, §6, of the Amendments to the Massachusetts Constitution.

Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

Massachusetts Session Laws

St. 1999, c.74

SECTION 1: The general court hereby finds that: (1) the danger of recidivism posed by sex offenders, especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, to be grave and that the protection of the public from these sex offenders is of paramount interest to the government; (2) law enforcement agencies' efforts to protect their communities, conduct investigation and quickly apprehend sex offenders are impaired by the existing lack of information known about sex offenders who live within their jurisdictions and that the lack of information shared with the public may result in the failure of the criminal justice system to identify, investigate, apprehend and prosecute sex offenders; (3) the system of registering sex

offenders is a proper exercise of the commonwealth's police powers regulating present and ongoing conduct, which will provide law enforcement with additional information critical to preventing sexual victimization and to resolve incidents involving sexual abuse promptly; (4) in balancing offenders' rights with the interests of public security and safety, the release of information about sex offenders to law enforcement before the opportunity for an individual determination of the sex offender's risk of reoffense is necessary to protect the public safety; (5) registration by sex offenders is necessary in order to permit classification of such offenders on an individualized basis according to their risk of reoffense and degree of dangerousness; (6) the public interest in having current information on certain sex offenders in the hands of local law enforcement officials, including prior to such classification, far outweighs whatever liberty and privacy interests the registration requirements may implicate. Therefore, the commonwealth's policy, which will bring the state into compliance with federal requirements, is to assist local law enforcement agencies' efforts to protect their communities by requiring sex offenders to register and to authorize the release of necessary and relevant information about certain sex offenders to the public as provided in this act.

SECTION 2: Chapter 6 of the General Laws is hereby amended by striking out sections 178C to 178P, inclusive, as appearing in the 1998 Official Edition, and inserting in place thereof the following 15 sections:-

Section 178C. As used in sections 178C to 178P, inclusive, the following words shall have the following meanings:-

"Agency", an agency, department, board, commission or entity within the executive or judicial branch, excluding the committee for public counsel services, which has custody of, supervision of or responsibility for a sex offender as defined in accordance with this chapter, including an individual participating in a program of any such agency, whether such program is conducted under a contract with a private entity or otherwise. Each agency shall be responsible for the identification of such individuals within its custody, supervision or responsibility. Notwithstanding any general or special law to the contrary, each such agency shall be certified to receive criminal offender record information maintained by the criminal history systems board for the purpose

of identifying such individuals.

"Mental abnormality", a congenital or acquired condition of a person that affects the emotional or volitional capacity of such person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes such person a menace to the health and safety of other persons.

"Predatory", an act directed at a stranger or person with whom a relationship has been established, promoted or utilized for the primary purpose of victimization.

"Sentencing court", the court that sentenced a sex offender for the most recent sexually violent offense or sex offense or the superior court if such sentencing occurred in another jurisdiction or the sex offender registry board to the extent permitted by federal law and established by the board's regulations.

"Sex offender", a person who resides or works in the commonwealth and who has been convicted of a sex offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense or a person released from incarceration or parole or probation supervision or custody with the department of youth services for such a conviction or adjudication or a person who has been adjudicated a sexually dangerous person under section 14 of chapter 123A, as in force at the time of adjudication, or a person released from civil commitment pursuant to section 9 of said chapter 123A, whichever last occurs, on or after August 1, 1981.

"Sex offender registry", the collected information and data that is received by the criminal history systems board pursuant to sections 178C to 178P, inclusive, as such information and data is modified or amended by the sex offender registry board or a court of competent jurisdiction pursuant to said sections 178C to 176P, inclusive.

"Sex offense", an indecent assault and battery on a child under 14 under section 13B of chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A

of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under section 26 of said chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of said chapter 272; inducing a minor into prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior under section 16 of said chapter 272, but excluding a first or single adjudication as a delinquent juvenile before August 1, 1992; incestuous marriage or intercourse under section 17 of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272 aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

"Sex offense involving a child", an indecent assault and battery on a child under 14 under section 13B of chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under the age of under section 26 of said chapter 265; inducing a minor into prostitution under section 4A of chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt

to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

"Sexually violent offense", indecent assault and battery on a child under 14 under section 13B of chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the law of another state, the United States or a military, territorial or Indian tribal authority, or any other offense that the sex offender registry board determines to be a sexually violent offense pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071.

"Sexually violent predator", a person who has been convicted of a sexually violent offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sexually violent offense, or a person released from incarceration, parole, probation supervision or commitment under chapter 123A or custody with the department of youth services for such a conviction or adjudication, whichever last occurs, on or after August 1, 1981, and who suffers from a mental abnormality or personality disorder that makes such person likely to engage in predatory sexually violent offenses.

Section 178D. The sex offender registry board, known as the board, in cooperation with the criminal history systems board, shall establish and maintain a central computerized registry of all sex offenders required to register pursuant to sections 178C to 178P, inclusive, known as the sex offender registry. The sex offender registry shall be updated based on information made available to the board, including information acquired pursuant to the registration provisions of said sections 178C to 178P, inclusive.

The file on each sex offender required to register pursuant to said sections 178C to 178P, inclusive, shall include the following information, hereinafter referred to as registration data:

(a) the sex offender's name, aliases used, date and place of birth, sex, race, height, weight, eye and hair color, social security number, home address and work address;
(b) a photograph and set of fingerprints;
(c) a description of the offense for which the sex offender was convicted or adjudicated, the city or town where the offense occurred, the date of conviction or adjudication and the sentence imposed;
(d) any other information which may be useful in assessing the risk of the sex offender to reoffend; and
(e) any other information which may be useful in identifying the sex offender.

The board shall develop standardized registration and verification forms, which shall include registration data as required pursuant to sections 178C to 178P. The board shall make blank copies of such forms available to all agencies having custody of sex offenders and all city and town police departments; provided, however, that the board shall determine the format for the collection and dissemination of registration data, which may include the electronic transmission of data. Records maintained in the sex offender registry shall be open to any law enforcement agency in the commonwealth, the United States or any other state. The board shall promulgate rules and regulations to implement the provisions of sections 178C to 178P, inclusive. Such rules and regulations shall include provisions which may permit police departments located in a city or town that is divided into more than one zip code to disseminate information pursuant to the provisions of section 178J categorized by zip code and to disseminate such information limited to one or more zip codes if the request for such dissemination is so qualified; provided, however, that for the city of Boston dissemination of information may be limited to one or more police districts.

The board may promulgate regulations further defining in a manner consistent with maintaining or establishing eligibility for federal funding pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, the eligibility of sex offenders to be relieved of the

obligation to register, including but not limited to, regulations limiting motions under subsection (e) of section 178E, section 178G and relief from registration pursuant to paragraph (d) of subsection (2) of section 178K.

Section 178E. (a) Not less than 90 days prior to the release of any sex offender required to register pursuant to sections 178C to 178P, inclusive, from custody, the agency which has custody of the sex offender shall transmit to the board said sex offender's registration data, which for purposes of this paragraph shall include identifying factors, anticipated future residence, offense history and documentation of any treatment received for a mental abnormality. The board shall promptly transmit the registration data to the police departments in the municipalities where the sex offender intends to live and work and where the offense was committed and to the Federal Bureau of Investigation. The sex offender shall be informed by, and shall acknowledge in writing to, the agency which has custody of the sex offender of the duty to register, to verify registration information, to give notice of change of address or intended change of address and the penalties for failure to do so and for giving false registration information, and of his right to submit to the board, according to section 178L, documentary evidence relative to his risk of reoffense, the degree of dangerousness posed to the public and of his duty to register under this section. If such sex offender is a juvenile at the time of much notification, notification shall also be mailed to such sex offender's legal guardian or agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record. The agency shall transmit such acknowledgment to the board within ten days of receipt of such acknowledgment. Not later than two days after his release from custody, a sex offender shall register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, home address or intended home address, work address or intended work address.

(b) An agency that has supervision of a sex offender required to register pursuant to sections 178C to 178P, inclusive, on probation or parole shall, within five days of assuming supervision of such sex offender, transmit to the board such sex offender's registration data which, for purposes of this paragraph, shall include identifying factors, residential address or anticipated future residence, work address, offense history, documentation of any sex

offender treatment and documentation of any treatment received for a mental abnormality. The agency shall also report any changes of address of any sex offender required to register pursuant to said section, 178E to 178P, inclusive, within its jurisdiction to the board. The board shall promptly transmit the registration data to the police departments in the municipalities where such sex offender intends to live and work and where the offense was committed and to the Federal Bureau of Investigation. The sex offender shall be informed by, and shall acknowledge in writing to, the agency which has custody of the sex offender of the duty to register, to verify registration information and to give notice of change of address or intended change of address and the penalties for failure to do so and for giving false registration information, and of his right to submit to the board, according to section 178L, documentary evidence relative to his risk of reoffense, the degrees of dangerousness posed to the public and his duty to register under this section. If such sex offender is a juvenile at the time of such notification, notification shall also be mailed to such sex offender's legal guardian or agency having custody of the juvenile in the absence of a legal guardian, and his most recent attorney of record. A sex offender shall, within two days of receiving such notice, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, home address or intended home address, work address or intended work address.

(c) Any court which enters a conviction for a sex offense or adjudication as a youthful offender or as a delinquent juvenile by reason of a sex offense, but does not impose a sentence of confinement of 90 days or more to be served immediately shall inform the sex offender and require the sex offender to acknowledge, in writing, his duty to register, to verify registration information and to give notice of change of address or intended change of address and the penalties for failure to do so and for giving false registration information, and of his right to submit to the board, according to section 178L, documentary evidence relative to his risk of reoffense, the degree of dangerousness posed to the public and of his duty to register under this section. If such sex offender is a juvenile at the time of such adjudication, the legal guardian or agency having custody of the juvenile and his most recent attorney of record shall also be required to acknowledge, in writing, such information. The court shall cause such sex offender's registration data which, for purposes of this paragraph,

shall include identifying factors, anticipated future residence, offense history and documentation of any treatment received for a mental abnormality to be transmitted to the board within five days of sentencing. The board shall promptly transmit the registration data to the police departments in the municipalities where such sex offender intends to live and work and where the offense was committed and to the Federal Bureau of Investigation. A sex offender shall, within two days of receiving such notice or of release from confinement, whichever is later, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, home address or intended home address, work addressor intended work address.

(d) Any court which accepts a plea for a sex offense shall inform the sex offender prior to acceptance and require the sex offender to acknowledge, in writing, that such plea may result in such sex offender being subject to the provisions of sections 178C to 178P, inclusive. Failure to so inform the sex offender shall not be grounds to vacate or invalidate the plea.

(e) Upon written motion of the commonwealth, a court which enters a conviction or adjudication of delinquent or as a youthful offender may, at the time of sentencing, having determined that the circumstances of the offense in conjunction with the offender's criminal history does not indicate a risk of reoffense or a danger to the public, find that a sex offender shall not be required to register under sections 178C to 178P, inclusive. Such motion by the commonwealth shall state the reasons for such motion with specificity. The court may not make such a finding if the sex offender has been determined to be a sexually violent predator; has been convicted of two or more sex offenses defined as sex offenses pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, committed on different occasions; has been convicted of a sex offender involving a child or a sexually violent offense; or if the sex offender is otherwise subject to minimum or lifetime registration requirements as determined by the board pursuant to section 178D.

(f) In the case of a sex offender who has been convicted of a sex offense or adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense, on or after December 12,

1999, and who has not been sentenced to immediate confinement, the court shall, within 14 days of sentencing, determine whether the circumstances of the offense in conjunction with the offender's criminal history indicate that the sex offender does not pose a risk of reoffense or a danger to the public. If the court so determines, the court shall relieve such sex offender of the obligation to register under sections 178C to 178P, inclusive. The court may not make such a determination or finding if the sex offender has been determined to be a sexually violent predator; has been convicted of two or more sex offenses defined as sex offenses pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C, section 14071, committed on different occasions; has been convicted of a sex offense involving a child or a sexually violent offense; or if the sex offender is otherwise subject to minimum or lifetime registration requirements as determined by the board pursuant to section 178D.

(g) A sex offender who moves into the commonwealth from another jurisdiction shall, within two days of moving into the commonwealth, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, home address or intended home address, work address or intended work address. The board shall transmit the registration data to the police department in the municipality where such sex offender intends to live and work and shall transmit the same to the Federal Bureau of Investigation.

(h) A sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to move to a different city or town within the commonwealth shall, not later than ten days prior to establishing such new residence, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, home address or intended home address, work address or intended work address. The board shall transmit notice of such change of address to the police departments in the municipalities where the sex offender last registered, where the sex offender intends to live and where the offender was committed and shall transmit the same to the Federal Bureau of Investigation. A sex offender required to register pursuant to said sections 178C to 178P, inclusive, who intends to change his address within a city or town shall notify the board in writing not later than ten days prior to establishing such

new residence. The board shall transmit notice of the change of address to the police departments within such city or town, in the municipality where the offense was committed and to the Federal Bureau of Investigation.

(i) A sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to move out of the commonwealth shall notify the board not later than ten days before leaving the commonwealth. The board shall transmit notice of the change of address to the police departments in the municipalities where such sex offender last registered, where the offense was committed and to the Federal Bureau of Investigation. The board shall notify such sex offender of the duty to register in the new jurisdiction and shall forward a copy of his registration data to the appropriate law enforcement agency in such new jurisdiction.

(j) A sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to change his work address shall notify the board in writing not later than ten days prior to establishing the new work address. The board shall transmit notice of the change of address to the police department in the municipalities where such sex offender previously worked, where such sex offender intends to work, where such sex offender resides or intends to reside and where the offense was committed. The board shall transmit notice of the change of address to the Federal Bureau of Investigation.

(k) The registrar of motor vehicles shall inform a person applying for or renewing a license to operate a motor vehicle that he has a duty to register with the board if such person is a sex offender, pursuant to regulations established by the board.

(l) Except as hereinbefore provided, a sex offender residing or working in the commonwealth shall, within ten days of the effective date of this section, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, home address or intended home address, work address or intended work address. The board shall promptly transmit the registration data to the police departments where the sex offender intends to live and work, where the offense was committed and to the Federal Bureau of Investigation. The board shall send written notification of the requirements of sections 178C to 178P, inclusive, to the last

known address of all sex offenders residing in the commonwealth who, prior to the effective date of this section, have been released from all custody and supervision. If any such sex offender is a juvenile at the time of such notification, notification shall also be mailed to such sex offender's legal guardian or the agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record.

(m) Upon registering, verifying registration information or giving notice of change of address or intended change of address under this section, a sex offender shall provide independent written verification of the address at which he is registered or, if changing address, will be registered.

(n) Registration data received by the board and disseminated to law enforcement pursuant to this section shall not be disseminated to the public except in accordance with sections 178I, 178J and 178K

Section 178F. Except as provided in section 178F 1/2 for a sex offender finally classified by the board as a level 2 or a level 3 sex offender, a sex offender required to register pursuant to sections 178C to 178P, inclusive, shall annually verify that the registration data on file with the board remains true and accurate by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, home address and work address. A sex offender who lists a homeless shelter as his residence shall verify registration data every 90 days with the board by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury the sex offender's name, home address and work address. A homeless shelter receiving state funding shall cooperate in providing information in the possession of or known to such shelter, when a request for information is made to such shelter by the board; provided, however, that such request for information shall be limited to that which is necessary to verify an offender's registration data or a sex offender's whereabouts. A shelter that violates the provisions of this paragraph shall be punished by a fine of $ 100 a day for each day that such shelter continues to violate the provisions of this paragraph. In addition, in each subsequent year during the month of birth of any sex offender required to register, the board shall mail a nonforwardable verification form to the last reported address of such sex offender. If such sex offender is a juvenile at the time of such notification, notification shall also

be mailed to such sex offender's legal guardian or the agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record. Such sex offender shall, within five days of receipt, sign the verification form under the penalties of perjury and mail it back to the board. The board shall periodically, and at least annually, send written notice to a city or town police department regarding any sex offender required to register whose last known address was in such city or town or who gave notice of his intent to move to or is otherwise believed to live or work in such city or town, but who has failed to register or verify registration information as required.

The board shall examine through electronic transfer of information the tax returns, wage reports, child support enforcement records, papers or other documents on file with the commissioner of revenue or any other entity within the executive branch when there is reason to believe sex offender required to register has not so registered in accordance with this chapter or where the address of such sex offender cannot be verified through other means; provided, however, that nothing herein shall be construed to authorize the disclosure, directly or indirectly, of any information other than the address of such sex offender.

Section 178F 1/2. A sex offender finally classified by the board as a level 2 or a level 3 sex offender who is required to register pursuant to sections 178C to 178P, inclusive, shall appear in person annually at the local police department in the city or town in which such sex offender lives, or if such sex offender does not reside in the commonwealth, in the city or town in which such sex offender works, to verify that the registration data on file remains true and accurate. At such time, the sex offender's photograph and fingerprints shall be updated. Such sex offender who has been determined to be a sexually violent predator under paragraph (c) of subsection (2) of section 178K shall also appear in person at such police department every 90 days to verify that the registration data on file remains true and accurate. Such sex offender who lists a homeless shelter as his residence shall appear in person at such local police department every 90 days to verify that the registration data on file remains true and accurate. A homeless shelter receiving state funding shall cooperate in providing information in the possession of or known to such shelter, when a request for information is made to such shelter by the board or such local police department; provided, however, that such request for

information shall be limited to that which is necessary to verify an offender's registration data or a sex offender's whereabouts. A shelter that violates the provisions of this paragraph shall be punished by a fine of $ 100 a day for each day that such shelter continues to violate the provisions of this paragraph. In addition, in each subsequent year during the month of birth of any sex offender required to register, the board shall mail a nonforwardable verification form to the last reported address of such sex offender. If such sex offender is a juvenile at the time of such notification, notification shall also be mailed to such sex offender's legal guardian or the agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record. Such sex offender shall, within five days of receipt, sign the verification form under the penalties of perjury and register in person at the police department in the municipality in which such sex offender lives, or if such sex offender does not reside in the commonwealth, in the city or town in which such sex offender works. The board shall periodically, and at least annually, send written notice to a city or town police department regarding any sex offender required to register whose last known address was in such city or town or who gave notice of his intent to move to or is otherwise believed to live or work in such city or town, but who has failed to register or verify registration information as required. A sex offender finally classified as a level 2 or level 3 , offender shall also comply with the provisions of paragraphs (g) to (j), inclusive, of section 178E, but the offender shall give the required notice in person at the police department in the city or town where such sex offender resides, or if such sex offender does not reside in the commonwealth, in the city or town in which such sex offender works.

The board shall examine through electronic transfer of information the tax returns, wage reports, child support enforcement records, papers or other documents on file with the commissioner of revenue or any other entity within the executive branch when there is reason to believe a sex offender required to register has not so registered in accordance with this chapter or where the address of such sex offender cannot be verified through other means; provided, however, that nothing herein shall be construed to authorize the disclosure, directly or indirectly, of any information other than the address of such sex offender.

Section 178C. The duty of a sex offender required to register

pursuant to this chapter and to comply with the requirements hereof shall, unless sooner terminated by the board under section 178L, end 20 years after such sex offender has been convicted or adjudicated or has been released from all custody or supervision, whichever last occurs, unless such sex offender was convicted of two or more sex offenses defined as sex offenses pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, committed on different occasions, has been convicted of a sexually violent offense; has been determined by the sentencing court to be a sexually violent predator, or if such sex offender is otherwise subject to lifetime registration requirements as determined by the board pursuant to section 178D, in which cases the duty to register shall never be terminated. A person required to register with the sex offender registry board may make an application to said board to terminate the obligation upon proof, by clear and convincing evidence, that the person has not committed a sex offense within ten years following conviction, adjudication or release from all custody or supervision, whichever is later, and is not likely to pose a danger to the safety of others. For so long as such sex offender is under a duty to register in the commonwealth or in any other state where the offender resides or would be under such a duty if residing in the commonwealth, such sex offender shall not be entitled to relief under the provisions of section 100A or 100B of chapter 276. An offender determined by the sentencing court to be a sexually violent predator may, not earlier than ten years after such determination, file a motion in the sentencing court for a determination whether he remains a sexually violent predator. The court shall notify and obtain a report from the board and the burden shall be on such sex offender to demonstrate to the court by clear and convincing evidence that he is no longer a sexually violent predator. Any subsequent conviction for a sex offense or act of domestic violence shall be prima facie evidence that the offender is still a sexually violent predator. The board shall notify the victim and the district attorney in the county where such sex offender resides and, if different, where such sex offender works and where such sex offender was prosecuted and provide the victim and district attorney with the opportunity to respond to such application.

Section 178H. (a) A sex offender required to register pursuant to this chapter who knowingly: (i) fails to register; (ii) fails to verify registration information; (iii) fails to provide notice of a change of

address; or (iv) who knowingly provides false information shall be punished in accordance with this section.

(1) A first conviction under this subsection shall be punished by imprisonment for not less than six months and not more than two and one-half years in a house of correction nor more than five years in a state prison or by a fine of not more than $ 1,000 or by both such fine and imprisonment.

(2) A second and subsequent conviction under this subsection shall be punished by imprisonment in the state prison for not less than five years.

(b) Violations of this section may be prosecuted and punished in any county where the offender knowingly: (i) fails to register; (ii) fails to verify registration information; (iii) fails to provide notice of a change of address; or (iv) knowingly provides false information.

(c) Any offender who lists a homeless shelter as his residence pursuant to sections 178C to 178P, inclusive, and who violates the provisions of subsection (a) shall, for a first conviction, be punished by imprisonment for not more than 30 days in a house of correction; for a second conviction, be punished by imprisonment for not more than two and one-half years in a house of correction nor more than five years in a state prison or by a fine of not more than $ 1,000, or by both such fine and imprisonment; and for a third and subsequent conviction, be punished by imprisonment in a state prison for not less than five years; provided, however, that the sentence imposed for such third or subsequent conviction shall not be reduced to less than five years, nor suspended, nor shall any person sentenced herein be eligible for probation, parole, work release or furlough, or receive any deduction from his sentence for good conduct until he shall have served five years. Prosecutions commenced hereunder shall neither be continued without a finding nor placed on file.

Section 178I. Any person who is 18 years of age or older and who states that he is requesting sex offender registry information for his own protection or for the protection of a child under the age of 18 or another person for whom the requesting person has responsibility, care or custody shall receive at no cost from the board a report to the extent available pursuant to sections 178C to

178P, inclusive, which indicates whether an individual identified by name, date of birth or sufficient personal identifying characteristics is a sex offender with an obligation to register pursuant to this chapter, the offenses for which he was convicted or adjudicated and the dates of such convictions or adjudications. Any records of inquiry shall be kept confidential, except that the records may be disseminated to assist or defend in a criminal prosecution.

Information about an offender shall be made available pursuant to this section only if the offender is a sex offender who has been finally classified by the board as a level 2 or level 3 sex offender.

All reports to persons making inquiries shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275.

The board shall not release information identifying the victim by name, address or relation to the offender.

Section 178J. (a) A person who requests sex offender registry information shall:

(1) be 18 years of age or older;
(2) appear in person at a city or town police station and present proper identification;
(3) require sex offender registry information for his own protection or for the protection of a child under the age of 18 or another person for whom such inquirer has responsibility, care or custody, and so state; and
(4) complete and sign a record of inquiry, designed by the board, which shall include the following information: the name and address of the person making the inquiry, the person or geographic area or street which is the subject of the inquiry, the reason for the inquiry and the date and time of the inquiry.

Such records of inquiries shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under the provisions of section 4 of chapter 275.

Such records of inquiries shall state, before the signature of the inquirer, as follows: "I understand that the sex offender registry information disclosed to me is intended for my own protection or for the protection of a child under the age of 18 or another person for whom I have responsibility, care or custody." Such records of inquiries shall be kept confidential, except that such records may be disseminated to assist in a criminal prosecution.

(b) The person making the inquiry may either:

(1) identify a specific individual by name or provide personal identifying information sufficient to allow the police to identify the subject of the inquiry; or

(2) inquire whether any sex offenders live or work within the same city or town at a specific address including, but not limited to, a residential address, a business address, school, after-school program, day care center, playground, recreational area or other identified address and inquire in another city or town whether any sex offenders live or work within that city or town, upon a reasonable showing that the sex offender registry information is requested for his own protection or for the protection of a child under the age of 18 or another person for whom the inquirer has responsibility, care or custody; or

(3) inquire whether any sex offenders live or work on a specific street within the city or town in which such inquiry is made.

(c) If the search of the sex offender registry results in the identification of a sex offender required to register pursuant to this chapter who has been finally classified by the board as a level 2 or level 3 offender under section 178K, the police shall disseminate to the person making the inquiry:

(1) the name of the sex offender;

(2) the home address if located in the areas described in clause (2) or (3) of subsection (b);

(3) the work address if located in the areas described in said clause (2) or (3) of said subsection (b);

(4) the offense for which he was convicted or adjudicated and the dates of such conviction or adjudication;

(5) the sex offender's age, sex, race, height, weight, eye and hair color; and

(6) a photograph of the sex offender, if available.

The police shall not release information identifying the victim by name, address or the victim's relation to the offender.

Section 178K. (1) There shall be, in the criminal history systems board, but not subject to its jurisdiction, a sex offender registry

board which shall consist of seven members who shall be appointed by the governor for terms of six years, with the exception of the chairman, and who shall devote their full time during business hours to their official duties. The board shall include one person with experience and knowledge in the field of criminal justice who shall act as chairman; at least two licensed psychologist's or psychiatrists with special expertise in the assessment and evaluation of sex offenders and who have knowledge of the forensic mental health system; at least one licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of sex offenders, including juvenile sex offenders and who has knowledge of the forensic mental health system; at least two persons who have at least five years of training and experience in probation, parole or corrections; and at least one person who has expertise or experience with victims of sexual abuse.Members shall be compensated at a reasonable rate subject to approval of the secretary of administration and finance.

The chairman shall be appointed by and serve at the pleasure of the governor and shall be the executive and administrative head of the sex offender registry board, shall have the authority and responsibility for directing assignments of members of said board and shall be the appointing and removing authority for members of said board's staff. In the case of the absence or disability of the chairman, the governor may designate one of the members to act as chairman during such absence or disability. The chairman shall, subject to appropriation, establish such staff positions and employ such administrative, research, technical, legal, clerical and other personnel and consultants as may be necessary to perform the duties of said board. Such staff positions shall not be subject to section 9A of chapter 30 or chapter 31.

The governor shall fill any vacancy for the unexpired term. As long as there are four sitting members, a vacancy shall not impair the right of the remaining members to exercise the powers of the board.

The sex offender registry board shall promulgate guidelines for determining the level of risk of reoffense and the degree of dangerousness posed to the public or for relief from the obligation to register and shall provide for three levels of notification depending on such risk of reoffense and the degree of dangerousness posed to the public; apply the guidelines to assess

the risk level of particular offenders; develop guidelines for use by city and town police departments in disseminating sex offender registry information; devise a plan, in cooperation with state and local law enforcement authorities and other appropriate agencies, to locate and verify the current addresses of sex offenders including, subject to appropriation entering into contracts or interagency agreements for such purposes; and conduct hearings as provided in section 178L. The attorney general and the chief counsel of the committee for public counsel services, or their designees, shall assist in the development of such guidelines. Factors relevant to the risk of reoffense shall include, but not be limited to, the following:

(a) criminal history factors indicative of a high risk of reoffense and degree of dangerousness posed to the public, including:
(i) whether the sex offender has a mental abnormality;
(ii) whether the sex offender's conduct is characterized by repetitive and compulsive behavior;
(iii) whether the sex offender was an adult who committed a sex offense on a child;
(iv) the age of the sex offender at the time of the commission of the first sex offense;
(v) whether the sex offender has been adjudicated to be a sexually dangerous person pursuant to section 14 of chapter 123A or is a person released from civil commitment pursuant to section 9 of said chapter 123A; and
(vi) whether the sex offender served the maximum term of incarceration;
(b) other criminal history factors to be considered in determining risk and degree of dangerousness, including:
(i) the relationship between the sex offender and the victim;
(ii) whether the offense involved the use of a weapon, violence or infliction of bodily injury;
(iii) the number, date and nature of prior offenses;
(c) conditions of release that minimize risk of reoffense and degree of dangerousness posed to the public, including whether the sex offender is under probation or parole supervision, whether such sex offender is receiving counseling, therapy or treatment and whether such sex offender is residing in a home situation that provides guidance and supervision, including sex offender-specific treatment in a community-based residential program;
(d) physical conditions that minimize risk of reoffense including, but not limited to, debilitating illness;

(e) whether the sex offender was a juvenile when he committed the offense, his response to treatment and subsequent criminal history;
(f) whether psychological or psychiatric profiles indicate a risk of recidivism;
(g) the sex offender's history of alcohol or substance abuse;
(h) the sex offender's participation in sex offender treatment and counseling while incarcerated or while on probation or parole and his response to such treatment or counseling;
(i) recent behavior, including behavior while incarcerated or while supervised on probation or parole;
(j) recent threats against persons or expressions of intent to commit additional offenses;
(k) review of any victim impact statement; and
(l) review of any materials submitted by the sex offender, his attorney or others on behalf of such offender.
(2) The guidelines shall provide for three levels of notification depending on the degree of risk of reoffense and the degree of dangerousness posed to the public by the sex offender or for relief from the obligation to register:
(a) Where the board determines that the risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability, it shall give a level 1 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where such sex offender lives and works or, if in custody, intends to live and work upon release and where the offense was committed and to the Federal Bureau of Investigation. The police shall not disseminate information to the general public identifying the sex offender where the board has classified the individual as a level 1 sex offender. The police may, however, release such information identifying such sex offender to the department of correction, any county correctional facility, the department of youth services, the department of social services, the parole board, the department of probation and the department of mental health, all city and town police departments and the Federal Bureau of Investigation.
(b) Where the board determines that the risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information, it shall give a level 2 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where the sex offender lives and works or, if in

custody, intends to live and work upon release and where the offense was committed and to the Federal Bureau of Investigation. The public shall have access to the information regarding a level 2 offender in accordance with the provisions of sections 178I and 178J. The sex offender shall be required to register and to verify registration information pursuant to section 178F 1/2.

(c) Where the board determines that the risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination, it shall give a level 3 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where the sex offender lives and works or, if in custody, intends to live and work upon release and where the offense was committed and to the Federal Bureau of Investigation. A level 3 community notification plan shall require the police department to notify organizations in the a community which are likely to encounter such sex offender and individual members of the public who are likely to encounter such sex offender. The sex offender shall be required to register and to verify registration information pursuant to sections 178F 1/2. Neighboring police districts shall share sex offender registration information of level 3 offenders and may inform the residents of their municipality of a sex offender they are likely to encounter who resides in an adjacent city or town. The police or the board shall actively disseminate in such time and manner as such police department or board deems reasonably necessary the following information:

(i) the name of the sex offender;
(ii) the offender's home address;
(iii) the offender's work address;
(iv) the offense for which the offender was convicted or adjudicated and the date of the conviction or adjudication;
(v) the sex offender's age, sex, race, height, weight, eye and hair color; and
(vi) a photograph of the sex offender, if available; provided, however, that the police or the board shall not release information identifying the victim by name, address or relation to the sex offender. All notices to the community shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for

threatening to commit a crime under section 4 of chapter 275. The public shall have access to the information regarding a level 3 offender in accordance with sections 178I and 178J.

If the board, in finally giving an offender a level 3 classification, also concludes that such sex offender should be designated a sexually violent predator, the board shall transmit a report to the sentencing court explaining the board's reasons for so recommending, including specific identification of the sexually violent offense committed by such sex offender and the mental abnormality from which he suffers. The report shall not be subject to judicial review under Section 178M. Upon receipt from the board of a report recommending that a sex offender be designated a sexually violent predator, the sentencing court, after giving such sex offender an opportunity to be heard and informing the sex offender of his right to have counsel appointed, if he is deemed to be indigent in accordance with section 2 of chapter 211D, shall determine, by a preponderance of the evidence, whether such sex offender is a sexually violent predator. An attorney employed or retained by the board may make an appearance, subject to section 3 of chapter 12, to defend the board's recommendation. The board shall be notified of the determination. A determination that a sex offender should not be designated a sexually violent predator shall not invalidate such sex offender's classification. Where the sentencing court determines that such sex offender is a sexually violent predator, dissemination of the sexually violent predator's registration data shall be in accordance with a level 3 community notification plan; provided, however, that such dissemination shall include such sex offender's designation as a sexually violent predator.

(d) The board may, upon making specific written findings that the circumstances of the offense in conjunction with the offender's criminal history do not indicate a risk of reoffense or a danger to the public and the reasons therefor, relieve such sex offender of any further obligation to register, shall remove such sex offender's registration information from the registry and shall so notify the police departments where said sex offender lives and works or if in custody intends to live and work upon release, and where the offense was committed and the Federal Bureau of Investigation. In making such determination the board shall consider factors, including but not limited to, the presence or absence of any physical harm caused by the offense and whether the offense

involved consensual conduct between adults. The burden of proof shall be on the offender to prove he comes within the provisions of this subsection. The provisions of this subsection shall not apply if a sex offender has been determined to be a sexually violent predator; has been convicted of two or more sex offenses defined as sex offenses pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, committed on different occasions; or has been convicted of a sexually violent offense. The provisions of this subsection shall also not apply if a sex offender has been convicted of a sex offense involving a child or a sexually violent offense, and such offender has not already registered pursuant to this chapter for at least ten years, or if the sex offender is otherwise subject to lifetime or minimum registration requirements as determined by the board pursuant to section 178D.

(3) The sex offender registry board shall make a determination regarding the level of risk of reoffense and the degree of dangerousness posed to the public of each sex offender listed in said sex offender registry and shall give immediate priority to those offenders who have been convicted of a sex offense involving a child or convicted or adjudicated as a delinquent juvenile or as a youthful offender by reason of a sexually violent offense or of a sex offense of indecent assault and battery upon a mentally retarded person pursuant to section 13F of chapter 265, and who have not been sentenced to incarceration for at least 90 days, followed, in order of priority, by those sex offenders who (1) have been released from incarceration within the past 12 months, (2) are currently on parole or probation supervision, and (3) are scheduled to be released from incarceration within six months. All agencies shall cooperate in providing files to the sex offender registry board and any information the sex offender registry board deems useful in providing notice under sections 178C to 178P, inclusive, and in assessing the risk of reoffense and the degree of dangerousness posed to the public by the sex offender. All agencies from which registration data, including data within the control of providers under contract to such agencies, is requested by the sex offender registry board shall make such data available to said board immediately upon request. Failure to comply in good faith with such a request within 30 days shall be punishable by a fine of not more than $ 1,000 per day.

Section 178L. (1) Upon review of any information useful in

assessing the risk of reoffense and the degree of dangerousness posed to the public by the sex offender, including materials described in the board guidelines and any materials submitted by the sexoffender, the board shall prepare a recommended classification of each offender. Such recommendation may be made by board staff members upon written approval by one board member; provided, however, that if the sex offender was a juvenile at the time of the offense, written approval must be given by a board member who is a licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of juvenile sex offenders.

(a) Not less than 60 days prior to the release or parole of a sex offender from custody or incarceration, the board shall notify the sex offender of his right to submit to the board documentary evidence relative to his risk of reoffense and the degree of dangerousness posed to the public and his duty to register according to the provisions of section 178E. If the sex offender is a juvenile at the time of such notification, notification shall also be mailed to the sex offender's legal guardian or agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record. Such sex offender may submit such evidence to the board within 30 days of receiving such notice from the board. Upon a reasonable showing, the board may extend the time in which such sex offender may submit such documentary evidence. Upon reviewing such evidence, the board shall promptly notify the sex offender of the board's recommended sex offender classification, his duty to register, if any, his right to petition the board to request an evidentiary hearing to challenge such classification and duty, his right to retain counsel to represent him at such hearing and his right to have counsel appointed for him if he is found to be indigent as determined by the board using the standards under chapter 211D; provided, however, that such indigent offender may also apply for and the board may grant payment of fees for an expert witness in any case where the board in its classification proceeding intends to rely on the testimony or report of an expert witness prepared specifically for the purposes of the classification proceeding. Such sex offender shall petition the board for such hearing within 20 days of receiving such notice. The board shall conduct such hearing in a reasonable time according to the provisions of subsection (2). The failure timely to petition the board for such hearing shall result in a waiver of such right and the registration requirements, if any, and the board's

recommended classification shall become final.

(b) The district attorney for the county where such sex offender was prosecuted may, within ten days of a conviction or adjudication of a sexually violent offense, file a motion with the board to make an expedited recommended classification upon a showing that such sex offender poses a grave risk of imminent reoffense. If the petition is granted, the board shall make such recommendation within ten days of the expiration of the time to submit documentary evidence. If the petition is not granted, the board shall make such recommended classification as otherwise provided in this section.

(c) In the case of any sex offender not in custody, upon receiving registration data from the agency, the police department at which the sex offender registered, the sentencing court or by any other means, the board shall promptly notify the sex offender of his right to submit to the board documentary evidence relative to his risk of reoffense and the degree of dangerousness posed to the public and his duty to register, if any, according to section 178E. If such sex offender is a juvenile atthe time of such notification, notification shall also be mailed to such sex offender's legal guardian or agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record. Such sex offender may submit such evidence to the board within 30 days of receiving such notice from the board. Upon a reasonable showing, the board may extend the time in which a sex offender may submit such documentary evidence. Upon reviewing such evidence, the board shall promptly notify such sex offender of the board's recommended sex offender classification, his duty to register, if any, and his right to petition the board to request an evidentiary hearing to challenge such classification and duty, his right to retain counsel to represent him at such hearing and his right to have counsel appointed for him if he is found to be indigent as determined by the board using the standards under chapter 211D; provided, however, that such indigent offender may also apply for and the board may grant payment of fees for an expert witness in any case where the board in its classification proceeding intends to rely on the testimony or report of an expert witness prepared specifically for the purposes of the classification proceeding. Such sex offender shall petition the board for such hearing within 20 days of receiving such notice. The board shall conduct such hearing in a reasonable time according to the provisions of

subsection (2). The failure timely to petition the board for such hearing shall result in a waiver of such right and the registration requirements, if any, and the board's recommended classification shall become final.

(2) If an offender requests a hearing in accordance with subsection (1), the chair may appoint a member, a panel of three board members or a hearing officer to conduct the hearing, according to the standard rules of adjudicatory procedure or other rules which the board may promulgate, and to determine by a preponderance of evidence such sex offender's duty to register and final classification. The board shall inform offenders requesting a hearing under the provisions of subsection (1) of their right to have counsel appointed if a sex offender is deemed to be indigent as determined by the board using the standards under chapter 211D. If the sex offender does not so request a hearing, the recommended classification and determination of duty to register shall become the board's final classification and determination and shall not be subject to judicial review. All offenders who are juveniles at the time of notification shall be represented by counsel at the hearing.

Section 178M. An offender may seek judicial review, in accordance with section 14 of chapter 30A, of the board's final classification and registration requirements. The court shall, if requested, appoint counsel to represent the sex offender in the proceedings if such sex offender is deemed indigent in accordance with section 2 of chapter 211D. An attorney employed or retained by the board may make an appearance, subject to section 3 chapter 12, to defend the board's decision. The court shall reach its final decision within 60 days of such sex offender's petition for review. The court shall keep proceedings conducted pursuant to this paragraph and records from such proceedings confidential and such proceedings and records shall be impounded, but the filing of an action under this section shall not stay the effect of the board's final classification.

Section 178N. Information contained in the sex offender registry shall not be used to commit a crime against a sex offender or to engage in illegal discrimination or harassment of an offender. Any person who uses information disclosed pursuant to the provisions of sections 178C to 178P, inclusive, for such purpose shall be punished by not more than two and one-half years in a house of

correction or by a fine of not more than $ 1,000 or by both such fine and imprisonment.

Section 178O. Police officials and other public employees acting in good faith shall not be liable in a civil or criminal proceeding for any dissemination of sex offender registry information or for any act or omission pursuant to the provisions of sections 178C to 178P, inclusive.

Section 178P. Whenever a police officer has probable cause to believe that a sex offender has failed to comply with the registration requirements of sections 178C to 178P, inclusive, such officer shall have the right to arrest such sex offender without a warrant and to keep such sex offender in custody.

SECTION 3. Section 1 of chapter 123A of the General Laws, as so appearing, is hereby amended by inserting before the definition of "Community access board" the following definition:-
"Agency with jurisdiction", the agency with the authority to direct the release of a person presently incarcerated, confined or committed to the department of youth services including, but not limited to a sheriff, keeper, master or superintendent of a jail, house of correction or prison, the director of a custodial facility in the department of youth services, the parole board and, where a person has been found incompetence to stand trial, a district attorney.

SECTION 4. Said section 1 of said chapter 123A, as so appearing, is hereby further amended by inserting after the definition of "Community Access Program" the following two definitions:-
"Mental abnormality", a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the person a menace to the health and safety of other persons.
"Personality disorder", a congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses.

SECTION 5. Said section 1 of said chapter 123A, as so appearing, is hereby further amended by inserting after the word "sixty-five", in line 32, the following words: - ; assault on a child with intent to commit rape under section 24B of chapter 265; drugging persons

for sexual intercourse under section 3 of chapter 272.

SECTION 6. Said section 1 of said chapter 123A, as so appearing, is hereby further amended by striking out the definition of "Sexually dangerous person" and inserting in place thereof the following definition:-

"Sexually dangerous person", any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

SECTION 7. The first paragraph of section 6A of said chapter 123A, as so appearing, is hereby amended by adding the following sentence:- Any juvenile who is committed as a sexually dangerous person to the treatment center or a branch thereof under the provisions of this chapter shall be segregated from any adults held at such facility.

SECTION 8. Said chapter 123A, as so appearing, is hereby further amended by adding the following five sections:-

Section 12. (a) Any agency with jurisdiction of a person who has been convicted of or adjudicated as a delinquent juvenile or a youthful offender by reason of a sexual offense as defined in section 1 or who has been charged with such offense but has been found incompetent to stand trial shall notify in writing the district attorney of the county where the offense occurred and the attorney general six months prior to the release of such person, except that in the case of a person who is returned to prison for no more than

six months as a result of a revocation of parole or who is committed for no more than six months, such notice shall be given as soon is practicable following such person's admission to prison. In such notice, the agency with jurisdiction shall also identify those prisoners or youths who have a particularly high likelihood of meeting the criteria for a sexually dangerous person.

(b) When the district attorney or the attorney general determines that the prisoner or youth in the custody of the department of youth services is likely to be a sexually dangerous person as defined in section 1, the district attorney or the attorney general at the request of the district attorney may file a petition alleging that the prisoner or youth is a sexually dangerous person and stating sufficient facts to support such allegation in the superior court where the prisoner or youth is committed or in the superior court of the county where the sexual offense occurred.

(c) Upon the filing of a petition under this section, the court in which the petition was filed shall determine whether probable cause exists to believe that the person named in the petition is a sexually dangerous person. Such person shall be provided with notice of, and an opportunity to appear in person at, a hearing to contest probable cause.

(d) At the probable cause hearing, the person named in the petition shall have the following rights:

(1) to be represented by counsel;
(2) to present evidence on such person's behalf;
(3) to cross-examine witnesses who testify against such person; and
(4) to view and copy all petitions and reports in the court file.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the court's probable cause determination, the court, upon a sufficient showing based on the evidence before the court at that time, may temporarily commit such person to the treatment center pending disposition of the petition. The person named in the petition may move the court for relief from such temporary commitment at any time prior to the probable cause determination.

Section 13. (a) If the court is satisfied that probable cause exists to believe that the person named in the petition is a sexually dangerous person, the prisoner or youth shall be committed to the treatment center for a period not exceeding 60 days for the purpose of examination and diagnosis under the supervision of two qualified examiners who shall, no later than 15 days prior to the expiration of said period, file with the court a written report of the examination and diagnosis and their recommendation of the disposition of the person named in the petition.

(b) The court shall supply to the qualified examiners copies of any juvenile and adult court records which shall contain, if available, a history of previous juvenile and adult offenses, previous psychiatric and psychological examinations and such other information as may be pertinent or helpful to the examiners in making the diagnosis and recommendation. The district attorney or the attorney general shall provide a narrative of police reports for each sexual offense conviction or adjudication as well as any psychiatric, psychological, medical or social worker records of the person named in the petition in the district attorney's or the attorney general's possession. The agency with jurisdiction over the person named in the petition shall provide such examiners with copies of any incident reports arising out of the person's incarceration or custody.

(c) The person named in the petition shall be entitled to counsel and, if indigent, the court shall appoint an attorney. All written documentation submitted to the two qualified examiners shall also be provided to counsel for the person named in the petition and to the district attorney and attorney general.

(d) Any person subject to an examination pursuant to the provisions of this section may retain a psychologist or psychiatrist who meets the requirements of a qualified examiner, as defined in section 1, to perform an examination on his behalf. If the person named in the petition is indigent, the court shall provide for such qualified examiner.

Section 14. (a) The district attorney or the attorney general at the request of the district attorney may petition the court for a trial which shall be by jury unless affirmatively waived by the person named in the petition. Such petition shall be made within 14 days of the filing of the report of the two qualified examiners. If such

petition is timely filed within the allowed time, the court shall notify the person named in the petition and his attorney, the district attorney and the attorney general that a trial by jury will be held within 60 days to determine whether such person is a sexually dangerous person. The trial may be continued upon motion of either party for good cause shown or by the court on its own motion if the interests of justice so require, unless the person named in the petition will be substantially prejudiced thereby. The person named in the petition shall be confined to a secure facility for the duration of the trial.

(b) The person named in the petition shall be entitled to the assistance of counsel and shall be entitled to have Counsel appointed if he is indigent in accordance with section 2 of chapter 211D. In addition, the person named in the petition may retain experts or professional persons to perform an examination on his behalf. Such experts or professional persons shall be permitted to have reasonable access to such person for the purpose of the examination as well as to all relevant medical and psychological records and reports of the person named in the petition. If the person named in the petition is indigent under said section 2 of said chapter 211D, the court shall, upon such person's request, determine whether the expert or professional services are necessary and shall determine reasonable compensation for such services. If the court so determines, the court shall assist the person named in the petition in obtaining an expert or professional person to perform an examination and participate in the trial on such person's behalf. The court shall approve payment for such services upon the filing of a certified claim for compensation supported by a written statement specifying the time expended, services rendered, expenses incurred and compensation received in the same case or for the same services from any other source. The court shall inform the person named in the petition of his rights under this section before the trial commences. The person named in the petition shall be entitled to have process issued from the court to compel the attendance of witnesses on his behalf. If such person intends to rely upon the testimony or report of his qualified examiner, the report must be filed with the court and a copy must be provided to the district attorney and attorney general no later than ten days prior to the scheduled trial.

(c) Juvenile and adult court probation records, psychiatric and psychological records and reports of the person named in the

petition, including the report of any qualified examiner, as defined in section 1, and filed under this chapter, police reports relating to such person's prior sexual offenses, incident reports arising out of such person's incarceration or custody, oral or written statements prepared for and to be offered at the trial by the victims of the person who is the subject of the petition and any other evidence tending to show that such person is or is not a sexually dangerous person shall be admissible at the trial if such written information has been provided to opposing counsel reasonably in advance of trial.

(d) If after the trial, the jury finds unanimously and beyond a reasonable doubt that the person named in the petition is a sexually dangerous person, such person shall be committed to the treatment center or, if such person is a youth who has been adjudicated as a delinquent to the department of youth services until he reaches his twenty-first birthday, and then to the treatment center for an indeterminate period of a minimum of one day and a maximum of such person's natural life until discharged pursuant to the provisions of section 9. The order of commitment, which shall be forwarded to the treatment center and to the appropriate agency with jurisdiction, shall become effective on the date of such person's parole or in all other cases, including persons sentenced to community parole supervision for life pursuant to section 133C of chapter 127, on the date of discharge from jail, the house of correction, prison or facility of the department of youth services.

(e) If the person named in the petition is scheduled to be released from jail, house of correction, prison or a facility of the department of youth services at any time prior to the final judgment, the court may temporarily commit such person to the treatment center pending disposition of the petition.

Section 15. If a person who has been charged with a sexual offense has been found incompetent to stand trial and his commitment is sought and probable cause has been determined to exist pursuant to section 12, the court, without a jury, shall hear evidence and determine whether the person did commit the act or acts charged. The hearing on the issue of whether the person did commit the actor acts charged shall comply with all procedures specified in section 14, except with respect to trial by jury. The rules of evidence applicable in criminal cases shall apply and all rights available to criminal defendants at criminal trials, other than the

right not to be tried while incompetent, shall apply. After hearing evidence the court shall make specific findings relative to whether the person did commit the act or acts charged; the extent to which the cause of the person's incompetence to stand trial affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on his own behalf; the extent to which the evidence could be reconstructed without the assistance of the person; and the strength of the prosecution's case. If the court finds, beyond a reasonable doubt, that the person did commit the act or acts charged, the court shall enter a final order, subject to appeal by the person named in the petition and the court may proceed to consider whether the person is a sexually dangerous person according to the procedures set forth in sections 13 and 14. Any determination made under this section shall not be admissible in any subsequent criminal proceeding.

Section 16. The department of correction and the department of youth services shall annually prepare reports describing the treatment offered to each person who has been committed to the treatment center or the department of youth services as a sexually dangerous person and, without disclosing the identity of such persons, describe the treatment provided. The annual reports shall be submitted, on or before January 1, 2000 and every November 1 thereafter, to the clerk of the house of representatives and the clerk of the senate, who shall forward the same to the house and senate committees on ways and means and to the joint committee on criminal justice. The treatment center shall submit on or before December 12, 1999 its plan for the administration and management of the treatment center to the clerk of the house of representatives and the clerk of the senate, who shall forward the same to the house and senate committees on ways and means and to the joint committee on criminal justice. The treatment center shall promptly notify said committees of any modifications to said plan.

SECTION 9. Chapter 127 of the General Laws is hereby amended by inserting after section 133C, as so appearing, the following section:-

Section 133D. (a) A person upon whom a sentence of community parole supervision for life has been imposed under section 45 of chapter 265 shall be subject to the jurisdiction of the parole board for the term of such sentence.

Except as otherwise provided in this section, a person serving such sentence of community parole supervision for life shall be subject to the provisions of law governing parole as if such person were a parolee. The parole board shall impose terms and conditions for such sentence within 30 days prior to the commencement of community parole supervision. Such terms and conditions may be revised, altered and amended by the parole board at any time.

A person under community parole supervision for life shall be under the jurisdiction, supervision and control of the parole board in the same manner as a person under parole supervision. The board is authorized to establish such conditions of community parole supervision for life, on an individual basis, as may be necessary to ensure public safety. Such conditions may include protecting the public from such person committing a sex offense or kidnapping as well as promoting the rehabilitation of such person. Such conditions shall include sex offender treatment with a recognized treatment provider in the field for as long as the board deems necessary, and compliance with the requirements of sections 178C to 178P, inclusive, of chapter 6.

The board is authorized to impose and enforce a supervision and rehabilitation fee upon a person on community parole supervision. To the extent possible, without reducing a parolee's income to such a extent that the potential for successful community reintegration is diminished, the board shall set such fee in an amount that will substantially defray the cost of the community parole supervision program.

The board shall also establish a fee waiver procedure for hardship and indigency cases.

(b)(1) Notwithstanding the board's authority to issue a certificate of termination of sentence under section 130A after a person sentenced to community parole supervision has been on such supervision for a period of 15 years, such person may petition the board for termination of community parole supervision. Such termination may only occur by a majority vote of all the members. Upon receiving such a petition, the board shall, within 60 days, conduct a hearing before the full membership. At less 30 days prior to a hearing on the petition, the board shall cause a criminal history check to be conducted and notify in writing the victims of the crime for which the sentence was imposed, the attorney

general, the district attorney in whose district the sentence was imposed, the chief of police or head of the organized police department of the municipality in which the crime was committed and the chief of police or head of the organized police department of the municipality in which the parolee resides, of the person's petition for release from supervision. Such officials and victims shall be provided the opportunity to respond to such petition. Such officials and victims may appear in person or be represented or make written recommendations to the board, but failure of any or all of such officials to appear or make recommendations shall not delay the termination procedure.

If a victim is deceased at the time the hearing on termination of said sentence is scheduled, the deceased victim may be represented by his relatives in the following order: mother, father, spouse, child, grandchild, brother or sister, niece or nephew.

(2) Prior to the hearing, the petitioner shall be examined, personally interviewed and evaluated by a psychiatrist or licensed psychologist who is an expert in the field of sex offender treatment and who is approved by the board. The psychiatrist or psychologist shall file with the board written reports of his examinations and diagnosis and his recommendation for the disposition of such petitioner. The petitioner's treatment while on community parole supervision shall be examined and considered by such psychiatrist or psychologist in such recommendation. Such reports shall be admissible in a hearing conducted pursuant to this section. If such petitioner refuses to be personally interviewed by such psychiatrist or psychologist, without good cause, such petitioner shall be deemed to have waived his right to a hearing on the petition and the petition shall be dismissed by the board. The cost of such examination and evaluation shall be the responsibility of the petitioner; provided, however, that the board shall establish procedures for cases of hardship or indigency.

(3) At the hearing, the board shall call such witnesses as it deems necessary, including the examining psychiatrist or psychologist, the appropriate district attorney, the attorney general, the police chief or the victims of the crime or such crime victims' family members, as the board deems necessary. The petitioner may offer such witnesses and other proof at the hearing as is relevant to the petition.

(4) The board shall terminate community parole supervision for life if the petitioner demonstrates, by clear and convincing evidence, that he has not committed a sex offense or a kidnapping since his conviction, that he is not likely to pose a threat to the safety of others and that the public interest is not served by further community parole supervision over the petitioner.

(5) If a petition for release from supervision is denied by the board, such petitioner may not file another such petition for a period of three years.

(c) An individual who violates a condition of community parole supervision shall be subject to the provisions of section 149. If the parolee has served the entire period of confinement under his original sentence, the original term of imprisonment shall, upon a first violation, be increased to imprisonment in a house of correction for 30 days if such violation does not otherwise constitute a criminal offense. Upon a second violation, said original term of imprisonment shall be increased to 180 days in the house of correction if such violation does not otherwise constitute a criminal offense. Upon a third or subsequent violation, said original term of imprisonment shall be increased to one year in the house of correction if such violation does not otherwise constitute a criminal offense. If such violation otherwise constitutes a criminal offense, said increased term of imprisonment shall be served on and after any sentence received for commission of the new offense.

SECTION 10. Chapter 211D of the General Laws is hereby amended by adding the following section:-

Section 16. The committee shall establish, supervise and maintain a system for the appointment of counsel for the provision of legal services for indigents subject to the sex offender registry classification system and resulting appeals pursuant to sections 178C to 178P, inclusive, of chapter 6.

SECTION 11. The first paragraph of section 26 of chapter 265 of the General Laws, as appearing in the 1998 Official Edition is hereby amended by striking out the second sentence.

SECTION 12. Said section 26 of said chapter 265, as so appearing, is hereby further amended by adding the following paragraph:-

Whoever, without lawful authority, forcibly or secretly confines or imprisons a child under the age of 16 within the commonwealth against his will or forcibly carries or sends such person out of the commonwealth or forcibly seizes and confines or inveigles or kidnaps a child under the age of 16 with the intent either to cause him to be secretly confined or imprisoned in the commonwealth against his will or to cause him to be sent out of the commonwealth against his will or in any way held to service against his will, shall be punished by imprisonment in the state prison for not more than 15 years. The provisions of the preceding sentence shall no apply to the parent of a child under 16 years of age who takes custody of such child.

SECTION 13. Said chapter 265 is hereby further amended by adding the following section: -

Section 45. Any person who commits indecent assault and battery on a child under 14 under section 13B, indecent assault and battery on a mentally retarded person under the first paragraph of section 13F or indecent assault and battery on a person who has attained the age of 14 under section 13H may, in addition to the term of imprisonment authorized by such section, be punished by a term of community parole supervision for life to be served under the jurisdiction of the parole board, as set forth in section 133C of chapter 127. Any person who commits rape under section 22; rape of a child under 16 with force under section 22A; rape and abuse of a child under section 23: assault with intent to commit rape under section 24; assault of a child under 16 with intent to commit rape under section 24B; kidnapping a child under the age of 16 under section 26; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; or commits an attempt to violate any such section pursuant to section 6 of chapter 274, shall, except as provided for in section 18 of chapter 275, and in addition to the term of imprisonment authorized by such section, receive a sentence of community parole supervision for life to be served under the jurisdiction of the parole board, as set forth in section 133D of chapter 127. Any person convicted of violating section 13B, 13F, 13B, 22, 22A, 23, 24, 24B or 26 of this chapter or of an attempt to violate any of such sections pursuant to section 6 of chapter 274, after one or more prior convictions of indecent assault and battery, rape, assault with intent to commit rape, unnatural and lascivious acts, drugging for sex, kidnap or of

any offense which is the same as or necessarily includes the same elements of said offense shall, in addition to the term of imprisonment authorized by such section, be punished by a term of community parole supervision for life, to be served under the jurisdiction of the parole board, as set forth in said section 133D of said chapter 127. The sentence of community parole supervision for life shall commence immediately upon the expiration of the term of imprisonment imposed upon such person by the court or upon such person's release from probation supervision or upon discharge from commitment to the treatment center pursuant to section 9 of chapter 123A, whichever first occurs.

SECTION 14. Chapter 275 of the General Laws is hereby amended by adding the following section: -

Section 18. Whenever a person is convicted of a first offense under section 13B, 13F or 13H of chapter 265 or for a first offense for the attempt of any of the aforementioned crimes under section 6 of chapter 274, the district attorney, upon motion to the court, may request a hearing after conviction and before sentencing, to determine whether or not such person shall be committed, in addition to any term of imprisonment or probation authorized by said sections, to community parole supervision for life, to be served under the jurisdiction of the parole board as set forth in section 133D of chapter 127. Whenever a person is convicted of a first offense under section 22, 22A, 23, 24, 24B or 26 of said chapter 265, Section 3 or 35A of chapter 272 or for a first offense for the attempt of any of the aforementioned crimes under said section 6 of said chapter 274, the elements of which are mitigated by certain circumstances, the defendant, upon motion to the court, may request a hearing after conviction and before sentencing to determine whether or not such person shall receive, in addition to a term of imprisonment or probation authorized by such sections, community parole supervision for life, to be served under the jurisdiction of the parole board as set forth in said section 133D of said chapter 127.

At such hearing, the defendant shall have the right to be represented by counsel, and, if financially unable to retain adequate representation, to have counsel appointed to him. The defendant shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing and to present information. The rules concerning admissibility of

evidence in criminal trials shall not apply to the presentation and consideration of information at the hearing. A finding by the court that such person shall be committed to community parole supervision for life shall be supported by clear and convincing evidence.

In making a determination the judge shall, on the basis of any information which he can reasonably obtain, consider any mitigating or aggravating circumstances including, but not limited to, the defendant's character, propensities, criminal record, the nature and seriousness of the danger posed to any person or the community and the nature and circumstances of the offense for which the defendant is convicted. If the judge finds, by clear and convincing evidence, that no reasons for community parole supervision for life to be served under the jurisdiction of the parole board, as set forth in section 133D of chapter 127, exist, the judge shall not impose community supervision for life on such first offender.

Whenever a person is convicted of a first offense under section 22, 22A, 23, 24, 24B or 26 of chapter 265, or section 3 or 35A of chapter 272 or for a first attempt of any of the aforementioned crimes under the provisions of section 6 of chapter 274, the district attorney may file a motion with the sentencing judge requesting that the defendant not receive community parole supervision for life, and upon receipt of such motion, the sentencing judge shall not impose community parole supervision for life on such first offender.

SECTION 15. Notwithstanding subsection (1) of section 178K of Chapter 6 of the General Laws, the initial term of appointment for two members of the sex offender registry board shall be two years, the initial term of appointment for two other members of the board shall be three years, the initial term of appointment for two members shall be four years. The members presently serving as the sex offender registry board shall serve on the sex offender registry board until the expiration of their respective terms and their reappointment or the appointment of their successors.

SECTION 16. Notwithstanding the provisions of sections 178K and 178L of chapter 6 of the General Laws, the sex offender registry board shall adopt rules and regulations providing for evidentiary hearings in accordance with said section 178L prior to conducting any such hearings and shall file copies of such rules

and regulations with the committee on criminal justice not later than 60 days after such rules and regulations are adopted. Such rules and regulations shall include, but not be limited to, provision for notice and opportunity to be heard by the offender, provision for appointment of counsel if the offender is found to be indigent as determined by the board using the standards under chapter 211D of the General Laws and notification to the offender of his right to seek judicial review pursuant to section 14 of chapter 30A of the General Laws if he is aggrieved by a decision of the board.

SECTION 17. The sex offender registry board and the chief counsel for the committee for public counsel services shall annually prepare reports setting out the costs incurred by each such agency as a direct result of the implementation of this act. The report by the board shall include the status of the classification and registration of sex offenders. The annual reports shall be submitted to the clerk of the house of representatives and the clerk of the senate, who shall forward the same to the house and senate committees on ways and means and to the joint committee on criminal justice on or before January 1, 2000 and every November 1 thereafter.

SECTION 18. The secretary of public safety shall conduct a study relative to the costs to municipal and state police departments relative to the establishment of the sex offender registry. Such study shall include, but not be limited to, the costs of hiring additional personnel, training, technology system upgrades and dissemination of information to the public. The secretary shall file the results of such study with the house and senate committees on ways and means not later than February 1, 2000.

SECTION 19. The parole board shall conduct a study relative to the costs of the establishment of community parole supervision for life. The study shall include, but not be limited to, the costs of hiring additional personnel, training, technology system upgrades, and the expansion of the intensive parole program for sex offenders on a statewide basis. The parole board shall file the results of such study with the house and senate committees on ways and means and the joint committee on criminal justice not later than November 1, 1999.

SECTION 20. There is hereby established a special commission to consist of six members of the senate and six members of the house

of representatives to advise the general court as to the viability of requiring appropriate treatment for defendants charged with a sex offense as a condition of bail.

Massachusetts General Laws

G.L. c.6, §178F 3/4, enacted by St. 2010, c.256, §42

A homeless sex offender shall wear a global positioning system device, or any comparable device, administered by the commissioner of probation.

Chapter 6, §178K(2)(e), inserted by St. 2006, c.303, §6

No sex offender classified as a level 3 offender shall knowingly and willingly establish living conditions within, move to, or transfer to any convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded which meets the requirements of the department of public health under section 71 of chapter 111. Any sex offender who violates this paragraph shall, for a first conviction, be punished by imprisonment for not more than 30 days in a jail or house of correction; for a second conviction, be punished by imprisonment for not more than 2 1/2 years in a jail or house of correction nor more than 5 years in a state prison or by a fine of not more than $1,000, or by both such fine and imprisonment; and for a third and subsequent conviction, be punished by imprisonment in a state prison for not less than 5 years; provided, however, that the sentence imposed for such third or subsequent conviction shall not be reduced to less than 5 years, nor suspended, nor shall any person sentenced herein be eligible for probation, parole, work release or furlough, or receive any deduction from his sentence for good conduct until he shall have served 5 years. Prosecutions commenced hereunder shall neither be continued without a finding nor placed on file.

Chapter 127, §133D 1/2, inserted by St. 2006, c.303, §7

Any person under court ordered parole supervision or under community parole supervision for life for any offense listed within the definition of "sex offense", a "sex offense involving a child" or a "sexually violent offense", as defined in section 178C of chapter 6, shall, as a requirement of such parole, wear a global positioning

system device, or any comparable device, administered by the board at all times for the length of his parole for any such offense. The board shall, in addition to any other condition, establish defined geographic exclusion zones including, but not limited to, the areas in and around the victim's residence, place of employment and school and other areas defined to minimize the parolee's contact with children, if applicable. If the parolee enters an excluded zone, as defined by the terms of his parole, the parolee's location data shall be immediately transmitted to the police department in the municipality wherein the violation occurred and the board, by telephone, electronic beeper, paging device or other appropriate means. If the board or the parolee's parole officer believes that the parolee has violated his terms of parole by entering an excluded zone as prescribed in this section, the board or parole officer shall cause the parolee to be taken into temporary custody in accordance with section 149A of chapter 127.

The fees incurred by installing, maintaining and operating the global positioning system device, or comparable device, shall be paid by the parolee. If a parolee establishes his inability to pay such fees, the board may waive them.

G.L. c.265, §47, enacted by St. 2006, c.303, §8

Any person who is placed on probation for any offense listed within the definition of "sex offense", a "sex offense involving a child" or a "sexually violent offense", as defined in section 178C of chapter 6, shall, as a requirement of any term of probation, wear a global positioning system device, or any comparable device, administered by the commissioner of probation, at all times for the length of his probation for any such offense. The commissioner of probation, in addition to any other conditions, shall establish defined geographic exclusion zones including, but not limited to, the areas in and around the victim's residence, place of employment and school and other areas defined to minimize the probationer's contact with children, if applicable. If the probationer enters an excluded zone, as defined by the terms of his probation, the probationer's location data shall be immediately transmitted to the police department in the municipality wherein the violation occurred and the commissioner of probation, by telephone, electronic beeper, paging device or other appropriate means. If the commissioner or the probationer's probation officer has probable cause to believe that the probationer has violated this term of his

probation, the commissioner or the probationer's probation officer shall arrest the probationer pursuant to section 3 of chapter 279. Otherwise, the commissioner shall cause a notice of surrender to be issued to such probationer.

The fees incurred by installing, maintaining and operating the global positioning system device, or comparable device, shall be paid by the probationer. If an offender establishes his inability to pay such fees, the court may waive them.

## SUPPLEMENTAL ADDENDUM

### TABLE OF CONTENTS

# CITY OF LYNN

*In City Council* December 14, 2010 page 1 of 6

**IN THE YEAR TWO THOUSAND AND TEN AN ORDINANCE AMENDING THE ORDINANCE PERTAINING TO SEX OFFENDER RESIDENCY RESTRICTIONS IN THE CITY OF LYNN**

**SECTION 1:00 Findings.**

A. The City of Lynn recognizes that it has a compelling interest in protecting children from the threat of sexual abuse; and

B. Due to a child's vulnerability, the City Council is compelled to take a protective role by adopting laws that are designed to protect the City's children from registered sex offenders; and

C. Registered sex offenders continue to reside in close proximity to public and private schools, parks and playgrounds; and

D. Without adequate protective ordinances at the local level, registered sex offenders will continue to move to buildings, apartments, domiciles or residences in close proximity to schools, parks and playgrounds; and

E. The City of Lynn wishes to protect children in the educational and recreational environment.

**SECTION 2:00 Intent.**

A. The Lynn City Council finds that sex offenders pose a significant threat to the health and safety of the community and especially to children, whose age and inexperience makes them particularly vulnerable to the heinous and reprehensible acts of these offenders; and

B. The rate of recidivism among sex offenders is high. Limiting the frequency of contact between registered sex offenders and areas where children are likely to congregate reduces the opportunity and temptation, and can reduce the risk of repeated acts against children; and

C. After careful consideration, the Lynn City Council finds that this legislation is the most narrowly tailored means of limiting, to the fullest extent possible, the opportunity for registered sex offenders to approach or otherwise come in contact with children in places where children would naturally congregate, and that the protection of the health and safety of our children is a compelling governmental interest.

D. It is the intent of this ordinance to serve and protect the City of Lynn's compelling interest to promote, protect and improve the health, safety and welfare of the citizens of Lynn by creating areas around locations where children regularly congregate

# CITY OF LYNN



in concentrated numbers wherein certain registered sex offenders are prohibited from loitering and establishing temporary or permanent residence.

E. By the enactment of this or any other legislation, the City Council understands that it cannot remove the threat posed by registered sex offenders or guarantee the safety of children, or assure the public that registered sex offenders will comply with the mandates of this ordinance and state law relative to registration. This legislation is intended to create a civil, non-punitive regulatory scheme in order to protect children to the extent possible under the circumstances and not as a punitive measure of any kind.

F. Registered sex offenders pose a clear threat to the children residing and visiting in the community. Because registered sex offenders are more likely than any other type of offender to re-offend for another sexual offense, the Lynn City Council desires to impose safety precautions in furtherance of the goal of protecting children. The purpose of this regulation is to reduce the potential risk of harm to children of the community by impacting the ability of registered sex offenders to be in contact with unsuspecting children in locations that are primarily designed for use by, or are primarily used by children, namely, the grounds of their public or private school for children, a park, or other public recreational facility. The City of Lynn desires to add location restrictions to such offenders where the state law is silent.

**SECTION 3:00 Definitions.**

For the purpose of this Ordinance, the following terms shall have the respective meanings ascribed to them:

*Registered Sex Offender.* A person convicted of a criminal sex offense and designated as a Level 2 or 3 sex offender by the Massachusetts Sex Offender Registry Board pursuant to M.G.L. c. 6, §178C. The Board has determined that these individuals have a high risk to reoffend and that the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active community notification.

*Sex Offender* and *Sex Offense* shall have the same meaning as provided for in M.G.L. c. 6, §178C.

*Child* shall mean a person or persons under the age of eighteen (18) years of age.

*School.* A licensed or accredited public or private school or church school that offers instruction in pre-school or other business permitted as a school by the City of Lynn and/or the Commonwealth of Massachusetts, or any of grades K through 12.

# CITY OF LYNN



*Park* includes active and passive public land designated for recreational or athletic use by the City of Lynn, the Commonwealth of Massachusetts or other governmental subdivision, and located within the city of Lynn.

*Recreational Facility* includes, but is not limited to, a playground, a forest preserve, conservation area, jogging or running track, hiking trail, beach, water park, wading pool, soccer field, baseball field, football field, basketball court or hockey rink.

*Permanent Residence* shall mean a place where a person lives, abides, lodges or resides for fourteen (14) or more consecutive days.

*Temporary Residence* shall means a place where a person lives, abides, lodges or resides for a period of less than fourteen (14) consecutive days or fourteen (14) days in the aggregate during any calendar year, which is not the person's permanent address or place where the person routinely lives, abides, lodges, or resides and which is not the person's Permanent Residence; but Temporary Residence shall not include residence at a hospital or other healthcare or medical facility for less than fourteen consecutive days or fourteen (14) days in the aggregate during any calendar year.

*Establishing a Residence* shall mean to set up or bring into being a dwelling place or an abode where a person sleeps, which may include more than one location, and may be mobile or transitory, or by means of purchasing real property or entering into a lease or rental agreement for real property (including a renewal or extension of a prior agreement whether through written extension or automatic renewal).

**SECTION 4:00. Residency Restrictions.**

A. Prohibition. A Registered Sex Offender is prohibited from establishing a Permanent or Temporary Residence within one thousand (1,000) feet of any School or Park in the City of Lynn.

B Evidentiary matters, measurements. For purposes of determining the minimum distance separation, the distance shall be measured by following a straight line from the outer property line of the Permanent or Temporary Residence to the nearest outer property line of any School or Park.

C. Exceptions. A Registered Sex Offender residing within one thousand (1,000) feet of any School or Park does not commit a violation of this section if any of the following apply:

1. The Registered Sex Offender established a Permanent Residence prior to the effective date of this ordinance, and

# CITY OF LYNN



a. Permanent Residence was established by purchasing the real property where the residence is established, or
b. Permanent Residence was established through a valid, fixed term, written lease or rental agreement, executed prior to the effective date of this ordinance, whose term has not yet expired.

2. The Registered Sex Offender is a minor.

3. The Registered Sex Offender is residing with a person related by blood or marriage within the first degree of kindred within the City of Lynn.

4. The School or Park within one thousand (1,000) feet of the Registered Sex Offender's Permanent Residence was opened after the Registered Sex Offender established the Permanent Residence.

D. Notice to move. A Registered Sex Offender who resides on a permanent or temporary basis within one thousand (1,000) feet of any School or Park shall be in violation of this section, and shall, within thirty (30) days of receipt of written notice of the Registered Sex Offender's noncompliance with this ordinance from the City Solicitor's Office, move from said location to a new location, but said location may not be within one thousand (1,000) feet of any School or Park. It shall constitute a separate violation for each day beyond the thirty (30) days the Registered Sex Offender continues to reside within one thousand (1,000) feet of any School or Park. Furthermore, it shall be a violation each day that a Registered Sex Offender shall move from one location within the City of Lynn to another that is within one thousand (1,000) feet of any School or Park.

**SECTION 5:00 Child Safety Zones.**

A. Prohibitions.

1. A Registered Sex Offender is prohibited from entering upon the premises of a School unless previously authorized specifically in writing by the school administration.

2. A Registered Sex Offender shall not enter any Park or other private or public Recreational Facility when children are present and approach, contact, or communicate with any child present, unless the Registered Sex Offender s a parent or guardian of a child present in such Park or other private or public Recreational Facility.

3. A Registered Sex Offender shall not loiter on or within one thousand (1,000) feet of any property in which there is a School, Park, or other private or public Recreational Facility. Under this section, "loiter" shall

# CITY OF LYNN



mean to enter or remain on property while having no legitimate purpose therefor, or, if a legitimate purpose exists, remaining on that property beyond the time necessary to fulfill that purpose. No person shall be in violation of this subsection unless he or she has first been asked to leave a prohibited location by a person authorized to exclude the Registered Sex Offender from the premises. An authorized person includes, but is not limited to, law enforcement officer, owner or manager of premises, or principal or teacher if the premises is a School.

A. Exceptions

1. The prohibitions defined in this section shall not be construed or enforced so as to prohibit a Registered Sex Offender from exercising his or her right to vote in any federal, state or municipal election, or from attending any religious service.

2. The prohibitions defined in this section do not apply to a Registered Sex Offender's place of residence when such residence is excepted under this ordinance.

**SECTION 6:00 Enforcement.**

A. The City of Lynn Police Department shall be charged with enforcement of this Ordinance with exception of the Notice to Move which shall be sent by the City Solicitor's Office.

B. A map depicting the prohibited areas shall by created by the Inspectional Services Department and maintained by the City Clerk's Office. The map and copy of this ordinance shall be available to the public at the City Clerk's Office and on the City of Lynn's website.

**SECTION 7:00 Penalties.**

A. Any violation of this Ordinance shall result in: (1) a non-criminal fine of $300.00 for a first violation; (2) a non-criminal fine of $300.00 for each additional violation of this provision. A Registered Sex Offender commits offense for each and every day a violation continues.

B. Any subsequent offense of this Ordinance by a Registered Sex Offender: Non-criminal fine of $300.00 and notification to offender's landlord, parole officer and/or probation officer, and the Commonwealth of Massachusetts Sex Offender Registry Board that the Registered Sex Offender has violated a municipal ordinance.

# CITY OF LYNN



**SECTION 8:00 Inconsistent provisions.**

All ordinances or parts of ordinances inconsistent herewith are hereby repealed.

**SECTION 9:00 Severability.**

If any of the provisions of this ordinance or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions of said ordinance nor the application of such other provisions, which can be given effect without the invalid provisions or application thereof, and for this purpose the provisions of this ordinance are severable.

**SECTION 10:00 Time of Effect.**

This ordinance shall take effect thirty-one (31) days after its final approval as adopted and advertised.

-Add. 7-

SEX OFFENDER RESIDENCY
RESTRICTIONS - AMENDMENT

— ORDINANCE —

# ORDER

Offered by Councillor PHELAN
In City Council

Date: DECEMBER 14, 2010

Date Adopted: JANUARY 11, 2011

| Councilor | YES | NO |
|---|---|---|
| Cahill | X | |
| Capano | X | |
| Colucci | X | |
| Crighton | X | |
| Crowley | X | |
| Cyr | X | |
| Duffy | X | |
| Ford | X | |
| Lozzi | X | |
| Phelan | X | |
| Trahant | X | |
| | | |
| TOTAL | 11 | 0 |

Janet L. Rowe 1/12/11
Asst City Clerk

Date Approved: January 12, 2011

Judith Flanagan Kennedy
Mayor

*In City Council*

*Immediate Reconsideration*

*Notice of Reconsideration*

| Councillor | YES | NO |
|---|---|---|
| Cahill | | |
| Capano | | |
| Colucci | | |
| Crighton | | |
| Crowley | | |
| Cyr | | |
| Duffy | | |
| Ford | | |
| Lozzi | | |
| Phelan | | |
| Trahant | | |

*Referred to* *Law Dept, Police, ISD*

*Date:* January 12, 2011

**A TRUE COPY ATTEST:**
Mary F Audley
**CITY CLERK**

**Commonwealth of Massachusetts**
**County of Essex**
**The Superior Court**

CIVIL DOCKET#: **ESCV2012-00749-A**

RE: Five Registered Sex Offenders v Lynn

TO: Miriam Mack, Esquire
ACLU of Massachusetts
211 Congress Street
Boston, MA 02110

## NOTICE OF DOCKET ENTRY

You are hereby notified that on **07/07/2014** the following entry was made on the above referenced docket:

**MEMORANDUM AND DECISION ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT... ORDER, The caption for this matter is changed so that it shall read, "Three Registered Sex Offenders, John Doe, Charles Coe, and Paul Poe, on Behalf of Themselves and Other Persons Similarly Situated." The City of Lynn's Rule 56(f) motion for extension [52] is DENIED. Plaintiffs' motion for partial summary judgment [D.62] is ALLOWED IN PART. Judgment shall enter on Count I of the Complaint in favor of plaintiffs, declaring that the Ordinance, restricting the residency options of level two and level three sex offenders in the City of Lynn, is invalid and unenforceable as it violates Article 89, s 6 of the Articles of Amendment of the Massachusetts Constitution (Home Rule Amendment). Final judgment on Count I of the complaint shall enter under Mass.R.Civ.P. 54(b). There is no just reason for delay. Piece-meal appeals are not likely in this case, and the court's ruling herein should be subject to appellate review without the delay that would be caused by the adjudication of the remaining counts of the complaint. The remaining counts of the complaint are STAYED pending further order of this court. (Timothy Feeley, Justice). Copies mailed 7/7/2014**
Dated at Salem, Massachusetts this 7th day of July, 2014.

Thomas H. Driscoll Jr.,
Clerk of the Courts

BY: Carlotta McCarthy Patten
Assistant Clerk

Telephone: (978) 825-4800

**Disabled individuals who need handicap accommodations should contact the Administrative Office of the Superior Court at (617) 788-8130** cvdgeneric_2.wpd 1268234 memord maluzare

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2012-00749-A

THREE REGISTERED SEX OFFENDERS (John Doe, Charles Coe, and Paul Poe), on Behalf of Themselves and Other Persons Similarly Situated,
Plaintiffs

vs.

CITY OF LYNN,
Defendant

---

# MEMORANDUM AND DECISION ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

## BACKGROUND

The individual plaintiffs (the "plaintiffs"), having court permission to proceed under pseudonyms [D. 8], are level three registered sex offenders residing in the City of Lynn (the "City").[1] The plaintiffs also represent a certified class of similarly convicted sex offenders who reside in the City and were earlier classified by the Massachusetts Sex Offender Registry Board ("SORB") as level two or level three sex

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[1]The case was originally commenced by "Five Registered Sex Offenders," including Michael Moe and Richard Roe. The court allowed the motion of Michael Moe and Richard Roe to be dismissed as named plaintiffs and class representatives. [D. 61]. The court has changed the caption of this case to reflect the court's dismissal order.

offenders.[2] [D. 16]. The classification levels established by SORB for the plaintiffs and class members are not at issue in this case. Any rights of judicial review of those classification levels have been exercised under Chapter 30A of the General Laws, are currently pending under Chapter 30A (or upon appellate review), or were accepted by plaintiffs and class members without judicial review.

This action arises out of an ordinance adopted by the Lynn City Council on January 12, 2011, and approved that same date by the Mayor of the City (the "Ordinance"). [D. 1, Ex. A]. By its terms, the Ordinance became effective thirty-one days after its final approval. The Ordinance applies to persons convicted of a criminal sex offense, classified by SORB as level two or level three sex offenders under the sex offender registry law ("SORL") of this Commonwealth, and residing in the City. See G. L. c. 6, §§178C-178Q. The Ordinance prohibits level two and level three sex offenders from living within 1,000 feet of a school or park in the City, subject to certain limited exceptions.

One must register as a sex offender if SORB finds the individual to: (1) have at least one conviction or adjudication for an offense of a sexual nature; (2) reside or work in the Commonwealth; and (3) pose a current danger of re-offending. 803 CMR § 1.06(2)(a)-(d). Once SORB has determined a sex offender's eligibility for

[2]The plaintiffs' motion for class certification was allowed without opposition. [D. 16].

registration, SORB recommends and establishes (after a hearing if the recommendation is challenged) a classification level. A level one offender is one who bears a low risk of re-offending and who poses such a degree of dangerousness that public safety is not served by public availability of the offender's registration information. G. L. c. 6, § 178K(2)(a). Level two includes those offenders who carry a moderate risk of re-offending and whose "degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information." *Id.* at § 178K(2)(b). A level three classification is proper when the "risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination" of the registration information. *Id.* at § 178K(2)(c).

The various levels available for classification by SORB are actually levels of notification, from no availability (low risk), to public availability (moderate risk), to active dissemination (high risk). *Moe* v. *Sex Offender Registry Board*, 467 Mass. 598, 601 (2014). The registration information of level two and level three sex offenders (including photographs) is required to be published by SORB on a comprehensive Internet database. G. L. c. 6, § 178D, as amended by St. 2013, c. 38, §§ 7,9. Active dissemination of the registration information of level three sex offenders (including photographs) is subject to a "community notification plan" that

requires local police to notify community organizations and members of the public likely to encounter the sex offender, as well as the police departments of adjacent communities. G. L. c. 6, §178K(2)(c).

After the Board issues its recommendation, the offender can request a hearing challenging the classification. G. L. c. 6, § 187L(1)(c). The hearing officer conducts a *de novo* review and must find by a preponderance of the evidence whether the offender must register, and if so, at what level. 803 CMR § 1.10(1). The hearing officer's findings constitute a final agency decision, from which, the offender may seek judicial review. G. L. c. 6, § 178M and G. L. c. 30A, § 14(7). The Board, in issuing its final classification decision, "is required to determine 'whether and to what degree public access to the offender's personal and criminal history information . . . is in the interest of public safety.'" *Id.* at 615, citing 803 CMR §§ 1.22(3)(c), 1.39(3)(c) (2004).

The registration process involves various governmental agencies, highlighting the need for a uniform, state-wide approach to regulating and managing convicted sex offenders. Department of Corrections/Houses of Corrections are required to notify SORB of the release of any sex offender required to register not less than ninety days before release. The Probation Department has a similar notification duty within five days of assuming supervision of such a sex offender. SORB transmits the sex

offenders' registration data to applicable local police departments and the FBI. Courts have notification responsibilities upon accepting pleas to sex offenses or imposing sentences of less than ninety days. G. L. c. 6, § 178E. Changes of residences or places of employment/schooling must be reported to SORB by the registered sex offender, which then notifies applicable police departments and the FBI. *Id.* Registration requirements vary depending on a sex offender's classification level. Level one offenders must mail to SORB an annual verification of their registration information. G. L. c. 6, § 178F. Level two and level three offenders must appear annually at their local police departments to verify registration data and have photographs and fingerprints updated. Homeless sex offenders must appear at their local police departments every thirty days to verify registration data. G. L. c. 6, § 178F½. A homeless sex offender shall wear a GPS device, administered by the commissioner of probation. G. L. c. 6, § 178F3/4. SORB is given access to Department of Revenue information in order to verify registration data. *Id.* Failure to register or to give notice of change of address, or providing false information to SORB, is a criminal offense. G. L. c. 6, §178H. The SORL does not place general residency restrictions upon sex offenders. Nor does any other state statute place such restrictions on sex offenders.

The Ordinance places residency restrictions on registered level two and three

sex offenders residing in the City.[3] Such sex offenders are "prohibited from establishing a Permanent or Temporary residence within one thousand (1,000) feet of any School or Park in the City of Lynn." There are certain limited exceptions. It is not a violation of the Ordinance if the sex offender established a permanent residence prior to the effective date of the ordinance and established such residence either (1) by purchasing the real property where the residence is established or (2) through a valid, firm, fixed term written lease or rental agreement, executed prior to the effective date of the ordinance and whose term has not yet expired. Minor sex offenders cannot violate the Ordinance. Nor does a sex offender living with a person related by blood or marriage within the first degree of kindred, or a sex offender residing in a permanent residence within 1,000 feet of a school or park opened after the permanent residence was established.

A City map prepared on behalf of the City shows the 1,000 foot residency exclusion areas surrounding schools and parks. [D. 1, Ex. B]. A substantial portion

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[3]The court has been informed by plaintiffs that as many as forty other towns and cities in the Commonwealth have enacted similar residency restrictions on convicted sex offenders. From a review of cases from other jurisdictions, the court knows that such locally enacted residency restrictions are not uncommon. For example, "[s]ex offender residency restrictions are multiplying throughout New York State, as local legislatures scramble to out maneuver each other with highly restrictive ordinances designed to banish registered offenders from their communities." *People* v. *Oberlander*, 22 Misc. 3d 1124(A), 2009 WL 415558 (N.Y. Sup. Ct. (Rockland Co.) 2009) (unpublished opinion). The court is also informed that there are no prior Massachusetts court decisions addressing the constitutionality of general residency restrictions imposed upon convicted sex offenders.

of residential areas of the City fall within the residency restrictions. The plaintiffs allege that the restricted areas constitute approximately 95% of residential areas of the City, and the City does not dispute that representation. It is also alleged that each of the named plaintiffs lives in a restricted area and has received a "notice to move" from the City. The failure to comply with the notice to move from (and not into a restricted residency area) is a violation of the Ordinance for each such day after thirty days that the sex offender continues to reside within the restricted areas. Non-criminal fines of $300 are imposed for each day of a residency restriction violation.

The complaint alleges that each named plaintiff is subject to the Ordinance, as a sex offender classified as a level two or level three offender by SORB, residing in the City, and having received a notice to move from the City. Each, at the time the complaint was filed, lived in a residency restricted area, and was not eligible for any exceptions to the residency restrictions. The complaint attacks the Ordinance on a number of legal bases. Count I alleges a violation of the Home Rule Amendment, Article 89, § 6 of the Articles of Amendment to the Massachusetts Constitution, and G. L. c. 43B, § 13 (cities and towns may adopt local ordinances not inconsistent with the constitution or laws enacted by the Legislature). Count II alleges that the ordinance violates the *ex post facto* clauses of the United States and Massachusetts Constitutions. Count III alleges a violation of substantive due process under the

United States and Massachusetts Constitutions. Count IV alleges a violation of the right to travel found in the Massachusetts Declaration of Rights. Count V alleges a violation of the right to familial association under the United States and Massachusetts Constitutions. Count IV alleges cruel and unusual punishment under the United States and Massachusetts Constitutions. The complaint asks for a declaration of rights and injunctive relief consistent with its various constitutional challenges. Apparently due to the City's agreement not to enforce the Ordinance's residency restrictions during the pendency of this action, no motion for temporary or preliminary injunctive relief has been filed by the plaintiffs.

Now before the court is the plaintiffs' motion for partial summary judgment. [D. 62]. Plaintiffs seek entry of judgment on only three of the claims in the complaint: Count I (Home Rule Amendment); Count II (*ex post facto*); and Count IV (right to intrastate travel and right to association). A non-evidentiary hearing was held on June 25, 2014. For reasons discussed below, the court will **ALLOW** so much of plaintiff's motion for partial summary judgment that is based on the Home Rule Amendment (Count I). Because of the court's ruling under the Home Rule Amendment, the court will not reach or decide the merits of plaintiffs' other arguments raised in its motion. Because of the court's ruling under the Home Rule Amendment, the court will **DENY** the City's motion for an extension of time under

Mass. R. Civ. P. 56(f) for further discovery [D. 52], which the court previously reserved on pending consideration of the plaintiffs' summary judgment motion.

## DISCUSSION

### 1. Home Rule Amendment and Applicable Law

The Articles of Amendment of the Massachusetts Constitution includes the following:

> Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, **which is not inconsistent with the constitution or laws enacted by the general court** in conformity with powers reserved to the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

Mass. Const. Art. Amend. 89, § 6 (emphasis added). Those powers reserved to the general court as referenced by Section 6 of Article 89 include the "power to act in relation to cities and towns, but only by generals laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two," as well as by certain special laws. Mass. Const. Art. Amend. 89, § 8.

The effect of this so-called "Home Rule Amendment" is to prohibit

inconsistency between state and local laws.[4] Analysis of whether a local ordinance is inconsistent with state enactments is analogous to the doctrine of preemption under federal law. *Connors* v. *City of Boston*, 430 Mass. 31, 35 (1999). Such inconsistency may be found where "there was either an express legislative intent to forbid local activity on the same subject or whether the local regulation would somehow frustrate the purpose of the statute so as to warrant an inference that the Legislature intended to preempt the subject [internal citation omitted] [or] we can infer that the Legislature intended to preempt the field because legislation on the subject is so comprehensive that any local enactment would frustrate the statute's purpose." *Id.* at 35-36. Express legislative intent does not require an express preemption provision or statement. A comprehensive statute or statutory scheme can express an legislative intent to forbid local activity on the same subject, even without an express preemption provision/statement. *New England Tel. & Tel. Co.* v. *Lowell*, 369 Mass. 831, 834-835 (1976) (locality could not add a requirement for maintenance of utility lines in light of an exemption of the same requirement in a state statute). "If the Legislature has made no explicit indication of its intention in this respect, a legislative intention to bar local ordinances and by-laws purporting to exercise a power or function on the

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[4]The constitutional provision from Section 6 has been codified at G. L. c. 43B, § 13, using "virtually identical language." *Connors v. City of Boston*, 430 Mass. 31, 35 (1999).

same subject as State legislation may nevertheless be inferred in all the circumstances." *Bloom* v. *City of Worcester*, 363 Mass. 136, 155 (1973).

"The mere existence of statutory provision for some matters within the purview of [a local ordinance] will not render it invalid as repugnant to law." *Commonwealth* v. *Baronas*, 285 Mass. 321, 323 (1934). On the other hand, "where by legislation a subject matter has been fully dealt with, a by-law or a town or city dealing further and otherwise with that subject matter is 'repugnant to law' within the meaning of the statute."[5] *Id.* at 322.

There is no presumption in favor of the constitutionality of a by-law/ordinance challenged on home rule grounds as inconsistent with a state statute, *Wendell* v. *Attorney General*, 394 Mass. 518, 524 (1985), but a sharp conflict between local and state laws is required before a local ordinance will be declared invalid. *Bloom*, 363 Mass. at 154. "On the other hand, where the legislature had enacted 'a complete and comprehensive statutory system' on a subject, it was said before the Home Rule Amendment that there was no room for local ordinances or by-laws. *Bloom*, 363 Mass. at 254, citing *Commonwealth* v. *Welbarst*, 319 Mass. 291, 295 (1946); *Southborough* v. *Boston & Worcester St. Ry.*, 250 Mass. 234, 239 (1924). "In a close

[5]In Home Rule Amendment cases, inconsistency has been deemed analogous with the earlier requirement that local ordinances not be repugnant to law. See *Bloom*, 363 Mass. at 150-151, 155; G. L. c. 40, § 21.

case, the considerations influencing the decision [on consistency/inconsistency] depend on the particular circumstances and a perception of the extent to which the Legislature has or has not made a preemptive intent clear." *Wendell*, 394 Mass. at 525. "In such an analysis, it is not inappropriate to take note of what has or has not been traditionally a matter of local regulation." *Id.*

**2. Analysis**

The court starts by defining the subject matter of the Ordinance as the civil regulation and management of the post-incarceration lives of convicted sex offenders.[6] The subject matter of the Ordinance has not traditionally been a matter of local regulation. The City has not suggested that it or other towns and cities of this Commonwealth have, before the enactment of the Ordinance and similar local laws by other municipalities, regulated the post-conviction lives of convicted sex offenders. To this court's knowledge, all current laws regulating the post-conviction lives of sex offenders in this Commonwealth, except locally enacted residency restrictions such as the Ordinance, have been enacted by the Legislature, and are applicable uniformly throughout the Commonwealth.

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[6]The court understands that the plaintiffs contend that the Ordnance imposes unlawful punishment upon certain sex offenders, in violation of the *ex post facto* clauses of the United States and Massachusetts Constitutions. For purposes of the court's ruling on the Home Rule Amendment challenge, the court will assume that the Ordinance, as the City contends, is a civil regulation.

Plaintiffs and the class they represent have all been convicted and punished for their respective sexual offense or offenses, although some may have continuing restraints on their liberty, such as probation or parole. They now live in the community, specifically, the City of Lynn. They also have been classified by SORB as moderate or high risks to reoffend sexually, and are obligated by law to register and are subject to the availability and/or dissemination of their registration information, as required by their classification levels. The registration obligations and dissemination of registry information is uniform throughout the Commonwealth, with the same registration obligations and the same dissemination protocols, regardless of where within the Commonwealth a sex offender lives, whether the locale is urban or rural, whether the sex offender's residence is next to or near schools, parks, day-care facilities, churches, museums, libraries, beaches, ski slopes, skating rinks, summer camps, movie theaters, malls, or any other locations where children might assemble, frequent, or congregate.

The comprehensive state-wide scheme for the registration of sex offenders and the availability or dissemination of their registry information originated in 1996, and has been regularly updated and adjusted by legislative amendments almost continuously since, suggesting a legislative intent to cover the entire field of regulating and managing the lives of convicted sex offenders on a uniform, state-wide

basis. St. 1996, c. 239; St. 1999, c. 74; St. 2003, c. 77; St. 2006, c. 139; St. 2008, c. 176; St. 2010, c. 256; St. 2010, c. 267; St. 2011, c. 178. Before the initial enactment, the Legislature (i.e. the Senate), exhibiting an understanding of the potential constitutional difficulties of regulating the post-incarceration lives of convicted sex offenders, submitted a series of constitutional questions to the Supreme Judicial Court because "grave doubts exist as to the constitutionality of the community notification provisions of the bill." *Opinion of the Justices*, 423 Mass. 1201, 1203 (1996). The 1999 SORL required annual reports of costs and the status of classifications and registrations from SORB and CPCS, a study of costs to municipal and state police departments, and a study relative to the costs of the establishment of community parole supervision for life for sex offenders, and established a special commission to advice the Legislature as to the viability of requiring appropriate treatment for defendants charged with a sex offence as a condition of bail. St. 1999, c. 74, §§ 17-20. Continued legislative interest and focus on the state-wide regulation of convicted sex offenders under the SORL, G. L. c. 6, §§ 178C *et seq.*, can also be seen from the bills currently pending before the legislature. See 2013 MA H.B. 1232; 2013 MA H.B. 1252; 2013 MA H.B. 1260; 2013 MA H.B. 1409; 2013 MA H.B. 1509; 2013 MA H.B. 1529; 2013MA S.B. 656; 2013 MA S.B. 755.

Equally significant, if not more so, is the Legislature's current effort to keep

the regulation and management of convicted sex offenders as current, comprehensive, and reliable as possible concerning a subject matter (i.e., risk of sexual recidivism) where empirical studies and changing perspectives are on-going. See *Doe No. 205614* v. *Sex Offender Registry Board*, 466 Mass. 594, 608 (2013) ("eleven years have passed since SORB last updated those guidelines, during which time knowledge and understanding of sexual recidivism has expanded considerably"). The Legislature has recently established a special commission "to investigate and study the most reliable protocols for assessing and managing the risk of recidivism of sex offenders." St. 2013, c. 38, § 208. See *Ryals* v. *City of Englewood*, 962 F. Supp. 2d 1236, 1250 (D. Colo. 2013) (on issue of legislative intent to preempt post-conviction regulation of sex offenders "[i]t is especially telling that the legislature has tasked the [Sex Offender Management Board] with researching and making recommendations on the best practices for sex offender residency on a statewide level"). The mandated make-up of the special commission shows a recognition of the complexities of assessing and managing the risk of recidivism of sex offenders, and the need for best current practices on a uniform state-wide basis. The commission consist of four legislators, chairman of SORB, commissioner of probation' commissioner of mental health, secretary of public safety and security, secretary of health and human services, and six persons appointed by the governor, including three with expertise in the

assessment, treatment and risk management of adult sex offenders and familiarity with research on recidivism of sex offenders, one of whom shall have such expertise with respect to juvenile sex offenders, one from the Massachusetts District Attorneys' Association, and one from the committee for public counsel services. Chairman, commissioners, and secretaries can appoint designees. All of the governmental officials have state-wide experience and responsibilities. The special commission is required to convene within sixty days of the effective date of the enabling legislation, and submit a written report, including any recommended legislative or regulatory action, to appropriate government officials not later than 180 days after the effective date of the enabling legislation. Residency restrictions such as contained in the Ordinance certainly fall within the mandate of the special commission to "investigate and study the most reliable protocols for assessing and managing the risk of recidivism of sex offenders."

As a starting point, the Legislature has, at least to-date, regulated and managed the risk of sexual recidivism by sex offenders through a comprehensive registration system (i.e., the SORL) that includes notification of police for level one offenders, public availability of registry data, including Internet dissemination, for level two offenders, and active dissemination of registry data for level three offenders.

This court concludes that in enacting the SORL and other sex offender state-

wide statutes, the Legislature made a conscious and informed choice to regulate and manage convicted sex offenders without general restrictions on their residency options. The preamble to the 1999 sex offender legislation found a grave risk of sexual recidivism and a paramount interest of protecting the public from sex offenders, found that the registration system is a proper exercise of powers regulating present and ongoing conduct and will provide law enforcement with additional information critical to preventing sexual victimization, and that the registration system will assist local law enforcement agencies' efforts to protect their communities through registration and release of sex offender registry data. St. 1999, c. 74, § 1. The emergency preamble states that the deferred operation of the act would tend to defeat its purpose, "which is to protect forthwith the vulnerable members of our communities from sexual offenders." *Id.* Given the paramount purpose of protecting the public from sex offenders, the absence of residency restrictions can only be a conscious choice by the Legislature, as residency restrictions are certainly designed, according to the City, to advance the "compelling interest in protecting children from the threat of sexual abuse." [D.1, Ex. A, Section 1:00 of the Ordinance].

Residency restrictions would not be incompatible with the registration/notification system established by the SORL, making their absence

reflective of conscious legislative intent. If the Legislature concluded that residency restrictions would advance the public interest of preventing sexual victimization such that uniform restrictions should exist throughout the Commonwealth, it would have been a easy matter, and an expected matter, to incorporate such restrictions in the SORL.[7]

The regulation and management of convicted sex offenders through a comprehensive registration and notification/dissemination system is only the starting

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[7]The court need not and will not make any findings about the effectiveness or lack of effectiveness of residency restrictions of the sort in the Ordinance. However, the record is undisputed, and it is certainly safe to say, that residency restrictions are a subject of some controversy among experts studying risk factors for sexual recidivism. The Sex Offender Management Board of the State of Colorado published a Report on "Safety Issues Raised by Living Arrangements for and Location of Sex Offenders in the Community" and recommended against residency restrictions as a method to deter re-offense or to control recidivism. *Ryals* v. *City of Englewood*, 962 F. Supp. 2d 1236, 1244-1255 (D. Colo. 2013). Published studies cited by plaintiffs' expert, Dr. Levenson, contend that there is little to no empirical link between residential restrictions and reduced sexual recidivism. [JA 13]. The City's expert, Dr. White, acknowledges that "most studies that measure groups of offenders are not favorable to residency restrictions," and that "there are no empirical research studies supporting residency restrictions." [JA 33]. Of more interest to the court is Dr. Levenson's common sense view that housing availability is greatly diminished by residency restriction policies and that studies find an increase in homelessness and transience following enactment of residency restrictions. Dr. White acknowledged that in his own experience after New Jersey implemented residency restrictions: "There is no doubt that these restrictions caused hardships for some of the offenders I treated, as stated in Dr. Levenson's report." Increased homelessness and transience act to frustrate the purpose of a state-wide, comprehensive registration and notification/dissemination system. It makes it more difficult to monitor and keep track of sex offenders, and it adversely affects what is a recognized mitigating factor on a sex offender's risk to reoffend. 803 CMR 1.40(12) ("The offender who is currently residing in a positive and supportive environment lessens the likelihood of reoffense by reducing the stressors in his life and surrounding himself with family, friends, and acquaintances."). It also creates "a substantial burden on state probation and parole officers faced with limited housing options while attempting to return sex offenders to their pre-adjudication communities or other support systems." *Ryals*, 962 F. Supp. 2d. at 1251.

point of the Legislature's regulation and management of convicted sex offenders. Other uniform, state-wide enactments confirm that there is no intended place for a piece-meal approach, municipality by municipality, to regulating the lives of convicted sex offenders. In fact, the 1999 legislation amending the SORL also reinstituted sexually dangerous persons proceedings in this Commonwealth and created for the first time community parole supervision for life for certain sex offenders. St. 1999, § 74.

Chapter 123A of the General Laws is entitled Care, Treatment and Rehabilitation of Sexually Dangerous Persons. It provides a protocol leading to possible civil commitment for an indefinite period of time for a convicted sex offender who is adjudicated to be a sexually dangerous person ("SDP"). It targets a subset of convicted sex offenders that could generally be deemed to be at the very highest risk of reoffending sexually, and addresses the risk of sexual recidivism of those found to be sexually dangerous by committing them civilly until a determination is made that they are no longer sexually dangerous. As defined in G. L. c. 123A, § 1, a SDP is "a person who has been . . . convicted by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility." The current legislation was originally enacted in 1999, replacing earlier

versions that were found to be at least in part unenforceable. See *Commonwealth* v. *Bruno*, 432 Mass. 489, 494 (2000); 1999 St. c. 74. It has been amended several times since. St. 2002, c. 492; St. 2004, c. 66; St. 2008, c. 451; St. 2010, c. 267. Under Section 12(a) of Chapter 123A, the Department of Corrections/House of Corrections is obligated to inform the applicable district attorney (or the attorney general) six months before the release from custody of a sex offender. Upon notice, the district attorney (or attorney general) has the right under G. L. c. 123A, § 12(b) to commence a proceeding under Chapter 123A by filing a petition in court seeking to hold and adjudicate the sex offender as a SDP. The dual goals of the 1999 enactment were "to protect the public from sexually dangerous persons, and to provide them treatment and rehabilitation." *Bruno*, 432 Mass. at 500.

When the Legislature updated the sex offender registry scheme and the SDP commitment procedures in 1999, it also created in the same enactment community parole supervision for life ("CPSL"). St. 1999, c. 74, § 9. See G. L. c. 127, § 133D. Although recently declared to violate the separation of powers doctrine articulated in art. 30 of the Massachusetts Declaration of Rights, *Commonwealth* v. *Cole*, 468 Mass. 294 (2014),[8] the creation of CPSL was part of a broad-based legislative effort,

[8]The *Cole* decision did not suggest that CPSL was beyond the reach of legislative power. To the contrary, the Court stated: "If the legislature wishes to mandate a period of supervised release for sex offenders following the expiration of their sentences, and to authorize a term of imprisonment

that included an updated sex offender registry system, updated SDP commitment procedures, and CPSL. All three statutory creations cover the field of post-incarceration regulation and management of convicted sex offenders on a uniform, state-wide basis. All three statutory creations serve the same purpose, at least in part: to protect the public from sexual recidivism by convicted sex offenders.

All sentencing courts of the Commonwealth, wherever situated, have power to impose terms and conditions of probation as a component of sentencing, including special conditions tailored to regulating the lives of convicted sex offenders For example, since the end of 2006, all convicted sex offenders placed on probation are subject to a mandatory condition of probation that requires them to wear a GPS device at all times for the length of probation, with exclusionary zones established by the commissioner of probation. G. L. c. 265, § 47. The same enactment imposed the same condition upon sex offenders on parole. G. L. c. 127, § 133D½.[9] In June 2004

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after the original term of imprisonment where a sex offender violates a condition of supervised release, the Legislature may do so without violating art. 30. Such legislation simply must require that a judge, rather than the parole board or another executive agency, determine whether a sex offender has violated a condition of supervised release, and whether a new or suspended term of imprisonment should be imposed." *Cole*, 468 Mass. at 307. Federal law permits supervised release for life to be imposed on certain sex offenders. 18 U.S.C. § 3583(a)-(d) (2012).

[9]The Supreme Judicial Court has since held that the automatic retroactive application of the GPS requirement to probationers and parolees violated state and federal constitutional protections against *ex post facto* laws, and cannot be applied to persons who are placed on probation/parole for sex offenses committed before the statute's effective date. *Commonwealth* v. *Cory*, 454 Mass. 559, 572 (2009) (probation); *Doe* v. *Chairperson of the Mass. Parole Bd.*, 454 Mass. 1018, 1019 (2009) (parole). However, the *Cory* Court also held that a sentencing court does not implicate *ex post facto*

the Massachusetts Parole Board added sex offender conditions to its policies governing the parole of sex offenders. *Doe* v. *Massachusetts Parole Bd.*, 82 Mass. App. Ct. 851, 853 (2012). Two years later the parole board promulgated the intensive parole for sex offenders policy. The addition of GPS as a modification of parole is restricted to instances of changed circumstances occurring during the term of parole. *Id.* at 860.

As can be seen by the *Cory*, *Doe* and *Doe* cases regarding probation/parole and GPS devises, legislation in this difficult area is fraught with constitutional concerns. See also *Doe* v. *Attorney General*, 426 Mass. 136, 144 (1997) (sex offender registration laws implicate constitutionally protected liberty and privacy interests); *Opinion of the Justices,* 423 Mass. at 1202-1203 (grave legislative doubts of the constitutionality of community notification provisions); *Kansas* v. *Hendricks*, 521 U.S. 346, 356 (1997) (SDP commitment procedures implicate constitutionally protected liberty interests); *Cole*, 468 Mass. at 301 (enforcement of CPSL violations implicate separation of powers concerns). Careful legislative drafting, constant monitoring of enacted legislation, updating it as necessary, and keeping pace with the empirical research and studies in the area of sexual recidivism risks are all important

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provisions by exercising discretionary power to impose GPS conditions in an individual case. *Id.*

tasks of which the Legislature is well aware. Regulating the lives of convicted sex offenders is an subject matter that garners an immense amount of legislative concern and effort, and which is better suited to uniform, state-wide regulations than to a piece-meal, municipality by municipality, approach. The court expects that schools and/or parks exist to some degree in every city and town in the Commonwealth. Sex offenders have to live somewhere, and there is no reason to believe sex offenders do not live in every county in this Commonwealth. Although local cities and town have an interest in the safety and protection of their residents, regulating the lives of convicted sex offenders is simply too wide-spread, uniform, and complex a problem to be left to a locally driven, piece-meal approach. From a common sense perspective, enforcement of the Ordinance will drive sex offenders underground (hampering registration and notification/dissemination efforts) or into a dwindling number of other cities and towns without similar residency restrictions. Other than local residency restrictions such as the Ordinance, all other efforts at regulating and managing convicted sex offenders in order to protect the public and reduce sexual recidivism have been established by uniform, state-wide legislation. It defies common sense that the Legislature consciously left such a crucial area of regulating the lives of convicted sex offenders to the whims and political motivations of

individual cities and towns.[10]

For all of the above reasons, this court concludes that, even without express preemption language, the totality of the circumstances support an express legislative intent to forbid local activity in the area of the civil regulation and management of the post-incarceration lives of convicted sex offenders. Alternatively, this court concludes that the Legislature intended to preempt the subject area because the legislation on the subject is so comprehensive and coordinated on a uniform, state-wide basis that a local enactment such as the Ordinance would frustrate the uniform and comprehensive approach to the civil regulation and management of the post-incarceration lives of convicted sex offenders.

This court's ruling is supported by the weight of authority from other jurisdictions in this still developing area of law. In *G.H.* v. *Township of Galloway*, 401 N.J. Super. 392 (2009), aff'd, 199 N.J. 135, 971 A.2d 401 (N.J. 2009) (*per curiam*), where two municipal ordinances prohibited offenders required to register pursuant to New Jersey's SORL, see N.J.S.A. 2C:7-1 to 7-19, from living within 2,500 feet of any school, park, playground or daycare center in the town. *G.H.*, 401 N.J. Super. at 397. The defendants in *G.H.*, as does the City in this case, argued that

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[10]This court is taking no position on the constitutionality of uniform, state-wide residency restrictions similar to those contained in the Ordinance. This court's ruling is limited to the Home Rule Amendment challenge raised by plaintiffs.

New Jersey's SORL only pertained to registration and notification and did not extend to residency restrictions, such that the local residency restriction ordinances would complement the existing sex offender system rather than conflict with it. *Id.* at 399. The New Jersey Appellate Division of the Superior Court disagreed, and stated that "[t]he system is all-encompassing regarding the activities of [sex offenders] living in the community. We conclude that the ordinances conflict with the expressed and implied intent of the Legislature to exclusively regulate this field, as a result of which the ordinances are preempted." *Id.* In so ruling, the court pointed to several factors indicating an intention by the state to occupy the field. Those factors were: lifetime community supervision and parole requirements, parole approval of residence with appropriate support, id. at 406, a sex offender tier system involving multiple layers of government that applies throughout the state, *id.* at 416-417, and the lack of anything unique about a particular locality that requires additional protection for children greater than the remainder of the state. *Id.* at 418-419. The Supreme Court of New Jersey affirmed in a *per curiam* opinion. 199 N.J. 135, 971 A. 2d 401 (N.J. 2009).

Three United States district courts have found municipal residency restrictions imposed upon sex offenders to be preempted by comprehensive state-wide regulation

of post-conviction sex offenders. *Ryals*, 962 F. Supp. at 1251[11]; *Terrance* v. *City of Geneva*, 799 F.2d 250 (W.D.N.Y. 2011); *Fross v. County of Allegheny*, 612 F. 2d 651 (W.D. Pa. 2009). The federal court in the *Terrance* case followed the holdings of three decisions of various courts of New York State finding municipal residency restrictions to be preempted by state law. *Doe* v. *County of Rensselaer*, 24 Misc. 3d 1215(A); 2009 WL 2340873 (N.Y. Sup. Ct. Rensselaer Co. 2009) (unpublished decision); *People* v. *Blair*, 23 Misc. 3d 902, 873 N.Y.S. 2d 890 (City Ct. of Albany 2009); *People* v. *Oberlander*, 22 Misc. 3d 1124(A), *supra*.[12]

The court does not suggest that the residency restrictions or the state regulatory schemes considered in the above cited cases are identical to the Ordinance and the laws of this Commonwealth, although it is worth noting that the Supreme Judicial Court recognized that the Commonwealth's proposed SORL was similar to that in New Jersey. *Opinion of the Justices*, 423 Mass. at 1204, 2011. However, it is accurate to say that comprehensive state-wide legislation regulating the lives of

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[11]On the appeal of the City of Englewood, the United States Court of Appeals for the Tenth Circuit "held that the question would be certified to the Supreme Court of Colorado to determine whether city ordinance was preempted by Colorado law." *Ryals* v. *City of Englewood*, ___ Fed. Appx. ___, 2014 WL 1180227 (10th Cir. 2014).

[12]The only state court case to the contrary cited by the City is *People v. Diack*, 41 Misc. 3d 974, 974 N.Y.S. 235 (N.Y. Sup. Ct. App. Term 2013). Plaintiffs informed the court at the hearing that leave to appeal has been granted in the *Diack* case. See *People v. Diack*, 22 N.Y. 3d 1155, 7 N.E. 3d 1127 (N.Y. Ct. of Appeals 2014).

convicted sex offenders has been found by a number of different courts to preempt and invalidate local municipal efforts to place residency restrictions upon convicted sex offenders, with only one case to the contrary cited by the City, and that case is now on appeal to the highest appellate court in New York State.

**DECLARATION OF RIGHTS**

The City's Ordinance, restricting the residency options of level two and level three sex offenders in the City of Lynn, is invalid and unenforceable as it violates Article 89, § 6 of the Articles of Amendment of the Massachusetts Constitution (Home Rule Amendment).

**ORDER**

The caption for this matter is changed so that it shall read, "Three Registered Sex Offenders, John Doe, Charles Coe, and Paul Poe, on Behalf of Themselves and Other Persons Similarly Situated." The City of Lynn's Rule 56(f) motion for extension [D. 52] is **DENIED**. Plaintiffs' motion for partial summary judgment [D. 62] is **ALLOWED IN PART**. Judgment shall enter on Count I of the Complaint in favor of plaintiffs, declaring that the Ordinance, restricting the residency options of level two and level three sex offenders in the City of Lynn, is invalid and unenforceable as it violates Article 89, § 6 of the Articles of Amendment of the Massachusetts Constitution (Home Rule Amendment). Final judgment on Count I

of the complaint shall enter under Mass. R. Civ. P. 54(b). There is no just reason for delay. Piece-meal appeals are not likely in this case, and the court's ruling herein should be subject to appellate review without the delay that would be caused by the adjudication of the remaining counts of the complaint. The remaining counts of the complaint are **STAYED** pending further order of this court.

Timothy Q. Feeley
Associate Justice of the Superior Court

July 7, 2014

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January 20, 2015

Barbara Stats, Town Clerk
Town of North Reading
Town Hall
235 North Street
North Reading, MA 01864

**Re: North Reading Fall Annual Town Meeting of October 6, 2014 ------- Case # 7369**
**Warrant Articles # 13 and 19 (Zoning)**
**Warrant Articles # 14, 15, 17, and 18 (General)**

Dear Ms. Stats:

**Articles 13, 14, 15, 17, 18, and 19** - We approve these Articles from the October 6, 2014, North Reading Fall Annual Town Meeting. Our comments on Article 18 are provided below.

**Article 18** - Article 18 adds to the Town's general by-laws a new Sex Offender Residency By-law.

## I. General Description of the North Reading Sex Offender Residency Restrictions By-law.

The Sex Offender Residency Restrictions By-law is divided into seven sections: Section 145-1 includes the purpose and intent; Section 145-2 defines terms used in the by-law; Section 145-3 prohibits the residency of certain sex offenders within 1,000 feet of any elderly housing facility, school, day-care center, or park, and within 250 feet of any school bus stop[1]; Section

[1] The residency restriction section is similar to the following Town by-laws which were, for the most part, approved by this Office on the following dates: West Boylston (January 10, 2007); Dedham (March 24, 2008); Rockland (September 4, 2008); Southborough (October 9, 2008); Somerset (October 27, 2008); Mendon (December 29, 2008); Dudley (February 20, 2009); Webster (February 24, 2009);

145-4 establishes exceptions to residency restrictions; Section 145-5 designates the North Reading Police Department as the enforcing authority and requires a map depicting those areas prohibited to certain sex offenders; Section 145-6 establishes the penalties for violations of the by-law; and Section 145-7 establishes the by-law's effective date.

## II. The Attorney General's Standard of Review.

Pursuant to G.L. c. 40, § 32, the Attorney General has a limited power of disapproval of town by-laws with every "presumption made in favor of the validity of municipal by-laws." Amherst v. Attorney General, 398 Mass. 793, 796 (1986). In disapproving a by-law, the Attorney General must cite an inconsistency between the by-law and the Constitution or laws of the Commonwealth. Amherst, 398 Mass. at 796. When reviewing by-laws for consistency with the Constitution or laws of the Commonwealth, the Attorney General's standard of review is equivalent to that of a court performing a facial review. Because the adoption of a by-law by Town Meeting is both the exercise of the Town's police power and a legislative act, the vote carries a "strong presumption of validity." Durand v. IDC Bellingham, LLC, 440 Mass. 45, 51 (2003). For the reasons set forth in more detail below, in giving our approval of the by-law, we do not opine as to whether the amendments would be held constitutional if reviewed by a court on a fuller factual record.[2]

States and municipalities across the United States have passed laws similar to that which North Reading has adopted. Several state and federal courts have upheld those laws as valid under the United States Constitution and applicable state Constitutions.[3] There are also several instances in which sex offender restrictions have been struck down by the courts as

Charlton (March 12, 2009); Hanson (August 12, 2009); Pembroke (August 12, 2009); Warren (October 7, 2009); Townsend (December 9, 2009); Norwood (October 14, 2010); Hanover (October 18, 2010); Colrain (December 3, 2010); Shirley (January 7, 2011); Hopkinton (November 18, 2011); Oxford (February 1, 2012); Ayer (February 21, 2012); Swansea (April 6, 2012); Charlemont (October 10, 2012); Spencer (January 10, 2013); Barre (March 13, 2103); Milford (August 19, 2013); and Lancaster (February 11, 2014); Mansfield (August 6, 2014); Westport (August 18, 2014); Winchendon (November 17, 2014); and Templeton (January 5, 2015).

[2] In the course of our review of other sex offender restriction by-laws from other Towns, we received letters submitted jointly by the American Civil Liberties Union of Massachusetts ("ACLU") and the Committee for Public Counsel Services ("CPCS"), dated 11/28/07, 11/19/10, 11/15/11, 12/13/11, and 10/03/12 opposing the by-laws on grounds of alleged inconsistencies between the by-laws and the laws and Constitution of the Commonwealth. These letters have aided us in our review and we address herein many of the issues raised in these letters.

[3] *See* State v. Stark, 802 N.W.2d 165 (S. Dakota 2011); Doe v. Miller, 405 F.3d 700, 704 (8th Cir., 2005) (Iowa); Weems v. Little Rock Police Dept., 453 F.3d 1010 (Ark. 2006); U.S. v. King, 2009 WL 3271280 (W.D. Okla. 2009); State v. Willard, 756 N.W.2d 207 (Iowa 2008); and People v. Leroy, 357 Ill.App.3d 530 (2005).

unconstitutional or preempted by state law.[4] However, no Massachusetts appellate court has yet reviewed sex offender restrictions similar to that which North Reading has adopted.[5] It should also be noted that the Supreme Judicial Court has repeatedly held that the Massachusetts Constitution puts greater restrictions on the exercise of police powers than the United States Constitution. Thus, it would be possible for sex offender restrictions to be affirmed under the federal Constitution, but struck down under the Massachusetts Constitution.[6]

As noted above, no Massachusetts appellate court has yet reviewed municipal restrictions on where sex offenders may be. However, in Doe v. Police Commissioner of Boston, 460 Mass. 342 (2011), the Supreme Judicial Court analyzed a statutory residency restriction, G.L. c. 6, § 178K (2) (e), which bars a Level 3 sex offender from "knowingly and willingly establish[ing] living conditions within, mov[ing] to, or transfer[ing] to any convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded which meets the requirements of the department of public health under section 71 of chapter 111." G.L. c. 6, § 178K (2) (e). The court held that, as applied to the plaintiff, the statute failed to provide for an individualized determination that the public safety benefits of requiring a particular registered sex offender to leave a rest home outweighed the risks to the registered sex offender from the removal. Doe, 460 Mass. at 343. The court determined that the liberty and privacy rights implicated by G.L. c. 6, § 178K (2) (e), are far more substantial than the registration and dissemination provisions of the sex offender classification scheme, G.L. c. 6, §§ 187C-178Q. Thus, the court concluded that an individualized hearing in the context of classification under G.L. c. 6, § 178L and 803 C.M.R. § 1.40 (9) (c) was not sufficient to justify the application of G.L. c. 178K (2) (e). Id. at 350.

The applicability of Doe to this by-law is not completely clear. First, the court stressed that Doe was an "as applied" challenge based upon the plaintiff's particular circumstances (*see*

[4] *See* Fross v. County of Allegheny, 20 A.3d 1193 (Penn. 2011); Terrance v. City of Geneva, 799 F.Supp.2d 250 (W.D.N.Y. 2011); G.H. v. Township of Galloway, 401 N.J. Super. 392 (2008); State v. Pollard, 886 N.E.2d 69 (2008); Mann v. Georgia Department of Corrections, et al., 282 Ga. 754 (2007); Elwell v. Township of Lower, 2006 WL 3797974 (N.J. Super. Ct. Law Div. 2006); and City of Northglenn v. Ibarra, 62 P.3d 151 (Colo. 2003).

[5] In Three Registered Sex Offenders v. City of Lynn, (Civil Action Number ESCV2012-00749-A) the court (Feeley, J.) allowed in part the Plaintiffs' Motion for Partial Summary Judgment, concluding that the City's sex offender residency restriction ordinance violates the Home Rule Amendment because it conflicts with the Commonwealth's exclusive authority to regulate and manage the post- incarceration lives of convicted sex offenders. The City has filed a notice of appeal. The Town may wish to monitor the appeal and discuss the decision's impact with Town Counsel.

[6] *See* Goodridge v. Dept. of Public Health, 440 Mass. 309, 329 (2003) ("The Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language. Planned Parenthood League of Mass., Inc. v. Attorney Gen., 424 Mass. 586, 590, 677 N.E.2d 101 (1997); Corning Glass Works v. Ann & Hope, Inc. of Danvers, 363 Mass. 409, 416, 294 N.E.2d 354 (1973).")

id. at 350, 351), whereas the Attorney General's role here is to review the by-law for its facial validity. On the other hand, the Doe court chose to address the merits of the plaintiff's claim despite its apparent mootness, id. 343 & n.3, "because the issues are significant and have been fully briefed and it is in the public interest to do so." This indicates that the court viewed its conclusions of law as having some application beyond the plaintiff himself.

Second, the Doe court chose to characterize one effect of the statute on the plaintiff as a deprivation of an existing property interest in his place of residence.[7] Here, in contrast, the by-law on its face would operate prospectively to prohibit covered sex offenders from lawfully residing in certain places. However, the statute at issue in Doe also infringed on the plaintiff's liberty interests in "liv[ing] where [he] choose[s] and . . . mov[ing] freely within and without the Commonwealth," id. at 347-48, which is also an effect of the by-law. It was the totality of these effects on plaintiff's various property and liberty interests that led the Doe court to rule that, as applied to the plaintiff, the statute was invalid because it failed to provide an individualized balancing of interests. Id. at 348-50. Whether the courts would reach the same conclusion with respect to the North Reading by-law is unclear. We therefore strongly suggest the Town discuss this matter with Town Counsel, as the holding of the Supreme Judicial Court in Doe may have significant implications for the validity of the North Reading by-law.

A court might also determine that the by-law violates the fundamental right of free movement within the Commonwealth as protected under the Declaration of Rights. *See* Doe v. Police Commissioner of Boston, 460 Mass. at 347-48 ("A restriction on the right to choose where one lives is a further imposition on the liberty interests protected by our State Constitution"); *see also* Commonwealth v. Weston W., 455 Mass. 24, 26 (2009) (City of Lowell's juvenile curfew ordinance is subject to strict scrutiny, is not sufficiently "narrowly tailored," and therefore unconstitutionally infringes on a minor's right to freedom of movement). The Town provided the Attorney General with a map that depicts those portions of the Town within which the restrictions imposed under the by-law are applicable. It is unclear whether the by-law, combined with other factors, makes it reasonably possible for a sex offender to reside within the Town of North Reading. However, the Attorney General's review of the by-law does not and cannot include the kind of factual inquiry a court might make in the course of resolving a legal challenge.

In addition, a by-law that effectively bans sex offenders from being within the Town of North Reading, or substantial portions thereof, might be the subject of a due process or other constitutional challenge in court, the outcome of which cannot be predicted with certainty. In Zuckerman v. Hadley, 442 Mass. 511, 512 (2004), the court held on due process grounds that "absent exceptional circumstances . . . restrictions of unlimited duration on a municipality's rate of development are in derogation of the general welfare and thus are unconstitutional." The court viewed the Town's rate-of-growth by-law as pushing away its burden of accommodating

[7] The court stated that, "[b]ecause the plaintiff has an existing placement in a rest home that the State in effect threatens to take away from him, the statute implicates property interests as well." 460 Mass. at 348.

new residents because its by-law limited the number of building permits that could be issued each year for single-family homes. Id. at 519-20. "Despite the perceived benefits that enforced isolation may bring to a Town facing a new wave of permanent home seekers, it does not serve the general welfare of the Commonwealth to permit one particular Town to deflect that wave onto its neighbors." Id. at 519. Similarly, North Reading's by-law might be seen as an effort to avoid what a court might characterize as the Town's shared burden of accommodating sex offenders. Although Zuckerman involved a challenge to a rate-of-growth by-law, its principle might be held to apply to sex offender residency restrictions. A court considering such a challenge would likely take into account, among other things, the possibility that all neighboring municipalities might enact similar restrictions, thus effectively creating a state-wide ban and implicating inter-state issues. The Attorney General's review of the by-law does not and cannot include the kind of factual inquiry a court might make in the course of resolving such challenges.

Also, we cannot conclude that, under the governing constitutional standards, the purpose and effect of the by-law are "punitive," let alone so clearly punitive as to trigger constitutional protections related to "punishment." *See, e.g.*, Smith v. Doe, 538 U.S. 84, 92, 97, 105 (2003). It must be noted, however, that this area of the law continues to develop. *See, e.g.*, Commonwealth v. Cory, 454 Mass. 559 (2009) (statutory requirement that convicted sex offender wear global positioning system (GPS) bracelet as condition of probation was punitive and violated ex post facto clause as applied to offender who committed offense before statute took effect); Commonwealth v. Goodwin, 458 Mass. 11, 19-23 (2010) (post-sentencing modification of probation conditions to require GPS monitoring of sex offender was punitive in effect, raising double jeopardy and other concerns); *but see* Doe v. Sex Offender Registry Board, 459 Mass. 603, 621-622 (2011) (increase in probation fee even if imposed retroactively was not punitive in nature so as to violate the ex post facto clause).

We note that the public safety concerns cited by the Town in support of the by-law are legitimate. The Attorney General shares those concerns. However, some may question whether the local legislative response is appropriately focused on the public safety risks it seeks to prevent and whether the nature and magnitude of the restrictions imposed by the by-law can be reconciled with applicable provisions of the Constitution and laws of the Commonwealth. Moreover, it is unclear whether by-laws such as the one North Reading adopted are reasonably likely to achieve their presumed objectives. To some extent, the by-law could conceivably frustrate the legislative objectives of the state's Sex Offender Registry Act, G.L. c. 6, §§ 178C-178Q, by creating a disincentive for sex offenders to comply with the Act's registration requirements. It has been reported that in other jurisdictions, sex offender residency restrictions have resulted in a drop in registration compliance and in sex offenders "disappearing." Dwight H. Merriam, *Residency Restrictions for Sex Offenders: A Failure of Public Policy, Planning & Environmental Law*, Oct. 2008, at 11. Whether this is a consequence that would render North Reading's by-law fatally inconsistent with state law, however, is in part a fact-dependent matter beyond the scope of the Attorney General's by-law review function and, therefore, is an issue for the courts to decide.

## III. Analysis of Specific Provisions of the North Reading Sex Offender Residency By-law.

### A. Section 145-2 Definitions.

Section 2 defines the terms used in the by-law. Specifically, "Establishing a Permanent Residence" is defined as follows (with emphasis added):

> Establishing a Permanent Residence - To set up a home, dwelling place or abode where a person sleeps, which may include more than one location, and may be mobile or transitory, or by means of purchasing real property or *entering into a lease or rental agreement for real property.*

We approve the definition of "Establishing a Permanent Residence," but note that the italicized text raises a question when considered in the context of the exceptions located in Sections 145-4 (A) and (B). The question arises because it is unclear whether "entering into a lease or rental agreement" includes a renewal or extension of a pre-existing lease or agreement. Section 145-4 (A) provides exceptions from the residency restrictions for persons who established a permanent residence and reported and registered the residence prior to the effective date of the by-law. Section 145-4 (B) provides an exception when the elderly housing facility, school, day-care center, park, or school bus stop was established after the sex offender established the permanent residence and reported and registered the residence prior to the effective date of the by-law.

It is unclear whether the phrase "entering into a lease or rental agreement for real property" means (1) a renewal or extension of such a lease or agreement is *within* the Sections 145-4 (A) and (B) exceptions, or instead (2) that such a renewal or extension, when it occurs after the by-law's effective date, constitutes establishing a residence, and so is subject to the prohibitions in the residency restriction section. The second interpretation may be subject to a constitutional challenge on the grounds that it takes property rights without compensation, or operates retroactively, in violation of the due process clause. We recommend that the Town discuss this issue with Town Counsel to determine which interpretation is intended and is most appropriate.

### B. Section 145-3 Prohibited Acts.

1. Section 145-3 (A) provides as follows:

> A. It is unlawful for any sex offender who is finally classified as a Level 3 sex offender by the Sex Offender Registry Board, for as long as so classified, to establish a permanent residence within one thousand (1,000) feet of any elderly housing facility, school, day-care center, or park or within 250 feet of any school bus stop if, after written notice and a hearing before the Police Chief and/or his designee, the Police Chief and/or his designee determines that the Level 3 sex offender poses a risk to children and/or the elderly, and, therefore, residency should be limited in accordance with this section.

The "individualized determination" requirement in Section 145-3 (A) was likely included in the by-law to address the concerns raised in Doe v. Police Commissioner of Boston, 460 Mass. 342 (2011). In Doe, the Supreme Judicial Court analyzed a statutory residency restriction, G.L. c. 6, § 178K 3 (2) (e), which bars a Level 3 sex offender from "knowingly and willingly establish[ing] living conditions within, mov[ing] to, or transfer[ing] to any convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded. . . ." G.L. c. 6, § 178K (2) (e). The court held that, as applied to the plaintiff, the statute failed to provide for an individualized determination that the public safety benefits of requiring a particular registered sex offender to leave a rest home outweighed the risks to the registered sex offender from the removal. Doe, 460 Mass. at 343. The court determined that the liberty and privacy rights implicated by G.L. c. 6, § 178K (2) (e) are far more substantial than the registration and dissemination provisions of the sex offender classification scheme, G.L. c. 6, §§ 187C-178Q. Thus, the court concluded that an individualized hearing in the context of classification under G.L. c. 6, § 178L and 803 C.M.R. § 1.40 (9) (c) was not sufficient to justify the application of G.L. c. 178K (2) (e). Id. at 350.

Section 145-3 (A) is silent on the procedures that will govern the hearing, including the time period within which the Chief of Police will issue his or her determination. In order to avoid any due process challenges, the Town may wish to consult with Town Counsel regarding future amendments to the by-law to clarify the hearing procedures, including a time period for the issuance of the Chief of Police's determination.

C. Section 145-6 Violations and Penalties.

Section 145-6 provides penalties for violating the by-law and provides in pertinent part as follows:

> Violations of this by-law may be enforced through all lawful means in law by the Police Chief or his designee, including, but not limited to, enforcement by noncriminal disposition pursuant to MGL c. 40, § 21D. The penalties shall be as follows:
>
> A. First Offense: written notification by the Police Chief and/or his designee that the finally classified Level 3 sex offender has thirty (30) days to move, along with an opportunity for a hearing with the Police Chief and/or his designee.

Section 145-6 provides for a hearing with the Police Chief as part of penalties for

violating the by-law. Section 145-6 is silent on purpose of the hearing and the procedures that will govern the hearing, including the time period within which the Chief of Police will issue his or her determination. Again, in order to avoid any due process challenges, the Town may wish to consult with Town Counsel regarding future amendments to the by-law to clarify the hearing procedures, including a time period for the issuance of the Chief of Police's determination.

## III. Conclusion.

Although we approve Article 18, we urge the Town to discuss the application of the by-law, and the issues identified in this decision, with Town Counsel, especially in light of the Supreme Judicial Court's ruling in Doe v. Police Commissioner of Boston and the Superior Court decision in Three Registered Sex Offenders v. City of Lynn.

**Note: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) general by-laws and amendments take effect on the date that these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) zoning by-laws and amendments are deemed to have taken effect from the date they were voted by Town Meeting, unless a later effective date is prescribed in the by-law.**

Very truly yours,
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cc: Town Counsel Darren R. Klein