

## Legal Q&A

By Christy Drake-Adams, Asst General Counsel

### **Q: Are there state laws that restrict where sex offenders may reside?**

**A:** Yes. Various state laws restrict where a sex offender may reside. For instance, a bill recently adopted by the legislature prohibits a registered sex offender from residing on the campus of a public or private institution of higher education unless: (1) the offender is assigned a risk level of one (the Texas Department of Public Safety determines the level of risk of each offender subject to registration); and (2) the institution approves the person to reside on the campus. Tex. H.B. 355, 85th Leg., R.S. (2017) (to be codified at TEX. CODE CRIM. PRO. art. 62.064).

The “child safety zone statutes” also have the effect of restricting where a sex offender may reside. Under these statutes, a parole panel must establish a child safety zone in certain circumstances when the panel determines that a person younger than 17 years of age was the victim of a sex-related offense. TEX. GOV’T CODE § 508.187. That means, as one condition of parole or mandatory supervision, a releasee may not go in, on, or within a distance specified by the panel of premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility. *Id.*; *see also id.* § 508.225 (giving the parole panel the discretion to establish a child safety zone for certain other inmates).

### **Q: May a home rule city adopt an ordinance restricting where sex offenders may reside within the city?**

**A:** The authority of a home rule city to adopt a sex offender residency restriction ordinance (SORRO) was acknowledged in a March 2007 Texas attorney general opinion. Tex. Att’y Gen. Op. No. GA-0526 (2007). The opinion concluded that because the SORRO (as described in the opinion) was not inconsistent with, but rather complimentary to, the child safety zone statutes, state law did not preempt the ordinance. *Id.* at 3-4. The attorney general declined to consider possible challenges to such ordinances on state or federal constitutional grounds, citing the fact-sensitive nature of such arguments. *Id.* at 5-6.

### **Q: May a general law city adopt an ordinance restricting where sex offenders may reside within the city?**

**A:** Yes. The legislature recently passed a bill expressly authorizing a general law city to adopt a SORRO. Tex. H.B. 1111, 85th Leg., R.S. (2017) (to be codified at TEX. LOC. GOV’T CODE § 341.906). It provides that:

- (1) the city council of a general law city by ordinance may restrict a registered sex offender from going in, on, or within a specified distance of a child safety zone in the city;
- (2) the specified distance in the ordinance may be no more than 1,000 feet;
- (3) a “child safety zone” is defined as premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming

pool, video arcade facility, or other facility that regularly holds events primarily for children, but excluding a church;

- (4) it is an affirmative defense to prosecution of an offense under the ordinance that the registered sex offender is in, on, or within a specified distance of a child safety zone for a legitimate purpose, including transportation of a child that the registered sex offender is legally permitted to be with, transportation to and from work, and other work-related purposes;
- (5) the ordinance must provide procedures for a registered sex offender to apply for an exemption from the ordinance; and
- (6) the ordinance must exempt a registered sex offender who established residency in a residence located within the specified distance of a child safety zone before the date the ordinance is adopted.

House Bill 1111 does not become effective until September 1, 2017. Any general law city that has adopted a SORRO should work with local legal counsel to review the ordinance and make sure it conforms to the requirements of House Bill 1111 prior to September 1.

**Q: Was a general law city authorized to adopt an ordinance restricting where sex offenders may reside within the city prior to the passage of House Bill 1111?**

**A:** It depends on who you ask. The attorney general opinion that concluded a home rule city could adopt a SORRO also concluded that a general law city did not have authority to adopt such an ordinance. Tex. Att’y Gen. Op. No. GA-0526 (2007) at 1-2. Despite the attorney general opinion, some general law cities continued to place residency restrictions on offenders, arguing that: (1) the attorney general opinion (which is only advisory in nature) is incomplete in its analysis; and (2) a general law city’s authority to regulate for the safety and welfare of its residents authorizes a SORRO.

In November 2015, an organization called the Texas Voices for Reason and Justice (TVRJ) sent letters to 46 general law cities that had passed SORROs. TVRJ demanded that the cities repeal their ordinance or they would be sued. As promised, TVRJ sued several cities that chose not to repeal their ordinance. The League has written several articles on the status of those cases, none of which have addressed the fundamental legal question of whether a general law city may adopt a SORRO. *See, e.g.*, TEX. MUN. LEAGUE, GENERAL LAW SEX OFFENDER REGULATION UPDATE (May 26, 2017), [https://www.tml.org/legis\\_updates/general-law-sex-offender-regulation-update](https://www.tml.org/legis_updates/general-law-sex-offender-regulation-update). To the extent any of these cases are pending in the courts, they may be rendered moot with the passage of House Bill 1111.

**Q: How many Texas cities have imposed residency restrictions on registered sex offenders?**

**A:** An informal survey conducted by the League in August 2015 revealed that 64 Texas cities had adopted a SORRO.

**Q: Other than the lawsuits brought by TVRJ, have any Texas SORROs been challenged?**

**A:** Yes. In 2008, the City of Commerce was sued in federal court. *John Doe 7 v. City of Commerce*, No. 3-08CV0324 (N.D. Tex. filed Feb. 2, 2008). The plaintiff in that case challenged the ordinance on the grounds that it: (1) was unconstitutionally vague; (2) violated the *ex post facto* clause of the United States Constitution; (3) violated the substantive due process clause of the Fifth Amendment to the United States Constitution; and (4) impaired the sex offender's property rights. Ultimately, the parties settled the case; the case was dismissed in 2010 as a result of the settlement.

In a more recent case, a registered sex offender and his family (the Duartes) brought a Section 1983 action against the City of Lewisville arguing that the city's SORRO was unconstitutional. The district court granted summary judgment in favor of the city. The Duartes appealed, challenging the grant of summary judgment with respect to their procedural due process and equal protection claims. The Fifth Circuit recently affirmed that decision. *Duarte v. City of Lewisville*, No. 15-41456, 2017 W.L. 2332540 (5th Cir. May 30, 2017).

Duarte was convicted of online solicitation of a minor. After his release from prison he returned to the City of Lewisville where his wife and children were residing. In addition to registering annually with the Texas Department of Public Safety, Duarte had to comply with the city's ordinance, which prohibits registered sex offenders from residing within 1,500 feet of "premises where children commonly gather."

In regard to the due process claim, Duarte argued he had a constitutionally-protected liberty interest to reside in the location of his choice and that due process required the city hold a hearing to determine his current dangerousness. The Fifth Circuit held that even if he had such a liberty interest "the absence of an additional hearing [other than the hearing at which he was convicted of online solicitation] allowing Duarte to contest current dangerousness does not offend the principles of procedural due process." *Id.* at \*2. Likewise, the ordinance does not deprive the Duarte family collectively of a constitutionally-protected liberty interest in "family consortium" without procedural due process.

The Duartes equal protection claim involved a challenge of the ordinance's differing treatment of child sex offenders subject to state-imposed community supervision versus child sex offenders who are not. The magistrate judge determined that this classification was subject to rational basis review and the Duartes did not object to that conclusion. The city argued the classification amounts to legislative deference to an existing court order and seeks to avoid conflicting orders. The Fifth Circuit held the challenged classification furthered a legitimate state interest. Thus, the ordinance did not violate the Equal Protection Clause. *Id.* at \*3-4.

**Q: Are sex offenders required to notify a city when they move to the city?**

**A:** Yes. In 1991, Texas enacted the Sex Offender Registration Program (SORP), codified at Chapter 62 of the Texas Code of Criminal Procedure. Under the SORP, sex offenders who are required to register under state law must either register or verify their registration with the city police department in any city where the offender intends to live for more than seven days. TEX. CODE CRIM. PRO. art. 62.051(a). There is the possibility of dual registration because offenders must also register in any city where they spend more than 48 consecutive hours at least three

times per month. *Id.* art. 62.059. The registration form includes, among other things, the offender's name, date of birth, physical characteristics, social security number, driver's license number, address, photo, and type of offense. *Id.* art. 62.051(c).

**Q: Is a city police department required to notify anyone when a sex offender moves to the city?**

**A:** Yes, there are various laws that require a city police department give notice to certain entities that a sex offender has moved to the city. For example, not later than the third day after a person registers, the police department must send a copy of the registration to the Texas Department of Public Safety and, if the offender resides on the campus of a public or private institution of higher education, to campus security. *Id.* art. 62.051(e). Under certain circumstances, the police department must also notify the superintendent of a public school district and the administrator of a private primary or secondary school located in the public school district that a registered sex offender has moved into the district. *Id.* art. 62.053(e).

In addition to being required to notify certain entities, a police department has the discretion to notify the general public that a sex offender has moved to the city if the offender has been assigned a numeric risk level of three. *Id.* art. 62.056(d). This notice may be provided in any manner determined appropriate, including publishing notice in a newspaper, holding a neighborhood meeting, posting notices in the area where the offender will reside, distributing printed notices to area residents, or establishing a specialized local website. *Id.*