THE HONORABLE LINDA LAU

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

KYLE D. LEWIS and MARY LOU LEWIS,

Plaintiffs,

v.

CITY OF ISSAQUAH,

Defendant

No. 05-2-28914-7

OPPOSITION TO CITY'S MOTION FOR SUMMARY JUDGMENT

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This case presents the remarkable scenario of a local government passing an ordinance admittedly designed for the purpose of banishing a politically unpopular and disliked person from his home. Summary judgment in favor of the city would be legally improper. Furthermore, the motion was brought very early in the litigation, making it premature for the court to rule until the parties have had a fair opportunity for discovery under CR 56(f).

I. FACTS

A. The Issaquah Ordinance and Its Effect on Plaintiffs

Mary Lou Lewis and her son Kyle Lewis are third- and fourth-generation natives of Issaquah. Starting when Kyle was five years old, they lived in a house in the 800 block of Highwood Drive. Mary Lou now lives in a different house, but owns the Highwood Drive house plus three other houses near her residence as rental properties. Lewis, ¶¶1-6.

In 1995, Kyle was convicted of child molestation in Snohomish County, based on conduct that occurred in 1993 when Kyle was a minor in foster care. He was initially sentenced under the SSOSA program and lived in the Highwood Drive house between 1995 and 1998. Kyle has since completed all terms of his sentence, including sex offender therapy and community custody, and he is no longer under Department of Corrections (DOC) supervision. Kyle is not a "sexually violent predator" as defined by law, and there have never been any civil commitment proceedings brought against him. Verified Complaint, ¶¶ 6-7; Lewis, ¶ 5.

After completion of his sentence, Kyle moved back to his childhood home in late June 2005 with his mother's consent. A housemate, who also had completed a sentence for a sex crime, moved with him. When neighbors were notified by police about Kyle's history, they immediately began to lobby the City, demanding that it evict Kyle. Many comments reflected the prevailing opinion that Kyle's punishment had been insufficient. One neighbor wrote that "[Kyle] should never have been let out of jail." Caplan, Ex. G. Another wrote that "the laws

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need to change so that those considered level 3 are either never granted release" or kept under permanent DOC supervision. Id., Ex. H. A realtor wrote the city council, urging them to adopt the ordinance because of "potential loss of market value for the homes in close proximity to the two registered sex offenders." Id., Ex. J. One resident denounced Mary Lou for allowing her son to live in his childhood home, saying: "Without her, Kyle would be another homeless wretch in the streets of Seattle." Id., Ex. I. The mayor responded: "As much as we want it to be otherwise, Issaquah, like every other city in Washington, can't restrict offenders from moving in once they have met the conditions of their probation." Id. The political pressure quickly mounted, however, and the city council drafted Ordinance 2428 ("the Ordinance") at a breakneck pace, signing it into law on August 15, to take effect on an emergency basis on August 16. Id., Ex. L.

The Ordinance was gerrymandered to ensure that Kyle would be forced to move. One condition of the Ordinance is that Level II or Level III sex offenders are not allowed to reside within 1000 feet of a school or day care. In fact, there are no schools or day care centers within 1000 feet of the Lewis home on Highwood Drive. Morrill, ¶¶ 9-11. (A city planner says there are two day care centers "in the Squak Mountain neighborhood," Leeson, ¶ 3, but not that they are within 1000 feet of the Lewis home.) The Ordinance therefore has another requirement that restricts sex offenders to areas zoned to allow both residential uses and the placement of Secured Community Transition Facilities. The city allows SCTFs only in areas zoned for commercial and industrial uses, and not areas zoned for single-family residences. IMC 18.06.130; Answer ¶ 13. The ban on sex offenders in single-family zoned neighborhoods, and not the proximity to child care facilities, is the portion of the Ordinance that achieves the City's goal of forcing Kyle to move. Morrill, ¶ 12. The City admits that its conduct was designed to ensure that Kyle could not live "in the single-family neighborhood where he now resides." Answer, ¶ 8.

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Unlike virtually all zoning laws, the Ordinance has no grandfather clause allowing persons on affected properties to continue the uses that existed up to the effective date. The City appears to have considered such a grandfather rule in this case, but it ultimately rejected the option to ensure that Kyle would be forced out. Caplan, Ex. K (IS 291).

The Ordinance is enforced against Kyle through the City's code enforcement remedies (Caplan, Ex. N), which include, at the city's "complete discretion," a civil fine of $250 per day or a misdemeanor charge. IMC 1.36.030(A)-(C). As to Mary Lou, the Ordinance makes it a gross misdemeanor for her to allow her son to reside on her properties. The day after the Ordinance was enacted, the City demanded that Kyle move and threatened to criminally prosecute Mary Lou if she did not evict Kyle in 15 days (less than the 20 days notice required for termination of tenancy under the Residential Landlord-Tenant Act, RCW 59.18.200). Verified Complaint, Exs. C & D.

Kyle could not find anyplace to live in Issaquah. The one landlord known to be willing to rent to him is Mary Lou, but the Ordinance places all of her properties off-limits. Lewis, ¶ 7. The available housing supply is so diminished by the Ordinance as to leave no reasonable opportunity for locating a residence. Mary Lou was unable to identify any vacancies or landlords willing to rent to Kyle. Id., ¶ 8. Professional organizations for landlords instruct their members not to rent to sex offenders as a matter of policy, and some landlords believe that sex offenders should be sent to the firing squad. Id., ¶ 11-13. Mobile home parks have free rein by law to evict registered sex offenders. RCW 59.20.080(1)(f). Plaintiff's geographic expert explains why the City could not have reasonably expected Kyle to find any housing under the Ordinance, so that its inevitable result is banishment from Issaquah. Morrill, ¶¶ 13-32.

The City does not assert that the Ordinance actually allowed Kyle to relocate within Issaquah when he was ordered to move out of his house. The City asserts that approximately

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500 existing dwelling units exist in the areas the Ordinance proposes for sex offenders, Leeson, ¶ 4, but it does not consider whether any of those units are actually available. It does not take into account that these available residences account for less than 1% of the city's territory; Morrill, ¶ 14, that 235 of these units are reserved for senior citizens, id., ¶¶ 19, 22; that 132 of the units are in an expensive condominium complex with no available rentals, id., ¶ 17; that some are currently occupied single-family homes or condos, id., ¶ 23; that the low vacancy rate for apartments means very few rentals are available at any given time (let alone when a person is forced to move on two week's notice), id., ¶ 27; that landlords have strong motivations not to rent to registered sex offenders, id., ¶ 29; that opening just one new day care center on Front Street would eliminate virtually all remaining rental units from consideration, id., ¶ 31; and that Issaquah's rapid growth means there is strong development pressure on the few remaining residential parcels in the non-residential zones to which offenders are limited, id., ¶ 30.

To avoid the possibility that his mother would be criminally charged, Kyle moved out of town until this litigation is resolved. Meanwhile, the City has filed suit against Kyle in municipal court to collect on a civil infraction, despite the fact that Kyle has a pending bankruptcy petition and is unlikely to be able to satisfy any judgment. Lewis, ¶ 9-10.

B. Sex Offender Residency Restrictions Do Not Aid Public Safety, And Make Future Crime More Likely

No studies demonstrate any connection between recidivism and a sex offender's residence address after incarceration. If anything, residency restrictions lead to more crime because they separate sex offenders from social support (including access to jobs, supervision, treatment, and family) that could contribute to rehabilitation and prevent future misconduct. The Minnesota Department of Corrections (MDOC) found "no evidence" that residential location near a school or park had any relationship to future offense. Caplan, Ex. C at 11.

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> Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact. The two level three offenders [in our study] whose re-offenses took place near parks both drove from their residences to park areas that were several miles away. … Based on these cases, it appears that a sex offender attracted to such locations for purposes of committing a crime is more likely to travel to another neighborhood in order to act in secret rather than in a neighborhood where his or her picture is well known.

Id. at 9. From this, MDOC concluded that "blanket proximity restrictions on residential locations of level three offenders do not enhance community safety." Id. at 11. Interviews in Florida confirm this conclusion: persistent offenders are "careful not to reoffend in close proximity to their homes, so geographical restrictions provided little deterrence." Id., Ex. E at 174.

The Colorado Department of Public Safety (CDPS) likewise found that recidivist sex offenses "appear to be randomly scattered throughout the study areas -- there does not seem to be a greater number of these offenders living within proximity to schools and childcare centers than other types of offenders." Id., Ex. D at 4. For this reason, CDPS concluded: "Placing restrictions on the location of correctionally supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism." Id.

In Iowa, where the modern experiment with residency laws began, "some of the residency law's harshest critics include law enforcement and prosecutors. They argue that the determined distance is arbitrary and fails to protect people from child molesters." Michael J. Duster, "Out of Sight, Out of Mind: State Attempts to Banish Sex Offenders," 53 Drake L. Rev. 711, 772 (2005).

If residency restrictions have any effect on recidivism, it is to make future crimes more likely. As the Minnesota study explained, residency restrictions create "a high concentration of

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offenders with no ties to the community; isolation; lack of work, education, and treatment options; and an increase in the distance traveled by agents who supervise offenders." Id., Ex. C at 9. Dr. Jill Levenson of the Florida Association for the Treatment of Sexual Abusers explains that residence restrictions "can lead to homelessness and transience, which interfere with effective tracking, monitoring, and close probationary supervision." Id., Ex. E at 169. Sex offender statutes "inadvertently may increase risk by aggravating the stressors (e.g., isolation, disempowerment, shame, depression, anxiety, lack of social supports) that can trigger some sex offenders to relapse." Id. As Dr. Levenson recently testified before the Florida legislature:

> Decades of criminological research have concluded that stability and support increase the likelihood of successful reintegration for offenders, and public policies that make it more difficult for offenders to succeed may jeopardize public safety. Employment stability has been established as an important factor in reduced criminal offending. In Colorado, it was found that sex offenders who had social and family support in their lives had significantly lower recidivism and rule violations than those who had negative or no support.
>
> Despite widespread support and popularity, there is no evidence that residence restrictions prevent sex crimes or increase public safety. These laws may, ironically, interfere with their stated goals of enhancing public safety by exacerbating the psychosocial stressors that can contribute to reoffending. Such stressors, referred to as dynamic risk factors, have been associated with increased recidivism. Sex offenders rouse little public sympathy, but exiling them may ultimately increase their danger.

Id., Ex. F at 2.

II. THE CITY'S MOTION SHOULD BE DENIED OR CONTINUED UNDER CR 56(F) TO ALLOW ESSENTIAL DISCOVERY

Rule 56(f) ensures that courts are not forced to decide dispositive summary judgment motions on undeveloped records. Turner v. Kohler, 54 Wn. App. 688, 693-94, 775 P.2d 474 (1989). Because justice is the "primary consideration" when CR 56(f) is invoked, Coggle v.

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Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (1990), Washington courts are "hesitant to cut litigants off from their right to a trial by means of a summary judgment, when they have had neither the opportunity nor the occasion" to pursue discovery, Bernal v. American Honda Motor Co., 87 Wn.2d 406, 416, 553 P.2d 107 (1976). Where a summary judgment motion is filed "so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case," a 56(f) denial should be granted "fairly freely" because "lightning-quick summary judgment motions can impede informed resolution" on the merits. Burlington Northern & Santa Fe Railroad v. The Assiniboine and Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773-74 (9th Cir. 2003). Allowing adequate time for discovery is not merely permitted by Rule 56(f) -- it is required. Id.

The city's motion was filed very early, before essential discovery could be had on several important topics. The complaint was filed on August 31, an amended complaint on September 27, and the answer on October 3. Plaintiffs served one abbreviated set of requests for production during the course of a TRO motion. There have been no further document requests, no interrogatories, and no depositions. Caplan, ¶ 2-5. The City filed its motion on this undeveloped record on November 18. There has been no opportunity to depose the City's declarants or others involved in crafting the Ordinance. Moving as expeditiously as possible, Plaintiffs retained an expert witness on geography (Dr. Morrill), but more information is needed to fully develop his opinions. Morrill, ¶¶ 35-36. Plaintiffs also retained an expert witness on sex offender treatment (Dr. Packard), but he has not had time to develop opinions for the case. Caplan, ¶¶ 6-9.

Discovery beyond the text of a statute is often necessary in a facial challenge, to illuminate the purposes, operation, and impact of the challenged law. E.g., McConnell v. Federal Election Commission, 251 F.Supp.2d 176, 206-07 (D.D.C. 2003) (describing extensive

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discovery and factual record in facial challenge), rev'd in part on other grounds, 540 U.S. 93 (2003); City of Chicago v. Morales, 527 U.S. 41, 49-50 (1999) (same). Here, the relevant legal tests require the court to consider facts that are not yet in the record, such as the City's subjective intent in enacting the Ordinance; whether the Ordinance is rationally related to its stated objectives; whether the Ordinance is excessive in relation to its asserted purpose; the effectiveness of alternative measures; and the extent of hardship the Ordinance creates. Plaintiffs intend to pursue discovery that will be essential to properly applying these legal standards. Avenues of discovery will include:

- Availability of alternative housing options for former sex offenders to reside in Issaquah. In addition to the information identified by Dr. Morrill, plaintiffs will need discovery regarding the distribution of day care centers and the procedures for establishing new day care centers.
- Depositions of the city council and mayor to determine the motivations behind the ordinance and their punitive animus toward plaintiffs.
- Depositions of city staff who developed the ordinance, to determine its justifications, purposes, and history. This will include the persons who created the maps that led to the Ordinance.
- Discovery into how the City of Issaquah exercises its authority to adjust the risk levels of sex offenders.
- Expert testimony on the efficacy of sex offender laws, and a comparison of their functioning in other jurisdictions.
- Discovery regarding the geographical distribution of sex crimes in Issaquah and statewide. This will likely include depositions of Issaquah police and third party subpoenas, the results of which will be reviewed by expert witnesses.

Caplan, ¶ 10.

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The discovery cut-off in this matter is more than a year away, in January 2007. Delaying this motion will cause no prejudice to the City. It would be an abuse of discretion for the court to deny plaintiffs the opportunity to pursue essential discovery.

III. THE ORDINANCE IS PREEMPTED BY STATE LAW

A. Washington Has A Comprehensive State-Level Statutory Scheme for Sex Offender Management

Interlocking provisions of the Washington Criminal Code, the Sentencing Reform Act, and the Community Protection Act form a comprehensive state-wide scheme for sex offenders. The state criminalizes sex crimes as felonies in RCW 9.94A. Defining felonies is an exclusive state function. See RCW 35A.11.020 and Section IV below. The law includes sentencing mandates and restrictions specific to sex offenses. See, e.g., RCW 9.94A.501; RCW 9.94A.525(2), (16); RCW 9.94A.540; RCW 9.94A.650; RCW 9.94A.690(1)(a)(ii). When a sex offender in prison becomes eligible to transfer to community custody in lieu of earned early release, DOC must review the offender's community custody plan and may deny the transfer to community custody if the agency determines that such a transfer would present a risk to community safety. RCW 9.94A.728(2)(d).

The state's responsibility does not end with the end of the term of incarceration. The DOC must notify local law enforcement officials, victims, and witnesses, prior to releasing a sex offender from prison. RCW 9.94A.612. The law requires DOC to continue supervising sex offenders serving parts of their sentence in the community after completing their prison term. RCW 9.94A.700; RCW 9.94A.710; RCW 9.94A.715(1); RCW 9.94A.720(1)(a). For the most serious sex offenders, community custody continues for the maximum length of the term. RCW 9.94A.712(5). During community custody, the DOC's responsibility includes approving the residence location and living arrangements of sex offenders sentenced to community placement.

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RCW 9.94A.700(4)(e); RCW 9.94A.710(2); RCW 9.94A.712(6)(a); RCW 9.94A.715(2)(a); RCW 9.9A.728(2)(c). Barring explicit waiver by the court, DOC must require offenders on community placement to remain within prescribed geographical boundaries. RCW 9.94A.720(1)(b). DOC may reject a release plan for a sex offender if it would involve placing a person convicted of a crime against children near schools. RCW 72.09.340(3). Significantly, legislation in 2005 created "community protection zones" around schools where offenders who committed crimes against children may not live while on community custody. Laws of 2005, ch. 436, amending RCW 9.94A.712(6)(a)(ii) and RCW 72.09.340(3)(b).

State responsibility also continues after the criminal sentence ends. In 1990 the legislature passed the Community Protection Act (CPA), an expansive set of laws enacted "to address concerns about sex offenders." State v. Heiskell, 129 Wn.2d 113, 117, 916 P.2d 366 (1996). This law "was comprehensive in addressing much more severe criminal penalties for sex offenders, adult and juvenile, establishing more extended post-release supervision of such offenders, creating a civil commitment system for sexually violent predators, providing for registration and community notification regarding sex offenders, limiting good time for incarcerated offenders, and providing treatment and victim services." State v. Cruz, 139 Wn.2d 186, 197, 985 P.2d 384 (1999).

For "sexually violent predators" -- defined as offenders "likely to engage in predatory acts of sexual violence if not confined in a secure facility," RCW 71.09.020(16) -- the CPA provides for civil commitment on McNeil Island. RCW 71.09.060. Conditional release from McNeil Island to an SCTF will be allowed only if a series of findings is made by judge or jury. Release from the SCTF may occur only if a court makes further findings in support of less restrictive alternatives. RCW 71.09.090 et seq. At all times during this process, the court must specify the residence of a conditionally released offender. RCW 71.09.096(3).

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For offenders who are not civilly committed, the statutes contemplate that offenders who have completed their sentences of incarceration, treatment, and community custody and are not civilly committed will be allowed to live in the community. The end-of-sentence review committee assesses each person before release from prison to determine whether they should be referred for commitment or instead described as Level I, II, or III offenders. RCW 71.09.025; RCW 72.09.345. This designation is for purposes of registration (so police and social service agencies know where the former offender is located), RCW 9A.44.130, and public notification (so interested members of the public can be aware of the relevant criminal history of their neighbors), RCW 4.24.550(1). See generally, State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994). Members of the public are to be notified "that a sex offender about to be released from custody will live in or near their neighborhood," because "if the public is provided adequate notice and information, the community can develop constructive plans to prepare themselves and their children for the offender's release." Laws of 1994, ch. 129 § 1. The legislature explained that there may be "public and private schools, child day care centers, family day care providers, public libraries, businesses and organizations that serve primarily children, women, or vulnerable adults, and neighbors and community groups near the residence where the offender resides, expects to reside, or is regularly found." RCW 4.24.550(3).

On two recent occasions, the legislature considered and rejected proposals that would allow local jurisdictions to impose residency restrictions for sex offenders. Senate Bill 6488 from 1998 would have allowed local jurisdictions to prevent Level III sex offenders from residing within 1000 feet of schools, school bus stops, public housing projects, or public parks. Caplan, Ex. P. House Bill 1119 from 2005 would have given local government veto power over an offender's proposed residence before DOC could distribute funds to help an offender secure housing in the community. Caplan, Ex Q. Neither bill made it out of committee.

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The legislature has also considered enacting its own statewide residency restrictions for offenders who have completed all custody, but has repeatedly decided against them. E.g., 1998 House Bill 1456 (half mile radius around schools and daycares); 1998 House Bill 2873 (one mile radius around schools); 1999 Senate Bill 5249 (one mile radius from victim); 2004 Senate Bill 5508 (one mile radius from schools and daycares). Caplan, Exs. R, S, T, and U. The only residency restrictions enacted into statute are those described above. These bills further illustrate the legislature's desire for comprehensive management of sex offenders -- including their residential placement -- at the state level.

B. The Ordinance Directly Conflicts with State Statutes

"A local regulation conflicts with a statute when it permits what is forbidden by state law or prohibits what state law permits." Entertainment Indus. Coalition v. Tacoma-Pierce County Health Dep't, 153 Wn.2d 657, 663, 105 P.3d 985 (2005) (citation omitted). Issaquah's ordinance prohibiting sex offenders from living in most areas of the city conflicts with several statutes. First, the Ordinance conflicts with RCW 4.24.550(3), where the legislature plainly contemplated that after completion of community custody, offenders would be able to live where they chose, even if that is near schools, day care centers, or unhappy neighbors.

Second, under RCW 9.94A.637(4), an offender who has completed all requirements of his sentence receives a certificate of discharge, which "shall have the effect of restoring all civil rights lost by operation of law upon conviction." Restoration of the offender's rights is not discretionary, but rather is automatic once the offender completes the requirements of his sentence. State v. Swanson, 116 Wn. App. 67, 74, 65 P.3d 343 (2003). The Ordinance conflicts with this law by imposing legal disabilities as a result of a conviction after the state would extinguish them.

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Third, the Ordinance conflicts with the DOC's authority to approve or restrict potential residences for sex offenders on community custody, by eliminating locations otherwise acceptable to the state. RCW 9.94A.700(4)(e); RCW 9.94A.710(2); RCW 9.94A.712(6)(a); RCW 9.94A.715(2)(a); RCW 9.94A.728(2)(c). Local entities may not act in ways that undermine authority that the legislature has delegated to a specific agency. Parkland Light & Water Co. v. Tacoma-Pierce County Board of Health, 151 Wn.2d 428, 90 P.3d 37 (2004)

C. The Washington Legislature Intends to Preempt the Field of Law Pertaining to the Treatment and Regulation of Sex Offenders.

A city may not regulate where the legislature "has expressly or by implication stated its intention to preempt the field." Heinsma v. Vancouver, 144 Wn.2d 556, 561, 29 P.3d 709 (2001). Statutes need not state overtly that they occupy a field. "[I]f the legislature is silent regarding its intent, the court must consider both 'the purposes of the statute and . . . the facts and circumstances upon which the statute was intended to operate' in order to determine the intent of the legislature." Id. (citations omitted).

The state's system for sex offenders has properly been described as "comprehensive." Cruz, 139 Wn.2d at 197. It therefore occupies the field, "leaving no room for concurrent jurisdiction." Rabon v. City of Seattle, 135 Wn.2d 278, 287, 957 P.2d 621 (1998) (citations omitted). The state punishes sex offenders under the criminal law and then closely specifies the conditions for reentry into the community. Offenders who are not civilly committed will be allowed to return to the community at the end of their sentences, subject to community notification as to their whereabouts. This comprehensive state law would fail if local pressure to keep sex offenders "not in my back yard" (NIMBY) resulted in a patchwork of local ordinances that gradually eliminated the places where released offenders might live. "At a minimum, dumping convicts on a city, county, or state neighbor is bound to raise public policy concerns."

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State v. Schimelpfenig, 128 Wn. App. 224, 226, 115 P.3d 338 (2005). In considering and rejecting laws that would give local governments veto power over sex offender residence in 1998 and 2004, the legislature reiterated its understanding that housing is a subject for exclusive state control. Caplan, Exs. P & Q. The state has explored various housing alternatives, and chosen only those it considers appropriate.

The state has already recognized that local NIMBY pressures could interfere with its plans for sex offender rehabilitation in SCTFs. State agencies must ordinarily comply with local development regulations created under the Growth Management Act, RCW 36.70A.103, but there is no similar deference when it comes to siting SCTFs, RCW 71.09.342. Because NIMBY opposition to housing of sex offenders conflicts with state planning, any local rules for siting SCTFs that are more restrictive than authorized by state law are void. RCW 71.09.341. With regard to offenders who have completed their sentences, the legislature has exercised similar authority, and does not intend to leave the result to a patchwork of inconsistent local laws like this one, enacted in haste without regard to statewide consequences.

The alternative to preemption is a domino effect like the one now occurring in Iowa, where neighboring jurisdictions race to foist their sex offenders on other communities. When the Iowa legislature barred sex offenders from living within 2000 feet of schools and day care centers, the only lawful residences for offenders were in rural areas without nearby schools. To keep out sex offenders who were forced out of cities and towns, the rural jurisdictions have now responded by enacting residency restrictions around parks, bus stops, and other landmarks that do exist within those jurisdictions. Towns in neighboring Nebraska and South Dakota have also begun enacting pre-emptive legislation for the time when the Iowa laws force offenders to leave the state. Caplan, Ex. O at 10-11. Statewide control -- of the sort created by existing Washington legislation -- is the only way to prevent this destructive game of human hot potato.

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Local NIMBY ordinances that isolate former sex offenders undermine the community safety goals the legislature seeks to serve through its comprehensive legislative system. The Washington Court of Appeals has explained how a carefully planned reintegration into the community is a goal of the SRA:

> One of the primary purposes of community custody is to protect the public by supervising offenders based on the risk they pose to community safety. A comprehensive release plan helps minimize the risk of reoffense. … The public would be best served if a sex offender has developed a viable release plan when the time comes for return to the community. The community custody system was designed in part to help an offender become established in the community and minimize his risk to reoffend.

In re the Personal Restraint Petition of Dutcher, 114 Wn. App. 755, 764-65, 60 P.3d 635 (2002) (citations omitted). As the legislature has observed, "homeless and transient offenders may present unique risks to the community," RCW 4.24.550(3)(d), so any local law that separates offenders from the small number of willing landlords will be counterproductive. The other likely result for offenders whose only realistic housing options are in restricted neighborhoods will be not to register with local law enforcement. Duster, 53 Drake L. Rev. at 773. Issaquah should not be allowed to sabotage the state system.

IV. THE ORDINANCE EXCEEDS ISSAQUAH'S POLICE POWERS

The Optional Municipal Code, RCW 35A, gives cities like Issaquah considerable home rule authority, subject to statutory and constitutional limits. In particular, a code city's authority regarding criminal law extends only to misdemeanors, not felonies.

> [A city council] may impose penalties of fine not exceeding five thousand dollars or imprisonment for any term not exceeding one year, or both, for the violation of such ordinances, constituting a misdemeanor or gross misdemeanor as provided therein. However, the punishment for any criminal ordinance shall be the same as the punishment provided in state law for the same crime. [A city council] alternatively may provide that violation of such ordinances constitutes a civil violation subject to

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> monetary penalty, but no act which is a state crime may be made a civil violation.

RCW 35A.11.020. The Ordinance exceeds the City's authority with regard to each sentence of this paragraph. First, it has imposed residency restriction as a punishment for sex offenses, which is something other than a fine or imprisonment. Second, it imposes a different punishment for sex crimes than the one provided by state law. Third, it has purported to layer a civil violation on top of acts that are already state crimes. The definition and punishment of felony crimes are the business of the state, not of local authorities.

In addition to this statutory limit, case law indicates that a Washington city exceeds its authority if its enactments are "not a reasonable exercise of the … police power." Weden v. San Juan County, 135 Wn.2d 678, 692, 958 P.2d 273 (1998). See generally, Hugh D. Spitzer, "Municipal Police Power In Washington State," 75 Wash. L. Rev. 495 (2000). Police power may only be validly exercised where "the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Lawton v. Steele, 152 U.S. 133, 137 (1894). An ordinance is unreasonable if it does not bear "a reasonable and substantial relation to accomplishing the purpose pursued." Weden, 135 Wn.2d at 700, (quoting City of Seattle v. Montana, 129 Wn.2d 583, 592, 919 P.2d 1218 (1996)). Here, there is already evidence in the record that the Ordinance is "clearly unreasonable, arbitrary or capricious," Weden, 135 Wn.2d at 700. At the very least, there is enough dispute on that score to defeat the City's early motion for summary judgment and allow a fair opportunity to develop the record under CR 56(f).

The Ordinance is unreasonable and arbitrary both in principle and in execution. As described above, there is no evidentiary basis to believe that residency restrictions deter or prevent recidivism among sex offenders, and a considerable evidentiary basis to believe they

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make future crime more likely. See Part I.B., above. As enacted by Issaquah, the inherently flawed notion of residency restriction is even more arbitrary:

- The City relies on existing zoning patterns that were enacted as part of the city's comprehensive plan that have nothing to do with crime control. No evidence suggests that recidivism is reduced by moving sex offenders from single-family neighborhoods into multi-family, mixed-use, or industrial neighborhoods. If it is dangerous for sex offenders to live in a single-family houses, the City allows them to live there anyway, so long as the house is part of a mixed-use neighborhood. And whatever protection the Ordinance provides to residents of single-family neighborhoods, it provides none to the equally deserving families who live in other types of neighborhoods. Families in apartment buildings are at much closer quarters to their neighbors than are families in a single-family zone.

- By relying on zoning created during a comprehensive planning process rather than on the existing character of neighborhood, the Ordinance rules off-limits a large pool of potential housing options in adjacent blocks that are of the same character as the areas where sex offenders are theoretically allowed to live. Morrill, ¶¶33-34.

- The City purports to be especially concerned with safety of children, but the Ordinance has no connection to persons who committed crimes against children. Most Level II or Level III sex offenders had adult victims, yet Issaquah purports to enhance safety by keeping these people away from schools and day care centers. Meanwhile, Level I sex offenders who had child victims are not restricted in any way.

- The Ordinance does not differentiate between offenders based on dangerousness, but instead lumps together all Level II and Level III sex offenders regardless of their age, participation in treatment, and prognosis. Even if there is be a role for cautious, case-by-case residency restrictions for particular high-risk individuals, a blanket restriction is arbitrary and unwise. Schimelpfenig, 128 Wn. App. at 230; Caplan, Ex. C at 11 (Minnesota Study).

V. THE ORDINANCE IS UNCONSTITUTIONAL

A. The Issaquah Ordinance Is Very Different From The Statutes Upheld in Iowa and Ohio

The statutes considered in Doe v. Miller, 405 F.3d 700 (8th Cir. 2005); State v. Seering, 701 N.W.2d 655 (Iowa 2005); and Doe v. Petro, 2005 WL 1038846 (S.D. Ohio 2005) are readily

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distinguishable from this case. (a) Those statutes had grandfathering provisions so that no one already in a residence on the date of enactment would be required to move. Iowa Code § 692A.2A.(4)(c); Ohio Session Law 2003, S 5, § 8 (uncodified portion of Ohio Code § 2950.031). (b) Neither statute was unambiguously designed to disadvantage specific identified persons, so none of the cases considered the bill of attainder theory. (c) Both statutes were based solely on proximity to schools, and did not address a ban on residence in areas zoned for single-family houses. (d) Both statutes were limited to offenders with child victims, unlike Issaquah's Ordinance, which applies to all Level II and Level III offenders. (e) Both were statewide statutes rather than local ordinances. (f) The statutes were analyzed by courts in other jurisdictions. Plaintiffs believe these cases were wrongly decided in addition to being distinguishable, but in any event they are not binding precedent for this Court.

B. The Ordinance Is A Bill of Attainder Because It Imposes Legislative Punishment on Identified Persons

The US and Washington constitutions forbid bills of attainder.

> A bill of attainder is a legislative act which applies to named individuals or to easily ascertained members of a group in such a way as to inflict punishment on them without judicial trial. The prohibitions on bills of attainder prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct.

State v. Hennings, 129 Wn.2d 512, 527, 919 P.2d 580 (1996) (citations omitted).

1. The Ordinance Was Specifically Intended To Affect Mr. Lewis and his Roommate

It is undisputed that Issaquah enacted the Ordinance in response to Kyle's presence within the city limits. A resolution leading to the enactment of the Ordinance recited its purpose to respond to the presence of two sex offenders moving into a house on Highwood Drive. Caplan, Ex. M. Documents produced by the City indicate that the Ordinance was gerrymandered

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to ensure that it would reach the Lewis home on Highwood Drive, and that a grandfathering provision was removed from early drafts to ensure that the law would affect Kyle Lewis personally. Morrill, Ex. C; Caplan, Ex. K. Although Kyle was not mentioned by name in the Ordinance as finally adopted, and the Ordinance has theoretical application to others in the future, this does not change the outcome. A bill of attainder applies "either to named individuals or to easily ascertainable members of a group." United States v. Lovett, 328 U.S. 303, 315 (1946). See also United States v. Brown, 381 U.S. 437, 461 (1965) (bills of attainder may "inflict their deprivations upon relatively large groups of people, sometimes by description rather than name").

2. The Ordinance Is A Legislatively-Imposed Punishment

"If the intention of the legislature was to impose punishment, that ends the inquiry." Smith, 538 U.S. at 92. To be sure, there is preamble language in the Ordinance proclaiming that its goal is public safety, but public safety is also the goal of the unquestionably punitive Sentencing Reform Act. RCW 9.94A.010 (goals of criminal sentencing laws include "to protect the public" and "to reduce the risk of reoffending by offenders in the community"). The record to date already contains evidence of punitive intent. Supporters of the Ordinance explained that it should be enacted because Kyle had not been punished enough and should have remained in jail. Caplan, Exs. G, H, I. The Ordinance was gerrymandered in a way that seems unrelated to the asserted interest in safety. At the very least, CR 56(f) allows plaintiff to investigate legislative intention, especially by deposing city officials about why the Ordinance was written as it was.

Regardless of the city council's subjective intent, the non-exclusive list of factors from Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) as reiterated in PRP of Metcalf, 92 Wn. App. 165, 180, 963 P.2d 911 (1998), reveal the punitive effect of the Ordinance.

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a. Affirmative Disability or Restraint. Imprisonment is not the only type of punishment associated with bills of attainder. While a more severe deprivation is more likely to be found punitive, Brown, 381 U.S. at 476, "the severity of a sanction is not determinative of its character as punishment." Selective Service Systems v. Minnesota Public Interest Research Group, 468 U.S. 841, 851 (1984). Laws that prevent former Confederates from practicing certain professions, Cummings v. Missouri, 71 U.S. 277 (1866), that prevent Confederates from collecting judgments in state courts, Pierce v. Carskadon, 83 U.S. 234 (1872), that bar Communists from leadership positions in trade unions, United States v. Brown, 381 U.S. 437 (1965), or that forbid same-sex couples from gaining legal recognition for their relationships, Citizens for Equal Protection v. Bruning, 368 F.Supp.2d 980, 1005-08 (D. Neb. 2005), are all invalid bills of attainder. The key is whether the law imposes an affirmative restraint not inflicted on the population at large.

The Washington Supreme Court held that sex offender registration and notification laws do not themselves constitute punishment, but in reaching that conclusion, the Court considered it crucial that registration simply resulted in an exchange of information and did not affect the defendant's freedom of movement or choice of residence:

> Collecting information about sex offenders in order to aid community law enforcement does not restrain sex offenders in any way. Sex offenders are free to move within their community or from one community to another, provided they comply with the statute's registration requirement.

State v. Ward, 123 Wn.2d at 500-01 (citations omitted; emphasis added). The U.S. Supreme Court also considered this to be important when deciding whether Alaska's registration and notification law imposed an affirmative restraint. Smith v. Doe, 538 U.S. 84 (2003). The law did not do so, because it "imposes no physical restraint," 538 U.S. at 100, leaves offenders "free to change jobs or residences," id., and "free to move where they wish and to live and work as

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other citizens," id. at 101. The Ordinance does exactly what Ward and Smith warned against. Without question, forcing a person to move out of his house and banishing him from his home town is an affirmative disability or restraint.

b. History of Residential Restrictions As Punishment. Governmental actions that "cast [a] person out of the community" or "expelled him from the community" were historically recognized as punishments. Smith v. Doe, 538 U.S. at 98. The Washington Court of Appeals discussed the use of banishment orders as part of a criminal sentence in State v. Schimelpfenig, 128 Wn. App. 224, 115 P.3d 338 (2005). The Court noted how "banishment orders conjure memories from 'the script of some old Grade-B cowboy movie where the sheriff tells the bad guy to "get out of Dodge".' " Id. at 226 (citation omitted). The history of banishment as a punishment is clear.

The residency restriction is punitive even if it is not a complete banishment from the city limits. State control over where a person resides is the essence of most criminal punishments. Incarceration is the most punitive form of residency restriction, but this control continues during community custody, when the DOC has control over where the defendant is allowed to live. Indeed, under the 2005 legislation, distance from schools during community custody is part of punishment. RCW 9.94A.712(6)(a)(ii); RCW 72.09.340(3)(b). Residency restrictions -- even those short of total banishment from a jurisdiction -- are unambiguously part of the criminal code and historically associated with punishment.

c. Scienter. Truly nonpunitive civil regulations (a sales tax, a traffic law requiring motorists to stop at red lights, a zoning ordinance that bars heavy industry from a residential neighborhood) will apply to all persons even if they lack malice. The Issaquah Ordinance applies only against who have committed culpable acts of wrongdoing with guilty knowledge as

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defined by the criminal law. This is a hallmark of punishment: "Scienter is associated with penalties, not with taxes." Bailey v. Drexel Furniture Co., 259 U.S. 20, 36 (1922).

d. Underlying Purpose of Retribution and Deterrence. "[D]eprivations inflicted to deter future misconduct" are more likely to be found punitive. Brown, 381 U.S. at 458-59. Many of the English bills of attainder "were enacted for preventive purposes -- that is, the legislature made a judgment, undoubtedly based largely on past acts and associations … that a given person or group was likely to cause trouble … and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event." Id. The underlying purpose of the Ordinance is the same as the underlying purpose of punishment. Its goal is to deter future criminal conduct, and its method of doing so is to apply unwelcome burdens on wrongdoers in retribution for their past conduct.

e. Triggered By Conduct Already A Crime. Traditional zoning laws regulate noncriminal uses of property, such as building to a certain height, or operating a business in a certain neighborhood. The Ordinance was not triggered by Kyle's use of Mary Lou's property: he was using the property for residential purposes, just as his neighbors used their property. The Ordinance applies to him because of his past criminal conduct and its criminal law consequences. Moreover, the Ordinance is triggered by specific types of felonies. In Metcalf, deductions from prisoners' accounts were found not to be punitive in part because "the deductions are not concerned with what crime [the inmate committed], or how many, or how serious; the deductions apply equally to all inmates." 92 Wn. App. at 182. Issaquah's Ordinance applies only to people who engaged in specific past criminal conduct, because of that conduct, and to no one else.

f. Rational Relationship to A Nonpunitive Purpose. A law whose purpose is to deter crime by placing restrictions on persons who misbehaved in the past is punitive. But if we

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accept the argument that a desire to improve public safety is a nonpunitive purpose, the Ordinance is not rationally related to that purpose because (as explained in Part I.B. above) it will not reduce future crime. At the very least, plaintiffs should have the opportunity under CR 56(f) to further develop the record on this point, likely through expert testimony from treatment providers and corrections professionals.

g. Excessive In Relation to an Asserted Nonpunitive Purpose Even if the Ordinance was shown to reduce some types of crime, it is excessive because it is likely to produce other crime. It also pursues its purpose through drastic means. See Part V.D, below. One relevant factor is that the Ordinance is inescapable: there is nothing an affected person can do to exempt himself, no matter how much rehabilitation he demonstrates. This contrasts with the law in Selective Service, which was not a bill of attainder because the persons affected could easily avoid the loss of student loans by registering for the draft. 468 U.S. at 853. Cf. Brown 381 U.S. at 457 n. 32 (inescapability is probative of bill of attainder). Excessiveness of the Ordinance is an appropriate area for better development of the record, since the court should consider alternative methods by which the City could pursue its goal.

C. The Ordinance Violates Plaintiffs' Rights to Substantive Due Process and Equal Protection By Selectively Depriving Them of Their Fundamental Right to Travel Without Adequate Justification

The City misapprehends plaintiffs' due process and equal protection arguments. Plaintiffs do not make any claim regarding procedural due process, nor do they claim that sex offenders are a suspect class. However, both substantive due process and equal protection require the government to have an adequate basis before depriving selected persons of fundamental liberties. Both doctrines establish that when a regulation infringes upon a fundamental right, the regulation will be deemed unconstitutional unless it is narrowly tailored to serve a compelling state interest (the strict scrutiny test). Washington v. Glucksberg, 521 U.S.

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702, 721 (1997) (due process); Clark v. Jeter, 486 U.S. 456, 461 (1988) (equal protection). Even if the regulation does not implicate a fundamental right, it nevertheless must be rationally related to a legitimate government interest to pass constitutional muster (the rational relationship test). Glucksberg, 521 U.S. at 728 (due process); Clark, 486 U.S. at 461 (equal protection). Issaquah's ordinance fails both the strict scrutiny test and the rational relationship test.

The U.S. Supreme Court "long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." Shapiro v. Thompson, 394 U.S. 618, 629 (1969), overruled in part on unrelated grounds by Edelman v. Jordan, 415 U.S. 651 (1974). "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union." Id., 394 U.S. at 630. See also Dunn v. Blumstein, 405 U.S. 330, 341 (1972) ("The right to travel is an *unconditional* personal right.") (internal quotation marks and citation omitted; emphasis in original). While U.S. Supreme Court cases have focused on the right to interstate travel, the Washington Supreme Court has held that the fundamental right to travel applies to intrastate travel as well. "Rights, such as the right to travel, which involve personal liberty are not dependent on state lines. Both travel within and between states is protected." Eggert v. Seattle, 81 Wn.2d 840, 845, 505 P.2d 801 (1973).

The fundamental right to travel encompasses the right to establish a residence, or to migrate "with intent to settle and abide." See Cole v. Housing Auth. of Newport, 435 F.2d 807, 811 (1st Cir. 1970). "It is clear that the freedom to travel includes the freedom to enter and abide." Dunn, 405 U.S. at 338 (internal punctuation omitted; emphasis added). Striking down a city law that gave employment preference for local residents, Eggert cited with approval earlier cases that considered the right of free residence to be one of the "privileges and immunities"

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protected by the constitution and a "fundamental" right. 81 Wn.2d at 842. It further noted how the Universal Declaration of Human Rights of the United Nations declared: "Everyone has the right to freedom of movement and residence within the borders of each State." Id. at 841.

Right to travel cases frequently show special sensitivity when laws affect the rights of disfavored classes of people to move and choose residences. The leading Supreme Court travel cases all involved laws that either dissuaded or simply forbade poor people from freely choosing where to live. Saenz v. Roe, 526 U.S. 489 (1999) (durational residency requirement for welfare benefits), Shapiro, 394 U.S. at 629 (same), and Edwards v. California, 314 U. S. 160 (1941) (prohibiting immigration of indigent persons). In this way, the fundamental rights analysis regarding travel has long implicated both equal protection and due process concerns. Here, the Ordinance burdens the fundamental right of travel and residence only for particular disfavored persons. This makes it quite different from a neutral zoning law that regulates land rather than people (such as an ordinance forbidding all people from residing in areas prone to mudslides).

Because the Ordinance implicates the fundamental right of affected persons to migrate and reside in homes that would otherwise be available to them, it is unconstitutional unless the City can demonstrate that the Ordinance is necessary to promote a compelling governmental interest. Eggert, 81 Wn.2d at 844; Dunn, 405 U.S. at 342. While the Plaintiffs agree that deterring sex crimes is a compelling governmental interest, Part I.B. above shows that the Ordinance actually may undermine public safety goals rather than promote them. At a minimum, there should be a fair opportunity for discovery on the issue of necessity and narrow tailoring.

Even if Issaquah's residency restrictions did not infringe upon a fundamental right, they still would violate substantive due process and equal protection if they are not rationally related to a legitimate government interest. The rational relationship test, which courts use to evaluate

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government regulations that do not infringe upon a fundamental right or harm the plaintiff based on a suspect classification (like race) is a deferential standard of review, but "not a toothless one." Mathews v. Lucas, 427 U.S. 495, 510 (1976). Courts will strike legislation under this standard if the government's goal is not legitimate or if the legislation does not rationally further the government's goal. Zobel v. Williams, 457 U.S. 55 (1982); City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985). Washington cases applying substantive due process to property rights announce a similar but slightly more rigorous standard.

> To determine whether the regulation violates due process, the court should engage in the classic 3-prong due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the land owner.

Presbytery of Seattle v. King County, 114 Wn.2d 320, 330, 787 P.2d 907 (1990) (citations omitted). Property rights are certainly at issue here, both for the property owner who is prevented from providing shelter to her own son, to the tenant whose leasehold interest is extinguished. The same factual observations described in Part IV with regard to the police power apply under a rational basis review. The Ordinance is not rationally related to Issaquah's interest in public safety--or at the very least, plaintiffs should have a fair opportunity to prove it.

D. The Ordinance Imposes Cruel & Unusual Punishment By Banishing A Person From His Home, and By Punishing Him For His Status

The Ordinance imposes federal cruel and unusual punishment or state law cruel punishment in two distinct ways. First, the Ordinance imposes banishment in response to criminal activity. Schimelpfenig held that indiscriminate banishment orders are impermissible as part of a criminal sentence. 128 Wn. App. at 230. The term banishment "describes an ouster from the individual's home city, country, or territory." SeaRiver Maritime Financial Holdings, Inc. v. Mineta, 309 F.3d 662, 673 (9th Cir. 2002). Banishment "does more than merely restrict

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one's freedom to go or remain where others have the right to be: it often works a destruction of one's social, cultural, and political existence." Id. (citation omitted). Accord, Trop v. Dulles, 356 U.S. 86, 102 (1958) (banishment is "a fate universally decried by civilized people"). At the very least, the impact of the Ordinance on plaintiffs is important in assessing a claim of excessive punishment, so discovery should be allowed to proceed under CR 56(f).

The City may argue that the Ordinance applies not just because of Kyle's crime, but because the End of Sentence Review Committee designated him a Level II or Level III sex offender. If so, this highlights the second reason why the Ordinance is cruel and unusual punishment: it punishes Kyle based on mere status rather than for conduct. Government cannot punish people for being addicted to drugs, Robinson v. California, 370 U.S. 660 (1962), or for being vagrants, Pottinger v. City of Miami, 810 F.Supp. 1551, 1562 (S.D.Fla. 1992) (collecting cases), because no matter how carefully they conform their conduct to the general law, the state still punishes them for a state-defined status. In the same way, Issaquah punishes Kyle because of a state-defined status, no matter how carefully he obeys the law. Imposing punishment based on status is cruel.

E. Ex Post Facto and Property Rights Theories Are Not At Issue

The City has not moved for summary judgment on Plaintiffs' claims that the Ordinance is an ex post facto law or violates vested property rights. Compare City's Brief at 3 with Complaint, ¶26(g), (h) & ¶28.

VI. THE PARTIES AGREE THAT THIS CASE NEED NOT PROCEED UNDER THE LAND USE PETITION ACT (LUPA)

The Complaint included a LUPA claim in an abundance of caution to avoid the potential argument under RCW 36.70C.030 that LUPA, and not the Declaratory Judgment Act or § 1983,

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constitutes the "exclusive means" to challenge the Ordinance. Since the City has disavowed that defense, Answer ¶¶23-24, plaintiffs agree that there is no further role for LUPA in this action.

DATED this 5th day of December, 2005.

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