STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOHN DOE,

Plaintiff, **COMPLAINT**

- against - **Index No.:**

THE COUNTY OF ALBANY,

Defendant.

Plaintiff, by and through his attorneys, Kindlon Shanks & Associates, submits the following as and for a complaint herein and allege that:

PRELIMINARY STATEMENT

1. Plaintiff John Doe is a domiciled resident of the City and County of Albany, State of New York.

2. John Doe is a registered sex offender.

3. John Doe is being forced to leave a home he has rented since May, 2007.

4. John Doe is currently on parole until 2010, and his previous Parole Officer found his current apartment for him.

5. Albany County Local Law "L" for 2006, which went into effect on September 1, 2006, prohibits level two and three registered sex offenders from moving to a residence within 1000 feet of a school, childcare facility, municipal recreation facility, or any facility which offers

full time or part time religious educational services to children. (See Albany County Local Law "L" for 2006, attached as Exhibit "A.")

6. On or about September 4, 2007, Plaintiff was ordered by a representative of the Albany Police to vacate his apartment no later than October 4, 2007.

7. Since that time, Plaintiff has diligently searched for an apartment, and has checked approximately 30 addresses, but was told by the Police Officer in *each case* that the apartment fell in an "exclusion zone" pursuant to Albany County Local Law "L" for 2006.

8. Plaintiff suffers from several serious health conditions, including Hypertension, which must be monitored every day, via a phone line - he also suffers from Type II Diabetes and must give himself injections on insulin three times each day, requiring a refrigerator to store his insulin.

9. Plaintiff's new Parole Officer has not helped him find an apartment, and has told him that if he could not find one, he could perhaps be placed in a motel room- however, upon information and belief, such a motel room would not have the telephone and refrigerator he needs due to his medical conditions.

10. If he is forced to move to such a motel room, Plaintiff'‘s health will be placed at serious risk.

11. Plaintiff seeks an Order declaring Albany County Local Law "L" for 2006 unconstitutional for several reasons, including but not limited to: 1) the law violates New York State preemption principles; 2) the law violates the *ex-post facto* clauses of the New York State

and United States Constitutions.

THE PARTIES

12. At all times herein relevant, Plaintiff John Doe was and still is a resident of the City and County of Albany, State of New York.

13. At all times herein relevant, Defendant, County of Albany (hereinafter "the County") was and is a municipal corporation duly organized under the laws of the State of New York.

FACTS

14. Plaintiff John Doe is a level three registered sex offender living in the City of Albany, Albany County, State of New York.

15. Over twenty years ago, in 1985, John Doe was convicted of raping a 14 year old girl. He was sentenced to 12 ½ to 25 years in prison, and was released under Parole supervision on or about October 11, 2002.

16. Plaintiff has never been charged with a Parole violation or any new crime since his release in 2002. While incarcerated he had a good institutional record. Thus John Doe has not committed a crime in more than 22 years. Mr. Doe will be on Parole until September 14, 2010.

17. Other than the above mentioned offense, John Doe has no other conviction for any sex offense.

18. While he was in prison, John Doe successfully completed the Sex Offender

Program run in the prison by the New York State Department of Correction. Additionally, in 2004, Plaintiff entered a sex offender treatment program with Dr. Steven R. Nozik, Staff Psychologist at the Veterans Administration Hospital (VA) in Albany. He continues to attend that program and is doing well.

19. Because of serious medical conditions, John Doe has been disabled since 2004 - he is unable to work, and receives Disability payments.

20. John Doe is a veteran of the United States Military, and is thus entitled to receive medical treatment at the Veterans Administration Medical Center in Albany, New York.

21. John Doe has been diagnosed with severe Hypertension. He is enrolled in the Homebuddy Program at the VA, and must monitor his blood pressure on a daily basis. While he is hooked up to the blood pressure monitor, he must call a telephone number at the VA, and the results are read automatically over the telephone line. (See letter from VA Dr. Steven R. Nozik, which explains this, attached as Exhibit "B.")

22. Plaintiff has also been diagnosed with Type II Diabetes. He must give himself insulin injections three times each day. (Exhibit "B")

23. Plaintiff is also being treated for the following *additional* medical conditions: Hepatitis C, Status Post Myocardial Infarction, Congenital Ptosis, joint pain, Major Depressive Disorder, Agoraphobia, and Posttraumatic Stress Disorder. (Exhibit "B")

24. Albany County passed Local Law "L" for 2006 in August, 2006, and the Law became effective on September 1, 2006. The Law states that level two and three registered sex

offenders are not permitted to move within 1,000 feet of a school, childcare facility, municipal recreation facility, or any facility which offers full time or part time religious educational services to children (Exhibit "A")

25. The Local Law does not apply to those who are living in residences established before the effective date of the law. However, Plaintiff was forced to move in May, 2007, and thus the Law applied to him from that point onward.

26. For four and one half years, Plaintiff resided in an apartment on Morton Avenue in Albany, but last spring this building was sold, and all the occupants were evicted in approximately May, 2007.

27. Plaintiff's previous Parole Officer helped him find his current apartment, where he has been living since May, 2007 - he was thus led to believe that said apartment did not fall into any "exclusion zone" pursuant to Local Law "L."

28. However, on or about September 4, 2007, Mr. Doe was told by Albany Police Detective Patricia Farrell that his residence was located in an area prohibited by the Local Law, and that he would need to move by October 4, 2007 or face arrest. Mr. Doe has done everything he can to avoid being in violation of the law.

29. John Doe diligently attempted to find an apartment which did not fall into the "exclusion zone." However, he was never provided with any maps so he could ascertain which areas would be suitable. Mr. Doe found over *30 different apartments* and submitted them to Det. Farrell to see if they would be approved. In each of every case he was told the apartment fell into

the “exclusion zone” and that he would have to try again. (John Doe’s handwritten list of the addresses he submitted to Det. Farrell is attached as Exhibit “C.”)

30. At one point Det. Farrell told Mr. Doe to try checking Broadway in North Albany, or Delaware Avenue in the southern portion of Albany. However, when he did so, he learned that the Broadway area contained only warehouses, and that the portion of Delaware Avenue he was referred to contained only single family residences, which he could not afford to rent in any event.

31. Thus, it appears that, given John Doe’s financial and legal situation, the entire City of Albany is off limits to him.

32. John Doe was told by his current Parole Officer, who has *not* helped him find an apartment, that if he couldn’t not find anything, he could perhaps be placed in a motel room, most likely at the Skyline Motel in Colonie.

33. However, upon information and belief such a motel room would not contain a telephone or a refrigerator, both of which are absolutely necessary due to Mr. Doe’s health conditions. Being forced to move into such a motel room, which constitutes patently sub-standard residential housing in any case, would put Plaintiff’s health at serious risk.

34. In mid-September John Doe contacted attorney Kathy Manley at this law firm and this law firm agreed to take his case *pro bono*, believing that the Albany County Local Law “L” is unconstitutional.

35. Ms. Manley has spoken with both Det. Farrell and with Mark Harris, Esq. of the

Albany County District Attorney's Office to attempt some accommodation concerning his residence based on Mr. Doe's medical condition, or to determine if he could be granted more time to relocate. On September 26, 2007, Ms. Manley was told by Assistant District Attorney Harris that no exception would be made and that Mr. Doe would not be granted more time to find a different residence.

AS AND FOR A FIRST CAUSE OF ACTION:
VIOLATION OF PREEMPTION AND NEW YORK MUNICIPAL HOME RULE LAW

36. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "35" with the same force and effect as if more fully set forth herein.

37. In adopting the Penal law and the Sex Offender Registration Act, New York State has preempted the field in establishing penalties and restrictions for crimes involving sex offenses.

38. Albany County has thus exceeded its authority in enacting Albany County Local Law "L" for 2006, and the Local Law should be declared unconstitutional.

AS AND FOR A SECOND CAUSE OF ACTION:
VIOLATION OF THE EX POST FACTO CLAUSE

39. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "38" with the same force and effect as if more fully set forth herein.

40. Albany County Local Law "L" for 2006 imposes punishment retroactively on members of the class who were convicted prior to September 1, 2006, the effective date of the law.

41. Defendant's enforcement of Albany County Local Law "L" for 2006 thus violates the *ex post facto* clauses of the Constitutions of New York State and the United States and cannot stand.

AS AND FOR A THIRD CAUSE OF ACTION
VIOLATION OF THE DUE PROCESS CLAUSE - VAGUENESS

42. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "41" with the same force and effect as if more fully set forth herein.

43. Albany County Local Law "L" for 2006 denies Plaintiff John Doe his rights under the Due Process Clauses of the Constitutions of New York State and the United States in that the law fails to give adequate notice as to which residences fall within the excluded zone.

44. Defendant's enforcement of Albany County Local Law "L" for 2006 thus violates the Due Process clauses of the Constitutions of New York State and the United States and cannot stand.

AS AND FOR A FOURTH CAUSE OF ACTION
VIOLATION OF THE EQUAL PROTECTION CLAUSE

45. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "44" with the same force and effect as if more fully set forth herein**.**

46. Albany County Local Law "L" for 2006 effectively banishes Plaintiff from the City of Albany and thus draws the inference that he is being punished based on animus toward the class of registered level two and three sex offenders.

47. In *Romer v. Evans*, 517 US 620 (1996), the United States Supreme Court held

that harm to a politically unpopular group cannot constitute a legitimate government purpose and does not meet the rational basis test under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

48. Defendant's enforcement of Albany County Local Law "L" for 2006 thus violates Plaintiff's constitutional right to equal protection and cannot stand.

AS AND FOR A FIFTH CAUSE OF ACTION
VIOLATION OF THE DUE PROCESS CLAUSE - PROCEDURAL DUE PROCESS

49. Plaintiff repeats and realleges each and every allegation contained in paragraphs "1" through "48" with the same force and effect as if more fully set forth herein.

50. Albany County Local Law "L" for 2006 denies Plaintiff John Doe his right to Procedural Due Process in violation of the Equal Protection Clauses of the Constitutions of New York State and the United States in that it does not permit an individualized determination of any harm he might pose to children.

51. By failing to provide an opportunity for Plaintiff John Doe to show that he does not pose any risk to children, and by removing him from his home, Albany County Local Law "L" for 2006 denies him his right to Procedural Due Process in violation of the Equal Protection Clauses of the Constitutions of New York State and the United States - as such, this law cannot stand.

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief:

A. An Order declaring that Albany County Local Law "L" for 2006 is

unconstitutional and unenforceable, and enjoining the Defendant from enforcing said law.

B. Awarding Plaintiff such other and further relief as is just and proper, including costs.

Dated: September 27, 2007.
Albany, New York

Respectfully submitted,

KINDLON and SHANKS, P.C.

By: _____
Terence L. Kindlon

_____
Kathy Manley
Attorneys for Plaintiffs
74 Chapel Street
Albany, New York 12207
(518) 434-1493

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOHN DOE,

Plaintiff,

AFFIRMATION

-against-

Index No.:

THE COUNTY OF ALBANY,

Defendant.

Terence L. Kindlon and Kathy Manley, both duly authorized to practice law in the State of New York, hereby affirm the following under the penalties of perjury:

1. We are the attorneys representing Plaintiff John Doe. We are very familiar with the facts and circumstances in this case.

2. We submit this affirmation in support of our motion requesting a Temporary Restraining Order (TRO) and Preliminary Injunction staying enforcement of Defendant's order that Plaintiff John Doe vacate his residence by October 4, 2007.

THE FACTS

3. Plaintiff John Doe is a level three registered sex offender living in the City of Albany, Albany County, State of New York.

4. Over twenty years ago, in 1985, John Doe was convicted of raping a 14 year old girl. He was sentenced to 12 ½ to 25 years in prison, and was released under Parole supervision

on or about October 11, 2002.

5. Plaintiff has never been charged with a Parole violation or any new crime since his release in 2002. While incarcerated he had a good institutional record. Thus John Doe has not committed a crime in more than 22 years. Mr. Doe will be on Parole until September 14, 2010.

6. Other than the above mentioned offense, John Doe has no other conviction for any sex offense.

7. While he was in prison, John Doe successfully completed the Sex Offender Program run by the prison. In 2004, he entered a sex offender treatment program with Dr. Steven R. Nozik, Staff Psychologist at the Veterans Administration Hospital (VA) in Albany. He continues to attend that program and is doing well.

8. Because of serious medical conditions, described below, John Doe has been disabled since 2004 - he is unable to work, and receives Disability payments.

9. John Doe is a veteran of the United States Military, and receives medical treatment at the Veterans Administration Hospital in Albany.

10. John Doe has been diagnosed with severe Hypertension. He is enrolled in the Homebuddy Program at the VA, and must monitor his blood pressure on a daily basis. While he is connected to the blood pressure monitor, he must call a telephone number at the VA, and the results are read automatically over the telephone line. (See letter from VA Dr. Steven R. Nozik, which explains this, attached as Exhibit “B” to accompanying Verified Complaint)

11. Mr. Doe has also been diagnosed with Type II Diabetes. He must give himself insulin injections three times each day. (See Exhibit "B" to Verified Complaint)

12. Mr. Doe is also being treated for the following *additional* medical conditions: Hepatitis C, Status Post Myocardial Infarction, Congenital Ptosis, joint pain, Major Depressive Disorder, Agoraphobia, and Posttraumatic Stress Disorder. (See Exhibit "B"to Verified Complaint)

13. Albany County passed Local Law "L" for 2006 in August, 2006, and the Law became effective on September 1, 2006. The Law states that level two and three registered sex offenders are not permitted to move within 1,000 feet of a school, childcare facility, municipal recreation facility, or any facility which offers full time or part time religious educational services to children (See copy of the Local Law, attached as Exhibit "A" to Verified Complaint)

14. The Local Law does not apply to those who are living in residences established before the effective date of the law. However, Mr. Doe was forced to move in May, 2007, and thus the Law applied to him from that point onward.

15. For four and one half years, Mr. Doe resided in an apartment on Morton Avenue in Albany, but this building was sold, and all the occupants were subsequently evicted last spring.

16. Plaintiff's previous Parole Officer helped him find his current apartment, where he has been living since May, 2007 - he was led to believe that said apartment did not fall into

any “exclusion zone” pursuant to Local Law “L.”

17. On or about September 4, 2007, Mr. Doe was told by Albany Police Detective Patricia Farrell that his residence was prohibited by the Local Law, and that he would need to move by October 4, 2007 or face arrest under said Local Law. Mr. Doe has done everything he can to avoid being in violation of the law.

18. John Doe diligently attempted to find an apartment which did not fall into the “exclusion zone.” However, he was never provided with any maps so he could ascertain which areas would be suitable. Mr. Doe found over ***30 different apartments*** and submitted them to Det. Farrell to see if they would be approved. In each and every case he was told the apartment fell into the “exclusion zone” and that he would have to try again. (John Doe’s handwritten list of the addresses he submitted to Det. Farrell is attached as Exhibit “C” to the Verified Complaint)

19. At one point Det. Farrell told Mr. Doe to try checking Broadway in North Albany, or Delaware Avenue in the southern portion of Albany. However, when he did so, he learned that the Broadway area contained only warehouses, and that the portion of Delaware Avenue he was referred to contained only single family residences, which he could not afford to rent.

20. It appears that, given John Doe’s financial and legal situation, the entire City of Albany is off limits to him.

21. John Doe was told by his current Parole Officer, who has ***not*** helped him find an

apartment, that if he could not find anything, he could perhaps be placed in a motel room, most likely at the Skyline Motel in Colonie.

22. However, upon information and belief such a motel room would not contain a telephone or a refrigerator, both of which are absolutely necessary due to Mr. Doe's health conditions. Being forced to move into such a motel room would put Plaintiff's health at serious risk.

23. In mid-September John Doe contacted attorney Kathy Manley at this law firm and this firm agreed to take the case *pro bono*, believing that the Albany County Local Law "L" is unconstitutional.

24. Ms. Manley has spoken with both Det. Farrell and with Mark Harris, Esq. of the Albany County District Attorney's Office in an attempt to see if some accommodation could be made based on Mr. Doe's medical condition, or if he could be granted more time. On September 26, 2007, Ms. Manley was told by Mr. Harris that no exception would be made and that Mr. Doe would not be granted more time.

25. Together with this Affirmation and accompanying Order to Show Cause, Plaintiff is filing a Summons and Complaint in the New York State Supreme Court, Albany County, seeking a declaration that Albany County Local Law "L" for 2006 is unconstitutional.

26. This Affirmation is filed in support of the request for 1) a Temporary Restraining Order (TRO) enjoining Defendant from directing Plaintiff John Doe to leave his home until the

Court rules on the request for a Preliminary Injunction; and 2) a Preliminary Injunction enjoining Defendant from directing Plaintiff John Doe to leave his home at any time during the pendency of this action.

THE LAW

Provisional Remedy

27. In order to obtain a Temporary Restraining Order (TRO) and Preliminary Injunction, a party must show: 1) the likelihood of success on the merits; 2) the prospect of irreparable injury if the relief is denied; and 3) that the equities balance in the movant's favor. *Doe v. Axlerod*, 73 NY2d 748 (1988); *Grant v. Srogi*, 52 NY2d 496 (1981); *Gray v. Serbalik*, 257 AD2d 869 (3rd Dep't 1999).

28. There are many cases where TROs and/or Preliminary Injunctions have been granted in a variety of circumstances, some to protect the plaintiff's health, some to prevent eviction, and generally to preserve the status quo, all of which are the case herein. *Egan v. New York Care Plus*, 266 AD2d 600 (3rd Dep't 1999)(preliminary injunction upheld to prevent irreparable injury to Plaintiff's health); *Terrell v. Terrell*, 279 AD2d 301 (1st Dep't 2001)(a preliminary injunction was granted to prevent's the plaintiff from being evicted during the pendency of the action); *Moczan v. Moczan*, 135 AD2d 692 (2nd Dep't 1987) (preliminary injunction upheld to preserve status quo and prevent plaintiff's eviction); *Hightower v. Reid*, 5 AD3d 440 (2nd Dep't 2004) (preliminary injunction upheld to preserve status quo in real property

case); *Four Times Square Associates v. Cigna Investments*, 306 AD2d 4 (1st Dep't 2003) (preliminary injunction granted to preserve status quo); *Gray v. Serbalik*, supra (a TRO was issued to prevent defendant from cutting disputed trees); *US Ice Cream v. Carvel*, 136 AD2d 626 (2nd Dep't 1988)(a TRO was issued to allow the petitioner to stay in business pending trial in a franchise dispute); *Neumann v. Metropolitan Medical Group*, 153 AD2d 888 (2nd Dep't 1989).

29. While this challenge to a County Law purporting to regulate the residences of registered sex offenders appears to be an issue of first impression in this state, it is helpful to look at *Moczan*, supra, where the Second Department upheld the granting of a preliminary injunction *to prevent the plaintiff's eviction*, stating:

> "Under the circumstances of this case, the trial court did not abuse its discretion in granting a preliminary injunction in order that the status quo be maintained until the plaintiff's claim to a life estate in the subject premises is resolved. The defendant's failed to effectively dispute the plaintiff's contention that she will suffer irreparable injury if she is evicted nor did they dispute that the balancing of the equities is in her favor. ..." *Moczan*, supra, at 692, citations deleted.

Plaintiff is Likely to Prevail on the Merits

30. As described below, Plaintiff is likely to prevail on the merits. Although this is an issue of first impression in this state, there is a very strong preemption argument because New York State already has a comprehensive statutory scheme relating to sex offenders, and the current plethora of competing local laws in that area is counter to state policy. Moreover, there have been several recent cases in other jurisdictions where sex offender residency restrictions

(SORR) have been struck down on *ex post facto* and other grounds. Finally, there has been a host of research and reports including, significantly, a recent Human Rights Watch Report, discussed below, which shows that these laws are unconstitutional, ineffective, extremely cumbersome and counterproductive.

31. In 2006 and 2007, over 14 counties as well as a number of cities and towns in New York (as well as numerous localities in other states) have taken it upon themselves to pass laws restricting where sex offenders may live. (See www.theparson.net.so/residency) This is causing many problems for local police, as well as probation and parole officers, who are expected to enforce these laws. It is effectively banishing many ex-offenders from entire cities, towns and counties, in the process forcing them away from family members, which has been shown to be counterproductive. At times it leaves them homeless - those under supervision may be placed in motels at great cost, and those without supervision tend to go underground, often becoming homeless.[1] The laws pit county against county, and county against town, because each locality is afraid that if they are not exceedingly restrictive, they will be flooded with sex

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1According to the September, 2007 Human Rights Watch Report: "No Easy Answers: Sex Offender Laws in the U.S.", at 107-109, "The Iowa County Attorney's Association asserts that the state has lost track of over half its registered sex offenders since the [residency] restrictions went into effect. ...All sex offenders required to register must provide a home address, but because of the residency law, some sex offenders do not have a home. ...When users go to Iowa's online registry, they may be surprised to see a registrant's address listed as 'on the Racoon River between Des Moines and West Des Moines,' 'behind the Target on Euclid,' or 'underneath the I-80 bridge.' ... A Des Moines law enforcement officer explained to Human Rights Watch, 'We don't expect that the registrants are actually living under the bridge, it's just one of the places where they are legally allowed to admit to living, and so they list that as their address and go live someplace else.'"

offenders from neighboring communities.

Preemption

32. While localities are allowed to legislate in certain designated areas, they may *not* act in an arena where the state has preempted the field by showing its intent to act with respect to a particular subject. *Matter of Cohen v. Board of Appeals of Village of Saddle Rock*, 100 NY2d 395 (2003); *Albany Area Builders Assn. V. Town of Guilderland*, 74 NY2d 372 (1989); *Jancyn v. County of Suffolk*, 71 NY2d 91 (1987); *Consolidated Edison v. Town of Red Hook*, 60 NY2d 99 (1983).

33. The intent to preempt need not be express - the intent may be implied where the state has created a statutory scheme dealing with the subject matter in question. *Cohen*; *Albany Area Builders*; *Jancyn* (all supra). One of the purposes of the preemption doctrine is to prevent localities from creating many different standards on an issue of statewide concern. *Cohen; Jancyn; Consolidated Edison* (all supra.) This is exactly what is occurring with the plethora of recently-passed sex offender residence restrictions - the counties (and cities and towns) seem to be in a race to create the most stringent restrictions, thus driving sex offenders out of their localities.

34. In *Cohen*, the Court of Appeals recently held that the state had preempted the field of zoning variances, stating:

"The Legislature may expressly state its intent to preempt, or that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including *the need for statewide uniformity in a particular area*. A comprehensive and detailed statutory scheme may be evidence of the Legislature's intent to preempt. This Court will examine whether the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations. ..." *Cohen*, supra, at 400, emphasis supplied.

35. Similarly, in *Jancyn*, the Court of Appeals stated:

"Where it is determined that the State has preempted an entire field, a local law regulating the same subject matter is deemed inconsistent with the State's overriding interests because it either (1) *prohibits conduct which the state law, although perhaps not expressly speaking to, considers acceptable or at least does not prescribe* or (2) imposes additional restrictions on rights granted by State law. *Such laws, were they permitted to operated in a field preempted by State law, would tent to inhibit the operation of the State's general law and thereby thwart the operation of the State's overriding policy concerns. ...*" *Jancyn*, supra, at 97, emphasis supplied and citations deleted.

36. Finally, in *Consolidated Edison*, supra, the Court of Appeals held that a town was prohibited from regulating the siting of steam power plants, and pointing out the danger of an "uncoordinated welter" of local laws in the area, which is precisely what is occurring with sex offender residence restrictions. The Court stated:

"Local Law No. 2 is invalid because the Legislature has pre-empted such local regulation in the field of siting of major steam electric generating plants. The intent to pre-empt need not be express. It is enough that the Legislature has impliedly evinced its desire to do so. *A desire to preempt may be implied from a declaration of State police by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area*.

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On the heels of the enactment of Local Law No. 2, a neighboring town adopted a similar regulation. *Obviously, the proliferation of such local laws would lead to the very*

> *'uncoordinated welter of approvals" article VII* [regulating utilities] *was meant to replace, and thereby defeat the purpose and operation of the State regulatory scheme.*" *Consolidated Edison,* at 104-105, 107, emphasis supplied and citations deleted.

37. An examination of the current State statutes dealing with sex offenders demonstrates clearly that there has been a "declaration of State policy by the Legislature" in this area, and that "the Legislature has enacted a comprehensive and detailed regulatory scheme" with respect to sex offenders.

38. New York State has passed several detailed statutes relating to sex offenders. See, for example, Correction Law 168 et. seq., Penal Law 65.10 and other Penal Law provisions, and Executive Law 259-c. These provisions deal, respectively, with registration requirements for sex offenders; mandatory locational restrictions for certain sex offenders on probation or who receive a conditional discharge; and mandatory locational restrictions for certain sex offenders on parole. Significantly, John Doe is under Parole Supervision, and his previous Parole Officer was the one who found his current apartment.

39. In 1995 the State Legislature passed Correction Law 168 et. seq (Megan's Law) which became effective in January, 1996 and required everyone convicted of a sex offense as an adult to register his or her address with the police. A system was created to determine whether an ex-offender would be classified as level one, two or three, with level three ostensibly referring to the highest risk offenders. There are various levels of community notification, and registration requirements vary according to the sex offender level. (For example, level three offenders are

required to personally verify their addresses with law enforcement every 90 days.) An internet registry was set up for the public to access, and it now contains all level two and three offenders. At the time the law was passed the Legislature made a policy statement as to its purpose in passing this legislation, stating:

> "The legislature finds that the danger of recidivism[2] posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, and that the protection of the public from these offenders is of paramount concern or interest to government. ..."

40. Megan's Law has been amended many times since its passage, showing that the Legislature has a strong continuing interest in this area. In 2000 several sections were amended; in 2002 Section 168-d was amended to, among other things, require registration by those convicted prior to the effective date of the act; in 2003 there were more amendments; in 2006 the statute was amended to increase the length of registration from 10 years to 20 years for level one

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2While both the State and all the localities which have passed more and more onerous restrictions on sex offenders rely on allegedly high recidivism rates, research does dot support these claims. The September, 2007 Human Rights Watch Report stated, at 26-28: "...[N]umerous, rigorous studies analyzing objectively verifiable data - primarily arrest and conviction records - indicate sex offender recidivism rates are far below what legislators cite and what the public believes. The US Department of Justice tracked 9,691 male sex offenders in 15 states who were released from prison in 1994 and found that within three years only 5.3 percent of all sex offenders were arrested, and 3.5 percent convicted, for a new sex crime; 2.2 percent were rearrested for a sex offense against a child. ...The most comprehensive study of sex offender recidivism to date consists of a meta-analysis of numerous studies yielding recidivism rates for a period of up to 15 years post-release for people convicted of such serious offenses as rape and child molesting. The analysis, which included over 29,000 sex offenders, found that within four to six years of release, 14 percent of all sex offenders will be arrested or convicted for a new sex crime. Over a 15- year period, recidivism rates for all sex offenders averaged 24 percent. ... Sex offenders do not recidivate at far higher rates than other offenders, as is often believed. A federal study of prisoners released in 1994 found that 67.5 percent of all former prisoners were rearrested for a new offense within three years of their release."

offenders, and from 20 years to life for level two and three offenders; and finally, in 2007 the "Sex Offender Management and Treatment Act" (dealing with civil confinement) was passed.

41. In 2000 the Legislature amended Penal Law 65.10 to include a mandatory condition for sex offenders convicted of an offense against someone under 18 - when such persons are sentenced to probation or conditional discharge, the sentencing court *must* order that the offender stay away from any school "or any other facility or institution primarily used for the care or treatment of persons under the age of 18." Penal Law 65.10(4-A).

42. The Division of Parole has long had the authority to set special conditions for the release of parolees. Executive Law 259-c(2). In 2000 Executive Law 259-c was amended to add Section 14, which mandates that level three sex offenders convicted of an offense against someone under 18 must stay away from schools and other youth facilities in the same manner as those on probation or conditional discharge under Penal Law 65.10. In 2006 Executive Law 259-c was amended again, this time to require the parole board to notify local social service departments of the release of level two and three offenders in their county if it appears that these people are likely to seek services for homeless persons. Executive Law 259-c(16). Again, John Doe is currently under Parole Supervision, and it was his previous Parole Officer who found his current apartment for him.

43. In 2007 the Sex Offender Management and Treatment Act was passed, requiring civil confinement for certain sex offenders. This statute, however, also mentions the need for

effective sex offender outpatient management and post-release supervision. The 2007 statute also makes a policy statement, as follows:

> "(A)That recidivist sex offenders pose a danger to society that should be addressed through comprehensive programs of treatment and management. Civil and criminal process have distinct but overlapping goals, and both should be part of an integrated approach that is based on evolving scientific understanding, flexible enough to respond to current needs of individual offenders, and sufficient to provide meaningful treatment and to protect the public.
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> ***
>
> (C) ...[F]or other sex offenders, it can be effective and appropriate to provide treatment in a regimen of strict and intensive outpatient supervision. Accordingly, civil confinement should be only one element on a range of responses to the need for treatment of sex offenders. The goal of a comprehensive system should be to protect the public, reduce recidivism, and ensure offenders have access to proper treatment.
>
> (D) That some of the goals of civil commitment - protection of society, supervision of offenders, and management of their behavior - are appropriate goals of the criminal process as well. For some recidivistic sex offenders, appropriate criminal sentences, including long-term post-release supervision, may be the most appropriate way to achieve these goals." (Sex Offender Management and Treatment Act, 2007 NY ALS 7)

44. Clearly, the policy statements made in both 1995, when Megan's Law was passed, and in the 2007 sex offender management legislation, as well as all the other statutes and amendments discussed above, shows that the State has evinced its intent to legislate in the field of sex offender monitoring and management, thus preempting the field and prohibiting localities from doing so.

Ex Post Facto

45. Additionally, Albany County Local Law "L" for 2006 is unconstitutional because

it effectively banishes Plaintiff John Doe and others from the entire City of Albany, including his current apartment, based on an *ex-post facto* law, which increases the punishment for the original crime after it is committed. In The Second Circuit Court of Appeals recently stated,

> "…It is hard to improve on the definition of the *Ex Post Facto* Clause set out in an early Supreme Court case, *Calder v. Bull*, 3 US 386, 390 (1798). In that case Justice Chase described the following kind of legislation as prohibited … . Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed'." *United States v. Kilkenny*, 2007 US App. LEXIS 15932 (July 5, 2007).

46. In *Smith v. Doe*, 538 US 84 (2003), a divided Supreme Court held that an Alaska sex offender *registration* law did not violate the *Ex Post Facto* Clause as it was said not to constitute *punishment* because simply registering was not very onerous. However, the Court said that, in contrast to registration, *banishment* was considered punishment, stating, "…a State that decides to punish an individual is likely to select a means deemed punitive in our tradition … The most serious offenders [in colonial times] were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." *Smith v. Doe*, at 97-98. The *Smith* Court also further distinguished the registration law from ones such as the Washington County law, stating, "…offenders subject to the Alaska statute are free to move where they wish…" *Smith*, at 101.

47. Very recently, in *Mikaloff v. Walsh*, 2007 US Dist. LEXIS 65076 (ND OH Sept. 4, 2007), a federal judge held that the Ohio sex offender residency restrictions were

unconstitutional in violation of the *Ex Post Facto* Clause. The *Mikaloff* court stated:

> "...Mikaloff seeks to enjoin enforcement against himself of *Ohio Revised Code Section 2950.034*, a law that prohibits sex offenders from residing within 1,000 feet of a school. ...This Court concludes that the residency restriction is an unconstitutional *ex post facto* law, enters judgment against the defendant, and enjoins the defendant from enforcing the law as against Mikaloff.
>
> ***
>
> The Ex Post Facto Clause of the Federal Constitution 'forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."' *Weaver v. Graham*, 450 US 24, 29 (1981), quoting *Cummings v. Missouri*, 71 US 277 (1867). ... 'To fall within the ex post facto prohibition, two elements must be present: (1) the law must apply to events occurring before its enactment, and (2) it must disadvantage the offender affected by it.' *United States v. Abbington*, 144 F.3d 1003 (6th Cir. 1998).
>
> ...The key issue in this case is whether or not the Act is punitive, because only punitive statutes implicate the Ex Post Facto Clause.
>
> ***
>
> If the Ohio General Assembly did not intent the statute to be punitive, or its intent is ambiguous, then the Court decides whether the statute is 'so punitive either in purpose or effect' that it should be considered to constitute punishment. *Ward*, 448 US 242, 249.
>
> ***
>
> To determine whether the statutory scheme is so punitive as to negate a state's attempt to deem it civil, the Court considers five factors listed in *Smith v. Doe*, 538 US 84 : 'whether, in its necessary operation, the regulatory scheme: has been regarded in our history as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose.' *Id*, at 96....
>
> ***
>
> [The language of the statute] suggests the bill is civil, as for 'the immediate preservation of the public peace, health and safety.' ORC 2950.34. But a closer look reveals this is not the case. ...
>
> ***
>
> ...*The inclusion of criminal penalties is penal* and not something that 'serves the sole remedial purpose of protecting the public.' ...
>
> ***

Further, *Defendants argue that the County prosecutors can only seek an injunction* and that neighbors can bring these actions... On balance, because prosecutors can bring the actions but the enforcement mechanism is an injunction, the Court finds the enforcement procedures ambiguous as to whether the law was intended as criminal or civil.

***

Based on the above stated reasons, this Court finds, on balance, the legislature intended the statute as punitive. Even if it did not, the statute's intent is at the very least unclear. For that reason, the Court will consider the statute's effect.

***

Turning to the *Doe* factors, *the Court finds the residency restriction imposes an onerous affirmative disability and restraint; is analogous to parole and probation, historical forms of punishment; promotes the traditional aims of punishment, deterrence and retribution; the law is at best minimally related to the non-punitive purpose of protecting children and is excessive in relation to this alleged purpose.*

1. Affirmative Restraint

As applied to Mikaloff, the residency restriction imposes an onerous affirmative disability and restraint. ...

In this case, the law prevents a sex offender from living in his own home...

...Plaintiff Mikaloff is not 'free to change residences,' but can only move to homes that are not within 1,000 feet of a school. ...

***

2. Regarded in our History and Traditions as Punishment

The Court finds the residency restrictions analogous to the residency restrictions typical to probation and parole. Probation and parole are regarded by our history as punishment. ...

The residency restriction actually provides for a more onerous punishment that parole because it is a blanket prohibition. In determining whether a particular home is suitable for a particular parolee, the parole officer or board undertakes a case-specific analysis. The residency restriction engages in no such case-by-case analysis....

***

The defendants argue that non-compliance with the residency restriction does not trigger criminal sanction, whereas violating a parole or probation condition does....

...[S]ubjecting a sex offender to constant ouster from his or her home seems a significant deprivation of liberty and property interests. ...

3. Promotes Traditional Aims of Punishment

Punishment aims to impose retribution and deterrence. ...

> The publicity of the residency restrictions increases general deterrence. ...
> ***
> ...Ohio's residency restriction does more than promote general deterrence.
> Ohio's residency restriction significantly furthers retributive purposes... *The residency restriction applies regardless of the type of offense committed, the offender's classification level, and his or her risk or re-offense. ...This lack of any case-by-case determination demonstrates that the restriction is 'vengeance for its own sake.' ...*
> *4. Rational Relation to a Nonpunitive Purpose*
> ***
> The Court concludes that the restrict where an individual sleeps at night, even while it does not restrict where he or she spends her days, has some rational relation to restricting access or opportunity to children in those areas.
> *5. The Statutes Excessiveness with Respect to that Purpose*
> *While the statute is rational, the Court finds the statute is excessive with respect to its stated purpose. The complete lack of individualized risk assessment troubles the Court. As Justice Souter noted in Doe 'the fact that [the registration and notification law] uses past crimes as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on.' Doe,* 538 US at 109. ...
> ***
> For the reasons stated above, the Court DECLARES that O.R.C. 2950.034 violates the *ex post facto* clause of the Constitution and ENJOINS defendants from enforcing this law against Plaintiff Mikaloff. ..." *Mikaloff,* supra, at 1-2, 9-12, 14-15, 17, 20, 22-30, 33-35, emphasis supplied and some citations deleted.

48. All the reasons discussed in *Mikaloff* showing why the Ohio residency restriction was an unconstitutional *ex post facto* violation apply equally to Albany County Local Law "L" for 2006. Both laws are completely lacking in any individualized assessment of risk. Both laws would force the respective plaintiffs from their homes. Thus, even if the intent of the law is somehow seen as civil, the *Doe* factors, discussed at length in *Mikaloff*, show that the *effect* of the law is punitive, and thus it cannot be applied to Plaintiff John Doe, who was convicted long

before the passage of this law.

49. Moreover, in contrast to the Ohio law, which *only* provides for an injunction, rather than criminal penalties, the *only* enforcement mechanism in Albany County Local Law "L" for 2006 is criminal - the Law states, "Any violation of the provisions of this Local Law shall be punishable as a Misdemeanor." (Exhibit "A" to Verified Complaint, at 2) This provision shows that the *intent* of the law is penal and punitive, and therefore there is no need to even reach the *Doe* factors, because in that case, the *Ex Post Facto* Clause is automatically implicated, and the Law is unconstitutional.

50. Similarly, in *Kentucky v. Baker*, a Kentucky District Court recently held that a very similar sex offender residence restriction violated the *Ex Post Facto* Clause, stating, …this Court finds it nearly impossible to understand how any court reviewing SORR's [sex offender residence restrictions] would not make a finding that the penalty has historically been considered a punishment. … [A]pplication of these statutes to the defendants herein, each of who have triggering sex offender convictions which pre-date the effective date of the statute, constitutes an ex post facto punishment which is barred by both the United States Constitution and the Kentucky Constitution." *Kentucky v. Baker*, at 19 and 33 (Kenton District Court, Fourth Division, Case Numbers 07-M-00604 et.al. 2007)(available at www.theparson.net/so/residencyrestrictions.source.prod_affiliate.79.pdf.)

51. Therefore, Plaintiff is likely to prevail on the merits because Albany County Local Law "L" for 2006 is punitive, and thus its application to Plaintiff violates the *Ex Post Facto* Clauses of the United States and New York State Constitutions.

Other Issues

52. As set forth in the Complaint, Plaintiff also alleges that Albany County Local Law "L" for 2006 1) is unconstitutionally vague because it violates due process by failing to give adequate notice as to which residences fall in the excluded zone (especially considering that the daycare center at issue herein was not included on the County maps); 2) violates equal protection because it banishes a whole class for people; and 3) violates procedural due process as it does not permit an individualized determination of whether there is any risk posed by John Doe.

53. Finally, as is the case with all such sex offender residency restrictions, Albany County Local Law "L" for 2006 is ineffective, cumbersome and ultimately counterproductive. It sweeps too broadly, causing great hardship to those caught in its ambit; it doesn't prevent sex offenders from being in proximity from children, but only from residing or working in such areas; it creates a huge extra workload for law enforcement who are expected to determine and enforce the exclusion zones; and it ultimately renders many sex offenders homeless and/or drives them underground, thus making them much more difficult to monitor.

54. The recent Human Rights Watch Report contains a comprehensive analysis of these residency restrictions, and concludes that they are fundamentally flawed for many reasons,

stating:

> "The evidence is overwhelming, as detailed in this report, that these laws cause great hardship to the people subject to them. On the other hand, proponents of these laws are not able to point to convincing evidence of public safety gains from them. ... Blanket residency restriction should be abolished.
>
> ***
>
> ...Residency restrictions push former offenders away from the supervision, treatment, stability, and supportive networks they may need to build and maintain successful, law abiding lives. For example, Iowa officials told Human Rights Watch that they are losing track of registrants who have been made transient by the state's residency restriction law or who have dropped out of sight rather than comply with the law. As one Iowa sheriff said, 'We are less safe as a community now than we were before the residency restrictions.'
>
> ***
>
> As a human rights organization, Human Rights Watch seeks to prevent sexual violence and to ensure accountability for people who violate the rights of others to be free from sexual abuse. ... We do not object to time-limited restrictions that are imposed on individual offenders on a case-by-case basis, for example, as a condition of parole. But a wholesale banishment of a class of individuals should have no place in the United States." "*No Easy Answers: Sex Offender Laws in the US,"* Human Rights Watch, at 3, 9-10, 12.

Plaintiff Would Suffer Irreparable Injury if He is Forced from his Home

55. As described above, Plaintiff has diligently tried to find another apartment in the City of Albany, but has been unable to do so. (See Exhibit "C" to the Verified Complaint, which lists over 30 addresses Plaintiff submitted to Det. Farrell.)

56. As discussed above, if Plaintiff is forced onto the streets, or into a motel room, his health will be placed at serious risk because, upon information and belief, he will then not have adequate access to a telephone or a refrigerator, both of which are absolutely necessary for his

health. (See Exhibit "B" to Verified Complaint)

57. As in *Egan*, supra, where a preliminary injunction was granted to protect the Plaintiff's health, the risk to John Doe's health shows that he would suffer irreparable injury if he is forced from his home.

58. The Plaintiff has very conscientiously tried to do everything possible to ensure he is not in violation of Albany County Local Law "L" for 2006.

The Equities Favor Allowing Plaintiff Doe to Remain in his Home

59. While it will cause irreparable injury to the Plaintiff if he is forced from his home during the pendency of this action, the Defendant will suffer no hardship whatsoever if Plaintiff is allowed to remain in his current apartment. This is an apartment which was not only approved, but *discovered*, by Plaintiff's previous Parole Officer. Prior to May, 2007 Plaintiff lived peacfully for 4 and one half years on Morton Avenue in Albany. The status quo will simply be preserved, at no cost to Defendant.

60. Plaintiff has not committed a crime in over 22 years and has been faithfully abiding by all the conditions of his Parole Supervision and continuing sex offender treatment. He poses no threat to anyone.

61. Thus, because the granting of a preliminary injunction will prevent irreparable damage to the Plaintiff, while causing absolutely no hardship to the Defendant, the balance of the equities clearly supports the granting of the preliminary injunction. *Hightower v. Reid,* 5 AD3d

440 (2nd Dep't 2004). In that case, the court granted a preliminary injunction, stating:

> "...[T]he balance of the equities tips in the plaintiff's favor. Vista Holding, Inc., and Sprint Equities, Inc., in whom title to the real property is vested, will suffer no great hardship as a result of the issuance of the preliminary injunction, which was necessary to preserve the status quo..." *Hightower*, supra, at 441.

Conclusion

62. Therefore, because Plaintiff has shown that: 1) he is likely to prevail on the merits; 2) forcing him to move will cause irreparable damage; and 3) the balance of the equities favors the Plaintiff, the Court should grant the preliminary injunction.

A Temporary Restraining Order (TRO) Should Also be Ordered

63. CPLR 6313 provides:

> "...If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice...."

64. A temporary restraining order should be granted herein because Plaintiff John Doe has been directed to move by October 4, 2007, and it is almost certain that the motion for a preliminary injunction will not be decided before that time.

CONCLUSION

65. Based on the foregoing, the Court should grant Plaintiffs a TRO and preliminary injunction allowing Plaintiff John Doe to remain in his residence during the pendency of this action.

AFFIRMED: September 27, 2007

KINDLON and SHANKS, P.C.

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_____
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Albany County Attorney
112 State Street, Room 900
Albany, New York 12207

John Doe
(Address on file)

****

CERTIFICATE OF SERVICE

Amy Hiller hereby certifies that on September 27, 2007 she served the above Affirmation to each of the individuals named above.

_____

Amy Hiller