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ALAN CARLSON, Clerk of the Court

BY _____ DEPUTY

APPELLATE DIVISION
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE

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8 PEOPLE OF THE STATE OF) CASE NO. 30-2011-530069
CALIFORNIA,)
9 Plaintiff and)
Respondent,) JUDGMENT ON APPEAL
10 vs.) from the
11 HUGO GODINEZ,) SUPERIOR COURT
12 Defendant and) of
Appellant.) ORANGE COUNTY
13) WEST JUSTICE CENTER
14) HON. WILLIAM D. CLASTER,
JUDGE

15 Defendant appeals his conviction of a violation of Orange
16 County Ordinance 3-18-3, which provides that any person required
17 to register as a sex offender pursuant to Penal Code section 290
18 who enters into or upon any "Orange County Park where children
19 regularly gather" without written permission of the Sheriff is
20 guilty of a misdemeanor. Appellant contends the ordinance is
21 pre-empted by State law and that it is unconstitutionally vague
22 and overly broad. We reverse on grounds that the ordinance is
subject to State preemption.

23 "Under article XI, section 7 of the California
24 Constitution, '[a] county or city may make and enforce
25 within its limits all local, police, sanitary, and
26 other ordinances and regulations not in conflict with
27 general [state] laws.' 'If otherwise valid local
28 legislation conflicts with state law, it is preempted
by such law and is void.' [Citations.] 'A conflict
exists if the local legislation " 'duplicates,
contradicts, or enters an area fully occupied by

1 general law, either expressly or by legislative
2 implication.

3 (O'Connell v. City of Stockton (2007) 41 Cal.4th 1061, 1067,
4 citing, inter alia, Sherwin-Williams v. City of Los Angeles
5 (1993) 4 Cal.4th 893, 897, emphasis in original.) These same
6 cases articulate when each of the above conditions applies:

7 A local ordinance *duplicates* state law when it is
8 "coextensive" with state law . . . A local ordinance
9 *contradicts* state law when it is inimical to or cannot
10 be reconciled with state law . . . A local ordinance
11 *enters a field fully occupied* by state law in either
12 of two situations—when the Legislature "expressly
13 manifest[s]" its intent to occupy the legal area or
14 when the Legislature "impliedly" occupies the field.

15 (O'Connell, supra, 41 Cal.4th at 1067-1068, citing Sherwin-
16 Williams, supra, 4 Cal.4th at 898.)

17 In determining the issue of pre-emption, the first issue is
18 to determine the relevant field. (Gregory v. City of San Juan
19 Capistrano (1983) 142 Cal.App.3d 72, 84.) Appellant
20 characterizes the relevant field as the "control, containment
21 and conduct of registered sex offenders," while Real Party puts
22 forth the much narrower field of "criminalizing where sex
23 offenders may go." But, "where sex offenders may go" is a
24 subset of "containment." "Containment" is defined in the
25 Macmillan Dictionary to include "the process of controlling a
26 situation or substance that could become harmful or dangerous."

27 The same publication defines "contain" to include "to keep
28 something harmful from spreading" or "to keep within limits."
As applied to this case, a restriction or criminalization of
"where sex offenders may go" is but a subgroup of the broader
issue of "containment." As discussed below, extensive state
legislation restricts and regulates numerous areas of the lives
of registered sex offenders. At least some of those restrictions
pertain specifically to "where sex offenders may go," and
include criminal penalties for violations thereof. As examples,

1 Penal Code section 653b provides criminal penalties for "every
2 person" who "loiters about any school or public place at or near
3 which children attend or normally congregate and who remains at
4 any school or public place at or near which children attend or
5 normally congregate, or who reenters or comes upon a school or
6 place within 72 hours, after being asked to leave," with
7 enhanced penalties for registered sex offenders. Penal Code
8 section 626.81 provides that any person required to register as
9 a sex offender who "comes in to any school building or upon any
10 school ground without lawful business thereon and written
11 permission from the chief administrative official of that
12 school, is guilty of a misdemeanor." Penal Code section
13 3003.5(b) provides that it is "unlawful" for "any person for
14 whom registration is required pursuant to Section 290 to reside
15 within 2000 feet of any public or private school, or park where
16 children regularly gather."¹ These provisions restrict "where
17 sex offenders may go" as part of the broader state provision for
18 "containment" of sex offenders.

19 When the Legislature has not expressly stated its
20 intent to occupy an area of law, we look to whether it
21 has *impliedly* done so. This occurs in three
22 situations: when "(1) the subject matter has been so
23 fully and completely covered by general law as to
24 clearly indicate that it has become exclusively a
25 matter of state concern; (2) the subject matter has
26 been partially covered by general law couched in such
27 terms as to indicate clearly that a paramount state
28 concern will not tolerate further or additional local
action; or (3) the subject matter has been partially
covered by general law, and the subject is of such a
nature that the adverse effect of a local ordinance on

¹ We are aware that in People v. Mosley, Supreme Court Case Number S187965, the court is currently considering the following questions: (1) Does Penal Code section 3003.5, subdivision (b), validly create a misdemeanor offense subject to violation by all persons required to register for life pursuant to Penal Code section 290 et seq., regardless of their parole status?; (2) If Penal Code section 3003.5, subdivision (b), is not separately enforceable as a misdemeanor offense, does that section nevertheless operate to establish the residency restrictions contained therein as a valid condition of sex offender registration pursuant to Penal Code section 290 et seq.?

1 the transient citizens of the state outweighs the
2 possible benefit to the' locality."

3 (O'Connell, supra, 41 Cal.4th at 1068, citing Sherwin-Williams,
4 supra, 4 Cal.4th at 898.) We conclude that the ordinance at
5 issue in this case is subject to implied preemption under either
6 situation 1 or situation 3, above.

7 Legislative intent to preempt a field may be found in a
8 "multiplicity of statutes" rather than a "single enactment."
9 (See Abbott v. City of Los Angeles (1960) 53 Cal.2d 674 and
10 cases cited therein. See also O'Connell, supra.)

11 Although none of the statutes addressing sex offenders
12 states in so many words an express intent to occupy the field of
13 sex offender "containment," pre-emption is strongly implied.
14 Penal Code section 290.03(a) provides in part that the
15 "Legislature finds and declares that a comprehensive system of
16 risk assessment, supervision, monitoring and containment for
17 registered sex offenders residing in California communities is
18 necessary to enhance public safety and reduce the risk of
19 recidivism posed by these offenders." Section 290.03(b)
20 provides that "[i]n enacting the Sex Offender Punishment,
21 Control, and Containment Act of 2006, the Legislature hereby
22 creates a standardized, statewide system to identify, assess,
23 monitor and contain known sex offenders for the purpose of
24 reducing the risk of recidivism posed by these offenders,
25 thereby protecting victims and potential victims from future
26 harm." This specifically-stated creation of a "standardized,
27 statewide system" to, among other things, "contain" known sex
28 offenders strongly suggests that the Legislature has, if not
expressly, then at least impliedly, occupied the field of
restrictions on where sex offenders may go and penalties for
violations of those restrictions.

We additionally note that in enacting Penal Code section
3053.8, the Legislature specifically considered and rejected a

1 broad prohibition against all registered felony sex offenders
2 entering parks, in favor of a more narrowly tailored restriction
3 designed to protect children from those offenders most likely to
4 do them harm. We are aware that standing alone, "the
5 nonenactment of legislation is an exceedingly unreliable
6 indicator of legislative intent and an exceedingly weak reed
7 upon which to rest a preemption of the exercise by a
8 municipality of its police powers." (Gregory v. City of San
9 Juan Capistrano, supra, 142 Cal.App.3d at 84.) However, in this
10 case, the Legislature's consideration and rejection of the much
11 broader proposed Penal Code section 647.9 in favor of the
12 narrowly tailored Penal Code section 3053.8 as part of a
13 comprehensive reform of the laws pertaining to registered sex
14 offenders suggests to this court that the Legislature concluded
15 that not all registered sex offenders need to be prohibited from
16 entry into all parks under all circumstances.

17 We further note that the residency restriction statute,
18 Penal Code section 3033.5, contains an express provision that
19 "[n]othing in this section shall prohibit municipal
20 jurisdictions from enacting local ordinances that further
21 restrict the residency of any person for whom registration is
22 required pursuant to Section 290." After rejecting the much
23 broader prohibition against all felony sex offenders "being in"
24 or entering parks, the Legislature did not include such an
25 express provision for more restrictive local regulations in
26 Penal Code section 3053.8. That the Legislature did not include
27 such a provision in Penal Code section 3053.8 raises the
28 application of the legal maxim inclusio unius est exclusio
alterius (the inclusion of one is the exclusion of another).
(People v. Bivert (2011) 52 Cal.4th 96, 120.)

We further conclude that the "adverse effect" of the ordinance at issue here, together with the numerous similar yet not identical ordinances enacted by various cities on the

1 "transient citizens of the state" outweighs the "possible
2 benefit to the locality." (See O'Connell, supra.) We take
3 judicial notice that Fullerton Municipal Code section 7.150.050
4 prohibits offenders from being within 300 feet of a City park,
5 and contains its own definition of "offenders," limited to those
6 who have committed offense against children. City of Orange
7 Ordinance 9.10.030 prohibits registered offenders from
8 "loitering" in a "child safety zone," defined as those areas
9 located within 500 feet from the nearest property line of a
10 child care center, public or private school, park, public
11 library, school bus stop, swimming or wading pool, commercial
12 establishment that provides any area in or adjacent to such
13 establishment as a children's playground, or any facility whose
14 primary purpose is to provide classes or group activities for
15 children. The term "loiter" for purposes of that ordinance is
16 defined as to delay, linger or idle about without lawful
17 business. Tustin Ordinance 5953 prohibits "loitering," defined
18 as remaining for more than five minutes "without a lawful
19 purpose" in a "child safety zone," defined to include the area
20 within 300 feet of various designated establishments, with
21 certain exceptions including access to a public park "for the
22 purpose of exercising the right of free expression or assembly."

23 Irvine Ordinance 4-14-803 precludes registered persons from
24 "enter[ing] upon or into any City park and recreational facility
25 where children regularly gather" without written permission, and
26 defines "City park and recreational facility" to mean "community
27 and neighborhood parks, the Orange County Great Park, open space
28 preserves, trails" and "all other lands and facilities under the
ownership, operation or maintenance the City that are utilized
for public park or recreational purposes, whether passive or
active." Santa Ana Ordinance 10-702 prohibits "sex offenders,"
defined as those required to register when the underlying
offense involved a child, from "being on or within" 300 feet of

1 a "children's facility," "while there for the apparent purpose
2 of observing a child or children," "while loitering" or if the
3 offender returns after having been notified to leave.

4 The various and inconsistent terms of these and
5 potentially other local ordinances make clear to this court
6 that regulations pertaining to the "containment" of sex
7 offenders, including restrictions on where such offenders
8 "may go," must of necessity be a matter of exclusively
9 state concern. Real Party cites Great Western Shows v.
10 County of Los Angeles (2002) 27 Cal.4th 853, 866 and Galvan
11 v. Superior Court (1969) 70 Cal.2d 851, which acknowledged
12 the differences between urban and rural areas with respect
13 to gun violence, and that "problems with firearms are
14 likely to require different treatment in San Francisco
15 County than in Mono County." But, Real Party fails to
16 explain how differences in demographics, zoning, geographic
17 landscape and community developments require each community
18 to have its own twist on sex offender requirements for the
19 protection of children, as Real Party contends. Rather, it
20 is in the interest of all communities to protect children
21 from falling victim to sexual predators. In our view,
22 uniform restrictions on "where sex offenders may go" are
23 best suited to provide that protection, by ensuring that
24 all residents of the state are familiar with where sex
25 offenders are and are not permitted, so that parents may
26 act accordingly for the protection of their children by
27 avoiding places where those who pose a threat to children
28 are likely to be found.


25 The effect of inconsistent local ordinances on the
26 "transient population of the state" is substantial. Given
27 the wide variation among the local ordinances, the
28 probability of an offender being unaware of the particular
restrictions on his or her activities in a particular


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community, and thus the chance of inadvertently violating one of these ordinances, is great. Such a patchwork of local ordinances poses tremendous risk to the offender who may not be aware of each regulation in each city, or indeed even know the precise location of city borders. A standard, statewide system provides the greatest opportunity for all registered sex offenders to acquaint themselves with what is required of them and avoid incurring future violations, while also keeping the public aware of those areas from which sex offenders are prohibited. In sum, any gain to an individual local community from its own specific ordinance is outweighed by the substantial risk to the transient citizens of the state.

For the reasons discussed above, we conclude that County Ordinance 3-18-3 is void on grounds that it enters an area of law subject to State preemption. We therefore need not consider whether the ordinance is unconstitutionally vague or overly broad.

The judgment of the trial court is reversed.


CLAY M. SMITH, Presiding Judge


CHARLES MARGINES, Judge


CRAIG L. GRIFFIN, Judge

NOV 15 2012

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8	PEOPLE OF THE STATE OF)	CASE NO. 30-2011-530069
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9)	
	Plaintiff and)	ORDER ON APPEAL
10	Respondent,)	from the
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11	vs.)	of
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12	HUGO GODINEZ,)	WEST JUSTICE CENTER
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13	Defendant and)	
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14)	JUDGE

15 Defendant appeals his conviction of a violation of Orange
16 County Ordinance 3-18-3, which provides that any person required
17 to register as a sex offender pursuant to Penal Code section 290
18 who enters into or upon and "Orange County Park where children
19 regularly gather" without written permission of the Sheriff is
20 guilty of a misdemeanor. This court reversed the trial court
21 judgment in a judgment entered on November 15, 2012. This court
22 concluded that the ordinance is void on grounds that it is
subject to State law preemption.

23 CRC Rule 8.1005(a) permits the appellate division to
24 certify a case for transfer to the Court of Appeal on its own
25 motion if it "determines that transfer is necessary to secure
26 uniformity of decision or to settle an important question of
27 law." In this case, transfer is necessary to settle the
28 "important question" of whether cities and counties may enact
their own local ordinances prohibiting registered sex offenders

1 from being present in or near locations including parks and
2 other places "where children regularly gather," or whether such
3 local ordinances are barred by the enactment of state statutes
4 including the specific enactment in Penal Code section 290.03
5 and related statutes of a "standardized, statewide system to
6 identify, assess, monitor and contain known sex offenders." Our
7 research has disclosed no published case authority addressing
8 whether local ordinances pertaining to the containment of sex
9 offenders, including whether such offenders may go, are
10 permissible, or void on grounds of state law preemption.

11 In addition, this court currently has pending before it one
12 other matter challenging a Fullerton ordinance prohibiting
13 registered sex offenders from being present within 300 feet of
14 its City parks. (Dermody v. Superior Court, OCSC Case Number
15 30-2012-592465.) We are also aware that additional cases are
16 pending at the trial court level, and/or other persons have been
17 arrested for violations of similar ordinances in other cities.
18 It is apparent to this court that this is an issue likely to
19 recur. Resolution of the preemption issue by the Court of
20 Appeal will provide uniform guidance in future cases.

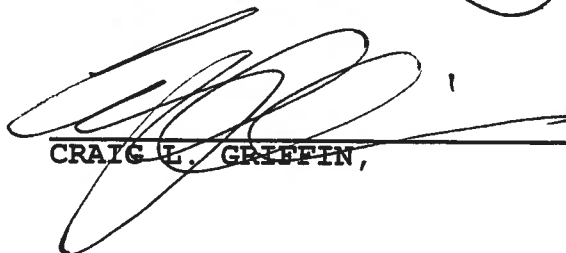
21 The matter is certified for transfer to the Court of Appeal
22 pursuant to CRC Rule 8.1005.

23 

24 CLAY M. SMITH, Presiding Judge

25 

26 CHARLES MARGINES, Judge

27 

28 CRAIG L. GRIFFIN, Judge