

City of Piedmont
Council Agenda Report

DATE: March 15, 2010

FROM: George Peyton, City Attorney

SUBJECT: **Report on Possible Municipal Legislation Regarding Penal Code
Section 290 (Sex Offender Registrants)**

RECOMMENDATION

After reviewing this report, provide staff with instructions on a possible Sex Offender Residency Ordinance or other action.

BACKGROUND

The City was notified that James F. Donnelly, a Sex Offender Registrant pursuant to Penal Code Section 290 had taken up residence in his sister's home at 256 Wildwood Avenue near Wildwood School. The Police Department after full consultation with the State Attorney General's Office and in accordance with law had a Public Notice published relating to Mr. Donnelly's presence at 256 Wildwood Avenue and other pertinent information on March 3 in the *Piedmont Post* and on March 5 in *The Piedmonter* to provide notice to the Piedmont community. In addition, the Police Department provided a copy of the same public notice on March 3 to be distributed without changes to it. Mr. Donnelly has indicated to the Piedmont Police Department that he intends to relocate outside of Piedmont within the next several weeks.

Applicable Law

In California the law requires sex offenders to register pursuant to Section 290 of the California Penal Code. "The purpose of section 290 is to assure that persons convicted of the crimes enumerated therein shall be readily available for police surveillance at all times because the Legislature deemed them likely to commit similar offenses in the future." (In re Alva (2004) 33 Cal. 4th 254, 264.) Section 290 was originally enacted in 1947, and has been amended since then. An approximately 100 page treatise on the law entitled "Sex Offender Registration in California by Deputy Attorney General Janet E. Neeley (2009) makes clear that interpretation and implementation of Section 290 is complicated.

Megan's Law was originally enacted in 1996 by the State Legislature (AB1562) and is generally cited relating to all California laws relating to public notification involving sex offenders. It provides authority for notification at various levels, including a Megan's

Notice published by the Piedmont Police Department was published pursuant to Penal Code Section 290.45.

In November, 2006, California voters approved Proposition 83, entitled “The Sexual Predator Punishment and Control Act: Jessica’s Law.” As part of Proposition 83 a new subsection (b) of Penal Code Section 3003.5 became effective which makes it unlawful for a registered sex offender to live and reside within an area of 2000 feet from any school (public or private) or from any park where children gather on a regular basis.

Local Sex Offender Residency Ordinances

Also found in Jessica’s Law is an authorization for enactment of local ordinances pursuant to Penal Code Section 3003.5(c): “Nothing in this section should prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290.” Based on my investigation various cities around California have adopted such local Sex Offender Residency Ordinances, apparently more commonly in Southern California than in the Bay Area. I have attached two local Ordinances, one from Delano and the other from Grover Beach, that are relatively straight forward and would appear to be adaptable to Piedmont’s needs. Some of the Ordinances I have reviewed are long and complicated and deal with fact situations that would not apply to Piedmont, such as motels. I will be analyzing specific questions involving local Ordinances later in this Report.

Impetus for Local Ordinances

It appears that one of the primary reasons local communities are moved to pass local Ordinances is because there is no penalty for violation of the 2000 foot prohibited area rule under Penal Code Section 3003.5(b). The Piedmont Police Department was informed of this fact by the Alameda County District Attorney’s Office in connection with James Donnelly when he took up residence near Wildwood School, and a New York Times article on March 6, 2010, stated: “For Donnelly’s housing decision to be considered a violation of state law, “there has to be a punishment attached,” Nancy O’Malley, the Alameda County District Attorney, said in an interview. “Jessica’s law never assigned a punishment.”

General Comments About Local Ordinances

In general, a number of people who I have spoken with have raised questions about enforceability of local Sex Offender Residency Ordinances. For instance, I spoke at some length with Deputy Attorney General Janet Neeley in Sacramento, who is generally considered to be the top expert in California on sex offender laws. Ms. Neeley feels strongly about the matter, and said that she felt that such local Ordinances may well be held unconstitutional and in many, if not most, cases would be unenforceable. She said that she and the Attorney General’s Office were definitely recommending against adoption of local Ordinances.

A Southern California attorney I spoke with whose law firm represents a number of cities in Los Angeles and Ventura Counties, indicated that he had made a presentation in February to Southern California City Attorneys on the latest developments relating to Sex Offender Laws, including those that would impact Piedmont adopting its own local Sex Offender Residency Ordinance.

He specifically called my attention to both the very recent In Re: E.J. California Supreme Court decision, 2010 WL 337150, as well another Sex Offender case now pending before the California Supreme Court. The attorney pointed out that in the In Re: E.J. decision was rather limited in scope, and stated: “None of the constitutional issues of which I’m sure is the basis of your inquiry were reviewed by the Court.” He further said that the California Supreme Court in its decision specifically referred back to the Superior Court a number of constitutional issues, including purported violations of the constitutional rights to privacy, intrastate travel, property and substantive due process, as well as the argument that Penal Code Section 3003.5 (which authorized the local Ordinances) is vague and overbroad.

In connection with the other case, People v. Mosley (2008) 86 Cal. Rptr. 3d. 23 [granted review by the Supreme Court (2009) 203 P. 3d. 425], the lower Court held that Section 3005.5 as applied to the defendant had the effect of a penalty, based on reasoning in the attorney’s words that the “...residency restrictions forced sex offenders to choose where to live and make decisions concerning their families and subjects them to the constant threat of ouster if a school or park opens nearby. Registration is akin to traditional punishments of banishment and property deprivation.”

The attorney went on to say: “The focus of my presentation was that these cases have not been reconciled by the Supreme Court. As a result, there is no existing case law on which an ordinance can be effectively drafted without fear of challenge at the Superior Court level ... I know that several of our City Attorneys have advised their clients to refrain from enacting an ordinance based on Prop. 83 until there is more direction from the Supreme Court.”

Various other attorneys I spoke with urged caution in either adopting new local Sex Offender Residency Ordinances or in trying to enforce such Ordinances that are already on the books, particularly because the status of the law is very uncertain right now until the California Supreme Court makes a ruling that decides a number of the constitutional and related challenges that have been made against such laws. Since public defenders and criminal attorneys who defend sex offenders will likely bring up these various defenses in any prosecution of a violation of a local Residency Ordinance, some of these attorneys pointed out that enforcement actions could be lengthy and expensive, as well as possibly unsuccessful.

Ex Post Facto Doctrine

A key legal issue involving James Donnelly, the Sex Offender Registrant in Piedmont, is that he can raise an Ex Post Facto defense based on the fact that he had established

residency in Piedmont prior to any local Sex Offender Residency Ordinance being adopted here, and that he was being penalized after the fact. Deputy Attorney General Janet Neeley said that she felt Mr. Donnelly would likely be successful in raising such a defense. In practical terms, perhaps even more important is that while the Alameda County District Attorney's Office through its Chief Deputy District Attorney (after fully consulting with District Attorney Nancy O'Malley) agreed to provide enforcement of a Piedmont Sex Offender Residency Ordinance (assuming that the DA's Office had previously approving the wording of the Ordinance), the Alameda County District Attorney will not carry out enforcement against Mr. Donnelly in Piedmont due to their belief that he would have a good Ex Post Facto Defense.

I raised the question relating to the Ex Post Facto Defense with a number of other attorneys, and they were in general agreement with that it would be successfully used based on Piedmont's fact situation. In fact, a number of cities specifically include wording in their local Ordinances that they will not be applicable to a sex offender who resided in the city before the Ordinance was adopted. Others said that cities who did not exclude a sex offender with prior residence in the city simply did not enforce the Ordinance against such people.

Options to Council

Since it appears that adoption of a Sex Offender Residency Ordinance would not be enforceable against James Donnelly, at least as part of his current residency, the first question is whether the City Council still would like to adopt an Ordinance that would apply to future Registered Sex Offenders who may decide to take up residence in Piedmont.

Obviously, a number of Piedmont residents, particularly those with young children, are honestly concerned about protecting Piedmont children from sex offenders. If so, the Council can instruct me to draft a local Sex Offender Residency Ordinance for your consideration at a future meeting. Based on what I have been told by others far more knowledgeable than I in the field of sex offender laws, there is a reasonable likelihood that Piedmont will have to make changes in such an Ordinance in the next few years based on whatever rulings the California Supreme Court eventually makes on the various constitutional and other challenges currently being considered. In addition, any actual enforcement action under a Piedmont Ordinance may be difficult for reasons previously stated in this Report, at least until the California Supreme Court has ruled in a manner that gives more certainty than now exists.

In speaking to the City Attorney of Grover Beach, whose local Ordinance is attached, he mentioned one possible reason for adopting an Ordinance now, i.e., that just by having it on the books and spreading word widely in the Piedmont community, it may discourage future Registered Sex Offenders from locating in Piedmont. The Grover Beach City Attorney went on to mention that in one case where they found out a Registered Sex Offender was trying to buy a home in a restricted area under the local Ordinance, the City gave notice to the title company of the potential violation and the escrow failed to close.

Piedmont could give written notice to all real estate companies and rental properties in Piedmont, if the Council decides to pass such an Ordinance.

Drafting of a Local Ordinance

If you do wish to consider a local Ordinance for Piedmont, I will need some guidance on what the contents will be. First, I definitely suggest that it include a No Retroactive Application provision as is set forth in Section 9.80.060 of the attached Delano Ordinance (page 8).

Another basic question is whether you want to use the 2,000 foot limit set forth in State law and in the Delano Ordinance under Section 9.80.030. You will notice that in Section 3999 B. of the Grover Beach Ordinance the limit is 1,000 feet instead of 2,000 feet. The Grover Beach City Attorney told me that one reason his City decided to reduce the distance to 1,000 feet was that there was a concern that using 2,000 feet would exclude Registered Sex Offenders from living anywhere within the Grover Beach city limits, and this total exclusion might be used as a successful defense by a Registered Sex Offender against enforcement of the Grover Beach Ordinance. He further indicated that Grover Beach currently has Registered Sex Offenders living in the unrestricted areas of the city. Timothy Rood has suggested in an email to the City Council dated March 3, 2009 that a 500 foot limit be considered, and that might have some merit. Incidentally, I understand that using the 2,000 foot limit would probably exclude a Registered Sex Offender from living anywhere in Piedmont.

Here are some other matters to consider:

1. What do you want to use as the definition for the specific sites from which the area is measured for the restricted zone? Penal Code Section 3005.5 (b) uses a public or private school or park where children gather as the criteria. Grover Beach adds “day care center” (see Section 3999 B.I.), while Delano adds various other locations, such as “public library” and “school bus stop location” (see Section 9.80.020 B. defining “Children’s facility.”) My suggestion is that you restrict the locations to either Penal Code Section 3005.5 (b) or add “day care centers”.
2. Delano includes a prohibition against loitering within 300 feet of any children’s facility. I am not sure how enforceable that would be, but would be happy to check with the Alameda County District Attorney if you might like this included in a Piedmont Ordinance.
3. Grover Beach provides that a Map be adopted showing the restricted areas, and also provides that the Map will be updated on an annual basis, particularly due to the fact that according to its City Attorney Grover Beach is a growing community which adds new schools and parks from time to time. Obviously, if you decide on 2,000 feet to determine that restricted area, this would not be necessary because the entire area of Piedmont would be covered.

Summary

Because of the current uncertainty in the applicable law, any Ordinance you adopt may be difficult to enforce and may have to be changed, possibly in a substantial way. On the other hand, if you feel that the mere adoption of a Sex Offender Residency Ordinance will help discourage Registered Sex Offenders from locating within areas of Piedmont close to schools or playgrounds, I will do my best to draft an Ordinance to carry out your wishes. Remember that if we want the Alameda County District Attorney to enforce Piedmont's Ordinance, we will need to allow time for the DA's Office to review and approve the Ordinance before you adopt it.

City of Delano

Chapter 9.80

REGULATIONS REGARDING LOITERING AND RESIDENCY REQUIREMENTS ON REGISTERED SEX OFFENDERS

Sections:

- 9.80.010 Purpose
- 9.80.020 Definitions
- 9.80.030 Restriction on Residency
- 9.80.040 Prohibition against loitering
- 9.80.050 Prohibition against returning to a site
- 9.80.060 No retroactive application of residency requirements
- 9.80.070 Notification of sex offender
- 9.80.080 Enforcement authority

9.80.010 Purpose. On November 7, 2006, the voters of the State of California overwhelmingly approved Proposition 83 “The Sexual Predator Punishment and Control Act: Jessica’s Law,” so as to better protect Californians, and the children of this State in particular, from sex offenders. Proposition 83 enacted new subsection (b) of Penal Code 3003.5 which made it unlawful for any registered sex offender to reside within 2000 feet of any public or private school, or any park where children regularly gather. In addition, proposition 83 specifies in subsection (c) of Penal Code Section 3003.5 that municipal jurisdictions may enact local ordinances that further restrict the residency of set offenders. The City Council of the City of Delano has determined that the factors set forth in Section 2 of Proposition 83, including the high recidivism rate of sex offenders and the frequency with which they prey on victims under the age of 18, make it incumbent upon the City of Delano to enact additional restrictions as to control behavior by sex offenders to decrease the potential for their victimization of children and to protect its residents.

9.80.020 Definitions. When used in this Chapter the following words, terms, and phrases shall have the meanings ascribed to them in this Section.

- A. Child or Children A child or children shall mean any person under the age of eighteen(18) years of age.

- B. Children's facility A Children's Facility shall mean any child day care facility, public library, commercial establishment that provides any area in or adjacent to such establishment as a children's playground, school bus stop location, public or private school, or any location that regularly facilitates on their property classes or group activities for children.
- C. Child Day Care Center A Child Day Care Center shall mean a facility that provides non-medical care to children in need of personal services, supervision, or assistance essential for sustaining the activities of daily living or for the protection of the individual on less than a twenty four (24) hour basis, including but not limited to any family day care home, infant center, preschool, extended day care facility, or school-age child care center.
- D. Loitering Loitering shall mean to delay or linger without any apparent purpose or cause which is in excess of 5 minutes.
- E. Sex Offender A Sex Offender shall mean any person who has been required to register with a governmental entity as a Sex Offender, including but not limited to any person required to so register pursuant to California Penal Code Section 290.

9.80.030 Restriction on residency. It is unlawful for any Sex Offender to reside within two thousand (2000) feet of any Children's Facility or Child Day Care Center within the City.

9.80.040 Prohibition against loitering. It is unlawful for any Sex Offender to loiter within three hundred (300) feet of any Children's Facility or Child Day Care Center within the City.

9.80.050 Prohibition against returning to a site. It is unlawful for any Sex Offender to return to any location within three hundred (300) feet of any children's facility or child day care center at any time after having been notified to leave such children's facility or child day care center by the owner or any authorized official or agent of such children's facility or day care center.

9.80.060 No retroactive application of residency requirements. Notwithstanding any provision of Chapter 9.80 to the contrary, any Sex Offender legally occupying any residence within the City of Delano prior to the effective date of this ordinance may continue to occupy such residence and shall not be deemed in violation of this Chapter by reason of such occupancy. Should such Sex Offender move after the effective date of Chapter 9.80, the provisions of Section 9.80.030 shall apply.

9.80.070 Notification of sex offenders. The Delano Police Department is directed to send a copy of Chapter 9.80 to each sex offender who on the effective date of Chapter 9.80 is living within the City of Delano.

9.80.080 Enforcement authority. The Chief of Police, or his/her authorized agents, shall see to the enforcement of all regulations relating to this Chapter.

ORDINANCE NO. 07-01

**AN ORDINANCE OF THE CITY COUNCIL OF THE
CITY OF GROVER BEACH, CALIFORNIA, ADDING CHAPTER 16 TO ARTICLE III
OF THE GROVER BEACH MUNICIPAL CODE, REGARDING
RESIDENCY REQUIREMENTS FOR PENAL CODE 290 REGISTRANTS**

WHEREAS, based on the evidence available, sex offenders have recidivism rates as high as forty-five percent. According to a 1997 report by the U. S. Department of Justice, and subsequent amendments, sex offenders are least likely to be cured and the most likely to re-offend, and tend to prey on the most innocent members of society; and

WHEREAS, more than two-thirds of the victims of rape and sexual assault are under eighteen years of age. Sex offenders have a dramatically higher recidivism rate for their crimes than any other type of violent felon. Sex offenders pose a clear threat to the children residing or visiting in the City of Grover Beach; and

WHEREAS, the voters of the State of California adopted Proposition 83 which went into effect on January 1, 2007. One section of Proposition 83 enacted Penal Code Section 3003.5 which authorizes municipal jurisdictions to enact local ordinances that restrict the residency of any person who is required to register as a sex offender pursuant to Penal Code Section 290; and

WHEREAS, the City Council of the City of Grover Beach desires to impose safety precautions in furtherance of the goal of protecting children by establishing areas around schools, parks, and licensed day care centers wherein certain sexual offenders shall be prohibited from establishing permanent or temporary residence; and

WHEREAS, this Ordinance is not intended to conflict with state law but is intended to supplement existing state law but to tailor the areas where sex offenders are allowed to establish residence to the unique geography of the City of Grover Beach.

NOW THEREFORE, THE CITY COUNCIL OF THE CITY OF GROVER BEACH does ordain as follows:

PART 1.

SECTION 1. RECITALS

The above recitals and findings are true and correct.

SECTION 2. Chapter 16 is hereby added to Article III of the Grover Beach Municipal Code to read as follows:

CHAPTER 16. RESIDENCY REQUIREMENTS FOR PENAL CODE 290 REGISTRANTS

Sec. 3999. Definitions and Prohibitions.

A. Definitions.

1. "Children" means those persons who are under the age of eighteen (18).
2. "Sex offender" means a person who has been required to register with a governmental entity as a sex offender under California Penal Code Section 290.
3. "Day care center" means any child care facility including infant centers, preschools, extended day care facilities, and school-age child care centers, as defined in Section 1596.76 of the California Health and Safety Code and licensed pursuant to the provisions of the California Child Day Care Facilities Act (Health and Safety Code Sections 1596.70 et. seq).
4. "Permanent residence" means a place where a person abides, lodges, or resided for fourteen (14) or more consecutive days.
5. "Temporary residence" means a place where a person abides, lodges, or resides for a period of fourteen (14) or more days in the aggregate during any calendar year and which is not the person's permanent address, or a place where a person routinely abides, lodges, or resides for a period of four (4) or more consecutive or nonconsecutive days in any month and which is not the person's permanent residence.
6. "Park" means any city, county, school district, state or federal public park or playground where children are likely to be.
7. "School" means any public or private school which is established to educate children under eighteen years of age.

B. Prohibitions.

1. It is unlawful for any sex offender as defined in this Ordinance, where their victim was less than eighteen years of age, to establish a permanent residence or temporary residence within one thousand (1,000) feet of any school, park, or day care center, as defined in this Ordinance.
2. The City Council shall, by Resolution, adopt a list of the facilities described in this subsection as well as a map showing the protected locations and those properties within one thousand (1,000) feet of the protected locations. The list and map shall be updated on an annual basis, but may be updated more frequently should new protected locations be established or where uses in existing protected location have changed.
3. Distance from protected locations shall be measured from the outer boundaries of the properties on which the facilities described in this subsection are situated. Any parcels that are partially included within a protected area, as shown on the map, shall be considered to be wholly included within the protected area.

4. The distance of one thousand (1,000) feet shall be measured in a straight line from the closest property line of the residence of a sex offender, to the closest property line of any protected location.

Section 3999.1. Violations

A violation of this section is a misdemeanor punishable by a fine of up to One Thousand Dollars (\$1,000.00) or by imprisonment for up to one (1) year, or both. A person is guilty of a new and separate offense if he/she has not relocated his/her residence to an area which is not within one thousand (1,000) feet of a protected area within thirty (30) days of being cited for a violation of this section for the first time. In addition a person is guilty of a new and separate offense for each day thereafter that he/she does not relocate his/her residence to an area that is not within one thousand (1,000) feet of a protected area.


PART 2. SEVERABILITY

If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this Ordinance or any part thereof is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portion of this Ordinance or any part thereof. The City Council hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause, or phrase thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional.

PART 3. This Ordinance shall become effective thirty (30) days after the date of its adoption, and within fifteen (15) days after its adoption, it shall be published once, together with the names of the Council Members voting thereon, in a newspaper of general circulation within the City.

INTRODUCED at a Special Meeting of the City Council held Monday, January 22, 2007 and **PASSED, APPROVED, and ADOPTED** by the City Council at a Regular Meeting on Monday, February 5, 2007 on the following roll call vote, to wit:

AYES:	Council Members Ashton, Nicolls, Versaw, Mayor Pro Tem Shoals, and Mayor Lieberman.
NOES:	Council Members – None.
ABSENT:	Council Members – None.
ABSTAIN:	Council Members – None.



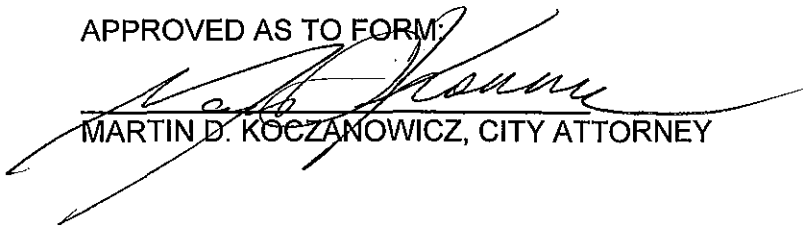
STEPHEN C. LIEBERMAN, MAYOR

ATTEST:



DONNA L. McMAHON, CITY CLERK

APPROVED AS TO FORM:



MARTIN D. KOCZANOWICZ, CITY ATTORNEY

Correspondence – Item 5 – Legislation Regarding Sex Offenders

Includes correspondence received prior to 2:00 p.m. on 3/11/10

Dear Council Members,

As the parent of a Wildwood student who regularly walks to and from school, I was dismayed to learn just now that the PPD has been advised by the state and county District Attorneys not to attempt any enforcement action against James F. Donnelly, the registered sex offender who has moved in directly across the street from Wildwood Elementary, in violation of the 2000 foot residency restriction set by California Penal Code Section 3003.5(b). Principal Cramer's message in today's newsletter stated that the lack of any penalty in the statute for violation of Prop 83, Jessica's Law, was the reason that the State and County DAs had advised you not to attempt any enforcement measures against this individual.

However, I note that the statute also allows jurisdictions to enact more restrictive laws: 3003.5(c) "Nothing in this section shall prohibit municipal jurisdictions from enacting local ordinances that further restrict the residency of any person for whom registration is required pursuant to Section 290."

I urge you to adopt a local ordinance as soon as possible that restricts the residency of any person for whom registration is required pursuant to Section 290 from living within at least 500 feet of any public or private school, or park where children regularly gather, and specify an appropriate and enforceable penalty.

Thank you for your attention.
Timothy Rood

I am equally concerned and dismayed by this loop hole in the law. I urge the City Counsel to consider the suggestions of Timothy Rood and create a local ordinance to remove the sexual predator from our community. I am also forwarding this to others in the community in the hopes that the power of more people could persuade the City Counsel to take some action.

Thanks for your consideration.
Johanna Kohr

As I watch the news and join in with the parents concern and confusion ~ I would like to know so I can clear up my confusion. Are there not many laws that do not come with the consequences attached? I was and I may be wrong, under the impression ~ you break a law you get a ticket or arrested ~ you either pay the ticket ~ or stay in jail until you see a Judge so he or she can set bail and a court date. Or in a case such as this, the Judge and I am by no means suggesting the Judge create a law as Jessica's Law already exists ~ the Judge therefore has the duty ~ the responsibility, of taking all the information at his disposal and set a sentence, even a sentence as little as 30 days for breaking the law with a order attached to it ~ you must have a place to be released to that will comply with Jessica's Law for you will not be released until you do, also if it happens again you will serve by the Judges order a mandatory-

minimum 5 year prison sentence. I fear if nothing is done ~ and I will add uderstandably so ~ to protect their children ~ they will takr matters into their own hands.

Respectfully,
Reverend ~ McBride
