



September 9, 2013

Alexandria Village Board
P.O. Box 65
Alexandria, NE 68303

Re: Draft ordinance No. 147

Dear Members of the Board:

I have reviewed the proposed sex offender residency restriction ordinance No. 147 currently pending before your Board. I am writing with concerns that several portions of the ordinance are unconstitutional.

The Village may certainly pass a restriction on where registered sex offenders live. The difficulty with the draft is that it goes beyond what state law permits and has been preempted by existing statutes—and therefore violates several sections of the Nebraska State Constitution and the United States Constitution.

There are three portions of the draft ordinance that would need to be stricken to pass constitutional muster:

1. Covered locations: The draft itemizes those locations included in the state law (school, licensed daycare center) but goes further and includes new locations not permitted by state law (village-owned and maintained playground or park, any school district bus stop located on village property). These new locations must be stricken.
2. Grandfather clause: The draft permits a grandfather clause—but not citing to the date of this ordinance's passage, but rather passage of the state law. This ignores the purpose of a grandfather clause and must be adjusted to the date of the ordinance passing. The Nebraska State Constitution Article I-16 prohibits any bill of attainder or ex post facto law.
3. Penalty to landlords: The draft seeks to punish landlords who rent to a sex offender. This creation of a new crime is not permitted by state law at all.

The Village Board can only go as far as state law has gone—and no further. *Nebraska Revised Statutes* 29-4015 et seq. outlines exactly what residency restrictions the Village may pass. Those statutes are the “ceiling,” not the floor. The Supremacy Clause and Tenth Amendment of the United

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States Constitution reserve certain powers to the federal government and certain powers to the states. Municipalities such as Alexandria may not add to the limits set by the state legislature. As the Nebraska Supreme Court has said:

Unlike natural persons [municipal corporations] can exercise no power except such as has been expressly delegated to them, or such as may be inferred from some express delegated power essential to give effect to that power...Courts almost universally hold that legislative charters wherein cities are empowered to perform certain acts or functions are construed with a greater degree of strictness than ordinary civil statutes, and the rule in Nebraska is that they shall be strictly construed. Their authority to perform municipal acts will not be extended beyond the plain import of the language of the charter....the city council by ordinance...cannot operate to extend the charter. *Garver v. City of Humboldt*, 120 Neb. 132, 231 N.W. 699 at 700-701 (Neb. 1930)

The Supreme Court interprets these limits on small municipalities with strict construction:

Powers conferred upon municipal boards by legislative charter will not be extended beyond the plain import of the language used therein. Statutes empowering municipal boards to perform certain functions will be strictly construed, and all doubt will be resolved against the exercise of the power rather than in favor of it. Under the law of this state, a city council cannot by enactment of an ordinance, extend its powers beyond the limits described in its charter. *Manners v. City of Wahoo*, 153 Neb. 437, 442, 45 N.W.2d 113, 115 (Neb. 1950).

Local laws may not go further than the limits clearly established by the Legislature, which is why we ask the Village Board to review the draft ordinance again with this background of caselaw in mind.

Again, eliminating the three portions described above are all that will be required to bring the proposed ordinance into compliance with state law and will accomplish the goal of provide limits on where registered offenders may live. If those three portions are stricken, ACLU Nebraska will close its file on this matter.

I look forward to hearing from you when you have decided upon a final version of the ordinance.


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