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November 18, 2011

Mayor Gary Monahan  
City of Costa Mesa  
City Hall  
77 Fair Drive  
Costa Mesa, CA 92626

Re: Orange County Sex Offender Ordinance

Dear Mayor Monahan:

Thank you for taking a large step toward increasing public safety by considering enacting an ordinance in your city to prohibit registered sex offenders from entering parks where children regularly gather.

As I wrote to you previously, the Board of Supervisors unanimously passed a County ordinance on April 5, 2011, to create child safety zones to protect children from sexual predators in parks, playgrounds and beaches. Many other cities have either enacted or in the process of enacting their own ordinance to protect children from sexual predators.

On Monday, November 14, 2011, Hugo Godinez was convicted in a court trial for violating the Orange County Codified Child Safety Zone Ordinance 3-18-1. He is required to register as a sex offender for life because he was convicted of misdemeanor sexual battery on June 23, 2010. On Aug. 16, 2010, and May 2, 2011, Godinez signed two Department of Justice forms acknowledging he understood the terms and conditions of his registration. On the same date, Godinez met with a deputy probation officer to discuss Ordinance 3-18-1 pertaining to restricting registered sex offenders' access to locations where children regularly gather such as Orange County parks. The defendant signed a copy of the Ordinance. On May 5, 2011, at around 10:53 a.m., Hugo Godinez entered Mile Square Regional Park in the City of Fountain Valley. This park is known to be a gathering place for families on holidays. The 20-acre park includes two lakes, three 18-hole golf courses, archery range, baseball and softball fields, and picnic shelters. There is 55 acre recreation center with tennis courts, basketball courts, racquetball courts, a gymnasium, the Kingston Boys & Girls Club, and a community center. On this particular date, there were many people, including children, celebrating Cinco de Mayo. The defendant did not leave the park until 2 p.m. There were VeriTracks Global Positioning Satellite System prints out showing the defendant's movements. He later admitted to an Orange County Sheriff's Deputy on the Sex Offender Notification and registration (SONAR) detail that he went to Mile Square regional Park and stayed at the Park for several hours while knowing he was not supposed to be there and knowing it was wrong. He will be sentenced on November 17, 2011.

In August 2011, Richard Ernest Hibbard, 72, transient, became the first defendant to be convicted under the County Child Safety Zone Ordinance. Hibbard is a registered sex offender stemming from a misdemeanor child annoyance conviction from Los Angeles. Since then, in 1998, 2002, 2007, 2009, 2010, and 2011, he was convicted of numerous felonies and misdemeanors for failing to register as a sex offender. On July 21, 2011, at about 5 p.m., deputies from the Orange County Sheriff's Department (OCSD) responded to Dana Point Harbor. A citizen approached OCSD deputies and asked them to keep an eye on the defendant because he was "belligerent around the kids," using profane language and talking loudly. There were at least 10 children in the immediate vicinity where Hibbard had been standing on the dock sidewalk. On Aug. 10, 2011, he pleaded guilty to being in violation of Ordinance 3-18-3 (prohibited offender entering a county park) and was sentenced to 31 days in jail.

In October 2011, the City of Westminster became the first Orange County city to convict a sex offender for violating the Child Safety Zone Ordinance. Steve James Dietrich is a registered sex offender stemming from convictions for rape by force and oral copulation with a minor under 14 years of age by force or fear. On July 16, 2011, and Aug. 6, 2011, Dietrich was cited by the same police officer for entering a park where children regularly gather. He was convicted on October 17, 2011. Dietrich was sentenced to probation and 60 days in jail.

There are several cities undertaking this issue and considering enacting an ordinance modeled after that of the County. Others are considering "residence restriction" types of ordinances or "loitering" types of statutes. Some cities are considering limiting the ban to those who have prior convictions with child victims. Although a ban against those individuals with convictions against child victims would be a good start, I would appreciate it if you would consider some of the points contained in this letter. You may find that we considered many of the same issues you are tackling and may come to similar conclusions.

### **RECENT DEVELOPMENTS**

You may have heard that the Eldorado District Attorney released a disturbing videotape of child predators Philip and Nancy Garrido. The married couple was sentenced in April 2011 to 431 years and 36 years to life in prison, respectively, for abducting former-Orange County resident, 11-year-old Jaycee Lee Dugard, from a school bus stop and sexually assaulting her for 20 years. In one of the video clips, Phillip Garrido is singing in a park while directing his wife Nancy Garrido how to shoot the video. He asks her, "Got me good?" "I can see you really good," she answers. She then films a little girl on playground equipment behind him, the child's legs splayed. There are also other children playing on swings and on the playground. The Garridos are sexual predators, watching and filming children in parks. You can view the chilling video on the Internet at <http://documents.latimes.com/garrido-dugard-evidence/>.

In July of this year, a 33-year-old man was arrested after putting his hand down the pants of a 6-year-old girl and touching her vagina while at a movie night at the Grand Park in Aliso Viejo. She was standing just 10 feet from her father. This case is pending.

In April of this year, a Lake Forest woman called the police when she saw a registered sex offender/child pornographer with a video camera near her children while they were playing at a park. The Orange County Sheriff's Department (OCSD) deputies who responded told her that the man could not be arrested because he was not on probation or parole, and there is no such law in the City of Lake Forest.

### **NARROWING THE BAN TO SIMPLY PROHIBIT "LOITERING"**

Limiting the ban to prohibit sex offenders from "loitering" in parks would not be effective. State law already prohibits sex offenders from loitering "about any school or public place at or near which children attend or normally congregate . . ." (Penal Code § 653b.) This would presumably apply to parks. Penal Code 653b, however, is not effective because it requires the sex offender to remain at the location or re-enter the location after being asked to leave. So long as the sex offender has not been asked to leave, he is not in violation of Penal Code 653b. In addition, it is difficult to prove loitering in a trial. "Loitering" means "to delay, to linger, or to idle about a school or public place without lawful business for being present." (Penal Code § 653b, subd. (d).) It would be difficult to prove a sex offender was "loitering" in a park when that person was simply sitting on a park bench or on the grass or strolling through the park. Even videotaping or photographing may not be considered "loitering," as those are common activities of lawful citizens. Yet, these are some of the very activities the proposed Ordinance seeks to preclude with respect to sex offenders. Their presence in parks allows them to identify, observe, and possibly interact with potential victims whom they seek to groom and eventually exploit. Finally, any loitering prohibition may be preempted by Penal Code 653b. (See *O'Connell v. City of Stockton* (2007) 41 Cal.4<sup>th</sup> 1061, 1067 [a local ordinance may be preempted where it enters an area expressly or impliedly fully occupied by state law].) For these reasons, limiting the ban to "loitering" in parks would not provide an effective tool to protect children from sex offenders' activities in parks.

### **GENESIS AND PROCESS IN DEVELOPING THE COUNTY SEX OFFENDER ORDINANCE**

In 2010, registered sex offender Eric Hinnenkamp lived 155 feet from a Fullerton park where children regularly gather. He was a Los Angeles County parolee who was released from prison to an apartment in Huntington Beach. Hinnenkamp inherited a house from his parents in Fullerton and was intending to live at the residence. According to Megan's Law website, his prior convictions included felony lewd conduct on child victims, indecent exposure, and restrained sexual battery. Understandably, local citizens became alarmed and asked law enforcement for a solution. The Orange County District Attorney (OCDA) began researching legal solutions and coming up with practical applications in response. Meanwhile, the OCDA also monitored the development of Chelsea's Law in the State legislature. The result was the development and enactment of the County Child Safety Ordinance, which closed a loophole in the existing law.

### **RESIDENCY RESTRICTIONS V. CHILD SAFETY ZONES**

The OCDA initially considered enacting both sex offender restrictions, which generally fall into two categories: (1) Residency restrictions; and (2) Child safety zones. Residency restrictions restrict an offender from residing within a specified distance of certain locations, such as schools and parks. Child safety zones restrict offenders' movement within and/or around areas where children congregate, such as schools, parks, libraries, etc.

#### **Residency Restrictions**

The available research found by the OCDA suggests that residency restrictions have little impact on sex offender recidivism and may even compromise public safety. Generally, researchers have been unable to correlate any meaningful relationship between residential proximity to schools, parks, etc. and sexual recidivism. Research indicates that residency restrictions diminish housing options in urban areas, which forces offenders to move to more rural locations. This limits offenders' access to social services and community resources that help prevent recidivism by transitioning into the community. Residency restrictions also

decrease employment opportunities for offenders and increase their transience and homelessness. These unintended consequences reduce the number of offenders accurately tracked by local law enforcement agencies. The research findings were anecdotally supported by conversations with local and State law enforcement officials.

For more detailed discussions of this topic, please see the articles and the sources cited in the quarterly bulletin *Geography and Public Safety*, Vol. 2, Issue 1, May 2009, and listed at: <http://www.ojp.usdoj.gov/nij/maps/gps-bulletin-v2i1.pdf>.

Residency restrictions also face constitutional challenges relating to the right to privacy, the right to intrastate travel, substantive due process and other rights. The outcome of such challenges is uncertain in California. In *In re E.J.* (2010) 47 Cal.4th 1258, the California Supreme Court suggested a residency restriction must be narrowly tailored to further the government interest of protecting children from sex offenders. The Court remanded the petitioners' constitutional claims to the trial court for evidentiary hearings concerning, among other things, the supply of available housing for each sex offender in their respective community. If a residency restriction makes a substantial portion of a community off-limits to sex offenders, it may be difficult to sustain its constitutionality.

Meanwhile, the OCDA was waiting for the enactment of Chelsea's Law, which contained the language of the County Ordinance.

### **Chelsea's Law - Amended**

The language in the drafted sex offender ordinance is adapted from proposed language in Chelsea's Law and from Penal Code 626.81, which prohibits sex registrants from entering school grounds without written permission. Until recently, Chelsea's Law (AB 1844) would have added as Penal Code 647.9 much of the language set forth in the County Ordinance.

On July 15, 2010, Chelsea's Law was amended to delete the originally proposed language as Penal Code 647.9. The bill was signed into Law on Sept. 8, 2010. Instead, the bill added section 3053.8 to the Penal Code. That section precludes Penal Code 290 registrants from entering parks where children gather without express permission, but only applies the restriction to parolees who served prison time for certain sexual offenses in which one or more of the victims was under 14 years of age. Thus, the "park restriction" in Chelsea's Law does not apply to sex registrants who have been discharged from parole. Some of these sex registrants are subject to lifetime parole and some are be subject to parole for 20 years, depending upon the particular crime committed.

## **LEGAL ISSUES EXPLORED:**

### **Child Safety Zones - Constitutionality**

A court will examine each law to determine whether it is narrowly tailored to the government interest. Child safety zone laws appear easier to defend than residency restrictions. Safety zone laws are more narrowly tailored to furthering the interest of protecting children by keeping sex offenders away from areas in which children congregate.

The more broadly a restriction sweeps, the more likely a court will find it is not narrowly tailored. The more tailored a law appears to protect children from sex offenders, while still permitting legitimate activities by the sex offenders, the more likely it will survive a constitutional challenge.

There are two types of constitutional challenges: (1) a facial challenge, which considers only the text of the law and seeks to void the law as a whole; and (2) an as-applied challenge, which considers the law's application to a particular challenger's facts. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) To defeat the entire law in a facial challenge, the challenger must show it "inevitably pose[s] a present total and fatal conflict with applicable constitutional prohibitions." (*Ibid.*) For example, a particular offender may argue a law aimed at all sex offenders - as opposed to a law tailored to sex offenders whose victims were children - is not narrowly tailored. It seems unlikely, however, that a court would find the law totally conflicts with constitutional principles, since many of the registered sex offenders committed crimes against children. Furthermore, many offenders have both adult and child victims (e.g. Rodney Alcala as further explained later) while others commit crimes which may lead to future victims (e.g. indecent exposure defendants commit offenses in public places with children). Thus, the law would not be constitutionally overbroad when applied to those offenders.

A particular offender could bring an as-applied constitutional challenge. Such a challenge considers whether the law is being applied in a constitutionally impermissible manner. (*Tobe v. City of Santa Ana, supra*, 9 Cal.4th 1069, 1084.) The court evaluates the propriety of the application on a case-by-case basis to determine whether to relieve the defendant of the sanction. (*Ibid.*) This could preclude application of the relevant law to a particular sex offender, but would not render the law constitutionally infirm as to others.

### **Retroactivity**

In general, application of a law is retroactive only if it attaches new legal consequences to, or increases a party's liability for, an event, transaction, or conduct that was *completed* before the law's effective date. (*In re E.J., supra*, 47 Cal.4th 1258, 1273.) Therefore, the critical question for determining retroactivity usually is whether the last act or event necessary to trigger application of the statute occurred before or after the statute's effective date. (*Ibid.*)

In *In re E.J., supra*, 47 Cal.4th 1258, the court indicated it may be impermissible to apply the 2,000-foot residency restriction to a sex offender who acquired housing before the law's effective date. (*Id.* at pp. 1275-1276.) The offender would not have had notice of the restriction before the conduct to which the law speaks occurred. (*Id.* at p. 1276, citing *Doe v. Schwarzenegger* (E.D. Cal. 2007) 476 F.Supp.2d 1178, 1179, fn. 1 [residency restriction could not be applied retroactively to persons paroled and released from prison prior to the law's effective date].)

For our purposes, the last act necessary to trigger application of child safety zone laws would seem to be the offender's unlawful entry and/or loitering upon property within a protected zone. Thus, application to all offenders would not seem to be impermissibly retroactive.

### **Ex Post Facto**

An impermissible ex post facto law is one which makes more burdensome the punishment for a crime after its commission. (*In re E.J., supra*, 47 Cal.4th 1258, 1279.) Because the child safety zone laws would not be applied retroactively, they would not raise ex post facto issues. (*In re E.J., supra*, 47 Cal.4th 1258, 1279-1280 [ex post facto only applies to laws applied retroactively].)

**Will enactment of such an ordinance create a cause of action if a registered sex offender does harm a child at a park where there is such an ordinance?**

**Government Code section 845 - Failure to provide any or adequate police protection; Responding to alarm states as follow:**

Neither a public entity nor a public employee is liable for failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service.

A police department shall not fail to respond to a request for service via a burglar alarm system or an alarm company referral service solely on the basis that a permit from the city has not been obtained.

**PRACTICAL ISSUE CONSIDERED**

What resources will the enactment of this ordinance take away from police? The OCDA believes the enactment of this ordinance will cause a minimal shift in resources. A typical scenario would be a parent calling the police when they see a person acting suspiciously in a park around children. This law is an additional tool for law enforcement to contact and arrest registered sex offenders in parks where children regularly gather. Since the passage of the County Ordinance, the OCSD had 10 requests by eight sex offenders. One waiver has been granted.

**ORANGE COUNTY ORDINANCE**

**Sec. 3-18-1. - Purpose and intent.**

**It is the purpose and intent of this article to protect children from registered sex offenders by restricting sex offenders' access to locations where children regularly gather. It is intended to reduce the risk of harm to children by impacting the ability of sex offenders to be in contact with children. It is further the intent of this article to provide additional restrictions beyond those provided for in state law by restricting sex offenders from certain limited locations, and by allowing for criminal penalties for violations of this article. It is not the intent of this article to allow conduct otherwise prohibited by state law, or to contradict state law. Orange County Parks are recognized by the County of Orange Board of Supervisors as locations where children regularly gather.**

(Ord. No. 11-012, § 1, 4-5-11)

**Sec. 3-18-3. - Prohibitions.**

**Any person required to register pursuant to California Penal Code sections 290, et seq. who enters into or upon any Orange County Park where children regularly gather without written permission from the Orange County Sheriff or Sheriff's designee is guilty of a misdemeanor. Each entry into any such area, regardless of the time period between entries, shall constitute a separate offense under this article.**

(Ord. No. 11-012, § 1, 4-5-11)

**Sec. 3-18-4. - Penalties for violation.**

**Punishment for a violation of this article shall be as follows:**

- (1) Upon a first conviction, by imprisonment in a county jail for a period of not more than six (6) months, or by a fine not exceeding five hundred dollars (\$500.00), or by both imprisonment and a fine.

- (2) Upon a second conviction, by imprisonment in a county jail for a period of not less than ten (10) days and not more than six (6) months, or by both imprisonment and a fine not exceeding five hundred dollars (\$500.00). Upon a second conviction, however, the person shall not be released on probation, parole, or any other basis until he or she has served not less than ten (10) days.
- (3) Upon a third or subsequent conviction, by imprisonment in a county jail for a period of not less than ninety (90) days and not more than six (6) months, or by both imprisonment and a fine not exceeding five hundred dollars (\$500.00). Upon a third or subsequent conviction, however, the person shall not be released on probation, parole, or any other basis until he or she has served not less than ninety (90) days.  
(Ord. No. 11-012, § 1, 4-5-11)

### **Definitions**

There are two main terms to define: 1) park; and 2) the administrative official from whom written permission must be obtained.

Some local jurisdictions may choose to leave the term as drafted without further definition. Relevant State law provisions do not define the term "park." (Penal Code § 3003.5 [precludes sex registrants from residing within 2000 feet of a "park where children regularly gather"]; Chelsea's Law (Penal Code § 647.9) [would preclude certain parolees from entering "any park where children regularly gather"].)

Some local jurisdictions may want to further define the term. Some cities have local ordinances defining the term "park." For example, Grover Beach defines a "park" as "any city, county, school district, state or federal public park or playground where children are likely to be." Santa Clarita states a "[p]ark" shall include any areas owned, leased controlled, maintained, or managed by a public entity which are open to the public where children regularly gather and which provide recreational, cultural, and/or community service activities including, but not limited to, playgrounds, playfields, athletic courts, trails, paseos, and open space." Huntington Beach states a "[p]ark" includes every park, recreation center, lake, pond or other body of water, riding and hiking trail, parking lot and every other recreation facility owned, managed and/or controlled by the City and under jurisdiction of the Director." Each local jurisdiction should decide whether it wishes to further define the term "park" depending upon its particular circumstances. Orange County chose to define the area as places where "children regularly gather" and specifically named certain places.

Similarly, each local jurisdiction should consider the appropriate entity from where permission must be obtained before a sex registrant can enter a park. The appropriate person may vary depending upon how the local jurisdiction is organized. In Orange County, the Board of Supervisors believed that the Orange County Sheriff, who has investigative and authority and patrol responsibility in the defined areas, would be in the best position to give exemptions.

The court may imply knowledge (scienter) element to the crime. A court would require evidence showing the defendant knew or reasonably should have known the "park" was a place where children regularly gather.

Some cities are contemplating whether to limit the ban to sex offenders who have been convicted of a crime against a child under the age of 18.

**LIMITING THE BAN TO REGISTERED SEX OFFENDERS “WHO HAVE BEEN CONVICTED OF A CRIME AGAINST A CHILD UNDER THE AGE OF 18”**

While drafting the County Ordinance, Supervisor Shawn Nelson and Orange County District Attorney Tony Rackauckas actively contemplated whether to exclude a certain class of offender in the proposed sex-offender statute. Of concern were those who, while a teenager, were convicted of engaging in consensual sex with a younger teenager and now must register as a sex offender for life, although he has subsequently grown up with no further violations. Since then, others have voiced their concern of former “fraternity boys” who they believe now have the requirement to register as sex offenders after being arrested for urinating in public.

There seem to be many myths as to the persons who are required to register as sex offenders.

PENAL CODE SECTION 290 (c) states:

The following persons shall be required to register: Any person who, since July 1, 1944, has been or is hereafter convicted in any court in this state or in any federal or military court of a violation of Section 187 (murder) committed in the perpetration, or an attempt to perpetrate, rape or any act punishable under Section 286 (sodomy), 288 (lewd acts upon a child), 288a (oral copulation of a minor), or 289 (forcible sexual penetration), Section 207 (forcible kidnapping) or 209 (forcible kidnapping for ransom) committed with intent to violate Section 261 (rape), 286 (sodomy), 288 (lewd acts upon a child), 288a (oral copulations of a minor), or 289 (forcible sexual penetration), Section 220 (forcible and or in concert or assault with intent to commit rape, sodomy, oral copulation, lewd acts upon a child or penetration, Section 243.4 (sexual battery), paragraph (1), (2), (3), (4), or (6) of subdivision (a) of Section 261 (rape of a mentally incapacitated victim, forcible rape, rape of a victim who is unable to resist due to intoxication, rape of an unconscious victim and rape using threat to retaliate, paragraph (1) of subdivision (a) of Section 262 (spousal rape) involving the use of force or violence for which the person is sentenced to the state prison, Section 264.1 (forcible rape, spousal rape, sexual penetration acting in concert with another), 266 (enticing a minor into prostitution or procurement of sex with another man by fraud), or 266c (sexual intercourse or penetration, oral copulation or sodomy using fraud or force), subdivision (b) of Section 266h (pimping a minor for prostitution), subdivision (b) of Section 266i (pandering a minor for prostitution), Section 266j (making available or transporting a minor for lewd acts), 267 (taking a minor from parents or guardian for prostitution), 269 (aggravated sexual assault of a child under 14 where the perpetrator is more than 7 years older involving forcible rape, oral copulation, sexual penetration or sodomy), 285 (incest), 286 (sodomy), 288 (lewd acts upon a child), 288a (oral copulation of a minor), 288.3 (contacting of a minor to commit forcible kidnapping or kidnapping for ransom, rape, child endangerment, sodomy, lewd acts upon a child, oral copulation of a minor, forcible sexual penetration, possession of child pornography, 288.4, contact with a minor with sexual intent), 288.5 (continuous sexual abuse of a child), 288.7 (sexual intercourse, sodomy, penetration of a child under the age of 10), 289 (forcible sexual penetration), or 311.1 (distributing child pornography), subdivision (b), (c), or (d) of Section 311.2 (production of child pornography), Section 311.3 (developing or exchanging child pornography), 311.4 (employing minor to assist in distribution of child pornography), 311.10 (advertising or distributing child pornography), 311.11 (possession of child pornography), or 647.6 (child annoyance) former Section 647a, subdivision (c) of Section 653f (solicitation of forcible and or acting in concert, rape, sodomy, oral copulation, lewd acts upon a child, and sexual penetration, subdivision 1 or 2 of Section 314, indecent exposure, any offense involving lewd or lascivious conduct under Section 272, contributing to a delinquency of a minor, or any felony violation of Section 288.2, sending harmful material to a minor with sexual intent; any statutory predecessor that includes all elements of one of the above-mentioned offenses; or any person who since that date has been

or is hereafter convicted of the attempt or conspiracy to commit any of the above- mentioned offense.

As to the issues of statutory rape cases, Penal Code 261.5, 290 and 290.006, do not require registration for the offense. Penal Code 261.5 prohibits sexual intercourse with persons under 18 years old. (Penal Code § 261.5(a).) In general, the penalties for violating the statute vary depending upon whether there is an age difference of more than two years, more than three years, or whether the perpetrator is over age 21 and the victim is under age 16. (Penal Code § 261.5.) None of the offenses carries mandatory registration.

Penal Code 290.006 gives the court discretion to impose registration in any offense where the person committed the offense as a result of "sexual compulsion or for purposes of sexual gratification." This statute provides a good mechanism to distinguish between young offenders who may be sexual predators and/or dangerous and young offenders who fall into the facts as described above. The offenders described above are not likely to be required to register.

On the other hand, some individuals who violate Penal Code 261.5 - even at a young age - were identified and found to be sexual predators and/or dangerous by the court. If those are the facts, then it would not be wise to exclude all registrants who violate Penal Code 261.5 from the proposed park-restriction law.

Another statute pertaining to unlawful sex with minors is Penal Code section 288. Among other things, that section punishes those who sexually molest a child under 14, or molest a child who is 14 or 15 years old where the perpetrator is more than 10 years older than the child. (Penal Code §288(c)(1).) Individuals who violate Penal Code 288 are required to register under Penal Code section 290 should not be excluded from the proposed park-restriction statute.

Obviously, there is no requirement for registration for urinating in public, usually municipal code violations.

The OCDA consulted its prosecutors in the Sexual Assault Unit, including the supervisor of the Unit, Assistant District Attorney Rosanne Froeberg. They all strenuously advised against narrowing the application of the ordinance stating that law enforcement cannot classify 290 registrants based upon the particular type of sex offense they commit and predict the type of future sex offense based upon past sex offenses. Just because a 290 registrant's prior sex offense did not involve a child does not mean his future offenses will not involve children.

### **SEX OFFENDERS VIOLATE AGAINST BOTH ADULTS AND CHILDREN**

A case in point is one of Orange County's most notorious and dangerous serial killers, Rodney Alcalá. Alcalá's first known victim was an adult female. He sexually assaulted her in an alley while he was serving in the U.S. Army. His future victims included both children and adults. In 1968, he violently kidnapped and brutally sexually assaulted an 8-year-old girl he had never met. In 1971 and 1977, he brutally sexually assaulted and murdered two women in New York, both 23 years old. After returning to California, he raped, sodomized and murdered 18-year-old Jill Barcomb by smashing her face with a rock and strangling her in November 1977. In December 1977, Alcalá raped, sodomized and murdered 27-year-old Georgia Wixted by beating her face with a claw hammer and strangling her. In June 1979, Alcalá raped and murdered 33-year-old Charlotte Lamb by beating her and strangling her with shoe laces. In June 1979, Alcalá raped and murdered Jill Parenteau by strangling her with a cord. On June 20, 1979, Alcalá kidnapped 12-year-old Robin Samsøe from Huntington Beach, murdered her, and

dumped her body in the San Gabriel Mountains. Although her body was badly decomposed, her remains showed that Alcala had knocked out her front teeth. Her earring was later found in his sick victim "souvenir" trove in his locker. He was sentenced to the death penalty in Orange County for the California murders in 2010. New York charged Alcala with the two murders in January 2011, and he is awaiting trial. Alcala not only had both adult and child victims, he moved back and forth between the victims' age groups.

#### **PARENTS AND GRANDPARENTS WHO USE THEIR CHILDREN TO GAIN ACCESS TO VICTIMS**

Some people argue that some sex offenders are parents and grandparents with children who want to go to parks, thus they should have access to parks. Most sex offenders also happen to be parents and/or grandparents. In many instances, they use their children to gain access to other children to molest. George England was convicted for using his adopted 7-year-old daughter to molest three girls ages nine to 10. England drilled a hole in the wall from his bedroom into the bathroom in order to watch them and take nude photos of the young girls as they bathed, whom he repeatedly molested. Although Jackie Zudis (she has agreed to be named publicly) was sexually assaulted by England for more than a decade in some of the most egregious ways including being made to have sex with the defendant's dog, she most regrets being the instrument to the other girls' sexual assault by England. A grandfather named Octavio Cortez was convicted for molesting three girls ages four to seven, including putting his hands down one of the Jane Doe's pants and touching her vagina while she was playing with "Barbies" with the defendant's granddaughter. Patricia Anne Serrano, 43, Fountain Valley is awaiting trial on charges she molested and engaged in substantial sexual contact with her twelve-year-old son's friend.

#### **INDECENT EXPOSURE**

Some defendants are required to register because they are convicted of indecent exposure. Our Court of Appeal, 4<sup>th</sup> District, recently upheld the sex offender registration requirement for indecent exposure in *People v. Donald Honan* (2010) 186 Cal. App. 4th 175. The Court held that a person who exposes his private parts with the intent "to direct public attention to his genitals" is necessarily engaged in a purposeful and aggressive sexual display designed to provoke others.

Although violators of this section are misdemeanants, their conduct is one that should be prohibited from parks. In many cases, these registrants engage in 314 (indecent exposure) in view of children in parks and park restrooms where children regularly gather. In other cases, many defendants who have Penal Code 314 (indecent exposure) convictions are also child molesters. It makes little sense not to include this class of registrants when deciding who to ban from parks in creating safety zones.

#### **CHILD PORNOGRAPHY**

Another class of registrants who would not be included in the limited version of the ordinance is those who must register after a conviction for possessing child pornography. Shockingly, a lot of the child pornography being circulated today depicts very young children, sometimes even babies, engaged in various sex acts with inanimate and live objects, sometimes with other children and adult subjects. Some child pornography includes depictions of forcible encounters. Although child pornography shows the result of a violation of children, it would not technically be a violation with a child victim as is written ordinances limiting the ban against

offenders with convictions involving child victims. There is no reason why any adult would possess child pornography, except those who have abnormal sexual desire towards children.

In the case of Alejandro Avila, the man who abducted, sexually assaulted and murdered 5-year-old Samantha Runnion in 2002, Avila spent days prior to committing his heinous act against the little girl he had never met looking at child pornography of a girl about the same age as Samantha and fantasizing about molesting children.

As mentioned above, an Orange County mother was at a park enjoying the playground with her children. She saw a man holding a video camera near her children. She recognized the man from the Megan's Law website. She called the Orange County Sheriff to report the incident. The deputy sheriff could not arrest the sex offender because he was not on probation or parole. A proposed ordinance limiting the ban to offenders with child victims would not cover this defendant because his registration was based on a possession of child pornography conviction.

### **ANALYSIS OF COSTA MESA SEX OFFENDERS ON MEGAN'S LAW**

Available public records show many sex offenders who have both child and adult victims. Many offenders on the Megan's Law website have registered for committing sex offenses against both children and adults, possessing child pornography and flashing.

There are other registered sex offenders in Costa Mesa not listed on the public website but are known to law enforcement. A review of the public information listed on the Megan's Law website for Costa Mesa shows the following:

There are 66 individuals who were required to register due to felony convictions for Penal Code 288, lewd acts upon a child, or other crimes perpetrated on a child victim.

Twelve of the 66 of the sex offenders were also convicted of sex crimes committed by force or fear. Their criminal acts consist also of lewd acts, oral copulation, sodomy or sexual penetration with a minor under 14 years by force or fear, 21 or more years of age, sexual penetration or sodomy of the victim with a foreign object with a victim under 16 years of age and under 18 years of age, and rape by force or fear (unknown whether it is the same victim or a separate adult victim, presumably a separate adult victim). Notably, one of the sex offenders in this group is a woman, and another was convicted of spousal rape.

Of the 66 child molester registrants, nine were also convicted of more serious sex offenses due to their age difference with their victims. The sex acts consisted of oral copulation or sodomy with a minor under 16 by an offender who was more than 21 years old, and/or lewd acts on a child aged 14 or 15 by an offender more than 10 years older than the victim.

Eight of the 66 sex offenders, committed in addition to lewd acts other related sex crimes. Two were also convicted of indecent exposure. Two were convicted of contacting a minor with the intent to commit a specified sex offense. One was convicted of soliciting another to commit a specified sex act. Two were also convicted of employing or coercing a minor to produce child pornography. One was also convicted of continuous sexual abuse of a child. One individual in this group was additionally convicted for oral copulation and sex penetration with a foreign object with a minor under 18 years old.

Thirteen of the 66 were also on the registry after being convicted of misdemeanor child annoyance. One of these thirteen also had a misdemeanor conviction for indecent exposure. Another of the twelve was also convicted of failing to register as a sex offender.

These 66 sex offenders would be banned from Costa Mesa parks if either version of the ordinance passes.

Four of the registered sex offenders in Costa Mesa were required to register based on non-California sex offenses, thus it is unclear whether they will be banned from parks if the version limiting the ban to child sex offenders passes.

The following 17 sex offenders would still be allowed in Costa Mesa parks if the version limiting the ban to sex offenders with prior child victims were to be passed.

Four sex offenders were convicted of sex crimes where the victim was unable to give consent. Two of the individuals were convicted of rape, one for oral copulation, and one convicted of sex penetration with a foreign object.

Thirteen individuals have violent sex offense convictions against adult victims. Their victims' ages are unknown, but it is possible that the victims could be as young as 18. Four were convicted of forcible rape. Five were convicted of assault with intent to commit a specified sex offense including rape, sodomy or oral copulation. Four were convicted of sexual battery, including sexual battery involving a restrained person. One of these thirteen individuals was also previously committed as mentally disordered sex offender.

There are individuals who intend to molest children but unknown to them, did not have an actual child victim to molest. For example, if a sex offender entered a park believing he was meeting a minor to have sex, but the "minor" was instead a fictitious character in a law enforcement sting, the limited ordinance may not apply. In 2006, a California Highway Patrol lieutenant named Stephen Deck went to a park after exchanging numerous online chats with a girl he thought was 13 years old. He inquired if the girl liked older men, made graphic sexual statements and sexually suggestive comments about "eating pie," and arranged to meet the "victim" at a Laguna Beach park. He was met instead by law enforcement who arrested 12 others in the same sting on the same night. He was convicted by a jury and sentenced to probation and one year in jail in 2010, over the strenuous objection by the People, who advocated for state prison. After he completes probation or parole, he is likely to be allowed to enter parks in jurisdictions that limit their ban to sex offenders who "committed a crime against a child," since his victim was fictitious.

It should be noted there are 85,000 sex offenders who reside in California and currently have access to Costa Mesa parks. They are required to register under Penal Code 290 for a variety of reasons.

Would it make a parent feel safer to have their children in a park where there is a violent rapist versus a child molester? Can you distinguish the threat to children by those offenders who sexually assaulted an 18-year-old woman from those who pose a danger to minors? Should a person who possesses child pornography be allowed in parks so he can fulfill his fantasies or escalate his acts?

Society deems sex offenders and their actions so reprehensible and dangerous that they are required to register annually, within five working days of his or her birthday and/or five working

days of their move to a new address. Transients must update their registration every 30 days and sexually violent predators must update their registration every 90 days. Other sex offenders must be electronically tethered to law enforcement through the Global Positioning System.

Shouldn't these people be kept away from places where children regularly gather?

### **REMEDIES FOR SEX OFFENDERS WHO WISH TO GO INTO PARKS**

There are ways to balance protection of children and providing relief to registrants with unusual circumstances. There are three ways a registered sex offender can be granted permission to enter parks.

#### **Certificate of rehabilitation**

Under Penal Code 290.5, which in concert with Penal Code 4852.01, certain 290 registrants can apply to a court for a certificate of rehabilitation. Upon a court finding, a registrant may be relieved of the duty to register under section 290. This alleviates the concern that the park ordinance might affect a 290 registrant whose offense was relatively "minor" and claims he no longer poses a threat to society. The court is in a better position to determine if a certain individual no longer poses a threat to the community rather than a legislative body giving a general exemption to a class of offenders without knowing their individual threat assessment.

#### **Exemption from law enforcement**

Second, law enforcement is in a better position to grant permission to enter a park on a case-by-case basis as it has the resources to investigate, and the knowledge and experience to gauge a sex offender's threat assessment. For example, a gardener who works on a maintenance crew at a park every Tuesday from 9 to 10 a.m. could get permission from the city's police chief to be at the park during the specified time. The sex offender need not be a resident of the city and local law enforcement are notified of the presence of a sex offender.

#### **More inclusive ordinance**

Third, the OCDA does not see any rationale to limit the ordinance to those whose offense was against a child victim.

If however, Costa Mesa wishes to limit the sex offender ordinance, the OCDA feels that more 290 registrants should be included than is currently proposed. At a minimum, the ordinance should include:

- (1) 290 registrants whose offense was a felony;
- (2) 290 registrants whose offense involved someone under the age of 18;
- (2) 290 registrants who violated the following Penal Code sections, whether a misdemeanor or a felony and regardless of the victim's age:
  - (a) Any section listed in Chapter 7.5 (crimes involving obscene matter, including child pornography); and
  - (b) Sections 207 (kidnapping), 220 (forcible and/or in concert or assault with intent to commit rape, sodomy, oral copulation, lewd acts upon a child or penetration), 261 (rape), 264 (rape), 286 (sodomy), 288 (lewd acts upon a child), 288a (oral copulation of a minor), 288.2 (sending harmful material to

a minor with sexual intent), 288.3 (contacting a minor to commit forcible kidnapping or kidnapping for ransom, rape, child endangerment, sodomy, lewd acts upon a child, oral copulation of a minor, forcible sexual penetration, possession of child pornography), 288.5 (continuous sexual abuse of a child), 289 (forcible sexual penetration), 314 (indecent exposure), and 647.6 (child annoyance).

Thank you for your time and patience. I know we all share the desire to protect our children in every possible way from sex offenders. I hope you consider passing a similar ordinance to that of the County Ordinance for all of the above reasons.

Sincerely,

A handwritten signature in black ink that reads "Tony Rackauckas". The signature is written in a cursive, slightly slanted style.

Tony Rackauckas  
District Attorney  
County of Orange

*TR:ss/ru*

cc: Thomas Gazsi, Chief of Police Services  
Thomas Duarte, City Attorney  
Thomas Hatch, CEO