UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RONALD SCHROEDER,
Plaintiff,

v. **Case No. 20-CV-1066**

CITY OF MUSKEGO,
Defendant.

DECISION AND ORDER

Plaintiff Ronald Schroeder brings this §1983 action alleging that a City of Muskego ordinance regulating where sex offenders may live is unconstitutional. The ordinance applies to individuals who have been convicted of "a sexually violent offense and/or a crime against children." The "original domicile provision" of the ordinance prohibits an offender who was not domiciled in Muskego when he committed his most recent offense from ever living in the city. Another section prohibits offenders not subject to the original domicile provision from living within 1250 feet of certain specified locations where children gather.

In 2008, plaintiff was convicted of two counts of second-degree sexual assault, a sexually violent offense. In 2020, plaintiff asked the city attorney if he could live at the Muskego home of a friend. The city attorney explained to plaintiff the provisions of the ordinance and answered his question in the negative. Subsequently, plaintiff commenced the present action, and the parties now cross-move for summary judgement.

Defendant raises two preliminary issues. First, defendant suggests that the case may be moot because plaintiff is currently in jail awaiting trial on a first degree reckless homicide charge arising out of an incident alleged to have occurred several decades ago.

Defendant argues that because of the pending case, plaintiff may never be able to live in Muskego. If, however, "there exists some cognizable danger of recurrent violation," plaintiff's request for injunctive relief is not moot. *Wernsing v. Thompson*, 423 F. 3d 732, 745 (7th Cir. 2005). Plaintiff states that he wishes to live in Muskego and, if and when he does, defendant will likely apply the ordinance to him. And the possibility that he will be convicted does not eliminate the likelihood that the ordinance will come into play. Plaintiff's bail is set at $35,000, and plaintiff argues he might make bail. Also, the offense with which he is charged does not call for life imprisonment. Thus, there is a cognizable danger that the issue presently before me will recur. Finally, even if plaintiff's claim for injunctive relief were moot, plaintiff also seeks damages because defendant previously prohibited him from moving into Muskego. Defendant contends that such damages would be limited but even a claim for nominal damages suffices to keep plaintiff's suit alive. *Uzueqbunam v. Preczowski*, 141 S. Ct. 792, 801-02 (2021). Thus, plaintiff's claim is not moot.

Defendant also argues that I should not consider some of the evidence submitted by plaintiff because plaintiff failed to provide an accompanying verifying affidavit. But most of the evidence in question is properly before me via another route, either because defendant also submitted it or because it is a public record. And, I did not consider the remaining documents submitted by plaintiff. Thus, this argument fails.

I turn now to the summary judgment motions. Summary judgment is required where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). I address first the question of whether the original domicile provision, which bars plaintiff living in Muskego for the rest of his life,

violates the Ex Post Facto clause found in Article I, section 10, clause 1 of the Constitution. The Ex Post Facto clause prohibits governmental units from enacting ordinances which "retroactively alter the definitions of crimes or increase the punishment for criminal acts." *Hope v. Comm'r of Ind Dept. of Corr.* 9 F.4th 513, 530 (7th Cir. 2021) (quoting *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995)). To violate the clause, an ordinance must be both retroactive and punitive. The parties agree that the original domicile provision is retroactive because it applies to acts committed before it took effect. *Koch v. Village of Hartland*, 43 F. 4th 747, 756 (7th Cir. 2022). The question is whether the provision is also punitive.

In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court outlined an approach to assessing whether a law is punitive, which the Seventh Circuit has applied to ordinances regulating where sex offenders may live. *Vasquez v. Foxx*, 895 F.3d 515, 520–21 (7th Cir. 2018). The initial inquiry is whether the legislature intended the ordinance to impose punishment or to establish a civil regulatory scheme. But even if the legislature intended to create a civil nonpunitive regulatory scheme, the court must ask "whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention to deem it civil.'" *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361(1997)). Only the "clearest proof" can override the legislature's stated intent and "transform what has been denominated a civil remedy into a criminal penalty." *Id.* (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997)).

In the present case, plaintiff concedes that defendant's stated intent was to create a civil regulatory scheme. Indeed, the ordinance has a "Findings and Intent" section in which defendant disclaims any punitive intent. City. Ord. § 294-1(C). In analyzing whether

the effect of the ordinance is nevertheless punitive, I consider five factors that the *Smith* Court borrowed from *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 168–169 (1963). *Smith*, 538 U.S. at 97. These factors include: (1) whether the law's burden "has been regarded in our history and traditions as a punishment;" (2) whether the law imposes "an affirmative disability or restraint;" (3) whether the law "promotes the traditional aims of punishment;" (4) whether the law "has a rational connection to a nonpunitive purpose;" and (5) whether the law "is excessive with respect to [its nonpunitive] purpose." *Id.* These factors are not exhaustive or dispositive but merely relevant. *Vasquez*, 895 F.3d at 521. I turn now to a consideration of these factors.

Plaintiff argues that the original domicile provision is punitive because it is much like banishment, a traditional punishment expelling an individual from a community. The closest case that I have found to the one before me is *Hoffman v. Village of Pleasant Prairie*, 249 F.Supp. 3d 951 (E.D. Wis. 2017), which considered an ordinance prohibiting offenders from living in a village and also requiring offenders who lived in rental property to leave within six months. *Id.* at 958. The court concluded that the ordinance amounted to banishment. *Id.* I reach the same conclusion. Because the original domicile provision bars plaintiff from living in Muskego for the rest of his life, it sufficiently resembles banishment to support a finding that the provision is punitive.

Defendant argues that the ordinance does not resemble banishment because it does not bar plaintiff from spending time in the city. But courts have recognized that schemes that fall short of a complete ban on entering a jurisdiction but still impose severe residency restrictions can amount to banishment. *See Does 1-5 v. Snyder*, 834 F.3d 696, 705 (6th Cir. 2016); *Hoffman*, 249 F.Supp.3d. at 958; *In re Taylor*, 343 P.3d 867, 1038

(Cal. 2015). The residency restriction imposed by the original domicile provision, namely a total and permanent ban on residency anywhere in Muskego, is severe enough to qualify.

Plaintiff also argues that the original domicile provision is an affirmative disability or restraint. "The boundaries of this factor are undefined," and "[o]utside the 'paradigmatic' example of physical restraint, it is not evident what statutory requirements amount to a restraint or disability." *Hope*, 9 F.4th at 532. Thus, I cannot say that this factor weighs heavily in either party's favor.

Next, plaintiff contends that the ordinance promotes the traditional punitive aims of retribution and deterrence because the restrictions are imposed based solely on the basis of a person's having been convicted of a crime in the past. However, all laws regulating sex offenders impose burdens based on past convictions. This is simply their nature.

The requirement that a law have a rational connection to a nonpunitive purpose is easily met in that the legislature's justification for the provision need only rise above a mere "sham." *Vasquez*, 895 F.3d at 522. Defendant asserts that the nonpunitive purpose of the residency ban is to protect children in particular and the community in general. This justification arises above a mere sham.

The final *Smith* factor requires an examination of whether the requirements of the provision are excessive with respect to its non-punitive purpose. The issue "is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105. To avoid an excessive effect, a law having a particularly harsh impact, i.e. one akin to banishment, might provide for an individualized assessment. This would help to ensure that the law was rationally related to a non-punitive purpose. See *Shaw v.*

Patton, 823 F. 3rd 556, 575 (10th Cir. 2016, see also *Smith*, 538 U.S. at 104); *Weems v. Little Rock Police Dept.,* 453 F. 3rd 1010, 1017 (8th Cir. 2006).

Although the ordinance is rationally connected to a nonpunitive purpose, the burden it imposes is unreasonable in light of its objective. The imbalance between the severity of the burden, a permanent residency ban, and the public safety benefit of the ordinance is stark. Also, the ordinance does not permit an individualized assessment of the risk posed by an offender. Taken together, the severity of the ordinance's impact, the absence of exceptions or of the opportunity for an individualized assessment or of a right to appeal suggest that the ordinance is excessive with respect to its nonpunitive purpose.

Based on the *Smith* factors as discussed above, I conclude the effect of the original domicile provision is sufficiently punitive to negate the city's intention to deem it civil. The provision is too close to banishment to survive. Because I have found that this provision violates the Ex Post Facto clause, I need not consider plaintiff's arguments that it also violates substantive due process and equal protection of the law.

Plaintiff also challenges Muskego's residency restrictions beyond the original domicile provision. He argues that two aspects of the restrictions violate the Fourteenth Amendment's guarantee of substantive due process: (1) the ordinance's "unprecedented array of prohibited locations;" and (2) the ordinance's application to individuals who have never committed an offense against a child. Plaintiff concedes that these provisions are subject to rational basis review. Under the rational basis test, a law is valid if "its intrusion upon liberty is rationally related to a legitimate governmental interest." *Vasquez*, 895 F.3d at 525. "[S]ubstantive due process requires only that the statutory imposition not be completely arbitrary and lacking any rational connection to a legitimate government

interest." *Turner v. Glickman*, 207 F.3d 419, 426 (7th Cir. 2000). Plaintiff contends that I should apply a "more searching form" of rational basis review because sex offenders are an unpopular minority. The Seventh Circuit, however, has rejected similar arguments. *See, e.g., Vasquez*, 895 F.3d at 524-25; *Valenti v Lawson*, 889 F.3d 427, 430 (7th Cir. 2018).

The ordinance seeks to advance public safety, particularly as regards minors. Protecting the public from recidivism by sex offenders is a legitimate governmental interest. *Smith*, 538 U.S. at 93. Moreover, prohibiting sex offenders from residing near schools, day cares, parks and similar facilities is rationally related to that interest. *See, e.g., Hope*, 9 F.4th at 533. Plaintiff argues that the ordinance in the present case fails because it also prohibits residency near sites not principally used by children such as golf courses and conservation areas. But defendant states that it chose the protected locations because all are places where children sometimes congregate. That adults also appear at such locations does not establish that the ordinance is not rationally related to a legitimate governmental interest. Nor is defendant's failure to present scholarship supporting its selection of exclusion zones fatal to the ordinance. The rational basis test does not require legislative bodies to present empirical evidence supporting its choices. Plaintiff also points to literature indicating that residency restrictions are ineffective. The Seventh Circuit, however, has held that a legislature may rationally conclude such restrictions protect the public. *Hope*, 9 F.4th at 533-34; *Vasquez*, 895 F.3d at 522.

Finally, plaintiff contends that residency restrictions are irrational because they apply to sex offenders who have never committed an offense involving a minor. Defendant responds that it is not irrational to conclude that sex offenders who target

adults might also target minors and cites several studies that arguably support that position. I cannot say that because the ordinance targets sex offenders who have not previously assaulted children, it is not rationally related to a legitimate governmental interest. Thus, for the foregoing reasons, the residency requirements other than the original domical provision survive rational basis review.

For the reasons stated, **IT IS ORDERED** that plaintiff's motion for summary judgment at ECF no. 32 is **GRANTED IN PART** and **DENIED IN PART** as explained above.

IT IS FURTHER ORDERED that defendant's motion for summary judgment at ECF no. 26 is **GRANTED IN PART** and **DENIED IN PART** as explained above.

IT IS FURTHER ORDERED that plaintiff's motions for leave to file excess pages at ECF nos. 33 and 39 are **GRANTED.**

Dated at Milwaukee, Wisconsin, on this 21st day of November, 2022.

s/Lynn Adelman_____
LYNN ADELMAN
United State District Judge