January 7, 2008

Charles E. McNair, Director
Cayce Department of Public Safety
Post Office Box 2004
Cayce, South Carolina 29171

Dear Mr. McNair:

You request an opinion regarding the constitutionality of an ordinance of the City of Cayce. This ordinance imposes certain proximity restrictions on residency and loitering of registered sex offenders in relation to schools, churches, day care centers, parks and other designated facilities frequented by children and young people. In your request letter, you note that "[t]he ordinance is based on a Georgia state statute that has been determined by the courts to be constitutional."

Law / Analysis

The Cayce Ordinance in question provides as follows:

> **WHEREAS,** the Council has determined that it is in the interest of the security, safety, general welfare and peace of the public within the City for the City to impose certain restrictions on the residency and loitering of registered sex offenders to attempt to address the risk of sex crimes, the risk of recidivism of registered sex offenders, the threat posed by sex offenders, and the repercussions of sex crimes for the victims and for society as a whole,
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> **NOW, THEREFORE, BE IT ORDAINED** by the Mayor and Council of the City of Cayce, in Council, duly assembled, that Chapter 28 of the Cayce City Code ("Offenses and Miscellaneous Provisions") is hereby amended as follows:
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> 1. Article XII ("Sex Offenders") is added.
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> 2. Section 28-270 ("Restrictions on Residency and Loitering for Sex Offenders") is added to Article XII to read as follows:

ARTICLE XII. SEX OFFENDERS

Section 22-270. Restrictions on residency and loitering of sex offenders.

(a) Any person required to register as a sex offender pursuant to South Carolina Code Section 23-3-430 shall not maintain a residence, reside or loiter within 2500 feet of any school, child care facility, church, playground, park, designated school bus stop, public pool, youth athletic facility or playing fields or courts or rinks, or neighborhood or youth center.

(b) The buffer distance described above shall be determined by measuring from the outer boundary of the property on which the person maintains a residence, resides or loiters to the outer boundary of the other property, at their closest points. The buffer distance shall be measured as the shortest straight line between the two points without regard to any intervening structures or objects.

(c) As used in this section, the word "loiter" shall mean remaining idle in essentially one location for no apparent lawful purpose, or without a lawful purpose for being present, or for the purpose of watching, gazing or looking upon the occupants of the other property in a clandestine manner or with unlawful intent, or under circumstances that warrant alarm for the safety of persons or property in the vicinity, or to establish control over identifiable areas, or to intimidate others from entering those areas, or to conceal illegal activities.

(d) The prohibition on maintaining a residence or residing shall not apply to a permanent residence established by the registered sex offender prior to the enactment of the Code section or prior to the commencement of the operation of the other buffered property for any of the purposes listed in subsection (a) above.

If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this Ordinance is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this Ordinance, the Council hereby declaring that it would have passed this Ordinance, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

South Carolina's sex offender registry is codified at S.C. Code Ann. §§ 23-3-400. Our Supreme Court has described the legislation creating the registry as follows:

> [t]he Act mandates that [convicted sex offenders] register as a sex offender in South Carolina for life. S.C. Code Ann. § 23-3-460; See South Carolina Sex Offender Registry at http://www.sled.state.sc.us. The online registry provides information like sex, age, height, and weight to help identify the offender. It also includes the offender's last reported address and the sex offense he committed.

Hendrix v. Taylor, 353 S.C. 542, 546, 579 S.E.2d 320, 322 (2003). One purpose of the registry is to "provide law enforcement the tools needed in investigating criminal offenses." Moreover, such provision's intent is "to provide for the public health, welfare and safety of its citizens." *Hendrix*, 353 S.C., *Id.* at 550, 579 S.E.2d, *Id*. at 324. In *Hendrix*, the Court upheld the Registry Act as constitutional against due process and equal protection challenges. Decisions of our Court have also rejected other constitutional challenges as well. *See*, *State v. Walls*, 348 S.C. 26, 558 S.E.524 (2002) [Sex Offender Registry Act does not violate *Ex Post Facto* Clause when defendant was required to register 25 years after committing the offense]; *In the Interest of Ronnie A.*, 355 S.C. 407, 585 S.E.2d 311 (2003) [juvenile's due process rights were not violated by requirement that he register as sex offender].

With that background in mind, we turn to an analysis of the proposed Cayce Ordinance. As you note in your letter, the Ordinance imposes certain proximity restrictions on residence and loitering of registered sex offenders in relation to schools, churches, day care centers, parks and other designated facilities frequented by children and young people. In analyzing the constitutionality of the Ordinance, we recognize that like any other municipal ordinance, Cayce's would, if adopted, carry with it the presumption of validity. As was stated in a prior opinion of this Office, dated December 14, 2006,

> ... an ordinance is a legislative enactment and therefore, is presumed constitutional. *Town of Scranton v. Willoughby,* 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). Our Supreme Court "has held that a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt. *City of Beaufort v. Baker*, 315 S.C. 146, 153, 432 S.E.2d 470, 474 (1993). Moreover, "[w]hile this office may comment upon constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

The Cayce Ordinance is not unique in its attempt to afford protection for children from registered sex offenders. A number of federal and state decisions have addressed the constitutionality of similar ordinances and statutes attacked on the basis of various constitutional

challenges. Almost universally, these decisions have upheld as constitutional the particular ordinance or statute in question. *See, Mann v. State*, 278 Ga. 442, , 603 S.E.2d 283 (2004); *Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006); *State ex rel. White v. Billings*, 139 Ohio Misc.2d 76, 860 N.E.2d 831 (2006); *Hyle v. Porter*, 170 Ohio App.3d 710, 868 N.E.2d 1047 (2006); *Lee v. State*, 895 So.2d 1038 (Ala. 2004); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *People v. Leroy*, 357 Ill.App.3d 530, 828 N.E.2d 769 (2005); *Standley v. Town of Woodfin*, 650 S.E.2d 618 (N.C. 2007); but see, *State v. Mutter*, 171 Ohio App.3d 563, 871 N.E.2d 1264 (2007); *Mann v. Georgia Dept of Corrections*, ___ S.E.2d ___ (2007), 2007 WL 4142738.

In *Doe v. Miller*, *supra*, for example, sex offenders brought a class action challenging the constitutionality of an Iowa statute which prohibited a person who had committed a criminal sex offense against a minor from residing within 2000 feet of a school or child care facility. The Eighth Circuit Court of Appeals upheld the statute against a variety of constitutional challenges, including those based upon procedural due process, substantive due process, the constitutional right to travel, and the fact that the provision violated the *Ex Post Facto* Clause. The Court of Appeals rejected the contention that the right to choose one's residence is a fundamental right. In the Court's view, the statute in question rationally advanced the state's interest in protecting children from sexual offenders. Thus, the statute was deemed valid. In the words of the Eighth Circuit,

> [w]e think the decision whether to set a limit on proximity of "across the street" ... or 500 feet or 3000 feet ... or 2000 feet ... is the sort of task for which the elected policymaking officials on a State, and not the federal courts, are properly suited .... The policymakers of Iowa are entitled to employ such "common sense" and we are not persuaded that the means selected to pursue the State's legitimate interest are without rational basis.

405 F.3d at 714-716. Moreover, in *People v. Leroy*, *supra*, the Illinois Court of Appeals concluded that the probationer possessed no fundamental constitutional right to live with his mother within 500 feet of a school. In addition, the residency restriction did not constitute cruel and unusual punishment, reasoned the Court. Articulating the Legislature's purpose and design in enacting such a provision, the Court stated as follows:

> [w]ith regard to the public interest subsection (b-5) seeks to protect, we conclude that the state has a legitimate and compelling interest in protecting children from adult offenders. See, *e.g.*, *People v. Williams*, 133 Ill.2d 449, 455, 141 Ill.Dec. 444, 551 N.E.2d 631 (1990). In conjunction with that interest, the state has broad powers, subject to constitutional confines, to avert potentially dangerous situations. *Williams*, 133 Ill.2d at 457, 141 Ill.Dec. 444, 551 N.E.2d 631. As we have stated before, the prohibitive subsections of section 11-9.4 of the Criminal Code of 1961 (720 ILCS

> 5/11-9.4 (West 2002)) are intended to protect children from known child sex offenders. *People v. Diestelhorst*, 344 Ill.App.3d 1172, 1184, 280 Ill.Dec. 201, 801 N.E.2d 1146 (2003). Prohibiting known child sex offenders from having access to children in schools bears a reasonable relationship to protecting school children from known child sex offenders. *People v. Stork*, 305 Ill.App.3d 714, 722, 238 Ill.Dec. 941, 713 N.E.2d 187 (1999). Accordingly, we conclude that by prohibiting child sex offenders from living within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age, subsection (b-5) also bears a reasonable relationship to the goal of protecting children from known child sex offenders and sets forth a reasonable method of furthering that goal. Although the record is bare of any statistics or research correlating residency distance with sex offenses, we conclude that it is reasonable to believe that a law that prohibits child sex offenders from living within 500 feet of a school will reduce the amount of incidental contact child sex offenders have with the children attending that school and that consequently the opportunity for the child sex offenders to commit new sex offenses against those children will be reduced as well. Although it is not clear from the record how the distance of 500 feet was decided upon, we believe that 500 feet is a reasonable distance. We note that among the 13 states that have enacted some form of residency restriction applicable to sex offenders, the 500-foot restriction of subsection (b-5) is the least restrictive in geographical terms.

828 N.E.2d at 776.

Moreover, in *Weems v. Little Rock Police Dept., supra*, the Court held that the residency restriction upon sex offenders living within 2000 feet of a school or day care center is constitutional. In the Court's opinion, this requirement does not violate substantive due process or equal protection by treating high risk offenders who do not own property differently from property-owning high risk offenders, or from low risk offenders. Nor did the restriction intrude upon the constitutional right to travel. According to the Eighth Circuit, "[t]he Arkansas legislature undoubtedly has a legitimate interest in protecting children from the most dangerous sex offenders." In the view of the Court, "a residency restriction designed to reduce proximity between the most dangerous offenders and locations frequented by children is within the range of rational policy options available to a state legislature charged with protecting the health and welfare of its citizens." 453 F.3d at 1015.

Likewise, the Iowa Supreme Court, in *State v. Seering*, *supra* upheld a statute which prohibits sex offenders from living within 2000 feet of an elementary or secondary school or child care facility. In the Court's Opinion, "[a]lthough freedom of choice in residence is of keen interest to any individual, it is not a fundamental interest entitled to the highest constitutional protection." 701 N.W.2d at 664. Instead, the State must demonstrate only a rational interest in restricting the choice of residency location. Thus, concluded the Court, there is "'a reasonable fit between the government

interest of preventing sex offenders from reoffending and the residency restriction statute.'" *Id.* at 665. Moreover, the statute did not unreasonably infringe upon the offender's "private interest in freedom of choice of residence" or upon procedural due process. The purpose of the statute was not punitive and thus did not increase punishment after commission of the crime, in contravention of the *Ex Post Facto* Clause.

Your letter indicates that the Cayce Ordinance is modelled upon a Georgia statute. In *Mann v. State, supra* the Supreme Court of Georgia addressed the constitutionality of the law which barred registered sex offenders from living within 1000 feet of a child care facility, a school or any area where minors congregate. In the view of the Court, "the statute aims to lessen the potential for those offenders inclined toward recidivism to have contact with, and possibly victimize, the youngest members of society. As such, the State's interests underlying the Residency Statute are entitled to substantial weight." 603 S.E.2d at 286. With respect to the argument that "the Registered Offender statute is unconstitutionally over-broad because less restrictive remedies are available to promote the State's interest in separating convicted sex offenders and minors," the Court rejected such argument, concluding as follows:

> [h]owever, a statute is over-broad only if it reaches a substantial amount of constitutionally protected conduct. In the present case, the Registered Offender Statute does not have an impact upon any protected conduct, since it only prohibits residency within 1,000 feet of a "child care facility," "school," or an "area where minors congregate." A convicted sex offender may still own property and lease it, visit it, or conduct any type of business upon it within the 1,000 foot zone. Accordingly, contrary to appellant's argument, we conclude the Statute's restrictions are narrowly tailored to serve its intended purpose, and we reject his over-breadth argument.

603 S.E.2d at 286.

The most recent *Mann* case (WL 4142738) decided by the Georgia Supreme Court must also be examined. In that case, the question before the Court was whether the retroactive application of the Georgia Residency statute to a sex offender by forcing him to move out of his home after a child care center opened a facility within the restricted zone constituted an unconstitutional "taking" of his property without just compensation. The Georgia Supreme Court recognized and reiterated the first *Mann* decision's conclusion rejecting Mann's "takings challenge to the residency restriction on the basis that he had only a minimal property interest in the living arrangement he enjoyed at his parent's home." However, in *Mann* II, the circumstances had changed. Mann had "moved from his parent's home, got married in August 2003 and purchased, together with his wife, a home on Hibiscus Court in Clayton County in October 2003."

Subsequently, a child care center located within 1000 feet of both Mann's home and his restaurant. Mann's probation officer thus demanded that the statute required that he move from his home upon penalty of arrest and revocation of probation.

The Georgia Supreme Court, however, concluded that requiring Mann to move even though the child care facility located within the 1000 feet restriction constituted a "taking" without "just compensation." In the Court's opinion,

> [u]nder the terms of ... [the Georgia] statute, it is apparent that there is no place in Georgia where a registered sex offender can live without being continually at risk of being ejected. OCGA § 42-1-15 contains no "move-to-the-offender" exception to its provisions. Compare, e.g., Ala.Code § 15-20-26(e) (2007) ("[c]hanges to property within 2,000 feet of an adult criminal sex offender's registered address which occur after an adult criminal sex offender establishes residency or accepts employment shall not form the basis for finding that a criminal sex offender is in violation of" residency/work restrictions); Iowa Code § 692A.2A (4)(c) (2006) (sex offender "residing within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility does not commit a violation of this section if any of the following apply: ... a school or child care facility is newly located on or after July 1, 2002"). Thus, even when a registered sex offender like appellant has strictly complied with the provisions of OCGA § 42-1-15 at the time he established his place of residency, the offender cannot legally remain there whenever others over whom the offender has no control decide to locate a child care facility, church, school or "area where minors congregate," as that term is defined in OCGA § 42-1-12(a)(3), within 1,000 feet of his residence. As a result, sex offenders face the possibility of being repeatedly uprooted and forced to abandon homes in order to comply with the restrictions in OCGA § 42-1-15.
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> Further, OCGA § 42-1-15 is part of a statutory scheme that mandates public dissemination of information regarding where registered sex offenders reside. OCGA § 42-1-12(I). Thus, third parties may readily learn the location of a registered sex offender's residence. The possibility exists that such third parties may deliberately establish a child care facility or any of the numerous other facilities designated in OCGA § 42-1-12 within 1,000 feet of a registered sex offender's residence for the specific purpose of using OCGA § 42-1-15 to force the offender out of the community. See D. Hunter & P. Sharman, Peach Sheet: Crimes and Offenses, 23 Ga. St. U.L.Rev. 11, 19 (2006) (quoting "candid" comment at Senate Judiciary Committee hearing that residency/work restrictions in OCGA § 42-1-15 will force sex offenders "in many cases [to] have to move to another state, and that's the greatest protection I think any of us can offer our kids"). A registered sexual offender

> who knowingly fails to quit a residence that is located within 1,000 feet of any of the facilities or locations designated in the statute commits a felony punishable by imprisonment for not less than ten nor more than 30 years. OCGA § 42-1-15(d).
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> As the United States Supreme Court recognized in *Lingle v. Chevron U.S.A.*, Inc., 544 U.S. 528, 537, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005),
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> > government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster-and that such "regulatory takings" may be compensable under the Fifth Amendment.
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> Accord *Mann*, supra, 278 Ga. at 443(2), 603 S.E.2d 283. Regulations that fall short of eliminating property's beneficial economic use may still effect a taking, depending upon the regulation's economic impact on the landowner, the extent to which it interferes with reasonable investment-backed expectations, and the interests promoted by the government action.

Contrasting the situation with that in the earlier *Mann* case, where Mann's "property interest in his rent-free residence at his parent's home ... [was] minimal," the Court found that "the property interest in the Hibiscus Court residence he purchased with his wife [was] ... significant." In the Court's view, Mann and his wife had purchased a home not then in contravention of the restrictions "for the sole purpose of serving as their home." Accordingly, "prohibiting appellant from residing at the Hibiscus Court house, thus utterly impairs appellant's use of his property as the home he shares with his wife." *Id.* Requiring he and his wife to move is "'functionally equivalent to the classic taking in which government directly ... ousts the owner from his domain." (Quoting *Lingle, supra*, 544 U.S. at 539). The Court also noted that the statute could easily have included a provision protecting such homeowners as other states with similar provisions had done.[1]

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[1] In our view, the Cayce Ordinance is not preempted by the Sex Offender Registry Act. As our Supreme Court has stated, determining whether a local ordinance is valid is a two step process. The first step is to ascertain whether the local government had the power to enact the ordinance. If so, then it must be ascertained whether the ordinance is inconsistent with the Constitution or general law of the state. *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 629 S.E.2d 624 (2006).

Here, nothing in the Registry Act suggests the Legislature intended to proscribe the type of restriction contained in Cayce's Ordinance. Moreover, in *American Civil Liberties Union of New Mexico v. City of Albuquerque*, 137 P.3d 1215 (N.M. 2006), the New Mexico Court of Appeals held

(continued...)

Conclusion

It is our opinion that the Cayce ordinance, prohibiting those on the sex offender registry from residing or loitering within 2500 feet of any school, child care facility, church, or other similar facility where children congregate would likely be upheld by a court as constitutionally valid. As discussed above, numerous decisions have found similar statutes or ordinances to be constitutional against a variety of constitutional challenges, including procedural and substantive due process, equal protection, vagueness, etc. These decisions have focused upon the State's interest in the protection of children from convicted sex offenders as being paramount. Clearly, in this instance, the purpose of the Cayce ordinance as stated therein is to "attempt to address the risk of sex crimes, the risk of recidivism of registered sex offenders, the threat posed by sex offenders, and the repercussions of sex crimes for the victims and for society as a whole." Inasmuch as courts have consistently recognized that the right of a convicted sex offender to a particular residency is not a "fundamental" right, we believe a court would likely uphold the Cayce ordinance as a valid and rational means of addressing the threat posed by convicted sex offenders to young children in the places where children most likely congregate or frequent. In the words of one court, a municipality such as Cayce "undoubtedly has a legitimate interest in protecting children from the most dangerous sex offenders." *Weems, supra*. As *Weems* concluded, a legislative body may rationally choose a policy "designed to reduce proximity between the most dangerous offenders and locations frequented by children ...." *Id*. Such is the case here.

With regard to the "loitering" prohibition in the Ordinance, the Seventh Circuit in *Doe v. City of Lafayette*, 377 F.3d 757 (7th Cir. 2004) has concluded that banning altogether a convicted sex offender from all city parks does not violate either the First Amendment or the Due Process Clause. While the Court in *Doe* acknowledged that the plurality opinion in *City of Chicago v. Morales*, 527 U.S. 41 (1999) recognized that the Due Process Clause provides a "liberty" interest in the freedom to loiter for innocent purposes, such is not, according to the Seventh Circuit, a fundamental right. Therefore, concluded the Court in *Doe*, the policy was reasonably related to the city's interest in protecting children. Moreover, in this instance, the Cayce Ordinance defines "loitering" as "remaining idle in essentially one location *for no apparent lawful purpose."* (emphasis added).

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[1](...continued)
that an ordinance restricting the residence of sex offenders to certain locations was not preempted by the New Mexico sex offender registry Act. The Court found that the Legislature, in enacting the registry Act did not intend to occupy the field; nor did the ordinance conflict with state law . In view of the presumption of validity which Cayce's ordinance must be given as well as the fact that there is no indication of an intent by the General Assembly to preempt such ordinances, we conclude there is no preemption of the Cayce ordinance by state law.

We also note that the Cayce ordinance contains a provision which states that the prohibition "shall not apply to a permanent residence established by the registered sex offender prior to the enactment of this Code section or prior to the commencement of the operation of the other buffered property for any of the purposes listed in subsection (a) above." This provision distinguishes the Cayce ordinance from the constitutional defect identified in the second *Mann* case. Thus, so long as this protection remains in the proposed Cayce Ordinance, any unconstitutional "takings" issue is obviated. Such a provision protecting homeowners is thus in accord with *Mann's* statement that any such statute or ordinance should contain such a "grandfather" provision.

Finally, we note that the restriction in the Cayce Ordinance is proposed as being 2500 feet. As the courts have indicated, the exact distance of the restriction is primarily a matter for the legislative body (such as city council) to determine. Obviously, the less the restriction imposed, the more likely a court will uphold it. We note that *Weems, supra* upheld a distance of 2000 feet, as did *Lee v. State, supra* and *State v. Seering, supra*. On the other hand, a restriction so onerous that a person is legislated out of the city or municipality may be constitutionally problematical, although we have located one unpublished federal decision, *Hawkins v. City of Gainesville*, 2007 WL 4412994 which upheld a city ordinance prohibiting sex offenders from living within 2500 feet of the city limits.

In conclusion, we advise that the Cayce Ordinance would likely be upheld. So long as such an ordinance is not applied to a person establishing a permanent residence prior to the passage of the Ordinance, or prior to "the commencement of the operation of the other buffered property for any purpose" listed in such an ordinance, (as Cayce's proposed ordinance presently does), the Ordinance will likely be deemed by a court to be valid.

Very truly yours,

Henry D. McMaster
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