

**Arnold, Bradley**

**From:** Arnold, Bradley  
**Sent:** Thursday, November 05, 2009 8:34 AM  
**To:** 'Derrill McAteer'  
**Cc:** Barsell, Deb; 'Tom Hogan'  
**Subject:** RE: Sexual Offender/Sexual Predators in library memo attached

Derrill,

Well written – I will add this under the County Attorney report for you to gain direction from the BOCC to develop the appropriate ordinance.

Bradley

**From:** Derrill McAteer [mailto:Derrill@hoganlawfirm.com]  
**Sent:** Thursday, November 05, 2009 8:29 AM  
**To:** Arnold, Bradley; Barsell, Deb  
**Subject:** Sexual Offender/Sexual Predators in library memo attached

As always please let me know if you have any questions.

MEMORANDUM

**TO:** BRADLEY ARNOLD,  
COUNTY ADMINISTRATOR

**FROM:** THE HOGAN LAW FIRM, LLC  
AS COUNTY ATTORNEY

**SUBJECT:** BAN OF SEXUAL OFFENDERS OR PREDATORS FROM SUMTER  
COUNTY LIBRARY BRANCHES

**CC:** THOMAS S. HOGAN, JR.

**DATE:** NOVEMBER 5, 2009

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SEXUAL OFFENDER v. SEXUAL PREDATOR

Under Florida law, there are two primary designations for individuals who perpetrate sex crimes, "sexual offenders" and "sexual predators." Predators are considered the more dangerous of the two groups and both classifications have a number of criteria that a convicted individual must meet in order to be designated as an offender or predator. Both designations require that the individual register with the Florida Department of Law Enforcement, although the requirements of such registration differ depending on the classification.

Pursuant to Fla. Stat. §775.21, there are several criteria that must be met for a person to be designated as a sexual predator, the most serious of the sex crimes classifications, and be forced to register as such with the state. The first criteria requires that the person be convicted of a qualifying crime<sup>1</sup> that is a capital, life or first degree felony sex offense and that the offense was committed on or after October 1, 1993; or that the person is convicted for any felony violation or attempt thereof for a qualifying offense that is committed after October 1, 1993 in addition to having a prior conviction for any felony violation or attempt thereof for a qualifying offense. Additionally, there must be a written court finding designating the individual as a sexual predator or, as of July 1, 2004, regardless of whether an individual meets or does not meet the criteria listed above, anyone who is civilly committed under the Florida Jimmy Ryce Sexually Violent Predator Act must register as a sexual predator.

Qualifying under the designation of “sexual offender” and being required to register as such can happen several different ways under Florida law pursuant to Fla. Stat. §943.0435.<sup>2</sup> The first criteria for this designation is that a person must be convicted of attempting, soliciting, conspiring to commit or actually committing any of the crimes in the chart below or similar offenses in another jurisdiction (or any similar offense in Florida that has been re-designated from a former statute to the one specified). The second requirement is that the person must be in the custody or control of, or under the supervision of, the Florida Department of Corrections, or be in the custody of a private correctional facility, on or after October 1, 1997, as a result of the conviction listed in the chart below; or any of the following:

- 1) On or after October 1, 1997, the person must be released or have been released from the sanction imposed for the conviction.
- 2) The person must establish or maintain a residence in this state and not have been designated as a sexual predator by a court of this state but have been designated as a sexual predator, as a sexually violent predator, or by another sexual offender designation in another state or jurisdiction, and as a result of such designation, the person is subjected to registration or community or public notification, or both, or would be if a resident of that state or jurisdiction;
- 3) The person must establish or maintain a residence in this state and be in the custody or control of, or under the supervision of, any other state or jurisdiction as a result of a conviction for committing, or attempting, soliciting, or conspiring to commit, any of the specified criminal offenses listed below (or any similar offense committed in this state which has been re-designated from a former statute number to the one specified).
- 4) The person must be adjudicated delinquent for committing, attempting, soliciting, or conspiring to commit any of the crimes (on or after July 1, 2007) specified in the second chart below when the juvenile was 14 years of age or older at the time of the offense.

**FOR ADULT ADJUDICATIONS**

	§787.01*	Kidnapping <i>Where the victim is a minor and the defendant is not the victim's parent or guardian</i>
	§787.02*	False imprisonment <i>Where the victim is a minor and the defendant is not the victim's parent or guardian</i>
	§787.025(2)(c)	Luring or enticing a child <i>Where the victim is a minor and the defendant is not the victim's parent or guardian</i>
	§794.011**	Sexual Battery; ** <i>excluding subsection (10)</i>
	§794.05	Unlawful sexual activity with certain minors
	§796.03	Procuring a person under the age of 18 for prostitution
<b>Commission of</b> <u>OR</u> Attempt, Solicitation Of, or Conspiracy to Commit	§796.035	Selling or buying of minors into sex trafficking or prostitution
	§800.04	Lewd/lascivious offenses committed upon or in the presence of persons less than 16 years of age
	§825.1025	Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult
	§827.071	Sexual performance by a child
	§847.0133	Protection of minors; prohibition of certain acts in connection with obscenity
	§847.0135	Computer pornography, excluding subsection 847.0135(4)
	§847.0137	Transmission of child pornography by electronic device/equipment
	§847.0138	Transmission of material harmful to minors to a minor by electronic device/equipment
	§847.0145	Selling or buying of minors (for portrayal in a visual depiction engaging in sexually explicit conduct)
	§985.701(1)	Sexual misconduct prohibited
		<b>Or A violation of a similar law of another jurisdiction</b>

\*NOTE: Before using a Kidnapping or False Imprisonment conviction to determine if an offender is a sexual offender, current case law in Florida should be consulted for the applicable interpretations and applications of these convictions.

**FOR ADJUDICATIONS OF DELINQUENCY**

	§794.011*	Sexual Battery; *excluding subsection (10)
<b>Commission of</b> <u>OR</u> Attempt, Solicitation Of, or Conspiracy to Commit	§800.04(4)(b)	Lewd/lascivious battery where the victim is under 12 or the court finds sexual activity by the use of force or coercion
	§800.04(5)(c)1	Lewd/lascivious molestation, victim under 12, where the court finds molestation involving unclothed genitals
	§800.04(5)(d)	Lewd/lascivious molestation, victim under 16 but more than 12, where the court finds the use of force or coercion and unclothed genitals
		<b>Or A violation of a similar law of another jurisdiction</b>

## **METHOD FOR IDENTIFYING SEXUAL PREDATORS AND OFFENDERS**

A list of sexual offenders and predators is available through the Florida Department of Law Enforcement website at <http://offender.fdle.state.fl.us/offender/Search.jsp>. This website allows individuals to search by offender name, neighborhood, and by email or instant messenger names. This website would be a very simple tool for librarians and others who handle library and/or library card registration to cross-reference names of applicants with names of sexual offenders and predators.

## **PRECEDENT FOR OTHER GOVERNMENTAL UNITS APPLYING SIMILAR ACTION**

Cities and counties taking action to keep dangerous sexual offenders and predators away from their library systems for purposes of protecting children is increasingly common. Ordinances of this type have been enacted in cities such as New Bedford, Massachusetts, and many other governmental entities have made attempt to keep sex offenders and sexual predators away from their libraries. The primary issue is that such a ban passes constitutional muster, as the American Civil Liberties Union has opposed the restrictions placed upon sex offenders in the city of Dover, New Hampshire on the grounds that such restrictions are unconstitutional, though Dover's restrictions were related to where sex offenders can live rather than their ability to visit a public library. The simplest way to ensure that the ordinance is valid is to make sure that it is narrowly tailored to prevent dangerous offenders and those who harm children from the library system as it may not be proper from a constitutional prospective to ban every person who is a sexual offender from the library system.

## **LEGAL ISSUES**

When a governmental entity such as Sumter chooses to enact an ordinance banning a class of individuals from an area, there are certain legal issues that must be examined. The primary issue is that of classifications. Classifications of individuals may be made on the basis of personal attributes or characteristics, but these classifications must have some legitimate relationship to real differences with reference to the subject regulated. *State v. Bryan*, 87 Fla. 56,

63-64 (Fla. 1924). Furthermore, these classifications may not be arbitrary or discriminatory. *Id.* Classes that have been historically subjected to purposeful unequal treatment or relegated to a position of political powerlessness so that they require extra protection from the majority in the political process are referred to as “suspect” or “quasi-suspect” classes. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *The Florida Bar v. Neiman*, 816 So.2d 587, 597 (Fla. 2002).

Courts treat laws as inherently questionable when they primarily burden suspect or quasi-suspect classes. *Westerheide v. State*, 767 So.2d 637, 654 (Fla. 5<sup>th</sup> DCA 2000); decision approved, 831 So.2d 93 (Fla. 2002). Thus, classifications often give rise to equal protection issues under the 14<sup>th</sup> Amendment, however, due to precedent set forth in case law, an equal protection examination is not necessary here. Simply put, sex offenders are not a suspect or quasi-suspect class for purposes of an equal protection analysis. *Doe v. Moore*, 410 F.3d 1337 (11<sup>th</sup> Circ. 2005). Furthermore, sub-classes of sex offenders also do not qualify as suspect or quasi-suspect classes. *Id. at*

With respect to banning sex offenders from Sumter’s libraries, it does not appear that any of the offender’s fundamental rights are being impinged upon and the type of ordinance proposed does not deal with a suspect classification. Accordingly, such an issue would not be examined under strict scrutiny or intermediate scrutiny. An ordinance of this type would be examined by the Court according to the lowest level of scrutiny, the “rational basis” standard. *Westerheide v. State*, 767 So.2d 637, 654 (Fla. 5<sup>th</sup> DCA 2000); decision approved, 831 So.2d 93 (Fla. 2002). Under a rational basis standard, the burden is upon the party challenging the law to show that there is no conceivable factual basis which would rationally support such a classification. *Id.* This means that the Court would simply look at whether Sumter’s ordinance was rationally related to a legitimate governmental interest and, if it was, the ordinance would stand.

Another issue that might arise is related to the actual library cards themselves. After researching Florida Statutes Chapter 257 which deals directly with public libraries, there does not appear to be any language that would prohibit an ordinance banning sexual predators or dangerous offenders from receiving library cards as any such ordinance would be examined in accordance with the constitutional analysis set forth above. If Sumter wishes to ban these same

individuals from a law library, however, an issue might arise with respect to whether the county is denying individuals the ability to appropriately defend themselves in a Court of law. At this juncture, an analysis of this type is likely both premature and outside the scope of this memorandum, but nevertheless, it is an issue that Sumter should be readily aware of.

### CONCLUSION

Sumter County may create an ordinance that bans sexual predators and some sexual offenders from its library system. Enacting an ordinance that is narrowly tailored to achieve the objective of protecting children and the public at large from dangerous sex offenders appears to be the best way to ensure that the ordinance is not challenged or overturned on constitutional grounds. The biggest issue left on the table will now be what the penalties will be for violation of the ordinance, should it be drafted. If you have any questions, please feel free to contact The Hogan Law Firm.

**END NOTES:**

1. See F.S. §775.21(4) for the list of qualifying offenses and F.S. §775.21(3) for additional information regarding sexual predator registration.
2. See F.S. §943.0435(1) for additional information regarding sexual offender registration.