DISTRICT COURT, ADAMS COUNTY, COLORADO 1100 Judicial Center Drive Brighton, CO 80601	
Plaintiff/Appellee: CITY OF NORTHGLENN vs. Defendant/Appellant: JULIANA IBARRA	▲ **Court Use Only** ▲
Appeal from the Municipal Court, City of Northglenn The Honorable Ronald J. Cohen. Opinion by the Honorable John J. Vigil Adams County District Court Judge. Herbert C. Phillips and Corey Y. Hoffman Attorneys for Plaintiff/Appellee. Gregory A. Eurich, Jim Goh, Susannah Pollvogt, and Mark Silverstein Attorneys for Defendant/Appellant.	Case Number: 00 CV 1363 Div.: D

ORDER

THIS MATTER comes before the Court on appeal from the Northglenn Municipal Court, wherein the defendant was convicted of violating Northglenn Municipal Ordinance 1248, Section 11-5-2(b)(58), by providing a home for three unrelated foster children who are required to register as sexual offenders pursuant to C.R.S. § 18-3-412.5. This Court, having reviewed the record and briefs submitted by counsel, REVERSES the conviction and REMANDS this matter for further proceedings consistent with the views expressed herein.

The record shows that the defendant and her husband Eusebio, are owners of a single-family residence in Northglenn where they have lived for fifteen years. The defendant is a foster parent certified by Lost & Found, Inc., a child placement agency licensed by the State of Colorado, and has received special training to provide foster care for juvenile sex offenders. On the date of the alleged violation, the defendant shared her home with her natural son and four foster children. Three of the foster children are required to register as sex offenders pursuant to C.R.S. § 18-3-412.5.

The City of Northglenn first addressed the issue of unrelated sex offenders living in the same household in December 1999, when it enacted Ordinance 1243, which, *inter alia*, prohibited unrelated sex offenders from living together. The City of Northglenn thereafter contacted the defendant and requested compliance with the ordinance. In correspondence with the City, the defendant challenged the ordinance on the grounds that procedural requirements of the Northglenn City Code had not been followed. The City of Northglenn apparently agreed with the defendant and responded by enacting Ordinance 1248 on January 27, 2000. Under the provisions of Ordinance 1248, registered sex offenders are prohibited from living together in group quarters in residential zones of Northglenn. Moreover, Ordinance 1248 defines a family as not including "more than one individual (or two or more individuals related by blood or marriage) required to register as a sex offender." Ordinance 1248 was also specifically excepted from the non-conforming use provisions of the Northglenn Zoning Ordinance. Ordinance 1248 was enacted as an emergency ordinance to take immediate effect and, in it's enactment, the City of Northglenn made findings in support of its determination that there was a public safety risk associated with unrelated registered sex offenders residing together.

The City served the defendant on February 1, 2000, with a summons and complaint to which she responded with a Motion to Dismiss and requested an evidentiary hearing. At the time the defendant was served with the summons and complaint, two of the foster children were under the age of eighteen. On May 4, 2000, the Motion to Dismiss and request for evidentiary hearing was denied. After a trial to the court on June 1, 2000, judgment of conviction was entered against the defendant and a seven hundred and fifty-dollar fine and costs of eighteen dollars were assessed.

In her appeal, the defendant contends that the municipal court erred by failing to conclude (1) that the ordinance violates the Federal Fair Housing act by discriminating on the basis of familial status and handicap; (2) that the ordinance violates the Due Process Clause of the United States Constitution; (3) that the ordinance violates the constitutional prohibition against retroactive laws; and (4) that the ordinance exceeds the Home Rule powers of the City of Northglenn. In response, the City of Northglenn argues, initially, that because familial status discrimination protections under the Fair Housing Act apply only to individuals under the age of eighteen, the defendant's argument that the ordinance violates the Fair Housing Act's proscription against discrimination based upon familial status is moot because all three of the registered sex offenders residing at the defendant's residence have reached the age of eighteen.

Contrary to the contentions of the City of Northglenn, the defendant's argument that Ordinance 1248 violates the familial status discrimination protections under the Fair housing Act is not moot even though the three foster children residing with her are over the age of eighteen. This is not an appeal of a civil order where a change in circumstances might operate to moot an issue. Instead, this is a direct appeal of a criminal conviction entered as consequence of the defendant's status as a foster parent of two boys under the age of eighteen at the time she was served with the summons and complaint alleging a violation of the ordinance.

FAMILIAL STATUS DISCRIMINATION UNDER THE FAIR HOUSING ACT

The defendant first argues that the municipal court erred in denying her motion to dismiss because Ordinance 1248 violates the Fair Housing Act by discriminating on the basis of familial

status. This Court agrees that the ordinance is discriminatory as it treats families with unrelated registered sex offenders differently than families with related registered sex offenders.

The Federal Fair Housing Act makes it unlawful to "make available or deny" housing to any person on the basis of race, color, religion, sex, ***familial status***, national origin or handicap. 42 U.S.C. § 3602(I) (emphasis added). Under the FHA, discriminatory zoning practices are prohibited. 42 U.S.C. § 3604(f)(1)(B) & (3)(B); Smith & Lee Assoc., Inc. v. City of Taylor, 13 F.3d 920 (6th Cir. 1993); Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995). "A state law or municipal ordinance is expressly preempted and invalidated under the FHA if it is a discriminatory housing practice." Bangerter, 46 F.3d at 1500 n. 15.

The Fair Housing Act defines "familial status" as one or more individuals (who have not attained the age of eighteen years) who are domiciled: (1) with a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.[1] The protections afforded against discrimination on the basis of familial status apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of eighteen years.[2]

To support her position that Ordinance 1248 violates the FHA prohibition against discrimination based upon familial status, the defendant relies upon, *inter alia*, Gorski v. Troy, 929 F.2d 1183 (7th Cir. 1991) and Keys Youth Servs. v. City of Olathe, 52 F.Supp.2d 1284 (D. Kan. 1999). This Court finds both the Gorski case and the City of Olathe case instructive in this Court's assessment of whether the defendant's conviction should be reversed because the ordinance under which she stands convicted violates the Fair Housing Act.

In Gorski, the plaintiffs were tenants of an apartment complex pursuant to a lease that restricted occupancy, without prior approval by the landlord, to no more than two adults. The lease also contained a prohibition against children in the units. The plaintiffs were in the process of applying to be foster parents and requested authorization from the landlord to bring foster children into their home. The landlord denied permission and the tenants were subsequently evicted. The plaintiffs brought suit against the landlord alleging familial status discrimination under the FHA. The court determined that the plaintiffs had standing to bring suit under the FHA even though they were not yet licensed foster care providers and concluded that they had been evicted in retaliation for their attempt to have the landlord's discriminatory policy changed. The court reasoned that the "plain language of the Act convinces us that foster parents...are protected by the FHA from discrimination on the basis of familial status. The definition of familial status specifically includes "designee" of parents or other persons having custody of the children." Id. at 1187. Gorski determined that the landlord's actions were discriminatory in that they expressed preference for tenants on the basis of familial status in violation of 42 U.S.C.S. § 3604(c).

In City of Olathe, the plaintiff was a youth services provider who applied to operate a group home for teenagers with behavioral problems in a residential area. A city zoning

[1] 42 U.S.C.S. § 3602(k).
[2] Id.

ordinance permitted residential treatment facilities in a residential area upon the issuance of a special use permit. Under the ordinance, any number of persons in a family related by blood or marriage were permitted to occupy a single family home. Occupancy restrictions, however, were placed on group homes for unrelated children who lived with a designee of the person having custody unless those children were disabled and the home housed eight or fewer children. The plaintiff's request for a special use permit was denied because of safety and property value concerns. The plaintiff brought suit alleging familial status and handicap discrimination in violation of the FHA. The court upheld a lower court's denial of summary judgment on handicap discrimination grounds but upheld a grant of partial summary judgment invalidating the ordinance on the grounds that it violated the FHA's prohibition against familial status discrimination by placing additional burdens on unrelated families.

Here, as in Gorski, the defendant has a protected interest under the FHA's proscription against discrimination based upon familial status with respect to the two foster children who were under the age of eighteen at the time the summons and complaint were served because "foster parent[s] clearly [are] designee[s] of the state, which, in turn, is the legal custodian of a child committed to its care." Id. at 1187. Like the zoning ordinance in City of Olathe, Ordinance 1248 violates the provisions of the FHA because of the disparity in the treatment of individuals on the basis of familial status. Under Ordinance 1248, "family" is defined as "not includ[ing] more than one individual (or two or more individuals related by blood or marriage) required to register as a sex offender under the provisions of C.R.S. § 18-3-412.5, as amended." Under the ordinance two foster siblings required to register as sex offenders may not live together but two biological siblings in identical circumstances are not subject to the same restrictions. On its face, the ordinance impermissibly discriminates on the basis of familial status.

In reviewing Ordinance 1248, this Court is not unmindful of the expressed intent of our general assembly concerning children. The Colorado legislature, through the Children's Code, has declared that the purpose of laws concerning children in this state is, among other things, "to secure for each child subject to...[the] provisions [of the code] such care and guidance, preferably in his own home, as will best serve his [or her] welfare and the interests of society and "[t]o preserve and strengthen family ties whenever possible..." C.R.S. § 19-1-101, et. seq. See also, L.G. v. People, 890 P.2d 647 (Colo.1995) (the overriding purpose of the Children's Code is to protect the welfare and safety of Colorado children by providing procedures through which their best interests can be served). Furthermore, our legislature has declared that one of the primary purposes of the Children's Code is to "secure for any child removed from the custody of his [or her] parents the necessary care, guidance, and discipline to assist him [or her] in becoming a responsible and productive member of society." See C.R.S. § 19-1-102(1)(d). Additionally, C.R.S. § 19-2-906(4) states that persons under the age of eighteen adjudicated under this state's juvenile justice system may receive a sentence by the court to include placement out of the home. Except for an aggravated juvenile offender, the court may place legal custody of the juvenile in the county department of social services, or a child placement agency for placement in a family child care home, foster care home, or child care center. See, C.R.S. § 19-2-915. Thus, children in foster homes are entitled to the necessary care, guidance, and discipline that such homes provide whether they are victims of abuse and neglect, suffering from mental illnesses or physical infirmities, or placed there as a result of adjudication.

The foster children here were placed with the defendant after adjudication and were required to register as sex offenders.[3] All of the defendant's foster children were placed in her home through a state-supported agency.[4] None of the registered sex offenders was related by blood or marriage to the defendant, or to any other person residing at the residence.[5] Like the tenants in Gorski, the defendant in this case received her training from a state-supported placement agency, which consisted of extensive training on providing a foster home to adolescent sex offenders.[6] The defendant was also the designee of the state of Colorado in caring for the juvenile sex offenders who were residing in her home. Although the City of Northglenn argues that Ordinance 1248 is aimed at multiple unrelated sex offenders living together and does not preclude the defendant from being a parent, foster parent, or caring for foster children, the practical legal effect of Ordinance 1248 is that it prevents foster families with children who must register or who intend to provide a foster home for such children from residing within Northglenn's city limits. Gorski and City of Olathe imply that the FHA is to be construed liberally to prohibit discrimination against families with children, including foster families with children, irrespective of any alleged mental or physical illnesses that may afflict those children. The holdings in Gorski and City of Olathe demonstrate how under the FHA, the protection of the family with children, including foster children, is paramount rather than how the child was placed with that family. Moreover, as the Children's Code declares, all foster children are entitled to receive the same care as non-foster children. Because Ordinance 1248 permits two siblings who are registered sex offenders to live together but denies the same opportunity to two unrelated foster children, it is the opinion of this Court that the ordinance favors families related by blood or marriage over other types of families. Some foster children, specifically those required to register, will not receive the support and nurturing that can be attained through a family environment because of Ordinance 1248. Accordingly, it is this Court's determination that Ordinance 1248 discriminates on the basis of familial status in violation of the Fair Housing Act. The municipal court erred in concluding otherwise.

HANDICAP DISCRIMINATION UNDER THE FAIR HOUSING ACT

The defendant next argues that Ordinance 1248 discriminates on the basis of handicap in violation of the Fair Housing Act. This Court does not agree.

Under the FHA, "handicap" is defined as "a physical or mental impairment which substantially limits one or more of such person's major life activities." 42 U.S.C.S. § 3602(h). The term "handicap" as defined by the FHA has the same definition as the term "disability" as that term is used in federal civil rights laws.[7] However, the term "disability", as defined by the Americans with Disabilities Act, does not include "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical disorders, or other sexual behavior disorders." 42 U.S.C.S. §12211(b)(1). See also Winston v. Maine

[3] Appendix to Opening Brief of Defendant-Appellant Juliana Ibarra, Tab 2, p. 30.
[4] Id.
[5] Opening Brief of Defendant-Appellant Juliana Ibarra, p. 3.
[6] Appendix to Opening Brief of Defendant-Appellant Juliana Ibarra, Tab 2, p.30.
[7] Under the American with Disabilities Act, 42 U.S.C.S. § 12102(2)(A), 2) the term "disability" means an individual with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."

Technical College Sys., 631 A.2d 70 (Me. 1993), cert. denied, 511 U.S. 1069, 114 S.Ct. 1463, 128 L.Ed.2d 364 (1994) (holding that sexual behavior disorders are excluded from the definition of a disabled individual under Americans with Disabilities Act of 1990).

The record suggests that the foster children in question may be suffering from behavioral disorders. This Court, however, is unable to determine from the record if the foster children's alleged emotional illnesses and learning disabilities, which the defendant argues are a result of the children's alleged victimization, is a "handicap" under the FHA. In general, evidence of emotional illness and learning disabilities might qualify foster children for protected status under the FHA. City of Olathe, 52 F. Supp.2d at 1299. However, the foster children in this case were adjudicated juvenile sex offenders and placed in the defendant's foster home as a condition of probation and not placed there because of their specific need for emotional counseling and support.[8] Furthermore, this Court is unaware of any case law that substantiates the defendant's claim that persons convicted of criminal sexual behavior are "handicapped" and hence, protected under the FHA. The defendant's foster children do not meet the definition of disabled under either the Fair Housing Act or the Americans with Disabilities Act by virtue of their status as sexual offenders. Having reached this conclusion, it is unnecessary to address the defendant's argument that the City of Northglenn failed to make reasonable accommodations.

RIGHT TO ASSOCIATE AND RIGHT TO PERSONAL CHOICE

The defendant also contends that Ordinance 1248 violates the defendant's fundamental right to freedom of association and fundamental right to personal choice in matters of family life. This Court agrees.

To establish a violation of due process, a person must show that he or she has a constitutionally protected liberty interest. People v. S.L.F., No. 99CA1188, 2000 LEXIS 1634, at *6 (Colo. Ct. App. 2000), cert. denied sub nom. P.E. v. People ex rel. A.W.R., No. 00SC861, 2001 LEXIS 52 (Colo. Jan. 22, 2001); Watso v. Department of Social Services, 841 P.2d 299 (Colo. 1992). The Fourteenth Amendment of the United States Constitution protects individuals from arbitrary governmental restrictions on liberty interests. U.S. Const. amend XIV. See also Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). This same freedom from governmental restrictions on liberty interests is protected by the Colorado Constitution. Colo. Const. art. II, § 25; People v. S.L.F., 2000 LEXIS 1634, at *6. In addition, the U.S. Supreme Court has determined that the Fourteenth Amendment includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997); Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

Choices about marriage, family life, and the upbringing of children are among associational rights the Supreme Court has ranked as "of basic importance in our society," ... rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect. M. L. B. v. S. L. J., 519 U.S. 102, 117 S. Ct. 555, 136 L. Ed. 2d 473 (1996). See also Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987);

[8] Appendix to Opening Brief of Defendant-Appellant Juliana Ibarra, Tab 2, pp. 9-10, 30.

Zablocki v. Redhail, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978); Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932, 52 L. Ed. 2d 531 (1977); Loving v. Virginia, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (marriage); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), and Meyer v. Nebraska, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923) (raising children). In particular, the Supreme Court has long recognized family matters as a fundamental liberty interest that are protected by the Fourteenth Amendment. In Bowen v. Gilliard, 483 U.S. 587, 107 S. Ct. 3008, 97 L. Ed. 2d 485 (1987), the Supreme Court stated:

> The family is an institution "deeply rooted in this Nation's history and tradition." Our society's special solicitude for the family reflects awareness that "it is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." As a result, we have long recognized that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." Therefore, "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation."

483 U.S. at 611 (citations omitted).

The issue of a constitutionally protected liberty interest as it relates to foster families was addressed by the Supreme Court, in dicta, in Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 97 S.Ct. 2094, 53 L.Ed.2d 14 (1977). In Smith, the Supreme Court upheld, on due process grounds, the constitutionality of a New York law authorizing the removal of a foster child from a foster family back to the natural parents or to another foster home on ten days' notice. The Smith Court recognized the importance of familial relationships stemming from emotional ties derived from the intimacy of daily association, which could arise in a foster family as well as in a biological family. However, in dictum, it indicated that if a foster family's "claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties." Id. at 845-846. Furthermore, the Supreme Court declared that whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family was to return a child to his natural parents. Id. at 830-40, 847.

In this state, the issue of a constitutionally protected liberty interest in a foster family was recently discussed in People v. S.L.F., supra. In S.L.F., a foster mother appealed an order in a dependency and neglect proceeding returning permanent custody of a foster child to the biological mother and dismissing the foster mother's motion for permanent custody. The foster child had been placed with the foster mother after the child was adjudicated dependent or neglected. After a dispositional hearing, the juvenile court ordered that the department of human services retain legal custody of the child, that the child remain in the same foster home, and that the biological mother undergo a treatment plan. Subsequent hearings revealed that the biological mother was visiting the child regularly and interacted well with him but was not participating in

individual therapy as required in the treatment plan. Ultimately, the juvenile court, over objections of the foster mother and the guardian ad litem, adopted a recommendation of the department of human services and ordered that temporary custody of the child be given to the mother.

In reaching its decision, the court analyzed the Smith ruling as well as decisions from other jurisdictions concerning the liberty interest of a foster parent. The S.L.F. court also examined Colorado statutes concerning placement of a child in a foster home and concluded that:

> [A] review of Colorado law concerning foster parents convinces us that no expectation of a continued foster placement can arise until the goal of reunification of the child with his or her natural family has been abandoned. The primary purpose of the Children's Code is reunification of the family. If it is necessary to remove a child from his or her home, temporary care may be provided by a foster family while efforts are being made to rehabilitate his or her parents and to reunite the family. Recognizing the critical need of a child to bond with and attach to a primary adult, however, the General Assembly has imposed time limits within which reunification should be achieved. Only when it becomes apparent that reunification is unrealistic does the focus shift to finding a permanent home for the child; at that time, the department may begin to consider long-term foster care or an award of guardianship to the foster parent. Further, after the focus shifts to finding a permanent home, the department must continue to provide reasonable efforts to preserve the biological family.
>
> 2000 LEXIS 1634 at *10-*11 (citations omitted).

In S.L.F, the reunification of the child with the natural family had not been abandoned as evidence indicated that during the child's placement with the foster mother, the department's goal of reuniting the mother and the child did not change and that the department continued to make efforts to rehabilitate mother. Furthermore, the court noted the biological mother substantially complied with the treatment plan and maintained her relationship with the child by frequently and consistently visiting him throughout the pendency of the proceeding. Based on these facts and its analysis of Colorado law, the court concluded that the "the foster mother did not have a realistic expectation of continuation of the foster parent-foster child legal relationship." S.L.F., 2000 LEXIS 1634 at *12.

The record in this appeal reveals the presence of certain factual circumstances that were not evident in either Smith or S.L.F., the existence of which leads this Court to the conclusion that the municipal court was incorrect in its determination that Ordinance 1248 did not violate a liberty interest or fundamental right to which the defendant was entitled. In both Smith and S.L.F., the government action challenged involved reunification of the child with the natural family through statutory procedures.[9] The natural families or state in those cases sought the

[9] In Smith, one foster parent attempted to block the removal of her foster children based upon the state agency's determination that the foster mother's arthritis made it difficult for the foster mother to provide adequate care to the foster children.

return of the child to the natural or biological families in accordance with the stated purpose of the state's foster family legislation and the best interest of the child.

Unlike Smith and S.L.F., however, the record on appeal here does not contain any facts that would indicate that reunification between the defendant's foster children and their natural or biological families was ongoing or that the foster children's natural families had expressed any desire to seek reunification. Moreover, the record is devoid of any facts that would suggest that the natural or biological families have maintained contact with the foster children. There also is no evidence to show that the department of social services was continuing to make reasonable efforts to preserve the natural or biological family. The evidence further indicates that the defendant's foster children were placed in the defendant's foster home after being in more restrictive care environments.[10] At least two of the foster children lived in homes were generational incest and step family incest was involved.[11] Given their criminal convictions for sexual assault and incest, it is unlikely that the foster children will be returned to their biological families. Furthermore, the children were placed with the defendant in accordance with statutory requirements that they be placed in the least restrictive setting. C.R.S. 19-3-703.

According to the defendant, the foster children lived with her "because they no longer have biological parents to care for them or protect their interests."[12] Their placement within the defendant's foster home not only provides them with the family support these children no longer have but with the necessary psychological counseling they require as well. Eventually, these children will not be returned home but moved to independent living for reintegration into the community once they are determined by the department of social services to be ready for such arrangements. In light of the decision in S.L.F. and given the abandonment of reunification as a permanent goal and the placement of the children in the least restrictive setting, as has occurred here, it is the opinion of this Court that defendant had an expectation of a continued foster placement. As such, it is the determination of this Court that the defendant had a constitutionally protected liberty interest in maintaining her foster family free from government interference.

Having determined that the municipal court erred in finding that defendant did not have a constitutionally protected liberty interest, this Court now turns to the issue of whether or not the municipal court also erred in finding that the ordinance did not infringe on that interest in violation of the Fourteenth Amendment.

Zoning decisions of a municipal authority are presumed valid and a party challenging the constitutionality of a zoning ordinance normally bears the burden of proving the asserted invalidity beyond a reasonable doubt. Zavala v. City and County of Denver, 759 P.2d 664 (Colo. 1988). The discretion of a municipality to promulgate zoning regulations is by no means absolute, however, but is subject to constitutional limitations applicable to all governmental legislative decisions. Id. at 670. When an ordinance is alleged to infringe a fundamental right, that ordinance is subject to strict scrutiny analysis and will survive a constitutional challenge mounted on substantive due process or equal protection grounds only upon a showing by the government that the regulation is suitably tailored to serve a compelling state interest. Id. See

[10] Appendix to Opening Brief of Defendant-Appellant Juliana Ibarra, Tab 3.
[11] Appendix to Opening Brief of Defendant-Appellant Juliana Ibarra, Tab 2, pp. 16-18.
[12] Opening Brief of Defendant-Appellant Juliana Ibarra, pg. 25.

also City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); Rademan v. City & County of Denver, 526 P.2d 1325 (Colo. 1974). Zoning classifications that do not infringe upon fundamental rights or create suspect classifications are generally measured by the less demanding rationality standard. Under this standard, the legislation will be upheld if the purpose of the enactment is valid and the terms of the ordinance are rationally related to that governmental goal. Zavala, 759 P.2d at 670.

A review of the record shows that the municipal court applied the incorrect level of scrutiny in determining whether or not Ordinance 1248 violated the defendant's right to due process. Since the defendant had a constitutionally protected liberty interest, the ordinance was subject to strict scrutiny analysis and the burden was upon the City of Northglenn to prove that Ordinance 1248 was narrowly tailored to serve a compelling interest. The City of Northglenn advances the position that the purpose of the ordinance is to protect the community from sexual offenders. However, the City failed to present any evidence that public safety is enhanced when sex offenders are prohibited from living together under one roof. The City of Northglenn also failed to demonstrate that Ordinance 1248 is narrowly tailored to achieve this purported goal of public safety. The effect of the ordinance is to create two classes of sex offenders, related sex offenders and unrelated sex offenders, and subject them to disparate treatment without a showing of even a rational basis for the disparity in treatment. A state (or municipality in this instance) may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Zobel v. Williams, 457 U.S. 55, 102 S. Ct. 2309, 72 L. Ed. 2d 672 (1982); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 37 L. Ed. 2d 782 (1973). Furthermore, some objectives -- such as "a bare . . . desire to harm a politically unpopular group," -- are not legitimate state interests. Id. at 534. See also Zobel, 457 U.S. 55 at 63. As such, the municipal court erred when it applied a rational basis test instead of the more stringent strict scrutiny test since a fundamental right was implicated.

EX POST FACTO LAWS AND BILL OF ATTAINDER

The defendant also contends that Ordinance 1248 violates the constitutional prohibition against retroactive laws. This Court disagrees.

Both the United States Constitution and the Colorado Constitution prohibit ex post facto laws and bills of attainder. U.S. Const. art. I, § 9; Colo. Const. art. II, § 11. In determining whether a law is ex post facto, Colorado courts adhere to the standard articulated in Dobbert v. Florida: "Any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto." People v. District Court (Thomas), 834 P.2d 181 (Colo. 1992)(quoting Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977); see also People v. Aguayo, 840 P.2d 336 (Colo. 1992). Thus, a statute is an ex post facto violation if it is retroactively applied to a defendant and it increases or makes more onerous the applicable punishment for the crime. See Thomas, 834 P.2d at 195.

The record indicates that Ordinance 1248 was passed on January 27, 2000, and the defendant was not cited for the alleged offense until February 11, 2000. While it is true that the

foster children resided with the defendant prior to the enactment of Ordinance 1248, the record does not contain any indication that the defendant was prosecuted for conduct that occurred prior to the date Ordinance 1248 became effective. In fact, the offense for which the defendant was prosecuted alleges that the violation was committed on February 11, 2000, after the enactment of Ordinance 1248. An ordinance is not unconstitutional merely because the facts upon which it operates occurred before the adoption of the ordinance. See People v. D.K.B., 843 P.2d 1326 (Colo. 1993). Therefore, this Court concludes that the municipal court did not commit error when it found that the Ordinance did not violate constitutional prohibitions against ex post facto laws.

Likewise, a bill of attainder is a legislative act that applies to named individuals, or members of an easily ascertainable group, and that imposes punishment upon those individuals without the benefit of a criminal trial. Garcia v. Zavaras, 960 P.2d 1191 (Colo. 1998); Velaverde v. Zavaras, 960 P.2d 1162 (Colo. 1998). See United States v. Lovett, 328 U.S. 303, 66 S. Ct. 1073, 90 L. Ed. 1252 (1946). Here, there is insufficient evidence in the record that would sustain a finding that the Ordinance is an unconstitutional bill of attainder. The defendant was convicted after a trial to the court for her failure to comply with Ordinance 1248. Therefore, the defendant's argument that Ordinance 1248 is an unconstitutional bill of attainder fails.

PREEMPTION

Defendant's final argument is that Ordinance 1248 is preempted by the Colorado Children's Code because it attempts to regulate matters of statewide concern. However, Ordinance 1248 is a zoning ordinance that attempts to regulate the use of property and, as such, is a matter of purely local concern. Voss v. Lundvall Brothers, Inc., 830 P.2d 1061 (Colo. 1992); City of Greeley v. Ellis, 527 P.2d 538 (Colo. 1974).

For the foregoing reasons, the defendant's conviction is REVERSED and the matter is REMANDED with instructions to the City of Northglenn Municipal Court that it GRANT the defendant's Motion to Dismiss.

DONE AND SIGNED THIS 14th DAY OF March, 2001.

BY THE COURT:

John J. Vigil
District Court Judge

COMBINED COURT, ADAMS COUNTY, STATE OF COLORADO Court Address: 1100 JUDICIAL CENTER DRIVE BRIGHTON, CO 80601	
THE PEOPLE OF THE STATE OF COLORADO, CITY OF NORTHGLENN Plaintiff/Appellant vs. JULIANA IBARRA Defendant/Appellee	| | COURT USE ONLY | |
Attorney or Party Without Attorney Name: Atty. Reg.# Address: Phone Number FAX Number: E-mail:	Case Number: 00CV1363 Division D Courtroom

CERTIFICATE OF MAILING

I certify that I have sent a copy of the ORDER in the above numbered case to each person listed below:

Hon. Harlan R. Bockman	Adams County District Court
Hon. Thomas R. Ensor	Adams County District Court
Hon. Donald W. Marshall	Adams County District Court
Hon. C. Vincent Phelps	Adams County District Court
Hon. John E. Popovich	Adams County District Court
Hon. Chris Melonakis	Adams County District Court
Hon. John J. Vigil	Adams County District Court
Mag. Vincent White	Adams County District Court
Mag. David Juarez	Adams County District Court
Mag. Robert Doyle	Adams County District Court
Mag. Johnny C. Barajas	Adams County District Court
Hon. Ovid R. Beldock	Adams County Court
Hon. Cindy H. Bruner	Adams County Court
Hon. Emil A. Rinaldi	Adams County Court
Hon. Sabino E. Romano	Adams County Court
Hon. Jeffrey L. Romeo	Adams County Court
Hon. Michael A. Cox	Adams County Court
Mag. Randall J. Davis	Adams County Court
Library file	Judicial Center
Special Assistant Attorney General	Herbert C. Phillips
1350 Seventeenth St. Suite 450, The Market Center	Denver, Co 80202-1517
Holland & Hart	555 Seventeenth St., Suite 3200 Denver, Co 80201-8749
Mark Silverstein, American Civil Liberties Union Foundation of Colorado	400 Corona St., Denver, Co 80218
Northglenn Municipal Court,	11701 Community Center Drive, Northglenn, Co 80234

Date 3-15-01

COMBINED COURT ADAMS COUNTY SEAL COLORADO

Laura Flores
Deputy Clerk
Adams County District Court

3-15-01