

CONFIDENTIAL LEGAL MEMORANDUM



To: Joel Gregozeski, Town Administrator
From: Ashley Lehocky, Town Attorney
Date: March 10, 2020
Re: Sexual Offender Residency Ordinances

I have taken some time to refresh myself on the sex offender residency restrictions. In a nutshell, the Town may enact an ordinance setting forth residency restrictions for sexual offenders. However, amendments to Ch. 980 Wis. Stat. preempt municipal ordinances for the higher risk category of “sexually violent persons.” Sexually violent persons are those who are designated by the State as high risk and, as such, are required to register with the Department of Corrections.

Reporting and residency restrictions are mandatory for “sexually violent persons.” “Sexually violent person” means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence. Wis. Stat. § 980.01(7).

“Sexually violent offense” means any of the following:

(a) Any crime specified in s. 940.225 (1), (2), or (3) [[Sexual Assault](#)], 948.02 (1) or (2) [[Sexual Assault of a Child](#)], 948.025 [[Engaging in Repeated Acts of Sexual Assault of the Same Child](#)], 948.06 [[Incest with a Child](#)], 948.07 [[Child Enticement](#)], or 948.085 [[Sexual Assault of a Child Placed in Substitute Care](#)].

(am) An offense that, prior to June 2, 1994, was a crime under the law of this state and that is comparable to any crime specified in par. (a).

(b) Any crime specified in s. 940.01, 940.02, 940.03, 940.05, 940.06 [[crimes resulting in death](#)], 940.19 (2), (4), (5), or (6), 940.195 (4) or (5) [[crimes of battery](#)], 940.30, 940.305, 940.31 [[crimes involving kidnapping/false imprisonment](#)], 941.32 [[administering dangerous drugs](#)], 943.10, 943.32 [[burglary and robbery](#)], or 948.03 [[child abuse](#)] that is determined, in a proceeding under s. 980.05 (3) (b) [[at a trial](#)], to have been sexually motivated.

(bm) An offense that, prior to June 2, 1994, was a crime under the law of this state, that is comparable to any crime specified in par. (b) and that is determined, in a proceeding under s. 980.05 (3) (b), to have been sexually motivated.

(c) Any solicitation, conspiracy, or attempt to commit a crime under par. (a), (am), (b), or (bm).

Wis. Stat. § 980.01(6)

Courts may also require extended supervision and reporting for offenders who have been convicted of violations in which the court imposes a sentence or places a person on probation for any violation, or for the solicitation, conspiracy, or attempt to commit any violation, under Ch. 940 [Crimes Against Life and Bodily Security], 944 [Crimes Against Sexual Morality] or 948 [Crimes Against Children], or sec. 942.08 [Invasion of Privacy] or 942.09*¹ [Representations Depicting Nudity], or secs. 943.01 to 943.15 [crimes involving criminal damage to property]. Typically, courts will impose reporting requirement for offenses in which the victim was a minor and the convicted person was not the victim's parent.

The 2015 "Limited Preemption of Local Sex Offender Ordinances" Act 156 prohibits/preempts local sex offender residency restriction ordinances from being enforced against a person on supervised release, or against a person who provides housing to the person, provided that the sexually violent person is (1) subject to supervised release, (2) residing where s/he is ordered, and (3) in compliance with all court orders issued under Ch. 980.

Ch. 980 Wis. Stats. creates a residency restriction for Ch. 980 persons on supervised release:

- a. 1,500 foot radius around "any school premises, child care facility, public park, place of worship, or youth center"
- b. If offense against "adult at risk" or "elder adult": 1,500 foot radius around a nursing home or an assisted living facility
- c. If offense against child under 13: offender is a "serious child sex offender" and may not be placed into a residence adjacent to a property where a child's primary residence exists.

Only when the person is not under DHS supervision would a municipality's residency restrictions likely take effect. In other words, a local ordinance only impacts those who are no longer being supervised by the State. That means either the person has completed the reporting term (typically, no less than 15 years after incarceration), or, the person was not actually considered a "sexually violent person" to begin with.

If the Town wishes to enact a residency restriction ordinance, it certainly has the ability to do so. However, it must understand that the impact of that ordinance will be limited by statute. For example, in the case which prompted the Town's inquiry, the person in question has been designated sexually violent and is required to register, report and be supervised for 15 years from his release date. A Town ordinance would not apply to him during his supervision period.

¹ Mark Mayo was convicted of Wis. Stat. sec. 942.09(2)(am)1 "Capture an Image of Nudity".

Common elements of a municipal residency restriction ordinance include:

1. Designation of offender: either offense based (listing violations the municipality will consider) or offender based (includes all offenses by anyone who has been registered as a Special Bulletin Notification “SBN” sex offender pursuant to sec. 301.46(2) and (2m) Wis. Stats.)
2. Radius around prohibited areas: Typically, 500-2,000 feet (measurements should be defined to avoid vagueness; e.g. the distance shall be measured by following a straight line from the outer property line of the residence to the nearest outer property line of the prohibited area)
3. Designation of prohibited areas: schools, parks, day care facilities, recreational trails and playgrounds. Others have included nursing homes, libraries, swimming pools/ponds, etc.)
4. Exceptions: grandfather clause for those who have already established residency, “Romeo and Juliet” (two minors engaged in consensual relations), minors residing with guardians, etc.
5. Domicile clause: prohibiting residency of offenders who were not from that municipality at the time of the offense.

Local sex offender residency ordinances often times have more of a political benefit than a legal one. The greatest potential benefit for the Town, in my opinion, is that a domicile clause (no. 5 above) may be effective in limiting intake of certain offenders from other municipalities. A local ordinance will also give the Town standing to sue if it believes the DHS or the DA’s office has placed a supervised individual inappropriately and inconsistently with state law.

For those who are not placed by the State, a town enforces its sex offender residency ordinance through a nuisance action. Violation of a sex offender residency restriction is a nuisance *per se*. In other words, the municipality is not required to demonstrate an actual injury has occurred, a violation of the ordinance is, in and of itself, an injury at law. The Town would seek an injunction from the circuit court prohibiting the person from residing at the location in question.

Offenders may challenge an ordinance on due process grounds. An offender must be given the opportunity to present to the town his or her case to demonstrate that he or she qualifies for an exception or exemption. These decisions could then be appealed to the circuit court.

The highest risk offenders are subject to monitoring by the State, not the Town. If the Town of Greenville is interested in enacting a sex offender residency ordinance, it should be mindful to ensure that the more recent 2015 Ch. 980 Wis. Stat. amendments are accounted for. The ordinance should not be more restrictive than state statute. Please let me know if you would like for our office to draft a proposed ordinance.