

Sexual Offender Ordinances

One frequent question raised by town officials is how to handle sexual offenders in their communities. Recent court cases and legislative changes have affected ordinances that regulate the placement of sexual offenders. These ordinances are complex. We often receive calls asking how to craft these ordinances. Even though these are complicated ordinances, there are some basics to know when you craft your ordinance to avoid legal challenges.

“Sexually Violent Persons”

Local ordinances are preempted by state law when it comes to “sexually violent persons” (SVPs). An SVP is an individual who committed a violent sexual offense or was found not guilty of a violent sexual offense by reason of insanity or mental defect, 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). Whether a person is an SVP is a court decision made after a sexually violent offense conviction. SVPs have more stringent restrictions placed on them by the courts and the State.

When a person is designated an SVP, towns cannot place living restrictions on them under certain conditions. Wis. Stat. 980.135 states “No county, city, town, or village may enforce an ordinance or resolution that restricts or prohibits a sex offender from residing at a certain location...so long as the individual is subject to supervised release under this chapter, the individual is residing where he or she is ordered to reside under s. 980.08, and the individual is in compliance with all court orders issued under this chapter.” This means if the SVP is under the supervision of the Department of Health Services, is living where the court ordered the person to live, and is complying with all rules of supervised release, a local ordinance will not apply.

It is important to note that an SVP still has location restrictions placed upon them by the state. The person may not live within 1500 feet of a school, daycare center, place of worship, park, or youth center. There are also additional restrictions if the original offense involved an at risk group. For example if the offense involved a child, the SVP could not live within 1500 feet of the primary residence of a child.

Although towns cannot regulate the placement of these types of sexual offenders, the town may create ordinances regarding placement of other offenders.

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If the person is not an SVP, then a municipal ordinance would apply. This authority is not unlimited. A recent court decision clarified when ordinances go too far, and what information is necessary to uphold an ordinance.

Before explaining the court case, a quick overview of village powers is necessary. Only towns that have been granted village powers by the electors may pass a sexual offender ordinance. Village powers allow the town to pass ordinances for the public health, safety, and general welfare. This is generally referred to as a municipality’s “police powers”. This means any restriction in a sexual offender ordinance must relate to the public health, safety, and general welfare. If your town does not have village powers you cannot pass a sexual offender ordinance because there is no statute that specifically grants municipalities this ability.

Although village powers are generally broad and can encompass many regulations, they are not unlimited when it comes to a sexual offender ordinance. That is what led to a lawsuit involving the village of Pleasant Prairie that challenged the constitutionality of its sexual offender ordinance.

The Pleasant Prairie Case

The Village of Pleasant Prairie passed an ordinance regulating where child sex offenders could live (Offenders). The ordinance prohibited Offenders from living within 3,000 feet of a "prohibited location". The village designated schools, day-care centers, parks, trails, playgrounds, places of worship, athletic fields used by minors or any other place designated by the village as a "prohibited location". The village's ordinance also prohibited offenders from moving into the village unless they lived there at the time of their offense. The ordinance did exempt Offenders from the location requirements if they lived continuously in a home prior to and after the passage of the ordinance, but the ordinance prevented Offenders from renewing rental agreements in prohibited locations after six months. Further, the ordinance prevented Offenders from living within 500 feet of each other. The ordinance was a blanket prohibition, and did not have a procedure to evaluate each Offender's danger to the community.

The Village's ordinance did have two grandfather clauses for Offenders. Offenders who took up a residence were grandfathered if a prohibited location was established near them. Also, Offenders could live with close family members if the family member lived in the same location for at least two years in the prohibited zone.

These restrictions resulted in over 90% of the village being a prohibited location to Offenders. Few residential dwellings were in the remaining 10%. The 10% became even further restricted with the 500 foot minimum dwelling distance between Offenders, meaning there was an extremely limited area where Offenders could reside.

Several individuals who fell under these restrictions sued the Village claiming the ordinance was so restrictive it violated their constitutional rights. The plaintiffs had two claims, an ex post facto claim and an equal protection claim.

The Ex Post Facto Claim

An Ex Post Facto claim alleges that the government imposed a retroactive punishment. In this case the plaintiffs alleged that the village's ordinance imposed an additional punishment on Offenders for prior convictions. The court had to weigh five factors in analyzing the ordinance: 1) Does the ordinance inflict a traditional punishment; 2) Does the ordinance impose an affirmative disability or restraint; 3) Does the ordinance promote the traditional aims of punishment; 4) Does the ordinance have a rational connection to a non-punitive purpose; and 5) Is the ordinance excessive with respect to its purpose?

With the first factor, the court found the ordinance amounted to banishment because it prohibited many Offenders from living in the village, and forced some to move out. Banishment is a traditional punishment and satisfied the first factor. Similarly, the second factor placed severe restraints on Offenders. Also, the third factor promoted the traditional aims of punishment because it segregated Offenders and had a deterrence aim in attempting to keep Offenders away from children to deter recidivism.

The fourth and fifth factors are the most important in the analysis and usually considered together. Essentially the court balances the punitive effect of the ordinance with the ordinance's connection to its stated purpose. The key for the fifth factor is whether the punishment is actually rationally related to the purpose of the ordinance, not whether the purpose is admirable. When analyzing these factors the court found in favor of the Offenders because the Village did not have any data or information supporting why its restrictions actually had a positive effect. Further, the Village's ordinance was a blanket ordinance and did not allow for individualized assessments of Offenders. Thus the court found the punishment was excessive compared to its connection to its purpose. Since the Village had no data to support the ordinance, the court found that it eliminated the possibility that the requirements were rational. In sum, the ordinance's non-punitive purpose did not outweigh the punitive effects because the law did not have any data or evidence to support its restrictions, only conjecture.

The Equal Protection Claim

The Offenders also challenged the ordinance claiming that it violated their Fourteenth Amendment rights to equal protection under the law. This means the law must treat all persons similarly situated alike. For this claim, the plaintiffs had to show 1) the village intentionally treated them differently from others similarly situated; 2) the village intentionally treated them differently because they belonged to a certain class; and 3) the difference in treatment was not rationally related to a legitimate state interest. It is important to note this test heavily weighs in favor of the government in most cases. If the court can reasonably come up with any justification for the law, it must uphold it. Even with this extremely lenient standard that favors the government, the court ruled for the offenders challenging the ordinance.

The plaintiffs won because the village did not have any data or evidence to show why it needed to treat child sex offenders differently than other sex offenders. The Village did not have anything to show that treating the groups differently had any effect on safety to the community. The Court noted that if the village had provided any evidence that it might have ruled differently, but since the village did not provide any data to support the ordinance, it had to rule in favor of the plaintiffs.

Key Takeaways from the Pleasant Prairie Case

The first takeaway from this case is to hire an attorney when crafting your ordinance. The Towns Association does not have a sample Sex Offender ordinance because these are complex documents that must be crafted specifically for your town. To make sure your ordinance passes constitutional muster an attorney should draft your ordinance.

The second lesson from this case is the importance of data and facts. Your ordinance must be based on protecting the public health, safety, or general welfare. The key is establishing that your ordinance provisions actually achieve those goals. That means providing data and facts to support your ordinance provisions. Had the village in the *Pleasant Prairie* case provided any information to support its ordinance restrictions the case could have turned out differently. But, the court repeatedly stated that the Village had no such information. That means seeking out studies showing that distances between residential dwellings and protected locations actually reduces the risk of recidivism, or showing why the town wants to treat sex offenders differently based on the offense. Further, for more restrictive ordinances there should be an individualized assessment. Blanket ordinances without individual assessments become more risky the stronger your ordinance becomes. There is obviously a cost to doing all of this. These upfront costs, however, are necessary to ensure your ordinance is legal and protects your town and outweigh potential legal costs from making a sloppy ordinance.