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September 29, 2015

Amy E. Hefter
Legislative Research Analyst
Legislative Reference Bureau
City Hall

Re: Residency Restrictions for Sex Offenders Domicile Clauses

Dear. Ms. Hefter,

In your letter dated August 26, 2015, you asked on behalf of Alderman Tony Zielinski, for our office to review proposed legislation for legality and enforceability regarding an amendment of Milwaukee Code of Ordinances 106-51 to include what is commonly known as an "original domicile restriction" for sex offender residency restrictions.

Original domicile restrictions limit the lawful residency of certain types of sex offenders to those who were residents of that municipality at the time of the underlying offense. The proposed amendment would prohibit the residency of sex offenders who have been convicted of a sexually violent offense or a crime against a child unless that sex offender lived in Milwaukee at the time of committing the offense resulting in the sex offender's most recent conviction for committing the sexually violent offense or crime against a child.

There are two published Wisconsin cases that address sex offender residency restrictions. *See Village of Menomonee Falls v. Jason R. Ferguson*, 2011 WI App 73, 334 Wis. 2d 131; *City of South Milwaukee v. Kester*, 2013 WI App 50, 347 Wis. 2d 334. In *Ferguson*, the court of appeals upheld the validity of the Menomonee Falls sex offender residency restriction ordinance and determined once the sex offender moved residences he no longer qualified for the grandfather clause exception. *Ferguson*, 2011 WI App 73, ¶ 29. In doing so, the *Ferguson* court noted that not only does Wisconsin not have a state statute addressing sex offender residency restrictions but that "Wisconsin municipalities are allowed and commonly do enact sex offender residency restriction ordinances." *Id.* at ¶ 16.

Two years later in *Kester*, the court of appeals upheld South Milwaukee's sex offender residency restriction. In doing so, the *Kester* court acknowledged the many laws the state legislature has adopted regarding sex offenders in holding state law does not preempt the ordinance in question. *Kester*, 2013 WI App 50, ¶ 19. In particular, the *Kester* court

found the purpose of the underlying ordinance was "to reduce the risk of reoffense by child sex offenders" and that "purpose advances both the reassimilation of sex offenders into the larger community and the protection of the public." *Id.* at ¶ 19. The *Kester* court also held sex offender residency restrictions are lawful as long as they do not defeat the purpose or violate the spirit of the various laws regulating sex offenders. *See id*; *Anchor Sav. & Loan Ass'n*, 120 Wis. 2d 391, 397, 355 N.W. 2d 234 (1984).

Turning to state law, Wis. Stat. § 301.03(2) requires the Department of Corrections to initially place sex offenders in the county in which the person resided or was convicted of the offense. Similarly, Wis. Stat. § 980.08(4)(cm) requires the court to place a sexually violent person on supervised release with the Department of Health Services in the county of residence for that person. An ordinance prohibiting a non-resident from being placed in its municipality is not inconsistent with these state laws.

In addition, it is notable a recent survey of the 18 other municipalities in Milwaukee County reveals that 14 of those municipalities currently have an original domicile clause. Our office is unaware of any challenges to those municipal ordinances based on their original domicile clause.

Given the aforementioned published cases and a review of state law, we do not believe an ordinance prohibiting the residency of non-Milwaukee sex offenders who commit a sexually violent offense or crime against a child defeats the purpose or violates the spirit of any law regulating sex offenders. We, therefore, believe the proposed amendment to MCO 106-51 would be lawful on its face.

However, we caution the combination of too many restrictions and too few exceptions compromises the facial validity of MCO 106-51 if there are no substantive residency options for applicable sex offenders. An ordinance that acts as an indirect prohibition on most, if not all, applicable sex offenders would defeat the public safety purpose of the ordinance given its foreseeable impact of creating homeless violent sex offenders and sex offenders who have offended against children. It would also violate the spirit of Wis. Stat. §§ 301.03 and 980.08(4)(cm), which create placement and supervision responsibilities upon the Department of Corrections and Department of Health Services, respectively. This placement availability issue has been magnified since the passage of MCO 106-51 now that every Milwaukee County municipality has enacted its own sex offender residency restriction ordinance.

We recommend any amendments to MCO 106-51 to further limit residency options for applicable sex offenders are passed in conjunction with an exception or exceptions that create additional residency options consistent with the public safety legislative intent of MCO 106-51.

If you have any further questions regarding this matter, please feel free to contact our office.

Very truly yours,

GRANT F. LANGLEY
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