



DOES V. SNYDER II: FREQUENTLY ASKED QUESTIONS

The Michigan Sex Offender Registration Act (SORA) Class Action

February 5, 2020

I. BASIC FACTS ABOUT THE *DOES II* LAWSUIT

What is the *Does v. Snyder II* lawsuit?

Does # 1-6 v. Snyder, No. 16-cv-13137 E.D. Mich.) (*Does II*) is a class action lawsuit brought on behalf of all people required to register under Michigan's Sex Offender Registry Act (SORA). *Does II* seeks to enforce a successful lawsuit challenging SORA that was brought on behalf of six people. The purpose of *Does II* is to apply that earlier decision to all Michigan registrants.

In August 2016, the Sixth Circuit Court of Appeals held that SORA's 2006 and 2011 amendments – which created exclusion zones limiting where registrants can live and work, retroactively lengthened registration periods to life, and imposed many new and in-person reporting requirements – violate the U.S. Constitution's Ex Post Facto Clause. *See Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (*Does I*). The district court judge previously decided in 2015 that the exclusion zones and certain other reporting requirements were unconstitutionally vague or violated the First Amendment, and also held that registrants can't be prosecuted for inadvertent violations of SORA.

Despite the decisions in *Does I*, the State of Michigan continues to subject over 40,000 people to SORA. The *Does II* lawsuit seeks to enforce the *Does I* decision for all registrants. But the most important goal is to reform Michigan's registry so that it is based not on myth and fear about registrants but on modern social science research.

What are the Claims in *Does II*?

Does II focuses on the legal claims that were successful in *Does I*. There are four claims:

- The **Ex Post Facto Claim** asserts that applying today's registration statute to people whose offenses occurred long ago violates the Constitution. The Sixth Circuit in *Does I* said that the 2006 and 2011 amendments to SORA cannot be applied retroactively. Therefore, people whose offenses pre-dated the 2006 amendments or the 2011 amendments cannot be forced to comply with parts of the law that were passed later. This

claim only applies to people whose offenses occurred before those amendments. Specifically:

- People whose offenses occurred before April 12, 2011, cannot be subjected to the 2011 amendments, which retroactively extended many individuals' registration terms to life, classified registrants by tiers, and imposed extensive reporting requirements.
- People whose offenses occurred before January 1, 2006, also cannot be subjected to the 2006 amendments, which imposed restrictions on where people can live, work and "loiter," and which enabled the public to subscribe to updates about registrants on the internet.
- The **Due Process Vagueness Claim** asserts that SORA's exclusion zones and some of SORA's reporting requirements are unconstitutional because it is impossible for registrants to know where the exclusion zones are or what they must report. Under the Constitution's Due Process Clause, people generally cannot be punished for conduct that they can't know is illegal. The district court in *Does I* found that SORA's exclusion zones, "loitering" provision, and certain reporting requirements were unconstitutionally vague.
- The **Due Process Strict Liability Claim** asserts that because SORA is a very complicated law and makes many normal activities a crime, registrants cannot be punished for making an innocent mistake about what they are or are not supposed to do under SORA. The district court in *Does I* said that you cannot be held strictly liable simply for violating SORA, instead you *intend* to violate the law to be prosecuted.
- The **Free Speech Claim** asserts that SORA's extensive reporting requirements for online activity violate the First Amendment. The district court in *Does I* held that some of SORA's online reporting requirements are unconstitutional.

What is a Class Action Lawsuit?

A class action is a form of lawsuit that permits one or more people ("plaintiffs" or "class representatives") to represent a larger group ("class") of individuals who all have similar claims. A class action allows the court to decide those claims for everyone at once.

In *Does II*, there are six individual class representatives who are bringing the case on behalf of *all* registrants. This is different from *Does I*, which was brought only on behalf of the individual plaintiffs in that case.

What has the Court Decided So Far in *Does II*?

In September 2018, the District Court granted class certification, meaning that any rulings in *Does II* will apply not just to the six plaintiffs, but to other registrants whose situation is similar. The Court certified a Primary Class, which includes all Michigan registrants. The Primary Class

is asserting the Due Process Vagueness Claim, Due Process Strict Liability Claim, and the Free Speech Claim.

The Court also certified two subclasses for the Ex Post Facto Claim:

- (1) The Pre-2006 Ex Post Facto Subclass (people whose offenses occurred before January 1, 2006); and
- (2) The 2006-2011 Ex Post Facto Subclass (people whose offenses occurred on or after January 1, 2006, but before April 12, 2011).

The Pre-2006 Ex Post Facto Subclass is arguing that neither the 2006 nor 2011 amendments can be applied to people with pre-2006 offenses. The 2006-2011 Ex Post Facto Subclass is arguing that the 2011 amendments cannot be applied to people with offenses prior to April 12, 2011. If you fall within one or more of the class definitions, then you are already a member of the class (and any applicable subclass); you do not have to do anything to become part of the class.

On May 23, 2019, the Court issued a declaratory judgment on the Ex Post Facto Claim, ruling that SORA is punishment, and that the 2006 and 2011 amendments cannot be retroactively applied.

What Happens Next?

The court is holding a hearing on February 5, 2020 in Port Huron to hear arguments on two motions that were filed in September and December of 2019:

1. Motion for relief for the ex post facto subclasses. That motion asks the court for three things:
 - i. Ruling on Severability. We've asked the court to say that SORA cannot be applied at all to registrants with offenses that occurred before April 12, 2011, the effective date of the 2011 Amendments. The Sixth Circuit Court of Appeals ruled in *Does I* that those amendments cannot be applied retroactively. The class attorneys have argued that SORA is impossible to understand without the 2011 amendments. In other words, the amendments are not *severable*, they cannot be cut (or severed) from the statute with the remainder of the statute in place. If the Court agrees that the 2011 amendments are not severable, the Legislature must pass a new law if it wants to apply SORA to pre-2011 registrants. It cannot apply the current law. The lawyers for the defendants have asked the court to certify the question of severability to the Michigan Supreme Court. Certifying means that instead of deciding the issue of severability himself, the judge would ask the Michigan Supreme Court to decide whether the 2011 amendments are severable.
 - ii. Barring Unconstitutional Enforcement. We've asked the court to bar enforcement of the 2006 amendments against people whose registrable offenses occurred prior to January 1, 2006. Those amendments limit where registrants can live, work and spend time, and affect electronic notices that go out to the public when registrants move.
 - iii. Notice. We've also asked the court to order notice to all registrants, prosecutors and law enforcement, so that everyone who must follow or enforce SORA knows what the current law is.

2. Motion for relief for all SORA registrants: The motion asks the court to prevent enforcement of the geographic exclusion zones and certain reporting requirements, as well as to order that registrants cannot be criminally prosecuted for unintentional violations of SORA.

Will This Litigation Affect Individuals Who Do Not Reside in Michigan?

Generally, no, unless the other state's registration requirements are tied to registration in Michigan as a result of a Michigan conviction. This lawsuit is a challenge to Michigan's registry. It does not challenge registries in other states, each of which has its own separate and distinct SORA statute. Some states' registries make registration requirements dependent on a person's registration requirements in the state of conviction. Therefore, for some people living in other states who have Michigan convictions, this lawsuit could affect their SORA obligations.

Who Are the Lawyers in the Case?

The case is being litigated by the American Civil Liberties Union of Michigan (ACLU) and the University of Michigan Clinical Law Program (MCLP) – the attorneys who litigated *Does I* – and the Oliver Law Group, a firm that specializes in class action litigation.

What Should Michigan Do Now?

One option going forward is a “consent judgment” in *Does II*, where the state agrees to make changes to Michigan's registry to bring it into compliance with the Constitution. Another option is for the legislature to revise the law.

We think Michigan should use the *Does I* decisions and the current *Does II* litigation to take a hard look at SORA. We now know – based on modern social science research – that public crime-based registries are ineffective and waste taxpayers' money. Scientific research shows that most registrants will never commit another sexual offense, and that today's super-registration laws may *increase* recidivism rates (or have no effect at all).

We suggest that legislators bring together a work group to determine:

- whether a public registry is the best way to promote safety, based on modern research;
- whether the millions of dollars spent on the registry each year are well-spent or are wasted;
- how law enforcement can focus on those people who pose a real threat to the public rather than monitoring tens of thousands of people who do *not* pose such a risk;
- how to develop a process to ensure that only people who pose a real risk are monitored; and
- how to apply current research to fashion smart laws based on science (as opposed to unconstitutional laws based on myths or fears about sex offenders).

What Does *Does II* Mean for Individual Lawsuits Challenging SORA?

Does II is designed to address many of the most serious burdens currently placed on registrants. If the class is certified, and if the lawsuit is successful, all registrants will benefit. For example, the Court of Appeals' decision in *Does I* held that the 2011 amendments, which extended many

registrants' obligations from 25 years to life, cannot be applied retroactively. If the class action successfully extends the *Does I* decision to other registrants, most or all registrants whose terms were extended to life will see their registration periods drop back to 25 years.

How Can I Stay Up to Date On the Case Or Get More Information?

This FAQ is designed to answer common questions about the case. Going forward, the ACLU will post important case documents and major updates at:

<https://www.aclumich.org/en/SORA>

Because there are over 40,000 people on Michigan's registry, **the lawyers in this case cannot answer questions for individual registrants.** If you have questions about your individual case, you should talk to an attorney.

II. BASIC FACTS ABOUT MICHIGAN'S REGISTRY

Michigan's Registry Is Exceptionally Large

- Michigan's registry is the fourth largest state registry in the country.
- There are almost 40,000 people on Michigan's registry.
- Michigan has the second highest per-capita registration rate of any state.
- Approximately 2,000 more people are added to the registry each year.
- Because the registry is so large, it hard for police to know which registrants need careful monitoring.

Michigan's Registry Is Expensive

- Taxpayers pay between \$1.2 - \$1.5 million each year just on the registration database maintained by the state police's central registration unit.
- But most of the costs of SORA fall on local police, the Department of Corrections, and the Michigan courts, who spend untold millions on registry enforcement each year, with no demonstrable public safety effect.

Michigan Registers People Who Are Not a Danger to the Community

- People are required to register without anyone ever deciding whether they are a danger to the public.
- Registration is based solely on past convictions (no matter how old), not on present risk.
- Modern research shows that scientific assessments are much better at predicting risk than past convictions.
- Some people with minor convictions can present significant risk while other people with what appear to be more serious convictions can present little risk.
- The registry includes children as young as 14.

- The registry includes people who never committed a sex offense.
- The registry includes people who were never convicted of a crime.
- Michigan requires most people to register for life, no matter how old their crime, what they have done since, or how small a risk they pose to the community.

III. RECIDIVISM, RISK, AND REGISTRIES

Public Conviction-Based Registries Don't Work

Public sex offender registries do not reduce sex offending or make the community any safer. In fact, modern scientific research shows that public registries may actually increase sex offending.

Researchers believe this is so because public registration makes it harder for people to return to their families and communities, and harder for people to get schooling, housing, and jobs. All people with records, including sex offenders, are less likely to recidivate when they have strong family and community support, stable housing, educational opportunities, and good jobs.

Research suggests that some non-public registries that base registration on risk assessments rather than on a past conviction may reduce recidivism.

Most Child Sex Offenses Are Committed by Non-Registrants Who Know the Victim

Research shows that about 93 percent of child sex abuse cases are committed by family members or acquaintances, not strangers. By far the greatest danger of sexual abuse of children is not from strangers, but rather from relatives, sitters, friends, etc.

While a Small Percentage of People Convicted of Sex Offenses Pose a Significant Risk to Public Safety, Most Do Not

Research has shown that about 95 percent of individuals arrested for sex offenses do not have a prior sex offense or are not on a registry. In other words, the great majority of sex crimes are committed by new offenders, not repeat offenders. The risk of a new (first) sex offense is about 3 percent in the general male population. The risk that someone will commit a new sex offense varies significantly among offenders. Most people convicted of sex offenses do not reoffend sexually.

The Likelihood of Reoffending Drops Dramatically Over Time

From the outset, low-risk former sex offenders have a lower risk of committing a new sex offense than a baseline group of non-sex offenders. Even medium-to-high risk offenders become less likely to offend than the baseline of non-sex offenders over time. Individuals who reoffend usually do so within three-to-five years.

Experts have concluded that lifetime registration is unnecessary because after 17 years, reoffending is very unlikely, even for people who were originally high-risk offenders. The graph attached

as Exhibit 1 shows how the recidivism rates of offenders at different risk levels compare to the baseline risk of non-sex offenders.

IV. MICHIGAN’S EXCLUSION ZONES

- Registrants cannot live or work within 1,000 feet of a school.
- Registrants cannot “loiter” within 1,000 feet of a school, which means that registrant-parents cannot participate in many of their children’s educational activities, attend school activities, or take their children to a park within an exclusion zone.
- School exclusions zones apply to all registrants, even to those whose crime had nothing to do with children and who have never been found to be a danger to children.
- Exclusions zones don’t work because they block former offenders from housing, employment, treatment, stability, and supportive networks they need to build and maintain successful, law-abiding lives.
- A study by the Prison Policy Initiative found that almost 50 percent of Grand Rapids is off-limits to registrants (and much of the other 50 percent contains non-residential areas). *See* Exhibit 2, attached.
- Social science research shows no connection between where child sex offenses occur and where the offender lives or works.
- Most child sex offenses occur in the home and are committed by family members, friends, sitters, or others with a *connection* to the child.

The U.S. Department of Justice recommends against offender exclusion zones because the zones do not reduce crime:

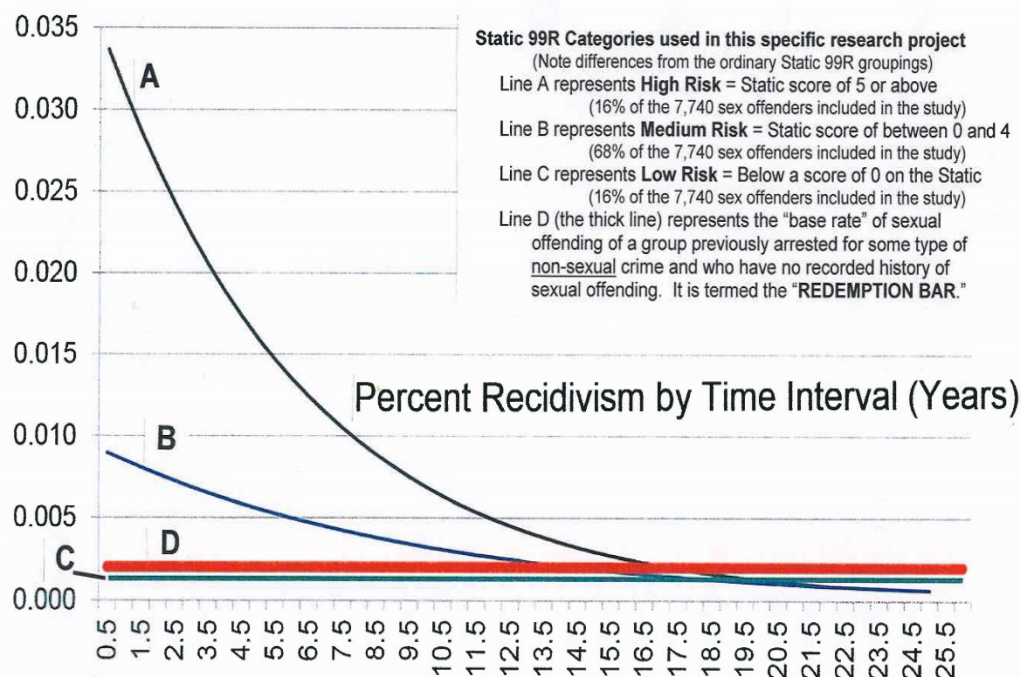
“Restrictions that prevent convicted sex offenders from living near schools, daycare centers, and other places where children congregate have generally had no deterrent effect on sexual reoffending, particularly against children. In fact, studies have revealed that proximity to schools and other places where children congregate had little relation to where offenders met child victims.”

A Department of Justice-funded study found that exclusion zones may have increased recidivism in Michigan. It is also impossible to know where exclusion zones are because the size and shape of the zone depends on whether you measure from the school door, the school building, or the school property line. Attached Exhibit 3 shows how exclusion zones expand depending on how you measure them. Because registrants and law enforcement officials have no way of knowing where property lines are, they cannot know where exclusion zones begin and end. This is why the federal district court held the exclusion zones to be unconstitutionally vague.

Exhibit 1:

SEX OFFENDER SEXUAL RECIDIVISM RISK LEVELS OVER TIME

Recidivism was calculated at six month intervals - .5, 1.0, 1.5 years, etc. Groups were differentiated by Static 99R risk level



Hanson: "Modern treatment methods can have a significant effect in reducing recidivism."
 [The offenders in this study had not received effective treatment.]

Karl Hanson conclusion: "Rather than considering all sexual offenders as continuous, lifelong threats, society will be better served when legislation and policies consider the cost/benefit break point after which resources spent tracking and supervising low-risk sexual offenders are better directed toward the management of high risk sexual offenders, crime prevention and victim services."

Future Hanson research plan: The risk of sexual recidivism of sex offenders who have remained completely arrest free since release.

Exhibit 2:

"School safety zones" in the city of Grand Rapids

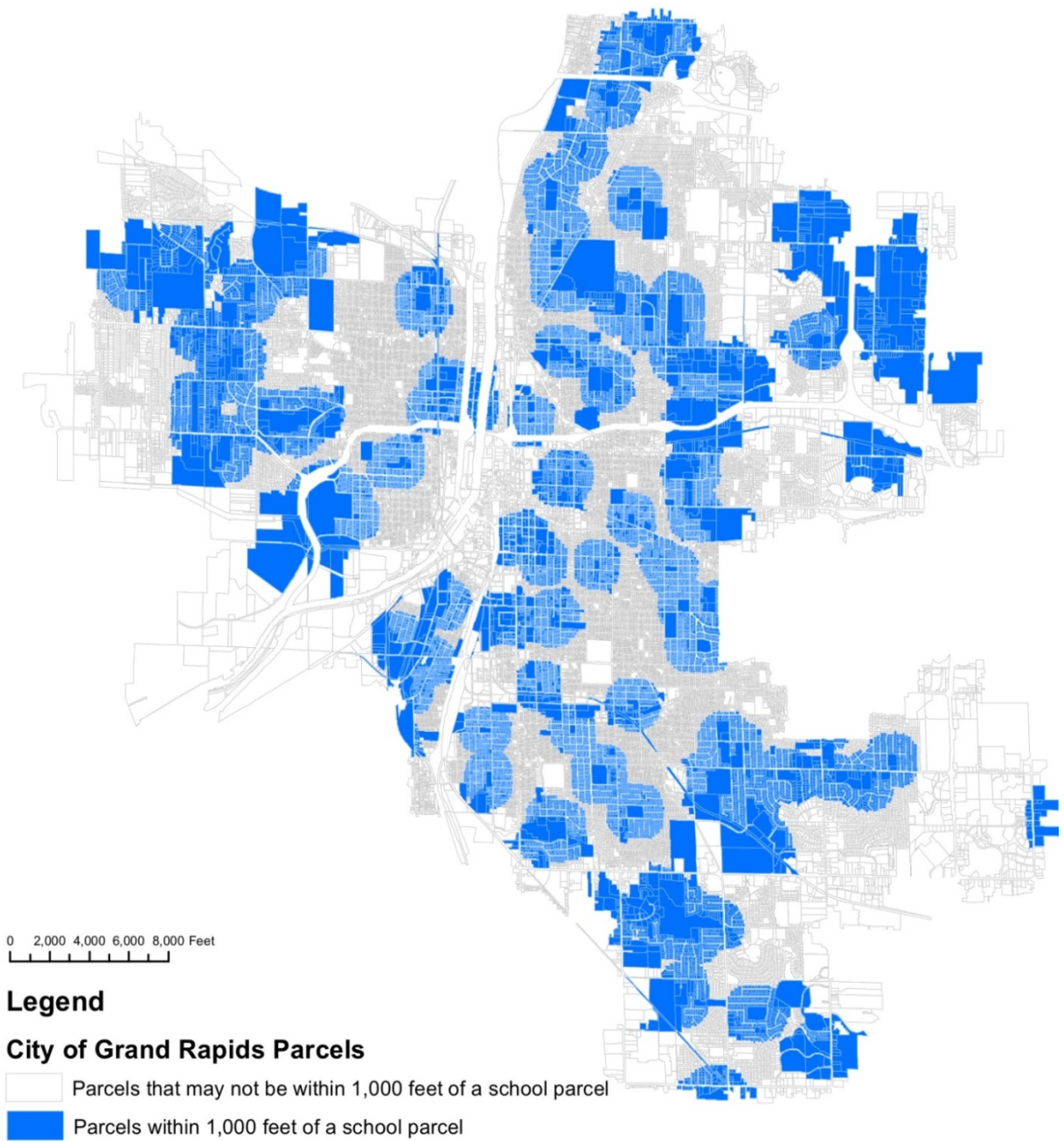
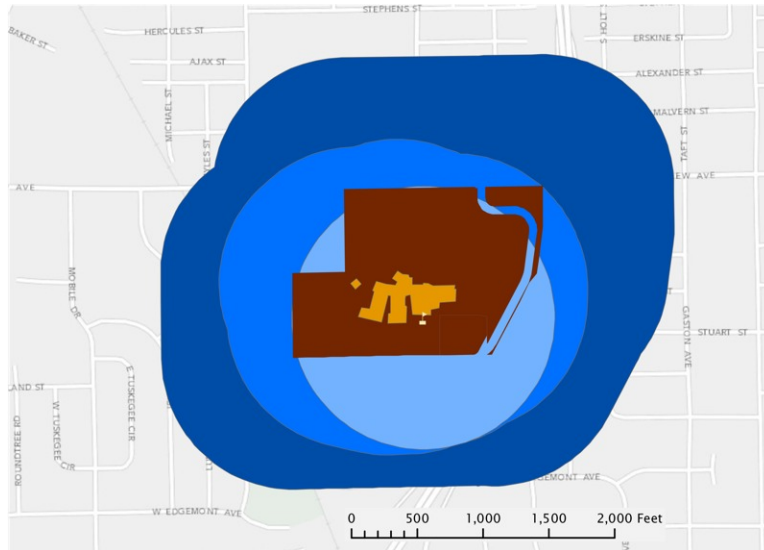


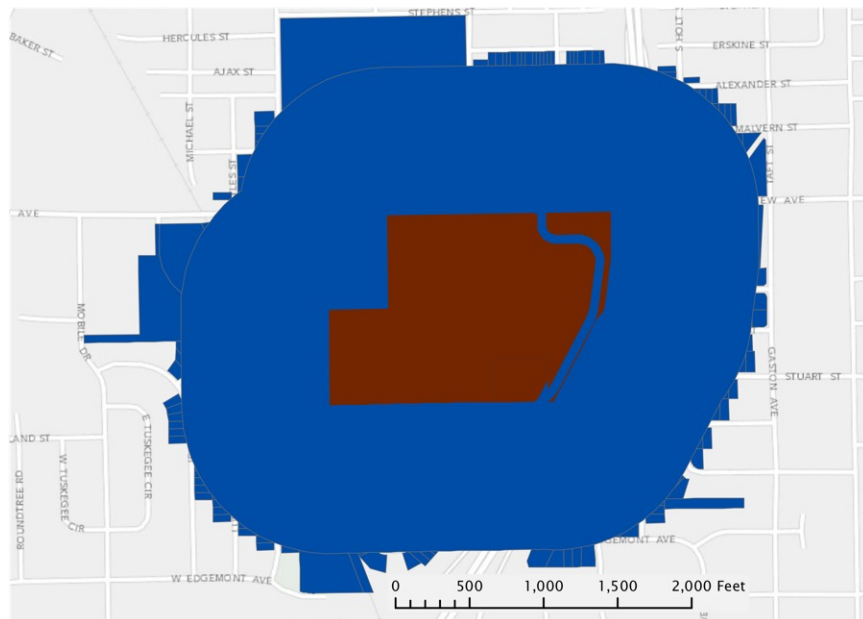
Figure 10.

Exhibit 3:

Changing Exclusion Zones Depending on How You Measure



1000-foot geographic zones drawn around each of three nested protected areas: the school's entrance (school symbol), the school building (orange) and the school property (brown)



Actual geographic zone measured from school building perimeter to home property line.

V. SORA LEGISLATIVE HISTORY OVERVIEW

1994 SORA First Enacted:

- confidential, non-public, law enforcement database;
- no regular reporting requirements;
- revealing registry information is a crime & a tort (treble damages);
- 25 year inclusion in database, except repeat offenders;
- allowed limited public inspection of registry information.

1999 Amendments:

- created internet-accessible registry;
- required quarterly or annual *in-person* registration;
- required fingerprinting and photographs;
- increased penalties for SORA violations;
- expanded categories of people required to register.

2002 Amendments:

- added new in-person reporting for higher educational settings.

2004 Amendments:

- registrants' photos posted on the internet;
- imposed registry fee, and made it a crime not to pay the fee.

2006 Amendments:

- criminalized working within 1,000 feet of a school;
- criminalized living within 1,000 feet of a school;
- criminalized "loitering" within 1,000 feet of a school;
- increased penalties;
- created public email notification system.

2011 Amendments:

- created federal SORNA-based 3-tier system;
- classified registrants retroactively into tiers based solely on offense;
- tier level determines length of registration and frequency of reporting;
- retroactively extended registration period to life for Tier III registrants;
- offense pre-dating registry results in registration if convicted of any new felony ("recapture" provision);
- in-person reporting for vast amount of information (like internet identifiers);
- "immediate" reporting for minor changes (like travel plans & email accounts).

2013 Amendments:

- imposed annual fee.