

ORDINANCE NO. 2013-08

AN ORDINANCE TO REPEAL AND RECREATE  
SECTION 10.11 OF THE TOWN OF DELAFIELD CODE  
TO PROVIDE REGULATIONS AND RESTRICTIONS REGARDING  
RESIDENCY AND LOITERING OF DESIGNATED SEX OFFENDERS  
WITHIN THE TOWN OF DELAFIELD

WHEREAS, the Wisconsin State legislature has provided for the punishment, treatment and supervision of persons convicted or otherwise responsible for sex crimes against children, including their release in the community; and

WHEREAS, Ch. 980 of the Wis. Stats provides for the civil commitment of sexually violent persons. The purpose of the statute is to protect the public, to treat convicted sex offenders who are at a high risk to reoffend, to reduce the likelihood that they will engage in such conduct in the future, and following such commitment sec. 980.08 Wis. Stats. provides, under certain conditions, for the supervised release of such persons into the community; and

WHEREAS, according to the US Department of Justice, Bureau of Justice Statistics, in 2001 there were approximately three hundred eighty-six thousand (386,000) convicted sex offenders registered in forty-nine (49) states and the District of Columbia; and

WHEREAS, according to a 1997 report prepared by the US Department of Justice titled "Sex Offenses and Offenders", nearly two-thirds of the victims of convicted rape and sexual assault offenders serving time in state prison were under the age of eighteen (18); the median age of victims of imprisoned sexual assault offenders was less than thirteen (13) years; the median age for rape victims was about twenty-two (22) years; an estimated twenty-four percent (24%) of those serving time for rape and nineteen percent (19%) of those serving time for sexual assault had been on probation or parole at the time of the offense; and

WHEREAS, the United States Supreme Court has recognized that the risk of recidivism posed by sexual offenders is "frightening and high" and "when convicted sex offenders re-enter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault". *Smith v. Doe*, 538 U.S. 84 (2003) and *McKune v. Lile*, 536 U.S. 24, 34 (2002) citing *U.S. Department of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders*, 27 (1997); U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Prisoners Released in 1983*, page 6 (1997); and

WHEREAS, a number of states across the United States, including but not limited to Florida, Georgia, Alabama, Iowa and California, impose restrictions on sex offenders with respect to residency; and

WHEREAS, the decision of the United States Court of Appeals for the 8<sup>th</sup> Circuit in *Doe v. Miller*, 405 F.3d 700, 716 (8th Cir., 2005), provides, in part, "the record does not support a conclusion that the Iowa General Assembly and the Governor acted based merely on negative attitudes toward, fear of, or a bare desire to harm a politically unpopular group. [Citation omitted] Sex offenders have a high rate of recidivism, and the parties presented expert testimony that reducing opportunity and temptation is important to minimizing the risk of re-offense. Even experts in the field could not predict with confidence whether a particular sex offender will reoffend, whether an offender convicted of an offense against a teenager will be among those who "cross over" to offend against a younger child, or the degree to which regular proximity to a place where children are located enhances the risk of re-offense against children. One expert in the district court opined that it is just "common sense" that limiting the frequency of contact between sex offenders and areas where children are located is likely to reduce the risk of an offense. [Citation omitted] The policymakers of Iowa are entitled to employ such "common sense," and we are not persuaded that the means selected to pursue the State's legitimate interest are without rational basis"; and

WHEREAS, the Town Board is authorized to exercise all powers related to villages and conferred on village boards by Ch. 61, Wis. Stats., all in accordance with § 60.10(2)(c), Wis. Stats.; and

WHEREAS, § 60.22(3) and 61.34(1), Wis. Stats. grants the "power to act for the government and good ... and for the health, safety, welfare and convenience of the public, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means"; and

WHEREAS, the Wisconsin Court of Appeals stated in *Village of Menomonee Falls v. Ferguson* (2011 WI App 73, 334 Wis.2d 131, 799 N.W.2d 473) that "Wisconsin does not have a sex offender residency restriction statute. Instead, Wisconsin municipalities are allowed and commonly do enact sex offender residency restriction ordinances"; and

WHEREAS, the Town Board has previously regulated this issue, by Section 10.11 of the Town Code, and now intends to update and re-adopt its regulation of this issue in light of court precedents, experiences and interpretations arising since the ordinance was first adopted. The Town Board finds that the adoption of residency and loitering restrictions for sexual offenders will promote the health, safety and welfare of the public.

Now, Therefore, the Town Board of the Town of Delafield, Waukesha County, Wisconsin DO ORDAIN AS FOLLOWS:

SECTION 1. Chapter 10 entitled "Public Nuisance," of the Town of Delafield Municipal Code, Section 10.11 entitled "Designated Sex Offenders Regulated," is hereby repealed and recreated to read as follows:

## 10.11 DESIGNATED SEX OFFENDERS REGULATED.

### 1. Findings and Intent.

- (a) This Chapter is a regulatory measure aimed at protecting the health and safety of children from the risk that convicted sex offenders may re-offend in locations close to their residences. The Governing Body finds and declares that sex offenders are a serious threat to public safety. When convicted sex offenders re-enter society, they are much more likely than any other type of offender to be re-arrested for a new sexual assault. The Governing Body further finds that, given the high rate of recidivism for sex offenders and that reducing opportunity and temptation is important to minimizing the risk of re-offense, there is a need to protect children where they congregate or play in public places in addition to the protections afforded by state law near schools, and other places children frequent. The Governing Body finds and recognizes that, in addition to schools, there are other areas where children congregate or play.
- (b) This Chapter is not intended to impose a criminal penalty or punishment of sexual offenders, but rather to serve the Town's compelling interest to promote, protect, and improve the health, safety, and welfare of children in the Town by creating areas around locations where children regularly congregate in concentrated numbers where sexual offenders and sexual predators are prohibited from loitering and/or establishing temporary or permanent residence and by regulating certain activities that may be used by sexual offenders to prey upon children.
- (c) Due to the high rate of recidivism for sexual offenders, and because reducing both opportunity and temptation would help minimize the risk of re-offense, the Governing Body finds that there is a compelling need to protect children where they congregate or play in public places.

### 2. Definitions.

For purposes of this Chapter, the following terms shall have the following meaning unless the context otherwise requires:

- (a) Child means a person under the age of 18.
- (b) Children means two or more persons under the age of 18.
- (c) Child Safety Location means the site upon which any of the following are located without regard to whether such site is located within the geographic limits of the Town of Delafield:
  - 1. Facility for children;
  - 2. Group home, as defined in Wis. Stat. sec. 48.02(7);
  - 3. Library, that is held open for use by the public;
  - 4. Licensed day care center as defined in Wis. Stat. sec. 48.65;

5. Public or private primary, elementary, secondary, middle, junior high, or high school;
6. Recreational trail, playground or park;
7. Specialized school for children, including, without limitation, a gymnastics academy, dance academy, or music school; the Schoenstatt Retreat Center is a specialized school;
8. Swimming pool, wading pool, or aquatic facility held open for use by the public;
9. A public or private golf course or range;
10. Church or places of worship;
11. Movie theater; and
12. Delafield Town Hall.

(d) Child Safety Zone means any place within the Town that is physically located within two thousand feet (2,000') of any Child Safety Location.

(e) Crime Against Children means any of the following offenses set forth within the Wisconsin Statutes, as amended, or the laws of this or any other state or the federal government, having like elements necessary for conviction where the victim is a child, respectively:

- § 940.225(1), First degree sexual assault;
- § 940.225(2), Second degree sexual assault;
- § 940.225(3), Third degree sexual assault;
- § 940.22(2), Sexual exploitation by therapist;
- § 940.30, False imprisonment - victim was minor and not the offender's child;
- § 940.31, Kidnapping - victim was minor and not the offender's child;
- § 944.01, Rape (prior statute);
- § 944.06, Incest;
- § 944.10, Sexual intercourse with a child (prior statute);
- § 944.11, Indecent behavior with a child (prior statute);
- § 944.12, Enticing child for immoral purposes (prior statute);
- § 948.02(1), First degree sexual assault of a child;
- § 948.02(2), Second degree sexual assault of a child;
- § 948.025, Engaging in repeated acts of sexual assault of the same child;
- § 948.05, Sexual exploitation of a child;
- § 948.055, Causing a child to view or listen to sexual activity;
- § 948.06, Incest with a child;
- § 948.07, Child enticement;
- § 948.075, Use of a computer to facilitate a child sex crime;
- § 948.08, Soliciting a child for prostitution;
- § 948.095, Sexual assault of a student by school instructional staff;
- § 948.11(2)(a) or (am), Exposing child to harmful material-felony sections;
- § 948.12, Possession of child pornography;
- § 948.13, Convicted child sex offender working with children;

§ 948.30, Abduction of another's child;  
§ 971.17, Not guilty by reason of mental disease - of an included offense;  
§ 975.06, Sex Crimes Law, commitment.

- (f) Domicile means an individual's fixed and permanent home where the individual intends to remain permanently and indefinitely and to which whenever absent the individual intends to return provided, however, that no individual may have more than one domicile at any time. Domicile does not include a residence for any special or temporary purpose.
- (g) Facility for children means a public or private school, a group home, as defined in Section 48.02(7), Wisconsin Statutes, a residential care center for children and youth, as defined in Section 48.02(15d), Wisconsin Statutes, a shelter care facility, as defined in Section 48.02(17), Wisconsin Statutes, a daycare center licensed under Section 48.65, Wisconsin Statutes, a daycare program established under Section 120.13(14), Wisconsin Statutes, a daycare provider certified under Section 48.651, Wisconsin Statutes, or a youth center, as defined in Section 961.01(22), Wisconsin Statutes.
- (h) Minor means a person under the age of 17.
- (i) Park means any area held open for use by the public for active or passive leisure purposes including, but not limited to, any park, parkway, recreation or open space area, beach, playground, conservation area, lake access point or recreational trail. "Park" also means any private lake access point or private beach that owners of two or more lots or condominium units are entitled use, pursuant to a deed restriction, subdivision plat, condominium declaration, condominium plat, homeowner's association regulation or similar rights of common use.
- (j) Permanent Residence means a place where the person abides, lodges, or resides for 14 or more consecutive days.
- (k) Sex Offender means a person who has been convicted of, found delinquent of, or found not guilty by reason of disease or mental defect of a sexually violent offense and/or a crime against children.
- (l) Sexually Violent Offense has the meaning set forth in Wis. Stat. sec. 980.01(6), as amended from time to time.
- (m) Temporary Residence means a place where the person abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not the person's permanent address or a place where the person routinely abides, lodges, or resides for a period of four or more consecutive or non-consecutive days in any month and which is not the person's domicile.

### 3. Residency Restrictions for Sex Offenders, Exceptions.

- (a) Child Safety Zone Restriction. Subject to the exceptions in Section 3(c), no sex offender shall establish a permanent residence or temporary residence within the Town of Delafield that is within a Child Safety Zone, as determined by following a

straight line from the outer property line of the permanent residence or temporary residence to the nearest outer property line of any Child Safety Location.

- (b) Original Domicile Restriction. In addition to Section 3(a), but subject to the exceptions in Section 3(c), no sex offender, shall establish a permanent or temporary residence within the Town of Delafield and no supervised release of a sex offender shall be established in Town of Delafield unless such person was domiciled in the Town of Delafield at the time of the offense resulting in the person's most recent conviction for committing the sexually violent offense and/or crime against children.
- (c) Exceptions. A sex offender may not be found to be in violation of the residency restrictions in Section 3(a) if the sex offender establishes that any of the following apply:
  - 1. The person was domiciled in the Town of Delafield prior to January 11, 2011, provided, however, that if the person was then subject to Wis. Stat. Sec. 301.45, the person must have also reported and registered the residence pursuant to Wis. Stat. Sec. 301.45 prior to such date to take advantage of the exception.
  - 2. The person is a minor and is not required to register under Wis. Stats. Sec. 301.45 and Sec. 301.46.
  - 3. The Child Safety Location began after the sex offender had established the permanent residence or temporary residence and reported and registered the residence if required pursuant to Wis. Stat. Sec. 301.45.
  - 4. The sex offender is subject to an active court order to serve a sentence or is otherwise involuntarily required to reside in a jail, prison, juvenile facility, or other correctional institution or mental facility within the Child Safety Zone.

#### **4. Renting Real Property to Sex Offenders, Restricted.**

No person shall let or rent any place, structure, or part thereof, trailer or other conveyance, with the knowledge that it will be used as a permanent residence or temporary residence by a sex offender contrary to the provisions of Section (3) of this Ordinance.

#### **5. Prohibited Activities by Sex Offenders, Exception.**

- (a) Prohibited Activities by Sex Offenders. Except as provided in subsection 5(b), no sex offender shall participate in a holiday event in the Town of Delafield involving one or more child by means of distributing candy or other items to such child or children in relationship to Halloween, wearing a Santa Claus costume in a public place in relationship to Christmas, or wearing an Easter Bunny costume in a public place in relationship to Easter, or other similar activities that may, under the circumstances then present, tend to entice a child to have contact with a sex offender.

- (b) Exception. Events in which the sex offender is a parent or legal guardian of the child or children involved are exempt from the provisions of Section (5)(a) of this Ordinance provided that no child or children other than a child or children of the sex offender are present at the event.

**6. Loitering by Sex Offender Prohibited, Exception.**

- (a) Loitering by Sex Offender. No sex offender shall loiter or prowl on or within 200 feet of any Child Safety Location, at a time, or a manner not usual for law abiding individuals, under circumstances that warrant alarm for the safety of the persons or property in the vicinity. Among the circumstances which may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a law enforcement officer, refuses to identify himself or herself or manifestly endeavors to conceal himself or herself or any object. Unless flight by the actor or other circumstances makes it impractical, a law enforcement officer shall prior to any arrest for an offense under this section, afford the actor an opportunity to dispel any alarm which would otherwise be warranted, by requesting him or her to identify himself or herself or explain his or her presence and conduct at the aforementioned locations. No person shall be convicted of an offense under this section if the law enforcement officer did not comply with the preceding sentence, or if it appears at trial that the explanation given by the actor was true, and, if believed by the law enforcement officer at the time, would have dispelled the alarm.
- (b) Exception. The prohibitions set forth in section 6(a) of this Ordinance shall not apply where the sex offender is a minor who is with one or both of his or her parents or guardian at the time of the offense or the actor was exercising First Amendment rights protected by the United States Constitution, including freedom of speech, free exercise of religion and the right of assembly.

**7. Child Safety Zone Map.**

The Town Clerk's Office shall maintain an official map showing Child Safety Zones within the Town. The Town Clerk's Office shall update the map at least annually to reflect any changes in the location of Child Safety Zones. The map is to be displayed in the office of the Delafield Town Clerk. In the event of a conflict, the terms of this Ordinance shall control. In no event shall a failure to update the map in compliance with this Ordinance preclude the prosecution or conviction of any sex offender under this Ordinance.

**8. Penalties.**

- (a) Any violation of this ordinance shall be subject to the penalties and remedies as set forth in Section 25.04 of this Code. Each day of violation shall constitute a separate offense.
- (b) In addition and not to the exclusion or prejudice of such other penalties and remedies as may apply, violation of Section 3 or Section 4 of this Ordinance shall also constitute a public nuisance, which the Town may enforce by action or proceeding to enjoin or abate such public nuisance.

SECTION 2. SEVERABILITY.

The several sections of this ordinance are declared to be severable. If any section or portion thereof shall be declared by a court of competent jurisdiction to be invalid, unlawful or unenforceable, such decision shall apply only to the specific section or portion thereof directly specified in the decision, and shall not affect the validity of any other provisions, sections or portions thereof of the ordinance. The remainder of the ordinance shall remain in full force and effect. Any other ordinances whose terms are in conflict with the provisions of this ordinance are hereby repealed as to those terms that conflict.

SECTION 3. EFFECTIVE DATE.

This ordinance shall take effect upon passage and publication or posting as provided by law.

Dated this 24<sup>th</sup> day of September, 2013.

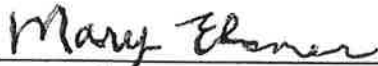
Date of Adoption: 9/24/13

TOWN OF DELAFIELD:



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Paul L. Kanter, Town Chairman

ATTEST:



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Mary Elsner, Town Clerk

Published and/or posted this 12<sup>th</sup> day of November, 2013.

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