DOES V. SNYDER

The Michigan Sex Offender Registration Act (SORA) Case

I. THE SIXTH CIRCUIT U.S. COURT OF APPEALS DECISION

What Did the Court of Appeals Say about Michigan's Sex Offender Registry?

> "A regulatory regime that severely restricts where people can live, work, and 'loiter,' that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law [that was upheld by the U.S. Supreme Court in 2003]. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live....
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> We conclude that Michigan's SORA imposes punishment.... As the founders rightly perceived, as dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice."

What Exactly Did the Court of Appeals Decide?

In a unanimous opinion, the Court of Appeals decided that retroactively imposing punishment without individual risk assessment or due process violates the Constitution. The court noted that the 2006 and 2011 SORA amendments added geographic exclusion zones, imposed strict new reporting requirements, and extended registration up to life for the vast majority of registrants, without providing any review or appeal (with rare exceptions). The court found SORA to be more like criminal probation or parole than like a civil regulation.

The court said a registry that does not include individual risk assessment cannot meet the state's professed goals of public safety. The court found clear evidence that the registry does not effectively contribute to public safety: "…offense-based public registration has, at best, no impact on recidivism ..." and laws like SORA "actually increase the risk of recidivism," probably because they make it "hard for registrants to get and keep a job, find housing, and reintegrate into their

communities." The Court found that "[t]he requirement that registrants make frequent, in-person appearances before law enforcement … appears to have no relationship to public safety at all."

To Whom Will the Court of Appeals Decision Apply?

There is not yet a final judgment in the *Does v. Snyder* case. The state has about three months to appeal the decision, and if the U.S. Supreme Court accepts the case, another 8-15 months could pass before a final decision issues. What impact this case will have will depend on what happens during further appeals.

The case was brought only on behalf of the six named plaintiffs. However, if the Court of Appeals' decision is not modified during further appeals, the court's reasoning that the current version of SORA is punishment will apply to everyone whose offense was committed before July 1, 2011. The court's reasoning that the geographic exclusion zones are punishment will apply to everyone whose offense was committed before January 1, 2006. In addition, the legislature will need to make changes to SORA to address the constitutional problems in the statute. Depending on what changes are made, those amendments could affect everyone on the registry.

What Should Registrants Do Now?

We recommend that *all registrants stay SORA-compliant until there is a final judgment.* State criminal courts are not bound by federal appellate decisions (except for U.S. Supreme Court decisions), and is not yet clear how Michigan state courts will apply the *Does v. Snyder* decision. We strongly recommend *full compliance* to avoid criminal charges or other consequences.

Individuals who are charged with criminal SORA violations (e.g., residing in an exclusion zone, failure to register) can try to raise the defense in criminal court that SORA is unconstitutional if it is being applied retroactively to them. Whether *Does v. Snyder* provides a defense may depend on factors like the date of the original sex offense and what part of SORA the individual allegedly violated. Individuals charged with SORA violations should seek qualified defense counsel or ask for appointed counsel if they cannot afford an attorney.

The Court of Appeals' decision held that the 2011 amendments, which extended many registrants' obligations from 25 years to life, cannot be applied retroactively. Because there is not yet a final judgment, we do *not* recommend that registrants file motions to shorten their registration periods back to 25 years. Individuals who would have *already* come off the registry under the pre-2011 version of SORA should consult with an attorney.

Registrants whose offenses occurred before January 1, 2006 and who want to work or live within an exclusion zones (e.g. take a specific job or live with family) should consult with an attorney.

Registrants who are on parole or probation should follow all parole and probation orders related to their sex offender registration.

Individuals who are facing current felony charges for non-sex offenses but who could be added

to the registry based on a past sex offenses ("recapture" cases) should consult with an attorney.

Registrants who want to support the legislative effort to reform Michigan's sex offender laws should contact that ACLU at aclu@aclumich.org.

What Should Michigan Do Now?

We think Michigan should use the court's decision 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. These statutes were passed in reaction to exceedingly rare events – sexually-motivated child abductions by strangers. But only a handful of the 42,000-plus people on Michigan's registry committed that sort of crime. Scientific research shows that most registrants will never commit another sexual offense, and that today's super-registration laws may actually *increase* recidivism rates (or have no effect at all).

We suggest that the Michigan hold legislative hearings to figure out:

- 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 for individualized risk assessment 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).

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What Does the Court of Appeals Decision Mean for Registries in Other States?

Sixth Circuit decisions are binding in Michigan, Ohio, Tennessee, and Kentucky. To the extent that those states have laws similar to Michigan's, those states' SORAs may be unconstitutional as well. The Sixth Circuit decision is not binding outside the four states, though the opinion may influence how courts in other states and federal circuits view sex offender laws.

How Does the Court of Appeals Decision Differ from the Trial Court's Decisions?

The Sixth Circuit reversed the decision of the U.S. District Court in Detroit and held that SORA cannot be applied retroactively under the Ex Post Facto Clause of the U.S. Constitution.

Because the Sixth Circuit decided that SORA cannot be retroactively applied to the plaintiffs, the Court of Appeals did not have to decide many of the other issues decided by the federal district court, including that:

- SORA's geographic exclusion zones – which prohibit registrants from living, working, or loitering within 1,000 feet of school property – are unconstitutionally vague (because neither registrants nor law enforcement officials can know where the zones are);

- SORA's prohibition on "loitering" is unconstitutionally vague (because ordinary people cannot tell if or when they are violating the law);
- SORA's internet reporting requirements violate the First Amendment right to free speech (because the they are vague and registrants must report such changes in person);
- registrants cannot be penalized for SORA violations unless they knowingly break the law, given SORA's extensive restrictions on ordinary conduct (like opening an email account or renting a car);
- SORA's requirement that registrants must report "routine" or "regular" use of cars, phones, and email addresses is unconstitutionally vague (because neither registrants nor law enforcement can know when the use becomes criminal).

What Happens Next?

The Sixth Circuit remanded the case to the trial court so that it can enter a judgment in favor of the registrants who challenged the law. The state can seek rehearing "en banc" (before the full Sixth Circuit Court of Appeals), or it can seek discretionary review in the U.S. Supreme Court.

Who Are the Judges Who Decided the Case?

The unanimous Sixth Circuit Court of Appeals opinion was written by Judge Alice Batchelder, who was appointed to the court by President George H.W. Bush. The other two judges on the panel were Judge Gilbert Merritt, a Carter appointee, and Judge Bernice Donald, an Obama appointee. The federal district court judge who decided the case was Robert Cleland, who was appointed by President George Bush. In other words, judges appointed by both conservative and liberal presidents agreed that Michigan's SORA violates the U.S. Constitution.

Who Are the Plaintiffs?

The lawsuit was brought by six Michigan registrants who were retroactively required to register as Tier III offenders *for life*. All six plaintiffs are low-risk offenders.

- John Doe #1 robbed a fast food restaurant in 1990. Because he threatened and struck the manager's son, he was convicted of kidnapping. He has never committed a sex offense but he is still required to register for life. After his release from prison, he worked as a vocational services coach for disabled adults. He and his fiancée are raising two children.
- John Doe #2 was a teenager when he had a relationship with a 14-year-old girl in 1996. His case was handled under a youthful diversion program and he does not have a criminal record (even though the registry labels him as a "convicted" sex offender). He served in the active-duty military twice, and was injured in a grenade explosion. He has one daughter.
- John Doe #3 was also a teenager when he had a relationship with a 14-year-old girl in 1998. He is now married to a schoolteacher and has three young sons.
- John Doe #4 had a relationship in 2005 with a woman he met at an over-18 nightclub, but who was actually 15. The couple is now married and has two children. Due to the registry, Doe #4 has been periodically homeless and unable to live with his wife and kids.
- John Doe #5 was convicted in 1980 of criminal sexual conduct for an offense involving sex that he said was consensual but the woman said was not. He never committed another sex

offense and was not required to register until more than 30 years later, when he was convicted of stealing scrap metal, which triggered the registration requirement. He has children and grandchildren.
- Mary Doe was convicted in Ohio for a sexual relationship with a 15-year-old boy in 2003. Under Ohio law, she was found to be low-risk and no longer had to register, but she has to register for life in Michigan. She lives with her husband and daughter.

What Are the Main Claims in the Case?

The plaintiffs made the following legal claims (among others) in the case:

Applying today's registration law retroactively – to people whose offenses occurred long ago – violates the Constitution's Ex Post Facto Clause.

The exclusion zones violate the Constitution's Due Process Clause because people cannot be punished for crimes without notice that their conduct is illegal, yet it is impossible to know where the exclusion zones are. Other reporting requirements are also impermissibly vague.

SORA severely restricts parents' ability to be involved in their children's education and upbringing, in violation of their right to parent. SORA also interferes with the right to work and travel.

Requiring registrants to report their on-line activity violates the First Amendment.

BASIC FACTS ABOUT MICHIGAN'S REGISTRY

Michigan's Registry Is Exceptionally Large

- Michigan's registry is the fourth largest state registry in the country.
- As of June 2016, there were over 42,000 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.

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.

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.

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:

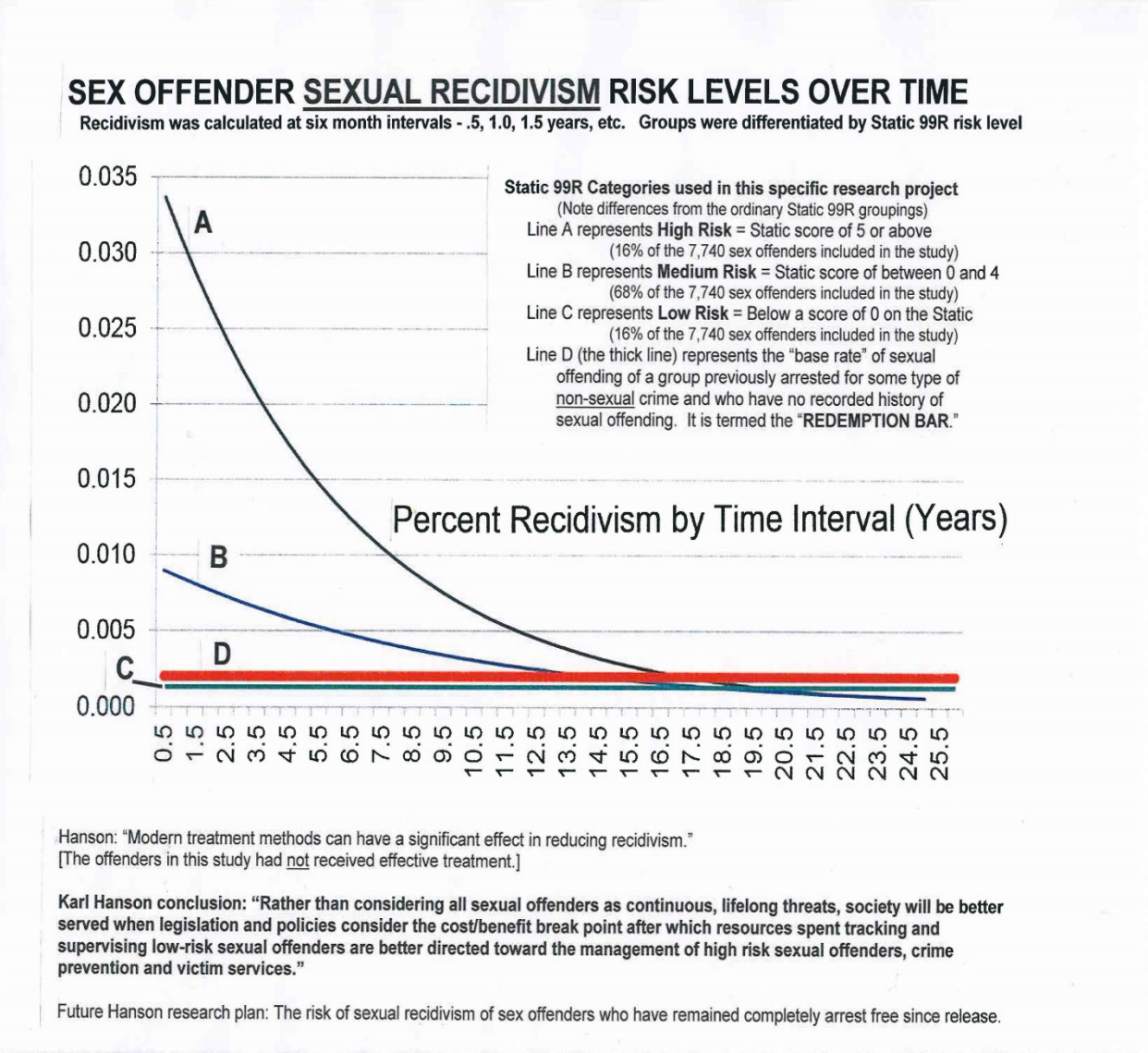


Exhibit 2:

"School safety zones" in the city of Grand Rapids

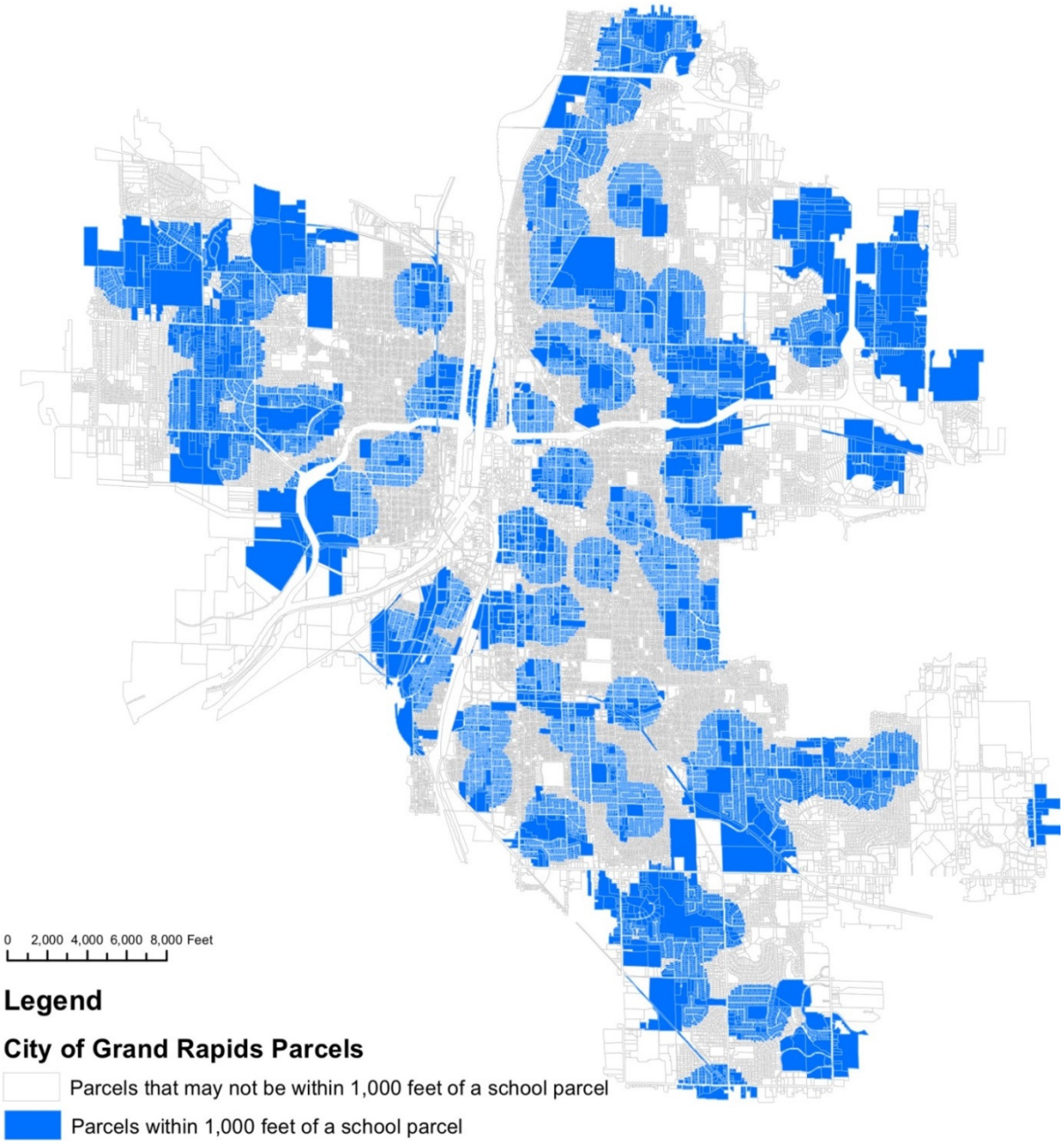
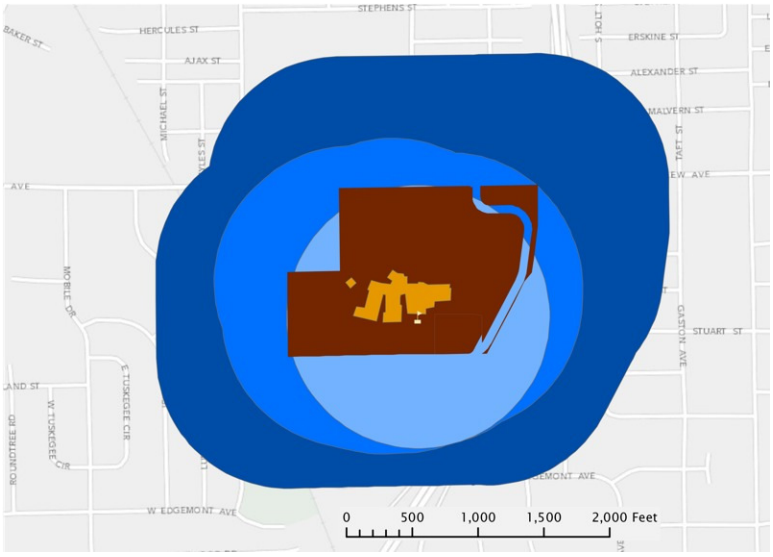


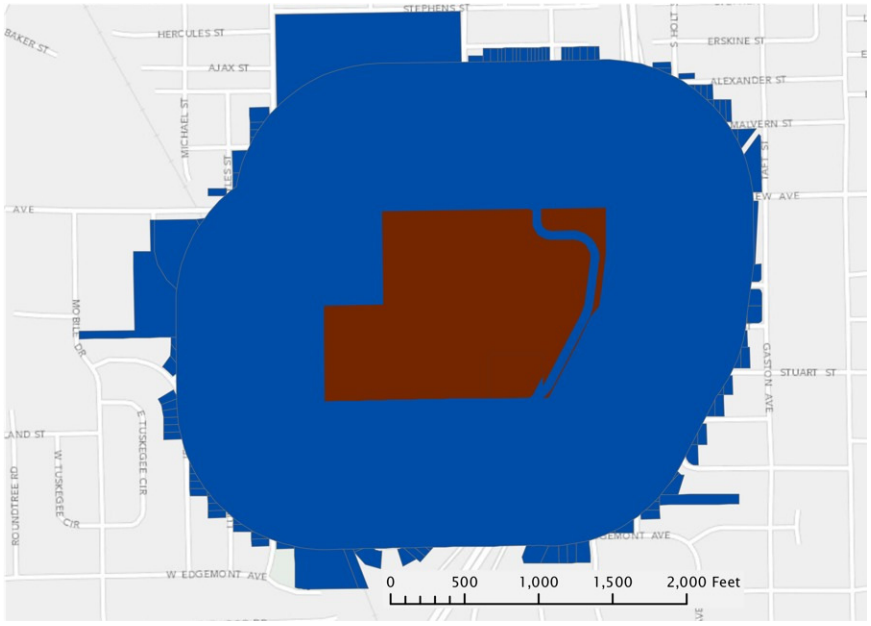
Figure 10.

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.