INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION



2005 Annual Report
Health and Environment Section

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This report contains a brief summary of some of the cases affecting local governments in the area of health and environments since the 2004 Annual Conference.

ENVIRONMENT

Environmental Regulations

Tuffendsam v. Dearborn County Board Of Health, 385 F.3d 1124 (7th Cir.2004)

A homeowner sued the county health board under § 1983, alleging that the actions in forcing the homeowner to correct a septic tank problem constituted due process and equal protection violations. The district court granted summary judgment to the city and on appeal the court of appeal ruled that a "class of one" was not created by the board's uneven enforcement of sanitation laws.

WORTH COUNTY FRIENDS OF AGRICULTURE v. WORTH COUNTY, 688 N.W.2d 257 (Iowa 2004)

C residents sought a declaration that county ordinance setting standards for toxic and odorous air emissions, safety for workers in confinement feeding operations, and water pollution by confinement feeding operations were invalid and illegal. The trial court declared the ordinance void and unenforceable and the county appealed. The Iowa Supreme Court ruled the ordinance was expressly preempted by a state statute prohibiting the county from adopting legislation regulating a condition or activity occurring on land used for the production, care, feeding, or housing of animals. The court also ruled that the statute did not violate home-rule amendment to State Constitution.

Product Regulation

Croplife America, Inc. v. City Of Madison, 373 F. Supp.2d 905 (E.D. Wis. 2005)

Fertilizer sellers challenged the constitutionality of city and county ordinances barring the sale of commercial fertilizers containing phosphorus. The district court held that the ordinances were not preempted by Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) because the ordinance requirements did not conflict with the use instructions on the pesticide labels. The court also held the ordinances did not violate Commerce Clause because they did not discriminate against out of state producers, and they did not burden interstate commerce more than intrastate commerce. In fact, the plaintiffs produced no evidence that the ordinances affected interstate commerce at all with respect to the city ordinance. With respect to the county ordinance, the court found any minimal impact was rationally justified by the need to improve water quality. The court found the county ordinance banning phosphorus in commercial fertilizers but allowing use of biosolids containing phosphorus did not violate equal protection. The court reasoned the county could rationally decide that to put the existing phosphorous-containing biosolids to good use, while disfavoring the sale of fertilizers where manufacturers add phosphorous. Lastly, the court held the city ordinance was not unconstitutionally vague and that persons of ordinary intelligence could understand what was meant by the prohibition on use under conditions which promoted or created "run-off" and that the ordinances did not place unconstitutional restriction on commercial speech.

Zoning Regulation

F.W. Disposal South, LLC, v. St. Louis County, No. ED 84765, 2005 WL 1229745 (Mo.App. E.D. May 24, 2005)
A waste management company sought a declaratory judgment to prevent the county from enforcing an ordinance which required certain solid waste facilities to be located at least 1,000 feet away from churches and other residential buildings. The court held the ordinance was enacted primarily for zoning purposes, and as such, the county was required to follow its own procedural safeguards relating to zoning changes when it enacted the ordinance. The county failed to do so, rendering the ordinance invalid.

Franklin v. The State of Georgia, 279 Ga. 150, 611 S.E.2d 21, (Ga. 2005)
The defendant was convicted of Cherokee County Code provisions the dealing with creation nuisances. The defendant appealed, appealed arguing the ordinance was unconstitutionally vague with respect to provisions dealing with the accumulation of litter or rubbish on property. The court of appeals disagreed. Noting that while the ordinance definitions were not all inclusive, the allowed a person of ordinary intelligence to ascertain what would constitute a violation.

PUBLIC HEALTH

Lead Paint Suits
City Of Milwaukee v. NL Industries, Inc., 278 Wis.2d 313, 691 N.W.2d 888 (Wis. App. 2004)
Milwaukee sued various paint manufacture companies to recover costs associated with the abatement of lead-paint hazards in city homes. The City asserted claims for public nuisance, conspiracy, and restitution. The trial court granted summary judgment in favor of paint companies and the City. The court of appeals reversed finding that genuine issues of material fact existed as to the causation element of city's public nuisance claim. The court also noted that whether public policy concerns precluded the companies' liability to city should be addressed after a trial based on a complete factual record;

Needle Exchange
State Of New Jersey, by the Atlantic County Prosecutor v. City Of Atlantic City, 2005 WL 1944323 (N.J.Super.A.D. Aug. 16, 2005)
A county prosecutor sued the city challenging the validity of a municipal ordinance which established a needle exchange program and authorized municipal health officials to distribute sterile hypodermic syringes to drug addicts for their use in injecting drugs. The trial court declared the ordinance invalid and permanently enjoined its implementation. The appellate court held the municipal ordinance conflicted with provisions of the New Jersey Code of Criminal Justice which prohibits persons from using, or assisting others, in using controlled dangerous substances.

Smoking Ordinances
The Players, Inc. v. City Of New York, 371 F. Supp.2d 522 (S.D.N.Y. 2005)
A private social club challenged the constitutionality of a municipal ban on smoking in bars and food service establishments. The district court held the ban did not violate club's Fourth Amendment rights; did not violate equal protection; was not facially overbroad; and did not violate due process. The Fourth Amendment challenge arose because the

City had the right under its regulations to inspect business premises for compliance with health regulations, without obtaining a warrant. The court noted the city had a significant interest in protecting the health of workers and patrons, that warrantless searches and inspections are necessary to further the cty's goal (businesses with advance warning could frustrate the purposes of the ordinance) and that the regulations effectively put business owners on notice that inspection would occur regularly. Each of these factors mitigated the need for a warrant.

Empire State Restaurant And Tavern Association, Inc. v. New York State, 360 F. Supp.2d 454 (N.D.N.Y 2005)
The owners and operators of bars and food service establishments sued challenging validity of state statute regulating environmental smoke. The district court held that the statute was not preempted by the regulations passed under the by Occupational Safety and Health Administration (OSHA) Act which deal with hazardous and toxic substances. The court noted the regulations did not address occupational smoke exposure at all, therefore the state statute was not preempted.

Ex parte Woodall, 154 S.W.3d 698 (Tex. App. 2004)
The defendant was convicted of violating a municipal ordinance prohibiting smoking in all enclosed public places. She appealed, asserting that the ordinance was unconstitutional. The court of appeals held the ordinance was a valid enactment pursuant to the city's police powers. The court also held the ordinance was a reasonable method of protecting residents' health in spite of the fact that another Texas city enacted a less stringent ordinance.

Taverns For Tots, Inc. v. City Of Toledo, 341 F.Supp.2d 844 (N.D. Ohio 2004)
An organization of sued Toledo in state court, alleging that the enactment and enforcement of an anti-smoking ordinance, which prohibited smoking in places of public accommodations, violated its First Amendment rights of assembly, association, and free speech. The district court held the ordinance did not violate the First Amendment for a variety of reasons. First, the members of Taverns for Tots did not exhibit any characteristics of the type of intimate relationships that were protected by First Amendment, nor did the ordinance the right of expressive association of patrons of the organization. In addition, the act of smoking in a tavern is not sufficiently expressive conduct to merit protection under the First Amendment's Free Speech Clause. Even assuming the ordinance did affect First Amendment rights, the ordinance would pass muster under intermediate level of scrutiny. The ordinance was content-neutral because it served purposes unrelated to the supposed content of the speech any smoker was trying to convey. In addition, the ordinance was narrowly tailored to a substantial government interest (protecting individuals from the hazards of tobacco smoke).

WATER
Drinking Water
City Of Chesapeake v. Cunningham, 268 Va. 624, 604 S.E.2d 420 (Va. 2004)
A customer of the city water department sued the city, alleging that her miscarriage was caused by toxic water supplied by the City. The Virginia Supreme Court ruled the city's

decision to take down air stripping towers and reconstruct the water treatment plant for use of a reverse osmosis system was an exercise of its discretionary governmental function, and that the city's public information campaign regarding temporary risks associated with consuming city water during period in which water treatment process was changed was a governmental function. Therefore, the doctrine of under sovereign immunity, the City was immune from liability claims for the plaintiff's miscarriage.

Coshow v. City Of Escondido, No. D045382, 2005 WL 1972562 (Cal.App. 4 Dist. Aug. 17, 2005). Although fluoridation has been and continues to be a controversial issue, courts in the United States have uniformly held that fluoridation of water is a reasonable and proper exercise of the police power in the interest of public health *Beck v. City Council of Beverly Hill*s, 30 Cal.App.3d 112, 115 (1973)(listing cases); see also *deAryan v. Butler*, 119 Cal.App.2d 674, 682 (1953). Several residents of Escondido, California sued the City of Escondido ("City") and California Department of Health Services ("Department") for declaratory and injunctive relief, challenging the City's plan to fluoridate its drinking water with hydrofluorosilicic acid (HFSA) and claiming the use of HFSA violates their constitutional rights and exposes the general public to unnecessary health risks. The court granted judgment on the pleadings in favor of City and Department after finding the residents failed to state a cause of action for declaratory or injunctive relief.

The residents appealed, asserting among other things the trial court erred by dismissing his fourth amended complaint which alleged violations of fundamental constitutional rights to privacy and bodily integrity under the federal and state Constitutions. The residents contended they stated a cause of action for violation of a fundamental constitutional right by alleging the City's conduct of dumping dangerous levels of arsenic into the public water supply severely and negatively impacts their bodily integrity and that of every other citizen served by City's water supply. They asserts they are being forced, without consent, to drink the municipal water containing a drug--HFSA--that has never been tested or approved by the FDA to treat dental caries and which is dangerous to the health of residents.

Congress enacted the Safe Drinking Water Act ("federal SDWA"), 42 U .S.C., § 300f *et seq*., in 1974 to establish uniform quality standards for the public water systems in the United States and to reduce contamination in drinking water. The federal SDWA prohibits states from enacting drinking water laws less stringent than those established by the Environmental Protection Agency (EPA). *See*, 42 U.S.C ., § 300g. In 1976, the California legislature enacted California's SDWA, declaring water delivered by public water systems in this state should be at all times pure, wholesome and potable, and adopting procedures to be followed in an effort to accomplish this objective. Stats.1976, ch. 1087, § 2.5, pp. 4918-4929, adding former § 4010 et seq., currently codified in § 116270 *et seq*. Effective September 29, 1996, section 116410 was added to the SDWA, requiring public water systems with at least 10,000 service connections to be fluoridated "to promote the public health of Californians of all ages through the protection and maintenance of dental health, a paramount issue of statewide concern." See, § 116410, subd. (a).

In an attempt to state a cause of action for declaratory and injunctive relief based on a constitutional violation, the residents characterized the City's fluoridation plan as "forced medication" with potential adverse consequences to human health, or with a chemical that has not been approved by the FDA for such medicinal purposes, thereby implicating fundamental rights to bodily integrity and privacy under the Ninth and Fourteenth Amendments to the United States Constitution. The court however refused to agree that there was a fundamental right to drinking water of a certain quality or free from HFSA. The court also stated "Neither the state nor federal Constitution guarantees a right to a healthful or contaminant-free environment."