International Municipal Lawyers Association
2021 Annual Conference
Minneapolis, Minnesota
Date September 29th, 2021

Emerging Issues for the Minnesota City Attorney

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Pam Whitmore

Shareholder and Attorney, Eckberg Lammers



Open Meeting Law Changes

- How pandemic and remote meetings spurred legislative change
- Take-aways from changes
- Impact of changes:
  - Short Term
  - Long Term
- Data Practice Opinion & advising our cities when conducting business remotely
- COVID Surge
- Remote technology, participation and accommodation requests

David S. Kendall

Attorney, Campbell, Knutson, P.A



Local Regulations Addressing Nicotine Addiction

R. J. Reynolds v. City of Edina

- Similar to litigation occurring in Los Angeles and San Diego Counties
- Local ordinances banning sale of flavored tobacco products
- Candy, soda pop, sweet flavors
- Youth vaping epidemic
- Flavored vapes = disproportionate marketing to, and impact upon, youth and people of color
  - Unknown health impacts, except addition to nicotine is known
  - Claim that it helps adult smokers of cigarettes quit smoking = unsupported
- Local governments prevailed at Federal District Court level, however
- Federal District Court in Minnesota ruled in favor of City on different basis

Federal Tobacco Control Act

- Preservation: except as in Preemption clause, local authority not preempted
- Preemption: Localities may not enact any requirement different from federal requirements related to tobacco product standards, premarket review, adulteration, misbranding, labeling, registration, good manufacturing standards.
  - Do you see a common element?
- Saving: Preemption does not apply to requirements relating to sale

Different Rationale

- California Federal Courts = the regulation is not a tobacco [manufacturing] product standard, therefore preserved by “preservation clause” in Tobacco Control Act and never preempted
- Minnesota Federal Court = the regulation is a tobacco [manufacturing] product standard and is therefore preempted by Tobacco Control Act, but saved by the “savings clause” in the Act
- R. J. Reynolds has appealed both
- Nationwide litigation strategy, seeking circuit split

Current Status

- City of Edina case argued before Eighth Circuit on May 12, 2021- awaiting ruling

- Los Angeles County case- scheduled for oral argument before Ninth Circuit on October 19, 2021

Similar Litigation in Minnesota

- City of Arden Hills passed similar ordinance banning sale of flavored tobacco products
- Plaintiff also claimed monetary damages due to value of lease for “adults only” tobacco shop space
- Minnesota state court upheld ordinance
- Ordinance stayed against “adults only” tobacco shops until July 1, 2023.

Statewide Regulation?

- Did not pass in 2021, maybe 2022?
- Questions

Susan Naughton

Attorney
League of Minnesota Cities

Energy Policy Advocates v. Ellison

- Pending before the Minnesota Supreme Court
- Does the common-interest doctrine apply in Minnesota?
- Exception to the waiver of attorney-client privilege when privileged information is shared with a third party with a common interest
- Request for AGO data relating to environmental matters
- Decision in the spring?



Jared D. Shepherd,

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Zoning Zoning Everywhere?: Regulation after Waconia v. Dock

Meet the Docks

- Context: Years long dispute between Dock family and their homeowners association regarding the placement of their docks.
- The City rejects the family's multiple dock-related zoning amendments.
- Dock family then begins construction of a formidable, permanent dock.


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Waconia versus Docks (or docks)

- Without a hearing, the City adopted Ordinance 707, prohibiting permanent docks.
- The City sought a permanent injunction to remove the Dock's dock.
- The Docks argued that the ordinance was a zoning ordinance and, therefore, was ineffectual due to a lack of public hearing.

ORDINANCE NO. 707

CITY OF WACONIA

AN ORDINANCE AMENDING WACONIA CITY CODE PART VII BY ADDING CHAPTER 750 REGULATING DOCKS ON PUBLIC WATERS

750.01 Authority, Purpose, Intent and Application.

Subd. 1 Authority, Purpose and Intent. As authorized by Minn. Stat. §412.221, subd. 12, the intent of this Chapter is to control and regulate Docks for riparian properties

750.03. Permanent Docks Prohibited. Permanent Docks in Public Waters from Riparian Lots within the City are prohibited.

Issues

- Can a City rely solely on Minn. Stat. § 412.221, subd. 12 in adopting a dock regulation?

  Or

- Is a dock ordinance a zoning ordinance subject to the procedural requirements of Minn. Stat. § 462.357?

412.221 SPECIFIC POWERS OF COUNCIL.

Subd. 12. **Harbors, docks.** The council shall have power to establish harbor and dock limits and by ordinance regulate the location, construction and use of piers, docks, wharves, and boat houses on navigable waters and fix rates of wharfage. The council may construct and maintain public docks and warehouses and by ordinance regulate their use.

462.357 OFFICIAL CONTROLS: ZONING ORDINANCE.

Subd. 3. **Public hearings.** No zoning ordinance or amendment thereto shall be adopted until a public hearing has been held thereon by the planning agency or by the governing body.



The Supreme Court's Test



Step 1: Determine whether the ordinance governs a subject identified in Minn. Stat. §462.357.

Step 2: Determine whether an ordinance serves a zoning purpose.

"Because we have not previously adopted a test for determining whether an ordinance is a zoning regulation, we must do so now." *City of Waconia v. Dock*, 961 N.W.2d 220, 229 (Minn. 2021)

The Supreme Court's Test Applied to the Docks' dock

Step 1: Determine whether the ordinance governs a subject identified in Minn. Stat. §462.357.

The Court determined that Ordinance 707 related to some subjects identified in Minn. Stat. subd. §462.357, namely the dock structure's location, size, and type of foundation.

Step 2: Determine whether an ordinance serves a zoning purpose.

The Court determined that the ordinance served a zoning purpose as its declared purpose was for safety, general health, and welfare. Further, the Court found that the ordinance related to zoning districts and the development of land.

Conclusion: Ordinance 707 is a zoning ordinance

Where Do We Go From Here?

412.221 SPECIFIC POWERS OF COUNCIL.

Subd. 8. **Parks, trees.** The council shall have power to provide for, and by ordinance regulate, the setting out and protection of trees, shrubs, and flowers in the city or upon its property.

Subd. 9. **Cemeteries.** The council shall have power to acquire by purchase, gift, devise, condemnation or otherwise, hold and manage cemetery grounds, to enclose, lay out and ornament such grounds and sell and convey lots therein. It may by ordinance regulate cemeteries and the disposal of dead bodies.

Subd. 10. **Markets.** The council shall have power to establish markets, provide public scales, and appoint a weighmaster. It may by ordinance regulate markets and the use of scales and restrain sales in streets.

Subd. 13. **Ferries.** The council shall have power to acquire and operate ferries across any river flowing through or by the city.

Subd. 14. **Tourist camps; parking facilities.** The council shall have power to acquire, improve and operate, and by ordinance regulate tourist camps and automobile parking facilities.