STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0389

Patti Lynn Abrahamson, et al.,
Appellants,

vs.

City of Le Sueur, et al.,
Respondents.

Filed August 19, 2013
Affirmed
Connolly, Judge

Le Sueur County District Court
File No. 40-CV-12-815

Timothy J. Keane, Thomas F. DeVincke, Malkerson Gunn Martin LLP, Minneapolis, Minnesota (for appellants)

Christopher M. Hood, Robert T. Scott, Flaherty & Hood, P.A., St. Paul, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Cleary, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellants challenge the district court's dismissal of their declaratory-judgment action and denial of their motion to require respondent-city to hold a special election on a

proposed amendment to the city's public-nuisance ordinance. Appellants assert that the district court erred by determining that the proposed ordinance amendment conflicts with state nuisance law and is a land-use regulation preempted by the Municipal Planning Act (MPA). Because we conclude that the proposed ordinance is preempted by the MPA, we affirm.

FACTS

Appellants are residents of the respondent City of Le Sueur (city) who oppose the development of a proposed energy power plant. The proposed bioenergy-electric-generating power plant is known as the Hometown Bio Energy Project (project). The project will use an anaerobic digestion process to convert up to 45,000 tons per year of local agricultural and food processing residuals (including silage, potato and vegetable processing residuals, poultry manure, grasses, hay, and cereals) into biogas, a liquid byproduct, and a solid renewable fuel.

The Minnesota Municipal Power Agency (MMPA) proposed to develop the project on a site of approximately 35 acres just outside of the city. The site is currently an abandoned gravel pit, and the land surrounding the pit is primarily cropland, with a portion of industrial-zoned land to the north. The city council accepted a petition for annexation from the current owner of the proposed project site and completed annexation of the site in December 2011.

The city is a Home Rule Charter (charter) city, as authorized by Minnesota Statutes Chapter 410; the city's charter reserves to the voters the right to petition the city council for adoption of ordinances. Concerned about the possible nuisance impact of the

project, appellants proposed an ordinance amending Ordinance No. 517 of the city's Code of Ordinances relating to public nuisances.

The proposed ordinance read as follows, with the proposed new language underlined:

SECTION I.
PUBLIC NUISANCE PROHIBITION

A person must not act or fail to act in any manner that causes a public nuisance. For purpose of this Ordinance, a person that does any of the following is guilty of maintaining a public nuisance:

. . . .

(d) Maintains or permits an activity which causes any unreasonable noxious, unpleasant, or strong odor which causes material distress, discomfort, or injury to persons of ordinary sensibilities in the immediate vicinity thereof. Such activity is hereby declared to be a nuisance and is hereby prohibited, or

(e) Maintains or permits an activity which causes any odor, stench or smell of such character, and of continued duration which substantially interferes with the comfortable enjoyment of private homes by persons of ordinary sensibilities. Such activity is hereby declared to be a nuisance and is hereby prohibited, or

(f) Does any other act or omission declared by law or this ordinance to be a public nuisance.

SECTION II.
PUBLIC NUISANCES AFFECTING HEALTH

The following are hereby declared to be nuisances affecting health:

(a) Exposed accumulation of decayed or unwholesome food or vegetable matter including but not limited to agricultural and food processing residuals; animal, food and yard waste material; corn silage; potato waste, processed food products and crop residue;

. . . .

> (e) Accumulation of manure, refuse or other debris including but not limited to cow, horse, chicken manure, and poultry litter;
>
> . . . .
>
> (l) The accumulation of mixed municipal solid waste (MSW);
>
> (m) The storage, treatment, or any disposal facility for any types of hazardous substances;
>
> (n) The storage, dumping, disposal, incineration, or reduction of garbage, MSW, sewage, dead animals, unwholesome food or vegetable matter, hazardous substances or refuses;
>
> (o) The storage of animal, food, agricultural and yard waste materials; and
>
> (p) The storage, treatment, or accumulation of any putrescible matter.

On March 14, 2012, the Le Sueur Ordinance Initiative Committee submitted a petition in support of the ordinance to the city council for adoption. Section 5.05 of the city's charter requires that a petition for adoption of any ordinance shall consist of at least 15% of the total number of votes cast at the last preceding presidential year general election. The petition in favor of the ordinance was executed by more than 600 voters, more than 25% of the total voters at the presidential election in 2008. The appellants were all signatories of this petition. On April 23, the city clerk certified to the city council that the petition in support of the ordinance was sufficient to satisfy Section 5 of the charter.

On June 25, the city council considered, debated, and refused to enact the proposed ordinance. Section 5.07 of the home charter provides:

> If the council fails to pass the proposed ordinance, . . . the proposed ordinance shall be submitted by the council to

> the vote of the electors at the next regular municipal election; but if the number of signers of the petition is equal to at least [twenty-five per cent] (25%) of the total number of voters voting in the municipality at the last preceding presidential year general election, the council shall call a special election upon the measure. Such special election shall be held not less than [thirty] (30) nor more than [forty-five] (45) days from date of final action on the ordinance by the council . . . but if a regular election is to occur within three months, the council may submit the ordinance at that election . . . .

On July 9, the city council adopted a resolution declaring that the city would not hold a special election on the proposed ordinance. The city council acknowledged that, "given the City Council's June 25, 2012 decision not to act on the proposed ordinance, Section 5.07 of the Charter would otherwise operate to require the proposed ordinance to be submitted to the voters of the City in an election." But the council decided not to hold the election, finding that:

> The proposed ordinance is inconsistent with the public policy of the State of Minnesota, as expressed in Minn. Stat. Ch. 561, in that the proposed ordinance exceeds the City's authority to regulate public nuisances thereunder.
>
> The proposed ordinance represents an attempt by the petitioners to dictate the outcome of a specific local land use issue and development proposal, namely the Hometown BioEnergy Facility, which the [MMPA] has proposed to construct on newly annexed property on the southern boundary of the City.
>
> The Legislature, by enacting Minn. Stat. § 462.357, the Municipal Planning Act, has preempted the Charter's initiative provisions with respect to the process for adopting and approving land use planning and zoning ordinances and regulating local land uses and development, including the proposed ordinance and the City Council's consideration [of] the proposed Hometown BioEnergy Facility development.

Appellants then brought this declaratory-judgment action, seeking the district court's determination that the city is required to convene a special election on the proposed ordinance. The district court denied the motion, concluding that the proposed ordinance conflicts with state nuisance law and is preempted by the Municipal Planning Act. This appeal follows.

D E C I S I O N

Appellants challenge the district court's decision that the city was not required to hold an election on appellants' proposed ordinance because the proposed ordinance amendment was a land-use regulation preempted by the MPA. There are no disputed facts on appeal. "Thus, the question of whether state statutes prevail over a local charter provision is purely a question of law, which this court reviews de novo." *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 346 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

"Any local government unit when authorized by law may adopt a home rule charter for its government." Minn. Const. art. XII, § 4. State law authorizes cities to adopt charters for their governance. Minn. Stat. § 410.04 (2012). The city adopted a home rule charter that reserves to the people of the city the powers of initiative and referendum. Le Sueur, Minn., City Charter, Ch. 5, § 5.01 (2012). The city council acknowledged that appellants complied with the procedural requirements of the charter, such that the council's decision not to act on the proposed ordinance would typically trigger a special election on the proposed ordinance. But, as the council noted, the right of home rule cities to a referendum has some restrictions under the law.

Generally, in matters of municipal concern,

> home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld. The adoption of any charter provision contrary to the public policy of the state, as disclosed by general laws or its penal code, is also forbidden. The power conferred upon cities to frame and adopt home rule charters is limited by the provision that such charter shall always be in harmony with and subject to the constitution and laws of the state. But these limitations do not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ from those of existing general laws.

State ex rel. Town of Lowell v. City of Crookston, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958) (quotation and citations omitted).

The MPA's purpose is "to provide municipalities, in a single body of law, with the necessary powers and a uniform procedure for adequately conducting and implementing municipal planning." Minn. Stat. § 462.351 (2012). The MPA gives municipalities authority to "carry on comprehensive municipal planning activities for guiding the future development and improvement of the municipality and may . . . implement such plan by ordinance . . . ." Minn. Stat. § 462.353, subd. 1 (2012).

"The question of whether state law has preempted a field depends on the facts and circumstances of each case." *Nordmarken*, 641 N.W.2d at 348. "The doctrine of preemption is premised on the right of the state to so extensively and intensively occupy a particular field or subject with state laws that there is no reason for municipal regulation." *Id.* Where preempted, a local law that purports to govern, regulate, or

control an aspect of the preempted field is void. *Id.* In determining whether preemption has occurred, we consider:

> (1) the subject matter regulated; (2) whether the subject matter is so fully covered by state law that it has become solely a matter of state concern; (3) whether any partial legislation on the subject matter evinces an intent to treat the subject matter as being solely a state concern; and (4) whether the nature of the subject matter is such that local regulation will have an adverse effect on the general state population.

Id.

This court has held that the "Minnesota state legislature preempted [land use] referendum provisions in cities' home rule charters when it enacted the [MPA] . . . ." *Id.* at 350. Specifically, we noted that the legislature has evinced its intent

> to occupy the field of the process by which municipal land use and development laws are finally approved or disapproved. And because local regulation by referendum would encroach into that occupied field and undermine the comprehensive and uniform nature of the process, . . . referendum is preempted by the MPA . . . .

Id. at 349.[1]

Nordmarken involved a commercial real estate development plan proposed in the City of Richfield. *Id.* at 346. The city approved an amendment of its comprehensive land-use plan to accommodate the proposed development by rezoning part of the area to be developed. *Id.* As citizens of a home rule charter city, the appellants filed petitions

[1] *Nordmarken* found that the referendum was preempted by both the MPA and the Metropolitan Land Planning Act (MLPA). The MLPA is designed to ensure that municipalities in the metropolitan area, which are interdependent, coordinate their development plans. Le Sueur falls outside of the metropolitan area, so the MLPA is not at issue in this case.

with their city council for referendums on the ordinances amending the comprehensive plan and rezoning the property for development. *Id.* In holding that the MPA preempted the local regulation, this court noted that the MPA provides "for a comprehensive, orderly, and uniform process, [whereas] referendum by its very nature is a narrow, piecemeal device that encourages sporadic and fragmented land development and use." *Id.* at 349.

Just as in *Nordmarken*, this case involves an attempt by a group of citizens to use the city's charter provisions on referendums to pass an ordinance that would regulate land use. As the city council noted, "[t]he proposed ordinance represents an attempt by the petitioners to dictate the outcome of a specific local land use issue and development proposal, namely the Hometown BioEnergy Facility . . . ." A city council's finding is entitled to deference from this court. *See, e.g.*, *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982) ("[I]t is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in the performance of their duties.") The district court also specifically found that the proposed ordinance was an attempt to control land use: "it is clear that the effect of the Ordinance would prevent the Project from being built and operated. It is also clear that, despite denials by the Committee's counsel, the purpose here is to prevent the Project from gaining approval." We agree. Section II of the proposed ordinance provides for a blanket prohibition on "[e]xposed accumulation of decayed or unwholesome food or vegetable matter including but not limited to agricultural and food processing residuals; animal, food and yard waste material; corn silage; potato waste, processed food products

and crop residue," "[a]ccumulation of manure . . .," "[t]he storage of animal, food, agricultural and yard waste materials," and "[t]he storage, treatment, or accumulation of any putrescible matter." Such blanket prohibitions would serve to almost completely eliminate the proposed bioenergy plant of the sources of the feedstock resources on which the plant would rely, including corn silage, potato waste, manure, and food residuals.

Appellants argue that, because the proposed ordinance at issue in this case is not a land-use regulation, "but rather a valid exercise of the power to regulate nuisance activity," it is not preempted by the MPA. But, even though the proposed ordinance is a nuisance ordinance, it attempts to regulate land use. And, "[d]espite the broad governance authority conferred through a home rule charter, any charter provision that conflicts with state public policy is invalid." *Nordmarken*, 641 N.W.2d at 347. Here, the proposed nuisance ordinance is clearly an attempt to regulate land use by referendum, which is in conflict with Minnesota's stated public policy of encouraging comprehensive municipal planning as articulated in the MPA and discussed in detail in *Nordmarken*. *See* Minn. Stat. § 462.351 (stating purpose of the MPA is to provide for "a uniform procedure for adequately conducting and implementing municipal planning."); *Nordmarken*, 641 N.W.2d at 349 ("[R]eferendum by its very nature is a narrow, piecemeal device that encourages sporadic and fragmented land development and use); *see also Town of Lowell*, 252 Minn. 526, 528, 91 N.W.2d 81, 83 (1958) ("The adoption of any charter provision contrary to the public policy of the state, as disclosed by general laws or its penal code, is also forbidden.").

Therefore, the district court did not err by concluding that the proposed ordinance is preempted by the MPA and that the city council is not required to have a special election on the ordinance because the ordinance is in conflict with state public policy as expressed in the MPA.[2] Because we conclude that the proposed ordinance is preempted by the MPA, we do not address whether the proposed ordinance conflicts with state nuisance law.

Affirmed.

[2] We note that, although our opinion prevents appellants from blocking the bioenergy project through the passage of this nuisance ordinance, appellants are free to voice their concerns and participate in the project's planning through the regular zoning process, and have in fact done so through public hearings and comments to the Minnesota Pollution Control Agency.