STATE OF MINNESOTA

IN COURT OF APPEALS

C5-92-2400

Beltrami County
District Court File Nos. K4-91-1094,
K6-91-1095

Amundson, Judge
Dissenting, Short, Judge

State of Minnesota,
Northern Township,

Respondent,

Jana Austad
Kief, Fuller, Baer, Wallner
& Rogers, Ltd.
P.O. Box 880
514 America Avenue
Bemidji, MN 56601

vs.

Leigh Waughtal, et al.

Appellants.

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Commissioner of Pollution
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Filed: August 31, 1993
Office of Appellate Courts

Considered and decided by Amundson, Presiding Judge, Schumacher, Judge, and Short, Judge.

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

AMUNDSON, Judge

Appellants challenge the trial court's finding that they violated the Northern Township's Water Supply System and Utility Ordinance and the trial court's determination that the ordinance is constitutional. We affirm.

FACTS

Northern Township (the township) completed construction of its own water system in 1988. On May 17, 1988, the township adopted the Water Supply System and Utilities Ordinance (the ordinance). The ordinance makes it unlawful to "construct or maintain" a private well for human consumption in certain areas. The ordinance also requires people in certain areas to hook up to the township water system and to use that system for all of their human consumption of water.

Initially, to encourage people to hook up to the system, all work was done free of charge. The township now requires any property owner who did not hook up at the time of installation to pay the entire cost of hooking up to the system.

Leigh and Carol Waughtal own property which is in the area served by the township water supply system. On that property, the Waughtals have a private well. The Waughtals have not hooked up to the township water system. The Waughtals claim that hooking up to the township water system would cost them $7,000.

The Waughtals were charged with a misdemeanor for refusing to hook up to the township water system in violation of section 4,

subdivision 7(e) and section 5, subdivision 13 of the ordinance. The Waughtals requested a jury trial. However, before the case was tried, the prosecutor certified the charge as a petty misdemeanor. The trial court found the Waughtals guilty of violating the ordinance and determined that the ordinance is constitutional. The Waughtals were fined $100 each, stayed on the condition that they hook up to the township water system before May 15, 1993. This appeal followed.

D E C I S I O N

I. Violation of the Ordinance

The Waughtals argue the trial court erred in finding that they violated the ordinance.

A. Section 4, subdivision 7(e)

Section 4, subdivision 7(e) of the ordinance provides:

> It is unlawful for any person to construct or maintain any private well of any kind or form intended for use or used for human consumption of water within that area of the township designated by the State of Minnesota as having polluted ground water and/or served by the township water supply system.

(Emphasis added.)

Because of the "and/or" term, the township must prove two elements to prove a violation of this ordinance provision--(1) that the Waughtals constructed or maintained a well, and (2) that the well was in an area designated by the state as having polluted ground water or that the Waughtals were in an area served by the township's water supply system.

1. Construct or maintain a private well

The township does not argue that the Waughtals have constructed a well. Therefore, the issue on appeal is whether they have maintained a private well. The Waughtals argue that maintaining a well is not the same as using a well. They claim that in order to maintain a well, one must do something more than just use it. The township argues that the Waughtals maintained their well by providing the source and support necessary to keep the well functioning. The township contends that it is not necessary to have repaired the well, but that providing and paying for electricity to run the well's electric motor is enough.

"Maintain" is defined as:

> 1. To continue; carry on: maintain good relations. 2. To preserve or keep in a given existing condition, as of efficiency or repair: maintain two cars. 3. a. To provide for: maintain a family. b. To keep in existence; sustain: food to maintain life.

American Heritage Dictionary 757 (2d college ed. 1982) (emphasis in original).

The township's construction is consistent with the plain language of the ordinance. Providing electricity for the well is necessary to maintain the well--to keep the well in an existing condition of operation. Under the Waughtals's reading of the ordinance, a well which did not need repairs for two decades or more has not been maintained.

In addition, even if we were to assume a more restrictive meaning of maintain--that is, "maintain" means keeping in an existing condition of repair--our conclusion would be the same. In

order to keep a well in an existing condition of repair, specific maintenance such as changing a screen or a pump would be necessary only if the screen or pump were broken. When nothing is broken, obviously no such extraordinary actions are necessary to keep it in an existing condition of repair. Either way, the well is being maintained.

The Waughtals argue that, to the extent "maintain" is to be interpreted as including "use," the ordinance is void for vagueness. Since we do not construe the ordinance in this manner, we do not reach this issue.

Thus we conclude the trial court properly determined that the Waughtals maintained a private well.

2. Designation by the state

The Waughtals correctly argue that the language of the ordinance requires a showing of current pollution. See Section 4, subdivision 7(e) ("within that area of the township designated as having polluted ground water") (emphasis added). The township has not established that the Waughtals' property has polluted ground water. However, because of the disjunctive nature of the ordinance, the township does not have to prove the Waughtals' property has polluted ground water. It is enough for the township to prove that the Waughtals maintained a private well and that well was located in an area served by the township water supply system.

3. Served by township's water supply system

The Waughtals do not dispute that they are in an area served by the township's water supply system.

Thus, the township has proved that the Waughtals maintained a private water well and that they are served by the township's water supply system. Accordingly, the trial court properly determined the Waughtals violated section 4, subdivision 7(e) of the ordinance.

B. Section 5, subdivision 13

Section 5, subdivision 13 of the ordinance provides:

> Notwithstanding any other provisions hereunder to the contrary, all persons or property owners * * * within that area of the Township designated by the State of Minnesota as having polluted ground water and/or which is served by the Township water supply system shall be required to hookup to the Township water system and to use the same for all of the human consumption of water.

As noted above, the Waughtals do not dispute they are in the area served by the township water supply system. It is also undisputed that the Waughtals have not hooked up to the township water system. Thus, the trial court properly found the Waughtals violated section 5, subdivision 13 of the ordinance.

II. Constitutionality

The Waughtals argue that the ordinance is unconstitutional since it violates their right to privacy, is an improper use of police power and constitutes a taking without just compensation.

A municipal ordinance is presumed constitutional. City of St. Paul v. Dalsin, 245 Minn. 325, 329, 71 N.W.2d 855, 858 (1955). The burden of proving an ordinance is unreasonable or that the requisite public interest is not involved, and consequently that the ordinance does not come within the police power of the city, rests on the party attacking its validity. Id. There is a

strong presumption favoring a city's actions. Arcadia Dev. Corp. v. City of Bloomington, 267 Minn. 221, 226, 125 N.W.2d 846, 850 (1964). If the reasonableness of the city's actions is doubtful or fairly debatable, a court will not interject its own conclusions as to more preferable actions. Id.

A. Right to Privacy

The Waughtals argue the ordinance violates their right to privacy under the Minnesota constitution.

There is a right to privacy under the Minnesota constitution. Jarvis v. Levine, 418 N.W.2d 139, 148 (Minn. 1988). This privacy right is independent of and broader than the privacy right under the federal constitution. Id. at 147-49. The Minnesota Supreme Court has noted that

> the right of personal privacy could also extend to protect an individual's decision regarding what he will or will not ingest into his body.

Minnesota State Bd. of Health v. City of Brainerd, 308 Minn. 24, 35-36, 241 N.W.2d 624, 631 (1976). This right, however, is not absolute. Id. at 36, 214 N.W.2d at 631. In City of Brainerd, the state board of health sought a writ of mandamus to compel the city to fluoridate its water supply. The supreme court stated that, in determining the constitutionality of an ordinance that allegedly invades a privacy right, the court should consider (1) the importance of the state's purpose; (2) the nature and magnitude of the effect of requiring the act; (3) whether the state's purpose justifies the intrusion; and (4) whether the means adopted by the state to accomplish this purpose is proper and reasonable. Id. at

36-37, 214 N.W.2d at 631.

The Waughtals concede the township's purpose in enacting the ordinance is "laudable." The intrusion, however, is negligible--the Waughtals have to put up with a water line under ground and use township water rather than well water. See id. at 38, 214 N.W.2d at 632 ("While forced fluoridation does intrude on an individual's decision whether or not to ingest fluoride, the impact of this intrusion on an individual's life is negligible."). While the Waughtals may prefer their own water, it would be difficult for us to give substantial weight to such a preference. See id. (Such a prerogative "if fully recognized would confer upon the individual the prerogative to refuse to allow the government to chlorinate water or to take similar actions which it has been determined to be in the best interests of public health.") Absent significant adverse consequences, we do not accord substantial weight to the preference to use well water. See id.

Given the minimal intrusion involved, we conclude that the ordinance is justified. We do not find the means adopted by the township to accomplish its purpose "particularly offensive or unusual." See id. at 39, 214 N.W.2d at 633. As the City of Brainerd court noted, the preparation and treatment of water is a "common and accepted public function" and such a quality-control measure does not "ordinarily affront a person's sensibilities." Id.

Therefore we hold the ordinance does not violate the right of privacy under the Minnesota constitution.

B. Police Power

The Waughtals argue that the ordinance is an improper exercise of the township's police power. They contend that since use of their well does not injuriously affect the public health, safety, morals, or general welfare, the ordinance is invalid. Two other state supreme courts have rejected this argument in upholding similar ordinances requiring connection to a municipal water supply system. See Town of Ennis v. Stewart, 807 P.2d 179 (Mont. 1991) (requiring connection to city water system valid even absent allegation of immediate threats arising from use of private well water); McMahon v. City of Virginia Beach, 267 S.E.2d 130 (Va. 1980) (ordinance that required landowners to hook up to the city water system but did not require use of city water was a valid exercise of police power), cert. denied, 449 U.S. 954 (1980).

In addition, in Hutchinson v. City of Valdosta, 227 U.S. 303, 33 S. Ct. 290 (1913), the United States Supreme Court upheld a city ordinance that required property owners residing along streets with sewer lines to install "water closets" in their houses and connect them to the public sewer. In Hutchinson the owner of a house without a water closet who did not comply with the ordinance was subject to a fine not to exceed $200, or to labor on the streets or public works, or to be confined in the guardhouse of the city for not exceeding 90 days. Id. at 305, 33 S. Ct. at 291. In order to comply with the ordinance, the homeowner would have had to build an addition to her house which, with connection to the sewer system and payment for water would cost her a "considerable sum of money."

Id.

The Supreme Court held that the ordinance was a valid exercise of police power. Id. at 308, 33 S. Ct. at 292. It noted:

> It is the commonest exercise of the police power of a state or city to provide for a system of sewers, and to compel property owners to connect therewith. And this duty may be enforced by criminal penalties. It may be that an arbitrary exercise of the power could be restrained, but it would have to be palpably so to justify a court in interfering with so salutary a power and one so necessary to the public health. There is certainly nothing in the facts alleged in the bill to justify the conclusion that the city was induced by anything in the enactment of the ordinance other than the public good, or that such was not the effect.

Id.

Later courts have cited Hutchinson in upholding ordinances requiring connection to water or sewer systems. See Schrader v. Horton, 471 F. Supp. 1236 (W.D. Va. 1979),(water system), aff'd, 626 F.2d 1163, 1243 (4th Cir. 1980); Board of Health v. Crew, 129 A.2d 115 (Md. 1957) (water system); McNeill v. Harnett County, 398 S.E.2d 475 (N.C. 1990) (sewer system); Kingmill Valley Pub. Serv. Dist. v. Riverview Estates Mobile Home Park, Inc., 386 S.E.2d 483 (W. Va. 1989) (sewer system).

In addition, the Waughtals rely on an attorney general opinion, Op. Att'y Gen. 469c-11 (Nov. 30, 1964) in which the attorney general stated:

> A village lacks authority to require a property owner to use a municipal water system in the absence of a showing that the use of private water is injurious to the public health.

The supreme court has stated:

> While the opinion of the attorney general is entitled to great weight, it is not determinative in its own. The

> attorney general's written opinions, under Minn. Stat. § 270.09, have the force and effect of law until overruled by a court of competent jurisdiction.

Northern States Power Co. v. Williams, 343 N.W.2d 627, 632 (Minn. 1984).

First, we note that the attorney general's opinion predated City of Brainerd by 12 years. The opinion recognized there was no controlling Minnesota authority ("Whether the police power includes the authority to compel the use of municipal water systems has not, to our knowledge, been judicially determined.") After City of Brainerd, we are not hampered by such a lack of judicial direction on the issue.

Second, although the attorney general's opinion would require a showing that the public health is endangered by the continued use of a private water system before a municipality could compel the use of a municipal system, there is no requirement that the danger to public health must be imminent before a municipality may act. See, e.g., Town of Ennis, 807 P.2d at 183 ("Allowing some citizens to forgo connection to such a system indefinitely or until a health threat is imminent may make such a system unaffordable and thereby defeat the purpose of preventing potential health problems before they arise.") (emphasis in original); City of Virginia Beach, 267 S.E.2d at 134 ("There is no requirement that protective measures be limited to actions taken after a crisis has arisen or a catastrophic disaster has struck."). We believe such a requirement would be unwise. Cf. City of Virginia Beach, 267 S.E.2d at 134 ("To anticipate seemingly unlikely events * * * as public health

hazards may be to exercise commendable prudence and foresight.") Even though the threat to the Waughtals' water supply may not be imminent, we believe that the township has made a sufficient showing of endangerment to justify its actions. We will not impose on the township our conclusions as to what would have been the best course of action. See City of Bloomington, 267 Minn. at 226, 125 N.W.2d at 850. We conclude the Waughtals have not met the burden of showing the ordinance is an improper exercise of police power.

C. Taking

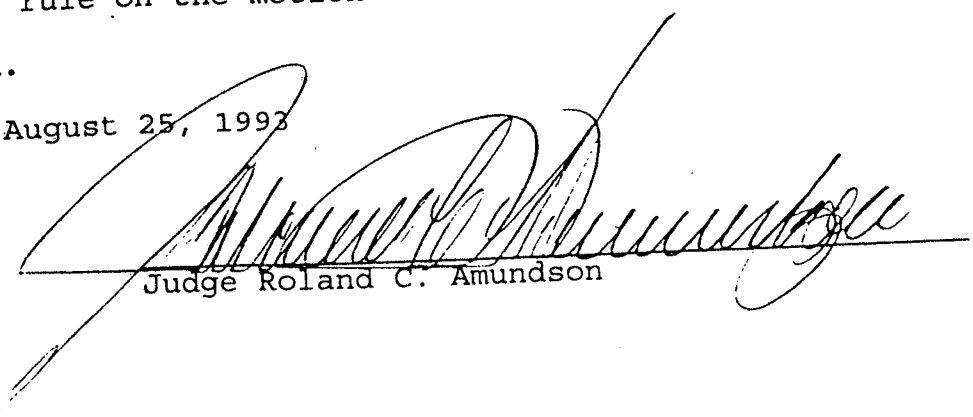
The Waughtals argue that enforcement of the ordinance would amount to a taking of their property without compensation. As the township correctly notes, even if there is a taking, it would not be an affirmative defense in a criminal action. It would just mean that the Waughtals, if successful in their claim, would be entitled to compensation in a civil action.

III. Motion to Strike

In making our decision, we do not rely on material in the appendix of the Pollution Control Agency's amicus brief, therefore we decline to rule on the motion to strike.

Affirmed.

Dated: August 25, 1993



Judge Roland C. Amundson

SHORT, Judge (dissenting).

I respectfully dissent. The ordinance is unconstitutional because it is an improper use of the township's police power. Under its police power, the township may enact ordinances for the health and safety of its citizens, but such ordinances must be reasonable and not arbitrary. Olsen v. City of Minneapolis, 263 Minn. 1, 13, 115 N.W.2d 734, 742 (1962); Fairmont Foods Co. v. City of Duluth, 260 Minn. 323, 325, 110 N.W.2d 155, 157 (1961). The record contains no evidence either that the Waughtals' well is polluted or that their continued use of well water would endanger the general public's health and safety. In light of these facts, the township's ordinance is unreasonable and arbitrary. See, e.g., Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 245 (Minn. 1984) (health department's determination of maximum formaldehyde levels was arbitrary and capricious). The fact that it would cost the Waughtals over $7,000 to comply with the ordinance also renders the ordinance unconstitutional. See Missouri Pac. R.R. Co. v. Norwood, 283 U.S. 249, 255, 51 S. Ct. 458, 461 (1931) (cost of complying with state law may be considered in determining whether law is arbitrary and unconstitutional). The Waughtals' situation differs from the facts of Minnesota State Bd. of Health v. City of Brainerd, 308 Minn. 24, 241 N.W.2d 624 (1976) (the floridation case) in two important respects: (1) the Waughtals' choice to continue using their well affects only themselves rather than the general public; and (2) the Waughtals are being made to suffer criminal penalties. Cf. id. at 28, 241

N.W.2d at 627 (civil case). The ordinance's unreasonable and arbitrary nature makes it an unconstitutional exercise of the township's power to enact ordinances for its citizens' health and safety.

8/25/93

M. D. Short