

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF LE SUEUR

FIRST JUDICIAL DISTRICT

Patti Lynn Abrahamson, John Weber, and
Frank J. Ebert (deceased),

PLAINTIFFS,

**ORDER DENYING
MOTION FOR SPECIAL ELECTION**

v.

City of Le Sueur and Monica Muchow, in her
capacity as City Clerk for the City of Le Sueur,

DEFENDANTS.

FILE NO. 40-CV-12-815

The above-entitled matter came on for hearing before the undersigned Judge of District Court at the Le Sueur County Courthouse in Le Center, Minnesota on the 31st day of August, 2012. Mr. Thomas F. DeVincke, Esq., and Mr. Timothy J. Keane, Esq., appeared on behalf of the Plaintiffs. Mr. Robert T. Scott, Esq., appeared on behalf of the Defendants.

The matter was originally set for a Motion Hearing on July 24, 2012, but it was continued to allow the City of Le Sueur time to respond to Plaintiff's motion. Plaintiffs filed a Memorandum of Law in Support of Motion for Expedited Relief. Defendants filed a Memorandum of Law in Opposition to Plaintiffs' Motion for Order Adjudging that Defendants Must Convene Special Election. Plaintiffs filed a Reply Memorandum in Support of Motion for Judgment.

This Court, having considered the motion, the arguments of the parties, having reviewed the contents of the file, and being duly advised, now makes the following:

FINDINGS OF FACT

1. Parties here are Defendants City of Le Sueur and its city clerk. Collectively they will be referred to as “the City”. Plaintiffs are representatives of a citizens’ group, and will be collectively referred to as “the Committee”.
2. The Committee brought a motion to require the City to convene a special election on a proposed ordinance (“the Ordinance”).
3. The Committee is seeking a declaratory judgment from this Court under the Uniform Declaratory Judgments Act. Minn. Stat. § 555.01 *et seq.*
4. The Committee is composed of City of Le Sueur residents “engaged in promoting responsible government through informed and active participation.” (Pl.’s Mem. of Law in Support of Mot. for Exp. Relief (“Pl.’s Mem.”), p. 2.)
5. The City is a Home Rule Charter city as authorized by Minn. Stat. Ch. 410. (Pl.’s Mem., p. 5.)
6. The Minnesota Municipal Power Agency (“MMPA”) has proposed the construction of a biodigester facility (the “Project”), to be located in Le Sueur. (Pl.’s Mem., p. 2.)
7. The Project site consists of 34.9 acres, and is currently an abandoned gravel pit. (Def.’s Mem., p. 6.)
8. The land use in the area surrounding the Project is nearly all cropland, with an industrial-zoned area to the north within the City of Le Sueur. (Def.’s Mem., p. 6.)
9. “[I]f constructed, the bioenergy plant would use a wet anaerobic digestion process to convert agricultural and food processing wastes, known as “feedstocks”, into biogas and two other commercially valuable products: a liquid byproduct to be used as an agricultural soil amendment; and a solid renewable boiler fuel.” (Def.’s Mem., p. 7, *see* Exh. 1-A, ¶ 1.)

10. “The biogas, composed primarily of methane, would be used to fire four 2-megawatt reciprocating engine generator sets.” (Def.’s Mem., p. 7, *see* Exh. 1-A, ¶ 1.)
11. “Indispensable to the process would be the power plant’s ability to receive and store agricultural feedstock such as silage, potato and other vegetable processing residuals, poultry manure, grasses, hay, snack foods and cereals, which would then be converted to biogas through anaerobic digestion.” (Def.’s Mem., p. 7, *see* Exh. 1-A, ¶ 6.)
12. The silage would be stored in a dedicated 5.5-acre covered silage storage area. (Def.’s Mem., p. 8, *see* Exh. 1-A, ¶ 5.)
13. The Committee, along with other concerned citizens, proposed an ordinance amending Ordinance No. 517 of the City of Le Sueur’s Code of Ordinances as they relate to public nuisances. (Pl.’s Mem., p. 2, Exh. 2, *see* Aff. DeVincke, Exh. A.)
14. If the Ordinance were enacted, it would amend Chapter 17 of the City of Le Sueur Code of Ordinances relating to prohibited public nuisances. (Pl.’s Mem., p. 2.)
15. The City argues that the Ordinance is a land use regulation, and therefore preempted by the Municipal Planning Act (“MPA”). Therefore, the City is not required to hold a special election on the proposed Ordinance. (Def.’s Mem. of Law in Opp. to Pl.’s Mot. for Order Adjudging that Def.s Must Convene Special Election (“Def.’s Mem.”), p. 2.)
16. The Committee argues that the MPA is not involved since the Ordinance is not to meant to regulate land use but, rather, is a nuisance regulation, and is therefore a valid exercise of the general police power. (Pl.’s Reply Mem. of Law in Support of Motion for Judgment (“Pl.’s Reply”), p. 2.)

17. The Committee states that the Project proposed by the MMPA poses the potential to create nuisance effects and further potential environmental degradation, noise, odors, and potential adverse health effects. (Pl.'s Mem., p. 2.)

18. The Committee argues that the proposed "Ordinance would not prohibit the Project in anyway," and that the City "would simply have to conform to the nuisance prohibitions as duly adopted by the electors of Le Sueur." (Pl.'s Reply, p. 3.)

19. However, 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.

20. On or about February 6, 2012, Mr. Ed Michaelson presented the City Council with a Petition to Stop the Hometown Bio Energy Project in Le Sueur, Minnesota. The petition was signed by more than 1,000 "homeowners, business owners, ratepayers and concerned citizens of the City of Le Sueur, Sharon Township and Ottawa Township." (Def.'s Mem., p. 11, *see* Exhs. 2-B & 2-C.)

21. The petition stated the citizens' opposition to the proposed Project was based on concerns about the Project's impact on property values, airport zoning, traffic, and groundwater. Further, the Committee believes that the Project would produce "rancid odors for a radius of 2 to 3 miles." (Def.'s Mem., p. 11, *see* Exh. 2-C.)

22. Each of the named Plaintiffs in this matter signed the petition. (Def.'s Mem., p. 11, *see* Exh. 2-C, p. 3-5.)

23. On March 5, 2012, City Clerk Muchow received a certification that five citizens, including John Weber, had formed a committee for the initiation of two ordinances. (Def.'s Mem., p. 12, *see* Exh. 2-D.)

24. On or about March 13, 2012, City Clerk Muchow wrote to the Committee members to inform them that their proposed ordinances were inappropriate for initiative, and directed them to the governing legal precedent. (Def.'s Mem., p. 13, *see* Exh. 2-F.)

25. On or about March 14, 2012, pursuant to the authority set forth in Section 5 of the City's Home Rule Charter (the "Charter"), the Committee submitted a petition in support of the Ordinance. (Pl.'s Mem., p. 2, *see* Aff. DeVincke, Exh. B.)

26. The proposed Ordinance would significantly expand the types of conditions and activities that constitute a public nuisance in the City of Le Sueur. It, additionally, identifies several specific activities and conduct that would constitute a public nuisance per se, and would thus be prohibited throughout the City. (Def.'s Mem., p. 13, *see* Exh. 2-F.)

27. The City argues that this, in effect, constitutes "de facto zoning". (Def.'s Mem., p. 13.)

28. The Ordinance, in pertinent part, states that: "The following are hereby declared to be nuisances affecting health:

- 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."

(Def.'s Mem., p. 15, *see* Exh. 2-F) (emphasis added).

29. The City argues that "[b]y prohibiting, in all circumstances and without exception, "[t]he storage . . . of... unwholesome food or vegetable matter," the "storage of . . . agricultural and

yard waste materials,” and the “storage, treatment, or accumulation of any putrescible matter,” the proposed ordinance would deprive the bioenergy plant of the vast majority of the sources of the feedstock upon which its operation would depend.” (Def.’s Mem., p. 15-16, *see* Exh. 2-F, p. 8.)

30. The City Clerk again reviewed the Ordinance and determined that it, like the two previous proposed ordinances, concerned a matter over which the legislature and the MPA preempted local charter provisions. (Def.’s Mem., p. 16.)

31. On or about March 30, 2012, the Committee, pursuant to the initiative procedures outlined in the City Charter, filed their petition in twenty-two separate packets of signatures with the City Clerk. (Def.’s Mem., p. 16, *see* Exh. 2-H.)

32. On or about April 23, 2012, the City Clerk certified to the City Council that the Committee’s petition in support of the Ordinance was sufficient as to form so as to satisfy Section 5 of the Charter. (Pl.’s Mem., p. 3.)

33. On or about June 4, 2012, the City Council conducted a public hearing on the Ordinance. (Def.’s Mem., p. 17.)

34. The City Council considered the Ordinance at its June 11, 2012 and June 25, 2012 regular meetings. (Def.’s Mem., p. 17.)

35. On June 25, 2012, the City Council considered, debated, and refused to enact the Ordinance. (Pl.’s Mem., p. 2; Def.’s Mem., p. 17, *see* Exhs. 2-K & 2-L.)

36. The City Council passed Resolution #12-036 at its June 25, 2012 meeting to document that “it has (not) taken and will take no action on the proposed ordinance.” (Def.’s Mem., p. 17, *see* Exh. 2-M.)

37. On July 9, 2012, the City Council adopted Resolution #12-041, declaring that the City would not hold an election on the Ordinance. (Pl.'s Mem., p. 2, *see* Aff. DeVincke, Exh. C.)

38. The City conceded that the Committee had satisfied the Charter's procedural requirements to trigger a city-wide special election. (Def.'s Mem., p. 2.)

39. Resolution #12-041 stated that the proposed Ordinance was inconsistent with the public policy of the State of Minnesota, that the proposed Ordinance was an attempt to dictate the outcome of a specific local land use issue and development proposal, and that the legislature had 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. (Def.'s Mem., p. 17-18, *see* Exh. 2-N.)

40. The Committee argues that "[t]he City Council, in derogation of Plaintiffs' rights, as established by the Charter, has refused the requests to submit the Ordinance to a vote of the electors. In doing so, the City has frustrated the electors' rights under both the Charter and state law, abused its discretion and breached its legal duty to hold the required election." (Pl.'s Mem., p. 2.)

41. The Committee argues that, as citizens of a home rule charter city, they have the right to seek enactment of the Ordinance through direct election. (Pl.'s Mem., p. 5.)

42. Applications to rezone the Project site from the City's Transitional zoning district (an interim district intended to preserve the status quo until such time as permanent zoning is established) to the City's General Industry district are currently pending before the City Council. (Def.'s Mem., p. 9. *see* Zoning Ordinance §§ 27-20 & 27-31a.)

43. The City has reserved all judgment on the application of its Zoning Ordinance to the Project until such time as the MMPA submits a formal development and/or permit application to the City. (Def.'s Mem., p. 9.)

44. However, it appears from the information publicly available, that the Project would be permitted as a "production" or "processing" facility in the City's General Industry district, but that a Conditional Use Permit would be required for the gas storage tanks. (Def.'s Mem., p. 9.)

45. The site would also be required to comply with the Le Sueur Airport Zoning Ordinance before it could be constructed. (Def.'s Mem., p. 9.)

46. The Project has generated controversy and considerable organized opposition within the local community. (Def.'s Mem., p. 9.)

CONCLUSIONS OF LAW

Summary Judgment

1. The Committee sought a declaratory judgment from this Court under the Uniform Declaratory Judgments Act. Minn. Stat. § 555.01 *et seq.*
2. Declaratory judgments are subject to the Minnesota Rules of Civil Procedure. (*See* Minn. R. Civ. P. 1 & 81, & Appendix A.)
3. If the Court grants the Committee's motion, there does not appear to be any additional issues for the Court to resolve. (Def.'s Mem., p. 19.)
4. Therefore, this motion most closely resembles a motion for summary judgment under Minn. R. Civ. P. 56, and the Court should apply the summary judgment standard of review to the Committee's motion. (Def.'s Mem., p. 19.)
5. Minn. R. Civ. P. 56.03 provides that summary judgment is appropriate if "there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of

law.”

6. When considering a summary judgment motion, the facts are viewed in the light most favorable to the nonmoving party. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 542 (Minn. 2001).

7. A party opposing a motion for summary judgment may not simply rely on general statements of fact, or conclusory allegations in the pleadings, “but rather must demonstrate at the time the motion is made that specific facts are in existence which create a genuine issue for trial.” See *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

8. If there is a “complete lack of proof on an essential element of the [party’s] claim,” summary judgment must be granted. See *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995).

9. The burden of establishing the existence of the material fact is upon the party opposing the motion for summary judgment. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. App. 1989).

10. Summary judgment should be employed only where it is perfectly clear that no issue of fact is involved, and that it is neither desirable nor necessary to inquire into facts which might clarify the application of the law. *Rhee v. Golden Home Builders, Inc.*, 617 N.W.2d 618, 622 (Minn. Ct. App. 2000) (quoting *Donnay v. Boulware*, 144 N.W.2d 711, 716 (Minn. 1966)).

11. Summary judgment may be entered for a non-moving party, on the basis of the documents before the court when the motion is made. *Leidall v. Grinnell Mut. Reinsurance Co.*, 374 N.W.2d 532, 535 (Minn. Ct. App. 1985).

Preemption

12. The City Charter reserves for the people of Le Sueur the power to “initiate and adopt any ordinance, except an ordinance appropriating money or authorizing the levy of taxes,” and establishes the procedures through which an initiative ordinance may be adopted and take effect. *See* City Charter, §§ 5.01-.09 (Aff. DeVincke, Exh. B.)

13. The City acknowledged the Committee’s compliance with the procedural requirements of §§ 5.04 through 5.06 of the City Charter, such that the City Council’s decision not to act on the proposed Ordinance would ordinarily suffice to trigger a special election on the proposed Ordinance under § 5.08 of the City Charter. (Def.’s Mem., p. 20.)

14. “The general rule is that, 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.’” *State ex rel. Town of Lowell v. City of Crookston*, 91 N.W.2d 81, 83 (Minn. 1958) (quotations omitted).

15. Therefore, the right to a referendum has some restrictions under the law.

16. The people of a city adopting a charter may not regulate matters of general state concern, but as to matters of municipal concern, they have all the legislative power of the state, save as such power is expressly or impliedly withheld. *Park v. City of Duluth*, 159 N.W. 627 (Minn. 1916).

17. All charter provisions remain subject to the constitution and laws of the state, and any charter provision that conflicts with state public policy is invalid. *Haumant v. Griffin*, 699 N.W.2d 774, 777-78 (Minn. Ct. App. 2005), *rev. denied* Minn. Aug. 24, 2005, (citing

Nordmarken v. City of Richfield, 641 N.W.2d 343, 347 (Minn. Ct. App. 2002)) (quotations omitted).

18. A home rule charter “does not preclude the legislature from preempting charter authority on matters of state concern.” *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 347 (Minn. 1995).

19. “In determining whether or not preemption has occurred, Minnesota courts consider four factors:

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 shows 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.”

Nordmarken v. City of Richfield, 641 N.W.2d 343, 348 (Minn. Ct. App. 2002) (citing *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 820 (Minn. 1966)).

20. The State of Minnesota authorizes cities to plan for and regulate land uses through the MPA. Minn. Stat. §§ 462.351-.364.

21. The public policy of the MPA 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.

22. A land use regulation, such as a zoning change, an amendment to a comprehensive plan, or other regulation that is directed toward one’s use of land, and contemplated in the “authority

to plan” as provided in Minn. Stat. § 462.353, is an exercise of police power by the City.

23. Therefore, if the Ordinance controls land use regulation, it should not be the subject of a referendum. If it is a nuisance regulation, it can be the subject of the requested referendum.

24. The Committee argues that the Ordinance is not a land use regulation because 1) it regulates conduct, not land; and 2) the Ordinance would not prohibit the Project in any way.

(Pl.’s Mem., p. 9-10.)

25. That argument is not persuasive as the plain language of the Ordinance regulates land use.

26. The Ordinance, as submitted, regulates the storage of many broad categories of materials, as well as treatment of materials. Storage of this type of material would be done on land.

27. Therefore, the Ordinance would, at least in part, regulate land use and the referendum on the Ordinance is preempted by the Municipal Planning Act.

28. We next analyze the Ordinance as a nuisance regulation.

State Statute

29. Municipalities in Minnesota have broad authority, under their police powers, to enact regulations “to provide for the government and good order of the city, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of residence, trade and commerce ,and the promotion of health, safety, order, convenience, and the general welfare.” Minn. Stat. §§ 412.221, subd. 32, & 410.33.

30. Minn. Stat. § 561.01 defines nuisance as “[a]nything which is injurious to health, or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance. An action may be brought by any person whose property is injuriously affected or whose personal enjoyment is lessened by

the nuisance, and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.”

31. Nuisance regulations can generally be categorized as either ‘nuisances per se’ or ‘nuisances in fact.’ (Def.’s Mem., p. 26.)

32. A nuisance per se is an act, occupation, or structure, which is a nuisance in all situations, at all times. *See, e.g., Robinson v. Westman*, 29 N.W.2d 1 (Minn. 1947).

33. The right to relief is established by proving the act itself, rather than proving the harmful effects of such act. *Id.*

34. A nuisance in fact is an act, occupation, or structure that becomes a nuisance based upon its harmful effect as determined by its relationship to its surroundings, its location, or the manner in which it is performed or operated. *See, e.g., Olsen v. City of Minneapolis*, 115 N.W.2d 734 (Minn. 1962).

35. A nuisance is a public nuisance if it affects a considerable number of people, violates public rights and produces a common or general injury, or injures or annoys the portion of the public that comes into contact with them. *See Excelsior Baking Co. v. City of Northfield*, 77 N.W.2d 188 (Minn. 1956).

36. Within the contours of the general statutory definition of nuisance, cities have the authority to craft more specific regulations describing the precise conditions, activities, and conduct constituting a public nuisance within that city, and providing for the prevention or abatement of the same. *See Minn. Stat. § 412.221, subd. 23.*

37. However, cities may not exercise this authority in an arbitrary or unreasonable manner, and may not declare something a public nuisance that would otherwise be considered a private nuisance, relatively harmless, or simply not a nuisance at all. *See, e.g., Claesgens v. Animal*

Rescue League of Hennepin County, 216 N.W.2d 535, 536 (Minn. 1927).

38. The proposed amendments to Section I of the City's nuisance ordinance would seem to constitute a valid exercise of the City's authority to regulate public nuisances. However, the proposed amendments to Section II conflict with the statutory definition of nuisance. (Def.'s Mem., p. 28.)

39. The amendments to Section I are nuisance in fact regulations, because they focus on the harmful effects of the activities prohibited rather than the specific activities themselves, making such activities a nuisance only upon causing an objectively harmful or offensive odor. (Def.'s Mem., p. 28.)

40. The proposed Section II amendments are drafted to prohibit specific activities, conduct, or land uses without regard to whether they cause any injury to the public in the context of the surroundings, location, or the manner in which they are performed or operation. (Def.'s Mem., p. 28.)

41. Regulation that flatly prohibits all such activities without consideration of the circumstances under which they take place, such as the proposed Section II amendments, is the type of arbitrary or unreasonable prohibitions that Courts have found to be unenforceable.

42. The proposed Section II amendments conflict with Minn. § 561.01's definition of nuisance.

43. The proposed amendments conflict with the public policy of the State of Minnesota.

"Blue Pencil" Doctrine

44. A logical question arises whether this Court is authorized to, and should, edit the Ordinance and, through reasonable construction, avoid the conflict with the MPA. In other words, should the Court, "blue pencil" the Ordinance. The blue pencil doctrine is applied most

often in Minnesota to noncompete agreements and restrictive covenants. But presumably, it could be used in this situation.

45. A court has an “obligation to avoid judicial legislation.” *U.S. v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 478-79 (1995).

46. For the Court to edit the words of a statute may contravene the constitutional principle of separation of powers. See Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 57-58 (1995).


47. This Court does not view itself as a legislative body and a court should not be “in the business of rewriting statutes or ordinances.” *Umeka Lewis v. John J. Jaeger, Robert E. Boge, & The City of Dubuque*, 818 N.W.2d 165, 184 (Iowa 2012).

48. It is not for this Court to rewrite the Ordinance in order to save it from conflict with Minnesota State law.

ORDER

1. The Committee’s motion to require the City to hold a special election is **DENIED**.
2. The Committee’s Complaint is **DISMISSED** with prejudice.

Dated this 17th day of October, 2012.




M. Michael Baxter
Judge of District Court

(COURT SEAL)

Le Sueur Co. District Court
FILED

OCT 17 2012

COURT ADMINISTRATOR
By:  Deputy