THE MESHING OF STATE AND LOCAL REGULATIONS

By
Troy Gilchrist, Attorney

CONTENTS

INTRODUCTION

An important aspect of exercising local regulatory authority understands how that authority fits into the overall scheme of government regulation and the limits imposed by the structure. To aid in that understanding, the following will provide a brief description of township regulatory authority, the doctrines of preemption and conflict, and a discussion of local planning and zoning authority. This paper will not discuss the other various issues associated with local regulations (e.g., procedural considerations, constitutional issues, etc.).

SOURCE OF LOCAL AUTHORITY

All governmental authority stems from the United States Constitution. In Minnesota, local units of government are considered creatures of the legislature and depend on it for their authority. Cities and townships "have no inherent power and possess only such powers as are expressly conferred by statute or implied as necessary in aid of those powers which have been expressly conferred."[1]

Because local government powers are based on statute, it is extremely important for town boards to maintain a working knowledge of their statutory authority and how it interacts with other governmental authority. Since the written word is often less than clear, understanding statutory authority requires interpretation. The need for interpretation, in turn, gives rise to the possibility of misinterpretation or conflicting interpretations. Herein lies the frustration most local officials experience with statutes. Unfortunately, because local regulation stems from statutory authority, it is a field that requires a great deal of interpretation.

In many ways, the vagueness associated with local authority is necessary since it is not possible for the legislature to contemplate every situation that may give rise to local regulation. Occasionally, the legislature conveys specific regulatory authority; however, most often it grants general authority and leaves it to the local governing boards to decide how best to implement the authority. If a local government is seen as going "too far" in the exercise of its authority, either the legislature can provide more specific guidance, or a person subject to the regulation can challenge it in court.

a. Specific Statutory Authority

Townships are provided authority to adopt ordinances regarding some very specific activities. Examples of this specific authority include: traffic regulations (169.04); discharge of firearms in a platted area (366.01, subd. 2); keeping of games of skill and conducting certain performances (366.01, subd. 2); burning vegetation on town road rights-of-way (164.02, subd. 1); and regulate dogs and cats (365.10, subd. 13; 366.01, subd. 2). Towns that have adopted urban town powers may also regulate: the use of streets and public grounds (368.01, subd. 3); trees and shrubs (368.01, subd. 4); cemeteries (368.01, subd. 5); wells and waterworks (368.01, subd. 6); tourist camps and automobile parking facilities (368.01, subd. 7); fires (368.01, subd. 9); transient dealers (368.01, subd. 11); taxi cabs and automobile rental agencies (368.01, subd. 12); a variety of health related matters (368.01, subd. 14); nuisances (368.01, subd. 15); and parks and recreational facilities (368.01, subd. 24).

b. General Authority

The two sources of township authority that can be most accurately described as general are the planning and zoning, and the general welfare powers. Each provides the opportunity to adopt regulations to address a wide range of issues.

Townships have two separate sources of planning and zoning authority. Traditionally, the town electors could authorize the town board to engage in planning and zoning under Minn. Stat. § 366.10 - .181. In 1982, all town boards were given the authority to undertake planning and zoning activities on their own initiative under Minn. Stat. § 462.351 - .364. This second source of authority is much more detailed and extensive than those originally granted to townships.

An integral part of planning and zoning is the adoption of official controls to which regulate the physical development of the town including air space and subsurface areas. The regulations can include zoning, subdivision controls, site plan regulations, sanitary codes, building codes, and official maps. (Minn. Stat. § 462.352, subd. 15)

The broadest authority given to local governments falls under the heading of general welfare powers. These powers allow local units of government to adopt ordinances as needed to protect the health, safety, order, convenience, and general welfare of the community. In urban towns, the general welfare authority is contained in Minn. Stat. § 368.01, subd. 19, and is left to the discretion of the town board. In non-urban towns, the general welfare authority is contained in Minn. Stat. § 365.10, subd. 17 and is conditioned upon the Board receiving elector authorization to exercise the power.

c. Elector Authorization

Townships are unique in the level of participation allowed to their residents. One aspect of that involvement, as already mentioned, is deciding whether to authorize the town board to adopt an ordinance. In some cases, the statute authorizing townships to adopt a regulation is conditioned upon receiving elector authorization at an annual or special town meeting. A town board may not exercise the particular power without elector authorization. However, a vote of the electors authorizing the adoption of an ordinance does not obligate the town board to create an ordinance.

The result is a balance of the democratic authority of the electors and the representational authority of the board. Each must be in favor of an ordinance before it can be adopted. The statute will indicate whether elector authorization is required.

PREEMPTION AND CONFLICT

The doctrines of preemption and conflict are used by courts to determine whether a local ordinance is inconsistent with state law and therefore invalid. These doctrines are separate concepts, but are often raised together when an ordinance is challenged as being inconsistent with state law.

a. Preemption

Preemption is often thought of as the "occupation of the field" concept. The inconsistency that arises under preemption is that the state's regulation of a field has left no room, either expressly or impliedly, for regulation on a local level.

> "[A] state law may fully occupy a particular field of legislation so that there is no room for local regulation, in which case a local ordinance attempting to impose any additional regulation in that field will be regarded as conflicting with the state law, and for that reason void, even though the particular regulation set forth in the ordinance does not directly duplicate or otherwise directly conflict with any express provision of the state law."[2]

As this quotes points out, preemption can be found even though not every aspect of the field is covered by state regulation.

To determine whether a local ordinance is preempted, the courts typically consider four questions:

(1) What is the "subject matter" which is to be regulated?

(2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern?

(3) Has the legislature in partially regulating the subject matter indicated that is a matter solely of state concern?

(4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?[3]

By reviewing these questions, the courts attempt to determine the extent to which a particular field is occupied by the state.

b. Conflict

Conflict is based on the concept that an ordinance must be in harmony with, and not repugnant, to state laws. There are four general principles related to conflict:

(1) Conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other.

(2) Conflict exists where the ordinance permits what the statute forbids.

(3) Conflict exists where the ordinance forbids what the statute Expressly permits.

(4) No conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute.[4]

c. Preemption and Conflict Applied

Whether an ordinance is preempted by or in conflict with a state law depends, of course, on the facts of the particular situation. However, understanding how these concepts are applied will help town board's better understand the limits of their regulatory authority. Also, keep in mind that these doctrines are distinct and are applied separately by the courts. For instance, an ordinance may not be preempted by state law, but it could still be found invalid on the basis that it conflicts with state law.

The most difficult aspect of understanding preemption and conflict is that they can be found to exist even though the legislature did not expressly raise the issue of local control when passing legislation in a particular field. As a result, the absence of statutory language expressly prohibiting local control does not necessarily mean such control is permitted. The Minnesota Supreme Court expressed frustration over the lack of legislative direction when it said "[i]t is imperative, if we are to give faithful effect to legislative intent, that the legislature should manifest its preemptive intent in the clearest terms."[5]

One way to think about regulatory authority among the various levels of government is to picture each field as containing a funnel of authority. The funnel narrows as it extends down the levels of government since regulations can only become stricter as they become more localized. Those governmental units within the funnel may enact regulations to the extent allowed by their position in the funnel.

In some cases, the funnel starts at the federal level and extends all the way down to the city or town level. In other cases, the funnel may start at the state level and extend only down to the county. Each field has its own funnel of authority and its width at a particular level is unique to the field.

The following township cases provide examples of how the state and the courts have approached preemption and conflict.

1. Expressed Preemption Example

The regulation of pesticides is a good example of the interaction between federal, state, and local controls. In Minn. Stat. § 18B.02, the legislature addressed the issue of local regulation of pesticides by stating:

> "Except as specifically provided in this chapter, the provisions of this chapter preempt ordinances by local governments that prohibit or regulate any matter relating to the registration, labeling, distribution, sale, handling, use, application, or disposal of pesticides. It is not the intent of this section to preempt local responsibilities for zoning, fire codes, or hazardous waste disposal."

This language indicates the legislature chose to approach the field of pesticide regulation by preempting the field while acknowledging the validity of certain types of local controls that may indirectly impact pesticide use.

In 1992, Mantrap Township adopted a pesticide ordinance that required a permit for the aerial application of pesticides.[6] When the ordinance was challenged as being preempted under Minn. Stat. § 18B.02, the township argued the ordinance was a valid exercise of its zoning authority expressly allowed by the statute.

Upon examining the nature of the ordinance, the court held that the ordinance was in fact a pesticide regulation rather than a zoning control. As a pesticide regulation, the court held it was preempted by the statute.[7]

Another aspect of the pesticide regulation field is the application of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In a United States Supreme Court Case, the Court held that a local government ordinance was not preempted by or in conflict with the FIFRA.[8] Therefore, while the Mantrap Township ordinance would likely be permissible under the federal regulations, it was not permissible under the regulatory scheme established by the state legislature. This is a field where the funnel starts at the federal level and ends with the state.

2. Implied Preemption Example

A recent township case dealt with the issue of preemption and conflict in a field where the legislature did not express its intent regarding local controls.

In 1991 Crooks Township adopted an ordinance regulating animal feedlots.[9] The ordinance established setbacks, a bond requirement, and manure application restrictions. Shortly after the ordinance was adopted, it was challenged as being preempted by and in conflict with Minn. Stat. § 116.07, subd. 7 which creates a process for counties to assume from the MPCA responsibility for processing feedlot permit applications. The court examined the issue by asking the four questions regarding preemption.

While discussing those issues, the court attempted to discern legislative intent even though no direct expression of intent was included in the statute. Based on the nature of pollution as the court saw it and the absence in the statute of the bond requirement contained in the ordinance, the court determined the legislature intended to preempt local ordinances regulating pollution from animal feedlots.

The court also found that the ordinance also conflicted with state law and therefore was invalid. The basis for this finding was that a setback requirement contained in the ordinance would have prohibited the feedlot even though it had already received approval from the MPCA and the county.[10] According to the court, such provisions are irreconcilable and so cannot coexist.

3. Permitted Local Regulation Example

In 1986, the Court of Appeals reviewed a township that was found to be consistent with the state regulatory scheme.[11]

Wrenshall Township enacted an ordinance prohibiting the use of sludge in the township. Sludge is a by-product created by waste treatment facilities and can be used as fertilizer. An owner who had been using sludge on his land challenged the ordinance as being beyond the township's authority. The MPCA had permitted the owner to use the sludge, but that use became prohibited under the township ordinance.

After reviewing a number of statutory definitions, the court found that sludge is a "waste" and that spreading sludge constituted a "waste facility." Furthermore, the state statute allowed local governmental units to ban the creation of waste facilities. Since the legislature specifically provided for local regulation, it did not preempt the field. Therefore, the local regulations were permitted. However, the court found that the legislature structured the field in such a way that local regulations are reviewable by the waste management board and the decision of the board are final.

4. Indirect Regulation Example

A particularly interesting regulatory scheme recently created by the legislature allows townships to have a say in a MPCA permitting process without adopting regulations.[12]

Persons interested in landfarming contaminated soil must apply for a permit from the MPCA. If the application involves the spreading of contaminated soils that did not originate in the township in which they are to be spread, the MPCA must provide the town board 60 days notice of the application. If the town board passes a resolution within the specified time requesting the MPCA not to issue the permit, the permit cannot be issued.

Through this regulatory structure, MPCA retains the regulatory authority, but the legislature has created an opportunity for town boards to directly impact the process without MPCA retains the regulatory authority, but the legislature has created an opportunity for town boards to directly impact the process without having to enact its own regulations with such controls would not be required to also seek a county permit.

INTERACTION OF LOCAL PLANNING & ZONING CONTROLS

One area of local regulation that receives a lot of attention is local planning and zoning. Counties, townships, and cities are authorized to engage in local planning and zoning activities. How these different levels of control interact can be very confusing. To help clarify this issue, the following will briefly summarize the layering of county and township controls, and the extension of city controls beyond city boundaries.

a. County & Township Controls

When a township adopts local zoning controls, those controls must be both consistent with and at least as restrictive as the county controls.[13] Any township controls that do not satisfy these requirements are not valid. For instance, a township may not take an area that is zoned by the county for agriculture and designate it an industrial zone under the township's ordinances. Such a designation would be inconsistent with and less restrictive than the county ordinance and therefore invalid.[14]

1. Shoreland Regulations

In 1977, the Attorney General's Office issued an opinion indicating that when a town adopts shoreland regulations that are consistent with and at least as restrictive as those of the county, the township ordinances apply to the exclusion of the county.[15] A person applying for a permit in township The reasoning behind this opinion is
that since the township controls must be as restrictive as the county controls, the state's goal of protecting shorelands is satisfied. Enforcing the township's ordinance effectively insures the application of the county ordinance within the township. Furthermore, an unnecessary burden would result from requiring a person to obtain a permit from both the township and county on an issue that is fully addressed by the township's ordinances.

Before a township adopts shoreland regulations it must also consider the requirements of the rules established by the DNR. These rules recognize the authority of townships to adopt shoreland management controls, but also place restrictions on the adoption of such controls.[16] In order to be considered as restrictive as and consistent with the county controls under Minn. Stat. § 394.33, subd. 1, the township's controls must cover the same full range of shoreland management provisions covered by the county (including dimensional standards and prohibition of land uses) and the township must ***demonstrate*** to the county board that its proposed ordinance and administration is at least as restrictive as the county's.

Once a township adopts shoreland regulations, it becomes fully responsible for enforcing the controls and complying with all state requirements associated with regulating shorelands.

2. Subdivision Regulations

In another opinion of the Attorney General the question of township and county subdivision regulations was raised. The opinion stated that when a township regulates the subdivision of land it does so at the exclusion of the county.[17] As with its earlier opinion regarding shoreland regulations, the opinion pointed out that compliance with the township standards, which must be at least as strict as the county standards, effectively amounts to compliance with relevant county standards. The burden of an owner having to seek dual authorization was also raised to support the idea of excluding the application of county standards. The opinion also pointed out that townships engaged in subdivision regulations may retain park dedication fees that may be imposed under the statutes.

In townships that have not adopted subdivision regulations, the county retains the authority to approve proposed plats.[18] The statutory plat approval process does not require approval by the town board. While some counties have chosen to directly involve the town boards in the plat approval process, others do not seek input from the township.

If a town board is interested in becoming a part of the plat approval process without actually adopting subdivision regulations, it may create a planning commission. Once a township has a planning commission, a county board may not approve a plat in the township unless the town board approves the plat and the laying of streets and other public ways.[19] Such authority can be particularly helpful to a township that does not have the resources to fully engage in zoning, but who has an interest in the plating of land in the township.

3. Enforcement

A local unit of government is obligated to enforce its own zoning ordinances. The courts have held that a county is not required to enforce township zoning controls unless it has contracted with the town board to do so under Minn. Stat. § 394.32.[20]

4. Regional Planning

Various opportunities exist for counties, cities, and townships to plan cooperatively.[21] The statutes allowing regional planning indicate the extent to which the joint decisions bind the individual parties.

For those areas that fall within the jurisdiction of a regional development commission, all long-term comprehensive plans and other matters as indicated by the commission must be submitted for comment and recommendations.[22]

In the metropolitan area, local zoning is also impacted by the review and planning authority of the metropolitan council.[23]

B. Extension of City Controls

Cities are given limited authority to unilaterally extend application of their zoning controls into the townships surrounding their boundaries. The following will discuss the regulations most often extended; however, keep in mind that there may be other circumstances in which activities of the city may affect township zoning (i.e., airport zoning,[24] wellhead protection, etc.).

1. General Zoning Controls

"A city may by ordinance extend the application of its zoning regulations to unincorporated territory located within two miles of its limits in any direction, but not in a ***county or town*** which has adopted zoning regulations . . .. [25] "Any city may thereafter enforce such regulations in the area to the same extent as if such property were situated within its corporate limits, until the county or

town board adopts a comprehensive zoning regulation which includes the area."[26]

The effect of this limited authority is that a city may not extend application of its zoning ordinances if either the county or the town has zoning ordinances. Furthermore, it appears that if a city has extended its zoning ordinances, application of the ordinances must be withdrawn if either the county or the township subsequently adopts a comprehensive zoning regulation which includes the area.

2. Subdivision Controls

"A municipality may by resolution extend application of its subdivision regulations to unincorporated territory located within two miles of its limits in any direction but not in a ***town*** which has adopted subdivision regulations . . .."[27] The key difference between this authority and the general authority for a city to extend zoning regulations is that subdivision regulations may be extended even if the county has adopted such regulations.[28] Only the existence of township subdivision regulations will preclude the extension of the city regulations.

3. Building Code

"A city may by ordinance extend the enforcement of the code to contiguous unincorporated territory not more than two miles distant from its corporate limits in any direction."[29] "After the extension, the city may enforce the code in the designated area to the same extent as if the property were situated within its corporate limits."[30] "Enforcement of the code by the city outside of its jurisdiction commences on the first day of January in the year following the notice and hearing."[31]

CONCLUSION

The authority to regulate the activities of individuals is one of the most important powers given local governments. Of course, with that power comes a great deal of responsibility. One of the primary responsibilities of a local government is to take reasonable steps to make sure the controls it imposes are within its authority and permitted under the overall scheme of federal, state, and local regulations. Such steps are only the beginning of a local government=s responsibilities when it decides to regulate activities locally.

The bottom line is that town boards must be sure to work closely with their local attorneys whenever they consider adopting local regulations.

ENDNOTES

1. Northern States Power Co. v. City of Granite Falls, 463 N.W.2d 541, 543 (Minn. App. 1990) (quoting Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 820 (Minn. 1966)).

2. Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 819 (Minn. 1966)(quoting People v. Commons, 148 P.2d 724, 727 (Cal. App.)).

3. Id. at 820.

4. Id. at 816-17.

5. State v. Dailey, 169 N.W.2d 746, 748 (Minn. 1969).

6. Minnesota Agr. Aircraft Ass'n v. Township of Mantrap, 498 N.W.2d 40, 41 (Minn. App. 1993).

7. Id. at 42-43.

8. Wisconsin Public Intervenor v. Mortier, -- U.S. --, 111 S.Ct. 2476 (1991).

9. Board of Sup'rs of Crooks Tp., Renville County v. ValAdCo, 504 N.W.2d 267 (Minn. App. 1993).

10. Id. at 272.

11. Sherner v. Culliton, 382 N.W.2d 562.

12. Minn. Stat. § 116.07, subd. 11.

13. Minn. Stat. § 394.33, subd. 1.

14. Berggren v. Town of Duluth, 304 N.W.2d 24, 27 (Minn. 1981).

15. Op.Atty.Gen., 441-H, April 26, 1977.

16. M.R. 6120.3900, subp. 4a.

17. Op.Atty.Gen., 441-H, June 30, 1989.

18. Minn. Stat. § '' 505.03 & .09; once a town reaches a population of over 5,000, it assumes the plat approving authority.

19. Minn. Stat. § 505.09, subd. 1.

20. Scinocca v. St. Louis County Bd. Of Com'rs, 281 N.W.2d 659 (Minn. 1979).

21. Minn. Stat. § '' 462.3585; 462.371-.375; 414.0325, subd. 5.

22. Minn. Stat. § 462.391, subd. 1.

23. See Minn. Stat. § 473.175; 473.181; 473.858; 473.859.

24. Minn. Stat. § 360.061-.074.

25. Minn. Stat. § 462.357, subd. 1 (emphasis added).

26. Minn. Stat. § 462.357, subd. 1.

27. Minn. Stat. § 462.358, subd. 1 (emphasis added).

28. Op.Atty.Gen., 59a-32, Aug. 18, 1995.

29. Minn. Stat. § 16B.62, subd. 1.

30. Minn. Stat. § 16B.62, subd. 1.

31. Minn. Stat. § 16B.62, subd. 1.