

Municipal Law Alert

BAKKE ❖ NORMAN

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Ordinances Regulating Aesthetics

The question of whether and how to regulate aesthetics has vexed local officials for years. The difficulty seems to flow from the inevitable clash between an individual's rights with respect to their property and the rights of those who are affected by that individual's choices - one person's trash is another person's treasure. However, recently, governments seem to be somewhat more inclined to delve into this area of regulation. The general area of "aesthetic regulation" is broad and somewhat difficult to define. However, this article discusses one type of ordinance that falls under the broad category of aesthetic ordinances - architectural and design ordinances.

Some municipalities desire to enact ordinances that force property owners to comply with the architectural and design standards set forth in the ordinance. These ordinances are generally enacted in order to attempt to preserve property values of surrounding properties and/or the integrity or character of a neighborhood. There was a time not too long ago when such ordinances ran into strong resistance from the courts. One court stated the following:

Aesthetic considerations are a matter of luxury and indulgence rather than necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation. The cut of the dress, the color of the garment worn, the style of the hat, the *architecture of the building or its color* may be distasteful to the refined senses of some; yet government can neither control nor regulate in such affairs.

Curran Bill Posting & Distributing Co. v. City of Denver, 107 P. 261 (Co. 1910). However, in recent years, courts appear to be much more willing to accept

such regulations. For example, in 1984, the United States Supreme Court stated the following:

It is well settled that the state may legitimately exercise its police powers to advance aesthetic values. Thus, in *Berman v. Parker*, 348 U.S. 26, 32-33, 75 S.Ct. 98, 102-103, 99 L.Ed. 27 (1954), in referring to the power of the legislature to remove blighted housing, this Court observed that such housing may be "an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn." *Ibid.* We concluded: "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary."

Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

Similarly, in *State ex rel. Saveland Park Holding Corp. v. Weiland*, 269 Wis. 262, 69 N.W.2d 217 (1955), the Wisconsin Supreme Court held that a building permit could not be issued if the building were so at variance with existing structures that it would cause depreciation of property values. The court made the following observation:

We have no difficulty in arriving at the conclusion that the protection of property values is an objective which falls within the exercise of the police power to promote the 'general welfare', and that it is immaterial whether the zoning ordinance is grounded solely upon such objective or that such purpose is but one of several legitimate objectives. Anything that tends to destroy property values of the inhabitants of the village necessarily adversely affects the prosperity, and therefore the general welfare, of the entire village.

Notwithstanding this sweeping language, ordinances regulating aesthetics still must comport with the constitutional standard of being reasonably related to achieving a legitimate public purpose. Some courts will make their own independent review to ensure that the purpose stated by the municipality is actually served by the ordinance. If that stated purpose is not served, the ordinance may be invalidated. *See City of Nichols Hills v. Richardson*, 939 P.2d 17 (Okla. Cir. 1997).

If an ordinance regulating aesthetics is rationally related to a legitimate governmental interest, it will probably be upheld under a municipality's police power. However that does not mean that every municipality should rush to adopt such ordinances. Before doing so, consideration should be given to whether there is a problem that would be addressed by such an ordinance or a legitimate purpose that would be served by adopting such an ordinance. If there is no problem to be remedied, then there probably is little need for such an ordinance.

In addition, municipalities should also consider the time and cost associated with enforcing the ordinances. At a minimum, the municipality will need to hire someone who has the ability to review plans in order to determine if they comply with the ordinance. In addition, there may be a need to employ someone to determine when violations exist and to enforce the ordinances through citations and other measures. Therefore, prior to adopting an ordinance, a municipality should carefully weigh the benefits associated with the adoption of the ordinance against the costs, including the inevitable conflict with property owners.

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Municipal Court: Taking Control of Ordinance Enforcement

This article is the first in a series by Bakke Norman's municipal prosecution team discussing ordinance enactment and enforcement.

Municipal courts are specially-created by towns, villages or cities to hear ordinance violation cases. If a municipality does not have a municipal court, an ordinance violation, such as a citation issued by a municipal police officer, will be prosecuted in circuit court in the county in which the municipality is located. According to the Wisconsin Court System website, as of May 2008, there were 252 municipal courts and 254 municipal judges in Wisconsin. Milwaukee has the largest municipal court, with three full-time judges and three part-time court commissioners handling more than 240,000 cases annually.

In Wisconsin, cases commonly heard by municipal courts are first-time Operating While Intoxicated (OWI) offenses. Wisconsin is the only state where a first offense OWI is an ordinance violation, not a criminal offense. Other frequently-heard cases are juvenile matters, such as truancy, underage drinking, drug offenses and curfew violations. In fact, municipal courts handle a significant portion of the statewide court caseload in these areas. Thus, municipal courts are an important part of the overall court system in Wisconsin, relieving the burden that would otherwise fall on circuit courts.

Creating municipal courts

A municipality's authority to create a municipal court is statutory: "[A municipal] court shall become operative and function when the city council, town board or village board adopts an ordinance or bylaw providing for the election of a judge and the operation and maintenance of a court." Wis. Stat. § 755.01(1).

A municipality may create its own court system or may join another neighboring municipality to form one court. If multiple municipalities choose to create one court, there are special rules. First, the contracting municipalities need not be contiguous or in the same county. Second, the municipalities joining to form one court must enact identical ordinances. Wis. Stat. § 755.01(4). Finally, one municipality may contract with another municipality for services for the joint exercise of power to enforce the ordinances of the municipality. Wis. Stat. § 66.0303.

Members of the municipal courts

A municipality creating a municipal court will need to fill (and fund) a number of positions.

Municipal Judge: The municipal judge is elected by the voters of the municipality to a term of two to four years. The municipal judge must be a resident of the municipality. In the case of a municipal court governing multiple municipalities, residents from all the municipalities elect the judge. While some municipal judges are lawyers, a municipal judge does not have to be licensed to practice law in the State of Wisconsin. The municipality's board (city council, town board, or village board) sets the judge's salary.

Municipal Court Clerk: In addition to the municipal judge, the court must also have a municipal court clerk. The municipal court clerk is responsible for the day-to-day management of the municipal court. The municipal court clerk sets the court schedule and collects and files all court documents. The clerk collects the forfeiture, costs, fees and surcharges from defendants. The clerk then turns those monies over to the municipal treasurer, along with a report of the title, nature of offenses and total amount of judgments imposed in actions and proceedings in which the monies were collected. The clerk is present at all court hearings and keeps a record of those proceedings. The municipal judge appoints the court clerk. The clerk's salary is set by the municipal board.

Municipal Prosecutor: In addition to the judge and clerk, a municipal court must have a municipal prosecutor. The municipal prosecutor is hired by the municipality to prosecute the ordinance violation citations. The municipal prosecutor need not be present during the initial appearances, the hearings where an individual who was issued a citation (defendant) may appear to enter a plea to his or her citation. Prosecutors may hold pretrial conferences following an initial appearance to discuss a citation with a defendant and potentially negotiate a deal. The prosecutor also appears at all motion hearings and trials when a municipal citation is contested. Essentially, the municipal prosecutor represents the municipality's interest in the prosecution of citations. Usually, municipal prosecutors are private attorneys who contract with municipalities to perform these duties.

Police Department/Other Municipal Officials: A municipal court case is initiated by a citation, which may be issued by the municipal police department or another municipal official. Who has authority to issue citations for specific ordinance violations is delineated in the municipality's ordinances. The issuing officer or official will also be involved in the prosecution of the

citation, including testifying at motion hearings or trial if the citation is contested.

Court process

As stated above, the court process is initiated by a citation, issued by a police officer or other municipal official who has been granted the power to issue a citation by ordinance. A citation can be issued for any ordinance violated within the municipal limits. Municipal ordinance violation cases are civil, not criminal, actions. The forfeiture or penalty imposed may be collected by the municipality.

A municipal citation must, pursuant to Wis. Stat. § 800.02(2), include the following information:

- 1) The name, address and date of birth of the defendant.
- 2) The name and department of the issuing officer.
- 3) The violation alleged, the time and place of occurrence, a statement that the defendant committed the violation, or ordinance/resolution or bylaw violated and the designation of the violation in language which can be readily understood.
- 4) A date, time and place for the court appearance.
- 5) Provisions for the amount of deposit and stipulation in lieu of a court appearance, if applicable.
- 6) Notice that the defendant may make a deposit and thereby obtain release if an arrest has been made.
- 7) Notice that the defendant may, by mail prior to the court appearance, enter a plea of not guilty and may within 10 days after entry of the plea request a jury trial.
- 8) Notice that, if the defendant makes a deposit and fails to appear in court, the defendant is deemed to have tendered a plea of no contest and submits to a forfeiture, plus costs, fees and surcharges.
- 9) Notice that if the violation resulted in damage to the property or physical injury to a person the court may summon the defendant into court to determine if restitution shall be ordered.
- 10) Any other pertinent information.

Generally, municipal court is held once or twice per month depending on the size of the municipality. At the initial appearance (the date of which was listed on the citation), the defendant will appear in front of the municipal judge. At the initial appearance, the defendant will plead guilty, not guilty, or no contest. A guilty or no contest plea will result in a finding of guilt by the judge. The judge will then impose the penalty authorized by ordinance for the violation. The clerk, who is also present, will enter the judgment accordingly. If the individual pleads not guilty, the process continues to a pretrial conference and/or trial.

At a pretrial conference, the prosecutor will meet with the defendant and attempt to resolve the dispute regarding the citation. This is commonly known as the “plea bargaining” stage. If an agreement is not reached at the pretrial conference, the matter is set for trial. Trial is generally held at night; however, a defendant can request that trial be held during the day.

At trial in municipal court, the rules of evidence that govern the presentation of evidence in circuit court are applicable. Wis. Stat. § 800.08(4). The municipal prosecutor appears and calls all witnesses he or she needs in order to prove the defendant violated an ordinance. The prosecutor has the burden to prove by clear, satisfactory and convincing evidence that the defendant is guilty. Wis. Stat. § 800.08(3). The defendant may testify and may also call witnesses to testify on his or her behalf.

Because municipal courts only hear civil ordinance violations and not criminal matters, a number of the familiar rules and protections for defendants do not apply in municipal court. For instance, a defendant can hire an attorney to represent the defendant in municipal court; however, a defendant does not have the right to a court-appointed attorney or public defender in municipal court. The defendant also does not have a right against self-incrimination; thus, a defendant can be called to testify against him or herself.

After hearing the evidence presented by the prosecutor and the defendant, the judge will decide whether the defendant is guilty or not guilty. The judge’s decision may be issued in writing at a date following the trial or orally at the close of evidence. Either party may appeal the judge’s decision to the circuit court within 20 days after judgment. Wis. Stat. § 800.14(1).

If the municipal judge finds a defendant guilty, the judge may order the defendant to pay restitution and/or a fine plus costs, fees and surcharges. Wis. Stat. § 800.09(1). The judge may also suspend a defendant’s operating privileges if the defendant fails to make restitution or pay the forfeiture, assessment and costs within 60 days after due. Wis. Stat. § 800.09(1)(c). Additionally, if a forfeiture or penalty ordered is not paid, the judge can find the defendant in contempt and assess additional penalties.

Conclusion

Deciding whether to form a municipal court requires a municipality to consider a variety of factors, including increased control over prosecution of ordinance violations, costs associated with hiring the necessary personnel, revenue generated from the fines and administrative burdens of a municipal judge election. Consult with your municipal attorney for more information. The Wisconsin Supreme Court also publishes a helpful guide titled “Starting a Municipal Court,” which can be found online at: <http://wicourts.gov/about/organization/municipal/docs/sartcourt.pdf>.

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The *Municipal Law Alert* is published by the Municipal Practice Group at Bakke Norman Law Offices as a service to our municipal clients and to other municipalities within our regional practice area. If you have any questions about any issue raised in this newsletter, please contact any member of the Bakke Norman Municipal Practice Group. You are welcome to recopy this newsletter for distribution to other officials or employees within your municipality for internal use.

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