

April 19, 2012

- by Erika K. Eckley \*

Kansas towns and cities can, pursuant to their statutory “home rule” power, enact ordinances to resolve issues affecting public health and safety. This authority, however, is not unlimited. Towns and cities that enact such ordinances must ensure they are constitutionally sound. One way in which local regulations may be questioned is when there is a lack of objective and defined standards that give fair notice to all residents of conduct that will violate the ordinance.

In this case,<sup>1</sup> a small, rural community was faced with a challenge to its local ordinance prohibiting nuisances created by dust and industrial noise. The controversy started when a local grain elevator sought and was granted a permit to build a new grain storage bin. Shortly after the bin became operational, local neighbors began to complain about the noise and dust from the drying operation.

The affected citizens started a petition drive to encourage local leaders to oppose any further expansion of the grain elevator’s operations and to deal with the public nuisances of dust and excessive noise caused by the elevator.

At about the same time, the elevator requested a consultation visit from a state agency to determine if there were any safety issues regarding noise and air contaminants at the facility. The state inspector found none. Also, in response to the complaints, another state agency inspector made two unannounced visits to the facility. These visits netted test results well within applicable limits for dust. The facility

was not cited for any violations.

A short time later, the city charged the elevator with violating the city ordinance prohibiting the making of excessive noises or generating nuisances. After a short trial in municipal court, the elevator was found guilty of violating the ordinance. The elevator appealed and filed a motion to dismiss on the basis that the ordinance was too vague and should be voided.

The city ordinance at issue prohibited “any person or entity to make, continue, maintain or cause to be made or continue an excessive, unnecessary, unreasonable or unusually loud noise which annoys, disrupts, injures or endangers the comfort, repose, health, peace or safety of others” within the city.

In its motion, the elevator argued the ordinance failed to provide an objective standard for determining whether the complainant had reasonable grounds to complain of the noise, and that because of this deficiency, the city had no way to account for individual sensitivities. That, the elevator argued, made the ordinance subject to arbitrary and discriminatory enforcement. In addition, the elevator argued that the ordinance did not sufficiently define the prohibited conduct so as to provide fair warning to potential violators. Noise and dust are common in rural communities, but they affect public health and welfare only when generated in at excess levels. It was the defined and objective standard of excess, the elevator argued, of which it is entitled to have advance notice in order to comply. The statute did not include an objective

standard.

The city argued that the constitutionality of an ordinance was to be presumed and that all doubts should be decided in favor of the ordinance's validity. The city reminded the court that it is only when an infringement is clearly beyond substantial doubt that an ordinance is deemed unconstitutional.

The district court agreed the ordinance was too vague, ruled in favor of the elevator, and dismissed the violations. The city appealed.

In the appellate record, the court was provided with legal research and opinions from concerned entities regarding the effects this and similar ordinances would have on agricultural operations and small, rural communities if upheld. The court also heard from municipal organizations about the need to regulate against threats to public health, safety, and well-being of citizens.

After examining the policy arguments as well as several similarly drafted ordinances that had been deemed vague, the court held that there "is no reason" the city could not enact a more specific ordinance to proscribe objective conduct relating to dust and industrial noise. Thus, the court struck down the ordinance as unconstitutionally vague. The court did, however, remind the city that when dust and noise become public nuisances, it is well within the city's police powers to enact an ordinance to prohibit the nuisance so long as the ordinance clearly defines the objective standards by which penalties will be assessed.

In sum, the elevator can continue to operate in the small, rural community. The citizens of agricultural communities will not be burdened by "excessive, unnecessary, unreasonable or unusually loud noises or nuisances" that are clearly defined as such. Clearly, communication of expectations and well-defined limits of those expectations are the keys to happy coexistence.

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<sup>1</sup> City of Lincoln Center v. Farmway Co-op, Inc., No. 105,962, 2012 WL 1222268 (Kan. Ct. App. Apr. 12, 2012).