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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1125**

Go Green Energy, LLC,
Appellant,

vs.

City of Orono,
Respondent.

**Filed April 10, 2017
Affirmed
Kirk, Judge**

Hennepin County District Court
File No. 27-CV-16-2012

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellant)

George C. Hoff, Shelley M. Ryan, Hoff Barry, P.A., Eden Prairie, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the summary-judgment dismissal, on statutory-immunity grounds, of its tort claims arising out of respondent City of Orono's passage of an ordinance

regulating small-wind-energy-conversion systems (SWECS). Because the district court did not err in concluding that the city is entitled to immunity as a matter of law, we affirm.

FACTS

On December 9, 2013, the Orono City Council adopted an ordinance categorically prohibiting wind-energy-conversion systems within the city. *See* Orono, Minn., Code of Ordinances § 78-1379(f) (2014). Appellant Go Green Energy, LLC, its owner, Jay Nygard, and others brought a declaratory-judgment action, asserting that the ordinance was preempted by Minn. Stat. § 216F.02 (2016), which allows for construction of SWECS, subject to local regulation of siting and construction. The district court agreed, and, on October 23, 2014, entered an order granting the plaintiffs' motion for summary judgment and enjoining the city from enforcing the ordinance beginning November 24, 2014. *Go Green Energy, LLC, et al. v. City of Orono*, No. 27-CV-14-7419 (Order Oct. 24, 2014) (*Go Green I*).¹

The district court in *Go Green I* held that conflict preemption applied to defeat the ordinance because it forbade what Minn. Stat. § 216F.02 allowed. But the district court noted that the city was not entirely precluded from regulating SWECS and specifically declined to hypothesize what regulations might be permissible:

This ruling does not leave the City without authority to regulate SWECS within its borders. It merely prohibits the complete banning of all SWECS within the City. Plaintiff agrees that the City has the authority, under the statute, to regulate the siting and construction for SWECS for such things as safety, noise and visual impact etc. The City is free to enact reasonable requirements for the construction and siting of SWECS. What

¹ Neither party appealed the district court's decision in *Go Green I*.

is not before this Court is what reasonable regulations are permissible. This Court is taking no position on whether a future city ordinance which addresses the City's concerns but is not a complete ban is legally enforceable.

On October 27, 2014, the city council passed an ordinance placing a temporary moratorium on the construction of SWECS until the earlier of adoption of a new SWECS ordinance or October 27, 2015. The city council directed the planning commission to hold a hearing for the purpose of amending the city's official controls regulating SWECS.

In the months that followed, the planning commission undertook an investigation into the appropriate limitations on SWECS. The commission held two public meetings, on November 16, 2014, and January 20, 2015. As part of its review, the commission considered SWECS ordinances from other jurisdictions as well as a model ordinance by the Minnesota Pollution Control Agency (MPCA). The commission addressed policy considerations including: whether SWECS should be allowed in both residential and commercial zoning districts; appropriate height, setback, and location standards; and whether ornamental wind devices should be subject to the ordinance. Following its review, the commission forwarded a proposed ordinance to the city council.

The city council reviewed the proposed ordinance at meetings held on March 9 and 23, 2015, and passed the ordinance at a meeting on April 13, 2015. The city council's meeting minutes reflect its consideration and weighing of the interests of property owners wishing to construct SWECS against the interests of neighbors who may be impacted by noise, shadows or flickering, and vibrations caused by SWECS. The council also considered the feasibility of constructing SWECS under the proposed ordinance, ultimately

determining that both the setback requirement and requirement for a minimum distance from the principal structure should be reduced on feasibility grounds.

The new SWECS ordinance allows SWECS as an accessory use on lots at least ten acres in gross area in certain residential zones and as a conditional use on lots at least five acres in gross area and subject to conditional-use-permit approval in certain commercial and industrial zones. The ordinance includes maximum hub-height and blade-length requirements, a 100-foot setback requirement from all property lines, and requires that SWECS be located no more than 100 feet from owners' principal residences. The ordinance prohibits any vibration, requires compliance with MPCA noise regulations, and includes maintenance and inspection requirements.

Based on allegations that the new SWECS ordinance is so restrictive that it constitutes a de facto ban, Go Green initially filed and then withdrew a motion for contempt in *Go Green I*. Go Green thereafter filed this separate action seeking to recover tort damages based on the city's alleged tortious interference with future contracts. Go Green did not assert a declaratory-judgment claim in this action. The city moved for summary judgment based on statutory and vicarious official immunity. The district court granted dismissal on grounds of statutory immunity. Go Green appeals, challenging the application of statutory immunity to bar its claim.

D E C I S I O N

This court reviews de novo both the grant of summary judgment and the application of statutory immunity. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 503 (Minn. 2006). Municipalities are subject to tort liability unless an exception applies under the Municipal

Tort Claims Act, Minn. Stat. §§ 466.01-.15 (2016). See Minn. Stat. §§ 466.02 (providing general rule of liability), .03 (providing exceptions). In this case, the city asserted, and the district court held, that the city is entitled to immunity under the discretionary-function exception, which provides that a municipality is immune from “any claim based upon the performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.” Minn. Stat. § 466.03, subd. 6.

“The major underpinnings for the discretionary function exception to governmental tort liability rest in the notion that the judicial branch of government should not, through the medium of tort actions, second-guess certain policy-making activities that are legislative or executive in nature.” *Nusbaum v. Blue Earth County*, 422 N.W.2d 713, 718 (Minn. 1988). “Thus, it is important for courts to focus on the idea that statutory immunity seeks to protect policy-based decisions and to prevent the impairment of effective government.” *Schroeder*, 708 N.W.2d at 503. Accordingly, the discretionary-function exception generally applies to protect planning-level decisions, i.e., those decisions that involve the evaluation and weighing of social, political, and economic considerations. *Id.* at 504; see also *Nusbaum*, 422 N.W.2d at 722 (noting that while planning-operational distinction is helpful, it “should not be used in a conclusory manner,” but rather “as a tool for focusing attention on the central inquiry of whether the challenged governmental conduct involved a balancing of policy objectives”).

An immunity analysis begins with identifying the precise governmental conduct challenged. *Schroeder*, 708 N.W.2d at 504. “Government conduct is considered discretionary and thus protected by statutory immunity when the state produces evidence

that the conduct was of a policy-making nature.” *Id.* Although “[t]he burden is on the state to prove that it is immune under the discretionary function exception . . . there may be cases where the challenged government conduct facially involves a balancing of policy objectives,” in which case “it may be unnecessary for the state to produce evidence of how the decision precipitating the challenged conduct was made.” *Nusbaum*, 422 N.W.2d at 722 n.6.

The district court determined that the governmental conduct at issue in this case is the city’s adoption of the ordinance governing SWECS, and that the record established that this conduct was discretionary because “the [c]ity balanced numerous policy factors such as safety, nuisance concerns, and the desirability for renewable energy when drafting and passing the ordinance.” The district court concluded that “the conduct that Go Green has challenged is clearly planning level, not operational conduct” and that, “[a]s such, the City is entitled to tort immunity.”

Go Green does not challenge the district court’s conclusion that adoption of the SWECS ordinance was planning-level, discretionary conduct, nor could it successfully do so. *See, e.g., Holmquist v. State*, 425 N.W.2d 230, 234 (Minn. 1988) (“The adoption of standards or regulations is considered a protected planning level activity because it almost inevitably requires the balancing of policy considerations.”) Rather, Go Green argues that (1) it is challenging not the adoption, but the *operation* of the ordinance; and (2) statutory immunity does not apply to its tortious-interference claim because the ordinance is preempted by state law and the district court’s order in the first action. We reject both arguments.

Go Green’s argument that it challenges the *operation* rather than the adoption of the ordinance proposes a false dichotomy. Critically, Go Green makes no allegations about the operation of the ordinance separate from its adoption. Moreover, a challenge to the operation of the ordinance according to its terms is a challenge to the adoption of the ordinance itself. *See Nusbaum*, 422 N.W.2d at 723 (explaining that a challenge to simple application of a policy—as opposed to implementation of policy with exercise of professional judgment—is a challenge to the policy itself); *Watson by Hanson v. Metro. Transit Comm’n*, 553 N.W.2d 406, 414 (Minn. 1996) (applying immunity because appellant’s “challenges amount to an attack upon the policies themselves”).

Go Green’s assertion that its tortious-interference claims are not barred are similarly not well-founded. Go Green asserts that the district court erred by failing to address its arguments that the SWECS ordinance is preempted by Minn. Stat. § 216F.02 and collaterally estopped by the *Go Green I* order *before* determining whether the city is entitled to immunity. We disagree. Because immunity protects governmental entities not just from liability, but from litigation, the application of immunity generally should be decided as early as possible. *Sletten v. Ramsey County*, 675 N.W.2d 291, 299-300 (Minn. 2004). And, when it applies, statutory immunity precludes all tort claims against a municipality, regardless of the underlying legal theory or likelihood of success. *See* Minn. Stat. § 466.03, subd. 6 (immunizing discretionary conduct “*whether or not the discretion is abused*”) (emphasis added); *Schroeder*, 708 N.W.2d at 503 (noting that purpose of statutory immunity is to prevent second-guessing municipal policy decisions “*through the medium of tort actions*”) (emphasis added). Because of this, the determination that the

city's adoption of the ordinance was a planning-level, discretionary decision ends the analysis.

Go Green relies heavily on the unpublished decision of this court in *Ebin v. City of South St. Paul*, No. CX-99-584, 1999 WL 1057549 (Minn. App. Nov. 23, 1999). Unpublished decisions of this court are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2016). Moreover, *Ebin* is distinguishable because the court decision at issue in *Ebin* left no room for the city's exercise of discretion. *See id.* at *6 (explaining that a previous court decision "established that 18th Avenue South was already open and that the city had no discretion to close it"). The district court's order in *Go Green I* determined only that the previous ordinance banning SWECS was preempted by state law, and expressly recognized the city's authority to pass an ordinance governing the siting and construction of SWECS. Thus, this is not a case like *Ebin* in which the city purported to accomplish through the exercise of discretion precisely what it had no discretion to undertake.

Our decision here is limited to affirming the district court's decision dismissing Go Green's claims on the ground of statutory immunity. Because our holding in this regard is dispositive, we do not separately address Go Green's argument that the district court erred by declining to strike the city's affirmative defenses or the city's alternative argument that it is entitled to vicarious official immunity. And, because Go Green did not assert a declaratory-judgment claim, we, like the district court, take no position on the reasonableness of the city's SWECS ordinance.

Affirmed.