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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1339**

Zach Nubbe and Mineral Service Plus, LLC,
Appellants,

vs.

City of Waverly,
Respondent.

**Filed May 6, 2019
Appeal dismissed
Rodenberg, Judge**

Wright County District Court
File No. 86-CV-17-2582

Erik F. Hansen, Elizabeth M. Cadem, Burns & Hansen, P.A., Minneapolis, Minnesota (for appellants)

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Bruce M. Kleven, Minneapolis, Minnesota (for amicus curiae Minnesota Water Well Association)

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Considered and decided by Reilly, Presiding Judge; Rodenberg, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this appeal from the district court's summary judgment concluding that Waverly City ordinance 17-04 is not preempted by state statute but enjoining respondent City of Waverly from enforcing the ordinance against appellants Zach Nubbe and Mineral Service Plus LLC (MSP) as it relates to the construction of a private well on the Nubbe property, appellants argue that the district court erred by concluding that the ordinance banning construction of wells is not preempted by Minnesota Statutes chapter 103I (2018). We dismiss the appeal as moot.

FACTS

Appellant Nubbe hired appellant MSP to construct an irrigation well on his property in Waverly, Minnesota. MSP submitted an application and well-notification form to the Minnesota Department of Health (MDH) on April 6, 2017. That same day, MSP notified local utility operators, including respondent, of the well's proposed location. MDH granted MSP a permit to construct the well on Nubbe's property. On April 7, J.W., a maintenance supervisor for respondent, informed appellants that respondent had in place a ban on groundwater-well construction. In fact, no such ban existed at that time.

On April 11, 2017, respondent held a public hearing to discuss a proposed ordinance amendment banning private wells in the city. Ordinance 17-04 was passed on April 11, effective upon publication, making it unlawful for any person to install a new private well on any lot within the city limits if the lot has "reasonable access to city water service" and defining any lot within 150 feet of the city water system as having such reasonable access.

See Waverly, Minn., Code of Ordinances ch. 51, § 51.10 (2017) (codifying Waverly City Ordinance 17-04).

Appellants commenced this action on May 9, 2017, seeking a declaratory judgment that ordinance 17-04 is “invalid, null, and void, as local regulation of well construction” because it is preempted by Minnesota Statutes chapter 103I, and further declaring that, regardless of whether the ordinance is preempted, it has no retroactive effect and cannot bar appellants from constructing the proposed Nubbe well.

The parties presented the district court with cross-motions for summary judgment. Appellants requested summary judgment for declaratory relief as described in their complaint. Respondent argued that (1) the district court should declare ordinance 17-04 valid and allow respondent to ban the installation of new private wells on lots that have reasonable access to municipal water service, and (2) ordinance 17-04 applies to the proposed well on Nubbe’s property because the ordinance did not take effect until April 17, 2017, but construction was not started before this date, and therefore respondent would not be enforcing the ordinance retroactively.

The district court granted respondent’s motion for summary judgment in part, determining that ordinance 17-04 is not preempted by state law. The district court granted appellant’s motion for summary judgment in part, determining that ordinance 17-04 may not be applied retroactively to appellants, and it therefore enjoined respondent from enforcing the ordinance as it relates to the Nubbe well.

Appellants properly filed an appeal on August 14, 2018, challenging the district court’s determination that the ordinance is not preempted. Respondent filed a notice of

related appeal (NORA) with the district court on August 28, 2018, seeking review of the district court's grant of injunctive relief concerning the proposed Nubbe well. Respondent served the notice on appellants' counsel, but did not file the NORA with the Clerk of the Appellate Courts. On October 5, 2018, appellants filed their principal brief. Respondent, in turn, filed a brief which was not captioned as a cross-appellant's brief. Respondent's brief, in part, challenges the district court's determination enjoining application of the ordinance to the Nubbe well. Appellants moved to strike the portion of respondent's brief addressing the retroactivity issue on the ground of respondent's failure to properly file a NORA. We granted appellants' motion to strike the portion of respondent's brief addressing the retroactivity issue decided adversely to respondent because respondent failed to perfect a related appeal. *See Arndt v. Am. Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986) (affirming the court of appeals' refusal to address an issue decided adversely to respondent where respondent failed to file a NORA).

After striking respondent's argument concerning the retroactivity issue, we questioned both of counsel at oral argument whether this appeal is now moot. Because of this additional issue raised by the court, we provided counsel with an opportunity to file supplemental briefing regarding the mootness question. Supplemental briefs were received and reviewed.

D E C I S I O N

"The presence of a justiciable controversy is essential to the exercise of our jurisdiction." *In re Dahlgren Twp.*, 906 N.W.2d 512, 520 (Minn. App. 2017). An appellate court must consider whether a justiciable controversy exists, regardless of whether the issue

has been raised by the parties. *Izaak Walton League of Am. Endowment, Inc. v. State, Dep't of Nat. Res.*, 252 N.W.2d 852, 854 (Minn. 1977); *see also In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (explaining that the court must consider the issue of mootness, because it is a constitutional prerequisite to the exercise of jurisdiction, even if not briefed by the parties). If the appellate court cannot grant “effectual relief,” then the issue is deemed moot and results in dismissal of the appeal because appellate courts do not issue advisory opinions or decide cases merely to establish precedent. *Schmidt*, 443 N.W.2d at 826; *see Twin Cities Metro. Pub. Transit Area v. Holter*, 249 N.W.2d 458, 460 n.3 (Minn. 1977) (“That a party must be aggrieved in order to appeal remains fundamental to . . . Rule 103.03, Minnesota Rule of Civil Appellate Procedure.”). A controversy is only justiciable when it involves the concrete assertion of a legal right. *See Minn. Ass’n of Pub. Sch. v. Hanson*, 178 N.W.2d 846, 850 (Minn. 1970). Merely possible or hypothetical injury does not involve the concrete assertion of a legal right. *State v. Colsch*, 284 N.W.2d 839, 841-42 (Minn. 1979). Generally, if an event occurs that resolves the issue, the issue will be dismissed as moot. *Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 376 (Minn. App. 2004), *review denied* (Minn. Apr. 4, 2005).

“[M]ootness can be described as the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).” *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (quotation omitted). “Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court,” and may be acquired in two ways: “either the plaintiff has suffered some ‘injury-in-fact’ or the plaintiff is the

beneficiary of some legislative enactment granting standing.” *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). The purpose of the standing requirement is to ensure that issues coming before the court are vigorously and adequately represented. *Id.*

Although the district court enjoined respondent from enforcing the ordinance as to the Nubbe well, that issue is not before us on appeal because no related appeal was perfected. The district court ruled that appellants “are legally entitled to construct a well on [Nubbe’s] property” and that respondent “is enjoined from enforcing the new well construction ban of Ordinance 17-04” as it relates to Nubbe’s well. We interpret this as an active injunction against respondent from enforcing the relevant ordinance against the building of a well on the Nubbe property. Consequently, the preemption issue is now moot. Appellants have not suffered—nor have they alleged—any additional injury beyond their desire to construct a well on the Nubbe property, and there is no relief that we can provide. *See Doran v. Indep. Sch. Dist. No. 720*, 831 N.W.2d 1, 4 (Minn. App. 2013) (explaining that a case is moot “if the party seeking relief has already obtained it” (quotation omitted)). MSP argues that it may be injured by being precluded from constructing other wells in the city of Waverly, but the complaint contains no allegations concerning future (or past) plans by either of the appellants to construct additional wells in the city of Waverly. Any argument concerning future injury MSP might suffer is based on assertions that are entirely outside of the record on appeal. Deciding the question of whether respondent’s ordinance is preempted by state law in the present procedural posture would amount to an advisory opinion.

When there is no injury that a court can redress, the case must be dismissed for lack of justiciability, except in certain narrowly-defined circumstances. *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). Mootness is a flexible doctrine, as opposed to a mechanical rule that is invoked automatically, and appellate courts “will not deem a case moot if it implicates issues that are capable of repetition, yet likely to evade review.” *Kahn*, 701 N.W.2d at 821. This occurs where there is a reasonable expectation that the complaining party would be subject to the same action again *and* the duration of the challenged action was too short to be fully litigated before it ceased or expired. *Id.* The other circumstance in which a court may deem a case not moot and retain jurisdiction is where the case is “functionally justiciable” and presents an important public issue of statewide significance that should be decided immediately. *Id.* at 821-22 (quotation omitted). Neither of these exceptions are applicable here.

The capable-of-repetition-yet-evading-review exception is traditionally applied where the nature of the challenged action is of inherently limited duration. *See, e.g., State ex rel. Doe v. Madonna*, 295 N.W.2d 356, 361 (Minn. 1980) (reviewing the constitutionality of three-day hold orders for mentally-ill appellants who were no longer subject to confinement at the time of their challenge). This case does not present an issue that is capable of repetition, yet will evade review. A party seeking to construct a well in Waverly who, unlike appellants, is prohibited from constructing the well can challenge the ordinance and have that claim fully litigated before the issue expires. *See Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 348-49 (1975) (determining that the capable-of-repetition-yet-evading-review doctrine is limited to a situation where: (1) the

challenged action is too short in its duration to be fully litigated prior to its cessation, *and* (2) there is a reasonable expectation that the same complaining party will be subject to the same action again); *cf. Klaus v. Minn. State Ethics Comm’n*, 244 N.W.2d 672, 674-75 (Minn. 1976) (addressing disclosure requirements for candidates for public office even though the election was over).

The other possible mootness exception, providing discretion to review a case that is functionally justiciable and presents an important question of immediate statewide significance, is applied narrowly. *See Dean v. City of Winona*, 868 N.W.2d 1, 7 (Minn. 2015). While the issue here may be functionally justiciable, we do not see this case as presenting an issue of statewide significance that necessitates immediate resolution. *Cf. In re Guardianship of Tschumy*, 853 N.W.2d 728, 740-41 (Minn. 2014) (reaching the merits of a moot issue to clarify the scope of guardians’ authority to remove life-support from a ward—“one of life’s most fundamental decisions”—because there were thousands of wards under the state’s supervision); *Verhein v. Piper*, 917 N.W.2d 96, 100 (Minn. App. 2018) (deciding the merits of a technically-moot issue because the applicability and constitutionality of statute affecting all persons who apply for medical assistance benefits and have a felony drug conviction was an issue of statewide significance that should be decided immediately).

This case is similar to *Dean*, where appellants sued the city of Winona “after each sought and was denied a standard rental license” for their properties. 868 N.W.2d at 4. A city ordinance limited the number of lots on a block that are eligible for certification as rental properties. *Id.* at 3. The *Dean* appellants argued that the ordinance exceeded the

city's power. *Id.* By the time the case reached the Minnesota Supreme Court, none of the appellants still owned property in Winona. *Id.* at 4. The supreme court dismissed the action as moot, concluding that the challenge to the ordinance did not present a justiciable question, because none of the appellants had any remaining interest in the outcome of the litigation and neither exception to the mootness doctrine applied. *Id.* at 3, 5-7. The supreme court explained:

The right to rent one's property is an important property interest. But this case does not present the urgency and broad impact that were present in cases determined to be functionally justiciable and of statewide significance that required an immediate decision. Other municipalities impose rental limitations. However, they do not operate in an identical fashion. When, as here, the issues presented are limited to the homeowners of one municipality, the case does not present the urgency and impact that were present in other cases that we have found functionally justiciable and of statewide significance.

Id. at 7 (footnote omitted). The supreme court noted that other similar ordinances deserved independent consideration. *Id.* at 7 n.2.

The parties to this appeal agree that several other municipalities impose restrictions on wells. Whether those ordinances operate in a fashion identical to respondent's ordinance 17-04 and would be similarly enforced elsewhere cannot be ascertained on this record. As in *Dean*, the issue appealed here is limited to property owners, and potentially businesses that construct wells, in one municipality. This case, like *Dean*, presents no issue urgently requiring resolution. The Nubbe well can be constructed. Respondent is enjoined

from applying the ordinance to that well.¹ Issues pertaining to other wells and ordinances of other municipalities can be resolved if and when a justiciable controversy appears.

Appeal dismissed.

¹ A person constructing a water-supply well on property owned by the individual for either farming or agricultural purposes, or for the individual's place of abode, is only required to notify MDH of the installation and location of the well, mailed to the commissioner within ten days *after* the well is completed. Minn. Stat. § 103I.205, subd. 1(d). On this record, there is no need for appellants to obtain any additional permits to construct the proposed well.