Planning Law Update
APA-Iowa Annual Conference
2022 Edition

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Agenda

- Cases addressing
  - Signs,
  - Flags,
  - The importance of timing, written communication, and objective zoning code enforcement;
  - Iowa's right-to-farm law's nuisance immunity clause,
  - The constitutionality of a 28E agreement, and
  - The definition of a street.

City of Austin, Texas v. Reagan National Advertising

U.S. Supreme Court

April 21, 2022

Austin v. Reagan

- Austin, Texas regulates off-premises signs differently than on-premises signs.
  - No new off-premises signs are permitted.
  - Existing off-premises signs are grandfathered in but cannot be altered in ways that increase their nonconformity.
- Reagan sought permits to digitize some of its billboards and was denied.
- Reagan sued, claiming this differential treatment (off- vs. on-premises) violated the First Amendment.

Austin v. Reagan

- The district court held that Austin's code provisions were **content neutral** under *Reed v. Town of Gilbert* (Austin wins).
- Court of Appeals found the distinction to be **content-based** because you must read the sign's message to determine the distinction between on- and off-premises. (Reagan wins).
- At issue here is the first SCOTUS interpretation of *Reed v. Town of Gilbert* since the case was decided in 2016.

Reed vs. Town of Gilbert (review)

- *Reed* focused on three types of exempt signs
  - Ideological Signs
  - Political Signs
  - Temporary Directional Signs Related to a Qualifying Event.
- Each were regulated differently regarding size, time, and location to display

Reed v. Town of Gilbert (review)

- In *Reed v. Town of Gilbert,*
  - The city argued that because the sign code did not favor one *viewpoint* over another (did not favor, for example, Democratic political signs over Republican political signs) the regulations were not “content-based”
  - However, the majority opinion found the regulations content - based because they focused on the message (a “qualifying event,” an ideological matter, an election) to trigger different regulations for each category.
- Sign restrictions that are *content-based* (when restrictions are applied differently depending on the message of the sign) are subject to *strict scrutiny* and rarely upheld.
  - These laws likely will be struck down “regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.”

(back to) Austin v. Reagan

- *Reed* held that a regulation of speech is content-based under the First Amendment if it "targets speech based on its communicative content, that is, if it "applies to particular speech because of the topic discussed or the idea or message expressed."

- Austin's regulations are not "based on the topic discussed or the idea or message expressed." A sign's message matters only to the extent that it informs the sign's relative location.

Austin v. Reagan

- The city's on- vs. off-premises distinction is more like ordinary time, place or manner restrictions, which do not require the application of the strict scrutiny standard.

- SCOTUS has previously validated distinctions between on- and off-premises signs as being content neutral.

- Reading *Reed* to mean that a regulation cannot be content neutral if its application requires reading the sign "is too extreme an interpretation of this Court's precedent."

Austin v. Reagan

- Thomas (author), Gorsuch and Barrett dissent:
  - Reagan reads *Reed* correctly. The Austin code discriminates against certain signs based on the message they convey – e.g., whether they promote an on- or off-site event, activity, or service.
  - However, the majority "misinterprets *Reed*'s clear rule for content-based restrictions and replaces it with an incoherent and malleable standard."

Lamar Company
v.
City of Des Moines, Des Moines Building and Fire Board of Appeals, and Des Moines Zoning Board of Adjustment

Iowa Court of Appeals

June 29, 2022

Lamar v. DSM

- In October, 2019, DSM enacted an ordinance outlawing digital signs on certain corridors, effective 12/15/19.
- Wanting to ensure some signs would be grandfathered in, Lamar submitted plans to the city to convert 5 billboards from static to digital.
- After processing began, city officials, after input from council, denied the permits. Lamar appealed to the Building Board *and* the ZBA, both of which rejected the appeal.
- Lamar petitioned the district court for a writ of certiorari but was denied relief. Lamar appeals…

Lamar v. DSM

- Lamar alleges (1) Building Board lacked jurisdiction to decide on the matter and (2) DSM's misinterpretation of the grandfather clause in question resulted in an unlawful denial of Lamar's application.
- On (1), the court finds that since the ZBA issued its own determination, independent of the Building Board, Lamar's application was incomplete as of 12/15/19. Lamar's jurisdictional complaint does not hold water.

Lamar v. DSM

- On (2), the Court agrees with Lamar.
  - The clause allows applicants to proceed if their "complete…application" was "accepted for processing" before 12/15/19.
  - The district court ruled that the actions and communications of city staff lead to the conclusion that the applications were not complete and could not be processed.
  - The Court of Appeals, in "consider[ing] the full context of the clause", rules that the applications should have been considered complete because they *had* been accepted for processing prior to the deadline.

Lamar v. DSM

- The Court cites staff-to-staff, staff-to-council, council-to-staff, and staff-to-applicant emails, concluding that, based on the language of these communiqués and the language and context of the grandfather clause, the city acted in an **arbitrary** and **capricious** manner by denying the permits and in the rejections of the Building Board and ZBA.

Shurtleff v. City of Boston

U.S. Supreme Court

May 2, 2022

Shurtleff v. Boston

- For years, Boston has allowed groups to hold ceremonies on the plaza in front of City Hall, during which participants may hoist a flag of their choosing on a flagpole in place of the city's own flag.
- Between 2005 and 2017 groups raised at least 50 different flags for 284 such ceremonies, including flags from other countries, flags honoring EMS workers, the Pride Flag and others.

Shurtleff v. Boston

- Shurtleff, director of a Christian group, want to hold a ceremony to celebrate the civic and social contributions of the Christian community, and raise the “Christian flag.”
- City found no record of ever allowing a religious flag to be raised in the past. City was concerned that flying the ”Christian flag” would violate the Establishment Clause of the First Amendment, and so told Shurtleff that they could hold the event but could not raise the flag.
- District court sided with Boston. First Circuit Court of Appeals agreed.

Shurtleff v. Boston

- SCOTUS reversed:
- Court must look to several factors to determine:
  - The history of the expression at issue;
  - The public's likely perception as to who (the government or a private person) is speaking; and
  - The extent to which the government has actively shaped or controlled the expression.

Shurtleff v. Boston

- Generally, flags' contents, presence, and location have long conveyed governmental messages.
- In this case, other than day, time and location, Boston exerted little control over the expression.
  - **No written policies existed** about what groups could participate or the contents of the flag.
  - The application itself only asks for contact information and a brief description of the event. City employees did not ask to see the flag before the event.
  - Until Shurtleff's application, the city had never denied a request to fly a flag.

Shurtleff v. Boston

- The lack of meaningful involvement in the selection of flags or their messages means the flag-raising event is not "government speech." Establishment Clause not implicated.
- Therefore, Boston's refusal to let petitioner fly his flag violated the Free Speech Clause of the First Amendment as it was "impermissible viewpoint discrimination."

Kading Properties, LLC
v.
City of Indianola

Iowa Court of Appeals

March 31, 2022

Kading v. Indianola

- Kading, a real estate developer, submitted site plans for new multifamily housing on two plats in Indianola but City Council rejected the plans.
- Kading petitioned the district court for a writ of certiorari, which was initially granted but then annulled after a hearing on the merits. Kading appeals…

Kading v. Indianola

- The Court examines 3 questions raised at appeal to determine whether the Council acted appropriately in denying Kading's site plans.
  - Note: Each site exceeded one acre, thereby shifting approval responsibilities from the Community Development Director to Council

Kading v. Indianola

Q1: Did Council *have* to make findings supporting their decision to reject or offer modifications as referenced in the city's ordinances?

- City code states that, "If the Council rejects the plan, they **will** advise the owner or developer of any changes which are desired or that should have consideration before approval is given."
  - Kading argues that public comment was used to perform an illegitimate quasi-judicial review, but Council argues that the comment period was part of their legislative process. The court(s) agree.
- The Court holds the Council to their code (they *should* have given Kading feedback) but needs to review whether "will" is **mandatory** or **directory**. If mandatory, Council's failure invalidates subsequent proceedings. If directory, the proceedings are only invalidated if Kading can show prejudice.

Kading v. Indianola

Q1: Did Council *have* to make findings supporting their decision to reject or offer modifications as referenced in the city's ordinances?

- In reading Indianola City Code, the Court determines that the code's main objective is to allow for proper development and planning of the city's land. Providing reasoning for the denial is a duty "designed to assure order and promptness" but isn't essential to the main objective, therefore it is only directory.
- There is no precedent in this context for proving prejudice, so the Court looks to other contexts (*Downing v. Iowa DOT, 1987*) and requires Kading to show that the city's error impacted the outcome of the case.
  - Kading cannot show that the lack of feedback changed the denial of the site plan and acknowledges that public opposition from the community and concerns raised publicly by Indianola's P&Z staff and commission were known to them.

Kading v. Indianola

Q2: Was Council's decision arbitrary because it considered public comments over considerations of the city code not supported by substantial evidence?

- Kading argues that the city acted in an **arbitrary** and **capricious** manner. In other words, "without regard to the laws or facts of the case (*Marianne Craft Norton Tr. V. City Council, 2009*).
- Although Council did not provide its reasoning, the Court looks to Indianola City Code, which contains general policies around the considerations necessary when conducting a site plan approval process.
- During this process, the Council collected evidence from several sources which lead them to the reasonable conclusion that the site plan was not consistent with the general policies laid out in city code.

Kading v. Indianola

Q3: Was Council overstepping its authority and performing duties reserved under Iowa Code for a Zoning Board of Adjustment?

- Kading claims that by creating a special approval process for lots larger than one acre, the Council usurped the ZBA's powers.
- The Court determines that Kading never asked the Council to make any *special exceptions* to the terms of the ordinances, just to review the plans to ensure the development met the existing regulations.

Kading v. Indianola

- Q1: Did Council have to make findings supporting their decision to reject or offer modifications as referenced in the city's ordinances?
  - A: Yes, but Kading couldn't show that the lack of a decision was made 'with prejudice'.
- Q2: Was Council's decision arbitrary because it considered public comments over considerations of the city code not supported by substantial evidence?
  - A: No.
- Q3: Was Council overstepping its authority and performing the duties reserved under Iowa Code for a Zoning Board of Adjustment?
  - A: No.

Garrison v. New Fashion Pork, LLP

Iowa Supreme Court

June 30, 2022

Garrison v. New Fashion Pork

- *Iowa Code* 657.11 allows neighboring landowners to bring successful nuisance suits against animal agricultural producers *only if*
  - The producer fails to comply with state and federal regulations applicable to animal feeding operations

OR

  - The producer's operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the persons life and property, **and**
  - The operation failed to use existing prudent generally accepted management practices reasonable for the operation.

Garrison v. New Fashion Pork

- In 2004, in the case of *Gacke v. Pork Xtra, Iowa Code* 657.11 was ruled unconstitutional *as applied to the facts of that case* by the Iowa Supreme Court. Not based on Takings claim, but rather the Inalienable Rights clause of the Iowa Constitution:

All men and women are, by nature, free and equal, and have certain inalienable rights-among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

Garrison v. New Fashion Pork

- The SCOSI began by throwing the decision in *Gacke* under the bus.
  - *Gacke*'s three-part test should be overruled.…*Gacke* is an outlier. [The present case] illustrates how [the *Gacke* decision was] created out of whole cloth, engenders unnecessary litigation and is difficult to administer. *Gacke* was wrongly decided in that it failed to apply rational basis review to a challenge under [the Inalienable Rights clause] of our constitution to section 657.11(2). Our prior and subsequent decisions…have made clear that challenges under the inalienable rights clause to regulatory statutes must be adjudicated under the highly deferential rational basis test.

Garrison v. New Fashion Pork

- "*Stare decisis*** does not prevent the court from reconsidering, repairing, correcting or abandoning past judicial announcements when error is manifest . . . and stare decisis has limited application in constitutional matters."

**the legal concept that previous cases carry precedential authority

Garrison v. New Fashion Pork

- The rights guaranteed by the [Inalienable Rights clause] are subject to reasonable regulation by the state in the exercise of its police power.
- This formulation, of course, is virtually identical to the rational-basis due process test or equal protection tests under the Federal Constitution.
- Under the rational basis test the challenger must refute every reasonable basis upon which the statute could be found to be constitutional.
- There *is* a rational basis for the legislature to promote farming. Reducing nuisance liability is a proper means to that end.

Garrison v. New Fashion Pork

- Garrison relied solely on the constitutional argument at trial. Thus, he
  - presented no witnesses, expert or otherwise, to testify as to the prudence or general acceptance of any farm management practices.
  - Presented no witnesses, expert or otherwise, to set a standard as to existing generally accepted management practices.
  - Failed to identify any alternative technologies and approaches that would be considered "existing prudent generally accepted management practices."
  - Identified no evidence that Defendants departed from any standard industry practices.
- He therefore failed to meet his burden of overcoming New Fashion's nuisance immunity protection of 657.11.

Site A Landowners v. South Central Regional Airport Agency, City of Pella, and City of Oskaloosa and Mahaska County

and

City of Pella and City of Oskaloosa v. Mahaska County

Iowa Supreme Court

June 24, 2022

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- Pella, Oskaloosa, and Mahaska signed a 28E agreement (the Agreement) to create an airport authority which would build and operate a regional airport in rural Mahaska County.
- Landowners at the proposed site (Site A) organized against the project and got new county supervisors elected.
- New supervisors tried to withdraw from the Agreement.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- SCRAA facts:
  - Board of Directors is 6 members, 3 from Pella, 2 from Oskaloosa, 1 from Mahaska County.
  - The Agreement allows the authority to bring an eminent domain action in its own name or to request that a party to the agreement (either one of the cities or the county) bring such an action, which it shall then be compelled to do.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- Key provisions in the Agreement:
  - Amending or terminating the Agreement requires the approval of the governing boards of each party.
  - Each party must cooperate in good faith and use its best efforts to carry out the provisions of the Agreement, including “resolv[ing] road relocations which may be required.”

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- Cities filed suit against the county to get the county to fulfil its obligations under the terms of the Agreement.
- Landowners filed suit against the cities and county-alleging that the airport authority was illegal-to prevent their land from being acquired through eminent domain.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- District courts ruled that Site A lacked standing since their case was merely speculative and granted summary judgement in favor Pella and Oskaloosa, requiring that Mahaska County abide by the requirements of the Agreement.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- The Court of Appeals (the Court) first considers whether the way the Cities and County formed an airport authority violates Iowa Code related to county home rule and joint airport authorities.
- Iowa Code Ch. 331 lays out the home rule authority of counties, and references Ch. 330 and 330A as how counties may establish airport commissions.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- SCRA was *not* created according to 330 or 330A, so Mahaska Co argues that the Agreement should be voided.
- Cities argue that 330 and 330A represent *nonexclusive* means of creating an airport authority.
  - The Court agrees with the Cities.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- The Court then considers the constitutionality of the County's entry into the Agreement.
- The Agreement requires the unanimous consent of all parties to terminate or amend it.
  - The Court finds that this binds the County to the SCRA for the life of the agency even if a new BoS is elected.
  - This, in turn, **unconstitutionally** binds future BoS's from the exercise of their legislative powers, which the Court also clarifies are core governmental functions, not merely proprietary ones.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- The Cities contend that the Agreement only delegates authority ”to change outcomes or undo decisions” to the SCRAA, affording a degree of durability to the Agreement.
  - The Court disagrees, stating that this line of reasoning is “contrary to our constitutional order”.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- Since the Agreement does not allow the County a mechanism to symmetrically enter or exit, or to delegate or revoke any authority, including eminent domain, the Court rules that it is unlawful.
- The severability clause written into the Agreement means that only one Article is deemed unconstitutional, so the remainder of the Agreement is still in effect.
  - The Court decides that the BoS can vote to withdraw from the Agreement.

Site A v. SCRAA et al. & Pella and Oskaloosa v Mahaska Co.

- Note: Justice Appel files a concurrence, agreeing with everything said in the majority, but emphasizing the fact that the court did not consider whether a municipality or local government can delegate its regulatory powers or powers of eminent domain to a third party – in this case the SCRAA.

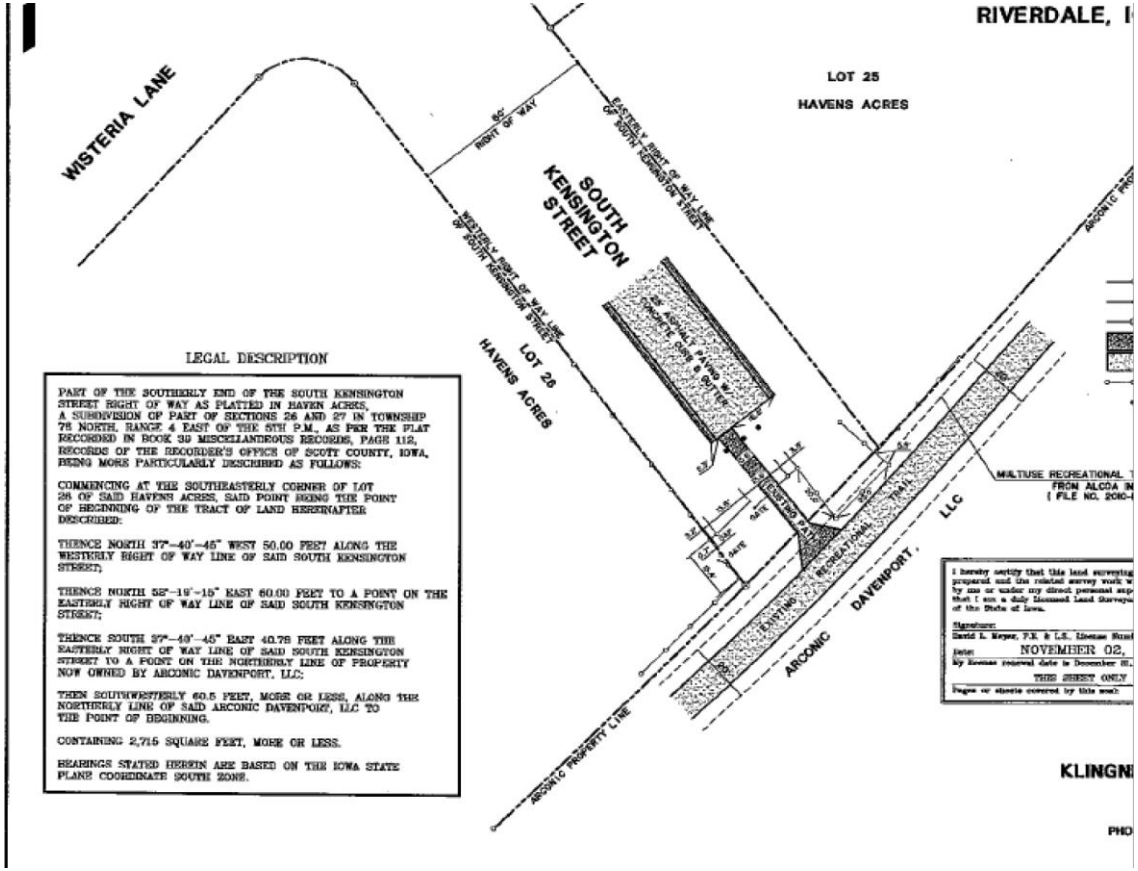
Cornbelt Running Club
v.
City of Riverdale

Iowa Court of Appeals

March 2, 2022

Cornbelt v. Riverdale

- A local running group sued the city for fencing and gating a portion of a public right of way to stop people from using a 5-foot-wide paved path as a shortcut between two recreational paths.
- The Club claimed the fence was an improper closure of the street and a statutory nuisance.



Map of the area in question

Cornbelt Running Club v. City of Riverdale

Cornbelt v. Riverdale

- District court, applying statutory definition of "street" in Iowa Code 306.3(8), ruled that the path in question did not meet the definition of a street, and therefore the City was not obligated to ensure that it was "open to the use of the public, as a matter of right, for purposes of vehicular traffic."
- The Club appealed, claiming the district court improperly defined a street and that the City's actions (building a fence, gate, and bollards) constituted a nuisance, in violation of Iowa Code 364 – Duties and responsibilities of cities

Cornbelt v. Riverdale

- Court of Appeals concludes that the district court correctly determined that the paved path was not a street because it *could* not be open to the public for the purposes of vehicular traffic.
- The Court also rejected the Club's argument that some sidewalks can be considered (part of) a street even if they are not designed to transport vehicles.
  - Those examples were all sidewalks along roads, whereas there is no vehicular traffic on or adjacent to this path

McNaughton v. Chartier and the City of Lawton

Iowa Supreme Court

June 24, 2022

McNaughton v. Cartier

- McNaughton entered into an easement agreement with the Chartiers to allow a small part of a road to pass through McNaughton's property.
- The road was used to access the Chartiers' business from Highway 20, and covered a 23’ x 80’ strip.
- The agreement provided that it was a '"private' easement granted for the use and benefit of the parties . . . and [was] not to be construed as an easement for the use and benefit of the general public.”

McNaughton v. Cartier

- The city paved and completed other improvements to the access road (now Char-Mac Drive). The paved portion covers 13’ x 60’ of the easement.
- City repeatedly asked McNaughton to dedicate the paved portion to the city by McNaughton refused.
- Chartiers sold the property, but did not assign or attempt to assign any rights in the easement to the purchaser.
- After the deal was finalized, McNaughton demanded various [*presenter’s note: outrageous*] forms of compensation from the Chartiers for the easement. They refused. McNaughton sued, claiming purchaser had no rights under the easement because of failure to assign them.

McNaughton v. Cartier

- The district court found McNaughton had "dedicated the concrete portion of the easement to the City" because, among other things, the public had used the easement as the parties had agreed and because McNaughton had "never attempted to restrict the use of the concrete portion of the easement area." Court of Appeals disagreed, as did the Supreme Court.

McNaughton v. Cartier

- A grantor's intent to dedicate land for public use must be clear and unmistakable.
- A public dedication must be accomplished through “deliberate, unequivocal, and decisive acts and declarations of the owner, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use."
- "[m]ere permissive use of a way, no matter how long continued, will not amount to a dedication."
- McNaughton wins.

Back up and running!

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Thank you!

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