



## MEMORANDUM OF LAW

To: Valerie Brady, Ph.D., Associate Director for Research  
Minnesota Sea Grant College Program, University of Minnesota Duluth

From: Zachary Klein, Ocean and Coastal Law Fellow, National Sea Grant Law Center

Re: Protecting Minnesota's Inland Shorelines from Wake Boats (NSGLC-20-04-01)

Date: February 27, 2020

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### Advisory Request Summary

On January 3, 2020, you contacted the National Sea Grant Law Center ("NSGLC") regarding what is allowable for local regulation wake boats on Minnesota's inland waters. You posed the question: What is legally allowable for local regulation of wakeboard boats along public and private shorelines?

### Background

Watercrafts known as wakeboard boats, bladder boats, ballast boats, or wave boats (hereafter "wake boats") are vessels designed to create a large, specially-shaped track of waves so that someone standing on a so-called "wakeboard" behind the vessel may jump the waves from side to side, typically while performing aerial tricks.

Minnesota Sea Grant was contacted by Minnesotans who expressed concern about the impact of wake boats on inland waters, particularly with respect to the state's celebrated lakes. Property owners along Lake Lotus, for example, have reported damage to shorelines and private docks from wake boats, and also claim that large wakes knock over small children and pose a danger to kayakers and canoers on the lake.<sup>1</sup> Local residents have lodged similar complaints in Douglas County<sup>2</sup> and elsewhere across the state.<sup>3</sup> As a result, local groups and governments are exploring

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<sup>1</sup> See Unsie Zuege, *Lake Lotus residents debate wake surfing's impact on other recreational activities*, SW News Media (July 4, 2019). Available at [https://www.swnewsmedia.com/lotus-lake-residents-debate-wake-surfing-s-impact-on-other/article\\_75eca199-4ed7-557c-abe9-de508e0a03b8.html](https://www.swnewsmedia.com/lotus-lake-residents-debate-wake-surfing-s-impact-on-other/article_75eca199-4ed7-557c-abe9-de508e0a03b8.html).

<sup>2</sup> See Karen Tolkinen, *Wakesurfing boats create waves, property owners complain about damage*, Alexandria Echo Press (Aug. 11, 2017). Available at <https://www.echopress.com/news/4311039-wakesurfing-boats-create-waves-property-owners-complain-about-damage>.

<sup>3</sup> See Kristi Marohn, *Surf's up on Minnesota's hottest lake sport, but not everyone's on board*, MPR News (July 26, 2019). Available at <https://www.mprnews.org/story/2019/07/26/wake-surfing-interest-increases-on-minnesota-lakes-but-not-everyone-on-board>.

regulations that would keep wake boats farther away from shore and off smaller lakes entirely.<sup>4</sup> In your request, you asked what regulation is allowable by these entities.

The Big Sugar Bush Lake Association (“the Association”) is a nonprofit organization that was founded in 1975 to promote, protect, and maintain the environmental and recreational value of Big Sugar Bush Lake in Becker County, Minnesota.<sup>5</sup> In November 2018, the Association’s Board of Directors passed a motion to request legal assistance from an attorney in proposing an ordinance that would ban wake boats on Big Sugar Bush Lake (“the Lake”) to Sugar Bush Township’s Board of Supervisors. The Board of Directors subsequently received a letter threatening legal action over the motion from a private practice attorney.

### **Local Governments’ Authority to Regulate Water Surface Use**

Municipalities have no inherent powers under Minnesota law.<sup>6</sup> Rather, municipalities are able to exercise only those powers that are expressly conferred to them by statute or are implicitly necessary to carry out the powers which are expressly conferred.<sup>7</sup> Minnesota’s municipalities draw their authority to regulate boating from two statutory sources.

First, on a general level, Minnesota’s municipalities are expressly vested with what is known as the “police power” by Minnesota Statutes § 412.221. The statute provides, in relevant part, that the municipalities “shall have power to provide for [...] the promotion of health, safety, [...] and the general welfare by such ordinances not inconsistent with the constitution and laws of the United States or of this state [...].”<sup>8</sup> The Minnesota Supreme Court has explicitly acknowledged that this passage “undoubtedly” provides a town or city with the “implied power to [r]egulate boating on lakes within its boundaries.”<sup>9</sup>

Municipalities draw specific authority to regulate the surface use of watercraft from Chapter 86B of the Minnesota Statutes, which governs water use. Section 86B.201, which concerns local ordinance authority, indicates that a city may adopt ordinances relating to the use of a water body that is entirely within that city’s boundaries as long as the ordinances are consistent with Chapter 86B and pertinent Department of Natural Resources (“DNR”) regulations.<sup>10</sup> The same section of Chapter 86B likewise grants counties the authority to regulate the use of a water body that is “wholly or partly” within that county, subject to the same consistency conditions.<sup>11</sup> Of relevance to larger Minnesota cities who may be experiencing issues with wake boats, Section 86B.201 also expressly allows a city with a population of at least 200,000, or the park board thereof, to forbid the use of motorboats or boats with attached motors on its lakes.<sup>12</sup>

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<sup>4</sup> See *id.*

<sup>5</sup> See BIG SUGAR BUSH LAKE ASSOCIATION, *Minutes of first association organizational committee meeting, April 23, 1975* (accessed Jan. 14, 2020); BIG SUGAR BUSH LAKE ASSOCIATION, *Big Sugar Bush Lake Association bylaws 2017-* (accessed Jan. 14, 2020). Available at <http://www.bigsugarbush.net/about.html>.

<sup>6</sup> *Vill. of Brooklyn Ctr. v. Rippen*, 255 Minn. 334, 335 (1959).

<sup>7</sup> *Id.*; see *Tousley v. Leach*, 180 Minn. 293 (1930).

<sup>8</sup> Minn. Stat. § 412.221, subd. 32 (2019). Available at <https://www.revisor.mn.gov/statutes/cite/412.221>.

<sup>9</sup> *Vill. of Brooklyn Ctr.*, 255 Minn. at 336.

<sup>10</sup> Minn. Stat. § 86B.201, subd.2(a). Available at <https://www.revisor.mn.gov/statutes/cite/86B.201>.

<sup>11</sup> *Id.*

<sup>12</sup> Minn. Stat. § 86B.201, subd.2(b). Available at <https://www.revisor.mn.gov/statutes/cite/86B.201>.

In addition to those statutory provisions, Section 86B.205 explicitly vests counties with substantial discretion in regulating the type and size of watercraft allowed to use bodies of water within their jurisdiction.<sup>13</sup> Section 86B.205 likewise permits counties to limit the types and horsepower of boats' motors, as well as the use of the water body at various times and the use of various parts thereof.<sup>14</sup> Finally, for the explicit purpose that they may "secure the safety of the public and the most general public use," counties may regulate the speed of watercraft "and the conduct of other activities" on lakes and rivers.<sup>15</sup>

Regardless of whether a surface use ordinance is proposed by a municipality or a county, it must be submitted to the commissioner of the DNR for review and approval.<sup>16</sup> The commissioner must approve or deny the proposed ordinance within 120 days after receiving it and, if the commissioner denies the proposed ordinance, she must return it with a written statement of the reasons for denial.<sup>17</sup> Thus, the legal authority of Minnesota municipalities and counties to restrict wake boating on their lakes is effectively limited by this aspect of the DNR's discretion.

With this in mind, the DNR has expressed a preference for accommodating all compatible uses of water bodies where feasible.<sup>18</sup> This suggests that the DNR may not be receptive to municipal or county ordinances that attempt to totally prohibit wake boats from eligible waters. The DNR commission will likely be amenable to less sweeping restrictions that are within local governments' authority to propose. Introducing or expanding no wake zones<sup>19</sup> or modest speed limits, for example, would allow wake boats to continue accessing lakes without generating waves that threaten the shoreline and other lake users.<sup>20</sup> Speed limits can coexist with area zoning, particularly at medium- and large-sized lakes where no wake zones might extend only 100-150 feet from the shore. The DNR also enforces time zoning schemes for lake surface use, and these schemes can range from simple to fairly complex.<sup>21</sup>

### **Examples of Local Ordinances that Regulate Inland Boating in Minnesota**

Many municipalities and counties have navigated the above-identified process to successfully implement watercraft ordinances and restrictive surface use zoning of lakes with the DNR's approval. The Town of Arthur in Kenebec County, for example, has established a no wake zone over the surface of Fish Lake during times when the high water level is at or above 950 feet mean sea level, and the no wake zone remains in effect until the high water level stays below 950

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<sup>13</sup> Minn. Stat. § 86B.205, subd.5. Available at <https://www.revisor.mn.gov/statutes/cite/86B.205>.

<sup>14</sup> Minn. Stat. § 86B.205, subd.5.

<sup>15</sup> *See id.*

<sup>16</sup> Minn. Stat. § 86B.205, subd.4. Available at <https://www.revisor.mn.gov/statutes/cite/86B.205>.

<sup>17</sup> *See id.*

<sup>18</sup> MINNESOTA DEPARTMENT OF NATURAL RESOURCES, *Initiating local surface use zoning* (accessed Feb. 6, 2020). Available at <https://www.dnr.state.mn.us/regulations/boatwater/surfaceusezoning.html>.

<sup>19</sup> No wake zones have a speed limit of 5 miles per hour in Minnesota. *Id.*

<sup>20</sup> *See id.*

<sup>21</sup> For complex time zoning see, e.g., the DNR's willingness to enforce surface use restrictions only on weekends and holidays between Memorial Day and Labor Day. MINNESOTA DEPARTMENT OF NATURAL RESOURCES, *Initiating local surface use zoning*.

feet mean sea level for three consecutive days.<sup>22</sup> Elsewhere, the County of Crow Wing allows only boats with electric motors on Little Pine Lake and has imposed no wake zones across swaths of the Gull Chain of Lakes, the Whitefish Chain of Lakes, the Mission Chain and other lakes within its jurisdiction; these zones are primarily confined to channels and near-shore areas, where they extend 150 feet into the water.<sup>23</sup> The County of Aitkin has also enacted similar restrictions for various lakes and rivers within its jurisdiction.<sup>24</sup>

The municipal lake ordinances of Ramsey County alone reflect the vast spectrum of watercraft and speed regulations that Minnesota towns and cities have successfully introduced for their lakes. Many of the no wake zones are anchored by the shoreline and generally extend 100-150 feet therefrom, but some are more ambitious: Arden Hills restricts all boats on Lake Johanna to 5 miles per hour within 250 feet of shore and in the center of the lake at all times; Maplewood requires boats on all lakes within the municipality to travel at a slow, no wake speed within 300 feet of shore occupied by swimmers or anglers; and Mounds View even requires a slow, no wake speed within 300 feet of any shoreline, angler, swimmer, or occupied boat at Spring Lake.<sup>25</sup>

Please note that this review of relevant local ordinances—which was extensive, but not exhaustive—did not reveal any instances of an ordinance that created restrictions unique to wake boats or otherwise imposed different restrictions for different classes of boats (other than on the basis of electric motors, as in the aforementioned Little Pine Lake example from Crow County).

### **Lake Associations’ Lack of Authority to Regulate Boating on Their Respective Lakes**

Much like the state’s municipalities, lake associations in Minnesota lack the authority to create and enforce restrictions on the public unless explicitly conferred by statute. This means that most—if not all—of Minnesota’s lake associations are currently without the statutory authority to promulgate binding regulations on their own for the purpose of protecting lake shores from wake boats.

All of the lake associations in Minnesota that were identified during the course of this research were established as—and continue to be—nonprofit organizations whose membership are open to the public at large, as opposed to entities open only to eligible property owners who can be bound by covenant (akin to a homeowners association).<sup>26</sup> Nonprofit organizations in Minnesota must be organized and otherwise act in accordance with Chapter 317A of Minnesota’s Statutes,

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<sup>22</sup> Town of Arthur, Minnesota, *Fish Lake Water Surface Use Ordinance, Ordinance No.5* (2008). Available at [https://cms5.revize.com/revize/kanabecounty/document\\_center/Departments/Coordinator/Township%20Information/Arthur%20Township/Fish%20Lake%20Water%20Surface%20Use%20Ordinance.pdf](https://cms5.revize.com/revize/kanabecounty/document_center/Departments/Coordinator/Township%20Information/Arthur%20Township/Fish%20Lake%20Water%20Surface%20Use%20Ordinance.pdf).

<sup>23</sup> County of Crow Wing, Minnesota, *Water Surface Use Ordinance, Ordinance No. 83* (accessed Feb. 18, 2020). Available at <https://www.crowwing.us/DocumentCenter/View/1209/Water-Surface-Use-No-83-for-Citations?bidId=>.

<sup>24</sup> County of Aitkin, Minnesota, *Watercraft Ordinance § 5* (accessed Feb. 19, 2020). Available at <https://www.co.aitkin.mn.us/ordinances/WatercraftOrdinance.pdf>.

<sup>25</sup> Ramsey County Sheriff’s Office, *Local Lake Ordinances* (accessed Feb. 19, 2020). Available at <https://www.ramseycounty.us/your-government/leadership/sheriffs-office/sheriffs-office-divisions/public-safety-services/water-patrol-services/local-lake-ordinances>.

<sup>26</sup> See, e.g., *Big Sugar Bush Lake Association bylaws 2017-*, *supra* n.5; BIG SUGAR BUSH LAKE ASSOCIATION, “Early history of the Big Sugarbush Lake Association” (accessed on Feb. 6, 2020) available at [www.bigsugarbush.net/about.html](http://www.bigsugarbush.net/about.html).

which governs the formal creation and internal operations of such entities, but does not actually confer to them any enforceable power over non-members or public resources, such as roads.<sup>27</sup>

The only possible exception to this rule would be a lake association that was (or will be) created as a “common interest community” pursuant to Chapter 515B of the Minnesota Statutes, also known as the Minnesota Common Interest Ownership Act (“MCIOA”). The MCIOA applies only to common interest communities, which the statute defines as

*contiguous or noncontiguous real estate within Minnesota that is subject to an instrument which obligates persons owning a separately described parcel of the real estate, or occupying a part of the real estate pursuant to a proprietary lease, by reason of their ownership or occupancy, to pay for (i) real estate taxes levied against; (ii) insurance premiums payable with respect to; (iii) maintenance of; or (iv) construction, maintenance, repair or replacement of improvements located on, one or more parcels or parts of the real estate other than the parcel or part that the person owns or occupies.*<sup>28</sup>

The statute applies to condominium associations, cooperatives, and similar homeowner association-like organizations created to manage planned communities, conferring upon them the legal authority necessary to create and enforce rules, such as for shared spaces or resources owned jointly by organization members.<sup>29</sup> However, the statute implicitly anticipates its applicability to “unplanned” common interest communities in which eligible property owners execute instruments concerning the use of their property that meet the above-identified criteria. These property owners may even have been “members of an entity created before June 1, 1994 which performs functions similar to those performed by a master association regardless of whether the entity is subject to this chapter.” The Big Sugar Bush Lake Association meets these criteria and—if the Association’s membership still largely or entirely consists of local property owners, as it did at the Association’s first meeting<sup>30</sup>—then the Big Sugar Bush Lake Association and other similarly situated lake associations may be eligible for conversion into organizations that can create enforceable rules upon shared lakes—such as a wake boat ban—under the authority conferred by the MCIOA.

### **Legal Arguments That Might Be Raised Against Local Ordinance**

Critics of local restrictions on wake boating argue that such restrictions are not only bad public policy, but outright illegal. Below is a brief discussion of critics’ legally oriented arguments and an assessment of their veracity.

*Wake boats and wake boating cannot be restricted on lakes classified as “Recreational Development” by the DNR.*

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<sup>27</sup> See Minn. Stat. §§ 317A.001-.909. Available at <https://www.revisor.mn.gov/statutes/cite/317A>.

<sup>28</sup> See Minn. Stat. §§ 515B.1-103(10).

<sup>29</sup> See Minn. Stat. §§ 515B.3-107. Available at <https://www.revisor.mn.gov/statutes/cite/515B.3-107>.

<sup>30</sup> See BIG SUGAR BUSH LAKE ASSOCIATION, *Minutes of first association organizational committee meeting, April 23, 1975* (accessed Jan. 14, 2020); BIG SUGAR BUSH LAKE ASSOCIATION, *Big Sugar Bush Lake Association bylaws 2017-* (accessed Jan. 14, 2020). Available at <http://www.bigsugarbush.net/about.html>.

Wake boating advocates allege that municipal restrictions on wake boats are not permissible at lakes—such as Big Sugar Bush Lake—that are classified as “Recreational Development” by the DNR, rather than as “Natural Environment.” This claim is incorrect. Just as the terms “on-Broadway,” “off-Broadway,” and “off-off-Broadway” refer to the seating capacity of a theater, rather than its physical proximity to Manhattan’s famed thoroughfare,<sup>31</sup> the titles used in Minnesota’s lake classification system do not reflect the actual characteristics of, or regulatory implications for, the lakes in each class.

DNR regulation Minn. R. 6120.300 subpart 1a(B) provides that Recreational Development lakes are “characterized by moderate levels of recreational use and existing development. Development consists mainly of seasonal and year-round residences and recreationally oriented commercial uses.”<sup>32</sup> However, these features are not criteria of the DNR’s classification system. The actual criteria for categorization include: size and shape; amount and existing type of development; road and service center accessibility; existing natural characteristics of the waters and shorelands; state, regional, and local plans and management programs; existing land use restrictions; and the presence of significant historic sites.<sup>33</sup> Contrary to the perception that Natural Environment lakes are more environmentally fragile and operationally restricted than Recreational Development lakes, the Minnesota DNR website explicitly clarifies that these classifications are “used to determine lot size, setbacks and [...] land uses on the adjacent land. The classification has nothing to do with surface water use of boats or motors, hunting and fishing or fish management. These are governed by other regulations.”<sup>34</sup>

As a result, the possibility of and procedure for locally regulating wake boats on a lake are unaffected by that lake’s classification as Natural Environment, Recreational Development, or General Development.

*Local ordinances that specifically regulate wake boats are arbitrary and capricious.*

Wake boating advocates may also assert that local ordinances which are applicable only to wake boats would be vacated by a court on the basis of being arbitrary and capricious.

A Minnesota court will subject a municipal ordinance relating to the use of a lake or its surface water to the rational basis test.<sup>35</sup> Under the rational basis test, the burden is on the challenging party to establish that a municipality’s ordinance is “unsupported by any rational basis related to promoting the public health, safety, welfare, or morals.”<sup>36</sup> Moreover, Minnesota courts give great

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<sup>31</sup> See Playbill Staff, *How To Tell Broadway From Off-Broadway From...*, PLAYBILL (Jan. 13, 2019). Available at <http://www.playbill.com/article/how-to-tell-broadway-from-off-broadway-from-com-110450>.

<sup>32</sup> Available at <https://www.revisor.mn.gov/rules/6120.3000/>.

<sup>33</sup> Minn. R. 6120.3000 subpart 1. Available at <https://www.revisor.mn.gov/rules/6120.3000/>.

<sup>34</sup> MINNESOTA DEPARTMENT OF NATURAL RESOURCES, *Frequently asked questions about lakes*, “What are ‘environmental’ lakes? Are they wild? Are there restrictions on motors or hunting and fishing?” (accessed on Feb. 5, 2020). Available at <https://www.dnr.state.mn.us/lakes/faqs.html>.

<sup>35</sup> See *BECA of Alexandria, L.L.P. v. Cty. of Douglas ex rel. Bd. of Comm’rs*, 607 N.W.2d 459, 463 (Minn. Ct. App. 2000).

<sup>36</sup> See *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006), quoting *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414-415 (Minn. 1981).



deference to the municipality's decision—"even if the city council's decision is debatable, so long as there is a rational basis for what it does, the courts do not interfere."<sup>37</sup>

For an ordinance restricting wake boats to withstand judicial scrutiny, the municipality or county that enacted it must demonstrate a rational relationship between that ordinance and public health, safety, and the general welfare. The available information suggests that municipalities and counties will be able to satisfy this burden. In addition to concerns that wake boats substantially impact shorelines and private docks, there are reports of boats flipping over and people being injured due to wake boat activity. Preventing personal injuries and property damage relates to the promotion of public health, safety, and welfare, and a reviewing court will likely defer to a local government's assessment of how to best achieve this objective under the circumstances.

What is less clear, however, is whether an ordinance that imposes restrictions only on wake boats would be voided on the basis of equal protection. Government entities must treat similarly situated parties the same in the absence of rational basis for different treatment.<sup>38</sup> The language codifying this principle in the relevant provisions of Chapter 86B is ambiguous with respect to whether local ordinances may impose restrictions only on certain kinds of boats. Subdivision 6 of Minn. Stat. § 86B.205 reads in full: "Public access restrictions. The county board must allow the same types and sizes of watercraft and horsepower of motors to access and enter the lake or water body as are generally allowed to be operated on the lake or water body. Special use exceptions that are not dependent on lakeshore or property ownership may be granted by permit."

While this can be interpreted as permitting ordinances that impose restrictions on wake boats as long as they are enforced for all wake boats at the lake in question (i.e., that a county does not purport to ban wake boats at a lake and then allow certain individuals to continue wake boating thereupon), there is a plausible interpretation of this language that protects wake boat owners as a class against which municipalities and counties may not discriminate via ordinance. In other words, that counties may only regulate an activity without prejudice to the kind of boat actually engaged in that activity—e.g., a county may not impose a 15 mile per hour speed limit at a lake only for wake boats, but may impose a 15 mile per hour speed limit for all boats upon the lake.

## **Conclusion**

Our research did not uncover any examples of municipal or county ordinances in Minnesota that apply only to one kind of boat on eligible waters. Additionally, no Minnesota court has interpreted the relevant statutory language. While this does not necessarily mean that municipalities lack the legal authority to ban or impose restrictions specific to wake boats, the combination of the Chapter 86B's public access provisions and the practical implications of the DNR's oversight suggest that wake boat-specific ordinances are unlikely to be the most efficient or effective means for local entities to act on their wake boat-related concerns. Ordinances focused more broadly on "no-wake zones" and speed restrictions may raise less legal concerns.

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<sup>37</sup> *Honn*, 313 N.W.2d at 415.

<sup>38</sup> See *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *In re Welfare of B.A.H.*, 845 N.W.2d 158 (Minn. 2014).

Thank you for bringing your question to the National Sea Grant Law Center. I hope you find the above information useful, and please contact us at your convenience with any follow-up questions.