

A06-1696

STATE OF MINNESOTA
IN SUPREME COURT

In re the Matter of the
Decision of the Otter Tail
Board of Adjustment to Deny
a Variance to Cyril Stadsvold
and Cynara Stadsvold.

APPELLANT'S ANSWER TO PETITION FOR REHEARING

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None

LEGAL ISSUES

- I. Respondent County of Otter Tail's Petition for Rehearing must be denied for failure to serve a complete copy of its Petition upon Appellants.
- II. Respondent's Petition for Rehearing fails to state a justiciable controversy as it seeks an advisory opinion as to how the Court's decision be applied to "use variances".
- III. The Court's decision does not violate the separation of powers.
- IV. The Amici Association of Minnesota Counties and the Minnesota Association of Townships do not have standing to file a Petition for Rehearing.

Statement of Case and Facts

Appellants received Respondent's Petition for Rehearing dated June 27, 2008 by mail on June 30, 2008, and received Request for Leave to File Joint Petition for Rehearing and Petition for Rehearing from Amici Association of Minnesota Counties and Minnesota Association of Townships dated June 30, 2008 by mail on July 2, 2008. Appellants Stadsvold are serving and filing their answer herein on July 2, 2008.

I. Respondent County of Otter Tail's Petition for Rehearing must be denied for failure to serve a complete copy of its Petition upon Appellants.

A petition for rehearing must be filed with the Supreme Court within 10 days of its decision, and served upon the opposing party at or before the time of filing. Minn. R. Civ. P. Rules 125.02 and 140.01. Respondent's Petition for Rehearing that was served on Appellants fails to contain page 3 of its Petition (A-1 and A-2). Appellants have been deprived of the ability to review, analyze and respond to Respondent's argument since one third of the text of that argument was missing. Accordingly, Respondent's Petition must be denied, or in the alternative, the Supreme Court should not entertain Respondent's argument at III B entitled "Petitioner believes that the Court's decision seemingly ignores a portion of Minn. Stat. §394.27, subd. 7 (2007)" as contained on pages 2, 3, 4 and 5 of the Petition.

II. Respondent's Petition for Rehearing fails to state a justiciable controversy as it seeks an advisory opinion as to how the Court's decision should be applied to "use variances".

In order for Minnesota Courts to have jurisdiction over an issue, there must be an actual and justiciable controversy between the parties. St. Paul Area Chamber of Commerce v. Marzitelli, 258 N.W.2d 585, 587 (Minn. 1977). "The controversy must be justiciable in the sense that it involves definite and concrete assertions of right and the contest thereof touching the legal relations of parties having adverse interests in the matter with respect to which the declaration is sought." Id. There must exist "a genuine conflict in the tangible interests of the opposing litigants." Id.

In several of its arguments for rehearing, Respondent asks the Court to declare the application of its decision to "use variances". (Respondent's Petition for Rehearing, pp. 4, 5, 7, 8 and 10). There is no controversy between Appellants and Respondents on a "use variance". Its undisputed that Appellants house and garage is a permitted use. Appellant's request to Respondent was for an "area variance". Appellant's appeal to the District Court, Court of Appeals and the Supreme Court concerned Respondent's denial of that area variance request. Since there is no justiciable controversy between Appellants and Respondents as to "use variances", Respondent's request for rehearing fails to state a justiciable controversy, and in actuality seeks an

advisory opinion as to the application of this Court's decision of "use variances". Thus, Respondent's request for rehearing should be denied.

Moreover, Respondent's argument on use variances fails to recognize the difference between the various forms of uses, i.e. expressly permitted uses, non-conforming uses, conditional uses and prohibited uses. Minn. Stat. §394.27, subd. 7 only forbids a variance from a prohibited use. In addition, the Supreme Court has previously ruled on "use variances" in In Re Kenney, 374 N.W.2d 271, 273-275 (Minn. 1985). "The crux of the jurisdictional issue is the proper interpretation of Minn. Stat. §394.27, subd. 7, the state statute establishing the variance power of the Board of Adjustments." Id at 273. "[T]he state law does not intend to allow area variances only, but use variances as well." Id at 275. See also Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85, 92, 93 (Minn. App. 2000) (review denied Nov. 15, 2000) for the legislative history of Minn. Stat. §394.27, subd. 7 and construction of that statutory language. The Minnesota Legislature has convened numerous times since the Kenney and Kismet decisions, but has not further amended that portion of Minn. Stat. §394.27, subd. 7. "When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language." Minn. Stat. §645.17 (4). The Court's judicial construction of a statute

which has not been reversed by legislature, is as much of the statute as it had been written into the statute originally. Western Union Telegraph Company v. Spaeth, 232 Minn. 128, 44 N.W.2d 440, 441 (Minn. 1950). Thus, the Court's construction of the statute is proper.

III. The Court's decision does not violate the separation of powers.

A statute is ambiguous if it is susceptible to more than one reasonable interpretation. Phelps v. Commonwealth Land Title Insurance Company, 537 N.W.2d 271, 274 (Minn. 1995). Where a statute uses technical words, but fails to define those technical words, those words are to be construed according to their special meaning. Minn. Stat. §645.08(1). The Court's decision in Stadvold specifically concludes that Minn. Stat. §394.27, subd. 7 is ambiguous for failure to define the meaning and use of technical words used in that statute. The Court's decision defines "practical difficulty" by applying its special meaning that had been in existence decades earlier. See also Minn. Stat. §645.17(4). Thus, the Court did not violate the separate powers of doctrine.

IV. The Amici Association of Minnesota Counties and the Minnesota Association of Townships do not have standing to file a Petition for Rehearing.

It is improper for persons who are not parties to a proceeding to petition for rehearing. People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minnesota Environmental Quality Council, 266 N.W.2d 858, 874, 875 (Minn.

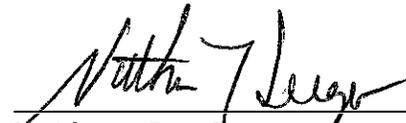
1978). In addition, the Petition for Rehearing filed by the Amici is untimely. The Amici Joint Petition for Rehearing Amici Curiae of the Association of Minnesota Counties and the Minnesota Association of Townships is dated June 30, 2008. The Affidavit of Service by Mail accompanying that Petition is also dated June 30, 2008.(A-3). Service and filing of that Petition is more than 10 days after the date of the Supreme Court's decision. Minn.R.Civ.P. Rule 140.01. Accordingly, the Petition for Rehearing submitted by Amici Association of Minnesota Counties and the Minnesota Association of Townships should be struck, and relief denied.

Conclusion

Appellants were not timely served all of Respondent's Petition for Rehearing. Appellant seeks a ruling on a non justiciable issue, i.e. application of the Court's decision to use variances. The Court did not violate the separation of powers doctrine. The Amici's Petition is neither proper nor timely. Accordingly, the Petition for Rehearing should be denied.

Respectfully submitted,

Dated: 7-2-08


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