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State of Minnesota
In Supreme Court

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

RESPONDENT'S PETITION FOR REHEARING

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I. INTRODUCTION

Petitioner County of Otter Tail, Minnesota (hereinafter "County" or "Petitioner") respectfully submits this Petition for Rehearing or Reconsideration (hereinafter "Petition") of the Court's decision in *In re Stadsvold*, issued June 19, 2008. The Court's opinion in this matter is attached hereto in Appendix A.

Minn. R. App. 140.01 allows a party to petition the Court for rehearing when there is "(a) any controlling statute, decision or principle of law; or (b) any material fact; or (c) any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied or misconceived." The Court does have discretion to grant a petition for rehearing in order to clarify an earlier decision. *See Gudvangen v. Austin Mutual Insurance Co.*, 284 N.W.2d 813, 817 (Minn. 1978).

The Court's decision in this matter is its first decision defining the difference between the phrases "practical difficulties" and "particular hardship" as found in Min. Stat. § 394.27, subd. 7 (2007). App. A ¶ 5. Based on its reading of the Court's decision, the County believes that the Court may have overlooked or misapplied portions of Minn. Stat. § 394.27, subd. 7 (2007). The County also believes that the Court may have adopted a rule of law that modifies the breadth of land use authority delegated to counties by the legislature. Consequently, the decision may exceed limitations placed on the Court by the separation of powers clause of the Minnesota Constitution. Specifically, the statutory prohibition on use variances in Minn. Stat. § 394.27, subd. 7 was not discussed by the Court in its decision in this case. The County respectfully submits this Petition to

request that the Court grant a rehearing on these issues, and for clarification of its decision.[1]

II. FACTS

The relevant facts of this case have been fully discussed by this Court, and thus do not bear repeating in this Petition.[2] Petitioner does not allege the existence of any material fact not already discussed by the Court.

III. ANALYSIS

A. Petitioner Filed its Petition in a Timely Manner.

Under Minn. R. App. 140.01 a "petition for rehearing in the Supreme Court may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period." The Court issued its decision in this matter on June 19, 2008. Petitioner filed this Petition on June 27, 2008, within the 10-day period specified by Minn. R. App. 140.01. Therefore, the County's submission of this Petition is timely and may be considered by the Court.

B. Petitioner Believes that the Court's Decision Seemingly Ignores a Portion of Minn. Stat. § 394.27, subd. 7 (2007).

The Court's decision draws the distinction between "area" and "use" variances, and establishes requirements which an applicant for either an area or a use variance must meet before the respective variance may or must be granted. The Court defined area

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[1] The County is also concerned about the policy implications of other portions of the Court's opinion, discussing after-the-fact variances and the "good faith" of the applicants for variances, as well as the elements of "practical difficulties" discussed by the Court. The County also requests rehearing on these matters.

[2] The relevant facts at issue are fully discussed at App. A ¶ 2-3

variances as variances that "involve matters such as setback lines, frontage requirements, height limitations, lot-size restrictions, density regulations, offstreet parking, and yard requirements." App. A ¶ 5. (Internal citation omitted). By comparison, the Court defined use variances as those which "permit a use of land other than those prescribed by the zoning regulations." *Id.* (Internal citation omitted). The Court held that, under Minn. Stat. § 394.27, subd. 7 (2007), an area variance is properly granted when the applicant shows "practical difficulties." The Court held that a use variance is properly granted when the applicant establishes "particular hardships." *Id.*

Notwithstanding the Court's decision in this matter, Minn. Stat. § 394.27, subd. 7, expressly **prohibits** a County Board from granting use variances. It is therefore unclear, under the Court's holding, when and under what circumstances the particular hardship standard should, or might, apply.

The Court, in *Appeal of Kenney*, 374 N.W.2d 271 (Minn. 1985), stated that a county's authority to grant variances from zoning restrictions on nonconformities included the authority to grant "use variances" in a noncomformity context. *Id.* at 274. However, the Court's holding in this matter does not indicate how it affects, modifies, limits, or extends the *Kenney* decision. The question is particularly uncertain given the Court's finding in *Kenney* that "it is unnecessary to read into the terms of the statute the area variance/use variance distinction." *Id.*

Under one reading of the Court's decision in this case, the Court has seemingly expanded upon its holding in *Kenney*, effectively abrogating Minn. Stat. § 394.27, subd. 7, in one of two ways. In this matter, the Court properly focused on the elements of

"practical difficulty." The Court did not in any respect address the situations in which a county may grant use variances under the new purported requirement that use variances be allowed. The Court's broad definition of a use variance appears to allow (in fact require) counties to consider "particular hardships" of applicants for use variances, even when the proposed use of the property is prohibited in the zoning district. Reading the Court's holding in this way, Minn. Stat. § 394.27, subd. 7 is abbreviated by effectively removing its legislative prohibition on the granting of use variances.

If, on the other hand, the Court's decision is to be read as leaving the legislative prohibition against use variances intact, the Court has largely and effectively removed the "particular hardship" standard and elements from the statute, at least to the extent a county might consider the elements pertinent in a specific variance request context Interpreting the decision in a way that neutralizes use of the "practical difficulties" factors itself violates the canon of construction that endeavors to give meaning to all parts of a statute.

In simple terms, the Court, without discussing either its *Kenney* holding or the statutory prohibition on use variances, has either expanded counties' authority to grant use variances, or greatly curtailed their ability to consider the elements of "particular hardship." It is unclear from the decision in this case what result the Court intended.

In summary, the County is most concerned that the Court's decision in this matter may have failed to appropriately consider the prohibition against the granting of use variances found in Minn. Stat. § 394.27, subd. 7, and therefore fails to give effect to all of the statute's provisions. For this reason, the County agrees with Justice Gildea's

statement that the Court's decision "rewrites the relevant statute,"[3] and respectfully petitions the Court for rehearing to consider this decision's impact and expressly address its meaning in light of the legislative prohibition against the granting of use variances contained in Minn. Stat. § 394.27, subd. 7 (2007).

C. Petitioner Believes That the Court's Decision May Have Overlooked the Limitations Imposed on it by the Separation of Powers Doctrine.

Minnesota Government is divided into three distinct departments: legislative, executive and judicial. The powers of government are divided among these branches of government. No member of one branch is allowed the powers of any other branch "except in the instances expressly provided" in the Minnesota Constitution. Minn. Const. art. III, § 1. A court's "attempt to negate the application of legislation on other than constitutional grounds creates serious separation of powers problems." *State v. Ramirez*, 597 N.W.2d 575, 578 (Minn. Ct. App. 1999) (quoting *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980)). In the area of land use, Minnesota Courts have been especially attentive to separation of powers principles. *See, e.g., Putnam & Associates v. City of Mendota Heights*, 510 N.W.2d 264 (Minn. Ct. App. 1994).

1. <u>The County's Zoning Authority is Granted to it by the Legislature.</u>

This Court has developed an expansive body of law distinguishing the legislative functions of a municipality from the "quasi-judicial" functions of a municipality. *See, e.g., Dead Lake Association, Inc., v. Otter Tail County*, 695 N.W.2d 129 (Minn. 2005) (holding that certiorari was limited to quasi judicial acts of a municipality and not

[3] App. A ¶ 9

available to review legislative decisions). The land use power enjoyed by political subdivisions of the State is an extension of the State's police power, and is therefore legislative in nature. Minnesota courts have long accepted the legislative nature of municipal land use authority. *Id.*; *Kiges v. City of Saint Paul*, 240 Minn. 522, 530, 62 N.W.2d 363, 369 (1953); *See Also, Sun Oil Co. v. Village of New Hope*, 300 Minn. 326, 333, 220 N.W.2d 256, 261 (1974) ("it is well established that [a municipality] acts in a legislative capacity under its delegated police powers when it adopts or amends a zoning ordinance") (internal citations omitted).

The general rule regarding municipal authority to act is known as "Dillon's Rule." According to Dillon's Rule, a municipal corporation "possesses and can exercise the following powers, and not others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation – not simply convenient, but indispensable." *See J. Dillon, Commentaries on the Law of Municipal Corporations* § 237 (5th ed. 1911).

In Minnesota, it is well settled that municipalities have only the powers granted to them by statute. *See State v. Minneapolis-St. Paul Metropolitan Airport Commission*, 248 Minn. 134, 143, 78 N.W.2d 722, 728 (1956) ("it must be kept in mind that a municipality is only a political subdivision of the state created for the purpose of performing those functions entrusted to it by the legislature acting for the people of the state as a whole"). This is particularly true in the land use area. *See Arcadia Development*

Corp. v. City of Bloomington, 267 Minn. 221, 225, 125 N.W.2d 846, 849 (1964) ("city's right to act here, as always, is dependent upon a grant from the state").

2. The County Does Not Have the Legislative Authority to Grant a Use Variance.

A municipality "has no inherent power to enact zoning regulations. A municipality receives power to zone only by legislative grant of authority by the state." *Haverhill Township v. County of Olmsted*, 674 N.W.2d 781, 783 (Minn. Ct. App. 2004 (quoting *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 27 (Minn. 1981)). Minn. Stat. § 394.27, subd. 7 (2007), gives counties the authority to grant variances; It is a power specifically delegated to counties by the legislature. Section 394.27, subd. 7, however, specifically prohibits counties from granting use variances.[4] A municipality cannot "exceed the limitations imposed by the enabling legislation." *Haverhill*, 674 N.W.2d at 783 (quoting *Costley*, 313 N.W.2d at 27). *See Also City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 6 (Minn. 2008) ("a city cannot enact a local regulation that conflicts with state law").

The Court's potential broad definition of "use variance" in this case appears to include not only the "variances" for nonconformities discussed in *Kenney*, but other general use variances (i.e. variances from any "official control" per the language of Minn. Stat. § 394.27) prohibited by Minn. Stat. § 394.27, subd. 7 as well. Therefore, the County is without power to grant a "use variance" as defined by the Court. Doing so

[4] Minn. Stat. § 394.27, subd. 7 (2007) states that: "[n]o variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located."

would be in excess of the limited authority delegated to the County by the state in Minn. Stat. § 394.27.

3. **The Court's Decision, Read Broadly, Would Appear to Alter the Scope of Municipal Regulation in Violation of the Separation of Powers Doctrine.**

The Court held that the "particular hardship standard is the appropriate standard to apply to use variances." App. A ¶ 5. If the Court intends that the County may grant use variances to any applicant, not just those seeking a variance relating to a nonconformity, the Court has granted the County a power which the legislature denied it. If, on the other hand, the Court's decision leaves intact the prohibition against the granting of use variances, the Court has removed the particular hardship standard and its elements almost entirely from the County's consideration, and has therefore curtailed its legislatively-granted power to consider the statutory elements of particular hardship in the context of a variance request. Under such an interpretation, as discussed above, the Court's decision either reaffirms *Kenney*, and restricts those situations where the particular hardship standard is applicable to the rare instances wherein a county grants a variance for a nonconformity, or the Court's decision rejects *Kenney* and attaches the particular hardship standard to use variances which a county may never grant. From the text of the Court's decision, it is unclear which of these results was intended. But, irrespective of the way that the County interprets the Court's decision, the County reads it, as it is currently written, as in conflict with a legislative grant of authority to Minnesota counties.

The United States Supreme Court has held that "[t]he number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they

shall be exercised rests in the absolute discretion of the state." *City of Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U.S. 394, 397, 39, S.Ct. 526, 527 (1919); *Reynolds v. Vann*, 377 U.S. 533, 575, 84 S.Ct. 1362, 1389 (1964). This Court has similarly found that the legislature creates municipal entities, "and to them it delegates certain clearly defined portions of the sovereign power. Except as restrained by constitutional provisions, these auxiliary agencies of government are under the absolute control of the Legislature." *Schigley v. City of Waseca*, 106 Minn. 94, 96, 118 N.W. 259, 260 (1908); *See also Monaghan v. Armatage*, 218 Minn. 108, 112, 15 N.W.2d 241, 243 (1944) ("Absent constitutional restriction the *legislature* may at its pleasure modify or withdraw any powers so entrusted to a city, hold such powers itself, or vest them in other agencies.") (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178, 179 S.Ct. 40, 46 (1907)) (emphasis provided). Therefore, it appears to be well settled law that the legislature, not the judiciary has the sole authority to expand, or reduce, the scope of a municipality's power.

The Court's authority with respect to matters delegated to municipalities is "to oversee a [municipality's] actions in order to restrain a transgression of the bounds and standards of the grant of power." *Arcadia Development Corp.*, 267 Minn. at 225. It is not the Court's role to "interfere with legislative discretion on [zoning matters.]" *Unger v. County of Dodge*, 2007 WL 2993695 (Minn. Ct. App. 2007) (Not Reported)[5] (quoting *State ex rel. Howard v. Vill. Of Roseville*, 244 Minn. 343, 347, 70 N.W.2d 404, 407 (1955). Nor is it the Court's role to expand upon what the legislature has granted a

municipality. *See, e.g., Reider v. Anoka-Hennepin School Dist. No. 11*, 728 N.W.2d 246, 250 (Minn. 2007) (holding that the Court may not add terms to a statute which the legislature has omitted).

The Court has no independent authority to confer power to, or remove power from a municipality. Yet that appears to be one potential reading of the effect that the Court's decision in this case has. If the decision purports to authorize counties to grant use variances in excess of those which the Court previously recognized as allowable in its *Kenney* decision, the Court has judicially added to the County's authority under Minn. Stat. § 394.27, which is the sole purview of the legislature. If, on the other hand, the Court's decision eliminates the County's ability to consider the "particular hardship" elements when it considers variance requests, including area variance requests, the Court has restricted the initial breadth of the County's authority, which is also a power solely held by the legislature. The County therefore respectfully submits this Petition and requests a rehearing to consider the impact of the separation of powers doctrine on the Court's decision.

IV. Conclusion

The Court's decision adopts a very broad definition of "use variance." The County believes that the Court may have failed to consider the prohibition on the granting of use variances contained in Minn. Stat. § 394.27, subd. 7 in its analysis of the "practical difficulty" and "particular hardship" standards contained in the statute. The County is similarly concerned that the Court's holding goes beyond interpretation of the statute, and

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[5] Attached hereto in Appendix A.

impermissibly encroaches upon the legislature's authority to determine the breadth of a municipality's land use power, or lack thereof. It is unclear how the decision in this case impacts the Court's prior decision in *Kenney*, and in what circumstances the County, or any county, could ever apply the "particular hardship" standard. Given the large number of variance requests that all Minnesota counties receive, the County is especially concerned that confusion or uncertainty as to the proper application of the Court's holding will lead to a significant potential increase in the number of appeals of variance decisions to district court. Presented with a potential Hobsen's Choice, counties will be forced to determine whether to summarily reject use variance requests as directed by statute, or consider and perhaps grant them per this Court's decision. A clarification of this decision is in the interests of not only counties, but of property owners as they navigate the land use process, and of neighbors and residents who might be significantly affected by a use variance request.

For these reasons, the County requests that the Court grant its Petition for Rehearing to consider these concerns, and to clarify the Court's holding in this matter.[6]

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[6] The County, as authorized by Appellate Rule 140, also requests that the decision be stayed pending the rehearing process.

Dated: 6/27/08

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