

NO. A09-1773

State of Minnesota
 In Court of Appeals

In the Matter of the Administrative Order issued to Wright County

Wright County,

Relator,

vs.

Department of Labor and Industry,

Respondent,

and

Corinna Township,

Respondent.

RELATOR WRIGHT COUNTY'S REPLY BRIEF

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INTRODUCTION AND ARGUMENT

This memorandum is submitted in response to the briefs of Corinna Township and the Department of Labor and Industry. Wright County has fully analyzed the issues and the interrelationships between various Minnesota statutes in its brief to this Court. Wright County would, however, make the following points to this Court for its consideration as it reviews the positions of the Respondents in this case.

A. DOLI'S INTERPRETATION IS ENTITLED TO NO DEFERENCE.

The Respondents state that this is basically a case of statutory construction. Wright County agrees. Caselaw is clear that administrative interpretations do not control court interpretation of a statute. Administrative positions on the meanings of laws are entitled to no deference when they are wrong. Minn. Stat. § 326B.105 gives DOLI the power to administer and interpret a code of standards for the construction and reconstruction of buildings and governing matters of structural materials, design and construction. DOLI is not given the powers to dictate what a statute says. Nor is DOLI given the power to strip one municipal body of its authority to administer the building code and determine that another should do so merely on the basis that one municipality is a county and the other municipality is a township.

B. DIVESTING THE COUNTY OF AUTHORITY TO ADMINISTER THE CODE DOES NOT COME FROM ANY PLAIN LANGUAGE OF CHAPTER 326B OF MINNESOTA STATUTES.

The Respondents would have this Court believe that the town is the sole building permitting authority due to the plain language of Minn. Stat. § 326B.133. Respondents argue that a municipality may designate no more than one building official to be

responsible for code administration. Wright County agrees that the statute says this. However, Wright County is a municipality as defined in Minn. Stat. § 326B.103. Wright County had designated a building official. The Township is also a municipality as defined under Minn. Stat. § 326B.103. They have designated a building official. To argue that this provision of Minnesota Statutes Chapter 326B by its plain and ordinary language does not permit parallel administration of the Code is a stretch, and frankly, absurd. The plain language, together with the definition of what a municipality is, unequivocally recognizes concurrent jurisdiction.

The Respondents seek to misconstrue the meanings of words in the argument that it makes regarding this provision of Chapter 326B. They continue to want to lump cities, counties and townships together, ignoring the distinction that exists between them in Minnesota law. The Township argues on page 10 its Memorandum that the County recognizes within cities in its jurisdiction that once the city administers the Building Code that the County no longer does so. Wright County agrees. But the reason that Wright County recognizes the distinction is that such a distinction exists within the area of official controls under Minnesota law. Chapter 394 of Minnesota Statutes has a significant distinction between cities and townships that the Respondents simply fail to acknowledge, and in fact seek to draw the Court away from. This Court must keep in mind that under Minn. Stat. Chapter 394, a municipality is defined to mean only a city. Under Minn. Stat. § 394.32, once a city has adopted official controls, a county has no authority whatsoever within the city. Thus, when a city adopts a building code, the county has not authority within the city.

The same is not true in a township. West Circle Properties LLC v. Hall, 634 N.W.2d 238 (Minn. App. 201), and Minn. Stat. § 394.33 unequivocally establish that this same exclusion that applies to cities does not apply as between counties and townships. DOLI takes a simplistic view that is not supported by the caselaw. West Circle Properties, *supra*, indicates that the legislative intent is to make land use regulations of townships subject to county regulations in the interests of achieving uniformity within county boundaries. Any town regulations which may be promulgated are effective upon adoption of county official controls only insofar as they are not inconsistent with the county regulations, and importantly, only to the extent they are applied in a consistent manner with the County's. Id.

This Court needs to be cognizant of the fact that in the West Circle Properties case what the township did was to adopt the county ordinance. Under Respondents' argument, any analysis in West Circle Properties would end there. But that did not end the analysis in the West Circle Properties case. Indeed, the township action was found to be improper.

West Circle Properties, *supra*, indicates a preemption and a priority exactly the opposite of what is being suggested by the Respondents in this case. They offer no logical reason for ignoring this law. West Circle Properties states that in any situation involving concurrent jurisdiction, it is essential that priority be established by some means. Wright County contends that it has to be a logical means. Not just a desire to ease administration. Not just a desire to take a viewpoint irrespective of other pertinent law. Not just under a sky is falling argument that if this Court does not agree with DOLI,

that it is tantamount to a declaration that townships and cities will be acting unlawfully everywhere within the State of Minnesota. No evidence supports any of those types of arguments. The West Circle Properties case said that the legislature has already made the priority determination. They note the legislature used a chronological approach: If a county has already imposed certain land use restrictions, a township may not override them. Construing Minnesota law otherwise would enable townships to deprive a county of its power to administer land use controls and produces an absurd result. Such a result is exactly that being proposed by the Respondents in this case.

Lumping cities, townships, and townships together and saying one rule applies to all of them misconstrues Minnesota law and misdirects this Court from the real issue. Respondents continue to improperly analyze the issues and the law as applicable to this case.

Corinna Township also seeks to argue that the fact that DOLI has never ordered a county to cease and desist enforcement of the code within a municipality is evidence that the counties in Minnesota acknowledge that their authority to enforce the code in a city or town ends if and when that city or town adopts the code and appoints its own building official. DOLI seeks to suggest that counties within the metropolitan area are following some long-standing interpretation that once a township adopts the code, counties no longer have any authority. There is simply no evidence to support either of these arguments.

We need to be clear here about the age and long-standing nature of the position being put forth by DOLI. DOLI is saying the Township's adoption of the Code preempts

Wright County from administering and enforcing the Code. DOLI says the Township, by acting, strips away all powers of the County. DOLI is also saying that the statutes in question allow it to be the arbiter of a dispute between independent political subdivision in this State and to determine that Wright County is now divested of all authority. Generally, Courts are the arbiters of such disputes.

DOLI states “this ‘jurisdictional’ issue has existed since the inception of the Code because municipalities have had the ability to adopt the Code by ordinance since 1972. Therefore, according to DOLI, this issue has existed for 37 years. DOLI suggests, or at least implies, that the divesting of counties of jurisdiction has occurred many times. It points to Washington County, Ramsey County, and Hennepin County. But the facts submitted by DOLI do not support that conclusion, and in fact prove that the first time this “divestiture doctrine” or “preemptive doctrine” has been implemented is in Wright County, by way of this proceeding.

The Affidavit of Mr. Hernick unequivocally proves this point. Mr. Hernick indicates in paragraph 3 that there are counties that no longer enforce the Code. He lists Washington, Hennepin, and Ramsey Counties. Exhibit 2 to the Hernick Affidavit is a “true and correct copy of a list prepared by the Department identifying the counties, cities and Town where the Code is in effect as of January 1, 2008.” While Mr. Hernick makes a point of indicating that Washington, Hennepin, and Ramsey Counties no longer enforce the Code, Exhibit 2 indicates that Washington, Ramsey, and Hennepin Counties did not have the Code in effect in them as of January 1, 2008. See Hernick Exhibit 2, pp. 7, 8, 15, and 20. On each of those pages, those counties are listed as not having the Code in

effect. As to the assertions about what happens in Olmstead and/or Scott Counties, there is simply no record evidence to support those assertions, and they must be rejected. So nothing in these Counties' experience supports the "long-standing interpretation" that Code adoption by a township divests a County of its code enforcement authority. All we know by exhibits submitted is that those Counties did not have the MSBC in effect as of 2008. And nothing is offered as to cooperative agreements between those Counties and townships as allowed for under Minn. Stat. § 326B.121, subd. 1b(f).

Conspicuously absent from the Hernick Affidavit is any statement or evidence to the effect that ever before has a county been ordered to cease enforcement of the Code by DOLI because a township adopted the Code. There is no statement that DOLI has banned any of the other counties listed as enforcing the Code from enforcing within any of the cities or towns within those counties. Hernick Exhibit 2 lists Carver, Chisago, Freeborn, Isanti, Itasca, Kandiyohi, Meeker, Mille Lacs, Olmstead, Rice, Scott, Sherburne, Steele, Wright and Wabasha Counties as enforcing the Code. With all the cities and towns listed within them as also enforcing the Code, DOLI has not one example of any other county being ordered to cease from enforcing the Building Code. And this is supposed to show a long-standing interpretation of the statute that allows them to strip Wright County of its statutorily granted power and order it to stop enforcing the Code? Not one example after 37 years?

When one really looks at the facts that are being submitted, the claim that there is a long-standing interpretation of the enabling legislation supporting the Commissioner action in this case is ludicrous. Not only does Exhibit 2 to the Hernick Affidavit prove

the bankruptcy of DOLI's position and argument, but other exhibits and lack of exhibits submitted undermine their claims in this case. DOLI has submitted not one paper, position statement, memorandum, or shred of evidence showing that the interpretation they advance has ever been taken before. Yet they admit that this issue has existed since 1972. One would think that if the issue existed for 37 years, and this is a long-standing interpretation of the statute, that something would exist.

Exhibit 3 to the Hernick Affidavit includes the form DOLI developed for a municipality to submit to DOLI to designate a Building Official. At the top, the form notes for municipalities that "two or more municipalities may combine in the designation of a Building Official for the purposes of administering the provisions of the Code." So it points out the law that they can reach agreements on Code enforcement. But nowhere does it point out that once a municipality within a County designates a Building Official, the County Building Official is stripped of all authority.

Mr. Hernick also submitted as Exhibit 1 the Minnesota State Building Code Adoption Guide. Numerous sections of that Adoption Guide show that up until this particular case, the State has considered building permits to be part of the broader area of land use controls. What is interesting is that in this Adoption Guide there is no statement, no section, no provision that indicates that once a township has adopted the Building Code that a county's prior adoption of the Code was no longer of any force or effect within that township. Furthermore, that document, even if it had such a statement, is dated January 28, 2009. One would think that if DOLI's position were being taken on a

statewide basis and not just in regard to Wright County, that this Guide, published in January, 2009, would reference the divestiture provisions.

Finally, this “long-standing” interpretation by DOLI is not even consistently applied within Wright County. Respondents have argued in this case by making reference to other townships within the County that it says are enforcing the Code and have certified Building Officials. They question why Respondent has opposed Corinna’s efforts to enforce the Code. First, it is clear that DOLI has no concern with what other laws say, or it would know that County zoning vis-à-vis cities and townships is different under Minn. Stat. Ch. 394. County zoning applies in townships. It does not apply in cities. As to Corinna Township, only it applied to the County to have zoning ordinances effective in a shoreland area as required under Minnesota Rules § 6120.3900. However, as to Silver Creek Township, the Hernick Affidavit Exhibits show that Silver Creek Township has adopted and is enforcing the Code. See, Exhibit 2. Exhibit 4 lists the certified Building Official for Silver Creek Township as Craig Schulz, whom this Court is aware is the certified Building Official for Wright County. Yet there is no agreement between Wright County and Silver Creek. See, Second Affidavit of Thomas Salkowski. Apparently DOLI’s “long-standing” interpretation only applies vis-à-vis Wright County and Corinna Township.

There simply is no “long-standing” interpretation that exists to support DOLI’s claim that they have a right to divest the County of its authority to administer and enforce the Building Code. All we have is a statement from Mr. Hernick that that is what they want to do. And assertions by Respondent, unsupported by any fact or law, that they can.

What we are left with is this. An assertion by DOLI that this is the way it is. This is the way we have always done it. Without any reference to any supporting provision of the statutes to support that interpretation.

C. THE SUPERFLUOUSNESS ARGUMENT

DOLI continues to argue that acknowledging county authority renders superfluous the ability of towns and cities to administer and enforce the code. Once again, we need to be clear. This case does not involve cities. Land use law recognizes a distinction in county powers when dealing with cities and when dealing with townships. They are not the same. The plain fact of the argument submitted by the Respondents in this case is to render the ability of counties to administer and enforce the code superfluous. At no time do either Respondent ever offer any valid and legitimate reason for interpretation of the statute that mandates that conclusion.

D. THE DNR E-MAIL.

Once again the Respondents want to define out of the mix of official controls building permits. Building permits are clearly defined to be part of official controls under both Chapter 394, dealing with counties, and Chapter 462, dealing with cities and townships. The Respondent's reference to a DNR email want to at least suggest to the Court that the DNR also takes the position that official controls do not include building permits. But the email exhibit referenced by DOLI in its brief says nothing of the sort. The specific question asked to Mr. Otterson of the DNR was "In the agency's opinion, are building permits an integral part of the shoreland rules?" See Exhibit 00, p. 2. Mr. Otterson, the author of Exhibit QQ, never answers that question. What he says is that:

Provisions for the licensure and administration of state building code requirements fall under separate statutes and rules. In general, a statute authorizes state agencies and local governments to develop rules and local ordinances, under specific conditions provided by the governing statute. Rules never take precedence over statutes. It would be inappropriate to use a given rule to interpret separate statutes and rules.

See Exhibit QQ, Novotne Affidavit.

E. THE WRIGHT COUNTY RESOLUTION OF JULY, 2008.

The record is clear that Corinna Township acknowledges that it has no shoreland zoning authority. Only the County administers land use regulations within the shoreland district.

In July, 2008, the County Board undertook its duties pursuant to Minnesota Law under Minnesota Rule 6120.3900. The County made express findings that the Township did not demonstrate adequate capabilities to administer State Shoreland Regulations.

Respondent DOLI makes a point in noting that the County Resolution in question said nothing about the Township's efforts to adopt the Building Code. But why should the County Board have said anything about the Code on July 8, 2008? There was no issue. The County has consistently acted in accordance with the definitions set forth in Minnesota law. The Building Code and building permits are official controls and permits within the definitions of official controls in Chapters 394 and 462 of Minnesota Statutes. The County Resolution of July, 2008 speaks generally of permits, and is thus inclusive of building permits. Rather than being silent, the Resolution is a consistent application of Minnesota law.

CONCLUSION

Many of the issues raised by the Relator in its Memorandum to the Court are simply not addressed on the merits by the Respondents. The Respondents ignore arguments because they have no legitimate response to them. In reality, they want this Court to rule that DOLI may arbitrarily choose to divest a municipality that has not been shown to have engaged in any wrongful conduct in its administration or enforcement of the Code of all of its powers of Code enforcement. This position is unsupportable and should not be accepted by this Court.

Respectfully submitted,

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Dated: December 8, 2009.

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