

NO. A09-1773

State of Minnesota
In Court of Appeals

In the Matter of the Administrative Order issued to Wright County

RESPONDENT CORINNA TOWNSHIP'S BRIEF

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STATEMENT OF LEGAL ISSUES

- I. WHETHER MINN. STAT. § 322B.133, SUBD. 1, PERMITS WRIGHT COUNTY TO CONTINUE TO ADMINISTER THE BUILDING CODE IN CORINNA TOWNSHIP, CONCURRENTLY WITH CORINNA TOWNSHIP'S DULY APPOINTED BUILDING OFFICIAL.

The Commissioner of the Department of Labor and Industry affirmed the cease and desist order issued to Wright County prohibiting it from continuing to administer the Minnesota State Building Code (the "Code") in Corinna Township, because Corinna Township had properly adopted the Code by ordinance and had designated a building official, who was empowered as the sole permitting authority within that municipality by statute.

Most apposite authorities:

- Minn. Stat. § 326B.133, subd. 1
- Minn. Stat. § 326B.121, subd. 2

- II. WHETHER WRIGHT COUNTY'S AUTHORITY TO ADMINISTER LAND USE CONTROLS IN SHORELAND AREAS EXTENDS TO THE ISSUANCE OF BUILDING PERMITS.

The Commissioner of the Department of Labor and Industry ruled that Corinna Township's designated building official has the authority to administer the Code throughout Corinna Township, including shoreland areas.

Most apposite authorities:

- Minn. Stat. § 103F.211, subd. 1
- Minn. R. 6120.3900, subp. 1

STATEMENT OF THE CASE

This dispute arises out of Respondent Corinna Township's ("the Town") designation as the building authority within the Town by the Minnesota Department of Labor and Industry ("DOLI"). Despite this designation, Relator Wright County ("the County") has refused to recognize the Town's authority to issue building permits within shoreland management areas of the Town. However, under Minnesota law, there can be only one building permitting authority for any municipality, a designation which the Town has earned and for which it deserves to be recognized. Furthermore, the County's power to administer land use controls in shoreland areas does not extend to the issuance of building permits. DOLI recognized this in the order which the County now appeals. DOLI's ruling was correct, appropriate, and consistent with the longstanding practice in which even the County has acquiesced for decades.

Although the County attempts to muddy the waters on appeal by presenting numerous issues for this Court to resolve, this case requires nothing more than basic statutory interpretation. Because this dispute is limited to DOLI's interpretation of the statutes it is empowered by the legislature to enforce, DOLI is entitled to substantial deference on its interpretation. Because DOLI's interpretation follows the plain meaning of the statutes in question, the Commissioner's decision should be upheld.

STATEMENT OF THE FACTS

I. The Town Adopts the Minnesota State Building Code

On August 5, 2008, the Town adopted the Minnesota State Building Code (the "Code"), which until that point had been administered by the County. The Town, through its consultant, promptly notified the County of its intention to begin administering the Code on August 11, 2008. (See August 5, 2008, letter from Charles Marohn to Richard Norman, Tom Kelly, and Tom Salkowski, attached to the Affidavit of Viola Novotne as Exhibit EE.) The Town was informed by DOLI by letter dated August 14, 2008, that it was the sole building permitting authority for the Town from that point forward. (See August 14, 2008, letter from Stephen Hernick to Loren Kohlen, attached to the Affidavit of Viola Novotne as Exhibit KK.)

In an August 14, 2008, letter to the Minnesota Pollution Control Agency ("MPCA") and DOLI, Wright County, through its attorney, denied Corinna Township's authority to administer building permits in the Shoreland Management Districts. (See August 14, 2008, letter from Tom Kelly to Scott McLellan and Pat Shelito attached to the Affidavit of Viola Novotne as Exhibit LL.) Specifically, the County stated that the Town could not issue building permits in the shoreland areas because building permits are an "integral part of shoreland rules," which the County had not authorized the Town to administer. (Id.)

On August 16, 2008, Constance Bakken, a resident of Corinna Township, submitted an application to the Town for a building permit within the Shoreland Management District. (See Permit Application, attached to the Affidavit of Viola Novotne as Exhibit UU.) On August 21, 2008, the Town forwarded Constance Bakken's application to the County for the sole purpose of allowing the County to assess the application's compliance with the County's shoreland regulations. (See August 21, 2008, letter from Charles Marohn to Tom Salkowski, attached to the Affidavit of Viola Novotne as Exhibit NN.) On August 26, 2008, the County sent a letter to Constance Bakken, stating that it did not recognize the Town's authority to issue building permits in the shoreland area, and that applicants would have to apply directly to the County. (See August 26, 2008, letter from Tom Salkowski to Constance Bakken, attached to the Affidavit of Viola Novotne as Exhibit PP.)

II. The DOLI Proceeding

On October 14, 2008, DOLI served the County with an order requiring the County to cease and desist from issuing building permits within the Town. (Rel. Add. p. 1.) On February 20, 2009, the Town submitted a motion to intervene in the DOLI proceeding, based on the effect DOLI's decision would have on the Town's rights and responsibilities. The Town's motion to intervene was granted on April 10, 2009. (Rel. A.A. p. 148.)

On May 21, 2009, the ALJ issued her Recommended Order on Motion to Dismiss and Cross Motions for Summary Disposition, recommending that the

County's Motion to Dismiss and Motion for Summary Disposition be denied, and that DOLI's Motion for Summary Disposition be granted. (Rel. Add. p. 6.) The parties then submitted arguments and exceptions to the ALJ's recommendations, and on September 21, 2009, the DOLI Commissioner issued Findings of Fact, Conclusions of Law, and Order, affirming the ALJ's recommended order in its entirety. (Rel. Add. p. 19.) The Commissioner concluded that the designation of the Town's building official effectively removed the authority of the County's building official to administer the Code within the Town. (Id.) The Commissioner further concluded that Code enforcement is entirely separate from the land use controls implicated in shoreland management, and accordingly found that the Town's building official has authority to administer the Code throughout the Town, including within shoreland management areas. (Id.)

STANDARD OF REVIEW

Administrative agencies are entitled to a presumption of correctness, and it is the role of a reviewing court to give deference to the agency's expertise in the subject matter. Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 824 (Minn. 1977). A party seeking judicial review of an action taken by an administrative agency bears the burden of proof. Markwardt v. State, Water Resources Bd., 254 N.W.2d 371, 374 (Minn. 1977).

Furthermore, an agency's interpretation of the statutes which it is charged with administering is entitled to deference, "and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature." George A. Hormel & Co. v. Asper, 428 N.W.2d 47, 50 (Minn. 1988). See also, Benda v. Girard, 592 N.W.2d 452, 455 (Minn. 1999). The dispute at issue herein is entirely one of statutory construction and DOLI's interpretation of the statutes the legislature has entrusted it with administering. Accordingly, the Commissioner's decision is entitled to deference and must be upheld absent an express conflict with Minn. Stats. Ch. 326B.

LEGAL ARGUMENT

I. MINN. STAT. § 326B.133 Permits Only One Building Official to Exercise Code Enforcement Authority within a Municipality.

It is clear from the plain language of Minn. Stat. § 326B.133 that the Town is the sole building permitting authority for its jurisdiction. Pursuant to Minn. Stat. § 326B.133, a municipality "may designate **no more than one** building official responsible for code administration" (emphasis added). Minn. Stat. § 326B.103 includes towns in the definition of "municipality." The building official is responsible for the issuance of building permits, pursuant to Minn. R. 1300.0110, subp. 3.

The Town assumed responsibility for administering the Code within the Town on August 5, 2008. Specifically, the Town appointed Loren Kohnen as the Town's building official. At the time that Mr. Kohnen was recognized by DOLI as

the Town's building official, the County was then on notice that it was no longer the permitting authority within the Town, since a municipality may not have more than one building official.

Although the County's brief discusses canons of statutory interpretation at length, at no time does the County attempt to explain how this Court can give effect to Minn. Stat. § 326B.133's requirement that each municipality have "no more than one" building official, while simultaneously finding that the County can continue to enforce the Code within the Town after DOLI has duly designated another building official for the Town. The statute plainly does not permit the kind of parallel administration of the Code apparently envisioned by the County. There may be no more than one building official responsible for Code administration, and within the Town, that official is Loren Kohlen. Accordingly, the County no longer has any power to administer the Code or issue building permits within the Town's jurisdiction.

A. Minn. Stat. § 326B.121, subd. 2, states only that the County cannot unilaterally quit enforcing the Code, not that the Town cannot take up Code enforcement itself and divest the County of authority within the Town's jurisdiction.

As the County correctly points out in its brief, Minn. Stat. § 326B.121, subd. 2, does require municipalities that adopted the Code on or before January 1, 2008, to continue to enforce it. Specifically, that section states:

If, as of January 1, 2008, a municipality has in effect an ordinance adopting the State Building Code, that municipality must continue to administer and enforce the State Building Code within its jurisdiction.

The municipality is **prohibited from repealing its ordinance** adopting the State Building Code.

Minn. Stat. § 326B.121, subd. 2 (emphasis added).

However, this does not mean, as the County has suggested, that the County is required to continue enforcing the building code within the Town even after the Town has designated its own building official. Rather, this statute evidences the legislature's desire to ensure that the building code is consistently being enforced throughout the state. It means exactly what the above-quoted subdivision states, specifically that the County cannot now repeal its adoption of the Code. As the County itself states, "[A municipality enforcing the Code] may not repeal its ordinance adopting the Code." (Relator's Br. At p. 12) Under this statute, the County must continue to enforce the Code in the areas of its jurisdiction in which it is the appropriate permitting authority and may not repeal its ordinance adopting the Code. There is nothing in the statute to suggest that the Town cannot assume responsibility for enforcement of the Code for areas within the Town's jurisdiction from the County after January 1, 2008, nor has the County cited any authority for that proposition. The plain language of the statute supports the Commissioner's ruling.

B. Minn. Stat. § 326B.133, does not confer concurrent jurisdiction on the County's building official in a town that has adopted the building code and appointed its own building official.

Minn. Stat. § 326B.133 requires that each municipality have a building official. Specifically, it states:

Each municipality shall designate a building official to administer the code. A municipality may designate no more than one building official responsible for code administration defined by each certification category established in rule.

Minn. Stat. § 326B.133, subd. 1.

Counties are contained in the definition of "municipality" pursuant to Minn. Stat. § 326B.103, subd. 3. Accordingly, the County correctly asserts that it is required to have a building official. However, it does not follow that the County's building official must have concurrent jurisdiction with the Town's building official. Although the statute does require each municipality to designate a building official, it goes on to state that no more than one building official may be responsible for building code administration within the municipality.

The plain meaning of the first two sentences of Minn. Stat. § 326B.133, subd. 1, quoted above, could be read as completely irreconcilable, since the first sentence requires every county, city, and town to have a building official, and the second sentence mandates that every county, city, and town have only one building official in charge of administering the Code. Indeed, if the County's view is accepted, every city and town in the state that adopts the

Code would run afoul of Minn. Stat. § 326B.133, subd. 1, since all cities and town adopting the Code would the apparently have two building officials (one belonging to the local government and one from the county).

Minn. Stat. § 645.26, subd. 2, provides some guidance on this point. It states, "When, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail." By this rule of construction, the second sentence of Minn. Stat. §326B.133, subd. 1, must be given its plain meaning, namely that there can be only one building official responsible for administering the Code within the Town. In order to harmonize the first sentence with this reading, it must be construed to mean that, while the County is required to have its own building official, that building official is not responsible for code enforcement in cities and towns that have their own building inspectors. Such a scenario is far from unworkable, and in fact it is what the County already does with the cities within its jurisdiction.² As Commissioner correctly determined, the Town is statutorily empowered to adopt the Code and become the sole permitting authority within its jurisdiction. Such a decision correctly interprets the plain language of Minn. Stats. Ch. 326B and gives effect to all provisions therein.

² The County puts great emphasis on the fact that no county has been ordered to cease and desist enforcement of the Code within a municipality that has newly adopted the Code. (Rel.'s Br. At 27-28.) Although the County cites this as evidence of DOLI's lack of power to "divest" the County of Code enforcement authority, this lack of precedent is more correctly interpreted as a longstanding interpretation by counties across the state that their authority to enforce the Code in a city or town ends if and when that municipality adopts the Code and appoints its own building official.

C. The County's argument that counties have priority over towns in all areas relating to official controls is misplaced.

The County argues that the official controls of towns are subject to county regulations, and that "statutory policy grants the County priority of the Township in official controls." (Rel.'s Br. at 35.) While the County is correct that a town may not enforce shoreland management controls without the consent and authorization of its county, pursuant to Minn. R. 6120.3900, subp. 1, it does not follow that this particular, narrow statutory preference for counties over towns equates to a statutory scheme that prohibits towns from adoption and administering the Code without county acquiescence.

The County relies on Minn. Stat. § 394.33, which requires that town planning and zoning controls be at least as restrictive as those enacted by the county in which that town is located. From this, in conjunction with Minn. R. 6120.3900, the County argues that there is a general legislative preference for regulations to be enforced by counties, rather than towns.

As an initial matter, the County's reliance on Minn. Stat. § 394.33 is misplaced, since there is clearly no danger of the "Town's" Code being less restrictive than the "County's" Code, since all municipalities adopt the same Code. Accordingly, the County's reliance on Berggren v. Town of Duluth for the proposition that a preference for counties achieves the legislative interest of uniformity within county boundaries is irrelevant. 304 N.W.2d 24 (Minn. 1981)

Since all municipalities enforce the same Code, there can be no concern for lack of uniformity.

Furthremore, analyzing the Town's power to adopt and enforce the Code with reference to planning and zoning powers is improper and irrelevant, since the Town's statutory authority to adopt the Code is wholly independent from its statutory authority to adopt land use controls. The County cites West Circle Properties LLC v. Hall for the proposition that the County should take priority over the Town in the area of Code enforcement. 634 N.W.2d 238 (Minn.App. 2001). Specifically, the County quotes the West Circle Properties Court in saying, "If a County has already imposed certain land use restrictions, the township may not override those restrictions." Id. at 244 (emphasis added).

The County's reliance on West Circle Properties is misplaced. It is clear that the Town is not attempting to "override" any County ordinance by adopting the Code. The Code is the same for all municipalities, so there can be no concern of conflicting or less restrictive provisions. Furthermore, to the extent that Minn. Stat. § 394.33 is even relevant to the analysis, it does expressly permits the Town to adopt its own "official controls," which are defined in Chapter 394 to include building codes, so long as they are not inconsistent with or less restrictive than the County's ordinances. Thus, the County's argument that it should receive priority consideration from DOLI in determining which municipality has authority to enforce the Code within the Town is misplaced.

II. THE COUNTY'S POWER TO REGULATE WITHIN SHORELAND MANAGEMENT AREAS DOES NOT EXTEND TO THE ISSUANCE OF BUILDING PERMITS.

Minn. R. 6120.3900, subp. 5, gives counties the power to regulate land use controls in shoreland areas. However, the Minnesota Department of Natural Resources has stated that shoreland management does not include the issuance of building permits. (See the August 29, 2008 e-mail from Peder Otterson to Charles Marohn, attached to the Affidavit of Viola Novotne as Exhibit QQ.) Furthermore, the DNR's enabling statute does not give it the power to promulgate rules relating to building permits in shoreland areas. For these reasons, the Commissioner correctly ruled that the Town's building permitting authority extends into shoreland areas.

A. Minn. R. 6120.3900 Does Not Apply to Building Permits.

The County argues that its power over shoreland regulations extends to the issuance of building permits. (Rel.'s Br. At 30-42) However, the County misinterprets the breadth of Minn. R. 6120.3900, subp. 1.

The County asserts exclusive authority over regulation in the Shoreland Management Districts, pursuant to Minn. R. 6120.3900, subp. 5. However, any exclusive authority Wright County may have over shoreland areas does not extend to building permits under Minn. R. 6120.3900, subp. 1. That rule states, "Local governments must provide for the administration and enforcement of their shoreland management controls by establishing permit procedures for building

construction, installation of sewage treatment systems, and grading and filling.” Because the County has refused the Town’s request to assume shoreland management duties, the County is the local government referred to in the rule.

Although the rule contains the language “permit procedures for building construction,” a closer analysis makes it clear that this is a reference to land use controls, such as siting and setback issues. The enabling statute for this rule, Minn. Stat. § 103F.211, supplies a list of standards to be developed by the Minnesota Department of Natural Resources in its rulemaking capacity. That list includes:

- (1) **the area of a lot and length of water frontage suitable for a building site;**
- (2) **the placement of structures in relation to shorelines and roads;**
- (3) the placement and construction of sanitary and waste disposal facilities;
- (4) **designation of types of land uses;**
- (5) changes in bottom contours of adjacent public waters;
- (6) preservation of natural shorelands through the restriction of land uses;
- (7) variances from the minimum standards and criteria; and
- (8) for areas outside of a municipality only, a model ordinance.

Minn. Stat. § 103F.211, subd. 1 (emphasis added). This list makes it clear that the legislature intended shoreland area management to include land use controls, but not to extend to building permits.

Furthermore, Minn. R. 6120.3900’s requirement that the County establish “permit procedures for building construction” is not tantamount to requiring that the County issue those permits. The County would have this Court believe that the Code is inseparable from land use controls, and that it is not possible for the Town’s building official to administer the Code without also having to enforce the

County's shoreland regulations. The Town has already evidenced its intent to make sure that all permit applications comply with the County's shoreland regulations by forwarding applications within shoreland management districts to the County for review. The County has proffered no explanation as to why this is not a workable solution other than the inconvenience of forcing landowners to work with two different municipalities to obtain a permit. This is an ironic concern, given the fact that the County appears to also argue that it has concurrent jurisdiction to enforce the Code within the Town, thereby requiring landowners throughout the Town (and not just in shoreland management districts) to work with both the Town and the County for the purposes of obtaining a building permit.

It is also important to note that the statute refers to the "placement **and construction** of sanitary and waste disposal facilities," but with reference to building structures refers only to "placement." Minn. Stat. § 103F.211, subd. 1(2) and (3) (emphasis added). Certainly if the legislature had intended for shoreland management controls to include the construction of buildings (and thereby apply to buildings), it would have drafted the statute so that it stated "placement and construction of structures" rather than just "placement of structures." This is a clear example of the rule *expressio unius est exclusio alterius*; the legislature included only "placement" of structures, and thusly excludes construction of structures. As it stands, "placement of structures" implicates land use controls such as setback and lot size requirements.

The Town has received a statement from the Minnesota Department of Natural Resources that it does not construe its Rule, Minn. R. 6120.3900, to include building permits within the County's exclusive authority in the shoreland areas. (See Exhibit QQ to the Affidavit of Viola Novotne.) This is certainly a reasonable interpretation of the statute. While the location of homes and other structures with respect to bodies of water does have an environmental impact, it is difficult to discern what effect building code issues would have on the protection of shoreland areas. The DNR is charged with rulemaking relating to the "placement of structures," not the construction of structures, so the DNR's interpretation of its own rule is consistent with its statutory mandate. The statute unambiguously excludes building permits from the arena of shoreland management controls, and even in the event that this Court finds the enabling statute ambiguous, deference should be given to the agency's interpretation, which is that building permits are excluded.

B. Minn. R. 6120.3900 Cannot Apply to Building Permits Because the DNR's Enabling Authority Does Not Give It the Power to Regulate Building Permits.

Regardless of the DNR's interpretation of its own rule, Minn. R. 6120.3900 cannot apply to building permits. According to DNR rules and the enabling statute for those rules, the County appears to have exclusive control for land use controls within the shoreland. The rules do not state that exclusivity extends to

building permits, nor would the enabling legislation permit the rules to so state. Although Minn. R. 6120.3900, subp. 1, includes “permit procedures for building construction” in the list of shoreland management duties, the authorizing statute makes clear that the permits to which the rule refers are land use permits, not building permits. Minn. Stat. § 103F.211, the authorizing statute for the rule on which the County relies, lists land use considerations like placement, bulk, and density regulations, among those items to be included in shoreland management plans. Nowhere does the statute mention building permits. The rule does not, and indeed cannot under Minn. Stat. § 013F.211, give the County exclusive control over building permits within the shoreland. The DNR’s interpretation of its own rule, namely that it does not give building permitting authority to the County in shoreland areas, is consistent with the authority granted by the enabling statute.

CONCLUSION

For the reasons set forth above, Corinna Township, by and through its Board of Supervisors, respectfully requests that this Court affirm the Commissioner of the Department of Labor and Industry’s Findings of Fact, Conclusions of Law, and Order dated September 21, 2009.

MURNANE BRANDT



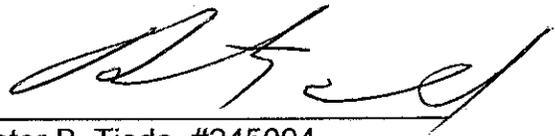
Dated: November 25, 2009

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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Respondents The Sierra Club and St. Croix River Association certify that this Brief complies with the requirements of Minn. R. Civ. P. § 132.01 in that it is printed in proportionately spaced typeface utilizing Microsoft Word and contains 3,963 words and 419lines, excluding Table of Contents and Table of Authorities.

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