

No. A09-1773

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STATE OF MINNESOTA

IN COURT OF APPEALS

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In the Matter of the Administrative Order Issued to Wright County

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RESPONDENT MINNESOTA DEPARTMENT  
OF LABOR AND INDUSTRY'S BRIEF

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RATWIK, ROSZAK &  
MALONEY, P.A.  
Scott T. Anderson (#0227638)  
300 U.S. Trust Building  
730 Second Avenue South  
Minneapolis, MN 55402  
(612) 339-0060  
*Attorneys for Relator Wright County*

MURNANE BRANDT  
Peter B. Tiede, (#0245094)  
Cally E. Swanson (#0388980)  
30 East Seventh Street, Suite 3200  
St. Paul, MN 55101  
(651) 227-9411  
*Attorneys for Intervenor/Respondent  
Corinna Township*

LORI SWANSON  
Attorney General  
State of Minnesota

Christopher M. Kaisershot (#0268665)  
Assistant Attorney General  
445 Minnesota Street, Suite 1200  
St. Paul, Minnesota 55101-2130  
(651) 757-1264  
*Attorneys for Respondent Minnesota  
Department of Labor and Industry*

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## LEGAL ISSUE

*Whether the Commissioner of the Department of Labor and Industry properly ordered Wright County to cease and desist from administering the State Building Code, including the issuance of building permits, in Corinna Township?*

The Commissioner adopted the Administrative Law Judge's recommendation and affirmed the Administrative Order issued to Wright County which required it to cease and desist from administering the State Building Code ("Code"), including the issuance of building permits, in Corinna Township ("Corinna"). This is because Corinna had lawfully adopted the Code by ordinance and designated a building official to administer and enforce the Code within the township.

Most apposite statutes: Minn. Stat. §§ 326B.082, 326B.101, 326B.121, and 326B.133 (2008).

Most apposite cases: *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001); *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988); *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997), *rev. denied* (Minn. 1997).

## STATEMENT OF THE CASE

On October 14, 2008, pursuant to Minn. Stat. § 326B.082, subd. 7 (2008), the Department of Labor and Industry (“Department”) issued an Administrative Order that required Wright County (“Relator”) to cease and desist from administering the Minnesota State Building Code (“Code”), including the issuance of building permits, in Corinna Township (“Corinna”). This is because Corinna had adopted the Code by ordinance and designated its own building official to enforce and administer the Code. The Department recognized Corinna’s certified building official, and notified Relator that Corinna had authority to enforce the Code within the township.

But Relator refused to recognize Corinna’s ability to enforce the Code within certain areas of the township and, indeed, notified the citizenry that the county would not recognize any building permits issued by Corinna in the shoreland areas.<sup>1</sup> Relator drew its line in the sand whereby it conceded that Corinna may administer the Code in all parts of the township located *outside* the shoreland areas, while insisting that it retained authority to administer the Code *within* the shoreland areas. This is notwithstanding that numerous other cities and townships located with Wright County enforce the Code,

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<sup>1</sup> See Minn. Rule 6120.2500, subp. 15 (2007) (“‘Shoreland’ means land located within the following distances from public water: 1,000 feet from the ordinary high water level of a lake, pond, or flowage; and 300 feet from a river or stream, or the landward extent of a flood plain designated by ordinance on a river or stream, whichever is greater. The limits of shorelands may be reduced whenever the waters involved are bounded by topographic divides which extend landward from the waters for lesser distances and when approved by the commissioner [of the Department of Natural Resources]”).

including inside their own shoreland areas. At bottom, neither the Code nor its enabling legislation support or otherwise authorize Relator's novel jurisdictional theories.

Following cross-motions for summary disposition, the Administrative Law Judge rejected Relator's jurisdictional arguments in their entirety and recommended that the Commissioner affirm the Administrative Order. Thereafter, the Commissioner similarly rejected Relator's arguments and affirmed the Administrative Order.

## STATEMENT OF FACTS

### I. FRAMEWORK OF THE REGULATORY PROCESS.

#### A. The State Building Code.

The Code,<sup>2</sup> which is administered by the Commissioner the Department of Labor and Industry ("Commissioner"), is the basic and uniform standard of care in Minnesota:

The State Building Code governs the construction, reconstruction, alteration, and repair of buildings and other structures to which the code is applicable. *The commissioner shall administer and amend a state code of building construction* which will provide basic and uniform performance standards, establish reasonable safeguards for health, safety, welfare, comfort, and security of the residents of this state and provide for the use of modern methods, devices, materials, and techniques which will in part tend to lower construction costs. The construction of buildings should be permitted at the least possible cost consistent with recognized standards of health and safety.

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<sup>2</sup> The specific Code requirements were promulgated at Minn. Rules Ch. 1300, 1301, 1302, 1303, 1306, 1325, 1350, 1360 (2007). The Code also incorporates by reference other recognized standards, documents and codes, such as the 2006 International Building Code, at Minn. Rules Ch. 1305, 1307, 1309, 1311, 1315, 1335, 1341, 1346, 1361, 1370, and 4715 (2007). Finally, the Code also includes the Minnesota Energy Code. See Minn. Stat. § 326B.115 (2008), and Minn. Rules Ch. 7672, 7674, 7676, and 7678 (2007). The Code is available on the Internet at [http://www.doli.state.mn.us/pdf/bc\\_2007msbc.pdf](http://www.doli.state.mn.us/pdf/bc_2007msbc.pdf).

Minn. Stat. § 326B.101 (2008) (emphasis added). The Code “is the standard that applies statewide for the construction, reconstruction, alteration, and repair of buildings and other structures of the type governed by the [C]ode.” Minn. Stat. § 326B.121 (2008). “To achieve uniform and consistent application of the [Code], the [C]ommissioner has final interpretative authority applicable to all codes adopted as part of the [Code] . . . .” Minn. Stat. § 326B.127, subd. 5 (2008).

When it was first established in 1971, the Code was mandatory for all local units of government having or adopting a building code on or after July 1, 1972.<sup>3</sup> The Code superseded and replaced existing building codes on the date it was enacted. In 1977, the law was expanded to make the Code apply statewide effective January 1, 1978. The law was then amended in the late-seventies to allow counties *outside* the seven county metropolitan area to hold referendums on whether to rescind the Code. In 1981, municipalities with a population of 2,500 or less were also allowed to hold similar referendums. Stephen P. Hernick Affidavit (“Hernick Aff.”), ¶ 2. Thus, since at least 1978, the Code has been mandatory inside the metropolitan area.<sup>4</sup>

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<sup>3</sup> See, e.g., *Minnetonka v. Mark Z. Jones Assoc., Inc.*, 306 Minn. 217, 236 N.W.2d 163 (Minn. 1975) (local construction ordinances in conflict with the Code are preempted).

<sup>4</sup> See also Minn. Stat. § 473.121, subd. 2 (2008) (“‘Metropolitan area’ . . . means the area over which the Metropolitan Council has jurisdiction, including only the counties of Anoka; Carver; Dakota excluding the city of Northfield; Hennepin excluding the cities of Hanover and Rockford; Ramsey; Scott excluding the city of New Prague; and Washington.”).

Municipalities have been allowed to adopt the Code by ordinance at anytime since 1972.<sup>5</sup> *Id.* at ¶ 2 and Ex. 1, p. 7 (“History of the State Building Code”). In many parts of Minnesota, cities and towns were the first to adopt the Code. *Id.* at ¶ 3. Cities and towns within the metropolitan area have continued to adopt the Code to the point that, for instance, in Washington County there is no longer Code administration done at the county level because all the cities and towns in Washington County have adopted and are enforcing the Code. *Id.* Similarly, the Code is not enforced by either Hennepin County or Ramsey County because all of their respective cities and towns have adopted and are enforcing the Code. *Id.*

The Legislature did not prohibit a city or town from adopting and enforcing the Code even if that municipality rested within either a metropolitan area county or a non-metropolitan area county that had adopted the Code. *See, e.g.,* Hernick Aff., ¶ 12; Minn. Stat. ch. 326B (2008). Because the plain language of statute has always authorized cities and towns to adopt and enforce the Code, State regulators have consistently interpreted the Code’s enabling legislation to allow cities and towns to adopt and enforce the Code in jurisdictions in which the county has also adopted the Code. Hernick Aff., ¶ 6. In such cases, the Department recognizes the designation of the city’s or town’s appointed

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<sup>5</sup> For purposes of the Code, “municipality” includes “a city, county, or town, the University of Minnesota, or the state for public buildings and state licensed facilities.” Minn. Stat. § 326B.103, subd. 9 (2008); *see also* Minn. Stat. § 16.84, subd. 3 (1971) (definition of “municipality” when the Code was first adopted meant “any city, village, borough, county, town acting through its town board . . .”).

certified building official for Code enforcement purposes within the limits of the city or town. *Id.* at ¶ 12, and Ex. 1, p. 16.<sup>6</sup>

In 2008, the Legislature amended the underlying statute to require that if the municipality had adopted the Code as of January 1, 2008, “that municipality must continue to administer and enforce the State Building Code within its jurisdiction” and, thus, “is prohibited from repealing its ordinance adopting the State Building Code.” Minn. Stat. § 326B.121, subd. 2(a) (2008). As such, once a municipality had adopted the Code, the Legislature precluded that municipality from changing its mind as was allowed under the former statute. These “lock-in” provisions do not apply to any municipality with a population of less than 2,500 that is located outside a metropolitan county. *Id.*; *see also* *Hernick Aff.*, ¶ 10.

As part of the 2008 amendments, the Legislature specified that “[i]f a municipality is not required by [section 326B.121, subd. 2(a)] to administer and enforce the State Building Code, *the municipality may choose to administer and enforce the State Building Code within its jurisdiction by adopting the code by ordinance.*” Minn. Stat. § 326B.121, subd. 2(b) (2008) (emphasis added). Consequently, the Legislature specifically retained the longstanding ability any city or town to administer and enforce the Code if it so chooses.

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<sup>6</sup> The record contains a listing of the cities, counties, and towns enforcing the Code as of January 1, 2008. *Hernick Aff.*, Ex. 2. For example, in Wright County, nineteen other cities and towns enforce the Code and have certified building officials recognized by the Department. *Hernick Aff.*, Ex. 2, p. 21; *see also* *Hernick Aff.*, Ex. 4 (list of the certified building officials recognized by the Department, organized by city, county, and township as of December 1, 2008).

**B. The Commissioner's Other Code-Related Responsibilities.**

In addition to being the regulator appointed by the Legislature to administer and amend the Code,<sup>7</sup> the Commissioner is responsible for certifying and regulating the building officials designated by each municipality. All municipalities that adopt the Code must designate a building official certified by the Department to administer the Code. Minn. Stat. § 326B.133, subs. 1 and 3 (2008). “Building officials shall, in the municipality for which they are designated, be responsible for all aspects of [C]ode administration for which they are certified, including the issuance of all building permits and the inspection of all manufactured home installations.” Minn. Stat. § 326B.133, subd. 4 (2008). Municipalities are required to notify the Commissioner of any vacancy or designation within 15 days of such vacancy or designation. Minn. Stat. § 326B.133, subd. 7 (2008); *see also* Hernick Aff., ¶ 5, and Exs. 3-4.

If the Commissioner determines that a municipality is not properly administering the Code, the Commissioner may have enforcement taken over by the State Building Official or another building official. Minn. Stat. § 326B.121, subd. 3 (2008). “The [C]ommissioner may direct a municipality with a building official to perform services for another municipality . . . .” Minn. Stat. § 326B.133, subd. 4 (2008). The Commissioner also may deny, suspend, limit, place conditions on, or revoke a certificate if the building official violates any provision of sections 326B.101 to 326B.194, or section 326B.082. Minn. Stat. § 326B.133, subd. 5 (2008).

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<sup>7</sup> Minn. Stat. § 326B.101 (2008)

The Legislature also appointed the Commissioner as the final decision-maker in all disputes between persons aggrieved by orders, decisions, or determinations issued by any building official concerning the application or interpretation of the Code. Specifically, an aggrieved person may appeal to the local or State board of appeals as to whether “true intent of the [C]ode or the rules legally adopted thereunder have been incorrectly interpreted, the provisions of this [C]ode do not fully apply, or an equally good or better form of construction is proposed.” Minn. Rule 1300.0230, subp. 3 (2007). “A person aggrieved by the final decision of any municipality as to the application of the code . . . may, within 180 days of the decision, appeal to the Commissioner.” Minn. Stat. § 326B.139 (2008). An appeal to the Commissioner must be heard under the Administrative Procedures Act as a contested case under Minn. Stat. ch. 14 (2008). *Id.*<sup>8</sup>

**C. The Administrative Procedures Act.**

The Commissioner may issue an administrative order to “any person” who violates any provision of chapter 326B, including requiring the person to cease and desist from committing the violation. Minn. Stat. § 326B.082, subd. 7 (2008); *see also* Minn. Stat. § 326B.081, subd. 3 (2008) (defining “applicable law”). The recipient of an administrative order has 30 days to request a hearing, or it becomes a final order of the Commissioner. Minn. Stat. § 326B.082, subd. 8(a) (2008).

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<sup>8</sup> Thus, another avenue that Relator’s dispute with Corinna could have come before the Commissioner would have been if one of the citizens caught between these dueling municipalities filed an appeal to the local or State Board of Appeals. Minn. Stat. § 326B.139 (2008), and Minn. Rule 1300.0230, subp. 3 (2007).

Any hearing requested to contest an administrative order must be conducted by an administrative law judge (“ALJ”) at the Office of Administrative Hearings, an independent State agency. *See* Minn. Stat. §§ 14.48, and 326B.082, subd. 8(c) (2008). The recipient has the opportunity to assert defenses, submit evidence, and cross-examine witnesses. Minn. Stat. § 14.60 (2008). The ALJ and the Commissioner cannot consider any information outside the hearing record. Minn. Stat. § 14.60, subd. 2 (2008).

After the hearing, or on a motion for summary disposition,<sup>9</sup> the ALJ renders findings of fact, conclusions of law, and a recommendation to the Commissioner. Minn. Stat. § 14.61 (2008). “Upon issuance of the [ALJ’s] report, the official record shall be certified to the agency.” Minn. Stat. § 14.58 (2008). The Commissioner must afford the parties the opportunity to file argument and exceptions (which must be limited to the record) before issuing a final decision. Minn. Stat. §§ 14.60-14.62, and 326B.082, subd. 8(e) (2008). Any appeal is made to the Court of Appeals. Minn. Stat. §§ 14.63-14.69, and 326B.082, subd. 8(e) (2008).

## **II. RELATOR REFUSED TO ALLOW CORINNA TO ADMINISTER THE CODE.**

This appeal stems from a dispute between Relator and Corinna that has been brewing since March 2006. *See* Affidavit of Viola Novotne (“Novotne Aff.”), Exs. A-UU. Corinna wished to assume zoning and planning responsibilities, as well as the administration and enforcement of the Code within the township. This appeal, however,

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<sup>9</sup> “Summary disposition is the administrative equivalent to summary judgment.” Beck, *Minnesota Administrative Practice*, § 7.4.1 at 114 (2d ed. 1998); *see also* *Pietsch v. Minn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. Ct. App. 2004); Minn. Rules 1400.5500K and 1400.6600 (2007).

only relates to Corinna's lawful attempts to adopt and enforce the Code within the township. The following is a summary of the undisputed, material facts:

- On November 20, 2007, the Corinna Town Board unanimously approved Resolution 2007-6 adopting Corinna Township Ordinance 2007-3, an ordinance adopting the Code. Novotne Aff., Ex. FF; *see also* Hernick Aff., Ex. 1 (Minnesota State Building Code Adoption Guide).
- On July, 8, 2008, Relator passed a resolution regarding Corinna's efforts to engage in planning and zoning activities; however, Relator did not include within its resolution any specific commentary on Corinna Township Ordinance 2007-3 or Corinna's efforts to adopt and enforce the Code. Novotne Aff., Ex. BB.
- On August 5, 2008, Corinna submitted the Notice of Designation or Vacancy of Certified Building Official to the Department. Novotne Aff., Ex. FF; *see also* Hernick Aff., Ex. 3.
- On August 8, 2008, claiming that it "is a requirement of state shoreland rules," Relator advised that it intended to "continue to exercise its authority to issue land use and building permits, and [subsurface sewage treatment systems] permits within the shoreland management area in Corinna Township, as it always has." Novotne Aff., Ex. HH.
- On August 14, 2008, the Department recognized the appointment of Loren Kohlen as the Certified Building Official for Corinna. Hernick Aff., Ex. 5; Novotne Aff., Ex. KK.
- As the designated building official, Mr. Kohlen is responsible for administering and enforcing the Code in Corinna, including all Code-related plan review, inspections, permitting, record keeping and interpretations. Hernick Aff., ¶ 13.
- On August 14, 2008, Relator notified the Department that "[t]he County has made it clear to Corinna township that they may not administer building permits in shoreland areas because they are an integral part of the shoreland rules, and the township has not been certified by the county board under Minn. R. 6120.3900(4a)(B) to administer shoreland rules." Relator insisted that "Wright County is the municipal code administrator -- at least within the shoreland district." Novotne Aff., Ex. LL.

- On August 18, 2008, the Department notified Relator that Corinna had the ability and authority to administer and enforce the Code within the township. Hernick Aff., Ex. 6; Novotne Aff., Ex. MM.
- On August 26, 2008, Relator notified a citizen that it “will not recognize any permit issued by or for the Township in shoreland management areas.” Novotne Aff., Ex. PP.
- On August 29, 2008, a representative from the Department of Natural Resources (“DNR”) advised Corinna that the Code provisions do not fall under DNR’s authority under Minn. Stat. §§ 103F.201 - 103F.221 (2008) or Minn. Rules 6120.2500 - 6120.3900 (2007). Novotne Aff., Ex. QQ.
- On August 29, 2008, the Commissioner sent a letter to Relator reiterating that “the Department recognizes the authority of Corinna Township to administer the [Code] as it relates [to] buildings and structures regulated by the Code.” Hernick Aff., Ex. 7; Affidavit of Doug Nord (“Nord Aff.”), Ex. A.
- On September 23, 2008, Doug Nord (Supervisor, Regional and Code Administrative Services Section, Construction Codes and Licensing Division, Department of Labor and Industry) spoke with Relator’s certified building official, Craig Schulz, and asked him if he was still issuing building permits in Corinna. Schulz indicated that, notwithstanding the Commissioner’s August 29, 2008 letter, Relator believed it had jurisdiction to issue Code-related building permits in the shoreland district of Corinna, and that Relator intended to continue issuing such Code-related building permits in Corinna. Nord Aff., ¶¶ 4-5.

### **III. THE DEPARTMENT’S REGULATORY PROCEEDING AGAINST RELATOR.**

Pursuant to Minn. Stat. § 326B.082, subd. 7 (2008), on September 26 and October 14, 2008, respectively, the Department issued Administrative Orders to Schulz and Relator requiring them to cease and desist from administering the Code, including issuing building permits, in Corinna. Relator’s Addendum 1-3.<sup>10</sup> Schulz and Relator each

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<sup>10</sup> References to Relator’s Addendum are designated as “R.Add. \_\_\_\_”

requested a hearing to contest their orders, and the cases were ultimately consolidated. Commissioner's Return of Record at Nos. 2-3.<sup>11</sup>

At the prehearing conference, the parties agreed to submit to matter on cross-motions for summary disposition because the case presented a legal question and no facts were in dispute. CRR at No. 3.<sup>12</sup> On February 20, 2009, Corinna filed a motion to intervene, as well as a memorandum opposing Relator's substantive arguments. CRR at No. 9. On April 10, 2009, the ALJ granted Corinna's motion to intervene in the administrative action. Relator's Appendix 155-157.<sup>13</sup> The ALJ allowed Relator the opportunity to file a response to Corinna's substantive pleading, which Relator did on April 20, 2009. A.158-171.

On May 22, 2009, the ALJ issued the Recommended Order on Motion to Dismiss and Cross Motions for Summary Disposition. Relator's Addendum 6-18.<sup>14</sup> After the

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<sup>11</sup> References to the Commissioner's Return of Record are designated as "CRR. \_\_\_."

<sup>12</sup> On December 23, 2008, the Department and Schulz entered into a Consent Order that vacated the order against him without prejudice, conditioned on his agreement that, as Relator's employee, he was subject to the Administrative Order issued against Relator on October 14, 2008. *See* CRR at No. 5 (Consent Order).

<sup>13</sup> References to Relator's Appendix are designated as "A. \_\_\_"

<sup>14</sup> Relator's December 22, 2008 motion to dismiss had been deferred until the ALJ could rule on the cross-motions for summary disposition. R.Add. 4-5. Relator had argued, in part, that the administrative action should be dismissed or stayed because on September 18, 2008, Corinna filed a declaratory action in Wright County District Court seeking to enjoin Relator from Code enforcement within the township. A.7-54. The ALJ correctly denied Relator's motion to dismiss, noting that "the administrative process protects the autonomy of administrative agencies and promotes judicial efficiency." R.Add. 10. Relator has not appealed any issue relating to whether district court or the administrative process is the appropriate venue to adjudicate this dispute.

parties submitted argument and exceptions to the ALJ's report and recommendation,<sup>15</sup> on September 21, 2009, the Commissioner issued Findings of Fact, Conclusions of Law, and Order ("Commissioner's Order"). R.Add. 19-24. The Commissioner denied Relator's motion to dismiss and summary disposition motion, granted the Department's summary disposition motion, and affirmed the Administrative Order in its entirety. R.Add. 22. As part of the Commissioner's Order, the Commissioner issued eleven Findings of Fact and six Conclusions of Law, and adopted and incorporated as his own the ALJ's memorandum subject to four modifications. R.Add. 20-21, 23.

In sum, the Commissioner concluded that "the Department has the authority to recognize the Township's building official and the designation and notice to [Relator] removes the authority of the County building official to perform the identical function within the Township." R.Add. 23-24; *see also* R.Add. 17 (ALJ's Mem.). Because Relator admittedly continued to enforce the Code in a jurisdiction in which it was not authorized, the Commissioner ordered Relator to cease and desist from administering the Code in Corinna. R.Add. 21-22; *see also* R.Add. 1-3; Minn. Stat. §§ 326B.082, subd. 7, and 326B.133, subs. 1 and 4 (2008).<sup>16</sup>

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<sup>15</sup> Relator's argument and exceptions included exhibits which were outside the record and, thus, may not be considered on appeal. *See* CRR at No. 21. Minn. Stat. § 14.60, subd. 2 (2008); *see also* Minn. Rules 1400.7300, subp. 2 and 1400.8100 (2007).

<sup>16</sup> No civil penalties were imposed against Relator as part of the Administrative Order or the Commissioner's Order. R.Add. 1-3, 19-24.

## SCOPE OF REVIEW

Judicial review of the Commissioner's final order is narrow and deferential. Minn. Stat. § 14.69 (2008); *Geo. A. Hormel & Co. v. Asper*, 428 N.W.2d 47, 50 (Minn. 1988). "A presumption of correctness attaches to an agency decision, and deference is shown to an agency's conclusions in the area of its expertise." *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities*, 768 N.W.2d 112, 119 (Minn. 2009). The party seeking judicial review of an action taken by an administrative agency has the burden of proof. *Markwardt v. State, Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977).

An agency's factual findings "must be viewed in the light most favorable to the agency's decision and shall not be reversed if the evidence reasonably sustains them." *Board Order, Kells (BWSR) v. City of Rochester*, 597 N.W.2d 332, 336 (Minn. Ct. App. 1999). "[A]n agency's interpretation of the statutes it administers 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." *Geo. A. Hormel & Co.*, 428 N.W.2d at 50; *see also In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001).

"An agency ruling is arbitrary and capricious if the agency: (a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the

agency's expertise." *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 730 (Minn. Ct. App. 1997) (quotation omitted), *rev. denied* (Minn. 1997).

## ARGUMENT

Relator's multiple assignments of errors may be distilled to its disagreement with the ALJ's and Commissioner's statutory interpretation.<sup>17</sup> Relator contends that it should be allowed to retain Code enforcement within the shoreland areas of Corinna, while conceding that Corinna has such authority outside the shoreland areas.<sup>18</sup> Relator's arguments are flawed. Nothing in the Code or its enabling legislation supports bifurcating Code enforcement within a city or township based on the location of the shoreline. Indeed, shoreland ordinances and Code enforcement are distinct regulatory functions and Relator's proffered statutory interpretation fails as a matter of law.

### **I. CITIES AND TOWNS HAVE AUTHORITY TO ADOPT AND ENFORCE THE CODE EVEN IF THEY SIT WITHIN A COUNTY THAT HAS ADOPTED THE CODE.**

The Legislature could have prohibited any municipality from adopting or enforcing the Code if that municipality rested within county that had adopted the Code. It did not. Instead, since the inception of the Code, the Legislature vested cities and towns with the authority to adopt and enforce the Code. Minn. Stat. § 326B.121, subs. 1

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<sup>17</sup> See Relator's Br. p. 7 ("In essence, this case is all about statutory construction.").

<sup>18</sup> See, e.g., Relator's Br., p 38; Novotne Aff., Exs. HH, LL, and PP; A.28-29; see also Relator's Br., p. 17 ("The County is only arguing that its authority extends to that area where it is the sole land use permitting authority. Nothing more.").

and 2 (2008); *Hernick Aff.*, ¶¶ 2-3, 6.<sup>19</sup> This authority exists even if the city or town rests within a county that enforces the Code:

If a municipality is not required by paragraph (a)<sup>20</sup> to administer and enforce the State Building Code, the municipality *may choose to administer and enforce the State Building Code within its jurisdiction by adopting the code by ordinance.*

Minn. Stat. § 326B.121, subd. 2(b) (2008) (emphasis added). The statute plainly authorizes any city or town which is not otherwise required to adopt and enforce the Code to administer the Code in its jurisdiction once it adopts the Code by ordinance.

Relator does not contend that Corinna was precluded from adopting the Code by ordinance. Rather, Relator argues that even though Corinna lawfully adopted the Code, it is prohibited from *administering and enforcing* the Code within a portion of the township. Relator's argument lacks merit. The plain language of the statute authorizes Corinna to administer and enforce the Code within the township. Minn. Stat. §§ 326B.121, subd. 2(b), and 645.16 (2008).

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<sup>19</sup> The term "municipality" includes "a city, county, or town, the University of Minnesota, or the state for public buildings and state licensed facilities." Minn. Stat. § 326B.103, subd. 9 (2008).

<sup>20</sup> The referenced paragraph "(a)" provides as follows: "(a) 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. This paragraph does not apply to municipalities with a population of less than 2,500 according to the last federal census that are located outside of a metropolitan county, as defined in section 473.121, subdivision 4." Minn. Stat. § 326B.121, subd. 2(a) (2008).

**A. The Commissioner's Statutory Interpretation Is Correct and Entitled To Deference.**

Relator contends that Minn. Stat. § 326B.121, subd. 2(b) (2008) is not controlling because Minn. Stat. § 326B.121, subd 2(a) (2008) provides as follows:

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.

But paragraphs (a) and (b) are readily reconciled because paragraph (b) modifies the language contained in paragraph (a). To hold otherwise would render superfluous the ability of towns and cities to administer and enforce the Code. *See* Minn. Stat. § 645.16 (2008) (must give effect to all provisions); R.Add. 13, 23 (“If the County’s argument were accepted, it would render meaningless the right of a township to seek appointment of its own building official.”).

The Commissioner and the ALJ gave effect to both paragraphs by interpreting them to mean that a municipality that is enforcing the Code, such as Wright County, must continue to enforce the Code *unless and until* a city or town that is not obligated to enforce the Code decides to adopt and enforce the Code for purposes of that jurisdiction. R.Add 13, 23; *see also* Minn. Stat. § 326B.121, subd. 2(a) and (b) (2008). Similarly, the Commissioner and ALJ observed that “[t]he clear meaning of the two [paragraphs] read together is to prohibit a municipality that has adopted the Building Code from reversing its decision, as was allowed under the predecessor versions of the law,” while “allowing a

township the choice of undertaking the responsibility to administer the Building Code.”  
R.Add 13, 23.<sup>21</sup>

The plain language of the statute establishes the Legislature’s intention that smaller local government units, such as cities and towns, have the option to enforce the Code, notwithstanding the prior Code enforcement of the county in which the city or town sits. *See* Minn. Stat. § 645.26 (2008) (laws should be reconciled, if possible, to give effect to all provisions). The Legislature, thus, prioritized cities and towns over counties for purposes of Code enforcement. Minn. Stat. § 326B.121, subd. 2(b) (2008).

This “jurisdictional” issue between counties and cities has existed since the inception of the Code because municipalities have had the ability to adopt the Code by ordinance since 1972. *Hernick Aff.*, ¶ 2. The Department’s longstanding interpretation of the Code’s enabling legislation has consistently recognized the designation of the city’s or town’s building official for Code enforcement within the limits of the city or town, even in counties that administer the Code. *Id.* at ¶ 6; *see also* Minn. Stat.

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<sup>21</sup> Relator’s claim that the Commissioner engaged in “rulemaking” must be rejected because the Commissioner’s and ALJ’s interpretation comport with the plain meaning of statutes that the Commissioner is charged with enforcing. *Cable Comm’s Bd. v. Nor-West Cable Communications Partnership*, 356 N.W.2d 658, 667 (Minn. 1984); *see also* *Geo. A. Hormel & Co.*, 428 N.W.2d at 50; *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (“The agency decision-maker is presumed to have the expertise necessary to decide technical matters with the scope of the agency’s authority and judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing.”) (citation and footnote omitted); Minn. Stat. § 326B.101 (“The commissioner shall administer and amend a state code of building construction . . .”).

§ 645.16(8) (2008) (intention of the legislature may be ascertained by administrative interpretations of the statute).<sup>22</sup> The process of adoption by cities and towns within counties which have adopted occurred in Washington County, and continues to occur in Scott County and Olmsted County. *Hernick Aff.*, ¶ 3. Similarly, even though metropolitan area counties have not been specifically exempted from Code enforcement since it became mandatory in 1978, the Code is not enforced by Hennepin County or Ramsey County because all of their respective cities and towns have adopted and are enforcing the Code. *Id.* There is simply nothing left for Hennepin County, Ramsey County, or Washington County to do.

Ironically, Relator cannot pretend that its conduct comports with its arguments in this case because numerous cities and towns located in Wright County, in fact, are responsible to enforce and administer the Code in their respective jurisdictions, including within shoreland areas:

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<sup>22</sup> Relator's suggestion that the Department should consider criteria other than the plain language of the statute is puzzling in light of the fact that it devoted an entire section of its brief to accusations that the Department has engaged in interpretative rulemaking. *Compare* Relator's Br. at p. 21 (Relator's proposed criteria) *with* Relator's Br. at pp. 22-29 (argument regarding rulemaking); *see also White*, 567 N.W.2d at 730 (agency's rulings are "arbitrary and capricious" if it relies on factors not intended by the Legislature). It would be improper for the Commissioner to rely on Relator's proposed criteria.

- Stockholm Township
- City of Montrose
- City of Rockford
- City of St. Michael
- Middleville Township
- City of South Haven
- City of Monticello
- City of Waverly
- Silver Creek Township
- City of Annandale
- City of Otsego
- City of Maple Lake
- City of Albertville
- City of Buffalo
- City of Clearwater
- City of Cokato
- City of Delano
- Frankfort Township
- City of Howard Lake

Hernick Aff., Ex. Ex. 2 (p.21); A.153.<sup>23</sup> It remains unclear why Relator contends it retains Code enforcement within Corinna when so many other municipalities enforce the Code inside the county. In any event, Relator's arguments lack merit because the Code's enabling legislation does not contain any language prioritizing counties over towns and cities, much less any authority for a county to pick-and-choose in which cities and towns it wishes to enforce the Code.

A reversal by the Court of Appeals would be tantamount to a declaration that (a) townships and cities throughout Minnesota that currently enforce the Code are doing so unlawfully if they sit within a metropolitan area county or a non-metropolitan area county that has adopted the Code, and (b) Hennepin County, Ramsey County, Washington County, Scott County, Olmsted County, and other counties, including *Wright County*, are in violation of Minnesota law for not universally enforcing the Code

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<sup>23</sup> The Department is not aware of any other Code enforcement disputes between Relator and any of the above-listed municipalities, all of which have adopted the Code and designated a building official. See Hernick Aff., Ex. 4 (list of designated building officials).

throughout their respective counties. *See, e.g.,* Hernick Aff., ¶¶ 3-4, and Exs. 1-2; *see also* Minn. Stat. § 645.16(6) (2008) (legislative intent ascertained by considering consequences of a particular interpretation). Anything short of an affirmation of the Commissioner's Order would result in major upheaval in the realm of Code enforcement. A transformation of such significance should only occur through the legislative process and not within the confines of the court system.<sup>24</sup>

The Commissioner's statutory interpretation is consistent with the plain language of the statute, presumed correct, and entitled to deference. *See In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities*, 768 N.W.2d at 119; *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d at 278. The Commissioner's Order should be affirmed.

**B. The Code In Corinna Is Identical To The Code In Wright County.**

The Department's interpretation that only Corinna may enforce the Code in its jurisdiction is also consistent with other conflict resolution mechanisms between counties and their cities and towns. For example, in the realm of planning and zoning issues, the

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<sup>24</sup> Contrary to Relator's claims on appeal, it strains reason to suggest that the Legislature intended for two building officials to exercise concurrent jurisdiction over the same geographic area, such that citizens must pay for Code-related permits and inspections from both the county building official, as well as the building official from the city or town. Indeed, Relator conceded that any such interpretation would waste limited government resources and lead to higher construction costs and more expensive housing, thereby violating the express purposes of the Code. *See* Minn. Stat. § 326B.101 (2008); *see also* A.27 ("The County does not believe double permitting is necessary, nor is it good public policy"); Minn. Stat. § 645.17(1) (2008) ("the legislature does not intend a result that is absurd, impossible or execution, or unreasonable.").

Legislature specifically authorized cities and towns to enact and enforce official controls so long as they were not “inconsistent with or less restrictive” than the county’s standards. Minn. Stat. § 394.33 (2008).

But by definition the Code is designed to provide “basic and uniform performance standards.” Minn. Stat. § 326B.101 (2008). Moreover, municipalities are generally forbidden from modifying the Code. *See* Minn. Stat. § 326B.121, subd. 2(c) (2008) (“A municipality must not by ordinance, or through development agreement, require building code provisions regulating components or systems of any structure that are different from any provision of the State Building Code.”). The law provides that a municipality may only adopt a “more restrictive” ordinance with the approval of the State Building Official and “where geological conditions warrant a more restrictive ordinance.” Minn. Stat. § 326B.121, subd. 2(c) (2008). In this case, however, Relator has not adopted a “more restrictive” ordinance to claim any exception to the general rule and, thus, any claim that the Code is less restrictive in Corinna fails as a matter of law.

Relator cannot argue that Corinna’s version of the Code is “inconsistent with or less restrictive than” its version of the Code because they are identical. *See also* Novotne Aff., Ex. BB, p. 5 (Relator’s resolution stating that it will recognize Corinna’s permitting authority if it is consistent with county standards and located outside shoreland areas). Relator’s arguments fail because the Code is the Code, and the Legislature has expressed

its preference that cities and town have priority over counties if and when, as here, the ordinances are consistent and equally restrictive. Minn. Stat. § 394.33 (2008).<sup>25</sup>

## II. THE CODE IS NOT A SHORELAND REGULATION.

Relator erroneously claims that the Commissioner's Order somehow encroaches on its ability to enforce its shoreland management controls in contravention of DNR rules. Relator's argument is fundamentally flawed because the Code is distinct from shoreland regulations: the Code relates to the *construction* of buildings to which the Code applies, whereas shoreland regulations relate to *zoning and land use controls*. Compare Minn. Stat. § 326B.101 (2008) with Minn. Stat. § 103F.211, subd. 1 (2008); see also R.Add. 16-17, 23.

The Code is not encompassed by, integral to, or incorporated into shoreland regulations. And neither the Commissioner's Order nor the Administrative Order purport to prohibit Relator from enforcing its land use regulations in shoreland areas. Rather, the Administrative Order was narrowly tailored to prohibit Relator from administering the Code, including the issuance of building permits, in Corinna Township.

Contrary to Respondent's suggestions, chapter 326B does not contain any authority to split Code enforcement within a township or city based on shoreland and

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<sup>25</sup> If Relator ever has any concerns about whether Corinna is properly administering the Code, it may file a complaint with the Commissioner. If the Commissioner determines that Relator's complaint is meritorious, the Commissioner "may have administration and enforcement" undertaken by another municipality, including Relator's building official. Minn. Stat. § 326B.121, subd. 3 (2008); see also Minn. Stat. § 326B.133, subd. 4 (2008) (Commissioner may direct a municipality's building official to perform services for another municipality).

non-shoreland areas. This is, in part, because the Code is not a shoreland regulation and uniformly applies throughout the jurisdiction that has adopted the Code. *Compare* Minn. Stat. § 326B.101 (2008) *with* Minn. Stat. § 103F.211, subd. 1 (2008).

Relator's suggestion that allowing Corinna to enforce the Code somehow divests its ability to enforce its shoreland regulations similarly lacks merit. This is because, by rule, Corinna's building official is prohibited from issuing any building permit until the building official "is satisfied that the proposed work conforms to the requirements of the code and applicable laws and ordinances." Minn. Rule 1300.0120, subp. 8 (2007). Thus, no Code-related building permit may be issued by Corinna's building official until the applicant demonstrates compliance with Relator's shoreland regulations.

Finally, and in any event, Minn. Rule 6120.3900, subp. 4a (2007) does not and cannot divest a municipality's ability to adopt and enforce the Code under Minn. Stat. § 326B.121, subd. 2 (2008). The DNR does not have the authority to promulgate a rule to override any statute, nor does the DNR suggest that its rule overrides the Code. *Novotne Aff.*, Ex. QQ. Likewise, the Code does not prohibit municipalities from adopting planning and zoning ordinances, such as shoreland regulations. Minn. Stat. § 326B.121, subd. 2(g) (2008) ("*Nothing in this subdivision prohibits a municipality from adopting ordinances relating to zoning, subdivision, or planning unless the ordinance conflicts with a provision of the State Building Code that regulates components or systems of any structure.*") (emphasis added). In short, Code enforcement and planning and zoning are two distinct regulatory schemes designed to regulate distinct functions.

Relator's attempt to stymie Corinna's ability to enforce the Code pursuant to an unrelated regulatory scheme lacks merit.

### CONCLUSION

In this case, effective August 14, 2008, the Department recognized the designation of Loren Kohlen as the Certified Building Official for Corinna Township. As the designated building official, Mr. Kohlen is responsible for administering and enforcing the Code in Corinna Township, including all Code-related plan review, inspections, permitting, record keeping and interpretations. In light of Mr. Kohlen's appointment, and consistent with the State's long-standing interpretation and administration of the Code-related enabling legislation, Relator lacks jurisdiction to enforce or administer the Code in Corinna Township.

The Legislature vested the Commissioner with the ultimate responsibility to administer the Code in Minnesota. Even if the statute were ambiguous (which it is not), as the official designated by the Legislature to administer the Code, the Commissioner's longstanding interpretation is entitled to deference. Relator continued to improperly administer the Code in a jurisdiction in which it is not recognized in violation of Minnesota law and, moreover, declined the Department's request to refrain from Code enforcement in Corinna. As such, the Commissioner properly ordered Relator to cease and desist from administering the Code in Corinna.

The Commissioner's Order should be affirmed.

Dated: November 23, 2009

Respectfully submitted,

LORI SWANSON  
Attorney General  
State of Minnesota



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CHRISTOPHER M. KAISERSHOT  
Assistant Attorney General  
Atty. Reg. No. 0268665

445 Minnesota Street, Suite 1200  
St. Paul, Minnesota 55101-2127  
(651) 757-1264 (Voice)  
(651) 296-1410 (TTY)

ATTORNEYS FOR DEPARTMENT OF  
LABOR AND INDUSTRY

AG. #2526196-v1