

NO. A09-1773

4

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 BRIEF, ADDENDUM AND APPENDIX

Scott T. Anderson (#0227638)
 Matthew J. Bialick (#0389088)
 RATWIK, ROSZAK & MALONEY, P.A.
 730 Second Avenue South, Suite 300
 Minneapolis, MN 55402
 (612) 339-0060

Attorneys for Relator

Kathryn Berger (#0174580)
 Acting Chief General Counsel
 MN Department of Labor & Industry
 443 Lafayette Road North
 St. Paul, MN 55155
 (651) 284-5019

Attorney for Respondent DOLI

Christopher M. Kaisershot (#0268665)
 Assistant Attorney General
 Minnesota Attorney General's Office
 1400 Bremer Tower
 445 Minnesota Street
 St. Paul, MN 55101-2131
 (651) 282-9992

Attorney for Respondent DOLI

Peter B. Tiede (#0245094)
 MURNANE BRANDT
 30 East Seventh Street, Suite 3200
 St. Paul, MN 55101
 (651) 227-9411

Attorney for Respondent Corinna Township

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF LEGAL ISSUES1

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS5

ARGUMENT.....6

 I. THE CEASE AND DESIST ORDER EXCEEDED THE
 COMMISSIONER’S STATUTORY AUTHORITY6

 A. Wright County has not violated any provision of the MSBC.....9

 B DOLI’s cease and desist order exceeds its authority because it is in
 contravention of the plain language of the Building Code 11

 II. DOLI IMPROPERLY ENGAGED IN INTERPRETATIVE
 RULEMAKING.....18

 III. DOLI’S DESIGNATION OF THE TOWNSHIP BUILDING OFFICIAL
 TO ADMINISTER THE BUILDING CODE WAS ARBITRARY AND 2

 A. DOLI’s interpretation is inconsistent with the statute’s plain
 meaning.....24

 B. DOLI’s interpretation is not longstanding.....26

 IV. ANY DETERMINATION OF PREEMPTION OF PERMITTING
 AUTHORITY UNDER CHAPTER 326B HAS TO TAKE INTO
 ACCOUNT RELATED STATUTES AND RULES GOVERNING
 OFFICIAL CONTROLS30

CONCLUSION.....42

TABLE OF AUTHORITIES

Cases

<u>Altenburg v. Board of Supervisors of Pleasant Mound Township</u> , 615 N.W.2d 874 (Minn. App. 2005).....	16
<u>Amarol v. St. Cloud Hospital</u> , 598 N.W.2d 379 (Minn. 1999).....	1, 7
<u>American Tower, L.P. v. City of Grant</u> , 636 N.W.2d 309 (Minn. 201)	7
<u>Anderson v. City of Minneapolis</u> , 178 N.W.2d 215 (Minn. 1970).....	33
<u>Berggren v. Town of Duluth</u> , 304 N.W.2d 24 (Minn. 1981).....	2, 35
<u>Blue Earth County Welfare Dept. v. Cabellero</u> , 225 N.W.2d 373 (Minn. 1974)	9
<u>Cable Communications Board v. Nor-West Communications Partnership</u> , 356 N.W.2d 658 (Minn. 1984).....	passim
<u>Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater</u> , 731 N.W.2d 502, 512 (Minn. 2007).....	22
<u>County of Hennepin v. County of Houston</u> , 39 N.W.2d 858 (Minn. 1949)	8
<u>Ed Hermann & Sons v. Russell</u> , 535 N.W.2d 803 (Minn. 1995).....	1, 8
<u>Frank's Nursery Sales, Inc. v. City of Roseville</u> , 295 N.W.2d 604 (Minn. 1980).	1, 8
<u>Gayle v. Commissioner of Taxation</u> , 37 N.W.2d 711 (Minn. 1949)	1, 8, 9
<u>Guerrero v. Wagner</u> , 246 N.W.2d 838 (Minn. 1976)	7
<u>Hagen v. Martin County</u> , 91 N.W.2d 657 (Minn. 1958)	9
<u>Hutchinson Technology, Inc. v. Commissioner of Revenue</u> , 698 N.W.2d 1 (Minn. 2005)	9
<u>In re Contested Case of Ebenezer Society</u> , 433 N.W.2d 436 (Minn. App. 1988)	29
<u>In re Matter of Minnesota Independent Equal Acts as Corporations Application for Certificate of Public Convenience and Necessity</u> , 477 N.W.2d 516 (Minn. App. 1991).....	9

<u>In the Matter of the Excess Surplus Status of BlueCross and BlueShield of Minnesota</u> , 624 N.W.2d 264 (Minn. 2001)	20
<u>Kirkwald Const. Co. v. M.G.A. Const. Co.</u> , 513 N.W.2d 241 (Minn. 1994)	8
<u>Latola v. Turk</u> , 247 N.W.2d 598 (Minn. 1976).....	13
<u>Markwardt v. State Water Resource Board</u> , 254 N.W.2d 371 (Minn. 1977)	2, 18, 20
<u>Matter of Northern States Power Co. Application for Certificate of Site Compatibility for the Goodhue County Independent Spent Nuclear Fuel Storage Facility</u> , 563 N.W.2d 302 (Minn. App. 1997)	7
<u>McLeod County Board of Commissioners as Drainage Authority v. State Department of Natural Resources</u> , 549 N.W.2d 630 (Minn. App. 1996)	25
<u>Minch v. Buffalo-Red River Watershed District</u> , 723 N.W.2d 483 (Minn. App. 2006).....	14
<u>Minneapolis St. Ry. Co. v. City of Minneapolis</u> , 40 N.W.2d 353 (Minn. 1950).....	15, 25
<u>Minnesota-Dakotas Retail Hardware Ass'n v. State</u> , 279 N.W.2d 360 (Minn. 1979)	7
<u>Resident v. Noot</u> , 305 N.W.2d 311, 312 (Minn. 1981).....	22, 23
<u>Roinestad v. McCarthy</u> , 82 N.W.2d 697 (Minn. 1957).....	8
<u>Scinocca v. St. Louis County Board of Commissioners</u> , 281 N.W.2d 659 (Minn. 1979)	34
<u>St. Otto's Home v. Minnesota Dept. of Human Servs.</u> , 437 N.W.2d 35, 39 (Minn. 1989)	23
<u>State by Spannus v. Lloyd A. Fry Roofing Co.</u> , 246 N.W.2d 696, 700 N. 6 (Minn. 1976)	14
<u>State v. McKown</u> , 475 N.W.2d 63 (Minn. 1991).....	9
<u>Swenson v. State, Dept. of Pub. Welfare</u> , 329 N.W.2d 320, 324 (Minn. 1983)	25
<u>Village of Blaine v. ISD No. 12</u> , 138 N.W.2d 32 (Minn. 1965).....	25

<u>West Circle Properties, LLC v. Hall</u> , 634 N.W.2d 238 (Minn. App. 2001).....	passim
<u>White Bear Lake Care Center, Inc. v. Minnesota Department of Public Welfare</u> , 319 N.W.2d 7 (Minn. 1982)	2, 22, 24, 25
<u>White Bear Rod and Gun Club v. City of Hugo</u> , 388 N.W.2d 739 (Minn. 1986).....	31

Statutes

Minn. Stat. §§ 14.01	22
Minn. Stat. § 14.02	19
Minn. Stat. § 14.131	22
Minn. Stat. § 14.14	22
Minn. Stat. § 14.22	22
Minn. Stat. § 14.25	22
Minn. Stat. §§ 14.50	19
Minn. Stat. § 14.69	2, 6, 19
Minn. Stat. § 103F.205	36
Minn. Stat. § 326B.01	1
Minn. Stat. § 326B.082	1, 9, 10
Minn. Stat. § 326B.103	1, 12, 24
Minn. Stat. § 326B.121	passim
Minn. Stat. § 326B.133	passim
Minn. Stat. § 366.16	33
Minn. Stat. § 394.22	3, 32, 33
Minn. Stat § 394.25	3, 34

Minn. Stat. § 394.33	3, 34, 35, 36
Minn. Stat. § 394.29	33
Minn. Stat. § 394.37	34
Minn. Stat. § 462.352	3, 33, 34
Minn. Stat. § 471.59	12
Minn. Stat. § 645.17	8
Minn. Stat. § 645.44	13
Minn. Stat. § 84.974	36

Other Authorities

State Building Code	passim
Town Zoning Act	34

Rules

Minn. R. § 120.3900	5, 36, 38
Minn. R. § 1300.0070	13
Minn. R. § 1300.0110	10, 12
Minn. R. § 8420.0200	40
Minn. Rule § 1300.0100	24
Minn. R. § 1300.0120	33
Minn. R. § 6120.2500	36

STATEMENT OF LEGAL ISSUES

1. Whether the Department's decision established that Wright County violated a provision of the State Building Code?

The Department determined that continuing to enforce the Building Code within the shore land area of Corinna Township when Corinna Township had a designated building official violated the Building Code.

Most Apposite Cases:

Amarol v. St. Cloud Hospital, 598 N.W.2d 379 (Minn. 1999).

Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980).

Most Apposite Statutes:

Minn. Stat. §§ 326B.133, 326B.082, and 326B.01.

2. Whether the statutes governing the Department's administration of the State Building Code allow it to divest one municipal entity of its authority to administer and enforce the Code in favor of another municipal entity?

The Department determined that the plain and ordinary meaning of Minn. Stat. Ch. 326B allows them to determine that one municipality can be chosen over another municipality when both administer the State Building Code.

Most Apposite Cases:

Gayle v. Commissioner of Taxation, 37 N.W.2d 711 (Minn. 1949).

Amarol v. St. Cloud Hospital, 598 N.W.2d 379 (Minn. 1999).

Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980).

Ed Hermann & Sons v. Russell, 535 N.W.2d 803 (Minn. 1995).

Most Apposite Statutes:

Minn. Stat. §§ 326B.103; 326B.121 and 326B.133.

3. Whether the Agency's determination in this case constitutes improper interpretive rule-making?

The Department determined that the Agency's interpretation was not improper interpretive rule-making because its interpretation corresponded with the plain and

ordinary meaning of the statute and conformed to the Agency's long-standing interpretation.

Most Apposite Cases:

Cable Communications Board v. Nor-West Communications Partnership, 356 N.W.2d 658 (Minn. 1984).

White Bear Lake Care Center, Inc. v. Minnesota Department of Public Welfare, 319 N.W.2d 7 (Minn. 1982).

Most Apposite Statutes:

Minn. Stat. §§ 326B.133 and 326B.121.

4. Whether DOLI's designation of the Township building official to administer the Building Code was arbitrary and capricious?

The Department, by issuing the ruling it did, determined that it did not make its decision in an arbitrary and capricious manner.

Most Apposite Cases:

Markwardt v. State Water Resource Board, 254 N.W.2d 371 (Minn. 1977).

Cable Communications Board v. Nor-West Cable Communications Partnership, 356 N.W.2d 658 (Minn. 1984).

Most Apposite Statute:

Minn. Stat. § 14.69.

5. Whether DOLI's decision properly interpreted the State Building Code without reference to other related statutory provisions within Minnesota law?

The Department determined that its interpretation of the State Building Code had no reference or impact upon any other related Minnesota Statutes.

Most Apposite Cases:

West Circle Properties, LLC v. Hall, 634 N.W.2d 238 (Minn. App. 2001).

Berggren v. Town of Duluth, 304 N.W.2d 24 (Minn. 1981).

Most Apposite Statutes:

Minn. Stat. §§ 394.22; 462.352; 394.33; and 394.25.

STATEMENT OF THE CASE

On October 14, 2008, the Minnesota Department of Labor and Industry (DOLI) issued a cease and desist order to Wright County. That order required Wright County to cease and desist from administering the State Building Code, including the issuance of building permits, in Corinna Township, a township located wholly within Wright County. The order concluded that violations of law had occurred under Minn. Stat. § 326B.082, subd. 7, and that Wright County was administering the MSBC in a jurisdiction in which it was not designated to do so, in violation of Minn. Stat. § 326B.133, subs. 1 and 4.

On October 21, 2008, Wright County made a request for hearing on the cease and desist order. Wright County requested the hearing because it concluded that the conclusions of law in the cease and desist order exceeded DOLI's authority, constituted a clear error of law, and ignored the plain and ordinary meaning of statutes. The request for a hearing also raised the issue that the order constituted impermissible rule-making by DOLI, was against public policy, and should be withdrawn because there was a pending court case between Corinna Township and Wright County raising the same issue.

Pursuant to the provisions of the Minnesota Administrative Procedures Act (APA), the matter was assigned to an Administrative Law Judge (ALJ) for hearing. Wright County made a motion to dismiss or, in the alternative, to stay proceedings in the administrative matter pending the outcome of the court case between Corinna Township and Wright County. On January 14, 2009, that motion was denied.

On February 20, 2009, Corinna Township made a motion to intervene in the administrative proceeding. On April 10, 2009, that motion was granted by the ALJ. As there were no material facts in dispute, DOLI and Wright County made motions for summary disposition, and the matter was decided on those motions. The motion record closed on April 21, 2009, upon the receipt of Wright County's memorandum replying to Corinna Township's motion to intervene and motion supporting DOLI's position on summary disposition.

On May 21, 2009, the ALJ issued her recommended order on motion to dismiss and cross-motions for summary judgment. The recommendation was that the County's motion to dismiss be denied; that DOLI's motion for summary judgment be granted, and the County's motion for summary disposition be denied; and that the administrative cease and desist order dated October 14, 2008, be affirmed. That recommendation was made in a 13-page memorandum.

By letter dated May 27, 2009, DOLI's chief general counsel informed all parties of their right to file comments with the Commissioner regarding the ALJ's recommended order up to and through the date of June 16, 2009. DOLI and Wright County filed comments by letter dated June 16, 2009. The record closed as of 4:30 p.m. on that date. In an order dated September 1, 2009, DOLI issued its findings of fact, conclusions of law and order. The Commissioner adopted, with four word changes the memorandum and conclusions of the ALJ in their entirety. On September 28, 2009, Wright County applied for and had issued a writ of certiorari in this proceeding.

STATEMENT OF THE FACTS

Wright County has been the administrative authority enforcing the State Building Code within its jurisdiction for at least the last 29 years. This includes the area within Corinna Township. Wright County has a building official certified by the Commissioner pursuant to Minn. Stat. § 326B.133, subd. 3, Craig Schulz. In the summer of 2008, Corinna Township, located within Wright County, adopted for the first time the Minnesota State Building Code (“MSBC”). On August 11, 2008, Corinna Township designated Loren Kohlen as the building official for Corinna Township.

Corinna Township has no valid Zoning Ordinance in the Shoreland Area of the Township. Pursuant to State Shoreland Regulations, adopted by the Department of Natural Resources, a township may not enforce official controls in a shoreland unless and until the township zoning has been certified by the County under Minn. Rules §6120.3900. By resolution dated July 8, 2008, Wright County determined it would not approve Corinna Township’s shoreland regulations. See Exhibit 1 to Motion to Dismiss or Stay. Corinna Township, the Minnesota Department of Labor and Industry, and the Minnesota Pollution Control Agency have all been notified that only Wright County has valid zoning governing the shoreland area of Corinna Township, and that therefore only Wright County has valid official controls governing shoreland areas. See Exhibits 2 and 3 to Wright County’s Motion to Dismiss or Stay. Corinna Township has not disputed this. See Novotne Affidavit at Exhibits OO and RR.

In August 2008, the Wright County Attorney advised both the MPCA and DOLI that Wright County’s position was that since Wright County was the only entity

authorized to administer land use permits in the Shoreland Area of Corinna Township, that only it was properly authorized to administer the MSBC therein. On August 18, 2008, DOLI sent a letter to Wright County Attorney Thomas N. Kelly stating that only the building official designated by Corinna Township may administer the MSBC in Corinna Township. On August 29, 2008, DOLI sent a letter to Tom Salkowski, the Wright County Planning and Zoning Administrator, again stating that only the building official designated by Corinna Township may administer the MSBC in Corinna Township.

After DOLI staff was informed that the County continued to issue building permits in Corinna Township, on September 23, 2008, DOLI spoke with Wright County's designated building inspector, Craig Schulz, and instructed him to stop administering the MSBC in Corinna Township. DOLI was told that Wright County intended to continue to administer the MSBC in the shoreland area of Corinna Township. A cease and desist order was thereafter issued against Mr. Schulz, and then the following month, the cease and desist order against Wright County that is in issue in this case.

ARGUMENT

I. THE CEASE AND DESIST ORDER EXCEEDED THE COMMISSIONER'S STATUTORY AUTHORITY.

The APA clearly states that a reviewing court may overturn agency action when such action exceeds statutory authority. Minn. Stat. § 14.69(b). Courts have routinely held that by exceeding statutory authority, an administrative agency has committed reversible error. See, e.g., Minnesota-Dakotas Retail Hardware Ass'n v. State, 279

N.W.2d 360 (Minn. 1979); Matter of Northern States Power Co. Application for Certificate of Site Compatibility for the Goodhue County Independent Spent Nuclear Fuel Storage Facility, 563 N.W.2d 302 (Minn. App. 1997). Under Minnesota law an administrative agency exceeds its statutory authority when it takes action that is inconsistent with the agency's enabling legislation. See, e.g., Guerrero v. Wagner, 246 N.W.2d 838 (Minn. 1976).

The Cease and Desist Order in the case is inconsistent with the statutes governing the Building Code, building officials, and the authority of DOLI. It impermissibly strips Wright County of its authority and designates one Building Code official, the Township's, over another, the County's. Such power is not granted to DOLI by Minnesota law. The Commissioner is in essence saying the Township preempts the County. That position contravenes established law in the land use area and interferes with the administration, implementation, and enforcement of statutes and rules beyond the purview of DOLI.

In essence, this case is all about statutory construction. Therefore it is appropriate to visit the rules of statutory construction before setting forth the statutory framework under which this Court must evaluate the Cease and Desist Order. Interpreting a statute is a question of law. American Tower, L.P. v. City of Grant, 636 N.W.2d 309 (Minn. 201). When interpreting a statute, the first thing a court does is to determine whether the statute's language is ambiguous. See Amarol v. St. Cloud Hospital, 598 N.W.2d 379 (Minn. 1999). A statute is ambiguous if the language therein is subject to more than one reasonable interpretation. Where a statute is ambiguous, we then examine legislative

intent. Words and phrases within a statute are to be construed according to their plain and ordinary meaning. See, e.g., Franks Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980); Minn. Stat. § 645.08. Thus an important conclusion and rule in interpreting statutes is that where the language of a statute is plain and unambiguous, statutory construction is neither necessary nor permitted, and courts must apply the statute's plain meaning. See Ed Herman & Sons v. Russell, 535 N.W.2d 803 (Minn. 1995); Minn. Stat. § 645.16.

When examining DOLI's position in this case, it also important to keep in mind that every law is to be construed, if possible, to give effect to all of its provisions. Kirkwald Const. Co. v. M.G.A. Const. Co., 513 N.W.2d 241 (Minn. 1994); Minn. Stat. § 645.17. No clause, word or sentence is deemed superfluous, void or insignificant. In this regard the court is to be guided by the presumption that the legislative body passing the act intended to have a meaning ascribed to all of its terms. See Gale v. Commissioner of Taxation, 37 N.W.2d 711 (Minn. 1949); Minn. Stat. § 645.17.

There are other rules that need to be kept in mind when looking at the statutes in this case. First, the Legislature does not intend a result that is unreasonable. Second, the Legislature intends the entire statute to be effective and certain. Finally, statutes are presumed to be passed with deliberation and with full knowledge of all existing statutes on the same subject. In this regard, that means that in interpreting statutes it is the duty of a court to give effect to all related statutory provisions if possible. See County of Hennepin v. County of Houston, 39 N.W.2d 858 (Minn. 1949); Roinestad v. McCarthy, 82 N.W.2d 697 (Minn. 1957). Related to this is the rule that statutes that govern similar

subject matter should be read *in pari materia*. See Hagen v. Martin County, 91 N.W.2d 657 (Minn. 1958) (concluding that the various chapters of Minnesota water law should be construed together). Statutes *in pari materia* are those relating to the same person or thing or having a common purpose. See State v. McKown, 475 N.W.2d 63 (Minn. 1991). All of these rules were ignored by DOLI in issuing its final decision in this case.

Case law is clear that administrative interpretations do not control Court interpretation of a statute when the language of the statute is clear. See, Hutchinson Technology, Inc. v. Commissioner of Revenue, 698 N.W.2d 1 (Minn. 2005); In re Matter of Minnesota Independent Equal Acts as Corporations Application for Certificate of Public Convenience and Necessity, 477 N.W.2d 516 (Minn. App. 1991). Administrative positions on the meaning of laws are entitled to no deference when they are wrong. Even if you accept DOLI's claim to a long-standing "jurisdictional interpretation," an examination, evaluation and analysis of the statutory basis to strip a political subdivision of its powers has to be made. See, e.g., Blue Earth County Welfare Dept. v. Cabellero, 225 N.W.2d 373 (Minn. 1974).

A. Wright County has not violated any provision of the MSBC.

Minn. Stat. § 326B.082 requires the Commissioner to state the facts of an alleged violation and specify the applicable law violated. The Cease and Desist Order indicates simply that Wright County is administering the MSBC in violation of Minn. Stat. § 326B.133, subds. 1 and 4. Minn. Stat. § 326B.133, subd. 1 states that "each municipality shall designate a building official to administer the code." It allows, but does not mandate municipalities to combine together to in designating building official to

administer the Code. Minn. Stat. § 326B.133, subd. 4, simply sets forth the duties of a Building Official, which are to administer all aspects of the code, including the issuance of building permits.

The DOLI decision points to no evidence that Wright County has misapplied the Building Code as it applies to construction methods, devices, materials, or techniques, to use the phrase the ALJ used. It does not point to any code provision being improperly applied, interpreted, administered, or enforced. The County's violation in this case is apparently solely that it is trying to administer and enforce the Code in the face of DOLI selection of the Township. Yet this issue does not fall within the purview of Minn. Stat. §§ 326B.082, subd. 7 or 326B.01, subd. 7 as it does not involve "improper enforcement" by any "person or entity."

The duties and powers of a building official are said to be "all aspects of Code administration" including the issuance of building permits. Minn. Stat. § 326B.133, subd. 4. Minn. R. § 1300.0110 sets forth enforcement and administration duties in more detail, and thus gives meaning to what it would mean to improperly administer the code. A building official is to receive applications, review construction documents, and issue permits. The building official is to inspect premises and enforce compliance with the Code. The building official is to issue all necessary notices and orders. They are to carry proper identification. And they are to maintain records. The Commissioner has not alleged, proven, or attempted to prove that Mr. Schulz, the designated building official for Wright County, has in any way, shape or form violated any of these duties and

powers. Absent that, the Commissioner has failed to show that any violation of the MSBC occurred.

All the Commissioner points to is that Wright County has continued to administer the Code in the shoreland areas of Corinna Township. But the plain language of the statutory provisions cited above show that is not a violation of law “Each municipality” means just what it says. Each and every municipality is to designate a building official. Subdivision 4 merely says “Building officials shall, in the municipality for which they are designated, be responsible for all aspects of Code administration” What that means is the County building official is responsible for all aspects of Code administration. By issuing building permits in Corinna Township Wright County is not violating the Code. Wright County is in fact performing its duties as designated by statute. The Commissioner cannot take those duties away, or claim, without any statutory support, that such conduct is a violation of law. In short, DOLI failed to prove a violation of any law occurred, and the department’s decision needs to be overturned for this reason.

B. DOLI’s cease and desist order exceeds its authority because it is in contravention of the plain language of the Building Code.

The Department in this case has determined that the plain language of the pertinent statutes compels the conclusion that DOLI can divest a county of its authority to administer the MSBC. Interestingly, the opinion issued by DOLI has to resort to what it terms “expansive recitation of the Department’s statutory duties” to find this authority. Thus, while purporting to be based on a clear and plain meaning of the statutes, nowhere

can DOLI point to a provision granting it the authority to determine priority among and between municipalities.

The State Building Code defines a municipality to mean, in pertinent part, a “city, county or town.” See Minn. Stat. § 326B.103, subd. 9. A designate is defined to be the formal designation by municipalities’ administrative authority of a certified building official accepting responsibility for code administration. Id., subd. 6. Minn. Stat. § 326B. 121, subd. 1b states that 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. It may not repeal its ordinance adopting the Code. That statute specifically allows a municipality to enter into a contract with another municipality under Minn. Stat. § 471.59 (a joint powers agreement) to enforce the State Building Code.

Minn. Stat. § 326B.133, subd. 1, states that “each municipality shall designate a building official to administer the Code.” It allows, but does not mandate, municipalities to combine together in the designation of a building official for purposes of administering the provisions of the Code within their communities. The duties of a building official are also set forth in Minn. Stat. § 326B.133, subd. 4. That provision states that Building officials shall, in the municipality for which they are designated, be responsible for all aspects of Code administration for which they are certified, including the issuance of all building permits See also Minn. R. § 1300.0110.

These statutory provisions are plain and unambiguous. As a municipality having adopted the Building Code and having a Building Code in effect as of January 2008, and

having a designated building official, Wright County “must enforce the State Building Code within its jurisdiction.” Must is a mandatory term. The rules adopted under the State Building Code say as much. See Minn. R. § 1300.0070, subp. 13. This is consistent with Minnesota law, set forth in Minn. Stat. § 645.44, which indicates that the terms “must” and “shall” are mandatory. There are no exceptions. One cannot interpret this language out of the statute, no matter how much DOLI would like to. DOLI can say, as the ALJ’s order does, that this language is merely meant to prohibit repeal of an ordinance that adopted the MSBC. But the next sentence in Minn. Stat. § 326B.121, subd. 1b, says that a municipality may not repeal a ordinance adopting the MSBC. Doli’s decision makes the sentence mandating code enforcement superfluous, in violation of the rules of statutory construction.

Looking at the plain and ordinary meaning of the words used by the Legislature, the designated building official for Wright County has a duty to enforce the Code within the County. A township is merely a political subdivision of a county. See Latola v. Turk, 247 N.W.2d 598 (Minn. 1976). It is part of the jurisdiction of the county. Certainly, in defining a municipality to include a city, town and county, the Legislature has to be presumed to know that cities and towns sit within counties. There is simply concurrent jurisdiction, a doctrine well recognized in the law. See, e.g., West Circle Properties, LLC v. Hall, 634 N.W.2d 238 (Minn. App. 2001). That does not mean a township divests the county of its authority to enforce the Code simply because it, too, adopts the Code. The Legislature could have easily stated in law that which DOLI is

contending in this case, i.e., that once a township has adopted a building code, the county no longer has any jurisdiction within the township with respect to the building code.

Yet the Legislature did not make any such a statement in Chapter 326B. The Legislature made provisions for and dealt with the situation of a city administering and enforcing the code within portions of a township. See Minn. Stat. § 326B.121, subd. 1b(d). The Legislature addressed the situation of municipalities entering into agreements to administer the Code. Id. at subd. 1b(f). The Legislature provided for the situation where a municipality has no qualified employees to carry out inspection and enforcement. However, nowhere in these statutes does the Legislature give the Commissioner of DOLI the power to effectively remove administration and enforcement of the Code from a county that has adopted and is enforcing the State Building Code merely on the basis that a township has a designated building official. The legislature dealt with numerous other situations. It could have provided for that. It simply chose not to. See, e.g., State by Spannus v. Lloyd A. Fry Roofing Co., 246 N.W.2d 696, 700 N. 6 (Minn. 1976) (stating that courts cannot construe statutes to confer upon agencies implicit authority when to do so would contravene the apparent intent of the Legislature). If the Legislature had intended to grant the Commissioner the authority to declare a county's ability and duty to administer and enforce a building code within a township void once a township adopted the building code, it would have done so explicitly. See Minch v. Buffalo-Red River Watershed District, 723 N.W.2d 483 (Minn. App. 2006).

Significantly, the Legislature did provide for a situation where the Commissioner could take away the powers of a municipality to enforce the Building Code. But not

under the circumstances DOLI concludes it is empowered to do so. Minn. Stat. § 326B.121, subd. 2, only grants the Commissioner the power to divest an entity of its administration and enforcement powers upon a finding that a municipality that has adopted the State Building Code is “not properly administering and enforcing the Code.” This provision is as significant for what it doesn’t say as what it does say. The Legislature clearly envisioned circumstances under which the Commissioner could take away a municipality’s power to enforce the Code. It did not specify that one of the situations in which the Commissioner could do so was when a township was enforcing the Code. Instead, the Legislature determined that the only circumstances under which administration and enforcement could be withdrawn was if the municipality is “not properly” doing its job. As already noted, there was no allegation or proof that that has occurred in this case. Absent that, the Commissioner is without power to take away Wright County’s authority to administer and enforce the Building Code within Corinna Township.

Municipalities are self-governing in matters of police and municipal jurisdiction. A municipal corporation may not surrender or curtail its police power in the absence of express legislative authorization. See Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 353 (Minn. 1950). Just as a municipality may not surrender its powers in the absence of express legislative authorization, DOLI may not take away a municipality’s powers without such express authorization.

Furthermore, although DOLI seeks to ignore established law, Minnesota courts have already stated that as between a county and a township, preemption applies only

insofar as the state has directed. See Altenburg v. Board of Supervisors of Pleasant Mound Township, 615 N.W.2d 874 (Minn. App. 2005). How then can the DOLI position be justified? Moreover, utilizing the last in time, least experienced and smallest governmental unit is an irrational and unreasonable method of doing so.

The decision of the Commissioner states that the statutes are clear that the department has the authority to designate the Township's building official, and that the designation and notice to the County removes the authority of the County building official to perform the identical function within the township. There is a statement that the Building Code is a statewide standard that is meant to establish reasonable safeguards for "health, safety, welfare, comfort and security of the residents of this state." There is a citation to the fact that the Department has the authority to interpret the Building Code to assure that it is applied uniformly and consistently. The interesting thing about this analysis and recitation of powers is that nowhere in the final decision issued by DOLI is there a statute cited that explicitly states such authority exists. In reality all the ALJ in this case did was accept the interpretation of the Department without question, and without analysis. The ALJ's memorandum opinion, adopted by the Commissioner, states that the Department has interpreted the statute to mean that a county administers and enforces the Building Code unless a building official has been designated for a city or town therein. Once a city or town has a certified building official, "the county loses its authority to administer the Building Code at that time." And yet, DOLI is left without a citation to one specific reference anywhere within the entire framework of Chapter 326B that supports this position.

DOLI states that in order to give meaning to a township's authority to administer and enforce the Building Code the County's authority is to be withdrawn. But DOLI fails to explain why the opposite should not be the case. Why shouldn't the sole land use permitting authority, the County, also issue building permits. How do we give meaning to the County's authority to administer and enforce the Building Code under the department's determination of municipal priority? Or is it only the Township that DOLI is concerned with? The County is only arguing that its authority extends to that area where it is the sole land use permitting authority. Nothing more.

DOLI's decision states that it would be absurd to read the statute as providing townships the right to designate a building official who has no actual authority when the County is fulfilling that role. And that it would cause confusion and duplication of effort for any person seeking a permit. The opposite is also true. It would be absurd to read the statute as providing counties the right to designate a building official, who would have no authority to administer the Code or issue permits if a township, twenty-nine (29) years later, determines that it will fulfill that role. It would also cause confusion and duplication for any person seeking a permit. They would need permits from the sole variance and conditional use permitting authority, the County, and also the Township. The reason that DOLI's rationale for its position is so easily turned on its head is that all the reasons for arbitrarily choosing a township over a county apply equally to support the County's right to administer the Building Code. Looked at this way, it is evident that no analysis or rationale basis has been used by DOLI in concluding it must divest a County of its duties under the MSBC. The decision to do so represents the agency's will rather

than it's judgment, the epitome of arbitrariness. See Markwardt v. State Water Resources Board, 254 N.W. 2d 371 (Minn. 1977).

II. DOLI'S DESIGNATION OF THE TOWNSHIP BUILDING OFFICIAL TO ADMINISTER THE BUILDING CODE WAS ARBITRARY AND CAPRICIOUS.

Agency decisions are reversed when they reflect an error of law, the findings are arbitrary and capricious, or the findings are unsupported by substantial evidence. Cable Communications Bd., 356 N.W.2d at 668; Minn. Stat. § 14.69. An agency decision is arbitrary and capricious if it represents the agency's will rather than its judgment.

Markwardt v. State, Water Res. Bd., 254 N.W.2d 371, 374 (Minn. 1977). If an administrative agency engaged in reasoned decision-making, the court will affirm, even though it may have reached a different conclusion had it been the fact finder. Cable Communications Bd., 356 N.W.2d at 669. The court will intervene, however, where there is a combination of danger signals which suggest that the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and reflective findings. Id.

It is quite clear that DOLI's decision is merely their will rather than a reasoned judgment. That DOLI is engaging in interpretive rule-making without the benefit of fact gathering and public input. The arbitrary and capricious nature of their decision is clear from an even cursory examination of the issues.

What DOLI has done in this case is choose between competing jurisdictions, as to which should be enforcing the Code. Given that there is no express language in the statutes giving DOLI authority to pick townships over counties no matter the

administrative merits, and given there is no misconduct by the County that has been pointed to in the manner in which it is enforcing or administrating the Code, there must be some standard of selection that is based upon administrative merit. Without that, there is no reasonableness. The final decision of the agency in this case just ignores this issue. The decision itself is framed in the past tense. In other words, DOLI has already made the selection, that being, that the Township should prevail over the County in terms of who gets to administer the Building Code. The only thing left for the ALJ and the Commissioner to do in this case was to rationalize some authority, within the statute, to justify the choice that was already made.

But this is improper. This was a contested case hearing involving two jurisdictions that both have building permit authority under the statute. It involves the legal rights, duties or privileges of specific parties. See Minn. Stat. § 14.02, subd. 3. There must be some adequate documentation of statutory authority to act in this case. See Minn. Stat. §§ 14.50 and 14.69. The decision itself must be supported by substantial evidence. But in this case, there is no standard enunciated, factors looked at, or criteria that would demonstrate a reasoned decision-making process in choosing the Township over the County. The closest the decision in this case comes to any kind of analysis is the apparent acceptance by the Commissioner of the Département's own position of administrative inconvenience and confusion, or the assertion that it has always been done that way. But that certainly does not justify something that appears to be totally arbitrary and capricious in a jurisdictional selection in this case.

Case law tells us that courts will exercise judicial restraint regarding agency decision which are considered “presumptively correct” when the Agency’s “expertise” and “special knowledge” is involved within their field of “technical training.” But there is no evidence in this case that any of the scant rationale provided the decision has any rational connection to any issue of building techniques or the Agency’s special training. See In the Matter of the Excess Surplus Status of BlueCross and BlueShield of Minnesota, 624 N.W.2d 264 (Minn. 2001). A position that says we will always pick townships over larger counties to administer the Code has nothing to do with technical building competence. It has everything to do with an exercise of the Agency’s will rather than its judgment based upon reasoned analysis and facts.

Assuming, for purposes of argument, that DOLI did have the authority to choose between municipalities when faced with competing jurisdictions, its designation of the Township building official as the proper authority was arbitrary and capricious. See Markwardt, 254 N.W.2d at 374-75. DOLI did not base its decision on any standards, factors, or criteria that would demonstrate a reasoned decision-making process. DOLI did not analyze factors to determine the merit of one municipality’s authority over the other. DOLI pointed to no evidence to suggest the County had misapplied the Code. The County was merely trying to administer and enforce the Code as required by statute. See Minn. Stat. § 326B.133, subd. 4. Nor did DOLI point to any evidence to suggest that the Township would be better at enforcing and administering the Code. Instead, DOLI selected the Township over the County merely because, according to both the ALJ and DOLI, that was how it was done.

If DOLI is to be given authority to select between municipalities' building officials, standards should be in place to ensure a reasoned decision-making process. A building official's duties and responsibilities should be incorporated into this standard. Building officials are charged with administering and enforcing the Code, including the issuance of all building permits and the inspection of all manufactured home installations. Minn. Stat. § 326B.133, subd. 4. In choosing between the building officials of two municipalities, DOLI should at least be required to consider the following criteria: the relative experience of each jurisdiction, including experience in the disputed area; the relative training and expertise of each municipality; what building official currently has authority in the disputed area; who exercises land use authority in the disputed area; the resources available to each building official; and whether the building officials have a history of poor performance or have previously been divested of their authority for failing to properly administer and enforce the Code. None of these pertinent factors were used as a basis of a decision in this case.

An analysis of such factors and a finding as to each would ensure whatever decision DOLI made was based on articulated standards and reflective findings. See Cable Communications Bd. v Nor-West Cable Communications Partnership, 356 N.W.2d 658 (Minn.1984). As DOLI arbitrarily selected the Township over the County without reference to any standards, factors, criteria, or analysis as to why the Township was the correct municipality, this decision should be reversed.

III. DOLI IMPROPERLY ENGAGED IN INTERPRETATIVE RULEMAKING

Interpretative rules are promulgated to make specific the law enforced or administered by an agency. Cable Communications Bd. v. Nor-West Cable Communications Partnership, 356 N.W.2d 658 (Minn. 1984). Courts have held that all agency rules, whether legislative, interpretative, or procedural, are subject to the rulemaking requirements of the APA. Id.; White Bear Lake Care Ctr., Inc. v. Minnesota Dep't of Pub. Welfare, 319 N.W.2d (Minn. 1982); See Minn. Stat. § 326B.02. In general, under the APA, proposed rules need to be published, a statement of need and reasonableness needs to be published, public comments are entitled to be made, and hearings may be required. See Minn. Stat. §§ 14.01, 14.14, 14.22, 14.131, and 14.25. Failure to promulgate rules in accordance with the APA results in invalidity of the rule. White Bear Lake Care Ctr., Inc., 319 N.W.2d at 9.

Generally, if an agency's interpretation of a rule or statute corresponds with its plain meaning, or if the rule or statute is ambiguous and the agency interpretation is a longstanding one, the agency is not deemed to have promulgated a new rule. Resident v. Noot, 305 N.W.2d 311, 312 (Minn. 1981); White Bear Lake Care Ctr., Inc., 319 N.W.2d at 8; Cable Communications Bd., 356 N.W.2d at 667; Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance for the Discharge of Treated Wastewater, 731 N.W.2d 502, 512 (Minn. 2007). If, however, an agency adopts policy inconsistent with the plain meaning of the statute or policy that is not longstanding, without following the APA procedures, the court invalidates the agency action. See White Bear Lake Care Ctr., Inc., 319 N.W.2d at 8; Cable Communications Bd., 356 N.W.2d at 667-68. When a decision

turns on the meaning of words in a statute or regulation, a legal question is presented, which the court reviews de novo. St. Otto's Home v. Minnesota Dept. of Human Servs., 437 N.W.2d 35, 39 (Minn. 1989). Courts will not defer to agencies when the language subject to construction is clear and capable of understanding. Resident v. Noot, 305 N.W.2d at 312. DOLI's interpretation of a statute that is clear and capable of understanding is neither consistent with the plain meaning of Minn. Stat. § 326B.133, nor longstanding, and should be invalidated.

Here, DOLI admittedly rendered an interpretation of Minn. Stat. § 326B.133. In its Order, DOLI stated it has interpreted the statute to mean that a county administers and enforces the Code unless a building official has been designated by a city or town therein. See the Findings of Fact, Conclusions of Law, and Order dated September 1, 2009, p. 5. According to DOLI, once a city or township has a designated building official, that person handles building permits within the township, and the county loses its authority to administer the Code. Id. As a result, DOLI concluded that Wright County violated Minn. Stat. § 326B.133 by administering the Code in a jurisdiction in which it was not designated to do so, Corinna Township. Order, p. 3. DOLI, however, did not promulgate this interpretative rule according to the rulemaking procedures of the APA. The ALJ acknowledged the APA's requirements but asserted that because DOLI's interpretation of Minn. Stat. § 326B.133 coincided with the plain meaning of the statute, it was unnecessary for DOLI to implement that interpretation through rulemaking. That analysis and conclusion is simply wrong.

A. DOLI'S interpretation is inconsistent with the statute's plain meaning.

Wright County will not reiterate all of the arguments already made herein. But as already argued, Minn. Stat. § 326B.133, subd. 1 states that each municipality shall designate a building official to administer the Code. "Municipality" is defined by the Code as a city, county, or town. Minn. Stat. § 326B.103, subd. 9. And Minn. Stat. §§ 326B.121, subd. 1b prohibits a municipality from stopping its administration of the Code if it was doing so as of January 1, 2008.

No mention is made of a municipality being divested of the authority to administer the Code when another municipality designates a building official. The legislature could have provided for this, as evidenced by its permitting the commissioner to divest a municipality of its authority when the municipality fails to properly administer and enforce the Code. Minn. Stat. § 326B.121, subd. 3; See White Bear Lake Care Ctr., Inc., 319 N.W.2d at 9. That provision, given meaning through rules already promulgated through proper rulemaking procedures, has already been addressed herein. See Minn. Rule § 1300.0100, defining enforcement and administration duties. A county overseeing the implementation of the Code within its boundaries as required by statute does not constitute a failure to properly administer and enforce the Code. Thus, while the ALJ's opinion cites § 326B.121, in reality it provides no support whatsoever for a preemption determination by DOLI.

DOLI simply has no authority to choose one municipality over another in determining who enforces the Building Code. That is for those municipalities involved to decide, and to work out. Case law indicates that as a political subdivision of the State, a

County has a greater duty than others to see that legislative policy is carried out. Indeed, Counties are to play a leadership role in carrying out legislative policy. See, e.g., McLeod County Board of Commissioners as Drainage Authority v. State Department of Natural Resources, 549 N.W.2d 630 (Minn. App. 1996). Case law also makes clear that each municipality is self-governing in matters of police and municipal jurisdiction. See, Village of Blaine v. ISD No. 12, 138 N.W.2d 32 (Minn. 1965). A municipal corporation may not surrender or curtail its police power in the absence of express legislative authorization. See, Minneapolis St. Ry. Co. v. City of Minneapolis, 40 N.W.2d 355 (Minn. 1950). If a municipal corporation may not surrender or curtail its power in the absence of express legislative authorization, certainly DOLI cannot take away that power without express legislative authorization.

DOLI must either follow the regulations it is charged with implementing or amend them in accordance with statutory rulemaking procedures. See Swenson v. State, Dept. of Pub. Welfare, 329 N.W.2d 320, 324 (Minn. 1983). As DOLI adopted an interpretation that is inconsistent with the statute's plain meaning without following the APA procedures, DOLI's decision to strip the County building official of its authority to administer the Code within the Township, by ordering it to cease and desist, should be invalidated. See White Bear Lake Care Ctr., Inc., 319 N.W.2d at 8; Cable Communications Bd., 356 N.W.2d at 667-68.

B. DOLI's interpretation is not long-standing.

DOLI concluded that it had a long-standing interpretation of Chapter 326B so as to justify its decision to divest Wright County of its Building Code powers in the shoreland area of Corinna Township. We need to be clear here about the age and long-standing nature of the interpretation adopted by the commissioner in this case.

DOLI asserted that what it calls 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 suggested, or at least implied, and the ALJ seemed to accept, that the divesting of counties of jurisdiction has occurred many times. DOLI listed Washington County, Ramsey County, and Hennepin County where this apparently had occurred. But the facts submitted by DOLI did not support that conclusion, and in fact prove that the first time this "divestiture doctrine" or "preemption doctrine" has been implemented is in Wright County, by way of this proceeding.

DOLI submitted, and the final decision of the department pointed to, the Affidavit of Mr. Hernick in support of the long-standing interpretations. But that evidence proves the opposite. Mr. Hernick indicates in paragraph 3 of his affidavit 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 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 of DOLI's attorney in the proceeding below 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). Thus this proves nothing.

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 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 were submitted in this matter, 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 conclusion, but other exhibits and lack of exhibits submitted undermine the long-standing interpretation claim. DOLI submitted not one paper, position statement, memorandum, or shred of evidence showing that the interpretation they adopted this last fall in regards to Wright County 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. That point will be delved into in more detail further on in this Brief. 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.

There simply is no "long-standing" interpretation that exists to support DOLI's interpretation of statutes 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. Assertions by DOLI's counsel, unsupported by any fact or law, that they can. And a conclusion by the Commissioner that in fact that is the case.

DOLI's interpretation does not correspond with the plain meaning of the statutes or rules. It is therefore an "interpretive rule" which must be adopted by proper rule making procedures. DOLI is taking a position that does not at all correspond with any rule that has been promulgated in Chapter 1300 of Minnesota Rules. There is no preemption or priority set forth in the statutes or rules between the different entities mandated to enforce the Code. . See, e.g., In re Contested Case of Ebenezer Society, 433 N.W.2d 436 (Minn. App. 1988).. This Court should rule that the Commissioner has engaged in improper rule making and reverse the decision in this case.

V. ANY DETERMINATION OF PREEMPTION OF PERMITTING AUTHORITY UNDER CHAPTER 326B HAS TO TAKE INTO ACCOUNT RELATED STATUTES AND RULES GOVERNING OFFICIAL CONTROLS

The DOLI decision makes a number of conclusions as to why a building permit has nothing to do with zoning, shoreland regulations, or the administration of local governmental units' land use authority. DOLI's conclusion seems to be that it will be an administrative inconvenience for them if both the County and the Township administer building permits within certain portions of the Township. The DOLI decision concludes that it is doing nothing to prohibit municipalities from adopting planning and zoning ordinances, such as shoreland regulations. That it is doing nothing to divest Wright County of its ability to enforce its shoreland regulations" But DOLI ignores statutory provisions important in interpreting Chapter 326B, and placing it in the scheme of things in Minnesota law. Stated otherwise, it violates the rule of *in pari materia*. The Commissioner's interpretation myopically focuses solely on the Building Code, when the Building Code is merely one aspect of a statutory framework within the State of Minnesota that governs the development and use of land in order to protect the public interest and advance the public's health, safety and welfare. One does not have to look very far to see that this is the case. There are other principles that come into play. The first of those is concurrent jurisdiction.

Concurrent jurisdiction is not some unusual, obscure or unique legal doctrine. The Supreme Court has on many occasions indicated that the jurisdiction of two forums may overlap, but the mere fact that that occurs does not mean that either forum excludes the

other. See, e.g., White Bear Rod and Gun Club v. City of Hugo, 388 N.W.2d 739 (Minn. 1986). In West Circle Properties v. Hall, 634 N.W.2d 238 (Minn. App. 2001) this Court addressed concurrent jurisdiction in situations involving counties and townships. The West Circle Court noted that in any situation involving concurrent jurisdiction, it is essential that priority be established by some means. The Court notes that legislature did that in Minn. Stat. § 394.33. It used a chronological approach. The West Circle Court noted that a township may not override the county restrictions, and that construing the statutes to allow that would deprive the County of its power to administer land use controls and produce an absurd result. Id., at pp. 243, 244. DOLI has studiously ignored discussing this law. And it considers that it's statutory scheme cannot allow for two jurisdictions to have concurrent authority. One must exclude the other, even though Minnesota law holds otherwise. It pretends that this case turns only on the four corners of the MSBC, ignoring any other law or legal principle. That is simply wrong.

We can start with the Building Code itself. The Building Code recognizes the interrelationship of the Building Code with other provisions of Minnesota law. Minn. Stat. § 326.121, subd. 1b(g) states as follows:

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.

Id. This provision simply recognizes what other statutes recognize: zoning ordinances, subdivision controls, septic system controls, and building codes are all subparts of a

larger statutory framework that relates to planning and zoning activities that control the development and use of land

Next we can turn to the materials submitted by DOLI in this matter.

Mr. Hernick's Exhibit 1, the Building Code Adoption Guide, indicates that the Building Code official is responsible for coordinating his activities with the local zoning ordinances. See, Exhibit to Hernick Affidavit, Exhibit 2, p. 10. Permits are not to be issued until it has been determined by the Building Official issuing the permit that the work would not violate "any other law or ordinance of the jurisdiction." The Adoption Code has a specific section entitled "Other Regulations" in which it indicates that other codes and regulations impact building projects, "for instance, local Zoning Codes play a big role in the location, design and development of most every project." Id, Hernick Exhibit 1. Thus DOLI materials indicate that building permits and other land use controls are interrelated and impact one another.

We can look to Minnesota law on land use regulations. Counties, cities and townships are granted the power under Minnesota law to enact official controls that control the physical development of the municipality, or any part or detail thereof. Many people refer to these simply as zoning ordinances. But that is too narrow an interpretation, inconsistent with law. The definition of official control in Minn. Stat. § 394.22, the County Planning, Development and Zoning Chapter, states that official controls may include ordinances establishing zoning, subdivision controls, site plan rules, sanitary codes, building codes, housing codes and official maps. City and township authorization to conduct planning and development activities comes from Chapters 366

and 462 of Minnesota Statutes. Minn. Stat. § 462.352, subd. 15, defines official controls exactly the same as that set forth in Minn. Stat. § 394.22.

Thus we have to start from the proposition recognized in the Building Code, and made clear under Chapters 394, 366 and 462 of Minnesota Statutes, that the issuance of a building permit is merely a small part of a larger regulatory framework in which counties, cities, townships and the State regulate and control the use and development of land. The issuance of a building permit impacts the administration and enforcement of land use controls. This is recognized in Minn. Stat. § 366.16, where a Township is specifically authorized to enforce its zoning ordinance by withholding building permits that would be issued under the MSBC. This is also recognized in the Rules promulgated by DOLI, as Minn. Rule § 1300.0120, subp. 8 states that a building official must assure that not only does any proposed work conform to the requirements of the code, but also to all “applicable laws and ordinances.” The common law has recognized this interrelationship between the issuance of building permits and the administration of zoning ordinances for years. Anderson v. City of Minneapolis, 178 N.W.2d 215 (Minn. 1970) is a case in point. The Supreme Court, citing to numerous other cases therein, noted that when issuing a building permit, the official issuing that permit is required to “make a judgment as to whether plans submitted in support of the application for the permit constituted a permissible use of the property in the area involved.” Id., at 217. It is a land use decision involving the interpretation of zoning ordinances.

This interrelationship is also evidenced in other portions of Chapter 394. Minn. Stat. § 394.29 states that in order to carry out the purposes of Chapter 394, a county may

employ a planning director and staff as it deems necessary, which includes but is not limited to “a zoning administrator, sanitary inspector and a building official.” The State Building Code is specifically referred to in Minn. Stat. § 394.25, subd. 8, identifying forms of official controls and noting it to be one of the laws that can be adopted by reference. Nowhere does DOLI address the fact that Minn. Stat. § 394.22, subd. 6, defines official controls to include Building Codes. Minn. Stat. § 462.352, subd. 15, the Town Zoning Act, also defines the Building Code as an official control. Much as DOLI wants to assert that there is no relationship between Building Codes and other land use controls, the law simply states otherwise.

The Commissioner simply glosses over the fact that Building Codes are official controls and states that while Chapter 394 says counties can enact them, nowhere does it say they have to enforce them. The Commissioner, however, ignores Minn. Stat. § 394.37, which requires Counties to enforce such official controls. And put aside for a moment that it is totally inappropriate and without any legal support to reach a conclusion that one municipality administers official controls for another. Indeed, we know from the case of Scinocca v. St. Louis County Board of Commissioners, 281 N.W.2d 659 (Minn. 1979) that that is not the law.

The Commissioner states that the County’s position is inconsistent with the authority granted townships to undertake zoning under Chapter 394, citing all they need to be is at least as restrictive as the Counties. But the Commissioner failed to take even a cursory look at the law in this area. The legislature has established that the County has priority over the Township in the area of official controls. Minn. Stat § 394.33 states that

after the adoption of official controls by a county, no town is allowed to enact official controls inconsistent with or less restrictive than the standards prescribed by the County. This provision has been explicitly held to limit the authority of a Township in the area of official controls. See West Circle Properties LLC v. Hall, 634 N.W. 2d 238 (Minn. App. 2001). In speaking about the issue of concurrent jurisdiction, the West Circle Court stated that:

It is essential that priority be established by some means. Here the legislature used a chronological approach: If a County has already imposed certain land use restrictions, the township may not override those restrictions. Construing these statutes to enable individual townships to override restrictions previously imposed by the County would, in effect, deprive the county of its power to zone and would produce an absurd result.

Id. at 243, 244. As stated in the case of Berggren v. Town of Duluth, 304 N.W.2d 24 (Minn. 1981), Minn. Stat. § 394.33 indicates a legislative intent to make official controls of towns subject to county regulations in the interest of achieving uniformity within county boundaries. Berggren, like the West Circle Properties, LLC case, supra, indicates the statutory policy grants the County priority over the Township in official controls.

So case law interpreting Minn. Stat. § 394.33 establishes that any priority that exists in the law, established by the legislature, rests with a County and not a Township. But the law goes further than that. In the shoreland area, in effect, the County not only has priority, but has to agree that the Township can administer official controls before that occurs.

Minnesota law grants the Department of Natural Resources the sole responsibility for creating and enforcing rules and regulations relating to shoreland management. See Minn. Stat. § 84.974. The Department of Natural Resources has enacted wide-ranging and detailed shoreland and floodplain management rules pursuant to the authority granted it in Chapter 84 of Minnesota Statutes, as well as Chapters 102A, 103B, 103E-103G, 115, 116, 394, 396 and 462. The DNR rules provide detailed minimum standards and criteria for the use and development of the shoreland within the State of Minnesota. See Minn. R. Ch. 6120. Variances and conditional use permits are defined in the definitional section (Rule 6120.2500) with reference to the manner in which the term is defined in Minnesota Statutes Chapter 394. In examining Shoreland Ordinances, we are therefore dealing with land use controls.

The primary responsibility and burden for ensuring that the purposes of shoreland development regulations (as set forth in 103F.201) are met falls on counties and cities. Counties and cities must adopt shoreland ordinances or else face specific sanctions by the DNR. Townships are not even defined as being a municipality under Minn. Stat. § 103F.205, subd. 3.

The rules relating to shoreland development in Chapter 6120 of Minnesota Rules require local governments to provide for the administration and enforcement of their shoreland management controls by establishing permit procedures for building construction, sewage treatment systems, and grading and filling. See Minn. R. § 6120.3900, subp. 1. The DNR rules provide, under the stated authority of Minn. Stat. § 394.33, for a township to adopt shoreland management controls. However, and

consistent with West Circle, in order for there to be any effective township controls, they must first be approved by the county. Once again the county is held to have a priority over the township. In this instance it is an approval or veto power. The township must demonstrate to the county that their ordinances and ability to administer them is “at least as restrictive as the county’s” prior to final adoption by the township. See Minn. R. § 6120.3900, subp. 4a. If the county does not approve, then the township has no shoreland zoning authority. As indicated in the Affidavit of Tom Salkowski, and Exhibit 1 thereto, the Township did not make the required showing to the County as set forth under Minn. R. § 6120.3900. As a result, only the County has zoning that is effective in the shoreland of Corinna Township. The Township concedes that the County administers land use regulations within the shoreland district within Corinna Township. See Novotne Affidavit at Exhibits OO & RR.

It is readily apparent that building permits are but one small part of a complete statutory scheme relating to land use. An established priority already exists in the land use area. Rather than assume that the legislature meant something not stated, why not assume that the legislature enacted Minnesota Statutes Chapter 326B with a complete understanding of all related existing law? In other words, in applying the canons of statutory construction that mandate that assumption? Rather than interpret words out of the statute by the tortured reading, why not just interpret the statutes with an eye toward their plain and ordinary meaning in light of all statutes governing the same and related topics? Because, when that is done, we see that the legislature has adopted Chapter 326B, understanding that the Building Code is merely one type of “official control,” both

under the County Planning Act (Chapter 394) and the City and Town Planning Act (Chapter 462). The legislature clearly understands that the existing law on the topic has been and continues to be that County zoning applies in all unincorporated areas of a county, which includes townships. Under certain circumstances, as set forth in the cases cited to this Court, the Township may take over zoning duties. However, in shoreland areas, it may only do so when express findings are made by the County pursuant to Minnesota Rule Chapter 6120.3900. In light of all of this established law, the legislature intended each municipality in issue here to have “overlapping” authority, and allowed them to enter into agreements to determine who might enforce what. Where they cannot so agree, the legislature left them to their own devices to work that out, as separate and independent political subdivisions.

DOLI does not contest the fact that only the County administers land use controls in the shoreland area of Corinna Township. That, in reality, should end the inquiry. Whomever exercises land use authority in a given area should also exercise building code permitting authority. But instead, in the face of evidence in the record to the contrary, the DOLI decision states that they will assume that the Township will coordinate all permitting with the County. At one point DOLI concludes, without any evidence to support it, that there will be no impact on the County. And then at another point DOLI concedes that it may be “difficult” for a Township building inspector to become familiar with all of the County ordinances that come into play when a building permit is applied for. But that, in the eyes of DOLI, is for the legislature to fix because the statutes in question so clearly divest the County of authority. Interestingly, this admission of

“difficulty” is an acknowledgment that a non-County Building Official could interpret Wright County’s land use controls in a manner that is inconsistent with what Wright County does. That of course is exactly the problem.

Common sense dictates that the land use regulatory authority is the entity that is also the building permit authority. By saying Wright County’s Building Official no longer has the authority to issue building permits within the shoreland area of Corinna Township, DOLI is taking away Wright County’s authority to insure, through its Building Official, that its Zoning Ordinances are being complied with. What DOLI’s position does is make the Corinna Township Building Official the administrator and interpreter of Wright County’s Zoning Ordinances. That is Wright County’s duty, responsibility, and right. The Township cannot take that away from Wright County. Nor, under the circumstances present in this case, can DOLI.

What is efficient about requiring a member of the public to deal with two entities? The DOLI decision assumes that it would be more efficient for the township to administer the Building Code in the shoreland area. The decision offers no persuasive rationale as to why it is more efficient. Under the DOLI decision, a person has to go to the both County and the Township to insure permits are properly processed. Indeed, the efficiencies and the ease of administration, and convenience to the public as a whole, is advanced by insuring that in the shoreland area of Corinna Township, a citizen has to only go to one place for his or her permits: Wright County. This makes sense. As the Second Affidavit of Thomas Salkowski indicates, Corinna Township’s Building Official has had no contact with Wright County to insure compliance with Wright County

Ordinances, pp. 5, 6. That is something that only the Wright County Building Official is set up to do. Id., p. 6. The Building Official is a member of the Wright County Planning and Zoning Department. He is trained staff. He is familiar with the statutes and the ordinances of Wright County. He makes sure that this “seamless web of regulation” is complied with. See, Second Affidavit of Salkowski.

Currently, we know that Wright County trains its Building Official and its zoning people to administer its ordinances, and to work together in doing so. Certainly, if DOLI’s position is that they need not concern themselves with zoning and that DOLI’s rules, regulations, and statutes have nothing to do with zoning, then we know that DOLI is taking no responsibility to insure that Township Building Officials are trained, skilled, and experienced in interpreting and administering County land use ordinances. Certainly they are doing nothing to train and insure knowledge of the Township.

In issuing a permit to build a structure, there are many considerations other than just whether it complies with the Building Code. Placement of the structure on the land may involve setback provisions. Height may be regulated by the Ordinance. A question may exist as to whether the structure itself, for the use intended, is permitted within the district, or whether it is a conditional use for which a hearing must be held. Or the use may not be permitted at all within the district. Questions arise as to whether wetlands are involved, and thus whether permits are required under the Wetland Conservation Act, Minn. Stat. Ch. 103G and Minn. R. Ch. 8420. If wetlands will be impacted, Minn. R. § 8420.0200, subp. 1 indicates that the local governmental unit for issuing required wetland permits is the entity “with zoning authority over the project.”

Thus, when issuing a building permit, it is absolutely essential that it be coordinated with all other regulations that affect the parcel in question. Whether variances must be applied for, conditional uses applied for, wetland permits applied for, or other permits that might be issued by the Department of Natural Resources governing waters, the Minnesota Pollution Control Agency governing feedlots, etc. all come into play. The Commissioner's decision to divest Wright County of its authority to issue building permits in Corinna Township has a wide-ranging impact upon public health, safety and welfare. It affects the public in a detrimental way. If a building is sited improperly, it may need to be removed. The costs, expense, and emotional toll that takes on an individual is too great a risk to take on such flimsy arguments set forth by the Commissioner in this case. The cost and expense of correcting improper enforcement on the general public of Wright County, at a time when public funds are scarce, is too great a risk to take on such flimsy arguments as made by the Commissioner in this case.

Accepting the Commissioner's interpretation of the State Building Code would detrimentally impact the County's ability to administer and enforce official controls within the shoreland areas of Corinna Township. Given the complete absence of any legislative intent that the Commissioner has the authority to divest the County of its duty to administer and enforce the Building Code, this Court simply cannot accept that set of circumstances. Issuing building permits within a shoreland area necessarily involves determinations under official controls adopted and enforced solely by the County. Only the County can interpret and enforce the Ordinances that control the physical development of the shoreland area within Corinna Township. Official controls protecting

public waters are meant to further the public health, safety and general welfare and to protect economic and environmental values in the State of Minnesota. It is apparent that not only is the Commissioner's interpretation of the State Building Code unwarranted by the language of the Code itself, but it is in derogation of the public policy of the State of Minnesota, and detrimental to the health, safety and welfare of the public.

CONCLUSION

This Court should not accept the Commissioner's position in this case. Wright County is properly undertaking its duties consistent with the State Building Code, Chapter 394 of Minnesota Statutes, and the applicable statutes and rules governing shoreland development. This Court should rule that the Commissioner's Cease and Desist Order exceeds DOLI's statutory authority, is erroneous under the law, arbitrary and capricious, and against the public policy of the State of Minnesota.

Respectfully Submitted,

RATWIK, ROSZAK & MALONEY, P.A.

Dated: October 28, 2009

By: Scott T. Anderson
Scott T. Anderson (No. 227638)
Matthew J. Bialick (No. 0389088)
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

ATTORNEYS FOR RELATOR