

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Environmental Driven Solutions, LLC,	Supreme Court No. 20160100
Plaintiff and Appellee,	Dunn County No. 13-2013-CV-100
v.	
Dunn County, A North Dakota Municipality,	
Defendant and Appellant,	
v.	
North Dakota Industrial Commission,	
Intervenor and Appellee.	

Appeal from Judgment
Dated March 3, 2016

District Court, Southwest Judicial District
Dunn County, North Dakota

The Honorable Judge Dann Edward Greenwood, Presiding

**BRIEF OF AMICUS CURIAE
IN SUPPORT OF DUNN COUNTY**

North Dakota League of Cities
BY: Stephanie Dassinger, Staff Attorney
ND ID # 06774
410 East Front Avenue
Bismarck, ND 58501
TEL (701) 223-3518
FAX (701) 223-5174
Amicus Curiae

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[¶ 1] **TABLE OF AUTHORITIES**

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Egeland v. Continental Resources, Inc., 2000 ND 169, 616 N.W.2d 861 ¶ 13

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STATUTES

N.D.C.C. § 11-33-01 ¶ 9, 16, 17

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N.D.C.C. § 24-16-03 ¶ 18

[¶2] INTEREST OF AMICUS CURIAE

[¶3] The North Dakota League of Cities has an interest in this appeal as an amicus curiae. The North Dakota League of Cities is a voluntary membership organization with over ninety percent of North Dakota’s 357 incorporated cities as members. Our member cities make up ninety-nine percent of the population of incorporated cities in North Dakota. Under the North Dakota Century Code, incorporated cities have the right to enact ordinances for planning and zoning. Additionally, if certain rules are followed, cities are allowed to exercise zoning powers in areas beyond their incorporated boundaries, known as extra territorial boundaries. If statutes are interpreted in such a way that, they preempt city zoning when the plain language of the statute does not discuss preemption, it would greatly impair a city’s ability to exercise its planning and zoning authority.

[¶4] STATEMENT OF AUTHORSHIP AND CONTRIBUTIONS

[¶5] No party’s counsel authored this brief in whole or in part, neither a party nor party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person, other than the amicus curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

[¶ 6] ARGUMENT

[¶ 7] I. Dunn County has Jurisdiction Over Proposed Treating Plants in Dunn County.

[¶ 8] At issue in this case is whether Dunn County or the North Dakota Industrial Commission have jurisdiction over a proposed treating plant in Dunn County. The proposed treating plant would process oil waste solids from tank bottoms but does not dispose of them. See Deposition of Mark Bohrer pg. 15-16 [APP. 58-59].

[¶ 9] The North Dakota Legislature has granted counties broad powers with regards to regulating land use within in their borders. See NDCC § 11-33-01. More specifically, counties have the power to regulate “the location and use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes” in order to promote “health, safety, morals, public convenience, general prosperity, and public welfare” within the county. Id. Nothing in the statutes relating to county zoning powers indicates that a treating plant would not be controlled by county zoning. Thus, other statutes must be examined to determine whether another agency has jurisdiction over treating plants.

[¶ 10] Environmental Driven Solutions, LLC (“EDS”) and the North Dakota Industrial Commission (“Industrial Commission”) assert that NDCC § 38-08-04 provides the Industrial Commission exclusive jurisdiction over treating plants. More specifically, Section 38-08-04(2)(e) provides:

The commission has the authority:
....
2. To regulate:
....

e. Disposal of saltwater and oilfield wastes.

(1) The commission shall give all affected counties written notice of hearings in such matters at least fifteen days before the hearing.

(2) The commission may consider, in addition to other authority granted under this section, safety of the location and road access to saltwater disposal wells, treating plants, and all associated facilities.

Id.

[¶11] A closer look at Section 38-08-04(2)(e) reveals that the legislature only gave the Industrial Commission authority over “disposal of ... oilfield wastes.” The facility at issue in this case, processes oil and field waste but does not dispose of it. Id. Further, Section 38-08-04(2)(e) goes on to provide that the when regulating the disposal of oilfield waste, the Industrial Commission can consider, “safety of the location and road access to saltwater disposal wells, treating plants, and all associated facilities.” Id. This subsection clarifies that the Industrial Commission may consider these enumerated facilities, which includes treating plants, when regulating disposal of oil field waste. However, it does not state that the Industrial Commission has any authority to regulate treating plants. The plain language of NDCC § 38-08-04(2)(e) does not give the Industrial Commission jurisdiction over treating plants.

[¶12] During the District Court proceedings, EDS and the Industrial Commission asserted that the rules promulgated by the Industrial Commission provided the Industrial Commission with jurisdiction over treating plants. This argument is flawed because an administrative agency only has jurisdiction as provided by the legislature. See Samdahl v. N.D. Dept. of Transp., 518 N.W.2d 714, 717 (N.D. 1994) (“[T]he jurisdiction of an administrative agency is dependent upon the terms of the statute.” (quotations omitted)).

As explained above, the legislature did not give the Industrial Commission jurisdiction over treating plants.

[¶13] Reliance was also placed on statements in Amerada Hess Corporation v. Furlong Oil & Minerals Co. and Egeland v. Continental Resources, Inc., that assert that the Industrial Commission has broad control over the oil and gas industry. 348 N.W.2d 913 (N.D. 1984); 2000 ND 169, 616 N.W.2d 861. This reliance is misplaced as both of those cases involve underground oil and gas operations, not a purely above ground facility. 348 N.W.2d 913, 913 (dispute involved use of a well-bore); 2000 ND 169, ¶ 11, 616 N.W.2d 861, 864 (dispute involved pooling of oil and gas interests). There is no authority stating that the legislature intended to provide the Industrial Commission with exclusive jurisdiction of a facility that is only above ground for processing, not disposing of, oil waste.

[¶14] The district court held that “the North Dakota legislature intended that the North Dakota Industrial Commission would “occupy the field” of the regulation of oil and gas waste treatment plants and, therefore, has exclusive jurisdiction of the issue of the location of oil and gas waste treating plants.” Memorandum Opinion, ¶ 22 [App. 36]. This holding is erroneous because: 1) It relies on NDCC § 38-08-04(2)(e) which does not provide the Industrial Commission with authority over treating plants; 2) It relies on the rules promulgated by the Industrial Commission which, as explained above, does not give the Industrial Commission greater jurisdiction than is provided in the statute; and 3) It relies on cases involving downhole operations, not purely above ground facilities, for the proposition that the Industrial Commission has broad authority over the oil and gas

industry.

[¶15] Under the plain language of N.D.C.C. § 38-08-04(2)(e), the Industrial Commission does not have jurisdiction over treating plants. Dunn County has jurisdiction over treating plants under its broad statutory zoning authority. As such, this Court should reverse the trial court's judgment and hold that Dunn County, under its broad zoning powers, has jurisdiction to regulate treating plants within Dunn County.

[¶16] **II. Alternatively, Sections 11-33-01 and 38-08-04, N.D.C.C., should be interpreted Harmoniously to Give Meaning to Both Statutes and To Provide that Both Dunn County and the Industrial Commission Have Jurisdiction Over Treating Plants.**

[¶17] In the event that this Court finds that the Industrial Commission has jurisdiction over treating plants, Sections 11-33-01 and 38-08-04, N.D.C.C., should be interpreted together providing that a treating plant needs to comply with the Industrial Commission rules and county zoning rules..

[¶18] In Mountrail County v. Hoffman, a county brought an action for a citizen to abate a nuisance. 2000 ND 49, ¶ 3, 607 N.W.2d 901, 202. The citizen argued that the county did not have jurisdiction to bring the action to abate the nuisance because a statute exists allowing the director of the Department of Transportation to abate nuisances of junkyards maintained within one-thousand feet of a state highway right of way. Id. In that case the Court held:

Although N.D.C.C. § 24-16-03 allows the director of DOT to enforce N.D.C.C. ch. 24-16 [Establishment of junkyards and automobile graveyards], nothing in the statutes indicates the director has exclusive enforcement authority. Statutes relating to the same subject matter should

be construed in harmony whenever possible. See City of Bismarck v. Fettig, 1999 ND 193, ¶ 14, 601 N.W.2d 247.

Id. ¶ 6.

[¶19] Similarly here, if the language in N.D.C.C. 38-08-04 provides the Industrial Commission with jurisdiction over treating plants, it does not state anything about that jurisdiction being exclusive. Further, the reasons behind the Industrial Commission having exclusive jurisdiction over an oil and gas well and the location, mainly being that an oil and gas well needs to be located near an oil and gas reservoir, do not exist for treating plants. Therefore, if the Court finds that the Industrial Commission has jurisdiction over treating plants, it should harmonize that jurisdiction with the county zoning statutes and hold that a treating plant must comply with the Industrial Commission rules and the county zoning code.

[¶20] **CONCLUSION**

[¶21] Under the plain language of NDCC § 38-08-04(2)(e), the Industrial Commission does not have jurisdiction over treating plants. Dunn County has jurisdiction over treating plants under its broad statutory zoning authority. As such, this Court should reverse the trial court's judgment and hold that Dunn County, under its broad zoning powers, has jurisdiction to regulate treating plants within Dunn County. Alternatively, if the Court finds that the Industrial Commission has jurisdiction over treating plants, it should harmonize that jurisdiction with the county zoning statutes and hold that the proposed treating plant must comply with the Industrial Commission rules and the Dunn County Zoning Code.

[¶22] Respectfully submitted this 26th day of July, 2016.

North Dakota League of Cities

/s/ Stephanie Dassinger

Stephanie Dassinger

stephanie@ndlc.org

ND State Bar No. 06774

410 East Front Avenue

Bismarck, ND 58501

TEL (701) 223-3518

FAX (701) 223-5174

Amicus Curiae

[¶ 23] CERTIFICATE OF SERVICE

A copy of this document was electronically filed with the North Dakota Supreme Court, on July 26, 2016 and served electronically upon:

Zachary Evan Pelham – Attorney for Plaintiff/Appellee
zep@pearce-durick.com and #zepefile@pearce-durick.com

Hope Lisa Hogan – Attorney for Intervenor/Appellee
hhogan@nd.gov

Ariston E. Johnson – Attorney for Defendant/Appellant
ari@dakotalawdogs.com

/s/ Stephanie Dassinger

Stephanie Dassinger