

STATE OF MINNESOTA  
IN SUPREME COURT

**FILED**

December 20, 2017

**OFFICE OF  
APPELLATE COURTS**

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Joel Jennissen, Russell Burnison,  
Mark Vanick, William Reichert, and  
Sunil Lachhiramani,

Petitioners,

v.

City of Bloomington, Minnesota,

Respondent.

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**PETITION FOR REVIEW OF  
DECISION OF THE MINNESOTA  
COURT OF APPEALS**

**Appellate Court Case No.: A17-0221**

**Date of Filing of Court of Appeals**

**Decision: November 20, 2017**

Petitioners, Bloomington residents Joel Jennissen, Russell Burnison, Mark Vanick, William Reichert, and Sunil Lachhiramani, request that this Court review the published November 20, 2017 decision of the Minnesota Court of Appeals.

The lower court affirmed the Hennepin County District Court's January 11, 2017 decision, finding preemption of the field of regulation in the municipal organized solid waste collection process under Minn. Stat. §115A.94.

**STATEMENT OF LEGAL ISSUE**

1. Does Minn. Stat. §115A.94 preempt the field of regulation of organized collection of solid waste, removing all municipal authority in the process? The district court erroneously found field preemption, thus barring Petitioners' proposed charter amendment from inclusion on the general election ballot. The court of appeals agreed, and affirmed the decision of the district court.

## STATEMENT OF THE CASE

This published case comes before the Court on stipulated facts, and is a matter of first impression.

Petitioners are five residents of the City of Bloomington. Bloomington is a home rule charter city under Minnesota Statutes Chapter 410. The reservation of legislative power under the city charter “creates a system of coterminous, dual authority to enact or change legislation,”<sup>1</sup> which Bloomington’s residents share with its city council. City voters also have the right to amend the Charter pursuant to Minn. Stat. §410.12.

City officials opted to begin the process of organized collection of mixed solid waste (MSW) pursuant to Minn. Stat. §115A.94 in late 2014. A few months later, Petitioners collected the necessary signatures and presented a proposed ballot initiative to the Bloomington City Attorney. The language in the initiative was nearly identical to the proposed Charter Amendment before the Court today. This initiative, which formed the basis for an initial round of litigation (*Jennissen 1*), was rejected by the city. The city attorney claimed that the measure, along with all other municipal legislative authority, was preempted by the Minnesota Waste Management Act (WMA).<sup>2</sup>

During the pendency of the *Jennissen 1* litigation, Bloomington city officials pressed forward with the effectuation of organized collection in the city. The matter came before the Honorable James A. Moore on cross motions for summary judgment and

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<sup>1</sup> *Jennissen 1* Order at 6.

<sup>2</sup> *Id.* at 3-4.

on April 25, 2016, the Honorable James Moore granted the City of Bloomington's motion. The *Jennissen I* Court did not reach the issue of preemption. Rather, Judge Moore ruled on the threshold issue of the measure's propriety as a ballot initiative.<sup>3</sup> The court found that, while organized collection was a proper subject for citizen-initiated legislation, a charter amendment was the proper avenue for redress.<sup>4</sup>

Consequently, Petitioners collected the signatures necessary to amend the City Charter pursuant to Minn. Stat. §410.12. The language of the Petitioners' Charter Amendment, which forms the basis for the matter before the Court, reads as follows:

Unless first approved by a majority of the voters in a state general election, the City shall not replace the competitive market in solid waste collection with a system in which solid waste services are provided by government-chosen collectors or in government-designed districts. The adoption of this charter amendment shall supersede any ordinances, ordinance amendments, or charter amendments related to solid waste adopted by the city council in 2015-2016.

This too was rejected by the city attorney, who again asserted field preemption of the organized collection process.

All additional grounds cited by the City of Bloomington in denying the citizen petitions have been abandoned, unaddressed, or rejected by the courts. These grounds include: classifying the initiative as a "premature referendum," asserting unconstitutional contractual impairment of the city's hauler contract, contending that the choice of solid waste collection is not a proper subject for citizen legislation, and calling the charter amendment a "cloaked" referendum.<sup>5</sup>

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<sup>3</sup> *Jennissen I* Order at 6-9.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> Appellants' Brf. at 6-7.

In October of 2016, this matter came before the Honorable Daniel Moreno on cross motions for summary judgment. In its January 11, 2017 decision, the district court found that the proposed charter amendment was preempted by the WMA.<sup>6</sup> The court held that, “(b)ecause of the WMA’s purpose of protecting the environment and public health at a statewide level,” the legislature intended to preclude local authority and occupy the field.<sup>7</sup> Other than a footnote on the last pages of the opinion, the district court did not address the most critical provision of the organized collection statute - - Subdivision 6.<sup>8</sup>

The Minnesota Court of Appeals agreed with the district court’s ruling and found field preemption. It is this finding that Petitioners ask the Court to review.

## **STATEMENT OF CRITERIA AND BRIEF ARGUMENT**

At the outset, it bears repeating that Bloomington residents have legislative power that is identical to that of the city council.<sup>9</sup> This means to preclude voter legislative power is also to preclude that of the city council. Therefore, both groups can be treated singly when discussing local authority.

The heart of the preemption question is whether the legislature intended to give cities a framework within which to work in implementing organized collection of MSW,

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<sup>6</sup> January 11, 2017 Order at 13-17.

<sup>7</sup> *Id.* at 17.

<sup>8</sup> *Id.* at 17-18.

<sup>9</sup> Except the power to tax and spend, which is not at issue here. *See* Bloomington City Charter §5.01.

or a fixed set of rigorous limits outside of which a municipality cannot deviate. Put another way, does the process under §115A.94 represent the minimums a city must follow, or is it a set of exclusive minimums and maximums allowable under the statute? The plain language of the law reveals that it is the former, and that conflict preemption is the proper means of evaluating local regulations within this context. By finding field preemption, both the district court and the court of appeals have held that the latter applies, and that the exercise of any local authority in the area of organized collection is void. This cannot be reconciled with the statute.

Minn. Stat. §115A.94 Subd. 6 provides, in its entirety:

**Subd. 6. Organized collection not required or prevented.**

- (a) The authority granted in this section to organize solid waste collection is *optional* and is *in addition to* authority to govern solid waste collection granted by other law.
- (b) Except as provided in subdivision 5, a city, town, or county is not:
  - (1) required to organize collection; or
  - (2) prevented from organizing collection of solid waste or recyclable material.
- (c) Except as provided in subdivision 5, a city, town, or county may exercise *any authority granted by any other law, including a home rule charter*, to govern collection of solid waste.

(emphasis added). Subdivision 5 concerns organized collection by a county and is inapplicable here.

The Petition before the Court should be granted to harmonize the above language with the lower courts' holding. This subdivision reserves for cities the express, unmistakable legislative authority to collect MSW within their borders. It goes so far as to specifically identify home rule charters as authoritative bodies of law. The defining characteristics of a home rule charter are the powers of initiative, referendum, recall, and

Chapter 410 charter amendment power. The legislature could not have been clearer that it intended for cities to be able to exercise municipal authority in the field. It correctly recognized organized collection as a subset of a city's authority to collect its own trash - - a tool in a city's tool kit, and one set of minimum standards that satisfy the WMA.

Both lower courts separate and exclude a city's power to govern collection of its solid waste from the process of organized collection under §115A.94. In re-defining the power to "govern" in this context, the court of appeals says that the city retains the ability to license collectors, determine the type of trash to collect, and which days to collect it.<sup>10</sup> We get no guidance in this new definition of authority from the statute, nor from the WMA generally.

This is a question that is almost certain to recur. Per the standing decision, a city has nearly unfettered power to "govern" trash collection in the city, but that does not extend to the "organizing" process. Exactly what powers are included with "governance" that do not pertain to organizing? Where do the areas overlap and, more importantly, where would a city turn for guidance on this new principle of law?

The question at bar is an important matter of first impression for the Court. It will have a significant statewide impact because the Court is defining for cities the limits of their authority in the waste collection process. A finding of field preemption by §115A.94 affects every municipality in the state and is not restricted to home rule charter cities like Bloomington.

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<sup>10</sup> Order, *Jennissen et. al. v. City of Bloomington* (Minn.Ct.App. Nov. 20, 2017) at 11.

Further, the impact of this decision will be felt across a broad spectrum of law. The two cases most often cited by the parties are *Nordmarken v City of Richfield*,<sup>11</sup> which involves zoning, and *In re Appeal of Rochelau*,<sup>12</sup> a case dealing with county sewage treatment systems. Neither of these cases have language approaching the significant reservation of power contained in §115A.94 Subd. 6. To find field preemption in the presence of such language would have wide-ranging and dire consequences for city governments and citizens in future jurisprudence. A finding against field preemption would be narrow, and confined to statutes containing language similar to that in Subdivision 6.

Both the district court and the court of appeals expressed a concern that allowing city voters to “override the process” would threaten the carefully-crafted noneconomic protections found elsewhere in the WMA.<sup>13</sup> Other bases for negating city authority included the possibility of not promoting the broad policy goals of the WMA, and ignoring the state’s broad environmental concerns, thus threatening the state’s general population.<sup>14</sup> None of these serve as a basis for field preemption.

An all-or-nothing, false choice is presented. Either ban all local legislative authority in the organized collection process, or fail to comply with the WMA. The reasoning employed by the lower court fails to recognize that local laws may be complementary to the WMA. A city ordinance could enhance the efficacy of the

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<sup>11</sup> 641 N.W.2d 343 (Minn.Ct.App. 2002)

<sup>12</sup> 686 N.W.2d 882 (Minn.Ct.App. 2004)

<sup>13</sup> Order, *Jennissen et. al. v. City of Bloomington* (Minn.Ct.App. Nov. 20, 2017) at 14.

<sup>14</sup> *Id.*



organized collection process for a given city, and include *more* protection for the environment. In drafting §115A.94, the legislature recognized that local units of government knew better how to tailor waste collection under their unique set of circumstances than the state did. This is why it included Subdivision 6.

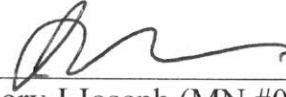
There is no contention by Petitioners that any portion of the Waste Management Act may be ignored or overridden, or that all the steps need not be followed. To the extent that a proposed charter amendment conflicts with the organized collection process, or any other part of the Waste Management Act, it should be scrutinized under the doctrine of conflict preemption. But to deprive cities of all legislative power is to render the entirety of §115A.94 meaningless. It forbids a city from considering any other factors that the council or residents consider significant, unique, or particularly helpful to that city. It forbids cities from taking additional steps to protect the environment and further the goals of the WMA.

This Court should grant the Petition because the extent of municipal legislative power in the waste collection arena has been severely limited by the lower court. The stripping away of all local authority in the organized collection process will affect every city in the state. This decision will also be readily adaptable to other areas of law, and will dramatically expand the application of the doctrine of field preemption. Such an important development warrants review by the Supreme Court. The other issues having been resolved by the lower courts, the Petitioners Respectfully ask the Court to grant an injunction directing the City of Bloomington to place the Charter Amendment on the next general election ballot.



Dated: December 20, 2017

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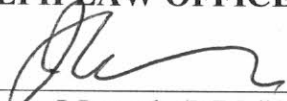
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## **CERTIFICATION OF COMPLIANCE WITH LENGTH REQUIREMENT**

I, Gregory J Joseph, certify that Appellants' Petition for Review of the Decision of the Minnesota Court of Appeals complies with the length requirement of Minn. R. Civ. App. P. 117, Subd. 3, and contains 1,985 words. This Petition was prepared with Microsoft Office Word 2016 software.

Dated: December 20, 2017

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