
State of Minnesota
In Court of Appeals

RICHARD J. BREZA,

Respondent,

vs.

CITY OF MINNETRISTA,

Appellant.

**APPELLANT CITY OF MINNETRISTA'S
BRIEF AND APPENDIX**

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STATEMENT OF ISSUES

1. THE DISTRICT COURT LACKED JURISDICTION TO CONSIDER ANY CHALLENGE TO THE CITY'S EXEMPTION DECISION.

The District Court denied the City's motion for summary judgment, finding undesignated fact issues in dispute even though the parties had stipulated that no material facts were disputed. Following trial, the District Court determined that the matter of jurisdiction was already decided and that it was not an adequate remedy.

Minn. Stat. § 103G.2242, subd. 9

Minn. R. 8420.0250

Drum v. Minnesota Bd. of Water & Soil Res., 574 N.W.2d 71 (Minn. Ct. App. 1998)

2. MINN. STAT. § 15.99 CANNOT COMPEL THE ISSUANCE OF A WETLAND EXEMPTION WHICH VIOLATES STATE LAW.

The District Court denied the City's motion for summary judgment, finding undesignated fact issues in dispute even though the parties had stipulated that no material facts were disputed. Following trial, the District Court ruled that Minn. Stat. § 15.99 compelled the issuance of an exemption for "all 5,757 [sic] square feet of Petitioner Breza's filling activity."

Minn. Stat. § 15.99, subd. 2

Village of Brooklyn Center v. Rippen, 96 N.W.2d 585, 587 (Minn. 1959)

Manco of Fairmont, Inc. v. Town Board of Rockdell Township, 583 N.W.2d 293 (Minn. Ct. App. 1998)

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STATEMENT OF THE CASE

Plaintiff-Respondent Richard J. Breza (“Breza”) commenced this action on February 5, 2003 seeking a writ of mandamus to compel the City of Minnetrista (“City”) to issue an exemption for illegal filling activities Breza had conducted on his property. A.10-25.

Both Breza and the City moved for summary judgment, agreeing that the matter involved no dispute of material facts. The questions presented to the District Court in the motions involved (a) whether the District Court had jurisdiction to hear Breza’s appeal (or whether that matter should properly have been before the Board of Soil and Water Resources); (b) the scope of Breza’s application for an exemption; and (c) the effect of Minn. Stat. § 15.99 on Breza’s application for an exemption pursuant to the Wetland Conservation Act (“WCA”) which the Act itself did not authorize. The District Court, despite the parties’ agreement that no material facts were in dispute and that the issues could be decided as a matter of law, entered an Order on August 6, 2003 finding disputed issues of fact (which the Court did not identify) precluding summary judgment for either party. A.6-8. The District Court denied the City’s motion to reconsider by Order dated August 27, 2003. A.9.

The matter proceeded to a court trial on June 3, 2004, largely on undisputed, stipulated facts. The Court, in an Order dated September 13, 2004, found in favor of Breza and entered an order compelling the City to issue an exemption for 5,757 square feet of fill. A.3-5. This appeal on both the denial of the summary judgment and judgment from the trial followed.

STATEMENT OF FACTS

Breza resides at 6725 Halstead Avenue in the City. Breza's property is legally described as "Lot 6 and the East Half of Lot 5, Halstead Park, Hennepin County, Minnesota" ("Property"). A.11, ¶ 1. The Property is situated on Halstead Bay in the shoreland protection zone of Lake Minnetonka. A.26, ¶1. A Type 3 wetland, as defined by Minnesota Rules,¹ is located on the Property and is depicted on a 1994 survey of the Property. A.26, ¶2 & A.29.

Breza purchased the Property in 1997. A.26, ¶1. An application for a building permit submitted to the City on November 21, 1996 for the construction of the residence at 6725 Halstead Avenue ("Residence") lists Breza as the "Owner" of the Property. A.26, ¶3 & A.30-31. The building permit application included the 1994 Survey depicting the wetland on the Property. A.29-31.

The City issued a building permit for the construction of the Residence on January 28, 1997. A.32. The permit as issued lists special conditions, including: (1) construction is required to correlate exactly to the site and building plans submitted; (2) active erosion controls must be maintained throughout construction; (3) clear cutting is prohibited; and (4) fill² is prohibited from wetlands, floodplain and below the ordinary high water mark.

¹ Pursuant to Minn. R. 8420.0100, subp. 54a(C), a "Type 3" wetland is defined as: inland shallow fresh marshes in which soil is usually without standing water during most of the growing season but is water logged within at least a few inches of the surface. Vegetation includes grasses, sedges, rushes, and various broad-leafed plants.

² Minn. R. 8420.0100, subp. 18 defines "fill" as "any solid material added to or deposited in a wetland that would alter its cross-section or hydrological characteristics, obstruct flow patterns, change the wetland boundary, or convert the wetland to a non-wetland."

A.32. The City issued a Certificate of Occupancy for the Residence on August 22, 1997. A.26, ¶4.

In July of 2000, Breza contracted with an excavation company to fill the wetland on the Property. A.26, ¶5. Breza took this action without first obtaining a permit or approval to fill as required by the WCA. See Minn. Stat. § 103G.221 et seq. Breza's contractor filled an area of wetland measuring approximately 5,737 square feet. Id.

On December 10, 2000, the Minnesota Department of Natural Resources ("DNR") issued a "Wetland Conservation Act Cease and Desist Order" to Breza which directed that he "stop draining or filling a wetland" on the Property. A.27, ¶7 & A.33-34. The cease and desist order advised Breza that he could make an application to the Local Government Unit (the City) for an exemption or a no-loss determination. A.33. The cease and desist order further stated:

If you do not apply for an exemption or no-loss determination within three weeks of the date of the issuance of this order, or if your application is denied, then whatever drain or fill work has been done may require restoration according to a restoration plan designed by the Soil and Water Conservation District.

A.33.

On December 29, 2000, Breza filed an application for an exemption with the City. A.27, ¶9 & A.35-37. On the application form, Breza identified August 4, 2000 as the "Date Project Started." A.36. In a December 29, 2000 letter to the City accompanying the application, Breza stated:

On approximately August 4 & 5 there was approximately 4 cubic yards of black dirt in the back yard and sod placed over that area. This order has not

been violated since its effective date I would like to apply for an exemption. Included is a receipt for the sod purchased.

A.35.

The City's WCA Agent, John Smyth, by letter dated January 16, 2002, informed Breza that his application for an exemption for four cubic yards of fill could not be processed because the Act measured impact in terms of area, not volume. A.27, ¶10 &

A.38.

On June 10, 2002, Breza's counsel wrote to the City demanding that Breza's exemption application be approved by operation of Minn. Stat. § 15.99, subd. 2. A.27, ¶13 & A.41-42. The City's WCA Agent stated in a responsive letter dated July 3, 2002, that the City agreed that an exemption had been approved pursuant to Minn. Stat. § 15.99, subd. 2. A.27, ¶14 & A.43-47. The WCA Agent's letter indicated that the only exemption legally available for Breza's Type 3 wetland was a de minimus exemption under Minn. R. 8420.0122, subp. 9(A)5 which would permit the filling of up to 400 square feet. Id. That maximum exemption under the WCA was granted by the City at that time. Id. Breza also was notified via the July 3, 2002 correspondence that any appeal of the City's decision must be commenced by mailing a petition for appeal to the Minnesota Board of Water and Soil Resources ("BWSR") pursuant to Minn. R. 8420.0250. A.43. Breza has to date taken no action to challenge the decision before the BWSR and has not restored the wetland. A.28, ¶17.

On August 22, 2002, the Commissioner of Natural Resources issued a Restoration Order commanding Breza to restore the wetland located on the Property by no later than

October 15, 2002. A.27, ¶15 & A.48-50. The Restoration Order informed Breza of several options for compliance and included the Hennepin Conservation District conclusion that Breza had unlawfully filled approximately 0.13 acres (5,737 square feet) of wetland.

Breza was afforded the opportunity to present his position regarding the wetland filling violation issue to the City Council at its meeting on February 3, 2003. A.28, ¶18 & A.51-67. Following the discussion, the City Council moved to affirm the maximum exemption it had the authority to grant under the WCA – the 400 square foot de minimus exemption. Id.

Breza sought a writ of mandamus compelling the City to issue an exemption for the entire Property. Though the parties agreed there were no facts in dispute, the Hennepin County District Court denied both parties' motions for summary judgment citing unidentified fact issues and held a trial on the merits. A.6-8. Following a trial which included stipulated facts and the testimony of one witness, the Court issued an order granting Breza's request for a writ of mandamus compelling the City to issue an exemption for the entire 5,757 [sic] square feet. A.3-5. This appeal followed.

ARGUMENT

I. Standard of Review

On appeal from a judgment, this Court may review any order involving the merits or affecting the judgment. Minn. R. Civ. App. P. 103.04. Although an order denying summary judgment is not ordinarily appealable, it may be reviewed as part of an appealable judgment. Peterson v. Brown, 457 N.W.2d 745, 748 (Minn. Ct. App. 1990).

“On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.” State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

A reviewing court is not bound by and need not defer to a district court’s decision on a purely legal issue. Frost-Benco Elec. Ass’n v. Minnesota Pub. Utils. Comm’n, 358 N.W.2d 639, 642 (Minn. 1984). The application of law to stipulated facts is a question of law which is reviewed de novo. Morton Bldgs., Inc. v. Comm’r of Revenue, 488 N.W.2d 245, 257 (Minn. 1992).

II. The District Court lacked jurisdiction to consider any challenge to the City’s exemption decision.

The District Court in this matter lacked subject matter jurisdiction to hear Breza’s challenge to the City’s wetland exemption decision because Breza failed to appeal the City’s July 3, 2002 decision to BWSR within 30 days as required by Minn. Stat. § 103G.2242, subd. 9³ and Minn. R. 8420.0250.⁴ As a result, the City’s exemption

³ Minn. Stat. § 103G.2242, subd. 9, states, in relevant part:

Appeal. (a) Appeal of a replacement plan, exemption, wetland banking, wetland boundary or type determination, or no-loss decision may be obtained by mailing a petition and payment of a filing fee of \$200, which shall be retained by the board to defray administrative costs, to the board within 30 days after the postmarked date of the mailing specified in subdivision 7. If appeal is not sought within 30 days, the decision becomes final.

(emphasis added).

⁴ Minn. R. 8420.0250 states, in relevant part:

Subpart 1. Appeal of local government unit decisions. The decision of a local government unit to approve, approve with conditions, or reject a replacement plan, banking plan, public road project notice, exemption, no-loss, or wetland boundary or type request becomes final if not appealed to the board within 30 days after the date on which the decision is mailed to

decision permitting 400 square feet of fill is final and the District Court had no jurisdiction to hear Breza's challenge. The existence of subject matter jurisdiction in a particular dispute is a question of law and challenges to a court's exercise of it are subject to de novo review. See Minnesota Ctr. for Env'tl. Advocacy v. Metro. Council, 587 N.W.2d 838, 842 (Minn. 1999).

Minnesota has adopted stringent requirements regarding the filling of wetlands and designated cities as the local units of government to administer the WCA and to ensure that wetlands are protected. The Minnesota legislature enacted the WCA to "achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands." Minn. Stat. § 103A.201, subd. 2(b)(1); see also Minn. R. 8420.0100. The WCA regulates activities that drain or fill wetlands. Minn. Stat. § 103G.222, subd. 1(a); see also Minn. R. 8420.0105. To that end, the WCA requires that "[w]etlands must not be drained or filled, wholly or partially, unless replaced by restoring or creating wetland areas of at least equal public value...." Minn. Stat. § 103G.222, subd. 1(a); Minn. R. 8420.0105. Generally, the WCA requires landowners to provide a replacement plan for any reduction in wetlands, but does allow certain limited exemptions from replacement requirements. Minn.Stat. §§ 103G.222, subd. 1 and 103G.2241. In order to obtain an exemption determination, a landowner must apply via the local government

those required to receive notice of the decision. This subpart applies to those determinations which are made under comprehensive wetland protection and management plans.
(emphasis added).

unit.⁵ *Id.* Minn. Stat. § 15.99, while not applicable to such applications on its face, is specifically applied to exemption determinations by application of Minn. R. 8420.0210.

BWSR is vested with the “ultimate responsibility for implementing” the WCA. Drum v. Minnesota Bd. of Water & Soil Res., 574 N.W.2d 71, 74 (Minn. Ct. App. 1998) (citing Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0250). In addition to implementation of the WCA, BWSR is charged with the responsibility to hear appeals from the decisions of local government units. *Id.* Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0250 provide that the decision of a local government unit becomes “final” if an appeal is not made to BWSR within 30 days.⁶

In this matter, Breza acknowledges that he filled approximately 5,737 square feet of wetland, fourteen times the amount permitted by any available exemption, on his property without any approval. Such activity is a clear violation of the WCA. After the DNR issued a cease and desist order, Breza sought an after-the-fact exemption. However, the City’s power to issue such an exemption is limited, i.e. filling activity is exempt only if it qualifies for a specific exemption as set forth in Minn. Stat. §103G.2241

⁵ Cities are not vested with discretion to make exemptions to the WCA unless such exemptions are specifically authorized by the WCA itself or Minnesota Rules.

⁶ In State Dep’t of Conservation v. Sheriff, a property owner’s application under the statutory predecessor to Minn. Stat. § 103G.245 for a permit to place fill in the lake bordering his property was denied. 207 N.W.2d 358 (Minn. 1973). Eight years later, after the property owner was discovered by a conservation officer dumping fill into the lake, the court entered judgment which permanently enjoined the property owner from filling any part of the lake bed. The court rejected the property owner’s attempt in that proceeding to seek a redetermination of his previously denied permit application. “If [the property owner] were allowed a new determination of that issue, he would obtain a broader review than if he had appealed from the commissioner’s order.” *Id.* at 360.

and Minn. R. 8420.0115. The City, as the local government unit under the WCA, issued its exemption determination on July 3, 2002. In conformity with the WCA, Breza was notified of the decision in writing. Breza's counsel also was notified. Breza failed to challenge the exemption decision, or its timeliness, to BWSR within 30 days as required by Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0250. Instead, Breza challenged the exemption decision in district court (the wrong venue, as noted) well after the statutory appeal period had expired.

Minnesota statutes and rules set forth a specific procedure for parties seeking to challenge determinations by local government units in matters pertaining to wetlands. See Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0250. Those directives do not limit the scope of appeals to be brought under them. Further, the WCA expressly encompasses the requirements of Minn. Stat. § 15.99. See Minn. R. 8420.0200. Indeed, the Minnesota legislature fully intended the WCA to encompass all aspects of wetland issues and to “promote comprehensive and total water management planning.” Minn. Stat. § 103A.202 (emphasis added).

Breza had notice of the appeal process and failed to follow the statutory procedures for challenging the City's action. Both the statute and the rule are clear regarding the consequences of failure to challenge a decision within 30 days – the decision is final and cannot be the subject of a viable claim in District Court. Pursuant to the statute and applicable rule, the City's decision is final and Breza's failure to challenge the decision in the proper venue at the proper time is fatal to his claim. The District Court's determination should be reversed.

III. Minn. Stat. § 15.99 cannot compel the issuance of a WCA exemption which violates state law.

There is no dispute in this matter that Breza illegally placed 5,737 square feet of fill in a designated wetland or that the time limits of Minn. Stat. § 15.99 were violated related to Breza's after the fact application for an exemption under the WCA. This case is about the effect of those undisputed facts. At the District Court, Breza asserted that the City is mandated by operation of Minn. Stat. § 15.99 to approve whatever application Breza made for an exemption to excuse his illegal filling activities. Undaunted by the fact that he now seeks⁷ an exemption which is patently illegal under state law, Breza contends (and the District Court held) that a violation of Minn. Stat. § 15.99 effectively confers unlimited power on municipal governments to approve land use applications, regardless of whether the City had any other statutory authority to approve the application. The City has no authority under the WCA to issue an exemption for all of the illegal fill on Breza's property and Minn. Stat. § 15.99 cannot be construed to confer such authority.

Minnesota law leaves no doubt that municipalities have no inherent authority and exercise only those powers expressly conferred on them by the Minnesota legislature. Village of Brooklyn Center v. Rippen, 96 N.W.2d 585, 587 (Minn. 1959) (noting the "well settled" principle that municipal governments have "no inherent powers"). In enacting the WCA in 1991, the Minnesota legislature clearly stated its intent to "achieve

⁷ Breza's application for an exemption states on its face that it is for 4 cubic yards, or 72 square feet, of fill. Breza now claims that the exemption was for all 5,737 square feet of fill illegally placed in the wetland. See supra at IV.

no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands....” Minn. Stat. § 103A.201, subd. 2(b)(1). In pursuit of that goal, the WCA allows only carefully limited exemptions to its general requirement that any filling of a wetland area is accompanied by the restoration or creation of wetland of equal public value. Minn. Stat. § 103G.222, subd. 1(a); Minn. R. 8420.0105. The exemptions are set forth in Minn. Stat. § 103G.2241, subd. 1-10 and Minn. R. 8420.0122.⁸ Unless one of the specified exemptions applies, the City (as the “local government unit” under the WCA) has no authority to issue an exemption to drain or fill wetlands without a replacement plan. Any approval of an exemption not permitted by the WCA would be beyond the City's authority and illegal.

In this case, Breza placed fill in a 5,737 square-foot area of a Type 3 wetland without approval. Absent approval of a replacement plan, which Breza has not proposed, all draining and filling activity is prohibited by the WCA unless it meets one of the enumerated exemptions. The only exemption arguably applicable to Breza's illegal activity is the de minimis exemption, which in a Type 3 wetland would permit up to 400 square feet to be filled in a shoreland area. Minn. Stat. § 103G.2241, subd. 9. That

⁸ The exemption standards include: (1) activities related to specified agricultural activities; (2) public drainage systems; (3) activities exempt under federal regulations; (4) drainage of a restored wetland authorized by contract or easement; (5) wetlands which were incidentally created; (6) limited public works and utilities projects; (7) forestry; (8) development approved prior to the effective date of the WCA; (9) de minimis activity; and (10) wildlife habitat.

exemption has already been approved by the City to the maximum extent permitted by the WCA.⁹

Breza, in his motion for summary judgment and at trial, argues that the violation of Minn. Stat. § 15.99 trumps the WCA and any other law which would stand in the way of Breza's illegal filling activity being approved. Minn. Stat. § 15.99, subd. 2, "Deadline for response," stated¹⁰ the following in paragraph (a):

Except as otherwise provided in this section and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems, or expansion of the metropolitan urban service area for a permit, license, or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request. If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.

⁹ Breza's application actually requested an exemption for only four cubic yards, or approximately 72 square feet. The application for exemption references the cease and desist order, denotes the Project type as "fill" and identifies August 4, 2000 as the date on which the project started. Breza included with the application a letter which described the project: "[o]n approximately August 4 & 5 there was approximately 4 cubic yards of black dirt in the back yard and sod placed over the area." Breza's testimony at the District Court did not dispute that the only information supplied to the City was that "4 cubic yards" of fill was placed in the wetland. Breza did not dispute the figure when a letter from the City's Wetland Conservation Agent, the Commissioner of Natural Resources' restoration order, or the July 3, 2002 exemption order utilized it as the basis for analysis. Breza's written application contemplated four cubic yards of fill (which translates into approximately 72 square feet at an average depth of 1.0 to 1.5 feet) and Minn. Stat. § 15.99 cannot be used to compel any other exemption from wetland replacement obligations. That he now argues for an exemption for the entire property has no relevance to the actual scope of the written representations he made as part of his application for the exemption he now seeks to compel. Thus, any compelled issuance of a permit to fill wetland area would be limited to 72 square feet.

¹⁰ Minn. Stat § 15.99 was amended in 2003, subsequent to the application giving rise to this litigation.

Breza fixates on the phrase “notwithstanding any other law to the contrary” and postulates a hyper-literal reading of it which cannot be justified by the text of the statute itself or by its clear purpose and intent. Breza argued at the trial court that “[t]he phrase... directs the court to disregard any conflicting law that would prevent an automatic approval.” A.140.

No such draconian outcome is suggested, much less required, by the statute. The phrase applies to the sentence of which it is a part. Upon a written request for action on a land use related application, agency action is required within 60 days “notwithstanding any other law to the contrary” which may prescribe a different time period. Minn. Stat. § 15.99, subd. 2. The language simply clarifies the preemptive intent of the statute with respect to time periods. Contrary to Breza’s argument, the quoted language does not require the Court to toss aside any substantive provisions of any applicable law which might otherwise doom an application. As this Court has noted in Manco of Fairmont, Inc. v. Town Board of Rockdell Township, Minn. Stat. § 15.99 is a timing statute, the purpose of which is to keep government agencies from “taking too long to decide.” 583 N.W.2d 293, 296 (Minn. Ct. App. 1998). If this Court were to accept Breza’s position, Minn. Stat. § 15.99 ceases to be a timing statute, as enacted and as intended, and becomes instead an overarching grant of unfettered substantive authority. Minn. Stat. § 15.99 cannot and does not confer unbridled power on municipal

governments to authorize actions that state substantive laws flatly prohibit.¹¹ The City, in this instance, can only approve an exemption under the WCA – whether via operation of Minn. Stat. § 15.99 or otherwise – which it is authorized by the WCA itself.

In support of its argument that the timing requirements of Minn. Stat. § 15.99 supercede all substantive law, Breza cites Moreno v. City of Minneapolis, 676 N.W.2d 1 (Minn. Ct. App. 2004). A.155-158. Moreno is readily distinguishable from the instant case and Breza’s heavy reliance on it is misplaced. Moreno involved an application by the Minneapolis Institute of Arts for an amendment to its Planned Unit Development in order to add a new wing to the Institute. Moreno, 676 N.W.2d at 3-4. The City’s Planning Commission considered and approved the amendment application within the 60-day timeframe set forth in Minn. Stat. § 15.99. Appellant appealed the Planning Commission’s decision to the Minneapolis City Council. Id. The City Council did not act on the application until after the expiration of the 60-day period. Id. This Court concluded that, under the City’s internal process, a zoning application was not approved or denied for purposes of Minn. Stat. § 15.99 until the City Council has resolved all appeals challenging the application. Id. at 6. An appeal of the

¹¹ Breza’s argument would compel, in the event of a city’s failure to follow the timeliness requirements of Minn. Stat. § 15.99, approval of unauthorized or illegal land use related applications. Moreover, Breza’s interpretation invites mischief in the event a city or other agency under the statute were in the position of seeking to evade state or federal law. In that instance, a city could deliberately fail to act on an application which violates

Planning Commission decision was not a new written request which restarted the 60-day time limit for Minn. Stat. § 15.99 purposes. Id. at 7. The Court in Moreno also concluded that, given that approval had been granted by operation of Minn. Stat. § 15.99, the application could not be challenged as arbitrary, capricious or an error of law. Id.

Breza takes this conclusion and attempts to use it to foreclose any argument by the City that it had no authority to issue the exemption Breza now seeks to compel. Breza's claim fails to draw a critical distinction between the application in Moreno and the application in the present matter. In Moreno, the applicant sought an amendment to its PUD, the terms of which were wholly within the control of the City of Minneapolis, not dictated by statute and rule. Minnesota has long recognized the general police powers of municipalities include the power to regulate land use and development. Alexander Co. v. City of Owatonna, 24 N.W.2d 244, 251 (Minn. 1946). Moreover, pursuant to Minn. Stat. §§ 462.351 and 462.365, municipalities have broad authority to enact and enforce planning and zoning regulations such as planned unit developments and amendments to them. Minneapolis was acting within that authority. Thus, overriding state-imposed limitations on that authority are not even at issue in Moreno. In stark contrast, the instant case involves a request for an exemption under WCA. As noted herein, a municipality has no power or authority not expressly conferred

the law it opposes and see that law cast aside because it is "contrary" to automatic approval under Minn. Stat. § 15.99.

upon it by the Minnesota legislature. See Village of Brooklyn Center, 96 N.W.2d at 587. The WCA and its corresponding rules expressly confine possible exemptions to wetland replacement requirements to those specifically enumerated in the statute. See Minn. Stat. § 103G.2241, subd. 1-10. The City's ability to administer WCA is not granted in the nature of a broad police power, but pursuant to specific statutory guidelines from which the City has no authority to deviate. Moreno, to the extent it is persuasive for this Court, forecloses the argument that an arbitrary and capricious challenge falling within the City's plenary zoning authority could still lead to the denial of an application approved by operation of Minn. Stat. § 15.99. This matter involves an attempt to secure approval via Minn. Stat. § 15.99 of an exemption which would be flatly illegal and which the City had no power or authority to grant in the first instance.

Briefs filed by the parties in the Moreno litigation confirm this understanding. Appellant Minneapolis Institute of Arts, in arguing for approval of its planned unit development amendment application by operation of Minn. Stat. § 15.99, expressly stated that it "does not argue that approvals resulting from fraud or malfeasance, or based on manifestly illegal applications, should be exempt from review." A.219 (emphasis added). The argument in Moreno involved a dispute over what the City Code authorized regarding zoning and amendments to a planned unit development – all matters indisputably within the plenary zoning

authority of a municipal government.¹² Here, in contrast, the issue regards the undisputed fact that the City had no authority – absent Breza’s construction of Minn. Stat. § 15.99 violations as creating *carte blanche* municipal authority to approve applications – to issue an exemption for a Type 3 wetland for anything more than it already has: the de minimis exemption for 400 square feet of fill. See Minn. Stat. § 103G.2241, subd. 9(5).

Breza’s attempt, via this litigation, to convert Minn. Stat. § 15.99 from a timeliness requirement for responses to land use applications into a wholesale grant of substantive authority must be rejected. The District Court’s decision should be reversed.

CONCLUSION

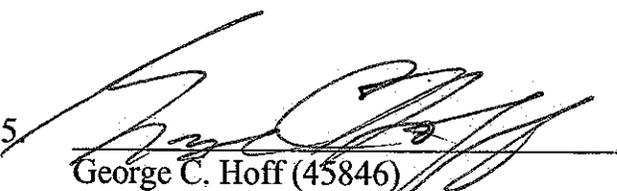
Through his lawsuit, Breza seeks an exemption for manifestly illegal filling activity which the WCA does not authorize municipal governments to grant. Breza insists that he need not pursue his appeal in the venue with jurisdiction over such matters and that Minn. Stat. § 15.99 dictates that applications which are not denied within the statute’s time limitation – even flatly illegal applications – are automatically approved. First, the entity vested with appellate jurisdiction over the City’s decisions under WCA is BWSR, not the District Court. Breza never sought review before BWSR and cannot seek such review in the courts now. Second, Minn. Stat. § 15.99 is intended and was written to insure that municipal governments do not take too long to decide on land use applications. The statute is not an overarching grant of substantive authority to municipal

¹² See Briefs filed in the Moreno. A.159-221.

governments which trumps all other law. The City in this matter is only authorized to grant an exemption for 400 square feet of fill in the type of wetland in question. Minn. Stat. § 15.99 does not authorize, and Breza cannot receive, anything greater under Minnesota law. Moreover, Breza's exemption application was limited to four cubic yards (approximately 72 square feet). While the City has granted an exemption for 400 square feet, Minn. Stat. § 15.99 could not, in any event, compel the issuance of an exemption which is larger than that for which Breza applied.

The District Court incorrectly denied the City's motion for summary judgment and reached incorrect legal conclusions after trial. The District Court's decisions should be reversed.

Dated this 24 day of February, 2005.



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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) (with amendments effective July 1, 2007).