

NO. A04-2286

State of Minnesota
 In Supreme Court

Richard Breza,

Appellant,

v.

City of Minnetrista,

Respondent.

**BUILDERS ASSOCIATION OF THE TWIN CITIES'
 BRIEF AS AMICUS CURIAE AND APPENDIX**

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INTRODUCTION

The Builders Association of the Twin Cities (“BATC”) respectfully submits this brief as *amicus curiae* in support of Petitioner Richard Breza (“Breza”).¹ BATC is a not-for-profit, voluntary trade association established to represent the interests of building contractors, land developers, manufacturers, suppliers, and related business enterprises throughout the Minneapolis-St. Paul metropolitan region. BATC urges this Court to affirm the district court’s decision.

BATC believes that the Court of Appeals decision should be reversed because it is contrary to the purposes of Minnesota Statute § 15.99. BATC’s members rely upon governments to make timely land-use decisions. Since its enactment, Minnesota Statute § 15.99 has provided a guaranty to builders and all other applicants that such decisions would be made within sixty days of a written request. That statute further provides that, if a local government unit fails to make a decision within sixty days, the request is approved by operation of law. The Court of Appeals’ decision severely threatens the statute’s guaranty by (a) allowing a city to challenge an automatic approval long after the statute’s sixty-day deadline and (b) holding that an application that exceeds the authority granted to local government units by administrative rules can never be automatically approved under the statute. Both of these holdings undermine the purposes for which Minnesota Statute § 15.99 was enacted.

¹ In accordance with Minn. R. Civ. App. P. 129.03, BATC hereby certifies that its counsel authored this whole amicus brief and that no person or entity, other than BATC itself, has made a monetary contribution to the preparation or submission of this brief.

LEGAL ARGUMENT

I. THE COURT OF APPEALS' DECISION SHOULD BE REVERSED BECAUSE IT IS CONTRARY TO THE PURPOSES OF MINNESOTA STATUTE § 15.99.

A. Minnesota Statute § 15.99 Was Enacted To Guaranty That Land-Use Decisions Would Be Timely, Certain, and Final.

The Minnesota legislature enacted Minnesota Statute § 15.99 to promote timely decision-making and certainty and finality of land-use decisions. During debate on the statute, Representative Brown stated that, "Minnesota citizens do have the right to receive a response to their requests in a timely manner and at the same time not be entangled in delays or squabbles" House Floor Debate on H.F. No. 641 (Apr. 12 1995) (statement of Rep. Brown), cited in American Tower, L.P. v. APT Minneapolis, Inc., 621 N.W.2d 37, 41 (Minn. Ct. App. 2000). Senator Wiener stated that the purpose of the statute was to:

assure citizens that when they apply for a land use permit they can get a response to the request within 45 days [the bill was originally introduced with a 45 day time limit] It's unfortunate you have to ask the government to be prompt, ask the government to respond quickly when a citizen does request a permit. There's many instances that are – people are waiting a year, two years, thee years for a request.

Hearing on S.F. No. 647 Before the Senate Comm. On Governmental Operations and Veterans (Mar. 29, 1995) (statement of Sen. Wiener.) (AA 147-148.)

Numerous Minnesota cases have verified that Minnesota Statute § 15.99's purpose is to promote timely, final, and certain land-use decisions. See Manco of Fairmont, Inc. v. Town Board of Rock Dell Township, 583 N.W.2d 293, 296 (Minn. Ct. App. 1998), rev. denied (Minn. Oct. 20, 1998) ("[T]he underlying purpose of Minn. Stat. § 15.99 is to

keep government agencies from taking too long in deciding [whether to grant a conditional use permit.]”); Tollefson Development, Inc. v. Elk River, 665 N.W.2d 554, 558 (Minn. Ct. App. 2003), rev. denied (Minn. Sept. 24, 2003) (“[T]he underlying purpose of the statute is to establish clear deadlines for local governments to take action on zoning applications.”); Concept Properties, LLP v. Minnetrista, 694 N.W.2d 804, 825 (Minn. Ct. App. 2005), rev. denied (Minn. July 19, 2005) (“The purpose of Minn. Stat. § 15.99 is to ensure timely land-use decisions by governmental agencies.”).

Statutes like Minnesota Statute § 15.99 are commonly referred to as “automatic approval” statutes. Other jurisdictions have enacted automatic approval statutes to promote the same purposes as Minnesota’s statute. The New Jersey Supreme Court has held that one purpose of New Jersey’s automatic approval statute “was to expedite the decision of land use applications.” See Lizak v. Faria, 476 A.2d 1189, 1194 (N.J. 1984). The Ohio Supreme Court has held that Ohio’s automatic approval statute “is designed to ensure prompt action to protect the developer from bureaucratic obstructionism.” P.H. English, Inc. v. Koster, 399 N.E.2d 72, 74-5 (Ohio 1980). The Commonwealth Court of Pennsylvania has held that Pennsylvania’s automatic approval statute “was enacted to remedy the losses occasioned by the indecision, vague recommendations, and protracted deliberations of local governing bodies and to eliminate deliberate or negligent inaction on the part of governing officials.” Mid-County Manor, Inc. v. Haverford Township Board of Commissioners, 348 A.2d 472, 477 (Pa. 1975).

B. Minnesota's Statute Sought To Achieve Timeliness, Certainty, and Finality By Mandating That, After Sixty Days Of Inaction, Applications Are Automatically Approved.

To achieve timeliness, certainty, and finality, the Minnesota legislature mandated that, if a government agency fails to make a land-use decision within sixty days after receiving an application, the application is automatically approved. See Minn. Stat. § 15.99, subd. 2 (2000). The plain language of the statute establishes that the legislature created a bright-line rule: "Failure of an agency to deny a request within 60 days is approval of the request." Id. (emphasis added).

II. THE COURT OF APPEALS' DECISION WILL FRUSTRATE THE STATUTE'S ABILITY TO GUARANTY TIMELY, CERTAIN, AND FINAL LAND-USE DECISIONS.

A. The Court of Appeals' Decision Defies The Statute's Purposes By Allowing The City To Challenge The Automatic Approval After The Sixty-Day Time Limit.

By allowing further review of land-use applications after the statute's sixty-day deadline, the Court of Appeals' decision ignores the legislature's purposes for enacting Minnesota Statute § 15.99. See Minn. Stat. § 645 (providing that, when interpreting a statute, a court should consider, among other things, "the occasion and necessity for the law," "the mischief to be remedied," and "the object to be attained."). As a consequence of the Court of Appeals' decision, applicants can no longer count on the statute's promise that after 60 days, their application is automatically approved. See Minn. Stat. § 15.99. Instead, the timeliness, certainty, and finality that were to occur within sixty days may take months or years. Now, applicants will not know whether they are entitled to rely on the statute's "automatic approval" unless they bring a declaratory judgment or mandamus

action to verify the effect of a city's inaction. This outcome is contrary to the purposes of the statute. See Gun Lake Assoc. v. Aitkin, 612 N.W.2d 177, 181, n.2 (Minn. Ct. App. 2000) rev. denied (Minn. Sept. 13, 2000). (holding that an approval under the statute "occurred without any further action by respondents to invoke their rights under the statute.") As the facts of this case demonstrate, there can be no timeliness, certainty, or finality if a city can simply refuse to acknowledge an automatically approved application 14 months after an "automatic approval" has occurred. (AA 45)

The Court of Appeals' decision denies applicants any certainty or finality by reading into Minnesota Statute § 15.99 a need to have judicial review of an automatic approval, after the sixty-day deadline. To guaranty that "automatic approvals" are final, the Minnesota Legislature chose not to provide for further judicial review of applications after they had been automatically approved. See Minn. Stat. § 15.99. In other statutes governing land-use decisions, however, the Minnesota legislature has provided for judicial review of automatic approvals. For instance, Minnesota Statute § 462.358 provides that, if a city fails to act on an application for a subdivision within sixty days of preliminary approval, "the application shall be deemed finally approved." Minn. Stat. § 462.358, Subd. 3b. In Minnesota Statute § 462.361, the Minnesota legislature expressly provided a right to seek judicial review of a subdivision that is automatically approved under Minnesota Statute § 463.358. See Minn. Stat. § 462.361.

The Minnesota legislature knows how to provide for judicial review of automatic approvals, but it chose not to do so under Minnesota Statute § 15.99. The Minnesota legislature understood that the possibility of prolonged judicial review would eliminate

the timeliness, finality, and certainty that the statute was intended to create. The Court of Appeals' decision exposes applicants to the very uncertainty that the Minnesota legislature sought to remedy by enacting Minnesota Statute § 15.99.

B. The Court of Appeals' Holding, That Breza's Application Was Never Automatically Approved, Defies The Statute's Plain Language, And A Common Rule Of Statutory Construction.

The Court of Appeals' holding, that Breza's application could not have been automatically approved under Minnesota Statute § 15.99 because Minnetrista lacked the authority to grant the application, defies the statute's plain language and a common rule of statutory construction.

First, the Court of Appeals' decision defies the plain language of Minnesota Statute § 15.99. No language in the statute confines or limits the scope of an automatic approval. Rather, the statute provides that a request shall be granted "notwithstanding any other law to the contrary." Minn. Stat. § 15.99.

Second, the Court of Appeals' holding is based on the faulty reasoning that, because Minnetrista's authority to grant Breza's land-use request was limited by administrative rules governing wetlands, any automatic approval under Minnesota Statute § 15.99 is also so limited. Breza, 706 N.W.2d at AA 7-9. The Minnesota Court of Appeals' reasoning defies the commonly accepted rule of statutory construction that "when an administrative rule conflicts with the plain meaning of a statute, the statute controls." Special School Dist. No. 1 v. Dunham, 498 N.W.2d 441, 445 (Minn. 1993). The Court of Appeals wrongly held that Minnesota Statute § 15.99 is limited by Minnesota Rules Chapter 8420. Breza, 706 N.W.2d at AA 7. Rather, the opposite is

true. The state legislature has decided, without exception, that “Failure of an agency to deny a request within 60 days **is approval** of the request.” Minn. Stat. § 15.99 (emphasis added).

C. The Court of Appeals’ Holding That Breza’s Application Was Never Automatically Approved Wrongfully Imposes The Consequences Of Government Inaction On Innocent Land-Use Applicants.

1. By Holding That An Application In Excess Of A City’s Authority Can Never Be Automatically Approved, the Court of Appeals’ Decision Wrongfully Imposes The Consequences Of Inaction On Applicants.

The Minnesota Legislature intended that the government, not applicants, bear the burden of the government’s failure to comply with Minnesota Statute § 15.99’s sixty-day deadline. The legislative history of the statute indicates that the legislature intended that the government bear the consequences of inaction, even if it results in issuance of permits that are contrary to other laws:

I think the permit should be issued if the agencies can’t respond. And when permits start getting issued that we don’t like, then we’re going to start asking the agencies why they haven’t gotten together.

Hearing on S.F. No. 647 Before The Senate Comm. On Governmental Operations and Veterans (Mar. 29, 1995) (statement of Sen. Beckman.).

The Court of Appeals’ holding, that because administrative rules limited Minnetrista’s authority to approve Breza’s application, it was never automatically approved under Minnesota Statute § 15.99, exposes homeowners and builders to exactly the kind of uncertainty that the statute sought to resolve. Now, homeowners and builders are exposed to the risk that they may learn, long after commencing a project in reliance

on an automatic approval, that their application was never automatically approved at all.² Cf. Yeh v. Cass, 696 N.W.2d 115, 132 (Minn. Ct. App. 2005) (reasoning that a developer acquires a vested right to develop property when she relies on an approval and begins to construct a project). In such instances, an applicant that relies on the automatic approval may even be subject to criminal sanctions.³

The Court of Appeals' decision burdens applicants with the consequences of the city's failure to decide within the sixty-day period. Alternatively, the Court of Appeals could have decided that Breza's application was automatically approved, but that the approval violated some other state law. Such reasoning, at least, would be consistent with the statutory language, which compels automatic approval as a matter of law. See Minn. Stat. § 15.99. Such a ruling would also protect applicants who act in reliance on the automatic approval, and then learn later that the approval was wrong. In these cases, since the applicant would have been acting pursuant to an automatic approval, the applicant would not be acting unlawfully. Rather, the city would bear the consequences of allowing the automatic approval to take place.

² In its amicus brief to the Court of Appeals, the League of Minnesota Cities offered three hypothetical situations describing the harms to the State and its citizens if the Court did not allow a municipality to later question or challenge the scope of a permit that has been granted under the sixty-day rule. The equities, and any persuasiveness, of these hypothetical situations are changed if the end of each hypothetical is changed to provide that "the applicant completed the project in reliance on the approval under the sixty-day rule." Under this revised hypothetical, the equities, along with the plain language of the statute and its legislative history, compel that the government, and not the applicant, should bear the consequences of the government's delay in acting on the application.

³ For instance, a homeowner who acted in reliance on an automatic approval could be charged with a misdemeanor under Minn. R. 8420.0230, subp. 5.

2. Delays In Land Use Decisions Cause Economic Harm.

Real estate and construction are important components of our economy. As of 2002, domestic building and construction was a \$1.2 trillion annual industry. 2002 Economic Census, U.S. Census Bureau, United States Department of Commerce, October 2005, *available at* <http://www.census.gov/prod/ec02/ec0223sg1.pdf>. In the United States, construction is the single largest industry. As of 2001, it employed approximately 15% of the labor force and accounted for about 15% of the gross national product. Encyclopedia Americana, Grolier, vol. 7, p. 677 (2001). Additionally, approximately two thirds of the total national wealth is represented by land, land resources, and real-estate improvements. The value of all real estate is estimated in excess of six times the worth of all mechanical and other equipment of factories and utility industries. *Id.*, vol. 23, p. 290.

Delays and uncertainty in the municipal approval process decrease supply and increase the cost of housing and other development. A recent study by PriceWaterhouseCoopers concluded as follows:

- “Reduced permitting times will encourage economic development. Permitting delays increase costs, reduce returns on investment, and cause investors to seek other opportunities. The study finds that shortening permitting processes by 3 months on a 22-month project cycle could make the difference in the decision whether or not to undertake the project.”
- “Permitting delays raise tenant costs both in new buildings and existing buildings. When permitting delays are the norm, the increased costs and delayed returns on investment are built into rents paid by all tenants. Permitting delays discourage investment, leading to less construction, fewer buildings, and a tighter real estate market. As a result, rents are higher for all tenants.”

- “With competition between jurisdictions for new development dollars, more efficient permit processes can attract investment from other areas. Local governments frequently compete to attract new developments. Improved permit processes can be a cost effective tool in addition to or in lieu of other inducements such as preferential tax rates or regulatory relief.”
- Variation in permitting time leads to uncertainty for investors, who will demand a higher rate of return to compensate them for the additional risk of cost overruns caused by permit delays.

PriceWaterhouseCoopers National Economic Consulting, The Economic Impact of Accelerating Permit Processes on Local Development and Government Revenues (2005)

available at <http://www.aia.org/SiteObjects/files/permitstudyfullreport.pdf> at BATC Ap.

2-3. Building officials and architects from around the country have offered the following examples of negative impacts from permitting delays:

- “Extending length and depth of reviews drives up construction costs, making construction of affordable housing difficult.”
- When Intel is considering construction of a chip plant in the United States, several states are considered. “Major factors affecting the final decision are the cost and amount of time needed to move through the building regulation system of each of those states or their local jurisdictions.” Intel estimates that a single day’s delay costs the firm \$1 million.
- “Ninety percent of the products that Hewlett Packard manufactures have a life span of less than 12 months. (The life span is the period from the time the products are conceived to the time they are out of date.) For this reason, the company is much more likely to favor a permitting process that takes two weeks rather than two months.”

American Institute of Architects Building Permit Streamlining Narrative, January 15 and 16, 2004, pp. 2-3, *available at* http://www.aia.org/static/state_local_resources/buildingpermit/narrative.pdf. at BATC Ap. 27-28.

The Court of Appeals' decision will cause these economic harms by causing delays and uncertainty in development. Under the Court of Appeals' decision, a homeowner or developer would need to have another public hearing, another governmental determination, and possibly a court challenge before the homeowner or developer would know whether her application has been approved with finality. Under these circumstances, the timeliness, certainty, and finality that were to occur within 60 days may take months or years. There can be no timeliness, certainty or finality if a city can deny an application fourteen months after an application was made, if a homeowner must have another public hearing on the application, or if a homeowner must commence a mandamus action in order to determine if an application was approved under the 60-day rule.

III. THE BRIGHT-LINE RULE CREATED BY THE LEGISLATURE IN MINNESOTA STATUTE § 15.99 SHOULD BE ENFORCED

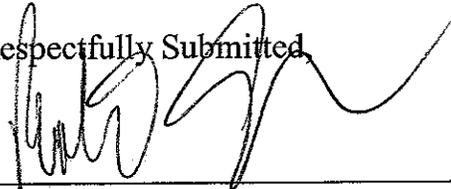
This Court should enforce the statute's purposes by holding that, if a municipality fails to act on an application for sixty days, it is automatically approved. See Minn. Stat. § 15.99. Several prior Court of Appeals decisions have promoted the statute's purposes by enforcing this bright line rule. For instance, in Moreno, the Minnesota Court of Appeals promoted the statute's principle of finality by holding that the Court lacks the authority to review an automatic approval for error of law. See Moreno v. City of Minneapolis, 676 N.W.2d 1, 6 (Minn. Ct. App. 2004). In Gun Lake Assoc. v. Aitkin, the Court of Appeals held that a conditional use permit was automatically approved under Minnesota Statute § 15.99, even though the county failed to abide by relevant statutes and

ordinances when approving the permit. 612 N.W.2d at 182. This result followed from the court's reasoning that "We cannot hold that the county acted in an arbitrary, or otherwise improper, fashion when the result it reached was compelled by statute." Id.

CONCLUSION

For the reasons set forth above, this Court should reverse the Court of Appeals' decision.

Respectfully Submitted,



Dated: March 23, 2006

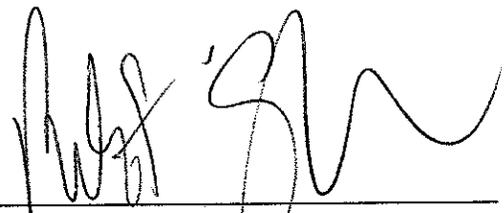
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CERTIFICATE OF COMPLIANCE

The undersigned, Robert J. Shainess, hereby certifies pursuant to Minn. R. Civ. App. P. 132.01, subd. 3(c), that the word count of the attached Amicus Brief of The Builders Association of the Twin Cities, is 3,521 words. The Brief complies with the typeface requirements of the rule and was prepared, and the word count was made, using Microsoft Word 2000.

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