

NO. A04-2286

State of Minnesota
 In Supreme Court

Richard Breza,

Appellant,

v.

City of Minnetrista,

Respondent.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. RESPONDENT'S ATTEMPTS TO REWRITE THE ESTABLISHED RECORD ON APPEAL SHOULD BE REJECTED OUT OF HAND.

In its brief, the City makes the confounding arguments that: (1) Breza applied for an exemption for less than the amount of fill placed in his backyard; and (2) the only type of wetland on Breza's property is Type 3. City's Brief, pp. 8, 10 nn.7-8. These contentions contradict the district court's explicit findings of facts and the stipulated facts—neither of which have been challenged on appeal. AA 14-19. Further, these contentions contradict the City's admission that “[t]he matters before this Court involve exclusively legal issues.” City's Brief, p. 8. Accordingly, the Court should disregard contentions of fact by the City that are inconsistent with the established facts found by the district court and stipulated by the parties.

First, the City improperly argues that Breza only applied for a 72 square-foot exemption based on a letter attached to his application, then contends that its grant of a 400 square-foot exemption is sufficient because it gives Breza a larger exemption than he requested. City's Brief, pp. 8, 10 n.8. This argument is not supported by the record. In its order, the district court found that Breza applied “for an exemption for the 5,757 square feet that had been filled.” AA 15. The district court's finding is consistent with Breza's testimony at trial that he “was applying for an exemption for all the fill-in work that had been done.” AA 113.

Not only does the City's argument misstate the record, but it also defies logic to suggest that Breza only applied for a 72 square-foot exemption when he had placed more

than 5,000 square feet of fill on his property. Moreover, both the DNR Enforcement Officer who issued the Cease and Desist Order and the City's WCA Agent who visited Breza's property clearly could see and knew that he had filled far more than 72 square feet on his property and both had directed that absent an exemption, all fill placed would be required to be removed.¹

Second, the City contradicts uncontested facts to which it stipulated at trial when it contends that Breza's yard had only Type 3 wetlands. City's Brief, p. 10 n.7. The stipulated facts do not state, as the City claims, that only Type 3 wetlands existed. Rather, the stipulation states that "[w]hen Breza acquired the Property, *parts of it* were covered by a wetland that was classified as Type III." AA 17 (emphasis added). A wetland delineation report for Breza's property identified Type 2, 3 and 7 wetland. AA 21-35. Accordingly, the City's attempts to rewrite the factual record should be

¹ Breza testified that the following occurred the day the DNR Enforcement Officer visited his property:

I was in my back yard and a big black Dodge Ram truck came down the side driveway that is to the west of our property. And a gentleman in fatigues with a gun as [sic] D.N.R. officer came out of his truck and asked if there was any fill or anything that had been done to the property. We walked over the property and I told him what had been done, and it was a short conversation. He asked me what had, you know, when's the last time something had been done on it, and it was a very short visit.

AA 105. Shortly after the officer's visit, Breza received a Cease and Desist Order by mail. *Id.* The City's WCA Agent wrote Breza that, "Currently you have a restoration order issued by the Hennepin Conservation District to remove approximately 5,737 square feet of fill material from a wetland that was filled without a permit." AA 46.

disregarded as well as all of the City's arguments stemming from its insupportable assertions of fact.

II. CASTING THE UNAMBIGUOUSLY-WORDED 60-DAY RULE AS MERELY A "TIMING STATUTE" CONTRADICTS THE PLAIN LANGUAGE OF THE LAW AND THWARTS THE LEGISLATURE'S INTENT TO IMPOSE A MEANINGFUL, SUBSTANTIVE PENALTY UPON UNTIMELY ACTION.

The City, echoing the court of appeals, contends that Minn. Stat. § 15.99 is merely a timing statute that does not mandate the automatic approval of Breza's Exemption Application. City's Brief, pp. 10-13; *see* AA 9 (where court of appeals concludes that Section 15.99 "is a timing statute ... [that] does not alter the underlying statutory authority of an agency to approve an application"). This conclusion of the court of appeals follows from its mistaken rationale that the City had no legal authority to allow Breza's fill to remain in place. According to the court of appeals, to permit the fill to remain as a consequence for a 60-Day Rule violation would lead to "an absurd and unreasonable result" that would be contrary to Minn. Stat. § 645.17 ("Legislature does not intend a result that is absurd, impossible of execution or unreasonable"). AA 9. Allowing the fill to remain is not absurd, impossible of execution or unreasonable—it is clearly the legislatively-intended consequence for the City's failure to act on Breza's application for more than a year.

Minnesota courts have consistently held that Minn. Stat. § 15.99 is unambiguous and that courts must give full force and effect to the statute's plain mandate:

Because this statute is unambiguous, this court must 'give effect to the statute's plain meaning.' While automatic approval of a permit application is an extraordinary remedy,

Minnesota appellate courts have shown no reluctance to grant this remedy and enforce the provisions of section 15.99 when a city has failed to satisfy its clear requirements.

Northern States Power Co. v. City of Mendota Heights, 646 N.W.2d 919, 924-25 (Minn. App. 2002). The City advocates affirming the court of appeals' reading of limiting language into Minn. Stat. § 15.99, but there is no legal justification for doing so. The fundamental rule of statutory construction dictates that, "When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn. Stat. § 645.16 (2004). If a statute, construed according to ordinary rules of grammar, is unambiguous, a court may engage in no further statutory construction and must apply its plain meaning. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996).

The statute plainly provides—without limitation—that "[f]ailure of an agency to deny a request within 60 days is approval of the request." The City asks this Court to apply limitations to the statute that the Legislature did not prescribe. Courts cannot add to a statute "what the legislature purposely omits or inadvertently overlooks." *Ullom v. Independent Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994) (citation and internal quotation omitted). A change in a statute must come from the Legislature, *Martinco v. Hastings*, 265 Minn. 490, 497, 122 N.W.2d 631, 638 (1963), and based on the Legislature's words and actions in adopting and subsequently amending the 60-Day Rule, there is no indication that it intends to limit the mandatory consequence of automatic approval from untimely government action.

The legislative history from the 1995 adoption of Section 15.99 includes a colloquy on the very subject of frustrations arising from delays in wetland permitting as an example of the type of ill that the Legislature was seeking to correct. AA 153-74. There was testimony concerning the lack of coordination by agencies in addressing wetland-permitting issues; there were legislative assertions of the desire to place “the burden of coordination on the agencies themselves;” there was a statement of legislative intent “to get all agencies to act so [applicants] ... would be directed where they need to go, and then to get the answers within 60 days”; and there were affirmative legislative declarations that if agencies “don’t get their act together the permit just gets issued,” and that “if you don’t do it, if you don’t do your work, then the permit’s going to be issued.” *Hearing on S.F. No. 647 Before the Senate Comm. on Governmental Operations and Veterans* (Mar. 29, 1995). AA 147-48, 154, 163-64. Finally, the ultimate legislative expression manifesting that the Legislature knew and understood what the consequences of automatic approval may be, was Senator Beckman’s statement that “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.” AA 164.

As if this were not enough, the Legislature has twice amended the 60-Day Rule since its adoption—in 1996 and 2003—and on neither occasion did the Legislature disturb or modify in any way the mandate of Subdivision 2 that “[f]ailure of an agency to deny a request within 60 days is approval of the request.” 1996 Minn. Laws ch. 283, § 1; 2003 Minn. Laws ch. 41, § 1. Accordingly, characterization of Minn. Stat. § 15.99 as merely a “timing statute” is simply wrong. Minn. Stat. § 15.99 does not *recommend* that

an agency act within a prescribed period, it *mandates* action by prescribing a clear (and clearly-intended) consequence of automatic approval. The statute plainly provides that if an agency fails to act, the decision is taken out of the agency's hands and automatic approval of the application results. *See MSP Co.*, 646 N.W.2d at 926 ("The underlying purpose of this statute is to establish clear deadlines for *local governments to take action on zoning applications.*") (citation omitted; emphasis added).

It is clear from the legislative history and the plain language of the statute, that the automatic approval language is the heart and soul of the statute and that the timing element merely provides the catalyst to ensure a prompt response to citizens. Therefore, failing to mandate the automatic approval consequence of Minn. Stat. § 15.99 serves only to diminish the purpose behind the statute and ignore the Legislature's clear directive.

III. SEPARATE AND APART FROM AUTOMATIC APPROVAL UNDER THE 60-DAY RULE, RESPONDENT HAD AUTHORITY UNDER THE WCA TO ALLOW ALL THE FILL THAT HAD BEEN PLACED TO REMAIN.

The City argues and the court of appeals concluded that the City had no authority to grant Breza's application to allow all the fill to remain because under the WCA, the City could only grant a de minimis exemption of 400 square feet. This is incorrect because the WCA regulatory scheme gives the City authority to allow all the fill to remain and to order Breza to implement an after-the-fact wetland replacement at another location under Minn. R. 8420.0290, subp. 4 (1999). AA 209.²

² Although the City contends that Breza is presenting a new argument by asserting that the City does in fact have the authority to allow the fill to remain, that contention is simply untrue. Breza has alleged from the beginning of this litigation

Under wetland replacement rules, the City as LGU could have required Breza to replace the affected wetland at another location by creating a wetland or expanding an existing wetland twice as large as that filled by Breza. *Id.* Indeed, the City's WCA Agent recognized that offsite replacement was an option when he wrote to Breza that, "Due to the above findings, the fill in this wetland will need to be removed *rather than replaced via creation of another wetland off site or purchase from a wetland bank.*" AA 46³ (April 8, 2002 letter) (emphasis added). This letter, of course, was sent 16 months after Breza had submitted his application—long after the time when the City still had authority to direct Breza to remove the fill.

that the City had the authority to grant the application and Breza attempted to work with the City to obtain a replacement plan in order to avoid litigation. Breza's Court of Appeals Brief, p. 20; AA 63-74.

³ Moreover, the WCA Agent, during the February 3, 2003 City Council meeting to consider Breza's exemption request, advised the City that Breza's replacement plan presented a viable compromise. "A compromise could potentially involve restoring half of the wetland on-site and replacing the remaining off-site at a 2:1 ratio as required by the Wetland Conservation Act." AA 61. The City Council refused to acknowledge its blatant violation of Minn. Stat. § 15.99 and improperly focused on the precedent it would set if it allowed Breza to replace wetland offsite:

Well, I think one of the issues we have is we need to take a look at the precedents it might set and – I mean, that's – that's first and foremost. And I know we've been very, very concerned about the Halstead Bay. This is on Halstead Bay. * * * We've always been very concerned about the water quality of that bay. And, in fact, we're dealing with other wetland issues also pertaining to Halstead Bay. And we have said time and time again, we don't want these wetlands depleted. We don't want them diminished.

AA 71. Such policy considerations were unavailable to the City after it had grossly violated the statutory time deadline requirement of the 60-Day Rule.

The court of appeals, in rather cryptic and contradictory fashion, observed in a footnote that “Breza would be able to keep more than 400 square feet of fill” by “filing an after-the-fact wetland permit application to the city.” AA 10 n.6. The City, too, acknowledges that it could have allowed Breza to keep the fill in place under a replacement plan, but was not compelled to do so—placing the onus on Breza to have requested the option and (ironically) claiming that he did not timely make such a request. City’s Brief, pp. 28-29. These acknowledgements by the court below and the City prove the point that the City was not legally hamstrung under the WCA from allowing all of Breza’s fill to remain in place. Both the court of appeals and the City suggest that Breza could have or should have filed some other type of application to have obtained relief in the form of an after-the-fact replacement plan that would have allowed the fill to remain. *Id.*; AA 10 n.6. Placing the onus on Breza after allowing his timely application to languish for a year is precisely the type of bureaucratic run-around that the Legislature was seeking to prevent when it adopted the original 60-Day Rule in 1995.

The instructions and application form that Breza received with the Cease and Desist Order were incomplete, at best, and misleading, at worst. AA 41 (Cease and Desist Information Sheet 1999), AA 43 (Application for a Determination of Wetland Exemption or No Loss). The Information Sheet and Application suggested that by submitting the application, if granted, Breza would be allowed to keep all of the fill in

place. *Id.* This is certainly the way that Breza understood the papers.⁴ These documents failed to explain the meaning of an “Exemption” or a “No Loss” determination. *Id.* No mention of after-the-fact replacement is made in any of the documents provided to Breza pursuant to the Cease and Desist Order. *See* AA 40-41, 43. Moreover, the Cease and Desist Order issued to Breza cited Minnesota Rules Part 8420.0290 as authority for applying “for an exemption or no-loss determination” AA 40. Part 8420.0290 concerns not only exemption and no-loss determinations, but also, under Subpart 4, “After-the-fact replacement.” AA 209.

Breza should not be penalized for the bureaucratic shortcomings of vague and incomplete instructions and a sketchy application form. After all, the legislators who adopted the 60-Day Rule declared that they intended to “put the burden of coordination on the agencies themselves;” they recognized that “[t]he people who have the resources to make the decisions are the bureaucrats ...[t]he person who’s coming in and asking for the permit ... doesn’t have the kind of force behind it that state government does” and they further recognized that “*the onus should be on [the bureaucrats] to make the decision in a timely manner.*” AA 153-74 (Senators Riveness and Beckman) (emphasis added). Accordingly, as both the court of appeals and the City admit, the WCA regulatory scheme provides a procedure for allowing Breza’s fill to remain in place. It is not the case that the City had no “underlying authority” to approve Breza’s application.

⁴ Breza testified that he understood he was applying for “a complete exemption for the work that had been done on the property” and that he was seeking exemption “for all the fill-in work that had been done.” AA 110, 113.

See contra AA 10 (court of appeals). The conclusion of the court of appeals that it could not grant relief under the 60-Day Rule because the City had no underlying authority under the WCA to grant Breza's application is erroneous and must be reversed.

IV. RESPONDENT'S HYPOTHETICALS FAIL TO RECOGNIZE THAT IN ADOPTING THE 60-DAY RULE, THE LEGISLATURE LIMITED ITS REACH TO THOSE REGULATORY AREAS OVER WHICH IT HAS PREEMINENT AUTHORITY.

The City (and the League of Minnesota Cities in its amicus brief) trot out unconvincing hypotheticals in arguing that surely the Legislature did not mean what it said and did not say what it meant when it unambiguously directed that *certain types* of written requests directed to *certain agencies*, as defined under the statute, will become automatically approved if not acted on within the time deadline allowed under the statute. *See* City's Brief, pp. 24-27; League of Cities Amicus Brief at pp. 9-10. Both the City and the League ignore that the Legislature circumscribed the reach of the 60-Day Rule to certain governmental approvals where, as the legislative history reflects, there had become a problem with extremely dilatory government response.

Initially, the 60-Day Rule directs that "an agency" must approve or deny certain written requests within 60 days. "Agency" is a defined term under the statute.

Subdivision 1. **Definition.** For purposes of this section, "agency" means a department, agency, board, commission, or other group in the executive branch of state government; a statutory or home rule charter city, county, town, or school district, any metropolitan agency or regional entity; and any other political subdivision of the state.

Minn. Stat. § 15.99, subd. 1 (2000). AA 201. All of the above-listed agencies are political subdivisions of the state and subject to the regulatory control of the Legislature.

Cities, counties, towns, school districts and the Metropolitan Council are all creatures of state statute with powers that emanate from, and that are limited by, the Legislature. *See* Minn. Stat. §§ 123A-123B, 471.59 (school districts); 365-368 (towns); 373 (counties); 410 (home rule charter cities); 412 (statutory cities); 462.381-462.398 (Metropolitan Council).

Further, the 60-Day Rule specifies and limits the types of applications that are subject to the strict time deadline requirements of the statute and subject to the unambiguously direct consequence of “approval of the request” if it is not acted upon timely.

[A]n 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.

Minn. Stat. § 15.99, subd. 2 (2000) (emphasis added). AA 201. Accordingly, the Legislature was not concerned with every decision by the agencies that it made subject to the time deadline statute; the Legislature was only concerned with certain types of permitting, licensing or governmental approval decisions that had come to its attention on account of perniciously-long delays in governmental decision-making. The bill’s Senate sponsor described the problem as follows:

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, three years for a request.* And what the amendment has done is narrowed it to relate to zoning, septic systems or expansion of the MUSA line.

Hearing on S.F. No. 647 Before the Senate Comm. On Governmental Operations and Veterans (Mar. 29, 1995) (emphasis added). AA 148-49 (Sen. Wiener).

Another area where dilatory decision-making was a problem (and in some LGUs, apparently still is) was wetland permitting. *Id.* AA 153, 161. The Legislature expressly and purposefully in 1996 incorporated Minn. Stat. § 15.99 into the WCA, which requires that the LGU comply with the 60-Day Rule or suffer the consequences for its inactions. Minn. Stat. § 103G.2242, subd. 4 (2004), 1996 Minn. Laws ch. 462, § 44 (“The local government unit reviewing . . . exemption or no-loss determination requests must act on all . . . exemption or no-loss determination requests in compliance with section 15.99.”). AA 217. The requirement that an LGU make a timely decision is further enforced by the express adoption of Minnesota’s 60-Day Rule in rules promulgated under the WCA: “The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99 [the 60-day rule], which generally requires a decision to be made within 60 days of receipt of a complete application.” *Id.*

Although the City claims that its authority is limited by the WCA’s objective to achieve no net loss in Minnesota’s existing wetlands, the WCA’s express incorporation of the 60-Day Rule into its procedures shows that the Legislature not only sought to adopt a law protecting wetlands, but also adopted a law protecting citizens from the abuse arising from protracted wetland permit decision-making. If the Legislature believed that the automatic approval language of Minn. Stat. § 15.99 conflicted with the purpose of the WCA, it would not have expressly incorporated into the WCA the time deadline statute, with its clear automatic-approval consequence. Accordingly, the Legislature properly

exercised its unquestionable regulatory authority over political subdivisions of the state, and intentionally and purposefully adopted legislation that mandated a remedy to which these political subdivisions are subject.

The other problem with the City and the League's doom and gloom scenarios is that for these scenarios to materialize, only the most complete and utter governmental ineptitude would have to prevail. To insulate agencies from the consequences of such ineptitude would be diametrically opposed to the intent of the Legislature, as the history of this statute shows. The Legislature intended that the consequence of approval for untimely decision-making would force governmental agencies to become more attentive, vigilant and responsive to citizen requests. AA 164 (where Sen. Beckman states that "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 agencies why they haven't gotten together."). At this point, over ten years after the adoption of the 60-Day Rule, every agency in this state knows—or should know—and certainly has a duty to know the requirements of the statute. Every agency can easily avoid the consequences of violating the 60-Day Rule simply by knowing how to count and by acting within 60 days—or by giving itself the statutory automatic extension of up to an additional 60 days, for a total of 120 days (one-fourth of a year!) to act on a request governed by the time deadline provisions.⁵ See Minn. Stat. § 15.99, subd. 3(f) (2000). AA 202.

⁵ What is more, the statute allows additional extensions beyond this unilateral extension; essentially unlimited extensions are possible by the mutual consent of the agency and the applicant. Minn. Stat. § 15.99, subd. 3(f). AA 202. The power of an agency to request and obtain an extension by "mutual" consent should not be

To suggest as the City and the League do that the Legislature did not intend the result obtained by enforcing the 60-Day Rule in the case before this Court, is to ignore the straightforward directive of the statute and to ignore the legislative history. The Legislature intended and wanted the consequence of approval to have a salutary effect on the efficiency and responsiveness of agencies to certain types of citizen requests. All the agencies and all the decisions within the 60-Day Rule's purview are matters on which the Legislature holds preeminent authority. This allows the Legislature, if it wishes, to implement a clear, simple and direct remedy for an endemic problem of government nonresponsiveness: automatic approval of untimely responded-to written requests. To say as the City and the League do, that the Legislature did not and could not do this, is to ignore the Legislature's fundamental authority to create, regulate and, if necessary, constrain the powers of political subdivisions in this State: the Legislature giveth, and the Legislature may taketh away. The true remedy here is for this City to treat citizen requests that fall under the 60-Day Rule with the attention and respect that the Legislature intended and that the law demands.

CONCLUSION

This Court is obligated to give effect to the plain and unambiguous statutory language of the automatic approval provision of Minn. Stat. § 15.99. Under the statute, Breza's written request to be exempt from removing any fill from his yard, pursuant to

underestimated. When faced with the Hobson's choice of being "asked" by the agency to agree to an extension, or suffer an outright denial of the application, the applicant becomes a supplicant and invariably "agrees" to the extension.

instructions and a form provided by the agency, is automatically approved. For all the above-stated and previously-stated reasons, the decision of the court of appeals should be reversed and the district court's judgment granting Breza's Writ of Mandamus should be reinstated.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,651 words. This brief was prepared using Microsoft Word 2002, Version (10.6612.6714) SP3.

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