

NO. A04-2286

State of Minnesota
In Supreme Court

Richard Breza,

Appellant,

v.

City of Minnetrista,

Respondent.

BRIEF AND APPENDIX OF RESPONDENT CITY OF MINNETRISTA

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STATEMENT OF THE ISSUES

- I. Whether Minnesota municipal governments have only that authority granted to them by the state legislature.

The Court of Appeals held in the affirmative. The Court of Appeals recognized the limitations on the City's authority under the Wetland Conservation Act. "Because the city did not have the authority to grant Breza's application for a 5,737 square-foot exemption if it had acted during the 60 days, its inaction cannot serve to approve it."

See AA. 8.

Most Apposite Cases, Statutes, and Rules:

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

Minn. Stat. §§ 103G.222, subd. 1(a) and 103G.2241, subd. 1-10

Minn. R. 8420.0105 and 8420.0122

- II. Whether Minn. Stat. § 15.99 is a timing statute and not an unfettered grant of substantive authority.

The Court of Appeals held in the affirmative. Consistent with the text of the statute, legislative history, and caselaw, the Court of Appeals stated: "We conclude that Minn. Stat. § 15.99 is a timing statute." See AA. 9.

Most Apposite Cases and Statutes:

Minn. Stat. § 15.99, subd. 2.

Minn. Stat. §§ 645.16, 645.17 and 645.26

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

Moreno v. City of Minneapolis, 676 N.W.2d 1 (Minn. Ct. App. 2004)

STATEMENT OF THE CASE

Appellant Richard J. Breza ("Breza" or Appellant) 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. City 1-16. Both Breza and the City moved for summary judgment, agreeing that the matter involved no disputed material facts. The questions presented to the District Court in the cross-motions for summary judgment 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 WCA 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. City 17-19. The District Court denied the City's motion to reconsider by Order dated August 27, 2003. City 20.

The matter proceeded to a court trial on June 3, 2004, largely on undisputed, stipulated facts. Appellant's Appendix 17 (hereinafter "AA. ____"). 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. AA.14.

The City appealed, arguing that (a) the District Court did not have jurisdiction over the matter given the exclusive nature of the Board of Water and Soil Resources'

jurisdiction to rule on exemption decisions; and (b) Minn. Stat. § 15.99 cannot compel the issuance of a wetland exemption which was not within the City's power to issue and, thus, would violate state law. The Court of Appeals, in Breza v. City of Minnetrista, 706 N.W.2d 512 (Minn. Ct. App. 2005), held that the District Court had jurisdiction but reversed, holding that the District Court had erred in ordering the City to issue a wetland exemption larger than was available under state law. AA.1.

Appellant petitioned this Court to consider the matter and this Court granted the petition by order dated February 14, 2006.

STATEMENT OF THE FACTS

Appellant resides at 6725 Halstead Avenue in the City. Appellant's property is legally described as "Lot 6 and the East Half of Lot 5, Halstead Park, Hennepin County, Minnesota" ("Property"). City 2, ¶ 1. The Property is situated on Halstead Bay in the shoreland protection zone of Lake Minnetonka. AA.17, ¶ 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. AA.17-20. The parties stipulated in proceedings before the District Court that the wetland on the Property is a Type 3 wetland. AA.17, ¶ 2.

Appellant purchased the Property in 1997. AA.17, ¶1. An application for a building permit submitted to the City on November 21, 1996 for the construction of the

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.

residence at 6725 Halstead Avenue (“Residence”) lists Appellant as the “Owner” of the Property. AA.17, ¶3 & City 21-23. The building permit application included the 1994 Survey depicting the wetland on the Property. City 24.

The City issued a building permit for the construction of the Residence on January 28, 1997. AA.38. The building permit states the following as “special conditions”:

1) Construction must exactly follow site and building plans. 2) Erosion controls must be active throughout construction. 3) Clear cutting is prohibited. 4) *Fill^[2] is prohibited from wetlands, floodplain and OHW.^[3]*

Id. (emphasis added). The City issued a Certificate of Occupancy for the Residence on August 22, 1997. AA.39.

Despite the clearly stated restrictions on the building permit, in July of 2000, Appellant contracted with an excavation company to fill the wetland on the Property. AA.17, ¶ 5. Appellant took this action without first obtaining a permit or approval to fill as required by the WCA. See Minn. Stat. § 103G.221 et seq. Appellant’s contractor filled an area of wetland measuring approximately 5,737 square feet. AA.17, ¶ 5.

On December 10, 2000, the Minnesota Department of Natural Resources (“DNR”) issued a “Wetland Conservation Act Cease and Desist Order” to Appellant which directed that he “stop draining or filling a wetland” on the Property. AA.17, ¶7 & AA. 40-41. The Cease and Desist Order advised Appellant that he could make an application

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.”

³ “OHW” refers to the Ordinary High Water mark of Lake Minnetonka. Fill is prohibited below that line.

to the Local Government Unit (the City) for an exemption or a no-loss determination.

AA.40. 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.

Id.

On December 29, 2000, Appellant filed an application for an exemption with the City. AA.18, ¶¶ 9 & 43. On the application form, Appellant identified August 4, 2000 as the "Date Project Started." AA.43. In a December 29, 2000 letter to the City accompanying the application, Appellant 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.

AA.42.

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. AA.18, ¶10 & AA.45.

On June 10, 2002, Appellant's counsel wrote to the City demanding that Appellant's exemption application be approved by operation of Minn. Stat. § 15.99, subd. 2. AA.18, ¶ 13 & AA.49-50. Smyth, the City's WCA Agent, stated in a responsive letter dated July 3, 2002, that the City agreed an exemption had been approved pursuant to

Minn. Stat. § 15.99, subd. 2. AA.17, ¶ 14 & AA.51-58. Smyth's letter indicated that the only exemption legally available for Appellant's Type 3 wetland was a *de minimis* exemption under Minn. R. 8420.0122, subp. 9(A)5 which would permit the filling of up to 400 square feet. Id. Even though Appellant's application materials only sought an exemption for approximately 72 square feet⁴ of fill, the maximum exemption, the largest possible for the project under the WCA, was granted by the City at that time. Id.

On August 22, 2002, the Commissioner of Natural Resources issued a Restoration Order commanding Appellant to restore the wetland located on the Property by no later than October 15, 2002. AA.18, ¶ 15 & AA.56. The Restoration Order informed Appellant of several options for compliance and included the Hennepin Conservation District conclusion that Appellant had unlawfully filled approximately 0.13 acres (5,737 square feet) of wetland.

Appellant 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. AA.19, ¶ 18 & AA.63-74. 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 minimis* exemption. Id.

Appellant 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

⁴Four cubic yards of fill translates into approximately seventy-two square feet, assuming approximately one to 1.5 feet of depth.

citing unidentified fact issues and held a trial on the merits. City 17-19. 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. AA.14-16. The City appealed and the Court of Appeals reversed the writ, holding that Minn. Stat. § 15.99 could not be used to compel the issuance of a wetland exemption the City otherwise lacked the authority to issue under state law. See Breza v. City of Minnetrista, 706 N.W.2d 512 (Minn. Ct. App. 2005) (AA. 1-13). Appellant sought review in this Court.

SUMMARY OF ARGUMENT

There is no dispute in this matter that Appellant illegally filled wetland areas on his Property or that he applied to the City for an after-the-fact exemption for that unlawful activity. Further, there is no dispute that the City failed to respond to that exemption request within the time constraints set by Minn. Stat. § 15.99. This case is about the consequences of that action.⁵

Appellant asks this Court to read Minn. Stat. § 15.99 as an unlimited grant of substantive authority instead of the timing statute it was intended to be. That more limited intention is clear from the language of the statute itself, the legislative history of

⁵ The Amicus Curiae brief of the Builders Association of the Twin Cities ("BATC") is devoted in large measure to a discussion of how the statute was intended to insure "timely, certain, and final" land use actions and discusses the negative consequences when decisions are delayed, e.g., increased costs of construction. See BATC Brief, pp. 2-7, 9-12. Regardless whether such assertions are true, they are beside the point. The only issue in this matter is whether the consequences of failing to act within the time period set by Minn. Stat. § 15.99 can include automatic approval of applications the municipality *had no authority to approve in the first instance*.

the statute, canons on statutory interpretation, and consistent Minnesota case law interpreting it. Moreover, the City has already issued the largest exemption available under the WCA – one that is in fact larger than the one for which Appellant actually applied in this matter – and Appellant made no alternative proposal that offered a reasonable replacement or that the City was compelled to accept.

Appellant suggests that the Court of Appeals exceeded its authority by making new law in this matter. Such a suggestion is baseless. The Court of Appeals simply recognized Minn. Stat. § 15.99 for what it is – a timing statute which was intended to require prompt action, not a broad and unfettered grant of authority to entities whose power is otherwise controlled by the state legislature.

This Court should affirm the Court of Appeals' decision in this matter.

ARGUMENT

I. Standard of Review

The matters before this Court involve exclusively legal issues. A reviewing court is not bound by and need not defer to a district court's decision on a purely legal question. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). This Court reviews de novo a district court's issuance of a writ of mandamus based on a legal determination. Nolan & Nolan v. City of Eagan, 673 N.W.2d 487, 493 (Minn. Ct. App. 2003). Questions of statutory construction also are subject to de novo review by this Court. Brookfield Trade Ctr., Inc. v. County of Ramsey, 584 N.W.2d 390, 393 (Minn. 1998).

II. Minnesota municipal governments have only that authority specifically granted to them by the state legislature.

Minnesota law has long held 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”). That municipalities are creatures of state law and may not exercise broader authority than granted by the legislature is axiomatic and beyond dispute.

In enacting the WCA in 1991, the state legislature clearly stated its intent 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). 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. 8420.0122.⁶ 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 suitable replacement plan. The City has no power not conferred by the state legislature.

⁶ The exemption standards include the following: (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.

In this case, Appellant placed fill in a 5,737 square-foot area of a Type 3 wetland⁷ without approval. Absent approval of an adequate replacement plan, which Appellant 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 Appellant'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 exemption has already been approved by the City to the maximum extent permitted by the WCA. Appellant now seeks an exemption more than fourteen times the maximum permitted by the WCA. Nothing in Minn. Stat. § 15.99 would permit or compel the City to so egregiously violate substantive law.

III. Minn. Stat. § 15.99 is a timing statute and not an unfettered grant of substantive authority.

Undaunted by the fact that he now seeks⁸ an exemption which is patently illegal under state law, Appellant contends that a violation of Minn. Stat. § 15.99 effectively

⁷ Appellant argues in its brief before this Court that the Court of Appeals erred by characterizing the wetland at issue as a Type 3. Such a contention contradicts the parties' stipulation at the District Court that the wetland on the property is, in fact, a Type 3 wetland. See AA. 17, ¶ 2. Such a stipulation cannot be retracted at this late stage in the litigation. Regardless, Appellant does not identify how the outcome of the Court of Appeals' decision might have been different had the wetlands on the Property been characterized differently.

⁸ Appellant argues that he applied for a full exemption for all fill materials he illegally placed on the Property. See Appellant's Brief, p. 29. However, the exemption which was approved by the City was for a larger exemption than Appellant sought prior to litigation. Appellant's application actually requested an exemption for only four cubic yards, or approximately seventy-two 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. AA. 43. Appellant included with the application a letter which described the project: "[o]n approximately August 4

confers unlimited power on municipal governments to approve land use applications, including his application for an illegal exemption under the WCA, regardless whether the City had any existing authority to approve the application. In the lower courts and in its brief submitted to this Court, Appellant consistently asserts that the City is mandated by operation of Minn. Stat. § 15.99 to approve whatever application Appellant made for an exemption to excuse his illegal filling activities. As the Court of Appeals properly held, the City has no authority under the WCA to issue an exemption for all the illegal fill placed on Appellant's Property and Minn. Stat. § 15.99 cannot be construed to confer such authority.

The language of the statute itself and subsequent amendments, its legislative history, and consistent case law interpreting it confirm that Minn. Stat. § 15.99 is exactly what it says it is: a timing statute. It is not, as Appellant seeks, a boundless grant of authority eviscerating all other law. The Court of Appeals decision should be affirmed.

&5 there was approximately 4 cubic yards of black dirt in the back yard and sod placed over the area.” AA. 42. Appellant did not dispute the figure when a letter from the City's WCA Agent, the Commissioner of Natural Resources' restoration order, or the July 3, 2002 exemption order utilized it as the basis for analysis. Appellant's written application contemplated four cubic yards of fill (which translates into approximately seventy-two square feet at an average depth of 1.0 to 1.5 feet). AA. 45-48. That Appellant argues in litigation 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 via Minn. Stat. § 15.99. In short, the City has already granted a larger exemption than Appellant sought.

A. *The text of Minn. Stat. § 15.99 indicates that it is a timing statute.*

At the time of Appellant's application, Minn. Stat. § 15.99, subd. 2, "Deadline for response," stated⁹ 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.

In short, the statute requires municipal governments to act on land use applications within sixty days (or permitted extensions) or the failure to act will constitute approval.

Appellant fixates on language within this subdivision of what is, in reality, a requirement of prompt action on applications and attempts to convert it into something much larger.

Appellant focuses on two particular phrases within the subdivision. See Appellant's Brief, pp. 10-13; 18-19.

Appellant asserts that "approvals occur automatically upon a violation of the statute, *notwithstanding any other law to the contrary.*" Id., p. 19. Appellant takes this phrase out of context and attempts to attach meaning to it which it cannot logically carry. In reviewing statutes, "words and phrases are construed according to rules of grammar and according to their common and approved usage." Minn. Stat. § 645.08(1). Purely as a matter of grammar, the dependent clause containing "notwithstanding any other law to

⁹ Minn. Stat. § 15.99 was subsequently amended in 2003. However, Appellant's application (and thus, this case) predates that version of the statute and it is not applicable in this matter. Appellant quotes subdivision 2 of the statute at p. 11 of his brief, including

the contrary” modifies only the sentence of which it is a part. It does not modify an entire paragraph. See Smart, Walter Kay, English Review Grammar, p. 108 (4th ed., 1968) (dependent “clause of concession” concedes that the statement it contains is opposed to the statement in the main clause of the sentence).¹⁰ The sentence of which the “notwithstanding any other law to the contrary” language is a part regards the time frame for decision on particular types of applications. Minn. Stat. § 15.99, subd. 2. That sentence sets the basic time limit for decision on those specified applications at sixty days. In other words, agency action is required within sixty days “notwithstanding any other law to the contrary” which may prescribe a different time period. The language simply clarifies the preemptive intent of the statute as stated in that sentence, i.e., with respect to time periods. As a matter of usage and grammar, the language as placed in the sentence cannot carry any more meaning than that. The language does not require this Court to toss aside any substantive provisions of any applicable law which might otherwise doom an application.

Appellant also assigns undo weight to the last sentence in the subdivision: “Failure of an agency to deny a request within 60 days is approval of the request.” Minn. Stat. § 15.99, subd. 2. In the context of the remainder of the statute, that language simply sets the consequence for failing to act within sixty days. Appellant postulates a hyper-literal reading of the language and argues that it be read in isolation. Under Appellant’s

ellipses which should not appear. The applicable statute is quoted above and appears in Appellant’s Appendix at AA. 201.

¹⁰ For the Court’s convenience, Chapter IX on “Clauses” of Mr. Smart’s text is included in the Appendix to this submission at City Appendix, pp. 38-53.

formulation, all of substantive law, up to and including the U.S. Constitution, would yield before the awesome power of this single sentence within a single subdivision of a single statute directed at insuring prompt action on land use applications. Under Appellant's formulation, applications relating to land use permits would not even have to be filed with the correct municipality. The only thing which prevents one government entity from treading on the authority of another is "law." Appellant suggests that Minn. Stat. § 15.99 directs that all such law should be disregarded in the event sixty days elapse prior to a decision on an application. No such over-arching intent can be read into the text of this simple timing statute. The only logical reading is that the text of this subdivision was intended to set the consequence of a failure to decide in a timely manner – not a basis to disregard all substantive or jurisdictional limitations on municipal authority. The Court of Appeals recognized this fact and its decision should be affirmed.

B. Legislative history of Minn. Stat. § 15.99 and subsequent amendments to it demonstrate that it was intended to insure prompt action, not to confer unlimited new authority.

Appellant and its Amici suggest that legislative history of Minn. Stat. § 15.99 confirms the understanding that the statute was intended to have a remarkably broad sweep. On the contrary, the legislative history confirms that prompt decision-making was the issue and that an elimination of the limits of substantive law was never even considered. Appellant cites the statement of Sen. Wiener:

I introduced this bill in order to provide a forum to discuss how the state and local government agencies can assure citizens that when they apply for a land use permit that they can get a response to the request within forty-

five days¹¹.... There's many instances that are – people are waiting a year, two years, three years for a request.

Appellant's Brief, p. 11, n. 6. As is apparent from the quote, the Senator's concerns are related to timing for decisions. Appellant also cites a lengthy discourse among members of the Senate Committee on Governmental Operations and Veterans, including Sen. Wiener. Id., pp. 30-31. The various statements speak for themselves, but the upshot is that "the onus should be on [the government] to make the decision in a timely manner." Id. at 31. Of course that is what Minn. Stat. § 15.99 intends. However, nothing in the quoted statements or elsewhere in the legislative history of Minn. Stat. § 15.99 indicates that the consequences of a failure to decide in a timely manner is the elimination of all limitations of substantive law. See AA. 145-199.

While Minn. Stat. § 15.99 is on its face explicitly a timing statute and not an unwieldy new source of substantive authority, the legislature has provided guidance in ascertaining its intent should this Court harbor some doubt about the nature of Minn. Stat. § 15.99. Minn. Stat. § 645.16 states:

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the law;
- (2) The circumstances under which it was enacted;
- (3) The mischief to be remedied;
- (4) The object to be attained;
- (5) The former law, if any, including other laws upon the same or similar subjects;
- (6) The consequences of a particular interpretation;
- (7) The contemporaneous legislative history; and

¹¹ The statute as proposed contained a forty-five day time frame for decision making which was later amended to be sixty days.

(8) Legislative and administrative interpretations of the statute.

As noted herein (and in all of the other briefs submitted in this matter), the legislature was concerned with too slow decision-making by agencies on land use applications. The legislature sought to insure that such decisions were made in a timely manner. That is the “occasion and necessity for the law” and the “mischief to be remedied.” See *Id.*, ¶ (1) and (3). Nothing in the legislative history would support the conclusion that the legislature intended, through Minn. Stat. § 15.99, to change substantive law as to agencies’ and local governments’ spheres of authority under the WCA or any other substantive limitations on their power. The “consequences of [Appellant’s] interpretation” of Minn. Stat. § 15.99 are the elimination of those substantive limits. See Minn. Stat. § 645.16, ¶ (6). The legislature, of course, could not have intended any such drastic alteration of substantive law via a timing statute.

Further, the legislature has provided a set of presumptions to be used in ascertaining legislative intent should this Court look beyond the obvious timing-related as opposed to substantive nature of Minn. Stat. § 15.99. Minn. Stat. § 645.17 states:

In ascertaining the intention of the legislature the courts may be guided by the following presumptions:

- (1) The legislature does not intend a result that is absurd, impossible of execution, or unreasonable;
- (2) The legislature intends the entire statute to be effective and certain;
- (3) The legislature does not intend to violate the constitution of the United States or of this state;
- (4) When a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language; and
- (5) The legislature intends to favor public interest as against any private interest.

Appellant's desired reading of Minn. Stat. § 15.99, which as noted herein would be contrary to its text, also runs counter to several of these presumptions.

First, a construction of Minn. Stat. § 15.99 that would confer upon local governments, after the expiration of sixty days, power to approve limitless exemptions under the WCA they could not approve prior to that time, would be absurd and unreasonable. The legislature could not have intended to alter all of substantive law in pursuit of more prompt land use decisions, particularly without any discussion which would indicate such grandiose and unprecedented intentions. Secondly, Appellant's construction of Minn. Stat. § 15.99 would inevitably lead to violations of the U.S. and Minnesota constitutions. Simple negligence on the part of a clerk working for some agency or local government, by failing to correctly calculate the timing for a decision on an application, could eviscerate that entity's ability to uphold constitutional protections. Under Appellant's reading of Minn. Stat. § 15.99, the agency or local authorities would then be powerless to oppose even the most heinous discrimination or blatant violations of fundamental rights. Third, Appellant's construction of Minn. § 15.99 also would run afoul of the final presumption: that the legislature favors public interest over private gain. Here, the City's authority as LGU under the WCA to issue wetland exemptions is strictly limited. That limitation is borne of the WCA's bold objective: "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) (seeking to achieve a "no net loss" of wetlands situation). The WCA seeks to preserve for the public the state's precious water resources and empowers local governments, within strict confines, to see to that objective. In contrast,

Appellant seeks to use a city's failure to follow a timing statute to circumvent the public interest and obtain a larger backyard. Absent demonstrated legislative intent to permit it, such personal interest cannot so readily trample on the public good.

While it is the 2000 version of the statute at issue in this matter, the import of the 2003 amendment to Minn. Stat. § 15.99 confirms the legislature's intent that the statute is and has always been about timing, not about substantive law. The statute was amended in 2003 to read, in relevant part: "Except as otherwise provided in this section, *section 462.358, subdivision 3b, or chapter 505*, and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request...."

(emphasis identifying amendment). The statutes referenced as exceptions to § 15.99 both relate specifically to different time periods for decision-making which are excepted from the sixty-day requirement. See Minn. Stat. § 462.358, subd. 3b (setting a 120-day timeframe for review of subdivision applications) and Minn. Stat. § 505 (setting a thirty-day timeframe for submission of plats to the commissioner of transportation). Clearly the legislative intent with respect to "law to the contrary" was limited to timing provisions and was not intended to eviscerate all of substantive law.¹²

¹² Appellant proposes what amounts to irreconcilable conflict between statutory provisions, that the operation of Minn. Stat. § 15.99 compels something the WCA flatly prohibits. Reading Minn. Stat. § 15.99 as a timing statute rather than a substantive law statute eliminates any such conflict. However, in the event of such a conflict, Minn. Stat. § 645.26, subd. 1 provides criteria for resolving it: specific provisions prevail over general ones unless the legislature has a manifest intention that the general should prevail. In Hyatt v. Anoka Police Dep't, 691 N.W.2d 824 (Minn. 2005), this Court reconciled a general dog bite liability statute against a specific provision for use of reasonable force by police, finding that the specific provision prevailed. Id. at 830. Similarly, specific limitations placed on a City over wetland exemptions by the WCA

The Court of Appeals' decision, which recognizes legislative intent and upholds it, should be affirmed.

C. Cases interpreting Minn. Stat. § 15.99 consistently hold that it is a timing statute and not a broad grant of new authority for municipalities.

Minnesota courts have long recognized the legislative objective behind Minn. Stat. § 15.99. As the Court of Appeals noted in Manco of Fairmont, Inc. v. Town Board of Rockdell Township, 583 N.W.2d 293, 296 (Minn. Ct. App. 1998), Minn. Stat. § 15.99 is a timing statute, the purpose of which is to keep government agencies from "taking too long to decide." If this Court were to accept Appellant'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. In this instance, 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. The City 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.

should prevail over a general statute intended to insure timely land use decisions. There is not manifest intention by the legislature that the provisions of the WCA or any substantive provisions of law should be subsumed by Minn. Stat. § 15.99.

In every case Appellant cites in support of his argument, the relief automatically approved by operation of Minn. Stat. § 15.99 was within the City's legislatively-granted sphere of authority. In American Tower, L.P. v. City of Grant, 636 N.W.2d 309 (Minn. 2001), this Court held that Minn. Stat. § 15.99 mandated the approval of a conditional use permit for a telecommunications tower. The Court of Appeals found in Northern States Power Co. v. City of Mendota Heights, 646 N.W.2d 919 (Minn. Ct. App. 2002), that Minn. Stat. § 15.99 required approval of a conditional use permit for improvements to the utility's transmission lines. In Demolition Landfill Services, LLC v. City of Duluth, 609 N.W.2d 278 (Minn. Ct. App. 2000), the Court of Appeals held that Minn. Stat. § 15.99 mandated approval of a special use permit¹³ for a landfill.¹⁴ Appellant also cites the Court of Appeals' decision in Kramer v. Otter Tail County Bd. of Comm'rs, 647 N.W.2d 23 (Minn. Ct. App. 2002), which held that Minn. Stat. § 15.99 mandated approval of a conditional use permit and a plat for shoreland development). In each of these cases, the application fell within the respective government's authority: Minn. Stat. § 462.3595 gives municipalities the authority to issue conditional use permits; counties have parallel

¹³ A "special use permit" is legally equivalent to a conditional use permit.

¹⁴ The Brief of Amicus Curiae Minnesota Association of Realtors ("MAR") cites these same cases and uses them to argue that municipalities attempt to "slink around the statute's consequences." MAR Brief, p. 11. As noted herein, this case is not about whether a violation of Minn. Stat. § 15.99 occurred or an evasion of consequences. The City has already suffered consequences in this matter: the automatic approval of the largest available exemption for filling activities under the WCA. The City viewed any filling of the wetland as improper. See AA. 65-74, 76-77. This matter is about whether the consequences should also include automatic approval of matters outside the City's scope of authority. In short, the City argues (and the Court of Appeals held) that if an approval would have been an illegal action before the passing of sixty days, it did not become legal by virtue of Minn. Stat. § 15.99.

authority under Minn. Stat. § 394.301. Outcomes mandated by Minn. Stat. § 15.99 are for matters within the legislatively-granted authority of the government entity. No case stands for the proposition that Minn. Stat. § 15.99 can result in approval of some application which is beyond the parameters of that authority and would flout state substantive law.

As further support for its argument that Minn. Stat. § 15.99 supercedes all substantive law, Appellant cites the Court of Appeals' decision in Moreno v. City of Minneapolis, 676 N.W.2d 1 (Minn. Ct. App. 2004).¹⁵ As the Court of Appeals in this matter recognized, Moreno is readily distinguishable from the instant case and Appellant's 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. The Court of Appeals 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 Planning Commission decision was not a new written request which restarted the 60-day time limit

¹⁵ No Supreme Court review of the Court of Appeals' decision in Moreno was sought.

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.

Appellant takes this conclusion and attempts to use it to foreclose any argument by the City that it had no authority to issue the exemption Appellant now seeks to compel. Appellant's assertion fails to draw the same critical distinction which renders of all the cases he cites inapposite. 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 limited or dictated by some overriding statutory authority. 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 et seq., 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, which expressly confines possible wetland replacement exemptions and narrowly tailors the City's ability, as LGU, to administer them. Minn. Stat. § 103G.2241, subd. 1-10.

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.” City 35 (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.¹⁶ Here, in contrast, the issue regards the undisputed fact that the City had no authority – absent Appellant’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). Appellant now seeks an exemption which the City has no statutory authority to issue – an exemption which, if issued by the City, would be “manifestly illegal” under the WCA. As the parties in Moreno recognized, the decision in that case does not suggest the conclusion that a “manifestly illegal” exemption must be issued pursuant to Minn. Stat. § 15.99. City 35.

Moreno, and every other case Appellant cites, involve matters which were within the sphere of authority of the respective government entity in each case. Appellant’s application, in contrast, if it is construed as Appellant would construe it, i.e., to seek an exemption for the entire 5,737 square feet of fill, is outside the City’s authority to issue under the WCA. The *only* means by which Appellant could obtain such an illegal exemption is via his unsupportable reading of Minn. Stat. § 15.99. Appellant’s attempt,

¹⁶ The Reply Brief of the Appellant Minneapolis Institute of Arts filed in the Moreno litigation is included in the City’s appendix to this Brief at pp. 25-37. The remainder of the briefs filed by the parties in Moreno were included with the City’s Appendix at the Court of Appeals at pp. A. 159-221.

through 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 Court of Appeals' decision should be affirmed.

IV. Limitations on the City's legal authority are not optional.

Appellant argues that after the expiration of the Minn. Stat. § 15.99 deadline, "the City could no longer invoke whatever limits on its powers may have been operative during the legally allowable period for the City to act." See Appellant's Brief, p. 20. However, limits on municipal authority exist whether a City "invokes" them or not. Neither the Appellant nor some oddly broad reading of Minn. Stat. § 15.99 can change the well-settled principle of law that municipalities have only that authority granted by the legislature. See Rippen, 96 N.W.2d at 587. Moreover, federal and state constitutional protections – which would fall under the rubric of "whatever limits" on a city's authority as suggested by Appellants – cannot simply be brushed aside in pursuit of Appellant's overzealous reading of the intended consequences of violating a timing statute.

Under Appellant's view, the power of § 15.99 is boundless. No matter what application is filed, no matter how offensive to any substantive law, no matter that it treads upon authority far beyond that granted to a municipality, the application is approved simply because it was not denied within sixty days. If a landowner seeks to construct a public pool that would discriminate on the basis of race and for whatever reason the application was not denied within sixty days, it would have to be approved notwithstanding that it blatantly violates state or federal Civil Rights laws and the

Fourteenth Amendment.¹⁷ If a landowner proposed a high-stakes casino or a brothel in a residential area and the city miscalculated the number of days it had to act on the proposal, the city would be powerless to reject the proposal regardless of its illegality. Those “other laws” would be disregarded simply by operation of Minn. Stat. § 15.99 under Appellant’s formulation.¹⁸ Further, it matters not to Appellant whether the municipality was merely negligent or actively engaging in nefarious conduct.

Appellant’s interpretation of Minn. Stat. § 15.99 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 or other requirements. In that instance, a city could deliberately fail to act on an

¹⁷ Of course, no state law could trump those federal provisions, but that is precisely why Appellant’s argument must fail. Appellant argues, taking the statute entirely out of its context, that all other law must bow before the power of Minn. Stat. § 15.99. While permitting violations of the WCA may not so readily prove patently offensive, Appellant’s argument offers no logical stopping point. There is no line that can logically be drawn which would allow Minn. Stat. § 15.99 to trump WCA, but fall short of permitting racial discrimination or other prohibited conduct. Both are covered by “other law.” Both would be cast aside if Minn. Stat. § 15.99 has the indelible power that Appellant suggests.

¹⁸ Amicus Curiae MAR argues that negative consequences for the delinquent municipality are the intended penalty of Minn. Stat. § 15.99. MAR Brief, pp. 9-11. However, when a municipality is forced by virtue of its failure to act to approve *whatever* application was submitted, the penalty may far outweigh the offense and moreover, may punish those who had no power over the decision-making process. Automatic approval of an application submitted to the wrong municipality, for example, would penalize an entity which never even saw the application. Where a proposed use is, for example, discriminatory or damaging to the environment in a manner outside the scope of the City’s authority, those penalized by the automatic approval include victims of discrimination and the general public. Certainly such an approach would encompass far more than the legislature intended; it is a can of spraypaint where a pointed brush would do. Rather, the intended targets (and no others) are penalized if the statute is construed as the Court of Appeals did: to require automatic approval of matters which are otherwise within the municipality’s scope of authority.

application which blatantly violates the law it opposes and see that law cast aside because it is “contrary” to automatic approval under Minn. Stat. § 15.99.

Appellant would have this Court hold that, if a municipal government simply fails to (or waits to) act until after sixty days have elapsed on a written zoning request, Minn. Stat. § 15.99 trumps all other law and the application is approved. The municipality’s power to approve any request – regardless of its nature or legality – would be unlimited because of Minn. Stat. § 15.99. Moreover, it would not even matter in Appellant’s view whether an applicant submitted its request to the correct municipality or agency.¹⁹ Appellant could have submitted his wetland exemption application for his Minnetrista property for consideration by Orono or Brooklyn Park. Another applicant could have submitted an application related to property he did not even own. A third applicant could request a permit for a septic system in Duluth from the Department of Economic

¹⁹ Amicus BATC evidently shares this extreme view and believes that the onus should be on the municipality to correct an applicant’s mistake. BATC fears that applicants will rely on a municipality’s inaction to their detriment and worries that prosecution could be the result. See BATC Brief, pp. 7-8. Such fears are unfounded. If the applicant submits an application for something within the municipality’s power to grant (and it is related to property the applicant owns within that municipality), Minn. Stat. § 15.99 would mandate approval after sixty days as intended. If, however, the applicant submits an application for a substantively illegal use (as Appellant did here) or for any use on property it does not own or which lies outside the municipal boundaries, it has no entitlement to rely on inaction. Moreover, such a contention flies in the face of the presumption that citizens should “acquaint themselves with those laws that are likely to affect their usual activities.” State v. Jacobsen, 687 N.W.2d 610, 615 (Minn. 2005). Under Appellant’s construction, he bears no responsibility for illegally filling a wetland and then seeking an illegal exemption which the City had no authority to approve. BATC cites Yeh v. Cass, 696 N.W.2d 115, 132 (Minn. Ct. App. 2005), but mischaracterizes its holding. Yeh stands for the proposition that vested rights do not attach to approvals when a developer mischaracterized what it seeks to build. Id.

Security.²⁰ Issues such as municipal boundaries and jurisdictions, ownership of real property, and agencies' spheres of authority are all defined by law – law which would be disregarded under Appellant's formulation of Minn. Stat. § 15.99 unless action was taken within sixty days. Had the legislature intended to enact such a sea change in Minnesota law (leaving aside questions of whether it could even do so), it would have done so in some fashion other than burying this seemingly innocuous language in a timing statute.

The City has no more authority to grant larger or different wetland filling exemptions than those set by the WCA than it would to approve a racially discriminatory public pool, let alone one on property the applicant did not even own or that was within some other municipality's boundaries. None of these flatly illegal approvals could be compelled by operation of Minn. Stat. § 15.99. The simple fact is that Appellant is seeking automatic approval of an application the City has no power – as a result of the timing requirements of Minn. Stat. § 15.99 or otherwise – to grant.

Minn. Stat. § 15.99 does not operate as a grant of unfettered substantive authority to agencies and municipal governments. Nor does it permit them to flout principles of property ownership or act beyond the scope of their jurisdictional or substantive boundaries. The Court of Appeals' decision should be affirmed.

²⁰ While DES generally would not be involved in land use decision-making, it meets the definition of "agency" in the statute and would be covered by its provisions. See Minn. Stat. § 15.99, subd. 1 (at AA. 201).

V. **Appellant's argument regarding its "compromise" proposal has nothing to do with what could have been approved by operation of Minn. Stat. § 15.99.**

Appellant raises a new argument in its brief: that the City had the authority to approve a replacement plan under the WCA and that somehow Appellant's requested relief should be granted on that basis. First, this argument did not appear in Appellant's Petition for Review to this Court and was not briefed at the Court of Appeals. For that reason alone, this Court should not consider it. See Eakman v. Brutger, 285 N.W.2d 95, 97 (Minn. 1979) (holding that, pursuant to "well-established principles," new arguments are not considered on appeal).

Even if it is considered by this Court, the argument has no bearing on whether the City was compelled to approve an illegal application under Minn. Stat. § 15.99. What Appellant now terms an application for a "compromise replacement plan" was first offered at a meeting of the Minnetrista City Council on February 3, 2003. See AA. 66 (pp. 6-7). A replacement plan is a possible alternative to seeking an exemption. Minn. R. 8420.0290, subp. 4, permits consideration of an "after-the-fact replacement" of wetlands "at a ratio not to exceed twice the replacement ratio otherwise specified." See AA. 209. The replacement ratio which would have been required in this matter was a standard two-to-one replacement. See Minn. Stat. § 103G.222, subd. 1(e) (setting requirement for replacement of wetlands filled on non-agricultural land at two-to-one). Under Minn. R. 8420.0290, subp. 4, the City thus could have considered a ratio of replacement of up to four-to-one. Appellant, via his counsel on February 3, 2003, offered a replacement of roughly half the wetland (essentially, a one-to-two ratio of replacement)

and a cash payment of \$4,800. The City rejected the compromise offer on the same night it was offered. See AA 76-77. There is no lapse of time (much less sixty days) and no basis to require that the City accept a compromise proposal which fell far short of the maximum replacement contemplated by the Minnesota Rules. To the extent the oral compromise proposal can even be considered a proper land use application, the City rejected it on the same day it was offered. Id. Minn. Stat. § 15.99 has no relevance to such a situation.

CONCLUSION

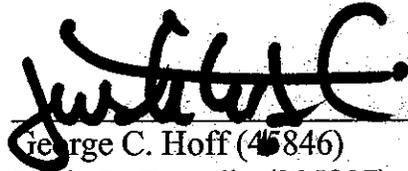
Through his lawsuit, Appellant seeks an exemption for manifestly illegal filling activity which the WCA does not authorize municipal governments to grant. Appellant insists that Minn. Stat. § 15.99 dictates that *any* application which is not denied within the statute's time limitation – even a flatly illegal application – is automatically approved. 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 abrogation of all other provisions of law. The City has already issued the largest exemption available under the WCA – one that is in fact larger than the one for which Appellant actually applied in this matter – and Appellant's offer of compromise was inadequate.

Appellant's suggestion that the Court of Appeals exceeded its authority in this matter is without merit. The Court of Appeals simply recognized Minn. Stat. § 15.99 for precisely what it is – a timing statute which was intended to require prompt action. Minn.

Stat. § 15.99 is not an unfettered grant of authority to entities whose power is otherwise set by specific statutory parameters.

This Court should affirm the Court of Appeals' decision in this matter.

Dated this 18th day of April, 2006.



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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).