

NO. A05-1686

State of Minnesota
In Supreme Court

Hans Hagen Homes, Inc.,

Respondent,

v.

City of Minnetrista,

Appellant.

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

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STATEMENT OF THE ISSUES

- I. **Minn. Stat. § 15.99 cannot compel approval of an application when the City, acting within the required timeframe, denied the application on rational and factually-supported written findings and the applicant had actual notice of that denial.**

The District Court and Court of Appeals held that even though the City made a rational and factually-based decision, in writing, to deny the application prior to the expiration of the time period and the applicant was aware of that decision and had ready access to written confirmation of it, Minn. Stat. § 15.99, subd. 2(a) mandated automatic approval because the City did not “provide” the written decision directly to the applicant as stated in subd. 2(c).

Most Apposite Case and Statutes:

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

American Tower, L.P. v. City of Grant, 636 N.W.2d 309 (Minn. 2001)

Minn. Stat. §§ 15.99, subd. 2(a) and 2(c)

Minn. Stat. § 645.17(5)

- II. **This Court should adopt a prejudice standard to prevent the default approval under Minn. Stat. § 15.99 of land use applications found, in a timely manner and in writing, to be harmful to the public health, safety, and welfare.**

The Court of Appeals recognized that its decision to affirm the District Court was a harsh penalty and acknowledged that “a prejudice requirement would temper the risk of public injustice” where automatic approval occurs under subd. 2(c) notwithstanding a rational and timely decision that the proposal would be contrary to the public good.

Most Apposite Case:

Terrell v. State Farm Ins. Co., 346 N.W.2d 149, 151 (Minn. 1984)

Reliance Ins. Co. v. St. Paul Ins. Co., 239 N.W.2d 922, 924 (Minn. 1976)

D’Anna v. Planning Bd. of Township of Washington, 606 A.2d 417 (N.J. Super. Ct. App. Div. 1992)

Precision Indus. Design Co., Inc. v. Beckwith, 447 A.2d 186, 191 (N.J. Super. Ct. App. Div. 1982)

INTRODUCTION

While this case arises under Minn. Stat. § 15.99, it is not an instance of a government entity taking too long to decide on a land use application. There is no dispute that the Appellant City of Minnetrista (“City”), before the agreed upon deadline to act on an application submitted by Respondent Hans Hagen Homes, Inc. (“Hagen Homes”), (a) denied the application; (b) adopted written findings which provide an uncontested rational basis supporting that denial; and (c) made those findings available to the public both online and at City Hall. Moreover, the parties agree that Hagen Homes had actual notice of the City’s decision (a representative attended the meeting at which the application was discussed) approximately six weeks prior to the expiration of the agreed-upon time period. Nonetheless, the District Court ruled that Minn. Stat. § 15.99, subd. 2(c) compelled approval of the application because the City did not “provide” the written findings of denial directly to Hagen Homes until they were requested nine days after the deadline. The Court of Appeals affirmed, even though its decision recognized that the outcome resulted in a “risk of public injustice.” Hans Hagen Homes, Inc. v. City of Minnetrista, 713 N.W.2d 916, 923 (Minn. Ct. App. 2006).

That decision should be reversed. Nothing in the text of the statute demands the outcome that the lower courts so reluctantly reached. Even if that result were compelled by the statute as construed by the Court of Appeals, this Court should adopt a reasonable prejudice standard to prevent the unwarranted default approval of applications which a City has determined, rationally and in a timely manner, would be harmful to the public.

STATEMENT OF THE CASE

Hagen Homes commenced this action on March 28, 2005 seeking a writ of mandamus to compel the City to approve Hagen Homes' application to rezone property and amend its Comprehensive Plan by expanding the Municipal Urban Services Area ("MUSA") to encompass the property ("Application").

Both parties moved for summary judgment. The City argued that it was entitled to summary judgment because it denied Hagen Homes' Application within the time limitation agreed to by the parties pursuant to Minn. Stat. § 15.99 on written findings which were rational and supported by the record,¹ a Hagen Homes representative was present at the meeting at which the matter was discussed and was aware of the City's decision, and a written copy of the decision was available at City Hall within twenty-four to forty-eight hours after the meeting at which Resolution No. 89-04, denying the Application, was adopted. Hagen Homes nonetheless sought automatic approval because the City did not mail a copy of the Resolution until Hagen Homes requested it shortly after the agreed upon deadline for decision passed more than six weeks later, even though Hagen Homes acknowledged that it knew of the decision and suffered no prejudice by not receiving earlier written confirmation. Hagen Homes also sought automatic approval of a "Conceptual Site Plan" which had been attached to its rezoning and Comprehensive

¹ Hagen Homes acknowledged that the City had a rational basis to deny the application and that the City's actions were not arbitrary or capricious. The challenge pertained only to what Hagen Homes perceived as a technical violation of Minn. Stat. § 15.99.

Plan amendment application, even though it had not actually applied for approval of the contents of that document.

The District Court granted Hagen Homes' motion in part and denied it in part by Order dated July 14, 2005. The District Court ordered the City to approve Hagen Homes' Application for rezoning and to amend its Comprehensive Plan. The District Court found that Hagen Homes had not made an application for approval of its "Conceptual Site Plan" and denied that part of the motion. The City appealed and the Court of Appeals affirmed, concluding that the District Court had "properly construed the requirements" of Minn. Stat. § 15.99, but noting the "risk of public injustice" resulting from the decision. The City petitioned this Court for review on June 15, 2006 and this Court accepted review by Order dated July 19, 2006.

STATEMENT OF THE FACTS

On or about May 18, 2004, Hagen Homes submitted its Application for Comprehensive Plan² amendment and rezoning. App.1-16. The land Hagen Homes seeks to rezone consists of six parcels within the City containing approximately 220 acres which are located south of State Highway 7, east of Highland Drive, and west of Oak Road ("Subject Property"). App. 11. In its Application, Hagen Homes requested that the City rezone the Subject Property from Rural Agriculture to R-4-PUD. App. 11. Hagen Homes also requested a Comprehensive Plan amendment expanding the MUSA boundary

² As required by Minn. Stat. § 473.858, the City has adopted a Comprehensive Plan to guide development within the City, which was last updated in 1999 and approved by the Metropolitan Council. App. 63, ¶¶ 4, 5. The Comprehensive Plan is currently scheduled to be updated again in 2007-2008. App. 63, ¶6 & App. 24.

to provide public services to the Subject Property. App. 11. Along with its Application, Hagen Homes submitted a drawing entitled “Conceptual Site Plan” as an example of what could be built on the Subject Property in the event its Application was approved. App. 16. However, Hagen Homes did not file an application for Site Plan approval.³ App. 34, p. 4, l.2-9.

In a letter dated June 30, 2004, the City requested an extension of time in which to make a decision on Hagen Homes’ Application until September 25, 2004. App. 63, ¶7. By letter dated July 26, 2004, Hagen Homes agreed to extend the sixty-day time limit prescribed by Minn. Stat. § 15.99 to November 30, 2004 to allow the City more time to make a decision on Hagen Homes’ Application. App.17.

Prior to the October 4, 2004 City Council meeting, the City Planner provided a report to the City Council concerning Hagen Homes’ Application. App. 18-26. On October 4, 2004, the City Council held a public hearing on the Application at which Hagen Homes’ representative made a presentation regarding the Application. App. 27-32 & App. 33-49. Following Hagen Homes’ presentation, public comments and City Council discussion, the City Council moved to deny the Application because the proposal

³ Hagen Homes does not challenge the lower courts’ decision that the “Conceptual Site Plan” was not part of the Application and therefore was not approved by operation of Minn. Stat. § 15.99.

was not consistent with the Comprehensive Plan and further studies were needed on traffic and other issues.⁴ App. 49, p.64, 1.3-19. That motion carried. App. 32.

On October 18, 2004, at the next regularly scheduled meeting of the City Council, the City Council approved the minutes of the October 4, 2004 meeting and adopted Resolution No. 89-04 denying the Application ("Resolution"). App. 50-55. The Resolution included the following bases for denial, which are consistent with the reasons stated during the October 4, 2004 meeting:

- (i) the Subject Property is located in an area of the City which is not currently within the MUSA and is not designated for development at urban densities;
- (ii) the Subject Property is currently zoned A which permits 10 acre zoning for single family dwellings and could be subdivided under the current zoning and comprehensive plan to allow up to 23 single family dwellings;
- (iii) the comprehensive plan continues to reflect the City's vision for the Subject Property and there is no compelling reason to amend the plan;
- (iv) development of the Subject Property would increase the already heavy traffic on TH 7;
- (v) the Subject Property is not the appropriate area for more development at this time;
- (vi) any decision regarding the development of the Subject Property should be made in connection with a review of the entire comprehensive plan, not a small isolated area; and
- (vii) the City will have the opportunity to consider development of the Subject Property when the comprehensive plan is next revised in 2008.

App. 52-55. The minutes of the October 18, 2004 City Council meeting were approved on November 3, 2004, the next City Council meeting. App. 64, ¶10. The minutes of both the October 4, 2004 and October 18, 2004 City Council meetings were posted on the

⁴ Hagen Homes conceded that the City had a rational basis for its decision which was factually supported by the record. The challenge in this matter relates only to the requirements of Minn. Stat. § 15.99.

City's website prior to the deadline for decision, November 30, 2004. App. 64, ¶11. A copy of the Resolution was available from City Hall within twenty-four to forty-eight hours after the October 18, 2004 City Council meeting. App. 64, ¶12.

After the expiration of the November 30, 2004 deadline, Hagen Homes requested a copy of the Resolution. Consistent with the request, the City mailed a copy of the Resolution on or about December 9, 2004. App. 64, ¶13. Hagen Homes initiated this lawsuit on March 28, 2005, seeking a writ of mandamus to compel the City to approve the Application due to the City's failure to "provide" directly to Hagen Homes written confirmation of the decision prior to the expiration of the agreed-upon deadline for decision under Minn. Stat. § 15.99, subd. 2(c). App. 56-62.

ARGUMENT AND AUTHORITIES

A. Standard of Review

This matter involves purely legal questions regarding the affect of a statue and this Court is not bound to accept the lower courts' decision on them. Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984). A reviewing court need not defer to the lower court's application of the law when, as in this case, the material facts are not in dispute. Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (Minn. 1989).

When a district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed *de novo* by appellate courts. Lefto v. Hoggsbreath Enters., Inc., 581 N.W.2d 855, 856 (Minn. 1998) (citing Wallin v. Letourneau, 534 N.W.2d 712, 715 (Minn. 1995)).

B. Minn. Stat. § 15.99 cannot compel approval of an application when the City, acting within the required timeframe, denied the application on rational and factually-supported written findings and the applicant had actual notice of that denial.

The portions of Minn. Stat. § 15.99, subd. 2 which are relevant to this matter state⁵ the following:

Deadline for response. (a) 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 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.

...

(c) Except as provided in paragraph (b), if an agency, other than a multimember governing body, denies the request, it must state in writing the reasons for the denial at the time that it denies the request. If a multimember governing body denies a request, it must state the reasons for denial on the record and provide the applicant in writing a statement of the reasons for the denial. If the written statement is not adopted at the same time as the denial, it must be adopted at the next meeting following the denial of the request but before the expiration of the time allowed for making a decision under this section. The written statement must be consistent with the reasons stated in the record at the time of the denial. *The written statement must be provided to the applicant upon adoption.*

(emphasis added). As these sections and consistent Minnesota case law make clear, Minn. Stat. § 15.99 is a timing statute, the purpose of which is to keep government

⁵ Minn. Stat. § 15.99 was amended during the 2006 legislative session to add references in subd. 1(c), 2(a), and 3(b) to review before watershed districts and soil and water conservation districts. Those changes occurred after this case was filed and, in any event, have no bearing on the questions presented to this Court for consideration in this matter.

agencies – including municipal governments – from “taking too long to decide.” Manco of Fairmont, Inc. v. Town Bd. of Rockdell Township, 583 N.W.2d 293, 296 (Minn. Ct. App. 1998). See also American Tower, L.P. v. City of Grant, 636 N.W.2d 309, 313 (Minn. 2001) (noting purpose of Minn. Stat. § 15.99). Minn. Stat. § 15.99 is intended to insure that a land use application does not languish at city hall, bogging down the property owner in bureaucratic uncertainty. The statute requires prompt action on applications and provides a specific consequence for a city’s failure to act in a timely manner: automatic approval.

None of that is disputed in this matter. Here, there is no suggestion that the City took too long to decide. The City denied the application and stated legally rational and factually-supported reasons for its denial on the record. Hagen Homes’ representative was in attendance at the meeting and heard first hand the City’s decision to deny the application and the reasons supporting that denial. Copies of the Resolution were available at City Hall within forty-eight hours after the decision and the minutes of both meetings at which the matter was discussed were posted on the City’s website. All of this occurred promptly and well-within the timeframe for a decision. The City’s only oversight in this matter was that it did not provide in writing directly to Hagen Homes formal notice of what Hagen Homes indisputably already knew – that its application had been denied.

The Court of Appeals held, based on these undisputed facts, that automatic approval was required nonetheless. See Hagen Homes, 713 N.W.2d at 918. The Court of Appeals’ conclusion in this case is that the statute’s various provisions have an

“interdependent functioning of the subdivisions.” Id. at 921. But lost in the Court of Appeals’ efforts at achieving some overarching synthesis in the language was the actual point of the statute.

Minn. Stat. § 15.99 was intended to require timely action on land use applications. As cited in nearly every court decision on Minn. Stat. § 15.99 since its enactment, the point of the statute is to keep agencies from “taking too long to decide” on land use applications. Manco of Fairmont, Inc., 583 N.W.2d at 296. See also American Tower, 636 N.W.2d at 313. That objective is accomplished in subdivision 2(a). That subdivision provides that a decision on an application must be made within sixty days, that a denial must be accompanied by written reasons explaining it, and that failure to do either results in automatic approval of the request. Subdivision 2(a) establishes the requirements of timely action and defines the penalty for not meeting them. It is the only section of the statute that contains the default approval penalty.

In contrast, subdivision 2(c)⁶ functions as general instructions to agencies, defining how the writing requirement set up by subdivision 2(a) is to be handled by different types of decision makers and at what meeting and when a denial must be adopted. It states that a later adopted written statement must be consistent with reasons given at the time of denial and that the written statement is to be provided to the applicant. But notably, subdivision 2(c) does not provide a penalty and, though it repeats language from subdivision 2(a) regarding the writing requirement, it does not repeat the

prescribed penalty provision language. When construing statutes, the court cannot supply that which the legislature omits. See In Re Raynolds' Estate, 18 N.W.2d 238, 240 (Minn. 1945). The first step in statutory construction is to simply read the statute. Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 416 (Minn. 2002). Subdivision 2(c) provides directives but does not include the harsh remedy prescribed for violations of subdivision 2(a).⁷

The plain meaning of subdivisions 2(a) and 2(c), read side by side, is that they are functionally independent. But the Court of Appeals' decision seems to assume that such functional independence cannot occur because, for a statute to have a plain meaning, all of its various directives and requirements must coalesce into one.⁸ The Court of Appeals' reasoning does not allow for the possibility that a statute can have a plain, overriding and

⁶ Minn. Stat. § 15.99, subd. 2(c) was not part of the original sixty-day rule as enacted in 1995. That portion of the statute was added, without any penalty provision, among other amendments in 2003.

⁷ The Court of Appeals states, ostensibly as support for its construction of the statute, that if the subdivision 2(a) penalty did not bleed through to subdivision 2(c), the latter subsection would carry no penalty. However, as the decision in Manco of Fairmont, Inc., 583 N.W.2d at 295, made abundantly clear, statutes may have some portions that carry a penalty and others that do not. Without an "explicit consequence" stated in the statute, the courts do not imply one. Id. See also In Re Raynolds' Estate, 18 N.W.2d at 240. That the legislature enacted subdivision 2(c) without a penalty provision five years after Manco of Fairmont, Inc. was decided is strongly indicative of its intent to reserve the ultimate sanction, full usurpation of agency authority, for those cases involving the most egregious violations of the sixty-day rule.

⁸ The Court of Appeals stated that its recent decision in Veit Co. v. Lake County, 707 N.W.2d 725 (Minn. Ct. App. 2006), also required its "hybrid application of subdivisions 2(a) and 2(c)." Hagen Homes, 713 N.W.2d at 922. However, that case involved an agency's failure to provide *any* written statement of the reasons for its denial within the sixty-day period. Veit Co., 707 N.W.2d at 730. That failure is a clear violation of subdivision 2(a) requiring invocation of that subdivision's penalty provision, regardless what the provisions of subdivision 2(c) may separately require.

consistent objective – that agencies do not “take too long to decide” on land use applications – and still have provisions that provide independent directives, requirements, and consequences in aid of that objective.

In support of its reasoning, the Court of Appeals offers Minn. Stat. § 15.99, subd. 3(c). Minn. Stat. § 15.99, subd. 3(c) states: “An agency response meets the 60-day time limit if the agency can document that the response was sent within 60 days of receipt of the written request.” The Court suggests that if the City’s formulation of the statute’s meaning were correct, subdivision 3(c) would be rendered superfluous and have no effect. The Court of Appeals misreads both the language and the intent of that provision.

First, subdivision 3(c)’s plain language is contrary to the Court of Appeals’ interpretation. Courts are to “construe words and phrases according to the rules of grammar and accord their most natural and obvious usage.” Vlahos v. R & I Constr. of Bloomington, 676 N.W.2d 672, 679 (Minn. 2004). The language of subdivision 3(c), given its natural meaning, simply states a method by which an agency can prove that it met the time requirement: via documentation that the response was sent within sixty days. Second, the provision’s location in the statute is telling. It is placed not among the core provisions describing the requirement of timely action or establishing the penalty for failure to act, but among secondary provisions which could be aptly described as housekeeping issues: describing when an application is deemed complete, how agencies acting on the same application interact, circumstances in which the time period is or may be extended, and how extensions may be requested. See Minn. Stat. § 15.99, subd. 3(a), (b), (d), (e), and (f). Subdivision 3(c), read naturally and in its context among other

secondary items, has no bearing on the interaction between the sections of subdivision 2. It simply provides a manner in which an agency can show that it complied with the sixty day requirement. Regardless how subdivision 2 is read or interpreted, subdivision 3(c) would retain its intended meaning.

In ascertaining such legislative intent, whether for subdivision 3(c) or the statute as a whole, courts are to be guided by a number of presumptions. Minn. Stat. § 645.17. One particular presumption is directly applicable in this case: Minn. Stat. § 645.17(5). It states: “The legislature intends to favor the public interest as against any private interest.” Id. Here, the City determined it was in the interest of its citizenry to deny the application for rational and factually-supported reasons related to conflict with the City’s Comprehensive Guide Plan⁹ as well as traffic concerns and other issues. Automatic approval in the face of that determination, by virtue only of a tardy mailing of a notice of denial when Hagen Homes waited to request written confirmation of what Hagen Homes already knew, serves no one but Hagen Homes.

⁹ The overarching legislative nature and importance of comprehensive planning would be difficult to overstate. The legislature has found that “municipalities are faced with mounting problems in providing the means of guiding future development of land so as to insure a safer, more pleasant and more economical environment” and gave cities the power and duty to adopt Comprehensive Plans to address development problems. Minn. Stat. § 462.351. See also Minn. Stat. §§, 473.851, 473.858 (the latter two citations apply specifically to metropolitan area cities, which includes Minnetrista). It is these difficult and important legislative decisions that Hagen Homes is asking to be made by default under Minn. Stat. § 15.99 based on the failure to provide directly to it notice of what it already knew – that its application had been denied. In this case, it would mean forcing the City to accept over 300 new residential units (translating into nearly 1,000 new residents) into a largely rural community of only 5,250.

The City denied the application within the required timeframe, stating rational and factually-supported reasons for denial in writing and making that written statement available to the public both at City Hall and on the City's website, and Hagen Homes was contemporaneously aware of the City's action. The City's only misstep in this matter was that it did not provide directly to Hagen Homes written notice of what it already knew. A technical failure to follow the guidelines of subdivision 2(c) does not require imposition of the default approval required by subdivision 2(a). The Court of Appeals' decision should be reversed.

C. This Court should adopt a prejudice standard to prevent the default approval under Minn. Stat. § 15.99 of land use applications found, in a timely manner and in writing, to be harmful to the public health, safety, and welfare.

Even if this Court rejects the City's construction of the statute, the Court of Appeals decision should be reversed. Both the majority opinion and the concurrence in this matter recognized the "risk of public injustice" and stated that a prejudice standard should be adopted in order to temper that risk. Such a standard would have no applicability to cases involving the core purpose of Minn. Stat. § 15.99 – preventing agencies from "taking too long to decide." Manco of Fairmont, Inc., 583 N.W.2d at 296. See also American Tower, 636 N.W.2d at 313. Where an agency fails to act on a complete application subject to its jurisdiction within the time period, or fails to support a denial with written reasons within the time period, i.e. violates the specific requirements of Minn. Stat. § 15.99, subd. 2(a), the application is approved by operation of law – public policy concerns notwithstanding. However, before technical defects in compliance with other portions of the statute lead to the ultimate sanction of default

approval, courts should consider whether those minor missteps resulted in any prejudice to the applicant.

The efficacy of a reasonable prejudice standard is apparent when considering the facts of this case. Hagen Homes applied for rezoning and a Comprehensive Plan amendment for a huge residential development in mostly rural Minnetrista.¹⁰ The City considered the application, including an oral presentation by a Hagen Homes representative, and made a rational and factually-supported decision to deny it. A Hagen Homes representative was present during the City's deliberations and heard the decision. The City stated its reasons for denial in writing and, throughout the entire process, Hagen Homes has never challenged the factual or legal basis for the City's decision. The written statement was available to the public at City Hall within forty-eight hours and was uploaded to the City's website. All of this occurred well-within the timeline for a decision. Some six weeks later, just days after the agreed-upon deadline for a decision had passed, Hagen Homes requested that the City provide it written confirmation of the denial and the City sent it. Despite mounting no challenge to the factual or legal basis for the decision and suffering no prejudice as a result of the City's oversight, Hagen Homes began preparing a lawsuit. If there is a civil context equivalent to lying in wait, this case

¹⁰ At earlier stages of this litigation, Hagen Homes sought approval by operation of Minn. Stat. § 15.99 for a Concept Plan which included approximately 303 units on the 220-acre tract. While Hagen Homes has now abandoned its efforts to obtain default approval of a Concept Plan for which it never actually applied, the attempt is indicative of what Hagen Homes seeks to build should its Comprehensive Plan amendment and rezoning application be approved. Development on that scale (the addition of nearly 1,000 new residents) would lead to a huge percentage population increase for a largely rural community like Minnetrista which has only approximately 5,250 residents.

presents it. A reasonable prejudice standard would preclude a Minn. Stat. § 15.99 claim for default approval under such circumstances.

This Court has previously considered adoption of a reasonable prejudice standard in Terrell v. State Farm Ins. Co., 346 N.W.2d 149 (Minn. 1984). In Terrell, the insured moved from Minnesota to Maine as a result of a job transfer less than a month after an automobile accident. Id. at 150. Due to misunderstandings of the applicable law, the insured's claim was not filed until nearly two years later. Id. Under Minn. Stat. § 65B.55, subd. 1, however, insurers were specifically permitted to require notice within a strict six month period after a claim and the insurer had done so. Id. The District Court held that the statute was not an absolute bar to liability absent a showing of actual prejudice by the insurer. Its holding relied on this Court's precedents in Reliance Ins. Co. v. St. Paul Ins. Co., 239 N.W.2d 922, 924 (Minn. 1976) (requiring notice of a claim "as soon as practicable") and Farrell v. Nebraska Indem. Co., 235 N.W.2d 612 (Minn. 1931) (requiring "immediate written notice" of a claim), which had held that policy provisions requiring prompt notice of claims only barred coverage where the insurer could show that delayed notice had caused actual prejudice to the insurer. This Court reversed, holding that it was bound to apply the statute's specific directive, but observed: "Were it not for the fact that section 65B.55, subd. 1, specifically authorizes the insurer to insert this type of notice provision in its policy, we would have no difficulty in rejecting appellant's

contentions.” Id. The same public policy considerations¹¹ should lead this Court to reverse the Court of Appeals’ decision in this matter.

The holding in Terrell and consistent caselaw would require that, in light of the specific statutory directive in Minn. Stat § 15.99, subd. 2(a), that deadline (i.e. failure to decide within sixty days in writing) is firm and approval follows, public policy considerations notwithstanding. However, no such rigid requirement necessarily need apply to the “provide” language in Minn. Stat. § 15.99, subd. 2(c) and no previous Minnesota case requires that it do so. As noted herein, that portion of the statute contains no express statutory directive for approval based on the failure to “provide” a copy of the decision within the statutory timeframe. Under the reasoning of Terrell, this Court should consider public policy objectives and uphold the City’s rational denial because no prejudice resulted from the tardy written notice of what the applicant already knew – that its application had been denied. The Terrell decision indicates this Court would have done so in that case if the option had been available to it: “We conclude that we are not at

¹¹ Four justices dissented in Terrell, suggesting that a prejudice standard should be imposed notwithstanding what the majority perceived as an insurmountable obstacle to doing so:

[I]f the intent of the legislature in enacting the notice provision was, as I take it to be, to avoid prejudice to the insurer, it is difficult to impute to the legislature the further intent to absolutely bar a claim for economic loss benefits for which premiums have been paid when failure to give timely notice has not resulted in prejudice to the insurer.

346 N.W.2d at 152-53 (Wahl, J. dissenting). In this matter, the four Terrell dissenters presumably would have been even more bothered by the public policy implications of default approval in this case where nothing in Minn. Stat. § 15.99, subd. 2(c) explicitly requires it.

liberty to add a requirement of prejudice [due to the statutory language], even though in our view the better policy favors such a showing.” 346 N.W.2d at 152.

“Better policy” certainly supports a prejudice requirement in this case. As Judge Randall observed in his concurrence at the Court of Appeals, in the event of a rigid application of Minn. Stat. § 15.99, the “inherent right of a municipality to fulfill its duty to protect the citizenry from unhealthy variances is emasculated.” Hagen Homes, Inc., 713 N.W.2d at 924 (Randall, J. concurring). Absent a prejudice standard, an “administrative slip of the pen” (Id.) leads to approval of any and every land use application, no matter how inappropriate for the location or damaging to the environment or otherwise injurious to the public good.¹² The majority, too, recognized that a “prejudice standard would temper the risk of public injustice.” Id. at 923. Where the

¹² Courts in other jurisdictions with similar automatic approval statutes have considered the imminent harm to the public and lack of prejudice to the applicant when reviewing such cases. In D’Anna v. Planning Bd. of Township of Washington, 606 A.2d 417, 418 (N.J. Super. Ct. App. Div. 1992), the Court reviewed a case where the Board had deemed the initial application incomplete due to nineteen deficiencies related to drainage and sewer systems. Id. The applicant’s revised application, which changed the lot configuration but corrected none of the problems identified in the original, was misplaced by a substitute employee and the Board made no decision until after the “automatic approval” deadline had passed. Id. The trial court concluded that automatic approval was required, but the Appellate Division reversed, noting that “[t]he record before us does not contain as much as a hint of bad faith, sharp practice, overreaching or dilatory conduct on the part of the Board.” Id. at 419. The Court also noted that the Board’s power to impose conditions to protect the public interest would be lost as a result of automatic approval. Id. That result “totally frustrates the Board’s obligation to protect the public.” Id. at 420. “We hold that the best interest of the public should not be sacrificed based solely on the inadvertence of a substitute worker where the applicant has suffered no prejudice.” Id. Here, an even more innocuous error (i.e. failure to provide written notice to the applicant of what it already knew) should not lead to automatic approval. The City *actually did* decide, in writing and in a timely fashion, that approval of the application would be harmful to the public.

Court of Appeals erred is by deciding it could not impose a prejudice requirement because it found that Minn. Stat. § 15.99, subd. 2(c) was laden with the same harsh penalty as subdivision 2(a). Whether simply the result of flawed analysis or reached out of deference to this Court's review as the higher authority, the Court of Appeals' decision should be reversed. Where an agency deciding on an application meets all the requirements of Minn. Stat. § 15.99, subd. 2(a), which contains all the items guaranteeing compliance with the central tenets of the statute, courts should require a showing of actual prejudice to the applicant prior to mandating default approval as a result of some technical misstep under one of the statute's secondary provisions.

The Court in Precision Indus. Design Co., Inc. v. Beckwith, 447 A.2d 186, 191 (N.J. Super. Ct. App. Div. 1982), considering a case under New Jersey's forty-five day automatic approval provision under its Open Public Meetings Act, noted that automatic approval statutes were "designed to encourage prompt consideration and disposition of applications for the advancement of the interests of both the developers and the public." The Court reversed a lower court decision to require automatic approval and made the following astute observations regarding the dangers inherent in too-rigid application of such statutes:

Careful distinctions must nevertheless be drawn between municipal inaction, the evil which the automatic approval mechanism was designed to remedy, and, on the other hand, municipal action which is timely, clearly and unambiguously expressed, and fully explained and rationalized but which, by reason of a technical rather than a substantive defect, is imperfectly taken. We are persuaded that the legislative purpose in enacting the automatic approval mechanism would be unjustifiably distorted in a manner patently subversive to the public interest if a technical

defect attendant upon an express decision to deny a development application were permitted to convert the denial into an approval.

Id. The Precision Industrial Design court's logic applies with full force to cases where an applicant (particularly, as here, one that admits no prejudice resulted from the City's failure to provide written confirmation of its decision) seeks automatic approval under Minn. Stat. § 15.99, subd. 2(c). The City's rational decision in this matter – reached, documented in writing, and known to the applicant well-within the timeframe for a decision – should stand. This Court should hold that, absent a demonstration of prejudice to the applicant, a technical defect unrelated to the core purpose of the statute (i.e. timely decision-making) should not result in default approval of applications which an agency has timely decided would be injurious to the public.

CONCLUSION

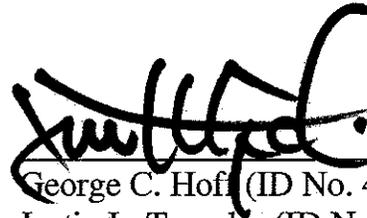
Since its original enactment in 1995, the intention of Minn. Stat. § 15.99 has never been in doubt: its purpose is to keep agencies – including the municipal government in this case – from “taking too long to decide.” It was not intended nor can it be read to require approval in a situation where an application was timely denied on written findings which were readily available to the public and with actual notice to the applicant.

Moreover, prior to mandating default approval under Minn. Stat. § 15.99, subd. 2(c) in such a situation, this Court should require a showing of actual prejudice to the applicant.

No prejudice occurred in this matter. The lower courts' decision mandating approval of an application – which had been denied on rational and factually-supported

written findings with full knowledge of the applicant well-within the timeframe for a decision – should be reversed.

Dated this 18th day of August, 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).