

NO. A05-1686

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STATE OF MINNESOTA  
IN SUPREME COURT

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**Hans Hagen Homes, Inc.,**

*Respondent,*

v.

**City of Minnetrista,**

*Appellant.*

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**BRIEF OF *AMICUS CURIAE*  
LEAGUE OF MINNESOTA CITIES**

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**TABLE OF CONTENTS**

	<b>PAGE</b>
TABLE OF AUTHORITIES.....	ii
LEGAL ISSUE.....	1
INTRODUCTION.....	2
STATEMENT OF THE CASE AND FACTS.....	3
ARGUMENT.....	3
A public-policy exception to the 60-Day Rule should be adopted to avoid the unreasonably rigid application of the statute’s penalty to technical violations of its provisions.....	3
CONCLUSION.....	10

**TABLE OF AUTHORITIES**

**PAGE**

**MINNESOTA STATUTES**

Minn. Stat. § 15.99.....*passim*

**MINNESOTA CASES**

*Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309 (Minn. 2001).....4

*City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980).....6

*Erickson v. Sunset Memorial Park Ass'n*,  
259 Minn. 532, 108 N.W.2d 434 (Minn. 1961).....4

*Hans Hagen Homes, Inc. v. City of Minnetrista*, 713 N.W.2d 916  
(Minn. Ct. App. 2006).....3, 5

*Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*,  
583 N.W.2d 293 (Minn. Ct. App. 1998).....4, 5-6

**OTHER STATUTES**

53 P.S. § 10908.....8

24 V.S.A. § 4470.....7

**OTHER CASES**

*Hammond v. Zoning Hearing Bd. of the Borough of Stroudsburg*,  
564 A.2d 1324 (Pa. Commw. Ct. 1989).....8

*Heisterkamp, III v. Zoning Hearing Bd. of the City of Lancaster*,  
383 A.2d 1311 (Pa. Commw. Ct. 1978).....7

*Hinsdale v. Village of Essex Junction*, 572 A.2d 925 (Vt. 1990).....6-7

*Leo's Motors, Inc. v. Town of Manchester*, 613 A.2d 196 (Vt. 1992).....6-7

*Limekiln Golf Course, Inc. v. Zoning Bd. of Adjustment of Horsham Township*,  
275 A.2d 896 (Pa. Commw. Ct. 1971).....7-8

## **ISSUE**

Should an application to develop 220 acres of rural land be automatically approved under the 60-Day Rule solely because a city was nine days late in providing the applicant with written notice of the application's denial even though the city reasonably denied the application within the statutory deadline based on written findings, and the applicant had actual notice of the denial and was not prejudiced by the late written notice?

## INTRODUCTION

The League of Minnesota Cities has a voluntary membership of 830 out of 853 cities in Minnesota. The League represents the common interests of cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy, and insurance services. The League has a public interest<sup>1</sup> in this appeal as a representative of the hundreds of cities subject to Minnesota's "60-Day Rule" found at Minn. Stat. § 15.99. We have a particular interest in ensuring that the 60-Day Rule is interpreted in a way that achieves its purpose while protecting the public.

In this case, a developer used the 60-Day Rule to force the automatic approval of an application the city council had reasonably denied within the statutory deadline based on factually supported written findings. The developer had actual notice of the denial but did not notify the city that it had not received a written copy of the denial until after the statutory deadline had passed. As a result, the developer was able to use a technical violation of the 60-Day Rule to force the automatic approval of the development of 220 acres of rural land at the expense of the public interests of the citizens of Minnetrista, a small, mostly rural city, with a population of approximately 5,250 located in the southwestern corner of Hennepin County.

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<sup>1</sup> Pursuant to Minn. R. Civ. App. P. 129.03, the League certifies that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to its preparation or submission.

## STATEMENT OF THE CASE AND FACTS

The League concurs with Appellant's statement of the case and facts.

### ARGUMENT

**I. A public-policy exception to the 60-Day Rule should be adopted to avoid the unreasonably rigid application of the statute's penalty to technical violations of its provisions.**

Appellant's Brief demonstrates why the court of appeal's decision was erroneous.

The League concurs with Appellant's legal arguments, which will not be repeated here.

Instead, this brief will focus on why this Court should adopt a public-policy exception to the 60-Day Rule to avoid the unreasonably rigid application of the statute's penalty to technical violations of its provisions.

The court of appeals below reluctantly applied the harsh penalty of automatic approval while acknowledging a desire for an exception that would "temper the risk of public injustice" from the rigid application of the statute's penalty to technical violations of its provisions. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 713 N.W.2d 916, 923 (Minn. Ct. App. 2006). If this Court recognizes a public-policy exception to the 60-Day Rule, the statute can be interpreted in a way that achieves its purpose while protecting the public.

The prejudice standard advocated by Appellant (see Appellant's Brief at 14-20) essentially urges this Court to adopt an exception to the 60-Day Rule based on the doctrine of substantial compliance. In short, Appellant argues that if there has been substantial compliance with the statute and there has been no prejudice to the applicant, technical violations of the 60-Day Rule should not result in an application's automatic

approval. From a public-policy perspective, this is an attractive argument because it interprets the 60-Day Rule in a way that achieves its purpose while providing protection for the public. This type of exception is also consistent with decisions by the Minnesota Court of Appeals and courts in other jurisdictions.

The purpose of the 60-Day Rule is to keep governmental agencies from taking too long to make decisions about certain land-use applications. *Manco of Fairmont, Inc. v. Town Board of Rockdell Township*, 583 N.W.2d 293, 296 (Minn. Ct. App. 1998); *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). In order to ensure prompt action, the 60-Day Rule provides an extraordinary and harsh remedy — automatic approval of any application that is not acted on within the statute’s deadline.

This Court has consistently recognized that statutes are not to be given a construction contrary to public policy if they are reasonably susceptible of any other construction. *See, e.g., Erickson v. Sunset Memorial Park Ass’n*, 259 Minn. 532, 543, 108 N.W.2d 434, 441 (Minn. 1961). Interpreting the 60-Day Rule in a way that incorporates the doctrine of substantial compliance is good public policy because it ensures that governmental agencies are making timely decisions on land-use applications while preventing developers and landowners from manipulating the statute to promote their private interests at the expense of the public good.

In this case, for example, the developer had actual notice of the denial of its application, but did not notify the city of its technical violation of the statute until after the statute’s deadline had passed. Developers and landowners should not be allowed to “lie in the weeds” and use the 60-Day Rule to play a game of “gotcha” with a

governmental agency in situations where they have not been prejudiced by the governmental agency's failure to comply with a technical provision of the statute. A developer should not be allowed to change the character of a small, mostly rural city simply because of a technical mistake by city staff — a mistake that has caused no prejudice to the developer. As recognized by Judge Randall's concurring opinion at the court of appeals, it is bad public policy to interpret the 60-Day Rule in a way that could allow the "administrative slip of the pen" to result in the automatic approval of "a tire-burning industrial unit, a coal-fired power plant, a monstrous metal-shredder plant, [or] a car battery/freon disposal plant." *Hans Hagen Homes, Inc.*, 713 N.W.2d at 924.

This is not the first time Minnesota courts have considered whether a public-policy exception should apply to the 60-Day Rule. The Minnesota Court of Appeals has already held that the doctrine of substantial compliance applies to the 60-Day Rule reasoning that the statute contains portions that are mandatory and portions that are directory. *Manco of Fairmont, Inc. v. Town Board of Rock Dell Township*, 583 N.W.2d 293, 296 (Minn. Ct. App. 1998).

In *Manco*, the township received an application for a conditional use permit that would have increased the size of a hog feedlot from 2,000 to 4,000 animal units. The township sent the land-use applicant an extension letter within the required deadline that simply stated that the township intended to take an additional 60 days to make a decision. The land-use applicant argued that its application had been automatically approved because the township had failed to comply with the statutory requirement providing that a

written notice of an extension of the 60-Day Rule “must state the reasons for the extension.” See Minn. Stat. § 15.99, subd. 3(f) (1996).

The court of appeals refused to allow automatic approval of the application reasoning that because subdivision 3(f) did not specify the content, type, or extent of reasons to be provided and because there were no negative consequence provided should the government entity not provide reasons, the subdivision was directory and substantial compliance was all that was required. *Id.* at 295-296.

The law does not mandate in all cases strict and literal compliance with all procedural requirements. Technical defects in compliance, which do not reflect bad faith, undermine the purpose of the procedures, or prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action.

*Id.* at 295 (quoting *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 391 (Minn. 1980)).

It is true that the *Manco* Court was not interpreting the subdivision of the 60-Day Rule at issue in this case. But courts in other jurisdictions have reviewed similar “mandatory” language relating to the provision of written notice of decisions made under automatic-approval statutes and have concluded the language is directory. The Supreme Court of Vermont, for example, refused to allow automatic approval of a zoning application even though the zoning board failed to mail the applicant written notice of its timely decision until approximately one week after the statutory deadline. *Hinsdale v. Village of Essex Junction*, 572 A.2d 925 (Vt. 1990). See also, *Leo’s Motors, Inc. v. Town of Manchester*, 612 A.2d 196 (Vt. 1992) (Vermont Supreme Court denied automatic approval of zoning applications when board’s decisions were timely even though the

applicants did not have actual notice of the timely decisions until the board mailed written notice of its decisions two days after the statutory deadline).

The Vermont statute at issue in *Hinsdale* provided in part:

(a) The board shall render its decision, which **shall** include findings of fact, within forty-five days after completing the hearing, and **shall** within that period send to the appellant, by certified mail, a copy of the decision...If the board does not render its decision within the period prescribed by this chapter, the board shall be deemed to have rendered a decision in favor of the appellant and granted the relief requested by him on the last day of such period.

24 V.S.A. § 4470(a) (1984) (emphasis added). When denying automatic approval of the application, the *Hinsdale* Court reasoned:

The wording chosen by the Legislature clearly separates the giving of written notice from the rendering of the decision. The first sentence of § 4470(a) states that the “board shall render its decision...and shall... send to the appellant, by certified mail, a copy of the decision.” It is directly inconsistent with the statutory language to say that a decision has not been rendered until it is sent to the landowner as required by § 4470(a). Since the deemed-approval remedy is applicable only when the board fails to “render its decision within the period prescribed by this chapter,” the statute cannot be read to deem approval on failure to give written notice within forty-five days of the hearing. The Legislature has not created a deemed-approval remedy for failure to give written notice of a decision within forty-five days, and, therefore, we must conclude that the notice time limit is directory.

*Hinsdale* at 928.

Likewise, the Pennsylvania Commonwealth Court has also concluded that the statutory requirements for providing written notice of timely decisions made under its automatic-approval statute are directory and failure to comply with those requirements do not result in automatic approval. *See, e.g., Limekiln Golf Course, Inc. v. Zoning Bd. of Adjustment of Horsham Township*, 275 A.2d 896, 904 (Pa. Commw. Ct. 1971); *Heisterkamp, III v. Zoning Hearing Bd. of the City of Lancaster*, 383 A.2d 1311, 1313

(Pa. Commw. Ct. 1978); *Hammond v. Zoning Hearing Bd. of the Borough of Stroudsburg*, 564 A.2d 1324, 1326-27 (Pa. Commw. Ct. 1989).

In *Limekiln*, for example, the statute at issue provided in part:

(9) The board...shall render a written decision...within forty-five days of the last hearing before the board...Where the board has power to render a decision and the board...fails to render the same within the period required by this clause, the decision shall be deemed to have been rendered in favor of the applicant.

(10) A copy of the final decision or, where no decision is called for, of the findings **shall** be delivered to the applicant personally or mailed to him not later than the day following its date.

53 P.S. § 10908 (9, 10) (1968) (emphasis added). The *Limekiln* Court denied automatic approval of the application at issue even though the board had failed to mail a copy of its decision until five days after the statutory deadline reasoning that the board had complied with the essential provisions of the statute.

[W]e have no hesitancy in concluding that the delivery or mailing requirement of clause (10) is directory rather than mandatory...[W]hether a statute is mandatory or not depends on whether the thing directed to be done is of the essence of the thing required...The essence of clauses (9) and (10) of Section 908 is the filing of the report within the time fixed in clause (9), not the giving of notice. We are not unmindful that zoning procedures are to be strictly followed; but if the statutory provision in question is simply intended to promote dispatch and if non-compliance does not injure the landowner, the provision is to be construed as directory...We do not believe that the legislature intended the severe stricture of clause (9) to follow from a failure to observe the letter of clause (10).

*Id.* at 904.

Like the courts in Vermont and Pennsylvania, this Court should hold that the language relating to the provision of written notice of decisions under Minnesota's 60-Day Rule, which is found at Minn. Stat. § 15.99, subd. 2(c), is directory. The Minnesota Legislature has clearly separated the requirements for making timely decisions from the

requirements for providing written notice of the decisions by placing those requirements in separate subparts of subdivision 2 and by only attaching the automatic-approval language to the failure to make timely decisions. Further, the essence of Minnesota's 60-Day Rule is to require governmental agencies to make timely decisions on certain land-use applications, not to dictate the procedural requirements for providing written notice of those decisions. Developers and landowner that cannot demonstrate prejudice should not be allowed to use technical violations of the 60-Day Rule to force through approval of land-use applications benefiting their private interests at the expense of the public interests of the community.

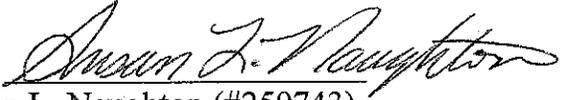
## CONCLUSION

This Court should adopt a public-policy exception to the 60-Day Rule to avoid the unreasonably rigid application of the statute's penalty to technical violations of its provisions. If this Court recognizes a public-policy exception to the 60-Day Rule, the statute can be interpreted in a way that achieves its purpose while protecting the public. For all of these reasons, the League of Minnesota Cities respectfully requests that the court of appeals' decision be reversed.

Dated: August 25, 2006

Respectfully submitted,

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