

Nos. A06-2019 and A06-2361

State of Minnesota  
 In Supreme Court

Kanabec County Board of Commissioners,  
 Kanabec County Planning Commission, and  
 Kanabec County Environmental Services,

*Appellants,*

vs.

Calm Waters, LLC, a Minnesota limited liability corporation,

*Respondent.*

APPELLANTS' REPLY BRIEF

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## ARGUMENT

### **I. A COMPLETE APPLICATION WAS NEVER FILED BY RESPONDENT**

Respondent argues, citing PTL, LLC. v. Chisago County Board of Commissioners, 656 N.W.2d 567 (Minn. App. 2003) and other cases, that the requirements for an application to be complete must be set forth in the ordinance itself. However, the cases cited for this proposition in fact state nothing about applications or what may be required for a particular application. What the cases cited by Respondent are talking about are standards upon which a decision maker, whether that decision maker be the County Board, the Board of Adjustment, or the Planning Commission, must make a decision. To cite a series of cases that stand for the proposition that if the standards of the ordinance are set forth then the governmental entity must grant the permit does not speak to the issue in this case.

Even the Respondent's citation to the cases in its brief ignores a large body of law representing reasoned analysis of land use ordinances and the basis upon which land use decisions are to be made. Zylka v. City of Crystal, 167 N.W.2d 45 (Minn. 1969), as well as a slew of other cases, set forth the applicable law. As stated in Zylka, where the ordinance does not specify standards, that means the municipality has reserved for itself the discretion to determine whether a permit shall be granted. It's a broad discretionary power. When the municipality has given itself this discretion to act an arbitrary denial is found only when the evidence establishes that the requested use does not endanger the public health, safety or welfare of the area affected, or the community as a whole. Zylka 167 N.W.2d at p.49.

Zylka is not the only case that has set forth the above rule. Many other cases have considered the issue. The applicable law is that a municipal board can retain for itself

discretion. The discretion is not unfettered. The control on that discretion is that such a decision, where permit is denied, must be based upon reasons to “public health, safety or welfare.” If the reasons for the denial are not shown to be based upon those considerations, then the denial of the permit would be arbitrary and capricious. However, where the record supports the public health, safety or welfare concern given by the County or other municipal entity, then there is no further inquiry and no further action. The municipality has the power to make that decision. The municipality has the discretion to make the decision. It is the very purpose for land use ordinances. See, e.g. Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn. 1982); Main Realty, Inc. v. Pagel, 208 N.W.2d 758 (Minn. 1973); Hay v. Township of Grow, 206 N.W.2d 19 (Minn. 1973); Metro 500, Inc. v. City of Brooklyn Park, 211 N.W.2d 358 (Minn. 1973); Holaseck v. Village of Medina, 226 N.W.2d 900 (Minn. 1975); Amoco Oil Company v. City of Minneapolis, 395 N.W.2d 115 (Minn. App. 1986); Curtis Oil v. City of North Branch, 364 N.W.2d 880 (Minn. App. 1985).

Respondent’s argument also ignores the record in this case. The County has indicated in its Subdivision Ordinance that proposed subdivisions are to be coordinated with existing nearby municipalities or neighborhoods so that the community as a whole may be developed harmoniously. It specifies “proposed land uses shall conform to any county or township zoning ordinance in effect.” Appendix at p. A-102. The Ordinance specifies that no proposed lots in any subdivision can have less area or width than is required by zoning regulations applying to the area in which it is located. Id. at A-105. Furthermore, one of the requirements on passing a preliminary plat is that the Planning Commission consider conformity with “adopted county plans.” Id. at A-99. The County Comprehensive Plan

indicates the close cooperation between the County and townships in land use regulation in Kanabec County. The Comprehensive Plan states that the County's planning and zoning is implemented at the township level. See R.A. at pp. 123-125. Table 13 of the Comprehensive Plan illustrates all of the minimum lot size requirements and maximum residential densities established by each township's zoning regulations. R.A. at p. 125.

It can be seen from the Comprehensive Plan in the Subdivision Ordinance in the Subdivision Ordinance of Kanabec County that a requirement for a township approval letter relates specifically to standards set forth in the ordinance that are to be evaluated by the decision maker when passing upon a preliminary plat application. While the Respondent argues there are no valid regulations in the township, the record does not support that assertion. In support of this allegation Respondent cites to Respondent's own attorney's assertions set forth in letters. They also point to a letter from someone at the Department of Natural Resources, which if anything indicates that the Township Ordinance predates any statewide regulations. That letter indicates nothing more than that.

In reality, Kroschel Township has a zoning ordinance. See Appendix at p. A-114; R.A. at pp.16-38, 39-72. The Township Zoning Ordinance has a minimum lot area of not less than 20 acres for each dwelling. A township is allowed to do this. Pursuant to Minn. Stat. §394.33 a township can have regulations that are more restrictive than that of the County. The statewide Shoreland Management Rules adopted by the Department of Natural Resources also provides that townships may adopt shoreland management controls under the authority of Minn. Stat. §394.33 that are "not inconsistent with or less restrictive than the controls adopted by the county in which the township is located." Id.

Certainly the record reveals that the Respondent simply refused to approach the Township or obtain a Township approval letter in regard to their application for a preliminary plat approval. Beyond that, Respondent's attorney's assertions about the state of land use regulations in Kroschel Township are simply not supported. A Town Board supervisor, Mr. Bill Erickson, wrote to Kanabec County Environmental Services Department on September 18 quoting provisions of the Kroschel Township Ordinance. Record No. 24. The minutes of the October 18, 2006 Kanabec County Planning Commission meeting show a member of the Kroschel Township Planning Commission speaking. Barb Peterson, Planning Commission member for Kroschel Township, is indicated to have stated that "the Calm Waters representatives, Jim and Grant Lindberg, did not contact the Township as they had stated they would do at the previous County Planning Commission meeting." Record No. 35.

There was never a completed application in this case. There is simply no law that sets forth that all of the requirements for an application must be specified by ordinance. The 60-day Rule cannot apply under these circumstances.

**II. THE KANABEC COUNTY ENVIRONMENTAL SERVICES OFFICER IS THE PROPER AUTHORITY TO EXTEND THE TIMEFRAME IN WHICH TO ACT UNDER MINN. STAT. §15.99**

Respondents cite Moreno v. City of Minneapolis, 676 N.W.2d 1 (Minn. App. 2004) for the proposition that since a planning commission is not a "agency" within the meaning of Minn. Stat. §15.99, that the Environmental Services Officer has no ability to extend the 60-day Rule. They argue there is no delegated authority to her to do so.

Moreno is inapplicable in this case. The Moreno decision focused upon whether the Planning Commission had made a final decision. The context of the analysis was a local zoning scheme that allowed appeals from the Planning Commission decision to the City Council. The case decided that until the City Council had ruled on an appeal, that a “final decision” within the meaning of Minn. Stat. §15.99 had never been made.

However it is interesting that the Respondents would make that argument. If they are correct that because the Environmental Services Department is not a “agency”, and that as a result thereof, no one within the Environmental Services Department can extend the 60-day deadline, then there has been no application that has ever been made in this case. The Respondents claim they submitted an application to the Environmental Services Department. Taken to its extreme, Respondent’s argument would mean there was never an application submitted, and that applications have to be submitted to the governing body, and no other entity. Clearly this would be an absurd result.

Beyond that, to argue that only the final decision makers can decide all aspects of processing the application, such as when more time is needed, is not only without any legal support, it is not a common sense approach to land use issues. The decision makers in this case are the Planning Commission. These are merely citizens volunteering their services who use and rely upon the assistance of the professional employees hired by government to carry out day to day duties and needs of government programs. The same is true whether the Respondents are correct in asserting that only the County Board of Commissioners could be the decision maker in this case.

The record clearly establishes that the Environmental Services Officer is the person who undertakes to administer the Subdivision Ordinance. She takes in the applications. She is responsible for enforcing the Ordinance. She distributes information to people. She provides advice guidance to the Planning Commission in making decisions. She also administers the County's Zoning Ordinance. Certainly, the Environmental Services Officer is acting within the scope of his or her authority when the employee takes action clearly within the realm of that employee's area of responsibility.

Not only should the above always be the case, it is recognized in the law. Furthermore, the record supports that County decision makers in this case were well aware of the Environmental Services Officer's extension of the timeline in which to make a decision. The minutes of the September 20, 2006 meeting indicate that the first item noted under the business of the Calm Waters preliminary plat application was "information as to the 15.99 Rule extension was given to Planning Commission members prior to the meeting." Record No. 28. If that does not in and of itself indicate that this was deemed to be an area within her realm of authority, it certainly indicates acquiescence. The reason that a public hearing was not held in September on this matter was that the Respondents asserted that the notice, since it did not say "hearing" was insufficient. They asserted that no public hearing could be handled then on September 20. Record No. 23. Interestingly, Respondents also assert for the first time that having acquiesced in the arguments of Respondent's attorneys, an extension of the time limits under Minn. Stat. §15.99 to ensure that proper notice was given is an illegitimate reason for an extension.

The question is not, as Respondents would contend, whether the Environmental Services Department is an “agency” as defined under Minn. Stat. §15.99. Nothing in the law suggests that only the governing body can determine the time limits under that statute should be extended. The municipality acts through its agents. The appropriate agent is entitled to do an extension on behalf of the municipality.

### **III. THE PLANNING COMMISSION HAD THE AUTHORITY TO DENY RESPONDENT’S APPLICATION**

Respondent argues that the plain meaning of the word approve prohibits interpreting denial authority to go along with approval authority. While citing to Minn. Stat. §394.30, subd. 4, Respondent ignores the plain meaning of that language.

Minn. Stat. §394.30, subd. 4, states “in all instances in which the Planning Commission is not the final authority, as authorized in subdivision 5, the Commission shall review all applications for conditional uses and plans for subdivisions of land and report thereon to the Board.” Subdivision 5 of that same statute only uses the word “approve” in regard to subdivisions of land. If the authority to approve does not include the authority to deny, then the Planning Commission can never be the final authority because the final decision could not be made by the Planning Commission. Since the main thing the Planning Commission is doing pursuant to the statute in question is to order the “issuance” of conditional use permits and “approve” some or all categories of subdivision of land, it is quite clear that the legislature intended those phrases to include the power to deny. Respondents urge this Court, and the Court of Appeals agreed, that the County should be penalized for taking the exact word of the statute, “approve” and using it in their ordinance

when it is quite clear that the legislature intended by using the word approve that a final decision on the issue could be made by the Planning Commission. We know as a matter of course that Kanabec County interpreted its own ordinance to mean that the Planning Commission had the power to deny a preliminary plat. We know that because the County Board of Commissioners never took up the preliminary plat issue after the County Planning Commission had decided to deny the same.

There is nothing unique about interpreting approval authority to include denial authority. Indeed under the enabling legislation giving cities and townships the power to enact zoning ordinances, Minn. Stat. §462.3595, subd.1, only gives approval authority to cities and townships. It states “conditional uses may be approved by the governing body or other designated authority by a showing by the applicant that the standards and criteria stated in the ordinance will be satisfied.” Id. Accepting Respondent’s arguments and the Court of Appeals decision would mean that no conditional use permit may be denied by a city or township. It is quite clear that this Court has never viewed the words “issuance” or “approval” to be so restrictive. A basic principal, as stated in Zylka v. City of Crystal, 167 N.W.2d 45, 49 (Minn. 1969), is that the administering body, be it the council itself or a planning commission to which power to act is delegated “has broad discretionary power to deny an application for a special use permit...” See also Barton Contracting Company v. City of Afton, 268 N.W.2d 712, 717 (Minn. 1978).

It makes no sense in terms of the performance of government functions to hold that the power to issue a permit, or the power to approve a permit, does not carry with it the corresponding grant of the power to deny a permit. It is quite clear that in using such words

the legislature intends to grant final authority to make a decision. Hypertechnical construction of words does not advance any interest of society under such circumstances. This Court, in going back to cases almost 40 years old, has consistently recognized that fact and has deemed approval authority to include denial authority.

#### **IV. THE 60-DAY RULE SHOULD NOT BE DEEMED TO APPLY TO SUBDIVISION APPLICATIONS**

Respondent, focusing on a number of arguments, believes that the 60-day rule applies to subdivisions, and that this Court should so rule. Pointing to such things as whether there are alternate timelines in Chapter 505, the legislative history, and case law, Respondents argue that the law must apply to subdivisions. It argues, without any basis in the law, that a preliminary plat application and a final plat application should be treated as two separate and distinct permit approvals to which separate and distinct timelines apply. In reality, arguing that preliminary and final plat approval are two separate and distinct things does nothing but show the inapplicability and unworkable nature of applying the 60-day rule to subdivision application.

Contrary to the Respondents' assertions, legislative history does not support their argument. The legislative history makes it plain that the entire purpose of the 2003 amendments that inserted the language in question in Minn. Stat. § 15.99, subd. 2(a) was to clarify the existing law and to insure that it was not interpreted to apply to subdivision approvals. RA 170-72; RA 181-83. This was nothing but an attempt to clarify the original intent of the statute, so that a subdivision application would not be interpreted to be a application "relating to zoning." See Krahl v. Nine Mile Creek Watershed Dist., 283

N.W.2d 538 (Minn. 1979); Cruse v. Cruse, 396 N.W.2d 877 (Minn. App. 1986). This conclusion is directly supported by the Minnesota House of Representatives House Research Department, which published that Minn. Stat. § 15.99 does not apply to the plat review process under Chapter 505 for applications made on or after June 1, 2003. See, <http://www.house.leg.state.mn.us/hrd/issinfo/ss60day.htm>.

While Respondent argues that because a hearing is required on a subdivision application that it should be treated like a conditional use permit or a variance, and therefore be found to be within the perimeters of Minn. Stat. § 15.99, the fact that there is a hearing required is simply irrelevant to whether the subdivision of land constitutes zoning. An appeal of a determination of an administrative official as to the interpretation of a zoning ordinance under Minn. Stat. § 394.27, requires a hearing, but that does not mean that there has been any application pertaining to zoning to which the 60-day rule applies. Amendments to ordinances require hearings. Yet that does not mean that those ordinances are all “zoning” or that there are requests relating to zoning that are deemed to be within the 60-day rule.

Nor is it true that Kramer v. Ottertail County, 647 N.W.2d 23 (Minn. App. 2002) decided that the 60-day rule applied to subdivision approvals. It does not appear that that issue was ever addressed to that court. Instead, the County argued that the 30-day time limit provided by Minn. Stat. §116D.04 to appeal the County’s decision to appeal an EIS extended the timeframe under which to make a decision under Minn. Stat. §15.99. The County never argued whether or not the 60-day Rule applied to subdivisions. Similarly, Respondent’s citation to Advantage Capital Management v. City of Northfield, 664 N.W.2d

421 (Minn. App. 2003) for the proposition that a site plan was determined by that Court to be a written request related to zoning is an incorrect reading of what that court said. In reality, the Court of Appeals noted that its interpretation of the 60-day Rule was consistent with cases that have applied the Rule to “special use permits, conditional use permits, variances, and site plan approval that relate specifically to zoning.” *Id.* at 427. It would be more correct to indicate that the Court of Appeals was noting that some site plans could relate specifically to zoning, but it was not categorically saying that all do.

Finally, Respondent spends much time focusing on whether or not timelines exist in Chapter 505 of Minnesota Statutes, and arguing that a reference to Minn. Stat. §15.99 in that Chapter requires a determination that the Rule applies to subdivision approvals. But §505.03 merely gives a time limit for acting upon County Engineer comments to a City or Township on a plat as to whether a plat meets County guidelines. That section indicates that no city or town may approve a preliminary plat until it has received the County Engineer’s written comments and recommendations or until the comment period has expired, whichever occurs first. This process of municipalities conferring and reaching decisions is the only process to which any timeline should be found to exist. Furthermore, the language quoted by the Respondents does not in fact indicate that §15.99 applies, but merely lists specific statutes that might have timelines within them.

Were this Court to deem that §505.03 mandated that Minn. Stat §15.99 applies to plats, then there would be a direct conflict between the provisions of §15.99 and the provisions of Chapter 505. Where possible, courts interpret statutes to avoid such conflict. Where impossible to avoid such conflict, “the latest expression of the legislature which will

control.” State by Mondale v. Hannah Mining Company, 121 N.W.2d 356, 360 (Minn. 1963); Minn. Stat. §645.26, subd. 4. The clarifying amendment of 2003 to Minn. Stat. §15.99 would therefore apply and preclude any application to subdivisions.

### **CONCLUSION**

For all the foregoing reasons, the Appellant respectfully requests that this court reverse the Court of Appeals, and rule that the County properly acted in denying the application for preliminary plat in this case.

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Dated: March 24, 2008

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I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this Brief is 417 lines, 3,850 words. This Brief was prepared using Microsoft Word.

- **RATWIK, ROSZAK & MALONEY, P.A.**

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