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NO. A08-1501

State of Minnesota  
**In Supreme Court**

Lance J. Johnson,

*Respondent,*

v.

Cook County, a municipal corporation,

*Appellant.*

**APPELLANT'S BRIEF, ADDENDUM AND APPENDIX, VOLUME I**

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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).

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**STATEMENT OF ISSUES**

**I. WHEN A MUNICIPALITY DOES NOT ISSUE WRITTEN REASONS FOR ITS TIMELY DENIAL OF A ZONING REQUEST, IS THE AUTOMATIC-APPROVAL PENALTY IN MINN. STAT. § 15.99 TRIGGERED?**

The district court held it does not. The Court of Appeals reversed.

Apposite authority:

*Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536 (Minn. 2007)  
Minn. Stat. § 15.99 (2000)

**II. IS RESPONDENT'S CHALLENGE TO THE 2001 ZONING DECISION TIME-BARRED?**

The district court held the claims were time-barred. The Court of Appeals reversed.

Apposite authority:

*Hebert v. City of Fifty Lakes*, 744 N.W.2d 226 (Minn. 2008)  
*Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536 (Minn. 2007)  
Minn. Stat. § 541.07(2)

## STATEMENT OF THE CASE

This appeal arises from the Cook County Board of Commissioners' timely denial of Respondent Lance Johnson's 2001 request to rezone his property, located along Highway 61 between Lutsen and Grand Marais, from residential to commercial use. Although the Board timely denied the 2001 application, the Board did not issue separate written reasons to support its decision. Johnson took no action to challenge the 2001 denial until 2006.

In May 2006, Johnson commenced this action, challenging the Board's September 11, 2001, denial of his rezoning request, as well as the Board's 2005 approval of an adjacent owner's rezoning request.<sup>1</sup> With respect to the 2005 approval, the County rezoned isolated and undeveloped property bordering the northern portion of parcels abutting Highway 61, from commercial to residential. In addition to challenging the 2005 approval as arbitrary and capricious, Johnson alleged this approval constituted a regulatory taking.

Appellant Cook County moved for summary judgment seeking dismissal of all Johnson's claims. In his responsive memorandum, for the first time, Johnson alleged a violation of Minnesota Statutes section 15.99, the so-called 60-day rule. In an Order and Memorandum dated January 23, 2007, the district court granted the County's Motion for Summary Judgment, dismissing any challenge to either the 2001 or 2005 rezoning

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<sup>1</sup> The Complaint does not mention the 60-day rule or Minnesota statutes section 15.99.

decisions. Johnson subsequently dismissed the takings claim. He then appealed only the district court's decision affirming the Board's denial of his 2001 rezoning request.

The Court of Appeals reversed in an unpublished opinion, holding the County's failure to issue written reasons violated the 60-day rule, resulting in automatic approval of Johnson's 2001 rezoning request. *Johnson v. Cook County*, No. A08-1501 (Minn. App. Aug. 4, 2009) (unpublished, attached at Add.12, Add.18-A). The Court of Appeals also held because Johnson's request was automatically approved, his claims could not be time-barred. Add.19.

The County petitioned this Court for further review, which this Court granted on October 20, 2009. Add.20.

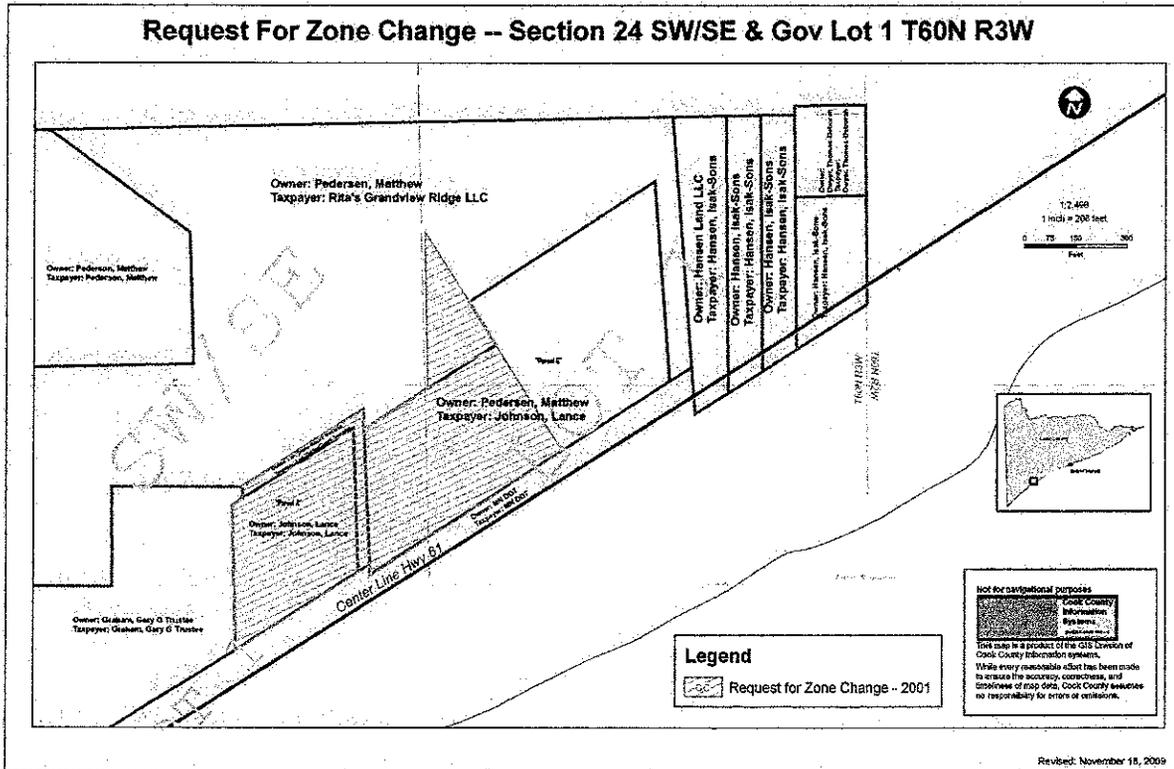
### **STATEMENT OF FACTS**

Lance Johnson owns two parcels of property in Cook County located along Highway 61 between Lutsen and Grand Marais. A.2-A.3. Johnson acquired the first parcel, zoned residential, in January 2001 from Gerold Loh ("Parcel A"). A.268. Johnson purchased the second parcel from Matthew Pederson on a contract for deed ("Parcel B"). A.444. When he acquired the property, the west half of Parcel B was zoned residential "R-1" and the east half was zoned general commercial.<sup>2</sup> A.403.

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<sup>2</sup> In 1992, the County Board rezoned several parcels of property, including the east half of "Parcel B" near Grand Marais, from residential to general commercial. A.269, A.33. Johnson acquired Parcel A from Loh nine years after this rezoning. Parcel A did not border the rezoned general commercial property; rather, it bordered residential property on all sides. A.27, A.350.

In May 2001, Johnson and Pederson requested rezoning of Parcel A and part of Parcel B from residential to general commercial. A.8, A.33. This rezoning request involved a total of 11.45 acres: 4.16 acres owned by Johnson and 7.29 acres owned by Pederson. A.33. The scope of the 2001 rezoning request is depicted below:



See A.350, A.33, A.27.<sup>3</sup>

On June 13, 2001, the Planning Commission considered Johnson's rezoning request. A.13-14. Johnson was present at the meeting. A.63. Following this meeting, the Planning Commission recommended the Board deny Johnson's rezoning request.

The Planning Commission found:

<sup>3</sup> This map (as well as maps on pages 6 and 7) is based upon a compilation of the maps and information in the record to more clearly illustrate the scope of the pertinent application.

The 15-acre parcel rezoned general commercial in 1992 remains for sale. There are potential general commercial uses that are consistent with the area. The area between the Ski Hill Road and the Caribou Trail is more acceptable to the Lutsen residents as a commercial zone district. The speed limit in this area has already been reduced to 40 miles to accommodate traffic and there are a number of existing businesses. Lutsen is not a large enough community to support two commercial centers. Before the public hearing the Zoning Office received 6 letters in opposition to this request and 1 letter in favor of it. Since that time we have received 2 additional letters (attached) and one phone call from Mrs. Lucille Collins in opposition to the request. There was a lot of testimony from Lutsen residents in opposition to this request at the Planning Commission Hearing.

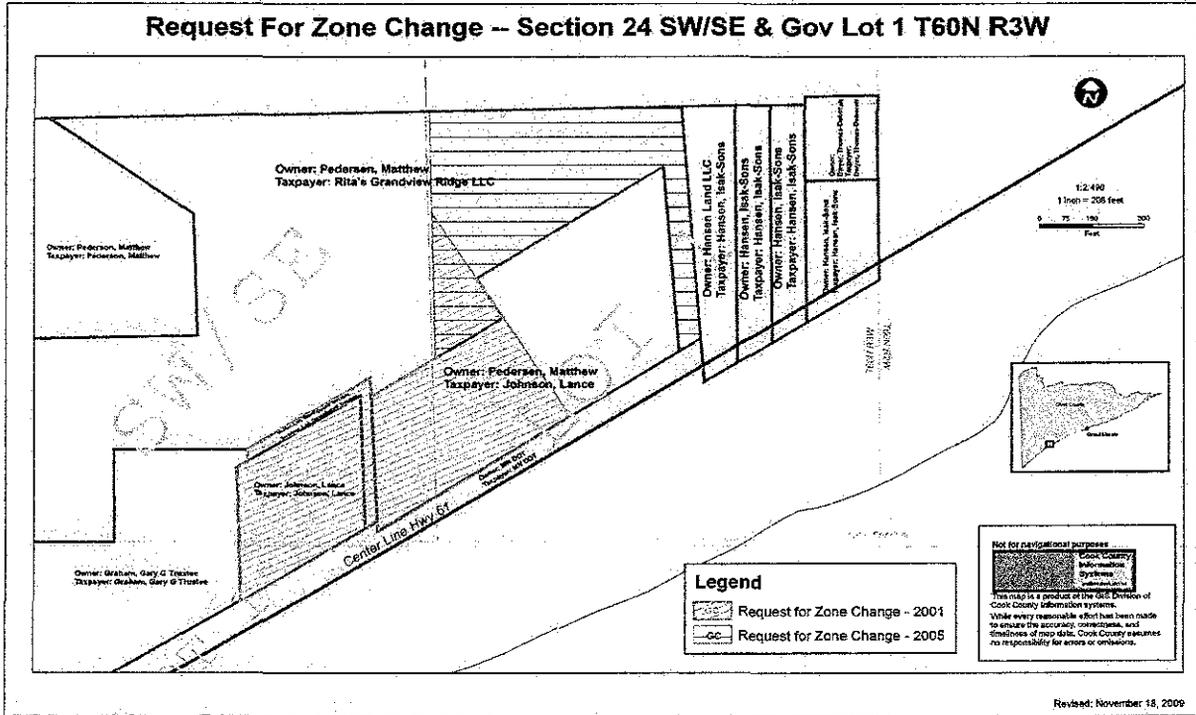
A.33-34. Johnson received a copy of the Planning Commission's written recommendation to the Board. A.53-A.55. At Johnson's request, the Board extended the deadline for addressing his request. A.45.

On September 11, 2001, the Board reviewed the Planning Commission's recommendation and findings and held a public hearing on Johnson's request. A.72. The Board received testimony from Johnson, his contract for deed vendor's representative, and Johnson's attorney regarding the project. A.73. The Board also received testimony in opposition to the request. A.73. Ultimately, the Board voted to deny Johnson's request. A.73. The minutes reflect the following Board action: "Following discussion, a motion was made by Mianowski, seconded by James Hall, and carried to deny the rezoning request from Lance Johnson and Matthew Pederson." A.73. The Board, however, did not issue separate written reasons for denial to Johnson.

In 2005, Tom Dwyer ("Dwyer") requested, on behalf of Rita's Grandview Ridge ("Rita's Grandview project"), the County to rezone isolated and undeveloped property



also encompassed in the 2005 rezoning request. This triangle portion included in both the 2001 and 2005 requests is highlighted below:



See A.74, A.349, A.350.

Johnson never advised the County he considered his 2001 zoning application approved by operation of law, until the County moved for summary judgment in 2006.

### **SUMMARY OF ARGUMENT**

Minnesota Statutes section 15.99 contains an automatic-approval provision for an agency's failure to make a decision on a zoning request within 60 days. An agency is also required to issue written reasons at the time the decision is made, but this provision does not include the penalty language. The Court of Appeals erred when it held a violation of the directory provision requiring written findings results in automatic approval of a zoning request, despite the Board's timely denial of the zoning application.

Therefore, the district court's decision dismissing Johnson's challenge to the Board's September 11, 2001, denial of his zoning application should be affirmed.

The Court of Appeals also erred when it concluded Johnson's challenge to the 2001 denial was not time-barred under either the doctrine of laches or the statute of limitations. The district court's decision holding Johnson's claim time-barred should be affirmed.

### **STANDARD OF REVIEW**

When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion, reviewed de novo. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). Statutory construction is a question of law, reviewed de novo. *Calm Waters, LLC v. Kanabec County Bd. of Comm'rs.*, 756 N.W.2d 716, 719 (Minn. 2008).

The decision whether to apply laches lies within the district court's discretion and will be reversed only for an abuse of discretion. *Corah v. Corah*, 75 N.W.2d 465, 469 (1956).

### **ARGUMENT**

#### **I. THE AUTOMATIC-APPROVAL PENALTY IN MINN. STAT. § 15.99 IS NOT TRIGGERED WHERE A MUNICIPALITY TIMELY DENIES A WRITTEN REQUEST RELATED TO ZONING.**

"The legislature enacted section 15.99 in 1995 to provide deadlines for local governments to take action on zoning applications." *Hans Hagen Homes v. City of Minnetrista*, 728 N.W.2d 536, 540 (Minn. 2007); 1995 Minn. Laws ch. 248, art. 18, § 1,

at 2415, 2477-78. Section 15.99, subdivision 2, often referred to as the “60-day rule,” provides in relevant part:

**Subd. 2. Deadline for response.** 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 . . . 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.

Minn. Stat. § 15.99, subd. 2 (2000). “The rationale for mandating written findings accompanying a decision to deny a zoning application is to prevent a government’s post hoc rationalization of a capricious decision.” *Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804, 827 (Minn. App. 2005) (citing *Demolition Landfill Services, LLC v. City of Duluth*, 609 N.W.2d 278, 282 (Minn. App. 2000)).

This statute has been amended since the Board’s September 11, 2001 decision and is now referred to as subdivision 2(a).<sup>4</sup> Although the 60-day requirement explicitly provides the consequence of automatic approval, the written-reasons requirement does not. Nonetheless, in *Demolition Landfill Services, LLC v. City of Duluth*, the Court of

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<sup>4</sup> In 2003, the legislature amended subdivision 2, adding (b) and (c) and classifying the previous version of subdivision 2 as 2(a). 2003 Minn. Laws ch. 41, § 1, at 321-23. Subdivision 2(c) added a requirement the written statement of reasons for denial “must be provided to the applicant upon adoption.” It did not provide an express consequence for the failure to comply. In 2006, the legislature added watershed district review and soil and water conservation district review to the requests subject to the 60-day deadline. 2006 Minn. Laws, ch. 226, § 1, at 257-59. In 2007, the legislature amended other subdivisions of section 15.99 and added section 473.175 as an exception under subdivision 2. 2007 Minn. Laws ch. 57, art. 1, § 11 at 338; 2007 Minn. Laws ch. 113, § 1, at 724.

Appeals extended the automatic-approval penalty to the written-reasons requirement. 609 N.W.2d 278, 281-82 (Minn. App. 2000), *review denied* (Minn. July 25, 2000).

*Hans Hagen Homes v. City of Minnetrista* is controlling. In *Hans Hagen*, this Court addressed the city of Minnetrista's failure to timely deliver a written statement of its reasons for denying Hans Hagen Homes' request for rezoning and an amendment to the city's comprehensive plan. 728 N.W.2d at 538. Hans Hagen submitted its request on May 18, 2004. *Id.* The city extended its responsive deadline and Hans Hagen agreed to a November 30, 2004 response deadline. *Id.* On October 4, 2004, the city council held a public hearing to consider the request and a representative from Hans Hagen was present. *Id.* After receiving public comment and presentations, the city council denied the application. *Id.* On October 18, 2004, the city council approved its October 4 meeting minutes and adopted a resolution with the written reasons for denying the request. *Id.* A representative was not present and Hans Hagen did not receive a copy of the resolution with written reasons for denial until December 9, 2004. *Id.*

Despite the city of Minnetrista's failure to provide written findings to Hans Hagen within the 60-day period required for making a decision, this Court held the failure "does not result in the automatic approval penalty that is provided in subdivision 2(a) . . ." *Id.* at 540. This Court reasoned, "[T]he automatic approval penalty applies only to the failure of an agency to deny a request within 60 days, ..." *Id.* This Court added, "[T]he legislature did not change any of the words of the automatic approval penalty, which remain tied to the failure of a [municipality] 'to deny a request'" when it amended section 15.99. *Id.* at 540-41. In short, the legislature did not add a penalty when it amended the

statute to require written reasons be provided to the applicant, meaning the provision requiring written reasons is directory rather than mandatory. This Court's reasoning in *Hans Hagen* is equally applicable to the case at bar. Indeed, this Court prophetically noted:

The automatic approval penalty language of subdivision 2(a) could be read even more narrowly. Because the triggering event of the penalty is the failure "to deny a request," the penalty could be read to apply only where the City has not acted on the request (i.e., has not held a public hearing and taken a vote) before the expiration of the response deadline. But, because the City does not argue for that narrower construction, and the facts before us show that the City did both – acted to deny and stated its reasons for denial in writing – before the expiration of the response deadline, we will not decide that precise issue and instead leave it for another day.

*Hans Hagen Homes, Inc.*, 728 N.W.2d at 540 n. 1 (emphasis added). That day has arrived. This Court should confirm what the statute plainly omits: the automatic-approval penalty does not apply to the failure to provide written reasons supporting a timely denial.

Like the applicant in *Hans Hagen*, Johnson was present at the public hearing in which his request was considered and timely denied. The Board discussed the Planning Commission's recommendation and findings, of which Johnson had a copy. However, the Board did not issue separate written reasons when it denied Johnson's application. Nonetheless, this Court should continue to follow its reasoning from *Hans Hagen* and recognize the narrow construction of the automatic-approval penalty in section 15.99, subdivision 2.

This Court has held the automatic-approval penalty does not apply to the failure to provide written reasons to the applicant because the provision is directory rather than

mandatory. 728 N.W.2d at 540. Similarly, the provision in subdivision 2 requiring written reasons is directory, not mandatory. A statute will be construed as directory when the provisions of the statute do not relate to the essence of the thing to be done, are merely incidental or subsidiary to the chief purpose of the law, are not designed for the protection of third persons, and do not declare the consequences of a failure to comply with the provision. *State, by Lord v. Frisby*, 260 Minn. 70, 76, 108 N.W.2d 769, 773 (1961); *Farmers Coop. Elevator Co. of Atwater v. Enge*, 122 Minn. 316, 320, 142 N.W. 328, 330 (1913).

The provision requiring written reasons supporting the denial does not relate to the essence of subdivision 2. First, section 15.99 is entitled “Time Deadline for Agency Action.” Minn. Stat. § 15.99 (emphasis added). Second, subdivision 2 is entitled “Deadline for response.” Minn. Stat. § 15.99, subd. 2 (emphasis added). The subdivision requires an agency to approve or deny a written zoning request within 60 days. *Id.* “Failure of an agency to deny a request within 60 days is an approval of the request.” *Id.* The essence of section 15.99 and subdivision 2 is to establish a time deadline for a decision. Indeed, the *Hans Hagen* court identified the purpose of subdivision 2 and asked whether it is accomplished by ordering automatic approval:

[E]ven if we were to conclude that the juxtaposition of subdivision 2(a), with an automatic approval penalty, and subdivision 2(c), with no explicit penalty, created some ambiguity, we would reach the same result. We have said that the purpose of subdivision 2 was to establish “deadlines for local governments to take action on zoning applications.” *Am. Tower, L.P.*, 636 N.W.2d at 312. That purpose is fully accomplished by construing the requirement of subdivision 2(a) that the agency take action on the application to be mandatory and subject to the penalty, but the requirement

of subdivision 2(c) that the agency give written notice to the applicant to be directory and not subject to the penalty.

728 N.W.2d at 543 (emphasis added). Written reasons do not relate to the essence of a deadline. Rather, written reasons for denial, as required by subdivision 2, are merely incidental or subsidiary to the essence of establishing deadlines for action by an agency. The provision for written reasons for denial is undoubtedly tailored to protect the applicant for rezoning, rather than a third person, by requiring timely decision-making. Thus, because the Board “took action” on the application before the deadline, the purpose of subdivision 2 was “fully accomplished.” *Id.*

This Court has also observed statutory provisions defining the mode in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system, and dispatch in public business, are generally deemed directory. *Benedictine Sisters Benevolent Assoc. v. Pettersen*, 299 N.W.2d 738, 740 (Minn. 1980). The requirement of written reasons is clearly intended to provide guidance to government officials making a zoning decision, similar to the statute’s requirement written findings be delivered to the applicant. *See* Minn. Stat. § 15.99, subd. 2(c) (2008).

Further, the statute does not provide consequences for failure to provide written findings. This Court has previously recognized the failure to provide consequences reinforces the directory nature of the statute. *See In re Giem*, 742 N.W.2d 422, 428 n. 8 (Minn. 2007) (discussing Minnesota Supreme Court cases deeming statutes to be directory for failure to provide consequences). Indeed, the legislature has amended section 15.99 several times and has not broadened the automatic-approval penalty from

the failure of a governing body “to deny a request” within 60 days. *See Hans Hagen*, 728 N.W.2d at 540-41.

Although the Board did not issue separate written reasons supporting the denial, this Court has previously recognized the failure to comply with a directory provision in a statute does not invalidate the underlying action taken. *See Benedictine Sisters Benevolent Assoc.*, 299 N.W.2d at 740 (holding commissioner of health’s decision on certificate of need not invalidated by failure to comply with directory provision for time period to issue decision); *Sullivan v. Credit River Twp.*, 299 Minn. 170, 177, 217 N.W.2d 502, 507 (1974) (holding action of board not invalidated by violation of directory clause of open meeting law). Thus, the Board’s failure to comply with the directory language directing it to provide written findings does not invalidate the denial of the rezoning request.

Moreover, because the automatic-approval provision is penal in nature, it should be construed narrowly against the penalty. *Hans Hagen*, 728 N.W.2d at 543. Courts presume “the legislature intends to favor the public interest as against any private interest.” *Id.*; Minn. Stat. § 645.17(5) (2008). The public interest is reflected in the County’s zoning and comprehensive plan and area residents who likely made property decisions based on the zoning, which outweigh the private interests of Johnson to have his application automatically approved. Further, courts presume the legislature does not intend a result that is unreasonable. Minn. Stat. § 645.17(1). It would be unreasonable to interpret subdivision 2 in a manner to disregard the County’s affirmative actions in

handling the zoning application by noticing and holding public hearings at the Planning Commission and Board of Commissioners levels and its action taken within the 60 days.

Because the automatic-approval penalty clearly does not apply to the Board's failure to provide written reasons supporting a timely denial, the Court of Appeals' decision should be reversed and the district court's dismissal of Johnson's challenge to the 2001 zoning decision must be affirmed.

## **II. RESPONDENT'S CHALLENGE TO THE 2001 ZONING DECISION IS TIME-BARRED.**

Following the County's September 11, 2001 denial of his zoning request, Johnson took no affirmative action to demonstrate he considered his request automatically approved by operation of law. He raised the issue for the first time in response to the County's Motion for Summary Judgment in 2006 – the existence of a potential claim for a violation of the 60-day rule is not even mentioned in the Complaint. Nonetheless, the Court of Appeals concluded Johnson did not have to take further action as his request was approved “by operation of law” in 2001. *Johnson*, 2009 LEXIS 840, at \*7. The Court of Appeals erred by overturning the district court's determination concerning laches. *See Corah v. Corah*, 75 N.W.2d at 469 (a district court's decision concerning laches will only be reversed for an abuse of discretion).

“[A] party is barred by laches when the delay is so long and the circumstances of such character as to establish a relinquishment or abandonment of rights.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 233 (Minn. 2008) (citation omitted). A party who

comes into a court of equity must act with reasonable diligence, under all the circumstances, or he is chargeable with laches. *Id.*

The doctrine of laches prevents one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay. *Klapmeier v. Town of Center*, 346 N.W.2d 133, 137 (Minn. 1984). It is designed to promote vigilance and to discourage delay in enforcing rights and cuts off stale claims of those who have procrastinated unreasonably and without excuse. *State ex rel. Sawyer v. Mangni*, 43 N.W.2d 775, 781 (Minn. 1950). Laches applies to land use claims. *Shortridge v. Daubney*, 425 N.W.2d 840, 842 (Minn. 1988) (holding delay of approximately four years in challenging a special assessment precludes relief from the assessment based upon a technical defect in the notice of assessment as to the length of time within which an appeal to district court may be taken).

This Court precluded plaintiffs' delayed claims when they had actual knowledge of the incident at issue. *Id.* In *Shortridge v. Daubney*, plaintiffs received notice of a hearing on a special assessment and attended the hearing in 1981. *Id.* at 841. Although the notice of hearing had a technical defect regarding the appeal period, the city attorney orally corrected the defect at the hearing. *Id.* The Court found plaintiffs also had actual knowledge of the correct appeal period at the time. *Id.* Plaintiffs later challenged the special assessment in 1984, arguing the technical defect rendered the assessment invalid. *Id.* This Court was troubled by plaintiffs "delayed four years in challenging the assessment despite having actual knowledge" about the correct appeal period. *Id.* at 842. Applying the doctrine of laches and barring plaintiffs' claim, this Court recognized

“[m]unicipalities are prejudiced if there is no point in time at which their assessments become final.” *Id.*

Applying these principles to the case at bar, the district court properly determined Johnson’s claims were time-barred:

The Court finds compelling the County’s argument with respect to the 2001 rezoning denial. The Court concludes [Johnson’s] election to take no action for almost five years with no reasonable basis or reasonable explanation for the delay and where others, including local governmental units (the town board of Lutsen and the County of Cook in particular) as well as other property owners have acted in reliance on the validity of the action, that [Johnson] has lost whatever right to seek review that he had at the time of the 2001 proceeding.

Here the record is clear [Johnson] knew of the denial at the time of the denial, and for the purposes of determining whether the doctrine of laches ought apply, the Court is satisfied his actual knowledge from 2001 coupled with the other circumstances shown, including particularly the conduct of others in reliance on the Board’s action over a period of approximately five years, precludes and prevents him from now asserting a claim based on the decision of Cook County in 2001.

Add.4.

The record demonstrates Johnson unreasonably and inexcusably delayed asserting any rights concerning the September 11, 2001 decision until late 2006. Johnson participated in the consideration by the Planning Commission and County Board of his rezoning request in 2001 and, obviously, knew in 2001 about the denial. A.72-A.73. However, he failed to take any action to assert a 60-day violation until December 2006, when his attorney raised the issue in response to the County’s Motion for Summary Judgment. A.384-A.386.

By taking no action with respect to the 2001 zoning denial until years later,

Johnson prejudiced the County, the 2005 rezoning applicant, the Town of Lutsen, and other neighboring landowners. Had Johnson raised this issue in 2001, the County would sit in a better position to defend itself since, with the passage of time, the County has reused tapes which recorded hearings and from which the County could generate a verbatim transcript. More importantly, over the course of the last several years, the County made land use decisions based upon the residential nature of the area and, in particular, caused the 2005 rezoning applicant to move forward with its residential project. Clearly, laches protects a municipality from having to defend land use decisions years after the public and the county have relied on those decisions.

The County would not represent the only one prejudiced. Since 2001, neighboring landowners likely made decisions to buy or sell their properties based upon the residential nature of the area. At the time of the 2001 hearing, many concerned citizens made it clear they made decisions regarding their property based upon their belief the area would remain residential. A.16, A.17, A.20, A.22, A.23, A.24, A.37-A.44. Neighboring property owners felt expanding the general commercial zone further west would have a negative impact on the residential qualities of the neighborhood and the property values. *Id.*

In reliance on the County's zoning decision in 2004, the Town of Lutsen adopted a Lutsen Town Center Plan. A.333. This Town Center Plan was adopted by the County on September 28, 2004. A.332. The town center runs on the west side from the Arrowhead Electric property along Highway 61 to the Clearview property on the eastern side. A.338, A.346. Johnson's property was not located within the town center, but

approximately a mile and a half to the northeast of the town center along Highway 61.

A.346. Accordingly, the Court of Appeals' decision is incompatible with the Lutsen Town Center Plan which was adopted by the County.

Additionally, the northeast portion of the area requested in the 2001 rezoning was also part of the 2005 rezoning request and residential development project. A.74; see A.349. The Court of Appeals' decision calls into question the zone structure for the overall residential development project. Clearly Rita's Grandview Ridge is prejudiced by relying on the County's 2001 zoning decision in applying for and receiving rezoning on the property, a CUP for a residential development project. This residential development project now abuts general commercial property.

To now declare an eight year-old zoning decision invalid affects the entire community, particularly in light of a land use plan which prioritizes developing existing commercial areas. *See Wheeler v. City of Wayzata*, 533 N.W.2d 405, 409 (Minn. 1995) (discussing how a delay in appealing a zoning decision inevitably harms owners of nearby properties since they relied on the present condition in making decisions about the sale, purchase, and development of their properties).

Although Johnson claimed he had "no reason to initiate this action sooner because until an adjacent property owner sought a conditional use permit for its property, [the County] did nothing to stop Johnson from using the Property commercially," there is no dispute he has not built the proposed antique and art mall or used his storage shed for this purpose. Court of Appeals App. Br. p. 15. He gave neither the County nor neighboring landowners any indication he considered his property as zoned commercial. In fact,

Johnson was present at the Planning Commission and the Board of Commissioner's meetings regarding the 2005 request. A.187, A.235. However, he never mentioned he considered his property to be general commercial. Interestingly, Johnson claimed that if the 2005 request was granted, he should "be able to file an application" for rezoning of his property that should be automatically granted because one of the reasons denying his request was that there was adequate commercial property in the area. A.189. Clearly, in 2005 Johnson did not believe or treat his property as commercial and he should not be allowed five years later to bring this claim. Because Johnson's delay in challenging the 2001 rezoning decision prejudiced the County, the Town of Lutsen and neighboring landowners, the district court correctly determined his claim was time-barred.

In addition to laches, Johnson's claim is time-barred by Minnesota Statutes § 541.07(2), which provides a two-year statute of limitations "upon a statute for a penalty or forfeiture." Whether a claim under section 15.99, subdivision 2 is subject to the two-year statute of limitations depends on whether the statute is for a penalty. A statute for a penalty requires more than recovery of actual damages and other costs. *See Freeman v. O Petroleum Corp.*, 417 N.W.2d 617, 618-19 (Minn. 1988) (discussing inapplicability of two-year statute of limitations to polygraph statute which provided for recovery of provable damages); *Estate of Riedel v. Life Care Retirement Communities, Inc.*, 505 N.W.2d 78, 82 (Minn. App. 1993) (discussing inapplicability of two-year statute of limitations to consumer fraud statute providing recovery of provable damages). Section 15.99, subdivision 2 does not provide for recovery of damages or costs. It represents something other than damages. As a consequence for failure to timely deny an

application, it is automatically approved. Such a penalty divests a governing body of its decision-making authority, which is a “harsh penalty.” The automatic approval occurs regardless of whether the applicant was damaged. *See Freeman*, 417 N.W.2d at 618 (discussing *Merchant’s Nat’l Bank of Chicago v. Northwestern Mfg. & Car Co.*, 48 Minn. 349, 51 N.W. 117 (1892)). Because subdivision 2 goes beyond recovery of actual damages, it is a penalty.

Indeed, this Court has previously recognized section 15.99, subdivision 2 as a penalty, characterizing it as a “harsh” penalty. *Hans Hagen*, 728 N.W.2d at 540. The subdivision penalizes municipalities with automatic approval of applications for untimely actions. Minn. Stat. § 15.99, subd. 2. In *Hans Hagen*, this Court also classified the automatic-approval clause as a “penalty” when it discussed the narrow construction of statutes which are penal in nature. 728 N.W.2d at 543.

It is anticipated Johnson will argue a statute is considered penal for limitations purposes if it punishes an offense against the public rather than redresses a private wrong. This misconstrues the analysis in *Freeman*. 417 N.W.2d at 618. In *Freeman*, this Court stated the two-year statute of limitations included punishment for an offense against the public, rather than exclusively applies to an offense against the public. *Id.* Whether a statute is for a penalty should be determined by analyzing the relevant statute, rather than whether it benefits public or private interests. Section 15.99, subdivision 2 plainly provides a penalty for failure to deny an application in 60 days. Accordingly, the two-year statute of limitations under section 541.07(2) applies.

Here, the County Board denied the 2001 rezoning request on September 11, 2001, and Johnson failed to bring action until 2006. Because Johnson's claim is time-barred under section 541.07(2), the Court of Appeals' decision should be reversed and the district court's Order should be affirmed.

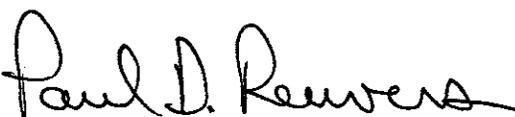
**CONCLUSION**

The automatic-approval penalty in Minnesota Statutes section 15.99 should never be triggered by a timely denial. Legislation by default should be sparingly invoked and timely action should not trigger this "harsh" penalty. Accordingly, the Court of Appeals' decision should be reversed and the district court's dismissal reinstated.

Respectfully submitted,

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