

No. A08-1501

---

State of Minnesota  
**In Supreme Court**

---

Lance J. Johnson,

*Respondent,*

vs.

Cook County, a municipal corporation,

*Appellant.*

---

**BRIEF OF *AMICI CURIAE***  
**LEAGUE OF MINNESOTA CITIES**  
**ASSOCIATION OF MINNESOTA COUNTIES**  
**MINNESOTA ASSOCIATION OF TOWNSHIPS**

Paul D. Reuvers (#217700)  
Susan M. Tindal (#330875)  
IVERSON REUVERS  
9321 Ensign Avenue South  
Bloomington, MN 55438  
(952) 548 7200

*Attorneys for Appellant*  
*Cook County*

Roy J. Christensen (#0302508)  
JOHNSON, KILLEN & SEILER, P.A.  
800 Wells Fargo Center  
230 West Superior Street  
Duluth, MN 55802  
(218) 722-6331

*Attorney for Respondent*  
*Lance J. Johnson*

Susan L. Naughton (#259743)  
LEAGUE OF MINNESOTA CITIES  
145 University Avenue West  
St. Paul, MN 55103-2044  
(651) 281-1232

*Attorney for Amici Curiae*  
*League of Minnesota Cities*  
*Association of Minnesota Counties*  
*Minnesota Association of Townships*

---

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
LEGAL ISSUE.....	1
STATEMENT OF INTEREST OF <i>AMICI</i> .....	2
INTRODUCTION.....	3
STATEMENT OF THE CASE AND FACTS.....	4
STANDARD OF REVIEW.....	4
LEGAL ARGUMENT.....	4
<b>I. The purpose of the 60-Day Rule is satisfied when a governmental entity votes to deny a zoning application within the statutory deadline.....</b>	<b>4</b>
<b>II. A narrow construction of the 60-Day Rule protects the strong public interest in having zoning decisions made on the merits and not by default.....</b>	<b>8</b>
CONCLUSION.....	11

**TABLE OF AUTHORITIES**

**PAGE**

**MINNESOTA STATUTES**

Minn. Stat. § 15.99.....*passim*  
Minn. Stat. § 645.17.....9

**MINNESOTA SESSION LAWS**

2003 Minn. Laws ch 41, § 1.....7

**MINNESOTA CASES**

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

*Concept Props., LLP v. City of Minnetrista*,  
694 N.W.2d 804 (Minn. App. 2005).....7

*Demolition Landfill Servs., LLC v. City of Duluth*,  
609 N.W.2d 278 (Minn. App. 2000).....6, 7

*Hans Hagen Homes, Inc. v. City of Minnetrista*,  
713 N.W.2d 916 (Minn. App. 2006).....10

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

*Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*,  
583 N.W.2d 293 (Minn. App. 1998).....9

*City of Minneapolis v. Wurtele*,  
291 N.W.2d 386 (Minn. 1980).....9

*State by Lord v. Frisby*,  
260 Minn. 70, 108 N.W.2d 769 (1961).....6

*Swanson v. City of Bloomington*,  
421 N.W.2d 307 (Minn. 1988).....7

## LEGAL ISSUE

Minnesota statute unambiguously provides that the penalty of automatic approval of certain zoning requests under Minn. Stat. § 15.99 is triggered only when a governmental entity fails “to deny a request” within the statutory deadline. Should a landowner’s rezoning application be automatically approved when the landowner has actual notice that a county board voted to deny his application within the statutory deadline but the county board failed to issue written reasons for the denial?

The court of appeals held that Respondent Johnson’s rezoning application was automatically approved under Minn. Stat. § 15.99 because the county board failed to issue written reasons for the denial of his application within the statutory deadline.

## STATEMENT OF INTEREST OF AMICI

The League of Minnesota Cities (“LMC”) has a voluntary membership of 830 out of 854 cities in Minnesota.<sup>1</sup> LMC 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, policy-development, risk-management and advocacy services. LMC’s mission is to promote excellence in local government through effective advocacy, expert analysis and trusted guidance for all Minnesota cities.

The Association of Minnesota Counties (“AMC”) is a voluntary association of all 87 counties in the State of Minnesota organized pursuant to Minn. Stat. § 375.163. The mission of AMC is to provide counties with support so that they may effectively perform the duties and responsibilities delegated to them by law. AMC works closely with the legislative, administrative and judicial branches of government on issues involving adoption, enforcement and modification of laws and policies that affect counties, and represents the position of counties before state and federal government agencies and the public.

The Minnesota Association of Townships (“MAT”) is a nonprofit organization representing 1,785 out of 1,786 Minnesota townships. MAT provides research, training, legislative representation, and other services for its members.

---

<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 person or entity other than the League made a monetary contribution to its preparation or submission.

*Amici* have a public interest in this appeal as representatives of thousands of governmental entities throughout the state that must make zoning decisions to protect the public safety and welfare and that must comply with Minn. Stat. § 15.99 (“60-Day Rule”). We have a public interest in ensuring that the unambiguous language of the 60-Day Rule is interpreted in a way that achieves its purpose while protecting the strong public interest in having zoning decisions made on the merits and not by default.

### **INTRODUCTION**

In this case, Mr. Johnson is attempting to manipulate the 60-Day Rule to force the automatic approval of a rezoning application from 2001 that the county board timely denied at a meeting at which Mr. Johnson was present. The court of appeals erroneously concluded that Mr. Johnson’s application was automatically approved under the 60-Day Rule because the county board failed to issue written reasons for the denial within the statutory deadline. The court of appeals’ decision is bad public policy, and it conflicts with the unambiguous language of the 60-Day Rule and with this Court’s decision in *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536 (Minn. 2007).

*Amici* have united to urge this Court to hold that the 60-Day Rule’s harsh penalty of automatic approval is not triggered in situations where there has been a timely vote to deny a zoning application, regardless of whether the statute’s other requirements have been satisfied. Developers and landowners should not be allowed to use technical violations of subsidiary provisions of the 60-Day Rule to promote their private interests at the expense of the public safety and welfare.

## STATEMENT OF THE CASE AND FACTS

*Amici* concur with Cook County's statement of the case and facts.

## STANDARD OF REVIEW

*Amici* concur with Cook County's statement of the standard of review.

## LEGAL ARGUMENT

Cook County's Brief demonstrates why the court of appeals' decision should be reversed. *Amici* will not repeat those legal arguments here. Instead, this brief will focus on why this Court should interpret the unambiguous language of the 60-Day Rule in a way that fulfills its purpose while protecting the strong public interest in having land-use decisions made on the merits and not by default.

**I. The purpose of the 60-Day Rule is satisfied when a governmental entity votes to deny a zoning application within the statutory deadline.**

The purpose of the 60-Day Rule is to keep governmental entities from taking too long to take action on certain zoning applications. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536 (Minn. 2007); *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 certain zoning applications if a governmental entity fails “to deny a request” within the statutory deadline. Both the purpose of the 60-Day Rule and its unambiguous language are satisfied in situations where there has been a timely vote to deny an application, regardless of whether a governmental entity issues written reasons for the denial or complies with the other subsidiary requirements of the statute.

In *Hans Hagen Homes*, this Court concluded that the 60-Day Rule “is not ambiguous” and that based on its unambiguous language, the penalty of automatic approval only applies to a governmental entity’s failure to “timely deny” a zoning application.

We hold that a city’s failure to timely provide an applicant with a written statement of the reasons for denying an application regarding zoning, as required by section 15.99, subd. 2(c), does not trigger the automatic approval penalty of subdivision 2(a), which **only applies to the failure to timely deny the application.**

728 N.W. 2d at 540, 544 (Minn. 2007) (emphasis added). In *Hans Hagen Homes*, the city council made a timely decision to deny a zoning application and issued written reasons for the denial within the statutory deadline but failed to provide the written reasons to the applicant within the statutory deadline. *Id.* Even though the *Hans Hagen Homes* Court was not required to go beyond these facts, it chose to note that the unambiguous language of the 60-Day Rule could be interpreted even more narrowly in situations – like that in this appeal – where a governmental entity has timely voted to deny an application but has failed to issue written reasons for the denial within the statutory deadline.

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.)

*Id.* at 540, n. 1.

In this case, the court of appeals ignored the unambiguous language of the 60-Day Rule and this Court’s direction in *Hans Hagen Homes* regarding the narrow interpretation

of the statute. Instead, the court of appeals erroneously concluded that a “denial” of an application under the 60-Day Rule cannot be effective until a governmental entity has issued written reasons for the denial. *Johnson v. Cook County*, No. A08-1501 (Minn. App. Aug. 4, 2009) (unpublished decision). Appellant’s Addendum at 17. In reaching this erroneous conclusion, the court of appeals relied primarily on a court of appeals’ decision that predates *Hans Hagen Homes*. *Id.*; See *Demolition Landfill Servs. LLC v. City of Duluth*, 609 N.W.2d 278 (Minn. App. 2000). Instead, the court of appeals should have focused on *Hans Hagen Homes* and on the importance this Court placed on determining the purpose of a statute when determining whether particular provisions of it are mandatory or directory.

It is generally said that, where 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 of compliance, the statute will ordinarily be construed as directory and not as mandatory.

*Hans Hagen Homes*, 728 N.W.2d at 541 (quoting *State by Lord v. Frisby*, 260 Minn. 70, 76, 108 N.W.2d 769, 773 (1961)).

The essential purpose of the 60-Day Rule is to require governmental agencies to take timely action on certain zoning applications, not to dictate the requirements for explaining those decisions or for providing written notice of them. The Minnesota Legislature has unambiguously signaled the purpose of the 60-Day Rule by separating into different sentences the requirement for taking timely action and the requirement for issuing written reasons for that action and by only attaching the automatic-approval penalty to the sentence with the requirement for taking timely action. See Minn. Stat.

15.99 (2000)<sup>2</sup>. Nowhere in the 60-Day Rule does it state that written reasons are necessary to make a denial effective. The court of appeals' conclusion that a denial is ineffective without the issuance of written reasons conflicts not with the unambiguous language of the 60-Day Rule, and it also conflicts with Minnesota law regarding the purpose of written findings.

The vote to deny a zoning application and the adoption of written reasons or written findings are separate activities that serve separate purposes. A governmental entity takes "action" on a zoning application by voting to approve or deny it, and the action is effective as soon as the vote is complete. In contrast, a governmental entity adopts written findings to explain the vote in order to create a record that a court can review to determine whether the vote was reasonable if it is challenged. *See e.g., Swanson v. City of Bloomington*, 421 N.W.2d 307, 311-313 (Minn. 1988); *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)). Written findings explain the reasons for the action but are not necessary to make the action effective.

The purpose of the 60-Day Rule is to require governmental entities to take timely action on certain zoning applications. Timely action was taken in this case, and Mr. Johnson had actual notice of that action because he was present at the meeting where the

---

<sup>2</sup> The 60-Day Rule was amended in 2003 by renumbering subdivision 2 to subdivision 2(a) and subdivision 2(c). 2003 Minn. Laws ch 41, § 1. The Legislature did not change any of the words of the automatic-approval penalty, which remained tied to the failure "to deny a request."

vote to deny his application took place. Developers and landowner should not be allowed to use technical violations of subsidiary provisions of the 60-Day Rule to force the approval of zoning applications that benefit their private interests at the expense of the public safety and welfare.

**II. A narrow construction of the 60-Day Rule protects the strong public interest in having zoning decisions made on the merits and not by default.**

A narrow construction of the 60-Day Rule is required by the statute's unambiguous language. It also satisfies the purpose of the statute while protecting the strong public interest in having zoning decision made on their merits and not by default. Indeed, the majority opinion in *Hans Hagen Homes* noted that even if the Court had concluded that the 60-Day Rule was ambiguous, the proper construction of the statute would still preclude automatic approval in situations where there has been a timely vote to deny an application because the purpose of the statute is satisfied in these situations.

But even 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.

*Hans Hagen Homes*, 728 N.W.2d at 543. The majority opinion also noted that several canons of statutory construction favored a narrow construction of the 60-Day Rule including: (a) the rule that "statutes that are penal in nature are construed narrowly

against the penalty;” (b) the presumption that “the legislature intends to favor the public interest as against any private interest,” (quoting Minn. Stat. § 645.17(5)); and (c) “the further presumption that the legislature does not intend a result that is unreasonable,” (citing Minn. Stat. § 645.17(1)). *Id.* at 543-544. Each of these canons of statutory construction also cuts against automatic approval in this case.

Mr. Johnson was well aware that the county board had voted to deny his rezoning application in 2001 because he was present at the meeting where the denial vote took place. Mr. Johnson did not even notify the county board of its technical violation of the statute, however, until 2006. 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 governmental entities in situations where they have not been prejudiced by a governmental entity’s technical violation of a subsidiary provision of the statute.

The law [60-Day Rule] 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.

*Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Twp.*, 583 N.W.2d 278, 295 (quoting *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 391 (Minn. 1980)).

It is bad public policy to allow land-use decisions to be made by default. If it was not for this Court’s decision in *Hans Hagen Homes*, for example, a developer would have been 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 in Minnetrista at the expense of the public interest in preserving the character of a small, mostly rural city. And as Judge Randall

recognized in his concurring opinion at the court of appeals in *Hans Hagen Homes*, it is bad public policy to 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 916, 924 (Minn. App. 2006). The private interests of developers and landowners in forcing the approval of their zoning applications should not be allowed to overcome the strong public interest in having zoning decisions made on the merits and not by default.

**CONCLUSION**

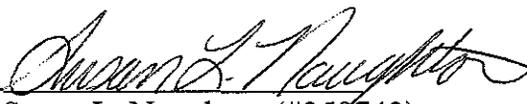
This Court's holding will affect all of the cities, counties and townships in Minnesota. *Amici* have united to urge this Court to clarify that the 60-Day Rule's harsh penalty of automatic approval only applies when a governmental entity has failed to vote to deny a zoning application within the statutory deadline and that the other subsidiary provisions of the statute are directory only and cannot trigger the penalty of automatic approval. If the development lobby wishes to have additional penalties written into the unambiguous language of the 60-Day Rule it will have to convince the Legislature (and not this Court) that technical violations of subsidiary provisions of the statute should trigger the penalty of automatic approval. This Court should not allow the private interests of developers and landowners in forcing the approval of their zoning applications to overcome the strong public interest in having zoning decisions made on the merits and not by default.

For all of these reasons, *amici* respectfully requests that this Court reverse the court of appeals' decision.

Dated: November 25, 2009

Respectfully submitted,

LEAGUE OF MINNESOTA CITIES  
ASSOCIATION OF MINNESOTA COUNTIES  
MINNESOTA ASSOCIATION OF TOWNSHIPS

By:   
Susan L. Naughton (#259743)  
LEAGUE OF MINNESOTA CITIES  
145 University Avenue West  
St. Paul, Minnesota 55103-2044  
Attorney for Amici Curiae