

NO. A08-1501

State of Minnesota
 In Supreme Court

Lance J. Johnson,

Respondent,

v.

Cook County, a municipal corporation,

Appellant.

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The County timely denied Johnson's zoning application. As a result, the harsh penalty of automatic approval contained in Minn. Stat. § 15.99 does not apply. Johnson's reliance on the Minnesota Court of Appeals' decision in *Demolition Landfill Services, LLC v. City of Duluth*, 609 N.W.2d 278 (Minn. App. 2000) is misplaced. Consistent with the plain language of the statute and this Court's reasoning in *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536 (Minn. 2007), the automatic approval penalty only applies when a decision is not timely. As the *Amici Curiae* points out, "[d]evelopers and landowners 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." *Amici Br.* p. 8.

Johnson's challenge to the September 11, 2001 zoning decision is time-barred. Johnson unnecessarily delayed challenging the County's 2001 denial of his zoning application. Johnson should not be allowed to sit on his hands for years while the County, Town of Lutsen and neighboring landowners rely on the denial of the rezoning decision. The private interest of a landowner in compelling the approval of their zoning request should not be allowed to triumph over the public interest of having zoning decisions timely made on the merits and not by default.

CLARIFICATION OF FACTS

Johnson claims, "Parcel B is located adjacent to the Lutsen landmark Isak Hansen Construction & Lumber True Value, which has been zoned commercial and operated as

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 District Court's reasoning is sufficient to allow meaningful judicial review.¹

ARGUMENT

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

Johnson asserts the 2003 amendments to Minn. Stat. § 15.99 do not impact this Court's consideration of the case because the rezoning denial occurred prior to the amendments. *Resp. Br. p. 8, fn. 2*. However, the amendments and this Court's decision in *Hans Hagen* do directly impact this Court's decision in this case. Johnson states, the 2003 amendments added provisions this Court "has since deemed 'directory' in stark contrast to the decisions of this Court and the Court of Appeals indicating the 'mandatory' nature of the pre-amendment language at issue here." *Id.* Essentially, Johnson admits the 2003 amendments support the County's position the amendments

¹ Johnson improperly refers to and mischaracterizes matters outside the record in footnote 1 of his brief. *See Resp. Br., p. 4 n. 1.*

demonstrate the Legislature's intent that the failure to issue written reasons for the denial does not result in automatic approval of the request. In 2003, Minn. Stat. § 15.99 was amended to, among other changes, renumber subdivision 2 as subdivision 2(a) and to add new subdivisions 2(b) and 2(c). *See Hans Hagen*, 728 N.W.2d at 540. This relevant portion of the statute states:

Subd. 2. Deadline for response.

(a) Except as otherwise provided in this section, section 462.358, subdivision 3b, or 473.175, or chapter 505, and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems, watershed district review, soil and water conservation district review, or expansion of the metropolitan urban service area for a permit, license, or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request. If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.

(b) When a vote on a resolution or properly made motion to approve a request fails for any reason, the failure shall constitute a denial of the request provided that those voting against the motion state on the record the reasons why they oppose the request. A denial of a request because of a failure to approve a resolution or motion does not preclude an immediate submission of a same or similar request.

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

Minn. Stat. § 15.99. When the legislature amended *section 15.99* in 2003, by renumbering subdivision 2 to *subdivision 2(a)* and adding *subdivision 2(c)*, the legislature did not change any of the words of the automatic approval penalty, which remained tied to the failure of a city “to deny a request.” Additionally, the legislature did not provide a penalty in *subdivision 2(c)* or reference the penalty from *subdivision 2(a)* in *subdivision 2(c)*. See *Hans Hagen*, 728 N.W.2d at 540-541. Therefore, the language in Minn. Stat. § 15.99 to “state in writing the reasons for the denial” remained directory, not mandatory and failure to issue written reasons does not result in automatic approval of the request. *Id.* at 540 (stating, “[w]e know of no reason why the legislature must provide a consequence for noncompliance for every requirement of a statute. To the contrary, our case law recognizes that a statute may contain a requirement but provide no consequence for noncompliance, in which case we regard the statute as directory, not mandatory.”) Therefore, the 2003 amendments simply clarify the writing requirement *remains* directory, not mandatory.

Johnson relies heavily on the Minnesota Court of Appeals’ decision in *Demolition Landfill Services, LLC v. City of Duluth*, 609 N.W.2d 278 (Minn. App. 2000) claiming it “was the law in place at the time Johnson’s rezoning requests was denied in 2001.” *Resp. Br. p. 10*. This Court of Appeals’ decision is not controlling. Since *Demolition Landfill*, this Court has addressed Minn. Stat. § 15.99 and that decision *is* controlling. *Hans Hagen* discussed Minn. Stat. § 15.99 and whether failure to provide an applicant timely written reasons for denying an application triggered the automatic approval penalty of the statute and found the automatic approval penalty provision did not apply. *Hans Hagen*,

728 N.W.2d at 540. This Court even accentuated that the penalty language could be read more narrowly stating, “[b]ecause 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.

Contrary to Johnson’s assertion that the statute’s requirement to produce written reasons is mandatory, this Court specifically found the requirement that a municipality deny a request within the response period, “is mandatory because the automatic approval penalty applies to noncompliance with that subdivision, but that the requirement [...], that a city provide the written statement of the reasons for denial to the applicant, is only directory.” *Id.* at 542. Consistent with the reasoning in *Hans Hagen*, because the County timely denied Johnson’s request (held a public hearing and took a vote), the penalty provision (automatic approval of the request) does not apply. *See Minn. Towers, Inc., v. City of Duluth*, 474 F.3d 1052 (8th Cir. 2007) (“[t]he issue is whether [Minn. Stat. § 15.99,] *subdivision 2(c)* mandates that a written statement be provided within § 15.99’s sixty-day period for denials . . . we conclude the Supreme Court of Minnesota would answer it in the negative.”).

Johnson also claims that if there was no penalty for the failure to produce contemporaneous written reasons for denying a rezoning request, agencies would be free to deny a zoning request for any reason without any accountability to the public and there

could not be a meaningful challenge of the denial because the reasons would be unknown. *Resp. Br. p. 12.*² This Court squarely addressed this concern and found:

The failure of a statute to provide consequences for noncompliance with its requirements does not make the statute ineffective. When a statute requires a governmental body to perform some act, it is reasonable to assume the governmental body will do so or it could be compelled to do so by mandamus.

Hans Hagen, 728 N.W.2d at 541. Municipalities must have a rational basis for their zoning decisions. In fact, Johnson's lawsuit alleged his 2001 zoning decision was arbitrary and capricious.³ Therefore, the written reason requirement being directory does not render a challenge meaningless. The purpose of Minn. Stat. §15.99 is to establish "deadlines for local governments to take action on zoning applications." *Id.* at 543. That purpose is fully accomplished by construing the requirement the agency take action within 60 days as mandatory and subject to the automatic approval penalty, but the requirement of written findings is directory and not subject to the penalty. *Id.*

It is a rule of statutory construction that statutes that are penal in nature are construed narrowly against the penalty. *Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771, 774 (Minn. 2004). Courts also presume "the legislature intends to favor the public interest as against any private interest." *Hans Hagen*, 728 N.W. 2d at 543; Minn. Stat. §

² Johnson was present during the Planning Commission and Board of Commission meetings discussing his request. He demonstrated in the 2005 Planning Commission meeting he was aware of the reasons the Board denied his request by indicating one of the reasons his request was denied was because there were adequate commercial zones within the area. *See* A.189-190.

³ Johnson did not raise a violation of Minn. Stat. §15.99 until filing his response to the County's Motion for Summary Judgment. A.384. He then asked the District Court to grant him summary judgment "sua sponte." A.386.

645.17(5). Here, the public interest is reflected in the County's official controls. Area residents also made decisions based on the zoning classification. The public interest outweighs the private interest of Johnson to have his application approved by default. It would be unreasonable to interpret Minn. Stat. § 15.99 in a way to disregard the County's timely and affirmative actions in denying Johnson's zoning request. (See Minn. Stat. § 645.17(1), the legislature does not intend an absurd or unreasonable result). Accordingly, the Court should hold only the failure to make a timely decision results in automatic approval.

II. JOHNSON'S CHALLENGE TO THE 2001 ZONING DECISION IS TIME-BARRIED.

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. A party who comes into a court of equity must act with reasonable diligence, under all the circumstances, or he is chargeable with laches. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 233 (Minn. 2008) (citation omitted). Johnson was present during the 2005 Planning Commission and Board of Commissioner's meetings regarding Rita's Grandview's rezoning request and never mentioned he considered his property to be general commercial. He claimed if the 2005 request was granted, he should be able to file an application for rezoning of his property to general commercial and it should be automatically granted because one of the reasons denying his request was that there was adequate commercial property in the area. A.189. Obviously, Johnson did not believe or treat his property as commercial in 2005 and he

should not be allowed to bring this claim years later. Johnson claims there was no principle of law that “required” him to sue. *Resp. Br. 14*. However, laches prevents a lawsuit when one 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).

By taking no action with respect to the 2001 zoning denial until years later, Johnson clearly prejudiced the County, the 2005 rezoning applicant, the Town of Lutsen, and other neighboring landowners. 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. The Town of Lutsen adopted a Lutsen Town Center Plan in reliance on the County’s zoning decision. A.333. 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. 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. 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.

Johnson argues if any statute of limitations applies, it would be Minn. Stat. § 541.05, which provides a six year limitation for actions “upon a liability created by

statute, other than those arising upon a penalty or forfeiture or where a shorter period is provided by section 541.07.” Minn. Stat. § 541.05, subd. 2 (emphasis added). Because Minn. Stat. § 15.99 is a penalty statute, the two-year statute of limitations in Minn. Stat. § 541.07 applies. See *Hans Hagen*, 728 N.W.2d at 540 (characterizing Minn. Stat. § 15.99 as a “harsh” penalty).

Johnson asserts that Minn. Stat. § 15.99 is not penal because it does not punish the public. *Resp. Br. p. 15*. He relies on *Estate of Riedel v. Life Care Retirement Communities, Inc.*, 505 N.W.2d 78 (Minn. App. 1993) which discusses the inapplicability of two-year statute of limitations to consumer fraud statute providing recovery of provable damages. Section 15.99, subdivision 2, however, 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, and results in the penalty of legislation by default. The automatic approval occurs regardless of whether the applicant was damaged. See *Freeman v. O Petroleum Corp.*, 417 N.W.2d 617, 618-19 (Minn. 1988). Because subdivision 2 goes beyond recovery of actual damages, it is a penalty. Accordingly, Johnson’s claims are now time-barred.

CONCLUSION

The automatic-approval penalty in Minn. Stat. § 15.99 cannot 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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Dated: January 4, 2010

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