

STATE OF MINNESOTA
IN COURT OF APPEALS
NO. A12-0735

MOTOKAZIE! INC. AND PORTINGA BROTHERS, LLC,
APPELLANTS,

vs.

RICE COUNTY, MINNESOTA AND ITS
COUNTY BOARD OF COMMISSIONERS,
RESPONDENTS.

APPELLANTS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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ARGUMENT

I. MOTOKAZIE'S REQUESTED ORDINANCE TEXT AMENDMENT WAS ACTUALLY APPROVED

A. Minn. Stat. § 375.51, subd. 1 – not Chapter 394 – governs the voting requirement for the enactment of county ordinances and ordinance amendments

1. County's argument for Chapter 394's "implied extension" of its statutory authority is barred because it was not raised below

County did not raise below any argument that its Supermajority Vote requirement was statutorily authorized by Minn. Stat. ch. 394 – notably, § 394.25. Indeed, while paragraphs 5-6 of County's Answer reference § 394.25, subd. 10, they do so only with respect to how ordinance text amendment requests are initiated, not the voting requirement for the enactment of such text amendments. *See* A.126 ¶¶ 5-6. County did not even mention Chapter 394 at the summary judgment hearing. *See* A.342-56. And County's summary judgment opposition brief contained the following single sentence regarding Chapter 394, which — ironically — plainly supports the irrelevance of Chapter 394 to this § 375.51 dispute: "Chapter 394, an entirely separate and distinct statutory scheme, governs the County's ability to carry on planning and zoning. Minn. Stat. § 394.21, subd. 1." *Resp.App.84*(emphasis added).¹

¹ County nevertheless charges that "[t]he weakness of [Motokazie's] argument that the County has no authority to enact and enforce Section 503.04 is underscored by the fact that their discussion of the County's authority under Chapter 394 is limited to a single sentence." County Br. at 11 n.3. But, in truth, Motokozie's one-sentence reference to Chapter 394 for another, separate point underscores that County's brand new Chapter 394 argument was never before raised.

Appellate courts, including this Court, do not consider matters not argued to and considered by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Minnesota Mut. Fire and Cas. Co. v. Retrum*, 456 N.W.2d 719, 723 (Minn. App. 1990). Because County failed to raise the argument before the district court that Chapter 394 authorizes its Supermajority Vote requirement, it should be disregarded on appeal.

2. Regardless, Chapter 394 contains no voting requirement for ordinance or ordinance amendment enactment

Minn. Stat. §§ 394.24, subd. 1 and 394.25, subd. 1 authorize counties to enact "official controls," which include zoning ordinances.² Chapter 394 also contains provisions specifying certain procedures to be followed for the enactment of ordinances or ordinance amendments, including §§ 394.235 (certification of taxes paid as condition to requested amendment of official controls), 394.25, subd. 10 (process to initiate amendments to official controls), 394.26 (public hearing requirements). There is, however, no provision within Chapter 394 which specifies the voting requirements for counties to enact ordinances or amendments thereto. Rather, the exclusive statutory authority for the voting requirement to enact ordinances and ordinance amendments is contained solely within § 375.51, subd. 1, which provides that "[e]very county ordinance

² "Official control' means legislatively defined and enacted policies, standards, precise detailed maps, and other criteria, all of which control the physical development of a municipality or a county or any part thereof or any detail thereof, and are the means of translating into ordinances all or any part of the general objectives of the comprehensive plan. Such official controls may include but are not limited to ordinances establishing zoning, subdivision controls, site plan rules, sanitary codes, building codes, housing codes, and official maps." Minn. Stat. § 394.22, subd. 6 (emphasis added).

shall be enacted by a majority vote of all the members of the county board unless a larger number is required by law."

3. This Court cannot enlarge County's authority by an "implied extension"

Because the legislature has explicitly set forth in § 375.51, subd. 1 the voting requirement for ordinance and ordinance amendments, County is not permitted to ignore those requirements in favor of an "implied extension" of the authority granted in Chapter 394. Minnesota appellate courts have repeatedly confirmed that local governments are compelled to follow statutory mandates. Indeed, the Supreme Court recently held, despite decades of contrary precedent, that municipalities are constrained by the plain language of the statutory authority granted by the legislature. *See Kruppenacher v. City of Minnetonka*, 783 N.W.2d 721, 732 (Minn. 2010). Thus, County's authority to enact its Supermajority Vote requirement is governed solely by § 375.51, subd. 1 and not any of the provisions in Chapter 394 or any "implied extension" thereof.

B. For purposes of § 375.51, subd. 1, "law" and "county ordinances" do not and cannot mean the same thing

1. County's attempted self-authorization of its Supermajority Vote requirement would nullify the legislative requirement of a simple "majority vote"

At its core, County's argument is that it is permitted to self-authorize its Supermajority Vote requirement by (1) enacting an ordinance provision that requires a four-fifths (4/5ths) supermajority vote to adopt any ordinance amendment and (2) relying on that ordinance to then be the "law" which "require[s]" a "larger number" than the simple "majority vote" mandated in § 375.51, subd. 1. County's attempted self-

authorization must fail. To hold otherwise would nullify and render meaningless the simple "majority vote" requirement in § 375.51, subd. 1 because, as illustrated here, any county could simply enact an ordinance containing a supermajority voting requirement and then claim that the enacted ordinance is the "law" which "require[s]" a "larger number" than the simple "majority vote."

2. The language of § 375.51, subd. 1 plainly demonstrates that "law" and "county ordinances" are distinct terms

There is no dispute that § 375.51, subd. 1 repeatedly refers to "law" and "county ordinance" as separate and distinct terms. Indeed, the legislature provided a clear and plain distinction in the statute between (1) a "law," which authorizes the "enact[ment]" of a "county ordinance," and (2) a "county ordinance." County's attempted transformation of "law" and "county ordinance" into synonymous terms violates the plain language of the statute, which this Court is required to respect and enforce. *See Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 153 (Minn. 2007); *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). Plainly stated, because they are separate and distinct terms a "county ordinance" cannot itself be the "law" under § 375.51, subd. 1 which "require[s]" a "larger number" than a simple "majority vote" to "enact" a "county ordinance."

3. To the extent § 375.51, subd. 1 is not plain and unambiguous, principles of statutory construction confirm that "law" and "county ordinance" are distinct terms

While there are no definitions within Chapters 375 or 394 of "law" or "county ordinances," several appellate decisions have confirmed that state law is distinct from and

superior to local ordinances. *See, e.g., State v. Thomas*, 279 Minn. 326, 327, 156 N.W.2d 745, 746 (1968) ("Ordinances by definition are the laws of a municipality made by the authorized municipal body in distinction from the general laws of the state and constitute local regulations for the government of the inhabitants of the particular place"); *City of Morris v. Sax Invs., Inc.*, 749 N.W.2d 1, 6 (Minn. 2008) ("Notwithstanding a city's broad 'power to legislate in regard to municipal affairs,' state law may limit the power of a city to act in a particular area") (quoting *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 357, 143 N.W.2d 813, 819-20 (1966)).

Moreover, while County relies on six separate dictionary definitions of "law" and "ordinance" to support its requested interpretation (County Br. at 16-17), the appellate courts have repeatedly looked beyond dictionary definitions and utilized established principles of statutory construction to determine the legislature's intent. *See, e.g., Sprint Spectrum LP v. Comm'r of Revenue*, 676 N.W.2d 656, 662-63 (Minn. 2004) ("While dictionary definitions are sometimes helpful in statutory interpretations, it would expand the power of a dictionary's author for this court to rely solely on a portion of a specific dictionary text, or to overemphasize single words or examples within a specific dictionary entry"); *State v. Williams*, 762 N.W.2d 583, 586-87 (Minn. App. 2009) (rejecting proffered dictionary definitions as evidencing statute's plain language and instead interpreting statute using principles of statutory construction); *State v. Gradishar*, 765 N.W.2d 901, 903 (Minn. App. 2009) (same); *see also State v. Peck*, 773 N.W.2d 768, 776 (Minn. 2009) ("But Minn. Stat. § 645.16 (2008) requires courts to look beyond dictionaries. More specifically, the majority ignores the parameters for statutory

construction set out by the legislature and deviates from the manner by which we have historically performed statutory construction") (Anderson, J., dissenting).

Finally, Motokazie provided in its opening brief a detailed analysis of the relevant rules of statutory construction which, in the event of a statutory ambiguity, confirm that the references in § 375.51, subd. 1 to "law" and "county ordinance" are not synonymous. *See* Motokazie Br. at 22-24. County literally has no response to, and does not otherwise dispute, Motokazie's statutory construction arguments. *See* County Br. at 14-17. County, therefore, has waived any opposition to Motokozie's statutory construction arguments. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) ("It is well-established that failure to address an issue in a brief constitutes waiver of that issue").

4. County's Supermajority Vote requirement is ineffective because it was not enacted pursuant to the statutory authority granted by the legislature

Motokazie does not deny that a properly-enacted ordinance has the force and effect of law. Indeed, as Motokazie highlighted in its opening brief, the cases which County cites in support of its Supermajority Vote requirement provide that an ordinance has the force and effect of law only if the ordinance was "proper[ly]" enacted pursuant to the requisite statutory authority. *See* Motokazie Br. at 25-26 (citing *Mayes v. Byers*, 214 Minn. 54, 63, 7 N.W.2d 403, 407 (1943) ("[a] city ordinance **within its proper scope** has the force and full effect of law") (emphasis added); *Bott v. Pratt*, 33 Minn. 323, 328, 23 N.W. 237, 239 (1885) ("[a]n ordinance which a municipal corporation **is authorized to make**, is as binding on all persons within the corporate limits as any statute or other laws") (emphasis added); *Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*, 787 N.W.2d

523, 534 (Minn. 2010) ("A city ordinance **within its proper scope** has the force and effect of law") (emphasis added) (quoting *Mayer*, 214 Minn. at 63, 7 N.W.2d at 407)). But County does not deny that the converse is also true – namely, if an ordinance is enacted **without proper statutory authorization**, then it does **not** have the force and effect of law. *See* County Br. at 14-15.

For the reasons stated herein, County's enactment of its Ordinance containing a Supermajority Vote requirement for the adoption of ordinance amendments is beyond the statutory authorization provided by the legislature in § 375.51, subd. 1. *See supra* § I.A. Because there is no statutory authorization for County's Supermajority Vote requirement, it is *ultra vires* and unenforceable as a matter of law.

C. County failed to timely bring its Ordinance into compliance with Laws 1974 chapter 571

County argues that because the sentence in § 375.51, subd. 1 that "[e]very county ordinance shall be enacted by a majority vote of all the members of the county board unless a larger number is required by law" was not amended by Laws 1974 chapter 571, County was not required to eliminate its 1967-enacted Supermajority Vote requirement by August 1, 1978. County Br. at 17 n.4. This is erroneous.

Minn. Stat. § 394.312 plainly provides that "[a]ny official controls and any procedures for the administration of official controls which are in existence on August 1, 1974, shall be brought into compliance with Laws 1974 chapter 571, within four years from August 1, 1974." (Emphasis added). County does not argue that this statutory mandate is in any way ambiguous or unclear. Thus, per § 394.312's plain language,

County was required to bring its Ordinance into compliance with the entirety of "Laws 1974 chapter 571" and not just those portions of "Laws 1974 chapter 571" containing statutory amendments to, among others, § 375.51, subd. 1.

Laws 1974 chapter 571 enacted an amended § 375.51, subd. 1 which, among other things, maintained the requirement that "[e]very county ordinance shall be enacted by a majority vote of all the members of the county board unless a larger number is required by law." (Emphasis added). Of course, County's 1967-enacted Supermajority Vote requirement was not a simple "majority vote" for the enactment of an ordinance amendment. And County does not dispute that it failed to amend its Ordinance by August 1, 1978 to comply with Laws 1974 chapter 571 by eliminating the Supermajority Vote requirement.

II. MOTOKAZIE'S REQUESTED ORDINANCE TEXT AMENDMENT WAS AUTOMATICALLY APPROVED

A. Under the plain language of § 15.99, Motokazie's requested zoning ordinance text amendment is a request "relating to zoning . . . for . . . other governmental approval of an action"

1. Motokazie's Application is a request "relating to zoning"

County provides no basis to justify the district court's determination that a request for a text amendment to a zoning ordinance is not a request "related to zoning." Indeed, as Justice Dietzen wrote in his concurrence in *Calm Waters, LLC v. Kanabec County Bd. of Comm'rs*, 756 N.W.2d 716, 723 (Minn. 2008), the phrase "related to zoning" should be broadly interpreted and applied:

Clearly, the phrase 'written request relating to zoning' **describes something broader than 'zoning'** itself. Giving the words 'relating to' their plain and

ordinary meaning results in the conclusion that the phrase 'relating to zoning' described not only requests made under a zoning ordinance, but **also other requests that have a connection, link, or logical relationship to a zoning ordinance**".

Id. (emphasis added).³

A request for a text amendment to a zoning ordinance is a "request related to zoning" because it has "a connection, link or logical relationship to a zoning ordinance." Even the district court acknowledged that "the plain meaning of 'request related to zoning' may suggest inclusion of an application to amend a zoning ordinance." Add.7 (emphasis added). To hold that a request for a text amendment to a zoning ordinance has no "connection, link or logical relationship to a zoning ordinance," and therefore is not a request "relating to zoning," would vitiate the plain language of § 15.99 and otherwise be absurd.

2. Motokazie's Application is for "governmental approval of an action"

County argues that Motokazie's Application does not seek "governmental approval of an action" because (a) it is quasi-legislative in nature and "Section 15.99 simply does not apply to an attempt to change the regulatory structure of a law" and (b) the Application does not satisfy the intended geographic scope of § 15.99, as examined in *In Re System Designation of Multi-Flo Wisconsin Aerobic Treatment Units*, No. C0-01-823,

³ County's only response to Justice Dietzen's interpretation of the phrase "related to zoning" is that it is in "a concurring opinion which has no precedential value." County Br. at 19. But County conspicuously fails to provide any contrary definition of the phrase "related to zoning." *Id.* Nor does County provide any explanation of how or why Justice's Dietzen's interpretation is in any way erroneous. *Id.*

2001 WL 1665410 (Minn. App. Dec. 21, 2011) (A.363-68) (*Multi-Flo*). County Br. at 27-28. County is wrong on both counts.

First, the case law interpreting § 15.99 has provided no exclusion or exemption for quasi-legislative requests "related to zoning." In determining "whether [the] designation of a new technology [individual sewage-treatment system] is 'governmental approval of an action' within the meaning of [Minn. Stat. § 15.99,] subdivision 2," this Court in *Multi-Flo*, 2001 WL 1665410, at *3-4, did not even suggest, as County argues, that it only applied to quasi-judicial actions (*e.g.*, CUP, preliminary plat, variances, plats). In fact, there was no analysis or discussion whatsoever by this Court regarding the difference between quasi-legislative and quasi-judicial decisions. *Id.* Moreover, as set forth in Motokazie's opening brief, at least seven courts have applied the 60-day Rule to quasi-legislative rezoning applications. *See* Motokazie Br. at 37-38 (citing cases).

Second, while this Court in *Multi-Flo* ultimately determined that § 15.99 was not intended to approve by default "unproven sewage-treatment systems as 'standard systems'" because of the potential for a negative statewide effect, it confirmed that the 60-day Rule was intended and should apply to requests within "a local geographic area" and "constrained area," including, specifically, "county boundaries." *See Multi-Flo*, 2001 WL 1665410, at *3-4. Motokazie's Application does just that by seeking an Ordinance text amendment that would apply only within "a local geographic area" and "constrained area" – namely, only within "[C]ounty['s] boundaries."

3. **Motokazie submitted its Application "in writing to the agency on an application form provided by the agency"**

County has an "application form" for applications for a text amendment to the zoning ordinance. Indeed, County's application packet for zoning ordinance text amendments is entitled "ZONING AMENDMENTS AND REZONING OF PROPERTY." A.273-277 (bold, underlining and capitalization in original). The coversheet of County's application packet notes that "[t]he following information is required before the application may be accepted and considered complete" (A.273), which is consistent with the language in § 15.99, subd. 1(c) definition of "request" that "[t]he agency may reject as incomplete a request not on a form of the agency if the request does not include information required by the agency."

There is no dispute that Motokazie submitted to County its application for the requested zoning ordinance text amendment on "an application form provided by [County]," as required by § 15.99, subd. 1(c). There is also no dispute that Motokazie provided all information required by County's application packet and that, after its September 14, 2011 receipt of the "authorization from Portinga Brothers, LLC" (A.203), County did not declare any incompleteness with the Application.

B. If § 15.99, subd. 1(c)'s definition of "request" is ambiguous as applied to ordinance text amendments, then County's proffered statutory construction based on the legislature's purported drafting intent fails

In support of its lone statutory construction argument, County argues that, "[i]f the legislature intended text amendments to ordinances and other laws to be regulated by the 60-day rule, it would have listed this as it did the other five particular actions." County

Br. at 19 (emphasis added). County's argument is exceptionally unpersuasive because it is premised on a falsity.

Section 15.99 – notably, its subdivision 1(c) definition of "request" — simply does not "list[]" any specific types of "written application related to zoning," let alone County's reference to "the other five particular actions." Yet § 15.99 has, as County recognized, been applied to numerous unlisted types of "written application related to zoning." Indeed, the 60-day Rule has been applied to, among others, (1) conditional use permit applications (*Veit Co. v. Lake County*, 707 N.W.2d 725, 730-31 (Minn. App. 2006)), (2) variance applications (*Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925-26 (Minn. App. 2002)), (3) planned unit development applications (*Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. App. 2004)), (4) preliminary plat applications (*Kramer v. Otter Tail County Bd. of Comm'rs*, 647 N.W.2d 23, 26 (Minn. App. 2002)) and (5) rezoning applications (*Johnson v. Cook County*, 786 N.W.2d 291 (Minn. 2010)). Because none was "list[ed]" in § 15.99, each of these "requests" was subject to the 60-day Rule because it, like Motokazie's requested Ordinance text amendment, was a request "related to zoning."

C. Requests "related to zoning" are not limited to only quasi-judicial requests

1. The 60-day Rule has been repeatedly applied to decisions on quasi-legislative rezoning requests

County provides no basis for this Court to conclude that the legislature intended to exclude quasi-legislative requests "related to zoning" from the ambit of § 15.99. Nor

does any such basis exist because the 60-day Rule has been repeatedly applied to quasi-legislative decisions by district and appellate courts.

There is no dispute that rezoning requests are quasi-legislative in nature. *See Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000) ("Amendment of a zoning ordinance is a legislative act"); *see also* County Br. at 23 ("[a] decision on such a non-permit type request is legislative because it requires the governing agency to make a legislative judgment that a particular term will be defined in a manner that will be consistent with promoting the public health, safety, morals and general welfare"). There is also no legitimate dispute that the 60-day Rule has been repeatedly applied to quasi-legislative rezoning requests. Indeed, Motokazie cited seven cases (four of which were also cited by the district court) in which the 60-day Rule has been applied to rezoning requests. *See* Motokazie Br. at 37-38 (citing cases).

County's only response to these seven cases is to say that, exclusive of the district court cases, "each case concerned a particular nuance of the 60-day rule and the rezoning request was not automatically approved" and "[n]one of the cases actually raised the issue of whether the 60-day rule applied to rezoning."⁴ County Br. at 33-34. Motokazie agrees

⁴ Because the district court decisions did apply the automatic approval consequence to the rezoning cases, County desperately tries to find another basis to distinguish these cases. The only distinction that County could come up with is that these cases are somehow less significant because Motokozie's counsel represented the successful mandamus petitioner in those cases. County Br. at 33 n.6 ("[Motokazie's] reliance on two of [Motokazie's] counsel's own district court orders demonstrates the bankruptcy of [Motokazie's] argument"). But it is the district court – not Motokozie's counsel — that issued those decisions. And, interestingly, County's counsel was the opposing counsel for Sherburne County in *VONCO Corp. v. Sherburne County, Minn. and its Bd. of*

that none of the appellate rezoning decisions has applied § 15.99, subd. 2(a)'s automatic approval consequence to automatically approve of the requested rezoning. But the fact that the automatic approval consequence has not been enforced due to (as County states) "particular nuance[s] of the 60-day rule," does not mean that the 60-day Rule was not applied to the rezoning requests.

In *Johnson*, 786 N.W.2d at 296 and *Hans Hagen Homes Inc. v. City of Minnetrista*, 728 N.W.2d 536, 544 (Minn. 2007), for example, the Supreme Court analyzed that the rezoning requests were subject to the 60-day Rule, but it determined that § 15.99, subd. 2(a)'s automatic approval penalty was not triggered by the failure to state in writing the reasons for denial or the failure to provide the applicant with the statement of written reasons for denial. Of course, there would have been no need to analyze the automatic approval consequence if, as County now argues, the 60-day Rule did not apply to rezoning requests. Appellate courts do not issue such advisory opinions. See *Sinn v. City of St. Cloud*, 295 Minn. 532, 533, 203 N.W.2d 365, 365 (1972) ("This court does not issue advisory opinions or decide cases merely to make precedents") (citing *St. Paul City Ry. Co. v. City of St. Paul*, 259 Minn. 129, 106 N.W.2d 452 (1960)).

The 60-day Rule has been repeatedly and uniformly applied to rezoning requests, which are quasi-legislative. Thus, the fact that Motokazie's requested zoning ordinance text amendment is quasi-legislative rather than quasi-judicial does not preclude this Court

Comm'rs, No. C2-01-969 (Minn. 10th Jud. Dist. Aug. 8, 2001) (A.34-41) in which the district court applied the 60-day Rule to automatically approve of a rezoning request.

from applying and enforcing the 60-day Rule to automatically approve of the Application.

2. Rezoning requests do not relate to specific uses of property

County's sole support for its argument that the 60-day Rule applies only to requests "related to zoning" which relate to a specific use of property is based on this Court's statement in *Advantage Capital Mgmt. v. City of Northfield*, 664 N.W.2d 421, 427 (Minn. App. 2003) that a request "related to zoning" is "a request to conduct a specific use of land within the framework of the regulatory structure relating to zoning or, in other words, a zoning application." But County does not dispute that the building permit application at issue in *Advantage Capital* was subject to a separate non-zoning legislative scheme (*i.e.*, Minn. Stat. §§ 326B.101-.16), whereas Motokazie's requested zoning ordinance text amendment is subject to the zoning legislative scheme (*i.e.*, Minn. Stat. ch. 394).

Moreover, rezoning requests – which, as set forth above, are requests "related to zoning" subject to the 60-day Rule – do not relate to specific uses of land. County does not dispute that rezoning requests, like requests for a zoning ordinance text amendment, seek to amend the existing zoning ordinance. *See Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981) ("In enacting a zoning ordinance or in amending an ordinance to rezone, the approach is legislative"). As such, rezoning decisions do not regard "specific property uses" but rather reflect legislative judgment regarding the effect of the requested "rezoning" on the public. *See Motokazie Br.* at 39-40 (citing cases). In other words, "[w]hile an amendment of the zoning ordinance can permit particular

property to be used in a manner formerly forbidden by the ordinance," it is, nonetheless, not a decision on a "specific property use." *See State, by Rochester Ass'n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885, 889 (Minn. 1978).

Like rezoning requests, Motokazie's requested text amendment sought to amend the zoning ordinance to expand the "Organized Motorsports" conditionally-permitted use within County's Agricultural and Urban Resource zoning districts. And, importantly, Motokazie's requested zoning ordinance text amendment is governed by the same provisions and subject to the same requirements as a rezoning request. Indeed, County does not dispute that requests for ordinance text amendments and rezonings are (1) governed by Ordinance § 503.04, which is entitled "Zoning Amendments," (2) included within the § 502.03 definition of "Zoning Amendments,"⁵ (3) initiated pursuant to the same "Zoning Amendment & Rezoning Packet" and "Rice County Land Use Permit Application" form (A.273-77), (4) subject, per Ordinance § 503.04(A), to the same approval criteria (A.23); (5) subject, per Ordinance § 503.04(C)-(D), to the same information submission requirements (A.23-24); and (6) subject, per Ordinance § 503.04(E), to the same procedure for review and approval (A.24-25).

In sum, there is no material difference to the County Board's review and decision on a requested rezoning than on a requested zoning ordinance text amendment. Therefore, per County's own Ordinance criteria and procedures, requests for "rezonings"

⁵ Section 502.03 defines "Zoning Amendment" as "[a] change authorized by the County either [(1)] in the allowed use within a district or [(2)] in the boundaries of a district." A.226.

and "text amendments" must be classified the same for purposes of § 15.99 — that is, they both are requests "related to zoning."

D. "Automatic" approval of Motokazie's Application is compelled

1. County's "doomsday" arguments are unfounded

In enforcing the "automatic" approval consequence of § 15.99, subd. 2(a), courts do not evaluate the type of action being "automatically" approved. "Although automatic approval of a permit application is an extraordinary remedy, it is a remedy that has been granted by the legislature 'notwithstanding any other law to the contrary.'" *Moreno*, 676 N.W.2d at 6 (quoting Minn. Stat. § 15.99, subd. 2). Indeed, the "automatic" approval penalty is mandatory. "When a city [or county] has failed to satisfy its clear requirements, the remedy shall be granted." *Id.* (citing *Northern States Power Co.*, 646 N.W.2d at 925) (emphasis added).

And courts have not hesitated to enforce § 15.99, subd. 2(a)'s strict deadline. They have again and again ordered municipalities and other government agencies to approve zoning requests based on untimely denials. *See Northern States Power Co.*, 646 N.W.2d at 924-25 (emphasis added). Indeed, courts have routinely approved even highly contentious land uses under § 15.99. Failure to abide by the statutory deadline has forced municipalities to approve zoning requests for many controversial projects, such as: (a) landfills (*Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278, 281 (Minn. App.), *review denied* (Minn. July 25, 2000)); (b) gravel crushing and washing operations (*Veit Co.*, 707 N.W.2d at 730-31); (c) power line upgrades (*Northern States Power Co.*, 646 N.W.2d at 921); (d) a communications tower (*American Tower*, 636 N.W.2d at 310),

as well as far more "routine" matters such as (e) rezoning approvals (*VONCO Corporation*, No. C2-01-969), and (f) preliminary plat approvals (*Kramer*, 647 N.W.2d at 26). There is no legal basis for this Court to reach a different conclusion here.

2. *Breza and Town of Brook Park are inapposite*

County's reliance on *Breza v. City of Minnetrista*, 706 N.W.2d 512 (Minn. App. 2005) and *Town of Brook Park v. Tretter*, No. A10-1881, 2011 WL 3903189 (Minn. App. Sept. 6, 2011) (Resp.App.136-40) is misplaced because, in each case, the applicant's request was not within the agency's authority to grant in the first place. In *Breza*, the applicant was prohibited by state law from seeking a wetland exemption over 400 square feet. Therefore, the applicant's request for a 5,737 square-foot exemption was beyond the city's authority to grant and, as a result, it was "automatically approved" per § 15.99, subd. 2(a) only to the maximum 400 square foot exemption permitted by state law. Similarly, in *Town of Brook Park*, the applicant was not entitled under the ordinance to request a general-commercial CUP to operate a salvage yard because it did not have state-highway frontage. Because the town had no discretion to issue the requested CUP in the first place, § 15.99, subd. 2(a) did not result in automatic approval of the CUP.

In stark contrast, there is no dispute that Motokazie was entitled to seek, and County had the discretion to grant, the requested zoning ordinance text amendment. Indeed there was a 3-2 majority vote in favor of the Application. Because Motokazie submitted a zoning application which County had authority to approve, § 15.99, subd. 2(a)'s automatic approval consequence results from County's admittedly untimely decision on the Application.

E. County's 60-day deadline was not extended

1. The two statutorily-prescribed ways to extend the 60-day Rule deadline

The two statutorily-prescribed ways to extend the 60-day deadline are set forth in § 15.99, subs. 3(f) and 3(g). Subdivision 3(f) sets forth the agency's requirements for unilaterally extending the 60-day deadline. And subdivision 3(g) sets forth the applicant's requirements for "request[ing] an extension" of the 60-day deadline.

2. The 60-day deadline was not extended per § 15.99, subd. 3(g)

County asserts that Motokazie (1) submitted a "written notice to the agency" (*i.e.*, County) (2) "request[ing] an extension of the time limit." County Br. at 36-37. For its assertion, County represents that, at the parties' September 21, 2011 scheduling meeting, "[t]he parties **agreed** not to operate under the time constraints outlined in Section 15.99" and their subsequent September 22 and 26, 2011 "emails exchanged . . . demonstrate[d] a written agreement to extend any deadline imposed by default under Section 15.99." *Id.* But these representations are demonstrably false.

The parties' "emails exchanged" made no explicit or implicit mention of § 15.99 or its "time limits," let alone evidence an "agreement" to forego or waive the statutory deadlines. *See* A.139-46. And the parties' sworn affidavits attest to the fact that neither § 15.99 nor its "time limits" were even discussed by the parties prior to the expiration of the 60-day deadline. *See* A.137 ¶ 4; A.154 ¶ 4; A.157 ¶ 4; A.192-93 ¶¶ 12-17; A.187 ¶ 6; A.272 ¶ 13. Of course, Motokozie cannot "request an extension of the time limit" per

subdivision 3(g) without, at a minimum, mentioning and discussing § 15.99 and its "time limits."

Worse yet for County's argument, Motokazie's owner attested that he did not even know about the 60-day Rule, let alone whether it applied to ordinance text amendments, until after the statutory deadline for County to approve or deny the application had expired. *See* A.138 ¶ 8; A.272 ¶ 13. Without such knowledge, Motokazie simply could not have "agreed not to operate under the time constraints outlined in Section 15.99" or "agree[d] to extend any deadline imposed by default under Section 15.99."

Regardless, there is nothing about either (1) the routine September 21, 2011 scheduling meeting for the Application or (2) the resulting "proposed schedule" that indicates that "[t]he parties agreed not to operate under the constraints outlined in Section 15.99" or "agree[d] to extend any deadlines imposed by default under Section 15.99." The meeting and the "proposed schedule" instead reflects run-of-the-mill cooperation, not extraordinary contractual commitments to forego or waive statutory rights. Indeed County insisted on, and Motokozie's acquiesced to, the express clarification that the "proposed schedule" was "contingent" on County's reservations of all of its rights. *See* A.147-48. Motokazie's then-lawyer's subsequent arguments with County's counsel for a shortening of the decision timeline through the elimination of unnecessary steps (A.61-63; A.271-72 ¶ 12; Resp.App.128 ¶ 6) and his subsequent questions about the propriety of the supermajority voting requirement which is referenced in the "proposed schedule" reflect the same. *Id.*

Rather, at most under the "proposed schedule," each side had complete responsibility and discretion to do whatever it needed to do to try to comply with the "contingent" and non-binding schedule, including the proposed November 22, 2011 decision date. Motokazie had to prepare and submit Project-related submissions. *See* A.147-48. County had to send out notices, conduct public hearings and meetings and process additional Project related applications and submissions. *Id.* And County had over six weeks between the September 21 meeting and the November 7 "automatic approval" date to either deny the Application per Minn. Stat. § 15.99, subd. 2(a) or unilaterally send its written notice of the extension of the deadline per Minn. Stat. § 15.99, subd. 3(f).

3. The 60-day deadline was not extended per § 15.99, subd. 3(f)

County represents that Ms. Runkel's September 26, 2011 "email provides written notice of the extension of the 60-day rule." County Br. at 37-39. Yet, as discussed above, County has literally no substantive basis to make such a claim. Ms. Runkel's September 26, 2011 email nowhere discusses "the extension of the 60-day rule." A.142-44. And her affidavit, along with County's other affidavits, say nothing about such an intended "extension of the 60-day rule." A.186-96; Resp.App.125-29. Rather Ms. Runkel and the rest of the County's affiants acknowledge that, before its timeline expired, § 15.99 and its "time limits" were never discussed. *Id.*

Moreover, County's affiants attested that County did not otherwise comply with the 60-day Rule because, at all times, it believed that the 60-day Rule did not apply to requested ordinance text amendments, including the Application. A.186 ¶ 3; A.194 ¶ 23;

Resp.App.126 ¶ 7; Resp.App.128 ¶ 8. Indeed, County's affiants blamed Motokazie for County's non-compliance with the 60-day Rule, charging that Motokazie failed to warn County that the rule applied to text amendments. *See* A.194 ¶ 23; Resp.App.126 ¶ 8; Resp.App.128 ¶ 9.

III. **MANDAMUS IS AN APPROPRIATE REMEDY FOR BOTH THE ACTUAL APPROVAL AND "AUTOMATIC" APPROVAL OF THE APPLICATION**

A. **Motokazie's claim of County's actual approval or "automatic" approval of the otherwise discretionary requested ordinance text amendment is properly reviewed by mandamus**

But for Motokazie's claims of County's actual approval (by its 3-2 majority vote in favor of the request) and "automatic" approval (by its failure to deny the request within the 60-day deadline to do so), Motokazie's challenge to County's otherwise discretionary denial of the requested text amendment would have had to have been by either declaratory judgment in the district court or a writ of certiorari in this Court. *See Sutton v. Town Board of Princeton*, No. A06-702, 2007 WL 48872, at 2-3 (Minn. App. Jan. 9, 2007) (Resp.App.132-35) (mandamus challenge to discretionary preliminary plat denial was inappropriate because applicant did not allege "'omission' or 'nonperformance' as described by the mandamus statutes, or 'fail[ure] to perform' as described in *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006)"]. Yet, with Motokazie's claims of County's actual approval and automatic approval of the requested text amendment, Motokazie's challenge to County's otherwise discretionary denial of the request is properly brought by mandamus. *See Kramer*, 647 N.W.2d at 26 (mandamus

challenge to preliminary plat denial was appropriate because applicant alleged "failure to perform" within § 15.99's 60-day deadline). There is no contrary case law.

B. Motokazie's mandamus claims are appropriate despite *Mendota Golf* and its declaratory judgment claim

County represents that "the *Mendota Golf* decision clearly established that a declaratory judgment action is generally an adequate remedy of law which would preclude the use of mandamus." County Br. at 44. Yet, even after *Mendota Golf*, 708 N.W.2d 162, the uniform case law continues to explicitly allow zoning applicants to pursue relief for a Minn. Stat. § 15.99 violation through a mandamus claim. Indeed, citing to the Supreme Court's own post-*Mendota Golf* decision in *Breza*, 725 N.W.2d at 110, this Court in *Stroetz v. Farmington Township*, No. A09-1853, 2010 WL 2035909, at *2 (Minn. App. May 25, 2010) (SA.369-71), reaffirmed that "[m]andamus is appropriate where a political entity clearly fails to perform its duty under Minn. Stat. § 15.99." (Emphasis added).

With regard to what constitutes another "plain, speedy, and adequate remedy in the ordinary course of law" under § 586.02, this Court in *Kramer*, 647 N.W.2d at 26-27, explained that "the remedy which will preclude mandamus **must** [(1)] be equally as convenient, complete, beneficial, and effective as would be mandamus, and [(2)] be sufficiently speedy to prevent material injury." (Emphasis and bracketed information added). Thus, because "a writ of certiorari to this court is more expensive, more time-consuming, and more complicated than a petition to the district court for a writ of mandamus," this Court "conclude[d] that a writ of certiorari is not an adequate remedy

and, therefore, respondents were entitled to a writ of mandamus. See *Demolition*, 609 N.W.2d at 280; see also *American Tower, L.P. v. City of Grant*, 621 N.W.2d 37, 41-3 (Minn. App. 2000) (writ of mandamus requiring city to issue CUP proper after city failed to act in time), *aff'd*, 636 N.W.2d 309 (Minn. 2001)." *Id.* at 27 (emphasis added).

The same is true with regard to declaratory judgment actions in the district court. There are, in fact, three clear and statutorily-prescribed advantages of a mandamus action over a declaratory judgment action.

First, Motokazie's declaratory judgment action would not, standing alone, provide it with an alternative adequate remedy to its mandamus action. Under the Minnesota Declaratory Judgments Act, a district court is only empowered to declare parties' respective rights or status. See Minn. Stat. §§ 555.01 and .02. And, requiring Motokazie to later seek mandatory injunctive relief ordering County to approve of the requested Ordinance text amendment has, in fact, already been determined by this Court to not be an adequate alternative remedy. See *Northern States Power Co. v. Minn. Metropolitan Council*, 667 N.W.2d 501, 510-11 (Minn. App. 2003) ("[a] property owner is entitled to seek mandamus if it becomes obvious that the state's proposed plans will cause a future, substantial loss of access to his or her property"), *reversed on other grounds*, 684 N.W.2d 485 (Minn. 2004).

Second, Motokazie's mandamus action provides additional remedies that a stand-alone declaratory judgment action does not – namely, the right to seek its damages. Contrary to the Declaratory Judgments Act which does not expressly provide for an award of damages, § 586.09 specifically provides that Motokazie "shall recover the

damage sustained" as a result of County's arbitrary denial. (Emphasis added). Indeed, this Court recently (1) noted that mandamus damages are "automatic" under § 586.09 (*Pigs R Us, LLC v. Compton Township*, 770 N.W.2d 212, 216 (Minn. App. 2009)) and (2) ruled that mandamus decisions are not final and appealable without a determination of § 586.09 mandamus damages (*Ridge Creek I, Inc. v. City of Shakopee*, No. A07-1308 (Minn. App. Sept. 18, 2007 Order) (SA.372-74)); *Northern Metals, LLC v. Aasen*, No. A12-512 (Minn. App. May 1, 2012 Order) (SA375-78)).

Third and perhaps most critically, Chapter 586 grants mandamus petitioners a unique and extraordinary procedural advantage over the standard prosecution of a Chapter 555 declaratory judgment action. Unlike a declaratory judgment action, a mandamus action, as illustrated here, presents the petitioner's case immediately and *ex parte* to the district court without any delay, interference with or defense from the respondent. The mandamus action also requires the respondent to expeditiously defend its challenged action either by answer or a court proceeding. These initial procedural advantages to the petitioner are huge and nowhere found in a standard declaratory judgment action.

Clearly, then, Motokazie's request for declaratory relief does not preclude its request for mandamus relief. Rather Minnesota appellate courts have repeatedly held that mandamus relief may be pursued simultaneously with declaratory and other relief. *See, e.g., Miller Waste Mills, Inc. v. Mackay*, 520 N.W.2d 490 (Minn. App.) (consolidating mandamus action and declaratory judgment action), *review denied* (Minn. Oct. 14, 1994); *City of Barnum v. County of Carlton*, 386 N.W.2d 770, 774-76 (Minn. App. 1986) (on

petitioner's request for mandamus and declaratory relief, court of appeals reversed district court's denial of mandamus relief for arbitrary CUP denial); *Nolan and Nolan v. City of Eagan*, 673 N.W.2d 487, 494 (Minn. App. 2003) ("we conclude that case law indicates that a petitioner can properly pursue mandamus and tort claims simultaneously"), *review denied* (Minn. Mar. 16, 2004). The district courts have likewise recognized the same. *See, e.g., Veit USA, Inc.*, No. 71-CV-07-1855 (Pet. Ex. A, Attach. 3) (summary judgment granted to Veit with its joint mandamus/declaratory judgment action). Therefore, Motokazie's mandamus claims for County's actual and automatic approval of its Application are properly pursued.

CONCLUSION

The district court's decision should be reversed and Motokazie's requested zoning ordinance text amendment should be approved as a matter of law.

DATED: July 2, 2012

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Appellants certifies that this brief complies with the requirements of Minn. R. App, P. 132.01 in that it is printed in 13 point, proportionately spaced typeface utilizing Microsoft Word 2007 and contains 6,887 words, including headings, footnotes and quotations.

DATED: July 2, 2012

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