
State of Minnesota
In Court of Appeals

RICHARD J. BREZA,

Respondent,

vs.

CITY OF MINNETRISTA,

Appellant.

**APPELLANT CITY OF MINNETRISTA'S
REPLY BRIEF AND ADDENDUM**

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INTRODUCTION

Respondent illegally placed fill in a wetland on his property. After a Minnesota Department of Natural Resources enforcement officer discovered the activity and informed Respondent of his rights, Respondent sought an exemption. Though the face of the application for exemption noted four cubic yards of fill, Respondent now claims an exemption roughly 80 times larger – more than 14 times larger than the maximum exemption the City could issue. Respondent seeks this exemption even though he failed to pursue an appeal through the Board of Water and Soil Resources (“BWSR”), the entity charged with exclusive jurisdiction to administer the Wetland Conservation Act and exemptions to its stringent provisions. Respondent also seeks an order compelling the City to issue, by operation of Minn. Stat. § 15.99, an exemption the City has no statutory authority to grant. The District Court, after denying cross motions for summary judgment even though both parties agreed that there were no disputed issues of material fact,¹ found that it had jurisdiction over the matter despite the clear statutory directive vesting BWSR with “ultimate responsibility” and that Minn. Stat. § 15.99 compels the issuance of an exemption more than 14 times larger than the maximum the City could have granted under statute or rule. The District Court’s decision must be reversed.

¹ The City is challenging both the denial of summary judgment and the order following trial allowing the illegal fill to remain on the property. A denial of summary judgment may be reviewed as part of an appealable judgment. Peterson v. Brown, 457 N.W.2d 745, 748 (Minn. Ct. App. 1990). Due to the parties’ agreement regarding the facts at the time of summary judgment and the parties’ stipulated facts at the time of trial, the two distinct challenges essentially collapse into a single challenge relating to the legal issues.

ARGUMENT

I. **The District Court had no jurisdiction to rule on a matter under the exclusive authority of BWSR.**

Respondent contends that he properly sought review of the City's wetland exemption decision and enforcement under Minn. Stat. § 15.99 in District Court rather than before BWSR because (1) his challenge to the City's decision falls under § 15.99 and not the Wetland Conservation Act (WCA); and (2) mandamus is the appropriate remedy for a violation of § 15.99. Neither point recognizes the ultimate authority to oversee the administration of WCA which is granted to BWSR or that BWSR could have provided all the relief Respondent seeks.

Respondent chastises the City for providing "no authority" for the proposition that Respondent had to appeal to BWSR prior to commencing an action in district court. See Respondent's Brief, p. 10. However, the authority referenced by the City is no less than the statute itself and the Minnesota Rules which state that unless an appeal to BWSR (not to the district court) is made within 30 days, it becomes final. See City's Brief and Appendix, p. 9 (citing Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0250).² Minnesota has adopted strict standards for the filling of wetlands and designated cities as the local government units to administer the WCA. Appeals from those decisions must

² As for the citation to State Dep't of Conservation v. Sheriff, 207 N.W.2d 358 (Minn. 1973), that case was cited by the City, in a footnote, for the unremarkable proposition that a land owner cannot ask a court for broader review than a statutory scheme vesting jurisdiction in the commissioner of conservation would permit. Id. at 360. The case, regardless of its vintage, stands for the idea that statutory schemes setting up a system for exclusive review of administrative decision-making cannot be skirted by seeking review in a venue perceived as more friendly.

be directed to BWSR within 30 days pursuant to the statute and Minnesota Rules. See Minn. Stat. § 103G.2242, subd. 9³ and Minn. R. 8420.0250.⁴ As Respondent acknowledges, Minn. Stat. § 15.99 is only applicable in this matter because the WCA expressly incorporates it. See Minn. Stat. § 103G.2242 and Minn. R. 8420.0210. BWSR has the “ultimate responsibility for implementing” the WCA. Drum v. Minnesota Bd. of Water & Soil Res., 574 N.W.2d 71, 74 (Minn. Ct. App. 1998). BWSR’s “ultimate responsibility” for WCA includes the enforcement of Minn. Stat. § 15.99 as part of the statutory scheme.

Minnesota statutes and rules set forth a specific procedure for parties seeking to challenge determinations by local government units in matters pertaining to wetlands. See Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0250. Those directives do not

³ Minn. Stat. § 103G.2242, subd. 9, states, in relevant part:
Appeal. (a) Appeal of a replacement plan, exemption, wetland banking, wetland boundary or type determination, or no-loss decision may be obtained by mailing a petition and payment of a filing fee of \$200, which shall be retained by the board to defray administrative costs, to the board within 30 days after the postmarked date of the mailing specified in subdivision 7. If appeal is not sought within 30 days, the decision becomes final.

(emphasis added).

⁴ Minn. R. 8420.0250 states, in relevant part:
Subpart 1. Appeal of local government unit decisions. The decision of a local government unit to approve, approve with conditions, or reject a replacement plan, banking plan, public road project notice, exemption, no-loss, or wetland boundary or type request becomes final if not appealed to the board within 30 days after the date on which the decision is mailed to those required to receive notice of the decision. This subpart applies to those determinations which are made under comprehensive wetland protection and management plans.

(emphasis added).

limit the scope of appeals to be brought under them. Indeed, the Minnesota legislature fully intended the WCA to encompass all aspects of wetland issues and to “promote comprehensive and total water management planning.” Minn. Stat. § 103A.202 (emphasis added). Simply because Respondent characterizes his objection to the City’s determination in terms of timing rather than substance⁵ does not alter BWSR’s exclusive jurisdiction over the matter.

It is important to note that had Respondent timely sought review before BWSR as was required, that body had the ability to grant the remedy Respondent sought. Had BWSR been persuaded by Respondent’s appeal, it could have reversed the City’s determination and issued the exemption for Respondent’s fill activities. BWSR has the “ultimate responsibility” for the administration of WCA and may issue exemptions on any ground. Drum, 574 N.W.2d at 74.

Absent BWSR’s exclusive jurisdiction, it is certainly correct, as Respondent argues, that mandamus is an appropriate remedy for enforcement of Minn. Stat. § 15.99 in many cases. See Respondent’s Brief, pp. 9-10.⁶ It is, however, by no means the

⁵ Of course, Respondent could make no possible substantive argument in favor of his application. The maximum exemption which the City had the authority to issue as local government unit has already been issued.

⁶ Respondent argues, citing Kramer v. Otter Tail Bd. of Comm’rs, 647 N.W.2d 23 (Minn. Ct. App. 2002), that mandamus relief would be appropriate because the only other relief was “more expensive, more complicated, and more time consuming.” See Respondent’s Brief, p. 10. However, the opposite is actually true. For example, if Respondent could and did appeal to BWSR today, he could obtain direct review of the City’s decision by paying a \$200 filing fee (as opposed to \$247 in Hennepin County District Court) and get a decision within from BWSR within 60 days after submission (as opposed to within 90 days after much more complicated, expensive, and lengthy litigation – in this case, a trial on the merits). See Minn. Stat. § 103G.2242, subd. 9.

exclusive remedy. Nothing in Minn. Stat. § 15.99 even suggests that enforcement must only occur in district court or that mandamus is the exclusive manner in which that enforcement can occur. Moreover, none of the several cases cited by Respondent in favor of mandamus involved a supervisory board vested with exclusive jurisdiction and empowered with the right to overturn a municipal decision. See Respondent’s Brief, p. 9

Section 15.99 is specifically incorporated into the statutory scheme over which BWSR has the “ultimate responsibility” for enforcement. Drum, 574 N.W.2d at 74. BWSR is the entity that must enforce the 60-day rule in this instance. Because Respondent failed to appeal to BWSR as was required, the City’s determination is final, the District Court lacks jurisdiction, and its determination should be reversed.

II. Even if jurisdiction was proper in the District Court, Minn. Stat. § 15.99 cannot compel the issuance of an exemption which the City had no statutory authority to grant.

In its attempt to avoid the cold reality that he cannot lawfully obtain the exemption he seeks – whether via Minn. Stat. § 15.99 or otherwise, Respondent misreads the statute, mischaracterizes his own application, and misconstrues this Court’s precedent.

A. Minn. Stat. § 15.99 is a timing statute, not an unfettered grant of substantive authority.

Neither the requirements of Minn. Stat. § 15.99 nor that they have been incorporated in the WCA are disputed in this matter. At the time of Respondent’s

application, Minn. Stat. § 15.99, subd. 2, “Deadline for response,” stated⁷ the following in paragraph (a):

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, septic systems, 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.

In short, the statute requires agencies (including municipal governments) to act on written requests related to zoning within 60 days and prescribes the consequence of a failure to do so. As this Court has noted in Manco of Fairmont, Inc. v. Town Board of Rockdell Township, Minn. Stat. § 15.99 is a timing statute, the purpose of which is to keep government agencies from “taking too long to decide.” 583 N.W.2d 293, 296 (Minn. Ct. App. 1998).

The City does not dispute that it failed to decide within the required timeframe. This matter is about the consequences of that failure. Respondent asserts that “[t]he phrase ‘notwithstanding any other law to the contrary’ directs the court to disregard any conflicting law that would prevent an automatic approval.” See Respondent’s Brief, p. 16. Respondent’s fixation on that phrase leads him to ask this Court to adopt an

⁷ Minn. Stat. § 15.99 was subsequently amended in 2003. Respondent cites the 2003 amended version of Minn. Stat. § 15.99 and attaches the same in its appendix. See R.A. 1-6. However, Respondent’s application (and thus, this case) predates that version of the statute and it is not applicable in this matter. The applicable statute is quoted above.

extraordinarily broad reading of it which is not warranted by the statute itself and which runs contrary to sound public policy.

In reviewing statutes, “words and phrases are construed according to rules of grammar and according to their common and approved usage.” Minn. Stat. § 645.08(1). Purely as a matter of grammar, the dependent clause containing “notwithstanding any other law to the contrary” modifies only the sentence of which it is a part. It does not modify an entire paragraph. See Smart, Walter Kay, English Review Grammar, p. 108 (4th ed., 1968) (dependent “clause of concession” concedes that the statement it contains is opposed to the statement in the main clause of the sentence) (Add. 11.)⁸

In other words, agency action is required within 60 days “notwithstanding any other law to the contrary” which may prescribe a different time period. Minn. Stat. § 15.99, subd. 2. The language simply clarifies the preemptive intent of the statute with respect to time periods.⁹ Acceptance of Respondent’s construction of the statute enlarges Minn. Stat. § 15.99 into a substantive provision rather than simply a timing provision as was intended. It is “well-settled” law in Minnesota that cities have no authority not

⁸ For the Court’s convenience, Chapter IX on “Clauses” of Mr. Smart’s text is included as an Addendum to this submission.

⁹ This understanding is confirmed when the 2003 amendment to Minn. Stat. § 15.99 is considered. The statute was amended to read, in relevant part: “Except as otherwise provided in this section, section 462.358, subdivision 3b, or chapter 505, and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request....” The statutes referenced as exceptions to § 15.99 both relate specifically to different time periods for decision-making which are excepted from the 60-day rule. See Minn. Stat. § 462.358, subd. 3b (setting a 120-day timeframe for review of subdivision applications) and Minn Stat § 505 (setting a 30-day timeframe for submission of plats to the commissioner of transportation). Clearly the legislative intent with respect to “laws to the contrary” was limited to timing, not substantive law.

specifically granted by the legislature. Village of Brooklyn Center v. Rippen, 96 N.W.2d 585, 587 (Minn. 1959) (municipal governments have “no inherent powers”). Under Respondent’s view, the power of § 15.99 is boundless. No matter what application is filed, no matter how offensive to substantive law up to and including the U.S. Constitution, no matter that it treads upon authority beyond that granted to a municipality, the application is approved simply because it was not denied within 60 days. Moreover, it matters not to Respondent whether the municipality was merely negligent or actively engaging in nefarious conduct. Respondent would have this Court hold that, if a municipal government simply waits to act until after 60 days have elapsed on a written zoning request, its power to approve any request is unlimited because Minn. Stat. § 15.99 trumps all other law. Had the legislature intended to enact such a sea change in Minnesota law, it would have done so in some fashion other than burying a dependent clause in a timing statute.

Respondent also asserts that if the City’s construction of Minn. Stat. § 15.99 were correct, “there would simply be no 60-day rule cases resulting in automatic approval.” Respondent’s Brief, p. 20. The very next sentence of Respondent’s brief illustrates the folly in such overwrought hyperbole by listing situations which, even under the City’s formulation of the statute, would still lead to automatic approval under the 60-day rule of Minn. Stat. § 15.99, e.g., “conditional use permits, special use permits, rezoning, building permits and other approvals.” Respondent’s Brief, p. 20. Applications pertaining to each of those items are within a municipality’s broad planning and zoning authority and approval of the same could be properly compelled by operation of Minn. Stat. § 15.99. In

contrast, automatic approval cannot occur, under the City's formulation, where the application is for something entirely outside the City's authority.

This more logical reading of § 15.99, the one that aligns with basic principles of English grammar and usage as well as sound public policy, is that "notwithstanding any other law to the contrary" prevents the use of some other timing statute to evade the strictures of § 15.99 – not the use of § 15.99 to evade the strictures of all substantive law.

B. The City has already approved a larger exemption than the Respondent sought in his Application and the largest one available under the WCA.

Respondent excoriates the City for maintaining that Respondent's application for an exemption contemplated 4 cubic yards or approximately 72 square feet of fill – not the 5,737 square feet he seeks now. See Respondent's Memorandum, p. 14, n. 3.

Respondent asserts that the City's contention is "truly bizarre" and that the City is "misconstruing" Respondent's application materials. Id. However, the application for an exemption and the letter accompanying it speak for themselves. On a line designated "Date Project Started" on Respondent's application for an exemption dated December 29, 2000, Respondent wrote in "8/4/2000." A.36. The letter from Respondent to the City Planner of the same date states the following:

On approximately August 4 & 5 there was approximately 4 cubic yards of black dirt in the back yard and sod placed over that area. This order has not been violated since its effective date I would like to apply for an exemption. Included is a receipt for the sod purchased.

A. 35. The City concluded based on Respondent's own submissions that his project started on August 4, 2000 and that on August 4 and 5 "approximately 4 cubic yards of black dirt" were placed on the property. The notion that the City should have somehow

concluded based on these submissions that Respondent actually wanted an exemption almost *80 times larger* is absurd.

Moreover, Respondent has already been granted the largest exemption available to it under the WCA. In enacting the WCA in 1991, the Minnesota legislature clearly stated its intent to “achieve no net loss in the quantity, quality, and biological diversity of Minnesota’s existing wetlands....” Minn. Stat. § 103A.201, subd. 2(b)(1). In pursuit of that goal, the WCA allows only carefully limited exemptions to its general requirement that any filling of a wetland area is accompanied by the restoration or creation of wetland of equal public value. Minn. Stat. § 103G.222, subd. 1(a); Minn. R. 8420.0105. The exemptions are set forth in Minn. Stat. § 103G.2241, subd. 1-10 and Minn. R. 8420.0122.

Respondent alludes to these exemptions and the City’s authority to issue them,¹⁰ but does not assert that he actually is qualified for any of them. See Respondent’s Brief, p. 20. In fact, he is qualified only to receive the *de minimus* exemption which is limited to 400 square feet for a Type 3 wetland in the shoreland protection zone. See Minn. Stat. § 103G.2241, subd. 9(5). Absent replacement of the wetland on some other site, which Respondent has not proposed, that exemption is the largest one available for issuance by the City¹¹ under state law and the City has already granted it. A. 45 – A. 47.

¹⁰ The exemption standards include: (1) activities related to specified agricultural activities; (2) public drainage systems; (3) activities exempt under federal regulations; (4) drainage of a restored wetland authorized by contract or easement; (5) wetlands which were incidentally created; (6) limited public works and utilities projects; (7) forestry; (8) development approved prior to the effective date of the WCA; (9) *de minimis* activity; and (10) wildlife habitat.

¹¹ Minn. R. 8420.0210 states, in part, that a local government unit’s decision on an exemption application “*shall* be based on the exemptions standards” cited herein.

C. Respondent misconstrues this Court's decision in Moreno v. City of Minneapolis.

Respondent argues that, under Moreno v. City of Minneapolis, 676 N.W.2d 1 (Minn. Ct. App. 2004), the City lost the ability to “invoke whatever limits on its powers may have been operative” by failing to act within the timeline prescribed by Minn. Stat. § 15.99. Respondent's Brief, p. 19. However, limits on municipal authority exist whether a City “invokes” them or not. Neither the City nor some twisted reading of Minn. Stat. § 15.99 can change the settled principle of law that municipalities have only that authority granted by the legislature. See Rippen, 96 N.W.2d at 587. The simple fact is that Respondent is seeking automatic approval of an application the City has no power – as a result of the timing requirements of Minn. Stat. § 15.99 or otherwise – to grant.¹²

Moreno compels no other conclusion. The applicant in that case sought an “exception” to a planned unit development. The opposing party argued that the only proper manner of altering a PUD's provisions was through a variance process, not via any “exception,” and that the City had therefore “acted in an unreasonable, arbitrary, and capricious manner.” A.189 – A.190. However it was termed, the argument involved matters explicitly contained within the City's authority and an assertion that the City had acted arbitrarily in using that authority. Minn. Stat. § 462.351 et seq. confers broad municipal authority to enact and enforce planning and zoning regulations such as PUDs

¹² Respondent also characterizes the City's argument as stating that Minn. Stat. § 15.99 encroaches on its powers to consider zoning matters. See Respondent's Brief, p. 19. Respondent states the City's position precisely backward. The City argues that Respondent's construction of Minn. Stat. § 15.99 would impermissibly *enlarge* municipal

and amendments to them. In contrast, the WCA expressly confines possible wetland replacement exemptions and narrowly tailors a city's ability to administer them. Minn. Stat. § 103G.2241, subd. 1-10.

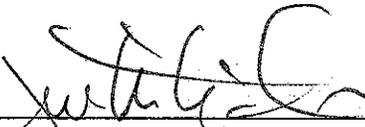
The applicability of Moreno to future cases is to foreclose the argument that approval of a request within the authority of the City to grant would be arbitrary or capricious; not to compel issuance of an exemption the City had no power or authority to grant in the first instance. In every case Respondent cites in support of its argument, enforcement under Minn. Stat. § 15.99 resulted in automatic approval of requests *that were within the city's authority* – e.g. conditional use permits, plats, rezoning requests, building permits. See Respondent's Brief, pp. 19-20. The Appellant in Moreno flatly acknowledged that Minn. Stat. § 15.99 cannot be used to compel approval of “manifestly illegal applications.” A.219. While Respondent's application was, on its face, for a legal exemption of fewer than 400 square feet (which has already been granted), Respondent now seeks an exemption which the City has no statutory authority to issue – an exemption which, if issued by the City, would be “manifestly illegal” under the WCA. As the parties in Moreno recognized, the decision in that case does not compel this Court to conclude that a “manifestly illegal” exemption must be issued.

authority beyond its proper scope by requiring automatic approval of requests the City had no other authority to approve.

CONCLUSION

Respondent's contention that he need not appeal the City's determination to BWSR runs contrary to WCA, which vests "ultimate responsibility" for its administration in BWSR. Respondent failed to appeal the City's determination to BWSR within 30 days as required by law and the District Court had no jurisdiction over the matter. The District Court's ruling in this matter undercuts the exclusive jurisdiction vested in BWSR and must be reversed. Even if jurisdiction in the District Court had been proper, Minn. Stat. § 15.99 cannot be used to compel the issuance of an exemption under the WCA which the City, as local government unit, had no authority to grant. Respondent has already received an exemption larger than the one he actually applied for and the maximum the City could issue under law. The District Court's decision should be reversed.

Dated this 11th day of April, 2005.



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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) (with amendments effective July 1, 2007).