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State of Minnesota  
**In Court of Appeals**

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Richard J. Breza,

*Respondent,*

v.

City of Minnetrista,

*Appellant.*

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**RESPONDENT'S BRIEF**

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## STATEMENT OF LEGAL ISSUES

I. **WHETHER THE DISTRICT COURT HAD JURISDICTION TO ISSUE A WRIT OF MANDAMUS COMPELLING APPELLANT CITY OF MINNETRISTA TO GRANT RESPONDENT'S REQUESTED EXEMPTION FROM WETLAND RESTORATION UNDER THE 60-DAY RULE, MINN. STAT. § 15.99?**

The District Court held: That it had jurisdiction to hear the case under well-established and controlling authority.

*Kramer v. Otter Tail Bd. Of Com'rs*, 647 N.W.2d 23 (Minn. App. 2002). R.A. 27

*Am. Tower, L.P. v. City of Grant*, 621 N.W.2d 37 (Minn. App. 2000).

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

*Gun Lake Ass'n v. County of Aitkin*, 612 N.W.2d 177 (Minn. App. 2000).

II. **WHETHER THE EVIDENCE AND THE LAW SUSTAIN THE DISTRICT COURT'S FINDINGS AND CONCLUSION THAT RESPONDENT'S EXEMPTION REQUEST, WHICH WAS NOT ACTED ON BY APPELLANT FOR OVER 14 MONTHS, WAS APPROVED BY OPERATION OF LAW UNDER THE 60-DAY RULE, MINN. STAT. § 15.99?**

The District Court held: That because the City failed to deny Breza's request within 60 days, the request was approved by operation of law under Minn. Stat. § 15.99.

Minn. Stat. § 15.99, subd. 2. R.A. 1.

*Moreno v. City of Minneapolis*, 676 N.W.2d 1, 7 (Minn. App. 2004). R.A. 31.

*Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. 2002).

*Gun Lake Ass'n v. County of Aitkin*, 612 N.W.2d 177 (Minn. App. 2000).

## STATEMENT OF CASE AND FACTS

This dispute concerns respondent Richard Breza's ("Breza") request to appellant City of Minnetrista ("City") for an exemption from regulations relating to the filling of a wetland area. The City is located in western Hennepin County, Minnesota, and is defined as a local government unit ("LGU") under the Wetland Conservation Act, Minn. Stat. §§ 103G.221-.2373 ("WCA"). A. 11.

In 1997, Breza purchased vacant property on which he intended to construct a home, at 6725 Halsted Avenue, Minnetrista, Minnesota (the "Property"). A. 11. The Property is situated on Halsted Bay on Lake Minnetonka and is located within the Shoreland Protection zone of Lake Minnetonka. A. 12, A. 26. When Breza acquired the Property, parts of it were covered by a wetland, as reflected in a 1994 survey of the Property. A. 29. A 1995 wetland delineation report on the Property shows that there were Types 2, 3 and 7 wetlands on the Property. R.A. 48.

On November 21, 1996, Breza's builder submitted an application to the City for the construction of Breza's house at 6725 Halsted Avenue. A. 30. Breza did not fill out or see the building permit at any time prior to the commencement of this litigation. A. 87. In 1997, Breza constructed a house on the Property, and on August 22, 1997, a Certificate of Occupancy was issued for Breza's newly-constructed dwelling. A. 26, R.A. 45

In 2000, Breza discovered that the wetland in his backyard was filled with debris—including tires, batteries, cans and bottles—that apparently had been discarded

there or that had washed into the wetland area from the lake. A. 88. In an effort to clean up his yard, Breza hired a contractor in July 2000 to place 15 to 20 dump truck loads of fill in the wetland on his Property. A. 89, A. 26. In August 2000, Breza placed an additional four cubic yards of fill on the Property. A. 90. Breza neither knew, nor was he advised by his contractor at the time of these activities, that it was necessary to obtain a permit before filling the wetland on his Property. A. 89. The total amount of fill in the wetland covered approximately 5,737 square feet. A. 26.

In late 2000, an enforcement agent from the Minnesota Department of Natural Resources (“DNR”) visited the Property. A. 27, A. 93. The DNR agent asked Breza when the last filling activity had occurred. Breza stated that the last fill had been placed in August. A. 27. On December 10, 2000, the DNR issued a cease and desist order to Breza directing him, in part, “to immediately cease and desist any activity draining or filling the wetland” on the Property (the “Cease and Desist Order”). A. 33. The Cease and Desist Order further stated in part, “If you do not apply for an exemption ... within three weeks of the date of the issuance of this order ... then whatever drain or fill work has been done may require restoration ....” A. 34. The Cease and Desist Order included an application form that was to be used to apply for an exemption for the filling activity.

*Id.*

On December 29, 2000, Breza made a timely application to the City for an exemption for the fill placed in the wetland on the form provided by the DNR entitled “Determination of Wetland Exemption or No-Loss” (the “Exemption Application”).

A. 27, A. 36, A. 12. The Exemption Application – printed on a form provided by the DNR – contains the following spaces for completion by the applicant:

Type of Determination: Exemption \_\_\_\_\_ No Loss \_\_\_\_\_

Under “Type of Determination,” Breza indicated on the Exemption Application that he was seeking an “Exemption.” A. 36. Based on the language of both the Cease and Desist Order and the Exemption Application, Breza understood that by making this application, he was seeking relief from regulations requiring all areas filled on the Property be returned to wetland status. A. 98.

Breza also included with his Exemption Application a short letter explaining his most recent fill activity on the site:

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 [and] I would like to apply for an exemption. Included is a receipt for the sod purchased.

A. 35. Breza included this letter to indicate that he had not violated the Cease and Desist Order issued by the DNR and to document his response to the DNR officer, who had asked Breza when he had last placed fill on the Property. A. 97.

The City did not act on Breza’s Exemption Application for over a year. Finally, on January 16, 2002, the City’s WCA Agent issued a letter purporting to deny Breza’s application, which stated in part that “the city cannot accept your exemption request.”

A. 38. The letter further stated, “[a]s required by the Minnesota WCA we will need to determine the area of impact to this basin to determine the next steps and your options.”

*Id.* Although the WCA Agent's letter is dated January 16, 2002, Breza did not receive the letter until sometime in February 2002, or 14 months after Breza had applied for the exemption. A. 107-108. The City admitted at trial and in other documentary evidence that its response to Breza's Application for Exemption was untimely under the 60-day rule, Minn. Stat. § 15.99, subd. 2. A. 54-55, A. 64, A. 43.

On April 8, 2002, the City's WCA Agent issued a letter to Breza stating in part that "the fill in this wetland will need to be removed rather than [sic] replaced via creation of another wetland off site or purchase from a wetland bank ...." On June 10, 2002, Breza, through his counsel, wrote the City demanding that the Exemption Application be deemed approved by operation of law under Minn. Stat. § 15.99, subd. 2, the 60-day rule. A. 41-42. On July 3, 2002, the City's WCA Agent issued a written response to Breza, which stated that "[t]he City agrees with your conclusion that an exemption has been approved pursuant to Minn. Stat. § 15.99, subd. 2." A. 43. The City additionally asserted in its response that the only exemption it could legally issue to Breza was a *de minimus* exemption under Minn. R. 8420.0122, subp. 9A(5). *Id.* Accordingly, the City stated that it was only willing to grant Breza an exemption of 400 square feet. *Id.*

On February 3, 2003, the City Council adopted a resolution allowing only 400 square feet of fill to remain on the Property and requiring Breza to restore the remainder of the filled area back to wetland. A. 62. Once again, the City Council conceded that it had violated Minn. Stat. § 15.99. The City Attorney admitted on the record that "there

certainly was a failure to comply within 60 days. There's really no question about that.”

A. 54-55. The City Council further directed that the restoration work be performed in the spring of 2003. A. 62, A. 65.

In February of 2003, Breza commenced an action petitioning the district court for a writ of mandamus compelling the City to grant an exemption over the entire Property, consistent with his application. A. 11. The parties filed cross-motions for summary judgment. Breza argued that his exemption request was approved by operation of Minn. Stat. § 15.99, which provides that an agency's failure to deny a request within 60 days is approval of the request. Breza also argued that the court had jurisdiction because mandamus is the proper remedy for a Section 15.99 violation and the exemption was for the entire 5,737 square feet that he filled. The City argued that the letter Breza sent with his exemption application asked for only four cubic yards to be exempt from restoration, even though his application requested exemption for the 5,737 square feet that he filled. The City also argued that the court did not have jurisdiction to hear this case and that the maximum exemption Breza was allowed under the law was 400 square feet. On August 6, 2003, the district court denied the parties' motions. A. 6-8. On August 27, 2003, the district court also denied the City's request to file a motion to reconsider its summary judgment ruling. A. 9.

On June 3, 2004, the parties tried the case to the district court. A. 68. On September 13, 2004, the court granted a writ of mandamus requiring the City to issue an

exemption for 5,737 square feet<sup>1</sup> for Breza's filling activity. A. 3-5. The court concluded that since the City failed to deny Breza's request within 60 days, it was approved by operation of law. A. 4. On October 22, 2004, judgment was entered. A. 5. On December 1, 2004, the City filed its notice of appeal from the district court's October 22, 2004 judgment. A. 1.

### ARGUMENT

#### I. THE DISTRICT COURT HAS THE AUTHORITY TO ISSUE A WRIT OF MANDAMUS COMPELLING THE CITY TO GRANT BREZA'S REQUESTED EXEMPTION.

The district court properly concluded that it had jurisdiction to hear the case. On appeal, the City argues that the district court was not competent to decide the 60-day rule issues in this case because it lacked subject matter jurisdiction. According to the City, "The District Court in this matter lacked subject matter jurisdiction to hear Breza's challenge to the City's wetland exemption decision because Breza failed to appeal the City's July 3, 2002 decision to the [Minnesota Board of Water and Soil Resources] (BWSR) within 30 days as required by Minn. Stat. § 103G.2242, subd. 9 and Minn. R. 8420.0250." App. Br. 7, R.A. 20. In the City's view, Breza erred when he filed a complaint and petitioned for mandamus relief in district court rather than appeal the LGU's decision to the BWSR. The determination of subject matter jurisdiction is a

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<sup>1</sup> The district court found that Breza filled a total of 5,757 square feet of his property and issued an exemption for all "5,757 square feet of Petitioner's Breza's filling activity as referenced in the Cease and Desist Order." A. 3-5. The parties stipulated at trial that Breza filled 5,737 square feet of his Property. A. 26, A. 70, A. 73.

question of law, which this court reviews *de novo*. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002).

**A. Breza Correctly Sought Judicial Enforcement of the City's Violation of Minn. Stat. § 15.99.**

The City's argument is demonstrably incorrect for two reasons. First, Breza was not in district court challenging the merits of the July 3, 2002 Wetland Conservation Act decision. Instead, he was asking for a judicial recognition that the City's inaction for more than a year resulted in the automatic approval of his exemption request under Minn. Stat. § 15.99. These are two wholly distinct claims. The statutes and rules cited by the City pertain to challenges to LGU decisions and are patently irrelevant to the 60-day issue. The only authority directly relevant in this case is Minn. Stat. § 103G.2242, which states in part, "the local government unit receiving . . . exemption or no-loss determination requests must act on all . . . exemption or no-loss determination requests in compliance with section 15.99." R.A. 19. *See also* Minn. R. 8420.0210 (stating that "local government unit decision must be made in compliance with Minnesota Statutes, section 15.99 [the 60-day rule], which generally requires a decision be made within 60 days of receipt of a complete application."). R.A. 7. Under this authority, the correct analysis is under Minn. Stat. § 15.99 to determine the consequences of the City's admitted failure to comply with the statutory deadline.

**B. Under Minnesota Law, Mandamus is the Appropriate Remedy for a Minn. Stat. § 15.99 Violation.**

This court has made it clear that mandamus relief, which may only be granted by a court under Minn. Stat. § 586.02, is the appropriate remedy for a violation of Minn. Stat. § 15.99. See *Kramer v. Otter Tail Bd. of Com'rs*, 647 N.W.2d 23, 26-27 (Minn. App. 2002) (citing *American Tower, L.P. v. City of Grant*, 621 N.W.2d 37, 41-43 (Minn. App. 2000) (holding 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)). R.A. 27, R.A. 30. See also *Carlson v. Blue Earth County Bd. Of Comm'rs*, No. C1-99-1980, 2000 WL 1239734, at \* 6 (Minn. App. Sept. 5, 2000) (noting that “[h]ad relators believed that the rejection by the board of a motion to approve the permit did not constitute a denial as required by section 15.99, their action lay in filing a writ of mandamus in district court”). R.A. 24. “Mandamus is an extraordinary legal remedy that courts issue only when the petitioner shows that there is a ‘clear and present official duty to perform a certain act.’” *Kramer*, 647 N.W.2d at 26 (quoting *McIntosh v. Davis*, 441 N.W.2d 115, 118 (Minn. 1989)). R.A. 29. For a petitioner to be entitled to mandamus relief, the petitioner must demonstrate three elements: (1) the failure of an official to perform a duty clearly imposed by law; (2) a public wrong specifically injurious to petitioner; and (3) no other adequate remedy. *Id.*; *Demolition Landfill Servs., L.L.C. v. City of Duluth*, 609 N.W.2d 278, 280 (Minn. App. 2000), *review denied* (Minn. July 25, 2000). A. 4, R.A. 29.

In *Kramer*, this court held that it is appropriate for an applicant to move for mandamus relief when a government agency has violated Minn. Stat. § 15.99. 647

N.W.2d at 26. R.A. 29. First, the court reasoned that a government agency's failure either to approve or deny an application within 60 days is a clear failure to perform an official duty imposed by law. *Id.* Second, the court noted that the county's failure to act on the application injured the applicant because the applicant was unable to develop its resort. *Id.* And third, the court held that mandamus relief was appropriate because the only other available relief was more expensive, more complicated, and more time consuming. *Id.*

Here, the district court appropriately relied upon *Kramer* to hold that Breza was entitled to mandamus relief because of the City's admitted failure to respond to Breza's application within 60 days. Like *Kramer*, the district court found that: (1) the City failed to perform an official duty imposed by law by waiting for 14 months to respond to Breza's application; (2) the City's failure to act timely harmed Breza because his wetland exemption application and the status of his filling activity remained unresolved; and (3) the other available remedy, which was a writ of certiorari, would have been too time consuming. A. 3-5. Further, in view of this court's many decisions holding that mandamus relief is the appropriate remedy for a Minn. Stat. § 15.99 violation, it would have been inappropriate for Breza to appeal the decision to BWSR, which has no authority to issue mandamus relief or otherwise declare a violation of Minn. Stat. § 15.99.

**C. The City Offers No Authority in Support of its Claim that Breza Must Appeal to BWSR Before Commencing an Action in District Court.**

The City footnotes a single case in support of its claim that Breza must appeal to BWSR before commencing an action in district court. *See State Dept. of Conservation v.*

*Sheriff*, 207 N.W.2d 358 (Minn. 1973). In *Sheriff*, a landowner applied to the Commissioner of Conservation (now the DNR Commissioner) for a permit in 1961 to place fill on the bed of Lake Minnewaska. *Id.* at 359. The request was denied in 1962. *Id.* More than eight years later, a conservation officer discovered the landowner dumping fill into the lake. *Id.* The Department of Conservation obtained an injunction in district court and the landowner appealed. The Minnesota Supreme Court affirmed the district court's injunction and stated:

If defendant wished to contest the finding of the commissioner that the filling which defendant proposed was detrimental to the public interest, the appropriate remedy was to appeal to the district court from the commissioner's determination pursuant to s [sic] 105.47. No such appeal was taken, and defendant is not entitled to a redetermination of the question of public detriment in this proceeding which was commenced to obtain an injunction to restrain violation of the commissioner's order.

*Id.* at 360. In the City's view, this decision supports its contention that Breza should have appealed to BWSR.

Conspicuously absent from the *Sheriff* decision is any discussion of Minn. Stat. § 15.99. The reason for this absence is simple: the 60-day rule was not adopted until 1995. Thus, the case could not have any impact on the correct way to initiate a review of a City's grossly untimely actions under Minn. Stat. § 15.99. The City cannot truly

believe that a dispute regarding jurisdiction under Minn. Stat. § 15.99 can be resolved by a case decided over twenty years prior to its enactment.<sup>2</sup>

Perhaps more importantly, the *Sheriff* case does not even stand for the proposition that a denial must be appealed administratively. As the quotation above demonstrates, the landowner should have commenced an action challenging the Commissioner's decision *in district court*. *Id.* at 360. The landowner's trouble arose when he raised the issue eight years later in response to the Commissioner's request for injunctive relief. In the Supreme Court's view, this was too late for a redetermination from the Commissioner. *Id.* In this case, Breza commenced an action in district court, just as the landowner should have done in *Sheriff*. The similarities, however, end there. In this case, Breza is simply following the dictates of cases such as *Kramer v. Otter Tail Bd. of Com'rs, supra*, seeking enforcement of a clear, legislatively-imposed duty through the remedy of mandamus. R.A. 27-30. Breza is not challenging the decision of the City as LGU; rather, he is seeking a judicial declaration that there are serious consequences for the City's failure to make a decision within the legal time limit. Thus, the district court had jurisdiction to hear Breza's request for mandamus relief, and the arguments to the contrary in the City's brief are misguided and unavailing.

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<sup>2</sup> Moreover, *Sheriff* predates the Wetland Conservation Act (adopted in 1991) by some 30 years. Accordingly, the case cannot stand for the principles claimed by the City because it predates by decades both the adoption of the wetland regulatory scheme in this state and the adoption of the time deadline statute for certain agency decisions.

**II. BREZA'S EXEMPTION REQUEST HAS BEEN APPROVED BY OPERATION OF LAW UNDER MINN. STAT. § 15.99.**

The City admits that “the time limits of Minn. Stat. § 15.99 were violated” by the City and that this case is about the consequence of this undisputed violation. App. Br., p. 11. Despite the clear language in Minn. Stat. § 15.99, which expressly provides for the approval of Breza’s request, and despite Minnesota law interpreting Minn. Stat. § 15.99, which expressly provides that when a city fails to adhere to the time limit, the application is approved as a matter of law, the City still argues that Breza’s request cannot be granted under Minn. Stat. § 15.99. The City contends that the district court should not have granted Breza’s request for a writ of mandamus compelling the City to issue an exemption for all 5,737 square feet of Breza’s filling activity, because it claims that, the request was beyond the authority of the City to grant. The appellate court will reverse a trial court’s order on an application for mandamus relief “only when there is no evidence reasonably tending to sustain the trial court’s findings.” *Coyle v. City of Delano*, 526 N.W.2d 205, 207 (Minn. App. 1995).

The district court found that Breza applied for an exemption request for the 5,737 feet of fill on his Property. A. 4. The court also found that on January 16, 2002, over one year after Breza submitted his application, the City issued a letter purporting to deny Breza’s application. *Id.* The district court correctly concluded that Minn. Stat. § 15.99 applies to this case and that since the City failed to deny Breza’s request within 60 days, it was approved by operation of law. *Id.* On appeal, the City does not dispute the district court’s findings. The City misstates the record, however, when it contends that Breza is

now seeking an exemption for all 5,737 feet of fill when he originally only sought exemption for four cubic yards. Breza's intentions have always been, as the district court found, to obtain an exemption for all the fill he placed on his property not just for 4 cubic yards.<sup>3</sup> A 98.

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<sup>3</sup> The City apparently bases this position on a letter that the City insists on misconstruing. The letter was sent by Breza along with his exemption application. In response to the DNR's Cease and Desist Order issued on December 10, 2000, which by its nature suggested that Breza was continuing to fill the wetland on the Property. Breza's letter addressed this issue by noting that no fill activity had taken place since August 2000:

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 [and] I would like to apply for an exemption. Included is a receipt for the sod purchased.

A. 35. The City apparently views this letter as limiting Breza's exemption request to a mere four cubic yards of fill. App. Br. 11, n.7. The City's position is truly bizarre given the circumstances of the exemption request and the language of Breza's application. The DNR viewed the Property before issuing the Cease and Desist Order, and it knew full well the scope of the fill on the site. A. 27, A. 93. Indeed, it is improbable at best that the DNR would have issued a Cease and Desist Order for the placement of four cubic yards of fill. The Cease and Desist Order issued by the DNR stated that "[i]f you do not apply for an exemption or no-loss determination within three weeks of the date of the issuance of this order, or if your application is denied, then *whatever drain or fill work has been done* may require restoration according to a restoration plan..." (emphasis added). A. 34. The City cannot truly believe that the Cease and Desist Order referred only to four cubic yards of fill; if this were the subject of the Cease and Desist Order, the "restoration" referred to would relate only to four cubic yards of fill. Of course, the DNR would not have required the removal of a mere four yards of fill when 5,737 square feet of wetland had been affected.

**A. Under Minnesota Law, the City's Failure to Respond to Breza's Request Within the Time Requirements of Minn. Stat. § 15.99 Mandates Approval of His Application.**

The City argues that Minn. Stat. § 15.99 cannot compel the issuance of Breza's requested exemption because the City under the WCA has no authority to "issue an exemption for all 5,737 feet of fill and Minn. Stat. § 15.99 cannot be construed to confer such authority." App. Br. 11. Under the WCA, a "local government unit ("LGU") is responsible for determining whether the use of a property qualifies for an exemption." Minn. R. 8420.0210.<sup>4</sup> R.A. 7. Here, it is undisputed that the LGU responsible for making the exemption determinations for the Property is the City. According to the regulations promulgated under the WCA, "[a]n exemption may apply whether or not the local government unit has made an exemption determination. If the landowner requests an exemption determination, then the local government unit must make one." *Id.* The requirement that a LGU make a timely determination is enforced by the express adoption of Minnesota's 60-day rule in WCA regulations: "The local government unit decision must be made in compliance with Minnesota Statutes, section 15.99 [the 60-day rule], which generally requires a decision to be made within 60 days of receipt of a complete

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<sup>4</sup> It is important to note that although it is true the WCA contains a general prohibition against draining or filling a wetland without an approved plan providing for its replacement, the statute contains several *exemptions* that may apply to relieve a landowner from this replacement requirement. *See* Minn. Stat. § 103G.222, Subd. 1 (prohibitions); *See* Minn. Stat. § 103G.2241, subs. 1-10 (exemptions). R.A. 8-12. If an exemption is granted, the applicant is exempt from the prohibitions against draining and filling, and is therefore exempt from the requirement of producing a "replacement plan." Minn. Stat. § 103G.2241.

application.” *Id.* In addition, the WCA also expressly incorporates section 15.99: “the local government unit reviewing . . . exemption or no-loss determination requests must act on all . . . exemption or no-loss determination requests in compliance with section 15.99.” Minn. Stat. § 103G.2242 (2004). R.A. 19.

Because the WCA expressly incorporates the time deadlines of Minn. Stat. § 15.99 and requires that the an LGU respond in a manner consistent with Minn. Stat. § 15.99 or suffer the consequences for its inactions, the City’s argument that the exemption approval is “illegal” is without merit. Under Minn. Stat. § 15.99, subd. 2:

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.***

(emphasis added). R.A. 1. The phrase “notwithstanding any other law to the contrary” directs the court to disregard any conflicting law that would prevent an automatic approval. Even if the City is correct when it argues that the WCA prohibits the exemption requested by Breza, the WCA is a “law to the contrary” that must be disregarded. The Legislature was no doubt aware that agencies would rely on other statutes to resist the automatic approval provision of Minn. Stat. § 15.99, but it provided clear guidance to the courts when such disputes arose: the approvals occur automatically upon a violation of the statute, *notwithstanding any other law to the contrary*. To conclude otherwise would be to eviscerate the time deadline statute. In this case, the

City's position is that it suffers no consequence for its failure to act on Breza's exemption application for over a year, because a *de minimus* exemption is all that the City is empowered to give, regardless of whether the City took 60 days or 60 months to act on Breza's application. Such an interpretation violates both the letter and the intent of the 60-day rule law.

**B. The Approval of Breza's Application is Compelled by Minn. Stat. § 15.99 and Cannot be Challenged by Arguing an Error of Law.**

The City fails to understand that Breza's exemption request is not only allowed, but is compelled by statute because of the City's failure to deny his application within the time deadline set by Minn. Stat. § 15.99, subd. 2. See *Gun Lake Assoc. v. County of Aitkin*, 612 N.W.2d 177, 182 (Minn. 2000) (rejecting relators' argument that the grant of the CUP application is defective because the county failed to abide by relevant statutes and ordinances, and holding that the grant was compelled by statute, on account of the county's failure to deny the application within the time requirements of Minn. Stat. § 15.99). Moreover, this court has already definitively rejected the City's argument by holding that "when the operation of Minn. Stat. § 15.99 statutorily compels the approval of a zoning application, approval of that application cannot be an error of law." *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 7 (Minn. App. 2004). R.A. 31, R.A. 36.

In *Moreno*, the City of Minneapolis argued that Minn. Stat. § 15.99 could not act to approve the applicant's zoning request because the request violated the Minneapolis zoning ordinances and the City had no authority to violate these ordinances. *Id.* at 7. R.A. 36. The court rejected the City's argument, holding that "when approval of a

zoning application is statutorily compelled, it cannot then be argued that the approval was an error of law.” *Id.* The 60-day rule by its terms states “notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning ....” Minn. Stat. § 15.99, subd. 2. This language legally ratifies any action taken to enforce the 60-day rule, so it cannot be said that such action violates the law:

[T]he underlying purpose of Minn. Stat. § 15.99 is to keep government agencies from taking too long in deciding issues like the one in question. 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.’ When a city has failed to satisfy its clear requirements, the remedy shall be granted.

*Id.* at 6 (quotations omitted) (citations omitted). R.A. 35.

The City attempts to distinguish *Moreno* from this case by arguing that the applicant in *Moreno* sought an amendment that was within the control of the City of Minneapolis versus Breza’s request, which was not allowed by statute or rule. This argument is not only inaccurate but it highlights the City’s tortured reading of Minn. Stat. § 15.99. App. B. p. 16. The appellant in *Moreno* did argue that the city lacked authority to grant the exceptions to the application. 676 N.W.2d at 7; A. 189-90. This court rejected the appellant’s argument because the approval was compelled by statute and could not be challenged on the grounds that the approval was an error of law. Like the appellant in *Moreno*, the City is attempting to challenge the approval of the application as an error of law because the City claims that it has no authority under the WCA exemption provisions to grant Breza’s exemption. By blatantly violating Minn. Stat. § 15.99, the

City has lost the ability to raise this argument—it was only viable and relevant during the 60-day time period when the City could legally consider and act on Breza’s exemption application. Once the City violated the time deadline statute, Breza became entitled to his statutorily-mandated remedy under Section 15.99, and the City could no longer invoke whatever limits on its powers may have been operative during the legally allowable period for the City to act.

The City is essentially arguing that Minn. Stat. § 15.99 encroaches on its powers to consider zoning matters, but this court has already held that “such an encroachment is fully within the authority of the legislature to give and revoke.” *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 927 (Minn. App. 2002). In addition, if the City were correct in its reasoning, there would simply be no 60-day rule cases resulting in automatic approval. Case law enforcing the 60-day rule is replete with examples of enforcement of the time deadline statute by its terms—conditional use permits, special use permits, rezoning, building permits and other approvals have been ordered to be issued automatically upon a violation of the statute. *See e.g., American Tower, L.P. v. City of Grant*, 636 N.W.2d 309 (Minn. 2001) (60-day rule mandates automatic approval of telecommunications tower); *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. App. 2002) (60-day rule mandates automatic approval of conditional use permit for upgrade of utility’s transmission lines); *Kramer v. Otter Tail County Bd. of Com’rs*, 647 N.W.2d 23 (Minn. App. 2002) (60-day rule mandates automatic approval of plat for shorefront development); *Demolition Landfill*

*Services, LLC v. City of Duluth*, 609 N.W.2d 278 (Minn. App. 2000) (60-day rule mandates automatic approval of special-use permit for landfill). R.A. 27. In each of these cases, the particular agency was required to issue permits and other approvals *even though* it failed to hold public hearings, make findings, or conduct other reviews when it missed the deadlines. Nonetheless, the courts directed the agencies to issue the approvals because that is what the unambiguous and mandatory terms of the 60-day rule require.

In this case, the City argues that it cannot issue anything other than a *de minimis* exemption for Breza's property under the standards of Minn. R. 8420.0122. See City's Memo. in Supp. Sum. Judg. at 11-12. This is what the City means when it argues that the exemptions would be "illegal" if issued. Despite its protestations, the City has authority to issue exemptions that are not *de minimis*. See Minn. Stat. § 103G.2241, subs. 1-10. R.A. 8-12

To accept the City's position on this issue is to depart from the *stare decisis* effect of the many 60-day rule cases decided by this court and to ignore this court's prior recognition that the statutory consequence for violating the time deadline "unambiguously . . . mandates an approval." *Demolition*, 609 N.W.2d at 281. In any 60-day rule challenge, there is always another public hearing, determination, or finding required by law that the agency missed because of its own procrastination. Cities are not entitled to "revisit" these issues after the expiration of the deadline in an effort to defeat the operation of Minn. Stat. § 15.99. *Id.* (reasoning that "[w]e cannot permit a municipality to bend the letter of the statute for the sake of administrative ease"). The

statute provides for only one result upon a violation of the 60-day deadline: automatic approval, notwithstanding any other law to the contrary. Accordingly, the City's "illegality argument" must be rejected in its entirety and the district court's grant of mandamus relief to Breza must be affirmed.

**III. THE LEAGUE'S PLEAS TO PREVENT "BAD PUBLIC POLICY" SHOULD BE REDIRECTED TO THE LEGISLATURE.**

**A. The League is Not an Independent Amicus Curiae.**

The League of Minnesota Cities (the "League") filed an amicus brief in this case in support of the City's position. This brief violates the appellate rules requiring the participation of independent amici because the League also represents the City in this case. In every pleading in this case, except for the appellate brief, the League's attorney has appeared on the signature block as representing the City and has signed numerous pleadings on the City's behalf. In addition, the League's attorney filed an affidavit with the district court in support of the City's motion for summary judgment where she stated that she is "one of the attorneys representing the City of Minnetrista" in this case. R.A. 43.

The League is clearly not an independent amicus as required by the Minnesota Rules of Civil Appellate Procedure. Minn. Civ. App. R. 129.03 requires a certification in the brief that indicates whether counsel for a party wrote the brief in whole or in part and that identifies every person or entity other than the amicus curiae who made a monetary contribution to the preparation of the brief. "This rule is intended to encourage participation of **independent amici**, and to prevent the courts from being misled about

the independence of *amici* or being exposed to ‘a mirage of amicus support that really emanates from the petitioner’s word processor.’” Advisory Committee Comment to 2000 Amendments to Minn. R. Civ. P. 129 (quoting Stephen M. Shapiro, *Certiorari Practice: The Supreme Court’s Shrinking Docket*, reprinted at 24 *Litigation*, Sprint 1998 at 25, 74) (emphasis added). Here we have a “mirage of amicus support” in which the League represents appellant and additionally weighs in as amicus. Although this may not violate the letter of the rule, it certainly violates the spirit of the rule, which is to encourage independent amicus participation. The effect of the League’s participation here is to give appellant two bites of the apple. This court should not permit amicus participation by the League in cases like this one where it represents a party before the court.

**B. The League’s Hypotheticals are Improperly Directed to This Court.**

The entire focus of the League’s brief is on hypothetical situations that allegedly demonstrate the purportedly bad public policy that would result from allowing Minn. Stat. § 15.99 “to compel cities to issue zoning permits that violate state law.” Amicus Br. 2. This court is an error-correcting court and does not engage in making public policy, especially when it is confronted with a clear statute that it is bound to enforce. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (citation omitted); *Minnesota State Troopers Ass’n ex rel. Pince v. State, Dep’t of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. App. 1989); *see also Terault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987) (holding that the “task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court”).

This court has already held that Minn. Stat. § 15.99, subd. 2, “unambiguously states that failure to deny a permit application within the statutory time period mandates an approval.” *Demolition*, 609 N.W.2d at 281. Because the statute is unambiguous, this court “must give effect to the statute’s plain meaning.” *Id.* Moreover, this court has already held that “when the operation of Minn. Stat. § 15.99 statutorily compels the approval of a zoning application, approval of that application cannot be an error of law.” *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 7 (Minn. App. 2004). R.A. 31, R.A. 36. Accordingly, the League’s argument that the statute would compel cities to violate the law is misguided because, as discussed above, the approval of applications under Minn. Stat. § 15.99 is compelled by the plain dictates of the statute and cannot be defeated with arguments that such approval is contrary to the law.

Further, every agency in this state knows or has a duty to know about the 60-day rule and can easily avoid the consequences of violating the time deadline statute simply by knowing how to count and by acting within 60 days--or giving itself an automatic extension of up to an additional 60 days, for a total of 120 days--one-fourth of a year--to act on a request governed by the time deadline provisions.

Although the League’s commentary is replete with potential “bad public policy” that could flow from Minn. Stat. § 15.99, the League conveniently ignores the “bad public policy” that results from the City’s failure to act for over a year in this case. The Legislature’s purpose in enacting Minn. Stat. § 15.99 was to keep government agencies from taking too long in deciding issues like the one in question. *Manco of Fairmont, Inc.*

*v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293, 296 (Minn. App. 1998), *review denied* (Minn. Oct. 20, 1998). Stripped of the City's and the League's rhetoric, the undisputed fact is that the City failed to respond to Breza's timely application for an exemption for 14 months.

In addition, the League argues the lofty purposes of the WCA and poses many rhetorical questions that are misdirected to this court and should more appropriately be directed to the Legislature. Amicus Br. 2. As discussed above, it is clear that the Legislature intended that requests under the WCA be subject to the time limits in Minn. Stat. § 15.99, because the WCA expressly incorporates by reference the time limits of Section 15.99. It could not be more clear that the Legislature intended requests for decisions made under the WCA to be circumscribed by the procedures and requirements of the 60-day rule.

### CONCLUSION

Simply put, the City's failure to respond to Breza's exemption request within 60 days compelled the approval of his request by operation of law. Breza properly sought judicial enforcement of the City's violation by asking the district court for mandamus relief, requiring the City to grant the full exemption. Based on the undisputed facts in this case, the district court correctly held that under Minn. Stat. § 15.99 as incorporated into the WCA and its regulations, the exemption application for all fill placed on the Property must be approved by operation of law. For all the above-stated reasons, Breza respectfully requests that this court affirm the district court's decisions: (1) to deny the

City's summary judgment motion;<sup>5</sup> and (2) to grant a writ of mandamus requiring the City to issue an exemption for all 5,737 square feet of Breza's filling activity.

Dated: *March 29, 2005*

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<sup>5</sup> The City appears to be appealing from the district court's denial of its summary judgment under the theory that although denial of a summary judgment is not ordinarily appealable, it may be reviewed as part of an appealable judgment. *Peterson v. Brown*, 457 N.W.2d 745, 748 (Minn. App. 1990). On appeal from a summary judgment, this court asks two questions: (1) whether there are any genuine issues of material fact; and (2) whether the lower courts erred in their application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990) (citation omitted). Despite the City's assertions that it is appealing the district court's ruling on summary judgment, it does not argue to that end. The district court denied the City's summary judgment motion because it concluded that there were genuine issues of material fact. The City does not contend on appeal that this was an erroneous conclusion. Moreover, this case was then tried to the district court where the court made findings of fact. The City does not dispute these findings either. Therefore, Breza respectfully requests that this court affirm the district court's denial of the City's summary judgment motion, along with affirming the court's ruling on the merits after trial.

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).