

NO. A04-2286

State of Minnesota
 In Supreme Court

Richard Breza,

Appellant,

v.

City of Minnetrista,

Respondent.

**BRIEF AMICUS CURIAE OF MINNESOTA ASSOCIATION OF REALTORS®
 IN SUPPORT OF APPELLANT**

LARKIN HOFFMAN DALY &
 LINDGREN, LTD

Gary A. Van Cleve (#156310)

Jessica B. Rivas (#0312897)

1500 Wells Fargo Plaza

7900 Xerxes Avenue South

Bloomington, Minnesota 55431-1194 (952) 941-9220

(952) 835-3800

Attorneys for Appellant

THOMSEN & NYBECK, P.A.

Donald D. Smith (#102349)

Christopher P. Renz (#0313415)

3300 Edinborough Way, Suite 600

Edina, Minnesota 55435

(952) 835-7000

*Attorneys for Amicus Curiae
 Minnesota Association of Realtors®*

HOFF, BARRY & KUDERER

George C. Hoff (#45846)

Justin Templin (#0305807)

160 Flagship Corporate Center

775 Prairie Center Drive

Eden Prairie, Minnesota 55344

(952) 941-9220

Attorneys for Respondent

LEAGUE OF MINNESOTA CITIES

Susan L. Naughton (#25973)

145 University Avenue West

St. Paul, Minnesota 55103-2044

(651) 281-1232

*Attorneys for Amicus Curiae
 League of Minnesota Cities*

FREDRIKSON & BYRON, P.A.

Joseph G. Springer (#213251)

200 South Sixth Street, Suite 4000

Minneapolis, Minnesota 55402-1425

(612) 492-7168

*Attorneys for Amicus Curiae
 Builders Association of the Twin Cities*

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INTRODUCTION

The Minnesota Association of Realtors® encourages this Court to reverse the decision of the Court of Appeals in the instant case.¹ The Minnesota Association of Realtors® (the “Association”) is a Minnesota trade association which has approximately 12,000 members who are licensed to engage in the brokerage and sale of real estate in Minnesota. The Association pursued the passage and supported the original adoption of Minn. Stat. § 15.99. The Association promoted the legislation as a way to hold government agencies accountable and to ensure that timely decisions would be made by government agencies so that economic resources and opportunities would not be squandered by unnecessary delay. The Respondent’s positions undermine the objective of the statute -- timely response by government agencies to citizen requests for government actions.

The District Court correctly gave effect to the provisions of Minn. Stat. § 15.99 when it held that in this case, since the Respondent had failed to deny Appellant’s request within 60 days, the entirety of Appellant’s request was approved by operation of law. The Association advocates affirming the District Court’s decision and reversing the Court of Appeals’ decision.

¹Counsel for Amicus Curiae the Minnesota Association of Realtors® received no assistance, in whole or in part, from any other parties in authoring the amicus brief filed in this matter. Furthermore, no person or entity, other than the Amicus Curiae, made a monetary contribution to the preparation or submission of the brief.

ARGUMENT

I. **THE RELIEF SOUGHT BY APPELLANT IS SUPPORTED BY THE LEGISLATIVE HISTORY OF MINN. STAT. §§ 15.99 AND 103G.2242, SUBD. 4.**

The language of Minn. Stat. § 15.99 is unambiguous and requires that the decision of the Court of Appeals be reversed. The impropriety of the Court of Appeals' decision in this case is especially clear in light of the legislative history undergirding the statutes at issue.

A. ***The Legislature Contemplated that Substantial Consequences Could Result from the Operation of Minn. Stat. § 15.99 and Therefore, the Court Should Not Shy Away from Applying the Law Due to the Consequences in the Case at Bar.***

The provisions of Minn. Stat. § 15.99, specifically provision 2(a), provide for significant consequences in the event that a local government unit fails to timely respond to a written request. Minn. Stat. § 15.99 (2004). In the instant case, Respondent contends that despite its failure to respond to Appellant's written request for 11 months, *Breza v. City of Minnetrista*, 706 N.W.2d 512, 515 (Minn. Ct. App. 2005), the consequences of applying Minn. Stat. § 15.99 to afford Appellant the relief sought would be "draconian." (Resp't Ct. of Appeals Br. at 14.) However, the severity of the statute's remedies was contemplated by the legislature in considering the statute and with that knowledge, the legislation was passed. During floor debate by the House of Representatives, Representative Ozment expressed concern that as a result of the statute, controversial changes might be implemented due to

inaction. *Debate on H.F. 641*, Floor of the House, 1995 Leg., 79th Sess. (Minn. April 12, 1995) (statement of Representative Ozment). In response, Representative Brown, the bill's author, acknowledged that such a result could occur, but went on to explain the statute by stating "local units are responsible for inaction" and "the burden is on the local units of government, not the legislative or executive branches." *Id.* (statement of Representative Brown). Respondent and its supporting amici wish to ward this Court away from full enforcement of Minn. Stat. § 15.99 claiming the consequences would be too harsh. But the strong nature of the remedy afforded to Appellant is not a sufficient reason for the Court to foreclose that remedy, as this outcome was considered by the very legislators who passed the statute at issue. For these reasons, the decision of the Court of Appeals in this matter should be reversed and judgment rendered in favor of Appellant.

B. The Bounds of the Authority of a Local Government Unit Should Not Foreclose Enforcement of Minn. Stat. § 15.99 Because Agencies That Would Have Such Authority Were Contemplated by the Legislature to Be Coordinated with the Local Government Unit for the Benefit of the Consumer.

The Court of Appeals determined, in part, that local government units did not have the authority to approve Appellant's application and therefore its inaction could not result in approval of the entire application. *Breza v. City of Minnetrista*, 706 N.W.2d 512, 518 (Minn. Ct. App. 2005). This ruling failed to recognize the concept of "coordination of agencies for the benefit of the consumer" that was contemplated by the legislature in relation to Minn. Stat. § 15.99 and which is reflected in

provisions of that statute. In testifying regarding the purpose of the bill, Mr. Glenn Dorfman of the Minnesota Association of Realtors® stated, in fact specifically in reference to wetlands, ". . . except that it's even more complex in wetlands . . . We have virtually no coordination so again all we want is a user friendly system: If you ask DNR a question then they should coordinate the answer to that question across all the agencies that deal with wetlands and then give you a coordinated answer so that you can go on with your business." *Hearing on S.F. 647 Before the S. Comm. on Gov. Operations and Veterans*, 1995 Leg., 79th Sess. (Minn. March 29, 1995) (statement of Glenn Dorfman). Similarly, Senator Riveness spoke in support of placing the burden of coordination on the government agencies in relation to the period within which the agency must inform the consumer of an incomplete application:

"Lots of times agencies don't get to it for 30 days or 60 days, then find a piece of paper they don't have and we've all [experienced an agency saying] 'Oh, by the way, you need to go somewhere else,' or [we're] not told and find out later that we really need to see multiple agencies. [This legislation is] basically saying we want people to have a service hat on. It's their job to help citizens solve problems."

Id. (statement of Sen. Riveness); (see also Appellant's Br. at 31). Mr. Dorfman again testified regarding coordination stating: "If there are five state agencies, it is our hope that this will force all of them to give the consumer one answer within the 60-day period." *Id.* (statement of Glenn Dorfman). In response to a question from a fellow Senator inquiring as to whether a permit would just get issued if the

agencies failed to coordinate, the bill's author answered in the affirmative stating: "the agency you go to first must direct you to other necessary agencies and . . . all should act simultaneously." *Id.* (statement of Sen. Weiner).

As the statements by the legislators involved in enacting the statute indicate, it was anticipated that a consumer could make a single application and the recipient of the application would be charged with communicating to the various agencies that would have authority over the application. In the instant case, the consumer was Appellant and he submitted his application to Respondent. As contemplated by the legislature, Respondent should have communicated with affected agencies, such as the Department of Natural Resources, to coordinate a response within the required 60-day period. Instead, Respondent did not reply to Appellant's application for nearly a year. Respondent didn't have its "service hat" on and now seeks to create the very situation that Minn. Stat. § 15.99 was drafted to avoid – passing the consumer along to someone else for that which the consumer seeks.² The Court of Appeals inappropriately confined the relief afforded to the relief it believed could be

²In fact, the Court of Appeals' decision attempts to place Appellant and other similarly-situated consumers in a "catch 22." The Court of Appeals, in a footnote, states that Appellant would have been able to retain more than the *de minimus* exception had he filed another type of application "to the city." (emphasis added) *Breza*, 706 N.W.2d at 518, n. 6. At the same time, the Court of Appeals claims that the city's authority was limited to 400 feet. *Id.* at 518. Not only does the holding constitute self-contradiction, but it represents the very situation that the legislature sought to avoid—the "runaround" for a consumer attempting to seek government permission.

rendered by the initial agency to which the application was submitted. The Court of Appeals' decision is contrary to the intent of the statute.

C. The Legislative History Demonstrates that Applications Regarding Wetland Issues Were Particular to the Purpose of Minn. Stat. §§ 15.99 and 103G.2242 and Therefore, Appellant Should Be Granted the Relief Sought to Effectuate that Particular Purpose.

The area at issue in this case – wetlands—was explicitly considered as an area in which relief under Minn. Stat. § 15.99 would be appropriate and was needed. Statements by Glenn Dorfman of the Minnesota Association of Realtors® regarding the need for the statute were quoted in previous sections of this brief and specifically reference the problem of providing timely response to a consumer on issues involving wetlands. *Hearing on S.F. 647 Before the S. Comm. on Gov. Operations and Veterans*, 1995 Leg., 79th Sess. (Minn. March 29, 1995) (statement of Glenn Dorfman). Later in that same hearing, Mr. Dorfman again stated that the issues which were most pressing for providing government response dealt with the wetlands: "In the case of farmers, we're getting a lot of complaints about the amount of time they have to wait—again, on wetlands issues." *Id.* Based on this testimony in the legislative process, it is clear that wetlands issues, the very issue in the case at bar, were one of the contemplated reaches of Minn. Stat. § 15.99. As such, this Court should avoid excluding such issues from the reach of Minn. Stat. § 15.99 as advocated by the Respondent. While Respondent will contend that its position does not preclude wetlands issues from Minn. Stat. § 15.99, the limited consequence for the governmental units and agencies advocated by Respondent undercuts the

purpose of the statute – to provide timely response to applications for issues, specifically including wetlands issues.

The intention of the legislature to have the consequences of Minn. Stat. § 15.99 apply to wetlands provisions is further bolstered by the explicit reference to Minn. Stat. § 15.99 in Minn. Stat. § 103G.2242. Not only does the reference exist, but the reference was the result of the specific review of limitations applying to wetlands issues by legislative bodies charged with overseeing the implementation of provisions relating to the wetlands. As referenced in the testimony of Glenn Dorfman of the Minnesota Association of Realtors® in the debate on Minn. Stat. § 15.99: "[W]e did take the wetlands issue out of the bill and we are arguing that in front of the agricultural committee which is the same kind of parallel thinking." *Hearing on S.F. 647 Before the S. Comm. on Gov. Operations and Veterans*, 1995 Leg., 79th Sess. (Minn. March 29, 1995) (statement of Glenn Dorfman)³. In that

³In the same hearing, Mr. Dorfman stated that there was not an interest in undoing or interfering with environmental regulation. Mr. Dorfman referred to the regulation of power plants as the type of regulation that Mr. Dorfman didn't foresee the statute intending to effect, which type of regulation is extremely specialized and removed from direct interaction with the citizen/consumer. Separately, in order to ensure that the application of wetlands issues was appropriately addressed by bodies with specific duties as to those issues, the wetlands issue was taken out of the bill before the Senate Committee on Government Operations and Veterans and was being separately addressed by the agriculture committee. *Hearing on S.F. 647 Before the S. Comm. on Gov. Operations and Veterans*, 1995 Leg., 79th Sess. (Minn. March 29, 1995) (statement of Glenn Dorfman). Language parallel to that in § 15.99 was considered in the Committee on Agriculture and Rural Development in 1995 as part of a larger wetlands bill. See S.F. 483, 1995 Leg., 79th Sess. (Minn. 1995). Before final passage of the bill in 1996, the language was changed to refer directly to § 15.99. See *id.*; H.F. 787, 1995 Leg., 79th Sess. (Minn. 1995); see also *Bill Status*

same legislative biennium, the addition of a specific reference to Minn. Stat. § 15.99 was added to subdivision 4 of Minn. Stat. § 103G.2242. Minn. Stat. § 103G.2242, subd. 4; H.F. 787, 1996 Leg., 79th Sess. (Minn. 1996), H.F. 787, 79th Sess., Regular Session, Laws 1996, Chapter 462 § 28. That the action or inaction of the local government unit was intended to determine the consequence as to wetlands issues is further made clear by the summary of the amendment to the wetlands statute, which summary was distributed to members of the Senate Committee on Agriculture and Rural Development. Memorandum from Greg Knopff, Senate Research, to Members of the S. Comm. On Agriculture and Rural Dev. 4 (March 29, 1995) (MAR Amicus A. at 1.) The description in that memorandum to the legislators on the committee was: "Section 9 [Time Limits.] specifies that a replacement plan is deemed approved if the LGU fails to act within the 60-day time limit." (*Id.* at 4.) The explicit statement that a replacement plan is approved based on inaction by the local government unit is precisely the circumstance in the case at bar. Neither the Senate

of H.F. 787, available at http://www.revisor.leg.state.mn.us/revisor/pages/search_status/status_detail.php?b=Senate&f=HF0787&ssn=0&y=1995. Implementing the statutory consequences of Minn. Stat. § 15.99 does not undo or interfere with environmental regulations, but rather acts as a catalyst for governmental agencies to make decisions about those regulations, including exceptions thereto. Furthermore, the application of Minn. Stat. § 15.99 to wetlands issues was specifically referred to the committee charged with governance of those issues, and after its review, the legislature deemed it appropriate to make Minn. Stat. § 15.99, including its timing and consequences, explicitly apply to wetlands issues per Minn. Stat. § 103G.2242. As such, the interference with certain types of government regulation which was not advocated by the bill's supporters was avoided by the manner in which Minn. Stat. §§ 15.99 and 103G.2242 were enacted and is not implicated by the District Court's finding in Appellant's favor.

Committee memorandum nor the eventual statute indicate that Minn. Stat. § 15.99's consequence provision is triggered depending on the implications to other agencies. The legislative branch of the State's government contemplated whether Minn. Stat. § 15.99 should apply to wetlands issues and deemed it appropriate. In drawing an unwarranted distinction regarding the consequence of Minn. Stat. § 15.99 based on the level of government to which the application was submitted, rather than the nature of the application, the Court of Appeals inappropriately ignored the consequences explicitly considered and intended by the legislature to apply to wetlands issues.

II. IN LIMITING THE CONSEQUENCES OF RESPONDENT'S INACTION, THE COURT OF APPEALS WEAKENED THE STATUTE'S EFFECTIVENESS AND THE PURPOSE OF MINN. STAT. § 15.99.

A. *The Purpose of Minn. Stat. § 15.99 Is Undermined by the Holding of the Court of Appeals.*

The intent of Minn. Stat. § 15.99 was to keep government agencies from taking too long in deciding permit issues. *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. Ct. App. 2004). The statute provides government agencies with the ability to avoid the consequences set forth in subdivision 2 of the statute; those government agencies can grant, deny, or seek an extension of time to make the determination. Minn. Stat. § 15.99, subd. 2. In other words, little is necessary for the government to protect itself from the automatic grant consequence of the statute; simply denying or seeking an extension accomplishes that protection. Minn. Stat.

§ 15.99 does not change the underlying law or regulation, it simply requires that certain government processes be completed in a reasonable period of time. However, Minn. Stat. § 15.99 may produce consequences that result from inaction, which consequences certain government agencies find undesirable; this undesirability underscores the very purpose of the statute – to provide impetus to comply with the statute’s deadlines that exist for the consumer’s benefit. In the instant case, Respondent did not even manage to pass over the low hurdle set by Minn. Stat. § 15.99 of simply making a decision within 60 days, but rather took approximately a year, at the end of which it mustered only a response that it would not accept an application due to a discrepancy in the manner in which the fill described was measured. *Breza v. City of Minnetrista*, 706 N.W.2d 512, 514 (Minn. Ct. App. 2005). Once it was time for the consequences of Respondent’s inaction to be brought to bear, Respondent sought to avoid a remedy of any consequence, suggesting that the consequence be an exemption for 400 square feet versus the 5,737 square feet for which Appellant applied. *Id.* The Court of Appeals’ decision only supports Respondent’s unwarranted delay and in so doing, hardly provides a disincentive for Respondent, and other similarly situated government agencies, to engage in protracted delay regarding a consumer’s/citizen’s request. The consequence which the statute provides and Appellant seeks is the type of result that is necessary to accomplish the statute’s purpose of providing incentive to government agencies to be responsive to the consumers. The decision of the Court

of Appeals dulls the intended consequence of Minn. Stat. § 15.99 and as such, contravenes the ability of the statute to satisfy its purpose.

B. This Case Presents Another in a Line of Instances of Local Government Units Inexplicably Failing to Comply with the Meager Statutory Requirements and Instead Attempting to Slink Around the Statute's Consequences.

Local government units have attempted to circumvent the requirements of timely response provided in Minn. Stat. § 15.99, subd. 2 through various creative means over the years. In *American Tower v. City of Grant*, the local government unit attempted to automatically create a blanket extension of the 60 day timing requirements of Minn. Stat. § 15.99 by inserting boilerplate language into the application form for conditional use permits. 636 N.W.2d 309, 311 (Minn. 2001). In the *American Tower* case, this Court wisely recognized the local government unit's antics as contrary to the statute's language and its intent. 636 N.W.2d at 312-13. In *Northern States Power Co. v. City of Mendota Heights*, the local government unit failed to make a determination as to a conditional use permit within the prescribed time period of Minn. Stat. § 15.99, subd. 2 and sought to avoid the result by enacting a franchise ordinance, as well as making a litany of other ineffective legal arguments. 646 N.W.2d 919, 921-24 (Minn. Ct. App. 2002). In *Northern States Power*, the appellate court appropriately recognized the clearly delineated requirements of Minn. Stat. § 15.99 and enforced its consequences while dismissing the flailing attempts of the local government unit to "end-around" the statute. *Id.* at 925-28. In *Demolition Landfill Services, LLC v. City of Duluth*, the city council

rejected a resolution within the time period set forth in Minn. Stat. § 15.99, but did not vote to deny the permit application until after the time period set forth in the statute. 609 N.W.2d 278 (Minn. Ct. App. 2000). Duluth's city council, while it could have taken the simple step of denying the application within the time period, instead delayed a simple "up or down" vote on the matter for another month and a half. *Id.* at 279-80. The Court of Appeals in *Demolition Landfill Services, LLC*, appropriately applied the statute's plain meaning and found that the city failed to timely act as required under the statute and held that therefore the permit application was approved by law. *Id.* at 282. In *Veit Co. v. Lake County*, the Court of Appeals held that an application was approved by operation of law where a local government unit held a hearing and voted to deny the application within the time period of the statute, but failed to give written reasons for its denial until after that time period. 707 N.W.2d 725 (Minn. Ct. App. 2006).

These cases exemplify the various ways in which government agencies seek to avoid the very obligations that Minn. Stat. § 15.99 forces them to perform in a timely manner. These cases also highlight the continuing failure by local government units to comply with the relatively simple requirements of Minn. Stat. § 15.99, which failure carries with it the consequences that the appellate courts of this State have appropriately and repeatedly enforced. This Court should not allow cities to create a gap in the strictures of Minn. Stat. § 15.99, as they have attempted to do in the myriad of ways described in the cited cases, which strictures exist for the

benefit of consumers. The Court of Appeals' decision only opens the door to cities which are attempting to circumvent the easily-complied-with requirements of Minn. Stat. § 15.99.

CONCLUSION

The decision of the Court of Appeals erred not only in its failure to apply the clear and unambiguous language of Minn. Stat. § 15.99, but also its failure to uphold the intent of the legislature underlying that statute. The consequences of Minn. Stat. § 15.99, which consequences the Court of Appeals decision failed to apply, were intended by the legislature in order to effectuate the statute's purpose and should not be muted in the case of Respondent's failure to respond to Appellant's application. The reach of Minn. Stat. § 15.99 was not only intended to be broad, but was specifically intended to govern wetlands issues based on the action or inaction of local governing units. This Court should continue to stand guard against the assault on the clear application of Minn. Stat. § 15.99, which assault has been repeatedly attempted by local governing units in prior cases.

For all these reasons, *Amicus Curiae* Minnesota Association of Realtors® asks that this Court reverse the decision of the Court of Appeals and find that the entirety of Appellant's exemption request is deemed approved by operation of law.

Respectfully Submitted,

THOMSEN & NYBECK, P.A.

Dated: 3/22/06

By 

Donald D. Smith, Atty No. 102349
Christopher P. Renz, Atty No. 313415
Attorneys for *Amicus Curiae* Minnesota
Association of Realtors®
3300 Edinborough Way, Suite 600
Edina, Minnesota 55435-5962
Telephone No. (952) 835-7000

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the typeface requirements of Minnesota Rules of Appellate Procedure 132.01, subdivisions 1 and 3, for a brief produced with a proportional font. The length of this brief is 469 lines and 4,212 words. This brief was prepared using WordPerfect version 12 software.

Respectfully Submitted,

THOMSEN & NYBECK, P.A.

Dated: 3/22/06

By 

Donald D. Smith, Atty No. 102349
Christopher P. Renz, Atty No. 313415
Attorneys for *Amicus Curiae* Minnesota
Association of Realtors®
3300 Edinborough Way, Suite 600
Edina, Minnesota 55435-5962
Telephone No. (952) 835-7000

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).