

NO. A04-2286

**State of Minnesota
In Supreme Court**

Richard Breza,

Appellant,

v.

City of Minnetrista,

Respondent.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

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LEGAL ISSUE

Minnesota law provides that a city's failure to deny a zoning application within the deadline established by Minn. Stat. § 15.99 results in approval of the request. Can a landowner force a city that has missed the statute's deadline to issue a zoning permit that the city is not statutorily authorized to issue and that violates state law?

INTRODUCTION

The League of Minnesota Cities has a voluntary membership of 830 out of 853 cities in Minnesota. The League represents the common interests of cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy, and insurance services.

The League has a public interest in this case as a representative of cities.¹ The League has a particular interest in clarifying that a landowner cannot use Minn. Stat. § 15.99 to force a city that has missed the statute's deadline to issue a zoning permit that the city is not statutorily authorized to issue and that violates state law.

In this case, Breza illegally filled 5,737 square feet of wetland in violation of the state Wetland Conservation Act. He subsequently filed an application with the City of Minnetrista seeking an exemption from the wetland requirements. Because the City failed to act on the application within the deadline established by Minn. Stat. § 15.99, it issued Breza an exemption for 400 square feet of fill — the maximum the City was authorized to approve under state law. Minn. R. 8420.0122, subp. 9(A)5.

Breza sued claiming that the City was required to issue an exemption for the entire 5,737 square feet of fill. Breza argued that if a city fails to comply with Minn. Stat. § 15.99, the city becomes authorized and compelled to approve *any* violation of state law by a landowner. The district court ruled in Breza's favor. The court of appeals reversed

¹ Pursuant to Minn. R. Civ. App. P. 129.03, the League certifies that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity made a monetary contribution to its preparation or submission.

holding that Minn. Stat. § 15.99 is a timing statute and does not grant cities unlimited authority to approve landowners' violations of state law. *Breza v. City of Minnetrista*, 706 N.W.2d 512 (Minn. Ct. App. 2005).

It is important to clarify at the outset that the Court's decision in this case will not affect the vast majority of zoning applications submitted to cities. This is because the vast majority of zoning applications only implicate local ordinances. For example, an application for a conditional use permit to operate a golf course is reviewed to determine whether it meets the city-established standards for the permit. In cases like this, it is clear that if a city fails to deny an application within the deadline established by Minn. Stat. § 15.99, the application is approved even if it violates city ordinances. By failing to act on a timely basis, the city loses authority to enforce its *own* ordinances.

In contrast, the issue before this Court involves the less common situation where a zoning application implicates not only local ordinances but state law as well. Again, if a city fails to act on an application within the statutory deadline, the application is approved even if it violates the city's *own* ordinances. But what is at issue in this case, is whether a city's failure to act on a timely basis will also strip the state of its authority to enforce state law.

Respondent's Brief demonstrates why the court of appeals' decision should be affirmed. The League concurs with Respondent's legal arguments, which will not be repeated here. Instead, this brief will focus on why it would be bad public policy to allow landowners to use Minn. Stat. § 15.99 to force cities to issue zoning permits that they are not statutorily authorized to issue and that violate state law. It would be bad public

policy to allow landowners to use Minn. Stat. § 15.99 to evade state law because it would usurp the state's power, frustrate the statute's purpose, and deprive Minnesota citizens of the protection of state law.

STATEMENT OF THE CASE AND FACTS

The League concurs with Respondent's statement of the case and facts.

ARGUMENT

I. It would be bad public policy to allow landowners to use Minn. Stat. § 15.99 to force cities to issue zoning permits that they are not statutorily authorized to issue and that violate state law. If landowners can use Minn. Stat. § 15.99 to evade state law, it would usurp the state's power, frustrate the statute's purpose, and deprive Minnesota citizens of the protection of state law.

A. The state's power would be usurped.

Appellant argues that Minn. Stat. § 15.99 gives cities unlimited authority to approve landowners' violations of state law simply because the statute does not expressly state that a city's mandated approval of a landowner's application must be consistent with state law. If Appellant's line of reasoning is correct, however, cities also have authority to approve landowners' violations of the state and federal constitutions and of federal law. But if this were the proper interpretation of the statute, the automatic-approval portion of the statute would be unconstitutional and preempted by federal law.

Instead, it is well settled that courts are required to interpret state statutes to be consistent with the state and federal constitutions if possible. *See, e.g.,* Minn. Stat. § 645.17; *State on Behalf of Forslund v. Bronson*, 305 N.W.2d 748, 751 (Minn. 1981) (citation omitted) (if an act is reasonably susceptible of two different constructions, one of which would render it constitutional and the other unconstitutional, the court must

adopt the one making it constitutional). Likewise, courts will interpret state statutes to be consistent with federal law if possible. *See, e.g., Martin v. City of Rochester*, 642 N.W.2d 1, 11 (Minn. 2002) (citations omitted) (noting that federal preemption of state law is generally disfavored).

Such a result is possible, if the automatic-approval language of Minn. Stat. § 15.99 is interpreted to require any mandated approval to be consistent with the state and federal constitutions and with federal law even though the language of the statute does not expressly require such consistency. Essentially, a court interpreting the statute's automatic-approval language is able to take "judicial notice" of the obvious and uncontested fact that a state and its political subdivisions do not have power to authorize violations of the state and federal constitutions or of federal law.

Likewise, a court interpreting the statute's automatic-approval language is able to take "judicial notice" of the equally obvious and uncontested fact that cities do not have power to approve violations of state law even though this fact is not expressly acknowledged in the statutory language. Indeed, it is well settled that cities are political subdivisions of the state and have only those powers the state has delegated to them. *See, e.g.,* Minn. Const. art XII, § 3; *Welsh v. City of Orono*, 355 N.W.2d 117, 120 (Minn. 1984); *State v. Minneapolis-St. Paul Metro. Airports Comm'n*, 248 Minn. 134, 143, 78 N.W.2d 722, 728 (Minn. 1956). The Minnesota Legislature certainly has not *expressly* delegated to cities and its other political subdivisions unlimited power to authorize landowners' violations of state law. And the claim that such a delegation of power can be *implied* by Minn. Stat. § 15.99 is unpersuasive.

There simply is no logical reason why the state would choose to give its political subdivisions the power to authorize violations of state law. The Minnesota Legislature has adopted state laws — like the Wetland Conservation Act — to protect the health, safety, and welfare of its citizens. Why then, would the state choose to allow the actions of its political subdivisions to determine whether these important state laws will be enforced uniformly throughout the state? Why would the state allow the health, safety, and welfare of its citizens to turn on the actions of its political subdivisions — actions that are beyond the state’s control?

Appellant and its amici make much of the legislative history in this case. But the legislative history only serves to confirm points that are not in dispute — that Minn. Stat. § 15.99 applies to wetland applications and that some legislators were aware that controversial land-use applications might be approved by the inaction of governmental agencies. What the legislative history does not do is supply *any* evidence whatsoever that any legislator considered the fact scenario present in this case or intended to give political subdivisions of the state unlimited power to authorize landowners’ violations of state law.

In fact, the legislative history from the senate committee that considered the bill that resulted in Minn. Stat. § 15.99 indicates that the legislators believed that each agency with an interest in a particular application would have a separate opportunity to act on the application. Following a discussion about wetland applications, Senator Wiener, the Senate sponsor of the bill, responded to a question about cooperation among agencies.

Senator Beckman: That’s the way it works, isn’t it? So if you have five state agencies interacting with each other, if they don’t get their act together the permit just gets issued.

Senator Wiener: Mr. Chair?

Chairman Metzen: Senator Wiener.

Senator Wiener: Yes.

Senator Beckman: And then who's responsible if there are five agencies?

Senator Wiener: Well – Mr. Chair?

Chairman Metzen: Senator Wiener.

Senator Wiener: Senator Beckman, the bill is to try to act – when you will go to your first agency, if there are other agencies that are going to touch this land use permit, that they will direct you where you need to go and to act simultaneously. **So one agency can't be responsible for giving the answers for all five agencies, but the intent is to get all agencies to act so when that person goes to desk one they may need to go to desk two, but they would be directed where they need to go, and then to get the answers within 60 days.**

Hearing of S.F. No. 647 Before the Senate Comm. On Governmental Operations and Veterans (Mar. 29, 1995) (Appellant's App. at AA 163-AA 164) (Emphasis added).

In short, it is bad public policy to give up the state's power to protect its people unless there has been an express statutory waiver of that power or there is clear, unambiguous evidence of the state's intent to make such a dramatic waiver of its power. Neither exists in this case. And the irrationality of the claim that Minn. Stat. § 15.99 contains such a waiver is further highlighted when the statute's purpose is considered.

B. The purpose of Minn. Stat. § 15.99 would be frustrated.

It is undisputed that the purpose of Minn. Stat. § 15.99 is to keep governmental agencies from taking too long to make certain land-use decisions. *Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293, 296 (Minn. Ct. App. 1998),

rev. denied (Minn. Oct. 20, 1998). As a result, it makes sense that the Legislature has chosen to impose the penalty of automatic-permit approval on any governmental agency that takes too long to decide. For example, if a city fails to deny a zoning permit within the deadline imposed by Minn. Stat. § 15.99, the permit is approved regardless of whether it complies with the city's zoning ordinances. Because the city failed to act on the application on a timely basis, it is punished by losing the authority to enforce its own ordinances.

In a case like this, however, where the state was not the permitting agency and could not ensure that the land-use application was processed in compliance with Minn. Stat. § 15.99, it does not make sense to punish the state by allowing a landowner to flagrantly evade state conservation laws. The statute cannot serve as an incentive for timely action unless the proper governmental agency receives the penalty. Political subdivisions of the state simply do not have the same interest as the state in ensuring that state laws are enforced. And in fact, there are likely situations where certain political subdivisions that disagree with certain state laws will have no interest whatsoever in ensuring that those state laws remain enforceable.

C. Minnesota citizens would be deprived of the protection of state law.

It would be bad public policy to punish the state in situations where it is not the governmental agency that failed to meet the deadline imposed by Minn. Stat. § 15.99. It would also be bad public policy to punish Minnesota citizens in these situations by depriving them of the protection of state law. In this case, the district court deprived Minnesota citizens of the protection provided by the Wetland Conservation Act. And if

the court of appeal's decision is not affirmed, Minnesota citizens will risk losing the protection of many other state laws.

Consider, for example, the hypothetical situation where a city receives an application for installation or repair of a septic system that does not comply with requirements mandated by the Minnesota Pollution Control Agency. *See, e.g.*, Minn. Stat. § 115.55; Minn. Rules Ch. 7080. If the city fails to act on the application within the deadline of Minn. Stat. § 15.99, the application will automatically be approved, and Minnesota citizens will lose the protection of state laws designed to protect them from the public-health hazards associated with the improper treatment and disposal of human sewage.

Or consider the hypothetical situation where a city receives an application for a variance from setback requirements in an area where the requirements are mandated by state shoreland regulations. *See, e.g.*, Minn. Stat. §§ 103F.221; 103F.211; Minn. Rules Ch. 6120. If the city fails to act on the application within the deadline of Minn. Stat. § 15.99, the application will automatically be approved, and Minnesota citizens will lose the protection of state laws designed to protect their water resources.

And finally, consider the hypothetical situation where a landowner submits an application to a city seeking to operate a feedlot that will violate state environmental laws. *See, e.g.*, Minn. Stat. § 116.07; Minn. Rules Ch. 7020. City staff correctly inform the landowner that the city does not have statutory authority to issue feedlot permits and

that the proper permitting agency is either the county or the Minnesota Pollution Control Agency (“MPCA”).²

City staff — believing that the landowner’s application has been properly disposed of — do not bring the feedlot application before the city council for a vote. Once the deadline of Minn. Stat. § 15.99³ has passed, however, the feedlot application will be automatically approved as submitted, and Minnesota citizens will lose the protection of state laws designed to protect them from the negative environmental effects caused by animal manure.

It is possible to attempt to distinguish the last hypothetical by arguing that because the city was not the proper permitting agency in the first place, it would not have authority to issue the permit under Minn. Stat. § 15.99. But closer analysis reveals that there really is no meaningful distinction between the legal issue in this last hypothetical and the legal issue in the case before this Court.

The hypothetical city clearly does not have statutory authority to issue a permit for a feedlot. Likewise, the City of Minnetrista clearly does not have statutory authority to issue a permit that authorizes the filling of 5,737 square feet of wetland. The legal issue in both situations is whether a landowner (whether it be the hypothetical landowner or

² Under state law, only the MPCA, and in certain circumstances, counties participating in the MPCA’s delegated county program, have authority to issue feedlot permits. *See* Minn. Stat. § 116.07, subd. 7; Minn. Rules 7020.1500-.1900.

³ Certain feedlot-permitting decisions are expressly subjected to the requirements of Minn. Stat. § 15.99. *See, e.g.*, Minn. Stat. § 116.07, subd. 7(b) (providing that “[f]or permit applications filed after October 1, 2001, section 15.99 applies to feedlot permits issued by the agency or a county pursuant to this subdivision”).

Appellant Breza) can use Minn. Stat. § 15.99 to force a city to issue a permit that it is not statutorily authorized to issue and that violates state law.

The Builders Association of the Twin Cities argues that there is a competing public policy at stake. *See Amicus Curiae* Brief for Builders Association of the Twin Cities at 2-8. Essentially, the Builders Association argues that the public interest in ensuring that developers and landowners can rely on the finality of mandated approvals under Minn. Stat. § 15.99 outweighs the public interest in ensuring that the state can protect the health, safety, and welfare of its citizens. In evaluating the Builders Association's argument, however, it is important to remember the limited nature of the court of appeal's holding in this case.

If the court of appeals' decision is affirmed, the only developers and landowners that can no longer rely on the finality of mandated approvals under Minn. Stat. § 15.99 are those that submit land-use applications to cities and other political subdivisions of the state that violate state law. Since we are all generally charged with knowledge of state law, it is hard to reasonably argue that it is bad public policy to require developers and landowners to accept the risks involved with voluntarily going forward with land-use activity with either actual or constructive knowledge that they are violating state law. It simply is not persuasive to argue that the public interest is best served by allowing developers and landowners to use Minn. Stat. § 15.99 to immunize their violations of state law.

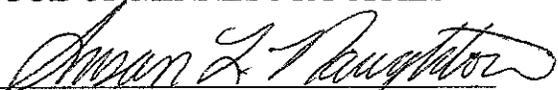
CONCLUSION

It would be bad public policy to allow landowners to use Minn. Stat. § 15.99 to force cities that miss the statute's deadline to issue zoning permits that they are not statutorily authorized to issue and that violate state law. If landowners can use Minn. Stat. § 15.99 to evade state law, it would usurp the state's power, frustrate the statute's purpose, and deprive Minnesota citizens of the protection of state law. For all of these reasons, the League of Minnesota Cities respectfully requests that the court of appeals' decision be affirmed.

Dated April 25, 2006

Respectfully submitted,

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