

**COPY**

NO. A05-1686  
STATE OF MINNESOTA  
IN SUPREME COURT

Hans Hagen Homes, Inc.,  
*Respondent,*

v.

City of Minnetrista,  
*Appellant.*

**BRIEF OF AMICUS CURIAE BUILDERS ASSOCIATION  
OF THE TWIN CITIES**

Gary A. Van Cleve (#156310)  
Jessica B. Rivas (#312897)  
LARKIN HOFFMAN DALY &  
LINDGREN, LTD.  
1500 Wells Fargo Plaza  
7900 Xerxes Avenue South  
Minneapolis, Minnesota 55431-1194

*Attorneys for Respondent Hans Hagen  
Homes, Inc.*

Miriam Elizabeth Stone (#245070)  
BUILDER ASSN. OF TWIN CITIES  
2960 Center Pointe Drive  
Roseville, Minnesota 55113-1182

*and*

Thomas H. Boyd (#0200517)  
Lloyd W. Grooms, (#0188694)  
WINTHROP & WEINSTINE, P.A.  
225 South Sixth Street  
Suite 3500  
Minneapolis, Minnesota 55402

*Attorneys for Amicus Curiae Builders  
Association of Twin Cities*

George C. Hoff (#45846)  
Justin L. Templin (#0305807)  
HOFF, BARRY & KOZAR, P.A.  
160 Flagship Corporate Drive  
775 Prairie Center Drive  
Eden Prairie, Minnesota 55344-7319

*Attorneys for Appellant City of Minnetrista*

Scott A. Smith (#174026)  
Courtney Ward-Reichard (#232324)  
Dana M. Lenahan (#353759)  
HALLELAND LEWIS NILAN & JOHNSON, P.A.  
600 U.S. Bank Plaza, 220 South Sixth Street  
Minneapolis, Minnesota 55402-4501

*Attorneys for Amicus Curiae Minnesota Center  
for Environmental Advocacy*

Susan L. Naughton (#259743)  
League of Minnesota Cities  
145 University Avenue West  
St. Paul, MN 55103-2044

*Attorney for Amicus Curiae League of  
Minnesota Cities*

**TABLE OF CONTENTS**

	<u>Page No.</u>
TABLE OF AUTHORITIES .....	ii
INTEREST OF AMICUS CURIAE .....	1
STATEMENT OF THE CASE AND FACTS.....	2
ARGUMENT .....	2
I.    THE COURT OF APPEALS APPLIED MINNESOTA STATUTES § 15.99 IN ACCORDANCE WITH WELL-SETTLED RULES OF STATUTORY CONSTRUCTION AND EXISTING CASE LAW .....	3
II.   A PLAIN LANGUAGE READING OF THE STATUTE REQUIRES THE COURT TO REVIEW THE STATUTE AS A WHOLE RATHER THAN ANALYZE EACH SUBDIVISION IN ISOLATION .....	4
III.  THE COURT SHOULD DECLINE TO IMPOSE A PREJUDICE STANDARD BECAUSE THE PROVISIONS OF SECTION 15.99 ARE MANDATORY AND THE ALLEGED POTENTIAL OF HARSH RESULTS CANNOT DIVERT THE COURT’S INTERPRETATION OF AN UNAMBIGUOUS STATUTE.....	6
A.   Section 15.99, subdivision 2 is mandatory and mandatory provisions require strict compliance, regardless of potentially harsh results .....	8
B.   Hypothetical scenarios of potentially harsh results do not support the imposition of a standard that is not supported by the plain language of the statute .....	9
C.   Shifting the burden to the applicant to show evidence of prejudice inappropriately relieves the government of their legislatively mandated responsibilities, adds to the burden of the applicants, and lacks any meaningful standard of review .....	11
IV.  POLICY ARGUMENTS FOR THE CREATION OF A PREJUDICE STANDARD SHOULD BE DIRECTED TO THE LEGISLATURE RATHER THAN TO THIS COURT .....	15
CONCLUSION.....	16

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Amaral v. St. Cloud Hosp.</i> , 598 N.W.2d 379 (Minn. 1999).....	3-4
<i>Am. Tower, L.P. v. City of Grant</i> , 636 N.W.2d 309 (Minn. 2001).....	3, 4, 11-12
<i>Broehm v. Mayo Clinic Rochester</i> , 690 N.W.2d 721 (Minn. 2005).....	10
<i>City of Minneapolis v. Village of Brooklyn Center</i> , 27 N.W.2d 563 (Minn. 1967).....	4
<i>City of St. Louis Park v. King</i> , 75 N.W.2d 487 (Minn. 1956).....	5
<i>Demolition Landfill Servs., LLC v. City of Duluth</i> , 609 N.W.2d 278 (Minn. Ct. App. 2000).....	8
<i>Dolder v. Griffin</i> , 323 N.W.2d 773 (Minn. 1982).....	8
<i>Glen Paul Court Neighborhood Ass'n v. Paster</i> , 437 N.W.2d 52 (Minn. 1989).....	5
<i>Hans Hagen v. City of Minnetrista</i> , 713 N.W.2d 916 (Minn. Ct. App. 2006).....	6
<i>Hibbing Educ. Ass'n v. Pub. Employment Relations Bd.</i> , 369 N.W.2d 527 (Minn. 1985).....	3
<i>ILHC of Eagan, LLC v. County of Dakota</i> , 693 N.W.2d 412 (Minn. 2005).....	5
<i>Invention Marking, Inc. v. Spannaus</i> , 279 N.W.2d 75 (Minn. 1979).....	15
<i>Kollodge v. F. &amp; L. Appliances, Inc.</i> , 360 N.W.2d 62 (1956) .....	5
<i>Martinco v. Hastings</i> , 122 N.W.2d 631 (Minn. 1963).....	15

<i>Merle's Constr. Co., Inc. v. Berg,</i> 442 N.W.2d 300 (Minn. 1989).....	8
<i>State v. Frisby,</i> 108 N.W.2d 769 (1961) .....	8
<i>State v. West,</i> 173 N.W.2d 468 (Minn. 1969).....	15
<i>Thiele v. Stich,</i> 425 N.W.2d 580 (Minn. 1988).....	10
<i>Veit Co. v. Lake County,</i> 707 N.W.2d 725 (Minn. Ct. App. 2006).....	8
<i>Weston v. McWilliams &amp; Assocs.,</i> 716 N.W.2d 634 (Minn. 2006).....	11

**Statutes and Regulations**

Minn. R. Civ. App. P. 129.03 .....	1
Minn. R. 4410.0100 .....	11
Minn. Stat. § 15.99.....	<i>passim</i>
Minn. Stat. § 514.011.....	8

## INTEREST OF AMICUS CURIAE

Amicus Curiae Builders Association of the Twin Cities (“BATC”) respectfully submits this brief pursuant to the Court’s order dated August 9, 2006.<sup>1</sup>

BATC is a not-for-profit, voluntary trade association established to represent the interests of building contractors, land developers, manufacturers, suppliers, and related business enterprises throughout the Minneapolis-St. Paul metropolitan region. BATC was founded in 1948 by a small group of builders, and has since expanded to include approximately 1,800 member companies representing builders, remodelers, developers, sub-contractors, suppliers, and other professionals who support the building industry.

BATC is dedicated to providing a diverse selection of quality and affordable housing to the Twin Cities area. Its members annually deliver nearly 20,000 housing units to the region. In support of its members, BATC focuses on the land development and infrastructure capacity in the Twin Cities region and educating association members, policy makers and the public about the field of real estate development, as well as urban development patterns, generally, and housing, specifically; and the public infrastructure and highly regulated programs and processes that are necessary to support residential development and housing affordability. BATC participates in these issues at the local, state, and federal government levels in drafting legislation, commenting on proposed

---

<sup>1</sup> BATC’s undersigned counsel certifies pursuant to Rule 129.03 of the Minnesota Rules of Civil Procedure that no counsel for any party authored this brief either in whole or in part, and that no one made a monetary contribution to the preparation or submission of this brief, other than BATC, its members and its counsel. Minn. R. Civ. App. P. 129.03.

## INTEREST OF AMICUS CURIAE

Amicus Curiae Builders Association of the Twin Cities (“BATC”) respectfully submits this brief pursuant to the Court’s order dated August 9, 2006.<sup>1</sup>

BATC is a not-for-profit, voluntary trade association established to represent the interests of building contractors, land developers, manufacturers, suppliers, and related business enterprises throughout the Minneapolis-St. Paul metropolitan region. BATC was founded in 1948 by a small group of builders, and has since expanded to include approximately 1,800 member companies representing builders, remodelers, developers, sub-contractors, suppliers, and other professionals who support the building industry.

BATC is dedicated to providing a diverse selection of quality and affordable housing to the Twin Cities area. Its members annually deliver nearly 20,000 housing units to the region. In support of its members, BATC focuses on the land development and infrastructure capacity in the Twin Cities region and educating association members, policy makers and the public about the field of real estate development, as well as urban development patterns, generally, and housing, specifically; and the public infrastructure and highly regulated programs and processes that are necessary to support residential development and housing affordability. BATC participates in these issues at the local, state, and federal government levels in drafting legislation, commenting on proposed

---

<sup>1</sup> BATC’s undersigned counsel certifies pursuant to Rule 129.03 of the Minnesota Rules of Civil Procedure that no counsel for any party authored this brief either in whole or in part, and that no one made a monetary contribution to the preparation or submission of this brief, other than BATC, its members and its counsel. Minn. R. Civ. App. P. 129.03.

regulations, establishing standards, and otherwise providing input to ensure sound public policy.

BATC's members operate in a highly regulated environment. In order to function efficiently and effectively, they rely on timely and responsive actions by cities in connection with land use applications. BATC's members are among those constituents whom the Legislature intended to benefit from the enactment of Minnesota Statutes section 15.99 which requires greater responsiveness and responsibility on the part of cities in their handling of land use applications.

#### **STATEMENT OF THE CASE AND FACTS**

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

#### **ARGUMENT**

BATC submits this amicus curiae brief in support of Respondent Hans Hagen Homes ("Hans Hagen"). The Court of Appeals correctly applied the plain language of the relevant subdivisions of Minnesota Statutes section 15.99 in affirming summary judgment and holding that Appellant City of Minnetrista ("City") did not comply with the statute because it failed to provide Hans Hagen with a written statement setting forth its reasons for denying Hans Hagen's application within the agreed upon extension of the legislatively mandated sixty-day deadline. The City urges this Court to abandon the clear language of the statute and to impose an additional burden upon applicants whereby the applicant would have to prove some type of actual prejudice before the relief mandated by the Legislature would be granted. The imposition of such a standard is not supported by the clear language of the statute. Further, that standard would erode section 15.99's

underlying policy of protecting applicants from cities that fail to comply with their statutorily imposed obligations. In addition, the proposed standard would effectively shift the burden from cities to applicants in direct contradiction of the express terms of the statute. For all of these reasons, this Court should affirm the decision of the Court of Appeals.

**I. THE COURT OF APPEALS APPLIED MINNESOTA STATUTES § 15.99 IN ACCORDANCE WITH WELL-SETTLED RULES OF STATUTORY CONSTRUCTION AND EXISTING CASE LAW.**

Minnesota Statutes section 15.99 requires that, when a multimember governing body denies a request, it must both state, in writing, the reasons for the denial, and “the written statement must be provided to the applicant upon adoption.” Minn. Stat. § 15.99, subd. 2(c) (2004). The City urges the Court to overlook the express and unambiguous requirement to provide the written notice to Hans Hagen as the applicant, and instead focuses solely and exclusively on the requirement to formally deny the request. The City’s position is inconsistent with a plain language reading of the statute as well as the extensive case law interpreting and applying the statutes multiple requirements. The statute requires more than denial at a public meeting.

Interpreting a statute is a question of law that the Supreme Court reviews de novo. *Hibbing Educ. Ass’n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985). When interpreting a statute, a court must first determine whether the statute’s language, on its face, is ambiguous. *See Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). “A statute is only ambiguous when the language therein is subject to more than one reasonable interpretation.” *Amaral v. St. Cloud Hosp.*, 598

N.W.2d 379, 384 (Minn. 1999). Where the Legislature's intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and the Court must apply the statute's plain meaning. *Am. Tower*, 636 N.W.2d at 312. The Court shall not use artificial reasoning to find ambiguity where none exists. *City of Minneapolis v. Village of Brooklyn Center*, 27 N.W.2d 563, 565 (Minn. 1967).

Minnesota Statute section 15.99 is not ambiguous. Subdivision 2(c) of the statute requires decision making bodies to provide written notice of the denial and the reasons for that denial to the applicant. It is undisputed that the City failed to provide a written statement to the applicant during the time period within which the City had to comply with the requirements of Minnesota Statutes section 15.99. Therefore, under the plain language reading of the statute, Hans Hagen's application was automatically approved.

**II. A PLAIN LANGUAGE READING OF THE STATUTE REQUIRES THE COURT TO REVIEW THE STATUTE AS A WHOLE RATHER THAN ANALYZE EACH SUBDIVISION IN ISOLATION.**

The City argues that, because subdivision 2(c) does not contain an express penalty clause, the City's failure to follow the requirements of that subdivision does not result in any type of penalty. *Appellant's Brief* at 10. According to the City, the objective of the statute is accomplished in subdivision 2(a) and, therefore, the provisions in subdivision 2(c) function as general instructions to agencies that lack any consequences. *Id.* This argument is contrary to the way in which courts have interpreted multi-section statutes generally, as well as the interpretation that has been consistently applied to this particular statute.

While subdivision 2(c) does not contain an independent penalty clause, the subdivision cannot be considered in a vacuum. A statute is to be construed as a whole so as to harmonize and give effect to all its parts. *City of St. Louis Park v. King*, 75 N.W.2d 487, 493 (Minn. 1956). A plain meaning interpretation of a statute may require a reviewing court to read an entire act as a whole so that the plain meaning of the provision can be ascertained from the full context of the act. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (court required to “read a particular provision in context with other provisions of the same statute in order to determine the meaning of the particular provision”); *Glen Paul Court Neighborhood Ass’n v. Paster*, 437 N.W.2d 52, 56 (Minn. 1989) (recognizing sections of statute must be read together because arrangement of sections may provide plain meaning); *Kollodge v. F. & L. Appliances, Inc.*, 360 N.W.2d 62, 64 (1956) (stating that particular provision of statute cannot be read out of context).

The clear language of section 15.99 mandates that the City’s failure to properly deny a land use application within the permitted timeframe shall result in automatic approval of the land use application. The statute imposes several requirements, all of which must occur for a “proper denial.” The City is obligated to (1) make specific findings, (2) prepare written findings, and (3) present the written findings to the applicant within the mandated timeframe. Because the City failed to timely provide written findings setting forth its reasons for denying Hans Hagen’s application, the City did not comply with all of the requirements imposed by the Legislature in section 15.99.

Therefore, based upon the plain language of the statute, the application was automatically approved.

**III. THE COURT SHOULD DECLINE TO IMPOSE A PREJUDICE STANDARD BECAUSE THE PROVISIONS OF SECTION 15.99 ARE MANDATORY AND THE ALLEGED POTENTIAL OF HARSH RESULTS CANNOT DIVERT THE COURT'S INTERPRETATION OF AN UNAMBIGUOUS STATUTE.**

The City and the League of Minnesota Cities (“League”) both urge this Court to impose a burden upon applicants to not only demonstrate that the City failed to comply with the statute, but to also establish they suffered actual prejudice by the government’s failure to strictly comply with the requirements of section 15.99. *See Appellant Brief* at 14-20; *Brief of League of Minnesota Cities* at 3-5. The City and the League argue that the imposition of this “actual prejudice” standard by the Court is appropriate because a literal application of the statute may have harsh results. *Id.* This argument should be rejected.

The language of section 15.99 is mandatory and the fear of potentially harsh results stemming from these statutory requirements cannot justify the imposition of a standard that is not supported by the Legislature’s plain language and clear purposes. As the Court of Appeals noted, “when a statutory provision is clear on its face and consistent with the manifest purpose of the legislature, courts do not subject the statute to further analysis.” *Hans Hagen v. City of Minnetrista*, 713 N.W.2d 916, 923 (Minn. Ct. App. 2006).

Both the City and the League fail to recognize that, from a policy perspective, the proposed “prejudice” standard adds an additional burden on applicants and excuses cities

of their legislatively mandated obligations to be responsive and responsible in their handling and treatment of the land use applications to which section 159.99 are plainly intended to apply. This is in direct conflict with the intended policy underlying the statute - imposing consequences on cities that fail to be responsive. The proposed exception swallows the unqualified rule and the legislative purpose underlying the rule.

Further, in addition to relieving cities of the burden to act responsively and responsibly, the proposed standard would increase the burden and uncertainty imposed on applicants regarding the eventual outcome of their applications. Moreover, the proposed “actual prejudice” standard lacks any meaningful standard of review. Ultimate resolution of these applicators would require litigation between applicants and cities over whether there has been sufficient prejudice. The City’s desired re-writing of the statute would require courts to decide, on a case by case basis, whether applicants have sustained their burden to establish actual prejudice.

BATC urges this Court to recognize that the Legislature has already decided that an applicant who does not receive prompt and appropriate action on its application is prejudiced because the city’s failure to act will always threaten to comprise the completion of a given project or development in a timely and costly effective manner. Thus, a judicially imposed standard for proving some additional prejudice beyond the prejudice the Legislature sought to prevent and remedy would be wholly inappropriate.

A. Section 15.99, subdivision 2 is mandatory and mandatory provisions require strict compliance, regardless of potentially harsh results.

Minnesota courts interpreting and applying this statute have uniformly held that the provisions of section 15.99, subd. 2 are mandatory. *See Veit Co. v. Lake County*, 707 N.W.2d 725, 730 (Minn. Ct. App. 2006), *review denied* (Minn. April 18, 2006) (determining the requirements of section 15.99, subdivision 2(c) as adopted by 2003 Legislature are mandatory); *Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278, 281-282 (Minn. Ct. App. 2000), *review denied* (Minn. July 25, 2000) (determining requirement of subdivision 2 to state written reasons at time of denial is mandatory). The decision by the Court of Appeals in this case was wholly consistent with these previous decisions.

Minnesota courts have consistently required strict compliance with mandatory language in statutes even if the result may be harsh. When the provisions of a statute are mandatory, strict compliance is required. *State v. Frisby*, 108 N.W.2d 769, 773 (1961). The mechanics' lien statute provides an excellent example. *See* Minn. Stat. § 514.011, subd. 2 (requiring contractors and suppliers to provide pre-lien notice within 45 days of first providing materials). Courts have repeatedly held this statutory language to be mandatory language which requires strict compliance even though the results are harsh. *Merle's Constr. Co., Inc. v. Berg*, 442 N.W.2d 300, 302 (Minn. 1989) (requiring strict compliance with pre-lien requirements because "[t]he pre-lien notice is no mere technicality"); *Dolder v. Griffin*, 323 N.W.2d 773, 780 (Minn. 1982) (noting in

mechanic's lien context that statutes determining whether a lien attaches to dwelling must be strictly construed even if they are liberally construed after lien has been created).

The provisions of section 15.99 are mandatory. Consistent with Minnesota law, strict compliance is mandated. The Court must decline the invitation to impose a prejudice standard upon a statute with mandatory timing and notice requirements that are clear on its face.

- B. Hypothetical scenarios of potentially harsh results do not support the imposition of a standard that is not supported by the plain language of the statute.

The City, the League and the Minnesota Center for Environmental Advocacy ("MCEA") all present hypothetical possibilities that *could* someday be before the Court to argue that the Court should intervene because the Court of Appeals' interpretation *could* have harsh results.

For example, MCEA presents a doomsday picture of what may happen if this Court upholds the Court of Appeals' interpretation of the statute. *See MCEA Brief* at 20 ("the Court of Appeals' decision, if allowed to stand, will work harm on many levels"). By presenting a number of hypothetical "worst case scenarios" under which the literal application of the statute could result in a harsh result, MCEA urges the Court to adopt a particular interpretation of the statute. There are several flaws with MCEA's position.

Because the issues raised by MCEA were not raised in the lower court, and because they are hypothetical situations, the MCEA's parade of horrors cannot appropriately be considered by this Court. Generally, a reviewing court should not consider issues that were neither considered in the district court nor adequately briefed on

appeal. *Broehm v. Mayo Clinic Rochester*, 690 N.W.2d 721, 728 (Minn. 2005) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988)). MCEA's broad concerns about the possibility of harm do not reflect upon the current matter before the Court, but rather are a series of hypothetical situations that the MCEA urges the Court to avoid.<sup>2</sup>

Furthermore, the Legislature has already provided protection against the type of disaster scenario that is presented by MCEA. Minnesota Statutes section 15.99 requires that the sixty day decision-making period be tolled if the decision is subject to compliance with other laws, including, but not limited to, environmental review. *See* Minn. Stat. § 15.99, subd. 3(d) ("The time limit in subdivision 2 is extended if a state statute, federal law, or court order requires a process to occur before the agency acts on the request, and the time periods prescribed in the state statute, federal law, or court order make it impossible to act on the request within 60 days. In cases described in this paragraph, the deadline is extended to 60 days after completion of the last process required in the applicable statute, law, or order.").

MCEA's arguments are misdirected in this case. The type of environmental review that MCEA claims will be overlooked by the granting of automatic approval of Hans Hagen's application is not the type of environmental review that would customarily take place at this point in the development process. Hans Hagen's application included a

---

<sup>2</sup> It is worth noting that MCEA spends a considerable amount of time addressing the application of Minnesota Statutes section 15.99 on a wetland exemption application. One cannot help but wonder whether MCEA's concerns would be more appropriately directed to the Court's consideration of the case of *Richard Breza v. City of Minnetrista*, App. Ct. No. A04-2286, scheduled to be heard by the Minnesota Supreme Court in October 2006. BATC would urge the Court to carefully separate the issues raised here from those raised in other separate and distinct situations.

request for re-zoning and an amendment to the City's Comprehensive Plan. Environmental review, in the form of an environmental assessment worksheet ("EAW") or environmental impact statement ("EIS") need not be initiated upon an action for rezoning or an application for an amendment to a comprehensive plan.<sup>3</sup> Contrary to the picture presented by the City and MCEA, the approval of Hans Hagen's application in this case will not preclude environmental review if it is deemed to be necessary.

This Court has repeatedly refused to adopt a particular standard notwithstanding the alleged potential of harsh results, and the Court should likewise reject such a standard here. *See, e.g., Weston v. McWilliams & Assocs.*, 716 N.W.2d 634, 644 (Minn. 2006) (holding principles of equity and justice did not preclude reading of unambiguous statute because "prejudice is the natural consequence of the statute of repose that the legislature has chosen to enact").

- C. Shifting the burden to the applicant to show evidence of prejudice inappropriately relieves the government of their legislatively mandated responsibilities, adds to the burden of the applicants, and lacks any meaningful standard of review.

It is undisputed that the underlying purpose of Minnesota Statutes section 15.99 is to force municipalities and other agencies to fulfill certain obligations in a timely manner and to provide applicants with a number of "procedural safeguards." *Am. Tower*, 636

---

<sup>3</sup> The development thresholds for projects requiring mandatory environmental review can be found at Minnesota Rules chapter 4400. The Rules are clear that a "project" for purposes of environmental review, means "a governmental action, the results of which would cause *physical manipulation* of the environment, directly or indirectly. The determination of whether a project requires environmental documents shall be made by reference to a *physical activity* to be undertaken and not to the governmental process for approving the project." Minn. Rules 4410.0200 (emphasis added).

N.W.2d at 312, 313. These procedural safeguards were enacted and imposed by the Legislature on all cities to ensure that applicants are provided with adequate and timely notice of the municipalities' decisions relating to their applications. The actual prejudice standard advocated by the City and its supporters would undermine the legislative purpose, and result in both harm and a harsh result for applicants who, under the law, are entitled to rely on these safeguards.

As with Hans Hagen, most applicants typically have a great deal at stake with their zoning applications and much of that risk is tied to the timing of the project. Furthermore, where applications are denied, applicants rely upon the City's specific findings to determine their future course of action with regard to the development of their property. Section 15.99 has been a source certainty and stability in the business of residential construction. Timely government responsiveness to an application is one of the few ways a property owner can manage risk and economic consideration.

Further, as noted, the statute places the full burden upon the city to approve or deny an application within 60 days and, in the case of a denial, provide the applicant with written findings within the same 60 days time period. The Legislature's clear intent behind the procedural requirements was to place a burden upon the municipalities to respond in a timely manner. The Legislature placed no responsibility upon the applicants to show actual prejudice and this Court should not impose such a standard. Shifting the burden to an applicant to show evidence of prejudice would impermissibly relieve cities of their burden and responsibility, and impose a standard upon the applicants that was not intended by the Legislature.

Ironically, the City and the League are asking the Court to impose a double standard. Applicants must provide their requests for action in writing in order to be considered for action by a municipality; verbal requests are insufficient. It is only reasonable that a similar written requirement be imposed upon the governmental bodies that implement the zoning controls and guide future use of an owner's property. Indeed, the Legislature has considered this issue and concluded that cities should be held to the same standard as applicants by imposing such formal written requirements under section 15.99.

The City argues that a requirement of actual prejudice is a "better policy" in this case based upon the City's duty to protect citizenry from unhealthy variances which could be caused by an "administrative slip of the pen." *See Appellant's Brief* at 18 (*citing* Randall, J. concurring opinion). However, this statute was enacted to *protect the applicants*, not the municipalities. Indeed, the Legislature intends to impose consequences on cities who fail to be responsive and responsible in their handling of land use applications. Specifically, the Legislature placed a duty upon the City to ensure it follows the requisite procedure. Rather than creating an exception, an approval more in line with the Legislature's intent would be for the City to implement effective controls and monitoring systems to ensure against inadvertent or unintended approvals. This would be particularly advisable for the City which has repeatedly failed to meet its obligation under section 15.99. *See Respondent's Brief* at 21-22 and 36.

Finally, the proposed actual prejudice standard lacks any meaningful standard of review and would require applicants to engage in extensive and expensive litigation over

the issue of whether sufficient prejudice has occurred. Real estate development is a highly regulated field. BATC's members must operate within this environment. Cities and developers alike are required to comply with a multitude of federal, state and local regulations. These regulations impose deadlines and corresponding consequences for the failure to follow the deadlines. For example, if an applicant fails to submit a land use application prior to a specific date, the application cannot be properly noticed and a public hearing cannot be held. If a state agency fails to provide public comments during an official comment period of environmental review, that agency's input will not be included. In exchange for the complex set of restrictions and requirements found in all levels of regulation, both cities and developers should be able to rely on the certainty of the process. The City is asking this Court to remove this certainty and replace it with a highly litigious setting whereby applicants would have to expend extensive resources and undergo substantial delay to prove that they have suffered actual prejudices rising to a level deserving of relief. The Legislature intended for applicants to receive this relief without additional action, delay, expense or litigation. BATC urges this Court to carefully consider the impact of a new standard upon the applicants, and apply a plain language reading of the statute. By affirming the decision of the Court of Appeals, the Court will ensure that the procedural requirements of section 15.99 continue to provide predictability and clear direction to applicants and cities alike.

#### IV. POLICY ARGUMENTS FOR THE CREATION OF A PREJUDICE STANDARD SHOULD BE DIRECTED TO THE LEGISLATURE RATHER THAN TO THIS COURT.

The repeated theme of the arguments provided by City, the League, and the MCEA throughout this dispute center around the fact that the City and its supporters feel as though the application of the statute yields an unfair result. They urge the Court to re-write the clear language of the statute so that the result is different than what the statute plainly requires. This argument is directed at the improper branch of government.

If there is to be a change to a statute, it must come from the Legislature. *Martinco v. Hastings*, 122 N.W.2d 631, 638 (Minn. 1963). As the parties in this case have acknowledged, the Legislature has taken the opportunity to revise section 15.99 on more than one occasion.<sup>4</sup> To the extent that the City, the League, and the MCEA believe that a change is needed to the statute, their arguments should be directed to the Legislature, not the Court. Courts have recognized that the judiciary “may not sit as a super-legislature to judge the wisdom or the desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along bright lines.” *Invention Marking, Inc. v. Spannaus*, 279 N.W.2d 75, 82 (Minn. 1979); *see also State v. West*, 173 N.W.2d 468, 474 (Minn. 1969) (holding it is not for courts to make, amend or change statutory law, but only to apply it, and any revision of statute should be left to legislature).

By and through the legislative process, the various stakeholders, including the cities and BATC’s members, have and will continue to be able to set forth their positions

---

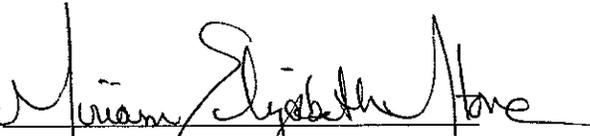
<sup>4</sup> The legislative history of section 15.99 reveals that the statute was amended in both 1996 and 2003.

and advocate possible amendment that might be made to section 15.99. The Legislature, not the courts, is the appropriate venue in which to continue any further debate over the imposition of a "prejudice" standard.

CONCLUSION

For the above-stated reasons, BATC respectfully requests the Court to affirm the Court of Appeals' decision.

Dated: October 2, 2006

By:   
Miriam Elizabeth Stone, #245070  
BUILDER ASSN. OF TWIN CITIES  
2960 Center Pointe Drive  
Roseville, Minnesota 55113-1182

and

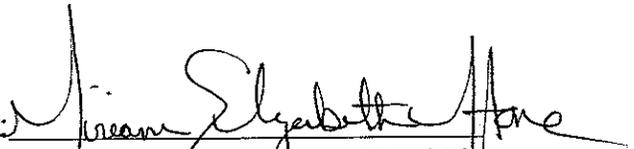
By:   
Thomas H. Boyd, #0200517  
Lloyd W. Grooms, #0188694  
WINTHROP & WEINSTINE, P.A.  
225 South Sixth Street  
Suite 3500  
Minneapolis, Minnesota 55402  
Tel: (612) 604-6400  
Fax: (612) 604-6800

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

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a Brief produced with a proportional 13-point font. The length of this Brief is 4,179 words. Amicus Curiae Builders Association of the Twin Cities' Brief was prepared using Microsoft Word 2000.

Dated: October 2, 2006

By:   
Miriam Elizabeth Stone, #245070  
BUILDER ASSN. OF TWIN CITIES  
2960 Center Pointe Drive  
Roseville, Minnesota 55113-1182

And

By:   
Thomas H. Boyd, #0200517  
Lloyd W. Grooms, #0188694  
WINTHROP & WEINSTINE, P.A.  
225 South Sixth Street  
Suite 3500  
Minneapolis, Minnesota 55402  
Tel: (612) 604-6400  
Fax: (612) 604-6800

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