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State of Minnesota

In Supreme Court

Hans Hagen Homes, Inc.,

Respondent,

v.

City of Minnetrista,

Appellant.

REPLY BRIEF OF APPELLANT CITY OF MINNETRISTA

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INTRODUCTION

Respondent's lengthy brief in this matter seeks to distract this Court from the real question at issue via misdirection and *non sequitor* assertions. This case is not about whether Hans Hagen Homes, Inc. ("Hagen Homes") had a proper opportunity to present its proposal to the City. It did, at length and in full. This case is not about the interpretation of an ambiguous statute, requiring complicated interpretation and blending of statutory sections. Rather, it should be a straight-forward reading of a clear, unambiguous statute. It is not about whether the development proposal is a good one for the City. That matter was decided at the municipal level and was never challenged by the Respondent. This case is about whether a developer should be granted a default approval when the City made a timely and rational decision regarding the application on the record in the presence of the developer's representative and made its written findings of the same available to the public, but did not provide them directly to the applicant until nine days after the deadline for decision. Nothing in Minn. Stat. § 15.99 or any previous case would require such default approval. Even if this Court were to reject the straight-forward reading of the statute in favor of the Court of Appeals' and Respondent's more convoluted reasoning, it should adopt a prejudice standard to prevent default approval of an application rationally and timely found to be harmful to the public good where the City has not violated any of the central tenets of Minn. Stat. § 15.99 and the developer is unharmed by the minor oversight.

The Court of Appeals' decision in this matter should be reversed.

ARGUMENT AND AUTHORITIES

A. **Minn. Stat. § 15.99 cannot compel approval of an application when the City, acting within the required timeframe, denied the application on rational and factually-supported written findings and the applicant had actual notice of that denial.**

This case turns on the various requirements of Minn. Stat. § 15.99, subd. 2, which state the following in relevant part:

> **Deadline for response.** (a) Except as otherwise provided in this section, section 462.358, subdivision 3b, or chapter 505, and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems, or expansion of the metropolitan urban service area for a permit, license, or other governmental approval of an action. *Failure of an agency to deny a request within 60 days is approval of the request.* If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.
>
> ...
>
> (c) Except as provided in paragraph (b), if an agency, other than a multimember governing body, denies the request, it must state in writing the reasons for the denial at the time that it denies the request. If a multimember governing body denies a request, it must state the reasons for denial on the record and provide the applicant in writing a statement of the reasons for the denial. If the written statement is not adopted at the same time as the denial, it must be adopted at the next meeting following the denial of the request but before the expiration of the time allowed for making a decision under this section. The written statement must be consistent with the reasons stated in the record at the time of the denial. *The written statement must be provided to the applicant upon adoption.*

(emphasis added). As these sections and consistent Minnesota case law make clear, Minn. Stat. § 15.99 is a timing statute, the purpose of which is to keep government agencies – including municipal governments – from "taking too long to decide." Manco of Fairmont, Inc. v. Town Bd. of Rockdell Township, 583 N.W.2d 293, 296 (Minn. Ct.

App. 1998). Minn. Stat. § 15.99 is intended to insure that a land use application does not languish at city hall, bogging down the property owner in bureaucratic uncertainty.

That uncertainty did not occur in this case. The City did not take too long to decide. Hagen Homes does not dispute that the City made a timely decision and that the decision was rational and supported by the record. Hagen Homes does not dispute that the written findings as adopted match those stated on the record while a Hagen Homes representative was present at the meeting. See Respondent's Brief, p. 2, n. 1. Further, Hagen Homes conceded at the District Court and at the Court of Appeals that it did not suffer any prejudice as a result of requesting and receiving late written confirmation of what it already knew had occurred.

In its brief to this Court, Hagen Homes complains that it had no notice of the meeting at which the written findings for denial were actually adopted and therefore suffered some deprivation of due process. See Respondent's Brief, p. 14, n. 3 and 43. That contention strains credulity. First, there is no dispute that the written findings adopted on October 18 are consistent with the stated findings from October 4 and Hagen Homes never claimed those findings were arbitrary or capricious. Second, Minn. Stat. § 15.99 explicitly states that where written findings are not adopted at the meeting at which a decision is made, they must be adopted at the next public meeting, and prior to the deadline. See Minn. Stat. § 15.99, subd. 2(c). The City did so here. No more notice than that is necessary. Third, Hagen Homes had already availed itself of the opportunity to speak regarding its application (as noted in its brief, Hagen Homes made a lengthy presentation). The adoption of written findings at the subsequent meeting did not, and

needed not, involve another public hearing. Hagen Homes would not have been granted another opportunity to present its case in any event. No due process or any other violation of Hagen Homes' rights has occurred.[1]

Despite all this, Respondent asks that the courts employ the steepest possible penalty – automatic approval of an application in the face of the City's rational and timely denial. The Court of Appeals' decision in this matter should be reversed because it fails to recognize that Minn. Stat. § 15.99 does not require so radical an outcome.

The Respondent's argument and the Court of Appeals' conclusion in this case was that the statute's various provisions have an "interdependent functioning of the subdivisions." See Hans Hagen Homes, Inc. v. City of Minnetrista, 713 N.W.2d 916, 921 (Minn. Ct. App. 2006). No such convoluted reasoning is necessary – or, indeed, sensible – in this matter. The statute has a plain meaning. But instead of simply reading the statute's provisions, the Court of Appeals sought to determine an "integrated plain meaning" from context. Id. at 920. In doing so, the Court of Appeals lost sight of the statute's point – to make sure that land use decisions are timely. This Court need only read the clear text of the statute to reach a logical result which accomplishes the statute's goal and gives meaning to all of its provisions.

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[1] It is ironic that a party attempting to use Minn. Stat. § 15.99 to obtain default approval of an application (which it does not dispute the city had a factual and rational reason to reject) would complain about due process. Hagen Homes, in its zeal to rush the dense development of a largely rural area, apparently has no qualms about trampling the due process rights of residents and property owners who attended hearings to voice concerns about the proposal, and had those concerns factored into a timely and rational decision, only to have all of that rendered meaningless and those legitimate concerns cast aside because of a clerical error.

As noted, the entire objective of Minn. Stat. § 15.99 as enacted in 1995 is to insure prompt action on land use applications and to prescribe a harsh penalty for failing to take such action. That objective is accomplished in subdivision 2(a). That subdivision provides that a decision on an application must be made within sixty days, that a denial must be accompanied by written reasons explaining it, and that failure to do either results in automatic approval of the request. Subdivision 2(a) establishes the requirements of timely action and defines the penalty for not meeting them. It is the only section of the statute that contains the default approval penalty.

In contrast, the later-enacted provisions of subdivision 2(c) function as general instructions to agencies, defining how the writing requirement set up by subdivision 2(a) is to be handled by different types of decision makers and at what meeting and when a denial must be adopted. It states that a later adopted written statement must be consistent with reasons given at the time of denial and that the written statement is to be provided to the applicant. Notably, subdivision 2(c) *does not provide a penalty* and, though it repeats language from subdivision 2(a) regarding the writing requirement, it does not repeat the prescribed penalty provision language.

Other Minnesota statutes serve as compelling examples that when the legislature intends a penalty to cover an entire section or chapter, it knows how to clearly and explicitly state as much. The Government Data Practices Act contains specific provisions for civil as well as criminal penalties for violations. See Minn. Stat. §§ 13.08 and 13.09. The "Civil remedies" section states: "Notwithstanding section 466.03, a political subdivision, responsible authority, statewide system, or state agency *which*

violates any provision of this chapter is liable to a person or representative of a decedent who suffers any damage as a result of the violation...." Minn. Stat. § 13.08. That section makes abundantly clear that a violation of any part of the chapter triggers the penalty provision. Examples of similar statutory language abound in Minnesota law. See, e.g, Minn. Stat. § 46.045, subd. 2a (f) (stating penalties for violations of specific subdivisions within the chapter); Minn. Stat. § 72A.12 (setting separate penalties for violations of separate subdivisions within the same overall statutory scheme); Minn. Stat. § 204C.06, subd. 3 and 4 (stating different penalties for different subdivisions within the same statute). No similar language appears in Minn. Stat. § 15.99. Instead, the penalty provision is contained in a single subdivision. Not coincidentally, that is the same subdivision which requires prompt action on land use applications and timely adoption of written findings supporting the decision. These are the core requirements of the statute.

Rather than simply accepting the statute as written, the Court of Appeals and Respondents in this matter assume an ambiguity that is not present and attempt to "interpret" the statute. In so doing, they violate bedrock premises of statutory construction: (a) the first step in statutory construction is to simply read the statute; and (b) the court cannot supply that which the legislature omits. See Gomon v. Northland Family Physicians, Ltd., 645 N.W.2d 413, 416 (Minn. 2002); In Re Raynolds' Estate, 18 N.W.2d 238, 240 (Minn. 1945). The language of Minn. Stat. § 15.99 makes clear that the harsh penalty set forth in subdivision 2(a) applies to violations of the requirements of that subdivision. Had the legislature intended an overarching penalty, it would have written

the statute that way. Instead, the legislature drafted the subdivisions as functionally independent and this Court should abide that manifest intention.

The Court of Appeals did not. Instead, the Court of Appeals in this matter "construed" the statute because it concluded that if the subdivision 2(a) penalty did not bleed through to subdivision 2(c), the latter subsection would carry no penalty. However, as its decision in Manco of Fairmont, Inc., 583 N.W.2d at 295, made abundantly clear, statutes may have some portions that carry a penalty and others that do not. Without an explicit consequence stated in the statute, the courts should not imply one. See Northland Country Club v. Comm'r of Taxation, 241 N.W.2d 806, 809 (Minn. 1976). That the legislature enacted subdivision 2(c) without a penalty provision five years after Manco of Fairmont, Inc. was decided is strongly indicative of its intent to reserve the ultimate sanction, full usurpation of agency authority, for those cases involving the most egregious violations of the sixty-day rule.

The Court of Appeals also offers an analysis based on Minn. Stat. § 15.99, subd. 3(c). Minn. Stat. § 15.99, subd. 3(c) states: "An agency response meets the 60-day time limit if the agency can document that the response was sent within 60 days of receipt of the written request." The Court suggests that if the City's formulation of the statute as containing functionally independent components, subdivision 3(c) would be rendered superfluous and have no effect. The Court of Appeals misreads both the language and the obvious intent of that provision. The language of subdivision 3(c), given its natural meaning, simply states a method by which an agency can prove that it met the time

requirement: via documentation that the response was sent within sixty days.[2] Second, the provision's location in the statute is telling. It is placed not among the core provisions describing the requirement of timely action or establishing the penalty for failure to act, but among secondary provisions which could be aptly described as housekeeping issues: describing when an application is deemed complete, how agencies acting on the same application interact, circumstances in which the time period is or may be extended, and how extensions may be requested. See Minn. Stat. § 15.99, subd. 3(a), (b), (d), (e), and (f). Subdivision 3(c), read naturally and in its context among other secondary items, has no bearing on the interaction between the sections of subdivision 2. Regardless how subdivision 2 is read or interpreted, subdivision 3(c) would retain its intended meaning.

The Court of Appeals' reasoning in this matter does not allow for the possibility that a statute can have a plain, overriding and consistent objective – that agencies do not "take too long to decide" on land use applications – and still have provisions that provide independent directives, requirements, and consequences in aid of that objective. The Court of Appeals stated that its recent decision in Veit Co. v. Lake County, 707 N.W.2d 725 (Minn. Ct. App. 2006), also required its "hybrid application of subdivisions 2(a) and 2(c)." Hagen Homes, 713 N.W.2d at 922. Respondent notes Veit Co. argues that it presents "precisely the issue" here. Respondent's Brief, p. 20. In reality, Veit is entirely inapposite. That case involved an agency's failure *even to issue any written statement* of

[2] Subdivision 3(c) simply employs a sort of "mailbox rule" for proof of timely action.

the reasons for its denial within the sixty-day period. Veit Co., 707 N.W.2d at 730. That failure is a clear violation of subdivision 2(a) requiring invocation of that subdivision's penalty provision, regardless what the provisions of subdivision 2(c) may or may not separately require.[3] Subdivision 2(c), which is the entire point of contention in this matter, has nothing to do with the situation or the decision in Veit Co.

Moreover, the Court of Appeals and Respondent ignore statutory presumptions which are to guide courts in ascertaining clear legislative intent. Minn. Stat. § 645.17. One particular presumption is directly applicable in this case: Minn. Stat. § 645.17(5). It states: "The legislature intends to favor the public interest as against any private interest." Id. The plain meaning of the statute in this matter comports with that presumption. Here, the City determined, in a timely manner, that it was in the interest of its citizenry to deny the application for rational and factually-supported reasons related to conflict with the City's Comprehensive Guide Plan[4] as well as traffic concerns and other issues.

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[3] As further support for its argument, Respondent repeatedly cites Demolition Landfill Services, LLC v. City of Duluth, 609 N.W.2d 278 (Minn. Ct. App. 2000) rev. denied (Minn. July 25, 2000). Nothing in that case supports Respondent. In fact, Demolition Landfill stands for the proposition that the requirements which are now part of subdivision 2(a) of the statute are mandatory. The City does not now and has never disputed that fact. The affirmation of the Demolition Landfill court that the provisions of subdivision 2(a) are mandatory does not extend to any other, later adopted sections. The addition of subdivision 2(c) by the legislature *after* Demolition Landfill was decided is an indication that its requirements – stated separately from subdivision 2(a) and without its penalty provision – were and are meant to be directory.

[4] The overarching legislative nature and importance of comprehensive planning would be difficult to overstate. The legislature has found that "municipalities are faced with mounting problems in providing the means of guiding future development of land so as to insure a safer, more pleasant and more economical environment" and gave cities the power and duty to adopt Comprehensive Plans to address development problems. Minn.

Automatic approval in the face of that timely determination serves no one but Hagen Homes. A technical failure to follow the guidelines of subdivision 2(c) does not require imposition of the default approval required in the event of violations of subdivision 2(a). The Court of Appeals' decision should be reversed.

B. **This Court should adopt a prejudice standard to prevent the default approval under Minn. Stat. § 15.99 of land use applications found, in a timely manner and in writing, to be harmful to the public health, safety, and welfare.**

Regardless whether this Court accepts the straight-forward construction of the statute, the Court of Appeals' decision should be reversed. Both the majority opinion and the concurrence in this matter recognized the "risk of public injustice" and stated that a prejudice standard should be adopted in order to temper that risk. Such a standard would apply only in narrow circumstances. Where an agency fails to act on a complete application subject to its jurisdiction within the time period, or fails to support a denial with written reasons within the time period (i.e. violates the specific requirements of Minn. Stat. § 15.99, subd. 2(a)), the application is approved by operation of law. Public policy considerations would not alter the outcome in such a case. However, before technical defects in compliance with other portions of the statute lead to the ultimate sanction of default approval, courts should consider whether those minor missteps resulted in any prejudice to the applicant.

Respondent, of course, takes the view that none of the concerns that led to the City's rational and factually-supported denial in this matter are as important as the

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Stat. § 462.351. It is these difficult and important legislative decisions that Hagen Homes is asking to be made by default under Minn. Stat. § 15.99.

protection of its own windfall. But the facts of the case at bar[5] are a model of why a reasonable prejudice standard makes sense. Hagen Homes applied for rezoning and a Comprehensive Plan amendment for a huge residential development in mostly rural Minnetrista.[6] The City considered the application, including an oral presentation, and made a rational and factually-supported decision to deny it. A Hagen Homes representative heard the decision and the reasons supporting it first-hand and Hagen Homes never challenged the factual or legal basis for them. The written statement of those reasons, adopted at the next public meeting as permitted in Minn. Stat. § 15.99, subd. 2(c), was available to the public at City Hall and online via the City's website. All of this occurred well-within the timeline for a decision. Then, just days after the deadline for a decision had passed, Hagen Homes requested that the City provide it written confirmation of the denial. Though it suffered no prejudice and had no quarrel with the City's rationale for denial, Hagen Homes commenced a lawsuit. A prejudice standard would preclude a Minn. Stat. § 15.99 claim for default approval under such circumstances.

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[5] Respondent cites a variety of cases which talk about the courts' willingness to impose the harsh remedy prescribed in the statute. Respondent's Brief, p. 31. But what respondent ignores is that none of those cases deal with a factual scenario like this one. None of those cases involve an applicant attempting to get default approval where the government *actually made* a factually-supported and rational decision, with written findings, prior to the deadline. The existence or paucity of prejudice was not at issue in any of those prior cases.

[6] The proposed development would contain approximately 303 units – or nearly 1,000 new residents –in a community of approximately 5,250.

As noted in the City's initial brief, this Court has previously considered adoption of a reasonable prejudice standard in Terrell v. State Farm Ins. Co., 346 N.W.2d 149 (Minn. 1984). This Court in that case declined, however, because specific statutory language prevented it. But here, the "provide" portion of the statute, tacked on the end of Minn. Stat. § 15.99, subd. 2(c), contains no express statutory directive for approval based on the failure to comply. Under Terrell, this Court should consider public policy objectives and uphold the City's rational denial because no prejudice resulted from the tardy written notice of what the applicant already knew – that its application had been denied. The Terrell decision indicates this Court would have adopted a prejudice standard in that case if the option had been available to it, holding that "better policy favors such a showing." 346 N.W.2d at 152.[7]

"Better policy" certainly supports a prejudice requirement in this case. Absent a prejudice standard, an "administrative slip of the pen" leads to approval of any and every land use application, no matter how inappropriate for the location or damaging to the environment or otherwise injurious to the public good. Hagen Homes, Inc., 713 N.W.2d at 924 (Randall, J. concurring).[8] The majority, too, recognized that a "prejudice standard

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[7] Such a standard would not have run afoul of the Separation of Powers in Terrell, and it would not do so here. As noted, Minn. Stat. § 15.99, subd. 2(c) does not include a penalty. To require a showing of prejudice before violations of subd. 2(c) lead to automatic approval comports with the legislative intent to both maintain municipal authority to protect the welfare of its citizens and to insure that land use application decisions are made promptly.

[8] Respondent asserts that its proposal "cannot be compared to the worst-case scenarios raised by the special concurrence." Respondent's Brief, p. 32, n.5. Of course a housing development is not the same as a toxic site in a residential area. However, the City concluded based on facts in the record of this matter that the proposal was injurious to the

would temper the risk of public injustice." Id. at 923. Where the Court of Appeals erred is by deciding it could not impose a prejudice requirement because it found that Minn. Stat. § 15.99, subd. 2(c) contained the same harsh penalty as subdivision 2(a). As noted herein and in the City's initial brief, nothing in Minn. Stat. § 15.99 subd. 2(c) states that automatic approval is the consequence of not providing the otherwise duly-adopted written findings directly to the applicant. Contrary to Respondent's assertion, the reasoning of Terrell leads to the adoption of a prejudice standard in this matter. Whether simply the result of flawed analysis or reached out of deference to this Court's review as the higher authority, the Court of Appeals' decision in this matter should be reversed and the City's rational decision in this matter – reached, documented in writing, and known to the applicant well-within the timeframe for a decision – should stand.[9]

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public good and Hagen Homes never challenged that decision. Moreover, Respondent's reference to Lake Elmo v. Metropolitan Council, 685 N.W.2d 1 (Minn. 2004) is baffling. That case involved a dispute over whether regional or local planning activities were paramount. This matter involves a developer attempting to override a rational government decision, even though it admits it suffered no prejudice, simply because it did not receive written confirmation of what it already knew. Lake Elmo plainly has no bearing on this case.

[9] Respondent attempts to use foreign caselaw to bolster its arguments. See Respondent's Brief, p. 38. However, as noted with the Minnesota cases, none of them deals specifically with a case like the one at bar. Here, there is no dispute that the City made a rational and factually-supported denial of the application, with written findings, and that Respondent knew about it, all within the deadline for a decision. See, e.g., Rodier v. Twp. of Ridley, 597 A.2d 279, 281 (Pa. Commw. Ct. 1991) (noting that applicant received no notice, *either personally or in writing*, until after the statutory deadline); Mobile City Planning Comm'n v. S. Region Dev., Inc., 628 So.2d 739, 740 (Ala. Civ. App. 1993) (ordering automatic approval, but in a case where government gave no reasons for its denial of an application within the timeframe). As for the Brooker & Cole article cited by Respondent on page 39 of its Brief, it offers what amounts to a survey of other state's automatic approval statutes, the judicial decisions under them, and offers guidance for avoiding "un-wise land use decisions that may adversely affect neighboring

This Court should hold that, absent a demonstration of prejudice to the applicant, a technical defect unrelated to the core purpose of the statute (i.e. timely decision-making) should not result in default approval of applications which an agency has timely decided would be injurious to the public.[10]

CONCLUSION

Minn. Stat. § 15.99 is a clear statute which contains both mandatory and directory provisions. The penalty for a violation of subd. 2(a) does not bleed through to a violation of subd. 2(c). Had the legislature intended that outcome, it certainly could have written the statute that way. Even if this Court does not choose this clear statutory path to resolution of the issue presented in this matter, this Court should adopt a prejudice standard to avoid default approval of land use applications where the City has acted in a timely and rational way with full knowledge of the applicant, but failed to provide written confirmation of that action until after the deadline. The Court of Appeals decision in this matter should be reversed.

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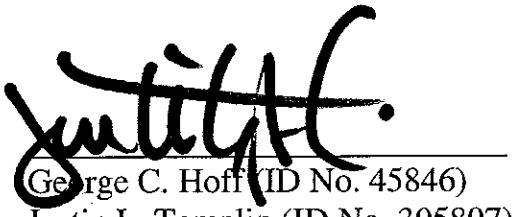
landowners and the community." Brooker, Gregory G. & Cole, Karen R., Automatic Approval Statutes: Escape Hatches and Pitfalls, 29 Urb. Law. 439 (Summer, 1997). Other states' statutes and other courts' rationale may be interesting reading and have some relevance to an attempt to divine a fair rule, but this Court should not decide an important question of state-wide policy, i.e. whether automatic approval should result even though the City made a timely and rational decision with written findings with the applicant's actual knowledge prior to the deadline, based on what other courts have said in relation to similar statutes in various factual scenarios.

[10] Respondent submits that legislative history demonstrates that lawmakers were aware of potentially harsh consequences when they enacted Minn. Stat. § 15.99 in 1995. That statement is true in terms of the original enactment of the statute, but it is misleading, at best, with reference to Subdivision 2(c), which was added eight years later. None of the lengthy quotes offered by Respondent has any bearing on what the legislature meant to accomplish when it enacted Subdivision 2(c) in 2003.

Dated this 6th day of October, 2006.



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