

NO. A05-1686

State of Minnesota
In Supreme Court

Hans Hagen Homes, Inc.,

Respondent,

v.

City of Minnetrista,

Appellant.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

I. WHETHER RESPONDENT'S WRITTEN ZONING REQUEST WAS AUTOMATICALLY APPROVED UNDER MINN. STAT. § 15.99, "THE 60-DAY RULE," WHEN APPELLANT ORALLY DENIED THE REQUEST WITHIN THE TIME DEADLINE, BUT (A) FAILED AT THE TIME OF DENIAL TO STATE WRITTEN REASONS FOR THE DENIAL; (B) FAILED AT THE TIME OF DENIAL TO PROVIDE RESPONDENT WRITTEN REASONS FOR THE DENIAL; AND (C) FAILED WITHIN THE TIME DEADLINE TO SEND RESPONDENT LATER-ADOPTED WRITTEN REASONS FOR THE DENIAL?

Court of appeals held: In the affirmative. Affirming the district court's grant of summary judgment to respondent, the court of appeals applied well-established rules of statutory construction to conclude that, "The plain meaning of subdivision 2 [of Minn. Stat. § 15.99] is that the agency must provide the applicant a written statement of the reasons for denying an application within the sixty-day statutory deadline, or an authorized extension, and that failing to do so results in approval of the application as a matter of law." *Hans Hagen Homes, Inc. v. City of Minnetrista*, 713 N.W.2d 916, 922 (Minn. App. 2006).

Apposite authorities:

Minn. Stat. § 15.99, subs. 2(a), 2(c), 3(c) (2004) (60-Day Rule).

Minn. Stat. §§ 645.16 and 645.17(2) (2004) (Construction of laws).

Demolition Landfill Services, LLC v. City of Duluth, 609 N.W.2d 278 (Minn. App. 2000), *review denied* (Minn. July 25, 2000) (requirement of Section 15.99, subd. 2, to state written reasons at time of denial of written request is mandatory).

Veit Co. v. Lake County, 707 N.W.2d 725 (Minn. App. 2006), *review denied* (Minn. Apr. 18, 2006) (requirements of Section 15.99, subd. 2(c), adopted by 2003 legislature, allowing multi-member governing body to adopt written reasons for denial "at next meeting following the denial of the request," but stating that written reasons "must" (a) be adopted before expiration of the time deadline; (b) be consistent with reasons stated previously on the record; and (c) be provided to applicant upon adoption, are mandatory).

Concept Properties, LLP v. City of Minnetrista, 694 N.W.2d 804 (Minn. App. 2005), *review denied* (Minn. July 19, 2005) (Section 15.99, subd. 3(f), stating that time deadline met "if agency can document that the response was sent within 60 days of receipt of the written request," clarifies that agency complies with 60-Day Rule if agency can document decision made *and sent* by deadline).

Minnesota Towers, Inc., et al. v. City of Duluth, 2005 WL 1593044 (D. Minn., July 1, 2005) (requirements of Section 15.99, subd. 2(c) that agency adopt written reasons for denial and provide upon adoption not met when city attorney provided written notice of denial within time deadline, but city failed to adopt and provide written reasons for denial until after time deadline).

II. WHETHER A PREJUDICE STANDARD MAY BE READ BY JUDICIAL FIAT INTO THE 60-DAY RULE—A STATE STATUTE THAT HAS BEEN UNIFORMLY RECOGNIZED BY THE COURTS OF THIS STATE TO BE UNAMBIGUOUS?

Court of appeals held: In the negative. The court of appeals, in *obiter dictum*, observed with respect to automatic approval that “the penalty is harsh” and that “a prejudice requirement would temper the risk of public injustice,” but the court concluded that, “When a statute’s language is plain, the function of the courts is to enforce it according to its terms. Minn. Stat. § 645.16. We therefore affirm the district court’s summary judgment on the petition for mandamus.” 713 N.W.2d at 923. Similarly, a concurring opinion recognized that, “The court today correctly interprets the express language of Minn. Stat. § 15.99 ...,” and that the decision “is in accordance with the plain language of section 15.99,” but nevertheless “strongly suggest[ed] that with section 15.99, some showing of actual prejudice should be determinative of the issue before us.” *Id.* at 923, 926.

Apposite authorities:

Minn. Stat. § 645.16 (Construction of laws).

Terrell v. State Farm Ins. Co., 346 N.W.2d 149 (Minn. 1984) (refusing to read actual prejudice requirement by judicial fiat into statute plainly allowing insurer to include reporting requirement in policy time-barring claims unless notice of accident given by insured within six months of accident).

STATEMENT OF THE CASE

Respondent Hans Hagen Homes, Inc. (“Hans Hagen”) commenced this action against appellant City of Minnetrista (the “City”) in Hennepin County District Court on March 29, 2005, alleging that the City had committed a clear violation of its statutory duties under Minn. Stat. § 15.99 (the “60-Day Rule”) in processing Hans Hagen’s written zoning application. R. App. 59. Hans Hagen sought from the district court issuance of a writ of mandamus directing that the City approve Hans Hagen’s application for (a) a Comprehensive Plan amendment to extend the Metropolitan Urban Services Area (“MUSA”), and (b) rezoning of certain undeveloped land within the City for a master-planned residential neighborhood of 303 detached, single-family homes and 47 acres of park and open space. App. 59-60.

On May 16, 2005, Hans Hagen and the City filed and served cross-motions for summary judgment, which motions were argued to the district court (Hon. Francis J. Connolly) on June 6, 2005. R. App. 12. Hans Hagen argued that the City violated two mandatory requirements under Minn. Stat. § 15.99 when: (1) the City failed to provide Hans Hagen with a written statement of reasons for the denial within the time deadline; and (2) the City adopted a written statement of reasons that was not “consistent with the reasons stated in the record at the time of the denial.” *Id.*, subd. 2(c). Because of these violations, Hans Hagen argued that Minn. Stat. § 15.99 mandated automatic approval of Hans Hagen’s land use application in its entirety, including the approval of a concept plan that Hans Hagen submitted with its application. R. App. 21. The City argued on summary judgment that, while it admittedly did not provide Hans Hagen with a copy of

the City's written statement of reasons for the denial until after the statutorily-mandated time deadline, it nevertheless complied with the 60-Day Rule because it made the denial available at City Hall and on its website. *Id.*

The district court granted Hans Hagen's motion for summary judgment as to the 60-Day Rule violation and denied the City's.¹ The district court concluded as to the 60-Day Rule violation that,

Under the plain language of Minn. Stat. § 15.99 and clear precedent, the City violated Minn. Stat. § 15.99 by failing to provide a written statement to Hans Hagen by the November 30, 2004 deadline. The Court holds that the City's failure to comply with Minn. Stat. § 15.99 mandates automatic approval of Hans Hagen's application for rezoning and extension of the MUSA line.

R. App. 22. The "clear precedent" on which the district court relied was *Concept Properties, LLP v. City of Minnetrista*, 694 N.W.2d 804, 826 (Minn. App. 2005), and *Minnesota Towers, Inc., et al. v. City of Duluth*, 2005 WL 1593044 (D. Minn., July 1, 2005 (J. Frank)). R. App. 41-48. Both decisions considered whether an agency had timely denied a land use request based on when written reasons for the denial were adopted and sent to the applicant. In *Concept Properties*, the court of appeals concluded that the City of Minnetrista did not violate the 60-Day Rule when it mailed a copy of its decision of denial to the applicant on the very last day of the time deadline, because "it is

¹ The district court denied Hans Hagen's mandamus requests that (a) the after-the-fact written reasons given by the City were not consistent with the reasons stated in the record at the time of the denial; and (b) the concept plan submitted by Hans Hagen along with its zoning application must also be deemed approved on account of the untimely denial by the City. Neither of these aspects of the district court's ruling was challenged on appeal.

clear that the agency complies with the statute as long as the agency can document that it made a decision to deny the application *and sent* a decision by the deadline.” 694 N.W.2d at 826 (emphasis added). In *Minnesota Towers*, the United States District Court for the District of Minnesota concluded that the City of Duluth violated the 60-Day Rule because “the City Council’s oral reasoning on the record was not sufficient to comply fully with the [statutory] requirements ...” and the City Council’s adoption of a written resolution of denial “did not fall within the 60-day deadline” R. App. 45.

The district court below distinguished *Concept Properties*, stating, “Here, unlike *Concept Properties*, the City did not send a copy of the resolution by the November 30, 2004 deadline to Hans Hagen.” R. App. 21. The district court applied *Minnesota Towers*, stating, “In this case, as in *Minnesota Towers*, the City Council’s oral reasoning on the record is insufficient to comply fully with the requirements of Minn. Stat. § 15.99, subd. 2.” *Id.* Based on this reasoning, the district court ordered the City to approve Hans Hagen’s application, rezoning the property from Rural/Agriculture to R-4-PUD, and amending the City’s Comprehensive Plan to extend the MUSA line to serve the Subject Property. R. App. 12-13.

The City appealed the district court’s decision to the Minnesota Court of Appeals, which affirmed on May 16, 2006. R. App. 1. The court of appeals (Hon. Harriet Lansing) analyzed and read subdivisions 2(a), 2(c) and 3(c) of the statute in context with each other to determine whether the 60-Day Rule is ambiguous and whether the above-

cited subdivisions have an “integrated plain meaning.” R. App. 5-8.² The court concluded that the three subdivisions can be read together plainly and unambiguously to give effect to the entire statute. R. App. 8.

The plain meaning of subdivision 2 is that the agency must provide the applicant a written statement of the reasons for denying an application within the sixty-day statutory deadline, or an authorized extension, and that failing to do so results in approval of the application as a matter of law. Minn. Stat. § 645.16; *Ed Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn. 1995).

R. App. 7-8.

Notwithstanding its conclusion that the plain meaning of the 60-Day Rule compelled approval of Hans Hagen’s land use application, in *obiter dictum*, the court of appeals observed (a) that “the penalty is harsh,” and (b) that “a prejudice requirement would temper the risk of public injustice.” R. App. 8. The court was unwavering in its holding, however, recognizing that,

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 because without deference to clear statutory language, “legislators will have difficulty imparting a stable meaning to the statutes they enact.” *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879-80 (7th Cir. 2002) (recognizing that deference to plain meaning keeps branches of government in equilibrium and “preserve[s] language as an effective medium of communication from legislatures to courts”).

² “Determining the integrated plain meaning requires us to ‘read a particular provision in context with other provisions of the same statute in order to determine the meaning of the particular provision.’” 713 N.W.2d at 921 (quoting *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) (other citations omitted). R. App. 6.

Id. Accordingly, the court of appeals adhered to its role in construing and applying statutes and affirmed.

When a statute's language is plain, the function of the courts is to enforce it according to its terms, Minn. Stat. § 645.16. We therefore affirm the district court's summary judgment on the petition for mandamus.

Id. A lengthy special concurring opinion (Hon. R.A. Randall) similarly acknowledged that, "The court today correctly interprets the express language of Minn. Stat. § 15.99 (2004) ..." and that "[t]oday's finding is in accordance with the plain language of section 15.99 ...," but nevertheless "strongly suggest[ed] that with section 15.99, some showing of actual prejudice should be determinative of the issue before us." R. App. 8, 10.

On June 15, 2006, the City petitioned this court for further review, which was granted on July 19, 2006.

STATEMENT OF FACTS

Hans Hagen controls through purchase, option agreements, and planning agreements, property in the City; the property contains approximately 220 acres located south of State Highway 7, east of Highland Drive, and west of Oak Road (the "Subject Property"). R. App. 14. On May 18, 2004, Hans Hagen submitted a Comprehensive Plan amendment and rezoning application to the City for the Subject Property. R. App. 15. In its application, Hans Hagen specifically requested that the City rezone the Subject Property from Rural/Agriculture to R-4-PUD. Hans Hagen also requested that the MUSA line be adjusted to allow public services (municipal sewer and water) to extend to the Subject Property. *Id.*

Hans Hagen's application included a narrative explaining that Hans Hagen had originally in October 2003 submitted a rezoning and MUSA line extension request for 375 residential units, consisting of a mix of single family homes and townhomes. App. 11. Hans Hagen withdrew this original application "to permit additional time to revise the request and work with surrounding property owners." *Id.* The revised request submitted by Hans Hagen on May 18, 2004, scaled down the density of the original request by (a) omitting 37 acres of property north of Highway 7, allowing it to remain Rural Residential; (b) adding approximately 43 acres south of Highway 7; (c) reducing the residential units from 375 to 303; and (d) making all residential units detached single family, which provided "life-cycle" housing opportunities for everyone from first-time home buyers, to families, to empty nesters. *Id.*

Hans Hagen pointed out in its May 2004 application to the City the many justifications for granting the MUSA line adjustment and rezoning. App. 12-15. These justifications included in part:

1. The uniqueness of the site compared to other properties in the City on account of immediately adjacent municipal sewer and water available along Highway 7, which permitted efficient use of existing City infrastructure and took advantage of current unused sewer capacity in the regional system. App. 12.
2. The uniqueness of the site's location between Highway 7 and the Carver Park Preserve, which boundaries would "limit and define the extent of municipal sewer and water in this area of the City" and which "will not create a proliferation of similar requests in this area of the community." *Id.*
3. Changes that had taken place within the City since its 1998 Comprehensive Plan was adopted, including the extension of municipal sewer and water along Highway 7 and the City's need to

meet new housing density goals to satisfy the regional planning requirements of the Metropolitan (“Met”) Council. Hans Hagen pointed out that its proposal to create a residential neighborhood with a housing density of 3.0 units per acre would help the City meet its housing density goals with the Met Council. *Id.*

4. The consistency of Hans Hagen’s request with numerous express goals stated in the City’s 1998 Comprehensive Plan. Among the City’s stated goals highlighted by Hans Hagen were (a) preserving rural character, (b) providing a diversity of life-cycle housing and sense of community and (c) open space preservation and park development.
 - a. Hans Hagen observed that its proposal would preserve rural character by “permitting greater residential density in an area currently served by municipal utilities and adequate transportation facilities, which reduces development pressure in areas planned for long term rural/agricultural.” App. 13.
 - b. Hans Hagen pointed out that its plans to provide a mix of detached homes at a density of 3.0 units per acre provided for life-cycle housing and that its neighborhood concept of single family homes on smaller lots allowed units to be clustered in a smaller area, thus creating more open space for park, neighborhood and community gathering. *Id.*
 - c. Hans Hagen stated that its planned 47-acre park and open space area, along with a public trail through the site connecting the park and open space to the Carver Park Preserve, was consistent with the City’s stated goal of open space preservation and park development. *Id.*

Following receipt of Hans Hagen’s application, the City Planner in a letter of June 30, 2004, requested an extension of time under the 60-Day Rule in which to make a decision. R. App. 15. In a July 26, 2004 letter to the City Planner, Hans Hagen consented to a time deadline extension until November 30, 2004, to allow the City more time to make a decision on Hans Hagen’s application. App. 17.

The matter was scheduled to come before the City Council for public hearing and

final decision on October 4, 2004. The City Planner's report to the City Council in anticipation of this hearing described how Hans Hagen had revised its original 2003 request to reduce the number of residential units and to increase the amount of land included in the request. App. 19. The report also highlighted the amount of open space included in the plan and summarized Hans Hagen's justifications for the rezoning and MUSA line adjustment. App. 20-22. The City Planner pointed out to the City Council that while the Subject Property proposed by Hans Hagen for development was currently not guided for urban development under the City's 1998 Comprehensive Plan, "[t]he City Council must examine the development that has occurred since the adoption of the Comprehensive Plan, and determine if factors exist to consider allowing development of this property." App. 23.

The City Planner noted that in the interim between Hans Hagen's original application to the City in 2003 and its 2004 application,

the City and Metropolitan (Met) Council have entered into numerous discussions about the City's Comprehensive Plan. Resulting from these discussions is a Memo-Of-Understanding (MOU) that is currently being negotiated between the two parties. To review, the Met Council is concerned that developments since 1999 have not included enough units to fulfill the goals laid out in the sewer component of the Comprehensive Plan (which expected a minimum density of 2.2 units per acre in all urban subdivision). * * * Ultimately, the request from Hans Hagen Homes could be a component of an overall solution to the problem **provided the City of Minnetrista identifies this as an appropriate area to grow.**

Id. (emphasis in original).

The City Planner's report also summarized the City Planning Commission action

on the Hans Hagen proposal:

The lengthy review by the [Planning] Commission was a direct result of the on-going discussions between the City of Minnetrista and the Metropolitan (Met) Council. However, as the pressure to address density issues has apparently subsided, staff requested the Planning Commission conclude their review and provide the Council a recommendation based on the current Comprehensive Plan. After taking the applicants [sic] narrative and public hearing comments into account, the Commission recommend the City Council deny all requests.

App. 25.

On October 4, 2004, the City Council held a public hearing and made a final decision denying Hans Hagen's application. A representative of Hans Hagen was present at this meeting. App. 35. The meeting minutes report that the denial was "[b]ased on the findings of fact it is not in the Comprehensive Plan and further studies on transportation should be done." App. 32. The City did not adopt any written reasons in support of its denial on October 4, 2004, nor did it provide any written reasons to Hans Hagen.

The City neither indicated at the October 4 meeting, nor otherwise notified Hans Hagen that it planned to adopt written findings at the City Council's next meeting on October 18, 2004. R. App. 25. Following the October 4 meeting, Hans Hagen's Land Development Manager checked the City's website regularly for any further discussion on the Hans Hagen proposal. R. App 26. Contrary to its customary practice of having provided Hans Hagen with written notices prior to every other City Council meeting discussing Hans Hagen's application, the City never provided Hans Hagen with written notice that it would be addressing the application again at the October 18, 2004 meeting.

R. App. 27-33. Consequently, Hans Hagen was not present at the October 18 meeting and had no opportunity to be heard in connection with the City's written findings in support of its denial.

On October 18, 2004, the City Council adopted "Resolution 89-04 Denying a requested Comprehensive Plan amendment and rezoning on multiple properties along State Highway 7 for Hans Hagen Homes" (the "Resolution"). App. 50, 52-55. In contrast with the City Council's brief oral reasons given on the record at the October 4 meeting ("not in the Comprehensive Plan and further studies on transportation should be done"), the City enumerated eight written reasons for denial of Hans Hagen's written request—all but one of which relied on the proposal's inconsistency with the City's 1998 Comprehensive Plan, the amendment of which to provide for higher density was the subject of ongoing negotiations with and pressure from the Met Council. App. 53-55, 23, 25.

Following the October 18 meeting, the City did not provide Hans Hagen notice of its adoption of the written Resolution, or a copy of the Resolution by the agreed-upon extended deadline of November 30, 2004, under the 60-Day Rule. R. App. 16. Eventually, Hans Hagen became aware of the Resolution's existence and requested a copy from the City. R. App. 34. Pursuant to Hans Hagen's request, the City provided an unexecuted copy of the Resolution on or about December 9, 2004, seven weeks after the Resolution's adoption. R. App. 26. The City never provided a copy of the final executed and adopted written Resolution to Hans Hagen until after litigation commenced. *Id.*

ARGUMENT

This court should affirm the conclusions of the two lower courts that a timely denial of a written zoning request under the 60-Day Rule plainly and unambiguously requires the agency not only to make the denial decision before the time deadline, but also to (a) adopt written reasons for the denial, and (b) either provide or send these written reasons to the applicant before the time deadline. The plain language of the statute, rules of statutory construction, prior decisions applying Minnesota's 60-Day Rule and the statute's legislative history all compel the conclusion that the decisions of the district court and the court of appeals below were correct and must be affirmed.

This court should reject any invitation to impose by judicial fiat an *ad hoc* requirement that actual prejudice must be shown before a violation of the 60-Day Rule can be found. Such an imposition violates canons of statutory construction and the separation of powers. Furthermore, it disregards other provisions of the 60-Day Rule and the legislative history, both of which show that the legislature took into account the chimerical scenarios raised by the City and its *amicus* supporters. Moreover, almost all of the two dozen or more states that have similar time deadline statutes—the sole exceptions being those select few state decisions embraced by the City and its *amicus* supporter—enforce strictly the specific notification requirements in automatic approval statutes. Finally, any change to the plain dictates of Minnesota's 60-Day Rule must emanate from the legislature, not the courts.

I. THE STANDARD OF REVIEW OF THIS APPEAL IS *DE NOVO*.

While it has not been raised as an issue in this case, given this court's recent clarification of the proper use of mandamus in municipal zoning matters, Hans Hagen notes at the outset that enforcement of the 60-Day Rule through the remedy of mandamus is appropriate, because a claim under the 60-Day Rule concerns an agency's failure to perform a clearly-defined statutory duty. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 176-79 (Minn. 2006) (rejecting use of mandamus "to review the exercise of legislative discretion in municipal zoning matters ..." and confirming that, "mandamus may be appropriate ... [for] claims that a city failed to perform a clearly defined duty that is required by a statute or ordinance."); *Cf. Kramer v. Otter Tail County*, 647 N.W.2d 23, 27 (Minn. App. 2002) (holding writ of mandamus is appropriate remedy for violation of 60-Day Rule statute).

On cross-motions for summary judgment, the district court granted Hans Hagen's request for mandamus relief, requiring that the City automatically approve Hans Hagen's application under Minn. Stat. § 15.99. R. App. 12-13. An appellate court will reverse a trial court's order on an application for mandamus relief "only when there is no evidence reasonably tending to sustain the trial court's findings." *Coyle v. City of Delano*, 526 N.W.2d 205, 207 (Minn. App. 1995). Appellate review of a grant of mandamus relief is *de novo*. *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 493 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004) ("When the District Court's decision on a petition for writ of mandamus is based solely on a legal determination, this court reviews that decision *de novo*.").

The question before this court is simply whether Minn. Stat. § 15.99 means what it says, when it states in mandatory terms that a “written statement [of denial] *must* be provided to the applicant upon adoption” and that “[a]n agency response meets the 60-day limit if the agency can document that the response *was sent* within 60 days of receipt of the written request.” R. App. 36-37 (emphasis added). Addressing this question is a matter of statutory construction. Interpreting a statute is a question of law that this court reviews *de novo*. *Hibbing Educ. Ass’n v. Pub. Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985).

II. THE COURT OF APPEALS PROPERLY HELD THAT RESPONDENT’S ZONING APPLICATION WAS AUTOMATICALLY APPROVED UNDER MINN. STAT. § 15.99, BECAUSE APPELLANT FAILED TO STATE AND PROVIDE TO RESPONDENT WRITTEN REASONS FOR DENIAL AT THE TIME OF THE DENIAL, AND BECAUSE APPELLANT FAILED WITHIN THE EXTENDED TIME DEADLINE TO SEND RESPONDENT LATER-ADOPTED WRITTEN REASONS FOR THE DENIAL.

The operative provisions of Minn. Stat. § 15.99 at issue in this case are subdivisions 2(a), 2(c) and 3(c). Subdivision 2(a) mandates in part that “an agency must approve or deny within 60 days a written request relating to zoning, septic systems, or expansion of the [MUSA] ...,” and that “[f]ailure of an agency to deny a request within 60 days is approval of the request.” R. App. 36. Subdivision 2(a) further mandates that upon denial, “the agency must state in writing the reasons for the denial at the time that it denies the request.” *Id.*

Subdivision 2(c) mandates in part that if a multimember governing body denies a request, then it “must state the reasons for denial on the record and provide the applicant in writing a statement of the reasons for the denial.” *Id.* Subdivision 2(c) further

mandates that if the multimember governing body does not adopt a written statement of reasons at the same time as the denial, then “it must be adopted at the next meeting following the denial ... but before the expiration of the time allowed for making a decision under this section.” *Id.* Subdivision 2(c) mandates two further requirements of the written statement of reasons: that it “must be consistent with the reasons stated in the record at the time of the denial ...” and that it “must be provided to the applicant upon adoption.” *Id.*

Subdivision 3(c) provides that, “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.” R. App. 37.

It is undisputed that in this case, the City failed to provide Hans Hagen with any written statement of reasons for its denial within the agreed-upon extended time deadline under the 60-Day Rule. *See* Brief and Appendix of Appellant City of Minnetrista (“Appellant’s Brief”) at 9.³ As the following argument demonstrates, the City’s failure is a clear violation of the unambiguous, mandatory requirements of Minn. Stat. § 15.99.

³ The City obfuscates the facts by repeatedly and variously asserting that it adopted written findings and made them available online and at City Hall (Appellant’s Brief at 1, 2, 14), that Hans Hagen had “actual notice” of the City’s decision to deny because a Hans Hagen representative was at the October 4 meeting (*id.* at 2, 9, 15), and that the City’s only transgression was “that it did not provide in writing directly to Hagen Homes formal notice of what [it] indisputably already knew ...:” (*id.* at 9). The undisputed facts are that the City did not prepare a written statement of reasons and provide it to Hans Hagen as a result of the October 4 City Council meeting. Yet the City would have this court (mis)understand that written reasons for denial came out of the October 4 meeting that Hans Hagen did attend and of which Hans Hagen had “actual notice.” If this were true, then why did the City prepare an elaborate, detailed written statement of reasons for denial at its next meeting on

A. The Duties Under the 60-Day Rule that are Incumbent Upon an Agency in Timely Denying a Written Request are Plainly Evident from the Language of the Statute, its Subsequent Amendments and Cases Applying the Statute.

1. The 60-Day Rule requirements that an agency deny a written request relating to zoning within 60 days and provide simultaneous written reasons for denial have always been held to be mandatory.

In 1995 Minnesota joined approximately two dozen other states that have adopted “automatic approval” statutes for written requests relating to zoning and certain other specified approvals. Minnesota’s statute is commonly referred to as the 60-Day Rule because the basic time deadline established for making a decision on such requests is 60 days. 1995 Minn. Laws 248, art. 18 § 1, codified at Minn. Stat. § 15.99. The statute’s originally-adopted form stated the fundamental duty imposed upon an agency as follows:

Except as otherwise provided in this section . . . and notwithstanding any other law to the contrary, *an agency must approve or deny within 60 days* a written request relating to zoning, septic systems, or expansion of the metropolitan urban service area for a permit, license, or other governmental approval of an action. *Failure of an agency to deny a request within 60 days is approval of the request. If an agency denies a request within 60 days, it must state in*

October 18? While Hans Hagen was aware of the City’s one-liner, on-the-record justification for denial given on October 4 (“it is not in the Comprehensive Plan and further studies on transportation should be done”), it is undisputed that: (1) the City never provided Hans Hagen with any purportedly written reasons emanating from the October 4 meeting; (2) that the City never gave notice to Hans Hagen of the City’s intention to take up Hans Hagen’s proposal at its next meeting on October 18; (3) that the City never provided a draft of its detailed written reasons for denial before the October 18 meeting; (4) that the City’s absence of notice deprived Hans Hagen of any opportunity to appear at the October 18 meeting and speak to the proposed written reasons for denial; (5) that the City never provided Hans Hagen with the adopted written reasons for denial after the October 18 meeting; and (6) that Hans Hagen did not receive from the City the later-adopted written reasons for denial until it discovered their existence some weeks later, requested them from the City and received them seven weeks after their adoption.

writing the reasons for the denial at the time that it denies the request.

Minn. Stat. § 15.99, subd. 2 (1996) (emphasis added). The City is an “agency” within the meaning of the statute. Minn. Stat. § 15.99, subd. 1(b). Early on, it was recognized that the time deadline requirement for making a decision in subdivision 2 was mandatory, because the statute stated the agency’s duty of timely decision-making in mandatory terms and stated a consequence for failure to fulfill this duty: the agency “*must approve or deny within 60 days*” certain written requests and “[f]ailure of an agency to deny a request within 60 days *is approval of the request.*” *Id.* (emphasis added); *Manco of Fairmont, Inc. v. Town Board of Rock Dell Township*, 583 N.W.2d 293 (Minn. App. 1998) (“We conclude that Minn. Stat. § 15.99, subd. 2 is mandatory”).

Two years after *Manco*, the court of appeals concluded that the portion of subdivision 2 requiring written reasons for a denial at the time of denial was also mandatory. *Demolition Landfill Services, LLC, v. City of Duluth*, 609 N.W.2d 278, 281-82 (Minn. App.), *review denied* (Minn. Apr. 25, 2000) (emphasis added). In *Demolition Landfill*, a timely-brought city council resolution to grant a special use permit for a landfill failed to pass. At a later meeting after the 60-Day Rule deadline expired, the city council passed a resolution to deny the permit. *Id.* at 280. The court of appeals held that the failure to pass a timely-brought resolution to grant a written zoning request was not a denial of the request within the meaning of the 60 Day Rule. *Id.* at 281 (“[W]e cannot conclude that the council’s rejection of the resolution granting the permit equated to a denial of the permit application.”). The court further concluded that even if the failed

resolution to grant the request were deemed a denial, the 60-Day Rule was still violated because “it is undisputed that no written reasons were given ... when the council rejected the resolution granting the permit.” *Id.* The court stated its rationale for this conclusion as follows:

Subdivision 2, at issue here, states that the consequence of not denying a request within 60 days is automatic approval. Immediately following this stated consequence, the subdivision mandates simultaneous, written reasons for the denial. *Cf. R.A. Putnam & Assocs. v. City of Mendota Heights*, 510 N.W.2d 264, 267 (Minn. App. 1994) (“The requirement that contemporaneous findings be recorded prevents a city from offering after-the-fact justifications * * * unrelated to the actual reasons for the initial decision.” (quotation omitted)), *review denied* (Minn. Mar. 15, 1994). ***We conclude therefore, that simultaneous, written reasons for a denial are mandatory and not directory.***

Id. at 281-82 (emphasis added) (footnote omitted). In the footnote to the above-quoted statement, the court rejected the city’s argument that the city was entitled to a reasonable amount of time after the denial to prepare written reasons for denial:

Notably, in *Manco* this court stated in dicta that subdivision 2 is mandatory because it contains consequences for noncompliance with the time-limit requirement. *Manco*, 583 N.W.2d at 295. We reject the city’s assertion that under *R.A. Putnam*, the city was not required to prepare simultaneous, written reasons for its denial and was entitled to a reasonable amount of time to prepare them. In *R.A. Putnam*, this court considered whether a zoning decision was arbitrary and concluded that if a record is prepared within a reasonable time after a zoning decision, arbitrariness should not be presumed. 510 N.W.2d at 267. ***Here, we are not deciding whether the city acted arbitrarily. Instead, we are applying the unambiguous language of Minn. Stat. § 15.99, subd. 2.***

Id., n. 1 (emphasis added). Accordingly, the court in *Demolition Landfill* recognized the unambiguous and mandatory duties owed by an agency to effect a legally-valid denial: there must be a timely-adopted resolution of denial, together with simultaneous written reasons for the denial. Neither a failed resolution to grant the written zoning request, nor later-adopted written reasons meets the “unambiguous language of Minn. Stat. § 15.99, subd. 2.”

2. The 2003 amendments to the 60-Day Rule similarly impose mandatory duties on an agency timely to prepare and provide written reasons for a denial on a strict time basis.

Demolition Landfill laid the groundwork for amendments to the 60-Day Rule that the legislature adopted in 2003, which legislatively overturned *Demolition Landfill's* direct holding and codified circumstances under which later-adopted written reasons for a denial could meet the demands of the statute for timely decision-making. The legislature amended subdivision 2 by designating the existing subdivision as clause (a) and added new clauses (b) and (c). 2003 Minn. Laws ch. 41, § 1. Clause (b) directly overturned *Demolition Landfill's* holding that a failed vote to approve a written zoning request does not qualify as a denial under the 60-Day Rule:

- (b) When a vote on a resolution or properly made motion to approve a request fails for any reason, the failure shall constitute a denial of the request provided that those voting against the motion state on the record the reasons why they oppose the request. A denial of a request because of a failure to approve a resolution or motion does not preclude an immediate submission of a same or similar request.

Id., codified as Minn. Stat. § 15.99, subd. 2(b). From and after the effective date of this amendment, a failed resolution for approval of a written zoning request may be deemed a

denial under the 60-Day Rule, provided the other requirements of subdivision 2(b) are met.

Clause (c) addressed *Demolition Landfill's* footnote 1 rejection of later-adopted written reasons for a denial as contrary to the unambiguous, mandatory terms of the statute:

(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 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 the 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.

Id., codified as Minn. Stat. § 15.99, subd. 2(c) (emphasis added). From and after the effective date of this amendment, a multimember body, such as a city council, “must” either adopt written reasons for a denial “at the same time as the denial,” or “at the next meeting following the denial of the request but before the expiration of the time allowed for making the decision” *Id.* Whether the written reasons for denial are adopted simultaneously with the denial, or at the immediately following meeting, the written statement “*must* be consistent with the reasons stated in the record at the time of the denial” and “*must* be provided to the applicant upon adoption.” *Id.* (emphasis added).

3. Minnesota court decisions since the 2003 amendments have consistently applied their mandatory requirements by their plain and unambiguous terms.

Subsequent court decisions show untroubled and uniform application of the clear terms of these amendments. Most recent and most apposite is *Veit Company v. Lake County*, 707 N.W.2d 725 (Minn. App.), *review denied* (Minn. Apr. 18, 2006), where the court of appeals held that a county's failure (a) to provide the permit applicant a written statement of reasons for the denial simultaneous with the denial; (b) to adopt a written statement of reasons at its next meeting before the time deadline expired; and (c) to provide the written statement to the applicant upon adoption, violated the 60-Day Rule and resulted in the automatic approval of a blasting and quarrying permit.

Veit made the noteworthy point that the legislature's 2003 amendments to the 60-Day Rule after *Demolition Landfill* did not include any amendment to the written-reasons requirement that *Demolition Landfill* concluded was mandatory; accordingly,

the *Demolition Landfill* construction of the written-reasons requirement applies to this case. *See State v. Anderson*, 666 N.W.2d 696, 700 (Minn. 2003) (stating that when the legislature does not amend the supreme court's construction of a statute, the court's construction stands) [other citations omitted].

707 N.W.2d at 729. The City here barely mentions *Veit*, relegating it to a footnote and attempting to distinguish it by claiming that *Veit* concerned the "failure to provide *any* written statement of reasons for its denial within the sixty-day period." Appellant's Brief at 11, n. 8 (emphasis in original). That is precisely the issue here: the City failed to *provide* any written statement of reasons to Hans Hagen before the expiration of the time

deadline and only provided such reasons after the expiration of the extended time deadline and seven weeks after their adoption.

Completely unmentioned and unaccounted for by the City are the additionally relevant cases of *Concept Properties, LLP, v. City of Minnetrista*, 694 N.W.2d 804 (Minn. App.), *review denied* (Minn. Apr. 19, 2005), and *Minnesota Towers, Inc., et al. v. City of Duluth*, 2005 WL 1593044 (D. Minn., July 1, 2005), both of which reaffirm the mandatory nature of the 60-Day Rule's requirement that before the time deadline expires, the agency must not only deny the written request, but also adopt a written statement of reasons for denial, and provide it to the applicant. R. App. 41-48.

In *Concept Properties*, the City was also accused of violating the 60-Day Rule when it sent written reasons for denial by mail to the applicant on the very last day of the time deadline, but the reasons were not received by this deadline.⁴ *Concept Properties* concerned the pre-2003 amendments version of the 60-Day Rule. 694, N.W.2d 825. The court nevertheless reconfirmed the *Demolition Landfill* conclusion that simultaneous written reasons must be provided as part of a legally-valid denial. *Id.* at 826. The court

⁴ Given that the time deadline in *Concept Properties* was May 27, 2003, and the litigation that it spawned commenced well before the City was called to act on Hans Hagen's application, one would have expected the City to be acutely aware of its duties under the 60-Day Rule and scrupulously conscious of fulfilling them. It must be noted that there is at least one other 60-Day Rule violation claim involving the City which is currently pending before this court: *Breza v. City of Minnetrista*, 706 N.W.2d 512 (Minn. App. 2005), *review granted* (Minn. Feb. 14, 2006) (concerning delay by the City of more than a year in acting on written request under Wetland Conservation Act). That one city would run afoul of statutory time deadline requirements with such regularity underscores the continuing need for the 60-Day Rule and for its strict enforcement.

in *Concept Properties* looked to subdivision 3(c) of Section 15.99 in concluding that the City had not violated the 60-Day Rule when it sent by mail its written reasons for denial before the time deadline expired, but the reasons were not received by the time deadline:

Notably absent from the language of section 15.99 is any requirement that an applicant *receive* written reasons for the denial within the agreed upon timeframe. Subdivision 2 states that “a failure to deny a request” within the statutory or agreed upon timeframe will be deemed an approval of the application. Subdivision 3(c) further clarifies that an agency response meets the statutory time limit “if the agency can document that the response was *sent* within 60 days of receipt of the written request.” *Id.*, subd. 3(c) (emphasis added). ***Applying the plain meaning of this rule to a circumstance when the parties have agreed to their own deadline, it is clear that the agency complies with the statute as long as the agency can document that it made a decision to deny the application and sent a decision by the deadline.***

Id. at 826 (bold emphasis added). Ironically, and in the face of *Concept Properties*' holding in its favor, the City stands before this court now arguing that subdivision 3(c) serves merely a “housekeeping” function under the statute. Appellant's Brief at 12. *Concept Properties* supports, by contrast of its facts with those of the instant case, the conclusions of the courts below. As the district court stated:

Here, unlike *Concept Properties*, the City did not send a copy of the resolution by the November 30, 2004 deadline to Hans Hagen. The City did not provide Hans Hagen with a copy of the resolution until Hans Hagen asked for it after learning of its existence. * * * As the Court of Appeals explained in *Concept Properties*, subdivision 3(c) clarifies how the City meets the 60-day timeline imposed by subdivision 2(a). 694 N.W.2d at 826. The penalty for failing to comply with the 60-day limit is automatic approval as specified by subsection 2(a).

R. App. 21-22.

Also ignored by the City is *Minnesota Towers*, where, like this case, the City of Duluth tried to convince the court that it had complied with the 60-Day Rule when it orally denied on the record a special use permit, but failed to send an adopted written statement of reasons for denial to the applicant until after the time deadline expired. R. App 44-45. The U.S. District Court held this response to violate the mandatory requirements of the 60-Day Rule:

The Court finds that the failure of the resolution before the City Council, accompanied by the City Council's oral reasoning on the record, was not sufficient to comply fully with the requirements of § 15.99, subdivision 2. * * * Subdivision 2(b) addresses what constitutes a denial, but it does not obviate the need for the City Council to adopt a written statement documenting such reasoning "before the expiration of the time allowed for making a decision under this section" pursuant to subdivision 2(c). The City Council's adoption of the written resolution did not occur until December 6, 2004, and thus did not fall within the 60-day deadline required by § 15.99.

R. App. 45. The district court below correctly applied the conclusion of *Minnesota Towers* to the facts of this case, concluding here that "the City Council's oral reasoning on the record is insufficient to comply fully with the requirements ..." of the 60-Day Rule. The district court below focused on subdivision 2(c)'s mandate that the written statement of reasons "must be provided to the applicant upon adoption:"

Provide does not simply mean to make available, as the City argues, but also means to "supply" and to "furnish." Webster's New World College Dictionary (Victoria Newfeldt 3rd ed. 1996). The Plaintiff was not made aware of either the website posting or City Hall's record of the meetings and thus was not supplied nor furnished with a written statement. Therefore, it can not be said that the applicant, Hans Hagen,

was “provided” with a written statement within the meaning of Minn. Stat. § 15.99, subd. 2(c).

R. App. 21. The City renews these same unavailing arguments in its brief to this court. Appellant’s Brief at 2, 9, 14 (arguing that the City made available to the public a “written statement” memorializing its October 4 oral denial “both at City Hall and on the City’s website”). This court should give no greater consideration to these arguments of the City than the courts below did.

Accordingly, the plain language of the 60-Day Rule, the 2003 amendments to the statute and the Minnesota cases uniformly applying what have been repeatedly held to be the unambiguous mandatory requirements of the statute all compel the conclusion that the City violated the 60-Day Rule when it failed to provide to Hans Hagen a written statement of reasons for its denial until after the extended time deadline had expired.

B. The Court of Appeals Correctly Concluded that the Plain Meaning of the 60-Day Rule Requires Automatic Approval of a Written Zoning Request Unless the Agency Both Denies the Request and Adopts and Supplies Written Reasons for the Denial Before the Time Deadline Expires.

The court of appeals saw little need to invoke any of the case authority applying Minnesota’s 60-Day Rule because it was able to reach the conclusion that the City had violated the 60-Day Rule based upon the plain language of the statute and well-established rules of statutory construction. R. App. 5-7.

The starting point for the court of appeals was to recognize the court’s role in ascertaining the meaning of a statute, which is, quite simply, to “effectuate the intention of the legislature” and if the language of the statute is unambiguous, then it must be applied according to its plain meaning. *Id.*; Minn. Stat. § 645.16 (2004) (when law is

unambiguous, “the letter of the law shall not be disregarded under the pretext of pursuing the spirit”); *Kersten v. Minn. Mut. Life Ins. Co.*, 608 N.W.2d 869, 874-75 (Minn. 2000).

Moreover, the court of appeals correctly recognized that the content and framework of the statute must be examined to determine whether the statute has a plain meaning. R. App. 5; *Genin v. Mercury Marquis*, 622 N.W.2d 114, 117 (Minn. 2001). The court reasoned that “[d]etermining the integrated plain meaning requires us to ‘read a particular provision in context with other provisions of the same statute in order to determine the meaning of the particular provision.’” R. App 6 (citations omitted).

Giving additional weight to the court of appeals analysis was its invocation of United States Supreme Court authority on statutory construction:

The Supreme Court has recognized that, in discerning plain meaning, a provision that seems ambiguous in isolation may be clarified by the remainder of the statute because “the same terminology [may be] used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” *United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 ... (1988). ... Thus, statutory construction includes not only attention to the specific words, but also “the specific context in which that language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 ... (1997).

Id. The court of appeals also correctly reasoned that the approach of examining the statute as a whole and reading each section in context with other sections is consistent with the rule of statutory construction that, “The legislature intends the entire statute to be effective and certain.” R. App. 40.

Based upon these principles, the court of appeals had no trouble reading subdivisions 2(a) and 2(c) as having a plain meaning that requires an agency to provide the applicant reasons for denying an application within the statutory time deadline and that failing to do so results in automatic approval of the request:

Reading the subdivisions of section 15.99 together reveals a plain meaning that is evident in the interdependent functioning of the subdivisions. Subdivision 2(c) interrelates with subdivision 2(a) by providing additional and more specific explanation of its requirements. The district court correctly reasoned that because subpart (c) refers back to subpart (a), the same penalty applies even though the legislature did not insert it a second time into subpart (c). In a subdivided section that focuses successively on various aspects of the response deadline, a presumption that the contents of each subdivision must be restated in the parallel subdivisions would defeat the obvious purpose of the serial division. The context and the coordinated effect establish that the penalty in subdivision 2(a) is interrelated with, and applies to, the requirements in subdivision 2(c). Importantly, if subdivision 2(a)'s penalty did not apply to subdivision 2(c), the statute would provide no penalty for violating the mandatory requirements in subdivision 2(c).

R. App. 6-7. The court had previously emphasized the mandatory nature of the requirements of subdivision 2(c) by highlighting the prevalence of the word "must" in connection with the duties that it prescribes. R. App. 5.

Similarly, the court concluded that subdivision 3(c) made no sense unless subdivisions 2(a) and 2(c) combined to prescribe mandatory requirements subject to the penalty of automatic approval:

Finally, unless subdivisions 2(a) and 2(c) combine to provide the penalty of automatically granting the application if the agency does not provide written response to the applicant within sixty days, the language of subdivision 3(c) would not

make sense. Subdivision 3(c) provides that an “agency response meets the 60-day time limit if the agency can document that the response was sent within 60 days of the written request.” Unless the failure to provide a written response to the applicant triggers the automatic-issuance penalty, the reference to the sixty-day limit would be superfluous and subdivision 3(c) would have no effect.

R. App. 7. Accordingly, the court read the subdivisions at issue in this case in a coordinated way that gives meaning and effect to all three provisions, consistent with the rules of statutory construction. Minn. Stat. §§ 645.16 (“Every law shall be construed, if possible, to give effect to all its provisions.”), and 645.17(2) (“The legislature intends the entire statute to be effective and certain.”). R. App 39-40.

The City’s attempt to parse these subdivisions and claim that they are “functionally independent” (Appellant’s Brief at 11) cannot stand against this cohesive analysis of the court of appeals. The City refuses to read the statutory subdivisions as a whole in contravention of the above-stated rules of construction. The City further wrongly argues that because the legislature did not repeat the penalty of automatic approval in subdivision 2(c) when it was adopted in 2003, five years after *Manco* held that the basic requirement of agency action within 60 days is mandatory because a penalty attaches to its violation, this means that the requirement to provide written reasons for the denial within the time deadline is not mandatory. *Id.*, n.7. The court of appeals correctly dispatched this flawed reasoning:

After this court issued *Manco* and *Demolition Landfill*, the legislature amended subdivision 2 by adding subparts (b) and (c). 2003 Minn. Laws ch. 41, § 1 at 322. Although the amendments do not directly impact our analysis, the legislature notably did not include in the amendments any

indication that the provisions of subdivision 2 were not mandatory.

R. App. 7.

The court also invoked its recent holding in *Veit*, where “we concluded that the simultaneous-written-reason requirements in subdivisions 2(a) and 2(c) are mandatory and must be completed within the sixty-day deadline or an authorized extension, for agency action.” *Id.* Just as the City attempts to argue here that its publication of its October 4 denial on its website should suffice to meet the statute, the county in *Veit* argued that the statute’s purpose was fulfilled because a transcript of the denial proceedings was sufficient. 707 N.W.2d at 727-28. The court of appeals below concluded that under *Veit*, the City’s argument of mere availability of written reasons for the denial fails to satisfy the plain dictates of the statute:

[In *Veit*] even if the transcript had been sufficient to satisfy the writing requirement of subdivision 2(a), ***the record contained no evidence that the county provided the applicant with a copy before the deadline expired, as required by subdivision 2(c).*** *Id.* 730. Consequently, we held that the application was approved as a matter of law.

R. App. 7 (emphasis added).

When statutory provisions, such as these in the 60-Day Rule, are clear on their face, courts must uphold the letter of the law. The court’s role in interpreting statutes is to look at the language of the statute before it and, where the language is clear, the court shall not engage in further construction. *Owens ex. rel. Owens v. Water Gremlin Co.*, 605 N.W.2d 733, 736-37 (Minn. 2000). Established rules of statutory construction mandate that when the words of the law and their application to an existing situation are

clear and free from all ambiguity, statutory construction is neither necessary, nor permitted and courts must apply the statute's plain meaning. *Ed Herman & Sons v. Russell*, 535 N.W.2d 803, 806 (Minn. 1995); Minn. Stat. § 645.16 (2005). Accordingly, the court of appeals correctly construed the provisions of Minn. Stat. § 15.99 in harmony and in light of the statute's purpose, when the court held that the City's failure to provide Hans Hagen with written reasons for denial by the agreed-upon time deadline, which written reasons the City adopted without any notice to Hans Hagen or opportunity for Hans Hagen to be heard, violated Minn. Stat. § 15.99, subd. 2.

III. THE COURT SHOULD REJECT THE INVITATION TO IMPOSE BY JUDICIAL FIAT AN ACTUAL PREJUDICE STANDARD INTO THE 60-DAY RULE—A STATE STATUTE THAT HAS BEEN UNIFORMLY RECOGNIZED BY THE COURTS OF THIS STATE TO BE CLEAR AND WITHOUT AMBIGUITY.

The City seizes upon *obiter dictum* in the court of appeals decision to advocate for the *ad hoc* imposition of an actual prejudice standard into the 60-Day Rule. This court should reject the invitation for many reasons: (a) it violates separation of powers principles, (b) the statute and its legislative history show that the legislature took into account the concerns raised below, (c) the very authority on which the special concurrence below relied in advocating an actual prejudice standard militates against it where legislation is clear, and (d) the vast majority of states with automatic approval statutes—including Minnesota—strictly enforce their automatic approval statutes.

A. The Court of Appeals Properly Recognized that Where a Statute is Clear, Due Respect for Coordinate Branches of Government Dictates that the Judiciary's Duty is Limited to Enforcing the Law By Its Terms.

The specially-concurring opinion in the court of appeals conceded that the court correctly decided the case, but raised a number of concerns that can only be characterized as policy-related over the effect of the decision. R. App. 8-10. The concurrence advocated that either the legislature or this court “make changes needed to protect municipalities” R. App. 9. The court’s main opinion acknowledged these concerns, but properly resisted as outside the court’s purview any invitation to read into the plain terms and directives of the 60-Day Rule any limiting language.

We agree that the penalty is harsh, and we share the observations of the special concurrence that a prejudice requirement would temper the risk of public injustice. But 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 because without deference to clear statutory language, “legislators will have difficulty imparting a stable meaning to the statutes they enact.”

R. App. 8. (citation omitted). In support of this conclusion, the court cited *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879-80 (7th Cir. 2002), where the Seventh Circuit recognized that judicial deference to plain meaning keeps branches of government in equilibrium and “preserve[s] language as an effective medium of communication from legislatures to courts.” *Id.*

Rules of statutory construction emanating from both statute and common law clearly reflect the need for the judiciary to respect the coordinate roles of the legislature and the courts. It is presumed that the “legislature intends the entire statute to be

effective and certain.” Minn. Stat. § 645.17(2); *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958). Furthermore, “[w]hen the words of a law in their existing situation are clear and free from all ambiguity, ...” it is impermissible for the courts to disregard the letter of the law “under the pretext of pursuing the spirit.” R. App. 39.

The court of appeals recognized as much with respect to the 60-Day Rule, calling attention to past rulings in which the courts have strictly enforced section 15.99 according to its terms. *See N. States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925 (Minn. App. 2002), *review denied* (Minn. Sept. 25, 2002) (recognizing that “automatic approval is an extraordinary remedy” but that nevertheless “Minnesota appellate courts have shown no reluctance to grant this remedy and enforce the provisions of section 15.99 [where] a city has failed to satisfy its clear requirements”); *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. App. 2004) (automatically approving application even though it was “harsh, extraordinary remedy”).

For these reasons, this court need not and should not go any further than enforcing the plain meaning of subdivision 2 of section 15.99; to do otherwise abrogates separation of powers principles that are manifested in the well-established rules of statutory construction.

B. The 60-Day Rule and its Legislative History Show that the Concerns Stated in the Specially-Concurring Opinion were Raised Before the Legislature and Taken Into Account in the Ultimately-Adopted Statute.

The specially-concurring opinion stated the concern over automatic approvals arising from “an administrative slip of the pen” for unpopular or onerous uses such as “a

tire-burning industrial unit, a coal-fired power plant, a monstrous metal-shredder plant, a car battery/freon disposal plant, etc.” R. App. 10. Such prospects were brought to the attention of the legislature at the time it adopted the 60-Day Rule and both the legislative history and the statute, itself, show that they were taken into account.⁵

1. The 60-Day Rule expressly allows for extensions of time when a request requires coordinated approvals from state or federal agencies.

Subdivision 3 of section 15.99 is entitled “**Application; extensions**” and it includes provisions allowing for the tolling of the strict time deadline to act on applications that require coordinate approvals from state or federal agencies while these other agencies process such requests. Minn. Stat. § 15.99, subs. 3(d) and 3(e) provide as follows:

- (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

⁵ In fairness, Hans Hagen’s proposal cannot be compared to the worst-case scenarios raised by the special concurrence. As detailed in respondent’s Statement of Facts, *supra*, the proposal is for a residential development that is consistent with the Met Council’s regional planning goals between Highway 7 and the Carver Park Preserve, with 47 acres of park and open space, along with trails linking the neighborhood open space to the park preserve. The City’s denial of Hans Hagen’s request, based on its outdated 1998 Comprehensive Plan, demonstrates that, like its east metro counterpart, the City of Lake Elmo, the City before the court here resists the legitimate regional planning authority of the Metropolitan Council. *See City of Lake Elmo v. Metropolitan Council*, 685 N.W.2d 1 (Minn. 2004) (where this court held that Met Council properly exercised its regional planning authority under state statute to reject Lake Elmo’s Comprehensive Plan amendments that were squarely at odds with regional planning goals).

60 days after completion of the last process required in the applicable statute, law, or order. Final approval of an agency receiving a request is not considered a process for purposes of this paragraph.

(e) The time limit in subdivision 2 is extended if: (1) a request submitted to a state agency requires prior approval of a federal agency; or (2) an application submitted to a city, county, town, school district, metropolitan or regional entity, or other political subdivision requires prior approval of a state or federal agency. In cases described in this paragraph, the deadline for agency action is extended to 60 days after the required prior approval is granted.

R. App. 37. The worst-case scenarios cited by the specially-concurring opinion would all fall within the ambit of either subdivision 3(d) or 3(e)—other permitting would be required from state agencies.⁶ Indeed, the court of appeals recently held that subdivision 3(d) operated to toll the 60-day deadline when environmental review of a proposed development project was initiated by citizen petition under the Minnesota Environmental Policy Act (“MEPA”), Minn. Stat. Ch. 116D (2004). *Allen v. City of Mendota Heights*, 694 N.W.2d 799 (Minn. App. 2005).⁷

⁶ A tire-burning industrial unit requires both an air emissions permit and a waste disposal permit from the Minnesota Pollution Control Agency (“MPCA”). Minn. R. 7001.0520 (2004); Minn. R. 7007.0150 (2004). A coal-fired power plant is subject to Environmental Quality Board (“EQB”) permitting and MPCA air emissions permits. Minn. Stat. § 116C.61 (2004); Minn. R. 7007.0150 (2004). A metal-shredder plant would also be subject to MPCA permitting requirements and a car battery/freon disposal plant would require MPCA waste disposal permitting as well as hazardous substance management permitting. Minn. R. 7001.3050 (2004); Minn. R. 7007.0150 (2004).

⁷ The Minnesota Center for Environmental Advocacy (“MCEA”), as *amicus curiae* supporting the City, improperly attempts to inject into this case the issue of whether the same result obtains when the law calls for mandatory—as opposed to citizen-initiated—environmental review. See MCEA’s Brief at 1. This court should disregard MCEA’s argument because the issue was never raised below—nor could

Additionally, subdivision 3(f) allows the agency unilaterally to extend the strict 60-day time deadline up to an additional 60 days simply “by providing written notice of the extension to the applicant.” *Id.* Finally, subdivision 3(g) allows the applicant to request an extension from the agency upon written notice. Accordingly, express provisions of section 15.99 show that the legislature considered and accounted for extenuating circumstances that would justify extensions to the strict time deadline.

2. Legislative history of the 60-day rule shows that the legislature took into account the concerns raised by the court of appeals.

The 60-Day Rule’s legislative history further supports this. Testimony taken and statements made by senators during the March 29, 1995 hearing of the Senate Governmental Operations and Veterans Committee on S.F. 647 demonstrate that the senators were acutely aware of the concerns raised by the court of appeals below. The following is a colloquy between the bill’s sponsor, Sen. Wiener, and Sen. Stevens:

(Sen. Stevens) And I guess I just want to be very clear with your ... exceptions here, that when it comes into something that’s out of the norm, when it requires a lot of scientific information, that we’re not mandating any automatic approval on something like this, because it is a decision that can’t be made lightly, nor should it be made with an automatic approval. * * *

(Sen. Wiener) Senator Stevens, that is exactly why we have an amendment here ... the time limit will be extended if the

it have been—because Hans Hagen’s request for rezoning and a comprehensive plan amendment does not trigger mandatory environmental review under MEPA. Minn. Stat. Ch. § 116D (2004); Minn. R. 4410.4300 (2004); Minn. R. 4410.4400 (2004). Addressing such an issue runs directly counter to the well-established principle that the appellate courts will not address issues raised for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988).

request submitted to a state agency requires prior approval from a federal agency ... and then in Section F ... an agency seeking an extension under the subdivision shall, before the end of the initial 60-day period, provide written notice of the extension to the applicant.

R. App 74. Clearly the subdivision 3 provisions were intended to address the concerns of the specially-concurring opinion.

Other legislative history shows that the concern over the “administrative slip of the pen” resulting in automatic approval was also brought to the legislature’s attention. This concern received somewhat less hospitable consideration, since it was the legislature’s intention to impose a “no excuse” policy upon government agencies.⁸ The Senate committee heard and responded to testimony from a representative of the Association of Minnesota Counties as follows:

(Mr. Weyrens) “[T]here’s absolutely no question that everybody that I know of in county government supports an efficient and an effective government. But what this does is this places the possibility that a potentially very negative application will slip through the system through some mistake in the process. We all need to keep in mind that there is that old adage: ... to err is to be human. And we think there is some real policy implications of this 45-day [changed before adoption to 60-day] approval period. * * * This is a very broad and sweeping bill that very basically is going to

⁸ Sen. Riveness stated at the hearing that, “I want kind of a no excuse policy, and I think that’s what’s anticipated here.” R. App. 58. Similarly, statements of Sen. Beckman made clear that the time deadline is intended to be strictly enforced so that the legislature’s intent of creating more attentive and responsive government would be fulfilled: “And when permits start getting issued that we don’t like, then we’re going to start asking the agencies why they haven’t gotten together * * * So I think the onus should be on those folks to make the decision in a timely manner. And to me this is just simply saying if you don’t do it, if you don’t do your work, then the permit’s going to be issued.” R. App. 68, 78.

increase the cost of local governments In this situation there's no money to pay for added costs of administering programs.

(Sen. Riveness) I'd like to suggest to government at all levels that doing the job right the first time, setting up systems to meet reasonable deadlines for citizens, does not have to be costly at all ... many private sector companies have found that they've been ... able to reduce complaint departments when they have zero defect on the way in. They do the job right, they do it in a timely manner and with reasonableness. * * * Frankly, I think I could make the case you may well reduce your costs. If we all kind of get on board and do the job right, are in the process of continuous improvement. I know many local governments who have been doing a bang-up job in customer service. * * * So I think your point is one that we need to consider, but I would hope that, rather than holding up flags, that you would hold up a peace offering, saying let's do this right and do it together.

R. App. 82-83 (Weyrens), 84-86 (Riveness).

It could not be more clear from both the express language of the 60-Day Rule and its legislative history that lawmakers purposely adopted a strict time deadline—with certain exceptions for more complex, extenuating circumstances—fully intending that local governments respond by adopting systems to ensure that “administrative slips” would not occur.⁹

⁹ Given this particular City's track record under the 60-Day Rule, one wonders why it has failed to institute any “failsafe” system for processing zoning applications and how many more 60-Day Rule cases it will require before the City understands and obeys its clear obligations under the law? *See* Brooker & Cole at 473 (fully cited *infra*, Section III. D), where the authors recommend that public bodies “should take special pains ...” to assure understanding of “the limits under the statutes and any technical requirements that may create pitfalls.” *Id.* Indeed, the authors offer that, “A sample monitoring log for use under the Minnesota statute which could be adapted for use in other states is available from the authors.” Perhaps the City should avail itself of this offer.

C. The Very Authority on Which the Special Concurrence Relies Militates Against Reading an Actual Prejudice Standard Into Legislation that Is Clear.

The special concurrence invoked *Terrell v. State Farm Ins. Co.*, 346 N.W.2d 149 (Minn. 1984), in supporting its call for judicial imposition of an actual prejudice standard into the 60-Day Rule. Application of *Terrell* to this case results, however, in the conclusion that the court cannot impose such a standard for the simple reason that the 60-Day Rule and its intent are clear.

Terrell concerned the insurer-insured relationship, which in and of itself distinguishes the case from the circumstances here.¹⁰ In *Terrell*, this court restrained itself from reading an actual prejudice standard into a state insurance statute that allowed the insurer to establish a time limit barring claims by the insured unless notice of an accident or loss was given within that time limit. The parties in *Terrell* had stipulated to the absence of prejudice that arose from the insured having given untimely notice of the accident. This court refused, however, to read an actual prejudice standard into the insurance statute for the following reason:

¹⁰ This court has not hesitated to favor the insured over the insurer in many circumstances because the court recognizes the inequality of bargaining power between the parties, the nature of insurance policies as preprinted form contracts that are similar to contracts of adhesion and that the policyholder ought fairly to receive the *quid pro quo* for premium payments—coverage under the policy. See *Kersten v. Minnesota Mut. Life Ins. Co.*, 608 N.W.2d 869, 873 (Minn. 2000) (resolve policy ambiguities in favor of insured on account of preprinted nature of insurance contracts); *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 277 (Minn. 1985) (noting great disparity in bargaining power between parties to insurance contract justifying application of doctrine of protecting reasonable expectations of insured); *Struble v. Occidental Life Ins. Co. of CA*, 120 N.W.2d 609 (Minn. 1963) (construe insurance contracts liberally in favor of insured).

Although absolving appellant from liability seems to us unduly harsh on the insureds, it likewise appears to us that the legislature has *clearly indicated* its intent to protect automobile insurers from liability absent timely receipt of the policy-required notice of the accident.

346 N.W.2d at 152 (emphasis added). Likewise, the legislature here has “clearly indicated” its intent that the time deadline requirement—including the notice of written reasons requirement—be both mandatory and strictly enforced.

If there is to be an actual prejudice standard imposed, then it must be left to the legislature to impose it. Indeed, even the concurrence here implicitly recognized this when it candidly disclosed that the situation in *Terrell* was later changed by the legislature, not the courts: “In recognizing disfavor on forfeiture of decisions or policies due to the passing of arbitrary deadlines, the legislature amended the statute at issue in *Terrell* to require a showing of actual prejudice.” R. App. 9. Accordingly, *Terrell* correctly counsels judicial restraint, not judicial activism, where the law and its intent are clear.

D. Decisions from Other States Demonstrate that Strict Enforcement of Automatic Approval Statutes is the Norm, Not the Exception.

The City and its *amicus* supporter League of Minnesota Cities (the “League”) suggest on the basis of select decisions from New Jersey, Pennsylvania and Vermont, that strict enforcement by the courts below of the requirement that an agency provide a timely written statement of reasons for its denial is an aberration. This is not the case. A treatise surveying state automatic approval statutes observed the following concerning statutes that contain mandatory notification of denial requirements:

Provisions mandating the notification of planning decisions to applicants are as diverse as the American planning process itself. Despite this diversity in the statutory law, the case law is relatively clear. Courts tend to enforce strictly the specific notification requirements in automatic approval statutes. This should not be all that surprising given a court's comfort in enforcing court rules on notice and process.

G. Brooker & K. Cole, "Automatic Approval Statutes: Escape Hatches and Pitfalls," 29 Urb. Law. 439, 459 (Summer, 1997) ("Brooker & Cole"). Brooker & Cole noted that Vermont and certain select Pennsylvania cases cited by the League,¹¹ which have held notice of decision requirements directory rather than mandatory, "seem to be the exception to the general rule of strict interpretation of the unambiguous statutory notice requirements." Brooker & Cole at 462.¹²

Other Pennsylvania cases post-dating those cases cited by the League have ruled in favor of automatic approval based on what could be considered technical violations of the statute.¹³ In *Rodier v. Twp. Of Ridley*, 597 A.2d 279, 281 (Pa. Commw. Ct. 1991), the court ordered automatic approval when a township mailed notice on the last day

¹¹ League's Brief at 6-7.

¹² Additionally, the Pennsylvania and Vermont cases are distinguishable based on the differences between those states' and Minnesota's automatic approval statute. Vermont and Pennsylvania statutes provide that a governing board shall "render" a decision within the applicable time period. Courts of those states have concluded that "render" does not equate to providing written notice and have refused to grant automatic approval when such notice is given after the time deadline.

¹³ By the very nature of what these laws are attempting to accomplish, automatic approval statutes contain "technical" requirements. Accordingly, most violations of such statutes may be cast as "technical," although to do so is pejorative of what lawmakers seek to accomplish in adopting such requirements. See Brooker & Cole at 473 ("It is clear from the case law that many (virtually all) automatic approvals are inadvertent.").

legally possible and it was returned for insufficient postage. The township then re-mailed the notice two days late. The court rejected the township's argument it had attempted to comply within the time deadline, stating that "[such] reasoning would defeat the purpose of section 508, which is to ensure that each applicant receives timely notice of a denial" In *Coretsky v. Bd. Of Comm'rs*, 555 A.2d 72, 74 (Pa. 1989), the court held that notice was defective and granted automatic approval where the township's notice of decision failed to cite to the governing ordinance or statute as required by the automatic approval statute. The court recognized the "harshness of the result ...," but declared, "we cannot overlook the plain meaning of the statute to avoid a harsh result ... [t]o read an exception into [the statute] ... would eventually emasculate the rule itself.". In *Bd. Of Comm'rs v. Appaloosa Dev. Corp.*, 551 A.2d 1, 2 (Pa. Commw. Ct. 1988), the court granted automatic approval when the board mailed the notice two days late; the court declared that use of the word "shall" in the statute means that the notice requirement is mandatory.

Similarly, the City relies on dated New Jersey authority to suggest that the decisions below here are wrong. A New Jersey Superior Court decision decided just this year adopts the general rule of strict interpretation. *See New York SMSA Ltd. P'ship v. Twp. Council*, 889 A.2d 1129, 1133 (N.J. Super. Ct. App. Div. 2006) (automatic approval statute mandatory based on use of word "shall;" township's notice amendments stricken as violating state statutory notice requirements; court declares legislature intended uniform, bright-line rule).

Finally, an Alabama decision further illustrates the general rule of strict interpretation of the unambiguous statutory notice requirements. In *Mobile City Planning Comm'n v. S. Region Developers, Inc.*, 628 So.2d 739, 740 (Ala. Civ. App. 1993), the court held that the notice of denial was ineffective because it merely contained a general statement that there were “concerns” and “questions” over the proposed resubdivision; the court said that the general statement was “tantamount to no reason at all.” *Id.* Because no legally sufficient reason was given within the required timeframe, the court ordered automatic approval.

Separate and apart from these cases simply exemplifying the rather unremarkable exercise of proper judicial enforcement of unambiguous and mandatory statutory notice requirements, Brooker & Cole provide an additional rationale why courts strictly enforce such requirements:

Courts may be inclined to strictly enforce notice provisions in automatic approval statutes because of the importance of communication between the planning authority and the applicant. If the importance of the completeness of the initial planning application and the need for written materials at the front end of the planning process is stressed, so should the significance of written notice and findings on the back end of the process, when the planning authority makes its decision.

Id. at 462. Minnesota’s 60-Day Rule stresses such a communication “balance.” It contains specific application requirements that must be followed in order to qualify as a “request” that triggers the commencement of the 60-day time limit.¹⁴ Moreover, the

¹⁴ Minn. Stat. § 15.99, subd. 1(c) contains the following detailed definition of what constitutes a “request” for purposes of triggering the 60-Day Rule:

agency has the authority to reject a request as incomplete and toll the running of the 60-day clock if it “sends written notice within 15 business days of receipt of the request telling the requester what information is missing.” R. App. 36. The mandatory obligations that an applicant must meet to trigger the agency’s obligation to respond under the 60-Day Rule justify a reciprocal, mandatory communication duty on the part of the agency in providing a timely written explanation of why it is denying the request.¹⁵ It is certainly the very least the agency can do, given the enormous time and effort that many applicants invest in presenting their development proposals to government agencies. *See* App. 35-41 (22-page transcript of Hans Hagen representative John Rask’s presentation to City Council), App. 48 (where Council member acknowledges “how

A request must be submitted in writing to the agency on an application form provided by the agency, if one exists. The agency may reject as incomplete a request not on a form of the agency if the request does not include information required by the agency. A request not on a form of the agency must clearly identify on the first page the specific permit, license, or other governmental approval being sought. No request shall be deemed made if not in compliance with this paragraph.

R. App. 36.

¹⁵ Coincidentally, (or perhaps not so coincidentally) *Terrell*, in examining the legislative intent of the notice requirement imposed upon the insured, engaged in a similar parity of reasoning: the legislative history of the insurance claim deadline statute showed that it was the “other side of the coin” from another section of the statute requiring prompt payment by insurers of first party benefits. 346 N.W.2d at 152. Legislative proponents of the claim time deadline provision asserted that since insurers were being required to pay no-fault benefits promptly, “the insured had a reciprocal duty ... to report accidents promptly or lose coverage.” *Id.*

much work that Mr. Rask put into this to prepare to give us a suggestion for what Hans Hagen would do for a development in this area.”).

At bottom, such reciprocal duties and responsibilities would appear to be grounded in notions of due process and fundamental fairness. It is well to remember the fundamental due process tenets announced in *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978).

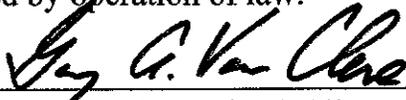
An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Id.; cf. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 715-16 (Minn. 1978) (“basic rights of procedural due process required in that case are reasonable notice of hearing and a reasonable opportunity to be heard”). The legislature established the mandatory procedures of the 60-Day Rule to afford applicants for zoning requests certain procedural rights in their dealings with local government. The legislature further established reciprocal obligations of government agencies to ensure timely and fair government response. Hans Hagen was deprived of any opportunity to be present and to state objections when the City decided to adopt after-the-fact reasons in support of its oral denial. Hans Hagen was deprived of any notice of the City’s later-adopted reasons when the City failed to provide them to Hans Hagen until seven weeks after the City adopted them. While whether such deprivations arise to the level of a due process violation may be debatable, what is not debatable is that the City’s failures of omission clearly violated the mandatory requirements of the law.

CONCLUSION

For all the above-stated reasons, respondent Hans Hagen respectfully requests that this court affirm the decisions below that appellant City of Minnetrista violated the unambiguous and mandatory requirements of Minn. Stat. § 15.99, subd. 2, and that Hans Hagen's zoning application is approved by operation of law.

Dated: 9/20/06



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STATE OF MINNESOTA
IN SUPREME COURT
NO. A05-1686

Hans Hagen Homes, Inc.,

Respondent,

v.

City of Minnetrista,

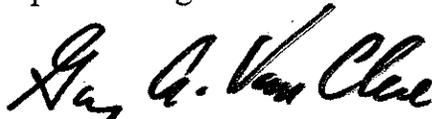
Appellant.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 13201, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,952 words. This brief was prepared using Microsoft Word.

Dated:

9/20/06



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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).