

Nos. A06-2019 and A06-2361

State of Minnesota
In Supreme Court

Kanabec County Board of Commissioners,
Kanabec County Planning Commission, and
Kanabec County Environmental Services,

Appellants,

vs.

Calm Waters, LLC, a Minnesota limited liability corporation,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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STATEMENT OF ISSUES

I. WHETHER MINN. STAT. § 15.99 APPLIES TO SUBDIVISION APPLICATIONS IN KANABEC COUNTY?

The Court of Appeals held that Minn. Stat. § 15.99 applied to subdivision applications as they are written applications related to zoning.

Most apposite case. Kramer v. Otter Tail County Board of Commissioners, 647 N.W.2d 23 (Minn. App. 2002).

II. WHETHER KANABEC COUNTY COULD CREATE A SUBSTANTIVE SUBDIVISION REGULATION BY MERELY MAKING IT A REQUIREMENT ON THE APPLICATION FORM RATHER THAN AMENDING THE SUBDIVISION ORDINANCE?

The Court of Appeals held that Kanabec County failed to file a Notice of Review on this issue and briefly commented that it agreed with the District Court that no statute or ordinance required such an approval letter.

Most apposite case. PTL, LLC, v. Chisago County Board of Commissioners, 656 N.W.2d 567 (Minn. App. 2003).

III. WHETHER THE KANABEC COUNTY ENVIRONMENTAL SERVICES DIRECTOR HAD AUTHORITY TO EXTEND THE TIME FRAME TO ACT UNDER MINN. STAT. § 15.99?

The Court of Appeals held that the Board of Commissioners did not delegate the authority to issue an extension under Minn. Stat. § 15.99.

Most apposite case. Moreno v. City of Minneapolis, 676 N.W.2d 1 (Minn. App. 2004).

IV. WHETHER THE KANABEC COUNTY BOARD OF COMMISSIONERS COULD DELEGATE THE AUTHORITY TO DENY A SUBDIVISION APPLICATION UNDER MINN. STAT. § 394.30, AND IF SO, DID THE BOARD OF COMMISSIONERS PROPERLY DELEGATE SUCH AUTHORITY IN THE SUBDIVISION ORDINANCE?

The Court of Appeals held that the authority to deny a preliminary plat could not be delegated to the Planning Commission under Minn. Stat. § 394.30.

Most apposite case. Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980).

STATEMENT OF THE CASE

This appeal comes to the Court as the result of the Court of Appeals decision in Case No. A06-2019 holding that Kanabec County failed to approve or deny Respondent's preliminary plat application within 60 days after the submission of a complete application as defined by the Subdivision Ordinance. The Court of Appeals dismissed the companion certiorari challenge, Case. No. A06-2361, as moot based on its resolution of A06-2019.

On July 26, 2006 a complete preliminary plat application as defined by the Subdivision Ordinance was submitted by Respondent. The application was wrongfully returned for failing to include a Township approval letter on August 8, 2006. Respondent returned the complete, unaltered, application as defined by the Subdivision Ordinance on August 14, 2006. On September 18, 2006, the Kanabec County Environmental Services Director improperly attempted to unilaterally extend the time for consideration an additional sixty days as a result of the County's failure to properly publish notice of a public hearing. On September 20, 2006, the Planning Commission¹ discussed the application solely as an agenda item, took no action on the application, made no motion to extend the time to make a decision and did not direct Environmental Services to do so. The statutorily required public hearing was not held at the September 20, 2006 Planning Commission meeting.

¹ The Subdivision Ordinance defines the Commission as "The Planning *Advisory* Commission of Kanabec County, Minnesota". Section. 2.15 (emphasis added).

Kanabec County failed to make a decision on Respondent's application by September 25, 2006 and a Petition for Writ of Mandamus was filed with the District Court requesting that the application be deemed approved by operation of law on September 27, 2006. The District Court, acting through the Honorable Judge Krista K. Martin, denied Respondent's request for both peremptory and alternative writs in an Order dated October 17, 2006. On October 18, 2006, the Kanabec County Planning Commission held a public hearing on the preliminary plat application without providing notice to Respondent and denied the application. On October 24, 2006, Kanabec County Environmental Services sent Respondent's attorneys written notice of the denial of the preliminary plat application by the Kanabec County Planning Commission. Respondent attempted to appeal the recommendation of denial to the Board of Commissioners and was denied that opportunity by Environmental Services.

Respondent appealed the District Court Order in Court of Appeals Case No. A06-2019, filed on October 24, 2006. On December 14, 2006, Respondent filed a Petition for Writ of Certiorari with the Court of Appeals challenging the denial of the application in Case No. A06-2361. Appellant moved to consolidate the two appeals for oral argument and decision and the Court of Appeals granted the Motion to Consolidate in an Order dated March 26, 2007. On October 23, 2007, the Court of Appeals, though Judges Schumaker, Stoneburner and Toussaint, reversed the District Court's decision and held that the preliminary plat application

was approved by operation of law under Minn. Stat. § 15.99 in Case No. A06-2019 and dismissed the certiorari appeal in Case. No. A06-2361 as moot.

STATEMENT OF THE FACTS

Appellants mischaracterize several facts and issues presented in this case which need to be addressed prior to the discussion of the merits. First, Appellants conveniently combine all sub-level governmental departments and the County Board and Planning Commission into the word “County” in its Brief. This mischaracterization of who is acting tends to imply authority to sub-level governmental departments where that authority does not exist. This drafting technique attempts to imply authority to the actions of Environmental Services where it did not exist by mischaracterizing all actions as being taken by the County in an official capacity rather than by the sub-level of government who took the action unilaterally and without authority. Second, Appellants’ routinely assert the validity and existence of several Kroschel Township land use regulations. Kroschel Township has no valid shoreland regulations and did not have a planning commission at the time the application was submitted.

Respondent filed a preliminary plat application on July 26, 2006 with Kanabec County Environmental Services as defined by the Kanabec County Subdivision Ordinance. (A-118-128) The application met or exceeded all of the requirements for a preliminary plat application as of the County’s Subdivision Ordinance. The property is located within the shoreland district as defined under the County’s Subdivision and Shoreland Ordinances.

Prior to filing the plat application, Respondent, through its counsel, sent a letter to Kroschel Township Clerk, Sandy Merrill, on July 14, 2006 requesting copies of the Township Official Map, Township Comprehensive Plan, Township Subdivision Ordinance, Road Ordinance or any other land use regulation the Township may have. (R-1) On July 26, 2006, another letter was sent to Kroschel Township through its Clerk requesting the same information. (R-2) After filing the preliminary plat application on July 26, 2006, Grant W. Lindberg received a phone call from Ms. Sandy Merrill on July 27, 2006. Grant W. Lindberg sent a letter to Ms. Merrill on July 27, 2006 to confirm their telephone conversation in which Ms. Merrill stated that the only land use ordinance the Township had adopted is the Zoning Ordinance. (R-3) Ms. Merrill stated that the Township did not have an Official Map, a Comprehensive Plan, a Subdivision Ordinance, a Planning Commission, an Ordinance establishing a Planning Commission or any ordinance containing road design standards. Id. The letter contained a request that if that information was incorrect that the Township contact Grant W. Lindberg and provide him with the requested information. Id. A copy of this letter was sent to the Kanabec County Attorney's Office and to Dr. Ron Menk, Kroschel Township Chairman. Id. To date, Respondent has not received proof of any validly adopted land use regulations or ordinances as requested in writing, except the Township's Zoning Ordinance which was previously filed with Kanabec County Recorder's Office. Kroschel Township did not have a Planning Commission at the time the application was submitted. Id.

On August 8, 2006, Teresa L. Bearce, Environmental Services Director, wrongfully returned the preliminary plat application to Respondent's legal counsel, Lindberg & McKinnis, P.A. (A-128) The basis for rejecting the application was the failure to include the Township approval letter as required solely on the application form. Id. Grant W. Lindberg notified the Kanabec County Attorney's Office that returning of the application was without legal basis and that he would be personally returning the application to the County on August 14, 2006. (R-4-5)

On August 14, 2006, Grant W. Lindberg returned the unaltered preliminary plat application to the Kanabec County Attorney's Office. (A-131) In addition to returning the original, unaltered, complete preliminary plat application, Grant W. Lindberg provided the County with a letter from Area Hydrologist, Mike Mueller, which stated that in the Department of Natural Resource's opinion Kanabec County is the shoreland authority as Kroschel Township's regulations do not meet the requirements of Minnesota Statutes and Minnesota Rules. (R-6)

On September 7, 2006 a Notice was published in the Kanabec County Times for the September 20, 2006 regular monthly meeting of the Kanabec County Planning Commission. (R-7) The Notice does not state the meeting is for a public hearing, but a regular public meeting, and only that the request is being handled as an agenda item. Id. On September 15, 2006, Grant W. Lindberg notified the County in writing that the publication of September 7, 2006 does not

meet the requirements of Minnesota law and therefore the Planning Commission could not hold a public hearing on September 20, 2006.² (R-8-9)

On September 18, 2006, Teresa L. Bearce of Kanabec County Environmental Services unilaterally sent out a letter stating that “Kanabec County Environmental Services” will be extending the time limit an additional 60 days “so as to address the issue of improper notification.” (A-135) Additionally, the letter stated that the regular meeting, not a public hearing, will be held on September 20, 2006. Id. This letter was sent without the direction of the Board of Commissioners or the Planning Commission as no motion of either governing body has been presented extending the sixty (60) day requirements under Minn. Stat. § 15.99.

On September 20, 2006, the Kanabec County Planning Commission held its regular meeting where the application of Respondent was discussed solely as an agenda item. (R-10-11) The Planning Commission did not make any motion requesting additional information from Petitioner or any motion directing Environmental Services to extend the 60-day rule or request additional information from Petitioner. Id. In fact, the Planning Commission did not make any motions at the public meeting relating to Respondent’s application. Id.

After sixty days passed from the July 26, 2006 plat application submission, Respondent filed a Petition for Writ of Mandamus with Kanabec County District

² The District Court held that the notice was insufficient and Appellant did not file a Notice of Review on this issue.

Court on September 27, 2006 arguing that Kanabec County had failed to make a timely decision under Minn. Stat. § 15.99. (A-15) The District Court denied Respondent's request and dismissed the proceeding on October 17, 2006. (A-57) The District Court's decision was faxed to Respondent's attorneys on October 18, 2006. (R-12) Respondent appealed the decision of the District Court as Case No. A06-2019. (A-65)

On October 18, 2006, the Kanabec County Planning Commission held a public hearing concerning the preliminary plat application of Respondent. (A-75) Respondent did not receive any notice of the public hearing. (R-13-14) Respondent's attorneys did not receive any notice of the public hearing. (R-15-22) However, it appears from the minutes that several of those opposed to the preliminary plat application from the Township were provided notice of the hearing by Kanabec County Environmental Services. (A-71) A motion was made by Larry Knudson and seconded by Pat O'Brien to deny the preliminary plat application of Calm Waters. Id. This motion passed by a 4-0 vote, the record is not clear as to why Chairperson Stan Cooper did not vote. Id. The Minutes were prepared by Kanabec County Environmental Services director Teresa Bearce. Id. Respondent cannot verify if the minutes accurately represent what occurred at the proceeding as Respondent was denied the opportunity to attend the hearing and no audio recording of the October 18, 2006 meeting is believed to exist.

On October 24, 2006, Kanabec County Environmental Services mailed to Respondent's attorneys written notice of the action taken at the October 18, 2006

Planning Commission meeting. (A-75) The written notification of denial states that the grounds for denial where (1) “[t]he proposed road exceeds what is allowed by ordinance and does not have township approval” and (2) “[t]he proposed lots sizes do not meet the 20 acres required for lot size within Kroschel Township.” Id. The grounds for denial are without factual or legal basis and the arbitrary denial of the application was challenged in Case No. A06-2361. (A-78)

Respondent filed an appeal of the Planning Commission’s denial with the Kanabec County Board of Commissioners on November 14, 2006 under Section 3.4 of the Kanabec County Shoreland Ordinance which provides that all decisions of the Planning Commission may be appealed to the County Board. (R-23-25) This appeal was filed with the Kanabec County Board of Commissioners for the purposes of exhausting all administrative remedies available at the County. Id. On November 22, 2006, Respondent was sent a letter from Teresa Bearce, Kanabec County Environmental Services Director, that as the interpreter of the Ordinance, she solely determined that Calm Waters, LLC had no administrative remedy to appeal the Planning Commission’s decision to the County Board. (R-26) The letter stated that any appeal Calm Waters wished to make must be done according to the laws set forth by the Minnesota Courts. Id. The County’s actions relating to the October 18, 2006 Planning Commission meeting, the County’s violation of Respondent’s Due Process rights and the denial of the application were appealed by Respondent in a Petition for Writ of Certiorari as Case No. A06-2361. (A-76)

STANDARD OF REVIEW

This case presents the legal issue of whether Minn. Stat. § 15.99 applies to a subdivision application submitted to a county regulating under Chapter 394.³

This Court reviews questions of statutory construction *de novo*. Houston v. Int'l Data Transfer Corp., 645 N.W.2d 144, 149 (Minn. 2002).

LEGAL ARGUMENT

I. MINN. STAT. § 15.99 APPLIES TO SUBDIVISION APPLICATIONS SUBMITTED IN KANABEC COUNTY.

A. The plain language of Minn. Stat. § 15.99 includes the preliminary plat application subject to this proceeding.

The Court of Appeals held that the plain language of section 15.99 compelled the conclusion that the preliminary plat application submitted to the County under Chapter 394 was subject to its provisions. Minn. Stat. § 15.99, subd. 2(a) provides, in part, that “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....” Where the Legislature’s intent is clearly discernible from the plain and unambiguous language of the statute, statutory construction is neither necessary nor permitted, and courts apply the statute’s plain meaning. Ed

³ Contrary to Appellants’ asserted Standard of Review, the issue before this Court is not whether the Appellants’ actions were reasonable or rational. Appellants’ failed to take any action within 60 days after the submission of a complete application as defined by the Subdivision Ordinance and the actions taken by Appellants’ were not addressed by the Court of Appeals decision as Case A06-2361 was dismissed as moot. Therefore, rationality or reasonableness has no application to the issues presented to this Court.

Herman & Sons v. Russell, 535 N.W.2d 803 (Minn. 1995); Minn. Stat. § 645.16.

In construing statutes, courts are not to supply that which the Legislature purposely omits or even inadvertently overlooks. See, e.g., Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 588 (Minn. 1971); State v. Corbin, 343 N.W.2d 874 (Minn. App. 1984). Statutes are presumed to be passed with deliberation and with full knowledge of all existing statutes on the same subject. See, e.g., County of Hennepin v. County of Houston, 39 N.W.2d 858 (Minn. 1949); Roinestad v. McCarthy, 82 N.W.2d 697 (Minn. 1957). In determining whether any particular disputed language in a statute has a “plain meaning” courts also look to the full context of the language in the act or statutory provision in order to properly ascertain the meaning from context. Advantage Capital Management v. City of Northfield, 664 N.W.2d 421, 426 (Minn. App. 2003), *rev. denied*.

The plain and unambiguous language of section 15.99 requires a determination that it applies to the preliminary plat application subject to this proceeding. The statute provides “*Except as otherwise provided in this section, section 462.358, subdivision 3b, or Chapter 505 ... an agency must approve or deny within 60 days a written request relating to zoning.*” (emphasis added) The critical language of the statute relevant to this case for the purposes of determining the plain language of the statute is the “Except as otherwise provided in” section 462.358, subd. 3(b) or Chapter 505. The exceptions shed significant light on the statutes application to preliminary plat applications in general. It is important to

note that the exceptions both apply to the subdivision or platting of land. A clear and undisputable indication that the Legislature believed that subdivision applications were a request subject to the statute or a request relating to zoning. There would be no need for the Legislature to remove subdivision and platting requests from the application of the statute if the Legislature did not believe that it applied in the first place.

Section 462.358, subd. 3(b) provides the review procedure for plat applications at the city and township levels. Subdivision 3(b) additionally provides an alternate time period for the consideration of preliminary plat review in that the “A subdivision application shall be preliminarily approved or disapproved within 120 days following delivery of an application completed in compliance with the municipal ordinance....” Under Subdivision 3(b) a township or city can only extend the review period with the consent of the applicant. If a municipality “fails to preliminarily approve or disapprove an application within the review period, the application shall be deemed preliminarily approved....” Section 462.358 is essentially a restatement of the principles articulated in section 15.99 except for it provides a slightly longer initial review period for preliminary plat applications.⁴

In the context of section 15.99, section 462.358, subd. 3(b) provides an alternate timeline for cities and townships to make a decision of preliminary plat

⁴ It should be noted that if a county properly extends the review period under Section 15.99 that a county would have 120 days to render a decision. In this case the Appellants failed to do so. Furthermore, section 462.358, subd. 3(b) provides that cities and towns have 60 days to approve a final plat and the failure to do so results in the approval of the plat.

applications. The failure to do so results in the same penalty as provided for in section 15.99. The exception of section 462.358, subd. 3(b) and its “otherwise provided” timeline is clear evidence of the application of section 15.99 to preliminary plat applications in general.

The other exception from section 15.99 is Chapter 505. Chapter 505 contains regulations relating to plat content and requirements. While Chapter 505 contains several time periods which may apply to certain plats (for example, land abutting a trunk highway) those time provisions do not apply to all plats.⁵ It is instructive in this case that neither Appellants nor Amicus Curiae have been able to identify an alternate timeline in Chapter 505 which applies to the plat at hand. In fact, Appellants’ have previously acknowledged that there are no timing provisions in Chapter 505 which apply to Respondent’s application.⁶ The exception of Chapter 505, when other timelines are provided therein, from the application of section 15.99 evidences, based on the plain, unambiguous language of the statute, that preliminary plat applications are within the coverage of section 15.99. Any holding to the contrary yields an absurd result and would ignore the plain language of section 15.99.

A review of Chapter 505 indicates that the Legislature clearly intended the deadlines of section 15.99 to apply to subdivision and plat applications. Section

⁵ It should be noted that Minn. Stat. § 15.99, subd. 3(b) provides that the time for decision begins to run for all executive branch agencies if more than one agency’s approval is required on the date the application is received by one agency.

⁶ “Chapter 505 does not set out a specific timeline within which a county has to make subdivision decisions....” Resp. Brief. A06-2019 at p.21

505.03, subd. 2 provides for plat approval and road review. Subdivision 2(c) provides as follows “[a meeting between city and county officials to discuss the county engineer’s recommendations on a preliminary plat] shall not extend the time deadlines for preliminary or final approval as required under this section, **section 15.99** or 462.358, or any other law....” (emphasis added) The express and unambiguous language contained in Chapter 505 contemplates that preliminary and final plats are subject to the time requirements of section 15.99. To hold that subdivision applications are not subject to the requirements of section 15.99 would require a construction of the statute that ignores its plain language and the plain language of section 505.03.

Furthermore, Appellants’ reliance upon the exception of Chapter 505 is misplaced. The enabling legislation for a county to regulate the subdivision process is under Chapter 394. Minn. Stat. § 394.25, subd. 7 provides that a county may adopt an ordinance providing for the “*subdividing of land and the approval of land plats*”. (emphasis added)

Contrary to the assertions of Appellants’ and Amicus Curiae, Kanabec County subdivision regulations were adopted under Minn. Stat. § 394.25 and not Chapter 505. Section 1.1 of the Kanabec County Comprehensive Plan states that the counties are given authority to plan for and manage development within their jurisdictions under Minnesota Statutes 394.21 to 394.37. (R-37) Section 1.1 continues “[t]he comprehensive plan, when adopted by the County Board, becomes the basis for official controls adopted under the provisions of Minnesota

Statutes Sections 394.21 to 394.37. Official controls generally mean ... *subdivision regulations...*” *Id.* (emphasis added) Kanabec County regulates under Chapter 394; not Chapter 505. The plain language of the statute does not exempt subdivision regulations adopted under Chapter 394 from the application of section 15.99. Assuming that even if Chapter 505 did apply, there are no timelines contained therein which apply to this application which therefore brings the application back within the coverage of Section 15.99. Additionally, section 505.03, subd. 2(c) expressly recognizes that plats are subject to the time requirements of section 15.99. See also Minn. Stat. § 394.25, Subd. 7(b) which requires a county to approve a preliminary plat that meets the applicable standards and criteria contained in the county’s zoning and subdivision regulations.

The plain, unambiguous language of the statute demands that this Court hold that section 15.99 applies to subdivision applications. First, the “Except as otherwise provided” and the exceptions contained therein shed significant light on the application of the statute to subdivision applications. There is no need to except from a statute what does not apply initially. Second, neither exception provides an alternate timeline which would apply to this plat. Section 462.358, while instructive for comparison purposes, only applies to cities and towns. The other exception, Chapter 505, does not set out a specific timeline within which a county has to make subdivision decisions, therefore, there are no “except as otherwise provided” time periods to apply to this proceeding. Additionally, section 505.03, subd. 2(c) is clear and unambiguous language that section 15.99

applies to preliminary and final plat approvals. This Court should affirm the Court of Appeals determination that subdivision applications are within the coverage of section 15.99 based on the plain language.

B. The legislative history is clear that Minn. Stat. § 15.99 applies to subdivision review.

Only if a statute's meaning is ambiguous should this Court look outside the statutory language to ascertain legislative intent. Wynkoop v. Carpenter, 574 N.W.2d 422, 425 (Minn. 1998). If this Court finds the language to be ambiguous, the legislative history clearly shows that subdivision applications are subject to the provisions of section 15.99. The legislative history of the 2003 amendments to Minn. Stat. § 15.99 clearly demonstrates (1) that subdivision applications are within the coverage of the statute and (2) that the Legislature did not intend to exempt subdivision applications from the 60-day time limit when there was no other controlling statutory time period contained in section 462.358, Subd. 3(b) or Chapter 505.

The Senate Committee on State and Local Government Operations ("Senate Committee") met on March 12, 2003 to discuss SF 486. The bill's sponsor, Senator Solon, stated that "if a different law provides a specific time frame for an action, the legislative policy behind that time frame should not be undone by this statute." (RA-170)⁷ (emphasis added) Testimony was taken at the meeting from Kent Sulem of the Minnesota Association of Townships. Mr. Sulem

⁷ The cite of "RA" refers to the County's Brief and Appendix in Case A06-2019.

testified that the amendment was offered to clear up confusion regarding conflicting time lines. (RA-172) Additionally, Susan Dioury testified to a concern regarding the proposed removal of the “notwithstanding any other law to the contrary” language, still contained in the statute, and how that language may allow an agency to put in any time period they wish and usurp the 60-day time period. (RA-178-79) This evidences a clear legislative intent not to leave the time period for review to the discretion of the agency as now argued by Appellants.

On March 26, 2003, the Senate Committee met again to discuss SF 486. The bill’s sponsor, Senator Solon, stated that an “exemption from the 60-day rule for subdivision approvals and plat approvals was being made due to the time line established by the respective statutes.” (RA-181) (emphasis added) Additionally, at these meetings the intent of the Legislature to not to remove quasi-judicial decisions from the statute with regard to the term “relating to zoning” is clear. Senator Solon stated that a proposed definition of zoning was necessary because of “the need to distinguish between the quasi-judicial actions taken by a governing body which have been subject to the 60-day rule and the quasi-legislative matters that should not be subject to an artificial time line.” (RA-170) Kent Sulem’s testimony reflected the same need to keep quasi-judicial matters under time requirements and exempt quasi-legislative matters. (RA-171) The decision to approve or deny a preliminary plat is a quasi-judicial decision. Good Value Homes, Inc. v. City of Eagan, 410 N.W.2d 345, 348 (Minn. App. 1987).

The legislative history is clear that the exemption for subdivision and platting applications was only to apply when there was a time line established in the respective statutes (i.e. section 462.358, subd. 3(b) or Chapter 505). Furthermore, the Bill Summary created for HF 433 states that the amendment “provides that the time for response in the laws governing subdivision regulations and platting govern those actions (and therefore the “60-day rule” does not apply). (RA-198) The key to that sentence is the phrase “laws governing subdivision regulations and platting govern those action”; in the absence of a law governing subdivision regulations there is no indication that the Legislature intended that the time limit for action was to be left solely to the discretion of the agency.

The Legislature intend to exclude subdivision and platting applications from the time limits of Minn. Stat. § 15.99 when a respective statute established a different time for review. The amendment was to resolve any conflicts existing between statutes. For example, section 462.358 provides that cities and towns have 120 days to make a decision on a plat before the mandatory approval penalty applies. However, it is clear from the plain language of the statute and its legislative history that if section 462.358 did not apply or that there was no alternate time for review provided in Chapter 505 that the general provisions of section 15.99 were to apply to the application. This legislative intent is confirmed by section 505.03, Subd. 2(c) which provides that the time requirements of that section “shall not extend the time deadlines for preliminary or final approval as required under this section, *section 15.99* or 462.358....” (emphasis added) If a

specific time line in section 462.358 or Chapter 505 does not apply, the general provision of section 15.99 must apply. Any holding to the contrary would yield an absurd result as the Legislature clearly did not intend for counties to establish their own time lines.

C. A subdivision application is a written request “relating to zoning” under Minn. Stat. § 15.99.

Where the legislature’s intent is clearly discernable from plain and unambiguous language, statutory construction is neither necessary nor permitted and courts apply the statute’s plain meaning. Ed Herman & Sons, 535 N.W.2d at 806; Minn. Stat. § 645.16 (2000). If this Court determines that the statute is ambiguous and that the legislative history does not resolve the matter, the Court should find that the plain meaning of the words contained in the statute compels a determination that a subdivision application is a “request relating to zoning”. Appellants’ argument that the word “zoning” as used in section 15.99 does not apply to subdivision approvals is contrary to the case law, section 505.03, subd. 2(c) and the legislative history.

In Kramer v. Otter Tail County Board of Commissioners, 647 N.W.2d 23 (Minn. App. 2002), the Court of Appeals held that a preliminary plat application was approved by the operation of Minn. Stat. § 15.99 as a result of the County’s failure to act on the application within 60 days. The language at issue in this proceeding in section 15.99, “relating to zoning”, was contained in the statute at the time of the Kramer decision. Id. at 25. The Court held that the County’s

failure to act required that a writ of mandamus issue. Id. at 26. First, the Court held that the County was required to approve or deny the plat application within 60 days.⁸ Id. (“The county’s refusal to approve the plat was therefore a failure to perform an official duty clearly imposed by law.”) Second, the Court held that the county’s failure to act resulted in an injury to the respondents because they were unable to develop their property. Id. Finally, the Court held that there was no other plain, speedy, and adequate remedy in the ordinary course of law. Id. The Court stated that a writ of certiorari to the Court of Appeals was not an adequate remedy because a certiorari appeal is more expensive, time-consuming and complicated than a petition to the district court.

Appellants’ reliance upon Advantage Capital Management v. City of Northfield, 664 N.W.2d 421 (Minn. App. 2003), in support of their argument that “zoning” does not include preliminary plat review is misplaced. In Advantage Capital Management, there were two applications submitted to the City of Northfield, a building permit application and a site plan application. Id. at 423-424. The Court of Appeals in determining whether the building permit application was a “request relating to zoning” stated that “[z]oning involves ‘governmental regulation of the uses of land and buildings according to districts or defined areas.’” Id. at 426. The Court ultimately concluded that a building permit

⁸ Appellants’ attempt to distinguish Kramer by stating it is a conditional use permit case. That argument is without merit. All three mandamus factors were discussed in the context of the plat application by the Court and the holding expressly states that the plat application, not the conditional use permit, was approved by the application of section 15.99.

application was not a written request relating to zoning noting that the “concern with structural, engineering and safety standards in the construction process differs qualitatively from the regulation of land use within certain districts or defined areas...” *Id.* The Court, however, also concluded that a site plan application was a written request relating to zoning. *Id.* at 427. The Court cited a definition of a site plan as “a plan, to scale, showing uses and structures proposed for a parcel of land as required by the regulations involved.” *Id.* A preliminary plat application is significantly more like a site plan application than a building permit application.

Appellants’ further attempt to justify their “plain language” argument by stating that a subdivision application is not specifically listed within section 15.99 and therefore must not be included. That argument is without any merit. Numerous applications are considered a “request relating to zoning” without being specifically listed in section 15.99. A site plan application is not specifically listed either but the Court in Advantage Capital Management clearly believed that it was under the coverage of section 15.99, nor is a conditional use permit or a variance yet those are traditionally thought of as a zoning request. However, it is undisputed that all three of these applications fall under the coverage of section 15.99. However, when one reviews the statutes contained in Chapter 394 a pattern quickly emerges. For example, under Minn. Stat. § 394.26, a public hearing is required before any conditional use permit, variance or subdivision proposal is approved. Under Minn. Stat. § 394.30 discusses the role of a planning commission with regard to conditional use permits, planned unit developments

and the subdivision of land. In all these cases, the subdivision of land is routinely referenced with other requests which are within the coverage of section 15.99. See State v. Suess, 236 Minn. 174, 52 N.W.2d 409 (Minn. 1952) (the meaning of ambiguous words may be determined by reference to their association with other associated words and phrases).

Appellants' attempt to distinguish a zoning application from a subdivision application is without merit and ignores the plain language of the statute and its legislative history. As discussed above, the plain language of the statute and its exceptions clearly indicate that a subdivision request is a "request relating to zoning". Additionally, the legislative history is clear that the legislature believed that a subdivision application was a "request relating to zoning". Appellants' argument also ignores Minn. Stat. § 505.03, subd. 2(c) which expressly states that preliminary and final plat approvals are subject to the time deadlines required under section 15.99. Additionally, Minn. Stat. § 394.25, subd. 7(b) provides that a "county must approve a preliminary plat that meets the applicable standards and criteria contained in the county's zoning and subdivision regulations...." The plain language of section 394.25 that a preliminary plat application is an approval relating to zoning. This Court must hold that a subdivision application is a request within the coverage of section 15.99.

D. Minn. Stat. § 15.99 must apply to subdivision review.

When interpreting an ambiguous statute, a court should be guided by the principle that "[t]he Legislature does not intend a result that is absurd, impossible

of execution, or unreasonable.” Minn. Stat. § 645.17. While subdivision review can be a complicated process that does not mean that it cannot be completed within 60 days as argued by Appellants and Amicus Curiae. If an extension is done properly an additional 60 days is added. This gives a county four months to make a decision on a preliminary plat application.⁹ The two-step process used by Kanabec County requires two separate applications to be filed and two approvals to be made.¹⁰ The county has 60 days to make a decision on each application after it has been properly submitted. The time line is not applied to the entire process as suggested by Appellants; rather the 60-day requirement runs from the submission of each application as they are independent under the two-step platting process.

It is instructive that section 462.358, subd. 3b provides the same penalty as section 15.99 for failure to act on a plat application within the review period, i.e. approval of the application. Section 462.358, subd. 3b provides “If the municipality or the responsible agency fails to preliminarily approve or disapprove an application within the review period, the application shall be deemed preliminarily approved....”¹¹ Why should cities and towns be subject to this penalty for failing to act but not counties as argued by Appellants and Amicus

⁹ This is the precise amount of time provided to cities and towns under Minn. Stat. § 462.358, Subd. 3b.

¹⁰ As further indication of the separateness of the two applications, the Kanabec County Subdivision Ordinance requires all improvements to be built prior to final plat approval. Article V (A-107)

¹¹ This language directly contradicts the argument advanced by Appellants and Amicus Curiae that the subdivision review process is not amenable to the application of the 60-day rule.

Curiae? Rural cities and especially township usually have substantially less resources available to them for plat review than a county yet they are required to act in a timely manner and subject to a penalty for their failure to act. The Legislature has clearly spoken that as a matter of policy plats are not so complex that they should be exempt from the automatic approval penalty for a failure to act in accordance with the statutes. See also Minn. Stat. § 505.03, subd. 2(c) (the time deadlines for preliminary plat or final plat approval under section 15.99 is not extended by the review requirements of the statute). The “doomsday” argument of Appellants and Amicus Curiae is without any merit whatsoever.¹²

The only illogical result is a holding that section 15.99 does not apply to plats. A holding under the argument advanced by Appellants and Amicus Curiae would permit a county to establish its own time lines with regard to platting. That is not what the legislature intended nor is it sound public policy. The Legislature clearly did not intend to allow counties to set their own time limits for reviewing preliminary plat applications when it requires cities and towns to make timely decisions.¹³

¹² As is the argument that because the subdivision process is a quasi-judicial proceeding and therefore should not be subject to the 60-day rule. Variance requests, conditional use requests, and site plan requests are all quasi-judicial decisions subject to the application of the 60-day rule. In fact, the legislative history is clear that the 60-day rule was to apply quasi-judicial requests.

¹³ In fact, Kanabec County arguably violated the deadlines laid out in its Subdivision Ordinance which require the application to be considered at the first meeting after the submission of the plat. Section 3.31 (A-99). The application was submitted in July of 2006 and the Planning Commission did not review the application for the first time until September of 2006.

The purpose of Minn. Stat. § 15.99 is to ensure timely land-use decisions by governmental agencies. Tollefson Dev., Inc. v. City of Elk River, 665 N.W.2d 554, 558 (Minn. App. 2003), review denied (Minn. Sept. 24, 2003). “[T]he underlying purpose of Minn. Stat. § 15.99 is to keep government agencies from taking too long in deciding issues.” Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Twp., 583 N.W.2d 293, 296 (Minn. App. 1998). A holding under the argument advanced by Appellants’ and Amicus Curiae would allow counties to continually table preliminary plat applications indefinitely or for great periods of time resulting in an administrative moratorium. That is truly an absurd result the Legislature never intended and goes directly against the purpose of the statute requiring timely decisions.

II. KANABEC COUNTY CAN NOT REGULATE SUBDIVISION REQUIREMENTS BY CREATING A SUBSTANTIVE REGULATION ON ITS APPLICATION FORM RATHER THAN BY AMENDING THE SUBDIVISION ORDINANCE.

A. Kanabec County failed to file a Notice of Review on this issue.

The Court of Appeals after holding that the application had been approved by section 15.99 briefly commented on several other issues contained in the district court’s ruling. (A-8-9) With regard to the issue of whether the application was incomplete because it did not include a township approval letter, the Court of Appeals held that Appellants did not file a notice of review to challenge the decision. A respondent must file a notice of review under Minn. R. Civ. P. 106 to obtain review of an adverse decision by the district court, even if judgment was

ultimately entered entirely in favor of respondent. Arndt v. Am. Family Ins. Co., 394 N.W.2d 791, 794 (Minn. 1986). Appellants' failed to file a Notice of Review on this issue and therefore this issue is not properly before the Court.

B. The application submitted to Kanabec County was complete as defined by the Subdivision Ordinance.

On July 26, 2006, Appellant filed a complete application for preliminary plat approval with Kanabec County Environmental Services as defined by the Subdivision Ordinance. On August 8, 2006, Kanabec County Environmental Services returned the application stating that it was incomplete due to the failure to include the township approval letter. (A-128) The only document of Kanabec County which requires the township approval letter is the preliminary plat application form. (A-79)

Section 3.10 to Section 3.14 of the Kanabec County Subdivision Ordinance sets forth what a subdivider must submit to the Environmental Services Director. The subdivider shall submit to the Environmental Services Director (Section 3.11) eight copies of the preliminary plan and protective covenants, if any proposed (Section 3.12), two copies of topographic information including elevation (Section 3.13) and two copies of soils information (Section 3.14). (A-99) The required information under the Subdivision Ordinance was provided to Kanabec County Environmental Services on July 26, 2006. (A-118) The application as defined by the Ordinance was complete.

The County cannot regulate the subdivision and platting of land outside of its properly adopted Subdivision Ordinance. To determine whether a governmental entity's decision was unreasonable or arbitrary and capricious, we look to the *controlling ordinance*. White Bear Docking & Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn. 1982) (emphasis added). If an ordinance specifies minimum standards to which a development plan must conform, "local officials lack discretionary authority to deny approval of a preliminary plat that meets those standards." Chanhassen Estates Residents Association v. City of Chanhassen, 342 N.W.2d 335, 340 (Minn. 1984); PTL, LLC v. Chisago County Board of Commissioners, 656 N.W.2d 567, 571 (Minn. App. 2003) (denying preliminary plat based upon comprehensive plan was arbitrary and capricious as outside of Subdivision Ordinance). See also Minn. Stat. § 462.358, subd. 3b which states that an application must be submitted within 120 days following the submission "of an application completed in compliance with the municipal ordinance".

The Court in PTL, LLC stated that "[w]e are mindful of the demands of land-use management. It is certainly proper for the board of commissioners to consider aesthetics, historical uses of the land, and the public cost of providing services for a given land use. *But these considerations must be reflected with sufficient specificity in the land-use ordinances. This decision does not preclude future revision of the zoning and subdivision ordinances to address these considerations.*" 656 N.W.2d at 575-576 (emphasis added). The standards

contained in the ordinances govern a county board's decision when reviewing a preliminary plat. PTL, LLC, 656 N.W.2d at 575. The Subdivision Ordinance is the controlling instrument; not the application form.

The explicit requirements of the Kanabec County Subdivision Ordinance do not require a township approval letter as a requirement for preliminary plat application. By requiring a township approval letter on its application, Kanabec County Environmental Services has made township approval a condition of obtaining preliminary plat approval without amending the Subdivision Ordinance or without any direction for the requirement from the Board of Commissioners.¹⁴ "The standards established in the zoning ordinance are conclusive until the board rezones the district or amends the zoning ordinance through the proper legislative channels." PTL, LLC, 656 N.W.2d at 575. Land use requirements "*must be reflected with sufficient specificity in the land-use ordinances.*" Id. at 575-576. The requirement of a Township approval letter on the application form is an illegal attempt to regulate subdivision regulations outside of the properly adopted Subdivision Ordinance.

Township pre-approval is required under Minn. Stat. § 505.09 under certain circumstances. However, the proceeding before this Court is not one of the circumstances. The requirements of section 505.09 are not triggered if the Township does not have a Zoning and Planning Commission to review and

¹⁴ Respondent requested all information regarding the adoption of the township letter requirement on the application form from Appellants and was not provided any information by Appellants. (R-5)

approve or deny preliminary plats. Appellant requested from the Township its Subdivision Ordinance and its ordinances creating a Planning Commission on several occasions in writing and by telephone. (R-1-3) The Township confirmed that it did not have any of the requested documents or a planning commission at the time the application was submitted. (A-3)

Furthermore, the County acknowledged that the application was complete as initially filed by the fact that after being return without the Township approval letter it accepted the original, unaltered application without the township approval letter and set the matter for a public meeting before the Planning Commission and forwarded the application and accompanying materials to its professional staff for comment. By accepting the original, unaltered preliminary plat application the County acknowledged that the original application was complete and that its attempt to restart the sixty day limit was ineffective. Therefore, the 60 day period began to run on July 26, 2006.

Appellants' argue that under Minn. Stat. § 15.99, subd. 3(a) that the County was able to place any requirement it deemed necessary on an application under a previously adopted rule, ordinance or policy. This argument is contrary to the policy underlying the numerous Minnesota cases that have held that all subdivision regulations must be contained in a duly adopted ordinance. PTL, LLC, 656 N.W.2d at 575-576 (Land use requirements “must be reflected with sufficient specificity in the land-use ordinances.”)

A holding that a county can place a substantive requirement on an application form and use that requirement as the sole basis to reject an application would permit counties to essentially amend their subdivision ordinances without holding public hearings, publication or public review. It would permit the amending of ordinances without the approval of a county board. A holding under the Appellants' argument is against the purpose of the statute and against policy previously articulated by the appellate courts. "To allow the board to deny approval of a preliminary plat that proposes a permitted use and complies with the regulations specified for that use would, in effect, allow the board to arbitrarily amend the zoning ordinance simply by denying applications for subdivision approval. Such a practice would deprive landowners of adequate guidance in the preparation of preliminary plats and would allow capricious actions based on subjective criteria rather than express zoning provisions enacted to guide land-use decisions." PTL, LLC, 656 N.W.2d at 573.

Finally, Appellants' improperly attempt to suggest the application of Breza v. City of Minnetrista, 724, N.W.2d 106 (Minn. 2006) to this proceeding. First, that issue is not properly before this Court as it was not included in Appellants' Petition for Review. Second, Breza is inapplicable to this proceeding as the County was the sole regulatory authority for the preliminary plat application submitted. As previously discussed, the Township had no valid regulations in the shoreland district and therefore the review of the application was solely at the county level. The County recognized the lack of shoreland authority of the

Township in its comprehensive plan¹⁵, shoreland ordinance¹⁶ and a letter sent to town boards (R-27). Additionally, the DNR stated that the Township was without valid shoreland regulations. (R-6) See also Minn. Rule 6120.3900, Subp. 4a (A) stating that township controls must cover the same full range of controls as the county controls including “dimensional standards.” (R-29) While the Township may have attempted to adopt regulations in the Shoreland, they are invalid, unenforceable and without effect. The application of Breza is not properly before this Court and is inapplicable in this proceeding as only the County’s density requirements apply.

III. KANABEC COUNTY ENVIRONMENTAL SERVICES DIRECTOR DID NOT HAVE AUTHORITY TO UNILATERALLY EXTEND THE TIME FRAME TO ACT UNDER MINN. STAT. § 15.99.

After holding that the plat had been approved by operation of section 15.99, the Court of Appeals address several other issues raised as dicta. The Court commented that the county did not delegate authority to issue an extension of the time for review to the Environmental Services Director. On September 18, 2006, Teresa L. Bearce, Environmental Services Director, unilaterally attempted to extend the 60 day limit an additional sixty days under Minn. Stat. § 15.99, Subd. 3 on behalf of Kanabec County Environmental Services. (A-135) The reason stated for the extension of the deadline was “to address the issue of improper

¹⁵ See Section 2.8.3 recognizing only Arthur Township as having valid Shoreland Regulations. (R-64)

¹⁶ See Appendix A stating the requirements necessary for a township to adopted shoreland management controls. (R-106) Kroschel Township has not met these requirements.

notification” of the public hearing. Id. The letter of September 18, 2006 of Teresa L. Bearce, Environmental Services Director, stated that “*Kanabec County Environmental Services* will be extending the time limit an additional 60 days.” Id. At the September 20, 2006 public meeting the Planning Commission did not request additional information, it did not direct Environmental Services to obtain more information, nor did it make any motion on the matter whatsoever or take any official action. (R-10-11)

Kanabec County Environmental Services is not an “agency” under section 15.99 and therefore cannot unilaterally extend the sixty day time limit under subdivision 3(f). Subdivision 3(f) of section 15.99 states that “an *agency* may extend the time limit in subdivision 2 before the end of the initial 60-day period by providing written notice of the extension to the applicant.” Subdivision 1(b) defines “agency” as “a statutory or home rule charter city, county, town...” In Moreno vs. City of Minneapolis, 676 N.W.2d 1, 5 (Minn. App. 2004), the Court held that Minneapolis Planning Commission was not an agency within the definition of Minn. Stat. § 15.99, Subd. 1(b). The Court stated as follows:

“Minn. Stat. § 15.99, subd. 1, defines an agency as a “department, agency, board, commission, or other group in the executive branch of state government; a statutory or home rule charter city, county, town...”
Significantly, the portion of the statute that defines a commission as an agency limits that definition to a commission within the executive branch of state government. The city planning commission was not acting as a

statutory or home rule city because the planning commission is merely a level of government within the city's governmental structure. ... While it is true that in some cases that the decision of the planning commission will be final because there is no challenge to its decision, if the decision is challenged, the application is not finally approved until the challenge is resolved by the city council."

Id. at 5-6. The decision in Moreno requires a finding that Kanabec County Environmental Services is not an agency within the definition of Minn. Stat. § 15.99, Subd. 1(b). Kanabec County Environmental Services is merely a level of government within the Kanabec County governmental structure.

Kanabec County Environmental Services has absolutely no decision making authority to approve or deny preliminary plat applications.¹⁷ The only authority delegated to Kanabec County Environmental Services under the Subdivision Ordinance is to accept preliminary plat applications (Section 3.11), distribute copies of the preliminary plat application (Section 3.20), grant an exemption certification (Section 7), accept exemption certificate applications (Section 7.10), grant exemption certificates (Section 7.30) and enforce the ordinance (Section 12.10). Kanabec County Environmental Services had no

¹⁷ Appellants' argue that because the Environmental Services Director is charged with the administrative duty of accepting and circulating the application that it should also be granted the ability to affect the substantive, statutory right to a timely decision. The time limit for decision under section 15.99 is not merely an incident of the processing of an application as alleged by Appellants, but a substantive right which should only be extended by the decision maker itself.

authority over preliminary plat decisions and had not been delegated the authority to extend the time requirements under Minn. Stat. § 15.99.¹⁸ The Court of Appeals properly found that the Kanabec County Environmental Services is not an “agency” under Minn. Stat. § 15.99 and therefore could not extend the time for review. (A-10) Kanabec County Environmental Services had no authority to exercise subdivision 3(f) of section 15.99. Only the decision maker, a.k.a. the “agency”, is in the best position to determine whether more time is necessary to make a decision. In this case, the Planning Commission and Board of Commissioners took no action to extend the time for review before the expiration of the 60 days.

While not addressed by the Court of Appeals, assuming that Kanabec County Environmental Services is an agency under Minn. Stat. § 15.99, Kanabec County Environmental Services written reason for extending the sixty day limit is without legal basis. Minn. Stat. § 15.99, Subd. 3(f) provides that “[t]he notification must state the reasons for the extension and its anticipated length, which may not exceed 60 days unless approved by the applicant.” The Court has not addressed what standard of review is required of the reasons stated or if any reason stated is sufficient to meet the statutory requirements, the Court has only found that extenuating circumstances is too strict of a standard. American Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001). Respondent requests

¹⁸ On November 14, 2007, the Kanabec County Board of Commissioners specifically delegated this power to the Environmental Services Director as Resolution #28 in direct response to the Court of Appeals decision. (R-108)

that this Court find that an agency can not merely state any reason for the extension as a reason stated may directly conflict with the purpose of the statute, may attempt to excuse a municipality for its own delays and negligence or may be evidence of arbitrary or capricious action.

The requirement under subdivision 3(f) that an agency provide a written reason for the extension serves two purposes. First, it notifies the applicant of the reason why they are not receiving the timely decision to their application which is required by the statute. Second, it enables a reviewing court the ability to determine whether the reasons stated justify the extended delay and is based upon a valid reason. Merely requiring an agency to state the reasons, *any reason*, for the extension under subdivision 3(f) negates the very purpose of the statute requiring timely decisions and is essentially a blank check for agencies to act inappropriately, arbitrarily and negligently.

The reason offered by Kanabec County Environmental Services to justify the extension (forty-two days after the original filing of the application) under subdivision 3(f) is without merit. The extension is solely to remedy Environmental Services own failures and that failure should not be held against Respondent. The Legislature in Subdivision 3(f) specifically requires that a reason for extension be provided in writing. If the Legislature did not wish a person to be able to challenge the sufficiency of the reason why did they require the reason be provided in writing? Kanabec County Environmental Services failed to properly follow the laws of Minnesota and had ample time to have the matter reviewed by

the proper authority. The failure to do so should not allow it to extend the time for review at the expense of Petitioner's right to a timely decision under section 15.99.

Finally, the doctrine of substantial compliance does not apply in this proceeding. The doctrine of substantial compliance does not apply if it would undermine the purpose of the procedures or prejudice the rights of those intended to be protected by the procedures. City of Minneapolis v. Wurtele, 291 N.W.2d 386 (Minn. 1980). Additionally, as a result of the mandatory consequences in Minn. Stat. § 15.99 for the failure to act within 60 days "the doctrine of substantial compliance would not apply thereto." Manco of Fairmont, Inc., 583 N.W.2d at 295. In Manco, the Court found that the written notification requirements were directory rather than mandatory because they did not make a directive regarding content and did not provide a negative consequence for failure to comply. Id. at 296. The issue before this Court is whether Kanabec County Environmental Services is an "agency" under the statute therefore the directory-mandatory analysis is irrelevant with regard to whether the written notification requirements were substantially met. Kanabec County Environmental Services unilaterally acted without authority and the action taken had no validity. It does not matter if the requirements of section 15.99, subd. 3(f) were substantially complied with or not. That is issue is not before this Court and is not contained in Appellants' Petition for Review.

IV. KANABEC COUNTY PLANNING COMMISSION COULD NOT DENY THE PRELIMINARY PLAT APPLICATION UNDER EITHER MINN. STAT. § 394.30 OR THE SUBDIVISION ORDINANCE.

- A. Whether the Planning Commission had authority to deny the preliminary plat is irrelevant as Kanabec County failed to take any action within 60 days from the submission of the complete application under Minn. Stat. § 15.99.**

The Court of Appeals held that the Planning Commission only had authority to approve a preliminary plat application under section 394.30, subd. 5 and that the Board of Commissioners retained exclusive authority to deny a preliminary plat application under section 394.30, subd. 4. This issue was presented in Case A06-2361 as part of the challenge against the arbitrary decision of the Planning Commission and whether that decision was with jurisdiction.¹⁹ A resolution of this issue is not necessary to resolve this case. It is clear that the Appellants' had a legal duty to act on the application within 60 days of its submission on July 26, 2006. The record is clear that regardless of who had the final decision making authority that no action was taken on the application within the initial sixty days. If this Court finds that section 15.99 applies to Respondent's subdivision application, that the application was complete as defined by the Ordinance and that the period for review was not properly extended, a resolution of this issue is unnecessary because no action was taken by the County within 60 days of the submission of the application at all.

¹⁹ Respondent vigorously opposed the consolidation of the two appeals for this very reason; the risk of confusion resulting from the numerous issues present in each appeal.

B. The Planning Advisory Commission only had the authority to approve a preliminary plat application under Minn. Stat. § 394.30.

If this Court determines that a resolution of this issue is necessary to resolve this case, the Court of Appeals determination that the Planning Advisory Commission only had approval authority under Minn. Stat. § 394.30, subd. 5 should be affirmed. Where the Legislature's intent is clearly discernible from the plain and unambiguous language of the statute, statutory construction is neither necessary nor permitted, and courts apply the statute's plain meaning. Ed Herman & Sons, 535 N.W.2d at 803; Minn. Stat. § 645.16. Minn. Stat. § 394.30, subd. 5 states that "[t]he board may by ordinance assign additional duties and responsibilities to the planning commission including ... the authority to *approve* some or all categories of subdivisions of land..." (emphasis added) "In all instances in which the planning commission is not the final authority authorized in subdivision 5, the commission shall review all applications ... for subdivision of land and report thereon to the board." Minn. Stat. § 394.30, Subd. 4.

The clear and unambiguous language of the statute only permits a county board to delegate "the authority to *approve* some or all categories of subdivisions of land." Minn. Stat. § 394.30, Subd. 5. The Legislature did not grant the county board the power to delegate the power to make all decisions or deny preliminary plat applications. The Legislature only permits a county board to delegate the power to "approve". The power to delegate denial power was not provided to county boards by the Legislature. In fact, the Legislature is aware of the

difference between and the distinctness of approval power and denial power and has specifically included both powers in several statutes. For example, section 15.99, subd. 2 requires an agency to “approve or deny” a request. Section 462.358, Subd. 3b permits a municipality to delegate review of subdivision applications to a planning commission, “but final *approval* or *disapproval*” remains with the governing body. (emphasis added)²⁰ In construing statutes, courts are not to supply that which the Legislature purposely omits or even inadvertently overlooks. Wallace, 184 N.W.2d at 588. Statutes are presumed to be passed with deliberation and with full knowledge of all existing statutes on the same subject. County of Hennepin, 39 N.W.2d at 858.

The word “approve” is clear and unambiguous. The word “approve” does not include its negative, deny. To “approve” is to confirm, ratify, sanction, or consent to some act or thing done by another. Black’s Law Dictionary, 5th Edition (1979). To “approve” is to give formal sanction to; to confirm authority. Black’s Law Dictionary, 7th Edition (1999). To “approve” something is an affirmative act that something is acceptable. Approval is a positive concept while denial is negative.²¹

²⁰ It is interesting to note that for cities and towns that the Legislature has removed all authority from a planning commission to approve or deny an application.

²¹ Appellants’ reliance upon Southern Pacific Co. v. Olympian Dredging Co., 260 U.S. 205, 43 S.Ct. 26 (1922) is misplaced. The statement relied upon was not central to the holding, which was whether Southern Pacific was liable for sinking Olympian’s ship. Southern Pacific was granted permission to build a new bridge but as a condition of building the new bridge an old bridge had to be removed. One condition of its removal was the cutting of the base to a level below the river

A county board cannot delegate the power to deny a preliminary plat application because the Legislature did not grant it the authority to do so. A county board would exceed the scope of the enabling legislation if it delegated to a planning commission the power to deny preliminary plats. Minn. Stat. § 394.30, Subd. 5 only grants a board the ability to delegate the authority to “approve some or all categories of subdivisions of land.” “In all instances in which the planning commission is not the final authority, as authorized by subdivision 5, the commission shall review all applications ... for subdivisions of land and report thereon to the board.” Minn. Stat. § 394.30, Subd 4. The Legislature’s intent is clear; a planning commission must report its recommendation for a denial of a preliminary plat to a county board.

As a result of the lack of jurisdiction to deny a preliminary plat application and the failure of the Board of Commissioners to review the plat application, a final decision has not yet been made on the preliminary plat application. This Court should affirm the Court of Appeals and hold that the clear and unambiguous language of Minn. Stat. § 394.30, Subd. 5 only permits a planning commission to “approve” subdivision applications and that the Kanabec County Planning

at the time. Twenty-two years later the United States lowered the river exposing the remaining timbers. The authority of Secretary of War to grant or deny the bridge was not at issue in the case and the statement is dicta at best as it is not necessary for the holding.

Commission lacked jurisdiction and authority to make the final decision denying Respondent's preliminary plat application.²²

Appellants also claim that a system where a county board must review a recommendation for denial from a planning commission is absurd and would result in a "cumbersome, unworkable arrangement" or "inefficient process of hearings". These concerns are without legal or practical merit. Routinely county boards review the recommendations of advisory planning commissions with respect to various land use issue.²³ In many cases, county boards approve the actions of the planning commission.²⁴ In fact, Minn. Stat. § 394.30, subd. 4, contemplates the very procedure which Appellants claims is unworkable, cumbersome and inefficient. Appellants' "doomsday" argument is without merit.

C. The Planning Commission was only delegate approval authority under the Subdivision Ordinance and therefore could not deny the application.

Assuming that this Court finds that Minn. Stat. § 394.30, Subd. 5 may permit a county board to delegate denial authority; the Kanabec County Board of Commissioner's has not delegated the authority to deny a preliminary plat to the

²² Appellants' argument that the Court of Appeals' decision renders the phrase "final authority" in section 394.30 meaningless is without merit. Under subdivision 5, the planning commission is the final authority if it approves the plat. Under subdivision 4, the county board is the final authority if the plat is denied.

²³ In fact, section 462.358, subd. 3(b) requires the exact process that the Appellants and Amicus Curiae claim is unworkable evidencing the lack of merit of their argument.

²⁴ The Association of Minnesota Counties cites an informal survey yet fails to provide the actual results to Respondent or the Court. That statement should be taken for what it is worth; nothing.

Kanabec County Planning Commission. Section 3.31 of the Kanabec County Subdivision Ordinance provides that “[t]he Commission may approve a preliminary plan subject to certain revisions.” (A-99) (emphasis added) In construing a zoning ordinance, appellate courts generally focus on three rules of construction: (1) the ordinance should be construed in accordance with the plain and ordinary meaning of its terms, (2) the ordinance should be construed strictly against the governmental entity and in favor of the property owner, and (3) the ordinance must be considered in light of its underlying policy. SLS P’ship v. City of Apple Valley, 511 N.W.2d 738, 741 (Minn.1994); Frank’s Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608-09 (Minn.1980). But where the meaning of an ordinance or statute is free from ambiguity, there is no room for construction. Glen Paul Court Neighborhood Ass’n v. Paster, 437 N.W.2d 52, 56 (Minn.1989).

The Kanabec County Board of Commissioners adopted the Kanabec County Subdivision Ordinance. The Kanabec County Board of Commissioners delegated to the Planning Commission the authority to “approve a preliminary plan subject to certain revisions.” Kanabec County Subdivision Ordinance Section 3.31 (A-99) As discussed previously, to “approve” is to give formal sanction to; to confirm authority. Black’s Law Dictionary, 7th Edition (1999). The word “approve” does not contemplate the negative; deny.

The Kanabec County Board of Commissioners did not delegate the authority to deny a preliminary plat application through its Subdivision Ordinance.

The Planning Commission may approve a preliminary plat application, but if it does not feel that approval is appropriate it must make a recommendation to the Board of Commissioners for a final decision pursuant to section 394.30, subd. 4.²⁵ The Board of Commissioners is the final decision maker under the Subdivision Ordinance to deny a preliminary plat application. The Planning Advisory Commission's recommendation of denial is only advisory. Respondent filed an appeal of the decision with the Board of Commissioners, but that appeal was rejected by Teresa Bearce of Kanabec County Environmental Services. As a result of the Planning Commission's lack jurisdiction to deny a preliminary plat application under the Subdivision Ordinance and the failure of the Board of Commissioners to review the plan, a final decision has not yet been made on the preliminary plat application.

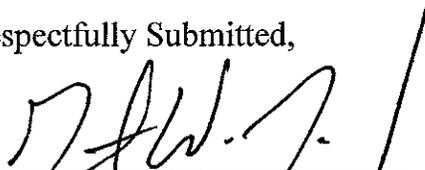
²⁵ Appellants' argue that because language to this effect is missing from the Ordinance that it should be construed against Respondent and in favor of a finding of delegation. This argument is without merit for two reasons. First, the fact that the Ordinance is poorly drafted should not be held against Respondent, rather the poor drafting and failure to address a situation should be construed against Appellants. Second, there is no need for a section in the Ordinance to this effect because there is a statute directly on point which provides the procedure to be followed. Minn. Stat. § 394.30.

CONCLUSION

For all of the foregoing reasons this Court should affirm the Court of Appeal's determination that Respondent's application was approved as a matter of law. If this Court should reverse the Court of Appeals' decision for any reason Case A06-2361 should be reinstated for review and decision on the merits.

DATED: 3/11/08

Respectfully Submitted,



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STATE OF MINNESOTA
IN SUPREME COURT

Kanabec County Board of Commissioners,
Kanabec County Planning Commission, and
Kanabec County Environmental Services,

Appellants,

CERTIFICATION OF BRIEF LENGTH

vs.

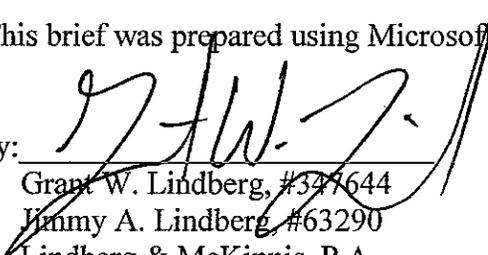
Calm Waters, LLC, a Minnesota limited
Liability corporation,

Respondent.

COURT OF APPEALS
CASE NOS.: A06-2019 and A06-2361

I hereby certify that this brief conforms to the requirements of
Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a monospaced font. The
length of this brief is 1,051 lines, 11,351. This brief was prepared using Microsoft Word.

DATED: 3/11/08

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