

**Nos. A06-2019 and A06-2361**

State of Minnesota  
**In Supreme Court**

OFFICE OF  
 APPELLATE COURTS

OCT - 9 2008

FILED

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 PETITION FOR REHEARING**

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## **PETITION FOR REHEARING**

Pursuant to Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure, Calm Waters, L.L.C. respectfully petitions the Court for rehearing of its judgment and decision issued on September 25, 2008. The grounds for the petition are as follows:

1. The Court in holding that the County acted within its authority in requiring a township approval letter as part of its subdivision application failed to consider the application of Minn. Stat. 394.25, subd. 7 and its prior precedent;
2. The Court in holding that the Planning Commission had final authority to deny preliminary plat applications failed to consider 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 and the effect of Minn. Stat. § 394.30, subd. 4.
3. The Court in holding that the failure to properly publish the notice of public hearing was merely a “technical” defect failed to consider prior principles of law.
4. The Court in holding that the Environmental Services Director is an “agency” misapplied the plain language of Minn. Stat. § 15.99.
5. The Court in holding that the Appellants timely denied Respondent’s preliminary plat application failed to consider and overlooked Respondent’s challenge to the denial of the application in Case No. A06-2361 as arbitrary and capricious.

Rehearing is warranted because resolution of the unaddressed issues has important, outcome-determinative implications for the decision in this case and for

future cases in which similar questions will arise. Calm Waters, L.L.C. adopts and incorporates by reference its Brief and Appendix on file with the Court.<sup>1</sup>

### ARGUMENT

**I. The Court failed to consider and overlooked Minn. Stat. § 394.25, subd. 7, and its prior precedent in holding that the Court acted within its authority when it required that subdivision applications include a township approval letter.**

The Court held that the County acted within its authority when it required that subdivision applications include a township approval letter. However, the Court failed to consider the application of Minn. Stat. § 394.25, subd. 7(b) which 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 unless the county adopts written findings based on a record from the public proceedings why the application shall not be approved.” (emphasis added); see also National Capital Corp. v. Village of Inver Grove Heights, 301 Minn. 335, 337, 222 N.W.2d 550, 552 (1974) (where a subdivision ordinance specifies standards to which a proposed plat must conform, it is arbitrary as a matter of law to deny approval of a plat which complies in all respects with the subdivision ordinance.); Zylka v. City of Crystal, 283 Minn. 192, 167 N.W.2d 45 (1969); Twin City Red Barn, Inc. v. City of St. Paul, 291 Minn. 548, 192 N.W.2d 189 (1971); Inland Const. Co. v. City of Bloomington, 292 Minn. 374, 195 N.W.2d 558

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<sup>1</sup> Because Rule 130.01 requires that parties not engage in unnecessary duplication all references contained herein will be to the appropriate Appendixes already on file with the Court.

(1972); Hurrle v. County of Sherburne ex rel. Board of Com'rs., 594 N.W.2d 246 (Minn. App. 1999); PTL, L.L.C. 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).

This Court held that “Calm Waters is correct that no Minnesota statute or Kanabec County ordinance specifically requires a township approval letter.” It was undisputed that the application as defined by ordinance was complete and the County treated the application as complete upon resubmission. Because the township approval letter was not required by either statute or ordinance, the County therefore could not deny the plat, let alone reject an application, under Minn. Stat. § 394.25, subd. 7(b) or National Capital Corp. for that reason.<sup>2</sup> The Court’s failure to consider and address the application of this statutory requirement and correlating case law necessitates a rehearing as the Court’s decision permits an agency to reject, and therefore deny, an application which

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<sup>2</sup> The Township had no regulatory authority to review or take action on the application. The County recognized the lack of shoreland authority of the Township in its comprehensive plan (Section 2.8.3 recognizing only Arthur Township as having valid Shoreland Regulations (R-64)), shoreland ordinance (Appendix A stating the requirements necessary for a township to adopt shoreland management controls (R-106)) and a letter sent to town boards (R-27). 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) Township’s regulations are therefore invalid, unenforceable and without effect. This is a material fact which the Court failed to consider in holding that the County properly denied Calm Waters’ application.

otherwise meets the standards contained within the duly adopted ordinances if the application does not comply with the “policy” of the agency.

The Court’s holding also fails to consider that the township approval letter goes beyond mere “information required by ... policy of the agency” under section 15.99 and is in fact a substantive subdivision regulation. The failure to consider the distinction between “information required” for applications and the creation of a substantive regulation outside of the ordinance adoption process requires that a rehearing be granted. See Minn. Stat. § 394.22, subd. 6 defining “official controls” as “**enacted policies** ... which control the physical development of a ... county ... and are the means of translating into ordinances all or any part of the general objectives of the comprehensive plan.” The Court also failed to consider that the express language of the Subdivision Ordinance itself contemplated Township review after submission, not prior to. See Sections 3.20 and 3.24 directing the Environmental Services Director to distribute copies of the application to the affected Board of Town Supervisors after its receipt. (A-99)

The Court also failed to consider that the section of the subdivision ordinance the Court used as a basis to support the finding of the “policy” is unenforceable. The Court cited language in the ordinance in support of its finding of “policy” that states “[p]roposed subdivisions shall be coordinated with existing nearby municipalities or neighborhoods so that the community as a whole may develop harmoniously.” See Kaufman v. Planning and Zoning Comm’n of the City of Fairmont, 171 W.Va. 174, 298 S.E.2d 148, 154-55 (1982) (reversing

denial of preliminary-plat approval on ground that statute requiring local government to determine whether distribution of traffic and population promoted "harmonious development" lacked specificity necessary to ensure fair administration and put subdividers on notice of requirements they must satisfy to obtain subdivision approval); Goodman v. Bd. of Comm'rs of the Township of South Whitehall, 49 Pa.Cmwlt. 35, 411 A.2d 838, 841 (1980) (holding that subdivision plan could not be rejected on basis of subdivision ordinance statement of purpose declaring that subdivision must be coordinated with existing developments so that "area as a whole may be developed harmoniously"). Similarly, the Court in finding that the comprehensive plan supported the "policy" finding misapplied the principal of law that the comprehensive plan is merely a guidance tool. PTL, L.L.C., 656 N.W.2d at 567; see also Minn. Stat. § 394.24, subd. 1. ("Official controls which shall further the purpose and objectives of the comprehensive plan and parts thereof shall be adopted by ordinance."); Minn. Stat. § 394.22, subd. 6 (enacted policies of the county are official controls which must be reflected in ordinances).

The Court's holding permits counties to regulate outside of their adopted ordinances and create substantive zoning and subdivision regulations under the guise of "policy" which only need to be "reasonably apparent" to the applicant. This is a complete departure from the prior precedent of this Court and in direct contradiction with the applicable statutes contained in Chapter 394. Minnesota Courts have repeatedly condemned the creation of regulations outside of

ordinances. “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, L.L.C., 656 N.W.2d at 573; see also County Builders, Inc. v. Lower Providence Township, 5 Pa.Cmwlth. 1, 287 A.2d 849, 852 (1972) (stating that subdivision ruling that effectively amends a zoning ordinance improperly allows local government to “hold in reserve unpublished requirements capable of general application for occasional use”).

Prior to this decision, applicants could review the properly adopted ordinances and know with certainty what was expected of them and what was necessary to get approval. This holding brings that certainty into serious doubt because an applicant now must look beyond the duly adopted ordinances, including as in this case a duly adopted ordinance which defines what a complete application is, and try to discern any “reasonably apparent” policy of the agency that it has failed to enact in the adopted ordinances. Because this holding fails to consider and is in direct contradiction with Minn. Stat. § 394.25, subd. 7(b) and the principles of law announced National Capital Corp., a rehearing is necessary to resolve their application to the issues presented.

**II. The Court failed to consider Section 3.4 of the Kanabec County Shoreland Ordinance in holding that the Planning Commission had final decision authority on plats located in the shoreland district.**

In denying Calm Waters' preliminary plat application Kanabec County relied upon several sections of its shoreland ordinance to support the denial. (A-73 citing to Section 4.2 and 7.12 of the Shoreland Ordinance) In fact, the Kanabec County Shoreland Ordinance contains numerous regulations controlling the subdivision of land. See Section 5.32 regarding grading in subdivisions (R-94) and Section 7.0 which is titled "SUBDIVISION/PLATTING PROVISIONS". (R-104) The Court failed to consider the connection between the ordinances and the fact that the ordinance provides in Section 3.4 that "[a]ll decisions of the Planning Commission may be appealed to the County Board." (R-79) The Court failed to consider the right to appeal all decisions of the Planning Commission as permitted under Section 3.4. The Court failed to consider that the Planning Commission by the subdivision ordinance's definition was advisory. See Section 2.15 defining commission as "The Planning Advisory Commission" and Section 2.22. (A-96)

If the Court would have considered these material facts it would have required a finding that since an appeal was requested by Calm Waters that no final decision has been made to date by the County. The failure of the Court to consider the right of appeal under Section 3.4 requires a rehearing.

Furthermore, the Court in holding that Minn. Stat. § 394.30, subd. 5, permits a county to delegate denial authority to deny a preliminary plat failed to consider Minn. Stat. § 394.30, subd. 4, which provides "In all instances in which

the planning commission is not the final authority, as authorized in subdivision 5, the commission shall review all applications for conditional use permits and plans for subdivisions of land and report thereon to the board.” The Court failed to consider this section of the statute which the Court of Appeals correctly found essential provides for automatic administrative review of a planning commission’s recommendation for denial. Every law shall be construed to give effect to all of its provisions. Minn. Stat. § 645.16. The Legislature indents the entire statute to be effective and certain. Minn. Stat. § 645.17 (2). The Court failed to apply this principal of law and statutory construction requirement in holding that Minn. Stat. § 394.30, subd. 5, permits a planning commission to deny plat applications and has rendered subdivision 4 meaningless and without effect.

The Court also failed to consider the practical effect of its decision. Under the Court’s holding any person, including the applicant or a member of the general public, who wishes to appeal either the approval or denial of a planning commission’s determination on a plat application at the county level must now appeal directly to the Court of Appeals on a Writ of Certiorari action. This is a serious waste of judicial resources on an already overburdened docket at a time when funding and resources for the judicial branch are at a critical state. Section 394.30, subd. 4, is designed to prevent that result and the Court’s failure to consider the built in statutory appeal structure requires a rehearing.

**III. The Court failed to consider controlling principles of law in holding that the failure to properly publish a notice of public hearing under Minn. Stat. § 394.26, Subd. 2, is merely a “technical” defect.**

The Court failed to consider in holding that the County’s failure to properly publish the notice of public hearing applicable statutes and principles of law. Minn. Stat. § 394.26, Subd. 2 requires notice of the time, place and purpose of any public hearing be given by publication in the official newspaper of the county at least ten (10) days before the hearing. Notice requirements have been strictly construed in zoning and land use matters and notices must contain indication of the subject matter. Glen Paul Court Neighborhood Association v. Paster, 437 N.W.2d 52, 56 (Minn. 1989).

In Pilgrim v. City of Winona, 256 N.W.2d 266 (Minn. 1977), the Minnesota Supreme Court held that the “bona fide attempt” provision of the statute governing adoption of zoning ordinances was not satisfied where the only notice of public hearing before the city council did not state that it was a “public hearing.”<sup>3</sup> Id. The Court held that regular city council meetings cannot satisfy “public hearing” requirements unless they are noticed as such and conducted as such that the public has a right to speak on the noticed issue. Id. In Pilgrim, the notice of the impending consideration of the ordinance said nothing about a “public hearing.” Id. The Pilgrim Court agreed with the District Court’s finding that regular meetings cannot satisfy the “public hearing” requirement of the statutes

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<sup>3</sup> Unlike Minn. Stat. § 462.357, Section 394.26 does not contain a “bona fide attempt” provision for Counties.

unless they are noticed as such. Id. See also Town of Lyle v. Chicago, M. & St. P. Ry. Co., 55 Minn. 223, 56 N.W. 820 (1893), (Supreme Court stated that the notice of the time and place of a hearing was a jurisdictional issue and held that as a result of the defective notice the proceedings in that case were without jurisdiction and void.); Rhodenbaugh v. City of Bayport, 450 N.W.2d 608 (Minn. App. 1990) (Notice and hearing requirements of statute authorizing city to order improvement are jurisdictional and failure of city to comply with such requirements invalidates any subsequent assessment for improvement).

This Court has never held that failure to properly publish the statutorily required public hearing notice is merely a “technical” defect which can be disregarded entirely. Therefore, a rehearing is necessary to resolve whether the failure to publish according to statute is merely a “technical” requirement which can be ignored or if prior precedent of this Court must be followed.<sup>4</sup>

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<sup>4</sup> The Court also failed to consider principles of law regarding the presumption of mailing in holding that the record reflects that the County sent a copy of the notice to Calm Waters. Nafstad v. Merchant, 228 N.W.2d 548, 550 (Minn. 1975), states there is a presumption that if mail is (1) properly addressed and (2) sent with prepaid postage it is presumed to be received by the addressee. The County produced no evidence that the mail was properly addressed. The Preliminary Plat Application checklist does not have Respondent’s or Respondent’s counsels’ address on it. Record No. 32. There is no evidence of what address the mailings were sent to on the record or the Preliminary Plat Application checklist. The document provides no evidence of prepaid postage. Record No. 32.

**IV. The Court in holding that the Kanabec County Environmental Services Director is an “agency” misapplied the plain language of Minn. Stat. § 15.99, subd. 1.**

The Court misapplied the plain language of Minn. Stat. § 15.99, subd. 1, in holding that the Kanabec County Environmental Services Director is an “agency” under the statute. 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 or department as an agency limits that definition to a commission or department within the executive branch of state government. The Environmental Services Department was not acting as a county because the department is merely a level of government within the county's governmental structure. This sound statutory construction was first announced in the Court of Appeals decision in Moreno v. City of Minneapolis, 676 N.W.2d 1, 5 (Minn. App. 2004). The Court’s decision appears to overrule the construction in Moreno without addressing the case and therefore a rehearing is necessary.

Furthermore, the Court failed to address the fact that the subdivision and shoreland ordinance contain numerous specific delegations of power to the Environmental Services Director but does not delegate the power to extend the 60-day limit. The Court in finding that Director had the power based that decision on the fact that “there is nothing in the record to suggest that the [Director] did not have the authority to act on behalf of the department” failed to consider that the Board knew how to delegate authority, had done so through ordinance and did not

grant the authority to extend under section 15.99 in the ordinance. 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 authority over preliminary plat decisions and had not been delegated the authority to extend the time requirements under Minn. Stat. § 15.99.

**V. The Court in holding that the Appellants timely denied Respondent's preliminary plat application failed to consider and overlooked Respondent's challenge of the denial of the application in Case No. A06-2361 as arbitrary and capricious.**

The Court in holding that the County denied the application in a timely manner failed to permit Calm Waters to have the basis of the denial reviewed by any court as it is legally entitled to do. The Court failed to address Calm Waters' challenge to the County's denial as arbitrary and capricious once finding that a timely denial had been made. To date, Calm Waters has not been afforded review of the actual denial itself as arbitrary and capricious by either court. Therefore, a rehearing is necessary on the denial itself and whether it was arbitrary and capricious or the matter should be remanded to the Court of Appeals for determination as previously requested. (Respondent's Brief at page 45)

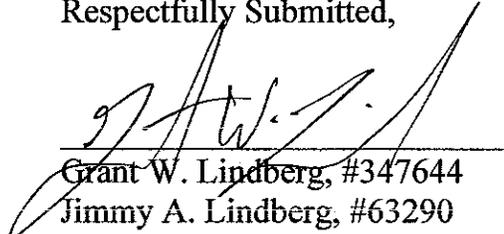
The challenge to the County's decision is an issue in Case A06-2361 and included in the Petition for Writ of Certiorari. (A-76) Calm Waters requested that the Court of Appeals determine whether the reasons cited in the October 24, 2006 written notification of denial were without legal basis or not based on substantial record evidence and therefore the denial was arbitrary and capricious as a matter of law. The Court will review the denial or approval of a preliminary plat application to determine whether the decision is unreasonable, arbitrary, or capricious. Hurrle, 594 N.W.2d at 249. A decision is arbitrary or capricious if it is not supported by substantial evidence in the record, is based on a legally insufficient reason, or is based on subjective or unreasonably vague standards. PTL, L.L.C., 656 N.W.2d at 571. Calm Waters has a right to have the denial reviewed and has been completely denied that right. The Court's failure to consider whether the denial was arbitrary and capricious requires a rehearing.

### CONCLUSION

For all of the foregoing reasons, Calm Waters, L.L.C. respectfully requests the Court to grant its petition for rehearing.

Respectfully Submitted,

DATED: 10/2/08

  
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