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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1987**

Gary Modlin,
Appellant,

vs.

Pope County Soil and Water,
Respondent.

**Filed June 23, 2014
Reversed and remanded
Larkin, Judge**

Pope County District Court
File No. 61-CV-12-584

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Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

On appeal from the district court's denial of his petition for a writ of mandamus to compel respondent to approve an application to withdraw wetland credits, appellant argues that the district court erred by ruling that his application was inadequate to start the 60-day time period for a decision under Minn. Stat. § 15.99 (2012). We reverse and remand.

FACTS

In April and May 2012, appellant Gary Modlin spoke with employees of respondent Pope County Soil and Water Conservation District (SWCD) about filling 1,200 square feet of wetland on his property. Modlin submitted an "Application for Withdrawal of Wetland Credits from the Minnesota Wetland Bank" (application to withdraw wetland credits) to the SWCD on August 16. On October 3, in response to a verbal request from an SWCD employee, Modlin submitted a form entitled "Minnesota Local/State/Federal Application Form for Water/Wetland Projects." On October 16, the SWCD denied Modlin's request to fill his wetland.

Modlin petitioned the district court for a writ of mandamus, asking the district court to direct the SWCD "to approve and sign the Application for Withdrawal of Wetland Credits" on the grounds that the SWCD failed to comply with Minn. Stat. § 15.99, subd. 2(a), which requires an agency to "approve or deny within 60 days a written request relating to . . . soil and water conservation district review . . . for a permit, license, or other governmental approval of an action."

The district court issued an alternative writ of mandamus, directing the SWCD to show cause regarding why Modlin’s petition should not be granted. The district court held a hearing on the matter and heard testimony from both parties. After the hearing, the district court issued a written order granting Modlin’s petition and ordering the SWCD “to grant approval to [Modlin’s] request . . . forthwith unless it files a notice of appeal with the [c]ourt of [a]ppeals.” The SWCD moved for amended findings or a new trial. The district court granted the SWCD’s motion and ultimately denied mandamus relief. Modlin appeals.

D E C I S I O N

“A [district] court’s order on an application for mandamus relief will be reversed on appeal . . . when there is no evidence reasonably tending to sustain the trial court’s findings.” *Coyle v. City of Delano*, 526 N.W.2d 205, 207 (Minn. App. 1995). “When the district court’s decision on a petition for a writ of mandamus is based solely on a legal determination, this court reviews that decision de novo.” *Nolan & Nolan v. City of Eagan*, 673 N.W.2d 487, 493 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004). The application of a statute to undisputed facts presents an issue of law that we review de novo. *Davies v. W. Publ’g Co.*, 622 N.W.2d 836, 841 (Minn. App. 2001), *review denied* (Minn. May 29, 2001).

The Wetland Conservation Act (WCA) generally provides that a wetland must not be drained or filled unless replaced by restoring or creating wetland areas of at least equal public value under a replacement plan. Minn. Stat. § 103G.222, subd. 1(a) (2012). The SWCD is a “local government unit” (LGU) under the WCA. Minn. Stat. § 103G.005,

subd. 10e(1) (2012). As an LGU, the SWCD is charged with the task of approving wetland replacement plans pursuant to the WCA and rules adopted by the Board of Water and Soil Resources (BWSR). *See, e.g.*, Minn. Stat. § 103G.2242, subd. 1(a) (2012); Minn. R. 8420.200, subp. 2. When a landowner proposes to use wetland credits to mitigate a wetland impact, the BWSR is ultimately responsible for withdrawing wetland credits from the Minnesota wetland bank because the BWSR is the entity that manages the bank. Minn. R. 8420.0330, subp. 4C; Minn. R. 8420.0700; Minn. R. 8420.0745, subp. 2. However, an applicant for a wetland replacement plan seeking to use banking credits to replace wetlands

must complete a credit withdrawal form prescribed by the [BWSR] and include it as part of the replacement plan application submitted to the local government unit. If the local government unit approves the use of bank credits for replacements, the local government unit must sign the credit withdrawal form and notify the [BWSR's] banking administrator.

Minn. R. 8420.0745, subp. 2.

Under Minnesota Statutes section 15.99,

an agency must approve or deny within 60 days a written request relating to zoning, septic systems, watershed district review, soil and water conservation district review, or expansion of the metropolitan urban service area for a permit, license, or other governmental approval of an action. Failure of an agency to deny a request within 60 days is approval of the request.

Minn. Stat. § 15.99, subd. 2(a).

“Request” means a written application related to zoning, septic systems, watershed district review, soil and water conservation district review, or the expansion of the

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

Id., subd. 1(c).

Modlin argues that his application to withdraw wetland credits was a “request” that triggered the 60-day timeline under section 15.99. Modlin further argues that because the SWCD did not make a decision within 60 days, his request was automatically approved. *See id.*, subd. 2(a). The district court rejected those arguments, concluding that the application to withdraw wetland credits

is not a form of the Soil and Water Conservation District; as such, [Modlin] is required to identify the specific license or permit requested on the first page. [Modlin] failed to do so. Since [Modlin’s] application did not meet statutory requirements, the [SWCD’s] failure to deny the application within sixty (60) days does not warrant automatic approval.

Modlin does not challenge the district court’s finding that the application to withdraw wetland credits “was not on a form provided by the Soil and Water Conservation District,” and the record sustains that finding. The face of the application to withdraw wetland credits indicates that it is a form provided by the “BWSR” and not by the SWCD. It states: “Return Original to BWSR”; “BWSR Form: wea-bank-05 (withdrawal form).doc”; and the final signature line is labeled “BWSR APPROVAL.”

But the form includes a space for the “authorized representative” of the “Local WCA LGU” to grant its approval of the request.

Because the application to withdraw wetland credits is “[a] request not on a form of the agency [(i.e., the SWCD)],” it had to “clearly identify on the first page the specific . . . governmental approval being sought.” *See* Minn. Stat. § 15.99, subd. 1(c). The district court determined that the application was inadequate because it “did not identify the Soil and Water Conservation District nor did it state what [Modlin] sought from the District.” But contrary to the district court’s reasoning, section 15.99, subdivision 1(c), does not state that the first page must specifically identify the *agency* from which relief is sought. Instead, section 15.99, subdivision 1(c), requires an applicant to identify the specific type of relief sought: “permit, license, or other government approval.” *Id.* The title of Modlin’s application to withdraw wetland credits clearly identifies the specific relief sought: “Application for Withdrawal of Wetland Credits From the Minnesota Wetland Bank.”

Moreover, even though Modlin did not identify the SWCD as the “Regulating Authority(ies) Approving the Use of Wetland Bank Credits” on the first page of the application, we are satisfied that under the circumstances here, it was clear that Modlin sought relief from the SWCD. Specifically, the SWCD uses the BWSR’s application to withdraw wetland credits in its capacity as the LGU responsible for approving the use of bank credits for wetland replacement. *See* Minn. R. 8420.0745, subp. 2 (stating that “a credit withdrawal form prescribed by the [BWSR]” must be included “*as part of* the replacement plan application submitted to the local government unit” and that “[i]f the

local government unit approves the use of bank credits for replacements, the local government unit must sign the credit withdrawal form and notify the [BWSR's] banking administrator”) (emphasis added).

In sum, Modlin’s application to withdraw wetland credits clearly identified on the first page the specific governmental approval being sought. It therefore was a “request” under section 15.99, subdivision 1(c). The SWCD had 60 days to approve or deny the request, and its failure to deny the request within 60 days “is approval of the request.” Minn. Stat. § 15.99, subd. 2(a).

We recognize that Modlin’s application to withdraw wetland credits is largely incomplete; he did not fill in several sections of the application, including those regarding the impact site, the regulating authority approving the use of wetland credits, and the credits proposed to be withdrawn. We also recognize that the SWCD needed complete information to make an informed decision. But the SWCD had a remedy under section 15.99: it could have extended the time to approve or deny Modlin’s application. “If an agency receives a written request that does not contain all required information, the 60-day limit starts over only if the agency sends written notice within 15 business days of receipt of the request telling the requester what information is missing.” *Id.*, subd. 3. Although an SWCD employee verbally asked Modlin to submit a form entitled “Minnesota Local/State/Federal Application Form for Water/Wetland Projects,”¹ after he

¹ Although the district court did not make findings on this issue, the SWCD argues and the record suggests that this form is provided by the SWCD for requests related to applications to withdraw wetland credits. We observe that the SWCD’s provision of that

submitted his application to withdraw wetland credits, the SWCD did not send Modlin written notice under section 15.99, subdivision 3, which would have extended the timeline.

The SWCD argues that even if Modlin’s August 16, 2012 application to withdraw wetland credits was a request as defined by section 15.99, subd. 1(c), this court should not compel it to sign off on Modlin’s application because Modlin “essentially seeks to compel the SWCD to take action that runs in direct conflict with the WCA.” The SWCD relies on *Breza v. City of Minnetrista*, 725 N.W.2d 106 (Minn. 2006), and argues that “[s]ection 15.99 is merely a timing statute and does not preempt the substantive requirements of the WCA” and that if the SWCD “does not have the underlying authority to approve a wetlands application within the time period outline in [s]ection 15.99, the application cannot be approved by the [SWCD’s] inaction.” *See Breza*, 725 N.W.2d at 114 (holding that “statutory approval of wetland exemption application could not exceed the scope of city’s authority”).

Before we address the SWCD’s specific arguments, we review the supreme court’s decision in *Breza*. In *Breza*, the supreme court considered “what happens when an approval under section 15.99 conflicts with the substantive authority given to the LGU in state law.” *Id.* at 113. *Breza* applied for an exemption from state law requirements relating to wetlands, after he filled approximately 5,737 square feet of wetland on his property. *Id.* at 108. It appears that *Breza*’s application, like Modlin’s, lacked detail:

form to Modlin suggests that the SWCD understood the specific governmental approval that Modlin sought.

“the application simply requested an exemption, with no specification beyond the description that ‘there was approximately 4 cubic yards of black dirt in the back yard and sod placed over that area.’ There was no suggested restoration plan, request for approval of a replacement plan, or request for a no-loss determination.” *Id.* at 110.

The city agreed that it had violated section 15.99 by taking longer than 60 days to respond to Breza’s application and that Breza’s application therefore was automatically granted. *Id.* at 109. However, the city claimed that because Breza only qualified for a 400 square foot de minimis exemption, that was the extent of the exemption that was granted by operation of section 15.99. *Id.* The supreme court examined the scope of relief the city could have granted if it had approved Breza’s application within the section 15.99 deadline and determined that “the only exemption Breza qualified for under the WCA was the 400 square foot de minimis exemption” and that “the city had no authority . . . to allow fill covering more than 400 square feet to remain in the wetland on Breza’s property.” *Id.* at 110-11.

The supreme court rejected Breza’s argument that section 15.99, subdivision 2, is preemptive and that even if the city did not have authority to approve the application under the WCA, it was nonetheless approved by operation of section 15.99. *Id.* at 113-

14. The supreme court explained:

The consequence of the city’s failure to act within 60 days is that any deficiencies that might have existed in Breza’s exemption application are deemed waived, and the application is approved. The breadth of the exemption approved, however, is limited by the scope of the city’s authority to grant an exemption, as defined in the WCA. In Breza’s case, state law gave the city authority to grant Breza a

400 square foot exemption, and that is the extent of the city's authority under state law. We hold that Minn. Stat. § 15.99 cannot operate to grant a broader exemption.

Id. at 114 (citation omitted). However, the supreme court noted that

this case does not involve an issue on which the city has discretion, such as approval of a replacement plan submitted under the WCA This opinion should not be read to indicate how we might view the application of Minn. Stat. § 15.99 in matters of discretionary decision-making by LGUs. We leave that question for another day.

Id. at 114 n.15.

We now turn to the SWCD's specific arguments under *Breza*. First, the SWCD contends that it "cannot sign off on [Modlin's August 16, 2012 application to withdraw wetland credits] if there is no approved wetland replacement plan."² The SWCD states that Modlin's October 3, 2012 "Minnesota Local/State/Federal Application Form for Water/Wetland Projects" was a wetland replacement plan application, which the SWCD timely denied on October 16. The SWCD cites the following rule as support for its contention:

Replacement plan applicants proposing the use of bank credits for replacement must complete a credit withdrawal form prescribed by the board and include it as part of the replacement plan application submitted to the local government unit. If the local government unit approves the use of bank credits for replacement, the local government unit

² The SWCD also contends that "even if [it] did sign the application, BWSR may not allow for the withdrawal of credits because the SWCD has not approved their use for replacement of a specific wetland impact." See Minn. R. 8420.0500, subp. 2 ("No person may impact a wetland, wholly or partially, without being eligible for an exemption or no-loss, or first having a wetland replacement plan approved."). We decline to address that contention because the BWSR's ultimate decision regarding Modlin's application is not an issue in this appeal. See *In re Welfare of E.S.C.*, 731 N.W.2d 149, 151 (Minn. App. 2007) (stating that Minnesota courts "do not issue advisory opinions").

must sign the credit withdrawal form and notify the board's banking administrator according to part 8420.0255, subpart 5. The board shall not withdraw credits from a bank account unless a regulatory entity with authority over the use of the credits has approved the use of the subject credits for replacement of a specific wetland impact.

Minn. R. 8420.0745, subp. 2.

Assuming that an LGU cannot sign off on an application to withdraw wetland credits if the LGU does not approve the use of bank credits for replacement, it does not necessarily follow that under *Breza*, the application to withdraw credits cannot be approved by operation of section 15.99. That is because Minn. R. 8420.0745, subp. 2, ties an LGU's responsibility to sign off on an application to withdraw wetland credits to the LGU's *discretionary* decision regarding the attendant replacement plan. *See Breza*, 725 N.W.2d at 114 n.15 (stating that a city's decision regarding approval of a replacement plan submitted under the WCA involves an issue on which the city has discretion). Unlike the city in *Breza*, the SWCD had discretion to grant Modlin's request. It could have approved Modlin's wetland replacement plan application and, therefore, signed off on his application to withdraw wetland credits. Thus, the SWCD's attempt to portray its refusal to sign off on Modlin's application to withdraw wetland credits as nondiscretionary is not persuasive, and the SWCD's reliance on *Breza* is misplaced. *See id.* ("This opinion should not be read to indicate how we might view the application of Minn. Stat. § 15.99 in matters of discretionary decision-making by LGUs.").

Moreover, the rules provide that "local government unit decisions made under this chapter must be in compliance with Minnesota Statutes, section 15.99." Minn. R.

8420.0255. The LGU must make a decision “in compliance with the time period prescribed by Minnesota Statutes, section 15.99, which, on the effective date of this part, generally requires a decision in 60 days.” *Id.* subp. 4. The WCA also requires compliance with section 15.99. *See* Minn. Stat. § 103G.2242, subd. 4 (2012) (“Upon receiving and considering all required data, the local government unit . . . must act on all replacement plan applications, banking plan applications, and exemption or no-loss determination requests in compliance with section 15.99.”). In sum, approval of an application to withdraw wetland credits by operation of section 15.99 is allowed under the WCA and associated rules.

The SWCD next contends that Modlin’s “proposed use of wetland credits cannot be approved as a matter of law because it fails to comply with sequencing requirements.” The SWCD argues that it “must not approve a wetland replacement plan unless it finds that the applicant’s proposed activity complies with the principles outline in Minnesota Rule 8420.0520, subpart 1 [(the sequencing rule)].” The SWCD concludes that “[p]ursuant to *Breza’s* holding that [s]ection 15.99 is a timing statute that does not compel approval of an application that would not otherwise be allowed, [Modlin] must not be permitted to move forward with a project that does not comply with the WCA’s sequencing rules.”

Once again, the SWCD fails to recognize that its decision regarding a wetland replacement plan is discretionary. *See Breza*, 725 N.W.2d at 114 n.15. Although the rules state that “[t]he local government unit must not approve a wetland replacement plan unless the local government unit finds that the applicant has demonstrated that the

activity impacting a wetland complies with [enumerated] principles,” those principles are not objective standards that compel a certain determination; instead, the principles are subjective and allow the LGU to exercise discretion. *See* Minn. R. 8420.0520, subp. 1 (listing principles). Moreover, the sequencing rule provides that “[f]lexibility in application of the sequencing steps may be requested by the applicant and allowed at the discretion of the local government unit, subject to the conditions [herein], as determined by the local government unit,” if certain conditions are met. Minn. R. 8420.0520, subp. 7a. In sum, because the SWCD’s decision was discretionary, we reject its argument that Modlin’s proposed use of wetland credits cannot be approved as a matter of law. Thus, operation of section 15.99 does not compel the SWCD to act beyond its authority in conflict with the holding of *Breza*. *See Breza*, 725 N.W.2d at 114 n.15.

Lastly, the SWCD contends that Modlin’s “proposed use of wetland credits does not comply with applicable replacement standards” and that it therefore cannot sign off on Modlin’s application to withdraw wetland credits “as a matter of law.” The SWCD asserts that under the relevant rules, Modlin must purchase wetland credits to replace his proposed wetland impact at a ratio of two to one. *See* Minn. R. 8420.0111, subp. 37; Minn. R. 8420.0117, subp. 1; Minn. R. 8420.0522, subp. 4. The SWCD therefore asserts that Modlin’s plan to replace “1200 square feet of wetland impact with 1200 square feet of credits (a 1-to-1 replacement ratio),” would “violate [the] replacement standards prescribed by law.” The SWCD argues that under *Breza*, Modlin “does not have the right to obtain approval of a wetland impact under Section 15.99 if the approval is not allowed

under the substantive law governing his request to impact the wetland.” In this instance, the SWCD’s *Breza* argument has merit.

Although the SWCD’s decision was largely discretionary, it is not clear that the SWCD has discretion regarding the required ratio of wetland replacement credits for each acre of wetland impacted. *See* Minn. R. 8420.0522, subp. 4 (setting forth required replacement ratios). In that way, the required replacement ratio in this case is similar to the exemption limitation in *Breza*. In fact, Modlin recognizes that “[t]he replacement standards are objective requirements that could arguably be considered comparable to exemption standards.”

We are therefore guided by *Breza*: the consequence of the SWCD’s failure to act within 60 days of Modlin’s application to withdraw wetland credits is that any deficiencies in the application are deemed waived and the SWCD must sign off on the application. *See Breza*, 725 N.W.2d at 114. However, the breadth of the SWCD’s approval must be consistent with any objective replacement ratio standards that limit the SWCD’s authority to approve the use of wetland credits for wetland replacement in this case. *See id.* (“The breadth of the exemption approved, however, is limited by the scope of the city’s authority to grant an exemption, as defined in the WCA.”). Because a determination regarding the required replacement ratio is fact specific, *see* Minn. R. 8420.0522, subpart 4, it must be made in the first instance in district court. *See Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (stating that “[i]t is not within the province of [appellate courts] to determine issues of fact on appeal”). We therefore remand for a determination regarding the appropriate replacement ratio in this case.

In conclusion, we hold that Modlin’s application to withdraw wetland credits is a request under section 15.99, subd. 1(c). Because the SWCD failed to deny the request within 60 days, the request is approved by operation of section 15.99, subdivision 2(a), to the extent authorized by law (i.e., in accordance with any required replacement ratio). We therefore reverse the district court’s denial of mandamus relief and remand for the district court to determine the appropriate replacement ratio and to grant relief consistent with this opinion. The district court has discretion to reopen the record for the purpose of determining the replacement ratio. *See Taylor v. LSI Corp. of Am.*, 781 N.W.2d 912, 917 (Minn. App. 2010) (remanding a “fact-intensive” issue to the district court and granting the district court, on remand, discretion to reopen the record), *aff’d*, 796 N.W.2d 153 (Minn. 2011).

Reversed and remanded.