

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Declaratory Judgment

CoPar Development, LLC,

Case No. 62-C5-06-010746

Plaintiff,

v.

**DEFENDANT CITY OF MAPLEWOOD'S
MEMORANDUM OF LAW IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

City of Maplewood,

Defendant.

INTRODUCTION

The pending Motion for Summary Judgment is an effort by a developer to make the merits of its land-use applications moot, based on a technicality that caused no harm. Representatives of the Plaintiff were present at September 28, 2006 when the City Council denied its August 2006 application for a Conditional Use Permit/Planned Unit Development. (Ex. HHH to the Administrative Record at 23-43, 44-52, 176-78). Plaintiff's representatives also heard the City Council members spell out to the audience and on the record the reasons for their action. (*Id.* at 178-183). But because the City did not give Plaintiff the reasons a second and third time – by formally adopting written findings and then delivering those findings to them, all before the statutory deadline for the City to deny the request – Plaintiff asks this Court to select the “nuclear option” of turning a denial into an approval, without ever reaching the merits of the City's denial. Plaintiff's argument presumes that the Minnesota Supreme Court will agree with its interpretation of § 15.99 (in a ruling in another case that could issue any day now). See *Hans Hagen Homes Inc. v. City of Minnetrista*, 713 N.W.2d 916 (Minn. Ct. App. 2006), review granted (Minn. July 19, 2006), argued January 10, 2007 and awaiting decision.

For the benefit of those citizens who participated in the statutorily-mandated public process that culminated in the City Council's action, and those citizens who would be forced to live near the proposed project if automatically approved, the success of this case should rise or fall on whether the denial was lawful (a question not presented in Plaintiff's Motion). As the intermediate appellate court of another state reasoned in similar circumstances, "[w]e are persuaded that the legislative purpose in enacting the automatic approval mechanism would be unjustifiably distorted in a manner patently subversive to the public interests if a technical defect attendant upon an express decision to deny a development application were permitted to convert the denial into an approval." *Precision Indus. Design Co. Inc. v. Beckwith*, 447 A.2d 186, 191 (N.J. Super. Ct. App. Div. 1982). Accordingly, the Court should decline to grant summary judgment to the Plaintiff on its mandamus claim. At a minimum, the Court should not grant summary judgment until the Supreme Court has taken the final step in *Hans Hagen Homes* (by issuing its ruling).

RELEVANT FACTS

Because the Plaintiff's Motion is narrowly focused on the question of whether certain applications must be automatically approved under Minn. Stat. § 15.99, rather than upon the question of whether the City's denial of those applications was lawful, relatively few facts are truly material to the outcome of this Motion.

1. The City's consideration of Plaintiff's August 7, 2006 Applications

Through this Motion, Plaintiff seeks to convert open space on a bluff overlooking the Mississippi River into nearly 300 housing units. On August 7, 2006, Plaintiff submitted two applications to the City of Maplewood – an application for a conditional use permit for a planned unit development for 191 units ("CUP/PUD application"), and an application for preliminary plat approval of that proposed project ("preliminary plat application"). (Ex. MM to the

Administrative Record). At some point an application to vacate certain streets (“the street vacation application”) was broken out and separately listed. (Ex. RR to Administrative Record). The applications were the subject of a staff report dated August 29, 2006 (*Id.* and Ex. XX), a full public hearing before the Maplewood Planning Commission on September 6, 2006 (Ex. WW), a second staff report to the City Council dated September 8, 2006 (Ex. XX), partial consideration by the City Council on September 25, 2006 (Ex. BBB), and the resumption of consideration at a special meeting convened for this purpose on September 28, 2006 (Ex. DDD, HHH).

Throughout this process, the City received an extraordinary amount of evidence and other information from the applicant, city staff, and from citizens who exercised their statutory right to participate in the process. See Minn. Stat. § 462.357 subd. 3, and Exs. MM through DDD, and HHH of the Administrative Record. By the closest of margins, however, the Plaintiff failed to convince a majority of the members of the Maplewood City Council to vote in favor of the critical zoning application (the CUP/PUD application).¹

Immediately after the 3-2 vote, the Mayor stated, “Okay. Well, with that, then I guess we need to have some findings with regard to denial.” (Ex. HHH at 178). She then recited a series of grounds for denial of the application, all of them occupying nearly three full pages of a transcript later created by the Plaintiff. (*Id.* at 178-81). Council Member Hjelle then gave an additional reason of his own supporting his vote to deny (*Id.* at 182-83), and Council Member Cave declined to give additional reasons. (*Id.* at 183).

¹ There appears to be no dispute that the issuance of a CUP/PUD by the City was a necessary precondition to the City’s authority to lawfully grant preliminary plat approval for the project. Thus, the CUP/PUD application was considered and voted upon first by the Council, and when that application was denied, the remaining applications were deemed moot. (Ex. HHH at 187-88).

There is no dispute that at least two representatives of the Plaintiff, Curt Schneider and Tom Hanson, were present for the meeting, participated actively in it, and were present for both the vote and the statements on the record of the reasons. (See, e.g., Ex. HHH at 23-43, 44-52, 176-78). Indeed, a comment by Mr. Schneider appears on the transcript just one page before the motion to deny and the Council's vote on that motion. (*Id.* at 176-178). Thus, there can be no dispute that the Plaintiff received actual notice of the actual reasons given by the Council at the time of the vote.

Minutes were taken of the September 28 meeting,² and were approved by the City Council at the October 9, 2006 City Council meeting (Ex. GGG at 1-2). In addition, the City provided to the Plaintiff (upon request) a video recording of the meeting, which the Plaintiff then transcribed in its entirety. (Ex. HHH).

2. The Plaintiff's Withdrawal of Prior Applications and Submission of Revised Applications

The August 7 applications for a 191-home development were simply the latest of a number of applications that the Plaintiff had submitted to the City regarding the development of this parcel. For example, in 2005 the Plaintiff was seeking to develop 299 units of attached and unattached housing on the site. (See, e.g., Ex. BB at 1). A project of that magnitude required preparation of an environmental assessment worksheet, as a prelude to determining whether an environmental impact statement was also necessary. (*Id.*) Moreover, as part of the proposed 299-unit development the Plaintiff was seeking an amendment to the City's comprehensive guide plan. (See, e.g., Attachment 1 to Ex. W: March 31, 2006 letter to the City from CoPar listing applications for which approval was sought.)

² The September 28, 2006 Minutes were listed on the Index of the Administrative Record but were inadvertently left off from the second part of Exhibit DDD in the copy of the materials submitted to the Court. Thus a copy is submitted as Exhibit 3 to the Affidavit of John M. Baker.

On July 10, 2006, the City issued a negative declaration on the need for an environmental impact statement on the 299-unit project. (Ex. II). However, the negative declaration passed by a 3-2 vote (Ex. JJ at 1), and if a similar vote were cast on an application to amend a comprehensive guide plan, it would fail (because it would not constitute the 2/3rds supermajority that is required under Minnesota law for approval of a comprehensive guide plan amendment). See Minn. Stat. § 462.355 subd. 3. Thus, as the Planner later reported to the Planning Commission and the City Council, “the developer decided to withdraw their application for the 299-unit senior housing development for the site and redesign the proposal to try to address the concerns of the neighbors, planning commission and city.” (Ex. RR at 2, also attached to Ex. RR). That project involved only 191 units. (*Id.*) The Plaintiff’s own written submission to the City stated that “CoPar Development is pleased to present *the revised* Carver Crossing of Maplewood development plans for your consideration,” and emphasized its alleged consistency with the current guide plan designation. (Ex. MM at 1) (Emphasis added). The conclusion of its submission stated “without undue delay we hope to receive your approval and construct *this development . . .*” (*Id.* at 9) (Emphasis added).

STATUTORY CONTEXT

Plaintiff’s motion rests solely upon Minn. Stat. § 15.99. “The underlying purpose of the statute is to ‘establish[] time deadlines for local governments to take action on zoning applications.’” *Advantage Capital Management v. City of Northfield*, 664 N.W.2d 421, 427 (Minn. Ct. App. 2003) rev. denied (Sept. 24, 2003) (quoting *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)(brackets in *Advantage Capital Management*)). While § 15.99 is commonly known as an “automatic approval” or “deemed approved” statute, as written by the Legislature the statute requires automatic approval only in one setting – when an agency fails to deny a request (as defined in the statute) within 60 days of approval.

The statute authorizes automatic approval in only one portion of § 15.99 – the boldfaced sentence of Subd. 2(a):

Subd. 2. Deadline for response. (a) Except as otherwise provided in this section, section 462.358, subdivision 3b, or chapter 505, and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems, 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.** If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.

Minn. Stat. § 15.99 Subd. 2 (a). While other sections of § 15.99 define key terms such as “request”³ and “agency”⁴ and sets forth various additional requirements – including those that Plaintiff alleges the City violated – none of the other sections of § 15.99 authorize automatic approval as a consequence of anything other than “failure of an agency to deny a request within 60 days” Subd. 2(a).

Moreover, nothing in the statute provides that, if a city votes to deny a request governed by this statute, it still has not “denied” that request for purposes of this statute until it has satisfied every other responsibility that any other portion of the statute creates. To the contrary, the text of the statute demonstrates that the “denial” takes place at the time the vote is taken on the request. See, e.g., Subd. 2(c) (“If the written statement is not adopted *at the same time as the*

³ Subd. 1(c), as amended in 2003, provides that for purposes of § 15.99, “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.”

⁴ There is no dispute that the City of Maplewood is an “agency” for purposes of this statute. See Minn. Stat. § 15.99 subd. 1 (b).

denial, it must be adopted *at the next meeting following the denial of the request* but before the expiration of the time allowed for making a decision under this section. The written statement must be consistent with the reasons stated in the record *at the time of the denial.*”) (Emphasis added).

Nevertheless, in the first ten years that § 15.99 was in effect, dicta in cases not reaching the Minnesota Supreme Court suggested that automatic approval should result in settings not provided for in the statute. See, e.g., *Demolition Landfill Services LLC v. City of Duluth*, 609 N.W.2d 278, 282 (Minn. Ct. App. 2000), rev. denied (Minn. July 25, 2000) (noting, in a case involving no timely denial, that “[a]bsent a denial within the statutory time limit *and simultaneous, written reasons for the denial*, the permit application is approved”) (emphasis added). Thus, in 2006 the Court of Appeals twice held that automatic approval was authorized even of applications that were timely denied under Subd. 2(a), if the agency then failed to comply with separate requirements under 2(c). *Veit Co. v. Lake County*, 707 N.W.2d 725, 727 (Minn. Ct. App. 2006), rev. denied (Minn. Apr. 18, 2006) and *Hans Hagen Homes Inc.*, 713 N.W.2d at 922.

However, the City of Minnetrista petitioned the Supreme Court for review of the *Hans Hagen Homes* decision, and the Supreme Court granted review on July 19, 2006. The City of Minnetrista’s Petition for Review (and the briefing to the Supreme Court) present the question of whether automatic approval is required where there has been a failure to satisfy one or more of the other statutory requirements found in § 15.99, even if the City’s action in denying the request was timely. At oral arguments on January 10, 2007, a frequent subject of questions and comments from the justices was a question of statutory construction common to this case -- the authorization in the statute of automatic approval as a remedy for a failure to timely deny, but not

as a remedy for a failure to timely provide written reasons for a timely denial. (See Ex. 1 to Affidavit of John M. Baker, submitted herewith).

LEGAL ARGUMENT

I. THE COURT SHOULD EITHER DENY THE MOTION OR DEFER ITS RULING TO AWAIT THE SUPREME COURT'S FORTHCOMING DECISION IN *HANS HAGAN HOMES INC. V. CITY OF MINNETRISTA*, ARGUED JANUARY 10, 2007.

The outcome of Plaintiff's Motion is most likely to be affected if not controlled by a forthcoming decision of the Minnesota Supreme Court in *Hans Hagen Homes Inc. v. City of Minnetrista*. The question common to both cases is whether a statute that specifies the remedy of automatic approval only when there is a "failure of an agency to deny a request within 60 days" should be judicially rewritten, to also require automatic approval when an agency *timely* denies a request but fails to satisfy a different provision elsewhere in the statute (for which the Legislature did not make automatic approval a required or authorized penalty). A review of the justices' questions and comments in oral argument in *Hans Hagen Homes*, provided to this Court as a video file in an accompanying CD-ROM (Ex. 1 to Baker Affidavit), should provide CoPar with little comfort that the Supreme Court will make automatic approval a consequence of anything but a failure to timely deny a request.

A. Plaintiff's Theory Disregards Longstanding Principles of Statutory Construction.

When the Legislature has imposed by statute a requirement upon state or local officials but has not specifically provided that a particular consequence must follow from its violation, Minnesota's appellate courts have frequently respected the legislative silence in that setting, and have refrained from filling in that silence by attaching a penalty. "[A] statute which does not declare the consequences of a failure to comply may be construed as a directory statute."

Sullivan v. Credit River Township, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974) (citation omitted). Failure to comply with a directory statute does not necessarily invalidate action taken with respect to that statute. *Id.*, 299 Minn. at 177, 217 N.W.2d at 507. As the Court of Appeals has also recognized in the context of this statute, the fact that the statute includes some mandatory provisions does not make every requirement in the statute mandatory rather than directory. *Manco of Fairmont, Inc. v. Town Bd.*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998) (statute can contain both directory and mandatory provisions), review denied (Minn. Oct. 20, 1998).

There is “the well-established rule of statutory construction that statutory provisions defining the time and mode in which public officers shall discharge their duties, and which are obviously designed merely to secure order, uniformity, system and dispatch in public business are generally deemed directory.” *Szczech v. Commissioner of Public Safety*, 343 N.W.2d 305, 307 (Minn. Ct. App. 1984) (quoting *Wenger v. Wenger*, 200 Minn. 436, 438, 274 N.W. 517, 518 (1937)). Under this principle, a party to an implied consent proceeding is not entitled to a rescission of revocation simply because the court hearing on their case does not occur within the statutorily-mandated period. *Heller v. Wolner*, 269 N.W.2d 31, 33 (Minn. 1978) (under the previous statute) and *Szczech*, 343 N.W.2d at 308 (under the later statute). That is because the relevant statutes did not provide a sanction or a consequence that must occur if the statutory deadline was missed. *Id.*

In *Eason v. Independent School Dist. No. 11*, 598 N.W.2d 414, 417 -418 (Minn. Ct. App. 1999), a district court found that a school district had violated the Pupil Fair Dismissal Act (“PFDA”), by failing to serve written notice of suspension on the student “at or before the time the suspension is to take effect,” as required by Minn.Stat. § 121A.46, subd. 3. The Plaintiff

relied upon this violation to secure an injunction against the suspension. However, that injunction was overturned by the Court of Appeals for reasons that apply equally to this statute. What was critical to the Court of Appeals was that the PFDA did not “express any consequences for failure to comply with the suspension provisions” of the statute *Id.* at 417. As a result, the Court itself could not attach any consequences, including those consequences provided in the statute for violations of separate provisions of it. The Court of Appeals reasoned:

[B]ecause the PFDA does not express any consequences for failure to comply with the suspension provisions, the portion of the act dealing with suspensions is directory, rather than mandatory. *Sullivan v. Credit River Township*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974) (statute that does not express consequences of failure to comply with its provisions is directory); *Manco of Fairmont, Inc. v. Town Bd.*, 583 N.W.2d 293, 295 (Minn. App. 1998) (statute can contain both directory and mandatory provisions), review denied (Minn. Oct. 20, 1998). Although there is a duty to comply with directory provisions of a statute, noncompliance with a directory provision does not invalidate the action. *Sullivan*, 299 Minn. at 177, 217 N.W.2d at 507 & n. 2. Consequently, an implied cause of action for permanent injunctive relief would be inconsistent with the statute's directory suspension provisions.

Id. at 417-18.

Similarly, in *Carl Bolander & Sons Co. v. City of Minneapolis*, 488 N.W.2d 804, 809 (Minn. Ct. App. 1992), *aff'd*, 502 N.W.2d 203 (Minn. 2003), Plaintiff sought to nullify the City of Minneapolis determination that an environmental assessment worksheet (“EAW”) was required for the plaintiff’s proposed project. The City had acknowledged that it had failed to comply with its duty under the statute and regulations to act on a petition for an environmental assessment worksheet within 30 days. See Minn.Stat. § 116D.04, subd. 2a(c). However, that statutory violation did not entitle the plaintiff to nullify the City’s decision to require an EAW, for reasons that apply equally here.

Neither section 116D.04, subdivision 2a(c) nor the rules promulgated thereunder, see Minn. R. 4410.1100, subp. 7 (1991), provides a penalty for noncompliance. Where a statute or rule does not explicitly declare the consequences of a failure to comply, "we construe the language as directory only." *e.g.*, *In Re Application of Crown Coco, Inc.*, 458 N.W.2d 132, 138 (Minn.App.1990) (construing rule); *see also Sullivan v. Credit River Township*, 299 Minn. 170, 176-77, 217 N.W.2d 502, 507 (1974) (construing statute). "Violation of a directory statute does not result in the invalidity of the action taken." *Id.* at 177, 217 N.W.2d at 507. Therefore, we conclude that the city's failure to act within the time allotted by section 116D.04, subdivision 2a(c) does not relieve Bolander of its obligation to complete an EAW.

Carl Bolander & Sons Co., 488 N.W.2d at 809 -810.

In re Eigenheer, 453 N.W.2d 349, 354 (Minn. Ct. App. 1990), involved an interpretation of Minn.Stat. § 105.45 (1988), which imposed a 60-day deadline for the agency to issue a ruling following a hearing on a wetlands-related application. The statute's failure to specify a consequence caused the Court of Appeals to reject the appellant's argument that the unlawful delay should cause the outcome of the decision to change. "Although compliance with the 60 day limit should be and is encouraged, the failure of the statute to state any consequences for delay persuades us that declaring the order void would be an inappropriate and unduly harsh remedy." *Id.* at 355.

B. Plaintiff's Approach also Addresses a Conflict between the Objectives of Two Different Statutes in a Manner that Frustrates the Purpose of One without Serving the Objective of the Other.

Another flaw in Plaintiff's argument is that it ignores how the automatic approval statute fits within a broader statutory framework. Those statutes that are unquestionably frustrated by automatic approval are entitled to at least the same respect as § 15.99. Thus, when the Court performs its responsibility to construe statutes for the purpose of ensuring that the purposes of all of them are achieved, it should reject the Plaintiff's effort to procure mandamus here.

As noted above, the hearings and proceedings held by the City were conducted pursuant to the Legislature's statutory delegation of land-use planning authority to local governments in

the Municipal Planning Act as amended. See Minn. Stat. § 462.357 subd. 3; § 462.3595 (setting forth requirements cities must apply in response to applications for conditional use permits). The relief that Plaintiffs' seek fully frustrates the accomplishment of the objectives of the MPA, because it renders moot the required hearings and the required application by the City of its statutorily-mandated criteria.

The purpose of § 15.99, however, was accomplished in this setting when the City timely denied the Plaintiff's applications. "The underlying purpose of the statute is to 'establish[] time deadlines for local governments to take action on zoning applications.'" *Advantage Capital Management*, 664 N.W.2d at 427 (quoting *Am. Tower, L.P.*, 636 N.W.2d at 312). Here, the City took timely action on the zoning applications. Moreover, because the Council members also provided reasons immediately after the vote was cast (Ex. HHH at 178-83), it also furthered the value of the requirement that a denial be accompanied by reasons – to make it more difficult for the City to offer after-the-fact justifications unrelated to the actual reasons for the denial. Ex. 4 to Baker Aff. at 5 (Ruling denying automatic approval in *Bradley Operating Ltd. Partnership v. City of Roseville*, File No. C4-00-4813 (Ramsey Co. Dist. Ct. Sept. 18, 2000) at 5).⁵

C. In Any Event, the Absence of Prejudice to Plaintiff of the City's Omissions Should Preclude Automatic Approval.

The Plaintiff has wholly failed to demonstrate that the City's failure to have given it notice a second and third time of the reasons for the denial resulted in any prejudice. The Plaintiff's representatives were present for the meeting, where specific reasons were articulated immediately after the vote was taken. Indeed, if anything the Plaintiff was *benefited* by this approach, because to some degree it hampers the ability of the City to defend the merits of the

⁵ Although the *Bradley Operating Ltd. Partnership* opinion predated an amendment to § 15.99 allowing findings to be adopted at a later meeting, it is offered for the purpose of demonstrating the purpose of that portion of § 15.99 that requires such findings.

denial on the record through reasons that might have been more articulately explained in writing findings. Thus, the absence of prejudice to the Plaintiff ought to further preclude the availability of automatic approval. See *Terrell v. State Farm Ins. Co.*, 356 N.W.2d 149, 150 (Minn. 1984); see also *Precision Indus. Design Co. Inc.*, 447 A.2d at 191.

In summary, under these circumstances it makes no sense for CoPar to push this Court to award it a total victory before the Supreme Court tells us all whether CoPar's interpretation of the statute is correct. The Court should deny Plaintiff's Motion. At a minimum the Court should decline to grant the Motion until after the Supreme Court has issued its ruling in *Hans Hagen* and after the parties have had an opportunity to submit supplemental briefs addressing its effect.

II. EVEN IF THE COURT CONCLUDES THAT AUTOMATIC APPROVAL IS PROPER, IT CANNOT LAWFULLY ORDER APPROVAL OF APPLICATIONS FOR A 299-UNIT PROJECT.

Even if this Court concludes that automatic approval can occur even after a timely denial, Plaintiffs' effort to secure approval of a far bigger project than the City Council voted upon must be rejected, for several reasons.

The record reflects that the Plaintiffs withdrew the larger project (and submitted a smaller project). On July 10, 2006, the City issued a negative declaration on the need for an environmental impact statement on the 299-unit project. (Ex. II). However, the negative declaration passed by a 3-2 vote (Ex. JJ at 1), and if a similar vote were cast on an application to amend a comprehensive guide plan, it would fail (because it would not constitute the 2/3rds supermajority that is required under Minnesota law for approval of a comprehensive guide plan amendment). See Minn. Stat. § 462.355 subd. 3. Thus, as the Planner later reported to the Planning Commission and the City Council, "the developer *decided to withdraw* their application for the 299-unit senior housing development for the site and redesign the proposal to try to address the concerns of the neighbors, planning commission and city." (Ex. RR at 2, also

attached to Ex. RR). That project involved only 191 units. (*Id.*) The Plaintiff's own written submission to the City stated that "CoPar Development is pleased to present *the revised* Carver Crossing of Maplewood development plans for your consideration," and emphasized its alleged consistency with the current guide plan designation. (Ex. MM at 1) (Emphasis added). The conclusion of its submission stated "without undue delay we hope to receive your approval and construct *this development . . .*" (*Id.* at 9) (Emphasis added).

Because the record reflects that the Plaintiff *withdrew* its earlier applications, (Ex. RR at 2, also attached to Ex. RR) and Plaintiff has submitted no contradictory evidence, it would be the City, and not the Plaintiff, that would be entitled to summary judgment. Moreover, the Plaintiffs were specifically asking the City to approve the *revised* development plans. (Ex. MM at 1, 9). Under these circumstances, the kind of "clear legal duty" required for mandamus cannot exist.

Furthermore, the submission of superseding applications makes it irrelevant if the applicant did not formally withdraw the earlier applications. In *Wisconsin's Environmental Decade, Inc. v. State Dept. of Natural Resources*, 94 Wis.2d 263, 271-272, 288 N.W.2d 168,172 (Wis. Ct. App. 1979), the Court noted that "[i]t is unclear whether the remanded application was formally withdrawn by the District but both the District and the DNR have treated that application as having been superseded by the revised application first filed in October 1977 and refiled in July 1978." It added:

An agency to which an application is made is generally bound by the scope of the application before it. **If an application which was the subject of judicial review is no longer before the agency, either through withdrawal or supersedence, no reason exists for further action on the application.**

Id., (emphasis added). Thus, upon the submission of the revised applications (and Plaintiff's request that the City approved the applications as revised), no reason existed for further action on the earlier applications, and the City cannot be faulted for failing to vote on them.

Moreover, the larger project would have required approval of a comprehensive guide plan amendment. An application for a comp guide plan amendment (other than one seeking an expansion of the metropolitan urban service area) is not a kind of “request” subject to the automatic approval provisions of Minn. Stat. § 15.99. The scope of § 15.99 has been affected by a combination of judicial interpretations of the phrase “request” and at least one legislative amendment to that definition. Even before § 15.99 was enacted, its scope was narrowed in a manner very material to this action. As originally introduced as Senate File 647 in 1995, the bill, if adopted, would apply to a “written request *relating to land use* for a permit, license, or other governmental approval of an action.” S.F. 647, as introduced in the 1995-96 Session, attached as Baker Aff. Ex. 2. “During senate floor debate, the senate version of the bill was amended to delete a reference to the generic term, “land use,” and replace it with the more precise term, “zoning.” *Advantage Capital Management v. City of Northfield*, 664 N.W.2d at 427 (Minn. Ct. App. 2003), (citing Senate Floor Debate on S.F. No. 1246 (May 2, 1995) (A-4 Amendment)). In 2000 and 2003, the legislature amended the definition further, resulting in the current definition. See 2000 Minn. Laws ch. 435 Section 4 and 2003 Minn. Laws ch. 41 Section 1.

Then, in July 2003 the Minnesota Court of Appeals issued a published opinion clarifying the meaning of the phrase “relating to zoning . . .” *Advantage Capital Management*, 664 N.W.2d at 426-28. The Court of Appeals noted that “the specificity of the three areas listed – zoning, septic systems, and expansion of the metropolitan urban service area – *indicates that the statute is tailored to particular actions.*” *Id.* at 426 (emphasis added). It held that “[i]n light of the legislative history, purpose, and effect of the competing interpretations, we conclude that “a written request relating to zoning” is a request to conduct a specific use of land within the framework of the regulatory structure relating to zoning or, in other words, a zoning

application.” *Id.* 664 N.W.2d at 427. Thus, cases “have applied the sixty-day rule to special-use permits, conditional-use permits, variances, and site-plan approval that relate specifically to zoning.” *Id.* (citing *N. States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925 (Minn. Ct. App. 2002) (applying statute to CUP request for power line); *Am. Tower, L.P.* 636 N.W.2d at 313 (applying statute to application for CUP to build telecommunications towers); *Demolition Landfill Servs., LLC, v. City of Duluth*, 609 N.W.2d 278, 281 (Minn. Ct. App. 2000) (applying statute to special-use permit request for landfill), review denied (Minn. July 25, 2000)).⁶

In this case, because the statute specifically refers to *one* type of comprehensive guide plan amendment – extending the metropolitan urban service area – but conspicuously failed to refer more generally to such amendments, or to refer to the type of amendment needed for the 299-unit-project, it would violate fundamental principles of statutory construction for this Court to more generally conclude that all applications for comprehensive guide plan amendments are subject to Section 15.99. Thus, the Court could not automatically approve a comp guide plan amendment in this suit (and the circumstances that created the *need* for the Plaintiff to have requested such an amendment will remain).

Until the City exercised its legislative discretion to reguide the property to allow the type of 299-unit project that CoPar previously proposed, any zoning approvals for that project would have been unlawful and for that reason would have been incapable of automatic approval under a 2006 Minnesota Supreme Court decision. The Minnesota Supreme Court recently made it clear that an applicant cannot obtain through automatic approval more than the substantive law would

⁶ For similar reasons, the application to vacate streets cannot be the subject of automatic approval under § 15.99 because such an application does not constitute a “request” within the meaning of § 15.99 Subd. 1. Thus, the City is entitled to a denial of the Plaintiff’s Motion to the extent that it seeks to obtain approval of that application under § 15.99.

authorize a city to grant voluntarily. See *Breza v. City of Minnetrista*, 725 N.W.2d 106 (Minn. 2006). Because the City lacked the authority to grant a CUP/PUD or preliminary plat without first eliminating the inconsistency with the comprehensive guide plan, any automatic approval would violate the holding of *Breza*.⁷

In any event, equitable doctrines of waiver, estoppel, and unclear hands preclude CoPar from securing automatic approval of the larger design in this fashion. Under its own theory, CoPar would secure approval for a larger configuration of its project regardless of whether or not the City approved the application for a smaller project that it had substituted, simply because the Council did not *also* specifically deny the larger project within 60 days (in the midst of the City's consideration of CoPar's newer drawings). CoPar itself *requested* the City to approve the *revised* project. To describe CoPar's own approach as setting a trap for the unwary is an understatement, because it would allow a developer to lure a City into paying attention to a revision of its project so that it fails to take action on the previous configuration of its own project, and then takes advantage of its own approach by demanding automatic approval of the pre-revision project.

III. PLAINTIFF IS NOT ENTITLED TO INVALIDATE THE CITY'S MORATORIUM.

Plaintiff's claim that the moratorium adopted in November 2006 may not be applied to it is based on the premise that its applications were automatically approved before the moratorium went into effect. Until the Court itself reaches that conclusion, however, the question is not ripe

⁷ For similar reasons, the Plaintiff is not entitled to automatic approval of its application for preliminary plat approval, which was legally dependent upon the City's approval of the CUP/PUD application. Once the CUP was denied, it became unlawful for the City to approve the preliminary plat application within the meaning of *Breza*. Thus, automatic approval of that application is not permitted.

for adjudication. Thus, the Plaintiff is not entitled to Summary Judgment on its challenge to the application of the moratorium to its property.

CONCLUSION

For the reasons set forth above, the City of Maplewood respectfully requests the Court to deny Plaintiff's Motion for Summary Judgment and to decline to grant mandamus against the City. At a minimum, the Court should defer any grant of the Plaintiff's Motion until after the Minnesota Supreme Court has issued its decision in *Hans Hagen Homes Inc. v. City of Minnetrista*.

Dated: February 26, 2007

GREENE ESPEL, P.L.L.P.

By 

John M. Baker, Reg. No. 174403
200 S. Sixth Street, Suite 1200
Minneapolis, MN 55402
(612) 373-0830

Attorneys for Defendant City of Maplewood

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, subdivision 2, to the party against whom the allegations in this pleading are asserted.

By 

John M. Baker, Reg. No. 174403

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