

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Other Civil (Declaratory Judgment)

CoPar Development, LLC,

Court File No. 62-C5-06-010746

Judge Kathleen Gearin

Plaintiff,

vs.

**MEMORANDUM OF LAW IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

City of Maplewood,

Defendant.

INTRODUCTION

Plaintiff, CoPar Development, LLC (“CoPar”), respectfully submits this memorandum of law in support of its motion for summary judgment. In this motion, CoPar requests that the Court grant it summary judgment because it is undisputed that the Defendant, the City of Maplewood (“City”), violated Minnesota’s “60-Day Rule,” Minn. Stat. § 15.99 *et. seq.* CoPar further requests summary judgment in its favor that the City’s recently adopted moratorium is unenforceable to prevent the development of the real property at issue. By agreement of the parties, this motion does not address the underlying validity of the City’s denial of CoPar’s zoning submissions. The parties have agreed to address the basis for the City’s denial of the requested zoning approvals at a later time, depending upon the resolution of the legal issues in this motion. Except as otherwise noted in this Memorandum, all references to Exhibits are to the Administrative Record compiled by the City and filed with the Court.¹

¹ CoPar is not conceding that the Administrative Record supplied to the Court by the City is final and complete, but for purposes of this motion for summary judgment the Court will not need to resolve that issue.

STATEMENT OF LEGAL ISSUES

1. Are the Projects Proposed by CoPar Automatically Approved by Application of Minnesota Statute § 15.99?
2. Is the Moratorium Adopted by the City to Prevent Development of CoPar's Property Valid?

STATEMENT OF DOCUMENTS RELIED UPON

For this motion, CoPar relies upon all files, pleadings and documents of record as well as the Administrative Record compiled by the City and submitted to the Court. The references herein to Exhibits are to the Administrative Record by document and bates number.

STATEMENT OF UNDISPUTED FACTS

I. THE PARTIES

CoPar is a Minnesota limited liability company with offices in Lake Elmo, Minnesota. The City is a municipal corporation organized and existing under the laws of the State of Minnesota.

II. THE PROPERTY

CoPar is the fee owner of certain real property in Maplewood, Minnesota ("Real Property"). The Real Property² is located south of Carver Avenue and immediately west of 494 and is commonly referred to as Carver Crossing. *Plaintiff's Complaint* ¶ 6; *Defendant's Answer* ¶ 6. The Real Property is approximately 72.4 acres. *Id.*

² As the Court reviews the relevant documents, it is worth noting that the Real Property is at times referred to as the "Schlomka Property." See e.g. *Administrative Record, Exhibit C.*

III. THE APPROVAL PROCESS FOR THE DEVELOPMENT OF THE PROPERTY

In early to mid-2005, CoPar began the process of seeking the approvals necessary to develop the Real Property. *See Generally Administrative Record, Exhibit RR.*³

A. **March 31, 2006. CoPar Submits To The City Requests To Develop A 299 Unit Development.**

On March 31, 2006, CoPar submitted to the City and requested approval of a 299 Unit Development for the Real Property (“299 Unit Development”). *Administrative Record, Exhibit W, MAP 0537 to 0557.* CoPar included with its 299 Unit Development proposal a Comprehensive Plan Amendment Application, a Planned Unit Development Application, a Community Design Review Board Application and a Preliminary Plat Application. *Id.* According to City staff, the 299 Unit Development of the Real Property “is the lowest development level provided within the Maplewood Land Use Plan at 4.1 units per acre.” *Administrative Record, Exhibit BB, MAP 0638.*

Based on the language in the City’s staff report, it appears that the City Planner believes that CoPar withdrew the 299 Unit Development. *Administrative Record, Exhibit RR, MAP 0999.* CoPar, however, has not withdrawn that proposal and there is nothing in the Administrative Record supporting the conclusion that CoPar withdrew the requests for approval of the 299 Unit Development. There is no evidence in the Administrative Record that the City denied the application for the 299 Unit Development. There is no evidence that the City provided written notice to CoPar that the application for 299 Unit Development was denied. Finally, there is no evidence that the City at any meeting denied the application for 299 Unit Development.

³ Exhibit RR, which is an August 29, 2006 Planning Memorandum, generally summarizes the history of the development efforts for the Real Property. While CoPar does not agree with all of the statements in Exhibit RR, for purposes of this motion, the Exhibit may be relied upon by the Court for an adequate history of the project. It is worth noting that the City admits that this memorandum is a detailed review and analysis of the project. *See Complaint ¶ 21, Answer ¶ 21 (admitting paragraph 21 of the Complaint).*

B. July 10, 2006. The City Issues A Negative Declaration On The Need For An Environmental Impact Statement.

As part of the development project, CoPar recommended that the City require an environmental assessment worksheet (“EAW”).⁴ *Administrative Record, Exhibit L; BB*. The City, as the responsible governmental unit (“RGU”), completed the EAW in February of 2006. *Administrative Record, Exhibit G*. According to the City Staff report, the EAW represented the “worst case scenario.” *Administrative Record, Exhibit BB, MAP 0638*.

Following the completion of the EAW, the City issued a negative declaration on the need for any further studies of the development of the Real Property (through a more detailed environmental impact statement or “EIS”). Among other things the City concluded in resolution:

2. The EAW satisfactorily addressed all of the issues for which existing information could have been reasonably obtained; and

* * *

4. Based on criteria established in Minnesota Rules 4410.1700, and the Findings of Fact, the Project does not have a potential for significant environmental effects; and

5. An Environmental Impact Statement is not required, and the City of Maplewood therefore makes a “Negative Declaration”.

Administrative Record, Exhibit HH, MAP 0820-21; see also Administrative Record, Exhibit II.

While the 299 Unit Development had “no potential for significant environmental effects,” CoPar, without withdrawing its previous application, but in an effort to work with the City and

⁴ An EAW is a document prepared as part of the environmental review process established by the Minnesota Environmental Policy Act, Minn. Stat. § 116D.002, et seq. It is “a brief document which is designed to set out the basic facts necessary to determine whether an environmental impact statement is required for a proposed action” and to “to initiate the scoping process for an [Environmental Impact Statement].” Minn. Stat. § 116D.04, subd. 1a(a); Minn. R. 4410.0200, subp. 24. The EAW is not relevant to the present motion for summary judgment regarding the City’s violation of the 60-Day Rule. It may be relevant in the future if the City seeks to justify the purported denial of the project for environmental reasons, after having already determined in the formal EAW process that there was not a

appease the City's apparent concerns submitted a revised plan for a 191 Unit Development ("191 Unit Development").

C. August 7, 2006. CoPar Seeks Approval Of The 191 Unit Development.

On August 7, 2006, CoPar submitted to the City further revised development plans for a 191 Unit Development and requested a Conditional Use Permit, Planned Unit Development Approval and Preliminary Plat Approval. *Administrative Record, Exhibit MM, MAP 0951-79; see also Complaint ¶ 20; Answer ¶ 20.* The Application included all of the information requested by the City including, among other documents, the following:

- Preliminary Plat,
- Site Plan,
- Grading and Erosion Control Plan,
- Utility Plan,
- Stormwater Management Plan,
- Tree Preservation Plan,
- Open Space Plan (preserving nearly 28 acres of open space or approximately 38.5 percent of the Real Property),
- Noise Contour Exhibit,
- Mississippi River Control Area Corridor Exhibit.

Id.

potential for significant environmental effects as a result of the project. In addition, the EAW provides a detailed description of the property at issue.

D. August 29, 2006. The City Staff Recommends Approval Of The 191 Unit Development.

On August 29, 2006, the City Planner recommended approval of the 191 Unit Development.

Administrative Record, Exhibit RR, MAP 0998-1033. The extensive staff report from the City Planner notes, among other things:

“[a]s proposed, the 191 units on the 73-acre site means that there would be 2.64 units per acre (an average of 16,420 square feet per unit). The individual lot widths and sizes, as proposed, will vary depending on the topography of the lot and the style of the unit. As I noted above, they all appear to be consistent in size and layout (if not larger) with other town house lots in Maplewood.” Further “the proposed overall project density of 2.64 units per acre is consistent with the density standards in the comprehensive plan for single dwelling residential and low-density multiple-family development.”

Administrative Record, Exhibit RR, MAP 1002. The same staff report notes that “[w]hile many of the neighbors would prefer no or little development of the property, the property owner has the right to develop and use his land. The city must balance the interests and rights of the property owner to develop his land with the city’s ordinances, development standards and Maplewood’s Comprehensive Plan.” According to the City Planner, “[t]he current proposal balances the city’s interest in preserving many of the natural features of the site while giving the owner the opportunity to develop the site.” *Id.* at MAP 1011. The City Planner continued:

In the last year and one-half since the city first reviewed the developer’s initial concept plan for the property, they have significantly revised the plans and reduced the number of units on the property. The applicant has invested more than one year in time with meetings, plan preparation, revisions and analysis (including the EAW) to prepare the latest plans. The current proposal balances the city’s interest in preserving many of the natural features on the site while giving the owner the opportunity to develop the site. *This balance is something the city should strive for with every development.*

Id. (emphasis added).

E. September 28, 2006. The City Council Considers The 191 Unit Development.

On September 28, 2006,⁵ the City Council met to consider the 191 Unit Development. Three of the five members of the City Council voted to deny the 191 Unit Development. At the City Council meeting following the September 28, 2006 City Council meeting, on October 9, 2006, the City did not adopt a written statement of the reasons denying the 191 Unit Development. *Administrative Record, Exhibit GGG.*

To summarize, the City failed to do all of the following with respect to the 191 Unit Development:

1. State in writing the reasons for the denial of the 191 Unit Development.
2. Adopt a written statement describing the reasons for the denial of the 191 Unit Development.
3. Adopt at the meeting following the September 28, 2006 City Council meeting and within 60 days of August 7, 2006 (the date CoPar requested approval for the 191 Unit Development) a written statement of the reasons for denying the 191 Unit Development.

F. November 13, 2006. The City Adopts A Moratorium.

On November 13, 2006, the City Council adopted a moratorium that, on its face, prevents development of the Real Property. The Moratorium states that “[t]he City will not approve any new development, subdivision or building permit for a new building, except for those parcels that are two acres in size or smaller and now of record, during the moratorium period.” *Affidavit of Howard A. Roston, Exhibit A.*⁶

⁵ The September 28, 2006 meeting was the continuation of the September 25, 2006 meeting. *Administrative Record, Exhibit BBB, MAP 1171.*

⁶ The November 13, 2006 meeting minutes do not appear to be included in the Administrative Record submitted by the City. CoPar presumes that the City will not object to this document and hereby moves that it be included in the Administrative Record.

G. CoPar Commences The Present Action Against The City.

On November 29 2006, CoPar served and filed its Amended Complaint, Appeal and Petition for Writ of Mandamus (“Complaint”)⁷. In its Complaint, CoPar alleged:

In violation of Minn. Stat. § 15.99, the City failed to timely and adequately provide notice and written notice to CoPar explaining the reasons for the denial of CoPar’s application. In violation of Minn. Stat. § 15.99, the City failed to adopt any reasons for the denial of the Project at the meeting following the September 28, 2006 meeting.

Complaint ¶ 27. In its Answer to the Complaint, the City responded:

With regard to the allegations in paragraph 27 of the Complaint, Defendant admits that it did not fully satisfy all of the literal duties of Minn. Stat. § 15.99 subd. 2 (c) because the reasons that the City Council gave in the presence of applicant’s representatives when denying the project, and again in its published and approved minutes of the September 28, 2006 meeting, were also not given to applicant in writing before the expiration of the time allowed for making a decision under that section, but affirmatively states that it substantially complied with both the spirit and the intent of § 15.99 and that its failure to provide redundant notice of why Plaintiff’s applications were denied did not injure the applicant or any public interest.

Answer ¶ 27.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Summary Judgment is to be granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Minn. R. Civ. P. 56.03*. A genuine issue of material fact must be shown by substantial evidence. *Gunderson v. Harrington*, 632 N.W.2d 695 (Minn. 2001). In order to defeat a motion for summary judgment, “the party opposing the motion may not rely upon mere general statements of fact but must demonstrate at the time the motion is

⁷ CoPar amended the original complaint after the City adopted the above referenced moratorium.

made that *specific facts* are in existence which create an *issue for trial.*” *Matter of Leisure Hills Health Care*, 518 N.W.2d 71, 75 (Minn. Ct. App. 1994) (emphasis added) *citing Hunt v. IBM Mid Am*, 384 N.W.2d 853 (Minn. 1986); *see also Minn. R. Civ. P. 56.05.*

A. CoPar Is Entitled To Summary Judgment That The City Violated The 60-Day Rule And A Writ Of Mandamus Compelling The City To Issue All Approvals And Permits Sought By CoPar For Both The 299 Unit Development and the 191 Unit Development.

CoPar is entitled to judgment as a matter of law that both the 299 Unit Development and the 191 Unit Development have been approved by the City due to the City’s failure to comply with the plain language of Minn. Stat. § 15.99. As such, CoPar is entitled to an order and Writ of Mandamus directing that the City issue all approvals for both projects, at CoPar’s discretion.

The Minnesota Legislature has adopted very specific requirements that municipalities (and other units of government) must follow when considering zoning and land use applications. Minn. Stat. § 15.99, subd. 2 provides in its entirety that:

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 agency⁸ 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.

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

⁸ Agency is defined to include cities. *Minn. Stat. § 15.99, subd. 1 (b).*

(c) Except as provided in paragraph (b), if an agency, other than a multimember governing body, denies the request, it must state in writing the reasons for the denial at the time that it denies the request. If a multimember governing body denies a request, it must state the reasons for denial on the record and provide the applicant in writing a statement of the reasons for the denial. If the written statement is not adopted at the same time as the denial, it must be adopted at the next meeting following the denial of the request but before the expiration of the time allowed for making a decision under this section. The written statement must be consistent with the reasons stated in the record at the time of the denial. The written statement must be provided to the applicant upon adoption.

Minn. Stat. § 15.99, subd. 2. Based on the language of the statute (and as further discussed below), the statute requires that an agency do all of the following when denying an application:

1. Approve or deny a written zoning related request within 60 days. *Minn. Stat. § 15.99, subd. 2(a).* If denied, the reasons must be in writing. *Id.*
2. State on the record the reasons that the request is denied. *Minn. Stat. § 15.99, subd. 2(b).*
3. If the agency is a multimember body (such as the City Council in this case) any reasons for denial must be provided to the applicant in writing at the time of denial or at the next meeting following the denial *and* within the 60 days required by the 60-Day Rule. *Minn. Stat. § 15.99, subd. 2(c).*

The Appellate Courts in Minnesota have steadfastly concluded that a violation of the 60-Day Rule results in automatic approval of the proposed project. For example, in *Veit Company v. Lake County*, 707 N.W.2d 725 (Minn.Ct. App. 2006) *review denied*, the applicant, on June 14, 2004, submitted to the County a request for a conditional use permit for blasting and quarrying. The County planning commission conducted a hearing on August 16, 2004 and voted to deny the conditional use permit. A written notice of the decision was provided to the applicant at the

August 16, 2004 meeting, but that notice did not state the reasons for denial. In October of 2004 the applicant received a written order denying the application. The applicant then sued arguing that the conditional use permit was automatically approved under Minn. Stat. § 15.99. *Id.* at 727.

The Minnesota Court of Appeals, interpreting the plain language of the 60-Day Rule stated:

Under Minn.Stat. § 15.99, subd. 2(a), an agency has 60 days to approve or deny a zoning request, and if the agency fails to deny the request within 60 days, the request is approved by operation of law. Minn.Stat. § 15.99, subd. 2(a), also requires that if an agency denies a zoning request, the agency “must state in writing the reasons for the denial at the time that it denies the request.” There is no dispute that the planning commission denied relators’ CUP⁹ application within the permitted 60-day period; a motion to deny the application was passed at the August 16, 2004 commission meeting, and a written notice of denial was given to relators’ representative at the meeting. But the written notice of denial did not state any reasons for the denial.

In *Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278 (Minn.App. 2000), *review denied* (Minn. July 25, 2000), this court construed as mandatory the requirement in Minn.Stat. § 15.99, subd. 2 (1998), that “[i]f an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request.” The *Demolition Landfill* court concluded, “Absent a denial within the statutory time limit and simultaneous, written reasons for the denial, the permit application is approved.” 609 N.W.2d at 282. By requiring “simultaneous, written reasons for the denial” to avoid automatic approval, the *Demolition Landfill* court construed the statute to mean that written reasons for a denial are an essential part of the denial. *Id.* at 281-82.

Following the *Demolition Landfill* decision, the legislature amended subdivision two of section 15.99 by designating the existing subdivision two as clause (a) and adding clauses (b) and (c). 2003 Minn. Laws ch. 41, § 1. The legislature did not amend the provision construed as mandatory by the *Demolition Landfill* court. Therefore, the *Demolition Landfill* construction of the written-reasons requirement applies to this case. *See State v. Anderson*, 666 N.W.2d 696, 700 (Minn. 2003) (stating that when the legislature does not amend the supreme court’s construction of a statute, the court’s construction stands) (citing *W. Union Tel. Co. v. Spaeth*, 232 Minn.

⁹ A “CUP” is a conditional use permit which is a type of zoning approval.

128, 131-32, 44 N.W.2d 440, 441-42 (Minn. 1950) (“The judicial construction of a statute, so long as it is unreversed, is as much a part thereof as if it had been written into it originally”); *see also* Minn. Stat. § 645.17 (2002) (providing that “when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language”).

The new provisions in clause (c) that apply to a multimember governing body (1) continue the requirement that if a request is denied, the multimember governing body *must state the reasons for the denial in writing*; and (2) add a requirement *that the written statement be provided to the applicant*. But for a multimember governing body, it is not necessary that the written statement of the reasons for a denial be adopted and provided to the applicant at the time of the denial. However, if a multimember governing body does not adopt a written statement of the reasons for a denial at the time of the denial, the written statement must be adopted at the multimember governing body's next meeting following the denial and before the permitted period for denying a request expires. *Although these new provisions provide an alternative method for a multimember governing body to satisfy the requirement that reasons for a denial be stated in writing, they do not provide a basis for this court to depart from the Demolition Landfill court's conclusion that the statutory written-reason requirements are mandatory.*

Id. at 728-29 (*emphasis added*). The Court of Appeals concluded that:

It is undisputed that the planning commission did not adopt a written statement of the reasons for denying relators' CUP application and provide the written statement to relators at the August 16, 2004 meeting where the application was denied. By itself, this does not mean that the application is granted, because the new requirements in subdivision 2(c) permitted the planning commission to adopt a written statement of the reasons for the denial at its next meeting before the 60-day period for making a decision expired. But the August 16, 2004 meeting occurred on the last day of the 60-day period for making a decision, and as a result, the planning commission's next meeting did not occur before the 60-day period expired. Consequently, the planning commission could not use the alternative method for a multimember governing body to satisfy the requirement that reasons for a denial be stated in writing.

* * *

Because the requirement that reasons for a denial be stated in writing is mandatory, and the planning commission did not use either of the two permitted methods for a multimember governing body to meet this requirement, relators' CUP application was approved by operation of law.

Id. at 730 (emphasis added). Only months later in *Hans Hagen Homes, Inc. v. City of Minnetrista*, 713 N.W.2d 916 (Minn. Ct. App. 2006), *review granted*, the Minnesota Court of Appeals reached a similar conclusion based on the 60-Day Rule. In May of 2004, the applicant, Hagen Homes submitted a rezoning request to the City of Minnetrista. As permitted by Minn. Stat. § 15.99, Hagen agreed to extend the deadline for decision to November 30, 2004.¹⁰ The City denied the request at its October 4, 2004 meeting, but did not adopt written findings until its October 18, 2004 meeting. The city posted meeting minutes on its website prior to the agreed upon November 30, 2004 extension date. It did not, however, provide to the applicant with a copy of the resolution until December 9, 2004. *Id. at 918-19.*

The Minnesota Court of Appeals held that the City's failure to provide the applicant with written notice results in automatic approval of the rezoning request. According to the Court:

The city contends that the automatic approval of the application is a disproportionate sanction for a technical failure to mail the resolution to Hagen Homes, particularly because Hagen Homes does not dispute that it had actual notice of the application's denial. We agree that the penalty is harsh, and we share the observations of the special concurrence that a prejudice requirement would temper the risk of public injustice. But when a statutory provision is clear on its face and consistent with the manifest purpose of the legislature, courts do not subject the statute to further analysis because without deference to clear statutory language, "legislators will have difficulty imparting a stable meaning to the statutes they enact." *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879-80 (7th Cir. 2002) (recognizing that deference to plain meaning keeps branches of government in equilibrium and

¹⁰ It is worth noting that CoPar did not agree to any such extension in this case; nor did the City seek any extension under Minn. Stat. § 15.99, subd. 3.

“preserve[s] language as an effective medium of communication from legislatures to courts”).

We must presume that the legislature understood the effect of its words and intended the language of the statute to be effective and certain. Minn. Stat. § 645.17(2); *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 74, 93 N.W.2d 690, 698 (1958). “*While automatic approval of a permit application is an extraordinary remedy, Minnesota appellate courts have shown no reluctance to grant this remedy and enforce the provisions of section 15.99 [if] a city has failed to satisfy its clear requirements.*” *N. States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925 (Minn. App. 2002), review denied (Minn. Sept. 25, 2002); see also *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. App. 2004) (holding that application was approved as matter of law even though it was harsh and extraordinary remedy). When a statute’s language is plain, the function of the courts is to enforce it according to its terms. Minn.Stat. § 645.16. We therefore affirm the district court’s summary judgment on the petition for mandamus.

Id. at 923 (*emphasis added*).

1. CoPar Is Entitled To Summary Judgment That The 299 Unit Development Has Been Approved.

Applying the plain language of the statute, CoPar is entitled to summary judgment that the 299 Unit Development has been automatically approved. As described above, CoPar submitted its application for the 299 Unit Development on March 31, 2006. The Administrative Record is void of any evidence that the City took any action to deny the 299 Unit Development within the 60 days required in Minn. Stat. § 15.99, subd. 2(a). Also in violation of § 15.99, subd. 2(a) there is no evidence that the City stated in writing any reasons for denying the application for the 299 Unit Development.

In addition, there is no evidence that “those voting against the motion [for the 299 Unit Development) state[d] on the record the reasons why they oppose[d] the request” as required by Minn. Stat. § 15.99, subd. 2(b).

Finally, there is no evidence that the City stated in writing the reasons for the denial of the 299 Unit Development or adopted any written reasons for the denial at the next meeting and within 60 days of the application as required by Minn. Stat. § 15.99, subd. 2(c).

2. CoPar Is Entitled To Summary Judgment That The 191 Unit Development Has Been Approved.

The City also failed to comply with Minn. Stat. § 15.99 with respect to the 191 Unit Development. In particular, as noted above, the application for the 191 Unit Development was submitted on August 7, 2006. There is no evidence that the City stated in writing the reasons for the denial of the 191 Unit Development within 60 days as required by Minn. Stat. § 15.99, subd. 2(a). In violation of Minn. Stat. § 15.99, subd. 2(c), the City also failed to “provide the applicant [CoPar] in writing a statement of the reasons for the denial” and failed to adopt “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” a written statement for the denial. Indeed, the City, in its Answer, admits its failure to comply with Minn. Stat. § 15.99, subd. 2(c). *See Answer* ¶ 27.

3. The City’s Multiple Violations Of Section 15.99 Entitles CoPar To Automatic Approval Of Both The 299 Unit Development And The 191 Unit Development.

As fully described above, the City’s failure to comply with Section 15.99 constitutes automatic approval of the both the 299 Unit Development and the 191 Unit Development. *Veit Company*, 707 N.W.2d at 730; *Hans Hagen Homes*, 713 N.W.2d at 923. Based on the undisputed facts and the plain language of the statute, CoPar is entitled to summary judgment and a writ of

mandamus compelling the City to issue all permits and approvals necessary for CoPar to complete, at its option, either the 191 Unit Development or the 299 Unit Development.¹¹

B. CoPar Is Entitled To Summary Judgment That The City's November 13, 2006 Moratorium Does Not Apply To The Real Property.

After realizing its violation of the 60-Day Rule (and indeed, after the commencement of this lawsuit), the City has apparently attempted to “correct” the automatic approvals as described above by adopting a moratorium (also known as an interim ordinance). In Minnesota moratoria are governed by Minn. Stat. § 462.355 which provides in relevant part:

Subd. 4. **Interim ordinance.** (a) If a municipality is conducting studies or has authorized a study to be conducted or has held or has scheduled a hearing for the purpose of considering adoption or amendment of a comprehensive plan or official controls as defined in section 462.352, subdivision 15, or if new territory for which plans or controls have not been adopted is annexed to a municipality, the governing body of the municipality may adopt an interim ordinance applicable to all or part of its jurisdiction for the purpose of protecting the planning process and the health, safety and welfare of its citizens. The interim ordinance may regulate, restrict, or prohibit any use, development, or subdivision within the jurisdiction or a portion thereof for a period not to exceed one year from the date it is effective.

Minn. Stat. § 462.355. The right of a city, however, to adopt a moratorium is not unlimited. *Minn. Stat. § 462.355* further provides that:

no interim ordinance may halt, delay, or impede a subdivision that has been given preliminary approval, nor may any interim ordinance extend the time deadline for agency action set forth in section 15.99 with respect to any application filed prior to the effective date of the interim ordinance.

¹¹ For example, the City will still be required to approve building permits as part of the normal construction project. Because CoPar is entitled to the relief requested in this motion, it is also entitled to such other ministerial permits as may be required to complete the project. Otherwise, the Court's order issuing the writ of mandamus would be a nullity. See e.g. *Curry v. Young*, 285 Minn. 387, 397, 173 N.W.2d 410, 416 (1969) (“[I]f plaintiffs are entitled to this variance they are also entitled to a building permit Consequently, the court had power to order the issuance of a building permit....”).

Id. In *Semler Construction v. City of Hanover*, 677 N.W.2d 457 (Minn. Ct. App. 2003), the Minnesota Court of Appeals held that “while the city may place an interim moratorium on development, the moratorium may not apply to development projects that have already received preliminary plat approval.”¹² In *Semler*, the City of Hanover approved a rezoning and conditional use permit for the development of the subject property. *Id.* at 459. Thereafter, the public elected a new council member who opposed the project. Immediately after the election, the City adopted an interim ordinance and based on the moratorium denied further requests for approval by the developer. The Minnesota Court of Appeals held:

Minn. Stat. § 462.355, Subd. 4, provides that no moratorium may impede a subdivision that has been given preliminary approval prior to the effective date of the interim ordinance. The preliminary plat had already been approved at the time the moratorium was adopted. The City’s attempted application of its moratorium to [the developer’s] plat application is *void and of no consequence.*”

Id. at 466 (emphasis added).¹³

Because both the 191 Unit Development and 299 Unit Development have already been approved (by virtue of the City’s violation of the 60-Day rule) the moratorium is unenforceable and void as to either development. Additionally, by its plain language, Section 466.355 does not operate to extend the deadline for action under Minn. Stat. § 15.99. As fully described above, it is indisputable that CoPar submitted its application prior to the effective date of the proposed interim ordinance and, therefore, that ordinance, may not halt, delay or impede the development of the Real Property.

¹² The *Semler* Court concluded that the City violated its duty of good faith and fair dealing with the landowner and remanded for a determination of whether to award attorneys’ fees.

¹³ It is worth noting that *Semler* also clarifies what it means to have “preliminary plat approval.” The word “preliminary” is really a misnomer. Preliminary Plat approval in Minnesota is in fact the most important step in obtaining approval of a subdivision. *Id.* at 461. Final plat approval is typically a ministerial action following preliminary plat approval.

Finally, Section 462.355 restricts moratoria to one year. *Minn. Stat. § 462.355, subd. 4(a)*. This is the *second* moratorium that the Real Property has been subjected to. Indeed, the Real Property was subject to a moratorium as recently as 2003 when the City also “studied” the property. *Affidavit of Howard A. Roston, Exhibit B*. Apart from the fact that this demonstrates no further studies are again needed, the plain language of the statute restricts moratoria “for a period not to exceed one year.” The intent of the one year period in the statute is to prevent cities from adopting indefinite “interim” ordinances. The City cannot lawfully accomplish through serial moratoria that which is expressly prohibited by the statute at issue. In other words the City cannot adopt two one-year moratoria when a two-year moratorium would be clearly unlawful.

CONCLUSION

For the reasons set forth above, CoPar is entitled to summary judgment that both the 191 Unit Development and the 299 Unit Development are automatically approved by operation of Minn. Stat. § 15.99. CoPar is further entitled to summary judgment that the moratorium is “void and of no consequence” to either project. CoPar respectfully request that the Court issue a writ of mandamus compelling the City to grant all required approvals and permits necessary for either project.

Respectfully Submitted,

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