NO. A07-0109

State of Minnesota
In Court of Appeals

Diffley Ventures, LLC,

Appellant,

vs.

City of Eagan,

Respondent.

BRIEF OF *AMICUS CURIAE* BUILDERS ASSOCIATION OF MINNESOTA

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2007 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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INTERESTS OF AMICUS CURIAE

Amicus Curiae Builders Association of Minnesota ("BAM") respectfully submits this brief pursuant to the Court's order filed July 25, 2007 and received July 28, 2007.[1]

BAM was established in 1974, and now serves more than 4,850 homebuilding and remodeling industry professionals throughout the State of Minnesota. Its members construct more than 35,000 housing units in Minnesota on an annual basis. In total, BAM's constituents provide more than 500,000 jobs in Minnesota. BAM's members frequently purchase property for development and subsequent construction of residential homes. Additionally, some BAM members also develop real property for commercial and/or industrial uses.

BAM's members operate in a highly regulated environment. In order to function efficiently and effectively, they rely on timely and responsive actions by cities in connection with land use applications. BAM's constituents are among those whom the Legislature intended to benefit from the enactment of Minnesota Statutes section 15.99 which requires greater responsiveness and responsibility on the part of cities in their handling of land use applications.

BAM is interested in protecting the public policies of timeliness, due process, separation of powers, and certainty of agency approvals provided under Minnesota Statutes 15.99. Most of BAM's members, including land developers and builders,

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[1] BAM's undersigned counsel certifies, pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, that no counsel for any party authored this brief either in whole or in part, and that no one made a monetary contribution to the preparation or submission of this brief, other than BAM, its members and its counsel. Minn. R. Civ. App. P. 129.03.

depend upon timely agency approval of requests relating to development and construction, including requests for rezoning, variances, wetland issues, preliminary planned development approvals and final planned development approvals.

STATEMENT OF THE CASE AND FACTS

BAM concurs with Appellant's statement of the case and facts.

SUMMARY OF ARGUMENT

The clear and unambiguous purpose of the 60-Day Rule is to protect property owners through an efficient application of the zoning process at local governmental levels. To developers seeking zoning approvals, time is money. Unnecessary delays cost money. In the context of residential development, this negatively affects the affordability and availability of housing. Delays by cities in addressing land use applications necessarily result in homeowners paying more for their homes.

Minnesota Statutes section 15.99 could not be more clear. Failure of a city to act on a request within 60-days is an automatic approval of that request—unless a valid extension of time is applicable. Requiring each request to be separately approved or denied is what the plain language of the 60-Day Rule requires and is standard practice among municipalities across the State of Minnesota. Although the statute at issue is not ambiguous, and therefore statutory construction is not necessary, reference to outside sources confirms this result. Legislative history requires a broad and liberal application of this remedial statute in order to suppress the mischief (*i.e.*, delay) at which it was aimed.

Construing and applying Minnesota Statutes section 15.99 in a manner that is at odds with its clear and unambiguous language violates the separation of powers doctrine set forth in the Minnesota Constitution. Specifically, engrafting language into the statute that appears nowhere in the text of the law and materially changes it must be rejected by this Court as an inappropriate usurpation of legislative power. The impact of the assertion by the lower court is that a development project could be built with just one approval by the city. However, that is not standard practice, or realistic, for projects of significant size with multiple phases of construction.

If the lower court's application of Minnesota Statutes section 15.99 is accepted, then it will result in a substantial change in existing practices, cause unnecessary, added complexity and decrease the predictability of the decision making process. The bright-line rule, clearly expressed in the statute, is that each request requires a separate approval or denial. Introducing uncertainty into the process actually serves to cause more confusion—contrary to the Legislature's desire to facilitate efficiency, predictability of results, and a streamlining of the process. The practical approach of treating each request as requiring a separate approval or denial complies with the clear language of the statute and intent of the Legislature—which includes *simplifying* the process.

ARGUMENT

I. MINNESOTA STATUTES SECTION 15.99 CONSTITUTES REMEDIAL LEGISLATION THAT MUST BE LIBERALLY CONSTRUED TO SUPPRESS THE MISCHIEF TO WHICH IT IS DIRECTED AND TO EFFECT ITS REMEDIAL PURPOSE OF PREVENTING DELAYS.[2]

To the extent this Court determines statutory construction of Minnesota Statutes section 15.99 is necessary, then the Court should be guided by the canon of statutory interpretation requiring remedial laws to be liberally construed. This canon of construction mandates application of the express and unequivocal statutory remedy provided in section 15.99, subd. 2 when an agency fails to either approve or deny a request within the statutory time period.

The Minnesota Legislature intended Minnesota Statutes section 15.99 to be construed as remedial legislation. An important purpose of the 60-Day Rule was to "restore the rights of the citizens." (BAM/APP-050) Senator Riveness, one of the authors of this legislation, stated during a Senate floor debate that this law was intended to "reform" current practices relating to land use approvals by "simplifying the bureaucracy." (BAM/APP-050, emphasis added.) Senator Weiner (a co-author of this legislation) and others repeatedly referred to this law as benefiting "consumers" and being "pro-consumer." (BAM/APP-052, BAM/APP-033 to 034, BAM/APP-118, BAM/APP-039) It was the intent of Senator Weiner that this legislation "make a difference to consumers when they are applying for land use permits." (BAM/APP-033)

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[2] BAM maintains that Minnesota Statutes section 15.99 is unambiguous and that it does not require any statutory interpretation. In light of the lower court's finding that the statute is ambiguous, however, BAM includes this argument to guide the Court in the event it believes construction or interpretation of the statute is appropriate.

"The power and the club in the bill is that if they [(*e.g.*, cities)] don't respond, the consumer gets an automatic approval at the end of 60 days." (BAM/APP-033) In other words, Senator Riveness explained, the Legislature wanted a "service guarantee" with a "no excuse policy." (BAM/APP-034)

The legislative history of section 15.99 makes clear that a key purpose was to counteract abuses caused by unnecessary and long delays. Legislators seemed most concerned that there needed to be a time limit and that citizens should know how long the process would take. (BAM/APP-019, BAM/APP-033 to 034) Impetus for the bill came from specific instances where government bodies simply failed to act on land use applications. For example, Glen Dorfman from the Realtors Association, a proponent of the bill, testified: "We're having problems with getting permits and approvals or denials, actually getting some governmental action on certain issues." (BAM/APP-033) Along similar lines, Senator Weiner said that in many instances, landowners/consumers had waited, "a year, two years, three years" for government action. (BAM/APP-033) Representative Brown similarly cited instances where approvals/denials had been unnecessarily delayed:

> I can cite instances where individual citizens of this State have contacted me. Some have waited as long as nine months, some have waited as long as a year and a half. And they've said, we're not so concerned about the answer no, but what we're actually concerned about is [just getting] an answer. (BAM/APP-023)

Representative Sviggum voiced similar sentiments:

> And I see the bill as being one that just basically says, government, get your act together with a private citizen of the

> State of Minnesota[.] . . . You know, make a decision so that an individual and his family can get on with their life. It seems to make some sense that way. (BAM/APP-024)

The legislative history of this statute unequivocally demonstrates it was intended to protect consumers. Under Minnesota law, consumer protection statutes are remedial in nature and must be liberally construed in favor of protecting consumers. *See Boubelik v. Liberty State Bank*, 553 N.W.2d 393, 402 (Minn. 1996) (legislatively overruled on other grounds, Minn. Stat. § 325F.68, subd. 2); *State v. Alpine Air Prods.*, 490 N.W.2d 888, 892 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993). *See also Knese v. Heidegerken*, 358 N.W.2d 177, 179-80 (Minn. Ct. App. 1984) (Civil Damages Act) (remedial legislation must be given liberal construction so as to suppress the mischief at which it is aimed); *Cook v. Playworks*, 541 N.W.2d 366, 368 (Minn. Ct. App. 1996) (reemployment insurance statutes) (remedial statutes must be interpreted liberally in favor of awarding benefits); *La Bere v. Palmer*, 44 N.W.2d 827, 829 (Minn. 1950) (venue statute) (liberal construction given to a remedial statute to give effect to its legislative intent); *Murphy v. Myers*, 560 N.W.2d 752, 754 (Minn. Ct. App. 1997) (Parentage Act) (holding remedial statute must be construed liberally to achieve its purpose); *Watson v. U.S.A.A.*, 551 N.W.2d 500, 502 (Minn. Ct. App. 1996) (auto insurance statute) ("The statute is remedial and therefore must be construed liberally[.]"); *Ryan Contracting, Inc. v. JAG Invs., Inc.*, 634 N.W.2d 176, 183 (Minn. 2001) (Mechanic's Lien Laws) ("we liberally construe the lien statutes as remedial acts").

Section 15.99, subdivision 2's broad authorization (*e.g.*, ". . . notwithstanding any other law to the contrary . . .") and clear legislative mandate (*i.e.*, "Failure . . . to deny a

request within 60 days is approval of the request."), reflect the dual remedial purposes of enforcement and deterrence. Consistent with the remedial intent of section 15.99, this Court should refuse to engraft any artificial limitations on the statute. Once the prerequisites of section 15.99 are satisfied, the remedial purposes of the statute must be effectuated by deeming all requests not specifically denied automatically approved.[3]

II. DELAYS IN THE DEVELOPMENT PROCESS RESULT IN COSTS ULTIMATELY PAID BY HOMEOWNERS AND CONSUMERS.

A primary purpose in passing the 60-Day Rule was to streamline and simplify the development process to make it more efficient and avoid unnecessary costs. The Legislature perceived a demonstrated need to facilitate a process where developers were not held hostage by local authorities who either could not, or would not, approve or deny requests relating to zoning and other land use issues.

During the 1995 House of Representatives floor debate, an author of what later became Minnesota Statutes section 15.99, explained:

> Regulatory time delays regarding applications for the land use activities targeted in this bill can impose potentially unnecessary costs to Minnesota property owners. I would submit to you[,] members[,] it is critical that government streamline its processes and act as efficiently as possible as we enter the new century. Minnesota citizens do have the right to receive a response to their requests in a timely manner and at the same time not to be entangled in delays or squabbles over bureaucratic regulation. [This legislation] simply sets a time certain for the bureaucracy to respond to citizens requests and it is designed to reduce the costs to those citizens. (BAM/APP-019)

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[3] BAM takes no position on whether or not in this case Diffley satisfied the procedural prerequisites entitling it to automatic approval of its requests pursuant to Minn. Stat. § 15.99, subd. 2.

During the March 29, 1995 Senate Governmental Operations and Veterans Committee meeting regarding requests to be governed by Minnesota Statutes section 15.99, testimony was provided regarding the inefficiencies and costs of delays in the process, in part, as follows:

> We want to make sure they're dealt with in an expedient way so people can get on with their lives and aren't trapped in this maze of you, them, pointing fingers, and - - because that costs money. It's inefficient and it costs money. (BAM/APP-109)

The Legislature understood developers face real holding costs; holding costs that are passed-on to homeowners and businesses. The holding costs relating to zoning and other matters falling within the scope of Minnesota Statutes section 15.99 can exceed tens of thousands of dollars per month. Land developers in Minnesota face a number of challenges relating to time. The Legislature recognized Minnesota's climate requires certain aspects of the development process to be conducted only during a limited period each year. (BAM/APP-121) Accordingly, the development process regulated by agencies needed to be determined efficiently—within a 60-day timeframe, extended to up to 120-days—in order for developers not to miss the window of opportunity that Minnesota's climate dictates.

The consequences of cities delaying approval of development requests can mean 6 months or more of added delay. Such delays can have the effect of making a development unprofitable—in which case new housing stock will not be built. Alternatively, development will continue, but the added costs are borne by consumers

and business owners. Such delays directly affect the availability of affordable, quality housing.

In the present case, it appears that Diffley Ventures, LLC ("Diffley") was trapped in the "maze" of "bureaucratic regulation" referenced by the Legislature. The City of Eagan sought and received at least two additional 60-day extensions to act on Diffley's requests after having already approved the Preliminary Planned Development (with 31 conditions). Only then did the City of Eagan approve Diffley's Final Planned Development (without access to Daniel Drive) and Diffley's Final Plat after the statutory deadline of Minnesota Statutes section 15.99, subd. 2 had expired. Notwithstanding the City of Eagan's and the lower court's post-hoc explanations, the record is clear that both the City of Eagan and Diffley understood requests by Diffley still needed to be either approved or denied.

III. THE LOWER COURT'S DETERMINATION ENGRAFTS A PARADIGM FOR PROCESSING REQUESTS IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

The lower court engrafted a paradigm for processing requests governed by Minnesota Statutes section 15.99 that cannot be supported by the clear, unambiguous and plain language of the statute. BAM fully supports and incorporates Diffley's argument regarding the lower court's erroneous analysis of section 15.99 as implementing a "project-based" approval for certain requests governed by that section. The lower court's creation and application of such a standard constitutes a prohibited judicial amendment of the statute in violation of the separation of powers mandated by Minnesota's constitution. *See* Minn. Const., art. 3, § 1.

Minnesota Statutes section 15.99 is not ambiguous, and therefore, is not subject to statutory construction or well-meaning judicial amendments. *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 313 (Minn. 2001) (holding the 60-Day Rule to be unambiguous); *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 540 (Minn. 2007) ("First, we conclude that the statute is not ambiguous."); *Demolition Landfill Services, LLC v. City of Duluth*, 609 N.W.2d 278, 281 and n.1 (Minn. Ct. App. 2000) ("Minn. Stat. § 15.99, subd. 2, unambiguously states that failure to deny a permit application within the statutory time period mandates an approval."); *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 924-25 (Minn. Ct. App. 2002) ("this statute [§ 15.99] is unambiguous").

The lower court's application of section 15.99 judicially engrafts language (which does not otherwise exist) into the plain and unambiguous language of the statute. It introduces procedures and processes heretofore unknown in the application of Minnesota Statutes section 15.99 to written requests governed by it. Constitutional principles of separation of governmental powers prohibit judicial amendment of Minnesota Statutes section 15.99. Specifically, the separation of powers doctrine prohibits the judiciary from engrafting a "project-based" vs. "document-based" approval process or "unified application" process into section 15.99. There is no language in the statute supporting such a change in the paradigm for processing requests under section 15.99.

The lower court's attempt to avoid the mandatory, automatic approval of Diffley's Final PD for violation of the 60-Day Rule, should not be upheld. It is wholly inconsistent with the uniform decisions from Minnesota appellate courts holding that the provisions of

section 15.99, subd. 2(a) are mandatory. *See, e.g., Hans Hagen Homes, Inc.*, 728 N.W.2d at 542; *Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Twp.*, 583 N.W.2d 293, 295-96 (Minn. Ct. App. 1998), *rev. denied* (Minn. Oct. 20, 1998) (holding subd. 2, now renumbered as Subd. 2(a), is mandatory).[4]

BAM respectfully requests this Court to reject the lower court's usurpation of legislative power and to hold that the unambiguous provisions of Minnesota Statutes section 15.99 require separate approval or denial of each request within the timeframe mandated by that statute.

IV. THE LOWER COURT'S DECISION PRODUCES AN ABSURD RESULT AND IS BAD POLICY.

Fundamentally, the lower court's decision does not make sense. The lower court's decision should be rejected because it creates uncertainties, complexities and inefficiencies. Adopting the lower court's analysis would change the current practice followed by cities across Minnesota, and replace that practice with a methodology that burdens both the cities and the landowners submitting requests for approval.

A. The lower court's decision creates uncertainties, complexities and inefficiencies, contrary to the intention of the Legislature to make the process more "friendly" and "efficient."

The legislative history of section 15.99 unequivocally demonstrates the Legislature intended to make the process of obtaining approvals relating to land use and

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[4] Minnesota courts consistently require strict compliance with mandatory language in remedial statutes even if the results may be harsh. The strict compliance required for the mandatory pre-lien notice under the mechanic's lien statutes is an excellent example. *See* Minn. Stat. § 514.011. If pre-lien notice is not provided, then a contractor does not possess any lien rights. *See, e.g., Merle's Const. Co. v. Berg*, 442 N.W.2d 300, 302 (Minn. 1989).

zoning more "citizen friendly," "pro-consumer" and "user friendly." (BAM/APP-050, BAM/APP-039, BAM/APP-118, BAM/APP-033) The lower court's decision, if adopted, does just the opposite. A bright-line approach of treating each request for approval as requiring separate action under the 60-Day Rule is consistent with the unambiguous language of the statute, is the current practice throughout the State of Minnesota, and is fully supported by the legislative history of section 15.99.

Under the lower court's analysis, each time a land use application is received, a city must make a subjective determination as to whether multiple requests relate to a "unified application," a "project-based" approval process or a "document-based" approval process. This creates added work and the possibility of dissimilar treatment of very similar requests. This also creates the prospect of a single parcel of land receiving inconsistent treatment if multiple single request approvals are sought by way of several applications rather than combining all requests for approval in a single application form.

The lower court's ruling would result in gross inefficiencies and delays. In the present case, Diffley sought multiple approvals (Preliminary Planned Development, Final Planned Development and Final Plat) using a single application form. However, Diffley and other developers could just as easily submit multiple, single-request application forms, over the course of several weeks or months in order to increase the likelihood that the subjective determination of an agency would not treat the application as part of a "unified application" or "project-based" approval, but rather as a "document-based" approval. This would exponentially increase the amount paperwork agencies (*e.g.*, cities) would be required to process and would add further unnecessary delays into the process.

B. The lower court's decision produces an absurd result because it adds language to an unambiguous statute.

The lower court stands alone as the only court to ever interpret section 15.99 as imposing a distinction between a "document-based" and "project-based" approval process. The statute itself does not use this nomenclature. Minnesota Statutes section 15.99. Indeed, there are no statutes under Minnesota law that impose such a distinction. This post-hoc distinction of the City and lower court is without any support. The lower court's distinction between a "document-based" and "project-based" approval process, notably, does not rest on the fact that a single application form was filed seeking approval of multiple requests. Rather, it rests solely upon the lower court's manufacturing a results-oriented alleged ambiguity in section 15.99.

The lower court's misinterpretation of section 15.99 is manufactured rather than being inherent in the plain language of the statute itself. The lower court explained that it "must determine whether Minnesota Statutes section 15.99 sets out a project or document-based approval requirement." However, there is nothing in section 15.99 suggesting any such determination "must" be made. The lower court then determined that section 15.99 was ambiguous as to whether it required a "document-based" or "project-based" approval process, but concluded (based upon its own construction of the statute) that it must be a "project-based" approval process.

The lower court's inquiry and distinction between a "project-based" and "document-based" approval process, adds an entire layer of unnecessary analysis on top

of the statute. The lower court cannot supply what the legislature omitted. *See Ullom v. Independent Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. Ct. App. 1994).

> [W]hen a statutory question involves the failure of expression rather than the ambiguity of expression, this court is not free to substitute amendment for construction and thereby supply the omissions of the legislature. * * * Moreover, this court is prohibited from adding words to a statute and cannot supply what the legislature either purposely omitted or inadvertently overlooked.

Tracy State Bank v. Tracy-Garvin Coop., 573 N.W.2d 393, 395 (Minn. Ct. App. 1998). Accordingly, the correct analysis is to treat each request for an approval as requiring either an approval or denial within 60-days pursuant to the plain language of section 15.99, subdivision 2.

C. **The 60-day clock applies to each request, not to a series of requests that happen to be on the same application form.**

The lower court imposes a new concept of a "unified application" to defeat the requirement that each request be either approved or denied within 60-days. Similar to the lower court's distinction between "document-based" and "project-based" approval, this added layer of complexity and analysis must also be rejected because it is not supported anywhere in the language of section 15.99. The practical effect of adopting the lower court's "unified application" analysis is that developers will submit a separate application form for each separate request for approval. As described above, this will result in the inefficiencies, complexities, delays and uncertainties that the Legislature sought to avoid by enacting section 15.99.

The Supreme Court's holding that section 15.99 requires an "individualized approach based upon an applicant's zoning requests" further serves to undermine the "unified application" and "project-based" approval theories of the lower court. *American Tower, L.P.*, 636 N.W.2d at 313. The Legislature has amended Section 15.99 twice since the Supreme Court's application of the "individualized approach" analysis, but did nothing to the statue to indicate it disagreed with the Supreme Court's 2001 opinion in *American Tower*. Accordingly, applying section 15.99 using an "individualized approach" is presumed correct. Minn. Stat. § 645.17 (4).

D. Forcing the development process into a single "unified application" such that an agency is subject to the 60-Day Rule only once is bad policy.

The lower court's decision apparently seeks to artificially limit developers to a single "unified application." Such a limitation is impractical, radically changes existing practices, and is not supported by the plain language of section 15.99.

Developing real estate and seeking the necessary approvals is a process with many different parts. (BAM/APP-137 to 153) Often, the distinct parts of the development process may necessarily occur over many months and in some instances over a number of years. Properties are frequently developed in phases. Although preliminary approvals may be granted, final approvals on certain phases may not occur for years. During the intervening time, both the needs of the property owners (*e.g.*, developers) and of the individual agencies (*e.g.*, cities) may change. It is unrealistic to expect that all requests for approvals relating to land use could be contained in a single "unified application."

A "unified application" approach under circumstances such as the present case where, for example, both a preliminary and final planned development approval are requested on the same application form, is also unworkable and radically different from existing practice. The "unified application" approach is belied by the fact that not one, but two separate application fees are collected, one fee for each of the respective requests for approval. (*See* BAM/APP-137 to 153, representative land use application forms and corresponding fees from various cities). Typically, approval for a preliminary and final planned development is listed as separate line items on a city counsel's agenda and is voted on separately. Further, cities such as Eagan treat a preliminary planned development and final planned development quite differently. For example, the City of Eagan expressly provides for treatment of preliminary versus final planned developments as follows:

- Different procedures relating to the requirements and approvals of preliminary versus final planned developments. (*See generally,* Eagan City Ordinance sec. 11.60, subd. 18 (C).)

- Different effects for approval of a preliminary versus final planned development. (*Compare id.* at sec. 11.60, subd. 18 (C)(9) with sec. 11.60, subd. 18(C)(15).)

- Different submissions to the city for approval of a preliminary versus final planned development. (*Compare id.* at sec. 11.60, subd. 18(C)(12) *with* sec. 11.60, subd. 18(C)(13).[5]

Nowhere in the City of Eagan Zoning Code (or other cities' zoning codes of which BAM is aware) is there any indication that cities follow a "unified application" approach

[5] Approval of a final planned development requires submission of final plat. *See* Eagan City Ordinance sec. 11.60, subd. 18 (C)(13)(a). Accordingly, approval of the preliminary planned development in this case could not have automatically been approval of the final planned development because the final plat was not approved at that time.

to zoning matters governed by the 60-Day Rule. Rather, cities follow the more practical approach intended by the Legislature and supported by the unambiguous language of the statute—namely, each request for approval is treated separately for purposes of complying with the 60-Day Rule. This allows a straightforward, consistent application and understanding of the process for all parties involved.

CONCLUSION

Based on the foregoing, BAM respectfully requests this Court to reverse the lower court's decision.

Respectfully submitted,

Dated: August 3, 2007

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