STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1932
A07-2006

In the Matter of the Denial of Certification of the Variance Granted to Robert W. Hubbard by the City of Lakeland.

Filed December 9, 2008
Reversed
Stauber, Judge

Minnesota Department of Natural Resources
File No. 32000178102

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Considered and decided by Shumaker, Presiding Judge; Hudson, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On a certiorari appeal from a decision by the Minnesota Commissioner of Natural Resources refusing to "certify" a local government decision to grant a variance on property located within the Lower St. Croix National Scenic Riverway, relators argue that (1) the Commissioner of Natural Resources lacks legislative authority under the Lower St. Croix Wild and Scenic River Act to overturn local government variance decisions; (2) the Municipal Planning Act, Minn. Stat. §§ 462.351–.365 (2006), entitled Mr. Hubbard to replace his nonconforming property without obtaining a variance; (3) the record supports the city council's finding of a hardship entitlement to the variance to which the commissioner failed to give proper deference; and (4) notwithstanding the other errors, Mr. Hubbard and the City of Lakeland argue that Mr. Hubbard's variance request must be approved by operation of law because the commissioner failed to meet the 60-day deadline established in Minn. Stat. § 15.99, subd. 2(a) (2006). Because we find that Minn. Stat. § 15.99 operated to approve the variance request, we reverse.

FACTS

The federal government included the Lower St. Croix River within the National Wild and Scenic Rivers System in 1972. Minnesota passed the parallel Lower St. Croix Wild and Scenic River Act in 1973. Minn. Stat. § 104.25 (Supp. 1973) (currently codified at Minn. Stat. § 103F.351 (2006)). A portion of the statute directed the Minnesota Department of Natural Resources (hereinafter "DNR") and its Wisconsin counterpart to create a master plan to guide development in the Lower St. Croix River

region. Minn. Stat. § 104.25, subd. 2 (Supp. 1973) (currently codified at Minn. Stat. § 103F.351, subd. 2(a) (2006)). That plan was developed in 1976. Nat'l Park Serv., Lower St. Croix National Scenic Riverway Master Plan (1976) (in cooperation with the states of Minnesota and Wisconsin). A 1990 amendment to this legislation also instructed the Minnesota Commissioner of Natural Resources to "adopt rules that establish guidelines and specify standards for local zoning ordinances applicable to the area." 1990 Minn. Laws ch. 391, art. 6, § 40 at 605 (currently codified at Minn. Stat. § 103F.351, subd. 4(a) (2006)).

The City of Lakeland adopted corresponding ordinances, requiring setbacks from the St. Croix River blufflines. The City Ordinance also permitted the issuance of hardship variances under certain circumstances. Minn. R. 6105.0540 (2005) and City Ordinance § 802.01 direct all variances of this nature to be certified by the DNR as complying with the intent of the federal and state Wild and Scenic Rivers Acts and the master plan for the Lower St. Croix River.

In 2006, Mr. Hubbard purchased land in the City of Lakeland, along the St. Croix River. The property is within the Lower St. Croix National Scenic Riverway. A bluff extends the entire length of the Hubbard property on the riverward side. Mr. Hubbard purchased the property with the intent of constructing a new residence, replacing the existing structure. Under the current Lakeland zoning ordinances, new construction is generally required to be at least 40 feet distant from the bluffline, in addition to meeting other zoning requirements.

Sometime prior to 1945, the existing house was constructed on the property. The house was built into the side of the bluff in an area excavated for such construction. The front side of the existing house sits on the edge of the bluff, and the house extends back away from the bluffline.

In early summer 2006, Mr. Hubbard presented his construction proposal to the City of Lakeland's zoning administrator. He was advised that, since his proposal was to "replace" the current structure rather than remodel it, a bluffline setback variance was required by the city zoning ordinance.

On July 14, 2006, Mr. Hubbard filed his bluffline variance request, including the required bluffline survey, with the City of Lakeland and requested a variance which would allow him to replace the existing house.

On August 31, 2006, the DNR submitted a letter to Lakeland's planning commission urging denial of Mr. Hubbard's variance proposal. After reviewing Mr. Hubbard's petition and input from the DNR and the community, the planning commission recommended that the city council deny Mr. Hubbard's variance application.

On September 19, 2006, the Lakeland City Council reviewed Mr. Hubbard's bluffline variance application and the planning commission's recommendation. The council approved the variance and directed Lakeland's city attorney to draft a resolution granting Mr. Hubbard's requested variance.

On November 29, 2006, Dale Homuth, DNR Regional Hydrologist, notified the City of Lakeland that, pursuant to Minn. R. 6105.0540 and 6105.0380, the DNR would not certify or approve the bluffline setback variance granted to Mr. Hubbard. The notice

further alleged that the local variance was "not effective unless or until the Commissioner of the DNR has certified compliance."

In letters dated December 21 and 22, 2006, the city and Mr. Hubbard both demanded a contested case proceeding to review the DNR's staff decision not to certify the local variance.

The contested hearing was heard on March 29–30, 2007, by an Administrative Law Judge (ALJ). The ALJ issued findings and a recommendation on May 8, 2007, that the DNR commissioner uphold the DNR staff decision to deny certification of Lakeland's variance to Mr. Hubbard. The DNR then set a deadline of June 22, 2007, for filing exceptions and arguments relating to the ALJ report and recommendation. On that date, the record was deemed closed.

On August 21, 2007, 60 days after the record closed, the commissioner had neither issued a decision nor notified the parties that he would be granting himself an extension of time to do so under Minn. Stat. § 15.99, subd. 3(f) (2006). The City of Lakeland wrote to the commissioner on August 29, 2007, stating that, under Minn. Stat. § 15.99, the request for "certification" of the city's variance decision must be deemed "approved" by operation of law. On September 18, 2007, the commissioner issued his findings of fact, conclusions, and order, largely, but not wholly adopting the ALJ's findings and recommendations. He acknowledged receipt of the city's August 29th letter but refrained from addressing the 60-day rule, stating he "considered no admissions after the record closed." This certiorari appeal followed.

D E C I S I O N

Whether Minn. Stat. § 15.99 (2006), operated to approve the variance certification is a question of law which we review de novo. *See Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992) (stating that the court has plenary power in reviewing questions of law).

The statute in effect at all times relevant to this appeal reads, in part:

> [N]otwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning. . . 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).[1] The statutory definition of "agency" includes an agency of the executive branch such as the DNR. Minn. Stat. § 15.99, subd. 1. The definition of "a written request related to zoning" includes a request for a variance. *Advantage Capital Mgmt. v. City of Northfield*, 664 N.W.2d 421, 427 (Minn. App. 2003) ("'[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. This interpretation of section 15.99 is consistent with the cases that have applied the sixty-day rule to . . . variances[] and site-plan approval that relate specifically to zoning."). Logic compels us to conclude that a request for certification of a variance

[1] We use the term "the 60-day rule" to refer to this provision for approval by operation of the statute of an application that is not denied within 60 days.

grant, as called for in Mr. Hubbard's December 22, 2006 letter requesting a contested case hearing, would likewise be considered such a "written request."

Application of the 60-day rule was first asserted in a letter from the City of Lakeland dated August 29, 2007. That letter posited that the commissioner's decision, not yet issued at that time, was moot because the 60-day rule operated to approve the variance on August 21, 2007, 60 days after the deadline set by the commissioner for filing arguments and exceptions to the ALJ report. The commissioner did not address the 60-day rule in his subsequent denial of the variance,[2] issued on September 18, 2007. Because of this, the commissioner argues that the application of the 60-day rule is not properly before this court. However, the commissioner's failure to address the issue following the City of Lakeland's August 29, 2007 letter raising the 60-day rule does not prohibit this court from examining the issue. In light of the fact that the city presented the 60-day rule deadline to the commissioner, the commissioner declined to address the issue, and in the absence of a need for further fact-finding or evidence on this particular topic, the interests of justice permit us to examine this issue. Minn. R. Civ. App. P. 103.04 (stating that this court may "review any other matter as the interest of justice may require").

Minn. Stat. § 15.99, subd. 3(d), directs that the 60 day deadline is extended "to 60 days after completion of the last process required . . . ." It notes that final agency

[2] The commissioner acknowledged receiving the August 29th letter from the city, as well as an August 29th letter from the Sierra Club and an August 30th letter from the DNR. However, the commissioner declared he "considered no admissions after the record closed."

approval is *not* a process for the purposes of this subdivision. This statute has been the law in Minnesota since 1995, and this court has previously determined it to be unambiguous. "Because the statute is unambiguous, this court must 'give effect to the statute's plain meaning.'" *Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278, 281 (Minn. App. 2000) (citing *Tuma v. Comm'r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986); *see also* Minn. Stat. § 645.16 (2006) ("When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

The process at issue here was initiated by Mr. Hubbard's timely December 22, 2006 letter demanding a contested case hearing following the DNR's November 29, 2006 notice of non-certification. Though the ALJ hearing did not take place until March 29–30, 2007, Mr. Hubbard does not contest that the section 15.99 deadline was extended so that the ALJ process could be completed. Rather, the city of Lakeland and Mr. Hubbard assert that the June 22, 2007 deadline for filing exceptions and arguments to the ALJ report was the "last process required" under Minn. Stat. § 15.99, subd. 3(d).

We agree. August 21, 2007, was the deadline for the commissioner to exercise his authority before the variance certification would automatically be approved by operation of the 60-day rule. The commissioner did not grant himself an extension; he issued his decision on September 18, 2007. Minn. Stat. § 15.99, subd. 2a declares, "[f]ailure of an agency to deny a request within 60 days is approval of the request." Because the commissioner failed to affirm the denial of the variance request on or before August 21, 2007, the request is approved.

The DNR argues that even if the commissioner's final review was governed and nullified by section 15.99, the ALJ report denying Mr. Hubbard's variance would remain as the final decision in the case. This argument fails for two reasons. First, Minn. Stat. § 14.62, subd. 2(a) (2006), provides that the ALJ report "constitutes the final decision in the case unless the agency modifies or rejects it under subdivision 1 within 90 days." Here, the agency did modify the ALJ report. The commissioner's September 18, 2007 order made a number of modifications to the ALJ report. These modifications were made within 90 days of the closing of the record but not within the 60 days required by section 15.99. Therefore, the ALJ report could not constitute the final decision of the agency. Second, section 15.99 *does not* declare that failure of an agency to deny a request within 60 days results in the most recent prior decision (here, the ALJ report) controlling. Instead, section 15.99 unambiguously states that the consequence of agency delay is "approval of the request." In fact, this court has stated that the operation of section 15.99 cuts off the jurisdiction of the agency that failed to act. In *Breza v. City of Minnetrista*, this court declared, "[o]nce an application is approved by operation of law under Minn. Stat. § 15.99, subd. 2, the [agency, here the DNR] loses jurisdiction over the application, and any attempt thereafter to act on the application is invalid." 706 N.W.2d 512, 516 (Minn. App. 2005), *aff'd*, 725 N.W.2d 106 (Minn. 2006).

Because we conclude that the commissioner did not affirm or deny the variance certification within 60 days of the DNR-declared closure of the ALJ filing record, Mr. Hubbard's variance was approved by operation of law under Minn. Stat. § 15.99. Therefore, we need not reach the issues of DNR authority to oversee local land-use

decisions, the commissioner's alleged failure to give proper deference to the city council's decision, or the application of the Municipal Planning Act.

Reversed.