STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2101

Mesenbrink Construction & Engineering, Inc.,
Appellant,

vs.

The County of Rice,
Respondent.

Filed December 23, 2008
Affirmed
Minge, Judge

Rice County District Court
File No. 66-CV-06-639

Justin P. Weinberg, Gislason and Hunter LLP, 2700 South Broadway, P.O. Box 458, New Ulm, MN 56073 (for appellant)

Paul D. Reuvers, Jason J. Kuboushek, Iverson Reuvers, 9321 Ensign Avenue South, Bloomington, MN 55438 (for respondent)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

MINGE, Judge

Appellant landowner challenges the district court's grant of summary judgment in favor of respondent county arguing that the district court erred by (1) finding that respondent complied with the notice requirements of Minn. Stat. § 375.51 (2006) when

adopting a development moratorium; (2) determining that respondent's application for a preliminary development was not a request related to zoning; and (3) not ruling that respondent's preliminary development plan had been automatically approved under the 60-day rule of Minn. Stat. § 15.99 (2006). We affirm.

FACTS

Appellant Mesenbrink Construction & Engineering, Inc., owns land in the shoreland zoning district of Rice County, which it would like to develop as a residential subdivision. On July 15, 2004, the Rice County Board of Commissioners (county board) amended its zoning ordinance to allow residential and commercial planned unit developments (PUDs) in the shoreland zoning district. In July 2005, a developer applied for approval of a 35-unit PUD project. As a result, the county board recognized that the newly amended zoning ordinance had the unintended consequence of allowing excessive density.

On March 17, 2005, Mesenbrink agreed to purchase its land in the shoreland zoning district. Because Mesenbrink planned to develop the property as a PUD, it began preparing the necessary documents to complete a preliminary development plan application (PDPA) to the county.

On December 27, 2005, the county board initiated a study on the impact of higher densities in the shoreland district and discussed placing a moratorium on development in the shoreland district to allow time for the study to be conducted. The county board scheduled a public hearing on the proposed moratorium before the Rice County Planning Commission for January 19, 2006. On January 6, 2006, Rice County published notice of

the hearing. On January 11, 2006, Rice County published a second notice, stating the county board's intent to enact the proposed moratorium. After learning that Rice County was considering a temporary moratorium, Mesenbrink filed a PDPA on January 18, 2006. Mesenbrink then appeared before the planning commission at the January 19 public hearing and spoke against the proposed moratorium. The planning commission decided to recommend adoption of the moratorium to the county board.

On January 24, 2006, the county board considered and enacted the moratorium as an ordinance. The ordinance provided:

> Pending the completion of the above referenced study and adoption of official controls, no application to initiate Planning Commission review of a preliminary development plan for a Residential Planned Unit Development in the Shoreland District will be processed or approved and no application for such approval will be accepted. Preliminary development plans that have been subject to public hearing and approved by the Planning Commission as required under the Rice County Zoning Ordinance . . . may continue with the PUD Ordinance process and are exempted from the temporary restrictions of this Ordinance.

Rice County, Minn., Zoning Ordinance § 530.03 (Jan. 24, 2006). Pursuant to this ordinance, the zoning administrator returned Mesenbrink's PDPA and filing fee on January 26, 2006.

On June 9, 2006, Mesenbrink commenced this action against respondent Rice County, seeking a determination that: (1) the county's moratorium ordinance was null and void because the county failed to comply with statutory notice requirements; (2) the county discriminated against Mesenbrink; and (3) because the county did not act within

60 days on Mesenbrink's PDPA, the application was automatically approved pursuant to the directive of Minn. Stat. § 15.99.

Mesenbrink moved for summary judgment. The district court denied the motion but granted leave to Rice County to bring its own motion for summary judgment. The county then moved for summary judgment, and the district court entered judgment in favor of Rice County. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court erred in finding that the county board complied with the notice requirements of Minn. Stat. § 375.51 (2006) when it adopted the moratorium. Mesenbrink argues that proper notice was not given and that, as a result, the moratorium ordinance is null and void. On appeal from summary judgment, this court must determine whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). When, as here, the district court grants summary judgment based on the application of statutes to undisputed facts, the result is a legal conclusion, reviewed de novo by this court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

A county may enact a temporary interim zoning ordinance. Minn. Stat. § 394.34 (2006). It is agreed that the Rice County moratorium was such an ordinance. Enactment of a temporary interim zoning ordinance must follow the following requirements:

> Subdivision 1. . . . A public hearing shall be held before the enactment of any ordinance . . . .
>
> Subdivision 2. No county ordinance shall be enacted unless a notice of the intention to enact it has been published in the official newspaper of the county not less than ten days before the meeting or public hearing required by subdivision 1 at which it is to be considered. Public hearings may be continued from time to time and additional hearings may be held. The notice shall state the subject matter and the general purpose of the proposed ordinance. Proof of the publication of the notice shall be attached to and filed with the ordinance, if enacted, in the office of the county auditor.

Minn. Stat. § 375.51, subds. 1, 2 (2006). The Minnesota Supreme Court held that an ordinance is valid when adopted in substantial compliance with statutory provisions. *See Itasca County v. Rodenz*, 268 N.W.2d 423, 424 (Minn. 1978) ("[W]e are satisfied that the public had adequate notice of the hearing and of the enactment of the zoning ordinance.").

In this case, the county published notice on January 6 for a January 19 public hearing on seven items. The proposed moratorium item was described as follows: "Public hearing on an Interim Ordinance temporarily prohibiting residential Planned Unit Developments in the shoreland district." The public hearing was held as scheduled on January 19, 13 days after publication of the notice of hearing. Mesenbrink had notice, attended the public hearing, and spoke against the proposed moratorium. On January 11, Rice County published a second notice stating "NOTICE OF INTENTION TO ENACT AN INTERIM ORDINANCE." The county board met, considered, and enacted the ordinance, creating the moratorium on January 24. Section 375.51, subdivision 2, expressly states that the publication of an intention to enact an ordinance must be made

"not less than ten days before *the meeting* or *public hearing* . . . at which it is to be considered." *Id.* (emphasis added).

Mesenbrink asserts that the first notice was defective because it did not expressly state the county's "intention to enact" the ordinance as required by statute. *See id.* Mesenbrink points out that, although the second notice supplies the missing required language, the second does not provide an effective fix because it was published less than ten days before the January 19 meeting at which the public hearing was held. Admittedly, the January 6 notice lacks the exact statutory language and is not a model that we would encourage counties to use. However, the January 6 notice states that the hearing will be on a proposed ordinance. The phrase "proposed ordinance" implies that the county was contemplating the adoption of the ordinance. Because the January 6 notice of hearing was published 13 days prior to the planning commission's January 19 hearing at which the proposed ordinance was considered and because it substantially complied with the notice requirements of Minn. Stat. § 375.51, subds. 1, 2, we conclude that the district court did not err in determining that the notice was adequate.

Mesenbrink also argues that Rice County's prehearing and preadoption publications were faulty because neither included a copy of the ordinance. This claim is based on the language of Minn. Stat. § 375.51, subd. 3. Because the record does not show that this argument was made in the district court and there has been no opportunity to develop a record on this claim, it is not properly before this court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts generally consider only

issues presented to and considered by the district court).[1] Accordingly, we do not reach the question.

II.

The second issue is, assuming that the moratorium ordinance was validly adopted, whether failure of the county board to act on Mesenbrink's PDPA resulted in automatic approval of the PDPA by operation of Minn. Stat. § 15.99. That statute provides that "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." Minn. Stat. § 15.99, subd. 2(a) (2006). The legislature enacted section 15.99 to establish deadlines for local governments to take action on zoning applications. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 540 (Minn. 2007); *Am. Tower, LP v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001).

The Minnesota Supreme Court stated "we will assume, without deciding, that a subdivision application . . . constitutes a 'written request related to zoning' within the meaning of the 60-day rule [under Minn. Stat. § 15.99]." *Calm Waters, LLC v. Kanabec County Bd. of Comm'rs*, 756 N.W.2d 716, 719 (Minn. 2008). This court explained that a site plan application is a request related to zoning. *Advantage Capital Mgmt. v. City of Northfield*, 664 N.W.2d 421, 427 (Minn. App. 2003), *review denied*

[1] Although we do not reach the question, we note that the statutory language relied on by Mesenbrink appears to require only publication of the ordinance after its enactment. *See* Minn. Stat. § 375.51, subd. 3.

(Minn. Sept. 24, 2003). In applying this standard, this court concluded 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.* (quotation omitted).

Here, the PDPA is very similar to the site plan application in *Advantage Capital*. In that case, the site plan application was defined as "'a plan, to scale, showing uses and structures proposed for a parcel of land as required by the regulations involved.'" *Id*. (quoting Northfield, Minn., City Code § 34-771 (2003)). Rice County requires that a preliminary development plan: (1) be prepared at a scale of not less than one inch = 200 feet; (2) show adjacent uses; (3) illustrate the street pattern; (4) illustrate the location, use and size of public and private open space; (5) show the location of residential, commercial, multifamily residential, and other proposed land uses; and (6) illustrate the methods for sewage and wastewater disposal, drinking water supply, stormwater management and erosion control. Rice County, Minn., Zoning Ordinance § 522.06 (A, C, F-I) (2007). These requirements are more specific than the site plan application, which was held to be a request related to zoning in *Advantage Capital.* Because Mesenbrink's PDPA is a proposal for a specific use of land within the framework of the regulatory structure relating to zoning, we conclude the PDPA was a request related to zoning under Minn. Stat. § 15.99.

The county contends that, even if a PDPA is a request related to zoning, section 15.99 does not apply in this circumstance because section 15.99 excludes actions under

chapter 505. *See* Minn. Stat. § 15.99, subd. 2(a) ("Except as otherwise provided in . . . chapter 505 . . . an agency must approve or deny within 60 days a written request relating to zoning . . . ."). The county's reasoning is that a PDPA is an application for a subdivision of land and that because subdividing land is governed by Minnesota Statutes chapter 505, anything done pursuant to chapter 505 is exempted from the 60-day rule.

This argument mischaracterizes the language of section 15.99. The statute expressly states "[*e*]*xcept as otherwise provided in . . . chapter 505*." *Id.* (emphasis added). Contrary to Rice County's assertion, the statutory language does not create a blanket exception for any land-use decision made pursuant to chapter 505. Rather, it incorporates any exceptions that are contained in chapter 505. Because the county does not point to any exception to the 60-day requirement in chapter 505 that applies to initiatives similar to Mesenbrink's PDPA, we conclude that the PDPA is not exempt from time deadline requirements.

III.

The third issue is whether the return of Mesenbrink's PDPA by the zoning administrator constituted county action within 60 days as required by Minn. Stat. § 15.99. "[W]here the material facts are undisputed and as a matter of law compel only one conclusion," summary judgment is appropriate. *Ill. Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978) (quotation omitted).

The legislature authorizes counties "to carry on county planning and zoning activities." Minn. Stat. § 394.21, subd. 1 (2006). Counties may establish "standards and procedures to be employed in land development including, but not limited to, subdividing of land and the approval of land plats . . . ." Minn. Stat. § 394.25, subd. 7(a) (2006). A county "may employ a planning director and such staff as it deems necessary to assist the planning director in carrying out assigned responsibilities, including but not limited to a zoning administrator . . . ." Minn. Stat. § 394.29 (2006).

On January 18, 2006, Mesenbrink filed its PDPA. On January 24, 2006, six days after Mesenbrink submitted its PDPA, the board met and enacted the moratorium ordinance. Prior to the moratorium ordinance, the zoning administrator was expected to review applications, determine whether applications were complete and appropriate, and if so, forward applications to the planning commission. Afterward the adoption of the ordinance, the zoning administrator, as a county employee, was effectively prohibited from accepting, processing, or taking any action to advance an application for a PUD in the shoreland district. The facts indicate that the Mesenbrink PDPA had not been forwarded to the planning commission at the time the moratorium was enacted. Thus, the zoning administrator returned the PDPA. He did this with a cover letter dated January 26, 2008, stating the reason for the return. This was eight days after Mesenbrink filed its PDPA. The zoning administrator was simply following the moratorium ordinance as a county employee. The record includes additional correspondence between Mesenbrink and the zoning administrator dealing with the return of the PDPA. It is clear from this

correspondence that Mesenbrink understood what the administrator was doing and treated the return as a denial.

Because enactment of the moratorium effectively denied Mesenbrink's PDPA and the zoning administrator's letter returning the PDPA and the filing fee communicated the

denial, we conclude that the requirement that the county deny in writing the Mesenbrink PDPA within 60 days was satisfied.

Affirmed.

Dated: