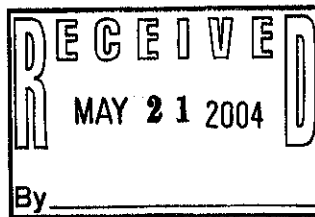


STATE OF MINNESOTA  
COUNTY OF DAKOTA



FIRST JUDICIAL DISTRICT  
HASTINGS, MINNESOTA 55033

In Re: JOHN N. ALLEN et al.  
vs. CITY OF MENDOTA HEIGHTS  
Case Number: 19-C4-04-006289

JOHN MICHAEL BAKER  
GREENE ESPEL  
200 S 6TH ST STE 1200  
MINNEAPOLIS MN 55402-1415

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NOTICE OF FILING OF ORDER  
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You are hereby notified on May 20, 2004 an  
ORDER AND JUDGMENT

was filed in the above entitled matter.

A true and correct copy of this notice has been served by mail upon the parties named herein at the last known address of each, pursuant to the Minnesota Rules of Civil Procedure.

Sue Lawrence, Chief Deputy

Dated: May 20, 2004 By \_\_\_\_\_DCB\_\_\_\_\_ Deputy

Case Number: 19-C4-04-006289  
In Re: JOHN N. ALLEN et al.  
vs. CITY OF MENDOTA HEIGHTS

COPIES OF THE ATTACHED ORDER HAVE BEEN SENT TO THE FOLLOWING:

CHRISTOPHER JOHN DEIKE  
7900 XERXES AVE S., STE 1500  
BLOOMINGTON, MN 55431

JOHN MICHAEL BAKER  
GREENE ESPEL  
200 S 6TH ST, STE 1200  
MINNEAPOLIS, MN 55402-1415

CENTRAL ASSIGNMENT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT

Court File No. C4-04-00689

John N. Allen and Joel T. Buttenhoff,  
MinnStar Builders, Inc., a Minnesota  
corporation,

Petitioners,

vs.

**ORDER AND JUDGMENT**

The City of Mendota Heights, a municipal  
corporation,

Respondent.

The above-entitled matter came on for hearing before the undersigned Judge of District Court on April 22, 2004, at the Dakota County Judicial Center, Hastings, Minnesota. The Petitioners appeared through their attorney, Gary Van Cleve. The Respondent appeared through its attorneys, John Baker and Pamela Vander Wiel.

Based upon the arguments of the parties and the file, the Court makes the following:

**ORDER:**

1. The Respondent's Motion for Judgment on the Pleadings is **GRANTED**, and the Petitioner's Petition is **DISMISSED**.
2. The Petitioner's Motion for Summary Judgment is **DENIED**.
3. The attached Memorandum is made a part hereof.

**Dated: May 19, 2004**

**BY THE COURT:**

FILED DAKOTA COUNTY  
VAN A. BROSTROM, Court Administrator

MAY 20 2004  
DCB  
DEPUTY

*Robert R. King, Jr.*  
Robert R. King, Jr.  
Judge of District Court

JUDGMENT  
I HEREBY CERTIFY THAT THE ABOVE ORDER  
WAS ENTERED IN ACCORDANCE WITH THE JUDGEMENT OF THIS COURT.  
VAN A. BROSTROM, COURT ADMINISTRATOR  
BY: *[Signature]*  
MAY 20 2004

## MEMORANDUM

The Respondent City of Mendota Heights has brought a Motion for Judgment on the Pleadings, while the Petitioners have brought a Motion for Summary Judgment. There does not appear to be a significant factual dispute. Hence, the matter is ripe for determination.

### **Facts:**

The Petitioners seek to build 157 townhomes in Mendota Heights. On November 5, 2002 the Petitioners applied with the City for rezoning, preliminary plat approval, site plan approval, a conditional use permit, a variance, and a street vacation. On December 2, 2002, before the City took action on any of the applications, a group of citizens filed a petition under the Minnesota Environmental Policy Act ("MEPA") requesting the preparation of an environmental assessment worksheet (EAW) for the project. The City granted the EAW Petition on January 7, 2003. The Petitioners could have challenged that decision, but the time for them to do so has expired.

The City prepared an EAW, as required by the MEPA, and released it for comments. The EAW was certified as complete on September 16, 2003. The time for submitting comments ended on October 29, 2003. The MEPA then required the City Council to determine whether the project posed the potential for significant environmental effects. On November 29, 2003 the City determined that the project had the potential for significant environmental effects, and therefore was required by the MEPA to order the preparation of an Environmental Impact Statement (EIS).

Under the MEPA the Petitioners had up to 30 days to appeal to the District Court the City's determination requiring an EIS. The Petitioners failed to appeal. Instead, they have brought the instant action requesting the Court to find that their applications were automatically approved, under Minn. Stat. §15.99, due to the City's failure to act on their applications within 120 days of the applications.

The Petitioners are also requesting the Court to require the City, through mandamus, to grant a request that the City not order an EIS, under §15.99, claiming that the City did not deny their request within 60 days.

### **Discussion:**

The key issue in this case is the interpretation and application of Minn. Stat. §15.99. Subdivision 2 of that statute states:

**Subd. 2. Deadline for response.** (a) Except as otherwise provided in this section, ... and notwithstanding any other law to the contrary, an agency must approve or deny within 60 days a written request relating to zoning, septic systems, 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.

The City argues that the situation at hand is covered by an exception to Subdivision 2, which is found in Subdivision 3(d), which states:

**Subd. 3. Application; extensions.** (d) The time limit in subdivision 2 is extended if a state statute, federal law, or court order requires a process to occur before the agency acts on the request, and the time periods prescribed in the state statute, federal law, or court order make it impossible to act on the request within 60 days. In cases described in this paragraph, the deadline is extended to 60 days after completion of the last process required in the applicable statute, law, or order. Final approval of an agency receiving a request is not considered a process for purposes of this paragraph.

The City argues that state law, the Minnesota Environmental Policy Act ("MEPA"), requires a process to occur (an Environmental Impact Statement, or "EIS") before the City can act on the Petitioner's request, and that the time periods involved make it impossible for the City to act within the 60-day time limitation. The Court agrees with this interpretation.

The Petitioner argues that the phrase "notwithstanding any other law to the contrary," contained in Subdivision 2, trumps the MEPA. However, that argument ignores the preceding phrase "except as otherwise provided in this section," which would refer to Subdivision 3 and the language therein.

Allowing §15.99 to "trump" the MEPA would violate the MEPA's goal of informed decision-making. In *No Power Line v Minnesota Environmental Quality Council*, 262 N.W.2d 312, 327 (Minn. 1977) the Supreme Court stated:

The purpose of all environmental legislation, at both the state and the federal levels, is to force agencies to make their own impartial evaluation of environmental considerations before reaching their decisions.

Obviously, the City would not be able to impartially evaluate environmental considerations if it did not have the necessary data before it to do so. The City's responsibility is mandated by the MEPA, under Minn. Stat. §116D.04 Subd. 2a, which states, in part:

Where there is potential for significant environmental effects resulting from any major governmental action, the action **shall** be preceded by a detailed environmental impact statement prepared by the responsible governmental unit....  
[emphasis added]

The Petitioner argues that the §15.99 Subd. 3(d) exception applies only if state law **requires** a process to occur before the agency (the City) acts on the request, and that MEPA does not require a process to occur. However, the use of the word "shall" in the foregoing section makes the provisions therein mandatory. The City was **required** to have an EIS prepared if the City concluded there were potential significant environmental effects resulting from the granting of the Petitioner's applications. The City did reach that conclusion, and it therefore had to order the preparation of an EIS. What is especially troubling here is the fact that the Petitioner could have challenged that decision in Court, and raised all of the issues they have brought to this Court's attention (e.g. the implied bad faith of some of the members of the MMDC in petitioning for an environmental study). For some reason, however, the Petitioners allowed the time for such a challenge to lapse.

The same analysis applies regarding the Environment Assessment Worksheet ("EAW"). Here, 40 some people petitioned the City for an EAW. Minn. Stat. §116D.04 Subd. 2a(c) states, in part:

An environmental assessment worksheet **shall** also be prepared for a proposed action whenever material evidence accompanying a petition by not less than 25 individuals, submitted before the proposed project has received final approval by the appropriate governmental units, demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental effects.

[emphasis added]

The word "shall" again **requires** the preparation of an EAW. Therefore, when the City was presented with the Petition and accompanying data, it was required to order the EAW if it believed that there may be potential for significant environmental effects.

The Petitioner also argues that the EAW and EIS preparations did not make it **impossible**, under Subd. 3(d) of §15.99, for the City to make a decision within 120 days of the application. The Petitioner argues that the EAW/EIS could have been prepared simultaneously with the City's obligation to act on the applications.

However, as the City points out, the word "impossible" has a legal meaning that is less restrictive than the literal meaning. The Minnesota Supreme Court has interpreted the statutory use of the word "impossible" to mean "not reasonably practical" or "wholly impractical." *Kedrowski v Czech*, 244 Minn. 111, 122, 69 N.W.2d 337, 344 (1955); *State v Gettins*, 205 Minn. 185, 187, 285 N.W. 533, 534 (1939). Furthermore, as the City's brief points out, there was a **real** impossibility here. The various waiting periods mandated by the Minnesota Rules would have consumed all of the 120 days, factoring in the 27 days that had elapsed before the petition that triggered environmental review was filed.

Lastly, the legislature's intent to give the MEPA the highest priority in statutory interpretation is made clear from the opening language located at Minn. Stat. §116D.03 Subd. 1:

The legislature authorizes and directs that, to the fullest extent practicable the policies, rules and public laws of the state shall be interpreted and administered in accordance with the policies set forth in sections 116D.01 to 116D.06 [the major portions of the MEPA].

Consistent with this goal would be the conclusion that the legislature intended to keep the "automatic approval" clock from running during an environmental review. Any other conclusion would render a good deal of the MEPA meaningless, or at least non-functional.