STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1148
A19-1149

In the Matter of the Application of USS Water Town Solar LLC
for a Conditional Use Permit (A19-1148),

In the Matter of the Application of USS Water City Solar LLC
for a Conditional Use Permit (A19-1149).

Filed July 27, 2020
Reversed
Ross, Judge

Le Sueur County Board of Commissioners
File Nos. 19002, 19003

Timothy M. Kelley, James A. Schoeberl, Stinson LLP, Minneapolis, Minnesota (for relators)

Jay T. Squires, Michael J. Ervin, Rupp, Anderson, Squires & Waldspurger P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Slieter, Judge; and Kalitowski, Judge.[*]

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

ROSS, Judge

Two energy companies applied to a county for conditional use permits to construct solar gardens within the county, and, according to the companies, the county denied the

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

applications only after a period of indecision so lengthy that the applications were approved automatically as a matter of law. In this certiorari appeal, the companies ask us to apply the automatic-approval statute and hold the county's denials ineffectual. Because the county failed to deny the applications within the statutory period, the purportedly denied applications were approved by operation of law, and we reverse.

FACTS

Two subsidiary companies of U.S. Solar Corporation—relators USS Water Town Solar LLC and USS Water City Solar LLC—each applied for a conditional use permit (CUP) in Le Sueur County to construct a solar garden. The applications concerned separate parcels, but the county considered them at once and eventually denied them on the same bases. Although Water Town Solar and Water City Solar filed separate appeals, the appeal issues on which we rest our decision are materially the same, and we consolidated the appeals after oral arguments.

The two companies submitted their CUP applications on January 14, 2019. Each sought the county's permission to construct and operate a one-megawatt solar garden in Waterville Township. Each project would cover a separate ten-acre parcel southwest of Waterville. A county official designated each application complete by checking the "Application Complete" box on the submissions in the area labeled for "Office Use Only."

The county and companies exchanged emails between February 1 and February 6, 2019, discussing two adjustments the county directed the companies to make on their site plans to comply with county ordinances. One adjustment regarded the projects' setbacks from the road, which the submitted site plans had mistakenly measured from the roadway

center line rather than from the edge of the right of way. The other regarded a driveway, which Water City's site plan had drawn as a dead end rather than as a turnaround. The county informed the companies that their applications would not be considered unless they amended the plans accordingly. The companies submitted updated site plans on February 6, 2019.

The county's planning and zoning commission held a public hearing on the CUP applications on February 14, 2019. Some residents spoke opposing the applications. The planning and zoning commissioners voted to recommend denying the applications. The county board of commissioners met to consider the recommendations on February 26, 2019. The board discussed the applications only briefly and returned them to the planning and zoning commission for reconsideration because additional information had been submitted after the February 14 hearing.

On February 28, 2019, two days after the county board meeting, the county sent the companies letters providing notice that the county faced a statutory obligation to decide the applications within 60 days and announcing that the county was extending the 60-day deadline for its review period "for an additional 60 days commencing March 15, 2019."

The planning and zoning commission held a second public hearing on May 9, 2019, and the commissioners again voted to recommend that the county board deny the applications. The county board did not vote immediately on the applications.

Two things happened on May 28, 2019. First, the county board voted to deny the applications. And second, based on Minnesota's automatic-approval statute, *see* Minn. Stat. § 15.99 (2018), the companies sent a letter to the county asserting, "We understand

that [today] the [b]oard voted, after both [a]pplications had already been approved by statute, to deny both [a]pplications."

The county sent the companies a letter disputing their claim to automatic approval. The letter asserted that the county denied the applications within the allowable period based on two factual claims. It claimed that, although the companies submitted their applications on January 14, 2019, the initial statutory 60-day period "restart[ed]" on February 6, 2019, the date the companies submitted their modified site plans. And it claimed that the county's letters extending the deadline contained a "clerical error" when they specified March 15, 2019, as the beginning of the extended period when really they should have specified April 7, 2019, as the commencement. The county refused to issue the CUPs.

The companies appeal the county's denials in this certiorari appeal.

D E C I S I O N

The companies offer three theories to challenge the county's denials of their CUP applications. They argue that the applications were approved by operation of law under the automatic-approval statute, that the county's denials were arbitrary and capricious, and that the denials violated their right to equal protection by comparison to how the county treated similar CUP applications. We decide this case on the first theory only.

The companies' automatic-approval argument rests on Minnesota Statutes section 15.99, which governs the deadlines for agency action. The statute limits an agency (which includes counties, Minn. Stat. § 15.99, subd. 1(b)) to 60 days to approve or deny a written request related to zoning. Minn. Stat. § 15.99, subds. 2(a), 3(a). The agency may extend the deadline up to an additional 60 days by giving written notice to the applicant, allowing

for up to 120 days to decide the request. *Id.*, subd. 3(f). If the agency fails to deny the request within the statutory period, then the request is approved automatically. *Id.*, subd. 2(a).

The parties dispute the timing of both the initial period and the extended period. The companies argue that the initial 60-day period began on January 14, 2019, which is the date they submitted their written applications, and that the additional 60-day extension period began on March 15, 2019, which is the date specified in the county's February 28 letters extending the time period. Under this construction, the 120-day maximum period expired on May 14, 2019, two weeks before the county commissioners finally voted on the applications. The county argues that the initial 60-day period either started or restarted on February 6, 2019, which is the date the companies submitted the amended site plans, and that the additional 60-day extension period began on April 7, 2019, 60 days after the February 6 start date. Under this construction, the 120-day maximum period expired on June 6, 2019, a week after the county commissioners finally voted on the applications. For two related but independent reasons, we conclude that the county missed the statutory deadline.

The Deadline Based on the Companies' Submission Date

We first conclude that the county missed the statutory deadline because it made its decision more than 120 days after the companies submitted their materially completed applications. Without dispute, the deadline measured from the original submission date of January 14, 2019, would make the county's decisions tardy and ineffectual. The county

urges us to disregard that date on the contention that the original submissions were not complete. But the law does not suggest that the need for minor changes in the site plans resulted in the submissions being incomplete.

The county maintains that the submissions failed to begin the initial review period. An initial 60-day review period begins when the agency receives an applicant's written request "containing all information required by law or by a previously adopted rule, ordinance, or policy of the agency." Minn. Stat. § 15.99, subd. 3(a). If a written request does not contain all required information, and if the agency sends written notice to the applicant within 15 business days after receiving the request stating what information is missing, the 60-day period restarts. *Id.* We therefore consider the submissions to determine whether they contained all information required by law, rule, ordinance, or county policy.

The county identifies two types of deficiencies in the applications that prevented the applications from being complete: the incorrect setback measurements in both applications and the incorrect driveway configuration in one of them. We will assume for our discussion that the email exchange about these particulars constitutes "written notice" and that the county sent its first email within 15 business days after the companies submitted their applications. The county argues that the deficiencies demonstrate that the site plans failed to comply with county ordinances. Deciding whether the applications contained all required information leads us to interpret provisions of the Le Sueur County zoning ordinance, a task that we undertake de novo. *See RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015).

The county zoning ordinance indicates what is required for a completed CUP application:

> An application for a new Conditional Use Permit, extension, or amendment of an existing Conditional Use Permit shall be filed with the Department on an official application form. The application shall:
>
> 1. Include the name and address of the applicant and/or landowner of the site and any architect, professional engineer and contractor employed by the applicant.
>
> 2. Shall be accompanied by such plans, elevations and site plans as prescribed by the Planning Commission and shall be filed at least twenty (20) days prior to the hearing.
>
> 3. Include any copies of any necessary State and Federal Permits.

Le Sueur County, Minn., Zoning Ordinance § 21, subd. 2.A (2019). The ordinance does not state expressly that an application accompanied by a site plan with an insufficient setback measurement or a disfavored driveway design is incomplete. Nor does it say more generally that a site plan that includes designs inconsistent with zoning restrictions are incomplete. The CUP ordinance does require that an application's accompanying site plans must be "as prescribed by the Planning Commission," but a prescription is literally a directive in writing, and the county does not identify any prescription of the planning commission—written or not—regarding the errors in the companies' original site plans. We add that the statute contemplates information that is "missing" from the application, Minn. Stat. § 15.99, subd. 3(a), not information that was included in the application but that contains an ordinance-based flaw. The county does not adequately support its position that the original applications were incomplete.

Even if we assume that the county had the authority to treat the companies' applications as incomplete, the record informs us that the county treated the applications as complete. Whether an application is complete for the purposes of section 15.99, subdivision 3(a), can rest on an agency's internal designation of the application and its written and oral representations to the applicant. For example, in *Harstad v. City of Woodbury*, a city project manager reviewing a zoning application completed a review memorandum and marked two requirements as "not complete." 902 N.W.2d 64, 68, 77 (Minn. App. 2017), *aff'd*, 916 N.W.2d 540 (Minn. 2018). But the project manager instead told the applicant in a voicemail message not to put too much stock in the review memorandum and to ignore one of the incomplete requirements. *Id.* We held that the application was incomplete because the city's review memorandum designated it as such. *Id.* at 78–79. We reasoned that the project manager's voicemail "did not affirmatively state or imply that the application was complete," and that, even though the city began to process the application, the record showed that it was still waiting for the applicant to submit revised plans. *Id.*

The record leads us to conclude that the county did not treat the companies' January 14, 2019 applications as incomplete. The county's internal processing designated the applications literally as "complete" by so marking the applications in the area calling for a designation. At oral argument in this appeal, the county maintained that the record contained no evidence that the companies were ever notified of the county's designation of the applications as complete. But the argument is not persuasive. The applications, which included the county's internal designations of completeness, were publicly available

and presented twice to the county board. And those documents are part of the record on appeal. *See* Minn. R. Civ. App. P. 110 ("The [d]ocuments filed in the trial court . . . shall constitute the record on appeal in all cases."), 115.04, subd. 1 (providing that the provisions in rule 110 regarding the record on appeal apply to certiorari appeals and that references in the rule to the trial court should be read as referring to the body whose decision is to be reviewed). The public, including the companies, were constructively notified of how the county had designated the applications.

We observe too that the county provided the most compelling evidence that it had treated the January 14 application submissions as complete in its February 28, 2019 letters to the companies. By informing the companies that it was extending the 60-day deadline for its review period "for an *additional* 60 days commencing March 15, 2019" (emphasis added), the county implicitly indicated that any concerns with the site plans did not alter the running of the initial 60-day period that commenced on January 14 (60 days before March 15). We address the county's unconvincing "clerical error" contention below.

The only circumstantial support for the county's position that the original submissions were incomplete is a statement in the early email exchange saying, "Unfortunately without the updated site plans the applications will have to be removed from the Agenda." But the county never stated that the applications would be treated as incomplete based on the need for "updated" site plans. Nor did it base the need for updated plans on the notion that the original plans lacked any of the "information required" by law, rule, ordinance, or policy under Minnesota Statutes section 15.99, subdivision 3(a). It rested instead on the idea that some of the information in the plans was incorrect. The

ambiguous email statement is insufficient to counterbalance the unambiguous evidence that the county was treating the original applications as complete.

We are not persuaded to a different result by the county's related argument that the submission of updated site plans constituted an "amendment" to the applications so as to justify restarting the initial 60-day period. The county bases its argument on our decision in *Tollefson Dev., Inc. v. City of Elk River*, where we held that "the 60-day period runs from the date a written amendment to a zoning request is submitted, not from the date of the original application." 665 N.W.2d 554, 559 (Minn. App. 2003), *review denied* (Minn. Sept. 24, 2003). *Tollefson* is factually dissimilar to this case. *Tollefson* dealt with a rezoning application in which the applicant amended the application to change the zoning designation it was requesting. *Id.* at 556. The amendment altered the nature of the request itself, unlike here, where the requests at all times remained for the same thing—permission to construct and operate the solar gardens—with only minor adjustments to the delineation of the projects based on the setback requirement and the design of a driveway. And in *Tollefson*, after amending the application, the applicant did not submit revisions to the plat in time for the city council's next monthly meeting, which meant that the council could not consider the application until the following month. *Id.* In contrast here, the companies' submissions of the adjusted site plans had no effect on the timing of hearings or consideration by either of the two county bodies reviewing the applications and participating in the decision. Neither of the updated site plans constituted a substantive amendment.

The Deadline Based on the County's Specified Extension Period

The second reason we conclude that the county missed the statutory deadline is that, even if the county had treated the amended applications as complete only as of February 6, 2019, it then expressly stated that it was exercising its statutory authority to extend the deadline for 60 days "commencing March 15, 2019," or until May 14, 2019. The county intended its February 28, 2019 letters to serve as "official notification[s]" of the specific length of its extensions. The statutory authority for an agency's notification extending the deadline must state "its anticipated length, which may not exceed 60 days" unless approved by the applicant. Minn. Stat. § 15.99, subd. 3(f). This provision gave the county discretion to choose the length of the extensions up to 60 days. By expressly beginning its 60-day extensions on March 15, 2019, the county expressly designated May 14, 2019, as the deadline for the review period regardless of the timing of the original period.

We must address the county's characterization of the March 15, 2019 date as a mere "clerical error." The county's use of the term "clerical error" does not comport with any common understanding of the term. An error of that sort is typically one that results "from a minor mistake or inadvertence and not from judicial reasoning; esp. a drafter's or typist's technical error that can be rectified without serious doubt about the correct reading." *Black's Law Dictionary* 659 (10th ed. 2014). Our civil procedural rules, for example, allow a court to correct "[c]lerical mistakes" and other "errors . . . arising from oversight or omission" on the court's own initiative or on motion by any party. Minn. R. Civ. P. 60.01. Inherent in these characterizations is that a clerical error is one that is apparent on its face and easily corrected. The county's identifying "March 15, 2019," as a date relevant to

calculating the initial date, or as a date relevant to calculating the extension-deadline date, is not an error that the companies would easily recognize. Instead, the date tracks the timing of the original submissions and corroborates the county's designations of the submissions as "complete." Indeed, the county did not first call the date a "clerical error," or an error of any kind, until after the running of the deadline designated in the February 28 letters. Once the county's declared extended deadline expired, the applications were approved as a matter of law, rendering any postapproval representations by the county immaterial. We do not doubt that the county engaged in an error in failing to decide the applications within the statutory deadline. But the record nowhere supports its assertion that the error was truly "clerical."

We recognize that the time limits in section 15.99 should be construed narrowly against application of the automatic-approval rule. *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 543 (Minn. 2007). But these circumstances require us to apply the penalty even on a narrow statutory construction. The county designated the January 14, 2019 applications as completed. It notified the companies in unambiguous terms that the 60-day extensions would begin on March 15, 2019. And at no point during the additional 60 days did the county ever communicate or attempt to correct the supposed clerical error. No narrow construction can except the county's delay from the absolute force of the statute: "Failure of an agency to deny a request within 60 days is approval of the request." Minn. Stat. § 15.99, subd. 2(a); *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 5 (Minn. App. 2004) (recognizing that "the result must be that the application was statutorily

approved as a matter of law"). Approval became effective immediately after the 60-day extensions expired.

Because we reverse the county's denials based on the companies' automatic-approval argument, we need not consider their arbitrary-and-capricious or equal-protection arguments.

Reversed.