

STATE OF MINNESOTA

IN DISTRICT COURT

COUNTY OF WINONA

THIRD JUDICIAL DISTRICT
Case Type: Civil Other/Miscellaneous
Court File No. 85-CV-19-546
Honorable Douglas C. Bayley

Daley Farm of Lewiston, L.L.P., Ben Daley,
Michael Daley, and Stephen Daley,

Plaintiffs/Appellants,

vs.

The County of Winona,

Defendant/Respondent,

and

Land Stewardship Project and Defenders of
Drinking Water,

Intervenor/Defendant.

**MEMORANDUM OF LAW IN SUPPORT OF DALEY FARM'S
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs/Appellants Daley Farm of Lewiston, L.L.P., Ben Daley, Michael Daley, and Stephen Daley submit this memorandum of law in support of their motion for summary judgment with respect to Counts V, VI, and VII of their Supplemental Complaint. Daley Farm is comprised of five family members who jointly own and operate a dairy farm located near Lewiston in rural Winona County, which has been in the family for more than 160 years. For the past several years, Daley Farm has sought to modernize its facilities and expand its farming operation so that the family farm can

continue for another generation. After extensive environmental review, the Minnesota Pollution Control Agency (twice) determined that Daley Farm's proposed project does not have the potential for significant environmental effects and (twice) issued permits for the project to proceed.

Unfortunately, the MPCA's rigorous scientific analysis is not sufficient for a small, but rabid, group of activists who oppose modern agriculture based on an irrational belief that size is all that matters. These activists went far beyond legitimate advocacy for their sincere, though misguided, ideological beliefs about farming and conspired with county officials to undermine the quasi-judicial zoning process by stacking the board of adjustment with members who had actively participated in their opposition campaign and who had prejudged the merits of Daley Farm's variance application.

This Court has already chastised the County for these egregious actions, declared the initial denial of Daley Farm's requested variance void, and remanded the application for reconsideration by a new board. But rather than providing Daley Farm a fair hearing on remand, Winona County instead treated the remand proceedings as a continuation of this litigation and merely sought to justify the initial, biased decision. Because Winona County failed to timely act on Daley Farm's variance application as required under Minnesota law and acted unreasonably, arbitrarily, and capriciously in denying the remanded application, Daley Farm respectfully requests that this Court grant its motion for summary judgment and order the County to grant the requested variance.

STATEMENT OF THE ISSUES

- I. Was Daley Farm's Variance Application automatically approved by operation of Minnesota Statutes § 15.99 when the Winona County Board of Adjustment failed to deny the application within 60 days after it was remanded to such board?
- II. Was the denial of Daley Farm's remanded Variance Application unreasonable, arbitrary, and capricious where the Winona County Board of Adjustment considered evidence outside of the record?
- III. Was the denial of Daley Farm's remanded Variance Application unreasonable, arbitrary, and capricious where bias continued to taint the administrative process following this Court's previous remand of the application for reconsideration?
- IV. Was the denial of Daley Farm's remanded Variance Application unreasonable, arbitrary, and capricious where the such denial was not supported by the Winona County Board of Adjustment's factual findings or by the evidence in the record?

DOCUMENTS COMPRISING THE RECORD

1. Complaint and Notice of Appeal dated March 18, 2019, with attached exhibits (Index #3) (the "**Complaint**" or "**Compl.**");
2. Answer and Response to Appeal dated April 15, 2019 (Index #7) (the "**Answer**");
3. Supplemental Complaint dated February 18, 2022 (Index #108) (the "**Supplemental Complaint**" or "**Supplemental Compl.**");
4. Answer to Supplemental Complaint dated March 17, 2022 (Index #110) (the "**Supplemental Answer**");
5. Administrative Record filed November 17, 2020, and March 30, 2023 (Index #35-50 and Index #148-156) ("**Admin. R.**");¹

¹ A copy of the transcript of the public hearing of the Winona County Board of Adjustment that was held on February 21, 2019, is included in the Administrative Record as Item No. 54 (Bates Nos. 2501-2771 in Index #154) and is cited throughout this memorandum as "**First Hearing Tr.**" (with specific citations to the page and line of the transcript). A copy of the transcript of the board of adjustment's December 2, 2021, meeting to reconsider Daley Farm's Variance Application (as such term is defined below) on remand is included in the Administrative Record as Item No. 69 (Bates Nos. 3109-3116 in Index #156) and is cited throughout this memorandum as "**Second Hearing Tr.**" (again with specific citations to the page and line of the transcript).

6. Affidavit of Matthew Berger (Depositions) dated June 8, 2023 (filed contemporaneously with this memorandum);²
7. Affidavit of Matthew Berger (Public Documents) dated June 8, 2023 (the “**Public Affidavit**” or “**Public Aff.**”), with attached exhibits (filed contemporaneously with this memorandum); and
8. Affidavit of Matthew Berger (Confidential Documents) dated June 8, 2023 (“**Confidential Affidavit**” or “**Confidential Aff.**”), with attached exhibits (filed contemporaneously with this memorandum).

STATEMENT OF UNDISPUTED FACTS

I. Cast List (Not Necessarily in Order of Appearance)

The material facts in this case involve the actions and statements of several people over an extended period of time. Because the roles of these people may not be immediately apparent, Daley Farm provides this brief introduction to the main characters in these events.

Daley Farm of Lewiston, L.L.P., or “**Daley Farm**,” is a limited liability partnership that is comprised of five members of the Daley family. Daley Farm owns and operates a dairy farm located near Lewiston in rural Winona County. The Daley family has farmed in and have been active members of the Lewiston community for more than 160 years. **Ben Daley** is one of the partners of Daley Farm and submitted the variance application at issue in this case on behalf of Daley Farm. **Michael Daley** and **Stephen Daley** were previously partners of Daley Farm but retired from the partnership during the pendency

² Throughout this memorandum, the transcripts submitted to the Court with this Affidavit will be cited as “**Larson Tr.**,” “**Stoll Tr.**,” “**Hales Tr.**,” “**First Kovecsi Tr.**,” “**Potter Tr.**,” “**Fitzgerald Tr.**,” “**Heublein Tr.**,” “**Second Kovecsi Tr.**,” “**Qualley Tr.**,” and “**McGinty Tr.**,” with specific references to the appropriate pages and lines of the transcripts. Documents that were marked and identified as exhibits during these depositions and that were also submitted to the Court with this Affidavit will be cited as “**Depo. Ex. ___**” (with specific reference to the appropriate exhibit number marked on the document).

of this proceeding. Michael Daley and Stephen Daley own a parcel of land on which Daley Farm proposes to construct and operate a portion of Daley Farm's proposed modernization and expansion project. (See Compl., at ¶¶ 1-4, 6-8; Answer, at ¶¶ 3-4; Admin. R. (Index #149) 1698, 1849.)

Land Stewardship Project, or "LSP," is a Minneapolis-based nonprofit organization that opposes large-scale, modern farming operations, which it derisively refers to as "factory farms." (See LSP, *Factory Farms*, <https://landstewardshipproject.org/factory-farms/#take-the-peldge-say-no-to-factory-farms> (last visited May 30, 2023); see also Larson Tr., at 18:20-21:5, 54:21-54:25; Stoll Tr., at 25:15-26:7, 34:1-35:14; Hales Tr., at 39:22-41:11.) **Bobby King, Douglas Nopar, Johanna Rupprecht, and Barbara Sogn-Frank** were employees of LSP who actively worked on the organization's efforts to oppose Daley Farm's proposed modernization and expansion project. (See, e.g., Public Aff., at exs. D, J-K.)

Marie Kovecsi, Chris Meyer, Greg Olson, Steve Jacob, and Marcia Ward served on the Winona County Board of Commissioners at all times relevant to this proceeding, including on January 8, 2019 (when Cherie Hales, Wendy Larson, and Rachel Stoll were appointed to the Winona County Board of Adjustment); on January 7, 2020 (when Elizabeth Heublein was appointed to the board of adjustment); and on January 5, 2021 (when Kelsey Fitzgerald and Jordan Potter were appointed to the board of adjustment. (Public Aff., at exs. AX-AZ.) Commissioners Kovecsi, Meyer, and Olson were LSP's allies on the county board. (Public Aff., at ex. AM; Confidential Aff., at ex. CG.)

Cherie Hales was appointed to the Winona County Board of Adjustment in 2015 and served as the chair of such board when Daley Farm's variance application was first heard and decided. (Hales Tr., at 47:19-47:21, 71:13-71:22; Admin. R. (Index #154) 2440; Admin. R. (Index #156) 2791; *see* Depo. Ex. 25.) Ms. Hales has also been a member of LSP since the early 1980s (Hales Tr., at 17:23-18:13) and, as set forth more fully below, was actively involved in leading LSP's efforts to oppose Daley Farm's proposed modernization and expansion project. Ms. Hales was not a member of the Winona County Board of Adjustment when Daley Farm's variance application was remanded to such board. (*See* Admin. R. (Index #156) 2955.)

Wendy Larson was appointed to the Winona County Board of Adjustment in January 2019 and was a member of such board when Daley Farm's variance application was first heard and decided. (Public Aff., at ex. AX; Larson Tr., at 80:1-80:8, 83:18-84:13; Admin. R. (Index #154) 2440; Admin. R. (Index #156) 2791; *see* Depo. Ex. 25.) Ms. Larson had been a member of LSP for several years and was identified by LSP as one of its "leaders." (Larson Tr., at 14:25-16:12, 26:16-26:20, 32:18-33:5, 46:25-51:6, 57:18-58:8; Depo. Exs. 2, 7.) Ms. Larson was not a member of the Winona County Board of Adjustment when Daley Farm's variance application was remanded to such board. (*See* Admin. R. (Index #156) 2955.)

Rachel Stoll was appointed to the Winona County Board of Adjustment in January 2019 and was a member of such board when Daley Farm's variance application was first heard and decided. (Public Aff., at ex. AX; Admin. R. (Index #154) 2440; Admin. R. (Index #156) 2791; *see* Depo. Ex. 25.) Ms. Stoll had been a member of LSP for several

years. (Stoll Tr., at 20:15-21:2, 24:7-24:12.) As set forth more fully below, Ms. Stoll was actively involved in LSP's efforts to oppose Daley Farm's proposed modernization and expansion project. Ms. Stoll was not a member of the Winona County Board of Adjustment when Daley Farm's variance application was remanded to such board. (See Admin. R. (Index #156) 2955.)

Larry Greden and **Phillip Schwantz** were members of the Winona County Board of Adjustment when Daley Farm's variance application was first heard and decided. (Public Aff., at ex. AX; Admin. R. (Index #154) 2440; Admin. R. (Index #156) 2791.) Mr. Schwantz was also a member of the Winona County Board of Adjustment when Daley Farm's variance application was remanded to such board, but Mr. Greden was no longer a member of the board of adjustment at that time. (See Admin. R. (Index #156) 2955.)

Elizabeth Heublein was appointed to the Winona County Board of Adjustment in January 2020. (Heublein Tr., at 20:3-20:25; Public Aff., at ex. AY.) **Kelsey Fitzgerald** and **Jordan Potter** were appointed to the Winona County Board of Adjustment in January 2021. (Public Aff., at ex. AZ; Fitzgerald Tr., at 19:11-19:14; Potter Tr., at 8:22-9:2.) All three of them were members of the board of adjustment when Daley Farm's variance application was remanded to such board. (See Admin. R. (Index #156) 2955.)

Kay Qualley was the director of the Winona County Planning and Environmental Services Department at all times relevant to this proceeding. In this capacity, Ms. Qualley oversees the land use planning activities for the County, including processing variance applications that come before the board of adjustment. **Carly McGinty** is the Winona

County Feedlot Officer and works under Ms. Qualley. In this capacity, Ms. McGinty works on zoning applications that relate to feedlots. (Qualley Tr., at 9:21-12:15, 13:20-14:4; McGinty Tr., at 8:7-9:11.)

II. Daley Farm Plans to Modernize Its Dairy Facilities and Expand Its Dairy Farm.

Daley Farm operates a dairy farm located on three parcels of land located near Lewiston in rural Winona County. This land is located in an area that is zoned as an Agricultural/Resource Conservation District under the Winona County Zoning Ordinance. The existing facilities have a total capacity of 1,608 cows and 120 calves, or 2,275.2 animal units.³ (Compl., at ¶¶ 6-8, 31; Answer, at ¶¶ 4, 16.) In addition to barns, milking parlors, and other normal facilities that comprise a dairy farm, Daley Farm has invested significant resources in equipment that allows the farm to reclaim and reuse water and to clean and reuse sand (which is used for bedding in the barns), thus reducing the water usage and environmental impact of Daley Farm's operation. (Admin. R. (Index #154) 2480-93; First Hearing Tr., at 58:25-65:12.)

Several years ago, Daley Farm began developing plans to modernize its existing facilities and expand its dairy farm. These plans include constructing a new barn, milking parlor, sand processing and storage building, animal mortality building, feed storage pad, manure storage basin, and runoff controls, and eliminating some existing facilities that are outdated (the "**Modernization Project**"). If the Modernization Project is

³ An "animal unit" is "a unit of measure used to compare differences in the production of animal manure . . . for an animal feedlot or a manure storage area." Minn. R. 7020.0300, subp. 5. As relevant to Daley Farm's proposed Modernization Project, each mature dairy cow represents 1.4 animal units, each heifer (i.e., a young female that has not yet borne a calf) represents 0.7 animal units, and each calf represents 0.2 animal units. *Id.*

completed, the facilities would have a total maximum capacity of 3,983 cows, 525 heifers, and 120 calves, or 5,967.7 animal units. (Admin. R. (Index #150) 17-154; Admin. R. (Index #149) 1698, 1849; *see* Compl., at ¶ 9; Answer, at ¶ 4.)

Daley Farm developed this plan to modernize and expand at its existing site, rather than adding a new site at a different location, in order to utilize the existing equipment to reduce the environmental impact of the farming operation, reduce traffic and fossil fuel use, and minimize the need to transport animals, feed, and manure. (Admin. R. (Index #149) 1856, 1860; First Hearing Tr., at 58:25-65:12, 68:8-68:23, 80:25-82:1, 84:15-85:25.) Winona County planning staff acknowledged that expanding on other sites “could cause more environmental damage to Winona County’s natural resources than the consolidated feedlot site expansion” proposed by Daley Farm due to “duplication of machinery” and “additional transportation of manure, cattle, workers, feed, and crops leading to more fossil fuel emissions and elevated stress on county roads.” (Admin. R. (Index #149) 1834.)

Under Minnesota law, Daley Farm was required to complete an “environmental assessment worksheet,” or “EAW,” for the Modernization Project and could not obtain the necessary permits until the Minnesota Pollution Control Agency either issued a negative declaration on the need for an “environmental impact statement,” or “EIS,” or determined that a completed EIS is adequate.⁴ Minn. Stat. § 116D.04, subds. 2a(b), 2b

⁴ An EAW is “a brief document which is designed to set out the basic facts necessary to determine whether an [EIS] is required for a proposed action.” Minn. Stat. § 116D.04, subd. 1(c) (2022). In contrast, an EIS is longer and more detailed and must be prepared when “there is a potential for significant environmental effects resulting from” the project. *Id.*, at subd. 2a(a). The “preparation and distribution of an EIS is neither swift nor inexpensive,” *Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of*

(2022); Minn. R. 4410.4300, subps. 1, 29. Daley Farm was also required to obtain either a National Pollutant Discharge Elimination System (NPDES) permit or a State Disposal System (SDS) permit from the MPCA prior to the construction, expansion, modification, or operation of its dairy facilities. Minn. R. 7020.0405, subp. 1.

In addition to these state requirements, Daley Farm's proposed Modernization Project is also subject to the Winona County Zoning Ordinance.⁵ Section 8.4.2 of the Ordinance provides that "[n]o permit shall be issued for a feedlot having in excess of 1,500 animal units per feedlot site,"⁶ and Section 10.4.6.1 of the Ordinance further provides that a new feedlot with between 300 and 1,500 animal units is a conditional use in an Agricultural/Resource Conservation District. Thus, Daley Farm was also required to obtain a variance (issued by the Winona County Board of Adjustment)⁷ from the 1,500 animal unit cap and a conditional use permit (reviewed by the Winona County Planning Commission but ultimately issued by the Winona County Board of Commissioners) for its proposed Modernization Project.

Comm'rs, 713 N.W.2d 817, 839 (Minn. 2006) (Anderson, G. Barry, dissenting), and a requirement to complete an EIS is often "the kiss of death" for a project, *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990).

⁵ The Winona County Zoning Ordinance is available at <https://www.co.winona.mn.us/515/Winona-County-Zoning-Ordinance>.

⁶ Although Daley Farm's existing facility exceeds the 1,500 animal unit cap under the Ordinance, the facility existed before the animal unit cap was enacted and is therefore allowed to continue as a nonconforming use under Sections 3.2.2. and 3.2.3 of the Ordinance. *See also* Minn. Stat. § 394.36 (2022).

⁷ Section 5.6 of the Ordinance authorizes the board of adjustment to grant a variance "where it is determined that, by reason of exceptional circumstances, the strict enforcement of the [zoning requirement] would cause unnecessary practical difficulties." The specific criteria that the board must consider and apply in deciding whether to grant a variance are set forth in Section 5.6.2 of the Ordinance.

Daley Farm began the regulatory approval process for its proposed Modernization Project on July 31, 2017, by submitting to the MPCA the initial data for the preparation of an EAW and an application for modification of an individual NPDES permit. (Admin. R. (Index #150) 17-154.)

III. Cherie Hales and Other Members of the LSP Organizing Committee Begin a Campaign to Oppose Daley Farm’s Proposed Modernization Project.

Throughout most of the relevant time period, Land Stewardship Project had a local “organizing committee” (sometimes referred to as a “steering committee”) that met regularly to set the organization’s priorities and strategy on issues in and around Winona County. (Hales Tr., at 21:4-21:18, 24:19-25:4, 28:10-28:22, 29:20-30:1; accord Larson Tr., at 51:7-55:4.) Cherie Hales was a member of the LSP Organizing Committee since at least February 2015 and regularly prepared the minutes of the committee’s meetings. (Hales Tr., at 23:1-23:7, 24:9-24:18, 46:20-48:1; Public Aff., at ex. C.) In fact, according to the meeting minutes that she prepared, Ms. Hales was so active within LSP that she was offered (but declined) the opportunity to chair the committee in 2015:

Committee Chairmanship: Since our last meeting, Cherie decided she would prefer to not be chair of the organizing committee. She felt that being on the Board of Adjustment, and applying for Planning Commission, it would be better to be a little more “low profile”. It was her concern that she might be accused of bias and asked to recuse herself from a decision that we would want to have allies voting on. Vince agreed to act as Chair, Cherie will be vice-chair.

(Public Aff., at ex. D.) In other words, Ms. Hales deliberately hid her conflict of interest so she could continue using her public positions to promote LSP's interests.⁸

LSP began organizing against Daley Farm's proposed Modernization Project very early in the administrative review and approval process. The minutes (which Cherie Hales again prepared) of the October 23, 2017, meeting of the LSP Organizing Committee note that "[i]t is possible that the Daley's who are grandfathered in over the AU cap, may be planning a major expansion which it will be important to organize opposition to." (Public Aff., at ex. E (emphasis added).) These minutes also reflect that Ms. Hales immediately commented on the merits of the project and linked her comment to her role on the board of adjustment:

⁸ Ms. Hales' attempts to hide or minimize her involvement continued through the proceedings on Daley Farm's Variance Application. For example, at the start of the public hearing on the application, Ms. Hales characterized her involvement with LSP as follows:

MS. HALES: Yes. I'm a member of Land Stewardship, and I have been for some years. I get -- as a member, I get a newsletter and, sometimes, mailings.

But not to be flippant, I'm a member of the Marine Art Museum, the food co-op, Winona History Center, the library, and the local Audubon Club, and I get mailings from them and newsletters and would have to say I'm not actually in charge of the activities of any of these organizations.

(First Hearing Tr., at 23:5-23:14.) And during her deposition, Ms. Hales testified as follows:

Q. How would you describe your involvement with Land Stewardship Project over the years?

A. Sometimes just reading the newsletter; sometimes more actively involved if there was something that took my interest.

Q. How would you describe your involvement with Land Stewardship Project over, say, the last five years? Has it been more active or less active?

A. At the beginning of the frac sand thing I went to some of their meetings. Later I didn't go to any of those meetings because -- excuse me -- because I got appointed to the Board of Adjustment and I served on planning commission one year.

(Hales Tr., at 20:14-21:3.) In fact, as set forth more fully below, Ms. Hales was an active member of LSP's Organizing Committee for several years—at the same time she served on the board of adjustment—and actively participated in setting and implementing LSP's strategy on numerous issues, including LSP's opposition to Daley Farm's proposed Modernization Project.

Cherie said it was frustrating that these expansions meet the criteria making it hard to vote them down, even when they are so clearly wrong. It would take an ordinance change to protect water. Doug reminded her, and the rest of the committee, just how hard it can be to change the ordinance, and noted it could start a real fight with big ag which might include an animal cap challenge.

(*Id.*) Shortly thereafter, Ms. Hales stated her general opposition to feedlot expansions, regardless of the facts and circumstances of a specific project:

Good morning. First I need to apologize to Doug for my worried call last evening. I was pretty distressed upon receiving the [Planning Commission] packet and finding yet another feedlot expansion proposed.

(Public Aff., at ex. F.)

The LSP Organizing Committee (including Cherie Hales) discussed Daley Farm's proposed Modernization Project again at its November 30, 2017, meeting and immediately began to gather information to identify "specific concerns [LSP could] potentially raise" in its opposition to the project. (Depo. Ex. 17; Public Aff., at exs. G-I; Confidential Aff., at ex. CA.) The LSP Organizing Committee (still including Ms. Hales) continued to discuss and strategize about LSP's opposition to Daley Farm's proposed Modernization Project at its monthly meetings between February 2018 and May 2018 and at LSP's annual membership meeting that spring. (Depo Exs. 8, 17, 28, 30-31; Hales Tr., at 23:9-26:9, 32:7-44:9.)

IV. Cherie Hales and LSP Weaponize the Environmental Review Process as Part of Their Campaign to Oppose Daley Farm's Proposed Modernization Project.

On October 1, 2018, the MPCA published public notices of the availability of an EAW and of the agency's intent to issue a modified individual NPDES permit for Daley Farm's proposed Modernization Project. (Admin. R. (Index #152, 148) 1429-1664.) The

public notices originally established a public comment period from October 1, 2018, through October 31, 2018, but the agency (at LSP's request) subsequently extended the public comment period through November 15, 2018. (Admin. R. (Index #152) 1430; Public Aff., at exs. K-O; *see* Compl., at ¶¶ 13-14; Answer, at ¶¶ 6-7.)

LSP immediately weaponized the environmental review process as part of its campaign to oppose Daley Farm's proposed Modernization Project. LSP's strategy included delaying and extending the public comment period, soliciting its members (and other allies) to submit public comments to the MPCA, and using its close ties with Marie Kovecsi (a Winona County Commissioner and LSP ally) to encourage Winona County to request that the MPCA require an EIS for the project. (Depo. Exs. 12, 20-21, 32; Public Aff., at exs. J-V; Confidential Aff., at exs. CB-CD.)

As a member of the LSP Organizing Committee, Cheri Hales was actively involved in formulating and implementing LSP's efforts related to the environmental review process for Daley Farm's proposed Modernization Project. For example, in one e-mail to Barbara Sogn-Frank – LSP's Factory Farm Policy Organizer – Ms. Hales described tactics that she (and LSP) had used during a recent campaign against frac sand mining in Winona County and directly advised LSP staff on how the lessons from the frac sand campaign could be applied to LSP's campaign against Daley Farm's proposed Modernization Project. Ms. Sogn-Frank described Ms. Hales' advice as "golden" and indicated that her suggested approach was "exactly the direction we'll work on together tomorrow." (Public Aff., at ex. S.)

Rachel Stoll was also actively involved in LSP's efforts to use the environmental review process to oppose Daley Farm's proposed Modernization Project. Ms. Stoll attended several LSP meetings at which these efforts were discussed, volunteered to review and summarize the EAW to assist other LSP members in submitting comments, and was asked to comment on behalf of the organization for a news article about Daley Farm's project. (Stoll Tr., at 34:8-35:25, 48:13-49:8, 51:21-56:15, 61:1-62:13; Depo. Exs. 19, 21; Public Aff., at exs. L, N, Q, T-Y; Confidential Aff., at exs. CB-CC.)

In addition to their behind-the-scenes efforts on behalf of LSP, Cherie Hales and Rachel Stoll submitted public comments to the MPCA in opposition to Daley Farm's proposed Modernization Project. Wendy Larson also submitted a public comment to the MPCA in opposition to Daley Farm's proposed Modernization Project. (Compl., at ¶¶ 15-17, exs. A-C; Answer, at ¶¶ 8-10.)

V. **The MPCA (Twice) Determined that Daley Farm's Proposed Modernization Project Does Not Have a Potential for Significant Environmental Effects and (Twice) Issued a Negative Declaration on the Need for an EIS and a Modified NPDES Permit for the Project.**

Despite the best efforts of Cherie Hales, Rachel Stoll, Wendy Larson, and others, LSP's efforts to require an EIS for Daley Farm's proposed Modernization Project were not successful. Instead, following detailed study and analysis, the MPCA determined that the Modernization Project does not have a potential for significant environmental effects and that an EIS therefore is not required. The MPCA simultaneously approved a modification of Daley Farm's individual NPDES permit for the Modernization Project. (Compl., at ¶¶ 18-19, exs. D-E; Answer, at ¶¶ 11-12.)

LSP and Minnesota Center for Environmental Advocacy (MCEA)—another activist group who served as LSP’s attorneys—challenged the MPCA’s decisions. (Compl., at ¶ 20; Answer, at ¶ 13.) The court of appeals affirmed most of the MPCA’s findings that Daley Farm’s proposed Modernization Project does not have a potential for significant environmental effects but concluded that the MPCA had failed to adequately consider potential greenhouse gas emissions that may be associated with the project. *In re Denial of Contested Case Hearing Request & Modification of Notice of Coverage under Individual NPDES Feedlot Permit No. MN0067652, Nos. A19-0207 & A19-0209, 2019 WL 5106666, at *5-13* (Minn. Ct. App., Oct. 14, 2019). Accordingly, the court reversed the MPCA’s decisions and remanded the matters to the agency to consider whether the project has the potential for significant environmental effects from greenhouse gas emissions. *Id.* at *8.

The MPCA subsequently issued a Supplemental EAW and, after an additional public comment period, issued Supplemental Findings of Fact, Conclusions of Law, and Order[s] on April 24, 2020, again determining that Daley Farm’s proposed Modernization Project does not have a potential for significant environmental effects and that an EIS therefore is not required, and again approving the modification of Daley Farm’s individual NPDES permit for the project. (Public Aff., at exs. A-B.) LSP and MCEA did not seek judicial review of these findings, conclusions, or orders.

VI. Cherie Hales and LSP Begin Organizing to Oppose Daley Farm’s Anticipated Applications for a Variance and a Conditional Use Permit from Winona County.

In the meantime, while its efforts to require Daley Farm to complete an EIS were continuing, LSP also began organizing to oppose Daley Farm’s proposed Modernization Project at the county level. (Depo. Ex. 34; Public Aff., at exs. M, S, Z; Confidential Aff., at ex. CE.) During this time, Cherie Hales was advising LSP about the county zoning process that Daley Farm would have to complete for its project. For example, on October 11, 2018, Ms. Hales provided LSP with a detailed analysis of the criteria that the board of adjustment must consider in deciding whether to grant a variance request and stated, “It seems to me that it would be hard to argue that the application [referencing Daley Farm’s proposed Modernization Project] would meet these criteria.” (Public Aff., at ex. AA; *see id.*, at ex. AB.) The following day, Barbara Sogn-Frank (LSP’s Factory Farm Organizer) stated that she would “keep [Ms. Hales] posted on all the updates and goings-on” while Ms. Hales was moving – Ms. Hales responded and promised, “I will help as I can.” (*Id.*, at ex. AC.) Rachel Stoll also volunteered to take the lead for LSP in conducting an in-depth investigation of Daley Farm’s prior interactions with Winona County to gather information that LSP could use in its campaign to oppose Daley Farm’s proposed Modernization Project. (Stoll Tr., at 44:24-46:25; Depo. Exs. 18, 36; Public Aff., at exs. X, AD-AH; Confidential Aff., at ex. CF; *see also* Stoll Tr., at 36:7-43:18.)

Cherie Hales and LSP also focused on the composition of the Winona County Board of Adjustment. On October 11, 2018, Ms. Hales raised a potential “complication” with her continued service on the board of adjustment with two LSP employees:

I mentioned the complication of my moving. There is actually an additional complication that this move creates. There are 5 members on the Board of Adjustment. Four of them have to be rural residents. Margaret Walsh is the B of A member who lives in town, and I'm moving to town. I don't know how long I can keep that move "secret." If I stay on til end of the year/term, Margaret, I think, would like to step down from B of A, and possibly I could then fill her seat. Depending on who is chairing the County Board, and if they would re-appoint me in that seat. Politics involved there ... There is one member whose 6 years will be up and my seat open for appointments. Again, depending on who is Chair, the balance on the Board could shift in an unfavorable way.[⁹]

(Public Aff., at ex. AA.) The following day, Ms. Hales forwarded to Doug Nopar (an employee of LSP who was actively involved on the LSP Organizing Committee and LSP's campaign against Daley Farm's proposed Modernization Project) a message she had received from Winona County with the following note:

I'm not sure where things are at with the Winona Cnty Steering Committee, but I just got this from the County. It's application time. The deadline is 11/19. Are we going to solicit applicants?

Both Margaret and my 2 year terms are up, and Hunnewell is done.

B of A requires 4 members to be rural residents, only 1 member from town which currently is Margaret. So my moving into town conundrum is getting real close now. (I shared this move problem with Barb & Bobbi in my email yesterday)

(*Id.*, at ex. AI.) Mr. Nopar responded the following day, indicating that "Margaret told [him] yesterday that she's stepping down from B of A with the expectation that you'll take her 'urban' spot." (*Id.*)

⁹ According to LSP's internal e-mail communications, Margaret Walsh was also one of LSP's leaders in Winona County and was extensively involved in LSP's campaign against Daley Farm's proposed Modernization Project. (Confidential Aff., at ex. CH.)

In addition to keeping Cherie Hales on the board of adjustment, LSP (and Ms. Hales) also targeted Larry Greden – another member of the board who LSP thought would support Daley Farm’s proposed Modernization Project. On October 12, 2018, Doug Nopar e-mailed Ms. Hales:

I see in today’s letter to the editor from the Daley family that Adam and Sidney Greden are listed as family members. My hunch is that Board of Adjustment member Larry Greden would be related, maybe a grandfather? Does that disqualify him from voting as a Board of Adjustment member. Larry is a big dairy farmer by Altura, and longtime supporter of farm expansion.

(Public Aff., at ex. AB.) Ms. Hales responded minutes later, stating, “You would think that Larry would need to recuse himself, but” (*Id.*) And an e-mail from Mr. Nopar to Ms. Hales the following day illustrates the extent to which Ms. Hales was part of LSP’s inner circle with respect to its campaign to oppose Daley Farm’s project and the manner in which LSP hoped to use the perceived dirt on Mr. Greden to manipulate the composition of the board that would consider the Variance Application:

Cherie, I’d like us to keep the fact “not publicly mentioned to anyone but our closest loved ones” that Larry Greden might be Adam Greden’s relative and might not be able to vote on the Daley expansion. The Daley’s are counting on his vote, I’m sure. Let’s not let him step off the B of A and have a potential county board chair instead appoint another factory farm ally.

(*Id.*, at ex. AI.)

Cherie Hales again e-mailed Doug Nopar on November 29, 2018, to seek legal advice from LSP’s attorneys regarding Mr. Greden’s potential conflict so that she could avoid asking the county attorney about the issue. (Public Aff., at ex. AJ.) After MCEA indicated that “the county attorney may not necessarily see this conflict of interest as clear

and compelling,” Ms. Hales worked with LSP staff to craft a script for LSP members to contact Margaret Walsh (the chair of the board of adjustment at the time) directly about the issue. (*Id.*, at exs. AK-AL.)

Ultimately, the full extent of LSP’s strategy to manipulate the composition of the Winona County Board of Adjustment and Planning Commission with members it knew would oppose Daley Farm’s applications for a variance and a conditional use permit was conveniently described in an e-mail from Doug Nopar to Cherie Hales (and copied to others) on October 29, 2018:

Johanna and I talked last week about County appointments in January to the Planning and Zoning Commission (4 likely openings if Chris Meyer, Vince, [REDACTED BY LSP] go off), and to the Board of Adjustment (2 likely openings including [REDACTED BY LSP] going off. These two bodies will have an important say on the Daley Dairy expansion plans.

Vince has indicated that he does not want to serve a second two year term.

Of significant importance is who is named the next County board chair. It is the chair that names the Planning Commission members and potentially the Board of Adjustment members as well. Under the current rotation, that chair for 2019 would be Steve Jacob. However, that rotation was decided upon by the current county board, and they are under no obligation to continue that rotation given that there will certainly be a new county board in January (Pomeroy retiring). Historically, the County Board chair is elected at the first meeting in January. If our County board allies are elected [to] the Board in November, we’ll want to lobby them to make sure that neither Steve Jacob nor Marcia Ward are elected chair.

Here’s a proposal: 1) Encourage Kelley Stanage to re-apply for a 2nd two-year term on the Planning Commission; 2) Encourage LSP members [REDACTED BY LSP], Lynn Carlson, [and] Patrick Byron to re-apply for the Planning Commission (they have applied in the past and not been appointed). 3) Encourage LSP members [REDACTED BY LSP] and Wendy Larson to apply for the Board of Adjustment; 4) Encourage Cherie Hales to re-apply for the Board of Adjustment as an “urban” representative, as she

is moving to Winona. 5) Send an e-mail out to all Winona County LSP members, encouraging them to apply for these important posts.

(Public Aff., at ex. AM.)

VII. Daley Farm Applies for a Variance from the 1,500 Animal Unit Capacity Limit under the Winona County Zoning Ordinance.

Consistent with the procedures set forth in the Winona County Zoning Ordinance, Ben Daley, on behalf of Daley Farm, filed an application with the Winona County Board of Adjustment on November 16, 2018, requesting a “variance from [the] 1,500 animal unit capacity limit per feedlot” (the “**Variance Application**”). (Compl., at ¶ 32, ex. F; Answer, at ¶ 17.) This request was originally scheduled to be heard by the board of adjustment on December 20, 2018, but the hearing was delayed because the MPCA did not timely complete the environmental review process. (Admin. R. (Index #149) 1695-96; *see also* Public Aff., at exs. AH, AN.) The hearing was ultimately rescheduled for February 21, 2019. (Admin. R. (Index #149) 1727.)

Once the Variance Application was filed, Winona County staff began communicating information about the application (and the planned proceedings on the application) to Cherie Hales (in her capacity as a member of the Winona County Board of Adjustment). And acting as LSP’s internal mole within the county zoning apparatus, Ms. Hales repeatedly passed these official communications and information on to LSP to assist LSP in its opposition campaign against Daley Farm’s proposed Modernization Project. (Public Aff., at exs. AN-AP.)

VIII. While Daley Farm's Variance Application is Pending, Cherie Hales and LSP Conspire with County Commissioners to Stack the Winona County Board of Adjustment and Planning Commission with LSP Members Who Were Known to Oppose Daley Farm's Proposed Modernization Project.

As noted above, a key component of LSP's campaign to oppose Daley Farm's proposed Modernization Project was manipulating the membership of the Winona County Board of Adjustment and Planning Commission to ensure they were stacked with members who would oppose the project. (Public Aff., at ex. AM.) After Daley Farm submitted the Variance Application, Cherie Hales worked closely with a small group of other LSP activists to communicate with Marie Kovecsi, Chris Meyer, and Greg Olson (LSP's allies on the county board) to coordinate and implement LSP's strategy. (*Id.*, at ex. AQ-AU.) According to an e-mail communication sent by Doug Nopar on December 29, 2018, Commissioner Kovecsi was fully on board with LSP's plan:

Bobby and Barb, Marie is feeling quite confident about the board chair situation, and that Greg and Chris will be with her. She knows it's going to be a very difficult meeting, with Steve Jacob and Marcia Ward throwing a hissy fit.

Barb, Marie has confirmed that she'll meet with us on Friday at 8:45 at the Bluff Country Co-op meeting room in back. She wants to go over committee appointments with us. She is feeling quite strong and positive on Rachel Stoll. We need to figure out who else we want to invite to that meeting. Doesn't need to be a big meeting.[¹⁰]

¹⁰ During her first deposition in this case, which was taken before Plaintiffs obtained this communication from LSP, Ms. Kovecsi was directly asked and denied discussing appointments to the board of adjustment or planning commission with Doug Nopar or any other employees of LSP. (First Kovecsi Tr., at 50:19-50:22.) But after Daley Farm obtained LSP's document production and concrete evidence that such discussions had occurred, Commissioner Kovecsi admitted that she met with Mr. Nopar and LSP to discuss these appointments. (Second Kovecsi Tr., at 49:16-51:7.)

(*Id.*, at ex. AU.) Ms. Hales attended (or at least planned to attend) LSP's meeting with Commissioner Kovcesi to discuss and coordinate the appointments to the board of adjustment and planning commission. (*See id.*, at ex. AV.)

LSP's internal communications also indicate that Chris Meyer fully supported LSP's strategy to manipulate the county board's internal workings and the subsequent appointments to the board of adjustment and planning commission (although Commissioner Meyer was concerned that these manipulations not become public):

Barb and Bobby, just got off the phone with Chris. I can fill you in more when we talk. She's confident that, although it will be a very testy board meeting on January 8th, that she and Marie and Greg will prevail on the board chair issue. She is concerned about the issue being played out in the press before hand. Please don't share this via e-mail with others. Chris is real nervous about e-mail trace-ability, track-ability, etc.

(Public Aff., at ex. AT.) Greg Olson also supported LSP strategy: "Greg sounds totally solid and unwavering. A good call. He's expecting to hear from us this weekend on our committee recommendations." (*Id.*, at ex. AW.)

Ultimately, LSP's plan was successful, and on January 8, 2019, the Winona County Board of Commissioners elected Marie Kovcesi as Chair and appointed LSP's hand-picked candidates to the board of adjustment and planning commission. (Public Aff., at ex. AX.) According to an e-mail message that Barbara Sogn-Frank (LSP's Factory Farm Policy Organizer) sent to LSP's "peeps" – including Cherie Hales and Rachel Stoll – the following day, LSP attributed the appointments to the board of adjustment and planning commission to its efforts and believed these appointments to be a key victory in its campaign against Daley Farm's proposed Modernization Project. (Depo. Ex. 25.)

IX. Winona County Staff Unilaterally Expand the Scope of Daley Farm’s Variance Application and Issue Detailed “Recommendations.”

As noted above, Daley Farm filed its Variance Application on November 16, 2018, requesting a “variance from [the] 1,500 animal unit capacity limit per feedlot” (Compl., at ¶ 32, ex. F; Answer, at ¶ 17), and a public hearing on this application was eventually scheduled on February 21, 2019 (Admin. R. (Index #149) 1727). Prior to the scheduled hearing, the Winona County Attorney issued a memorandum to the board of adjustment dated February 12, 2019 (Admin. R. (Index #149) 1743-54), and the Winona County Planning Department issued a Staff Report dated February 13, 2019 (Admin. R. (Index #149) 1814-37).

In their memorandum and report, the Winona County Attorney and Winona County Planning Department unilaterally expanded the scope of the variance that Daley Farm actually requested to also include a variance from Section 3.2.3(2) of the Winona County Zoning Ordinance, which prohibits an expansion of nonconforming uses. (Admin. R. (Index #149) 1743, 1745, 1815; *see* Qualley Tr., at 26:19-27:6; McGinty Tr., at 17:21-18:20.) Daley Farm did not consent to this change to its Variance Application and denied that it required this additional variance. (First Hearing Tr., at 82:2-83:2; *see* Qualley Tr., at 27:7-27:9.) This Court subsequently agreed with Daley Farm that it did not require the additional variance from Section 3.2.3.2 of the Ordinance that county staff had unilaterally added to the Variance Application. (Order (Index #93).)

In addition to (purportedly) describing the variance that Daley Farm requested, the Staff Report provided a general overview of Daley Farm’s proposed Modernization

Project, the relevant factual background, and potentially relevant laws, rules, and ordinances. (Admin. R. (Index #149) 1814-28.) County staff also distributed draft Findings of Fact setting forth the staff's conclusions that the Variance Application should be denied. (Admin R. (Index #149) 1809-13.) But the factual background provided in the Staff Report and the facts and analysis in the recommended findings were necessarily incomplete because these documents were compiled more than a week before the public hearing and before receiving Daley Farm's submission. In other words, the Staff Report and recommended findings were based on an incomplete factual record.

X. **Cherie Hales and Rachel Stoll Continue to Hide Their Extensive Activities on Behalf of LSP to Oppose Daley Farm's Proposed Modernization Project.**

One week before the scheduled hearing, Daley Farm raised concerns about the public comments that Cherie Hales, Wendy Larson, and Rachel Stoll had submitted to the MPCA during the environmental review process. Daley Farm specifically asserted that these public comments "clearly indicate that Ms. Hales and Ms. Larson have prejudged the factual issues" related to the Variance Application and "will not be impartial decisionmakers." Daley Farm therefore demanded "that Ms. Hales and Ms. Larson recuse themselves from any participation in the hearing." (Admin. R. (Index #149) 1838-45.)

This was not the first time that Daley Farm had raised these concerns. In fact, Shelly DePestel (one of the partners of Daley Farm) spoke during the public comment section of the December 11, 2018, meeting of the Winona County Board of Commissioners and raised these same concerns before the county board reappointed Cherie Hales or

appointed Wendy Larson and Rachel Stoll to the Winona County Board of Adjustment. (Winona County (Government), *12 11 2018 CB meeting*, YouTube (Jan 10, 2020), https://www.youtube.com/watch?v=7e_EJfSKsiE (located at 2:10-3:23 of the video); Public Aff., at ex. AR.)

Mere hours before the scheduled hearing, the Winona County Attorney issued another memorandum concluding that members of the board of adjustment did not need to recuse themselves as long as “they can state for the record that they are able to set aside their personal opinions and relationships and fairly and impartially decide the matter solely on the record before them” and “disclose any outside conversations, independent review, and other discussions they may have heard or engaged in outside of the formal BOA proceedings in the Daley Farms variance request.” (Admin. R. (Index #149) 1901-06; *see* First Hearing Tr., at 7:13-7:22.)

In order to effectuate the procedures outlined in the County Attorney’s second memorandum, Stephanie Nuttall (an Assistant Winona County Attorney) asked each of the board of adjustment members at the start of the public hearing on February 21, 2019, whether they “had or heard conversations with anyone else about this particular variance request prior to this meeting. Ms. Nuttall subsequently questioned Cherie Hales and Rachel Stoll about their connections and involvement with LSP. Ms. Hales and Ms. Stoll each downplayed their connections and involvement with LSP and made misleading statements that failed to honestly disclose their extensive involvement in LSP’s advocacy efforts to oppose Daley Farm’s proposed Modernization Project. (First Hearing Tr., at

9:12-11:20, 18:2-18:18, 21:1-21:16, 23:5-23:22, 24:22-25:11; *see* Order Granting Summ. J. & for Remand (Index #80), at 5.)

XI. Cherie Hales, Wendy Larson, and Rachel Stoll Vote to Deny Daley Farm’s Variance Application.

At the conclusion of the public hearing on February 21, 2019, the members of the Winona County Board of Adjustment discussed, and then voted on, whether Daley Farm’s Variance Application satisfied each of the eight variance criteria set forth in the Winona County Zoning Ordinance. The board subsequently adopted written Findings of Fact its findings and decision. Specifically, with respect to each of the variance criteria, the board of adjustment found as follows:

1. The variance request is not in harmony with the intent and purpose of the ordinance. . . .
2. The variance request is consistent with the comprehensive plan. . . .
3. The applicant has not established that there are practical difficulties in complying with the official control and proposes to use the property in a reasonable manner. . . .
4. The variance request is due to special conditions or circumstances unique to the property not created by owners of the property since enactment of the Ordinance. . . .
5. The variance will not alter the essential character of the locality nor substantially impair property values, or the public health, safety, or welfare in the vicinity. . . .
6. Economic considerations are the only claimed practical difficulties. It must be shown that economic considerations alone do not constitute practical difficulties. . . .
7. The variance cannot be alleviated by a reasonable method other than a variance and is the minimum variance which would alleviate the practical difficulty. . . .

8. The request is not a use variance and does not have the effect of allowing any use that is not allowed in the zoning district, permit a lower degree of flood protection than the regulatory flood protection elevation or permit standards lower than those required by State Law. . . .

Based on their findings that the first, third, and sixth criteria for a variance were not satisfied, the board—by a three-to-two vote, with Ms. Hales, Ms. Larson, and Ms. Stoll voting in favor of the motion—denied Daley Farm’s Variance Application. (Compl., at ¶¶ 61-64, ex. H; Answer, at ¶ 29; First Hearing Tr., at 163:1-223:18.)

XII. On Appeal, this Court Declares the Winona County Board of Adjustment’s Initial Denial of Daley Farm’s Variance Application Void and Remands the Application for Reconsideration by the Board of Adjustment.

Plaintiffs appealed the denial of the Variance Application pursuant to Minnesota Statutes § 394.27, subdivision 9, and asserted additional claims for deprivation of Plaintiffs’ constitutional right to due process of law. (*See generally* Compl.) At the conclusion of a summary judgment hearing on December 21, 2020, this Court ruled from the bench that “[t]his decision made by the Board of Adjustment is so severely tainted by members of the Board of Adjustment that it can’t stand.” (Hearing Tr. (Index #88), at 39:9-39:12.) As the Court explained more fully:

Here we have three members of the Land Stewardship Project who are on the Board of Adjustment and not by coincidence. I think the record is clear that they got placed on the Board of Adjustment in a conscious manner with aforethought to oppose a particular application for variance that was going to come before them, and this just can’t be. It can’t work that way.

I want to back up and make clear that I’m not criminalizing anybody here. I’m not faulting people that are advocates for good cause. I’m not faulting the Land Stewardship Project for being a zealous advocate for the environment or those individuals who volunteer and work for little or no compensation to try to do good things. We experience them at all sorts of different levels.

I was a school board member for almost two decades. You know, parent organizations that sought to get members on the school board was a proper thing to do. But a school board, a county board, a legislature are policy-making bodies. The Board of Adjustment is an adjudicative body. By their own discussions in the record they say, we can't change ordinances. We don't make ordinances. And they don't. They listen to cases and make decisions based on what someone else has decided to be the rules and the law. But in that regard they are to be fair and impartial.

And while here there was some type of perfunctory disclaimer through the County Attorney's Office that, Oh, I'll be fair and impartial when three members of the five have publicly advocated against the applicant in this case at the MPCA level, and it doesn't take all three of them, just even one of them, has done that, has shown a zealous advocacy for a position, there's just no way that person then can be a fair and impartial judge hearing this case.

* * * *

Now, again, I applaud people that spend their time and effort to work on causes that are worthy, but they have to understand their roles. And in our Democratic process lately there's been a lot of doubt expressed publicly about the integrity of our public institutions and people clearly are losing faith in them. Whether it's something as high as the federal government or way down local, a local county board of adjustment, we have rules in place so that everyone, everyone gets treated fairly. Even if their case does not have merit, when they come in at the start of that process, they are entitled under our rules, under our whole Democratic process to fair and impartial hearings and processes, and that clearly could not happen in this instance. And if we allow it to go and say, Well, gee, they said they were going to be fair when clearly they could not be, well, we're just going to add to the skepticism, the cynicism, the loss of faith in these public institutions. We've got to play by the rules, folks, and those rules were broken in this instance.

(*Id.*, at 40:10-41:21, 42:14-43:9.) The Court then requested further briefing from the parties on the appropriate remedy and took the remaining issues under advisement. (*Id.*, at 43:10-44:13.)

This Court issued a written decision on January 25, 2021, memorializing its earlier decision on the record. The Court described its prior ruling as follows:

Following a lengthy oral argument on the merits of the Motions, the Court orally ruled from the bench [that] the Board of Adjustment's decision in denying Plaintiffs' variance application was so severely tainted by the conduct of three of the Board members that it could not be sustained. In making that finding, the Court noted that the Board of Adjustment is a quasi-judicial body required by law to grant applicants due process and a fair and impartial decision making processes, and that, even though there was an on the record disclaimer with the Winona County Attorney's Office wherein all Board members pledged to be fair and impartial, that didn't negate that three members publically advocated against the project at the MPCA and continued their zealous advocacy throughout the variance process.

(Order Granting Summ. J. & for Remand (Index #80), at 1-2.) The Court then ordered "[t]hat the Winona County Board of Adjustment's denial of Daley Farm's Variance Application is declared void and Daley Farm's Variance Application is remanded for reconsideration by the current, 2021 Winona County Board of Adjustment." (*Id.* at 2.) In deciding to remand the application, the Court noted that the composition of the board of adjustment had changed and that "Philip Schwantz will be the only member remaining on the Board from the group who voted on the original application." (*Id.* at 7.)

XIII. The Court of Appeals Declines to Exercise Discretionary Review of this Court's Order Remanding Daley Farm's Variance Application to the Winona County Board of Adjustment.

Following additional proceedings to clarify that Daley Farm does not need a variance from the nonconforming use provisions of the Ordinance (*see* Order (Index #93)), Daley Farm petitioned for discretionary review of the remand remedy. (*See generally* Pet. for Discretionary Review (Index #95).) The court of appeals denied this request on August 24, 2021. (Order (Index #99).)

XIV. Winona County Delays Reconsideration of Daley Farm’s Remanded Variance Application for Several Months.

After the court of appeals denied Daley Farm’s request for discretionary review, Daley Farm and Winona County (each through its respective legal counsel) began discussing the timing and procedures for the remand proceedings. On September 21, 2021, the County informed Daley Farm that it would schedule a hearing on the remanded Variance Application for December 2, 2021. Daley Farm responded and reiterated its position – which had previously been conveyed to the County by telephone – that “this matter should come before the board of adjustment on remand as soon as possible” and “before December 2.” (Public Aff., at ex. BB.)

Daley Farm reiterated its concerns about the timing of the remand proceedings on October 19, 2021:

I understand that the Winona County Board of Adjustment intends to consider Daley Farm’s variance application at a special meeting on December 2, 2021, at the Riverport Event Center. The district court finally determined all issues related to the appeal and remand on June 29, 2021, and the court of appeals denied Daley Farm’s Petition for Discretionary Review of the remand order on August 24, 2021. As I have previously communicated to Mr. Reuvers, Daley Farm requested that its variance application come before the board of adjustment as soon as possible after the court of appeals declined to review the remand order. Daley Farm is deeply disappointed that the county elected to further delay the proceedings until December, which is more than 3 years after the variance application was filed, and does not believe that this delay was necessary or appropriate.

(Admin. R. (Index #156) 2805.) Daley Farm also objected to the County holding a second public hearing and indicated that the remanded application should instead be decided based on the existing record. (*Id.*) On November 16, 2021, Winona County agreed that

the application would be decided based on the existing record, but the date of the board of adjustment meeting remained the same. (Admin. R. (Index#156) 2808-09.)

XV. In Advance of the Scheduled Board of Adjustment Meeting, Winona County Publishes a Biased Staff Report on the Remanded Variance Application.

In early October 2021, Kay Qualley (the Director of the Winona County Planning and Environmental Services Department) directed Carly McGinty (the Winona County Feedlot Officer) to prepare an updated Staff Report on Daley Farm's Variance Application in anticipation of the board of adjustment's reconsideration of the application on remand. (McGinty Tr., at 21:21-22:3; Depo. Ex. 122.) As part of these instructions, Ms. Qualley stated that the updated Staff Report should "be substantially the same as the previous one, notwithstanding the new information." (Depo. Ex. 122 (emphasis added).) Ms. Qualley indicated that the direction to disregard the new information and stick to the original report came from Paul Reuvers, the outside attorney who has represented Winona County throughout this litigation. (*Id.*)

But Carly McGinty believed that she "was supposed to take in the whole record" and should therefore update the analysis of the variance criteria from the original report to reflect the new information that had come in after the original staff report was prepared. In particular, Ms. McGinty identified three criteria for which she believed the staff analysis and recommendations from the original report should be changed, based on the new information received after the original report was prepared, to reflect that Daley Farm's Variance Application satisfied these criteria. (McGinty Tr., at 22:17-23:18.)

On October 29, 2021, Carly McGinty sent her draft of the updated staff report to Kay Qualley and Stephanie Nuttall (the Assistant Winona County Attorney who handles zoning matters). The rough draft that Ms. McGinty prepared and circulated included several updates to the original staff report based on the new information that the County had received since the original report was prepared, including changes to the analysis of three of the variance criteria to indicate that Daley Farm's Variance Application satisfied these criteria. (Depo. Ex. 123.)

Although Kay Qualley admitted that new information had been received after the first staff report was prepared (Qualley Tr., at 40:12-42:3), she did not agree with Carly McGinty's updates to the staff report. As Ms. McGinty testified during her deposition:

Q. At some point in the course of working on the updated staff report, did some issues or conflict arise between yourself and Ms. Qualley?

A. We had disagreements on the staff analysis.

Q. Okay. Can you describe for me what those disagreements were.

A. I believed that staff analysis numbers 1, 4 and 7 should be in favor, or that they met the criteria. And she did not agree with that analysis.

Q. In the original staff report back in 2019, the recommendation was that those three criteria were not satisfied, correct?

A. Correct.

Q. Why did you believe - or why did your conclusion about those criteria change as you were preparing the updated staff report?

A. My opinion changed on those criteria because of the removing of the nonconforming use that the judge required, and taking in the whole record from the original Board of Adjustment hearing.

Q. You stated that Ms. Qualley had disagreed with your assessment?

A. Correct.

Q. Did she express to you why she disagreed with your conclusions?

A. Not really, no.

Q. What do you recall her expressing?

A. I recall that she said that Paul Reuvers did not agree with it, and that was her reasoning. She didn't go into details on why.

Q. Did Ms. Qualley give you the opportunity to explain why you believed the new information that had been presented at the first hearing warranted a change in those conclusions?

A. So Kay Qualley and I had a meeting in her office to go over the staff report. I tried to explain my side, but it was a one-sided conversation.

(McGinty Tr., at 32:1-33:12.) Ms. McGinty subsequently reiterated her belief that Ms. Qualley would not consider Ms. McGinty's updates to the staff analysis because Ms. Qualley "thought that it was against Mr. Reuvers' opinion or his direction he wanted the staff report to go." (*Id.*, at 34:1-34:4.) In a subsequent e-mail message describing this meeting, Ms. Qualley confirmed Ms. McGinty's belief that Paul Reuvers was dictating the content of the updated staff report:

You came into my office angry and were not at your best. I regret to inform you, but Paul Reuvers had already looked over your report and rejected it as making changes he had not requested and did not find supportable. I still wanted to go through it with you as a professional courtesy

(Depo. Ex. 125.)

Following their meeting, and the significant changes that Kay Qualley made to the updated staff report, Carly McGinty was no longer comfortable with the report going out

under her name and asked to have her name removed from the report. (McGinty Tr., at 35:8-35:17; Depo. Ex. 125.) As Ms. McGinty testified in her deposition:

Q. Did you feel that the report going out with your name on it would impact your interactions with Winona County farmers in the future?

A. Yes.

Q. Why did you believe that?

A. I believed that some of the staff report and the staff analysis no longer made sense to me. And I know that in Winona County there is a pretty good divide between people that were for and against the Daleys. And I had worked on relationships with everybody. And I believed that my staff report - my updated staff report was fair to the information that was presented.

Q. Okay. And after the changes that Ms. Qualley made to the report, did you feel that the report was no longer fair?

A. That's how I felt, yes.

Q. And what about the changes made you feel that the report was no longer fair?

A. I felt like it didn't take into account what we were remanded to do with the judge. And it didn't take into account the previous Board of Adjustment hearing.

(McGinty Tr., at 36:12-37:7.) And as the updated staff report was being finalized, Ms. Qualley directed Ms. McGinty to "jettison" her prior drafts of the updated report— Ms. McGinty understood this direction to mean that she should "get rid of all the other versions of the report." (McGinty Tr., at 37:9-37:23; Depo. Ex. 126.)

Ultimately, Kay Qualley and Winona County "Planning Staff" issued the updated Staff Report and proposed Findings of Fact on November 15, 2021. (Admin. R. (Index #156) 2813-43.)

XVI. Marie Kovecsi and LSP's Other "Allies" on the Winona County Board of Commissioners Continue to Appoint Opponents of Daley Farm's Proposed Modernization Project to the Board of Adjustment.

Between the Winona County Board of Adjustment's initial denial of Daley Farm's Variance Application on February 21, 2019, and this Court's order remanding the application to the board for reconsideration, the composition of the board of adjustment changed significantly. At the time of the remand, the board of adjustment was comprised of Kelsey Fitzgerald, Elizabeth Heublein, Jordan Potter, Robert Redig, and Phillip Schwantz. Mr. Redig, however, ultimately recused himself from considering Daley Farm's remanded Variance Application because he "was outspoken against the variance the first time it was heard." (Admin. R. (Index #156) 2955; Potter Tr., at 15:12-15:22.)

Kelsey Fitzgerald was appointed to the Winona County Board of Adjustment in January 2021. (Fitzgerald Tr., at 19:11-19:14; Public Aff., at ex. AZ.) She has been a member of LSP for more than 10 years. (Fitzgerald Tr., at 10:18-11:4.) Prior to applying for the board of adjustment, Ms. Fitzgerald was familiar with the positions that LSP advocated in opposition to Daley Farm's proposed Modernization Project, agreed with those positions, and may have signed petitions circulated by LSP in opposition to Daley Farm's proposed Modernization Project. (*Id.*, at 11:22-13:25.) Doug Nopar (an LSP activist) recruited Ms. Fitzgerald to apply for the Winona County Board of Adjustment based on her views about agriculture. (*Id.*, at 21:5-21:23; Confidential Aff., at ex. CJ.)

Elizabeth Heublein was appointed to the Winona County Board of Adjustment in January 2020. (Heublein Tr., at 20:3-20:25; Public Aff., at ex. AY.) At the Winona County Board of Commissioners meeting at which Dr. Heublein was appointed, Marie Kovecsi

stated that Dr. Heublein “has some very careful reasons for wanting to join this committee.” (Winona County (Government), *Winona County Board Meeting 01-07-2020*, YouTube (Jan 10, 2020), https://www.youtube.com/watch?v=9fx9H_oetfg (located at 1:01:34-1:01:55 of the video)).

Marie Kovecsi’s odd choice of words – that Elizabeth Heublein had “very careful reasons” to join the board of adjustment – is significant given Commissioner Kovecsi’s extensive connections with LSP. Commissioner Kovecsi was a member of LSP for several years and, while serving as a county commissioner, actively participated in LSP’s “narrative development” process to shape the organization’s public perception and lobbied a state legislator on behalf of LSP. (First Kovecsi Tr., at 10:11-10:14, 14:19-15:8, 24:24-28:15, 31:13-33:21; Depo. Exs. 2, 7.) LSP specifically enlisted Commissioner Kovecsi to participate in their advocacy efforts by contacting the Commissioner of the MPCA to ask for an extension of the public comment period on Daley Farm’s EAW and modified NPDES permit – Commissioner Kovecsi responded that she “[c]alled him as soon as our Board meeting broke up.” (Public Aff., at ex. M (also marked as Depo. Ex. 109); Second Kovecsi Tr., at 23:23-28:7.) Later, after attending a Township Officers Association meeting at which Daley Farm’s proposed Modernization Project was discussed, Commissioner Kovecsi affirmatively contacted LSP to make sure LSP was aware of the discussion as part of its advocacy efforts. (Public Aff., at ex. AR (also marked as Depo. Ex. 116); Second Kovecsi Tr., at 57:11-58:21.)

Most significantly, Marie Kovecsi directly participated in LSP’s plan to manipulate the composition of the Winona County Board of Adjustment prior to the first board of

adjustment hearing on Daley Farm's Variance Application. In an internal LSP communication on December 29, 2018, Doug Nopar described a recent telephone conversation with Commissioner Kovecsi the chair of the county board and appointments to the board of adjustment and planning commission:

Bobby and Barb, Marie is feeling quite confident about the board chair situation, and that Greg and Chris will be with her. She knows it's going to be a very difficult meeting, with Steve Jacob and Marcia Ward throwing a hissy fit.

Barb, Marie has confirmed that she'll meet with us on Friday at 8:45 at the Bluff Country Co-op meeting room in back. She wants to go over committee appointments with us. She is feeling quite strong and positive on Rachel Stoll. We need to figure out who else we want to invite to that meeting. Doesn't need to be a big meeting.

(Public Aff., at ex. AU; Confidential Aff., at ex. CG; Second Kovecsi Tr., at 46:4-48:4; *see also* Public Aff., at exs. AQ, AV.) During her first deposition on October 30, 2019 – which was less than a year after the events in question but before Plaintiffs obtained the cited documents from LSP – Commissioner Kovecsi denied that she discussed any of the appointments to the board of adjustment or planning commission with Doug Nopar or LSP. (First Kovecsi Tr., 50:19-50:22.) But after LSP's document production put the lie to her prior testimony, Commissioner Kovecsi admitted that she met with Mr. Nopar and LSP at the Bluff Country Co-op to discuss these appointments. (Second Kovecsi Tr., at 49:16-51:7.)

According to its internal documents, LSP considered Marie Kovecsi (as well as Chris Meyer and Greg Olson) to be its allies. (Confidential Aff., at ex. CG.) Later, LSP specifically identified Commissioner Kovecsi (both by name and position as a county

commissioner) as a key member in Winona County who had been directly involved in LSP's campaign to oppose Daley Farm's proposed Modernization Project and who had become disillusioned by LSP's lack of support during and after the prior proceedings in this litigation. (Confidential Aff., at exs. CH-CI.)

XVII. The Winona County Board of Adjustment Is Evenly Divided on Competing Motions to Approve and to Deny Daley Farm's Remanded Variance Application.

Daley Farm's remanded Variance Application was reconsidered by the Winona County Board of Adjustment on December 2, 2021. (Admin. R. (Index #156) 2955.) Prior to the meeting, the board members received and reviewed the record from the prior public hearing on the application. (Qualley Tr., at 36:9-36:20; Fitzgerald Tr., at 29:14-30:7; Heublein Tr., at 25:5-25:18; Potter Tr., at 16:16-18:7.) After hearing presentations from county staff and Daley Farm, the board of adjustment discussed and voted on each of the eight variance criteria set forth in the ordinance. (Admin. R. (Index #156) 2955-61; Second Hearing Tr., at 71:24-118:21.) County staff subsequently prepared written findings of fact that Jordan Potter (who was serving as chair of the board at this meeting) signed and that the County subsequently sent to Daley Farm. (Admin. R. (Index #156) 3109-18; Potter Tr., at 24:6-25:3, 25:22-26:8.)

With respect to seven of the eight variance criteria, the Winona County Board of Adjustment found that Daley Farm's Variance Application satisfied the criteria. Specifically, the board found as follows with respect to these criteria:

1. The variance request is in harmony with the intent and purpose of the ordinance. . . .

2. The variance request is consistent with the comprehensive plan. . . .
3. The applicant has established that there are practical difficulties in complying with the official control and proposes to use the property in a reasonable manner. . . .
4. The variance request is due to special conditions or circumstances unique to the property not created by owners of the property since enactment of the Ordinance. . . .
5. The variance will not alter the essential character of the locality nor substantially impair property values, or the public health, safety, or welfare in the vicinity. . . .

* * * *

7. The variance can[not] be alleviated by a reasonable method other than a variance and is the minimum variance which would alleviate the practical difficulty. . . .^[11]
8. The request is not a use variance and does not have the effect of allowing any use that is not allowed in the zoning district, permit a lower degree of flood protection than the regulatory flood protection elevation or permit standards lower than those required by State Law. . . .

(Admin. R. (Index #156) 3113-14 (emphasis in original); *accord* Second Hearing Tr., at 71:24-95:15, 105:10-109:12.)

With respect to the remaining criterion – “[e]conomic considerations alone do not constitute practical difficulties” – the board of adjustment voted two-to-two (with Kelsey Fitzgerald and Elizabeth Heublein voting in favor of the motion and Jordan Potter and Phillip Schwantz voting against the motion) to accept the staff’s recommendation that

¹¹ During the board of adjustment meeting, a motion was made by Phillip Schwantz and seconded by Jordan Potter to find that “the variance cannot be alleviated by a reasonable method other than a variance and is the minimum variance which would alleviate the practical difficulty” – this motion was adopted by a three-to-one vote. (Second Hearing Tr., at 106:8-108:23.) The written findings of fact inadvertently neglected to change the word “can” (as recommended in the Staff Report) to “cannot” (as adopted by the board).

this criterion was not satisfied. (Second Hearing Tr., at 99:25-101:13.) In a mirror image of the first vote, the board also split evenly on a separate motion to find that “economic considerations are not the sole motivation behind the Daley Farm’s proposed project.” (*Id.*, at 102:23-105:9.) Thus, the board did not adopt any finding with respect to this criterion. Despite the board’s failure to adopt any finding on this criterion, county staff, at the direction of legal counsel, inserted language in the written findings language stating that “[e]conomic considerations are the only claimed practical difficulties.” (Admin. R. (Index #156) 3114 (emphasis in original); Qualley Tr., at 76:21-77:13, 78:17-79:23.) To be clear, this finding was never adopted by the board of adjustment.

At the conclusion of the meeting, the board of adjustment again split two-to-two on motions to approve and to deny the variance (with Jordan Potter and Phillip Schwantz voting for the variance and Kelsey Fitzgerald and Elizabeth Heublein voting against the variance). (Second Hearing Tr., at 114:5-114:14, 118:12-118:19.) If it were timely (*see infra* pp. 45-49), this action would have constituted a denial of the application. *See* Minn. Stat. § 15.99, subd. 2(b).

SUMMARY JUDGMENT STANDARD

Rule 56.01 of the Minnesota Rules of Civil Procedure requires the district court to grant summary judgment where “the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.” The rule effectuates the stated purpose of the Minnesota Rules of Civil Procedure to “secur[e] a just, speedy, and inexpensive determination of an action” in cases where the facts are

undisputed “and a party is entitled to judgment under the law applicable to such facts.”
DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997); *see* Minn. R. Civ. P. 1.

ARGUMENT

“ ‘Zoning’ is the division of land into distinct districts and the regulation of certain uses and developments within those districts.” 83 Am.Jur.2d *Zoning and Planning* § 3; *accord Black’s Law Dictionary* 1856 (10th ed. 2014). Zoning ordinances are established to regulate the use and development of private land “ ‘in order to promote public health, safety, welfare, morals, and aesthetics.’ ” *In re Stadsvold*, 754 N.W.2d 323, 329 (Minn. 2008) (quoting *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980)). But zoning ordinances create an inevitable tension with property rights, and in balancing the rights of citizens and the rights of municipalities, courts must respect the right of citizens to use and enjoy their private property and protect such rights “from unreasonable zoning restrictions.” *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 731 (Minn. 2010) (quoting *Simplex Technologies, Inc. v. Town of Newington*, 766 A.2d 713, 716-17 (N.H. 2001)); *accord Arcadia Dev. Corp. v. City of Bloomington*, 125 N.W.2d 846, 225-26 (Minn. 1964) (“As a useful rule it has long been stated that a city must act ‘reasonably,’ otherwise, its ordinances could not have the effect of overcoming the property rights of others. Its acts must be calculated to effect its legitimate purposes and goals without going beyond the demands of the occasion.”).

Recognizing the need to balance these competing rights, and in order “to provide ‘the opportunity for amelioration of unnecessary hardships resulting from the rigid enforcement of a broad zoning ordinance,’ ” zoning ordinances allow “variances” from

the strict requirements of those ordinances. *Stadsvold*, 754 N.W.2d at 329 (quoting *Curry v. Young*, 173 N.W.2d 410, 415 (Minn. 1969)); accord *Arcadia Dev.*, 125 N.W.2d at 228. A “variance” includes “any modification or variation of official controls where it is determined that, by reason of exceptional circumstances, the strict enforcement of the official controls would cause unnecessary hardship.” Minn. Stat. § 394.22, subd. 10 (2020). A county board of adjustment may grant a variance when the variance is “in harmony with the general purposes and intent of the official control” and “consistent with the comprehensive plan,” and when “the applicant for the variance establishes that there are practical difficulties in complying with the official control.” Minn. Stat. § 394.27, subd. 7 (2020). “ ‘Practical difficulties’ . . . means that the property owner proposes to use the property in a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality.” *Id.*

A board of adjustment’s proceedings on a variance request are quasi-judicial in nature because the decision operates “directly on the particular interests of the applicant” rather than on the public as a whole. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 715-16 (Minn. 1978); accord *Interstate Power Co., Inc. v. Nobles County Bd. Of Comm’rs*, 617 N.W.2d 566, 574 (Minn. 2000); *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981).

In order to maintain public confidence in administrative agencies and actions, “ [t]he maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance.’ ” *Juster Bros.*,

Inc. v. Christgau, 7 N.W.2d 501, 506 (Minn. 1943) (quoting *Morgan v. U.S.*, 304 U.S. 1, 22 (1938)).

The due process of law clauses of our state and federal constitutions are standing guarantees of substantial justice, and prevent such caprice or arbitrary action as would prevent a litigant from having a substantially fair trial. . . . While a statute may confer upon an administrative board exemption from rules of evidence or procedure, it cannot authorize exemption from the due process clause, which is a permanent safeguard against the recurrence of abuses such as characterized the Court of Star Chamber.

Id. at 507; accord *Morgan*, 304 U.S. at 14 (“[I]n administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play.”). “A fair hearing is a fundamental requisite.” *Juster Bros.*, 7 N.W.2d at 508.

“The basic rights of procedural due process required in [a quasi-judicial zoning proceeding] are reasonable notice of hearing and a reasonable opportunity to be heard.” *Barton Contracting*, 268 N.W.2d at 716. “Parties to an administrative proceeding are [also] entitled to a decision by an unbiased decisionmaker.” *Buchwald v. Univ. of Minnesota*, 573 N.W.2d 723, 727 (Minn. Ct. App. 1998); accord *Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. Ct. App. 2003) (“The center correctly states that its constitutional due process protections include the right to an ‘impartial’ decisionmaker.”); *Deli v. Univ. of Minnesota*, 511 N.W.2d 46, 50 (Minn. Ct. App. 1994) (recognizing that due process requirements are satisfied by, *inter alia*, “a hearing before an impartial board or tribunal”).

I. Because the Winona County Board of Adjustment Did Not Deny Daley Farm’s Variance Application within 60 Days after this Court Remanded the Application to the Board, the Variance Application Was Approved by Operation of Law under Minnesota Statutes § 15.99.

In Count VII of their Supplemental Complaint, Plaintiffs assert that Daley Farm’s Variance Application was approved by operation of law under the 60-day rule in Minnesota Statutes § 15.99 (2022). (Supplemental Compl. (Index #108), at ¶¶ 148-54.) Because the material facts relevant to this claim are not disputed and demonstrate that Winona County did not act on Daley Farm’s remanded Variance Application within the statutory deadline, Daley Farm is entitled to a summary judgment declaring that the Variance Application was automatically approved by operation of law and directing Winona County to take all actions necessary to issue the variance requested in such application.

Minnesota Statutes § 15.99, subdivision 2(a), provides that “an agency^[12] must approve or deny within 60 days a written request^[13] relating to zoning” and that “[f]ailure of an agency to deny a request within 60 days is approval of the request.”¹⁴ This statute is intended “to ‘establish[] time deadlines for local governments to take action on

¹² The term “agency” expressly defined in the statute to include a “county.” Minn. Stat. § 15.99, subd. 1(b). Thus, Winona County is an “agency” to whom the statutory 60-day rule applies.

¹³ The term “request” is defined in the statute to include “a written application related to zoning,” Minn. Stat. § 15.99, subd. 1(c), and prior cases “have applied the sixty-day rule to special-use permits, conditional-use permits, variances, and site-plan approval that relate specifically to zoning.” *Advantage Capital Management v. City of Northfield*, 664 N.W.2d 421, 427 (Minn. Ct. App. 2003) (emphasis added). Thus, Daley Farm’s Variance Application is a “request” to which the statutory 60-day rule applies.

¹⁴ Similarly, Section 5.6.3 of the Winona County Zoning Ordinance also requires the board of adjustment to “reach a decision [on a variance request] consistent with the time table set forth in Minnesota Statutes 15.99 (60 Day Rule).”

zoning applications,' " *Advantage Capital Mgmt. v. City of Northfield*, 664 N.W.2d 421, 425, 427 (Minn. Ct. App. 2003) (quoting *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)), and "to keep government agencies from taking too long in deciding issues like the one in question," *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. Ct. App. 2004) (internal quotation marks omitted). Accordingly, the Minnesota Supreme Court has described the 60-day deadline in the statute as "definitive," and prior cases "have strictly enforced the 60-day rule by consistently holding that an agency's failure to comply with the section 15.99 timeline results in automatic approval of the request at issue." *Breza v. City of Minnetrista*, 725 N.W.2d 106, 113 (Minn. 2006).

The 60-day statutory deadline begins to run upon "the agency's receipt of a written request containing all information required by law or by a previously adopted rule, ordinance, or policy of the agency, including the applicable application fee." Minn. Stat. § 15.99, subd. 3(a). But this time limit "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 for such process "make it impossible to act on the request within 60 days." *Id.*, at subd. 3(d). Under these circumstances, "the deadline is extended to 60 days after completion of the last process required in the applicable statute, law, or order." *Id.*¹⁵

The material facts regarding the application of the 60-day rule are not disputed. Ben Daley, on behalf of Daley Farm, initially filed the Variance Application on November

¹⁵ The statute also provides that "[a]n agency may extend the time limit in subdivision 2 before the end of the initial 60-day period by providing written notice of the extension to the applicant." Minn. Stat. § 15.99, subd. 3(f). In this case, however, the County did not send the required notice to extend the 60-day deadline. (McGinty Tr., at 21:12-21:20.)

16, 2018, and the MPCA issued a negative declaration on the need for an environmental impact statement for Daley Farm’s proposed Modernization Project on January 4, 2019. (Compl., at ¶¶ 18, 32, exs. D, F; see Answer, at ¶¶ 11, 17.) The Winona County Board of Adjustment initially denied Daley Farm’s Variance Application on February 21, 2019. (Compl., at ¶¶ 63-64, ex. H; Answer, at ¶ 29.) But on January 25, 2021, this Court declared the Winona County Board of Adjustment’s initial denial of Daley Farm’s Variance Application “void” and remanded the application to the Winona County Board of Adjustment for reconsideration. (Order Granting Summ. J. & for Remand (Index #80), at p. 2, ¶ 2.)

When this Court declared the initial denial of Daley Farm’s Variance Application to be “void,” the board of adjustment’s prior action was rendered “[o]f no legal effect.” *Black’s Law Dictionary* 1805 (10th ed. 2014) (defining “void”). And when an administrative action is reversed by a reviewing court, the necessary effect of such reversal is to negate such action and render it void *ab initio*. *Kunze v. Korolchuck*, 349 N.W.2d 337, 338 (Minn. Ct. App. 1984); see *Black’s Law Dictionary* 1805 (defining “void ab initio” to mean “[n]ull from the beginning”). Thus, this Court’s prior decision left Daley Farm’s original Variance Application, which was filed on November 16, 2018, sitting with no action by Winona County to approve or deny this written request relating to zoning.

Daley Farm subsequently asked the Minnesota Court of Appeals for discretionary review of the remand remedy. (See generally Pet. for Discretionary Review (Index #95).) The court of appeals denied this request on August 24, 2021. (Order (Index #99).) Nonetheless, the Winona County Board of Adjustment did not act on the remanded

Variance Application until December 2, 2021 – i.e., 311 days after this Court rendered the initial denial of Daley Farm’s Variance Application “void” and remanded the application to the board of adjustment, and 100 days after the court of appeals declined to review the remand order. (Admin. R. (Index #156) 2955.) During this interim period after the court of appeals denied discretionary review of the remand remedy, Daley Farm repeatedly requested that the board of adjustment consider the remanded application as soon as possible and objected to Winona County’s delay in reconsidering the application. (Public Aff., at ex. BB; Admin. R. (Index #156) 2805.)

Applying the undisputed facts to the applicable law, the 60-day deadline for Winona County to act on Daley Farm’s Variance Application began to run on January 4, 2019, when the MPCA issued a negative declaration on the need for an environmental assessment worksheet and lapsed on March 5, 2019. Although the Winona County Board of Adjustment’s initial denial of the Variance Application on February 21, 2019, would have satisfied the statutory deadline, such action was declared “void” and is therefore of no legal effect. Thus, under a strict reading of the applicable law, the initial denial could not satisfy the statutory requirement, and Daley Farm’s Variance Application was approved by operation of law as of March 6, 2019.

But the Court does not need to go so far in this case. Although the statutory provisions do not expressly extend, toll, or restart the 60-day deadline when a denial of zoning request is subsequently reversed and declared void, the Minnesota Court of Appeals has recognized that a similar 60-day deadline in a county ordinance applies following a remand of a zoning request. *In re McDuffee*, No. A07-1053, 2008 WL 2492323,

at *3 (Minn. Ct. App., June 24, 2008). This decision implicitly recognizes that a remand constitutes a new “receipt” of the zoning request or that the statutory deadline is equitably tolled or reset when an initial denial of a request is later found to be invalid.

Applying these principles in this case, this Court remanded the Variance Application to Winona County on January 25, 2021, and the court of appeals denied Daley Farm’s request for discretionary review of the remand order on August 24, 2021. Thus, even under the most favorable interpretation of the facts available to Winona County, the County received the remanded Variance Application no later than August 25, 2021, and the 60-day statutory deadline for Winona County to deny the remanded application expired no later than October 25, 2021.

Because Winona County did not deny the remanded Variance Application within 60 days after its receipt, the application was automatically approved by operation of law under Minnesota Statutes § 15.99, subdivision 2(a). The undisputed facts therefore establish that Daley Farm is entitled to summary judgment on Count VII of the Supplemental Complaint and to an order declaring that the Variance Application was approved and directing Winona County to take all actions necessary to issue the variance requested in such application.

II. The Winona County Board of Adjustment’s Denial of Daley Farm’s Remanded Variance Application Was Unreasonable, Arbitrary, and Capricious Due to Factual and Legal Errors.

A decision to grant or deny a variance is subject to judicial review via an appeal “to the district court in the county in which the land is located.” Minn. Stat. § 394.27, subd. 9; accord *Carlson v. Chermak*, 639 N.W.2d 886, 889 (Minn. Ct. App. 2002); see *In re*

Stadsvold, 754 N.W.2d 323, 327 (Minn. 2008). In this proceeding, Plaintiffs appealed from the Winona County Board of Adjustment's denial of Daley Farm's remanded Variance Application because such denial was unreasonable, arbitrary, and capricious due to bias and prejudgment (Count V) and due to factual and legal errors (Count VI). (Supplemental Compl. (Index #108), at ¶¶ 131-47.)

On appeal, the Court must review the board of adjustment's decision "to determine whether it was reasonable." *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85, 90 (Minn. Ct. App. 2000). In doing so, the Court must "determine whether the zoning authority 'was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and . . . whether the evidence could reasonably support or justify the determination.'" *Stadsvold*, 754 N.W.2d at 332 (quoting *Frank's Nursery*, 295 N.W.2d at 608)). An administrative decision is arbitrary and capricious if " 'it represents the agency's will and not its judgment' " or if the agency

(a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view or the result of the agency's expertise.

In re Schmalz, 945 N.W.2d 46, 54 (Minn. 2020) (internal quotations omitted); *see RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015) (recognizing that a denial of a zoning request is "unreasonable, arbitrary, or capricious" if the reasons given for the decision were either legally insufficient or did not have a factual basis in the record).

A. The Winona County Board of Adjustment's Denial of Daley Farm's Remanded Variance Application Was Unreasonable, Arbitrary, and Capricious Because a Member of the Board Conducted Independent Research and Based Her Decision on Evidence Outside of the Record.

As noted above, a board of adjustment's proceedings on a variance request are quasi-judicial in nature. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 715-16 (Minn. 1978); accord *Interstate Power Co., Inc. v. Nobles County Bd. Of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000); *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981). In such proceedings, "[a] fair hearing is a fundamental requisite." *Juster Bros., Inc. v. Christgau*, 7 N.W.2d 501, 508 (Minn. 1943). And a denial of a variance application must be reversed if the evidence in the record established through the hearing does not reasonably support or justify the determination. See *Stadsvold*, 754 N.W.2d at 332. Fundamentally, then, a county's decision must be based on information in the record. See *Matter of E. River Elec. Coop.*, No. A21-0885, 2022 WL 1073736, at *3 (Minn. Ct. App., Apr. 11, 2022) ("A county acts unreasonably if the reasons for its decision are legally insufficient or lack a factual basis in the record." (citing *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015))).

Consistent with these principals, Stephanie Nuttall (an Assistant Winona County Attorney) specifically instructed the members of the Winona County Board of Adjustment on the record and procedures to be used to reconsider Daley Farm's remanded Variance Application:

The specific record to be considered by the 2021 Board of Adjustment has been provided to the board members. The board members are not to consider any information that has been received outside the official record, the agenda packet and other materials provided by County staff prior to the

meeting, or provided during the December 2, 2021 meeting. Any information received from any other source is to be disregarded. At the meeting the County staff will present the updated staff report and respond to questions, and the petitioner will have an opportunity to present their petition and respond to questions. The Board of Adjustment will then discuss the petition, based on the record provided, and make a decision regarding the variance request.

(Admin. R. (Index #156) 2877 (emphasis added).) Nonetheless, Elizabeth Heublein admitted that she ignored this fundamental requirement and considered evidence outside the record in voting to deny Daley Farm's Variance Application:

Q. When you are performing your role on the Board of Adjustment, do you bring your own personal knowledge and background to that position?

A. Obviously. Everybody does.

Q. Okay. And you rely on your personal knowledge and background in making the decisions on the board?

A. Not if I don't - not if I don't know. I look it up and become informed. And that's a requirement of a real board member that's going to work.

Q. And where do you look up that information?

A. I go to research. I go to books. I go to media. In terms of documentaries. I look at newspapers. I go to a variety of sources that let me know across the board different kinds of things about the questions I have. So I don't choose one source. I have done research for 40 years. I know that you have to look at everything that you possibly can get your hands on to be able to come up with being informed.

Q. And does that involve research that goes beyond what staff presents, what applicants present and what people who present at the hearings present?

A. I believe it should. Because we are there as trusted representatives of the community. And if we only rely on one source of information and don't bring other parts of the puzzle to the table, then I believe we are not doing justice to the responsibility that we have.

Q. And when you were performing your role on the Board of Adjustment, do you conduct that independent research to inform yourself?

A. I do. On every case that comes before the board.

Q. So you did independent research on the Daley Farm application?

A. On the issues that were presented in terms of the land, in terms of the animal EAU. I went to many, many different sources. Not just here. But what's happening in other parts of the country as well.

Q. What sources did you rely on in considering Daley Farm's application?

A. Research from the University of Minnesota, from the Minnesota State Health Department. Research from the Minnesota Ag Department, from the other - Protection Board. As well as comparing that to - I looked at stuff from Iowa. I looked at stuff from Wisconsin that had some of the same issues, you know, some of the same data. It was all stuff I went to the Internet to find.

(Heublein Tr., at 21:16-23:10.)

Because Dr. Heublein conducted her own research—and failed to disclose the sources and information on which she relied—Daley Farm could not review or respond to this information and was thus deprived of a fair hearing. And because Elizabeth Heublein based her decision on evidence outside of the administrative record, the Winona County Board of Adjustment's denial of Daley Farm's remanded Variance Application is not reasonably supported or justified by evidence in the record. The denial of the Variance Application was therefore unreasonable, arbitrary, and capricious.

B. The Winona County Board of Adjustment's Denial of Daley Farm's Remanded Variance Application Was Unreasonable, Arbitrary, and Capricious Because Bias and Prejudgment Continued to Taint the Administrative Process on Following the Earlier Remand of the Variance Application.

A quasi-judicial administrative decision (such as the denial of a variance application) is also unreasonable, arbitrary, and capricious if the decision "represents the [board's] will and not its judgment" or if the board "relied on factors not intended by the legislature." *Schmalz*, 945 N.W.2d at 54. Further, a decision by an unbiased and impartial decisionmaker is a fundamental requirement in a quasi-judicial proceeding. *Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. Ct. App. 2003); *Buchwald v. Univ. of Minnesota*, 573 N.W.2d 723, 727 (Minn. Ct. App. 1998); *Deli v. Univ. of Minnesota*, 511 N.W.2d 46, 50 (Minn. Ct. App. 1994).

In *Continental Property Group, Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510 (Minn. Ct. App., May 3, 2011), the Minnesota Court of Appeals reviewed a decision by the Minneapolis City Council to deny two conditional use permit applications and two variance applications filed by Continental Property Group (all related to the same project). *Id.* at *1. Lisa Goodman—who was one of the members of the city council and took part in the council's decision to deny the permit and variance applications—

"took a position in opposition and exhibited a closed mind with regard to [CGP's] proposed project prior to hearing [CGP's] appeal"; "adopted an advocacy role in opposition to [CGP's] proposed project well before she discharged her quasi-judicial duties"; and "was clearly involved in an effort not only to assist to organize and mobilize neighborhood opposition to the project, but also to sway the opinions of her fellow council members."

Id. at *6. The court of appeals held “that the city council’s decision was arbitrary and capricious” based on these findings that one (out of thirteen) council members was biased and had prejudged the merits of the applications. *Id.*; accord *Living Word Bible Camp v. County of Itasca*, No. A12-0281, 2012 WL 4052868, at *8 (Minn. Ct. App., Sept. 17, 2012).

This decision is consistent with decisions from other jurisdictions. See *McVay v. Zoning Hearing Bd. of New Bethlehem Borough*, 496 A.2d 1328, 1330-31 (Pa. Commw. Ct. 1985); *Barbara Realty Co. v. Zoning Bd. of Review of the City of Cranston*, 128 A.2d 342, 344 (R.I. 1957); see also *Yamaha Motor Corp., U.S.A. v. Riney*, 21 F.3d 793, 798 (8th Cir. 1994); *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970); *1616 Second Ave. Rest., Inc. v. New York State Liquor Auth.*, 550 N.E.2d 910, 912 (N.Y. 1990).

As this Court has already recognized, the Winona County Board of Adjustment’s initial denial of Daley Farm’s Variance Application was invalid due to the significant bias and prejudgment by three of the five board members who had publicly advocated against the proposed Modernization Project prior to the hearing and “continued their zealous advocacy throughout the variance process.” (Order Granting Summ. J. & for Remand (Index #80), at 1-2; accord Hearing Tr. (Index #88), at 39:9-43:9.) Nonetheless, because the biased members were no longer on the board of adjustment, this Court believed that the new board would grant Plaintiffs a fair hearing and therefore remanded Daley Farm’s Variance Application for reconsideration. (Order Granting Summ. J. & for Remand (Index #80), at 2, 7.)

Unfortunately, this Court underestimated the extent to which LSP had infiltrated the Winona County government and pervasiveness of the bias against Daley Farm’s

proposed Modernization Project within the government. Marie Kovcesi—one of the county commissioners—was actively assisting LSP in its advocacy campaign to oppose Daley Farm’s proposed Modernization Project and participated in LSP’s plan to manipulate the composition of the board of adjustment and planning commission prior to the first hearing. (Public Aff., at exs. M (also marked as Depo. Ex. 109), AQ, AR (also marked as Depo. Ex. 116), AU-AV; Confidential Aff., at exs. CG-CI; Second Kovcesi Tr., at 23:23-28:7, 46:4-48:4, 57:11-58:21.) Commissioner Kovcesi and LSP’s other allies on the county board appointed Elizabeth Heublein to the board of adjustment in January 2020 based on “very careful reasons.” (Public Aff., at ex. AY; Winona County (Government), *Winona County Board Meeting 01-07-2020*, YouTube (Jan 10, 2020), https://www.youtube.com/watch?v=9fx9H_oetfg (located at 1:01:34-1:01:55 of the video).) A year later, and after this Court had already ruled that the initial denial of Daley Farm’s Variance Application would be reversed, LSP’s allies on the county board appointed Kelsey Fitzgerald, who Doug Nopar (an LSP activist) had personally recruited based on her views about agriculture, to the board of adjustment. (Fitzgerald Tr., at 21:5-21:23; Confidential Aff., at ex. CJ.) Thus, much like Cherie Hales, Wendy Larson, and Rachel Stoll before them, the record in this case suggests that Dr. Heublein and Ms. Fitzgerald were appointed to the board of adjustment by LSP’s allies on the county board in a conscious manner to oppose Daley Farm’s proposed Modernization Project.

The record also demonstrates that Winona County did not take a fresh look at Daley Farm’s Variance Application on remand. Instead, the County—at the direction of its outside litigation counsel—intentionally disregarded new information that it had

received after the first Staff Report was prepared and stubbornly sought to justify its prior analysis and decision. (Depo. Exs. 122, 125; McGinty Tr., at 32:1-33:12, 34:1-34:4.) As a result of this biased process, the County published an updated Staff Report that its feedlot officer testified was unfair and did not properly take into account the prior proceedings. (McGinty Tr., at 36:12-37:7.) The County's planning director then directed her employee to "jettison" prior drafts of the report that were based on the entire record. (Depo. Ex. 126.) In short, the record indicates that the remand proceedings were merely a continuation of the County's litigation strategy defending the initial biased decision rather than a fresh and fair look at Daley Farm's Variance Application.

Finally, the record demonstrates that county staff, at the direction of its legal department, falsified the written Findings of Fact. Specifically, county staff inserted a written finding that "[e]conomic considerations are the only claimed practical difficulties" even though the Winona County Board of Adjustment never adopted this finding. (Admin. R. (Index #156) 3114 (emphasis added); Qualley Tr., at 76:21-77:13, 78:17-79:23; *see* Second Hearing Tr., at 99:25-105:9.)

Taken as a whole, the factual record demonstrates that Winona County's zoning process with respect to Daley Farm's Variance Application remained fundamentally biased and unfair following this Court prior decision to remand the application to the Winona County Board of Adjustment for reconsideration. As a result of the flawed process, the denial of the remanded Variance Application represented Winona County's will, rather than its reasoned judgment based on the evidence in the record, and was therefore unreasonable, arbitrary, and capricious.

C. The Winona County Board of Adjustment's Denial of Daley Farm's Remanded Variance Application Was Unreasonable, Arbitrary, and Capricious Because the Board's Factual Findings Do Not Support Its Ultimate Decision.

A denial of a variance application is unreasonable, arbitrary, and capricious if the reasons given for the decision are not legally sufficient. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015). Section 5.6.2 of the Winona County Zoning Ordinance sets forth eight criteria that the board of adjustment must consider and apply in deciding whether to grant a variance:

1. The variance request is in harmony with the intent and purpose of the ordinance.
2. The variance request is consistent with the comprehensive plan.
3. The applicant has established that there are practical difficulties in complying with the official control and proposes to use the property in a reasonable manner.
4. The variance request is due to special conditions or circumstances unique to the property not created by owners of the property since enactment of this Ordinance.
5. The variance will not alter the essential character of the locality nor substantially impair property values, or the public health, safety or welfare in the vicinity.
6. Economic considerations alone do not constitute practical difficulties.
7. The variance cannot be alleviated by a reasonable method other than a variance and is the minimum variance which would alleviate the practical difficulty.
8. The request is not a use variance and shall not have the effect of allowing any use that is not allowed in the zoning district . . . or permit standards lower than those required by State Law.

In this case, the Winona County Board of Adjustment affirmatively found that Daley Farm’s Variance Application satisfies seven of the specified criteria. On Criterion No. 6—“[e]conomic considerations alone do not constitute practical difficulties”—the Winona County Board of Adjustment did not make any finding (notwithstanding the written Findings of Fact attached to the Variance Denial, which were falsified by county staff, at the direction of its legal department, after the hearing). (Second Hearing Tr., at 71:24-109:12; Admin. R. (Index #156) 3113-14; Qualley Tr., at 76:21-77:13, 78:17-79:23.)

With respect to the other seven criteria, the Ordinance requires an affirmative finding that the Variance Application satisfies the condition(s) specified in the criterion. For example, Criterion No. 1 requires an affirmative finding by the board of adjustment that “[t]he variance request is in harmony with the intent and purpose of the ordinance.” In contrast, Criterion No. 6 merely defines an exception to an earlier criterion. Specifically, Criterion No. 3 requires the board of adjustment to affirmatively find that the applicant for a variance “has established that there are practical difficulties in complying with the official control and proposes to use the property in a reasonable manner.” And Criterion No. 6 clarifies that the requirement to establish practical difficulties in Criterion No. 3 cannot be satisfied solely by economic considerations. If, on the other hand, the Ordinance intended to impose an affirmative requirement in Criterion No. 6, the County would have used different language similar to the other criteria—for example, Criterion No. 6 could have stated that “the variance request is not based on economic considerations alone.” Such “ ‘distinctions in language in the same context are presumed to be intentional.’ ” *Seagate Tech., LLC v. Western Digital Corp.*, 854

N.W.2d 750, 759 (Minn. 2014) (quoting *In re Stadsvold*, 754 N.W.2d 323, 328-29 (Minn. 2008)).

The impact of this grammatical distinction becomes evident when the variance criteria are applied to the Winona County Board of Adjustment's findings in this case. Here, the board affirmatively found that Daley Farm "has established that there are practical difficulties in complying with the official control." (Admin. R. (Index #156) 3113 (emphasis in original).) But the board did not affirmatively find that economic considerations were the only practical difficulty that Daley Farm claimed or established. Because the board did not affirmatively find that the condition specified in Criterion No. 6 was satisfied, the exception in this criterion was not triggered, and the board's affirmative finding in Criterion No. 3 that Daley Farm has established practical difficulties remains intact. When county staff (at the direction of its legal department) inserted an adverse finding on Criterion No. 6 that was never adopted by the board of adjustment, the County tacitly admitted that the findings actually adopted by the board do not support the denial of Daley Farm's Variance Application.

Because the board's factual findings demonstrate that Daley Farm satisfied each of the affirmative requirements specified in the Ordinance for a variance, the Winona County Board of Adjustment's stated reasons for denying Daley Farm's Variance Application are not legally sufficient, and the denial of the application is therefore unreasonable, arbitrary, and capricious.

D. The Winona County Board of Adjustment's Denial of Daley Farm's Remanded Variance Application Was Unreasonable, Arbitrary, and Capricious Because the Evidence in the Record Does Not Support the Board's Factual Findings.

Even if this Court construes Criterion No. 6 to require an affirmative finding that economic considerations are not the only practical difficulties claimed or established, a denial of a variance application is also unreasonable, arbitrary, and capricious if the evidence in the record does not “ ‘reasonably support or justify the determination.’ ” *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (quoting *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980)); *accord RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015).

In this case, Criterion No. 6 in the Ordinance – “[e]conomic considerations alone do not constitute practical difficulties” – is the only variance requirement that the Winona County Board of Adjustment did not affirmatively find was satisfied by Daley Farm’s Variance Application. But the record includes a detailed memorandum that Daley Farm (through its attorney) submitted in support of its Variance Application. (Admin. R. (Index #149) 1846-61.) In this memorandum, Daley Farm acknowledged that its proposed Modernization Project and related Variance Application “is motivated, **in part**, by economic considerations.” (*Id.*, at 1858.) But Daley Farm also specifically identified several non-economic considerations that support the Variance Application:

In addition to economic considerations, Daley Farms’ variance request is also motivated by non-economic motivations to reduce the environmental impact of the farm (as extensively described above in section 1 of the memorandum), promote animal welfare and food safety, and ensure the continued safety and well-being of its employees. Indeed, in a separate section of its analysis, county staff acknowledges that separating additional

dairy cows into facilities on different properties – rather than expanding the existing facility – “could cause more environmental damage to Winona County’s natural resources” because there would be “additional transportation of manure, cattle, workers, feed, and crops leading to more fossil fuel emissions and elevated stress on county roads.” [Admin R., at 1834.] Thus, Daley Farms’ requested variance is based on more than merely economic consideration.

(*Id.*) This evidence was not contradicted.

Thus, the record demonstrates that economic considerations were not the only practical difficulties that Daley Farm claimed to support its Variance Application and cannot reasonably support or justify a finding to the contrary. The Winona County Board of Adjustment’s denial of Daley Farm’s Variance Application was therefore unreasonable, arbitrary, and capricious.

E. The Appropriate Remedy in this Case Is to Order the Winona County Board of Adjustment to Issue the Requested Variance.

If this Court concludes that the Winona County Board of Adjustment’s denial of Daley Farm’s remanded Variance Application was unreasonable, arbitrary, or capricious under any (or any combination of) the bases set forth above, this Court must then determine the appropriate remedy. The Minnesota Supreme Court has held that if a governmental body’s decision in a quasi-judicial zoning was arbitrary and capricious, the reviewing court should generally order the governmental body to issue the requested variance or permit. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 732-33 (Minn. 2010); *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 2000); see *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, 342 N.W.2d 335, 340-41 (Minn. 1984); *Metro 500, Inc. v. City of Brooklyn Park*, 297 Minn. 294, 304 211 N.W.2d 358, 364 (1973). But where the

governmental agency failed to make necessary findings to explain its decision, and allow a meaningful judicial review of that decision, the Court has concluded that the decision was merely premature—and not necessarily arbitrary—and therefore remanded the proceeding back to the agency for further consideration. *Krummenacher*, 783 N.W.2d at 733; *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 462-63 (Minn. 1994); *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 742-43 (Minn. 1986).

The Court subsequently explained that the broader remands in *Earthburners* and *White Bear Rod & Gun Club* were “merely exceptions to the general principle” that a government agency who is found to have arbitrarily denied a zoning request should be ordered to issue the variance or permit and should be limited to the narrow circumstances of those cases, *Interstate Power Co., Inc. v. Nobles County Board of Comm’rs*, 617 N.W.2d 566, 577 (Minn. 2000), and the Court “emphasize[d] that *Earthburners* was not intended to provide local government units with a routinized opportunity for a second bite at the apple . . . ,” *id.* at 577 n.6. Rather, “in the rare case when an *Earthburners* remand is necessary because the record of a zoning decision is so inadequate that judicial review is impossible, the county fortuitously avoids application of the general rule that a permit denial not supported by an adequate record or findings will result in an appellate order to grant the permit.” *Id.* at 577. The Court indicated that a reviewing court should consider the fundamental fairness of the circumstances before remanding the denial of a zoning request for further proceedings. *Id.* at 578.

Here, this Court has already given Winona County a second bite at the apple. The County has demonstrated that it is incapable of fairly deciding Daley Farm’s Variance

Application. LSP and its allies have similarly demonstrated that they are incapable of limiting their activities to legitimate advocacy and restraining themselves from improperly placing their thumb on the scale of justice by manipulating the composition of quasi-judicial bodies. This Court should therefore apply the general remedy and specifically order the Winona County Board of Adjustment to grant Daley Farm a variance as requested in the Variance Application.

CONCLUSION

As set forth herein, the undisputed facts conclusively demonstrate that the Winona County Board of Adjustment did not deny Daley Farm's Variance Application within 60 days after receiving the zoning request on remand. Accordingly, Daley Farm respectfully requests that this Court grant its motion for summary judgment on Count VII of the Supplemental Complaint and issue an order declaring that the Variance Application was automatically approved under Minnesota Statutes § 15.99 and directing Winona County to take all actions necessary to issue the variance requested in such application.

Further, the undisputed facts also conclusively demonstrate that the Winona County Board of Adjustment acted arbitrarily and capriciously, and unreasonably, in denying Daley Farm's remanded Variance Application. Accordingly, Daley Farm respectfully requests that this Court grant its motion for summary judgment and order the County to grant the variance as requested in the Variance Application.

Dated this 8th day of June, 2023.

/s/ Matthew C. Berger

Matthew C. Berger #0387666

mberger@gislason.com

Mark S. Ullery #170434

mullery@gislason.com

GISLASON & HUNTER LLP

2700 South Broadway

P. O. Box 458

New Ulm, MN 56073-0458

Phone: (507) 354-3111

Fax: (507) 354-8447

*Attorneys for Plaintiffs/Appellants Daley
Farm of Lewiston, L.L.P., Ben Daley, Michael
Daley, and Stephen Daley*