STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF WINONA | THIRD JUDICIAL DISTRICT
Case Type: Civil/Other (Misc.)

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

Plaintiffs/Appellants,

v.

County of Winona,

Defendant/Respondent,

and

Land Stewardship Project and Defendants of Drinking Water,

Intervenors/Defendants.

Court File No. 85-CV-19-546
The Hon. Douglas C. Bayley

DEFENDANT WINONA COUNTY'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This action is part of Daley Farm of Lewiston, L.L.P., Ben, Michael, and Stephen Daley's (collectively "Daley Farm") near decade-long struggle to expand the largest feedlot in Winona County (the "County"), which already significantly exceeds the County's regulations. Daley Farm's variance application, which has been denied twice by the Winona County Board of Adjustment ("Board"), seeks to quadruple what is allowed by the County's Zoning Ordinance, and triple Daley Farm's existing operation.

Even if this request were not unreasonable on its face, Daley Farm only applied for the variance, rather than expanding within the confines of the generally applicable law, because of its admitted economic motivation. The Board's decision was reasonable, and the Court should affirm it.

STATEMENT OF THE LEGAL ISSUES

1. Whether Daley Farm has a constitutionally protected property interest in an applied-for variance and, if so, whether the process Daley Farm has received, and is receiving under Minn. Stat. § 394.27, is truly irrational, egregious, and extraordinary as to shock the conscience?

2. Whether the Winona County Board of Adjustment denied Daley Farm's request for a variance from the requirement in Section 8.4.2 of the Winona County Zoning Ordinance within 60 days?

3. Whether the Winona County Board of Adjustment reasonably denied Daley Farm's variance application, where Daley Farm admitted it was based on economic considerations alone?

4. Whether speculative and baseless allegations of bias and prejudgment are sufficient to overturn an otherwise reasonable quasi-judicial decision reached by a co-equal branch of government?

STATEMENT OF THE RECORD

See, Itemized List of Administrative Record Contents, Doc. #149 at 1-9.

STATEMENT OF MATERIAL FACTS

A. Daley Farm of Lewiston

Daley Farm of Lewiston is a livestock feedlot in Utica Township, Winona County at 18774 Highway 14, Lewiston, Minnesota 55952 ("Daley Farm Site"). *Complaint*, ¶ 6, March 18, 2019. The Daley Farm Site is in Winona County's Agricultural/Resource Conservation District (A/RC), *Admin. R. 1917*, where "[l]ivestock feedlots having less than three hundred (300)-animal units" are a permitted principal use. WINONA COUNTY, MINN., ZONING ORDINANCE ("*WCZO*") § 10.4.4.12.[1] In 2014, Daley Farm sought to expand its current operations to allow even more animal units than the site can currently support. *Admin. R. at 1-16.* While the current dairy herd of 1,728 cows and calves already makes Daley Farm the largest feedlot in Winona County, they wanted to expand their capacity to a total of 5,967.7 animal units. *Admin. R. 21*.

Many felt the proposed expansion was purely economic. *Admin. R. 397, 445, 463, 616, 1049*. Daley Farm acknowledged they looked to expand after a new generation of the Daley family desired "to return to Winona County and work on the family farm." *Admin. R. 1698*. With these added people came a desire for more income to "provide economic support for the additional family members to return to the agricultural communities in Winona County[.]" *Admin. R. 1849*. From Daley Farm's viewpoint, "[a]n expansion of the

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[1] *Available online at*: https://www.co.winona.mn.us/DocumentCenter/View/2017/Ordinance-41-County-Zoning-Ordinance

farm is necessary in order to support the additional people who will be making their living by farming in Winona County." *Admin. R. 1698*. This would generate the income necessary to support the desired quality of life for the Daley family "into the future, into the next generation[,]" and "for future generations." *Admin. R. 1970, 2587:2-4*.

B. Winona County's Feedlot Regulations

Winona County "contains a wealth of natural resources including an abundance of surface and ground water." *WCZO* § 8.1.1. The County "recognizes the importance of protecting these resources from pollution to ensure the health of the public and to maintain safe, high[-]quality water for recreational, residential, agricultural, and commercial uses." *Id.* To "protect the health of the public and the natural resources of Winona County[,]" the County has adopted numerous livestock feedlot regulations to ensure "that farmers properly manage animal feedlots and animal wastes." *Id.* For instance, through an April 1998 Ordinance, the Winona County Board of Commissioners capped feedlots at 1,500 animal units. *Admin. R. 1746*. Setting the limit, involved a feedlot study task force made up of farmers, environmentalists, and other residents and it was a "real hard[-]fought battle." *Admin. R. 1773 at 28:5*. The task force carefully considered where to draw the line, with members advocating for limits anywhere from 300 to 2,500 animal units. *Admin. R. 1773 at 28:12-28:18*. In the end, the Winona County Board of Commissioners decided a compromise was appropriate and set the animal unit cap at 1,500 animal units. *WCZO* § 8.4.2 (mandating no feedlot "permit shall be issued for a feedlot having in excess of 1,500 animal units per feedlot site."); *see also WCZO* § 10.4.6.1

(defining conditional animal feedlot use as "a feedlot having in excess of three hundred (300) animal units but not more than one thousand and five hundred (1,500) animal units.").

C. 2014 Daley Farm Variance Application

On August 21, 2014, Ben Daley, on behalf of Daley Farm, filed an application for a variance from the "Animal Cap" requirement in Winona County Zoning Ordinance ("Zoning Ordinance") "Section 8.4.2." *Admin. R. 9*. The desired expansion, however, required Daley Farm first go through the environmental review process overseen by the Minnesota Pollution Control Agency, and required by 4410.4300, subp. 29. *Admin. R. 1*.

D. Mandated Environmental Review

On July 31, 2017, the Minnesota Pollution Control Agency ("MPCA") received an initial data submittal for the preparation of an Environmental Assessment Worksheet ("EAW") for Plaintiffs' proposed expansion. *Admin. R. 17*. As a result of the ensuing environmental review process, Daley Farm's expansion plans would become clear.

As revealed, Daley Farm's expanded feedlot would operate under an Individual National Pollutant Discharge Elimination System ("NPDES") Permit, which incorporates a manure management plan requiring application of manure on application sites in accordance with applicable state regulations. *Admin. R. 181*. This was not surprising, as Daley Farm had been operating under an "Individual NPDES Feedlot Permit issued to Daley on November 17, 2010[,]" *Admin. R. 1350-1351*, which already required Daley Farm to develop updates to its manure management plan to comply with the law. *Admin. R.*

157-161. What may have been surprising, however, was the fact Daley Farm had been operating in violation of federal zero discharge requirements since 2010, had not come into compliance with these requirements by the initial deadline set for January 1, 2014, and would be required to achieve compliance no later than October 1, 2019. *Admin. R. 1350-1351.* Daley Farm's expansion plans included the construction and installation of runoff control measures for an existing non-compliant feed pad, and the closure of a separate non-compliant feedlot site, both of which Daley Farm would be required to complete by a new, October 1, 2021, deadline if Daley Farm was to "continue to operate" its current dairy farm site if, for instance, it was "unable to receive all needed permits and approvals[.]" *Admin. R. 160, 1350-1351, 1438.*

What was likely less surprising—given the sheer size of the proposed expansion—was Daley Farm's expanded feedlot would require 41 individual application sites spread throughout St. Charles, Utica, and Fremont Townships, simply to handle all the manure generated at the new site. *Admin. R. 1463-1506*.

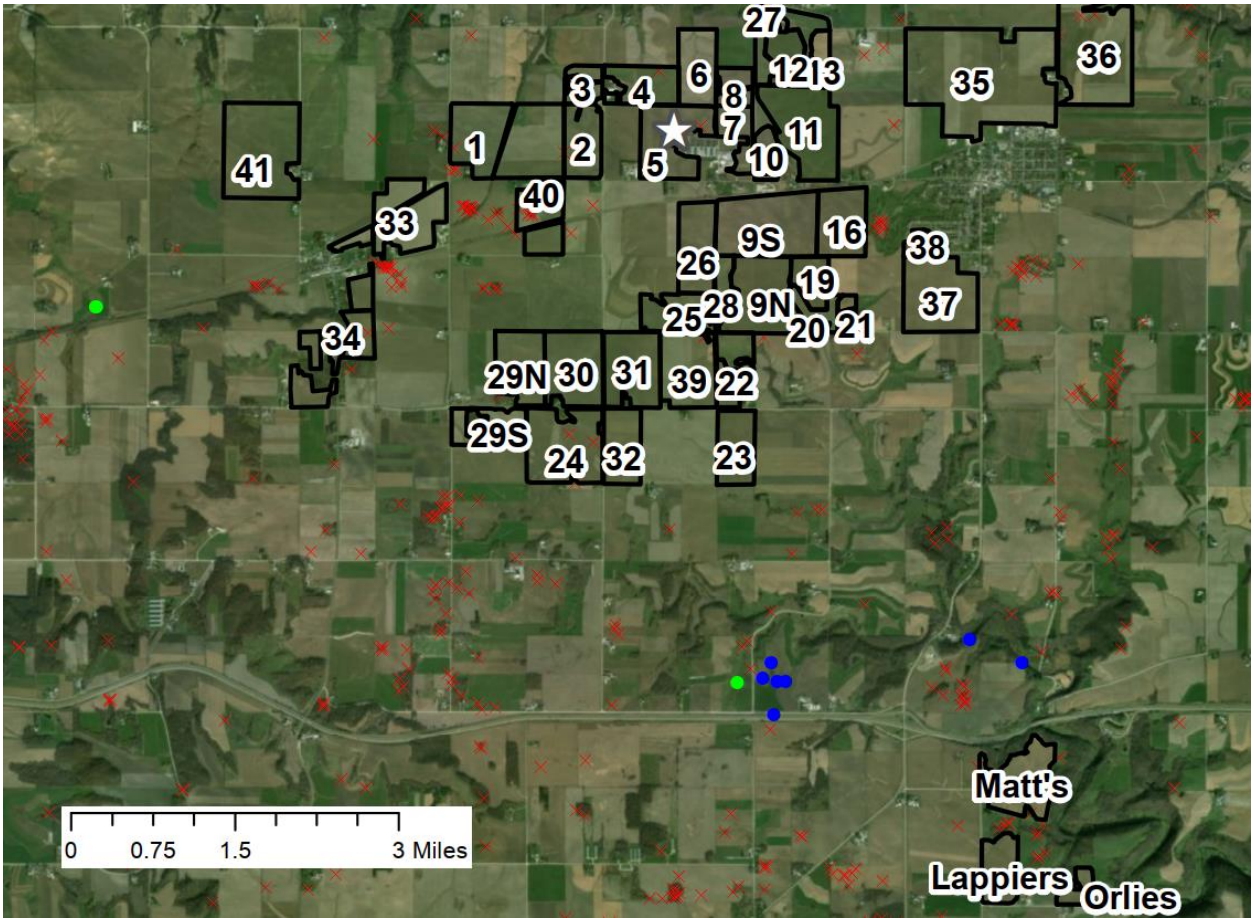

Fig. 1. *Admin. R. 1463.*

The increased fossil fuel emissions to transport manure to these sites, some of which will require a 16-mile round trip transport, was not adequately analyzed, much less compared to the projected emissions should Daley Farm choose instead to expand at multiple smaller facilities on different sites in the area.[2]

[2] On October 14, 2019, the Minnesota Court of Appeals reversed and remanded the MPCA's decision for further proceedings after it determined "the MPCA failed to consider the effects of the proposed expansion's greenhouse-gas emissions" and "MPCA's determination that an EIS was not needed was arbitrary and capricious[.]" *See Matter of Denial of a Contested Case Hearing Request & Modification of a Notice of Coverage Under Individual Nat'l Pollution Discharge Elimination Sys. Feedlot Permit No. MN0067652*,

On October 1, 2018, the public comment period on Plaintiffs' EAW opened. *Admin. R. 1429*. Plaintiffs' proposed expansion was an issue of substantial interest in the community, and over the next month the MPCA received over 600 public comments. *Admin. R. 192-1098*. Before the MPCA completed its part of the review, Ben Daley, on behalf of Daley Farm, filed a variance application on November 16, 2018, requesting "a variance from the requirement in Section 8.4.2 of the Winona County Zoning Ordinance." *Admin. R. 1665, 1970*.

In the end, the MPCA issued an Order for a Negative Declaration on the need for an Environmental Impact Statement regarding the proposed large-scale expansion on January 4, 2019. *Admin. R. 155*. At the same time, the MPCA formally requested "an environmental impact statement to study and address nitrate pollution of groundwater in the geologically sensitive karst region of southeastern Minnesota" based on "extensive data documenting nitrate contamination of public and private drinking water wells" held by "[t]he Minnesota Department of Health (MDH) and the Minnesota Department of Agriculture (MDA)." *Admin. R. 156*. After the County believed the MPCA completed its portion of the review it began processing the variance application in earnest. *Admin. R. 1*.

No. A19-0207, 2019 WL 5106666, at *1-5 (Minn. App. Oct. 14, 2019). The results of the MPCA's further review were not provided to the County or included in the administrative record before the Board.

When it did, it became apparent why Daley Farm purportedly was seeking a variance to expand and modernize. *Admin. R. 1838-1841*. Regarding its desire to modernize, however, Daley Farm only identified activities it could complete without a variance, including many activities federal law, and the MPCA, would require Daley Farm to complete without a variance. *Admin. R. 1847-1853, 1858*.

Concerning its desire to expand, Daley Farm repeated the justification it consistently reiterated from the outset. In its variance application, Daley Farm explained, "[a]n expansion of the farm is necessary in order to support the additional people[,]" *Admin. R. 1698*, i.e., "a new generation of the family" who "desires to return to rural Winona County and work on the family farm." *Admin. R. 1849.* Daley Farm did "not deny" and in fact "fully acknowledged" its "economic motivation for proposing this project[.]" *Admin. R. 1858, 2586:14-2586:15, 2587:11-2587:12*. It was understandable Daley Farm wanted to expand to generate additional revenue to support the next generation of Daley family members, while also funding a nest egg for the current generation, or in the Daleys' own words: "for us to bring in the next generation and yet retire at some point, we need to do an expansion so we can leave our children with something and still have a thriving business." *Admin. R. 2095*.

Daley Farm's continued and repeated reliance on increased revenues to explain its need for a variance was especially perplexing given Daley Farm admitted it could "expand its operation by constructing multiple smaller facilities on different sites in the area," and the only reason it declined to do so was because it had "made significant

investments to construct its existing facilities … these existing facilities cannot be moved" and "such expansions would cause significant duplication of equipment, dramatically increase the cost of the project, [and] decrease the efficiency of the operation[.]" *Admin. R. 1699*; *see also Admin. R. 2586:24-2587:1.* While expansion on multiple smaller sites could actually "prevent the soil from becoming saturated with manure" and "strike a better balance between agriculture and protecting the area's drinking water resources[,]" *Admin. R. 2096,* County staff did not even need to consider this potential because Daley Farm's admissions made it clear:

> [T]he stated grounds for the expansion are exclusively economic considerations. The applicant stated that providing jobs for additional family members and supporting others making a living by farming in the area is a primary reason for the variance request. Other stated grounds include operational economic efficiencies and receiving benefits for the investments already made in the facility, which are also economic considerations.

Admin. R. 2840. Therefore, County staff reasonably concluded economic considerations were "the only claimed practical difficulties." *Id.*

On February 21, 2019, the Board denied Daley Farm's request for a variance because, among other reasons, "[m]odernization of equipment can be done without a variance[,]" and Daley Farm failed to establish practical difficulties beyond its own economic motivation. *Admin. R. 2786-2787.*

Following a remand to the Board, and Daley Farm's request the County reprocess the previous variance application, *Admin. R. 2804*, the Board held another meeting on the

variance request on December 2, 2021. *Admin. R. 2810*. Because the administrative record contained no evidence Daley Farm needed a variance for non-economic reasons, *see Admin. R. 2717:20-2718:8, 2720:14-17, 2801, 2832, 2839, 2959, 2961, 3043:2-14, 3062:4-13, 3082:23-3084:4*, and economic considerations were the only claimed practical difficulties, the Board denied the variance application. *Admin. R. 2840, 3058:16-3064:13, 3113-3114*.

This appeal followed.

LEGAL STANDARD FOR DALEY FARM'S CONSTITUTIONAL CLAIMS

A court "shall" grant a motion for summary judgment when there is no genuine issue of material fact, and a party is entitled to judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted); *see* Minn. R. Civ. P. 56.03. A fact is only "material for purposes of summary judgment if its resolution will affect the outcome of the case." *Sayer v. Minnesota Dep't of Transp.*, 790 N.W.2d 151, 162 (Minn. 2010) (citation omitted). "When a motion for summary judgment is made and supported, the nonmoving party must present specific facts showing that there is a genuine issue for trial." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quotation omitted); *see* Minn. R. Civ. P. 56.05.

"A genuine issue of material fact arises when there is sufficient evidence regarding an essential element to permit reasonable persons to draw different conclusions." *Kelly for Washburn v. Kraemer Constr., Inc.*, 896 N.W.2d 504, 508 (Minn. 2017). "A party cannot rely upon speculation to demonstrate the existence of a genuine fact issue." *Johnson v. Van Blaricom*, 480 N.W.2d 138, 140 (Minn. App. 1992). Evidence merely creating a

metaphysical doubt is not sufficiently probative with respect to an essential element to create a genuine issue for trial. *DLH, Inc.*, 566 N.W.2d at 71. Resisting summary judgment requires more than mere averments, unverified conclusory allegations, and claims about evidence a party might produce at trial. *Id.*; *Cargill Inc. v. Jorgenson Farms*, 719 N.W.2d 226, 234 (Minn. App. 2006) (quoting *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995)). A complete lack of proof on an essential element of the plaintiff's claim mandates judgment as a matter of law. *Lubbers*, 539 N.W.2d at 401. "[T]his failure renders all other facts immaterial." *Jane Doe 43C v. Diocese of New Ulm*, 787 N.W.2d 680, 686 (Minn. App. 2010) (quotation omitted).

LEGAL STANDARD FOR DALEY FARM'S REMAINING CLAIMS

The standard applicable to a summary judgment motion is irrelevant to an appeal from a municipal decision, *see generally*, *Dietz v. Dodge Cty.*, 487 N.W.2d 237, 237–41 (Minn. 1992), specifically a municipal zoning decision. Zoning appeals "are not traditional civil appeals[,]" but many of the same rules apply. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 19 (Minn. App. 2003). For instance, there is necessarily no "genuine issue as to any material fact" because the facts are established by the Administrative Record. Minn. R. Civ. P. 56.01. "In reviewing actions by a governmental body, the focus is on the proceedings before the decision-making body, in this case," the Winona County Board of Adjustments. *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 207 (Minn. 1993). Judicial review must be "nonintrusive and expedient[,]" as well as limited. *Dietz*, 487 N.W.2d at 239. Review "is

limited to an examination of the record" and the Court "should confine itself at all times to the facts and circumstances developed before" the government body. *Big Lake Ass'n v. Saint Louis Cty. Plan. Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009). Courts "engage in an independent examination of the record and arrive at [their] own conclusions as to the propriety of the" zoning authority's decision. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006). Nevertheless, the Court's "function **is not** to weigh the evidence, but to review the record…" *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 76 (Minn. 2015) (emphasis added).

While similar principles apply, the principles at issue here stem from the Minnesota Constitution, not procedural rules. Under the Minnesota Constitution, the "legislature may provide by law for the creation, organization, administration, consolidation, division and dissolution of local government units and their functions[.]" Minn. Const. art. XII, § 3. Simply stated, "[c]ounties are creations of the Legislature[,]" *In re Welfare of J.B.*, 782 N.W.2d 535, 549 (Minn. 2010), as well as "a derivative of the executive branch of government." *Dietz*, 487 N.W.2d at 239. Accordingly, courts in Minnesota have long recognized local government units represent a co-ordinate branch of government with powers, "which courts, as judicial bodies, are not constitutionally permitted to exercise." *Cty. of Washington v. City of Oak Park Heights*, 818 N.W.2d 533, 538 (Minn. 2012) (citing Minn. Const. art. III, § 1). The legal standard here turns on the specific power at issue.

"The proceedings conducted by local government entities can result in two types of decisions," the first of which is "legislative." *Zweber v. Credit River Twp.*, 882 N.W.2d 605, 609 (Minn. 2016). "The other possibility is that the County's decisions were quasi-judicial[.]" *Id.*

E. The Court must afford wide-latitude and substantial deference when reviewing the Board's quasi-judicial variance decision.

While counties represent a co-equal government branch, they are still statutory creations, with only such power as expressly granted or fairly implied by the Legislature. *Motokazie! Inc. v. Rice Cty.*, 824 N.W.2d 341, 345–46 (Minn. App. 2012). "Counties are empowered by" Minnesota Statutes "Chapter 394[,]" the county zoning "enabling statute[,]" to "conduct planning and zoning activities." *Toby's of Alexandria, Inc. v. Cty. of Douglas*, 545 N.W.2d 54, 55-56 (Minn. App. 1996) (citing Minn. Stat. § 394.21-.37).

A local government unit's decision to grant or deny a zoning variance is a **quasi-judicial decision**. *Big Lake*, 761 N.W.2d at 490 (emphasis added). Like other quasi-judicial zoning decisions, variances are "flexibility devices." *Zylka v. City of Crystal*, 283 Minn. 192, 195, 167 N.W.2d 45, 48 (1969); *see also White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 741 (Minn. 1986) (noting decisions on conditional use permits are quasi-judicial). Variances prevent "unnecessary hardships resulting from the rigid enforcement of a broad zoning ordinance[.]" *In re Stadsvold*, 754 N.W.2d 323, 329 (Minn. 2008). Despite some similarities, variances are unique. For example, both the Legislature and the courts acknowledge the power to grant variances from a county's local controls is exclusively

vested in the county's board of adjustments. *See id.* ("The board of adjustment has the exclusive power to order the issuance of variances."); Minn. Stat. § 394.27, subd. 7 ("The board of adjustment shall have ***the exclusive power*** to order the issuance of variances from the requirements of any official control…") (emphasis added); *and*, *Moore v. Comm'r of Morrison Cty. Bd. of Adjustment*, 969 N.W.2d 86, 91 (Minn. App. 2021) (same) (quoting Minn. Stat. § 394.27). Notwithstanding the fact a variance is distinct from other zoning approvals like a conditional use permit,[3] courts review all zoning matters by asking whether the zoning authority acted reasonably. *Pawn Am. Minnesota, LLC v. City of St. Louis Park*, 787 N.W.2d 565, 572 n.11 (Minn. 2010). The Court cannot, however, answer this question without affording proper deference to the Board.

Courts afford zoning authorities "wide latitude" in making quasi-judicial decisions. *Big Lake*, 761 N.W.2d at 491. A municipality has discretion when reaching a quasi-judicial decision and there is a strong presumption municipal actions are proper. *Arcadia Dev. Corp. v. City of Bloomington*, 125 N.W.2d 846, 850 (Minn. 1964). "[E]xcept in

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[3] A conditional use "is legislatively Permitted in a zone subject to controls …" and "contemplates a permitted use when under the terms of the ordinance the prescribed conditions" are met. *Westling v. City of St. Louis Park*, 284 Minn. 351, 170 N.W.2d 218, 221–22 (1969). Whereas a variance "is legislatively ***Prohibited*** …" and "contemplates a departure from the terms of the ordinance" for special reasons. *Id.* (emphasis added). Stated differently, the governing body already decided to allow the former upon compliance, and to forbid the latter regardless of compliance, though exceptional circumstances may call for an exception. *See Zylka*, 167 N.W.2d at 49 (noting, in contrast to other land use approvals, a variance "permits particular property to be used in a manner ***forbidden*** by the ordinance by varying the terms of the ordinance." (emphasis added)).

rare cases where there is no rational basis for the decision, it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in routine zoning matters." *Big Lake*, 761 N.W.2d at 491.

Rooted in the balanced separation of powers, this "limited and deferential review … ensures that the judiciary does not encroach upon the constitutional power spheres of the other two branches of government." *Id*. Indeed, the Minnesota Supreme Court has "stressed the limited role of the judiciary in reviewing zoning decisions." *Id.* Courts' authority to interfere in these matters "***is***, and ***should be***, limited and sparingly invoked." *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 175 (Minn. 1982) (emphasis added).

The unique place occupied by variance applications,[SUPRA n.3] results in an even more limited and deferential review. The "subjective balancing of factors in granting or denying variances is a classical area where judicial deference is extended to the" municipal body. *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 493 (Minn. App. 1995). "Municipalities have ***broad discretion*ary** power in considering whether to grant or deny a variance." *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 727 (Minn. 2010) (emphasis added); *see also*, *Kismet Invs., Inc. v. Cty. of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000) ("County boards of adjustment have the exclusive power" and "broad discretion to grant or deny variances[.]"). In "light of the broad discretion," an applicant "labors" under a "heavy burden of proof…" *Westling v. City of St. Louis Park*, 284 Minn. 351, 356, 170 N.W.2d 218, 222 (1969); *see also*, *VanLandschoot v. City of Mendota Heights*, 336

N.W.2d 503, 509 (Minn. 1983) ("Since respondent was seeking variances…, he had a heavy burden to demonstrate reasons why he was entitled to the requested action."); *and*, *Luger v. City of Burnsville*, 295 N.W.2d 609, 612 (Minn. 1980) (same).

ARGUMENT

I. DALEY FARM'S CONSTITUTIONAL CLAIMS FAIL AS A MATTER OF LAW.

While the main issue in this case is whether the Winona County Board of Adjustment reasonably denied Daley Farm's variance request, Daley Farm also claims it suffered a constitutional injury in Counts Eight and Nine of the operative complaint. *Doc. #106 at 15-17.*[4]

Winona County is a municipal corporation and a local government. "[L]ocal governments[,]" like the County, "are responsible only for their own illegal acts." *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quotation omitted). A "municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). The County is not liable for individual conduct unless the action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal

[4] Daley Farm also made identical claims in its first complaint, and because this is the continuation of the same proceeding the initial claims are subsumed within the restated claims. *See Doc. #3 at 25-27.*

policy of some nature caused a constitutional tort." *Id.* Thus, governmental bodies like the County can only "be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122 (1988). A "'policy' is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters." *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). A "municipality may not be held liable under § 1983 merely because it failed to implement a policy that would have prevented an unconstitutional act by an employee otherwise left to his own discretion." *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1216 (8th Cir. 2013). Daley Farm does not allege and cannot identify any official County policy, which compels unconstitutional action by a County official or employee, which means its constitutional claims necessarily fail. These claims suffer from far greater deficiencies than this.

Daley Farm claims the County, "with respect to the consideration and denial of Daley Farm's Variance Application[,] violated" its "fundamental right to due process of law." *Id. at ¶¶156, 159.*[5] Eighth Circuit and Minnesota courts treat the due process

[5] Daley Farm asserts its 42 U.S.C. § 1983 claims are based, in part, on "Article I, Section 7, of the Minnesota Constitution[.]" *Doc. #106 at 16-17, ¶¶159-160.* "[A]lleged violations of state laws, state-agency regulations, and even state court orders" cannot be vindicated "under 42 U.S.C. § 1983." *Scheeler v. City of St. Cloud, Minn.*, 402 F.3d 826, 832 (8th Cir. 2005). "Only federal rights are guarded and vindicated by" the statute. *Whisman Through Whisman v. Rinehart*, 119 F.3d 1303, 1312 (8th Cir. 1997). Thus, such claims are "properly dismissed … for failure to state a claim cognizable under § 1983[,]" because

protections in the United States Constitution and the Minnesota Constitution identically. *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 657 (Minn. 2012); *McDonald v. City of Saint Paul*, 679 F.3d 698, 704 n.3 (8th Cir. 2012); *Yanke v. City of Delano*, 393 F. Supp. 2d 874, 879 (D. Minn. 2005), *aff'd sub nom. Yanke v. City of Delano, Minnesota*, 171 F. App'x 532 (8th Cir. 2006). To establish a due process violation, "a plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived him of such an interest without due process of law." *Elder v. Gillespie*, 54 F.4th 1055, 1064 (8th Cir. 2022). Both essential elements are absent here.

A. It is clearly established as a matter of law that Daley Farm's constitutional claims are futile for want of a constitutionally protected interest.

Analyzing a "due process claim must begin with an examination of the interest allegedly violated[,]" because "[t]he possession of a protected life, liberty or property interest is a condition precedent to the government's obligation to provide due process of law, and where no such interest exists, there can be no due process violation." *McDonald*, 679 F.3d at 704. This condition precedent is satisfied by reference to "an independent source, such as state law, rules or understanding that support"[6] a "legitimate claim to entitlement as opposed to a mere subjective expectancy." *Snaza v. City of Saint Paul, Minn.*, 548 F.3d 1178, 1182-1183 (8th Cir. 2008) (quotation omitted).

"[a] bad-faith violation of state law remains only a violation of state law." *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1105 (8th Cir. 1992).

6 *Carolan v. City of Kansas City, Mo.*, 813 F.2d 178, 181 (8th Cir. 1987).

State law creates a legitimate claim to entitlement in a land use approval when two elements are satisfied. A property interest exists "if the municipality, under state law or ordinance, lacks discretion" to deny the application because the applicant "complies with" and "fulfill[s] the requirements." *Carolan v. City of Kansas City, Mo.*, 813 F.2d 178, 181 (8th Cir. 1987). Both conditions—i.e. the applicant complied "with all the applicable laws and codes required for permit issuance[,]" *Ellis v. City of Yankton, S.D.*, 69 F.3d 915, 917 (8th Cir. 1995); and, the municipality lacks discretion to deny the application— "must be met before a constitutionally protected property interest … arises." *Carolan*, 813 F.2d at 181. Courts have found certain land use applications meet these requirements under Minnesota law, in limited circumstances, but no court has ever found a variance application creates a protected property interest. Quite the opposite in fact.

A variance application is not a property interest entitled to constitutional protection. *See Solum v. Bd. of Cnty. Comm'rs for Cnty. of Houston*, 880 F. Supp. 2d 1008, 1012–13 (D. Minn. 2012) (finding "'the [plaintiffs] have not established a protected property interest, and summary judgement as to their procedural due process claim is warranted[,]" where plaintiffs based their claim on a "variance application to the board of adjustment."); and, *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at *4 (Minn. App. May 3, 2011) (holding plaintiff "did not have a protected property interest in its variance application because an applicant has no claim of entitlement to a variance.") (citing *Krummenacher*, 783 N.W.2d at 727). The reason a variance application is not a property interest entitled to constitutional protection, and

why no court applying Minnesota law has ever suggested otherwise, is simple; no one is above the law.

No one, not even Daley Farm, has a constitutional right to violate the law. But this is what a variance is, "a safety valve for unforeseen circumstances" granting permission to vary the strict letter of a zoning provision. *Stadsvold*, 754 N.W.2d at 329 (quotation omitted); *see also Merriam Park Cmty. Council, Inc. v. McDonough*, 297 Minn. 285, 289, 210 N.W.2d 416, 419 (1973) (quoting the 1969 St. Paul Zoning Code, which tracks the 1916 New York City Building Zone Resolution). "Lest there be any misunderstanding," the Minnesota Supreme Court took particular care to outline the ways in which a variance is different from other land use approvals in *Westling v. City of St. Louis Park*, 170 N.W.2d 218. Other land use approvals are "***expressly permitted***[,]" "legislatively ***Permitted*** in a zone subject to controls[,]" or "***not forbidden***" when a landowner "fully complie[s] with conditions imposed for obtaining a permit." *Id.* at 221–22 (emphasis added). A variance on the other hand "is legislatively ***Prohibited***" and "contemplates a departure from the terms of the ordinance" for special reasons. *Id.* Put differently, the governing body already determined it would allow the former, upon compliance, and it already determined it would **not allow** the latter, **regardless** of an applicant's compliance, though special circumstances may warrant an exception. *Zylka,* 167 N.W.2d at 49.

Thus, it is well-established an applicant for a different land use approval "has a much lighter burden of proof than an applicant for a variance[,]" *O'Neil v. Broadbent*, 303 Minn. 171, 177, 226 N.W.2d 885, 888 (1975), because "variances are distinguishable from

special-or conditional-use permits[.]" *Kismet*, 617 N.W.2d at 90; *see also Luger*, 295 N.W.2d at 611–13. Daley Farm will attempt to ignore more than a half-century of binding Minnesota precedent and claim the County is attempting to create artificial distinctions between variances and other land use approvals. But Minnesota courts have always[7] recognized the distinct nature of variances. These other land use approvals "generally should be granted when an applicant meets the conditions specified in the ordinance[,]"*id.*, because even zoning authorities must comply with the law, and "when an ordinance specifies minimum standards … local officials lack discretionary authority to deny" an application meeting those standards. *PTL, L.L.C. v. Chisago Cnty. Bd. of Comm'rs*, 656 N.W.2d 567, 571 (Minn. App. 2003) (collecting cases).[8] An applicant for a variance on the other hand "labors" under a "heavy burden of proof" resulting from "the

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[7] "Minnesota enacted section 394.27 in 1959 but did not adopt a specific statutory standard" until 1974. *Stadsvold*, 754 N.W.2d at 330. Even by that time, the distinct nature of variances was clearly established, and remains so today. *See Westling*, 170 N.W.2d 218, 221-22 (decided in 1969); *and*, *Zylka,* 167 N.W.2d at 49 (same).

[8] *PTL* dealt with a plat application, which is more akin to a conditional use permit than a variance in that "once the conditions and requirements therein are satisfied, the plat mechanically receives final approval." *Semler Const., Inc. v. City of Hanover*, 667 N.W.2d 457, 463 (Minn. App. 2003). Even where the alleged procedural due process property interest is based on a plat application, however, there is no protected property interest. *See Odell v. City of Eagan*, 348 N.W.2d 792, 798 (Minn. App. 1984) ("There is no constitutionally protected interest in state law procedures. The due process clause does not convert every statutory right into a constitutional entitlement. Procedures such as the Eagan preliminary plat application process are designed to prevent arbitrary actions, but there is no property interest in being fairly considered in the process. The property interest is the award of the preliminary plat approval itself.") (citing *Vruno v. Schwarzwalder*, 600 F.2d 124, 131 (8th Cir. 1979); *and*, *Tumulty v. City of Minneapolis*, 511 F. Supp. 36, 37–38 (D. Minn. 1980), *aff'd sub nom. LaGrange v. City of Minneapolis*, 645 F.2d 615 (8th Cir. 1981)).

broad discretion conferred on [a municipality] to grant or deny a variance." *Westling,* 170 N.W.2d at 221-222; *see also Krummenacher*, 783 N.W.2d at 727 ("Municipalities have broad discretionary power in considering whether to grant or deny a variance."); *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 630 (Minn. App. 2002) (same); *Luger,* 295 N.W.2d at 612 ("[A] heavy burden is imposed on an applicant for a variance to show that its grant is appropriate."); *and*, *VanLandschoot*, 336 N.W.2d at 509 ("Since respondent was seeking variances … , he had a heavy burden to demonstrate reasons why he was entitled to the requested action.").

Daley Farm does not have a protectible property interest in an applied for variance. Variances are discretionary exceptions to clearly established rules unlike other land use applications. No court applying Minnesota law has ever so much as suggested a landowner has a legitimate entitlement to preferential treatment. Since there is no property right in a variance application, the Court should dismiss the constitutional claims as a matter of law.

B. Daley Farm is receiving all the process it is due.

Variance proceedings are quasi-judicial because "the zoning authority is applying specific use standards set by the zoning ordinance to a particular individual use." *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981). The basic rights of procedural due process required in a quasi-judicial proceeding "are reasonable notice of hearing and

a reasonable opportunity to be heard." *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978).[9]

Daley Farm received, and is receiving, all process due. Indeed, Daley Farm is receiving more process than it is due, given it has no protectible property interest. Following a duly noticed public hearing, Minn. Stat. § 394.26, Minnesota law vests a county board of adjustment with "the exclusive power to order the issuance of variances…" Minn. Stat. § 394.27, subd. 7. Here Daley Farm had actual notice and they availed themselves of the opportunity to be heard at a meaningful time and in a meaningful manner. Daley Farm received notice of the Board's hearing, attended the hearing, and fully availed itself of the available procedures. *See generally Admin. R.* Daley Farm received due process in the variance proceeding. *See generally, id*. The fact they objected to the result only highlights Daley Farm received due process, because they were afforded the opportunity to challenge the variance decision here. *Moore*, 969 N.W.2d at 91 ("The decision of the board is final, subject to an appeal to the district court, which reviews the decision to determine whether it was reasonable."). Moreover, Daley Farm availed itself of the opportunity to be heard before the Board twice, and this is the second time Daley Farm availed itself of the opportunity for judicial review. Daley Farm has been afforded more process than it is due.

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[9] *Barton Contracting* was not a variance case, but a conditional use permit case. *Barton*, 268 N.W.2d at 716 ("When the governing body considers *an application for a* ***special-use permit*** pursuant to such ordinance, its action no longer bears on an open class of persons but directly on the particular interests of the applicant[.]") (emphasis added).

There is no allegation, or evidence in the record, that Daley Farm did not receive reasonable notice of the Board's hearing or a reasonable opportunity to be heard. Instead, Daley Farm's constitutional claims are based entirely on the unsupported allegation the Board's decision was tainted by bias and prejudgment.

Courts take "a restrictive view" of when land use planning decisions by local government agencies violate an aggrieved party's due process rights. *Bituminous Materials, Inc. v. Rice Cnty., Minn.*, 126 F.3d 1068, 1070 (8th Cir. 1997) (citing *Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992)). This restrictive view is necessary to avoid turning every zoning denial into a "constitutional tort." *Chesterfield*, 963 F.2d at 1104. Procedural due process claims involving local land use decisions "must demonstrate the government action complained of is truly irrational, that is, something more than arbitrary, capricious, or in violation of state law." *Pietsch v. Ward Cnty.*, 991 F.3d 907, 910 (8th Cir.), *cert. denied sub nom. Pietsch v. Ward Cnty., N. Dakota*, 142 S. Ct. 563 (2021) (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005); quotation omitted); *see also Queen Anne Cts. v. City of Lakeville*, 726 F. Supp. 733, 738 (D. Minn. 1989) (holding plaintiff's allegations "zoning decision was arbitrary and irrational for numerous reasons, … under Minnesota law … are not actionable…"). A "due process claim in the zoning context exists, if at all, only in extraordinary situations and will not be found in run-of-the-mill zoning disputes." *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 690-691 (Minn. 1991) (zoning authority's, admittedly, arbitrary conduct of "erroneously rel[ying] on an expert who had an obvious conflict of interest and who failed to study

the project directly," and "reject[ing] the only credible expert studies and recommendations," was not sufficient to state an actionable due process claim). Under the truly irrational standard, the action must "be so egregious or extraordinary as to shock the conscience." *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006) (citing *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998)). "An example would be attempting to apply a zoning ordinance only to persons whose names begin with a letter in the first half of the alphabet." *Chesterfield*, 963 F.2d at 1104.

Even if Daley Farm "could prove a constitutionally protected property interest," which it cannot, Daley Farm cannot prove the second element of a due process claim, "that the Board's actions were truly irrational." *Bituminous Materials,* 126 F.3d at 1070-1071. Daley Farm received reasonable notice of the Board's hearing and a reasonable opportunity to be heard. Moreover, as noted below, Daley Farm's allegations of bias are completely unfounded and speculative. Still, even if they were not, these "allegations are far too insubstantial to support a" due process claim. *Id*. Indeed, it would be inconsistent with the restrictive view's "high threshold" to hold a "due process claimant will survive summary judgment by alleging that a land use planning decisionmaker does not like the plaintiff." *Id.*

Daley Farm's constitutional claims fail as a matter of law. Daley Farm received and is receiving all the process it is due. Actually, Daley Farm is receiving more process than it is due because it has no legally protected property interest in an applied for variance. This is fatal to Daley Farm's constitutional claims as a matter of law, and the result would

be the same even if it were not. Daley Farm's allegations of bias are completely unfounded and speculative, but even if they were not, they are far too insubstantial to support a due process claim. Because Daley Farm's constitutional claims fail as a matter of law, the Court should grant the City summary judgment on all the constitutional claims.

II. THE COUNTY DENIED PLAINTIFFS' WRITTEN REQUEST RELATING TO ZONING WITHIN 60 DAYS AS REQUIRED BY MINN. STAT. § 15.99.

The County complied with Minn. Stat. § 15.99, the so-called 60-day Rule. Under Minn. Stat. § 15.99, subd. 2, "an agency must approve or deny within 60 days a written request relating to zoning[.]" The law, however, extends this time limit if an application "requires prior approval of a state or federal agency." Minn. Stat. § 15.99, subd. 3(e). The operative application was sent to the County on November 16, 2018, requesting "a variance from the requirement in Section 8.4.2 of the Winona County Zoning Ordinance." *Admin. R. 1665, 1970*. On January 4, 2019, the MPCA issued a negative declaration on the need for an environmental impact statement for Daley Farm's treble growth plan. *Admin. R. 155*. As a result, the County had until March 5, 2019, to act on Daley Farm's application, and it acted within the time limit by denying the variance request on February 21, 2019. *Admin. R. 2772-2783*. It is undisputed the Board's February 21, 2019, decision "satisfied the statutory deadline," but Daley Farm claims this initial denial was rendered void and of no legal effect, resulting in *the variance from the requirement in Section 8.4.2* being "approved by operation of law as of March 6, 2019[,]" *Pls.' Mem. at 45*, i.e., ***two weeks***

before Daley Farm appealed the Board's decision resulting in the remand. *See Compl., Doc. #3*. The absurdity of Daley Farm's argument is self-evident.

Alternatively, Daley Farm argues 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." *Pls.' Mem. at 49*. Daley Farm cites no authority for this proposition because none exists. *Id.* Instead, Daley Farm relies on an unpublished case where the court never mentions the 60-day rule except in the dissent:

> The county board argues that they were advised that they must move quickly to avoid the effect of the sixty-day rule that would result in automatic issuance of the permit. Complying with statutory time limits is important, but the statute does not indicate that the sixty-day rule applies to a remand from a court decision.

In re McDuffee, No. A07-1053, 2008 WL 2492323, at *10 (Minn. App. June 24, 2008) LANSING, Judge (dissenting). In short, to the extent Daley Farm can cite to any authority about the effect a remand has on Minn. Stat. § 15.99, the authority supports the conclusion the 60-day rule does not apply on remand. Even if there was one case so much as suggesting Minn. Stat. § 15.99 applies on remand—which there is not—Daley Farm does not explain why it would apply under the facts here.

The undisputed facts prove Daley Farm never submitted a written request relating to zoning. A written request related to zoning "means a written application related to zoning," which "must be submitted in writing to the agency on an application form provided by the agency, if one exists." Minn. Stat. § 15.99, subd. 1(c). An application form

provided by the agency exists, and Daley Farm utilized the application when it applied for "a variance from the requirement in Section 8.4.2 of the Winona County Zoning Ordinance." *Admin. R. 1665, 1970*. Daley Farm, however, acknowledges its application was deficient and subject to administrative denial because "Daley Farm was also required to obtain a variance" from "Section 10.4.6.1 of the" Zoning Ordinance, which it failed to apply for at any point in the past nine years. Accordingly, on October 19, 2021, counsel for Daley Farm wrote to the County to request "a variance from the entirety of the animal unit cap under the Ordinance, including Section 8.4.2, Section 10.4.6.1, and any other applicable provisions that manifest a limit on the number of animal units that Daley Farm may have at its dairy farm." *Admin. R. 2804*.[10] This letter cannot start Minn. Stat. § 15.99's clock because the additional variance was not requested on the application form provided by the agency and "[n]o request shall be deemed made if not in compliance with this paragraph." Minn. Stat. § 15.99, subd. 1(c). Still, even if Daley Farm had made a request in compliance with Minn. Stat. § 15.99, subd. 1(c)—which it did not—automatic approval would not follow because the Board acted upon the variance request on December 2, 2021, within sixty days of Daley Farm's noncompliant request to add an additional variance to its application. *Admin. R. 2964-3108*.

[10] As phrased by counsel for Daley Farm, this would include a variance from Zoning Ordinance Section 3.2.3.2 (continued use of non-conforming uses).

Therefore, for the foregoing reasons, among others,[11] Daley Farm's 60-day rule argument is baseless.

III. THE BOARD REASONABLY DENIED THE VARIANCE APPLICATION.

The question for the Court in all zoning matters is the same,[12] "namely, whether the zoning authority's action was reasonable." *Honn*, 313 N.W.2d at 416–17. This question can be stated in the negative, i.e., whether the zoning authority's action was unreasonable, arbitrary, or capricious. Or it can "be stated in terms of what is not arbitrary and capricious." *Sagstetter*, 529 N.W.2d at 491. When a zoning authority acting within its jurisdiction is "not mistaken as to the applicable law[,]" its decision is based on legally

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[11] While not in the administrative record, it should be noted the County refrained from holding the remand hearing *at the request of Daley Farm's counsel*, who first requested additional time to pursue an interlocutory appeal (which does not qualify as a process required to occur before remand under Minn. Stat. § 15.99) and to request reconsideration (same). A party is equitably estopped from arguing for the application of Minn. Stat. § 15.99 under these circumstances. *See Ridge Creek I, Inc. v. City of Shakopee*, No. A09-178, 2010 WL 154632, at *5–7 (Minn. App. Jan. 19, 2010).

[12] Throughout its Memorandum of Law Daley Farm mistakenly cites several inapplicable cases to support its claim this quasi-judicial appeal is subject to the standards of review relevant when the Minnesota Administrative Procedure Act applies. *See, e.g.*, *Pls.' Mem. at 50-54* (quoting *In re Schmalz*, 945 N.W.2d 46, 54 (Minn. 2020)). This standard is limited to decisions reviewed under the Minnesota Administrative Procedure Act. Minn. Stat. §§ 14.57–14.62. *See*, *e.g., Citizens Advocating Responsible Dev. v. Kandiyohi Cnty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) (citing *In re Charges of Unprofessional Conduct Contained in Panel File 98-26*, 597 N.W.2d 563, 567 (Minn. 1999)). In other words, it only applies to agencies "having a statewide jurisdiction," *see* Minn. Stat. § 14.02, subd. 2; *and*, local government environmental decisions under Minn. Stat. § 116D.04, subd. 10. This is not such a case, and it is nothing like the extreme outlier where a court applied this standard to a quasi-judicial municipal zoning decision. *See Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d 184, 187–88 (Minn. App. 2009) (discussing *In re Block*, 727 N.W.2d 166, 180 (Minn. App. 2007)).

sufficient criteria and is reasonable if "the evidence could reasonably support or justify the determination." *Stadsvold*, 754 N.W.2d at 332 (emphasis added). Courts will not invalidate a zoning variance decision if the zoning authority "acted in good faith and within the broad discretion accorded them by statutes and the relevant ordinances." *VanLandschoot*, 336 N.W.2d at 509. The "decision will only be reversed if its stated reasons are legally insufficient or without factual basis." *Sagstetter*, 529 N.W.2d at 491 (quotation omitted).

No matter how the question is phrased, courts analyze the question under a familiar two-pronged framework. This framework "focuses on the legal sufficiency and factual basis for the reasons given" to support a zoning authority's decision. *Mendota Golf*, 708 N.W.2d at 180. Thus, unsurprisingly, courts first "determine if the reasons given by the [zoning authority] were legally sufficient." *RDNT*, 861 N.W.2d at 75–76. "Second, if the reasons given are legally sufficient," courts "determine if the reasons had a factual basis in the record." *Id.*; *see also VanLandschoot*, 336 N.W.2d at 508.

A. The Board based its decision on legally sufficient criteria.

The county zoning "enabling statute" specifies procedures for obtaining variances. *Toby's*, 545 N.W.2d at 55-56. The County must exercise its zoning authority according to the enabling statute, *see Stadsvold*, 754 N.W.2d at 329–31, but the statute "specifically provides … counties may go beyond the features set forth in the enabling statute." *Id.* As such, it is well established the legal sufficiency of a zoning authority's decision is determined by reference to its local controls. *VanLandschoot*, 336 N.W.2d at 507-508 n.2.

Even though "the standards set out in the local ordinance[—]not … the standards contained in the statute[—]" are the measure of "reasonableness[,]" *White Bear Docking*, 324 N.W.2d at 176, the standards set out in the County's Zoning Ordinance mirror those contained in the statute. *Compare*, *WCZO* § 5.6; *with*, Minn. Stat. § 394.27, subd. 7.

Variances may only be allowed when an applicant establishes multiple factors. *Id*. "Variances ***shall only be permitted*** when they are in harmony with the general purposes and intent of the official control and when the variances are consistent with the comprehensive plan." Minn. Stat. § 394.27, subd. 7 (emphasis added); *see also WCZO* § 5.6.2. Additionally, the Board "***may***" grant a variance when there are "practical difficulties in complying with the official control." *Id.* (emphasis added). The burden of showing practical difficulties is on the applicant, i.e., Daley Farm. Minn. Stat. § 394.27, subd. 7 ("Variances may be granted *when* ***the applicant*** *for the variance* ***establishes*** that there are practical difficulties in complying with the official control.") (emphasis added).

Likewise, on appeal, the burden of showing error rests with the party relying on it. *Schwardt v. Cty. of Watonwan*, 656 N.W.2d 383, 387 (Minn. 2003). Daley Farm bears the "burden of persuasion that the reasons" stated by the Board for denying the variance "are legally insufficient."[13] *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 765 n.4 (Minn. 1982) ("[A]ppellants have not met their burden of showing that the Council's action was taken without legally sufficient reasons with factual support in the record."). This is a

[13] Nothing in the Daleys' Notice of Appeal states why the Board's decision is legally insufficient.

"heavy burden" which is not satisfied merely by showing the Board made a mistake. *Luger*, 295 N.W.2d at 612. Instead, as "an applicant for a variance" Daley Farm must "show that its grant is appropriate." *Id.* This entails not only disproving the bases relied on by the Board, but also proving the application meets each and every requirement, even those the Board never reached. *Krummenacher*, 783 N.W.2d at 727; *Mohler*, 643 N.W.2d at 631. Conversely, failure to meet even one requirement sustains the Board's decision. "Not all of the reasons stated need be legally sufficient[,]" *Hubbard*, 323 N.W.2d at 765 n.4, "when at least one of the reasons given for the denial" has a rational basis. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997).

Under Zoning Ordinance Section 5.6.2 the "Board of Adjustment ***shall not*** grant a variance … unless it ***shall*** make findings" on eight individual criteria. WCZO § 5.6.2 (emphasis added). "The word 'shall'" is "mandatory[.]" *WCZO* § 4.1.E; *see also* Minn. Stat. § 645.44, subd. 16 ("'Shall' is mandatory."). Among the eight individual criteria, upon which the Board must make findings, is the requirement a variance may not be based upon "[e]conomic considerations alone…" *WCZO* § 5.6.2.6 ("Economic considerations alone do not constitute practical difficulties."); *see also* Minn. Stat. § 394.27, subd. 7 ("Economic considerations alone do not constitute practical difficulties.").

It is undisputed this "is the only variance requirement that the Winona County Board of Adjustment did not affirmatively find was satisfied by Daley Farm's Variance Application." *Pls.' Mem at 61*. Nonetheless, the Board based its decision on legally sufficient criteria. The Zoning Ordinance prohibited the Board, as a matter of law, from

granting Daley Farm's variance request absent a finding the applicant proved practical difficulties beyond economic considerations alone.

Even if Daley Farm disputed this, the binding law applied to this situation is clear. For example, in *Moore v. Morrison County*, the Minnesota Court of Appeals observed Morrison County's "zoning ordinance mandates that the board consider six mandatory conditions[,]… expressly makes consideration of these six factors mandatory[,] and allows a variance only if all six are established[.]" 969 N.W.2d at 89–90. Like the County here, Morrison County also required an applicant prove their variance request is not based upon economic considerations alone. *Id.* ("Does the alleged practical difficulty involve more than just economic considerations.").

Daley Farm asks the Court to place an interpretive gloss over the Zoning Ordinance, under which the Board did not have to find Daley Farm established one, and only one, mandatory variance criteria. It just so happens this interpretive gloss would only apply to the one mandatory variance criterion Daley Farm failed to establish. The Court cannot, however, reach the conclusion Daley Farm advances. Doing so would put the Court at odds with the Minnesota Supreme Court, who has consistently reiterated the standards set out in the local ordinance control, *see VanLandschoot*, 336 N.W.2d at 508 n.6; *and*, *White Bear Docking*, 324 N.W.2d at 176, as well as the Minnesota Court of Appeals who approvingly required a variance applicant establish, as a mandatory condition to receiving a variance, their variance request was not based upon economic considerations alone. *Moore*, 969 N.W.2d at 89–90. More importantly, to reach such a conclusion the

Court would need to violate a legal principle, which has been well-established for more than five decades.

The same rules that apply to the interpretation of a statute apply to the interpretation of an ordinance." *State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017). When the words of an "ordinance in their application to an existing situation are clear and free from ambiguity, judicial construction is inappropriate." *Chanhassen Ests. Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 339 (Minn. 1984). Indeed, it is prohibited. *Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 9, 153 N.W.2d 209, 216 (1967) (Judicial construction of an unambiguous ordinance is neither "necessary nor permitted."). The Court's only task is to apply the plain language of the statute while declining "to explore its spirit or purpose." *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016). *Id.*; *see also* Minn. Stat. § 645.16 ("[T]he letter of the law shall not be disregarded under the pretext of pursuing the spirit."). There is nothing ambiguous about the mandate the Board "shall not grant a variance from the regulations of this Ordinance unless it shall" find "[e]conomic considerations alone do not constitute practical difficulties." *WCZO* § 5.6.2.

The Board relied on the criteria in the Zoning Ordinance. The Zoning Ordinance's mandatory criteria, including the prohibition on reliance on economic considerations alone, are consistent with both the zoning enabling statute and binding caselaw. Even if the criteria were inconsistent, the standards set out in the local ordinance control. The Board relied on the criteria in the Zoning Ordinance and therefore based its decision on legally sufficient criteria.

B. The Record evidence supports the Board's decision.

If the Board relied on legally sufficient reasons, the Court determines "if the reasons had a factual basis in the record." *RDNT,* 861 N.W.2d at 76. The burden is still with Daley Farm. *Id.*; *see also Schwardt*, 656 N.W.2d at 387 (individuals challenging zoning authority's decision must show legal insufficiency and "abuse of discretion.").

"[E]conomic motivations can be present" if there were convincing "reasons independent of economic motivation" warranting a variance, such that the economic considerations do not "serve as the sole motivation for the variance." *State ex rel. Neighbors for E. Bank Livability v. City of Minneapolis*, 915 N.W.2d 505, 517 n.23 (Minn. App. 2018). But when, as here, the administrative record evidence establishes the Board "could have rationally concluded" the practical difficulties were based on economic considerations alone, Daley Farm cannot meet its burden simply by arguing the evidence in the record does not reasonably support or justify the Board's determination.[14] *VanLandschoot*, 336 N.W.2d at 509–10.

[14] Daley Farm misquotes the Minnesota Supreme Court's *Stadsvold*, 754 N.W.2d at 332, opinion to claim a district court can overturn a co-equal government branch's quasi-judicial decision "if the evidence in the record does not 'reasonably support or justify the determination.'" *Pls.' Mem. at 61*. What the Court ***actually*** said was it reviews zoning actions "to determine whether the evidence ***could*** reasonably support or justify the determination." *Id.* at 332 (emphasis added). Properly quoted the Court's statement is consistent with the well-established standard of review reiterated repeatedly by Minnesota's appellate courts. *See, e.g., VanLandschoot*, 336 N.W.2d at 508–09 ("A municipal decision-making body has a broad discretionary power to deny an application for variances. The fact that a court reviewing the action of a municipal body may have arrived at a different conclusion, had it been a member of the body, does not invalidate

Daley Farm must show the Board reached a conclusion "*without **any** evidence* to support it." *Dietz*, 487 N.W.2d at 239 (emphasis added). If there was conflicting evidence, courts "ordinarily defer to [the municipality's] judgment[,]" *RDNT*, 861 N.W.2d at 76, absent opposing evidence "so compelling," "so significant" and so "one-sided" it suggests "an abuse of discretion…" *Schwardt*, 656 N.W.2d at 389. Lacking either scenario, courts will "defer to a municipality's decision when the factual basis" relied on "has *even the **slightest*** validity." *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. App. 2004) (emphasis added). Daley Farm cannot meet its burden.

Based on the administrative record evidence, the Board could rationally conclude economic considerations alone prompted Daley Farm's variance request. Courts have always decided whether a variance request runs afoul of Minn. Stat. § 394.27, subd. 7 ("Economic considerations alone do not constitute practical difficulties.") by further interrogating the "reasons independent of economic motivation" allegedly necessitating the variance. *Neighbors for E. Bank Livability*, 915 N.W.2d at 517 n.23. Further interrogating these reasons, based on the administrative record evidence, suggests whether the zoning authority "could have rationally concluded" these alternative reasons, or economic considerations alone, were the motivating factor for seeking a variance instead of operating within the terms of an ordinance. *VanLandschoot*, 336 N.W.2d at 509–10

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the judgment … if they acted in good faith and within the broad discretion accorded them by statutes and the relevant ordinances.").

(holding variance application motivated "*primarily*" by "the cost of owning and maintaining a large lot" was insufficient to justify granting variances.) (emphasis added); *see also*, *Tuckner v. May Twp.*, 419 N.W.2d 836, 839 (Minn. App. 1988) ("The property may continue to be used as it is presently being used—a residential property with seasonal dwellings which may be rented out. This use is reasonable, even if it may not be as profitable as selling the property as separate parcels."); *Cont'l Prop. Grp., LLC v. City of Wayzata*, No. A15-1550, 2016 WL 1551693, at *5–6 (Minn. App. Apr. 18, 2016) (holding zoning authority did not misapply the law because it considered practical difficulties factors amidst the backdrop of applicant's primary motivation to see acceptable economic return.); *and*, *In re Appeal of Decision of Winona City Council on Variance Petition No. 93-01-V.*, No. C7-94-37, 1994 WL 385642, at *3 (Minn. App. July 26, 1994) (rejecting appeal upon finding variance request was based on concerns, which "were predominantly, if not completely, economic.").[15] Further interrogating these purported non-economic reasons here establishes Daley Farm's variance request was based on economic considerations alone, and at the very least, conclusively establishes the Board reasonably concluded Daley Farm failed to prove otherwise.

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[15] *See also*, *Sagstetter*, 529 N.W.2d at 493 (finding ordinance requirement "variance should not be based *primarily* on a desire to increase the value or income potential of the parcel of land[,]" consistent with statutory language about economic considerations alone.); *Cont'l Prop. Grp., Inc. v. Hassan Twp.*, No. A07-1600, 2008 WL 2651422, at *2 (Minn. App. July 8, 2008) ("Without the desired variance, appellant is still able to build a smaller, allegedly less marketable office/warehouse than the one it has proposed. This is a financial or economic consideration and was duly noted as such by the board and therefore does not constitute a" basis to grant the variance.)

As the name it applied to its proposed project implies, "Daley Farms' proposed expansion and modernization project" seeks to achieve two goals—expansion and modernization—both of which Daley Farm claimed caused its variance request, and both of which are premised on economic considerations alone. *Admin. R. 1838-1841*.

An applicant's decision to apply for a variance, when it can carry out the same "reasonable use for the property absent a variance[,]" often indicates the absence of required variance criteria or the presence of an economic motivation alone. *See, e.g.*, *Kismet*, 617 N.W.2d at 90-92 (holding applicant did not establish required variance criteria because its application was based on economic considerations alone). For example, a reasonable use can become unreasonable by the mere fact the variance is not needed, because there is nothing "compelling a board to accept a landowner's proposal to implement a reasonable use in a manner that would require a variance when the use can be accomplished in a different manner within the terms of an ordinance." *Steinkraus v. Cook Cty. Bd. of Adjustment*, No. A06-2309, 2007 WL 2417283, at *3 (Minn. App. Aug. 28, 2007). Thus, when a property owner seeks to add on to a cabin to make it handicap accessible and to accommodate guests, a county board of adjustment is not compelled to conclude the proposal is reasonable if the same reasonable use can be accomplished without a variance. *Id.* (affirming board decision to deny variance where landowner had existing variance to construct second residence, which could be made handicap accessible and could accommodate guests). The same is true when, as here, an applicant claims it

needs a variance to accomplish things it can accomplish without a variance, and the only other explanation for the variance request is economic motivation.

Daley Farm does not require a variance to modernize its current dairy operation. In support of its claimed non-economic reasons for seeking a variance Daley Farm claims its desire to triple the size of its operation will "reduce the environmental impact of the farm…, promote animal welfare and food safety, and ensure the continued safety and well-being of its employees." *Pls.' Mem at 61* (citing *Admin. R. 1858*). Daley Farm, however, can do all this without a variance. None of these benefits, which would flow from Daley Farm complying with existing laws,[16] existing regulations,[17] and existing best management practices, [18] are reasonable proposals "***not permitted*** by an official control[.]" Minn. Stat. § 394.27, subd. 7 (emphasis added). Put another way, nothing in the Zoning Ordinance prevents Daley Farm from following the laws and permit

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16 *See Admin. R. 1849* ("[T]he proposed project includes … the closure of a separate (but nearby) feedlot site, that are not currently in compliance with federal effluent limitation requirements.").

17 *Compare Admin. R. 1850* ("Daley Farms' expanded feedlot will operate under an Individual NPDES Permit that incorporates a manure management plan… In contrast, if fields are not subject to a manure management plan that is incorporated into a feedlot permit…"); *with*, *Admin. R. 157* ("The ***existing feedlot*** consists of three sites, regulated under the State of Minnesota Individual Animal Feedlot National Pollution Discharge Elimination System (NPDES) Permit MN0067652 (Individual NPDES Feedlot Permit).") (emphasis added), *and Admin. R. 161* (Daley Farm's existing Individual NPDES Feedlot Permit already "requires Daley to develop updates to its M[anure]M[anagement]P[lan] that meet the requirements of Minn. R. 7020.2225.").

18 *See Admin. R. 1849* ("[T]he proposed project includes the construction and installation of runoff control measures for an existing feed pad and portion of the feedlot at the site[.]").

regulations already applicable to it or implementing the proposed best management practices without a variance. The idea Daley Farm will not follow state and federal law, or try to be a good environmental steward, unless the County permits it to triple the size of its operation is simply an attempt to hold the Board hostage, not a practical difficulty. Indeed, the record is replete with evidence supporting the conclusion Daley Farm does not need to obtain a variance to accomplish these non-economic considerations. *See Admin. R. 2717:20-2718:8, 2720:14-17, 2801, 2832, 2839, 2959, 2961, 3043:2-14, 3062:4-13, 3082:23-3084:4*. This does not, as Daley Farm incorrectly believes, mean its variance request is motivated by more than economic considerations. In fact, as noted, it shows Daley Farm's proposal is unreasonable because it rejected reasonable alternatives, which do not require a variance, in favor of an unreasonable alternative, which does require a variance, based on its economic motivation alone.

Each of Daley Farm's other (genuine) explanations for seeking a variance are based on economic considerations alone. There is no dispute Daley Farm has a reasonable use for the property absent a variance. Absent the requested variance, Daley Farm "may continue to operate at" its current size. *Admin. R. 1438*. From the outset Daley Farm made it clear if it were "unable to receive all needed permits and approvals," including its variance request, it would "continue to operate" its current dairy farm site. *Admin. R. 160*. Daley Farm, however, does not want to continue at its current size, it wants to expand to generate additional revenue to support the next generation of Daley family members, while also funding a nest egg for the current generation.

Daley Farm admitted economic considerations alone motivated its expansion efforts. In its variance application, Daley Farm explained it was proposing to triple the size of its current operation "because a new generation of the family desires to return to Winona County and work on the family farm." *Admin. R. 1698*. "An expansion of the farm is necessary in order to support the additional people who will be making their living by farming in Winona County." *Id*. This admission was not a mistaken moment of candor, but an oft-repeated forthright justification, *see, e.g., Admin. R. 1849* (explaining Daley Farm is proposing to triple the size of its current operation "because a new generation of the family … desires to return to rural Winona County and work on the family farm. The expansion is necessary to make the farm economically sustainable into the future and provide economic support for the additional family members…"), well-known in the community. *See Admin. R. 397, 445, 463, 1049*. Daley Farm did "not deny" and in fact "fully acknowledged" its "*economic motivation* for proposing this project[.]" *Admin. R. 1858, 2586:14-2586:15, 2587:11-2587:12* (emphasis added). For instance, in discussing its *economic motivation* Daley Farm explained its goal was to ensure the farm is "sustainable into the future, into the next generation[,]" *Admin. R. 2587:2-4*, or, in other words, "*for us to bring in the next generation* and yet retire at some point, *we need to* do an expansion so we can *leave our children with* something and still have *a thriving business*." *Admin. R. 2095* (emphasis added).

Given Daley Farm admitted, several times, its desire to expand was motivated by purely economic considerations, the Board could rationally conclude Daley Farm's

variance request was motivated by economic considerations alone. Indeed, Daley Farm confirmed economic considerations were its sole motivation in attempting to explain why it chose to expand in the proposed manner.

Daley Farm can expand its dairy farming operation absent a variance. Indeed, it was Daley Farm who first made this reasonable alternative use clear. As Daley Farm explained, it could "expand its operation by constructing multiple smaller facilities on different sites in the area[.]" *Admin. R. 1699*. Moreover, the record evidence shows expansion on multiple smaller sites would actually "prevent the soil from becoming saturated with manure" and "strike a better balance between agriculture and protecting the area's drinking water resources." *Admin. R. 2096*. Daley Farm claimed this would "increase traffic and fossil fuel emissions by increasing the amount of transportation required for the operation," *Admin. R. 1699*, but this assertion is nothing more than "unscientific speculation," and "unsubstantiated concerns[,]" which the Board could not credit in reaching a determination. *Trisko*, 566 N.W.2d at 356; *see also Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 728 (Minn. App. 1988). Even if the Board could rely on Daley Farm's speculative fears, the record evidence proves they are unfounded. The administrative record evidence proves the sheer amount of the manure generated by Daley Farm's massive, proposed expansion will require forty-one individual manure application sites spread throughout St. Charles, Utica, and Fremont Townships, some of which will require a sixteen-mile round trip transport. *Admin. R. 1463-1506*. There is nothing in the record suggesting expansion at multiple smaller facilities on different sites

in the area would require transportation and fossil fuel emissions anywhere near the level Daley Farm proposes generating under its current proposal. Absent Daley Farm's unsubstantiated unscientific speculation and unfounded fears, there is nothing preventing Daley Farm from expanding within the Zoning Ordinance's confines. Nothing besides economic considerations that is.

Again, Daley Farm admitted economic considerations alone stopped it from expanding without a variance. While there is nothing preventing Daley Farm from expanding "its operation by constructing multiple smaller facilities on different sites in the area," Daley Farm does not want to do this because "such expansions would cause significant duplication of equipment, dramatically increase the cost of the project, [and] decrease the efficiency of the operation[.]" *Admin. R. 1699*. Simply stated, **it would be more expensive**. "In this case," Daley Farm argued "the considerations go far beyond the economics, … [i]t is about taking advantage of the existing facilities[.]" *Admin. R. 2586:24-2587:1*. Problematically, Daley Farm admitted taking advantage of the existing facilities meant protecting its existing investment: "Daley Farms of Lewiston made significant investments to construct its existing facilities prior to the enactment of the 1,500 animal unit cap …, and these existing facilities cannot be moved to another location outside of Winona County." *Admin. R. 1699*. Daley Farm rejected the option to expand at multiple smaller sites based solely on its *economic motivation*. *Id.* While Daley Farm believed "taking advantage of the existing facilities" was distinct from its economic motivation, caselaw in Minnesota establishes otherwise. In *Kismet Investors, Inc. v. County of Benton*,

the plaintiff argued its variance request should be granted "based on financial investment[,]" specifically "substantial and costly improvements[,]" "combined with practical difficulties of complying with the zoning ordinance." 617 N.W.2d at 91. The court, however, found the plaintiff had other reasonable uses for its property, and the "landowner's significant investment in the property," neither "demonstrate[d] the absence of other reasonable uses[,]" nor allowed plaintiff to claim "a unique plight based on its investment." *Id.* at 92.

The record evidence proves economic considerations alone constituted Daley Farm's claimed practical difficulties. Daley Farm admitted its economic motivation drove it to reject reasonable alternatives, which would not require a variance, in favor of the variance request. To this day Daley Farm has not identified any practical difficulty preventing it from continuing to operate, or expand, outside its own *economic motivation*. The Board's decision was reasonable. Accordingly, the Court should affirm it.

IV. DALEY FARM CANNOT OVERTURN THE BOARD'S REASONABLE DECISION WITH SPECULATIVE AND BASELESS ALLEGATIONS OF BIAS AND PREJUDGMENT.

In addition to relying on imagined legal and factual deficiencies to argue the Board's decision was arbitrary, capricious, and unreasonable, Daley Farm attempts to advance the same argument based on purported bias and prejudgment concerns. Judicial review on Daley Farm's Minn. Stat. § 394.27 appeal of this case "is limited to an examination of the record" and the Court "should confine itself at all times to the facts and circumstances developed before" the government body. *Big Lake*, 761 N.W.2d at 491.

To make their bias and prejudgment allegations more believable, Daley Farm relies on more than seven hundred pages of documents outside the administrative record, *see Docs. ##163-167*, but even this violation of binding Minnesota Supreme Court precedent does not advance the ball.

A. Neither Bias, nor prejudgment tainted the Board's decision.

Referring to Daley Farm's allegations of bias and prejudgment as speculative and baseless may seem hyperbolic, but the Court need look no further than Daley Farm's own argument to see this is an accurate description. Daley Farm claims Board members Elizabeth Heublein and Kelsey Fitzgerald were appointed to the board "in a conscious manner to oppose Daley Farm's" expansion. *Pls.' Mem. at 56*. It is no coincidence Daley Farm questions the integrity of the two Board members who correctly concluded Daley Farm's variance request rested on economic considerations alone. In fact, this does more to explain why Daley Farm is alleging bias and prejudgment than anything within (or outside) the administrative record. Take for instance Elizabeth Heublein, who Daley Farm claims is biased based on a single statement, which did not occur during the variance proceedings, and which Heublein did not even make. The statement, which Daley Farm accurately quotes once,[19] was made by then-Winona County Board of Commissioners Chair Marie Kovecsi: "Dr. Heublein 'has some very careful reasons for

[19] Daley Farm inaccurately presents the same statement on page 56 of its Memorandum to make it seem as though Marie Kovecsi had careful reasons for wanting to appoint Elizabeth Heublein to the Board. *Pls.' Mem. at 56*.

wanting to join this committee.'" *Pls.' Mem. at 37*. If it seems remarkable Daley Farm's bias allegations against Elizabeth Heublein are based entirely on someone else's "odd choice of words[,]" it is actually the exact same basis Daley Farm relies on to suggest Kelsey Fitzgerald is biased. Even if the Court could consider this second statement in ruling on the current motions—which it cannot[20]—doing so would not make Daley Farm's bias allegations any less transparent, because there is no dispute it is untrue. No one recruited Kelsey Fitzgerald; she decided to apply for the Board on her own. *Fitzgerald Dep. 21:1-22:14*. Similarly, Elizabeth Heublein, the candidate supposedly installed by Land Stewardship Project, knew nothing about Daley Farm when she was appointed to the Board.[21] *Heublein Dep. 23:11-23:14, 29:8-29:14*. At best, Daley Farm's bias and prejudgment allegations are entirely theoretical because they require the Court to make speculative leaps from immaterial and unrelated facts, while at the same time attributing

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[20] In addition to being outside the administrative record, the statement Kelsey Fitzgerald was recruited by someone affiliated with Land Stewardship Project, *see Doc. #164 at 201*, is inadmissible hearsay within inadmissible hearsay, and cannot be considered, even if this issue were subject to the summary judgment standard. *See* Minn. R. Civ. P. 56.03(b). Kelsey Fitzgerald did not speak to anyone affiliated with LSP about her reasons for applying to the Board, and specifically did not speak to Alex Romano about applying to the Board in general. *Fitzgerald Dep. 21:1-21:9*. Presumably Doug Nopar made this statement to Alex Romano, and thus it would be an out of court statement offered for the truth of the matter asserted if Alex Romano had testified to this conversation. *See* Minn. R. Evid. 801. But Romano did not testify to this statement, and Doug Nopar did not either. Thus, when the statement was repeated in an e-mail it became hearsay within hearsay. Minn. R. Evid. 805.

[21] Likewise, she knew nothing about what Marie Kovecsi meant by "careful reasons." *Heublein Dep. 29:8-29:14*.

unfounded evil motives to everyone (save Daley Farm and its supporters). Daley Farm fails to meet its burden of proof.

Even with the benefit of these unreasonable inferences, the Court is left with nothing more than a baseless conspiracy, which does not suffice to meet Daley Farm's heavy burden. "[T]he standard of review remains whether on the evidence before it, the Board reached a reasonable decision." *Town of Grant v. Washington Cty.*, 319 N.W.2d 713, 717 (Minn. 1982). It remains Daley Farm's burden to show the Board's decision was legally insufficient as measured against the standards outlined in the Zoning Ordinance, or the Board's conclusions and findings are without a factual basis in the record. Simply alleging the Board members were biased does not change this standard.

Moreover, Daley Farm would not be entitled to benefit from unreasonable inferences even if its claims were subject to the summary judgment standard, instead of the applicable "limited and deferential review" mandated by the Minnesota Constitution. *Big Lake*, 761 N.W.2d at 491. "The district court is required to draw only *reasonable* inferences in [Daley Farm's] favor." *Superior Const. Servs., Inc. v. Belton*, 749 N.W.2d 388, 393 (Minn. App. 2008). The Court "is not required to save [Daley Farm] by drawing unreasonable inferences[,]" because "[s]ummary judgment is designed to dispose of specious claims" such as these. *City of Savage v. Varey*, 358 N.W.2d 102, 105 (Minn. App. 1984). These problems alone would be enough to justify summary judgment in the County's favor on all Daley Farm's claims, but the problems do not end here.

B. Neither Bias, nor Prejudgment supply a legal basis for overturning the Board's decision.

Daley Farm does not provide any precedential legal support for its argument. For example, Daley Farm would have the Court believe there are only two unpublished opinions[22] where Minnesota's appellate courts addressed what effect, if any, allegations of bias have on quasi-judicial municipal proceedings. *See Pls.' Mem. at 54-55* (citing *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, 2011 WL 1642510; *Living Word Bible Camp v. Cnty. of Itasca*, No. A12-0281, 2012 WL 4052868 (Minn. App. Sept. 17, 2012)). But this is not true.

The fact a party alleges bias does not create an independent ground to overturn an otherwise reasonable quasi-judicial decision. This is true whether the decisionmaker has a perceived or actual interest. Regarding the former, a decisionmaker's membership in an organization, which may be affected by a decision, is not enough to make the resulting decision arbitrary, capricious, or unreasonable. *Rowell v. Bd. of Adjustment of the City of*

[22] None of the published opinions cited by Daley Farm are relevant here, as they either involve an entitlement appeal from a benefits determination under the Minnesota Uniform Relocation Act, *see Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. App. 2003), or appeals under the University of Minnesota's employment grievance process. *See Deli v. Univ. of Minnesota*, 511 N.W.2d 46 (Minn. App. 1994); *and*, *Buchwald v. Univ. of Minnesota*, 573 N.W.2d 723, 725 (Minn. App. 1998). To the extent these cases have any relevance they establish a high bar for finding bias and support the County alone because they stand for the following propositions: The fact a decisionmaker has entertained certain views as a result of prior investigations does not necessarily mean the decisionmaker is biased or impartial, *Buchwald*, 573 N.W.2d at 728; a plaintiff does not have right to investigate the decisionmaker's backgrounds to determine if they are impartial, *Deli*, 511 N.W.2d at 51; and, there is no basis to suggest a municipal body cannot be an impartial decisionmaker, even when it is an adverse party in the proceedings it seeks to decide. *Chanhassen Chiropractic*, 663 N.W.2d at 562–63.

Moorhead, 446 N.W.2d 917, 921 (Minn. App. 1989). "[W]ithout evidence of a closer connection," membership in an organization is "such that it could not reasonably have influenced the voting Board member" and "is not a sufficiently direct interest in the outcome of the matter under consideration to justify setting aside" the municipality's action. *Id.* Concerning the latter, when an aggrieved applicant alleges bias and prejudgment, the Court can consider "the interest of such officials" as a "relevant factor in determining whether their actions were arbitrary," and whether the "proceedings are void because they acted pursuant to this interest." *Lenz*, 153 N.W.2d at 219. In *Lenz*, the Minnesota Supreme Court also found, however, an interest did not affect the decision's validity, even though four of the five members of the watershed district board owned land affected and benefited by the project, which the board had approved. *Id.* at 219. As the Court explained, when a local government authority's decision is found legally insufficient and without a factual basis in the record, the fact an individual member of the body had an interest in the proceedings "'would furnish additional support' for the conclusion" the decision "was arbitrary and unsupported by the evidence." *Id.* (quoting *Petition of Jacobson*, 234 Minn. 296, 301, 48 N.W.2d 441, 445 (1951)). In other words, if a municipality's decision is reasonable, bias allegations do not provide an independent basis to overturn the quasi-judicial decision.

The foregoing proves the Board's decision was, in fact, reasonable; therefore, bias and prejudgment allegations cannot justify overturning the decision. This is true even

when the bias and prejudgment allegations are not speculative and baseless like they are here.

The Court should affirm the Board's decision, whether it relies on *Lenz* or the unpublished cases cited by Daley Farm. There is no basis to conclude either Heublein or Fitzgerald acted based on personal interest, real or perceived. There is no evidence Heublein or Fitzgerald prejudged and advocated against the application prior to the hearing. *See Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at *6 (Minn. App. May 3, 2011); *see also Hoyt v. Goodman*, No. 10-CV-3680 SRN FLN, 2011 WL 1193369, at *2 (D. Minn. Mar. 29, 2011). Likewise, there is no evidence any Board members tried to create legal roadblocks, which prevented Plaintiffs' application from being granted. *See id*. This is not a case where the Board "insisted on and obtained input from opponents of the project in shaping the conclusions" or was adamant its findings "reflect the bias of project opponents." *Living Word Bible Camp v. Cty. of Itasca*, No. A12-0281, 2012 WL 4052868, at *8 (Minn. App. Sept. 17, 2012).

In short, Daley Farm cannot overturn the board's reasonable decision with speculative and baseless allegations of bias and prejudgment.

C. The County did not falsify the Board's findings.

Daley Farm claims the County "staff, at the direction of its legal department, falsified the written Findings of Fact." *Pls.' Mem. at 57*. Daley Farm makes clear it does not actually believe this statement, but instead is using inflammatory language to highlight the reality "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." *Pls.' Mem. at 57*. While half the Board did not adopt the finding, it does not change the reality the finding accurately reflects the basis—as described by the two Board members who felt Daley Farm did not establish the variance was based on more than economic considerations alone—for denial. *Admin. R. 3058:16-3064:13, 3113-3114.* The County followed the proper procedure on remand.

A remand to a zoning authority is "not intended to provide local government units with a routinized opportunity for a second bite at the apple[,]" *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 577 n.6 (Minn. 2000), or "an opportunity after the fact to substantiate or justify earlier decisions." *Earthburners, Inc. v. Cnty. of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994). On remand a zoning authority must "'confine its inquiry to those issues raised in earlier proceedings…'" *Stadsvold*, 754 N.W.2d at 333 (quoting *Earthburners* at 463). New information the Board may have received after its first decision is "beyond the scope of the" remand, "legally insufficient[,]" and the Board could not use it without resulting in "no permissible basis in the record" to support its decision. *Interstate Power*, 617 N.W.2d at 580.

The Board followed this requirement, which the Minnesota Supreme Court recognizes is a crucial principle involved in a remand. *Id.* at 577–78. Nonetheless, Daley Farm claims the Board's observance of this crucial principle, which is binding on the Court, resulted in a "biased process[.]" *Pls.' Mem. at 57*. To highlight the bizarre nature of

its argument, Daley Farm asserts the County should have utilized a staff report violating this crucial principle. *Id.* This alone would be enough to justify jettisoning the staff report, even if the employee who prepared it had not testified she was unable to be impartial because she was concerned doing so would harm relationships she had worked to establish with Winona County farmers. *See McGinty Dep. at 36:12-36:23*; *see also Doc. #167 at 172* (admitting recommendations in draft staff report were formulated out of concern the truth would "leave a bad taste in the Winona County farmers' mouths."). Neither McGinty's bias, nor her inexperience preparing staff reports was the reason Qualley changed the staff report. Instead, it was the fact Qualley believed McGinty's analysis was wrong. *Qualley Dep. 50:21-51:4*. The County's process was not biased; it followed the same process it follows with every staff report. *Qualley Dep. 42:9-59:1*.

D. There is nothing biased or prejudicial about independently researching issues raised in the variance proceedings.

Daley Farm argues the Board's decision was arbitrary and capricious because one Board member apparently did not abide by the purportedly "fundamental requirement" to ignore "evidence outside the record…" *Pls.' Mem. at 52*. Once again Daley Farm does not cite any support for this argument because it does not exist. No caselaw suggests this is a requirement, much less a fundamental requirement. In fact, binding precedent suggests quasi-judicial decisionmakers need not ignore personal knowledge or experience, avoid independent research or investigation, or otherwise limit itself to the materials within the administrative record.

"[Q]uasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings, civil or criminal, many of which would be plainly inappropriate in these quasi-judicial settings." *Barton*, 268 N.W.2d at 716. For example, Daley Farm claims it "could not review or respond to" information outside the record "and was thus deprived of a fair hearing." *Pls.' Mem. at 53*. But the basic rights of procedural due process required in a quasi-judicial proceeding "are reasonable notice of hearing and a reasonable opportunity to be heard." *Barton*, 268 N.W.2d at 716. Neither "cross-examination" nor "advance copies of written materials presented at the … hearing" are "essential[s] of procedural due process in such hearings." *Id*. There is not "any authority" in Minnesota law, which suggests quasi-judicial decisionmakers cannot rely on information that is both "one-sided" and "outside-of-the-record." *In re N. Metro Harness, Inc.*, 711 N.W.2d 129, 138–39 (Minn. App. 2006). Likewise, "information outside the record" regarding "the general nature of geological formations … and their bearing on possible environmental damage" is made part of the record even if it was presented "2 years earlier in connection with" an unrelated proposal if it was referenced by public commenters. *Barton*, 268 N.W.2d at 716. Board member Heublein explained her "primary concern is water" and nitrate pollution. *Admin. R. 3082:10-3084:4*. The outside information, which Heublein had to go "to the Internet to find" was not actually outside the record because various commenters referenced and linked to this information in their comments. Take for instance the MPCA's formal request for "an environmental impact statement to study and address nitrate pollution of groundwater in the geologically

sensitive karst region of southeastern Minnesota" based on "extensive data documenting nitrate contamination of public and private drinking water wells" held by "[t]he Minnesota Department of Health (MDH) and the Minnesota Department of Agriculture (MDA)." *Admin. R. 156*. While the administrative record references this extensive data set, it is not included within the record, and therefore would need to be independently researched. In fact, counsel for Daley Farm was responsible for at least one of these internet sojourns, and when Heublein asked him about it during the hearing he was unsure why he had referred the Board members to this article. *See Admin. R. 1849* (Daley Farm counsel referring and linking to "an online article from the University of Minnesota Extension Service" which recommends that dairy farmers "diversify their farming operation"); *and*, *Admin. R. 3032:23-3033:9*. The fact Heublein researched an aspect of Daley Farm's Treble Growth Plan, which Daley Farm itself suggested was important, can hardly be a basis for finding the Board's decision was arbitrary and capricious. *See Admin. R. 3072:22-3073:12* ("As I noted before, there are several theories around the county and in other counties where instead of increasing herd size they diversified more.… And I know other dairies in a couple other states -- Colorado, where I used to live, and Wisconsin -- where they've used manure as a way -- not to put only back on fields but to also use to do big compost that is used as well. So, I think there could be reasonable methods to alleviate the need for that variance.")

CONCLUSION

The Winona County Board of Adjustment took the requisite hard look at Plaintiffs' variance application, seeking to effectively quadruple the allowable size of their feedlot, and reasonably determined Plaintiffs failed to satisfy the relevant criteria. Considering the deferential standard of review, the Court should grant Defendant's Motion for Summary Judgment.

Dated: June 29, 2023

s/Paul Donald Reuvers
Paul Donald Reuvers, #0217700
Andrew A. Wolf, #398589
IVERSON REUVERS
9321 Ensign Avenue South
Bloomington, MN 55437
Telephone: (952) 548-7200
paul@iversonlaw.com
andrew@iversonlaw.com

Attorneys for Defendant Winona County