STATE OF MINNESOTA
COUNTY OF WINONA

DISTRICT COURT
THIRD JUDICIAL DISTRICT

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
Case Type: Civil Other/Misc.

INTERVENOR-DEFENDANTS LAND STEWARDSHIP PROJECT'S AND DEFENDERS OF DRINKING WATER'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

At its heart, this is a simple case, although Plaintiffs have tried to complicate it with inapplicable law and irrelevant facts that have already been adjudicated. Fundamentally, this case is about Winona County and its efforts to protect its vulnerable drinking water supplies from manure and fertilizer contamination. To do this, Winona County has restricted the size of feedlots within the County. Plaintiffs Daley Farm of Lewiston, L.L.P., Ben Daley, Michael Daley, and Stephen Daley (collectively "Plaintiffs") own and operate a dairy feedlot in Winona County that is already bigger than what the County Ordinance allows. Now Plaintiffs want to expand their feedlot to approximately *four times* the County's legal limit. To do so, they need a variance from the County's Zoning Ordinance which prohibits the exact type of expansion Plaintiffs are seeking.

Two different makeups of the Winona County Board of Adjustment have denied Plaintiffs' request for a variance. Plaintiffs have found this answer unacceptable, appealing the decision both times. The district court reversed and remanded the Board's first denial of the variance, finding some of the board members took on an advocacy role against the expansion. Plaintiffs discuss the facts of the Board's first denial at length, but these facts are irrelevant to the second denial which is the only decision before the Court today.

In appeals of local zoning authority decisions, this Court acts in an appellate capacity, reviewing the County's decision to determine if it was unreasonable, arbitrary, or capricious. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75–76 (Minn. 2015). Except in the "rare instances" where the decision "has no rational basis," the court should defer to the decision of the local zoning body. *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982).

Plaintiffs argue the Board of Adjustment's second denial should be reversed because it was based on legal and factual errors and was biased. But Plaintiffs have not made any of the required showings for their claims. Instead, the record shows the Board followed the correct law by making its decision on the criteria required for a variance in the County Zoning Ordinance. Moreover, the Board's decision was well supported by evidence in the record, including Plaintiffs' own statements. Plaintiffs' claims of bias also fail because extensive discovery revealed there was no evidence that board members took an advocacy role against the project. The Board's decision is therefore legally sufficient, factually supported, without bias, and not arbitrary or capricious. Accordingly, this court should uphold it.

Finally, Plaintiffs originally pleaded claims alleging the County had violated Plaintiffs' rights to due process. However, Plaintiffs have failed to advance these claims in their Motion,

likely because Plaintiffs cannot establish they have the property interest required to bring a due process challenge. As a result, Intervenor-Defendants should be granted summary judgment as to these claims. Plaintiffs also allege that their variance application must be granted due to a timing technicality. However, Intervenor-Defendants disagree and adopt and incorporate the arguments of Defendant Winona County on Plaintiffs' Count VII.

For the above reasons, Intervenor-Defendants[1] request that this Court deny Plaintiffs' Motion for Summary Judgment and grant the Defendants' collective Motions for Summary Judgment.

STATEMENT OF THE ISSUES

I. Are Defendants entitled to summary judgment on Plaintiffs' due process claims when Plaintiffs did not have a protected property interest in their variance application?

II. Did the Winona County Board of Adjustment act unreasonably, arbitrarily, or capriciously in denying Plaintiffs' variance request when their decision was based on the Zoning Ordinance's criteria for a variance, and the Board referenced Plaintiffs' own statements as evidence in the record that showed one of the criteria was not met?

III. Did any members of the Winona County Board of Adjustment adopt an advocacy role against Plaintiffs' proposed expansion?

DOCUMENTS COMPRISING THE RECORD

The parties agree that the record of the County's 2021 variance decision includes the documents filed with this Court by Defendant Winona County on March 30, and 31st 2023 (Index # 148-156). This brief also cites to the following documents which have been previously submitted to the Court:

1. Plaintiffs' Complaint filed March 21, 2019 (Index # 3).

[1] Intervenor-Defendant Land Stewardship Project and Intervenor-Defendant Defenders of Drinking Water have chosen to brief these issues together to reduce the number of pleadings the Court must review.

2. Appellate Court Order filed August 5, 2021 (Index # 99).

3. Plaintiffs' Supplemental Complaint filed February 18, 2022 (Index #108).

4. Land Stewardship Project's Intervention Pleading filed March 17, 2022 (Index # 112).

5. Verified Pleading In Support of Intervention of Intervenor-Defendant Defenders of Drinking Water filed March 21, 2022 (Index # 117).

6. Exhibits G (deposition of Kelsey Fitzgerald), H (deposition of Elizabeth Heublein), J (deposition of Chris Meyer), K (deposition of Marie Kovecsi), and M (deposition of Greg Olson) to the Affidavit of Matthew C. Berger (Depositions), filed June 8, 2023 (Index # 165-167).

7. Exhibits AY (minutes of the January 7, 2020, meeting of the Winona County Commissioners) and AZ (minutes of the January 5, 2021, meeting of the Winona County Commissioners) to the Affidavit of Matthew C. Berger (Public Documents) filed June 8, 2023 (Index # 163).

STATEMENT OF UNDISPUTED FACTS

I. Winona County Leaders Wrote the Comprehensive Plan and Zoning Ordinance to Protect Natural Resources From Agricultural Pollution

For years, Winona County's guiding community values have been to support local agriculture, while also protecting the community's sensitive natural resources. *See Winona County Comprehensive Plan Update*, Winona Cnty. Bd. of Comm'rs 4, 14, 31 (2014) (hereinafter "Comp. Plan").[2] This is because the region has both an abundant agricultural economy and a unique vulnerability to pollution. *See Id.* at 61, 64. Winona County is in an area of the state with karst geology. *Id.* at 53. In karst areas, the bedrock is porous and filled with tunnels. This means anything applied to the topsoil, like fertilizer or manure used by farms, can move easily from the soil, through tunnels in the bedrock, into the groundwater. *Id.* at 49, 61. In Winona County, the community's drinking water supply is sourced from the groundwater. *Id.* at 34, 61-62. As such,

[2] The Winona County Comprehensive Plan is available at https://www.co.winona.mn.us/514/2014-Winona-County-Comprehensive-Plan.

community leaders have made it a priority to balance support for the local agricultural economy with protection of the community's drinking water from agricultural pollution. *See Id.* at 30, 31, 33; Winona County, Minn., Zoning Ordinance § 8.1.1 (Dec. 14, 2010) (hereinafter "Zoning Ord.").[3]

Winona County leaders have tried to strike this balance through provisions in the Comprehensive Plan and the Zoning Ordinance. The Comprehensive Plan states, "[b]ecause water moves very quickly in limestone formations and sinkholes with little or no purification by filtration, care must be used in preventing pollution in these areas. As a result, intense agricultural operations such as *feedlot* or solid waste disposal sites should be *carefully regulated or prohibited* in karst areas." Comp. Plan at 53 (emphasis added). The Comprehensive Plan further states that the policy of the County is to "[c]arefully control the location *and size* of feedlots and other animal confinement areas in the County to minimize pollution." Comp. Plan at 18 (emphasis added).

Similar provisions are found in the Winona County Zoning Ordinance, which implements the guiding principles found in the Comprehensive Plan. Chapter 8 of the Ordinance, which is the chapter on feedlots, states its purpose is to "maintain a healthy agricultural community within the County while ensuring that farmers properly manage animal feedlots and animal waste to protect the health of the public and the natural resources of Winona County." Zoning Ord. § 8.1.1. To achieve this purpose, the Winona County Zoning Ordinance limits the size of feedlots, mandating that, "[n]o permit shall be issued for a feedlot having in excess of 1,500 animal units per feedlot

[3] The Winona County Zoning Ordinance is available at https://www.co.winona.mn.us/515/Winona-County-Zoning-Ordinance.

site." *Id.* at § 8.4.2. This provision of the Ordinance is often referred to as the "animal unit cap."[4] Any feedlot with 1,500 or more animal units at the time the Ordinance was adopted was deemed "non-conforming," but the Ordinance allows those feedlots to continue at their current size, so long as the number of animal units on that feedlot does not increase. *Id*. at § 8.2.1. The Ordinance explicitly prohibits these non-conforming feedlots from getting bigger. *Id*. at § 3.2.3.

II. Plaintiffs' Feedlot Is Already Non-Conforming and Prohibited From Expansion, Yet Plaintiffs Seek to Expand to Four Times the Maximum Size that Local Law Allows

Plaintiffs operate a dairy feedlot in Winona County. Admin. R. 1429. Plaintiffs' feedlot is currently allowed to have 2,160.2 animal units. Admin. R. 2815. This is above the Ordinance's limit of 1,500 animal units because Plaintiffs were "grandfathered-in" under the provision that allowed for feedlots existing at the time the Ordinance was passed to continue at their current size. Admin. R. 2819; *see also* Zoning Ord. § 8.2.1. However, the Ordinance only allows this *so long as the size does not increase*. Zoning Ord. § 8.2.1. Plaintiffs already operate the largest feedlot in Winona County. Admin. R. 1452. Despite this, Plaintiffs now seek to increase their feedlot to 5,968 animal units. Admin. R. 2814. In other words, Plaintiffs, who are already allowed to have 1.5 times the maximum number of animal units permitted in the County now seek to expand their feedlot to quadruple the maximum number of animal units permitted, despite an explicit prohibition against this expansion.

Plaintiffs have repeatedly stated that they want to expand their feedlot beyond the maximum size allowed for economic reasons. *See* Admin. R. 1698 (Plaintiffs' Variance Application summary stating, "[a]n expansion of the farm is necessary to support the additional

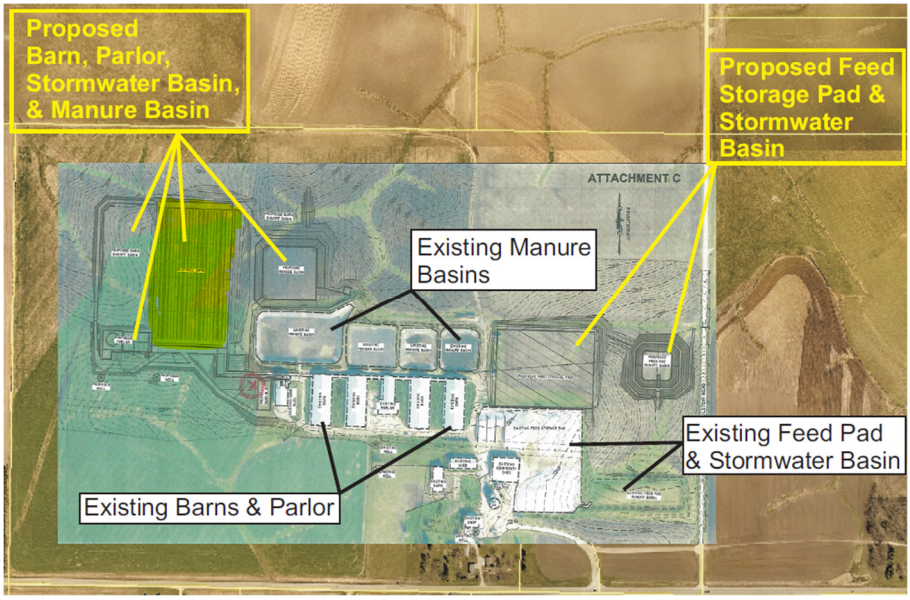
[4] Animal units or "AUs" is a unit of measure used to standardize different livestock species by the amount of manure produced. *See* Zoning Ord. § 4.2. For example, one mature dairy cow that weighs over 1,000 pounds is 1.4 animal units. But a calf is only .2 animal units, and a turkey is even less, between .005-018 animal units. *Id.* Many statutes, rules, and local ordinances are written in terms of AUs.

people who will be making their living by farming in Winona County."). The proposed expansion's environmental assessment worksheet, which is based on information from Plaintiffs, stated that the purpose of the expansion was to:

> [E]nable successive generations of the family to come into family dairy business without having to establish separate dairy enterprises. By working together under one corporate ownership and one facility, the family can take advantage of economy of scale. This economy of scale will enable the pooling of financial, labor, and management resources to keep the dairy business profitable in the current competitive dairy market.

Admin. R. 40.

To accommodate their proposed growth in animals (from approximately 1,600 dairy cows to 4,000) Plaintiffs would need to make significant infrastructure additions to their property. This includes a new barn that will be 8.34 *acres* large (or more than 360,000 square feet), a milking parlor, an additional manure storage pit, a feed storage pad, a feed storage pad runoff basin, a sand storage shed, an animal mortality building, and two livestock wells. Admin. R. 2824. A map of the proposed facility is below. *See* Admin. R. 2846. The map shows the proposed new barn, highlighted in yellow, is exponentially larger than the feedlot's existing barns located along the bottom of the site.



III. Plaintiffs' Expansion Plans Are Prohibited by Local Law

Plaintiffs' expansion plans are in direct violation of the Zoning Ordinance. Their plans violate (1) the animal unit cap limiting the size of feedlots in the County to 1,500 animal units, and (2) the prohibition on expanding non-conforming uses. *See* Zoning Ord. §§ 8.4.2, 8.2.1, 3.2.3; *see also* Admin. R. 1745 (memorandum describing required variances). Plaintiffs can only proceed with their plans if the County grants them permission to violate the Zoning Ordinance through the issuance of a variance. Admin. R. 1745. A variance is different than other zoning tools like conditional or special use permits. A variance seeks a use which has been legislatively prohibited within a zoning district, whereas a "special use" or "conditional use" is one which is expressly permitted within the zoning district, subject to some controls. *Compare* Admin. R. 1745-46 (defining conditional and permitted use) *with* Admin. R. 1746 (defining variance). Thus, conditional use permits and special use permits are generally granted when an applicant meets the conditions specified in the ordinance, but the Board has discretion to decide whether an applicant may be allowed to violate the Zoning Ordinance through a variance. *See White Bear Docking*, 324 N.W.2d at179.

Under the Winona County Zoning Ordinance, variances are only to be granted in *exceptional circumstances*. Zoning Ord. § 4.2. Variances are governed by Ordinance § 5.6.2, which prohibits granting a variance unless the Board of Adjustment makes findings that the applicant has satisfied the following eight criteria:

1. The variance request is in harmony with the intent and purpose of the ordinance.
2. The variance request is consistent with the comprehensive plan.
3. The applicant has established that there are practical difficulties in complying with the official control and proposes to use the property in a reasonable manner.

4. The variance request is due to special conditions or circumstances unique to the property not created by owners of the property since enactment of this Ordinance.

5. The variance will not alter the essential character of the locality nor substantially impair property values, or the public health, safety, or welfare in the vicinity.

6. Economic considerations alone do not constitute practical difficulties.

7. The variance cannot be alleviated by a reasonable method other than a variance and is the minimum variance which would alleviate the practical difficulty.

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

Zoning Ord. § 5.6.2; *see also* Admin. R. 1747 ("If any one of these standards is not met, the variance should not be granted.")

IV. Plaintiffs' Expansion Plan Is Deeply Controversial Among Winona County Residents

Plaintiffs' expansion plan has been highly contentious in Winona County with many residents for and against the proposal. *See* Admin. R. 2212-2215 (showing 169 written comments received on Plaintiffs' variance application), 2063-2330 (showing text of all 169 public comments with comments for and against the variance application), 2447-2449 (showing approximately 60 members of the public signed up to speak at Plaintiffs' first variance hearing), 2441-2446 (showing an additional 140 members of the public attended Plaintiffs' first variance hearing).

Both Intervenor-Defendants Defenders of Drinking Water and Land Stewardship Project oppose Plaintiffs' expansion. Defenders of Drinking Water ("Defenders") is a group of local community members from Winona County that are concerned about their water quality. Intervenor-Def.'s Mem. In Supp. Intervention 5. Defenders support enforcement of the animal unit cap in order to prevent the harms to the environment and human health that are likely to arise from the granting of the variance. *Id.*

Land Stewardship Project is a long-standing Minnesota non-profit organization with members and a local office in Winona County. *See* Land Stewardship Project's Intervention Pleading 1. Land Stewardship Project's mission is to "foster an ethic of stewardship for farmland, to promote sustainable agriculture, and to develop healthy communities." *Our Mission*, Land Stewardship Project, https://landstewardshipproject.org/our-mission/ (last visited June 27, 2023); *see also* Land Stewardship Project's Intervention Pleading 1. Land Stewardship Project also does not believe Plaintiffs should be allowed to violate the democratically established animal unit cap as doing so would undermine sustainable agriculture and responsible stewardship of farmland. Land Stewardship Project's Intervention Pleading at 1-2.

At the heart of Defenders', Land Stewardship Project's, and many other community members' concerns, are the impacts of Plaintiffs' expansion on the community, particularly its drinking water. *See* Admin. R. 2063-2330 (public comments on variance application), 192-1307 (public comments on Plaintiffs' environmental assessment). Plaintiffs' expansion would greatly increase the amount of manure generated at Plaintiffs' feedlot. If the variance is granted, Plaintiffs' feedlot would produce 46.2 million gallons of liquid manure each year (Admin. R. 1444)—roughly twice that generated by the entire city of Rochester or four times that produced by the entire human population of Winona County. Admin. R. 2084.

Manure contains nitrate, which is a dangerous water pollutant. Admin. R. 2085. When manure is applied to farm fields in the karst area, the karst geology allows for easy infiltration of the nitrate into the groundwater aquifers. Admin. R. 1736. Many of the fields Plaintiffs would spread liquid manure on also have, or are near, sinkholes which can provide direct access for nitrate to enter the groundwater aquifer. Admin. R. 169. Due to the karst area's vulnerability, the area already suffers from nitrate contamination of drinking water. Admin. R. 156, 1730 ("SE MN is

particularly affected by nitrate contamination of its drinking water because of prevailing karst geology and . . . plentiful agriculture.").

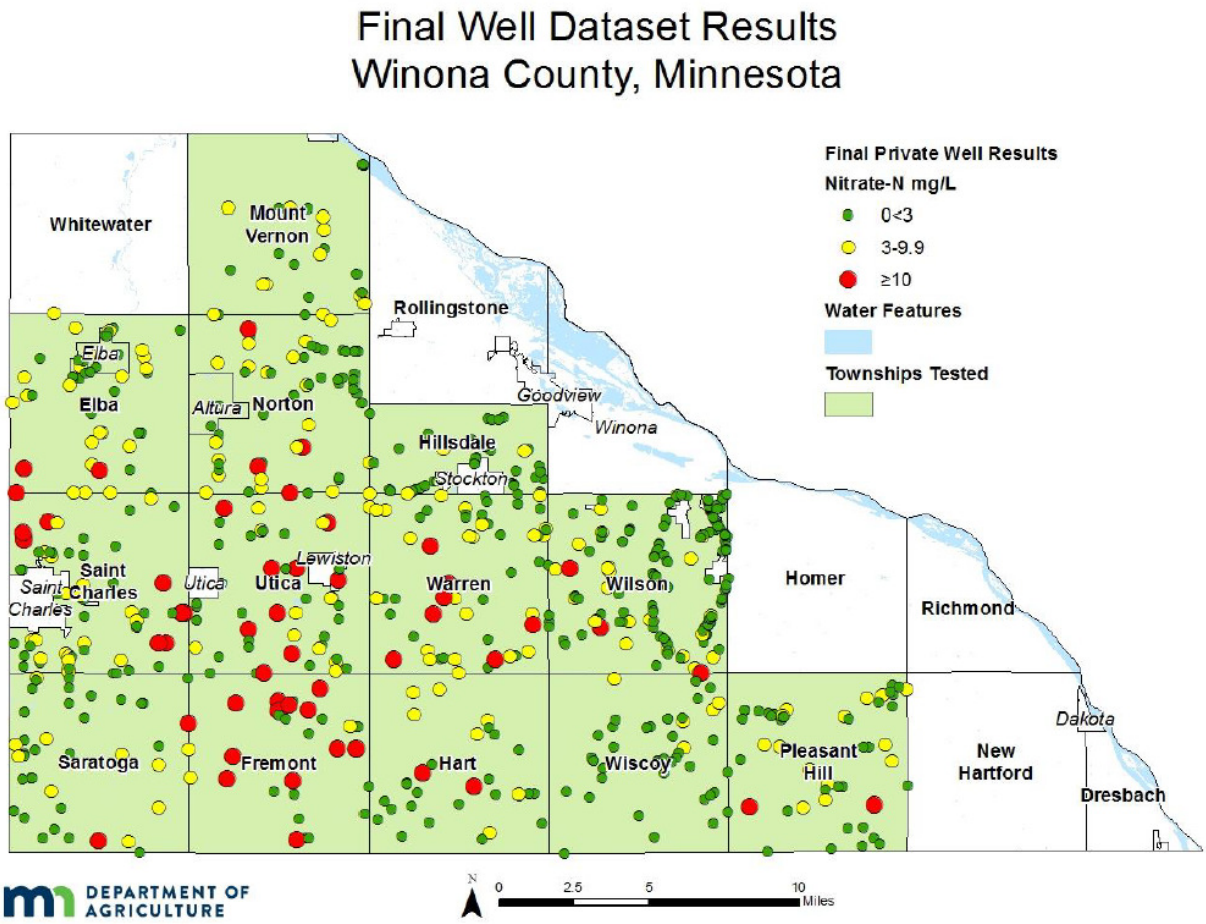
Nitrate in drinking water can pose a health risk to people, especially infants and the elderly. Admin. R. 156. Consuming nitrate-contaminated drinking water removes oxygen from the blood and can lead to serious illness or death in infants, pregnant women, and other vulnerable populations. *See* Admin. R. 156, 1036, 1737, 2085. Long-term exposure to elevated levels of nitrate in drinking water has also been linked to certain cancers, thyroid disease, and birth defects. Intervenor-Def.'s Mem. In Supp. Intervention 6. Thus, under the federal Safe Drinking Water Act, the Environmental Protection Agency ("EPA") has established a maximum contaminant level of 10 milligrams/liter for nitrate in drinking water. Admin. R. 1736. Anything above that level is above the human health limit, and unsafe for consumption. As such, Winona County's Comprehensive Plan contains a policy to "maintain groundwater nitrate level[s] at a point which is equal to or less than the drinking water standard of 10 parts per million." Comp. Plan at 34.

Unfortunately, the region around Plaintiffs' feedlot already has problems with nitrate contamination of drinking water. Plaintiffs' facility is located between the cities of Lewiston and Utica. Both cities have long struggled with high concentrations of nitrate in their drinking water. *See* Admin. R. 1439, 2085. The primary source of this contamination is from the application of commercial fertilizers and manure to croplands. Admin. R. 1035, 1164. Lewiston has dug additional wells to try to eradicate nitrate from the city's water at a cost of approximately one million dollars per well. Admin. R. 1439, 2085. The public water supply for Utica was also contaminated with nitrate, forcing the city to drill another well. *Id.* However, even Utica's new well has already reached nitrate levels of 8.5mg/L, which is dangerously close to maximum contaminant level of 10 mg/L. *See* Admin. R. 2085. If Utica's sole functioning well reaches

10mg/L, the city will have to dig an additional well or invest in a multimillion-dollar treatment system. Admin. R. *Id.*

Despite this, under Plaintiffs' expansion plan, Plaintiffs would apply liquid manure to cropland within the water supply area for Utica's drinking water well. Admin. R. 1142, 1736. The County's water analysis found that applying additional nitrate-containing material like manure to cropland in this area has the strong potential to contribute additional nitrate to Utica's water source over time. Admin. R. 1736. Moreover, this addition of nitrate-containing material may speed up the need for a replacement water supply for the City of Utica. *Id.*

Private wells in the area fare no better. In Utica Township where Plaintiffs' facility is located, 20% of the private wells tested had nitrate rates above the 10mg/L maximum contaminant level. Admin. R. 1131, 2085. Just south of Plaintiffs' feedlot in Freemont Township, the percentage rises to 42.9% of private wells above the maximum contaminant level. *Id.* The map on the following page shows the private well testing results for Winona County; wells with nitrate levels above the human health limit are represented by red dots.



Admin. R. 2086. Thus, given the current state of Winona County's drinking water supply, resident's concerns about spreading 46 million gallons of nitrate-laden manure on karst land are understandable.

V. Plaintiffs' Attempt to Circumvent the Local Prohibition on Large Feedlots Was Denied by the Board of Adjustment in 2019

Plaintiffs filed an application for a variance with Winona County in 2018. *See* Admin. R. 1665-1667. Variance applications are considered by the Winona County Board of Adjustment. The Board of Adjustment is separate from the Winona County Commissioners, but the Commissioners determine who is appointed to the Board of Adjustment. To become a member of the Board of Adjustment, an individual must apply and be selected by a majority vote of the Commissioners.

The Winona County Board of Adjustment considered Plaintiffs' variance application during a public hearing on February 21, 2019. *See* Admin. R. 2772-2783 (Feb. 21, 2019, Minutes). There were at least 200 members of the public in attendance. *See* Admin. R. 2441-2449 (Feb. 21, 2019, hearing sign-in sheets). The Board of Adjustment has five members, which at that time were Cherie Hales, Wendy Larson, Rachel Stoll, Larry Greden, and Phillip Schwantz. *See* Admin. R. 2440. At the 2019 hearing, the Board voted to deny Plaintiffs' variance application by a vote of 3 to 2. Admin. R. 2782:489-494 (minutes), 2743:17-2745:3 (transcript). Members Greden and Schwantz were in favor of granting the variance, while members Hales, Larson, and Stoll voted against it. *Id.*

Plaintiffs appealed the Board of Adjustment's decision to district court. *See* Pls.' Compl. (Mar. 21, 2019). At a hearing on December 21, 2020, the district court granted Plaintiffs' Motion for Summary Judgment and reversed and remanded the matter back to the Board of Adjustment for reconsideration. *See* Order Granting Summ. J. And Remand (Jan. 25, 2021) (hereinafter "Order"). The court reasoned that three Board of Adjustment members, namely Cherie Hales, Wendy Larson, and Rachel Stoll, took a position in opposition to Plaintiffs' application and exhibited a closed mind prior to the hearing. Order at 4. The court also found members Stoll and Hales had adopted an advocacy role by going beyond mere passive membership in Land Stewardship Project to actively participating in Land Stewardship Project's advocacy to oppose Plaintiffs' expansion. *Id.* Because of this, the court found the members of the Board had prejudged the merits of Plaintiffs' variance application, making the Board's decision arbitrary and capricious. *Id.* at 5.

In regard to the remedy, the court did not grant the variance application as Plaintiffs requested. *See* Pls.' Compl. at 28 (Mar. 21, 2019). Instead, the court reasoned it was better to

remand the matter back to the Board to ensure "the judiciary does not encroach upon the constitutional power spheres of the other two branches of government or exceed the limited role of the judiciary in reviewing zoning decisions." Order at 6. The court further noted this remedy was appropriate as all three board members at issue—Cherie Hales, Wendy Larson, and Rachel Stoll—were no longer members of the Board of Adjustment. Order at 7.

Plaintiffs moved for reconsideration, and then petitioned the Court of Appeals for discretionary review, which declined to consider the matter. *See* Appellate Ct. Order (Aug. 24, 2021). Plaintiffs' variance application then went back to the Board of Adjustment for reconsideration on remand. By this time, the makeup of the Board of Adjustment had changed almost entirely. Phillip Schwantz, who had previously voted to *grant* Plaintiffs' variance, was the only member that remained on the Board of Adjustment from the original vote. *See* Admin. R. 2440 (makeup of Board of Adjustment for 2019 vote), 2955 (makeup of Board of Adjustment for 2021 vote). The table below shows the change in the composition of the Board of Adjustment between the original vote, and the remand vote.

Board of Adjustment Members

Original Vote (2019)	Cherie Hales	Wendy Larson	Rachel Stoll	Larry Greden	Phillip Schwantz				
Remand Vote (2021)					Phillip Schwantz	Jordan Potter	Elizabeth Heublein	Kelsey Fitzgerald	Robert Redig

VI. On Remand, the New Board of Adjustment Denied Plaintiffs' Request to Violate the Prohibition on Large Feedlots

Plaintiffs' variance application came back before the Board of Adjustment on the original application (Plaintiffs did not file a new application). Thus, the decision on remand was to be made on the original record. Admin. R. 2876-77 (memorandum from Assistant Winona County Attorney Stephanie Nuttall stating remand decision must be made on original record). Despite this, Plaintiffs

were allowed to supplement the record by submitting an additional twenty-three page memorandum from Plaintiffs' counsel (Admin. R. 2879-2901) and giving a new, updated presentation to the Board at the remand hearing. Admin. R. 2934-54 (Plaintiffs' remand hearing PowerPoint presentation); *compare* Admin. R. 2480-2500 (Plaintiffs' original hearing PowerPoint presentation). No one else was given a similar opportunity. Members of the public were not allowed to provide any additional information or comments and were not allowed to speak at the Board's remand hearing. Admin. R. 2876.

The remand hearing took place on December 2, 2021. Admin. R. 2955. Board member Robert Redig was absent; therefore, only four board members participated in the deliberation: Mr. Schwantz, Mr. Potter, Dr. Heublein, and Ms. Fitzgerald. Admin. R. 2955. Each of these members, in response to questioning from the Assistant Winona County Attorney, indicated that they could put aside any personal opinions and make their decision as to the petition based solely on the record before them. Admin. R. 2955, 2980-83. At the hearing, the Board systematically walked through the eight criteria that must be met in order to grant a variance. Admin. R. 2957-62, 3035-75. Winona County staff had prepared draft findings of fact for the Board to consider on each criterion. As the Board considered each criterion, they voted on whether to adopt or modify the staff's proposed finding on that criterion. Admin. R. 2957-62, 3035-75.

Consistent with his original vote, Mr. Schwantz's statements during the hearing showed a clear intent to grant the variance, and he ultimately voted for a second time to grant Plaintiffs the variance. Admin. R. 2957-61; *see, e.g.*, Admin. R. 3039:17-23, 3041:9-21, 3048:9-3049:3, 3052:15-3053:2, 3059:16-24, 3063:9-17, 3069:8-23. Mr. Potter's position in support was similarly apparent and he also voted in favor of Plaintiffs on all eight criteria. Admin. R. 2957-61; *see, e.g.,* Admin. R. 3046:11-3047:1, 3053:7-10, 3061:22-23, 3066:10-13. In contrast, Dr. Heublein and Ms.

Fitzgerald took a more thoughtful approach. Both asked Plaintiffs questions during the hearing and both voted in favor of Plaintiffs on some criteria and against them on others. *See* Admin. R. 3025-3030 (Dr. Heublein asking questions of Plaintiffs' representatives), 3030:19-31:1 (Ms. Fitzgerald asking Plaintiffs' representatives when infrastructure was added), 3045:19-3046:9 (Ms. Fitzgerald asking whether infrastructure constitutes a practical difficulty), 3060:22-3061:3 (Dr. Heublein asking whether Plaintiffs' claimed environmental benefits would happen without the variance). Dr. Heublein voted in favor of Plaintiffs on criteria 2, 5, and 8, but found Plaintiffs had not met their burden on criteria 1, 3, 4, 6, and 7. Admin. R. 2957-61, 3072:3-8. Ms. Fitzgerald voted in favor of Plaintiffs on all criteria except 6. Admin. R. 2957-61.

It was the Board's vote on criterion 6 that caused Plaintiffs' variance application to fail. Admin. R. 2960. Criterion 6 states, "economic considerations alone do not constitute practical difficulties." The criterion turns on whether the applicant has shown their difficulty in complying with the Ordinance is more than merely economic. Dr. Heublein moved to adopt the Staff's finding that Plaintiffs had *not* satisfied criterion 6. Admin. R. 2959, 3062:25-3063:7. Dr. Heublein and Ms. Fitzgerald voted in favor of the motion, and Mr. Schwantz and Mr. Potter voted against the motion. Admin. R. 2959, 3064:1-13. Then Mr. Schwantz made a motion to find Plaintiffs *had* satisfied criterion 6, which again was a tie vote with Mr. Schwantz and Mr. Potter in favor and Dr. Heublein and Ms. Fitzgerald opposed. Admin. R. 2959-60, 3065:23-3068:9. As a result, the Board could not adopt findings as to criterion 6.

The Board then proceeded to take an overall vote on whether to grant Plaintiffs' variance application. This was again a tie vote, with Mr. Schwantz and Mr. Potter voting yes, and Dr. Heublein and Ms. Fitzgerald voting no. Admin. R. 2960, 3077:5-14. A second motion was made, this time to deny the variance. Admin. R. 3077:24-3078:5. This was again a tie vote, but with Dr.

Heublein and Ms. Fitzgerald voting yes, and Mr. Schwantz and Mr. Potter voting no. Admin. R. 2960-61, 3081:12-19. Because the vote to approve the variance failed, the Board's attorney noted that Minn. Stat. § 15.99 2(b) applied, and the failure to approve the variance constituted a denial of the request. Admin. R. 2961, 3081-82. The Board members then provided final statements for their decisions on the matter, and the meeting of the Board was adjourned. Admin. R. 2961, 3081-85.

Plaintiffs subsequently appealed this second denial of the Board of Adjustment. *See* Suppl. Compl. at 2. It is only the propriety of this second vote on remand that is before this Court on the parties' motions for summary judgment.

ARGUMENT

Plaintiffs bring two types of claims in this case, both of which must be dismissed. First, Plaintiffs' due process claims, which are before the Court on a summary judgment standard, must be dismissed because Plaintiffs lack the requisite protected property interest. Second, Plaintiffs' claims appealing the Board of Adjustment's denial, which are before this Court in an appellate posture, must be dismissed because the Board's decision was supported legally, factually, and was without bias.

Intervenor-Defendants' Memorandum is divided into three sections, first addressing the due process claims, and then addressing the claims on appeal, and finally addressing the appropriate remedy for Plaintiffs' claims.

SECTION 1: DUE PROCESS CLAIMS

I. Defendants are Entitled to Summary Judgment on Plaintiffs' Constitutional Claims and Section 1983 Claim (Counts III, IV, VIII and IX)[5]

Plaintiffs allege that the Board of Adjustment's decision to deny the Plaintiffs' variance application violates the Minnesota and federal constitutional guarantee of due process.[6] For these claims, Plaintiffs must show that the County deprived Plaintiffs of a constitutionally protected property interest.[7] But since a variance application is not a protectable property interest, all of Plaintiffs' due process claims—in both the original Complaint and the Supplemental Complaint—must be dismissed. Plaintiffs' claims in the Supplemental Complaint additionally fail because (1) the County provided Plaintiffs with constitutionally sufficient notice and opportunity to be heard, and (2) the Board of Adjustment's decision was a rational exercise of its decision-making power. Accordingly, for these additional reasons, Defendants are entitled to judgment as a matter of law on Counts VIII and IX.

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[5] Plaintiffs did not move for summary judgment on Counts VIII and IX and have not pursued Counts III and IV since they were filed in 2019, either in their first or second summary judgment motion. It is not clear that Plaintiffs are continuing to pursue Counts III and IV at all. To the extent Plaintiffs have not abandoned these claims, they must be dismissed.

[6] It is unclear whether Plaintiffs are pursuing procedural or substantive due process claims or both. Intervenor-Defendants will address both types of due process claims in this section.

[7] Federal Circuit Courts of Appeals have long-cautioned against applying section 1983 to local land-use disputes. *See, e.g.*, *Gardner v. Balt. Mayor & City Council*, 969 F.2d 63, 67-68 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts. . . . Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals[.]"); *United Artists Theatre Cir., Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 402 (3d Cir. 2003) ("Land-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with 'improper' motives."). The Minnesota Supreme Court has echoed this concern, stating, "[t]o allow the loser of each zoning decision, both those who seek a change and those who seek to block changes, to sue in federal court on bald allegations of arbitrariness would significantly burden both federal courts and local zoning decisionmakers." *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 690 (Minn. 1991).

A. Standard of Review

The Court evaluates the Plaintiffs' due process and section 1983 claims under the summary judgment standard. Summary judgment must be granted when there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A party opposing summary judgment must present specific facts showing there is a genuine issue for trial and cannot rely upon speculation or surmise to create a fact issue. *Fownes v. Hubbard Broad., Inc.*, 225 N.W.2d 534, 536 (Minn. 1975). The opposing party cannot avoid summary judgment with evidence "which is not sufficiently probative with respect to an essential element of the non-moving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997).

B. The Standard for Evaluating Plaintiffs' Due Process and Section 1983 Claims Is the Same[8]

The Court evaluates the Plaintiffs' due process and section 1983 claims together, as section 1983 is the federal statute that provides a cause of action for violations of the federal constitution.[9] The Plaintiffs' Supplemental Complaint alleges that the Board of Adjustment's alleged bias

[8] In parallel litigation removed to federal court, Plaintiffs alleged similar due process and section 1983 claims against Winona County Commissioners and a member of the Board of Adjustment. Defs.' Notice of Filing Notice of Removal with the United States District Court, *Daley Farm of Lewiston, L.L.P. v. Kovecsi*, No. 85-CV-22-1958 (Minn. Dist. Ct. Nov. 22, 2022). When confronted with a motion to dismiss, Plaintiffs amended their complaint, which prompted another motion to dismiss. LSP Defendants' Memorandum of Law in Support of Motion to Dismiss Plaintiffs' Amended Complaint, *Daley Farm of Lewiston, L.L.P. v. Kovecsi*, No. 22-cv-2957 (D. Minn. Feb. 7, 2023), ECF No. 28. Rather than defend their allegations, Plaintiffs dismissed their case. Notice of Voluntary Dismissal, *Daley Farm of Lewiston, L.L.P. v. Kovecsi*, No. 22-cv-2957 (D. Minn. Mar. 14, 2023), ECF No. 34. What was true there at the Rule 12 stage is true here at the Rule 56 stage: Plaintiffs have not alleged or raised facts to support their due process and section 1983 claims and the Defendants are entitled to judgment as a matter of law.

[9] To the extent that Plaintiffs' section 1983 claim is premised on alleged violations of the Minnesota Constitution, that claim fails as a matter of law because "42 U.S.C. § 1983 does not provide a cause of action for a violation of the Minnesota Constitution and the Minnesota legislature has not enacted a statute similar to § 1983." *Foster v. Litman*, No. 19-cv-260, 2020 WL 2786956, at *6 (D. Minn. May 29, 2020).

against Plaintiffs' expansion proposal violated their due process rights under both the Minnesota and federal Constitutions. The due process protection provided under the Minnesota Constitution is identical to the due process guarantees under the Constitution of the United States. *Sartori v. Harnischfeger Corp.,* 432 N.W.2d 448, 453 (Minn. 1988). And since section 1983 is the procedural mechanism to bring a federal constitutional claim, the due process and section 1983 claims rise and fall together. *See, e.g.*, *Schneyder v. Smith*, 653 F.3d 313, 319 (3d Cir. 2011) (explaining section 1983 claims).

There are two different types of due process claims: procedural and substantive. Both types require that a party receive "adequate notice and an opportunity to be heard before being deprived of life, liberty, or property." *Christopher v. Windom Area Sch. Bd.*, 781 N.W.2d 904, 911 (Minn. App. 2010); *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991). Minnesota courts conduct a two-step analysis to determine whether the government has violated an individual's procedural or substantive due process rights. The first step is the same: the court must identify whether the government has deprived the individual of a constitutionally protected liberty or property interest. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632 (Minn. 2012); *Raymond v. Bd. of Regents of Univ. of Minn.*, 140 F. Supp. 3d 807, 815 (D. Minn. 2015); *Northpointe*, 465 N.W.2d at 689. For procedural due process, the second step is whether the procedures followed by the government to deprive the individual of the protected interest were constitutionally sufficient. *Sawh*, 823 N.W.2d at 632. For substantive due process, the second step is "whether the deprivation, if any, is the result of an abuse of governmental power sufficient to state a constitutional violation." *Northpointe*, 465 N.W.2d at 689.

Here, as a matter of law, the County did not violate the Plaintiffs' due process rights because the Plaintiffs do not have a protectible property interest in their variance application, and

accordingly all of their due process claims must be dismissed. The Plaintiffs are also unable to satisfy the second step of either type of due process claim.

1. The Plaintiffs Have No Protectible Property Interest

The Plaintiffs do not have a protectible property interest in their variance application, which is fatal to all of their due process claims (III, IV, VIII, IX). Protected property interests arise from independent sources "such as state law, rules, or understandings that support claims of entitlement to certain benefits." *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 791 (Minn. 1989). "A protected property interest is a matter of state law involving a legitimate claim to entitlement as opposed to a mere subjective expectancy." *Snaza v. City of St. Paul*, 548 F.3d 1178, 1182 (8th Cir. 2008) (quotation omitted). "A permit applicant may have a legitimate claim to entitlement if the government's discretion is constrained by a regulation or ordinance *requiring* issuance of a permit when prescribed terms and conditions have been met." *Id.* at 1183 (emphasis added). In other words, if government officials may grant or deny a benefit in their discretion, "the benefit is not a protected entitlement," and it therefore cannot form the basis of a due process claim. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quotation marks omitted).

In deciding whether a particular land-use benefit qualifies as a protectable property interest for the purposes of the due process clause, the inquiry focuses on the extent to which the issuing authority has discretion to grant or deny the benefit. Under Minnesota law, "[a] municipality has broad discretionary power when considering an application for variance." *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 630 (Minn. App. 2002) (citing *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983)). This is made clear in the Minnesota statutes that authorize local governments to issue variances, which explicitly state that "[v]ariances *may be granted* when the applicant for the variance establishes that there are practical difficulties in complying with the official control." Minn. Stat. § 394.27, subd. 7 (emphasis added); *see* Zoning

Ord. § 5.6.2. (giving Board of Adjustment discretion to grant variance if eight factors are met). Minnesota courts have unequivocally stated that a due process claim may not be brought by an applicant for a variance because "an applicant has no claim of entitlement to a variance." *Cont'l Prop. Grp., Inc. v. City of Minneapolis,* No. A10-1072, 2011 WL 1642510, at *4 (Minn. App. May 3, 2011) (citing *Krummenacher v. City of Minneapolis*, 783 N.W.2d 721, 727 (Minn. 2010)); *see also Solum v. Bd. of Cnty. Comm'rs for Cnty. of Houston*, 880 F. Supp. 2d 1008, 1013 (D. Minn. 2012) (plaintiffs had no protectable property interest in zoning application).

Here, Plaintiffs have no entitlement to the variance because the Board of Adjustment possesses discretion in determining whether a variance should be granted. Accordingly, the Plaintiffs' interest in the variance application "amounts to nothing more than an abstract need or desire." *Bituminous Materials, Inc. v. Rice Cnty., Minn.*, 126 F.3d 1068, 1070 (8th Cir. 1997) (quotation marks omitted) (applicant's interest in the permitting process was not sufficient to establish a protected property interest). Since the Plaintiffs lack an entitlement to a variance, their due process claims fail as a matter of law—both in the Supplemental Complaint, and in the original Complaint (to the extent Plaintiffs are continuing to pursue those claims). Defendants therefore are entitled to summary judgment.

2. Any Procedural Due Process Claim Additionally Fails Because the Zoning Board's Process was Adequate

To the extent Plaintiffs are alleging a procedural due process violation, they have also not made out this claim for another, independent reason: Winona County provided constitutionally sufficient notice and a chance for the Plaintiffs to assert their claim to the variance.

In addition to a protected property interest, procedural due process requires (1) notice and (2) a meaningful opportunity to be heard. *Sawh*, 823 N.W.2d at 632. These are flexible concepts that depend on the circumstances of the case. *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304

(Minn. App. 2007). In the land-use context, "quasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings." *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 716 (Minn. 1978). "In the zoning context . . . procedural due process is afforded when the landowner has notice of the proposed government action and an opportunity to be heard." *Anderson v. Douglas Cnty.,* 4 F.3d 574, 578 (8th Cir. 1993).

Here, Plaintiffs received sufficient notice of the proceedings and had ample opportunity to be heard on their variance application, including at the second hearing. Prior to the hearing, Plaintiffs' attorney submitted a lengthy memorandum detailing Plaintiffs' arguments for the variance. *See* Admin. R. 2879-2901. On December 2, 2021, Plaintiff Ben Daley and the Plaintiffs' attorney spoke at great length before the Board of Adjustment about "the criteria" governing variances and why the Board of Adjustment should grant the Plaintiffs a variance. Admin. R. 2992-3031. In particular, the Plaintiffs' attorney detailed the reasons why Plaintiffs believed practical difficulties necessitating the variance were not purely economic. Admin. R. 3019-20. This was critical, because the Board of Adjustment's decision turned on whether it believed there were non-economic reasons Plaintiffs needed the variance. Admin. R. 3058-67. Notably, opponents were not offered an opportunity to add to the record at this hearing—*only* the Plaintiffs and their attorneys received this opportunity—thus underscoring the opportunity the Plaintiffs were afforded to convince the decisionmakers to approve the variance. *See* Admin. R. 2876 (memorandum stating no public comment would be taken at the remand hearing.)

Plaintiffs had notice and a meaningful opportunity to be heard, and accordingly, Plaintiffs' procedural due process claims fail.

3. Any Substantive Due Process Claim Additionally Fails Because the Board's Decision Does Not Shock the Conscience

If Plaintiffs are raising a substantive due process claim, this also fails. This is not only due to the lack of a protected property interest, but also because the Board of Adjustment's decision to deny the variance is supported by the record and, therefore, does not rise to a substantive due process violation.

In the zoning context, "[w]hether government action is arbitrary or capricious within the meaning of the Constitution turns on whether it is so 'egregious' and 'irrational' that the action exceeds standards of inadvertence and mere errors of law." *Northpointe*, 465 N.W.2d at 689 (quoting *Condor Corp. v. City of St. Paul*, 912 F.2d 215, 220 (8th Cir. 1990)); *see also Azam v. City of Columbia Heights*, 865 F.3d 980, 986 (8th Cir. 2017) (explaining "the high burden facing" a person alleging a substantive due process claim). The high burden of advancing a substantive due process claim was showcased by the Eighth Circuit in *Bituminous Materials*. 126 F.3d at 1068. There, after a county board of commissioners imposed restrictions on a road paving contractor's use permit, the contractor alleged a substantive due process claim premised on "personal animus" by some commissioners. *Id.* at 1069-71. The contractor asserted the commissioners treated other contractors differently, admitted that they were "screwing [the contractor] over," had been treating the contractor "unfairly," commented that "they do not care if [the contractor] ever does business in the county again," and strongly disliked the contractor. *Id.* at 1071. The Eighth Circuit was unmoved, concluding "that these allegations are far too insubstantial to support a substantive due process claim." *Id; see also Chesterfield Dev. Corp. v. City of Chesterfield*, 963 F.2d 1102, 1104 (8th Cir. 1992) (rejecting due process claims even when zoning board ran afoul of the zoning statute because a federal court "should not . . .sit as a zoning board of appeals"); *see also Northpointe*, 465 N.W.2d at 691 (rejecting substantive due process claim despite reliance on an

expert with an obvious conflict of interest and rejection of another expert's credible studies and recommendations); *Bituminous Materials*, 126 F.3d at 1070 (reaffirming that bad-faith enforcement of the law does not support a substantive due process claim).

This Court should reach the same conclusion as the Eight Circuit. In essence, the Plaintiffs allege that two members of the Board of Adjustment were biased against Plaintiffs' expansion proposal. These claims of bias are based on scant facts that a county commissioner supported Dr. Heublein's appointment to the Zoning Board for "very careful reasons," and that Ms. Fitzgerald was a member of Land Stewardship Project (even though Ms. Fitzgerald joined Land Stewardship Project to support her farming business and largely ceased participation once she joined the Board of Adjustment). Pls.' Mem. at 55-56; Admin. R. 2977:8-2978:10. These tepid allegations fall well short of alleging a triable substantive due process claim. The Plaintiffs need much more than mere evidence that the "decisionmaker does not like the plaintiff." *Bituminous Materials*, 126 F.3d at 1071. The Board of Adjustment's decision to deny the Plaintiffs' variance application is not so egregious or irrational as a matter of law to support a trial on a substantive due process claim. Therefore, the Defendants are entitled to summary judgment on the Plaintiffs' substantive due process claim as well.

For all of these reasons, Defendants are entitled to summary judgment on all of Plaintiffs' claims based on due process—Counts III and IV in the original Complaint, to the extent Plaintiff continues to pursue those claims, and Counts VIII and IX in the Supplemental Complaint. There are no genuine issues of material fact as to these claims, and based on well-established due process law, Defendants are entitled to judgment as a matter of law.

SECTION 2: CLAIMS ON APPEAL

Counts V and VI of Plaintiffs' Supplemental Complaint are appellate claims, and this Court stands in an appellate posture as to these two counts.

I. The Board's Decision Must Be Upheld Because it Is Free of Legal and Factual Errors, and Is Therefore Not Arbitrary or Capricious (Count VI)

A. Standard of Review

In Count VI of the Supplemental Complaint, Plaintiffs appeal the second denial of their variance application. Plaintiffs bring this appeal under Minn. Stat. § 394.27, subd. 9, which provides that a party aggrieved by the decision of a county board of adjustment on a variance application shall have the right to appeal to the district court "on questions of law and fact." Plaintiffs allege the Board of Adjustment's second denial of their variance application was afflicted with "factual and legal errors" (Count VI). Suppl. Compl. at 12-14.

In zoning appeals like this one, this Court acts as an appellate court and reviews the variance decision based on the record made before the local zoning body. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 311 (Minn. 1988). Thus, the Board of Adjustment's decision is treated by this Court like a trial court decision. Because review is limited to the record developed before the local decision-maker, cases like these are decided via motions for summary judgment. However, the standard of review for this Court to apply is not the familiar summary judgment standard but the one set forth below.

County boards of adjustment are given broad discretionary power to approve or deny variances. *VanLandschoot*, 336 N.W.2d at 508-09. As the Minnesota Supreme Court has stated, the "scope of review is narrow." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006). This is based on separation of powers principles, as local officials are the ones entrusted to make land use choices for their communities. *See Big Lake Ass'n v. St. Louis Cnty.*

Plan. Comm'n, 761 N.W.2d 487, 491 (Minn. 2009) ("Our limited and deferential review of a quasi-judicial decision is rooted in separation of powers principles."); *Swanson,* 421 N.W.2d at 311 ("The court's authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked.").

The standard of review for variance decisions and other zoning matters is whether the local authority's action was reasonable. *VanLandschoot*, 336 N.W.2d at 508. The court assesses whether the decision was unreasonable, arbitrary, or capricious, by applying a two-step analysis. *RDNT, LLC*, 861 N.W.2d at 75–76. First, the court determines whether the board's stated reasons were legally valid; second, the court determines whether the decision "had a factual basis in the record." *Id.*

Because the reviewing court must give deference to the zoning board's decision, the court should only set aside a decision in "those rare instances in which the . . . decision has no rational basis." *White Bear Docking*, 324 N.W.2d at 176; *see Khan v. Minneapolis City Council,* No. A11-1504, 2012 WL 3262983, at *3 (Minn. App. Aug. 6, 2012) (decision not arbitrary and capricious if there is a rational connection between facts found and choice made). Moreover, if there is evidence supporting the board's decision, a court must not substitute its judgment for that of the zoning authority, even if it would have reached a different conclusion had it been a member of the board. *VanLandschoot*, 336 N.W.2d at 509; *Moore v. Comm'r of Morrison Cnty. Bd. of Adjustment*, 969 N.W.2d 86, 91 (Minn. App. 2021). The deference to the zoning authority is so great that even if the reviewing court finds the decision *debatable*, so long as there is a rational basis for what the board does, the courts do not interfere. *Mendota Golf*, 708 N.W.2d at 180 (quotation omitted). The reviewing court also does not weigh the evidence, and instead reviews the record to determine whether there was legal evidence to support the zoning authority's

decision. *RDNT, LLC,* 861 N.W.2d at 76. If there is conflicting evidence, the court should defer to the zoning authority's judgment as to the weighing of that evidence. *See White Bear Docking,* 324 N.W.2d at 176.

Plaintiffs have the burden of proof to demonstrate to this Court that the reasons stated by the Board for denying the variance are without factual support in the record or are legally insufficient. *See Moore*, 969 N.W.2d at 91.

B. The Winona County Zoning Ordinance

Under Winona County's Zoning Ordinance, a variance is defined as, "[a]ny modification or variation of official controls[10] where it is determined that, by reason of *exceptional circumstances*, the strict enforcement of the official controls would cause unnecessary practical difficulties." Zoning Ord. § 4.2 (emphasis added). This provision makes clear a variance is only intended to be used rarely in exceptional circumstances, *not* for common occurrences. An individual seeking a variance is asking for special permission to violate local law and do something otherwise prohibited by the Ordinance. Because of this, the applicant for a variance has a "heavy burden" to demonstrate to the local board why a variance is appropriate. *VanLandschoot*, 336 N.W.2d at 509.

Thus, Plaintiffs had the burden to show the Board how they satisfied each of the eight criteria that must be met under the Winona County Zoning Ordinance to grant a variance.[11] As to variances, the Winona County Ordinance states:

[10] The "official controls" of Winona County are the policies, standards, maps and other criteria that control the physical development of the County. Official controls include, but are not limited to, the Winona County Zoning Ordinance and the Comprehensive Plan. Zoning Ord. § 4.2.

[11] In addition to receiving a variance from section 8.4.2 of the Zoning Ordinance (the animal unit cap), Intervenor-Defendants also believe Plaintiffs were required to receive a variance from the prohibitions on expanding a non-conforming use. *See* Zoning Ord. § 3.2.3, 8.2.1

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

Zoning Ord. § 5.6.2.

C. The Board's Decision Must Be Upheld Because it Was Legally Supported

The first step for this Court in determining whether the Board of Adjustment's decision was unreasonable, arbitrary, or capricious, is to determine whether the Board's reasons for denying the variance were legally valid. As discussed below, the Board of Adjustment's reasons were legally valid, and the Board's decision should be upheld.

Plaintiffs had the heavy burden to show they satisfied all eight criteria required to receive a variance. The Board of Adjustment found Plaintiffs had met their burden on each of the criteria except criterion 6. Admin. R. 2957-2960. As to criterion 6, the Board could not make a finding that Plaintiffs needed a variance for reasons other than economic ones. Admin. R. 3062:25-3068:9.

Because of this, the Board only found Plaintiffs had made the required showing on *seven* (not eight) of the criteria, and the Plaintiffs' variance application had to be denied per the terms of the Ordinance. *See* Zoning Ord. § 5.6.2 (prohibiting board from granting variance unless it makes findings the eight criteria are met). Accordingly, the Board's reason for denying the variance was legally sufficient.

Plaintiffs argue the Board's decision was legally invalid by asserting the Board's findings show Plaintiffs actually *met* all the requirements for a variance. Plaintiffs' argument rests on their assertion that criterion 6 is an *exception* to criterion 3. And because the Board found criterion 3 was met, but made no finding on criterion 6, "the exception to [criterion 3] is not triggered," making the Board of Adjustment's reasons for denying the variance legally insufficient. Pls.' Mem. at 60. However, Plaintiffs' reading of the Ordinance is not supported by its plain language.

The variance criteria are written as eight co-equal criteria, and the Board must make findings on all of them to grant a variance. This is made clear by the introductory language to the criteria, which states, the "Board of Adjustment ***shall not*** grant a variance . . . unless it shall make findings of fact . . . on the following standards," and then lists the eight criteria. Zoning Ord. § 5.6.2 (emphasis added). This language prohibits the Board from granting a variance *unless* it makes findings of fact on each of the standards. *Id*. The Ordinance starts from a default position that the variance is not granted, and that cannot be overcome until findings on the following standards (the eight criteria) are made. This language does not leave open the possibility of granting the variance when findings on only *some* of the criteria have been made.

Looking at the criteria themselves, criterion 6 plainly is not written as a subpart or exception to criterion 3. There is no indication to the Board that if they make a positive finding on criterion 3, they must then jump to criterion 6 to determine if an exception to criterion 3 applies.

Instead, each of the criteria stands alone, and all must be satisfied before the Board can grant a variance.

Moreover, criterion 6 comes verbatim from the statute codifying what must be established before a board of adjustment may grant a variance. *See* Minn. Stat. § 394.27, subd. 7. Thus, this Board could not possibly issue a variance without making a finding that Plaintiffs had demonstrated criterion 6 was met. Such a finding is required by statute.

Ultimately, this Court would have to re-write the Winona County Zoning Ordinance to find Plaintiffs' argument correct. The Ordinance is clear on its face that the Board must make findings on all eight criteria in order to grant a variance. The Board was correct to deny the variance when the Board could not make findings in Plaintiffs' favor on all eight of the necessary criteria. Accordingly, the Board of Adjustment's decision was legally supported, and was not unreasonable, arbitrary, or capricious.

D. The Board's Decision Must Be Upheld Because it Was Factually Supported by the Record

The second step for this Court in determining whether the Board of Adjustment's decision was unreasonable, arbitrary, or capricious, is to determine whether the Board of Adjustment's decision had a factual basis in the record. So long as any one of the reasons given by the Board is supported by a rational basis, the decision will be affirmed. *See Trisko v. City of Waite Park,* 566 N.W.2d 349, 352 (Minn. App. 1997) (stating not all reasons for the denial need be legally sufficient and supported by facts in the record so long as one of the reasons given for the denial satisfies the rational basis test). Here, the Board of Adjustment's decision to deny the variance had a firm factual basis in the record. In fact, evidence in the record supports a negative finding on the

majority of the criteria required for a variance. The Board's decision, therefore, is supported by the facts in the record.

1. The Board of Adjustment's Reasons for Failing to Find Criterion 6 Satisfied Had a Factual Basis in the Record

Criterion 6 asks whether Plaintiffs' need for the variance is for exclusively economic reasons. To receive a variance, the applicant has to show strict enforcement of the Ordinance would cause them "practical difficulties."[12] Zoning Ord. § 5.6.1. Both Minnesota law and the Winona County Ordinance section 5.6.2 explicitly state that economic considerations alone are not practical difficulties. In other words, if the applicant's need for the variance is for purely economic reasons, then there is not a "practical difficulty," and the applicant cannot receive a variance. *See* Minn. Stat. § 394.27, subd. 7.

a. Plaintiffs' Own Statements Show Their Reason for Seeking the Variance Was Purely Economic

Plaintiffs failed to meet their heavy burden to show that their need for the variance was for reasons other than economic ones. For years, Plaintiffs have said the reason they are seeking this variance is to add additional jobs at the feedlot to employ new members of the family. Admin. R. 1698, 1699, 1849, 2095, 2559:1-3. In both their variance application and in statements to the press, Plaintiffs and their representatives have been clear about this motivation, stating:

- "Daley Farms of Lewiston is proposing to expand and modernize its existing dairy facilities because a new generation of the family desires to return to Winona County and work on the family farm." Admin. R. 1698 (Plaintiffs' Variance Application Summary).
- "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." Admin. R. 1698 (Plaintiffs' Variance Application Summary).

[12] A "practical difficulty" is a legal term of art which means "the property owner proposes to use the property in a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality." Minn. Stat. § 394.27, subd. 7.

- "Although Daley Farms of Lewiston could, in theory, expand its operation by constructing multiple smaller facilities on different sites in the area, such expansions would . . . dramatically increase the cost of the project . . .." Admin. R. 1699 (Plaintiffs' Variance Application Summary).
- "And as that margin compresses, dairies need to adapt. They need to change the way they operate if they are going to survive *economically* . . . And if we look at Daley Farm here, . . . [t]hey are attempting to adopt a project to meet the *economic* realities of the time and preserve their operation." Admin. R. 2576:18-2577:7 (Statement of Plaintiffs' Attorney at 2/21/19 hearing) (emphasis added).
- "The expansion is necessary to make the farm economically sustainable into the future and provide economic support for the additional family members to return..." Admin. R. 1849 (Plaintiffs' Attorney's written argument in support of variance).

This same reason was also given in Plaintiffs' environmental assessment worksheet, which described the need for the expansion as follows:

> Daley Farms of Lewiston, LLP is owned by seven members of the Daley family. This expansion will enable successive generations of the family to come into family dairy business without having to establish separate dairy enterprises. By working together under one corporate ownership and one facility, the family can take advantage of economy of scale. This economy of scale will . . . keep the dairy business profitable in the current competitive dairy market.

Admin. R. 40.

Even Plaintiffs have openly agreed that their variance request is "motivated, in part, by economic considerations." Admin. R. 1858 (memorandum to the Board from Plaintiffs' Attorney in support of the variance); *see also* Admin. R. 2587:11-12 (Plaintiffs' attorney stating, "We're not denying that economic considerations are part of it.").

Plaintiffs' request is similar to that in *Continental Property Group v. Wayzata* where the developer emphasized that the variance was needed to see an acceptable economic return on the property. *Cont'l Prop. Grp., LLC v. City of Wayzata*, No. A15-1550, 2016 WL 1551693, at *6 (Minn. App. Apr. 18, 2016). The local government denied the variance and the Court of Appeals affirmed on the basis that the local government correctly recognized that economic considerations could not be the sole need for the variance. *Id.* Similarly here, the support in the record is

substantial showing Plaintiffs' "need" for this variance is purely economic. Accordingly, the Board of Adjustment's inability to find criterion 6 met is supported by the record.

b. Plaintiffs' List of Non-Economic Reasons for Seeking the Variance Are All Things Plaintiffs Can Do Without a Variance

Plaintiffs believe the Board should have found they satisfied criterion 6 because they argue that they have additional, non-economic motivations for their expansion. In a written argument submitted by Plaintiffs' attorney to the Board, Plaintiffs' attorney argued the non-economic reasons the variance was needed were to reduce the environmental impact of the feedlot, promote animal welfare and food safety, and ensure safety and well-being of employees. Admin. R. 2895. Plaintiffs' attorney pointed to the following as specific examples of the non-economic reasons a variance was necessary: (1) the new facilities have been designed to comply with all laws and regulations, (2) the expansion would include runoff control measures for an existing part of the farm and closure of part of the farm that is not in compliance with federal law, (3) the expansion would have to operate under an NPDES permit and comply with those terms, (4) the additional manure would be used as fertilizer, and (5) the expansion would include converting 800 acres from row crops to alfalfa. Admin. R. 1849-1851. Plaintiffs argue this evidence was not contradicted, and as such, the Board could not reasonably find the Plaintiffs' need for the variance was only economic. Pls.' Mem. at 62. However, as discussed above, there was ample contradictory evidence in the record—most obviously, Plaintiffs' own statements that they were seeking the variance to employ more family members.

Moreover, Plaintiffs did not show that any of their purported non-economic reasons were reasons for *needing* the variance. Plaintiffs assert their expansion will provide environmental and safety benefits, but criterion 6 does not ask whether the proposed use will have non-economic *benefits*. Instead, this criterion requires Plaintiffs to show they have non-economic *reasons to need*

the variance. Zoning Ord. §§ 4.2, 5.6.2. However, none of Plaintiffs' "non-economic reasons" are things they need a variance to achieve. All of the "non-economic reasons" are things Plaintiffs are already required to do, or are already doing, without a variance.

For example, Plaintiffs' first non-economic reason is that the new facilities have been designed to comply with all laws and regulations. Admin. R. 1849. Yet, any facility Plaintiffs operate, whether related to this expansion or not, has to comply with all applicable laws and regulations; a variance is not needed for Plaintiffs to comply with laws.

Regarding their second non-economic reason—that the expansion will include runoff control measures and will close part of the farm that is not in compliance with federal law (Admin. R. 1849)—Plaintiffs have to take actions to bring their facility into compliance with federal law and control pollution, regardless of whether they obtain a variance. Indeed, an order from the Minnesota Pollution Control Agency already states that "[i]f the Winona County variance or exemption is not approved . . . Daley will . . . add open-lot runoff controls, in accordance with [their] Individual NPDES Feedlot Permit Schedule of Compliance." Admin. R. 170. Thus, Plaintiffs already have a Schedule of Compliance with the state to bring their facility into compliance with the law, regardless of whether the variance is granted.

Regarding non-economic reason 3—that the expansion will have to operate under an NPDES permit and comply with those terms (Admin. R. 1850)—Plaintiffs' facility already has to operate under an NPDES permit and follow its terms. This is true regardless of whether they are granted a variance. Plaintiffs' facility has been operating under an NPDES permit for decades. *See* Admin. R. 2825-2828 (documenting issuance of NPDES permit to Plaintiffs and history of inspections and violations under those permits since 1997).

Thus, the first three touted "non-economic" reasons for needing the variance just recite Plaintiffs' current and ongoing obligation to follow the law and receive the appropriate permits. These are obligations that exist regardless of whether they receive a variance and are not reasons they *need* a variance.

As to the fourth and fifth reasons, these are things Plaintiffs already do without a variance, and would simply do more of if their facility was larger. For example, as to non-economic reason 4, that Plaintiffs will use their manure as fertilizer (Admin. R. 1850), Plaintiffs already use the manure their cows produce as fertilizer and apply it to area farm fields. They do not require a variance to use their manure as fertilizer. In fact, their state NPDES permit already contemplates that they will. Admin. R. 2818. If Plaintiffs are granted a variance, their expansion would generate more manure that needs to be spread locally, but that is a *result* of the variance, not a need for it.

Finally, as to non-economic reason 5—that Plaintiffs will convert 800 acres from row crops to alfalfa (Admin. R. 1851)—Plaintiffs already have 900 acres in alfalfa, without receiving a variance. Admin. R. 2818. Their proposal to add more alfalfa simply maintains the status quo, as Plaintiffs must increase the number of acres of alfalfa to correspond to the increase in animals to maintain the same environmental benefits. Plaintiffs could choose to plant more alfalfa without adding a single animal—a variance is not *needed* for them to convert more row crops to alfalfa.

Thus, all of Plaintiffs' "non-economic reasons" are not reasons they *need* a variance. They simply document planned compliance with state and federal law, and farm practices Plaintiffs will follow if they are allowed to expand. The non-economic reasons would be results of Plaintiffs' proposed expansion, but not the reason Plaintiffs *need* to violate the local law to expand their feedlot. In other words, none of the non-economic reasons Plaintiffs proffer show *exceptional*

circumstances that would cause "practical difficulties" in complying with the animal unit cap. Instead, Plaintiffs "need" for the variance clearly remains entirely economic.

After considering all of Plaintiffs "non-economic" reasons, Winona County staff came to the same conclusion, rejecting Plaintiffs' non-economic argument, and stating:

> The variance request ***is economic*** in nature. The petitioners want to expand their existing dairy facilities to accommodate the addition of family members, who desire to work on the family farm. By expanding their existing dairy facilities, it will increase their milk production and expand their existing revenue.
>
> The Daley Farms of Lewiston Variance Request document submitted by Ben Daley states, *"Daley Farms of Lewiston is proposing to expand and modernize its existing dairy facilities because a new generation of the family desires to return to Winona County and work on the family farm. The Daley family has farmed in Winona County for more than 150 years. 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."*
>
> The petitioners have been cited in several media outlets (i.e., Winona Daily News, Winona Post, AgriNews, etc.) stating their economic reasoning behind this variance request.

Admin. R. 2833-2834 (Staff Report).

Thus, the facts in the record support the Board's decision that criterion 6 was not met, and the Board's denial of the variance should be upheld.

c. Board Members Found the Evidence in the Record Showing Plaintiffs Were Seeking the Variance for Economic Reasons Most Credible

At the Board of Adjustment's hearing on Plaintiffs' variance, two of the four board members felt the record showed Plaintiffs' need for the variance was purely economic. Dr. Heublein addressed Plaintiffs' non-economic reasons and found, "[a]ll of those things are there now if they're practicing what they say they're practicing. So that doesn't have any effect with expansion, that's going to continue." Admin. R. 3061:10-12. Thus, Dr. Heublein concluded their need for the variance was exclusively for economic reasons, finding, "[w]hat they need is to bring more revenue into the farm." Admin. R. 3061:13-14. Ms. Fitzgerald also did not believe Plaintiffs'

proffered non-economic reasons were reasons why they needed the variance, stating "I guess I feel kind of how Elizabeth [Heublein] feels with [the non-economic factors] on that would stay the same regardless of whether they expanded or not and stay the same size." Admin. R. 3063:18-21.

Thus, based on Plaintiffs' own statements and the rest of the record, Dr. Heublein and Ms. Fitzgerald both determined that Plaintiffs' "non-economic reasons" were not truly a motivation for seeking the variance. Both voted to find Plaintiffs had not met criterion 6, and as discussed in the two previous sections, there is more than ample support in the record for this conclusion.

This case is not the "rare instance" in which the Board of Adjustment's zoning decision has "no rational basis." *White Bear Docking*, 324 N.W.2d at 176. Indeed, evidence from the Plaintiffs' own statements supports the conclusion of Dr. Heublein and Ms. Fitzgerald that Plaintiffs' motivation in seeking the variance was economic. Accordingly, even if this Court would have reached a different decision, it must affirm the Board of Adjustment's decision. *VanLandschoot*, 336 N.W.2d at 509. Because the Board of Adjustment's decision was legally valid and supported by the evidence, and therefore not unreasonable, arbitrary or capricious, this Court should affirm it.

2. The Record Shows Plaintiffs' Variance Application Should Have Been Denied by an Even Greater Degree

While Plaintiffs object to the Board's denial of their variance based on criterion 6, Plaintiffs did not actually meet their burden on many more of the criteria, and based on evidence in the record, the Board likely should have denied the variance by an even greater degree. Intervenor-Defendants discuss the other factors the Plaintiffs were required to meet below to illustrate the ample amount of factual support in the record for the Board of Adjustment to deny the variance.[13]

[13] Although Intervenor-Defendants think the Board should have found against Plaintiffs on many more of the variance criteria, Intervenor-Defendants are not asking the Court to find the Board

a. Criterion 1: Plaintiffs' Application Was Not in Harmony with the Intent and Purpose of the Winona County Zoning Ordinance

The first of the Zoning Ordinance's variance criteria requires the applicant to show the variance sought is in harmony with the intent and purpose of the Ordinance. The intent and purpose of the section of the Ordinance that Plaintiffs sought a variance from is to "balance the county's competing interests in maintaining a healthy agricultural community with ensuring that farmers properly manage animal feedlots and animal waste to protect the health of the public and the natural resources of Winona County." *See* Zoning Ord. § 8.1.1. The animal unit cap prohibiting feedlots over 1,500 animal units is one of the provisions Winona County enacted to achieve this purpose. *See* Zoning Ord. § 8.4.2. Another is section 8.2.1 which prohibits feedlots that were grandfathered-in from increasing in size. Zoning Ord. § 8.2.1.

An expansion of an already non-conforming feedlot to nearly quadruple the maximum size permitted by the Ordinance could never be "in harmony with" the Ordinance. The Ordinance's drafters anticipated that feedlots might want to significantly expand and expressly forbade such a large expansion in order to further the County's goal of balancing agriculture with protection of drinking water. A grant of a variance in this instance would therefore directly violate the stated intent and goals of the Ordinance. The Winona County staff agreed, noting:

> The petitioner is proposing to quadruple the allowable animal unit maximum that has been established in the WCZO, the purpose for which is to protect public health, safety, and welfare. A request that so substantially exceeds the clear intent and purpose of the Ordinance is ***not in harmony*** with the intent and purpose of the Ordinance.

Admin. R. 2830. Thus, there is further evidence in the record supporting denial of the variance.

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erred on these factors. Rather, we offer this as Intervenor-Defendants' perspective as to why the Board was certainly correct in denying Plaintiffs' requested variance.

b. Criterion 2: Plaintiffs' Requested Variance Is Not Consistent with the Comprehensive Plan

The second variance criterion asks whether the variance is consistent with the Comprehensive Plan. The Winona County Comprehensive Plan seeks to balance the local agricultural economy with protecting natural resources. It states:

- "[The County should] carefully control the location and size of feedlots and other animal confinement areas in the County to minimize pollution . . .."
- "[The County should use] sustainable policies that balance the needs of agriculture, landowners and the environment."
- "Because water moves very quickly in limestone formations and sinkholes with little or no purification by filtration, care must be used in preventing pollution in these areas. As a result, intense agricultural operations such as feedlot or solid waste disposal sites should be *carefully regulated* or *prohibited* in karst areas."

Comp. Plan at 18, 31, 53 (emphasis added). Thus, in order to be consistent with the Comprehensive Plan, any requested variance must strike a balance between agriculture and protection of critical natural resources.

While the Comprehensive Plan requires limits on feedlots in karst areas, Plaintiffs are seeking to expand their feedlot in the karst area significantly. This variance would not "carefully control the location and size of feedlots and other animal confinement areas in the County to minimize pollution," and would not ensure feedlots are "carefully regulated or prohibited in karst areas." Comp. Plan at 18. Thus, this criterion was also not met, and there is further evidence in the record supporting denial of the variance.

c. Criterion 3: Plaintiffs Have Not Established There Are "Practical Difficulties" in Complying with the Ordinance Because They Do Not Propose to Use the Property in a Reasonable Manner

The third variance criterion asks whether the applicant has established there are "practical difficulties" in complying with the Ordinance. "Practical difficulties" are defined by statute to mean, (1) "the property owner proposes to use the property in a reasonable manner not permitted

by an official control"; (2) "the plight of the landowner is due to circumstances unique to the property not created by the landowner"; and (3) "the variance, if granted, will not alter the essential character of the locality." Minn. Stat. § 394.27, subd. 7.

Plaintiffs have not demonstrated practical difficulties, as they fail the first prong of the practical difficulties test. Plaintiffs do not "propose[] to use the property in a reasonable manner not permitted by an official control." *See* Minn. Stat. § 394.27, subd. 7. In *Continental Property Group, LLC v. Wayzata,* the Court of Appeals found a requested variance would not "use the property in a reasonable manner" when the requested variance *far* exceeded what was permitted under the ordinance. *Cont'l Prop. Grp., LLC v. City of Wayzata*, 2016 WL 1551693, at *4. In that case, a developer sought a variance to build a five-story building in an area that was zoned for only two-story buildings. *Id.* at *1. The local board found, and the Court of Appeals affirmed, the developer did not "propose to use the property in a reasonable manner" because the height of the building *far* exceeded what was allowed under the ordinance. *Id*. at *4-5.

Similarly, Plaintiffs' requested variance would be an extreme departure from the existing zoning law. Plaintiffs' feedlot currently has at least 660 more animal units than the Ordinance allows, and they seek to increase to 4,467 animal units *above* the maximum amount permitted by the Ordinance. Admin. R. 2914. Plaintiffs, who already have the largest feedlot in the county, now seek to have the equivalent of four maximum size feedlots consolidated into one. *See* Admin. R. 1452, 2093. This cannot be said to be a "reasonable use" of the property.

The Staff Report agreed this was not a reasonable use and recommended the Board find Plaintiffs had not made the required showing on this factor. Admin. R. 2832. Thus, there is further evidence in the record supporting denial of the variance.

d. Criterion 4: Plaintiffs' Request Is Not Due to Special Conditions Unique to the Property

The fourth variance criterion asks whether Plaintiffs' request for a variance was due to unique conditions of the property that were not created by the Plaintiffs since the enactment of the Ordinance. This is the second prong of the practical difficulties test. Plaintiffs have not shown their need for the variance is due to something unique to their property and therefore fail this prong of the practical difficulties test as well.

Courts have been clear that "circumstances unique to the property" means features or characteristics of the property, which by their existence, causes the property owner difficulty conforming their proposed use to the zoning code. *See Nolan v. City of Eden Prairie*, 610 N.W.2d 697, 702 (Minn. App. 2000) (holding there were circumstances unique to the property when the property's location at the end of a cul-de-sac, a stand of trees, and significant grade change of 44 feet, limited the owner's ability to create house pads and lot lines in compliance with the zoning code); *State ex rel. Neighbors for E. Bank Livability v. City of Minneapolis*, 915 N.W.2d 505, 517–18 (Minn. App. 2018) (holding there were unique circumstances when permanent structures on either side of a proposed apartment building physically limited the lot size and ability to build horizontally on the property in compliance with the zoning code); *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 492 (Minn. App. 1995) (finding unique circumstances when soil conditions and a sewer main prohibited excavation that would allow [the project] to comply with the 30 foot height limitation in the ordinance).

Courts have also been clear that a "circumstance unique to the property" is *not* the operation of the zoning code on the property. *See Tulien v. City of Minneapolis*, No. A20-0542, 2021 WL 79526, at *3 (Minn. App. Jan. 11, 2021) (finding fact that current zoning code made it difficult to create a contemporary apartment building on the site was not a circumstance unique to the

property). If the zoning code prohibiting something the property owner wanted to do was enough to show "unique circumstances," every request for a variance would automatically have a "circumstance unique to the property." *Id.* at *4.

Finally, in considering whether there are "unique circumstances" courts often look to whether the property is similarly situated to neighboring parcels. *See Cont'l Prop. Grp., LLC v. City of Wayzata*, 2016 WL 1551693, at *5 (affirming finding of no unique circumstances when the property shared the same physical characteristics as similar properties in the immediate area).

There is no physical feature or characteristic of Plaintiffs' property which, by its existence, causes Plaintiffs difficulty in complying with the animal unit cap. Admin. R. 2832. Indeed, Plaintiffs pointed to none. Instead, Plaintiffs asserted their existing farming infrastructure was a circumstance unique to the property. *See* Admin. R. 2893. But this infrastructure is common to local farms, not unique. Admin. R. 2832. And its mere existence does not make it difficult for Plaintiffs to comply with the animal unit cap. *See Tulien*, 2021 WL 79526, at *3. Plaintiffs have successfully operated at this site with the required number of animal units for years. Additionally, if Plaintiffs obtain the variance, they have to build a great deal *more* infrastructure on their property to accommodate the animals. *See* Admin. R. 2824. Thus, the feedlot's buildings are not the unique circumstance the Ordinance speaks of.

The Winona County staff agreed, and based on similar reasoning, recommended the Board find Plaintiffs had not satisfied this criterion. Admin. R. 2832. Thus, there is further evidence in the record supporting denial of the variance.

e. Criterion 5: Plaintiffs' Variance Would Alter the Essential Character of the Locality; Substantially Impair Property Values; or Substantially Impair the Public Health, Safety, and Welfare in the Vicinity

The fifth variance criterion is the final prong of the practical difficulties test. It asks whether the grant of the variance will alter the essential character of the locality, substantially impair

property values, or substantially impair the public health, safety, and welfare in the vicinity. The grant of a variance to Plaintiffs has the potential to do all three.

Plaintiffs' massive proposed expansion does have the potential to alter the essential character of the locality. While the area is an agricultural one, Plaintiffs' feedlot already is the largest in the county, and if the variance were granted, it would be the eleventh largest dairy in the state, dwarfing nearby farms. Admin. R. 1452, 2093. In *Continental Property Group v. Wayzata,* the court found a variance would alter the character of the locality when it would permit a building that was much taller, denser, and that had a larger concentration of business activity than other buildings in the neighboring area. *Cont'l Prop. Grp., LLC v. City of Wayzata*, 2016 WL 1551693, at *5. The same is true here. This facility would be significantly different than other farms in the area. And *Continental Property Group v. Wayzata* shows the mere fact that the facility is in a location zoned for that type of activity does not automatically mean it will not alter the character of the locality.

Plaintiffs' expansion also could impact property values. The Appraisal Journal (a leading professional publication for property appraisers) found that a large animal facility will reduce neighboring property values by 3.1% to 26% depending on multiple factors, and even up to 88% for directly abutting properties if conditions are not well managed. Admin. R. 2093.

The public health, safety, and welfare in Plaintiffs' vicinity will also likely be affected if the variance is granted due to the 46 *million* gallons of manure that must be spread on area farm fields each year. Admin. R. 2094. As discussed previously, Plaintiffs plan to spread manure in an area where it is easy for the manure to leach into the groundwater, contaminating the community's drinking water supply. While Plaintiffs assert the environmental review of their expansion proposal demonstrates their expanded facility would not pollute, Plaintiffs' history of violations

has not instilled confidence in the community that pollution will be avoided. *See* Admin. R. 2825-2828 (detailing various instances of non-compliance and violations, many of which involve manure).

The record, yet again, presents further evidence to support denial of the variance.

f. Criterion 7: Plaintiffs' Need Can Be Alleviated By Means Other Than A Variance

Finally, variance criterion seven requires Plaintiffs to demonstrate that the variance sought cannot be alleviated by a reasonable method other than a variance, and that it is the minimum variance which would alleviate the practical difficulty. Because Plaintiffs have not shown they have a practical difficulty, this factor is already not met. But in any case, Plaintiffs do have other options beyond the variance that they seek, and they certainly have not shown this is the minimum variance necessary.

Plaintiffs noted in their variance request, and even at the remand hearing, that they could achieve the same expansion by constructing multiple smaller facilities on different sites in the area. Admin. R. 1699, 3022:5-9. This is not impractical as Plaintiffs currently already have 3-4 separate feedlot sites in the area. Admin. R. 2815, 2817 (2021 Staff Report indicating Plaintiffs had 4 separate sites but Plaintiffs eliminated site LLP1 before the 2021 Board of Adjustment vote). While this (according to Plaintiffs) would increase the cost of the project, it is still a way to accommodate Plaintiffs' desire to expand, and employ more family members, without a variance. Admin. R. 1699, 3022:5-9. The record simply shows it is not Plaintiffs' preferred alternative. Moreover, nothing in the record establishes that the requested variance is the smallest possible one that would address Plaintiffs' difficulty—i.e., the need to support more family members. Nothing shows that Plaintiffs need to expand to 6,000 animal units rather than some smaller number. Indeed, Winona

County staff noted the requested variance was for the *maximum* number of animals that could be supported by Plaintiffs' feedlot. Admin. R. 2834.

Thus, the record shows Plaintiffs had options other than seeking this specific variance. The Staff Report reached the same conclusion and recommended finding Plaintiffs had not satisfied this criterion. *See* Admin. R. 2834. Accordingly, the record evidence further supports denial of the variance.

In sum, looking at the evidence and all the variance factors—not merely criterion 6—there is more than ample evidence that Plaintiffs' variance application should have been denied. The Board of Adjustment's decision is clearly supported by facts in the record, and this Court should defer to and uphold the Board's decision.

II. The Board's Decision Must Be Upheld Because it Was Not Arbitrary or Capricious Due to Bias or prejudgment (Count V).

In Count V of the Supplemental Complaint, Plaintiffs bring another claim on appeal under Minn. Stat. § 394.27, subd. 9, this time arguing the Board's decision was arbitrary and capricious due to bias and prejudgment.[14] Suppl. Compl. at 12. However, because the conduct of the Board does not show bias or prejudgment, the Board's decision must be upheld.

At the outset, it is important to note Plaintiffs' arguments in this section of their memorandum (Pls.' Mem. at 49-57) attempt to set forth a standard for analyzing bias by citing inapplicable cases. Few of the cases Plaintiffs rely on involve appeals of local zoning decisions under Minn. Stat. § 394.27. Instead, most of the cases Plaintiffs cite to are decided under the requirement for an unbiased decisionmaker under the due process clause. These cases do not have

[14] Given that Minn. Stat. § 394.27, subd. 9 only allows for appeals under this provision on "questions of law and fact" it appears that Plaintiffs' claim alleging bias (Count V) is not properly pled under this statute. Nevertheless, Intervenor-Defendants will still address the reasons why Intervenor-Defendants should be granted summary judgment on this count.

any bearing on a challenge of bias and prejudgment brought under a Minnesota state statute (Minn. Stat. § 394.27, subd. 9). And, as discussed previously, Plaintiffs cannot show the requisite protectible property interest required to trigger due process protections. Thus, Plaintiffs cannot use due process case law to support their statutory claim, especially when they cannot even make out a due process claim. This court should ignore references to these cases, which are entirely irrelevant to this discussion.[15]

Other cases cited by Plaintiffs relate to the standard under the Minnesota Administrative Procedure Act ("MAPA") for finding an *administrative agency's* decision arbitrary and capricious. *See In re Schmalz*, 945 N.W.2d 46, 54 (Minn. 2020); *Living Word Bible Camp v. County of Itasca*, No. A12-0281, 2012 WL 4052868, at *8 (Minn. App. Sept. 17, 2012). But appeals from Minn. Stat. § 394.27 are not subject to MAPA review. *See* Minn. Stat. § 14.69. Instead, zoning appeals from Minn. Stat. § 394.27, subd. 9 have their own standard of review, set forth clearly in case law: (1) whether the decision was legally supported, and (2) whether the decision had factual support in the record. *RDNT, LLC*, 861 N.W.2d at 75-76.[16]

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[15] Plaintiffs' cited due process cases include the following: *Juster Bros., Inc. v. Christgau*, 7 N.W.2d 501, 508 (Minn. 1943) (due process requires a fair hearing) (Pls.' Mem. at 51); *Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562-63 (Minn. App. 2003) (due process protections include the right to an impartial decisionmaker) (Pls.' Mem. at 54); *Buchwald v. Univ. of Minn.*, 573 N.W.2d 723, 727 (Minn. App. 1998) (due process requires unbiased decisionmaker) (Pls.' Mem. at 54); *Deli v. Univ. of Minn.*, 511 N.W.2d 46, 50 (Minn. App. 1994) (due process requires hearing before impartial board) (Pls.' Mem. at 54); *McVay v. Zoning Hearing Bd. of New Bethlehem Borough*, 496 A.2d 1328, 1330-31 (Pa. Commw. Ct. 1985) (Pls.' Mem. at 55); *Cinderella Career & Finishing Sch., Inc. v. F.T.C.*, 425 F.2d 583, 591 (D.C. Cir. 1970) (Pls.' Mem. at 55); *1616 Second Ave. Rest., Inc. v. New York State Liquor Auth.*, 550 N.E.2d 910, 912 (N.Y. 1990) (Pls.' Mem. at 55). None of these cases are relevant to Plaintiffs' claim under Minn. Stat. § 394.27, subd. 9, nor are the other cases cited by Plaintiffs from other jurisdictions (Pls.' Mem. at 55) relevant to an interpretation of a specific Minnesota statute.

[16] The review of a municipal zoning decision is of course different than review of a state agency's decision, and the standards for reviewing each are different. *Compare* Minn. Stat. § 14.69 with *Swanson v. City of Bloomington*, 421 N.W.2d 307, 314 (Minn. 1988) ("[T]he question is whether

Claims under Minn. Stat. § 394.27 that a local government's zoning decision should be overturned due to bias or prejudgment are rare.[17] Intervenor-Defendants have found only a handful of cases analyzing such claims. And notably, Intervenor-Defendants found only one other case in which a Minnesota court actually *overturned* a local zoning board's decision based on a bias claim brought under state statute—*Continental Property Group v. City of Minneapolis*.[18] In that case, the Court of Appeals based its decision on the fact that one of the council members *actively advocated* against a project, organizing and mobilizing neighborhood opposition and lobbying her

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the city council's decision was reasonable or whether it was unreasonable, arbitrary, or capricious."). Instead of using the definition from administrative law, Minnesota courts have found zoning decisions arbitrary and capricious when municipalities have not clearly articulated the reasons behind their decisions, or their decisions are not supported by the evidence in the record. *See, e.g., Zylka v. City of Crystal*, 167 N.W.2d 45, 51 (Minn. 1969) (city acted arbitrarily and capriciously when it did not give reasons for denying a special use permit); *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) (board acted arbitrarily and capriciously in denying conditional use permit when reasons given by the board for the denial had no factual basis in the record); *Schmidt v. County of Douglas*, No. A06-2055, 2007 WL 2034505, at *2 (Minn. App. July 17, 2007) (board's decision to deny variance was not arbitrary and capricious when there was some support for the board's findings in the record); *Mellby v. Cass Cnty.*, No. A06-80, A06-299, 2007 WL 968633, at *5 (Minn. App. Apr. 3, 2007) (planning commission's approval of conditional use permit, preliminary plat, and final plat were not arbitrary or capricious when approvals were based on ample evidence and the ordinances were correctly applied). Thus, Intervenor-Defendants believe it is most appropriate to use the definition of arbitrary and capricious that has developed in the zoning context—whether the board's stated reasons were legally valid and whether the decision "had a factual basis in the record." *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015).

[17] Notably, is not rare for an individual who disagrees with a zoning board's decision to *allege* bias. *See Creative Env't's, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir. 1982) ("*Every* appeal by a disappointed developer from an adverse ruling by a local [] planning board necessarily involves some claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason."). This makes the scarcity of cases actually *reversing* local zoning decisions based on bias under Minnesota statute even more remarkable.

[18] This case is different from the case of *Continental Property Group v. Wayzata* discussed earlier in this brief. Additionally, *Continental Property Group v. City of Minneapolis* was brought under Minn. Stat. § 462.361, the statute allowing judicial review of city (rather than county) zoning decisions. Generally, however, courts apply the same the standard of review for appeals from both the municipal and county zoning statutes.

fellow council members to vote against the project. *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at *6 (Minn. App. May 3, 2011).

But since this unpublished case was issued in 2011, the Minnesota Court of Appeals has twice distinguished and limited it in other cases alleging bias. For example, in *Stalland v. City of Scandia*, even though plaintiff asserted that a council member had previous knowledge of the project, asked community members with knowledge of the project to attend the council's hearing, and had not kept an open mind about the project, the Court of Appeals declined to overturn the council's decision, explaining that the council member had not actively advocated against the project with the public or other council members. No. A20-1557, 2021 WL 3611371, at *8 (Minn. App. Aug. 16, 2021). Similarly, in *In re Matter of Rollingstone Community School*, even though school board members had written an opinion piece about a forthcoming decision, the Court of Appeals again did not find bias or prejudgment. The court noted that the decision in *Continental Property* was based on a council member's "advocacy activities," and that nothing in the record in this case indicated the opinion piece affected the board's decision. No. A18-0799, 2019 WL 1591772, at *5, n.5 (Minn. App. Apr. 15, 2019)

From these cases, it is clear that mere advance knowledge about a project, or unsupported allegations that a board member did not keep an open mind, are insufficient to make a local zoning decision arbitrary and capricious due to bias under state law. Instead, as indicated by *Continental Property Group v. City of Minneapolis*, active advocacy relating to a specific project by a board member—within the community and among fellow board members—is required to overturn a decision. This is consistent with the Court's duty to defer to a local zoning board's decision except in the rare instances when it has no rational basis. *White Bear Docking,* 324 N.W.2d at 176.

Here, despite Plaintiffs' broad allegations of unfairness and bias, discovery has actually turned up so little evidence of impartiality that Plaintiffs have only two, rather strained, complaints—that board member Dr. Heublein conducted some background research and that Land Stewardship Project allies somehow placed Dr. Heublein and Ms. Fitzgerald on the Board of Adjustments to oppose Plaintiffs' proposal.[19] Pls.' Mem. at 53, 56. Because there is no evidence of advocacy against Plaintiffs' proposed expansion by Dr. Heublein or Ms. Fitzgerald that comes anywhere close to *Continental Property Group v. City of Minneapolis*, the Board's decision must be upheld.

A. Dr. Heublein's Background Research Was Not Improper, and Did Not Result in Arbitrary or Capricious Decision-Making

Plaintiffs allege that because Dr. Heublein conducted her own research, she must have based her decision on evidence outside of the record, thereby creating bias and prejudgment that amounted to arbitrary or capricious decision-making. Dr. Heublein testified that if she does not know something, she will "look it up and become informed." Aff. of Matthew Berger (Dep.), Ex. H, Heublein Tr. at 21:22-23 (hereinafter "Ex. H"). To make sure she is informed, she will consult a variety of sources like books, documentaries, and newspapers, never relying on just one source. *Id*. at 22:1-5. Dr. Heublein further testified that because the board members serve as trusted

[19] Plaintiffs also argue that Winona County Planning and Environmental Services Director Kay Qualley disagreed with her subordinate, Carly McGinty, regarding the contents of the staff report on Plaintiffs' proposed expansion. Pls.' Mem. at 56-57. It is unclear how Plaintiffs believe this demonstrates that the decision of the Board of Adjustment was so biased as to be arbitrary and capricious. Qualley is not a decision-maker on the Board of Adjustment, and in any case, there is no evidence in the record tying her to Land Stewardship Project or demonstrating she was biased against Plaintiffs, and Plaintiffs have cited none. Plaintiffs have not pointed to any ordinance or statute that is violated by county staff disagreeing over the contents of a report. *See Stalland*, 2021 WL 3611371, at *8 (finding repeatedly that council actions were not improper when they violated no ordinance or statute). Nor have Plaintiffs cited any case law indicating that a disagreement among staff makes a board's decision improper.

representatives of the community, the board members effectively have a civic responsibility to make sure they are informed enough to make good decisions. *Id*. at 22:12-16.

Unfortunately for Plaintiffs, the Minnesota Court of Appeals has held that a local zoning decision is not arbitrary and capricious simply because a city council member has previous, outside knowledge relating to the project. In *Stalland*, residents of a housing development requested an amendment to their conditional use permit. *Stalland*, 2021 WL 3611371, at *1. The city council denied the amendment and residents appealed, alleging one board member's prejudgment of the application made the decision unreasonable, arbitrary, or capricious. *Id.* at *3. Appellants argued that one city council member had prior knowledge of the project because he was working for the city when the development sought its original conditional use permit. Because he was involved in the original conditional use permit discussion, Plaintiffs alleged he had previous knowledge that allowed him to prejudge the permit amendment before the hearing. But the court found that the council member's previous knowledge did not create bias or prejudgment, and the vote was not improper. *Id.*

Dr. Heublein's background research, performed to ensure she was educated enough to understand the information presented to her, is like the prior knowledge of the council member in *Stalland*, and does not disqualify her vote. In fact, in *Stalland*, the board member's knowledge was considerably more than general background knowledge—he had specific knowledge of the project, explaining that "he was quite familiar with the original negotiations around the . . . development, as he was a watershed district manager at the time [the original conditional use permit was issued]." *Id.* He voted against amending the permit, partially based on his knowledge about the negotiations around the original conditional use permit. Part of his rationale was to honor the original negotiated agreement. *Id*. This board member's involvement in the original conditional use permit decision,

and his opinion on the permit amendment based on his prior involvement, would certainly show a greater opportunity for bias or prejudgment than Dr. Heublein's general background research. Thus, if the *Stalland* board member's prior involvement with the project was not a problem, Dr. Heublein's background research certainly would not be.

This outcome makes sense. Local boards need members with sufficient background knowledge, or willingness to learn, in order to make sound land use decisions for the community. Board members must be allowed to do the basic research required for them to be able to understand an issue that comes before them. For example, if this Court was unfamiliar with the acronym "AU" (short for animal units) it would not be surprising, nor improper, for this Court to conduct an internet search for that acronym in order to understand arguments in this case. Plaintiffs also can point to no statute or ordinance prohibiting the background research Dr. Heublein has done. *Id.* at *8 (council members' actions in inviting watershed managers to hearing was not improper when it violated no ordinance or statute).

What Plaintiffs appear to seek is decision-making in a vacuum. But in reality, members of local governing bodies come to these boards with connections to others in the community, prior history with the people and projects that will come before them, their own views, beliefs, and values, and their own understanding of the issues. If it was disqualifying to have some background knowledge of the people, the parcel, or the issues relevant to the request before the board, it would be extraordinarily difficult to find board members eligible to serve, especially in smaller, rural communities.

B. Dr. Heublein's Conclusions Are Based On, and Supported By, the Record

Additionally, Plaintiffs do not explain how Dr. Heublein's performance of background research translates to Plaintiffs' conclusion that her decision was biased, and therefore arbitrary or capricious. Pls.' Mem. at 51-53. The relevant part of the Board's decision is the decision on

criterion 6, which is the criterion that resulted in the denial of the variance. Criterion 6 states: "[e]conomic considerations alone do not constitute practical difficulties." Zoning Ord. § 5.6.2.

As discussed previously, the question on this factor turned on whether the Plaintiffs were seeking the variance for exclusively economic reasons. But Plaintiffs nowhere explain what outside research they think Dr. Heublein depended on for her decision on this criterion. Notably, Plaintiffs do not point to any specific facts Dr. Heublein mentions in her decision that they allege were not in the record. Moreover, the decision on this criterion depends upon Plaintiffs' specific reasons for needing a variance. Background research in books or articles would have no bearing on this criterion. Indeed, at the time of the vote, Dr. Heublein said she had seen no outside materials that affected her vote. Admin. R. 2976:7-2977:7.

In addition, as discussed previously, there is more than sufficient evidence in the record to support Dr. Heublein's conclusion that Plaintiffs sought the variance for economic reasons, including the staff report recommendation and many of Plaintiffs' own statements in the record. *See* Section I.D.1. Dr. Heublein based her decision on this record evidence. In explaining her decision, she stated, "[t]hey're needing this variance to make sure that they have the capacity to support the family that wants to come in on the business . . ." Admin. R. 3060:24-3061:2. She refuted Plaintiffs' assertion there were non-economic reasons for the variance by finding Plaintiffs' non-economic reasons would be present, regardless of the expansion. Admin. R. 3061:6-14. Dr. Heublein's conclusions were well supported by the record as discussed in Section I.D.1.

In sum, Dr. Heublein's decision on the relevant criterion—criterion 6—was clearly supported by information in the record. There is no showing that Dr. Heublein's outside research made the Board of Adjustment's decision arbitrary and capricious.

C. There Was Nothing Inappropriate About the Appointment of Ms. Fitzgerald or Dr. Heublein to the Board of Adjustment

Plaintiffs next allege there was bias and prejudgment amounting to arbitrary and capricious decision-making because Dr. Heublein and Ms. Fitzgerald were supposedly planted on the Board of Adjustment by "Land Stewardship Project allies" to oppose Plaintiffs' variance request. Plaintiffs point to two things to support this claim. Pls.' Mem. at 54-56. First, Plaintiffs allege the Winona County Commissioners who supported Dr. Heublein's appointment to the Board of Adjustment did so based on "very careful reasons." *Id.* at 56. Second, Plaintiffs contend that a member of Land Stewardship Project, namely Doug Nopar, recruited Ms. Fitzgerald for the Board based on her views about agriculture, and Commissioners that were "Land Stewardship Project allies" voted to appoint her for that reason. *Id.*

The facts uncovered in discovery do not support Plaintiffs' arguments that Dr. Heublein or Ms. Fitzgerald were placed on the board inappropriately. Regarding the appointment of Dr. Heublein, the Winona County Commissioners met on January 7, 2020, to vote on two open positions on the Board of Adjustments. Aff. of Matthew Berger (Public Docs.), Ex. AY, Minutes of Jan. 7, 2020, Meeting at 5 (hereinafter "Ex. AY"). At this time, the first decision on Plaintiffs' variance was in place, and it would be nearly a year before anyone would know this decision was to be overturned and remanded. *See* Order Granting Summ. J. And Remand (Jan. 25, 2021). At the Commissioners' meeting on January 7, 2020, Commissioner Olson moved to appoint applicant Dr. Heublein to the Board of Adjustment with a second by Commissioner Meyer. Ex. AY at 5. In discussion on the motion, Commissioner Kovecsi stated, "I would support Elizabeth Heublein, she is a rural resident, she has some very careful reasons for wanting to join this committee, and I would support her nomination." Winona County Government, *Winona County Board Meeting 01-07-2020,* YouTube at 1:00:37-1:04:30 (Jan. 7, 2020)

https://www.youtube.com/watch?v=9fx9H_oetfg. The motion passed, and Dr. Heublein was appointed to the Board of Adjustment that day. Ex. AY at 5.

As part of the discovery in this case, Plaintiffs deposed the three Commissioners that voted in favor of appointing Dr. Heublein to the Board. In the deposition of Commissioner Kovecsi, Plaintiffs asked what she meant when she stated that Dr. Heublein had "careful reasons" for wanting to join the Board of Adjustment. Commissioner Kovecsi testified, "I remember her application . . . She is a researcher, an academic researcher in her skill set. And to me that's how I work. I am a researcher in a broad way. And so I would have thought highly of her because of that characteristic, yes. I would have appreciated that characteristic in her and connected it with being able to make a fair judgment." Aff. of Matthew Berger (Dep.), Ex. K, Kovecsi Tr. at 68:21-69:7 (hereinafter "Ex. K").

Commissioner Meyer was similarly deposed and testified she did not know what Commissioner Kovecsi meant at the hearing when she used the phrase "careful reasons," and did not recall having any discussions about who should fill that Board of Adjustment seat prior to the vote. Aff. of Matthew Berger (Dep.), Ex. J, Meyer Tr. at 31:22-32:3 (hereinafter "Ex. J"). Plaintiffs also deposed Commissioner Olson and asked if he knew what Commissioner Kovecsci was referring to when she used the phrase, "careful reasons." Aff. of Matthew Berger (Dep.), Ex. M, Olson Tr. at 20:17-22 (hereinafter "Ex. M"). He did not even recall the statement being made at the meeting. Olson Tr. 20:17-22. Finally, when Plaintiffs deposed Dr. Heublein, she also testified the phrase "careful reasons" did not mean anything to her, and that she decided to apply for the Board of Adjustment because she had "always been involved in community boards" and "feel[s] responsible to do that," and because her sons were urging her to apply for various local positions to stay civically engaged. Ex. H at 29:8-23; 15:9-16:25.

Plaintiffs point to no evidence to show that Commissioners Olson, Meyer, and Kovecsi were acting together in a conspiracy to appoint Dr. Heublein so that she may oppose Plaintiffs' project. And there is no evidence in the record to this effect. Instead, the record reflects that Dr. Heublein applied for the position based on her own interest in serving a civic duty. Plaintiffs point to no evidence that Dr. Heublein ran at the behest or urging of anyone else (except her sons) and there is none. Moreover, the record shows that Commissioner Kovecsi voted for Dr. Heublein because of what she saw in Dr. Heublein's application, and she was referring to Dr. Heublein's application when she stated Dr. Heublein had "careful reasons" for wanting to join the board. No other Commissioner even knew what Commissioner Kovecsi meant by the phrase "careful reasons." Finally, Plaintiffs point to no evidence that Commissioner Meyer, Commissioner Olson, and/or Commissioner Kovecsi were asked to vote in favor of Dr. Heublein at the behest of Land Stewardship Project or anyone else, and there is no evidence in the record to this effect.

Plaintiffs also allege Ms. Fitzgerald was planted on the Board of Adjustment by "Land Stewardship Project allies" to oppose Plaintiffs' application. Again, the facts do not support this assertion. Ms. Fitzgerald submitted her application for the Board of Adjustment in the Fall of 2020, months before the district court decided to overturn the original vote. Aff. of Matthew Berger (Dep.), Ex. G, Fitzgerald Tr. at 20:23-25 (hereinafter "Ex. G"). At that time, no one knew Plaintiffs' variance would come before the Board of Adjustment again. Ms. Fitzgerald testified that she did have a conversation with Land Stewardship Project member Doug Nopar about running for the board, but they never discussed the Plaintiffs' proposed project, their variance application, or how to vote on it. Ex. G at 17:23-18:4, 21:5-11. This makes sense given that no one at that time knew then that the Board of Adjustment would be voting on Plaintiffs' application a second time. As to her conversation with Mr. Nopar, Ms. Fitzgerald testified as follows:

Q. And describe that conversation for me, please.

A. He [Doug Nopar] told me that he heard me speak at an event that I was at a couple weeks prior, and that he thought I would be a good candidate because I am passionate about agriculture and the use of the land in Winona County, and that I should consider running for the Board of Adjustment. He explained a little bit about what the Board of Adjustment does. And then I had to think about it and decide if I was going to apply.

Q. Was that conversation with Mr. Nopar part of what got you thinking about applying?

A. Yes.

Ex. G at 21:12-23. Ms. Fitzgerald ultimately decided to apply for the Board because she thought getting more experience with zoning regulations and other types of land use in the area would be useful for her work as a farmer. Ex. G at 19:17-20:25. She was appointed to the Board of Adjustment on January 5, 2021. Aff. of Matthew Berger (Public Docs.), Ex. AZ, Minutes of Jan. 5, 2021, Meeting at 3 (hereinafter "Ex. AZ"). Four out of five of the County Commissioners voted to appoint Ms. Fitzgerald, including Commissioner Ward, who has been a vocal supporter of Plaintiffs and their variance request. *Id.*

Plaintiffs deposed all of the Commissioners voting in favor of Ms. Fitzgerald except for Commissioner Ward. Commissioner Meyer testified that she did not have communications with anyone associated with Land Stewardship Project about Ms. Fitzgerald's appointment. Ex. J at 33:20-34:2. No other individual reached out to Commissioner Meyer to suggest she support Ms. Fitzgerald either. *Id.* at 34:11-13. Commissioner Olson did not recall being contacted by any representative of Land Stewardship Project about Ms. Fitzgerald's appointment. Ex. M at 20:23-21:4. Commissioner Kovecsi testified she did not have conversations with Land Stewardship Project about Board appointments after January 2019, and Ms. Fitzgerald was appointed two years after that. Ex. K at 51:19-23.

Thus, again, Plaintiffs point to no evidence to show that Commissioners Olson, Meyer, and Kovecsi were acting together in a conspiracy to appoint a candidate at the behest of Land

Stewardship Project, or to appoint a candidate to oppose Plaintiffs' project. Instead, the record reflects that Ms. Fitzgerald became interested in the position after a conversation with Doug Nopar, but ultimately decided to apply for her own reasons. Moreover, there is no evidence that Ms. Fitzgerald was asked to vote a certain way on Plaintiffs' project by Land Stewardship Project, or anyone else.

In *Stalland*, the court of appeals found there was no bias or prejudgment amounting to arbitrary or capricious decision-making when a board member's alleged conflict of interest was based on mere speculation that they could not keep an open mind. *Stalland*, 2021 WL 3611371, at *9. As the court there noted, "mere speculation is not enough to survive a summary judgment motion." *Id.* (citing *Osborn v. Twin Town Bowl, Inc.,* 749 N.W.2d 367, 376 (Minn. 2008)). Similarly here, Plaintiffs offer nothing but speculation to support their claim that Dr. Heublein and Ms. Fitzgerald were appointed to the Board of Adjustment by allies of Land Stewardship Project in order for them to oppose the Plaintiffs' variance request. There are no facts that show bias and prejudgment that created an arbitrary and capricious decision here. Indeed, Commissioners Kovecsi, Meyer, and Olson all voted in favor of appointing Phillip Schwantz to the Board for a second time, knowing full well that he had voted in favor of Plaintiffs' variance application once already. *See* Ex. AY at 5. This cuts directly against Plaintiffs' implication that these Commissioners were trying to appoint board members to vote against Plaintiffs' expansion.

In any event, even if Plaintiffs could point to evidence showing various County Commissioners had been lobbied to appoint Dr. Heublein and Ms. Fitzgerald to the Board of Adjustment, this is not sufficient to make the Board of Adjustment's decision arbitrary and capricious under Minnesota statute. Such a finding would require a showing of Dr. Heublein and Ms. Fitzgerald taking an active advocacy role against the project in the community or with fellow

board members. Instead, the alleged conduct underlying Plaintiffs' argument here is nothing more than community engagement and advocacy. The *Noerr-Pennington* doctrine and related precedent make clear that the First Amendment preserves the right to engage and seek to persuade public officials about pending matters to be decided and otherwise to engage in the democratic process. *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 615-16 (8th Cir. 1980) (affirming the dismissal of the claims against the defendants based on their lobbying regarding zoning changes); *see also Tarpley v. Keistler*, 188 F.3d 788, 794 (7th Cir. 1999) (reiterating that the First Amendment protects the right to petition the government to obtain action favorable to their interests "even if the result of [that action] might harm the interests of others.") (citing United States Supreme Court precedent).

Thus, Plaintiffs' allegation that Land Stewardship Project lobbied its elected County Commissioners to vote for certain candidates for the Board of Adjustment, even if true, is precisely the political activity expected from any advocacy group and, more to the point, is protected by the First Amendment. *See, e.g., Tarpley*, 188 F.3d at 796 (reiterating that "[p]olitical advocacy is, after all, the reason for political association"). Indeed, lobbying elected officials to appoint a preferred candidate to the Board of Adjustment is a "paradigmatic First Amendment right" and a "traditional form of political activity." *Id.* at 795.

In their brief, Plaintiffs spend twenty pages detailing actions taken before the *original* denial of Plaintiffs' variance in 2019 (Pls.' Mem. at 11-30), all of which are entirely irrelevant to this Court's examination of the Board of Adjustment's *remand* vote in 2021. This is, apparently, because Plaintiffs could find so little evidence of impropriety regarding the remand vote that they hoped this Court would be swayed by these now irrelevant facts about a decision made by different decision-makers. Then, Plaintiffs spent many pages cobbling together a standard for "bias" based

on entirely irrelevant case law for due process claims and Minnesota Administrative Procedure Act cases. Pls.' Mem. at 51-57. Again, this is apparently because Plaintiffs found little case law supporting their claim under Minn. Stat. § 394.27. This Court should not be fooled by Plaintiffs' attempted sleight of hand. Plaintiffs have not even come close to establishing the kind of active advocacy against a proposal by a decision-maker that is needed for a reversal of a local zoning board's decision based on bias or prejudgment. Accordingly, this Court must uphold the Board's decision.

SECTION 3: APPROPRIATE REMEDY IF PLAINTIFFS' MOTION IS GRANTED

I. Plaintiffs Incorrectly Assert that this Court May Grant Their Requested Variance

In addition to focusing on irrelevant facts and citing inapplicable case law, Plaintiffs incorrectly insist that they are entitled to have the Court issue their requested variance as a remedy if they are awarded summary judgment. But this Court has already determined that remand is the appropriate remedy if the variance decision by the Board of Adjustment resulted from bias, and the Court should follow that determination if it finds in favor of Plaintiffs.

As explained by this Court, remand is the most appropriate remedy here, as sending the decision back to the Board of Adjustment "would 'ensure the judiciary does not encroach upon the constitutional power spheres of the other two branches of government,' or exceed 'the limited role of the judiciary in reviewing zoning decisions.' *Big Lake Ass'n v. Saint Louis Cty. Planning Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009)." Order Granting Summ. J. And Remand, at 6 (Jan. 25, 2021). County zoning bodies are entrusted with the power to make decisions regarding variances, and with broad discretion in making those decisions. Minn. Stat. § 394.27, subd. 5 (granting board of adjustment authority to issue variances); *VanLandschoot*, 336 N.W.2d at 508-09. For this reason, similar cases have determined that the appropriate remedy is not for the court

to make the decision itself, but instead to remand for a new, unbiased hearing to the body to whose discretion the decision is statutorily entrusted.

For example, in *Continental Property Group, Inc. v. City of Minneapolis*, when the court overturned a decision for bias, the Court of Appeals reasoned that remand was the proper remedy because "the city council's decision would not necessarily have been arbitrary and capricious had the council followed the correct standards and procedures in considering CPG's applications—namely, had it not allowed a biased councilmember to participate in the decision." 2011 WL 1642510, at *1. Similarly, in *Living Word Bible Camp v. County of Itasca*, another case involving a biased decision by a county (in this instance, on the need for an environmental impact statement), where the record could have supported a positive or negative decision, the Court of Appeals agreed with the district court that a new decision "without input from a biased decisionmaker, is the appropriate remedy." No. A12-0281, 2012 WL 4052868, at *4, 8 (Minn. App. Sept. 17, 2012). As this Court already found, this is consistent with case law from other jurisdictions. Order Granting Summ. J. and for Remand, at 8.

Plaintiffs' argument cites cases that stand for the "general principle that when a governmental body denies a permit with such insufficient evidence that the decision is arbitrary and capricious, the court should order issuance of the permit."[20] *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999). Notably, Plaintiffs' cases do not involve allegations of a biased decision-maker;

[20] The Plaintiffs also assert that this case's procedural history means the Court should award the variance if it finds the Board of Adjustment acted improperly, citing *Interstate Power Co., Inc. v. Nobles County Board of Commissioners*, 617 N.W.2d 566, 578 (Minn. 2000). But the fairness considerations cited in *Interstate Power* stemmed from "a change in the law" that occurred after the initial proceedings concluded. *Id.* at 578. *Interstate Power* therefore determined remand to be improper because "the [land-use] amendment expressly enacted to affect that remand" would result in "manifest injustice." *Id.* at 579. Since Winona County has not taken any official action designed to thwart the Plaintiffs from receiving proper consideration of their variance application, the fairness concerns articulated in *Interstate Power* do not apply.

as explained above, in such cases remand is the proper remedy. (Pls' Mem. at 62.) In any case, in *Livingood*, the county admitted that its decision to deny a permit was inadequately explained and "that the record does not support its decision." 594 N.W.2d at 893. Here, an inadequate record is not the issue. Rather, Plaintiffs assert the Board of Adjustment improperly denied the variance due to bias—in other words, that the Board of Adjustment did not apply the correct legal standard. In such cases, an exception to *Livingood* applies, because property owners must have their variance applications "heard under the correct legal standard, which supports a remand in this case." *See Krummenacher v. City. Of Minnetonka*, 783 N.W.2d 721, 733 (Minn. 2010). Here, in essence, Plaintiffs claim that the Board of Adjustment did not apply the proper legal standard in evaluating the variance application, but rather that the Board of Adjustment made its own decision untethered to the appropriate legal considerations. When the decisionmaker fails to consider the appropriate legal considerations when making a land-use decision, the proper remedy is remand with instructions to evaluate the request using the proper standard. *Id*.

This Court's previous order summed up the remedy issue succinctly:

> The Winona County Board of Adjustment has the exclusive power to order the issuance of variances from the requirements of any official control. When a decision is made by a biased decisionmaker in other contexts, the party challenging the decision is not automatically entitled to their desire result. Instead, the remedy is to hold the hearing anew with an impartial decisionmaker. There is no reason the result should differ here.

Order Granting Summ. J. and Remand, at 8 (Jan. 25, 2021). There is no reason the result should differ now, and this Court should follow the instructions of case law and its previous decision and order remand if it finds for Plaintiffs.

CONCLUSION

Plaintiffs requested a variance from an Ordinance expressly prohibiting the type of expansion they sought for their feedlot. Plaintiffs had the burden to prove their application met all

of the eight criteria required in order to be granted a variance from the local law. Plaintiffs did not meet this heavy burden before the Board of Adjustment, and their variance application was appropriately denied for the second time. Plaintiffs' claims on appeal fail, as the evidence shows there was a rational basis for the Board's decision, and that it was not unreasonable, arbitrary, or capricious. Moreover, Plaintiffs have not shown any evidence of bias or prejudgment that could constitute arbitrary or capricious decision-making. Finally, Plaintiffs' Complaint alleges they were deprived of constitutional due process; however, Plaintiffs have failed to show they have the protected property interest that is required to trigger due process protections. Therefore, Intervenor-Defendants ask this Court to affirm the Winona County Board of Adjustment's denial of Plaintiffs' variance application, and grant summary judgment on all remaining claims in this case in favor of Intervenor-Defendants and Defendants.

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Amelia J. Vohs (#0397095)
Joy R. Anderson (#0388217)
Jay E. Eidsness (#0395347)
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY
1919 University Avenue West, Suite 515
(651) 223-5969
avohs@mncenter.org

Attorneys for Intervenor-Defendant Defenders of Drinking Water

/s/Justin D. Cummins
Justin D. Cummins, #276248
CUMMINS & CUMMINS, LLP
920 Second Avenue South, Suite 1245
Minneapolis, MN 55402
(612) 465-0108
justin@cummins-law.com

Attorney for Intervenor-Defendant Land Stewardship Project