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State of Minnesota
7/13/2023 12:17 PM

STATE OF MINNESOTA IN DISTRICT COURT

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

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

Plaintiffs/Appellants,

vs.

The County of Winona,

Defendant/Respondent,

and

Land Stewardship Project and Defenders of Drinking Water,

Intervenor/Defendant.

REPLY MEMORANDUM OF LAW IN SUPPORT OF DALEY FARM'S MOTION FOR SUMMARY JUDGMENT AND RESPONSE MEMORANDUM OF LAW IN OPPOSITION TO WINONA COUNTY AND ACTIVIST GROUPS' MOTIONS FOR SUMMARY JUDGMENT

The parties previously agreed upon, and this Court approved, a modified briefing schedule with respect to the parties' cross motions for summary judgment that are scheduled to be heard on August 3, 2023. (Corr. from Matthew C. Berger to Hon. Douglas C. Bayley (May 31, 2023) (Index #158); Judicial Order (June 1, 2023) (Index #159).) Consistent with that modified briefing schedule, Plaintiffs/Appellants Daley Farm of Lewiston, L.L.P., Ben Daley, Michael Daley, and Stephen Daley previously filed an initial

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

memorandum of law in support of its motion for summary judgment (*see* Mem. of Law in Supp. of Daley Farm's Mot. for Summ. J. (Index #162) ("**Daley Farm's Initial Mem.**")), and Winona County and the activist groups who intervened as defendants in this proceeding each subsequently submitted an initial memorandum of law in response to Daley Farm's motion for summary judgment and in support of its motion for summary judgment (*see* Winona Cnty's Mem. of Law in Supp. of Mot. for Summ. J. (Index #170) ("**County's Initial Mem.**"); Intervenor-Defs.' Mem. of Law in Supp. of Mot. for Summ. J. & in Resp. to Pls.' Mot. for Summ. J. (Index #175) ("**Activist Groups' Initial Mem.**").)

Plaintiffs now submit this memorandum of law as a reply in support of their motion for summary judgment and in opposition to the motions for summary judgment filed by Winona County and the activist groups who intervened as defendants in this proceeding. Because the parties' cross motions address many of the same issues, and in the interest of judicial economy and avoiding unnecessary duplication, Plaintiffs incorporate the statement of undisputed facts and legal arguments from Daley Farm's Initial Memorandum into this response in opposition to the motions filed by Winona County and the activist groups who intervened as defendants in this proceeding, and Plaintiffs accordingly limit the arguments presented in this memorandum to new issues raised in the County's Initial Memorandum or the Activist Groups' Initial Memorandum that warrant further response.

For the reasons set forth herein, as well as in Daley Farm's Initial Memorandum, Plaintiffs respectfully request that this Court grant its motion for summary judgment with respect to Counts V, VI, and VII of their Supplemental Complaint and deny the

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

motions for summary judgment filed by Winona County and the activist groups who intervened as defendants in this proceeding.

ARGUMENT

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

In Count VII of their Supplemental Complaint, Plaintiffs assert that Daley Farm's Variance Application was approved by operation of law under Minnesota Statutes § 15.99. (Supplemental Compl. (Index #108), at ¶¶ 148.54.) Under this statute, "an agency must approve or deny within 60 days a written request relating to zoning," and the "failure of an agency to deny a request within 60 days is approval of the request." Minn. Stat. § 15.99, subd. 2(a). In its motion, Daley Farm requests summary judgment on this claim.[1] (Daley Farm's Initial Mem., at 45-49.)

Winona County asserts that the 60-day rule in Minnesota Statutes § 15.99 does not apply to a remanded zoning request. (County's Initial Mem., at 28.) In support of these argument, the County argues that "Daley Farm cites no authority for this proposition because none exists." (*Id.*) Of course, the reverse is also true—the County does not offer

[1] The activist groups who intervened as defendants in this proceeding did not respond to this argument in their initial memorandum. (*See generally* Activist Groups' Initial Mem.) Although these activist groups may filed a reply brief under the modified briefing schedule, this reply brief must be "limited to new legal or factual matters raised by an opposing party's response to a motion," Minn. Gen. R. of Prac. 115.03(c). The issue regarding the 60-day rule, however, was raised in Daley Farm's initial motion and was not raised in the activist groups' motion. Accordingly, by this omission, the activist groups implicitly concede Daley Farm's argument that the 60-day rule applies to the remanded Variance Application and was not satisfied in this case.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

any legal authority to support its assertion that the 60-day rule does not apply after a zoning request is remanded. (*Id.*)

More fundamentally, Winona County's assertion that "Daley Farm cites no authority for this proposition" is factually untrue (which Winona County acknowledges in the very next sentence of its memorandum (*see id.*)). Specifically, Daley Farm cited *In re McDuffee*, No. A07-1053, 2008 WL 2492323 (Minn. App., June 24, 2008), to support its position that the 60-day rule applies to the remanded Variance Application. (Daley Farm's Initial Mem., at 48-49.)

In *McDuffee*, the Morrison County Board of Commissioners initially granted a conditional use permit for a dog-breeding facility. No. A07-1053, 2008 WL 2492323, at *1. Opponents of the proposal challenged the permit approval, and the court of appeals held that the approval was arbitrary and capricious and remanded the matter to the Morrison County Board of Commissioners for reconsideration of the permit application. *Id.* (citing *In re Block*, 727 N.W.2d 166, 182 (Minn. App. 2007)). On remand, the county board unanimously approved the permit a second time. *Id.* at *2.

The opponents of the proposal again sought judicial review, arguing that "the board's failure to postpone the public hearing [on the remanded application] until a protective order sealing a report in a separate district court proceeding was lifted was unreasonable, arbitrary, and capricious." *Id.* at *3. The court of appeals rejected this argument because "[t]here is nothing in the record to show that at the time of the public hearing, the protective order in the separate district court action would be lifted soon, if ever." *Id.* This timing was significant, according to the court's majority opinion, because

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

the county board "was required by the land-use ordinance to make a decision within 60 days." *Id.* Thus, although the court did not expressly cite Minnesota Statutes § 15.99, but instead referenced an ordinance provision imposing the same 60-day deadline,[2] the court's majority opinion specifically relied on the applicability of the 60-day rule to the remanded zoning application to support its holding.[3] Thus, Winona County's assertion that no authority exists to support the proposition that the 60-day rule does not apply to a remanded zoning application is not accurate.

Continuing to grasp at straws, Winona County next tries to avoid application of the 60-day rule by asserting that "Daley Farm never submitted a written request relating to zoning." (County's Initial Mem., at 28.) In its initial pleading in this case, however, Daley Farm alleged as follows:

> Consistent with the procedures provided in Section 5.6.3 of the Winona County Zoning Ordinance, Ben Daley, on behalf of Daley Farm, filed an application with the Winona County Board of Adjustment on November 16, 2018, requesting a 'variance from [the] 1,500 animal unit capacity limit per feedlot' requirements under the Winona County Zoning Ordinance (the "**Variance Application**"). A true and correct copy of the Variance Application is attached hereto as **Exhibit F**.

(Compl. & Notice of Appeal (Index # 3), at ¶ 32.) In responding to this allegation in its Answer, Winona County admitted that "Ben Daley, on behalf of Daley Farms, submitted

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[2] As Daley Farm noted in its initial brief, Section 5.6.3 of the Winona County Zoning Ordinance also requires the board of adjustment to "reach a decision [on a variance request] consistent with the time table set forth in Minnesota Statutes 15.99 (60 Day Rule)." (Daley Farm's Initial Mem., at 45 n.14.) Thus, the court of appeals' reliance on the county ordinance, rather than the state statute, is not sufficient to distinguish *McDuffee* from the present case.

[3] As Winona County notes in its responsive brief, Judge Lansing, writing in dissent, stated that "the statute does not indicate that the sixty-day rule applies to a remand from a court decision." *Id.* at *10 (Lansing, J., dissenting). The majority, however, disagreed with Judge Lansing.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

a variance application, a copy of which is attached as Exhibit F to the Complaint." (Answer & Resp. to Appeal (Index #7), at ¶ 17.) Under Minnesota law, an application for a variance is "a written application related to zoning" to which the 60-day rule applies. *Advantage Capital Management v. City of Northfield*, 664 N.W.2d 421, 427 (Minn. App. 2003). Thus, Winona County admitted in its answer, and cannot now deny, that Daley Farm submitted, and the County received, a request related to zoning.

Winona County's assertion that "Daley Farm never submitted a written request relating to zoning" is also contradicted by the record as a whole. First, this Court can see Daley Farm's "written request relating to zoning" with its own eyes—a copy of Daley Farm's Variance Application was attached to its Complaint (which, as noted above, the County admitted) and is included in the Administrative Record prepared and submitted by Winona County.[4] (Compl. & Notice of Appeal (Index # 3), at ex. F; Admin. R. (Index

[4] In its initial memorandum, Winona County argues (for the first time in this lengthy proceeding) that Daley Farm's Variance Application "was deficient and subject to administrative denial because 'Daley Farm was also required to obtain a variance' from 'Section 10.4.6.1 of the' Zoning Ordinance, which it failed to apply for at any point in the past nine years." (County's Initial Mem., at 29.) But the face of the Variance Application demonstrates that Daley Farm broadly applied for a "variance from [the] 1,500 animal unit capacity limit per feedlot" (Admin. R. (Index #148) 1665), and the County has consistently acknowledged that the requested variance from the animal unit cap included a variance from both Section 8.4.2 and 10.4.6.1 of the Winona County Zoning Ordinance (*see, e.g.*, Admin. R. (Index #148) 1815; Admin. R. (Index #156) 2814). Further, to avoid any potential confusion, Daley Farm (through its attorney) clarified the scope of the variance requested in the original Variance Application prior to the hearing on the remanded application. (Admin. R. (Index #156) 2804 ("Daley Farm's pending variance application should be construed as a request for a variance from the entirety of the animal unit cap under the Ordinance, including Section 8.4.2, Section 10.4.6.1, and any other applicable provisions that manifest a limit on the number of animal units that Daley Farm may have at its dairy farm.").) In a responsive letter, Paul Reuvers—the same attorney who signed the County's Initial Memorandum—stated that "[t]he County is amenable to determining Daley Farm's variance request on the existing application, with the clarification in your October 19, 2021, letter," and that the County would construe the original Variance Application as "seeking a variance from Zoning Ordinance section 10.4.6.1." (Admin. R. (Index #156) 2808-09.) Thus, the County's new argument that Daley Farm's written Variance Application was deficient is contradicted by the record, including the admissions of the same attorney making this spurious argument.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

#148) 1665-90.) In correspondence, public notices, and staff reports included in the record, the County also repeatedly admitted that Daley Farm submitted a petition requesting a variance. (Admin. R. (Index #148) 1695, 1727, 1814; Admin. R. (Index #156) 2813, 2844.) And perhaps most significantly, the Winona County Board of Adjustment held a public hearing on the Variance Application and considered the remanded Variance Application for a second time at another meeting[5]—under the procedures set forth in the Section 5.6.3 of the Winona County Zoning Ordinance, the board of adjustment could not hear or consider a request for a variance unless an application was "officially submitted" to the County. Thus, Winona County has consistently acknowledged through its words and conduct that Daley Farm submitted, and the County received, a written application requesting a variance.

Finally, Winona County's argument that the 60-day rule does not apply to a remanded zoning request turns the legislative intent of the statute on its head. Minnesota Statutes § 15.99 is intended "to 'establish[] time deadlines for local governments to take action on zoning applications,'" *Advantage Capital*, 664 N.W.2d at 425, 427 (quoting *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001)), and "to keep government agencies from taking too long in deciding issues like the one in question," *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. Ct. App. 2004) (internal quotation

[5] In yet another acknowledgement of the obvious, Stephanie Nuttall (an Assistant Winona County Attorney) recounted the procedural history of Daley Farm's Variance Application at the outset of the hearing on the remanded application and acknowledged that "[t]here was an application submitted in 2018 for the variance that was just described." (Second Hearing Tr. at 5:24-5:25.)

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

marks omitted). There is no logical basis to apply such a deadline to an initial zoning request but not to a remanded request.

To the contrary, the policy rationales for strictly applying the deadline are even stronger in the context of a remanded application. Because a zoning request can only be remanded after initial proceedings and subsequent judicial review have occurred, there will necessarily have been a long delay that has already occurred when an application is remanded for reconsideration. Further, the remand can only occur after a court has determined that the local government acted improperly in the original proceedings on the zoning request. It would create a perverse incentive, and lead to an absurd result, if a local government must act in a timely fashion on an initial application but can then delay as long as it wants after it commits an error requiring reversal of the initial decision.

In the end, however, this issue comes down to an application of the plain language of the statute. Minnesota Statute § 15.99, subdivision 2(a), requires—in plain and straightforward terms—that an agency must act on a request relating to zoning within 60 days and provides a direct consequence (automatic approval of the request) if the agency fails to comply with this deadline. The statute also plainly states that this 60-day deadline begins to run "upon the agency's receipt of a written request containing all information required by law or by a previously adopted rule, ordinance, or policy of the agency, including the applicable application fee." Minn. Stat. § 15.99, subd. 3(a). As extensively discussed above, as well as in Daley Farm's Initial Memorandum, there is no genuine issue of material fact that Winona County received the Variance Application from Daley Farm or that this application is a request related to zoning.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

The only question, then, is when Winona County received the zoning request and when the 60-day deadline began to run. In this case, however, the answer to that question is not material to the resolution of this issue. Even applying the most favorable facts available to the County—i.e., that the remanded Variance Application was received by Winona County on August 24, 2021, when the court of appeals denied Daley Farm's request for discretionary review of the remand remedy[6]—the County did not take any action on the request until December 2, 2021 (100 days later). Thus, the undisputed facts in this case demonstrate that Winona County did not deny the remanded Variance Application within 60 days after its receipt. The application was therefore automatically approved by operation of law under Minnesota Statutes § 15.99, subdivision 2(a), and Daley Farm is entitled to summary judgment on Count VII of the Supplemental Complaint and to an order declaring that the Variance Application was approved and directing Winona County to take all actions necessary to issue the variance requested in such application.

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

Plaintiffs also appealed from the Winona County Board of Adjustment's denial of Daley Farm's remanded Variance Application based on bias and prejudgment (Count V)

[6] In a footnote, Winona County also implies that Daley Farm should be equitably estopped from arguing for the application of the 60-day rule because it requested additional time for reconsideration of this Court's initial order (to clarify the scope of required variance) and for an interlocutory appeal of the remand remedy. (County's Initial Mem., at 30 n.11.) But even if the County reasonably relied on these requests in delaying further proceedings while those requests were pending, it could not rely on such requests after the court of appeals denied Daley Farm's request for discretionary review.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

and factual and legal errors (Count VI). (Supplemental Compl. (Index #108), at ¶¶ 131-47.) In their motion, Plaintiffs ask this Court to grant summary judgment in their favor on these claims for several reasons. (*See* Daley Farm's Initial Mem., at 49-62.) Winona County and the activist groups who intervened as defendants in this case also ask this Court to grant summary judgment in their favor. (*See* County's Initial Mem., at 30-55; Activist Groups' Initial Mem., at 27-61.)

A. Winona County Improperly Attempts to Narrow the Standard of Review Applicable to Daley Farm's Statutory Appeal of the Winona County Board of Adjustment's Denial of Daley Farm's Remanded Variance Application.

Before addressing the substantive issues related to these claims, the parties dispute the standard of review applicable to Daley Farm's appeal. Minnesota Statute § 394.27, subdivision 9, specifically provides that a county board of adjustment's decision to grant or deny a variance is subject to judicial review via an appeal "to the district court in the county in which the land is located." *Accord Carlson v. Chermak*, 639 N.W.2d 886, 889 (Minn. App. 2002). On appeal, the Court must review the board of adjustment's decision "to determine whether it was reasonable." *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000).

Winona County and the activist groups who intervened as defendants in this proceeding argue that this reasonableness review is limited to a two-pronged analysis that only considers whether the reasons given for the challenged decision are (i) legally sufficient and (ii) had a factual basis in the record. (County's Initial Mem., at 30-31 (citing *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015), *Mendota Golf, LLP*

v. City of Mendota Heights, 708 N.W.2d 162, 180 (Minn. 2006), and *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983)); Activist Groups' Initial Mem., at 28 (citing *RDNT* and *VanLandschoot*).) But *RDNT* involved review of a municipal decision on a conditional use permit, 861 N.W.2d at 72, and *Mendota Golf* involved a mandamus proceeding related to a proposed amendment to a comprehensive plan, 708 N.W.2d at 166, 169-70. In other words, neither of these cases involved a direct appeal of a county variance decision to the district court as specifically authorized by statute.

In contrast to the first two cases relied upon by Winona County (and the first case relied upon by the activist groups who intervened as defendants in this proceeding), *VanLandschoot* involved an appeal from a decision denying a variance. 336 N.W.2d at 504. But the County and activist groups' reliance on the standard of review recited in this case is misplaced. After reciting the general reasonableness standard, the Minnesota Supreme Court stated that "[w]e examine the municipality's action to ascertain whether it was arbitrary and capricious, or whether the reasons assigned by the governing body do not have 'the slightest validity' or bearing on the general welfare of the immediate area, or whether the reasons given by the body were legally sufficient and had a factual basis." *Id.* at 508 (internal citation omitted). Because each of these phrases is separated by the word "or," the phrase "arbitrary and capricious" must mean something different than "whether the reasons given by the body were legally sufficient and had a factual basis." In other words, the narrow standard of review that the County seeks to impose is only one aspect of a broader reasonableness standard that applies to a review of a variance decision under Minnesota law.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

The Minnesota Supreme Court again recognized that the standard of review applicable to an appeal of a variance decision in *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008). Specifically, in *Stadsvold*, the Court stated that "[w]e review zoning actions to determine whether the zoning authority 'was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and to determine whether the evidence could reasonably support or justify the determination.' " *Id.* (quoting *Frank's Nursery Sales, Inc.*, 295 N.W.2d 604, 608 (Minn. 1980)). Thus, while the two-pronged analysis recited by Winona County is undoubtedly one aspect of the applicable standard of review, it is not the sole basis by which a court must review an appeal from a variance decision. Instead, the reviewing court must also review the decision to determine whether it was arbitrary, capricious, or oppressive.[7]

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

Having addressed the applicable standard of review, Daley Farm turns to the substantive issues applicable to the parties' cross motions for summary judgment on Daley Farm's appeal from the denial of its remanded Variance Application. Daley Farm first argues that the denial of its remanded Variance Application was unreasonable, arbitrary, and caprcious because Dr. Elizabeth Heublein (one of the board of adjustment

[7] Winona County accuses Daley Farm of improperly citing cases applying the standard of review applicable to other administrative decisions under the Minnesota Administrative Procedures Act. (County's Initial Mem., at 30 n.12.) These cases, however, apply an arbitrary and capricious standard that is substantially similar to the standard applicable to variance appeals (which, again, is broader than the two-pronged analysis that the County seeks to apply), and the County does not provide any rationale as to why it is improper to consider these similar standards in this case.

members) conducted independent research and considered evidence outside the record in voting to deny Daley Farm's Variance Application. (Daley Farm's Initial Mem., at 51-53.) The evidence regarding Dr. Heublein's independent research, and her reliance on that information in voting on the merits of Daley Farm's remanded Variance Application, is not disputed—Dr. Heublein testified under oath that she conducted such outside research and relied on such research in her quasi-judicial actions in this matter. (Heublein Tr., at 21:16-23:10.)

In opposition to Plaintiffs' motion, and in support of its own motion, Winona County cites *In re North Metro Harness, Inc.*, 711 N.W.2d 129, 138-39 (Minn. App. 2006), for the proposition that "[t]here is not 'any authority' in Minnesota law, which suggests quasi-judicial decisionmakers cannot rely on information that is both 'one-sided' and 'outside-of-the-record.' " (County's Initial Mem., at 54.) But Winona County's reliance on *North Metro Harness* relies on selective quotations to misrepresent the court of appeals' reasoning and decision.

Specifically, in affirming an administrative decision by the Minnesota Racing Commission to approve a racetrack license, after granting reconsideration of its prior decision to deny such license, the court of appeals noted that it was "not at ease with the commissioners' decisions to engage in one-sided, outside-of-the-record conversations" after its initial denial of the license and that "it would have been better for the commissioners to have refrained from engaging in off-the-record communications." *North Metro Harness*, 711 N.W.2d at 138-39. But the court also noted that these *ex parte* communications merely influenced commissioners to request reconsideration of the

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

initial decision and that "the commission did not grant North Metro's license based on these communications." *Id.* at 139 (emphasis added). Instead, the court specifically noted that "the commission voted to grant the application only after reopening the record and receiving additional information that supplemented the record." *Id.* Accordingly, the court of appeals recognized that there is not "any authority that the commissioners may not rely on these communications in moving for reconsideration." *Id.* (emphasis added).

In relying on *North Metro Harness*, Winona County selectively quotes the phrases "one-sided" and "outside-of-the-record" to imply that the court of appeals concluded that the commission did not err by relying on such information in making a quasi-judicial decision on the merits of the pending license application. (County's Initial Mem., at 54.) In doing so, the County intentionally omits the context indicating that such information was only relied upon in deciding a procedural motion for reconsideration and not on the merits of the quasi-judicial decision. (*Id.*) These omissions are misleading, and *North Metro Harness* does not support the proposition that a quasi-judicial decisionmaker may rely on one-sided, outside-of-the-record information in deciding the merits of a request for a license (or permit or variance). To the contrary, by emphasizing that the members of the Minnesota Racing Commission did not rely on such information in considering the merits of the pending license application, but instead re-opened the record to receive and consider any additional information that was relevant to its decision on the merits, the court of appeals implicitly confirmed that reliance on outside-of-the-record is improper on the merits of the quasi-judicial decision.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

The activist groups who intervened as defendants in this proceeding also rely on *Stalland v. City of Scandia*, No. A20-1557, 2021 WL 3611371 (Minn. Ct. App., Aug. 16, 2021), to justify Dr. Heublein's independent research. (Activist Groups' Initial Mem., at 52-53.) In *Stalland*, one member of the city council who was considering a proposed amendment to a conditional use permit had personal knowledge of relevant facts of the negotiations that led to the original permit based on his prior role as a watershed district manager. No. A20-1557, 2021 WL 3611371, at *3. But the facts in *Stalland* do not indicate, and the appellants in *Stalland* did not allege, that the city council member actually relied on any information outside of the record in considering or deciding the merits of the proposed permit amendment. *Id.* at *3, *7.

In contrast to *North Metro Harness* and *Stalland*, the undisputed facts in this case demonstrate that Dr. Heublein intentionally sought out information that was outside of the administrative record on Daley Farm's remanded Variance Application and that she specifically relied on that outside-of-the-record information in deciding the merits of this quasi-judicial decision. Thus, these case are distinguishable from the present case and do not justify Dr. Heublein's improper conduct here.

Finally, Winona County relies on *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712 (Minn. 1978), to justify Dr. Heublein's reliance on her independent, outside-of-the-record research. (County's Initial Mem., at 54.) In *Barton Contracting*, a landowner challenging the denial of a special use permit argued, and the district court found, that "three of the city council members relied on information outside the record" because they considered information about geological formations that had been presented to the city

council two years earlier in connection with a separate project. 268 N.W.2d at 716. But the Minnesota Supreme Court recognized that the same information "clearly was made part of the record in the present case." *Id.* In other words, the city council members in *Barton Contracting* did not consider information outside of the record.

In this case, Winona County similarly argues that "[t]he outside information, which [Dr.] Heublein had to go 'to the Internet to find' was not actually outside of the record because various commenters referenced and linked to this information in their comments." (County's Initial Mem., at 54.) In support of this assertion, the County points to Dr. Heublein's vague statement during the hearing on Daley Farm's remanded Variance Application that "her 'primary concern is water' and nitrate pollution." (*Id.* (citing Second Hearing Tr. 119:10-121:4).) The County then refers to the Minnesota Pollution Control Agency's request for a general environmental impact statement to study nitrate pollution in groundwater" as evidence in the record to support Dr. Heublein's vague concerns about nitrate pollution and groundwater.[8] (*Id.*) But Dr. Heublein did not identify the specific outside-the-record sources that she relied upon in considering Daley Farm's Variance Application. (Heublein Tr., at 23:2-23:10.)

[8] The County conveniently ignores the evidence in the record that MPCA specifically considered whether Daley Farm's proposed Modernization Project has a potential for significant environmental effects on surface water and groundwater—including nitrate pollution—and found that the proposed project will not "have significant adverse impacts on water quality" and will not "contribute to any potentially significant adverse effects on water quality." (Admin. R. (Index #149) 164, ¶ 56, 172, ¶ 133.) The Minnesota Court of Appeals affirmed these findings on appeal. *In re Denial of Contested Case Hearing Request & Modification of Notice of Coverage under Individual NPDES Feedlot Permit No. MN0067652*, Nos. A19-0207 & A19-0209, 2019 WL 5106666, at *8-*11 (Minn. Ct. App., Oct. 14, 2019).

Accordingly, the County's assertion that such information is actually part of the record is merely speculation that is not supported by evidence in the record.

As set forth more fully in Daley Farm's Initial Memorandum, the Winona County Board of Adjustment was required to make its quasi-judicial decision on Daley Farm's Variance Application based on the evidence in the record. *See In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008); *Matter of E. River Elec. Coop.*, No. A21-0885, 2022 WL 1073736, at *3 (Minn. Ct. App., Apr. 11, 2022). Indeed, the County's own attorney admitted that the board members were required to base their decision on Daley Farm's remanded Variance Application on the evidence in the record:

> The specific record to be considered by the 2021 Board of Adjustment has been provided to the board members. The board members are not to consider any information that has been received outside the official record, the agenda packet and other materials provided by County staff prior to the meeting, or provided during the December 2, 2021 meeting. Any information received from any other source is to be disregarded. At the meeting the County staff will present the updated staff report and respond to questions, and the petitioner will have an opportunity to present their petition and respond to questions. The Board of Adjustment will then discuss the petition, based on the record provided, and make a decision regarding the variance request.

(Admin. R. (Index #156) 2877 (emphasis added).) Because the undisputed facts demonstrate that Dr. Heublein based her decision on evidence outside of the administrative record, the Winona County Board of Adjustment's denial of Daley Farm's remanded Variance Application is not reasonably supported or justified by evidence in the record. The denial of the Variance Application was therefore unreasonable, arbitrary, and capricious.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

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

Daley Farm next argues that the denial of its Variance Application was unreasonable, arbitrary, capricious, and oppressive because the Winona County Board of Adjustment's consideration of the remanded application continued to be tainted by the bias and prejudgment that tainted its initial proceedings. (Daley Farm's Initial Mem., at 54-57.) Specifically, as set forth in the Statement of Undisputed Facts in Daley Farm's Initial Memorandum, the undisputed facts demonstrate that Land Stewardship Project conspired with its allies on the county board to appoint members to the board of adjustment who had actively participated in LSP's advocacy efforts to oppose Daley Farm's proposed Modernization Project. Considering this extensive evidence, this Court ruled from the bench at the conclusion of the prior summary judgment hearing that three members of the original board of adjustment were intentionally placed on the board by the county commissioners "in a conscious manner with aforethought to oppose" Daley Farm's Variance Application. (Hearing Tr. (Index #88), at 40:10-40:16.) Based on this overwhelming evidence, this Court concluded that the board of adjustment's initial denial of the Variance Application was "so severely tainted" by bias that it could not stand, declared the original denial of Daley Farm's Variance Application void, and remanded the application for reconsideration by the new board of adjustment. (*Id.* at 39:9-39:12; Order Granting Summ. J. & for Remand (Index #80), at 2.)

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

In opposition to Plaintiffs' motion, and in support of its own motion, Winona County attempts to sweep this issue under the rug by suggesting that this Court confine itself to the administrative record submitted by the County and should ignore the extensive evidence submitted by Plaintiffs. (County's Initial Mem., at 45-46.) In *Swanson v. City of Bloomington*, the Minnesota Supreme Court held that where a local zoning proceeding "was fair and the record clear and complete," a court should generally review the decision based on the administrative record created by the local government. 421 N.W.2d 307, 312-13 (Minn. 1988); *see Big Lake Ass'n v. Saint Louis County Planning Comm'n*, 761 N.W.2d 487, 490-91 (Minn. 2009) (applying *Swanson* to a county zoning decision). On the other hand:

> Where the [local] proceeding has not been fair or the record of that proceeding is not clear and complete, *Honn* applies and the parties are entitled to a trial or an opportunity to augment the record in the district court. The meaningful review to which parties are entitled requires no less.

Id.

Here, this Court has already determined that the initial proceedings before the Winona County Board of Adjustment were tainted by bias and prejudgment. These proceedings created the administrative record on which the board of adjustment purportedly based its decision on the remanded Variance Application. And any meaningful review of the fairness of the remand proceedings necessarily requires consideration of evidence outside of the administrative record. Under these circumstances, Minnesota law allows the parties to augment the record in this Court with

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

respect to Daley Farm's claims that the denial of its remanded Variance Application was unreasonable, arbitrary, capricious, and oppressive due to bias and prejudgment.[9]

In addressing the substance of Plaintiffs' claims of bias and prejudgment, Winona County and the activist groups who intervened as defendants in this proceeding ignore the entire history of events related to Daley Farm's remanded Variance Application and instead myopically focus on the appointments of Dr. Elizabeth Heublein and Kelsey Fitzgerald to the Winona County Board of Adjustment. (County's Initial Mem., at 46-48; Activist Groups' Initial Mem., at 55-61.) In isolation, Marie Kovecsi's reference to Dr. Heublein's "very careful reasons" for seeking a position on the board of adjustment and Ms. Fitzgerald's recruitment by a known LSP activist may not seem so egregious.[10] But these facts cannot be removed from the broader context of this case. The record in this case demonstrates that LSP is willing and able to manipulate the composition of the board of adjustment to ensure that Daley Farm's Variance Application is defeated, and Ms. Kovecsi has demonstrated that she is one of LSP's key allies in its opposition to Daley

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[9] Notably, Daley Farm submitted much of the same evidence from outside of the administrative record in support of its prior motion for summary judgment—which resulted in this Court's prior determination that the initial proceedings of the Winona County Board of Adjustment were "severely tainted" by bias and prejudgment and decision to declare the initial denial of Daley Farm's Variance Application void. Winona County did not challenge the submission or the consideration of this evidence then and implicitly acknowledged that the evidence was properly before the Court. This substantial change suggests that the County's argument now is merely a desperate ploy to avoid the damaging evidence that has been presented to this Court.

[10] Winona County argues that "the statement Kelsey Fitzgerald was recruited by someone affiliated with Land Stewardship Project . . . is inadmissible hearsay within inadmissible hearsay" and therefore cannot be considered by this Court. (County's Initial Mem., at 47 n.20.) As the County indicates, this statement is contained in an e-mail communication from Alex Romano to Shona Snater and may be based on a statement that Doug Nopar made to Alex Romano. (*Id.*) But Doug Nopar and Alex Romano were both employees and/or representatives of Land Stewardship Project. (*See* Fitzgerald Tr., at 17:3-17:15, 18:15-19:2.) And because Land Stewardship Project has intervened as a defendant in this proceeding, both of these statements are statements of a party opponent that are offered against such party. Therefore, neither statement is hearsay under Rule 801(d)(2) of the Minnesota Rules of Evidence.

Farm's proposed Modernization Project and is willing to lie about her involvement afterward. (*See* Daley Farm's Initial Mem., at 36-39, 56.) In this context, the evidence regarding Dr. Heublein and Ms. Fitzgerald's appointments to the board of adjustment is far more significant.

Winona County also ignores the substantial evidence demonstrating that the proceedings on remand were not a fresh look at Daley Farm's Variance Application. Instead, the evidence demonstrates that the remand proceedings were orchestrated by the County's litigation counsel, who directed county staff to intentionally disregard information in the record to publish an unfair and biased staff report.[11] (*See id.*, at 32-35, 56-57.) In other words, the County disregarded the spirit (if not the letter) of this Court's prior order and instead treated the remand proceedings as a mere continuation of the County's defense in this litigation.

In summary, the factual record, when viewed in its entirety, demonstrates that Winona County's consideration of Daley Farm's Variance Application remained fundamentally biased and unfair following this Court prior decision to remand the application to the Winona County Board of Adjustment for reconsideration. As a result of the flawed process, the denial of the remanded Variance Application represented

[11] Winona County argues that it could not consider "[n]ew information the Board may have received after its first decision" because such information is "'beyond the scope of the' remand, 'legally insufficient[,]' and the Board could not use it without resulting in 'no permissible basis in the record' to support its decision." (County's Initial Mem., at 52.) But the information that the County intentionally regarded, at the direction of its outside litigation counsel, was information that was received during the initial proceedings (but after the original staff report was prepared)—it was not received after the initial decision. Thus, the County's attempted justification for ignoring this information does not hold water.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

Winona County's will, rather than its reasoned judgment based on the evidence in the record, and was therefore unreasonable, arbitrary, capricious, and oppressive.

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

Third, Daley Farm argues that the denial of its Variance Application was unreasonable, arbitrary, and capricious because the factual findings actually adopted by the Winona County Board of Adjustment do not support its decision to deny the application (thus rendering the decision legally insufficient). (Daley Farm's Initial Mem., at 58-60.) The board of adjustment specifically found that Daley Farm satisfied seven of the eight criteria specified in the Winona County Zoning Ordinance, including that Daley Farm "has established that there are practical difficulties in complying with the official control and proposes to use the property in a reasonable manner." (Admin. R. (Index #156), at 3113-14; *accord* Second Hearing Tr., at 71:24-95:15, 105:10-109:12.) Notwithstanding the official findings that were prepared by county staff, at the direction of its legal department, after the hearing, the board of adjustment did not adopt any finding with respect to the remaining criterion (Criterion No. 6 in the Ordinance) that "[e]conomic considerations alone do not constitute practical difficulties."[12] (Second

[12] Winona County objects to Daley Farm's statement that county staff "falsified" the board of adjustment's written findings because the finding accurately reflects the sentiments of two board members. (Winona County's Initial Mem., at 51-52.) But the board of adjustment can only act by the affirmative vote of a majority of the members present—neither county planning staff nor the county's attorneys are authorized to act on behalf of the board. And the simple fact remains that county staff inserted a finding into the board's official Findings of Fact that the board specifically considered and did not approve. Thus, Daley Farm stands by its assertion that county staff, at the direction of its legal department, falsified the board's official Findings of Fact by inserting a finding that was not approved by the board.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

Hearing Tr., at 95:16-105:09; Admin. R. (Index #156) 3113-14; Qualley Tr., at 76:21-77:13, 78:17-79:23.)

As fully set forth in Daley Farm's Initial Memorandum, the wording of Criterion No. 6 in the Winona County Zoning Ordinance indicates that this criterion does not establish a separate affirmative requirement but instead merely defines an exception to the earlier requirement (in Criterion No. 3) of practical difficulties. In other words, once the board affirmatively found that Daley Farm "has established that there are practical difficulties in comply with the official control," Criterion No. 6 creates an exception that would have been triggered if the board found that economic considerations were the sole practical difficulty. If the board does not adopt such a negative finding on Criterion No. 6, its affirmative finding on Criterion No. 3 remains intact.

Daley Farm's interpretation of Criterion No. 6 in the Winona County Zoning Ordinance is also consistent with the plain language of the applicable Minnesota statute. Minnesota Statutes § 394.27, subdivision 7, establishes three criterion that must be satisfied for a variance:

> Variances shall only be permitted [1] when they are in harmony with the general purposes and intent of the official control and [2] when the variances are consistent with the comprehensive plan. Variances may be granted [3] when the applicant for the variance establishes that there are practical difficulties in complying with the official control.

The statute then defines "practical difficulties":

> "Practical difficulties," as used in connection with the granting of a variance, means that the property owner proposes to use the property in a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by

> the landowner; and the variance, if granted, will not alter the essential character of the locality.

Id. After setting forth this general definition, the statute creates an exception to that general definition and clarifies that "[e]conomic considerations alone do not constitute practical difficulties." *Id.* In other words, the statute only requires that an applicant for a variance demonstrate "that there are practical difficulties in complying with the official control." The presence of other considerations in addition to economic considerations is not a standalone requirement under the statute.

Nonetheless, Winona County asserts that Daley Farm's construction of the Winona County Zoning Ordinance is "at odds with the Minnesota Supreme Court . . . as well as the Minnesota Court of Appeals." (County's Initial Mem., at 34 (citing *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 n.6 (Minn. 1983), *White Bear Lake Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982), and *Moore v. Morrison County*, 969 N.W.2d 86, 90-91 (Minn. App. 2021)).) But neither *VandLandshoot* nor *White Bear Lake Docking* address whether the presence of additional considerations in addition to economic considerations is a requirement for a variance.

As to *Moore*, the Morrison County Ordinance at issue in that case differed significantly from the Winona County Zoning Ordinance at issue in this case. Specifically, the ordinance in *Moore* set forth six mandatory criteria in the form of a question that required a response. 969 N.W.2d at 89-90. As relevant here, the Morrison County ordinance provided, "Does the alleged practical difficulty involve more than just economic considerations." *Id.* Unlike the passive wording of the Winona County

Ordinance, which merely provides that "[e]conomic considerations alone do not constitute practical difficulties," the wording of the Morrison County ordinance requires a specific response. Further, the requirement for additional considerations in addition to economic considerations was not contested in *Moore*, and the court of appeals discussion of this criterion consisted of one sentence. *Id.* at 90-91. Thus, Daley Farm's construction of the Winona County Zoning Ordinance is not at odds with the Minnesota Court of Appeals decision in *Moore*.

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

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

Finally, Daley Farm argues that the denial of its Variance Application was unreasonable, arbitrary, and capricious because the evidence in the record does not, and cannot, "reasonably support or justify the denial."[13] (Daley Farm's Initial Mem., at 61-62 (quoting *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008)).) As noted in its initial

[13] Winona County accuses Daley Farm of misquoting the Minnesota Supreme Court's decision in *Stadsvold* by stating (outside of the quotation) that the evidence in the record does not "reasonably support or justify the determination," rather than stating that the evidence could not "reasonably support or justify the determination." (County's Initial Mem., at 36 n.14.) Daley Farm does not believe that this distinction has the significance that the County places on it. Nonetheless, to avoid any further confusion, Daley Farm clarifies that the evidence in the record, as set forth in its initial memorandum, but does not and cannot "reasonably support or justify the determination."

memorandum, Daley Farm has consistently acknowledged that its proposed Modernization Project and related Variance Application "is motivated, **in part**, by economic considerations." (Admin R. (Index #148) 1858.) But Daley Farm also specifically identified several non-economic considerations that support the Variance Application:

> In addition to economic considerations, Daley Farms' variance request is also motivated by non-economic motivations to reduce the environmental impact of the farm (as extensively described above in section 1 of the memorandum), promote animal welfare and food safety, and ensure the continued safety and well-being of its employees. Indeed, in a separate section of its analysis, county staff acknowledges that separating additional dairy cows into facilities on different properties—rather than expanding the existing facility—"could cause more environmental damage to Winona County's natural resources" because there would be "additional transportation of manure, cattle, workers, feed, and crops leading to more fossil fuel emissions and elevated stress on county roads." [Admin R., at 1834.] Thus, Daley Farms' requested variance is based on more than merely economic consideration.

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

Winona County argues that "[b]ased on the administrative record evidence, the Board [of Adjustment] could rationally conclude economic considerations alone prompted Daley Farm's variance request."[14] The activist groups make similar arguments. To justify these arguments, the County and the activist groups cherry-pick isolated statements by Daley Farm from the record and ignore other statements that do not fit their desired narrative. The County then ignores the Modernization Project that Daley Farm actually proposes and instead analyzes two separate projects—a hypothetical

[14] Of course, the record demonstrates that the board of adjustment did not actually make this conclusion. (Second Hearing Tr., at 95:16-105:09.)

modernization of the existing farm at its current capacity and a hypothetical expansion through construction of new facilities on separate sites. The County and the activist groups then reason that because Daley Farm could separately complete these hypothetical projects without a variance, its request for a variance for its Modernization Project is solely motivated by economic considerations. (County's Initial Mem., at 37-45; Activist Groups' Initial Mem., at 33-38.)

But these arguments directly contradict the record, including the conclusions of county planning staff and the findings of the board of adjustment. Undoubtedly, Daley Farm's abstract desire to expand its dairy operation has economic motivations. And if Daley Farm were solely motivated by those economic considerations, it could achieve those economic benefits by building new facilities on separate sites. But such expansion would come with non-economic costs—Winona County planning staff acknowledged that such multi-site expansion "could cause more environmental damage to Winona County's natural resources" because there would be "additional transportation of manure, cattle, workers, feed, and crops leading to more fossil fuel emissions and elevated stress on county roads" (Admin. R. (Index #148) 1834), and the board of adjustment found that "construction of separate facilities on different properties would create significant economic costs as well as non-economic costs such as increased traffic and fossil fuel use" (Admin. R. (Index #156) 3113 (emphasis added)). As it explained in its submissions to the board of adjustment, Daley Farm's desire to expand at its current site, rather than at multiple other sites, is based on these "non-economic motivations to reduce the environmental impact of the farm . . . , promote animal welfare and food

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

safety, and ensure the continued safety and well-being of its employees." (Admin. R. (Index #148) 1858.) Thus, Daley Farm's need for a variance is not solely based on economic considerations.

The factual record therefore does not, and cannot, reasonably support or justify a finding that economic considerations were the only practical difficulties claimed by Daley Farm, and the Winona County Board of Adjustment's denial of Daley Farm's Variance Application was therefore unreasonable, arbitrary, and capricious.[15]

III. Winona County and the Activist Groups Who Intervened as Defendants in this Proceeding Are Not Entitled to Summary Judgment on Plaintiffs' Constitutional Claims.

In Counts III and IV of their Complaint, Plaintiffs allege that Winona County violated Plaintiffs' fundamental right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 7, of the Minnesota Constitution, as well as principles of fundamental fairness, during the initial proceedings on Daley Farm's Variance Application. (Compl. (Index #3), at ¶¶ 88-94.) This Court previously concluded, "as a matter of law, that the due process rights of Plaintiffs were violated," and the Court denied the County's motion for summary judgment on these claims. (Order Granting Summ. J. & for Remand (Index #80), at 2, 5.) Following the remand proceedings, Plaintiffs restated their constitutional claims to

[15] The activist groups who intervened as defendants in this proceeding also purport to challenge the Winona County Board of Adjustments' findings on the other seven variance criteria. (Activist Groups' Initial Mem., at 39-47.) But the activist groups did not appeal from the board of adjustment's decision on the remanded Variance Application, and these findings are not properly before this Court on Daley Farm's appeal. Thus, while Daley Farm disputes the activist groups' factual and legal arguments regarding these findings, it will not waste the Court's time by responding to issues that are not properly before it.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

further incorporate the additional proceedings (in addition to the original proceedings). (Supplemental Compl (Index #108), at ¶¶ 155-61.)

A claim for deprivation of a constitutional right to due process of law requires two elements: (1) a "protected liberty or property interest is at stake," and (2) deprivation of such "interest without due process of law." *E.g.*, *Elder v. Gillespie*, 54 F.4th 1055, 1064 (8th Cir. 2022). Notwithstanding this Court's prior order, Winona County and the activist groups who intervened as defendants in this proceeding again seek summary judgment on Plaintiffs' constitutional claims, arguing that Plaintiffs lack a constitutionally protected interest and received sufficient process. (County's Initial Mem., at 17-27; Activist Groups' Initial Mem., at 19-26.)

A. Plaintiffs Have a Protected Interest in Both the Free Use and Enjoyment of Their Property for the Lawful Purpose of Dairy Farming and in the Variance Application Itself.

The first step in analyzing a due process claim is to determine whether a "protected liberty or property interest is at stake." *Elder*, 54 F.4th at 1064.

1. Plaintiffs Have a Protected Interest in the Free Use and Enjoyment of Their Property for the Lawful Purpose of Dairy Farming.

Minnesota has long recognized that "[t]he right of property generally includes the right freely to possess, use, enjoy, and dispose of the things which are subject to ownership." *Congdon v. Congdon*, 200 N.W. 76, 82-83 (Minn. 1924). Indeed, the right of a property owner to freely use and enjoy its property for lawful purposes is widely accepted as a bedrock principle of property law. *See* 63C Am.Jur.2d *Property* § 31 (recognizing that the primary rights of property ownership include (i) the exclusive right

to possession of the property, (ii) the right to change or improve the property, and (iii) the right to use the property for any lawful purpose). And the United States Supreme Court has recognized that "[t]he right of [an owner] to devote its land to any legitimate use is property within the protection of the Constitution." *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928).

In this case, Daley Farm, Michael Daley, and Stephen Daley own certain parcels of real property on which Daley Farm owns and operates dairy facilities. As the owner of this property, Daley Farm, Michael Daley, and Stephen Daley generally have a right to use their property for the lawful purpose of operating a dairy farm, *see Congdon*, 200 N.W. at 82-83, and this general right is a constitutionally protected interest, *see Seattle Title Trust Co.*, 278 U.S. at 121.

While the right of a property owner to freely use and enjoy its property is fundamental in any legal system that recognizes private property, this right (like most other rights) is not absolute. As relevant here, zoning ordinances regulate the use and development of private land " 'in order to promote public health, safety, welfare, morals, and aesthetics.' " *In re Stadsvold*, 754 N.W.2d 323, 329 (Minn. 2008) (quoting *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980)). In *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court recognized the authority of states (and, where authorized by states, local governments) to enact and enforce zoning ordinances that restrict otherwise lawful uses of property under the general police power. 272 U.S. 365, 388-90 (1926).

Courts have long recognized the inherent tension between the rights of private property owners and the authority of local governments to enact zoning ordinances. And just as a property owner's right to freely use and enjoy its property is not absolute, so too the government's police power to regulate the use of land by enacting a zoning ordinance is also not absolute. Just two years after it upheld the general validity of zoning ordinances in *Euclid*, the Supreme Court recognized that " '[t]he governmental power to interfere by zoning regulations with the general rights of the landowner by restricting the character of his use, is not unlimited,' " and that "[l]egislatures may not, under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Seattle Title Trust Co.*, 278 U.S. at 121 (quoting *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).

Courts have continued to recognize the inevitable tension between private property rights and zoning ordinances since that time. For example, in *Arcadia Development Corp. v. City of Bloomington*, the Minnesota Supreme Court stated:

> As a useful rule it has long been stated that a city must act "reasonably," otherwise, its ordinances could not have the effect of overcoming the property rights of others. Its acts must be calculated to effect its legitimate purposes and goals without going beyond the demands of the occasion. Further, ordinances and actions taken thereunder must be reasonable when applied to individual cases.

125 N.W.2d 846, 850 (Minn. 1964) (internal citations omitted). More recently, the Minnesota Supreme Court again recognized the inherent tension between (and need to balance) the competing interests of private property owners and local governments:

> Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of

> private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions.

Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 731 (Minn. 2010) (quoting *Simplex Technologies, Inc. v. Town of Newington*, 766 A.2d 713, 716-17 (N.H. 2001)).

Minnesota law recognizes the need to balance these competing rights and interests and "to provide 'the opportunity for amelioration of unnecessary hardships resulting from the rigid enforcement of a broad zoning ordinance.' " *Stadsvold*, 754 N.W.2d at 329 (quoting *Curry v. Young*, 173 N.W.2d 410, 415 (Minn. 1969)). Toward that end, zoning ordinances in Minnesota must allow a board of adjustment to grant "variances" from the strict requirements of those ordinances, Minn. Stat. § 394.27, subds. 5 & 7 (2022). A "variance" includes "any modification or variation of official controls where it is determined that, by reason of exceptional circumstances, the strict enforcement of the official controls would cause unnecessary hardship." Minn. Stat. § 394.22, subd. 10 (2022). A board of adjustment's proceedings on a variance application are quasi-judicial in nature because the decision operates "directly on the particular interests of the applicant" rather than on the public as a whole. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 715-16 (Minn. 1978); *accord Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000); *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981).

Applying these principles to the present case, the Winona County Zoning Ordinance generally allows animal feedlots (such as Daley Farm's dairy operation) in Agriculture/Resource Conservation Districts but restricts this lawful use by imposing an

arbitrary cap restricting feedlots to no more than 1,500 animal units. *See* Winona Cnty. Zoning Ordinance §§ 8.4.2, 10.4.6.1. By itself, such a bright-line restriction on lawful and productive uses of property is likely unreasonable as applied to some particular properties. The Ordinance, however, ameliorates these concerns by allowing affected persons to apply for a variance from the strict enforcement of the animal unit cap and by requiring the board of adjustment to hold a hearing and "make a decision and findings of fact regarding the variance request" within a statutory deadline. *See id.*, at §§ 5.6.1-5.6.3. Thus, the mandatory variance procedures in the Ordinance (including a hearing) are an essential and necessary component of the Ordinance itself.

When the issues in this case are viewed in context, the underlying interest at stake is not merely the fate of Daley Farm's Variance Application. Instead, the larger interest at stake is the right of Daley Farm, Michael Daley, and Stephen Daley to freely use their property for the lawful purpose of dairy farming. The animal unit cap in the Winona County Zoning Ordinance restricts this fundamental property interest but, in turn, also guarantees certain procedural rights to allow Plaintiffs to ameliorate the unreasonable application of this restriction by applying for a variance. Because these procedural requirements are an essential component of the Ordinance and are necessary to ensure that the restrictions in the Ordinance are reasonable, Plaintiffs have alleged sufficient facts to establish that the County Defendants deprived Plaintiffs of the protected interest in the free use and enjoyment of their property by depriving them of these guaranteed right to a fair hearing on the Variance Application.

Prior cases in the Eighth Circuit have generally focused their analysis of the interest at issue on the zoning application itself rather than on the underlying property rights of the landowner. *See Snaza v. City of Saint Paul*, 548 F.3d 1178, 1183 (8th Cir. 2008) (analyzing whether an applicant had a protected interest in a conditional use permit application); *Bituminous Materials, Inc. v. Rice Cnty.*, 126 F.3d 1068, 1070 (8th Cir. 1997) (analyzing whether an applicant had a protected interest in an application for a temporary equipment placement and operation permit); *Carolan v. City of Kansas City*, 813 F.2d 178, 181 (8th Cir. 1987) (analyzing whether an applicant had a protected interest in an occupancy certificate); *Littlefield v. City of Afton*, 785 F.2d 596, 600-02 (8th Cir. 1986) (analyzing whether an applicant had a protected interest in a building permit); *Heritage Dev. of Minn., Inc. v. Carlson*, 269 F.Supp.2d 1155, 1159-60 (D. Minn. 2003) (analyzing whether an applicant had a protected interest in an application for preliminary plat approval). In these cases, however, it generally appears that the parties did not argue that any other protected property interest applied.

The one exception to this general statement is *Snaza*. In that case, the court also noted that Snaza argued for the first time on appeal "that her fee simple title in the land is her protected property interest." 548 F.3d at 1183. Nonetheless, the court declined to consider whether this property interest was protected because it was not raised in the district court and Snaza did not present "any evidence that she has been denied her fee simple title in the land." *Id.* The court's discussion, however, implicitly recognizes that other property interests (in addition to an interest in the application itself) may apply in due process claims arising from zoning proceedings if properly raised by the parties. As

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

thoroughly discussed above, Plaintiffs have raised such an alternative property interest in this case.

This narrow focus on the application itself, rather than on the broader property rights implicated in zoning proceedings, also reflects a deeper and more fundamental issue that commentators have recognized in this area.

> A number of federal and state courts have taken a rather crabbed view of procedural due process in the context of zoning actions, both in characterizing the nature of the government action involved and the nature of private rights affected, and in their rulings on the nature of the procedural rights afforded by due process. Though there are notable exceptions in some states, courts generally have failed to utilize procedural due process as a device for curing what Richard Babcock has referred to as the "chronic illness" of procedural inadequacy and irregularity which pervades the zoning process today.

1 *Rathkopf's The Law of Zoning & Planning* § 2:3 (4th ed.) The arrogance with which Winona County and Land Stewardship Project felt free to ignore basic standards of fairness in this case and blatantly appoint members to the board of adjustment who had publicly and zealously advocated against Daley Farm's proposed Modernization Project, for the specific purpose of defeating this particular projects, shines a bright spotlight on this fundamental problem. And as this Court previously recognized, the consequences of these actions are significant:

> Now, again, I applaud people that spend their time and effort to work on causes that are worthy, but they have to understand their roles. And in our Democratic process lately there's been a lot of doubt expressly publicly about the integrity of our public institutions and people are clearly losing faith in them. Whether it's something as high as the federal government or way down local, a local county board of adjustment, we have rules in place so that everyone, everyone gets treated fairly. Even if their case does not have merit, when they come in at the start of that process, they are entitled under our rules, under our whole Democratic process to fair and impartial

> hearings and processes, and that clearly could not happen in this instance. And if we allow it to go and say, Well, gee, they said they were going to be fair when clearly they could not be, well, we're just going to add to the skepticism, the cynicism, the loss of faith in these public institutions. We've got to play by the rules, folks, and those rules were broken in this instance.

(Hearing Tr. (Index #88), at 42:14-43:9.)

Because Plaintiffs have a constitutionally protected interest in the free use and enjoyment of their property for the lawful purpose of dairy farming, Winona County and the activist groups who intervened as defendants in this proceeding are not entitled to summary judgment on this basis.

2. Plaintiffs Have a Protected Interest in the Variance Application Itself.

In addition to the constitutionally protected interest in the free use and enjoyment of their property, Plaintiffs also have a protected interest in the Variance Application itself. An applicant for a land use permit or approval has a protected property interest in the application itself if, under state law, the applicant has " 'a legitimate claim to entitlement as opposed to a mere subjective expectancy.' " *Snaza*, 548 F.3d at 1182 (quoting *Bituminous Materials*, 126 F.3d at 1070). "A protected interest in real property arises when state laws and regulations place substantive restrictions on municipal discretion, or when state laws and regulations contain mandatory language requiring permit issuance when certain conditions occur." *Minnetonka Moorings, Inc. v. City of Shorewood*, 367 F.Supp.2d 1251, 1257 (D. Minn. 2005); *accord Bituminous Materials*, 126 F.3d at 1070.

An applicant for a conditional use permit has a constitutionally protected property interest in the permit application under Minnesota law because approval " 'follows as a

matter of right' " if the specified requirements are met. *Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (quoting *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984)). Minnesota law grants local zoning officials the authority to approve conditional use permits "upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied." Minn. Stat. § 394.301, subd. 1 (2022). Consistent with this statutory authority, the section 5.5.4 of the Winona County Zoning Ordinance authorizes the county board to approve a conditional use permit if specified conditions (based on the type of use) are satisfied. Similarly, Minnesota law grants boards of adjustment authority to grant variances "when they are in harmony with the general purposes and intent of the official control" and "are consistent with the comprehensive plan," and "when the applicant for the variance establishes that there are practical difficulties in complying with the official control." Minn. Stat. § 394.27, subd. 7. And, again consistent with this statutory authority, the sections 5.6.2 and 5.6.3 of the Winona County Zoning Ordinance authorizes the board of adjustment to grant a variance if specified conditions are satisfied.

Minnesota courts recognize that "[m]unicipalities have 'broad discretionary power' in considering whether to grant or deny a variance." *Krummenacher*, 783 N.W.2d at 727 (quoting *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983)). But the same is true of conditional use permits. *Zylka v. City of Crystal*, 167 N.W.2d 45, 49 (Minn. 1969) (recognizing that "provisions authorizing the issuance of special-use [or conditional use] permits are intended to provide more flexibility in land-use control than provisions authorizing a variance" and that the local zoning authority "has broad

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

discretionary power to deny an application for a special-use [or conditional use] permit"). And in both cases, the discretion of a local zoning authority or board of adjustment to grant or deny the request is limited by a requirement that such decision must not be arbitrary or unreasonable. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015) (conditional use permits); *Krummenacher*, 783 N.W.2d at 727 (variances).

In other words, Minnesota law grants local zoning authorities or boards of adjustment the discretion to grant a conditional use permit or variance. In each case, however, that discretion is restricted by specific criteria that must be applied in making the decision and by the subsequent review by Minnesota courts, who will reverse either decision of it was arbitrary or unreasonable. While the criteria applicable to a variance generally impose a higher burden on an applicant than the criteria for a conditional use permit, the discretion of the local zoning authority or board of adjustment is substantively restricted in the same manner, and to the same extent, in both cases. Thus, for the same reasons that the Minnesota Supreme Court has recognized a protected property interest in an application for a conditional use permit, Minnesota law also recognizes that an applicant for a variance has a protected property interest in the variance application itself. Winona County and the activist groups who intervened as defendants in this proceeding therefore are not entitled to summary judgment on this basis.

B. Winona County Deprived Plaintiffs of a Protected Interest without Due Process of Law.

"The basic rights of procedural due process required in [a quasi-judicial zoning proceeding] are reasonable notice of hearing and a reasonable opportunity to be heard."

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

Barton Contracting, 268 N.W.2d at 716; *accord Anderson v. Douglas Cnty.*, 4 F.3d 574, 578 (8th Cir. 1993). Nonetheless, "in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play." *Morgan v. United States*, 304 U.S. 1, 14 (1938). Consistent with this principle, a sham hearing is not sufficient to satisfy the requirements of due process—instead, "[a] fair hearing is a fundamental requisite." *Juster Bros., Inc. v. Christgau*, 7 N.W.2d 501, 508 (Minn. 1943) (emphasis added). And a fair hearing requires an unbiased and impartial decisionmaker. *Schweiker v. McClure*, 456 U.S. 188, 196 (1982); *Buchwald v. Univ. of Minnesota*, 573 N.W.2d 723, 727 (Minn. Ct. App. 1998); *Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. Ct. App. 2003); *Deli v. Univ. of Minnesota*, 511 N.W.2d 46, 50 (Minn. Ct. App. 1994); *see Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) ("Due process guarantees 'an absence of actual bias' on the part of a judge." (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

As this Court has previously recognized, and as fully set forth in Daley Farm's Initial Memorandum, the factual record in this case demonstrates that Plaintiffs were not afforded a fair hearing before an impartial and unbiased decisionmaker. Thus, the record demonstrates that Plaintiffs were deprived of their fundamental right to due process of law. Winona County and the activist groups who intervened as defendants in this proceeding therefore are not entitled to summary judgment on this basis.

CONCLUSION

As set forth herein, as well as in Daley Farm's Initial Memorandum, the undisputed facts conclusively demonstrate that the Winona County Board of Adjustment

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

did not deny Daley Farm's Variance Application within 60 days after receiving the zoning request on remand. Accordingly, Daley Farm respectfully requests that this Court grant its motion for summary judgment, and deny the motions for summary judgment filed by Winona County and the activist groups who intervened as defendants in this proceeding, with respect to Count VII of the Supplemental Complaint. Daley Farm further requests that this Court issue an order declaring that the Variance Application was automatically approved under Minnesota Statutes § 15.99 and directing Winona County to take all actions necessary to issue the variance requested in such application.

The undisputed facts also conclusively demonstrate that the Winona County Board of Adjustment acted arbitrarily and capriciously, and unreasonably, in denying Daley Farm's remanded Variance Application. Accordingly, Daley Farm respectfully requests that this Court grant its motion for summary judgment, and deny the motions for summary judgment filed by Winona County and the activist groups, with respect to Daley Farm's appeal from the denial of the remanded Variance Application and order the County to grant the variance as requested in the Variance Application.

Finally, because Winona County and the activist groups are not entitled to judgment as a matter of law on Plaintiffs' constitutional claims, Daley Farm respectfully requests that their motions for summary judgment on such claims be denied.

Filed in District Court
State of Minnesota
7/13/2023 12:17 PM

Dated this 13th day of July, 2023.

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