STATE OF MINNESOTA **DISTRICT COURT**
COUNTY OF WINONA **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 REPLY IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

The elected decisionmakers of Winona County have placed a reasonable limit on the size of local feedlots in order to protect the community's drinking water supply while still supporting local farmers. Plaintiffs sought permission to violate this local law meant to protect the *community*, so that they could expand their *individual business* and profits. The Winona County Board of Adjustment ("Board of Adjustment" or "Board") twice declined to grant Plaintiffs permission to violate the local law. But Plaintiffs will not accept this answer. Instead, they have appealed the most recent denial to this Court, alleging conspiracy and bias against them, largely based on old facts that have already been adjudicated. Plaintiffs' arguments are unsupported by both the record and Minnesota law.

Defenders of Drinking Water and Land Stewardship Project are two community groups that include county residents who live near and would be affected by Plaintiffs' expansion (collectively "Intervenor-Defendants"). Both groups oppose Plaintiffs' expansion because it flies in the face of the law the *community* established to protect its drinking water and other natural resources. It would be clearly contrary to the intention of the Winona County Zoning Ordinance (hereinafter "Ordinance") to allow an already too-large feedlot like Plaintiffs' to grow to *quadruple* the local limit, especially when the local law specifies such feedlots are supposed to get smaller, not larger. It makes perfect sense then that the Board of Adjustment would deny Plaintiffs' variance request. Indeed, if Plaintiffs were granted the variance, it could eviscerate the animal unit cap altogether, as any other feedlot could qualify for a variance by simply asserting it wanted to employ more family members, as Plaintiffs did.

As shown by the briefing of Winona County and Intervenor-Defendants, the Board of Adjustment's decision was legally valid, factually supported, without bias and without constitutional issue, and the Board of Adjustment made its decision within the proper timeline under Minn. Stat. § 15.99. Given this, and in light of the significant deference owed to the Board, there is no basis for this Court to overturn the Board's decision. Therefore, Intervenor-Defendants ask this Court to grant the Motions for Summary Judgment made by Winona County and Intervenor-Defendants, deny the Motion for Summary Judgment of the Plaintiffs, and dismiss this case in its entirety.

ARGUMENT

I. Plaintiffs' Appeal of the Variance Decision Must Be Dismissed Because the Decision Was Free of Legal and Factual Errors (Count VI)

At the outset, Plaintiffs challenge Winona County's and Intervenor-Defendants' (collectively, "Defendants") recitation of the standard of review applicable to appeals of zoning

decisions. Plaintiffs try to distinguish the cases cited by Defendants as inapplicable because they address zoning decisions beyond just variances. However, "the standard of review is the same for all zoning matters, namely, whether the zoning authority's action was reasonable." *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416–17 (Minn. 1981). While the standard for all zoning matters is reasonableness, "the nature of the matter under review" such as a conditional use permit, a variance, or a special use permit, "has a bearing on what is reasonable." *Id.* at 417.

The standard for determining reasonableness was set forth clearly and succinctly by the Minnesota Supreme Court in 2015 in *RDNT, LLC v. City of Bloomington*. 861 N.W.2d 71 (Minn. 2015). There, the Minnesota Supreme Court explained that a reviewing court may only reverse a zoning authority's decision if the local government acted "unreasonably, arbitrarily, or capriciously." *Id*. at 75–76 (quoting *Schwardt v. Cnty. of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003)). The court further explained the two steps for determining whether a decision was unreasonable, arbitrary, or capricious. *Id*. First, the court determines whether the board's stated reasons were legally sufficient. *Id.* Second, if the reasons were legally sufficient, the court determines if the reasons "had a factual basis in the record." *Id.* If the answer at both steps is yes, the decision is not unreasonable, arbitrary, or capricious, and must be affirmed.

Plaintiffs attempt to argue that this is only one part of the standard of review, and that the Court must also perform a separate—and undefined—analysis to determine whether the Board's decision was "arbitrary, capricious, or oppressive." *See* Pls.' Reply Mem. at 12. Plaintiffs point to two Minnesota Supreme Court cases that use slightly different phrasing for the standard of review to support their argument. But in fact, *RDNT* is clear that courts should use the two-step analysis to determine whether a local body's decision was unreasonable, arbitrary, or capricious—there is not a separate "arbitrary and capricious" or "oppressiveness" analysis courts are required to apply

in addition to considering legal and factual errors. *RDNT*, 861 N.W.2d at 75 ("There are two steps in determining whether a city's denial was unreasonable, arbitrary, or capricious.").

Prior to *RDNT*, courts stated the same general standard of review in slightly different terms—which is natural, given the significant number of cases that deal with zoning appeals. But since *RDNT* was decided in 2015, the language used by the appellate courts has been standardized to follow the Supreme Court's articulation of the two-step analysis. *See Puce v. City of Burnsville*, 971 N.W.2d 285, 293-94 (Minn. App. 2022) ("We ask whether the zoning authority's action was reasonable, and whether there is a reasonable basis for the decision, or on the other hand, whether the decision is unreasonable, arbitrary, or capricious. . . . The first question is whether the reasons given by the city were legally sufficient. . . . The second question is whether the City's reasons had a factual basis in the record." (internal quotations omitted)), *cert. granted,* (May 17, 2022); *Moore v. Comm'r of Morrison Cnty. Bd. of Adjustment*, 969 N.W.2d 86, 91 (Minn. App. 2021) ("To determine whether the board acted reasonably, we consider whether the board's stated reasons were legally valid and whether the decision had a factual basis in the record."); *In re Goodpaster*, No. A22-0982, 2023 WL 2847347, at *2 (Minn. App. Apr. 10, 2023) ("Caselaw has expressed the standard in various ways . . . . To determine if a county board's decision was contrary to reason, we consider whether it articulated legally sufficient reasons with a factual basis in the record.").

The two cases cited by Plaintiffs to support their interpretation of the standard were decided well before the Supreme Court decided *RDNT* in 2015. *See* Pls.' Reply Mem. at 11-12 (relying on *VanLandschoot v. City of Mendota Heights* decided in 1983, and *In re Stadsvold* decided in 2008). Thus, two Supreme Court cases decided prior to *RDNT* do not provide useful guidance for this Court. This Court should apply the standard of review as described by the collective Defendants

as it is the most recent Minnesota Supreme Court precedent and the expression of the standard used by courts presently.

A. The Board of Adjustment's Decision Must Be Upheld Because It Was Legally Supported

Under the standard from *RDNT*, the Court's first step in reviewing the Board of Adjustment's decision is to determine whether the Board's reasons for denying the variance were legally valid. On this point, Plaintiffs continue to assert that the Board of Adjustment's decision was not legally valid because satisfaction of seven of the eight variance criteria was enough to grant Plaintiffs' variance. Plaintiffs rely on their assertion that criterion 6 is an exception to criterion 3, and that the Board of Adjustment's tie vote on criterion 6 meant the Board did not adopt a finding that the exception applied and the variance was therefore granted. However, the plain language of the Ordinance defeats Plaintiffs' argument.

The rules governing statutory interpretation also apply to the interpretation of ordinances. *Cannon v. Minneapolis Police Dep't*, 783 N.W.2d 182, 192-93 (Minn. App. 2010). Therefore, to interpret an ordinance, the court first looks at the plain language to determine whether the ordinance is ambiguous. *Id.* at 193. An ordinance is ambiguous only if it is susceptible to more than one reasonable interpretation. *Id.* If an ordinance is clear and free from ambiguity, the plain meaning controls and the court will not look beyond the express language of the ordinance. *Haghighi v. Russian–Am. Broad. Co.*, 577 N.W.2d 927, 929 (Minn. 1998); *see also* Minn. Stat. § 645.16. Courts generally may not re-write an ordinance under the guise of statutory interpretation. *Laase v. 2007 Chevrolet Tahoe*, 776 N.W.2d 431, 438 (Minn. 2009) (citing *Genin v. 1996 Mercury Marquis*, 622 N.W.2d 114, 119 (Minn. 2001)).

The plain language of Ordinance § 5.6.2 states, "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*: [listing the eight variance criteria]." Winona County, Minn., Zoning Ordinance § 5.6.2 (Dec. 14, 2010) (emphasis added). There is no ambiguity in this language, which uses ordinary, well-understood terms. *See* Minn. Stat. § 645.08 (in plain language analysis, words are construed according to their common usage). Thus, the plain meaning of the Ordinance controls and the Court cannot look beyond the express language of the Ordinance. This language plainly prohibits the Board of Adjustment from granting a variance *unless* it makes findings of fact based upon the "following standards," which are the eight listed criteria.

Given the plain, unambiguous language of the Ordinance, what Plaintiffs seek is impossible. The language "shall make findings of fact . . . on the following standards" prohibits the Board of Adjustment from approving a variance by making findings on some of the criteria but not others. The Board of Adjustment must make findings on *all eight* criteria before it can grant a variance. In this instance, the Board of Adjustment did not make findings on all eight criteria because the Board did not agree to a finding on criterion 6. Therefore, the Ordinance plainly prohibits the Board from granting the variance. To read the Ordinance as requested by Plaintiffs would first require this Court to find the Ordinance is ambiguous and then to effectively re-write the Ordinance under the guise of statutory interpretation—something courts cannot do. *See Laase,* 776 N.W.2d at 438.

Moreover, Minnesota courts have interpreted variance requirements consistent with the Board of Adjustment's interpretation, and Plaintiffs are unable to cite opposing authority to support their assertion that criterion 6 is an exception. For example, in *Continental Property Group, LLC v. City of Wayzata,* the Minnesota Court of Appeals reviewed the City of Wayzata's

denial of a variance.[1] No. A15-1550, 2016 WL 1551693 (Minn. App. Apr. 18, 2016). There, the court walked through the variance factors the applicant had to meet and found that the applicant had not established practical difficulties. *Id.* at *4-6. Under Plaintiffs' interpretation of the variance criteria, this would be the end of the court's analysis. There would be no need for the court to consider whether the "exception" to the finding of practical difficulties applied when the court did not find there were any practical difficulties to begin with. Yet even though no practical difficulties were found, the *Continental Property* court still analyzed the next variance factor—that "[e]conomic considerations alone do not constitute practical difficulties."[2] *See id.* at *6. Thus, the court in *Continental Property* evaluated the factors for a variance in the same way as the Winona County Board of Adjustment—as co-equal factors that all must be analyzed in deciding whether to grant a variance.

Plaintiffs' interpretation of the Ordinance also directly conflicts with the history of Minn. Stat. § 394.27, subd. 7, which is where the Winona County Ordinance's variance criteria are taken from. Prior to 2011, Minn. Stat. § 394.27 did not define what it meant to have a "practical difficulty." *See Moore*, 969 N.W.2d at 91. To flesh out this meaning, the Minnesota Supreme Court developed discretionary factors that zoning authorities could consider to determine whether an

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[1] While *Continental Property* addressed the decision of a *city* zoning authority rather than a *county* zoning authority, the distinction is immaterial. The language regarding practical difficulties and economic considerations in Minn. Stat. § 462.357, the statute for city-issued variances, is identical to Minn. Stat. § 394.27, subd. 7, the statute for county-issued variances.

[2] Plaintiffs' Reply Memorandum argues that the language "[e]conomic considerations alone do not constitute practical difficulties" is not written so as to be an affirmative requirement. Plaintiffs then attempt to distinguish case law by requiring an ordinance to phrase this requirement in the exact same terms as Winona County's Ordinance in order to be authoritative. However, the exact phrasing used in Winona County's Ordinance, that "economic considerations alone do not constitute practical difficulties" is what the court considered in *Continental Property,* and the court read that language to be a co-equal variance factor that had to be established, not an exception to another factor, or a factor that somehow operated differently because of its phrasing.

applicant had shown practical difficulties. *Id.; see also In re Stadsvold*, 754 N.W.2d 323, 331, 333 (Minn. 2008); *In re Kenney*, 374 N.W.2d 271, 275 (Minn. 1985). In 2011, the Legislature amended Minn. Stat. § 394.27 to define practical difficulties in statute. *Moore*, 969 N.W.2d at 94. The Legislature's definition adopted many, but not all the factors the Supreme Court had previously articulated. Most importantly, the Legislature specifically added a new factor that stated, "economic considerations alone do not constitute practical difficulties." *Id.* at 94; Minn. Stat. § 394.27, subd. 7. The Legislature also made consideration of this and the other practical difficulty factors mandatory, as opposed to the court's prior discretionary standard. *Id.*

Plaintiffs' argument then, that the Board of Adjustment could approve Plaintiffs' variance without finding that "economic considerations alone do not constitute practical difficulties," goes against the clear history of the statute upon which Winona County's Ordinance is based. The Legislature made consideration of the entire practical difficulties standard, including this provision, mandatory. Plaintiffs' argument that Winona County must make a finding on every part of the practical difficulties test *except* this provision—one the Legislature deemed important enough to specifically add—conflicts with the clear intent of the Legislature.

Finally, even if Plaintiffs' interpretation were correct, it would be of no consequence given that the Board of Adjustment took a final overall vote on whether to grant the variance. Specifically, after voting on each of the variance criteria, the Board of Adjustment voted on whether to approve the variance as a whole. The motion failed because the vote on the motion was tied. Admin. R. 3077:3-14. As such, Minn. Stat. § 15.99, subd. 2(b) applied. This statute states, "[w]hen a vote on a . . . properly made motion to approve a request fails for any reason, *the failure shall constitute a denial of the request* provided that those voting against the motion state on the record the reasons why they oppose the request." (emphasis added). The two Board members who

voted against the motion, Dr. Heublein and Ms. Fitzgerald, stated their opposition on the record. *See* Admin. R. 3082:10-3083:7 (Dr. Heublein's reasons for voting against the motion); *see also* Admin. R. 3078:25-3080:10 (Ms. Fitzgerald's reasons for voting against the motion).

Thus, regardless of how the Board of Adjustment voted on the individual variance criteria, and regardless of whether the Court agrees with Plaintiffs' legal interpretation of the Ordinance, the Board of Adjustment did not grant Plaintiffs' variance. When the Board voted on the overall motion to approve the variance, the motion failed, and this failure constituted a "denial of the request" under Minn. Stat. § 15.99. There can be no question then that the Board's denial of the variance was legally valid. The Board of Adjustment's decision must therefore be upheld.

B. The Board of Adjustment's Decision Had a Factual Basis in the Record and Must Be Upheld

The second step for this Court in reviewing the Board of Adjustment's decision is to determine whether the Board's reasons for denying the variance had a factual basis in the record. Plaintiffs argue that the Board of Adjustment's denial on criterion 6 did not have *any* factual basis in the record because Plaintiffs' attorney made statements asserting Plaintiffs had non-economic reasons for seeking the variance.[3] Plaintiffs claim that in light of this, the Board of Adjustment could not possibly have found to the contrary. Plaintiffs take the untenable position that simply because their attorney said they had non-economic reasons for seeking the variance, this makes it so. However, the Board is not obligated to find a fact is true simply because an attorney has argued

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[3] Plaintiffs argue the section of Intervenor-Defendants' brief that explains why the variance should have been denied by an even greater degree is irrelevant since Intervenor-Defendants did not appeal the Board of Adjustment's decision. Pls.' Reply Mem. at n.15. It is true that Intervenor-Defendants did not appeal the Board's decision—they could hardly be expected to appeal a decision they agreed with to argue the Board should have gotten it "more right." Moreover, Plaintiffs appealed the Board's entire decision, not just its decision on criterion 6. Thus, Intervenor-Defendants believe it is important for this Court to know about all of the evidence that supported denying the variance, including on the other variance criteria.

it. Instead, the Board has the obligation to evaluate and weigh all the evidence and to make credibility determinations. And so long as there was *some* evidence in the record supporting the Board's decision, it must be upheld. *See RDNT*, 861 N.W.2d at 76 (finding the district court does not weigh the evidence, and instead simply reviews the record to determine whether there was legal evidence to support the board's decision); *Trisko v. City of Waite Park,* 566 N.W.2d 349, 352 (Minn. App. 1997) (not all reasons for a board's decision 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, there is abundant evidence in the record showing Plaintiffs' reasons for requesting the variance are purely economic. This evidence includes Plaintiffs' own statements, made over the course of many years, that their purpose in seeking this expansion is financial—to employ more family members in the business. *See* Int-Defs.' Mem. at 33-34 (listing various quotations by Plaintiffs and their counsel to this effect).[4] Additionally, Plaintiffs' counsel has acknowledged Plaintiffs are requesting this variance for economic reasons. *See* Admin. R. 1858 (noting the variance request is "motivated in part by economic considerations."); *see also* Admin. R. 2587:11-12 (stating, "[w]e're not denying that economic considerations are part of it[.]"). Indeed, Plaintiffs themselves have explained they are seeking this variance because it is more economic for them to expand the business on one site, rather than spreading it out on multiple sites. *See* Admin. R. 1699

[4] Plaintiffs complain that Intervenor-Defendants have "cherry-picked" statements of Plaintiffs and ignore the non-economic reasons Plaintiffs proffered. However, Intervenor-Defendants discussed Plaintiffs' alleged non-economic reasons for seeking the variance at length in our initial brief and explained why each of Plaintiffs' five proffered non-economic reasons were not a reason Plaintiffs needed a variance. *See* Int-Defs.' Mem. at 35-39. Specifically, all of Plaintiffs' non-economic reasons were either something Plaintiffs were already doing on their feedlot, or are legally required to do, regardless of the variance. Thus, these proffered reasons are not "exceptional circumstances" that would justify Plaintiffs receiving special permission to break local law. Instead, they are all things Plaintiffs can do without receiving a variance.

("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 cause significant duplication of equipment, *dramatically increase the cost of the project*, [and] decrease the efficiency of the operation[.]") (emphasis added); Admin. R. 40 ("By working together under one corporate ownership and one facility, the family can take advantage of economy of scale.").[5]

In fact, in Plaintiffs' variance request, which Plaintiffs "submitted to provide Daley Farms of Lewiston's written response to the variance criteria," Plaintiffs did not include any non-economic reasons for requesting a variance. *See* Admin. R. 1698. Instead, Plaintiffs said they were requesting the variance "because a new generation of the family desires to return to Winona County and work on the family farm. . . . 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. While the letter explains how Plaintiffs believe they satisfy the other variance criteria, their variance request is notably silent on criterion 6—providing no discussion as to any non-economic reasons for the variance. *See* Admin. R. 1698-99.

Indeed, Plaintiffs first offered their supposed non-economic reasons for needing the variance two days before the first Board of Adjustment vote. And the non-economic reasons were not statements by Plaintiffs but were instead included in a memorandum from Plaintiffs' attorney, seemingly to try to rectify this conspicuous gap in their application. *See* Admin. R. 1849-51, 2895.

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[5] Plaintiffs argue that if they were seeking this variance for purely economic reasons, they would just "achieve those economic benefits by building new facilities on separate sites," and that the reason they are not doing this is out of some abstract concern for the environment. Pls.' Reply Mem. at 27. However, Plaintiffs' own statements in the record show they strongly prefer not to expand on multiple sites because the best way to increase their revenue is to expand at their existing location. Admin. R. 40, 1698-99. In addition, the idea that a massive dairy feedlot that keeps animals in confinement, produces 46.2 million gallons of manure annually, and has significant greenhouse gas emissions will have environmental benefits is not credible. Admin. R. 1444.

It is the Board of Adjustment's job to weigh the evidence and determine which evidence is most credible. *See White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982) (noting that if there is conflicting evidence, the district court defers to the zoning authority's weighing of the evidence). In weighing the evidence, two of the Board members did not find Plaintiffs' proffered non-economic reasons credible, and instead, found the evidence showed Plaintiffs were simply seeking to employ more family members. Specifically, Dr. Heublein considered and rejected Plaintiffs' arguments that they had non-economic reasons for needing a variance. *See* Admin. R. 3060:22-3061:14. Instead, Dr. Heublein concluded Plaintiffs' need for the variance was purely economic. Admin. R. 3060:23-3061:3 ("They're needing this variance to make sure that they have the capacity to support the family that wants to come in on the business and require that. These other [non-economic] things would be there anyway."). Ms. Fitzgerald agreed with Dr. Heublein. *See* Admin. R. 3063:18-21("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."). Thus, Dr. Heublein and Ms. Fitzgerald both determined that Plaintiffs' reasons for seeking the variance were purely economic, and there is evidence in the record to support their decision.

This Court reviews the record to determine whether there was any legal evidence to support the Board of Adjustment's decision. *See RDNT,* 861 N.W.2d at 76. So long as any one of the reasons given by the Board of Adjustment is supported by a rational basis, the decision will be affirmed. *See Trisko,* 566 N.W.2d at 352. Thus, in order to succeed on this claim, Plaintiffs would have to show the Board reached a conclusion "*without any evidence* to support it." *Dietz v. Dodge Cnty.*, 487 N.W.2d 237, 239 (Minn. 1992) (emphasis added). There was not only *some* but *abundant* evidence in the record showing Plaintiffs had solely economic reasons for seeking this

variance. Because there is evidence in the record to this effect, this Court must uphold the Board of Adjustment's decision.

II. Plaintiffs' Appeal of the Variance Decision Must Be Dismissed Because the Decision Was Not Biased (Count V)

Plaintiffs continue to argue that the Board of Adjustment's decision should be overturned based on biased decisionmaking. Plaintiffs, however, have not uncovered any credible evidence that the second Board of Adjustment decision was improperly biased against them.

Plaintiffs have not identified an appropriate standard for overturning a local zoning decision based on bias under Minn. Stat. § 394.27. Nor have Plaintiffs contested the standard identified by Intervenor-Defendants: that a decisionmaker must participate in *active advocacy* relating to a specific project for a zoning decision to be overturned for bias. Int-Defs.' Mem. at 49-50. Instead, after months of discovery and multiple depositions, Plaintiffs can point to only three issues they say led to biased decisionmaking: Dr. Heublein's background research, Dr. Heublein and Ms. Fitzgerald's appointments to the Board of Adjustment, and the contents of the record on remand to the Board of Adjustment. But review of each issue reveals that none of them qualifies as evidence of bias by the Board of Adjustment or provides a basis to overturn the Board's decision.

A. Dr. Heublein's Background Research Did Not Result in Unreasonable, Arbitrary or Capricious Decisionmaking

First, Plaintiffs continue to insist that the Board of Adjustment's decision must be overturned because Dr. Heublein conducted background research, but they have not cited any case in which a court overturned a local zoning decision on this basis. Instead, Plaintiffs cite cases standing for the proposition that a local decision will be overturned if there is no evidence for the decision in the record. *See* Pls.' Reply Mem. at 17 (citing *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) ("A decision predicated on insufficient evidence . . . would be arbitrary and

capricious”); *In re: E. River Elec. Coop.,* No. A21-0885, 2022 WL 1073736, at *3 (Minn. App. Apr. 11, 2022) (“A county acts unreasonably if the reasons for its decision . . . lack a factual basis in the record.”)). But the fact that a decision will be overturned if it is unsupported by evidence *in the record* has no bearing on whether a decision must be overturned if a decisionmaker considers some additional evidence *outside of the record*.

Neither case cited by Plaintiffs considers the propriety of a local decisionmaking body looking at evidence outside of the record. In *Stadsvold*, the court remanded the zoning board’s decision when the board did not create a record of their reasons for denial sufficient for judicial review; there was no mention of evidence outside the record at all. *Stadsvold*, 754 N.W.2d at 333. In *East River Electric*, the court found that the board had created a sufficient record for review and upheld the board’s decision. *E. River Elec*., 2022 WL 1073736, at *4. The case mentions evidence outside the record only because the court refused to consider new evidence of purported bias raised on appeal by the plaintiff. *Id*. at *5 (refusing to credit plaintiff’s allegations of improper influence that were “based on information that is outside the record and being raised for the first time on appeal”). Ironically, if the Court followed *East River Electric* as Plaintiffs urge, the Court would not consider any of the deposition evidence Plaintiffs rely upon here, as such evidence is outside the Board of Adjustment’s record. Plaintiffs’ cases bolster the law cited by Intervenor-Defendants, which states that if there is a reasonable factual basis in the record for a local zoning body’s decision, it must be upheld. *RDNT*, 861 N.W.2d at 76.

Here, regardless of any background research by Dr. Heublein, the record contains a more than ample basis for her decision. Dr. Heublein testified in her deposition that she read the entire record, including a transcript of the first hearing. Aff. of Matthew Berger (Dep.), Ex. H, Heublein Tr. at 25:5-18. She also testified that she read the memorandum submitted by Plaintiffs’ attorney

in support of the variance request in advance of the second hearing. *Id*. 26:16-27:7. Then, Dr. Heublein articulated her reasons for her decision on the record, based on facts within the record, including on the critical factor—whether Plaintiffs' difficulties complying with the ordinance were non-economic. As she explained, based on Plaintiffs' own statements, Plaintiffs' purported non-economic reasons for the expansion were already in place, so the real purpose of the expansion was "to bring more revenue into the farm." Admin. R. 3061:13-14. Because Dr. Heublein's decision was based on facts in the record and expressed on the record, it was properly made.

In any case, Plaintiffs cannot establish that Dr. Heublein's background research actually affected her decision. Plaintiffs cannot point to any piece of outside information that somehow improperly influenced Dr. Heublein's decision that Plaintiffs' reasons for the variance were economic. This makes sense—no study or academic paper could provide information about Plaintiffs' specific reasons for needing a variance. Again, Dr. Heublein was clear about her reasons for believing Plaintiffs did not have non-economic practical difficulties, and they were based on information *in the record*. *See* Int-Defs.' Mem. at 33-34, 36-37.

Further, even if Dr. Heublein partially relied on her background research, this is not improper as long Dr. Heublein's ultimate decision had a basis in the record and Dr. Heublein did not actively advocate against the variance application with other Board of Adjustment members or the public. *Stalland v. City of Scandia*, No. A20-1557, 2021 WL 3611371, at *8 (Minn. App. Aug. 16, 2021). Plaintiffs try to distinguish *Stalland* by arguing that the city council member with outside knowledge did not actually rely on that knowledge in reaching his decision. Pls.' Reply Mem. at 15. But in *Stalland*, the council member's knowledge of evidence outside the record—in that case, his familiarity with the original negotiations that resulted in an express limitation on boat slips at a residential development—very clearly had an impact on his vote. 2021 WL 3611371, at

*3 (councilmember "explained that he was quite familiar with the original negotiations around the Tii Gavo development, as he was a watershed district manager at the time," and that he opposed an amendment to add more boat slips in part because of the opposition of DNR and the watershed district, which "were heavily involved in the original development agreement"). Yet the court of appeals still determined the council member's previous knowledge "did not create a technical defect." *Id.* at *8. As discussed in our initial memorandum, this case is comparable to *Stalland*. Because Dr. Heublein's decision had a basis in the record, whether she also considered background research is irrelevant. The Board of Adjustment's decision is reasonable and must be upheld.

B. The Appointments of Dr. Heublein and Ms. Fitzgerald Did Not Result in Unreasonable, Arbitrary or Capricious Decisionmaking

Next, Plaintiffs complain that the appointments of Dr. Heublein and Ms. Fitzgerald were tainted with bias. But to make this argument, Plaintiffs must depend on evidence from the *first* Board of Adjustment decision—evidence that is now entirely irrelevant to the *second* Board of Adjustment decision at issue here. Plaintiffs already received a remedy for any issues with the first decision: a new decision by an almost entirely new Board (with the exception of one member who has both times voted in favor of the Plaintiffs' variance). Order Granting Summ. J. & Remand at 8. Plaintiffs' assertion that actions related to the first decision now unacceptably taint the second decision with bias would put them in a no-lose position. Under Plaintiffs' argument, any decision by the second Board of Adjustment to deny their variance would be unacceptably tainted by bias simply because certain commissioners were on the County Commission long enough to approve appointments to the Board of Adjustment for both the original and the remanded vote. *See* Pls.' Reply Mem. at 20. Only if a decision were in Plaintiffs' favor, apparently, would Plaintiffs consider it unbiased. Unsurprisingly, Plaintiffs cite no case law in support of this untenable position—that a new decision by a new decisionmaker on remand remains tainted by alleged bias

from a previous decision. The Court must examine the purported bias of the second Board of Adjustment decision on its own merits.

Even Plaintiffs recognize that unless the Court relies on evidence related to the first vote, the evidence of bias they have presented is thin. Pls.' Reply Mem. at 20 (stating the evidence they have found of bias on the remand vote "may not seem so egregious."). Plaintiffs manage to muster only two points: that Commissioner Kovecsi appointed Dr. Heublein for "very careful reasons" and that Doug Nopar of Land Stewardship Project ("LSP") talked to Ms. Fitzgerald about applying for the Board of Adjustment. But these do not, in fact, demonstrate bias at all. Plaintiffs have no response to Ms. Kovecsi's explanation that the phrase "very careful reasons" referred to Dr. Heublein's background as a researcher, which she detailed in her application. Aff. of Matthew Berger (Dep.), Ex. K, Kovecsi Tr. at 68:21-69:7. No evidence whatsoever—only Plaintiffs' unsupported speculation—connects this innocuous phrase to actual bias against Plaintiffs. As for Ms. Fitzgerald, Plaintiffs cannot dispute that although Doug Nopar may have talked to Ms. Fitzgerald about applying for the Board of Adjustment, neither Nopar nor anyone else from LSP talked to Ms. Fitzgerald about Plaintiffs' proposed expansion. Aff. of Matthew Berger (Dep.), Ex. G, Fitzgerald Tr. at 17:23-18:4, 21:5-23. Nor can they contest Ms. Fitzgerald's testimony that she applied for the Board because she thought the experience would be useful for her work as a farmer. *Id*. at 19:17-20:35. Plaintiffs likewise cannot dispute that no one from LSP contacted Ms. Kovecsi or any other commissioners to lobby for Ms. Fitzgerald's appointment. Aff. of Matthew Berger (Deps.), Ex. J, Meyer Tr. at 33:20-34:2, 34:11-13; Ex. M, Olson Tr. at 20:23-21:4; Ex. K, Kovesci Tr. at 51:19-23.

Plaintiffs are simply wrong that Ms. Kovecsi and other commissioners were plotting to ensure the new Board of Adjustment denied Plaintiffs' request. Plaintiffs' extensive discovery,

including depositions of the commissioners, has turned up no evidence of such a plot. In addition, the idea of a conspiracy makes little sense considering the timing of the remand order. Dr. Heublein was appointed to the Board and Ms. Fitzgerald applied to join the Board before Plaintiffs' variance decision had even been remanded. At this point, nobody knew there would be a second vote on the variance application. Int-Defs.' Mem. at 55, 57. The conspiracy imagined by Plaintiffs is, therefore, implausible. Moreover, if Commissioner Kovecsi were conspiring against Plaintiffs, she would not have voted to reappoint Phillip Schwantz to the Board of Adjustment, knowing that he had already voted in favor of Plaintiffs' variance application once. *See* Aff. of Matthew Berger, Ex. AY, at 5.

Regardless of the motives of the commissioners, the cases cited by Plaintiffs only assert that Plaintiffs are entitled to unbiased *decisionmakers* (Pls.' Mem. at 55-56)—and the commissioners are not the decisionmakers in this case.[6] With respect to the actual decisionmakers, Plaintiffs cite no concrete evidence that Dr. Heublein and Ms. Fitzgerald were biased against Plaintiffs. The appointments of Dr. Heublein and Ms. Fitzgerald did not lead the Board of Adjustment to reach an arbitrary or capricious decision. The Board's decision therefore cannot be overturned for bias.

C. The Second Staff Report Did Not Result in Unreasonable, Arbitrary or Capricious Decisionmaking

Finally, Plaintiffs assert that the actions of the county attorney or county staff, in allegedly limiting the record for the second Board of Adjustment vote or purportedly leaving information out of the staff report, somehow resulted in a biased decision. But county employees should not

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[6] Plaintiffs make this argument citing cases under the due process clause. Notably, Plaintiffs failed to contest Intervenor-Defendants' argument that these cases are entirely irrelevant, as they relate to due process claims, not claims under Minn. Stat. § 394.27, subd. 9. Int-Defs.' Mem. at 47-48. Nonetheless, even under the standard quoted by Plaintiffs, only the bias of the decisionmakers themselves matters.

be accused of bias simply for doing their jobs in a manner Plaintiffs—who are not planning directors or county attorneys—disagree with. The staff report is not biased simply because it did not repeat every piece of evidence in the record, or because Plaintiffs do not like its findings. As the record holds ample evidence that Plaintiffs' variance application did not meet all the required factors (*see* Int-Defs.' Mem. at 33-47), the staff report was fully supported and reasonable.

In any case, contrary to Plaintiffs' assertions of a limited record, Winona County allowed Plaintiffs numerous opportunities to supplement the record for the second vote. Their attorney submitted a 23-page memorandum arguing his clients' case with alternate findings of fact to the Board; Plaintiffs made a lengthy presentation with a PowerPoint at the Board meeting; and Plaintiffs and their attorney answered numerous questions from Board members. Admin. R. 2879-2901, 2934-54, 2992-3031. If Plaintiffs did not convince the Board of Adjustment they should receive a variance, it was not because they were denied the opportunity to present their evidence. Notably, *only* Plaintiffs were given this opportunity—no opponents were allowed to speak at the public hearing or submit any evidence before the second vote. Admin. R. 2876. Arguably, on remand the process *favored* Plaintiffs.

Moreover, Plaintiffs fail to cite any cases supporting their assertion that bias by county staff would make a local body's decision arbitrary or capricious. On the contrary, the Court of Appeals has held that even misinformation from staff, "who, notably, are not the final decision-makers," cannot constitute a basis to overturn a land-use decision. *See Stalland*, 2021 WL 3611371, at *7. Accordingly, the actions of the staff did not make the Board of Adjustment's decision arbitrary or capricious.

In their attempt to argue that the second Board of Adjustment decision was biased, Plaintiffs have been forced to grasp at some remarkably thin straws—straws that break entirely

upon the least pressure of examination. Because Plaintiffs cannot show that Dr. Heublein or Ms. Fitzgerald engaged in active advocacy against Plaintiffs' variance request, and because this case does not present the "rare instance" where a decision "has no rational basis," this Court should defer to the Board of Adjustment's decision and uphold the decision to deny the variance. *See Stalland*, 2021 WL 3611371, at *5; *White Bear Docking & Storage*, 324 N.W.2d at 176.

III. Defendants Are Entitled to Summary Judgment on Plaintiffs' Constitutional Claims (Counts III, IV, VIII, and IX) [7]

Intervenor-Defendants next turn to Plaintiffs' arguments on their constitutional claims. Plaintiffs argue against summary judgment on their procedural due process claims by raising two unfounded legal arguments.[8] First, Plaintiffs take aim at zoning generally, arguing that the Court should consider Plaintiffs' ability to use their property as they see fit as a protected property interest. Next, Plaintiffs ask the Court to view variances and conditional use permits equally, and hold, contrary to well-established caselaw, that Plaintiffs have a protected property interest in their variance application. Neither argument has merit. Zoning has long been upheld as a lawful exercise of a state's ability to regulate land use, defeating Plaintiffs' suggestion that an ordinance restricting their unfettered ability to use their property gives them an entitlement that supports a due process claim. And variances are materially different from conditional use permits. The discretion afforded to decisionmakers to evaluate variance applications has long been viewed as sufficient to avoid

[7] Plaintiffs did not move for summary judgment on these claims, suggesting they recognize the weakness of their constitutional claims. If Plaintiffs believed they were entitled to judgment as a matter of law, presumably they would have requested summary judgment. Moreover, in opposing Defendants' motions for summary judgment, Plaintiffs do not identify any disputed material facts that would preclude summary judgment in favor of Defendants. By only citing law as the basis of their opposition, Plaintiffs implicitly acknowledge that this case is ripe for summary judgment.

[8] By not responding to Defendants' arguments about substantive due process, Plaintiffs implicitly acknowledge they are only pursuing procedural due process claims.

creating a claim to entitlement supporting a due process claim. Defendants are therefore entitled to judgment as a matter of law on all of Plaintiffs' due process claims.

A. Plaintiffs Do Not Have a Protected Property Interest to Farm However They Wish

Plaintiffs first argue against summary judgment on their constitutional claims by broadly claiming that they have a protected property interest to farm their land however they want. According to Plaintiffs, the protected property interest at stake here is the ability of Plaintiffs to use and enjoy their land by violating the animal unit cap in Ordinance § 8.4.2.

The fundamental problem with Plaintiffs' argument is that zoning ordinances, including Winona County's, are lawful ways for a local government to "regulate the use of privately owned land within its borders." *White v. City of Elk River*, 840 N.W.2d 43, 49 (Minn. 2013). As Plaintiffs recognize, this has been the law for nearly a century. *See Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding the constitutionality of zoning as a lawful use of a state's police powers). Additionally, by enacting a procedure for landowners to seek variances from the limitations in the Ordinance, Winona County ensured its regulation of private property is on sturdy constitutional footing. *See, e.g.*, *City of Waconia v. Dock*, 961 N.W.2d 220, 236-37 (Minn. 2021) (noting that protective doctrines like variances ameliorate concerns that zoning infringes on a landowner's due process rights).

Despite the fact that no court has recognized such an interest, Plaintiffs ask this Court to find that Plaintiffs have a protected property interest "to freely use their property for the lawful purpose of dairy farming." Pls.' Reply Mem. at 33. Plaintiffs cite no case law that supports this singular idea, and Intervenor-Defendants have found none.[9] Instead, Plaintiffs cite *Snaza v. City*

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[9] In cases involving variance applications, courts have only considered whether the *variance application* creates a protected property interest; they do not even consider the existence of some protected property right to use property free from the limitations of zoning. And as explained

of Saint Paul, Minnesota, 548 F.3d 1178, 1183 (8th Cir. 2008). But in *Snaza*, the Eighth Circuit *rejected* the proposition that simply restricting the use of one's property through zoning infringes on a property owner's fee simple title in the land. *Id.* The Eighth Circuit explained that although the zoning ordinance prevented the property owner from operating an outdoor auto sales lot on their property, the more than 70 other ways the property could lawfully be used defeated the suggestion that the property owner had been denied fee simple title in the land. *Id.*

The same is true here. Winona County is not prohibiting Plaintiffs from operating a dairy farm on their land, something Plaintiffs have been doing "for more than 160 years." Pls.' Mem. at 1. Instead, Winona County is lawfully exercising its right to restrict the size of feedlots through its Ordinance § 8.4.2.[10] As in *Snaza*, because Plaintiffs are free to run their dairy farm at its current 2,160.2 animal unit size, Plaintiffs' use and enjoyment of their land has not been unconstitutionally denied.[11] Additionally, the due process clause only supports "claims of entitlements to certain

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below, those cases reject the idea that a variance creates a protected property interest. *Solum v. Bd. of Cnty. Comm'rs for Cnty. of Houston*, 880 F. Supp. 2d 1008, 1012 (D. Minn. 2012) (finding no protected property interest in variance application); *Cont'l Prop. Grp., Inc. v. City of Minneapolis*, No. A10-1072, 2011 WL 1642510, at *4 (Minn. App. May 3, 2011) ("Similarly, CPG did not have a protected property interest in its variance application because an applicant has no claim of entitlement to a variance.").

[10] Plaintiffs notably do not plead that Winona County Zoning Ordinance § 8.4.2. is unconstitutional on its face or as applied. *See generally* Pls.' Compl.; Pls.' Supp. Compl. Instead, Plaintiffs plead that the "denial of Daley Farm's Variance Application" is the act that gives rise to the due process violation. Pls.' Supp. Compl. ¶ 156. Even so, while the ability of a state to regulate private land is not absolute, Intervenor-Defendants have found no cases in which a court held that a lawfully enacted zoning ordinance that caps the size of a feedlot is an unconstitutional limitation on private property.

[11] Plaintiffs' feedlot is larger than the current 1,500 animal unit cap because it was operating at this size when Ordinance § 8.4.2. came into effect. Plaintiffs' feedlot is thus operating as non-conforming use. *See* Ordinance § 3.2.2.1. (explaining non-conforming uses). It has long been the law in Minnesota that a local government "is not required to permit the expansion of nonconformities." *Cnty. of Freeborn v. Claussen*, 203 N.W.2d 323, 325 (Minn. 1972). And it is the intent of the Ordinance that "all non-conformities shall be gradually eliminated and eventually brought into conformity." Ordinance § 3.2.1.

benefits." *Snyder v. City of Minneapolis*, 441 N.W.2d 781, 791 (Minn. 1989). But Plaintiffs do not have an entitlement to use their land without restriction—due to zoning generally—or expand their feedlot to 5,968 animal units—due to Ordinance § 8.4.2 specifically. Therefore, Plaintiffs do not have a property interest protected by the Fourteenth Amendment to freely use their land for dairy farming without any limitations whatsoever.[12]

B. Plaintiffs Do Not Have a Protected Property Interest in Having Their Variance Granted

Variances also do not give rise to a protected property interest because decisionmakers have broad discretion to grant or deny the request. This discretion is fatal to Plaintiffs' claim because "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Hale v. Viking Trucking Co.*, 654 N.W.2d 119, 125 (Minn. 2002) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Plaintiffs try to avoid this conclusion by arguing that they have a protected property interest in having their variance granted because the Board of Adjustment's discretion to deny the variance is substantially limited. This lack of discretion, Plaintiffs assert, effectively means a variance follows as a matter of right upon a completed application, as with conditional use permits, giving rise to a claim to entitlement that supports a due process claim. Plaintiffs' argument ignores well-established law.

[12] Plaintiffs make too much of the Court's prior order adjudicating summary judgment related to the Board of Adjustment's first vote. The Court's statement that, "as a matter of law, . . . the due process rights of Plaintiffs were violated" flowed from the Court's conclusion that the Board of Adjustment's first decision was improperly tainted by bias. Because the Court did not independently evaluate Plaintiffs' constitutional challenges to the Board of Adjustment's decision or analyze whether Plaintiffs had a protected property interest, it is wrong to suggest that the Court has already determined Plaintiffs have a protected property interest in having their variance granted.

First, Minnesota courts have long recognized that conditional use permits and variances are different. *See, e.g.*, *Kismet Invs., Inc. v. Cnty. of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000) ("Thus, variances are distinguishable from special- or conditional-use permits[.]"); *Westling v. City of St. Louis Park*, 170 N.W.2d 218, 355 (Minn. 1969) ("Variances are to be distinguished from special uses, or permits for special uses, under zoning ordinances[.]"); *Zylka v. City of Crystal*, 167 N.W.2d 45, 48-49 (Minn. 1969) (highlighting uniqueness of variances and stating, "[i]n theory, if not in practice, provisions authorizing the issuance of special-use permits are intended to provide more flexibility in land-use control than provisions authorizing a variance."). Second, under settled law, local decisionmakers are given wide discretion in evaluating variance applications. *See, e.g.*, *Solum*, 880 F. Supp. 2d at 1014 ("[A] local board of adjustment has broad discretion to grant or deny a variance."); *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 727 (Minn. 2010) ("Municipalities have 'broad discretionary power' in considering whether to grant or deny a variance." (quoting *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983)). Third, Minnesota law establishes that different amounts of discretion are given to decisionmakers when evaluating these two types of land use applications. *Compare* Minn. Stat. § 394.301, subd. 2 ("Conditional use permits *shall* be issued"), *with* Minn. Stat. § 394.27, subd. 7 ("Variances *may* be granted") (emphases added). In sum, variances are not granted as a matter of right when the specified conditions are met—unlike conditional use permits—but instead are granted according to the zoning body's broad discretion. *Kismet*, 617 N.W.2d at 90. This means a variance applicant does not have an entitlement to a variance, and the application therefore cannot support a due process claim.

Most importantly, Plaintiffs' argument is at odds with Minnesota cases that have expressly concluded there is no protected property interest in a variance application. *Cont'l Prop. Grp.*, 2011

WL 1642510, at *6 ("Because CPG did not have a protected property interest in its CUP and variance applications, we conclude that it had no constitutional right to due process in the application-review process."); *Solum*, 880 F. Supp. 2d at 1012-13 (finding no protected property interest in variance application). This is also the law elsewhere. *See, e.g.*, *33 Seminary LLC v. City of Binghamton*, 120 F. Supp. 3d 223, 248 (N.D.N.Y. 2015) (holding no property interest in variance application because the zoning board of adjustment enjoyed "considerable discretion" in evaluating the request); *Bauss v. Plymouth Twp.*, 408 F. Supp. 2d 363, 367-68 (E.D. Mich. 2005) (no protected property interest in zoning variance because board has discretion to approve or deny the request).

The Ordinance and Minnesota law vest the Board of Adjustment with discretion to grant or deny variance requests. This discretion means Plaintiffs are not *entitled* to a variance that would quadruple the size of their feedlot. Thus, Plaintiffs do not have a protected property interest in having their variance granted, and their due process claims fail as a matter of law.

C. Plaintiffs Received Adequate Due Process

Plaintiffs' due process claims also fail because the Board of Adjustment's process and vote were constitutionally fair. Plaintiffs received all of the procedural due process they would be due if they could establish they had a protected property interest.

As a starting point, under due process law, the Board of Adjustment is presumed to be impartial; Plaintiffs therefore have the burden of proving otherwise. *See In re Kahn*, 804 N.W.2d 132, 137 (Minn. App. 2011) ("Ultimately, there is a presumption of administrative regularity, and the party claiming otherwise has the burden of proving a decision was reached improperly." (quotation marks omitted)). Overcoming this burden requires more than bald allegations that the decisionmaker was biased. The United States Supreme Court has repeatedly recognized that what rises to the level of a due process violation for bias is only a rare and extreme case. *See Caperton*

v. A.T. Massey Coal Co., 556 U.S. 868, 898-890 (2009). Indeed, the United States Supreme Court has only recognized four ways decisionmaker bias can rise to the level of a violation of the due process clause. The first is when the decisionmaker has a "direct, personal, substantial, pecuniary interest" in the outcome of the case. *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The second is when the decisionmaker is the victim of the conduct before them. *See Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (noting the personal nature of the attacks against the judge jeopardized the judge's ability to remain fair when deciding contempt charges). The third is when the adjudicator both makes final decisions and investigates the dispute before him. *See In re Murchison*, 349 U.S. 133, 137 (1955) (holding that due process was violated when judge was permitted to act as grand jury and then try the same person as a result of his investigation). The fourth is when an individual with a personal stake in the case has a significant and disproportionate influence in placing a particular judge on that case through campaign contributions. *See Caperton*, 556 U.S. 868 at 884.

None of these situations are present here. Plaintiffs claim certain members on the Board of Adjustment deprived them of a constitutionally fair hearing on their variance application because of a generalized claim of bias stemming from one member's tangential involvement with LSP. This falls well short of what Plaintiffs must show. *See, e.g.*, *Violette v. Midwest Printing Co.*, 415 N.W.2d 318, 325-26 (Minn. 1987) (ruling that two appellate court judges are not biased despite publicly stating their opinions about the constitutionality of the relevant statute before hearing a case based on that statute); *Grand Am. Rest. Co. v. City of St. Paul*, No. A11-1124, 2012 WL 2077314, at *7 (Minn. App. June 11, 2012) (reasoning that "it was not improper for [the public . decisionmaker] to receive opinions and information from his constituents"). Plaintiffs cannot point to any actual evidence of bias. And under the due process clause, mere prior involvement with an advocacy organization that has taken a position on a case is not sufficient "bias" to rise to the level

of a procedural due process violation. Therefore, Plaintiffs' constitutional claims must be dismissed.

IV. Defendants Are Entitled to Summary Judgment on Plaintiffs' 60-Day Rule Claim Because Winona County Complied with Minn. Stat. § 15.99 (Count VII)

Finally, Plaintiffs are simply wrong that Intervenor-Defendants did not respond to the argument that Winona County failed to comply with the 60-day rule in Minn. Stat. § 15.99. Pls.' Reply Mem. at 3, n.1. In their opening memorandum, Intervenor-Defendants stated that they disagreed with Plaintiffs' position on the 60-day rule, and that they "adopt and incorporate the arguments of Defendant Winona County on Plaintiffs' Count VII." Int-Defs.' Mem. at 2-3. Intervenor-Defendants also requested summary judgment on all of Plaintiffs' "remaining claims," which includes the 60-day rule claim. *Id*. at 64. Thus, Intervenor-Defendants are entitled to address this claim on reply.

Plaintiffs' arguments on the merits of this claim are equally misguided. Plaintiffs advance multiple arguments in support of their proposition that Winona County was required to make a decision on the remanded variance application within 60 days of the Court's January 25, 2021 order. Plaintiffs' arguments, however, are belied by the plain language of the statute. The statute requires Winona County to "approve or deny within 60 days a written request relating to zoning." Minn. Stat. § 15.99. The written request identified in Minn. Stat. § 15.99 is Plaintiffs' application submitted in November 2018, which Winona County properly acted on in February 2019 (less than 60 days after the Minnesota Pollution Control Agency's final decision on environmental review). Pls.' Compl. ¶¶ 63-64. Nowhere in the statute is there a reference or suggestion that the 60-day deadline restarts when a zoning application is remanded back to the decisionmakers for a revised opinion. Plaintiffs' argument would require this Court to add language to the statute, something the Minnesota Supreme Court has repeatedly rejected. *See, e.g., Cnty. of Dakota v. Cameron*, 839

N.W.2d 700, 709 (Minn. 2013) (refusing to add "functional equivalence" to the definition of comparable property in Minn. Stat. § 117.187); *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 604 (Minn. 2014) (refusing to add "plausible" to Minn. R. Civ. P. 8.01); *Reetz v. City of St. Paul*, 956 N.W.2d 238, 246 (Minn. 2021) (refusing to supply meaning to statute that the legislature chose not to include). If the Legislature intended Minn. Stat. § 15.99 to apply following remand, it would have said so explicitly. *See Seagate Tech, LLC v. W. Dig. Corp.*, 854 N.W.2d 750, 759 (Minn. 2014).

Moreover, because the failure to comply with the 60-day rule results in a "harsh, extraordinary remedy," "[c]ourts must narrowly construe" Minn. Stat. § 15.99 against its application. *Harstad v. City of Woodbury*, 902 N.W.2d 64, 77 (Minn. App. 2017) (quoting *Moreno v. City of Minneapolis*, 676 N.W.2d 1, 6 (Minn. App. 2004)); *see also Motokazie! Inc. v. Rice Cnty.*, 824 N.W.2d 341, 359 (Minn. App. 2012) (finding that Minn. Stat. § 15.99 should be construed narrowly because "the legislature intends to favor the public interest as against any private interest" (quoting *Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 543 (Minn. 2007))). Compared to Plaintiffs' private interest in the variance, Winona County's interest in enforcing the feedlot cap and allowing deviation from the official controls through the variance procedure is public. Thus, the Court should narrowly construe Minn. Stat. § 15.99, apply the statute as written, and conclude that the 60-day deadline does not automatically restart upon remand.

This conclusion is underscored by the Court's remand order. There, the Court remanded the case "back to the 2021 Winona County Board of Adjustment for further hearing on Plaintiffs' application." Order Granting Summ. J. & Remand at 8.[13] The Court did not order Plaintiffs to

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[13] Another flaw in Plaintiffs' reasoning is identifying when the 60-day clock supposedly restarted. Was it when the Court orally granted summary judgment from the bench after the conclusion of

submit a new application, allow Plaintiffs to amend their application, or otherwise suggest that by operation of remand Plaintiffs' application would be deemed new. Instead, the Court's remand order clarifies that the application at issue here remains the November 16, 2018, application. Since Winona County took action on that application within the 60-day deadline in Minn. Stat. § 15.99, Plaintiffs' claim that this Court must order issuance of the variance due to the 60-day rule fails, and this claim must be dismissed.

CONCLUSION

Plaintiffs' allegations that the Board of Adjustment denied their variance due to a conspiracy of bias against them are entirely unsupported by the evidence and the law in this case. The Board of Adjustment made a reasonable, legally, and factually supported decision that this Court must uphold. Intervenor-Defendants ask this Court to affirm the Board of Adjustment's denial of Plaintiffs' variance request and grant summary judgment in favor of Intervenor-Defendants and Winona County on all remaining claims in the case: Counts III and IV of the original Complaint and Counts V, VI, VII, VIII, and XI of the Supplemental Complaint. Intervenor-Defendants similarly ask that this Court deny Plaintiffs' Motion for Summary Judgment on Counts V, VI, and VII.

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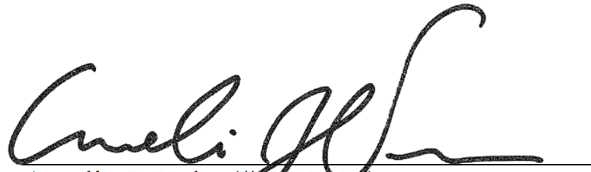
the hearing, when the Court's written summary judgment order was issued, or after the Court resolved the parties' reconsideration requests? Given the extraordinary remedy of Minn. Stat. § 15.99, an interpretation that invites ambiguity for when the 60-day deadline starts must be avoided.

Dated: July 27, 2023



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