STATE OF MINNESOTA | DISTRICT COURT

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

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

Plaintiffs,

vs.

County of Winona,

Defendant,

and

Land Stewardship Project, Defenders of Drinking Water,

Intervenors/
Defendants.

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

DEFENDANT COUNTY OF WINONA'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSIVE MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In response to the County's Motion for Summary Judgment, Daley Farm concedes it applied for a variance because of its economic motivation. Daley Farm identified no legitimate non-economic considerations motivating its application; any bias, prejudgment, or procedural violations; nor any constitutionally protectible entitlement. The Board's decision was reasonable and based on substantial evidence in the record. In

light of the deferential standard of review, the Court must affirm the denial of this massive and unprecedented variance application.

LEGAL STANDARD

Daley Farm takes issue with the County's statement of the standard of review for quasi-judicial municipal zoning decisions because the County allegedly cited no cases where variances were at issue. Daley Farm is flat wrong. *See, e.g.*, S*agstetter v. City of St. Paul*, 529 N.W.2d 488, 491 (Minn. App. 1995); *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."); *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983). Indeed, Daley Farm could have readily dispelled its obvious confusion had it simply looked to the well-settled precedent cited by the County. Instead, Daley Farm attempts to parse the *VanLandschoot* opinion like an ambiguous statute. 336 N.W.2d at 508; *Pls.' Mem. at 11* ("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.'"). This focus is especially peculiar because the *VanLandschoot* Court quoted two decisions involving *conditional use permits* not *variances*. *See VanLandschoot*, 336 N.W.2d at 508 (quoting *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982) ("Having made an independent examination of the City's quasi-judicial decision, as we must, we do not find, as did the trial court, … that the

reasons assigned by the council do not have 'the slightest validity.'")); *C. R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981) ("A recent decision settled … the scope of our review in zoning matters…. We are thus required to assess the legal sufficiency of the reasons given by the council and to determine whether, if legally sufficient, they had a factual basis."). Quite simply, "arbitrariness/capriciousness" and "reasonableness" are two sides of the same coin: "We examine the municipality's action to ascertain whether it was arbitrary and capricious, … or whether the reasons given by the body were legally sufficient and had a factual basis." *VanLandschoot*, 336 N.W.2d at 508.[1] The law is clear:

> A reviewing court will set aside a [municipality's] decision in a zoning variance matter if the decision is ***unreasonable***. ***Reasonableness*** is measured by the standards set out in the [municipality's] ordinances. ***Reasonableness*** *can be stated in terms of what is* ***not arbitrary and capricious***. The [municipality's] … decision will only be reversed if its stated reasons are ***legally insufficient*** or ***without factual basis***.

Sagstetter, 529 N.W.2d at 491 (emphasis added, quotations omitted).

> Our case law distinguishes between zoning matters which are legislative in nature (rezoning) and those which are quasi-judicial (variances and special use permits). Even so, the

[1] The Court also stated it examines a municipality's action to ascertain "whether the reasons assigned by the governing body do not have 'the slightest validity' or bearing on the general welfare…" *VanLandschoot*, 336 N.W.2d at 508. The Court explained where this criterion fits in a separate case: "The [municipality] applies the criteria set out in its ordinance having in mind, generally, the welfare of the community. On appeal, the reviewing court reviews the record to determine if the decision is reasonable and based on legally sufficient reasons with a proper factual basis." *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 743 (Minn. 1986) (citing *White Bear Docking & Storage, Inc.*, 324 N.W.2d at 176; *and*, *C. R. Invs., Inc.*, 304 N.W.2d at 325).

> standard of review is the same for all zoning matters, namely, whether the zoning authority's action was reasonable. Our cases express this standard in various ways: **Is there a "reasonable basis" for the decision? or is the decision "unreasonable, arbitrary or capricious"?** or is the decision "reasonably debatable"?

Honn v. City of Coon Rapids, 313 N.W.2d 409, 416–17 (Minn. 1981) (emphasis added). Nevertheless, "the reasonableness standard is the same for all zoning matters[.]" *Id.* The County correctly summarized the legal standard, which becomes even more obvious when considering the cases Daley Farm holds out as authoritative.

Curiously Daley Farm did not display the same fastidiousness it purportedly requires from the County when explaining the applicable legal standard. When confronted with the reality it cited inapplicable caselaw, Daley Farm obstinately claimed the County did "not provide any rationale as to why [this] is improper…" *Pls.' Reply Mem. at 12 n.7*. But the County noted these standards are only applicable to appeals from state agencies with statewide jurisdiction, authority to make rules, and adjudicate contested cases. *See* Minn. Stat. §§ 14.02, 14.69. This mandate from the Legislature forecloses Daley Farm's attempt to interject a different standard of review in this matter, particularly since the Minnesota Court of Appeals has squarely rejected this approach. *See Matter of Application No. 2020-006782, Conditional Use Permit*, No. A21-0383, 2022 WL 274252, at *5 n.12 (Minn. App. Jan. 31, 2022), *review denied* (Apr. 27, 2022).[2]

[2] ("The neighbors' brief cites standards of review from the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. § 14.69 (2020), as well as caselaw interpreting that statute. Those standards, however, only apply to "agency" decisions. *Id.*

ARGUMENT

I. IT IS CLEARLY ESTABLISHED DALEY FARM'S CONSTITUTIONAL CLAIMS MUST BE DISMISSED FOR LACK OF A CONSTITUTIONALLY PROTECTED INTEREST.

A. Minnesota law does not create a legitimate claim of entitlement to a variance application.

Daley Farm's claim Minnesota law recognizes a variance applicant "has a protected property interest in the variance application" is patently false. *Pls.' Reply Mem. at 36*. It cites no caselaw because none exists. *See Solum v. Bd. of Cnty. Comm'rs for Cnty. of Houston*, 880 F. Supp. 2d 1008, 1012–13 (D. Minn. 2012) (applying Minnesota law and finding "'the [plaintiffs] have not established a protected property interest, and summary judgement as to their procedural due process claim is warranted[,]" where plaintiffs based their claim on a "variance application to the board of adjustment."). Because its argument is legally baseless, Daley Farm suggests the Court should pretend it requested a conditional use permit not a variance. *Pls.' Reply Mem. 36-37*. Doing so would ignore more than a century of law and disregard planning and zoning's very foundations.

In 1916, in response to massive buildings consuming entire city blocks, New York City adopted its first zoning resolution, which would become the model across the country. *In re Stadsvold*, 754 N.W.2d 323, 329 (Minn. 2008). But "[e]arly zoning lacked a

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Under MAPA, an "agency" is "any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases." Minn. Stat. § 14.02, subd. 2 (2020). MAPA therefore does not apply to the county zoning decision in this appeal.").

formal planning element[,]" "corresponding planning legislation," and was "carried out with no large-scale plan." *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 79 (Minn. 2015) (J. ANDERSON, concurring). The United States Department of Commerce's Standard State Zoning and City Planning Enabling Acts, however, changed this. They called for municipalities to adopt zoning regulations in accordance with "a comprehensive study" to "prevent haphazard or piecemeal zoning[,]"[3] and explicitly described comprehensive planning's indispensable role in zoning.[4] When the work on the Standard Acts began in 1921, the U.S. Supreme Court had not weighed in on either zoning or planning. But in *Vill. of Euclid, Ohio v. Ambler Realty Co.*, the municipality had both "a comprehensive zoning plan" and a zoning ordinance, which divided land "into six classes of use districts[.]" 272 U.S. 365, 379–80 (1926). The Court had found "no serious difference of

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[3] Standard State Zoning Enabling Act § 3, U.S. Dept. of Commerce (1926), available online at: https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf

[4] Standard City Planning Enabling Act § I.7, U.S. DEPT. OF COMMERCE (1928) (The municipality "shall make careful and comprehensive surveys and studies of present conditions and future growth of the municipality and with due regard to its relation to neighboring territory. The plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development; including, among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, and the adequate provision of public utilities and other public requirements."), a*vailable online at*: https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/CPEnabling%20Act1928.pdf

opinion" with respect to planning and zoning's constitutional validity and had "no difficulty in sustaining [zoning] restrictions…" 272 U.S. 365, 388–90 (1926). *Euclid* marked a shift from "an exclusion-based system" where the law presumed land uses legitimate unless shown otherwise, to a "governance model" where the law presumed land uses "illegitimate unless they conformed to the" comprehensive plan and zoning ordinance's specifications. *RDNT*, 861 N.W.2d at 80 n.1 (internal marks and quotations omitted).

Variances and conditional use permits are the byproducts of this history. Unlike conditional use permits, variances were present from the very beginning in New York City's 1916 Zoning Resolution.[5] Lacking any comprehensive planning element, the drafters "could not fully anticipate all of the variations in particular parcels of land, individual land uses, and peculiar situations that would arise with zoning implementation." *Stadsvold*, 754 N.W.2d at 329. Accordingly, they "intentionally used vague and general terms to allow local zoning boards to use variances as a safety valve for unforeseen circumstances." *Id.* (quotation omitted). Conditional use permits came later with comprehensive planning. Unlike variances, which accounted comprehensive planning's absence, conditional use permits recognized a municipality could identify

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[5] *See* NEW YORK CITY, NEW YORK, 1916 ZONING RESOLUTION § 20 ("Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary any such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done."), *available online at*:
https://www.nyc.gov/assets/planning/download/pdf/about/city-planning-history/zr1916.pdf

certain uses through a well-studied comprehensive plan. Such uses—though generally compatible with other uses—might not be suitable as a matter of right in every area due to hazards or special problems. *Zylka v. City of Crystal*, 283 Minn. 192, 195, 167 N.W.2d 45, 48 (1969). Nevertheless, by identifying such uses, a municipality could also identify the circumstances under which it would permit the use. Thus, a conditional use is not technically permitted, but "the zoning ordinance expressly authorizes the proposed use" and outlines the conditions under which the municipality will consider it as such. *C. R. Invs.*, 304 N.W.2d at 324.[6] The application process "appl[ies] specific use standards set by the zoning ordinance to a particular individual use and" the zoning authority's decision, like the use itself, "must be held strictly to those standards." *State, by Rochester Ass'n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885, 889 (Minn. 1978). Review of such an application therefore "need go only to the applicant's compliance with the specific requirements, regulations and performance standards prescribed by the ordinance." *Chanhassen Ests. Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984). *Id.* "Subject to such compliance, approval … follows as a matter of right." *Id*. Variances did not disappear with the dawn of comprehensive planning, but Minnesota courts—and

[6] The conditional use is "***expressly permitted***" or "***not forbidden***" when a landowner "fully complie[s] with conditions imposed for obtaining a permit" because it "is legislatively ***Permitted*** in a zone subject to controls …" and "contemplates a permitted use when under the terms of the ordinance the prescribed conditions" are met. *Westling v. City of St. Louis Park*, 284 Minn. 351, 354–56, 170 N.W.2d 218, 221–22 (1969).

the Minnesota Legislature[7]—made clear they could only have continued relevance if they were understood amid the backdrop of a municipality's comprehensive planning process.

Minnesota courts have long recognized "variances are distinguishable from special-or conditional-use permits[.]" *Kismet Invs., Inc. v. Cnty. of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000); *see also Luger v. City of Burnsville*, 295 N.W.2d 609, 611–13 (Minn. 1980). Unlike a conditional use permit, a variance is not granted because a municipality already analyzed the request during its comprehensive planning process and determined circumstances under which it would "expressly permit" the request. *Westling v. City of St. Louis Park*, 284 Minn. 351, 353–57 n.3, 170 N.W.2d 218, 220–22 n.3 (1969). The variance, by its nature, requests something the municipality already analyzed during its comprehensive planning process and determined it ***would not allow regardless*** of compliance. Stated differently, a variance "is legislatively ***Prohibited*** …" and "contemplates a departure from the terms of the ordinance" for special reasons. *Westling*, 170 N.W.2d at 221–22. No one is entitled to a variance because no one is entitled "to use his property in a manner forbidden by the ordinance…" *Id.* This is why the law confers "broad discretion" on a municipality "to grant or deny a variance[,]" why the decision

[7] Minnesota courts previously recognized "two types of variances: use variances and area variances." *Stadsvold*, 754 N.W.2d at 329. The Minnesota Legislature, however, now dictates: "No variance may be granted that would allow any use that is not allowed in the zoning district in which the subject property is located." Minn. Stat. § 394.27, subd. 7.

is afforded even greater deference, and why an applicant for a variance "labors" under a "heavy burden of proof." *Id*. For example, a zoning authority can deny a conditional use permit where the project only provides 29 parking spaces, and the ordinance requires 31. *TPW, Inc. v. City of New Hope*, 388 N.W.2d 390, 392-394 (Minn. App. 1986). But if the project provided 31, the zoning authority could not deny based on general discretionary considerations like a lack of harmony with the municipality's comprehensive plan or local controls. *Concept Properties, LLP v. City of Minnetrista,* 694 N.W.2d 804, 819 (Minn. App. 2005). But a variance could be denied on such a basis, and the zoning authority can resolve the application in any manner the record supports. *Schwardt v. Cty. of Watonwan*, 656 N.W.2d 383, 389 (Minn. 2003). This is what Minnesota courts mean when they say a "municipality has broad discretionary power when considering an application for variance." *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 630 (Minn. App. 2002); *see also Solum*, 880 F. Supp. 2d at 1014 (citing *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 727 (Minn. 2010)). This is also why no court has ever found an entitlement to a variance, and why no one—not even Daley Farm—is entitled to violate the law.

There is no protectible property interest in a variance application. Daley Farm has no constitutionally protected interest upon which it can maintain a due process claim. Because Daley Farm has failed, as a matter of law, to bring a claim upon which the Court can grant relief, the Court should dismiss Daley Farm's constitutional claims. Analyzing the alternative interest Daley Farm tries to identify in its responsive memorandum does not change this conclusion.

B. Winona County did not deprive Daley Farm of the Free Use and Enjoyment of its Property for Dairy Farming.

A "protected life, liberty, or property interest is a condition precedent" to a due process claim. *Singleton v. Cecil*, 176 F.3d 419, 424 (8th Cir. 1999) (citations and quotations omitted). Recognizing it is clearly established Minnesota law does not create a legitimate claim of entitlement to a variance, Daley Farm tries—and fails—to couch its supposed right in some other amorphous terms. The Court will invariably struggle to analyze Daley Farm's alternative interest, because Daley Farm does not even know what it is.

First, Daley Farm alleges it has a right to operate a dairy farm, but this cannot be the basis for Daley Farm's constitutional claim. *Pls.' Reply Mem. at 30*. Dismissal inexorably follows from this purported right because Daley Farm admitted from the outset it currently owns and operates a dairy farm in Winona County and it is undisputed Daley Farm was never deprived of this supposed right. *Doc. #3 at 2 ¶ 6*.

Second, Daley Farm seems to suggest it has the right to use and enjoy its property for any purpose. Here again the Court would have to dismiss Daley Farm's claim because this right does not exist. It is a fundamental principle of law "that the right to use property as one wishes is subject to and limited by the proper exercise of the police power in the regulation of land use." *McShane v. City of Faribault*, 292 N.W.2d 253, 257 (Minn. 1980) (citing *Euclid*, 272 U.S. 365, 388–90). For nearly 100 years, *Euclid* has served as the basis for municipal land use planning and zoning nationwide. The Supreme Court has never

entertained a challenge to overturn *Euclid*, and "the constitutionality of zoning ordinances is no longer seriously debated." *RDNT*, 861 N.W.2d at 80 n.1.

Finally, Daley Farm contends its protected property right is the "right of property generally[,]" *Pls.' Reply Mem. at 29*, which "is hedged about with restrictions and limitations, not always appreciated by the average citizen." *Congdon v. Congdon*, 160 Minn. 343, 362, 200 N.W. 76, 83 (1924). Indeed, a "citizen may do as he will with his own only when it is lawful, and whether it is lawful depends on whether the disposition conflicts with the rules of law which may be applicable…" *Id.* The rules of law include those contained in a local zoning ordinance. *See State of Washington ex rel. Seattle Title Tr. Co. v. Roberge*, 278 U.S. 116, 120 (1928) (recognizing the right to use property as one wishes is subject to zoning ordinances and of land use regulations adopted by the proper exercise of the police power).[8] In short, it is well-settled a property owner may not violate the law, but is entitled to use their property consistent with—not in contravention of—the law. Not only does Daley Farm point the Court to cases which stand for this proposition, but Daley Farm also admits there is no support for its alleged interest. *Pls.' Reply Mem. at 34*. No court has ever misconstrued the applicable interest to the extent to which Daley Farm

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[8] *Seattle Title Tr. Co.* is an inapposite authority in this case. Aside from reaffirming the holding in *Euclid*, the decision there rested entirely on **the non-delegation doctrine**. *See Seattle Title Tr. Co.*, 278 U.S. at 121-123; *see also Luger*, 295 N.W.2d at 613–15 (discussing the non-delegation doctrine as applied to a variance request). If the Board denied Daley Farm's variance application because Daley Farm failed to receive the consent of neighboring property owners *Seattle Title Tr. Co.* might then be relevant, but this case "does not involve a statute or ordinance which permits or requires neighborhood consent to the grant of a variance." *Luger*, 295 N.W.2d at 614.

now asks this Court. *Id.* Consequently, Daley Farm has failed to identify a protected property interest and its constitutional claims must be dismissed.

II. THE BOARD REASONABLY DENIED THE VARIANCE APPLICATION.

The question for the Court in all zoning matters is the same, "namely, whether the zoning authority's action was reasonable." *Honn*, 313 N.W.2d at 416–17. "Reasonableness is measured by the standards set out in the [local] ordinances." *Sagstetter*, 529 N.W.2d at 491. To determine whether the Board acted reasonably, the Court considers "whether the board's stated reasons were legally valid and whether the decision had a factual basis in the record." *Moore*, 969 N.W.2d at 91. A reviewing court will only reverse a zoning variance decision if the zoning authority's "stated reasons are legally insufficient or without factual basis." *Sagstetter*, 529 N.W.2d at 491.

A. It is undisputed the Board based its decision on legally sufficient criteria.

When an ordinance's words are clear and unambiguous the Courts must apply the plain language without exploring its spirit or intent,[9] because judicial construction is not only inappropriate,[10] it is prohibited.[11]

"The Winona County Board of Adjustment shall not grant a variance … unless it shall" find "[e]conomic considerations alone do not constitute practical difficulties."

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[9] *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016); *see also State v. Vasko*, 889 N.W.2d 551, 556 (Minn. 2017) ("The same rules that apply to the interpretation of a statute apply to the interpretation of an ordinance."); *and*, Minn. Stat. § 645.16 ("[T]he letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

[10] *Chanhassen Ests*, 342 N.W.2d at 339.

[11] *Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 9, 153 N.W.2d 209, 216 (1967).

WCZO § 5.6.2.1. The Zoning Ordinance clearly and unambiguously required the Board find economic considerations were not Daley Farm's only claimed practical difficulties. The Court does not have occasion to interpret this unambiguous ordinance. But even if it did, the Court would not, as Daley Farm suggests,[12] ignore the explicit language limiting the Board's authority to grant a variance. *WCZO § 5.6.2.1* ("The Winona County Board of Adjustment ***shall not*** *grant a variance* from the regulations of this Ordinance ***unless it shall*** *make findings of fact* based upon the evidence presented and ***on the following standards***… "[e]conomic considerations alone do not constitute practical difficulties."") (emphasis added).

The Board did not find Daley Farm supported its variance request with any practical difficulties beyond its economic motivation. *See Admin. R. 3058:17-3064:4* (two Board members moved to adopt the proposed finding on the mandatory economic considerations criterion as written.[13]); *and*, *Admin. R. 3065:23-3068:10 (*two Board members agreed Daley Farm made this mandatory showing).[14] The Zoning Ordinance

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12 *State, City of Minneapolis v. Reha*, 483 N.W.2d 688, 693 (Minn. 1992) ("Specific sections of the ordinance cannot be viewed in isolation. The code must be read as a whole and considered in light of both its intent and its application by the city.").

13 *See Admin. R. 2840* ("[T]he stated grounds for the expansion are exclusively economic considerations. The applicant stated that providing jobs for additional family members and supporting others making a living by farming in the area is a primary reason for the variance request. Other stated grounds include operational economic efficiencies and receiving benefits for the investments already made in the facility, which are also economic considerations. Therefore, the applicant has not met this criteria."

14 The situation presented here is nearly identical to the one presented in *Matter of USS Great River Solar LLC*, where "two members voting in favor, [] two members voting against" and the zoning authority notified the applicant "the members voting against the

clearly and unambiguously required the Board find economic considerations were not Daley Farm's only claimed practical difficulties, and absent this mandatory finding the Board had no authority to grant Daley Farm's variance request. *WCZO § 5.6.2.1.* While the finding with respect to this mandatory criterion was subject to a split vote, Daley Farm admits "the board of adjustment can only act by the affirmative vote of a majority of the members present." *Pls.' Reply Mem. at 22 n.12*. Thus, the fact remains the Board did not adopt any finding with respect to this required criterion, had no authority to grant Daley Farm's variance request, and relied on legally sufficient criteria when it denied the variance request. *See Matter of USS Great River Solar LLC*, No. A21-1504, 2022 WL 4295368, at *2 n.5 (Minn. App. Sept. 19, 2022) ("Only four out of five commissioners were present for the hearing and voted on the motion to approve the request, with a split vote resulting in denial."). Daley Farm admits the Board "did not adopt any finding with respect to" this required criterion. *Pls.' Mem. at 22*. Therefore, it is not only undisputed the Board lacked authority to grant the variance because it did not find Daley Farm satisfied its

motion concurred with the [proposed] findings of fact." No. A21-1504, 2022 WL 4295368, at *2 (Minn. App. Sept. 19, 2022). While the Board used the finding supporting the reasoning of the two Board members who voted against the variance, the Board "was not required to prepare formal findings of fact[,]" *White Bear Rod & Gun Club*, 388 N.W.2d at 742, and the "fundamental issue is whether there is sufficient evidence" from which "the reviewing court can ascertain a reasonable basis for the" municipality's action. *Crystal Beach Bay Ass'n, Island View Route, Int'l Falls v. Koochiching County*, 243 N.W.2d 40, 42 (1976); *see also Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006). The record contains such evidence.

mandatory showing, but it is also undisputed the Board based its denial on legally sufficient criteria.

It is undisputed the Board based its denial on legally sufficient criteria. Therefore, the Court must affirm the Board's decision if facts in the record support the conclusion Daley Farm's variance request was motivated solely by economic considerations.

B. Daley Farm concedes the Record evidence supports the Board's decision.

Daley Farm did not meet its heavy burden. Daley Farm failed to show either the record contained no evidence supporting the Board's decision,[15] or the Board abused its discretion by ignoring evidence "so compelling," "so significant" and so "one-sided." *Schwardt*, 656 N.W.2d at 389. The County's initial memorandum pointed out the record evidence supports the Board's variance denial. Daley Farm made no effort to rebut this evidence. This alone warrants affirming the Board's decision. Nevertheless, the County also pointed out no evidence suggested non-economic considerations motived Daley Farm's variance request. Daley Farm provided no substantive response, conceding this truth. Accordingly, the Court "may not substitute its judgment for" the Board's "even if it would have reached a different conclusion." *Moore*, 969 N.W.2d at 91.

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[15] Daley Farm was required 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). Courts will "defer to a municipality's decision when the factual basis" relied upon "has *even the **slightest*** validity." *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. App. 2004) (emphasis added).

Daley Farm admitted its "economic motivation" drove it to try to triplicate the size of Winona County's largest feedlot. *Admin. R. 1858, 2586:14-2586:15, 2587:11-2587:12*. Daley Farm also admitted it cannot support multiple growing families, while funding the old guard's retirement unless it accomplishes its massive expansion. *Admin. R. 1698, 1849, 1858, 2095*. Although Daley Farm wants to expand, it does not want to do so at the expense of its current profits, so it overlooked options to expand without a variance. *Admin. R. 1699*. Daley Farm does not dispute these economic considerations motivated its variance request. Instead, Daley Farm reiterated the same vague unsupported claim it has been making for more than four years.

Daley Farm conceded no genuine non-economic considerations support its variance request. The sole "*evidence*" Daley Farm can point to for its non-economic motivations is fictitious. The February 19, 2019 "memo" from Daley Farm's counsel professed to "extensively describe[]" a handful of non-economic motivations for pursuing the variance request. *Admin. R. 1846-1861*. But the County interrogated each apparent non-economic motivation and found they were imaginary:

1. Neither the letter nor the record mentions why the expansion is necessary to promote animal welfare, to promote food safety, or for the well-being of Daley Farm's employees. *Admin. R. 233-236*.
2. Daley Farm must reduce the farm's negative environmental affects with or without a variance.
    a. Some of the actions Daley Farm claims to need a variance to accomplish are ongoing requirements of Daley Farm's current NPDES permit issued on November 17, 2010. *Admin. R. 157-161,*

1350-1351, 1438. Others are remedies required by the MPCA for ongoing violations of federal law. *Id*.

b. Either way, Daley Farm does not need a variance to follow existing laws, and the MPCA will not relieve it from doing so because it did not receive a variance.

3. Aside from requirements with which Daley Farm already had to comply, and violations it already had to correct, Daley Farm could only support its request with unsubstantiated and unscientific speculation.[16] No scientific evidence, however, suggests expanding without a variance would increase greenhouse gas emissions.

In reply, Daley Farm cited the same vague and shallow claim it first made on February 19, 2019.[17] In other words, Daley Farm declined to respond because it cannot dispute the record evidence, which proves it had no legitimate non-economic reason for seeking the variance.

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[16] Daley Farm did not provide any response to the County's argument the Board could not rely on this unsubstantiated and unscientific speculation. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 356 (Minn. App. 1997); *see also Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 728 (Minn. App. 1988). Daley Farm did not provide a response to this argument, and as such Daley Farm has waived any argument otherwise and conceded as much. *See Moore*, 969 N.W.2d at 92 n.6, n.7 (citing *State Dep't of Lab. & Indus. by the Special Comp. Fund v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997); *and*, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982)). Even if Daley Farm had not conceded no scientific evidence suggests expanding without a variance would increase greenhouse gas emissions, the Minnesota Court of Appeals already determined the greenhouse gas emissions from Daley Farm's proposed expansion were not adequately analyzed by the MPCA. *See Matter of Denial of a Contested Case Hearing Request & Modification of a Notice of Coverage Under Individual Nat'l Pollution Discharge Elimination Sys. Feedlot Permit No. MN0067652*, No. A19-0207, 2019 WL 5106666, at *1 (Minn. App. Oct. 14, 2019). None of the subsequent proceedings cited by Daley Farm were presented to the Board.

[17] Curiously, Daley Farm claims again: "This evidence was not contradicted," *Pls.' Reply Mem. at 26*, even though the record evidence refutes Attorney Berger's statement, which is not evidence.

It is undisputed Daley Farm's purported "non-economic motivations" are non-existent motivations and Daley Farm was solely motivated by economic considerations. Daley Farm tried to hold the Board hostage with idle threats regarding animal harm, unsafe food, and mistreated employees. Daley Farm even went so far as to threaten it would continue violating the national effluent standards for concentrated animal feeding operations, *see* 40 C.F.R. § 412, if the Board did not grant the variance request. But Daley Farm does not need a variance to be a good steward, a good employer, or to abide by its pre-existing obligations under federal law.

The Board reasonably denied the variance request. The Zoning Ordinance clearly and unambiguously required the Board find economic considerations were not Daley Farm's only claimed practical difficulties. It is undisputed the Board did not reach this finding. The Board could not make such a finding because all the evidence in the record conclusively established economic considerations were Daley Farm's sole motivation for seeking a variance. Moreover, no evidence indicates legitimate non-economic motivations exist. The Board reached a decision, which was not only reasonable, but required. The Board had no authority to grant Daley Farm's variance request absent the mandatory finding "[e]conomic considerations alone do not constitute practical difficulties." The Board acted reasonably, and thus the Court should affirm the Board's decision.

C. Daley Farm did not show it satisfied all required variance criteria.

Daley Farm cannot unilaterally control the scope of this appeal. In its initial memorandum, Intervenors Land Stewardship Project and Defenders of Drinking Water pointed out Daley Farm failed to establish it satisfied the seven remaining variance criteria in Zoning Ordinance Section 5.6.2.1. Apparently, Daley Farm believes because it filed the appeal here it can force the Court to overlook issues decided in its favor, even though the Board may have incorrectly resolved those issues.[18] Daley Farm is wrong. The Court allowed Intervenors to intervene to defend the Board's decision to deny the variance without limitation, and Intervenors' arguments are well-taken. *See Doc. #112, #127*. A party appealing a variance denial has a "heavy burden" satisfied only by showing "its grant is appropriate." *Luger*, 295 N.W.2d at 612. This entails disproving the Board's bases and proving the application meets every requirement. *Krummenacher*, 783 N.W.2d at 727; *Mohler*, 643 N.W.2d at 631. If the Board granted the variance in the first instance, Intervenors would have the right to appeal on all bases. They cannot be expected to appeal a decision they agree with because they believe the Board should have

[18] Daley Farm's argument in this regard irreconcilably conflicts with other arguments it advances. For instance, Daley Farm claims the County intentionally disregarded information in the record to publish an unfair and biased staff report. But the staff report Daley Farm wanted the County to publish concluded Daley Farm's variance request was based on economic considerations alone. *See Doc. 167 at 166*; *McGinty Dep. 47:17-48:4*. Thus, even if there was evidence the County attempted to present a biased staff report—which there is not—it would be irrelevant, because this allegation has no bearing on the economic consideration factor and Daley Farm itself argues the Court cannot consider the resolution of the other remaining factors.

decided more issues in favor of denial. They also cannot lose their right to appeal if the Court, rather than the Board, makes the decision to grant the variance. If this happens, and the Court limits Intervenors' arguments, it will only foster more litigation. Moreover, Daley Farm is simply wrong in believing they may unilaterally control this appeal's scope.

This appeal's scope is only limited by the issues raised before the zoning authority. In determining whether a zoning or land use planning issue was properly raised, courts do not "apply a wooden or inflexible formalistic test." *Big Lake Ass'n v. Saint Louis Cty. Plan. Comm'n*, 761 N.W.2d 487, 490–92 (Minn. 2009). "Rather, [courts] review the record to determine whether the issue was fairly raised for consideration by the zoning authority." *Id.* An issue can be "preserved in a variety of ways" including through "written submissions and in-person appearances at the public hearing." *Id.* An "issue does not need to be framed in precise legal terms, but there must be sufficient specificity to provide fair notice of the" issue's "nature" so "that the zoning authority has an opportunity to consider and address the issue." *Id.* (citing *Stadsvold*, 754 N.W.2d at 327). The record is replete with evidence Intervenors' concerns were sufficiently raised in the proceedings below to permit the arguments here.

III. THERE IS NO EVIDENCE THE BOARD'S REASONABLE DECISION WAS TAINTED BY BIAS OR PREJUDGMENT.

A. Bias did not taint the Board's decision.

If a municipality's decision is reasonable, bias allegations do not provide an independent basis to overturn the quasi-judicial decision. The fact a decisionmaker, or majority of individual decisionmakers, may have a personal interest in an outcome does not make their reasonable decision unreasonable. *Lenz v. Coon Creek Watershed Dist.*, 278 Minn. 1, 14, 153 N.W.2d 209, 219 (1967). But if the decision is unreasonable, the municipal officials' actions are arbitrary and the municipal proceedings are void if the officials "acted pursuant to this interest." *Id.* The situation presented here, is nothing like the one presented in *Lenz*. There four of five members had a personal interest. *Id.* Still the Court affirmed the decision and explained could only "furnish additional support for the conclusion" the decision "was arbitrary and unsupported by the evidence[,]" had it reached such a conclusion. *Id*.

No Board member had personal interest in Daley Farm's application. Daley Farm based its entire argument on the idea Elizabeth Heublein had reasons for wanting to join the Board. This same argument can be advanced with regard to every quasi-judicial decision made by every volunteer municipal body in the state. Wanting to join a board, however, is not sufficient to prove a member is biased.

Likewise, Daley Farm's argument concerning Kelsey Fitzgerald is based entirely on perceived bias. But perceived bias—based on membership in an organization—cannot

prove actual bias. *Rowell v. Bd. of Adjustment of the City of Moorhead*, 446 N.W.2d 917, 921 (Minn. App. 1989), *abrogated on other grounds by Krummenacher*, 783 N.W.2d 721. "[W]ithout evidence of a closer connection," it "is not a sufficiently direct interest in the outcome of the matter under consideration to justify setting aside" the municipality's action. *Id*.

Moreover, Daley Farm relies solely on inadmissible evidence to jump to conclusions about Commissioner Fitzgerald. Minn. R. Civ. P. 56.03(b). Evidence offered to support "a motion for summary judgment must be such evidence as would be admissible at trial." *Twin Cities Metro-Certified Dev. Co. v. Stewart Title Guar. Co.*, 868 N.W.2d 713, 720 (Minn. App. 2015). Daley Farm incorrectly analyzes Alex Romano's statement,[19] but even if it did not it admits Romano has no personal knowledge of the matters mentioned, which "***may***" instead "be based on a statement that Doug Nopar made."[20] *Pls.' Reply Mem. at 20 n.10* (emphasis added). No evidence—admissible or otherwise—lends credence to Daley Farm's blatant speculation, and it is just as likely Romano had no personal knowledge or second-hand hearsay knowledge of the matter,

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[19] Daley Farm claims this statement is not inadmissible hearsay because it is a statement of a party opponent offered against such party. *Pls.' Reply Mem. at 20 n.10*. But Daley Farm offers this statement against the County/Board, not LSP. Moreover, an intervenor is not a party. *Voyageurs Retreat Cmty. Ass'n v. City of Biwabik*, No. A22-0074, 2022 WL 4295333, at *4 (Minn. App. Sept. 19, 2022).

[20] In a strange twist, Daley Farm wants the Court to believe Romano's statement is based on inadmissible hearsay evidence—not personal knowledge, *see* Minn. R. Evid. 602—because admissible evidence proves Kelsey Fitzgerald did not speak to anyone affiliated with LSP about her reasons for applying to the Board, and specifically did not speak to Alex Romano about applying to the Board in general. *Fitzgerald Dep. 21:1-21:9*.

and no basis for the statement. In fact, this scenario is more likely because Daley Farm's conjecture is inconsistent with Kelsey Fitzgerald's sworn testimony regarding what motivated her Board of Adjustment application. *Fitzgerald Dep. 21:1-9*.

B. The Court should decline to create the new procedural duties and rules Daley Farm proposes.

Courts "are limited to correcting errors … not creat[ing] public policy." *Hayden v. City of Minneapolis*, 937 N.W.2d 790, 796 (Minn. App. 2020), *review denied* (Apr. 14, 2020). Nonetheless, Daley Farm argues the Court here should not only create policy, but it should also create a "fundamental requirement" preventing local officials from conducting independent research before making a quasi-judicial decision. *Pls.' Mem. at 52*. Instead of citing a single case supporting its premise, Daley Farm quibbles with the caselaw the County and Intervenors relied on, caselaw establishing this would be improper. *See generally*, *Pls.' Mem. 51-53*; *Pls.' Reply Mem. 12-17*. This alone is enough to reject Daley Farm's request for the Court to create a new duty. But Daley Farm did not even sufficiently distinguish the cases cited, at least one of which is binding on the Court.

Barton Contracting Co. v. City of Afton, is a published precedential case. 268 N.W.2d 712, 716 (Minn. 1978). There the Minnesota Supreme Court established procedural due process rights in quasi-judicial "proceedings are minimal." *Id*. Neither "cross-examination" nor "advance copies of written materials presented at the … hearing" are "essential[s] of procedural due process in such hearings." *Id*. Such precautions are inconsistent with the reality "information outside the record" can become part of the

record solely by reference. *Id*. Like the background information made part of the record in *Barton*, Commissioner Heublein conducted independent research to become informed regarding the topics referenced in the record. *Heublein Dep. 20:11-24:17*.[21] Daley Farm cannot distinguish this case, and it makes no attempt to do so. Instead, it resorts again to "mere speculation,"[22] which is not enough to prove bias or prejudgment. *Stalland v. City of Scandia*, No. A20-1557, 2021 WL 3611371, at *9 (Minn. App. Aug. 16, 2021) (citing *Lenz*, 153 N.W.2d at 219).

Similarly, the County cited *In re N. Metro Harness, Inc*., for the proposition no authority prevents quasi-judicial decisionmakers from relying on "one-sided" "outside-of-the-record" information. 711 N.W.2d 129, 138–39 (Minn. App. 2006). Daley Farm,

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[21] It should also be noted Daley Farm's arguments irreconcilably conflict with one another. As noted, Daley Farm declined to respond to any of Intervenors' arguments regarding the other required variance criteria because these findings are allegedly "not properly before this Court" and Daley Farm "will not waste the Court's time by responding to issues that are not properly before it." *Pls.' Reply Mem. at 28 n.15*. Thus, Daley Farm argues the sole finding before the Court is the economic considerations finding, but there is no evidence, much less allegation, Commissioner Heublein referenced information outside the record to become informed about the issues related to the economic considerations factor. Thus, by Daley Farm's own logic, and consistent with its own arguments, the Court cannot rest its decision on any independent research Commissioner Heublein conducted to become informed about topics unrelated to the economic considerations factor.

[22] Daley Farm points out it had the opportunity to depose Commissioner Heublein (which is generally prohibited in a quasi-judicial appeal, *see, e.g.*, *Dietz*, 487 N.W.2d at 239–41). Daley Farm further points out it either squandered this opportunity by failing to ask Commissioner Heublein to identify the specific outside-the-record sources that she relied upon to become informed about the topics mentioned in the administrative record, or it chose not to ask in order to remain willfully ignorant in a manner, which would allow it to pursue this argument. *Pls. Reply Mem. at 16*.

however, claims the County's reliance on this case is misleading. *Pls.' Reply Mem. at 13-14*. Daley Farm "*supports*" this accusation with the allegation the one-sided outside-of-the-record information "merely influenced commissioners to request reconsideration" but did not influence the resulting decision. *Pls.' Reply Mem. at 13-14*. What Daley Farm does fail to appreciate is the quasi-judicial body relied on the same information for both decisions:

> Following respondent the Minnesota Racing Commission's vote to deny respondent North Metro Harness, Inc.'s application for a Class A racetrack license, commissioners received new information outside of the record that settled concerns underlying the application denial. The commission sua sponte moved to reconsider its decision, and after reopening the record to receive new information, granted the application.

711 N.W.2d at 132. No doubt the commission later received the same information in the record, but this distinction makes no difference here where—unlike the commission in *N. Metro Harness*—there is no evidence suggesting Commissioner Heublein relied on information outside the record in reaching her decision. Daley Farm's false claim Commissioner Heublein relied on outside "information in voting on the merits"[23] does not change the truth. Commissioner Heublein conducted independent research to become informed regarding the topics referenced in the record. *Heublein Dep. 20:11-24:17*.

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[23] This must be a typo, as **nothing in the cited portion of Commissioner Heublein's deposition transcript** (or any other portion of her deposition for that matter) **suggests the independent research served any purpose beyond becoming informed about the topics coming before the Board**. *Heublein Dep. 20:11-24:17.*

The Board members are volunteers, not experts. Neither the Board members, nor the members of any other volunteer quasi-judicial body, could meaningfully perform their service without the ability to independently become informed.

In *Stalland v. City of Scandia*, the appellant alleged two city council members formed an opinion on their boat-slip application before the public hearing. 2021 WL 3611371, at *1-9. The court rejected this argument because the record suggested neither council member "tried to sway other councilmembers before the public hearing, or that they took on an activist role." *Id.* at *8. While one of the two members undoubtedly "came to the hearing with [] previous knowledge" based on prior involvement, "his involvement did not create a technical defect." *Id*. Daley Farm tries again to distinguish this case, but it does nothing more than repeat its false allegation.[24]

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

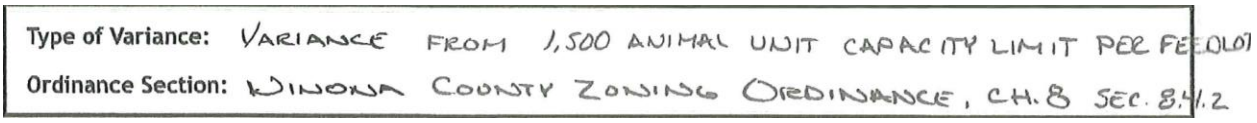
Under Minn. Stat. § 15.99, subd. 2(a), an agency must approve or deny a written request—for a permit, license, or other governmental approval of an action—relating to zoning within 60 days. Unlike the terms *relating to* and *zoning*, "the Legislature provided a specific definition for the term 'request' in Minn. Stat. § 15.99, subd. 1(c)." *State v. Sanschagrin*, 952 N.W.2d 620, 625 (Minn. 2020). When a word is defined in a statute,

[24] The allegation Commissioner Heublein "specifically relied" on "outside-of-the-record information in deciding the merits of this quasi-judicial decision[,]" which—as noted—is nothing more than bald-faced dishonesty. *Pls.' Reply Mem. at 15*.

Minnesota courts "are guided by the definition[,]" which is applied in its entirety without "opportunity to ignore part of the legislature's definition." *Id.*

A "request" means "a written application related to zoning … for a permit, license, or other governmental approval of an action[,]" which "must be submitted in writing to the agency on an application form provided by the agency[.]" Minn. Stat. § 15.99, subd. 1(c). "**The 60-day timetable begins when the agency receives a written request containing all the necessary information and any applicable fee.**" *Sanschagrin*, 952 N.W.2d at 625 (emphasis added).

Daley Farm asserts it satisfied Minn. Stat. § 15.99's "request" requirement when it filed an application "on November 16, 2018[.]" *Pls.' Reply Mem. at 5*. Indeed, the application sent to the County on November 16, 2018, requested "a variance from the requirement in Section 8.4.2 of the Winona County Zoning Ordinance." *Admin. R. 1665, 1970*. As Daley Farm points out, the Court can see this application "with its own eyes[.]" *Pls.' Reply Mem. at 6*.


Type of Variance: VARIANCE FROM 1,500 ANIMAL UNIT CAPACITY LIMIT PER FEEDLOT
Ordinance Section: WINONA COUNTY ZONING ORDINANCE, CH. 8 SEC. 8.4.2

Admin. R. 1665.

Daley Farms of Lewiston Variance Request

Daley Farms of Lewiston is requesting a variance from the requirement in Section 8.4.2 of the Winona County Zoning Ordinance--which provides that "[n]o permit shall be issued for a feedlot having in excess of 1,500 animal units per feedlot site" — in connection with a proposed project to expand and modernize its existing dairy facilities. The

Admin. R. 1970.[25] On January 4, 2019, the MPCA issued a negative declaration on the need for an environmental impact statement for Daley Farm's treble growth plan. *Admin. R. 155*. As a result, the County had until March 5, 2019, to act on Daley Farm's application, and it acted within the time limit by denying the variance request on February 21, 2019. *Admin. R. 2772-2783*. It is undisputed the Board's February 21, 2019, decision "satisfied the statutory deadline[.]" *Pls.' Mem. at 45.* It is undisputed the County complied with Minn. Stat. § 15.99, as it applied to the November 16, 2018, request for a variance from Zoning Ordinance Section 8.4.2. The Court's analysis could, and should, end here. But Daley Farm continues to tilt at windmills by speculating there was some other written

[25] The County's response to Daley Farm's 15.99 argument was moved to the end of this memorandum to make clear **the Court cannot avoid ruling on the merits of the foregoing issues by adopting Daley Farm's argument**. Even if the Court was convinced by Daley Farm's argument, it would have to limit application of the statute to Daley Farm's request for a variance from Section 8.4.2, because Daley Farm never requested a variance from Section 10.4.6.1. *Admin. R. 1665, 1970*. The Court could not apply Minn. Stat. § 15.99 to Daley Farm's non-compliant October 19, 2021, request for a variance from Section 10.4.6.1, the Court would still be required to address the remaining arguments, and this unsupported 60-day rule argument would effectively resolve nothing.

application related to zoning, which the County may have failed to deny within 60 days after receipt.

A remand is not "a written application related to zoning … for a permit, license, or other governmental approval of an action … submitted in writing to the agency on an application form provided by the agency[.]" Minn. Stat. § 15.99, subd. 1(c). Daley Farm professes to agree "this issue comes down to an application of the plain language of the statute."[26] *Pls.' Reply Mem. at 8*. But Daley Farm ignores the statute's plain language, which explicitly does not apply to a remand. It also ignores the reality the Minnesota Supreme Court has already analyzed Minn. Stat. § 15.99's plain language. *Sanschagrin*, 952 N.W.2d at 625–28. Minn. Stat. § 15.99 does not apply when a municipality did not receive a request meeting the statutory definition. *Id*. For instance, Daley Farm itself acknowledged it "was also required to obtain a variance" from "Section 10.4.6.1 of the"

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[26] *In re McDuffee*, the only case Daley Farm can cite in "support" of its argument is only relevant to the extent the dissenting judge recognized the plain language of "the statute [Minn. Stat. § 15.99] does not indicate that the sixty-day rule applies to a remand from a court decision." No. A07-1053, 2008 WL 2492323, at *10 (Minn. App. June 24, 2008) Lansing, Judge (dissenting). The Court can see this is true simply by reviewing the statute. In other words, this unpublished case is irrelevant. Though Daley Farm tries to misrepresent the decision by claiming "[t]he majority, however, disagreed [,]" it also admits it is talking out of both sides of its mouth: "the court did not expressly cite Minnesota Statutes § 15.99, but instead referenced an ordinance provision[,]" which—contrary to Daley Farm's claims—was not the same as Minn. Stat. § 15.99. *Pls.' Reply Mem. at 5*. Counsel for the County here was also counsel for Morrison County in *McDuffee* and the ordinance there required the Morrison County Board of County Commissioners to take action "within sixty (60) days after the public hearing." MORRISON COUNTY, MINN., ORDINANCES § 509.5 (1995). Thus, time was of the essence because "a public hearing on the CUP was held on March 26." *McDuffee*, 2008 WL 2492323, at *3. *McDuffee* says nothing about whether Minn. Stat. § 15.99 applies after a remand.

Zoning Ordinance. *Pls.' Mem. at 10*. Daley Farm also admits—as it must—it never requested a variance from Section 10.4.6.1. *See Admin. R. 1665, 1970*. Instead, it claims its request for a variance from "Winona County Zoning Ordinance, Ch. 8 Sec. 8.4.2" was an implicit request for a variance from Section 10.4.6.1. *Admin. R. 1665*; *Pls.' Reply Mem. at 6 n.4*. But there is no such thing as an "implicit request" under Minn. Stat. § 15.99,[27] and the very "concept is inconsistent with the plain language of a 'request,' which requires a 'clear[ ]' identification of the 'specific' governmental approval being sought." *Sanschagrin*, 952 N.W.2d at 626-628 ("Requiring agencies to determine whether a request is an 'implicit' one for zoning action would require agencies to make subjective decisions about whether a 'request' subject to section 15.99 has been submitted. Such subjectivity would result in more, not less, uncertainty in the time deadlines for zoning actions as agencies and property owners debate whether each correspondence in a zoning dispute contained an 'implicit request' that triggered the automatic approval provision of section 15.99."). An order remanding a matter to a co-equal government branch does not qualify as a request under the plain language of Minn. Stat. § 15.99 any more than an implicit request would. In fact, Daley Farm asks this Court to strain Minn. Stat. § 15.99's plain language even more than the appellant in *Sanschagrin*. Despite all its faults, the purported request there was at least made in writing. Here Daley Farm does not even identify what was

[27] Even if there was such a thing as an implicit request, a court cannot add additional requests, which were not present below, or eliminate conditions, which were present below, in ordering a remand. *N. States Power Co. v. Blue Earth Cnty.*, 473 N.W.2d 920, 923–24 n.5 (Minn. App. 1991).

supposed to serve as the request under Minn. Stat. § 15.99. Believe it or not, this is where Daley Farm's argument gets truly nonsensical.[28] Daley Farm's "reasoning" is preposterous, but it is also irrelevant.

The Minnesota Supreme Court has already determined Minn. Stat. § 15.99 is not ambiguous, it does not need to be interpreted, and it does not apply when no request is made within Minn. Stat. § 15.99's meaning. *Sanschagrin*, 952 N.W.2d at 625–28. As Daley Farm is want to do, it ignores this precedential Minnesota Supreme Court decision and ignores Minn. Stat. § 15.99's binding plain language. By doing so, Daley Farm is able to claim "the County does not offer any legal authority to support its assertion that the 60-day rule does not apply after a zoning request is remanded." *Pls. Reply Mem. at 3-4*. Daley

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[28] Daley Farm makes the truly incredible claim "when Winona County received the" imagined request "is not material to the resolution of" its 60-day rule argument. While this is simply a tactic to avoid admitting it never made another request under Minn. Stat. § 15.99, Daley Farm makes clear how absurd its argument actually is while trying to seem reasonable. As noted, Daley Farm initially argued its variance from the requirement in Section 8.4.2 was approved by operation of Minn. Stat. § 15.99 on March 6, 2019. *Pls.' Mem. at 48*. In other words, even though the Board had already denied Daley Farm's variance request, and even though this denial was still legally effective (because Daley Farm would not file an appeal for another two weeks) Daley Farm's variance request was somehow already approved. Daley Farm adds to the absurdity of this argument by now claiming the variance from Section 10.4.6.1 was approved by operation of Minn. Stat. § 15.99 on November 16, 2021, when counsel for the county agreed to not prolong this litigation by requiring Daley Farm to apply for a variance from Section 10.4.6.1. *Pls.' Reply Mem. at 6 n. 4*. Thus, under Daley Farm's perversion of Minn. Stat. § 15.99, the statute somehow operated to approve a request Daley Farm never made at the very moment someone affiliated with the County agreed to include it in the remand hearing. Daley Farm does not run from these results, but instead suggests this was what the Legislature intended. Moreover, the Legislature apparently also intended every remand would result in automatic approval because every remand will include "a long delay" far greater than 60 days from the initial application. *Pls.' Reply Mem. at 8.*

Farm can, and does, attempt to misconstrue the County's position as much as it wants, but it fails—not for lack of trying—to obscure the true state of the law.

Lastly, as the County pointed out in its initial brief, Minn. Stat. § 15.99 cannot apply here because it was Daley Farm's counsel, not the County, who asked the County to refrain from acting on the remand for more than seven months. *See Doc. 170 at 30 n.11* (citing *Ridge Creek I, Inc. v. City of Shakopee*, No. A09-178, 2010 WL 154632, at *5–7 (Minn. App. Jan. 19, 2010)). Daley Farm acknowledges this is true and simply responds by claiming the County could not rely on Attorney Berger's requests "after the court of appeals denied Daley Farm's request for discretionary review." *Pls.' Reply Mem. at 9 n.6.* But Daley Farm misapprehends the relevance of its request for the County to delay acting on the remand for more than seven months, which the County respected. Neither Daley Farm's request for reconsideration nor petition for an interlocutory appeal qualify as a process required to occur before remand under Minn. Stat. § 15.99, subd. 3(d). Thus, while the 60-day rule does not apply under the statute's plain language, even if it did, Daley Farm would have been required to submit a written request for an extension of the time limit in Minn. Stat. § 15.99, if it wanted the County to do nothing for more than seven months. Minn. Stat. § 15.99, subd. 3(g). Daley Farm never submitted such a request, but admittedly asked the County not to act on the remand for more than seven months. In other words, Daley Farm acknowledged what the plain language of Minn. Stat. § 15.99 confirms; the 60-day rule does not apply to a remand. If the plain language indicated otherwise the County would have required Daley Farm to submit a request under Minn.

Stat. § 15.99(g) before respecting Daley Farm's request for the County to take no action on the remand for more than seven months. If Daley Farm believed the statute's plain language indicated it applied on remand it would have submitted a request for a seven-month delay under Minn. Stat. § 15.99(g), which it did not. In either case, the County would have submitted a request under Minn. Stat. § 15.99(f), because substantial time and effort went into planning the meeting, including finding a location to accommodate the expected attendance, coordinating video and recording technology at the off-site location, all of which was complicated by staffing shortages. *Admin. R. 2808*. But the County did not send such a request because everyone understood Minn. Stat. § 15.99 did not apply to the remand and if there had been any indication otherwise, either from the Legislature in the statute's plain language, or from Daley Farm, the County would not have allowed Daley Farm to delay the remand hearing to the extent it did without documenting it. This is clear from the timeline of events preceding the remand hearing:

Timeline of Relevant Events		
1/25/2021	Remand Order	
1/30/2021	Counsel for County:	"I would like to discuss the remand process and procedure with you. For starters, I think we need to clarify what variances your folks are actually applying for.… **We also need to discuss timing, etc. I think we can shoot for the March 18 BOA meeting**[.]" *Reuvers Decl. Ex.* 1 (emphasis added).
2/4/2021	Counsel for County:	"**I do not believe the 60-day Rule is in play for the remand, and I assume that is your view too. If I am mistaken, please let me know. We want to move this forward as soon as practical, and we don't want to get tripped up on a timing argument down the line**, particularly with approaching the Court for further direction." *Reuvers Decl. Ex.* 2 (emphasis added).

6/29/2021	**District Court Order**	
7/1/2021	Counsel for County:	"I am checking in to see if your folks are still planning an interlocutory appeal, or *if we need to get this set up for the remand hearing*. *We will certainly coordinate* ***timing*** *and process for the remand*." *Reuvers Decl. Ex.* 3 (emphasis added).
7/1/2021	Daley Farm's Counsel:	"We still intend to ask the court of appeals for discretionary review." *Reuvers Decl. Ex.* 3.
7/1/2021	Counsel for County:	"Thanks for the quick follow-up. **We will obviously put the remand on the back burner**." *Reuvers Decl. Ex.* 3 (emphasis added).
8/24/2021	**Order Denying Interlocutory Appeal**	
9/21/2021	Counsel for County:	Reaching out regarding remand process and procedure and notifying Attorney Berger County has set remand hearing for December 2nd. *Reuvers Decl. Ex.* 4.
9/27/2021	Counsel for County:	"I want to confirm December 2 works for you and your clients. Please let me know when you get a chance. Thanks." *Id.*
9/29/2021	Daley Farm's Counsel:	"[I]f the county sets a hearing for December 2, my clients and I are available." *Reuvers Decl.¶ 19.*
9/29/2021	Counsel for County:	"We are set for December 2 at 1 pm at the Express Suites Riverport and Convention Center. Please let me know if you have comments on the procedure I set forth below. Thanks." *Reuvers Decl.¶19.*
10/8/2021	Counsel for County:	"Just following up on this. Thanks." *Reuvers Decl.¶20.*
10/11/2021	Daley Farm's Counsel:	"I am in trial today but will be following up with my folks later this week and should have something for you by the end of the week." *Reuvers Decl.¶21.*
10/19/2021	Daley Farm's Counsel:	*See Admin. R. 2803-2807.*

Thus, even if Daley Farm's 60-day rule argument had a modicum of merit—it does not—Daley Farm would be equitably estopped from making this argument on this record.

CONCLUSION

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

Dated: July 27, 2023

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